

# BLUME WEYBLE & NORRIS, LLC

## ATTORNEYS AT LAW

JOHN H. BLUME  
KEIR M. WEYBLE  
TERESA L. NORRIS  
DAVID I. BRUCK *OF COUNSEL*

1247 SUMTER STREET, SECOND FLOOR  
COLUMBIA, SOUTH CAROLINA 29201  
MAILING ADDRESS:  
POST OFFICE BOX 11744  
COLUMBIA, SC 29211  
PHONE: (803) 765-1044  
FAX: (803) 765-1143

May 5, 2009

RECEIVED

MAY 06 2009

S.C. SUPREME COURT

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

Re: *Freddie Eugene Owens v. State of South Carolina*, 2009-CP-23-0741

Dear Mr. Shearouse:

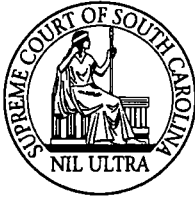
Thank you for your letter of May 1, 2009. Pursuant to your request, and *In re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996), I am writing to report on the status of the above-referenced capital post-conviction relief case. As your file likely reflects, Mr. Owens' *pro se* request for a stay of execution was granted by the South Carolina Supreme Court on March 5, 2009. On that same date, the Court assigned the case to the Hon. Edward W. Miller. Judge Miller held a hearing to determine Mr. Owens' financial status and desire for counsel on March 24, 2009. On March 27, 2009, Judge Miller entered an order appointing myself and Emily C. Paavola as counsel for Mr. Owens. Since then, we have been conducting a preliminary review of the record and other case materials, identifying potential claims for post-conviction relief, and identifying issues that will require further factual development. We also intend to file a counseled application for post-conviction relief on Mr. Owens' behalf by the expiration of the 60 day period for doing so set forth in *In re Stays*, 321 S.C. at 546, 471 S.E.2d at 141.

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

Sincerely yours,

*Keir M. Weyble*  
Keir M. Weyble (r)

c: Hon. Edward W. Miller  
Emily C. Paavola  
J. Anthony Mabry



# The Supreme Court of South Carolina

DANIEL E. SHEAROUSE  
CLERK OF COURT

BRENDA F. SHEALY  
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330  
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

May 1, 2009

Keir M. Weyble, Esquire  
Blume Weyble & Norris, LLC  
P.O. Box 11744  
Columbia, SC 29211

Re: Freddie Eugene Owens v. State

Dear Counsel:

As you know, the execution in this matter has been stayed pursuant to In re Stays of Execution in Capital Cases, 321 S.C. 544, 471 S.E2d. 140 (1996), to allow the defendant to pursue post-conviction relief, and you represent him in that PCR action which is filed as 2009-CP-23-0741. Under In re Stays of Execution in Capital Cases, the defendant must serve and file "a letter setting forth the status of the post-conviction relief matter every sixty (60) days. . . . If the Court determines this letter fails to show that the defendant is diligently pursuing the post-conviction relief action, the Court may issue an order dissolving the stay or setting forth additional requirements the defendant must meet to maintain the stay."

In the present case, you have not filed the required status letter. Therefore, it will be necessary for you to serve and file the required status letter within ten (10) days of the date of this letter. If you fail to do so or fail to serve and file a status letter every sixty (60) days thereafter, an execution notice may be issued.

Very truly yours,

CLERK

DES/dmh

Keir M. Weyble, Esquire

Page Two

May 1, 2009

cc: Assistant Attorney General J. Anthony Mabry  
The Honorable Edward Miller



# The Supreme Court of South Carolina

DANIEL E. SHEAROUSE  
CLERK OF COURT

BRENDA F. SHEALY  
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330  
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

March 5, 2009

Mr. Freddie Eugene Owens, #5065  
Lieber Correctional Institution  
P. O. Box 205  
Ridgeville, SC 29472

Re: The State v. Owens, Freddie Eugene

Dear Mr. Owens:

Enclosed is the order issued in the above entitled matter.

Very truly yours,

  
CLERK

DES/dmh

Enclosure

cc: Center for Capital Litigation  
Chief Appellate Defender Joseph L. Savitz, III  
Appellate Defender LaNelle C. DuRant  
Assistant Deputy Attorney General Donald J. Zelenka  
Assistant Attorney General J. Anthony Mabry  
The Honorable Robert Mills Ariail  
The Honorable Edward W. Miller  
Motte L. Talley, Esquire

# The Supreme Court of South Carolina

The State,

Respondent,

v.

Freddie Eugene Owens,

Petitioner.

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## ORDER

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Petitioner was convicted of murder, armed robbery, use of a firearm in the commission of a violent crime, and conspiracy to commit armed robbery. He was sentenced to death. This Court affirmed petitioner's death sentence in State v. Owens, 378 S.C. 636, 664 S.E.2d 80 (2008). On January 21, 2009, the United States Supreme Court denied petitioner's petition for a writ of certiorari.

Petitioner has now filed a pro se motion for a stay of execution while he pursues post-conviction relief (PCR). He also requests that trial counsel not provide any portion of petitioner's files to the Attorney General's Office until PCR counsel has been appointed and been given the opportunity to conduct an adequate investigation and file an amended PCR application.

The State has filed a return in which it states it does not oppose a

stay of execution, but objects to petitioner's request regarding disclosure of trial counsel's files.

In In re Stays of Execution, 321 S.C. 544, 471 S.E.2d 140 (1996), this Court stated that if the action of the United States Supreme Court on a capital defendant's petition for a writ of certiorari does not invalidate the sentence of death, the Clerk of this Court shall issue an execution notice.<sup>1</sup> If the defendant desires a stay to pursue state PCR, he must, within ten days of the date of the issuance of the execution notice, file a motion to stay with this Court, setting forth the issues intended to be raised in the PCR application. Id. The Court will thereafter assign a circuit judge to the case and issue a stay of execution. Id.

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

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<sup>1</sup> An execution notice has not been issued in this case.

until the judge issues a final order or judgment in the PCR action as long as the applicant files a PCR application within sixty days of the date of the order regarding counsel. Id.

S.C. Code Ann. § 17-27-130 (2003) states the following, in relevant part:

Where a defendant alleges ineffective assistance of prior trial counsel or appellate counsel as a ground for post-conviction relief or collateral relief under any procedure, the applicant shall be deemed to have waived the attorney-client privilege with respect to both oral and written communications between counsel and the defendant, and between retained or appointed experts and the defendant, to the extent necessary for prior counsel to respond to the allegation. This waiver of the attorney-client privilege shall be deemed automatic *upon the filing of the allegation alleging ineffective assistance of prior counsel* and the court need not enter an order waiving the privilege. Thereafter, counsel alleged to have been ineffective is free to discuss and disclose any aspect of the representation with representatives of the State for purposes of defending against the allegations of ineffectiveness, *to the extent necessary for prior counsel to respond to the allegation.*

(Emphasis added).

We find the issues petitioner states he will raise in his PCR application are sufficient to warrant a stay of execution. Accordingly, the request for a stay of execution is granted. The stay shall remain in effect to

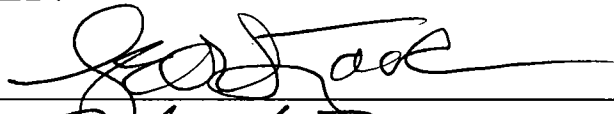
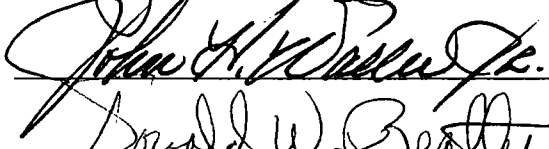
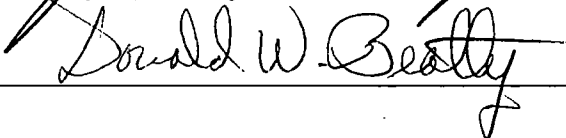
the extent provided by this Court in In re Stays of Execution in Capital Cases, supra.

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

As petitioner has not yet filed a PCR application, trial counsel may not make disclosures to the Attorney General's Office at this time. § 17-27-130. PCR counsel will have sixty days after the order designating him as counsel is issued to conduct an investigation and file a PCR application, which may include the issues petitioner has set forth in his motion for a stay of execution and any other issues of merit counsel chooses to raise. Only after the PCR application is filed will trial counsel be free to discuss and disclose any aspects of his representation of petitioner with the Attorney General's Office for purposes of defending against the allegations of ineffectiveness, and then only to the extent necessary for counsel to respond

to the allegations. We find these protections provided by section 17-27-130 and In re Stays of Execution are sufficient without further intervention by this Court regarding the handling of trial counsel's files.

IT IS SO ORDERED.

 C. J.  
 J.  
 J.

Pleicones, J. and Kittredge, J., not participating

Columbia, South Carolina

March 5, 2009

**STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT**

---

**RECEIVED**

FEB - 4 2009

S.C. SUPREME COURT

**Appeal from Greenville County  
Larry Patterson, Circuit Court Judge**

---

**THE STATE,**

Respondent,

v.

**FREDDIE EUGENE OWENS,**

Appellant.

---

**RETURN TO MOTION FOR STAY OF EXECUTION  
AND OPPOSITION TO REQUEST TO PREVENT LAWFUL  
DISCLOSURE OF EVIDENCE AND INFORMATION.**

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The Respondent State of South Carolina hereby makes a Return to the Motion for Stay dated January 22, 2009 and received January 29, 2009. The Respondent does not oppose the stay for the reasons set forth below. However, the State opposes the attempt by Owens to preclude access to a witness and evidence.

**MOTION FOR STAY OF EXECUTION**

On January 29, 2009, Owens served the State with his *pro se* Motion for a

Stay of Execution so that he may file an application for post-conviction relief.<sup>1</sup>

Owens alleges he wishes to pursue post-conviction relief and at such time he will allege the following grounds:

1. I was denied the right to effective assistance of counsel, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the South Carolina Constitution, by trial counsel's failure to object when the trial judge erred in disqualifying a juror and by trial counsel's failure to object to the solicitor's improper closing argument.
2. I was denied the right to effective assistance of counsel, guaranteed by the Sixth and Fourteenth Amendment to the United States

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**PROCEDURAL HISTORY**

Freddie Owens was initially convicted of murder, armed robbery, using a firearm during the commission of a violent crime and conspiracy to commit armed robbery after a trial before the Honorable Alexander Macauley and a jury. State v. Owens, 346 S.C. 637, 552, S.E.2d 745 (2001). The jury sentenced Owens to death for the murder of Irene Graves. Id. On his first appeal, this Court affirmed his convictions, but reversed his death sentence on the basis that defense counsel did not have sufficient time to investigate Owens' confession to the murder of his cell-mate which occurred during the statutory twenty-four (24) hour waiting period. Id.

Following a bench re-sentencing proceeding, Owens was again sentenced to death. This Court vacated the death sentence finding the trial judge's comments to Owens regarding his right to a jury trial at re-sentencing constituted reversible error. State v. Owens, 362 S.C. 175, 607 S.E.2d 78 (2004).

At his third sentencing proceeding, this time before a jury, Owens was sentenced to death for the third time. Owens appealed. This Court affirmed his death sentence on July 14, 2008. State v. Owens, 378 S.C. 636, 664 S.E.2d 80 (2008). This Court denied the petition for rehearing on August 8, 2008. Owens was represented in this appeal by Chief Appellate Defender Joseph L. Savitz and Assistant Appellate Defender LaNelle DuRant as appointed counsel.

Owens, through retained counsel, John H. Blume and Keir M. Weyble, made a Motion for a Stay of Execution on August 12, 2008. The State opposed the Stay of Execution. On September 5, 2008, this Court denied the Stay of Execution pursuant to In Re Stays of Execution, 321 S.C. 544, 471 S.E.2d 140 (1996) and Rule 23.3 of this Court finding the issues Owens alleged he wanted to raise to the United States Supreme Court were not preserved for review. Owens, through attorneys Blume and Weyble, made a petition for stay before the United States Supreme Court. On September 30, 2008, Chief Justice Roberts entered a stay of execution pending the timely filing and disposition of a petition for certiorari. Owens, through counsel, subsequently filed a Petition for Writ of Certiorari. The State opposed the grant of certiorari through its Brief in Opposition to the Petition for Writ of Certiorari. On January 21, 2009, the United States Supreme Court denied Owens' Petition for Writ of Certiorari.

Constitution and the corresponding provisions of the South Carolina Constitution, when trial counsel failed to preserve the state and federal constitutional issues related to the admission of a list of disciplinary infractions by failing to object on the basis of the Confrontation Clause and due process.

Owens also states within his Motion that he believes he has other viable post-conviction relief claims, however at this time he is not represented by counsel, does not have access to a copy of trial counsel's file<sup>2</sup>, and does not have any ability to conduct an investigation.

### **STATE'S POSITION REGARDING THE REQUESTED STAY**

The specific grounds alleged by Owens entitle Owens to a Stay of Execution pursuant to In re Stays of Execution in Capital Cases, 321 S.C. 544, 471 S.E.2d 140 (1996) to pursue post-conviction relief because each issue satisfies the condition precedent of being of a "general nature of the issues are appropriate for post-conviction relief."

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<sup>2</sup>In his Motion for Stay of Execution, Owens appears to argue he is entitled *to possession of trial counsel's file*. By statute, trial counsel's original file is to remain with trial counsel. S.C. Code Ann. § 17-27-150. It is not to be taken into the possession of new collateral counsel or the applicant, but they are authorized to have access and copies of the file. Further, original trial or appellate counsel is free to not only discuss, but "***disclose any aspect of the representation with representatives of the State*** for purposes of defending against the allegations of ineffectiveness, **to the extent necessary for prior counsel to respond to the allegation. . . .**" Respondents are not asserting that they have automatic access to the trial counsel's complete file in every case. However, *trial counsel* is and has been authorized to disclose any portion of the file *trial counsel* deems appropriate to address claims of ineffectiveness made by his client. Necessarily, this may involve disclosure of the complete file depending upon the nature or breadth of the particular allegations.

## STATE'S OBJECTION TO THE ANTICIPATORY REQUEST TO LIMIT ACCESS TO EVIDENCE .

The State objects to so much of Owens' Motion for Stay of Execution wherein Owens attempts to instruct, request, or direct his trial counsel, through this Court's anticipatory action, not to provide any portion of trial counsel's file to any representative of the Attorney General's office "*until post-conviction counsel . . . has been given the opportunity to conduct an adequate investigation and filed an amended application for post -conviction relief.*" This is clearly in contravention of the South Carolina Code of Laws.

S.C. Code Ann. Section 17-27-130 contains a waiver of the attorney-client privilege, "to the extent necessary for prior counsel to respond to the allegation." *See also Laughner v. United States*, 373 F.2d 326, 327 (5th Cir.1967) (where a habeas petitioner raises a claim of ineffective assistance of counsel, he waives the attorney-client privilege as to all communications with his allegedly ineffective lawyer); Johnson v. Alabama, 256 F.3d 1156, 1178 (11th Cir.2001)("...a party "waives its attorney-client privilege when it injects into this litigation an issue that requires testimony from its attorneys or testimony concerning the reasonableness of its attorneys' conduct." [cite omitted] By alleging that his attorneys provided ineffective assistance of counsel in their choice of a defense strategy, Johnson put

at issue-and thereby waived-any privilege that might apply to the contents of his conversations with those attorneys to the extent those conversations bore on his attorneys' strategic choices.”); Bullock v. Carver, 910 F.Supp. 551 (D.Utah 1995) (a petitioner claiming ineffective assistance of counsel in a habeas corpus motion has waived any attorney-client privilege); 81 Am.Jur.2d, *Witnesses* § 353 (1992) (waiver of the lawyer/client privilege is implied and automatic “[w]here a client testifies against the attorney, as where a defendant testifies adversely to his attorney's competence or alleges attorney misconduct ....”).

Section 17-27-130 specifically provides that a PCR applicant waives any attorney client privilege with regard to any allegations made in his PCR application and trial counsel may disclose any of trial counsel’s file in order to properly respond to the allegations made in the PCR application.<sup>3</sup> Additionally, in

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<sup>3</sup> In its pertinent part, §§17-27-130 states:

Where a defendant alleges ineffective assistance of prior trial counsel or appellate counsel as a ground for post-conviction relief or collateral relief under any procedure, the applicant shall be deemed to have waived the attorney-client privilege with respect to both oral and written communications between counsel and the defendant, and between retained or appointed experts and the defendant, to the extent necessary for prior counsel to respond to the allegation. This waiver of the attorney-client privilege shall be deemed ***automatic upon the filing of the allegation alleging ineffective assistance of prior counsel and the court need not enter an order waiving the privilege.*** Thereafter, counsel alleged to have been ineffective is ***free to discuss and disclose any aspect of the representation with representatives of the State*** for purposes of defending against the allegations of ineffectiveness, ***to the extent necessary for prior counsel to respond to the allegation.*** . . .

S.C. Code, § 17-27-130 (emphasis added).

order to file a proper Return to the application for post-conviction relief as required under Section 17-27-160 (B) within 30 days of the original application, the State must be allowed to discuss the allegations in the PCR application with trial counsel and have access to any records or documents within trial counsel's file that are responsive to the PCR application and to conduct appropriate discovery under Section 17-27-150 addressing the particular allegations within that particular application.

Owens has no legal right under our PCR statute, which he has indicated he has voluntarily chosen to pursue, to *prohibit* trial counsel from speaking with the Attorney General's Office regarding any allegations Owens actually raises in his PCR application (or any subsequent application) or from disclosing documents necessary to properly and truthfully defend Owens' particular allegations of ineffective assistance. Owens' assertion that trial counsel should refrain from disclosing documents necessary to defend the allegations against him in the application "*until . . . adequate time to investigate has passed, and the filing of an Amended PCR Application*" (when no PCR application as of yet has been filed) is baseless and not supported by our case law or statutes, particularly when there is no statutory requirement that an *amended* application would ever be filed in the

future.<sup>4</sup>

Additionally, the actions Owens encourages in this Motion would prohibit the swift, accurate, proper investigation of the truth of his claims in his PCR application and defeat an expedient search for the truth. See SCACR Rule 407, Rule 1.6 (b) (1)( “to prevent the client from committing a criminal act”),(6) (“ ... to respond to allegations in any proceeding concerning the lawyer’s representation”); (7) (“to comply with other law or a court order”); Rule 3.2 [Expediting Litigation]; Rule 3.4 (a) [ Fairness to Opposing Party and Counsel - access to evidence].<sup>5</sup>

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<sup>4</sup> Under the procedure of *In Re Stays of Execution*, the assigned judge should hold an appointment hearing of counsel within 30 days after the stay. To maintain the stay, the defendant through counsel, must timely file an application for post-conviction relief within sixty (60) days of the date of the order regarding counsel’s appointment. With the filing of any application, Section 17-27-150 is invoked to allow the waiver of the attorney-client privilege as to those identified claims.

<sup>5</sup> There is no authority that allows presentation or subornation of perjury in a civil case, including state PCR actions. See S.C. Rules of Civil Procedure, Form 5 [Application for Post-Conviction Relief]. (“[S]ince every application must be sworn under oath, any false statement of a material fact may serve as a basis of prosecution and conviction of perjury. Applicants should therefore exercise care to assure that all answers are true and correct.”). In a PCR action, the allegations are raised as facts “under oath” and under threat of future prosecution for falsehood. See Wilson v. State, 276 S.C. 609, 281 S.E.2d 128 (1981)(comment by state counsel in PCR action about possibility of perjury by Applicant in PCR action appropriate and not subject to a mistrial or chilling to the defendant’s rights). A claim of ineffectiveness raised under these conditions precedent authorizes prior counsel and the system of justice to address those matters fully. A recent Florida case, Oquendo v. State, 2008 WL 4998785, 5 (Fla.App. 4 Dist.,2008) is perceptive on this issue:

Post-conviction movants should also remain aware that penalties for direct contempt of court or perjury may be imposed when movants are untruthful in post-conviction proceedings. See *Roberts v. State*, 515 So.2d 434 (Fla. 5th DCA 1987) (approving a finding of direct contempt of court where the movant’s testimony was diametrically opposed to prior sworn testimony); see also *Emanuel v. State*, 601 So.2d 1273 (Fla. 4th DCA 1992) (explaining that a prosecution for perjury is the preferred alternative, but delineating under what circumstances direct contempt of court is appropriate).

Unless a credible threat of sanctions exists, post-conviction movants have little incentive

A grant of this extraordinary and anticipatory request would prevent the State and defense counsel's timely preparation to defend any specific allegations against his representation made in an application for post-conviction relief once it is filed, would prevent defense counsel's lawful revelation of materials and documents concerning those specifically raised allegations and would potentially cause additional delay for continuances and additional discovery. This is in contravention of the clear intent of the statutes, §§17-27-130, 17-27-160 and a lawful search for the truth.

WHEREFORE, having made a Return, the State agrees that Owens is entitled to a Stay of Execution to pursue a post-conviction relief application and have counsel appointed to file an application for post-conviction relief within sixty days of appointment pursuant to § 17-27-160 and *In Re Stays*.

Respectfully submitted,

HENRY D. McMASTER  
Attorney General

JOHN W. McINTOSH  
Chief Deputy Attorney General

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against saying whatever they choose in post-conviction proceedings, regardless of truth. An organized system of justice cannot operate without respect for truth. Those seeking justice must respect truth. As Justice Anstead has observed, "[p]erjury poisons the well from which justice flows." *Emanuel*, 601 So.2d at 1276.

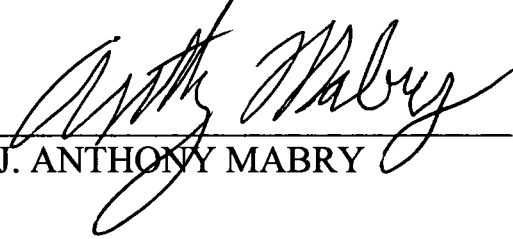
Id, (emphasis added).

DONALD J. ZELENKA  
Assistant Deputy Attorney General

J. ANTHONY MABRY  
Assistant Attorney General

**ATTORNEYS FOR  
RESPONDENT**

By:

  
\_\_\_\_\_  
J. ANTHONY MABRY

P.O. Box 11549  
Columbia, SC 29211  
February 4, 2009

## **CERTIFICATE OF SERVICE**

**I, J. Anthony Mabry**, hereby certify that I have served the Return to Motion for Stay of Execution and Opposition to Request to Prevent Lawful Disclosure of Evidence and Information in the foregoing action by depositing copies in the United States mail, postage prepaid, to the following:

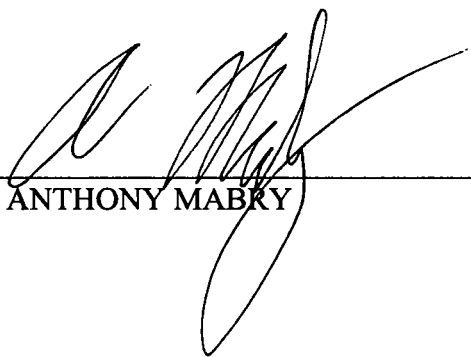
Freddie Eugene Owens, #5065  
Lieber Correctional Institution  
P. O. Box 205  
Ridgeville, SC 29472

Joseph L. Savitz, III, Esquire  
LaNelle DuRant, Esquire  
S.C. Commission on Indigent Defense  
Appellate Defense Division  
P.O. Box 11589  
Columbia, SC 29211

John H. Blume, III, Esquire  
Cornell Law School  
112 Myron Taylor Hall  
Ithaca, NY 14853

Keir M. Weyble, Esquire  
P.O. Box 11744  
Columbia, SC 29211

This 4<sup>th</sup> day of February, 2009.



---

J. ANTHONY MABRY

**CENTER FOR CAPITAL LITIGATION**

POST OFFICE BOX 11311  
COLUMBIA, SOUTH CAROLINA 29211

Voice: (803) 765-1044

Fax: (803) 765-1143

January 29, 2009

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

Re: *Freddie Eugene Owens v. State of South Carolina*

Dear Mr. Shearouse:

Please find enclosed for filing, the original and (6) copies of the proof of service for the Motion for Stay of Execution in the above captioned case. I am filing this on behalf of Freddie Eugene Owens, who filed his Motion for Stay pro se.

If you should have any questions, please do not hesitate to contact me.

FILED  
JAN 30 2009  
S.C. SUPREME COURT

Sincerely,

*Jill A. Rider*  
Jill A. Rider  
Paralegal

cc: Donald J. Zelenka, Esquire (Motion for Stay & Certificate of Service)  
Freddie Owens, 5065

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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The State of South Carolina, Respondent,

v.

Freddie Eugene Owens, Movant.

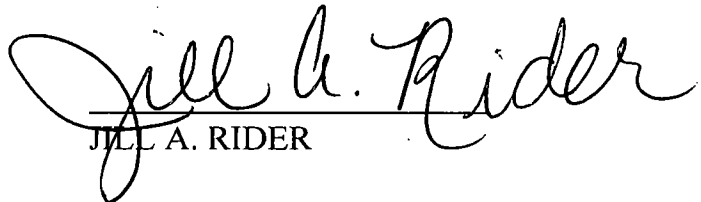
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**CERTIFICATE OF SERVICE**

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The undersigned certifies that a copy of the Motion for Stay of Execution in the above captioned case was mailed by first class United States mail, postage prepaid, this 29th day of January, 2009, upon the following:

Donald J. Zelenka  
Assistant Attorney General  
P.O. Box 11549  
Columbia, SC 29211

  
JILL A. RIDER

RECEIVED

JAN 30 2009

S.C. SUPREME COURT

RECEIVED

JAN 26 2009

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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The State of South Carolina, Respondent,

v.

Freddie Eugene Owens, Movant.

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**MOTION FOR STAY OF EXECUTION**

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## **I. Introduction.**

I, Freddie Eugene Owens, respectfully move this Court for an order staying my execution so that I may pursue state post-conviction relief. I further request that counsel be appointed to represent me in my post-conviction relief proceedings.

## **II. Facts Relevant To This Motion.**

I was convicted of murder, armed robbery, using a firearm during the commission of a violent crime, and conspiracy to commit armed robbery. *State v. Owens*, 346 S.C. 637, 552 S.E.2d 745 (2001). I received a death sentence for murder. *Id.* On my first appeal, this Court affirmed my convictions, but reversed the death sentence. *Id.* Following a bench re-sentencing proceeding, I again received a death sentence, and again this Court vacated the sentence. *State v. Owens*, 362 S.C. 175, 607 S.E.2d 78 (2004). My second re-sentencing proceeding was tried to a jury, which returned a death verdict. On July 14, 2008, this Court affirmed my death sentence following this second re-sentencing proceeding. *State v. Owens*, 378 S.C. 636, 664 S.E.2d 80, (2008). This Court denied a petition for a rehearing on August 8, 2008.

I have not previously filed an application for state post-conviction relief. I now desire to pursue my state post-conviction remedies, and I intend to raise the following issues in an application for post-conviction relief:

I was denied the right to effective assistance of counsel, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the South Carolina Constitution, by trial counsel's failure to object when the trial judge erred in disqualifying a juror and by trial counsel's failure to object to the solicitor's improper closing argument.

I was denied the right to effective assistance of counsel, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the South Carolina Constitution, when trial counsel failed to preserve the

state and federal constitutional issues related to the admission of a list of disciplinary infractions by failing to object on the basis of the Confrontation Clause and due process.

I do not have post-conviction counsel at this time. Further, I do not have trial counsel's file or any ability to conduct an investigation. Given those limitations, I cannot provide the court with any information regarding any additional claims that I may raise in my post-conviction application, although I believe there are other viable post-conviction claims available to me.

With the exception of the specific issues included in this motion at this time, I do not waive the attorney-client privilege to any extent, and I request that my trial counsel not provide any portion of my files to any representative of the Attorney General's office until post-conviction counsel has been appointed and has been given the opportunity to conduct an adequate investigation and file an amended application for post-conviction relief.

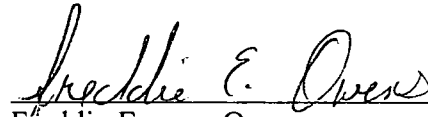
### **III. Reasons a Stay of Execution Should be Granted.**

According to the procedures set forth in *In re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996), I am entitled to a stay of execution while I pursue state post-conviction relief. Because I am indigent, I am also entitled to appointed counsel within thirty days of the stay order.

### **IV. Conclusion.**

For all of the reasons set forth above, I respectfully move this Court for an order staying my execution so that I may pursue state post-conviction relief.

Respectfully submitted,

  
Freddie Eugene Owens

January 22, 2009



HENRY McMASTER  
ATTORNEY GENERAL

February 4, 2009

RECEIVED

FEB - 4 2009

S.C. SUPREME COURT

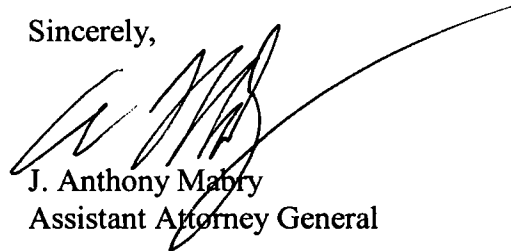
Honorable Daniel E. Shearouse  
Clerk, South Carolina Supreme Court  
P. O. Box 11330  
Columbia, SC 29211

Re: The State v. Freddie Eugene Owens

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Respondent's ***Return to Motion for Stay of Execution and Opposition to Request to Prevent Lawful Disclosure of Evidence and Information*** in the above-referenced matter for filing in your office. By copy of this letter, I am serving all interested parties with same.

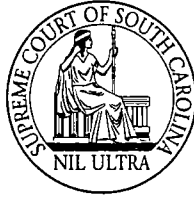
Sincerely,



J. Anthony Mabry  
Assistant Attorney General

JAM/lbb  
Enclosure

cc: Joseph L. Savitz, III, Esquire  
LaNelle DuRant, Esquire  
John H. Blume, III, Esquire  
Keir M. Weyble, Esquire  
Sandi Wofford, Victims Assistance  
Freddie Owens, # 5065



# The Supreme Court of South Carolina

DANIEL E. SHEAROUSE  
CLERK OF COURT

BRENDA F. SHEALY  
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330  
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

January 28, 2009

Freddie Eugene Owens, #5065  
Lieber Correctional  
Institution  
P. O. Box 205  
Ridgeville, SC 29472

Re: The State v. Owens, Freddie Eugene

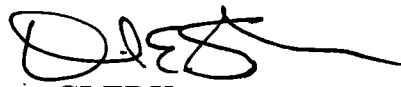
Dear Mr. Owens:

This will acknowledge receipt of your Motion for Stay of Execution in the above entitled matter.

However, no certificate of service was enclosed with the motion and the Court cannot act upon ex parte motions.

It will be necessary for you to file a certificate of service of the Motion for Stay of Execution no later than February 9, 2009.

Very truly yours,



CLERK

DES/jjp

cc: Chief Appellate Defender Joseph L. Savitz, III  
Appellate Defender LaNelle C. DuRant  
John H. Blume, III, Esquire  
Keir M. Weyble, Esquire  
Center for Capital Litigation  
Assistant Deputy Attorney General Donald J. Zelenka  
Assistant Attorney General J. Anthony Mabry  
Solicitor Robert Mills Ariail

Supreme Court of the United States

Office of the Clerk

Washington, DC 20543-0001

RECEIVED

JAN 26 2009

January 21, 2009

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

S.C. SUPREME COURT

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

Re: Freddie Eugene Owens  
v. South Carolina  
No. 08-7189  
(Your No. 26520)

Dear Clerk:

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

The petition for a writ of certiorari is denied.

Sincerely,



William K. Suter, Clerk

Jan-26-2009 16:44

From-SC ATTORNEY GENERAL CAPITAL LITIGATION 803-734-4035

T-614 P.002/002 F-679

RECEIVED

JAN 26 2009

S.C. SUPREME COURT

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

January 21, 2009

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

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

RECEIVED

JAN 26 2009

S.C. SUPREME COURT

Re: Freddie Eugene Owens  
v. South Carolina  
No. 08-7189

Dear Mr. Zelenka:

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

The petition for a writ of certiorari is denied.

Sincerely,



William K. Suter, Clerk

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

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

November 10, 2008

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

**RECEIVED**

NOV 14 2008

**S.C. SUPREME COURT**

Re: Freddie Eugene Owens  
v. South Carolina  
No. 08-7189  
(Your No. 26520)

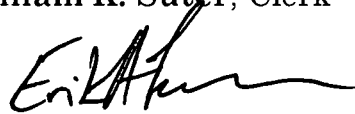
Dear Clerk:

The petition for a writ of certiorari in the above entitled case was filed on November 5, 2008 and placed on the docket November 10, 2008 as No. 08-7189.

Sincerely,

William K. Suter, Clerk

by



Erik A. Fossum  
Case Analyst

# BLUME WEYBLE & NORRIS, LLC

## ATTORNEYS AT LAW

JOHN H. BLUME  
KEIR M. WEYBLE  
TERESA L. NORRIS  
DAVID I. BRUCK *OF COUNSEL*

1247 SUMTER STREET, SECOND FLOOR  
COLUMBIA, SOUTH CAROLINA 29201  
MAILING ADDRESS:  
POST OFFICE BOX 11744  
COLUMBIA, SC 29211  
PHONE: (803) 765-1044  
FAX: (803) 765-1143

November 12, 2008

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

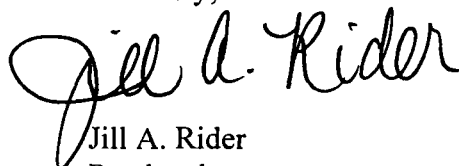
RE: *Freddie Eugene Owens v. State of South Carolina*

Dear Mr. Shearouse:

Please be advised that the Petition for Writ of Certiorari in the above referenced case was filed in the Supreme Court of the United States on November 6, 2008.

If you should have any questions, please do not hesitate to contact this office.

Sincerely,

  
Jill A. Rider  
Paralegal

Enclosure

RECEIVED

NOV 18 2008

S.C. SUPREME COURT,

**Shealy, Brenda**

---

**From:** Danny Bickell [dbickell@supremecourt.gov]  
**Sent:** Tuesday, September 30, 2008 3:55 PM  
**To:** Beth\_Walton@ca4.uscourts.gov; Shealy, Brenda  
**Subject:** Owens Stay Order  
**Attachments:** 08A257 Owens v. South Carolina.pdf

The order granting a stay of execution in, Freddie Owens v. South Carolina (08A257) is attached. Please call with any questions.

Thank you,

Danny Bickell  
(202) 479-3024

<<08A257 Owens v. South Carolina.pdf>>

**Supreme Court of the United States**

No. 08A257

FREDDIE EUGENE OWENS,

Applicant,

v.

SOUTH CAROLINA

---

**O R D E R**

---

UPON CONSIDERATION of the application of counsel for the applicant, and the response filed thereto,

IT IS ORDERED that the execution of sentence of death is stayed pending the timely filing and disposition of a petition for a writ of certiorari. See *Cole v. Texas*, 499 U.S. 1301 (1991) (SCALIA, J., in chambers). Should the petition for a writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for a writ of certiorari is granted, the stay shall terminate upon the issuance of the mandate of this Court.

/s/ John G. Roberts, Jr.  
Chief Justice of the United States

Dated this 30th  
day of September, 2008.

## Hopkins, Debbie

---

**From:** John Blume [john-blume@lawschool.cornell.edu]  
**Sent:** Tuesday, September 30, 2008 4:04 PM.  
**To:** Zelenka, Don; beth\_walton@ca4.uscourts.gov; Hopkins, Debbie; Stella\_Donelan@scd.uscourts.gov  
**Cc:** john@blumelaw.com  
**Subject:** Re: Fwd: Freddie Owens v. South Carolina - 08A257 - State Opposition to Stay Request in the United States Supreme Court - EXECUTION DATE - October 3, 2008

I am writing to inform you that I was just notified that Chief Justice Roberts granted the motion for a stay of execution pending the disposition and filing of a petition for writ of certiorari in the Supreme Court of the United States.

Sincerely,

John Blume At 11:39 AM 9/25/2008, Don Zelenka wrote:

>TO:  
>Debbie Hopkins - Deputy Clerk - South Carolina Supreme Court Beth  
>Walton - Deputy Clerk - United States Court of Appeals for the Fourth  
>Circuit Stella Donelan - Deputy Clerk , United States District Court  
>for the District of South Carolina  
>  
>CC: John H. Blume  
>  
>For your info on the status of this matter. Mr. Owens is seeking a stay  
>in the US Supreme Court for the purpose of seeking certiorari from the  
>South Carolina Supreme Court denial in his direct appeal. The state is  
>opposing the particular stay request. Mr. Owens has not sought state  
>postconviction or federal habeas corpus and has not sought a stay to seek either remedy.  
>  
>Mr. Owens is not a "volunteer" and is currently being represented by  
>John Blume of Cornell Law School. I am emailing Mr. Blume concerning  
>this communication with the court.  
>  
>  
>  
>Donald J. Zelenka  
>Assistant Deputy Attorney General  
>South Carolina Attorney General's Office P.O. Box 11549 Columbia, South  
>Carolina 29211  
>803-734-3601  
>803-734-4035 (FAX)  
>agdzenka@ag.state.sc.us  
>  
> >>> Don Zelenka 9/25/2008 11:21 AM >>>  
>To: Danny Bickell, Staff Attorney, United States Supreme Court  
>CC: John H. Blume, Counsel for Mr. Owens From : Donald J. Zelenka,  
>Assistant Deputy Attorney General  
>Date: September 25, 2008  
>  
>RE: Freddie Owens v. South Carolina, 08A257 - Opposition to Application  
>for Stay in the United States Supreme Court  
>  
>Attached is the State of South Carolina's Opposition to the Application  
>for Stay in the above matter. The original are being mailed this date  
>to the Court and counsel Blume. I am also attaching, for the court's  
>convenience Mr. Blume application as received by this office on  
>September 24, 2008. As noted on both this matter arises from a direct  
>appeal from Mr. Owens death sentence after the South Carolina Supreme  
>Court denied his similar request for a stay on September 5, 2008. His  
>sentence is scheduled to be carried out on Friday October 3, 2008 at 6  
>PM. I you have any questions, please contact me.  
>

>Please confirm receipt of this email.

>  
>  
>  
>  
>  
>

>Donald J. Zelenka

>Assistant Deputy Attorney General

>South Carolina Attorney General's Office P.O. Box 11549 Columbia, South

>Carolina 29211

>803-734-3601

>803-734-4035 (FAX)

>agdzelenka@ag.state.sc.us

John H. Blume

Professor of Law

Director, Cornell Death Penalty Project

112 Myron Taylor Hall

Ithaca, NY 14853

(607) 255-1030

**Hopkins, Debbie**

---

**From:** John Blume [john-blume@lawschool.cornell.edu]  
**Sent:** Friday, September 26, 2008 7:57 AM  
**To:** Zelenka, Don; beth\_walton@ca4.uscourts.gov; Hopkins, Debbie; Stella\_Donelan@scd.uscourts.gov  
**Cc:** john@blumelaw.com  
**Subject:** RE: Freddie Owens v. South Carolina - 08A257 - StateOpposition to Stay Request in the United States Supreme Court  
-EXECUTION DATE - October 3, 2008

Dear Ms. Hopkins, Ms. Walton and Ms. Donelan:

I would like to clarify one point in Mr. Zelenka's email. I am currently serving as *pro bono* counsel for Mr. Owens in connection with his petition for writ of certiorari in the United States Supreme Court. However, I do not intend to represent Mr. Owens in state post-conviction or federal habeas corpus proceedings. My representation is limited to the certiorari proceedings.

Very truly yours,

John H. Blume

---

**From:** Don Zelenka [mailto:AGDZELENKA@ag.state.sc.us]  
**Sent:** Thu 9/25/2008 11:39 AM  
**To:** beth\_walton@ca4.uscourts.gov; DHopkins@sccourts.org; Stella\_Donelan@scd.uscourts.gov  
**Cc:** john@blumelaw.com; John Blume  
**Subject:** Fwd: Freddie Owens v. South Carolina - 08A257 - StateOpposition to Stay Request in the United States Supreme Court - EXECUTION DATE - October 3, 2008

TO:  
Debbie Hopkins - Deputy Clerk - South Carolina Supreme Court  
Beth Walton - Deputy Clerk - United States Court of Appeals for the Fourth Circuit  
Stella Donelan - Deputy Clerk , United States District Court for the District of South Carolina

CC: John H. Blume

For your info on the status of this matter. Mr. Owens is seeking a stay in the US Supreme Court for the purpose of seeking certiorari from the South Carolina Supreme Court denial in his direct appeal. The state is opposing the particular stay request. Mr. Owens has not sought state postconviction or federal habeas corpus and has not sought a stay to seek either remedy.

Mr. Owens is not a "volunteer" and is currently being represented by John Blume of Cornell Law School. I am emailing Mr. Blume concerning this communication with the court.

Donald J. Zelenka  
Assistant Deputy Attorney General  
South Carolina Attorney General's Office  
P.O. Box 11549  
Columbia, South Carolina 29211  
803-734-3601  
803-734-4035(FAX)  
agdzenka@ag.state.sc.us

>>> Don Zelenka 9/25/2008 11:21 AM >>>  
To: Danny Bickell, Staff Attorney, United States Supreme Court  
CC: John H. Blume, Counsel for Mr. Owens  
From : Donald J. Zelenka, Assistant Deputy Attorney General  
Date: September 25, 2008

RE: Freddie Owens v. South Carolina, 08A257 - Opposition to Application for Stay in the United States Supreme Court

9/26/2008

Attached is the State of South Carolina's position to the Application for Stay in the above matter. The original are being mailed this date to the Court and counsel Blume. I am also attaching, for the court's convenience Mr. Blume application as received by this office on September 24, 2008. As noted on both this matter arises from a direct appeal from Mr. Owens death sentence after the South Carolina Supreme Court denied his similar request for a stay on September 5, 2008. His sentence is scheduled to be carried out on Friday October 3, 2008 at 6 PM. If you have any questions, please contact me.

Please confirm receipt of this email.

Donald J. Zelenka  
Assistant Deputy Attorney General  
South Carolina Attorney General's Office  
P.O. Box 11549  
Columbia, South Carolina 29211  
803-734-3601  
803-734-4035(FAX)  
agdzenka@ag.state.sc.us

9/26/2008

RECEIVED

SEP 25 2008

S.C. SUPREME COURT

No. \_\_\_\_\_

\_\_\_\_\_  
IN THE SUPREME COURT OF THE UNITED STATES  
\_\_\_\_\_

FREDDIE EUGENE OWENS, *Petitioner*,

vs.

JON OZMINT, COMMISSIONER, SOUTH CAROLINA DEPARTMENT OF  
CORRECTIONS, *Respondent*.  
\_\_\_\_\_

APPLICATION FOR A STAY OF EXECUTION PENDING THE FILING AND  
DISPOSITION OF A PETITION FOR WRIT OF CERTIORARI

I. INTRODUCTION.

Petitioner, Freddie Eugene Owen is an indigent prisoner under sentence of death imposed by the Greenville County, South Carolina, Court of General Sessions. Mr. Owens was convicted of murder, armed robbery, using a firearm during the commission of a violent crime, and conspiracy to commit armed robbery. *State v. Owens*, 346 S.C. 637, 552 S.E.2d 745 (2001). He received a death sentence for murder. *Id.* On his first appeal, the South Carolina Supreme Court affirmed Mr. Owens's convictions, but reversed his death sentence. *Id.* Following a bench re-sentencing proceeding, Mr. Owens again received a death sentence, and again the South Carolina Supreme Court vacated the sentence. *State v. Owens*, 362 S.C. 175, 607 S.E.2d 78 (2004). Mr. Owens's second re-sentencing proceeding was tried to a jury, which returned a death verdict. On July 14, 2008, the South Carolina Supreme Court affirmed Mr. Owens's death sentence following his second re-sentencing proceeding. *State v. Owens*, \_\_ S.C. \_\_, \_\_ S.E.2d \_\_, 2008

WL 2715953 (2008).<sup>1</sup> The South Carolina Supreme Court denied Mr. Owens's petition for a rehearing on August 8, 2008.

On August 12, 2008, Mr. Owens moved the South Carolina Supreme Court for an order staying his execution date pending the filing and disposition of a petition for writ of certiorari in this Court. On September 5, 2008, the South Carolina Supreme Court denied Mr. Owens's motion for a stay of execution and issued an order scheduling his execution for Friday, October 3, 2008.<sup>2</sup> As set forth below, Mr. Owens now requests that this Court enter an order staying his execution so as to permit him to pursue a petition for writ of certiorari in this Court.

**II. THIS COURT SHOULD STAY MR. OWENS'S EXECUTION BECAUSE HE HAS SUBSTANTIAL CONSTITUTIONAL CLAIMS THAT CANNOT BE ADEQUATELY CONSIDERED BY THIS COURT ABSENT A STAY.**

Mr. Owens intends to seek a writ of certiorari from the South Carolina Supreme Court's decision affirming his death sentence following his second re-sentencing proceeding. In his petition for a writ of certiorari, Mr. Owens intends to present the following federal questions:

- I. Whether the admission of certain disciplinary records under state hearsay exception rules violated the Confrontation Clause of the United States Constitution?
- II. Whether the South Carolina Supreme Court's finding that the Confrontation Clause claim was procedurally barred is an adequate and independent state ground given that trial counsel a) objected to the admission of the evidence, and

---

<sup>1</sup> A copy of the South Carolina Supreme Court's opinion is attached to this application as Attachment A.

<sup>2</sup> In accordance with Supreme Court Rule 23, a copy of the state court's order, dated September 5, 2008, is attached to this application as Attachment B. The order directs that Mr. Owens's execution be carried out "on the fourth Friday after the service upon [Director Ozmint] or receipt of this notice." Undersigned counsel reads this language to exclude the day of the order's entry from the "fourth Friday" calculation. Including the day of the order's entry would result in an execution date of September 26, 2008.

b) challenged the trustworthiness and reliability of the evidence, which are the precise values embodied in the Confrontation Clause?

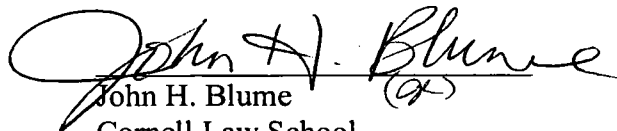
- III. Whether the South Carolina Supreme Court's holding that petitioner's Due Process Clause challenge to the prosecutor's sentencing phase argument was procedurally defaulted for want of contemporaneous objection is inconsistent with *Darden v. Wainwright*, 477 U.S. 185 (1985) and its progeny, which make an objection relevant to, but not determinative of, the issue of whether the prosecutor's argument rendered the proceeding fundamentally unfair?

Absent a stay of his execution, Mr. Owens will not have adequate time to properly prepare and file a petition for writ of certiorari in which to raise these constitutional claims. Accordingly, this Court should enter an order staying Mr. Owens's execution so that he may prepare and file a timely petition for a writ of certiorari.

### III. CONCLUSION.

Wherefore, for the foregoing reasons, this Court should enter an order staying Mr. Owens's execution pending the filing and final disposition of a petition for writ of certiorari in this Court.

Respectfully submitted,



John H. Blume  
Cornell Law School  
Myron Taylor Hall  
Ithaca, NY 14853  
(607) 255-1030  
COUNSEL FOR PETITIONER

September 23<sup>rd</sup>, 2008.

# **ATTACHMENT A**

Westlaw.

664 S.E.2d 80  
378 S.C. 636, 664 S.E.2d 80

FOR EDUCATIONAL USE ONLY

Page 1

**H**

State v. Owens  
S.C., 2008.

Supreme Court of South Carolina.  
The STATE, Respondent,  
v.  
Freddie Eugene OWENS, Appellant.  
No. 26520.

Heard June 12, 2008.  
Decided July 14, 2008.  
Rehearing Denied Aug. 8, 2008.

**Background:** Defendant was convicted in the Circuit Court, Greenville County, Alexander S. Macaulay, J., of murder, armed robbery, use of firearm in commission of violent crime, and conspiracy to commit armed robbery, and he was sentenced to death. Defendant appealed. The Supreme Court, 346 S.C. 637, 552 S.E.2d 745, affirmed murder and armed robbery convictions, reversed death sentence, and remanded for new sentencing proceeding. On remand, after bench trial, the Circuit Court, John W. Kittredge, J., sentenced defendant to death. Defendant appealed. The Supreme Court, 362 S.C. 175, 607 S.E.2d 78, reversed and remanded. On remand, a jury in the Circuit Court, Larry R. Patterson, J., returned death sentence. Defendant appealed.

**Holding:** The Supreme Court, Pleicones, J., held that list of disciplinary infractions allegedly committed by defendant while in Department of Corrections was admissible pursuant to business records exception to rule against hearsay.

Affirmed.

West Headnotes

**[1] Sentencing and Punishment 350H ⚡ 1789(3)**

350H Sentencing and Punishment

350HVIII The Death Penalty  
350HVIII(G) Proceedings  
350HVIII(G)4 Determination and Disposition

350Hk1789 Review of Proceedings to Impose Death Sentence

350Hk1789(3) k. Presentation and Reservation in Lower Court of Grounds of Review. Most Cited Cases

Capital defendant failed to preserve issues for appellate review, challenging juror disqualification and solicitor's closing argument, where there was no objection at trial to juror disqualification or to closing argument.

**[2] Sentencing and Punishment 350H ⚡ 1767**

350H Sentencing and Punishment

350HVIII The Death Penalty

350HVIII(G) Proceedings

350HVIII(G)2 Evidence

350Hk1755 Admissibility

350Hk1767 k. Documentary Evidence. Most Cited Cases

List of disciplinary infractions allegedly committed by capital defendant while in Department of Corrections was admissible at sentencing hearing pursuant to business records exception to rule against hearsay; trial judge permitted state to introduce redacted version of prison offenses and required state to omit from list all details of incidents, and all incidents not witnessed by prison guard or staff member. Rules of Evid., Rule 803(6); Code 1976, § 19-5-510.

**\*\*80** Chief Appellate Defender Joseph L. Savitz, III, and Appellate Defender LaNelle C. DuRant, both of South Carolina Commission on Indigent Defense, Division of Appellate Defense, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General J. Anthony Mabry,

all of Columbia, and Robert Mills Ariail, of Greenville, for Respondent.

Justice PLEICONES:

**\*637** Appellant appeals his death sentence following a second resentencing proceeding. This opinion consolidates his appeal and the mandatory proportionality review. We affirm.

Appellant was convicted of murder, armed robbery, using a firearm during the commission of a violent crime, and conspiracy to commit armed robbery, and received a death sentence for murder, thirty years for armed robbery, and five years for each of the other two offenses. On his first appeal, the convictions were affirmed, but his death sentence reversed and his five year sentence for firearm possession vacated.<sup>FN1</sup> **\*638** *State v. Owens*, 346 S.C. 637, 552 S.E.2d 745 (2001). Following a bench resentencing proceeding, appellant again received a death sentence. This **\*\*81** Court vacated that sentence, finding the trial judge's comments to appellant in regard to his right to a jury trial constituted reversible error. *State v. Owens*, 362 S.C. 175, 607 S.E.2d 78 (2004).

FN1. Under S.C.Code Ann. § 16-23-490(A), no firearm sentence may be imposed where the defendant receives a death sentence or life sentence without parole for the violent crime. The vacation of appellant's sentence was conditional: if appellant were ultimately to receive a life sentence for murder, then the five year sentence would be reimposed.

This second resentencing was tried to a jury which returned a death sentence, finding two aggravating circumstances: (1) the murder was committed in the commission of robbery while armed with a deadly weapon and (2) the murder was committed while in the commission of larceny with use of a deadly weapon. S.C.Code Ann. § 16-3-20(C)(a)(1)(d) and (e). Appellant raises three issues on appeal.

## ISSUES

- 1) Whether the trial judge erred in disqualifying a juror?
- 2) Whether the solicitor's closing argument was improper?
- 3) Whether the trial judge erred in admitting redacted prison disciplinary records?

## ANALYSIS

[1] Appellant conceded at oral argument that there was no objection at trial to the juror disqualification or to the closing argument. Without an objection, neither of these issues is properly preserved for appellate review. *E.g.*, *State v. Stone*, 376 S.C. 32, 655 S.E.2d 487 fn. 1 (2007) ("South Carolina's strict error preservation rules are no less applicable in death penalty cases"). Under these circumstances, we do not reach the merits of either issue.

[2] One issue is preserved for review: Appellant contends the trial court erred in admitting a list of disciplinary infractions allegedly committed by appellant while in the Department of Corrections because its admission violated the prohibition against hearsay, appellant's Confrontation Clause rights, and his due process rights. Neither the Confrontation Clause nor due process was raised to the trial court, and accordingly neither constitutional claim is preserved for our **\*639** review. *State v. Stone*, *supra*. We address only the hearsay issue.

The trial judge permitted the State to introduce a redacted version of appellant's prison offenses pursuant to the business records exception to the rule against hearsay. In so doing, he required the State to omit from the list all details of the incidents, and all incidents not witnessed by a prison guard or staff member. These rulings reduced the number of incidents to 28, which were presented to the jury in this format<sup>FN2</sup>:

FN2. We have made one minor alteration

in choosing to omit the names of the victims from the list.

1. April 13, 2001, breaks toilet, sink and sprinkler
2. May 26, 2001, throws hot water on another inmate
3. May 27, 2001, had a six and a half inch shank made from fencing and toothbrush
4. June 14, 2001, spat on a correctional officer
5. February 8, 2002, a 14 inch solid brass shank
6. March 29, 2002, stabs correctional officer in the face with a shank
7. June 12, 2002, stabs an inmate in the shower
8. June 15, 2002, kicks an inmate who is restrained in a restraint chair
9. August 5, 2002, slaps a male nurse in the face
10. August 17, 2002, throws a food tray and hits an officer in the head
11. August 23, 2002, struck an officer in the face with his fist
12. October 22, 2002, hits an officer in the face with his fist
13. October 23, 2002, sets fire to cell
14. December 22, 2002, shank made from fencing
15. December 30, 2002, a ten inch shank made from a push rod of the sink
16. July 17, 2005, spits in the face of an officer
17. August 26, 2005, slaps an officer in the face
18. August 31, 2005, sets fire to cell
- \*\*82** 19. September 11, 2005, threatens an officer
- \*640** 20. January 1, 2006, a 12 inch homemade

knife

21. January 3, 2006, breaks cell door window with broom stick
22. January 13, 2006, throws feces on an officer, hitting him in the face
23. February 3, 2006, spits in the face of another inmate
24. February 4, 2006, orally threatens an officer
25. February 28, 2006, a 12 inch weapon hidden between the mattresses
26. April 4, 2006, an eight and a half inch shank made from flat metal sharpened at the edge and wrapped with ace bandage
27. May 1, 2006, sets fire to his mattress
28. May 20, 2006, throws coffee on an officer

Appellant contends the records are inadmissible hearsay because they are not trustworthy under Rule 803(6), SCRE. We find no abuse of discretion in the trial judge's decision finding trustworthy those incidents witnessed by prison staff. *E.g.*, *State v. Pittman*, 373 S.C. 527, 647 S.E.2d 144 (2007) (admission of evidence with trial judge's discretion); *cf. Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980) *overruled on other grounds* *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) (properly administered, Rule 803(6) exceptions are among the safest against a confrontation-clause challenges).

Moreover, appellant has not asked to argue against the precedent of *State v. Whipple*, 324 S.C. 43, 476 S.E.2d 683 (1996) which held that these types of prison disciplinary records are admissible at the sentencing phase of a capital trial under the Uniform Business Records as Evidence Act, S.C.Code Ann. § 19-5-510 (the Act). *Id.* cited with approval in *State v. Holmes*, 361 S.C. 333, 605 S.E.2d 19

# Message Confirmation Report

SEP-05-2008 09:04 AM FRI

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Name :

Name/Number : 97651143  
Page : 6  
Start Time : SEP-05-2008 09:03AM FRI  
Elapsed Time : 00' 40"  
Mode : STD ECM  
Results : [O.K]

---

## The Supreme Court of South Carolina

The State, Respondent,  
v.  
Freddie Eugene Owens, Appellant.

The Honorable Alexander S. Macaulay  
Greenville County  
Trial Court Case No. 1998-GS-23-5218  
1998-GS-23-5220  
1998-GS-23-5222

---

### ORDER

---

TO THE HONORABLE JON D. OZMINT, DIRECTOR,  
DEPARTMENT OF CORRECTIONS:

This is to notify you that the sentence of death imposed in the case of  
The State v. Freddie Eugene Owens, from which an appeal has been taken  
has been affirmed and finally disposed of by the Supreme Court and the  
remittitur has been sent down to the Clerk of the Court of General Sessions of  
Greenville County.

IT IS, THEREFORE, required of you by Section 17-25-370 of the  
Code of Laws of South Carolina to execute the judgment and sentence of  
death imposed on said appellant on the fourth Friday after the service upon  
you or receipt of this notice.

STATE OF SOUTH CAROLINA )  
COUNTY OF DORCHESTER )

AFFIDAVIT OF PERSONAL COUNTY  
SERVICE

I, McKither Bodison at Lieber Correctional Institution, South  
Carolina Department of Corrections, hereby certify that I personally served a copy of the  
*Execution Order of The Supreme Court of South Carolina*, dated September 5, 2008,  
on **FREDDIE EUGENE OWENS, #5065**, at 12:48 p M., on September 5,  
2008.

s/ McKither Bodison

SWORN TO AND SUBSCRIBED before

me this 5<sup>th</sup> Day of September, 2008

Patly E. Britt - Forre  
Notary Public for South Carolina

My Commission Expires: 5/1/2018

RECEIVED

SEP - 9 2008

S.C. SUPREME COURT

ACKNOWLEDGE RECEIPT OF ORDER:

Freddie Eugene Owens, #5065  
Freddie Eugene Owens, #5065

# The Supreme Court of South Carolina

The State,

Respondent,

v.

Freddie Eugene Owens,

Appellant.

The Honorable Alexander S. Macaulay  
Greenville County  
Trial Court Case No. 1998-GS-23-5218  
1998-GS-23-5220  
1998-GS-23-5222

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## ORDER

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TO THE HONORABLE JON D. OZMINT, DIRECTOR,  
DEPARTMENT OF CORRECTIONS:

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IT IS, THEREFORE, required of you by Section 17-25-370 of the Code of Laws of South Carolina to execute the judgment and sentence of death imposed on said appellant on the fourth Friday after the service upon you or receipt of this notice.

Let a copy of this notice be served immediately upon the appellant.

  
CHIEF DEPUTY CLERK

Columbia, South Carolina

September 5, 2008

cc: John H. Blume, III, Esquire  
Keir M. Weyble, Esquire  
Assistant Deputy Attorney General Donald J. Zelenka  
Assistant Attorney General J. Anthony Mabry  
The Honorable Robert M. Ariail  
The Honorable Mark Sanford  
David M. Tatarsky, Esquire

# Message Confirmation Report

SEP-05-2008 09:00 AM FRI

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Elapsed Time : 00'14"  
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Results : [O.K]

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## The Supreme Court of South Carolina

The State, Respondent,  
v.  
Freddie Eugene Owens, Appellant.

The Honorable Alexander S. Macaulay  
Greenville County  
Trial Court Case No. 1998-GS-23-5218  
1998-GS-23-5220  
1998-GS-23-5222

---

### ORDER

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TO THE HONORABLE JON D. OZMINT, DIRECTOR,  
DEPARTMENT OF CORRECTIONS:

This is to notify you that the sentence of death imposed in the case of The State v. Freddie Eugene Owens, from which an appeal has been taken has been affirmed and finally disposed of by the Supreme Court and the remittitur has been sent down to the Clerk of the Court of General Sessions of Greenville County.

IT IS, THEREFORE, required of you by Section 17-25-370 of the Code of Laws of South Carolina to execute the judgment and sentence of death imposed on said appellant on the fourth Friday after the service upon you or receipt of this notice.

# The Supreme Court of South Carolina

The State,

Respondent,

v.

Freddie Eugene Owens,

Appellant.

The Honorable Alexander S. Macaulay  
Greenville County  
Trial Court Case No. 1998-GS-23-5218  
1998-GS-23-5220  
1998-GS-23-5222

---

## ORDER

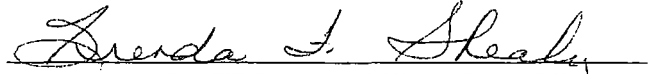
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TO THE HONORABLE JON D. OZMINT, DIRECTOR,  
DEPARTMENT OF CORRECTIONS:

This is to notify you that the sentence of death imposed in the case of The State v. Freddie Eugene Owens, from which an appeal has been taken has been affirmed and finally disposed of by the Supreme Court and the remittitur has been sent down to the Clerk of the Court of General Sessions of Greenville County.

IT IS, THEREFORE, required of you by Section 17-25-370 of the Code of Laws of South Carolina to execute the judgment and sentence of death imposed on said appellant on the fourth Friday after the service upon you or receipt of this notice.

Let a copy of this notice be served immediately upon the appellant.

  
CHIEF DEPUTY CLERK

Columbia, South Carolina

September 5, 2008

cc: John H. Blume, III, Esquire  
Keir M. Weyble, Esquire  
Assistant Deputy Attorney General Donald J. Zelenka  
Assistant Attorney General J. Anthony Mabry  
The Honorable Robert M. Arian  
The Honorable Mark Sanford  
David M. Tatarsky, Esquire

# Message Confirmation Report

SEP-05-2008 09:02 AM FRI

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Results : [O.K.]

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## The Supreme Court of South Carolina

The State, Respondent,  
v.  
Freddie Eugene Owens, Appellant.

The Honorable Alexander S. Macaulay  
Greenville County  
Trial Court Case No. 1998-GS-23-5218  
1998-GS-23-5220  
1998-GS-23-5222

---

### ORDER

---

TO THE HONORABLE JON D. OZMINT, DIRECTOR,  
DEPARTMENT OF CORRECTIONS:

This is to notify you that the sentence of death imposed in the case of  
The State v. Freddie Eugene Owens, from which an appeal has been taken  
has been affirmed and finally disposed of by the Supreme Court and the  
remittitur has been sent down to the Clerk of the Court of General Sessions of  
Greenville County.

IT IS, THEREFORE, required of you by Section 17-25-370 of the  
Code of Laws of South Carolina to execute the judgment and sentence of  
death imposed on said appellant on the fourth Friday after the service upon  
you or receipt of this notice.

# The Supreme Court of South Carolina

The State,

Respondent,

v.

Freddie Eugene Owens,

Appellant.

The Honorable Alexander S. Macaulay  
Greenville County  
Trial Court Case No. 1998-GS-23-5218  
1998-GS-23-5220  
1998-GS-23-5222

---

## ORDER

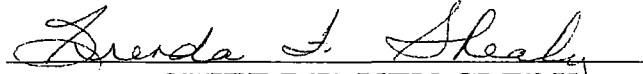
---

TO THE HONORABLE JON D. OZMINT, DIRECTOR,  
DEPARTMENT OF CORRECTIONS:

This is to notify you that the sentence of death imposed in the case of The State v. Freddie Eugene Owens, from which an appeal has been taken has been affirmed and finally disposed of by the Supreme Court and the remittitur has been sent down to the Clerk of the Court of General Sessions of Greenville County.

IT IS, THEREFORE, required of you by Section 17-25-370 of the Code of Laws of South Carolina to execute the judgment and sentence of death imposed on said appellant on the fourth Friday after the service upon you or receipt of this notice.

Let a copy of this notice be served immediately upon the appellant.

  
CHIEF DEPUTY CLERK

Columbia, South Carolina

September 5, 2008

cc: John H. Blume, III, Esquire  
Keir M. Weyble, Esquire  
Assistant Deputy Attorney General Donald J. Zelenka  
Assistant Attorney General J. Anthony Mabry  
The Honorable Robert M. Ariail  
The Honorable Mark Sanford  
David M. Tatarsky, Esquire

# Message Confirmation Report

SEP-05-2008 08:58 AM FRI

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Elapsed Time : 00'40"  
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Results : [O.K]

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## The Supreme Court of South Carolina

The State, Respondent,  
v.  
Freddie Eugene Owens, Appellant.

The Honorable Alexander S. Macaulay  
Greenville County  
Trial Court Case No. 1998-GS-23-5218  
1998-GS-23-5220  
1998-GS-23-5222

---

### ORDER

---

TO THE HONORABLE JON D. OZMINT, DIRECTOR,  
DEPARTMENT OF CORRECTIONS:

This is to notify you that the sentence of death imposed in the case of  
The State v. Freddie Eugene Owens, from which an appeal has been taken  
has been affirmed and finally disposed of by the Supreme Court and the  
remittitur has been sent down to the Clerk of the Court of General Sessions of  
Greenville County.

IT IS, THEREFORE, required of you by Section 17-25-370 of the  
Code of Laws of South Carolina to execute the judgment and sentence of  
death imposed on said appellant on the fourth Friday after the service upon  
you or receipt of this notice.

# The Supreme Court of South Carolina

The State,

Respondent,

v.

Freddie Eugene Owens,

Appellant.

The Honorable Alexander S. Macaulay  
Greenville County

Trial Court Case No. 1998-GS-23-5218

1998-GS-23-5220

1998-GS-23-5222

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## ORDER

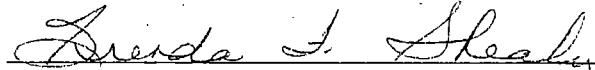
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TO THE HONORABLE JON D. OZMINT, DIRECTOR,  
DEPARTMENT OF CORRECTIONS:

This is to notify you that the sentence of death imposed in the case of The State v. Freddie Eugene Owens, from which an appeal has been taken has been affirmed and finally disposed of by the Supreme Court and the remittitur has been sent down to the Clerk of the Court of General Sessions of Greenville County.

IT IS, THEREFORE, required of you by Section 17-25-370 of the Code of Laws of South Carolina to execute the judgment and sentence of death imposed on said appellant on the fourth Friday after the service upon you or receipt of this notice.

Let a copy of this notice be served immediately upon the appellant.

  
CHIEF DEPUTY CLERK

Columbia, South Carolina

September 5, 2008

cc: John H. Blume, III, Esquire  
Keir M. Weyble, Esquire  
Assistant Deputy Attorney General Donald J. Zelenka  
Assistant Attorney General J. Anthony Mabry  
The Honorable Robert M. Ariail  
The Honorable Mark Sanford  
David M. Tatarsky, Esquire

# The Supreme Court of South Carolina

The State,

Respondent,

v.

Freddie Eugene Owens,

Appellant.

---

## ORDER

---

Appellant was convicted of murder, armed robbery, use of a firearm in the commission of a violent crime, and conspiracy to commit armed robbery, and he was sentenced to death. This Court affirmed appellant's death sentence in State v. Owens, Op. No. 26520 (S.C. Sup. Ct. filed July 14, 2008)(copy attached). Appellant's petition for rehearing was denied and the remittitur was sent to the lower court on August 8, 2008. Appellant now seeks a stay of execution pending the filing and disposition of a petition for a writ of certiorari in the United States Supreme Court (USSC). The State opposes a stay of execution.

In order for a capital defendant to obtain a stay of execution following the conclusion of his direct appeal and pending a petition for a writ of certiorari to the USSC, he must, within ten days of the date of the

execution notice,<sup>1</sup> make an appropriate motion for this Court to stay the execution under United States Supreme Court Rule 23.3. In re Stays of Execution in Capital Cases, 321 S.C. 544, 471 S.E.2d 140 (1996). The motion must set forth the federal question(s) intended to be raised in the petition for a writ of certiorari. Id. As long as one of the federal questions asserted *has been adequately preserved under state law so that it can be reviewed by the USSC*, this Court will grant a stay of execution for ninety days from the date the remittitur was sent for the appellant to file a petition for a writ of certiorari. Id.

Appellant states he intends to file a petition for a writ of certiorari in the USSC raising the following questions:

1. Did the admission of certain prison disciplinary records under state hearsay exception rules violate the Confrontation Clause of the United States Constitution?
2. Was the South Carolina Supreme Court's finding that the Confrontation Clause claim was procedurally barred an adequate and independent state ground given that trial counsel a) objected to the admission of the evidence and b) challenged the trustworthiness and reliability of the evidence, which are the precise values embodied in the Confrontation

---

<sup>1</sup> Notice of execution has not been issued in this case.

Clause?

3. Was the South Carolina Supreme Court's holding that appellant's Due Process Clause challenge to the prosecutor's sentencing phase argument was procedurally defaulted for want of a contemporaneous objection inconsistent with *Darden v. Wainwright*, 477 U.S. 185 (1985) and its progeny which make an objection relevant to, but not determinative of, the issue whether the prosecutor's argument rendered the proceeding fundamentally unfair?

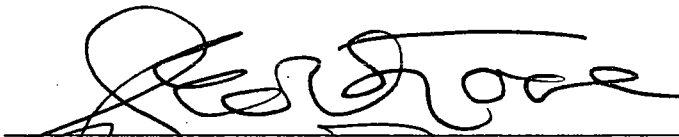
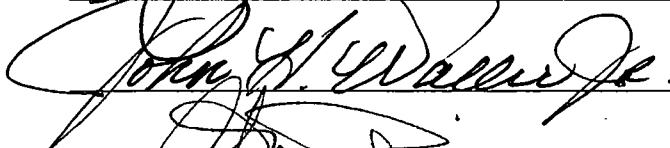
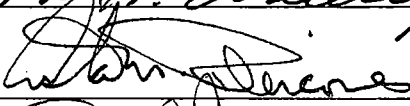
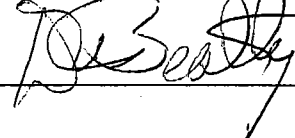
We find the issues appellant intends to raise to the USSC are not preserved for review. Appellant's argument that admission of the disciplinary records violated the Confrontation Clause was not raised in the trial court. State v. Dunbar, 356 S.C. 138, 587 S.E.2d 691 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge."). Appellant's two remaining issues were never raised to this Court, which appellant had the opportunity to do by way of a reply brief or in his petition for rehearing.<sup>2</sup> See U.S. Sup. Ct. Rule 19(g)(when seeking review of a state court judgment, a petitioner must specify the stage of the proceedings, both in the court of first instance and in

---

<sup>2</sup> The State argued in its brief that the issue regarding the solicitor's closing argument was not preserved for review. Appellant did not file a reply brief setting forth the Darden argument he now makes.

the appellate court, when the federal questions sought to be reviewed were raised, the method or manner of raising them, and the way they were passed on by the courts so as to show that the federal question was timely and properly raised and that the USSC has jurisdiction to review the judgment on a writ of certiorari). The petition for a stay of execution is therefore denied.

IT IS SO ORDERED.

  
C. J.  
  
J.  
  
J.  
  
J.

Kittredge, J., not participating

Columbia, South Carolina

September 5, 2008

664 S.E.2d 80  
378 S.C. 636, 664 S.E.2d 80

FOR EDUCATIONAL USE ONLY

Page 4

(2004) *vacated and remanded on other grounds* *Holmes v. South Carolina*, 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006). Appellant contends that the continuing validity of *Whipple* is in doubt as that decision predates the adoption of the SCRE, and alleges that Rule 803(6) added a veracity requirement to the admissibility requirements for a business record. Contrary to appellant's position, trustworthiness is an issue under the Act, \*641 not a new condition created by Rule 803(6). *Kershaw County Dep't of Soc. Servs. v. McCaskill*, 276 S.C. 360, 278 S.E.2d 771 (1981); *see also State v. Rice*, 375 S.C. 302, 652 S.E.2d 409 (Ct.App.2007).

378 S.C. 636, 664 S.E.2d 80

END OF DOCUMENT

Appellant failed to show an abuse of discretion in the trial judge's decision to admit the redacted prison disciplinary incidents. *State v. Pittman*, *supra*; *State v. Whipple*, *supra*.

#### PROPORTIONALITY REVIEW

Pursuant to S.C.Code Ann. § 16-3-25(c) (2003), we have conducted a proportionality review and find the death sentence was not the result of passion, prejudice, or any other arbitrary factor. Furthermore, a review of other decisions demonstrates that appellant's sentence was neither excessive nor disproportionate. *See State v. Humphries*, 325 S.C. 28, 479 S.E.2d 52 (1996) (murder of convenience store operator in the commission of attempted armed robbery); *State v. Simpson*, 325 S.C. 37, 479 S.E.2d 57 (1996) (murder of convenience store operator in the commission of armed robbery).

#### CONCLUSION

Appellant's capital sentence is

**AFFIRMED.**

TOAL, C.J., MOORE, WALLER and BEATTY,  
JJ., concur.  
S.C., 2008.  
*State v. Owens*

## **ATTACHMENT B**

## The Supreme Court of South Carolina

The State,

Respondent,

v.

Freddie Eugene Owens,

Appellant.

---

### ORDER

---

Appellant was convicted of murder, armed robbery, use of a firearm in the commission of a violent crime, and conspiracy to commit armed robbery, and he was sentenced to death. This Court affirmed appellant's death sentence in State v. Owens, Op. No. 26520 (S.C. Sup. Ct. filed July 14, 2008)(copy attached). Appellant's petition for rehearing was denied and the remittitur was sent to the lower court on August 8, 2008. Appellant now seeks a stay of execution pending the filing and disposition of a petition for a writ of certiorari in the United States Supreme Court (USSC). The State opposes a stay of execution.

In order for a capital defendant to obtain a stay of execution following the conclusion of his direct appeal and pending a petition for a writ of certiorari to the USSC, he must, within ten days of the date of the

execution notice,<sup>1</sup> make an appropriate motion for this Court to stay the execution under United States Supreme Court Rule 23.3. In re Stays of Execution in Capital Cases, 321 S.C. 544, 471 S.E.2d 140 (1996). The motion must set forth the federal question(s) intended to be raised in the petition for a writ of certiorari. Id. As long as one of the federal questions asserted *has been adequately preserved under state law so that it can be reviewed by the USSC*, this Court will grant a stay of execution for ninety days from the date the remittitur was sent for the appellant to file a petition for a writ of certiorari. Id.

Appellant states he intends to file a petition for a writ of certiorari in the USSC raising the following questions:

1. Did the admission of certain prison disciplinary records under state hearsay exception rules violate the Confrontation Clause of the United States Constitution?
2. Was the South Carolina Supreme Court's finding that the Confrontation Clause claim was procedurally barred an adequate and independent state ground given that trial counsel a) objected to the admission of the evidence and b) challenged the trustworthiness and reliability of the evidence, which are the precise values embodied in the Confrontation

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<sup>1</sup> Notice of execution has not been issued in this case.

Clause?

3. Was the South Carolina Supreme Court's holding that appellant's Due Process Clause challenge to the prosecutor's sentencing phase argument was procedurally defaulted for want of a contemporaneous objection inconsistent with *Darden v. Wainwright*, 477 U.S. 185 (1985) and its progeny which make an objection relevant to, but not determinative of, the issue whether the prosecutor's argument rendered the proceeding fundamentally unfair?

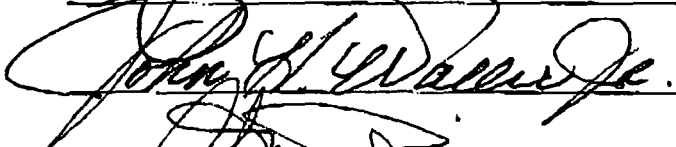
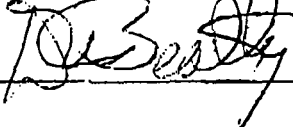
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<sup>2</sup> The State argued in its brief that the issue regarding the solicitor's closing argument was not preserved for review. Appellant did not file a reply brief setting forth the *Darden* argument he now makes.

the appellate court, when the federal questions sought to be reviewed were raised, the method or manner of raising them, and the way they were passed on by the courts so as to show that the federal question was timely and properly raised and that the USSC has jurisdiction to review the judgment on a writ of certiorari). The petition for a stay of execution is therefore denied.

IT IS SO ORDERED.

  
C. J.  
  
J.  
  
J.  
  
J.

Kittredge, J., not participating

Columbia, South Carolina

September 5, 2008

# The Supreme Court of South Carolina

The State,

Respondent,

v.

Freddie Eugene Owens,

Appellant.

The Honorable Alexander S. Macaulay  
Greenville County

Trial Court Case No. 1998-GS-23-5218  
1998-GS-23-5220  
1998-GS-23-5222

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## ORDER

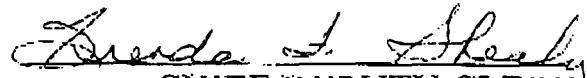
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TO THE HONORABLE JON D. OZMINT, DIRECTOR,  
DEPARTMENT OF CORRECTIONS:

This is to notify you that the sentence of death imposed in the case of The State v. Freddie Eugene Owens, from which an appeal has been taken has been affirmed and finally disposed of by the Supreme Court and the remittitur has been sent down to the Clerk of the Court of General Sessions of Greenville County.

IT IS, THEREFORE, required of you by Section 17-25-370 of the Code of Laws of South Carolina to execute the judgment and sentence of death imposed on said appellant on the fourth Friday after the service upon you or receipt of this notice.

Let a copy of this notice be served immediately upon the appellant.

  
CHIEF DEPUTY CLERK

Columbia, South Carolina

September 5, 2008

cc: John H. Blume, III, Esquire  
Keir M. Weyble, Esquire  
Assistant Deputy Attorney General Donald J. Zelenka  
Assistant Attorney General J. Anthony Mabry  
The Honorable Robert M. Ariail  
The Honorable Mark Sanford  
David M. Tatarsky, Esquire

No. \_\_\_\_\_

---

IN THE SUPREME COURT OF THE UNITED STATES

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FREDDIE EUGENE OWENS, *Petitioner*,

vs.

JON OZMINT, COMMISSIONER, SOUTH CAROLINA DEPARTMENT OF  
CORRECTIONS, *Respondent*.

---

PROOF OF SERVICE

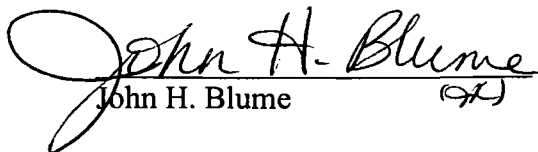
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I, John H. Blume, do declare that on this date, September \_\_, 2008, as required by Supreme Court Rule 29, I have served the enclosed APPLICATION FOR A STAY OF EXECUTION PENDING THE FILING AND DISPOSITION OF A PETITION FOR WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail, with first-class postage prepaid, and properly addressed to:

Donald J. Zelenka  
Assistant Deputy Attorney General  
P.O. Box 11549  
Columbia, SC 29211

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 23 2008.

  
John H. Blume

**Cc:** john@blumelaw.com; John Blume

**Subject:** Fwd: Freddie Owens v. South Carolina - 08A257 - State Opposition to Stay in the United States Supreme Court - EXECUTION DATE - October 3, 2008

TO:

Debbie Hopkins - Deputy Clerk - South Carolina Supreme Court

Beth Walton - Deputy Clerk - United States Court of Appeals for the Fourth Circuit

Stella Donelan - Deputy Clerk , United States District Court for the District of South Carolina

CC: John H. Blume

For your info on the status of this matter. Mr. Owens is seeking a stay in the US Supreme Court for the purpose of seeking certiorari from the South Carolina Supreme Court denial in his direct appeal. The state is opposing the particular stay request. Mr. Owens has not sought state postconviction or federal habeas corpus and has not sought a stay to seek either remedy.

Mr. Owens is not a "volunteer" and is currently being represented by John Blume of Cornell Law School. I am emailing Mr. Blume concerning this communication with the court.

Donald J. Zelenka

Assistant Deputy Attorney General

South Carolina Attorney General's Office

P.O. Box 11549

Columbia, South Carolina 29211

803-734-3601

803-734-4035(FAX)

agdzenka@ag.state.sc.us

>>> Don Zelenka 9/25/2008 11:21 AM >>>

To: Danny Bickell, Staff Attorney, United States Supreme Court

CC: John H. Blume, Counsel for Mr. Owens

From : Donald J. Zelenka, Assistant Deputy Attorney General

Date: September 25, 2008

RE: Freddie Owens v. South Carolina, 08A257 - Opposition to Application for Stay in the United States Supreme Court

Attached is the State of South Carolina's Opposition to the Application for Stay in the above matter. The original are being mailed this date to the Court and counsel Blume. I am also attaching, for the court's convenience Mr. Blume application as received by this office on September 24, 2008. As noted on both this matter arises from a direct appeal from Mr. Owens death sentence after the South Carolina Supreme Court denied his similar request for a stay on September 5, 2008. His sentence is scheduled to be carried out on Friday October 3, 2008 at 6 PM. If you have any questions, please contact me.

Please confirm receipt of this email.

Donald J. Zelenka

Assistant Deputy Attorney General

South Carolina Attorney General's Office

P.O. Box 11549

Columbia, South Carolina 29211

803-734-3601

803-734-4035(FAX)

agdzenka@ag.state.sc.us

9/25/2008

**Hopkins, Debbie**

---

**From:** Shearouse, Daniel  
**Sent:** Thursday, September 25, 2008 11:50 AM  
**To:** Hopkins, Debbie  
**Subject:** RE: Freddie Owens v. South Carolina - 08A257 - State Opposition to Stay Request in the United States Supreme Court - EXECUTION DATE - October 3, 2008

No just put it in the file. Hopefully, the USSC will say no quickly so that can get going with getting a stay to pursue PCR.

Dan

---

**From:** Hopkins, Debbie  
**Sent:** Thursday, September 25, 2008 11:45 AM  
**To:** Shearouse, Daniel  
**Subject:** FW: Freddie Owens v. South Carolina - 08A257 - State Opposition to Stay Request in the United States Supreme Court - EXECUTION DATE - October 3, 2008

Dan,  
  
Let me know if I need to do anything with this information from Don.  
  
Thanks.

*Debbie M. Hopkins*  
  
*Administrative Assistant*  
  
*South Carolina Supreme Court*  
  
*P. O. Box 11330*  
  
*Columbia, South Carolina 29211*  
  
*(803) 734-1080*

---

**From:** Don Zelenka [mailto:AGDZELENKA@ag.state.sc.us]  
**Sent:** Thursday, September 25, 2008 11:39 AM  
**To:** beth\_walton@ca4.uscourts.gov; Hopkins, Debbie; Stella\_Donelan@scd.uscourts.gov

9/25/2008

# The Supreme Court of South Carolina

The State,

Respondent,

v.

Freddie Eugene Owens,

Appellant.

---

## ORDER

---

Appellant was convicted of murder, armed robbery, use of a firearm in the commission of a violent crime, and conspiracy to commit armed robbery, and he was sentenced to death. This Court affirmed appellant's death sentence in State v. Owens, Op. No. 26520 (S.C. Sup. Ct. filed July 14, 2008)(copy attached). Appellant's petition for rehearing was denied and the remittitur was sent to the lower court on August 8, 2008. Appellant now seeks a stay of execution pending the filing and disposition of a petition for a writ of certiorari in the United States Supreme Court (USSC). The State opposes a stay of execution.

In order for a capital defendant to obtain a stay of execution following the conclusion of his direct appeal and pending a petition for a writ of certiorari to the USSC, he must, within ten days of the date of the

execution notice,<sup>1</sup> make an appropriate motion for this Court to stay the execution under United States Supreme Court Rule 23.3. In re Stays of Execution in Capital Cases, 321 S.C. 544, 471 S.E.2d 140 (1996). The motion must set forth the federal question(s) intended to be raised in the petition for a writ of certiorari. Id. As long as one of the federal questions asserted *has been adequately preserved under state law so that it can be reviewed by the USSC*, this Court will grant a stay of execution for ninety days from the date the remittitur was sent for the appellant to file a petition for a writ of certiorari. Id.

Appellant states he intends to file a petition for a writ of certiorari in the USSC raising the following questions:

1. Did the admission of certain prison disciplinary records under state hearsay exception rules violate the Confrontation Clause of the United States Constitution?
2. Was the South Carolina Supreme Court's finding that the Confrontation Clause claim was procedurally barred an adequate and independent state ground given that trial counsel a) objected to the admission of the evidence and b) challenged the trustworthiness and reliability of the evidence, which are the precise values embodied in the Confrontation

---

<sup>1</sup> Notice of execution has not been issued in this case.



# The Supreme Court of South Carolina

DANIEL E. SHEAROUSE  
CLERK OF COURT

BRENDA F. SHEALY  
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330  
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

September 5, 2008

John H. Blume, III, Esquire  
Keir M. Weyble, Esquire  
Blume Weyble & Norris, LLC  
P.O. Box 11744  
Columbia, SC 29211

Re: The State v. Owens, Freddie Eugene

Dear Counsel:

Enclosed is the order issued in the above entitled matter.

Very truly yours,

CHIEF DEPUTY CLERK

BFS/dmh

Enclosure

cc: Assistant Deputy Attorney General Donald J. Zelenka  
Assistant Attorney General J. Anthony Mabry  
The Honorable Robert Mills Ariail

# The Supreme Court of South Carolina

The State,

Respondent,

v.

Freddie Eugene Owens,

Appellant.

---

## ORDER

---

Appellant was convicted of murder, armed robbery, use of a firearm in the commission of a violent crime, and conspiracy to commit armed robbery, and he was sentenced to death. This Court affirmed appellant's death sentence in State v. Owens, Op. No. 26520 (S.C. Sup. Ct. filed July 14, 2008)(copy attached). Appellant's petition for rehearing was denied and the remittitur was sent to the lower court on August 8, 2008. Appellant now seeks a stay of execution pending the filing and disposition of a petition for a writ of certiorari in the United States Supreme Court (USSC). The State opposes a stay of execution.

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execution notice,<sup>1</sup> make an appropriate motion for this Court to stay the execution under United States Supreme Court Rule 23.3. In re Stays of Execution in Capital Cases, 321 S.C. 544, 471 S.E.2d 140 (1996). The motion must set forth the federal question(s) intended to be raised in the petition for a writ of certiorari. Id. As long as one of the federal questions asserted *has been adequately preserved under state law so that it can be reviewed by the USSC*, this Court will grant a stay of execution for ninety days from the date the remittitur was sent for the appellant to file a petition for a writ of certiorari. Id.

Appellant states he intends to file a petition for a writ of certiorari in the USSC raising the following questions:

1. Did the admission of certain prison disciplinary records under state hearsay exception rules violate the Confrontation Clause of the United States Constitution?
2. Was the South Carolina Supreme Court's finding that the Confrontation Clause claim was procedurally barred an adequate and independent state ground given that trial counsel a) objected to the admission of the evidence and b) challenged the trustworthiness and reliability of the evidence, which are the precise values embodied in the Confrontation

---

<sup>1</sup> Notice of execution has not been issued in this case.

Clause?

3. Was the South Carolina Supreme Court's holding that appellant's Due Process Clause challenge to the prosecutor's sentencing phase argument was procedurally defaulted for want of a contemporaneous objection inconsistent with *Darden v. Wainwright*, 477 U.S. 185 (1985) and its progeny which make an objection relevant to, but not determinative of, the issue whether the prosecutor's argument rendered the proceeding fundamentally unfair?

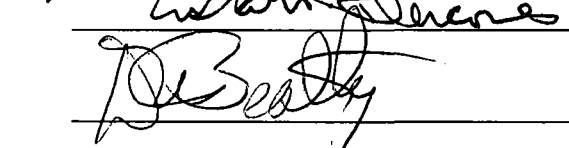
We find the issues appellant intends to raise to the USSC are not preserved for review. Appellant's argument that admission of the disciplinary records violated the Confrontation Clause was not raised in the trial court. State v. Dunbar, 356 S.C. 138, 587 S.E.2d 691 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge."). Appellant's two remaining issues were never raised to this Court, which appellant had the opportunity to do by way of a reply brief or in his petition for rehearing.<sup>2</sup> See U.S. Sup. Ct. Rule 19(g) (when seeking review of a state court judgment, a petitioner must specify the stage of the proceedings, both in the court of first instance and in

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<sup>2</sup> The State argued in its brief that the issue regarding the solicitor's closing argument was not preserved for review. Appellant did not file a reply brief setting forth the Darden argument he now makes.

the appellate court, when the federal questions sought to be reviewed were raised, the method or manner of raising them, and the way they were passed on by the courts so as to show that the federal question was timely and properly raised and that the USSC has jurisdiction to review the judgment on a writ of certiorari). The petition for a stay of execution is therefore denied.

IT IS SO ORDERED.

  
C. J.  
  
J.  
  
J.  
  
J.

Kittredge, J., not participating

Columbia, South Carolina

September 5, 2008



HENRY McMASTER  
ATTORNEY GENERAL

RECEIVED

AUG 18 2008

S.C. SUPREME COURT

August 18, 2008

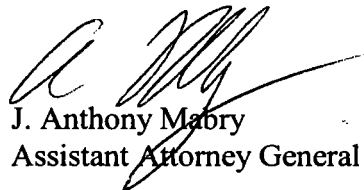
Honorable Daniel E. Shearouse  
Clerk, South Carolina Supreme Court  
P. O. Box 11330  
Columbia, SC 29211

Re: The State v. Freddie Eugene Owens

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the ***Response to Motion to Stay Execution*** in the above-referenced case for filing. By copy of this letter I am serving opposing counsel with same.

Sincerely,



J. Anthony Mabry  
Assistant Attorney General

JAM/lbb  
Enclosures

cc: Joseph L. Savitz, III, Esquire  
Robert M. Ariail, Solicitor  
Sandi Wofford, Victims Assistance

**STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT**

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In The Supreme Court

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**THE STATE,**

Respondent,

v.

**FREDDIE EUGENE OWENS,**

Appellant.

---

RECEIVED

AUG 18 2008

S.C. SUPREME COURT

---

**RESPONSE TO MOTION TO STAY EXECUTION**

---

**HENRY D. McMASTER**

Attorney General

**JOHN W. McINTOSH**

Chief Deputy Attorney General

**DONALD J. ZELENKA**

Assistant Deputy Attorney General

**J. ANTHONY MABRY**

Assistant Attorney General

P.O. Box 11549

Columbia, SC 29211

(803) 734-3665

**ROBERT M. ARIAIL**

Solicitor, Thirteenth Judicial Circuit

305 E. North St., Suite 325

Greenville, SC 29601

(864) 467-8282

**ATTORNEYS FOR RESPONDENT**

### ***Facts Relevant to State's Response***

Freddie Owens was convicted of murder, armed robbery, using a firearm during the commission of a violent crime and conspiracy to commit armed robbery after a trial before the Honorable Alexander MacCauley and a jury. State v. Owens, 346 S.C. 637, 552, S.E.2d 745 (2001). The jury sentenced Owens to death for the murder of Irene Graves. Id. On his first appeal, this Court affirmed his convictions, but reversed his death sentence on the basis that defense counsel did not have sufficient time to investigate Owens' confession to the murder of his cell-mate which occurred during the statutory twenty-four (24) hour waiting period. Id. Following a bench re-sentencing proceeding before the Honorable John Kittredge, Owens was again sentenced to death. This Court vacated the death sentence finding the trial judge's comments to Owens regarding his right to a jury trial constituted reversible error. State v. Owens, 362 S.C. 175, 607 S.E.2d 78 (2004). At his third sentencing proceeding, this time before a jury, Owens was sentenced to death for the third time. This Court affirmed his death sentence on July 14, 2008. State v. Owens, \_\_ S.C. \_\_, \_\_ S.E.2d \_\_, 2008 WL 371953 (2008). This Court denied Owens' petition for rehearing on August 8, 2008.

### ***Reasons why the stay should not be granted***

Pursuant to In re Stays of Execution in Capital Cases, 321 S.C. 544, 471 S.E.2d 140 (1996), Owens is not entitled to a stay of execution. Owens asks for a stay of execution *so he may petition the United States Supreme Court for certiorari*. Each of the issues he proposes to raise to the United States Supreme Court were procedurally defaulted at the trial level. In fact, this Court, in its unanimous opinion affirming Owens' death sentence, found that all of the issues Owens raised on direct appeal were procedurally barred, except Owens' challenge to the admissibility of prison disciplinary records on state evidentiary grounds. Owens (III.), *supra*.

Owens seeks a stay to raise the issue whether the admission of prison disciplinary records

under the hearsay exception violated the Confrontation Clause of the United States Constitution to the United States Supreme Court. In this Court's opinion affirming Owens' death sentence, this Court clearly stated:

One issue is preserved for review: Appellant contends the trial court erred in admitting a list of disciplinary infractions allegedly committed by appellant while in the Department of Corrections because its admission violated the prohibition against hearsay, appellant's Confrontation Clause rights, and his due process rights. **Neither the Confrontation Clause nor due process was raised to the trial court, and accordingly neither constitutional claim is preserved for our review.** State v. Stone, *supra*. We address only the hearsay issue.

Id. (emphasis added). Pursuant to In re Stays of Execution, a stay is not appropriate because the federal question was not adequately preserved under state law. Owens request for a stay must be denied. In Re Stays of Execution (this Court will, as it must, enter a stay of execution "so long as one of the issues raised has been adequately preserved under state law so that it can be reviewed by the United States Supreme Court").

Owens also seeks to raise a completely new claim regarding the prison disciplinary records that was not raised at the trial level or even before this Court. Owens seeks to raise to the United States Supreme Court the issue of whether this Court's finding that the Confrontation Clause claim was procedurally barred is an adequate and independent state ground given that trial counsel objected to the admission of the records and the reasons for the objection. Of course, this issue was never raised at the trial level or before this Court on direct appeal. Furthermore, it was not raised to this Court in Owens' Petition for Rehearing. It is not preserved for review under state law. Owens request for a stay must be denied. In Re Stays of Execution (this Court will enter a stay so long as one of issues raised has been adequately preserved under state law).

Owens also seeks a stay to raise an issue regarding Solicitor's closing argument. The only

issue regarding the Solicitor's closing argument raised to this Court on direct appeal was an allegation that the Solicitor's closing argument violated this Court's holdings in State v. Burkhardt, 371 S.C. 482, 640 S.E.2d 450 (2007) and State v. Bowman, 366 S.C. 485, 623 S.E.2d 378 (2005) and therefore introduced an arbitrary factor into the jury's deliberations in violation of S.C. Code Ann. Section 16-3-20. (See B.O.A.). This Court clearly held in its unanimous opinion in this case that any issue regarding the closing argument was not preserved:

Appellant conceded at oral argument that **there was no objection at trial to the juror disqualification or to the closing argument. Without an objection, neither of these issues is properly preserved for appellate review.** E.g., State v. Stone, 376 S.C. 32, 655 S.E.2d 487, fn. 1 (2007)(“South Carolina’s strict error preservation rules are no less applicable in death penalty cases”). Under these circumstances we do not reach the merits of either issue.

Owens (III.), *supra* (emphasis added). Owens now seeks to raise a claim regarding the closing argument to the United States Supreme Court. He asserts this Court found Owens’ “Due Process Clause challenge to the prosecutor’s sentencing phase argument was procedurally defaulted” and he wishes to challenge this finding as inconsistent with Darden v. Wainwright, 477 U.S. 185 (1985). (See Motion for Stay of Execution).<sup>1</sup> Pursuant to In re Stays of Execution, the issue Petitioner is now seeking to raise regarding the closing argument cannot be presented to the United States Supreme Court because it was procedurally defaulted at trial and before this Court. Any issue regarding the closing argument was clearly not preserved under state law. Furthermore, this issue was not raised to this Court in the Petition for Rehearing. Since Owens did not preserve this issue under state law, Owens request for a stay to pursue certiorari to the United States Supreme Court

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<sup>1</sup>Owens’ reliance on Darden v. Wainwright is misplaced. Darden involved the review of a closing argument on federal habeas review. Darden did not involve whether an issue was adequately preserved on state grounds to petition the United States Supreme Court for certiorari on direct appeal.

must be denied. In Re Stays of Execution (Court will issue stay if one of the issues raised was preserved under state law).

### CONCLUSION

Since none of the issues Owens wishes to raise to the United States Supreme Court were preserved under state law, Owens' Motion for Stay of Execution must be denied. Id. Owens may move before this Court for a stay of execution to pursue any post-conviction relief (PCR) application.

Respectfully submitted,

HENRY D. McMASTER  
Attorney General

JOHN W. McINTOSH  
Chief Deputy Attorney General

DONALD J. ZELENKA  
Assistant Deputy Attorney General

J. ANTHONY MABRY  
Assistant Attorney General

P.O. Box 11549  
Columbia, SC 29211  
(803) 734-3665

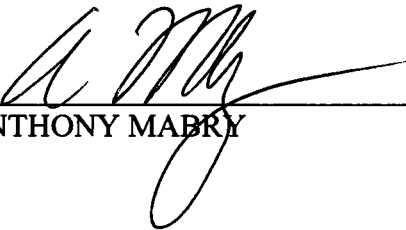
By: \_\_\_\_\_

  
J. ANTHONY MABRY  
ATTORNEY FOR RESPONDENT

August 18, 2008

## CERTIFICATE OF SERVICE

I, **Anthony Mabry**, hereby certify that I have served the Respondent's *Response to Motion to Stay Execution* in the foregoing action by depositing two (2) copies in the InterAgency Mail to Joseph L. Savitz, III, Chief Attorney, Division of Appellate Defense, 1330 Lady Street, Suite 401, Columbia, SC 29201 this 18<sup>th</sup> day of August, 2008.

  
\_\_\_\_\_  
ANTHONY MABRY

RECEIVED  
AUG 18 2008  
S.C. SUPREME COURT

RECEIVED

AUG 12 2008

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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The State of South Carolina, Respondent,

v.

Freddie Eugene Owens, Movant.

---

**MOTION FOR STAY OF EXECUTION**

---

**JOHN H. BLUME**  
Cornell Law School  
Myron Taylor Hall  
Ithaca, NY 14853  
(607) 255-1030

**KEIR M. WEYBLE**  
P.O. Box 11744  
Columbia, SC 29201  
(803) 765-1044

## **I. Introduction.**

Mr. Freddie Eugene Owens, by and through undersigned counsel, respectfully moves this Court for an order staying his execution date pending the filing and disposition of a petition for writ of certiorari to the United States Supreme Court.

## **II. Facts Relevant To This Motion.**

Mr. Owens was convicted of murder, armed robbery, using a firearm during the commission of a violent crime, and conspiracy to commit armed robbery. *State v. Owens*, 346 S.C. 637, 552 S.E.2d 745 (2001). He received a death sentence for murder. *Id.* On his first appeal, this Court affirmed Mr. Owens's convictions, but reversed his death sentence. *Id.* Following a bench re-sentencing proceeding, Mr. Owens again received a death sentence, and again this Court vacated the sentence, finding the trial judge's comments to Mr. Owens in regard to his right to a jury trial constituted reversible error. *State v. Owens*, 362 S.C. 175, 607 S.E.2d 78 (2004). Mr. Owens's second re-sentencing proceeding was tried to a jury, which returned a death verdict. On July 14, 2008, this Court affirmed Mr. Owens's death sentence following this second re-sentencing proceeding. *State v. Owens*, \_\_ S.C. \_\_, \_\_ S.E.2d \_\_, 2008 WL 3715953 (2008). This Court denied Mr. Owens's petition for a rehearing on August 8, 2008.

## **III. Reasons a Stay of Execution Should be Granted.**

Mr. Owens intends to petition for a writ of certiorari to the United States Supreme Court on the following federal questions:

- I. Whether the admission of certain prison disciplinary records under state hearsay exception rules violated the Confrontation Clause of the United States Constitution?
- II. Whether the South Carolina Supreme Court's finding that the Confrontation Clause claim was procedurally barred is an adequate and independent state ground

given that trial counsel a) objected to the admission of the admission, and b) challenged the trustworthiness and reliability of the evidence, which are the precise values embodied in the Confrontation Clause?

III. Whether the South Carolina Supreme Court's holding that petitioner's Due Process Clause challenge to the prosecutor's sentencing phase argument was procedurally defaulted for want of a contemporaneous objection is inconsistent with *Darden v. Wainwright*, 477 U.S. 185 (1985) and its progeny which make an objection relevant to, but not determinative of, the issue whether the prosecutor's argument rendered the proceeding fundamentally unfair?

According to the procedures set forth in *In re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996), Mr. Owens moves for an order staying his execution for ninety (90) days from the date of this Court's denial of his petition for rehearing on August 8, 2008. *Id.* at 141; *see, e.g., McDonald v. Missouri*, 464 U.S. 1306, 1307 (1984) ("Every defendant in a state court of this Nation who has a right of direct review from a sentence of death . . . is entitled to have that review before paying the ultimate penalty. The right of review otherwise is rendered utterly meaningless").

Undersigned counsel has consulted with counsel for the State in this matter and is authorized to represent that the State opposes this motion.

#### **IV. Conclusion.**

Pursuant to South Carolina Appellate Court Rule 224, Mr. Owens respectfully petitions this Court for an order staying his execution pending the filing and disposition of a petition for writ of certiorari in the United States Supreme Court.

Respectfully submitted,

**JOHN H. BLUME**  
Cornell Law School  
Myron Taylor Hall  
Ithaca, NY 14853

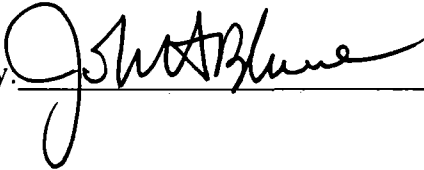
(607) 255-1030

**KEIR M. WEYBLE**

P.O. Box 11744

Columbia, SC 29211

(803) 765-1044

By. \_\_\_\_\_

August 12, 2008

THE STATE OF SOUTH CAROLINA

In The Supreme Court

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The State of South Carolina, Respondent,

v.

Freddie Eugene Owens, Movant.

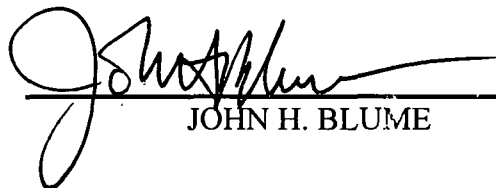
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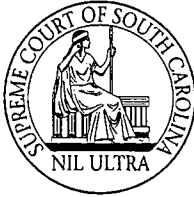
**CERTIFICATE OF SERVICE**

---

The undersigned certifies that a copy of this Motion For Stay Of Execution was mailed today by first class United States mail, postage prepaid, this 12<sup>th</sup> day of August, 2008, upon the following:

Donald J. Zelenka  
Assistant Deputy Attorney General  
P.O. Box 11549  
Columbia, SC 29211

  
\_\_\_\_\_  
JOHN H. BLUME



# The Supreme Court of South Carolina

DANIEL E. SHEAROUSE  
CLERK OF COURT

BRENDA F. SHEALY  
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330  
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

August 8, 2008

## REMITTITUR

The Honorable Paul B. Wickensimer  
Clerk of Court, Greenville County  
305 E. North Street  
Greenville, SC 29601-2120

Re: The State v. Owens, Freddie Eugene  
1998-GS-23-05220

Dear Mr. Wickensimer:

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

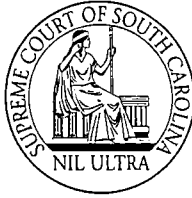
Very truly yours,

CHIEF DEPUTY CLERK

BFS/dmh

Enclosure

cc: Chief Appellate Defender Joseph L. Savitz, III  
Appellate Defender LaNelle C. DuRant  
Assistant Attorney General J. Anthony Mabry  
The Honorable Robert Mills Ariail



# The Supreme Court of South Carolina

DANIEL E. SHEAROUSE  
CLERK OF COURT

BRENDA F. SHEALY  
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330  
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

August 8, 2008

Chief Appellate Defender Joseph L. Savitz, III  
Appellate Defender LaNelle C. DuRant  
South Carolina Commission on Indigent Defense  
P O Box 11589  
Columbia, SC 29211

Re: The State v. Owens, Freddie Eugene

Dear Counsel:

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

“Petition for Rehearing is denied.

s/ Jean H. Toal C.J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

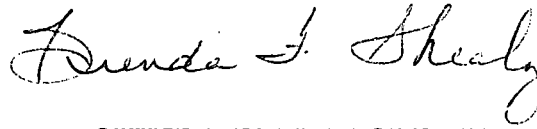
Justice James E. Moore,  
not participating.

August 8, 2008.”

The remittitur is today being forwarded to the lower court.

Chief Appellate Defender Joseph L. Savitz, III  
Appellate Defender LaNelle C. DuRant  
Page Two  
August 8, 2008

Very truly yours,

A handwritten signature in cursive script, reading "Brenda J. Shealy". The signature is written in dark ink and is positioned above the typed name.

CHIEF DEPUTY CLERK

BFS/dmh

cc: Assistant Attorney General J. Anthony Mabry  
The Honorable Robert Mills Ariail

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

---

ORIGINAL

THE STATE,

RESPONDENT,

V.

FREDDIE EUGENE OWENS,

RECEIVED

JUL 24 2008

APPELLANT, S.C. SUPREME COURT

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Appeal from Greenville County

Larry R. Patterson, Circuit Court Judge

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Opinion No. 26520

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PETITION FOR REHEARING

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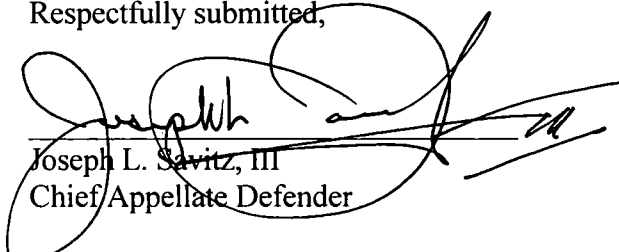
Counsel for Freddie Eugene Owens petition the Court for rehearing pursuant to *Rule 221(a)*, *SCACR*, as the Court has misapprehended Owens' position on the precedential value of *State v. Whipple*, 324 S.C. 43, 476 S.E.2d 683 (1996).

The Court observes that counsel did not ask to argue against the precedent of *Whipple*, which, the Court writes, "held that these types of prison disciplinary records are admissible at the sentencing phase of a capital trial under the Uniform Business Records as Evidence Act, *S.C. Code Ann. §19-5-510*." In actuality, counsel merely pointed out in their brief that *Section 19-5-510* was enacted "before the *South Carolina Rules of Evidence* became effective." Brief of Appellant, p. 15. Counsel did not argue – nor did their argument require – that *Whipple* should be overruled, *unless*

the Court is now interpreting that case to hold that any and all hearsay – regardless of its inherent unreliability - becomes admissible simply because an agent of the prosecution has designated the matter a “business record.”

For this reason, the Court should grant rehearing and reexamine this issue. Then, it should either grant Owens resentencing or, if not, clarify its holding on the scope of *Whipple* within the broader prohibition against hearsay, *Rule 802, SCRE*.

Respectfully submitted,



Joseph L. Savitz, III  
Chief Appellate Defender

LaNelle C. DuRant  
Appellate Defender

This 24th day of July, 2008.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Appeal from Greenville County

Larry R. Patterson, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

FREDDIE EUGENE OWENS,

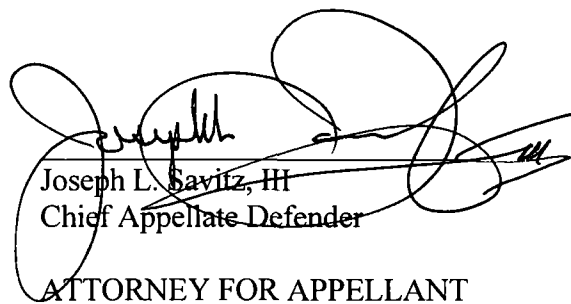
APPELLANT

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CERTIFICATE OF SERVICE

---

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon J. Anthony Mabry, Esquire, this 24th day of July, 2008.



Joseph L. Savitz, III  
Chief Appellate Defender  
ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 24th day  
of July, 2008.

 (L.S.)  
Notary Public for South Carolina

My Commission Expires: March 19, 2017.

Petition for rehearing is denied.

Robert E. Lee

C.J.

John H. Walker Jr.

J.

John R. Leinen

J.

Donald W. Beatty Jr.

J.

Justice James E. Moore, not participating.

August 8, 2008

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

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The State,

Respondent,

v.

Freddie Eugene Owens,

Appellant.

---

Appeal From Greenville County  
Larry R. Patterson, Circuit Court Judge

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Opinion No. 26520  
Heard June 12, 2008 – Filed July 14, 2008

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**AFFIRMED**

---

Chief Appellate Defender Joseph L. Savitz, III, and Appellate Defender LaNelle C. DuRant, both of South Carolina Commission on Indigent Defense, Division of Appellate Defense, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General J. Anthony Mabry, all of Columbia, and Robert Mills Ariail, of Greenville, for Respondent.

---

**JUSTICE PLEICONES:** Appellant appeals his death sentence following a second resentencing proceeding. This opinion consolidates his appeal and the mandatory proportionality review. We affirm.

Appellant was convicted of murder, armed robbery, using a firearm during the commission of a violent crime, and conspiracy to commit armed robbery, and received a death sentence for murder, thirty years for armed robbery, and five years for each of the other two offenses. On his first appeal, the convictions were affirmed, but his death sentence reversed and his five year sentence for firearm possession vacated.<sup>1</sup> State v. Owens, 346 S.C. 637, 552 S.E.2d 745 (2001). Following a bench resentencing proceeding, appellant again received a death sentence. This Court vacated that sentence, finding the trial judge's comments to appellant in regard to his right to a jury trial constituted reversible error. State v. Owens, 362 S.C. 175, 607 S.E.2d 78 (2004).

This second resentencing was tried to a jury which returned a death sentence, finding two aggravating circumstances: (1) the murder was committed in the commission of robbery while armed with a deadly weapon and (2) the murder was committed while in the commission of larceny with use of a deadly weapon. S.C. Code Ann. § 16-3-20(C)(a)(1)(d) and (e). Appellant raises three issues on appeal.

### ISSUES

- 1) Whether the trial judge erred in disqualifying a juror?
- 2) Whether the solicitor's closing argument was improper?
- 3) Whether the trial judge erred in admitting redacted prison disciplinary records?

---

<sup>1</sup> Under S.C. Code Ann. § 16-23-490(A), no firearm sentence may be imposed where the defendant receives a death sentence or life sentence without parole for the violent crime. The vacation of appellant's sentence was conditional: if appellant were ultimately to receive a life sentence for murder, then the five year sentence would be reimposed.

## ANALYSIS

Appellant conceded at oral argument that there was no objection at trial to the juror disqualification or to the closing argument. Without an objection, neither of these issues is properly preserved for appellate review. E.g., State v. Stone, 376 S.C. 32, 655 S.E.2d 487 fn. 1 (2007) (“South Carolina’s strict error preservation rules are no less applicable in death penalty cases”). Under these circumstances, we do not reach the merits of either issue.

One issue is preserved for review: Appellant contends the trial court erred in admitting a list of disciplinary infractions allegedly committed by appellant while in the Department of Corrections because its admission violated the prohibition against hearsay, appellant’s Confrontation Clause rights, and his due process rights. Neither the Confrontation Clause nor due process was raised to the trial court, and accordingly neither constitutional claim is preserved for our review. State v. Stone, *supra*. We address only the hearsay issue.

The trial judge permitted the State to introduce a redacted version of appellant’s prison offenses pursuant to the business records exception to the rule against hearsay. In so doing, he required the State to omit from the list all details of the incidents, and all incidents not witnessed by a prison guard or staff member. These rulings reduced the number of incidents to 28, which were presented to the jury in this format<sup>2</sup>:

1. April 13, 2001, breaks toilet, sink and sprinkler
2. May 26, 2001, throws hot water on another inmate
3. May 27, 2001, had a six and a half inch shank made from fencing and toothbrush
4. June 14, 2001, spat on a correctional officer
5. February 8, 2002, a 14 inch solid brass shank
6. March 29, 2002, stabs correctional officer in the face with a shank
7. June 12, 2002, stabs an inmate in the shower

---

<sup>2</sup> We have made one minor alteration in choosing to omit the names of the victims from the list.

8. June 15, 2002, kicks an inmate who is restrained in a restraint chair
9. August 5, 2002, slaps a male nurse in the face
10. August 17, 2002, throws a food tray and hits an officer in the head
11. August 23, 2002, struck an officer in the face with his fist
12. October 22, 2002, hits an officer in the face with his fist
13. October 23, 2002, sets fire to cell
14. December 22, 2002, shank made from fencing
15. December 30, 2002, a ten inch shank made from a push rod of the sink
16. July 17, 2005, spits in the face of an officer
17. August 26, 2005, slaps an officer in the face
18. August 31, 2005, sets fire to cell
19. September 11, 2005, threatens an officer
20. January 1, 2006, a 12 inch homemade knife
21. January 3, 2006, breaks cell door window with broom stick
22. January 13, 2006, throws feces on an officer, hitting him in the face
23. February 3, 2006, spits in the face of another inmate
24. February 4, 2006, orally threatens an officer
25. February 28, 2006, a 12 inch weapon hidden between the mattresses
26. April 4, 2006, an eight and a half inch shank made from flat metal sharpened at the edge and wrapped with ace bandage
27. May 1, 2006, sets fire to his mattress
28. May 20, 2006, throws coffee on an officer

Appellant contends the records are inadmissible hearsay because they are not trustworthy under Rule 803(6), SCRE. We find no abuse of discretion in the trial judge's decision finding trustworthy those incidents witnessed by prison staff. E.g., State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007) (admission of evidence with trial judge's discretion); cf. Ohio v. Roberts, 448 U.S. 56 (1980) *overruled on other grounds* Crawford v. Washington, 541 U.S. 36 (2004) (properly administered, Rule 803(6) exceptions are among the safest against a confrontation-clause challenges).

Moreover, appellant has not asked to argue against the precedent of State v. Whipple, 324 S.C. 43, 476 S.E.2d 683 (1996) which held that these types of prison disciplinary records are admissible at the sentencing phase of a capital trial under the Uniform Business Records as Evidence Act, S.C. Code Ann. § 19-5-510 (the Act). Id. cited with approval in State v. Holmes, 361 S.C. 333, 605 S.E.2d 19 (2004) *vacated and remanded on other grounds* Holmes v. South Carolina, 547 U.S. 319 (2006). Appellant contends that the continuing validity of Whipple is in doubt as that decision predates the adoption of the SCRE, and alleges that Rule 803(6) added a veracity requirement to the admissibility requirements for a business record. Contrary to appellant's position, trustworthiness is an issue under the Act, not a new condition created by Rule 803(6). Kershaw County Dep't of Soc. Servs. v. McCaskill, 276 S.C. 360, 278 S.E.2d 771 (1981); see also State v. Rice, 375 S.C. 302, 652 S.E.2d 409 (Ct. App. 2007).

Appellant failed to show an abuse of discretion in the trial judge's decision to admit the redacted prison disciplinary incidents. State v. Pittman, *supra*; State v. Whipple, *supra*.

### PROPORTIONALITY REVIEW

Pursuant to S.C. Code Ann. § 16-3-25(c) (2003), we have conducted a proportionality review and find the death sentence was not the result of passion, prejudice, or any other arbitrary factor. Furthermore, a review of other decisions demonstrates that appellant's sentence was neither excessive nor disproportionate. See State v. Humphries, 325 S.C. 28, 479 S.E.2d 52 (1996) (murder of convenience store operator in the commission of attempted armed robbery); State v. Simpson, 325 S.C. 37, 479 S.E.2d 57 (1996) (murder of convenience store operator in the commission of armed robbery).

### CONCLUSION

Appellant's capital sentence is

**AFFIRMED.**

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

FORM 1  
MEDIA COVERAGE OF COURT PROCEEDINGS

STATE OF SOUTH CAROLINA )  
COUNTY OF ) IN THE COURT Supreme Court  
The State )  
vs. )  
Freddie Eugene Owens )

Request for Electronic and Photographic Coverage  
Of Judicial Proceedings

Pursuant to Rule 605, South Carolina Appellate Court Rules, the undersigned hereby requests permission to use equipment in order to record, photograph or televise all or portions of the proceedings in the above captioned case.

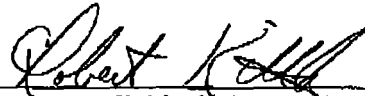
Consistent with Rule 605, the undersigned desires to use the following equipment:  
television camera, microphone

The proceedings that the undersigned desires to record, photograph or televise commence on: June 11, 9:30  
12

The personnel who will be responsible for the operation of this equipment are:  
Robert Kittle

The undersigned hereby certifies that the operation of the equipment and the conduct of the personnel will be in conformity with Rule 605.

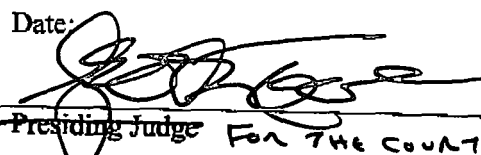
This 6th day of June, 2008.

  
(Individual Signature)

WSPA-TV  
(Representing/Firm)

~~RECEIVED~~  
GRANTED

Reporter/photographer  
(Position)

Date:   
Presiding Judge For The Court

250 International Dr., Spartanburg  
(Address)  
(803)254-2274 (Columbia bureau)  
(Telephone Number)

June 9, 2008.

RECEIVED

JUN 06 2008

S.C. SUPREME COURT



# The Supreme Court of South Carolina

DANIEL E. SHEAROUSE  
CLERK OF COURT

BRENDA F. SHEALY  
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330  
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

June 4, 2008

Chief Appellate Defender Joseph L. Savitz, III  
Appellate Defender LaNelle C. DuRant  
South Carolina Commission  
on Indigent Defense  
P O Box 11589  
Columbia, SC 29211

Assistant Deputy Attorney General Donald J. Zelenka  
Assistant Attorney General J. Anthony Mabry  
Office of the Attorney General  
P.O. Box 11549  
Columbia, SC 29211

Re: The State v. Owens, Freddie Eugene

Dear Counsel:

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

|                    |            |
|--------------------|------------|
| Appellant          | 15 minutes |
| Respondent         | 15 minutes |
| Appellant in Reply | 5 minutes  |

Chief Appellate Defender Joseph L. Savitz, III  
Re: The State v. Freddie Eugene Owens  
June 4, 2008  
Page two

Reminder:

This case is scheduled for hearing at 9:30 a.m. on Thursday, June 12, 2008.

Very truly yours,

Daniel E. Shearouse, Clerk

By Jean J. Peebles  
Administrative Assistant

DES/jjp

cc: Solicitor Robert Mills Ariail



HENRY McMASTER  
ATTORNEY GENERAL

April 10, 2008

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

Re: June Preliminary List  
*Donney Council v. State*  
*State v. Cornelius Washington*  
*State v. Freddie Eugene Owens*

Dear Mr. Shearouse:

Please be advised that I am scheduled to begin a death penalty PCR matter before Judge Macaulay the week of June 23, 2008 in Abbeville County in John Hughey v. State and it will conflict with the June 24-26 term. Melody Brown is co-counsel with me on Hughey.

I will be arguing Cornelius Washington and potentially Donney Council with Melody Brown. Anthony Mabry is primarily counsel on Owens and will handle that argument. Any accommodation that can be made would be appreciated.

Sincerely,

Donald J. Zelenka  
Assistant Deputy Attorney General

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APR 14 2008

DJZ/lbb

S.C. SUPREME COURT



# SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

ORIGINAL

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

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

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

April 10, 2008

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APR 10 2008

S.C. SUPREME COURT

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

Re: The State v. Freddie Eugene Owens

Dear Mr. Shearouse:

I have received notice that the above case will probably be heard at the June term of Court. I will be available June 11 and 12, but will not be available June 24, 25 and 26 as this is my vacation time. I would appreciate any consideration that may be given to schedule this case on June 11 and 12.

By copy of this letter, I am informing opposing counsel, J. Anthony Mabry, Esquire, of the Attorney General's Office, of this request. Thank you for your consideration of this request.

Sincerely,

LaNelle C. DuRant  
Appellate Defender

LCD/kde

cc: J. Anthony Mabry, Esquire



## The South Carolina Supreme Court

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

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

To: Chief Appellate Defender Joseph L. Savitz, III  
Appellate Defender LaNelle C. DuRant  
From: Daniel E. Shearouse  
Date: April 04, 2008  
RE: June Preliminary List

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

Court will meet the days of June 11, 12, 24, 25 and 26, 2008. Please notify this office in writing prior to April 11, 2008 as to any scheduling conflicts for the June term, and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

The State v. Owens, Freddie Eugene



## The South Carolina Supreme Court

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

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

To: Attorney General Henry Dargan McMaster  
Chief Deputy Attorney General John W. McIntosh  
Assistant Deputy Attorney General Donald J. Zelenka  
Assistant Attorney General J. Anthony Mabry

From: Daniel E. Shearouse

Date: April 04, 2008

RE: June Preliminary List

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The State v. Owens, Freddie Eugene



## The South Carolina Supreme Court

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

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

To: Robert Mills Ariail, Esquire  
From: Daniel E. Shearouse  
Date: April 04, 2008  
RE: June Preliminary List

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Court will meet the days of June 11, 12, 24, 25 and 26, 2008. Please notify this office in writing prior to April 11, 2008 as to any scheduling conflicts for the June term, and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

The State v. Owens, Freddie Eugene



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MAR 18 2008

S.C. SUPREME COURT

HENRY McMASTER  
ATTORNEY GENERAL

March 18, 2008

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

Re: The State v. Freddie Eugene Owens

Dear Mr. Shearouse:

Enclosed please find the original and fourteen (14) copies of the ***Final Brief of Respondent*** in the above-referenced matter for filing in your office. By copy of this letter I am serving opposing counsel with same.

Sincerely,

J. Anthony Mabry  
Assistant Attorney General

JAM/lbb  
Enclosures

cc: Joseph L. Savitz, III, Esquire  
Robert M. Ariail, Solicitor  
Sandi Wofford, Victims Assistance

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

---

Appeal from Greenville County

Larry R. Patterson, Circuit Court Judge

---

THE STATE,

RESPONDENT,

V.

FREDDIE EUGENE OWENS,

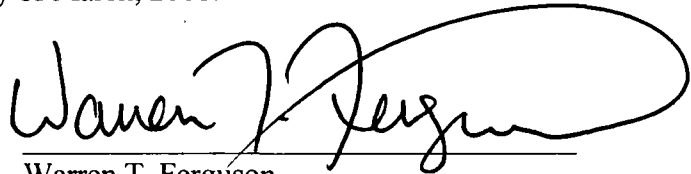
APPELLANT

---

CERTIFICATE OF SERVICE

---

I certify that a true copy of the Record on Appeal in the above referenced case has been served upon J. Anthony Mabry, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 this 5th day of March, 2008.



Warren T. Ferguson  
Administrative Assistant

SUBSCRIBED AND SWORN TO before me  
this 5th day of March, 2008.

 (L.S.)  
Notary Public for South Carolina

My Commission Expires: March 19, 2017.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

ORIGINAL

Appeal from Greenville County

Larry R. Patterson, Circuit Court Judge

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MAR - 5 2008

THE STATE,

RESPONDENT, S.C. SUPREME COURT

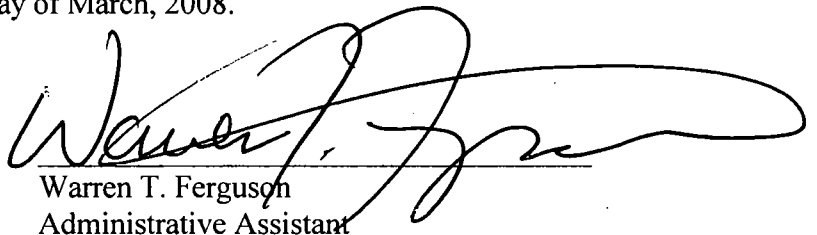
V.

FREDDIE EUGENE OWENS,

APPELLANT

CERTIFICATE OF SERVICE

I certify that a true copy of the Record on Appeal in the above referenced case has been served upon Donald J. Zelenka, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 this 5th day of March, 2008.

  
Warren T. Ferguson  
Administrative Assistant

SUBSCRIBED AND SWORN TO before me  
this 5th day of March, 2008.

 (L.S.)  
Notary Public for South Carolina

My Commission Expires: March 19, 2017

# The Supreme Court of South Carolina

The State,

Respondent,

v.

Freddie Eugene Owens,

Appellant.

The Honorable Larry R. Patterson  
Greenville County  
Trial Court Case No. 1998-GS-23-05220

---

## ORDER

---

For good cause having been shown, the time for serving and filing the Record on Appeal in the above entitled matter is hereby extended until March 5, 2008.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



CLERK

Columbia, South Carolina

February 5, 2008

cc: Chief Appellate Defender Joseph L. Savitz, III  
Appellate Defender LaNelle C. DuRant  
Assistant Deputy Attorney General Donald J. Zelenka  
Assistant Attorney General J. Anthony Mabry



# SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

ORIGINAL

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

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

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

February 4, 2008

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FEB - 4 2008

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

S.C. SUPREME COURT

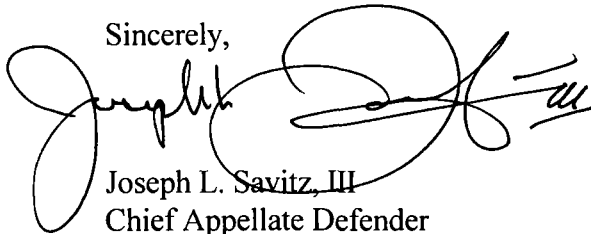
Re: The State v. Freddie Eugene Owens

Dear Mr. Shearouse:

The record on appeal in this capital case is due to be served and filed with the Court today. However, because of my heavy workload at this time, I am requesting an extension until March 5, 2008, in which to serve and file the record.

By copy of this letter, I am informing Donald J. Zelenka, of the Attorney General's Office, of my request.

Sincerely,



Joseph L. Savitz, III  
Chief Appellate Defender

JLS,III/kde

cc: Donald J. Zelenka

**STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT**

---

Appeal from Greenville County  
Larry Patterson, Circuit Court Judge

---

**RECEIVED**

JAN - 4 2008

**S.C. SUPREME COURT**

**THE STATE,**

Respondent,

v.

**FREDDIE EUGENE OWENS,**

Appellant.

---

**INITIAL BRIEF OF RESPONDENT**

---

**HENRY D. McMASTER**  
Attorney General

**JOHN W. McINTOSH**  
Chief Deputy Attorney General

**DONALD J. ZELENKA**  
Assistant Deputy Attorney General

**J. ANTHONY MABRY**  
Assistant Attorney General  
P.O. Box 11549  
Columbia, SC 29211  
(803) 734-3665

**ROBERT M. ARIAIL**  
Solicitor, Thirteenth Judicial Circuit  
305 E. North St., Suite 325  
Greenville, SC 29601  
(864) 467-8282  
**ATTORNEYS FOR RESPONDENT**

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## **APPELLANT'S ISSUES ON APPEAL**

- I. The trial judge abused his discretion when he summarily disqualified a potential juror, Sonya Ables (Juror Number 1), solely because she “went to [her] pastor and talked to him about [the death penalty],” as he incorrectly believed “there is a case right on point, that if a woman talks to her priest after she’s been called as a juror about capital punishment, she is disqualified under the law.”
- II. The trial judge committed reversible error by admitting Owens’ prison disciplinary records, as they violated the rule against hearsay, as well as the Sixth and Fourteenth Amendments.
- III. The trial judge committed reversible error by allowing the Solicitor to argue in closing that the conditions of life imprisonment in general justified a death sentence for Owens, as this argument injected an arbitrary factor into the jury sentencing considerations in violation of S.C. Code Section 16-3-25(C)(1).

## **RESPONDENT'S STATEMENT OF FACTS**

Freddie Owens brutally murdered Irene Graves on November 1, 1997. (Tr. p. 1060, ll. 11-14, p. 1062, ll. 11-17). Owens shot Graves in the right side of the head with a .32 caliber pistol. (Tr. p. 1188, ll. 16-24, p. 1204, ll. 8-20, p. 1055, ll. 1-13). The bullet went through Graves' brain and ricocheted back off of the inside of her skull to the other side of her head. (Tr. p. 1055, ll. 7-21). Ms. Graves was a single mother of one adult and two small children at the time of her murder. (Tr. p. 1105, ll. 18-25). She worked three jobs at the time of her death. (Tr. p. 1102, ll. 9-17).

Ms. Graves was operating a convenience store on Lauren's Road in Greenville during the early morning hours of November 1<sup>st</sup>, just after Halloween night. (Tr. p. 1097, ll. 5-16). Appellant and three of his friends had been on a crime spree on Halloween afternoon and into Halloween night. (Tr. p. 1143, l. 21-p. 1173, l. 2). Owens and his three co-defendants cased several stores and eventually robbed Prestige Cleaners on Lauren's Road and the Conoco Hot Spot on Augusta Road prior to the robbery of Ms. Graves' business. (Tr. p. 1143, l. 21-p. 1173, l. 2). During each robbery, the assailants wore ski masks or panty hose over their heads and carried handguns. (Tr. p. 1159, l. 21- 1160, l. 20, p. 1163, l. 13- p. 1164, l. 17, p. 1171, l. 16- p. 1172, l. 19, p. 1158, l. 18- 1160, l. 20, p. 1169, ll. 8-24, p. 1209, ll. 5-13, p. 1226, ll. 2-12). After midnight, the four men met again on Owens' front porch and discussed robbing two stores near the intersection of Lauren's Road and I-85. (Tr. p. 1173, l. 2 - p. 1176, l. 3). One of the stores was the Speedway convenience store at which the victim worked. (Tr. p. 1175, l. 15-p. 1176, l. 8).

Ms. Graves was murdered for money. Appellant and one of his co-defendants, Andre Golden, entered the store wearing a ski mask and panty hose over their faces. (Tr. p. 1075, ll. 2-16). Appellant wore the ski mask. (Tr. p. 1185, ll. 11-22). Upon Appellant initially entering the store,

Ms. Graves was accosted and cash was removed from one register. (Tr. p. 1075, ll. 10-24). At gun point, Ms. Graves was then taken to the area of the store safe. (Tr. p. 1075, ll. 24-25). She was then shot in the head. (Tr. p. 1075, ll. 24-25). Surveillance video captured the robbery and her murder. Another employee, who had stepped out of the store to obtain ice for the store's drink machine shortly before Owens and Golden entered, found Ms. Graves' lifeless body in front of the safe. (Tr. p. 1076, ll. 4-11). Appellant bragged to his girlfriend the next morning that he shot the victim, because she would not open the safe.<sup>1</sup> (Tr. p. 1114, ll. 8-25). Appellant also bragged to another co-defendant, not Golden, that he shot Ms. Graves for the same reason.<sup>2</sup> (Tr. p. 1181, 14-25). After the robbery, when the cash register was totaled up by store personnel, \$37.29 was missing from the store. (Tr. p. 1129, ll. 1-2).

Owens was convicted by a Greenville County jury of Murder, Possession of a Weapon During a Violent Crime, Armed Robbery and Conspiracy.<sup>3</sup> The night after Owens was convicted, Owen's cellmate, Christopher Lee, was beaten to death in the cell he shared with Owens in the

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<sup>1</sup>Ms. Graves, as a cashier, could not open the safe. She did not have the combination. (Tr. p. 1129, ll. 7-18).

<sup>2</sup>Owens told Nikko Vance when he got back in the car that "He shot that bitch in the head", and "she wasn't opening the safe, so he shot the whore." (Tr. p. 1181, ll. 18-25). Owens' girlfriend testified Owens told her "[s]he kept throwing up her hands and said she couldn't open the safe, so he just said 'I shot the bitch'". (Tr. p. 1114, ll. 23-25).

<sup>3</sup>In addition to Appellant's girlfriend Aisha Austin, Andre Golden testified in the guilt phase of Petitioner's first trial and also identified Petitioner as the person who shot Ms. Graves. *State v. Owens, infra (Owens I.)*. Golden pled guilty to murder and armed robbery. Nikko Vance, another co-defendant, who did not enter the store, testified at Petitioner's first trial and identified Appellant as the shooter based on statements Appellant and Golden made when they returned to the getaway vehicle. Detectives Wood and Willis testified Appellant initially denied involvement but later admitted he shot Ms. Graves. *Id.* Appellant's convictions were affirmed on direct appeal. *Id.*

Greenville County Detention Center. S.L.E.D. agents questioned Owens, and he confessed to the murder of Lee. (Tr. p. 1336, l. 9 - p. 1339, l. 6). Owens admitted he beat, strangled, slammed, and kicked Lee, jabbed the victim with a ballpoint pen and then stuffed the pen up Lee's nose. (Tr. p. 1336, l. 9 - p. 1339, l. 6). Owens also confessed to burning Lee with a cigarette lighter after he beat him unconscious. (Tr. p. 1336, l. 9- p. 1339, l. 6). The findings at Lee's autopsy were consistent with Owens' confession including the fact that Lee's chin hair was singed. (Tr. p. 1352, ll. 1-21).

Owens was sentenced to death by the jury in his first trial. The case was reversed and remanded for a new sentencing hearing only. State v. Owens, 346 S.C. 637, 552 S.E.2d 745 (2001). Owens waived his right to a jury at this subsequent sentencing proceeding. After a second sentencing hearing, Circuit Judge John Kittredge sentenced Owens to death. This Court reversed and remanded for a third sentencing proceeding. State v. Owens, 362 S.C. 175, 607 S.E.2d 78 (2004). After a third sentencing proceeding, Owens was sentenced to death a third time by a Greenville County jury on November 11, 2006. The jury unanimously found two aggravating circumstances: (1) the murder was committed during the commission of robbery while armed with a deadly weapon, and (2) the murder was committed while in the commission of a larceny with a deadly weapon. Circuit Judge Larry R. Patterson imposed the death sentence. This appeal follows.

## ARGUMENT

### I.

**This issue is not preserved for appellate review. Even if it had been preserved, the trial judge did not abuse his discretion in disqualifying potential juror Sonya Ables (Juror #1), when she admitted she went to her pastor and talked to him about the death penalty.**

In his first appellate issue, Owens alleges that the trial judge committed reversible error in disqualifying potential juror Sonya Ables. This issue has no merit.

#### *Failure to Preserve Alleged Error*

This issue is not preserved for appeal. No objection was made by Appellant at any time to the court's questioning of or disqualification of Juror Sonya Ables. (See Tr. p. 479-484). Appellant made no objection before the petit jury was empaneled and sworn. (See Tr. p. 484-1033). No objection was made at all thereafter regarding this issue. (See Tr. p. 1034-1614). Appellant made no request to conduct any additional voir dire of the juror. (See Tr. p. 479-484).

In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. In the Interest of Michale H., 360 S.C. 540, 602 S.E.2d 729 (2004) (trial court must be given an adequate opportunity to resolve the issue); State v. Dunbar, 356 S.C. 138, 587 S.E.2d 691 (2003); Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001); Knight v. Waggoner, 359 S.C. 492, 597 S.E.2d 894 (Ct. App. 2004) (arguments raised for the first time on appeal are not preserved for review).

This principle is applicable to issues of jury disqualification. State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996) (failure to object to the excusal of a juror for good cause constitutes waiver of issue on appeal); Ott v. Pittman, 320 S.C. 72, 463 S.E.2d 101 (Ct. App. 1995) (failure to object

to exclusion of potential jurors by trial judge constitutes waiver of issue on appeal).

This principle is also applicable in the voir dire setting. Failure to object to voir dire or lack of voir dire constitutes a waiver of the right to claim error on appeal. State v. Von Dohlen, 322 S.C. 234, 471 S.E.2d 689 (1996); Creighton v. Coligny Plaza Ltd. Partnership, 334 S.C. 96, 512 S.E.2d 510 (Ct. App. 1998) (absent timely objection to examination of juror, issue not properly preserved for appeal; although appellant requested two jurors be dismissed, they did not request further inquiry by trial court, which was argument on appeal; therefore, issue raised on appeal was not preserved below for appellate review); State v. Ivey, 331 S.C. 118, 502 S.E.2d 92 (1998) (If dissatisfied with the trial judge's examination of juror, appellant should have immediately moved for permission to make additional inquiries. Request the day after juror was qualified was untimely.). Owens now makes his first request on appeal. This issue is not preserved.

An objection to a juror's disqualification cannot be made after the jury returns its verdict, and in case of disappointment, have the verdict set aside upon a technicality. State v. Williams, 266 S.C. 325, 223 S.E.2d 38 (1976); State v. Rayfield, 232 S.C. 230, 101 S.E.2d 505 (1958); State v. Harreld, 228 S.C. 311, 89 S.E.2d 879 (1955); State v. Merriman, 287 S.C. 74, 337 S.E.2d 218 (Ct. App. 1985). That is exactly what Appellant is attempting to do in this case. Appellant failed to preserve this issue and waived this issue.<sup>4</sup>

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<sup>4</sup>Likewise our Legislature has made it clear that an objection to a juror's qualification must be made before the jury is empaneled and sworn. **S.C. Code Ann. Section 14-7-1030.**  
**Time for making objections to jurors.**

All objections to jurors called to try prosecutions, actions, issues or questions arising out of actions or special proceedings in the various courts of this State, if not made before the juror is empaneled or charged with the trial of the prosecution, action, issue or question arising out of an action or special proceeding, is waived, and if made thereafter is of no effect.

### ***Standard of Review***

In a capital case, a defendant has no right to a trial by any particular jury, only a right to a trial by a competent and impartial jury. State v. Caldwell, 300 S.C. 494, 338 S.E.2d 816 (1990); State v. Gaskins, 284 S.C. 105, 326 S.E.2d 132 (1985). It is the duty of the trial judge to see that a jury of unbiased, fair and impartial jurors are impaneled. State v. Mathews, 291 S.C. 339, 353 S.E.2d 444 (1986). A determination of whether a juror is qualified to serve on a death penalty case is within the sole discretion of the trial judge and not reversible on appeal unless wholly unsupported by the evidence. State v. Plemmons, 286 S.C. 78, 332 S.E.2d 765 (1985). The voir dire examination of a juror must be viewed in its entirety to determine whether the trial judge erred in his qualification or disqualification of a prospective juror. State v. Drayton, 293 S.C. 417, 361 S.E.2d 329 (1987). A juror's disqualification will not be disturbed on appeal if there is a reasonable basis from which the trial court could have concluded that the juror would not have been able to faithfully discharge his responsibilities as a juror under the law. State v. Evins, 373 S.C. 404, 645 S.E.2d 904 (2007); State v. Green, 301 S.C. 347, 392 S.E.2d 157 (1990).

### ***The Merits***

#### ***1. Disqualification Due to Failure To Follow Instructions.***

The trial judge's decision regarding Juror Ables was correct based on precedent of this Court. In State v. Gilbert, 277 S.C. 53, 283 S.E.2d 179 (1982), it was held that a trial judge properly excused a prospective juror, who, despite the court's instructions, revealed to her priest that she might be serving in a capital case and solicited his opinion as to the Catholic Church's stance on capital punishment. This Court reasoned that the possible seating of this juror would have introduced

an outside influence into the deliberations of the jury.<sup>5</sup> The same is true in the present case. Juror Ables testified during the voir dire by the court regarding the death penalty: “I just don’t think that I can do it and live okay. It’s just too deep within me. I have battled it since you told us that in October. I have thought about it a lot. *I went to my pastor and talked to him about it.* I really don’t think I could do it.” (Tr. p. 482, l. 24 - p. 483, l. 5). The trial judge was correct in stating on the record: “Ladies and gentlemen, there’s a case right on point that if a woman talks to her priest after she’s been called as a juror about capital punishment, she is disqualified under the law. (Tr. p. 483, ll. 10-13). The trial judge properly disqualified the juror, and Appellant, by his lack of any objection at all, agreed with the decision. Juror Ables, if qualified and seated on this case, would have introduced an outside influence into the jury’s deliberations. Gilbert, 277 S.C. at 57. This would be improper.

Appellant’s failure to object is significant in this situation. If Appellant had raised some objection to the court’s disqualification of Juror Ables, Judge Patterson could have allowed further voir dire on this issue or explained his ruling in more detail. Simply put, there was no objection to her disqualification or request to voir dire her on the issue of her talking to her pastor or priest. If an objection to her disqualification had been made, the court could have attached the juror’s summons and letter from the court as a court’s exhibit evidencing the fact that the juror talked to an outside source about the case and the issues therein after being summoned for jury service.<sup>6</sup> Since

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<sup>5</sup>Appellant argues in his brief that the trial judge was wrong in stating that there was *a case directly on point* on this issue. Appellant fails to mention or discuss Gilbert, *supra*, which is on point, anywhere in his brief.

<sup>6</sup>This is obviously what the juror was referring to when she said “I have battled this since you told us that in October”. Voir dire of the jury did not begin until November 7, 2006. (See Tr., November 7, 2006, p. 1).

Appellant made no objection or request to conduct any further voir dire, the issue was waived. “Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law and arguments.” Elam v. South Carolina Dep’t. of Transp., 361 S.C. 9, 23-24, 602 S.E.2d 772, 779-780 (2004); Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000).

Obviously, since Appellant did not object, Appellant offered no facts, law, or arguments to the trial judge with regard to this issue. This is exactly what the preservation requirement was meant to prevent. By his inaction, Appellant stated to the trial court that the juror’s disqualification was not an issue. State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005) (issue cannot be raised for the first time on appeal, but must have been raised to and ruled on by the trial judge to be preserved for appellate review). The preservation requirement prevents a party from keeping an ace card up his sleeve-intentionally or by chance-in the hope that an appellate court will accept that ace card and via a reversal, give him another opportunity to prove his case. I’On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000); *see also* Ellie, Inc. V. Micchichi, 358 S.C. 78, 594 S.E.2d 485 (Ct. App. 2004). Appellant made no objection or request regarding this juror, therefore this issue was not preserved and was clearly waived. Even if it had been preserved for appeal, there is no merit to this issue. Gilbert, *supra*.

## **2. Not a Witherspoon Violation.**

Owens mistakenly argues for the first time on appeal that the juror’s disqualification was a Witherspoon<sup>7</sup> violation. Judge Patterson’s disqualification of Juror Ables was not a Witherspoon

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<sup>7</sup>Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770 (1968) (holding right to an impartial jury is violated by procedure which automatically removes for cause those members of the jury who have general objections to the death penalty, however, a juror who states an

violation for two reasons.

First, the record is clear that Juror Ables was disqualified, because she had gone to her pastor and spoken to him about the case and the death penalty after being summoned for jury service, not because of her personal views for or against the death penalty. (Tr. p. 483, ll. 10-14).<sup>8</sup>

Second, it is clear from the record that further examination of the juror would have been unlikely to reveal she could subordinate her views and apply the law of the state. Juror Ables clearly stated during thorough examination by the trial judge that she would be unable to impose a death sentence, because she would be unable to go forward with her life or live if she did so. (Tr. p. 479-483). A juror may be excluded for cause when her views on capital punishment are such as would “prevent or substantially impair the performance of [her] duties as a juror in accordance with [her] instructions and [her] oath.” State v. Sapp, 366 S.C. 283, 291 (2005) *quoting* Wainwright v. Witt, 469 U.S. 412, 424, 105 S.Ct. 844 (1985).<sup>9</sup> A juror may be excused in a death penalty case if her beliefs or attitudes against capital punishment would render her unable to return a verdict according to the law. Sapp, *supra*. The record shows Juror Ables beliefs rendered her unable to return a verdict according to the law. She clearly stated an unwillingness to impose the death penalty and could properly have been disqualified. Witherspoon, *supra*; State v. Lindsey, 372 S.C. 185, 642 S.E.2d 557 (2007); State v. Jones, 288 S.C. 1, 340 S.E.782 (1985); State v. Copeland, 278 S.C. 572, 300

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unwillingness to impose the death penalty may be disqualified).

<sup>8</sup>Owens also asserts that the Judge violated J.E.B. v. Alabama, ex rel T.B., 511 U.S. 127 (1994) by disqualifying a *woman* who went to her priest. This assertion is ridiculous. Neither Judge Patterson nor this Court in Gilbert, *supra*, based its decision on the sex of the juror but on the fact that the juror had spoken to an outside source about a critical issue in the case. The mention of the juror’s sex was merely descriptive.

<sup>9</sup>In Sapp, this Court also dealt with an alleged Witherspoon violation. Id., at 287-292.

S.E.2d 63 (1982). Her disqualification, even if based on her views regarding the death penalty, was proper.

Appellant also appears to argue there was an Atkins<sup>10</sup> violation, because defense counsel did not conduct individual voir dire of Juror Ables. This argument, if made, is also erroneous for two reasons. First, the juror was not excused for cause because of her views regarding the death penalty, but was disqualified because she had spoken to her pastor regarding the case, the death penalty, and her service as a juror. (Tr. p. 483, ll. 10-14). The record is clear on this point. Atkins is simply not implicated. State v. Wise, 359 S.C. 14, 596 S.E.2d 475 (2004) (holding Atkins was distinguishable when juror was disqualified for reason other than jurors personal views regarding the death penalty). Juror Ables was *disqualified*, because she had contact with an outside source regarding the case after she was summoned for jury service. If she had been seated on the jury she would have introduced an outside influence into the jury's deliberations. Gilbert, *supra*.

“Second, it is clear from this record that further examination of [the] Juror would have been unlikely to reveal she could subordinate her views and apply the law of the state.” Wise, *supra* at 26. As previously stated, Juror Ables clearly stated she would not be able to live or go on with her life if she sentenced someone to death. (Tr. p. 482, l. 24 - p. 483, l. 6). The record reflects she stated an unwillingness to impose the death penalty.

In fact, Appellant's attorneys were not denied the right to question Juror Ables, they simply did not request to ask any questions given her clear testimony. They did not suggest or offer any additional questions to the trial judge. See Wise, *supra* at 26. As previously stated, no objection was

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<sup>10</sup>State v. Atkins, 293 S.C. 294, 360 S.E.2d 302 (1987). See also State v. Tucker, 334 S.C. 1, 512 S.E.2d 99 (1998); State v. Holmes, 320 S.C. 259, 464 S.E.2d 334 (1995); State v. Owens, 277 S.C. 189, 284 S.E.2d 584 (1981).

made to the Judge's voir dire of the juror nor did trial counsel request to ask any further questions. (Tr.p. 483-484).

While this Court made clear in Wise that it was not diluting the mandate of Section 16-3-20(D) as expressed in Atkins, *supra*, it also made clear the following:

When the record reveals a juror plainly is not qualified, after thorough examination by the trial judge, to serve and it does not reasonably appear further examination would likely reveal the juror could subordinate his views and apply the law of the state, a reasonable basis exists for excusal for cause of the juror without further examination by defense counsel.

There was no Atkins, violation in this case.

### ***3. Harmless Error.***

Even if Juror Ables was improperly disqualified, her disqualification was harmless. Holmes, *supra* (holding disqualification of juror was harmless where juror was placed on alternate list and alternates were never called). In the present case, if Juror Ables had been qualified, she would have been the seventeenth (17<sup>th</sup>) juror qualified. The jurors were struck in order of their qualification. (Tr. p. 1014-1019). Juror Ables voir dire occurred after the 16<sup>th</sup> juror qualified, Juror Fawn Norton. (Tr. p. 478-479). Juror Ables would have been the seventeenth (17<sup>th</sup>) juror presented at the jury strike. (Tr. p. 1017-1018). At the time she would have been presented, the State had exercised only two of its five (5) peremptory challenges. (Tr. p. 1014-1018). The State had excused Jurors Cassandra Carrol and Fawn Norton. (Tr. p. 1016, ll. 20-21, p. 1017, l. 25-p. 1018, l.1). There can be no question, based on Juror Ables testimony that she could not live or go on with her life if she imposed the death penalty, that the State would have struck Juror Ables with its third strike. Furthermore, this is supported by the fact that the State exercised only one more of its peremptory challenges,

Juror Rebecca Hunter, and that occurred during alternate juror selection. (Tr. p. 1019, l. 23). The State only exercised a total of two (2) peremptory challenges during the petit jury panel selection. (Tr. p. 1014-1019). After all twelve (12) jurors were seated on this case, the State still had three (3) of its five (5) peremptory challenges remaining. Even if Juror Ables had been qualified, she would not have been seated on this jury, because the State would have exercised at least one of its three remaining peremptory challenges to excuse Juror Ables.<sup>11</sup> Any error in Juror Ables disqualification was harmless.

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<sup>11</sup>Owens will certainly argue in reply that this analysis is merely speculative, however it strains credulity to argue the State would have allowed Juror Ables to be seated on the jury when she stated she could not give someone the death penalty and “..be able to go forward with my life then and then—I just don’t think that I can do it and live okay. Its just too deep within me.” (Tr. p. 482, l. 24 -p. 483, l. 2).

## II.

**The trial judge properly admitted the limited prison disciplinary records summary as business records; however, even if their admission was erroneous, it was harmless given the other evidence in aggravation presented in this case.**

Owens alleges the court improperly admitted evidence of his bad prison behavior under the business records exception to the hearsay rule. Owens has been incarcerated in the South Carolina Department of Corrections since his first conviction and death sentence. During his incarceration, the South Carolina Department of Corrections recorded the following incidents in their disciplinary records that were offered by the State in the sentencing phase of his 3<sup>rd</sup> trial:

April 13, 2001, breaks toilet, sink and sprinkler.  
May 26, 2001, throws hot water on another inmate.  
May 27, 2001, had a six and a half inch shank made from fencing and toothbrush.  
June 14, 2001, spat on a correctional officer.  
February 8, 2002, a 14 inch solid brass shank.  
March 29, 2002, stabs correctional officer Smith in the face with shank.  
June 12, 2002, stabs Undra Golden in the shower.  
June 15, 2002, kicks an inmate who is restrained in a restraint chair.  
August 5, 2002, slaps a male nurse in the face.  
August 17, 2002, throws a food tray and hits officer Guess in the head.  
August 23, 2002, struck an officer in the face with his fist.  
October 23, 2002, hits officer Eaton in the face with the fist.  
October 23, 2002, sets fire to cell.  
December 22, 2002, shank made from fencing.  
December 30, 2002, a ten inch made from a push rod of the sink.  
July 17, 2005, spits in the face of officer Jones.  
August 26, 2005, slaps officer Henley in the face.  
August 31, 2005, sets fire to cell.  
September 11, 2005, threatens officer Jones.  
January 1, 2006, a 12 inch homemade knife.

January 3, 2006, breaks cell door window with broom stick.  
January 13, 2006, throws feces on officer Williams hitting him in the face.  
February 3, 2006, spits in the face of another inmate.  
February 4, 2006, orally threatens officer Jones.  
February 28, 2006, a 12 inch weapon hidden between the mattresses.  
April 4, 2006, an eight an a half inch shank made from flat metal sharpened at the edge and wrapped with ace bandage.  
May 1, 2006, sets fire to his mattress.  
May 20, 2006, throws coffee on officer Smith.

(Tr. pp. 1389-1391).

### ***Standard of Review***

The relevance, materiality, and admissibility of evidence are matters within the sound discretion of the trial court, and a ruling will be disturbed only upon a showing of an abuse of discretion. State v. Rosemond, 335 S.C. 593, 518 S.E.2d 588 (1999).

### ***The Merits***

The purpose of the sentencing phase in a capital trial is to direct the jury's attention to the specific circumstances of the crime and the characteristics of the offender. State v. Owens, 346 S.C. 637, 552 S.E.2d 745 (2001). Evidence which would ordinarily be inadmissible in the guilt phase of trial may be introduced during the penalty phase. State v. Kornahrens, 290 S.C. 281, 350 S.E.2d 180 (1986), *cert. denied*, 480 U.S. 940, 107 S.Ct. 1592 (1987). During the sentencing phase, the trial judge may permit the introduction of additional evidence of aggravation in order to aid the jury in determining whether to recommend a death sentence. *Id.* See also, State v. Shuler, 353 S.C. 176, 577 S.E.2d 438 (2003).

Certainly the records were relevant to Owen's future adaptability in prison, a matter which was clearly proper for the sentencing jury. See State v. Howard, 295 S.C. 462, 369 S.E.2d 132

(1988); State v. Riddle, 291 S.C. 232, 353 S.E.2d 138 (1987), *overruled in part on other grounds*, State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). The records were also relevant, because they demonstrated the character of the accused. Owens, *supra*.

There were a total of 56 disciplinary violations of Owens while in the Department of Corrections. (Tr. p. 1486, ll. 8-15). The State did not introduce all 56 violations. After an *in limine* ruling by the trial judge, the state only offered the short summary above of the 28 violations in which an officer was involved and *required* or had a *business duty* to report the incident. The trial judge carefully considered this issue and had even researched the issue before the trial. (Tr. p. 1357). The court limited the State to the above summary under the business records exception. After the trial court's ruling *in limine*, the State did not offer nor would the court allow each individual disciplinary record, because the court felt it contained subjective matter. (Tr. p. 1354-1385). The limited summary was all that was admitted.

Rule 803(6)(c) South Carolina Rules of Evidence provides that even though the declarant is available to testify as a witness:

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness; provided, however, that subjective opinions and judgments found in business records are not admissible. The term "business" as used in this subsection includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

In State v. Whipple, 324 S.C. 43, 476 S.E.2d 683 (1996), this Court specifically decided this

issue and held that prison disciplinary records were admissible under the Uniform Business Records as Evidence Act. S.C. Code Ann. § 19-5-510 (1985).<sup>12</sup> The Whipple court specifically cited as authority State v. Rich, 293 S.C. 172, 359 S.E.2d 281 (1987) (parole records admissible) and State v. Howard, 295 S.C. 462, 369 S.E.2d 132 (1988) (police fingerprint records admissible). Appellant attacks the Whipple decision on the basis that it was decided under Section 19-5-510 and not SCRE 803(6). This reasoning is incorrect.

In State v. Holmes, 361 S.C. 333, 605 S.E.2d 19 (2004) *reversed on other grounds* Holmes v. South Carolina, 547 U.S. 319, 126 S.Ct. 1727 (2006), decided after the enactment of SCRE 803(6), this Court specifically cited Whipple as controlling authority on the issue of whether prison disciplinary records are admissible under the Uniform Business Records as Evidence Act, S.C. Code Ann. § 19-5-510 (1985). Clearly, § 19-5-510 was not obviated by the Rules of Evidence. Otherwise, this Court would not have recognized that statute as controlling in Holmes, a 2004 decision. In fact, in Holmes, the trial judge admitted the prison disciplinary records in the penalty phase of the trial under both § 19-5-510 and Rule 803(6).<sup>13</sup> Appellant Holmes raised the same objections Owens is raising now and his appeal was emphatically denied by this Court as having no merit. Holmes, *supra*.<sup>14</sup>

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<sup>12</sup>Section 19-5-510 provides:

A record of an act, condition, or event shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition, or event and if, the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

<sup>13</sup>See brief of Respondent from Holmes, *supra*.

<sup>14</sup>Appellant Owens fails to mention the Holmes decision anywhere in his brief.

Regardless, “SCRE 803(6) is substantially the same as former South Carolina law as Section 19-5-510 of the *Code of Laws of South Carolina* has been interpreted.” Danny R. Collins, South Carolina Evidence (2<sup>nd</sup> Ed. 2000), South Carolina Bar, *emphasis in the original*. The case law interpreting Section 19-5-510 also required that the record be trustworthy in the opinion of the court. *Id.* at 603, *citing* Jenkins v. Dixie Specialty, Co., 284 S.C. 425, 326 S.E.2d 658 (1985); State v. Duncan, 274 S.C. 379, 264 S.E.2d 421 (1980). The disciplinary records were admissible under either 19-5-510 or SCRE 803(6).

This issue has been decided by this Court twice now. Whipple, *supra*; Holmes, *supra*. Furthermore, the summary used by the State was appropriate under South Carolina Law. Rule 1006, SCRE (contents of voluminous records may be presented in form of a summary provided underlying data are admissible in evidence). Holmes, *supra* (same).

Other states are in agreement. In People v. Jackson, 182 Ill.2d 30, 230 Ill. Dec. 901, 692 N.E.2d 391 (1998), the court rejected an assertion similar to the one raised by Owens in this case. In Jackson, the court held that prison incident reports were admissible in a capital sentencing proceeding through the custodian, even when the author did not testify. In addressing these issues in People v. Casillas, 749 N.E.2d 864 (Ill. 2001), the court noted that it had previously rejected such a claim by an appellant, holding that the contents of prison incident reports are admissible during the penalty phase of a sentencing hearing so long as they are relevant and reliable. People v. Armstrong, 183 Ill.2d. 130, 233 Ill. Dec. 252, 700 N.E.2d 960 (1998); People v. Jackson, *supra*.

Similarly, in U.S. v. Chong, 98 F. Supp.2d 1110 (D. Hawaii. 1999), the court held disciplinary reports covering the defendant while in prison were admissible in the penalty phase of a capital proceeding, under the business records exception to the hearsay rule under Federal Rules

of Evidence 803(6).<sup>15</sup> In Chong, the defendant, like Owens, contended that these records are inherently untrustworthy and, hence, inadmissible. The defendant also argued the correctional officers were motivated to make unfavorable records, because they were involved in the proceedings and this fact erodes their reliability. The defendant further argued the reports were not generated with sufficient regularity to qualify for this hearsay exception. The court ruled otherwise, finding the records were reliable because the officers were required to report these incidents.

The Nevada court has similarly held these types of prison records admissible. In Thomas v. State, 114 Nev. 1127, 967 P.2d 1111 (Nev. 1999), the court held prison documents pertaining to the defendant were properly authenticated, and thus were properly admitted during the penalty phase of a murder trial pursuant to the business records hearsay exception. The court, based on persuasive federal and California authority, concluded the proper foundation was laid for the documents to fall under the business records hearsay exception. Other courts have similarly allowed the admission of the prison disciplinary records under a business or public records 803(8) exception. See Hall v. State, 650 P.2d 893 (Okla. Cr. 1982) (prison records containing information about an inmate's history of misconduct within the system fell within the business records exception to the hearsay rule found at 12 O.S. 1981 § 2803(8), and were not excluded under 2803(8)(a)-(e)). See also Frazier v. State, 874 P.2d 1289, 1292 (Okla. Cr. 1994) ("pen-pack" falls squarely within 2803).

The trial court in the present case directed Appellant's attorney to examine each record, and the court determined he would only allow the admission of the report of an incident by an officer who was under a duty to report the same. (Tr. p. 1383, ll. 4-23, p. 1384, l. 23 -p. 1385, l. 17). He

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<sup>15</sup>Federal Rule 803(6) does not exclude subjective opinions or judgments as does 19-5-510 and SCRE 803(6), however Respondent still believes the reasoning in Chong is apposite.

would not allow details of the incident or hearsay within hearsay. (Tr. p. 1361, ll. 16- p. 1363, l. 2).

Appellant's trial counsel reviewed each underlying record and agreed that 28 were officer reported as required by the judge. (Tr. p. 1384, ll. 1-11, p. 1385, ll. 7-17). The trial court found the records to be trustworthy. (Tr. p. 1384, l. 24-p.1385, ll. 1-17). Furthermore, the records which were introduced have special indicia of reliability. The Solicitor only offered a summary of those particular business records of which there was an administrative hearing in the Department of Corrections, which resulted in a conclusion by that body that the incident or infraction actually occurred, or Appellant waived his right to such a hearing. (Tr. p. 1382, ll. 12-25).

Respondent submits the disciplinary summary was properly admissible first under Holmes, *supra* and Whipple, *supra*. Disciplinary reports are admissible under the common law of this state in capital sentencing proceedings under the business records exception of § 19-5-510. Without question, the underlying records are relevant, because they address Appellant's adaptability to prison based on his past conduct and his future dangerousness and character.

Second, the submitted summary was reliable. The prison system is obligated as a matter of state law to keep records concerning prisoner's habits and deportment. S.C. Code Ann. §§ 24-1-130, 24-1-140, 24 -21-60, 24-21-70. *See, Rayfield v. South Carolina Dep't. Of Corrections*, 297 S.C. 95, 374 S.E.2d 910 (Ct. App. 1988) (discussing state statute requiring prison and parole officials to keep records of prisoners' habits and deportment and to prepare adequate reports concerning parole candidates). The custodian of the records testified that the records were kept in the regular course of business and were timely reported. Further, it has been generally held that such public records "have circumstantial guarantees of trustworthiness." *Accord, State v. Pearson*, 223 S.C. 377, 76 S.E.2d 151 (1953). Since the evidence is both relevant and reliable it was properly admitted.

The evidence is admissible under S.C.R.E. 803(6). Rule 803(6) SCRE provides that memorandum, reports, records, etc. in any form, of acts, events conditions, or diagnosis, are admissible as long as they are (1) prepared near the time of the event recorded; (2) prepared by someone with or from information transmitted by a person with knowledge; (3) prepared in the regular course of business; (4) identified by a qualified witness who can testify regarding the mode of preparation of the record; and (5) found to be trustworthy by the court. Rule 803(6); S.C. Code Ann. § 19-5-510 (Supp. 2001). *Accord*, Ex Parte D.H.E.C., 350 S.C. 243, 565 S.E.2d 293 (2002).

The evidence was properly admitted under this Rule, recognized as the business records exception.

***1. Record prepared at or near the time of the event recorded.***

The evidence before the court revealed the underlying correctional officer disciplinary reports were prepared at or near the time of the incident and in fact were made contemporaneously. (Tr. p. 1388, ll. 18-20 & p. 1360, ll. 10-17). Major Nettles testified the summary accurately reflected the records themselves. (Tr. p. 1389, ll. 3-5).

The federal courts, applying this rule, have recognized that the record of the transaction need not be contemporaneous with the event, but should be recent enough to be reliable as evaluated by the court. *Accord*, U.S. v. Goodchild, 25 F.3d 55 (1<sup>st</sup> Cir. 1994) (computer printouts of collection memos containing records of phone statements allowed as business records since underlying data recorded during conversation or immediately thereafter); Wheeler v. Sims, 951 F.2d 123 (7<sup>th</sup> Cir. 1992) (11 day lapse between observation and production of the record allowed). The records in this case satisfy this requirement.

## ***2. Record prepared by or from information by a person with knowledge.***

The record conclusively reveals that the summary admitted in this case was based upon disciplinary reports prepared by a correctional officer with knowledge of the incident. (Tr. p. 1360, ll. 21-23, p. 1383, ll. 4-7, p. 1384, l. 1-p. 1385, l. 17). Judge Patterson would not allow evidence of any other records into evidence but those prepared by a correctional officer with knowledge. (Tr. p. 1374, ll. 10-25, p. 1381, ll. 14-18, p. 1383, ll. 4-7, p. 1384, l. 1 - p. 1385, l. 17). It is not necessary to have the person who prepared the report present at trial. U. S. v. Moore, 923 F.2d 910 (1<sup>st</sup> Cir. 1991). The trustworthiness of the source was enhanced by the fact that it was reported through the prison disciplinary process. (Tr. p. 1382, ll. 12-25). A sufficient foundation is laid if the party seeking to introduce the evidence is able to show that it was the regular practice of the activity to base the incident report upon transmission from a person with knowledge. (Tr. p. 1360, l. 10-p. 1361, l. 9). This was satisfied.

## ***3. Record prepared in the regular course of business.***

The record custodian testified that this data was prepared or recorded in the regular course of business. (Tr. p. 1360, l. 10-p. 1361, l. 6). As stated above, South Carolina statutory law requires that prisoner records be maintained and provided to another state agency to assist in its decision-making process. It cannot be seriously disputed that these records qualify. Records which are drafted during regularly conducted business and not in response to isolated or unusual events are admissible. Courts have held that the regular practice requirement should be generously construed to favor admission, and stringent standards including requirements of careful checking and habits of precision were rejected in In re Japanese Electronic Antitrust Litigation, 723 F.3d 238 (3<sup>rd</sup> Cir. 1983). See Blondie v. Bic. Corp., 947 F.2d 15321 (6<sup>th</sup> Cir. 1991) (social worker's report on what fire

victims said about cause of fire admissible as business record inasmuch as made in scope of employment and as part of regularly conducted activity). Here the practice of providing accurate information of the prison incidents for parole reasons, to enhance safety and make the appropriate housing assignments requires the prison guards to timely report, making this an essential link in the trustworthiness chain.

#### ***4. Qualified witness identifies the record.***

An actual custodian of the records of the South Carolina Department of Corrections, Major Thierry Nettles, the custodian at Lieber Correctional where Appellant was housed, was the witness who presented and identified the records. (Tr. p. 1361, ll. 7-9). And Major Nettles is aware of what happens at other facilities with regards to how records are maintained. (Tr. p. 1364, ll. 8-12, p. 1366, ll. 7-13). And the record establishes that how the records are kept, the process for reporting incidents, and making a record of that, is standardized throughout the Department of Corrections. So, the same policy regarding making of the disciplinary record and the keeping of it is the same at each institution, not just at Lieber. (Tr. p. 1366, ll. 7-13). Under Connelly v. Wometco Enterprises, 314 S.C. 188, 442 S.E.2d 204 (S.C. App. 1994), the appropriate custodian testified. As stated in U.S. v. Reese, 568 F.2d 1246 (6<sup>th</sup> Cir. 1977), it is not required that the custodian have actual knowledge of actual data contained in the business record. See Twelfth RMA Partners, L.P. v. National Safe Corp., 335 S.C. 635, 518 S.E.2d 44 (Ct. App. 1999). Major Nettles was certainly a qualified witness under Rule 803(6). The trial court found he was qualified to testify under the Rule. (Tr. p. 1358, ll. 18-20, p. 1375, ll. 12-14, p. 1379, l. 18-p. 1380, l. 1). He had custody of Appellant's file since Appellant was housed at his facility. (Tr. p. 1379, l. 18-p. 1380, l. , p. 1371, ll. 13-20, p. 1387, l. 10 - p. 1389, l. 5). Who better to testify to the contents of Owens' disciplinary file than the

custodian of records at the facility at which Appellant was housed and the person responsible for the supervision of Appellant Owens' housing. (Tr. p. 1392, ll. 13-15, p. 1379, l. 23-p. 1380, l. 1).

***5. Record is trustworthy in the opinion of the court.***

Judge Patterson found these prison records trustworthy.<sup>16</sup> (Tr. p. 1358, ll. 9-22, p. 1384, l. 24-p. 1385, l. 17). The lower court reviewed the underlying incident reports for the summary and found the portions he admitted had an indicia of trustworthiness, because they were reported by an employee of the Department of Corrections who was under a duty to report the incidents and the Department kept a record on incidents involving inmates. (Tr. p. 1384, l. 24-p. 1385, l. 17). Further, this summary is purely a factual recording of the incident which eventually had a disciplinary result. (Tr. p. 1382, ll. 12-25). It was properly admitted. See State v. Key, 277 S.C. 214, 284 S.E.2d 781 (1981). Further, the summary is admissible, because the underlying records were (1) kept pursuant to a routine procedure designed to assure accuracy; 2) created for motives that end to assure accuracy; and (3) they are not merely accumulations of hearsay. See Rosenburg v. Collins, 624 F.2d 659 (5<sup>th</sup> Cir. 1980). (Tr. p. 1361, ll. 16-22, p. 1375, ll. 21-22, p. 1381, ll. 14-17, p. 1384, l. 24- p. 1385, l. 17).

***6. The Prison Records are admissible under either 803(6) or 803(8).***

At trial, the State proffered this evidence under Rule 803(6). As set forth above, this evidence meets the conditions precedent to its admission under this Rule. In addition to the cases

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<sup>16</sup>Judge Patterson in his final decision did not use the exact word "trustworthy", however a reading of the record dealing with this issue can lead to no other conclusion but that the judge found the offered portion of the records trustworthy, since Judge Patterson was clearly familiar with the requirements of Rule 803 and admitted the summary into evidence. (See Tr. p. 1354-1389). In fact, Judge Patterson pointed to the fact that the officers were required to report the incidents recorded, in deciding to admit the summary.

cited above, prison disciplinary records have been held to be admissible under Rule 803(8) in Games v. State, 743 N.E.2d 1132 (Ind. 2001), a capital case in which similar underlying reports were admitted. Also, in Combs v. Wilkinson, 315 F.3d 548 (6<sup>th</sup> Cir. 2002), the court found that the report prepared by a use of force committee was admissible under Rule 803(8), even though the committee lacked personal knowledge and its report was based upon 123 interviews and numerous documents, including staff and inmate incident reports, as well as an investigative report.

Appellant has asserted the summary contains “subjective opinions and judgements.” Appellant reads this exclusionary phrase too broadly. The summary is based upon the factual recitation of the incident and includes the disciplinary result. It is not a listing of subjective opinion, i.e. “proceeding from taking place within the mind.” but rather an objective statement of a factual result. Under Appellant’s theory, the business records exception to the hearsay rule would be eviscerated, since factual representations with an indicia of trustworthiness are the reasoning for its existence.<sup>17</sup>

### ***The Evidence does not violate the Confrontation Clause***

Appellant next alleges that even if the records are admissible, they violate the Confrontation Clause under Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004). Appellant’s reliance

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<sup>17</sup>At trial, the prosecution did not assert admissibility under Rule 803(8). As an additional sustaining ground, Respondent would submit this evidence can be admitted under this alternate rule. Rule 220(c) SCAR. Although S.C.D.C. employees are “peace officers”, disciplinary reports do not involve necessarily criminal case matters observed by police and law enforcement personnel. Instead, this information is maintained for correctional purposes to evaluate the deportment of the inmate and the safety of the institution. Respondents submit the excluded data was to exclude observations made by law enforcement at a crime scene, because such observations were made in an adversarial setting which were deemed less reliable than observations made by public officials in other settings. Here, the disciplinary records were not necessarily crimes, but prison violations. As such, Respondents submit the exclusion does not apply and the reports are admissible under Rule 803(8).

on Crawford is misplaced. The Court in Crawford specifically excepted the contents of business records from a Confrontation Clause challenge. Id. In fact this exact issue, regarding prison disciplinary records, was also decided by this Court in Holmes, *supra*. Id. (“properly administered the business and public records exceptions are among the safest against a Confrontation Clause challenge of the hearsay exception”) *citing* Crawford. *supra*.

The Court in Holmes was correct. Hearsay evidence contains sufficient indicia of reliability to satisfy the Confrontation Clause when the evidence either falls within “a firmly rooted hearsay exception” or “contains particularized guarantees of trustworthiness such that adversarial testing would be expected to add little, if anything, to the statements reliability.” Lilly v. Virginia, 527 U.S. 116, 124-125, 119 S.Ct. 1887 (1999), (quoting Ohio v. Roberts, 448 U.S. 56, 66, 100 S.Ct. 2531 (1980) *see also* Idaho v. Wright, 497 U.S. 805, 815, 110 S.Ct. 3139 (1990)). A defendant’s right to confrontation is not absolute. Lilly, *supra* at 123-24, Ohio, *supra* at 65-66, Christian v. Rhode, 41 F.3d 461, 467 (9<sup>th</sup> Cir. 1994).

This Court has recognized subsequent to Holmes, *supra* that business records do not implicate the Confrontation Clause. State v. Cutro, 365 S.C. 366, 618 S.E.2d 890 (2005) (“Finally, in Crawford v. Washington, 541 U.S.36, 54, 124 S.Ct. 1354 (2004), the United States Supreme Court noted the hearsay exception for business records and observed that business records are not ‘testimonial’ and therefore do not implicate the Confrontation Clause.”). In Cutro, *supra*, this Court held public records do not implicate the Confrontation Clause.<sup>18</sup>

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<sup>18</sup>In pre-Crawford decisions, business records were introduced in criminal cases in state and federal courts and determined not to violate the Confrontation Clause. *See* Manocchio v. Moran, 919 F.2d 770, 776-80 (1<sup>st</sup> Cir. 1990) (autopsy report admitted to prove cause of death without medical examiner did not violate the Confrontation Clause). “The admission of evidence under a firmly rooted exception to the hearsay rule that does not require unavailability of a

### *Harmless Error*

Even if this Court were to assume *arguendo* that the state trial court committed error in admitting the records under the business records exception or had violated Owens' rights under the Confrontation Clause by admitting the disciplinary summary, the Court must conclude that such error was harmless. *See State v. Bell*, 302 S.C. 18, 393 S.E.2d 362 at 372 (1990); *See also King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1988) ("assuming without deciding that the case summaries and disciplinary records were improperly admitted", the court held its examination of the record in its entirety lead it to conclude the alleged error did not affect a substantial right of the

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witness, such as the public records exception, does not violate the Confrontation Clause, and the public record recognition to the hearsay rule is firmly rooted." *Roberts*, 448 U.S. at 66 n.8, 100 S.Ct. At 2539 n.8; *United States v. Contreras*, 63 F.3d 852, 857 (9<sup>th</sup> Cir. 1995) (citations omitted); *United States v. Ray*, 930 F.2d 1368, 1370 (9<sup>th</sup> Cir. 1990), cert. denied, 498 U.S. 1124, 111 S.Ct. 1084 (1991). "Properly administered, the business and public records exceptions would seem to be among the safest of the hearsay exceptions." *Contreras*, 63 F.3d at 857. *See Sherman v. Scott*, 62 F.3d 136 (5<sup>th</sup> Cir. 1995) (testimony of supervisor demonstrated lab report finding cocaine had particular guarantees of trustworthiness and because cross-examination of chemists who prepared report would have been of little use to petitioner, admission of the report did not violate the Confrontation Clause.); *Minner v. Kirby*, 30 F.3d 1311 (10<sup>th</sup> Cir. 1994) (admission of chemists lab notes through chemist's supervisor was proper under the Confrontation Clause"); *United States v. Baker*, 855 F.2d 1353, 1360 (8<sup>th</sup> Cir. 1988) (lab reports of controlled substances did not violate Confrontation Clause); *Reardon v. Manson*, 806 F.2d 39, 41-43 (2d Cir. 1986) (chemists' reports admitted through supervisor did not violate Confrontation Clause); *United States v. Simmons*, 773 F.2d 1455, 1460 (4<sup>th</sup> Cir. 1985) (no Confrontation Clause violation because utility of confronting ATF record-keepers at trial was negligible); *People v. Hall*, 114 Ill.2d 376, 416-17, 102 Ill. Dec. 322, 499 N.E.2d 1335 (1986) (admission of prison records at sentencing hearing did not violate defendant's right of confrontation). *See also People v. Ward*, 154 Ill.2d 272, 328030, 181 Ill.Dec. 884, 609 N.E.2d 252 ( ) (court did not abuse discretion in allowing prison record to be introduced in sentencing hearing); *See State v. Dennis*, 337 S.C. 275, 281, 523 S.E.2d 173, 176 (1999) (since there is an adequate indicia of trustworthiness, adversarial testing would add little, there is no Confrontation Clause violation).

appellant).<sup>19</sup> Likewise in the present case there was overwhelming evidence of Petitioner's future dangerousness, character, and inability to adapt to prison life outside of the business records.

The violation of a defendant's right of confrontation is also subject to harmless error analysis. Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S.Ct. 1431(1986). A violation of the Confrontation Clause is not *per se* reversible error. State v. Dinkins, 345 S.C. 412, 548 S.E.2d 217 (2001), *citing* State v. Dinkins, 339 S.C. 597, 529 S.E.2d 557 (Ct. App. 2000); State v. Jenkins, 322 S.C. 360, 364, 474 S.E.2d 812, 815 (Ct. App. 1996). *Also* Bell, 302 S.C. 18, 393 S.E.2d at 372 (1990).

The Court must consider several factors to determine whether the alleged error is harmless or requires reversal. These factors include the importance of the challenged evidence to the State's case, whether the evidence was cumulative, whether the evidence was materially corroborated or contradicted by other evidence introduced at trial, the extent of cross-examination otherwise permitted, and the overall strength of the State's case. Jenkins, *supra* at 364-65, 474 S.E.2d at 815. On this issue, these factors conclusively weigh towards a conclusion of harmless error since the factors reveal: 1) The summary is similar to testimony of Major Thierry Nettles who stated Owens was the worst inmate in his custody and he houses problem inmates, and this statement came from personal knowledge of the witness, 2) the evidence is cumulative to other evidence of his inability

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<sup>19</sup>While the King court relied on Kotteakos v. U.S., 328 U.S. 750 (1946) harmless error standard rather than that set forth in Chapman v. California, 386 U.S. 18 (1967), the court's decision is still persuasive, because it found harmless error in light of other properly admitted evidence of future dangerousness.

to adapt in prison, i.e. the murder of Christopher Lee,<sup>20</sup> 3) the exhibit was corroborated by a defense witness, Dr. Donna Schwartz Watts, and not contradicted in the record, 4) cross examination clarified the record, defense counsel was able to clarify for the jury exactly what was meant by each entry if he so chose, 5) the strength of the state's case in developing Owens' character was overwhelming without the challenged summary.<sup>21</sup> The disciplinary records were clearly cumulative to other evidence in aggravation. Likewise, the evidence that he would be a predator in prison was firmly established without reference to the records. (Tr. p. 1392, ll. 11-20). The admission of the records, was harmless beyond a reasonable doubt.

Furthermore, the record is clear that Appellant's own experts reviewed and relied on

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<sup>20</sup>Dr. David Brunetti, a psychologist, also testified that Owens has antisocial personality disorder which is primarily characterized by repeated disregard for the rights and safety of others. (Tr. p. 1289, ll. 1-14). Brunetti stated Owens was likely to be an individual who is hostile in his relationship with others, very quick to experience anger, and had learned the way to deal with anger is aggressively, as well as with the use of weapons. (Tr. p. 1290, ll. 3-18). After reviewing Owens' confession to the Lee murder, Dr. Brunetti's opinion changed from Owens being an impulsive actor "to that this was a much more predatory type of aggression." (Tr. p. 1296, l. 16-p. 1297, l. 18). Brunetti also testified he reviewed all of Owen's records from the D.O.C. since 1999 and in his opinion even in maximum solitary confinement Owens continues to harm others. (Tr. p. 1298, l. 11-p. 1299, l. 8). This testimony was admitted without objection.

<sup>21</sup>In addition to the evidence of the robberies and brutal murder committed by Appellant, the jury heard testimony that Appellant was adjudicated delinquent as a juvenile for burglary (two counts), assault with intent to kill, and unlawful possession of a pistol. (Tr. p. 1494, ll. 3-17). The jury also heard Appellant's confession to the murder of his cellmate in the Greenville County detention center along with the testimony of the pathologist who performed the autopsy on Christopher Lee, who described the savage beating that resulted in Lee's death. (Tr. p. 1307-1339, 1341-1353). The jury also heard testimony that Owens, because of his prison conduct, was required to be housed "in a cell inside a cage" and that of the worst inmates in his cellblock, he was the most problematic inmate. (Tr. p. 1392, ll. 11-20). The jury also heard testimony from officer Joe Wood who testified Appellant bragged about selling lots of drugs and stated he wanted to be remembered as the one "who killed the most people in Greenville." (Tr. p. 1093, ll. 10-13). Owens also told his girlfriend he wanted to go down in history for committing the most murders in Greenville County without getting caught. (Tr. p. 1116, ll. 1-4).

Department of Corrections disciplinary records in rendering their opinions. (Tr. p. 1404, l. 16-p. 1405, l. 15). These witnesses included Marjorie Hancock and Doctor Thomas Cobb. (Tr. p. 1404, l. 16-p. 1405, l. 15 & Tr. p. 1449, ll. 12-16). Doctor Cobb testified Owens was in maximum security at Leiber Correctional Facility and Owens was getting in a lot of trouble. (Tr. p. 1437, ll. 1-6). Cobb testified Owens was kept “in a cell, inside of a cage” which was different than all the other cells on the cell block. (Tr. p. 1441, ll. 9-13). Cobb also testified Owens was found with a shank in his cell. (Tr. p. 1452, ll. 8-16). Cobb also testified Owens made things [weapons] for protection. (Tr. p. 1453, ll. 19-21).

And Doctor Donna Schwartz-Watts relied on the DOC records as well. (Tr. p. 1461, ll. 2-5). Dr. Schwartz-Watts testified without objection that she was “..aware of many of his disciplinaries since he’s been confined in the Department of Corrections.” (Tr. p. 1461, ll. 2-5). Schwartz-Watts told the jury Appellant had horrible behavior in the Department of Juvenile Justice which included write ups for fighting and being disruptive in school, among other things. (Tr. p. 1470, ll. 17-23). Schwartz-Watts testified Appellant’s behavior in the juvenile correction facilities was at times “aggressive”. (Tr. p. 1472, ll. 12-19). Schwartz-Watts testified that upon Owens’ release from Turbeville Correctional Institute, Owens accrued a number of armed robbery and assault charges. (Tr. p. 1471, l. 24-p. 1472, l. 7). Schwartz-Watts testified Owens had about 56 write-ups in the adult correctional system, including assaultive behavior. (Tr. p. 1472, l. 35-p. 1473, l. 7). She also stated he had a “long disciplinary history”. (Tr. p. 1473, ll. 6-7). Dr. Schwartz-Watts testified Owens “has a long history of illegal behaviors.” (Tr. p. 1481, ll. 13-14). She also testified Owens set fire to his cell and threw coffee in an officer’s face. (Tr. p. 1488, l. 16- p. 1489, l. 2). Schwartz-Watts admitted Owens was caught with a 12 inch weapon and a 8 inch shank on two different occasions in 2006.

(Tr. p. 1487, l. 16-p. 1488, l. 10). And Dr. Schwartz-Watts testified to the following:

Q: And I don't want to belabor this point, but in your report it talks that you referred to the disciplinary reports of the South Carolina Department of Corrections from 2001 through 2006?

A: Yes, sir.

Q: You had copies of all those infractions, incident reports?

A: Yes, sir. I would have had a list of them and then I think for probably the majority of them, there would have been a narrative to describe what happened.

Q: Right, the internal report –

A: Yes.

Q: - - that describes all that.

A: Yes.

Q: Now, I don't want to stand up here and read or have you read all those reports, but you did consider and use those reports as part of your review and diagnosis?

A: Absolutely, yes.

Q: And I assume you also used the material contained in the report as to who said what and who did what?

A: Yes, sir.

Q: All right. So if we needed to, we could go through those with you, but I just want to summarize in the end your comments were that Mr. Owens had substantial disciplinary infractions during his course of incarceration?

A: That is very fair to say.

Q: In fact, I believe you said he had something more than ordinary?

A: I counted 56, and - - of course, in the course of my career I look at - - its very common in doing evaluations I'll look at the list of assaultive disciplinaries, and it was a lengthy list.

Q: And we have - - and you may have been in the courtroom. We put in, through Mr. Nettles, a summary, very brief summary, of each one of those events, 28 of them to be exact we put in, and were you in the courtroom when we - -

A: No, sir.

Q: Okay, Well, there is a summary or a list of those that I would like to show you, State's Exhibit 30.

A: Thank you.

Q: And just so you will understand what that is, that is a summary of all of - - of 28 of those reports that - - you had the whole report. That's just a summary of what the heading of it was.

A: Yes, these all look familiar. Each one of these I have some recollection of reading the reports that went with them.

(Tr. p. 1485, l. 12 - p.1487, l. 8).

In summary, Dr. Schwartz-Watts and others testified without objection that Appellant had a lengthy disciplinary history including a history of assaultive behavior and possession of illegal weapons while incarcerated. In fact, the defense' witnesses testified to more disciplinary violations than the State offered into evidence. All of this evidence was before the jury without reference to the challenged summary. Additionally, Dr. Schwartz-Watts testified that the State's summary admitted into evidence was in fact a summary of the very documents she relied upon in reaching her opinion.<sup>22</sup> The summary could have been properly admitted through Doctor Schwartz-Watts if it had not already been entered.

Even assuming *arguendo* that the admission of the records was error, their admission was

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<sup>22</sup>In fact, Dr. Brunetti, a former defense expert, testified on behalf of the State that after reviewing the very same records, Owens continues to harm others while in maximum solitary confinement. This testimony was admitted without objection. (Tr. p. 1298, l. 22- p. 1299, l. 8). Brunetti testified before Major Nettles and before the records themselves were offered by the state. This evidence was also before the jury.

harmless beyond a reasonable doubt. State v. Haselden, 353 S.C. 190, 577 S.E.2d 445 (2003) (admission of improper evidence is harmless where the evidence is merely cumulative to other evidence); State v. Braxton, 343 S.C. 629, 541 S.E.2d 833 (2001); State v. Blackburn, 271 S.C. 324, 247 S.E.2d 334 (1978); *see also* State v. Williams, 321 S.C. 455, 469 S.E.2d 49 (1996) (instructing that error in admission of evidence is harmless where it is cumulative to other evidence which was properly admitted); State v. Douglas, 367 S.C. 498, 520, 626 S.E.2d 59, 71 (Ct. App. 2006) (“The admission of improper evidence is harmless where the evidence is merely cumulative to other evidence”).<sup>23</sup>

The jury, without regard to the summary, was aware Owens had a lengthy record of assaultive behavior while in confinement, including murder, and a history of making weapons or “shanks”. And, within his housing unit he was considered “assaultive”, “destructive”, and “damaging”, the “most problematic inmate”. (Tr. p. 1392, 18-20). Even in maximum solitary confinement “he continues to harm others.” (Tr. p. 1299, ll. 1-8). The admission of the summary was harmless beyond a reasonable doubt. State v. Motley, 251 S.C. 568, 164 S.E.2d 569 (1968) (no prejudice shown where a different witness testified to the same matter without objection).

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<sup>23</sup>*See also* State v. Rice, \_\_\_ S.E.2d \_\_\_, 2007 WL 2914651 (Ct. App. Oct. 5, 2007) (admission of business records was harmless where records were cumulative to other evidence).

### III.

**There was no reversible error with regard to the Solicitor's closing argument, given that the issue was not preserved, and the argument was permissible in any event.**

In his third issue on appeal, Appellant alleges the Solicitor entered an arbitrary factor into this sentencing proceeding by allegedly arguing general conditions of prison confinement. This issue has no merit.

#### *Failure to Preserve Alleged Error*

This issue is not preserved for appellate review. There was no objection to the portion of the Solicitor's closing argument Owens now challenges on appeal. (Tr. p. 1561). In fact, there was no objection made to any portion of the Solicitor's closing argument. (Tr. p. 1547-1563). "All that this Court has ever required is that the questions presented for its decision must first have been fairly and properly raised in the lower court and passed upon by that Court." Hubbard v. Rowe, 192 S.C. 12, 5 S.E.2d 187 (1939). Issues not raised to and ruled upon in the trial court will not be considered on appeal. In the Interest of Michael H., *supra* (trial court must be given an adequate opportunity to resolve the issue); Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) (issue cannot be raised for the first time on appeal); State v. Southerland, 316 S.C. 377, 447 S.E.2d 862 (1994) (contemporaneous objection must be made to preserve issue for appellate review).

"There are four basic requirements to preserving issues at trial for appellate review. The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." Jean Hoefer Toal et al., Appellate Practice in South Carolina 57 (2d ed. 2002). Appellant has met none of these requirements.

The preservation rule is also applicable to closing arguments. State v. Wiggins, 330 S.C. 538, 500 S.E.2d 489 (1998) (failure to object to closing argument precluded appellant from raising issue on appeal); State v. Carlson, 363 S.C. 586, 611 S.E.2d 283 (Ct. App. 2005); State v. Richardson, 358 S.C. 586, 595 S.E.2d 858 (Ct. App. 2004) (appellant failed to make any objection during closing arguments).

In State v. Patterson, 324 S.C. 5, 482 S.E.2d (1997), the solicitor “..equated life in prison with that of a motel with appellant as the innkeeper.” Id. at 17. Patterson objected for the first time on appeal. This Court held that because no objection was made at trial, the issue was not preserved. Id., citing Southerland, *supra*.

In State v. Gardner, 332 S.C. 389, 505 S.E.2d 338 (1998), the solicitor argued to the jury that the “easy life” afforded an inmate housed in the general population, was not an appropriate punishment for appellant’s crimes. Gardner challenged the argument for the first time on appeal. This Court held: “There was no objection to the closing argument, and therefore no issue is preserved for our review.” Id. at 393, citing State v. Franklin, 318 S.C. 47, 456 S.E.3d 357, *cert. denied*, 516 U.S. 856, 116 S.Ct. 160 (1995).

The proper course is to object immediately to an improper argument. In the Matter of the Care and Treatment of McCracken, 346 S.C. 87, 551 S.E.2d 235 (2001); State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996) (failure to object during closing argument); State v. Black, 319 S.C. 515, 462 S.E.2d 311 (Ct. App. 1995) (proper course during an improper argument is for opposing counsel to immediately object and have a record made of the statements or language complained of and ask the court for a distinct ruling thereon). Failure to do so results in the issue not being preserved for appellate review. Knight, *supra*.

And the objection, if made, must be timely. State v. Somerset, 276 S.C. 220, 277 S.E.2d 593 (1981) (ordinarily, if an appellant fails to object the first time a statement is made, he waives his right to raise the issue on appeal); Scott v. Porter, 340 S.C. 158, 530 S.E.2d 389 (Ct. App. 2000). Appellant made no timely objection to any of the Solicitor's closing argument. In fact, Appellant made no objection at all. See Wiggins, supra ("This argument is not preserved for appellate review because Appellant made no objection to Solicitor's arguments at any point during the trial").<sup>24</sup>

Furthermore, there is no issue of an inflammatory argument,<sup>25</sup> because this issue was not raised to the trial judge by way of a post-trial motion. Dial v. Niggel Assoc., Inc., 333 S.C. 253, 509 S.E.2d 269 (1998) (Toyota challenge must be raised to the trial judge by way of post-trial motion to be preserved for appeal.); See also Scott, supra (solicitor's comments during closing argument did not rise to the level of a Toyota argument). No post trial motion regarding the Solicitor's closing argument was made in this case. This issue is simply not preserved for appellate review. Dial, supra. Even if a post-trial motion had been made, the Solicitor's challenged comments do not

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<sup>24</sup>If an objection had been made and sustained, Appellant must move for a curative instruction or request a mistrial, otherwise he has received what he asked for and cannot be heard to complain on appeal. See Patterson, supra (during closing argument appellant objected, the judge ruled in appellant's favor and appellant failed to move to strike or request a curative instruction; issue not preserved for review, objecting party must contemporaneously make an additional objection); George, supra; State v. Carlson, 363 S.C. 586, 611 S.E.2d 283 (Ct. App. 2005); State v. Richardson, 358 S.C. 586, 595 S.E.2d 858 (Ct. App. 2004) (appellant did not move for mistrial on ground of improper argument); Holroyd v. Requa, 361 S.C. 43, 603 S.E.2d 417 (Ct. App. 2004) (failure to request curative instruction when objection during closing argument was sustained). In this case, there simply was no objection, and obviously no request for a mistrial or a curative instruction. Appellant has failed to preserve this issue for appeal.

<sup>25</sup>Toyota of Florence v. Lynch, 314 S.C. 257, 442 S.E.2d 611 (1994) (where challenged argument constitutes abuse of a party or witness); South Carolina State Highway Dep't. v. Nasim, 255 S.C. 406, 179 S.E.2d 211 (1971). See also State v. Bennett, 369 S.C. 219, 632 S.E.2d 281 (2006) (in which the appellant raised the issue in a post-trial motion for a new trial) citing Dial, supra and Toyota, supra as controlling.

constitute an abuse of a party or witness.

The preservation rule also applies to constitutional arguments of an appellant. State v. Powers, 331 S.C. 37, 501 S.E.2d (1998) (citations omitted). And, it applies when the appellant alleges an arbitrary factor has been introduced into the sentencing proceedings. State v. Stone, Shearouse Advance Sheets, Opinion No. 26408 (filed December 20, 2007) (citations omitted).

Finally, even if Appellant's contention on this issue was true, which it is not, in State v. Bowman, 366 S.C. 485, 623 S.E.2d 328 (2005), this Court held the appellant's claim the trial judge should not have allowed evidence of general prison conditions was not preserved for review, because "appellant did not raise this issue to the trial court before the testimony was presented and did not make a contemporaneous objection when the testimony was actually elicited. Further, the trial court did not rule on this issue as now stated by appellant." Id., at 498, *citing* State v. Moore, 357 S.C. 458, 593 S.E.2d 608 (2004); State v. Byrum, 326 S.C. 107, 485 S.E.2d 360 (1997); State v. Johnson, 363 S.C. 53, 609 S.E.2d 520 (2005). Appellant failed to preserve this issue for appellate review by failing to make any objection at all to the Solicitor's closing argument. (Tr. pp. 1547-1563). Wiggins, *supra*, *citing* Patterson, *supra*.

### **Standard of Review**

Owens alleges the trial judge erred in allowing the Solicitor to make the challenged portion of his closing argument. A trial judge is vested with broad discretion in dealing with the range and propriety of closing argument and ordinarily his rulings on such matters will not be disturbed. Patterson, *supra* at 17. The trial court's discretion will not be overturned absent a showing of an abuse of discretion amounting to an error of law that prejudices the defendant. State v. Copeland, 321 S.C. 318, 468 S.E.2d 620 (1996) *citing* State v. Washington, 315 S.C. 108, 432 S.E.2d 448

(1992) *also State v. Dawkins*, 297 S.C. 386, 377 S.E.2d 298 (1989). Additionally, the appellant has the burden of showing that any alleged error in argument deprived him of a fair trial. *Bell, supra*. Owens has failed to meet that burden.

### *The Merits*

Even if preserved, the argument was not improper, because the Solicitor's closing argument was tied directly to Appellant, Freddie Eugene Owens. Additionally, the matters discussed in this portion of the Solicitor's closing argument were tied to the record and the reasonable inferences from the record. The central theme and focus of the Solicitor's closing argument was that the death penalty was the appropriate punishment for Owens, not life in prison, because of the heinousness of the murder of Irene Graves, the evidence of Owens bad character and his assaultive conduct while incarcerated. (See Tr. pp. 1546-1563). The following is the portion of the Solicitor's argument Owens alleges was improper (*in italics*) in the context that it was made:<sup>26</sup>

Even in that environment of the cell inside a cage his assaultive behavior still exists. Dr. Cobb told you yesterday, and I don't know if you caught this, but he said "when I talked to him, I go inside the cage. When I talk to him through the window." He doesn't even go inside the cell with Freddie Owens.

He is still planning. He is still making shanks. He is still planning for assaultive behavior. He has those shanks under his mattress and he has them in his possession after he's been on medication.

But what we really have, Freddie Owens is playing a game. Halloween night was a game. Ride around and rob and then kill Irene Graves, because she wouldn't open the safe or cash register fast enough, because it was in grocery order mode. He has no respect for life. His statement was "I shot the bitch. I shot the whore." The mother of three children working three jobs, he called her a bitch. He has no respect for life. He has no respect for other people. In fact, his disrespect is so apparent that it put chills on the neck of Joe Wood, who said he had been a detective for over 25

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<sup>26</sup>In his brief, Owens only presents the portion of the argument to which he *now* objects, and does not present this Court with the context in which the argument was made.

years, and he was only one of two people, Freddie Owens, who put chills on his neck. And that's the reason, because Freddie is a unique person. He killed Irene Graves and he went home and went to bed. He killed Christopher Lee. Hands on, horrific predator killing; beat him the whole time he was unconscious; rammed his head into the floor; kicked him; stomped his chest; twisted his neck until he ripped the skin off of him, broke two ribs; rammed the pen up his nose to make him stop moaning; kicked him; burned him. Then he threw his lifeless body up on a bunk like a sack of potatoes and went to sleep. He could care less. He's cold. He's unfeeling. And in the Department of Corrections he continues to manifest that: Cold; assaultive; planning for assaults; shanks; stabbing. He continues as a predator.

Freddie wanted to be a person in Greenville who killed the most people and got by with it. He said it best what he is when he told Joe Wood "I'm a real menace." And Major Nettles summed it up for you when he said "he's still at this date my most problematic inmate in the population of the worst of the worst inmates in this state."

The greater the extent of his culpability, the greater the punishment. So what is the appropriate sentence to fit this crime and hold him responsible for his actions? Life imprisonment is not appropriate. You can't put him in prison for life and expect him to suffer, because he has to think about it everyday? He's not going to give another thought for Irene Graves. He's not going to give another thought for her two children. He's not going to give another thought for Christopher Lee.

He's not going to give another thought to any of those correctional officer's that he assaults. Nobody is going to be there to talk to him and say "do you remember the murder you did?" So he's not going to suffer with any memory in prison. He will go on with his self teaching and making himself better and reading his books, learning languages and doing things that he's doing. There is nobody going to be there to remind him.

*Sure, you and I may think going to prison would be a serious thing, and it would be, but what about Freddie Owens? Big prison is like a little city. In prison he will have all the necessities of life. Sure, he will be in solitary, but he will still have food to eat. They will provide him with clothes. He will have books to read. He will be able to recreate and exercise. He will have doctors to take care of him. He will have clothing that they provide, and he will have contact with his family and loved ones, and TV at times, and he will have family business. Not much more than a change of address for Freddie Owens. So don't think putting Freddie Owens in prison for the rest of his life is going to be a significant punishment for him.*

*The death penalty is the appropriate punishment for him. Remember Freddie could have made something of himself. He had a mother who did the best she could*

by him. That's what was testified by the psychiatrists. A teacher who cared about him, beyond normal expectations, gave him special help. He had average intelligence, IQ, has increased over the years. He was artistic. He was athletic, but he chose another route. He chose a route to be a predator and he chose a route to be a killer.

Remember, Irene Graves was a living, breathing human being, who had a right to continue to live. She had never harmed a soul. A good sweet person. She loved her children and she deserved to live, but he invaded her workplace and he took her life. And when you consider the punishment, want you to consider the extent of the crime and extent of his culpability. Killing Ms. Graves was a horrible crime and it deserves the most severe punishment. It was a senseless crime. Killing Christopher Lee was the same. Senseless, unnecessary, brutal predator. His behavior in prison has been the same. Correctional officers don't deserve the continuing abuse of Freddie Owens. He should be held accountable.

(Tr. p. 1558, l. 20- p. 1562, l. 13). Given the record in this case, and the context that the argument was made, it was not improper, but entirely proper.

In keeping with this Court's previous decision in State v. Bowman, *supra*, the State did not offer an expert witness or testimony regarding general conditions of confinement.<sup>27</sup> Testimony regarding how *Freddie Eugene Owens* was confined, and how he behaved in those conditions, came from his own psychologist and psychiatrists and the state's custodian of records who testified to Owens' record of disciplinary infractions and from the officer's own personal experience with Mr. Owens. See State v. Bryant, 372 S.C. 305, 642 S.E.2d 582 (2007) (how inmates other than the defendant at trial are treated in prison is inappropriate, evidence should be connected to particular defendant) (citation omitted). The record reflects that the Solicitor's comments were not only *not* improper, but also were entirely proper.

An appellate court must review the argument in the context of the entire record. Patterson,

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<sup>27</sup>The Solicitor also complied with this Court's subsequent decision in State v. Burkhardt, 371 S.C. 482, 640 S.E.2d 450 (2007) decided approximately 2 months after this sentencing proceeding.

*supra*; Rice, supra, citing Patterson.<sup>28</sup> Considerable latitude is generally allowed in matters of drawing and arguing inferences and deductions from evidence. Johnson v. Life Ins. Co. of Ga., 227 S.C. 351, 88 S.E.2d 260 (1955). A lapse of good taste will rarely constitute prejudicial error nor will robust language introduce an arbitrary factor. State v. Chaffee, 285 S.C. 21, 328 S.E.2d 464 (1984). Arguments must be confined to the evidence in the record and reasonable inferences therefrom, although failure to do so will not automatically result in reversal. State v. Huggins, 325 S.C. 103, 481 S.E.2d 114 (1997). A new trial will not be granted unless the comments so infected the trial with unfairness so as to make the resulting conviction [or death sentence] a denial of due process. Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868 (1974); Bennett, supra; Patterson, supra. “[W]hether or not the particular arguments are so prejudicial as to constitute reversible error depends upon the nature of the utterances and the circumstances under which they were made.” Bennett, supra, quoting Nasim, supra.

Doctor Schwartz-Watts, Appellant’s witness, testified to the following regarding Appellant:

He reads. He - - is fluent. He has taught himself Arabic. He has taught himself Swahili. He is studying French. He reads. He reads scholars. He won’t read any books unless it’s a scholar that’s published for 15 years. He reports he has taught other inmates how to read. He teaches them to read using the book Alexander the Great, because he doesn’t want them reading books that aren’t well written. So he’s able to focus his attention.

(Tr. p. 1479, ll. 9-17). “I also discovered that he’s fluent in sign language, which I didn’t know. I saw him sign in court. So he’s taught himself many things.” (Tr. p. 1479, ll. 21-23). Actions Doctor Tora Brawley, another defense witness, described as Owens “..bettering himself..”. (Tr. p. 1427, l.

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<sup>28</sup>By engaging in this analysis, Respondent does not concede the Solicitor’s comments were improper. Instead, the record reflects they were proper given the testimony introduced in the case by both the state and the defense.

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Additionally, in Owens' confession to the murder of Christopher Lee, Owens refers to he and other cellmates in his cell block watching the news on *television*. (Tr. p. 1336, ll. 24-25). Owens then states in his confession: "I then *worked out* and *took a shower*." (Tr. p. 1337, l. 1). Owens talks about *sleeping in his bed*. (Tr. p. 1337, ll. 1-2). Owens talks about being brought *breakfast* the morning after he killed Lee. (Tr. p. 1338, ll. 22-23). The prison disciplinary records admitted in evidence also reveal that Appellant was allowed to *shower*, was *given food*, and *coffee* and had a *mattress* to sleep on. (Tr. p. 1390, l. 11-p. 1391, l. 13). Albeit, Appellant abused all these privileges.<sup>29</sup> The record is clear Freddie Owens had these privileges. And, a shank found in his cell was manufactured from fencing on the *recreation yard*. (Tr. p. 1390, l. 18, p. 1391 ll. 19-22). In fact, most of the shanks found in Owens' cell were made from fencing material. (Tr. p. 1393, l. 13). If there was any question regarding Owens being allowed to have recreation it was cleared up by Doctor Cobb who stated he actually witnessed Owens being taken to the *recreation yard*. (Tr.p. 1441, ll. 6-8). The record also reflects that Owens received *visitors* while in prison and received *letters* from a friend. (Tr. p. 1420, ll. 7-13). Additionally, Freddie Owens has been *treated by doctors & a nurse* while in prison.<sup>30</sup> (Tr. p. 1434, l. 17-p. 1494, l. 18, p. 1390, l. 10). And there is a psychiatrist currently working at Owens facility under Dr. Cobb's direction. (Tr. p. 1448, ll. 9-14). The Solicitor's comments were based in the record and the inferences therefrom. See Vaughn v. State, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004).

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<sup>29</sup>Appellant stabbed an inmate in the *shower*, threw the *food* tray and *coffee* on a guard and set fire to his *mattress*.

<sup>30</sup>He slapped the nurse in the face.

The record also shows that Appellant had been incarcerated during his teenage years and almost all of his adult life. (Tr. p. 1405, ll. 7-8, 12-5). Life in prison would not be much more than a change of address for Appellant Owens. Appellant also told investigators after the murder “the only thing I’m here for is to eat, sleep, shit and piss. I don’t give a shit. I was born to be in jail.” (Tr. p. 1092, ll. 10-12). He also told the detectives: “If I go to jail, I go to jail, I don’t give a shit.” (Tr. p. 1092, l. 23-p. 1093, l. 1). The Solicitor’s comments were appropriate given this record. If Owens’ comments are to be believed, *life in prison doesn’t mean anything to Appellant Freddy Owens*. Just more of the same. The Solicitor’s comments were based in the record. A solicitor has a right to state his version of the testimony and comment on the weight to be given such testimony. Smith v. State, Shearhouse Advance Sheets, Opinion No. 26405, (filed December 10, 2007) *quoting Randall v. State*, 356 S.C. 639, 591 S.E.2d 608 (2004) *citing State v. Cooper*, 334 S.C. 540, 514 S.E.2d 584 (1999).

The challenged portion of the argument can now be viewed in light of the entire record:

Sure, you and I may think going to prison would be a serious thing and it would be, but what about Freddie Owens? (Tr. p. 1405, ll. 7-8, 12-15, p. 1092, ll. 10-12, p. 1092, l. 23-p. 1093, l. 1). Big prison is like a little city. In prison he will have all the necessities of life. Sure, he will be in solitary, (Tr. p. 1441, ll. 9-13) but he will still have food to eat. (Tr. p. 1338, ll. 22-23, p. 1390-1391, p. 1092, ll. 10-12). They will provide him with clothes. He will have books to read. (Tr. p. 1479, ll. 9-17). He will be able to recreate and exercise. (Tr. p. 1390, l. 1 & 18, p. 1391, ll. 19-22, p. 1393, ll. 13-14, p. 1441, l. 8). He will have doctors to take care of him. (Tr. p. 1390, l. 10, p. 1434, l. 17-p. 1494, l. 18). He will have the clothing they provide, and he will have contact with his family and loved ones (Tr. p. 1420, ll. 7-13) and TV at times (Tr. p. 1336, ll. 24-25) and he will have family business. (Tr. p. 1411, ll. 5-10, p. 1405, ll. 5-7). Not much more than a change of address for Freddie Owens. (Tr. p. 1405, ll. 7-8, 12-15). So don’t think putting Freddie Owens in prison for life is going to be a significant punishment for him. (Tr. p. 1092, ll. 10-12, p. 1092, l. 23-

p. 1093, l. 1).

The death penalty is the appropriate punishment for him. (Tr., p. 1181, ll. 18-25, p. 1114, ll. 23-25, p. 1092, ll. 10-12, p. 1092, ln. 23-p. 1093, l. 1, p. 1093, ll. 12-13). Remember that Freddie could have made something of himself. He had...

Or stated another way:<sup>31</sup>

So he's not going to suffer with any memory in prison. He will go on with his self teaching and making himself better and reading his books, learning languages and doing things that he's doing. (Tr. p. 1479, ll. 9-23 & 1427, l. 21). There is nobody going to be there to remind him.

Sure, you and I may think going to prison would be a serious thing and it would be, but what about Freddie Owens? *I spoke to staff at DJJ who had known him when he was incarcerated there. / ..I have read the records of his school records, SCDC records, and his Department of Corrections records. / He said "the only thing I'm here for is to eat, sleep, shit and piss. I don't give a shit. I was born to be in jail." / "He said "if my mom says anything, tell her I said adios, to kiss her ass too. She can kiss my ass too. Tell Ian and the rest of them assholes to fuck themselves. If I go to jail, I go to jail. I don't give a shit."* Big prison is like a little city. In prison he will have all of the necessities of life. Sure, he will be in solitary. *Freddie was in a cell, which was also inside a cage, which is a little bit different than all the other cells on the cell block.* But he will still have food to eat. *I woke up when Hefner opened the door to bring in breakfast. / August 17, 2002, throws a food tray and hits officer Guess in the head. / January 13, 2006 throws feces on officer Williams hitting him in the face. / May 20, 2006 throws coffee on officer Smith. / "[T]he only thing I'm here for is to eat, sleep, shit and piss."* They will provide him with clothes. He will have books to read. *He reads. He—he is fluent. He has taught himself Arabic. He has taught himself Swahili. He is studying French. He reads. He reads scholars. He won't read any books unless it's a scholar that's been published for 15 years. He reports he has taught other inmates how to read. He teaches them to read using the book Alexander the Great, because he doesn't want them reading the*

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<sup>31</sup>Bold type entries are from the record cites in the preceding paragraph. A / indicates a break in testimony.

*books that aren't well written. He will be able to recreate and exercise. May 27, 2001, had a six and a half inch shank made from fencing and toothbrush. / December 22, 2002, shank made from fencing. / A shank is a homemade weapon within the penitentiary. The two that - - say push rod actually comes out of the cell. The rest are predominantly made from fencing material off the rec field. / Did you ever witness any incidents or treatment of Freddie by the correctional staff? Not other than transporting him to the recreation yard. He will have doctors to take care of him.<sup>32</sup> August 5, 2002 slaps a male nurse in the face. / He seemed to enjoy my counseling and talking about his difficulties he was having... / I diagnosed Freddie with impulse control disorder, not otherwise specified; and anxiety disorder, not otherwise specified. / Did you prescribe medication for him? Yes, I did. / Has Freddie been compliant with your treatment plan? Yes, he has. / Now, Dr. Cobb, even though you are not going to Leiber presently, is there a psychiatrist going to Leiber? Yes there is. And is that psychiatrist actually working under your control? Yes, he is. / Actually, I may be mistaken, but I think he's been - - he was under the care of Dr. Cusack, who is a psychiatrist there for a number of years, even before Dr. Cobb came.<sup>33</sup> He will have the clothing that they provide, and he will have contact with his family and loved ones. And have you continued to keep up with Freddie over the years? I have. My husband and I visited him when he was - - I can't think of the name of the prison down in Summerville. I'm sorry, I can't think of name of it. We did visit him. And then after my husband died in 2002, I did not correspond with Freddie any more. And T.V. at times. At eleven p.m., on 2-15-99, myself and other inmates in my cell block watched the news and saw that I was found guilty. And he will have family business. Freddie, I'm sorry, Masey, was - - is Freddie Owen's dad had very, very little contact with the family. ... Freddie has had very little contact with him when he was growing up.*

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<sup>32</sup>Defense counsel asked a defense witness the following: "Well, if Freddie were to get a life sentence, where could he be housed in the Department of Corrections that would take care of his mental health treatment?" The witness spent a page of the transcript answering this question. (Tr. p. 1482-1483). The Solicitor's comments were tied to the record and the reasonable inferences therefrom.

<sup>33</sup>Respondent has not set forth all of the testimony referenced in the record regarding Appellant being treated by doctors, just a select portion. The testimony is too lengthy to include here. (Tr. p. 1434, l. 17 - p. 1494, l. 19).

*There has been subsequent contact in recent years.<sup>34</sup>/I interviewed the client, Freddie Owens. I interviewed his mother, his -- both of his sisters. I interviewed one of his brothers. I had the chance to talk to his stepfather, who was then stepfather.<sup>35</sup> Not much more than a change of address for Freddie Owens. I spoke to staff at DJJ who had known him when he was incarcerated there. / ..I have read the records of his school records, his SCDC records, and his Department of Corrections records. / He was in Burchwood Dorm, which is one of the more -- as Dr. Cobb was mentioning earlier, that was one of the dorms where juveniles were older and had more serious charges. So certainly he was in an environment that was more -- where the juveniles were considered maybe more dangerous than others, compared to other campuses. While in the Department of Corrections, I think it's been very fair to say that he's had a lot of write ups, even compared to other inmates. He's had, I believe I counted, about 56 write-ups over the years. Those write-ups have ranged from some things that are assaultive, to again, him still in his late twenties, now being disruptive at times, being very impulsive, but its certainly been characterized as a long disciplinary history. So don't think putting Freddie Owens in prison for life is going to be a significant punishment for him. He said "the only thing I'm here for is to eat, sleep, shit and piss. I don't give a shit. I was born to be in jail." / He said "if my mom says anything, tell her I said adios, to kiss her ass too. She can kiss my ass too. Tell Ian and the rest of them assholes to fuck themselves. If I go to jail, I go to jail. I don't give a shit."*

The death penalty is the appropriate punishment for him. *"I don't give a shit. I was born to be in jail." / "If I go to jail, I go to jail. I*

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<sup>34</sup>Owens has been incarcerated since 1997. This testimony was received in 2006. It is certainly a reasonable inference that Owens has had contact with his father in the last several years while incarcerated.

<sup>35</sup>Given the testimony that Owens has had visitors and corresponded with them while in prison, the jury could certainly infer that he could do the same with his family. Doctor Schwartz-Watts also testified "I think it's very fair to say he's attached to his mother. He's certainly attached to his teacher. And I think he's been attached to any -- Dr. Cobb, as well, any person that's provided help to him. And I think that's very fair to say. He's very attached to his family members, but overall, he's had very little chance for a relationship." (Tr. p. 1475, ll. 4-9). The jury could reasonably infer there was contact with his family and Owens was aware of family issues. (See also Tr. p. 1442, ll. 3-7). This referenced conversation took place sometime after 2005. (Tr. p. 1439).

***don't give a shit." / "She kept throwing up her hands and said she couldn't open the safe, so he just said 'I just shot the bitch.'" / "[S]he wasn't opening the safe, so he shot the whore." / Yeah, I want to be remembered as the one who killed the most people in Greenville. I'm a real menace.*** Remember Freddie could have made something of himself. He had a mother who did the best she could for him. That's ....

The Solicitor's closing argument was tied to the record and the reasonable inferences therefrom. The Solicitor's closing argument focused on Owen's character, his background and the nature of the crime. See Bennett, *supra*; State v. Reed, 293 S.C. 515, 519, 362 S.E.2d 13, 15 (1987) (overruled on other grounds by State v. Torrence, 305 S.C. 45, 69, 406 S.E.2d 315, 328 (1991)). Wide latitude and freedom of counsel in arguments to the jury are allowed so long as the arguments are based on facts in the record or inferences from those facts. Edwards v. Lawton, 244 S.C. 276, 136 S.E.2d 708 (1964).

The challenged portion of the argument must be reviewed in the context of the entire record and the entire closing argument. Patterson, *supra*. In essence, the Solicitor was arguing Owens should be put to death for the brutal murder of Irene Graves, given the circumstances of the crime, evidence of his character, inability to adapt to prison life, and future dangerousness. Owens should not be allowed the privilege of living, eating, sleeping, and breathing which a life sentence for Owens would entail. Those privileges that normally come with the privilege of being alive. Given the evidence, life in prison is not a significant punishment for Owens. He's been in jail before, look how he acted. His statements admitted during the trial indicate that prison means nothing to him. This Court has never prevented the Solicitor from making such a contrast in the appropriateness of punishment given the evidence in the case, as long as the evidence deals with a particular defendant. See Burkhart, *supra*; Bowman, *supra*. As this Court stated in Burkhart:

We are aware of the tension between evidence regarding the defendant's adaptability to prison life, which is clearly admissible, and this restriction on the admission of evidence regarding prison life *in general*. We note, however, that evidence of defendant's characteristics may include prison conditions if narrowly tailored to demonstrate the defendant's personal behavior in those conditions.

Id. at 488 (*italics in original*). Likewise, in Bowman, *supra*, this Court stated:

We emphasize that how inmates, other than the defendant at trial, are treated in prison; and whether other inmates have escaped from prison, is inappropriate evidence in the penalty phase of a capital trial. We admonish both the State and the defense that the penalty phase should focus solely on the defendant and any evidence introduced in the penalty phase should be connected to that *particular defendant*.

Id., at 488-499 (*emphasis added*).

The State did not introduce any evidence regarding whether other inmates had escaped or attempted to escape from prison. The State did not introduce any evidence of how other inmates are treated in prison other than Owens. Appellant mistakenly alleges the State violated this Court's holdings in Burkhart and Bowman. Appellant is wrong. The State followed those holdings by tying its closing argument directly to Appellant Freddie Owens, his behavior while incarcerated, and whether life in prison was the appropriate punishment for him.

Likewise, the Solicitor in his closing argument, only referred to how Freddie Eugene Owens would be confined and treated if the jury chose to sentence him to life and whether that was an appropriate punishment, or whether in contrast the death penalty was the more appropriate punishment for the murder of Irene Graves, given the circumstances of the crime, the evidence of Owens' character, and his actions in jail. *See Reed, supra* (argument must be confined to the record and its reasonable inferences and center on the characteristics of the defendant and nature of the crime). This case is not Burkhart or Bowman. There was no testimony regarding conditions of

prison life *in general*. The conditions of *Owens' confinement* and how he behaved in them were testified to in the record over and over and were all that was offered. Appellant concedes in his brief there was no testimony of general prison conditions. (See B. O A., p. 21). Instead, Appellant argues the Solicitor's closing argument was one of general prison conditions. This reasoning is incorrect as pointed out above. While admitting there was no testimony regarding general conditions of confinement, in his argument on this issue Owens fails to mention or discuss at all the extensive evidence admitted without objection regarding his own personal conditions of confinement and behavior therein. (B.O.A. pp. 21-23). This omission was necessary, because discussing this evidence would be an admission that the Solicitor's argument was supported by the record and the reasonable inferences therefrom.

Owen's boasted that prison life meant nothing to him. Prison was no punishment at all; he was born to be in jail. The Solicitor's statements were reasonable given Owen's callous disregard for law and order, and incarceration as a form of punishment.

The Solicitor's argument was one of retribution and punishment. The central theme of the argument was that Owens deserved the death penalty because of the heinousness of this murder and the evidence of Owens character and future dangerousness. As shown above, the Solicitor's argument was tied to evidence in the record that was admitted without objection or admitted through defense witnesses.<sup>36</sup> This Court has never held that a Solicitor cannot argue that the death penalty is a more appropriate punishment for the Defendant than life in prison. The Solicitor argued Owens should be put to death, not allowed to live under the *conditions he, Freddie Owens, was now*

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<sup>36</sup>Perhaps this is the reason there was no objection to any portion of the Solicitor's closing argument, nor was any post trial motion made to the trial judge regarding any portion of the Solicitor's closing argument.

*confined under*. Appellant would also have this Court limit the Solicitor from arguing in favor of the death penalty by contrasting death with the privileges of life itself, waking, sleeping, breathing, eating, etc. This would be a ridiculous result. Irene Graves and Christopher Lee no longer enjoy these privileges. This was a proper retributive argument given Owens' crimes, his actions inside jail, and his statements to police that prison meant nothing to him. The argument was tied to Freddie Owens, his crimes, the conditions of Freddie Owen's confinement, his actions in those conditions, and the evidence in the record, not general conditions of confinement. Freddie Owens actions and conduct and what punishment he deserved for those actions and conduct was the central focus of the Solicitor's closing argument. The argument was not improper. The argument was not calculated to arouse the juror's passions or prejudices, and its content stayed within the record and the reasonable inferences therefrom. *See Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). It did not introduce an arbitrary factor into the jury's deliberations.

Owens has the burden of proof of proving he did not receive a fair trial because of the alleged improper comments. *Humphries v. State*, 351 S.C. 362, 570 S.E.2d 160 (2002); *Simmons v. State*, *supra*. Improper comments, if made, do not automatically require reversal if they are not prejudicial to the defendant. *Id.* "[I]t is not enough that the remarks were undesirable or even universally condemned." *Darden v. Wainwright*, 477 168, 181, 106 S.Ct. 2464, 2471 (1986); *State v. Tubbs*, 333 S.C. 316, 509 S.E.2d 815 (1990). Owens bears the burden of establishing the argument was so improper it infected the sentencing proceeding with unfairness to the extent that the death sentence was a denial of due process. *Wiggins, supra, citing State v. Copeland*, 321 S.C. 318, 468 S.E.2d 620 (1996). Owens must show prejudice. *State v. Tucker*, 324 S.C. 155, 478 S.E.2d 260 (1996) *citing State v. Durden*, 264 S.C. 86, 212 S.E.2d 587 (1975). Owens has failed to meet this burden.

### ***Harmless Error***

Even assuming *arguendo* that the Solicitor's comments were inappropriate, they were harmless beyond a reasonable doubt. See Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992) (acknowledging appropriateness of harmless error analysis in capital cases where constitutional rights are violated); See also State v. Gaskins, 284 S.C. 105, 326 S.E.2d 132 (1985) (finding harmless error in admission during penalty phase of defendant's confession to other crimes). They did not so infect the trial with unfairness as to make the resulting death sentence a denial of due process. State v. McClure, 342 S.C. 403, 537 S.E.2d 273 (2000); State v. Davis, 309 S.C. 326, 422 S.E.2d 133, 146 (1992); State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1990). Even noting the evaluation of the consequences of an error in the sentencing phase of a capital case are more difficult because of the discretion that is given to the sentencing jury, this limited portion of the argument alleged to be erroneous was not prejudicial. State v. Atkins, 303 S.C. 214, 399 S.E.2d 760 (1990); State v. Tyner, 273 S.C. 646, 258 S.E.2d 559 (1979); State v. Hicks, 330 S.C. 207, 499 S.E.2d 209 (1998). The currently challenged portion of the Solicitor's argument only took up one paragraph in an argument that took up fifteen (15) pages of trial transcript. See Randall v. State, 356 S.C. 639, 591 S.E.2d 608 (2003) (objected to argument only took up ten lines in transcript); Tucker, *supra* (challenged comment allegedly necessitating mistrial was one isolated event in whole argument) citing State v. Chaffee, 285 S.C. 21, 328 S.E.2d 464 (1984) ("momentary lapse of good taste will rarely constitute prejudicial error"), *overruled on other grounds* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). This small portion of a lengthy argument in no way approaches the "overly zealous" argument disapproved of in State v. Northcutt, 372 S.C. 207, 641 S.E.2d 873 (2007) (holding solicitor sought to inflame passions of jury with argument, improperly injected his own

personal beliefs into the case, and staged a funeral procession before the jury).

Given the overwhelming evidence the death penalty was appropriate, including Owens' senseless murder of Irene Graves because she could not open the safe, his brutal torture and murder of Christopher Lee while in jail, his cavalier attitude toward prison life, and his assaultive behavior against guards, inmates, and medical personnel even in the most secure of prison environments, this challenged portion of the argument was harmless. *See Von Dohlen v. State*, 360 S.C. 598, 602 S.E.2d 738 (2005) (applicant failed to show result of sentencing proceeding would have been different where challenged comment of solicitor did not so infect the trial with unfairness as to make the result a denial of due process); *Humphries*, *supra* (death sentence affirmed where solicitor's closing argument in penalty phase did not prejudice petitioner); *State v. Tubbs*, 333 S.C. 316, 509 S.E.2d (1999) (solicitor's isolated references to defendant as Cobra were harmless where they did not infect entire trial with unfairness) *citing Arnold v. Evatt*, 113 F.3d 1352 (4<sup>th</sup> Cir. 1997) (solicitor's occasional use of nickname "Mad Dog," during guilt and re-sentencing proceedings did not deny defendant due process of law).

This issue was simply not preserved for appellate review, because Owens made absolutely no objection at any time to any portion of the Solicitor's closing argument, much less the portion he now challenges. Furthermore, there is no merit to this issue, because the Solicitor's challenged comments were tied directly to Freddie Owens, the evidence and the reasonable inferences therefrom, not general conditions of confinement. Finally, even if the challenged comments were somehow improper, they were harmless given the overwhelming evidence in this case that the death penalty was appropriate.

## CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the sentence of death should be affirmed.

Respectfully submitted,

HENRY D. McMASTER  
Attorney General

JOHN W. McINTOSH  
Chief Deputy Attorney General

DONALD J. ZELENKA  
Assistant Deputy Attorney General

J. ANTHONY MABRY  
Assistant Attorney General

P.O. Box 11549  
Columbia, SC 29211  
(803) 734-3665

By: 

J. ANTHONY MABRY

ATTORNEY FOR RESPONDENT

January 4, 2008

**STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT**

---

Appeal from Greenville County  
Larry Patterson, Circuit Court Judge

---

**THE STATE,**

Respondent,

v.

**FREDDIE EUGENE OWENS,**

Appellant.

---

**DESIGNATION OF MATTER TO BE  
INCLUDED IN RECORD ON APPEAL**

---

The Respondent has reviewed the Appellant's Designation of Matter and proposes no additional material to be included.

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

  
\_\_\_\_\_  
J. ANTHONY MABRY  
Assistant Attorney General

January 4, 2008



HENRY McMASTER  
ATTORNEY GENERAL

RECEIVED

JAN - 4 2008

S.C. SUPREME COURT

January 4, 2008

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

Re: The State v. Freddie Eugene Owens

Dear Mr. Shearouse:

Enclosed please find the *Initial Brief of Respondent and Designation of Matter* in the above-referenced case for filing. By copy of this letter I am serving opposing counsel with same.

Sincerely,

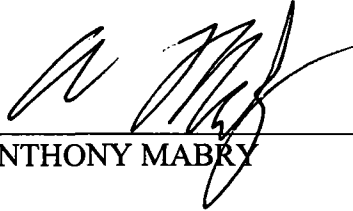
J. Anthony Mabry  
Assistant Attorney General

JAM/lbb  
Enclosure

cc: Joseph A. Savitz, III, Esquire  
Robert M. Ariail, Solicitor  
Sandi Wofford, Victims Assistance

**CERTIFICATE OF SERVICE**

I, **Anthony Mabry**, hereby certify that I have served the *Initial Brief of Respondent and Designation of Matter* in the foregoing action by depositing copies in the Interagency Mail to Joseph L. Savitz, III, Chief Appellate Defender, Division of Appellate Defense, 1330 Lady Street, Suite 401, Columbia, SC 29201 this 4<sup>th</sup> day of January, 2008.

  
\_\_\_\_\_  
J. ANTHONY MABRY

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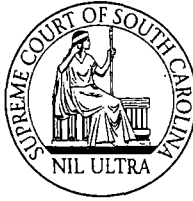
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S.C. SUPREME COURT

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JAN - 4 2008

S.C. SUPREME COURT



# The Supreme Court of South Carolina

DANIEL E. SHEAROUSE  
CLERK OF COURT

BRENDA F. SHEALY  
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330  
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

December 10, 2007

Assistant Attorney General J. Anthony Mabry  
Office of the Attorney General  
P.O. Box 11549  
Columbia, SC 29211

Re: The State v. Owens, Freddie Eugene

Dear Counsel:

The following Order has been endorsed on your Motion to Enlarge Time for Filing Initial Brief of Respondent and Designation of Matter in the above entitled case on appeal.

"Granted.

s/ Jean H. Toal C.J.  
For the Court

December 10, 2007."

Please be advised that the Initial Brief of Respondent and Designation of Matter should be served and filed on or before January 4, 2008.

Very truly yours,

CHIEF DEPUTY CLERK

Assistant Attorney General J. Anthony Mabry

Page Two

December 10, 2007

cc: Chief Appellate Defender Joseph L. Savitz, III  
Appellate Defender LaNelle C. DuRant



HENRY McMASTER  
ATTORNEY GENERAL

RECEIVED

DEC 5 2007

S.C. SUPREME COURT

December 5, 2007

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

Re: The State v. Freddie Eugene Owens

Dear Mr. Shearouse:

Enclosed please find Respondent's Motion to Enlarge Time For Filing Initial Brief of Respondent in the above-referenced matter for filing. By copy of this letter I am serving opposing counsel with same.

Sincerely,

Lonetta B. Brawley  
Legal Assistant to J. Anthony Mabry  
Assistant Attorney General

/lbb  
Enclosure

cc: Joseph L. Savitz, III, Esquire

**STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT**

---

Appeal from Greenville County  
Larry Patterson, Circuit Court Judge

---

RECEIVED

DEC - 6 2007

S.C. SUPREME COURT

**THE STATE,**

Respondent,

v.

**FREDDIE EUGENE OWENS,**

Appellant.

---

**MOTION TO ENLARGE TIME FOR  
FILING INITIAL BRIEF OF RESPONDENT  
AND DESIGNATION OF MATTER**

---

The Respondent, above-named, through undersigned counsel, hereby makes a motion to this Court to extend the time for filing the Initial Brief of Respondent and Designation of Matter from December 5, 2007, for a period of thirty (30) days, up to and including January 4, 2008. This is Respondent's third extension request. This request is due to the length of the record in this capital appeal, and the necessity of addressing the issues currently raised before this Court. Moreover, counsel for Respondent has been involved in other state and federal court matters during this time period;

Albright v. Allendale Correctional (Federal Habeas Return/Murder) filed 11/28/2007,

Simpkins v. Elaine Robinson, (Federal Habeas Return), filed 11/2/1007

Wright v. Bazzle (Federal Habeas Return/LWOP) filed 11/19/2007

Dowdy v. South Carolina (Federal Habeas Return/Murder) filed 10/26/2007

Fredrick Evins v. State (Death Penalty PCR Status Conference/Greenville South Carolina),

Jonathan Binney v. State (Death Penalty PCR),

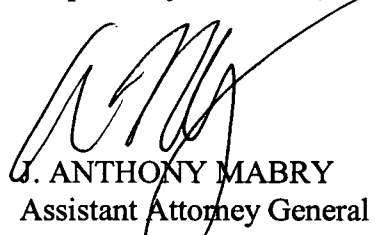
which has prevented the completion of this brief in a sufficient and timely manner.

The undersigned received oral consent to this request from opposing counsel, Joseph Savitz, Chief Attorney for Capital Appeals, Division of Appellate Defense, on this date.

Respondents' counsel are cognizant of this Court's policy on extension in capital cases and will work diligently to prepare and complete the referenced brief.

WHEREFORE, Respondent respectfully requests an extension of a period of time of thirty (30) days up to and including January 4, 2008 to complete this brief.

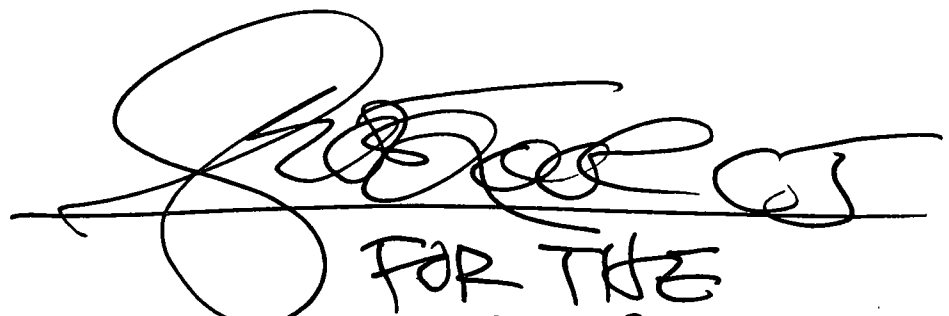
Respectfully submitted,



J. ANTHONY MABRY  
Assistant Attorney General  
**ATTORNEY FOR RESPONDENT**

December 5, 2007  
Columbia, South Carolina

Granted



FOR THE  
COURT

December 10, 2007

**STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT**

---

Appeal from Greenville County  
Larry Patterson, Circuit Court Judge

---

**THE STATE,**

Respondent,

v.

**FREDDIE EUGENE OWENS,**

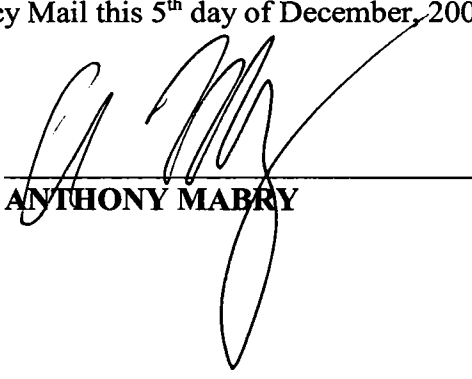
Appellant.

---

**CERTIFICATE OF SERVICE**

---

*I, Anthony Mabry, hereby certify that I have served Respondent's Motion to Enlarge Time for Filing Initial Brief of Respondent on Joseph Savitz, Post Office Box 11589, Columbia, SC, 29211-1589 depositing two copies in the InterAgency Mail this 5<sup>th</sup> day of December, 2007.*



---

**ANTHONY MABRY**



ORIGINAL

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

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

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

December 6, 2007

RECEIVED

DEC - 6 2007

S.C. SUPREME COURT

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

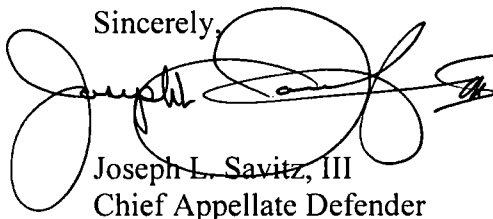
Re: The State v. Freddie Eugene Owens

Dear Mr. Shearouse:

Counsel for appellant has no objection to the State's request for an extension in this case.

Please contact me if additional information is needed.

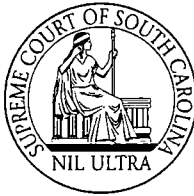
Sincerely,



Joseph L. Savitz, III  
Chief Appellate Defender

JLS,III/kde

cc: Anthony Mabry



# The Supreme Court of South Carolina

DANIEL E. SHEAROUSE  
CLERK OF COURT

BRENDA F. SHEALY  
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330  
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

November 2, 2007

Assistant Attorney General J. Anthony Mabry  
Office of the Attorney General  
P.O. Box 11549  
Columbia, SC 29211

Re: The State v. Owens, Freddie Eugene

Dear Counsel:

The following Order has been endorsed on your Motion to Enlarge Time for Filing Initial Brief of Respondent and Designation of Matter in the above entitled case on appeal.

“Granted.

Jean H. Toal C.J.  
For the Court

By s/ Daniel E. Shearouse  
Clerk

November 2, 2007.”

Please be advised that the Initial Brief of Respondent and Designation of Matter should be served and filed on or before December 5, 2007.

Assistant Attorney General J. Anthony Mabry

Page Two

November 2, 2007

Very truly yours,

A handwritten signature in black ink, consisting of the letters 'DES' followed by a long, horizontal, slightly wavy line extending to the right.

CLERK

DES/dmh

cc: Chief Appellate Defender Joseph L. Savitz, III  
Appellate Defender LaNelle C. DuRant



HENRY McMASTER  
ATTORNEY GENERAL

RECEIVED

NOV 1 2007

S.C. SUPREME COURT

November 1, 2007

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

Re: The State v. Freddie Eugene Owens

Dear Mr. Shearouse:

Enclosed please find Respondent's *Motion to Enlarge Time for Filing Initial Brief of Respondent and Designation of Matter* in the above-referenced case for filing. By copy of this letter I am serving opposing counsel with same.

Sincerely,

Lonetta B. Brawley  
Legal Assistant to J. Anthony Mabry  
Assistant Attorney General

/lbb  
Enclosure

cc: Joseph L. Savitz, III, Esquire

**STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT**

**RECEIVED**

NOV 1 2007

Appeal from Greenville County  
J.C. Nicholson, Jr., Circuit Court Judge

**S.C. SUPREME COURT**

**THE STATE,**

Respondent,

v.

**FREDDIE EUGENE OWENS,**

Appellant.

**MOTION TO ENLARGE TIME FOR  
FILING INITIAL BRIEF OF RESPONDENT  
AND DESIGNATION OF MATTER**

The Respondent, above-named, through undersigned counsel, hereby makes a motion to this Court to extend the time for filing the Initial Brief of Respondent and Designation of Matter from October November 5, 2007, for a period of thirty (30) days, up to and including December 5, 2007. This is Respondent's second extension request. This request is due to the length of the record in this capital appeal, and the necessity of addressing the issues currently raised before this Court. Moreover, counsel for Respondent has been involved in other state and federal court matters during this time period which has prevented the completion of this brief in a sufficient and timely manner.

The undersigned received oral consent to this request from opposing counsel, Joseph Savitz, Chief Attorney for Capital Appeals, Division of Appellate Defense, on this date.

Respondents' counsel are cognizant of this Court's policy on extension in capital cases and

will work diligently to prepare and complete the referenced brief.

WHEREFORE, Respondent respectfully requests an extension of a period of time of thirty (30) days up to and including December 5, 2007 to complete this brief.

Respectfully submitted,

HENRY D. McMASTER  
Attorney General

JOHN W. McINTOSH  
Chief Deputy Attorney General

J. ANTHONY MABRY  
Assistant Attorney General

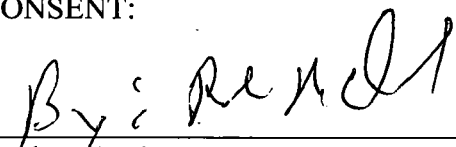
**ATTORNEYS FOR RESPONDENT**

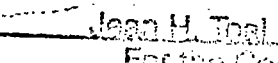
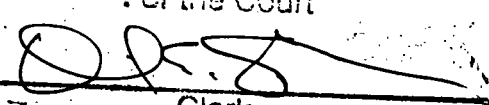
By:   
ANTHONY MABRY

Office of the Attorney General  
Post Office Box 11549  
Columbia, South Carolina 29211  
(803) 734-3665

November 1, 2007.  
Columbia, South Carolina.

I CONSENT:

By:   
Joseph L. Savitz, III

GRANTED.  
 Jean H. Toal C.J.  
For the Court  
By:   
Clerk

November 2, 2007

**STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT**

---

Appeal from Greenville County  
J.C. Nicholson, Jr., Circuit Court Judge

---

**THE STATE,**

Respondent,

v.

**FREDDIE EUGENE OWENS,**

Appellant.

---

**CERTIFICATE OF SERVICE**

---

*I, Anthony Mabry, hereby certify that I have served Respondent's Motion to Enlarge Time for Filing Initial Brief of Respondent on Joseph Savitz, Post Office Box 11589, Columbia, SC, 29211-1589 depositing two copies in the InterAgency Mail this 1<sup>st</sup> day of November, 2007.*

  
ANTHONY MABRY



ORIGINAL

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

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

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

November 1, 2007

RECEIVED

NOV 1 2007

S.C. SUPREME COURT

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

Re: The State v. Freddie Eugene Owens

Dear Mr. Shearouse:

Please accept this letter in lieu of a return to opposing counsel's request for an extension in this case. Counsel for appellant has no objection to this request

If additional information is needed, please contact me.

Sincerely,



Joseph L. Savitz, III  
Chief Appellate Defender

JLS,III/kde

cc: J. Anthony Mabry

# The Supreme Court of South Carolina

The State,

Respondent

v.

Freddie Eugene Owens,

Appellant.

The Honorable Larry R. Patterson  
Greenville County  
Trial Court Case No. 1998-GS-23-05220

---

## ORDER

---

For good cause having been shown, the time for serving and filing the Initial Brief of Respondent and Designation of Matter in the above entitled matter is hereby extended until November 5, 2007.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY *Srenda I. Shealy*  
CHIEF DEPUTY CLERK

Columbia, South Carolina

October 5, 2007

cc: Chief Appellate Defender Joseph L. Savitz, III  
Appellate Defender LaNelle C. DuRant  
Assistant Attorney General J. Anthony Mabry



HENRY McMASTER  
ATTORNEY GENERAL

October 4, 2007

RECEIVED  
OCT - 4 2007  
S.C. SUPREME COURT

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

Re: The State v. Freddie Eugene Owens  
Appeal from Greenville County

Dear Mr. Shearouse:

The initial brief of respondent in the above-entitled action is due to be filed and served on today's date. Due to my heavy caseload, I will not be able to complete this initial brief in a timely fashion. For this reason, I respectfully request an extension for thirty (30) days in which to file the initial brief.

Opposing counsel consents to this extension and will provide a confirming letter tomorrow, due to their office being closed this afternoon due to traffic from the Carolina/Kentucky football game.

Thank you for your consideration.

Sincerely,

J. Anthony Mabry  
Assistant Attorney General

ORIGINAL

RECEIVED

AUG 20 2007

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

---

Appeal from Greenville County

Larry R. Patterson, Circuit Court Judge

---

THE STATE,

RESPONDENT,

V.

FREDDIE EUGENE OWENS,

APPELLANT

---

INITIAL BRIEF OF APPELLANT

---

JOSEPH L. SAVITZ, III  
Chief Appellate Defender

LANELLE C. DURANT  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, S. C. 29211-1589  
(803) 734-1343

ATTORNEYS FOR APPELLANT

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## STATEMENT OF ISSUES ON APPEAL

1. The trial judge abused his discretion when he summarily disqualified a potential juror, Sonya Ables (Juror Number 1), solely because she “went to [her] pastor and talked to him about [the death penalty],” as he incorrectly believed “there is a case right on point, that if a woman talks to her priest after she’s been called as a juror about capital punishment, she is disqualified under the law.”

2. The trial judge committed reversible error by admitting Owens’ prison disciplinary records, as they violated the rule against hearsay, as well as the Sixth and Fourteenth Amendments.

3. The trial judge committed reversible error by allowing the Solicitor to argue in closing that the conditions of life imprisonment in general justified a death sentence for Owens, as this argument injected an arbitrary factor into the jury sentencing considerations in violation of *S.C. Code Section 16-3-25(C)(1)*.

## STATEMENT OF FACTS

Halloween 1997 was over, but during the early morning hours of November 1 two men robbed a Speedway convenience store in Greenville and fatally shot the clerk, Irene Graves, once in the head when she was unable to open the safe. See *State v. Owens*, 346 S.C. 637, 552 S.E.2d 745 (2001). The grand jury indicted Freddie Owens and Steven Golden for Grave's murder, armed robbery and two related but lesser offenses.

In February 1999 the State sought the death penalty against both Owens and Golden at a joint trial. Judge Alexander S. Macaulay presided. The second day of jury selection Golden pleaded guilty and avoided a possible death sentence in return for his testimony against Owens. Owens' defense was alibi. The jury found him guilty as charged. That night one of Owens' cellmates at the Greenville County Detention Center, Christopher Lee, who was in jail for a traffic offense, was brutally murdered. The following morning Owens gave SLED agents a statement in which he claimed sole responsibility for the homicide. This statement became the centerpiece of the State's case at sentencing. Owens was sentenced to death.

On direct appeal Owens argued that defense counsel had not been afforded an adequate opportunity to investigate the circumstances surrounding Lee's death. The Court agreed and remanded for resentencing. *Id.*

In January 2003 Judge John W. Kittredge presided at the resentencing hearing. Owens waived his right to a jury. The State relied primarily upon Owens' purported bad

conduct while in prison since his initial trial and, once again, his statement regarding Lee's murder. The judge sentenced Owens to death in a written order dated February 14, 2003.\*

The notice of intent to appeal was untimely. The Court construed the letter which accompanied the late notice as a petition for a common law writ of certiorari in its original jurisdiction and granted the petition. Owens then argued:

The judge erred during the jury waiver colloquy by informing Owens that his best hope for a life sentence might ultimately depend on lying jurors who would "claim to support the death penalty in hopes of getting on the jury" when "in reality such a juror is opposed to the death penalty and ... when they're selected and the time comes, they refuse to vote for the death penalty and will only vote for life."

Brief of Appellant, p. 3. The Court agreed and again remanded for resentencing. *State v. Owens*, 362 S.C. 175, 607 S.E.2d 78 (2004).

On November 6 through 11, 2006, Judge Larry R. Patterson presided at Owens' jury resentencing. The State relied on Owens' alleged poor behavior while incarcerated as before, and a forensic pathologist attempted to correlate his own findings with Owens' statement describing the manner of Lee's death. The judge charged the jury on two statutory aggravators:

- (1) The murder was committed while in the commission of robbery while armed with a deadly weapon; and
- (2) The murder was committed while in the commission of larceny with use of a deadly weapon

*S.C. Code Section 16-3-20 (C)(a)(1)(d and (e)).* He also charged five mitigators:

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\* The judge specifically afforded "no consideration" to Owens' "alleged involvement" in the homicide of his cellmate. The accuracy of Owens' statement remains in doubt and he has never been prosecuted for that incident.

- (1) The defendant has no significant history of prior criminal conviction involving the use of violence against another person;
- (2) The murder was committed while the defendant was under the influence of mental or emotional disturbance;
- (3) The defendant was an accomplice in the murder committed by another person and his participation was relatively minor.
- (4) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and
- (5) The age or mentality of the defendant at the time of the crime

*Section 16-3-20(C)(b)(1), (2), (4), (6) and (7).* The jury found both aggravators and recommended death. The judge sentenced Owens accordingly.

## ARGUMENT

1.

The trial judge abused his discretion when he summarily disqualified a potential juror, Sonya Ables (Juror Number 1), solely because she “went to [her] pastor and talked to him about [the death penalty],” as he incorrectly believed “there is a case right on point, that if a woman talks to her priest after she’s been called as a juror about capital punishment, she is disqualified under the law.”

In response to the judge’s leading question on voir dire, potential juror Sonya Ables (Juror Number 1) stated that she was probably most like the hypothetical juror who could never give the death penalty under any circumstances. Tr. p. 480, lines 12-17. The judge followed up with only two additional questions exploring Ables’ personal feelings about capital punishment:

Understanding [the] process, and if you heard evidence in aggravation and mitigation, do you feel that you could seriously give meaningful consideration to aggravating circumstances, mitigating circumstances, and write a sentence of death?

Tr. p. 482, lines 11-15. And:

If that were to be the determination of the jury, based on evidence and testimony in mitigation and aggravating evidence, you would be called upon to sign your name to the death verdict. Could you do that?

Tr. p. 482, lines 20-23. Her answer:

I thought about it a lot since October [2006]. I really have. I lost a lot of sleep over it. I really don’t believe that I could. ... I don’t think I can do it. I have – it’s that thing of for me personally just believing that, yes, he should get the death penalty, but being the one to write that sentence, personally I just don’t think that I can do it. ... I just don’t believe that I

could do it, you know, and just be able to go forward with my life then, and then – I just don't think that I can do it and live okay. It's just too deep within me. I have battled it since you told us that in October. I thought about it a lot. I went to my pastor and talked to him about it. I really don't think that I could do it.

Tr. p. 480, lines 19-22; tr. p. 482, lines 16-19; tr. p. 482, line 24 – p. 483, line 5. At this point the judge excused Ables from the courtroom and summarily disqualified her from serving on Owens' jury for the following reason:

Ladies and gentlemen, there's a case right on point, that if a woman talks to her priest after she's been called as a juror about capital punishment, she is disqualified under the law.

Tr. p. 483, lines 10-14. He afforded defense counsel no opportunity to rehabilitate Ables.

Tr. p. 483, line 15 – p. 484, line 2.

*Witherspoon v. Illinois*, 391 U.S. 510 (1968), holds that a capital defendant's right to an impartial jury under the Sixth and Fourteenth Amendments is violated by a jury selection procedure which automatically removes for cause those members of the venire who express conscientious objections to the death penalty. *Wainwright v. Witt*, 469 U.S. 412 (1985), provides that "the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment ... is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath'." 469 U.S. at 424, quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980). See, also, *State v. Evins*, 373 S.C. 404, 645 S.E.2d 904 (2007).

*S.C. Code Section 16-3-20(E)* similarly provides:

In a criminal act in which a defendant is charged with a crime which may be punishable by death, a person may not be disqualified, excused, or excluded from service as a juror by reason of his beliefs or attitudes against capital punishment

unless such beliefs or attitudes would render him unable to return a verdict according to law.

*Lockhart v. McCray*, 476 U.S. 162, 176 (1986), emphasizes:

It is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law.

The bottom line:

The State's power to exclude for cause jurors from capital juries does not extend beyond its interest in removing those jurors who would "frustrate the State's legitimate interest in administering constitutional capital sentencing schemes by not following their oath."

*Gray v. Mississippi*, 481 U.S. 648, 658 (1987), quoting *Witt*, 469 U.S. at 423.

The disqualification of even a single juror in violation of *Witherspoon* and *Witt* can never be harmless error. *Id.*

The Court has held that *S.C. Code Section 14-7-1010* "requires the judge [to] determine whether a juror is disqualified or exempted by law, a determination that may be made before [the] parties are given an opportunity to examine the juror in a death penalty case." *State v. Wise*, 359 S.C. 14, 596 S.E.2d 475, 479 (2004).

When the record reveals a juror plainly is not qualified, after thorough examination by the trial judge, to serve and it does not reasonably appear further examination would likely reveal the juror could subordinate his views and apply the law of the state, a reasonable basis exists for excusal for cause of the juror without further examination by defense counsel.

596 S.E.2d at 481. See, also, *State v. Tucker*, 334 S.C. 1, 512 S.E.2d 99 (1999).

The undersigned have been unable to identify any case, state or federal, which supports the proposition that, “if a woman talks to her priest after she’s been called as a juror about capital punishment, she is disqualified under the law.” More about this shortly.\*\*

In *State v. Simpson*, 325 S.C. 37, 479 S.E.2d 57 (1996), an already-qualified juror was excused after he subsequently concluded that his religious beliefs would prevent him from sentencing anyone to death under any circumstances. In *State v. Tucker*, S.E.2d at 104, a prospective juror was disqualified when he indicated that “his religious beliefs would not allow him to sit as a juror and that the special circumstances which might allow him to serve would require four days of counseling.” Similarly, in *State v. Wise*, 596 S.E.2d at 479, a prospective juror was excused after she testified that “her beliefs were personal and she was unaware of any pastoral counseling or similar program she could undergo in order to sit in judgment of another person.” The religious convictions of the two jurors in *Tucker* and *Wise* precluded them from finding a defendant guilty, much less sentencing someone to death. Finally, in *State v. Sapp*, 366 S.C. 283, 621 S.E.2d 883, 887 (2005), the disqualified juror “unequivocally stated ... that she could not consider the law regarding imposing the death penalty because of her religious beliefs,” then apologized and began sobbing.

As noted, the judge asked Ables exactly three questions, the first of them leading, to ascertain her opinion about capital punishment. She never unequivocally indicated she could not impose the death penalty because of her religious beliefs. Any reservations about capital punishment she tentatively expressed were not sufficient to disqualify her for cause under *Witherspoon* and *Witt*. In *Darden v. Wainwright*, 477 U.S. 168, 178 (1986), for

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\* At this point it should be observed that such a “rule” would appear to violate the Equal Protection Clause of the Fourteenth Amendment. See, for example, *J.E.B. v. Alabama ex rel T.B.*, 511 U.S. 127 (1994).

example, a prospective juror answered “yes” when asked by the judge, “Do you have any moral or religious, conscientious moral or religious principles in opposition to the death penalty so strong that you would be unable without violating your own principles to vote to recommend a death penalty regardless of the facts?” The Supreme Court observed, “The precise wording of the question asked of [the juror], and the answer he gave, do not by themselves compel the conclusion that he could not under any circumstance recommend the death penalty.” *Id.* The same holds true here.

In any case, the judge did not disqualify Ables because of her religious uncertainty about capital punishment. He removed her because of his erroneous belief that “there’s a case right on point that if a woman talks to her priest after she’s been called as a juror about capital punishment, she is disqualified under the law.” Automatically disqualifying Ables for this (non)reason constituted an abuse of discretion. See, also, *State v. Stone*, 350 S.C. 442, 567 S.E.2d 244 (2002).

A comparison of the truncated voir dire and removal of Ables with the treatment of other potential jurors, both for and against the death penalty, underscores this point. Keith Faust (Juror Number 133) initially told the judge that he would always sentence a defendant guilty of murder to death and could not even consider life imprisonment, regardless of the circumstances. Tr. p. 603, line 22 – p. 604, line 12. He was quite emphatic about his beliefs. Tr. p. 604, lines 13 and 14. The Solicitor nevertheless requested and received an opportunity to rehabilitate Faust. Tr. p. 604, lines 18-25. Faust eventually agreed that he could “meaningfully consider imposing either a life imprisonment sentence or a death sentence.” Tr. p. 613, lines 10-16. The judge found him qualified to sit on Owens’ resentencing jury. Tr. p. 620, lines 10 and 11. (The defense wisely used a peremptory

challenge to preclude Faust from sitting as an alternate. Tr. p. 1019, line 25 – p. 1020, line 5.) Nor did the judge summarily disqualify a trio of jurors who initially expressed religious reservations against capital punishment. See Margaret Payne (Juror Number 324), Patsy Barton (Juror Number 22) and John Adams (Juror Number 2). Tr. p. 256, line 3 – p. 259, line 13 (Payne); tr. p. 546, line 15 – p. 550, line 1 (Barton); tr. p. 876, line 21 – p. 878, line 15 (Adams). Another juror, Rebecca Hunter (Juror Number 211), was rehabilitated by defense counsel and qualified over the Solicitor’s objection after initially indicating that she could never give the death penalty “[b]ecause of my moral convictions.” Tr. p. 583, line 22 – p. 598, line 17.

A comparison of Ables’ answers with these other jurors’ demonstrates that the judge’s removal of Ables resulted not from her religious doubts about the death penalty, which were left relatively unexplored, but because she was a woman who had talked to her priest about capital punishment after learning she might have to sit on a death penalty case. The judge automatically removed Ables without determining if her beliefs would have substantially impaired her ability to perform the duties required of a capital juror.

The inflexible application of a general rule excluding women who seek religious guidance to clarify their feelings and beliefs about capital punishment violates the Sixth and Fourteenth Amendments. *Wainwright* and *Witt*. It constitutes an abuse of discretion and reversible error as a matter of law. *Gray*.

The Court should reverse Freddie Owens’ death sentence and remand for resentencing.

The trial judge committed reversible error by admitting Owens' prison disciplinary records, as they violated the rule against hearsay, as well as the Sixth and Fourteenth Amendments.

### FACTS

During the sentencing phase, the State called Major Thierry Nettles, who was the custodian of records for the Department of Corrections at Lieber Correctional Facility, where records pertaining to Owens were kept. Tr. p. 1354, line 2; tr. p. 1359, lines 22-23; tr. p. 1361, lines 3-9. The defense immediately objected and the judge held an *in camera* hearing related to Owens' records being admitted. Tr. p. 1354, lines 3-7.

The defense stated their objection to the court:

Your Honor, the defense would object to the testimony of Mr. Nettles to the extent that he intends to talk about records, any SCDC records regarding incidents or behavior. Our understanding of the law is that - and I'm looking at this case, is *Ex parte Department of Health and Environmental Control v. the State*, or *State v. John Doe*, and I can give you the cite of it - but they have to prove in order to get business records in, which I assume that's what they are trying to get them into, or the venue they are trying to get into, they have to prove the record in themselves trustworthy. My problem with these records are I do not believe they are trustworthy.

Tr. p. 1354, Lines 10-22. And:

In a lot of these occasions, Your Honor, they are talking about attacks on guards. So the person filling out the record would be the victim. It would be extremely difficult for me to think that a victim's testimony, without any other inquiry whatsoever, would be trustworthy.

Tr. p. 1354, line 23 – p. 1355, line 2.

The State argued that these records were admissible as a business record under *Rule 803(6), SCRE*:

Your Honor, I do believe that these records do fall - do come into evidence under the Business Record Act, that we must show - I'm getting to the rule real quick, Your Honor. According to the *Rule 803(6)*, records of regularly conducted activity. A memorandum, report, or record compiled at or near the time of the incident, and if it is shown that that is compiled at the time of the incident, and the custodian of records can testify to that. Then it is admitted into evidence under the Business Record Act, Your Honor.

Tr. p. 1355, line 19 – p. 1356, line 4. The defense responded that trying to enter these prison records “would be the same as the police trying to enter an incident report in a regular general sessions trial.” Tr. p. 1355, lines 10-12.

During the *in camera* testimony of Major Nettles, the State asked a series of questions related to record-keeping at SCDC.

Q. And as part of the business of housing inmates, is it the ---- is it the normal course of business to record incidents of infractions or rule violations or assaults by the inmate?

A. Yes, ma'am.

Q. And are those records kept in the normal course of business of the corrections department?

A. Yes, ma'am.

Q. And the records which are kept, are they made at or near the time of the incident involved?

A. Yes, ma'am.

Q. And are they made by persons who have personal knowledge of the events which occurred?

A. Yes, ma'am.

Tr. p. 1360, lines 10 – 23. On cross-examination, Nettles acknowledged the subjectivity of the records:

Q. Now let me ask you this about these incidents reports. Are there ever incidents which occur which are not reported incidents, incident reports; violations of the rules which are not---an incident report is not made from?

A. Sure there is.

Q. So there is a subjective component as to what comes - what an incident report—Let me back up. So there is some subjective component to determining what events caused the creation of an incident report, is that correct?

A. It's the degree of severity.

Q. Okay. So basically somebody when they make an incident report in the first case, they are making some kind of judgment as to the severity of the situation?

A. You are correct. Normally, that's the correctional officer on the scene.

Tr. p. 1365, lines 5-21.

After the proffer of Major Nettles' testimony, the judge said that it appeared that the SCDC would be in the nature of a business which keeps regular records of incidents in the ordinary course of business. However, the judge ruled that subjective statements or opinions and judgments and hearsay within hearsay could not come in. He ruled that a record of an incident could come in but that the specific facts and circumstances surrounding the incident could not come in as they would be subjective. Nevertheless, the judge said that it was absolutely hearsay not subject to cross-examination. Tr. p.

1361, line 16 – p. 1362, line 25; tr. p. 1367, lines 20-25. The judge decided to go through each incident separately to determine which ones could come in.

Ultimately, the State prepared a list of incidents which they believed met the judge's ruling and gave this list to the judge and defense for review. The defense renewed their objection to the records in their entirety but agreed to review the list. Tr. p. 1379, lines 11-17; tr. p. 1375, lines 5-6. After some changes, the defense said, "[s]ubject to our earlier objections, given the court's ruling, this exhibit as proposed now is fine with us." Tr. p. 1384, lines 8-11.

Major Nettles testified before the jury as to the incidents in the SCDC report:

1. April 13, 2001, breaks toilet, sink and sprinkler
2. May 26, 2001, throws hot water on another inmate
3. May 27, 2001, had six and half inch shank
4. June 14, 2002, spat on correctional officer
5. February 8, 2002, a fourteen inch solid brass shank
6. March 29, 2002, stabs correctional officer with shank
7. June 12, 2002, stabs Andra Golden in shower
8. June 15, 2002, kicks inmate restrained in chair
9. August 5, 2002, slaps male nurse
10. August 17, 2002, hits officer in head with food tray
11. August 23, 2002, hits officer in face with his fist
12. October 22, 2002, hits officer Eaton in face with his fist
13. October 23, 2002, sets fire to cell
14. December 22, 2002, shank made from fencing
15. December 30, 2002, a ten inch made from a push rod of sink
16. July 17, 2005, spits in face of officer Jones
17. August 26, 2005, slaps officer Henley in face
18. August 31, 2005, sets fire to cell
19. September 11, 2005, threatens officer Jones
20. January 1, 2006, a 12 inch homemade knife
21. January 3, 2006, breaks cell door with broom
22. January 13, 2006, Throws feces on officer Williams hitting him in face
23. February 3, 2006, spits in face of inmate
24. February 4, 2006, orally threatens officer Jones

- 25. February 28, 2006, a 12 inch weapon hidden in mattress
- 26. April 4, 2006, a eight and half inch shank made from flat metal sharpened at the edge and wrapped with ace bandage
- 27. May 1, 2006, sets fire to mattress
- 28. May 20, 2006, throws coffee on Officer Smith.

Tr. p. 1389, line 22 – p. 1391, line 13.

The Judge's ruling was reversible error. The records were hearsay and did not fall under an exception to the rule against hearsay and also violated the Confrontation Clause of the Sixth Amendment to the United States Constitution. The admission of these prison records additionally violated due process under the Fourteenth Amendment to the United States Constitution.

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. *Rule 801(C), SCRE*. The business records exception states that even though the declarant is available to testify as a witness:

A memorandum, report, record or data compilation, in any form, of acts, events, conditions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness; provided, however, that subjective opinions and judgments found in business records are not admissible. The term "business" as used in this subsection includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

*Rule 803(6), SCRE.*

The Supreme Court ruled in *State v. Whipple*, 324 S.C. 43, 476 S.E.2d 683 (1996), that disciplinary records from capital defendant's incarceration were admissible at sentencing under business records exception because they were relevant to defendant's future adaptability in prison. The prison records in *Whipple* included "various minor infractions" and a drawing by another inmate depicting a bottle of "Cold Filter Whipple" captioned, "If you want to be a woman killer, drink some cold filtered Whipple and get yourself fried." The Court held that the issue was not preserved for review but went on to say that, in any event, the records were admissible under the business records exception.

The Uniform Business Records as Evidence Act, *S.C. Code Section 19-5-510*, was enacted before the South Carolina Rules of Evidence became effective. *Rule 1103, SCRE. Section 19-5-510* states:

The term business shall include every kind of business, profession, occupation, calling or operation of institutions, whether carried on for profit or not.

A record of an act, condition or event shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

The Rules of Evidence, which became effective after Business Records Act, include a requirement that the records must be trustworthy with no subjectiveness. The prison disciplinary records in Owens' case were admitted as business records under *Rule 803(6), SCRE.*

The United States Supreme Court focused on the matter of trustworthiness in *Crawford v. Washington*, 541 U.S. 36 (2004), where it ruled that out-of-court statements that are testimonial are barred under the Confrontation Clause unless witnesses are unavailable and defendants had a prior opportunity to cross-examine witnesses, regardless of whether such statements are deemed reliable abrogating *Ohio v. Roberts*, 448 U.S. 56 (1980).

The Court reached this conclusion after an in depth review of the history of the hearsay rule and the Confrontation Clause. During the historical review, the Court cited the South Carolina case of *State v. Campbell*, 1 S.C. 124, 125 (1844), which stated : “One of the ‘indispensable conditions’ of the South Carolina Constitution is that prosecutions be carried on ....by witnesses confronted by [the accused], and subjected to his personal examination.”

The Court in *Crawford* declined to offer a comprehensive definition of testimonial and nontestimonial evidence, but did define these terms to some extent. It explained that an accuser who makes a formal statement to government officers is testimonial in a sense that a person who makes a casual remark to an acquaintance does not. The involvement of government officers in the production of testimonial evidence presents the risks for prosecutorial abuse. The Court also ruled that “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial” would be considered testimonial. Materials such as affidavits, where the defendant was unable to cross-examine and would reasonably be expected to be used prosecutorially, were included in the various formulations of testimonial statements.

The *Crawford* Court went on to say that the ultimate goal of the Confrontation Clause is to ensure reliability of evidence, but that it is a procedural rather than substantive guarantee, in that it commands not that evidence be reliable but that reliability be assessed in a particular manner, i.e., by testing in crucible of cross-examination.

Freddie Owens was being accused by the people paid to guard him and watch over him for almost ten years of numerous and serious disciplinary infractions and violations of the rules without having, nor without ever having had in the past, the opportunity to question and cross-examine these witnesses. This was a direct violation of the Confrontation Clause of the Sixth Amendment, as it involved the unreliable testimonial evidence that *Crawford* meant to exclude. These were not business records but were accusatory testimonial statements and affidavits made by witnesses and victims who were not in court simply disguised as business records.

First, the records were hearsay because they were out-of-court statements made by officers who were not in court to testify. They did not meet the business records exception under *Rule 803(6)* because the statements contained subjective opinions and judgments. *Rule 803(6)* states clearly that subjective opinions and judgments contained in the records should not come in. Major Nettles testified that the correctional officers decided which incidents went into the incident report based on the severity of the event. This clearly made even the inclusion of an event a subjective judgment whether the details were described or not.

In the case of *In re Harvey*, 355 S.C. 53, 584 S.E.2d 893 (2003), the Supreme Court ruled that the log book of the treatment center where the defendant had resided, which contained summaries of “critical incidents” in which the defendant had been

involved, were not admissible under the business records exception because of the subjective opinions and judgments included in the log. The staff reported any behaviors that the staff decided were significant in the log book. The Court ruled that improper admission of the log book was not harmless.

Owens' case is similar to *In re Harvey* in that just the entry of an event into the disciplinary record was a subjective judgment and opinion. The officers had a personal stake in the disciplinary records because they were the victims of the incidents. Owens actually threw feces into the face of an officer, an act which would invoke the personal emotions and anger of anyone as is the nature of human beings. The officers had every incentive to distort the records against Owens whether it was intentional or not. Of the twenty-eight incidents included in Major Nettles' testimony to the court, thirteen of them involved direct assaults of various nature against correctional officers; five involved the finding of a shank in Owens' cell, and three involved setting fires in his cell and only four involved assaults against other inmates. Tr. p. 1389, line 16 – p. 1391, line 14.

The statements were made under circumstances which would lead an objective witness to believe that the statement would be available for use at a trial later. These officers were guards on death row. They knew that a person's prison disciplinary records could be admitted at the sentencing phase. Owens had already been resentenced to death two previous times. The States' case had relied heavily on Owens' conduct in prison during his last resentencing trial. The officers made these entries into the disciplinary records with the full understanding - indeed, the expectation - that this information would be used in a future sentencing trial.

*Carter v. Florida*, 951 So.2d 939, 32 Fla.L. Weekly D651 (2007), held that the officer's police report which contained victim's sworn statement concerning incident, did not fit within business or public records exception to hearsay rule and that the error in admitting the officer's police report was not harmless.

*Commonwealth v. Trapp*, 396 Mass. 202, 485 N.E.2d 162 (1985), held that the officer's disciplinary reports describing incidents involving defendant when he was detained at house of corrections awaiting trial were hearsay and were not admissible as business records. The court said that the common law exceptions to the rule excluding hearsay depended on two elements: a necessity for evidence that would otherwise be excluded and a guarantee of trustworthiness in the circumstances surrounding the making of the hearsay declarations. The opinion points out that when the State has custody and control of the accused, a dispute or controversy has already begun. During the defendant's trial for murder the trial judge admitted disciplinary records from his period of incarceration awaiting trial. The court said the dispute had already begun and that these records were so prejudicial as to require reversal of the judgments.

*Brown v. State*, 274 Ga. 31, 549 S.E.2d 107 (2001), held that the narrative portion of police report was not admissible under the business records hearsay exception. "Police work is often heavily influenced by the beliefs, impressions, and at times, hunches of the investigating officer. It is because of these difficulties that police report narratives do not fit easily within the business records exception to the hearsay rule". 549 S.E.2d at 109.

In *California v. Green*, 399 U.S. 149, 158 (1970), the Supreme Court held that untrustworthy evidence should not be presented to the triers of fact and that out-of court

statements are usually excluded because they lack trustworthiness. Included in the Court's reasons for untrustworthiness were two issues: (1) the witness not being available for the jury to assess his demeanor and credibility and (2) the witness not being subject to cross-examination.

The admission of these incidents also violated due process under the Fourteenth Amendment to the United States Constitution. The sentencing process must satisfy requirements of the due process clause. *Gardner v. Florida*, 430 U.S. 349 (1977). A capital defendant is denied due process when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain. 430 U.S. at 362, *State v. Riddle*, 291 S.C. 232, 353 S.E.2d 138 (1987).

For these reasons, the trial judge erred in admitting Owens' prison disciplinary records under the business records exception to the rule against hearsay. This Court should reverse his death sentence and remand for resentencing.

The trial judge committed reversible error by allowing the Solicitor to argue in closing that the conditions of life imprisonment in general justified a death sentence for Owens, as this argument injected an arbitrary factor into the jury sentencing considerations in violation of S.C. Code Section 16-3-25(C)(1).

One year before Owens' resentencing the Supreme Court decided *State v. Bowman*, 366 S.C. 485, 623 S.E.2d 378 (2005). The opinion gave fair warning to all:

We take this opportunity ... to caution the State and the defense that the evidence presented in the penalty phase of a capital trial is to be restricted to the individual defendant and the individual defendant's actions, behavior, and character. Generally, questions regarding escape and prison conditions are not relevant to the question of whether a defendant should be sentenced to death or life imprisonment without parole. We emphasize that how inmates, other than the defendant at trial, are treated in prison and whether other inmates have escaped from prison, is inappropriate evidence in the penalty phase of a capital trial. We admonish both the State and the defense that the penalty phase should focus solely on the defendant and any evidence introduced in the penalty phase should be connected to that particular defendant.

623 S.E.2d at 385.

Neither the State nor the defense introduced evidence regarding general prison conditions at Owens' resentencing. But the Solicitor was not deterred. He simply made the following argument without evidentiary support:

Sure, you and I may think going to prison would be a serious thing and it would be, but what about Freddie Owens? Big prison is like a little city. In prison he will have all the necessities of life. Sure, he will be in solitary, but he will still have food to eat. They will provide him clothes. He will have books to read. He will be able to recreate and exercise. He will have doctors to take care of him. He will have the clothing that they provide, and he will have contact with his

family and loved ones and TV at times, and he will have family business. Not much more than a change of address for Freddie Owens. So don't think putting Freddie Owens in prison for the rest of his life is going to be a significant punishment for him. The death penalty is the appropriate punishment.

Tr. p. 1561, lines 3-16.

Two months later the Court decided *State v. Burkhart*, 371 S.C. 482, 640 S.E.2d 450 (2007). During the sentencing phase of that case the State presented testimony “regarding the privileges available to an inmate who receives a sentence of life without parole,” which included “access to the yard, work, education, meals, canteen, phone, library, recreation, mail, television, and outside visitors.” 640 S.E.2d at 452-3. The Court reversed Burkhart’s death sentence, holding that “this entire subject matter injected an arbitrary factor into the jury sentencing considerations” in violation of *S.C. Code Section 16-3-25(C)(1)*, which requires the Court to reverse any death sentence “imposed under the influence of passion, prejudice, or any other arbitrary factor.” *Id.*

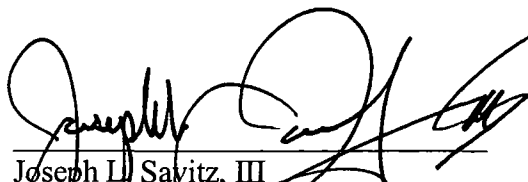
*Burkhart* leaves open the question of whether this error can ever be harmless. Regardless of how that issue is ultimately resolved by the Court, the error could not possibly have been harmless in Owens’ case. The Solicitor specifically contrasted Owens’ evidence in mitigation with his own evidence-free depiction of life imprisonment as nothing less than an extended free vacation. In *State v. McClure*, 342 S.C. 403, 537 S.E.2d 273, 275 (2000), which also involved an improper sentencing phase argument, the Court noted that “the evaluation of the consequences of an error in the sentencing phase of a capital trial are more difficult because of the discretion that is given to the sentencing jury. A capital jury can recommend a life sentence for any reason or no reason at all.”

The Court should reverse Freddie Owens' death Sentence and remand for resentencing.

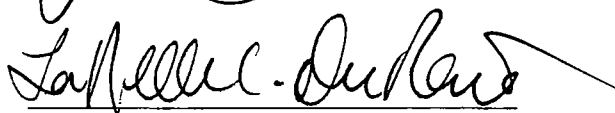
CONCLUSION

The trial judge committed three reversible errors during Freddie Owens' capital resentencing. This Court should reverse his death sentence and remand for resentencing.

Respectfully submitted,



Joseph L. Savitz, III  
Chief Appellate Defender



LaNelle C. DuRant  
Appellate Defender

ATTORNEYS FOR APPELLANT

This 20th day of August, 2007.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

---

Appeal from Greenville County

Larry R. Patterson, Circuit Court Judge

---

THE STATE,

RESPONDENT,

V.

FREDDIE EUGENE OWENS,

APPELLANT

---

**DESIGNATION OF MATTER TO BE  
INCLUDED IN RECORD ON APPEAL**

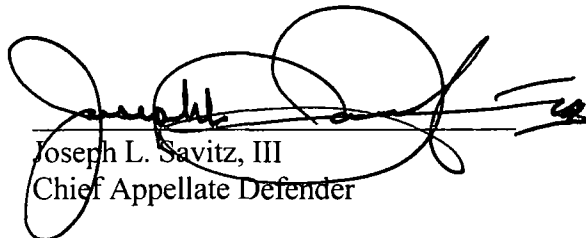
---

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

- (1) Trial transcript
- (2) Pretrial transcript
- (3) Sentencing documents

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

August 20th, 2007



Joseph L. Savitz, III  
Chief Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, S. C. 29211-1589  
(803) 734-1343

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Greenville County

Larry R. Patterson, Circuit Court Judge

THE STATE,

RESPONDENT,

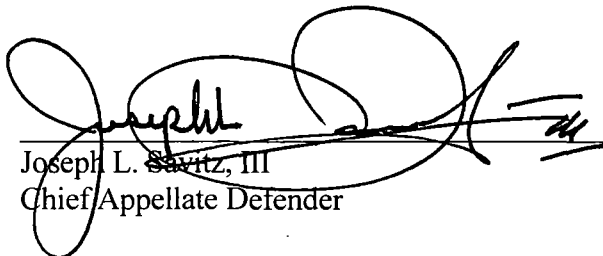
V.

FREDDIE EUGENE OWENS,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Donald J. Zelenka, Esquire, this 20th day of August, 2007.



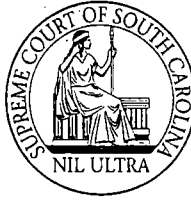
Joseph L. Savitz, III  
Chief Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me  
this 20th day of August, 2007.

 (L.S.)  
Notary Public for South Carolina

My Commission Expires: March 19, 2017 .



# The Supreme Court of South Carolina

DANIEL E. SHEAROUSE  
CLERK OF COURT

BRENDA F. SHEALY  
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330  
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

July 19, 2007

Chief Attorney Joseph L. Savitz, III  
Appellate Defender LaNelle C. DuRant  
South Carolina Commission on Indigent Defense  
P O Box 11589  
Columbia, SC 29211

Re: The State v. Owens, Freddie Eugene

Dear Counsel:

The following Order has been endorsed on your Petition for Extension of Time in Which to File the Initial Brief of Appellant and Designation of Matter in the above entitled case on appeal.

“Granted.

Jean H. Toal C.J.  
For the Court

By s/ Daniel E. Shearouse  
Clerk

July 19, 2007.”

Please be advised that the Initial Brief of Appellant and Designation of Matter should be served and filed on or before August 20, 2007.

Chief Attorney Joseph L. vitz, III  
Appellate Defender LaNelle C. DuRant  
Page Two  
July 19, 2007

Very truly yours,

A handwritten signature in black ink, consisting of the letters 'DES' followed by a long, horizontal, slightly wavy line extending to the right.

CLERK

DES/dmh

cc: Assistant Deputy Attorney General Donald J. Zelenka

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

---

Appeal from Greenville County

Honorable Larry R. Patterson, Circuit Court Judge

---

ORIGINAL

RECEIVED  
JUL 16 2007

SC Court of Appeals

STATE OF SOUTH CAROLINA,

RESPONDENT,

V.

FREDDIE EUGENE OWENS,

APPELLANT

RECEIVED

JUL 17 2007

S.C. SUPREME COURT

---

PETITION FOR EXTENSION OF TIME  
IN WHICH TO FILE THE INITIAL BRIEF OF APPELLANT  
AND DESIGNATION OF MATTER

---

Counsel for Freddie Eugene Owens, Chief Attorney Joseph L. Savitz, III, and Appellate Defender LaNelle C. DuRant, request an additional extension of 30 days in which to file the initial brief and designation of matter in this capital direct appeal. In support of this motion, counsel show:

(1) Chief Attorney Savitz presently has a caseload totaling over 200 cases (including 6 capital direct appeals), which consist of approximately 60,000 pages of transcript, an average of more than 1,000 pages per week. In addition, he is also responsible for the day-to-day administration of the division.

(2) He and co-counsel would have completed this step of the appellate process sooner had ~~not~~<sup>not</sup> the Court expedited the capital appeal in *State v. Stanko*, so that it had to take precedence.

(3) In the past month, the Chief Attorney has filed briefs and designations of matter in the following eight appeals:

*State v. Kenny Gene Lee*  
*State v. Keio Culler*  
*State v. Efrain Thomas*  
*State v. Clayton Smalls*  
*State v. Michael D. Thrift*  
*State v. Terriel Lashawn Mack*  
*State v. James Bodenstedt*  
*State v. Benjamin Johnson*

(4) In the past month, Appellate Defender LaNelle DuRant has filed briefs in the following seven appeals:

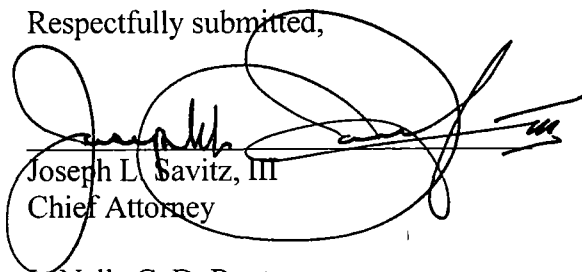
*State v. Leroy McGrier*  
*State v. Melvin Timmons*  
*State v. Stacy Andre Wright*  
*State v. James Grindle*  
*State v. Remus Hudgensby*  
*State v. Leroy McGrier 2*  
*State v. David Hargett*

(5) This request is made in good faith and not for the purpose of delay.

(6) As indicated by signature below, Donald J. Zelenka, of the Attorney General's Office, does not oppose this request

For these reasons, counsel for appellant, petitions the Court for an additional thirty days in which to file the initial brief of appellant and designation of matter in this death penalty case. Counsel requests that time limits for filing the initial brief of appellant be held in abeyance pending a ruling on this motion.

Respectfully submitted,

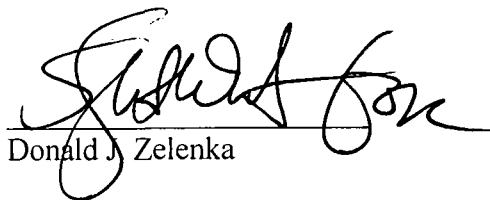


Joseph L. Savitz, III  
Chief Attorney

LaNelle C. DuRant  
Appellate Defender

Attorneys for Appellant

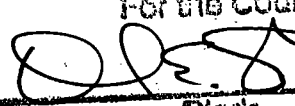
I do not oppose:



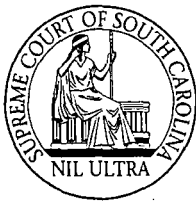
Donald J. Zelenka

This 13th day of July, 2007.

GRANTED.

John H. Tait C.J.  
For the Court  
By   
Clerk

July 19, 2007



# The Supreme Court of South Carolina

DANIEL E. SHEAROUSE  
CLERK OF COURT

BRENDA F. SHEALY  
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330  
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

June 19, 2007

Chief Attorney Joseph L. Savitz, III  
Appellate Defender LaNelle C. DuRant  
South Carolina Commission on Indigent Defense  
P O Box 11589  
Columbia, SC 29211

Re: The State v. Owens, Freddie Eugene

Dear Counsel:

The following Order has been endorsed on your Petition for Extension of Time in Which to File the Initial Brief of Appellant and Designation of Matter in the above entitled case on appeal.

“Granted.

Jean H. Toal C.J.  
For the Court

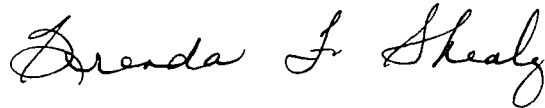
By s/ Brenda F. Shealy  
Chief Deputy Clerk

June 19, 2007.”

Please be advised that the Initial Brief of Appellant and Designation of Matter should be served and filed on or before July 18, 2007.

Chief Attorney Joseph L. Savitz, III  
Appellate Defender LaNelle C. DuRant  
Page Two  
June 19, 2007

Very truly yours,

A handwritten signature in cursive script, reading "Brenda J. Shealy". The signature is written in black ink and is positioned above the printed name of the signatory.

CHIEF DEPUTY CLERK

BFS/dmh

cc: Assistant Deputy Attorney General Donald J. Zelenka

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT  

---

RECEIVED

JUN 18 2007

Appeal from Greenville County

S.C. SUPREME COURT

Honorable Larry R. Patterson, Circuit Court Judge  

---

STATE OF SOUTH CAROLINA,

RESPONDENT,

V.

FREDDIE EUGENE OWENS,

APPELLANT

---

PETITION FOR EXTENSION OF TIME  
IN WHICH TO FILE THE INITIAL BRIEF OF APPELLANT  
AND DESIGNATION OF MATTER  

---

Counsel for Freddie Eugene Owens, Chief Attorney Joseph L. Savitz, III, and Appellate Defender LaNelle C. DuRant request an additional extension of 30 days in which to file the initial brief and designation of matter in this capital direct appeal. In support of this motion, counsel show:

(1) Chief Attorney Savitz presently has a caseload totaling over 200 cases (including 6 capital direct appeals), which consist of approximately 60,000 pages of transcript, an average of more than 1,000 pages per week. In addition, he is also responsible for the day-to-day administration of the division.

(2) In the past month, the Chief Attorney has filed briefs and designations of matter in the following seven appeals:

*State v. Kenny Gene Lee*  
*State v. Keio Culler*  
*State v. Otis Culbreath.*  
*State v. Randall Lane Smithr*  
*State v. Corey Williams*  
*State v. Curtis Smith*  
*State v. Stephen Stanko (death penalty)*

(3) In the past month, Appellate Defender LaNelle DuRant has filed briefs in the following thirteen appeals:

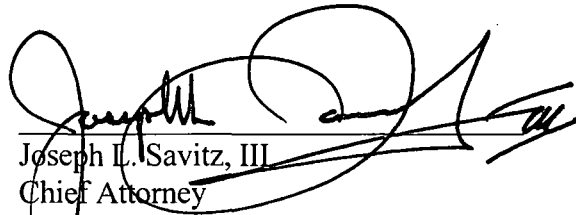
*State v. Elijah Battle*  
*State v. Gavin Williams*  
*State v. Antwan Salters*  
*State v. Herbert Lee Bell*  
*State v. Leroy Archie*  
*State v. Hardy Lassiter*  
*State v. Sidney Davis*  
*State v. Lewis Lloyd*  
*In the Matter of the Care and Treatment of Jerry F. Powell*  
*In the Matter of the Care and Treatment of Ricky Pitts*  
*State v. Antwan Middleton*  
*State v. Leroy McGrier*  
*State v. Melvin Lamont Timmons*

(4) This request is made in good faith and not for the purpose of delay.

(5) As indicated by signature below, Donald J. Zelenka, of the Attorney General's Office, does not oppose this request

For these reasons, counsel for appellant, petitions the Court for an additional thirty days in which to file the initial brief of appellant and designation of matter in this death penalty case. Counsel requests that time limits for filing the initial brief of appellant be held in abeyance pending a ruling on this motion.

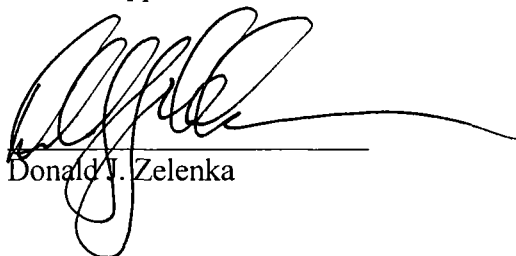
Respectfully submitted,

  
Joseph L. Savitz, III  
Chief Attorney

LaMelle C. DuRant  
Appellate Defender

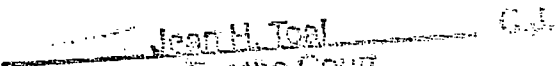
Attorneys for Appellant

I do not oppose:

  
Donald V. Zelenka

This 18th day of June, 2007.

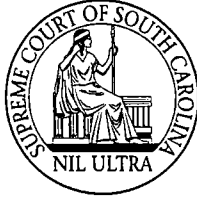
*Granted.*

  
Jean H. Toal  
For the Court

By   
Brenda L. Sheehy  
Clerk

*Chief Deputy*

*June 19, 2007*



# The Supreme Court of South Carolina

DANIEL E. SHEAROUSE  
CLERK OF COURT

BRENDA F. SHEALY  
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330  
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

May 22, 2007

Chief Attorney Joseph L. Savitz, III  
Appellate Defender LaNelle C. Durant  
South Carolina Commission on Indigent Defense  
P O Box 11589  
Columbia, SC 29211

Re: The State v. Owens, Freddie Eugene

Dear Counsel:

The following Order has been endorsed on your Petition for Extension of Time in Which to File the Initial Brief of Appellant and Designation of Matter in the above entitled case on appeal.

“Granted.

Jean H. Toal C.J.  
For the Court

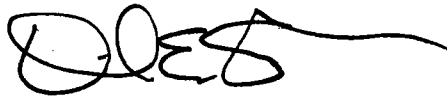
By s/ Daniel E. Shearouse  
Clerk

May 22, 2007.”

Please be advised that the Initial Brief of Appellant and Designation of Matter should be served and filed on or before June 18, 2007.

Chief Attorney Joseph L. Savitz, III  
Appellate Defender LaNelle C. Durant  
Page Two  
May 22, 2007

Very truly yours,



CLERK

DES/dmh

cc: Assistant Deputy Attorney General Donald J. Zelenka

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

---

Appeal from Greenville County

Honorable Larry R. Patterson, Circuit Court Judge

---

RECEIVED

MAY 21 2007

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA,

RESPONDENT,

V.

FREDDIE EUGENE OWENS,

APPELLANT

---

PETITION FOR EXTENSION OF TIME  
IN WHICH TO FILE THE INITIAL BRIEF OF APPELLANT  
AND DESIGNATION OF MATTER

---

Counsel for Freddie Eugene Owens, Chief Attorney Joseph L. Savitz, III, and Appellate Defender LaNelle C. DuRant request an additional extension of 30 days in which to file the initial brief and designation of matter in this capital direct appeal. In support of this motion, counsel show:

(1) Chief Attorney Savitz presently has a caseload totaling over 200 cases (including 6 capital direct appeals), which consist of approximately 60,000 pages of transcript, an average of more than 1,000 pages per week. In addition, he is also responsible for the day-to-day administration of the division.

(2) In the past month, the Chief Attorney has filed briefs and designations of matter in the following eight appeals:

*State v. Cedric Ross*  
*State v. Rpgger Dale McCoy*  
*State v. Tawyne Dyonne Austin.*  
*State v. Jack Edward Earl Parker*  
*State v. Kenny Wingate*  
*State v. Terrance Gisty*  
*State v. Frederick George Salyer*  
*State v. Elliott Mitchell*

(3) Chief Attorney Savitz is presently working on the capital case of *State v. Stephen C. Stanko* which is due to be filed with the Court May 23, 2007.

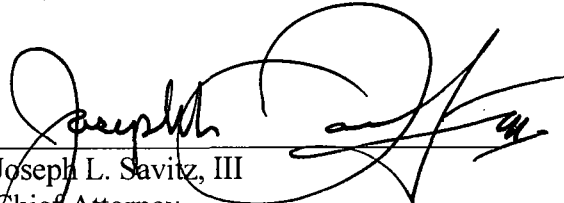
(4) In the past month, Appellate Defender LaNelle DuRant has filed briefs and petition for writ of certioraris in the following fifteen appeals:

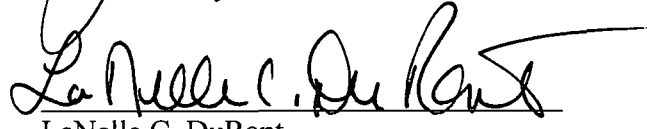
*Gary White v. State*  
*In the Matter of the Care and Treatment of Kenneth White*  
*State v. Heriberto E. Clarke*  
*State v. Eric Samuel Scriven*  
*Sergio Massey v. State*  
*In the Matter of the Care and Treatment of Wallace Jefferies*  
*State v. Eric Cornelius Crawford*  
*In the Matter of the Care and Treatment of Christopher Guinan*  
*State v. Perry Byrd*  
*State v. Moses Ellison*  
*Mark Teague v. State*  
*State v. Elrich Artis*  
*Maxie Goodyear v. State*  
*Bobby Sabb v. State*  
*State v. James Howard*

(5) This request is made in good faith and not for the purpose of delay.

WHEREFORE, counsel for appellant requests an additional 30 days in which to file the initial brief and designation of matter in this death penalty case.

Respectfully submitted,

  
Joseph L. Savitz, III  
Chief Attorney

  
LaNelle C. DuRant  
Appellate Defender

Attorneys for Appellant

This 17th day of May, 2007.

GRANTED.  
JAMES M. TROTT  
For the Court  
  
Clerk

May 22, 2007

ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

Appeal from Greenville County

Honorable Larry R. Patterson, Circuit Court Judge

RECEIVED

MAY 21 2007

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA,

RESPONDENT,

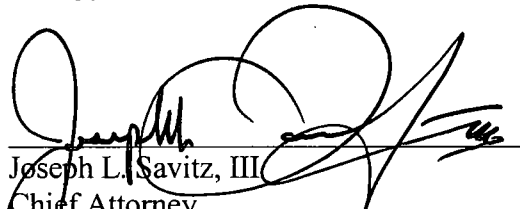
V.

FREDDIE EUGENE OWENS,

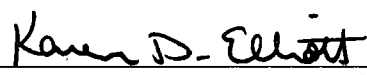
APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the petition for extension of time in the above referenced case was served on opposing counsel, Donald J. Zelenka, on the 17<sup>th</sup> day of May, 2007.

  
Joseph L. Savitz, III  
Chief Attorney  
Attorney for Appellant

SUBSCRIBED AND SWORN TO before me  
this 21<sup>st</sup> day of May, 2007.

 (L.S.)  
Notary Public for South Carolina  
My Commission Expires: March 19, 2017

# The Supreme Court of South Carolina

The State,

Respondent

v.

Freddie Eugene Owens,

Appellant.

The Honorable Larry R. Patterson  
Greenville County  
Trial Court Case No. 1998-GS-23-05220

---

## ORDER

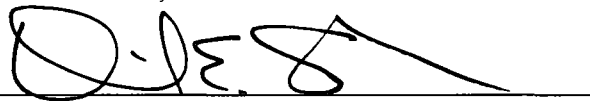
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For good cause having been shown, the time for serving and filing the Initial Brief of Appellant and Designation of Matter in the above entitled matter is hereby extended until May 17, 2007.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



CLERK

Columbia, South Carolina

April 18, 2007

cc: Chief Attorney Joseph L. Savitz, III  
Assistant Deputy Attorney General Donald J. Zelenka

ORIGINAL



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

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

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

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

April 17, 2007

RECEIVED

APR 17 2007

S.C. SUPREME COURT

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

Re: The State v. Freddie Eugene Owens

Dear Mr. Shearouse:

The initial brief of appellant and designation of matter in this capital case are due to be served and filed with the Court today. However, because of my heavy workload at this time, I am requesting an extension until May 17, 2007, in which to serve and file the brief.

By copy of this letter, I am informing Donald J. Zelenka, of the Attorney General's Office, of my request.

Sincerely,

Joseph L. Savitz, III  
Chief Attorney

JLS,III/kde

cc: Donald J. Zelenka



# SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

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

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

## RECEIPT

I, Debbie M. Hopkins, of the South Carolina Supreme Court, have received the following original trial transcript(s) in the death penalty case of State v. Freddie Eugene Owens

1. ✓ September 28, 2006 (Michael R. Watts)
2. ✓ November 6, 2006 (Volume One) (Michael R. Watts)
3. ✓ November 7, 2006 (Volume Two) (Michael R. Watts)
4. ✓ November 8, 2006 (Volume Three) (Michael R. Watts)
5. ✓ November 9, 2006 (Volume Four) (Michael R. Watts)
6. ✓ November 10, 2006 (Volume Five) (Michael R. Watts)
7. ✓ November 11, 2006 (Volume Six) (Michael R. Watts)

Date: March 13, 2007

Debbie M. Hopkins  
(Name)



# SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

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

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

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

RECEIVED

FEB 21 2007

S.C. SUPREME COURT

February 21, 2007

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

Dear Mr. Shearouse:

The following case falls under the 60 day rule for appeals, and the date we received the transcript is listed to the side.

The State v. Freddie Eugene Owens

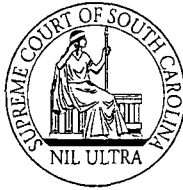
2/16/2007

I would appreciate you beginning our time limits from the above dates, and if you need additional information, or have any questions please contact me.

Thank you for your assistance in this matter.

Sincerely,

Melinda W. Long  
Legal Assistant



**RECEIVED**

FEB 13 2007

**South Carolina Court Administration**

**S.C. SUPREME COURT**

**South Carolina Supreme Court  
Columbia, South Carolina**

ROSALYN FRIERSON  
DIRECTOR

MARY S. SCHROEDER  
DEPUTY DIRECTOR

1015 SUMTER STREET, SUITE 200  
COLUMBIA, SOUTH CAROLINA 29201  
TELEPHONE: (803) 734-1800  
FAX: (803) 734-0269

**MEMORANDUM**

TO: Melinda Long  
FROM: Desiree R. Allen *DA*  
RE: Status Request – Late letters – February 8, 2007  
DATE: February 12, 2007

Pursuant to your five letters, I was able to confirm the status of the following transcript from this particular case. It would be helpful to know whether Mr. Watts has lumped all of these requests into one. By copy of this correspondence, I am requesting that we be informed, in writing, as to what transcripts this extension covers. If they are not considered one, more extensions should be forthcoming and copies will be provided to all interested parties.

| <u>Court Reporter</u> | <u>Due Date</u> | <u>Case Name</u>     | <u>Status</u>  |
|-----------------------|-----------------|----------------------|----------------|
| Michael Watts         | 2.2.07          | Freddie Eugene Owens | Ext. to 3.1.07 |

CC: S.C. Supreme Court ✓  
Office of Attorney General  
Michael Watts



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

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

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

February 8, 2007

Ms. Desiree Allen  
S.C. Court Administration  
1015 Sumter Street, 2nd Floor  
Columbia, South Carolina 29201-3739

RECEIVED

FEB 8 2007

S.C. SUPREME COURT

Dear Ms. Allen:

Below is a list of transcript(s) that were requested by this office. Pursuant to Supreme Court Rule 206(e), the allotted time of sixty (60) days has lapsed to either receive the transcript or an extension to deliver same.

| <u>Court Reporter</u> | <u>Due Date</u> | <u>Case Name</u>     |
|-----------------------|-----------------|----------------------|
| Mr. Michael Watts     | 2/2/07          | Freddie Eugene Owens |

Trial Date: November 11, 2006

I would appreciate your confirming in writing as to the status of the above-referenced transcript(s). If you should have any questions, please do not hesitate to contact me.

Sincerely,

Melinda W. Long  
Legal Assistant

xc: S.C. Supreme Court  
Attorney General's Office



# SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

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

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

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

February 8, 2007

RECEIVED

FEB 8 2007

S.C. SUPREME COURT

Ms. Desiree Allen  
S.C. Court Administration  
1015 Sumter Street, 2nd Floor  
Columbia, South Carolina 29201-3739

Dear Ms. Allen:

Below is a list of transcript(s) that were requested by this office. Pursuant to Supreme Court Rule 206(e), the allotted time of sixty (60) days has lapsed to either receive the transcript or an extension to deliver same.

| <u>Court Reporter</u> | <u>Due Date</u> | <u>Case Name</u>     |
|-----------------------|-----------------|----------------------|
| Mr. Michael Watts     | 2/2/07          | Freddie Eugene Owens |

Trial Date: November 6, 2006

I would appreciate your confirming in writing as to the status of the above-referenced transcript(s). If you should have any questions, please do not hesitate to contact me.

Sincerely,

Melinda W. Long  
Legal Assistant

xc: S.C. Supreme Court  
Attorney General's Office



# SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense  
1330 Lady Street, Suite 401  
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February 8, 2007

RECEIVED

FEB 8 2007

S.C. SUPREME COURT

Ms. Desiree Allen  
S.C. Court Administration  
1015 Sumter Street, 2nd Floor  
Columbia, South Carolina 29201-3739

Dear Ms. Allen:

Below is a list of transcript(s) that were requested by this office. Pursuant to Supreme Court Rule 206(e), the allotted time of sixty (60) days has lapsed to either receive the transcript or an extension to deliver same.

| <u>Court Reporter</u> | <u>Due Date</u> | <u>Case Name</u>     |
|-----------------------|-----------------|----------------------|
| Mr. Michael Watts     | 2/2/07          | Freddie Eugene Owens |

Trial Date: October 2, 2006

I would appreciate your confirming in writing as to the status of the above-referenced transcript(s). If you should have any questions, please do not hesitate to contact me.

Sincerely,

Melinda W. Long  
Legal Assistant

xc: S.C. Supreme Court  
Attorney General's Office



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

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

February 8, 2007

RECEIVED

FEB 8 2007

S.C. SUPREME COURT

Ms. Desiree Allen  
S.C. Court Administration  
1015 Sumter Street, 2nd Floor  
Columbia, South Carolina 29201-3739

Dear Ms. Allen:

Below is a list of transcript(s) that were requested by this office. Pursuant to Supreme Court Rule 206(e), the allotted time of sixty (60) days has lapsed to either receive the transcript or an extension to deliver same.

| <u>Court Reporter</u> | <u>Due Date</u> | <u>Case Name</u>     |
|-----------------------|-----------------|----------------------|
| Mr. Michael Watts     | 2/2/07          | Freddie Eugene Owens |

Trial Date: September 28, 2006

I would appreciate your confirming in writing as to the status of the above-referenced transcript(s). If you should have any questions, please do not hesitate to contact me.

Sincerely,

Melinda W. Long  
Legal Assistant

xc: S.C. Supreme Court  
Attorney General's Office



# SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

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

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

February 8, 2007

RECEIVED

FEB 8 2007

S.C. SUPREME COURT

Ms. Desiree Allen  
S.C. Court Administration  
1015 Sumter Street, 2nd Floor  
Columbia, South Carolina 29201-3739

Dear Ms. Allen:

Below is a list of transcript(s) that were requested by this office. Pursuant to Supreme Court Rule 206(e), the allotted time of sixty (60) days has lapsed to either receive the transcript or an extension to deliver same.

| <u>Court Reporter</u> | <u>Due Date</u> | <u>Case Name</u>     |
|-----------------------|-----------------|----------------------|
| Mr. Michael Watts     | 1/29/07         | Freddie Eugene Owens |

Trial Date: November 11, 2006 (Death Sentence I

I would appreciate your confirming in writing as to the status of the above-referenced transcript(s). If you should have any questions, please do not hesitate to contact me.

Sincerely,

Melinda W. Long  
Legal Assistant

xc: S.C. Supreme Court  
Attorney General's Office



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

Post Office Box 11589  
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Facsimile: (803) 734-1397

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

December 4, 2006

RECEIVED

DEC 04 2006

S.C. SUPREME COURT

Mr. Michael Watts  
Circuit Court Reporter  
489 Edgewater Drive  
Gaffney, SC 29340

Dear Mr. Watts:

Our office has been requested to perfect the appeal arising out of:

The State v. Freddie Eugene Owens

Indictment #: 1998-GS-23-05220

County: Greenville

Date of Trial: September 28, 2006

Presiding Judge: Larry R. Patterson

It is my understanding that you were the court reporter at this time. That being the case, I request that you send this office the original trial transcript along with your bill. If you send a copy to this office, please bill us accordingly. To ensure prompt payment of this bill, please prepare it on the enclosed CID FORM 3500 (Substitution for SCCA DI-4) and include the original criminal case number (Indictment number) where the space is provided.

We request that the lines on the paper be numbered from 1-25, and that you include in the transcript any and all recorded motions, pre and post-trial. Additionally, please transcribe the jury selection, and the State and defense counsel's opening and closing arguments. We have found that even if there are no objections, we need to review both opening and closing arguments for appeal.

If you are aware of the existence of co-defendants not listed in the prior captioned case, please contact us prior to transcribing the transcript. In this manner, we can consult our records to ensure that in ordering a transcript, a duplication has not occurred. In addition, if the Attorney General's Office has already requested an original transcript, please notify us.

Mr. Michael Watts  
December 4, 2006  
Page Two

I am sorry for any inconvenience this may cause, but I appreciate your assistance in this matter. If you have any questions, or problems, please contact me.

Thank you for your kind cooperation in this matter.

Sincerely,

  
Melinda W. Long  
Legal Assistant

xc: S.C. Supreme Court  
Attorney General's Office



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

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Facsimile: (803) 734-1397

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

RECEIVED

December 4, 2006

DEC 04 2006

S.C. SUPREME COURT

Mr. Michael Watts  
Circuit Court Reporter  
489 Edgewater Drive  
Gaffney, SC 29340

Dear Mr. Watts:

Our office has been requested to perfect the appeal arising out of:

The State v. Freddie Eugene Owens                      Indictment #:    1998-GS-23-05220

County: Greenville                      Date of Trial:    October 2, 2006

Presiding Judge: Larry R. Patterson

It is my understanding that you were the court reporter at this time. That being the case, I request that you send this office the original trial transcript along with your bill. If you send a copy to this office, please bill us accordingly. To ensure prompt payment of this bill, please prepare it on the enclosed CID FORM 3500 (Substitution for SCCA DI-4) and include the original criminal case number (Indictment number) where the space is provided.

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Mr. Michael Watts  
December 4, 2006  
Page Two

I am sorry for any inconvenience this may cause, but I appreciate your assistance in this matter. If you have any questions, or problems, please contact me.

Thank you for your kind cooperation in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Melinda W. Long". The signature is fluid and cursive, with a long horizontal stroke at the end.

Melinda W. Long  
Legal Assistant

xc: S.C. Supreme Court  
Attorney General's Office



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

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

December 4, 2006

RECEIVED

DEC 04 2006

S.C. SUPREME COURT

Mr. Michael Watts  
Circuit Court Reporter  
489 Edgewater Drive  
Gaffney, SC 29340

Dear Mr. Watts:

Our office has been requested to perfect the appeal arising out of:

The State v. Freddie Eugene Owens                      Indictment #:    1998-GS-23-05220

County: Greenville                      Date of Trial: November 6, 2006

Presiding Judge: Larry R. Patterson

It is my understanding that you were the court reporter at this time. That being the case, I request that you send this office the original trial transcript along with your bill. If you send a copy to this office, please bill us accordingly. To ensure prompt payment of this bill, please prepare it on the enclosed CID FORM 3500 (Substitution for SCCA DI-4) and include the original criminal case number (Indictment number) where the space is provided.

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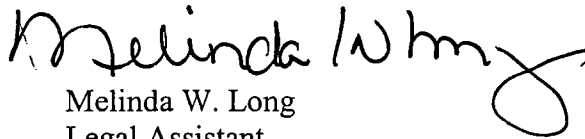
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Mr. Michael Watts  
December 4, 2006  
Page Two

I am sorry for any inconvenience this may cause, but I appreciate your assistance in this matter. If you have any questions, or problems, please contact me.

Thank you for your kind cooperation in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Melinda W. Long". The signature is fluid and cursive, with a large loop at the end of the last name.

Melinda W. Long  
Legal Assistant

xc: S.C. Supreme Court  
Attorney General's Office



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

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

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

December 4, 2006

RECEIVED

DEC 04 2006

S.C. SUPREME COURT

Mr. Michael Watts  
Circuit Court Reporter  
489 Edgewater Drive  
Gaffney, SC 29340

Dear Mr. Watts:

Our office has been requested to perfect the appeal arising out of:

The State v. Freddie Eugene Owens

Indictment #: 1998-GS-23-05220

County: Greenville

Date of Trial: November 11, 2006

Presiding Judge: Larry R. Patterson

It is my understanding that you were the court reporter at this time. That being the case, I request that you send this office the original trial transcript along with your bill. If you send a copy to this office, please bill us accordingly. To ensure prompt payment of this bill, please prepare it on the enclosed CID FORM 3500 (Substitution for SCCA DI-4) and include the original criminal case number (Indictment number) where the space is provided.

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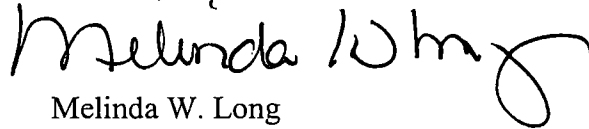
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Mr. Michael Watts  
December 4, 2006  
Page Two

I am sorry for any inconvenience this may cause, but I appreciate your assistance in this matter. If you have any questions, or problems, please contact me.

Thank you for your kind cooperation in this matter.

Sincerely,

A handwritten signature in black ink that reads "Melinda W. Long". The signature is fluid and cursive, with the first name "Melinda" being more prominent and the last name "Long" following in a similar style.

Melinda W. Long  
Legal Assistant

xc: S.C. Supreme Court  
Attorney General's Office

STATE OF SOUTH CAROLINA )

IN THE COURT OF  
GENERAL SESSIONS  
13<sup>th</sup> Judicial Circuit

County of Greenville )

STATE OF SOUTH CAROLINA )

Death Penalty Sentencing Report

vs. )

FREDDIE EUGENE OWENS )

Indictment 1998-GS-23-5220

Defendant. )

RECEIVED

DEC 4 2006

A. Name of Trial Judge: The Honorable Larry R. Patterson

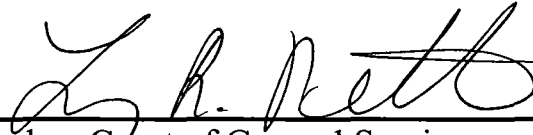
B. Name of Defendant: Freddie Eugene Owens

C. Names of Defense Attorneys: 1. Everett P. Godfrey, Jr. 2. Kenneth C. Gibson

D. Date Sentenced: November 11, 2006

E. Aggravating circumstance(s) found or a copy of the verdict form is attached:

1. Murder was committed while in the commission of robbery while armed with a deadly weapon 2. That the Murder was committed while in the commission of larceny with use of a deadly weapon.

  
\_\_\_\_\_  
Judge, Court of General Sessions

November 30, 2006

Greenville, South Carolina



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

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

November 29, 2006

Mr. Michael Watts  
Circuit Court Reporter  
489 Edgewater Drive  
Gaffney, SC 29340

Dear Mr. Watts:

RECEIVED  
NOV 29 2006  
S.C. SUPREME COURT

Our office has been requested to perfect the appeal arising out of:

The State v. Freddie Eugene Owens                      Indictment #:    1998-GS-23-05220

County: Greenville                      Date of Trial: November 11, 2006 (Death Sentence  
Imposed)

Presiding Judge: Larry R. Patterson

It is my understanding that you were the court reporter at this time. That being the case, I request that you send this office the original trial transcript along with your bill. If you send a copy to this office, please bill us accordingly. To ensure prompt payment of this bill, please prepare it on the enclosed CID FORM 3500 (Substitution for SCCA DI-4) and include the original criminal case number (Indictment number) where the space is provided.

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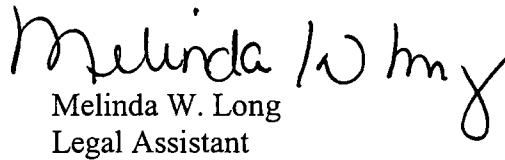
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Mr. Michael Watts  
November 29, 2006  
Page Two

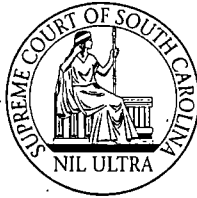
I am sorry for any inconvenience this may cause, but I appreciate your assistance in this matter. If you have any questions, or problems, please contact me.

Thank you for your kind cooperation in this matter.

Sincerely,

  
Melinda W. Long  
Legal Assistant

xc: S.C. Supreme Court  
Attorney General's Office



# The Supreme Court of South Carolina

DANIEL E. SHEAROUSE  
CLERK OF COURT

BRENDA F. SHEALY  
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330  
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

November 21, 2006

The Honorable Larry R. Patterson  
Greenville County Courthouse, Suite 315  
301 East North Street  
Greenville, SC 29601-2113

Re: The State v. Owens, Freddie Eugene

Dear Judge Patterson:

As you know, the trial judge must submit a Death Penalty Sentencing Report to the Supreme Court on all death penalty cases. Please find enclosed a copy of this questionnaire for your convenience in completing the report in the above matter.

Very truly yours,

CLERK

DES/dmh

Enclosure

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

---

**APPEAL FROM GREENVILLE COUNTY**  
Court of General Sessions

Larry R. Patterson, Circuit Court Judge

---

1998-GS-23-5220

---

The State, ..... Respondent.

v.

Freddie Eugene Owens, ..... Appellant.

---

**NOTICE OF APPEAL**

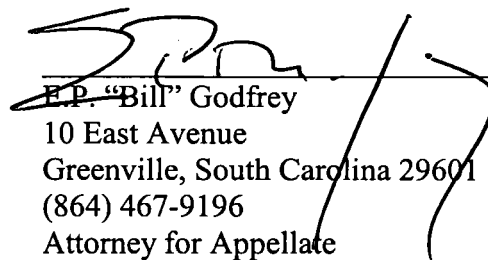
---

Freddie Eugene Owens appeals his sentence in this case. The sentence was imposed by the Honorable Larry R. Patterson on November 11, 2006.

November 17, 2006

**RECEIVED**

NOV 20 2006

  
E.P. "Bill" Godfrey  
10 East Avenue  
Greenville, South Carolina 29601  
(864) 467-9196  
Attorney for Appellate

Other Counsel of Record:  
Robert M. Ariail, Solicitor  
Betty C. Strom, Deputy Solicitor  
13<sup>th</sup> Circuit Solicitor's Office  
305 East North Street, Suite 325  
Greenville, South Carolina 29601-2185  
(864) 467-8647  
Attorneys for Respondent

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

---

**APPEAL FROM GREENVILLE COUNTY**  
Court of General Sessions

Larry R. Patterson, Circuit Court Judge

---

1998-GS-23-5220

---

The State, . . . . . Respondent.

v.

Freddie Eugene Owens, . . . . . Appellant.

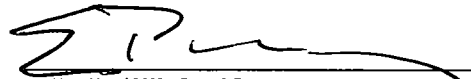
---

**PROOF OF SERVICE**

---

I certify that I have served the Notice of Appeal on Freddie Eugene Owens by depositing a copy of it in the United States Mail, postage prepaid, on November 17, 2006, addressed to Respondent's attorneys of record, Robert M. Ariail and Betty C. Strom, 305 East North Street, Suite 325, Greenville, South Carolina 29601-2185. I further certify that I deposited a copy of the Notice of Appeal in the United States Mail, postage prepaid, on November 17, 2006 on Freddie Eugene Owens to Paul B. Wickensimer, Clerk of Court, 305 East North Street, Greenville, South Carolina 29601 for filing in the Circuit Court.

November 17, 2006

  
E.P. "Bill" Godfrey  
10 East Avenue  
Greenville, South Carolina 29601  
(864) 467-9196  
  
Attorney for Appellant



# Godfrey Law Firm L.L.C.

10 East Avenue  
Greenville, SC 29601

(864) 467-9196  
(864) 467-9427  
godfreylawfirm.com

E.P. "Bill" Godfrey  
Attorney at Law

Mary Alice H. Godfrey  
Attorney at Law  
Certified Family Court Mediator

November 17, 2006

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

Re: *State of South Carolina v. Freddie Eugene Owens*  
1998-GS-23-5220

Dear Mr. Shearouse:

Enclosed for filing is a notice of appeal and proof of service in the above-captioned case.

Freddie Eugene Owens was re-sentenced for capital murder and sentenced to death.

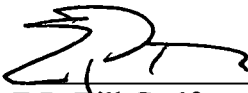
Also enclosed is a self-addressed, postage paid envelope for return to me of the additional clocked copies of the notice of appeal and proof of service.

Sincerely,

**RECEIVED**

NOV 20 2006

EPG/  
Enclosures

  
E.P. Bill Godfrey  
SC Bar No. 13043