STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions
R. Markley Dennis, Jr., Circuit Court Judge

The State,

Respondent,

vs.

William O. Dickerson,

Appellant.

FINAL BRIEF OF RESPONDENT

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APPELLANT'S 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 that 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 appellate 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?

(BOA, pp. 1-2).

RESPONDENT'S STATEMENT OF THE CASE

On April 23, 2009, Appellant, William O. Dickerson, stood trial in Charleston County on the charges of murder, criminal sexual conduct, first degree, and kidnapping. The State sought the death penalty. The Honorable R. Markley Dennis presided over the jury trial. Appellant was represented by defense counsel Jeffrey Bloom and Andrew Carroll. The Ninth Circuit Solicitor, Scarlett Wilson, tried the case along with Deputy Solicitor Bruce Durant and Assistant Solicitor Rutledge Durant. On April 30, 2009, the jury convicted Appellant as charged. (R. p. 3526, line 17- p. 3532, line 6). On May 4, 2009, the penalty phase began. (R. p. 3608, line 4 - p. 3609, line 20). On May 7, 2009, the jury found three aggravating circumstances: 1) criminal sexual conduct; 2) kidnaping; and 3) torture. (R. p. 4430, line 20 - p. 4431, line 12). The jury recommended death. (R. p. 4431, lines 13-19). The judge imposed a death sentence for murder, and thirty years on each of the other crimes. (R. p. 4439, line 7 - p. 4440, line 9). The judge also found " as an affirmative fact that the evidence in the case warrants the imposition of a death penalty and its imposition is not the result of prejudice, passion or any other arbitrary factor." (R. p. 4440, lines 12-20). This appeal follows.

RESPONDENT'S STATEMENT OF FACTS

At the time of his death, twenty-nine year old Gerard Roper ("Gerard" or "victim") lived with Kanesha[1] Singleton, the mother of Gerard's two small children. (R. p. 2105, lines 10-25; p. 2119, lines 16-17). On Tuesday, March 7, 2006, early in the morning after Ms. Singleton prepared the children for school, Gerard left to take his mother's car back to her. It was the last time Ms. Singleton saw Gerard alive. (R. p. 2107, lines 4-16). She could not reach him by phone as he left his cell phone at home. The cell phone rang periodically throughout the night. (R. p. 2109, lines 2-24). The next morning, Ms. Singleton went to her mother's house. Her mother worked with Gerard's mother, Shareen Roper, at a local department store. Ms. Singleton's mother told Ms. Singleton "that Gerard's mother had gotten a call that someone had Gerard and he was torturing Gerard." (R. p. 2110, lines 4-25).

Ms. Roper testified further that, though frantic, she was able to call a number she was given by another co-worker. A man answered. She asked for "Willie D" based on conversations she had about the situation. She identified herself as Gerard's mother and asked if he had seen Gerard. The person answered, "no, ma'am," but upon additional questioning began to scream into the phone and would not speak again. (R. p. 2125, line 4 - p. 2127, line 6).

In the mean while, Ms. Singleton returned to her home and checked Gerard's cell phone. She dialed the most frequently missed call. After speaking with an unknown female, Ms. Singleton's concern increased. She, with Gerard's mother, and a friend of Ms. Roper's (who was also a North Charleston police officer), went to Appellant's home. Neither

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[1] Ms. Singleton's first name is initially spelled "Kaneshia" in the transcript. (R. p. 2104, line 5). Through the remainder of the transcript, it is spelled "Kanesha." (See R. p. 2104, lines 16-18). Respondent has used the "Kanesha" spelling for consistency.

Appellant or Gerard were at the home, but officers were present and were also in the process of looking for Appellant and Gerard. Ms. Roper additionally called the city police. (R. p. 2111, line 7-p. 2114, line 22; p. 2127, line 8- p. 2128).

Ms. Singleton and Ms. Roper found out the next day, Thursday, March 9, 2006, around noon, that Gerard had been killed. Ms. Singleton testified that she was with Ms. Roper in Ms. Roper's front yard with an officer and the coroner delivered the news. (R. p. 2115, lines 7-21).

Ms. Roper confirmed in her testimony that Gerard came by with her car at approximately 7:30 or 8:00 a.m. that Tuesday morning. (R. p. 2122, lines 7 -19). Gerard's friend, Stevo Rivers, followed Gerard to his mother's house, then gave him a ride to Ben Drayton's house. (R. p. 2134, lines 4-19). Mr. Drayton's house was a "party house," a place for "drinking and using drugs." (R. p. 2150, lines 1-6). (See also R. p. 2186, "People would bring their enjoyment, whatever entertainment that they had, they'd bring it to my house. And all of it was against the law, the drugs, women, booze, drugs, whatever....").

Gerard and Rivers entered Drayton's home. Gerard went to play a video game while Rivers talked with Drayton. (R. p. 2135, lines 3-14). Rivers testified that just as he was leaving, he heard a knock at the back door. (R. p. 2135, lines 18-25). Rivers asked who was there, and the reply was "Willie." He yelled to Gerard that "Willie" was there and Gerard instructed Rivers to let him in. (R. p. 2136, lines 5-12). Appellant came through the door with a gun, then fired at Gerard, leaving a bullet hole in the door where Gerard stood. (R. p. 2137, lines 5-14; p. 2141, lines 8-11). Gerard attempted to calm Appellant. Rivers ran out of the house, but stayed in a nearby wooded area. He heard them exit the house, and saw them leave in "a green-in-color, two-tone" Suburban. (R. p. 2137, line 15 - p. 2139, line 6).

Rivers did not initially cooperate in the investigation, claiming that he left as the Suburban arrived. (R. p. 2148, lines 4-15). He testified that he decided to describe to officers "what had went down" after he found out about the details of killing. (R. p. 2148, lines 21-22). (See also p. 2158, lines 5-19, "No man deserves that."). Rivers also recalled that after Appellant fired at Gerard, Gerard said, "Will, I got your money." (R. p. 2160, lines 2-6).

Drayton, who was disabled, testified that Gerard was expected back that morning as Gerard had offered to take his electric bill payment for him and return the receipt. He was also to bring Drayton lunch. (R. p. 2171, line 25 - p. 2173, line 16). Drayton recalled Gerard and Rivers coming in, and Gerard going to another room to play video games. (R. p. 2173, lines 17-25). He also heard the knock on the back door, and that "Willie" was there. "Gerard said, 'That's my brother. Open the door." (R. p. 2174, lines 14-19). Things quickly turned heated. Drayton testified that he heard yelling, "'Where's my f-ing money?" and Gerard responded, "'I got your money." (R. p. 2174, line 20 - p. 2175, line 5). He heard Gerard say, "'don't shoot me," then footsteps and a gunshot. A scuffle ensued. Being confined to bed, Drayton could only hear footsteps and door slamming, and he "could hear them on the back porch, 'please don't kill me' and that was all." (R. p. 2175, lines 13-24). "About fifteen minutes or maybe less" later, Rivers came back into the house. Rivers told Drayton "that there was a couple of guys out there in a sort of van-type vehicle or SUV... two guys in there and one on the outside and that the guy that came in the house took him," Gerard. (R. p. 1984, lines 2-15). Drayton recalled that Rivers was "nervous," and told Drayton he left the house when he saw the gun, but stayed in the woods. (R. p. 2176, lines 18-25). Drayton confirmed the bullet hole in the door was not there prior to this altercation. (R. p. 2177, lines 9-17).

Antonio Nelson testified that the green Suburban belonged to him, and that he, with driver Devon "Dutch" Keeling, had given Appellant a ride that day. Nelson testified that on Tuesday, March 7, 2006, sometime that morning, Appellant, a friend since childhood, (R. p. 2242, lines 10-16), came to his house and wanted a ride to pick up his car. (R. p. 2192, lines 8-17; p. 2193, lines 6-9; p. 2197, line 1 - p. 2198, line 22). Nelson also knew Gerard though Appellant. Nelson believed Gerard and Appellant to be "[b]est friends." (R. p. 2193, lines 14-19). Nelson testified that Appellant is known as "Willie D." (R. p. 2192, lines 13-17). Nelson is confined to a wheelchair as a result of being shot in the back. (R. p. 2190, line 1 - p. 25). His friend Keeling would normally drive him for errands (after he and Nelson watched *The Young and the Restless,* so after 1:30 p.m.). (R. p. 2200, lines 5-25). Appellant left while Nelson dressed, but came back later that morning, still requesting a ride. (R. p. 2202, line 1 - p. 2011, line 2). Appellant also requested a gun which Nelson supplied. (R. p. 2203, lines 3-6). Nelson considered Appellant to be acting "paranoid," and Appellant told him that someone was "[t]rying to get him." (R. p. 2203, lines 8-19). Nelson heard Appellant talking to Appellant's girlfriend, "Shelley." They were arguing, loudly, and Appellant kicked a hole in Nelson's door. (R. p. 2204, line 7- p. 2013, line 7).

Nelson recalled that approximately one week before that day, Appellant showed him a video on Appellant's phone of what Appellant thought was "a male's penis or something," though Nelson did not see that on the video. He just agreed with Appellant. In another part of the video, Appellant claimed to hear a child trying to wake him to tell Appellant someone was in Appellant's home, but, again, Nelson did not see (or hear) what Appellant thought was on the video. (R. p. 2205, line 8 - p. 2207, line 6). Appellant thought that Shelley was cheating on him, and he was attempting to figure out who she was cheating with (at that time

he thought "Puddin" [unidentified in transcript] was the "main suspect"). (R. p. 2207, lines 13-25). According to Nelson, Appellant was not talking about the video on the day of the abduction. (R. p. 2208, lines 4-9).

When Keeling arrived, Keeling drove Nelson and Appellant to Appellant's brother's home. (R. p. 2208, lines 12-25). Nelson testified that Appellant left his powder cocaine at Nelson's house. He further testified that he and Keeling smoked marijuana laced with cocaine, but Appellant did not join them in smoking because he did not like the way the cigar was rolled. (R. p. 2211, line 13 - p. 2211, line 25). Appellant spoke with Shelley on the phone while in the car. (R. p. 2212, lines 20-24). According to Nelson, Appellant appeared to be having "a calm day." (R. p. 2213, lines 1-5). Appellant also tried to call Gerard, but could not reach him. (R. p. 2213, lines 6-16). Appellant then announced that he had "to pick up some money." (R. p. 2213, lines 21-23). Nelson initially protested because Keeling had a job to go to by five o'clock, but Keeling acquiesced and they drove to Drayton's house. (R. p. 2213, line 23 - p. 2214, line 10). Keeling knocked on the door, and having received no answer, went back to the Suburban and said no one was there. (R. p. 2214, line 17 - p. 2215, line 11). Appellant disagreed, and went to the house. Soon after, Nelson heard a gunshot, then Appellant returned to the vehicle with Gerard. (R. p. 2215, line 11 - p. 2217, line 6). Nelson testified he heard Gerard state that he initially ran from Appellant because Appellant had a gun. (R. p. 2217, lines 10-11). Gerard was also bleeding from a "gash in his forehead." Gerard told Nelson that Appellant hit him, showing Nelson the injury. Gerard told Appellant, "'You didn't have to hit me because I've got your money.'" (R. p. 2217, lines 15-25). Appellant asked Gerard why he didn't answer his phone when Appellant called, and Gerard responded, "'my phone is dead.'" (R. p. 2218, lines 6-8). Nelson testified that

Appellant stated that he did not "'want to hear anything [Gerard] ha[d] to say.'" (R. p. 2218, lines 10-11). Keeling drove to Appellant's brother's (i.e. Armon Dickerson's) house. (R. p. 2219, lines 1-3). Appellant actually first wanted to go back downtown, but Nelson, scared of Appellant by this time, refused. Appellant then said, "just take me to my brother's house." (R. p. 2219, lines 21-25). Nelson testified that when they arrived, they honked the horn and the brother, Armon "Bubba" Dickerson, came outside. (R. p. 2221, lines 1-2). Appellant grabbed Gerard and took him inside Armon's Apartment, Unit 3-E. Gerard stated, "'You don't got to grab me, I know how to walk.'" (R. p. 2221, line 23 - 2222, line 3). Nelson and Keeling left. Nelson testified that Keeling said, "' I ain't gonna do no more f****** favors for your no more." (R. p. 2222, lines 16-17).

Nelson also testified that someone dropped-off Appellant's car to his house while they were leaving. (R. p. 2223, lines 20-23). Later the same afternoon, Armon came by Nelson's house and picked up the car and the cocaine that Applicant had left with Nelson previously. Nelson also sold Armon "weed." (R. p. 2224, lines 9-24).

The next day, Applicant called Nelson and requested Nelson sell him "some weed" and that he would send a cousin, "Damien" a/k/a "Soap." (R. p. 2225, lines 13-25). He was also to tell Damien the names of individuals Appellant thought was "after him." (R. p. 2226, lines 3-24). Because Nelson did not fulfill the task to Appellant's liking, Appellant became angry and told Nelson he would not "f*** [him] anymore," which actually did not make any sense to Nelson. (R. p. 2227, line 20 - p. 2228, line 5). Nelson testified that the same day, Steven "Rock" Archie came by Nelson's house looking for Appellant. (R. p. 2228, lines 6-21). Nelson indicated unknown others came by his house looking for Gerard. (R. p. 2228, line 22 - p. 2229, line 5).

The next day, Thursday, Appellant called Nelson again. This time, Appellant wanted to return to Nelson's house. Nelson, having seen the news reports on the "gruesome things" done to Gerard, refused. Appellant tried to apologize for "flipping out" on Nelson earlier, but Nelson would have none of it. Nelson testified that he did not ask about Gerard because he did not want to talk to Appellant. (R. p. 2229, line 18 - p. 2231, line 20). Nelson identified one of the guns subsequently recovered from Armon's apartment, and connected to the crime, as the gun that he gave to Appellant. (R. p. 2238, lines 10-20; p. 2817, line 6 - p. 2821, line 13).

Keeling testified similarly, that initially they were only to drive to Armon's house, but detoured when Appellant wanted to stop and get money from someone. (R. p. 2272, lines 18-23). Keeling went to the door and asked for "some guy named Rod" (that he did not know), and was told he was not there. (R. p. 2273, line 16 - p. 2274, line 4). Appellant went to "check for himself." (R. p. 2274, lines 7-11). It was after that Keeling heard the gunshot and a bloody Gerard came out with Appellant. (R. p. 2275, line 19 - p. 2276, line 25).

Tomisha "Shelley" Nelson was in a relationship with Appellant, and living with him, at the time of the murder. (R. p. 2345, line 15 - p. 2347, line 4). She knew Gerard only through Appellant. Appellant described Gerard as "his best friend, he said." (R. p. 2347, lines 9-16). Shelley testified that she separated from Appellant on March 3, 2006, when he slapped her after an argument. The next morning, he came back to talk but she asked him to leave. He came back again to talk about reconciliation, but then he showed her a video on his phone "saying it was me and Gerard in the phone." She asked him to leave again and he did. (R. p. 2348, lines 8-24; p. 2351, lines 5-25). Shortly thereafter, Appellant hid behind another person and surprised Shelley, forced his way inside, then beat her severely, and

choked her. (R. p. 2348, line 25 -p. 2350, line 12). She escaped and ran to a neighbor's home. (R. p. 2350, lines 15-16). Appellant followed. The neighbor let Shelley use a phone, but when Appellant arrived, she fled through the house. (R. p. 2353, line 12 - p. 2354, line 2). She required hospitalization and stitches. (R. p. 2354, lines 5-10). Appellant continued to call her, and even took her for a medical check on the injury to her eyes. (R. p. 2354, line 14 - p. 2355, line 2). On March 7, 2006, Shelley testified that Appelalnt called her early in the morning and indicated that "somebody was following him" and sounded as if he was "out of control." (R. p. 2355, line 13 - p. 2356, line 13). Appellant called back that afternoon and told Shelley that he had Gerard, then hung up. She testified that he called later and sounded mad:

> He said that he had Gerard with him and Gerard made him mad, that Gerard wouldn't answer his phone calls, was ignoring him, avoiding him, this was his best friend, had made him mad. Gerard doesn't do things like that and I guess he didn't know why Gerard was doing that.
>
> I asked him where was Gerard. He gave Gerard the phone. Gerard was right there. I asked him to let me speak to Gerard. He gave Gerard the phone. Gerard got on the phone and [she] asked Gerard what was going on, if he was okay, Gerard stated that he wasn't, that he'd put a gun on him and was knocking out his teeth....

(R. p. 2357, lines 2-23).

She testified that Gerard also told her Appellant had "put the gun in him, stuck the gun up him" and did the same thing with a broom handle. (R. p. 2358, lines 2-7). Appellant said Gerard's "bunky" was bigger than hers. (R. p. 2358, lines 7-80). Shelley also testified that conversation had been partially record by her voice mail, and the conversation was played for the jury. (R. p. 2359, line 10- p. 2362, line 8). The solicitor also provided a transcript as an aid to the jury. (R. p. 2363, line 19 - p. 2364, line 13; p. 2379, line 24 - p. 2380, line 7)(State's Exhibit 296). Gerard's father, Aven Roper, confirmed that was his

son's voice on the recording. (R. p. 3337, lines 1-18). Sandra Fokes, Appellant's mother, identified Appellant's voice, and Shelley's voice. (R. p. 3328, line 12- p. 3329, line 3).

On cross-examination, Shelley testified that Appellant was in a group called "Money Under Pressure" as was Armon, and the group was a network for illegal activity. She said both that Gerard was part of the group and that he was not a part of that group. (R. p. 2393, line 15 - p. 2395, line 25).

Kimberly Gregg, Shelley's neighbor, testified that she recalled Shelley running up to her the afternoon of March 3, 2006, to use her phone. Applicant was also there, and angry. Shelley "had two bloodshot eyes, bloody eyes... red eyes, a gash under her eye and a busted lip. (R. p. 2457, line 17 - p. 2459, line 22). Appellant, complaining, stated he had taken care of Shelley, "all he wanted her to do was basically to be a housewife," then showed Ms. Gregg a video with a female groaning. Ms. Gregg could not see a face. (R. p. 2460, line 6 - p. 2461, line 24).

Steven "Rock" Archie, had been friends with Gerard since childhood. He knew Appellant "from the street area." (R. p. 2467, line 8 - p. 2468, line 8; p. 2470, lines 1-25). On Wednesday, March 8, 2006, Appellant called him at 10: 30 a.m. He initially thought it was a social call, but Appellant asked him when he had last seen Gerard, and what they had talked about. Archie responded, "'He didn't get nothing from me." (R. p. 2471, line 24 - p. 2474, line 20). Appellant than told Archie that he Gerard and had "just stuck a four-five up his a**." (R. p. 2474, lines 21-25). Archie at first did not believe him, but Appellant put Gerard on the phone, and Gerard confirmed, "'yeah... he just did that.'" (R. p. 2475, lines 4-8). Appellant also told Archie he had "just burned his balls," and, again, Gerard confirmed the injury. (R. p. 2475, lines 9-14). Appellant again got on the phone and told Archie he was

"f******" Gerard" and Archie was next. (R. p. 2475, lines 15-21). Archie threatened to find Appellant first, and rounded up several "of [his] partners" and went look for Appellant. (R. p. 2475, line 22 - p. 2476, line 17). Archie testified he went to Antonio Nelson's house, but Nelson claimed he did not know where Appellant was. (R. p. 2477, lines 4-8). Eventually, Archie went to his mother's house, and told his mother what he knew. (R. p. 2477, lines 11-23). His mother, a close friend to Gerard's mother, (R. p. 2468, lines 11-15), became very concerned and began making calls. She wanted Archie to call the police. (R. p. 2477, line 13 - p. 2478, line 1). Later, Appellant called Archie again. Appellant wanted to talk about Shelley, but Archie just wanted to know where Gerard was. Appellant told him Gerard was gone. Appellant then began to threaten Archie's mother. Archie asked where Appellant was, but Appellant would not tell him. (R. p. 2478, line 5 - p. 2479, line 10). Archie confirmed to the solicitor that his mother called Gerard's mother and the police. (R. p. 2479, lines 11-18).

Tyre Johnson testified that she was planning to move into the apartment next to Armon's apartment. On morning of March 9, 2006, she stopped by to check the apartment. The door was open when it should not have, and she saw "someone covered up" inside. She called the police. The responding officer told her there had been a homicide. (R. p. 2501, line 2 - p. 2503, line 20).

Officer Octavio Fabisiewicz testified that he had been dispatched in response to the call from Apt. E-4. The doorframe was broken, and it appeared that "someone had kicked the door in." (R. p. 2508, line 4 - p. 2509, line 4). He found a body on the kitchen floor, "laying on their stomach, only wearing a tee shirt" with "injures to the head," and a blood stained comforter. (R. p. 2509, lines 4-10).

Dontaire Anderson testified that he had known Appellant, "Willie D," all of his life. (R. p. 2525, lines 11-22). He testified that on March 9, 2006, Appellant called him and asked to be picked up. He indicated that "something had happened." (R. p. 2527, lines 8-14). He indicated he would help but could not leave at that moment. He was at a girlfriend's house at the time. Not "five minutes" after Anderson returned home that day, Appellant arrived by cab. (R. p. 2527, line 15 - p. 2528, line 9). He was pacing and appeared paranoid, making Anderson "a little edgy," as well. Appellant said, "I gonna to have to get one of them.'" (R. p. 2528, lines 20-25). Anderson, thinking his friend was targeted, helped him get to a hotel room and bought a bus ticket for Appellant to Atlanta. He asked about Gerard, having heard rumors, and Appellant told Anderson Gerard was "all right." (R. p. 2529, line 7 - p. 2531, line 13). Appellant also told him about an "incident" at a motel where "some guys were laying-in wait," and showed him a phone video taken while he was asleep and vulnerable. (R. p. 2534, line 9 - p. 2535, line 10). He also said Shelley had people looking for him. (R. p. 2535, lines 14-16).

Darren Prioetti, formerly of SunCom, testified that he cell phone Appellant used was registered to Johnette Watkins. That phone was discontinued on March 9, 2006. From March 6 through March 8, 2006, the phone was used in the Charleston area. From March 6 to the 9th, the phone was used in the Greenville area and in Decatur, Georgia. (R. p. 2436, line 17 - p. 2439, line 3).

Marlina Pinckney's boyfriend, Rashid Malik, a/k/a "Popcorn," was friends with Appellant. (R. p. 2540, line 14 - p. 2541, line 20). She found out about Gerard's death from news accounts, and, thereafter, she and Malik left their home to go to a hotel. Malik told Pinckney that he had hurt his hand in a fight with Appellant, and she did not feel safe at

home. (R. p. 2542, line 16 - p. 2543, line 20). On March 11, 2006, they returned in Pinckney's 2002 Crown Victoria to retrieve a few items. Appellant came by and took the car. (R. p. 2543, line 21 - p. 2545, line 20). Appellant said, "'I gotta get this car, I gonna run,'" Pinckney unsuccessfully tried to stop him, then called 911. (R. p. 2546, lines 14-19).

Officer Patrick Pontieri, Sr., testified that he found the car, wrecked, near Pinckney's home. A citizen witness described the driver, who had already left the scene. (R. p. 2555, line 13 - p. 2556, line 16). Officers were able to locate Appellant nearby. Appellant ran, but officers tracked and captured him. (R. p. 2557, line 22 - p. 2560, line 6).

During the investigation at the apartment where Gerard's body was found noticed blood on the door handle of the next door apartment, Unit E-3. Officer obtained a search warrant. Inside, it appeared someone had attempted to clean the apartment, though blood was still there. (R. p. 2587, line 6 - p. 2588, line 24). Blood spatter was detected on walls and the ceiling, the entertainment center had been cleaned off entirely, there were droplets, and a tooth in the kitchen, a cable cord with blood on it and a recently used, red stained mop. (R. p. 2592, line 6 - p. 2595, line 13). Based on the spatter, one "can probably deduce at one time there was blood pretty much all over this apartment." (R. p. 2596, lines 2-4). A sheet was up on a bedroom window, the only room missing miniblinds. (R. p. 2598, line 14 - p. 2599, line 10). Officers found multiple bloody items in the trash, including: a mailing tube; an empty bleach bottle with red stains, presumptive positive for blood and prints matching Armon; two sets of mini blinds, a broom handle; a cable cord; a broken drinking glass; a pair pants; an *Elle Girl* magazine with fecal matter attached and bloody footprints; a hook for the end of broomstick with what appeared to be fecal matter; nunchucks; a hooded sweatshirt, a tooth; identification cards for Gerard; socks and shoes. (R. p. 2603, p. 5 - p. 2635, line 24).

Armon's fingerprints were lifted both from the magazine and from the miniblinds in the trash. (R. p. 2650, lines 13-24). Blood samples were taken from multiple areas in E-3, including outside the apartment, inside the apartment in the laundry room and kitchen, hallway, living room and bedroom. (See R. p. 2715, line 18 - p. 2727, line 13). Three years later, on February 17, 2009, they returned to E-3 with a search warrant for the attic. Officers found two hand guns and a tee shirt. (R. p. 2733, line 8 - p. 2737, line 7).

Kinney Kinsey, a crime scene examiner from SLED, testified that he compared the shoes from Appellant with the print on magazine and found that they matched "in make model and size." (R. p. 2809, line 15 - p. 2815, line 25). He also testified he received the two handguns, one a .357 Smith and Wesson revolver, another a Ruger .357 magnum. The Smith and Wesson "was impacted with fecal matter and it contained fecal matter on the outside." (R. p. 2817, line 4- p. 2821, line 13). (See also p. 2825, lines 2-5, "barrel was completely obstructed with this matter"; p. 2828, lines 3-8, fecal material and small hairs on end of barrel; p. 2829, lines 5-7, debris at dismantling "could be dried blood. I did find a lot of dried blood on it, or that fecal matter"). The Smith and Wesson had one empty chamber and it appeared "at least one round had been fired from the weapon... [at] some point...." (R. p. 2824, line 22 - p. 2825, line 12). This is the gun Antonio Nelson testified that he gave to Appellant. (R. p. 2238, lines 10-20; p. 2817, line 6 - p. 2821, line 13).

Lilly Gallman, a SLED DNA analyst testified that she found blood matches from the samples inside Apartment E-3 to Appellant, Armon and Dickerson. Swabs from the mailing tube from the trash, the blinds from the trash, the cable cord from the trash, the drinking glass from the trash, the nunchucks from the trash, and the sweatshirt, pants and socks samples from the trash matched Gerard. The swab sample from the bleach bottle from the trash

matched Appellant. Swab samples from the guns matched Gerard. (R. p. 2866, line 12 - p. 2882, line 18).

Armon Dickerson testified against his brother. He testified that Appellant was not expected the day he came to the house with Gerard. (R. p. 3000, line 21 - p. 3001, line 14). His wife's small son was in the home at the time. He took the child upstairs when Appellant came in the house with Gerard. (R. p. 3003, lines 20-24). Appellant stayed in the kitchen with Gerard. Appellant told his brother that "Gerard was tying to set him up, to kill him." (R. p. 3003, line 25 - p. 3004, line 25). He told him about seeing Gerard at a hotel he was staying at just after hearing a "commotion outside the room door," and also showed him a video on his cell phone of Appellant in his home at bed. Appellant contended Gerard was in the video. (R. p. 3005, line 5 - p. 3006, line 10). According to Armon, Appellant appeared "normal" at the time Armon spoke to him. (R. p. 3006, line 11-14). As he confronted Gerard, "asking him why he was doing this to him," Appellant become agitated. (R. p. 3007, lines 3-6). Armon tried to say Gerard would not "do nothing like this to him," and Gerard was denying doing anything to Appellant, but Appellant began hitting Gerard with a pistol. (R. p. 3007, lines 4-23). Gerard went to his knees, and Appellant began to knock out some of Gerard's teeth with the barrel of the gun. The beating went on fifteen to twenty minutes. Armon testified he stood by doing nothing. (R. p. 3008, lines 2-25). Armon and stepson Jaylin then left to pick up Appellant's car and cocaine from Antonio Nelson. Armon testified he also purchased "weed" from Nelson. (R. p. 3011, line 14 - p. 3013, line 15). Armon testified that he then return to the apartment. Gerard was still in the kitchen, but in much worse shape, bloody, and there was blood spatter on the kitchen ceiling and walls. (R. p. 3014, lines 11-23). Appellant was sitting on the living room couch.

According to Armon, Appellant instructed him to get cleaning supplies. Armon again left with his stepson and this time went to his wife's (Selena Rouse's) work. (R. p. 3015, lines 8-25). Selena left work to stay with Armon. They purchased cleaning supplies – "[s]ome bleach, a mop bucket, trash bags and some ammonium" – with money that Appellant provided. They then returned to the apartment. (R. p. 3016, line 3 - p. 3017, line 24). This time, the lights were off in the kitchen, though Armon could see Gerard was still in the kitchen. Appellant had more blood on him, but he appeared to be acting "normal." (R. p. 3018, line 8 - p. 3019, line 10). Selena changed clothes and left. Though she was suppose to babysit her nephew at her home that night, she changed her plans to stay at her sister's house. She drove Appellant's car. (R. p. 3019, line 20- p. 3020, line 25). After Selena left with her son, Armon went back downstairs. "Gerard's pants was all the way down to his ankles." (R. p. 3029, lines 10-16). Appellant admitted to "hurting" Gerard. (R. p. 3022, line 3). Gerard was bleeding from his mouth, and his head injuries. "There was blood on the walls, blood on the ceiling, and blood on the floor." (R. p. 3022, lines 22 - p. 3023, line 2). Malik (a/k/a "Popcorn") came to apartment. Armon testified that he heard Appellant, in a phone conversation, ask Malik to come over and "take Rod from the house." (R. p. 3023, lines 12-21). According to Armon, Appellant told Malik that "Gerard was trying to kill him," and Malik "got angry and started hitting Gerard." (R. p. 3025, lines 1-6). Malik also kicked Gerard. (R. p. 3025, line 8). Malik's had was swollen from hitting Gerard. (R. p. 3025, lines 13-16). He hit him "four or five times." (R. p. 3025, lines 19-21). Malik left and return with another gun for Appellant. (R. p. 3026, lines 1-12). Appellant began to hit Gerard in the head with one gun, while "shoving" the other up Gerard's behind. (R. p. 3026, lines 15-18; p. 3027, line 25 - p. 3028, line 2). According to Armon, neither he nor Malik

did anything at this point. Armon testified that he was "talking to [Appellant] but it wasn't really dong any good." (R. p. 3026, line 23 - p. 3027, line 3). Appellant and Malik discussed taking Gerard "to some wooded area." (R. p. 3028, line 22 - p. 3029, line 1). Appellant called a cousin, Damien "Silk" Watson, for help. The conversation was recorded on voice mail. Armon identified his voice, Malik's voice, and Appellant's voice. (R. p. 3029, line 2 - p. 3031, line 8). Malik and Appellant tied Gerard with a telephone cord, and put him in a "downstairs closet" before Malik left again. (R. p. 3032, lines 4-16). According to Armon, Appellant and Armon smoked blunts together. Appellant laced his with cocaine. (R. p. 3033, lines 1-17). Appellant then went to take a nap in the living room and instructed Armon to watch Gerard. He gave Armon one of the guns. (R. p. 3033, lines 16-23). After Appellant fell asleep, Armon went to Gerard. Gerard "said, 'let me die, let me die.'" (R. p. 3034, lines 17-24). Gerard began to throw up blood and Armon gave him a pot to throw up in. (R. p. 3035, lines 5-25). Gerard asked to go to the bathroom. Armon testified he untied Gerard and took him to the bathroom. Gerard threw up again. Appellant awoke, and, angry with Armon for helping Gerard, forced Armon into the closet with Gerard. (R. p. 3036, lines 15-20). Appellant then opened the close and ordered Armon to shoot Gerard. Armon testified that he "acted like [he] was going to shoot him" but Appellant instructed him not to shoot. Appellant took the gun from Armon. (R. p. 3037, lines 8-11). He then let Armon out. By this time it was Wednesday morning and Selena had returned. (R. p. 3037, lines 12-20). Appellant gave her money and instructed her to get another apartment. (R. p. 3037, line 22 - p. 3038, line 6). Appellant "dragged [Gerard] out" of he closet and stood with him in front of the entertainment center. Appellant had a knife and began stabbing, but Gerard was blocking him attempts. (R. p. 3039, lines 7-14). Armon testified that Appellant picked

Gerard up and "body slammed him on the floor" a couple of times. (R. p. 3039, lines 11-16). Armon testified that Appellant instructed him to "hit him a few time," so Armon kicked Gerard twice in the chest and "hit him one time with the end table." (R. p. 3039, line 18 - p. 3040, line 1). Appellant used a kitchen knife to cut Gerard. Armon later ran the knife through the dishwasher. (R. p. 3040, lines 14-23). Armon testified that Appellant then picked up a vase and hit Gerard in the head. (R. p. 3042, lines 1-13). Lastly, Appellant hit Gerard in the head with a mirror. (R. p. 3042, lines 16-23). At that point, "Gerard stood up and he fell back over the living room table." (R. p. 3043, lines 1-2). Armon testified, "I think that is when he died and my brother told me to get something [to] wrap him up with." (R. p. 3043, lines 9-11). Appellant told him to get something to wrap Gerard's body in, and he and Armon moved the body to the apartment next door. (R. p. 3044, line 3 - p. 3045, line 23). Appellant "grabbed a bottle of bleach, and he went back over there, then he came back." He did not know what Appellant did with the bottle. (R. p. 3045, line 24 - p. 3046, line 4). However, he came back, changed clothes and instructed Armon to "[c]lean up" and "find a someplace to put the guns at." (R. p. 3045, lines 6-24). Selene returned and attempted to clean up, as well. (R. p. 3047, lines 9-16). Eventually, they determined "[i]t was tooo much to do and [they] decided to leave it...." (R. p. 3050, lines 7-8). Armon left for Columbia, and eventually went to Florida before turning himself in in February 2008. (R. p. 3052, line 3 - p. 3054, line 8).

Selena Rouse, Armon's wife, also testified. She admitted going back and forth in the apartment, knowing that Gerard was being injure. She admitted taking money for new apartment. She also testified that "Willie D... asked me if he should let him live or die?" and she replied, "he knows who you are and he knows where you brought him." (R. p. 3177, line

2 - p. 3177, line 11). She maintained that she was just trying to "cover" for Armon by not going to the police, (R. p. 3178, lines 8-18), and that she did not mean for her response to be a suggestion to kill Gerard; rather, she just "wanted him to get out of my house... to get away... to leave." (R. p. 3180, lines 1-9).

Rashad Abdul Malik, a/k/a "Popcorn," testified he knew Gerard from the neighborhood, and understood Gerard and Appellant to be close friends. (R. p. 3262, lines 2-18. He was "not too sure, but ... thought they had some drug dealings. (R. p. 3262, lines 24-25). He testified that Appellant and Shelley "broke up" shortly before the murder. He recalled Appellant had a "video" with her "having sex with someone." (R. p. 3263, line 7 - p. 3264, line 7). He denied being able to personally identify anyone on the tape. (R. p. 3264, lines 8-12). On Tuesday, March 7, 2006, Appellant called him at work and told him "a conspiracy theory that guys were out wanting to kill him." (R. p. 3267, line 6 - p. 3268, line 5). Appellant said Gerard "flipped" on him. (R. p. 3268, lines 6-11). Appellant wanted Malik to meet him, and Malik put off going to see Appellant. Then Appellant said he was going to "f***" him, i.e. going to kill him, if he didn't come to him. (R. p. 3270, line 18 - p. 3271, line 9). He thought he could contact Appellant's mother to try to intervene, and goes to her work to pick her up, but Appellant called and became very angry when Malik told him where he was and what he was doing. (R. p. 3271, line 17 - p. 3274, line 3). Appellant ordered Malik not to involve his mother, threatened to kill Malik's mother, and threatened to cut open Malik's pregnant girlfriend and take the baby. (R. p. 3274, lines 3-8). Malik testified he agreed to meet Appellant at Armon's house. (R. p. 3274, line 13; p. 3275, line 25). Malik saw Gerard, bloody, but alive, on the kitchen floor. (R. p. 3276, lines 9-17). Armon was "mopping up blood" and appeared to be high. (R. p. 3277, lines 4-23). Appellant was high,

as well. (R. p. 3278, lines 1-3). Though he noticed Gerard was partially naked, he asked no questions, and went to the store for Appellant. (R. p. 3278, line 17 - p. 3279, line 19). Upon his return, Appellant asks for his gun, a .38, which he gives to Appellant. (R. p. 3280, lines 5-22). This is identified as the other gun that was eventually recovered and connected to the crime. (R. p. 2819, lines 15-18). Appellant challenged Malik, and asked him questions about the video of the sex encounter. (R. p. 3283, lines 5-25). Malik testified he punched Gerard because Appellant "was putting me up against Gerard." He claimed, though, that he "didn't want to punch him, so [he] hit the floor at the same time and my hand got swollen." (R. p. 3284, line 15 - p. 3285, line 8). Appellant insisted he punch Gerard again, and Malik did. He also kicked Gerard. (R. p. 3286, lines 1-9). He recalled making telephone calls with Armon and Appellant, and identified a CD recording of one of the calls, trying to make arrangements for Silk and to address other issues. (R. p. 3289, line 1- p. 3297, line 7).

The extent of the injuries was decribed by Dr. Cynthia Schandl, a forensic pathologist, who performed the autopsy of the victim on March 9, 2006. (R. p. 2924, line 21- p. 2925, line 2; p. 2925, lines 5-10). Dr. Schandl testified that visual inspection revealed "extensive evidence of trauma and also over two hundred wounds to his body." (R. p. 2927, lines 4-9). Dr. Schandl described multiple wounds including: thirty-nine significant injuries, and additional minor injuries, to the head and neck area consisting of a "sharp" injuries to the right ear, and to the back of the head going down to the bone; "multiple fractures to the frontal bone" and broken nose resulting in a "misshapen" face with a "flattened" brow; hemorrhages of the membrane around the skull and muscles corresponding to the blunt force trauma; a piece of skull protruding inward toward the brain; an "obliterat[ion]" of the cribriform plate at the base of the frontal skull (similar to injuries sustained in a car crash);

"periorbital hematoma" or blood around both eyes, and hemorrhage of the eyes; "an additional fifteen-or-so injuries" including lacerations, abrasions and sharp injuries to the mouth including two freshly missing front teeth; a cracked thyroid cartilage (Adam's apple) and hyoid bone; hemorrhages in muscles on either side of the neck again indicating blunt trauma to the neck; "at least fifty injuries" to the legs including a sharp injury that went down to the bone, a broken bone, lacerations and abrasions; approximately twenty-five abrasions to the back and shoulder area; fifty or more injures to arms, including abrasions, fractures of the index fingers, bones in the hands, and the left wrist; and cut and swollen hands. (R. p. 2927, line 14 - p. 2954, line 25). There was also evidence of brain swelling, terminal aspiration, and ingestion of blood; two injuries to the anus; injuries to the prostate, bladder, rectum, and anus from forcing object(s) through anus into rectum; and a blackened-skin, or charred, burn injury on the scrotum. (R. p. 2957, line 8- p. 2962, line 12). The doctor testified the cause of death was "listed as blunt head and neck trauma due to sharp and blunt trauma to the body, which is contributory." (R. p. 2964, lines 8-11). She was unable to identify a specific fatal blow. (R. p. p. 2958, lines 1-2; p. 2964, lines 8-19). There were multiple individual possible causes of death:

> One is simply the repeated trauma to the head and the brain swelling that we see, so the brain damage that occurred.
>
> The second is the potential of strangulation. The blunt trauma to the neck is another potential cause of death.
>
> The third is simply loss of blood. So it's certainly possible that he lost enough blood during the injuries that that could be the cause of death.

(R. p. 2965, lines 1-10).

However, as the doctor confirmed to the solicitor, "regardless of the which particular one it was, *he died as a result of all the trauma to his body.*" (R. p. 2965, lines 1-18).

(emphasis added). He survived approximately eighteen to twenty-four hours after receiving the injury to his anus. (R. p. 2971, line 23 - p. 2972, line 3). In the penalty phase, Dr. Schandl testified that none of the over two hundred injuries were postmortem, (R. p. 3876, lines 6-13; p. 3897, lines 14-15), and, again, no one wound could be identified as a fatal wound: "The sum total of all the wounds was fatal." (R. p. 3896, lines 4-11).

During the guilt phase, Appellant addressed the jury, and indicated that all he did was help his brother, but also stated that, "The police, if they investigated thoroughly, it would be me and multiple codefendants." (R. p. 3434, lines 19-21).

ARGUMENT

I.

Appellant did not argue to the trial judge that his proffered cross-examination of Dr. Schandl was evidence of bias or demonstrated any fact going to credibility; thus, Appellant's argument on appeal is procedurally barred. Even so, the record shows the trial judge did not abuse his discretion in denying Appellant's request to cross-examine Dr. Schandl about the presumptive positive (for metabolites-cocaine) urine test where the information was not scientifically reliable, did not tend to make any fact in controversy more or less probable, had the tendency to mislead and or distract the jury, and also worked to assault the victim's character without just cause or basis.

Relevant Facts:

Dr. Cynthia Schandl was qualified without objection as an expert in forensic pathology. (R. p. 2924, line 21- p. 2925, line 2). Dr. Schandl performed the autopsy of victim Gerard Roper on March 9, 2006. (R. p. 2925, lines 5-10). Dr. Schandl testified that visual inspection revealed "extensive evidence of trauma and also over two hundred wounds to his body." (R. p. 2927, lines 4-9). Using diagrams in the guilt phase, (R. p. 2928, line 11 - p. 2929, line 14; p. 3829, lines 22-25), Dr. Schandl described multiple wounds including: thirty-nine significant injuries, and additional minor injuries, to the head and neck area consisting of a "sharp" injuries to the right ear, and to the back of the head going down to the bone; "multiple fractures to the frontal bone" and broken nose resulting in a "misshapen" face with a "flattened" brow; hemorrhages of the membrane around the skull and muscles corresponding to the blunt force trauma; a piece of skull protruding inward toward the brain; an "obliterat[ion]" of the cribriform plate at the base of the frontal skull (similar to injuries sustained in a car crash); "periorbital hematoma" or blood around both eyes, and hemorrhage of the eyes; "an additional fifteen-or-so injuries" including lacerations, abrasions and sharp injuries to the mouth including two freshly missing front teeth; a cracked thyroid cartilage (Adam's apple) and hyoid bone; hemorrhages in muscles on either side of the neck again

indicating blunt trauma to the neck; "at least fifty injuries" to the legs including a sharp injury that went down to the bone, a broken bone, lacerations and abrasions; approximately twenty-five abrasions to the back and shoulder area; fifty or more injures to arms, including abrasions, fractures of the index fingers, bones in the hands, and the left wrist; and cut and swollen hands. (R. p. 2927, line 14 - p. 2954, line 25). There was also evidence of brain swelling, terminal aspiration, and ingestion of blood; two injuries to the anus; injuries to the prostate, bladder, rectum, and anus from forcing object(s) through the anus into rectum; and a blackened-skin, or charred, burn injury on the scrotum. (R. p. 2957, line 8- p. 2962, line 12). Without objection, the solicitor asked Dr. Schandl: "Did you also routinely do a toxicology screening as part of your autopsies?" (R. p. 2962, line 13-14). Dr. Schandl responded that it was routine, and it was done in the instant case. Dr. Schandl also testified that the "toxicology analysis was negative." (R. p. 2962, lines 15-22). Dr. Schandl further testified that additional blood, and fingernail clippings were taken for testing. (R. p. 2963, line 20 - p. 2964, line 4). The doctor testified the cause of death was "listed as blunt head and neck trauma due to sharp and blunt trauma to the body, which is contributory." (R. p. 2964, lines 8-11). She was unable to identify a specific fatal blow. (R. p. p. 2958, lines 1-2; p. 2964, lines 8-19). There were multiple individual possible causes of death:

> One is simply the repeated trauma to the head and the brain swelling that we see, so the brain damage that occurred.
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> The second is the potential of strangulation. The blunt trauma to the neck is another potential cause of death.
>
> The third is simply loss of blood. So it's certainly possible that he lost enough blood during the injuries that that could be the cause of death.

(R. p. 2965, lines 1-10).

However, as the doctor confirmed to the solicitor, "regardless of the which particular one it was, *he died as a result of all the trauma to his body.*" (R. p. 2965, lines 1-18). (emphasis added). He survived approximately eighteen to twenty-four hours after receiving the injury to his anus. (R. p. 2971, line 23 - p. 2972, line 3).

On cross-examination, defense counsel attempted to ask about "an initial urine test," to which the solicitor objected. A bench conference was held. (R. p. 2980, lines 4-9). The solicitor argued the testimony would be unfairly prejudicial and of little probative value where the doctor would say the test does not support a showing of the presence of drugs.[2] (R. p. 2980, lines 10-20). The defense argued the "blood test" only tests for presence of the drug at the time of death, where a urine test could show a "day or two before." (R. p. 2981, lines 3-7). Defense counsel conceded that a urine confirmation test was not done, which could have, admittedly, returned a negative result. (R. p. 2980, line 23 - p. 2981, line 3). Defense counsel argued that the State had asked the initial question about toxicology and the "jury [would be] left with a false impression" in the absence of this additional questioning. (R. p. 2981, lines 10-16).

The trial judge ruled the question was improper. The trial judge reasoned the only fact that could possibly be proven is that the victim may have used drugs. This, in turn, could cause speculation as to whether the drug use lessened the pain, which was wholly irrelevant in the guilt phase. (R. p. 2981, line 17 - p. 2982, line 2). The trial judge did, however, allow defense counsel to proffer the testimony.

In the proffer, Dr. Schandl confirmed the correctness of her testimony that the toxicology report was negative for drugs. (R. p. 2985, lines 10-16). She denied a "positive

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[2] The Solicitor confirmed during the proffer that the objection was based upon both Rule 403 and 404, SCRE. (R. p. 2984, lines 14-19).

test" on the urine screen, but confirmed the urine test showed a "presumptive positive" for cocaine/metabolites. (R. p. 2985, lines 21 - p. 2986, line 2). Further, she testified that no confirmation test was performed on the urine sample. (R. p. 2986, lines 3- 5). The doctor also confirmed that the blood analysis determined whether "there are any substances present at or near the time of death" in the blood. (R. p. 2986, lines 9-13). On cross-examination in proffer, the solicitor asked the doctor what exactly made the blood toxicology results reliable, to which the doctor replied, the additional confirmatory testing. (R. p. 2987, line 18- p. 2988, line 7).

At the conclusion of the proffer, defense counsel again asserted that the State had opened the door to the "follow-up questioning" by posing the questions on the toxicology report. (R. p. 2988, lines 17-5). Counsel asserted he should be allowed to "explain" the report, and, if not, the jury would be "left with the impression that there's only a negative test," which, according to the defense, created a "false impression." (R. p. 2984, lines 5-9).

The trial judge asked defense counsel, "what issues does that specifically address insofar as this case is concerned?" (R. p. 2989, lines 10-12). Defense counsel responded:

> Your Honor, of course, it goes to a number of things. There has been testimony in the record that Mr. Roper - - and I'm not trying to malign Mr. Roper, that is not the intent of my argument. The Solicitor, in her own opening statement, advised the jury that Mr. Roper was affiliated with some drug use or conduct and I think that this type of evidence corroborates that, and goes to the context of some of the testimony around the time of the beginning of the conditions of his death.
>
> Lastly, again, I think it's very important that misleading evidence not be left in front of the jury. The Solicitor opened that door and we're entitled to explore it. It is limited testimony. The doctor can explain it. And, of course, the jury can give it whatever weight it desires to the testimony.

(R. p. 2989, line 13-p. 2990, line 7).

The trial judge found "it's specifically into character evidence and certainly not permitted by Rule 404." (R. p. 2990, lines 12-20). The judge noted that defense counsel did not object to the question posed by the State regarding the routine toxicology report. (R. p. 2991, lines 3-10). Moreover, the trial judge reasoned:

> I don't think it opens the door, however, to start the jury on an issue that really doesn't take the jury anywhere at all. Yes, inferentially you could argue that you are challenging the credibility of this witness, based on the fact that she said it was – that it was nothing and therefore the urine test showed something but I think that is so remote its of actually no prejudice to this witness, because the witness is not challenging - - excuse me. Mr. Dickerson, I don't think, is challenging, and hasn't as I've seen thus far in the cross examination, what Dr. Schandl has testified to, insofar as the cause of death or any of those things that would be pertinent to the State's case.
>
> Therefore, clearly, if it has any probative value, I think the prejudice is it leads the jury in an area that, frankly, takes them down a road that really doesn't go anywhere. No one is offering anything. So I think it's a clear 403 - - I sustain it under 403, and I think it falls directly within 403. While it really may not even be relevant under 402, it clearly would be excluded under 403. And for those reasons I will sustain the objection and did sustain.

(R. p. 2991, line 11 - p. 2992, line 13).

In making his motion for a directed verdict, Appellant asked the trial judge to reconsider the ruling and "incorporate those under the due process and fundamental fairness grounds." (R. p. 3386, line 3 - p. 3389, line 14).

Dr. Schandl was also called in the penalty phase. In his motion to limit the photographs from the autopsy, Appellant twice conceded the defense did not contest the medical testimony regarding the wounds:

> And I point out, in our cross examination of Dr. Schandl regarding the autopsy we never touched on any of the wounds. So the State is attempting to use photographs to prove testimony - - and I presume additional testimony by Dr. Schandle - - that has not been contested in any manner whatsoever. ...
>
> I particularly note again where we have not contested Dr. Schandl's testimony and the way she described it.

(R. p. 3829, lines 6-22).[3]

In the penalty phase, Dr. Schandl testified that none of the over two hundred injuries were postmortem, (R. p. 3876, lines 6-13; p. 3897, lines 14-15), and, again, that victim survived at least eighteen hours after receiving the injuries to the anal area, (R. p. 3895, lines 10-23). Again, Dr. Schandl testified that no one wound could be identified as a fatal wound: "The sum total of all the wounds was fatal." (R. p. 3896, lines 4-11).

Discussion:

Appellant argues at length that "Dr. Schandl's testimony as a neutral scientific witness was critical" and the doctor and the State "sought to mislead the jury" by "omitting key evidence," thus the doctor "is not worthy of belief." (BOA, pp. 4, 9 and 12). The evidence at issue is neither key nor misleading. Both the testimony and the proffer well demonstrate a truthful answer to the question posed – the toxicology report from the blood sample analysis was negative for drugs. Further, the defense sought to inject *unreliable* presumptive testing in contest to the reliable blood analysis. There is no value to the defense's purported question and answer. Thus, the trial judge did not abuse his discretion in disallowing the cross. Even so, the majority of appellant's argument is procedurally barred.

Appellant argues that Rule 608(c), SCRE should have allowed the cross-examination. (BOA, p. 10). This argument is procedurally barred. Defense counsel did not argue to the trial judge that the cross-examination was necessary to show bias, or at any time rely upon

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[3] Respondent notes that fifteen (15) photographs were selected to demonstrate the numerous injuries. The trial judge carefully reviewed the photographs and found them not be "excessively gory," and the number of photographs "speak[s] for the number of injuries," and were not simply repetitive. (R. p. 3831, line 15 - p. 3833, line 19). There is no challenge to his ruling regarding the photographs in this appeal.

or reference Rule 608. Instead, counsel argued the State had opened the door to information. In short, Appellant wished to address the information, not witness bias. As Appellant's argument on appeal is different than his argument below, the issue is procedurally barred from review. *See, e.g., State v. Freiburger,* 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005)(issue not preserved when one ground is raised to the trial court and another ground is raised on appeal). Even so, under either theory, the trial judge did not abuse his discretion.

First, as to opening the door, the trial judge specifically found that the State did not open the door to misleading evidence. (R. p. 2991, line 11 - p. 2992, line 13). While true that Appellant would be able to cross the witness on the blood toxicology report at issue, he is not allowed to introduce unreliable presumptive testing of urine to "explain or rebut" the blood toxicology report. "Opening the door" to rebuttal does not equate with unfettered authority to present tangentially related, and unreliable evidence, not otherwise admissible. *State v. Northcutt*, 372 S.C. 207, 220-221, 641 S.E.2d 873, 880-881 (2007)(while State opened the door to allowing admissibility of portions of a "letter he wrote to his wife expressing remorse for the death of their child in response to [wife's] testimony that his post-arrest phone calls to her showed a lack of remorse and concern," the entire letter, which included inadmissible hearsay, did not become admissible). See also 75 Am. Jur. 2d Trial § 293, Rebuttal To or Using Inadmissible Evidence ("While the admission of curative evidence rests in the court's discretion, evidence adduced to rebut or to explain earlier inadmissible evidence must be evidence of the same type or character"). *Cf. State v. Stokes*, 345 S.C. 368, 548 S.E.2d 202 (2001)(finding no error in disallowing evidence under a Rule 106 completeness analysis where "the redacted excerpts do not explain or clarify the previously admitted portions but, rather, would only have confused the jury as to the

identity"). Importantly, no misleading or false information was presented concerning the toxicology report based on the blood analysis – the report was negative, and the doctor testified correctly.[4] Thus, there could be no prejudice. *State v. Jackson*, 364 S.C. 329, 336, 613 S.E.2d 374, 377 (2005)(though finding issue not preserved, the failure to allow rebuttal could not prejudice the appellant were testimony admitted was truthful: "The testimony before the jury was that Jackson stated he would be willing to take a polygraph and Spell testified he never offered him one. This would *not* leave the jury with the impression that Jackson had taken and failed a polygraph.").

Consequently, because the cross was not necessary to dispel a false impression (being that there was none), the "presumptive" possibility of prior drug use could only be evidence tending to show bad character. Appellant is not allowed to gratuitously attack the victim's character. *State v. Stokes*, 345 S.C. at 374, 548 S.E.2d at 205 n.9 (2001)("To the extent Stokes sought admission of the redacted portions in order to demonstrate the victim's bad character, i.e., that she was willing to go along to participate in a murder, we find the evidence was properly excluded. *State v. Whipple,* 324 S.C. 43, 476 S.E.2d 683 (1996) (no error in refusing to admit evidence of victim's bad character where it did not tend to make

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[4] Respondent notes there is no inherent tension between a blood analysis showing no drugs, and a urine test showing a presumptive positive for drugs – a fact implicit in defense counsel's concession in argument, and the proffer as to the blood analysis time frame (at or near death). (See R. p. 2981, lines 1-7; p. 2986, lines 6-18). Each analysis reflects a different time period, with the urine analysis showing more history than presence at the time of death. See, for example, http://www.health.utah.gov/lab/toxicology/index/html (2007 Forensic Toxicology DUI Services Manual), at p. 7 ("Drug presence in urine samples serves only to establish history of use. Due to the variability of absorption, distribution, metabolism, excretion, and elimination of drugs between individuals, no correlation can be made between the presence of a drug in the urine and levels of that drug in blood. Furthermore, presence of a drug in the urine cannot be related to the degree of impairment."); http://pathology.ucsf.edu/sfghlab (Toxicology) ("Most drugs are present in higher concentrations and for a longer time in urine than in serum.").

more or less probable any issue at guilt phase of trial)."); Rule 404 (a)(2), SCRE (general character evidence not admissible, and character evidence of victim not admissible unless "of a pertinent trait of character...offered by the accused, or by the prosecution to rebut the same" or "peacefulness" evidence tending to show who was the "first aggressor" in a homicide case). *Cf. Chapman v. State*, 367 S.E.2d 541, 543 (Ga. 1988)("The general rule is that the character of a victim is not admissible because it is as unlawful to kill a violent person as to kill a non-violent person."). In fact, Appellant's argument that the evidence is misleading because it tends to show "the decedent was 'clean' when drugs were found in his system," (BOA, p. 12), is an implicit concession the cross-examination was a thinly veiled attempt to assault the victim's character. There was no issue concerning any character trait of the victim in the guilt phase to form a basis for any argument on relevance. Consequently, and contrary to Appellant's argument, (BOA, p. 10), the trial judge did not abuse his discretion in finding both Rule 404 and Rule 403 prevented admissibility of the information in cross-examination. *State v. Johnson*, 338 S.C. 114, 124, 525 S.E.2d 519, 524 (2000), *citing State v. Jenkins,* 322 S.C. 360, 474 S.E.2d 812 (Ct.App.1996)("a trial judge may impose reasonable limits on cross-examination based upon concerns about, among other things, harassment, prejudice, confusion of the issues, witness safety, or interrogation that is repetitive or only marginally relevant."); Rule 404, SCRE, supra; Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading of the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.").

"An appellate court will not disturb a trial court's ruling concerning the scope of cross-examination of a witness to test his or her credibility, or to show possible bias or self-interest in testifying, absent a manifest abuse of discretion." *Johnson*, 338 S.C. at 124-25, 525 S.E.2d at 524, *citing State v. Smith,* 315 S.C. 547, 446 S.E.2d 411 (1994). As demonstrated by the foregoing, Appellant has shown no abuse of discretion in the instant limitation on cross-examination. There was no false or misleading information, and the cross-examination would only allow a gratuitous attack on victim's character. The trial judge's ruling should be affirmed. As to the remaining argument that the cross-examination was necessary to show bias, not only is such argument procedurally barred, nothing in the records shows any fact tending to support bias.

"A witness may be cross-examined on any matter relevant to any issue in the case, including credibility." Rule 611(b), SCRE. "'[O]n cross-examination, any fact may be elicited which tends to show interest, bias, or partiality' of the witness." *State v. Brewington*, 267 S.C. 97, 101, 226 S.E.2d 249, 250 (1976), quoting 98 C.J.S. Witnesses § 560a (1957). *See also State v. Starnes*, 340 S.C. 312, 325, 531 S.E.2d 907, 914-915 (2000); Rule 608 (c), SCRE ("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."). Appellant sought to asked Dr. Schandl about another test – a presumptive test not confirmed by reliable medical testing – that could possibility indicate drug use that was not evident at the time of death. This cannot bear on the autopsy report as to injuries, the time of death or the cause of death. Moreover, Appellant repeatedly conceded that he did not cross-examine the pathologist on, or in any way contest, any of the medical findings on the injuries. (R. p. 3829, lines 6-22). Respondent agrees with Appellant that much of the reason for the death sentence

was likely the overwhelming evidence of torture. (BOA, pp. 12 and 13). However, since he did not contest any aspect of the testimony on the over two hundred injuries – including an estimate the victim survived the massive rectal injuries injury for at least eighteen hours – even if some remote basis for impeachment could be divined, there could be no impact on credibility. Simply, credibility as to the medical findings was not at issue. If there was error, it could only be harmless. *State v. Sims*, 348 S.C. 16, 558 S.E.2d 518 (2002)(error in limitation of cross-examination is subject to a harmless error analysis).

Error is harmless where the reviewing court determines, beyond a reasonable doubt, that the purported error did not "contribute" to the guilty verdict. *State v. Cabrera-Pena*, 361 S.C. 372, 380, 605 S.E.2d 522, 526 (2004), *citing Arnold v. State,* 309 S.C. 157, 420 S.E.2d 834 (1992), *cert. denied,* 507 U.S. 927, 113 S.Ct. 1302, 122 L.Ed.2d 691 (1993). It is comfortable logic that since neither credibility nor fact of the injuries were contested, failure to cross on a collateral issue going to credibility, or a non-relevant issue attacking victim's character, could not have affected the guilty verdict. The error, if any, "could not reasonably have affected the trial's outcome" thus is harmless. *State v. Page*, 378 S.C. 476, 483, 663 S.E.2d 357, 360 (Ct. App. 2008), *citing State v. Mitchell,* 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985).

Appellant is not entitled to any relief.

II.

Appellant's argument on appeal is based upon a new trial motion argument made after sentencing that introduced a new basis for a request to charge accessory after the fact. As the request was in no way timely, and could not have been a basis for the ruling denying the request the charge, the issue is not preserved for review. At any rate, the trial judge properly rejected Appellant's request to charge accessory after the fact of murder where accessory after the fact is not a lesser included offense of murder. Moreover, had the charge been available, it was not warranted as the charge is not supported by the evidence.

Relevant Facts:

Appellant requested the trial judge charge both accessory before the fact and accessory after the fact as lesser included offenses of murder. (R. p. 3060, line 5 - p. 3061, line 3). For accessory after the fact, Appellant relied upon *State v. Collins*, 329 S.C. 23, 405 S.E.2d 202 (1998)(*Collins II*), and argued that *Collins II* "declares the absence is not an essential element of accessory after the fact." (R. p. 3060, line 10 - p. 3061, line 11). Appellant also relied upon *State v. Cottrell*,[5] arguing *Cottrell* provides that "Any potential lesser-included offense should be included, particularly in a capital case." (R. p. 3061, lines 19-23). Defense counsel argued that the DNA evidence suggested that Appellant was not in the "*main part of Apartment E-3*, in the kitchen and living room area, where the homicide was committed." (R. p. 3062, lines 15-24)(emphasis added).[6] The trial judge questioned the propriety of parsing the evidence to support another charge. (R. p. 3062, line 6 - p. 3064, line 1). He noted: "I haven't heard any testimony that doesn't make him a full participant thus

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[5] *State v. Cottrell*, 376 S.C. 260, 657 S.E.2d 451 (2008)(reversing murder conviction and death sentence upon finding voluntary manslaughter should have been charged in the guilt phase jury instructions where evidence of record supported same).

[6] Appellant asserts in his brief that there was no DNA/blood evidence that he was *in the apartment*. (BOA, pp. 20). That is incorrect. Blood droplets from the laundry area inside the apartment matched to Appellant. (R. p. 2715, lines 5-14; p. 2718, line 21 - p. 2720, line 12; p. 2871, line 23 - p. 2872, line 5).

far, in the alleged crimes." (R. p. 3062, lines 6-8). However, the trial judge allowed defense counsel to argue for the charges at the close of the evidence. (R. p. 3064, line 6 - p. 3065, line 20). Prior to the charge, Defense counsel relied additionally upon *Beck v. Alabama*,[7] 447 U.S. 625 (1980), again, for the general "proposition of a defendant is entitled to any potentially lesser-included charged." (R. p. 3369, lines 15-22). The trial judge indicated his reading of *Collins* did not support accessory after the fact. (R. p. 3370, lines 1-25). The trial judge found *State v. Fuller*, 346 S.C. 477, 552 S.E.2d 282 (2001) instructive, wherein this Court found accessory after the fact of murder was not a lesser included offense, and denied Appellant's request to charge. (R. p. 3372, line 16-p. 3374, line 16). After the jury was instructed, Appellant objected to the omission of the charge. (R. p. 3503, lines 1-7).

In a new trial motion, defense counsel argued that the charge was warranted not only as a lesser included offense, but also as a "lesser offense" upon which he could waive notice and presentment. He asserted for the first time that "*Gentry*[8] changed the nature of what can or cannot be charged to the jury, in which the Court is no longer bound, I don't believe, by lesser-included offenses." (R. p. 4447, lines 1-5). He argued, "now - - in the *post-Gentry* world that it is incumbent upon the Court to charge any offense which is covered by the evidence and requested by the defendant." Of course, he maintained that if the defendant opposed such a charge, "that would be a different issue and then you'd be into a waiver or due process issue." (R. p. 4447, lines 10-14). The Solicitor argued this was not a matter of a lesser included offense, thus, there was no due process issue, and the holding in *Beck* did

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[7] The transcript actually reflects "*Jackson v. Alabama*," but the cite reference immediately thereafter is for *Beck*. (R. p. 3369, lines 15-22).

[8] *State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005).

not apply. (R. p. 4448, line 18 - p. 7, line 3). As to the new argument, the Solicitor argued, "[t]here haven't been cases that say that the court would have to charge any and all offenses" and "[i]t's understandable why there hasn't been a case that says that, because that would lead to a whole lot of other charges that would be confusing and unnecessary for the jury to decide." (R. p. 4449, lines 3-9). In reply, Appellant maintained that accessory after the fact could be a lesser included offense given this Court had dispensed with the "must not be present" requirement. (R. p. 4449, line 14 - p. 4450, line 5). The trial judge noted that "the reply argument" addressed "where we were at the trial," but nonetheless considered the *Gentry* argument, finding *Gentry* did not go that far, otherwise "then every major felony would have accessory before the fact and after the fact, or certainly after the fact now that presence is not a critical issue. I just don't believe that's where the Court went." (R. p. 4450, line 14 - p. 4451, line 19).

On appeal, Appellant specifically waived argument on the accessory before the fact charge, and presents the argument for error only in regard to the trial judge's failure to charge accessory after the fact. (BOA, p. 21, n. 5).

Discussion:

Appellant concedes that accessory after the fact is not a lesser included offense of murder. (BOA, p. 25). He also appears to abandon his position that it could be a lesser included offense since *Collins* II dispensed with the requirement the defendant not be present. (BOA, p. 25). His argument on appeal is that since *Gentry* held that jurisdiction is independent of the indictment, one need not be indicted to have an offense charged to the jury. (BOA, p. 23). Consequently, the denial to charge accessory after the fact here

amounted to a deprivation of due process under *Beck v. Alabama*. (BOA, p. 22). His argument is procedurally barred and without merit.

Appellant is correct that accessory after the fact is not a lesser included offense of murder. *State v. Fuller*, 346 S.C. 477, 552 S.E.2d 282 (2001). Appellant is also correct to abandon his assertion that accessory after the fact could be a lesser included offense under the elements test.

To qualify as a lesser included offense, the "greater" offense must encompass all the "lesser" offense elements. *State v. Northcutt*, 372 S.C. 207, 215, 641 S.E.2d 873, 877 (2007). "If the lesser offense includes an element not included in greater offense, then the lesser offense is not included in the greater." *Id.* "The elements of accessory after the fact to a crime are 1) the 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." *Fuller*, 346 S.C. at 480, 552 S.E.2d at 283. "Murder is the 'killing of any person with malice aforethought, either express or implied.'" *Northcutt*, 372 S.C. at 215, 641 S.E.2d at 877 *quoting* S.C. Code § 16-3-10. The accessory charge clearly contains elements not in the greater charge of murder, and cannot meet the elements test. In fact, accessory after the fact of murder criminalizes actions committed *after* the killing with malice aforethought, and cannot be proven on the same evidence of the act without more. Moreover this logic is in step with other jurisdictions. *See, for example, State v. Bradford*, 484 S.E.2d 221, 230 (W.Va. 1997)("As noted above, to prove accessory after the fact one must prove the felony was completed, the accessory knew the felon was guilty, and the accessory received, relieved, comforted or assisted the felon. The defendant concedes the offense of accessory after the fact does not meet the *Louk* test in this instance, because of the inclusion of additional

elements," in that state, absence, but also "that he assisted the principal perpetrator by one of the above enumerated acts. Since these elements need not be proven to convict for murder, we conclude the offense of accessory after the fact cannot be a lesser included offense to murder.");*Collins v. Com.*, 508 S.W.2d 43, 45 (Ky. 1974)("the offense of being an accessory after the fact is not a lesser degree of the offense of murder, and an instruction on that offense cannot properly be given under an indictment that does not specifically charge that offense"); *People v. Preston*, 508 P.2d 300, 308 (Cal. 1973)("Murder can be committed without the murderer being an accessory after the fact. The latter offense, therefore, is not necessarily included in the former."). Respondent notes that though Appellant argued below that the offense could be a lesser included offense ***after*** *Collins II*, *Fuller* was after *Collins II* and still held the charge was not a lesser included offense.[9] *Fuller, supra.* Moreover, as *Bradford* indicates, the absence requirement alone is not dispostive. Though the state in *Bradford* still required absence and noted that element to be different, the state court also noted that the other elements regarding aid must be proven, as well, and also defeats an elements test. Simply, "[a] defendant may not be found guilty as an accessory when indicted solely as a principal." *Id* at 480, 552 S.E.2d at 283, *citing State v. Collins*, 266 S.C. 566, 225 S.E.2d 189 (1976)(*Collins I*). It is a distinct and separate crime.

However, "[w]hen the defendant has not been indicted as an accessory, it is proper to charge the jury on the difference between accessory and principal '*where the evidence points to an exclusionary offense which dictates that different proof is required to each*

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[9] Respondent notes that this precedent demonstrates the charge would also fail the "historical precedent" exception. *Northcutt*, 372 S.C. at 216, 641 S.E.2d at 878 ("When an offense fails to meet the elements test, this Court will nevertheless construe it as a lesser included offense if the offense has traditionally been considered a lesser included offense of the greater offense charged.").

defendant.'" *Fuller*, 346 S.C. at 480, 552 S.E.2d at 283. Critically, even this "explanation only" charge is applicable only in limited circumstances – when the offense, under the particular facts of the case, "'could have been committed by only one principal first.'" *Id* at 481, quoting William Shepard McAninch, *The Criminal Law of South Carolina*, 369 (1996). *See also State v. Good*, 315 S.C. 135, 432 S.E.2d 463 (1993)("The rule ... is that a jury instruction on the law of accessory is only required where the evidence points to an exclusionary offense which dictates that different proof is required as to each defendant."). The instructional charge would not be applicable here as there is no one identified fatal wound: "The sum total of all the wounds was fatal." (R. p. 3896, lines 4-11). Applicant clearly led and participated in the gross beating and forced sodomy that resulted in death. The charge would not be warranted here. Moreover, the mere fact the defense wished to blame another for a "fatal blow" while not contesting participation in the beating does not entitle the defense to the charge. Precedent clearly demonstrates that an accessory after the fact charge is not a defense to be used, but a separate and distinct charge that may be sought by the prosecution. Further, the explanation instruction is necessary only in discrete circumstances. Moreover, to require an instruction on an uncharged offense could add nothing to the reliability of the proceedings. In fact, rather than work to ensure fairness, such a requirement would inject arbitrary and unnecessary considerations into the deliberations: "to require an accessory instruction on these facts opens the door for every criminal defendant to create a quasi lesser-included offense for which they could not be conviction." *Good*, 315 S.C. at 138, 432 S.E.2d at 465. In sum, the explanatory charge is of limited applicability and worth, and factually, was not in the least necessary in the instant case. Even

so, the instruction is not required as a verdict option where a defendant is not indicted for the offense. *Fuller.*

Appellant's remaining argument, based on *Gentry,* is procedurally barred. Appellant made his *Gentry* argument for the first time in the motion for a new trial. Appellant argued at the hearing on his new trial motion:

> Our argument is essentially unchanged, Your Honor. I would add some additional legal grounds, which may not have been apparent at the time that we made it.

(R. p. 4445, lines 21-24). (See also p. 4450, lines 11-13 (after arguing that accessory after the fact should be considered a lesser included offense, "So *alternatively* we would submit under *Gentry* all of our previous arguments that it should have been charged."(emphasis added)).

Thus, Appellant attempted to raise a new ground for allowing the same charge. The issue is procedurally barred from review.

Appellant was obliged to state his specific ground in the request to charge. Rule 20 (a), SCRCrimP ("All requests must include accurate citation to authorities relied upon."). The failure to do so deprived the trial judge of the opportunity to consider the request under the theory now posed. *See generally State v. Hale*, 284 S.C. 348, 355, 326 S.E.2d 418, 422 (Ct.App. 1985)("Having denied the trial judge an opportunity to cure any alleged error by failing to object to the charge, Hale cannot properly raise the issue for the first time on appeal."). This is not a trap for the defense, but a requirement that the real and certain grounds and decisions supporting a charge be submitted to the judge so that he can make an informed decision on the charge request.[10] Moreover, after a request but "*before* the jury

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[10] Respondent admits that the trial judge referenced his reasoning on *Gentry* into his comments at the motion for new trial regarding preservation: "... that's the reason I denied

retires," the defendant must be "given the opportunity to object" to the instructions. Rule 20(b), SCRCrimP (emphasis added). The objecting defendant must "state *distinctly* the matter objected to and the grounds for objection," the failure to do so resulting in a waiver. Id (emphasis added). Again, this brings purported error to the attention of the trial judge while there is opportunity to correct the error. The "opportunity for discussion" is of primary importance. *See State v. Johnson*, 333 S.C. 62, 64, 508 S.E.2d 29, 30 n. 1 (1998)("neither our opinion in *Whipple,* nor Rule 20(b), SCRCrimP ... have altered the long-standing rule that where a party requests a jury charge and, after opportunity for discussion, the trial judge declines the charge, it is unnecessary, to preserve the point on appeal, to renew the request at conclusion of the court's instructions"). Again, a defendant must bring his request and specific support for his request to the attention of the trial judge before the jury is finally charged and allowed to deliberate.

Presenting a new theory of entitlement for a charge in a new trial motion deprives the trial court of any opportunity to grant the request to charge. *See generally State v. Kelly*, 331 S.C. 132, 141, 502 S.E.2d 99, 104 n. 4 (1998)(finding issue procedurally barred: "Although this issue was raised in the new trial motion, it was not raised *as a ground* for a mistrial. Thus, appellant cannot properly raise this type of *trial error* for the first time in his new trial motion."); *State v. Hicks*, 330 S.C. 207, 217, 499 S.E.2d 209, 214 (1998)("A contemporaneous objection is necessary to preserve errors for direct appellate review, even in cases where a death sentence is imposed."); *Patterson v. Reid*, 318 S.C. 183, 185, 456 S.E.2d 436, 437

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it. It's preserved. It's an interesting point." (R. p. 4451, line 6 - p. 4452, line 2). However, it is cannot be disputed that the *Gentry* argument was *not* presented to the trial judge *before* the trial judge ruled on the charge, and instructed the jury. It could not have been part of the rationale behind the decision. Respondent interprets this passage as simply acknowledging the argument was made. At any rate, the preservation rules are applied by the appellate court, not by the trial court.

(Ct.App. 1995)(a party may not raise a new issue by post-trial motion when party had the opportunity to raise the issue at trial). *Cf. State v. Freiburger*, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005)(A defendant cannot argue one ground to the trial judge and a different one on appeal); *State v. Byram*, 326 S.C. 107, 113, 485 S.E.2d 360, 363 (1997)("appellant now argues the proffered evidence was offered in mitigation of punishment, not to prove his innocence. The trial judge did not rule on this issue. Accordingly, the issue is not preserved for appeal"). The motion for a new trial sought only a ruling on a proposed new theory as, without question, the late offered theory had no impact on the conduct at the trial. The defendant has, without doubt, waived his objection. He completely failed to allow the trial judge the opportunity to consider the new basis for entitlement when the charge still could have been given. For example, in *State v. King,* 334 S.C. 504, 509-510, 514 S.E.2d 578, 581 (1999), the trial judge was similarly denied the opportunity to cure an error due to the defendant's failure to timely raise an objection, and King's failure barred any relief.

King was aware that a television crew entered the courtroom and filmed the closing arguments and charge though the trial judge had instructed that no one was to enter the courtroom. King did not object. He filed a motion for new trial based on the disruption and or distraction "[o]nly after the jury returned with an unfavorable verdict...." *Id* at 510, 514 S.E.2d at 581. The trial judge there denied the new trial motion, finding that "appellant had waived this claim because his objection was not timely" and, at any rate, the filming was permissible, "and did not distract or disrupt the proceedings." *Id.* This Court agreed with the trial judge, and found King had "waived review of this issue by failing to object prior to the jury's verdict." *Id.* It is no different here, because Appellant failed to make the request

to charge on the ground at issue when the trial judge still had the opportunity to charge the jury. Even so, the issue is without merit.

Gentry does not hold that a defendant may select his own charge for submission to the jury; rather, *Gentry* declared that the indictment is a notice document, and does not establish or confer jurisdiction. 363 S.C. at 103, 610 S.E.2d at 500-501. Moreover, in *State v. Smalls*, 364 S.C. 343, 347, 613 S.E.2d 754, 756 (2005), this Court held that "signing a sentencing sheet for a charge to which a defendant had pled guilty constitutes a written waiver of presentment." Together, these cases instruct that there is no jurisdictional importance of the indictment, and no necessary ritual of a typed charging document. Neither take the incredible step Appellant would have the Court take – to completely vitiate the executive branch's authority to select the appropriate charge.

"In our criminal justice system, the Government retains 'broad discretion' as to whom to prosecute." *Wayte v. United States*, 470 U.S. 598, 607 (1985). "[S]o long as the prosecutor has probable cause to believe that the accused committed an offense ... the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *Bordenkircher v. Hayes*, 434 U.S. 357, 364-365 (1978). *Accord United States v. Goodwin*, 457 U.S. 368, 382 (1982)("A prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution."). "[T]he discretion of the prosecuting attorney as to whether or not to prosecute is generally not subject to judicial interference, expect in the narrow circumstances where it is necessary to do so in order to discharge the judicial function of interpreting and applying constitutional provisions. Absent evidence of a selective or discriminatory prosecutorial intent, or abuse of prosecutorial discretion, the

judiciary normally is powerless to interfere with the prosecutor's charging authority." 16 C.J.S. Constitutional Law § 347 (2010 update). Similarly, this Court has declared:

> [T]he South Carolina Constitution and South Carolina case law place the unfettered discretion to prosecute solely in the prosecutor's hands.... Prosecutors may pursue a case to trial, or they may plea bargain it down to a lesser offense, or they may simply decide not to prosecute the offense in its entirety. The Judicial Branch is not empowered to infringe on the exercise of this prosecutorial discretion...

State v. Needs, 333 S.C. 134, 146, 508 S.E.2d 857, 863 (1998), *quoting State v. Thrift*, 312 S.C. 282, 291-92, 440 S.E.2d 341, 346 (1994). *Gentry* did not affect or attempt to limit this well-recognized authority. The defense can no more force a selected offense on the State than he can force a limitation on their case by stipulation. *See State v. Jackson*, 364 S.C. 329, 334, 613 S.E.2d 374, 376 (2005)("The State, however, has the right to prove every element of the crime charged and is not obligated to rely upon a defendant's stipulation").

Appellant also argues that *Beck v. Alabama*, 447 U.S. 625 (1980), requires submission of applicable lesser-included offenses. (BOA, p. 22). Respondent agrees that a lesser-included offense must be charged where applicable. *Cottrell, supra. See also Hopper v. Evans*, 456 U.S. 605, 611(1982)("[D]ue process requires that a lesser included offense instruction be given *only* when the evidence warrants such an instruction."). However, as established above (and apparently conceded by Appellant, BOA, p. 25), accessory after the fact is not a lesser included offense. *Beck* did not declare that a defendant may choose the charge to be submitted to the jury. The Supreme Court had held that the States are not constitutionally required to instruct juries on crimes that are not lesser included offenses. *Hopkins v. Reeves*, 524 U.S. 88, 96-98 (1998)("Almost all States, including Nebraska, provide instructions only on those offenses that have been deemed to constitute lesser

included offenses of the charged crime. We have never suggested that the Constitution requires anything more."). In rejecting the position in *Hopkins*, the Court reasoned:

> [s]uch a requirement is not only unprecedented, but also unworkable. Under such a scheme, there would be no basis for determining the offenses for which instructions are warranted. The Court of Appeals apparently would recognize a constitutional right to an instruction on any offense that bears a resemblance to the charged crime and is supported by the evidence. Such an affirmative obligation is unquestionably a greater limitation on a State's prerogative to structure its criminal law than is *Beck's* rule that a State may not erect a capital-specific, artificial barrier to the provision of instructions on offenses that actually are lesser included offenses under state law.

Id.

Thus, there is no due process basis for allowing a defendant to make his choice of crime and force the crime into the state proceedings.

Relief in *Beck* was premised on the historic, and generally accepted rule, that a "lesser offense necessarily included in the offense charged" may be submitted to the jury where the facts support the charge be given. In fact, the Court cited to a South Carolina case in support of the generally accepted contention. *Id* at 637 n. 12 (citing *State v. Funchess*, 267 S.C. 427, 229 S.E.2d 331 (1976)).[11] The Court reasoned:

> While we have never held that a defendant is entitled to a lesser included offense instruction as a matter of due process, the nearly universal acceptance of the rule in both state and federal courts establishes the value to the defendant of this procedural safeguard. That safeguard would seem to be especially important in a case such as this. For when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense-but leaves some doubt with respect to an element that would justify conviction of a capital offense-the failure to give the jury the "third option" of convicting

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[11] In *Funchess,* this Court acknowledged: "We have held that it is not error to refuse to submit a lesser included offense unless there is testimony tending to show that the defendant is Only guilty of the lesser offense." 267 S.C. at 429, 229 S.E.2d at 332. This Court also noted the corollary restriction that "Presence of evidence to sustain the crime of a lesser degree determines whether it should be submitted to the jury and the 'mere contention that the jury might accept the State's evidence in part and might reject it in part will not suffice.'" *Id* at 430.

> on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction.

447 U.S. at 637.

Neither the holding or logic of *Beck* is applicable here. As demonstrated, *Beck* is confined to consideration of lesser included offenses within the charge at bar, supported by the evidence presented. Further, as the Court in *Beck* noted, a defendant in a non-capital setting in the Alabama at that time would have been entitled to seek a lesser-included offense charge – just not under the capital proceedings in contest. *Id* at 636-37. The Court found that inequality disturbing. *Id.* While Appellant makes that assertion here, (BOA, p. 24), it is without merit.

Again, accessory after the fact is not a lesser included offense and would not have been charged as a verdict alternative in any murder trial, absent a separate indictment on the charge brought by the State. *Fuller, supra.* Appellant's reliance on *State v. Roof*, 298 S.C. 351, 380 S.E.2d 828 (1989), (BOA, p. 24), is wholly misplaced as *Roof* does not address the propriety of giving the charge in the first place.

In *Roof*, two co-defendants were tried for murder. In statements, both defendants claimed coming upon the victim after his fatal injuries were inflicted presumably by the other. The trial court gave an accessory after the fact charge for one but not the other. This Court found the unevenly applied charge amounted to "a comment by the court on the dispositive factual issue... credibility." *Id* at 354, 380 S.E.2d at 829. Whether accessory after the fact should have been charged was not addressed in the majority opinion. Thus, *Roof* does not support Appellant's assertion the charge should have been given here.

Further, and as noted briefly above, the facts here would not support even an explanatory instruction on the crime in order demonstrate a difference between the principal

and an accessory. There was no one clear fatal wound in the instant case. Dr. Schandl testified that the victim died from the totality of the brutal beating: "The sum total of all the wounds was fatal." (R. p. 3896, lines 4-11). Appellant's argument that the jury "could" have found him guilty of being an accessory depends upon a belief that there was a fatal wound and another (he claims Armon Dickerson) inflicted one fatal wound. (BOA, pp. 23-24). This would depend upon, not a credibility determination between two diametrically opposed version of the event, *see Roof, supra,* but the hope that the jury simply *reject* all the other evidence of Appellant's deep involvement in the infliction of the multiple, horrendous injuries. The evidence repeatedly and consistently shows – independent of Armon's testimony and wife Selena's testimony which also supports same – that: Appellant abducted victim, shot and struck him, (R. p. 2136, line 5 - p. 2139, line 3 (Testimony of Steven Rivers Testimony); p. 2216, line 12 - p. 2222, line 3 (Testimony of Antonio Nelson); p. 2276, line 7 - p. 2278, line 14 (Testimony of Devon Keeling)); Appellant encouraged Malik to hit the obviously already severely injured, but still alive, victim while brother Armon began to clean the bloody scene, (R. p. 3276, line 7 - p. 3286, line 9)(Testimony of Rashid Malik); Appellant admitted to two people that he personally brutally sodomized victim, (R. p. 2357, line 25 - p. 2358, line 8)(Testimony of Shelley Nelson); p. 2474, lines 3-25)(Testimony of Steven Archie); in another telephone conversation, Appellant also admitted to having "burned his balls" and that he was "f****** Gerard," and Gerard confirmed the sodomy to Steven Archie (R. p. 2475, line 4 - p. 2475, line 15); and, a recording of victim's voice (as identified by victim's father at trial) memorialized victim's own acknowledgment of the sodomy and beating at the hands of Appellant while still being held captive by Appellant, (R. p. 3337, lines 1-18 (Testimony of Aven Roper). (See also R.

p. 2357, lines 17-23; p. 2362, lines 2-13)(Testimony of Shelley Nelson). (See also R. p. 3434, lines 19-21, Appellant's statement to jury during guilt phase, "The police, if they investigated thoroughly, it would be me and multiple codefendants."). Appellant could only be guilty as a principal. *See Good, supra. See also Williams v. State*, 994 So.2d 808, 821 (Miss. Ct.App. 2008)("Williams was a principal to the crime of murder. Therefore, he could not, at the same time, be an accessory after the fact.").

However, the issue presented is not preserved for review as Appellant failed to raise the *Gentry* argument to the trial judge before the jury was instructed; thus, the ground was neither ruled upon nor considered in the charging decision. The issue should be summarily dismissed.

Appellant is not entitled to any relief.

III.

The trial judge properly admitted Johnette Watson's testimony in the penalty phase concerning her positive interaction with Appellant and their especially close familial relationship. The trial judge did not abuse his discretion in declining to admit evidence descriptive of Watson's background in explanation of her own emotional sensitivity to an additional death in her family should Appellant be executed. The proffered testimony would focus on the character and circumstances of the witness, not the defendant.

Relevant Facts:

Appellant presented testimony from Johnette Watkins during the penalty phase. [12] Ms. Watkins testified that Appellant is her first cousin, a year younger than her, and was "like a brother" to her. (R. p. 4028, lines 4-21). She testified that he never exhibit violence around her as they were growing up, and that he was protective of her. (R. p. 4028, line 22-p. 4029, line 2). She testified that when he was released from SCDC in 2005, he had a nice girlfriend, a "positive attitude," and "[t]hings were good, he was around family, he got a job not long after, he got a car, he was doing fine." (R. p. 4029, lines 3-25).[13] However, he began to date someone else, Shelley Nelson – an individual that Watkins believed was not

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[12] Appellant presented a hefty case in mitigation. In addition to Ms. Watson, he presented: five detention center officers addressing Appellant's good behavior; an expert on "risk assessment" regarding incarceration; an expert in psychopharmacology; a former girlfriend; a school psychiatrist; two witness in mitigation of aggravating evidence; a social worker [who was, incidently, allowed remarkable leeway in presenting normally inadmissible hearsay, See R. p. 4201]; a former teacher; a former classmate; the director of the Boys Home Appellant attended; testimony of a psychiatrist and a psychologist; and testimony from Appellant's grandmother. The mitigation case was, essentially, that Appellant was from an economic disadvantaged background; lacked emotional support from his mother, but had a close relationship with, and the support of, his grandmother and first cousin; had a history of early depression and drug use, had an early introduction to the drug trade, and suffered from "cocaine psychosis" at the time of the torture and murder.

[13] Ms. Watkins also gave assistance to Appellant during this time. The jury heard in the guilt phase that the cell phone Appellant used at the time of the murder was registered to Ms. Watkins. (R. p. 2436, lines 17 - p. 2437, line 3; p. 2355, lines 22-25).

good for Appellant. (R. p. 4030, line 5-p. 4031, line 3). Appellant began to let his appearance slide, and Watkins suspected "he or Shelley may have been using or abusing drugs." (R. p. 4031, lines 4-24). Watkins identified four pictures showing Appellant (two with brother Armon) as a young child and teenager. (R. p. 4032, line 6-p. 4034, line 15). Watkins, when asked if "there [was] anything that you want to ask this jury or tell them" about Appellant, Watkins addressed the jury as follows:

> He's basically a good person. He got mixed up in the wrong things and I, I beg that you have mercy on him.

(R. p. 4034, lines 19-21).

Defense counsel then posed the following question: "How would his execution impact on your family?" The Solicitor objected, and the trial judge sustained the objection without comment, and without hearing argument. (R. p. 4034, line 22 - p. 4035, line 1). Two other witnesses testified, and the trial was recessed overnight. The next morning, Appellant offered argument, and made a proffer through counsel, as follows:

> I've done some additional research. I cannot find a South Carolina case in this context which directly addresses it but I understand that the case law is clear that a witness cannot give an opinion to the jury as to either imposing a death sentence or a life sentence or life as mercy.
>
> I am also aware, Your Honor, that there is emerging case law in other jurisdictions ... which has began to allow this type of testimony. To characterize it, for lack of a better term, it would be reverse-Payne testimony... or defendant impact testimony...
>
> The rationale of the state courts that have begun to allow it is that it goes to the character of the defendant.
>
> Of course at this phase, under *Locket (phonetic) v. Ohio* and other cases, the character of the defendant is at-issue. The reason the other state courts have analyzed it, it goes to the character of the defendant, as I interpret the case law, is that it attests to that family relationship between the witness and the defendant as to what impact his death would have on the family.

> What Ms. Watson would have testified to is that William's death would have had a hugh impact on the Dickerson and Watson family, Watson being the maternal side of his family, his cousins. Part of his 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, three years ago. So the death of William would exacerbate that. That would have been the extent of her testimony.

(R. p. 4078, line 6 - p. 4079, line 25).

The Solicitor again objected, noting, based on the proffer, that the testimony "regarding other deaths in the family... injects extraneous, irrelevant matters into the jury's province. They can get in all that evidence of love and affection, the meaningfulness that the Defendant's life has to them without going to that next question." (R. p. 4080, line 19 - p. 4081, line 2). Appellant noted that one of the "experts" would testify "to at least one of the homicides of Mr. Dickerson's cousins that had happened prior to this incident. I would be something involved [sic] him, his background and family." (R. p. 4081, lines 8-16).

The trial judge again found the testimony was not relevant. Cognizant that the witness cannot testify as to the appropriate punishment, the judge found "their opinion of whether they believe life would be better than the death sentence is certainly not relevant, that is not appropriate." (R. p. 4082, lines 2-9). He noted that the close "familial relationship is so important that it speaks directly to his character, as to whether they are close" was "already before the jury." (R. p. 4082, lines 10-24).

Discussion:

"A ruling on the admissibility of evidence is within the sound discretion of the trial court and will not be reversed absent an abuse of discretion." *State v. Mercer*, 381 S.C. 149, 160, 672 S.E.2d 556, 561 (2009), *quoting State v. Washington,* 379 S.C. 120, 123-24, 665

S.E.2d 602, 604 (2008). An appellant may show an abuse of discretion by showing the ruling was based upon an error of law. *Id.*

Appellant argues the trial judge's ruling was based on an error of law in that "[a] capital defendant is entitled to submit any relevant mitigating evidence in support of a sentence less than death." (BOA, pp. 30-31). (See also Tr. pp. 4079-4080). The record shows no abuse of discretion primarily because the proffer well demonstrates that the evidence offered is not connected to Appellant. Appellant attempts to tie the proffered evidence to the admissible evidence from the family member; however, the proffered evidence demonstrates a distinct break from what is admissible. The proffered evidence does not shown anything about Appellant's character or the circumstances of the offense.

This State has long allowed a plea for mercy in the sentencing phase. *See, e.g., State v. Torrence*, 305 S.C. 45, 50-51, 406 S.E.2d 315, 318-319 (1991). However, according to modern jurisprudence, such a plea must be grounded in the emotional tie to the defendant, and not simply an opinion on the appropriate sentence. *State v. Wise,* 359 S.C. 14, 26-28, 596 S.E.2d 475, 481-82 (2004). *See also State v. Sapp*, 366 S.C. 283, 292-294, 621 S.E.2d 883, 887-888 (2005). A family member making a plea for mercy may *not* weigh in on what the appropriate sentence should be. *State v. Johnson*, 338 S.C. 114, 126-127, 525 S.E.2d 519, 525 (2000)("the defense did not seek to elicit the opinion of Johnson's sister about what verdict the jury 'ought' to reach. Defense counsel merely proposed to ask her whether *she wanted* Johnson to die" which "did not address the ultimate issue to be decided by the jury"). The plea's value, consequently, is its reflection of the shared bond which itself is evidence of the defendant's character in that he is able to maintain that bond.

Appellant recognized during the proffer that the witness would be prohibited from giving and opinion on whether the sentence should be life or death "or life as mercy." (R. p. 4078, lines 14-17). However, he insisted the testimony would be admissible as evidence "of the character of the defendant" in "that it attests to that family relationship between the witness and the defendant as to what impact his death would have on the family." (R. p. 4079, lines 5-13). Appellant contends on appeal that the proffer – that Watkins had lost a brother and cousin to homicide – demonstrated admissible evidence of "appellant's ability to maintain this positive relationship" with Watson. (See BOA, pp. 26 and 31). However, Appellant fails to show how *Watkins' unique emotional sensitivity*, and the basis for that sensitivity, demonstrates anything about *Appellant's* character, specifically the argued "ability to maintain this positive relationship" with Watson. Thus, he fails to show the evidence was relevant. *See generally State v. Locklair*, 341 S.C. 352, 370, 535 S.E.2d 420, 429 (2000)("The emphasis in the sentencing phase of a capital trial is on the character of the defendant.").

Appellant argues that the proffered evidence is "execution impact" which is admissible under the more general argument he has a "constitutional right ... to present mitigating evidence [which] includes evidence of any aspect of his character...." (BOA, p. 31)(emphasis in original). As a first matter, this concedes the issue is *not* related to the defendant but the *probable* impact of another event outside the crime (the punishment for the crime) on a third party (not the defendant). In essence, this proves the evidence is irrelevant and inadmissible.

A capital defendant is allowed, pursuant to the Eighth and Fourteenth Amendments of the Constitution, to submit evidence in mitigation of "any aspect of [...his...] character or

record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death" to enable the jury to make an "individualized decision" in sentencing. *Lockett v. Ohio*, 438 U.S. 586, 604-605 (1978). However, the Court specifically acknowledged: "Nothing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." 438 U.S. at 604 n. 12. *See also Owens v. Guida*, 549 F.3d 399, 419 (6th Cir. 2008)("Although Owens is right that these cases permit defendants to introduce any *relevant* mitigating evidence, she is wrong to assume that they make all evidence automatically relevant"); *United States v. Purkey*, 428 F.3d 738, 756 (8th Cir. 2005)(*Lockett* ruling "does not mean that the defense has *carte blanche* to introduce any and all evidence that it wishes"). *Lockett* does not provide any basis for admissibility of testimony regarding the impact the future execution would have on another person.

Appellant argued at trial there was "emerging case law in other jurisdictions... which has begun to allow this type of testimony." (R. p. 4078, lines 18-21). Appellant characterized the testimony as "reverse-Payne"[14] testimony. (R. p. 4078, line 22 - p. 4079, line 1). He cited three state cases, one each from Oregon, Arizona and Florida. (R. p. 4080, lines 1-13). Only Oregon, however, shows a possible basis for this testimony,[15] and then only by state statutory provision. *State v. Stevens*, 879 P.2d 162, 168 (1994)("Because we resolve

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[14] *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

[15] The opinion is not clear as to the parameters of admissibility. The *Stevens* Court cautioned that "[c]learly, not everything to which the witness testified in the offers of proof is relevant," 879 P.2d at 167, but found testimony "that the defendant's execution would affect his daughter negatively because of some mitigating aspect of defendant's character or background" would be relevant under state law, *id* at 168. When read as a whole, the *Stevens* opinion is not a full endorsement of Appellant's position here, which reaches even further into the sensitivities of the individual testifying, separate and apart from the relationship at issue.

the issue on statutory grounds, we do not reach defendant's constitutional argument."). Both Arizona and Florida have *rejected* the testimony. *State v. Chappell*, 236 P.3d 1176, 1185 (Ariz. 2010)(while acknowledging "similar" evidence had been admitted in prior cases, finding that "execution impact evidence is not relevant to mitigation"); *Burns v. State*, 699 So.2d 646, 654 (Fla. 1997)(finding no abuse of discretion where evidence of "family relationships and the support [... the defendant...] provided his family" where properly admitted "as nonstatutory mitigation regarding [... the defendant's ...] character," evidence that "went to establish that death was not an appropriate penalty because of the impact the execution would have" on family members was not admissible and properly excluded). Rather than demonstrating an "emerging" trend, the case law shows a roundly rejected concept. *See, e.g., State v. Hale*, 892 N.E.2d 864, 893 (Ohio 2008)(citing collection of cases in support of conclusion "Several jurisdictions have held that testimony by the defendant's relatives concerning the impact that the defendant's relatives concerning the impact that the defendant's execution will have on them is not relevant to the defendant's character, his record, or the circumstances of his offense and therefore may be excluded"); *Williams v. State*, 168 S.W.3d 433, 445 (Mo. 2005)(citing collection of cases in support of conclusion that "every court, exception one [*Stevens, supra*], that has considered this issue has determined that testimony regarding the impact the execution would have on family or friends is inadmissible.").

Appellant's reliance on *Noel v. State*, 960 S.W.2d 439 (Ark. 1998), (BOA, p. 30), is misplaced as it also fails to support his position. In *Noel*, the Arkansas Supreme Court considered the admissibility of *victim* impact evidence, finding as follows:

> In the instant case, the defense called Valery Ussery, Noel's mother, to the stand during the penalty phase. She testified that Noel was not disrespectful

> and had "a kind heart." She also identified three photographs of Noel as a child, which were offered into evidence and which were clearly an effort to emphasize the loss that would be associated with his execution. In our judgement, that is precisely the type of mitigating testimony that the Supreme Court acknowledged could be offset by testimony relating to the human toll of a murder on the victim's family.

960 W.W.2d at 446).

Of course, first and foremost, the holding affirms admissibility, indeed, the necessity, of *victim* impact evidence. *Id.* Nothing in *Noel* opinion suggest that evidence was admitted to demonstrate a psychological profile or specific emotional sensitivity as to the family member; thus, it does not precisely address "execution impact" evidence. True "execution impact" evidence, goes not to the defendant's character, but psychological impact on the witness of the future event. Consequently, the evidence is more in line with opinion on the appropriate punishment, which is disallowed. *See Williams*, 168 S.W.3d at 445 (not error to disallow "expert testimony during the penalty phase regarding the psychological impact on his children if he were to be executed," reasoning testimony "likely" to allow opinion testimony on the appropriate punishment which is disallowed); *Burns*, 699 So.2d at 654 ("While we agree that Burns' family relationships and the support he provided his family are admissible as nonstatutory mitigation regarding Burns' character, this was not the focus of the proffered testimony. The proffered testimony went to establish that death was not an appropriate penalty because of the impact the execution would have on Burns' family."); *State v. Stenson*, 940 P.2d 1239, 1282 (Wash. 1997)("In the present case, the trial court did allow all character and background evidence, including evidence of Stenson's relationship with his family and friends and any circumstances of the crime which he wished to present. The court only excluded direct statements of how his execution might affect his family members. The witnesses' proposed testimony, which in fact was nothing more than their

opinions as to the sentence for the Defendant that they thought might be best for the Stenson children, was not relevant to the Defendant's character or background and hence was properly excluded."). *See also Torrence, supra; Wise, supra. Accord State v. Gilbert*, 277 S.C. 53, 58, 283 S.E.2d 179, 181 (1981)("the propriety of the death sentence as a form of punishment is a matter addressed to the discretion of the legislature."); *State v. Woomer*, 278 S.C. 468, 473, 299 S.E.2d 317, 320 (1982)(same).

As to the reference in *Noel* of the admitted evidence on behalf of the defendant in that case, the case shows a consistency in the treatment of the type of evidence that is properly admissible. Evidence demonstrating the bond reflects the character of the defendant. It is the bond aspect that may be considered in "the loss that would be associated with his execution." *Id. See, for example, Burns*, 699 So.2d at 654 n. 16 (emphasizing that family members were allowed to testify "regarding their relationship with Burns and the support Burns provided them" and drawing distinction between that permissible evidence and evidence of "Burns' death would impact their lives and the lives of their family members"); *People v. Ochoa*, 966 P.2d 442, 505-506 (Cal. 1998)("what is ultimately relevant is a defendant's background and character-not the distress of his or her family. A defendant may offer evidence that he or she is loved by family members or others, and that these individuals want him or her to live. But this evidence is relevant because it constitutes indirect evidence of the defendant's character"). Again, Applicant's attempt to define the irrelevant sympathy evidence as character evidence lacks merit. *State v. DiFrisco*, 645 A.2d 734, 771 (N.J. 1994)(reviewing admissibility under statute that "tracks" *Lockett* language: "With regard to defendant's attempt to introduce as a mitigating factor the potential that defendant's 'execution would cause excessive emotional hardship to his mother since she had already lost

one son,' we conclude that the 'catch-all' category does not encompass such a factor. It neither relates to defendant's character or record, nor to the circumstances of the offense, but rather focuses on the potential impact on a third party. Its exclusion was entirely proper."). "[S]ympathy for a defendant's family is not a matter that a capital jury can consider in mitigation, but that family members may offer testimony of the impact of an execution on them if by so doing they illuminate some positive quality of the defendant's background or character." *Ochoa*, 966 P.2d at 472. *See also People v. Vieira*, 106 P.3d 990, 1009(Cal. 2005)("A statement about how a defendant's death would make the family member suffer is not relevant to an individualized determination of defendant's culpability and may be properly excluded.").

Appellant's reliance on *Richmond v. Lewis*, 506 U.S. 40 (1992), (BOA, pp. 29-30), is also misplaced. First, the evidence at issue in that case is vaguely referenced within the opinion as evidence "of the effect his execution would have on his family" and the context and extent is not readily discernable. *Id* at 43. Second, the evidence was apparently not challenged. Third, the evidence was submitted in the March 1980 re-sentencing, prior to many of the cases analyzing and rejecting the evidence on the basis of relevance. Fourth, *Richmond v. Lewis* was an Arizona capital case. Arizona, when directly addressing the evidentiary issue, found that "execution impact evidence" is not relevant evidence. *Chappell, supra. See also State v. Roque*, 141 P.3d 368, 397 (Ariz. 2006)(finding no error in disallowing portion of letter from defendant's sister describing the suffering of defendant's family: "We have held that a sister's testimony expressing concern for the defendant's family's well-being is 'altogether unrelated to defendant, to his character, or to the circumstance of the offense' and is therefore not relevant mitigating evidence. Accordingly,

the judge did not abuse his discretion in excluding Sylvia's statements about the suffering of Roque's family."). In short, nothing in the case supports that the evidence *should* have been submitted, only that some evidence was. Arizona has since determined such evidence *should* not be submitted. *Id.* Consequently, *Richmond v. Lewis* fails to support Appellant's argument for admissibility.

At any rate, if one accepts that the evidence at issue would in any way reflect a positive characteristic of the defendant, the exclusion of the proffered evidence was harmless as direct evidence of the loving bond was admitted without objection. *See Hale*, 892 N.E.2d at 893 (noting even if exclusion was error, any error harmless were witness were permitted to testify as to the loving relationship and "aspects of his character that militated in favor of sparing his life"); *State v. Loftin*, 680 A.2d 677, 713 (N.J. 1996)("Even if the trial court's refusal to allow the jury to consider the impact of defendant's execution on his wife and children as mitigating factors was an error, the error would have been harmless, because defendant presented the jury with a multitude of character evidence that directly focused on his relationship with his wife and children.").

However, for all the foregoing reasons, the trial judge did not abuse his discretion. The solicitor was quite right in arguing that the proffered evidence would "inject[] extraneous, irrelevant matters into the jury's province." (R. p. 4080, lines 22-24). The evidence offered nothing more than a basis for sympathy for Ms. Watkins, which is neither character evidence nor evidence demonstrating the circumstances of the crime. Appellant's argument to the contrary should be rejected.

IV.

Appellant failed to exercise an available strike against Juror No. 370; thus, he is procedurally barred from complaining about the seating of the juror. Even so, the trial judge did not err in qualifying Juror No. 370 when his responses taken as a whole support a firm commitment to follow the law as given by the trial judge. Appellant can show no prejudice in the seating of the juror.

Relevant Facts:

Appellant challenges on appeal only the qualification of Juror No. 370. He argues that the Juror's responses in *voir dire* demonstrated that he "burden shifter" with the "belief that the defense had to present mitigation evidence in order to convince him that a death sentence was not warranted. (BOA, p. 38).

Appellant objected to the juror's qualification below on the ground that the jury was a "burden shifter." (R. p. 503, line 12 - p. 504, line 4). The trial judge disagreed, finding that some responses may have reflected a "personal concept of what the law was" but noting the juror "specifically stated and unequivocally stated that he would follow the instructions." (R. p. 504, lines 7-23). Appellant admits that he did not attempt to strike Juror 370 though he had available peremptory strikes at the time the juror was called. (BOA, pp. 38-39).

Discussion:

Appellant's issue is procedurally barred as he failed to use an available strike at the time the juror was called. Even so, Appellant is not entitled to relief. He has failed to show an abuse of discretion in qualifying the juror as the record fairly supports the trial judge's careful consideration of, and finding of, qualification.

The procedural bar at issue is a logical application of the requirement in *State v. Green*, 301 S.C. 347, 352, 392 S.E.2d 157, 159, 160 (1990):

> In reviewing an error as to the qualification of a juror, we engage in a three step analysis. First, as reflected by several South Carolina cases, an appellant

> must show that he exhausted all of his peremptory challenges. If appellant failed to exhaust all of his challenges, this Court need not examine whether a juror was erroneously qualified. If however, all peremptory challenges have been used, we move to a second step and examine the disputed juror to see if the juror was erroneously qualified. Finally, if a juror was erroneously qualified, then under an elementary principle of appellate review, the appellant must demonstrate that this error deprived him of a fair trial.

(internal citations omitted).

Thus, "[f]ailure to exhaust all of a defendant's peremptory strikes will preclude appellate review of juror qualification issues." *State v. Tucker*, 324 S.C. 155, 162, 478 S.E.2d 260, 264 (1996). *See also State v. Elmore*, 300 S.C. 130, 133, 386 S.E.2d 769, 770 (1989)("Elmore asserts error in the trial judge's refusal to disqualify juror Annie Johnson for cause. Failure to exhaust his peremptory challenges at trial, however, precludes his raising this claim on appeal"). The logic behind the requirement is clear. Where a party fails to use an available remedy at trial, he cannot complain later that the process was unfair. *See generally State v. Mitchell*, 330 S.C. 189, 195, 498 S.E.2d 642, 645 (1998)("Because counsel acquiesced in the judge's limitation of his cross-examination, and made no other objections ... Appellant cannot now complain about this issue."). Failure to utilize an available strike is the equivalent of acquiescing because defendant had the ability and opportunity to avoid the prejudice he now complains of. *See Skilling v. United States*, 130 S.Ct. 2896, 2918 n. 21 (2010)("Peremptory challenges, too, 'provid[e] protection against [prejudice],'"). Thus, Appellant has failed to preserve any issue for review. *Mitchell. See also People v. Mills*, 226 P.3d 276, 302 (Cal. 2010)("As a general rule, a party may not complain on appeal of an allegedly erroneous denial of a challenge for cause because the party need not tolerate having the prospective juror serve on the jury; a litigant retains the power to remove the juror by exercising a peremptory challenge. Thus, to preserve this claim for appeal we require, first,

that a litigant actually exercise a peremptory challenge *and remove the prospective juror in question.*")(emphasis added). *Cf. State v. Short*, 333 S.C. 473, 511 S.E.2d 358 (1999)("Before reversible error can be found, the complaining party must of course establish the denial of his right to exercise a peremptory challenge.").

In anticipated response to avoid the procedural bar, Appellant has argued:

> 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 ... was able to fully utilize his individual rating for each juror presented... Defense counsel was forced to seat #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...

(BOA, pp. 38-39)(emphasis in original).

Appellant concedes he made an informed decision not to exercise a strike. The juror at issue was not a juror Appellant was forced to take. He is a juror Appellant opted to take, contesting the seating now for the first time only because the jury returned an unfavorable verdict. Precedent frowns on building-in an error in such a fashion, favoring instead a contemporaneous object. *See State v. Torrence*, 305 S.C. 45, 64, 406 S.E.2d 315, 326 (1991)(Toal, J., concurring)(discussing abolishing the *in favorem vitae* doctrine: "The primary danger associated with the doctrine is that a defendant will deliberately refrain from objecting to an error which occurs during trial. This is what is referred to by some as "sandbagging". Of course, a contemporaneous objection requirement to preserve legal errors operates to procedurally preclude a defendant from allowing error to occur at trial and then complaining of it on appeal.").

Dispelling any notion that he was "forced" to use his strikes on "worse" jurors, however, is Appellant admission that he only objected to the qualification of two of the ten

jurors which he eventually struck. (BOA, p. 39). Consequently, he struck eight jurors he never objected to at all, while (at least according to his assertion on direct appeal) strategically seating a juror he had moved to disqualify. The transcript, and for that matter Appellant's brief, well supports that Appellant made a strategic decision to seat the juror, in full knowledge of the juror's statements in *voir dire* that defense counsel found objectionable. He has waived his right have the issue heard. *Mills, supra. See also United States v. Martinez-Salazar*, 528 U.S. 304, 318 (2000)(Scalia, J., concurring)("The difficult question, however, is not whether Federal Rule of Criminal Procedure 24(b) requires exercise of the peremptory, but whether normal principles of waiver (not to say the even more fundamental principle of *volenti non fit injuria*) disable a defendant from objecting on appeal to the seating of a juror he was entirely able to prevent.").[16]

Moreover, in further support of a procedural bar, Respondent would submit that Appellant presents a factual scenario very similar to the one in *Green. Green, supra. See also Green v. Maynard*, 349 S.C. 535, 564 S.E.2d 83 (2002)(subsequent state habeas action). In *Green*, the petitioner used a strike to prevent the seating of a juror who was erroneously qualified, but *voiced no objection* to either of the two jurors presented after he used his strikes. *Id.* The issue in *Green v. Maynard* was limited to whether there was a "denial of fundamental fairness" in applying the rule requiring a showing of prejudice. *Id* at 538-39, 564 S.E.2d at 84. However, this Court resolved the claim that there was no "denial of

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[16] *Martinez-Salazar* addresses only the federal rule requirement, and, of course, does not limit or affect in anyway the states procedural rules regarding peremptory strikes. *Accord Rivera v. Illinois*, 129 S.Ct. 1446, 1453 (2009)("When States provide peremptory challenges (as all do in some form), they confer a benefit 'beyond the minimum requirements of fair [jury] selection,' *Frazier v. United States,* 335 U.S. 497, 506, 69 S.Ct. 201, 93 L.Ed. 187 (1948), and thus retain discretion to design and implement their own systems...").

fundamental fairness" by applying the three step analysis in the direct appeal, and adhered to the rule that an appellant must show prejudice, i.e. that one or more of the jurors seated were not qualified and served because appellant had been forced to exercise his strikes on an erroneously qualified juror. In sum, the Court essentially found 1) that before complaining on appeal, the capital defendant must strike the juror who was erroneously qualified; then 2) show the seated jurors he was *forced* to take were unqualified. It would turn the logic, and pro-active dictates, of *Green* upside down to allow acquiescence to the seating of a juror a defendant had objected to, but simply opted not to strike for strategic reasons. Thus, the procedural bar here is a logical interpretation of the existing procedural bar in *Green*.

Also of note in *Green v. Maynard* is the Court's reference to a concomitant statute-based claim could also be *preserved* by voicing objection to the seating of an unqualified juror when the defendant has no further strikes available. *Id* at 543 n. 6. See S.C. Code § 14-7-1030 (requiring objection before jury impaneled or objection deemed waived). Again, the pro-active requirement is emphasized. Here, Appellant sat on his rights. Under the logic of *Green*, and under basic principles of waiver and issue preservation, the issue should not be reached. Appellant was never forced to accept this juror whom he claims is unqualified. According to his representation in the brief, Appellant planned his strikes from the strike list; however, he did not know if the State might strike other jurors, or how the strikes may ultimately fall in total. He did know, however, that he had moved to disqualify this juror, and yet he still failed to use an available strike. His issue is procedurally barred. At any rate, Appellant cannot show the juror should have been disqualified.

"[A] prospective juror may be excluded for cause when his views on capital punishment are such as would prevent or substantially impair the performance of his duties

as a juror in accordance with his instructions and his oath." *State v. Sapp*, 366 S.C. 283, 290-291, 621 S.E.2d 883, 886 (2005), *citing Wainwright v. Witt*, 469 U.S. 412, 424, 105 S.Ct. 844 (1985). "The ultimate consideration is that the juror be unbiased, impartial, and able to carry out the law as explained to him." *Sapp*, 366 S.C. at 291, 621 S.E.2d at 887.

"The determination whether a juror is qualified to serve in a capital case is within the sole discretion of the trial judge and is not reversible on appeal unless wholly unsupported by the evidence." *State v. Evins*, 373 S.C. 404, 418, 645 S.E.2d 904, 911 (2007). *See also State v. Longworth*, 313 S.C. 360, 365, 438 S.E.2d 219, 222 (1993); *State v. Bell*, 302 S.C. 18, 23, 393 S.E.2d 364, 367 (1990). "Deference must be paid to the trial court who sees and hears the juror." *Evins*, 373 S.C. at 418, 645 S.E.2d at 911, *citing State v. Green,* 301 S.C. 347, 392 S.E.2d 157 (1990).

Appellant's argument rests on parsed statements taken out of context which is contrary to settled law and unsupportive of error. The instant passage from *State v. Gilbert* is instructive:

> This Court will not consider only isolated statements made during voir dire but will examine the entire colloquy with the venireman in order to review his qualifications. Having done this, it is clear that the challenged juror was properly qualified. When questioned by the trial judge subsequent to confusing inquiries made by appellants' trial counsel, the juror stated that she would give due consideration to any mitigating factor that the court instructed her to consider.

277 S.C. 53, 56-57, 283 S.E.2d 179, 108-81 (1981).

Like the issue in *Gilbert*, when the whole of the answers are reviewed in the instant matter, the record supports the trial judge's determination that Juror 370 was qualified.

In capital *voir dire* proceeding, the parties and the prospective jurors will naturally engage in dialogue. Most all prospective jurors are being requested to answer broad questions about concepts and procedures that they know little or nothing about. It should be expect that many of the answers will demonstrate that disadvantage. *See, for example, State v. Bell*, 302 S.C. at 25, 393 S.E.2d at 368 ("The other two jurors initially misunderstood the bifurcation of the trial, but later, after clarification, responded that they could impose either the death penalty or a life sentence. The trial judge, therefore, did not abuse his discretion in qualifying the challenged jurors."); *State v. Green*, 301 S.C. at 354-55, 392 S.E.2d at 161 ("With regard to Mr. Brown, we find that while his responses indicated some confusion on his part, he demonstrated the ability to consider all evidence before reaching a decision."). The *voir dire* process should be used to uncover real issues with juror qualification. A juror should not be disqualified by simply pointing to missteps in the dialogue. *Id.*

Appellant is mistaken that the juror's responses ultimately indicated he would demand that the defense carry a certain burden of proof in regard to sentencing. (See BOA, p. 44). The record fully supports the trial judge's decision to qualify the juror, including his specific acknowledgment that the juror had answered more in line of "personal concepts" of what the procedure was, rather than indicating beliefs that would impair his ability to serve fairly. (R. p. 504, lines 7-16). The judge was especially impressed with the jurors eager anticipation of hearing the whole story, i.e. hearing from both sides, before making any sentencing decision. (R. p. 504, lines 17-21). This shows the proper "context" consideration of the entirety of the answers.

There was no hesitation or equivocation from the juror that he was a "three" (i.e. a juror who would listen and select the appropriate sentence), (R. p. 474, line 24 - p. 475, line

23). He confirmed to the trial judge in initial questioning that he would listen to the *all* the evidence before making a sentencing determination, (R. p. 483, lines 1-9); would keep an "open mind" on sentencing, (R. p. 483, line 17 - p. 484, line 2); and, would adhere to the Court's instruction on the law, (R. p. 477, lines 7-24). Specifically, when asked if he understood, or had any problem, with the principle that Appellant was presumed innocent, he responded, "Not at all." (R. p. 478, lines 2-24).

When questioned by defense counsel about his "opinion of the death penalty," the juror responded, though he was "not too up-to-date on this whole system," he thought "a lot of people get the death penalty when it is not deserved." (R. p. 486, lines 8-15). This is not what one would consider a clear, automatic death penalty inclined juror's stance to be. Then, when defense counsel asked about the circumstances of the killing, presuming the State proved murder (that it was not self-defense, accident or manslaughter), the juror's first response was that he "would still have to hear all the evidence, everything behind it ... When, how, where, all that stuff." (R. p. 488, lines 11-13). However, when pressed, he hedged, "I guess I would. If it was absolute, then definitely," but qualified that was only where all those things (absence of excuse or cause) were not a part of the case. (R. p. 488, lines 16-25). When defense counsel referenced mitigating factors, the juror agreed: "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. p. 490, line 20 - p. 491, line 12). Importantly, he inferred he would be inclined to impose death in egregious circumstances (proved 100%,

which, of course would place a higher burden on the State, not the defense).[17] (R. p. 491, line 13 - p. 492, line 24).

When taken in context, the juror's responses indicate that he could sentence to death where the State carried its burden in the worst of all possible cases, and there was absolutely no mitigation. Moreover, the juror had a personal understanding that the defense's job was to present evidence on the defendant's behalf, not simply that a sentencing decision is made upon conviction and the defense carried the burden of talking him out of it. In fact, he indicated his inclination to hear the full story due to an innate belief that "something had to happen" to prompt such violence. (See R. p. 493, lines 3-4, "Just to represent him, show something – I mean, something had to happen."). He confirmed to the solicitor that he answered defense counsel's questions based on his belief of how the system worked, "I thought that was kind of how it worked, but" if the trial judge instructed him "differently," he "wouldn't expect it" and would follow the judge's instructions.[18] (R. p. 496, lines 7-28). He denied that he would consider death "automatically." (R. p. 497, lines 12-18).

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[17] Incidently, this is consistent with his indication in *voir dire* and his juror questionnaire frankly indicating, "I really don't like police officers," and even indicated that he had received a ticket on the way to court that likely "enhanced that feeling," (though he would not allow it to affect the way he considered the evidence). (R. p. 476, lines 7-14). All in all, the juror's responses, in broad terms, appear to be less State oriented and more defense oriented.

[18] This belief that the system works with each side presenting argument or evidence is not novel or unique. In fact, after two other jurors were questioned from Juror 370, Juror 386 was questioned. That juror similarly responded: "I want both parties to prove what they have to put on the table and then I'd act accordingly." (R. p. 542, lines 9-11). Defense counsel raised no challenge to Juror 386. (R. p. 547, lines 17-24). Moreover, defense counsel did not strike this juror, and the juror served on the panel through sentencing. (R. p. 4432, lines 12-17).

On re-examination by defense counsel, he indicated again that if "all that bad stuff supporting the death penalty" is proven to him, he would "automatically *tend* to vote for the death penalty." (R. p. 501, lines 18 - p. 502, line 2)(emphasis added).

In sum, the responses show that the juror could impose death, and would perhaps be inclined to impose death in certain circumstances. The responses also show that he would, and indeed wanted, to listen to all facts and consider all circumstances before making a sentencing decision. It is true that certain answers appear to support an "automatic death penalty" vote, but careful and close examination of the responses as a whole rebuts such a contention. The trial judge did not abuse his discretion in qualifying the juror.

Lastly, Appellant's further argument that the juror was disqualified because he would not consider a plea for mercy was not a basis for disqualification. (R. p. 503, line 12 - p. 504, line 4). In fact, Appellant concedes this issue was not addressed by the trial judge. (BOA, p. 38). Therefore, this argument is procedurally barred. *State v. Freiburger*, *supra.* Even so, his argument is not supported by the record. Appellant has confused argument with evidence in interpreting the passage of the record at issue.

Appellant asked the juror even if "all that bad stuff in there" and shown, i.e. proof of guilt, and "they just argue for mercy, that is not something that is going to persuade you?" to which the juror responded, "no." (R. p. 492, lines13-24). The juror never indicated he would ignore a plea for mercy from family members, or friends, as presented in the penalty phase. Argument from counsel is not evidence of anything. *See, e.g., Simpson v. Moore*, 367 S.C. 587, 613, 627 S.E.2d 701, 715 (2006)(Pleicones, dissenting)("Counsel's closing argument is not evidence"); *Sosebee v. Leeke*, 293 S.C. 531, 535, 362 S.E.2d 22, 24 (1987)("closing argument is not evidence"). Even so, Appellant claims the response

indicates the juror's belief "that a plea for mercy was not sufficient to avoid *an automatic vote* for a death sentence." (BOA, p. 44). He claims this would be contrary to *Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009). (BOA, p. 44).

In *Rosemond*, the Supreme Court tied the propriety of the consideration of mercy to the receipt of "proper *evidence* of mercy." *Id* at 330, 680 S.E.2d at 10 (emphasis added). It is this consideration of mercy based on the evidence that makes the charge consistent with the instruction that "the jury should not be guided by sympathy, prejudice, passion, or public opinion." *Id*. Thus, according to *Rosemond*, the charging language *does not* support unfettered, unreasoned, emotional reaction; rather, the charge is meant to preserve the exercise of mercy *based on consideration of the evidence submitted.* At any rate, the juror testified that he would listen and consider all the evidence in accordance with the trial judge's instruction. (See R. p. 496, line 19 - p. 497, line 2; p. 499, lines 1-6). Thus, he would consider any "evidence of mercy" submitted. Again, the record fully supports the trial judge's ruling that the juror was qualified.

Appellant is not entitled to any relief.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment, conviction, and sentence of the lower court should be affirmed.

Respectfully submitted,

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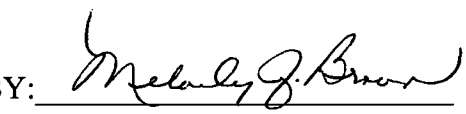
BY: 
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March 16, 2011.
Columbia, South Carolina.

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In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions
R. Markley Dennis, Jr., Circuit Court Judge

The State,

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Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the South Carolina Supreme Court's Order of August 13, 2007.

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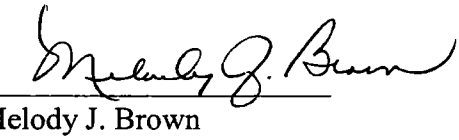

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