



May 14, 2013

RECEIVED

MAY 16 2013

S.C. Supreme Court

The Honorable Daniel E. Shearouse
Clerk
South Carolina Supreme Court
P.O. Box 11330
Columbia, S.C. 29211

Re: *Kevin Mercer v. State of South Carolina*, 2009-CP-32-5465

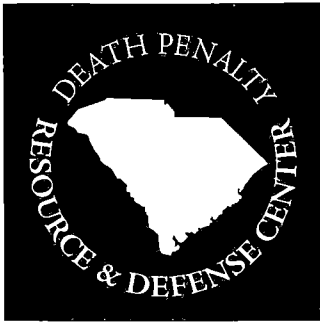
Dear Mr. Shearouse:

Pursuant to *In re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996), I am writing to report on the status of the above-referenced capital post-conviction relief case. The lower court entered an order granting Post-Conviction Relief. Both parties have filed notices of appeal. Cross petitions for a writ of *certiorari* have been filed and briefing has been completed.

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

Sincerely yours,

Emily C. Paavola



RECEIVED

MAR 15 2013

S.C. SUPREME COURT

March 14, 2013

The Honorable Daniel E. Shearouse
Clerk
South Carolina Supreme Court
P.O. Box 11330
Columbia, S.C. 29211

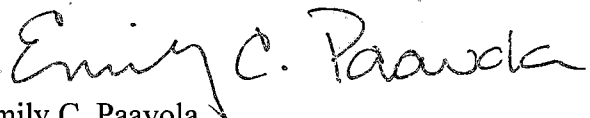
Re: *Kevin Mercer v. State of South Carolina*, 2009-CP-32-5465

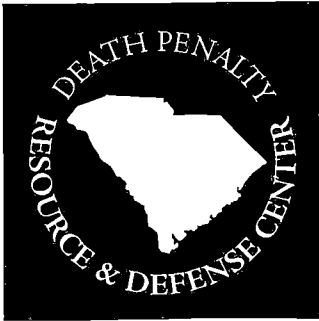
Dear Mr. Shearouse:

Pursuant to *In re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996), I am writing to report on the status of the above-referenced capital post-conviction relief case. The lower court entered an order granting Post-Conviction Relief. Both parties have filed notices of appeal. Cross petitions for a writ of *certiorari* have been filed and briefing has been completed.

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

Sincerely yours,


Emily C. Paavola



#2006-035197

DP# 26582

Box 13

January 14, 2013

RECEIVED

JAN 15 2013

S.C. SUPREME COURT

The Honorable Daniel E. Shearouse
Clerk
South Carolina Supreme Court
P.O. Box 11330
Columbia, S.C. 29211

Re: *Kevin Mercer v. State of South Carolina*, 2009-CP-32-5465

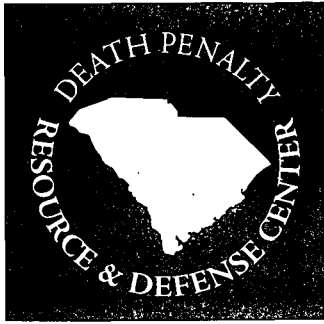
Dear Mr. Shearouse:

Pursuant to *In re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996), I am writing to report on the status of the above-referenced capital post-conviction relief case. The lower court entered an order granting Post-Conviction Relief. Both parties have filed notices of appeal. Cross petitions for a writ of *certiorari* have been filed and briefing has been completed.

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

Sincerely yours,

Emily C. Paavola
Emily C. Paavola



RECEIVED

NOV 19 2012

S.C. SUPREME COURT

DP
Box #13

November 15, 2012

The Honorable Daniel E. Shearouse
Clerk
South Carolina Supreme Court
P.O. Box 11330
Columbia, S.C. 29211

Re: *Kevin Mercer v. State of South Carolina*, 2009-CP-32-5465

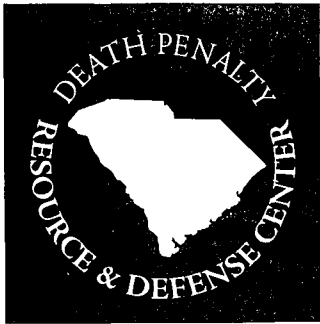
Dear Mr. Shearouse:

Pursuant to *In re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996), I am writing to report on the status of the above-referenced capital post-conviction relief case. The lower court entered an order granting Post-Conviction Relief. Both parties have filed notices of appeal. Cross petitions for a writ of *certiorari* have been filed and briefing has been completed.

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

Sincerely yours,

Emily C. Paavola



RECEIVED

SEP 19 2012

S.C. SUPREME COURT

September 17, 2012

The Honorable Daniel E. Shearouse
Clerk
South Carolina Supreme Court
P.O. Box 11330
Columbia, S.C. 29211

Re: *Kevin Mercer v. State of South Carolina*, 2009-CP-32-5465

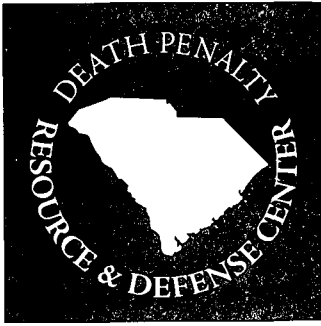
Dear Mr. Shearouse:

Pursuant to *In re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996), I am writing to report on the status of the above-referenced capital post-conviction relief case. The lower court entered an order granting Post-Conviction Relief. Both parties have filed notices of appeal. Cross petitions for a writ of *certiorari* have been filed and briefing has been completed.

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

Sincerely yours,

Emily C. Paavola



July 16, 2012

The Honorable Daniel E. Shearouse
Clerk
South Carolina Supreme Court
P.O. Box 11330
Columbia, S.C. 29211

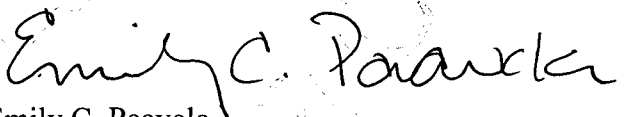
Re: *Kevin Mercer v. State of South Carolina*, 2009-CP-32-5465

Dear Mr. Shearouse:

Pursuant to *In re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996), I am writing to report on the status of the above-referenced capital post-conviction relief case. The lower court entered an order granting Post-Conviction Relief. Both parties have filed notices of appeal. Cross petitions for a writ of *certiorari* have been filed and briefing has been completed.

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

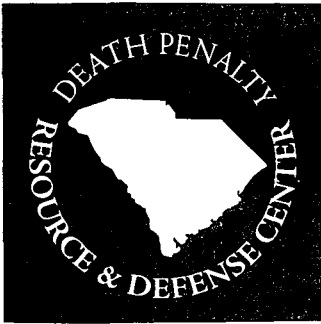
Sincerely yours,


Emily C. Paavola

RECEIVED

JUL 17 2012

S.C. SUPREME COURT



RECEIVED

MAY 10 2012

S.C. SUPREME COURT

May 15, 2012

The Honorable Daniel E. Shearouse
Clerk
South Carolina Supreme Court
P.O. Box 11330
Columbia, S.C. 29211

Re: *Kevin Mercer v. State of South Carolina*, 2009-CP-32-5465

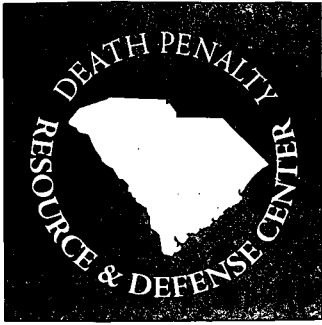
Dear Mr. Shearouse:

Pursuant to *In re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996), I am writing to report on the status of the above-referenced capital post-conviction relief case. The lower court entered an order granting Post-Conviction Relief. Both parties have filed notices of appeal. Cross petitions for a writ of *certiorari* have been filed. Respondent's final brief is due to be filed on May 21, 2012.

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

Sincerely yours,

Emily C. Paavola



March 15, 2012

The Honorable Daniel E. Shearouse
Clerk
South Carolina Supreme Court
P.O. Box 11330
Columbia, S.C. 29211

Re: *Kevin Mercer v. State of South Carolina*, 2009-CP-32-5465

Dear Mr. Shearouse:

Pursuant to *In re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996), I am writing to report on the status of the above-referenced capital post-conviction relief case. The lower court entered an order granting Post-Conviction Relief. Both parties have filed notices of appeal. Cross petitions for a writ of *certiorari* have been filed. Respondent's Reply is currently due to be filed today. Mercer's Reply is due to be filed on April 9, 2012.

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

Sincerely yours,

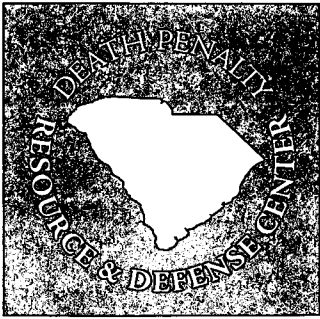
RECEIVED

MAR 19 2012

S.C. SUPREME COURT

Emily C. Paavola

Emily C. Paavola



January 16, 2012

The Honorable Daniel E. Shearouse
Clerk
South Carolina Supreme Court
P.O. Box 11330
Columbia, S.C. 29211

Re: *Kevin Mercer v. State of South Carolina*, 2009-CP-32-5465

Dear Mr. Shearouse:

Pursuant to *In re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996), I am writing to report on the status of the above-referenced capital post-conviction relief case. The lower court entered an order granting Post-Conviction Relief. Both parties have filed notices of appeal. Cross petitions for a writ of *certiorari* have been filed. Returns are currently due on February 2, 2012.

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

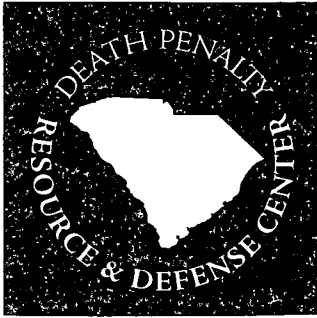
Sincerely yours,

Emily C. Paavola

RECEIVED

JAN 18 2012

S.C. SUPREME COURT



November 15, 2011

The Honorable Daniel E. Shearouse
Clerk
South Carolina Supreme Court
P.O. Box 11330
Columbia, S.C. 29211

Re: *Kevin Mercer v. State of South Carolina*, 2009-CP-32-5465

Dear Mr. Shearouse:

Pursuant to *In re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996), I am writing to report on the status of the above-referenced capital post-conviction relief case. The lower court entered an order granting Post-Conviction Relief. Both parties have filed notices of appeal. Cross petitions for a writ of *certiorari* are currently due on December 2, 2011.

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

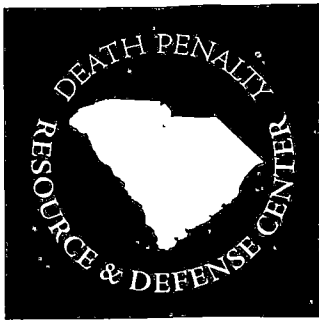
Sincerely yours,

Emily C. Paavola

RECEIVED

NOV 16 2011

S.C. SUPREME COURT



RECEIVED

SEP 19 2011

S.C. SUPREME COURT

September 15, 2011

The Honorable Daniel E. Shearouse
Clerk
South Carolina Supreme Court
P.O. Box 11330
Columbia, S.C. 29211

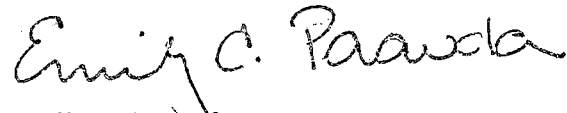
Re: *Kevin Mercer v. State of South Carolina*, 2009-CP-32-5465

Dear Mr. Shearouse:

Pursuant to *In re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996), I am writing to report on the status of the above-referenced capital post-conviction relief case. The lower court entered an order granting Post-Conviction Relief. Both parties have filed notices of appeal. Cross petitions for a writ of *certiorari* are currently due on October 3, 2011.

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

Sincerely yours,


Emily C. Paavola



August 31, 2010

The Honorable Daniel E. Shearouse
Clerk
South Carolina Supreme Court
P.O. Box 11330
Columbia, S.C. 29211

Re: *Kevin Mercer v. State of South Carolina*, 2009-CP-32-5465

Dear Mr. Shearouse:

Pursuant to *In re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996), I am writing to report on the status of the above-referenced capital post-conviction relief case. The parties held a status conference on July 13, 2010. The PCR judge has indicated that he intends to set a hearing date for December 6, 2010.

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

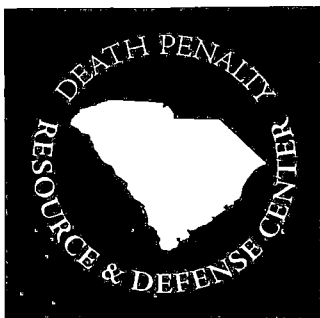
Sincerely yours,

Emily C. Paavola

RECEIVED

SEP 01 2010

S.C. SUPREME COURT



July 15, 2011

The Honorable Daniel E. Shearouse
Clerk
South Carolina Supreme Court
P.O. Box 11330
Columbia, S.C. 29211

Re: *Kevin Mercer v. State of South Carolina*, 2009-CP-32-5465

Dear Mr. Shearouse:

Pursuant to *In re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996), I am writing to report on the status of the above-referenced capital post-conviction relief case. The lower court held an evidentiary hearing on January 31 - February 1, 2011. The parties took additional in-court testimony on March 18, 2011. The PCR Court entered an order granting post-conviction relief on June 27, 2011.

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

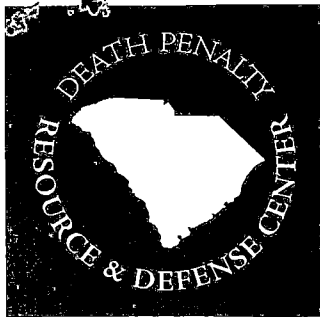
Sincerely yours,

Emily C. Paavola

RECEIVED

JUL 20 2011

S.C. SUPREME COURT



May 24, 2011

The Honorable Daniel E. Shearouse
Clerk
South Carolina Supreme Court
P.O. Box 11330
Columbia, S.C. 29211

Re: *Kevin Mercer v. State of South Carolina*, 2009-CP-32-5465

Dear Mr. Shearouse:

Pursuant to *In re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996), I am writing to report on the status of the above-referenced capital post-conviction relief case. The lower court held an evidentiary hearing on January 31 - February 1, 2011. The parties took additional in-court testimony on March 18, 2011. The PCR Court has instructed the parties to submit proposed orders. The State recently requested an extension of time, until June 3, 2011, to submit their proposed order.

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

Sincerely yours,

Emily C. Paavola

RECEIVED

MAY 25 2011

S.C. SUPREME COURT



March 16, 2011

The Honorable Daniel E. Shearouse
Clerk
South Carolina Supreme Court
P.O. Box 11330
Columbia, S.C. 29211

Re: *Kevin Mercer v. State of South Carolina*, 2009-CP-32-5465

Dear Mr. Shearouse:

Pursuant to *In re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996), I am writing to report on the status of the above-referenced capital post-conviction relief case. The lower court held an evidentiary hearing on January 31 - February 1, 2011. The parties have one additional witness to examine. His testimony has been scheduled to take place in court on Friday, March 18, 2011.

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

Sincerely yours,

Emily C. Paavola

RECEIVED

MAR 17 2011

S.C. SUPREME COURT



January 10, 2011

The Honorable Daniel E. Shearouse
Clerk
South Carolina Supreme Court
P.O. Box 11330
Columbia, S.C. 29211

Re: *Kevin Mercer v. State of South Carolina*, 2009-CP-32-5465

Dear Mr. Shearouse:

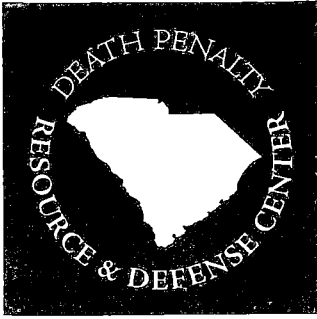
Pursuant to *In re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996), I am writing to report on the status of the above-referenced capital post-conviction relief case. This case has been scheduled for a PCR hearing on January 31, 2011.

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

Sincerely yours,

Emily C. Paavola

RECEIVED
JAN 14 2011
S.C. SUPREME COURT



August 31, 2010

The Honorable Daniel E. Shearouse
Clerk
South Carolina Supreme Court
P.O. Box 11330
Columbia, S.C. 29211

Re: *Kevin Mercer v. State of South Carolina*, 2009-CP-32-5465.

Dear Mr. Shearouse:

Pursuant to *In re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996), I am writing to report on the status of the above-referenced capital post-conviction relief case. The parties held a status conference on July 13, 2010. The PCR judge has indicated that he intends to set a hearing date for December 6, 2010.

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

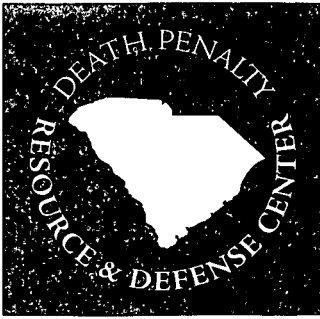
Sincerely yours,

Emily C. Paavola

RECEIVED

SEP 01 2010

S.C. SUPREME COURT



June 29, 2010

The Honorable Daniel E. Shearouse
Clerk
South Carolina Supreme Court
P.O. Box 11330
Columbia, S.C. 29211

Re: *Kevin Mercer v. State of South Carolina*, 2009-CP-32-5465

Dear Mr. Shearouse:

Pursuant to *In re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996), I am writing to report on the status of the above-referenced capital post-conviction relief case. Mr. Mercer's initial counseled application for post-conviction relief was filed on February 1, 2010. We have now received a copy of trial counsel's file and are continuing to investigate Mr. Mercer's claims for post-conviction relief. The parties have scheduled a status conference for July 13, 2010.

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

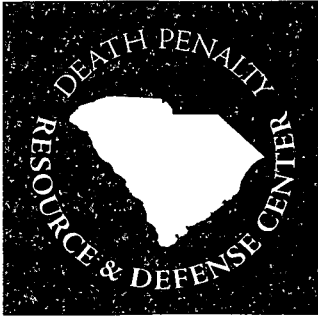
Sincerely yours,

Emily C. Paavola

RECEIVED

JUL 01 2010

S.C. SUPREME COURT



RECEIVED

APR 26 2010

April 23, 2010

S.C. SUPREME COURT

The Honorable Daniel E. Shearouse
Clerk
South Carolina Supreme Court
P.O. Box 11330
Columbia, S.C. 29211

Re: *Kevin Mercer v. State of South Carolina*, 2009-CP-32-5465

Dear Mr. Shearouse:

Pursuant to *In re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996), I am writing to report on the status of the above-referenced capital post-conviction relief case. Mr. Mercer's initial counseled application for post-conviction relief was filed on February 1, 2010. We have conducted a review of the record. We have attempted to begin identifying potential claims for post-conviction relief and identifying issues that will require further factual development. We have been hampered in this effort, however, by trial counsel's delay in providing a copy of her file. We have made repeated requests, both orally and in writing, but we still have not received a copy of trial counsel's file in accordance with S.C. Code § 17-27-130.

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

Sincerely yours,

Emily C. Paavola

Emily C. Paavola

cc: Hon. James R. Barber, III
Jason Peavy, Esq.

2009CP32 5465

The Circuit Court of South Carolina
Fifth Judicial Circuit

James R. Barber, III
Circuit Court Judge
Richland County Judicial Center
P.O. Box 2766
Columbia, South Carolina, 29201

(803) 576-1779
FAX (803) 576-1782



December 8, 2009

RECEIVED

FEB 16 2010

S.C. SUPREME COURT

The Honorable Beth Carrigg
Clerk of Court – Lexington County
205 East Main Street
Suite 146
Lexington, South Carolina 29072-3599

Re: Kevin J. Mercer, #6021 v. State of South Carolina

Dear Ms. Carrigg:

Enclosed herewith please find an executed Order Appointing Counsel in the captioned matter. Please file same and provide filed copies to the Attorney General, defense counsel, and applicant.

Sincerely yours,

John Ferguson, for

James R. Barber, III

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON, SC

2009 DEC -9 P 12:12

FILED

RECEIVED

FEB 16 2010

ORIGINAL

SOUTH CAROLINA SUPREME COURT

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

KEVIN J. MERCER, #6021

Applicant,

vs.

State of South Carolina,

Respondent.

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON, SC

IN THE COURT OF COMMON PLEAS

2009 CP 32 5465

ORDER APPOINTING COUNSEL FOR
POST-CONVICTION RELIEF

This matter is before this Court pursuant to the Order of the South Carolina Supreme Court assigning this Court to preside over the death penalty Post-Conviction Relief proceeding involving Kevin Jermaine Mercer.

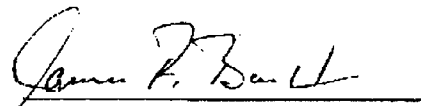
Mr. Mercer was convicted of murder, armed robbery, and possession of a firearm in the commission of a violent crime. *State v. Mercer*, 381 S.C. 149, 672 S.E.2d 556 (2009). He was sentenced to death. The South Carolina Supreme Court affirmed Mr. Mercer's convictions and sentence of death on January 12, 2009, and denied rehearing on February 19, 2009. *Id.* Mr. Mercer pursued a writ of certiorari from the United States Supreme Court, which was denied on October 5, 2009.

On November 24, 2009, this Court convened a hearing for the purpose of formally determining whether Mr. Mercer intended to pursue post-conviction relief, and if so, whether he wished for the Court to appoint counsel to represent him in the proceedings. Mr. Mercer indicated that he wished to pursue post-conviction relief with the assistance of counsel. Section 17-27-160(B) of the South Carolina Code of Laws, as amended, provides that an indigent applicant, if he so desires, is entitled to be represented by two (2) counsel, one of whom must have previously represented a death sentenced inmate in State or Federal Post-Conviction Relief proceedings or be death penalty qualified, pursuant to Section 16-3-26(B) of the South Carolina

Code of Laws, as amended. The Court has contacted Emily C. Paavola and Jason Peavy, both of Columbia, and each has consented to serve as counsel for Mr. Mercer. Ms. Paavola has been previously appointed to represent three death-sentenced inmates in this state and therefore qualifies to serve as lead counsel. Mr. Peavy, an attorney since 2001, has formerly served as an Assistant Attorney General. In his capacity as a prosecutor as well as in private practice, Mr. Peavy has handled a wide variety of felony criminal cases and is therefore appointed as second counsel.

IT IS THEREFORE ORDERED that Emily C. Paavola, Esquire, P.O. Box 11311, Columbia, South Carolina 29211, and Jason Peavy, 1720 Main Street, Suite 301, Columbia, South Carolina 29201, be appointed to represent Mr. Mercer in this post-conviction relief matter. A copy of this Order shall be served on counsel for all parties.

IT IS SO ORDERED.


Hon. James R. Barber, III

December 4, 2009

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2009CP3205465

Kevin Mercer #6021 vs. State Of South Carolina

CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other:
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

IT IS ORDERED AND ADJUDGED:

☒ See attached order;

☐ Statement of Judgment by the Court:

Court Reporter:

PRESIDING JUDGE -

This judgment was entered on the N/A, and a copy mailed first class this 10th day of December, 2009, to attorneys of record or to parties (when appearing pro se) as follows:

Emily C Paavola
PO Box 11311 Columbia, SC 29211
Jason Paul Peavy
1720 Main St., Suite 301 Columbia, SC 29201

A West Lee
SC Attorney General
P O Box 11549 Columbia, SC 292111549

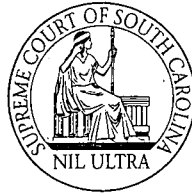
ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Beth A. Carrigg/lc

SCRPC APP-24/FORM 4

Beth A. Carrigg - Clerk of Court



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

November 4, 2009

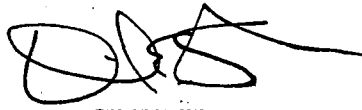
Acting Chief Appellate Defender Robert M. Dudek
South Carolina Commission on Indigent Defense
P O Box 11589
Columbia, SC 29211

Re: The State v. Mercer, Kevin

Dear Counsel:

Enclosed is the order issued in the above entitled matter.

Very truly yours,



CLERK

DES/dmh

Enclosure

cc: Assistant Attorney General S. Creighton Waters
The Honorable Donald Myers
The Honorable James R. Barber
The Honorable Beth Carrigg
Motte L. Talley, Esquire

The Supreme Court of South Carolina

The State,

Respondent,

v.

Kevin Mercer,

Appellant.

ORDER

Appellant was convicted of murder, armed robbery and possession of a weapon during the commission of a violent crime. He was sentenced to death. This Court affirmed appellant's convictions and death sentence in State v. Mercer, 381 S.C. 149, 672 S.E.2d 556 (2009).

Appellant's petition for rehearing was denied and the remittitur sent on February 19, 2009. On March 18, 2009, this Court granted a stay of execution while appellant petitioned the United States Supreme Court for a writ of certiorari. On October 5, 2009, the United States Supreme Court denied appellant's petition for a writ of certiorari.

Appellant now seeks a stay of execution, pursuant to In re Stays of Execution in Capital Cases, 321 S.C. 544, 471 S.E.2d 140 (1996), so that he can pursue post-conviction relief. Appellant states he will argue defense

counsel was ineffective for failing to retain a firearms expert, failing to make a sufficient argument that certain testimony regarding appellant's brain abnormality should have been admitted, and failing to adequately investigate appellant's upbringing.

The State has submitted a return in which it agrees that pursuant to In re Stays of Execution appellant is entitled to a stay of execution while he pursues post-conviction relief.

In In re Stays of Execution, supra, this Court stated that a defendant who desires a stay to pursue state PCR must, within ten days of the date of the issuance of the execution notice, file a motion to stay with this Court, setting forth the issues intended to be raised in the PCR application. The Court will thereafter assign a circuit judge to the case and issue a stay of execution. Id.

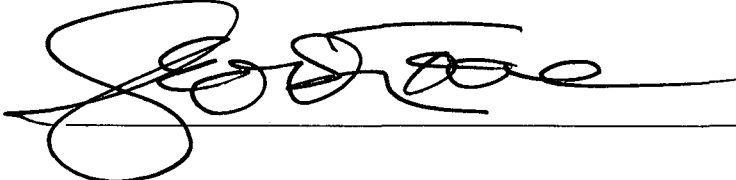
Within thirty days of the date of the order staying the execution, the circuit judge must determine the applicant's desires regarding counsel and issue an order setting forth the name of the counsel that the applicant has retained, appoints counsel for the applicant if he is indigent, or determines that the applicant will be allowed to proceed pro se based on a knowing and intelligent waiver of the right to counsel after being warned of the dangers

and disadvantages of proceeding pro se. Id. The stay will remain in effect until the judge issues a final order or judgment in the PCR action as long as the applicant files a PCR application within sixty days of the date of the order regarding counsel. Id.

We find the issues appellant states he will raise in his post-conviction relief application are sufficient to warrant a stay of execution. Accordingly, the request for a stay of execution is granted. The stay shall remain in effect to the extent provided by this Court in In re Stays of Execution in Capital Cases, supra.

The Honorable James R. Barber, III, is hereby assigned to the PCR action appellant intends to file. Judge Barber shall retain jurisdiction over this case regardless of where he may be assigned to hold court and may schedule such hearings as may be necessary at any time without regard to whether there is a term of court scheduled. Judge Barber shall conduct a hearing on appellant's desires regarding counsel within thirty days of the date of this order.

IT IS SO ORDERED.

 C. J.

John H. Wallace Jr. J.
Sam. Leino J.
Donald W. Batty J.
John W. Hittner J.

Columbia, South Carolina

November 4, 2009



HENRY McMASTER
ATTORNEY GENERAL

October 15, 2009

RECEIVED

OCT 15 2009

S.C. SUPREME COURT

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

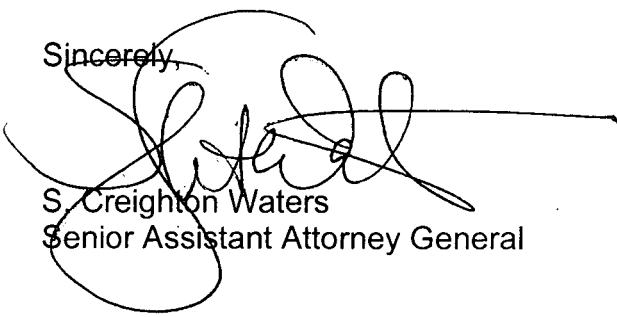
RE: The State v. Kevin Mercer

Dear Mr. Shearouse:

Please accept this letter in response to the Petition for Stay of Execution filed by Appellant, Kevin Mercer. Since Appellant identifies at least one issue of the sort appropriate for PCR, it thus appears that a stay is appropriate solely for the purpose of litigating a PCR action consistent with this Court's opinion in In re: Stays of Execution in Capital Cases, 321 S.C. 544, 471 S.E.2d 140 (1996). The State thus also requests that a judge be assigned to this capital PCR action and a hearing regarding appointment of counsel be held.

Thank you for your attention to this matter. If there are any further questions or concerns, do not hesitate to contact me.

Sincerely,



S. Creighton Waters
Senior Assistant Attorney General

cc: Robert M. Dudek, Esquire

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL
ORIGINAL

Appeal from Lexington County

John C. Few, Circuit Court Judge

RECEIVED

OCT 12 2009

THE STATE,

RESPONDENT, S.C. SUPREME COURT

V.

KEVIN MERCER,

APPELLANT

MOTION FOR A STAY OF EXECUTION AND
FOR THE APPOINTMENT OF A
POST-CONVICTION RELIEF JUDGE

Counsel for Kevin Mercer moves this Court for a stay of execution and to appoint a post-conviction relief judge so that post-conviction counsel can be appointed by the post-conviction relief judge.

I.

This Court affirmed petitioner's murder conviction and death sentence in State v. Kevin Mercer, 381 S.C. 149, 672 S.E.2d 556 (2009).

II.

Petitioner filed a petition for rehearing. This Court denied that petition on February 19,

2009.

III.

A petition for writ of certiorari to the United States Supreme Court, *Kevin Mercer. v. South Carolina*, No. 08-10556, was then filed on May 20, 2009. The Court denied certiorari in its order dated October 5, 2009. A copy of that order is attached to this motion.

IV.

Petitioner now can and will raise numerous grounds of ineffective assistance of counsel in an application for post-conviction relief. In his application for post-conviction relief, while reserving the right to amend once counsel is appointed, petitioner will assert, at a minimum, the following grounds of ineffective assistance of counsel:

- (a) Trial counsel was ineffective, in derogation of the Sixth Amendment to the United States Constitution, for failing to retain a firearms expert to show that there was gunshot residue on the gloves worn by Thompson, his alleged accomplice, to prove that Thompson was the triggerman since it was professional unreasonable for counsel to fail to do so where funds were available and the trial court invited counsel to request additional funds if they were needed;
- (b) Trial counsel was ineffective, in derogation of the Sixth Amendment to the United States Constitution, for failing to argue to the trial court that Dr. Steadman's proffered testimony that petitioner's "SPECT Scan" revealed he had a brain abnormality was materially different than Dr. Schwartz-Watts' testimony wherein she blamed much of the brain abnormality on drug use since there was a substantial chance the trial court would have admitted this crucial evidence had the proper argument been made at the trial level.

- (c) Trial counsel was ineffective, in derogation of the Sixth Amendment to the United States Constitution, for failing to adequately investigate petitioner's upbringing for strong evidence in mitigation regarding not only abuse but mental illness in the family since there was a reasonable likelihood that the admission of this evidence would have led to a sentence of life imprisonment rather than the death penalty.

This list is not exhaustive, and will likely expand, once appointed post-conviction counsel has had the opportunity to investigate. The above grounds are merely offered to show that numerous issues of ineffective assistance of counsel exist in this case.

V.

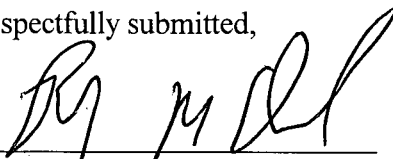
Present counsel cannot take a position on the issue of ineffective assistance of appellate counsel. That is a matter for post-conviction counsel and the post-conviction court to determine.

VI.

Based on the above, petitioner requests that this Court issue a stay of execution and appoint a post-conviction relief judge so that the appointed post-conviction relief judge can hold a hearing to appoint post-conviction counsel. This will allow petitioner to pursue his state court post-conviction relief action in the Lexington County Court of Common Pleas.

WHEREFORE, counsel for Kevin Mercer requests that this Court issue a stay of execution and appoint a post-conviction relief judge so that the appointed post-conviction relief judge can hold a hearing to appoint post-conviction counsel so that petitioner can pursue post-conviction relief with the assistance of counsel in the Lexington County Court of Common Pleas upon the grounds of ineffective assistance of counsel, and any other grounds that may arise from post-conviction counsel's investigation of this case.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Ry M D', written over a horizontal line.

Robert M. Dudek

Deputy Chief Appellate Defender for Capital Appeals

Attorney for Appellant

October 12, 2009

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

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

October 5, 2009

Mr. Robert M. Dudek
SC Commission on Indigent Defense
Division of Appellate Defense
1330 Lady St., 4th Floor
Columbia, SC 29201

Re: Kevin Mercer
v. South Carolina
No. 08-10556

Dear Mr. Dudek:

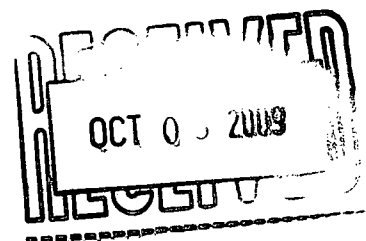
The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,



William K. Suter, Clerk



STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Lexington County

John C. Few, Circuit Court Judge

THE STATE,

RESPONDENT,

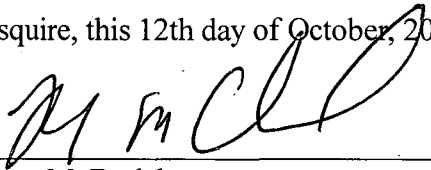
V.

KEVIN MERCER,

APPELLANT

CERTIFICATE OF SERVICE

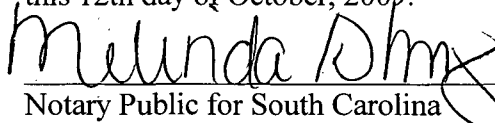
The undersigned attorney hereby certifies that a true copy of the motion for a stay of execution and to appoint a post-conviction relief judge in the above-referenced case has been served upon opposing counsel, S. Creighton Waters, Esquire, this 12th day of October, 2009.



Robert M. Dudek
Deputy Chief Appellate Defender for Capital Appeals

Attorney for Appellant

SUBSCRIBED AND SWORN TO before me
this 12th day of October, 2009.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2018



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1343
Facsimile: (803) 734-1397

Joseph L. Savitz, III, Chief Attorney
Wanda H. Carter, Deputy Chief Attorney

October 12, 2009

RECEIVED

OCT 12 2009

S.C. SUPREME COURT

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

Re: The State v. Kevin Mercer

Dear Mr. Shearouse:

Enclosed please find an original and six copies of the motion for a stay of execution and to appoint a post-conviction relief judge along with a certificate of service.

Sincerely,

Robert M. Dudek
Deputy Chief Appellate Defender for Capital Appeals

RMD/mwl

Enclosure

cc: S. Creighton Waters, Esquire

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

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

October 5, 2009

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

Re: Kevin Mercer
v. South Carolina
No. 08-10556
(Your No. 26582)

Dear Clerk:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,



William K. Suter, Clerk

RECEIVED

OCT 09 2009

S.C. SUPREME COURT

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

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

May 26, 2009

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

RECEIVED

MAY 26 2009

S.C. SUPREME COURT

Re: Kevin Mercer
v. South Carolina
No. 08-10556
(Your No. 26582)

Dear Clerk:

The petition for a writ of certiorari in the above entitled case was filed on May 20, 2009 and placed on the docket May 26, 2009 as No. 08-10556.

Sincerely,

William K. Suter, Clerk

by



Ruth Jones
Case Analyst



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332

Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Joseph L. Savitz, III, Chief Attorney
Wanda H. Carter, Deputy Chief Attorney

May 20, 2009

RECEIVED

MAY 20 2009

S.C. SUPREME COURT

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

Re: Kevin Mercer v. State of South Carolina

Dear Mr. Shearouse:

Please be advised that I have filed a petition for writ of certiorari and appendix in this case with the United States Supreme Court today. I have attached a copy of that petition.

Please contact me if you have any questions.

Sincerely,

Robert M. Dudek
Deputy Chief Attorney for Capital Appeals

RMD/mwl

Enclosure

cc: S. Creighton Waters, Esquire



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332

Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Joseph L. Savitz, III, Chief Attorney
Wanda H. Carter, Deputy Chief Attorney

May 20, 2009

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

RECEIVED

MAY 20 2009

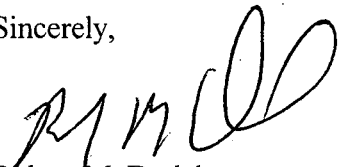
S.C. SUPREME COURT

Re: Kevin Mercer v. State of South Carolina

Dear Mr. Suter:

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

Sincerely,



Robert M. Dudek
Attorney at Law

RMD\mwl
Enclosure

cc: Honorable Daniel E. Shearouse, Clerk
S. Creighton Waters, Esquire

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2008

No. 2008-_____

RECEIVED

MAY 20 2009

S.C. SUPREME COURT

KEVIN MERCER,

PETITIONER

versus

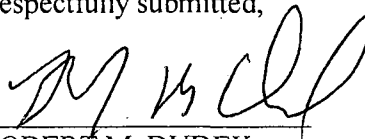
STATE OF SOUTH CAROLINA,

RESPONDENT

**MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS**

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

Respectfully submitted,



ROBERT M. DUDEK
Attorney at Law

South Carolina Commission
on Indigent Defense,
Division of Appellate Defense
1330 Lady Street, Fourth Floor
Columbia, SC 29201
(803) 734-1330

May 20, 2009

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2009

No. 09 - _____

RECEIVED

MAY 20 2009

S.C. SUPREME COURT

KEVIN MERCER,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

AFFIDAVIT OF KEVIN MERCER
IN SUPPORT OF MOTION TO
PROCEED IN FORMA PAUPERIS

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

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

1. Are you presently employed? **NO**

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

- b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

TEMPORARY-Labor Ready Service \$70.

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

NO

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

3. Do you own any cash or checking or savings account? NO

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

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

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

5. List the persons who are dependent upon you for support and state your relationship to those persons. My Three Children - I Am there Father

My son KEVIN J. Mercer Jr., My daughter KIARA J. Mercer, My son KEAVON J. Mercer.

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

Kevin Mercer
Kevin Mercer
KEVIN MERCER

SWORN to and subscribed before me
this 13th day of April, 2009.

Nyette R. Blum (L.S.)
Notary Public for South Carolina

My Commission Expires: 8/20/2016

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2008

No. 2008-_____

RECEIVED

MAY 20 2009

S.C. SUPREME COURT

KEVIN MERCER,

PETITIONER

versus

STATE OF SOUTH CAROLINA,

RESPONDENT

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

ROBERT M. DUDEK
Attorney at Law

South Carolina Commission
on Indigent Defense,
Division of Appellate Defense
1330 Lady Street, Fourth Floor
Columbia, SC 29201
(803) 734-1330

ATTORNEY FOR PETITIONER.

QUESTIONS PRESENTED
Capital case

1.

Whether the court erroneously held that the exclusion of mitigation expert neurological testimony offered pursuant to Lockett v. Ohio and Eddings v. Oklahoma showing Petitioner suffered from a specific brain abnormality which was offered to explain his poor judgment, his paranoia, and other problems relevant to his impulsive crime was harmless error where a single juror could have prevented a death verdict?

2.

Whether it was reversible error for the court to disqualify Juror Kyzer where Kyzer stated he could impose the death penalty, and sign the death verdict form since he was a death qualified juror under Uttecht v. Brown, and Wainwright v. Witt?

TABLE OF CONTENTS

QUESTION PRESENTED	1
TABLE OF CONTENTS	2
APPENDIX INDEX	3
TABLE OF AUTHORITIES.....	4
CITATION TO OPINION BELOW	6
JURISDICTION	6
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	7
STATEMENT OF FACTS	7
HOW THE FEDERAL ISSUE WAS RAISED BELOW	8
WHY THE WRIT SHOULD BE GRANTED	19
HOW THE FEDERAL ISSUE WAS RAISED BELOW	23
WHY THE WRIT SHOULD BE GRANTED	26
CONCLUSION	29

APPENDIX

1.	OPINION OF THE SOUTH CAROLINA SUPREME COURT	A1
2.	ORDER DENYING PETITION FOR REHEARING	A15
3.	RULE 403, SCRE	A18
4.	SOUTH CAROLINA CODE §16-3-20.....	A19

TABLE OF AUTHORITIES

CASES

<u>Ake v. Oklahoma</u> , 470 U.S. 68 (1985)	8
<u>Arizona v. Fulminante</u> , 499 U.S. 279 (1991).....	21
<u>Atkins v. Virginia</u> , 536 U.S. 304 (2002).....	17, 20
<u>Benge v. Johnson</u> , 474 F.3d 241 (6 th Cir. 2007)	26
<u>Chapman v. California</u> , 386 U.S. 18 (1967)	21, 22
<u>Eddings v. Oklahoma</u> , 455 U.S. 104 (1982)	passim
<u>Fahy v. Connecticut</u> , 375 U.S. 85 (1963).....	21
<u>Gray v. Mississippi</u> , 481 U.S. 648 (1987).....	27, 28
<u>Hitchcock v. Dugger</u> , 481 U.S. 393 (1987)	passim
<u>Lockett v. Ohio</u> , 438 U.S. 586 (1978).....	17, 19, 20
<u>McKoy v. North Carolina</u> , 494 U.S. 433 (1990).....	17, 20
<u>Penry v. Lynaugh</u> , 492 U.S. 302 (1989).....	17, 20
<u>Skipper v. South Carolina</u> , 476 U.S. 1 (1986)	17, 21
<u>State v. Kevin Mercer</u> , 672 S.E.2d 556 (2009).....	6, 8, 18, 19
<u>State v. McClure</u> , 537 S.E.2d 132 (2000)	20
<u>State v. Sims</u> 405 S.E.2d 377 (1991)	17
<u>State v. Singleton</u> , 326 S.E.2d 153 (1985).....	17
<u>United States v. Hasting</u> , 461 U.S. 499 (1983).....	22
<u>Uttecht v. Brown</u> , 551 U.S. 1 (2007)	25, 26, 27, 28
<u>Von Dohlen v. State</u> , 602 S.E.2d 738 (2004).....	20
<u>Wainwright v. Witt</u> , 469 U.S. 412 (1984).....	25, 26, 27
<u>Wiggins v. Smith</u> , 539 U.S. 510 (2003).....	18

<u>Witherspoon v. Illinois</u> , 391 U.S. 510 (1968).....	27
<u>Yates v. Evatt</u> , 500 U.S. 391 (1991)	21, 22

STATUTES

S.C. Code § 16-3-20(b)(2)	17, 20, 21
S.C. Code § 16-3-20(c)(b)(6)	17, 20, 21
S.C. Code § 16-3-20(c)(b)(7)	17, 20, 21

OTHER AUTHORITIES

28 U.S.C §1257(a)	7

RULES

Rule 403, SCRE	11, 12, 18

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. VI	7
U.S. Const. Amend. VIII.....	7, 19, 20
U.S. Const. Amend. XIV	7, 20

SUPREME COURT OF THE UNITED STATES

October Term, 2008

No. 2008-_____

KEVIN MERCER,

PETITIONER

versus

STATE OF SOUTH CAROLINA,

RESPONDENT

**PETITION FOR WRIT OF CERTIORARI TO THE
SOUTH CAROLINA SUPREME COURT**

Kevin Mercer asks this Court to issue a writ of certiorari to review the decision of the South Carolina Supreme Court in this case.

CITATION TO OPINION BELOW

The opinion of the South Carolina Supreme Court affirming petitioner's murder conviction and death sentence is reported as State v. Kevin Mercer, 672 S.E.2d 556 (2009). App.1-14.

JURISDICTION

The judgment of the South Carolina Supreme Court was entered on January 12, 2009. The petition for rehearing was denied on February 19, 2009. App. 15. This Court's jurisdiction is

invoked pursuant to 28 U.S.C §1257(a), petitioner having asserted below and asserting herein deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

This case also involves the Eighth Amendment to the United States Constitution, which states in pertinent part, "Excessive bails shall not be required . . . nor cruel and unusual punishment inflicted."

In addition, this case involves the Fourteenth Amendment to the United States Constitution, which provides in pertinent part, "[N]or shall any state deprive any person of life, liberty . . . without due process of law"

STATEMENT OF FACTS

Petitioner and co-defendant Marcus Thompson were indicted at the February, 2003 term of the Lexington County grand jury for the offenses of murder, armed robbery, possession of a firearm during the commission of a violent crime, and criminal conspiracy in shooting death of Army Sergeant Tracy Davis, and the stealing of his automobile from an apartment complex. R. 2729 - 2736. Petitioner and Thompson were stopped about seventeen minutes later by Trooper Dennis Stazer after a BOLO on the victim's automobile was dispatched, and they were arrested without incident. The crime, from any vantage point, was impulsive and hard to fathom. R. 1366, 1 - 1370, 1. 25.

The state's theory at trial was that petitioner was the triggerman, he simply liked the victim's automobile, and that vehicle was stolen so the men could go to Atlanta. Petitioner was

sentenced to death by a Lexington, South Carolina jury. Marcus Thompson, whom petitioner maintained was the triggerman, was later allowed to plead guilty to being an accessory after the fact of murder and armed robbery.¹ He received a twenty-six year sentence.

After petitioner was convicted and sentenced to death on April 22, 2006, Solicitor Myers received a letter from inmate Kevin Fuller on May 23, 2006 stating that he was “locked up with Marcus Antonio Thompson.” The letter stated that “several times at night he [Thompson] brags about killing Tracey Davis and Kevin [petitioner] getting the blame.” R. 2751. The South Carolina Supreme Court held petitioner’s mandatory direct appeal in abeyance and remanded for a hearing on petitioner’s motion for a new trial based on this after-discovered evidence. After a hearing, the trial judge, John Few, denied the motion, and the state supreme court affirmed that ruling on appeal. State v. Mercer, 672 S.E.2d 556, 563-567 (2009).²

HOW THE FEDERAL ISSUE WAS RAISED BELOW

During the penalty stage of the trial the defense called Dr. John Steedman as a witness. Dr. Steedman received a doctorate in biology from University of London. He graduated from the Medical University of South Carolina in 1992. He underwent residency training in both neurology and psychiatry specialties over a six-year period. He was board certified in neurology and board certified in psychiatry. R. 2263, l. 18 – 2264, l. 14. Dr. Steedman was qualified as an expert in neurology without objection. R. 2265, ll. 14 – 24.

¹ Petitioner and Thompson were not tried together.

² The South Carolina Supreme Court rejected petitioner’s argument that the trial judge violated this Court’s holding in Ake v. Oklahoma, 470 U.S. 68 (1985), by denying him funding to have the gloves Thompson admitted he was wearing on the day of the shooting tested for gunshot residue. See State v. Mercer, 672 S.E.2d 556, 563-567 (2009).

Dr. Steedman then explained that a spect scan was a way of "looking at the function of somebody's brain in terms of how much blood is running through the cortex . . . so it's mainly a question of showing differences from one side to the other or from front to back, side to side." R. 2266, ll. 8 – 19. Dr. Steedman testified that a spect scan is read by a radiologist looking to see if it shows abnormalities. R. 2266, l. 20 – 2267, l. 10.

Dr. Steedman did a "routine neurological exam" on petitioner. R. 2267, ll. 1 – 20. Dr. Steedman also read reports on petitioner's educational and other testing. R. 2267, ll. 21 – 25. Dr. Steedman said petitioner told him he graduated from high school and that he had done well.³ "He seemed quite naive about what he should describe to me. It was as if he was wanting to present himself as a fully functioning member of the society that he's used to which is obviously a high-drug-using society. So in that sense he was unusual. In other senses, he was not unusual." R. 2268, ll. 4 – 17.

Dr. Steedman described petitioner as having a significant learning disorder. However, petitioner did not qualify as being mentally retarded.⁴ R. 2270, l. 3 – 2272, l. 14.

Dr. Steedman testified that "in Mr. Mercer's case we have evidence of somebody whose brain functioning was not normal to begin with in these subtle ways in terms of a learning disability, and we are going to discuss a little of this - - the spect scan functional study as well." R. 2273, l. 20 – 2274, l. 6.

Dr. Steedman testified he had read petitioner's spect scan himself, and he also read the

³ Petitioner, in fact, had been in special education classes, moved often to another school, had a very low I.Q, and was ultimately placed on Social Security Disability (SSI). R. 2144, l. 3 - 2148, l. 25.

⁴ The trial judge also wrote in his report that petitioner had "below average" intelligence. The lowest selection of the three choices available. See Trial judge's report at 1. R. 2778.

radiologist's report. Dr. Steedman noted the radiologist wrote that there was a "*questionable abnormality* involving the left subfrontal cortex best seen in coronal view on the camera console. *Significance is questionable.* And in particular I do not believe this is an adequate etiology for dementia or other severe abnormality." R. 2274, ll. 13 – 21. (emphasis added).

At this point the solicitor stated he had no objection to entering the report into evidence, but the judge sent the jury out of the courtroom instead. R. 2274, l. 13 – 2275, l. 16.

The assistant solicitor then again complained he did not have adequate notice to prepare for this testimony. R. 2276, l. 20 – 2277, l. 14. The judge then stated he thought the report from spect scan showed it was "pretty much normal." Dr. Steedman disagreed: "it said there was a questionable abnormality." R. 2277, l. 17 – 2278, l. 6.

Dr. Steedman then informed the judge that the radiologist reading the scan was stating there was a possibility it was abnormal. Dr. Steedman told the judge his opinion was different: "I'm going to say I do think they are *definitely abnormal* and abnormal in a particular region that he describes." R. 2278, l. 9 – 2279, l. 9. (emphasis added). The judge then asked defense counsel when they learned of Dr. Steedman's opinion that there were definitely some abnormalities present. Defense counsel Kimbrough answered "shortly after the spect scan." R. 2279, ll. 3 – 11.

Assistant Solicitor Graham then brought up his complaint "we have with [experts] not writing report." R. 2279, l. 17 – 2280, l. 8. The solicitor then claimed he only learned there was an abnormality shown in the spect scan "this morning." Defense counsel immediately challenged him: "I don't know about that. We had a conversation about what our experts - - who our experts were and what their opinions were." R. 2280, ll. 9 – 16. Assistant Solicitor Graham agreed that he had a conversation with defense counsel about Dr. Steedman's testimony. R. 2280, l. 23 –

2282, l. 3.

Defense Counsel offered she was not attempting to admit the spect scans themselves. The judge then asked Dr. Steedman if he was going to offer an opinion that the abnormalities might translate into an effect on the behavior of petitioner. Dr. Steedman answered that he was indeed going to testify in that manner. R. 2282, ll. 6 – 15.

The judge then observed that he was concerned about the potential prejudice of Dr. Steedman's testimony based on the state "not having had a chance to view the scans and have their own expert review these scans is potentially significant and so that's the way I'm thinking through this problem." R. 2284, ll. 17 – 25. The judge said he saw little probative value to this testimony but significant prejudice to the state. R. 2285, ll. 1 – 8.

Defense counsel stated: "[A]s soon as we got this report, we gave it to them." Counsel argued the state had had the ability to be sufficiently prepared. R. 2285, l. 9 – 2286, l. 3.

The judge then ruled:

I can evaluate that under Rule 403. I can also evaluate that as to whether or not there is prejudice to the state in the late disclosure of the substance of that opinion, and under either analysis I find - - I'm going to exclude it. It does not change the fact that this witness can testify about the - - about his conclusions, but he can't - and he cannot testify *about the opinion that there is a specific abnormality that he finds in the reading of those scans.*

R. 2286, ll. 14 – 22. (emphasis added).⁵

After the judge ruled Dr. Steedman could not testify that there was a specific abnormality, the judge stated, "there's not any suggestion or allegation that anybody has done anything improper or anybody has done anything that is deceitful." The judge again stated he saw the prejudice to the state if the state was not allowed to have an expert to challenge Dr. Steedman's

⁵ See Rule 403, SCRE. App. 18.

opinion. The judge reiterated that he would not allow Dr. Steedman to testify there was "a specific abnormality." R. 2287, l. 8 – 2288, l. 21. The judge said "so the only thing that you can't say *is that you have come in behind the radiologist and looked at it and you think it is definite.*" R. 2292, ll. 21 – 23. (emphasis added).

In the presence of the jury Dr. Steedman was only allowed to testify that the report said there was a "questionable abnormality." "In other words, he is saying that this could be something that's there or it could be a nonspecific finding of the study that involves this area, the left front of the brain." R. 2295, ll. 6 – 17.

After Dr. Steedman was precluded from opining that petitioner had a specific brain abnormality, the following occurred with defense counsel:

Q. Dr. Steedman, based on your experience, have you had an occasion to deal with patients in your practice who have a combination of both mental illness and neurological impairment?

A. Yes, very frequently.

Q. As a result of those encounters with those types of patients, have you been able to identify or are you able to identify what the combined effect of having mental illness and brain impairment might be or is?

Mr. Graham: Objection, Your Honor.

The Court: Well, she's not asking - - it's another yes or no question. She's not asking it with relation to the defendant, so just in general . . . yes, sir.

Mr. Graham: He was not qualified - - he was only qualified as a neurologist, Your Honor, and that was done for a reason and she's trying to - - -

The Court: Right.

Mr. Graham: - - - Qualified him in another area.

The Court: Is this something that is - - that you do within the area of expertise as a neurologist?

The Witness: Yes, it is, very frequently, and that's way - - can I follow up on that question?

The Court: Explain that. Yes sir.

The Witness: We are, of course, talking - *-both in neurology and psychiatry, we're talking about the same organ of the body which is the brain. I very frequently see people that are brain-damaged. I also very frequently have patients that present me and I have to decide whether it is a psychiatric problem for which they need to then receive treatment from somebody who practices psychiatry more regularly than I do, and I have to make these decisions all the time. So I get presentations of people that may have a purely psychiatric problem. They may have a purely neurological problem. They may have both. And I have to make decisions about what's best for the treatment of that patient, how to best help them.*

R. p. 2299, l. 6 – 2300, l. 17. (emphasis added).

At this point the judge sent the jury out of the courtroom. R. 2300, ll. 21 – 25. The defense then proffered Dr. Steedman's testimony. Dr. Steedman was asked in his work with patients who have a mental disorder such as post-traumatic disorder and brain impairments "what are the types of behavioral systems or abnormalities that you might - - find?" Dr. Steedman answered:

I mean, I think the types of abnormalities that you might find are a cumulative effect on *poor judgment, depression, anxiety, thought disorders, paranoid*. Those are all things that - - And I'm not sure, you know, that the state is going to say that this is - - these are - - this is in the psychiatric realm. *These things are all there. They come from the brain. This is probably why I studied both because I wanted expertise in both areas so that I could help patients better.*

So the systems that one might see are in the psychiatric realm, the behavioral affect, and in the field of achievement of working in gainful employment and indeed problems –

problems of conforming one's behavior to living in society.
Those are the sorts of things that I would say.

R. 2301, l. 14 – 23 02, l. 22. (emphasis added).

Sensing the problem with the ruling the judge had already made on the limits of Dr. Steedman's opinions, defense counsel sought to admit as much of Dr. Steadman's testimony as possible under the circumstances. The following occurred:

Ms. Kimbrough: Your Honor, would it be appropriate, just so we don't cross over the line between neurology and psychiatry, for Dr. Steedman to say that he would expect to find problems in the psychiatric realm which is not what he's here to talk about as well as certain neurological behavioral consequences?

The Witness: Well, but the behavioral consequences I believe would be probably in the psychiatric realm. We could address just poor - - poor employment functioning and that sort of thing, poor school functioning.

The Court: I sustain the objection. This is - - this is - - as I - - - Tell me if I'm mistaken, but the initial purpose of having Dr. Steedman examine the defendant was to take his expertise and add it to the range of information that the psychiatrist would use to explain the psychiatric condition that the defendant had and how that might affect his behavior.

Ms. Kimbrough: Yes, Your Honor.

The Court: And so Dr. Schwartz-Watts has done that.

Ms. Kimbrough: She has.

R. 2301, l. 14 – 2302, l. 22. (emphasis added).

The judge repeated that he sustained the state's objection, and the judge said "he can talk about neurology all he wants to . . ." The judge ruled if any of Dr. Steedman's opinions were different from Dr. Watts's then that was prejudicial to the state "in having learned late that he is a psychiatrist." R. 2302, l. 21 – 2304, l. 3.

The judge conversely reasoned that if Dr. Steedman's opinions were the same as Dr. Watts's there was no prejudice to the state but that there was no reason for the defense to offer them and for the court "spending all this time trying to figure out whether his opinions are the same or are they different. We're just - - spinning our wheels." R. 2302, l. 21 – 2304, l. 3.

Defense counsel attempted to explain why the defense needed both expert's testimony: "Dr. Steedman's testimony would dove-tail with Dr. Schwartz-Watts but that it is not a mere image. She is not a neurologist." The judge countered: ""*We're talking specifically now about whether or not he can go beyond that area into the realm of psychiatry, and the answer is no, all right.*" R. 2304, l.4 – 2306, l. 4. (emphasis added).

After a short break, the judge told Dr. Steedman: "I am not suggesting that you're not qualified as a psychiatrist." However, he told the attorneys: "I am confining his testimony to neurology, and that shouldn't come as a surprise to anybody. It just so happens that you've got a neurologist who has expertise in psychiatry. It's perfectly natural that you would seek to elicit opinions within that area, but I'm not going to allow it for the reasons I've stated." R. 2304, l.4 – 2306, l. 4.

Within these strict confines Dr. Steedman was allowed to testify in the presence of the jury only that the radiologist found a "questionable abnormality" in petitioner's brain. The solicitor asked if this "questionable abnormality" caused petitioner to "attack an inmate in the jail with shanks."⁶ Dr. Steedman answered that the abnormality may have been a contributory factor to poor judgment. R. 2307, l. 16 – 2310, l. 14.

Dr. Watts had testified at length about petitioner's drug use, and its effect on him:

⁶ This was a sarcastic reference to a fight petitioner had with another inmate while confined prior to trial at the Lexington County Detention Center. R. 2001, l. 1 – 2035, l. 25.

[I] need to back up because there's one other part of the history you all need to know about which I also considered very significant. Mr. Mercer has abused a lot of drugs, So – A lot and very many and probably in combinations that I'm not very familiar with or comfortable with in knowing how they interact. He gave a history of using up to 12 grams of cocaine a day, smoking up to four ounces of marijuana a day which is a lot, drinking up to a 12-pack of beer, also drinking liquor every day, huffing Freon which is not something you hear of very often, using hallucinogens like angel dust. And what Mr. Mercer put it in the context of is that he had been using drugs for a very long period of time, but the death of his grandmother which was very significant. His grandmother appears to be one of the primary attachments for him. She had died, I believe, a year before Mr. Davis, Sergeant Davis, was killed, the year preceding that and that his drug use escalated after that period of time. So he was using a lot of drugs and certainly in combinations that I was concerned about the effects it would have on his brain.

R. 2154, ll. 5-25.

Whenever Dr. Watts talked about petitioner having a brain abnormality it was always coupled with his extreme drug use, and other non-significant facts such as petitioner had a learning disability and him finishing 180 out of a class of 181 at Columbia High School.⁷ R. 2155, l. 6 – 2169, l. 4. Dr. Watts also acknowledged she diagnosed petitioner with an anti-social personality disorder, and as having an oppositional defiant disorder. R. 2174, l. 15 – 2177, l. 15.

The trial judge charged the jury that it was to consider the statutory mitigating circumstances that the murder was committed while the defendant was under influence of a mental or emotional disturbance; that 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 the age or mentality of the defendant at the time of the crime. R. 2416, l. 9 – 2417, l. 1. See,

⁷ Coach Charles Macaluso testified that petitioner played the defensive line for him at Columbia High School for four years. Macaluso testified that petitioner “was in special needs classes, but he caused no problems whatsoever. He was – he was an outstanding student. He worked hard in the off-season program.” R. 2314, l. 16 – 2315, l. 12.

S.C. Code §16-3-20(c)(b)(2)(6)&(7). App. 21. The excluded evidence was probative of the jury's consideration of each of these three mitigating circumstances.

Petitioner argued on direct appeal to the South Carolina Supreme Court:

It is elementary that the jury must be able to consider and give effect to any mitigating evidence relevant to a defendant's background and character or the circumstances of the crime. Penry v. Lynaugh, 492 U.S. 302, 338, 109 S.Ct. 2934 (1989)⁸; McKoy v. North Carolina, 494 U.S. 433, 110 S.Ct. 1227 (1990); Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954 (1978). The sentencer has the authority to determine the weight to be given to relevant mitigating evidence. A court may not cause the relevant mitigating evidence to be given no weight by excluding the evidence from the jury's consideration. Eddings v. Oklahoma, 455 U.S. 104, 113, 115, 102 S.Ct. 869, 876, 877 (1982). See, also, Hitchcock v. Dugger, 481 U.S. 393, 398, 399, 107 S.Ct. 1821, 1824 – 1825 (1987); Skipper v. South Carolina, 476 U.S. 1, 4- 5, 106 S.Ct. 1669, 1670, 1671 (1986); State v. Sims, 304 S.C. 409, 405 S.E.2d 377 (1991); State v. Singleton, 284 S.C. 388, 326 S.E.2d 153 (1985).

Evidence petitioner suffered from a specific brain abnormality was clearly relevant, and it was helpful to petitioner's penalty phase defense. Any evidence the defense can present to the jury showing the defendant has an abnormality or deficiency is highly probative of the jury's consideration of the correct sentence because it tends to explain why the defendant is unusual, or why his behavior was different.

Brief of Appellant at 16-17.

In its opinion, the South Carolina Supreme Court addressed this issue under the caption heading: "Exclusion of Expert Mitigation." The Court noted that it "was clear error to exclude this testimony." The Court wrote that application of Rule 403, SCRE, had to be "cautiously invoked against a capital defendant in the penalty phase, especially in light of the due process implications at stake when a capital defendant seeks to introduce mitigation evidence." The

⁸ Overruled on other grounds in Atkins v. Virginia, 536 U.S. 304 (2002).

Court stated the state's objection to this evidence was "specious." The Court, citing this Court's opinion in Wiggins v. Smith, 539 U.S. 510 (2003), reminded "the bench and bar of the importance of a meaningful mitigation defense and, concomitantly, the ability of a capital defendant to fully present mitigation evidence." The Court found the error in excluding Dr. Steedman's mitigation testimony was harmless beyond a reasonable doubt because Dr. Donna Schwartz-Watts had testified similarly to Dr. Steedman about petitioner's brain abnormality. State v. Mercer, 672 S.E.2d 556, 561-563 (2009). App. 6-8.

Petitioner took strong exception to the harmless error analysis as it pertained to this mitigating evidence:

This Court may have overlooked the fact that Dr. Schwartz-Watts testified that petitioner was not *without fault* for his poor judgment and inability to conform his conduct to the standards expected by society. She testified petitioner's severe drug and alcohol abuse affected "his brain." A radiologist would only note a "questionable abnormality" R. 2154, l. 3 – 2157, l. 2.

That was much different from than Dr. Steadman's proffered testimony that petitioner suffered from a brain impairment -- it was *not his fault* -- and it caused his "poor judgment, depression, thought disorders" and paranoia. "They come from the brain." The abnormality caused petitioner's problems with "conforming one's behavior to living in society." R. 2301, l. 14 – 2302, l. 22,

While this Court found the state's objection to this testimony was ""specious," it nonetheless held the error was harmless because it was cumulative to Dr. Schwartz-Watts' testimony. State v. Kevin Mercer, Op. No. 26582 (filed January 12, 2009) at p. 13. Petitioner respectfully submits that this Court should reconsider that holding, and grant rehearing.

* * *

This Court's opinion, as it now stands, finds the trial court erred by not allowing the jury to hear Dr. Steadman's strong opinion about petitioner's brain abnormality -- an abnormality which petitioner could not help having -- but finds that error harmless because Dr. Steadman's testimony is said to be

cumulative to Dr. Watt's testimony that petitioner may have a brain abnormality, but that problem with his brain was in large part petitioner's *own fault because he badly abused drugs and drank excessively*. That makes a major difference to a juror. It is a distinction with a huge difference. In everyday terms it was like the difference between voluntary and involuntary intoxication. If you did it to yourself, it is your own fault. If it (the brain abnormality) is an act of God, you are excused to the extent that you will serve the rest of your life in prison as opposed to being executed Petitioner respectfully requests rehearing because excluding this relevant strongly mitigating evidence violated petitioner's Due process and Eighth Amendment right to present a complete defense against his proposed execution. See Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869 (1982); Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821 (1987); Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954 (1978).

Petition for rehearing at 1-3. The South Carolina Supreme Court denied rehearing. App. 15.

WHY THE WRIT SHOULD BE GRANTED

Evidence that petitioner had a specific brain abnormality was strong mitigating evidence since it helped explain to the jury why petitioner acted impulsively in committing the crime in this case, given his lack of judgment, which was caused by his brain abnormality. The exclusion of this expert testimony violated petitioner's Due process and Eighth Amendment right to present a complete defense against his proposed execution. See Eddings v. Oklahoma, 455 U.S. 104 (1982); Hitchcock v. Dugger, 481 U.S. 393 (1987); Lockett v. Ohio, 438 U.S. 586 (1978). Finding the error harmless beyond a reasonable doubt because it was cumulative to other evidence petitioner had a "questionable brain abnormality" which his drug use heavily contributed to, based on the entire record was a violation of the above cases. It cannot be said with any confidence that the exclusion of this mitigating evidence did not affect the verdict, particularly where the death verdict must be the unanimous vote of twelve jurors.

In Von Dohlen v. State, 602 S.E.2d 738, 746 (2004), the South Carolina Supreme Court, quoting State v. McClure, 537 S.E.2d 132, 141 (2000) stated, "we note the evaluation of the consequences of an error in the sentencing phase of a capital case [is] 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." Further, a death verdict must be unanimous. See S.C Code

§16-3-20 (C). App. 22.

In Eddings v. Oklahoma, 455 U.S. 104, 110 (1982), this Court, *citing* Lockett v. Ohio, 438 U.S. 586, 604 (1978), reiterated that the Eighth and Fourteenth Amendments mandate that a “sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.” See, also, Penry v. Lynaugh, 492 U.S. 302, 338 (1989)⁹; McKoy v. North Carolina, 494 U.S. 433(1990). Here, petitioner wanted the jury to consider the neurological opinion of Dr. Steedman that petitioner suffered from a specific brain abnormality. That brain abnormality may have affect petitioner’s behavior and provided the jury with an explanation for his impulsive crime. Dr. Steedman’s opinion that petitioner suffered from a specific brain abnormality was relevant evidence in mitigation. It not only went to the statutory mitigating circumstances charged by the judge, it also could be considered by the jury as a non-statutory mitigating circumstance or to supply “any other reason” not to sentence petitioner to death. S.C. Code § 16-3-20(c)(b)(2)(6) & (7). App. 21.

The sentencer has the authority to determine the weight to be given to relevant mitigating evidence. A court may not cause the relevant mitigating evidence to be given no weight by excluding the evidence from the jury’s consideration. Eddings v. Oklahoma, 455 U.S. 104, 113 (1982). See, also, Hitchcock v. Dugger, 481 U.S. 393, 398 (1987); Skipper v. South Carolina, 476 U.S. 1, 4-5 (1986). The South Carolina Supreme Court agreed that evidence petitioner suffered from a specific brain abnormality was clearly relevant. That court erred however by finding the exclusion of this helpful evidence to petitioner’s penalty phase defense was harmless error beyond a reasonable doubt.

⁹ Overruled on other grounds in Atkins v. Virginia, 536 U.S. 304 (2002).

It cannot be said here that it appears beyond a reasonable doubt that this excluded mitigating evidence would not have affected the verdict, particularly where one juror can force the imposition of a life sentence pursuant to South Carolina Code §16-3-20, and jurors can vote for a life sentence “for any reason or no reason at all.” Chapman v. California, 386 U.S. 18 (1967). There is a *reasonable possibility* that if the jury heard evidence that petitioner had a specific brain abnormality -- *that was not the result of his drug abuse* -- that a life sentence and not death would have been the punishment it imposed. Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963); Arizona v. Fulminante, 499 U.S. 279, 296 (1991).

“To say that an error did not contribute to the verdict is, rather, to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record. Yates v. Evatt, 500 U.S. 391, 403 (1991). A review of the entire record reveals this jury heard evidence from Dr. Schwartz-Watts that that petitioner used an extraordinary amount of drugs every day. She testified that she was naturally concerned about the effect these drugs had on petitioner’s brain. That testimony cannot fairly be ruled cumulative to Dr. Steedman’s testimony that petitioner had a specific brain abnormality, it was not a “questionable abnormality.”

Any evidence the defense can present to the jury showing the defendant has an abnormality or deficiency is highly probative of the jury’s consideration of the correct sentence because it tends to explain why the defendant is unusual, or why his behavior was different. Here, Dr. Steedman was precluded was offering the jury an explanation -- petitioner had an abnormal brain -- for petitioner’s impulsive seemingly unexplainable crime. It cannot be confidently said that, based on the whole record, this constitutional error was harmless beyond a reasonable doubt. United States v. Hasting, 461 U.S. 499, 509, n. 7 (1983). The exclusion of

this relevant mitigating evidence of petitioner's specific brain abnormality was reversible error, and the South Carolina Supreme Court erred by finding the error harmless. Eddings v. Oklahoma, 455 U.S. 104, 113 (1982). Hitchcock v. Dugger, 481 U.S. 393, 398 (1987); Skipper v. South Carolina, 476 U.S. 1, 4-5 (1986); Yates v. Evatt, 500 U.S. 391, 403 (1991); Chapman v. California, 386 U.S. 18 (1967).

It was reversible error for the court to disqualify Juror Kyzer where Kyzer stated he could impose the death penalty, and sign the death verdict form since he was a death qualified juror under *Uttecht v. Brown*, and *Wainwright v. Witt*

HOW THE FEDERAL ISSUE WAS RAISED BELOW

Juror Kyzer told the judge he could find petitioner guilty or not guilty and that he understood the concept of aggravating and mitigating circumstances. R. 933, l. 4 – 934, l. 21. Kyzer said he was between the second and third types of jurors.¹⁰ R. 935, ll. 8 – 12.

Kyzer at first said he was not sure he could vote for the death penalty or sign a death penalty verdict form. R. 936, l. 7 – 937, l. 23. However, on cross-examination Kyzer quickly said he could consider the death penalty and it would depend on the severity of the case. R. 939, l. 6 – 940, l. 13.

On re-examination by the judge, he was asked what in general was the source of his “feelings about the death penalty.” Kyzer responded that it would be hard to pass judgment on someone else but he knew “we’ve all got to live by the law.” R. 941, l. 12 – 942, l. 2.

The judge then asked Kyzer about his religious beliefs and how they affected his views on the death penalty. Kyzer answered that in his family they were brought up “an eye for an eye and a tooth for a tooth, but, you know, the laws have changed since whenever I was a kid and it’s just

¹⁰ The first “type of juror” is said to be one who would always vote for death if the defendant was convicted of murder, regardless of the mitigating evidence. The second type of juror would always for vote a life sentence regardless of the aggravating circumstances or other evidence in aggravation. The third type of juror could vote for death or for a life sentence depending on “all of the circumstances.” By the way these “three types” are presented it is intuitive that jurors are led to believe the third type of juror – the “open minded juror” – is the preferable type of juror.

hard to say. You know, I guess, you know, if I had to, I could put my name on the line, you know. I wouldn't feel comfortable doing it, but if I had to, I would." R. 942, ll. 3 - 16. The following colloquy then occurred between the judge and Kyzer:

Q. Well, I'm going to ask you one more question and then - - and then I'm going to let the - - then I'll turn it back over to the solicitor and any of the other lawyers who want to ask any questions. But - - but there's never going to be a situation in which you have to do it. It would always be a question of whether you - - whether you chose to do it. And - - and so I guess the first question is: If you were a juror in the penalty phase of the trial, would you - - and that's after the defendant has been convicted of murder, if he is convicted. Would you automatically impose a life sentence or would you consider all of the evidence that might be offered in the way of aggravating the crime and also all the evidence that might be offered in way of mitigating the crime and would you be able to consider imposing the death penalty?

A. Yes, sir.

Q. You think you could consider it?

A. I'd consider it, yeah.

Q. All right. And then the question would be: having - - if you decided that the death penalty was appropriate, would you be able to put your name on that line?

A. Yes, sir.

The Court: All right. Let me ask you to step out in the hall just one second, and then we'll get you back in here.

R. 942, l. 17 - 943, l. 16.

The judge then told the solicitor that maybe he should not have interrupted the solicitor's questioning of Kyzer. The judge then allowed the solicitor to continue to question Kyzer. R. 943, l. 18 - 944, l. 3.

During questioning by the solicitor Kyzer was asked if he could sign his name to the death penalty verdict form sentencing someone to death or if his feelings would interfere with that ability. Kyzer responded that his feelings would interfere with “it some.” R. 945, ll. 2 – 9. On re-cross examination by defense counsel, Kyzer said he would consider both options - - the death penalty or life imprisonment. R. 947, ll. 4 – 6. Kyzer again said he could sign his name to the death penalty form with the other jurors. R. 947, ll. 17 – 22.

Defense counsel Littlejohn argued that Kyzer was a qualified juror. “He has indicated he would consider both the types of sentences if we got to that stage. I think he hesitated because it would be hard for him to sign that death verdict, but he indicated in the bottom line that he could sign it if he thought it was the appropriate thing to do, and by virtue of those answers that does qualify him in this case.” The solicitor argued that Kyzer was not qualified under the Wainwright standard. The solicitor claimed Kyzer had said he would not sign the verdict sentencing form, and that “considering the death penalty” was not the Wainwright v. Witt test. R. 948, l. 14 – 949, l. 25.

After hearing from the solicitor, the judge ruled Kyzer was not a qualified juror. He stated that “every time he got ready to answer a question, he took a deep breath and had what I consider to be a very troubled look on his face.” Defense counsel took exception to Kyzer being disqualified for cause. R. 950, l. 1 – 951, l. 18.

On appeal to the South Carolina Supreme Court petitioner argued that Kyzer was a qualified juror pursuant to Wainwright v. Witt, 469 U.S. 412 (1984) and Uttecht v. Brown, 551 U.S. 1 (2007). The South Carolina Supreme Court held the disqualification of Kyzer did not violate petitioner’s rights under the Sixth and Fourteenth Amendments to the United States Constitution. The Court, citing this Court’s decision in Uttecht v. Brown, 551 U.S. 1, 9 (2007)

stated it was appropriate to grant the trial court broad discretion since that court can view the demeanor of the venire. The Court then affirmed the disqualification of Kyzer. App. 4-5.

WHY THE WRIT SHOULD BE GRANTED

This Court recently revisited Wainwright v. Witt in Uttecht v. Brown, 551 U.S. 1 (2007). In that five to four decision, the majority of this Court noted its deference to the trial court, especially in a federal habeas corpus case. To grant habeas relief the ruling on the federal issue must involve an application of federal law that is “objectively unreasonable” and not simply erroneous or incorrect. Benge v. Johnson, 474 F.3d 241 (6th Cir. 2007).

This is a direct appeal to this Court from the highest court of South Carolina. The deference this Court granted in the habeas case of Uttecht v. Brown is not applicable here.

Further, in Uttecht v. Brown, the Court considered defendant Brown’s failure to object to Juror Z’s excusal. The fact that Brown’s counsel did not feel sufficiently moved to object or take exception to Juror Z’s excusal seemed telling to the majority of this Court about the defense’s true position at trial.

This Court wrote that under Wainwright v. Witt, 469 U.S. 412 (1985) the judgment whether a venireman is biased is often based upon a determination by the trial court of the demeanor and credibility of the potential juror which are entitled to deference. The Court noted that some jurors may have difficulty articulating their views and that others may wish to hide their true feelings. Uttecht v. Brown, 127 S.Ct. at 2222–2223.¹¹ This Court wrote of its precedents, including Gray v. Mississippi, 481 U.S. 648, 107 S.Ct. 2045 (1987), which held that the wrongful exclusion of even a single juror for cause was reversible error:

These precedents establish at least four principles of relevance

¹¹ The pagination to the United States Reports on volume 551 has not been done by Westlaw to date. Hence, the citation to the Supreme Court Reporter.

here. First, a criminal defendant has the right to an impartial jury drawn from a venire that has not been tilted in favor of capital punishment by selective prosecutorial challenges for cause. Witherspoon, 391 U.S. at 521, 88 S.Ct. 1770. Second, the state has a strong interest in having jurors who are able to apply capital punishment within the framework state law prescribes. Witt, 469 U.S. at 416, 105 S.Ct. 844. Third, to balance these interests, a juror who is substantially impaired in his or her ability to impose the death penalty under the state-law framework can be excused for cause; but if the juror is not substantially impaired, removal for cause is impermissible. *Id.*, at 424, 105 S.Ct. 844. Fourth, in determining whether the removal of a potential juror would vindicate the state's interest without violating the defendant's right, the trial court makes a judgment based in part on the demeanor of the juror, a judgment owed deference by reviewing court. *Id.*, at 424 – 434, 105 S. Ct. 844.

This Court concluded by holding that “capital defendants have the right to be sentenced by an impartial jury. The State may not infringe on this right by eliminating from the venire those whose scruples against the death penalty would not substantially impair the performance of their duties.” Uttecht v. Brown, 127 S.Ct. at 2831.

As stated, this Court in Uttecht emphasized that the defense did not object to Juror Z's removal. This Court said that the state's challenge, Brown's waiver of an objection, and the trial court's excusal of Juror Z after observing his demeanor supported the conclusion that removing Juror Z was appropriate under the Witherspoon-Witt rule. Uttecht v. Brown, 127 S.Ct. at 2229. The majority noted that the defense may have failed to object because Juror Z did seem substantially impaired. The majority also noted defense counsel may have been glad that Juror Z was disqualified.

The situation here is very different. The defense strongly objected to the judge excusing Juror Kyzer where Kyzer said he could impose the death penalty and that he could sign the death verdict form sentencing petitioner to death. Juror Kyzer was a qualified juror, and any

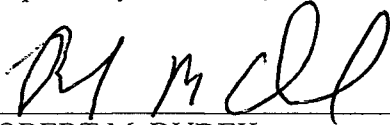
“hesitation” to attempt to articulate his views – given the totality of his *voir dire* – was insufficient to remove him for cause. The state was not entitled to a jury tilted very heavily towards death.

The solicitor successfully urged that “considering” the death penalty was a semantic disqualification, even though Kyzer said he could impose the death penalty and sign the death verdict form. If this Court’s conclusion that capital defendants are entitled to an impartial jury is to have force, this Court should respectfully hold that the excusal of Juror Kyzer, a qualified juror, was reversible error. The trial judge pointedly asked petitioner “if you decided that the death penalty was appropriate, would you be able to put your name on that line?” Juror Kyzer answered: “Yes, sir.” R. 943, ll. 10 – 13. The state could have used a peremptory challenge to remove Kyzer, but Kyzer was erroneously excused for cause in this case. See Gray v. Mississippi, 481 U.S. 648 (1987); Uttecht v. Brown, 551 U.S. 1 (2007).

CONCLUSION

By reason of the foregoing arguments, the petition for a writ of certiorari to the Supreme Court of South Carolina should be granted.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R M Dudek', written over a horizontal line.

ROBERT M. DUDEK
Attorney at Law

South Carolina Commission
on Indigent Defense,
Division of Appellate Defense
1330 Lady Street, Fourth Floor
Columbia, SC 29201
(803) 734-1330

ATTORNEY FOR PETITIONER.

May 20, 2009

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2008

No. 2008-_____

KEVIN MERCER,

PETITIONER

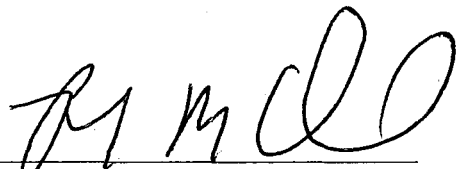
versus

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

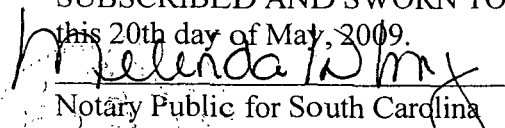
I certify that copies of the petition for writ of certiorari and appendix in this case have been served upon opposing counsel by mailing copies in envelopes properly addressed with postage prepaid on this 20th day of May, 2008.


ROBERT M. DUDEK
Attorney at Law

South Carolina Commission
on Indigent Defense,
Division of Appellate Defense
1330 Lady Street, Fourth Floor
Columbia, SC 29201
(803) 734-1330

ATTORNEY FOR PETITIONER.

SUBSCRIBED AND SWORN TO before me
this 20th day of May, 2009.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2018

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2008

No. 2008 -

KEVIN MERCER,

PETITIONER

versus

STATE OF SOUTH CAROLINA,

RESPONDENT

A P P E N D I X

ROBERT M. DUDEK
Attorney at Law

South Carolina Commission
on Indigent Defense,
Division of Appellate Defense
1330 Lady Street, Fourth Floor
Columbia, SC 29201
(803) 734-1330

ATTORNEY FOR PETITIONER.

Skip Navigation

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

The State, Respondent,

v.

Kevin Mercer, Appellant.

Appeal From Lexington County
John C. Few, Circuit Court Judge

Opinion No. 26582
Heard October 7, 2008 – Filed January 12, 2009

AFFIRMED

Deputy Chief Appellate Defender for Capital Appeals Robert M. Dudek, of South Carolina Commission on Indigent Defense, and Melissa Jane Reed Kimbrough, of Kimbrough & Taggart, both of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General S. Creighton Waters, all of Columbia; Solicitor Donald V. Myers, of Lexington, for Respondent.

JUSTICE KITTREDGE: This is a mandatory appeal from a sentence of death. On March 16, 2002, Army recruiter Sergeant First Class Tracy Davis was gunned down

outside his apartment in Lexington County, South Carolina. Kevin Mercer (Mercer) was convicted of murder, armed robbery, and possession of a firearm in the commission of a violent crime, and sentenced to death. In his appeal, Mercer challenges: (1) the disqualification of a juror; (2) the exclusion of evidence, both in the guilt and sentencing phases; (3) the denial of his post-trial motion for additional funds to test gloves for gunshot residue; and (4) the denial of his post-trial motion for a new trial based on after-discovered evidence. We affirm.

I.

Prior to his death, Sergeant First Class Tracy Davis (Davis) lived near Columbia, South Carolina, where he served as an active-duty member of the United States Army. He was attached to Fort Jackson where he trained Army recruiters.

On the evening of March 16, 2002, Davis arrived home at approximately 11:30 P.M. to the Raintree Apartments. As was his custom, he backed his vehicle, a white Lincoln Navigator, into a parking spot outside his apartment. According to a witness, after exiting his truck, Davis encountered a man and words were apparently exchanged.

The witness to the encounter was Davis's roommate, Sergeant First Class Clifton Magwood (Magwood). Magwood witnessed the confrontation from an apartment window. Magwood's room is on the second floor of the apartment, and his window looks out over the parking lot. Magwood testified that he heard a disturbance, got out of bed, looked through his blinds and observed Davis with a heavyset man, apparently armed with a handgun, demanding the keys to Davis's vehicle. Magwood saw the robber forcing Davis toward the rear of the vehicle and heard Davis tell the armed man, "All right. I'll give it to you."

Magwood left his vantage point to call 911 and summon help. The 911 call was logged at 11:32 P.M. Shortly thereafter, while running downstairs to help his roommate, Magwood heard a gunshot; he hurried outside to find Davis lying in the bushes near the parking lot. Magwood saw Davis's Navigator leaving the apartment complex. Davis died as a result of a gunshot to the back of the head.

Magwood only saw one individual confront Davis with a gun. Although Magwood only saw the individual from the back, he provided an immediate and detailed description of the assailant to law enforcement. The suspect was described as "a black male"; "broad shoulders"; "heavy build, muscular"; anywhere from 5'11" to 6'2" and weighing "215 to 225." Magwood further described the suspect's clothing as "a dark outfit, could be jean or denim or some type of dark outfit with a dark hat."

Magwood's detailed description of the killer, along with a description of the Navigator, was dispatched to all officers in the vicinity, by way of a "be on the lookout," commonly referred to as a BOLO. Deputy Dennis Stazer of the Lexington County Sheriff's Office responded to the BOLO broadcast by positioning his patrol car (at 11:42 P.M.) at what he believed could be an intercept position on a nearby interstate, I-20. Within minutes, a white Navigator drove past Deputy Stazer's location. Deputy Stazer pulled in behind the suspect vehicle and initiated a traffic stop at 11:50 P.M.

There were two black males in the Navigator, Mercer in the driver's seat and Marcus

Thompson in the front passenger's seat. Deputy Stazer utilized his patrol car's "light bar . . . to light up the interior of the [Navigator]." Deputy Stazer approached the driver's side and asked the driver (Mercer) for his license and registration. Mercer produced his license, but could not find the vehicle registration. Mercer eventually located a receipt from a car dealership and handed it to Deputy Stazer. The receipt confirmed that the Navigator belonged to the murder victim, Davis. Mercer and Thompson were taken into custody.

Inside the Navigator, a .357 caliber handgun was retrieved from under the driver's seat.[1] Testing matched the handgun to the bullet removed from Davis during the autopsy. Gunshot residue (GSR) testing done on Mercer's hands revealed materials considered to be consistent with GSR, although the test results were not conclusive. Testing done on Thompson's hands resulted in a negative test for GSR. Four gloves (two pairs) were found in Thompson's possession but were not tested for GSR. As Thompson was removed from the vehicle, a plastic bag containing fourteen .357 bullets "fell out of his pants legs."

Mercer matched the detailed description of the assailant furnished by Magwood. Mercer is 5 feet 10 inches tall and weighs 220 pounds.[2] The officers on the scene of the arrest confirmed that Mercer is a broad-shouldered, muscular individual, consistent with Magwood's description. Mercer was arrested wearing a "dark[,] . . . like a denim . . . jean jacket outfit"; he was also wearing "a black . . . baseball style cap."

Conversely, Thompson is "very slender" and "narrow-shouldered" and weighs about 150 pounds. At the time of his arrest, Thompson was wearing "a black tee shirt that was over a white tee shirt," with the white tee shirt conspicuously sticking out from the black tee shirt. Thompson was not wearing a hat.

Mercer and Thompson were charged with murder, armed robbery, possession of a firearm during the commission of a violent crime, and criminal conspiracy. Based on the State's view of the evidence, Thompson pled guilty to accessory before the fact of armed robbery, and accessory after the fact of murder, and armed robbery; he was sentenced to 28 years in prison. Mercer's charges proceeded to trial with the State seeking the death penalty.

Mercer pursued a third-party guilt defense, pointing to Thompson as the shooter. The jury convicted Mercer, with the jury ultimately recommending a sentence of death, from which Mercer appeals.

II.

Mercer raises six issues on appeal, which we place in four categories:

- (1) Whether the trial court abused its discretion in finding a juror not death penalty qualified under *Wainwright v. Witt*.
- (2) Whether the trial court abused its discretion during the guilt phase by excluding the testimony of Thompson's attorney "that Thompson was charged as only an accessory after the fact and that he was released on bond."
- (3) Whether the trial court abused its discretion during the penalty phase by (a) precluding Dr. John Steedman from opining that a "SPECT Scan" of Mercer's

brain revealed an "abnormality"; and (b) precluding Dr. Steedman from offering expert psychiatric opinion testimony.

- (4) Whether the trial court abused its discretion in denying Mercer's post-trial motions, one seeking additional funds to test Thompson's gloves for gunshot residue; and a second motion for a new trial based on after-discovered evidence that Thompson confessed to a cellmate that he committed the murder.

III.

Juror John Doe[3] and *Wainwright v. Witt*

Mercer claims the disqualification of Juror John Doe violated his Sixth and Fourteenth Amendment rights. We disagree. In *Wainwright v. Witt*, 469 U.S. 412 (1985), the Supreme Court stated that the critical issue regarding the disqualification of a capital juror 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.'" *Id.* at 424 (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980)). The *Wainwright* Court observed that a juror's bias need not be "proved with 'unmistakable clarity' . . . [because] bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism." *Id.* at 424. Finally, the *Wainwright* Court noted that "there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law . . . [and that] is why deference must be paid to the trial judge who sees and hears the juror." *Id.* at 425-26. It is with this standard in mind that we address whether the trial court abused its discretion in disqualifying Juror John Doe.

We have carefully reviewed the lengthy colloquy involving Juror Doe. While it is possible to cherry-pick certain responses and perhaps conclude that Juror Doe is qualified, a review of the totality of the responses reveals a potential juror vacillating and struggling with his strong convictions against the death penalty. Juror Doe, without hesitation, expressed an ability to impose a life sentence. Conversely, when the trial court asked if the juror could vote for a sentence of death, Juror Doe responded, "I'm not sure, sir."

The State followed the court's questioning by pursuing the same line of inquiry, to which Juror Doe responded that "it's just hard to judge, you know, someone else . . . for something that they've done." Following up, the State zeroed in on Juror Doe's reservations, asking whether Juror Doe could sign his name to a death penalty verdict, to which Doe responded, "I don't think so, sir."

Defense counsel attempted to rehabilitate Juror Doe, but without much success. Doe stated he would "try" to consider both options. The trial court permitted both sides to vet Juror Doe thoroughly. Doe answered, "probably so," when asked if his feelings would interfere with serving on the jury. And when Doe was asked, "if you were convinced that a death sentence was appropriate that you could sign that form along with the other jurors," he answered, "[t]hat goes back to like having to put my name on the line you said when -- for a death sentence. I'd still have to think about that."

The trial court concluded that Juror John Doe was not qualified under *Wainwright*:

I think the juror is not qualified. . . . There's several things that I think need to be mentioned, and the first is the juror's demeanor. . . . I believe that . . . this juror's views on capital punishment would substantially impair his ability to perform his duties as a juror in accordance with the instructions that I would give him.

. . . A lot of times I think we see jurors who hesitate . . . [and] I feel as though I can get a sense as to whether the juror is hesitating because they are trying to think deeply and be completely open and honest with us or are they hesitating because they are troubled by the . . . issue that they're about to discuss.

I did not get the impression, as I do sometimes, that this juror hesitated because he was trying to be clear about his feelings. I got the impression that he hesitated because he was troubled by . . . what he thought would be the question of whether or not he would be able to impose the death penalty. . . . And in the end I am left . . . with the impression that . . . this juror's views on the death penalty would substantially impair his performance of his duty to . . . follow the instructions that I would give him. And so I find that he is disqualified.

We find the trial court acted well within its broad discretion in finding Juror Doe's views would substantially impair his ability to follow his oath and the court's instructions on the law. See *Uttecht v. Brown*, 551 U.S. 1, 9 (2007) ("Deference to the trial court is appropriate [which necessarily involves granting the trial court broad discretion] because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors."); *State v. Wood*, 362 S.C. 135, 141, 607 S.E.2d 57, 60 (2004) (adhering to the rule that a "trial court's disqualification of a prospective juror will not be disturbed where there is a reasonable basis . . . [to] conclude[] that the juror would not have been able to faithfully discharge his responsibilities as a juror"); *State v. Council*, 335 S.C. 1, 10, 515 S.E.2d 508, 512 (1999) (following the rule that unless unsupported by the evidence, "determination of whether a juror is qualified to serve on a death penalty case is within the sole discretion of the trial judge"). Even the cold record before us reflects Juror Doe's hesitancy and profound unease with the prospect of performing his duties as a juror in accordance with his oath and the court's instructions. *State v. George*, 323 S.C. 496, 503, 476 S.E.2d 903, 908 (1996) (finding that the trial court acted correctly by disqualifying a juror that "declared that she did not think she could sign a form recommending the death penalty"); *State v. Longworth*, 313 S.C. 360, 366, 438 S.E.2d 219, 222 (1993) (disqualifying a juror who initially stated "he 'probably could' consider" the death penalty but later stated he did not "think so"). We affirm the disqualification of Juror John Doe.

IV.

Exclusion of Marcus Thompson's Lawyer's Testimony

During the guilt phase, Mercer sought to introduce testimony from Thompson's lawyer regarding the reduced charges against Thompson.[4] Specifically, Mercer wanted to introduce testimony that he and Thompson were initially charged with the same offenses, but later Thompson's charges were reduced and he was released on bond. Mercer claimed the information was relevant as part of his defense of third-party guilt. The State

objected to this testimony, asserting that it was not relevant to third-party guilt or otherwise. The trial court sustained the objection. Finding the proffered testimony of Thompson's attorney concerning Thompson's reduced charges and bail status not relevant to any issue before the jury, including third-party guilt, we affirm pursuant to Rule 220(b)(1), SCACR.[5]

V.

Exclusion of Expert Mitigation Evidence

Mercer retained numerous well-credentialed experts for the penalty phase, including a neurologist, a forensic psychiatrist, a pharmacologist, a sociologist licensed as a clinical social worker, and a corrections expert. During the penalty phase, the defense presented a comprehensive review of Mercer's troubled life.

The mitigation evidence revealed much about Mercer. A sampling of the evidence reveals that Mercer has a "damaging disability in terms of . . . making judgment[s] and inferences" and that he suffers from "untreated depression." The experts opined that Mercer's abusive upbringing resulted in post-traumatic stress disorder and anxiety disorder, which "are connected with previous trauma, nightmares[,] . . . distressive recollections" and substance abuse. Beyond Mercer's life experiences, he suffered from a myriad of cognitive deficiencies, including neurological dysfunction and learning disabilities. Because Mercer struggled from an early age to function in life and hold regular employment, he was found to be disabled by the Social Security Administration.

Against this backdrop of a thorough mitigation presentation, we are presented with two challenges to the trial court's exclusion of expert testimony in the penalty phase. "A ruling on the admissibility of evidence is within the sound discretion of the trial court and will not be reversed absent an abuse of discretion. An abuse of discretion occurs when the trial court's ruling is based on an error of law." *State v. Washington*, 379 S.C. 120, 123-24, 665 S.E.2d 602, 604 (2008) (internal citations omitted).

We first address the claim that the trial court abused its discretion in preventing Dr. John Steedman from opining that a "SPECT Scan" of Mercer's brain revealed an "abnormality." While we agree that it was clear error to exclude this testimony, we do not find that Mercer was prejudiced by the error. Next is the assignment of error in connection with the trial court precluding Dr. Steedman from offering psychiatric opinion testimony. Again, we find no reversible error.

A. "Spect Scan"

Dr. Steedman is a medical doctor who is board certified in neurology and psychiatry. Dr. Steedman analyzed a "SPECT Scan" conducted on Mercer's brain.[6] The SPECT Scan was initially reviewed by a radiologist who noted a "questionable abnormality." Dr. Steedman was prepared to render a stronger finding of an abnormality. The State objected strenuously against such testimony, claiming surprise and prejudice. After an offer of proof and lengthy discussion, the trial court sustained the objection on the basis of Rule 403, SCRE, and a so-called "discovery order" violation. This ruling rises to the level of an abuse of discretion.

Application of Rule 403 should be cautiously invoked against a capital defendant in the penalty phase, especially in light of the due process implications at stake when a capital defendant seeks to introduce mitigation evidence.[7] The probative value of Dr. Steedman's excluded testimony was, as a matter of law, not substantially outweighed by its potential for prejudice, as a result of the purported late disclosure or otherwise. Reliance on the so-called "discovery order" cannot withstand even minimal scrutiny, for there was no formal discovery order.[8] In any event, Dr. Steedman was disclosed to the State, as was the general substance of his testimony.

We nevertheless find no reversible error. When the entirety of the record is considered, the exclusion of Dr. Steedman's proffered testimony of an abnormality juxtaposed to the radiologist's notation of a "questionable abnormality" resulted in no prejudice to Mercer. Despite the erroneous ruling, a review of the record demonstrates that Dr. Steedman testified at length concerning Mercer's cognitive deficiencies. Dr. Steedman's unchallenged testimony included reference to the SPECT Scan results as "confirmatory" of Mercer's learning disorder. More to the point, the same evidence the State successfully and erroneously challenged—the SPECT Scan abnormality—was already in evidence without objection.

Another defense expert previously testified that the SPECT Scan revealed an abnormality. Dr. Donna Schwartz-Watts, a defense psychiatrist, testified that she "ordered what's called a SPECT Scan. And what a SPECT Scan is, this is one of the newer tests in medicine and it shows brain function. . . . But what it does, it's a . . . picture of how your brain functions, and that test came back abnormal. There's a . . . small area that's not normal on there. . . ." Later, as Dr. Schwartz-Watts began to sum up her testimony, she again talked about the SPECT Scan. Referring to Mercer, she said that "it's already a bad brain in the sense that he's got a learning disability and . . . we even know that on a SPECT Scan there's an abnormality." Thus, the very "SPECT Scan abnormality" testimony Mercer sought to admit through Dr. Steedman was presented to the jury without objection through Dr. Schwartz-Watts. We therefore find the trial court's error in excluding Dr. Steedman's opinion testimony was harmless beyond a reasonable doubt. *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (quoting *State v. Key*, 256 S.C. 90, 93, 180 S.E.2d 888, 890 (1971)) (noting that an error is harmless when it "could not reasonably have affected the result of the trial").

B. Exclusion of Dr. Steedman's psychiatric opinion

As noted, Dr. Steedman is board certified in both neurology and psychiatry. When Mercer sought to elicit brief testimony from Dr. Steedman as a psychiatrist, the State objected, claiming Dr. Steedman was only disclosed as an expert in neurology. The basis of the State's objection arose from the nonexistent discovery order, discussed above. The trial court entertained the objection, and Mercer proceeded to make an offer of proof. The offer of proof of Dr. Steedman's psychiatric opinion comprises a mere half page in this voluminous record. The thrust of Dr. Steedman's psychiatric opinion was that the "types of [Mercer's] abnormalities . . . are a cumulative effect on poor judgment, depression, anxiety, thought disorders, [and] paranoia." The State's objection was sustained, and Dr. Steedman was prevented from rendering a psychiatric opinion.

Although the basis of the State's objection was specious, no reversible error is present. The excluded evidence was presented to the jury through other witnesses, especially Dr.

Schwartz-Watts, without objection. Even defense counsel acknowledged that the proffered psychiatric opinion testimony of Dr. Steedman "certainly . . . mirrors [and] dovetail[s]" with Dr. Schwartz-Watts. As a result, Mercer sustained no prejudice from the exclusion of this cumulative evidence. *State v. Graham*, 314 S.C. 383, 386, 444 S.E.2d 525, 527 (1994) (noting that a harmless error analysis depends upon a host of factors, one of which is whether the excluded evidence was cumulative).

VI.

Denial of Mercer's Post-trial Motions

We finally address Mercer's two post-trial motions. These motions cannot be properly understood and evaluated in a vacuum, for they naturally flow from Mercer's efforts to create a reasonable doubt in the State's case by pointing to Marcus Thompson as the shooter.

The centerpiece of Mercer's guilt phase defense was third-party guilt—Thompson as the triggerman. As defense counsel asserted in the opening statement to the jury:

One of the key factors in this case was omitted [from the solicitor's opening remarks], and that is riding in the Lincoln Navigator was a second person. Ladies and Gentlemen that second person is not here today. We don't know where he is. Last time I heard he was out on bond. Last time I heard he wasn't even charged with murder or armed robbery. That wasn't how it started out. He was charged with all the same things that Kevin Mercer was.

.....

Suffice it to say Marcus Thompson was in the Navigator and he's not here today, and we believe that Marcus Thompson, in fact, was the shooter. That's our theory. It's pretty simple.

This theme was pursued throughout the trial, as the defense sought to create a reasonable doubt that Mercer was the triggerman. This approach was directly linked to what Mercer characterized as a "tunnel vision" approach to the investigation. One example comes from the gloves taken from Thompson that were not tested for gunshot residue (GSR). Counsel for Mercer argued forcefully that the State's decision not to test the gloves for GSR demonstrated the State's myopic view to focus on Mercer at the expense of a thorough and proper investigation. The following excerpts from the closing argument illustrate this defense strategy:

[The State does not] want to talk about Marcus Thompson. . . . You know, we had to dig and bring out the things about Marcus Thompson. They didn't want to show you any evidence about him. They wanted to ignore anything about him that would give you the full picture of what happened on May 16, 2002. . . . We had to pull it out of them.

.....

. . . But do we know that it wasn't Marcus Thompson with gloves on that pulled

that trigger in that dimly-lit parking lot?

....

They didn't show you the gloves because it points directly to Marcus Thompson being the shooter.

....

... And we'd know ... if they had sent those gloves to the [State Law Enforcement Division] lab. We'd know if they were full of barium, antimony, and lead. We'd know that.

....

... Maybe Marcus Thompson with his gloves on shot Sergeant Davis and then went and got Kevin [Mercer]. It's up to the State to prove it, and they haven't done it.

....

They chose to declare Kevin Mercer the shooter and ignore the other evidence, ignore the other possibilities, ignore Marcus Thompson and his gloves.

A. Denial of funding post-trial to test Thompson's gloves

Mercer's post-trial motion for funds to test Thompson's gloves for GSR was denied. The matter of authorizing funds to capital defendants lies within the sound discretion of the trial court. S.C. Code Ann. § 16-3-26(C)(1) (2003) (authorizing the trial court to award funds where court determines requested funds are "reasonably necessary"); *see also State v. Matthews*, 291 S.C. 339, 345, 353 S.E.2d 444, 448 (1986) (holding that the decision to award funds to capital defendants is a matter within the trial court's discretion). Before trial, the trial court authorized \$53,000 for Mercer's defense. The trial judge went further and invited defense counsel to request additional funds "if what I have authorized in this order is not going to get you all the way to trial." The record discloses no additional funding request prior to this post-trial motion.

Of particular significance to a proper resolution of this post-trial funding request is the fact that Mercer retained a GSR expert for trial. The expert, Jeffrey Hollifield, is a chemist, formerly employed with the South Carolina State Law Enforcement Division. Hollifield was assigned the limited task of analyzing the inconclusive results of the GSR test conducted on Mercer. For apparent strategic reasons, Hollifield was not tasked with testing the gloves found in Thompson's possession. As discussed above, the defense opted to challenge the adequacy of the State's investigation, pointing to the State's failure to test Thompson's gloves. Having elected not to test Thompson's gloves for trial purposes, there is no abuse of discretion in the denial of Mercer's post-trial motion for additional funding.

B. Denial of new trial motion based on after-discovered evidence

Following the trial, and while the case was initially on appeal, Solicitor Myers received a letter from Kevin Fuller, who had been one of Thompson's cellmates at the Lexington County Detention Center. In a second letter to Solicitor Myers, Fuller asked for "help" and "some probation" with his pending charges. According to Fuller, Thompson had admitted to shooting the victim. Solicitor Myers promptly forwarded Fuller's letters to defense counsel, who filed a motion for a new trial based on after-discovered evidence. Because this information came to light after the filing of the appeal, we remanded the matter to the trial court to conduct an evidentiary hearing. The trial court heard the matter fully and, in a detailed order, denied the new trial motion, both as to the guilt and sentencing phases. Mercer assigns error to the denial of his new trial motion.

The decision whether to grant a new trial rests within the sound discretion of the trial court, and this Court will not disturb the trial court's decision absent an abuse of discretion. *State v. Johnson*, 376 S.C. 8, 11, 654 S.E.2d 835, 836 (2007); *State v. Simmons*, 279 S.C. 165, 166, 303 S.E.2d 857, 858 (1983). Having carefully considered the new trial motion, fully cognizant of Mercer's third-party guilt defense, we find no abuse of discretion in the denial of his motion.

In order for Mercer to prevail in his new trial motion premised upon after-discovered evidence, he must show the after-discovered evidence: (1) is such that it would probably change the result if a new trial were granted; (2) has been discovered since the trial; (3) could not in the exercise of due diligence have been discovered prior to the trial; (4) is material; and (5) is not merely cumulative or impeaching. *State v. Spann*, 334 S.C. 618, 619-20, 513 S.E.2d 98, 99 (1999). The State concedes that all elements are met, save the first element.

In this post-trial setting, our jurisprudence recognizes the gatekeeping role of the trial court in making a credibility assessment.[9] *State v. Porter*, 269 S.C. 618, 621, 239 S.E.2d 641, 643 (1977) (noting that the determination of whether new evidence is credible for purposes of a new trial motion rests with the trial court); *State v. Deese*, 266 S.C. 534, 538, 225 S.E.2d 175, 176 (1976) (noting that the trial court is tasked with assessing the new evidence in a motion for a new trial); *State v. Pierce*, 263 S.C. 23, 33, 207 S.E.2d 414, 419 (1974) (quoting *State v. Mayfield*, 235 S.C. 11, 34-35, 109 S.E.2d 716, 729 (1959)) ("The credibility of newly-discovered evidence offered in support of a motion for a new trial is a matter for determination by the circuit judge to whom it is offered. In him, not this court, resides the power to weigh such evidence; and his judgment thereabout will not be disturbed except for error of law or abuse of discretion."). On review, we may not make our own findings of fact. The deferential standard of review constrains us to affirm the trial court if reasonably supported by the evidence.

The after-discovered evidence is limited to Fuller's testimony that Thompson admitted to being the triggerman. Thompson's participation in, and first-hand knowledge of, the crime, was clearly known to Mercer and the State from the beginning. With the proper standard of review in mind, we review the trial court findings.

We begin with the trial court's conclusion concerning Fuller's testimony:

I carefully observed Fuller's demeanor and listened to his testimony. In my view, the inconsistencies in his own stories, the differences between his version and that of Thompson and Johnston, and the inconsistency of Fuller's

story with known facts did not result from mistake or failure of recollection, but rather from intentional, calculated misrepresentations. I believe Fuller fabricated the story about Thompson admitting to shooting Sergeant Davis. I believe Fuller purposefully made different statements about this at different times when Fuller's view of what version of the story suited Fuller's interests best had changed. Finally, apart from the factors listed above, Fuller simply left me with the clear impression he was not telling the truth. Fuller's testimony has very little credibility.

Fuller's criminal record includes multiple convictions for burglary, aggravated assault and battery, and criminal domestic violence. Fuller characterized his criminal history as a "nice record." We recognize that all the key participants in the post-trial hearing have extensive criminal records.

More relevant to the inquiry is careful scrutiny of the actual statements Fuller attributes to Thompson. Given the inconsistencies with Fuller's story, there is a basis to sustain the trial court's lack of credibility finding. For example, on cross examination at the evidentiary hearing, Fuller gave varying versions as to when Thompson confessed to the murder.

Concerning the substance of the various statements, when Fuller was confronted with the inconsistency "about what happened to the gun," he said he "miswrote" the initial statement because he "was in a hurry."^[10] Another inconsistency is found in Fuller's account of where Davis was shot—as Davis was exiting his vehicle (which is Fuller's account) versus outside the vehicle.

Fuller informed investigators in a July 19, 2006, interview that another cellmate could corroborate Thompson's alleged confession. The other cellmate, Timothy Johnston, did testify, but he denied Fuller's account of the Thompson confession. The trial court found Johnston's testimony credible.

Fuller's credibility may be assessed not only by internal inconsistencies within his statements and testimony, but also by contrasting the purported Thompson confession against what are fairly solid facts. First, the only witness to the crime, Magwood, provided a physical description of the assailant, a description that closely matched the much bigger Mercer and not the slender Thompson. Second, Magwood saw Davis being forced, apparently at gunpoint, by the heavyset assailant toward the rear of the Navigator; Magwood found Davis lying in the bushes next to the parking lot. This is at odds with the Fuller account of the murder occurring in the area of the driver's door. Third, Fuller testified to a blood smear on the Navigator; the vehicle was stopped only minutes after the murder and no blood was found in or on the vehicle. Fourth, according to Fuller, Thompson shot Davis "pointblank . . . behind his ear." The pathologist opined that, because of the absence of soot or stippling around the wound, the fatal shot came from a distance of "at least two feet away from the skin of the victim." Fifth, according to Fuller, Thompson moved the murder weapon during the traffic stop and placed it under Mercer's seat. This is at odds with the testimony of Deputy Stazer, who pulled the vehicle over and saw no such movement in the vehicle.

To be sure, Mercer may challenge the certitude of these so-called facts, but their cumulative effect informed the judgment of the trial court in assessing the post-trial motion based on after-discovered evidence.

Having thoughtfully considered the evidence, the trial court determined that "there is essentially no chance the jury would believe Fuller's testimony that Thompson confessed to shooting Sergeant Davis." This finding of course is beyond the applicable "would probably change the result" standard. *Spann*, 334 S.C. at 619, 513 S.E.2d at 99. In denying the post-trial motion as to the guilt phase, the trial court observed that the jury was charged, without objection, on the law of "the hand of one is the hand of all." In denying the post-trial motion as to the sentencing phase, the trial court observed that the jury was charged that it could recommend a death sentence only if it found that Mercer was the triggerman.[11]

Mercer takes issue with the denial of his post-trial motion. Mercer posits a different view of the facts. Mercer, in essence, invites this Court to make different credibility determinations, especially with respect to Fuller. Beyond Fuller, it is argued that the trial court had a valid reason not to believe cellmate Johnston over Fuller, for Johnston was facing life imprisonment with a pending burglary first-degree charge.[12] We respectfully decline Mercer's invitation to engage in *de novo* fact finding. We further reject the suggestion to ignore the trial court's gatekeeping role in post-trial after-discovered evidence motions.

The credibility of newly-discovered evidence offered in support of a motion for a new trial is a matter for determination by the circuit judge to whom it is offered. In him, not this court, resides the power to weigh such evidence; and his judgment thereabout will not be disturbed except for error of law or abuse of discretion.

Mayfield, 235 S.C. at 34-35, 109 S.E.2d at 729.

To accept Mercer's premise that a jury must weigh the conflicting evidence ignores the *State v. Spann* factors and the gatekeeping role of the trial court as outlined in many cases, including *State v. Mayfield*. Moreover, the approach advanced by Mercer confuses the applicable standard in post-trial after-discovered evidence motions with the admissibility of third-party guilt evidence at trial.

The question before us, then, is whether the trial court's denial of the post-trial motion amounts to an abuse of discretion. We hold it does not. In so ruling, we are sensitive to the notion that a mere finding of a witness's lack of credibility does not complete the analysis, because a witness may lack persuasive credibility and still create reasonable doubt. This sensitivity forms part of our consideration. We have drawn the line, however, with Mercer's desire to use Fuller's testimony for "residual doubt" as to guilt in the sentencing phase. *Franklin v. Lynaugh*, 487 U.S. 164, 172-74 (1988) (clarifying Eighth Amendment jurisprudence by noting that a state is not constitutionally required to allow a capital defendant to submit "residual doubt" mitigation evidence in the sentencing phase of a capital case). We affirm the denial of Mercer's post-trial motion based on after-discovered evidence.

VII.

We have conducted the statutorily mandated review under S.C. Code Ann. § 16-3-25 (2003). We find the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor. We further find that the evidence supports the

jury's finding of a statutory aggravating circumstance, and that the sentence of death is proportionate to sentences imposed under similar situations. *State v. Huggins*, 336 S.C. 200, 519 S.E.2d 574 (1999); *State v. McWee*, 322 S.C. 387, 472 S.E.2d 235 (1996). Mercer's convictions and sentence of death are

AFFIRMED.

TOAL, C.J., WALLER, PLEICONES and BEATTY, JJ., concur.

[1] Deputy Stazer did not testify to seeing a handgun when he first approached the driver's window. Moreover, Deputy Stazer, who "had to keep [his] eyes on both of them," saw no movement from either Mercer or Thompson. Deputy Stazer testified that had there been any movement in the vehicle he considered as a threat, he would have responded with deadly force. This testimony concerning the lack of movement, especially by Thompson, acquires relevance when read in context with Mercer's post-trial motion for a new trial based on after-discovered evidence.

[2] This height and weight is taken from Mercer's driver's license which he produced to Deputy Stazer. There is nothing in the record that contradicts this description.

[3] We use the pseudonym John Doe.

[4] Neither the State nor Mercer called Thompson as a witness.

[5] Although this evidence was not admissible, we do recognize that defense counsel, in her opening remarks to the jury, referred to Thompson's reduced charges and bond status. According to counsel's opening statement, "We don't know where [Thompson] is. Last time I heard he was out on bond. Last time I heard he wasn't even charged with murder or armed robbery. That wasn't how it started out. He was charged with all the same things that Kevin Mercer was."

[6] SPECT is an acronym for single-photon emission computerized tomography. Richard E. Redding, *The Brain-Disordered Defendant: Neuroscience and Legal Insanity in the Twenty-First Century*, 56 Am. U. L. Rev. 51, 121 (2006). According to Dr. Steedman, "a spect scan is a . . . nuclear medicine study. It is . . . a way of looking at the function of somebody's brain in terms of how much blood flow is running through the cortex. It's mainly useful in detecting whether there are asymmetries and regional differences in blood flow . . . to parts of the brain which indicates . . . how hard those parts of the brain are working." An abnormal spect scan means there is either increased or decreased blood flow to a certain area in the brain. A decreased flow of blood to a particular region of the brain may be referred to as an abnormality and may be associated with general cognitive deficiencies and learning disorders.

[7] This Court reminds the bench and bar of the importance of a meaningful mitigation defense and, concomitantly, the ability of a capital defendant to fully present mitigation evidence. See *Council v. State*, ___ S.C. ___, ___ S.E.2d ___ (2008), Op. No. 26543 (S.C. Sup. Ct. re-filed Dec. 29, 2008) (Shearouse Adv. Sh. No. 48 at 12) (relying in large part upon *Wiggins v. Smith*, 539 U.S. 510 (2003), this Court determined that counsel's failure

to adequately investigate and present mitigating evidence resulted in the ineffective assistance of counsel requiring a new sentencing hearing). The trial courts, vested with considerable discretion in evidentiary matters, must not neglect the due process implications involved in a capital defendant's right to present mitigation evidence.

[8] In this case, the State repeatedly asked the trial court to order Mercer to disclose his experts and to require a written report from his experts. The trial court refused to order defense experts to produce written reports. *State v. Northcutt*, 372 S.C. 207, 216-17, 641 S.E.2d 873, 878 (2007) (holding that Rule 5, SCRCrimP, provides no basis for a trial court to require the creation of written defense expert reports for disclosure to the State). The trial court ultimately relented to the State's discovery requests by ordering the parties to meet and attempt to resolve the impasse. This was done, and because defense counsel failed to hit the bull's eye concerning Dr. Steedman's precise opinion regarding the SPECT Scan study, the State cried foul. The State's claim of unfair surprise is meritless.

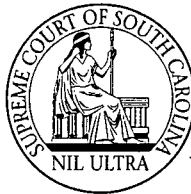
[9] The analytical framework at play in this post-trial motion (imposing on the trial judge a gate-keeping role in making credibility determinations) stands in stark contrast to the admissibility of third-party guilt evidence at trial. Provided threshold admissibility is met, third-party guilt evidence may not be excluded based on the trial court's view of the evidence or the perceived "strength" of the State's case. *Holmes v. South Carolina*, 547 U.S. 319, 330-31 (2006) (reversing the exclusion of evidence in a criminal trial and holding that the trial court may not exclude evidence of third-party guilt based upon a determination of the strength of the State's evidence).

[10] This inconsistency concerns Mercer's possession of the murder weapon immediately after the murder as he exited the apartment complex in Davis's Navigator.

[11] The trial court charged the jury:

Now, you will recall that in the guilt phase of the trial I charged you on the concept of the hand of one is the hand of all. That concept does not apply in this penalty phase of the trial. . . . Before you may consider imposing the death penalty, you must first find that the State has proven beyond a reasonable doubt that the defendant, Kevin J. Mercer, fired the shot that killed the victim. If you find that the State has failed to prove that Kevin J. Mercer fired that shot, then you may not impose the death penalty but you must impose a life sentence.

[12] As between Johnston and Fuller, the trial court recalled Johnston's testimony to the effect that "Fuller thought he could benefit from fabricating a story about Thompson shooting Sergeant Davis." While the record confirms that Fuller was seeking "help" with his charges, Johnston did not testify to any such "fabrication" admission by Fuller. Mercer is correct in challenging the trial court's erroneous finding in this regard. We view the error as insignificant. The strong findings of the trial court against Fuller's credibility cannot reasonably be said to be dependent on this one finding. This finding does not form a meaningful part of the trial court's order, for it stands alone in an otherwise coherent analysis.



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

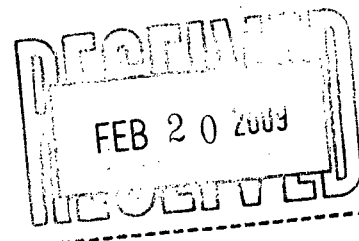
BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

February 19, 2009



✓ Deputy Chief Appellate Defender for Capital Appeals
Robert M. Dudek
South Carolina Commission on Indigent Defense
P O Box 11589
Columbia, SC 29211

Melissa Jane Reed Kimbrough, Esquire
Kimbrough & Taggart
1338 Pickens St.
Columbia, SC 29201-2630

Re: The State v. Mercer, Kevin

Dear Counsel:

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

“Petition for Rehearing is denied.

s/ Jean H. Toal C.J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

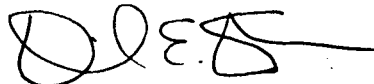
s/ John W. Kittredge J.

February 19, 2009.”

Deputy Chief Appellate Defender for Capital Appeals
Robert M. Dudek
Melissa Jane Reed Kimbrough, Esquire
Page Two
February 19, 2009

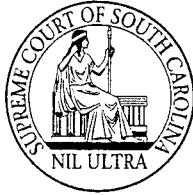
The remittitur is today being forwarded to the lower court.

Very truly yours,


CLERK

DES/dmh

cc: Assistant Deputy Attorney General Donald J. Zelenka
Assistant Attorney General S. Creighton Waters
The Honorable Donald V. Myers



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

February 19, 2009

REMITTITUR

The Honorable Beth Carrigg
Clerk of Court, Lexington County
205 East Main Street, Suite 146
Lexington, SC 29072-3599

Re: The State v. Mercer, Kevin
2003-GS-32-00409

Dear Ms. Carrigg:

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

Very truly yours,

CLERK

DES/dmh

cc: ✓ Deputy Chief Appellate Defender for Capital Appeals
Robert M. Dudek
Melissa Jane Reed Kimbrough, Esquire
Assistant Deputy Attorney General Donald J. Zelenka
Assistant Attorney General S. Creighton Waters
The Honorable Donald V. Myers

APPENDIX A

RULE 403

**EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF
PREJUDICE, CONFUSION, OR WASTE OF TIME**

Although relevant, evidence may be excluded if its probative value substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Discussion in Text:

Rule 403 is discussed in § 9.2, *infra*.

[Next Part>>](#)

Code 1976 § 16-3-20

Code of Laws of South Carolina 1976 Annotated [Currentness](#)

Title 16. Crimes and Offenses

Chapter 3. Offenses Against the Person

Article 1. Homicide

→§ 16-3-20. Punishment for murder: separate sentencing proceeding to determine whether sentence should be death or life imprisonment.

(A) A person who is convicted of or pleads guilty to murder must be punished by death, by imprisonment for life, or by a mandatory minimum term of imprisonment for thirty years. If the State seeks the death penalty and a statutory aggravating circumstance is found beyond a reasonable doubt pursuant to subsections (B) and (C), and a recommendation of death is not made, the trial judge must impose a sentence of life imprisonment. For purposes of this section, "life imprisonment" means until death of the offender without the possibility of parole, and when requested by the State or the defendant, the judge must charge the jury in his instructions that life imprisonment means until the death of the defendant without the possibility of parole. In cases where the defendant is eligible for parole, the judge must charge the applicable parole eligibility statute. No person sentenced to life imprisonment pursuant to this section is eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory life imprisonment required by this section. No person sentenced to a mandatory minimum term of imprisonment for thirty years pursuant to this section is eligible for parole or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory minimum term of imprisonment for thirty years required by this section. Under no circumstances may a female who is pregnant be executed so long as she is pregnant or for a period of at least nine months after she is no longer pregnant. When the Governor commutes a sentence of death to life imprisonment under the provisions of Section 14 of Article IV of the Constitution of South Carolina, 1895, the commuttee is not eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, good conduct credits, education credits, or any other credits that would reduce the mandatory imprisonment required by this subsection.

(B) When the State seeks the death penalty, upon conviction or adjudication of guilt of a defendant of murder, the court shall conduct a separate sentencing proceeding. In the proceeding, if a statutory aggravating circumstance is found, the defendant must be sentenced to either death or life imprisonment. If no statutory aggravating circumstance is found, the defendant must be sentenced to either life imprisonment or a mandatory minimum term of imprisonment for thirty years. The proceeding must be conducted by the trial judge before the trial jury as soon as practicable after the lapse of twenty-four hours unless waived by the defendant. If trial by jury has been waived by the defendant and the State, or if the defendant pleaded guilty, the sentencing proceeding must be conducted before the judge. In the sentencing proceeding, the jury or judge shall hear additional evidence in extenuation, mitigation, or aggravation of the punishment. Only such evidence in aggravation as the State has informed the defendant in writing before the trial is admissible. This section must not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the State of South Carolina or the applicable laws of either. The State, the defendant, and his counsel are permitted to present arguments for or against the sentence to be imposed. The defendant and his counsel shall have the closing argument regarding the sentence to be imposed.

(C) The judge shall consider, or he shall include in his instructions to the jury for it to consider, mitigating circumstances otherwise authorized or allowed by law and the following statutory aggravating and mitigating circumstances which may be supported by the evidence:

(a) Statutory aggravating circumstances:

(1) The murder was committed while in the commission of the following crimes or acts:

- (a) criminal sexual conduct in any degree;
- (b) kidnapping;
- (c) burglary in any degree;
- (d) robbery while armed with a deadly weapon;
- (e) larceny with use of a deadly weapon;
- (f) killing by poison;
- (g) drug trafficking as defined in Section 44-53-370(e), 44-53-375(B), 44-53-440, or 44-53-445;
- (h) physical torture;
- (i) dismemberment of a person; or
- (j) arson in the first degree as defined in Section 16-11-110(A).

(2) The murder was committed by a person with a prior conviction for murder.

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

(4) ~~The offender committed the murder for himself or another for the purpose of receiving money or a thing of monetary value.~~

(5) The murder of a judicial officer, former judicial officer, solicitor, former solicitor, or other officer of the court during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The murder of a federal, state, or local law enforcement officer or former federal, state, or local law enforcement officer, peace officer or former peace officer, corrections officer or former corrections officer, including a county or municipal corrections officer or a former county or municipal corrections officer, a county or municipal detention facility employee or former county or municipal detention facility employee, or fireman or former fireman during or because of the performance of his official duties.

(8) The murder of a family member of an official listed in subitems (5) and (7) above with the intent to impede or retaliate against the official. "Family member" means a spouse, parent, brother, sister, child, or person to whom the official stands in the place of a parent or a person living in the official's household and related to him by blood or marriage.

(9) Two or more persons were murdered by the defendant by one act or pursuant to one scheme or course of conduct.

(10) The murder of a child eleven years of age or under.

(11) The murder of a witness or potential witness committed at any time during the criminal process for the purpose of impeding or deterring prosecution of any crime.

(12) The murder was committed by a person deemed a sexually violent predator pursuant to the provisions of Chapter 48, Title 44, or a person deemed a sexually violent predator who is released pursuant to Section 44-48-120.

(b) Mitigating circumstances:

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

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

(3) The victim was a participant in the defendant's conduct or consented to the act.

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

(5) The defendant acted under duress or under the domination of another person.

(6) 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.

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

(8) The defendant was provoked by the victim into committing the murder.

(9) The defendant was below the age of eighteen at the time of the crime.

(10) The defendant had mental retardation at the time of the crime. "Mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.

The statutory instructions as to statutory aggravating and mitigating circumstances must be given in charge and in writing to the jury for its deliberation. The jury, if its verdict is a recommendation of death, shall designate in writing, and signed by all members of the jury, the statutory aggravating circumstance or circumstances which it found beyond a reasonable doubt. The jury, if it does not recommend death, after finding a statutory aggravating circumstance or circumstances beyond a reasonable doubt, shall designate in writing, and signed by all members of the jury, the statutory aggravating circumstance or circumstances it found beyond a reasonable doubt. In nonjury cases the judge shall make the designation of the statutory aggravating circumstance or circumstances. Unless at least one of the statutory aggravating circumstances enumerated in this section is found, the death penalty must not be imposed.

Where a statutory aggravating circumstance is found and a recommendation of death is made, the trial judge shall sentence the defendant to death. The trial judge, before imposing the death penalty, shall find as an affirmative fact that the death penalty was warranted under the evidence of the case and was not a result of prejudice, passion, or any other arbitrary factor. Where a statutory aggravating circumstance is found and a sentence of death is not recommended by the jury, the trial judge shall sentence the defendant to life imprisonment as provided in subsection (A). Before dismissing the jury, the trial judge shall question the jury as to whether or not it found a statutory aggravating circumstance or circumstances beyond a reasonable doubt. If the jury does not unanimously find any statutory aggravating circumstances or circumstances beyond a reasonable doubt, it shall not make a sentencing recommendation. Where a statutory aggravating circumstance is not found, the trial judge shall sentence the defendant to either life imprisonment or a mandatory minimum term of imprisonment for thirty years. No person sentenced to life imprisonment or a

mandatory minimum term of imprisonment for thirty years under this section is eligible for parole or to receive any work credits, good conduct credits, education credits, or any other credits that would reduce the sentence required by this section. If the jury has found a statutory aggravating circumstance or circumstances beyond a reasonable doubt, the jury shall designate this finding, in writing, signed by all the members of the jury. The jury shall not recommend the death penalty if the vote for such penalty is not unanimous as provided. If members of the jury after a reasonable deliberation cannot agree on a recommendation as to whether or not the death sentence should be imposed on a defendant found guilty of murder, the trial judge shall dismiss such jury and shall sentence the defendant to life imprisonment as provided in subsection (A).

(D) Notwithstanding the provisions of Section 14-7-1020, in cases involving capital punishment a person called as a juror must be examined by the attorney for the defense.

(E) In a criminal action 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.

CREDIT(S)

HISTORY: 1962 Code § 16-52; 1952 Code § 16-52; 1942 Code § 1102; 1932 Code § 1102; Cr. C. '22 § 2; Cr. C. '12 § 136; Cr. C. '02 § 109; G. S. 2454; R. S. 109; 1868 (14) 175; 1894 (21) 785; 1974 (58) 2361; 1977 Act No. 177 § 1; 1978 Act No. 555 § 1; 1985 Act No. 104, § 1; 1986 Act No. 462, § 27; 1990 Act No. 604, § 15; 1992 Act No. 488, § 1; 1995 Act No. 83, § 10; 1996 Act No. 317, § 1.

HISTORY: Amended by 2002 Act No. 224, § 1, eff May 1, 2002 (applicable to offenses committed on or after that date); 2002 Act No. 278, § 1, eff May 28, 2002; 2006 Act No. 342, § 2, eff July 1, 2006; 2007 Act No. 101, § 1, eff June 18, 2007.

EDITOR'S NOTE

2006 Act No. 342, § 1, provides as follows:

"This act may be cited as the 'Sex Offender Accountability and Protection of Minors Act of 2006'."

2006 Act No. 342, § 12, provides as follows:

"It is the intent of the General Assembly that one of the purposes of this act is to provide for the death penalty for a subsequent offense of first degree criminal sexual conduct with a minor who is less than eleven years of age and that this act does not alter or amend and is separate and distinct from the provisions of Section 16-3-20, providing for the imposition of the death penalty for murder."

EFFECT OF AMENDMENT

The first **2002** amendment, in item (C)(a)(7), inserted "including county and municipal corrections officers, a county detention facility employee or former county detention facility employee," preceding "or fireman".

The second **2002** amendment, in subsection (A), in the third sentence, inserted "without the possibility of parole, and when requested by the State or the defendant, the judge must charge the jury in his instructions that life imprisonment means until the death of the defendant without the possibility of parole"; and inserted the fourth sentence relating to the judicial charge of parole eligibility.

The **2006** amendment, in subparagraph (C)(a), added item (12) relating to sexually violent predators.

The **2007** amendment added subparagraph (C)(a)(1)(j) relating to arson in the first degree.

CROSS REFERENCES

Requirement that part of sentence be served as prerequisite to parole and deductions in time for earned work credits, see § 24-21-610.

Governor's power to commute sentences, see the South Carolina Constitution, Article IV, § 14.

LIBRARY REFERENCES

Homicide ~~C~~358.

Sentencing Guidelines ~~C~~350H1668, 350H1778.

WESTLAW Topic Nos. 203.

C.J.S. Homicide §§ 366 to 367, 370.

RESEARCH REFERENCES

ALR Library

21 ALR, Federal 2nd Series 1, Validity, Construction, and Application of Aggravating and Mitigating Provisions of Death Penalty Statutes--Supreme Court Cases.

122 ALR 5th 145, Application of Constitutional Rule of Atkins v. Virginia, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002), that Execution of Mentally Retarded Persons Constitutes "Cruel and Unusual Punishment" in Violation of...

79 ALR 5th 33, Victim Impact Evidence in Capital Sentencing Hearings--Post-Payne v. Tennessee.

Encyclopedias

21 Am. Jur. Proof of Facts 2d 645, Expert Testimony at Sentencing.

51 Am. Jur. Proof of Facts 3d 413, Proof of Chemical Dependency and Rehabilitative Efforts as Factor in Sentencing.

S.C. Jur. Appeal and Error § 77, Pleadings.

S.C. Jur. Appeal and Error § 129, Trial Matters.

S.C. Jur. Constitutional Law § 80, Criminal Proceedings.

S.C. Jur. Constitutional Law § 94, Civil Remedies and Proceedings.

S.C. Jur. Homicide § 23, Statutory Requirements.

S.C. Jur. Homicide § 24, Constitutionality.

S.C. Jur. Homicide § 27, Aggravating Circumstances.

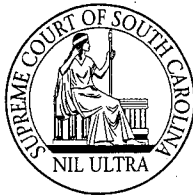
S.C. Jur. Homicide § 28, Mitigating Circumstances.

S.C. Jur. Jury § 17, Disqualifications.

S.C. Jur. Jury § 26, Disqualifications for Cause.

S.C. Jur. Jury § 27, Peremptory Challenges.

S.C. Jur. Poisons § 10, Criminal Liability.



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

March 18, 2009

Robert M. Dudek, Esquire
Deputy Chief Appellate Defender
for Capital Appeals
South Carolina Commission
on Indigent Defense
P O Box 11589
Columbia, SC 29211

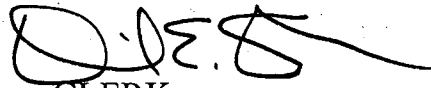
Re: The State v. Mercer, Kevin

Dear Counsel:

Enclosed is the order issued in the above entitled matter.

By copy of this letter and order, we are advising all interested parties of the action by the Court.

Very truly yours,



CLERK

DES/jjp

cc: Melissa Jane Reed Kimbrough, Esquire
Assistant Deputy Attorney General Donald J. Zelenka
Assistant Attorney General S. Creighton Waters
Solicitor Donald V. Myers

The Supreme Court of South Carolina

The State,

Respondent,

v.

Kevin Mercer,

Appellant.

ORDER

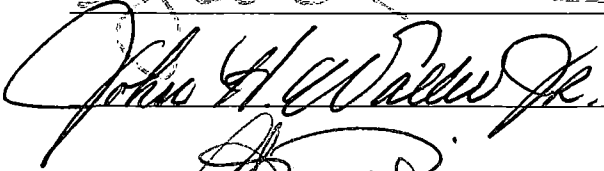
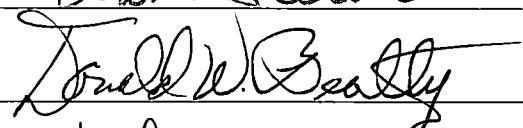
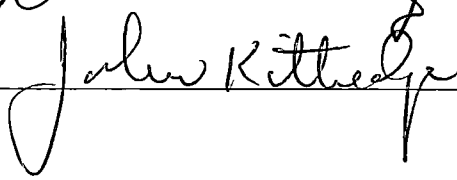
This Court recently affirmed appellant's death sentence in State v. Mercer, ___ S.C. ___, 672 S.E.2d 556 (2009). Appellant's petition for rehearing was denied and the remittitur sent on February 19, 2009. A notice of execution has not been issued.

Appellant now requests a ninety day stay of execution, from the date rehearing was denied, in which to file a petition for a writ of certiorari in the United States Supreme Court. The State has submitted a letter in which it acknowledges one of the issues appellant intends to raise in his petition for a writ of certiorari is preserved for federal review.

Because appellant intends to raise to the United States Supreme Court a federal question that is preserved for review, we grant the petition for a stay of execution pursuant to In re Stays of Execution in Capital Cases, 321

S.C. 544, 471 S.E.2d 140 (1996), and the stay shall remain in effect to the extent provided by this Court therein.

IT IS SO ORDERED.

	C. J.
	J.
	J.
	J.
	J.

Columbia, South Carolina

March 18, 2009



HENRY McMASTER
ATTORNEY GENERAL

March 6, 2009

RECEIVED

MAR - 6 2009

S.C. SUPREME COURT

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

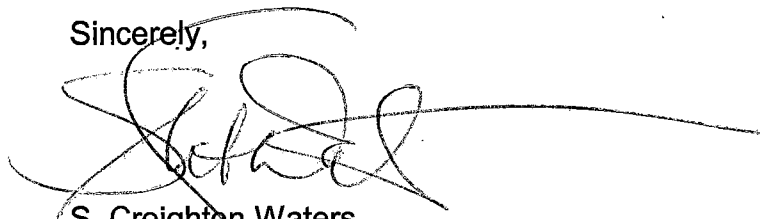
Re: The State v. Kevin Mercer
Appeal from Lexington County

Dear Mr. Shearouse:

Please accept this letter in lieu of a formal return to Appellant's Petition for Stay of Execution in the above-referenced case. Respondents do not object to a stay with regard to the second issue identified by Appellant. However, the State does not believe the first and third grounds for relief are preserved as to any federal constitutional basis, and thus they are not proper subjects for a certiorari petition. As to the first proposed claim for relief, Appellant contends he was denied his due process right to funds for testing of the gloves in the post-trial proceedings. However, as the State asserted in its brief on pages 19-20, any constitutional basis for this request was not preserved below, and indeed, this Court did not rule on any constitutional basis in its opinion. As to the third claim for relief, again, no federal constitutional basis was argued at trial and thus preserved for appeal.

Thank you for your attention to this matter, and of course do not hesitate to contact me with any questions or concerns.

Sincerely,



S. Creighton Waters
Senior Assistant Attorney General

SCW/epj
Enclosures

cc: Robert M. Dudek, Esquire
Melissa J. Kimbrough, Esquire



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332

Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Joseph L. Savitz, III, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

February 24, 2009

RECEIVED

FEB 24 2009

S.C. SUPREME COURT

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

Re: The State v. Kevin Mercer (Capital Case)

Dear Mr. Shearouse:

Enclosed please find an original and six copies of the petition for stay of execution along with a certificate of service.

Sincerely,

Robert M. Dudek
Deputy Chief Attorney for Capital Appeals

RMD/mwl

Enclosure

cc: S. Creighton Waters, Esquire
Melissa J. Kimbrough, Esquire
Kevin Mercer

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Lexington County

John C. Few, Circuit Court Judge

RECEIVED

FEB 24 2009

S.C. SUPREME COURT

THE STATE,

RESPONDENT,

V.

KEVIN MERCER,

APPELLANT

PETITION FOR STAY OF EXECUTION

Counsel for Kevin Mercer petitions this Court for a stay of execution to allow him to file a petition for writ of certiorari with the United States Supreme Court. This Court denied rehearing on February 19, 2009.

I.

This Court affirmed petitioner's murder, armed robbery, and possession of a firearm in the commission of a violent crime convictions and his death sentence in State v. Kevin Mercer, Opinion No. 26582 (filed January 12, 2009).

II.

A petition for rehearing was filed on January 27, 2009. As stated, this Court denied rehearing on February 19, 2009.

III.

A petition for writ of certiorari to the United States Supreme Court is now petitioner's proper avenue for relief from the judgment of this Court affirming his murder conviction, and sentence of death. Supreme Court Rule 13.1. Pursuant to *In re STAYS OF EXECUTION IN CAPITAL CASES*, 321 S.C. 544, 471 S.E.2d 544 (1996), this Court is the proper Court to issue the stay pending the disposition of petitioner's case in the United States Supreme Court.

IV.

Petitioner can raise the following federal issues, preliminarily framed, in the United States Supreme Court:

1.

Whether the Court erred, and denied appellant his due process rights under Ake v. Oklahoma, 470 U.S. 68 (1985), by holding the trial court did not abuse its discretion when it denied him funding to test the gloves found on co-defendant Thompson minutes after the murder for gunshot residue, since this was critical corroborating evidence of appellant's defense that Thompson was the shooter?

2.

Whether the Court erred by ruling the trial court did not commit reversible error by

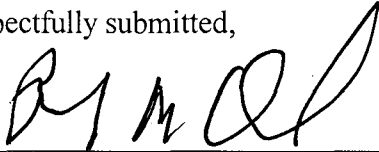
disqualifying Juror Kyzer since Kyzer stated he could impose the death penalty, and sign the death verdict form since he was a death qualified juror under Wainwright v. Witt, 469 U.S. 412 (1985) and Uttecht v. Brown, 511 U.S. 1 (2007)?

3.

Whether the Court erred by ruling the trial court did not commit reversible error under Holmes v. South Carolina, 547 U.S. 319 (2006) when it excluded testimony co-defendant Thompson was not charged with murder, that he was only charged with being an accessory after the fact and that he was released on bond since this evidence was relevant to appellant's defense that the state failed to investigate Thompson as being the killer, and the trial court erroneously excluded this evidence as inadmissible evidence of "third-party guilt"?

WHEREFORE, counsel for Kevin Mercer requests a ninety day stay of execution from February 19, 2009, in which to file a petition for writ of certiorari in the United States Supreme Court.

Respectfully submitted,

By: 

Robert M. Dudek

Deputy Chief Attorney for Capital Appeals

Melissa Jane Reed Kimbrough
Attorney at Law – Pro bono

ATTORNEYS FOR APPELLANT.

February 24, 2009

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Lexington County
John C. Few, Circuit Court Judge

THE STATE,

RESPONDENT,

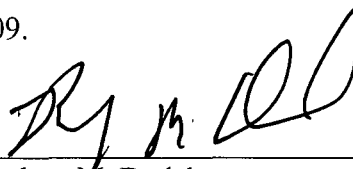
V.

KEVIN MERCER,

APPELLANT

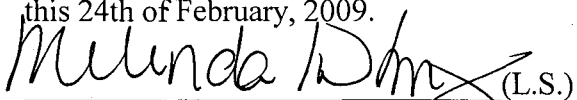
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Stay of Execution in the above referenced case has been served upon opposing counsel, S. Creighton Waters, Esquire, this 24th day of February, 2009.



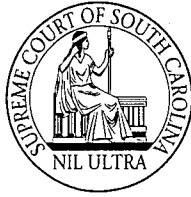
Robert M. Dudek
Deputy Chief Attorney for Capital Appeals

SUBSCRIBED AND SWORN TO before me
this 24th of February, 2009.



(L.S.)

Notary Public for South Carolina
My Commission Expires: October 30, 2018.



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

February 19, 2009

REMITTITUR

The Honorable Beth Carrigg
Clerk of Court, Lexington County
205 East Main Street, Suite 146
Lexington, SC 29072-3599

Re: The State v. Mercer, Kevin
2003-GS-32-00409

Dear Ms. Carrigg:

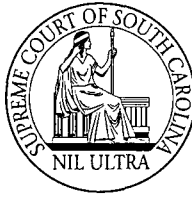
The above referenced matter is hereby remitted to the lower court. A copy of the judgment of this Court is attached.

Very truly yours,

CLERK

DES/dmh

cc: Deputy Chief Appellate Defender for Capital Appeals
Robert M. Dudek
Melissa Jane Reed Kimbrough, Esquire
Assistant Deputy Attorney General Donald J. Zelenka
Assistant Attorney General S. Creighton Waters
The Honorable Donald V. Myers



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

February 19, 2009

Deputy Chief Appellate Defender for Capital Appeals
Robert M. Dudek
South Carolina Commission on Indigent Defense
P O Box 11589
Columbia, SC 29211

Melissa Jane Reed Kimbrough, Esquire
Kimbrough & Taggart
1338 Pickens St.
Columbia, SC 29201-2630

Re: The State v. Mercer, Kevin

Dear Counsel:

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

“Petition for Rehearing is denied.

s/ Jean H. Toal C.J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

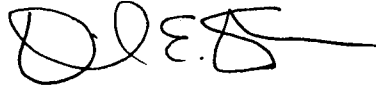
s/ John W. Kittredge J.

February 19, 2009.”

Deputy Chief Appellate Defender for Capital Appeals
Robert M. Dudek
Melissa Jane Reed Kimbrough, Esquire
Page Two
February 19, 2009

The remittitur is today being forwarded to the lower court.

Very truly yours,


CLERK

DES/dmh

cc: Assistant Deputy Attorney General Donald J. Zelenka
Assistant Attorney General S. Creighton Waters
The Honorable Donald V. Myers

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

THE STATE,

RESPONDENT,

V.

RECEIVED

KEVIN MERCER,

JAN 27 2009

APPELLANT S.C. SUPREME COURT

Appeal from Lexington County

John C. Few, Circuit Court Judge

Opinion No. 26582

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, counsel for Kevin Mercer petitions this Court to rehear this case because this Court may have overlooked the fact that Dr. Schwartz-Watts testified that appellant was not *without fault* for his poor judgment and inability to conform his conduct to the standards expected by society. She testified appellant's severe drug and alcohol abuse affected "his brain." A radiologist would only note a "questionable abnormality" R. 2154, l. 3 – 2157, l. 2.

That was much different from than Dr. Steadman's proffered testimony that appellant suffered from a brain impairment -- it was *not his fault* -- and it caused his "poor judgment, depression, thought disorders" and paranoia. "They come from the brain." The abnormality caused

appellant's problems with "conforming one's behavior to living in society." R. 2301, l. 14 – 2302, l. 22,

While this Court found the state's objection to this testimony was "'specious," it nonetheless held the error was harmless because it was cumulative to Dr. Schwartz-Watts' testimony. State v. Kevin Mercer, Op. No. 26582 (filed January 12, 2009) at p. 13. Appellant respectfully submits that this Court should reconsider that holding, and grant rehearing.

Further, defense counsel's plea to the trial judge that Dr. Steedman's testimony "mirrors [and] dove-tails with Dr. Schwartz-Watts" must respectfully be understood in the context of the trial court's incorrect reasoning that *if Dr. Steadman's testimony was different than Dr. Watt's* then it was unduly prejudicial to the state "in having learned late that he is a psychiatrist," and it would not be admitted. R. 2302, l. 21 – 2304, l. 3. Within this context trial counsel urged that Dr. Steadman's testimony was not so different from Dr. Watt's testimony that the state would be prejudiced by the alleged "discovery order violation" in revealing the scope of Dr. Steadman's testimony.

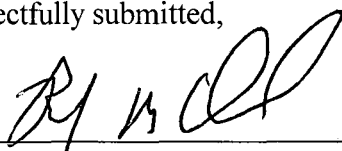
This Court's opinion, as it now stands, finds the trial court erred by not allowing the jury to hear Dr. Steadman's strong opinion about appellant's brain abnormality -- an abnormality which appellant could not help having -- but finds that error harmless because Dr. Steadman's testimony is said to be cumulative to Dr. Watt's testimony that appellant may have a brain abnormality, but that problem with his brain was in large part appellant's *own fault because he badly abused drugs and drank excessively*. That makes a major difference to a juror. It is a distinction with a huge difference. In everyday terms it was like the difference between voluntary and involuntary intoxication. If you did it to yourself, it is your own fault. If it (the

brain abnormality) is an act of God, you are excused to the extent that you will serve the rest of your life in prison as opposed to being executed.

Dr. Steadman would have been an impressive and convincing defense witness had the trial court not erroneously limited his testimony. Dr. Steadman received a doctorate in biology from University of London. He graduated from the Medical University of South Carolina in 1992. He underwent residency training in both neurology and psychiatry specialties over a six-year period. He was board certified in neurology and board certified in psychiatry. R. 2263, l. 18 – 2264, l. 14. Dr. Steadman was qualified as an expert in neurology without objection. R. 2265, ll. 14 – 24.

Dr. Steadman's testimony was not -- most respectfully -- "merely cumulative" to Dr. Watt's testimony. It was much different. Cf. State v. McFarlane, 279 S.C. 327, 306 S.E.2d 611 (1983). Appellant respectfully requests rehearing because excluding this relevant strongly mitigating evidence violated appellant's Due process and Eighth Amendment right to present a complete defense against his proposed execution. See Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869 (1982); Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821 (1987); Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954 (1978).

Respectfully submitted,

By: 

Robert M. Dudek
Deputy Chief Attorney for Capital Appeals

Melissa Jane Reed Kimbrough
Attorney at Law – Pro bono

ATTORNEYS FOR APPELLANT.

This 27th day of January, 2009.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Lexington County
John C. Few, Circuit Court Judge

RECEIVED

JAN 27 2009

S.C. SUPREME COURT

THE STATE,

RESPONDENT,

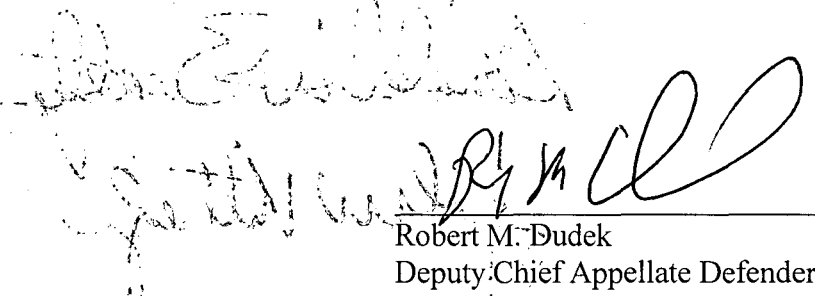
V.

KEVIN MERCER,

APPELLANT

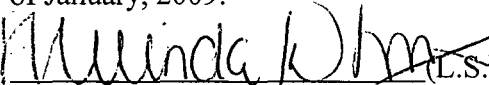
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon S. Creighton Waters, Esquire, this 27th day of January, 2009.


Robert M. Dudek
Deputy Chief Appellate Defender for Capital Appeals

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 27th day
of January, 2009.


(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2018.

Petition for rehearing is denied.

Robert CJ

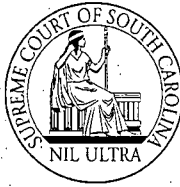
John H. Walker Jr. J.

Wm. Deane J.

Donald B. Seale J.

John H. Walker Jr. J.

February 19, 2009



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499

January 23, 2009

Mr. Robert Bezouska
Editorial Library
Commerce Clearing House
2700 Lake Cook Road
Riverwood, Illinois 60015

Ms. Marcia Fitzgerald
West Publishing
Editorial Department
619 Opperman Drive, Building D
Eagan, Minnesota 55123-1396

Lexis Nexis
Library Services
8891 Gander Creek Drive
Miamisburg, Ohio 45342

Ms. Chrissie Adams
Lawriter LLC
119 West Central Parkway
Cincinnati, Ohio 45202

RE: The State v. Kevin Mercer., Opinion No. 26582 (Filed January 12, 2009,
Advance Sheet #2)

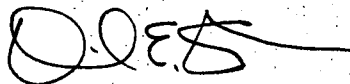
Dear Sir or Madam:

This is to advise you that a correction has been made in the above opinion. Enclosed is a copy of the page with the correction.

In footnote 7, the citation to Counsel v. State has been changed to read "See Council v. State, __ S.C. __, __ S.E.2d __ (2008), Op. No. 26543 (S.C. Sup. Ct. re-filed Dec 29, 2008) (Shearouse Adv. Sh. No. 48 at 12) ..."

I ask that it be changed in any electronic versions of this opinion. If you have any questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "D. Q. E. S." with a long horizontal flourish extending to the right.

CLERK

DES/klb

Enclosure

cc: Thom Neal, Esquire
Robert M. Dudek, Esq.
Melissa Jane Reed Kimbrough, Esq.
Assistant Attorney General S. Creighton Waters
Donald V. Myers, Esq.

by a radiologist who noted a “questionable abnormality.” Dr. Steedman was prepared to render a stronger finding of an abnormality. The State objected strenuously against such testimony, claiming surprise and prejudice. After an offer of proof and lengthy discussion, the trial court sustained the objection on the basis of Rule 403, SCRE, and a so-called “discovery order” violation. This ruling rises to the level of an abuse of discretion.

Application of Rule 403 should be cautiously invoked against a capital defendant in the penalty phase, especially in light of the due process implications at stake when a capital defendant seeks to introduce mitigation evidence.⁷ The probative value of Dr. Steedman’s excluded testimony was, as a matter of law, not substantially outweighed by its potential for prejudice, as a result of the purported late disclosure or otherwise. Reliance on the so-called “discovery order” cannot withstand even minimal scrutiny, for there was no formal

there are asymmetries and regional differences in blood flow . . . to parts of the brain which indicates . . . how hard those parts of the brain are working.” An abnormal SPECT Scan means there is either increased or decreased blood flow to a certain area in the brain. A decreased flow of blood to a particular region of the brain may be referred to as an abnormality and may be associated with general cognitive deficiencies and learning disorders.

⁷ This Court reminds the bench and bar of the importance of a meaningful mitigation defense and, concomitantly, the ability of a capital defendant to fully present mitigation evidence. *See Council v. State*, __ S.C. __, __ S.E.2d __ (2008), Op. No. 26543 (S.C. Sup. Ct. re-filed Dec. 29, 2008) (Shearouse Adv. Sh. No. 48 at 12) (relying in large part upon *Wiggins v. Smith*, 539 U.S. 510 (2003), this Court determined that counsel’s failure to adequately investigate and present mitigating evidence resulted in the ineffective assistance of counsel requiring a new sentencing hearing). The trial courts, vested with considerable discretion in evidentiary matters, must not neglect the due process implications involved in a capital defendant’s right to present mitigation evidence.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State,

Respondent,

v.

Kevin Mercer,

Appellant.

Appeal From Lexington County
John C. Few, Circuit Court Judge

Opinion No. 26582

Heard October 7, 2008 – Filed January 12, 2009

AFFIRMED

Deputy Chief Appellate Defender for Capital Appeals Robert M. Dudek, of South Carolina Commission on Indigent Defense, and Melissa Jane Reed Kimbrough, of Kimbrough & Taggart, both of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General S. Creighton Waters, all of Columbia; Solicitor Donald V. Myers, of Lexington, for Respondent.

JUSTICE KITTREDGE: This is a mandatory appeal from a sentence of death. On March 16, 2002, Army recruiter Sergeant First Class Tracy Davis was gunned down outside his apartment in Lexington County, South Carolina. Kevin Mercer (Mercer) was convicted of murder, armed robbery, and possession of a firearm in the commission of a violent crime, and sentenced to death. In his appeal, Mercer challenges: (1) the disqualification of a juror; (2) the exclusion of evidence, both in the guilt and sentencing phases; (3) the denial of his post-trial motion for additional funds to test gloves for gunshot residue; and (4) the denial of his post-trial motion for a new trial based on after-discovered evidence. We affirm.

I.

Prior to his death, Sergeant First Class Tracy Davis (Davis) lived near Columbia, South Carolina, where he served as an active-duty member of the United States Army. He was attached to Fort Jackson where he trained Army recruiters.

On the evening of March 16, 2002, Davis arrived home at approximately 11:30 P.M. to the Raintree Apartments. As was his custom, he backed his vehicle, a white Lincoln Navigator, into a parking spot outside his apartment. According to a witness, after exiting his truck, Davis encountered a man and words were apparently exchanged.

The witness to the encounter was Davis's roommate, Sergeant First Class Clifton Magwood (Magwood). Magwood witnessed the confrontation from an apartment window. Magwood's room is on the second floor of the apartment, and his window looks out over the parking lot. Magwood testified that he heard a disturbance, got out of bed, looked through his blinds and observed Davis with a heavysset man, apparently armed with a handgun, demanding the keys to Davis's vehicle. Magwood saw the robber forcing Davis toward the rear of the vehicle and heard Davis tell the armed man, "All right. I'll give it to you."

Magwood left his vantage point to call 911 and summon help. The 911 call was logged at 11:32 P.M. Shortly thereafter, while running downstairs to help his roommate, Magwood heard a gunshot; he hurried outside to find Davis lying in the bushes near the parking lot. Magwood saw Davis's Navigator leaving the apartment complex. Davis died as a result of a gunshot to the back of the head.

Magwood only saw one individual confront Davis with a gun. Although Magwood only saw the individual from the back, he provided an immediate and detailed description of the assailant to law enforcement. The suspect was described as "a black male"; "broad shoulders"; "heavy build, muscular"; anywhere from 5'11" to 6'2" and weighing "215 to 225." Magwood further described the suspect's clothing as "a dark outfit, could be jean or denim or some type of dark outfit with a dark hat."

Magwood's detailed description of the killer, along with a description of the Navigator, was dispatched to all officers in the vicinity, by way of a "be on the lookout," commonly referred to as a BOLO. Deputy Dennis Stazer of the Lexington County Sheriff's Office responded to the BOLO broadcast by positioning his patrol car (at 11:42 P.M.) at what he believed could be an intercept position on a nearby interstate, I-20. Within minutes, a white Navigator drove past Deputy Stazer's location. Deputy Stazer pulled in behind the suspect vehicle and initiated a traffic stop at 11:50 P.M.

There were two black males in the Navigator, Mercer in the driver's seat and Marcus Thompson in the front passenger's seat. Deputy Stazer utilized his patrol car's "light bar . . . to light up the interior of the [Navigator]." Deputy Stazer approached the driver's side and asked the driver (Mercer) for his license and registration. Mercer produced his license, but could not find the vehicle registration. Mercer eventually located a receipt from a car dealership and handed it to Deputy Stazer. The receipt confirmed that the Navigator belonged to the murder victim, Davis. Mercer and Thompson were taken into custody.

Inside the Navigator, a .357 caliber handgun was retrieved from under the driver's seat.¹ Testing matched the handgun to the bullet removed from Davis during the autopsy. Gunshot residue (GSR) testing done on Mercer's hands revealed materials considered to be consistent with GSR, although the test results were not conclusive. Testing done on Thompson's hands resulted in a negative test for GSR. Four gloves (two pairs) were found in Thompson's possession but were not tested for GSR. As Thompson was removed from the vehicle, a plastic bag containing fourteen .357 bullets "fell out of his pants legs."

Mercer matched the detailed description of the assailant furnished by Magwood. Mercer is 5 feet 10 inches tall and weighs 220 pounds.² The officers on the scene of the arrest confirmed that Mercer is a broad-shouldered, muscular individual, consistent with Magwood's description. Mercer was arrested wearing a "dark[,] . . . like a denim . . . jean jacket outfit"; he was also wearing "a black . . . baseball style cap."

Conversely, Thompson is "very slender" and "narrow-shouldered" and weighs about 150 pounds. At the time of his arrest, Thompson was wearing "a black tee shirt that was over a white tee shirt," with the white tee shirt conspicuously sticking out from the black tee shirt. Thompson was not wearing a hat.

¹ Deputy Stazer did not testify to seeing a handgun when he first approached the driver's window. Moreover, Deputy Stazer, who "had to keep [his] eyes on both of them," saw no movement from either Mercer or Thompson. Deputy Stazer testified that had there been any movement in the vehicle he considered as a threat, he would have responded with deadly force. This testimony concerning the lack of movement, especially by Thompson, acquires relevance when read in context with Mercer's post-trial motion for a new trial based on after-discovered evidence.

² This height and weight is taken from Mercer's driver's license which he produced to Deputy Stazer. There is nothing in the record that contradicts this description.

Mercer and Thompson were charged with murder, armed robbery, possession of a firearm during the commission of a violent crime, and criminal conspiracy. Based on the State's view of the evidence, Thompson pled guilty to accessory before the fact of armed robbery, and accessory after the fact of murder, and armed robbery; he was sentenced to 28 years in prison. Mercer's charges proceeded to trial with the State seeking the death penalty. Mercer pursued a third-party guilt defense, pointing to Thompson as the shooter. The jury convicted Mercer, with the jury ultimately recommending a sentence of death, from which Mercer appeals.

II.

Mercer raises six issues on appeal, which we place in four categories:

- (1) Whether the trial court abused its discretion in finding a juror not death penalty qualified under *Wainwright v. Witt*.
- (2) Whether the trial court abused its discretion during the guilt phase by excluding the testimony of Thompson's attorney "that Thompson was charged as only an accessory after the fact and that he was released on bond."
- (3) Whether the trial court abused its discretion during the penalty phase by (a) precluding Dr. John Steedman from opining that a "SPECT Scan" of Mercer's brain revealed an "abnormality"; and (b) precluding Dr. Steedman from offering expert psychiatric opinion testimony.
- (4) Whether the trial court abused its discretion in denying Mercer's post-trial motions, one seeking additional funds to test Thompson's gloves for gunshot residue; and a second motion for a new trial based on after-discovered evidence that Thompson confessed to a cellmate that he committed the murder.

III.

Juror John Doe³ and *Wainwright v. Witt*

Mercer claims the disqualification of Juror John Doe violated his Sixth and Fourteenth Amendment rights. We disagree. In *Wainwright v. Witt*, 469 U.S. 412 (1985), the Supreme Court stated that the critical issue regarding the disqualification of a capital juror 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.’” *Id.* at 424 (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980)). The *Wainwright* Court observed that a juror’s bias need not be “proved with ‘unmistakable clarity’ . . . [because] bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism.” *Id.* at 424. Finally, the *Wainwright* Court noted that “there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law . . . [and that] is why deference must be paid to the trial judge who sees and hears the juror.” *Id.* at 425-26. It is with this standard in mind that we address whether the trial court abused its discretion in disqualifying Juror John Doe.

We have carefully reviewed the lengthy colloquy involving Juror Doe. While it is possible to cherry-pick certain responses and perhaps conclude that Juror Doe is qualified, a review of the totality of the responses reveals a potential juror vacillating and struggling with his strong convictions against the death penalty. Juror Doe, without hesitation, expressed an ability to impose a life sentence. Conversely, when the trial court asked if the juror could vote for a sentence of death, Juror Doe responded, “I’m not sure, sir.”

The State followed the court’s questioning by pursuing the same line of inquiry, to which Juror Doe responded that “it’s just hard to judge, you know, someone else . . . for something that they’ve done.”

³ We use the pseudonym John Doe.

Following up, the State zeroed in on Juror Doe's reservations, asking whether Juror Doe could sign his name to a death penalty verdict, to which Doe responded, "I don't think so, sir."

Defense counsel attempted to rehabilitate Juror Doe, but without much success. Doe stated he would "try" to consider both options. The trial court permitted both sides to vet Juror Doe thoroughly. Doe answered, "probably so," when asked if his feelings would interfere with serving on the jury. And when Doe was asked, "if you were convinced that a death sentence was appropriate that you could sign that form along with the other jurors," he answered, "[t]hat goes back to like having to put my name on the line you said when -- for a death sentence. I'd still have to think about that."

The trial court concluded that Juror John Doe was not qualified under *Wainwright*:

I think the juror is not qualified. . . . There's several things that I think need to be mentioned, and the first is the juror's demeanor. . . . I believe that . . . this juror's views on capital punishment would substantially impair his ability to perform his duties as a juror in accordance with the instructions that I would give him.

. . . A lot of times I think we see jurors who hesitate . . . [and] I feel as though I can get a sense as to whether the juror is hesitating because they are trying to think deeply and be completely open and honest with us or are they hesitating because they are troubled by the . . . issue that they're about to discuss.

I did not get the impression, as I do sometimes, that this juror hesitated because he was trying to be clear about his feelings. I got the impression that he hesitated because he was troubled by . . . what he thought would be the question of whether or not he would be able to impose the death penalty. . . . And in the end I am left . . . with the impression that . . . this juror's views on the death penalty would substantially impair his performance of his duty to . .

. follow the instructions that I would give him. And so I find that he is disqualified.

We find the trial court acted well within its broad discretion in finding Juror Doe's views would substantially impair his ability to follow his oath and the court's instructions on the law. *See Uttecht v. Brown*, 551 U.S. 1, 9 (2007) ("Deference to the trial court is appropriate [which necessarily involves granting the trial court broad discretion] because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors."); *State v. Wood*, 362 S.C. 135, 141, 607 S.E.2d 57, 60 (2004) (adhering to the rule that a "trial court's disqualification of a prospective juror will not be disturbed where there is a reasonable basis . . . [to] conclude[] that the juror would not have been able to faithfully discharge his responsibilities as a juror"); *State v. Council*, 335 S.C. 1, 10, 515 S.E.2d 508, 512 (1999) (following the rule that unless unsupported by the evidence, "determination of whether a juror is qualified to serve on a death penalty case is within the sole discretion of the trial judge"). Even the cold record before us reflects Juror Doe's hesitancy and profound unease with the prospect of performing his duties as a juror in accordance with his oath and the court's instructions. *State v. George*, 323 S.C. 496, 503, 476 S.E.2d 903, 908 (1996) (finding that the trial court acted correctly by disqualifying a juror that "declared that she did not think she could sign a form recommending the death penalty"); *State v. Longworth*, 313 S.C. 360, 366, 438 S.E.2d 219, 222 (1993) (disqualifying a juror who initially stated "he 'probably could' consider" the death penalty but later stated he did not "think so"). We affirm the disqualification of Juror John Doe.

IV.

Exclusion of Marcus Thompson's Lawyer's Testimony

During the guilt phase, Mercer sought to introduce testimony from Thompson's lawyer regarding the reduced charges against

Thompson.⁴ Specifically, Mercer wanted to introduce testimony that he and Thompson were initially charged with the same offenses, but later Thompson's charges were reduced and he was released on bond. Mercer claimed the information was relevant as part of his defense of third-party guilt. The State objected to this testimony, asserting that it was not relevant to third-party guilt or otherwise. The trial court sustained the objection. Finding the proffered testimony of Thompson's attorney concerning Thompson's reduced charges and bail status not relevant to any issue before the jury, including third-party guilt, we affirm pursuant to Rule 220(b)(1), SCACR.⁵

V.

Exclusion of Expert Mitigation Evidence

Mercer retained numerous well-credentialed experts for the penalty phase, including a neurologist, a forensic psychiatrist, a pharmacologist, a sociologist licensed as a clinical social worker, and a corrections expert. During the penalty phase, the defense presented a comprehensive review of Mercer's troubled life.

The mitigation evidence revealed much about Mercer. A sampling of the evidence reveals that Mercer has a "damaging disability in terms of . . . making judgment[s] and inferences" and that he suffers from "untreated depression." The experts opined that Mercer's abusive upbringing resulted in post-traumatic stress disorder and anxiety disorder, which "are connected with previous trauma,

⁴ Neither the State nor Mercer called Thompson as a witness.

⁵ Although this evidence was not admissible, we do recognize that defense counsel, in her opening remarks to the jury, referred to Thompson's reduced charges and bond status. According to counsel's opening statement, "We don't know where [Thompson] is. Last time I heard he was out on bond. Last time I heard he wasn't even charged with murder or armed robbery. That wasn't how it started out. He was charged with all the same things that Kevin Mercer was."

nightmares[,] . . . distressive recollections” and substance abuse. Beyond Mercer’s life experiences, he suffered from a myriad of cognitive deficiencies, including neurological dysfunction and learning disabilities. Because Mercer struggled from an early age to function in life and hold regular employment, he was found to be disabled by the Social Security Administration.

Against this backdrop of a thorough mitigation presentation, we are presented with two challenges to the trial court’s exclusion of expert testimony in the penalty phase. “A ruling on the admissibility of evidence is within the sound discretion of the trial court and will not be reversed absent an abuse of discretion. An abuse of discretion occurs when the trial court’s ruling is based on an error of law.” *State v. Washington*, 379 S.C. 120, 123-24, 665 S.E.2d 602, 604 (2008) (internal citations omitted).

We first address the claim that the trial court abused its discretion in preventing Dr. John Steedman from opining that a “SPECT Scan” of Mercer’s brain revealed an “abnormality.” While we agree that it was clear error to exclude this testimony, we do not find that Mercer was prejudiced by the error. Next is the assignment of error in connection with the trial court precluding Dr. Steedman from offering psychiatric opinion testimony. Again, we find no reversible error.

A. “SPECT Scan”

Dr. Steedman is a medical doctor who is board certified in neurology and psychiatry. Dr. Steedman analyzed a “SPECT Scan” conducted on Mercer’s brain.⁶ The SPECT Scan was initially reviewed

⁶ SPECT is an acronym for single-photon emission computerized tomography. Richard E. Redding, *The Brain-Disordered Defendant: Neuroscience and Legal Insanity in the Twenty-First Century*, 56 AM. U. L. REV. 51, 121 (2006). According to Dr. Steedman, “a SPECT Scan is a . . . nuclear medicine study. It is . . . a way of looking at the function of somebody’s brain in terms of how much blood flow is running through the cortex. It’s mainly useful in detecting whether

by a radiologist who noted a “questionable abnormality.” Dr. Steedman was prepared to render a stronger finding of an abnormality. The State objected strenuously against such testimony, claiming surprise and prejudice. After an offer of proof and lengthy discussion, the trial court sustained the objection on the basis of Rule 403, SCRE, and a so-called “discovery order” violation. This ruling rises to the level of an abuse of discretion.

Application of Rule 403 should be cautiously invoked against a capital defendant in the penalty phase, especially in light of the due process implications at stake when a capital defendant seeks to introduce mitigation evidence.⁷ The probative value of Dr. Steedman’s excluded testimony was, as a matter of law, not substantially outweighed by its potential for prejudice, as a result of the purported late disclosure or otherwise. Reliance on the so-called “discovery order” cannot withstand even minimal scrutiny, for there was no formal

there are asymmetries and regional differences in blood flow . . . to parts of the brain which indicates . . . how hard those parts of the brain are working.” An abnormal SPECT Scan means there is either increased or decreased blood flow to a certain area in the brain. A decreased flow of blood to a particular region of the brain may be referred to as an abnormality and may be associated with general cognitive deficiencies and learning disorders.

⁷ This Court reminds the bench and bar of the importance of a meaningful mitigation defense and, concomitantly, the ability of a capital defendant to fully present mitigation evidence. *See Council v. State*, __ S.C. __, __ S.E.2d __ (2008), Op. No. 26543 (S.C. Sup. Ct. re-filed Dec. 29, 2008) (Shearouse Adv. Sh. No. 48 at 12) (relying in large part upon *Wiggins v. Smith*, 539 U.S. 510 (2003), this Court determined that counsel’s failure to adequately investigate and present mitigating evidence resulted in the ineffective assistance of counsel requiring a new sentencing hearing). The trial courts, vested with considerable discretion in evidentiary matters, must not neglect the due process implications involved in a capital defendant’s right to present mitigation evidence.

discovery order.⁸ In any event, Dr. Steedman was disclosed to the State, as was the general substance of his testimony.

We nevertheless find no reversible error. When the entirety of the record is considered, the exclusion of Dr. Steedman's proffered testimony of an abnormality juxtaposed to the radiologist's notation of a "questionable abnormality" resulted in no prejudice to Mercer. Despite the erroneous ruling, a review of the record demonstrates that Dr. Steedman testified at length concerning Mercer's cognitive deficiencies. Dr. Steedman's unchallenged testimony included reference to the SPECT Scan results as "confirmatory" of Mercer's learning disorder. More to the point, the same evidence the State successfully and erroneously challenged—the SPECT Scan abnormality—was already in evidence without objection.

Another defense expert previously testified that the SPECT Scan revealed an abnormality. Dr. Donna Schwartz-Watts, a defense psychiatrist, testified that she "ordered what's called a SPECT Scan. And what a SPECT Scan is, this is one of the newer tests in medicine and it shows brain function. . . . But what it does, it's a . . . picture of how your brain functions, and that test came back abnormal. There's a . . . small area that's not normal on there. . . ." Later, as Dr. Schwartz-Watts began to sum up her testimony, she again talked about the SPECT Scan. Referring to Mercer, she said that "it's already a bad

⁸ In this case, the State repeatedly asked the trial court to order Mercer to disclose his experts and to require a written report from his experts. The trial court refused to order defense experts to produce written reports. *State v. Northcutt*, 372 S.C. 207, 216-17, 641 S.E.2d 873, 878 (2007) (holding that Rule 5, SCRCrimP, provides no basis for a trial court to require the creation of written defense expert reports for disclosure to the State). The trial court ultimately relented to the State's discovery requests by ordering the parties to meet and attempt to resolve the impasse. This was done, and because defense counsel failed to hit the bull's eye concerning Dr. Steedman's precise opinion regarding the SPECT Scan study, the State cried foul. The State's claim of unfair surprise is meritless.

brain in the sense that he's got a learning disability and . . . we even know that on a SPECT Scan there's an abnormality." Thus, the very "SPECT Scan abnormality" testimony Mercer sought to admit through Dr. Steedman was presented to the jury without objection through Dr. Schwartz-Watts. We therefore find the trial court's error in excluding Dr. Steedman's opinion testimony was harmless beyond a reasonable doubt. *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (quoting *State v. Key*, 256 S.C. 90, 93, 180 S.E.2d 888, 890 (1971)) (noting that an error is harmless when it "could not reasonably have affected the result of the trial").

B. Exclusion of Dr. Steedman's psychiatric opinion

As noted, Dr. Steedman is board certified in both neurology and psychiatry. When Mercer sought to elicit brief testimony from Dr. Steedman as a psychiatrist, the State objected, claiming Dr. Steedman was only disclosed as an expert in neurology. The basis of the State's objection arose from the nonexistent discovery order, discussed above. The trial court entertained the objection, and Mercer proceeded to make an offer of proof. The offer of proof of Dr. Steedman's psychiatric opinion comprises a mere half page in this voluminous record. The thrust of Dr. Steedman's psychiatric opinion was that the "types of [Mercer's] abnormalities . . . are a cumulative effect on poor judgment, depression, anxiety, thought disorders, [and] paranoia." The State's objection was sustained, and Dr. Steedman was prevented from rendering a psychiatric opinion.

Although the basis of the State's objection was specious, no reversible error is present. The excluded evidence was presented to the jury through other witnesses, especially Dr. Schwartz-Watts, without objection. Even defense counsel acknowledged that the proffered psychiatric opinion testimony of Dr. Steedman "certainly . . . mirrors [and] dove-tail[s]" with Dr. Schwartz-Watts. As a result, Mercer sustained no prejudice from the exclusion of this cumulative evidence. *State v. Graham*, 314 S.C. 383, 386, 444 S.E.2d 525, 527 (1994) (noting that a harmless error analysis depends upon a host of factors, one of which is whether the excluded evidence was cumulative).

VI.

Denial of Mercer's Post-trial Motions

We finally address Mercer's two post-trial motions. These motions cannot be properly understood and evaluated in a vacuum, for they naturally flow from Mercer's efforts to create a reasonable doubt in the State's case by pointing to Marcus Thompson as the shooter.

The centerpiece of Mercer's guilt phase defense was third-party guilt—Thompson as the triggerman. As defense counsel asserted in the opening statement to the jury:

One of the key factors in this case was omitted [from the solicitor's opening remarks], and that is riding in the Lincoln Navigator was a second person. Ladies and Gentlemen that second person is not here today. We don't know where he is. Last time I heard he was out on bond. Last time I heard he wasn't even charged with murder or armed robbery. That wasn't how it started out. He was charged with all the same things that Kevin Mercer was.

.... Suffice it to say Marcus Thompson was in the Navigator and he's not here today, and we believe that Marcus Thompson, in fact, was the shooter. That's our theory. It's pretty simple.

This theme was pursued throughout the trial, as the defense sought to create a reasonable doubt that Mercer was the triggerman. This approach was directly linked to what Mercer characterized as a "tunnel vision" approach to the investigation. One example comes from the gloves taken from Thompson that were not tested for gunshot residue (GSR). Counsel for Mercer argued forcefully that the State's decision not to test the gloves for GSR demonstrated the State's myopic view to focus on Mercer at the expense of a thorough and

proper investigation. The following excerpts from the closing argument illustrate this defense strategy:

[The State does not] want to talk about Marcus Thompson. . . . You know, we had to dig and bring out the things about Marcus Thompson. They didn't want to show you any evidence about him. They wanted to ignore anything about him that would give you the full picture of what happened on May 16, 2002. . . . We had to pull it out of them.

. . . .
. . . But do we know that it wasn't Marcus Thompson with gloves on that pulled that trigger in that dimly-lit parking lot?

. . . .
They didn't show you the gloves because it points directly to Marcus Thompson being the shooter.

. . . .
. . . And we'd know . . . if they had sent those gloves to the [State Law Enforcement Division] lab. We'd know if they were full of barium, antimony, and lead. We'd know that.

. . . .
. . . Maybe Marcus Thompson with his gloves on shot Sergeant Davis and then went and got Kevin [Mercer]. It's up to the State to prove it, and they haven't done it.

. . . .
They chose to declare Kevin Mercer the shooter and ignore the other evidence, ignore the other possibilities, ignore Marcus Thompson and his gloves.

A. Denial of funding post-trial to test Thompson's gloves

Mercer's post-trial motion for funds to test Thompson's gloves for GSR was denied. The matter of authorizing funds to capital defendants lies within the sound discretion of the trial court. S.C. Code

Ann. § 16-3-26(C)(1) (2003) (authorizing the trial court to award funds where court determines requested funds are “reasonably necessary”); *see also State v. Matthews*, 291 S.C. 339, 345, 353 S.E.2d 444, 448 (1986) (holding that the decision to award funds to capital defendants is a matter within the trial court’s discretion). Before trial, the trial court authorized \$53,000 for Mercer’s defense. The trial judge went further and invited defense counsel to request additional funds “if what I have authorized in this order is not going to get you all the way to trial.” The record discloses no additional funding request prior to this post-trial motion.

Of particular significance to a proper resolution of this post-trial funding request is the fact that Mercer retained a GSR expert for trial. The expert, Jeffrey Hollifield, is a chemist, formerly employed with the South Carolina State Law Enforcement Division. Hollifield was assigned the limited task of analyzing the inconclusive results of the GSR test conducted on Mercer. For apparent strategic reasons, Hollifield was not tasked with testing the gloves found in Thompson’s possession. As discussed above, the defense opted to challenge the adequacy of the State’s investigation, pointing to the State’s failure to test Thompson’s gloves. Having elected not to test Thompson’s gloves for trial purposes, there is no abuse of discretion in the denial of Mercer’s post-trial motion for additional funding.

B. Denial of new trial motion based on after-discovered evidence

Following the trial, and while the case was initially on appeal, Solicitor Myers received a letter from Kevin Fuller, who had been one of Thompson’s cellmates at the Lexington County Detention Center. In a second letter to Solicitor Myers, Fuller asked for “help” and “some probation” with his pending charges. According to Fuller, Thompson had admitted to shooting the victim. Solicitor Myers promptly forwarded Fuller’s letters to defense counsel, who filed a motion for a new trial based on after-discovered evidence. Because this information came to light after the filing of the appeal, we remanded the matter to the trial court to conduct an evidentiary hearing. The trial court heard

the matter fully and, in a detailed order, denied the new trial motion, both as to the guilt and sentencing phases. Mercer assigns error to the denial of his new trial motion.

The decision whether to grant a new trial rests within the sound discretion of the trial court, and this Court will not disturb the trial court's decision absent an abuse of discretion. *State v. Johnson*, 376 S.C. 8, 11, 654 S.E.2d 835, 836 (2007); *State v. Simmons*, 279 S.C. 165, 166, 303 S.E.2d 857, 858 (1983). Having carefully considered the new trial motion, fully cognizant of Mercer's third-party guilt defense, we find no abuse of discretion in the denial of his motion.

In order for Mercer to prevail in his new trial motion premised upon after-discovered evidence, he must show the after-discovered evidence: (1) is such that it would probably change the result if a new trial were granted; (2) has been discovered since the trial; (3) could not in the exercise of due diligence have been discovered prior to the trial; (4) is material; and (5) is not merely cumulative or impeaching. *State v. Spann*, 334 S.C. 618, 619-20, 513 S.E.2d 98, 99 (1999). The State concedes that all elements are met, save the first element.

In this post-trial setting, our jurisprudence recognizes the gatekeeping role of the trial court in making a credibility assessment.⁹ *State v. Porter*, 269 S.C. 618, 621, 239 S.E.2d 641, 643 (1977) (noting that the determination of whether new evidence is credible for purposes of a new trial motion rests with the trial court); *State v. Deese*, 266 S.C.

⁹ The analytical framework at play in this post-trial motion (imposing on the trial judge a gate-keeping role in making credibility determinations) stands in stark contrast to the admissibility of third-party guilt evidence at trial. Provided threshold admissibility is met, third-party guilt evidence may not be excluded based on the trial court's view of the evidence or the perceived "strength" of the State's case. *Holmes v. South Carolina*, 547 U.S. 319, 330-31 (2006) (reversing the exclusion of evidence in a criminal trial and holding that the trial court may not exclude evidence of third-party guilt based upon a determination of the strength of the State's evidence).

534, 538, 225 S.E.2d 175, 176 (1976) (noting that the trial court is tasked with assessing the new evidence in a motion for a new trial); *State v. Pierce*, 263 S.C. 23, 33, 207 S.E.2d 414, 419 (1974) (quoting *State v. Mayfield*, 235 S.C. 11, 34-35, 109 S.E.2d 716, 729 (1959)) (“The credibility of newly-discovered evidence offered in support of a motion for a new trial is a matter for determination by the circuit judge to whom it is offered. In him, not this court, resides the power to weigh such evidence; and his judgment thereabout will not be disturbed except for error of law or abuse of discretion.”). On review, we may not make our own findings of fact. The deferential standard of review constrains us to affirm the trial court if reasonably supported by the evidence.

The after-discovered evidence is limited to Fuller’s testimony that Thompson admitted to being the triggerman. Thompson’s participation in, and first-hand knowledge of, the crime, was clearly known to Mercer and the State from the beginning. With the proper standard of review in mind, we review the trial court findings.

We begin with the trial court’s conclusion concerning Fuller’s testimony:

I carefully observed Fuller’s demeanor and listened to his testimony. In my view, the inconsistencies in his own stories, the differences between his version and that of Thompson and Johnston, and the inconsistency of Fuller’s story with known facts did not result from mistake or failure of recollection, but rather from intentional, calculated misrepresentations. I believe Fuller fabricated the story about Thompson admitting to shooting Sergeant Davis. I believe Fuller purposefully made different statements about this at different times when Fuller’s view of what version of the story suited Fuller’s interests best had changed. Finally, apart from the factors listed above, Fuller simply left me with the clear impression he was not telling the truth. Fuller’s testimony has very little credibility.

Fuller's criminal record includes multiple convictions for burglary, aggravated assault and battery, and criminal domestic violence. Fuller characterized his criminal history as a "nice record." We recognize that all the key participants in the post-trial hearing have extensive criminal records.

More relevant to the inquiry is careful scrutiny of the actual statements Fuller attributes to Thompson. Given the inconsistencies with Fuller's story, there is a basis to sustain the trial court's lack of credibility finding. For example, on cross examination at the evidentiary hearing, Fuller gave varying versions as to when Thompson confessed to the murder. Concerning the substance of the various statements, when Fuller was confronted with the inconsistency "about what happened to the gun," he said he "miswrote" the initial statement because he "was in a hurry."¹⁰ Another inconsistency is found in Fuller's account of where Davis was shot—as Davis was exiting his vehicle (which is Fuller's account) versus outside the vehicle.

Fuller informed investigators in a July 19, 2006, interview that another cellmate could corroborate Thompson's alleged confession. The other cellmate, Timothy Johnston, did testify, but he denied Fuller's account of the Thompson confession. The trial court found Johnston's testimony credible.

Fuller's credibility may be assessed not only by internal inconsistencies within his statements and testimony, but also by contrasting the purported Thompson confession against what are fairly solid facts. First, the only witness to the crime, Magwood, provided a physical description of the assailant, a description that closely matched the much bigger Mercer and not the slender Thompson. Second, Magwood saw Davis being forced, apparently at gunpoint, by the heavysset assailant toward the rear of the Navigator; Magwood found

¹⁰ This inconsistency concerns Mercer's possession of the murder weapon immediately after the murder as he exited the apartment complex in Davis's Navigator.

Davis lying in the bushes next to the parking lot. This is at odds with the Fuller account of the murder occurring in the area of the driver's door. Third, Fuller testified to a blood smear on the Navigator; the vehicle was stopped only minutes after the murder and no blood was found in or on the vehicle. Fourth, according to Fuller, Thompson shot Davis "pointblank . . . behind his ear." The pathologist opined that, because of the absence of soot or stippling around the wound, the fatal shot came from a distance of "at least two feet away from the skin of the victim." Fifth, according to Fuller, Thompson moved the murder weapon during the traffic stop and placed it under Mercer's seat. This is at odds with the testimony of Deputy Stazer, who pulled the vehicle over and saw no such movement in the vehicle.

To be sure, Mercer may challenge the certitude of these so-called facts, but their cumulative effect informed the judgment of the trial court in assessing the post-trial motion based on after-discovered evidence.

Having thoughtfully considered the evidence, the trial court determined that "there is essentially no chance the jury would believe Fuller's testimony that Thompson confessed to shooting Sergeant Davis." This finding of course is beyond the applicable "would probably change the result" standard. *Spann*, 334 S.C. at 619, 513 S.E.2d at 99. In denying the post-trial motion as to the guilt phase, the trial court observed that the jury was charged, without objection, on the law of "the hand of one is the hand of all." In denying the post-trial motion as to the sentencing phase, the trial court observed that the jury was charged that it could recommend a death sentence only if it found that Mercer was the triggerman.¹¹

¹¹ The trial court charged the jury:

Now, you will recall that in the guilt phase of the trial I charged you on the concept of the hand of one is the hand of all. That concept does not apply in this penalty phase of the trial. . . . Before you may consider imposing the death penalty, you must first find that the State has proven

Mercer takes issue with the denial of his post-trial motion. Mercer posits a different view of the facts. Mercer, in essence, invites this Court to make different credibility determinations, especially with respect to Fuller. Beyond Fuller, it is argued that the trial court had a valid reason not to believe cellmate Johnston over Fuller, for Johnston was facing life imprisonment with a pending burglary first-degree charge.¹² We respectfully decline Mercer's invitation to engage in *de novo* fact finding. We further reject the suggestion to ignore the trial court's gatekeeping role in post-trial after-discovered evidence motions.

The credibility of newly-discovered evidence offered in support of a motion for a new trial is a matter for determination by the circuit judge to whom it is offered. In him, not this court, resides the power to weigh such evidence; and his judgment thereabout will not be disturbed except for error of law or abuse of discretion.

beyond a reasonable doubt that the defendant, Kevin J. Mercer, fired the shot that killed the victim. If you find that the State has failed to prove that Kevin J. Mercer fired that shot, then you may not impose the death penalty but you must impose a life sentence.

¹² As between Johnston and Fuller, the trial court recalled Johnston's testimony to the effect that "Fuller thought he could benefit from fabricating a story about Thompson shooting Sergeant Davis." While the record confirms that Fuller was seeking "help" with his charges, Johnston did not testify to any such "fabrication" admission by Fuller. Mercer is correct in challenging the trial court's erroneous finding in this regard. We view the error as insignificant. The strong findings of the trial court against Fuller's credibility cannot reasonably be said to be dependent on this one finding. This finding does not form a meaningful part of the trial court's order, for it stands alone in an otherwise coherent analysis.

Mayfield, 235 S.C. at 34-35, 109 S.E.2d at 729.

To accept Mercer's premise that a jury must weigh the conflicting evidence ignores the *State v. Spann* factors and the gatekeeping role of the trial court as outlined in many cases, including *State v. Mayfield*. Moreover, the approach advanced by Mercer confuses the applicable standard in post-trial after-discovered evidence motions with the admissibility of third-party guilt evidence at trial.

The question before us, then, is whether the trial court's denial of the post-trial motion amounts to an abuse of discretion. We hold it does not. In so ruling, we are sensitive to the notion that a mere finding of a witness's lack of credibility does not complete the analysis, because a witness may lack persuasive credibility and still create reasonable doubt. This sensitivity forms part of our consideration. We have drawn the line, however, with Mercer's desire to use Fuller's testimony for "residual doubt" as to guilt in the sentencing phase. *Franklin v. Lynaugh*, 487 U.S. 164, 172-74 (1988) (clarifying Eighth Amendment jurisprudence by noting that a state is not constitutionally required to allow a capital defendant to submit "residual doubt" mitigation evidence in the sentencing phase of a capital case). We affirm the denial of Mercer's post-trial motion based on after-discovered evidence.

VII.

We have conducted the statutorily mandated review under S.C. Code Ann. § 16-3-25 (2003). We find the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor. We further find that the evidence supports the jury's finding of a statutory aggravating circumstance, and that the sentence of death is proportionate to sentences imposed under similar situations. *State v. Huggins*, 336 S.C. 200, 519 S.E.2d 574 (1999); *State v. McWee*, 322 S.C. 387, 472 S.E.2d 235 (1996). Mercer's convictions and sentence of death are

AFFIRMED.

**TOAL, C.J., WALLER, PLEICONES and BEATTY, JJ.,
concur.**

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State,

Respondent,

v.

Kevin Mercer,

Appellant.

Appeal From Lexington County
John C. Few, Circuit Court Judge

Opinion No. 26582
Heard October 7, 2008 – Filed January 12, 2009

AFFIRMED

Deputy Chief Appellate Defender for Capital Appeals Robert M. Dudek, of South Carolina Commission on Indigent Defense, and Melissa Jane Reed Kimbrough, of Kimbrough & Taggart, both of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General S. Creighton Waters, all of Columbia; Solicitor Donald V. Myers, of Lexington, for Respondent.

JUSTICE KITTREDGE: This is a mandatory appeal from a sentence of death. On March 16, 2002, Army recruiter Sergeant First Class Tracy Davis was gunned down outside his apartment in Lexington County, South Carolina. Kevin Mercer (Mercer) was convicted of murder, armed robbery, and possession of a firearm in the commission of a violent crime, and sentenced to death. In his appeal, Mercer challenges: (1) the disqualification of a juror; (2) the exclusion of evidence, both in the guilt and sentencing phases; (3) the denial of his post-trial motion for additional funds to test gloves for gunshot residue; and (4) the denial of his post-trial motion for a new trial based on after-discovered evidence. We affirm.

I.

Prior to his death, Sergeant First Class Tracy Davis (Davis) lived near Columbia, South Carolina, where he served as an active-duty member of the United States Army. He was attached to Fort Jackson where he trained Army recruiters.

On the evening of March 16, 2002, Davis arrived home at approximately 11:30 P.M. to the Raintree Apartments. As was his custom, he backed his vehicle, a white Lincoln Navigator, into a parking spot outside his apartment. According to a witness, after exiting his truck, Davis encountered a man and words were apparently exchanged.

The witness to the encounter was Davis's roommate, Sergeant First Class Clifton Magwood (Magwood). Magwood witnessed the confrontation from an apartment window. Magwood's room is on the second floor of the apartment, and his window looks out over the parking lot. Magwood testified that he heard a disturbance, got out of bed, looked through his blinds and observed Davis with a heavyset man, apparently armed with a handgun, demanding the keys to Davis's vehicle. Magwood saw the robber forcing Davis toward the rear of the vehicle and heard Davis tell the armed man, "All right. I'll give it to you."

Magwood left his vantage point to call 911 and summon help. The 911 call was logged at 11:32 P.M. Shortly thereafter, while running downstairs to help his roommate, Magwood heard a gunshot; he hurried outside to find Davis lying in the bushes near the parking lot. Magwood saw Davis's Navigator leaving the apartment complex. Davis died as a result of a gunshot to the back of the head.

Magwood only saw one individual confront Davis with a gun. Although Magwood only saw the individual from the back, he provided an immediate and detailed description of the assailant to law enforcement. The suspect was described as "a black male"; "broad shoulders"; "heavy build, muscular"; anywhere from 5'11" to 6'2" and weighing "215 to 225." Magwood further described the suspect's clothing as "a dark outfit, could be jean or denim or some type of dark outfit with a dark hat."

Magwood's detailed description of the killer, along with a description of the Navigator, was dispatched to all officers in the vicinity, by way of a "be on the lookout," commonly referred to as a BOLO. Deputy Dennis Stazer of the Lexington County Sheriff's Office responded to the BOLO broadcast by positioning his patrol car (at 11:42 P.M.) at what he believed could be an intercept position on a nearby interstate, I-20. Within minutes, a white Navigator drove past Deputy Stazer's location. Deputy Stazer pulled in behind the suspect vehicle and initiated a traffic stop at 11:50 P.M.

There were two black males in the Navigator, Mercer in the driver's seat and Marcus Thompson in the front passenger's seat. Deputy Stazer utilized his patrol car's "light bar . . . to light up the interior of the [Navigator]." Deputy Stazer approached the driver's side and asked the driver (Mercer) for his license and registration. Mercer produced his license, but could not find the vehicle registration. Mercer eventually located a receipt from a car dealership and handed it to Deputy Stazer. The receipt confirmed that the Navigator belonged to the murder victim, Davis. Mercer and Thompson were taken into custody.

Inside the Navigator, a .357 caliber handgun was retrieved from under the driver's seat.¹ Testing matched the handgun to the bullet removed from Davis during the autopsy. Gunshot residue (GSR) testing done on Mercer's hands revealed materials considered to be consistent with GSR, although the test results were not conclusive. Testing done on Thompson's hands resulted in a negative test for GSR. Four gloves (two pairs) were found in Thompson's possession but were not tested for GSR. As Thompson was removed from the vehicle, a plastic bag containing fourteen .357 bullets "fell out of his pants legs."

Mercer matched the detailed description of the assailant furnished by Magwood. Mercer is 5 feet 10 inches tall and weighs 220 pounds.² The officers on the scene of the arrest confirmed that Mercer is a broad-shouldered, muscular individual, consistent with Magwood's description. Mercer was arrested wearing a "dark[,] . . . like a denim . . . jean jacket outfit"; he was also wearing "a black . . . baseball style cap."

Conversely, Thompson is "very slender" and "narrow-shouldered" and weighs about 150 pounds. At the time of his arrest, Thompson was wearing "a black tee shirt that was over a white tee shirt," with the white tee shirt conspicuously sticking out from the black tee shirt. Thompson was not wearing a hat.

¹ Deputy Stazer did not testify to seeing a handgun when he first approached the driver's window. Moreover, Deputy Stazer, who "had to keep [his] eyes on both of them," saw no movement from either Mercer or Thompson. Deputy Stazer testified that had there been any movement in the vehicle he considered as a threat, he would have responded with deadly force. This testimony concerning the lack of movement, especially by Thompson, acquires relevance when read in context with Mercer's post-trial motion for a new trial based on after-discovered evidence.

² This height and weight is taken from Mercer's driver's license which he produced to Deputy Stazer. There is nothing in the record that contradicts this description.

Mercer and Thompson were charged with murder, armed robbery, possession of a firearm during the commission of a violent crime, and criminal conspiracy. Based on the State's view of the evidence, Thompson pled guilty to accessory before the fact of armed robbery, and accessory after the fact of murder, and armed robbery; he was sentenced to 28 years in prison. Mercer's charges proceeded to trial with the State seeking the death penalty. Mercer pursued a third-party guilt defense, pointing to Thompson as the shooter. The jury convicted Mercer, with the jury ultimately recommending a sentence of death, from which Mercer appeals.

II.

Mercer raises six issues on appeal, which we place in four categories:

- (1) Whether the trial court abused its discretion in finding a juror not death penalty qualified under *Wainwright v. Witt*.
- (2) Whether the trial court abused its discretion during the guilt phase by excluding the testimony of Thompson's attorney "that Thompson was charged as only an accessory after the fact and that he was released on bond."
- (3) Whether the trial court abused its discretion during the penalty phase by (a) precluding Dr. John Steedman from opining that a "SPECT Scan" of Mercer's brain revealed an "abnormality"; and (b) precluding Dr. Steedman from offering expert psychiatric opinion testimony.
- (4) Whether the trial court abused its discretion in denying Mercer's post-trial motions, one seeking additional funds to test Thompson's gloves for gunshot residue; and a second motion for a new trial based on after-discovered evidence that Thompson confessed to a cellmate that he committed the murder.

III.

Juror John Doe³ and *Wainwright v. Witt*

Mercer claims the disqualification of Juror John Doe violated his Sixth and Fourteenth Amendment rights. We disagree. In *Wainwright v. Witt*, 469 U.S. 412 (1985), the Supreme Court stated that the critical issue regarding the disqualification of a capital juror 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.’” *Id.* at 424 (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980)). The *Wainwright* Court observed that a juror’s bias need not be “proved with ‘unmistakable clarity’ . . . [because] bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism.” *Id.* at 424. Finally, the *Wainwright* Court noted that “there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law . . . [and that] is why deference must be paid to the trial judge who sees and hears the juror.” *Id.* at 425-26. It is with this standard in mind that we address whether the trial court abused its discretion in disqualifying Juror John Doe.

We have carefully reviewed the lengthy colloquy involving Juror Doe. While it is possible to cherry-pick certain responses and perhaps conclude that Juror Doe is qualified, a review of the totality of the responses reveals a potential juror vacillating and struggling with his strong convictions against the death penalty. Juror Doe, without hesitation, expressed an ability to impose a life sentence. Conversely, when the trial court asked if the juror could vote for a sentence of death, Juror Doe responded, “I’m not sure, sir.”

The State followed the court’s questioning by pursuing the same line of inquiry, to which Juror Doe responded that “it’s just hard to judge, you know, someone else . . . for something that they’ve done.”

³ We use the pseudonym John Doe.

Following up, the State zeroed in on Juror Doe's reservations, asking whether Juror Doe could sign his name to a death penalty verdict, to which Doe responded, "I don't think so, sir."

Defense counsel attempted to rehabilitate Juror Doe, but without much success. Doe stated he would "try" to consider both options. The trial court permitted both sides to vet Juror Doe thoroughly. Doe answered, "probably so," when asked if his feelings would interfere with serving on the jury. And when Doe was asked, "if you were convinced that a death sentence was appropriate that you could sign that form along with the other jurors," he answered, "[t]hat goes back to like having to put my name on the line you said when -- for a death sentence. I'd still have to think about that."

The trial court concluded that Juror John Doe was not qualified under *Wainwright*:

I think the juror is not qualified. . . . There's several things that I think need to be mentioned, and the first is the juror's demeanor. . . . I believe that . . . this juror's views on capital punishment would substantially impair his ability to perform his duties as a juror in accordance with the instructions that I would give him.

. . . A lot of times I think we see jurors who hesitate . . . [and] I feel as though I can get a sense as to whether the juror is hesitating because they are trying to think deeply and be completely open and honest with us or are they hesitating because they are troubled by the . . . issue that they're about to discuss.

I did not get the impression, as I do sometimes, that this juror hesitated because he was trying to be clear about his feelings. I got the impression that he hesitated because he was troubled by . . . what he thought would be the question of whether or not he would be able to impose the death penalty. . . . And in the end I am left . . . with the impression that . . . this juror's views on the death penalty would substantially impair his performance of his duty to . .

. follow the instructions that I would give him. And so I find that he is disqualified.

We find the trial court acted well within its broad discretion in finding Juror Doe's views would substantially impair his ability to follow his oath and the court's instructions on the law. *See Uttecht v. Brown*, 551 U.S. 1, ___, 127 S.Ct. 2218, 2224 (2007) ("Deference to the trial court is appropriate [which necessarily involves granting the trial court broad discretion] because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors."); *State v. Wood*, 362 S.C. 135, 141, 607 S.E.2d 57, 60 (2004) (adhering to the rule that a "trial court's disqualification of a prospective juror will not be disturbed where there is a reasonable basis . . . [to] conclude[] that the juror would not have been able to faithfully discharge his responsibilities as a juror"); *State v. Council*, 335 S.C. 1, 10, 515 S.E.2d 508, 512 (1999) (following the rule that unless unsupported by the evidence, "determination of whether a juror is qualified to serve on a death penalty case is within the sole discretion of the trial judge"). Even the cold record before us reflects Juror Doe's hesitancy and profound unease with the prospect of performing his duties as a juror in accordance with his oath and the court's instructions. *State v. George*, 323 S.C. 496, 503, 476 S.E.2d 903, 908 (1996) (finding that the trial court acted correctly by disqualifying a juror that "declared that she did not think she could sign a form recommending the death penalty"); *State v. Longworth*, 313 S.C. 360, 366, 438 S.E.2d 219, 222 (1993) (disqualifying a juror who initially stated "he 'probably could' consider" the death penalty but later stated he did not "think so"). We affirm the disqualification of Juror John Doe.

IV.

Exclusion of Marcus Thompson's Lawyer's Testimony

During the guilt phase, Mercer sought to introduce testimony from Thompson's lawyer regarding the reduced charges against

Thompson.⁴ Specifically, Mercer wanted to introduce testimony that he and Thompson were initially charged with the same offenses, but later Thompson's charges were reduced and he was released on bond. Mercer claimed the information was relevant as part of his defense of third-party guilt. The State objected to this testimony, asserting that it was not relevant to third-party guilt or otherwise. The trial court sustained the objection. Finding the proffered testimony of Thompson's attorney concerning Thompson's reduced charges and bail status not relevant to any issue before the jury, including third-party guilt, we affirm pursuant to Rule 220(b)(1), SCACR.⁵

V.

Exclusion of Expert Mitigation Evidence

Mercer retained numerous well-credentialed experts for the penalty phase, including a neurologist, a forensic psychiatrist, a pharmacologist, a sociologist licensed as a clinical social worker, and a corrections expert. During the penalty phase, the defense presented a comprehensive review of Mercer's troubled life.

The mitigation evidence revealed much about Mercer. A sampling of the evidence reveals that Mercer has a "damaging disability in terms of . . . making judgment[s] and inferences" and that he suffers from "untreated depression." The experts opined that Mercer's abusive upbringing resulted in post-traumatic stress disorder and anxiety disorder, which "are connected with previous trauma,

⁴ Neither the State nor Mercer called Thompson as a witness.

⁵ Although this evidence was not admissible, we do recognize that defense counsel, in her opening remarks to the jury, referred to Thompson's reduced charges and bond status. According to counsel's opening statement, "We don't know where [Thompson] is. Last time I heard he was out on bond. Last time I heard he wasn't even charged with murder or armed robbery. That wasn't how it started out. He was charged with all the same things that Kevin Mercer was."

nightmares[,] . . . distressive recollections” and substance abuse. Beyond Mercer’s life experiences, he suffered from a myriad of cognitive deficiencies, including neurological dysfunction and learning disabilities. Because Mercer struggled from an early age to function in life and hold regular employment, he was found to be disabled by the Social Security Administration.

Against this backdrop of a thorough mitigation presentation, we are presented with two challenges to the trial court’s exclusion of expert testimony in the penalty phase. “A ruling on the admissibility of evidence is within the sound discretion of the trial court and will not be reversed absent an abuse of discretion. An abuse of discretion occurs when the trial court’s ruling is based on an error of law.” *State v. Washington*, 379 S.C. 120, 123-24, 665 S.E.2d 602, 604 (2008) (internal citations omitted).

We first address the claim that the trial court abused its discretion in preventing Dr. John Steedman from opining that a “SPECT Scan” of Mercer’s brain revealed an “abnormality.” While we agree that it was clear error to exclude this testimony, we do not find that Mercer was prejudiced by the error. Next is the assignment of error in connection with the trial court precluding Dr. Steedman from offering psychiatric opinion testimony. Again, we find no reversible error.

A. “SPECT Scan”

Dr. Steedman is a medical doctor who is board certified in neurology and psychiatry. Dr. Steedman analyzed a “SPECT Scan” conducted on Mercer’s brain.⁶ The SPECT Scan was initially reviewed

⁶ SPECT is an acronym for single-photon emission computerized tomography. Richard E. Redding, *The Brain-Disordered Defendant: Neuroscience and Legal Insanity in the Twenty-First Century*, 56 AM. U. L. REV. 51, 121 (2006). According to Dr. Steedman, “a SPECT Scan is a . . . nuclear medicine study. It is . . . a way of looking at the function of somebody’s brain in terms of how much blood flow is running through the cortex. It’s mainly useful in detecting whether

by a radiologist who noted a “questionable abnormality.” Dr. Steedman was prepared to render a stronger finding of an abnormality. The State objected strenuously against such testimony, claiming surprise and prejudice. After an offer of proof and lengthy discussion, the trial court sustained the objection on the basis of Rule 403, SCRE, and a so-called “discovery order” violation. This ruling rises to the level of an abuse of discretion.

Application of Rule 403 should be cautiously invoked against a capital defendant in the penalty phase, especially in light of the due process implications at stake when a capital defendant seeks to introduce mitigation evidence.⁷ The probative value of Dr. Steedman’s excluded testimony was, as a matter of law, not substantially outweighed by its potential for prejudice, as a result of the purported late disclosure or otherwise. Reliance on the so-called “discovery order” cannot withstand even minimal scrutiny, for there was no formal

there are asymmetries and regional differences in blood flow . . . to parts of the brain which indicates . . . how hard those parts of the brain are working.” An abnormal SPECT Scan means there is either increased or decreased blood flow to a certain area in the brain. A decreased flow of blood to a particular region of the brain may be referred to as an abnormality and may be associated with general cognitive deficiencies and learning disorders.

⁷ This Court reminds the bench and bar of the importance of a meaningful mitigation defense and, concomitantly, the ability of a capital defendant to fully present mitigation evidence. *See Council v. State*, __ S.C. __, __ S.E.2d __ (2008), Op. No. 26543 (S.C. Sup. Ct. filed Sept. 8, 2008) (Shearouse Adv. Sh. No. 35 at 35) (relying in large part upon *Wiggins v. Smith*, 539 U.S. 510 (2003), this Court determined that counsel’s failure to adequately investigate and present mitigating evidence resulted in the ineffective assistance of counsel requiring a new sentencing hearing). The trial courts, vested with considerable discretion in evidentiary matters, must not neglect the due process implications involved in a capital defendant’s right to present mitigation evidence.

discovery order.⁸ In any event, Dr. Steedman was disclosed to the State, as was the general substance of his testimony.

We nevertheless find no reversible error. When the entirety of the record is considered, the exclusion of Dr. Steedman's proffered testimony of an abnormality juxtaposed to the radiologist's notation of a "questionable abnormality" resulted in no prejudice to Mercer. Despite the erroneous ruling, a review of the record demonstrates that Dr. Steedman testified at length concerning Mercer's cognitive deficiencies. Dr. Steedman's unchallenged testimony included reference to the SPECT Scan results as "confirmatory" of Mercer's learning disorder. More to the point, the same evidence the State successfully and erroneously challenged—the SPECT Scan abnormality—was already in evidence without objection.

Another defense expert previously testified that the SPECT Scan revealed an abnormality. Dr. Donna Schwartz-Watts, a defense psychiatrist, testified that she "ordered what's called a SPECT Scan. And what a SPECT Scan is, this is one of the newer tests in medicine and it shows brain function. . . . But what it does, it's a . . . picture of how your brain functions, and that test came back abnormal. There's a . . . small area that's not normal on there. . . ." Later, as Dr. Schwartz-Watts began to sum up her testimony, she again talked about the SPECT Scan. Referring to Mercer, she said that "it's already a bad

⁸ In this case, the State repeatedly asked the trial court to order Mercer to disclose his experts and to require a written report from his experts. The trial court refused to order defense experts to produce written reports. *State v. Northcutt*, 372 S.C. 207, 216-17, 641 S.E.2d 873, 878 (2007) (holding that Rule 5, SCRCrimP, provides no basis for a trial court to require the creation of written defense expert reports for disclosure to the State). The trial court ultimately relented to the State's discovery requests by ordering the parties to meet and attempt to resolve the impasse. This was done, and because defense counsel failed to hit the bull's eye concerning Dr. Steedman's precise opinion regarding the SPECT Scan study, the State cried foul. The State's claim of unfair surprise is meritless.

brain in the sense that he's got a learning disability and . . . we even know that on a SPECT Scan there's an abnormality." Thus, the very "SPECT Scan abnormality" testimony Mercer sought to admit through Dr. Steedman was presented to the jury without objection through Dr. Schwartz-Watts. We therefore find the trial court's error in excluding Dr. Steedman's opinion testimony was harmless beyond a reasonable doubt. *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (quoting *State v. Key*, 256 S.C. 90, 93, 180 S.E.2d 888, 890 (1971)) (noting that an error is harmless when it "could not reasonably have affected the result of the trial").

B. Exclusion of Dr. Steedman's psychiatric opinion

As noted, Dr. Steedman is board certified in both neurology and psychiatry. When Mercer sought to elicit brief testimony from Dr. Steedman as a psychiatrist, the State objected, claiming Dr. Steedman was only disclosed as an expert in neurology. The basis of the State's objection arose from the nonexistent discovery order, discussed above. The trial court entertained the objection, and Mercer proceeded to make an offer of proof. The offer of proof of Dr. Steedman's psychiatric opinion comprises a mere half page in this voluminous record. The thrust of Dr. Steedman's psychiatric opinion was that the "types of [Mercer's] abnormalities . . . are a cumulative effect on poor judgment, depression, anxiety, thought disorders, [and] paranoia." The State's objection was sustained, and Dr. Steedman was prevented from rendering a psychiatric opinion.

Although the basis of the State's objection was specious, no reversible error is present. The excluded evidence was presented to the jury through other witnesses, especially Dr. Schwartz-Watts, without objection. Even defense counsel acknowledged that the proffered psychiatric opinion testimony of Dr. Steedman "certainly . . . mirrors [and] dove-tail[s]" with Dr. Schwartz-Watts. As a result, Mercer sustained no prejudice from the exclusion of this cumulative evidence. *State v. Graham*, 314 S.C. 383, 386, 444 S.E.2d 525, 527 (1994) (noting that a harmless error analysis depends upon a host of factors, one of which is whether the excluded evidence was cumulative).

VI.

Denial of Mercer's Post-trial Motions

We finally address Mercer's two post-trial motions. These motions cannot be properly understood and evaluated in a vacuum, for they naturally flow from Mercer's efforts to create a reasonable doubt in the State's case by pointing to Marcus Thompson as the shooter.

The centerpiece of Mercer's guilt phase defense was third-party guilt—Thompson as the triggerman. As defense counsel asserted in the opening statement to the jury:

One of the key factors in this case was omitted [from the solicitor's opening remarks], and that is riding in the Lincoln Navigator was a second person. Ladies and Gentlemen that second person is not here today. We don't know where he is. Last time I heard he was out on bond. Last time I heard he wasn't even charged with murder or armed robbery. That wasn't how it started out. He was charged with all the same things that Kevin Mercer was.

....
... Suffice it to say Marcus Thompson was in the Navigator and he's not here today, and we believe that Marcus Thompson, in fact, was the shooter. That's our theory. It's pretty simple.

This theme was pursued throughout the trial, as the defense sought to create a reasonable doubt that Mercer was the triggerman. This approach was directly linked to what Mercer characterized as a "tunnel vision" approach to the investigation. One example comes from the gloves taken from Thompson that were not tested for gunshot residue (GSR). Counsel for Mercer argued forcefully that the State's decision not to test the gloves for GSR demonstrated the State's myopic view to focus on Mercer at the expense of a thorough and

proper investigation. The following excerpts from the closing argument illustrate this defense strategy:

[The State does not] want to talk about Marcus Thompson. . . . You know, we had to dig and bring out the things about Marcus Thompson. They didn't want to show you any evidence about him. They wanted to ignore anything about him that would give you the full picture of what happened on May 16, 2002. . . . We had to pull it out of them.

. . . .
. . . But do we know that it wasn't Marcus Thompson with gloves on that pulled that trigger in that dimly-lit parking lot?

. . . .
They didn't show you the gloves because it points directly to Marcus Thompson being the shooter.

. . . .
. . . And we'd know . . . if they had sent those gloves to the [State Law Enforcement Division] lab. We'd know if they were full of barium, antimony, and lead. We'd know that.

. . . .
. . . Maybe Marcus Thompson with his gloves on shot Sergeant Davis and then went and got Kevin [Mercer]. It's up to the State to prove it, and they haven't done it.

. . . .
They chose to declare Kevin Mercer the shooter and ignore the other evidence, ignore the other possibilities, ignore Marcus Thompson and his gloves.

A. Denial of funding post-trial to test Thompson's gloves

Mercer's post-trial motion for funds to test Thompson's gloves for GSR was denied. The matter of authorizing funds to capital defendants lies within the sound discretion of the trial court. S.C. Code

Ann. § 16-3-26(C)(1) (2003) (authorizing the trial court to award funds where court determines requested funds are “reasonably necessary”); *see also State v. Matthews*, 291 S.C. 339, 345, 353 S.E.2d 444, 448 (1986) (holding that the decision to award funds to capital defendants is a matter within the trial court’s discretion). Before trial, the trial court authorized \$53,000 for Mercer’s defense. The trial judge went further and invited defense counsel to request additional funds “if what I have authorized in this order is not going to get you all the way to trial.” The record discloses no additional funding request prior to this post-trial motion.

Of particular significance to a proper resolution of this post-trial funding request is the fact that Mercer retained a GSR expert for trial. The expert, Jeffrey Hollifield, is a chemist, formerly employed with the South Carolina State Law Enforcement Division. Hollifield was assigned the limited task of analyzing the inconclusive results of the GSR test conducted on Mercer. For apparent strategic reasons, Hollifield was not tasked with testing the gloves found in Thompson’s possession. As discussed above, the defense opted to challenge the adequacy of the State’s investigation, pointing to the State’s failure to test Thompson’s gloves. Having elected not to test Thompson’s gloves for trial purposes, there is no abuse of discretion in the denial of Mercer’s post-trial motion for additional funding.

B. Denial of new trial motion based on after-discovered evidence

Following the trial, and while the case was initially on appeal, Solicitor Myers received a letter from Kevin Fuller, who had been one of Thompson’s cellmates at the Lexington County Detention Center. In a second letter to Solicitor Myers, Fuller asked for “help” and “some probation” with his pending charges. According to Fuller, Thompson had admitted to shooting the victim. Solicitor Myers promptly forwarded Fuller’s letters to defense counsel, who filed a motion for a new trial based on after-discovered evidence. Because this information came to light after the filing of the appeal, we remanded the matter to the trial court to conduct an evidentiary hearing. The trial court heard

the matter fully and, in a detailed order, denied the new trial motion, both as to the guilt and sentencing phases. Mercer assigns error to the denial of his new trial motion.

The decision whether to grant a new trial rests within the sound discretion of the trial court, and this Court will not disturb the trial court's decision absent an abuse of discretion. *State v. Johnson*, 376 S.C. 8, 11, 654 S.E.2d 835, 836 (2007); *State v. Simmons*, 279 S.C. 165, 166, 303 S.E.2d 857, 858 (1983). Having carefully considered the new trial motion, fully cognizant of Mercer's third-party guilt defense, we find no abuse of discretion in the denial of his motion.

In order for Mercer to prevail in his new trial motion premised upon after-discovered evidence, he must show the after-discovered evidence: (1) is such that it would probably change the result if a new trial were granted; (2) has been discovered since the trial; (3) could not in the exercise of due diligence have been discovered prior to the trial; (4) is material; and (5) is not merely cumulative or impeaching. *State v. Spann*, 334 S.C. 618, 619-20, 513 S.E.2d 98, 99 (1999). The State concedes that all elements are met, save the first element.

In this post-trial setting, our jurisprudence recognizes the gatekeeping role of the trial court in making a credibility assessment.⁹ *State v. Porter*, 269 S.C. 618, 621, 239 S.E.2d 641, 643 (1977) (noting that the determination of whether new evidence is credible for purposes of a new trial motion rests with the trial court); *State v. Deese*, 266 S.C.

⁹ The analytical framework at play in this post-trial motion (imposing on the trial judge a gate-keeping role in making credibility determinations) stands in stark contrast to the admissibility of third-party guilt evidence at trial. Provided threshold admissibility is met, third-party guilt evidence may not be excluded based on the trial court's view of the evidence or the perceived "strength" of the State's case. *Holmes v. South Carolina*, 547 U.S. 319, 330-31 (2006) (reversing the exclusion of evidence in a criminal trial and holding that the trial court may not exclude evidence of third-party guilt based upon a determination of the strength of the State's evidence).

534, 538, 225 S.E.2d 175, 176 (1976) (noting that the trial court is tasked with assessing the new evidence in a motion for a new trial); *State v. Pierce*, 263 S.C. 23, 33, 207 S.E.2d 414, 419 (1974) (quoting *State v. Mayfield*, 235 S.C. 11, 34-35, 109 S.E.2d 716, 729 (1959)) (“The credibility of newly-discovered evidence offered in support of a motion for a new trial is a matter for determination by the circuit judge to whom it is offered. In him, not this court, resides the power to weigh such evidence; and his judgment thereabout will not be disturbed except for error of law or abuse of discretion.”). On review, we may not make our own findings of fact. The deferential standard of review constrains us to affirm the trial court if reasonably supported by the evidence.

The after-discovered evidence is limited to Fuller’s testimony that Thompson admitted to being the triggerman. Thompson’s participation in, and first-hand knowledge of, the crime, was clearly known to Mercer and the State from the beginning. With the proper standard of review in mind, we review the trial court findings.

We begin with the trial court’s conclusion concerning Fuller’s testimony:

I carefully observed Fuller’s demeanor and listened to his testimony. In my view, the inconsistencies in his own stories, the differences between his version and that of Thompson and Johnston, and the inconsistency of Fuller’s story with known facts did not result from mistake or failure of recollection, but rather from intentional, calculated misrepresentations. I believe Fuller fabricated the story about Thompson admitting to shooting Sergeant Davis. I believe Fuller purposefully made different statements about this at different times when Fuller’s view of what version of the story suited Fuller’s interests best had changed. Finally, apart from the factors listed above, Fuller simply left me with the clear impression he was not telling the truth. Fuller’s testimony has very little credibility.

Fuller's criminal record includes multiple convictions for burglary, aggravated assault and battery, and criminal domestic violence. Fuller characterized his criminal history as a "nice record." We recognize that all the key participants in the post-trial hearing have extensive criminal records.

More relevant to the inquiry is careful scrutiny of the actual statements Fuller attributes to Thompson. Given the inconsistencies with Fuller's story, there is a basis to sustain the trial court's lack of credibility finding. For example, on cross examination at the evidentiary hearing, Fuller gave varying versions as to when Thompson confessed to the murder. Concerning the substance of the various statements, when Fuller was confronted with the inconsistency "about what happened to the gun," he said he "miswrote" the initial statement because he "was in a hurry."¹⁰ Another inconsistency is found in Fuller's account of where Davis was shot—as Davis was exiting his vehicle (which is Fuller's account) versus outside the vehicle.

Fuller informed investigators in a July 19, 2006, interview that another cellmate could corroborate Thompson's alleged confession. The other cellmate, Timothy Johnston, did testify, but he denied Fuller's account of the Thompson confession. The trial court found Johnston's testimony credible.

Fuller's credibility may be assessed not only by internal inconsistencies within his statements and testimony, but also by contrasting the purported Thompson confession against what are fairly solid facts. First, the only witness to the crime, Magwood, provided a physical description of the assailant, a description that closely matched the much bigger Mercer and not the slender Thompson. Second, Magwood saw Davis being forced, apparently at gunpoint, by the heavysset assailant toward the rear of the Navigator; Magwood found

¹⁰ This inconsistency concerns Mercer's possession of the murder weapon immediately after the murder as he exited the apartment complex in Davis's Navigator.

Davis lying in the bushes next to the parking lot. This is at odds with the Fuller account of the murder occurring in the area of the driver's door. Third, Fuller testified to a blood smear on the Navigator; the vehicle was stopped only minutes after the murder and no blood was found in or on the vehicle. Fourth, according to Fuller, Thompson shot Davis "pointblank . . . behind his ear." The pathologist opined that, because of the absence of soot or stippling around the wound, the fatal shot came from a distance of "at least two feet away from the skin of the victim." Fifth, according to Fuller, Thompson moved the murder weapon during the traffic stop and placed it under Mercer's seat. This is at odds with the testimony of Deputy Stazer, who pulled the vehicle over and saw no such movement in the vehicle.

To be sure, Mercer may challenge the certitude of these so-called facts, but their cumulative effect informed the judgment of the trial court in assessing the post-trial motion based on after-discovered evidence.

Having thoughtfully considered the evidence, the trial court determined that "there is essentially no chance the jury would believe Fuller's testimony that Thompson confessed to shooting Sergeant Davis." This finding of course is beyond the applicable "would probably change the result" standard. *Spann*, 334 S.C. at 619, 513 S.E.2d at 99. In denying the post-trial motion as to the guilt phase, the trial court observed that the jury was charged, without objection, on the law of "the hand of one is the hand of all." In denying the post-trial motion as to the sentencing phase, the trial court observed that the jury was charged that it could recommend a death sentence only if it found that Mercer was the triggerman.¹¹

¹¹ The trial court charged the jury:

Now, you will recall that in the guilt phase of the trial I charged you on the concept of the hand of one is the hand of all. That concept does not apply in this penalty phase of the trial. . . . Before you may consider imposing the death penalty, you must first find that the State has proven

Mercer takes issue with the denial of his post-trial motion. Mercer posits a different view of the facts. Mercer, in essence, invites this Court to make different credibility determinations, especially with respect to Fuller. Beyond Fuller, it is argued that the trial court had a valid reason not to believe cellmate Johnston over Fuller, for Johnston was facing life imprisonment with a pending burglary first-degree charge.¹² We respectfully decline Mercer's invitation to engage in *de novo* fact finding. We further reject the suggestion to ignore the trial court's gatekeeping role in post-trial after-discovered evidence motions.

The credibility of newly-discovered evidence offered in support of a motion for a new trial is a matter for determination by the circuit judge to whom it is offered. In him, not this court, resides the power to weigh such evidence; and his judgment thereabout will not be disturbed except for error of law or abuse of discretion.

beyond a reasonable doubt that the defendant, Kevin J. Mercer, fired the shot that killed the victim. If you find that the State has failed to prove that Kevin J. Mercer fired that shot, then you may not impose the death penalty but you must impose a life sentence.

¹² As between Johnston and Fuller, the trial court recalled Johnston's testimony to the effect that "Fuller thought he could benefit from fabricating a story about Thompson shooting Sergeant Davis." While the record confirms that Fuller was seeking "help" with his charges, Johnston did not testify to any such "fabrication" admission by Fuller. Mercer is correct in challenging the trial court's erroneous finding in this regard. We view the error as insignificant. The strong findings of the trial court against Fuller's credibility cannot reasonably be said to be dependent on this one finding. This finding does not form a meaningful part of the trial court's order, for it stands alone in an otherwise coherent analysis.

Mayfield, 235 S.C. at 34-35, 109 S.E.2d at 729.

To accept Mercer's premise that a jury must weigh the conflicting evidence ignores the *State v. Spann* factors and the gatekeeping role of the trial court as outlined in many cases, including *State v. Mayfield*. Moreover, the approach advanced by Mercer confuses the applicable standard in post-trial after-discovered evidence motions with the admissibility of third-party guilt evidence at trial.

The question before us, then, is whether the trial court's denial of the post-trial motion amounts to an abuse of discretion. We hold it does not. In so ruling, we are sensitive to the notion that a mere finding of a witness's lack of credibility does not complete the analysis, because a witness may lack persuasive credibility and still create reasonable doubt. This sensitivity forms part of our consideration. We have drawn the line, however, with Mercer's desire to use Fuller's testimony for "residual doubt" as to guilt in the sentencing phase. *Franklin v. Lynaugh*, 487 U.S. 164, 172-74 (1988) (clarifying Eighth Amendment jurisprudence by noting that a state is not constitutionally required to allow a capital defendant to submit "residual doubt" mitigation evidence in the sentencing phase of a capital case). We affirm the denial of Mercer's post-trial motion based on after-discovered evidence.

VII.

We have conducted the statutorily mandated review under S.C. Code Ann. § 16-3-25 (2003). We find the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor. We further find that the evidence supports the jury's finding of a statutory aggravating circumstance, and that the sentence of death is proportionate to sentences imposed under similar situations. *State v. Huggins*, 336 S.C. 200, 519 S.E.2d 574 (1999); *State v. McWee*, 322 S.C. 387, 472 S.E.2d 235 (1996). Mercer's convictions and sentence of death are

AFFIRMED.

**TOAL, C.J., WALLER, PLEICONES and BEATTY, JJ.,
concur.**



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

ORIGINAL

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332

Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Joseph L. Savitz, III, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

RECEIVED

October 3, 2008

OCT 03 2008

The Honorable Daniel E. Shearouse
Clerk of Court
The South Carolina Supreme Court
P.O. Box 11330
Columbia, SC 29211

S.C. SUPREME COURT

Re: The State v. Kevin Mercer (Capital Case)
Oral Argument – Tuesday, October 7, 2008 at 10:30 a.m.

Dear Mr. Shearouse:

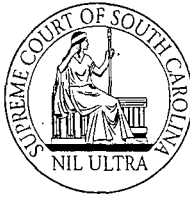
This is just to inform the Court that pro-bono co-counsel Lisa Kimbrough will argue issues 4 and 5 before the Court on Tuesday morning in the above-captioned death penalty case. These are the juror Kyzer excusal issue and the denial of the motion for a new trial issue. The time would be divided 22 minutes for me on the other four issues, and eight minutes for Ms. Kimbrough on her two issues. I will do the reply.

I left a message informing opposing counsel, S. Creighton Waters, Jr., of this arrangement earlier this afternoon, Friday. If the Court has any objection or concerns regarding this arrangement please contact me. Otherwise, I thank you for notifying the Court of this arrangement.

Sincerely,

Robert M. Dudek
Deputy Chief Appellate Defender for Capital Appeals

cc: S. Creighton Waters, Jr., Esquire
Lisa Kimbrough, Esquire



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

September 30, 2008

Deputy Chief Appellate Defender
for Capital Appeals Robert M. Dudek
South Carolina Commission on Indigent Defense
P O Box 11589
Columbia, SC 29211

Melissa Jane Reed Kimbrough, Esquire
Kimbrough & Taggart
1338 Pickens St.
Columbia, SC 29201-2630

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

Re: The State v. Mercer, Kevin

Dear Counsel:

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

Appellant	30 minutes
Respondent	30 minutes
Appellant in Reply	15 minutes

Deputy Chief Appellate Defender
Re: The State v. Kevin Mercer
September 30, 2008
Page two

Reminder:

This case is scheduled for hearing at 10:30 a.m. on Tuesday, October 7, 2008.

Very truly yours,

Daniel E. Shearouse, Clerk

By Jean J. Peebles
Administrative Assistant

DES/jjp

cc: Solicitor Donald V. Myers



The South Carolina Supreme Court

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

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

To: Melissa Jane Reed Kimbrough, Esquire
From: Daniel E. Shearouse
Date: August 07, 2008
RE: October Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the October 2008 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of October 7, 8, 9, 21 and 22, 2008. Please notify this office in writing prior to August 14, 2008 as to any scheduling conflicts for the October term, and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

The State v. Mercer, Kevin



The South Carolina Supreme Court

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

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

To: Deputy Chief Appellate Defender for Capital Appeals Robert M. Dudek

From: Daniel E. Shearouse

Date: August 07, 2008

RE: October Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the October 2008 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of October 7, 8, 9, 21 and 22, 2008. Please notify this office in writing prior to August 14, 2008 as to any scheduling conflicts for the October term, and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

The State v. Mercer, Kevin



The South Carolina Supreme Court

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

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

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

From: Daniel E. Shearouse

Date: August 07, 2008

RE: October Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the October 2008 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of October 7, 8, 9, 21 and 22, 2008. Please notify this office in writing prior to August 14, 2008 as to any scheduling conflicts for the October term, and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

The State v. Mercer, Kevin

The Supreme Court of South Carolina

The State,

Respondent,

v.

Kevin Mercer,

Appellant.

The Honorable John C. Few
Lexington County
Trial Court Case No. 2003-GS-32-00409

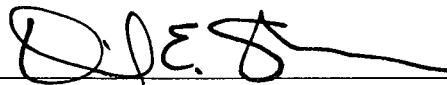
ORDER

For good cause having been shown, the time for serving and filing the Final Brief of Appellant and Final Reply Brief of Appellant in the above entitled matter is hereby extended until June 26, 2008.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



CLERK

Columbia, South Carolina

June 25, 2008

cc: Deputy Chief Appellate Defender for Capital Appeals
Robert M. Dudek
Assistant Attorney General S. Creighton Waters



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

ORIGINAL

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332

Joseph L. Savitz, III, Chief Attorney
Wanda H. Carter, Deputy Chief Attorney

Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1343
Facsimile: (803) 734-1397

June 24, 2008

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

RECEIVED

JUN 24 2008

S.C. SUPREME COURT

Re: The State v. Kevin Mercer (capital case)

Dear Mr. Shearouse:

The final brief of appellant and the final reply brief of appellant in the above referenced case are due to be served and filed today. However, because of my current caseload, I have been unable to complete these briefs for service. For that reason, I would respectfully request an extension of two days in which to serve and file these final briefs.

By copy of this letter, I am informing S. Creighton Waters, Esquire, of the Attorney General's Office, of my request.

Thank you for your assistance in this matter. Should you have any questions, please do not hesitate to contact me.

Sincerely,

Robert M. Dudek
Deputy Chief Attorney for Capital Appeals

RMD/mwl

cc: S. Creighton Waters, Esquire

HENRY McMASTER
ATTORNEY GENERAL



RECEIVED

JUN 24 2008

S.C. SUPREME COURT

June 24, 2008

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

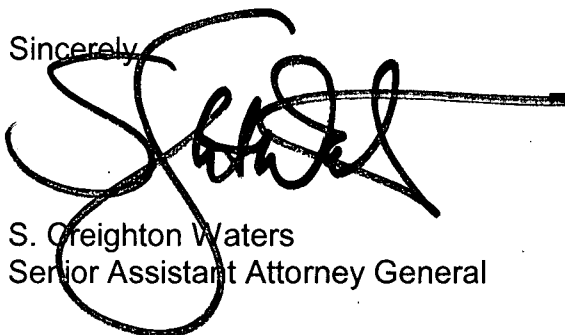
Re: The State v. Kevin Mercer
Appeal from Lexington County

Dear Mr. Shearouse:

Enclosed please find the original and fourteen (14) copies of the **Final Brief of Respondent**, dated June 24, 2008, along with proof of service in the above-referenced case.

Thank you for your cooperation in this matter.

Sincerely,



S. Creighton Waters
Senior Assistant Attorney General

SCW/ap
Enclosures

cc: Robert M. Dudek, Esquire
Melissa J. Kimbrough, Esquire
Honorable Donald V. Myers
Sandi Wofford, Victims' Services

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Lexington County

John C. Few, Circuit Court Judge

ORIGINAL

RECEIVED

JUN 04 2008

SC Court of Appeals

THE STATE,

RESPONDENT,

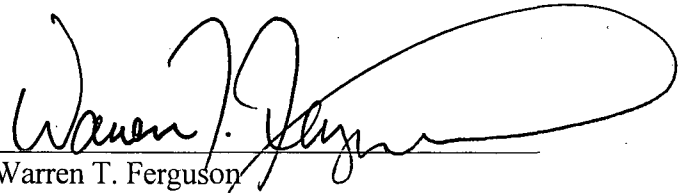
V.

KEVIN MERCER,

APPELLANT

CERTIFICATE OF SERVICE

I certify that a true copy of the Record on Appeal in the above referenced case has been served upon S. Creighton Waters, Esquire, Assistant Attorney General, Office of the Attorney General, Rembert Dennis Building, 1000 Assembly Street, Rm. 519, Columbia, SC 29201 this 4th day of June, 2008.


Warren T. Ferguson
Administrative Assistant

SUBSCRIBED AND SWORN TO before me
this 4th day of June, 2008.


(L.S.)
Notary Public for South Carolina

My Commission Expires: November 16, 2008

RECEIVED

JUN 05 2008

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Lexington County

John C. Few, Circuit Court Judge

THE STATE,

RESPONDENT,

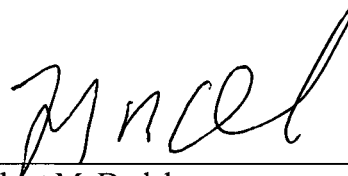
V.

KEVIN MERCER,

APPELLANT

CERTIFICATE OF SERVICE

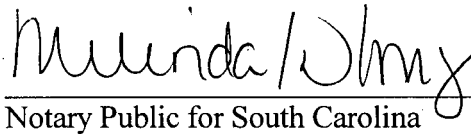
The undersigned attorney hereby certifies that a true copy of the Initial Reply Brief of Appellant in the above referenced case has been served upon Donald J. Zelenka, Esquire, at *, this 5th day of May, 2008.



Robert M. Dudek
Deputy Chief Appellate Defender for Capital Appeal

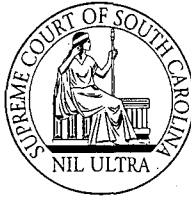
ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
This 5th day of May, 2008.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: ~~March 19, 2017~~

11/16/08



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

April 24, 2008

Deputy Chief Appellate Defender for Capital Appeals
Robert M. Dudek
South Carolina Commission on Indigent Defense
P O Box 11589
Columbia, SC 29211

Re: The State v. Mercer, Kevin

Dear Counsel:

The following Order has been endorsed on your Petition for Final Extension to File the Initial Reply Brief in the above entitled case on appeal.

“Granted.

Jean H. Toal C.J.
For the Court

By s/ Daniel E. Shearouse
Clerk

April 24, 2008.”

Please be advised that the initial reply brief should be served and filed on or before May 5, 2008.

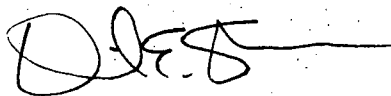
Deputy Chief Appellate Defender for Capital Appeals

Robert M. Dudek

Page Two

April 24, 2008

Very truly yours,

A handwritten signature in black ink, appearing to read 'R. M. Dudek', with a long horizontal flourish extending to the right.

CLERK

DES/dmh

cc: Assistant Attorney General S. Creighton Waters

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Lexington County

Honorable John C. Few, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KEVIN MERCER,

APPELLANT

PETITION FOR FINAL EXTENSION TO FILE
THE INITIAL REPLY BRIEF

In support of the petition for a final ten day extension to file the initial reply brief of appellant, counsel for appellant would respectfully show this Court:

1. The initial reply brief of appellant is due to be served and file with this Court on Thursday, April 24, 2008, having been extended by prior orders of this Court. Appellant was convicted of murder in Greenville County and sentenced to death.

2. Counsel filed a twenty-five page petition for writ of certiorari to this Court on Monday, April 21, 2008 in the case of Marshall Miller v. State. Counsel is also manually redacting the alleged victim's name from the Record on Appeal in the case of State v. William Douglas which is pending in this Court before oral argument. Counsel also will be filing a reply brief in State v. Roy Tennant which is due with the Court of Appeals Court on Thursday, May 1, 2008. Further, counsel has been working with co-counsel, Chief Attorney Joseph L. Savitz, III on the death penalty case of State v. Jeffrey Jones which must be filed with this Court on or before Friday, May 16, 2008.

ORIGINAL

RECEIVED
APR 23 2008
S.C. SUPREME COURT

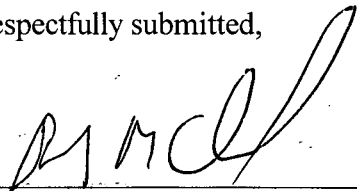
3. Counsel is keenly aware of Justice Waller's order on extensions in death penalty cases. However, due to counsel's present heavy caseload as listed partly above, this request is made out of necessity, and not for purposes of delay.

4. Counsel for appellant would respectfully request a final extension of a final ten days in which to serve and file the initial reply brief of appellant.

5. As indicated by signature below, counsel for the state graciously does not oppose this request.

WHEREFORE, counsel for appellant would respectfully request a final extension of ten days in which to serve and file the initial reply brief of appellant in the above-referenced capital case.

Respectfully submitted,

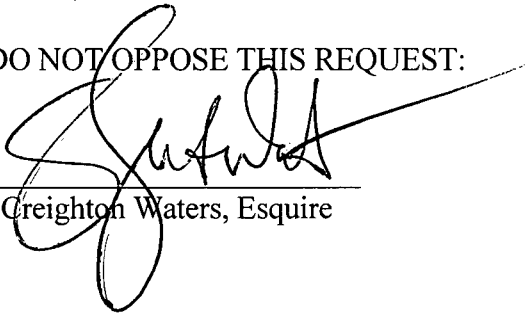


Robert M. Dudek
Deputy Chief Appellate Defender for Capital Appeals

Attorney for Appellant

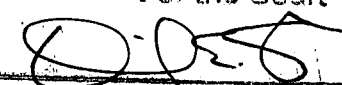
April 23, 2008

I DO NOT OPPOSE THIS REQUEST:

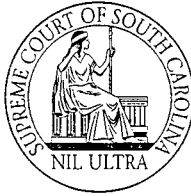


S. Creighton Waters, Esquire

GRANTED.

Jean H. Toal C.J.
For the Court
By 
Clerk

April 24, 2008



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

April 16, 2008

Deputy Chief Appellate Defender for Capital Appeals
Robert M. Dudek
South Carolina Commission on Indigent Defense
P O Box 11589
Columbia, SC 29211

Re: The State v. Mercer, Kevin

Dear Counsel:

The following Order has been endorsed on your Petition for Extension to File the Initial Reply Brief in the above entitled case on appeal.

“Granted.

Jean H. Toal C.J.
For the Court

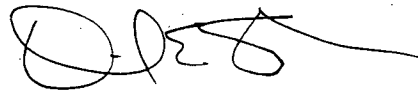
By s/ Daniel E. Shearouse
Clerk

April 16, 2008.”

Please be advised that the initial reply brief should be served and filed on or before April 24, 2008.

Deputy Chief Appellate Defender for
Capital Appeals Robert M. Dudek
Page Two
April 16, 2008

Very truly yours,

A handwritten signature in black ink, appearing to be "R. M. Dudek", with a long horizontal flourish extending to the right.

CLERK

DES/dmh

cc: Assistant Attorney General S. Creighton Waters

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

Appeal from Lexington County

Honorable John C. Few, Circuit Court Judge

THE STATE,

RECEIVED

RESPONDENT, APR 14 2008

V.

S.C. SUPREME COURT

KEVIN MERCER,

APPELLANT

PETITION FOR EXTENSION TO FILE
THE INITIAL REPLY BRIEF

In support of the petition for extension to file the initial brief of appellant, counsel for appellant would respectfully show this Court the following special circumstances to justify a ten day extension:

1. The initial reply brief of appellant is due to be served and file with this Court on today's date, having been extended by prior orders of this Court. Appellant was convicted of murder in Greenville County and sentenced to death.

2. Counsel is out of the office today due to his elderly mother having emergency hip surgery after falling last night in the hospital. Counsel was out of the office most of the day on Friday due to his elderly mother having emergency gallbladder surgery. Counsel filed a brief in the case of State v. Lemond Holland on Friday, April 11, 2008 with the Court of Appeals Counsel had oral argument on Tuesday, April 8, 2008 before the Court of Appeals in the murder case of State v. Hercules Mitchell. Counsel filed a merit brief in the murder case of State v. John Brayboy with the Court of Appeals the day before, Monday, April 7, 2008. Counsel has been

working on the death penalty record on appeal in the case of State v. Charles Christopher Williams which is due in this Court today. Counsel also is working on the death penalty case of State v. Jeffrey Jones with co-counsel, Chief Attorney Joseph L. Savitz, III.

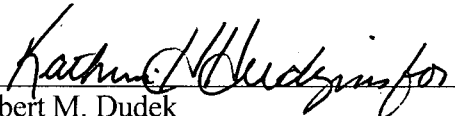
3. Counsel is keenly aware of Justice Waller's order on extensions in death penalty cases. However, due to counsel's present heavy caseload as listed partly above, this request is made out of necessity, and not for purposes of delay.

4. Counsel for appellant would respectfully request an extension of ten days in which to serve and file the initial reply brief of appellant.

5. As indicated by signature below, counsel for the state graciously does not oppose this request.

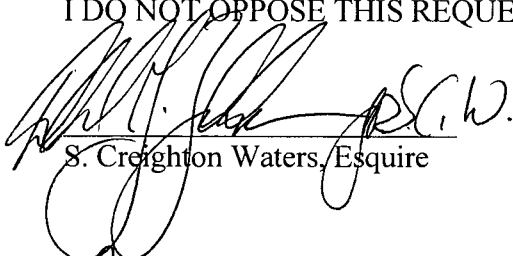
WHEREFORE, counsel for appellant would respectfully request an extension of ten days in which to serve and file the initial reply brief of appellant in the above-referenced capital case.

Respectfully submitted,

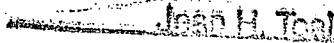
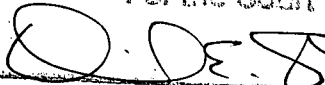

Robert M. Dudek
Deputy Chief Appellate Defender for Capital Appeals
Attorney for Appellant

April 14, 2008

I DO NOT OPPOSE THIS REQUEST:


S. Creighton Waters, Esquire

April 16, 2008

GRANTED

Joan H. Teal
For the Court
By 
Clerk

The Supreme Court of South Carolina

The State,

Respondent,

v.

Kevin Mercer,

Appellant.

The Honorable John C. Few
Lexington County
Trial Court Case No. 2003-GS-32-00409

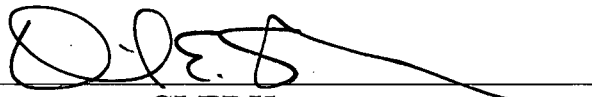
ORDER

For good cause having been shown, the time for serving and filing the Initial Reply Brief in the above entitled matter is hereby extended until April 14, 2008.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



CLERK

Columbia, South Carolina

April 4, 2008

cc: Deputy Chief Appellate Defender for Capital Appeals
Robert M. Dudek
Melissa Jane Reed Kimbrough, Esquire
Assistant Attorney General S. Creighton Waters

Original

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

APR - 3 2008

Appeal from Lexington County

Honorable John C. Few, Circuit Court Judge

S.C. SUPREME COURT

THE STATE,

RESPONDENT,

V.

KEVIN MERCER,

APPELLANT

PETITION FOR EXTENSION TO FILE
THE INITIAL REPLY BRIEF

In support of the petition for extension to file the initial brief of appellant, counsel for appellant would respectfully show this Court the following special circumstances to justify a ten day extension:

1. The initial reply brief of appellant is due to be served and file with this Court on today's date, having been previously extended by one prior order of this Court. Appellant was convicted of murder in Greenville County and sentenced to death.

2. Counsel filed a petition for writ of certiorari with this Court on Wednesday, April 2, 2008 in the murder case of State v. Carmen Rice, 375 S.C. 302, 652 S.E.2d 409 (2007). Counsel filed a petition for rehearing in the case of State v. Joseph Dozier with this Court on Monday, March 31, 2008. Counsel also filed a reply to the state's return in the death penalty PCR case of Thomas Ivey v. State on Thursday, March 27, 2008. Counsel is also working on the death penalty case of State v. Jeffrey Jones with Chief Attorney Joseph L. Savitz, III.

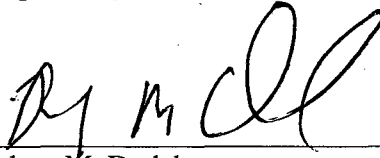
3. Counsel is keenly aware of Justice Waller's order on extensions in death penalty cases. However, due to counsel's present heavy caseload as listed partly above, this request is made out of necessity, and not for purposes of delay.

4. Counsel for appellant would respectfully request an extension of ten days in which to serve and file the initial reply brief of appellant.

5. As indicated by signature below, counsel for the state graciously does not oppose this request.

WHEREFORE, counsel for appellant would respectfully request an extension of ten days in which to serve and file the initial reply brief of appellant in the above-referenced capital case.

Respectfully submitted,

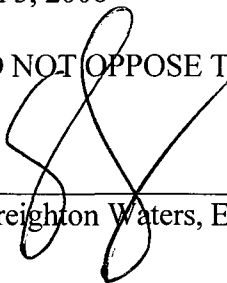


Robert M. Dudek
Deputy Chief Appellate Defender for Capital Appeals

Attorney for Appellant

April 3, 2008

I DO NOT OPPOSE THIS REQUEST:



S. Creighton Waters, Esquire

The Supreme Court of South Carolina

The State,

Respondent,

v.

Kevin Mercer,

Appellant.

The Honorable John C. Few
Lexington County
Trial Court Case No. 2003-GS-32-00409

ORDER

For good cause having been shown, the time for serving and filing the initial reply brief in the above entitled matter is hereby extended until April 3, 2008.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY *Zuenda I. Stealy*
Chief Deputy CLERK

Columbia, South Carolina

March 25, 2008

cc: Deputy Chief Appellate Defender for Capital Appeals
Robert M. Dudek
Assistant Attorney General S. Creighton Waters



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

ORIGINAL

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332

Joseph L. Savitz, III, Chief Attorney
Wanda H. Carter, Deputy Chief Attorney

Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1343
Facsimile: (803) 734-1397

March 24, 2008

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

RECEIVED

MAR 24 2008

S.C. SUPREME COURT

Re: The State v. Kevin Mercer (capital case)

Dear Mr. Shearouse:

The initial reply brief of appellant in the above referenced case is due to be served and filed today. However, because of my current caseload, I have been unable to complete this brief for service. For that reason, I would respectfully request an extension of ten days in which to serve and file this initial reply brief.

By copy of this letter, I am informing S. Creighton Waters, Esquire, of the Attorney General's Office, of my request.

Thank you for your assistance in this matter. Should you have any questions, please do not hesitate to contact me.

Sincerely,

Robert M. Dudek
Deputy Chief Attorney for Capital Appeals

RMD/mwl

cc: S. Creighton Waters Esquire



HENRY McMASTER
ATTORNEY GENERAL

March 14, 2008

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

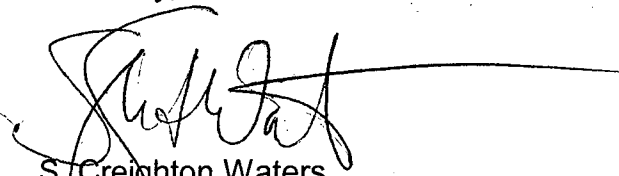
Re: The State v. Kevin Mercer
Appeal from Lexington County

Dear Mr. Shearouse:

Enclosed please find the original **Initial Brief of Respondent and Designation of Matter**, both dated March 14, 2008, along with proof of service in the above-referenced case.

Thank you for your cooperation in this matter.

Sincerely,



S. Creighton Waters
Assistant Attorney General

SCW/ap
Enclosures

cc: Robert M. Dudek, Esquire
Melissa J. Kimbrough, Esquire
Honorable Donald V. Myers
Sandi Wofford, Victims' Services

RECEIVED

MAR 17 2008

SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

MAR 17 2008

Appeal from Lexington County
John C. Few, Circuit Court Judge

S.C. SUPREME COURT

THE STATE,

Respondent,

v.

KEVIN MERCER,

Appellant.

PROOF OF SERVICE

I, S. Creighton Waters, Counsel for Respondent, certify that I have this date **served the Initial Brief of Respondent and Designation of Matter**, both dated March 14, 2008, on Appellant by depositing two copies of the same in the United States mail, first class postage prepaid, addressed to his attorneys of record:

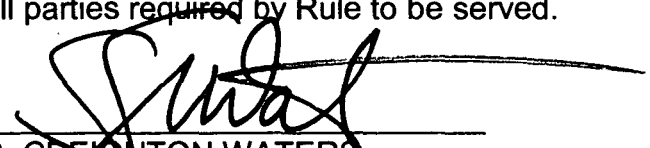
Robert M. Dudek, Esquire
South Carolina Office of Appellate Defense
P.O. Box 11589
Columbia, South Carolina 29211

and I certify that I sent three copies of the **Initial Brief of Respondent and Designation of Matter** by depositing two copies of the same in the United States mail, first class postage prepaid upon:

Melissa Jane Reed Kimbrough, Esquire
Kimbrough and Longshore
1811 Pickens Street
Columbia, South Carolina 29201-2630

I further certify that I have served all parties required by Rule to be served.

This 14th day of March, 2008.



S. CREIGHTON WATERS
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
ATTORNEY FOR RESPONDENT

The Supreme Court of South Carolina

The State,

Respondent,

v.

Kevin Mercer,

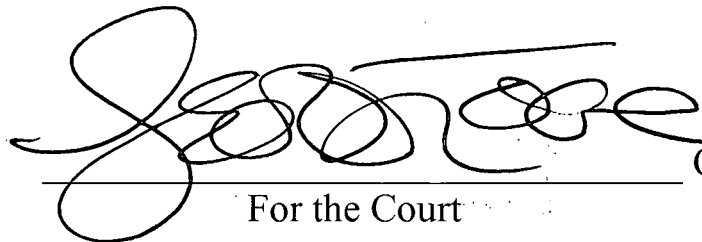
Appellant.

The Honorable John C. Few
Lexington County
Trial Court Case No. 2003-GS-32-00409

ORDER

For good cause having been shown, the time for serving and filing the Initial Brief of Respondent and Designation of Matter in the above entitled matter is hereby extended until March 14, 2008. No further extensions of time will be granted to serve and file the Initial Brief of Respondent and Designation of Matter in this case.

IT IS SO ORDERED.



C.J.
For the Court

Columbia, South Carolina

February 14, 2008

cc: Deputy Chief Attorney for Capital Appeals Robert M. Dudek
Assistant Attorney General S. Creighton Waters



HENRY McMASTER
ATTORNEY GENERAL

February 13, 2008

RECEIVED

FEB 13 2008

S.C. SUPREME COURT

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

Re: The State v. Kevin J. Mercer
Appeal from Lexington County

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the **Motion for an Extension of Time to File Initial Brief of Respondent and Designation of Matter**, dated February 13, 2008, together with the Certificate of Service, in the above-captioned case.

Thank you for your assistance in this matter. Please call this office if you need any additional information.

Sincerely,

S. Creighton Waters
Assistant Attorney General

cc: Robert M. Dudek, Esquire

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

Appeal from Lexington County
John C. Few, Circuit Court Judge

RECEIVED

FEB 13 2008

THE STATE,

Respondent,

S.C. SUPREME COURT

v.

KEVIN J. MERCER,

Appellant.

**MOTION FOR EXTENSION OF TIME TO
FILE INITIAL BRIEF OF RESPONDENT
AND DESIGNATION OF MATTER**

The Respondent above-named hereby makes a motion to this Court to extend the time for filing the Initial Brief of Respondent and Designation of Matter from January 14, 2008 for a period of thirty (30) days up to and including February 13, 2008. The Respondent had made an initial request on October 15, 2007, which this Court granted on October 16, 2007. The respondent made a second request on November 14, 2007, which this court granted on November 16, 2007. The respondent made a third request on December 14, 2007, which this Court granted on December 18, 2007. The respondent made a fourth request on January 14, 2008, which this Court granted also.

This extension is due to counsel's caseload and commitments in State and Federal Court. For example, counsel is presently working on a pleading due in federal court. Plus,

in addition to various other federal matters, counsel must over the next few weeks complete the Brief in Opposition in the Christopher Pittman case before the United States Supreme Court, and has two oral arguments. Further, counsel has been absent for the past week due to illness. And, of course, the present case is a capital case as well with a number of issues raised and a very large transcript.

As indicated by his signature below, counsel for Appellant consents to this request.

Wherefore Respondent respectfully requests an extension of a period of time of thirty (30) days up to and including March 14, 2008, to complete this brief.

Respectfully submitted,

HENRY D. McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

S. CREIGHTON WATERS
Assistant Attorney General

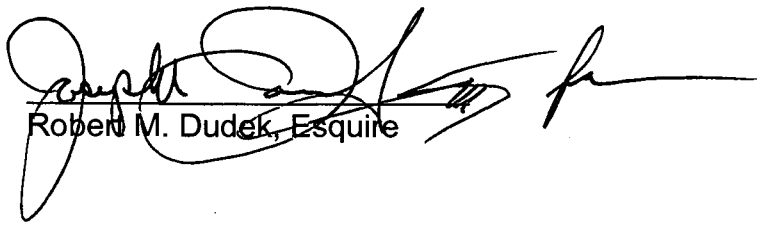
ATTORNEYS FOR RESPONDENT

By:  _____

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

February 13, 2008.

I CONSENT:



Robert M. Dudek, Esquire

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

Appeal from Lexington County
John C. Few, Circuit Court Judge

THE STATE,

Respondent,

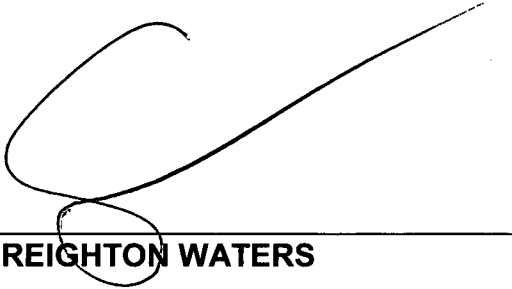
v.

KEVIN J. MERCER,

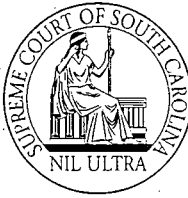
Appellant.

CERTIFICATE OF SERVICE

I, S. Creighton Waters, hereby certify that I have served Respondent's ***Motion for Extension of Time to File Initial Brief of Respondent and Designation of Matter***, on Robert M. Dudek, Esquire, South Carolina Office of Appellate Defense, 15589, Columbia, South Carolina 29211 by depositing a copy in the United States Mail, postage prepaid this 13th day of February, 2008.



S. CREIGHTON WATERS



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

January 15, 2008

Assistant Attorney General S. Creighton Waters
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

Re: The State v. Mercer, Kevin

Dear Counsel:

The following Order has been endorsed on your Motion for Extension of Time to File Initial Brief of Respondent and Designation of Matter in the above entitled case on appeal.

“Granted.

Jean H. Toal C.J.
For the Court

By s/ Daniel E. Shearouse
Clerk

January 15, 2008.”

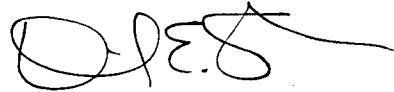
Please be advised that the Initial Brief of Respondent and Designation of Matter should be served and filed on or before February 13, 2008.

Assistant Attorney General S. Creighton Waters

Page Two

January 15, 2008

Very truly yours,

A handwritten signature in black ink, consisting of the letters 'DES' followed by a long, horizontal, slightly wavy line extending to the right.

CLERK

DES/dmh

cc: Melissa Jane Reed Kimbrough, Esquire
Deputy Chief Attorney for Capital Appeals Robert M. Dudek



HENRY McMASTER
ATTORNEY GENERAL

RECEIVED

JAN 14 2008

January 14, 2008

S.C. SUPREME COURT

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

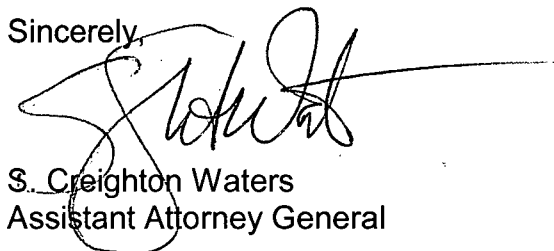
Re: The State v. Kevin J. Mercer
Appeal from Lexington County

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the **Motion for an Extension of Time to File Initial Brief of Respondent and Designation of Matter**, dated January 14, 2008, together with the Certificate of Service, in the above-captioned case.

Thank you for your assistance in this matter. Please call this office if you need any additional information.

Sincerely,



S. Creighton Waters
Assistant Attorney General

cc: Robert M. Dudek, Esquire

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

RECEIVED

JAN 14 2008

Appeal from Lexington County
John C. Few, Circuit Court Judge

S.C. SUPREME COURT

THE STATE,

Respondent,

v.

KEVIN J. MERCER,

Appellant.

**MOTION FOR EXTENSION OF TIME TO
FILE INITIAL BRIEF OF RESPONDENT
AND DESIGNATION OF MATTER**

The Respondent above-named hereby makes a motion to this Court to extend the time for filing the Initial Brief of Respondent and Designation of Matter from January 14, 2008 for a period of thirty (30) days up to and including February 13, 2008. The Respondent had made an initial request on October 15, 2007, which this Court granted on October 16, 2007. The respondent made a second request on November 14, 2007, which this court granted on November 16, 2007. The respondent made a third request on December 14, 2007, which this Court granted also.

This extension is due to counsel's caseload and commitments in State and Federal Court. For example, counsel is presently working on a pleading for federal court, filed a pleading in federal court this past Friday from a case which had a record over 1000 pages

long, and has this week two out of town hearings in capital PCRs. And, of course, the present case is a capital case as well with a number of issues raised and a very large transcript.

Respondent's counsel are cognizant of this Court's policy on extensions in capital cases and will do all to ensure that no further extensions are requested. As indicated by his signature below, counsel for Appellant consents to this request.

Wherefore Respondent respectfully requests an extension of a period of time of thirty (30) days up to and including February 13, 2008, to complete this brief.

Respectfully submitted,

HENRY D. McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

S. CREIGHTON WATERS
Assistant Attorney General

ATTORNEYS FOR RESPONDENT

By: _____

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

GRANTED.

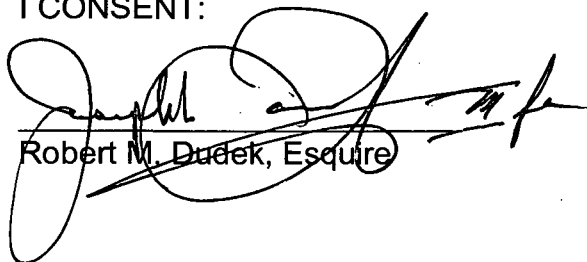
Jean H. Toal C.J.
For the Court

By: _____
Clerk

January 15, 2008

January 14, 2008.

I CONSENT:

A handwritten signature in black ink, appearing to read "Robert M. Dudek", is written over a horizontal line. The signature is stylized with large loops and a long horizontal stroke extending to the right.

Robert M. Dudek, Esquire

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Lexington County
John C. Few, Circuit Court Judge

THE STATE,

Respondent,

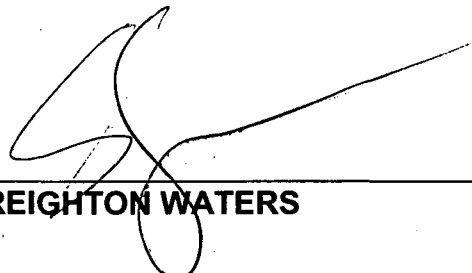
v.

KEVIN J. MERCER,

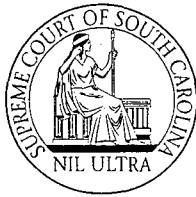
Appellant.

CERTIFICATE OF SERVICE

I, S. Creighton Waters, hereby certify that I have served Respondent's ***Motion for Extension of Time to File Initial Brief of Respondent and Designation of Matter***, on Robert M. Dudek, Esquire, South Carolina Office of Appellate Defense, 15589, Columbia, South Carolina 29211 by depositing a copy in the United States Mail, postage prepaid this 14th day of January, 2008.



S. CREIGHTON WATERS



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

December 18, 2007

Assistant Attorney General S. Creighton Waters
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

Re: The State v. Mercer, Kevin

Dear Counsel:

The following Order has been endorsed on your Motion for Extension of Time to File Initial Brief of Respondent and Designation of Matter in the above entitled case on appeal.

“Granted.

Jean H. Toal C.J.
For the Court

By s/ Daniel E. Shearouse
Clerk

December 18, 2007.”

Please be advised that the Initial Brief of Respondent and Designation of Matter should be served and filed on or before January 14, 2008.

Assistant Attorney General S. Creighton Waters
Page Two
December 18, 2007

Very truly yours,



CLERK

DES/dmh

cc: Melissa Jane Reed Kimbrough, Esquire
Deputy Chief Attorney for Capital Appeals Robert M. Dudek

HENRY McMASTER
ATTORNEY GENERAL



RECEIVED

DEC 14 2007

S.C. SUPREME COURT

December 14, 2007

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

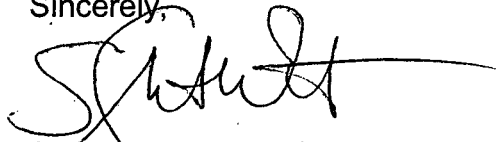
Re: The State v. Kevin J. Mercer
Appeal from Lexington County

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the **Motion for an Extension of Time to File Initial Brief of Respondent and Designation of Matter**, dated December 14, 2007, together with the Certificate of Service, in the above-captioned case.

Thank you for your assistance in this matter. Please call this office if you need any additional information.

Sincerely,



S. Creighton Waters
Assistant Attorney General

cc: Robert M. Dudek, Esquire

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

Appeal from Lexington County
John C. Few, Circuit Court Judge

RECEIVED

DEC 14 2007

S.C. SUPREME COURT

THE STATE,

Respondent,

v.

KEVIN J. MERCER,

Appellant.

**MOTION FOR EXTENSION OF TIME TO
FILE INITIAL BRIEF OF RESPONDENT
AND DESIGNATION OF MATTER**

The Respondent above-named hereby makes a motion to this Court to extend the time for filing the Initial Brief of Respondent and Designation of Matter from November 14, 2007 for a period of thirty (30) days up to and including January 14, 2007. The Respondent had made an initial request on October 15, 2007, which this Court granted on October 16, 2007. The respondent made a second request on November 14, 2007, which this court granted on November 16, 2007.

This extension is due to counsel's caseload and commitments in State and Federal Court. For example, counsel is presently working on a direct appeal from a murder case with a transcript over 2000 pages which counsel has had to request an extension through the weekend to complete. And, of course, the present case is a capital case as well with

a number of issues raised and a very large transcript.

Respondent's counsel are cognizant of this Court's policy on extensions in capital cases and will do all to ensure that no further extensions are requested. As indicated by his signature below, counsel for Appellant consents to this request.

Wherefore Respondent respectfully requests an extension of a period of time of thirty (30) days up to and including January 14, 2007 to complete this brief.

Respectfully submitted,

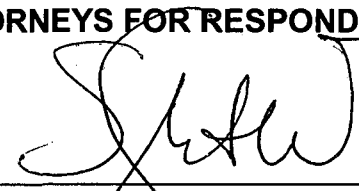
HENRY D. McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

S. CREIGHTON WATERS
Assistant Attorney General

ATTORNEYS FOR RESPONDENT

By: 

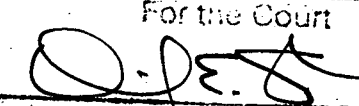
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

December 14, 2007.

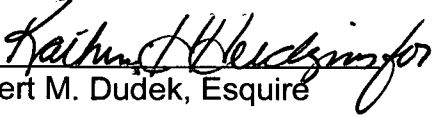
I CONSENT:


for Robert Dudley

GRANTED.

 **C.J.**
For the Court
By: 
Clerk

December 18, 2007


Robert M. Dudek, Esquire

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

Appeal from Lexington County
John C. Few, Circuit Court Judge

THE STATE,

Respondent,

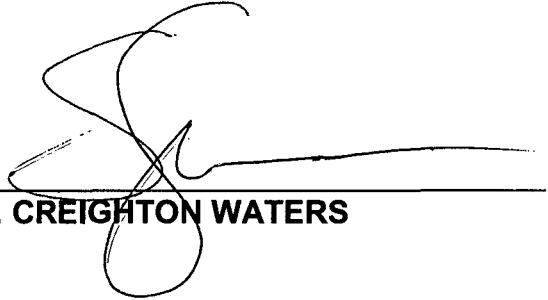
v.

KEVIN J. MERCER,

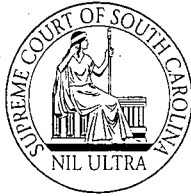
Appellant.

CERTIFICATE OF SERVICE

I, S. Creighton Waters, hereby certify that I have served Respondent's ***Motion for Extension of Time to File Initial Brief of Respondent and Designation of Matter,*** on Robert M. Dudek, Esquire, South Carolina Office of Appellate Defense, 15589, Columbia, South Carolina 29211 by depositing a copy in the United States Mail, postage prepaid this 14th day of December, 2007.



S. CREIGHTON WATERS



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

November 16, 2007

Assistant Attorney General S. Creighton Waters
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

Re: The State v. Mercer, Kevin

Dear Counsel:

The following Order has been endorsed on your Motion for Extension of Time to File Initial Brief of Respondent and Designation of Matter in the above entitled case on appeal.

“Granted.

Jean H. Toal C.J.
For the Court

By s/ Daniel E. Shearouse
Clerk

November 16, 2007.”

Please be advised that the Initial Brief of Respondent and Designation of Matter should be served and filed on or before December 14, 2007.

Assistant Attorney General
S. Creighton Waters
Page Two
November 16, 2007

Very truly yours,

Daniel E. Shearouse
DS

CLERK

DES/dmh

cc: Melissa Jane Reed Kimbrough, Esquire
Deputy Chief Appellate Defender for Capital Appeals
Robert M. Dudek



HENRY McMASTER
ATTORNEY GENERAL

RECEIVED

NOV 14 2007

November 14, 2007

S.C. SUPREME COURT

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

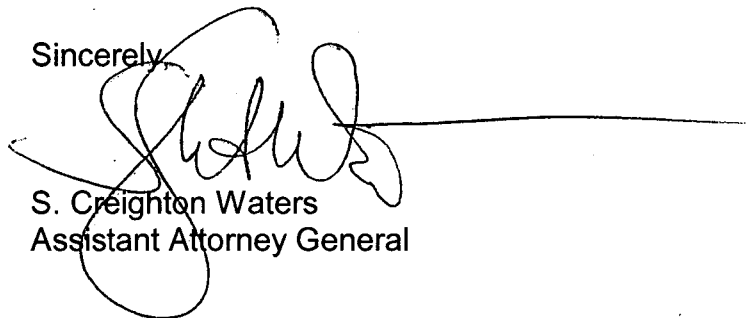
Re: The State v. Kevin J. Mercer
Appeal from Lexington County

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the **Motion for an Extension of Time to File Initial Brief of Respondent and Designation of Matter**, dated November 14, 2007, together with the Certificate of Service, in the above-captioned case.

Thank you for your assistance in this matter. Please call this office if you need any additional information.

Sincerely,



S. Creighton Waters
Assistant Attorney General

cc: Robert M. Dudek, Esquire

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

Appeal from Lexington County
John C. Few, Circuit Court Judge

RECEIVED

NOV 14 2007

S.C. SUPREME COURT

THE STATE,

Respondent,

v.

KEVIN J. MERCER,

Appellant.

**MOTION FOR EXTENSION OF TIME TO
FILE INITIAL BRIEF OF RESPONDENT
AND DESIGNATION OF MATTER**

The Respondent above-named hereby makes a motion to this Court to extend the time for filing the Initial Brief of Respondent and Designation of Matter from November 14, 2007 for a period of thirty (30) days up to and including December 14, 2007. The Respondent had made an initial request on October 15, 2007, which this Court granted on October 16, 2007.

This extension is due to counsel's caseload and commitments in State and Federal Court. For example, counsel today had an oral argument in a capital case before this Court. And, of course, the present case is a capital case as well with a number of issues raised and a very large transcript.

Wherefore Respondent respectfully requests an extension of a period of time of thirty (30) days up to and including December 14, 2007 to complete this brief.

Respectfully submitted,

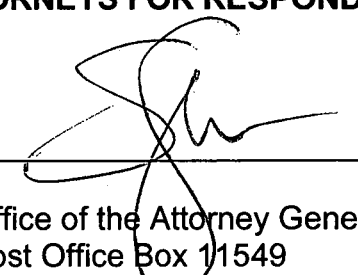
HENRY D. McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

S. CREIGHTON WATERS
Assistant Attorney General

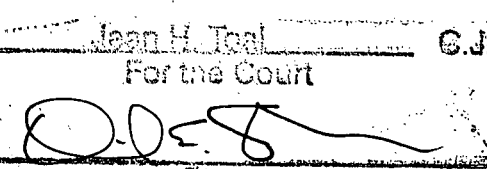
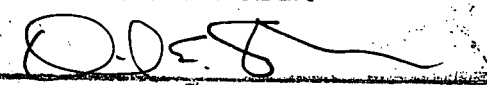
ATTORNEYS FOR RESPONDENT

By: 

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

November 14, 2007.

I consent
Robert Dudek
Robert Dudek

GRANTED

Jean H. Toal G.J.
For the Court
By 
Clerk

November 14, 2007

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Lexington County
John C. Few, Circuit Court Judge

RECEIVED

NOV 14 2007

S.C. SUPREME COURT

THE STATE,

Respondent,

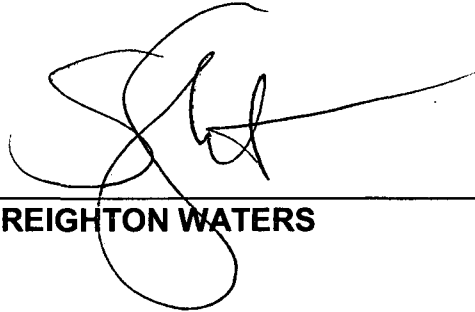
v.

KEVIN J. MERCER,

Appellant.

CERTIFICATE OF SERVICE

I, S. Creighton Waters, hereby certify that I have served Respondent's ***Motion for Extension of Time to File Initial Brief of Respondent and Designation of Matter***, on Robert M. Dudek, Esquire, South Carolina Office of Appellate Defense, 15589, Columbia, South Carolina 29211 by depositing a copy in the United States Mail, postage prepaid this 14th day of November, 2007.



S. CREIGHTON WATERS

The Supreme Court of South Carolina

The State,

Respondent

v.

Kevin Mercer,

Appellant.

The Honorable John C. Few
Lexington County
Trial Court Case No. 2003-GS-32-00409

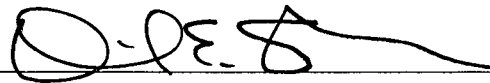
ORDER

For good cause having been shown, the time for serving and filing the Initial Brief of Respondent and Designation of Matter in the above entitled matter is hereby extended until November 14, 2007.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



CLERK

Columbia, South Carolina

October 16, 2007

cc: Melissa Jane Reed Kimbrough, Esquire
Assistant Attorney General S. Creighton Waters
Deputy Chief Attorney for Capital Appeals Robert M. Dudek



HENRY McMASTER
ATTORNEY GENERAL

October 15, 2007

RECEIVED
OCT 15 2007
S.C. SUPREME COURT

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

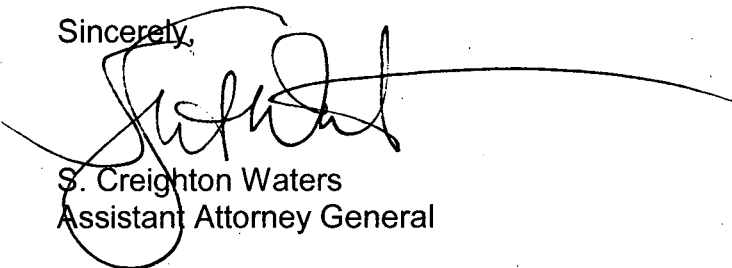
Re: The State v. Kevin J. Mercer
Appeal from Lexington County

Dear Mr. Shearouse:

The initial brief of respondent in the above-entitled action is due to be filed and served today, October 15, 2007. Due to my heavy caseload, I will not be able to complete this initial brief in a timely fashion. For this reason, I respectfully request an extension of thirty (30) days in which to file the initial brief.

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

Sincerely,



S. Creighton Waters
Assistant Attorney General

cc: Robert M. Dudek, Esquire

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Lexington County
John C. Few, Circuit Court Judge

THE STATE,

RESPONDENT,

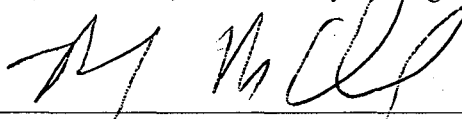
V.

KEVIN MERCER,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Donald J. Zelenka, Esquire, Assistant Deputy Attorney General, Office of the Attorney General, Rembert Dennis Building, 1000 Assembly Street, Rm. 519, Columbia, SC 29201, this 29th day of August, 2007.



Robert M. Dudek
Deputy Chief Attorney for Capital Appeals

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 29th day of August, 2007.


Notary Public for South Carolina

My Commission Expires: November 16, 2008.



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

July 31, 2007

Deputy Chief Attorney for Capital Appeals Robert M. Dudek
South Carolina Commission on Indigent Defense
P O Box 11589
Columbia, SC 29211

Re: The State v. Mercer, Kevin

Dear Counsel:

The following Order has been endorsed on your Petition for Extension to File the Initial Brief and Designation of Matter in the above entitled case on appeal.

“Granted.

Jean H. Toal C.J.
For the Court

By s/ Daniel E. Shearouse
Clerk

July 31, 2007.”

Please be advised that the Initial Brief of Appellant and Designation of Matter should be served and filed on or before August 29, 2007.

Deputy Chief Attorney for Capital Appeals

Robert M. Dudek

Page Two

July 31, 2007

Very truly yours,

A handwritten signature in black ink, appearing to read 'R. M. Dudek', followed by a long horizontal flourish.

CLERK

DES/dmh

cc: Assistant Deputy Attorney General Donald J. Zelenka

STATE OF SOUTH CAROLINA

ORIGINAL

IN THE SUPREME COURT

Appeal from Lexington County

Honorable John C. Few, Circuit Court Judge

RECEIVED

JUL 30 2007

S.C. SUPREME COURT

THE STATE,

RESPONDENT,

V.

KEVIN MERCER,

APPELLANT

PETITION FOR EXTENSION TO FILE
THE INITIAL BRIEF AND DESIGNATION
OF MATTER

In support of the petition for extension to file the initial brief of appellant, counsel for appellant would respectfully show this Court the following special circumstances to justify a final thirty day extension:

1. The initial brief of appellant is due to be served and file with this Court on today's date, having been previously extended by prior orders of this Court. Appellant was convicted of murder in Greenville County and sentenced to death.

2. Counsel is working on a motion, after working with the experts that he hopes will conclude the death penalty competency to waive appeals and be executed case of State v. Quincy Allen with a hearing before the Honorable John Kittredge in the near future. Counsel also filed a brief with this Court in the death penalty case of State v. Charles Williams on July 11, 2007. Counsel is today filing a brief with the Court of Appeals in the murder case of State v. Morris Sullivan which ended in a guilty verdict of voluntary manslaughter. Counsel also filed briefs with

the Court of Appeals in State v. Raymond Young and State v. Darian Meggett on Thursday, July 26, 2007. Trial counsel, Lisa Kimbrough, recently became, on a pro bono basis, second counsel on this case, and this final thirty day extension will assist both of us in finalizing the brief. Counsel also has an extremely heavy workload, and he also has oversight responsibilities for this office on pending death penalty cases.

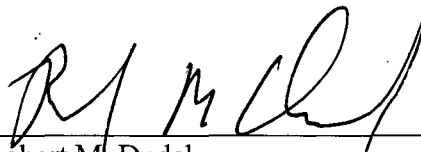
3. Counsel is keenly aware of Justice Waller's order on extensions in death penalty cases. However, due to counsel's present heavy caseload as listed partly above, this request is made out of necessity, and not for purposes of delay.

4. Counsel for appellant would respectfully request a final extension of thirty days in which to serve and file the initial brief of appellant.

5. Counsel has discussed this extension request with Donald J. Zelenka, and as indicated by signature below, Mr. Zelenka graciously does not oppose this request.

WHEREFORE, counsel for appellant would respectfully request a final extension of thirty days in which to serve and file the initial brief of appellant in the above-referenced capital case.

Respectfully submitted,

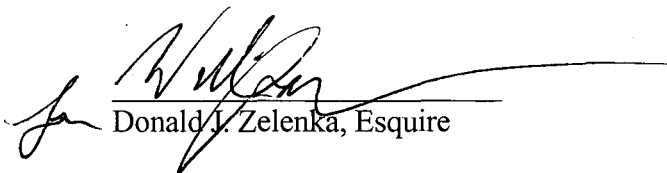


Robert M. Dudek
Deputy Chief Attorney for Capital Appeals

Attorney for Appellant

July 30, 2007

I DO NOT OPPOSE THIS REQUEST:

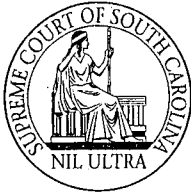


Donald J. Zelenka, Esquire

GRANTED.

Josh H. Teal
For the Court
Clerk

July 31, 2007



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

July 3, 2007

Deputy Chief Attorney for Capital Appeals Robert M. Dudek
South Carolina Commission on Indigent Defense
P O Box 11589
Columbia, SC 29211

Re: The State v. Mercer, Kevin

Dear Counsel:

The following Order has been endorsed on your Petition for Extension to File the Initial Brief and Designation of Matter in the above entitled case on appeal.

“Granted.

Jean H. Toal C.J.
For the Court

By s/ Daniel E. Shearouse
Clerk

July 3, 2007.”

Please be advised that the Appellant’s Initial Brief and Designation of Matter should be served and filed on or before July 30, 2007.

Very truly yours,


CLERK

DES/dmh

Deputy Chief Attorney for Capital Appeals Robert M. Duden

Page Two

July 3, 2007

cc: Assistant Deputy Attorney General Donald J. Zelenka

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Lexington County

Honorable John C. Few, Circuit Court Judge

RECEIVED

JUN 29 2007

S.C. SUPREME COURT

THE STATE,

RESPONDENT,

V.

KEVIN MERCER,

APPELLANT

PETITION FOR EXTENSION TO FILE
THE INITIAL BRIEF AND DESIGNATION
OF MATTER

In support of the petition for extension to file the initial brief of appellant, counsel for appellant would respectfully show this Court the following special circumstances to justify a thirty day extension:

1. The initial brief of appellant is due to be served and file with this Court on today's date, having been previously extended by two prior orders of this Court. Appellant was convicted of murder in Greenville County and sentenced to death.

2. Counsel is filing a petition for a writ of certiorari in the United States Supreme Court in the death penalty case of State v. Marion Alexander Lindsey and a petition for a writ of certiorari in the United States Supreme Court in the death penalty case of State v. James Nathaniel Bryant, III today or Monday at the latest. Counsel is also working on the death penalty cases of State v. Charles Christopher Williams, and also the competency to be executed remand case of State v. Quincy Allen, as well as other cases in his heavy caseload. Counsel also filed an initial brief in the case of

State v. Laurie Walling and an initial brief in the case of State v. Frank Curtis Dawson with the Court of Appeals on Thursday, June 29, 2007.

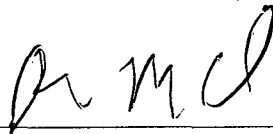
3. Counsel is keenly aware of Justice Waller's order on extensions in death penalty cases. However, due to counsel's present heavy caseload as listed partly above, this request is made out of necessity, and not for purposes of delay.

4. Counsel for appellant would respectfully request an extension of thirty days in which to serve and file the initial brief of appellant.

5. As indicated by signature below, counsel for the state graciously does not oppose this request.

WHEREFORE, counsel for appellant would respectfully request an extension of thirty days in which to serve and file the initial brief of appellant in the above-referenced capital case.

Respectfully submitted,



Robert M. Dudek
Deputy Chief Attorney for Capital Appeals

Attorney for Appellant

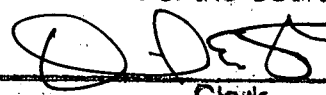
June 29, 2007

I DO NOT OPPOSE THIS REQUEST:

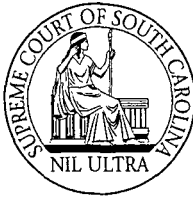


Donald J. Zelenka, Esquire

GRANTED.

Jean H. Toal C.J.
For the Court
By 
Clerk

July 3, 2007



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

May 31, 2007

Deputy Chief Attorney for Capital Appeals Robert M. Dudek
South Carolina Commission on Indigent Defense
P O Box 11589
Columbia, SC 29211

Re: The State v. Mercer, Kevin

Dear Counsel:

The following Order has been endorsed on your Petition for Extension of Time to File the Initial Brief and Designation of Matter in the above entitled case on appeal.

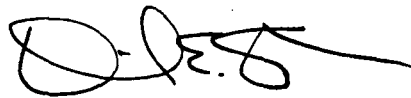
"Granted.

s/ Jean H. Toal C.J.
For the Court

May 31, 2007."

Please be advised that the Appellant's Initial Brief and Designation of Matter should be served and filed on or before June 29, 2007.

Very truly yours,


CLERK

DES/dmh

Deputy Chief Attorney for Capital Appeals

Robert M. Dudek

Page Two

May 31, 2007

cc: Assistant Deputy Attorney General Donald J. Zelenka

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

MAY 30 2007

Appeal from Lexington County

S.C. SUPREME COURT

Honorable John C. Few, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KEVIN MERCER,

APPELLANT

PETITION FOR EXTENSION TO FILE
THE INITIAL BRIEF AND DESIGNATION
OF MATTER

In support of the petition for extension to file the initial brief of appellant, counsel for appellant would respectfully show this Court the following special circumstances to justify a thirty day extension:

1. The initial brief of appellant is due to be served and file with this Court on today's date, having been previously extended by one prior order of this Court. Appellant was convicted of murder in Greenville County and sentenced to death.

2. Counsel is presently out of the office with his son on a college trip to Lexington, VA. Counsel has also been out of the office on sick leave. Counsel filed a petition for rehearing with this Court on Tuesday, May 29, 2007, in the death penalty case of State v. Fredrick Antonio Evins. Counsel filed a petition for writ of certiorari with the Supreme Court on Thursday, May 24, 2007 in the case of State v. Marquis Harrison. Counsel is further working on the death

penalty cases of State v. Charles Christopher Williams and also the competency to be executed remand case of State v. Quincy Allen, as well as other cases in his heavy caseload.

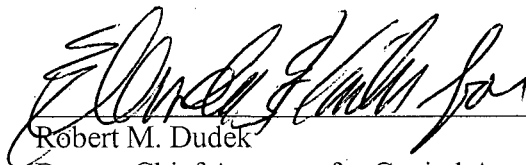
3. Counsel is keenly aware of Justice Waller's order on extensions in death penalty cases. However, due to counsel's present heavy caseload as listed partly above, this request is made out of necessity, and not for purposes of delay.

4. Counsel for appellant would respectfully request an extension of thirty days in which to serve and file the initial brief of appellant.

5. As indicated by signature below, counsel for the state graciously does not oppose this request.

WHEREFORE, counsel for appellant would respectfully request an extension of thirty days in which to serve and file the initial brief of appellant in the above-referenced capital case.

Respectfully submitted,

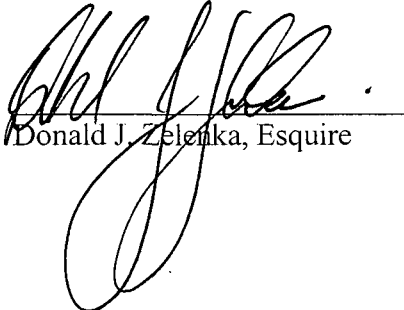


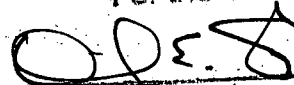
Robert M. Dudek
Deputy Chief Attorney for Capital Appeals

Attorney for Appellant

May 30, 2007

I DO NOT OPPOSE THIS REQUEST:


Donald J. Zelenka, Esquire

GRANTED.
John H. Thel C.J.
For the Court
By 
Clerk

May 31, 2007

The Supreme Court of South Carolina

The State,

Respondent

v.

Kevin Mercer,

Appellant.

The Honorable John C. Few
Lexington County
Trial Court Case No. 2003-GS-32-00409

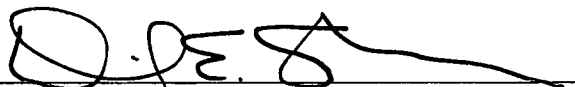
ORDER

For good cause having been shown, the time for serving and filing the Initial Brief of Appellant and Designation of Matter in the above entitled matter is hereby extended until May 30, 2007.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



CLERK

Columbia, South Carolina

May 1, 2007

cc: Deputy Chief Attorney for Capital Appeals Robert M. Dudek
Assistant Deputy Attorney General Donald J. Zelenka



ORIGINAL

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332

Joseph L. Savitz, III, Chief Attorney
Wanda H. Carter, Deputy Chief Attorney

Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1343
Facsimile: (803) 734-1397

April 30, 2007

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

RECEIVED

APR 30 2007

S.C. SUPREME COURT

Re: The State v. Kevin Mercer (capital case)

Dear Mr. Shearouse:

The initial brief of appellant and designation of matter in the above referenced case is due to be served and filed today. However, because of my current caseload, I have been unable to complete this brief for service. For that reason, I would respectfully request an extension of thirty days in which to serve and file this initial brief.

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

Thank you for your assistance in this matter. Should you have any questions, please do not hesitate to contact me.

Sincerely,

Robert M. Dudek
Deputy Chief Attorney for Capital Appeals

RMD/mwl

cc: Donald J. Zelenka, Esquire



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1343
Facsimile: (803) 734-1397

Joseph L. Savitz, III, Chief Attorney
Wanda H. Carter, Deputy Chief Attorney

RECEIPT

I, Daphne M. Helms, of the South Carolina Supreme Court, have received the following original trial transcript(s) in the death penalty case of State v. Kevin J. Mercer

1. ✓ January 13, 2006 (Daphne D. Helms)
2. ✓ February 23, 2006 (Daphne D. Helms)
3. ✓ March 30, 2006 (Daphne D. Helms)
4. ✓ August 9, 2006 (Daphne D. Helms)
5. ✓ April 10 – 13, 2006; April 17 – 22, 2006
(Volume One) (Daphne D. Helms)
6. ✓ April 10 – 13, 2006; April 17 – 22, 2006
(Volume Two) (Daphne D. Helms)
7. ✓ April 10 – 13, 2006; April 17 – 22, 2006
(Volume Three) (Daphne D. Helms)
8. ✓ April 10 – 13, 2006; April 17 – 22, 2006
(Volume Four) (Daphne D. Helms)
9. ✓ April 10 – 13, 2006; April 17 – 22, 2006
(Volume Five) (Daphne D. Helms)

Date: March 13, 2007

Debbie M. Hopkins
(Name)



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332

Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1343
Facsimile: (803) 734-1397

ORIGINAL

Joseph L. Savitz, III, Chief Attorney
Wanda H. Carter, Deputy Chief Attorney

RECEIVED

MAR - 7 2007

S.C. SUPREME COURT

March 7, 2007

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

Dear Mr. Shearouse:

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

The State v. Kevin Mercer

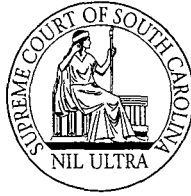
2/28/2007

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

Thank you for your assistance in this matter.

Sincerely,

Melinda W. Long
Legal Assistant



The Supreme Court of South Carolina

TITLE OF
CASE

(
(The State
(
(
(v. 2003GS3200409
(
(
(Mercer, Kevin J. (409)
(
(

NOTICE

Upon request and for good cause shown, Daphne Helms, Court Reporter, is hereby granted an extension up to and including January 26, 2007 to prepare and deliver the Transcript of Record in the above case.

Desiree Allen

Court Reporter Manager
South Carolina Court Administration

Columbia, South Carolina
12/27/2006

cc: Appellate Defense – Melinda Long
Daphne Helms

Debra Hopkins



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332

Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1343
Facsimile: (803) 734-1397

Joseph L. Savitz, III, Chief Attorney
Wanda H. Carter, Deputy Chief Attorney

January 3, 2007

RECEIVED

JAN 03 2007

S.C. SUPREME COURT

Ms. Desiree Allen
S.C. Court Administration
1015 Sumter Street, 2nd Floor
Columbia, South Carolina 29201-3739

Dear Ms. Allen:

Below is a list of transcript(s) that were requested by this office. Pursuant to Supreme Court Rule 206(e), the allotted time of sixty (60) days has lapsed to either receive the transcript or an extension to deliver same.

<u>Court Reporter</u>	<u>Due Date</u>	<u>Case Name</u>
Ms. Daphne D. Helms	12/25/06	Kevin Mercer

Trial Date: August 9, 2006

I would appreciate your confirming in writing as to the status of the above-referenced transcript(s). If you should have any questions, please do not hesitate to contact me.

Sincerely,

Melinda W. Long
Legal Assistant

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



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

ORIGINAL

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332

Joseph L. Savitz, III, Chief Attorney
Wanda H. Carter, Deputy Chief Attorney

Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1343
Facsimile: (803) 734-1397

January 3, 2007

RECEIVED

JAN 03 2007

S.C. SUPREME COURT

The Honorable Daniel E. Shearouse
Clerk of Court
The South Carolina Supreme Court
P.O. Box 11330
Columbia, SC 29211

Re: The State v. Kevin Mercer (Capital Case)

Dear Mr. Shearouse:

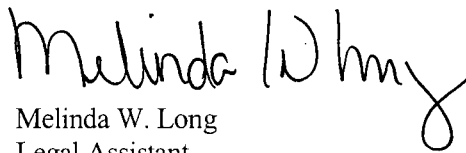
We received the transcripts from the following hearings on Tuesday, January 2, 2007
from court reporter Daphne Helms:

1. April 10, 2006 – April 22, 2006

We are still waiting on the motion for a new trial which was held on August 9, 2006.
Once this hearing has been received, we will assign the case to an attorney.

Please contact me if you have any questions.

Sincerely,



Melinda W. Long
Legal Assistant

/mwl

cc: Attorney General's Office



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1343
Facsimile: (803) 734-1397

Joseph L. Savitz, III, Chief Attorney
Wanda H. Carter, Deputy Chief Attorney

November 8, 2006

RECEIVED

NOV - 8 2006

S.C. SUPREME COURT

Ms. Desiree Allen
S.C. Court Administration
1015 Sumter Street, 2nd Floor
Columbia, South Carolina 29201-3739

Dear Ms. Allen:

Below is a list of transcript(s) that were requested by this office. Pursuant to Supreme Court Rule 206(e), the allotted time of sixty (60) days has lapsed to either receive the transcript or an extension to deliver same.

<u>Court Reporter</u>	<u>Due Date</u>	<u>Case Name</u>
Ms. Daphne D. Helms	10/23/06	Kevin Mercer

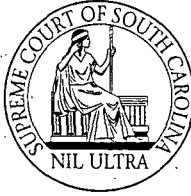
Trial Date: April 10, 2006 - April 22, 2006

I would appreciate your confirming in writing as to the status of the above-referenced transcript(s). If you should have any questions, please do not hesitate to contact me.

Sincerely,


Melinda W. Long
Legal Assistant

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



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

October 26, 2006

Melissa Jane Reed Kimbrough, Esquire
1720 Main St., Ste. 106
Columbia, SC 29201

Re: The State v. Mercer, Kevin

Dear Ms. Kimbrough:

Please be advised that the Notice of Appeal filed from the order of the Honorable John C. Few dated October 2, 2006, will be combined with the Notice of Appeal previously filed in this matter.

Very truly yours,

CHIEF DEPUTY CLERK

BFS/dmh

cc: Cameron B. Littlejohn, Jr., Esquire
South Carolina Commission on Indigent Defense
Assistant Deputy Attorney General Donald J. Zelenka

ORIGINAL



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1343
Facsimile: (803) 734-1397

Joseph L. Savitz, III, Chief Attorney
Wanda H. Carter, Deputy Chief Attorney

October 25, 2006

The Honorable Daniel E. Shearouse
Clerk of Court
The South Carolina Supreme Court
P.O. Box 11330
Columbia, SC 29211

RECEIVED
OCT 25 2006
S.C. SUPREME COURT

Re: The State v. Kevin Mercer (Capital Case)

Dear Mr. Shearouse:

We received the transcripts from the following hearings on Tuesday, October 24, 2006 from court reporter Daphne Helms:

1. March 30, 2006
2. February 23, 2006
3. January 13, 2006

However, we are still waiting on the trial transcript which was held on April 10, 2006 – April 22, 2006. I will let you know once it has been received in our office.

I am also requesting the hearing for the motion for a new trial which was held on August 9, 2006 per Lisa Kimbrough, Esquire. This notice was filed with the Court of Appeals with the hearing date of October 2, 2006 which is incorrect.

Please contact me if you have any questions.

Sincerely,

Melinda W. Long

Melinda W. Long
Legal Assistant

/mwl

cc: Attorney General's Office

Enclosures



Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1343
Facsimile: (803) 734-1397

Joseph L. Savitz, III, Chief Attorney
Wanda H. Carter, Deputy Chief Attorney

October 25, 2006

RECEIVED

OCT 25 2006

S.C. SUPREME COURT

Ms. Daphne D. Helms
Circuit Court Reporter
556 Heron Glen Drive
Columbia, SC 29229

Dear Ms. Helms:

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

The State v. Kevin Mercer

Indictment #: 2003-GS-32-409

County: Lexington

Date of Trial: August 9, 2006

Presiding Judge: John C. Few

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

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

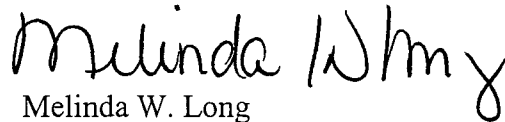
If you are aware of the existence of co-defendants not listed in the prior captioned case, please contact us prior to transcribing the transcript. In this manner, we can consult our records to ensure that in ordering a transcript, a duplication has not occurred. In addition, if the Attorney General's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

Ms. Daphne D. Helms
October 25, 2006
Page Two

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

Thank you for your kind cooperation in this matter.

Sincerely,

A handwritten signature in black ink that reads "Melinda W. Long". The signature is written in a cursive, flowing style.

Melinda W. Long
Legal Assistant

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



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1343
Facsimile: (803) 734-1397

Joseph L. Savitz, III, Chief Attorney
Wanda H. Carter, Deputy Chief Attorney

October 11, 2006

Ms. Daphne Helms
Circuit Court Reporter
556 Heron Glen Drive
Columbia, SC 29229

RECEIVED

OCT 11 2006

S.C. SUPREME COURT

Re: The State v. Kevin Mercer (Capital Case)
Lexington County
Indictment # 2003-GS-32-409

Dear Ms. Helms:

I spoke with you yesterday about the above referenced death penalty case. On May 17, 2006 I requested the April 22, 2006 hearing and then on May 22, 2006 I requested the trial transcript hearing which was held on April 10, 2006 – April 22, 2006.

After speaking with you, I realized that I have requested the April 22, 2006 hearing twice. Please disregard the first request which was mailed on May 17, 2006 requesting the April 22, 2006 hearing. However, I still need the second request that was sent asking for the trial transcript which began on April 10, 2006 and ended on April 22, 2006.

I hope this clears up any confusion that you had pertain to Mr. Mercer's death penalty case. Please do not hesitate to contact me if you have any other questions or concerns.

Sincerely,

Melinda W. Long
Legal Assistant

/mwl

cc: Supreme Court
Desire Allen



The South Carolina Court of Appeals

KENNETH A. RICHSTAD
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

October 10, 2006

Melissa J. Kimbrough, Esquire
1811 Pickens Street
Columbia, SC 29201

Re: The State v. Mercer, Kevin J. (409)

Dear Counsel:

We have received your Notice of Appeal in the case noted above. This case will be docketed in the Court of Appeals and all communications concerning this case, including motions and petitions, initial and final briefs, and the Record on Appeal, should be directed to and filed in this Court. For all filings, please note the requirements of Rule 238(a) of the South Carolina Appellate Court Rules, and be further advised that Court of Appeals policy requires the firm name of any counsel shown must be included in his or her address.

We suggest that large parcels such as copies of final briefs and the Record On Appeal be sent directly to the Court via the street address: 1015 Sumter Street, Columbia, S.C. 29201. Thank you for your attention to this. Failure to file in the proper court may result in the dismissal of your appeal.

PLEASE BE ADVISED that, pursuant to Rule 207 of the South Carolina Appellate Court Rules, the transcript must be ordered within thirty (30) days of the proof of service of the Notice of Appeal and you must provide this Court, opposing counsel, and the Office of Court Administration with all correspondence regarding the transcript. It is also Appellant's responsibility to make satisfactory arrangements (including agreement regarding payment for the transcript) with the Court Reporter for furnishing the transcript. You are reminded of the notification requirements of Rule 207(e), SCACR, also, please advise the Court in writing upon receipt of the transcript.

NOTE: If you believe this case has been improperly filed in the Court of Appeals, by reason of the limitations set forth in S.C. Code Ann. Section 14-8-200(b)(1998), as amended June 1, 1999, notify the Clerk's office of the Court of Appeals immediately. The cited Code Section prohibits the Court of Appeals from hearing appeals in seven classes of cases:

- 1) any final judgment from the circuit court which includes a sentence of death;
- 2) any final judgment from the circuit court setting public utility rates pursuant to Title 58;
- 3) any final judgment involving a challenge on state or federal grounds to the constitutionality of a state law or county or municipal ordinance where the principal issue is the constitutionality of the law or ordinance;
- 4) any final judgment from the circuit court involving the authorization, issuance, or proposed issuance of general obligation debt, revenue, institutional, industrial, or hospital bonds of the state, its agencies, political subdivisions, public service districts, counties, and municipalities or any other indebtedness now or hereafter authorized by Article X of the Constitution of this state;
- 5) any final judgment from the circuit court pertaining to elections and election procedure;
- 6) any order limiting an investigation by a State Grand Jury under S.C. Code Ann. Section 14-7-1630;
- 7) any order of the family court relating to an abortion by a minor under S.C. Code Ann. Section 44-41-33.

Very truly yours,
Kenneth A. Richstad
CLERK

KAR/ab

cc: Chief Attorney Joseph L. Savitz, III
Assistant Deputy Attorney General Salley W. Elliott

STATE OF SOUTH CAROLINA)

COUNTY OF LEXINGTON)

STATE OF SOUTH CAROLINA)

V.)

KEVIN J. MERCER,)

Defendant.)

NOTICE OF APPEAL
FROM THE CIRCUIT COURT

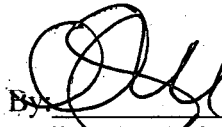
03-GS-32-409

Kevin Jermaine Mercer hereby appeals the Order dismissing his motion for new trial and motion for reconsideration signed by the Honorable John C. Few, entered October 2, 2006.

RECEIVED

OCT 6 2006

CLERK OF COURT



By _____
Melissa J. Kimbrough, Esquire
Attorney for the Applicant
1811 Pickens Street
Columbia, S.C. 29201
(803) 765-2796.

This 4th day of October, 2006.

RECEIVED

OCT 06 2006

SC Court of Appeals

*Set order
10/6/06 djp*

Kevin J. Mercer,
Defendant-Appellant

03-GS-32-409.

Certificate of Service

I hereby certify by my signature below that a copy of Applicant's notice of appeal was sent by first-class mail on today's date to the following person:

Attorney General Henry McMaster
Office of the South Carolina Attorney General
P.O. Box 11549
Columbia, S.C. 29211-1549

~~Served By:~~

Melissa J. Kimbrough, Esquire
1720 Main Street, Ste. 106
Columbia, S.C. 29201.
(803) 765-2796

This 4th day of October, 2006.

RECEIVED

OCT 06 2006

SC Court of Appeals

Shearouse, Daniel

From: Few, John C.
Sent: Monday, September 25, 2006 3:18 PM
To: 'Lisa Kimbrough'; shawn graham; rick hubbard; camlittlejohn@yahoo.com; Myers, Donald V.; - SC Toal
Cc: Carrigg, Beth; Shearouse, Daniel
Subject: Order in State v. Mercer

Attachments: Order on New Trial.doc



Order on
rial.doc (67

Dear Counsel:

I have signed the attached Order denying the Motion for a New Trial and mailed it to the Clerk of Court in Lexington for filing.

It has been a great pleasure to work with each of you on this case. I look forward to seeing you again soon.

John C. Few

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

)
) IN THE COURT OF GENERAL SESSIONS
)

STATE OF SOUTH CAROLINA,

2003-GS-32-0409

)
)
) vs.
)

ORDER

KEVIN J. MERCER,

)
)
) Defendant.
)
)

I. INTRODUCTION

This case is before the Court on remand from the Supreme Court of South Carolina for a hearing and ruling on the Defendant's Motion for a New Trial Based on After-Discovered Evidence. The Defendant contends that the new evidence requires a new trial in both the guilt and sentencing phases. For the reasons set forth below, the motion is DENIED.

II. KEY FACTS

On May 16, 2002, Mercer and Marcus Thompson went to Raintree Apartments in Lexington County to steal a vehicle. Sergeant Tracy Davis was selected as the victim because he was driving a Lincoln Navigator. During the course of the robbery, Sergeant Davis was shot and killed. Sergeant Davis' roommate Clifton Magwood was present in their apartment when the robbery occurred and was able to see through his window that Sergeant Davis was being robbed. By proving the time of the 911 call made by Magwood, the State was able to prove conclusively the time of the crime, including the murder.¹ Responding to a bolo² based on Magwood's description of Sergeant Davis'

¹ Magwood testified he heard the gunshots while he was on the phone with 911. The 911 tape was played for the jury, and it has the sound of gunshots on it.

² A "bolo" is a notice given by dispatchers to patrolling officers to "be on the lookout" for a certain vehicle.

Navigator, an officer with the Lexington County Sheriff's Office stopped Sergeant Davis' Navigator on I-20 westbound only minutes after the murder. Mercer was driving, and Thompson was in the passenger seat. The murder weapon was discovered under Mercer's seat. The distance between the scene of the murder and the location of the arrest was such that Mercer and Thompson had to have come almost directly from the scene when they were arrested.³

III. PROCEDURAL HISTORY

Both Mercer and Thompson were initially charged with murder. However, the State eventually decided it had been Mercer who killed Sergeant Davis. The State served notice of its intention to seek the death penalty against Mercer, and the case was tried beginning April 10, 2006. At the conclusion of the guilt phase, the jury found Mercer guilty of murder and armed robbery. The jury had been charged without objection that they could convict Mercer of murder even though he might not have been the actual shooter, under the doctrine of "the hand of one is the hand of all." In the sentencing phase, however, the jury was specifically charged that it may not recommend the death penalty for Mercer unless it found that the State had proven beyond a reasonable doubt that Mercer had actually fired the shot that killed Sergeant Davis. On April 22, 2006, the jury returned with a verdict recommending the death penalty, and Mercer was accordingly sentenced to death on that date.

After the Mercer trial, the State dismissed the murder indictment against Thompson and allowed him to plead guilty to accessory before the fact of armed robbery,

³ There was evidence at the trial, which is confirmed by evidence offered in the hearing of this motion, that Mercer and Thompson met briefly at the Economy Inn just after the murder in order to both get into the Lincoln Navigator. From there, they proceeded directly to I-20 and headed West.

and accessory after the fact of murder and armed robbery. Thompson plead guilty to those charges on June 20, 2006 and was sentenced to 28 years.

Thompson was not called to testify by either the State or the Defendant in either phase of Mercer's trial. In early May of 2006, while Thompson was housed in the Lexington County Detention Center before his guilty plea to these charges, he allegedly confessed to his cell-mate Kevin Fuller that Thompson was the one who had shot Sergeant Davis. Fuller wrote to the Solicitor and reported the statement that Thompson had allegedly made. The Solicitor promptly disclosed this statement to counsel for the Defendant, who then made a motion in the Supreme Court to have the case remanded for the purpose of allowing the Circuit Court to hear the motion for a new trial. The Supreme Court granted the motion to remand. This Court heard the motion on August 9, 2006.

IV. APPLICABLE LAW

In order to prevail on a motion for a new trial based on after-discovered evidence, Mercer must show that the after-discovered evidence:

- (1) is such that it would probably change the result if a new trial were granted;
- (2) has been discovered since the trial;
- (3) could not in the exercise of due diligence have been discovered prior to the trial;
- (4) is material; and
- (5) is not merely cumulative or impeaching.

State v. Spann, 334 S.C. 618, 619-20, 513 S.E.2d 98, 99 (1999) (citing *State v. Prince*, 316 S.C. 57, 447 S.E.2d 177 (1993)). See also *Johnson v. Catoe*, 345 S.C. 389, 548 S.E.2d 587 (2001).

V. PROBABLE RESULT OF A NEW TRIAL

The Defendant argues that the only disputed element is the first, whether the after-discovered evidence “would probably change the result if a new trial were granted.” The State did not contest this argument, and I agree. The other four elements are clearly met. Therefore, the focus of the Court will be on whether or not the result of the trial would “probably” be different if a new trial is granted.

VI. THE “AFTER-DISCOVERED” EVIDENCE

In order to determine if the Defendant has met its burden of proof in this motion, it is necessary to determine what the “after-discovered evidence” is. The fact that Thompson was a participant in the crime and had first-hand knowledge of what happened was known to both the State and the Defendant from the time the crime was committed. Both sides talked to Thompson before the trial, and both parties knew what his statements had been. From information readily available to both parties well in advance of trial, both the State and the Defendant were able to make intelligent predictions about what Thompson’s testimony would be if he were called to testify at trial. Neither chose to call him to testify. The only thing the parties know now that they did not know at the time of trial was that Fuller alleges Thompson made a statement to Fuller after the Mercer trial about who had pulled the trigger, and the circumstances surrounding that alleged statement. However, as discussed in detail at the hearing of this motion, Fuller’s statement about what Thompson allegedly said becomes admissible only after Marcus Thompson has testified. It is not admissible by itself. Therefore, even though the only evidence not known to the parties at the time of the trial is the alleged statement by Thompson to Fuller and Fuller’s subsequent testimony, the determination of whether a

new trial should be granted must be made after considering all of the evidence offered at the hearing of the motion, including the testimony of Thompson.⁴ For this reason, the “after-discovered evidence” is all evidence related to the testimony and credibility of Thompson and Fuller, which is all evidence offered at the hearing of this motion.

VII. GUILT PHASE

In my opinion, the State proved beyond any doubt in Mercer’s trial that Mercer *and* Thompson planned and participated in the armed robbery of Sergeant Davis’ vehicle, and that the murder was committed as a natural consequence of that armed robbery. They both drove to Raintree Apartments in Mercer’s vehicle, and were caught with the robbery and murder weapon in Sergeant Davis’ Navigator almost immediately after the crime. At the conclusion of the guilt phase, the Defendant did not object to charging the jury that Mercer could be guilty under the doctrine of “the hand of one is the hand of all.” The “after-discovered evidence” supports, rather than undermines, the jury’s verdict finding Mercer guilty on the charges of murder and armed robbery. The only seriously disputable fact in this entire case is whether or not Mercer pulled the trigger and fired the shot that killed Sergeant Davis. I find there is no likelihood whatsoever that the result of the guilt phase would be any different if this new evidence were presented at a new trial. For that reason, the motion for a new guilt phase trial is DENIED.

VIII. SENTENCING PHASE

There are two primary questions that must be considered in determining whether the new evidence would probably change the result of a new sentencing phase. The first concerns the likelihood the jury in a new trial would believe the alleged statement by Thompson actually occurred. The second concerns the likelihood the jury would believe

⁴ Both the State and the Defendant agreed with this at the hearing.

what Thompson allegedly told Fuller, if they found Thompson made the statement. I will discuss each in turn.

However, I will start off by stating that neither Fuller nor Thompson has any real credibility about them. As was demonstrated at the trial, and the hearing on the new-trial motion, they are both convicted felons who have given statements that conflicted with each other not only in their details but in their substance. Thompson's alleged jailhouse confession must be balanced against the alleged jailhouse confession made by Mercer, as testified to at the trial by Terry Brown, another convicted felon with very little credibility. In summary, the starting point of this analysis is that none of the witnesses whose testimony relates to this "after-discovered evidence" is particularly credible.

I would also like to note that it is clear that some conversation occurred in that jail cell in which Thompson discussed the charges against him and the specific facts of the case. In addition to Fuller's testimony about these conversations, the third cellmate Timothy "Rocky" Johnston described these conversations, and Thompson himself acknowledged that he had discussed this with his cellmates.

The evidence on the question of whether Thompson actually made the statement that he was the one who killed Sergeant Davis is the testimony of Thompson, the testimony of Fuller, and the testimony of Johnston. Starting with Fuller, I have already pointed out that he is not a believable person. Further, his statements and his testimony are full of major inconsistencies and contradictions. He admitted that he lied on several occasions both in connection to this case and otherwise. For example, he lied to the prison system the last time he was in prison, stating that he was a Muslim, so he could get better food. In his testimony in this case, he told markedly different stories about when

Thompson first told him it was Thompson who shot Sergeant Davis. He also told completely different stories as to what Thompson told him about how the gun was given to Mercer after Thompson supposedly used it to kill Sergeant Davis.

The State elicited evidence both on cross-examination of Fuller and through the testimony of Johnston that Fuller thought he could benefit from fabricating a story about Thompson shooting Sergeant Davis. Though Fuller testified he did not want help from the Solicitor's office regarding his pending charges, he wrote in a letter to Solicitor Myers "I do ask . . . that you talk to [assistant Solicitor] Shannon Heath about my two CDV charges, or over look them yourself." He wrote later in the same letter "Could you get me some help . . . and some probation?" State's Exhibit 4. According to Johnston, Thompson actually stated he intended to fabricate this story in order to get help on his current charges. Fuller has a significant history of lying to help himself, and there is strong evidence he did so again in this case.

Fuller was adamant in his testimony at the hearing that Johnston heard Thompson discussing the murder, including Thompson stating he had fired the shot. However, when Johnston testified, he denied having heard many of the things that Fuller said Johnston would corroborate. For example, Fuller said Thompson bragged in Johnston's presence about his role in Sergeant Davis' murder even before he specifically admitted having been the triggerman. Johnston denied this, stating that the conversations with Thompson were more along the lines of Thompson telling them what his situation was so that they could help him decide what to do when it came time to plead guilty or go to trial.

Finally, there are several known facts that are inconsistent with Fuller's account of what Thompson told him. Fuller wrote in his statement and testified at the hearing that

Thompson told him Sergeant Davis fell against the Navigator after he was shot, and that there was a blood smear on the side of the Navigator. There was no blood smear on the Navigator a few minutes later when Mercer and Thompson were stopped. There is also inconsistency as to where Sergeant Davis was shot, but that inconsistency is not as significant.

I carefully observed Fuller's demeanor and listened to his testimony. In my view, the inconsistencies in his own stories, the differences between his version and that of Thompson and Johnston, and the inconsistency of Fuller's story with known facts did not result from mistake or failure of recollection, but rather from intentional, calculated misrepresentations. I believe Fuller fabricated the story about Thompson admitting to shooting Sergeant Davis. I believe Fuller purposefully made different statements about this at different times when Fuller's view of what version of the story suited Fuller's interests best had changed. Finally, apart from the factors listed above, Fuller simply left me with the clear impression he was not telling the truth. Fuller's testimony has very little credibility.

Turning to Thompson, he also is not a believable person, but slightly more so than Fuller. Thompson also has given statements that were contradictory to his testimony here in many important details. For example, he has given statements that Mercer told him to go to the Economy Inn while Mercer robbed Sergeant Davis, and that he went to the Economy Inn on his own. He has given statements that he put the gun under Mercer's seat, and statements that Mercer did it. There are others. Thompson has little credibility.

It must also be recognized that at one point in time at least, Thompson had a significant motive to lie about his involvement in the shooting. Law enforcement had

bought into the idea that Mercer was the shooter, and it certainly was not in Thompson's best interests to convince them otherwise. This motive not to claim he was the shooter still existed at the time of the alleged statements to Fuller, but had largely disappeared by the time of the hearing. While Thompson still had some motive at the time of the hearing to keep people from knowing he might have done this, he no longer faced prosecution for the shooting. The Solicitor conceded on the record that Thompson's plea prevented his prosecution for murder under the double jeopardy clause. Finally, Thompson's testimony in the hearing before me did not have significant inconsistencies and contradictions like Fuller's did. When balancing the credibility of Fuller and Thompson, the testimony of Thompson has more credibility.

Timothy "Rocky" Johnston was the third cellmate when the Thompson statements were supposedly made. Although Johnston does not have much credibility on paper, he is the one witness in this whole analysis of jailhouse confessions who does not have anything to gain from his testimony. I observed him to be straightforward. His testimony was believable. Johnston testified that Thompson never admitted to shooting Sergeant Davis. He testified that all Thompson discussed with them was the general nature of the case in order to get help deciding whether or not to plead guilty.

The question before me, however, is not whether I believe Fuller or Thompson or Johnston. Rather, the question before me concerns the likelihood that the jury would believe them. Therefore, on the question of whether Thompson actually made the statements, I find that there is essentially no chance the jury would believe Fuller's testimony that Thompson confessed to shooting Sergeant Davis.

The second question concerns the likelihood the jury would believe what Thompson allegedly told Fuller, if they found Thompson made the statement. Much of the reason I believe there is very little likelihood the jury would believe this statement is discussed above. In addition, even though Thompson has limited credibility and undoubtedly would be effectively cross-examined by defense counsel at a retrial, Thompson's testimony that Mercer pulled the trigger is more credible evidence than Thompson's jailhouse confession, assuming he made one. On cross-examination by Solicitor Myers in the hearing on this motion, Thompson calmly and convincingly went through the entire sequence of events in a straightforward manner without any hesitation. He stated Mercer, not Thompson, had shot Sergeant Davis. In a new trial, both Thompson's testimony and his alleged confession to Fuller would be before the jury. In my opinion, the jury would be much more likely to believe Thompson's testimony than to believe what he allegedly said in his statement to Fuller. I find there is very little likelihood the jury would believe Thompson's statement to Fuller over his in-court testimony that Mercer pulled the trigger.

One of the factors I considered important is whether the Defense would be better off from a strategic standpoint in a new trial with the "after-discovered evidence" than they were in the original trial with the arguments that were made available by the State's decision not to call Thompson as a witness. In both phases of the trial, defense counsel wisely and effectively argued directly and implicitly that the jury should consider strongly the lack of testimony and evidence from Thompson. Counsel wisely and effectively suggested that the State's failure to call Thompson as a witness left the jury to speculate as to who pulled the trigger, creating reasonable doubt. Further, not having the

testimony of Thompson before the jury, defense counsel was able to argue much more effectively that the State's failure to test Thompson's gloves for gunshot residue also left the jury to speculate as to who pulled the trigger. By having the testimony of Thompson before the jury, the defense would have been seriously hampered in its ability to make these effective arguments. Thompson's testimony that Mercer did pull the trigger would have helped the State considerably, even though Thompson has limited credibility. This is true not only because Thompson testified that Mercer shot Sergeant Davis, but just as importantly because Thompson testified that he had worn the same gloves earlier in the day when he and Mercer went target shooting. This testimony would have completely taken away the argument defense counsel used so effectively that the State's failure to test the gloves for gunshot residue created reasonable doubt as to the identity of the shooter. With Thompson's testimony, it is clear there would have been gunshot residue on the gloves even if Thompson did not shoot Sergeant Davis.⁵ In my view, the strategic advantage of being able to make these arguments significantly outweighs the advantage of having largely incredible evidence available that Mercer did not shoot Sergeant Davis.

Taking all of this into consideration, and considering all the evidence before me, I find that there is essentially no chance the "after-discovered" evidence would change the outcome if a new trial were granted. In making this ruling, I considered all the testimony and evidence in the trial and the motion hearing. I did not focus just on the testimony of the individual witnesses in the motion hearing. For this reason, the motion for a new sentencing phase trial is DENIED.

⁵ The defense moved the Court after the remand to order funding to have the gloves tested. Thompson's testimony that he fired the gun earlier in the day while wearing the gloves makes the results of that testing essentially meaningless. The decision not to test the gloves before trial was a strategic one on the part of the defense. After Thompson's testimony, however, there is no reason to fund those tests.

IX. OTHER LAW

The Defendant has argued the applicability of *Holmes v. South Carolina*, ___ U.S. ___, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006). In *Holmes*, the United States Supreme Court reversed the Supreme Court of South Carolina's ruling that evidence of third-party guilt was not admissible in Holmes' trial. In this case, however, there is no dispute that the new evidence is admissible. Thus, *Holmes* is not helpful in deciding the Defendant's motion.

X. CONCLUSION

For the reasons set forth above, the "after-discovered evidence" does not undermine this Court's confidence in the verdict in either phase of the trial. I find there is no reasonable probability the "after-discovered" evidence would change the outcome if a new trial were granted. The motion for a new trial is accordingly DENIED.

IT IS SO ORDERED.

John C. Few
Circuit Court Judge

Greenville, South Carolina

September 25, 2006

The Supreme Court of South Carolina

The State,

Respondent

Kevin Mercer,

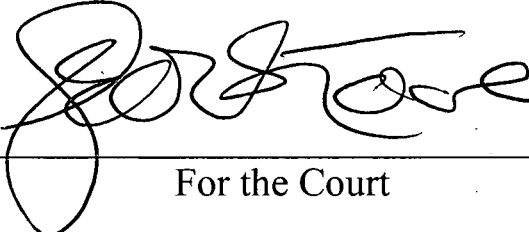
Appellant.

The Honorable John C. Few
Lexington County
Trial Court Case No. 2003-GS-32-00409

ORDER

For good cause having been shown, the time for The Honorable John C. Few to issue an order on appellant's Motion for a New Trial Based on After-Discovered Evidence in the above entitled matter is hereby extended until September 25, 2006.

IT IS SO ORDERED.



C.J.
For the Court

Columbia, South Carolina

September 12, 2006

cc: Cameron B. Littlejohn, Jr., Esquire
Melissa Jane Reed Kimbrough, Esquire
Assistant Deputy Attorney General Donald J. Zelenka
The Honorable Donald V. Myers, Esquire
The Honorable John C. Few
Appellate Defense

Shearouse, Daniel

From: Few, John C.
Sent: Monday, September 11, 2006 12:34 PM
To: Shearouse, Daniel
Subject: State v. Mercer - Motion for a New Trial

Dear Mr. Shearouse,

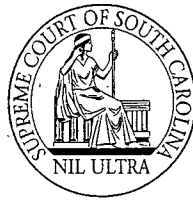
This is a death penalty case out of Lexington County in which the Defendant made a motion for a new trial based on after-discovered evidence. The case was on appeal at the time the motion was made, and the Court remanded it to me by Order dated July 10 or 11. That Order requires me to enter an Order deciding the motion within 60 days, which fell over this past weekend. Thus, my Order is due today. I have almost completed the Order, but because of my involvement the week of August 28 in a murder trial in Pickens that became much more complicated than I thought it would be, my involvement last week in jury selection in the trial of State v. Anthony Woods, a death penalty trial now underway in Clarendon County, and finally my involvement this week in the trial of State v. Woods, I have been unable to complete the Order. I expect to be able to put the finishing touches on the Order this week, but in order to make sure I am able to devote as much attention to this trial as is needed, I request that I be given until September 25 to file an Order. I expect this will be five business days after the completion of the Woods trial.

Thank you very much.

Sincerely,

John Few

9/11/2006



RECEIVED

SEP 19 2006

SC Court of Appeals

The Supreme Court of South Carolina

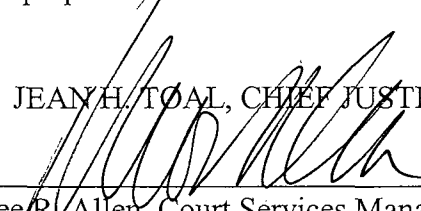
TITLE OF
CASE

(
(The State
(
(
(V. 2003GS3200409
(
(
(Kevin Mercer
(
(

ORDER

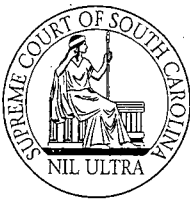
Upon request and for good cause shown, Daphne Helms, Court Reporter, is hereby granted an extension up to and including October 23, 2006 to prepare and deliver the Transcript of Record in the above case.

JEAN H. TOAL, CHIEF JUSTICE

By: 
Desiree R. Allen, Court Services Manager
South Carolina Court Administration

Columbia, South Carolina
9/13/2006

cc: Appellate Defense
Daphne Helms



The Supreme Court of South Carolina

TITLE OF
CASE

(
(The State
(
(
(V. 2003GS3200409
(
(
(Kevin Mercer
(
(
(

NOTICE

Upon request and for good cause shown, Daphne Helms, Court Reporter, is hereby granted an extension up to and including August 23, 2006 to prepare and deliver the Transcript of Record in the above case.

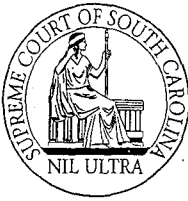
Desiree Allen

Court Services Manager
South Carolina Court Administration

Columbia, South Carolina
7/19/2006

cc: Appellate Defense
Daphne Helms

RECEIVED
JUL 20 2006
SC Court of Appeals



The Supreme Court of South Carolina

TITLE OF
CASE

(
(The State
(
(
(V. 2003GS3200409
(
(
(Kevin Mercer
(
(
(

NOTICE

Upon request and for good cause shown, Daphne Helms, Court Reporter, is hereby granted an extension up to and including August 18, 2006 to prepare and deliver the Transcript of Record in the above case.

Desiree Allen

Court Services Manager
South Carolina Court Administration

Columbia, South Carolina
7/17/2006

cc: Appellate Defense
Daphne Helms

RECEIVED

JUL 19 2006

SC Court of Appeals

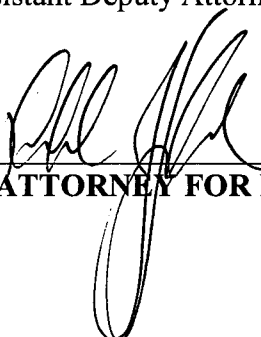
who, a trial judge, is vested with the judicial knowledge of the impact the evidence could have upon the jury under the test of *State v. Caskey, supra*.

Respondent does not concede at this time that Mercer is entitled to a new trial.

Respondent merely assert that at this preliminary stage of an appeal, the economies favor holding a hearing on the potential merits of his claim now,¹ rather than waiting for the completion of the direct appeal.

Respectfully submitted,

DONALD J. ZELENKA
Assistant Deputy Attorney General

By: 

ATTORNEY FOR RESPONDENT

Post Office Box 11549
Columbia, SC 29211

June 13, 2006

¹ The test for a new trial based upon after discovered evidence requires the movant to prove the evidence:

1. is such as would probably change the result if a new trial was held;
2. had been discovered since the trial;
3. could not, by exercise of due diligence be discovered before trial;
4. is material to the issue of guilt or innocence; and
5. is not merely cumulative or impeaching.

State v. Caskey, supra. Respondent, at this time, is only conceding the existence of element (2)(“had been discovered since the trial”).

CERTIFICATE OF SERVICE

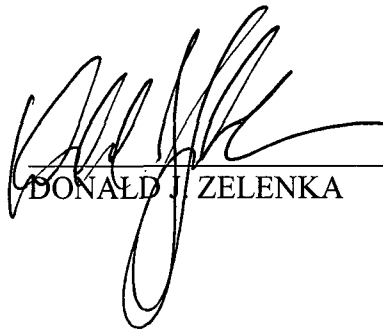
I, **Donald J. Zelenka**, hereby certify that I have served the *Respondents Return to Motion for Remand Hearing on Motion for New Trial Based Upon After-Discovered Evidence* in the foregoing action by depositing copies in the United States mail, postage prepaid, to the following:

Melissa J. Kimbrough, Esquire
1720 Main Street, Ste. 106
Columbia, South Carolina 29201

Cameron B. Littlejohn, Jr., Esquire
1720 Main Street, Ste. 202
Columbia, South Carolina 29201

Joseph L. Savitz, III
Chief Attorney
SC Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, South Carolina 29211

This 13th day of June, 2006.



DONALD J. ZELENKA

IN THE SUPREME COURT OF SOUTH CAROLINA

In Re: State v. Kevin Jermaine Mercer

03-GS-32-409

**MOTION FOR REMAND AND HEARING ON MOTION FOR NEW TRIAL
BASED ON AFTER-DISCOVERED EVIDENCE**

RECEIVED

MAY 31 2005

S.C. SUPREME COURT

Melissa J. Kimbrough, Esquire
1720 Main Street, Ste. 106
Columbia, S.C. 29201
(803) 765-2796.

Cameron B. Littlejohn, Jr., Esquire
1720 Main Street Ste. 202
Columbia, S.C. 29201
(803) 799-1888.

Joseph L. Savitz, Esquire
South Carolina Commission
On Indigent Defense
1205 Pendleton Street, Rm. 315
Columbia, S.C. 29201
(803) 734-1343.

ATTORNEYS FOR DEFENDANT

I. INTRODUCTION

Beginning April 22, 2006, Kevin Jermaine Mercer has resided on South Carolina's death row for the murder of Sgt. Tracey Lamar Davis, an Army recruiter who was shot and killed during an apparent carjacking. On May 23, 2006, counsel for Kevin Mercer received compelling new information provided by the Lexington County Solicitor's Office that Marcus Thompson recently confessed to his cellmate Kevin Fuller that he shot Sgt. Davis. (see Attachments A-I). The new information, which consists of two letters written to Solicitor Myers and one sworn statement to law enforcement, creates a substantial likelihood that a new trial would yield a different result. The new information first came to light on May 3, 2006, which was eleven (11) days after Mr. Mercer was sentenced to die, and therefore was not discoverable prior to trial, is clearly material to the question of guilt or innocence, as well as a punishment, and is neither cumulative nor impeachment evidence. For these reasons, Kevin Mercer should be granted a new trial.

II. FACTS RELEVANT TO THIS MOTION

Kevin Jermaine Mercer was indicted on charges of capital murder and armed robbery by a Lexington County grand jury during its March 2006 term of court. The State called Mr. Mercer's case for trial on April 10, 2006. On April 19, 2006 the jury returned verdicts of guilt on both counts. On April 22, 2006, Mr. Mercer was sentenced to die. A timely notice of intent to appeal was filed with this Court.

The defense theory at trial was straight-forward: Marcus Antonio Thompson shot and killed Tracey Lamar Davis, and then pinned the crime on Kevin Mercer. The defense

theory rested upon several pieces of strong circumstantial evidence tending to implicate Marcus Thompson as the shooter. Significantly, Thompson and Mercer were arrested a mere eighteen minutes after the shooting. Kevin Mercer was driving the vehicle and Thompson was in the front passenger's seat. At the time he was removed from the car, Thompson was found to be in possession of a bag of bullets of the same caliber used in the shooting and had two pairs of balled up knit gloves, which fell out of his pocket at the time he was removed from the victim's vehicle.

The state's theory that Kevin Mercer was the shooter rested upon the results of gunshot residue tests performed on Marcus Thompson and Kevin Mercer. The tests showed no residue on Thompson's hands, whereas two microscopic lead particles were found on the back of Mercer's hand. SLED agent Jennifer Stoner testified that lead, along with barium and antimony, is one of three components found in gunshot residue. Agent Stoner conceded that a positive gunshot residue result requires the presence of all three elements and that, without barium and antimony being present on Mercer's hands, all she could say is that the lead was "consistent" with gunshot residue.

Not presented at trial were the statements of Marcus Thompson pointing the finger at Kevin Mercer as the shooter. Marcus Thompson gave two statements. The first statement was taken shortly after his arrest. Subsequent to his arrest, and based on the gunshot residue results, the state reduced Thompson's charges to that of accessory before the fact of carjacking and after the fact of murder. After the reduction in his charges, Thompson was granted bond and released. A short time later Thompson was re-arrested, charged and pled guilty to drug distribution charges for which he received probation. Astoundingly, and despite his continuing criminal conduct, the state did not seek to

revoke Thompson's bond. While on probation, Thompson was arrested again for a driving offense in North Carolina, and let out on bond.

Approximately one month prior to Kevin Mercer's trial, Marcus Thompson met with the Solicitor and gave a second statement that was so wildly inconsistent with the first statement that the Solicitor ended the interview and, not surprisingly, did not call Marcus Thompson to testify at trial. With Thompson gone, the state had only one witness to support its theory and place the murder weapon directly in Kevin Mercer's hand, and that person was career criminal named Terry Brown.

While Terry Brown was well-qualified for the role of jailhouse snitch, he was neither credible nor objective concerning Kevin Mercer, or the facts surrounding the murder of Tracey Davis. Brown and Mercer despised one another, and there was a history of bad blood between them. One month prior to his capital trial, Mercer was convicted of assaulting Brown with a sharpened toothbrush during a detention center squabble. Despite their deep-seated dislike for one another, Brown testified Kevin confessed to him that he had shot Tracey Davis execution style while he was on his knees.

It is doubtful that Kevin Mercer would have confessed to a person he loathed. Moreover, the uncontested physical evidence and pathologist's report indicate that Davis was shot in the back of the head with the trajectory of the bullet traveling upward from its point of entry into the lower left back side of the victim's skull. Despite the obvious credibility problems associated with Terry Brown's testimony, his testimony, if believed, was damning and extremely prejudicial.

Marcus Thompson's absence from the trial left defense counsel without any way

to show that he was more likely the shooter. Thompson's inconsistent statements and seeming inability to remember his previous lies to law enforcement raise a strong suspicion that he was being deceitful about his role in Sgt. Davis' killing. With no evidence to support the defense theory about Marcus Thompson, Kevin Mercer's conviction was virtually assured.

Had the new information been available at the time of Kevin Mercer's trial it is likely that the result of one or both of the proceedings would have been different. Kevin Fuller's statement to law enforcement is exactly what Kevin Mercer needed during the guilt or innocence phase of his trial, as Kevin Fuller has absolutely no connection to Kevin Mercer, or any apparent score to settle with Marcus Thompson. Furthermore, even had the jury returned with a verdict of guilty as to murder, Kevin Fuller's information, if believed, would have prevented the jury from returning with a sentence of death based on the trial court's charge that death was appropriate only if the jury believed Kevin Mercer was the triggerman.

On May 3 2006, Kevin Fuller had been Marcus Thompson's cellmate for a mere two days. There is absolutely no evidence that any bad blood existed between the two of them. What's more, Kevin Fuller asked for nothing in return for the information he gave to the Solicitor's Office. It was only after Fuller gave a sworn statement on May 9, 2006, that he broached the topic of his pending criminal domestic violence charges, and ask for "help" for his mental problems. However, even during this final letter, sent on or about May 12, 200, Kevin Fuller made it clear that he expected nothing in return for his information: "[e]ather (sic) way God wants me to help put away the guy who killed Mr. Davis and I'm there is you need me Sir." (see Attachment G)

III. APPLICABLE LEGAL PRINCIPLES

The substantive legal principles governing this motion are well settled. The South Carolina Supreme Court continually held that in order to obtain a new trial based on after-discovered evidence, the movant must show that the evidence:

- 1) is such as would probably change the result if a new trial is had;
- 2) has been discovered since the trial;
- 3) could not by the exercise of due diligence have been discovered before trial;
- 4) is material to the issue of guilt or innocence; and
- 5) is not merely cumulative or impeaching.

See e.g., Hayden v. State, 278 S.C. 610, 299 S.E.2d 854, 855 (1983); State v. Allen, 276 S.C. 412, 279 S.E.2d 365, 366 (1981); State v. Caskey, 273 S.C. 325, 256 S.E.2d 737, 739 (1979); State v. Irvin, 270 S.C. 539, 243 S.E.2d 195, 198 (1978).

Evidence about which the moving party was excusably ignorant and could not have been discovered with the exercise of due diligence by trial counsel before or during the first trial satisfies the requirements for newly discovered evidence. State v. Kelly, 285 S.C. 373, 329 S.E.2d 445 (1985); State v. Irvin, 270 S.C. 539, 243 S.E.2d 195 (1978). Furthermore, sworn statements may be used to establish newly discovered evidence. See State v. Murray, 127 S.C. 340, 121 S.E.2d 265 (1923).

IV. BECAUSE THE NEWLY DISCOVERED EVIDENCE SUPPORTS HIS CLAIM THAT MARCUS THOMPSON SHOT AND KILLED SGT. TRACEY DAVIS, KEVIN MERCER SHOULD BE GRANTED A NEW TRIAL.

A. The new evidence is material and is such as will probably change the result if a new trial is granted.

The new evidence in this case would have a huge impact if a new trial were had. Marcus Thompson has admitted his role as triggerman in the murder of Sgt. Tracey Davis. Thompson's admission to the murder exposes him to the ultimate level of criminal liability, that for which a death sentence could be imposed.

Thompson's admission to Fuller includes details about which only an active participant in the murder would know, details that were unknown at the time of trial and, most significantly, consistent with the known physical evidence. Moreover, the new information contained in Fuller's statement was never provided in news or other media accounts. The significant details include the following:

- * That Thompson wore the gloves inside out so as to avoid leaving gunpowder residue (GSR) on the exterior portion of the gloves¹;
- * That Thompson and Kevin Mercer had shot the gun earlier in the day, which would explain why, several hours later, two particles of round lead were found on Mercer's hand²;

¹ Thompson erroneously believed that the gloves he had in his pocket were tested for gunpowder residue (GSR) and found to be negative; astoundingly, law enforcement never tested the gloves and later tossed them into a plastic evidence bag along with a glove found in the victim's car.

² This information is consistent with the expert testimony concerning GSR, of which Mercer was found to have one of the three elements--lead-comprising GSR. It is certainly plausible that, had Mercer fired a weapon early on the day of the murder, that a few particles might still be on his skin several hours later.

- * That Kevin Mercer drove the Sgt. Davis' vehicle after Thompson shot him;
- * That Thompson drove Mercer's vehicle to the hotel parking lot;
- * That Thompson shot the victim behind the ear;
- * That, Mercer was taken out of the victim's vehicle first, which gave Thompson the opportunity to hide the gun under the driver's seat;
- * That Thompson had the bullets that went to the gun used in the killing.

When viewed in light of the minimal evidence offered by the state in support of its position that Kevin Mercer was the shooter, the new evidence creates a strong inference of Thompson's guilt as a triggerman. Finally, and this point cannot be overstated, this new evidence bears directly on the issue of Marcus Thompson's culpability for the murder of Sgt. Davis, and is therefore material to the issue of Kevin Mercer's innocence.

B. The new evidence has been discovered since trial and could not have been discovered prior to the trial by the exercise of due diligence.

The recent discovery of new evidence establishing Marcus Thompson's guilt for the murder of Sgt. Davis was not a result of lack of due diligence on the part of trial counsel. Prior to Kevin Mercer's trial during April 10-22, 2006, Marcus Thompson was out on bond, committing drug and driving offenses, seemingly without fear of repercussion. In fact, it was only due to Thompson's inconsistent statements to law enforcement, which led the state to his bond revocation on May 1, 2006, that Thompson made his admissions to his cellmate Kevin Fuller. The key to the new evidence was Thompson's statements against interest, and those statements were not available until after the conclusion of Kevin Mercer's trial.

C. The new evidence is not merely cumulative or impeaching.

The new evidence which Kevin Mercer seeks to present at a new trial is neither impeaching nor cumulative. At trial, due to his Fifth Amendment Right, the defense was unable to examine Marcus Thompson; had no way to introduce his vacillating statements on the facts surrounding the murder; and, finally, had no witness who could offer what Kevin Fuller has brought forth. The new evidence generated by Kevin Fuller's statements is truly new. Thompson's admissions to Fuller answer several critical questions that could not have been addressed at trial. Why would Kevin Mercer have only one of the three components of GSR a mere eighteen minutes after the shooting if he had actually fired a .357? How did Kevin Mercer's vehicle end up at the Economy Inn? Why did certain witnesses report hearing two car doors slam? Why did Marcus Thompson have two pairs of knit gloves in his pocket during the month of May? For these, and potentially other, reasons, the newly discovered evidence in this case is not merely impeaching or cumulative.

V. CONCLUSION

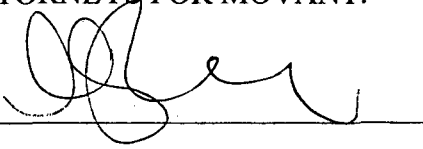
For all of the foregoing reasons, Kevin Mercer respectfully requests that this Court hold in abeyance his pending direct appeal, remand his case back to the Circuit Court for an evidentiary hearing on the newly discovered evidence to determine whether a new trial should be granted. A failure to do so may result in the execution of an innocent man, a miscarriage of justice sufficient to undermine any confidence in the state's judicial processes. Such a result does not comport with the high standards of justice required by the precedents of this Court, and of the entire judicial system of the United States.

Respectfully submitted,

Melissa J. Kimbrough, Esquire
1720 Main Street, Ste. 106
Columbia, S.C. 29201
(803) 765-2796.

Cameron B. Littlejohn, Jr.
1720 Main Street, Ste. 202
Columbia, S.C. 29201
(803) 799-1888.

Joseph L. Savitz, Esquire
1205 Pendleton Street, Rm. 306
Columbia, S.C. 29201
(803) 734-1330.
ATTORNEYS FOR MOVANT.

By: 

This 30th day of May, 2006.

State of South Carolina
Office of the Solicitor
Eleventh Judicial Circuit



COUNTIES
EDGEFIELD / LEXINGTON
McCORMICK / SALUDA
FAXES: (803) 785-8431 or (803) 785-8255

LEXINGTON COUNTY JUDICIAL CENTER
205 E. MAIN ST. • THIRD FLOOR
LEXINGTON, SOUTH CAROLINA 29072
TELEPHONE: (803) 785-8352

DONALD V. MYERS

Solicitor

May 23, 2006

Via Fax – Original by Mail

Cam Littlejohn, Esquire
1720 Main Street
Suite 202
Columbia, SC 29201

Re: *State v. Kevin Mercer*

Dear Cam,

Enclosed, please find additional discovery stamped C001 to 0008 provided to our office and law enforcement by Kevin Fuller on the above referenced case. I received the enclosed letter from Mr. Fuller after Marcus Thompson's bond was revoked by the Honorable Edward B. Cottingham, Sr. on May 1st, 2006.

Sincerely,

Donald V. Myers
Solicitor
11th Judicial Circuit

.cc Lisa Kimbrough, Esquire

State v. Mercer - Remand New Trial Motion
Attachment A

Kevin Fuller
 CCDC
 P.O. Box 2019
 Lexington, SC 29071

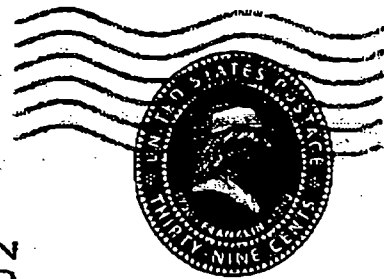
Clerk OF COURT

COLUMBIA SC 292

04 MAY 2006 PM 1 T

C/O "DONNIE MYERS"

Lexington County JUDICIAL Center
 205 E MAIN ST
 Lexington, SC 29072



MAY 23 2006 0002

23072+3557 C010



THIS ENVELOPE IS RECYCLABLE AND MADE
WITH 30% POST CONSUMER CONTENT.

RECEIVED MAY 23 2006
ON 5/23/06 11:11 AM
MAY 23 2006

MAY 23 2006* 0003

MAY 2006

DEAR DONNE MYERS

My NAME is Kevin Fuller. I'm locked up with MARCUS ANTONIO Thompson who helped Kevin Mercer in the murder. We stay in the same Room And several times at night he brags about killing Tracy Davis and Kevin getting the blame. He said Kevin switch the door open on the truck and he shot Tracy in the head then Kevin drove Tracy's truck down the road to the other hotel while Marcus Thompson drove Kevin's car behind him. He said he give the gun to Kevin and then they left and got on the high way and got caught. He bragged about how the police found gun residue on Kevin's hand and laughed because he said Kevin was practice shooting earlier. He said when ~~he~~ he got caught they found bullets and some gloves on him and they checked his hands to see if he fired the gun and then checked the gloves and found nothing he said he was smarter than the police because of CSI, he said he had the glove on inside out when he shot Kevin Mercer. I will tell this to his face because he should pay for what he's done. I'll give you a week to let me know what you want me to do, then I'll write the News and Kevin's Lawyer because something needs to be done. I will do what ever you say to do let me know or let my lawyer "Matthew BUCANNON" know.

Thank you,
Kevin Fuller

MAY 23 2006 0001



Lexington County Sheriff's Department



MAY 23, 2006*

0004

VOLUNTARY STATEMENT

DOB:

SSN:

(Not Under Arrest)

I, KEVIN FULLER, am not under arrest, nor am I being detained for any criminal offenses concerning the events I am about to make known to DET. MEFFORD. Without being accused of or questioned about any criminal offenses regarding the facts I am about to state, I volunteer the following information of my own free will, for whatever purposes it may serve. I am 37 years of age, and I live at 521 GIBSON RD, LEB, SC 29023.

ON-Wednesday the 3rd A couple days after Marcus Tappan moved into F-Dorm Room-7 we went to the hospital and came back bragging about being fucked up on pain pills. He started stating he was a lucky nigger because Lexington County was stupid. I was reading the newspaper and a guy named Kevin Mercer was on there because of murder. Marcus took the paper and said "this here nigger is dying for me". He said his self and Kevin followed a guy into Rain Tree Apartment. At that time Marcus put his gloves on inside car because he knew from watching CSI that a gun would leave powder marks after the guy parked. Kevin Mercer pull open the guys door to his truck and the guy was on the phone and he started to get out to defend his self. When Marcus said he shot him behind the ear and he fell beside the truck Marcus kicked his phone Kevin jumped in the guys 1998⁺ either Expedition or Escalade truck Marcus jumped in Kevin's car and they left and went back to where Kevin was staying then Marcus jumped in the truck with Kevin and they got on the highway and not to far down the road and got pulled over. The cop asked the driver "Kevin" to get out the car and he did. Marcus said it took the cop ten to ~~five~~ twenty minutes to tell him to get out the car before he got out the truck he put the gun under Kevin's seat. He brags about how Kevin and him self were shooting the gun earlier that day and how he took that mares truck to ride and jump in "ATL". He constantly brags about shooting Tracy Davis. And how Lexington County didn't check the inside of the gloves or didn't put two n-2's together because he had the bullets on him that went to the gun.

I have read each page of this statement consisting of 2 page(s), each page of which bears my signature, and corrections, if any, bear my initials, and I certify that the facts contained here in are true and correct.

Dated at 521 GIBSON RDhis 9th day of MAY 20 06

1506 HRS

WITNESS: DET. MEFFORD

WITNESS:

Kevin Lee Fuller
Signature of person giving voluntary statement.

STATEMENT

Page 2 of 2 pages.

MAY 23 2006 0005

Q: MEFFORD

A: FULLER

Q: DID YOU KNOW ANYTHING ABOUT KEVIN MERCER OR HIS CASE PRIOR TO THOMPSON TELLING YOU?

A: NO

Q: DID I OR ANYONE ELSE PROVIDE YOU WITH INFORMATION ON KEVIN MERCER OR HIS CASE, OTHER THAN THOMPSON?

A: NO

Q: DID I OR ANYONE PROMISE YOU ANYTHING IN EXCHANGE FOR THIS STATEMENT OR INFORMATION GIVEN TO YOU BY THOMPSON?

A: NO

Q: DID I PROVIDE OR CONFIRM ANY DETAILS OF THE CASE PERTAINING TO THIS STATEMENT?

A: NO

Q: DID ~~THE~~ I OR ANYONE CONTACT YOU PRIOR TO THOMPSON CALLING YOU IN YOUR CELL?

A: NO

Q: WHEN THOMPSON PROVIDED YOU WITH THIS INFORMATION, WHAT DID YOU DO?

A: I SENT A REQUEST TO THE JAIL AND A LETTER TO DONNIE MYERS FOR SOMEONE TO COME TALK TO ME ABOUT WHAT MARCUS WAS SAYING TO ME ABOUT SOME MURDER.

Q: IS THIS INTERVIEW THE FIRST RESPONSE TO YOUR LETTER OR REQUEST?

A: YES KLF /// END OF STATEMENT /// KLF

Sworn to before me this 9th day of MAY 2006.

Notary Public of South Carolina

Signature of person giving statement

Cheryl Price WK: 256-2483 ^{EX. 7227}
TS+04

Home: 803. 955-4536

After 5:00↑

MR DONNIE MYERS,

My NAME IS KEVIN FULLER. I wrote you letting you know about MARCUS THOMPSON telling me he killed MR DAVIS. The Investigator came and talked to me and got a statement. I informed him that I didn't want my self put in the paper or have to testify while I'm here. I will help any way I can though because this guy is bragging about how he killed this guy. I don't know nothing about the guy that got killed but if you would let his family know I will help any way I can. I do ask MR DONNIE MYERS that you talk to SHANNON HEATH about my two CDV charges or over issue them your self. My Girl Friend Cheryl Price put these charges on me in hopes to get me help not jail. She never signed the warrants and she asked for me to go to Morris Village. I'm bipolar and she wants me home but to get help. You can call her at work or home she writes me all the time and asks if theres something she can do. Could you get me some help if my family pays for it and some probation. Please look over it and let SHANNON HEATH know. Either way God wants me to help put away the guy who killed MR DAVIS AND I'm there if you need me SIR.

MAY 23 2006 0006

Thanks,
Kevin C. Fuller

Cheryl Price WK# 256-2453 ^{CA# 7027}
78104

Home: 803-955-4536

After 5:00⁺Original page came in
like thisTHIS ENVELOPE IS RECYCLABLE AND MADE
WITH 30% POST CONSUMER CONTENT.

letting you know about
avis. The Investigator
informed him that I
to testify while I'm here.
I'm bragging about how
out the guy that got killed
any way I can. I do ask
about my two CDV
I Cheryl Price put
in. She never signed
village. I'm bypoker
all her at work or
is something she
says for it and
is Heath know
my who killed

MARC
CAME
didnt
I will
he killed
but if ya
MR Darnie
charges on
these charge
the warrant
And she want
home she a
can do. Could
some probate
either way
MR DAVIS AND

MAY 23 2006

MAY 23 2006* 0007

Fuller

REVIN FULLER
LEDC
P.O. Box 2019
Lexington, SC 29071

SHY
S/S

COLUMBIA SC 292
- Clerk of Court
40 "Solicitors Office"
MR. DONNIE MYERS
205 E. MAIN ST
Lexington, SC 29072

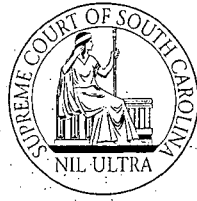


MAY 23 2006 * 0008

29072+3887 CO10



State v. Mercer - Remand New Trial Motion
Attachment I



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

June 7, 2006

The Honorable John C. Few
Greenville County Courthouse, Suite 318
305 East North Street
Greenville, SC 29601-2120

Re: The State v. Mercer, Kevin

Dear Judge Few:

This responds to a telephone conversation you had with a member of my staff regarding the Death Penalty Questionnaire in the above matter.

I am aware that there is an ongoing effort to revise the content of this questionnaire. However, until a new questionnaire form has been approved by the Supreme Court of South Carolina under S.C. Code Ann. §16-3-25 (2003), the current questionnaire form is the one that must be used.

For your convenience, I am enclosing another copy of this questionnaire. I ask that you please complete and return it within twenty (20) days of the date of this letter.

Very truly yours,

CLERK

Enclosure



Division of Appellate Defense

1205 Pendleton Street, Room 306
Columbia, SC 29201

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

May 22, 2006

Ms. Daphne D. Helms
Circuit Court Reporter
311 Steeple Court
Lexington, SC 29073-7698

RECEIVED
MAY 23 2006
S.C. SUPREME COURT

Dear Ms. Helms:

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

The State v. Kevin Mercer

Indictment #: 2003-GS-32-409

County: Lexington

Date of Trial: January 13, 2006

Presiding Judge: John C. Few

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

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

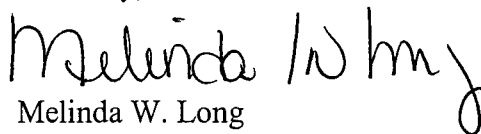
If you are aware of the existence of co-defendants not listed in the prior captioned case, please contact us prior to transcribing the transcript. In this manner, we can consult our records to ensure that in ordering a transcript, a duplication has not occurred. In addition, if the Attorney General's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

Ms. Daphne D. Helms
May 22, 2006
Page Two

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

Thank you for your kind cooperation in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Melinda W. Long". The signature is fluid and cursive, with the first name "Melinda" being more prominent and the last name "Long" written in a more compact, stylized manner.

Melinda W. Long
Legal Assistant

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



Division of Appellate Defense

1205 Pendleton Street, Room 306
Columbia, SC 29201

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

May 22, 2006

RECEIVED

MAY 23 2006

S.C. SUPREME COURT

Ms. Daphne D. Helms
Circuit Court Reporter
311 Steeple Court
Lexington, SC 29073-7698

Dear Ms. Helms:

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

The State v. Kevin Mercer

Indictment #: 2003-GS-32-409

County: Lexington

Date of Trial: February 23, 2006

Presiding Judge: John C. Few

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

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

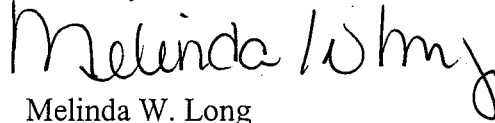
If you are aware of the existence of co-defendants not listed in the prior captioned case, please contact us prior to transcribing the transcript. In this manner, we can consult our records to ensure that in ordering a transcript, a duplication has not occurred. In addition, if the Attorney General's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

Ms. Daphne D. Helms
May 22, 2006
Page Two

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

Thank you for your kind cooperation in this matter.

Sincerely,

A handwritten signature in black ink that reads "Melinda W. Long". The signature is written in a cursive, flowing style.

Melinda W. Long
Legal Assistant

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



Division of Appellate Defense

1205 Pendleton Street, Room 306
Columbia, SC 29201

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

May 22, 2006

Ms. Daphne D. Helms
Circuit Court Reporter
311 Steeple Court
Lexington, SC 29073-7698

RECEIVED

MAY 23 2006

Dear Ms. Helms:

S.C. SUPREME COURT

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

The State v. Kevin Mercer

Indictment #: 2003-GS-32-409

County: Lexington

Date of Trial: March 30, 2006

Presiding Judge: John C. Few

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

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

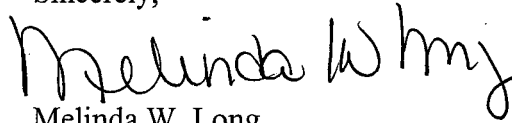
If you are aware of the existence of co-defendants not listed in the prior captioned case, please contact us prior to transcribing the transcript. In this manner, we can consult our records to ensure that in ordering a transcript, a duplication has not occurred. In addition, if the Attorney General's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

Ms. Daphne D. Helms
May 22, 2006
Page Two

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

Thank you for your kind cooperation in this matter.

Sincerely,

A handwritten signature in black ink that reads "Melinda W. Long". The signature is written in a cursive, flowing style.

Melinda W. Long
Legal Assistant

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



Division of Appellate Defense

1205 Pendleton Street, Room 306
Columbia, SC 29201

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

May 22, 2006

RECEIVED

MAY 23 2006

S.C. SUPREME COURT

Ms. Daphne D. Helms
Circuit Court Reporter
311 Steeple Court
Lexington, SC 29073-7698

Dear Ms. Helms:

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

The State v. Kevin Mercer

Indictment #: 2003-GS-32-409

County: Lexington

Date of Trial: April 10, 2006 - April 22, 2006

Presiding Judge: John C. Few

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

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

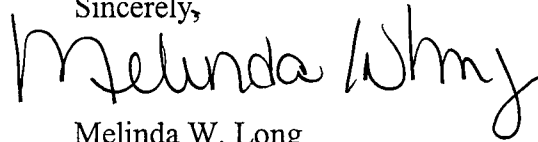
If you are aware of the existence of co-defendants not listed in the prior captioned case, please contact us prior to transcribing the transcript. In this manner, we can consult our records to ensure that in ordering a transcript, a duplication has not occurred. In addition, if the Attorney General's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

Ms. Daphne D. Helms
May 22, 2006
Page Two

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

Thank you for your kind cooperation in this matter.

Sincerely,

A handwritten signature in black ink that reads "Melinda W. Long". The signature is written in a cursive, flowing style. The first name "Melinda" is written in a larger, more prominent script, and the last name "W. Long" follows it in a similar but slightly smaller script. The signature is positioned to the right of the word "Sincerely,".

Melinda W. Long
Legal Assistant

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



Division of Appellate Defense

1205 Pendleton Street, Room 306
Columbia, SC 29201

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

May 17, 2006

RECEIVED

MAY 17 2006

S.C. SUPREME COURT

Ms. Daphne D. Helms
Circuit Court Reporter
311 Steeple Court
Lexington, SC 29073-7698

Dear Ms. Helms:

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

The State v. Kevin Mercer

Indictment #: 2003-GS-32-409

County: Lexington

Date of Trial: April 22, 2006

Presiding Judge: John C. Few

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

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

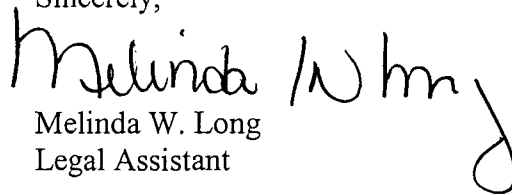
If you are aware of the existence of co-defendants not listed in the prior captioned case, please contact us prior to transcribing the transcript. In this manner, we can consult our records to ensure that in ordering a transcript, a duplication has not occurred. In addition, if the Attorney General's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

Ms. Daphne D. Helms
May 17, 2006
Page Two

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

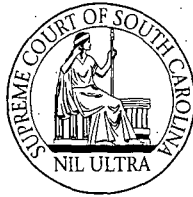
Thank you for your kind cooperation in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'Melinda W. Long'. The signature is fluid and cursive, with the first name 'Melinda' being more prominent and the last name 'Long' written in a more compact, stylized manner.

Melinda W. Long
Legal Assistant

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



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

April 28, 2006

The Honorable John C. Few
Greenville County Courthouse, Suite 318
305 East North Street
Greenville, SC 29601-2120

Re: The State v. Mercer, Kevin

Dear Judge Few:

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

Very truly yours,

CHIEF DEPUTY CLERK

BFS/dmh

Enclosure

Melissa J. Kimbrough

ATTORNEY AT LAW

April 25, 2006

Honorable Daniel E. Shearouse, Clerk
S.C. Supreme Court
P.O. Box 11330
Columbia, S.C. 29211

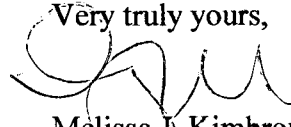
Re: *State v. Kevin Mercer*

Dear Mr. Shearouse:

Enclosed please find a notice of intent to appeal in the above-referenced case. Cam Littlejohn and I were appointed to represent Mr. Mercer in his capital trial in Lexington County, and would ask that the South Carolina Office of Appellate Defense assume responsibility for handling this appeal.

By copy of this letter, I am notifying Appellate Defense of this request. Please do not hesitate to contact me if you have any questions concerning this matter.

Very truly yours,



Melissa J. Kimbrough

/mk

Enclosures

cc: S.C. Office of Appellate Defense

RECEIVED

APR 27 2006

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)
STATE OF SOUTH CAROLINA)
V.)
KEVIN J MERCER)

NOTICE OF APPEAL
FROM THE CIRCUIT COURT

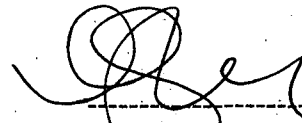
Kevin J. Mercer hereby serves notice of his intent to appeal his conviction and sentence of death plus thirty-years for the crimes of murder and armed robbery entered against him on April 22, 2006.

Notice is hereby provided on today's date of April 24, 2006 to the following:

Honorable Donald V. Myers, Solicitor
Lexington County Solicitor's Office
205 E. Main Street
Lexington, S.C. 29072

Lexington County Clerk of Court
205 E. Main Street
Lexington, S.C. 29072

S.C. Office of Attorney General
P.O. Box 11549
Columbia, S.C. 29211-1549



Melissa J. Kimbrough, Esquire
Attorney for the Applicant
1720 Main Street, Suite 106
Columbia, S.C. 29201
(803) 765-2796.

This 24th day of April, 2006.

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

STATE OF SOUTH CAROLINA

VS.

KEVIN J. MERCER,
DEFENDANT.

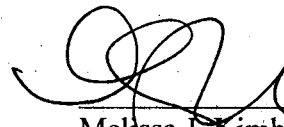
CERTIFICATE OF SERVICE

I hereby certify that defendant's notice of intent to appeal was sent by first-class
mail to the following persons:

Honorable Donald V. Myers, Solicitor
Lexington County Solicitor's Office
205 E. Main Street
Lexington, S.C. 29072

S.C. Office of the Attorney General
P.O. Box 11549
Columbia, S.C. 29211-1549

Lexington County Clerk of Court
205 E. Main Street
Lexington, S.C. 29072



Melissa J. Kimbrough, Esquire
1720 Main Street, Ste. 106
Columbia, S.C. 29201
(803) 765-2796.

April 24th, 2006.

RECEIVED

APR 27 2006

S.C. SUPREME COURT

Melissa J. Kimbrough

ATTORNEY AT LAW

April 27, 2006

South Carolina Supreme Court

Attn: Debby

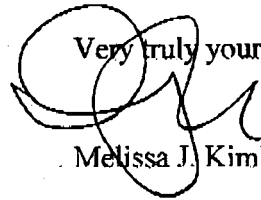
Via fax: 734-1499

Dear Debby:

The trial judge in *State v. Kevin Mercer* was John C. Few. The indictment number for Kevin Mercer's death penalty case is 03-GS-32-409, which included charges of murder, armed robbery and possession of a firearm during the commission of a violent crime.

I appreciate your assistance in this matter. Please feel free to contact me if you need any additional information.

Very truly yours,



Melissa J. Kimbrough

/mk

RECEIVED

APR 27 2006

S.C. SUPREME COURT

August 21, 2006

Daniel E. Shearouse
Clerk of Court
P.O. Box 11330
Columbia, SC 29211

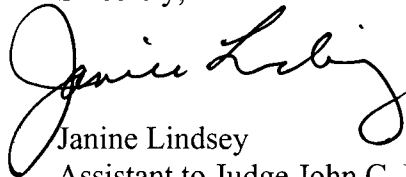
Re: The State v. Mercer, Kevin

Dear Mr. Shearouse,

I have enclosed Judge Few's Death Penalty Questionnaire.

We are waiting for a copy of Kevin Mercer's criminal records from Lexington County. I will forward a copy of the records when I receive them.

Sincerely,

A handwritten signature in black ink, appearing to read "Janine Lindsey", written over the typed name.

Janine Lindsey
Assistant to Judge John C. Few

RECEIVED

AUG 24 2006

S.C. SUPREME COURT

**REPORT OF THE TRIAL JUDGE
IN THE COURT OF GENERAL SESSIONS
LEXINGTON COUNTY, SOUTH CAROLINA**

THE STATE

VS

Kevin Jermaine Mercer
Case No. 2003-GS-32-409

A. DATA CONCERNING THE DEFENDANT

1. Name Mercer Kevin Jermaine
2. Date of Birth
Month Day Year
3. Social Security Number [] Unknown
4. Sex: Male ☒ 5. Race: White ☐
Female ☐ Black ☒
Other ☐
6. Education - Highest Grade Completed:
1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16
(Circle One) (College)
7. Do you have an opinion as to the Defendant's intelligence level?
Yes ☒ No ☐
- If so, is it
- a. Below Average ☒
b. Average ☐
c. Above Average ☐

RECEIVED

AUG 24 2006

8. Was a psychiatric evaluation performed? Yes [x] No []
- a. If performed, by whom? Donna Culley Ph. D.; Frieson, M.D.
- b. If performed, is defendant
1. Able to distinguish right from wrong? Yes [X] No []
2. Able to cooperate intelligently in his own defense? Yes [X] No []
- c. If performed, were character or behavior disorders found? Yes [X] No []
- (If yes, please elaborate)
- Antisocial Personality Disorder

9. Does the Defendant have a record of prior convictions?
- Yes [X] No []

- a. If so, either attach hereto a record manifesting such prior convictions(s) or list the offenses(s), the date(s) of such offense(s) and the sentence(s) imposed:

<u>Offense</u>	<u>Date of Offense</u>	<u>Sentence imposed</u>

1. See attached criminal history

2.

3.

4.

5.

6.

10. Was the defendant a resident or non-resident of the county in which the trial was held?

Resident [X]

Non-Resident []

B. DATA CONCERNING PRE-TRIAL MATTERS

1. The defendant was arrested on May 17, 2002
2. Was a preliminary hearing requested? Yes [X] No []
3. Was a preliminary hearing conducted? Yes [X] No []
4. The defendant was indicted at the February 10, 2003 term of the Court of General Sessions for Lexington County, South Carolina.
5. List each charge alleged in the indictment.
 - a. Murder
 - b. Arm Robbery
 - c. Possession of a firearm during Com. Violent Crime
 - d. Criminal Conspiracy
 - e.
 - f.
6. The defendant was arraigned on February 12, 2004.
 - a. If not arraigned, did the defendant waive arraignment?
Yes [] No []
7. Was the defendant provided with a true copy of the whole indictment at least three days prior to his trial thereupon?
Yes [X] No []
 - a. If not, did the defendant waive this right to a three day sight of the indictment?
Yes [] No []
8. Did the solicitor notify the defendant at least thirty days before trial that the State would seek imposition of the death penalty upon the defendant?

No []

9. Did the solicitor make known to the defendant in writing prior to trial the evidence in aggravation of punishment thereafter introduced by the State during the trial or during the sentencing proceeding?

No []

10. Did the defendant move for a change of venue.

No [X]

- a. If so, was the venue changed?

No []

- (1) If so, designate County. _____

C. DATA CONCERNING THE TRIAL

1. The defendant was brought to trial in the Court of General Sessions for Lexington County, South Carolina on April 17, 2006, during the April, 2006 term of that Court.

2. How did the defendant plead? Guilty[]
Not Guilty [X]

3. List each offense of which the defendant was convicted and each offense of which the defendant was acquitted:

- a. The offense(s) of which the defendant was convicted:

1. Murder
2. Arm Robbery
3. Possession of a firearm during Com. Violent Crime
- 4.
- 5.

- b. The offense(s) of which the defendant was acquitted:

1. Criminal Conspiracy was *nol prossed*
- 2.
- 3.
- 4.

5.

4. On what date and at what time did the conviction(s) occur?

April 22, 2006, at _____ o'clock ____ M.

D. DATA RELATING TO SENTENCING PROCEEDING

1. Before whom was the defendant's sentencing proceeding conducted?

the trial jury ☒ the trial judge ☐

a new jury ☐ a new trial judge ☐

- a. If conducted before the trial jury,

1. On what date and at what time was the sentencing proceeding held?

____ April 22, 2006, at _____ o'clock ____ M.

- a. If such proceeding was conducted less than twenty four hours after the defendant's conviction, did the defendant waive the twenty-four hour waiting period?

Yes ☐ No ☐

- b. If conducted before the trial judge or a new trial judge,

1. And if the defendant was convicted by a jury,

- a. Did the defendant and the State waive having the trial jury recommend sentence

Yes ☐ No ☒

If not, was the sentencing proceeding conducted by the trial judge because the case, due to nonprejudicial error, had been remanded to the trial court for resentencing based upon the record and argument of counsel?

Yes ☐ No ☒

- b. On what date and what time was the sentencing proceeding held?

_____, 200__ at _____ o'clock ____.

If such proceeding was conducted less than twenty four hours after the defendant's conviction, did the defendant waive the twenty four hour waiting period.

Yes [] No []

And if the defendant was convicted upon a plea of guilty, on what date was the sentencing proceeding held?

_____, 199____

c. If conducted before a new jury,

1. On what date was the sentencing proceeding held?

_____, 199____

2. Was such a proceeding conducted by the same judge who presided over the defendant's trial.

Yes [] No []

2. Which of following statutory aggravating circumstances were instructed, if the sentencing proceeding was conducted before a jury, and which of those circumstances were found irrespective of whether or not that proceeding was conducted before a jury or a trial judge?

(A) Murder was committed while in the Instructed Found
commission of

1. Criminal sexual conduct, [] []
_____ degree,

2. Kidnapping [] []

3. Burglary, _____ degree [] []

4. Robbery while armed with

	a deadly weapon.	☒	☒
5.	Larceny with use of a deadly weapon.	☐	☐
6.	Killing by poison	☐	☐
7.	Physical torture	☐	☐
B.	Murder was committed by a person with a prior record of conviction for murder.	☐	☐
C.	The offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.	☐	☐
D.	The offender committed the offense of murder for himself or another for the purpose of receiving money or any other thing of monetary value.	☐	☐
E.	the murder of a judicial officer, former judicial officer, solicitor, former solicitor, or other officer of the court during or because of the exercise of his official duty.	☐	☐
F.	The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.	☐	☐
G.	The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.	☐	☐

- H. Murder wherein two or more persons are murdered by the defendant by one act or pursuant to one scheme or course of conduct. ☐ ☐
- I. The murder of a child eleven years of age or under. ☐ ☐
3. Was (were) the aggravating circumstance(s) found supported by the evidence?
Yes ☒ No ☐
4. Was there evidence of mitigating circumstances found supported by the evidence?
Yes ☒ No ☐
5. If so, which of the following mitigating circumstances was in evidence?
- ☐ 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 victim was a participant in the defendant's conduct or consented to the act.
- ☐ 4. The defendant was an accomplice in the murder committed by another person and his participation was relatively minor.
- ☐ 5. The defendant acted under duress or under the domination of another person.
- ☒ 6. 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.

☒ 7. The age or mentality of the defendant at the time of the crime(s).

☐ 8. the defendant was provoked by the victim into committing murder.

☐ 9. the defendant was below the age of eighteen at the time of the crime(s).

☐ 10. Other. Please explain if 10 is checked.

6. If tried with a jury, was the jury instructed to consider the circumstances in number 5 as mitigating circumstances?

Yes ☒

No ☐

7. Was the jury provided in writing for its deliberation the statutory instructions as to aggravating and mitigating circumstances?

Yes ☒

No ☐

8. As a trial judge, did you, prior to imposing the sentence of death upon the defendant, find as an affirmative fact that the death penalty was warranted under the evidence of the case and was not a result of prejudice, passion or any other arbitrary factor?

Yes ☒

No ☐

E. DATA RELATING TO OFFENSE(S)

1. Was there evidence that the defendant, at the time the offense(s) was (were) committed, was

a. Under the influence of alcohol? Yes ☐

No ☒

b. Under the influence of narcotics
or other dangerous drugs? Yes [] No [X]

2. Was (were) any weapon(s) used in the commission of the crime of murder?

Yes [X] No []

a. If so, check each weapon used

1. Poison []

2. Pistol [X]

3. Rifle []

4. Shotgun []

5. Blunt instrument []

Describe -

6. Sharp instrument []

Describe -

7. Motor vehicle []

8. Other []

Describe -

3. Cause of death. Gunshot wound to head.

4. County in which the body was found. Lexington

5. County in which the murder occurred if different from county in which the body was found. _____

F. DATA RELATING TO VICTIM

1. What was the victim's age? 35

2. Was the victim related by blood or marriage to the defendant?

Yes []

No [X]

a. If so, what was the relationship? _____

3. Was the victim the same race as the defendant? Yes [X] No []

4. Was the victim the same sex as the defendant? Yes [X] No []

5. Was the victim physically harmed or tortured? Yes [X] No []

If yes, state nature of harm or extent of torture.

Gunshot wound to head _____

G. DATA CONCERNING DEFENSE COUNSEL

1. Who was (were the defendant's attorney(s) and what was (were) his (their mailing address(es)?

Name

Mailing Address

a. Cam Littlejohn 1720 Main St. Suite 202 Columbia, SC 29201

b. Melissa Kimbrough 1811 Pickens Street Columbia, SC 29201

c.

d.

2. Did the defendant retain his own counsel or did the court appoint defense counsel?

Retained by Defendant

[]

Appointed by Court

[X]

- a. Specify for each such counsel, the date retained or appointed, the number of years as a licensed attorney and the number of years of actual felony trial experience.

	Date retained	Years experience	Years
felony	<u>Name or appointed as attorney</u>	<u>trial experience</u>	
1.	Cam Littlejohn	January 2004	30 yrs 8 mos
2.	Melissa Kimbrough	January 2006	9 yrs
3.			
4.			

3. Identify by name each attorney who, at the time of his appointment, was employed by the Public Defender's Office.

4. Did each counsel serve throughout the trial?

Yes [X]

No []

- a. If not, explain in detail. _____
- _____
- _____

H. GENERAL CONSIDERATIONS.

1. Was race raised by the defense as an issue in the trial? Yes [] No [X]
2. Did race otherwise appear as an issue in the trial? Yes [] No [X]
3. Were members of the defendant's race represented on the petit jury? Yes [] No [X]
4. Were members of the defendant's race represented on the jury venire? Yes [X] No []
5. Was there any evidence that members of the Defendant's race were systematically excluded from the jury? Yes [] No [X]
6. Was the jury instructed to exclude race as an issue? Yes [] No [X]
7. Was there extensive publicity in the community concerning this case? Yes [] No [X]
8. Was the jury instructed to disregard such publicity? Yes [X] No []
9. Was the jury sequestered? Yes [] No [X]
10. Was the jury instructed to avoid any influence of passion, prejudice or any other arbitrary factor when recommending sentence? Yes [] No [X]
11. Your general comments concerning the appropriateness of the sentence imposed in this case.

—

—

12. If the defendant is a female, is she currently pregnant? Yes [] No []

- a. If so, the anticipated delivery date is _____.
13. This report was submitted to the defendant's counsel for such comments as he (they) desired to make concerning the factual accuracy of the report and
- a. His (their) comments are incorporated []
- b. he (they) stated he (they) had no comments []
- c. He has (they have) not responded []

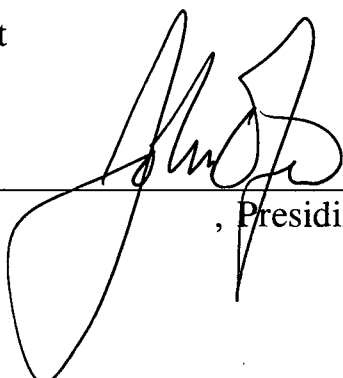
I. CHRONOLOGY OF CASE

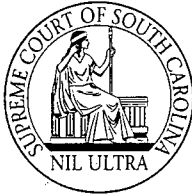
<u>Days</u>		<u>Elapsed</u>
1.	Date of offense May 16, 2002	0
2.	Date of arrest May 17, 2002	1
3.	Date trial began April 17, 2006	1657
4.	Date sentence imposed April 22, 2006	1662
5.	Date post trial motions ruled on Pending	
6.	Date trial judge's report completed <u>8/21/06</u>	
7.	*Date received by Supreme Court _____	
8.	*Date sentence review completed _____	
9.	*Total elapsed Days _____	

*To be completed by Supreme Court

Date:

8/21/06


_____, Presiding Judge



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

August 11, 2006

The Honorable John C. Few
Greenville County Courthouse, Suite 318
305 East North Street
Greenville, SC 29601-2120

Re: The State v. Mercer, Kevin

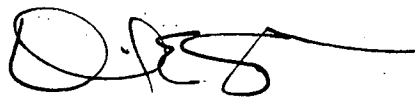
Dear Judge Few:

Please be advised that we have still not received the Death Penalty Questionnaire in the above entitled matter.

Enclosed you will find another copy of this Court's letter dated June 7, 2006 asking that you please complete and return within twenty (20) days of the date of this letter.

Please file the completed questionnaire with the Court within ten (10) days of the date of this letter.

Very truly yours,



CLERK

DES/dmh

Enclosure

Shearouse, Daniel

From: Don Zelenka [AGDZELENKA@ag.state.sc.us]
Sent: Tuesday, July 11, 2006 4:00 PM
To: Ed Salter; Myers, Donald V.; rick hubbard; shawn graham; Few, John C.; camlittlejohn@yahoo.com; Lisa Kimbrough
Cc: Shearouse, Daniel
Subject: Re: Kevin Mercer - Remand from SC Supreme Court for Motion for New Trial

Although I have not received a copy of the order yet, I had spoken with Dayton Riddle when the motion was filed. Inasmuch as this office has no knowledge about any facts related to the case, we are deferring to the 11th Circuit Solicitors Office for handling of the evidentiary matters and related to the remand and filing of a motion of a new trial.

Donald J. Zelenka
Assistant Deputy Attorney General
South Carolina Attorney General's Office P.O. Box 11549 Columbia, South Carolina 29211
803-734-3601
803-734-4035 (FAX)
agdzenka@ag.state.sc.us

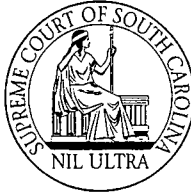
>>> "Few, John C." <JFewJ@sccourts.org> 7/11/2006 3:26 pm >>>
Dear Counsel:

As you probably know, the Supreme Court remanded the Mercer case yesterday, and required that I hold a hearing within 30 days. The best time for me to do that is August 7, 8, or 9. Since most of us will be in the Gary Terry PCR tomorrow, let's plan on having a conference tomorrow at which we set this for hearing.

Let's do it at Noon, and if we have to interrupt the Terry case we will.
If anybody has any major problems with this, let me know. We could move it to Thursday when we do the Locklair hearing.

Thanks,

John Few



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

July 10, 2006

Cameron B. Littlejohn, Jr., Esquire
1720 Main St., Ste. 202
Columbia, SC 29201

Melissa Jane Reed Kimbrough, Esquire
1720 Main St., Ste. 106
Columbia, SC 29201

South Carolina Office of Appellate Defense
South Carolina Commission
on Indigent Defense
Division of Appellate Defense
P O Box 11589
Columbia, SC 29211

Re: The State v. Mercer, Kevin

Dear Counsel:

Enclosed is the order issued in the above entitled matter.

By copy of this letter and order, we are advising all interested parties of the action by the Court.

Very truly yours,



CLERK

DES/jjp

cc: Solicitor Donald V. Myers
Office of the Attorney General
The Honorable Beth Carrigg
The Honorable John C. Few

The Supreme Court of South Carolina

The State,

Respondent,

v.

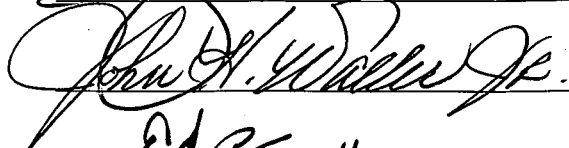
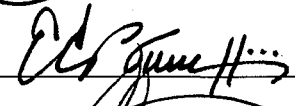
Kevin Mercer,

Appellant.

ORDER

Appellant moves this Court to hold his appeal in abeyance and remand the case to the circuit court for a hearing on appellant's motion for a new trial based on after-discovered evidence. The State concedes that the appeal should be held in abeyance to allow for a remand to address appellant's motion for a new trial. Appellant's motion to hold the appeal in abeyance and remand the case to the circuit court for a hearing on the motion for a new trial based on after-discovered evidence is granted. This appeal is hereby held in abeyance and the case remanded to the Honorable John C. Few, who shall hold an evidentiary hearing on appellant's motion within thirty (30) days of the date of this order and issue an order deciding the motion within sixty (60) days of the date of this order.

IT IS SO ORDERED.


C.L.

J.

J.

J.

Moore, J., not participating

Columbia, South Carolina

July 10, 2006

Melissa J. Kimbrough

ATTORNEY AT LAW

May 30, 2006

Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P.O. Box 11330
Columbia, S.C. 2911

RECEIVED
MAY 31 2006
S.C. SUPREME COURT

Re: *State v. Kevin Mercer*, 03-CP-32-409

Dear Mr. Shearouse:

Enclosed please find an original and six copies of a Motion for Remand and Hearing on Motion for New Trial Based on After-Discovered Evidence, with attachments and certificate of service for the Lexington County Solicitor's Office and the S.C. Office of the Attorney General.

Please contact me if you have any questions concerning this matter.

Very truly yours,



Melissa J. Kimbrough

/mk
enclosures



HENRY McMASTER
ATTORNEY GENERAL

RECEIVED

JUN 13 2006

S.C. SUPREME COURT

June 13, 2006

Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P.O. Box 11330
Columbia, South Carolina 29211

Re: *The State v. Kevin J. Mercer*

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the ***Respondents Return to Motion for Remand Hearing on Motion for New Trial Based Upon After-Discovered Evidence*** in the above-referenced matter for filing. By copy of this letter I am serving all interested parties.

Sincerely,



Donald J. Zelenka
Assistant Deputy Attorney General

DJZ/lbb
Enclosure

cc: Melissa J. Kimbrough, Esquire
Cameron B. Littlejohn, Jr., Esquire
Joseph L. Savitz, III, Esquire
Sandi Wofford, Victims Assistance

IN THE SUPREME COURT
STATE OF SOUTH CAROLINA

Appeal from Lexington County
06-GS-32-553

RECEIVED

JUN 13 2006

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA,

Respondent,

V.

KEVIN J. MERCER,

Appellant

**RESPONDENTS RETURN TO MOTION FOR REMAND
AND HEARING ON MOTION FOR NEW TRIAL
BASED UPON AFTER-DISCOVERED EVIDENCE**

The Respondent, State of South Carolina, by and through its below-signed counsel, hereby makes a Return to the Motion for Remand and Hearing on Motion for New Trial Based Upon After-Discovered Evidence. For the reasons set forth below, Respondent submits that the pending appeal should be held in abeyance to allow a remand to the Court of General Sessions and particularly trial judge, the Honorable John C. Few, to address whether the after-discovered evidence of Kevin Fuller satisfies the elements of "after-discovered evidence" set out in *State v. Caskey*, 273 S.C. 325, 256 S.E.2d 737 (1979).

I.

The Appellant, Kevin J. Mercer, was indicted for murder, armed robbery, and possession of a firearm while in the commission of a felony, § 16-23-490 during the February 2003 term of

the Court of General Session for Lexington County. 2003-GS-32-409. From April 17-22, 2006, he was tried before a jury and the Honorable John C. Few. He was convicted of his charge. After a separate sentencing hearing where statutory aggravating factors of murder committed while in the commission of armed robbery was found, he was sentenced to death on April 22, 2006.

On April 24, 2006, a notice of appeal was made to this Court. On May 22, 2006 his appellate attorney, the South Carolina Division of Appellate Defense, ordered the transcripts of the trial. At this time, upon information and belief, the transcripts are not prepared or available for either party.

On or about May 31, 2006, the Appellant, through his trial appellate counsel, made a motion to remand and hearing on a motion for new trial. Within the pleading, the Appellant essentially contends that on May 23, 2006, the Appellant received evidence through the Eleventh Circuit Solicitor's Office that Kevin Fuller, a detainee, had received information that Marcus Thompson had confessed to killing Sgt. Tracey Lamar Davis.

Mercer contends this information satisfies the elements of "newly discovered evidence" inasmuch as information was first brought to either parties' attention after the trial (and after the notice of appeal) was filed. He contends that this information was consistent with the defense theory at trial that Thompson killed Sgt. Davis and inconsistent with the State's theory that Mercer was the triggerman. The Appellant makes various other assertions concerning the entirety of the trial and potential impact this information has upon the case in support of his motion. However, without a copy of the transcript to review the entirety of the record, below-signed counsel can neither effectively nor ethically address these concerns, having not

participated at the trial. Nevertheless, addressing those factual claims are not necessary at this preliminary stage of the appeal.

Rule 29 of the South Carolina Rules of Criminal Procedure sets out the following:

Rule 29(b)

A motion for new trial based on after discovered evidence must be made within a reasonable period of time after the discovery of the evidence, provided however, that the motion for a new trial based on after discovered evidence made not be made while the case is on appeal unless the appellate court, upon motion, has suspended the appeal and granted leave to make the motion...

Therefore, the limited purpose of this motion before the court is whether leave of the court and suspension of the appeal is appropriate at this time.

Respondent submits the equities are in favor of suspending the appeal and allowing leave to file the motion in Lexington County. First, the appeal is within the preliminary stages of the transcript being ordered. Thus, the appellate issues have not been presented to the court at this time. Second, after consulting with the Solicitor's Office, it has been confirmed that the evidence relied upon specifically within the Appellant's motion, attachments A, B, C, D, E was brought to the defense attention after the trial and after the notice of appeal. Without addressing the merits of the substance of the information within, Respondent concedes that it is "new" and the request is being made "within a reasonable period of time after the discovery..."

Respondent, State of South Carolina, therefore asserts that the appeal be suspended to allow Mercer to make a motion for a new trial based upon after-discovered evidence.

Respondent requests, consistent with the practice in prior cases, that the leave of remand be made with a directive that the matter be heard by the original trial judge, the Honorable John C. Few,