ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

RECEIVED
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S.C. SUPREME COURT

THE STATE,

RESPONDENT,

V.

KEVIN MERCER,

APPELLANT

INITIAL BRIEF OF APPELLANT

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2.

Whether the court erred by excluding the expert neurological opinion of Dr. John Steedman that appellant suffered from a specific brain abnormality since Dr. Steedman's opinion that the abnormality might affect appellant's behavior was very probative of his penalty stage mitigation, and the court erred by excluding it under Rule 403, SCRE?

3.

Whether the court erred by excluding the expert testimony of Dr. John Steedman that disorders such as post-traumatic stress disorder and brain impairments can cause poor judgment, paranoia, and other negative consequences, since Dr. Steedman was qualified by his experience as a neurologist to give this opinion and the state's objection that this was psychiatric testimony went to the weight and not the admissibility of the expert's opinion?

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6.

Whether the court erred by excluding 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, and the court erroneously excluded this evidence as inadmissible evidence of "third-party guilt"?

STATEMENT OF THE CASE

Appellant was 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. R. *. Co-defendant Marcus Thompson, who appellant maintained was the triggerman was later allowed to plead guilty to being an accessory after the fact and armed robbery.[1] He received a twenty-six year sentence.[2]

Appellant's case came on for trial on April 17, 2006 before the Honorable John Few, and a jury.[3] Cameron B. Littlejohn, Jr. and Melissa J. Kimbrough represented appellant. Donald V. Myers, S. Rick Hubbard, III, D. Shawn Graham, and Marion Moses were solicitors. Tr. 1. At the conclusion of the guilt phase of the trial the jury found appellant guilty of these three offenses. Tr. 1709, ll. 1 – 9.

A penalty phase trial was then held. At the conclusion of the penalty phase the jury recommended that appellant be sentenced to death. Tr. 2431, ll. 7 – 20. Judge Few then imposed the death sentence. Tr. 2435, ll. 7 – 15.

This appeal follows.

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[1] Appellant and Thompson were not tried together.

[2] See South Carolina Department of Corrections website.

[3] The criminal conspiracy indictment which alleged appellant conspired with Thompson was *nol prossed.* See Report of the trial judge at 4. R. p. *

ARGUMENT

1.

The court erred by denying appellant funding so that an expert could test the gloves found on co-defendant Thompson minutes after the murder for gunshot residue. This was critical corroborating evidence of appellant's defense that Thompson was the shooter, and the court's denial of funding denied appellant an informed resolution to the new trial motion, and it also denied appellant the right to a present a meaningful and complete defense during a future trial.

Introduction – a review of the evidence

The state maintained at trial that appellant shot and killed the decedent while stealing his automobile on May 16, 2002. Appellant and Marcus Thompson were stopped in the decedent's automobile on the interstate about seventeen minutes after the shooting was reported. Thompson had gloves in his pocket – and this was on May 16, 2002 – as well as .357 caliber bullets. Appellant was driving the vehicle, and a gun was found underneath the driver's seat. The issue would later become whether Thompson placed the gun there after appellant was removed from the automobile by the police, and before the police removed Thompson. Tr. 1284, l. 4 – 1286, l. 4; tr. 1298, l. 1 – 1313, l. 25; Motion for a new trial hearing. Supp. Tr. 43, l. 18 – 44, l. 20; tr.85, l. 1 – 86, l. 25 R. p.* - *.

As will be seen infra, the state fought all efforts to show the jury that it failed to investigate co-defendant Thompson as being the triggerman, and that it gave him special treatment. For example, even through the motion for a new trial hearing, the state never had Thompson's gloves tested for gunshot residue. The results on appellant's hands were not positive for the existence of gunshot residue. Tr. 1519, l. 24 – 1529, l. 12.

Appellant was also denied funding to test Thompson's gloves for gunshot residue even though the state's failure to test Thompson's gloves for gunshot residue should intuitively seem inexcusable. The state also successfully excluded testimony from Thompson's attorney, David Farrell, that Thompson was only charged as an accessory after the fact and that Thompson had been released on bond.[4] Tr. 1593, l. 16 – 1598, l. 19. See Issue six infra.

The assistant solicitor had offered during the February 23, 2006 pre-trial hearing that he understood "no promises have been made to the co-defendant or any other witness in this case. The assistant solicitor agreed if a promise had been made or was made in the future that it would be disclosed to the defense. The solicitor then said no promises had been made to Thompson, and a discussion of how Thompson was released on bond followed. Supp. Tr. 17, l. 19 - 20, l. 24.

The judge noted at the end of the pre-trial hearing that Thompson had a $50,000.00 bond "order signed by Judge Jeffcoat, and that appears to be the bond that he posted . . . You can look at it yourselves and make whatever other inquiry you want . . ." Supp. Tr. 50, l. 20 -51, l. 1.

After appellant 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 [appellant] getting the blame."

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[4] That would have been the extent of Farrell's testimony. The defense was not going to inquire into any statements or potential attorney-client matters between Farrell and Thompson. It was purely the difference in the procedural posture of Thompson's case.

See Attachment D to Motion for a New Trial. R.*. On May 23, 2006 Solicitor Myers forwarded this letter to defense counsel Cameron Littlejohn. See Attachment A to Motion for a New Trial. R. *.

On May 9, 2006 Fuller gave the Lexington County Sherriff's Department a statement. See Attachment E to Motion for a New Trial. R.*. In this statement Fuller told the police that co-defendant Thompson was taken to the hospital while in jail, and that he "came back bragging about being fucked up on pain pills. He started stating he was a lucky nigger because Lexington County was stupid." Fuller said Thompson also said "this here nigger (referring to the newspaper) is dying for me." R.*.

Fuller also told the police that Thompson told him he shot the decedent in the head and that "he constantly brags about shooting Tracey Davis. And how Lexington County didn't check the inside of the gloves or didn't put two and two together because he had the bullets on him that went to the gun." R.*.

In a question and answer session with the police Fuller said he did not know anything about appellant or the case prior to Thompson talking to him. Fuller said he had not been promised anything in return for his statement and he stated upon receiving Thompson's confession he sent a request to the jail for Solicitor Myers or someone to come and talk with him "about what Marcus was saying to me about some murders." See Attachment F to Motion for a New Trial. R. *.

Thompson bragged about fooling the police, turning the gloves inside out, and the television show, CSI, informing him how to get away with the murder. See Attachment to Motion for a New Trial. R. *. This Court then granted appellant's motion to Suspend

the Appeal and Remand for a Hearing on the Motion for a New Trial based on this after-discovered evidence. See Motion for a New Trial and this Court's order. R. p. * – p. *.

Motion for a new trial hearing

At the motion for a new trial hearing Kevin Fuller testified that Thompson bragged about killing the decedent, and he also bragged about appellant getting the death penalty for his murder. Supp. Tr. 41, l. 3 – 51, l. 5. Thompson denied making these statements to Fuller, and defense counsel argued: "Thompson had the gloves. The gloves have never been tested. I'm not going to go through all this; I know the Court remembers all that. But Marcus Thompson had seventeen 357 bullets in his pocket . . . If a jury in another trial believed what Kevin Fuller said Marcus Thompson told him, that could make the hugest difference in this case. We thought there was a real reasonable doubt [during the trial, but] obviously the jury didn't agree with us." August 9, 2006 Supp. Tr. 129, l.7 – 133, l. 11.

Counsel added, "certainly the presence of gunshot shot residue on those gloves would corroborate his story." Supp. Tr. 137, l. 8 – 138, l. 10. The assistant solicitor responded, "if there's G.S.R. on those gloves, it's from the earlier shooting [Thompson allegedly claimed occurred] . . . Those gloves will prove nothing about this murder . . ." Supp. Tr. 138, l. 11 – 139, l. 7. Defense counsel responded that "[i]f this is a search for the truth, I think that full information about all the physical evidence is an absolute requirement." Counsel questioned why the state was opposed to testing Thompson's gloves." Supp. Tr. 139, ll. 9-21.

The judge then ruled that he did not think the existence of nonexistence of gunshot residue would have any impact on the believability of what Fuller testified Thompson said to him. The judge stated he did not see any reason for the state to pay to have the gloves

tested, and that for purposes of "my analysis here . . . I'm going to assume that there is gunshot reside on those gloves." Supp. Tr. 140, ll. 2-19.

In his order the trial judge noted the defense motion that the court provide funds to have Thompson's gloves tested. However, the judge reasoned that "Thompson's testimony that he fired the gun earlier in the day while wearing the gloves makes the results of that testing essentially meaningless." Order at p. 11, n. 5. R. p. *.

Discussion

In Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087 (1985), the Court noted that it had long recognized that when the state brings its judicial power against an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense. This principle is grounded in the Fourteenth Amendment's due process guarantee of fundamental fairness and it is derived from the belief that justice cannot be equal where, simply because the defendant is indigent, he is denied the opportunity to meaningfully participate in a judicial proceeding where his liberty or life is at stake. Ake v. Oklahoma, 470 U.S. 68, 76, 105 S.Ct. 1087, 1092 – 1093 (1985).

The Court also wrote in Ake v. Oklahoma that it had long focused on the basic tools an indigent defendant must be supplied by the state when an adversarial criminal proceeding is brought against him. See Ross v. Moffitt, 417 U.S. 600, 94 S.Ct. 2437 (1974); Britt v. North Carolina, 404 U.S. 226, 227, 92 S.Ct. 431, 433 (1971).

The Court in Ake v. Oklahoma held that when a defendant demonstrated to the trial judge that his sanity at the time of the offense was a significant factor at trial, the state must, at a minimum, assure the defendant access to a competent psychiatrist who

will conduct an appropriate examination and assist in the evaluation, preparation, and presentation of the defense. See also Panetti v. Quarterman, ___ U.S. ___, 127 S.Ct. 2842 (2007) (habeas application was not barred as successive where the state court failed to provide the defendant the procedures he was entitled to under the Constitution, *citing* funding also).

Here, appellant's guilt phase defense was that he was not the triggerman, and that Thompson, the man with the gloves and bullets in his pocket, was the triggerman. Tr. 1671, l. 13 – 1688, l. 11. Who the jury believed actually shot the decedent obviously still had penalty phase ramifications if appellant was still convicted after the jury heard this newly discovered Kevin Fuller evidence.

Respectfully, the trial judge's decision to deny appellant funding to hire an expert to test the gloves worn by co-defendant Thompson was arbitrary, unreasonable, and an abuse of discretion. The solicitor's suggested reasoning to the trial judge that because Thompson said he was shooting the gun earlier in day anyway that made the gunshot residue test irrelevant was fatally flawed. The jury did not have to believe – and probably would not have believed – Thompson's explanation that he was shooting a gun earlier in the day with gloves on during the month of May anyway. Further, although the judge said he would assume that Thompson's gloves tested positive for gunshot residue, his assumption, respectfully, was made in terms of this fatally flawed analysis. Moreover, a jury would not assume that Thompson's gloves tested positive for gunshot residue.

The denial of funding to test the gloves was fundamentally unfair, and appellant should be granted a new trial as argued in remaining five issues, or, in the alternative,

based on this issue, this Court should remand with an order that the indigent appellant be provided expert funding to test Thompson's gloves. See Ake v. Oklahoma, supra; S.C. Code §16-3-26 (C)(1).

2.

The court erred by excluding the expert opinion of neurologist Dr. John Steedman that appellant suffered from a specific brain abnormality since Dr. Steedman's opinion that the abnormality might affect appellant's behavior was very probative of his penalty phase mitigation, and the court erred by excluding this evidence under Rule 403, SCRE.

Relevant Facts

Dr. John 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. Tr. 2263, l. 18 – 2264, l. 14. Dr. Steedman was qualified with as an expert in neurology without objection. Tr. 2265, ll. 14 – 24.

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." Tr. 2266, ll. 8 – 19. Dr. Steedman testified that a spect scan is read by a radiologist looking to see it shows abnormalities. Tr. 2266, l. 20 – 2267, l. 10.

Dr. Steedman did a "routine neurological exam" on appellant. Tr. 2267, ll. 1 – 20. Dr. Steedman also read reports on appellant's educational and other testing. Tr. 2267, ll. 21 – 25. Dr. Steedman said appellant told him he graduated from high school and that he

had done well.[5] "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." Tr. 2268, ll. 4 – 17.

Dr. Steedman described appellant as having a significant learning disorder. However, appellant did not qualify as being mentally retarded.[6] Tr. 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." Tr. 2273, l. 20 – 2274, l. 6.

Dr. Steedman testified he had read appellant's spect scan himself, and he also read the 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." Tr. 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. Tr. 2274, l. 13 – 2275, l. 16.

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[5] Appellant, 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). Tr. 2144, l. 3 - 2148, l. 25.

The assistant solicitor then again to complain he did not have adequate notice to prepare for this testimony. Tr. 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." Tr. 2277, l. 17 – 2278, l. 6.

Dr. Steedman then informed the judge that the radiologist was saying 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." Tr. 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." Tr. 2279, ll. 3 – 11.

Assistant Solicitor Graham then brought up his complaint "we have with [experts] not writing report." Tr. 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 there opinions were." Tr. 2280, ll. 9 – 16. Assistant Solicitor Graham agreed that he had a conversation with defense counsel about Dr. Steedman's testimony. Tr. 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 appellant. Dr.

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[6] The trial judge also wrote in his report that appellant had "below average" intelligence. The lowest selection of the three choices. See Trial judge's report at 1. R. p. *.

Steedman answered that he was indeed going to testify in that manner. Tr. 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." Tr. 2284, ll. 17 – 25. The judge said he saw little probative value to this testimony but significant prejudice to the state. Tr. 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. Tr. 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.*

Tr. 2286, ll. 14 – 22. (emphasis added).

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 opinion. The judge reiterated that he would not allow Dr.

Steedman to testify there was "a specific abnormality." Tr. 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.*" Tr. 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." Tr. 2295, ll. 6 – 17.

Discussion

The judge charged the jury that it 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. Tr. 2416, l. 9 – 2417, l. 1. See, also, S.C. Code § 16-3-20(c)(b)(2)(6) & (7). The excluded evidence was probative of the jury's consideration of each of these three mitigating circumstances.

Rule 702, SCRE provides that "if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise."

Rule 703, SCRE, provides that facts and data, if of the type reasonably relied upon by experts in a particular field in forming opinions or inferences can be the basis of

the expert's opinion testimony. Further, the underlying facts or data themselves need not be admissible in evidence to form the basis for the opinion.

Dr. Steedman read the radiologist's report of a "questionable abnormality," and he also personally viewed the spect scans and came to the conclusion appellant suffered from a specific abnormality that might have an affect on appellant's behavior. Dr. Steedman's opinion that appellant 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 supply the "any other reason" not to sentence appellant to death. S.C. Code § 16-3-20(c)(b)(2)(6) & (7)

The definition of relevant evidence has always been broad during the penalty phase of a death penalty case. It includes the "bad character" or other bad acts of the defendant for the prosecution, and matters particular or peculiar to the defendant's mental or emotional capabilities or his upbringing for the defense.

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)[7]; 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 appellant suffered from a specific brain abnormality was clearly relevant, and it was helpful to appellant'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.

Respectfully, the judge's Rule 403, SCRE, analysis finding the probative value of this evidence substantially outweighed by its unduly prejudicial effect unfairly focused on the solicitor's complaint of prejudice because Dr. Steeman's testimony was compelling.

The definition of relevant evidence is defined as "evidence having any tendency to make the existence of any fact that it is the consequences to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE; State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991); State v. Schmidt, 288 S.C. 301, 342 S.E.2d 401 (1986).

The trial judge erred by excluding Dr. Steedman's relevant mitigation testimony that in his opinion appellant suffered from a specific brain abnormality. Eddings v. Oklahoma, 455 U.S. 104, 113, 115, 102 S.Ct. 869, 876, 877 (1982); Hitchcock v. Dugger, 481 U.S. 393, 398, 399, 107 S.Ct. 1821, 1824 – 1825 (1987); Skipper v. South Carolina,

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[7] Overruled on other grounds in Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242 (2002).

476 U.S. 1, 4- 5, 106 S.Ct. 1669, 1670, 1671 (1986). Appellant should be granted a new sentencing proceeding.

3.

The court erred by excluding the expert testimony of Dr. John Steedman that disorders such as post-traumatic stress disorder and brain impairments can cause negative consequences such as poor judgment and paranoia. Dr. Steedman was qualified by his experience as a neurologist to give this opinion – he was also board certified in psychiatry -- and the state's objection that this was psychiatric testimony went to the weight and not the admissibility of the expert's opinion.

Relevant Facts

After Dr. Steedman was precluded from opining that appellant had a specific brain abnormality, the following occurred:

> 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.

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

At this point the judge sent the jury out of the courtroom. Tr. 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.

Tr. 2301, l. 14 – 2302, 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.

Tr. 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." Tr. 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." Tr. 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." Tr. 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." Tr. 2304, l.4 – 2306, l. 4.

Within these strict confines Dr. Steedman was allowed to testify in the presence of the jury that the radiologist found a "questionable abnormality" in appellant's brain. The solicitor asked if this "questionable abnormality" caused appellant to "attack an

inmate in the jail with shanks."[8] Dr. Steedman answered that the abnormality may have been a contributory factor to poor judgment. Tr. 2307, l. 16 – 2310, l. 14.

Discussion

Dr. Steedman was a neurologist and he was also board certified in psychiatry. He was a very well qualified witness.

His testimony that disorders such as post-traumatic stress disorder and brain impairments have negative consequences including poor judgment and paranoia was critical to appellant's case in mitigation. This was a most difficult case where the jury surely would want to have an understanding of what may have affected appellant's behavior. Poor judgment and paranoia caused by appellant's abnormalities that were beyond his control were therefore critical matters in mitigation that appellant had the right to have the jury consider, and understand.

As stated, judge charged the statutory mitigating circumstances contained in S.C. Code §16-3-20(c)(b)(2)(6)&(7). All three of these mitigating circumstances were directly impacted by Dr. Steedman's testimony that was excluded from the jury's consideration.

Rule 702, SCRE, provides that expert testimony such as Dr. Steedman's was admissible. The line the trial judge drew between what Dr. Steedman could say as a neurologist, and what constituted psychiatric testimony, and what was too prejudicial to the state, was, respectfully, an erroneous one. Dr. Steedman clearly testified these matters where within his qualifications, his training, and his practice with patients.

Further, the judge's reasoning that if Dr. Steedman's testimony contradicted that of Dr. Watts' it should not be allowed was erroneous. The very important point is the jury could believe Dr. Steedman and not Dr. Watts or vice versa. Moreover, the judge's ruling that if Dr. Steedman's testimony corroborated Dr. Watt's testimony it was unnecessary, and a waste of time to listen to was fatally flawed for the same reason. The jury obviously could, and often does, credit one expert's testimony while discounting or discarding that of another expert. The court may not, as stated above, exclude mitigating evidence from the sentencer's consideration. Eddings v. Oklahoma, Hitchcock v. Dugger, supra.

In South Carolina, one juror being convinced by Dr. Steedman's excluded opinions on appellant's disorders and abnormalities could have prevented a death sentence. Given the overlap between neurology and psychiatry there was not any satisfactory reason to exclude Dr. Steedman's opinion. Cf. State v. Coney, 845 So.2d 120, 131 – 132 (Fla. 2003); Ledford v. Moskowitz, 742 SW.2d 645 (Ct. App. Tenn. 1987) (neurologist testimony created material issue of fact on standard of acceptable psychiatric practice in communities similar to those in which the psychiatrist worked, precluding summary judgment). That was true before even considering Dr. Steedman was board certified in psychiatry anyway.

The state's objections to Dr. Steedman's qualifications or testimony went to the weight and not the admissibility of the evidence. See Wilson v. Rivers, 357 S.C. 447, 593 S.E.2d 603 (2004); State v. Ramsey, 345 S.C. 607, 550 S.E.2d 294 (2001).

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[8] This was a sarcastic reference to a fight appellant had with another inmate while confined prior to trial at the Lexington County Detention Center. Tr. 2001, l. 1 – 2035, l.

Nonetheless, Dr. Steedman did have the education, the training, and the occupational skill of treating patients to give the opinions the trial judge excluded.

The judge's emphasis in his Rule 403, SCRE analysis on prejudice to the state in his rulings on Dr. Steedman's expert testimony, and his reasoning that if Dr. Steedman testimony contradicted the later testimony of Dr. Watts that it was not admissible, and if it was corroborating evidence of Dr. Watt's testimony it was not necessary was error for the reasons explained above. Appellant should be granted a new penalty phase trial.

25.

4.

Juror Kyzer was a *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844 (1985) qualified juror. The court committed reversible error by excluding this qualified juror.

Juror Kyzer told the judge he could find appellant guilty or not guilty and that he understood the concept of aggravating and mitigating circumstances. Tr. 933, l. 4 – 934, l. 21. Kyzer said he was between the second and third types of jurors. Tr. 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. Tr. 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. Tr. 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." Tr. 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 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." Tr. 942, ll. 3 – 16. The following 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.

Tr. 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. Tr. 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." Tr. 945, ll. 2 – 9. On re-cross examination by defense counsel Kyzer said he would consider both options - - the death penalty or life imprisonment. Tr. 947, ll. 4 – 6. Kyzer again said he could sign his name to the death penalty form with the other jurors. Tr. 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. Tr. 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. Tr. 950, l. 1 – 951, l. 18.

Discussion

The United States Supreme Court recently revisited Wainwright v. Witt in Uttecht v. Brown, __ U.S. __, 127 S.Ct. 2218 (2007). In that five to four decision, the majority noted its deference to the trial court, especially in a federal habeas corpus case which requires the ruling on the federal issue to involve an unreasonable application of federal law if the decision is "objectively unreasonable" and not simply erroneous or incorrect. Bengle v. Johnson, 474 F.3d 241 (6th Cir. 2007).

This is a direct appeal to this Court as the highest court of this State. The deference the Supreme Court in the habeas case of Uttecht v. Brown felt obligated to apply in is not equally 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 about the defense's true position at trial.

The Court wrote that under Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 1844 (1985) the judgment whether a venireman is biased is often based upon determination of demeanor and creditability which are entitled to deference even on direct appeal, but particularly in federal habeas. 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. The United State Supreme 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 here. First, a criminal defendant has the right to an impartial jury drawn from a venire that has not been titled 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.

The court concluded by holding that "capital defendant's have the right to be sentenced by an impartial jury. The State may not infringe on this right by eliminating from the venire those who scruples against the death penalty would not substantially impair the performance of their duties. Uttecht v. Brown, 127 S.Ct. at 2831.

As stated, the Court in Uttecht emphasized that the defense did not object to Juror Z's removal. The 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[9]-Witt rule. Uttecht v. Brown, 127 S.Ct. at 2229. The majority noted that the defense may have failed 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 appellant 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 titled 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

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sign the death verdict form. If the Supreme Court's conclusion that capital defendants are entitled to an impartial jury is to have force, this Court should hold that the excusal of Juror Kyzer, a qualified juror, was reversible error. The trial judge pointedly asked appellant "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." Tr. 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, 107 S.Ct. 2045 (1987). Appellant should be granted a new trial.

[9] Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770 (1968).

5.

The court erred by refusing to grant appellant a new trial based on after-discovered evidence where co-defendant Marcus Thompson's cellmate, Kevin Fuller, testified that Thompson bragged to him that he was the one who killed the decedent, and bragged that appellant received the death penalty for his crime. Fuller's testimony probably would have changed the result of the trial. This is especially true in regard to the penalty phase since appellant only had to convince one juror not to vote for the death penalty to change the result of the penalty phase.

Relevant Facts

As stated, the state maintained that appellant and not Thompson shot and killed the decedent while stealing his automobile. Tr. 1284, l. 4 – 1286, l. 4. Appellant will not repeat the background evidence contained in issue one. Suffice it to say that the state fought all efforts to show that it failed to investigate co-defendant Marcus Thompson as being the triggerman, and to show that Thompson was receiving favorable treatment.

Prior to the motion hearing testimony the defense agreed that Thompson's statement to Fuller admitting that he shot and killed the decedent would be admissible as a prior inconsistent statement. Supp. Tr. 14, ll. 10 – 16. See Rule 613 (b), SCRE. Defense counsel also argued Thompson's statements to Fuller would be admissible as a statement against penal interest in his absence. Supp. Tr. 12, ll. 3 – 13. See Rule 804, (b)(3), SCRE.

It was agreed that to prevail on a motion for a new trial based on after-discovered evidence appellant had to 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;

(5) Is not merely cumulative or impeaching.

See State v. Spann, 334 S.C. 618, 619 – 620, 513 S.E.2d 98, 99 (1999); Johnson v. Catoe, 345 S.C. 389, 548 S.E.2d 587 (2001); Hayden v. State, 278 S.C. 610, 299 S.E.2d 854, 855 (1983); State v. Caskey, 273 S.C. 325, 256 S.E.2d 737, 739 (1979).

Defense counsel correctly argued that there was really only one of the five elements in dispute and that was whether the after-discovered evidence would probably change the result if a new trial were granted. Supp. Tr. 3, l. 17 – 4, l. 15. Counsel also argued that the United States Supreme Court's decision in Holmes v. South Carolina, ___U.S. ___, 126 S.Ct. 1727 (2006), on third party guilt which was decided after appellant's trial would be applicable if a new trial were granted since appellant's case was still pending on direct appeal at the time Holmes v. South Carolina was decided. Supp. Tr. 5, l. 16 – 6, l. 17.

Kevin Fuller testified he had pending charges of two counts of criminal domestic violence of a high and aggravated nature and a criminal domestic violence third offense. He was represented by Jimmy Rogers on those charges, and Rogers was in the courtroom for the hearing. Supp. Tr. 41, l. 8 – 42, l. 5.

Fuller testified that he became roommates with Marcus Thompson on the "F.Pod Room Seven in the Lexington County Detention Center." Supp. Tr. 42, ll. 15 – 24.

Fuller testified that Thompson at one point went to the hospital to have "some gallstones removed, and then all of a sudden he come back. And when he come back, he turned around and we got to talking again and we kind of bonded." Supp. Tr. 42, l. 21 – 43, l. 3. Fuller testified:

> [W]ell, he told me him and Kevin Mercer was looking for a ride so they can go to Atlanta and party down and that they'd been out all day shooting some kind of gun and that he turned around and said that they found a guy with some kind of Escalade or Navigator and that they pulled in behind him in Kevin Mercer's car and that Kevin Mercer jumped out and opened the door and the guy - - they thought he had a gun on him, but he had a cell phone in his hand and Marcus Thompson shot the guy behind his ear. Then he kept bragging about, you know, well, you - - hell, you can kill anybody as long as you watch C.S.I., and he said that I guess whoever does the tests on murders or whatever didn't check the inside of the gloves and that he was bragging about how Lexington County had let him get bond and that how - - I ain't going to exactly say it but how a black man was going to pay for his crime because of his ignorance.
>
> Then he stated that they pulled - - I guess when they stole the man's stuff they went and parked Kevin Mercer's car at a hotel room somewhere, sir. And then they turned around and was driving that big truck, whatever kind of truck it was – I'm not sure, sir – but they was driving a truck and that Kevin Mercer was driving the truck and they got pulled over. And the officer told Kevin Mercer to step out of the vehicle and as Kevin Mercer stepped out of the vehicle, Marcus Thompson took the gun and placed it over on Kevin Mercer's side.
>
> Q. Okay.
>
> A. And that's exactly what he told me.

Supp. Tr. 43, l. 18 – 44, l. 20.

Fuller said "Marcus Thompson was very open about the murder," even talking in front of another inmate, Timothy Johnston. Supp. Tr. 44, l. 25 – 45, l. 6. Fuller said that Thompson bragged about killing the decedent and he also bragged about "how Kevin Mercer was going to get the death penalty . . . and he wasn't." Supp. Tr. 45, ll. 3 – 19.

Fuller further testified that Thompson called appellant "an idiot," and that Thompson bragged about fooling the police by turning his gloves inside out to hide gunshot residue.[10] Supp. Tr. 48, ll. 2 – 17. Fuller testified the details of the crime that he learned came from Marcus Thompson. Supp. Tr. 49, l. 23 – 50, l. 2. Fuller said he did not come forward with Thompson's omission to gain any advantage and he said that he planned on pleading guilty to the charges against him and that he knew he was going to prison. Supp. Tr. 51, ll. 1 – 5.

On cross-examination Fuller admitted he originally asked for help in getting probation, but he stated after the process he had now been through he did not expect any consideration: "I'm already nervous to start with because everybody at the detention center is talking about it. As a matter of fact this morning, guess who was sitting beside me? Marcus Thompson. So that's how good of a job there doing. And, yeah, I'm nervous and I really don't want to be here." Supp. Tr. 71, l. 15 – 85, l. 6.

Fuller also stated that Thompson told him he stuck the murder weapon underneath appellant's seat when appellant was removed from the car after the police stopped them on the interstate: "That way it looked like that Kevin had the gun on him." Supp. 86, ll. 2 – 17.

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[10] As stated, the police never tested Thompson's gloves, and the trial judge denied appellant funding for an independent gunshot residue analysis on the glove.

Marcus Thompson testified and predictably denied confessing to Fuller. Thompson stated that he pled guilty to accessory after the fact of murder and armed robbery and accessory before the fact of armed robbery. Supp. Tr. 17, ll. 12 – 14; Supp. Tr. 19, ll. 13 – 24; Supp. Tr. 20, l. 20 – 21, l. 24. Thompson said he did not tell Fuller "anything about the events of May 16, 2002, in the murder of Sergeant Tracey Davis." Supp. Tr. 21, ll. 21 – 24.

Thompson testified that he told the police he was there [at the apartment complex where the decedent was shot] before and after the shooting. He said he "met up" with appellant after the murder and he claimed he had no idea what appellant was going to do when he dropped him off at the apartment complex. Supp. Tr. 5, l. 1 – 25, l. 7.

Thompson claimed he waited for appellant at the Economy Inn because that was what appellant told him to do. He said the next time he saw appellant he was driving the decedent's Lincoln Navigator. Thompson admitted he had gloves on his hands, and he claimed the reason was "because I didn't want my fingerprints on the glove - - I mean on the gun." Supp. Tr. 25, l. 4 – 26, l. 9.

Thompson said after appellant picked him up at the Economy Inn they got on to Interstate 20 going towards Atlanta. Thompson maintained the bag of bullets found in his pocket when the police stopped them were given to him by appellant. Supp. Tr. 26, l. 6 – 27, l. 24.

On cross-examination Thompson admitted he knew Fuller was in jail on "two criminal domestic violence charges." Thompson stated that Fuller talked about wanting

to get out of jail and Thompson acknowledged he, Thompson, was allowed out of jail on bond after the murder, but his bond was later revoked. Supp. Tr. 29, l. 6 – 30, l. 6.

Thompson also acknowledged he went to the hospital while in jail to have some kidney stones removed. This was at the same time he was a cellmate with Fuller. Supp. Tr. 30, l. 3 – 31, l. 19. Thompson admitted that he lied to the police, and that he lied specifically about the bullets. Supp. Tr. 35, l. 5 – 38, l. 6. The following occurred between appellant and defense counsel Littlejohn:

> Q. And, Mr. Thompson, in regard to your signed sworn statement that you gave on May 17, 2002, when you were interviewed by Solicitor Myers, you, in fact, told him that many of the things in that other statement were not true.
>
> A. Yes.

Supp. Tr. 38, ll. 3 – 6.

The state then called Timothy Johnston, Jr. as a witness. Johnston testified he had had been cellmates with Kevin Fuller and then Thompson also became their cellmate. Johnston stated Thompson talked to him about the charges but he denied Thompson bragged about the crime to him. Supp. Tr. 103, l. 7 – 104, l. 3.

Johnston said Thompson told him he was charged with murder and that he had never been in prison before this case. Supp. Tr. 104, ll. 2 – 25. Johnston stated Thompson was asking them "what he thought was going to happen to him and what he needed to do." Supp. Tr. 105, ll. 4 – 7.

Johnston said to the best of his memory "he said that . . . the story of what happened" was that Thompson dropped appellant off at the Raintree Apartment Complex and that "the guy got killed." Johnston remembered something about "the guy's

girlfriend was on the telephone and heard everything go down and heard . . . two car doors shut, and that's why they're trying to say he was on the site also, but out of what he told me, he wasn't." Supp. Tr. 105, ll. 11 – 22. The following occurred between the solicitor and Johnston:

> Q. Now, did he have another occasion to talk about this?
>
> A. Yes, sir, one other time. He told me the story again, but Kevin was asleep that night when he told it. It was late. I mean, it was like probably one or two o'clock in the morning. We was up. He seemed kind of worried about it, and he told me the story again, but the only thing that didn't match on that story was the first time he told me the story he said that he met Kevin back at the motel. He was driving the car he dropped Kevin off with to begin with. Second time he said that he was in the truck itself that [was] stolen.
>
> Q. When they got stopped?
>
> A. Right. And I asked him about it, but he didn't he didn't really comment on it. I mean, he just left it at that.
>
> Q. So that didn't make sense to you.
>
> A. Right. That's one of those things that didn't match with what he told me.

Supp. Tr. 107, ll. 6 – 24.

Johnston stated there were no newspapers in their cell, and they never discussed what was in the newspaper. All of Johnston's information came from Thompson. Supp. Tr. 108, ll. 9 – 11.

Johnston also said that Kevin Fuller asked him if what Thompson was telling them in jail could be used to his advantage. Johnston said he told appellant he was not

sure and that "you'd probably be discredited because you are locked up with charges and they'd probably look at you and think you were trying to get your charges dropped. That's exactly what I told him." Supp. Tr. 111, l. 18 – 112, l. 2.

On cross-examination Johnston admitted he had a pending first degree burglary charge for which he could receive a life sentence. Supp Tr. 115, l. 17 – 116, l. 9. He acknowledged the Lexington County Solicitor's Office was prosecuting him but he stated, "I don't have anything to worry about on them [the pending charges]."[11] Supp. Tr. 115, l. 17 – 123, l. 11.

On cross-examination Johnston acknowledged Thompson told him at one point that he "met up with Kevin Mercer and they got arrested down the road." Supp. Tr. 118, ll. 20 – 25. However, Johnston also recalled "the first time he told me the story he said he showed up at the motel. He pulled up in the car and Kevin pulled up in the truck, and the police pulled up." Supp. Tr. 119, ll. 1 – 11.

Arguments of counsel

Defense counsel argued that Fuller testimony had strong implications for both the guilt and sentencing phases. He also argued if the jury credited Fuller's testimony regarding Thompson being the shooter that appellant was ineligible for the death penalty. Counsel also noted that under Holmes v. South Carolina, which appellant would have the benefit of at a new trial, appellant could be acquitted of murder, or the outcome of the sentencing hearing would be different. Supp. Tr. 125, l. 6 – 126, l. 21.

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[11] As of the writing of this initial brief, the Department of Corrections Inmate Search only has Timothy Mark Johnston, Jr., serving a three year sentence for Criminal Domestic Violence of a High and Aggravated nature out of Richland County. This Court can take judicial notice of that fact.

Counsel argued noted that Marcus Thompson had gloves on, and that the gloves had never been tested. Thompson also had bullets in his pockets. There was not any gunshot residue found on appellant and Fuller's testimony could have the "hugest difference" at a new trial. Supp. Tr. 128, l. 8 – 130, l. 20. As seen, defense counsel also moved that the judge authorize expert funds to test Thompson's gloves for gunshot residue.

The solicitor then argued that the gloves would not prove anything about the murder and that "if there is GSR on those gloves, it's from the earlier shooting, a least from the earlier shooting." Supp. Tr. 138, l. 11 – 139, l. 7. Defense counsel responded that the state should want the gloves tested if they wanted to prove Fuller "was just making this up." Supp. Tr. 139, ll. 9 – 21.

The judge ruled that he did not see any reason to have the state pay for the gunshot residue testing on the gloves, and he said for purposes of "my analysis here, I'm just going to assume that there is gunshot residue on those gloves." Supp. Tr. 140, ll. 2 – 21.

The Order – Guilt phase

The trial judge issued an order dated September 25, 2006 denying the motion for a new trial based on after-discovered evidence.

The judge reasoned that Fuller's testimony about what Thompson told him in jail would only become admissible after Marcus Thompson had testified. Order at page 4 and 5. R.* The judge found the only seriously disputable fact in this case was whether or not "Mercer pulled the trigger and fired the shot that killed Sergeant Davis." The judge found there was no likelihood the result of the guilt phase would be any different if the

new evidence were presented. The judge therefore denied the motion as to the guilt phase. Supp. Tr. 5.

The order – penalty stage

As to the penalty phase the judge wrote that neither co-defendant Thompson nor Fuller had any real credibility. Order at page 5. R.*. The order also stated the "the state elicited evidence on both 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." [12] Order at page 7. R.*.

The judge stated that he believed "Fuller fabricated a story about Thompson admitting to shooting Sergeant Davis." Order at page 8. R. *. The judge wrote that Thompson made statements "that were contradictory to his testimony hearing in many important details." Order at page 8. R. *.

The judge also wrote that "the solicitor conceded on the record that Thompson's plea agreement prevented his prosecution for murder under the double jeopardy clause," and the judge apparently reasoned that lessened Thompson's motive to lie about not having confessed to the murder to Fuller. Order at page 9. R. *.

The judge then reasoned that Thompson's testimony even with his "limited creditability" would help the state and hurt the defense during a new trial. The judge ruled he found there was "essentially no chance" the after-discovered evidence would change the outcome of a sentencing trial. The judge therefore denied the motion as to the

[12] As seen above, Johnston actually testified Fuller asked him if he thought he could get assistance with his charges by revealing what Thompson was telling them. Fuller did not say anything about fabricating testimony to get assistance.

sentencing phase also. Finally, the judge ruled that there is no dispute that the new evidence would be admissible at a new trial and therefore Holmes v. South Carolina was not helpful to deciding the motion for a new trial. Order at page 12. R. *.

Discussion

This Court in other contexts has noted the extreme difficulty in doing a harmless error analysis regarding the penalty phase of a death penalty trial since a single juror can cause the case to end in a sentence of life imprisonment. See State v. McClure, 342 S.C. 403, 537 S.E.2d 273 (2000). Importantly, it must be remembered that the judge's credibility findings regarding Fuller are based upon at least one very important false premise: That Fuller told Johnston that he wanted to *fabricate a story* regarding what Thompson told him to get assistance with his own charges. Here, again, is Johnston's actual testimony:

> Kevin asked me if *out of what Marcus told us could he use it to his advantage* to have his charges dismissed or possibly get probation rather than go to prison. I told him I wasn't sure. I said, "*you'd probably be discredited* because you're locked up with charges and they'd probably look at you and think you was trying to get your charges dropped." That's exactly what I told him.

Supp. Tr. 111, l. 21 – 112, l. 2. (emphasis added).

The evidence here clearly has been discovered since the trial and it could not have been discovered with the exercise of due diligence. Fuller's testimony was material to the issue of who was the triggerman, and extremely important therefore to the sentencing phase also. The testimony is not merely cumulative or impeaching.

In short, as was essentially undisputed, the only element in the State v. Caskey analysis at issue was whether the newly discovered evidence would probably change the

result if a new trial were granted. That "result" means the guilt phase, the penalty phase, or both.

If Thompson testified, and the judge found the solicitor conceded Thompson was protected by the double jeopardy clause, the statements to Fuller would be admissible as a prior inconsistent statement under Rule 613, SCRE. That prior inconsistent statement was also substantive evidence when the declarant testifies at trial and is subject to cross-examination. See State v. Copeland, 278 S.C. 572, 300 S.E.2d 63 (1982); State v. Smith, 308 S.C. 442, 424 S.E.2d 496 (1992); State v. Ferguson, 300 S.C. 408, 388 S.E.2d 642 (1990).

If Thompson could make himself unavailable then his admissions to Fuller would be admissible as a statement against penal interest under Rule 804(b)(3). This Court has noted that out-of-court statements against penal interest, made by an unavailable declarant, are admissible in both civil and criminal trials. See State v. Anders, 331 S.C. 474, 503 S.E.2d 443 (1998).

At a new trial appellant clearly would intend to show that there was a strong reasonable that appellant shot the decedent since Thompson was bragging about killing the decedent, and appellant getting the death penalty for his crime to Fuller. Further, as stated, a positive gunshot residue result on Thompson's gloves made that reasonable doubt even stronger. Holmes v. South Carolina, supra.

If Thompson rather than appellant shot the decedent and appellant's mental state was not one of reckless indifference for human life, then he was ineligible for the death penalty. See Tison v. Arizona, 425 U.S. 137, 107 S.Ct. 1676 (1987).

Further, if Thompson's role as a triggerman was substituted for that of appellant then appellant would be guilty of being an accessory after the fact and guilty of armed robbery if he participated in the crime. The judge's finding that "the after discovered evidence supports," rather than undermines the jury's verdict finding appellant guilty on the charges of murder and armed robbery" was incorrect. Appellant respectfully fails to see what evidence or logic, respectfully, supports the judge's conclusion, given the after-discovered evidence was Thompson's confession to Fuller. See Order at page 5. R. *.

Appellant also challenges the suggestion that Johnston was even slightly a neutral witness. Johnston was facing a Lexington County charge of first degree burglary, and a life sentence. Johnston also had other charges still pending. Johnston had every reason to fear the Lexington solicitor's office. He had every reason to curry favor in a major case – this case – with the solicitor. His confident attitude in "not being worried" about the possibility of a life sentence is also interesting given his present status of only being incarcerated on a Richland County minor charge. Tr. 115, l. 17 – 118, l. 2.

The judge also noted Thompson's lack of credibility, and it should hardly be doubted that Thompson still had every motive to lie at the hearing on the motion for a new trial. The fact of a legal argument that Thompson was protected by the double jeopardy against a future murder prosecution because he pled guilty to being an accessory after the fact must have been – common sense dictates – of little comfort to Thompson when he testified.

All of this together with the judge's critical erroneous conclusion that the testimony showed Fuller asked Johnston if he thought he could "benefit from fabricating

a story about Thompson shooting Sergeant Davis," shows the judge abused his discretion in his written order. See Order at p. 7. R. p. *.

Further, appellant did not test positive on the gunshot residue test. A positive result on the gloves Thompson was wearing therefore would strongly incriminate Thompson. The judge's reasoning that a positive gunshot residue result on the gloves would be meaningless because Thompson's "story" was that he was shooting the gun earlier in the day misses the point as discussed above.

Finally, as to the penalty phase, the judge reasoned that neither Thompson nor Fuller had any real credibility. However, as stated, the judge then implicitly found that the jury would believe Thompson over Fuller even though Thompson had an extremely powerful motive to lie to the police when he initially denied being the triggerman in this case, and when he testified at the post trial hearing. While appellant understands there was no mandate that the jury reconsider residual doubts as to guilt during the sentencing phase, and that residual doubt is not mitigating factor, the fact remains that any single juror could cause the penalty phase to end in a life rather than death sentence. See State v. McClure, 342 S.C. 403, 537 S.E.2d 273 (2000); Franklin v. Lynaugh, 487 U.S. 164, 108 S.Ct. 2320 (1988); State v. Southerland, 316 S.C. 377, 447 S.E.2d 862 (1984).

The jury deliberated from 4:12 p.m. until 6:50 p.m. during the penalty phase of appellant's trial without Fuller's testimony that Thompson confessed that he and not appellant was the triggerman. Deliberations during the penalty phase in this state do not tend to be lengthy since the jury hears the majority of the evidence during the guilt phase before the defendant is convicted.

The judge, under the unusual facts of this case, abused his discretion by finding that the after-discovered evidence, Thompson's bragging confession to Fuller, would probably not change the result of the guilt or penalty phase trial.

6.

The court erred by excluding the testimony of David Farrell that co-defendant Thompson was charged as only 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, and ignored his role in the crime. Further, the court erroneously excluded this evidence as inadmissible third-party guilt evidence.

Relevant Facts

In his closing argument during the guilt phase the assistant solicitor told the jury that appellant and not Thompson killed the decedent, and he anticipated that the defense would argue that Thompson was the actual killer: "[T]he first thing they're going to say, 'Where was this Thompson? Where is he? Why didn't the State call him?' Well, ladies and gentleman, he's not on trial today. *But soon enough there will be 12 people just like you sitting in these same chairs, and there will be a judge robed in black, just like Judge Few, but over in that chair, instead of Kevin Mercer, it going to be Marcus Thompson, that will be his day in court.* That jury will be sworn to deal with his case." Tr. 1659, l. 19 – 1660, l. 1. (emphasis added). Yet within months of that representation the solicitor *allowed Thompson to plead guilty.* Supp. Tr. 17, ll. 5-14.

Prior to David Farrell, the attorney for Marcus Thompson, being called as a witness earlier during the trial, the solicitor objected to his testimony. The solicitor contended the defense was trying to put in irrelevant and arbitrary evidence "before the jury before we could object." Tr. 1593, l. 16 – 1594, l. 2.

Defense counsel Littlejohn argued the state's opinion had been that "nothing about Marcus Thompson has anything to do with this case, but we certainly think it's

relevant the way that Marcus Thompson has been treated from the standpoint of the investigation and the manner in which he's been prosecuted. We do not intend on asking Mr. Farrell anything about a statement made by Mr. Thompson or anything like that."

The judge observed that if Thompson testified then how the prosecution treated him would be relevant "to things like bias and motive." The judge stated that since the state had chosen "to treat his case differently, the fact of having [made] that choice is not relevant - - of having made that choice is not relevant." Tr. 1594, l. 16 – 1595, l. 2.

Defense counsel Littlejohn countered that the solicitor's office had totally ignored "Marcus Thompson's role in the crime that occurred, and the fact Marcus Thompson was originally charged and then his charges were reduced to other charges and then he was allowed out on bond . . . and the state has done nothing about his bond even though he's gotten in trouble since then and the fact that he is judge - - they've just totally focused on Marcus - I mean, excuse me – on Kevin Mercer and just ignored Marcus Thompson." Tr. 1595, ll. 6 – 13.

The judge stated that the defense was articulating a third party guilt argument but that unless the evidence would exonerate appellant, it was not admissible. The judge cited "the hand of one is the hand of all" in support of his position. Tr. 1595, l. 14 – 1596, l. 16.

Defense counsel argued again that the state had failed to investigate Marcus Thompson and that "their theory all along has not been the hand of one is the hand of all or that two defendants were involved in the shooting. Their theory is Kevin Mercer was the sole gunman, and that's how they've treated this case." Tr. 1596, ll. 15 – 24.

The solicitor responded: "We can treat Marcus Thompson however we want to. That has nothing to do with the guilt or innocence on Kevin Mercer when Marcus Thompson is not a witness for us, not a part of the state's case or anything else." Tr. 1596, ll. 15 – 24.

The judge then stated that he understood the defense wanted to show that Thompson was only charged as an accessory after the fact and not for murder or armed robbery. Defense counsel Littlejohn confirmed that was correct, and counsel added the defense wanted to show Thompson was even released on bond. Tr. 1596, l. 25 – 1597, l. 8.

The judge sustained the objection. Defense counsel Littlejohn then offered to proffer the testimony. The judge responded that as he understood the proffer it would be that Thompson was charged with being an accessory after the fact, he was released on bond and he may have violated the conditions of that bond and the state had not moved to have the bond revoked. Defense counsel Littlejohn confirmed that was a summary of the testimony. Tr. 1597, l. 11 – 1598, l. 11.

Discussion

Juries are charged in every criminal case that a reasonable doubt can arise from a lack of evidence. The failure to investigate leads, test evidence, and ignoring an obvious suspect is therefore relevant. Here, appellant merely wanted to show that the police failed to investigate co-defendant Thompson and gave him preferential treatment in the

way he was charged, and released on bond.[13] This was relevant to appellant's defense that law enforcement focused solely on appellant and chose to ignore pursuing any evidence which might prove the contrary.

Evidence during a criminal trial is often admitted that leads defense counsel to argue the police focused solely on the defendant, and stopped investigating available leads because they arrogantly thought they had the right man, or they did not care if they had the right man. Here, the state incredibility did not even test Marcus Thompson's gloves for gunshot residue even though appellant's hands were negative for gunshot residue. Tr. 1512 – 1534; Tr. 1535 – 1537.

The judge here reasoned that because the state chose not to call Thompson as a witness that evidence of bias and the failure to investigate Thompson could not come before the jury. However, Holmes v. South Carolina, 547 U.S. 319, 126 S.Ct. 1727 (2006) held that the outright exclusion of the defendant's evidence of third-party guilt denied the defendant a fair trial, abrogating State v. Gay, 343 S.C. 543, 541 S.E.2d 541 (2001).

In this case the solicitor arrogantly maintained he would treat Thompson however his office desired, and that what appellant wished to show regarding the state's failure to investigate co-defendant Thompson and the state's treatment of him was not relevant. Again, the definition of relevant evidence is broad. Rule 401, SCRE. As in Holmes v. South Carolina, the state's position in this case was that its theory of the defendant's guilt controlled the admission of defense evidence.

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[13] Appellant has limited the proffer to only that that is uncontested since the solicitor challenged the statement that the state at that time had not moved to have Thompson's

Appellant recognizes that a defense that the police decided they had the right man, and stopped working on the case is a judgment call defense. Regardless, appellant was prevented from having the evidentiary predicate to present that defense.

After the solicitor successfully excluded evidence about the charges against Thompson being much less, and the evidence of Thompson's release on bond, the solicitor told the jurors in closing not to worry about Thompson -- that Thompson would be tried in the same manner as appellant. It strongly implied that Thompson was not being treated any differently than appellant when he was being treated differently, and when he in the short passage of time was allowed to plead guilty. This violated the essential demands of fairness, and appellant should be granted a new trial.

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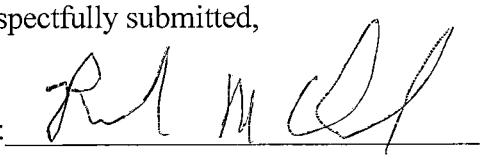
bond revoked.

CONCLUSION

By reason of the foregoing arguments, appellant's convictions should be reversed, and this case remanded to the Lexington County Court of General Sessions for a new trial. In the alternative, appellant should be granted a new sentencing trial.

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 29th day of August, 2007.

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

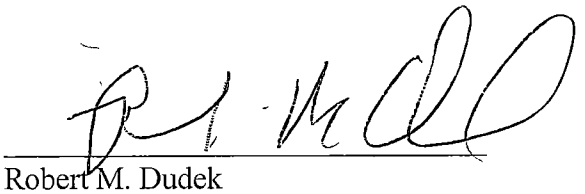
DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

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

(1) True–billed indictments;
(2) Entire Trial Transcript;
(3) All pre-trial transcripts;
(4) Motion for a New Trial Transcript;
(5) Motion for a New Trial;
(6) State's Return to Motion for a New Trial;
(7) Order of the trial court Denying Motion for a New Trial;
(8) Supreme Court Order dated July 10, 2006 remanding case;
(9) Jury instructions on aggravating and mitigating instructions;
(10) Trial judge's report;

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

August 29, 2007



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