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S.C. Supreme Court

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Appeal from Charleston County
R. Markley Dennis, Jr., Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

WILLIAM O. DICKERSON,

APPELLANT

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# FINAL BRIEF OF APPELLANT

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## STATEMENT OF ISSUES ON APPEAL

1.

Whether the court erred by refusing to allow defense counsel to cross-examine the pathologist, Dr. Schandl, about the fact the decedent tested positive for cocaine in his urine, since the pathologist testified on direct examination that the decedent's blood tested negative for drugs and appellant had the right to correct the misleading perception the pathologist had given the jury and the omission in her testimony reflected on her credibility as a "neutral" expert witness?

2.

Whether the court erred by refusing to charge the jury on the lesser offense of accessory after the fact of murder since there was evidence appellant was only guilty of that offense since appellant's brother admitted he beat the decedent inside decedent's apartment, his brother's wife decided the decedent should be killed, the decedent died inside his apartment, and appellant's brother testified appellant helped remove the body to a vacant apartment next door?

3.

Whether the court erred by refusing to allow appellant's first cousin, Johnette Watson, to whom appellant was like a brother, to testify that appellant's execution would deeply hurt her, since appellant's ability to maintain this positive relationship was admissible character evidence during the penalty phase?

4.

Whether the judge erred in qualifying a juror who would, if the state proved aggravating circumstances, automatically vote for the death penalty unless the defense presented evidence that convinced him that a death sentence was not warranted, improperly shifting the burden to the defendant to prove he should not be executed?

## STATEMENT OF THE CASE

Appellant was indicted by the Charleston County grand jury for the offenses of murder, kidnapping, and criminal sexual conduct in the first degree R. 4454-4459. The state filed its notice of intent to seek the death penalty. His case came on for trial on April 17, 2009 before the Honorable R. Markley Dennis, and a jury. Jeffrey Bloom and Drew Carroll represented appellant. Scarlett Wilson, Bruce Durant, and Rutledge Durant were the assistant solicitors. R. 193.

At the conclusion of the guilt phase the jury found appellant guilty on all counts. R. 3527, ll. 2 – 25. After the twenty-four hour waiting period the penalty phase trial commenced. The jury recommended a sentence of death. R. 4431, ll. 13 – 19. Judge Dennis sentenced appellant to death for murder, and he imposed thirty years concurrent sentences for the other offenses. R. 4439, l. 7 - 4440, l. 11.

This appeal follows.

## ARGUMENT

1.

The court erred by refusing to allow defense counsel to cross-examine the pathologist, Dr. Schandl, about the fact the decedent tested positive for cocaine in his urine, since the pathologist testified on direct examination that the decedent's blood tested negative for drugs and appellant had the right to correct the misleading perception the pathologist had given the jury and the omission in her testimony reflected on her credibility as a "neutral" expert witness.

**Introduction**

The state's theory of the case was that the decedent, who was appellant's best friend, was taken from his home on March 7, 2006 at gunpoint to the apartment of his appellant's brother, Armon Dickerson. R. 2999, l. 25 – 3000, l. 7; R. 3002, l. 3 – 3011, l. 11. The pathologist, Dr. Cynthia Schandl, testified the decedent likely lived between eighteen to twenty-four hours with the injuries he suffered inside Armon Dickerson's apartment. R. 2971, l. 22 – 2972, l. 3.

In his closing argument during the penalty phase the solicitor focused on the aggravating circumstance of physical torture and he reminded the jury of the testimony of Dr. Schandl regarding the eighteen or more hours the decedent suffered before he was killed. The solicitor told the juror's appellant did not deserve any mercy given the circumstances. R. 4365, l. 17 – 4376, l. 24.

Dr. Schandl's testimony as a neutral scientific witness was critical because Armon Dickerson and his wife, Selena Rouse, had good reason to slant their testimony in favor of the state. Armon admitted being involved in the murder but he denied he was actually *the*

*murderer*. Armon admitted he kicked the decedent in the chest and hit him with a table. Armon testified he helped wrap the decedent's dead body inside a comforter in his apartment and he helped moved the dead body into the next door vacant apartment where it was left. R. 3039, l. 3 – 3045, l. 21. At the time Armon testified he was charged with murder, and he admitted that "[I] am hoping that I get a deal or anything."[1] R. 2995, l. 6 – 2996, l. 1.

Rouse claimed that while the beating of the decedent took place in her apartment appellant "asked me if he should let him [the decedent] live or die," and Rouse said she responded: "He knows who you are and he knows where you brought him." R. 3177, l. 6 – 3180, l. 4. Rouse was charged as an accessory after the fact of murder and obstruction of justice.[2] R. 3249, ll. 6-9.

**Relevant Facts**

Dr. Schandl testified as an expert in forensic pathology. R. 2924, ll. 21 – 24. Dr. Dr. Schandl stated that the decedent suffered "a great deal of trauma" before he died, and she compared his injuries to "a motor vehicle crash" where you "see other injuries elsewhere, more fractures." R. 2940, l. 14 – 2941, l. 15.

Dr. Schandl opined that the decedent ultimately may have been "strangled to death." She also testified the decedent had bled from his rectum from an object, which Armon Dickerson said was a gun, being placed inside his anus. R. 2940, l. 14 – 2962, l. 12. Dr.

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[1] Armon Dickerson received a sentence of eighteen years imprisonment for voluntary manslaughter. See SCDC incarcerated inmate website.

[2] Rouse received a sentence of five years imprisonment as an accessory. See SCDC incarcerated inmate website.

Schandl testified in graphic detail during the guilt and penalty stages on direct examination about the injuries to the decedent's body. She noted that he had "thirty-nine broken-skin or blunt or sharp injuries to the head and neck area." R. 2933, l. 13-18.

Dr. Schandl also told the jury about the decedent's multiple fractures, and how he had "raccoon eyes" which "may suggest facial or skull fractures." R. 2930, l. 14 – 2941, l. 15. She also testified in vivid detail about the blunt trauma to the decedent's body, his teeth being knocked out, the fracture of his Adam's apple, and she opined about which injuries may have been fatal or strongly contributed to the decedent's death, and which injuries she thought were "defensive wounds." R. 2942, l. 2 – 2972, l. 3. Significantly, Dr. Schandl opined the decedent actually lived for eighteen to twenty-four hours after the "injury to his anus". R. 2971, l. 24 – 2972, l. 3.

When the state attempted to introduce photographs during the guilt phase, the judge observed that Dr. Schandl "can certainly, as she has done, describe them [the injuries] pretty extensively. And she's done a very good job of doing that as well," but he ruled the photographs would only be admissible during the penalty stage. R. 2972, l. 16 – 2976, l. 16.

The following colloquy occurred between the solicitor and Dr. Schandl on direct examination:

> Q. Did you also routinely do a toxicology screening as part of your autopsies?
>
> A. Yes, we do. It is routine that we do send the blood that we take at the time of autopsy for toxicologic examination.
>
> Q. And you did that in this case?
>
> A. Yes, we did.

Q. And what were the results of the toxicology analysis?

A. A toxicologic analysis *was negative*.

R. 2962, ll. 13 – 22. (emphasis added).

Defense counsel inquired at the beginning of cross-examination of Dr. Schandl:

Q. Let me start first by asking you - - you responded to the solicitor's question about a toxicology screen that was negative.

A. (Affirmative nod).

Q. And I want to ask you first, an initial urine test - - -

Solicitor Wilson: Your Honor, may we approach?

The Court: Yes.

Bench Conference.

R. 2979, l. 25 – 2980, l. 9.

The solicitor stated her objection was that under Rule 403, SCRE that the results of the urine test were unduly prejudicial. Defense counsel responded: "Well, she asked about a toxicology screen being negative. The urine test was positive. They did not do a confirmation urine test which would have yielded, potentially, a different result. The issue is that the blood test, as I understand it, is for if there was the presence of a substance at the time of death. The urine screen can test for a day or two before - - -." R. 2980, l. 23 – 2981, l. 7. The judge sustained the objection. R. 2980, ll. 8 – 9. Defense counsel added, "she asked the question, she asked if [about the toxicology report] and *now the jury is left with a false impression*." The judge refused to alter his ruling. R. 2980, l. 23 – 2982, l. 14. (emphasis added).

The defense proffered Dr. Schandl's testimony outside the presence of the jury. Dr. Schandl acknowledged she testified on direct examination that she said the toxicology test was negative for drugs. She omitted however that the decedent's urine test came back positive for cocaine. Dr. Schandl also admitted she did not do a follow up confirmation test on the positive finding of cocaine in the decedent's urine test. R. 2985, l. 3 – 2990, l. 8. On cross-examination during the proffer, Dr. Schandl now claimed neither the blood screen she testified about in the presence of the jury nor the urine screen "is reliable." R. 2987, l. 12 – 2988, l. 7.

During the sentencing phase the judge noted that the defense again had requested to place as proffer of Dr. Schandl before the jury. The judge stated that Dr. Schandl's guilt phase testimony and the proffer were incorporated fully into the sentencing phase. However, the judge again denied the defense request to cross-examine Dr. Schandl and have her admit the decedent's urine tested for cocaine. R. 3898, l. 25 – 3899, l. 22.

The state's penalty phase argument focused on the torture of the decedent, and the solicitor told the juror's that appellant did not deserve any mercy given the extreme torture of the decedent. "On this point you have heard the testimony of Dr. Schandl. Gerald Roper sustained over two hundred wounds. All of those occurred post-mortem (sic) all two hundred of them while he was alive, while he could feel them. Most of those wounds were not fatal, most of those wounds were designed to inflict pain and not to kill. Most importantly you learned of, by her [Dr. Schandl's] testimony concerning the abscess that had formed in the anal area, that this torture had [been] on going for at least eighteen hours, that there was period of at least eighteen hours between the time Gerald Roper was savagely

sodimized and the time he finally expired. Eighteen hours of suffering." R. 4365, l. 17 – 4366, l. 10.

The solicitor concluded: "Let me talk to you about mercy. Mercy did not exist in Apartment E-3 at 311 Fleming Road on March 7th and 8th of 2006. They may talk to you about mercy, they may ask you to give William Dickerson his life as an act of mercy . . . Mercy is something that you receive that you do deserve. . . ask yourselves why does he deserve mercy rather than justice . . . he knew what he was doing was wrong. Yet he chose evil, he chose brutality, he chose savagery."[3] R. 4369, 19 – 4375, l. 17.

**Discussion**

Dr. Schandl was presented to the jury as a neutral witness who was going to dispassionately present the jury with her scientific findings from the autopsy. It is clear beyond cavil that the solicitor and Dr. Schandl sought to mislead the jury.

Dr. Schandl testified on direct examination that the victim's blood screen was negative for drugs. Yet the pathologist and the solicitor knew his urine tested positive for cocaine. The solicitor immediately objected when the defense attempted to clarify this misleading testimony for the jury.

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[3] The solicitor's remarks that appellant "knew what he was doing" was a reference to Dr. Phillips's testimony that appellant was in a cocaine-induced psychosis and mentally and emotionally disturbed at the time the decedent was killed. The defense argued the insanity standard was intentionally being invoked by the state to mislead the jury about the purpose of the mitigating evidence. The judge ruled the solicitor could tell the jury that appellant knew that his actions were wrong but not that he knew the difference between right and wrong. Dr. Phillips, who remained the government's psychiatric expert in the John Hinkley case, testified appellant's extraordinary paranoia was directly linked to his cocaine-induced psychosis, and that appellant was "substantially impaired" at the time. R. 4212, ll. 10 – 21; R. 4308, 1. 3 - 4312, l. 18. <u>See</u>, <u>also</u>, R. 4308, l. 18 – 4309, l. 23; R. 4359, l. 14 – 4361, l. 3.

Rule 608(c), SCRE states "bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced." Under this rule, *anything* having a legitimate tendency to throw light on the accuracy, truthfulness, or credibility of a witness may be shown and considered in determining the credit to be accorded to his or her testimony. State v. Jones, 343 S.C. 562, 570, 541 S.E.2d 813, 817. During cross-examination, any fact may be elicited which tends to show interest, bias, or partiality of the witness. State v. Starnes, 340 S.C. 312, 325, 531 S.E.2d 907, 914 (2004). See also, State v. Mizzell, 349 S.C. 326, 563 S.E.2d 315 (2002).

In State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001), this Court found reversible error in the trial judge's refusal to allow the defense to cross-examine the co-defendant, James Brown, about his prior plea bargains with the state to show his knowledge of the system, and that he knew cooperating with the authorities led to leniency. This Court held this evidence was admissible under Rule 608(c), SCRE because it went to the co-defendant's bias, prejudice or motive to misrepresent the truth. See State v. Brewington, 267 S.C. 97, 226 S.E.2d 249 (1976).

Further, the judge abused his discretion refusing to allow this cross-examination pursuant to Rule 403, SCRE. Its probative value was not substantially outweighed by its unduly prejudicial nature.

The fact the decedent's urine tested positive for cocaine and Dr. Schandl and the state deliberately kept that evidence from the jury during direct examination was an inconvenient truth for the state.

In State v. Slocumb, 336 S.C. 619, 521 S.C. 507 (Ct.App. 2009), the defendant argued that evidence of his prior sexual in nature bad acts should have been excluded under

Rule 403, SCRE. The solicitor agreed these prior bad acts would not be admissible if an expert were not testifying. The Court of Appeals reasoned that because the expert had reviewed the documents of the prior bad acts, and they were directly contrary to or called into question his opinion evidence, the cross-examination of the expert was proper.[4]

The defense had the right to present evidence of the positive cocaine urine test on cross-examination to remove "the false impression" created by the direct examination of Dr. Schandl, and the judge's ruling to the contrary, respectfully, was arbitrary and an abuse of discretion. See State v. Mizzell, 349 S.C. 326, 563 S.E.2d 315 (2002).

As seen above, the state's penalty phase case and argument focused on the torture of the decedent, and the solicitor told the jury that appellant did not deserve any mercy given the extreme torture of the decedent. R. 4369, 19 – 4375, l. 17. Dr. Schandl's extremely detailed and graphic testimony, which the trial judge recognized, about the injuries inflicted on the decedent, which injuries may have been fatal, which may have been defensive, and over what time period, was the only "objective" testimony the jury had regarding this incident.

Appellant's brother, Armon Dickerson, a state's witness denied defense counsel's assertion on cross-examination that Armon actually killed the decedent. Armon claimed: "I took part in it, but I did not kill him." R. 3084, ll. 7 – 12. Armon also admitted he lied to the police and "that might as well been a fairy tale written down there [in his statement to the police]." R. 3090, ll. 2 – 21.

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[4] This Court denied certiorari. The order does not appear on Westlaw.

As seen, Armon's wife, Selena Rouse, who was also present in her apartment during the incident, attempted to soften the significance of the fact she essentially gave the order to kill the decedent rather than release him from her apartment.

The jury had the right and need to know that Dr. Schandl and the state chose to present biased misleading testimony that the decedent was "clean" when drugs were found in his system. "It is believed that a person who tells different stories about the same matter may not be trustworthy." See Anonymous, 19 S.C.L. (1 Hill) 251 (1833). It should be equally intuitive that a witness who sets out to deceive by omitting key evidence on the same subject matter is not worthy of belief. Whether this intent to deceive is blamed on the solicitor or the witness is immaterial, defense counsel correctly argued the misleading perception should have been corrected, and the judge's Rule 403, SCRE ruling excluding this evidence was an abuse of discretion. This cross-examination was proper under Rule 608, SCRE. State v. Mizzell; State v. Brewington, supra.

It is not too much to say that appellant was sentenced to death based on the torture aggravator and Dr. Schandl's graphic testimony in support of that aggravating circumstance about the decedent being tortured for, in her opinion, between eighteen and twenty-four hours.

The solicitor effectively argued Dr. Schandl's testimony and her opinions and conclusions to the jury and based on them the solicitor urged that mercy was an improper consideration for the jury in this case.

In State v. McClure, 342 S.C. 403, 409, 537 S.E.2d 273, 275 (2000), this Court noted that finding the consequences of an error during the sentencing phase of a capital case is more difficult because of the discretion that is given to the sentencing jury. A capital jury

can recommend a life sentence for any reason or no reason at all. See, also, Vasquez v. State, 388 S.C. 447, 463b 698 S.E.2d 561, 569 (2010).

As seen, during the sentencing phase the judge stated that the defense again requested to place the proffer of Dr. Schandl before the jury and the judge noted that Dr. Schandl's guilt phase testimony and the proffer were incorporated fully into the sentencing phase. The judge denied the defense request to place the proffer of the decedent's positive urine test for cocaine before the jury. R. 3898, l. 25 – 3899, l. 22.

The jury in this case was deliberately misled by Dr. Schandl, and her expert testimony and opinions about the extent of the torture of the decedent was critical to the jury's deliberations. This proffered cross-examination would have graphically revealed Dr. Schandl's bias and motive to misrepresent facts to the jury, and that error was not harmless. State v. McClure, 342 S.C. 403, 409, 537 S.E.2d 273, 275 (2000); Vasquez v. State, 388 S.C. 447, 463b 698 S.E.2d 561, 569 (2010). Appellant should be granted a new trial, or, in the alternative a new sentencing phase trial.

2.

The court erred by refusing to charge the jury on the lesser offense of accessory after the fact of murder since there was evidence appellant was only guilty of that offense since appellant's brother admitted he beat the decedent inside the decedent's apartment, his brother's wife decided the decedent should be killed, the decedent died inside his apartment, and he placed the dead body inside a vacant apartment next door.

**Relevant Facts**

There was evidence appellant was an accessory after the fact of the murder his brother, Armon Dickerson, committed in Armon's apartment. Thirty-three-year-old Antonio Nelson was confined to a wheel chair as a result of being shot in the back. Nelson testified that the decedent and appellant were "best friends." R. 2191, l. 1 – 2193, l. 17.

Nelson said that on the morning March 7, 2010 appellant knocked on his door prior to noon. Nelson said he only got up each day in time to watch The Young and the Restless at 12:30 so appellant awoke him late that morning. R. 2197, ll. 1 – 17. Nelson testified appellant was very paranoid because he thought someone had sent him a video on his cell phone showing a woman and a male's penis. Appellant told Nelson: "Shelly [his live-in girlfriend] was cheating on him." R. 2205, l. 13 – 2207, l. 13.

Nelson said he had his friend Devon came over a little later. Devon, his friend "Dutch," appellant, and Nelson then left for what Nelson claimed he thought was an uneventful trip to James Island to appellant's brother's apartment. R. 2208, l. 10 – 2210, l. 4.

Nelson remembered that "Dutch" was driving and Devon sat in the middle. Nelson sat in the front passenger seat with his pit bull. Appellant was in the back seat behind the driver. On the way to James Island the men, with the exception of appellant, smoked marijuana and cocaine in what Nelson described as a "boonk." R. 2210, l. 1 – 2211, l. 22. Nelson said appellant did not smoke with the other men because "he didn't like how big the whole in the front in was. He said the hole was too big for him." R. 2211, l. 21 – 2212, l. 4.

Nelson testified that during the drive he thought appellant was talking to Shelley on his cell phone, and Nelson said appellant also tried to telephone the decedent. Appellant told the other men, "I got to pick up some money." R. 2212, l. 20 – 2213, l. 23.

Therefore, instead of going to Armon Dickerson's apartment, appellant told Dutch how to get off the interstate to get to the decedent's house. Nelson said once they arrived at the decedent's house: "Devon got out and knocked on the door. And then he came back and said no one was there." Nelson claimed appellant said: "I know he's there. He's always in that fucking house. So Will [appellant] got out and knocked on the door. We turned the car around." Nelson testified he heard a gunshot as he was turning the car around. R. 2214, l. 13 – 2216, l. 8.

Nelson recalled that appellant returned to the vehicle with the decedent. Nelson remembered the decedent said to appellant: "Damn, you didn't have to wake me up." Nelson stated appellant then asked the decedent: "Well, why did you run?" Nelson testified the decedent responded, "because you've got the gun." Nelson also remembered that the decedent telling appellant, "you didn't have to hit me because I've got your money," and he recalled that the decedent was bleeding from his forehead at the time. R. 2216, l. 12 – 2217, l. 25.

Appellant then asked the other men to take him downtown. Nelson said he told appellant, "No, you're going to your brother's [apartment]. R. 2219, l. 1 – 2220, l. 12. Nelson said the men "took him straight to Bubba's [Armon's] house." R. 2220, ll. 13 – 24.

Nelson said once they got to Armon's apartment "they honked the horn and Bubba came outside and they got out and went inside." R. 2221, ll. 1 – 4. Nelson remembered appellant grabbed the decedent and the decedent told appellant: "You don't got [sic] to grab me, I know how to walk." Nelson recalled Armon came and got the pit bull, and the men went inside. Nelson remembered that Devon was angry with him and said as they were leaving the apartment complex: "I ain't gonna do no more fucking favors for you no more." R. 2222, ll. 3 – 17.

Nelson testified that when he later heard that the decedent was dead he knew his body had been found at Armon's apartment complex. R. 2255, ll. 1 – 10.

Thirty-two year old Stephen Archie was also paralyzed from being shot in the back. R. 2072, ll. 8 – 21. Archie was friends with both appellant and the decedent. R. 2267, l. 14 – 2271, l. 17. Archie testified appellant and the decedent "were good friends," that he had never seen them argue, and he said there was no bad blood between the men. R. 2470, l. 23 – 2471, l. 21.

Archie gave the police a statement on March 9, 2006, the same day the decedent's body was found in the apartment next door to Armon Dickerson's apartment. R. 2473, l. 4 – 2474, l. 13.

Archie claimed appellant earlier telephoned him and said he "stuck a forty-five up [the decedent's] ass." R. 2474, l. 21 – 2475, l. 21. Archie maintained that when appellant told him that he was "next," he told appellant: "You ain't got to come to me, I'm coming to

you." R. 2475, ll. 12 – 24. Archie said he "got a couple of my partners and we went looking for him." R. 2476, ll. 16 – 23.

Armon Dickerson lived with his girlfriend, Selena Rouse, and their son in Apartment E-3. His father, Jerome Fludd, lived in Apartment E-1. R. 2997, l. 13 – 2998, l. 11. Armon testified he knew the decedent but that they "didn't have that much of a relationship because he was older than me, but I know him." R. 2998, l. 8 – 2999, l. 21.

Armon claimed he was not expecting appellant, the decedent, Antonio Nelson, and Devon to come to his apartment on March 7, 2006. R. 3000, l. 12 – 3001, l. 12. Armon testified the decedent was bleeding and that appellant had a gun when they arrived. R. 3002, ll. 12 – 22. Armon testified that appellant had the pit bull with him and Armon took the dog upstairs with his son. R. 3003, ll. 17 – 24.

Armon maintained that appellant was trying to show him a video on his cell phone of what he said was his girlfriend and another man, but "I couldn't really make out what it was." R. 3005, ll. 15 – 24. Armon claimed that he did not know why appellant brought the decedent to his apartment, and he testified the decedent told him: "Your brother is going crazy, it's not me, I'm not doing anything to him." R. 3006, l. 1 9 – 3007, l. 9.

Armon said that appellant beat the decedent inside his apartment, and, as seen supra, Armon admitted he physically abused the decedent. However, Armon would only admit "I took part in the murder," but he denied that he killed the decedent. R. 3082, ll. 3 – 8. The following occurred on cross-examination of Armon:

> Q. And you knew that Gerard Roper had been killed; correct?
>
> A. Yes, sir.

Q. Because you killed him.

A. I didn't kill him. I took part in it, but I didn't kill him.

R. 3084, ll. 7 – 12.

Armon said after he picked up Rouse up from the McDonald's where she worked that day that they returned to his apartment with "some bleach, a mop bucket, trash bags and some ammonia" to clean up their bloody apartment. R. 3016, l. 1 – 3018, l. 18. As seen, Rouse claimed appellant, and not Armon, "asked me if he should let him [the decedent] live or die. Rouse said she responded: "He knows who you are and he knows where you brought him." R. p. 3087, ll. 6 – 22.

Rouse maintained that she only made this comment because she was scared and "he [the decedent] was in my apartment and it was my boyfriend. I was trying to cover for him." R. 3078, ll. 1 – 15. Armon admitted he helped wrap the decedent in a comforter, and dump his body in the vacant apartment next door, Apartment E-4. R. p. 3044, ll. 11 – 24.

Charleston Police Department Investigator Stevens Hood responded to Apartment E-4 on March 9, 2006 at 8:10 in the morning. A prospective tenant had discovered the body and telephoned the police. R. 2568, l. 4 – 2569, l. 22. Hood also went to Armon Dickerson's next door apartment, Apartment E-3 after specks of blood were spotted on the door. R. 2570, l. 12 – 2575, l. 7.

Hood remembered "E-4 was getting ready to be rented out so the housing complex, they had it cleaned, vacuumed, dusted, painted, there was no furniture." The police found the decedent's body "clothed in a black t-shirt and [he] was naked from the waist down." R. 2575, l. 9 - 22. Hood testified they believed "that apartment [E-4] was used to dump the body." R. 2576, l. 5 – 11.

As stated, the police noticed blood splatters behind the door to Armon Dickerson's next door apartment. R. 2578, l. 7 – 2582, l. 14. After obtaining a search warrant the police entered Apartment E-3, and they could immediately tell that someone had attempted to clean up the apartment. It was obvious from the blood inside Armon's apartment that it was a crime scene. R. 2588, l. 2 – 2593, l. 16. A video of Armon Dickerson's bloody apartment was played for the jury. R. 2591, l. 7 – 2595, l. 13. An Investigator pointed out different items to the jury as the bloody apartment video was played. R. 2594, l. 21 – 2599, l. 7.

Hood told the jurors: "It would be virtually impossible to swab every speck of blood [in the apartment]" R. 2598, ll. 1 – 2. Hood testified a bleach bottle with blood on it was also found inside Armon's apartment. Appellant's fingerprints were not found inside Armon's apartment although Armon's fingerprints were found on the bloody mini-blinds. R. 2693, l. 14 – 2707, l. 19.

The state called Dontaire Anderson as a witness. Anderson grew up in the same neighborhood as the decedent and appellant. R. 2524, l. 3 – 2526, l. 17. Anderson testified that appellant telephoned him on March 8, 2006, and asked Anderson to pick him up because "something had happened." R. 2527, l. 4 - 2528, 15. Anderson admitted that appellant was scared, and he admitted appellant was more scared than [he] had ever seen him before." R. 2533, l. 9-23. Appellant was concerned there were people out to get him, that wanted to kill him, and that he was vulnerable to attack. R. 2533, l. 12 - 2535, l. 22.

Anderson said that he was aware from a News report that appellant was a suspect in the decedent's murder. Anderson said he did not believe that appellant had been involved *in harming someone*, and he would not have helped appellant "get out of town" if he thought appellant had murdered the decedent. Anderson said appellant denied the reports, and his

involvement in killing the decedent. Anderson was concerned by appellant's genuine fright. R. 2532, l. 10 – 2538, l. 25.

Defense counsel asked for a jury instruction on accessory after the fact. Noting the bloody scene in Armon Dickerson's apartment E-3, defense counsel argued there was abundant evidence that it was where the decedent was murdered. Defense counsel noted neither that appellant's blood or DNA was not found inside the decedent's apartment. Defense counsel relied on State v Collins, 329 S.C. 23, 405 S.E.2d 202 (1998), but the judge interrupted counsel and stated that he disagreed with appellant's arguments and he said that he thought by appellant's approach that given evidence of another offense the court would have to give an accessory instruction "if there is any possibility that the jury could put together facts sufficient to support [the accessory offense]. The judge also said: "I haven't heard evidence that does make him a full participant thus far, in the alleged crimes." R. 3060, l. 5 – 3065, l. 23.

The judge also rejected appellant's argument that the accessory instruction was necessary pursuant to Beck v. Alabama, 447 U.S. 625, (1980). R. 3369, l. 22 – 3374, l. 16. Appellant also argued in his motion for a new trial that Beck v. Alabama required the trial court, in the context of a capital case, "to instruct the jury on any lesser or available offenses." R. 4461.

Appellant noted that after State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005) "the trial courts of General Sessions now had jurisdiction to hear all classes of cases encompassed by the state constitution, statutes, and common law." R. 4461. Appellant wrote in his new trial motion that an indictment was only a notice document after Gentry, and the court should have charged either accessory offense if there was evidence supporting

that offense. R. 4461. Appellant argued that while Beck v. Alabama applied specifically to lesser-included offenses under state law, "Gentry eliminated the jurisdictional requirement previously conferred on the trial court by the indictment and thus the need for strict lesser included offenses." R. 4461

After the judge charged the jury defense counsel renewed his requests for the judge to charge accessory after the fact and accessory before the fact "pursuant to our prior argument."[5] The judge responded: "I ruled previously on that and he refused to alter his instructions on murder being the only offense charged. R. 3503, ll. 1 – 13.

A hearing on appellant's motion for a new trial was held on July 7, 2009. R. 4443 Defense counsel Bloom argued that the judge should have instructed the jury on accessory after the fact of murder. R. 4445, l. 5 – 4448, l. 15. Counsel argued:

> I think Gentry gives the court jurisdiction to hear any classifications, so the limited construction of whether something is lesser-included or not is no longer relevant. I particularly submit under the Sixth, U.S. Const. Amend. VIII and Fourteenth Amendments, in Beck v. Alabama that once we are now in a post-Gentry world, that any offenses that are requested by the defendant and are also based on some evidence - - excuse me, some evidence - - should be charged. I specifically note, in fact, that in the Gentry case our South Carolina Supreme Court specifically refers to a United States Supreme Court case by the name of Cotton[6], and that of course is contained in the Gentry Opinion.
>
> So that would be our argument. Your Honor, and basis for new trial in that it should have been instructed to the jury, that denial of that is a denial of due process as well as a violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments.

---

[5] Appellant's argument on appeal only pertains to the offense of accessory after the fact.

[6] United States v. Cotton, 535 U.S. 625 (2002).

R. 4447, l. 19 – 4448, l. 14.

The solicitor stated, "Clearly if these charges were lesser-included offenses, you would have to charge them but they aren't. The Beck case that was cited does apply to lesser-included offenses, it doesn't apply to all offenses. There haven't been cases that say the court would have to charge any and all offenses." R. 4448, l. 18 – 4449, l. 5.

The judge stated this was an "interesting issue" but he ruled that while "Gentry changed much" that he did not believe charging accessory after and before the fact instructions were mandated in this case as counsel argued. The judge stated, "if they [this Court] want to change that, they can but I don't read their prior decisions as giving me that authority. Therefore, that's the reason I denied it. It's preserved. It's an interesting point. Thank you." R. 4450, l. 18 – 4452, l. 3.

In Beck v. Alabama, 447 U.S. 625 (1980), the United States Supreme Court held that a sentence of death cannot constitutionally stand after a jury verdict of a capital offense when the jury was not permitted to consider a verdict of guilt of a lesser-included offense other than capital offense where the evidence would have supported such a verdict.

There was evidence here appellant was only an accessory after the fact to murder. It was apparent from the forensic evidence and blood that the decedent was killed inside Armon's bloody apartment, and that the body was then dumped in the vacant apartment next door. There was evidence appellant helped dispose of the body. Although Armon denied being the murderer, he admitted he participated in the murder.

The jury obviously did not have to believe that Armon was not the murderer. Further, state's witness Anderson said he had heard news reports appellant was the main suspect in the murder, and he believed appellant when appellant told him he was not

involved in the murder. Anderson also testified he was very worried about appellant because appellant was very frightened that others were out to kill him. Any evidence of the *lesser* offense of accessory after the fact of murder mandated that jury instruction following Gentry in the same manner as it did a lesser-included offense prior to Gentry. See State v. Knoten 347 S.C. 296, 555 S.E.2d 391 (2001) (the defendant's totally conflicting statements nonetheless mandated a voluntary manslaughter instruction as a lesser-included offense in that murder case). See, also, State v. Light, 378 S.C. 641, 664 S.E.2d 465 (2008); State v. Crosby, 355 S.C. 47, 584 S.E.2d 110 (2003).

The jury could have found from the evidence that appellant was only an accessory after the fact of the murder because he helped Armon move the bodies. The elements of an accessory after the fact of a crime are that the: (1) felony has been completed; (2) the accused must have knowledge that the principal committed the felony; and (3) the accused must harbor or assist the principal felon. Absence from the scene is not an essential element of the crime. State v. Collins, 329 S.C. 23, 25-28, 495 S.E.2d 202, 204-205 (1998).

Armon Dickerson testified that appellant assisted him in moving the decedent's dead body into vacant apartment E-4. There was evidence appellant was aware that Armon had physically abused he decedent, and defense counsel pointedly asked Armon to admit he was the murderer in this case. Armon would only admit that he participated in the murder. The jury could have found appellant assisted Armon after Armon killed the decedent inside his apartment. This was simply a credibility determination for the jury to make if it had been instructed on the offense of accessory after the fact of murder.

In State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005), this Court held an indictment is only a notice document, and the trial court was not deprived of subject matter

jurisdiction based on the omission of certain language pertaining to an accessory after the fact. Thus, where there is evidence supporting the defendant being guilty of only a lesser offense, the fact *that it is not strictly a lesser-included offense under the elements test is immaterial.*

If appellant and Armon had been jointly tried for murder in a non-capital setting the evidence would have supported instructions on murder and after the fact as to both. As stated in McAninch, Fairey, and Coggiola The Criminal Law of South Carolina (5th ed.). at 416: "When co-defendants in a joint trial for murder each gave statements indicating that he was an accessory after the fact to a murder committed by the other, the trial judge giving an accessory after the fact instructions as to only one of them constituted improper judicial comment on witness credibility and necessitated reversal of the murder conviction of the one who was not given the accessory after the fact instruction. State v. Roof, 298 S.C. 351, 380 S.E.2d 828 (1989). The majority did not respond to Chief Justice Gregory's dissenting observation that the appellant could not have been given the accessory after the fact instruction because accessory after the fact is not a lesser included offense of murder, and the defendant had not been indicted as an accessory. *Id.* at 354, 380 S.E.2d at 829–30 (Gregory, C.J., dissenting)."

Here, appellant was indicted for murder. Although accessory after the fact of murder of murder was not a "lesser-included offenses" under the elements test, it was a *lesser offense* and there was evidence to support that lesser offenses being charged to the jury. Consequently, appellant's conviction should be reversed, and a new trial granted.

3.

The court erred by refusing to allow appellant's first cousin, Johnette Watson, to whom appellant was like a brother, to testify that appellant's execution would deeply hurt her, since appellant's ability to maintain this positive relationship was admissible character evidence during the penalty phase.

**Relevant Facts**

During the penalty phase the defense called Johnette Watson as a witness. Watson was appellant's first cousin. She was "about a year younger" than appellant and she testified "he's like a brother" to her. R. 4027, l. 18 – 4029, l. 21.

Appellant never exhibited any violent tendencies around her, and he was also protective of her. R. 4028, l. 22 – 4029, l. 2. Watson recalled that when appellant was released from the Department of Corrections in September 2005 that "things were good, he was around family, he got a job not too long after, he got a car, he was doing fine." R. 4029, ll. 3 – 8.

Watson related that appellant had a positive attitude and he was motivated to do well in life. R. 4029, ll. 9 – 12. Watson said she thought appellant got a new start in life by way of his relationship with Tierra McIntosh but the relationship eventually ended and appellant stated dating Shelly Nelson. Watson opined Nelson was not "good for William." R. 4029, l. 17 – 4031, l. 3.

Watson described appellant's transformation from being very particular about his appearance and his wardrobe "to looking like a bum." R. 4031, ll. 4 – 21. Watson

suspected appellant started doing drugs with Nelson. R. 4031, ll. 22 – 24. The following occurred on direct examination of Watson:

> Q. Next let me ask you, finally, is there anything that you want to ask this jury or tell them about William?
>
> A. He's basically a good person. He got mixed up in the wrong things and I, I beg that you have mercy on him.
>
> Q. How would his execution impact on your family?
>
> Solicitor Wilson: Your Honor, I object to that.
>
> The Court: Sustained.

R. 4034, l. 16 – 4035, l. 1.

Defense counsel Bloom verbally proffered that Watson would have answered that "William's death would have had a huge impact on the Dickerson and Watson family, Watson being the maternal side of his family, his cousins. Part of the unique reason for that is that Johnette Watson has lost a brother to homicide recently, within the last year or so, and another cousin of William Dickerson has been the victim of a homicide. I believe about three years ago. So the death of William would exacerbate that. That would have been the extent of her testimony." R. 4079, ll. 14 – 25.

Among the cases defense counsel argued in support his position that his evidence was admissible were State v. Stevens, 319 Or. 573, 879 P.2$^{nd}$ 162 (1994) and Richmond v. Lewis, 506 U.S. 40 (1992). R., 4080, ll. 1–13. Defense counsel added: "Not to mislead the court, that U.S. Supreme Court case doesn't specifically allow this type of testimony, it just recognizes in the body of the opinion, but Arizona does." R. 4080, ll. 4– 9.

After appellant's argument, the judge asked the solicitor if the state still objected to this line of questioning. The solicitor stated the state still objected to this testimony. R. 4080, l. 16 – 4081 l. 4. The judge then stated he did not consider the testimony relevant but he said that he recognized that the "familial relationship is so important that it speaks directly to his character, and to whether they are close." The judge said the witness had testified that appellant was like a brother to her and to his credit "how he treated her." R. 4082, ll. 2 – 24. However, the judge ruled he did not think the proffered evidence was relevant. R. 4083, ll. 3 – 8.

**Discussion**

In State v. Stevens, 319 Or. 573, 879 P.2d 162 (1994), a death penalty case, the Oregon Supreme Court held that the trial judge erred in not allowing evidence of how the defendant's daughter "may feel about him and what might be best for her in terms of this punishment." The defendant argued this testimony was admissible under an Oregon statute and required by the Eighth Amendment to the United States Constitution. Oregon v. Stevens, 319 Or. at 579, 879 P.2d 165.

The Oregon Supreme Court noted that the original Oregon death penalty statute had only three questions for the jury to answer in making a sentencing determination. The court wrote that on June 26, 1989, while the 1989 session of the Oregon legislature was ongoing, the United State Supreme Court issued its decision in Penry v. Lynaugh, 492 U.S. 302 (1989). The Oregon Supreme Court recognized that the United State Supreme Court held in Penry that death penalty must be "a reasoned *moral* response to the defendant's background, character, and crime. Oregon v. Stevens, 319 Or. at 580–581, 879 P.2d. at 165–166.

The Oregon legislature then added a fourth question for the jury to answer regarding the defendant's character, his background and any circumstances of the offense which might reduce the defendant's moral comparability or his blameworthiness for the crime. The court held "because the witness's testimony permits an inference that the defendant's execution would affect his daughter negatively because of some mitigating aspect of defendant's character or background, it is relevant to the fourth question. The trial court erred in sustaining the state's objection to the testimony." State v. Stevens, 319 Or. at 585, 879 P.2d 168.

The court held that because it resolved this issue on statutory grounds, it would not reach the defendant's Eight Amendment argument that this was admissible character evidence was constitutionally required. State v. Stevens, 319 Or. at 585, 879 P.2d 168. The court vacated the defendant's death sentence. See also State v. Metz, 131 Or. App. 706, 887 P.2d 795 (Or. App. 1994).[7]

As seen, defense counsel also cited Richmond v. Lewis, 506 U.S. 40 (1992) to the trial judge. That case was reversed and remanded with instructions because the trial judge weighed the unconstitutionally vague "heinousness" factor along with the aggravating and mitigating circumstances.

In the opinion, the Supreme Court noted that the defendant produced evidence "of the effect his execution would have on his family." Richmond v. Lewis, 506 U.S. at 43. The trial judge found in mitigation that "the defendant's family . . . will suffer considerable grief as the result of any death penalty that might be imposed. The judge

[7] Review denied by State v. Metz, 323 Ore. 493, 918 P.2d 848 (1996).

was unable to make a definitive finding as to rehabilitation and concluded that `there are no mitigating circumstances sufficiently substantial to call for leniency." Richmond v. Lewis, 506 U.S. at 44.

A capital defendant is entitled to submit any relevant mitigating evidence in support of a sentence less than death. Payne v. Tennessee, 501 U.S. 808, 822 (1991); McCleskey v. Kemp, 481 U.S. 279, 304 (1987). The Supreme Court applies a broad relevance standard to mitigating evidence. See McKoy v. North Carolina, 494 U.S. 443, 440 – 441 (1990). In a death penalty case, the sentencer [may] not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Skipper v. South Carolina, 476 U.S. 1, 4 (1986); Lockett v. Ohio, 438 U.S. 586, 604 (1978).

The Court in Noel v. State, 331 Ark. 79, 960 S.W.2d 439, 446 (1998) held that it was proper for the defendant's mother to introduce photographs of the defendant and to offer testimony about his kind character to emphasize the loss associated with his execution.

As in Oregon v. Stevens, where the court held evidence of the adverse effect of the defendant's execution on his daughter was relevant in mitigation, because it revealed something positive about the defendant's relationship with her, and it demonstrated that the defendant had "the capacity to be of emotional value to others." Oregon v. Stevens, 319 Or. 573, 879 P.2d. 162, 168 (1994). The same is true of appellant's relationship with Ms. Watson, his first cousin, and the effect his execution would have on her and her family.

Since the constitutional right of a capital defendant to present mitigating evidence includes evidence of *any aspect of his character* or record and any circumstance of the offense, the trial judge erred by excluding evidence of the impact appellant's execution would have on Johnette Watson whom she considered "like a brother" because of his kindness to her. Appellant should be granted a new sentencing proceeding.

4.

The judge erred in qualifying a juror who would, if the state proved aggravating circumstances, automatically vote for the death penalty unless the defense presented evidence that convinced him that a death sentence was not warranted, improperly shifting the burden to the defendant to prove he should not be executed

Juror #370 was not qualified to sit on Dickerson's capital jury because he was unable to follow the law in regard to burden of proof at sentencing. A plea for mercy was not sufficient, in this juror's mind, to avoid an automatic vote for a death sentence. R. 492, 13 – 493, l. 4. The judge erred in qualifying Juror #370. The unqualified juror was seated on the jury that sentenced Dickerson to death. R. 2016, l. 14 – 2017, l. 1; R. 2032, l. 13. The death sentence must be vacated.

When initially asked his opinion of the death penalty during *voir dire* Juror #370 stated, "I am – I think it needs to be there but there are certain situations that – I mean, I am not too up-to-date on this whole system but I feel like a lot of people get the death penalty when it is not deserved. People die all the time, I mean get put to death, when they're innocent. So – I don't know. It's a big thing." R. 486, ll. 8-15. The juror stated, "Well, I've been thinking about it a lot lately, like an 'eye for an eye' kind of thing but – it's a hard situation." R. 486, ll. 19-21. The juror then opined, "Well, I mean if someone – *if he was defending himself* and he ended up killing, then I think maybe it is like *life imprisonment*. Okay. But if he just brutally murdered someone, then I think that might be where the death penalty should come in." R. 486, l. 23 – 487, ll. 1-3. (emphasis added).

Defense counsel then defined murder for the juror and upon further questioning Juror #370 stated that if the case was "absolute" he would automatically vote for the death penalty. Defense counsel asked, "Okay. So even if there is no accident, self-defense, manslaughter, insanity, the State has proved it beyond a reasonable doubt, did it, meant to do it and they had the right person; in those cases you're not going to automatically vote for the death penalty?" R. 488, ll. 16-21. Juror #370 responded, "I guess – I guess I would. *If it was absolute, then definitely*." R. 488, ll. 22-23. (emphasis added). To clarify, defense counsel asked, "In that case, if the State can prove beyond a reasonable doubt and they also establish those other what we call 'bad facts' that supported a death sentence, are you saying again that you would automatically vote for the death penalty?" R. 490, ll. 3-8. Juror #370 responded, "Yeah." R. 490, l. 9.

When asked about mitigating factors, the juror said, "Right. That's why – all those situations, like who he is, like – that kinds of stuff is what I'd want to hear before I just say 'give them the death penalty.'" R. 490, ll. 24 –491, ll. 1-2. Defense counsel then asked, "Okay. If – would you expect, though – and let me just back up a minute because you've told us that if the State proves to you that it was murder, that he did it, meant to do it, and they had the right person and they had all that other kind of stuff, you would listen to the mitigation circumstances but – and I don't want to put words in your mouth, so I want to make sure that I am understanding you." R. 491, ll. 13-22. Juror #370 stated, "I mean, it was – yeah, I'd go with the death penalty." R. 491, ll. 23-24.

Defense counsel then asked the juror, "In that same line, would you expect the defendant or his attorney to present something to you to give you a reason not to vote for death? To kind of convince you, 'Okay, I found him guilty of murder, I've heard all this

other stuff but I'm for death.' Would you expect the defense to show, 'you need to show me stuff that would convince me otherwise, to vote for life'?" R. 491, l. 25 –492, ll. 1-8. Juror #370 responded, "I – yeah, isn't that what you've got to do?" R. 492, ll. 11-12. The following exchange took place between defense attorney and the juror:

> Q. Both sides may or may not present evidence. I guess what I am asking is what if the defense lawyers didn't put up any witnesses or evidence, just basically argued –
>
> A. It's a hundred percent proof that he did it?
>
> *Q.* Yes. And all that bad stuff in there *and they just for mercy, that is not something that is going to persuade you?*
>
> *A.* *No.*
>
> Q. So you would be looking at the defense to kind of convince you that a death penalty wasn't the right sentence?
>
> A. Yeah. Just to represent him, *show something* – I mean, something had to happen.

R. 492, l. 13 –493 ll. 1-4. (emphasis added).

The state then questioned the juror about his ability to follow instructions from the judge.

> Q. What I am getting at here is that there was another instruction that the Judge would give you and that would be that you couldn't hold the fact that a defendant in a case didn't testify or didn't present evidence, you couldn't hold that fact against him.
>
> A. Which is – right.
>
> Q. The Judge would tell you that it wouldn't be right and that it is the law that a juror cannot hold the fact

that a defendant doesn't testify or doesn't put anything up against him.

A. Right.

Q. If the Judge gave you that instruction, could you take that off the table?

A. Yes, ma'm.

Q. Because a minute ago you were saying that you would expect the defense to put something up.

A. Well, I mean – I thought that was kind of how it worked. But if – (pause)

Q. Well, the Judge would tell you that it works differently and ---

A. If he told me that, yeah, then I wouldn't expect it.

Q. You wouldn't consider that, the fact that they didn't put anything up – any evidence?

A. Yeah.

R. 495, ll. 13- 496, ll. 1-15.

Although the juror agreed that he could follow the judge's instruction, he admitted that he would want to hear mitigation as to why a death sentence was not warranted. The state asked the juror, "And even if there were a case where a murder conviction, you believe beyond a reasonable doubt that the state has proven those aggravating circumstances, you would still want to hear if there were going to be some mitigation. You would want to hear, I think you said, the whole story, what was going on?" R. 496, l.19 –497, l. 1. The juror responded, "Yes." R. 497, l.2.

The juror then changed his earlier answer about automatically voting for the death penalty if the state proved aggravators. R. 497, ll. 12 – 18. The state then asked the

juror, "If you found those aggravating circumstances and you believed, you listened to the mitigating circumstances, you considered them and you still thought the death penalty was appropriate, could you sign your name on a form ---" R. 497, ll. 19-24. The juror responded, "Absolutely." R. 497, l. 25. At this point, while the juror may have been rehabilitated in regard to automatically voting for the death penalty if the state proved aggravators, the questioning reflects that this juror would require the defense to present mitigation evidence in order to convince him that a death sentence was not warranted. The juror's view improperly shifted to the defendant the burden of proof in regard to mitigation evidence.

The judge then questioned the juror:

> Q. I want to follow up with just a couple of questions. I want to be sure of something -- I think I understand your answer but, [Juror #370], as you know, and I think you said this but I want to be sure, that – I asked you whether you would follow the law notwithstanding your personal opinions about the law or what you thought it was or should be; is that correct?
>
> A. Yes, sir.
>
> Q. And, so with respect – you said 'I am not familiar with how this all works.' There is no question that it is the law that not only are they presumed innocent but, as stated, Mr. Dickerson has nothing to prove or disprove or explain, he doesn't have to say anything, he doesn't have to present any evidence whatsoever. The jury can't consider that against him. That would be the instruction. Do you understand that?
>
> A. Yes, sir.
>
> Q. Would you have any problem following that instruction?

A. No.

Q. You would follow that and honor that in every respect?

A. Yes, sir.

R. 498, l. 22 –499, ll. 1-23.

The defense re-questioned Juror #370. "I just want to make sure that I understand you. If you found someone guilty of murder and you found all that evidence of aggravation, all that bad stuff supporting the death penalty, just personally you would look to the defense to kind of prove to you that the death penalty wasn't the right thing, that you'd automatically tend to vote for the death penalty; did I get that right?" R. 501, l. 18 –502, l. 1. The juror responded, "Yes." R. 502, l. 2.

The state then briefly re-questioned Juror #370.

Q. I just want to make sure that we're clear. Even if the Judge told you couldn't hold that against ---

A. Well, even if the Judge told me, is that all the time?

THE COURT: Yes.

JUROR NUMBER 370: Okay. Well, then I would listen to him (indicating Judge).

SOLICITOR WILSON: You would listen to what the judge said?

JUROR NUMBER 370: Yes. Sorry, I was – I understand.

R. 502, ll. 8-19

Defense counsel moved to disqualify Juror #370. R. 503, l. 12 – 504, ll. 1-4. Defense counsel argued that Juror #370 was not qualified because he was a "burden

shifter" who expected the defense to convince him that a death sentence was not warranted. Defense counsel argued that the juror's general statements that he could follow the instructions were not enough. R. 503, ll. 16-20.

The judge ruled:

> I think obviously he demonstrated some personal concept of what the law was but I – I believe that the young man specifically stated and unequivocally stated that he would follow the instructions. He demonstrated that in one of his answers to your question when he said, and I'm paraphrasing what he said, but he said 'that's what I mean, I would want to hear all the circumstances.' I think while he may be prone for that, I don't think that disqualifies him. He said that he would consider it and meaningful consideration that and impose the death penalty. I appreciate your position. I understand the position and I find that he is qualified.

R. 504, ll. 7-23.

The judge did not address the juror's erroneous burden shifting belief that the defense had to present mitigation evidence in order to convince him that a death sentence was not warranted. The juror maintained his erroneous position requiring the defense to present compelling mitigation evidence **after** the judge instructed him on the proper burden of proof. R. 498, l. 22 –499, ll. 1-23; R. 501, l. 18 –502, ll. 1 - 2. The judge did not address the juror's response that a plea for mercy was not sufficient to avoid an automatic vote for death. Juror #370 was unable to follow the law regarding burden of proof at sentencing. The judge erred in finding Juror #370 qualified.

Both defense counsel and the solicitor knew the order of the jury strike in advance, it was in the order the jurors were qualified, so both sides were able to plan, and defense counsel Bloom was able to fully utilize his individual rating for each juror

presented. See Court Reporter's Jury Strike list. R. 4469. Defense counsel was forced to seat Juror #370 on Dickerson's jury in order to save his ten peremptory strikes for potential jurors who were *even more death prone* than the unqualified Juror #370. R. 2032, l. 13. Dickerson exhausted his peremptory strikes in selecting the jury. R. 2023, ll. 23-24.

Two of the ten strikes used by the defense were for jurors who defense counsel had earlier moved to disqualify, Jurors #402 and #378, were also more death prone than Juror 370. Juror #402, characterized herself as a juror type one, a juror inclined to automatically impose the death penalty. R. 951, ll. 5-24. Defense counsel moved to disqualify Juror #402 based on her hesitation to impose a sentence of life without parole for malice murder. R. 972, ll. 13-20. The judge denied the motion and found the juror qualified. R. 972, l. 21–973, ll. 1-25.

Juror #378 initially stated that he would be a type three juror, a juror who had not pre-determined an appropriate sentence. R. 1017, l. 6 –1018, ll. 1-5. The juror later, however, stated that if the crime was deliberate he would not be a type three juror. R. 1024, ll. 8-19. The juror admitted that he had strong personal feelings in favor of the death penalty. R. 1024, l. 20 - 1025, l. 1; R. 1035, ll. 11-25. The juror became emotional when talking about his children and not wanting anything to happen to them. R. 1036, l. 20 –1037, ll. 1-9. Defense counsel moved to disqualify Juror #378 based upon how distraught he became during questioning. R. 1043, l. 21 –1044, 1045, ll. 1-23. Defense counsel cited State v. Sapp, 366 S.C. 283, 621 S.E.2d 883 (2005) in support of his argument that the juror was not qualified. R. 1045, ll. 9-15. The judge denied the motion and found the juror qualified. R. 1045, l. 24; R. 1046, 1047, ll. 1-23.

Defense counsel used five other peremptory strikes for Jurors #37, #124, #343, #149 and #11 based on the pro-death statements included in their juror questionnaires. In her juror questionnaire, Juror #37 wrote, 'I think that if a person takes a life that was no accident that they should give up their life." R. 773, ll. 22-24; R. 4549.

In his juror questionnaire, Juror #124 wrote, in reference to his opinion on the death penalty, "I believe it is necessary." R. 1154, ll. 20-22; R. 4644. When questioned about his response the juror stated, "I think when I was thinking that, that I believe that some type of capital punishment is necessary in the criminal justice system to make the criminal justice system effective." R. 1154, l. 22 –1155, ll. 1-2.

Juror #343 indicated on his juror questionnaire, "I agree with the death penalty." R. 1257, ll. 3-6; R. 4667-4675. When asked about the death penalty, Juror #149 wrote on his questionnaire, "If it [guilt] is proven beyond a reasonable doubt." R. 1280, ll. 1-4; R. 4691.

Juror #149 explained, "I mean if the facts support it a hundred percent, I have no – I wouldn't feel bad, or something, you know to do the death penalty. They'd still have to prove it, I'd still be acceptable to listening to everything but if I felt like the case was going in that direction, whatever, I have no issue with saying or voting for the death penalty." R. 1290, ll. 5-12.

When asked about her opinion of the death penalty, Juror #11 responded on her juror questionnaire, "Go for it!!!" with exclamation points. R. 1807, ll. 24 –1808, ll. 1-4. The jurors' written responses on the questionnaires reflect their strong feelings about the death penalty. Defense counsel needed to save five peremptory strikes for Jurors #37,

#124, #343, #149 and #11 because they were even more death prone than the unqualified Juror #370.

Three remaining peremptory strikes were used for jurors who made pro death penalty statements during *voir dire*. Juror # 160 stated, "I agree with the death penalty. I do feel that certain circumstances would require the death penalty and that certain wouldn't but I don't have any problem with it. I feel that sometimes circumstances do require that the death penalty be used." R. 866, ll. 20-25. Juror #160's belief that the death penalty was **required** in certain circumstances reflects a strong feeling about the death penalty.

In contrast, Juror #370 believed that the death penalty was sometimes imposed when it was not deserved. R. 486, ll. 8-15. Both Jurors #314 and #157 expressed views in favor of the death penalty. Juror #314 stated, "You're saying that it has been proven that, yes, he did it, he was there, and then I would say, yes, that I believe in the death penalty in that case." R. 1320, l. 23 –1321, l.1.

As stated, there were other potential jurors in the pool whom counsel rated more death prone than the jurors for whom defense counsel used the ten peremptory strikes. While challenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality, the peremptory challenge permits rejection for a real or imagined partiality that is less easily designated or demonstrated. Hayes v. State of Missouri, 120 U.S. 68, 70 (1887). (footnote omitted).

Defense counsel here should not be forced to use a peremptory strike on an erroneously qualified juror when there were legitimate reasons for saving those

peremptory strikes for other more death potential jurors.[8] Counsel's decision not to use a peremptory strike does not cure the error of qualifying Juror #370 when that juror was unable to follow the law in regard to burden of proof at sentencing.

In Wainwright v. Witt, 469 U.S. 412 (1985), the Supreme Court stated that the critical issue regarding the disqualification of a capital juror is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " Id. at 424, 105 S.Ct. 844 (quoting Adams v. Texas, 448 U.S. 38, 45 (1980)).

In State v. Mercer, 381 S.C. 149, 156, 672 S.E.2d 556, 559 (2009), this Court wrote, "The Wainwright Court observed that a juror's bias need not be "proved with 'unmistakable clarity' ... [because] bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism." Id. at 424, 105 S.Ct. 844."

In State v. Bennett, 328 S.C. 251, 257, 493 S.E.2d 845, 848 (1997), this Court noted, "When reviewing the trial court's qualification or disqualification of prospective jurors, the responses of the challenged jurors must be examined in light of the entire *voir dire*. State v. Green, supra. The ultimate consideration is that the juror be unbiased, impartial and able to carry out the law as explained to him. Id."

A capital defendant may challenge for cause any juror who would automatically vote for a death sentence. Morgan v. Illinois, 504 U.S. 719 (1992). "If even one such juror is impaneled and the death sentence is imposed, the state is disentitled to execute sentence." Id. at 729, 112 S.Ct. at 2230. The Morgan court rejected the state's claim that

[8] Defense counsel Bloom is also a jury consultant in capital cases. Two of his prior capital jury consulting cases have come before this Court. See, State v. Hill, 361 S.C.

general questions of fairness and impartiality were in all cases sufficient to detect unqualified jurors, stating:

> [S]uch jurors could in all truth and candor respond affirmatively, personally confident that such dogmatic views are fair and impartial, while leaving the specific concern unprobed.

504 U.S. at 735.

At first, Juror #370 stated that he would automatically vote for a death sentence if the state proved aggravators. R. 488, ll. 16-23; R. 490, ll. 3-9. Then, the juror twice stated that he expected the defense to convince him that a death sentence was not warranted. R. 490, l. 24–491, R. 492, ll. 1-8. Again, on two additional separate occasions, prior to and after questioning by the state and after questioning by the judge, Juror #370 expressed his belief that he would automatically vote for the death penalty *unless* the defense convinced him that a death sentence was not warranted. R. 492, l. 13 – 493, ll. 1-4; R. 501, l. 18 –502, ll. 1 - 2.

The juror's earlier generalized statements that he would follow the law were insufficient to cure his later unequivocal response that he would automatically vote for the death penalty *unless* the defense convinced him that a death sentence was not warranted. There is no *burden of proof* on a capital defendant with regard to evidence of *mitigating circumstances*. State v. Bell, 293 S.C. 391, 360 S.E.2d 706 (1987), *cert. denied* 484 U.S. 1020 (1988).

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297, 604 S.E.2d (2004) and State v. Whipple, 324 S.C. 43, 476 S.E.2d 683 (1996).

The judge told Juror #370, "And, so with respect – you said 'I am not familiar with how this all works.' There is no question that it is the law that not only are they presumed innocent but, as stated, Mr. Dickerson has nothing to prove or disprove or explain, he doesn't have to say anything, he doesn't have to present any evidence whatsoever. The jury can't consider that against him. That would be the instruction. Do you understand that?" R. 499, ll. 7-16.

After the above explanation by the judge, Juror #370 maintained his position that he expected the defense to present mitigation and would automatically vote for a death sentence *unless* the defense presented evidence that convinced him that a death sentence was not warranted. "I just want to make sure that I understand you. If you found someone guilty of murder and you found all that evidence of aggravation, all that bad stuff supporting the death penalty, just personally you would look to the defense to kind of prove to you that the death penalty wasn't the right thing, that you'd automatically tend to vote for the death penalty; did I get that right?" R. 501, l. 18 –502, l. 1. The juror responded, "Yes." R. 502, l. 2. The juror's view improperly shifted the burden of proof to the defendant with regard to evidence of mitigation.

Juror #370 admitted that a plea for mercy was not sufficient to avoid *an automatic vote* for a death sentence. R. 492, l. 13–493, ll. 1-4. The view is contrary to the law. "It is proper to instruct a jury in a capital sentencing phase that it may recommend a life sentence for any reason or no reason at all, including as an act of *mercy*. A jury's consideration of *mercy*, if proper evidence of *mercy* is admitted, is well recognized in the sentencing phase of a capital case." Rosemond v. Catoe, 383 S.C. 320, 330, 680 S.E.2d 5, 10 (2009). (emphasis added).

The juror's views in regard to burden of proof at sentencing, including his inability to consider mercy, substantially impaired his ability to perform his duties in accordance with the law, the instructions and his oath. The judge's ruling Juror #370 qualified is "wholly unsupported by the evidence." See State v. Bennett, 328 S.C. 251, 493 S.E.2d 845 (1997).

The present case is distinguished from this Court's finding in State v. Green, 301 S.C. 347, 392 S.E.2d 157, cert. denied 498 U.S. 881, 111 S.Ct. 229, 112 L.Ed2d 183 (1990) because in Green the unqualified juror did not serve on the jury. The unqualified juror in the present case was seated on the jury that ultimately sentenced Dickerson to death.

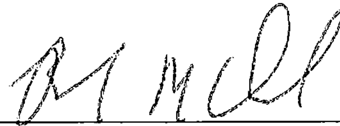
In Bennett this Court found a juror who would go with the majority unqualified to serve in the sentencing phase of a capital trial. The juror in the Bennett case, as in the present case, was seated on the jury that ultimately returned a death sentence. In Bennett, the judge's error in qualifying the jury member required a remand for re-sentencing. The judge's error in the present case in of qualifying Juror #370, an unqualified juror, requires a remand for re-sentencing.

Juror #370 was not qualified to sit on Dickerson's capital jury because he was unable to follow the law in regard to the burden of proof at sentencing. A plea for mercy was not sufficient, in this juror's mind, to avoid an automatic vote for a death sentence. The death sentence must be vacated.

## CONCLUSION

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

Respectfully submitted,



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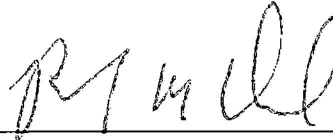
ATTORNEYS FOR APPELLANT.

This 17th day of March, 2011.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

March 17th, 2011



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STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Appeal from Charleston County
R. Markley Dennis, Jr., Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

WILLIAM O. DICKERSON,

APPELLANT

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CERTIFICATE OF SERVICE

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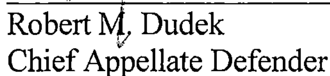
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Melody Brown, Esquire, Assistant Deputy Attorney General, Office of the Attorney General, Rembert Dennis Building, 1000 Assembly Street, Rm. 519, Columbia, SC 29201, this 17th day of March, 2011.



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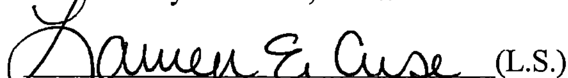
SUBSCRIBED AND SWORN TO before me
this 17th day of March, 2011.


(L.S.)
Notary Public for South Carolina
My Commission Expires: August 23, 2014.