

**ORIGINAL**

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

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Appeal from Greenville County  
Larry Patterson, Circuit Court Judge

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**RECEIVED**

MAR 18 2008

S.C. SUPREME COURT

**THE STATE,**

Respondent,

v.

**FREDDIE EUGENE OWENS,**

Appellant.

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**FINAL BRIEF OF 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. ( R. 1111, 1113, 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. ( R. 1239, 1255, 1106, 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. ( R. 1106, 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. ( R. 1156, Tr. p. 1105, ll. 18-25). She worked three jobs at the time of her death. ( R. 1153, 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. ( R. 1148, 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. ( R. 1194-1224, 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. ( R. 1194-1224, 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. ( R. 1210-11, 1214-15, 1222-23, 1209-11, 1220, 1260, 1277, 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. ( R. 1224-27, Tr. p. 1173, l. 2 - p. 1176, l. 3). One of the stores was the Speedway convenience store at which the victim worked. ( R. 1226-27, 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. ( R. 1126, Tr. p. 1075, ll. 2-16). Appellant wore the ski mask. ( R. 1236, Tr. p. 1185, ll. 11-22). Upon Appellant initially entering the store, Ms. Graves was accosted and cash was removed from one register. ( R. 1126, Tr. p. 1075, ll. 10-24). At gun point, Ms. Graves was then taken to the area of the store safe. ( R. 1126, Tr. p. 1075, ll. 24-25). She was then shot in the head. ( R. 1126, 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. ( R. 1127, 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> ( R. 1165, 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> ( R. 1232, 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. ( R. 1180, 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,

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<sup>1</sup>Ms. Graves, as a cashier, could not open the safe. She did not have the combination. ( R. 1180, 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." ( R. 1232, 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'". ( R. 1165, 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

Owen's cellmate, Christopher Lee, was beaten to death in the cell he shared with Owens in the Greenville County Detention Center. S.L.E.D. agents questioned Owens, and he confessed to the murder of Lee. ( R. 1388-1391, 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. ( R. 1388-1391, Tr. p. 1336, l. 9 - p. 1339, l. 6). Owens also confessed to burning Lee with a cigarette lighter after he beat him unconscious. ( R. 1388-1391, 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. ( R. 1404, 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.

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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.

## 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 R. 525-530, Tr. p. 479-484). Appellant made no objection before the petit jury was empaneled and sworn. (See R. 530, Tr. p. 484-1033). No objection was made at all thereafter regarding this issue. (See R. 1084-1668, Tr. p. 1034-1614). Appellant made no request to conduct any additional voir dire of the juror. (See R. 525-530, 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.” ( R. 5258-29, 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. ( R. 529, 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 unwillingness to

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. ( R. 529, 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. ( R. 525-29, 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, \_\_\_\_\_ 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.

300 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. ( R. 528-29, 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. ( R. 529-530, 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. ( R. 1064-69, Tr. p. 1014-1019). Juror Ables voir dire occurred after the 16<sup>th</sup> juror qualified, Juror Fawn Norton. ( R. 524-25, Tr. p. 478-479). Juror Ables would have been the seventeenth (17<sup>th</sup>) juror presented at the jury strike. ( R. 1067-68, Tr. p. 1017-1018). At the time she would have been presented, the State had exercised only two of its five (5) peremptory challenges. ( R. 1064-68, Tr. p. 1014-1018). The State had excused Jurors Cassandra Carrol and Fawn Norton. ( R. 1066, 1067-68, 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. ( R. 1069, Tr. p. 1019, l. 23). The State only exercised a total of two (2) peremptory challenges during the petit jury panel selection. ( R. 1064-69, 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.

**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.

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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.” ( R. 528-29, Tr. p. 482, l. 24 -p. 483, l. 2).

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.

( R. 1441-43, Tr. p. 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. ( R. 1409, 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. ( R. 1406-1437,

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

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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.

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>

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).

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<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.

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

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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.

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 (Okl.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 (Okl.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. ( R. 1435, 1436-37, Tr. p. 1383, ll. 4-23, p. 1384, l. 23 -p. 1385, l. 17). He would not allow details of the incident or hearsay within hearsay. ( R. 1413-15, 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. ( R. 1436-37, Tr. p. 1384, ll. 1-11, p. 1385, ll. 7-17). The trial court found the records to be trustworthy. ( R. 1436-37, 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. ( R. 1434, 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. ( R. 1440, 1412, Tr. p. 1388, ll. 18-20 & p. 1360, ll. 10-17). Major Nettles testified the summary accurately reflected the records themselves. ( R. 1441, 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. ( R. 1412, 1435, 1436-37, 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. ( R. 1426, 1433, 1435, 1436-37, 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. (R. 1434, 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. ( R. 1412-13, 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. ( R. 1412-13, 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. ( R. 1413, Tr. p. 1361, ll. 7-9). And Major Nettles is

aware of what happens at other facilities with regards to how records are maintained. ( R. 1416, 1418, 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. ( R. 1418, 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. ( R. 1431-32, 1433, 1439-1441, Tr. p. 1379, l. 18-p. 1380, l. , p. 1381, 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. ( R. 1444, 1431-32, 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> ( R. 1410, 1436-37, Tr. p. 1358,

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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 R. 1406-1441, Tr. p. 1354-1389). In fact, Judge Patterson pointed to the fact that the officers were required to

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. ( R. 1436-37, 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. ( R.1434, 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 Rosenberg v. Collins*, 624 F.2d 659 (5<sup>th</sup> Cir. 1980). ( R. 1413, 1427, 1433, 1436-37, 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 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 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

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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).

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 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-

### *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 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

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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).

<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.

(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 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

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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. ( R. 1341, 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. ( R. 1342, 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." ( R. 1348-49, 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. ( 1350-51, Tr. p. 1298, l. 11-p. 1299, l. 8). This testimony was admitted without objection.

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. ( R. 1444, 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 Department of Corrections disciplinary records in rendering their opinions. ( R. 1457-58, Tr. p. 1404, l. 16-p. 1405, l. 15). These witnesses included Marjorie Hancock and Doctor Thomas Cobb. ( R. 1457-58, 1502, 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. ( R. 1490, 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. ( R. 1494, Tr. p. 1441, ll. 9-13). Cobb also testified Owens was found with a shank in his cell. ( R. 1505, Tr. p. 1452, ll. 8-16). Cobb also testified Owens made things [weapons] for protection. ( R. 1506, Tr. p. 1453, ll. 19-21).

And Doctor Donna Schwartz-Watts relied on the DOC records as well. ( R. 1514, Tr. p.

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<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. ( R. 1547, 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. (R. 1359-1391, 1393-1405, 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. ( R. 1444, 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." ( R. 1144, 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. ( R. 1167, Tr. p. 1116, ll. 1-4).

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.” ( R. 1514, 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. ( R. 1523, Tr. p. 1470, ll. 17-23). Schwartz-Watts testified Appellant’s behavior in the juvenile correction facilities was at times “aggressive”. ( R. 1525, 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. ( R. 1524-25, 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. ( R. 1525-26, Tr. p. 1472, l. 35-p. 1473, l. 7). She also stated he had a “long disciplinary history”. ( R. 1526, Tr. p. 1473, ll. 6-7). Dr. Schwartz-Watts testified Owens “has a long history of illegal behaviors.” ( R. 1534, Tr. p. 1481, ll. 13-14). She also testified Owens set fire to his cell and threw coffee in an officer’s face. ( R. 1541-42, 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. ( R. 1540-41, 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.

( R. 1538-40, 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 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

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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. ( R. 1350-51, 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.

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”. ( R. 1444, Tr. p. 1392, 18-20). Even in maximum solitary confinement “he continues to harm others.” ( R. 1351, 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).

### 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

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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).

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 Hoefler 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>

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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

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 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

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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.

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. ( R. 1601-1617, Tr. p. 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 R. 1600-1617, Tr. p. 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 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

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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.

“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.

( R. 1612-16, 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. Burkhart, 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.

( R. 1532, 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.” ( R. 1532, Tr. p. 1479, ll. 21-23). Actions Doctor Tora Brawley, another defense witness, described as Owens “..bettering

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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.

himself..” ( R. 1480, Tr. p. 1427, l. 21).

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*. ( R. 1388, Tr. p. 1336, ll. 24-25). Owens then states in his confession: “I then *worked out* and *took a shower*.” ( R. 1389, Tr. p. 1337, l. 1). Owens talks about *sleeping in his bed*. ( R. 1389, Tr. p. 1337, ll. 1-2). Owens talks about being brought *breakfast* the morning after he killed Lee. ( R. 1340, 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. ( R. 1442-43, 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*. ( R. 1442, 1443, 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. ( R. 1445, 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*. ( R. 1494, Tr.p. 1441, ll. 6-8). The record also reflects that Owens received *visitors* while in prison and received *letters* from a friend. ( R. 1473, Tr. p. 1420, ll. 7-13). Additionally, Freddie Owens has been *treated by doctors & a nurse* while in prison.<sup>30</sup> ( R. 1487-1547, 1442, 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. ( R. 1501, Tr. p. 1448, ll. 9-14). The Solicitor’s comments were based in the record and the inferences therefrom.

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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.

See Vaughn v. State, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004).

The record also shows that Appellant had been incarcerated during his teenage years and almost all of his adult life. ( R. 1458, 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.” ( R. 1143, 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.” ( R. 1143-44, 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***

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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.

*inmates how to read. He teaches them to read using the book Alexander the Great, because he doesn't want them reading the 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*

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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. ( R. 1535-36, 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. ( R. 1487-1547, Tr. p. 1434, l. 17 - p. 1494, l. 19).

*has had very little contact with him when he was growing up. 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*

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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." ( R. 1528, Tr. p. 1475, ll. 4-9). The jury could reasonably infer their was contact with his family and Owens was aware of family issues. (See also R. 1495, Tr. p. 1442, ll. 3-7). This referenced conversation took place sometime after 2005. ( R. 1492, Tr. p. 1439).

*give a shit. I was born to be in jail.” / “If I go to jail, I go to jail. I 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,

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March 18, 2008

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

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Appeal from Greenville County  
Larry Patterson, Circuit Court Judge

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**THE STATE,**

Respondent,

v.

**FREDDIE EUGENE OWENS,**

Appellant.

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**CERTIFICATE OF COMPLIANCE**

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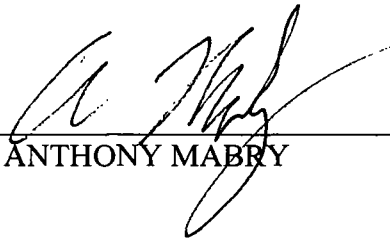
The undersigned hereby certifies that this Final Brief of Respondent complies with SCACR  
211(b).

This 18<sup>th</sup> day of March, 2008.

  
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J. ANTHONY MABRY  
Assistant Attorney General

**CERTIFICATE OF SERVICE**

I, **Anthony Mabry**, hereby certify that I have served the *Final Brief of Respondent* 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 18<sup>th</sup> day of March, 2008.

  
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J. ANTHONY MABRY