

**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.

INITIAL BRIEF OF RESPONDENT

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STATE SUPREME COURT

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STATEMENT OF ISSUES ON APPEAL

- I. IS THERE A NEED FOR A REMAND FOR RECONSIDERATION OF THE MOTION FOR A NEW TRIAL BASED ON THE TRIAL COURT'S REFUSAL TO PROVIDE FUNDS FOR GSR TESTING OF THE GLOVES FOUND ON MARCUS, WHERE THE ISSUE ARGUED NOW IS NOT PRESERVED, AND WHERE IN ANY EVENT THE JUDGE ASSUMED FOR PURPOSES OF HIS ANALYSIS THAT GSR WOULD BE FOUND ON THE GLOVES?
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STATEMENT OF THE CASE

During the February 2003 term, the Lexington County Grand Jury issued a three-count indictment of Appellant, Kevin J. Mercer, for murder, armed robbery, and possession of a weapon during a violent crime (03-GS-32-0409). {R. *}. The state gave notice of intent to seek the death penalty, and served its Notice of Evidence in Aggravation.

The trial judge in the original case was the Honorable John C. Few. Appellant was represented at the trial level by Cameron B. Littlejohn, Jr., and Melissa Kimbrough; Solicitor Donald V. Meyers and Assistant Solicitors Rick Hubbard, Shawn Graham, and Marion Moses prosecuted the case for the state.

Jury selection took place from April 10th through April 13th, 2006. Trial began before Judge Few and a jury on April 17th, 2006, and on April 19th, 2006, Appellant's jury convicted him of all charges. {Tr. 1708}.

Appellant exercised his right to the 24-hour cooling-off period in subsection 16-3-20(B) of the Code of Laws for South Carolina. The sentencing phase of his trial began on January 27th, 1997. Judge Few submitted the following aggravating factor to the jury:

Murder was committed while in the commission of robbery while armed with a deadly weapon.

The following mitigating factors were submitted to the jury:

- (1) The murder was committed while the Defendant was under the influence of mental or emotional disturbance.
- (2) The capacity of the Defendant to appreciate the criminality of his conduct was substantially impaired.
- (3) The age or mentality of the Defendant at the time of the crime.

On April 22nd, 2006, Appellant's jury found the aggravating factor and recommended

a sentence of death. {Tr. 2431-34}. Judge Few then sentenced Appellant to death for murder, thirty (30) years for armed robbery consecutive to the sentence Appellant was serving for ABIK, and five (5) years consecutive for possession of a weapon. {Tr. 2434-35}.

STATEMENT OF FACTS

Appellant was convicted and sentenced for murdering a highly decorated soldier in the parking lot of the soldier's Columbia-area apartment complex, in the process of stealing the soldier's SUV.

A. State's evidence in the guilt phase

On May 16th, 2002, the night he was murdered, Army Sgt. Tracy Davis attended a softball game with his roommate, Clifton Magwood, who was also a sergeant and recruiter like Tracy. After the game, Tracy drove himself home in his white Lincoln Navigator. Meanwhile, Clifton had already arrived back at their apartment and lay down at about 11 pm to watch a movie. Suddenly, he heard a commotion outside and Tracy's voice saying, "I'll give it to you". Clifton looked out the window to see Tracy being robbed a heavy set broad shouldered black male about 5'11 to 6' tall, wearing a dark outfit and dark hat. This man had what looked to be a gun in his hand. {Tr. 1316-29; 1334-38; 1346}.

Clifton immediately called 911 and ran upstairs to Tracy's room to look for a pistol. Clifton could not find any bullets for the gun, and as he was coming back downstairs -- still on the phone with 911 -- he heard a gunshot. Clifton ran outside in time to see Tracy's Navigator speeding away and Tracy lying in the brush with a gunshot wound to the back of his head. Officers and EMS responded to the scene, but there was nothing they could do. Clifton gave them a description of Tracy's white Navigator with a Masonic symbol on the rear. {Tr. 1299-1301; 1308-09; 1329-30; 1340-45; 1353; 1359-62; 1576-80}.

Meanwhile, Lexington County Sheriff's Deputy Stazer was out on I-20 when he received the BOLO on Tracy's SUV. At about 11:46 pm, he saw a white Navigator with a

Masonic emblem traveling westbound. Stazer pulled the SUV, and approached its two male occupants from the passenger side. After Stazer asked for a driver's license, proof of insurance, and registration, the driver asked if he did anything wrong. Stazer told him to produce the requested documents, but after looking around in the cabin, the driver could only find a yellow Pulliam Ford receipt. The driver claimed the SUV belonged to his brother, but dispatch advised Stazer that the name on the receipt matched the victim's. Deputy Stazer's stop then became a felony one. {Tr. 1313; 1379-89}.

Stazer ordered the occupants from the car at gunpoint, and as the passenger got out, a baggie of fourteen .357 bullets and one black knit glove fell from the pants leg. Underneath the driver's seat, Stazer found a .357 revolver. The driver proved to be Appellant, who was wearing a dark jean outfit. The passenger proved to be Marcus Thompson, who was a good bit smaller and more slender than Appellant. Thompson was wearing a dark shirt over a white one, with the white shirt was clearly visible at the neck. Late, three more gloves were found in Thompson's pants after they were logged into the evidence room. {Tr. 1390-95; 1403-07; 1412-16; 1451}.

The revolver found underneath Appellant's seat had one fired casing and five unfired cartridges. This gun was conclusively matched to the bullet to the back of the head that killed Tracy. {Tr. 1469-78; 1568}.

The State also called Appellant's cellmate in pre-trial lockup, who testified that Appellant bragged about committing the murder. Appellant told the cellmate that a guy had come to him looking for a SUV, or a truck, and Appellant told him he knew where one was. They went to the apartment complex, and when Tracy arrived in the Navigator they

approached him and demanded his keys. Appellant said he made Tracy get on his knees, and as Appellant and Thompson jumped in the SUV, Appellant turned and shot Tracy in the back of the head. Appellant related that he and Marcus were heading to Atlanta for "Freak Neak", which is a weekend long party for college and high school kids -- but they did not make it because they got a flat tire and the cops pulled them. {Tr. 1544-48}.

Appellant was tested for GSR at approximately 1:30 am. Two rounded lead particles were found on the back of his left palm, which is consistent with but not conclusive of the presence of GSR. {Tr. 1420; 1454-64; 1486; 1501-21}. On his booking form, Appellant was listed as being left handed. {Tr. 1540}.

B. The defense's guilt phase case

The defense first called an officer to testify police searched a car belonging to Appellant found at an Economy Inn near I-20. {Tr. 1585-87}. Next, the defense called a private forensic expert to testify that he would expect higher levels of GSR on someone who fired a .357 revolver. The expert testified that a GSR transfer was possible if an officer touched his weapon and then cuffed a suspect, but admitted on cross that such a transfer was highly unlikely. {Tr. 1611-28}. An evidence custodian testified that police logged in a pair of gloves found in pants belonging to Thompson. {1629-30}. Appellant called his mother, who claimed he was right handed. {Tr. 1637-38}.

C. The State's reply case

Deputy Stazer testified in reply that he had not fired his weapon since qualification in May of 2001, that he cleaned his gun right after, that he never fired his gun from that time until the incident but cleaned his gun regularly, and that he cleaned his cuffs after his

cuffs after every arrest with a sanitizing spray. {Tr. 1640-43}.

D. The State's penalty phase case

In the penalty phase, the State began by introducing Appellant's fairly extensive record of driving violations and suspensions. {Tr. 1735-43}. Next, the State called a former Richland officer who caught Appellant engaging in auto tampering. {Tr. 1745-47}. Another Richland officer described responding to a civil disturbance, and then pulling over a car that matched the description given. Appellant was inside, along with five ounces of marijuana and a .38 revolver – leading to his conviction for possession of marijuana with intent to distribute. {Tr. 1748-52}. A third Richland officer testified about Appellant's convictions for second degree burglary and strong arm robbery in 2001. {Tr. 1753-55}. The victim of that crime testified Appellant was part of a group of men that broke into her house while her grandchildren were there, pulled her out of the bath, and demanded money while holding a shotgun to her head. {Tr. 1757-58}. Yet another Richland officer testified about pulling a car Appellant was driving over in 2001, only to find a pistol after Appellant reached down for it between his legs. The officer was so concerned he purposefully left his fingerprints on the trunk of Appellant's car in case something happened. Appellant thought the whole thing was funny, laughing throughout his arrest. {Tr. 1776-85}. The backup officer also testified as to this event. {Tr. 1789-91}.

The next group of witnesses testified to Appellant's misbehavior and disciplinary infractions while in the Richland County Detention Center. {Tr. 1761-75}. A Richland records custodian testified as to the dates of Appellant's four stints in their jail. {Tr. 1793-94}.

Various members of probation offices testified to Appellant's violation of his probation conditions and positive tests for cocaine and marijuana, to the point that his probation was revoked and he received three years and six months. {Tr. 1795-1813}.

What followed was a slew of witnesses from the Lexington County Detention Center as to Appellant's disciplinary issues to the point that even LCDC eventually sent Appellant to SCDC for safekeeping prior to trial. This list of offenses included: (1) placing a green leafy substance in his mouth and swallowing it during a surprise shakedown {Tr. 1821-23}, (2) tapping a window to display his erect penis to a female staff member {Tr. 1824-29}, (3) overturning a food cart and dumping 30 gallons of tea because he had been put in confinement allegedly without an explanation {Tr. 1830-35}, (4) refusing direct orders to stay in his cell when on confinement {Tr. 1837-40}, (5) stealing medications from the nurse's cart {Tr. 1841-44}, (6) ingesting pills and then telling officers he was going to die for what he had done anyway {Tr. 1855-57}, (7) refusing a direct order to go back in his cell after recreation time had ended {Tr. 1865-67}, (8) removing bolts from a bunk and slamming it into the wall to create a six inch hole as part of an escape plan {Tr. 1869-79}, (9) hid a razor wrapped in toilet paper in a light fixture {Tr. 1881-83}, (10) created a disturbance in his cell after which a shank was discovered within {Tr. 1895-97}, (11) violated mail rules {Tr. 1899-1904}, (12) incited a fight and possessed a weapon {Tr. 1887-92}; (13) possessed contraband and was sentenced to 60 days disciplinary detention {Tr. 1985}; (14) slipped a note to a female officer as she passed his cell in which he propositioned her and offered to be her "secret friend" and "personal slave" {Tr. 1987-1992}; (15) was the only occupant in a cell where officers noticed the light fixture cover was

broken, and a two to three inch piece of plastic was missing that could be used as a weapon {Tr. 1993-99}. When he returned from SCDC's safekeeper status, Appellant had to be permanently segregated for officer safety, due to all his infractions. He also had to be placed in full restraints for 72 hours because there was nothing else the officers could do with Appellant. {Tr. 1999-2000}.

Finally, the State presented LCDC officers who testified about an incident in which Appellant's roommate approached guards and told them there was a fight in the recreation yard. When officers went to check it out, they saw the roommate run in from the yard towards the bathroom, with Appellant in hot pursuit, holding something in his hand and amidst cries of "he's got a shank!" The two inmates fought in the bathroom, and as they refused to comply with instructions to stop, other fights broke out among the inmates watching. In addition to various jailhouse infractions, Appellant was convicted for this incident of assault and battery with intent to kill ("ABIK"), for which he received twelve years, and carrying a weapon by an inmate, for which he received five years. The roommate had facial lacerations from the fight, and testified Appellant was attacking him with two shanks made from toothbrush handles and razor blades. {Tr. 2004-36}. The roommate also noted that Appellant told him one night that he did not shoot the officer who pulled him because it was the "cop's lucky day". {Tr. 2038-39}.

The State called an officer to testify as to a Wal-Mart receipt and items Appellant purchased shortly before the crime, including a dark hat and visor, as well as to introduce photographs of the victim at the crime scene. {Tr. 2043-52}. The pathologist more clearly described the wound that killed Tracy. {Tr. 2053-66}.

The State concluded with some victim impact evidence, who testified about Tracy's military career; his deep relationship with his daughter Tay and his mother; his strong friendship with his fellow soldiers and their families; his meticulous devotion to his military duties and responsibilities; the fact that Tracy was on the "fast track" in his military career; his posthumous promotion to Master Sergeant, for which he had been selected shortly before his murder; the naming of the award for leadership at the recruiter instruction school after Tracy; his involvement and good works in the community with the Masonic Order; and his efforts in starting up a youth mentoring program – the center of which was named for Tracy in his honor. {Tr. 2067-2133}.

E. Defense penalty phase case

The defense began with psychiatrist Dr. Donna Schwartz-Watts. She testified: (1) Appellant had a long history of asthma, but also a large number of somatic complaints for such a young man, which may be manifestations of anxiety {Tr. 2145-47}; (2) Appellant changed schools a lot, had terrible grades, a diagnosed learning disability, and a low IQ with poor verbal skills {Tr. 2146-48}; (3) Appellant had a diagnosis of oppositional defiant disorder as a child, meaning he had problems with authority, and also had mixed developmental delay disorder {Tr. 2149-51}; (4) while Appellant was not very forthcoming during their interviews and more concerned with his somatic problems rather than the big picture of what he was facing, Appellant did say he witnessed as a child his father assault his mother, and violence in the area he grew up {Tr. 2152-54}; (5) Appellant claimed a substance abuse history, including cocaine, marijuana, alcohol, huffing freon, and hallucinogens like angel dust, and his drug use increased after his grandmother died a year

prior to the murder of Tracy {Tr. 2154-55}; (6) she ordered neuropsychological testing on Appellant given his drug history and involvement in a car wreck, but could not complete the testing as Appellant's effort was too variable {Tr. 2155-56}; (7) his mother used Dexatrim in the first two months of her pregnancy {Tr. 2158-59}; (8) his mother would come home and find marks on Appellant's arms and was concerned he was being abused by his father, and Appellant told another psychologist that he had been sexually abused {Tr. 2158-59}; (9) one his sister hit him hard with a frying pan {Tr. 2160}; (10) Appellant's mother really helped him with school and he was able to graduate 180th of a class of 181 despite his learning disability, but his lack of success there meant school was not a safe haven from chaos at home {Tr. 2160-2162}; (11) there is a family history of depression, anxiety, and substance abuse {Tr. 2162-63}; (12) Appellant's wife said he frequently awoke with nightmares, which is a symptom of post-traumatic stress disorder (PTSD) {Tr. 2163-65}; (13) Appellant had diagnoses of PTSD, substance abuse, a reading disorder, and a personality disorder with antisocial traits {Tr. 2165-68; 2187}; and (13) that all of these things contributed to Appellant's "horrible judgment" {Tr. 2168-69}.

The defense next called Dr. Marti Loring, a clinical social worker who was qualified as an expert on PTSD, trauma, and abuse. {Tr. 2193} Dr. Loring generally described the symptoms and characteristics of PTSD and testified: (1) Appellant has PTSD {Tr. 2195}; (2) Appellant's father would drink, come home, and beat Appellant's mother, during which Appellant would try to protect her {Tr. 2203}; (3) Appellant got severe beatings that were longer than his other brother, because for a time Appellant's father thought Appellant was someone else's biological son {Tr. 2203-6}; (4) Appellant's mother would beat him as well

{Tr. 2204-06}; (5) part of his childhood was spent in squalid conditions in a Philadelphia home with holes, pigeons, and cats {Tr. 2206}; (6) the family had to leave Philadelphia for its safety after Appellant's older brother identified some thugs who robbed him {Tr. 2206}; (7) he has difficulty concentrating and had trouble in school despite his efforts, given his reading disability {Tr. 2207-08; 2213}; (8) he started to decline after a number of family deaths in 2001 {Tr. 2210; 2217-18}; (9) he was raped when he was young by an uncle {Tr. 2213}; (10) he had an imaginary friend named Pyro {Tr. 2214}; he had untreated depression and anxiety that led to substance abuse {Tr. 2215-16}; and (11) his antisocial traits were in large measure learned from the difficult environment in which he was raised {Tr. 2218-19}. As Dr. Schwartz-Watts had done, Dr. Loring agreed there was no connection between Appellant's PTSD and the murder of Tracey Davis. {Tr. 2223}.

The defense had earlier called Dr. Alexander Morton, a psychopharmacologist, who described Appellant's self-reported use of alcohol, marijuana, cocaine, and other drugs such as hallucinogens. Dr. Morton opined this drug use caused psychiatric problems, and stated: (1) a drug such as cocaine so stimulates the brain that it becomes a basic need; (2) Appellant would use drugs to diminish the constant anxiety and other symptoms of PTSD; (3) Appellant first used marijuana at age nine and then moved on to various legal substances as well as hard drugs; and (4) symptoms that could have resulted from Appellant's PTSD and substance abuse include increased anxiety, poor judgment, restlessness, agitation, irritability, and decreased inhibitions. {Tr. 1906-48}. On cross, Morton noted that he was a pharmacist and could not diagnose, that Appellant reported far more drug use to the defense experts than he earlier did during his state ordered

evaluations, that Appellant reported drug use only that morning and not the evening of the crime, and that while people off drugs should get better, Appellant's ABIK took place after he had been in the system two years. {Tr. 1948-49; 1961-67; 1972-74}.

The defense called former warden James Aiken, who testified that SCDC's security was so infallible that it could safely manage someone with the disruptive behavior patterns of Appellant. Aiken did not believe Appellant would be a predatory type of prisoner, even though Appellant had attacked another inmate and cut his face with a weapon – because a predator would have cut the inmate's throat, and extreme force was not required to regain control. {Tr. 2234-40}. Aiken stated that SCDC had all the equipment, training, and personnel needed to control Appellant in the setting. {Tr. 2241}. Even though under this Court's precedent the State cannot cross on the adequacy of SCDC's security measures despite Aiken's testimony as to their infallibility, Aiken then detailed with specificity the security measures available to deal with a number of potential problems in prison, and opined Appellant could be safely contained without any unusual risk to staff, other inmates, or the community (which of course, can only relate to the *general* adequacy of SCDC's security measures to prevent escape attempts). {Tr. 2242-43}. Finally, over the solicitor's adamant objection that it related to inmates other than Appellant, Aiken testified that inmates typically cannot keep up with disruptive behavior in prison because they eventually "burn out" as they get older. {Tr. 2245-48}.

Neurologist Dr. John Steedman was the next witness for the defense. Dr. Steedman examined Appellant in the jail, and found: (1) that he had a reflex disparity when tapping his biceps and triceps that indicated some sort of interruption in the pathways of

the brain {Tr. 2268-70}; (2) his IQ testing, while not qualifying as mentally retarded, was in the range of a learning disorder {Tr. 2270-72}; (3) he received supplemental security income at a young age due to this disability {Tr. 2271-72}; (4) his drug use would affect his judgment and lower his functioning {Tr. 2273}; (5) there was a questionable abnormality on a “spect scan” of the subfrontal cortex, but that the radiologist thought the significance was questionable and not indicative of a severe abnormality {Tr. 2274; 2294-96}; (6) Appellant had a disability in terms of his functioning, as well as anxiety disorders and PTSD {Tr. 2297-98}; and (7) there was a cumulative effect on Appellant of the brain dysfunction, PTSD, and substance abuse {Tr. 2298}. On cross, Dr. Steedman admitted Appellant’s MRI was normal, and that the “questionable abnormality was not the proximate cause of the murder, but could be a contributing factor to poor judgment”. {Tr. 2308-09}.

Retired high school coach Charles Mancuso coached Appellant in football during high school. He stated Appellant was easily influenced by peers, and they had to keep things simple since he was in special needs classes. However, Appellant was a hard worker and “outstanding student”. {Tr. 2313-16}.

Next was Appellant’s younger sister, who stated that her brother was always there for her, that her father had anger problems, and that the family moved south to escape bad conditions, {Tr. 2320-23}. Appellant’s other sister testified Appellant was picked on by other kids, that the family moved because of the bad environment, that there was violence between her parents, and that Appellant “caught” more from his parents than the others. {Tr. 2323-27}. Appellant’s wife stated he was “the best male role model [she] had ever met in [her] life”, and was her protector and friend. After displaying some family

photographs, she noted that Appellant began to “shut down” after his grandmother died in 2001. {Tr. 2327-32}. Appellant’s mother testified, contending that the family had a difficult home life with her husband’s anger and abuse, on top of bad schools and a poor environment. She stated he had problems as an infant and she had taken diet pills during her pregnancy because she did not know she was expecting. She described the effects of Appellant’s learning disability, and his difficulties in school, with his peers, and in trying to find employment. She also displayed some family photos, and described Appellant’s love for his family. {Tr. 2332-2351}. Finally, Appellant’s father testified, admitting he was responsible for anger and violence in the home, but stating that was how he grew up and he did not know any better. He denied ever drinking, though. {Tr. 2351-58}.

ARGUMENT

I. THERE IS NO NEED FOR A REMAND FOR RECONSIDERATION OF THE MOTION FOR A NEW TRIAL BASED ON THE TRIAL COURT’S REFUSAL TO PROVIDE FUNDS FOR GSR TESTING OF THE GLOVES FOUND ON MARCUS, WHERE THE ISSUE ARGUED NOW IS NOT PRESERVED, AND WHERE IN ANY EVENT THE JUDGE ASSUMED FOR PURPOSES OF HIS ANALYSIS THAT GSR WOULD BE FOUND ON THE GLOVES.

Appellant first contends the trial court erred in refusing during the hearing on the motion for a new trial to order testing for gunshot residue (GSR) on gloves found in the Navigator and Marcus Thompson’s pants. He asserts this was fundamentally unfair and denied him “his right to present a meaningful and complete defense during a future trial” – which is in and of itself a claim for relief that requires this Court to grant a new trial for a different substantive reason in the first place. In any event, Appellant did not make the arguments to the trial court that he makes now, and the judge’s express assumption for purposes of his new trial analysis that GSR was on the gloves precludes any need for a

remand. Indeed, the judge's correct conclusion that for purposes of the new trial motion the presence of GSR made no difference in the analysis provided a reasonable basis for denying the funding request.

A. Events below

During Deputy Stazer's testimony at trial, he stated that as Marcus Thompson exited the passenger side of the Navigator, "that's when the gloves and the shells fell out of his pant leg". {Tr. 1392-93}. Stazer testified on cross it was a black knit glove. {Tr. 1403; 1408}.

Investigator Frier testified on cross that there were some gloves or a glove recovered from Marcus Thompson at the scene, but he was not present. {Tr. 1419-20; 1428}.

Crime scene officer Collins testified that he did not find any gloves, but that he understood some gloves were later found in Thompson's clothes at the evidence room. {Tr. 1493-99}.

SLED agent Stoner testified she was never given any gloves to analyze. {Tr. 1537-38}.

During the defense case, Evidence Custodian Kyzer testified she brought on black glove with a grey inside, and one black glove marked "ladies' one size", which were recovered from the pockets of the jeans Marcus was wearing. She stated she was showing the evidence to members of the solicitor's office when they found the gloves in the pants. {Tr. 1626-30; 1640}.

After Appellant's conviction, he filed a motion for a new trial based on a statement

given by a cellmate of Marcus Thompson that Marcus had bragged he was the triggerman. This Court granted a remand to hear the motion. The details of this hearing will be more fully set forth in Issue V, *infra*, which substantively challenges the judge's denial of that motion.

Briefly, Kevin Fuller wrote a letter to the solicitor's office in which he claimed his cellmate Marcus had been bragging that he was the triggerman, but the police found no gunshot residue on him because he was wearing gloves inside out. **{Attachment D}**. Subsequently, Fuller gave a statement to investigators in which he again asserted Marcus had been bragging about killing Tracy, and stated Lexington County did not check the inside of the gloves. **{Attachment E}**. Fuller also wrote another letter to the solicitor in which he requested "help" and "probation" on his pending charges since he had provided this information. **{Attachment G}**. All of this information was turned over to defense counsel.

On August 9, 2006, an evidentiary hearing was convened on the motion for a new trial based on after-discovered evidence. Marcus Thompson was present and denied being the shooter or ever claiming to be the shooter to Fuller. He stated he did not participate in either the robbery or the murder and only met up with Appellant at the Economy Inn after Appellant went and committed the crime. **{8/9/06 Tr. 17-38}**.

Fuller testified at the hearing and reiterated his story about Marcus's alleged confession. **{8/9/06 Tr. 44-97}**. He stated that "Rocky" Johnston was also in the cell and could verify his statements. **{8/9/06 Tr. 88-91}**. However, Rocky Johnston was called by the solicitor and denied ever hearing Marcus confess to shooting Tracy, and that instead

Marcus always said Appellant killed Tracey. **{8/9/06 Tr. 102-123}**. Rocky stated that Fuller asked him if Fuller could use what Marcus said to get help on Fuller's charges. **{8/9/06 Tr. 111-12}**. The State also introduced copies of Marcus's pleas, noting they did not occur until June 20th, 2006. **{8/9/06 Tr. 124}**.

After the defense had finished its presentation, it asked the judge about its request to test the gloves for GSR. The judge stated he was still considering it but would leave the record open. **{8/9/06 Tr. 100}**.

At the end of the hearing, the defense request was made again. Defense counsel admitted that even if GSR was found on the gloves, it would not be conclusive, but contended it would be relevant and helpful. The court inquired about the significance of Fuller's claim that Marcus said he fired the gun earlier in the day prior to the crime, and the State agreed that any GSR could be from the earlier shooting – and pointed out that Marcus himself stated he put on the gloves to move the gun after Appellant told him he had used it to kill a man, which could be responsible for GSR. The defense replied that all of this was a question for the trier of fact. **{8/9/06 Tr. 137-39}**.

The court then concluded:

COURT: Okay. All right. I'm going to say on the record and I'll put it in the order that I don't think that the existence or nonexistence of the gunshot residue can have any impact . . . on the believability of what Mr. Fuller said or what Mr. Thompson said. And for purposes . . . of my analysis here, I'm just going to assume that there is gunshot residue on those gloves. So that's the way I'm going to treat that. I see no reason for the State to pay for . . . that testing to be done.

{8/9/06 Tr. 140}.

In the written order denying the motion for a new trial, the judge noted:

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.

{Order p. 11}.

B. The constitutional issue was not preserved below, and Appellant does not raise the statutory issue on direct appeal.

In his brief, Appellant asserts that due process right to have a fair opportunity to present a defense required testing of the gloves, citing Ake v. Oklahoma, 470 U.S. 68 (1985). However, no such constitutional argument was made below; thus, this contention is not preserved. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("A party may not argue one ground at trial and an alternate ground on appeal.").

Of course, S.C.Code Ann. § 16-3-26(C) (Rev. 2003) authorizes a judge to grant fees to an indigent capital defendant where expert services are reasonably necessary. Obviously, Appellant's request below was based in this statutory right. However, Appellant nowhere in his brief mentions this statute or the "reasonably necessary" standard. As such, he is arguing a different issue on appeal than that asserted at trial, and his issue is not preserved. State v. Gaster, 349 S.C. 545, 564 S.E.2d 87 (2002) (constitutional argument not raised to or ruled upon by the trial court not preserved for review).

C. There could be no error because the trial court assumed for purposes of the new trial hearing that there was gunshot residue on Thompson's gloves.

As noted in the events at trial, the judge expressly stated on the record that he was going to assume for purposes of the motion that Marcus's gloves had GSR on them.

{8/9/06 Tr. 140}. This precludes any possible reversible error on appeal, as that of course would be the best possible result upon which Appellant could hope from testing. The judge concluded that given the accounts presented from the various witnesses, it made no difference to his analysis whether the GSR was on the gloves.

Although Appellant attacks this by noting that Thompson might predictably try to provide nonculpable reason why he possessed the handgun and some point, this overlooks that it is Fuller's account upon which Appellant is relying in his motion, and Fuller also stated in his letter to the solicitor, his statement to police, and his testimony on the stand that Thompson said he and Appellant were practicing shooting the gun that day. **{Attachment D, E; 8/9/06 Tr. 43-44}**. The fact of the matter was that whichever account the judge believed in his necessary credibility analysis of the witnesses presented, there would be a reason for GSR to be present on the gloves, assuming it had been deposited in the first place and had not been wiped or brushed off, given GSR's notorious fragility. **{Tr. 1487-88}**. If the judge believed Fuller, there would be GSR from the earlier shooting, the murder itself, and the act of hiding the gun under Appellant's seat while he was being handcuffed. If the judge believed Thompson, then the GSR was explainable by Thompson's statement that when Appellant arrived in Tracy's Navigator, the gun was lying in the passenger's seat, so Thompson put on the gloves to give it to Appellant because he did not want his fingerprints on a gun Appellant had just used to murder someone. **{8/9/06 Tr. 25-27}**. If the judge believed Thompson was lying about how the GSR got on his gloves – well, then he would of course believed Fuller's account and granted the motion

for a new trial.¹

Of course, authorization for expenditure of funds for expert witnesses is addressed to the sound discretion of the trial judge and will not be disturbed absent an abuse of that discretion. State v. Yates, 280 S.C. 29, 310 S.E.2d 805 (1982); State v. Owens, 277 S.C. 189, 284 S.E.2d 584 (1981). See also Thames v. State, 325 S.C. 9, 478 S.E.2d 682 (1996). For the reason that testing was not necessary to the analysis on the motion for a new trial, it also was not “reasonably necessary” under § 16-3-26(C), and the judge did not abuse his discretion.

The judge’s assumption there was GSR on the gloves therefore precludes any need for a remand for testing and a reconsideration of the motion for a new trial.²

II. THE TRIAL COURT DID NOT ERR IN EXCLUDING DR. STEEDMAN’S TESTIMONY ABOUT AN ALLEGED ABNORMALITY FOUND ON A “SPECT SCAN”, WHERE THE RULING WAS BASED ON THE DEFENSE VIOLATION OF A MUTUAL DISCOVERY ARRANGEMENT TO WHICH IT CONSENTED, AND ALSO JUSTIFIED BY RULE 403, SCRE; REGARDLESS, ANY ERROR WAS HARMLESS GIVEN THE OTHER EXAMINATION PERMITTED AND THE TESTIMONY INTRODUCED FROM APPELLANT’S THREE OTHER EXPERT WITNESSES.

Appellant raises two issues with regard to the trial court’s limitation of testimony from defense penalty phase expert Dr. John Steedman. In this first issue, he asserts that the

¹ In the written order, the judge refers to “Thompson’s testimony that he fired the gun earlier in the day”, when in fact Thompson only stated he used the gloves to move the pistol after Appellant killed Tracy; this bit of confusion in the written order does not change the analysis correctly noted by the judge at the hearing that there was an “innocent” explanation provided by Thompson for the GSR, regardless of whether it was target shooting or moving the gun when he got in the passenger side of the Navigator.

² As to Appellant’s contention that if this Court orders a retrial on the basis of one of the other issues it should also order testing for GSR, the State would assert that such a ruling would be a premature advisory opinion and unwarranted. If this case is retried all kinds of circumstances and strategies could change, and it appropriately should be litigated under the circumstances existing at the point of some future trial – if one is necessary – rather than in a hypothetical fashion in a direct appeal where it cannot independently provide any basis for relief. Indeed, as the judge noted in his order, the defense strategically decided not to ask for GSR testing on the gloves during trial. {Order p. 11 n.1}.

judge erred in excluding testimony under Rule 403 from Dr. Steedman that “spect scan” films showed an abnormality on a portion of Appellant’s brain, because the evidence was mitigating. However, Appellant completely misses the boat on what happened at trial with this issue – Dr. Steedman’s testimony was specifically restricted on one point as to the “spect scans” only due to the defense’s violation of a mutual discovery order of the judge, to which the defense had consented. In any event, the judge did not commit an abuse of discretion in by excluding the evidence under Rule 403 in the alternative. In any event, exclusion of his testimony was harmless, given the testimony allowed from Steedman as well as the testimony from the other defense experts.

A. Events at trial

At a pre-trial conference on February 23rd, 2006, the State requested that the judge order the defense to require their trial experts to write reports to be turned over to the State as part of reciprocal discovery, and that the experts be required to preserve their notes. The defense replied that there was no authority to require the defense to generate such reports, although the defense conceded that if they did exist, they would be discoverable. The State noted that an expert’s underlying data would be disclosed upon cross pursuant to Rule 705, SCRE, but that a break would have to be taken in the trial to allow the State to review the notes and data, and potentially obtain and prepare their own expert in rebuttal. The State admitted there was no statutory authority for such a request, but stated it had been done in prior cases. The judge responded that he wanted both sides to have their discovery be prepared to resolve any discovery issues at the next pre-trial hearing.

{2/23/06 Tr. 23-30}.

The issue was raised again at the March 30th, 2006, hearing, when the State asserted it had not received any reciprocal discovery and the defense responded it had no written reports. The defense agreed that both sides should disclose their list of potential witnesses prior to trial. However, the State again asserted that the defense was purposefully ordering their experts not to prepare reports in order to gain a strategic advantage, and the failure to disclose would result in delays at trial. The defense stated there was nothing requiring it to disclose its mitigation case prior to trial. The court noted that obviously the defense was trying to gain a strategic advantage, but that there was no mystery about that. The judge noted that there was nothing to require him to order reports, but the question was whether he had the discretion to do so. The judge ultimately noted he would let the parties know the following Monday whether he would require reports, but ordered both sides to be prepared to disclose the substance of any expert opinions. The judge also pointed out that once the consensual disclosure of witness lists was made, "much of the mystery of what the experts' opinions are going to be is going to be removed". **{3/30/06 Tr. 8-15}**.

During *voir dire*, the judge ruled that he was not going to require the defense to require its experts to prepare reports for disclosure if a report had not already been done. Both sides expressed that there were names on the opposing party's witness list of which they were unaware of their relevance to the case, and defense noted "as much as possible, we identified what their speciality was". The State again expressed concerned that the trial would be delayed because the names did not help much. **{Tr. 1162-65}**.

After the defense stated it essentially knew what the opinions of its experts were,

the judge ruled:

COURT: So I am going to direct that you all have a conversation tomorrow morning in which you all discuss the individual experts that both sides have called and what is the . . . general nature and substance of the opinions that will be offered by those experts.

{Tr. 1165 lines 5-11}. The defense then specifically said *it did not object to that ruling*, but requested that it apply to the State as well, and include lay witnesses. The court agreed on both counts. {Tr. 1165-66}.

The State noted that it had only been provided so far with some xeroxed copies of photographs and a two page document of a brain scan, but the people conducted it were not on the witness list. Defense counsel then stated it would only take about 20 minutes for her to discuss the opinions of the defense experts with the State, and the parties agreed to meet at 8:30 the next morning to do so. {Tr. 1166-67}.

After some other matters the next morning, the State noted that the defense did not discuss the experts' opinions "as to what their purpose in trial would be". The State pointed out that the defense disclosed a witness who was a neurologist and who had run some tests, but the State had not been provided anything about the tests or what the expert's conclusions would be. The defense pointed out that the neurologist was still reviewing the raw data and they had told the solicitor they would "give them a heads up on what he was going to testify to". {Tr. 1175-76}. The defense stated that they have provided the "spect scan" to the State and were working on getting the State a better copy, but the neurologist had just received the scan and was reviewing it. She noted the scan had findings from the "pathologist" who read the scan, but they did not have a report from him. The defense noted that it had disclosed Dr. Schwartz-Watts had diagnosed PTSD, and they had

documentation of a learning disability. Counsel stated their social worker would testify also as to childhood trauma, and their psychopharmacologist would describe the effects of drugs. The defense promised to provide curriculum vitae for all their experts that morning, and the judge told the parties to call him that afternoon on his cell if they did not have the matter resolved. **{Tr. 1176-79}**.

During Dr. Steedman's testimony on direct in the penalty phase, he began to discuss the "spect scan", for which he had brought the original films. Dr. Steedman noted that the radiologist found a "questionable abnormality" in the left subfrontal cortex, but that the radiologist found its significance questionable and did not believe it would be reflective of "dementia or other severe abnormality". As Dr. Steedman started to elaborate on this, the State objected, and after a bench conference, the jury was sent out. **{Tr. 2274-75}**.

The judge then gave the State an opportunity to look over the spect scan films and the report from it. Under questioning by the judge, defense counsel agreed there had been a MRI done a couple of days prior, but Dr. Steedman disputed defense counsel's assertion he had received the MRI, saying he was only told it was normal. The State complained that it had not been given the spect scan films earlier and had no expert to review them. However, defense counsel asserted the State had been given copies which referenced where the original films were housed. Defense counsel apologized and also admitted that she thought there had been report prepared about the normal MRI, but in fact she had only been orally advised that the results were normal. **{Tr. 2275-77}**.

The State pointed out that had been willing to put a copy of the "spect sheet" in evidence as it had received that, but it had not been provided access to the films, and

could not go to the hospital to view Appellant's medical information. The court asked Dr. Steedman if a "questionable abnormality" was significant, and he explained that the radiologist was saying it was not enough for dementia or other cognitive loss. Dr. Steedman agreed the radiologist did not want to say for sure what he saw was even abnormal, but that Dr. Steedman was in fact going to say he believed they did reflect an abnormality. {Tr. 2277-78}.

The court noted that while it did not matter why this information had not been disclosed to the State in a timely manner, the question was whether that affected admissibility. Dr. Steedman stated he initially got the report, but wanted to see the original films, and it was a "long time" before he got them. However, he admitted he did not get around to looking at them until recently, but he had advised the defense investigator two nights prior that he thought there was a definite abnormality. {Tr. 2278-79}.

The State pointed out that was the problem – all they had been provided indicated there was nothing but a "questionable abnormality" of "questionable significance", and they were not told Dr. Steedman had done his own review to the contrary. The State noted it had no expert to review the films, and had only learned the substance of Dr. Steedman's opinion that morning. When defense counsel tried to assert that they had the mutual disclosure at the beginning of trial, the solicitor immediately pointed out that all they were told is Dr. Steedman is a neurologist, and offered to put up testimony that nothing substantive was offered. Defense counsel did not challenge this representation.³ {Tr.

³ The record is at odds with Appellant's misleading assertion on page 13 of his brief that "Assistant Solicitor Graham agreed that he had a conversation with defense counsel about Dr. Steedman's testimony" – inasmuch as it implies any substance was discussed. The record reflects the assistant solicitor hotly disputed that the defense offered any substance about Dr. Steedman's testimony, and offered to put up testimony to that effect – and defense counsel did not dispute this assertion.

2280-81}.

When the judge asked Dr. Steedman to state his findings, Dr. Steedman stated he found a “significant underperfusion of an area of left orbitofrontal cortex”. When asked if he would relate this to the behavior of the defendant, Dr. Steedman admitted that he could only say it “might be a factor” affecting the defendant’s behavior, as spect scans have not really “panned out as a useful technique” since they are “vague or fuzzy images” showing regions of less blood flow. When asked if he had anything more specific, Dr. Steedman stated that the possibly affected region of the brain has been identified as an area related to “memory problems, emotional problems, and judgment and planning problems”. However, he conceded “I wouldn’t want to . . . draw too specific an inference from” the scans, noting he could not say that someone with this scan would be behaving a certain way. However, he believed it would be confirmatory evidence, not primary evidence. **{Tr.**

2281-83}.

When the State pointed out that this proposed testimony fell short of the standard of a reasonable degree of medical certainty, the court agreed that this “elaborate sort of dire-sounding name” might confuse the jury and lead them to misunderstand and misapply the significance the expert was attaching to it. Dr. Steedman again agreed the spect scan had only limited significance to behavior of the defendant, stating such a study was like a “shadow”. **{Tr. 2283-84}**.

The judge then noted that on one hand he had prejudice to the State from lack of an opportunity to have their own expert review the scans, and on the other very little probative value as to an effect on the defendant. The court noted that the State was given

the radiologist's report which would lead one to believe that nothing more needed to be done to reply, and then Dr. Steedman came in to contradict it. The court concluded:

COURT: 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. 2284-86} (emphasis added). After a break, the judge reiterated his ruling, noting that Dr. Steedman could testify to his opinions, his other findings, and even the radiologist's findings on the spect scans – but the only limitation was he could not say that he saw a specific and definite abnormality on the scans. {Tr. 2287-94}.

B. Since Appellant failed to appeal both bases for the court's ruling, the issue is not preserved; indeed, Appellant waived his right to challenge this issue by his consent to the mutual discovery arrangement.

As set forth above, the trial court was clear that it was concerned with the defense's violation on this issue of the mutual discovery arrangement to which both parties had agreed – particularly since what had been disclosed would lead a reasonable person to conclude that there was nothing of substance there, and what was not disclosed was just the opposite. Regardless, the court was clear that it was basing its ruling on either the violation of the discovery arrangement or Rule 403, stating "*under either analysis* I find – I'm going to exclude it". {Tr. 2286 lines 17-18}. In his statement of the issue on appeal and his discussion, Appellant only challenges the judge's determination that the prejudicial effect of the evidence outweighed any probative value of the evidence, and he makes no arguments that the trial erred in ordering the discovery exchange on the first morning of

trial – indeed, he could not at his expressly consented to the mutual disclosure. {Tr. 1165-66}.⁴ See Rule 208(b)(1)(B), SCACR (“The brief of appellant shall contain [a] statement of each of the issues presented for review [and] [o]rdinarily, no point will be considered which is not set forth in the statement of the issues on appeal”).

Since the judge expressly ruled on alternative bases and Appellant has not challenged both on appeal, the discovery ruling is the law of the case and precludes relief on appeal. See Anderson v. Short, 323 S.C. 522, 525, 476 S.E.2d 475, 477 (1996) (holding when a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case); State v. Sampson, 317 S.C. 423, 427, 454 S.E.2d 721, 723 (Ct. App. 1995) (an unchallenged ruling, right or wrong, is the law of the case). Alternatively, the issue was waived by the defense’s consent to the discovery exchange on the first morning of trial. State v. Babb, 299 S.C. 451, 455, 385 S.E.2d 827, 829 (1989) (“[A] party cannot complain of an error which his own conduct has induced.”).

C. The judge correctly excluded the evidence under Rule 403, SCRE.

There is no doubt that Dr. Steedman’s testimony that the spect scan showed a brain

⁴ Of course, this Court has held that the Rule 5, SCRCrimP provides no basis for a trial court to mandate creation of defense expert reports solely for disclosure to the State. State v. Northcutt, 372 S.C. 207, 641 S.E.2d 873 (2007). This trial happened prior to Northcutt; regardless, the trial court declined to order such reports. The trial court merely was trying to avoid significant delay to a jury already burdened with capital voir dire and a capital trial, since the State would be entitled to review any defense expert’s notes and underlying data prior to cross, and could argue they needed to seek review by their own expert. See Rule 705, SCRE. This seems fairly part of the trial court’s general power and discretion to control the conduct of a criminal trial, which will not be the basis for reversal absent prejudice. See State v. Bridges, 278 S.C. 447, 448, 298 S.E.2d 212, 212 (1982). Indeed, this discovery exchange occurred after jury selection, and this Court has held it is appropriate to exchange witness lists for jury selection. See State v. Powers, 331 S.C. 37, 501 S.E.2d 116 (1998). And, as the trial court noted, the witness lists alone went a long way in alerting each side to the subject matter of the other’s witnesses. {3/30/06 Tr. 8-15}. However, whether the trial court could order the mutual exchange is inconsequential as Appellant expressly agreed to the procedure.

abnormality is relevant under Rule 401. Of course, Rule 403 allows exclusion of relevant evidence if the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. A 403 analysis is subject to an abuse of discretion standard, State v. Hamilton, 344 S.C. 344, 358, 543 S.E.2d 586, 593 (Ct. App. 2001), and an abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law. Ledford v. Pennsylvania Life Ins. Co., 267 S.C. 671, 675, 230 S.E.2d 900, 902 (1976). "A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in 'exceptional circumstances.'" Hamilton, 344 S.C. at 357-58, 543 S.E.2d at 593 (Ct. App. 2001).

Here, the only opinion excluded was that the spect scan showed an abnormality; however, Dr. Steedman admitted this was of limited significance. {Tr. }. He conceded that at best he could only say the abnormality "might have" an affect on Appellant's mentation. {Tr. 2281-82}. He stated a spect scan was at best only confirmatory evidence, that he did not want to draw any specific inference from it, and that it was only of limited significance – even referring to the test itself as "shadows" from which he was trying to draw a conclusion. {Tr. 2282-84}. And, he even noted that spect scans had not really "panned out" as an effective clinical tool (which, as an aside, is precisely the kind of statement the State might not have had the available expertise to elicit had they not objected on the discovery violation). {Tr. 2281-82}.

In contrast, the trial court was concerned that the jury might attach undue significance to the actual opinion – "a significant underperfusion of an area of left

orbitofrontal cortex”. The judge thought this very “dire” sounding name would carry undue weight with the jury despite an “indeterminate effect”. {Tr. 2283}.

Given the admitted limited probative value of the spect scan to an actual effect on Appellant’s mentation – where Dr. Steedman could not say to a reasonable degree of medical certainty that the possible abnormality indicated by the spect scan would have *any* effect – and the undue prejudice of the “dire” sounding medical descriptions, it cannot be said the trial court abused its discretion in excluding the evidence. See generally State v. LaBounty, 716 A.2d 1 (Vt. 1998) (trial court did not err in excluding defense expert evidence that alleged sex abuser did not fit the typical profile for such abusers, as it likely would have led to an unnecessary side trial into the actions of others which was a distraction from adjudication of the defendant’s actions in the case).

D. Any error in limiting Dr. Steedman on his conclusion as to the “spect scans” was harmless given the examination otherwise permitted and the extensive presentation on the issue from other witnesses.

Regardless, any error was harmless given Dr. Steedman’s other testimony and the testimony of the other defense experts. As this Court noted in State v. Northcutt, 372 S.C. 207, 641 S.E.2d 873 (2007), addressing the trial court’s erroneous requirement that the defense generate and produce expert reports, such an error is not reversible when in view of its relationship to the entire case it could not have reasonably affected the result of the trial.

Here, Dr. Steedman testified that Appellant had two abnormalities with his reflexes, which indicated neurological damage {Tr. 2269}, that Appellant had a learning disorder {Tr. 2270}, that his early problems in school were indicative of early problems not cause by

later drug use {Tr. 2272}; that Appellant's "brain functioning was not normal to begin with", which was exacerbated by drug use {Tr. 2273}; that the radiologist found the questionable abnormality on the spect scans, but a radiologist does not meet the patient and is only looking for severe dysfunction like dementia {Tr. 2295-96}; that the radiologist's findings were "not inconsistent" with his own finding of brain dysfunction {Tr. 2295}; that the spect scan was "not inconsistent with someone having difficulties" {Tr. 2297} – and most importantly, Dr. Steedman testified on cross that he believed the abnormality referred to in the radiologist's report could be a "contributing factor to poor judgment". {Tr. 2310}.

Moreover, Dr. Schwartz-Watts specifically testified that she had a spect scan performed and "that test came back abnormal . . . there's a small area that is not normal on there". {Tr. 2157}. She later noted that parts of Appellant's brain work and parts do not work well at all {Tr. 2161}; that his huffing of freon did nothing but damage his brain {Tr. 2166}; and concluded again by noting Appellant had a "bad brain in the sense that he has a learning disability", and "we even know that from the spect scan that there's an abnormality". {Tr. 2168}. Similarly, Dr. Loring stated that while neurological issues were not her specialty, Appellant had a probable "learning disability and brain damage", which would account for his impulsiveness and inability to follow directions.

Given that Dr. Steedman still was able to testify to brain dysfunction, and indeed tie the abnormality to Appellant's judgment, and the fact that both Dr. Schwartz-Watts and Dr. Loring referred to his alleged brain damage, with Dr. Schwartz-Watts calling the spect scan "abnormal", it cannot be said there was reversible error in the limitation of just but one aspect of Dr. Steedman's testimony. See Northcutt, 372 S.C. at 217-18, 641 S.E.2d at 878

(finding any error harmless from forced generation of expert reports, where the reports merely summarized underlying data that was disclosed to the State under Rule 5, and where even though the judge excluded a new diagnosis because it was not included in the report, the expert was able to explain that her older diagnosis was not credible and she was concerned at the time the defendant was suffering from the new diagnosis).

Any error was harmless and the trial court's ruling should be affirmed.

III. THE TRIAL COURT DID NOT ERR IN LIMITING DR. STEEDMAN TO ISSUES OF NEUROLOGY AND NOT PSYCHIATRY, WHERE THE RULING WAS BASED ON THE DEFENSE VIOLATION OF A MUTUAL DISCOVERY ARRANGEMENT TO WHICH IT CONSENTED; REGARDLESS, ANY ERROR WAS HARMLESS GIVEN THE OTHER EXAMINATION PERMITTED AND THE TESTIMONY INTRODUCED FROM APPELLANT'S THREE OTHER EXPERT WITNESSES.

Appellant next contends that the trial court erred in only allowing Dr. Steedman to testify as to issues of neurology and not psychiatry, since Dr. Steedman was a qualified psychiatrist, and the State's objections supposedly only went to weight, not admissibility. Again, Appellant completely misses the boat on what happened at trial with this issue – Dr. Steedman's testimony was limited to neurology only due to the defense's violation of a mutual discovery order of the judge, to which the defense had consented. In any event, exclusion of his testimony was harmless, given the testimony allowed from Steedman as well as the testimony from the other defense experts.

A. Events at trial

As noted before in the events at trial in the preceding issue, and incorporated here, the defense ultimately consented to a mutual exchange of witness names and substance of testimony the first morning of the State's case in chief.

During their penalty phase case the defense called Dr. John Steedman, who

testified he was a physician board certified in general adult neurology and psychiatry. The defense then offered Dr. Steedman as an expert in “the fields of neurology and psychiatry”. The State asked to approach, and after a bench conference off the record, the defense offered Dr. Steedman as an expert only in neurology – for which there was no objection by the State. The Court qualified Dr. Steedman, but pointed out:

Not that you’re not qualified as a psychiatrist. You’re going to testify as a neurologist.

{Tr. 2263-66}.

As Dr. Steedman’s testimony on direct was ending, defense counsel asked him for his opinion on “the cumulative effect of having the deficits that you identified: the brain impairment along with the mental illness of [PTSD] and substance abuse.” The State objected that this was outside the field of neurology, at which point defense counsel offered to rephrase. Defense counsel then asked:

In your experience is there any sort of combined effect when [PTSD], substance abuse, and the sorts of brain problems or brain functioning or brain dysfunction you found – is there some sort of cumulative effect?

The State objected again, but the court allowed Dr. Steedman to answer yes or no – and he answered, “yes”. **{Tr. 2298-99}.**

The court then noted the State was objecting to “the next answer”, and asked defense counsel to demonstrate Dr. Steedman’s qualifications. Dr. Steedman testified that he frequently has patients with a combination of mental illness and neurological impairment. However, when counsel asked if based on this experience Dr. Steedman could identify the combined effect of mental illness and brain impairment, the State objected, noting “[h]e was only qualified as a neurologist, Your Honor, and *that was done*

for a reason and now she's trying to . . . qualify him in another area" (emphasis added).
{Tr. 2299}.

The court agreed, and asked Dr. Steedman if this issue was something within his area of expertise as a neurologist. Dr. Steedman agreed that it was, but elaborated as follows:

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 to 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 regular 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.

The State then asked to approach and the jury was sent out. **{Tr. 2299-2300}**.

In a proffer, Dr. Steedman testified that behavioral symptoms that might result from a patient with PTSD and a brain impairment would be "a cumulative effect on poor judgment, depression, anxiety, thought disorders, paranoia" – which he stated were in the "psychiatric realm" and which was why he studied both neurology and psychiatry to understand patients better. Dr. Steedman added a patient might also have difficulty in employment and conforming to the rules of society. Dr. Steedman stated the behavioral consequences would all be in the psychiatric realm except possibly poor employment and school functioning **{Tr. 2301-02}**.

The court then sustained the State's objection, after defense counsel agreed that the "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". The judge noted that Dr. Schwartz-Watts had already testified as to those psychiatric issues, so he was going to sustain the objection to anything outside of testimony on neurology. {Tr. 2302-03}. When defense counsel asked if this would preclude her qualifying Dr. Steedman in psychiatry, as "his opinion mirrors that of Dr. Watts", the court responded:

COURT: Well, you know, this thing – this think goes both ways. I mean if he is a - - if you want to elicit opinions from him within the range - - in the field of psychiatry and if those are opinions that are different from those that were offered by Dr. Schwartz-Watts, then that give rise to the prejudice to the State in having late learned that he is a Psychiatrist. But, on the other hand, if those opinions are the same as Dr. Swartz-Watts, there's no prejudice to the State, but there's no reason to offer them because these opinions - - there is at least diminished reason to offer them. So it is a - - it almost removes the necessity of me spending all this time trying to figure out whether his opinions are the same or are they different. We're just - - we're spinning our wheels.

DEFENSE COUNSEL: Well, your Honor, we would certainly take the position that Dr. Steedman's testimony would dove tail with Dr. Schwartz-Watts but tha tis not a mirror image. She is not a Neurologist.

COURT: And - - and - - I recognize that, and I have not restricted you in any way not has the state asked me to restrict you in any way from eliciting anything about his neurological work on this Defendant or his neurological opinions. We're talking specifically now about whether or not he can go beyond that area in to the realm of psychiatry, and the answer is no.

{Tr. 2303-04}. After a short break, the judge elaborated:

There is - - there's no suggestion on my part and I don't believe on anybody's part that anybody, particularly you, sir, have done anything improper. I'm not suggesting that you're not qualified as a psychiatrist. The defense - - that is - - this is again another instance of my trying to reconcile the strategies of both sides, all legitimate.

The defense seeks to disclose as little as possible about the evidence that they would offer. The State asks to have as much as possible about what the defense would offer or disclose. I attempted to reconcile those last week. Or perhaps it was the week before, by ordering that you all have a conversation in which you would disclose the nature of the experts and the - - and the nature of their opinions. This witness was disclosed as a

neurologist.

I am confining his testimony to neurology, and that shouldn't have 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 wight that area, but I'm not going to allow it for the reasons that I have stated.

{Tr. 2304-05}. Cross examination then proceeded.

B . Since the judge limited Dr. Steedman to neurology only and not psychiatry based on a discovery violation and not on any concern about Dr. Steedman's qualifications, and Appellant consented to that mutual discovery, then his issue is not preserved, not properly presented on appeal, and waived by his consent.

Like the previous issue, Appellant misses the boat by arguing on appeal the wrong basis for the judge's ruling – and thus his ground must fail as there was no objection made at trial on the basis asserted on appeal, and, alternatively, the issue must be rejected as Appellant has failed to challenge the basis for the trial court's ruling.

Appellant argues the issue on appeal as if the State objected and the trial court excluded the testimony because of the extent of Dr. Steedman's qualifications in psychiatry. That is simply not the case. As seen by the development of the issue at trial as set forth above, the judge excluded the expert's testimony on psychiatry because the defense had violated the parties' *consensual* discovery agreement to mutually disclose the identity and nature of the testimony of everyone on the respective witness lists. As the judge specifically stated, since Dr. Steedman was only disclosed to the State as a neurologist, the judge "confin[ed] his testimony to neurology, which shouldn't come as a surprise to anybody". {Tr. 2306 lines 9-12}. There was no objection or ruling whatsoever on whether Dr. Steedman had the education and experience to testify as an expert in

psychiatry – indeed, judge repeatedly said to Dr. Steedman that he was a qualified psychiatrist, and the State only objected – at least as much as they could put on the record with the jury present – that “he was only qualified as a neurologist, . . . and that was done for a reason”. {Tr. 2266 lines 1-2; 2299 lines 20-22; 2303 lines 3-4; 2304 lines 21-24}.

Thus, Appellant’s arguments on qualification miss the boat entirely. Appellant makes no arguments that the trial erred in ordering the discovery exchange on the first morning of trial – indeed, he could not at his expressly consented to the mutual disclosure. {Tr. 1165-66}.⁵ Since the issue litigated below is not the same as the one raised here, and indeed since Appellant fails to challenge on appeal the actual basis of the judge’s decision, then the issue is both not preserved at trial and not properly presented on appeal. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) (“A party may not argue one ground at trial and an alternate ground on appeal.”); Rule 208(b)(1)(B), SCACR (“The brief of appellant shall contain [a] statement of each of the issues presented for review [and] [o]rdinarily, no point will be considered which is not set forth in the statement of the issues on appeal”). Indeed, since Appellant has not challenged on appeal the actual basis of the judge’s decision, it is the law of the case. State v. Sampson, 317 S.C. 423, 427, 454 S.E.2d 721, 723 (Ct. App. 1995) (an unchallenged ruling, right or wrong, is the law of the case).

Alternatively, the issue was waived by the defense’s consent to the discovery exchange on the first morning of trial. State v. Babb, 299 S.C. 451, 455, 385 S.E.2d 827,

⁵ As noted before in the previous issue, while Northcutt precludes an order requiring generation of expert reports for disclosure to the other side, here the trial court was simply trying to avoid needless delay and complication after the parties had already exchanged witness lists for jury selection – which seems part of the general discretionary power of the trial court to control the conduct of trial. In any event, whether the trial court could order the mutual exchange is inconsequential as Appellant expressly agreed to the procedure.

829 (1989) (“[A] party cannot complain of an error which his own conduct has induced.”); State v. McCrary, 242 S.C. 506, 131 S.E.2d 687 (1963) (where defendant consented to trial of two indictments at the same time, he cannot complain of it on appeal); State v. Marlowe, 120 S.C. 205, 112 S.E. 921 (1922) (where defendant consented to excuse seated juror on account of sickness, he cannot complain on appeal), overruled on other grounds, Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005).

C. Any error in limiting Dr. Steedman to neurological issues only was harmless given the examination otherwise permitted and the extensive presentation on the issue from other witnesses.

Even if the limitation of Dr. Steedman’s testimony to matters of neurology was error, it was harmless. As this Court noted in State v. Northcutt, 372 S.C. 207, 641 S.E.2d 873 (2007), addressing the trial court’s erroneous requirement that the defense generate and produce expert reports, such an error is not reversible when in view of its relationship to the entire case it could not have reasonably affected the result of the trial.

Here, they had already heard from psychiatrist Dr. Schwartz-Watts, social worker Dr. Loring, and psychopharmacologist Dr. Morton as to possible psychiatric effects of the cumulation of PTSD, neurological dysfunction, and substance abuse. Dr. Schwartz-Watts was specifically asked about how the “[PTSD], an impaired brain, and combination of drug effects affect someone’s judgment”, to which she answered they would all contribute to his “horrible judgment” based on his “bad brain in the sense that he’s got a learning disability”, “couple it with the drugs he’s used”, “and then we know that on a spect scan he’s got a questionable abnormality”. {Tr. 2168}. Dr. Loring noted that while she had to leave the neurological issues to others (which, of course, Dr. Steedman did testify on), Appellant’s

probable learning disability and brain damage “would account for some of his being impulsive and not following directions well”. {Tr. 2214}. Dr. Morton testified that symptoms that could have resulted from Appellant’s PTSD and substance abuse included increased anxiety, poor judgment, restlessness, agitation, irritability, and decreased inhibitions. {Tr. 1944-48}.

In any event, Dr. Steedman was allowed to answer in the affirmative when asked if there would be a cumulative effect from mental illness, substance abuse, and brain impairment – which was confirmatory and corroborative of the opinions of the other experts. {Tr. 2299}. Further, on cross, when the solicitor asked whether the abnormality caused Appellant to attack another inmate in jail, Dr. Steedman gave the most significant portion of the very answer he initially wanted to give – that the brain abnormality was “a contributory factor to poor judgment”. {Tr. 2310}. In any event, allowing him to list a few symptoms that had already been discussed at length by the psychiatrist, the psychopharmacologist, and the social worker is not the sort of additional information the absence of which is reversible error. See Northcutt, 372 S.C. at 217-18, 641 S.E.2d at 878 (finding any error harmless from forced generation of expert reports, where the reports merely summarized underlying data that was disclosed to the State under Rule 5, and where even though the judge excluded a new diagnosis because it was not included in the report, the expert was able to explain that her older diagnosis was not credible and she was concerned at the time the defendant was suffering from the new diagnosis).

Any error was harmless and the trial court’s ruling should be affirmed.

IV. THE TRIAL COURT DID NOT ERR IN EXCLUDING JUROR KYZER, GIVEN THE JUROR’S HESITATION, HIS VACILLATING AND CONFLICTING ANSWERS, AND THE

JUDGE'S EXPRESS RESOLUTION OF CREDIBILITY AND DEemeanOR ISSUES; REGARDLESS ANY ERROR WAS HARMLESS AS JUROR KYZER COULD ONLY HAVE BEEN AN ALTERNATE AND NO ALTERNATES WERE USED DURING TRIAL.

Appellant next contends the trial court erred in excluding Juror Kyzer for cause, asserting that his responses made him qualified under Wainwright v. Witt, 469 U.S. 412 (1985). However, there was ample support in the record for the judge's excusal of Juror Kyzer for cause, given the juror's hesitation, his vacillating and conflicting answers, and the judge's express resolution of credibility and demeanor issues. Regardless, any error in exclusion was harmless beyond a reasonable doubt, as the jurors were struck in order of qualification, based on this order Juror Kyzer could have at best been an alternate, and no alternates were used in the case.

A. Events at trial

As voir dire began for Juror Kyzer, and after the trial court went through basic questions relating to the guilt, the court explained the concept of aggravating and mitigating factors. After Kyzer said he thought he understood them, the court asked if the lawyers could hear Kyzer, to which defense counsel replied, "just barely". {Tr. 934}.

When the court asked what type of juror Kyzer was on the descriptive sheet listing the three types of jurors – (1) those who would always vote for death, (2) those who would always vote for life, and (3) those who could decide between both penalties – Kyzer stated he was "in between the second [auto-life] and third [both penalties] one". {Tr. 935}. Kyzer agreed he could vote to return a life sentence, but flatly said he was not sure when asked if he could return a death sentence. {Tr. 936}.

Under questioning by the solicitor as to what he meant by being in between the

second and third categories, Kyzer: (1) stated “to me its just hard to judge . . . someone else for something they’ve done”; (2) pointed out that “I’m just not sure what I could do”; (3) agreed that he hesitated for a long time before answering the judge that he did not know if he could vote for death, and (4) stated “I don’t think so” when asked if he could sign a verdict form for death”, based on his beliefs about the death penalty. **{Tr. 937}**.

The defense then attempted to rehabilitate the juror. As the process was explained, Kyzer agreed that it would be “very difficult” for him to consider a death sentence, but stated that if told by the judge that he had to consider both sentencing options, he would “try” to do so, although he added: “It would depend, I guess, upon the severity of the case. Yes, maybe I could”. **{Tr. 939-40}**.

When the solicitor followed up with questions on the difference between considering something and actually signing his name to the death verdict, Kyzer responded, “that was a hard question”, and he would have to “know for sure” before he could put his name on the line. **{Tr. 940-41}**.

The judge then asked to take over the questioning, and asked Kyzer if there was any “particular source” for his beliefs on the death penalty. Kyzer then stated the following:

I guess maybe - - I don’t know whether it’s just a belief or that I can’t -
- I find it hard for me to pass judgment of someone else, you know, even - -
I know we’ve all got to live by the law. I guess maybe if it would be a family
matter or something that someone had killed maybe I could - - you know, I
might could put my name on the line.

* * *

We were just brought up, you know, 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. 941 line 20 – 942 line 16}. Kyzer then told the judge that he could consider the death

penalty and could “put his name on that line”. {Tr. 942-43}.

After the judge sent Kyzer out, he apologized for taking over for the solicitor and assured the parties he was not trying to act as an advocate, but merely believed the poor juror really felt on the spot and was trying to “alleviate that”. {Tr. 943-44}.

The solicitor then resumed questioning, and Kyzer admitted that if the victim was not a family member “his feelings [on the death penalty] would interfere . . . some” with his ability to sign a death verdict. Kyzer then reiterated “probably so” when asked the same question. {Tr. 945-46}.

The defense then took another stab at Juror Kyzer, asking him again that if a finding of murder had already been made and the judge told him he had to consider one of the two sentences, could he sign his name to the form – to which Kyzer responded “I’d still have to think about that”. He then agreed that if all 12 jurors thought death was the right sentence, he could sign his name as well. {Tr. 946-47}.

The defense argued that despite Kyzer’s hesitation, his “bottom line” was that he could consider both penalties and sign a death verdict. The solicitor responded with three points: (1) that under State v. Platt, 281 S.C. 1, 313 S.E.2d 619 (1984), this Court has specifically held that the ability to merely consider both penalties was not sufficient for qualification; (2) that in State v. Truesdale, 285 S.C. 13, 328 S.E.2d 53 (1984), this Court held a juror was properly disqualified when he said he could vote for death in cases that affected his own family or loved ones; and (3) that in State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996), this Court held a juror was not qualified who could not sign her name to the death verdict. The solicitor argued that viewed in totality this juror’s responses were

insufficient to find him qualified. {Tr. 949}.

The judge agreed, ruling as follows:

I think the juror is not qualified. The - - there's several things that I think need to be mentioned, and the first is the juror's demeanor. Every time he got ready to answer a question, he took a deep breath and he had what I considered to be a very troubled look on his face. From that primarily I believe that - - 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.

The - - you know, a lot of times I think we see jurors who hesitate as you mentioned, Mr. Littlejohn, and I can get - - 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 - - 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 his - - what he thought would be the question of whether or not he would be able to impose the death penalty. And so this - - this juror to me is like so many that have - - that have been addressed in the appellate decision of our Supreme Court and in other courts, and I think primarily of the case from the Fourth Circuit called U.S. Versus Tipton where they - - where they discuss several jurors who gave conflicting answer to different questions during the entire course of their voir dire, and in the end I am left, as that District Judge was, with the impression that substantially impair his performance of his duty to consider - - to follow the instructions that I would give him. And so I find that he is disqualified.

{Tr. 950 line 1 – 951 line 10}.

B. General Rules

In Adams v. Texas, 448 U.S. 38 (1980), and Wainwright v. Witt, 469 U.S. 412 (1985), the United States Supreme Court noted that the appropriate test for exclusion of a juror in a capital case was simply whether the juror's views on capital punishment would "prevent or substantially impair" her ability to follow her oath and the trial court's instructions on the law. Wainwright specifically noted that the test for exclusion required

neither automatic decisionmaking by the juror nor “unmistakable clarity” as to the juror’s beliefs. *Id.* at 424-25. See also Morgan v. Illinois, 504 U.S. 719, 729-30 (1992).

The trial court’s determination of a juror’s qualification for a capital trial is within its sole discretion, and that decision is not reviewable on appeal unless wholly unsupported by the evidence. Further, on appeal the responses of the challenged juror must be considered in light of the entire *voir dire*. “The ultimate consideration is that the juror be unbiased, impartial, and able to carry out the law as explained to him.” State v. Council, 335 S.C. 1, 10, 515 S.E.2d 508, 512-13 (1999).

C. The trial court is entitled to and indeed is in the best position to judge the credibility and demeanor of the juror in deciding whether he is qualified, regardless of how his answers appear in the cold record.

Appellant is absolutely correct that juror “vacillation” during capital *voir dire* has been held to be a sufficient reason to exercise a peremptory strike. See, e.g. State v. Shuler, 344 S.C. 604, 545 S.E.2d 805 (2001). He is also correct that the solicitor could have used a peremptory strike on Kyzer. However, Appellant is incorrect in arguing that Juror Kyzer’s vacillation and equivocation in this case does not support exclusion for cause.

Part of the trial judge’s job during qualification is to make credibility determinations about a juror’s responses on her ability to be fair to both sides. Indeed, in Wainwright the Court noted:

Despite this lack of clarity in the printed record, however, 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. . . . [T]his is why deference must be paid to the trial judge who sees and hears the juror.

469 U.S. at 425-26. See also Wainwright, 469 U.S. at 422 (noting that the State may still

challenge a juror for cause if he refuses to follow the statutory scheme and “truthfully answer” the questions posed by the trial judge); Wainwright, 469 U.S. at 429 (in discussing application of the presumption of correctness in federal habeas corpus, noting that determination of juror impartiality is accomplished by *voir dire* “culminating in a finding by the trial judge concerning the venireman’s state of mind”, and that “such a finding is based on determinations of demeanor and credibility that are peculiarly within the trial judge’s province”); Andrews v. Collins, 810 F. Supp. 759, 769 (E.D. Tex. 1992) (“The trial court is in the best position to rule on a prospective juror’s qualification because the court views the juror’s demeanor and credibility, and as here, participates in the *voir dire* examination to clarify any ambiguities.”).

And, as the United States Supreme Court held just last year:

Deference to the trial court is appropriate 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. [citations omitted]. Leading treatises in the area make much of nonverbal communication. See, e.g., V. Starr & M. McCormick, Jury Selection 389-523 (3d ed.2001); J. Frederick, Mastering Voir Dire and Jury Selection 39-56 (2d ed.2005).

Uttecht v. Brown, 127 S.Ct. 2218, 2224 (2007).⁶

Moreover, this Court has repeatedly affirmed disqualification of a juror based on difficulty in considering the death penalty, even where that difficulty was not absolute, or

⁶ Appellant seems to contend that because Uttecht was a federal habeas case resulting from a state conviction, the deference discussed there is inapplicable here. It is true that pursuant to the Anti-Terrorism and Effective Death Penalty Act of 1996 federal courts may not grant habeas relief on a state court conviction unless the decision was an objectively unreasonable application of clearly established federal law, or an unreasonable determination of the facts. See Williams v. Taylor, 120 S.Ct. 1495, 1522 (2000) (construing the standard of review in 28 U.S.C. § 2254(d)(1)). However, simply because the AEDPA imposes an additional layer of deference to state court determinations has nothing to do with Uttecht’s discussion of Wainwright and its progeny that the inherent nature of the determination of a juror’s substantial impairment necessitates substantial deference to the trial court which participated in *voir dire* – and this discussion is applicable whether the case is on direct appeal or federal collateral attack. See generally Uttecht, 127 at 2222-24.

the juror's answers were conflicting. See, e.g. State v. Council, 335 S.C. 1, 10, 515 S.E.2d 508, 512-13 (1999) (juror's equivocation to one ambiguous question insufficient to overcome previous definite answers); State v. Simpson, 325 S.C. 17, 479 S.E.2d 57 (1996) (no error in excluding juror who, although initially qualified, stated three times the next day that he could never impose the death penalty); State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996) (rejecting allegation that juror should have been qualified because she was not "emphatically opposed" to the death penalty, where juror said she did not "think" she could vote for death or sign the form, and it was apparent that imposing death would "extremely difficult" for the juror); State v. Longworth, 313 S.C. 360, 438 S.E.2d 219 (1993) (record supports disqualification of juror where juror initially said he "probably could" consider death for a non-triggerman, but then repeatedly stated he did not "think" he could); State v. Riddle, 314 S.C. 1, 443 S.E.2d 557 (1994) (no error in disqualifying a reverend who said her Christian beliefs would "hinder" her, who said she could not give death, and who was unable to say otherwise); State v. Green, 301 S.C. 347, 392 S.E.2d 157 (1990) (no error in disqualifying juror who said his bias might affect his partiality, even though juror said he would try not to be prejudiced); State v. Gaskins, 284 S.C. 105, 326 S.E.2d 132 (1985) (trial court had reasonable basis for excluding juror where he consistently maintained his opposition to the death penalty and did not believe he could consider it); State v. Chaffee, 285 S.C. 21, 328 S.E.2d 464 (1984) (considering questioning in entirety, reasonable basis existed for trial court to exclude juror for cause).

Indeed, most recently, this Court rejected a similar claim relating to a juror who changed her answers after questioning on the value of a fair cross-section of the community, affirming the trial court's credibility determination that the juror's subsequent

“correct” answers were fueled by the later questioning and not a true representation of the juror’s capabilities. State v. Wood, 362 S.C. 135, 607 S.E.2d 57 (2004) (specifically noting that the trial court was in the best position to judge the demeanor of the juror, and further noting that disqualification of a juror is not reviewable unless wholly unsupported by the evidence).

Indeed, a trial court could exclude a juror even if the juror said all the right things, if, for example, there was evidence or a basis to believe the juror was concealing his real views on the death penalty to achieve a certain result in the case. See Uttecht v. Brown, 127 S.Ct. 2218, 2223 (noting that deference to the express or implicit findings of the trial judge is necessary even in the absence of clear statements from the juror as to his impairment, as some “may wish to hide their true feelings”, and thus where there is ambiguity, the trial court “aided as it undoubtedly [is] by its assessment of [the venireman’s] demeanor, [is] entitled to resolve it in favor of the State”) (quoting Wainwright, 469 U.S. at 434).

D. Here, there was ample support in the record for the judge’s excusal for cause, given Juror Kyzer’s hesitation, his vacillating and conflicting answers, and the judge’s express resolution of credibility and demeanor issues.

Here, it cannot be disputed that Juror Kyzer’s answers were all over the place, during which – although he occasionally said the “right” things – he hesitated, said he was “in between” the categories, said repeatedly he was not sure he could return a death sentence, said he did not “think” he could sign the form for a death verdict, said it would be “very difficult” for him to consider a death sentence, said it was “hard” for him to pass judgment on someone else, agreed he would not “feel comfortable” giving death, admitted

if the victim was not a family member that “probably would” interfere with his ability to sign a death form, and even during his answers during defense rehabilitation often qualified it by saying he would “try” or “maybe” be able to consider death or sign the form. See Events at Trial, *supra*. The vacillation, hesitation, and conflict is alone sufficient support in the record to infer a proper basis for the trial court’s ruling under the deferential standard of review.

Of course, the trial court is not required to set forth detailed findings as to why it excluded a juror for cause. As noted in Wainwright:

We decline to require the judge to write out in a separate memorandum his specific findings on each juror excused. A trial judge’s job is difficult enough without senseless make-work. Nor do we think under the circumstances that the judge was required to announce for the record his conclusion that [the juror] was biased, or his reasoning. The finding is evident from the record.

469 U.S. at 430.

Here, however, there is no need to infer – the trial court did expressly set forth its reasoning, noting that his assessment of the juror’s “troubled” demeanor and frequent hesitation was not that the juror was simply thinking carefully about his answers, but that he was so troubled by the idea of participating in giving a death sentence that he would be substantially impaired in the performance of his duty. {Tr. 950-51}.

Given this record, the judge’s role, and his express findings, that decision is clearly sustainable.⁷

⁷ Appellant seems to contend that because Uttecht noted the defense waived any objection, it is inapplicable since the defense strenuously objected here. However, in the end, the strenuousness of an objection is not dispositive of whether the record has any support for a judge’s decision to disqualify a juror – ultimately it is the juror’s answers and the judge’s resolution of credibility and demeanor issues. Uttecht merely referred to the defense lack of objection as an additional fact supporting the trial court’s determination

E. Any error is harmless since at best Kyzer could have been the second alternate, and no alternates were used in the case.

Here, even if the judge erred in excluding the juror, any error was harmless. Here, the jurors were ultimately struck in the order they were qualified. **{R. Jury selection sheets}**. Kyzer at best would have been available for selection as the second alternate, as all strikes were used in the selection of the actual jurors, and the jury was set, before alternate selection began. No alternates were used in the case. Thus, even if Kyzer was erroneously excluded, it made no difference in this trial. State v. Holmes, 320 S.C. 259, 464 S.E.2d 334 (1995) (finding error for failure to allow defense questioning harmless, because given the order of jury selection, at best juror could have been an alternate, and no alternates were used); State v. Green, 301 S.C. 347, 392 S.E.2d 157 (1990) (any error in qualification or alternate capital juror was harmless beyond a reasonable doubt where no alternates were used).

V. THE TRIAL COURT DID NOT ERR IN DENYING THE MOTION FOR A NEW TRIAL BASED ON AFTER-DISCOVERED EVIDENCE, WHERE THE COURT IS TASKED WITH ADJUDGING THE CREDIBILITY OF SUCH EVIDENCE, AND THE RECORD PROVIDES AMPLE SUPPORT FOR THE TRIAL COURT'S DETERMINATIONS IN THAT REGARD.

Appellant next contends the trial court erred in refusing to grant his motion for a new trial based on after-discovered evidence due to a claim by codefendant Marcus Thompson's cellmate that Marcus confessed to being the shooter. However, the trial court in handling such a motion is tasked with adjudging the credibility of the new evidence, and his assessment of issues of demeanor and credibility are entitled to great deference on appeal. Here, even if the cellmate's account was considered, it would not affect the guilt

to disqualify the juror, and it is of no consequence that such a fact does not exist here.

phase as Appellant would still face clear accomplice liability, and the judge's credibility resolutions are amply supported and sufficient to reject the claim as to both phases.

A. Events at trial

After Appellant's conviction, he filed a motion for a new trial based on a statement given by a cellmate of Marcus Thompson that Marcus had bragged he was the triggerman. This Court granted a remand to hear the motion.

Kevin Fuller wrote a letter to the solicitor's office in which he claimed his cellmate Marcus had been bragging that he was the triggerman. Fuller said Marcus told him Appellant opened the door to the Navigator and then Marcus shot Tracy in the head. Marcus gave the gun to Appellant, and Appellant then drove the Navigator and Marcus drove Appellant's car to a hotel. They left in the Navigator but they were caught by police. Fuller claimed Marcus told him police found no gunshot residue on him because he was wearing gloves inside out, which he learned from the show "CSI". **{Attachment D}**.

Subsequently, Fuller gave a statement to investigators. Some of the details were similar, except Fuller added that Marcus said when Kevin opened the Tracy's truck door, Tracy started to get out to defend himself, so Marcus shot him behind the ear at which point Tracy fell by the truck. Fuller also said this time Marcus said he had the gun when they were pulled in the Navigator, and it took 10 to 20 minutes for the officers to arrest Appellant while Marcus sat in the car. During this time, Marcus allegedly slid the gun under Appellant's seat. **{Attachment E}**.

Fuller also wrote another letter to the solicitor in which he requested "help" and "probation" on his pending charges since he had provided this information. **{Attachment**

G}. All of this information was turned over to defense counsel.

On August 9, 2006, an evidentiary hearing was convened on the motion for a new trial based on after-discovered evidence. Marcus Thompson, who received 28 years for his role in the crime, was present and under questioning by the defense denied being the shooter or ever claiming to be the shooter to Fuller. **{Tr. 17-21}**. On cross, Marcus noted gave a statement to police shortly after the crime in which he said he did not participate in either the robbery or the murder. He stated he dropped Appellant off and drove to the Economy Inn, after Appellant showed up with the SUV and said he shot someone in the head. Marcus testified he put on the gloves and handed the gun to Appellant so he could get in the passenger seat, and that when they were pulled by police Appellant put the gun under the driver's seat. He also noted Fuller talked about wanting to get out of jail **{8/9/06 Tr. 17-38}**. On redirect, Thompson was questioned about inconsistencies in his various statements and admitted portions of them were not true. **{8/9/06 Tr. 35-38}**.

Fuller testified at the hearing and reiterated his story about Marcus's alleged confession. Fuller said the two men were looking for a ride to Atlanta for a party, and approached Tracy's car. Appellant opened the door, and Tracy had what appeared to be a gun, so Marcus shot him behind the ear. Marcus bragged that the police did not check the inside of the gloves, and said that when the officers were arresting Appellant he slid the gun under the driver's seat. **{8/9/06 Tr. 43-45}**.

When pressed in greater detail, Fuller claimed Marcus said he "stuck the gun in the back of that man's – well, it was to the side of his head and shot the man dead and he slid out of the truck". **{8/9/06 Tr. 48}**.

On cross, the solicitor probed a number of subjects with Fuller, including: (1) Fuller's request in the letter for the solicitor's help and probation on Fuller's case {8/9/06 Tr. 51; 74-76}; (2) his lengthy prior record {8/9/06 Tr. 52-54}; (3) drug use {8/9/06 Tr. 53-54; 77}; (4) inconsistencies on when he says Thompson allegedly confessed {8/9/06 Tr. 62; 92-94}; (5) inconsistencies between the letter and his subsequent statement to investigators, such as what Marcus did with the gun after the murder, and how the shooting took place {8/9/06 Tr. 63-71; 80-87}; (6) his mental health issues {8/9/06 Tr. 77-79}; and (7) Fuller's claim Marcus said there was blood on his hand which he smeared on the truck {8/9/06 Tr. 87}.

Fuller also stated that "Rocky" Johnston was also in the cell and could verify his statements. {8/9/06 Tr. 88-91; 97}. However, Rocky Johnston was called by the solicitor and denied ever hearing Marcus confess to shooting Tracy, and that instead Marcus always said Appellant killed Tracey. {8/9/06 Tr. 102-123}. Rocky stated that Fuller asked him if Fuller could use what Marcus said to get help on Fuller's charges. {8/9/06 Tr. 111-12}. The State also introduced copies of Marcus's pleas, noting they did not occur until June 20th, 2006. {8/9/06 Tr. 124}.

The judge denied the motion for a new trial in an Order filed on September 26th, 2006. As to the guilt phase, the judge noted the evidence was clear that both Appellant and Marcus committed the crime, and that the defense did not object to a charge on the hand of one is the hand of all. Thus, since Fuller's recitation of Marcus's account has Mercer opening the door to Tracy's SUV before Marcus fired the shot thinking Tracy had a weapon and was going to hurt Appellant, the "after-discovered evidence" would actually "support, rather than undermine" the guilt phase verdicts under the "hand of one" type of

accomplice liability. **{Order p. 5}**.

As to the sentencing phase, the judge noted there were two issues: (1) whether it could be believed that Marcus Thompson told Fuller what Fuller claims, and (2) if it can, whether what Marcus substantively said was the truth. As to these issues, the judge found Fuller was “not a believable person”, that his statements and testimony were “full of major inconsistencies and contradictions”, that Fuller admitting lying on several occasions, and that Fuller told “markedly different stories” about when Marcus first allegedly confessed, and about what he supposedly did with the weapon after the crime. The judge pointed out that Fuller asked for help from the solicitor’s office after providing the information, and that Rocky stated Fuller intended to fabricate a story to help himself. The judge noted that Fuller was insistent that Rocky overheard this conversation, but Rocky denied it. Finally, the judge noted there were known facts inconsistent with Fuller’s account, including (1) that there was no blood on the Navigator even though Fuller stated there was a blood smear and Tracy fell against the SUV; and (2) inconsistencies as to where Tracy was when he was shot.

As to Fuller, the judge concluded:

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 Sgt. Davis. I believe Fuller purposefully made different statements about this at different times when Fuller’s view of what the story suited Fuller’s view 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.

{Order 6-8}.

The judge also found Thompson to have little credibility as well, but noted the solicitor's concession Thompson was protected by double jeopardy made him more credible on balance than Fuller. **{Order pp. 8-9}.**

As to Rocky Johnston, the judge concluded he was the one witness with nothing to gain, and stated: "I observed him to be straightforward. His testimony was believable."

{Order 9}.

Finally, the judge addressed what a jury would likely believe if the new evidence was offered, and concluded that based on these findings "there is essentially no chance the jury would believe Fuller's testimony that Thompson confessed". The court also found very little likelihood the jury would believe the substance of Fuller's account over Thompson's in court testimony, given that – while the judge found Thompson had little credibility – Thompson still "calmly and convincingly went through the entire sequence of events". Finally, the judge noted that the defense had made a strategic decision at the first trial not to call Thompson so that it had freedom to argue the State's failure to call and/or present evidence about Thompson was reasonable doubt. Had Thompson testified, in the judge's view this would have aided the State's case more than his absence, which freed the defense to its arguments. The judge concluded that after considering all the trial evidence and the hearing evidence, there was essentially no chance the new evidence would change the outcome. **{Order 9-11}.**

C. The trial court must consider the credibility of the evidence when assessing a motion for a new trial, and that determination is entitled to deference on appeal.

Of course, to obtain relief, Appellant 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 have been discovered prior to trial in the exercise of due diligence, (4) is material, and (5) is not merely cumulative or impeaching. Johnson v. Catoe, 345 S.C. 389, 548 S.E.2d 587 (2001); State v. Spann, 334 S.C. 618, 513 S.E.2d 98 (1999). The parties conceded only the first element was in play.

With this in mind, it is important to note that in making that determination the trial court first has an important gatekeeping function to determine the credibility of the supposed new evidence. For example, in Johnson v. Catoe, this court affirmed the trial court's finding that the recanting witness in that case was not credible, and that as such it was not probable that her new testimony would change the result of the trial. 345 S.C. 389, 548 S.E.2d 587. The Johnson Court, which, unlike in this case, was acting in its original jurisdiction, stated:

[T]o decide whether [the witness's] statement would probably change the result of petitioner's trial, we are required to determine [the witness's] credibility.

345 S.C. at 400 n.6, 548 S.E.2d at 593. As quoted in the case of State v. Porter, 269 S.C. 618, 239 S.E.2d 641 (1977):

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 . . . resides the power to weigh such evidence

See also State v. Wright, 269 S.C. 414, 237 S.E.2d 764 (1977) (affirming a trial court's denial of a motion for a new trial based on a witness's recantation, where the judge found that the new testimony was not "believable" based on the many versions offered); State v. Parker, 249 S.C. 139, 153 S.E.2d 183 (1967) (affirming a trial court's rejection of a motion

for a new trial based on the affidavit of a state inmate that his testimony was untrue, and noting: "It is a fixed rule that the credibility of newly-discovered evidence offered in support of a motion for a new trial is a matter for the determination by the circuit judge to whom it is offered.".); State v. Mayfield, 235 S.C. 11, 109 S.E.2d 716 (1959) (affirming trial court's testimony that repudiation was not believable, and noting "to hold such affidavits sufficient to require the granting of a new trial would be to open the door to fraud and perjury, as well as to invite interminable delays in the disposition of causes"); State v. Needs, 333 S.C. 134, 158, 508 S.E.2d 857, 869 (1999) (same); State v. Deese, 266 S.C. 534, 225 S.E.2d 175, 176 (1976) ("When testimony is in direct conflict and depends largely on the credibility of the new evidence, the trial judge is charged with the duty of assessing the evidence"). See also United States v. Roberts, 262 F.3d 286 (4th Cir. 2001) (affirming trial court that concluded, after viewing witness's demeanor, that it was not reasonably well satisfied the trial testimony was false); United States v. Nixon, 881 F.2d 1305 (5th Cir. 1989).

Of course, part and parcel of that judge's duty to assess the credibility of the newly discovered evidence is this Court's deference to that determination on appeal, as the judge had the opportunity to observe the evidence and testimony firsthand:

"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" (citation omitted).

State v. Morrison, 246 S.C. 575, 145 S.E.2d 15 (1965) (refusal to grant new trial on ground of after-discovered affidavit by inmate who confessed and who thought he had nothing to lose not abuse of discretion).

C. The judge correctly concluded that Fuller's testimony could have no

effect on the guilt phase.

While the judge's credibility finding as to Fuller, Thompson, and Johnston, to be discussed *infra*, would obviously support rejection of the new trial claim as to the guilt phase as well, it worth noting at the outset that the judge correctly observed that Fuller's account, even if believed, would have no effect on the guilt phase. Of course, as noted before, in all his various accounts he stated Appellant was the one to open the SUV's door and start the carjacking, although he contended Marcus said he fired the fatal shot. Moreover, in his statement to investigators as well as his hearing testimony, he stated that Marcus said he and Appellant were looking for a truck to take to Atlanta to party, when they saw the victim and Appellant jumped out and opened the door. **{Attachment E; 8/9/06 Tr. 43-45}**. Obviously, assuming the truth of Fuller's account, such conduct on the part of Appellant in planning the carjacking and being the one to begin it by opening the door would provide more than ample basis for criminal liability as either a principal second or under the doctrine of "the hand of one is the hand of all". See generally State v. Langley, 334 S.C. 643, 515 S.E.2d 98 (1999).

D. The judge's credibility findings have ample support in the record and are sufficient to affirm the guilt and penalty phases.

Respondent has already set forth in the Events at Trial section a list with record citations of the multiple issues with Fuller's testimony, and has already recounted the trial court's detailed list of reasons why he disbelieved Fuller's testimony and found no chance it would change the result at trial. Of course, part of this was his express reliance on his personal observations of the witnesses as they testified. Indeed, given that his assessment of demeanor was so eloquently and expressly set out, and such a

determination is entitled to great deference on appeal, that alone is sufficient support in the record to affirm the judge on his rejection of this evidence as requiring a new penalty phase.⁸

However, without detailing again every little inconsistency in Fuller's accounts, or basis for not believing him, a few main ones bear repeating. First, of course, is Fuller's request for help or probation on his charges from the solicitor's office, which is a substantial motive to lie and goes a long way in justifying a conclusion of fabrication. **{Attachment G; 51; 8/9/06 Tr. 74-77}**.

Next is the conflict of Fuller's version with other relatively objective facts of the crime. Of course, the judge pointed out that Fuller stated – although it varied – that Tracy was shot in, at or near the car, and that blood was on the car **{Attachment D, E; 8/9/06 Tr. 46-48; 87-88}**, but no biological evidence was found on or in the car – a virtual impossibility when a .357 hollow point hits someone's head. **{Tr. 1440-41; 1447-52}**. Indeed, Tracy was found lying in the brush and grass, not the parking lot. **{Tr. 1330; 1341-43}**.

There were other inconsistencies as well. For example, Fuller testified Marcus said "he stuck the gun in the back of that man's – well, it was to the side of his head and shot than man dead and he slid out of the truck" **{8/9/06 Tr. 48}**, but the pathologist testified there was no soot or stippling on the entrance wound, indicating a distance of at least two

⁸ In the penalty phase, the judge declined to give a Tison charge, and instead charged the jury that it could only find death if it found Appellant was the triggerman. The judge so ruled because of the lack of any evidence someone other than Appellant was the triggerman. **{Tr. 2251-58}**. Of course, in Tison v. Arizona, 481 U.S. 137, 158 (1987), the United States Supreme Court held that a death sentence could not be available for an accomplice unless the individual's participation in the felony was major and with a reckless indifference to human life. However, given Fuller's account that Appellant was still heavily involved in the crime, set forth in subsection C, Fuller's account would require a Tison charge and Appellant would remain death-eligible.

feet. {Tr. 1576-77}. And, Fuller claimed in one of his version that the officers took 10 to 20 minutes to secure Appellant, while Marcus sat in the SUV and during which he was able to put the gun under the driver's seat) {Attachment E}, but Deputy Stazer testified for his own safety he kept his eyes on both subjects, and he saw no movement from the passenger. Stazer pointed out that had the passenger moved, he would have responded with lethal force. {Tr. 1390-91}. Tracy's roommate Clifton Magwood only saw one assailant, who he described as a "heavy build, muscular" black man, and who was wearing dark clothes and appeared to have a gun in his hand {Tr. 1337-38}, but officers noted Marcus was much more slender than Appellant, and was wearing a white shirt under a dark shirt that was clearly visible. {Tr. 1395; 1413-16}.

Perhaps recognizing the ample support in the record for the trial court's resolution of the issues entrusted to him, Appellant tries to allege the trial court relied on a non-existent fact – inasmuch as the judge stated Johnston said Fuller asked him about fabricating a story to help Fuller's case and get his charges dismissed {Order p. 7}, when Johnston testified "[Fuller] 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". {8/9/06 111-12}. Appellant reads this too closely if he asserts there is no reference to fabrication, as the quote is "out of what Marcus told us", which reasonably could mean someone was going to take the basic facts relayed and then fabricate a story more likely to get attention. Regardless, we should trust the trial court's interpretation who was there to hear inflection and demeanor to decide what Johnston meant, rather than parse the cold record for nuances of meaning to reverse a carefully drafted order. Indeed, this was but one of many

factors mentioned. If this Court was that concerned, perhaps a remand for clarification would be more appropriate, but that does not seem necessary with such a weak point.

Second, this Court should not accept Appellant's request for judicial notice of an inmate search on Timothy Johnston, as the record does not reflect that the one serving 3 years for *Richland* County charges is even the same person, and even if it was, does not reflect if the Lexington charges are still pending, or if they were dismissed or otherwise resolved, if it was for any of the infinite number of other reasons that could exist other than some nefarious *quid pro quo*.

Third, Appellant repeatedly asserts he did not test positive on a GSR test. Not only is this not conclusive of anything, as GSR is extremely fragile and its absence of conclusive of nothing {Tr. 1486-88}, but Appellant did have two round lead balls on his left palm – which, although not conclusive of GSR, is in fact consistent with it, and inconsistent with environmental contamination. {Tr. 1517-19}.

The trial court's determination has support in the record and should be affirmed.

VI. THE TRIAL COURT CORRECTLY REFUSED TO ALLOW THE DEFENSE TO CALL THE NONTTESTIFYING CODEFENDANT'S ATTORNEY TO TESTIFY AS TO WITH WHAT THE PROSECUTOR CHARGED THE CODEFENDANT; WHERE SUCH EVIDENCE GOING TO THE PROSECUTOR'S BELIEF ABOUT THE CASE WAS NOT ONLY RELEVANT BUT CONFUSING AND WASTEFUL UNDER RULE 403, AND ALSO NOT PERMISSIBLE UNDER THIS COURT'S THIRD PARTY GUILT RULES.

Appellant next contends that the trial court erroneously excluded testimony during the guilt phase from the codefendant's attorney that the codefendant had only been charged as an accessory, and had been released on bond. However, any inquiry into the prosecutor's belief about the case – as shown by his charging decisions – was not relevant and would lead to confusion and waste of time; moreover, evidence about the prosecutor's

charging decisions would not be permissible under our third party guilt rules. Regardless, given the other examination permitted and defense arguments made, as well as the strong evidence of guilt, it cannot be said that any error was reversible.

A. Events at trial

During the defense guilt phase case, Appellant indicated his intent to call the attorney for codefendant Marcus Thompson, David Ferrell. The State objected, and outside of the presence of the jury asserted that since it had not called Marcus as a witness, and Marcus was not on trial, anything his attorney had to offer was irrelevant. The defense responded that it thought it was relevant how Marcus had been treated by the State, to which the State responded that how Marcus would be treated was a matter only for the day when Marcus's case was called. {Tr. 1593-94}.

The trial court questioned the defense on relevance, noting that while it could potentially see relevance in a situation where Marcus had testified and his treatment by the State might go to motive, bias, or other issues of credibility, but the mere fact of the State's choice as to how to charge Marcus constituted an opinion as to guilt that was not admissible. {Tr. 1594-95}.

The defense responded that it showed the State had "chosen to totally ignore Marcus Thompson's role in the crime", to the point where they had allegedly not sought to revoke Marcus's bond even though he got in trouble. The court responded that in order for such evidence to be admissible under the rules for third party guilt it would have to exonerate the defendant, and nothing about Marcus's charges does anything to show that Appellant was not at least guilty by the hand of one is the hand of all – at least with regard

to the armed robbery and murder charges. The defense replied that hand of one did not matter since the State's theory all along was that Appellant was the triggerman. {Tr. 1595-96}.

The State then interjected that such a ruling would require the State to get into "all the evidence we have and don't have against Marcus Thompson", which would be a "smokescreen" since Thompson was not on trial. The solicitor pointed out that while it was "natural" for the defense to try to shift blame to the codefendant, he was not on trial and had not been called. {Tr. 1596}.

Defense counsel agreed when the court asked if the defense was just calling Ferrell to testify that Marcus was not indicted for murder and armed robbery, but instead was indicted for accessory after the fact. The court then sustained the State's objection. {Tr. 1597}.

B. The trial court properly concluded that any inquiry into the prosecutor's belief about the case was not relevant and would lead to confusion and waste of time; moreover, the judge also properly concluded that the prosecutor's charging decisions would not be permissible under our third party guilt rules.

The prosecutor's charging decisions here were not relevant, and were also excludable under this Rule 403 as well as this Court's rules as to third party guilt. A 403 analysis is subject to an abuse of discretion standard, State v. Hamilton, 344 S.C. 344, 358, 543 S.E.2d 586, 593 (Ct. App. 2001), and an abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law. Ledford v. Pennsylvania Life Ins. Co., 267 S.C. 671, 675, 230 S.E.2d 900, 902 (1976). "A trial judge's decision regarding the comparative probative value and prejudicial effect of

evidence should be reversed only in 'exceptional circumstances.'" Hamilton, 344 S.C. at 357-58, 543 S.E.2d at 593 (Ct. App. 2001).

Appellant claims he wished to introduce the prosecutor's charging decisions to show the State failed to investigate Thompson and ignored his role in the crime. Sometime, such inferences may arise when a codefendant is testifying for the State is cross-examined on deals received or hopes for favorable treatment, pursuant to Rule 608(c), SCRE. See, e.g. State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001) (defense should have been allowed to examine testifying co-defendant on pending charges with same prosecutor's office under 608(c)). However, the focus and basis for admissibility under Rule 608(c), SCRE is the credibility of the *testifying* codefendant, and, of course, in the trial Marcus did not testify.

Alternatively, the defense may try to raise such inferences by cross-examining testifying police officers or investigator on certain things that were not done or not done as to the investigation of a codefendant or witness. See, e.g. State v. Weaver, 361 S.C. 73, 602 S.E.2d 786 (Ct. App. 2004) (finding not error to allow officer to state all witnesses pointed to defendant where specifics were not mentioned and it was in response to defense cross on why the officer did not perform GSR on everyone at the scene). Of course, here the defense did in fact have the opportunity to cross examine the officers and investigators, and did as much as possible attempt to bring up Marcus, his involvement, his arrest, and items in his possession. {Tr. 1398-1407; 1419-281486-90; 1496; 1520-37; 1541; 1585-87; 1629-30}. Despite his conclusory assertion to the contrary, Appellant clearly had an evidentiary predicate to make a "rush to judgment" argument, and indeed

he extensively did in closing. **{Tr. 1672 lines 11-23; 1671-88}**.

In any event, showing what *the officers* did or believed as they conducted their investigation is a far cry from introducing into evidence the charging decisions of the prosecutor to show *the prosecutor's* purported belief about the case – which is the only thing for which Marcus's lawyer's testimony could be offered. Obviously, had the State tried to offer such evidence to show what the prosecutor believed to support its case, the case would be reversed, as this Court has recently emphasized that it is even improper for a prosecutor to interject his personal opinion by arguing in closing that “we expect the death penalty”. State v. Northcutt, 372 S.C. 207, 641 S.E.2d 873 (2007). There is no good reason why the defense on the other hand should be able to present evidence on the beliefs of the prosecutor trying the case.

And, a number of courts have held in various contexts that prosecutor's charging decisions were not sufficiently relevant and admissible. United States v. Dufresne, 58 Fed. Appx. 890 (3rd Cir. 2003) (decision by state not to bring drug charges not relevant in federal drug prosecution; the reasons for such a decision are not in the record, are unreviewable, and irrelevant to the issues in the case, including credibility of witnesses); Brigman v. State, 64 P.3d 152 (Ak. Ct. App. 2003) (where State decided to drop all charges against testifying codefendant after his testimony, holding it was not error to allow defense evidence on this decision; the district attorney's state of mind is not relevant, and in any event a charging decision does not necessarily show the actual state of mind of the State, as it may dismiss charges for a number of reasons other than a belief in innocence); People v. Bount, 840 N.E.2d 762 (Ill. Ct. App. 2005) (finding irrelevant fact that State

charged defense witness with possession of same drugs after defense witness testified defendant had nothing to do with them; court noted that the possession could be joint anyway, which would not preclude defendant's guilt, and in any event whether the State believed the witness's account in its charging decision was not relevant – the issue at trial was which account the *jury* believed). See also United States ex. rel. Santiago v. Roth, No. 91 C 3303, 1991 W.L. 278309 (N.D. Ill. 1991) (unpublished) (“The State's decision not to charge Ephraim Sanchez and any inference it might have raised regarding the State's view of its own witnesses' credibility were only marginally, if at all, relevant to the issue of petitioner's guilt.”).

Here also, the prosecutor's personal belief as evidenced by charging decisions has little, if any, relevance to the trial. As the authorities note, a charging decision involves more than just an assessment of witness credibility, so the charging decision is not all that probative on the prosecutor's belief anyway. See Brigman, supra. Regardless, as the solicitor noted, he would have to respond – and indeed would have the right to respond based on the defense's opening of the door on this issue – with a mini-trial as to the evidence regarding Marcus to justify and defend any “belief” he had about the case that led to his charging decisions. Not only does that violate Northcutt, and not only can the State not fathom a reason why this Court would want a capital trial to degenerate into such an endeavor, but this seems precisely what the provisions of Rule 403 referring to confusion of issues, misleading the jury, and waste of time refer. Moreover, it seems at its core to violate Rule 3.7, Rule 407, SCACR, generally prohibiting a lawyer acting as a witness in a cause where he is also the advocate. Fundamentally, the issue Appellant seeks boils down to making the prosecutor's belief and the basis for it a factual issue in the

trial – which violates Rule 3.7 in spirit if not on its face.

If, on the other hand, the evidence is offered as third party guilt, it clearly fails. South Carolina’s standard for admission of third party guilt evidence requires that such evidence “must be limited to such facts as are inconsistent with [Petitioner’s] own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence”. State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941) (citing 20 Am. Jur. 254). Moreover, the United States Supreme Court’s recent decision in Holmes did not invalidate Gregory. In Holmes, the Court overruled application of the limits on third party guilt only to the extent that the lower court’s rejection of the proffered evidence relied solely on the fact that the prosecution’s other forensic evidence was strong – as opposed to simply analyzing the strength of the third party guilt evidence in and of itself. The United States Supreme Court in Holmes specifically noted that the Gregory rule was “widely accepted” and “not challenge[d]” there. 126 S.Ct. at 1733. It was only the “radical change” and “exten[sion]” of the rule to consider the strength of the prosecution’s evidence – as opposed to the probative value or potential adverse effects of the third party evidence – that led to reversal.

Here, merely showing Marcus was charged only as accessory in the crime – but still charged all the same – does absolutely nothing to exculpate Appellant as a participant in the crime, whether as the triggerman or as principal based on accomplice liability. Indeed, Appellant is incorrect when he asserts that this case is like Holmes in that the trial court applied the third party guilt rules relying solely on the State’s theory of the case – to the contrary, while the State argued Appellant was the triggerman, the court noted that it did not matter for purposes of the guilt phase if Appellant was the trigger man based on the

doctrine of hand of one is the hand of all, and thus the charging decision could not be exculpatory to Appellant. {Tr. 1595-96}.

As far as Appellant's present counsel's aspersion in a brief filed before this Court on a long-serving solicitor as being "arrogant" because the solicitor stated it was up to his office to decide how ultimately to resolve the charges against Marcus – that is precisely the power our system gives the office he obtained by election. There is nothing arrogant about this statement and Appellant's aspersion is not only completely unnecessary to make in an official document before this Court, but also completely unhelpful to his case.

C. Any error was harmless.

Given the other examination and argument counsel was able to do and make with regard to the investigation of Marcus, detailed above, and the strong evidence of guilt, where Appellant was pulled over with the murder weapon under his seat in the victim's car shortly after the shooting, it cannot be said that exclusion of Ferrell's testimony reasonably affected the result of trial. See generally State v. Northcutt, 372 S.C. 207, 641 S.E.2d 873 (2007).

CONCLUSION

For the foregoing reasons Respondent respectfully submit this Court should affirm Appellant's conviction and sentences.

Respectfully submitted,

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March 14, 2008.

**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 THE RECORD ON APPEAL**

Respondent proposes that the following be also included in the Record on Appeal:

1. Statements of Marcus A. Thompson dated May 17, 2002.
2. Investigative Report from March 16, 2006.
3. All attachments to the Motion for a New Trial.
4. Court's reporter's transcript table of contents.
5. Court Reporter's jury selection sheets

This Designation contains no matter which is irrelevant to this appeal.

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