

Hopkins, Debbie

From: Zelenka, Don
Sent: Friday, February 12, 2016 11:47 AM
To: Robert M. Dudek; David Alexander (dalexander@sccid.sc.gov); rvieth@hbvlaw.com; david@carolinalegalmatters.com
Cc: Hopkins, Debbie; Barnette, Barry
Subject: Re: Marion Lindsey v. State - Death Penalty PCR - Status Request Concerning Amended Order Denying Relief
Attachments: Letter - Request status of Appeal from Amended Order (00858147xD2C78).pdf

To all –

Attached is a letter sent this date to the Clerk of the South Carolina Supreme Court requesting information concerning Mr. Lindsey's case. In short, my records reflect that an amended order was served on October 2, 2015 upon PCR hearing counsel by the Spartanburg County Clerk of Court. No motion to alter or amend and no notice of appeal was served upon my records and a review of the Spartanburg County docket.

Don Zelenka

Donald J. Zelenka
Senior Assistant Deputy Attorney General
South Carolina Office of the Attorney General
P. O. Box 11549
Columbia, S.C. 29211
803-734-3601
FAX – 803-734-4035
dzelenka@scag.gov

RECEIVED

FEB 12 2016

SC SUPREME COURT

Hopkins, Debbie

From: Rick Vieth <rvieth@hbvlaw.com>
Sent: Friday, February 12, 2016 12:05 PM
To: Zelenka, Don; Robert M. Dudek; David Alexander (dalexander@sccid.sc.gov);
david@carolinalegalmatters.com
Cc: Hopkins, Debbie; Barnette, Barry
Subject: RE: Marion Lindsey v. State - Death Penalty PCR - Status Request Concerning Amended Order Denying Relief

Don, I just got off phone with David Collins. He said last activity he has in his file is March of, I think, last year. Dave can reply if I'm wrong on last activity in his file. I will take a look at file either later today or first thing Monday to see if I have a copy of Order from just 4 months ago. Seems like I would recall that if I got it, but if we got and failed to file Notice to Appeal, we will acknowledge fault on our behalf if someone has to file PCR against us. Thanks for sending. rv

Rick Vieth
Henderson, Brandt & Vieth, P.A.
360 E. Henry Street, Ste. 101
Spartanburg, SC 29302
private line (864) 583-5430
office ph.: (864) 582-2962
fax (864) 583-1894
rvieth@hbvlaw.com
www.hbvlaw.com

From: Don Zelenka [<mailto:DZelenka@scag.gov>]
Sent: Friday, February 12, 2016 11:47 AM
To: Robert M. Dudek <RDudek@sccid.sc.gov>; David Alexander (dalexander@sccid.sc.gov) <dalexander@sccid.sc.gov>;
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Cc: Debbie Hopkins <djhopkins@sccourts.org>; Barnette, Barry <bbarnette@spartanburgcounty.org>
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Hopkins, Debbie

From: David Collins <david@carolinafamilymatters.com>
Sent: Friday, February 12, 2016 12:11 PM
To: Rick Vieth
Cc: Zelenka, Don; Robert M. Dudek; David Alexander (dalexander@sccid.sc.gov); Hopkins, Debbie; Barnette, Barry
Subject: Re: Marion Lindsey v. State - Death Penalty PCR - Status Request Concerning Amended Order Denying Relief

Don,

Rick is correct about the date - it was March 2, 2015.
Judge Burch's office requested a copy of our previous proposed order in Word format.
I have no record of any activity since that time.

Thanks,
David

--
David M. Collins, Jr.
P.O. Box 2465
Greenville, SC 29602
(864) 990-3061 - Phone
(864) 990-3062 - Fax
david@carolinafamilymatters.com

Visit our website at www.carolinafamilymatters.com.



The information contained in this email transmission is privileged and confidential. It is intended only for the use of the individual(s) named herein. If the reader of this transmission is not the intended recipient, you are hereby notified that any dissemination, distribution, or copying of this communication or the information contained herein is strictly prohibited. If you have received this communication in error, please notify us immediately by voice at (864) 990-3061, fax at (864) 990-3062 or by email at david@carolinafamilymatters.com. Please delete the original from any storage media and destroy any hard copies. Thank you.

On Fri, Feb 12, 2016 at 12:05 PM, Rick Vieth <rvieth@hbvlaw.com> wrote:

Don, I just got off phone with David Collins. He said last activity he has in his file is March of, I think, last year. Dave can reply if I'm wrong on last activity in his file. I will take a look at file either later today or first thing Monday to see if I have a copy of Order from just 4 months ago. Seems like I would recall that if I got it, but if we got and failed to file Notice to Appeal, we will acknowledge fault on our behalf if someone has to file PCR against us. Thanks for sending. rv

Rick Vieth

Henderson, Brandt & Vieth, P.A.

360 E. Henry Street, Ste. 101

Spartanburg, SC 29302

private line (864) 583-5430

office ph.: (864) 582-2962

fax (864) 583-1894

rvieth@hbvlaw.com

www.hbvlaw.com

From: Don Zelenka [mailto:DZelenka@scag.gov]

Sent: Friday, February 12, 2016 11:47 AM

To: Robert M. Dudek <RDudek@sccid.sc.gov>; David Alexander (dalexander@sccid.sc.gov)
<dalexander@sccid.sc.gov>; Rick Vieth <rvieth@hbvlaw.com>; david@carolinalegalmatters.com

Cc: Debbie Hopkins <djhopkins@sccourts.org>; Barnette, Barry <bbarnette@spartanburgcounty.org>

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Don Zelenka

Donald J. Zelenka

Senior Assistant Deputy Attorney General

South Carolina Office of the Attorney General

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FAX – 803-734-4035

dzelenka@scag.gov

Hopkins, Debbie

From: Rick Vieth <rvieth@hbvlaw.com>
Sent: Friday, February 12, 2016 12:26 PM
To: David Collins
Cc: Zelenka, Don; Robert M. Dudek; David Alexander (dalexander@sccid.sc.gov); Hopkins, Debbie; Barnette, Barry
Subject: RE: Marion Lindsey v. State - Death Penalty PCR - Status Request Concerning Amended Order Denying Relief

We have same March 2 email regarding our proposed Order. We are looking though the entire file, but in our 'correspondence' file, this was last entry. David Alexander and Mr. Dudek sent a letter on March 3 regarding Reply to Return to Petition for Extraordinary Relief. That is last date we see so far.

Rick Vieth
Henderson, Brandt & Vieth, P.A.
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Subject: Re: Marion Lindsey v. State - Death Penalty PCR - Status Request Concerning Amended Order Denying Relief

Don,

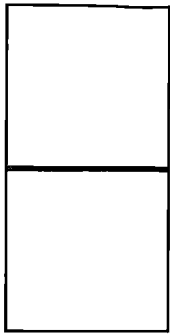
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David

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Don Zelenka

Donald J. Zelenka

Senior Assistant Deputy Attorney General

South Carolina Office of the Attorney General

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Columbia, S.C. 29211

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dzelenka@scag.gov



Henderson Brandt & Vieth, P.A.

Matthew A. Henderson
George Brandt, III
Richard W. Vieth
Joshua M. Henderson*

360 East Henry Street, Ste. 101
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FAX (864) 582-2927 Buck
FAX (864) 583-1894 Josh
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*Also licensed in North Carolina

Attorneys At Law

January 12, 2012

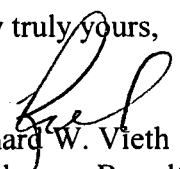
Hon. Daniel E. Shearouse
The Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

RE: Marion Alexander Lindsey vs. State
Case No.: 2007-CP-42-2848

Dear Clerk Shearouse:

Since my last notification of November 15, 2011, to this Court, this PCR case was tried the week of July 19, 2010. The Order of Dismissal was signed by Judge Burch on August 10, 2011 and filed with the Spartanburg County Clerk's Office on August 12, 2011. We are filing a Notice of Intent to Appeal after receiving Judge Burch's Order denying our Motion to Reconsider.

Very truly yours,



Richard W. Vieth
Henderson, Brandt & Vieth, P.A.
Private line: 583-5430
rvieth@hbvlaw.com
www.hbvlaw.com
RWV/kwh

cc: Hon. Paul Burch
Donald J. Zelenka, Esq.
David Collins, Esq.

RECEIVED

JAN 17 2012

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
Before the Supreme Court

FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Paul Burch

Case No. 2007-CP-42-2848

Marion Alexander Lindsey,

Applicant,

v.

State of South Carolina,

Respondent.

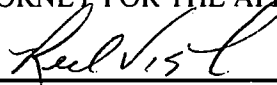
CERTIFICATE OF SERVICE

I, Richard W. Vieth, attorney for Petitioner, Marion Alexander Lindsey, certify that I have this 12th
day of January, 2012 mailed a copy of the Status Report Letter in the following manner to the
Respondent in a duly franked envelope addressed as follows:

Donald J. Zelenka, Asst. Deputy Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211

Respectfully submitted,

ATTORNEY FOR THE APPLICANT



SC Bar # 5711 Fed. ID.# 4468
Richard W. Vieth
Henderson, Brandt & Vieth, P.A.
360 East Henry St., Suite 101

RECEIVED
SPARTANBURG COUNTY
(804) 582-2962

JAN 17 2012

1/12/2012, 2012
Spartanburg, South Carolina

S.G. SUPREME COURT

STATE OF SOUTH CAROLINA
Before the Supreme Court

FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Paul Burch

Case No. 2007-CP-42-2848

Marion Alexander Lindsey,

Applicant,

v.

State of South Carolina,

Respondent.

CERTIFICATE OF SERVICE

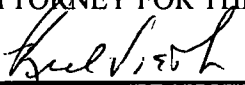
I, Richard W. Vieth, attorney for Petitioner, Marion Alexander Lindsey, certify that I have this 15th
day of November, 2011 mailed a copy of the Status Report Letter in the following manner to the
Respondent in a duly franked envelope addressed as follows:

Donald J. Zelenka, Asst. Deputy Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211

Respectfully submitted,

RECEIVED
NOV 17 2011
S.G. SUPREME COURT

ATTORNEY FOR THE APPLICANT


SC Bar # 5711 Fed. ID.# 4468
Richard W. Vieth
Henderson, Brandt & Vieth, P.A.
360 East Henry St., Suite 101
Spartanburg, SC 29302
(864) 582-2962

Nov. 15, 2011
Spartanburg, South Carolina



Henderson Brandt & Vieth, P.A.

Matthew A. Henderson
George Brandt, III
Richard W. Vieth
Joshua M. Henderson*

360 East Henry Street, Ste. 101
Spartanburg, SC 29302-2646
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FAX (864) 582-2952 Matt/Rick
FAX (864) 582-2927 Buck
FAX (864) 583-1894 Josh
www.hbvlaw.com

*Also licensed in North Carolina

Attorneys At Law

November 15, 2011

Hon. Daniel E. Shearouse
The Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

RE: Marion Alexander Lindsey vs. State
Case No.: 2007-CP-42-2848

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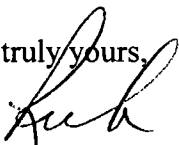
NOV 17 2011

S.C. SUPREME COURT

Dear Clerk Shearouse:

Since my last notification of September 12, 2011, to this Court, this PCR case was tried the week of July 19, 2010. The Order of Dismissal was signed by Judge Burch on August 10, 2011 and filed with the Spartanburg County Clerk's Office on August 12, 2011. We filed a Rule 59e Motion and Notice of Intent to Appeal. As of November 10, 2011, Judge Burch indicated that he would rule on the matter without the necessity of a hearing.

Very truly yours,



Richard W. Vieth
Henderson, Brandt & Vieth, P.A.
Private line: 583-5430
rvieth@hbvlaw.com
www.hbvlaw.com
RWV/kwh

cc: Hon. Paul Burch
Donald J. Zelenka, Esq.
David Collins, Esq.



Henderson Brandt & Vieth, P.A.

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Attorneys At Law

September 12, 2011

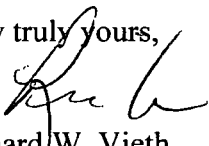
Hon. Daniel E. Shearouse
The Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

RE: Marion Alexander Lindsey vs. State
Case No.: 2007-CP-42-2848

Dear Clerk Shearouse:

Since my last notification of July 26, 2011, to this Court, this PCR case was tried the week of July 19, 2010. The Order of Dismissal was signed by Judge Burch on August 10, 2011 and filed with the Spartanburg County Clerk's Office on August 12, 2011. Neither the Attorney General's office nor I received the filed Order until September 8, 2011. We will be filing a Rule 59e Motion and Notice of Intent to Appeal within the time allowed.

Very truly yours,



Richard W. Vieth
Henderson, Brandt & Vieth, P.A.
Private line: 583-5430
rvieth@hbvlaw.com
www.hbvlaw.com
RWV/kwh

RECEIVED

SEP 16 2011

cc: Hon. Paul Burch
Donald J. Zelenka, Esq.
David Collins, Esq.

S.G. SUPREME COURT

STATE OF SOUTH CAROLINA
Before the Supreme Court

FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Paul Burch

Case No. 2007-CP-42-2848

Marion Alexander Lindsey,

Applicant,

v.

State of South Carolina,

Respondent.

CERTIFICATE OF SERVICE

I, Richard W. Vieth, attorney for Petitioner, Marion Alexander Lindsey, certify that I have this 13
day of September, 2011 mailed a copy of the Status Report Letter in the following manner to the
Respondent in a duly franked envelope addressed as follows:

Donald J. Zelenka, Asst. Deputy Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211

Respectfully submitted,

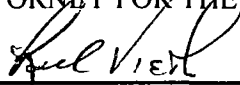
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SEP 19 2011

S.C. SUPREME COURT

9/13, 2011
Spartanburg, South Carolina

ATTORNEY FOR THE APPLICANT


SC Bar # 5711 Fed. ID.# 4468
Richard W. Vieth
Henderson, Brandt & Vieth, P.A.
360 East Henry St., Suite 101
Spartanburg, SC 29302
(864) 582-2962



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Attorneys At Law

July 26, 2011

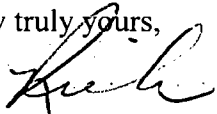
Hon. Daniel E. Shearouse
The Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

RE: Marion Alexander Lindsey vs. State
Case No.: 2007-CP-42-2848

Dear Clerk Shearouse:

Since my last notification of May 26, 2011, to this Court, this PCR case was tried the week of July 19, 2010 and is now ended. Both the U.S. Attorney General's Office and Defense counsel continue to work on proposed Orders to submit to Judge Burch. Our proposed Order will be in the mail by July 29, 2011.

Very truly yours,



Richard W. Vieth
Henderson, Brandt & Vieth, P.A.
Private line: 583-5430
rvieth@hbvlaw.com
www.hbvlaw.com
RWV/kwh

cc: Hon. Paul Burch
Donald J. Zelenka, Esq.
David Collins, Esq.

RECEIVED

JUL 27 2011

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
Before the Supreme Court

FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Paul Burch

Case No. 2007-CP-42-2848

Marion Alexander Lindsey,

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State of South Carolina,

Respondent.

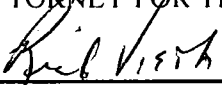
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I, Richard W. Vieth, attorney for Petitioner, Marion Alexander Lindsey, certify that I have this 26
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Donald J. Zelenka, Asst. Deputy Attorney General
Office of the Attorney General
Post Office Box 11549
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Respectfully submitted,

ATTORNEY FOR THE APPLICANT



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July 26, 2011
Spartanburg, South Carolina



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Attorneys At Law

May 26, 2011

Hon. Daniel E. Shearouse
The Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

RE: Marion Alexander Lindsey vs. State
Case No.: 2007-CP-42-2848

Dear Clerk Shearouse:

Since my last notification of March 25, 2011, to this Court, this PCR case was tried the week of July 19, 2010 and is now ended. Both the U.S. Attorney General's Office and Defense counsel are working on proposed Orders to submit to Judge Burch.

Very truly yours,

A handwritten signature in black ink, appearing to read "R. Vieth", is written over a horizontal line.

Richard W. Vieth
Henderson, Brandt & Vieth, P.A.
Private line: 583-5430
rvieth@hbvlaw.com
RWV/kw

cc: Hon. Paul Burch
Donald J. Zelenka, Esq.
David Collins, Esq.

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MAY 27 2011

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
Before the Supreme Court

FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Paul Burch

Case No. 2007-CP-42-2848

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MAY 27 2011

S.C. SUPREME COURT

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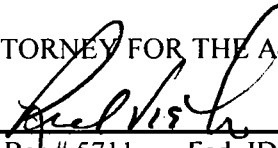
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I, Richard W. Vieth, attorney for Petitioner, Marion Alexander Lindsey, certify that I have this 26th
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Richard W. Vieth
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5/26/, 2011
Spartanburg, South Carolina



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Attorneys At Law

March 25, 2011

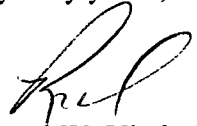
Hon. Daniel E. Shearouse
The Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

RE: Marion Alexander Lindsey vs. State
Case No.: 2007-CP-42-2848

Dear Clerk Shearouse:

Since my last notification of January 31, 2011, to this Court, this PCR case was tried the week of July 19, 2010 and is now ended. We have now submitted our brief to Judge Burch, which was filed with the Court of Common Pleas for Spartanburg County on October 26, 2010. The Attorney General has requested an extension in which to submit their brief.

Very truly yours,



Richard W. Vieth
Henderson, Brandt & Vieth, P.A.
Private line: 583-5430
rvieth@hbvlaw.com
RWV/kw

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MAR 28 2011

S.C. SUPREME COURT

cc: Hon. Paul Burch
Donald J. Zelenka, Esq.
David Collins, Esq.

STATE OF SOUTH CAROLINA
Before the Supreme Court

FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Paul Burch

Case No. 2007-CP-42-2848

Marion Alexander Lindsey,

Applicant,

v.

State of South Carolina,

Respondent.

CERTIFICATE OF SERVICE

I, Richard W. Vieth, attorney for Petitioner, Marion Alexander Lindsey, certify that I have this 25th
day of March, 2011 mailed a copy of the Status Report Letter in the following manner to the
Respondent in a duly franked envelope addressed as follows:

Donald J. Zelenka, Asst. Deputy Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211

Respectfully submitted,

RECEIVED

MAR 28 2011

S.C. SUPREME COURT

ATTORNEY FOR THE APPLICANT

Richard W. Vieth
SC Bar # 5711 Fed. ID.# 4468
Richard W. Vieth
Henderson, Brandt & Vieth, P.A.
360 East Henry St., Suite 101
Spartanburg, SC 29302
(864) 582-2962

3-25, 2011
Spartanburg, South Carolina



Matthew A. Henderson
George Brandt, III
Richard W. Vieth
Joshua M. Henderson*

360 East Henry Street, Ste. 101
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FAX (864) 582-2952 Matt/Rick
FAX (864) 582-2927 Buck
FAX (864) 583-1894 Josh
www.hbvlaw.com

*Also licensed in North Carolina

Attorneys At Law

January 31, 2011

Hon. Daniel E. Shearouse
The Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

RE: Marion Alexander Lindsey vs. State
Case No.: 2007-CP-42-2848

Dear Clerk Shearouse:

Since my last notification of December 28, 2010, to this Court, this PCR case was tried the week of July 19, 2010 and is now ended. We have now submitted our brief to Judge Burch, which was filed with the Court of Common Pleas for Spartanburg County on October 26, 2010. The Attorney General has requested a thirty (30) day extension in which to submit their brief.

Very truly yours,

A handwritten signature in black ink, appearing to read "R. Vieth", is written over a horizontal line.

Richard W. Vieth
Henderson, Brandt & Vieth, P.A.
Private line: 583-5430
rvieth@hbvlaw.com
RWV/kw

RECEIVED

FEB 02 2011

cc: Hon. Paul Burch
Donald J. Zelenka, Esq.
David Collins, Esq.

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
Before the Supreme Court

FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Paul Burch

Case No. 2007-CP-42-2848

Marion Alexander Lindsey,

Applicant,

v.

State of South Carolina,

Respondent.

CERTIFICATE OF SERVICE

I, Richard W. Vieth, attorney for Petitioner, Marion Alexander Lindsey, certify that I have this 31st
day of January, 2011 mailed a copy of the Status Report Letter in the following manner to the
Respondent in a duly franked envelope addressed as follows:

Donald J. Zelenka, Asst. Deputy Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211

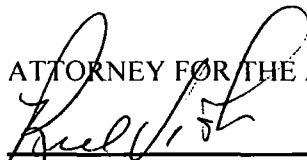
Respectfully submitted,

RECEIVED

FEB 02 2011

S.C. SUPREME COURT

ATTORNEY FOR THE APPLICANT



SC Bar # 5711 Fed. ID.# 4468
Richard W. Vieth
Henderson, Brandt & Vieth, P.A.
360 East Henry St., Suite 101
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1-31, 2011
Spartanburg, South Carolina



Matthew A. Henderson
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FAX (864) 583-1894 Josh

www.hbvlaw.com

*Also licensed in North Carolina

Attorneys At Law

December 28, 2010

RECEIVED

DEC 31 2010

S.C. SUPREME COURT

Hon. Daniel E. Shearouse
The Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

RE: Marion Alexander Lindsey vs. State
Case No.: 2007-CP-42-2848

Dear Clerk Shearouse:

Since my last notification of November 1, 2010, to this Court, this PCR case was tried the week of July 19, 2010 and is now ended. We have now submitted our brief to Judge Burch, which was filed with the Court of Common Pleas for Spartanburg County on October 26, 2010. The Attorney General has requested a thirty (30) day extension in which to submit their brief.

Very truly yours,

A handwritten signature in cursive script, appearing to read "R. Vieth", is written over the closing "yours,".

Richard W. Vieth
Henderson, Brandt & Vieth, P.A.
Private line: 583-5430
rvieth@hbvlaw.com
RWV/kw

cc: Hon. Paul Burch
Donald J. Zelenka, Esq.
David Collins, Esq.

STATE OF SOUTH CAROLINA
Before the Supreme Court

FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Paul Burch

Case No. 2007-CP-42-2848

RECEIVED

DEC 31 2010

S.C. SUPREME COURT

Marion Alexander Lindsey,

Applicant,

v.

State of South Carolina,

Respondent.

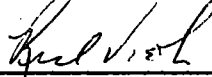
CERTIFICATE OF SERVICE

I, Richard W. Vieth, attorney for Petitioner, Marion Alexander Lindsey, certify that I have this 2nd
day of December, 2010, mailed a copy of the Status Report Letter in the following manner to the
Respondent in a duly franked envelope addressed as follows:

Donald J. Zelenka, Asst. Deputy Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211

Respectfully submitted,

ATTORNEY FOR THE APPLICANT



SC Bar # 5711 Fed. ID.# 4468
Richard W. Vieth
Henderson, Brandt & Vieth, P.A.
360 East Henry St., Suite 101
Spartanburg, SC 29302
(864) 582-2962

12/28, 2010
Spartanburg, South Carolina



Matthew A. Henderson
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www.hbvlaw.com

*Also licensed in North Carolina

Attorneys At Law

November 1, 2010

Hon. Daniel E. Shearouse
The Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

RE: Marion Alexander Lindsey vs. State
Case No.: 2007-CP-42-2848

Dear Clerk Shearouse:

Since my last notification of October 5, 2010, to this Court, this PCR case was tried the week of July 19, 2010 and is now ended. We have now submitted our brief to Judge Burch, which was filed with the Court of Common Pleas for Spartanburg County on October 26, 2010.

Very truly yours,

A handwritten signature in cursive script, appearing to read "R. Vieth", is written over a horizontal line.

Richard W. Vieth
Henderson, Brandt & Vieth, P.A.
Private line: 583-5430
rvieth@hbvlaw.com
RWV/kw

RECEIVED

NOV 03 2010

S.C. SUPREME COURT

cc: Hon. Paul Burch
Donald J. Zelenka, Esq.
David Collins, Esq.

STATE OF SOUTH CAROLINA
Before the Supreme Court

FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Paul Burch

Case No. 2007-CP-42-2848

Marion Alexander Lindsey,

Applicant,

v.

State of South Carolina,

Respondent.

CERTIFICATE OF SERVICE

I, Richard W. Vieth, attorney for Petitioner, Marion Alexander Lindsey, certify that I have this 2nd
day of November, 2010; mailed a copy of the Status Report Letter in the following manner to the
Respondent in a duly franked envelope addressed as follows:

Donald J. Zelenka, Asst. Deputy Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211

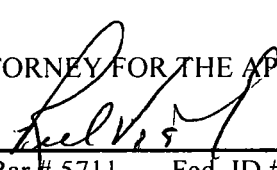
RECEIVED

NOV 08 2010

S.C. SUPREME COURT

Respectfully submitted,

ATTORNEY FOR THE APPLICANT


SC Bar # 5711 Fed. ID.# 4468
Richard W. Vieth
Henderson, Brandt & Vieth, P.A.
360 East Henry St., Suite 101
Spartanburg, SC 29302
(864) 582-2962

11-2, 2010
Spartanburg, South Carolina



Henderson Brandt & Vieth, P.A.

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*Also licensed in North Carolina

Attorneys At Law

October 5, 2010

Hon. Daniel E. Shearouse
The Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

RE: Marion Alexander Lindsey vs. State
Case No.: 2007-CP-42-2848

Dear Clerk Shearouse:

Since my last notification of July 1, 2010, to this Court, this PCR case was tried the week of July 19, 2010 and is now ended. We had to receive the transcript of the hearing before we could submit a brief to Judge Burch. David Collins and I are now reviewing the Court transcripts that we received back in mid-September and are preparing our brief to Judge Burch by October 18, 2010.

Very truly yours,



Richard W. Vieth
Henderson, Brandt & Vieth, P.A.
Private line: 583-5430
rvieth@hbvlaw.com
RWV/kw

RECEIVED

OCT 07 2010

cc: Hon. Paul Burch
Donald J. Zelenka, Esq.
David Collins, Esq.

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
Before the Supreme Court

FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Paul Burch

Case No. 2007-CP-42-2848

Marion Alexander Lindsey,

Applicant,

v.

State of South Carolina,

Respondent.

CERTIFICATE OF SERVICE

I, Richard W. Vieth, attorney for Petitioner, Marion Alexander Lindsey, certify that I have this 5th
day of October, 2010, mailed a copy of the Status Report Letter in the following manner to the
Respondent in a duly franked envelope addressed as follows:

Donald J. Zelenka, Asst. Deputy Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211

Respectfully submitted,

RECEIVED

OCT 07 2010

S.C. SUPREME COURT

10/5/2010, 2010
Spartanburg, South Carolina

ATTORNEY FOR THE APPLICANT

Richard W. Vieth
SC Bar # 5711 Fed. ID.# 4468
Richard W. Vieth
Henderson, Brandt & Vieth, P.A.
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*Also licensed in North Carolina

Attorneys At Law

July 1, 2010

Hon. Daniel E. Shearouse
The Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

RE: Marion Alexander Lindsey vs. State
Case No.: 2007-CP-42-2848

Dear Clerk Shearouse:

Since my last notification of May 3, 2010, to this Court, this case remains on the trial docket for the week of July 19, 2010. Our defense team is in its final preparation for trial.

With the trial being only three weeks away, this will be my last status letter in regards to this case.

Very truly yours,

A handwritten signature in dark ink, appearing to read "R. Vieth", is written over the closing "yours,".

Richard W. Vieth
Henderson, Brandt & Vieth, P.A.
Private line: 583-5430
rvieth@hbvlaw.com
RWV/kw

cc: Donald J. Zelenka, Esq.
David Collins, Esq.

RECEIVED
JUL 02 2010
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
Before the Supreme Court

FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Paul Burch

Case No. 2007-CP-42-2848

Marion Alexander Lindsey,

Applicant,

v.

State of South Carolina,

Respondent.

CERTIFICATE OF SERVICE

I, Richard W. Vieth, attorney for Petitioner, Marion Alexander Lindsey, certify that I have this 1st
day of July, 2010, mailed a copy of the Status Report Letter in the following manner to the
Respondent in a duly franked envelope addressed as follows:

Donald J. Zelenka, Asst. Deputy Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211

Respectfully submitted,

ATTORNEY FOR THE APPLICANT

Richard W. Vieth
SC Bar # 5711 Fed. ID.# 4468
Richard W. Vieth
Henderson, Brandt & Vieth, P.A.
360 East Henry St., Suite 101
Spartanburg, SC 29302
(864) 582-2962

July 1st, 2010
Spartanburg, South Carolina

RECEIVED
JUL 03 2010
S.C. SUPREME COURT



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*Also licensed in North Carolina

Attorneys At Law

May 3, 2010

Hon. Daniel E. Shearouse
The Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

RE: Marion Alexander Lindsey vs. State
Case No.: 2007-CP-42-2848

Dear Clerk Shearouse:

Since my last notification of March 29, 2010, to this Court, this case remains on the trial docket for the week of July 19, 2010. I am preparing a proposed Order this week for additional funding for our experts prior to trial.

Per the requirements, I will file another status report no later than July 2, 2010.

Very truly yours,

A handwritten signature in cursive script, appearing to read "R. Vieth", is written over the words "Very truly yours,".

Richard W. Vieth
Henderson, Brandt & Vieth, P.A.
Private line: 583-5430
rvieth@hbvlaw.com
RWV/kw

cc: Donald J. Zelenka, Esq.
David Collins, Esq.

RECEIVED
MAY 05 2010
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
Before the Supreme Court

FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Paul Burch

Case No. 2007-CP-42-2848

RECEIVED
MAY 05 2010
S.C. SUPREME COURT

Marion Alexander Lindsey,

Applicant,

v.

State of South Carolina,

Respondent.

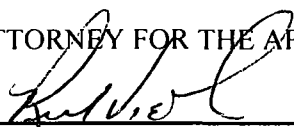
CERTIFICATE OF SERVICE

I, Richard W. Vieth, attorney for Petitioner, Marion Alexander Lindsey, certify that I have this 4th
day of May, 2010, mailed a copy of the Status Report Letter in the following manner to the
Respondent in a duly franked envelope addressed as follows:

Donald J. Zelenka, Asst. Deputy Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211

Respectfully submitted,

ATTORNEY FOR THE APPLICANT


SC Bar # 5711 Fed. ID.# 4468
Richard W. Vieth
Henderson, Brandt & Vieth, P.A.
360 East Henry St., Suite 101
Spartanburg, SC 29302
(864) 582-2962

May 4, 2010
Spartanburg, South Carolina



Matthew A. Henderson
George Brandt, III
Richard W. Vieth
Joshua M. Henderson*

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FAX (864) 582-2927 Buck
FAX (864) 583-1894 Josh
www.hbvlaw.com

*Also licensed in North Carolina

Attorneys At Law

March 29, 2010

Hon. Daniel E. Shearouse
The Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

RE: Marion Alexander Lindsey vs. State
Case No.: 2007-CP-42-2848

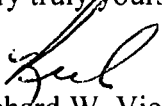
RECEIVED
MAR 30 2010
S.C. SUPREME COURT

Dear Clerk Shearouse:

Since my last notification of January 4, 2010 to this Court, this case has been continued to the week of July 19, 2010, and our defense team has also continued to obtain medical and school records that had not been retrieved in the original trial.

I apologize for not responding during this time-frame, but we had reason to believe the case would go to trial on March 8, 2010 until one of the defense attorneys in the first trial gave birth to a child and was unable to travel from her home near Washington, D.C. Consequently, we did not have any notification in our system to send a letter to the Supreme Court on Marion Lindsey as we anticipated the case being concluded during the week of March 8th.

Very truly yours,


Richard W. Vieth
Henderson, Brandt & Vieth, P.A.
Private line: 583-5430
rvieth@hbvlaw.com
RWV/kw

cc: Donald J. Zelenka, Esq.
David Collins, Esq.

STATE OF SOUTH CAROLINA
Before the Supreme Court

FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Paul Burch

Case No. 2007-CP-42-2848

Marion Alexander Lindsey,

Applicant,

v.

RECEIVED State of South Carolina,

Respondent.

MAR 30 2010

CERTIFICATE OF SERVICE

S.C. SUPREME COURT

I, Richard W. Vieth, attorney for Petitioner, Marion Alexander Lindsey, certify that I have this 29th
day of March, 2010, mailed a copy of the Status Report Letter in the following manner to the
Respondent in a duly franked envelope addressed as follows:

Donald J. Zelenka, Asst. Deputy Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211

Respectfully submitted,

ATTORNEY FOR THE APPLICANT



SC Bar # 57111 Fed. ID.# 4468
Richard W. Vieth
Henderson, Brandt & Vieth, P.A.
360 East Henry St., Suite 101
Spartanburg, SC 29302
(864) 582-2962

March 29, 2010
Spartanburg, South Carolina



Henderson Brandt & Vieth, P.A.

Matthew A. Henderson
George Brandt, III
Richard W. Vieth
Joshua M. Henderson*

360 East Henry Street, Ste. 101
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FAX (864) 583-1894 Josh
www.hbvlaw.com

*Also licensed in North Carolina

Attorneys At Law

January 4, 2010

Hon. Daniel E. Shearouse
The Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

RE: Marion Alexander Lindsey vs. State
Case No.: 2007-CP-42-2848

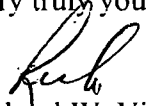
Dear Clerk Shearouse:

Since my last notification of November 3, 2009 to this Court, our defense team has continued to obtain medical and school records that had not been retrieved in the original trial.

Obtaining Mr. Lindsey's family history continues to be a work in progress.

Our work continues with an understanding that the trial of this case may be set in March, 2010.

Very truly yours,


Richard W. Vieth
Henderson, Brandt & Vieth, P.A.
Private line: 583-5430
rvieth@hbvlaw.com
RWV/kw

RECEIVED

JAN 12 2010

cc: Donald J. Zelenka, Esq.
David Collins, Esq.

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
Before the Supreme Court

FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Paul Burch

Case No. 2007-CP-42-2848

Marion Alexander Lindsey,

Applicant,

v.

State of South Carolina,

Respondent.

CERTIFICATE OF SERVICE

I, Richard W. Vieth, attorney for Petitioner, Marion Alexander Lindsey, certify that I have this 11th
day of January, 2010, mailed a copy of the Status Report Letter in the following manner to the
Respondent in a duly franked envelope addressed as follows:

Donald J. Zelenka, Asst. Deputy Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211

Respectfully submitted,

ATTORNEY FOR THE APPLICANT



SC Bar # 5711 Fed. ID.# 4468
Richard W. Vieth
Henderson, Brandt & Vieth, P.A.
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Spartanburg, SC 29302
(864) 582-2962

January 11, 2010
Spartanburg, South Carolina



Matthew A. Henderson
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Joshua M. Henderson*

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*Also licensed in North Carolina

Attorneys At Law

November 3, 2009

RECEIVED

NOV - 6 2009

S.C. SUPREME COURT

Hon. Daniel E. Shearouse
The Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

RE: Marion Alexander Lindsey vs. State
Case No.: 2007-CP-42-2848

Dear Clerk Shearouse:

Since my last notification of September 3, 2009 to this Court, our defense team has continued to obtain medical records that had not been retrieved in the original trial.

Obtaining Mr. Lindsey's family history continues to be a work in progress.

Our work continues with an understanding that the trial of this case may be set in March, 2010.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Rich", is written over the typed name.

Richard W. Vieth
Henderson, Brandt & Vieth, P.A.
Private line: 583-5430
rvieth@hbvlaw.com
RWV/kw

cc: Donald J. Zelenka, Esq.
David Collins, Esq.

STATE OF SOUTH CAROLINA
Before the Supreme Court

FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Paul Burch

Case No. 2007-CP-42-2848

RECEIVED

NOV - 6 2009

S.C. SUPREME COURT

Marion Alexander Lindsey,

Applicant,

v.

State of South Carolina,

Respondent.

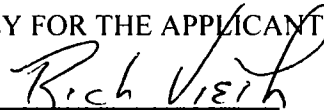
CERTIFICATE OF SERVICE

I, Richard W. Vieth, attorney for Petitioner, Marion Alexander Lindsey, certify that I have this 3rd day of November, 2009, mailed a copy of the Status Report Letter in the following manner to the Respondent in a duly franked envelope addressed as follows:

Donald J. Zelenka, Asst. Deputy Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211

Respectfully submitted,

ATTORNEY FOR THE APPLICANT



SC Bar # 5711 Fed. ID.# 4468
Richard W. Vieth
Henderson, Brandt & Vieth, P.A.
360 East Henry St., Suite 101
Spartanburg, SC 29302
(864) 582-2962

November 3, 2009
Spartanburg, South Carolina

**Henderson
Brandt &
Vieth, P.A.**

Matthew A. Henderson
George Brandt, III
Richard W. Vieth
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*Also licensed in North Carolina

Attorneys At Law

September 3, 2009

RECEIVED

SEP - 4 2009

S.C. SUPREME COURT

Hon. Daniel E. Shearouse
The Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

RE: Marion Alexander Lindsey vs. State
Case No.: 2007-CP-42-2848

Dear Clerk Shearouse:

Since my last notification of July 6, 2009 to this Court, our defense team has continued to obtain medical records that had not been retrieved in the original trial.

My mitigation investigator is also locating old friends and school contacts of the defendant.

Our work continues with an understanding that the trial of this case will be during the early part of 2010.

Very truly yours,



Richard W. Vieth
Henderson, Brandt & Vieth, P.A.
Private line: 583-5430
rvieth@hbvlaw.com
RWV/kw

cc: Donald J. Zelenka, Esq.
David Collins, Esq.

STATE OF SOUTH CAROLINA
Before the Supreme Court

FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Paul Burch

Case No. 2007-CP-42-2848

Marion Alexander Lindsey,

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v.

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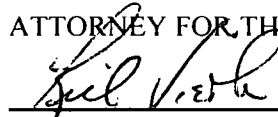
CERTIFICATE OF SERVICE

I, Richard W. Vieth, attorney for Petitioner, Marion Alexander Lindsey, certify that I have this 3rd day of September, 2009, mailed a copy of the Status Report Letter in the following manner to the Respondent in a duly franked envelope addressed as follows:

Donald J. Zelenka, Asst. Deputy Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211

Respectfully submitted,

ATTORNEY FOR THE APPLICANT



SC Bar # 5711 Fed. ID.# 4468
Richard W. Vieth
Henderson, Brandt & Vieth, P.A.
360 East Henry St., Suite 101
Spartanburg, SC 29302
(864) 582-2962

September 3, 2009
Spartanburg, South Carolina



Henderson Brandt & Vieth, P.A.

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Telephone (864) 582-2962
FAX (864) 582-2952 Matt/Rick
FAX (864) 582-2927 Buck
FAX (864) 583-1894 Josh
www.hbvlaw.com

*Also licensed in North Carolina

Attorneys At Law

July 6, 2009

RECEIVED

JUL 10 2009

S.C. SUPREME COURT

Hon. Daniel E. Shearouse
The Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

RE: Marion Alexander Lindsey vs. State
Case No.: 2007-CP-42-2848

Dear Clerk Shearouse:

Since the last notification updating the progress in the above captioned case, the parties in the case, along with Judge Burch, had a conference call to set a date for the amended PCR application to be filed and for the potential trial date to be set. A copy of the Order is enclosed.

Additionally, I have received the entire trial from CourtTV (now TruTV) and have reviewed the trial on DVD. I have also met with our mitigation investigator and social worker on June 30th. Appointments are being lined up this week to meet with family members of Mr. Lindsey.

Very truly yours,



Richard W. Vieth
Henderson, Brandt & Vieth, P.A.
Private line: 583-5430
rvieth@hbvlaw.com
RWV/kw

enclosure

cc: Donald J. Zelenka, Esq.
David Collins, Esq.

STATE OF SOUTH CAROLINA	)	
	)	
COUNTY OF SPARTANBURG	)	IN THE COURT OF COMMON PLEAS
	)	SEVENTH JUDICIAL CIRCUIT
Marion Alexander Lindsey, #6015	)	
	)	
Applicant,	)	SCHEDULING ORDER
	)	
	)	
vs.	)	
	)	
State of South Carolina,	)	C.A. No.: 2007-CP-42-2848
	)	
Respondent.	)	

Pursuant to a conference call on June 16, 2009 among the attorneys and this Court concerning the scheduling of the Post Conviction Relief hearing in the above captioned matter, the parties have agreed that the above captioned case be scheduled for a hearing at the convenience of the Court and Court Administration after January 1, 2010. The parties agree that it is essential that all issues be raised in one hearing and, in order to accommodate the scheduling of the Applicant's mitigation expert who has other death penalty trial conflicts during the fall of 2009, the most appropriate time to ensure all issues are heard in one trial would be after the first of the year at anytime.

Further, the parties agree that the Applicant's attorney shall file an amended application no later than August 1, 2009 setting forth, with specificity, the issues to be raised by the applicant.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT:

- 1) The Applicant, by and through his attorneys, shall file an amended application and serve the Attorney General's Office no later than August 1, 2009;
- 2) The above captioned case to be set for a hearing after January 1, 2010.

IT IS SO ORDERED.


 HON. PAUL M. BURCH
 JUDGE OF THE FOURTH JUDICIAL CIRCUIT

Date: 6/18/2009

2009 JUN 23 PM 2:42
 MAJOR KITCHENS
 FILED
 OF COURT

Computer

STATE OF SOUTH CAROLINA
Before the Supreme Court

FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Paul Burch

Case No. 2007-CP-42-2848

Marion Alexander Lindsey,

Applicant,

v.

State of South Carolina,

Respondent.

CERTIFICATE OF SERVICE

I, Richard W. Vieth, attorney for Petitioner, Marion Alexander Lindsey, certify that I have this 7th day of July, 2009, mailed a copy of the Status Report Letter in the following manner to the Respondent in a duly franked envelope addressed as follows:

Donald J. Zelenka, Asst. Deputy Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211

Respectfully submitted,

ATTORNEY FOR THE APPLICANT


SC Bar # 5711 Fed. ID.# 4468
Richard W. Vieth
Henderson, Brandt & Vieth, P.A.
360 East Henry St., Suite 101
Spartanburg, SC 29302
(864) 582-2962

July 7, 2009
Spartanburg, South Carolina

STATE OF SOUTH CAROLINA
Before the Supreme Court

FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Paul Burch

Case No. 2007-CP-42-2848

Marion Alexander Lindsey,

Applicant,

v.

State of South Carolina,

Respondent.

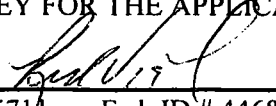
CERTIFICATE OF SERVICE

I, Richard W. Vieth, attorney for Petitioner, Marion Alexander Lindsey, certify that I have this 7th day of July, 2009, mailed a copy of the Status Report Letter in the following manner to the Respondent in a duly franked envelope addressed as follows:

Donald J. Zelenka, Asst. Deputy Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211

Respectfully submitted,

ATTORNEY FOR THE APPLICANT


SC Bar # 5711 Fed. ID.# 4468
Richard W. Vieth
Henderson, Brandt & Vieth, P.A.
360 East Henry St., Suite 101
Spartanburg, SC 29302
(864) 582-2962

July 7, 2009
Spartanburg, South Carolina



Henderson Brandt & Vieth, P.A.

Matthew A. Henderson
George Brandt, III
Richard W. Vieth
Joshua M. Henderson*

360 East Henry Street, Ste. 101
Spartanburg, SC 29302-2646
Telephone (864) 582-2962
FAX (864) 582-2952 Matt/Rick
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www.hbvlaw.com

*Also licensed in North Carolina

Attorneys At Law

May 7, 2009

Hon. Daniel E. Shearouse
The Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

RECEIVED

MAY - 8 2009

S.C. SUPREME COURT

RE: Marion Alexander Lindsey vs. State
Case No.: 2007-CP-42-2848

Dear Clerk Shearouse:

I, along with David Collins, are the third pair of attorneys appointed to represent Marion Lindsey in his PCR Capital case. Since the appointment, David and I have obtained and reviewed 8 boxes of files from the Spartanburg County Public Defender's Office and the offices of Doug Brannon, both of whom represented, along Karen Quimby, Marion Lindsey in the trial of the case.

In addition, we have met with our client at Lieber Correctional Institution located in Ridgeville, SC.

Also, I have retained the services of the following as part of the defense "team":

- 1) Carolyn Graham as our mitigation investigator. Carolyn has met with Mr. Lindsey on one occasion and is scheduled to meet with him again during the week of May 18th. She has gathered much information that we believe needs to be explored in the gathering of records that was not presented at the trial;
- 2) Janet Vogelsang, who is our mitigation expert;

In addition, an investigator is involved in reviewing some of the factual issues in the guilt phase of the trial.

Letter to The Supreme Court of South Carolina
May 7, 2009
Page two

At the time of my appointment, two significant roadblocks existed in the early stages of getting this matter reviewed quickly. One was the fact that I was involved in the appeal in the case of The United States of America vs. Eric Hans, a Federal Court arson/death penalty trial that I was involved in trial for over six weeks before Judge Herlong during the summer of 2007. That case was on appeal relative to the guilt phase when I was appointed to this case. While Mr. Hans received a life sentence, there were some issues to be addressed before the Fourth Circuit on the guilt phase. I was in Richmond, Virginia before the Fourth Circuit in March, 2009 and a great deal of time had to be spent preparing the briefs and arguments for that case.

Also, Carolyn Graham has been actively involved as the mitigation investigator in a case entitled State vs. Jerry Buck Inman, a capital case in Pickens, South Carolina involving the Defendant who raped and murdered a Clemson student. This case should have ended in 2008, but due to unexpected issues in that case, Judge Ned Miller had to continue the sentencing phase for several months. This case ended in April 2009. This put Carolyn Graham in a terrible position that neither she nor I could have been aware of and delayed her getting totally involved in this case during the latter stages of 2008.

Mrs. Graham has been to my office three times to review the boxes of material, with the most recent visit being a 5 hour meeting with me and Mr. Collins on May 6, 2009.

While a trial date in this case has not yet been set, I would anticipate that the trial could be heard late 2009 or, at the latest, during the winter months of 2010.

Per the requirements, I will file another status report no later than July 7, 2009.

Very truly yours,



Richard W. Vieth
Henderson, Brandt & Vieth, P.A.
Private line: 583-5430
rvieth@hbvlaw.com
RWV/kw

cc: Hon. Paul Burch
Donald J. Zelenka, Esq.
David Collins, Esq.

STATE OF SOUTH CAROLINA
Before the Supreme Court

FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Paul Burch

Case No. 2007-CP-42-2848

RECEIVED
MAY - 8 2009
S.C. SUPREME COURT

Marion Alexander Lindsey,

Applicant,

v.

State of South Carolina,

Respondent.

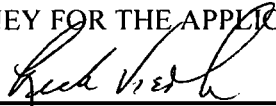
CERTIFICATE OF SERVICE

I, Richard W. Vieth, attorney for Petitioner, Marion Alexander Lindsey, certify that I have this date mailed a copy of the Status Report Letter in the following manner to the Respondent in a duly franked envelope addressed as follows:

Donald J. Zelenka, Asst. Deputy Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211

Respectfully submitted,

ATTORNEY FOR THE APPLICANT



SC Bar # 5711 Fed. ID.# 4468
Henderson, Brandt & Vieth, P.A.
360 East Henry St., Suite 101
Spartanburg, SC 29302
(864) 582-2962

May 7, 2009
Spartanburg, South Carolina



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

May 1, 2009

David M Collins, Jr., Esquire
Sinclair & Collins, LLC
302 E. St. John St.
Spartanburg, SC 29302

Richard W. Vieth, Esquire
Henderson Brandt & Vieth, PA
360 E. Henry St.
Spartanburg, SC 29302

Re: Marion Alexander Lindsey v. State

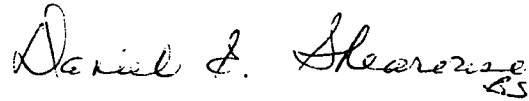
Dear Counsel:

As you know, the execution in this matter has been stayed pursuant to In re Stays of Execution in Capital Cases, 321 S.C. 544, 471 S.E2d. 140 (1996), to allow the defendant to pursue post-conviction relief, and you represent him in that PCR action which is filed as 2007-CP-42-2848. Under In re Stays of Execution in Capital Cases, the defendant must serve and file "a letter setting forth the status of the post-conviction relief matter every sixty (60) days. . . . If the Court determines this letter fails to show that the defendant is diligently pursuing the post-conviction relief action, the Court may issue an order dissolving the stay or setting forth additional requirements the defendant must meet to maintain the stay."

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

David M. Collins, Jr., Esquire
Richard W. Vieth, Esquire
Page Two
May 1, 2009

Very truly yours,

A handwritten signature in cursive script that reads "Daniel L. Shearouse". The signature is written in dark ink and is positioned above the typed name "CLERK".

CLERK

DES/dmh

cc: Assistant Deputy Attorney General Donald J. Zelenka
The Honorable Paul Burch



HENRY McMASTER
ATTORNEY GENERAL

April 14, 2009

Honorable Paul M. Burch
Circuit Court Judge
P.O. Box 276
Pageland, South Carolina 29728-0276

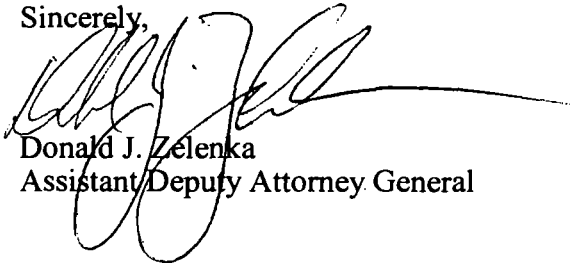
Re: Marion A. Lindsey v. State
Death Penalty PCR
2007-CP-42-2848

Dear Judge Burch:

This is a request for a status conference concerning the Marion Lindsay state PCR action which has been assigned to you by the South Carolina Supreme Court. The last action taken in this case appears to have been the July 2008 order appointing Richard Vieth and David Collins according to my records. This order removed Bill Godfrey and Ken Gibson. On August 5, 2008, I wrote new counsel and advised them that prior counsel Godfrey was retaining the previous records I had provided in my return and that those have been provided to current counsel.

If you have any questions, please advise me.

Sincerely,



Donald J. Zelenka
Assistant/Deputy Attorney General

RECEIVED

APR 15 2009

DJZ/dz

Enclosure:

cc: **SC SUPREME COURT**
Honorable Daniel E. Shearouse, Clerk, SC Supreme Court
Richard W. Vieth, Esquire
David M. Collins, Jr., Esquire
Harold "Trey" Gowdy, Solicitor



HENRY McMASTER
ATTORNEY GENERAL

August 5, 2008

Richard W. Vieth, Esquire
360 E. Henry Street
Spartanburg, SC 29302

David M. Collins, Jr., Esquire
302 E. Henry Street
Spartanburg, SC 29302

RECEIVED

AUG 06 2008

Re: Marion A. Lindsey v. State
Death Penalty PCR
2007-CP-42-2848

S.C. SUPREME COURT

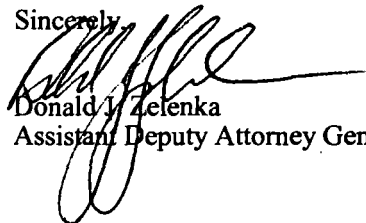
Dear Mr. Vieth and Mr. Collins:

I am in receipt of the new order appointing each of you to Mr. Lindsey's pending death penalty post-conviction relief matter. Please be advised that Mr. Lindsey was previously represented by Bill Godfrey and Ken Gibson who were removed by Order filed July 24, 2008.

For your information, I am attaching a copy of my previously filed Return to the original post-conviction relief application filed by Mr. Lindsey through his appellate counsel. It is my understanding that Bill Godfrey is retaining the attachments to the Return, including the appellate court briefs and record on appeal. Judge Paul Burch has been assigned to this matter.

If you have any questions, please advise me. I would request a status conference within 60 days to resolve scheduling issues for an evidentiary hearing.

Sincerely,


Donald V. Zelenka
Assistant Deputy Attorney General

DJZ/lbb

Enclosure: Return

cc: Honorable Paul M. Burch
Honorable Daniel E. Shearouse, Clerk, SC Supreme Court
E. P. "Bill" Godfrey, Esquire
Kenneth C. Gibson, Esquire
Harold "Trey" Gowdy, Solicitor

RECEIVED

JAN 25 2008

S.C. SUPREME COURT

HENRY MCMASTER
ATTORNEY GENERAL



January 24, 2008

Ricky K. Harris, Esquire
145 N. Church Street
Spartanburg, SC 29306

Scott D. Robinson, Esquire
Law Office of Scott D. Robinson
P.O. Box 10042
Greenville, SC 29603

Re: Marion Lindsey v. State
Death Penalty PCR Case - 2007-CP-42-2848

Dear Counsel Harris and Robinson:

I am in receipt of your order of appointment by Judge Paul Burch in the Spartanburg County death penalty post-conviction relief action filed by Marion Lindsey. Your attention is directed to S.C. Code § 17-27-160 concerning death penalty post-conviction relief actions, the time standards involved and to the decision of In Re Stays of Execution, 321 S.C. 544, 471 S.E.2d 140 (1996) which mandates that you provide the Clerk of the South Carolina Supreme Court with a letter concerning the status of this action to continue Mr. Lindsey's November 15, 2007 stay of execution. In that same Order, Judge Burch was vested with sole jurisdiction over this case.

By copy of this letter, I am providing each of you with the following documents already on file in this action:

Ricky K. Harris, Esquire
Scott D. Robinson, Esquire
January 24, 2008

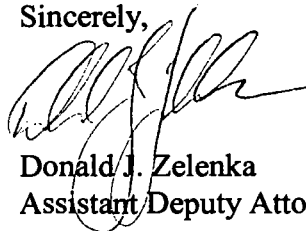
Page -2-

1. Post-Conviction Relief Application filed August 14, 2007.
2. State's Return to Post-Conviction Relief Application filed September 24, 2007.
3. Record on Appeal, *State v. Lindsey*, five volumes - 2194 pages.
4. Final Brief of Appellant.
5. Final Brief of Respondent.
6. Final Reply Brief of Appellant.
7. *State v. Lindsey*, 642 S.E.2d 557 (2007).

I am also enclosing a copy of the November 13, 2007 Order of the South Carolina Supreme Court again vesting Judge Burch with jurisdiction in this matter.

If you have any questions please contact me.

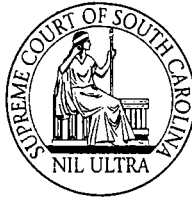
Sincerely,



Donald J. Zelenka
Assistant/Deputy Attorney General

DJZ/lbb
Enclosures

cc: Honorable Paul Burch
Harold W. Gowdy, Solicitor
Honorable Daniel E. Shearouse



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

November 15, 2007

Deputy Chief Appellate Defender
for Capital Appeals Robert M. Dudek
South Carolina Commission on Indigent Defense
P O Box 11589
Columbia, SC 29211

Re: The State v. Lindsey, Marion Alexander

Dear Counsel:

Enclosed is the order issued in the above entitled matter.

Very truly yours,

Daniel E. Shearouse
DS

CLERK

DES/dmh

Enclosure

cc: Assistant Deputy Attorney General Donald J. Zelenka
The Honorable Harold W. Gowdy, III
The Honorable Marcus W. Kitchens
The Honorable Paul M. Burch

The Supreme Court of South Carolina

The State,

Respondent,

v.

Marion Alexander Lindsey,

Appellant.

ORDER

Petitioner was convicted of murder and sentenced to death. This Court recently affirmed petitioner's conviction and sentence. State v. Lindsey, 372 S.C. 185, 642 S.E.2d 557 (2007). The Court issued a stay of execution on May 3, 2007, so that petitioner could seek a writ of certiorari from the United States Supreme Court. The petition for a writ of certiorari was denied by order dated October 1, 2007.

Petitioner now seeks a stay of execution so that he can pursue relief by way of an application for post-conviction relief (PCR) filed in the circuit court on August 14, 2007.¹ In the application, petitioner sets forth numerous allegations of ineffective assistance of trial counsel.

The State has filed a return in which it notes that by order dated October 12, 2007, this Court assigned the Honorable Paul M. Burch to

¹ The State filed a return to the PCR application on September 24, 2007.

petitioner's pending PCR action.² The State concedes the PCR application raises issues appropriate for PCR and therefore a stay is appropriate.

In In re Stays of Execution in Capital Cases, 321 S.C. 544, 471 S.E.2d 140 (1996), this Court stated that if the action of the United States Supreme Court on a capital defendant's petition for a writ of certiorari does not invalidate the sentence of death, the Clerk of this Court shall issue an execution notice.³ If the defendant desires a stay to pursue state PCR, he must, within ten days of the date of the issuance of the execution notice, file a motion to stay with this Court, setting forth the issues intended to be raised in the PCR application, after which this Court will assign a circuit judge to the case and issue a stay of execution. Id.

We find the PCR application filed by petitioner is sufficient to meet the requirements of In re Stays of Execution. Accordingly, the petition for a stay of execution is granted. The stay shall remain in effect to the extent provided by this Court in In re Stays of Execution.

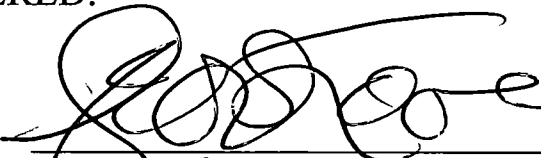
Judge Burch shall retain jurisdiction over this case regardless of where he may be assigned to hold court and may schedule such hearings as

² On October 17, 2007, the State requested a status conference for scheduling and appointment of qualified counsel.

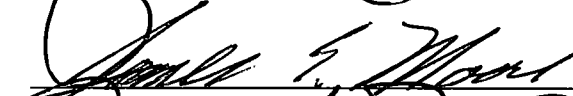
³ An execution notice has not been issued in this case.

may be necessary at any time without regard to whether there is a term of court scheduled. In addition, Judge Burch shall conduct a hearing on petitioner's desires regarding counsel within thirty days of the date of this order if he has not already done so.

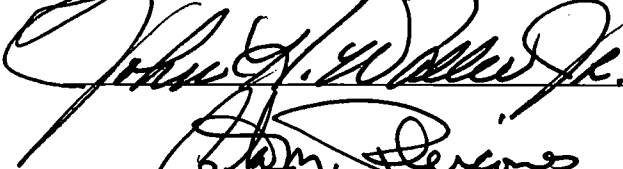
IT IS SO ORDERED.



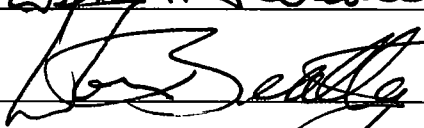
C. J.



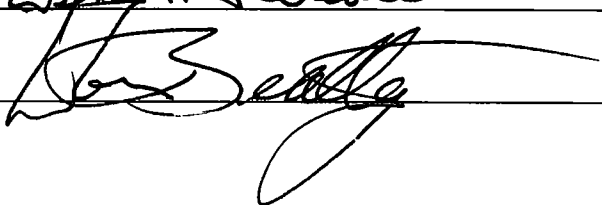
J.



J.



J.



J.

Columbia, South Carolina

November 15, 2007



HENRY McMASTER
ATTORNEY GENERAL

RECEIVED

October 17, 2007

OCT 17 2007

S.C. SUPREME COURT

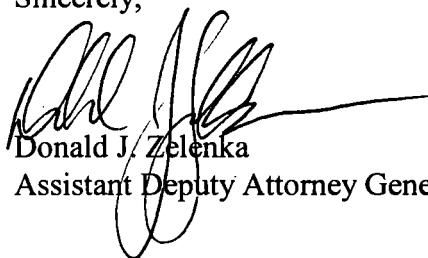
Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P.O. Box 11330
Columbia, SC 29211

Re: The State v. Marion A. Lindsey

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of a ***Return to Petition for Stay of Execution to Pursue State Post-Conviction Relief*** in the above-referenced matter for filing. By copy of this letter I am serving opposing counsel with same.

Sincerely,



Donald J. Zelenka
Assistant Deputy Attorney General

DJZ/lbb
Enclosure

cc: Robert M. Dudek, Esquire
Sandi Wofford, Victims Assistance

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

**Appeal from Spartanburg County
John Few, Circuit Court Judge - Trial
Paul Burch, Circuit Court Judge - PCR**

RECEIVED

OCT 17 2007

S.C. SUPREME COURT

THE STATE,

Respondent,

v.

MARION ALEXANDER LINDSEY,

Appellant.

**RETURN TO PETITION FOR A STAY OF EXECUTION TO PURSUE STATE
POSTCONVICTION RELIEF**



The Respondent, through undersigned counsel, hereby make a Return to the Petition for a Stay of Execution received on October 15, 2007 to allow him to pursue an application for state postconviction relief in Dorchester. On February 20, 2007, the South Carolina Supreme Court entered its opinion denying relief. State v. Lindsey, _ S.C. _, 642 S.E. 2d 557 (2007). A petition for rehearing was made through appellate counsel. The petition was denied on April 4, 2007 in an unpublished order.

The Petitioner, through counsel Dudek made a petition for writ of certiorari in the United States Supreme Court on June 29, 2007. Lindsey v. South Carolina, 07-5444. In the petition, Lindsey raised the following question:

Whether juror Krisher's belief that life imprisonment without parole was a more

substantial punishment than the death penalty was an acceptable reasons to disqualify him from service for cause under Wainwright v. Witt, 469 U.S. 412 (1985) where the juror testified he could impose death as punishment for murder, and his belief was not incompatible with the law as the trial court reasoned?

Petition, p. 2. The Respondents made a Brief in opposition on August 20, 2007. Certiorari was denied on October 1, 2007. Respondents do not oppose the stay request pursuant to the mandates of this Court in In Re Stays of Execution In Capital Cases, 321 S.C. 544, 471 S.E.2d 140 (1996). **NOTE, on October 12, 2007, this Court entered an Order assigning the Honorable Paul Burch to a pending PCR action, Lindsey v. State, 2007-CP-42-2848.**

Respondents will show this Court the following reasons:

I.



In his petition, he asserts that he intends to pursue state postconviction relief alleging claims of ineffective assistance of counsel. On August 14, 2007, the Petitioner, through Appellate Defender Robert Dudek made an application for postconviction relief. In the application, he alleged the following:

- I. Ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution for the reasons below and in the attachment to this Application. 10 (A).
 1. Defense counsel was ineffective for failing to present available evidence that petitioner was attempting to proceed in family court over the child visitation dispute. Petitioner had sought legal assistance and the failure to offer this available evidence constituted ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution on a critical issue exploited by the State to petitioner's detriment. 10(b). (EVIDENCE OF FAMILY COURT VISITATION AND SEEKING LEGAL ASSISTANCE).
 2. Defense counsel was ineffective for failing to properly argue the "great risk of danger" aggravating circumstance did not apply to petitioner's case since the shot was at close range and it was clear the decedent was the only intended victim. This failure by trial counsel constituted ineffective assistance of counsel in violation of the Sixth Amendment to the United

States Constitution. This was also an Eighth Amendment violation since petitioner was wrongfully placed in the class of "death eligible" defendants. 10 (c) . (FAILURE TO ADEQUATELY ARGUE INAPPLICABILITY OF "GREAT RISK OF DEATH" AGGRAVATOR).

- 
3. Defense counsel was ineffective for failing to present available evidence showing his wife was engaged in an adulteress relationship to counter the State's evidence that petitioner was completely at fault for the domestic dispute. Failure to present this evidence constituted ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution. 10 (d). (EVIDENCE IN MITIGATION THAT WIFE WAS ADULTERESS AND PARTIALLY AT FAULT IN RELATIONSHIP).
 4. Defense counsel was ineffective for failing to present available mitigating evidence regarding appellant's childhood and his mental capacity since this was relevant evidence. The failure to present available mitigating evidence constituted ineffective assistance of counsel in violation of his rights under the Sixth Amendment to the United States Constitution. 10(e). (APPELLANT'S CHILDHOOD AND MENTAL CAPACITY AS EVIDENCE IN MITIGATION).
 5. Defense counsel was ineffective for failing to offer evidence that he was steadily employed to counter the State's evidence that he was a drug dealer. The failure to offer this evidence constituted ineffective assistance of counsel in violation to the Sixth Amendment to the United States Constitution. 10(f). (EVIDENCE IN MITIGATION OF STEADY EMPLOYMENT).
 6. Defense counsel was ineffective for failing to offer evidence appellant was already lying on the ground when he was shot by the police officer. Allowing the state to distort the crime scene evidence to appellant's prejudice constituted ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution. 10(g). (FAILURE TO OFFER EVIDENCE THAT LINDSEY ON GROUND WHEN SHOT BY POLICE).
 7. Defense counsel was ineffective in violation of the Sixth and Eighth Amendments to the United States Constitution, by virtue its inadequate *voir dire*, and the failure to challenge for cause certain members of the jury that should not have remained on the jury. A death prone jury was consequently selected. 10(h). (INADEQUATE VOIR DIRE AND FAILURE TO CHALLENGE FOR CAUSE UNNAMED JURORS).

On September 24, 2007, Respondents made a Return to the application. On October 12, 2007,

this Court assigned the Honorable Paul Burch exclusive jurisdiction in the matter. On October 17, 2007, Respondent, through below-signed counsel, requested a status conference for scheduling and appointment of qualified counsel pursuant to Section 17-27-160.

III.

In this Court's written order in In Re Stays on April 8, 1996, this Court stated as follows:

If the defendant desires a stay to pursue state post-conviction relief, the defendant must, within ten (10) days of the date of the issuance of the execution notice, file a motion to stay with this Court, setting forth the issues intended to be raised in the application for post-conviction relief. [If the general nature of the issues are appropriate for post-conviction relief], this Court will assign a circuit judge to the case and issue a stay of execution.



In Re Stays, 321 S.C. 546 [bracketed portion not included in published order]. Respondents submit that the issue intended to be raised, under the prior precedent of this Court are of "*the general nature of issues appropriate for post-conviction relief*," and the entry of the stay would be appropriate. However, Respondent submits that under a Strickland v. Washington, 466 U.S. 668 (1984) and Jones v. State, 332 S.C. 329, 504 S.E.2d 822 (1998) analysis, the Petitioner cannot satisfy his burden of proof.

Therefore, Respondents do not oppose the granting of a stay to allow the assignment of a state post-conviction relief judge, appointment of two (2) qualified counsel pursuant to § 17-27-160 to allow a PCR proceeding to held consistent with Section 17-27-160 and In Re: Stays.

Respectfully submitted,

HENRY D. McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

ATTORNEYS FOR RESPONDENT

By

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3601

October 17, 2007

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

**Appeal from Spartanburg County
John Few, Circuit Court Judge - Trial
Paul Burch, Circuit Court Judge - PCR**

THE STATE,

Respondent,

v.

MARION ALEXANDER LINDSEY,

Appellant.

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, Counsel for the Respondent, certify that I have served Respondent's *Return to Petition for Stay of Execution* by depositing two (2) copies of the same in the United States mail, postage prepaid, addressed to:

Robert M. Dudek
Assistant Appellate Defender
South Carolina Office of Appellate Defense
P.O. Box 11330
Columbia, South Carolina 29211

This 17th day of October 2007.



DONALD J. ZELENKA

HENRY McMASTER
ATTORNEY GENERAL

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OCT 18 2007

S.C. SUPREME COURT



October 17, 2007

Honorable Paul M. Burch
P.O. Box 276
Pageland, SC 29728

Re: Marion A. Lindsey v. State - 2007-CP-42-2848
Death penalty PCR Matter
Request for Status Conference

Dear Judge Burch:

I am in receipt of an Order from the Chief Justice assigning this death penalty post-conviction relief to you. Mr. Lindsey's direct appeal was denied in *State v. Lindsey*, 372 S.C. 185, 642 S.E.2d 557 (February 20, 2007). Certiorari was denied in the United States Supreme Court on October 1, 2007. Lindsey, through appellate defender Robert Dudek filed an Application for Post-Conviction Relief on August 14, 2007 and we filed a Return on September 24, 2007. A copy of the Application and Return are attached.

Pursuant to S.C. Code § 17-17-160, I would request that a status conference be held to determine the Applicant's desire for counsel and to have two (2) counsel appointed, consistent with § 17-27-160. Lindsey was represented at trial by the late Michael Bartosh, Doug Brennan and Karen Quimby. On appeal, he was represented by Robert Dudek.

Appellate counsel Dudek has made a Petition for Stay of Execution dated October 11, 2007 to allow for post-conviction relief proceedings. The matter is presently before the Court.

Honorable Paul M. Burch
October 17, 2007

Page -2-

By copy of this letter, I am advising appellate counsel Dudek and the Clerk of the Supreme Court of this communication.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Zelenka', written over the word 'Sincerely,'.

Donald J. Zelenka
Assistant Deputy Attorney General

DJZ/lbb

Enclosures: Application for Post-Conviction Relief
Return
October 12, 2007 Appointment Order

cc: Honorable Daniel E. Shearouse
Robert M. Dudek, Esquire
Harold "Trey" Gowdy, Solicitor



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

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

RECEIVED

OCT 11 2007

October 11, 2007

S.C. SUPREME COURT

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

Re: State v. Marion Alexander Lindsey

Dear Mr. Shearouse:

Enclosed please find an original and six copies of the petition for stay of execution along with a certificate of service.

Sincerely,

Robert M. Dudek
Deputy Chief Appellate Defender for Capital Appeals

RMD/mwl

Enclosure

cc: Donald J. Zelenka, Esquire

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

Appeal from Spartanburg County
John C. Few, Circuit Court Judge

RECEIVED

OCT 11 2007

THE STATE,

S.C. SUPREME COURT

RESPONDENT,

V.

MARION ALEXANDER LINDSEY,

PETITIONER.

PETITION TO APPOINT POST-CONVICTION JUDGE
AND FOR A STAY OF EXECUTION

Counsel for Marion Alexander Lindsey petitions this Court for a stay of execution to allow petitioner to file an application for post-conviction relief in the Spartanburg County Court of Common Pleas.

I.

This Court affirmed petitioner's conviction and death sentence in State v. Marion Alexander Lindsey, 372 S.C. 185, 642 S.E.2d 557 (2007).

II.

Petitioner filed a petition for rehearing on March 13, 2007. This Court denied rehearing on April 4, 2007. This Court then issued a stay of execution on May 3, 2007, so that petitioner could seek a writ of certiorari from the United States Supreme Court.

III.

A petition for writ of certiorari to the South Carolina Supreme Court was filed in the United States Supreme Court, *Marion Alexander Lindsey v. South Carolina*, No. 07-5444, on July 2, 2007. That Court denied certiorari in its order dated October 1, 2007. (A copy of that order is attached). Petitioner also filed an application for post-conviction relief in the Spartanburg County Court of Common Pleas on August 14, 2007 to preserve his federal habeas one hundred and eighty day time limit in the event that avenue of relief ever becomes necessary. Regardless, in accord with In re STAYS OF EXECUTION IN CAPITAL CASES, 321 S.C. 544, 471 S.E.2d 140 (1996), a request for a stay of execution from this Court so that petitioner can pursue state post-conviction relief is now proper.

IV.

Petitioner intends, and has already, raised numerous grounds of ineffective assistance of counsel in post-conviction relief. They include:

- (a) Defense counsel was ineffective for failing to present available evidence that petitioner was attempting to proceed in family court over the child visitation dispute. Petitioner had sought legal assistance and the failure to offer this available evidence constituted ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution on a critical issue exploited by the state to petitioner's detriment.
- (b) Defense counsel was ineffective for failing to properly argue the "great risk of danger" aggravating circumstance did not apply to petitioner's case since the shot was fired at close range and it was clear the decedent was the only intended victim. This failure by trial counsel constituted ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution. This was also an Eighth Amendment violation since petitioner was wrongfully placed in the class of "death eligible" defendants.
- (c) Defense counsel was ineffective for failing to present available evidence showing his wife was engaged in an adulteress relationship to counter the state's evidence that petitioner was completely at fault for the domestic dispute. Failure to present this

evidence constituted ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution.

(d) Defense counsel was ineffective for failing to present available mitigating evidence regarding appellant's childhood and his mental capacity since this was relevant evidence. The failure to present available mitigating evidence constituted ineffective assistance of counsel in violation of his rights under the Sixth Amendment to the United States Constitution.

(e) Defense counsel was ineffective for failing to offer evidence that he was steadily employed to counter the state's evidence that he was a drug dealer. The failure to offer this evidence constituted ineffective assistance of counsel in violation to the Sixth Amendment to the United States Constitution.

(f) Defense counsel was ineffective for failing to offer evidence appellant's was already lying on the ground when he was shot by the police officer. Allowing the state to distort the crime scene evidence to appellant's prejudice constituted ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution.

(g) Defense counsel was ineffective, in violation of the Sixth and Eighth Amendments to the United States Constitution, by virtue its inadequate *voir dire*, and the failure to challenge for cause certain members of the jury that should not have remained on the jury. A death prone jury was consequently selected.

This list of ineffectiveness grounds is not exhaustive, but merely is offered to show that numerous issues of ineffective assistance of counsel are now ripe for adjudication.

V.

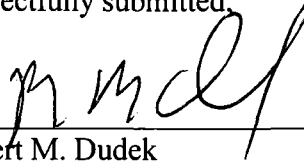
Present counsel cannot take a position on the issue of ineffective assistance of appellate counsel. That is a matter for post-conviction counsel to determine.

VI.

Based on the above, petitioner requests a stay of execution from this Court so that he can pursue his state court post-conviction relief action. Petitioner requests that this Court appoint a Circuit Court Judge to hold a timely hearing on the appointment of qualified counsel to represent him in this capital PCR. Counsel does not make this request for purposes of delay.

WHEREFORE, counsel for Marion Alexander Lindsey requests a stay of execution from the denial of certiorari in the United States Supreme Court so that he can file an application for post-conviction relief in the Spartanburg County Court of Common Pleas upon the grounds of ineffective assistance of counsel. Petitioner also requests that this Court appoint a PCR judge to preside over his case, and to appoint qualified counsel.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R M Dudek', written over a horizontal line.

Robert M. Dudek

Deputy Chief Appellate Defender for Capital Appeals

Attorney for Petitioner.

This 11th day of October, 2007

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Spartanburg County
John C. Few, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MARION ALEXANDER LINDSEY,

PETITIONER.

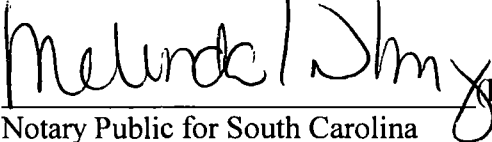
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Stay of Execution in the above referenced case has been served upon opposing counsel, Donald J. Zelenka, Esquire, this 11th day of October, 2007.



ROBERT M. DUDEK
Deputy Chief Appellate Defender for Capital Appeals

SUBSCRIBED AND SWORN TO before me
this 11th day of October, 2007.



(L.S.)
Notary Public for South Carolina
My Commission Expires: November 16, 2008

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

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

October 1, 2007

Mr. Robert M. Dudek
PO Box 11589
Columbia, SC 29211-1589

Re: Marion Alexander Lindsey
v. South Carolina
No. 07-5444

Dear Mr. Dudek:

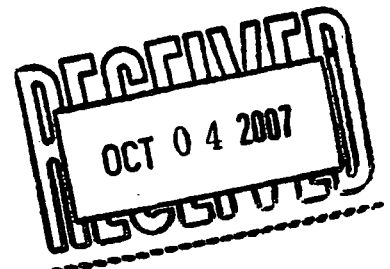
The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,



William K. Suter, Clerk



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

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

October 1, 2007

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

Re: Marion Alexander Lindsey
v. South Carolina
No. 07-5444
(Your No. 26268)

Dear Clerk:

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

The petition for a writ of certiorari is denied.

Sincerely,



William K. Suter, Clerk

RECEIVED
OCT 09 2007
S.C. SUPREME COURT

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

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

July 20, 2007

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

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JUL 25 2007

S.C. SUPREME COURT

Re: Marion Alexander Lindsey
v. South Carolina
No. 07-5444
(Your No. 26268)

Dear Clerk:

The petition for a writ of certiorari in the above entitled case was filed on June 29, 2007 and placed on the docket July 20, 2007 as No. 07-5444.

Sincerely,

William K. Suter, Clerk

by

Gail Johnson
Case Analyst



SCCID

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Facsimile: (803) 734-1397

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

June 29, 2007

RECEIVED

JUN 29 2007

S.C. SUPREME COURT

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

Re: Marion Alexander Lindsey v. State of South Carolina

Dear Mr. Shearouse:

Please be advised that I have filed a petition for writ of certiorari and appendix in this case with the United States Supreme Court today. I have attached a copy of that petition.

Please contact me if you have any questions.

Sincerely,

Robert M. Dudek
Deputy Chief Attorney for Capital Appeals

RMD/mwl

Enclosure

cc: Donald J. Zelenka, Esquire



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

June 29, 2007

RECEIVED

JUN 29 2007

S.C. SUPREME COURT

Honorable William K. Suter
Clerk
Supreme Court of the United States
Washington, DC 20543

Re: Marion Alexander Lindsey v. State of South Carolina

Dear Mr. Suter:

Enclosed is Petitioner's Certificate of Filing by Mail in the above-referenced case.

Sincerely,

Robert M. Dudek
Attorney at Law

RMD\MWL

Enclosure

cc: Honorable Daniel E. Shearouse, Clerk
Donald J. Zelenka, Esquire

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2006

No. 2006-_____

MARION ALEXANDER LINDSEY,

PETITIONER

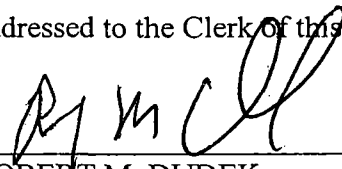
versus

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF FILING BY MAIL

I hereby certify that I am a member of the Bar of this Court and that on June 29, 2007, I filed the petition for writ of certiorari in the above-referenced case, together with a motion for leave to proceed in forma pauperis, by causing the originals and ten copies of the same to be deposited in the United States Mail, postage prepaid, and properly addressed to the Clerk of this Court.



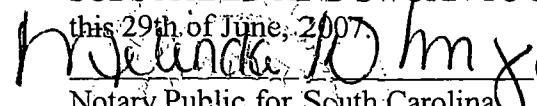
ROBERT M. DUDEK
Attorney at Law

South Carolina Commission
on Indigent Defense,
Division of Appellate Defense
1330 Lady Street, Fourth Floor
Columbia, SC 29201
(803) 734-1330

ATTORNEY FOR PETITIONER.

SUBSCRIBED AND SWORN TO before me

this 29th of June, 2007.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: November 16, 2008

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2006

RECEIVED

JUN 29 2007

No. 2006-_____

S.C. SUPREME COURT

MARION ALEXANDER LINDSEY,

PETITIONER

versus

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF SOUTH CAROLINA

ROBERT M. DUDEK
Attorney at Law

South Carolina Commission
on Indigent Defense,
Division of Appellate Defense
1330 Lady Street, Fourth Floor
Columbia, SC 29201
(803) 734-1330

ATTORNEY FOR PETITIONER.

QUESTION PRESENTED

Whether juror Krisher's belief that life imprisonment without parole was a more substantial punishment than the death penalty was an acceptable reason to disqualify him from service for cause under Wainwright v. Witt, 469 U.S. 412 (1985) where the juror testified he could impose death as punishment for murder, and his belief was not incompatible with the law as the trial court reasoned?

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SUPREME COURT OF THE UNITED STATES

October Term, 2006

No. 20-_____

MARION ALEXANDER LINDSEY,

PETITIONER,

versus

STATE OF SOUTH CAROLINA,

RESPONDENT.

**PETITION FOR WRIT OF CERTIORARI TO THE
SOUTH CAROLINA SUPREME COURT**

Marion Alexander Lindsey asks this Court to issue a writ of certiorari to review the decision of the South Carolina Supreme Court in this case.

CITATION TO OPINION BELOW

The opinion of the South Carolina Supreme Court affirming Petitioner's murder conviction is reported as State v. Marion Alexander Lindsey, 642 S.E.2d 557 (2007). App. 1 – 8.

JURISDICTION

The judgment of the South Carolina Supreme Court was entered on February 20, 2007. The petition for rehearing was denied on April 4, 2007. App. 9. This Court's jurisdiction is invoked pursuant to 28 U.S.C §1257(a), Petitioner having asserted below and asserting herein deprivation of

rights secured by the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the United States Constitution, which provides in pertinent part, “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .”

This case also involves the Eighth Amendment to the United States Constitution, which provides in pertinent part, “Excessive bails shall not be required . . . nor cruel and unusual punishments inflicted.”

This case further involves Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part, “[N]or shall any state deprive any person of life, liberty . . . without due process of law”

STATEMENT OF FACTS

Petitioner Marion Lindsey shot his estranged wife in the parking lot of a police station in Spartanburg County, South Carolina on March 18, 2002 culminating an ongoing dispute over child visitation. R. 1532, l. 12 – 1533, l. 1. Petitioner and his wife had separated before but the wife’s friend, Celeste Nesbitt, said this was “the first time she did not let him see the kids.” R. 1518, ll. 3-7.

The State sought the death penalty citing the sole aggravating circumstance that “the offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person.” See S.C. Code §16-3-20 (C)(a)(3). App. 12.

Petitioner’s case came on for trial on May 17, 2004 before the Honorable John C. Few and a

jury. R. 1. Michael Bartosh, Doug Brennan, and Karen Quimby represented Petitioner. The solicitors were Trey Gowdy, Barry Barnett, and Donnie Willingham. R. 1.

The jury found Petitioner guilty of murder, and at the conclusion of the penalty phase trial recommended a sentence of death which the judge imposed. R. 718 – 719; r. 2169, l. 10 – 2170, l. 5; r. 2174, ll. 1 – 14.

Petitioner argued at trial and on direct appeal to the South Carolina Supreme Court that a directed verdict should be granted on the sole aggravating circumstance since the state was using this aggravating circumstance, §16-3-20 (C)(a)(3), in an overbroad and unintended fashion. The trial court and the South Carolina Supreme Court rejected that contention. App. 6.

Petitioner also argued that his death sentence was disproportionate to this domestic crime of passion, and that there was not any other single aggravating circumstance case involving a spouse killing a spouse in modern South Carolina history. The state supreme court also refused to find the death sentence disproportionate under its mandatory proportionality review. The Court wrote that there had been other single aggravating circumstance cases in South Carolina thus ignoring Petitioner's argument that there had not been any other single aggravating circumstance case involving a spouse killing a spouse during a domestic dispute. See S.C. Code §16-3-25. App. 7. In doing so the Court's record of never having found a death sentence disproportionate survived.

REASON THE WRIT SHOULD BE GRANTED

Juror Krisher's belief that life imprisonment without parole was a more substantial punishment than the death penalty was not an acceptable reason to disqualify him from service for cause under *Wainwright v. Witt*, 469 U.S. 412 (1985) where that juror testified he could impose death as punishment for murder. The government was not entitled to use *Wainwright v. Witt* to exclude a juror for cause simply because his belief that life imprisonment without parole was a worse punishment than death does not agree with the government's view of a qualified juror. Juror Krisher was not substantially impaired because of this belief, and the State was not entitled to a jury walking lock step with its desired views where the juror was qualified.

HOW THE FEDERAL ISSUE WAS RAISED BELOW

Potential juror John Krisher was called for *voir dire*. Mr. Krisher initially stated that he did not know if he could impose the death penalty. R. 320, l. 8 - 321, l. 7. However, in response to defense counsel's questions, Mr. Krisher said that he could impose the death penalty and sign a death verdict form if he thought death was the appropriate sentence. R. 325, l. 9 - 326, l. 18.

When the solicitor questioned Mr. Krisher, he said that he believed a life sentence without parole was a harsher punishment than death. He said that because of his belief that a life sentence was a more severe punishment than death, he would "not necessarily but most likely" impose a life sentence for murder. R. 327, l. 7 - 328, l. 23. In response to further defense questions, Mr. Krisher repeated that he could impose either life or death depending on the circumstances of the case. R. 331, ll. 1-21.

The State moved to disqualify Mr. Krisher on the basis that his belief that a life sentence was a harsher punishment than death would impair his ability to apply the law. R. 332, ll. 2-10.

Defense counsel for Petitioner argued that while the law reserves capital punishment for aggravated murders, Mr. Krisher's view that a life sentence without parole was a worse punishment than death would not impair his ability to follow the court's instructions. R. 332, l. 11 - 334, l. 25.

The trial court agreed with the State, and disqualified Mr. Krisher over Petitioner's objection because his "opinion [about the death penalty] is contrary to South Carolina law and . . . would substantially impair his ability to follow my instructions in fairly deliberating as to what the sentence ought to be." The judge also stated, as an additional justification, that Mr. Krisher hesitated when the judge initially asked if he could impose death. R. 336, l. 3 - 338, l. 11.

Citing Wainwright v. Witt, 469 U.S. 412 (1985), Petitioner argued in his mandatory direct appeal to the South Carolina Supreme Court that the trial court abused its discretion by excusing Mr. Krisher for cause by ruling that his belief that life imprisonment without parole was a more substantial punishment than the death penalty was incompatible with the law. Petitioner noted that a potential juror in a capital trial may not be removed because of his personal views for or against the death penalty unless those views would render him unable to return a verdict according to the law. The juror must be excused only if his opinions will prevent or substantially impair the performance of his duties as a juror in accordance with his oath and instructions.

Wainwright v. Witt, 469 U.S. 412 (1985).

Petitioner wrote that he understood that:

The appellate court should defer to the trial court's discretion in reviewing the exclusion of potential jurors whose answers to *voir dire* questions about the death penalty were unclear, ambiguous, or contradictory. Wainwright v. Witt, *above*; United States v. Tipton, 90 F.3d 861 (4th Cir. 1996), *cert. denied*, 520 U.S. 1253, 117 S.Ct. 2414 (1997); United States v. Barnette, 211 F.3d 803 (2000). That is not the case here.

The solicitor successfully and erroneously argued that Mr. Krisher's view that a life sentence without parole was a worse punishment than death was illegitimate and contrary to South Carolina law. Mr. Krisher's views, however, are not like the opinions expressed by the jurors excused under Tipton in Barnette and United States v. Jackson, 327 F.3d 273 (4th Cir. 2003). The potential juror in Barnette stated that he would be able to follow the law, but also stated that he preferred one sentence over the other and would "weigh heavily on not wanting to go to the death penalty unless it was *very, very, very, very, very* well warranted." Barnette at 211 F.3d 811 (emphasis added). The Fourth Circuit held, under Witt and Tipton, that the juror's responses left the record unclear as to his opinion on the death penalty and that the trial judge did not commit reversible error by excluding him, since the judge had the opportunity to view the juror first-hand. It applied the same principle in Jackson, where a potential juror was excused after he said that that he would not automatically vote against the death penalty but stated that he could not sign a death verdict. Jackson at 327 F.3d 295. The Court ruled that, given the juror's flatly inconsistent answers, the lower court did not abuse its discretion by removing him. Id.

Mr. Krisher's opinion about the death penalty, unlike the jurors in Barnette and Jackson, was not ambiguous, contradictory, or unclear. He did not express a general opposition or ambivalence towards capital punishment, but just a personal opinion about its relative severity. He stated without qualification that he could follow the court's instructions, and that under the proper circumstances, he could vote for the death penalty and sign a death verdict.

Brief at pp. 18-19.

The South Carolina Supreme Court noted the Krisher's answers that he could impose death if he felt it was appropriate, and his responses that life imprisonment without parole was "the worse punishment of the two based on [his] beliefs." App. 3-5. The South Carolina Supreme Court then held:

[2][3][4][5][6] A prospective juror may be excluded for cause when his or her views on capital punishment would prevent or substantially impair the performance of his duties as a juror in

accordance with this instructions and his oath. State v. Sapp, 366 S.C. 283, 621 S.E.2d 883 (2005)(*citing* Wainwright v. Witt, 469 U.S. 412, 525, 105 S.Ct. 833, 83 L.Ed.2d 841 (1985)); State v. Wood, 362 S.C. 135, 607 S.E.2d 57 (2004); State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999); S.C. Code Ann. § 16-3-20(E) (2003) (juror may not be excused in a death penalty case unless his beliefs or attitudes against capital punishment would render him unable to return a verdict according to law).

When reviewing the trial court's qualification or disqualification of prospective jurors, the responses of the challenged juror must be examined in light of the entire voir dire. Sapp, *supra*. The determination whether a juror is qualified to serve in a capital case is within the sole discretion of the trial judge and is not reversible on appeal unless wholly unsupported by the evidence. *Id.* 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. *Id.*; State v. Green, 301 S.C. 347, 392 S.E.2d 157 (1990). Deference must be paid to the trial court who sees and hears the juror. Wainwright, *supra*.

*193 Juror K's equivocal views regarding the death penalty, his responses favoring a life sentence despite the facts of the case, and his noted hesitation when asked if he could vote for death, are a reasonable basis for the trial judge's conclusion that Juror K's views would substantially impair his ability to act as an impartial juror. Considering the voir dire as a whole, we find the trial judge did not abuse his discretion in excusing this juror.

App. 5.

Discussion as to why the writ should be granted

This Court has held that a juror must be excused only if his opinions will prevent or substantially impair the performance of his duties as a juror in accordance with his oath and instructions. Uttecht v. Brown, ___ U.S. ___, 127 S.Ct. 2218 (2007), *citing* Wainwright v. Witt, 469 U.S. 412 (1985). This was not a case where the juror had moral or religious reservations about the death penalty. Mr. Krisher merely proposed, during the course of a theoretical discussion, that life without parole might be a more severe punishment than death. His initial

hesitation, if any, did not demonstrate an unwillingness to consider capital punishment. Rather, his pause was a normal, natural response to being confronted unexpectedly with a question of profound import. Mr. Krisher established his mental bearings as the examination progressed, and he answered subsequent questions thoughtfully and confidently. Importantly, Mr. Krisher also said he could sign his name to the necessary South Carolina death form sentencing Petitioner to die for the murder if he thought that sentence was the right one after hearing the evidence. R. 320, l. 8 – 338, l. 11.

The idea that life confinement without the possibility of parole might be a more severe punishment than death is not unique to Mr. Krisher; it is fairly common, even among the victims of violent crime who do not oppose capital punishment on principle. In 2002, after spending more than twenty years as a fugitive overseas, 62-year-old Ira Einhorn was tried for the 1977 Philadelphia murder of Holly Maddox. Mr. Einhorn had been tried *in absentia* and sentenced to death in 1993. He was located in France years later, but that country refused to extradite him unless Pennsylvania granted a new trial and withdrew the death sentence. Pennsylvania complied, and Mr. Einhorn was extradited, convicted and sentenced to life without the possibility of parole. After the trial, Holly Maddox's brother (who was not reported to have opposed the 1993 death sentence) said, "You know that life without parole is a terrible punishment, worse than being executed . . . We [the family] want him in an environment where every day will be longer than the previous one . . . and we hope he lives another thirty years." Dave Lindorff, *For Ira Einhorn, A Fate Worse Than Death*, SALON.COM, news/features, Oct. 18, 2002.

More recently, during the sentencing hearing of serial bomber Erich Rudolph, victim Diane Derzis told Mr. Rudolph that he had chosen "a fate worse than death" by accepting a life

sentence and that she wished him "a very long life." *Rudolph Gets Life Sentence*, MONTGOMERY, ALA., ADVISOR, July 19, 2005 (elec. ed). Members of a Louisiana family interviewed about the fate of a former police officer who had murdered a family member expressed the same sentiment. *Family of Victim of Murderous Cop Doesn't Want Death Penalty*, LOUISIANA TIMES-PICAYUNE, July 27, 2005 (elec. ed).

As Petitioner argued to the court below, if the state wanted to remove Mr. Krisher from the jury, it should have exercised a peremptory strike against him. Allegedly vacillating responses to questions about the death penalty are valid reasons for the use of a peremptory strike, as illustrated in several cases interpreting Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986). In fact, the South Carolina Supreme Court stated in State v. Tucker, 512 S.E.2d 99 (1999), that:

"Where the solicitor perceives a person will have difficulty imposing the death penalty, he may exercise a peremptory challenge against the juror upon this ground . . ." Id. at 334 S.C. 8, 512 S.E.2d 102, citing State v. Green, 301 S.C. 347, 392 S.E.2d 157 (1990) and State v. Elmore, 300 S.C. 130, 386 S.E.2d 769 (1989).

The Supreme Court of California considered a juror with opinions similar to Mr. Krisher's in another Batson case, People v. McDermott, 51 P.3d 874 (2002). In McDermott, the prosecutor asked a potential juror if the death penalty was a more severe punishment than a life sentence without parole. Initially, the juror said, "I really can't say . . . I don't know . . . They are both bad." Id. at 51 P.3d 893-894. When pressed to choose which punishment would be worse, the juror replied, "Maybe I would say life in prison . . . So they could have a chance to think about what they did." And, when asked if she would ever give a death sentence, she replied, "I don't know that I would . . . why I would . . . or if I would." Id.

The prosecutor did not challenge the juror for cause but used a peremptory strike to remove her. In response to the defendant's Batson challenge, the prosecutor argued that the juror's stated opinions made her "unfavorable on the penalty issue" and were a race-neutral reason to strike her. The California Supreme Court affirmed, holding that the juror's "responses generally indicated neutrality on the death penalty, [but] she expressed considerable doubt that the death penalty was a harsher punishment than life in prison without the possibility of parole," which was a valid reason to exercise a peremptory strike. Id.

Mr. Krisher's personal beliefs that life without parole was a worse punishment than death may have justified the State's use of a peremptory strike to remove him from the jury if it made the State uncomfortable, which it obviously did. However, his answers did not render him ineligible to serve under Wainwright v. Witt, 469 U.S. 412 (1985) since his belief on life without parole being worse than the death penalty was hardly unique. Mr. Krisher was generally neutral on the issue of punishment, but he could vote for death. He did not oppose the death penalty on principle, and he only thought that a life sentence without parole may be a worse punishment than death. He testified that he could follow the law, vote for either sentence in the appropriate circumstances, and sign the verdict form sentencing Petitioner to death. He was a qualified juror.

This Court decided Uttecht v. Brown, ___ U.S. ___, 127 S.Ct. 2218 (2007), less than a month before this petition for a writ of certiorari will be filed. It is important to note that Brown was a federal habeas relief action where this Court, 5-4, found the Ninth Circuit Court of Appeals failed to respect the limited role of federal habeas relief. This is a direct appeal.

The other differences between this case and Brown are apparent. Juror Z apparently had

get difficulty understanding during *voir dire* that Brown would never be released from prison. Juror Z appeared obsessed with an incorrigible convicted murder who “would reviolates if released,” even though Juror Z was repeatedly told Brown would never be released. Juror Z expressed at least four times his concern about “reoffending.” Uttecht v. Brown, 127 S.Ct. at 2227. Importantly, the defense volunteered it had no objection to Juror Z being excused.

Here, the trial court erroneously thought Juror Krisher's beliefs that life without parole was a worse punishment than death was incompatible with the law, and mandated his excusal. Although the trial court is entitled to deference, “a criminal defendant has the right to an impartial jury drawn from a venire that has not been tilted in favor of capital punishment by selective prosecutorial challenges for cause.” Uttecht v. Brown, 127 S.Ct. at 2224 *citing* Witherspoon v. Illinois, 391 U.S. 510, 521 (1968). Defense counsel strenuously objected to Juror Krisher being excused for cause.

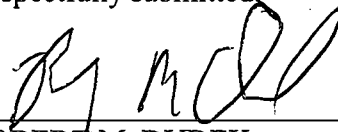
The trial court abused its discretion by removing him for cause from Petitioner's jury pool. The South Carolina Supreme Court erred by affirming the trial court's excusal of Juror Krisher for cause. There was not anything in the juror's beliefs on the death penalty or life imprisonment without parole that was so unusual or substantially impaired his ability to serve on a death penalty jury. There was also nothing that indicated he would not conscientiously apply the law to the facts adduced at trial. Lockhart v. McCree, 476 U.S. 162, 176 (1986).

This Court should respectfully grant certiorari and order a new trial. See Gray v. Mississippi, 481 U.S. 648, 658 (1987), *reaffirming* Davis v. Georgia, 429 U.S. 122 (1976) (the erroneous exclusion for cause of a qualified juror in a capital case cannot be harmless error).

CONCLUSION

By reason of the foregoing arguments, a writ of certiorari should issue.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R. M. Dudek', is written over a horizontal line.

ROBERT M. DUDEK

Attorney at Law

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(803) 734-1330

ATTORNEY FOR PETITIONER.

June 29, 2007

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2006

No. 2006-_____

MARION ALEXANDER LINDSEY,

PETITIONER,

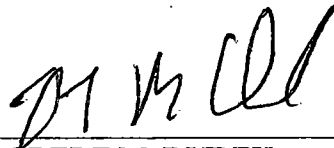
V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

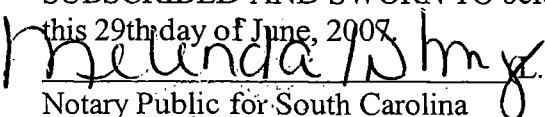
I certify that copies of the petition for writ of certiorari and appendix in this case have been served upon opposing counsel by mailing copies in envelopes properly addressed with postage prepaid on this 29th day of June, 2007.


ROBERT M. DUDEK
Attorney at Law

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on Indigent Defense,
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(803) 734-1330

ATTORNEY FOR PETITIONER.

SUBSCRIBED AND SWORN TO before me
this 29th day of June, 2007.


Melinda W. My (L.S.)
Notary Public for South Carolina
My Commission Expires: November 16, 2008

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2006

No. 2006 -

MARION ALEXANDER LINDSDEY,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

A P P E N D I X

ROBERT M. DUDEK
Attorney at Law

South Carolina Commission
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Division of Appellate Defense
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ATTORNEY FOR PETITIONER.

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

The State, Respondent,

v.

Marion Alexander Lindsey, Appellant.

Appeal from Spartanburg County
John C. Few, Circuit Court Judge

Opinion No. 26268
Heard January 17, 2007 – Filed February 20, 2007

AFFIRMED

Deputy Chief Attorney for Capital Appeals Robert M. Dudek and Appellate Defender Aileen P. Clare, both of South Carolina Commission on Indigent Defense, of Columbia; and Karen Michelle Quimby, of The Brannon Law Firm, of Spartanburg, for appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, of Columbia; and Solicitor Harold W. Gowdy, III, of Spartanburg, for respondent.

JUSTICE MOORE: Appellant killed his estranged wife, Ruby Nell Lindsey (Victim), on September 18, 2002, in the parking lot of the Inman City Police Department. The jury found a statutory aggravator pursuant to S.C. Code Ann. § 16-3-(C)(a)(3) (2003) and appellant was sentenced to death. We affirm.

FACTS

Celeste Nesbitt, a close friend of Victim, was the State's witness-in-chief. On the day of the murder, Celeste gave Victim a ride home from work at about 8:00 p.m. In the car were Celeste's two young daughters, four-year-old Keysha and ten-year-old Kiera, who were in the back seat with Victim—Keysha in a car seat behind the front passenger seat, Kiera in the middle, and Victim behind the driver's seat. Celeste was driving and Celeste's mother was in the front passenger seat. The car was a Mercury sedan with dark tinted rear windows.

Victim was separated from appellant at the time and was staying with her mother. As they neared Victim's mother's house, they saw appellant in his girlfriend's car. Celeste pulled into the yard and turned the car around so appellant was facing them in a head-on direction. Celeste rolled down her window and greeted him. Appellant asked her if she had seen Victim. Because Celeste knew appellant had threatened to kill Victim, she lied and answered that she had not seen her in three days.

Celeste's youngest daughter, Keysha, leaned forward in her car seat and greeted appellant. Appellant then asked who else was in the back seat. Celeste told him Kiera, her older daughter, was lying on the back seat asleep. Because the windows were tinted, appellant asked Celeste to roll down the window so he could see. Celeste answered that the window was broken. When appellant said he would get out to look, Celeste sped off.

Celeste drove to the police department without stopping while Victim dialed 911. When they arrived, Celeste jumped out of the car and urged Victim to get out. Victim was still in the back seat when appellant pulled into the parking lot and ran toward the back of Celeste's car. Celeste saw him pull out a gun and shoot into the car through the rear windshield. She dove for cover as she heard additional shots.

Officer Godfrey was in the police department parking lot when the dispatcher informed him there was a "rolling domestic," meaning a domestic dispute involving a vehicle. He saw the two cars pull into the parking lot, and saw appellant jump out and fire two rounds into Celeste's car. Officer Godfrey took cover and saw two more flashes from a gun. Appellant came around the front of the car and pointed his gun at Officer Godfrey who then fired four rounds at appellant. Appellant was wounded and fell to the ground.

Victim died at the scene. Four bullets from appellant's gun were recovered: three from Victim's head and one from the trunk of Celeste's car.[1] The bullet recovered from the trunk had traveled through the back seat of the car into the trunk. The car had two bullet holes in the rear driver's side window and two in the rear windshield.

Other evidence indicated that during their marriage, appellant struck Victim several times in front of witnesses. In December 2001, he beat her in a restaurant parking lot and left the scene before the responding officer could arrest him. On September 17, 2002, the night before the murder, appellant was arrested on a warrant for criminal domestic violence arising from this incident. He was released on a \$1,000 bond; one of the conditions of bond was that he have no contact with Victim.

ISSUES

1. Was Juror K improperly disqualified?
2. Should the trial judge have dismissed Juror M for misconduct during the jury's

view of the car?

3. Should a directed verdict have been granted on the aggravating circumstance?

4. Is the death sentence in this case disproportional to other death penalty cases?

DISCUSSION

1. Juror disqualification

Appellant claims the trial judge erred in excusing Juror K who was disqualified because of his views regarding the death penalty.

During initial questioning by the court, Juror K was asked if he could impose the death penalty. He answered, "I don't know. I really don't know if I could or not." During subsequent voir dire by defense counsel, the juror gave the following responses.

Q: There are going to be some allegations of domestic abuse in this case. Would that affect your ability to give either side a fair trial?

A: No, sir.

Q: Would that affect your ability – in the penalty phase, would that influence your decision as to whether or not life or death would be appropriate?

A: I don't know, sir.

Q: In other words, and I don't want to put words in your mouth, but as I understand what you are saying is you will be able to listen to both sides in the penalty phase and render what you feel to be the most appropriate penalty whether it be life or whether it be death?

A: Right.

Q: You will be able if you felt death was appropriate, you would be able to impose the death penalty?

A: Yes.

Upon questioning by the solicitor, however, Juror K equivocated.

Q: I noticed in your questions to (*sic*) the Judge, you were hesitant about the death penalty. You just did not know about it?

A: Right.

Q: You know life without parole is an option. He would never get out if he gets life without parole. With death being an option to you, would you ever give death in a case?

A: Most of the time I feel it is a better punishment to be in prison for life. I believe that death is not as big of a punishment as going to prison for life and having to stay in prison for the rest of your life.

Q: You feel life without parole would be a better sentence?

A: Yes, for something that is – I believe that is worse than the death penalty.

Q: So that would be the better option to you between the two?

A: Yeah.

Q: Would that be the option you would give the most cases or all cases?

A: I am not positive. I don't know for sure.

Q: You don't know what you would do?

A: Right, exactly.

Q: Your belief is that life without parole is a more serious punishment than the death penalty?

A: Yes.

Q: That would be the option you would choose?

A: Not necessarily but most likely.

Q: Most likely you would do that?

A: Yes.

Q: So substantially that will be your view concerning the case no matter what the facts would be, that would be your view?

A: Yes.

Defense counsel then re-examined the juror.

Q: . . . just so that everybody understands. You feel when given the choice between which would be worse, life in prison without parole or death, you feel that life is a worse punishment?

Q: I believe so, yes.

A: However, just so that I understand, if you felt death was appropriate in a case, you could give it?

Q: Yes, I could.

The solicitor then followed up with one last question:

Q: If I understood when we were talking or whatever, you wouldn't basically look at the facts of the case, you would look at life without parole being the worse punishment of the two based on your beliefs, is that right, sir?

A: Yes.

The trial judge found that the belief that life in prison was worse than death would substantially impair the juror's ability to follow the law as instructed. He further noted that when asked about giving the death penalty, Juror K "took a very big deep [breath] and exhaled as if he were very uncertain as to whether or not he could do that." The judge concluded "from watching him" and considering his inconsistent responses, that Juror K should be excused.

A prospective juror may be excluded for cause when his or her views on capital punishment would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. *State v. Sapp*, 366 S.C. 283, 621 S.E.2d 883 (2005) (*citing* *Wainwright v. Witt*, 469 U.S. 412, 424 (1985)); *State v. Wood*, 362 S.C. 135, 607 S.E.2d 57 (2004); *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999); S.C. Code Ann. § 16-3-20(E) (2003) (juror may not be excused in a death penalty case unless his beliefs or attitudes against capital punishment would render him unable to return a verdict according to law). When reviewing the trial court's qualification or disqualification of prospective jurors, the responses of the challenged juror must be examined in light of the entire voir dire. *Sapp*, *supra*. The determination whether a juror is qualified to serve in a capital case is within the sole discretion of the trial judge and is not reversible on appeal unless wholly unsupported by the evidence. *Id.* 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. *Id.*; *State v. Green*, 301 S.C. 347, 392 S.E.2d 157 (1990). Deference must be paid to the trial court who sees and hears the juror. *Wainwright*, *supra*.

Juror K's equivocal views regarding the death penalty, his responses favoring a life sentence despite the facts of the case, and his noted hesitation when asked if he could vote for death, are a reasonable basis for the trial judge's conclusion that Juror K's views would substantially impair his ability to act as an impartial juror. Considering the voir dire as a whole, we find the trial judge did not abuse his discretion in excusing this juror.

2. Jury view

During the sentencing phase, over appellant's objection, the trial judge granted the State's request for a jury view of Celeste's car.[2] After the viewing, defense counsel stated an objection that he saw Juror M

using his arm as a dowel or a measurement. He measured both the front driver's seat and the back seat of the automobile I'm assuming to get an idea of the position of the people. . . . What he did was he stuck his arm from the door jam to determine the length from the door jam to the middle of the head rest in the front. He did the same thing in the back. He stuck it, he put his arm, he was attempting to use the length of his arm to estimate distance is what it appeared to me."

The solicitor, on the other hand, stated that he thought the juror was simply testing the tint of the car window.

Appellant moved to have Juror M removed and an alternate juror seated. The trial judge found Juror M had done nothing improper and denied the motion. Appellant contends Juror M should have been dismissed because he conducted his own experiment.

A jury may be allowed to view the scene or pieces of evidence but it is improper for the jury to conduct its own experimentation. Stone v. City of Florence, 203 S.C. 527, 28 S.E.2d 409 (1943). The issue is what constitutes "experimentation" such that it rises to the level of juror misconduct. Jurors will not be presumed guilty of misconduct and acts that are merely incidental to an assessment of the evidence are not improper. *Id.*; see also State v. Buckhalter, 153 S.C. 487, 151 S.E.64 (1930) (not improper experimentation in trial for possessing contraband to allow jury to take liquor into jury room to smell or taste it). However, an attempted re-enactment of the facts at issue will render a juror's conduct improper. See, e.g., State v. Ballew, 83 S.C. 82, 63 S.E. 688 (1909)(jurors attempted to throw a hatchet against the wall of a jail cell to re-enact the prosecutor's description of the crime); Baroody v. Anderson, 195 S.C. 422, 11 S.E.2d 860 (1940) (jury asked the sheriff to drive his car around the curve where the wreck occurred at 35 mph in order to observe it approaching).

We find the trial judge did not abuse his discretion in refusing to dismiss Juror M. See State v. Simmons, 360 S.C. 33, 599 S.E.2d 448 (2004) (within trial judge's discretion to substitute alternate juror). First, it is not clear the juror was actually "taking measurements," as appellant claims, and we will not presume a juror engaged in misconduct. There was no attempted re-enactment of the crime, rather Juror M's actions were merely incidental to an assessment of the evidence. Moreover, photographs in evidence show the car's back seat, where the bullet hole was, where the child's car seat was, and where Victim was sitting. There is no real dispute regarding the measurements of the back seat such that any "measurements" by Juror M would have carried undue weight in jury deliberations.

3. Directed verdict on aggravating circumstance

Appellant moved for a directed verdict on the statutory aggravator provided in § 16-3-20(C)(a) (3) which states:

That the offender by his act of murder knowingly created a great risk of death to

more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person.

Appellant contends that because he shot Victim at close range and no other person was endangered, this aggravator should not apply as a matter of law.

The trial judge should submit a statutory aggravator to the jury if there is any evidence, direct or circumstantial, to support it. State v. Locklair, 341 S.C. 352, 535 S.E.2d 420 (2000). Here, the police department parking lot is clearly a public place and a gun is a weapon hazardous to more than one person. *Id.* (shooting in church parking lot). Further, appellant knew there were other occupants in the car with Victim when he shot multiple times into the confined space of the car's interior—conduct a reasonable person would know presents a great risk of harm to more than one person. Appellant also pointed his gun at Officer Godfrey in the parking lot. This evidence supports the submission of the statutory aggravator to the jury.

4. Proportionality review

Appellant contends the imposition of death in his case is disproportionate to other death penalty cases because his case involves only a single victim and resulted from a domestic dispute. See S.C. Code Ann. § 16-3-25 (2003) (proportionality review).

We find no support for appellant's attempt to reduce this crime to simply "a domestic dispute." Appellant's culpability is not lessened by the fact that the victim was his wife. There is no evidence of any immediate dispute leading up to the murder,[3] much less any provocation on Victim's part. In fact, appellant intentionally violated a court order forbidding contact with Victim.

Further, as discussed above, the evidence supports the submission of the aggravating factor in this case. The legislature has determined that a unanimous verdict on only one aggravating factor is sufficient to support the death penalty. There have been numerous capital cases where the jury found only a single aggravator and death was imposed. See, e.g., State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000) (killing police officer); State v. Rogers, 338 S.C. 435, 527 S.E.2d 101 (2000) (killing child under age of eleven); State v. Huggins, 336 S.C. 200, 519 S.E.2d 574 (1999) (armed robbery); Ray v. State, 330 S.C. 184, 498 S.E.2d 640 (1998) (kidnapping); State v. Atkins, 303 S.C. 214, 399 S.E.2d 760 (1990) (prior murder conviction). We find appellant's disproportionality argument without merit.

We have reviewed the record and conclude the imposition of death in this case was not the result of passion, prejudice, or any other arbitrary factor, nor is it excessive or disproportionate to the penalty imposed in other cases. The judgment of the circuit court is

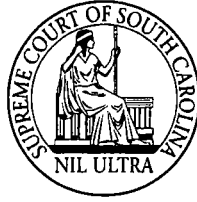
AFFIRMED.

TOAL, C.J., WALLER, BURNETT and PLEICONES, JJ., concur.

[1] Five shell casings were found but the fifth bullet was not recovered. A paramedic testified for the defense that when he arrived on the scene to transport appellant to the hospital, appellant said he had shot himself in the head.

[2] Appellant objected that seeing the car would be unfairly prejudicial because instead of focusing on the "spatial relationships" in the car, the jury would be affected by the fact that Victim had been killed there.

[3] Appellant's mother testified generally in the sentencing phase that appellant was upset he was not allowed to see his children.



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

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April 4, 2007

Deputy Chief Attorney for Capital Appeals Robert M. Dudek
South Carolina Commission on Indigent Defense
P O Box 11589
Columbia, SC 29211

Re: The State v. Lindsey, Marion Alexander

Dear Counsel:

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

“Petition for Rehearing is denied.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ E.C. Burnett, III J.

s/ Costa M. Pleicones J.

April 4, 2007.”

The remittitur is today being forwarded to the lower court.

Deputy Chief Attorney for Capital Appeals
Robert M. Dudek
Page Two
April 4, 2007

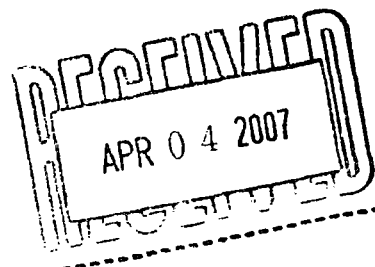
Very truly yours,



CLERK

DES/dmh

cc: Assistant Deputy Attorney General Donald J. Zelenka
The Honorable Harold W. Gowdy



§ 16-3-20. Punishment for murder: separate sentencing proceeding to determine whether sentence should be death or life imprisonment.

(A) A person who is convicted of or pleads guilty to murder must be punished by death, by imprisonment for life, or by a mandatory minimum term of imprisonment for thirty years. If the State seeks the death penalty and a statutory aggravating circumstance is found beyond a reasonable doubt pursuant to subsections (B) and (C), and a recommendation of death is not made, the trial judge must impose a sentence of life imprisonment. For purposes of this section, "life imprisonment" means until death of the offender. No person sentenced to life imprisonment pursuant to this section is eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory life imprisonment required by this section. No person sentenced to a mandatory minimum term of imprisonment for thirty years pursuant to this section is eligible for parole or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory minimum term of imprisonment for thirty years required by this section. Under no circumstances may a female who is pregnant be executed so long as she is pregnant or for a period of at least nine months after she is no longer pregnant. When the Governor commutes a sentence of death to life imprisonment under the provisions of Section 14 of Article IV of the Constitution of South Carolina, 1895, the commuttee is not eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, good conduct credits, education credits, or any other credits that would reduce the mandatory imprisonment required by this subsection.

(B) When the State seeks the death penalty, upon conviction or adjudication of guilt of a defendant of murder, the court shall conduct a separate sentencing proceeding. In the proceeding, if a statutory aggravating circumstance is found, the defendant must be sentenced to either death or life imprisonment. If no statutory aggravating circumstance is found, the defendant must be sentenced to either life imprisonment or a mandatory minimum term of imprisonment for thirty years. The proceeding must be conducted by the trial judge before the trial jury as soon as practicable after the lapse of twenty-four hours unless waived by the defendant. If trial by jury has been waived by the defendant and the State, or if the defendant pleaded guilty, the sentencing proceeding must be conducted before the judge. In the sentencing proceeding, the jury or judge shall hear additional evidence in extenuation, mitigation, or aggravation of the punishment. Only such evidence in aggravation as the State has informed the defendant in writing before the trial is admissible. This section must not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the State of South Carolina or the applicable laws of either. The State, the defendant, and his counsel are permitted to present arguments for or against the sentence to be imposed. The defendant and his counsel shall have the closing argument regarding the sentence to be imposed.

(C) The judge shall consider, or he shall include in his instructions to the jury for it to consider, mitigating circumstances otherwise authorized or allowed by law and the following statutory aggravating and mitigating circumstances which may be supported by the evidence:

(a) Statutory aggravating circumstances:

(1) The murder was committed while in the commission of the following crimes or acts:

- (a) criminal sexual conduct in any degree;
 - (b) kidnapping;
 - (c) burglary in any degree;
 - (d) robbery while armed with a deadly weapon;
 - (e) larceny with use of a deadly weapon;
 - (f) killing by poison;
 - (g) drug trafficking as defined in Section 44-53-370(e), 44-53-375(B), 44-53-440, or 44-53-445;
 - (h) physical torture; or
 - (i) dismemberment of a person.
- (2) The murder was committed by a person with a prior conviction for murder.
- (3) The offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person.
- (4) The offender committed the murder for himself or another for the purpose of receiving money or a thing of monetary value.
- (5) The murder of a judicial officer, former judicial officer, solicitor, former solicitor, or other officer of the court during or because of the exercise of his official duty.
- (6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.
- (7) The murder of a federal, state, or local law enforcement officer, peace officer or former peace officer, corrections employee or former corrections employee, or fireman or former fireman during or because of the performance of his official duties.
- (8) The murder of a family member of an official listed in subitems (5) and (7) above with the intent to impede or retaliate against the official. "Family member" means a spouse, parent, brother, sister, child, or person to whom the official stands in the place of a parent or a person living in the official's household and related to him by blood or marriage.
- (9) Two or more persons were murdered by the defendant by one act or pursuant to one scheme or course of conduct.
- (10) The murder of a child eleven years of age or under.
- (11) The murder of a witness or potential witness committed at any time during the criminal process for the purpose of impeding or deterring prosecution of any crime.
- (b) Mitigating circumstances:
- (1) The defendant has no significant history of prior criminal conviction involving the use of violence against another person.
 - (2) The murder was committed while the defendant was under the influence of mental or emotional disturbance.
 - (3) The victim was a participant in the defendant's conduct or consented to the act.
 - (4) The defendant was an accomplice in the murder committed by another person and his participation was relatively minor.

- (5) The defendant acted under duress or under the domination of another person.
- (6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
- (7) The age or mentality of the defendant at the time of the crime.
- (8) The defendant was provoked by the victim into committing the murder.
- (9) The defendant was below the age of eighteen at the time of the crime.
- (10) The defendant had mental retardation at the time of the crime. "Mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.

The statutory instructions as to statutory aggravating and mitigating circumstances must be given in charge and in writing to the jury for its deliberation. The jury, if its verdict is a recommendation of death, shall designate in writing, and signed by all members of the jury, the statutory aggravating circumstance or circumstances which it found beyond a reasonable doubt. The jury, if it does not recommend death, after finding a statutory aggravating circumstance or circumstances beyond a reasonable doubt, shall designate in writing, and signed by all members of the jury, the statutory aggravating circumstance or circumstances it found beyond a reasonable doubt. In nonjury cases, the judge shall make the designation of the statutory aggravating circumstance or circumstances. Unless at least one of the statutory aggravating circumstances enumerated in this section is found, the death penalty must not be imposed.

Where a statutory aggravating circumstance is found and a recommendation of death is made, the trial judge shall sentence the defendant to death. The trial judge, before imposing the death penalty, shall find as an affirmative fact that the death penalty was warranted under the evidence of the case and was not a result of prejudice, passion, or any other arbitrary factor. Where a statutory aggravating circumstance is found and a sentence of death is not recommended by the jury, the trial judge shall sentence the defendant to life imprisonment as provided in subsection (A). Before dismissing the jury, the trial judge shall question the jury as to whether or not it found a statutory aggravating circumstance or circumstances beyond a reasonable doubt. If the jury does not unanimously find any statutory aggravating circumstances or circumstances beyond a reasonable doubt, it shall not make a sentencing recommendation. Where a statutory aggravating circumstance is not found, the trial judge shall sentence the defendant to either life imprisonment or a mandatory minimum term of imprisonment for thirty years. No person sentenced to life imprisonment or a mandatory minimum term of imprisonment for thirty years under this section is eligible for parole or to receive any work credits, good conduct credits, education credits, or any other credits that would reduce the sentence required by this section. If the jury has found a statutory aggravating circumstance or circumstances beyond a reasonable doubt, the jury shall designate this finding, in writing, signed by all the members of the jury. The jury shall not recommend the death penalty if the vote for such penalty is not unanimous as provided. If members of the jury after a reasonable deliberation cannot agree on a recommendation as to whether or not the death sentence should be imposed on a defendant found guilty of murder, the trial judge shall dismiss such jury and shall sentence the defendant to life imprisonment as provided in subsection (A).

OFFENSES AGAINST THE PERSON,

§ 16-3-20

(D) Notwithstanding the provisions of Section 14-7-1020, in cases involving capital punishment a person called as a juror must be examined by the attorney for the defense.

(E) In a criminal action in which a defendant is charged with a crime which may be punishable by death, a person may not be disqualified, excused, or excluded from service as a juror by reason of his beliefs or attitudes against capital punishment unless such beliefs or attitudes would render him unable to return a verdict according to law.

ATTORNEY GENERAL'S OPINIONS

South Carolina's mandatory death penalty for murder in specified circumstances is unconstitutional in light of recent Supreme Court decisions. 1975-76 Op Atty Gen, No 4388, p 224.

§ 16-3-25. Punishment for murder: review by Supreme Court of imposition of death penalty.

(A) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of South Carolina. The clerk of the trial court, within ten days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court of South Carolina together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Supreme Court of South Carolina. •

(B) The Supreme Court of South Carolina shall consider the punishment as well as any errors by way of appeal.

(C) With regard to the sentence, the court shall determine:

- (1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and
- (2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in § 16-3-20, and
- (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(D) Both the defendant and the State shall have the right to submit briefs within the time provided by the court and to present oral arguments to the court.

(E) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

- (1) Affirm the sentence of death; or
- (2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the Supreme Court of South Carolina in

its decision, and the extracts prepared as hereinafter provided for, shall be provided to the resentencing judge for his consideration. If the court finds error prejudicial to the defendant in the sentencing proceeding conducted by the trial judge before the trial jury as outlined under Item (B) of § 16-3-20, the court may set the sentence aside and remand the case for a resentencing proceeding to be conducted by the same or a different trial judge and by a new jury impaneled for such purpose. In the resentencing proceeding, the new jury, if the defendant does not waive the right of a trial jury for the resentencing proceeding, shall hear evidence in extenuation, mitigation or aggravation of the punishment in addition to any evidence admitted in the defendant's first trial relating to guilt for the particular crime for which the defendant has been found guilty.

(F) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on all legal errors, the factual substantiation of the verdict, and the validity of the sentence.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2006

RECEIVED

JUN 29 2007

No. 06 - _____

S.C. SUPREME COURT

MARION ALEXANDER LINDSEY,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

AFFIDAVIT OF MARION ALEXANDER LINDSEY
IN SUPPORT OF MOTION TO
PROCEED IN FORMA PAUPERIS

I, Marion Alexander Lindsey, being duly sworn, state that I am the petitioner in this case; that because of my poverty I am unable to pay the costs of or give security for this proceeding; that I believe I am entitled to redress.

The responses to the questions and instructions below relating to my ability to pay costs or give security are true.

1. Are you presently employed? *NO*

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

- b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

1/29/02 7.00 hr \$1000.00 month

2. Have you received within the past twelve months any income from a business, progression or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources?

NO

- a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? NO

- a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? NO

- a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

My children - Alex 10, Trevia 6

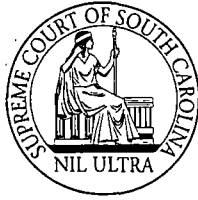
I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Marion A. Lindsey
MARION ALEXANDER LINDSEY

SWORN to and subscribed before me
this 27 day of march, 2007.

Royale W. Soy (L.S.)
Notary Public for South Carolina

My Commission Expires: 5 April 07



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

May 3, 2007

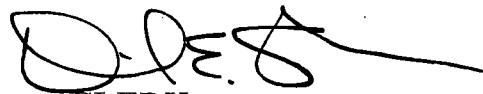
Deputy Chief Attorney for Capital Appeals Robert M. Dudek
South Carolina Commission on Indigent Defense
P O Box 11589
Columbia, SC 29211

Re: The State v. Lindsey, Marion Alexander

Dear Counsel:

Enclosed is the order issued in the above entitled matter.

Very truly yours,


CLERK

DES/dmh

Enclosure

cc: Assistant Deputy Attorney General Donald J. Zelenka
The Honorable Harold W. Gowdy, III

The Supreme Court of South Carolina

The State,

Respondent,

v.

Marion Alexander Lindsey,

Appellant.

ORDER

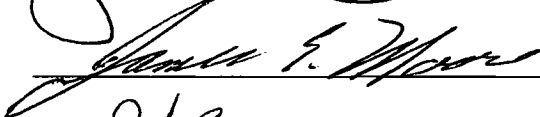
Petitioner was convicted of murder and sentenced to death. This Court affirmed petitioner's death sentence. State v. Lindsey, Op. No. 26268 (S.C. Sup. Ct. filed February 20, 2007). On April 4, 2007, the petition for rehearing was denied and the remittitur was sent to the lower court. A notice of execution has not been issued.

Petitioner now requests a ninety day stay of execution, from the date rehearing was denied and the remittitur sent, in which to file a petition for a writ of certiorari in the United States Supreme Court. The State has filed a return in which it states it does not oppose the request for a stay pursuant to In re Stays of Execution in Capital Cases, 321 S.C. 544, 471 S.E.2d 140 (1996) because a review of the record reveals at least one of the issues petitioner intends to raise in his petition for a writ of certiorari is

preserved.

Because petitioner intends to raise to the United States Supreme Court a federal question that is preserved for review, we grant the petition for a stay of execution pursuant to In re Stays of Execution in Capital Cases, supra, and the stay shall remain in effect to the extent provided by this Court therein.

IT IS SO ORDERED.

 C. J.
 J.
 J.
 J.

John H. Waller, Jr., J., not participating

Columbia, South Carolina

May 3, 2007

HENRY McMASTER
ATTORNEY GENERAL



April 12, 2007

RECEIVED
APR 12 2007
S.C. SUPREME COURT

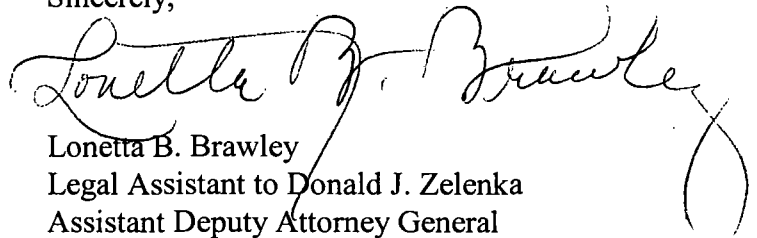
Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P.O. Box 11330
Columbia, SC 29211

Re: The State v. Marion Alexander Lindsey

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Respondent's *Return to Petition for Stay of Execution Pending Filing of a Petition for Certiorari to the United States Supreme Court* in the above-referenced matter for filing. By copy of this letter I am serving opposing counsel with same.

Sincerely,


Lonetta B. Brawley
Legal Assistant to Donald J. Zelenka
Assistant Deputy Attorney General

/lbb
Enclosure

cc: Robert M. Dudek, Esquire
Sandi Wofford, Victims Assistance

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Spartanburg County
John C. Few, Circuit Court Judge

RECEIVED

APR 12 2007

S.C. SUPREME COURT

THE STATE,

Respondent,

V.

MARION ALEXANDER LINDSEY,

Petitioner.

Return to Petition For Stay of Execution
Pending Filing of a Petition for Certiorari to the United States Supreme Court

The Respondent, through undersigned counsel, hereby make a Return to the Petition for a Stay of Execution received on April 10, 2007 to allow him to file a petition for writ of certiorari in the United States Supreme Court. The Court entered its opinion on February 20, 2007 in State v. Lindsey, Op. No. 26268 (SCSCT. February 20, 2007). Rehearing was denied on April 4, 2007. Certiorari in the United States Supreme Court, according to Respondent's calculation would be due to be filed on July 3, 2007. Respondents do not oppose the stay request pursuant to the mandates of this Court in In Re Stays of Execution In Capital Cases, 321 S.C. 544, 471 S.E.2d 140 (1996) for ninety days from the entry of the denial of rehearing to allow the filing of certiorari and/or until certiorari is acted upon should the petition be timely filed. Respondents will show this Court the following reasons:

I.

The Petitioner asserts that he intends to file a petition for a writ of certiorari in the United States Supreme Court. Pursuant to the Rules of the United States Supreme Court, Rule 13, review must be sought within ninety (90) days of the denial of the Petition for Rehearing on April 4, 2007. This Court in its Order concerning capital cases, *In Re Stays of Execution In Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996), stated that the Court will issue a stay in the direct appeal setting for filing certiorari, if the Petitioner files a stay motion setting forth the questions and "as long as the federal questions asserted have been adequately preserved under state law so that it can be reviewed by the United States Supreme Court", this Court will grant a stay of execution for ninety (90) days from the date of the remittitur.

In his motion before this Court, Marion Lindsey contends that he will pursue the following matters on certiorari:

1.

Whether the South Carolina Supreme Court erred by holding it was not error to excuse potential Juror Krisher for cause by ruling that Krisher's belief that life imprisonment without parole was a more substantial punishment than the death penalty made him ineligible to serve as a juror under Wainwright v. Witt, 469 U.S. 412 (1985), since this belief did not make the juror "death ineligible" under Witt?

2.

Whether the South Carolina Supreme Court erred by holding it was not error to refuse to direct a verdict on the "great risk of death" aggravator where petitioner shot his wife at close range and there was no evidence petitioner knowingly created a risk of death to more than one person since the court's ruling on this sole circumstance in this case makes this aggravating circumstance so broad that it fails to narrow the cases eligible for the death penalty as mandated under Gregg v. Georgia, 428 U.S. 153 (1976), and makes the imposition of the death penalty freakish?

3.

Whether petitioner's death sentence violates the Eighth Amendment to the United States Constitution since it is both excessive and disproportionate where the emotional shooting stemmed from a domestic dispute pertaining to child visitation between a husband and a wife and no death sentence has been imposed in the modern era under similar circumstances?

Motion, p. 2-3. A review of the record before this Court reveals at least one of the issues; issue three above, was preserved on appeal.

II.

Therefore, under *In Re Stays*, Respondent concedes the stay is appropriate, although there is no likelihood of success on the merits on certiorari for the reasons set forth in this Court's Opinion.

WHEREFORE, Respondent has made a Return to the Motion to Stay.

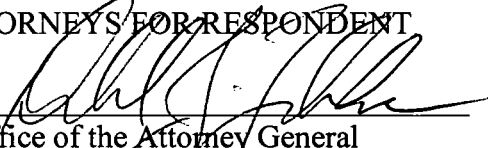
Respectfully submitted,

HENRY D. McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

ATTORNEYS FOR RESPONDENT

By: 
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
Telephone: (803) 734-6305

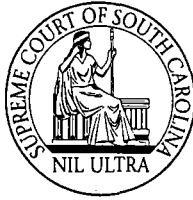
Columbia, South Carolina
April 12, 2007

CERTIFICATE OF SERVICE

I, **Donald J. Zelenka**, hereby certify that I have served two (2) copies of the ***Return to Petition for Stay of Execution*** in the foregoing action upon Robert M. Dudek, Deputy Chief Attorney for Capital Appeals by depositing said copies in Interagency Mail this 12th day of April, 2007.



DONALD J. ZELENKA



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

April 4, 2007

REMITTITUR

The Honorable Marcus W. Kitchens
Clerk of Court, Spartanburg County
180 Magnolia Street
PO Box 3483
Spartanburg, SC 29304-3483

Re: The State v. Lindsey, Marion Alexander
2002-GS-42-04753

Dear Mr. Kitchens:

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

Very truly yours,



CLERK

DES/dmh

Enclosure

cc: Deputy Chief Attorney for Capital Appeals Robert M. Dudek
Assistant Deputy Attorney General Donald J. Zelenka
The Honorable Harold W. Gowdy, III



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

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

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

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

April 9, 2007

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

RECEIVED

APR 9 2007

S.C. SUPREME COURT

Re: The State v. Marion Alexander Lindsey

Dear Mr. Shearouse:

Enclosed please find an original and six copies of the petition for stay of execution along with a certificate of service.

Sincerely,

Robert M. Dudek
Deputy Chief Attorney for Capital Appeals

RMD/mwl

Enclosure

cc: Donald J. Zelenka, Esquire
Marion Alexander Lindsey

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Spartanburg County
John C. Few, Circuit Court Judge

RECEIVED

APR 9 2007

S.C. SUPREME COURT

THE STATE,

RESPONDENT,

V.

MARION ALEXANDER LINDSEY,

PETITIONER

PETITION FOR STAY OF EXECUTION

Counsel for Marion Alexander Lindsey petitions this Court for a stay of execution to allow him to file a petition for writ of certiorari with the United States Supreme Court. This Court denied rehearing on April 4, 2007.

I.

This Court affirmed petitioner's conviction and death sentence in State v. Marion Alexander Lindsey, Opinion No. 26268 (filed February 20, 2007); 2007 WL 522301 (S.C.).

II.

A petition for rehearing was filed on March 13, 2007. As stated, this Court denied rehearing on April 4, 2007.

III.

A petition for writ of certiorari to the United States Supreme Court is now petitioner's proper avenue for relief from the judgment of this Court affirming his murder conviction, and sentence of death. Supreme Court Rule 13.1. Pursuant to *In re STAYS OF EXECUTION IN CAPITAL CASES*, 321 S.C. 544, 471 S.E.2d 544 (1996), this Court is the proper Court to issue the stay pending the disposition of petitioner's case in the United States Supreme Court.

IV.

Petitioner can raise the following federal issues, preliminarily framed, in the United States Supreme Court:

1 .

Whether the South Carolina Supreme Court erred by holding it was not error for the trial court to excuse potential Juror Krisher for cause by ruling that Krisher's belief that life imprisonment without parole was a more substantial punishment than the death penalty made him ineligible to serve as juror under Wainwright v. Witt, 469 U.S. 412 (1985), since this belief did not make the juror "death ineligible" under Witt?

3.

Whether the South Carolina Supreme Court erred by holding it was not error for the trial court to refuse to direct a verdict on the "great risk of death" aggravator where petitioner shot his wife at close range and there was no evidence petitioner knowingly created a risk of death to more than one person since the Court's ruling on this sole aggravating circumstance in this case makes this aggravating circumstance so broad that it fails to narrow the cases eligible for the death penalty

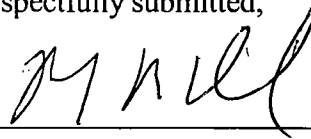
as mandated by the Gregg v. Georgia, 428 U.S. 153 (1976), and makes the imposition of the death penalty freakish?

3

Whether petitioner's death sentence violates the Eighth Amendment to the United States Constitution since it is both excessive and disproportionate where the emotional shooting stemmed from a domestic dispute over child visitation between a husband and a wife and no death sentence has been imposed in the modern era under similar circumstances?

WHEREFORE, counsel for Marion Lindsey Alexander requests a ninety day stay of execution from April 4, 2007, in which to file a petition for writ of certiorari in the United States Supreme Court.

Respectfully submitted,



Robert M. Dudek
Deputy Chief Attorney for Capital Appeals

April 6, 2007

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Spartanburg County
John C. Few, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MARION ALEXANDER LINDSEY,

PETITIONER

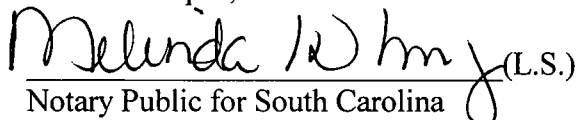
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Stay of Execution in the above referenced case has been served upon opposing counsel, Donald J. Zelenka, Esquire, this 9th day of April , 2007.



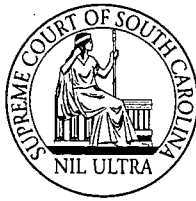
ROBERT M. DUDEK
Attorney for Petitioner

SUBSCRIBED AND SWORN TO before me
this 9th of April, 2007.



(L.S.)

Notary Public for South Carolina
My Commission Expires: November 16, 2008.



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

April 4, 2007

Deputy Chief Attorney for Capital Appeals Robert M. Dudek
South Carolina Commission on Indigent Defense
P O Box 11589
Columbia, SC 29211

Re: The State v. Lindsey, Marion Alexander

Dear Counsel:

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

“Petition for Rehearing is denied.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ E.C. Burnett, III J.

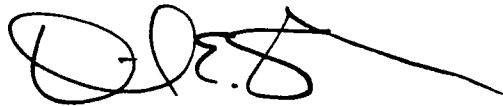
s/ Costa M. Pleicones J.

April 4, 2007.”

The remittitur is today being forwarded to the lower court.

Deputy Chief Attorney for Capital Appeals
Robert M. Dudek
Page Two
April 4, 2007

Very truly yours,

A handwritten signature in black ink, appearing to be "R. M. Dudek", with a long horizontal flourish extending to the right.

CLERK

DES/dmh

cc: Assistant Deputy Attorney General Donald J. Zelenka
The Honorable Harold W. Gowdy

ORIGINAL
RECEIVED

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

MAR 13 2007

S.C. SUPREME COURT

THE STATE,

RESPONDENT,

V.

MARION ALEXANDER LINDSEY,

PETITIONER

Appeal from Spartanburg County

John C. Few, Circuit Court Judge

Opinion No. 26268

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, petitioner requests rehearing because this Court may have overlooked the fact that its reliance on State v. Locklair, 341 S.C. 352, 535 S.E.2d 420 (2000), to support upholding the trial judge's ruling denying the directed verdict motion on the statutory aggravating circumstance provided in S.C. Code §16-3-20(C)(a)(3) misapprehends the major differences in fact between this case and Locklair. In Locklair the defendant shot the victim – his estranged girlfriend -- and then was tackled after he fired the first shot. However, Locklair fired two more times before the men fell to the ground. The gun fired an additional round before jamming. In Locklair this Court found that Locklair said "leave me the F***alone, I got to do this." All this was

after Locklair shot his estranged girlfriend, and several children still remained within firing range while in the street.

This Court further wrote that Locklair pointed the gun at the house where children were inside and attempted to fire, but the gun jammed. This Court also stressed that shots were fired in different directions during the struggle with Locklair. Moreover, this Court noted in Locklair -- when ruling that a gun could be a type of weapon “normally hazardous to the lives of more than one person” -- that other jurisdictions had held that a gun fired in the direction of two or more people satisfies the statutory aggravator. State v. Locklair, 535 S.E.2d at 428, n.4.

Here, conversely, the evidence showed there was a recent yet ongoing child visitation matter between petitioner and his wife. Petitioner and his wife had separated previously, but this was the first time petitioner was not allowed to see his children. Petitioner shot his wife at close range, and unlike this Court’s finding in Locklair there was *no evidence* petitioner meant to endanger anyone else, shot in several directions, wrestled over a loaded gun, or evidenced by words and/or action intent to do indiscriminate harm.

The only evidence in this case shows petitioner’s actions were directed solely towards his wife. If petitioner shot his estranged wife through the window at a distance on private property rather than at close range in a parking lot this is not a death penalty case.

Further, the opinion in this case references “a shooting in church parking lot” when discussing the facts of Locklair. However, the shooting in Locklair occurred in the front yard of the decedent girlfriend’s parent’s mill village house, and apparently in a public street. Counsel’s memory is that the church parking lot shooting actually involved the prior shooting of the victim’s husband. That prior shooting of the victim’s husband implicated the prior murder conviction

aggravator in the subsequent capital case. The prior victim's husband shooting in the church parking lot was a non-capital murder case which ended in a sentence of life imprisonment. See State v. Locklair, 535 S.E.2d at 428

Respectfully, applying the aggravating circumstance contained in S.C. Code § 16-3-20(C)(a)(3) to a husband-wife child visitation close range shooting clearly aimed at only the spouse - - and the spouse only - - does not "rationally narrow the class" of death-eligible defendants. It is a stretch of the aggravating circumstance to the breaking point and allows the imposition of the death penalty simply because the domestic dispute shooting occurred in a parking lot rather than on private property. See Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183 (2005) (capital punishment must be limited to those offenders who commit narrow category of most serious crimes and whose extreme culpability makes them most deserving of execution).

Respectfully, this Court has not - in this case -- provided a narrow and precise application of the statutory aggravator contained in S.C. Code § 16-3-20(C)(a)(3) that rationally narrows the class of death-eligible defendants. See Kansas v. Marsh, ___ U.S. ___, 126 S.Ct. 2516 (2006); Roper v. Simmons, *supra*. It is a forced construction. Imposition of the death penalty for a close range shooting in a simple child visitation matter -where emotions between the estranged spouses ran high -- allows the imposition of capital punishment in a freakish and arbitrary manner. See Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853 (1988); Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759 (1980).

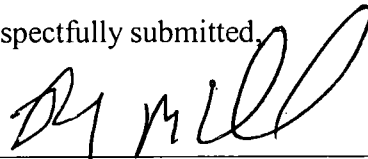
Further, this Court appears to have overlooked the fact that petitioner's main attack on the death penalty in this case was *not* that it was a one aggravating circumstance case, but that it was a one aggravating circumstance *domestic child visitation dispute* case that rationally does not rise to

the imposition of the death penalty.

Petitioner would finally note that this Court has never held the death penalty disproportionate when doing its mandatory review pursuant to S.C. Code § 16-3-25.¹ Yet, that proportionately review is a factor considered by the United States Supreme Court when deciding if the death penalty is being applied in an arbitrary or freakish manner by a state. See Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909 (1976).

Respectfully, allowing the imposition of the death penalty in what was an emotional child visitation dispute between a husband and wife does not allow for the imposition of capital punishment in a rational manner upon those offenders most deserving of that ultimate punishment. It is, conversely, an arbitrary and freakish application of the death penalty. Petitioner requests rehearing.

Respectfully submitted,



Robert M. Dudek
Deputy Chief Attorney for Capital Appeals

This 13th day of March, 2007.

¹ The unconstitutionality of the execution of minors and the mentally retarded was decided by the United States Supreme Court. See Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242 (2002); Roper v. Simmons, *supra*.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Spartanburg County
John C. Few, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MARION ALEXANDER LINDSEY, . .

PETITIONER

CERTIFICATE OF SERVICE

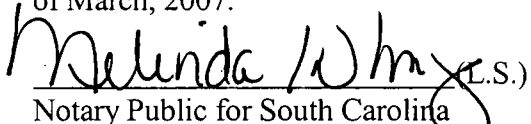
The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Donald J. Zelenka, Esquire, this 13th day of March, 2007.



Robert M. Dudek
Deputy Chief Attorney for Capital Appeals

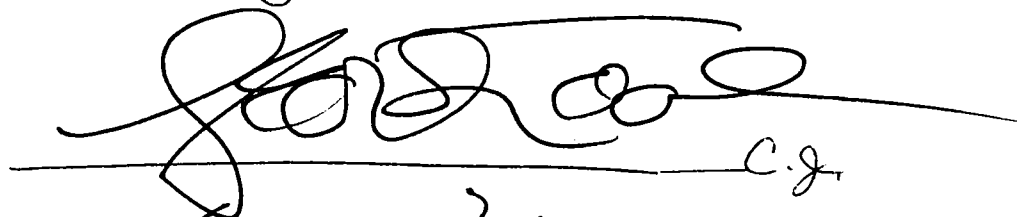
ATTORNEY FOR APPELLANT

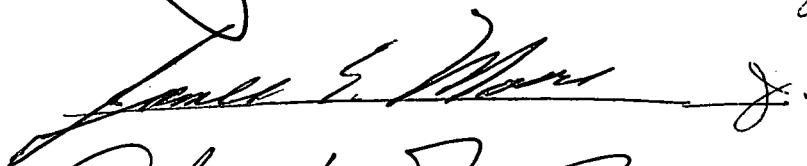
SWORN TO BEFORE ME this 13th day
of March, 2007.

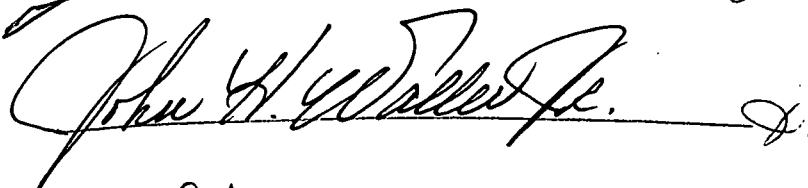
 (L.S.)
Notary Public for South Carolina

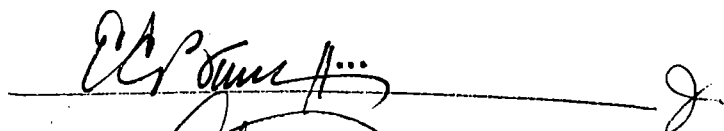
My Commission Expires: November 16, 2008.

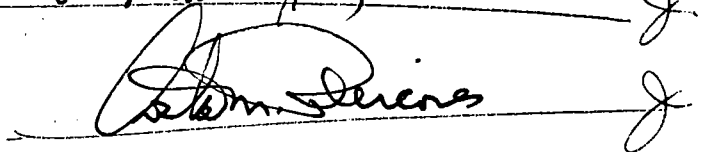
Petition for rehearing is denied.

 C. J.

 J.

 J.

 J.

 J.

April 4, 2007



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

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

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

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

March 13, 2007

RECEIVED

MAR 13 2007

S.C. SUPREME COURT

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

Re: The State v. Marion Alexander Lindsey (Capital Case)

Dear Mr. Shearouse:

Enclosed are the original and six copies of the petition for rehearing that I am filing today in the above-referenced case. Please contact me if you have any questions.

Sincerely,

Robert M. Dudek
Deputy Chief Attorney for Capital Appeals

RMD/mwl

Enclosure

cc: Donald J. Zelenka, Esquire



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

March 9, 2007

Deputy Chief Attorney for Capital Appeals Robert M. Dudek
South Carolina Commission on Indigent Defense
P O Box 11589
Columbia, SC 29211

Re: The State v. Lindsey, Marion Alexander

Dear Counsel:

The following Order has been endorsed on your Request for an Extension of Time to Serve and File the Petition for Rehearing in the above entitled case on appeal.

“Granted.

s/ James E. Moore J.
For the Court

March 9, 2007.”

Please be advised that the Petition for Rehearing should be served and filed on or before March 14, 2007.

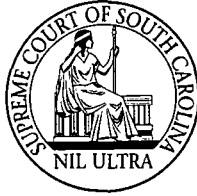
Very truly yours,



CLERK

DES/dmh

cc: Assistant Deputy Attorney General Donald J. Zelenka



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

March 8, 2007

Deputy Chief Attorney for Capital Appeals Robert M. Dudek
Appellate Defender Aileen P. Clare
South Carolina Commission
on Indigent Defense
P O Box 11589
Columbia, SC 29211

Re: The State v. Lindsey, Marion Alexander

Dear Counsel:

Enclosed is correspondence received from your client. Since he indicates he is apparently trying to obtain a copy of his client file to assist with this appeal, I am forwarding his correspondence to your office for any assistance that you can provide. Jones v. State, 348 S.C. 13, 558 S.E.2d 517 (2002); State v. Stuckey, 333 S.C. 56, 508 S.E.2d 564 (1998); Foster v. State, 298 S.C. 306, 379 S.E.2d 907 (1989).

I am also providing Clay T. Allen, Esquire, with a copy of the correspondence.

Very truly yours,



CLERK

Enclosure

cc: Clay T. Allen, Esquire (with copy of letter)
Karen M. Quimby, Esquire
Mr. Marion Alexander Lindsey, #6015
Assistant Deputy Attorney General Donald J. Zelenka



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

ORIGINAL

Division of Appellate Defense
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Wanda H. Carter, Deputy Chief Attorney

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

March 6, 2007

RECEIVED

MAR - 6 2007

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

S.C. SUPREME COURT

Re: The State v. Marion Alexander Lindsey (capital case)

Dear Mr. Shearouse:

The petition for rehearing in the above captioned case is due to be served and filed today. Unfortunately, due to my heavy caseload, I was not able to complete this petition for rehearing for service. For this reason, I respectfully request an extension of seven days in which to file this petition for rehearing.

By copy of this letter, I am informing Donald J. Zelenka, Esquire, of the Attorney General's Office, of this request. Thank you for your consideration in this matter.

Sincerely,

Robert M. Dudek
Assistant Appellate Defender

RMD/lec

cc: Donald J. Zelenka, Esquire

GRANTED.

FOR THE COURT

March 9, 2007

RECEIVED

MAR 06 2007

Dear your Honorable Judges OF THE
S.C. SUPREME COURT
Supreme Court, This is Mr. Marion A.
Lindsey. I'm writting to ask the
Courts to please send a order to
Mr. Clay T. Allen. My chief Public
Defender. Who represented me in my
trial. IN 2004. I wrote Mr. Allen asking
for my file, OR a copy of everything in
my file. Mr. Allen told me no. He's been
advised to not give me my file. If
I'm not mistaken. The South Carolina
State Law says I'm entitle to have
my file, OR a copy of my file. And if
anything is missing. That's breaking
the law. I would greatly appreciate
if you wrote Mr. Allen. And let him
know he is obligated by the State Law
to turn my file over to me. OR a copy
of everything in my file. I'm also filing
a complaint with the South Bar Association.
On Mr. Clay T. Allen. For with-holding my
file from me. I have every right to view
my file. For I can assist my Attorney in
my Appeals. Sincerly. Thank You Mr. Marion A.
Please answer me back?

Lindsey
3/2/07

Address: Mr. Marion A. Lindsey, SH #6015

Lieber Correctional Inst.

Death Row

P.O. Box 205 Ridgeville, S.C.

SS # 247-51-7558

29472-0205, A-wing-236

Dob-10-18-73

Trial IN: Spartanburg County Courts - 2004

Chief Public Defender Office

Mr. Clay T. Allen

258 North Church Street

Spartanburg, S.C. 29306

Phone: (864) 596-2561

Fax: (864) 596-2284

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State,

Respondent,

v.

Marion Alexander Lindsey,

Appellant.

Appeal from Spartanburg County
John C. Few, Circuit Court Judge

Opinion No. 26268
Heard January 17, 2007 – Filed February 20, 2007

AFFIRMED

Deputy Chief Attorney for Capital Appeals Robert M. Dudek and Appellate Defender Aileen P. Clare, both of South Carolina Commission on Indigent Defense, of Columbia; and Karen Michelle Quimby, of The Brannon Law Firm, of Spartanburg, for appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, of Columbia; and Solicitor Harold W. Gowdy, III, of Spartanburg, for respondent.

JUSTICE MOORE: Appellant killed his estranged wife, Ruby Nell Lindsey (Victim), on September 18, 2002, in the parking lot of the Inman City Police Department. The jury found a statutory aggravator pursuant to S.C. Code Ann. § 16-3-(C)(a)(3) (2003) and appellant was sentenced to death. We affirm.

FACTS

Celeste Nesbitt, a close friend of Victim, was the State's witness-in-chief. On the day of the murder, Celeste gave Victim a ride home from work at about 8:00 p.m. In the car were Celeste's two young daughters, four-year-old Keysha and ten-year-old Kiera, who were in the back seat with Victim—Keysha in a car seat behind the front passenger seat, Kiera in the middle, and Victim behind the driver's seat. Celeste was driving and Celeste's mother was in the front passenger seat. The car was a Mercury sedan with dark tinted rear windows.

Victim was separated from appellant at the time and was staying with her mother. As they neared Victim's mother's house, they saw appellant in his girlfriend's car. Celeste pulled into the yard and turned the car around so appellant was facing them in a head-on direction. Celeste rolled down her window and greeted him. Appellant asked her if she had seen Victim. Because Celeste knew appellant had threatened to kill Victim, she lied and answered that she had not seen her in three days.

Celeste's youngest daughter, Keysha, leaned forward in her car seat and greeted appellant. Appellant then asked who else was in the back seat. Celeste told him Kiera, her older daughter, was lying on the back seat asleep. Because the windows were tinted, appellant asked Celeste to roll down the window so he could see. Celeste answered that the window was broken. When appellant said he would get out to look, Celeste sped off.

Celeste drove to the police department without stopping while Victim dialed 911. When they arrived, Celeste jumped out of the car and urged Victim to get out. Victim was still in the back seat when appellant pulled into the parking lot and ran toward the back of Celeste's car. Celeste saw

him pull out a gun and shoot into the car through the rear windshield. She dove for cover as she heard additional shots.

Officer Godfrey was in the police department parking lot when the dispatcher informed him there was a “rolling domestic,” meaning a domestic dispute involving a vehicle. He saw the two cars pull into the parking lot, and saw appellant jump out and fire two rounds into Celeste’s car. Officer Godfrey took cover and saw two more flashes from a gun. Appellant came around the front of the car and pointed his gun at Officer Godfrey who then fired four rounds at appellant. Appellant was wounded and fell to the ground.

Victim died at the scene. Four bullets from appellant’s gun were recovered: three from Victim’s head and one from the trunk of Celeste’s car.¹ The bullet recovered from the trunk had traveled through the back seat of the car into the trunk. The car had two bullet holes in the rear driver’s side window and two in the rear windshield.

Other evidence indicated that during their marriage, appellant struck Victim several times in front of witnesses. In December 2001, he beat her in a restaurant parking lot and left the scene before the responding officer could arrest him. On September 17, 2002, the night before the murder, appellant was arrested on a warrant for criminal domestic violence arising from this incident. He was released on a \$1,000 bond; one of the conditions of bond was that he have no contact with Victim.

ISSUES

1. Was Juror K improperly disqualified?
2. Should the trial judge have dismissed Juror M for misconduct during the jury’s view of the car?

¹Five shell casings were found but the fifth bullet was not recovered. A paramedic testified for the defense that when he arrived on the scene to transport appellant to the hospital, appellant said he had shot himself in the head.

3. Should a directed verdict have been granted on the aggravating circumstance?
4. Is the death sentence in this case disproportional to other death penalty cases?

DISCUSSION

1. Juror disqualification

Appellant claims the trial judge erred in excusing Juror K who was disqualified because of his views regarding the death penalty.

During initial questioning by the court, Juror K was asked if he could impose the death penalty. He answered, "I don't know. I really don't know if I could or not." During subsequent voir dire by defense counsel, the juror gave the following responses.

Q: There are going to be some allegations of domestic abuse in this case. Would that affect your ability to give either side a fair trial?

A: No, sir.

Q: Would that affect your ability – in the penalty phase, would that influence your decision as to whether or not life or death would be appropriate?

A: I don't know, sir.

Q: In other words, and I don't want to put words in your mouth, but as I understand what you are saying is you will be able to listen to both sides in the penalty phase and render what you feel to be the most appropriate penalty whether it be life or whether it be death?

A: Right.

Q: You will be able if you felt death was appropriate, you would be able to impose the death penalty?

A: Yes.

Upon questioning by the solicitor, however, Juror K equivocated.

Q: I noticed in your questions to (*sic*) the Judge, you were hesitant about the death penalty. You just did not know about it?

A: Right.

Q: You know life without parole is an option. He would never get out if he gets life without parole. With death being an option to you, would you ever give death in a case?

A: Most of the time I feel it is a better punishment to be in prison for life. I believe that death is not as big of a punishment as going to prison for life and having to stay in prison for the rest of your life.

Q: You feel life without parole would be a better sentence?

A: Yes, for something that is – I believe that is worse than the death penalty.

Q: So that would be the better option to you between the two?

A: Yeah.

Q: Would that be the option you would give the most cases or all cases?

A: I am not positive. I don't know for sure.

Q: You don't know what you would do?

A: Right, exactly.

Q: Your belief is that life without parole is a more serious punishment than the death penalty?

A: Yes.

Q: That would be the option you would choose?

A: Not necessarily but most likely.

Q: Most likely you would do that?

A: Yes.

Q: So substantially that will be your view concerning the case no matter what the facts would be, that would be your view?

A: Yes.

Defense counsel then re-examined the juror.

Q: . . . just so that everybody understands. You feel when given the choice between which would be worse, life in prison without parole or death, you feel that life is a worse punishment?

Q: I believe so, yes.

A: However, just so that I understand, if you felt death was appropriate in a case, you could give it?

Q: Yes, I could.

The solicitor then followed up with one last question:

Q: If I understood when we were talking or whatever, you wouldn't basically look at the facts of the case, you would

look at life without parole being the worse punishment of the two based on your beliefs, is that right, sir?

A: Yes.

The trial judge found that the belief that life in prison was worse than death would substantially impair the juror's ability to follow the law as instructed. He further noted that when asked about giving the death penalty, Juror K "took a very big deep [breath] and exhaled as if he were very uncertain as to whether or not he could do that." The judge concluded "from watching him" and considering his inconsistent responses, that Juror K should be excused.

A prospective juror may be excluded for cause when his or her views on capital punishment would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. State v. Sapp, 366 S.C. 283, 621 S.E.2d 883 (2005) (*citing* Wainwright v. Witt, 469 U.S. 412, 424 (1985)); State v. Wood, 362 S.C. 135, 607 S.E.2d 57 (2004); State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999); S.C. Code Ann. § 16-3-20(E) (2003) (juror may not be excused in a death penalty case unless his beliefs or attitudes against capital punishment would render him unable to return a verdict according to law). When reviewing the trial court's qualification or disqualification of prospective jurors, the responses of the challenged juror must be examined in light of the entire voir dire. Sapp, *supra*. The determination whether a juror is qualified to serve in a capital case is within the sole discretion of the trial judge and is not reversible on appeal unless wholly unsupported by the evidence. *Id.* 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. *Id.*; State v. Green, 301 S.C. 347, 392 S.E.2d 157 (1990). Deference must be paid to the trial court who sees and hears the juror. Wainwright, *supra*.

Juror K's equivocal views regarding the death penalty, his responses favoring a life sentence despite the facts of the case, and his noted hesitation when asked if he could vote for death, are a reasonable basis for the trial judge's conclusion that Juror K's views would substantially impair his ability

to act as an impartial juror. Considering the voir dire as a whole, we find the trial judge did not abuse his discretion in excusing this juror.

2. Jury view

During the sentencing phase, over appellant's objection, the trial judge granted the State's request for a jury view of Celeste's car.² After the viewing, defense counsel stated an objection that he saw Juror M

using his arm as a dowel or a measurement. He measured both the front driver's seat and the back seat of the automobile I'm assuming to get an idea of the position of the people. . . . What he did was he stuck his arm from the door jam to determine the length from the door jam to the middle of the head rest in the front. He did the same thing in the back. He stuck it, he put his arm, he was attempting to use the length of his arm to estimate distance is what it appeared to me."

The solicitor, on the other hand, stated that he thought the juror was simply testing the tint of the car window.

Appellant moved to have Juror M removed and an alternate juror seated. The trial judge found Juror M had done nothing improper and denied the motion. Appellant contends Juror M should have been dismissed because he conducted his own experiment.

A jury may be allowed to view the scene or pieces of evidence but it is improper for the jury to conduct its own experimentation. Stone v. City of Florence, 203 S.C. 527, 28 S.E.2d 409 (1943). The issue is what constitutes "experimentation" such that it rises to the level of juror misconduct. Jurors will not be presumed guilty of misconduct and acts that are merely incidental to an assessment of the evidence are not improper. *Id.*; see also State v. Buckhalter, 153 S.C. 487, 151 S.E.64 (1930) (not improper experimentation

²Appellant objected that seeing the car would be unfairly prejudicial because instead of focusing on the "spatial relationships" in the car, the jury would be affected by the fact that Victim had been killed there.

in trial for possessing contraband to allow jury to take liquor into jury room to smell or taste it). However, an attempted re-enactment of the facts at issue will render a juror's conduct improper. *See, e.g., State v. Ballew*, 83 S.C. 82, 63 S.E. 688 (1909)(jurors attempted to throw a hatchet against the wall of a jail cell to re-enact the prosecutor's description of the crime); *Baroody v. Anderson*, 195 S.C. 422, 11 S.E.2d 860 (1940) (jury asked the sheriff to drive his car around the curve where the wreck occurred at 35 mph in order to observe it approaching).

We find the trial judge did not abuse his discretion in refusing to dismiss Juror M. *See State v. Simmons*, 360 S.C. 33, 599 S.E.2d 448 (2004) (within trial judge's discretion to substitute alternate juror). First, it is not clear the juror was actually "taking measurements," as appellant claims, and we will not presume a juror engaged in misconduct. There was no attempted re-enactment of the crime, rather Juror M's actions were merely incidental to an assessment of the evidence. Moreover, photographs in evidence show the car's back seat, where the bullet hole was, where the child's car seat was, and where Victim was sitting. There is no real dispute regarding the measurements of the back seat such that any "measurements" by Juror M would have carried undue weight in jury deliberations.

3. Directed verdict on aggravating circumstance

Appellant moved for a directed verdict on the statutory aggravator provided in § 16-3-20(C)(a)(3) which states:

That the offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person.

Appellant contends that because he shot Victim at close range and no other person was endangered, this aggravator should not apply as a matter of law.

The trial judge should submit a statutory aggravator to the jury if there is any evidence, direct or circumstantial, to support it. *State v. Locklair*, 341

S.C. 352, 535 S.E.2d 420 (2000). Here, the police department parking lot is clearly a public place and a gun is a weapon hazardous to more than one person. *Id.* (shooting in church parking lot). Further, appellant knew there were other occupants in the car with Victim when he shot multiple times into the confined space of the car's interior—conduct a reasonable person would know presents a great risk of harm to more than one person. Appellant also pointed his gun at Officer Godfrey in the parking lot. This evidence supports the submission of the statutory aggravator to the jury.

4. Proportionality review

Appellant contends the imposition of death in his case is disproportionate to other death penalty cases because his case involves only a single victim and resulted from a domestic dispute. *See* S.C. Code Ann. § 16-3-25 (2003) (proportionality review).

We find no support for appellant's attempt to reduce this crime to simply "a domestic dispute." Appellant's culpability is not lessened by the fact that the victim was his wife. There is no evidence of any immediate dispute leading up to the murder,³ much less any provocation on Victim's part. In fact, appellant intentionally violated a court order forbidding contact with Victim.

Further, as discussed above, the evidence supports the submission of the aggravating factor in this case. The legislature has determined that a unanimous verdict on only one aggravating factor is sufficient to support the death penalty. There have been numerous capital cases where the jury found only a single aggravator and death was imposed. *See, e.g., State v. Aleksey*, 343 S.C. 20, 538 S.E.2d 248 (2000) (killing police officer); *State v. Rogers*, 338 S.C. 435, 527 S.E.2d 101 (2000) (killing child under age of eleven); *State v. Huggins*, 336 S.C. 200, 519 S.E.2d 574 (1999) (armed robbery); *Ray v. State*, 330 S.C. 184, 498 S.E.2d 640 (1998) (kidnapping); *State v. Atkins*, 303 S.C. 214, 399 S.E.2d 760 (1990) (prior murder conviction). We find appellant's disproportionality argument without merit.

³Appellant's mother testified generally in the sentencing phase that appellant was upset he was not allowed to see his children.

We have reviewed the record and conclude the imposition of death in this case was not the result of passion, prejudice, or any other arbitrary factor, nor is it excessive or disproportionate to the penalty imposed in other cases. The judgment of the circuit court is

AFFIRMED.

TOAL, C.J., WALLER, BURNETT and PLEICONES, JJ., concur.



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
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Columbia, South Carolina 29211-1589
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Facsimile: (803) 734-1397

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

February 2, 2007

RECEIVED

FEB 2 2007

S.C. SUPREME COURT

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

Re: The State v. James Bryant
The State v. Marion Lindsay

Dear Mr. Shearouse:

Please accept this letter as a request for a tape of the oral arguments that were held in the above two death penalty cases. State v. James Bryant was argued on Wednesday, January 3, 2007 at 9:30 a.m. State v. Marion Lindsay was argued on Wednesday, January 17, 2007 at 9:30 a.m. I thank you in advance for your assistance.

Sincerely,

Robert M. Dudek
Deputy Chief Attorney for Capital Appeals

RMD/mwl



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1343
Facsimile: (803) 734-1397

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

January 12, 2007

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

RECEIVED

JAN 12 2007

S.C. SUPREME COURT

Re: State v. Marion Lindsey, oral argument, Wednesday, January 17, 2007 at
9:30 a.m. (Death Penalty Case)

Dear Mr. Shearouse:

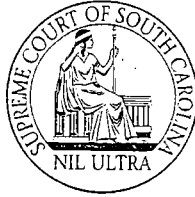
I plan to divide the fifteen minute time of oral argument up in the above-captioned capital case as follows: I will argue issues 2 (the impermissible juror experiment issue) and issue 3 (the great risk of death aggravator directed verdict motion issue) for ten (10) minutes. Co-counsel Aileen Clare will then argue issue 1 (the disqualification of the juror who thought life without parole was a more substantial punishment issue), and issue 4 (the proportionality single victim domestic dispute issue) for five minutes (5) minutes.

I will argue the reply. I know that these issues are out of order, but I obviously do not know what issues the Court is more interested in, and I hope this will flow at the argument. If the Court has a problem or concern with this arrangement, please contact me as soon as possible. Otherwise, I look forward to seeing you Wednesday morning.

Sincerely

Robert M. Dudek
Deputy Chief Attorney for Capital Appeals

cc: Donald J. Zelenka, Esquire
Aileen Clare, Esquire



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

January 9, 2007

Robert M. Dudek , Esquire
Deputy Chief Attorney for Capital Appeals
Aileen P. Clare, Esquire
Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
P O Box 11589
Columbia, SC 29211

Karen Michelle Quimby, Esquire
The Brannon Law Firm, PC
175 Magnolia Street, Suite 101
Spartanburg, SC 29306

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

Re: The State v. Lindsey, Marion Alexander

Dear Counsel:

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

Robert M. Dudek , Esquire
Re: The State v. Lindsey, Marion Alexander
January 9, 2007
Page two

Appellant 15 minutes

Respondent 15 minutes

Appellant in Reply 5 minutes

Reminder:

This case is scheduled for hearing at 9:30 a.m. on Wednesday, January 17, 2007.

Very truly yours,

Daniel E. Shearouse; Clerk

By Jean J. Peebles
Administrative Assistant

DES/jjp

cc: Solicitor Harold W. Gowdy, III



HENRY McMASTER
ATTORNEY GENERAL

November 13, 2006

RECEIVED
NOV 13 2006
S.C. SUPREME COURT

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

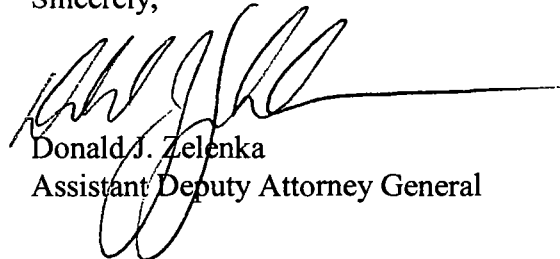
Re: The State v. Marion Ray Lindsey
January Preliminary List

Dear Mr. Shearouse:

I am in receipt of the January 2007 Preliminary List. Please be advised that I will be out of State and unavailable on January 3 and 4, 2007. This conflict is a pre-existing family commitment with advance non-refundable payments.

I will be available on January 17 and 18. I would appreciate your accommodation in this matter.

Sincerely,



Donald J. Zelenka
Assistant Deputy Attorney General

DJZ/lbb

cc: Robert M. Dudek, Esquire



The South Carolina Supreme Court

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

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

To: Deputy Chief Attorney for Capital Appeals Robert M. Dudek
Appellate Defender Aileen P. Clare

From: Daniel E. Shearouse

Date: November 09, 2006

RE: January Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the January 2007 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of January 3, 4, 17 and 18, 2007. Please notify this office in writing prior to November 16, 2006 as to any scheduling conflicts for the January term, and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

The State v. Lindsey, Marion Alexander



The South Carolina Supreme Court

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

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

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

From: Daniel E. Shearouse

Date: November 09, 2006

RE: January Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the January 2007 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of January 3, 4, 17 and 18, 2007. Please notify this office in writing prior to November 16, 2006 as to any scheduling conflicts for the January term, and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

The State v. Lindsey, Marion Alexander



The South Carolina Supreme Court

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

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

To: Karen Michelle Quimby, Esquire
From: Daniel E. Shearouse
Date: November 09, 2006
RE: January Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the January 2007 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of January 3, 4, 17 and 18, 2007. Please notify this office in writing prior to November 16, 2006 as to any scheduling conflicts for the January term, and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

The State v. Lindsey, Marion Alexander

The Supreme Court of South Carolina

The State,

Respondent

v.

Marion Alexander Lindsey,

Appellant.

The Honorable John C. Few
Spartanburg County
Trial Court Case No. 2002-GS-42-04753

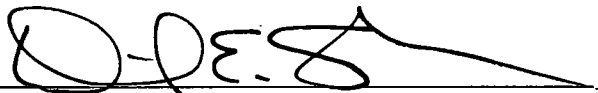
ORDER

For good cause having been shown, the time for serving and filing the final brief of appellant and final reply brief in the above entitled matter is hereby extended until October 30, 2006.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



CLERK

Columbia, South Carolina

September 29, 2006

cc: Appellate Defender Robert M. Dudek
Appellate Defender Aileen P. Clare
Assistant Deputy Attorney General Donald J. Zelenka



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

ORIGINAL

Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1343
Facsimile: (803) 734-1397

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

September 28, 2006

RECEIVED

SEP 28 2006

S.C. SUPREME COURT

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

Re: The State v. Marion Alexander Lindsey (capital case)

Dear Mr. Shearouse:

The final brief of appellant and final reply brief of appellant in the above referenced case are due to be served and filed today. I have been unable to complete these briefs for service due to the fact that we had to give the Attorney General's Office copies of our record because they were short a couple of volumes. As of today's date, our copies of the record are being printed. For that reason, I would respectfully request an extension of thirty days in which to serve and file these briefs.

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

Thank you for your assistance in this matter. Should you have any questions, please do not hesitate to contact me.

Sincerely yours,

Robert M. Dudek
Appellate Defender

RMD/mwl

cc: Donald J. Zelenka, Esquire



HENRY McMASTER
ATTORNEY GENERAL

RECEIVED

SEP 22 2006

S.C. SUPREME COURT

September 22, 2006

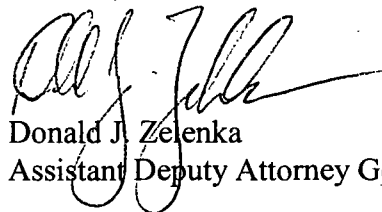
Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P.O. Box 11330
Columbia, South Carolina 29211

Re: The State v. Marion Alexander Lindsey

Dear Mr. Shearouse:

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

Sincerely,



Donald J. Zelenka
Assistant Deputy Attorney General

DJZ/lbb
Enclosures

cc: Robert M. Dudek, Esquire
Harold W. Gowdy, Solicitor
Sandi Wofford, Victims Assistance



Division of Appellate Defense
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Telephone: (803) 734-1343
Facsimile: (803) 734-1397

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

September 12, 2006

RECEIVED

SEP 12 2006

S.C. SUPREME COURT

Ms. Debbie Hopkins
South Carolina Supreme Court
P.O. Box 11330
Columbia, SC 29211

Re: State v. Marion Lindsey (Death Penalty Case)

Dear Ms. Hopkins:

This is just to confirm our conversation of today. Karen Quimby was a public defender at the time of Mr. Lindsey's trial, and she served as co-counsel to lead attorney Michael Bartosh. Michael Bartosh was the chief public defender at the time, and he wanted to remain on the appeal. Michael is now deceased, and I therefore substituted Ms. Quimby in his place.

Ms. Quimby has since left the public defender's office, and she is now in private practice at the address listed on the record on appeal. She is not being compensated, and she is merely being listed as co-counsel given that she was trial counsel and wanted to remain on the appeal in the place of the late Michael Bartosh. I hope this clears up any confusion which may have arose over this matter.

Sincerely

Robert M. Dudek
Appellate Defender

cc: Donald J. Zelenka, Esquire

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Spartanburg County

John C. Few, Circuit Court Judge

RECEIVED

SEP 8 2006

S.C. SUPREME COURT

THE STATE,

RESPONDENT,

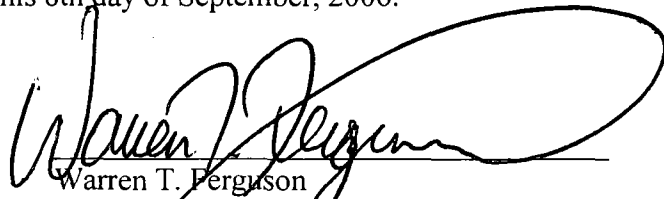
V.

MARION ALEXANDER LINDSEY,

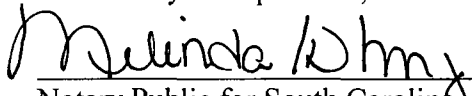
APPELLANT

CERTIFICATE OF SERVICE

I certify that a true copy of the Record on Appeal in the above referenced case has been served upon Donald J. Zelenka, Esquire, this 8th day of September, 2006.


Warren T. Ferguson
Administrative Assistant

SUBSCRIBED AND SWORN TO before me
this 8th day of September, 2006.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: November 16, 2008



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

ORIGINAL

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

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

August 15, 2006

RECEIVED

AUG 15 2006

S.C. SUPREME COURT

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

Re: The State v. Marion Alexander Lindsey

Dear Mr. Shearouse:

Enclosed is a proposed order in the above case. By copy of this letter, we are also forwarding a copy of this proposed order to Donald J. Zelenka. Thank you for your assistance in this matter.

Sincerely,

Robert M. Dudek
Assistant Appellate Defender

RMD/mwl

cc: Donald J. Zelenka, Esquire

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Spartanburg County

Honorable John C. Few, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MARION ALEXANDER LINDSEY,

APPELLANT

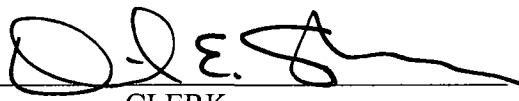
ORDER

On motion of Robert M. Dudek, attorney for appellant, it is hereby

ORDERED that State's Exhibit 21 (911 tape), State's Exhibit 27 - 31 (Photographs of the car), State's Exhibit 48 - 63 (Photos), and State's Exhibit 73 (Photo) be released to the Office of the Attorney General, or its designee, for transporting to the Supreme Court of South Carolina for purposes of review by the Court for the above-captioned case.

JEAN H. TOAL, CHIEF JUSTICE

By


CLERK

Columbia, South Carolina

August 16, 2006

Copies to: The Honorable Marc Kitchens
Robert M. Dudek, Esquire
Donald J. Zelenka, Esquire

The Supreme Court of South Carolina

The State,

Respondent

v.

Marion Alexander Lindsey,

Appellant.

The Honorable John C. Few
Spartanburg County
Trial Court Case No. 2002-GS-42-04753

ORDER

For good cause having been shown, the time for serving and filing the Record on Appeal in the above entitled matter is hereby extended until September 8, 2006.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



CLERK

Columbia, South Carolina

August 10, 2006

cc: Assistant Appellate Defender Robert M. Dudek
Assistant Deputy Attorney General Donald J. Zelenka



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

ORIGINAL

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1330 Lady Street, Suite 401
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Columbia, South Carolina 29211-1589
Telephone: (803) 734-1343
Facsimile: (803) 734-1397

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

August 9, 2006

RECEIVED

AUG 9 2006

S.C. SUPREME COURT

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

Re: The State v. Marion Alexander Lindsey (capital case)

Dear Mr. Shearouse:

The record on appeal in the above referenced case is due to be served and filed today. However, because of my current caseload, I have been unable to complete this record for service. For that reason, I would respectfully request an extension of thirty days in which to serve and file this record.

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

Thank you for your assistance in this matter. Should you have any questions, please do not hesitate to contact me.

Sincerely yours,

Robert M. Dudek
Assistant Appellate Defender

RMD/mwl

cc: Donald J. Zelenka, Esquire

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Spartanburg County

John C. Few, Circuit Court Judge

THE STATE,

RESPONDENT,

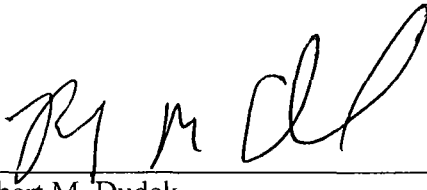
V.

MARION ALEXANDER LINDSEY,

APPELLANT

CERTIFICATE OF SERVICE

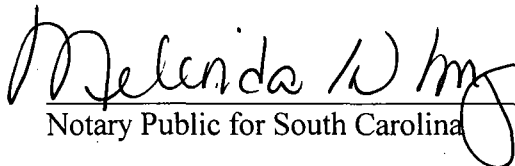
The undersigned attorney hereby certifies that a true copy of the Initial Reply Brief of Appellant in the above referenced case has been served upon Donald J. Zelenka, Esquire, this 10th day of July, 2006.



Robert M. Dudek
Assistant Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 10th day of July, 2006.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: November 16, 2008.

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Spartanburg County

John C. Few, Circuit Court Judge

RECEIVED

JUL 10 2006

S.C. SUPREME COURT

THE STATE,

RESPONDENT,

V.

MARION ALEXANDER LINDSEY,

APPELLANT

INITIAL REPLY BRIEF OF APPELLANT

ROBERT M. DUDEK
Assistant Appellate Defender

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

ATTORNEY FOR APPELLANT

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ARGUMENT IN REPLY

Issue 2

The only alleged aggravating circumstance in this case was that appellant knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person. Juror Mauldin using his arms to measure distances and angles went to the heart of whether there was evidence to prove that statutory aggravating circumstance given the close range shooting at the one intended victim. The judge had an easily available remedy - - replacing Juror Mauldin with an alternate - - and he abused his discretion on this critical issue by refusing to do so.

As stated, this is a death penalty case involving the single aggravating circumstance which was whether appellant “by his act of murder knowingly created **a great risk** of death to more than more person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person.” See S.C. Code § 16-3-20(C)(3). (emphasis added). A gunshot at close range usually would not create such a “great risk,” but that was a key issue that Juror Mauldin and the other jurors had to decide once the directed verdict motion was denied.¹

¹ While the state acknowledges on the directed verdict on the aggravator issue that the solicitor conceded that the facts of this case are different from State v. Locklair, 341 S.C. 352, 534 S.E.2d 420 (2000), it then mischaracterizes appellant’s position on this aggravating circumstance by stating appellant argues that only a shooting in a crowded shopping center would satisfy this aggravator. It then contends that the facts of this case are stronger for the state than they were in Locklair. Appellant accepts the holding of Locklair as he must, but it still must be emphasized that this Court noted in Locklair that the defendant had to be restrained – tackled – to keep him from continuing to fire his gun, and this Court noted several other people and children that were within the “firing range.” Respondent’s brief at 37-38. See State v. Locklair, 534 S.E.2d at 428 (2000). Further,

The state first argues the trial judge did not abuse his discretion because Mauldin's actions were not improper. However, the state acknowledges that the trial judge told the jurors that during the jury view, which was held over defense objections, that there would be no conversation and that they were just to look around but they could open the car door. Respondent's Brief at 18. The state strangely emphasizes the fact that the judge thought the juror using his arm to estimate or measure distances was no different than just looking at the car during the jury view. Further, although the judge's comments are difficult to follow he seems to draw a distinction between measuring space or angles with a tape measure, and doing such measurements using your arm. Respondent's Brief at 22.

However, as appellant stated in his initial brief "it is elementary that a juror cannot conduct his own experiments, measurements, or investigation outside of the evidence presented in court that is not subject to challenge by cross-examination." Appellant's Brief at 24. "The conducting of **any** experiment by the jury, amounting to the taking of testimony by them outside of the courtroom without the knowledge or consent of counsel, and allowing counsel no opportunity argue to the jury the inferences to be drawn from experiment, is, of course, improper." Baroody v. Anderson, 195 S.C. 422, 11 S.E.2d 860, 862 (1940).

present appellate counsel and the appellate counsel for the state were the same in Locklair, and both memory and the recording of the oral argument in Locklair show that the state successfully argued that children were scattering as Locklair indiscriminately fired or attempted to fire his gun, and several other people were in his line of fire. The state is obviously going to attempt to push the envelope until it makes this "great risk of harm . . . by means of a weapon or device" aggravator applicable to any situation where a bullet is fired in public (even a deserted or nearly deserted parking lot), (even at close range) and (even where solely at one obviously intended victim).

Further, this Court held in State v. Mouzon, 326 S.C. 199, 485 S.E.2d 918 (1997), that a jury view was not the taking of evidence. Since there is not any possibility anything of any substance will occur during the jury view, a defendant does not even have to be present. However, measuring distances and angles, which is what Juror Mauldin did, given the close range shooting in this case, was Mauldin conducting his own test or investigation to supplement or take the place of the evidence offered in court. Although it was done in the presence of counsel, it must be emphasized that the jury view was over appellant's objection.

Further, unlike Stone v. City of Florence, 203 S.C. 527, 28 S.E.2d 409, 410 (1943) the purpose of Juror Mauldin's actions in this case is clear. Juror Mauldin was trying to "confirm or disprove something doubtful" when he reached into the car and measured distances and angles with his arms. Stone v. City of Florence, 28 S.E.2d at 410. Through his actions, it is clear Juror Mauldin was attempting to determine where in the backseat of the car the decedent and the children were located, the distance between them, and apparently the angle of the shot. "He was standing there with a gun pointing directly in the back glass right here. Before I could reach my weapon, he had done fired two shots in the back of the glass." Tr. 1575, l. 19 – 1576, l. 8. "I saw him pull a gun out and stick the gun to the rear passenger windshield of the car and shot [shoot] into the car." These measurements and angles taken by Juror Mauldin go directly to the heart of the state's sole aggravating circumstance.

In Stone, this Court thought that it was common sense that the man in broad daylight could step down from a curb into a hole ten and a half feet lower without sustaining any injury, whereas a person unaware of the hole during the nighttime who unexpectedly

stepped into it would likely sustain a fall and an injury. Although the Stone case pertains to the correct legal standard governing jury views contained in Baroody, it was a civil negligence case, it involved “common sense,” and this is a death penalty case where the integrity of a jury finding on the sole aggravating circumstance is directly at issue. Tr. 2152, l. 2154, l. 2; Respondent’s brief at 2.

In short, Juror Mauldin’s measurements introduced extraneous facts that were “crucial in resolving a key material issue in the case.” Dawson v. State, 710 So.2d 472, 475 (Ala. 1997).

Moreover, Juror Mauldin was the only juror who conducted his own test or experiment on the measurements and angles during the jury view. Counsel immediately objected to Mauldin’s actions, and requested an extremely reasonable and available remedy. This is not a case where the defense waited to see if there was an adverse verdict and then raised the issue in a motion for a new trial. See Stone v. City of Florence, 28 S.E.2d at 411-412 (internal citations omitted); Cf. Baroody v. Anderson, 11 S.E.2d at 863-864. On the issue of fairness to the trial judge, he was on immediate notice of the problem and the objection, and he had a totally reasonable and readily available remedy since only one juror was involved. That remedy was replacing Juror Mauldin with an alternate.

It is beyond cavil that one juror can poison jury deliberations by conducting his own experiments, tests, or measurements that are not subject to cross-examination and rebuttal. Ex Parte Lasley, 505 So.2d 1263 (Ala. 1987).

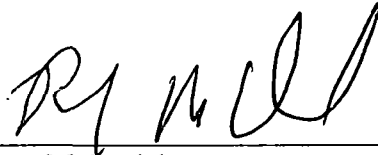
The judge abused his discretion in this death penalty case by refusing to remove Juror Mauldin where his actions went directly to whether the state proved the sole aggravating circumstance in this case. Appellant should be granted a new sentencing

proceeding since it is nearly impossible to conduct any harmless error analysis where jury deliberations are secret, the extent of juror Mauldin's input is those deliberations is unknown, and a jury can recommend a life sentence for any reason or "no reason at all." State v. McClure, 342 S.C. 403, 537 S.E.2d 273 (2000). "This test casts a 'light burden' on the defendant." Ex Parte Lasley, 505 So.2d at 1264.

CONCLUSION

By reason of the foregoing argument and by reason of the arguments in the appellant's initial brief, appellant should be granted a new trial. In the alternative, a new sentencing trial should be granted.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R. M. Dudek', written over a horizontal line.

Robert M. Dudek
Assistant Appellate Defender

ATTORNEY FOR APPELLANT.

This 10th day of July, 2006.

The Supreme Court of South Carolina

The State,

Respondent

v.

Marion Alexander Lindsey,

Appellant.

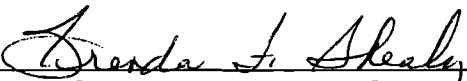
The Honorable John C. Few
Spartanburg County
Trial Court Case No. 2002-GS-42-04753

ORDER

For good cause having been shown, the time for serving and filing the Initial Reply Brief in the above entitled matter is hereby extended until July 10, 2006.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY 
CHIEF DEPUTY CLERK

Columbia, South Carolina

June 30, 2006

cc: Assistant Appellate Defender Robert M. Dudek
Assistant Deputy Attorney General Donald J. Zelenka

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Spartanburg County
John C. Few, Circuit Court Judge

RECEIVED

JUN 29 2006

S.C. SUPREME COURT

THE STATE,

RESPONDENT,

V.

MARION ALEXANDER LINDSEY,

APPELLANT

PETITION FOR EXTENSION
TO FILE INITIAL REPLY BRIEF OF
APPELLANT

The undersigned counsel would respectfully requests an extension of ten days in which to file the initial reply brief of appellant in the above-referenced death penalty case. In support of this motion, counsel would respectfully show the Court:

1. The initial reply brief of appellant in this case is due to be served and filed today, having been extended by one prior of this Court.

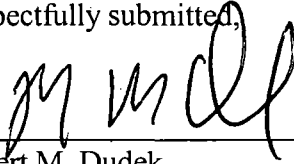
2. Counsel in filing a five issue petition for writ of certiorari in the lengthy murder case of State v. Otis James Compton with this Court today, June 29, 2006, and a three issue petition for writ of certiorari in the lengthy murder case of State v. Frank Patterson, with this Court. Counsel also filed a merit brief in the murder case of State v. Wanda Haithcock with the Court of Appeals on Monday, June 26, 2006. In addition, counsel is filing an initial reply brief in the death penalty case of State v. James Nathaniel Bryant, III with this Court today. Counsel at the present time also has a

very high caseload of mostly murder cases, and he has death penalty oversight responsibilities for this office. Counsel is well aware of Justice Waller's order on extensions in death penalty cases. Consistent with that order this extension request is made in good faith, out of absolute necessity, and not for purposes of delay.

3. As indicated by signature below, counsel for the state consents or does not oppose this request.

WHEREFORE, the undersigned counsel would respectfully request a ten day extension in which to file the initial reply brief of appellant in this case.

Respectfully submitted,



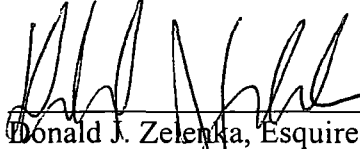
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I DO NOT OPPOSE THIS REQUEST:


Donald J. Zelenka, Esquire

The Supreme Court of South Carolina

The State,

Respondent

v.

Marion Alexander Lindsey,

Appellant.

The Honorable John C. Few
Spartanburg County
Trial Court Case No. 2002-GS-42-04753

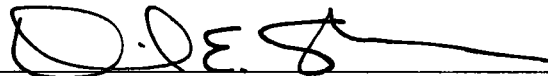
ORDER

For good cause having been shown, the time for serving and filing the Initial Reply Brief in the above entitled matter is hereby extended until June 29, 2006.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



CLERK

Columbia, South Carolina

June 20, 2006

cc: Assistant Appellate Defender Robert M. Dudek
Assistant Deputy Attorney General Donald J. Zelenka



SCCID

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June 19, 2006

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JUN 19 2006

S.C. SUPREME COURT

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

Re: The State v. Marion Alexander Lindsey (capital case)

Dear Mr. Shearouse:

The initial reply brief of appellant in the above referenced case is due to be served and filed today. However, because of my current caseload, I have been unable to complete this brief for service. For that reason, I would respectfully request an extension of ten days in which to serve and file this initial brief.

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

Thank you for your assistance in this matter. Should you have any questions, please do not hesitate to contact me.

Sincerely yours,

Robert M. Dudek
Assistant Appellate Defender

RMD/mwl

cc: Donald J. Zelenka, Esquire

original

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

**Appeal from Spartanburg County
John C. Few, Circuit Court Judge**

THE STATE,

Respondent,

V.

MARION ALEXANDER LINDSEY,

Appellant

INITIAL BRIEF OF RESPONDENT

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JUN 12 2006

SC SUPREME COURT

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

1.

Whether the court erred by excusing potential Juror Krisher for cause, and ruling that Krisher's belief that life imprisonment without parole was a more substantial punishment than the death penalty was incompatible with South Carolina law, since Krisher stated that he could impose the death penalty and sign the death form and he was a qualified juror?

2.

Whether the judge erred by refusing to replace Juror Mauldin with an alternate where Mauldin was conducting his own measurements during a jury view of the automobile in which the decedent was shot, since a juror conducting his own measurements or experiments during a jury view was improper?

3.

Whether the court erred by refusing to direct a verdict on the "great risk of death" aggravator since appellant shot his wife at close range and there was no evidence appellant knowingly created a risk of death to more than one person?

4.

Whether appellant's death sentence should be vacated as both excessive and disproportionate since this case involves a domestic dispute pertaining to child visitation and no death sentence has been imposed in this state in the modern era under similar circumstances?

RESPONDENTS'S STATEMENT OF THE CASE

The Appellant, Marion Alexander Lindsey, was indicted on October 3, 2002 by the Court of General Sessions for Spartanburg County for murder. R.p. %%. The charge arose from the homicide of Ruby (Nell) Lindsey on September 18, 2002. On October 10, 2002, Solicitor Trey Gowdy served his notice of intent to seek the death penalty consistent with S.C. Code Ann. § 16-3-26. He further served an additional notice of life sentence pursuant to § 17-25-45(A) based upon Lindsey's February 20, 1994 conviction for assault and battery with intent to kill. R.p. %%. Both were served on Lindsey and counsel Michael Bartosh personally.

A notice of statutory aggravating circumstances and evidence in support of aggravating circumstances was served on the Appellant on March 10, 2004. The listed statutory aggravator was:

That the defendant, Marion Alexander Lindsey, did murder Ruby Nell Lindsey, and by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person, Section 16-3-20(C)(a)(3) of the Code of Laws of South Carolina (1976) as amended (Cum. Supp. 1990).

R.p. %%. Supplemental notices were made on May 11, 2004 and May 14, 2004.

On May 17, 2004, the matter was called for trial before the Honorable John C. Few. the Appellant was present and represented by Spartanburg County Public Defender Michael Bartosh, Doug Brennan and Karen Quimby. The prosecution was represented by Seventh Circuit Solicitor Harold "Trey" Gowdy and Deputy Solicitors Barry Barbette and Donnie Willingham. On May 21, 2004 the jury convicted Lindsey of murder at 4:45 p.m. Tr. p. 1718, l. 14 - p. 1719, l. 5.

On May 22, 2004, the penalty phase began. After testimony, the jury was instructed to consider the sole aggravating circumstance involving "great risk of death to more than one person." Tr. 2152-53. The jury was also instructed to consider as mitigating circumstances:

1. Murder was committed while the defendant was under the influence of mental or emotional disturbance.
2. Age or mentality of the defendant at the time of the crime.

Tr. p. 2155-56. On May 24, 2004 the jury found the existence of the statutory mitigating circumstance and recommended a sentence of death. Tr. p. 2169-2171. Judge Few subsequently made findings that the evidence warranted the imposition of the death penalty and that its imposition was not as a result of passion, prejudice, or arbitrary factor. Tr. p. 2173, ll. 17-21. He then sentenced Lindsey to death in the manner provided by law. Tr. p. 2174.

ARGUMENT

- I. **The trial court properly excused venireperson John Krisher where there was a reasonable basis to conclude Krisher would not have been able to faithfully discharge his responsibility since his belief that a life sentence without parole was a harsher sentence than death would prevent or substantially impair the performance of his duties as a juror according to law.**

In his initial argument, Lindsey asserts that the trial court erred in excusing venireperson John Krisher based upon his comment that life imprisonment without parole was a harsher punishment than the death penalty. Respondents submit the trial court did not abuse its discretion in granting the state's motion to disqualify Krisher.

STANDARD OF REVIEW

In a capital case, the proper standard in determining the qualification of a prospective juror is whether the jurors' views on capital punishment would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. State v. Wood, 362 S.C. 135, 140, 607 S.E.2d 57, 59 (2005); S.C. Code Ann. § 16-3-20(E)(in capital case, juror may not be excluded for her attitude against capital punishment unless it would render juror unable to return a verdict according to law). When reviewing the trial court's qualification or disqualification of prospective jurors, the responses of the challenged jurors must be examined in light of the entire voir dire. *Id.* The ultimate consideration is that the juror be unbiased, impartial, and able to carry out the law as explained to him. *Id.* On appellate review, the trial court's disqualification of a prospective juror will not be disturbed where 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 law. Id., citing State v. Green, 301 S.C. 347, 392 S.E.2d 157 (1990). See Wainwright v. Witt, 469 U.S. 412 (1985)(there will be situations where the trial court is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law and this is why deference must be paid to trial court who sees and hears the juror).

HOW THE ISSUE WAS RAISED BELOW

A. The Voir Dire

During the voir dire of John Krisher the following occurred:

[Court]

Q. Now, if that happened, we're going to now talk about the penalty phase. Let me explain something to you. If the defendant is found guilty, we'll be talking about mitigating circumstances and aggravating circumstances. Aggravating circumstances are facts and incidents and details of an occurrence which the State of South Carolina has deemed to make worse or to aggravate the crime of murder. In other words, aggravating circumstances which accompany a murder increase the enormity or add to the injury of the crime of murder.

Mitigating circumstances, on the other hand, are facts or details or incidents or an occurrence which the State has declared to reduce the severity of the crime of murder and may be considered as extenuating or as reducing the degree of moral culpability or responsibility.

Now, if you were a juror in the sentencing phase of a murder case, could you, depending on the facts and the circumstances that are proven including the consideration of any aggravating or mitigating circumstances, and if you were given the choice of either the life sentence or the death penalty, could you impose a life sentence?

A. Yes.

- Q.** Could you impose the death penalty?
- A.** I don't know. I really don['t] know if I could or not.
- Q.** You don't know if you could or not. Well, that's - - I appreciate the honesty of your answer....

Tr. p. 320, l. 8 - p. 321, l. 9.

During the voir dire questioning of Krisher by defense counsel Bartosh it was developed that he had previously been arrested by the Spartanburg County Sheriff's Office for possession of marijuana and driving while his license was suspended. Tr. p. 323, ll. 4-11. He further indicated that he was a victim of verbal domestic violence. Tr. p. 323, ll. 13-24.

[Bartosh]

- Q.** ... there are going to be some allegations of domestic abuse in this case. Would that affect your ability to give either side a fair trial?
- A.** No, sir.
- Q.** Would that affect your ability - - in the penalty phase, would that influence your decision as to whether or not life or death would be appropriate?
- A.** I don't know, sir.
- Q.** In other words, and I don't want to put words in your mouth, but as I understand what you are saying is you will be able to listen to both sides in the penalty phase and render what you feel to be the most appropriate penalty whether it be life or whether it be death?
- A.** Right.
- Q.** You will be able if you felt death was appropriate, you would be able to impose the death penalty?
- A.** Yes.

Q. If you felt it was appropriate ?

A. Yes.

Q. Likewise if you believe it was appropriate, if you believe that life was appropriate, you be able to impose that?

A. Yes, sir....

Also, Tr. p. 326, ll. 5-19.

During the voir dire by Deputy Solicitor Barry Barnette, Krisher stated that he now understood that death is not automatic in a sentencing phase and that life without parole was always an option. Tr. p. 327, ll. 7-13. The following then occurred:

[Barnette]

Q. Knowing that, and I noticed in your questions to the Judge, you were hesitant about the death penalty. You just did not know about it?

A. Right.

Q. You know life without parole is an option. He would never get out if he gets life without parole. With death being an option to you, would you ever give death in a case?

A. Most of the time I feel it is a better punishment to be in prison for life. I believe that death is not as big of a punishment as going to prison for life and having to stay in prison for the rest of your life.

Q. You feel life without parole would be a better sentence?

A. Yes, for something that is - - I believe that is worse than the death penalty.

Q. So that would be the better option to you between the two?

A. Yeah.

- Q. Would that be the option you would give the most cases or all cases?
- A. I am not positive. I don't know for sure.
- Q. You don't know what you would do?
- A. Right, exactly.
- Q. Your belief is that life without parole is a more serious punishment than the death penalty?
- A. Yes.
- Q. That would be the option you would choose?
- A. Not necessarily but most likely.
- Q. Most likely you would do that?
- A. Yes.
- Q. So substantially that will be your view concerning the case no matter what the facts would be, that would be your view?
- A. Yes.
- Q. I notice you were also hesitate (sic) in talking about the burden of proof....

Tr. p. 327, l. 14 - p. 328, l. 25.

Defense counsel Bartosh then followed up on this line of questioning:

- Q. Mr. Krisher, I just - - on Mr. Barnett's question, just so that everybody understands. You feel when given the choice between which would be worse, life in prison without parole or death, you feel that life is a worse punishment?
- A. I believe so, yes.
- Q. However, just so that I understand, if you felt death was

appropriate in a case, you could give it?

A. Yes, I could.

Tr. p. 331, ll. 1-9.

Then, Deputy Solicitor Barnette followed up:

Q. If I understood when we were talking or whatever, you wouldn't basically look at the facts of the case, you would look at life without parole being the worse punishment of the two based on your beliefs, is that right, sir?

A. Yes.

Tr. p. 331, ll. 16-21.

B. The Motion to Exclude

Deputy Solicitor Barnette asserted that Krisher felt life without parole is a more serious punishment than death. He asserted Krisher should be disqualified because this belief would cause him not to look at the facts and choose life without parole over death. Tr. 332. Counsel Bartosh stated that although Krisher considered LWOP a worse punishment than death, he could give death, if he felt it was appropriate. Id.

Judge Few noted that under South Carolina law, the death penalty was reserved for that most severe and egregious murders and that it was a "more severe punishment than a life sentence." Tr. p. 332, ll. 16-22. Judge Few opined that Krisher's responses revealed that he would "impose a death sentence for less severe murders and impose a life sentence for the more severe murders" turning South Carolina law on its head. Tr. 333. Judge Few contended that under Krisher's responses if the State proved that it was the worst murder that ever occurred under the jurors views, eleven would be for death and Krisher would be for life since they all

agreed it was the “worst murder.” Tr. 334.

Deputy Solicitor Barnette opined that his responses revealed his decision would not cause him to look at the facts, but would be an life juror. Tr. 335. Barnette found Krisher hesitant about the life sentence, the burden of proof and the death sentence. See Tr. 328-29. Barnette noted that Krisher concluded that he “wouldn’t look at the facts of the case”. Tr. p. 335, ll. 6-9, referring to Tr. p. 331, ll. 16-17.

Barnette asserted that the inconsistent answers under State v. Tyner [273 S.C. 646, 258 S.E.2d 559 (1979)] should disqualify Krisher as a juror.

C. The Trial Court’s Findings

Judge Few found Krisher disqualified as a juror. Tr. p. 336, l. 3 - p. 338, l. 3. He determined that under South Carolina sentencing scheme the death penalty was the “worst penalty” and required unanimity or the sentence would be life. Tr. p. 336, ll. 3-15. Judge Few found as a fact that Krisher was clear in his belief that a life sentence was worse than a death sentence because it would require him to sit around and think about it. “I am concerned that this is an opinion that is contrary to South Carolina law and that it is an opinion that would substantially impair his ability to follow my instructions in fairly and objectively deliberating as to what the sentence ought to be.” Tr. 336-37.

Judge Few also noted the demeanor of Krisher in his responses as revealing an inability to serve. He stated Krisher took a very deep breath and hesitated revealing he was uncertain if he could ever give the death penalty, even though he said yes. Tr. p. 337, ll. 3-15. Judge Few concluded:

I am convinced that this is a juror whose views about the

death penalty, particularly his views that the death penalty is not as severe a punishment as the life sentence, that those [views] would substantially impair his ability to follow the law as I instructed and that ...it would substantially impair the performance of his duties as a juror in deliberating over what the penalties should be.

Tr. p. 337, l. 19 - p. 338, l. 3. Krisher was found disqualified and excused from jury service. Tr. p. 338, ll. 7-11.

After jury selection was completed, Judge Few inquired of the State and defense if there was any objection to the composition or manner of selection of the jury. Tr. p. 1452, ll. 8-13. Both Solicitor Gowdy and defense counsel Bartosh stated there was no objection. Tr. p. 1452, ll. 11-13.

LAW/ANALYSIS

- 1. The issue concerning the disqualification of venireperson Krisher is not properly before this Court because defense counsel did not object to the disqualification.**

A view of the entire *voir dire* process surrounding venireperson Krisher reveals that no objection was raised by defense counsel to either the disqualification of Krisher or the process of jury selection. Tr. p. 338, 1452. The record is silent concerning any defense objection. In stead, the discussion of the state's objection to the venireperson's qualification by the defense was merely explaining his own questions and Krisher's answers. Tr. p. 332, ll. 11-15, p. 332, l. 23- p. 333, l. 1, p. 333, ll 12-13, p. 334, ll. 2-5, ll. 8-11, l. 24, p. 335, ll. 1-2, p. 336, l. 16. At no time, did the defense counsel state a position in opposition tot he trial court's conclusion. Tr. 336-338.

Respondents submit that the issue raised herein is barred from appellate consideration since the defense never objected to the disqualification of the juror. See, *State v. Speights*, 263

S.C. 127, 208 S.E.2d. 43 (1974) (Court would not consider argument that trial court improperly disqualified a member of the panel as a result of *voir dire* interrogation, where such an objection was not submitted to the trial court). For this initial reason, Lindsey is procedurally barred from raising this claim at this time.

2. Exclusion Was Appropriate Where The Venireperson's Bias And Misunderstanding of the Death Penalty As A Lesser Punishment Than a Life Sentence Revealed an Inability to Apply Aggravating Circumstances Correctly.

In his *voir dire*, juror Krisher unequivocally revealed that he believed that life imprisonment without parole was a “more serious” or “worse” punishment than the death penalty which was not “as big.” Tr. p. 327-328, 331.

The problem with the belief by the potential juror is that it would turn the normal deliberative analysis on its head by giving a life sentence as the harshest penalty for a crime and the death penalty was a lesser penalty. More importantly, however, he suggested that he would *not* look at the facts of the case in making that decision. Tr. p. 331, ll. 16-21. Also, Tr. p. 328, ll. 20-23. The trial judge, in disqualifying the juror noted that the death penalty was intended to be a “more severe punishment than a life sentence.” Tr. p. 332. In his brief before this Court, Lindsey challenges the trial court’s assertion that the death penalty is a “more severe punishment.” IBOA, p. 20-22. He references, for the first time in his brief, anecdotal comments from a family member of a Pennsylvania murder victim of Ira Einhorn, that suggested he now believed that a sentence of life without parole was “a terrible punishment, worse than being executed . . .” IBOA, p. 20, citing David Lindorff, For Ira Einhorn, A Fate Worse Than Death, Salon.com, news/features, October 18, 2002. He also refers to other victim survivor family

anecdotal comments about certain victim views in favor of a life sentence. *Id.*

The problem with the Appellant analysis is that it is misdirected. It is irrelevant what isolated members of a victim's family may think is a "more severe" punishment or even that they might think a life sentence is "worse." The proper focus, instead, must be upon what the General Assembly thought when it passed the current death penalty statute as to what was a "more severe" punishment and what role it intended that the jurors had in making that determination in each particular case. Clear indications in the legislation reveal that the General Assembly intended the death penalty to be a more severe penalty than a life without parole sentence.

1. Statutory aggravating circumstances must be found before a death sentence can be imposed; a life without parole sentence may be imposed without finding *any* aggravating factors. §16-3-20 (A) S.C. Code Ann. (2005 Cum. Supp.) (B).
2. When the sentencing jury is unable to reach unanimity, the trial judge "shall sentence the defendant to life imprisonment." §16-3-20 ©
3. On appeal, the Supreme Court is mandated, when a death sentence is imposed, to determine "whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases . . ." §16-3-25 (B).
4. Upon a recommendation of death the trial Judge is required to determine if the death penalty was warranted under the evidence of the case and not the result of prejudice, passion or any other arbitrary factor, but not when a life sentence is recommended. §16-3-20 (C).

In addition, the role of mitigating circumstances supports the General Assembly (and the United States Supreme Court's) conclusion that a death sentence is intended to be a "worse" punishment than a life sentence. In Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (plurality opinion), the Court announced that the "Eighth Amendment and Fourteenth Amendments require that the sentencer ... not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Similarly, in

Skipper v. South Carolina, 476 U.S. 1 (1986), the Court held that evidence that a defendant in a capital case would not pose a danger if spared, but incarcerated, must be considered potentially mitigating and may not be excluded from the juror's consideration. In Eddings v. Oklahoma, 455 U.S. 1 (1982), the U.S. Supreme Court found that youth, a turbulent family history, beatings by his father, and severe emotional disturbance were mitigating. The Court held therein that a sentencer not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any circumstances of the offense that the defendant proffers as a basis "for a sentence less than death." Eddings v. Oklahoma, *supra*, 455 U.S. at _____. Stated another way, it has long been established by Supreme Court jurisprudence that an individualized determination of death worthiness requires that the jury be allowed to consider any evidence if "the sentencer could reasonably find that it warrants a sentence less than death." McKoy v. North Carolina, 494 U.S. 433, 441, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990).

The instructions on mitigation that this Court has endorsed make it clear that a juror must consider a death sentence a harsher punishment than life without parole. In State v. Bell (William), 305 S.C. 11, 406 S.E.2d 165 (1991), the Court stated: "[T]he sentencing jury in a capital case may not be precluded from considering as mitigating evidence any aspect of the defendant's character or record and any circumstances of the crime that may serve as a *basis for a sentence less than death*," citing Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987); State v. Cooper, 291 S.C. 332, 353 S.E.2d 441 (1986). (emphasis added). See also, State v. Jones, 298 S.C. 118, 378 S.E.2d 594 (1989) (authorized as adequate the judge's instruction that the jury could consider any mitigating circumstance authorized by law and could impose a life sentence even if aggravating circumstances were found).

Upon a proper motion, a juror should be excused based on his or her views on the death penalty, life imprisonment without parole, or life imprisonment with the possibility of parole if "the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" Wainwright v. Witt, 469 U.S. 412, 424(II), 105 S.Ct. 844, 83 L.Ed.2d 841 (1985)). This Court reviews a trial court's decision regarding a juror's qualification with deference to the trial court's application of this standard to the juror's voir dire responses. Here, it is evident that the juror's belief that a death sentence was less harsh than a life without parole sentence " would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" The venireperson was properly disqualified.¹

The Appellant attempts to distinguish the opinions of U.S. v. Tipton, 90 F.3d 861 (4th Cir. 1996) and U.S. v. Barnette, 211 F.3d 803 (2000). In Barnette, the Fourth Circuit upheld the exclusion of potential juror where the trial judge found substantial impairment concerning his voir dire responses that he would "weigh heavily on not wanting to go with the death penalty unless it was very, very, very well warranted", even though he said he would try to follow the law and consider the death penalty, but would possibly prefer one option over the other. In U.S. v. Tipton, the Court noted it deferred to the trial judge when a juror's answers were ambiguous and largely contradictory. The three disqualified jurors in Tipton each gave reservations, never retracted, and ambiguous responses as to the depth and likely consequences about their reservation. 90 F.3d at 880-81.

¹"[A] venireperson is not qualified to sit in a death-penalty case if it appears that he or she cannot consider the entire range of punishment, apply the proper burden of proof, or otherwise follow the court's instructions." State v. Anderson, 79 S.W.3d 420, 434 (Mo. banc 2002).

The Appellant claims that Krisher's opinion about the death penalty was not ambiguous, contradictory or unclear, like the Tipton jurors. we disagree. It was contradictory by his initial response on whether he could impose the death penalty that "I don't know. I really don't know if I could or not." Tr. p. 321, ll. 5-6. Subsequently, he stated that he felt that death "is not as big a punishment as going to prison for life", [Tr. 327], and the life without parole is a "better option." [Tr. 328]. Although he did declare, like the Tipton jurors, that he could give the death sentence if he felt it was appropriate, this was followed up with the contradictory comment that he would not look at the facts of the case, but would look at life without parole as being the worse punishment. Tr. 331.

The interplay of venireperson Krisher's belief that a life without parole sentence was "worse" and "more serious" and the law in which life is a lesser punishment make it clear that his belief would substantially impair his ability to discharge his duties. The issue is not whether he would merely "consider" a death sentence, but whether he considered life without parole a lesser sentence. Under the vernireperson's logic, he would give life imprisonment to the worse or more serious crimes since he opined that death was a lesser penalty. This belief was contrary the legislative intent to reserve the death penalty for the most serious murders.

Perhaps the most telling response by Krisher was his concluding remark that acknowledged that he basically would not look at the facts, but base his decision on his belief that a life sentence was worse than death. Tr. 331. In rejecting a fact based determination, he admitted that he would be unable to apply the law. It is implicit in his comments that he was not reserving the death penalty for the worst murders, but focusing on life without parole as the worse punishment. His views would bar reasonable deliberation on the consideration of both

aggravating and mitigating circumstances. To its natural conclusion, the potential juror would be giving the death sentence only as a less harsh punishment, contrary to the intent of the jury instructions which they would ultimately receive. Tr. 2153-2160. The trial judge's decision to exclude must be upheld.

II. The trial judge did not err in refusing to replace a juror with an alternate where the juror's alleged measurement of distance during a jury view was not misconduct nor a disqualifying test or experiments.

Lindsey maintains that he is entitled to a new trial because the trial court refused to remove juror Mauldin because during an authorized jury view of the automobile in which the decedent was shot, he appeared to be measuring distances within the car. Lindsey equates this alleged action with an improper experiment or demonstration. The trial judge rejected this assertion and concluded the juror was not acting improperly under this Court's precedent nor completing an experiment. Respondents concur that the trial court's refusal to replace the juror with an alternate was not error.

A. How the Issue was Raised Below

At the outset of the penalty phase, Solicitor Gowdy made a motion to allow the jury view the Mercury Topaz automobile in which the victim was killed. Tr. p. 1724, ll. 1-4. The stated reason for the view was that the prosecution "wanted the jury to be able to see the dimensions of the car and the car itself..." Tr. p. 1724, ll. 11-13.

The defense objected to the view, noting that there would be less intrusive ways to obtain that and that the state could take measurements and show the jury the width of the seat. Tr. p. 1724, ll. 15-18. Defense counsel Bartosh confirmed that his objection was under Rule 403 and asserted the unfair prejudice was "seeing the automobile itself." Tr. 1724.

Judge Few opined that he did not see the prejudice because it would add to the jury's understanding and have "significant probative value" and "I don't understand any unfair prejudice." Tr. p. 1725, ll. 1-6. It was noted that the blood stains had been removed from the car, but the bullet hole in the backseat was visible. Tr. 1725-26. However, he deferred his final decision until it was actually offered. Tr. 1726.

During the testimony of Celeste Nesbitt, the location of the car seat in the vehicle at the time of shooting on September 18, 2002 was described. Tr. 1879-1880. Also, Tr. p. 1894, ll. 1-8. The record reveals that Ms. Nesbitt was then asked to place the car seat in the vehicle. Tr. 1881.

After this was done, counsel Bartosh re-made his Rule 403 objection. He asserted that the state's purpose in the car viewing was to allow the jurors to understand "the spatial relationship between the size of the backseat, the position of the car seat, in order to appreciate the size. Tr. p. 1886, ll. 14-20.

Judge Few noted that in their presentation the state also wanted to show the size of the backseat in relation to the bullet hole which was a primary reason asserted by the state. Tr. p. 1886, ll. 21-25.

Defense counsel Bartosh contended that this relationship had been shown, less prejudicially, by the photographs admitted which showed the bullet hole location, including one with the dowel rod. Bartosh argued that although it did show the position of the car seat, it was incomplete on how much space Ms. Lindsey took up and it does not show how close she was to the car seat, so it is an incomplete demonstration. Tr. 1887.

Judge Few stated it was not his role to determine if there were less prejudicial ways for

the state to accomplish what they want to do, but whether their ways has the potential for unfair prejudice that substantially outweighs probative value. Tr. 1887-88.

Counsel Bartosh stated that the jury was going to be concentrating on looking at the car and seeing where a woman was shot to death, “not about how wide the seat is or where the car seat is.” Tr. p. 1888, ll. 12-16.

Judge Few authorized the jury view as allowing the jury to understand the aggravating circumstances. He declared the view could cut both ways:

“You might say the bullet hole is close to where Mrs. Lindsey was sitting and therefore unlikely to hit Kiera even if she was sitting up straight and not hiding under the edge of her car seat... I’m not saying the evidence weighs heavily in favor of the state or that it weighs in favor of the defendant in terms of aggravating circumstance. It’s just important evidence. To me, the probative value of seeing that car with the car seat in it and seeing that bullet hole is high. Since I see potential for unfair prejudice, I overrule the objections under Rule 403.”

Tr. p. 1890, ll. 3-20 (emphasis added).

Prior to the jury view of the automobile, the trial judge instructed the jury that there would be no conversation. He stated that the jury could look at the car, walk around, open doors and “just kind of see what you think.” Tr. p. 1895, ll. 6-12.

After the jury view was completed, the trial judge inquired of defense counsel Bartosh if there was anything he wanted to put on the record. Tr. 1896. Counsel Bartosh then placed his objection on the record concerning juror Mauldin and the viewing of the automobile:²

² The other matter defense counsel Bartosh discussed was his opinion that juror Sallis may have placed her hand on the car and appeared to be in silent prayer. Tr. 1897. Although counsel withdrew any objection, the Court stated that he was standing right behind her and did not see anything and did not appear to pause except to look into the car. Tr. 1897-98.

Mr. Bartosh: The other thing, Your Honor, Mr. Mauldin, [a juror] I believe, was using his arm as a dowel or a measurement. He measured both the front driver's seat and the back seat of the automobile I'm assuming to get an idea of the position of the people. Of course, Ms. Nesbitt was not in the car.

The Court: Right, I saw Mr. Mauldin doing something. He was standing beside the driver's door. The driver's door was closed. The driver's side rear door was open. And he reached his hand through the opening. It looked like he had his hand on the seat back of the driver's seat. Other than that, I couldn't tell what he was doing.

Mr. Bartosh: I think - -
You want to describe it?

Ms. Quimby: I was standing more towards the rear of the vehicle. His arm was through the back door opening. He rested it on the back of the driver's seat. But he also was trying to do an angle. It looked like he was trying to match up his elbow. He was trying to figure out the angles. We wanted to bring that to the attention of the Court.

The Court: Okay. Is there anything significant about that?

Mr. Bartosh: Your Honor, jurors aren't supposed to conduct their own investigation.

The Court: They are supposed to look at the evidence.

Mr. Bartosh: Exactly, they are supposed to view the evidence. But we feel in this case, he started to conduct his own investigation as to angles and things like that.

The Court: Uh, well, I think the jury has to ultimately get around to looking carefully at those angles cause that's a very key piece of evidence that relates to the aggravating circumstance that is alleged.

The Solicitor declared he did not see her but pause for less than a second. Tr. 1901.

Mr. Bartosh: Yes, but my point is, it is not his responsibility to conduct his own investigation and determine on his own what the angles are. They can look at the evidence and what the police officer testified to as to angles and distance and measurements and things like that, but a juror cannot conduct his own investigation.

The Court: So the suggestion is that if the juror examines the evidence that I have decided that they can examine too closely, under the Court's supervision, then he is conducting his own investigation?

Mr. Bartosh: No, sir. What I am suggesting is this, they can go out. They can look in the car. They can open the door. They can look inside the car. They can look at all the items that they want to. But once they start trying to determine distances on their own, by their own estimates and see angles by their estimates, then I think that is improper. They certainly are entitled to view it. I would also suggest, Your Honor, he was the only one that did.

The Court: Specifically, what it is that he did that you say that I need to attend to is to use his arm?

Mr. Bartosh: What he did was he stuck his arm from the door jam to determine the length from the door jam to the middle of the head rest in the front. He did the same thing in the back. He stuck it, he put his arm, he was attempting to use the length of his arm to estimate distance is what it appeared to me.

Tr. p. 1898, l. 5 - p. 1900, l. 22.

The judge asked defense counsel what he thought "they did that went beyond the view."

Defense counsel responded "it wasn't they, Your Honor it was Mr. Mauldin... he conducted measurements on his own, he went beyond viewing." Tr. p. 1901, l. 22 - p. 1902, l. 1.

The trial court asked counsel, assuming Mauldin did that with his arm, what is the

difference with that and a juror who measured 48 inches between the left side rear door and the edge of the car seat by only using his eyes. Tr. p. 1902, ll. 2-7.

The judge asked defense counsel “what do you propose I do?” Defense counsel responded, “replace him with an alternative, Your Honor... that would be the simple remedy.” Tr. p. 1902, ll. 13-21.

The judge stated he could not replace Mauldin without finding he was not fair or impartial and he asked, “what is wrong with trying to figure out how far it was? What is wrong with that. They are going to do that. That is part of their job...” Tr. p. 1902, l. 17 - p. 1903, l. 17.

Bartosh asserted the jury view was for viewing and juror Mauldin went beyond that. Tr. p. 1903, ll. 19-21. Solicitor Gowdy inquired as to what the difference is between one juror using a part of his body for measurement purposes and the other fourteen to using their mind and the same thing. Tr. p. 1903, l. 22 - p. 1904, l. 6.

Mr. Bartosh: Suppose one of them had pulled out their pocket and pulled a tape measurer and measured it. I don't think that would have been proper.

The Court: I am going to then remove from the jury every juror who pulled a tape measurer out of their pocket during that viewing and conducted a measurement. I think where this line is drawn is the jury is entitled to view and analyze the evidence based on the basic characteristics that every person brings into their role as jurors. Of course, that includes their common sense and the things that are in their mind.

That common sense would include how each different person analyzes the things that come before them during the course of their lives. some people can look at an object and estimate its size or

its distance without the need of any kind of measuring device.

Tr. p. 1904, ll. 7-24.

Further, Judge Few stated:

I can look at a table. I can look at a box. I can pretty much tell you how big it is just by looking at it. There would be some error. But I think I'm just pretty good at estimating distances. I don't need my arm usually to do that. Some other juror, some other people in the world may have different ways of going about doing something like that.

I don't believe that it is appropriate for me to screen jurors based on how they go about doing the things that we call on them to do in their role as jurors unless that involves using something that is outside the scope of evidence. That juror using his arm to make an estimate of distance is no different from me or some other member of the jury using their eyes to make an estimate of distance. So I don't see, I don't believe that there's anything for me to do.

I believe that it would be - - if I were to get that juror in here and ask him what he was doing, then I'm getting into the mind of that juror and perhaps making a suggestion to him that the way he goes about doing one particular thing that he thinks he need just to do in the course of his duty is not a proper way to do that. I am reluctant to do that. I believe that would be improper.

I believe that I got a good view of everything Mr. Mauldin did. I was watching him. I actually was standing up towards the front driver's side of the car about 15 feet away probably even with the front of the car when I first saw him go over and stick his hand in through the back driver's die door. Wanting to get a good handle on exactly what he was doing, I moved toward the back and watched him the whole time. I don't know what he was doing. But to me, he was not doing anything that was a whole lot different than what the other members of the jury were doing.

So I don't see anything to do. I don't see any indication

based on what I heard, looking at it the way you said you saw it and the way your people saw it that he was trying to make some measuring with his arm, I don't see anything improper in that.

Tr. p. 1904, l. 25 - p. 1906, l. 15.

Counsel Bartosh re-asserted his objection. Tr. 1906. He again requested that juror Mauldin be removed. Id., ll. 19-20.

Judge Few deferred a final ruling on the matter. However, he directed the jurors they could not talk about the case. Tr. p. 1906, ll. 23-25. He asked someone on the defense team to find law that supports his position. Tr. 1907.

During the proceeding, Judge Few provided counsel with two relevant cases, Baroody v. Anderson, 195 S.C. 422, 11 S.E.2d 860 (1940) and Stone v. City of Florence, 203 S.C. 522, 28 S.E.2d 409 (1943). Tr. 1981-82. the judge continued to defer the ruling until the conclusion of the proceeding Id.

Prior to closing, counsel Bartosh revisited the juror issue. Tr. 2099. Relying upon Baroody and Stone, he asserted that a juror may not perform an experiment (testimony and evidence) outside of the trial. He contended under Stone an experiment is a trial or special test to confirm or disprove something doubtful. Bartosh stated if a juror performs an experiment, it is improper. Id. Bartosh stated that the Court set aside a verdict [in State v. Ballew] where the jurors on a view of the jail improperly took a hammer and hit the side of the building in an escape case where the escapee had a hammer and knocked a hole in the wall and got out. Tr. p. 2099, ll. 14-21.

Counsel Bartosh asserted that since the juror conducted an experiment when he was

attempting to determine the distances, it was improper. He then contended the only remedy was to replace the juror with an alternate. Tr. p. 2100, ll. 1-5.

Judge Few re-affirmed his denial of the motion to replace juror Mauldin:

“All the juror did was observe. There was nothing the juror did where the results could be varied. ...everything that we heard the juror did, the results are going to be what they are....

Tr. p. 2100, ll. 10-15.

Judge Few distinguish Baroody and Stone from the instant situation. On Baroody, he concluded the [State v. Ballew] experiment was variable because throwing the hatchet against the wall to see what happens could have different results depending upon how the juror did the experiment. Similarly, in Baroody, the juror asked the sheriff to drive 35 m.p.h. around the curve to see what happens. Seeing these as totally different situations from the car viewing, Judge Few denied the motion. Tr. p. 2101, l. 2.

B. Law/Analysis

The critical issue before this Court concerns a juror's apparent actions during a jury view. The purpose of a jury view is to simply enable the jurors to better understand the evidence that has been presented in the courtroom. State v. Mouzon, 326 S.C. 199, 203, 485 S.E.2d 918 (1997). Stated another way, the view is not to permit the taking of evidence out of court, but merely to enable the jurors to comprehend more clearly, by the aid of visible objects, the evidence already received. 23A C.J.S. Criminal Law § 1156. See, Arnold v. Evatt, 113 F.3d 1352 (4th Cir. 1997)(view allowed jurors to visually confirm fact of isolated location).

It has been also held that although a jury is not permitted to conduct experiments or

develop facts not in evidence, the mere making of a more critical examination of an exhibit is not objectionable. U.S. v. Holmes, 30 Fed. Appx. 302 (4th Cir. 2002). Compare, State v. Burckhalter, 151 S.E. 64, 153 S.E. 487 (1930)(permitting jurors to take liquid into jury room and smell or taste it was not error) with U.S. v. Welch, 377 F.Supp. 367 D.S.C. 1973)(although juror placing adhesive tape on lip was an improper experiment, error was harmless).

S.C. Code Ann., § 14-7-1320 (1976), allows for the jury, at the request of a party, to be taken to view any property, matter or thing related to the controversy when it appears “that such view is necessary to a just decision...” In Stone v. City of Florence, 203 S.C. 527, 28 S.E.2d 409 (1943), the Court held that juror misconduct claims were without merit and reversed an order that had granted a new trial. The issue in Stone was whether the actions of jurors in stepping from the curb into the hole constituted an improper “experiment.” In denying the new trial, the Court concluded the actions were not misconduct during the jury view.

The Stone Court relied upon Baroody v. Anderson, 195 S.C. 422, 11 S.E.2d 860 (1940) and State v. Ballew, 83 S.C. 82, 63 S.E. 688 (1909), in denying relief. The court determined that in the Baroody situation, an improper experiment occurred when the jury at the jury view directed the sheriff to drive around the curve at the scene of an accident at 35 m.p.h., while the jury stood where the truck was at observing the car approach them. This was a re-enactment and the sheriff used as a witness. The Stone Court declared this was clearly improper and required a new trial because counsel had no opportunity to examine or cross-examine the sheriff or to check on the accuracy of the methods used. Concerning the Ballew case, the Stone Court noted another re-enactment was improperly attempted. There, a view of a jail was permitted in a “conveying into jail implements for the purpose of aiding prisoners to escape case” to go to the jail “look at

the place and see if we can see whether it was knocked off or how it was cut.” While at the jail view, the prosecutor displayed a cord and piece of iron the defendants asserted were used to draw the hatchet into the cell. After the prosecutor placed the hatchet against the wall, the jurors then attempted to throw the iron attached to the cord to draw the hatchet into the cell but failed. The Stone Court concluded that the juror’s actions were improper because “the jury attempted to reconstruct the situation, and by a detailed demonstration, which involved making the prosecutor an important witness attempted to reach a conclusion as to whether or not a certain thing could be done. The Court noted that juries may be allowed, in the discretion of the court to inspect the scene..., but it is improper for the jury to take evidence by experimentation, or otherwise, outside of the court.” Stone, supra, 28 S.E.2d at 411-12.

In concluding that the actions of the jurors at the scene stepping into the hole from the curb did not constitute the taking of evidence by an experiment, the Stone Court relied upon the following:

While the practice is not to be approved, yet it cannot be said to be prejudicial error for the jury to make measurements on the premises where the purpose thereof is merely to locate certain fixed monuments referred to in evidence, as to which there is no dispute or to take with them photographs and ascertain the points from which they were taken. There is no doubt it is also improper for the jury on the view to conduct experiments, though the making of trifling experiments was held to be non-prejudicial....

Stone, supra, 28 S.E.2d at 12 (emphasis added). The Stone Court then determined that there was an error of law and no evidentiary support for the granting of a new trial. Particularly, the Court noted that there was no issue as to the measurements and uncontradicted evidence was presented at trial about the distance from the top of the curb to the bottom of the hole.

In his brief, the Appellant relies upon three easily distinguishable cases. In Russell v. State, 661 P.2d 1293 (Nev. 1983), a juror committed misconduct during a recess when he drove from Carson City to Reno to measure the time it took and then revealed that information to the other jurors when the defendant had claimed an alibi that he was at work in Reno and would not have been able to get from Reno to Carson City by the time the crime took place where no evidence was presented at trial about the actual travel time. Plainly, this was improper independent research by the juror about a crucial aspect of the case. Similarly, in Ex Parte Thomas, 666 So.2d 855 (Ala. 1995), the Court found improper juror conduct warranting a new trial when the juror put on the pants the defendant was wearing, had another juror bind his hands behind him with a cord to attempt to determine if it was possible for the defendant to remove cocaine from his pocket during the ride in the police car when cocaine had been found in the police vehicle under the backseat. Because the improper experiment introduced new evidence crucial in resolving whether the defendant was physically capable of removing cocaine from his pocket, the misconduct was reversible. Again, in Bell v. State of California, 63 Cal.App. 4th 919, 74 Cal. Rptr.2d 241 (1998), the Court held a new trial was required when a juror conducted an experiment. The Court distinguished what the juror did in attempting to replicate the manner a party's hands and arms had been pinned behind his back from "a careful evaluation of the evidence." Error was created where the juror discussed the facts of the case with others in violation of the court's order, attempted to simulate the events, and then passed on the results to the jurors. Bell, supra.

In Lindsey's case, however, no experiments occurred. Instead, the Appellant's complaint appears to be addressed to a juror's careful evaluation at the jury view to better understand the

evidence presented at trial. During the testimony at trial, descriptions were given about the location of occupants in the automobile. Witness Celeste Nesbitt testified that she was in the driver's seat, the victim Nell Lindsey was in the rear seat, Celeste's oldest daughter, Kiera, was in the back middle seat, and her daughter, Keysha, was in a car seat in the back passenger side seat of the medium size Mercury Topaz. Nesbitt's mother Julia Martin was in the passenger front seat. She described the victim as 5 feet 7 inches and about 150 pounds. Tr. 1522. she further described her car having tinted windows. Tr. 1527. Officer Benny Godfrey testified he saw a male with a handgun pointing it at the back glass and fire two rounds into it and then saw two more flashes. Then, he saw Lindsey pointing the gun at him and Godfrey proceeded to fire four rounds at him Tr. 1566-68, 1571.

Officer Godfrey stated he then got an older woman (Mrs. Nesbitt's mother, Julia Martin) out of the front seat and then got the two children out of the back seat after one unlocked the door. Tr. 1573. There was a female (the homicide victim) in the left rear seat who appeared to be dead. Tr. 1574.

Spartanburg Deputy Sheriff Randy Bogan took photographs of the scene. Tr. 1586. State Exhibit 24 showed the backseat of car where Ms. Lindsey's body was found. Exhibits 27, 28, 29, 30 and 31 revealed various relevant matters:

- 27 - back of vehicle and bullet hole going into the backside of the back window.
- 28 - four bullet holes in vehicle.
- 29 - rear of vehicle where two bullet holes are.
- 30 - side view of vehicle and two bullet holes.

31 - closer view and different angle.

Tr. p. 1588-1590. State Exhibit 48 revealed the backseat of the car with the baby seat on the right side of the vehicle and a blood stain on the left side where the victim had been seated. Tr. 1599. State Exhibit 50 showed the bullet hole that goes through the backseat, described as “being center-ways of the backseat.” Tr. 1600. State Exhibits 61 and 63 showed the trunk of the vehicle with a dowel pointing to where the projectile was located in the trunk from the opposite side of the backseat. Tr. 1601-02. Exhibits, 54, 55, 56 and 58 showed the dowel revealing the angle from the seat into the trunk. Tr. 1603-04.

In the penalty phase, Kiera Potlow described her location in the vehicle along with victim. Seated in the middle, she described ducking under her sister’s car seat when the shooting started. Tr. 1756. She testified that she was not on the floor board, but ducked to the edge of the car seat. Tr. 1757-58.

In the penalty phase, Deputy Bogan described State Exhibit 73, which showed the victim in the backseat with the cell phone in her right hand slumped over, the car seat and the bullet hole in the seat. Tr. 1800-01.

As set out more fully in issue three, the prosecution case rested upon proof of the existence of the statutory aggravating circumstance of “by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.” See § 16-3-20(c)(a)(3). In denying the motion for directed verdict on the aggravator, Judge Few noted the evidence was that Lindsey may not have been able to see the victim because of the tinted car windows, but still fired into the window from two different angles [as revealed in the

photographic exhibits]. Further, the shots were fired into the vehicle. He noted that a bullet hole was in the area where one of the children was sitting where, if she would have leaned the other way, she would have been hit by the bullet. Tr. 1980-81.

In the closing argument of the Solicitor, he noted that the jury had seen the car, touched the car, “looked in and seen the dimensions in the back.” Tr. 2109. He followed it by using a picture to describe the inside of the car, the testimony that she had ducked her head toward the car seat, but that if she did the opposite move, her body would have passed directly where the bullet passed and she would be dead. Tr. 2109-10. According to the prosecution’s theory, “he fired two bullets in the direction of two children.” Tr. p. 2110, ll. 16-18. Also, Tr. 2110-11.

In his closing, defense counsel Bartosh also discussed the location of the victim, the children, and the bullet hole in the seat. Tr. 2135. Under his theory, if her daughter was sitting in the described position where the crime happened, “that bullet would have struck her. You have also seen the car. I don’t believe a child her size could scoot down underneath the car seat. I respectfully suggest that that would be a reasonable doubt as to whether or not she was placed in a great risk of death.” Tr. p. 2135, ll. 18-22. See also, Tr. p. 2142, ll. 4-23 (use of photographs to describe injuries and “the misplacement of that bullet.”).

Respondents submit that the actions of juror Mauldin at the jury view did not require his removal. Importantly, unlike the cases Lindsey relies upon there was no experiment or re-enactment of the shooting. What the juror apparently did was what jurors inevitably do in jury views; closely examine the view in light of the admitted evidence to better understand the evidence. The view was intended by the Court (and the requestor) to allow the jury to better understand the location of the bullet hole in relationship to where Ms. Lindsey was sitting and the

car seat. Tr. 1890. As Solicitor Gowdy stated, it was to see the dimensions of the car. Tr. p. 1724, ll. 11-13.

Here, juror Mauldin in allegedly looking inside the car and trying to understand better the angles portrayed in the admitted photographs and testimony was not conducting his own investigation. Similarly, reaching in from the door to the middle of the head rest was no different than the acceptable behavior of the Stone jurors in stepping from the curb to the manhole. It was not an experiment - it was a jury view with an understanding of the evidence. As the trial judge ultimately stated: “What is wrong with that; that is part of their job.” Tr. 1902-03. No “evidence” was taken in the jury view, only a better understanding of the facts in the case.³

Since it was not misconduct on the part of juror Mauldin, the trial judge plainly did not abuse his discretion in failing to replace him with an alternative. Alternately, if it was misconduct, at most, it was a “trifling” experiment that must be held as “nonprejudicial.” If the actions in Stone where a new trial was erroneously granted “based upon an error of law” and “without evidentiary support”, Stone, supra at 412, clearly the actions of Mauldin, which must be deemed “less serious” must be found to be non-prejudicial. His argument to the contrary must be dismissed.

³ As will be more fully set out in argument three, his argument on “prejudice” is a red herring. The act of shooting into a back seat multiple times where there were three passengers overwhelmingly and conclusively satisfies the aggravator of “great risk of death.” His concerns about distance would have no impact particular when he admits in his closing that the testimony supported the possibility that the child should have been struck by the bullet based upon her initial statement.

III. The lower court properly refused to direct a verdict because the evidence supported the “great risk of death to more than one person in a public place” aggravator where a passenger was at great risk of being murdered had she not leaned away when the bullet struck where her head would have been.

The State sought the death penalty based upon S.C. Code Ann. § 16-3-20(C)(a)(3) (Supp. 1998). This aggravating circumstance authorizes the imposition of a death sentence where a defendant

... by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person.

Ignoring the conclusive evidence of the proximity of the two children in the vehicle’s backseat with victim Ruby Nell Lindsey, the tinted glass preventing clear recognition, and the location of the bullet hole near the middle of car’s backseat where Kiera Potlow’s head would have been had she not leaned away, Lindsey claims that the statutory aggravating factor was inapplicable because the shooting was “at close range” and he did not mean to harm anyone other than his wife. Initial Brief of Appellant, p. 27. At no time does he ever discuss the underlying factual basis of the state’s theory of the case of aggravation – the great risk of death to those within the vehicle and particularly Kiera, and instead makes reference to the fact that after shooting into the vehicle, he focuses upon a collateral fact that Lindsey did not shoot the officer when he could have done so. As shown by the evidence set out in Argument III, the evidence conclusively supports the “great risk of death” aggravator and the trial judge had a duty to deny the directed verdict motion. To do otherwise would have been an error of law.

STANDARD OF REVIEW

In determining whether to submit an aggravating circumstance to the jury, the trial court is concerned with the existence of the evidence, not its weight. State v. Locklair, 341 S.C. 352, 535 S.E.2d 420 (2000); State v. Smith, 298 S.C. 482, 485, 381 S.E.2d 724, 726 (1989). The trial judge should submit the aggravator to the jury if “supported by any evidence, direct or circumstantial.” Id.

In construing statutes, words must be given their plain and ordinary meaning without resort to subtle or forced construction in an attempt to expand (or limit) the statute. Locklair, supra, 341S.C. at 367, 535 S.E.2d at 427-28.

How the Issue Was Presented Below

At the conclusion of the State’s penalty phase presentation, counsel Bartosh moved for a directed verdict on the “great risk of death” statutory aggravator. Tr. 1972. He initially relied upon a Georgia case, Pope v. State, 256 Ga. 195, 345 S.E.2d 831, 845 (1986), to apparently contend that shooting someone at fairly close range does not, by itself, create a great risk of death to more than one person because others are in the vicinity. Tr. 1974-75. Bartosh asserted that here you had someone firing at a fairly short distance at one person, it must be more than likelihood. Tr. 1975-76. Counsel also apparently referred to an unpublished Fourth Circuit opinion, Nolden v. U.S., 856 F.2d 187 (4th Cir. 1988)(unpublished), in support of his position that a .38 caliber handgun (as opposed to an automatic weapon) does not fit the “weapon normally dangerous to the lives of more than one person” definition. Tr. 1976-77.

Solicitor Gowdy relied upon State v. Locklair, 341 S.C. 352, 535 S.E.2d 420 (2000) in opposition to the motion. Tr. 1977. He asserted Locklair stood for the proposition that the

handgun satisfied the “weapon” definition. The prosecutor asserted that the parking lot of the Inman Police Station is clearly a “public place.” Tr. 1977. He noted that in Locklair, the attempted firing with the safety on satisfied the factor. Tr. p. 1977, ll. 21-25.

Solicitor Gowdy argued that the facts in Lindsey were much more egregious than Locklair. Here, he noted, children were in the car, one leaning forward and one asleep. In addition, with the tinted windows, Lindsey fired two shots from the back of the victim’s head and “then he walked around and fired two more times directly in the direction of the two children.” Tr. p. 1978, ll. 6-8. Gowdy noted that one of the bullets lodged in the trunk. He noted further that the autopsy photographs revealed one of the bullets that struck the victim had passed through both sides of her skull, lodging in her skin, with a possibility of clearing the skin and striking the children. Tr. p. 1978, ll. 9-16.

In recognizing that under Locklair there is no requirement that bystanders be injured, he created a “great risk” where one did miss, which was sufficient. In addition, he added the fact that Officer Godfrey testified that after the shooting, Lindsey pointed the gun at him in the public place. Gowdy concluded that “but for the fact that her [Kiera’s] head was laying either on the front, car seat or on her aunt’s [victim] shoulder, we very well could have two homicides. Tr. p. 1979, ll. 4-9.

Judge Few rejected the defense motion with apparent ease:

THE COURT: The facts of the Georgia case seem to me to be a good bit different. This case is pretty simple to me. The evidence is that on the two occasions that Mr. Lindsey apparently saw Ms. Nesbitt’s car, he was unable to tell that Ms., that his wife was in there because of the tint in the windows. Once when he passed them and they were driving through Spartanburg to Inman. But more importantly as they stopped side-by-side on the street in Inman outside of the house of Mrs. Nesbitt’s

mother I believe she said.

They were close enough to have a conversation through the window. And yet Mr. Lindsey could not tell that Mrs. Lindsey was in the back seat because of the tinted windows. Nevertheless, he fired shots into the window from two different angles while the vehicle was parked in a public place. And the second time around looking presumably to through the same window that he could not identify her through only minutes before. He fired shots in the direction of two children.

I have seen the bullet hole in the car, in the seat. The bullet hole is in the area that Kiera would have been sitting in. If she had decided in her - - none of us would know how to react to that situation. ...Certainly, a nine-year-old child is not going to have an ability to make a rational calculated decision as to how to best protect herself in the seconds that followed shots being fired into the head of the adult sitting next to her in the back seat. It is very possible that Kiera could have leaned the other way. She might could have leaned toward Nell for protection. And if she had done that, she would be dead. That bullet goes right through the space that she would have leaned into.

If she had not leaned away, from my view of the evidence she probably would have been hit. I've got absolutely no doubt that the facts in this case are sufficient to go to the jury on the aggravating circumstance of creating a great risk of death in a public place using a weapon that is capable of producing death. I did not get the language, I did not quote the statute. But I have no doubt that that is sufficient. Motion is denied.

Tr. p. 1980, l. 10 - p. 1981, l. 6.

As set out in argument three, the solicitor's closing argument paralleled his response and the judge's order on the statutory aggravating factor, also noting that Kiera was cut by the glass and injured physically and psychologically. Tr. 2108-2111. Strangely, the defense seemed to challenge the credibility of the witnesses statements about Kiera's location in the car, almost claiming that if she was where she said she was, she would now be dead. See, Tr. p. 2135, ll. 18-22. Interestingly, the juror requested the testimony of Kiera and Officer Benny Godfrey be replayed, as well as the 911 audiotape. Tr. 2164-65.

The jury found the existence of the statutory aggravating circumstance and recommended the death sentence. Tr. 2169-2171. Defense counsel Bartosh made a motion for a new trial based upon the alleged failure of the state to satisfy its burden of proof on the statutory aggravating circumstance. Tr. p. 2172, ll. 5-12. Judge Few denied the motion. Tr. p. 2172, l. 13.

LAW/ANALYSIS

Respondents submits that the evidence conclusively supports the existence of the statutory aggravating factor of “great risk of death” because the two children in the back seat were unquestionably within a zone of danger as a result of the four gunshots into the vehicle, particularly when the shooting began through a tinted window at various dangerous angles and by the testimony showed the bullet that exited the neck of the decedent would have struck and killed the child in the middle of the seat, had she not moved to one side.⁴ In State v. Locklair, supra. the court found that the “great risk of death” aggravator was properly supported by the evidence. Lindsay attempts to distinguish Locklair by asserting that it was limited to a situation where a murderer continued to try to fire his weapon after he had already shot and killed his girlfriend, albeit with the safety on. In Locklair, the Court held:

Locklair argues that this was a simple case of a victim being shot at close range, not the type of incident contemplated by the statute. However, the trial testimony does not support this assertion. According to Nichols' testimony, Locklair put more than one person at great risk of danger because he attempted to fire the gun several times, but the safety was on. After he shot Bridges, Locklair pointed the gun at Williams' home where there were children inside. Nichols was forced to tackle Locklair to stop him and Robert Williams, the victim's stepfather,

⁴ Respondents incorporate by reference the facts supportive of this conclusion set out in argument two, infra., at pages 29-31 as if set out *de novo* herein. Respondents would also note the summary of the 911 tape, including the children's screams as supportive of the knowledge of the existence of the children in the backseat. See Exhibit 21 (tape). See also, Tr.p. 1743-45 (opening by Deputy Solicitor Willingham).

had to struggle with Locklair to retrieve the gun. According to the trial testimony, the gun was dropped several times during the struggle with shots being fired in different directions. Also, at the very least, Nichols and Robert Williams, were placed in great danger as they attempted to stop Locklair from firing and retrieve the gun. **Finally, Locklair put many people at great risk of danger. Nichols, Robert William, Betty Williams, Dewey Morgan, and several children playing in the street were all within firing range when the shooting occurred.**

Id., 341 S.C. at 366, 534 S.E.2d at 427. ⁵

Lindsey contends that Locklair is dissimilar from his case. While not completely similar, as Solicitor Gowdy noted, the instant case is even more egregious and stronger on the actual risk of death shown toward the children in the back seat who were within the zone of danger and death from the actually fired bullets, whose lives were spared only due to fortuity of a leaning motion (or lack of movement) at the instant of the firing in a close area.

Conversely, he attempts to suggest that the “great risk of death” only exists in a large, crowded setting such as a shopping mall, citing State v. Ivey, 325 S.C. 137, 481 S.E.2d 12 (1997). In Ivey, the defendant fired at a police officer in a shopping mall. The jury found *inter alia* the existence of the “great risk of death” aggravator. However, this Court’s ruling did not address the sufficiency of the evidence supporting the aggravator or construe the statute. Nothing in Ivey suggests that the aggravator only applies in the setting suggested by the Appellant.

In fact Locklair, can be easily read to suggest that that the instant situation has already been addressed and approved by this Court by reliance upon footnote 4 in Locklair. As noted above, it cited three cases from outside South Carolina. Indeed, in each of those cited cases, other

⁵ In Locklair, the Court also noted that other jurisdictions have held that a gun fired in the direction of two persons satisfies the statutory aggravator citing State (N. C.) v. Moose, 310 N.C. 482, 313 S.E.2d 507 (1984); Jones v. Georgia, 243 Ga. 820, 256 S.E.2d 907 (1979); Moran v. Nevada, 103 Nev. 138, 734 P.2d 712 (1987). Id., at n. 4.

jurisdictions have ruled that a gun fired in the direction of two persons satisfies the statutory aggravator. *See, e.g., Jones v. State*, 243 Ga. 820, 256 S.E.2d 907 (1979), *construing* GA. CODE ANN. § 27-2534.1(b)(3)⁶ *now codified as* GA. CODE ANN. § 17-10-30(b)(3) [.32 caliber automatic pistol fired at two employees in convenience store supported the statutory aggravating circumstance]; *State v. Moose*, 310 N.C. 482, 313 S.E.2d 507 (1984), *construing* N.C. GEN. STAT. § 15A-2000(e)(10)⁷ [Shotgun fired into passenger compartment of car where two persons were seated satisfies requirements of statutory aggravating circumstance]; *Moran v. State*, 103 Nev. 138, 734 P.2d 712 (1987), *construing* NEV. REV. STAT. § 200.033(3)⁸ [Statutory aggravator existed where defendant reached around his companion seated immediately to his right in order to shoot victim].

The Appellant's reliance upon Nebraska law in *State v. Stewart*, 197 Neb. 497, 250 N.W.2d 849 (1977) for an indication of legislative intent is misplaced. The Nebraska Supreme Court based *Stewart* on NEB. REV. STAT. § 29-2523(1)(f). Nebraska law requires a showing that "[t]he offender knowingly created a great risk to **at least several persons**." [Emphasis added]. By its own terms, the Appellant must create a great risk of death "to more than **two other**

⁶This statutory aggravator exists when the defendant "by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person."

⁷The North Carolina statutory aggravator exists when the defendant "knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person."

⁸The Nevada aggravator requires proof that "[t]he murder was committed by a person who knowingly created a great risk of death to more than one person by means of a weapon, device or course of action which would normally be hazardous to the lives of more than one person].

persons. . . .” [Emphasis added]. State v. Stewart, 197 Neb. at 524, 250 N.W.2d at 864.

Accordingly, the Nebraska aggravator requires that the murderer’s weapon be capable of endangering a group, not just one other person. Nothing in the South Carolina statute requires a showing that the weapon must be dangerous to a group rather than the “lives of more than one person.”⁹

Plainly, the fact that Kiera or her sister were not struck direct by the bullet does not preclude the existence of the aggravating factor. *See Lisle v. State*, 113 Nev. 540, 937 P.2d 473 (1997) [Where defendant shot and killed victim seated in car, statutory aggravator existed because the passenger seated on the other side of the victim was in zone of danger]. *See also Commonwealth v. Rios*, 546 Pa. 271, 295-96, 684 A.2d 1025, 1036-37 (1996), *construing* 42 PA. CONS. STAT. § 9711(d)(7)¹⁰ [“It is not necessary that the endangered bystander be directly in the line of fire for a grave risk of death to occur”]. Moreover, in determining whether the murder weapon created a great risk of death, the trial judge may consider “the destructive capabilities of the weapon or device.” Moose, 310 N.C. at 497, 313 S.E.2d at 517. Under appropriate circumstances, “[a] pistol used in a public place may be hazardous to the lives of more than one

⁹Florida’s aggravator uses language like the Nebraska statute, and requires a showing that “[t]he defendant knowingly created a great risk of death to many persons.” FLA. STAT. § 921.141(5)(c). “By using the word ‘many,’ the legislature indicated that a great risk of death to a small number of people would not establish this aggravating circumstance.” Kampff v. State, 371 So.2d 1007 (Fla. 1979). Thus, any reliance upon that different factor of “many persons” in Hallman v. State, 560 So.2d 223, 225-226 (Fla. 1990), is misplaced. Unlike Hallman, it is not speculation, but proof that Kiera was in the zone of death when the bullets were fired into the automobile.

¹⁰The Pennsylvania aggravator requires proof that “[i]n the commission of the offense the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense.”

person.” Pope v. State, 256 Ga. 195, 211, 345 S.E.2d 831, 845 (1986), *citing* Jones v. State.¹¹ As the Oklahoma courts have consistently held in viewing this aggravator, “it is not the death of more than one person which supports the aggravating circumstance, but the defendant’s acts that create the risk of death to another which are in close proximity, in terms of time, location and intent to the act of the killing itself.” Snow v. State, 876 P. 2d 291, 297 (Okla. 1994).

Wholly absent from the Appellant’s argument on this issue is the undisputed fact that two children were seated in the back seat with the victim in close proximity. While the Appellant notes that the victim was shot with four shots, he makes no mention, conspicuously, of the fact of the bullet that grazed the victim and the bullet that entered the center of the seat where Kiera was sitting. Remarkably, the entire basis of the trial judge’s ruling cannot vanish by ignorance. The reason for this failing is obvious - to admit its existence was to admit the existence of the aggravating factor. As the defense cogently acknowledged in its closing, if the witness was correct in the statement of her location, she should be dead. That was the risk of her proximity to Mrs. Lindsey - revealed by their screams on the 911 call, Lindsey was not ignorant of their presence nor their great risk of death while they were in the zone of danger. Accord, Jones v. State, 128 P. 3d 521 (Okla. 2006) (evidence showed defendant killed victim while victim was sitting in vehicle with his sister and two young daughters and defendant knew of their presence when he shot victim); State v. Burns, 979 S.W.2d 276 (Tenn. 1998) (evidence supported

¹¹In Pope, the defendant killed a shopkeeper while they struggled over the gun. The third party victim was behind the defendant beating him with a mop when the gun fired. The defendant then turned and deliberately shot the other victim. Id., 256 Ga. At 196, 345 S.E.2d at 834. In vacating the death sentence, Georgia Supreme Court ruled that the statutory aggravator was not present because the shooting of the shopkeeper did not necessarily create a great risk of death to the other victim. Id., 256 Ga. at 211, 345 S.E.2d at 845.

aggravator of “great risk of death to two or more people “where defendant shot inside car in which three people were sitting, killing one and wounding another then fired shots at another man who left car, which directly imperiled four men playing basketball nearby).

Since there is evidence to support the existence of the statutory aggravating factor, the trial court correctly denied the motion for a directed verdict as to the aggravating factor. Here, the evidence existed that Lindsey “by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person.” It occurred in the Inman Police Department - a public place. The weapon - a .38 revolver - was the type of weapon recognized in Locklair as being hazardous to the lives of more than one person. Lindsey was aware that there was more than one person in the vehicle at the time of his shooting. And finally, the manner of his shooting, through tinted windows and then at various angles put “more than one person at great risk of death” the children in the back seat, would fortuitous positioning saved their lives from the bullets which struck Nell Lindsey. This exception is without merit.

IV. Where a person with a violent criminal history murders his estranged wife by multiple shootings at great risk of death to children in close proximity with other passengers in a vehicle after a judicial directive the evening before and immediately after a law enforcement officer directs the defendant to stop, the death sentence is proportionate even though there was only one homicide victim and it developed from a domestic dispute.

In his brief, for the first time, Lindsey contends the imposition of a death sentence upon him is disproportionate under S.C. Code §16-3-25 (C) review. He contends that it should be vacated because the evidence did not support the jury’s finding of the statutory aggravating circumstance of “great risk of death” and because the sentence is disproportionate and excessive

when compared with other cases.¹²

Under State law, S.C.Code Ann. § 16-3-25(C)(3) (2003) requires us to determine in a death case "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." The United States Constitution prohibits the imposition of the death penalty when it is either excessive or disproportionate in light of the crime and the defendant. State v. Copeland, 278 S.C. 572, 590, 300 S.E.2d 63, 74 (1982). In conducting a proportionality review, this Court will search for similar cases in which the death sentence has been upheld. *Id.*; S.C.Code Ann. § 16-3- 25(E) (2003). However, there is no requirement the sentence be proportional to any particular case; however, death sentences have been imposed in similar cases.

Lindsey characterizes his case as having only two feature: that it involved a single victim and arose from a domestic dispute. Ignoring the other features of his case and the existing aggravation arising from the circumstances of the crime and his past history of criminal misconduct and flaunting disregard of the law and societal responsibilities, he then suggests that his sentence must be vacated. For reasons obvious to the prosecutor in seeking death, the jury in finding death appropriate, and the trial judge in affirming the proportionality of the sentence, his request of this Court is without merit.

Any understanding of the facts of the case and the propriety of the harshest punishment must begin with a review of state exhibit 21, the 911 tape, made on September 18, 2002. Within that tape reveals that this act was more than a single victim incident, although only one victim

¹²Respondent incorporates herein by reference the entirety of Argument III above concerning the sufficiency of the aggravating circumstance of "great risk of death."

died. Within that tape reveals unique violence and blatant disregard of societal laws where Lindsey, ordered to avoid contact with the victim due to his prior criminal actions, tracks down the victim and kills the victim in cold blood while she is seeking respite at the Inman S.C. Police Station, in front of law enforcement.

State Exhibit 21, the tape of the 911 telephone call from Ruby Nell Lindsey to the Dispatcher reveals the following:

Dispatch: Spartanburg 911, what is your emergency?

Lindsey: Yes, I just got off work and my sister was going to drop me off and my husband, they signed a warrant on him last night and told him to stay away from me, now he's calling us, and I'm in Inman City. I'm on my way to the police station because he's behind us following us. He's coming down Main Street.

Dispatch: Okay, so you're ma'am! Wait a minute, don't hang up on me!

Lindsey: I'm not gonna hang up on you.

Dispatch: And he's "wanted" you said?

Lindsey: They already picked him up and the judge told him to stay away from me and here he is behind us and now following us.

Dispatch: What's your name?

Lindsey: Uh, Ruby Lindsey.

Dispatch: What's your phone number?

Lindsey: What's my phone number?

Dispatch: Yes ma'am, your cell phone number.

Lindsey: 978-xxxx. He's coming down right beside us.

Dispatch: What's his name?

Lindsey: Marion Lindsey.

Dispatch: Marion Lindsey?

Lindsey: Yep.

Dispatch: What kind of car are you in?

Lindsey: I'm in a gray car; I'm pulling into Inman City Police Station right now.

Dispatch: What kind of car is the male in?

Lindsey: He's in a Nissan Sentra.

Dispatch: What color?

Lindsey: Uh, gold.

Dispatch: Did he pull in behind you?

Lindsey: Yeah he pulled in behind us.

Lindsey: I'm not getting out!

(Children screaming in the background, conversation inaudible)

Dispatch: Hello?

(Child/Children crying in the background)

Dispatch: Hello? Hello? Hello?

State Exhibit 21, 21(a) (tape, enhanced CD).

The evidence of this horrific scene at the sanctuary of the police station parking lot further reveals that the driver, Celeste Nesbitt after driving them into the parking lot exited the vehicle and tried to get the decedent to leave but she was talking on the telephone to 911. Unsuccessful, Nesbitt saw the Appellant pull into the lot, jump from his car, and run toward the

back of the car. [Earlier, he had stopped them and Celeste told him, when he was unable to see through the tinted windows, that her daughters were in the back seat, but denied that there was anyone else there when he declared that somebody else id back there. Tr.p. 1526.] Celeste saw Lindsey pull out a gun and stick it to the rear passenger window and fire into the car. Celeste then crawled into the nearby police car for her own safety. After the shooting she was advised that they (the police) had got him and she was confronted with her oldest daughter screaming that Nell was dead. Tr.p. 1536.

Inman officer Godfrey described hearing about a “rolling domestic dispute” from the dispatcher. He stated that he saw the cars pull into the parking lot and saw Nesbitt jump out of the car and come running toward him and state that “he’s going to get her. . .”. He then saw the Appellant with a handgun point at the back glass. When Godfrey reached for his gun and hollered “don’t,” Lindsey ignored the demand and fired two shots into the back glass. Tr.p. 1567.

At that point, Godfrey took cover. He then saw two more flashes from Lindsey’s weapon. Seconds later, Officer Godfrey came out and Lindsey pointed the firearm at him. Godfrey reacted and fired four times at Lindsey. Tr. p. 1567, ll. 19-24, p. 1575, l.19 -p. 1576, l. 8. Lindsey was hit by him according to Godfrey and went down.¹³

Ruby Nell Lindsey suffered four separate gunshot wounds. Three bullets entered and remained in her head. The first was to the back of the head, 3 1/4 inches from the top and 3/4 of an inch to the left of the midline. The second was to the left temporal region. The third was near the nape of the neck. The fourth wound grazed the lower postural neck midline. Tr. p. 1654-

¹³Lindsey stated to the paramedics that he had shot himself in the head. Tr.p. 1674. Lindsey sustained wounds to his hip and legs. Tr. p. 1669.

1657.

In processing the scene, evidence revealed that shots went through the backside of the back window from the rear drivers side' and also from the driver's side rear window where Mrs. Lindsey was seated. Tr.p. 1588-1590. As throughly set out in the prior arguments, it was by fortuity that the children seated in the back seat were not killed or injured beyond the cuts and emotional trauma they received.

As Appellant recognizes the events evolved out of a domestic situation. The evidence presented revealed that Marion Lindsey had beaten his wife previously . Tr.p. 1775-1781, 1823. The victim had made calls contacting lawyers concerning a divorce. Tr. p. 1782. The Appellant referred to his wife as "bitch" and threatened to kill her if "I catch you doing anything." Tr.p. 1782. Testimony was received about an assault by Appellant on his wife at Appleby's Restaurant in December 2001 which resulted in a criminal domestic violence warrant. Tr.p. 1918-1921, 1924-1926.

Evidence also revealed that the Appellant was involved in the sale and distribution of crack cocaine. Tr.p. 1830-1834, 1855-56, 1863-64, 1875 (11.41 grams of crack cocaine in the September 14, 2000 incident).

Importantly, Magistrate Sarah Simmons of Spartanburg County testified about the September 17, 2002 arraignment of the Appellant on a criminal domestic violence charge the night before the victim's murder. Tr.p. 1931. She stated that she directed Lindsey that "there was to be no contact with the victim who is Nell Lindsey. Tr.p. 1933 - 1936.

Concerning other violent incidents in Lindsey's past, there was evidence presented that on February 20, 1994, Lindsey blocked the vehicle being driven by Stanford Wilkins with Jessica

Cannon as a passenger in the middle of the road. Lindsey then got out of his car and shot twice through his windshield, striking Wilkins in the arm. TR.p. 1943, 1950-51. Lindsey was convicted of assault and battery with intent to kill after a no contest plea on December 14, 1996 and received a two year sentence, suspended to one year and one year probation with restitution. Tr.p. 1953.

At the sentencing proceeding for this case, victim impact evidence , in addition to the testimony concerning the effect of the trauma on Kiera, include testimony from Stanley Staggs, the victim's father. Tr.p. 1954-1965. This testimony the impact on his life and her children's lives. Tr.p. 1961-1965.

The picture the prosecution and evidence revealed was harsh. A violent tempered criminal involved in the drug trade. It also revealed a person who flaunted his responsibility to obey authority. It also revealed a person with a past history for using a handgun shooting through windshields. It painted a picture of the type of person for which the death penalty was intended - a violent person with a prior criminal history where correctional rehabilitation had not changed his violence or disrespect for the law.

The Appellant seeks to set aside the true facts by mischaracterizing the completeness of this case as merely a single victim domestic situation. In doing so, he ignores relevant factors and the statutory aggravating circumstance that supports the death penalty. In the instant incident, the two children were at great risk of death. However, the incident itself also put at risk, the Celeste Nesbitt and her mother. The incident also revealed the danger to the community in his car pursuit that ultimately led to the Inman Police Station. The incident also revealed danger to law enforcement at the station where Lindsey ignored the plea to stop before he shot into the vehicle

and his own action in pointing at the officer, before the officer then proceeded to fire upon him. All this incident occurring after a judicial officer, the night before had directed his to avoid contact with the victim. Some cases blessedly stand on their own as to the proportionality of punishment. By any perspective, it is by chance that more injury and death did not occur at the Inman Police Station.

In State v. Weik, 356 S.C. 76, 587 S.E.2d 683 (2002), the Court addressed the fact of a proportionate sentence in a domestic situation. Although, in Weik, there were other factors of burglary and physical torture to support the statutory death penalty, it did not, like Lindsey situation have the risk to others in the manner that the crime was carried out nor did it have the extent of the criminal history of violence and disregard of lawful authority present in the instant case. Like State v. Ard , 332 S.C. 370, 505 S.E.2d 328 (1998), there was a domestic situation where he killed his female companion. Unlike the instant situation where there were no other deaths, a fetus was killed. However, the great risk of death of others may not rise to the same level, but approaches it particular where only fortuity saved lives. Like Ard, the defendant shared criminal lives, but Lindsey was presented as having as clear history of prior gun violence towards others. It cannot be said that the distinguishing features of each represent disproportionality, but only the uniqueness that each case has. Again, the test set out in Copeland is for similar cases, not exact cases.

Similarly, he attempts to distinguish State v. Locklair , supra. where the defendant killed his former girlfriend was he was out on bond for killing her estranged husband. In Locklair, like here there was a domestic situation and the existence of the “great risk of death” aggravator and a confrontation where he was arrested. Although the attempt to show dissimilarities is factually

correct, those dissimilarities do not reveal disproportionality. The common thread in each case was the death of a female companion, the judicial obligation to obey the law in the bonds allowing release, the threat to others who sought to intervene, and risk to other bystanders, and resistance to arrest by threatening further violence. These cases are not exact, but they are “similar.”¹⁴

In summary, the sentence of death for Lindsey is not disproportionate based upon the unique circumstances of the crime and characteristics of the defendant. In reviewing, the proportionality of cases, it is not simply to compare the number of aggravators to the number of mitigators. Rather, it must be to focus on whether death is a proportionate penalty after considering the totality of the circumstances of a particular case for a particular defendant. Clearly, this Court has not carved out any “domestic dispute” exception that suggests a death sentence is less appropriate in that setting than one of a random death. To the contrary, as here, such a death may be more proportionate since it may have been done after judicial and law enforcement directive to avoid that confrontation and may have intentionally put others a risk of harm and by a person with a prior criminal history of violence. His protestations for a life

¹⁴ See State v. Bowman, 366 S.C. 485, 623 S.E.2d 378 (2005) (single victim death); State v. Sapp, 366 S.C. 283, 621 S.E.2d 883 (2005) (Death sentence was not disproportionate in capital murder prosecution in which aggravating factors were that defendant had created a great risk of death to more than one person, and that victim was a police officer); State v. Shuler, 353 S.C. 176, 577 S.E.2d 438 (2003) (holding that the death penalty was warranted for defendant convicted of murders of former live-in lover, lover's thirteen year-old daughter, and lover's mother; aggravating circumstances included two or more persons were murdered pursuant to one scheme or course of conduct, and murder was committed during commission of burglary); State v. Binney, 362 S.C. 353, 608 S.E.2d 418 (2005) (a local resident, upon returning home from work, was surprised and shot by a man who was hiding inside her house. When police went to the victim's residence to investigate, they found a suicide note Binney wrote and signed. Binney was later found in the crawl space of his Spartanburg County residence); State v. Hughey, 339 S.C. 439, 529 S.E.2d 721 (2000); State v. Kelly, 331 S.C. 132, 502 S.E.2d 99 (1998); ,

sentence must be denied.

CONCLUSION

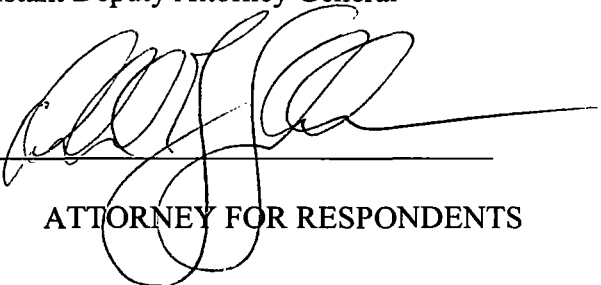
For all of the foregoing reasons, this Court should affirm the Appellant's conviction and sentence.

Respectfully submitted,

HENRY D. McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

By: 

ATTORNEY FOR RESPONDENTS

Post Office Box 11549
Columbia, South Carolina 29211

June 8, 2006

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

**Appeal from Spartanburg County
John C. Few, Circuit Court Judge**

THE STATE,

Respondent,

V.

MARION ALEXANDER LINDSEY,

Appellant

RESPONDENT DESIGNATION OF MATTER

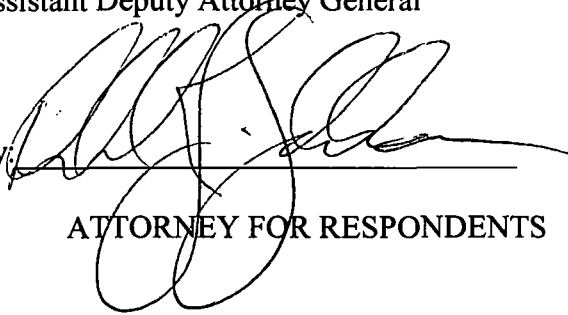
Respondents propose to include in the Record on Appeal the following exhibits:

1. State Exhibits 21, 21 (C) (911 tape).
2. State Exhibits 27-31
3. State Exhibits 48-63.
4. State Exhibit 73.
5. Sentencing Sheets and Verdict Forms.
6. Trial Judge's Report.

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

June 6, 2006

DONALD J. ZELENKA
Assistant Deputy Attorney General

By: 

ATTORNEY FOR RESPONDENTS



HENRY McMASTER
ATTORNEY GENERAL

June 8, 2006

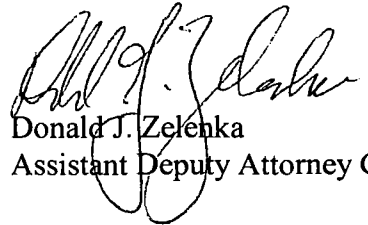
Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P. O. Box 11330
Columbia, South Carolina 29211

Re: *The State v. Marion Alexander Lindsey*

Dear Mr. Shearouse:

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

Sincerely,



Donald J. Zelenka
Assistant Deputy Attorney General

RECEIVED

JUN 12 2006

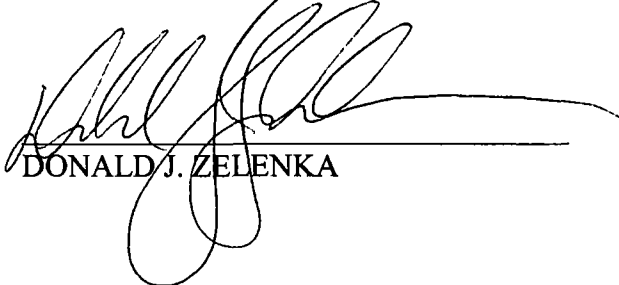
DJZ/lbb
Enclosure

S. C. SUPREME COURT

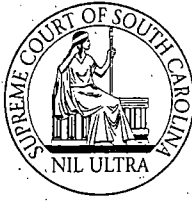
cc: Robert M. Dudek, Esquire
Harold "Trey" Gowdy, Solicitor
Sandi Wofford, Victims Assistance

CERTIFICATE OF SERVICE

I, **Donald J. Zelenka**, hereby certify that I have served in the *Initial Brief of Respondent* and Designation of Matter in the foregoing action by depositing two (2)copies in the mail to Robert M.Dudek, Division of Appellate Defense, P.O, Box 11589, Columbia, South Carolina 29211 this 6th day of June, 2006.



DONALD J. ZELEENKA



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

June 7, 2006

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

Re: The State v. Lindsey, Marion Alexander

Dear Counsel:

The following Order has been endorsed on your Motion to Enlarge Time for Filing Initial Brief of Respondent and Designation of Matter for Two Days Until June 8, 2006 in the above entitled case on appeal.

"Granted.

Jean H. Toal C.J.

By s/Daniel E. Shearouse
Clerk

June 7, 2006."

By copy of this letter we are advising opposing counsel of the action of the Court in this matter.

Very truly yours,

CLERK

Assistant Deputy Attorney General

Donald J. Zelenka

Page Two

June 7, 2006

cc: Assistant Appellate Defender Robert M. Dudek



HENRY McMASTER
ATTORNEY GENERAL

June 6, 2006

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

RECEIVED

JUN - 6 2006

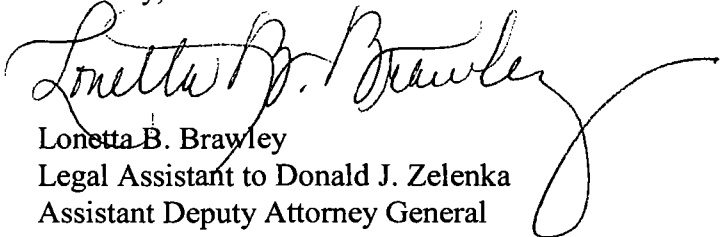
S.C. SUPREME COURT

Re: *The State v. Marion Alexander Lindsey*

Dear Mr. Shearouse:

Enclosed please find ***Motion to Enlarge Time*** in the above-referenced matter for filing in your office. By copy of this letter I am serving opposing counsel with same.

Sincerely,


Lonetta B. Brawley
Legal Assistant to Donald J. Zelenka
Assistant Deputy Attorney General

/lbb
Enclosure

cc: Robert M. Dudek, Esquire

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

Appeal from Spartanburg County
John C. Few, Circuit Court Judge

RECEIVED

JUN - 6 2006

S.C. SUPREME COURT

THE STATE,

Respondent,

v.

MARION ALEXANDER LINDSAY,

Appellant.

**MOTION TO ENLARGE TIME FOR
FILING INITIAL BRIEF OF RESPONDENT
AND DESIGNATION OF MATTER FOR TWO DAYS UNTIL JUNE 8, 2006**

The Respondents, above-named, hereby make a motion to this Court to extend the time for filing the Initial Brief of Respondent and Designation of Matter from June 6, 2006 for a period of two (2) days up to and including June 8, 2006. This is Respondents fifth and final request for an extension.

Respondents have been involved in numerous litigation in both state and federal court during this time period which has prevented the completion of this brief in a sufficient and timely manner. Respondents below-signed counsel has spoken with Robert Dudek of the South Carolina Office of Appellate Defense, who expressed he has no objection and consents to the extension request.

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

Wherefore Respondents respectfully request an extension of a period of time of two (2) days up to and including Thursday, June 8, 2006, to complete this brief and designation of matter.

Respectfully submitted,

HENRY D. McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

ATTORNEYS FOR RESPONDENT

By: Melody J. Brown (for)
DONALD J. ZELENKA
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

June 6, 2006

GRANTED.

JEAN H. ZOAR C.J.
FOR THE COURT

BY: D. J. E. S.
C. C. E. N. K.

June 7, 2006

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

JUN - 6 2006

S.C. SUPREME COURT

THE STATE,

Respondent,

v.

MARION ALEXANDER LINDSAY,

Appellant.

CERTIFICATE OF SERVICE

*I, Donald J. Zelenka, hereby certify that I have served Respondents **Motion to Enlarge Time for Filing Initial Brief of Respondent** on Robert M. Dudek, Esquire at P.O. Box 11589, Columbia, South Carolina 29211 by depositing copies in the United States Mail, postage prepaid this 6th day of June, 2006.*


DONALD J. ZELENKA

The Supreme Court of South Carolina

The State,

Respondent

v.

Marion Alexander Lindsey,

Appellant.

The Honorable John C. Few
Spartanburg County
Trial Court Case No. 2002-GS-42-04753

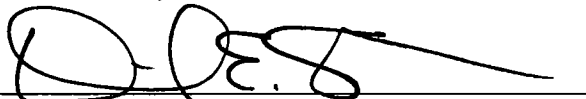
ORDER

For good cause having been shown, the time for serving and filing the Initial Brief of Respondent and Designation of Matter in the above entitled matter is hereby extended until June 6, 2006.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



CLERK

Columbia, South Carolina

May 23, 2006

cc: Assistant Appellate Defender Robert M. Dudek
Assistant Deputy Attorney General Donald J. Zelenka



HENRY McMASTER
ATTORNEY GENERAL

May 22, 2005

RECEIVED

MAY 22 2006

S.C. SUPREME COURT

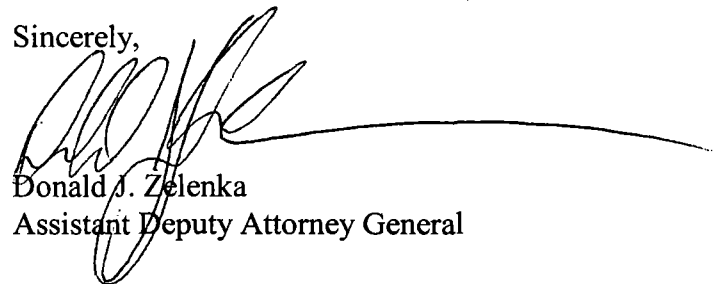
Honorable Daniel E. Shearhouse
Clerk, South Carolina Supreme Court
P. O. Box 11330
Columbia, South Carolina 29211

Re: *The State v. Marion Alexander Lindsey*

Dear Mr. Shearouse:

Enclosed please find a motion to enlarge time for filing initial brief of respondent in the above-referenced matter for filing in your office. By copy of this letter I am serving opposing counsel with same.

Sincerely,



Donald J. Zelenka
Assistant Deputy Attorney General

DJZ/lbb
Enclosure

cc: Robert M. Dudek, Esquire

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

Appeal from Spartanburg County
John C. Few, Circuit Court Judge

RECEIVED

MAY 22 2006

THE STATE,

Respondent,

S.C. SUPREME COURT

v.

MARION ALEXANDER LINDSAY,

Appellant.

**MOTION TO ENLARGE TIME FOR
FILING INITIAL BRIEF OF RESPONDENT
AND DESIGNATION OF MATTER FOR FIFTEEN DAYS UNTIL JUNE 6, 2006**

The Respondents, above-named, hereby make a motion to this Court to extend the time for filing the Initial Brief of Respondent and Designation of Matter from May 22, 2006 for a period of fifteen (15) days up to and including June 6, 2006. This is Respondents fourth and final request for an extension.

Respondents have been involved in numerous litigation in both state and federal court during this time period which has prevented the completion of this brief in a sufficient and timely manner.. Respondents below-signed counsel has attempted to consult with Robert Dudek of the South Carolina Office of Appellate Defense, but he was not in the office or available prior to the preparation of this motion.

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

Wherefore Respondents respectfully request an extension of a period of time of fifteen (15) days up to and including Tuesday June 6, 2006 to complete this brief and designation of matter.

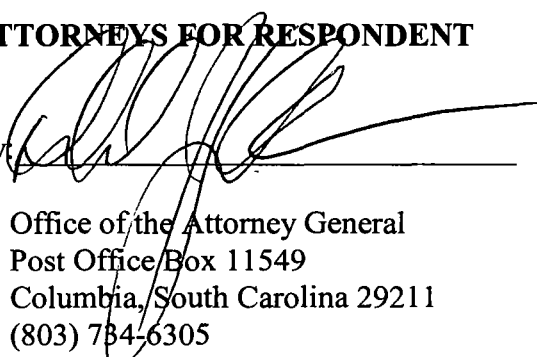
Respectfully submitted,

HENRY D. McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

ATTORNEYS FOR RESPONDENT

By: 

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 784-6305

May 22, 2006

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

THE STATE,

Respondent,

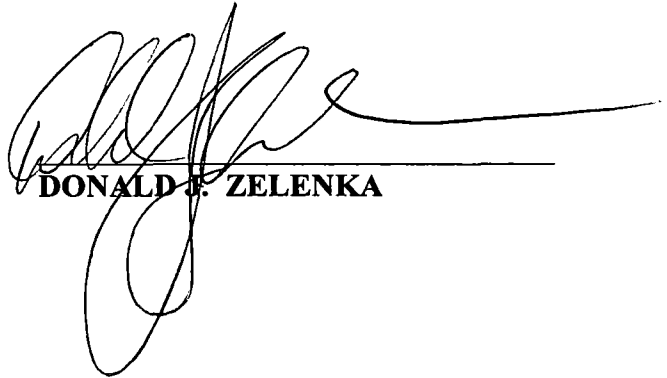
v.

MARION ALEXANDER LINDSAY,

Appellant.

CERTIFICATE OF SERVICE

*I, Donald J. Zelenka, hereby certify that I have served Respondents **Motion to Enlarge Time for Filing Initial Brief of Respondent** on Robert M. Dudek, Esquire at P.O. Box 11589, Columbia, South Carolina 29211 by depositing copies in the United States Mail, postage prepaid this 22nd day of May 2006.*



DONALD J. ZELENKA

The Supreme Court of South Carolina

The State,

Respondent

v.

Marion Alexander Lindsey,

Appellant.

The Honorable John C. Few
Spartanburg County
Trial Court Case No. 2002-GS-42-04753

ORDER

For good cause having been shown, the time for serving and filing the Initial Brief of Respondent and Designation of Matter in the above entitled matter is hereby extended until May 22, 2006.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY *Shanda L. Shealy*
CHIEF DEPUTY CLERK

Columbia, South Carolina

April 24, 2006

cc: Assistant Appellate Defender Robert M. Dudek
Assistant Deputy Attorney General Donald J. Zelenka



HENRY McMASTER
ATTORNEY GENERAL

April 21, 2006

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

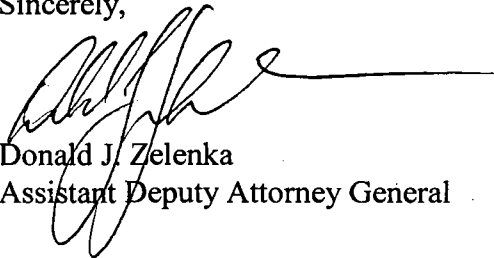
RE: State v. Marion Alexander Lindsay

Dear Mr. Shearouse:

Enclosed please find the original and six copies of a Motion to Enlarge Time and Certificate of Service in the above captioned matter.

Thank you for your assistance.

Sincerely,



Donald J. Zelenka
Assistant Deputy Attorney General

DJZ/hf

Enclosures

cc: Robert Dudek, Esquire

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APR 24 2006

SOUTH CAROLINA SUPREME COURT

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

Appeal from Spartanburg County
John C. Few, Circuit Court Judge

THE STATE,

Respondent,

v.

 **MARION ALEXANDER LINDSAY,**

Appellant.

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

The Respondents, above-named, hereby make a motion to this Court to extend the time for filing the Initial Brief of Respondent and Designation of Matter from April 21, 2006 for a period of thirty (30) days up to and including May 21, 2006. This is Respondents third request for an extension. This request is due to the extensive length of the record on appeal, intervening business events including a Brief in Opposition filed in the U.S. Supreme Court this date on Edward Freiburger which had previously been handled by counsel no longer assigned to this office.

Respondents have been involved in numerous litigation in both state and federal court during this time period which has prevented the completion of this brief in a sufficient and timely manner.. Respondents below-signed counsel has attempted to consult with Robert Dudek of the

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APR 24 2006

S. C. SUPREME COURT

South Carolina Office of Appellate Defense, but he was not in the office or available prior to the preparation of this motion.

Respondents' counsel are cognizant of this Court's policy on extension in capital cases and will do all to ensure that no further extensions will be required prior to this briefing being completed.

Wherefore Respondents respectfully request an extension of a period of time of thirty (30) days up to and including May 21, 2006 to complete this brief and designation of matter.

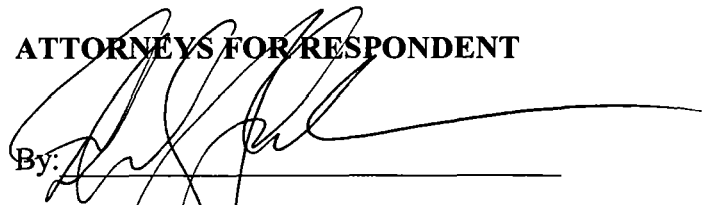
Respectfully submitted,

HENRY D. McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

ATTORNEYS FOR RESPONDENT

By: 

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

April 21, 2006

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

THE STATE,

Respondent,

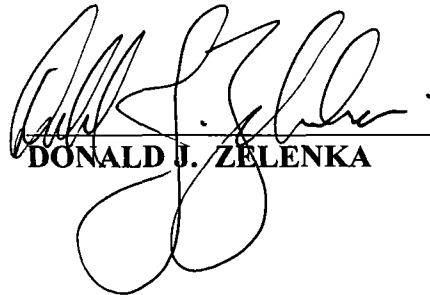
v.

MARION ALEXANDER LINDSAY,

Appellant.

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that I have served Respondents *Motion to Enlarge Time for Filing Initial Brief of Respondent* on Robert M. Dudek, Esquire at 1205 Pendleton Street, Room 306, Columbia, South Carolina 29201 by depositing copies in the United States Mail, postage prepaid this 21st day of April 2006.



DONALD J. ZELENKA

The Supreme Court of South Carolina

The State,

Respondent

v.

Marion Alexander Lindsey,

Appellant.

The Honorable John C. Few
Spartanburg County
Trial Court Case No. 2002-GS-42-04753

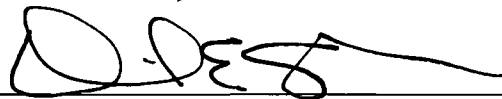
ORDER

For good cause having been shown, the time for serving and filing the Initial Brief of Respondent and Designation of Matter in the above entitled matter is hereby extended until April 21, 2006.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



CLERK

Columbia, South Carolina

March 23, 2006

cc: Assistant Appellate Defender Robert M. Dudek
Assistant Deputy Attorney General Donald J. Zelenka



HENRY McMASTER
ATTORNEY GENERAL

March 22, 2006

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MAR 22 2006

S.C. SUPREME COURT

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

Re: The State v. Marion Lindsey

Dear Mr. Shearouse:

Enclosed please find a motion to enlarge time to file the initial brief of respondent in the above-referenced matter for filing. By copy of this letter I am serving opposing counsel with same.

Sincerely,

Donald J. Zelenka
Assistant Deputy Attorney General

DJZ/lbb
Enclosure

cc: Robert M. Dudek, Esquire

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

RECEIVED

MAR 22 2006

Appeal from Spartanburg County
John C. Few, Circuit Court Judge

S.C. SUPREME COURT

THE STATE,

Respondent,

v.

MARION ALEXANDER LINDSAY,

Appellant.

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

The Respondents, above-named, hereby make a motion to this Court to extend the time for filing the Initial Brief of Respondent and Designation of Matter from March 22, 2006 for a period of thirty (30) days up to and including April 21, 2006. The Respondents had made an initial request on February 14, 2006 and this is the Respondents second request for an extension. This request is due to the extensive length of the record on appeal, intervening business events including the recent argument in the Bobby Holmes matter and personal out of state family obligations.

Respondents have been involved in numerous litigation in both state and federal court during this time period which has prevented the completion of this brief in a sufficient and timely manner. Further, he is currently preparing for a requested oral argument set for Friday March 24

in Federal District Court in the Luke Williams death penalty federal habeas action which had been earlier assigned to other counsel. Respondents below-signed counsel has consulted with Robert Dudek of the South Carolina Office of Appellate Defense and he has advised below-signed counsel that he has no objection to this request.

Respondents' counsel are cognizant of this Court's policy on extension in capital cases and will do all to ensure that no further extensions will be required prior to this briefing being completed.

Wherefore Respondents respectfully request an extension of a period of time of thirty (30) days up to and including April 21, 2006 to complete this brief and designation of matter.

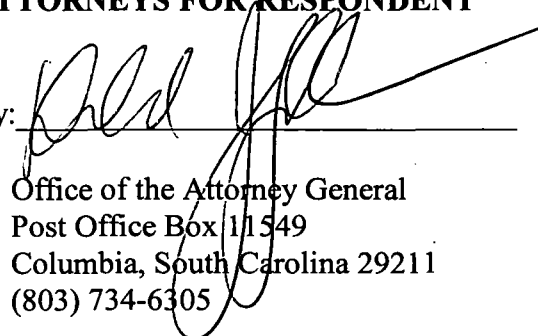
Respectfully submitted,

HENRY D. McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

ATTORNEYS FOR RESPONDENT

By: 

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

March 22, 2006

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

THE STATE,

Respondent,

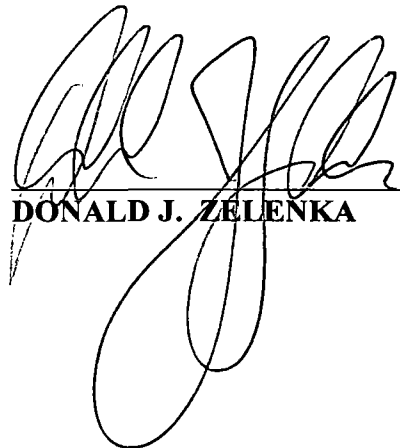
v.

MARION ALEXANDER LINDSAY,

Appellant.

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that I have served Respondents *Motion to Enlarge Time for Filing Initial Brief of Respondent* on Robert M. Dudek, Esquire at 1205 Pendleton Street, Room 306, Columbia, South Carolina 29201 by depositing copies in the United States Mail, postage prepaid this 22nd day of March 2006.



DONALD J. ZELENA

The Supreme Court of South Carolina

The State,

Respondent

v.

Marion Alexander Lindsey,

Appellant.

The Honorable John C. Few
Spartanburg County
Trial Court Case No. 2002-GS-42-04753

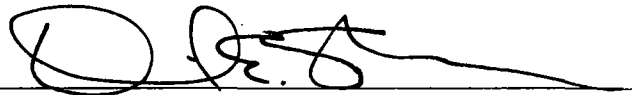
ORDER

For good cause having been shown, the time for serving and filing the Initial Brief of Respondent and Designation of Matter in the above entitled matter is hereby extended until March 22, 2006.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



CLERK

Columbia, South Carolina

February 15, 2006

cc: Assistant Appellate Defender Robert M. Dudek
Assistant Deputy Attorney General Donald J. Zelenka



HENRY McMASTER
ATTORNEY GENERAL

RECEIVED

FEB 14 2006

S.C. SUPREME COURT

February 14, 2006

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

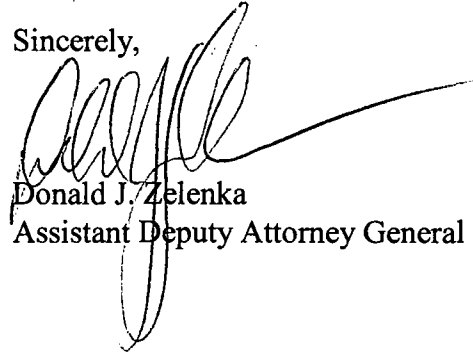
Re: The State v. Marion Alexander Lindsey

Dear Mr. Shearouse:

The initial brief of respondent in the above-referenced case is due to be filed on February 20, 2006. I am requesting an extension of thirty (30) days to file and serve Respondent's brief. Due to counsel's heavy caseload and other court commitments, counsel has been unable to prepare the brief. Also, counsel will be participating in a moot court session for the National Association of Attorneys General in Washington, DC on Monday, February 20, 2006 and oral argument at the U.S. Supreme Court in the capital case of *Bobby Lee Holmes v. State of South Carolina* on Tuesday, February 21st.

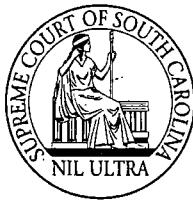
By copy of this letter I am informing opposing counsel of this request.

Sincerely,


Donald J. Zelenka
Assistant Deputy Attorney General

DJZ/lbb

cc: Robert M. Dudek, Esquire



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

December 20, 2005

Assistant Appellate Defender Robert M. Dudek
Office of Appellate Defense
1205 Pendleton Street, Rm. 306
Columbia, SC 29201

Re: The State v. Lindsey, Marion Alexander

Dear Counsel:

Enclosed is the order issued in the above entitled matter.

Very truly yours,



CLERK

DES/dmh

Enclosure

cc: Mr. Marion Alexander Lindsey, #6015
Assistant Deputy Attorney General Donald J. Zelenka
The Honorable Harold W. Gowdy, III
The Honorable John C. Few

The Supreme Court of South Carolina

The State,

Respondent,

v.

Marion Alexander Lindsey,

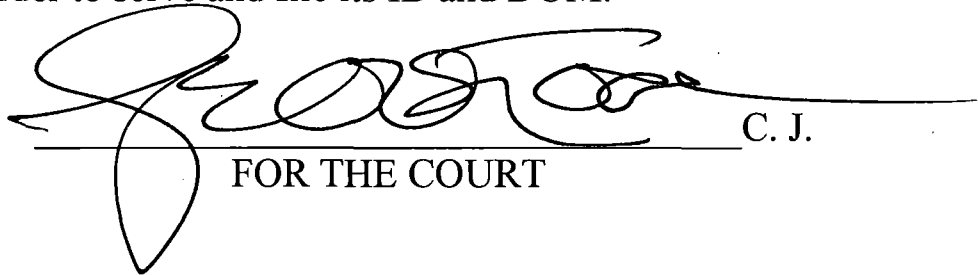
Appellant.

ORDER

Following a letter from appellant indicating that he wished to abandon his direct appeal and be executed, this Court remanded this matter to the Honorable John C. Few to determine appellant's competency and whether his decision to waive his direct appeal was knowing and voluntary.

Appellant has now filed an affidavit indicating that, after consulting with counsel, he no longer wishes to waive his right to a direct appeal. We, therefore, vacate the order remanding this matter to Judge Few.

Counsel for appellant served and filed an Initial Brief (IB) and Designation of Matter (DOM) prior to the remand. The State shall have sixty days from the date of this order to serve and file its IB and DOM.


C. J.
FOR THE COURT

Columbia, South Carolina

December 20, 2005

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG
THE STATE,

Respondent,

v.

MARION ALEXANDER LINDSEY

Appellant.

IN THE SOUTH CAROLINA SUPREME COURT

AFFIDAVIT

02-GS-42-0453

PERSONALLY appeared before me, Marion Alexander Lindsey, who being duly sworn, deposes and says that:

- "MAL"
Spartanburg
1. I was tried for murder in ~~Greenville County~~ before the Honorable John Few and a jury. The state sought the death penalty. After a trial by jury, I was sentenced to death.
 2. Robert M. Dudek represents me on my direct appeal to the South Carolina Supreme Court. Counsel filed a four issue brief for me on August 15, 2005.
 3. I subsequently informed the South Carolina Supreme Court in writing that I wished to drop all of my appeals and to be executed. I understand that the South Carolina Supreme Court then remanded my case for a competency to be executed hearing before Judge Few. I also understand Robert M. Dudek was appointed to represent me in this process, and at that hearing.
 4. Based on my recent conversations with counsel I now have a better appreciation of the procedures involved in a death penalty case, including waiving appeals, and post-conviction relief.
 5. For example, I now understand that issues of ineffective assistance of counsel, incompetent or unqualified counsel must be raised in post-conviction relief. I understand that post-

conviction relief provides a mechanism for a full evidentiary hearing with live testimony, and, conversely, that no new evidence can be submitted on direct appeal about counsel's performance or otherwise.

6. I understand that if the competency process continued that I would be evaluated in the next several weeks by a psychiatrist from the Department of Mental Health, and by an independent psychiatrist. I understand that a competency to be executed hearing would probably take place in early January 2006. I understand that at the competency to be executed hearing the judge would consider evidence of my competence. I also understand that if I was found competent to be executed that Judge Few would question me about whether I understood that if I waived my appeals as requested that I would indeed be executed.

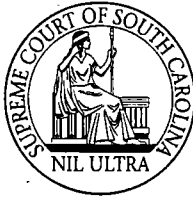
7. After conversing with counsel, I have decided that I do not wish to waive all of my appeals -- direct appeal, post-conviction relief, and federal habeas at this time. I respectfully request that my pending direct appeal no longer be held in abeyance and that it again proceeds in a normal fashion.

8. I am of sound mind, and I understand what I am doing. I making these decisions of my own free will and without undue influence from family or counsel. I therefore wish to withdraw my request to drop all of my appeals and be executed, and I respectfully request that the Supreme Court proceed with my direct appeal.

Marion A. Lindsey
Marion Alexander Lindsey

SWORN TO before me this 9th
day of December, 2005.

Warren J. Ferguson (S.)
Notary Public for South Carolina
My Commission Expires: Sept. 22, 2007



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

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September 7, 2005

Mr. Marion Alexander Lindsey, #6015
Lieber Correctional Institution
P. O. Box 205
Ridgeville, SC 29472

Re: The State v. Lindsey, Marion Alexander

Dear Mr. Lindsey:

Enclosed is the order issued in the above entitled matter.

Very truly yours,

CLERK

DES/dmh

Enclosure

cc: Assistant Appellate Defender Robert M. Dudek
Assistant Deputy Attorney General Donald J. Zelenka
The Honorable Harold W. Gowdy, III
The Honorable Marcus W. Kitchens
The Honorable John C. Few

The Supreme Court of South Carolina

The State,

Respondent,

v.

Marion Alexander Lindsey,

Appellant.

ORDER

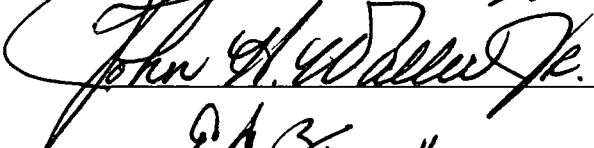
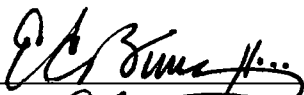
Appellant was convicted of murder and was sentenced to death. Counsel for appellant has filed a Notice of Intent to Appeal. Appellant has filed a *pro se* letter with the Court indicating that he does not want to continue with his appeal and wishes to be executed.

This matter is remanded to the Honorable John C. Few for a determination of whether appellant is competent and his decision to waive his right to a direct appeal is knowing and voluntary. Robert M. Dudek shall represent appellant at the competency hearing.

Judge Few shall conduct a full hearing allowing the introduction of testimony, exhibits, and evidence to provide a full record for this Court's evaluation. In determining appellant's competency to waive his right to a direct appeal, Judge Few shall apply the standard set forth in *Singleton v. State*, 313 S.C. 75, 437 S.E.2d 53 (1993). Further, Judge Few shall conduct

an in depth inquiry to ensure that appellant persists in his desire to abandon his direct appeal. *Id.*

IT IS SO ORDERED.

 A.C.J.
 J.
 J.
 J.

Toal, C.J., not participating

Columbia, South Carolina

September 7, 2005

RECEIVED

AUG 16 2005

S.C. SUPREME COURT

① To The Judge, ~~OR~~ Judges of the Supreme Court. This is Marion A. Lindsey. I'm a Inmate on "Death Row". At Lieber Correctional Institution. I've been on Death Row for 1 1/2 years. And I want to be put to Death. yes I'm sure!! And I'm compitent to make that decission. And I'm hoping you all grant my wishes. I'm going to give you all several reasons.

- # 1 First and far most, Is my victim's mother has had 4 Heart Attacks. And her health is not very good. I don't think she can wait 8 years to get her justice. For what I did. I'd like to give my victim's mother her justice. yes my family is in pain too. But atleast they can still talk to me. my victim's mother can't talk to her daughter ever again. And I don't think my family should have that Luxery. They should have to feel the same pain as my victim's family. Plus you all could free this space for somebody else. Who wants to fight their sentence. And save tax payers money. The prison system is already hurting for ~~money~~ ^{money}. So you all can free up some more money, By putting me to

② death. Don't worry about me not wanting to be in jail. Because that's not an issue. Hell, I get to sleep all day. Don't have to work. And get three free meals a day. I just feel it's not right for me to be here. And my victim's family can't see or talk to her. I've already made my funeral plans also. My family knows my decision. And one other thing. My Attorney probably will try to fight my decision. Don't let him hold you up. He didn't do the crime. I did!! No I didn't just make up my mind. I've been wanting this from the start. But my Attornies pushed me to go to trial. And my mother was begging me at the time. Now she's better!! This decision is mine, And mine alone!! I just have one request. And I'd like for you all to put it in writing. See when you go on death status here. They lock you away from everybody else. I want to stay where I'm at. And go to recreation with everybody else. Level 3. And my window to stay unlocked. I want to leave just like I am now. Not be kept away from everybody. My last days on earth. Don't

③ Worry, I'm at peace with God. I've asked God to forgive me. And I believe God has. NO I wasn't in my right mind when I committed my crime. But now I am. I know what I did was so very wrong. And I wish I could take it back. OR rather bring my victim back to her family. Please think about all this? And get back to me. THANK YOU

Marion A. Lindsey

Marion A. Lindsey, SK #6015

SS # 247-51-7558

Lieber Correctional Inst.

Dob 10/18/73

P.O. Box 205 Ridgville,

Race Black

South Carolina, 29472-0205

sex Male

B-wing-221

From Spartanburg
South Carolina

Sentence Spartanburg
County Court
house

Date sign

8/15/05

Marion A. Lindsey

Zip 29306

code 29303

" I'm a man!! I was sentence to death. Now " please put me to death? My victim's mother deserve her justice.

ORIGINAL
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STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

2005 AUG 15 PM 4:36

SC SUPREME COURT

Appeal from Spartanburg County
John C. Few, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MARION ALEXANDER LINDSEY,

APPELLANT

INITIAL BRIEF OF APPELLANT

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Assistant Appellate Defender

AILEEN P. CLARE
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ATTORNEYS FOR APPELLANT.

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STATEMENT OF ISSUES ON APPEAL

1.

Whether the court erred by excusing potential Juror Krisher for cause, and ruling that Krisher's belief that life imprisonment without parole was a more substantial punishment than the death penalty was incompatible with South Carolina law, since Krisher stated that he could impose the death penalty and sign the death form and he was a qualified juror?

2.

Whether the judge erred by refusing to replace Juror Mauldin with an alternate where Mauldin was conducting his own measurements during a jury view of the automobile in which the decedent was shot, since a juror conducting his own measurements or experiments during a jury view was improper?

3.

Whether the court erred by refusing to direct a verdict on the "great risk of death" aggravator since appellant shot his wife at close range and there was no evidence appellant knowingly created a risk of death to more than one person?

4.

Whether appellant's death sentence should be vacated as both excessive and disproportionate since this case involves a domestic dispute pertaining to child visitation and no death sentence has been imposed in this state in the modern era under similar circumstances?

STATEMENT OF THE CASE

Appellant was indicted by the Spartanburg County Grand Jury for the offense of murder. R. p. *. The state served its notice of intent to seek the death penalty.

Appellant's case came on for trial on May 17, 2004 before the Honorable John C. Few and a jury. Tr. p. 1. Michael Bartosh, Doug Brennan, and Karen Quimby represented appellant. The solicitors were Trey Gowdy, Barry Barnett, and Donnie Willingham. Tr. p. 1.

The jury found appellant guilty of murder. Tr. pp. 718 – 719. At the conclusion of the penalty phase the jury recommended a sentence of death. Tr. p. 2169, l. 10 – p 2170, l. 5. Judge Few then sentenced appellant to death. Tr. p. 2174, ll. 1 – 14.

This appeal follows.

STATEMENT OF FACTS

Appellant and his wife Nell had separated. Celeste Nesbitt testified appellant's wife "was like a younger sister to me." They even referred to each other as sisters in public. Tr. p. 1517, ll. 13 – 24. Nesbitt had known appellant for about six years at the time of his separation from his wife. Tr. p. 1518, ll. 3 – 7.

Nesbitt testified that appellant and his wife had separated on prior occasions. However, this was "the first time she did not let him see the kids." Tr. p. 1540, ll. 5 – 8. Nesbitt also remembered appellant's wife telling her "since I'm filing for divorce, I'm taking him off my insurance." Tr. p. 1540, ll. 5- 15.

At the time of this separation, the decedent wife was living with her mother, and the couple's two children, Alex and Trey Lindsey. The children were three years old and seven years old respectfully. Tr. p. 1520, l. 20 – p. 1521, l. 15.

Appellant's mother, Virginia Lindsey, verified that the decedent was not allowing appellant to see his children after this separation, but that appellant made efforts to care for them. Tr. 1675, l. 4 – 1676, l. 1677, l. 4. Appellant's cousin, Christopher Wilkins, also testified that appellant was very close to his children, and that he was not allowed to see them. Tr. 1677, l. 22 – 1679, l. 17.

The decedent worked at the Spartanburg Regional Hospital. On September 18, 2002 Nesbitt and her two children were going to visit her grandmother who was a patient at Spartanburg Regional Hospital. As Nesbitt pulled into the parking lot of the hospital at 5:45 p.m., the decedent called her on Nesbitt's cell phone and asked for a ride home. Nesbitt agreed to give the decedent a ride home. She told the decedent that she would wait for her to get off of work after she had visited her grandmother. Tr. p. 1518, l. 5 - p. 1521, l. 15.

After the decedent got off of work, Nesbitt, her mother, the decedent and Nesbitt's two daughters drove onto the highway to take the decedent home. Nesbitt remembered that, "I was in the driver's seat. My mother was in the passenger seat. Nell was in the rear driver's back seat. My oldest daughter was in the middle. And my youngest daughter was in her car seat on the passenger back seat." Tr. p. 1521, l. 24 – p. 1522, l. 3.

Nesbitt recalled, "as we crossed Howard Street, I said to Nell I thought I saw Tresse's car. She said I thought I saw it too." Tr. p. 1523, ll. 2 – 9. Tresse was apparently appellant's new girlfriend. Tr. p. 1523, l. 10 – p. 1524, l. 5.

Nesbitt testified, "as we were pulling up to her mother's house, she said that is him [appellant] driving the car. Don't stop. Keep going. I continued to go on down the street. I pulled into my mother's yard which she lived on the same street. I pulled in and pulled back out and turned around. As I was turning around, he [appellant] had made a U-turn and turned facing me." Tr. p. 1524, ll. 14 – 19.

Nesbitt said she stopped in the middle of the road, and she rolled her window down. Nesbitt recalled, "he [appellant] said hey, Celeste. I said hey, Myron. He said where are you going. I said to take my mother to meet my sister. He said have you talked to Nell. And I said three days ago." Tr. p. 1525, ll. 1 – 4.

Nesbitt had tinted windows, and the tinted windows apparently made it a little harder to see into the car. Tr. p. 1525, l. 10 – p. 1526, l. 3. Nesbitt remembered, "my youngest daughter was speaking to him. And he finally acknowledged [her] and spoke to her."¹ Then

¹Nesbitt later admitted that one of her daughters called appellant "Uncle Ron." She denied that this daughter was also talking to appellant, and that her daughter attempted to climb between the two front seats to talk to appellant. "She was asleep," Nesbitt testified. Tr. p. 1539, ll. 3 – 12.

he asked who was in the back seat. I said nobody but Keysha. And he said where is your oldest daughter. I said she laying back there asleep. He said is somebody else back there. I said no. He said roll the window down and let me see. I told him no, the window was broken.” Tr. p. 1526, ll. 2 – 8.

Nesbitt said when appellant again asked to see who was in the backseat she “sped off . . . I went to the police department.² I sped off. Nell asked me if should I call my grandmother or call 911. I said call 911. She said well, take me to the police station. I said that’s where we’re going. I went as fast as I could. I ran all the stop signs, ran the red light, jumped the railroad track, hit Main Street and went straight to the police department.” Tr. p. 1527, l. 20 – p. 1528, l. 1.

Nesbitt drove into the parking lot of the Inman Police Station, and she pulled “in beside one of the police cars that was already there.” Tr. p. 1528, ll. 12 – 19. Nesbitt recalled, “[I] jumped out. And I tried to get Nell to get out. She told me, she was talking to 911 on the phone. And I was like ‘Nell, get out. Nell, get out.’ As I was asking her to get out, he [appellant] was pulling into the parking lot. He jumped out of the car and ran toward the back of the car. As he ran towards the back of my car, I backed up towards the front of the police car. *I saw him pull a gun out and stick the gun to the rear passenger windshield of the car and shot into the car.* I then fell to the ground and hollered for help. The police car that I was parked beside had a rear door that was open. I crawled [into] the back door

²Nesbitt acknowledged that when appellant asked to look in her backseat before she sped away that he was not in “a rage,” and that she could understand what he was saying. Tr. p. 1536, ll. 2 – 5.

and crawled inside of the Inman police car and laid on the floor board. I heard shots but I saw nothing else.” Tr. p. 1532, l. 12 – p. 1533, l. 1. (emphasis added).

Nesbitt remembered “after the shooting took place and I heard the officer say that we got him [appellant] down, I crawled out [of] the police car.” Nesbitt recalled, “my oldest child was screaming that Nell was dead. He [the police officer] took us and told us to go to the side of the building.”³ Tr. p. 1536, ll. 2 – 23.

Pathologist Dr. David Wren testified the decedent was shot four times. He removed three bullets from the decedent’s head. The first gunshot wound was to the back of the decedent’s head. “It was three and a quarter inches from the top of the head and about three quarters of an inch to the left of midline.” The second wound was to the “left temporal region.” The third gunshot wound was “near the nape of the neck which was the back of the neck.” “[T]he other gunshot wound that I found was a grazing gunshot wound in the lower postural neck midline.” Tr. 1654, l. 2 – 1657, l. 10.

Inman police officer Harvey Godfrey went to Inman police station that day “to meet with one of our drug informers to show him picture lineups.” Tr. p. 1562, l. 4 – p. 1564, l. 15. Godfrey said as he was getting out of his vehicle at the police station, he received a dispatch about a “rolling domestic.” Godfrey explained that a “rolling domestic” was a domestic dispute between two people either in “one vehicle or two vehicles.” Tr. p. 1565, ll. 2 – 11.

³ Strangely the police did not keep the automobile in their possession. Nesbitt remembered she had the windows repaired from the “gunshot. And there was a bullet hole in the backbench of the car, not the baby seat, but the car seat. Nesbitt later sold the car to a friend of hers.” Tr. p. 1537, l. 4 – p. 1538, l. 8.

Godfrey remembered that the two vehicles – Nesbitt’s and appellant’s -- pulled in to the parking lot of the police station at that time. Godfrey recalled that a women jumped out of the car and came running towards him. Godfrey testified, “she [Nesbitt] was hollering something to the affect that he’s going to get her or something like that. At that point, I turned and looked back towards her car. And I saw a black male with a handgun pointing towards her car. And I saw a black male with a handgun pointing it at the back glass. At that time, I reached for my gun and hollered don’t. And he fired two rounds into the back glass.” Tr. p. 1567, ll. 6 – 11.

“At that point, I was taking cover behind the car.” Godfrey said he “saw two more flashes that appeared to be from a gun.” Godfrey said that “several seconds later, he came back out in front of the car pointing the firearm at me. And I fired four rounds.” Tr. p. 1567, ll. 19 – 24. As seen, the decedent was shot four times. As will be seen infra, the fifth bullet, the bullet not found, and the only bullet fired from appellant’s gun that did not hit the decedent, was used when appellant apparently tried to commit suicide immediately after he shot his wife.

Godfrey testified that he knew that he had shot appellant. He told other police officers “to cover him.” Tr. p. 1571, l. 6 – p. 1572, l. 17. Godfrey remembered “he [appellant] was [the] only person in the parking lot other than the people who was in the car, Ms. Nesbitt and myself.” Tr. p. 1572, ll. 11 – 17.

Godfrey described witnessing the shooting:

“[W]hen I turned and focused back this way, she [Nesbitt] said he [appellant] was going to get her. I was looking to see who he was. At that point, *he was standing there with a gun pointing directly in the back glass right here. Before I could reach my weapon, he had done fired two shots in the back*

glass. I went down here. I came across here. And I saw him running between the two cars. I saw two more shots. At that point, I lost sight of him. He was somewhere up here in front. I started down. I hollered at Celeste to see if she saw him. She said no. I started in between the two cars going towards the front of the car. When he came out from in front on the other side there pointing a gun at me and that's when I fired four rounds. He hit the ground at that point."

Tr. p. 1575, l. 19 – p. 1576, l. 8. (emphasis added).

Guy Carter was an Inman police officer. He remembered hearing shots fired outside and leaving the police station with his weapon drawn during the incident. He remembered Godfrey yelling "cover that mother fucker. I said where is he, Benny. He said he is on the ground in front of the patrol car." Tr. p. 1579, l. 4 – p. 1580, l. 8. Carter testified he covered appellant until the ambulance arrived. Carter knew appellant was bleeding but he could not tell "where the blood was coming from." Tr. p. 1580, l. 16 – p. 1582, l. 7.

Spartanburg EMS paramedic Joseph Stewart remembered finding appellant with gunshot wounds. One was a head injury. Tr. p. 1668, l. 8 – p. 1669, l. 18.

While Stewart was treating appellant "he [appellant] said he shot himself in the head." Appellant was then transported to the hospital. Tr. p. 1674, ll. 1 – 13.

Randy Bogan processed the parking lot of the police station following the shooting. Tr. p. 1585, l. 13 – p. 1586, l. 17. Bogan identified photographs - - State's Exhibit 27 – 31 - - showing shots that went through the "*backside of the back window of the vehicle from the rear driver side,*" and also from "the driver's side rear window where Ms. Lindsey was seated." Tr. p. 1588, l. 4 – p. 1590, l. 2. (emphasis added).

Bogan testified he recovered four shell casing in the parking lot. Tr. p. 1590, ll. 3 – 17. Bogan also collected a thirty-eight-caliber pistol and a nine-millimeter pistol. Tr. p.

1592, l. 23 – p. 1594, l. 15. As seen, Dr. Wren testified the decedent was shot twice in the head, once in the neck, and she had a grazing wound to the head. Bogan testified he found that one bullet that went through the back seat into the trunk. Tr. p. 1600, l. 2 – p. 1601, l. 15.

Bogan confirmed that five bullets were fired from appellant's thirty-eight-caliber pistol. Bogan accounted for four of those bullets as seen above, and Bogan said he did not know what happened to the fifth bullet. "I don't know if it may have been shot up in the air or what happened." Tr. p. 1605, l. 9 – p. 1606, l. 9. Similarly SLED firearm expert Danny Defreeze testified he was not able to account for the fifth bullet, the bullet which appellant apparently used in the attempt to shoot himself in the head. Tr. p. 1622, l. 12 – p. 1623, l. 9.

During the penalty phase of the trial Nesbitt's eleven-year-old daughter, Kiera Potlow, testified that she was sitting in the middle in the backseat at the time of the shooting. The decedent was sitting beside her behind Nesbitt who was driving. Her sister was in the car seat on her other side, the passenger side of the car. Tr. p. 1753, l. 16 – p. 1755, l. 18.

Potlow testified she was sleeping and that she ducked under her sister's seat when the shooting started. Tr. p. 1755, l. 14 – p. 1756, l. 13.

The Jury View

Defense counsel Bartosh objected to a jury view of the automobile. As seen above, the police strangely released the processed automobile, and Mary Lyles purchased it, and had the broken windows replaced with clear glass. Tr. p. 1806, l. 10 – p. 1808, l. 6. Lyles acknowledged she put a trailer hitch on the car after she bought it, but she denied she was responsible for any back bumper damage. Tr. p. 1808, l. 20 – p. 1809, l. 4.

Bartosh said he assumed the solicitor wanted the jury to see the “size of the back seat, the portion of the back seat, so that they can appreciate the size.” The judge stated that he also assumed the solicitor wanted to show “the size of the back seat in relation to the location of that bullet hole is I believe what they have said in the past is the primary reason they want the jury to see this.” Tr. p. 1886, ll. 14- 25.

Defense counsel argued:

[O]ur argument would be that can be accomplished in a less prejudicial ways. They already introduced several photographs showing the scene that they wish to take the jury out including the location of the bullet hole. There is one picture where the bullet hole has a dowel rod pointing through the hole.

What that doesn’t show, Your Honor, it shows the position of the car seat but it is incomplete if that is what they’re trying to do. You don’t know how much space Ms. Lindsey took up. All they are left with is the car seat and the backseat. If they are trying to get an idea of how close she was to the car seat, you cannot do that.

It is really an incomplete demonstration if that is what they’re trying to do. I would suggest that there are other ways. There are other less prejudicial ways that they can accomplish that. They can do a sketch showing a - -

Tr. p. 1887, ll. 1 – 20.

The judge interrupted defense counsel, stating, “it is not my job to tell the state my favorite way for them to go about doing what they want to do. The judge added, “the question is not whether there are less prejudicial ways to accomplish what they want to do. The question is whether the way that they have chosen has the potential for unfair prejudice that substantially outweighs the probative value. Tr. p. 1887, l. 23 – p. 1888, l. 2.

Defense counsel again stated that the prejudicial value of the jury view outweighed its probative value. Defense counsel noted that the jury was going to look into a car where a woman had been shot to death. Tr. p. 1888, ll. 2- 22.

The judge responded “I don’t see any unfair prejudice, zero.” Tr. p. 1888, l. 23 – p. 1889, l. 3. The judge offered that he had observed the car and that blood could not be seen on the seat. The judge stated while he was not making a finding of fact, “the bullet hole is maybe three inches outside the furthest point that Ms. Lindsey would have taken up if she was sitting up straight.” Tr. p. 1889, l. 4- p. 1890, l. 2.

The judge ruled that the jury view was important for the jury to understand the aggravating circumstance “that might cut both ways.” Tr. p. 1890, ll. 3- 20. The judge then overruled appellant’s Rule 403, SCRE objection. Tr. p. 1890, ll. 3 – 20.

The judge told the attorneys that he would send the bailiffs outside the courthouse to “make sure the jury don’t talk.” Tr. p. 1890, l. 24 - p. 1891, l. 7. Defense counsel told the judge that appellant did not wish to watch the jury view. The judge responded that he thought that South Carolina Law required the defendant to be present at every stage. However, the solicitor informed the judge that a jury view was not the taking of evidence, and that appellant’s presence was not required “so long as the judge accompanies the jury . . .” Tr. p. 1891, l. 14 – p. 1893, l. 16.

The judge then swore the bailiffs to not allow any person to speak during the jury view. Tr. p. 1894, l. 12 – p. 1896, l. 6. The judge told the jurors they would go down the back stairs of the courthouse “each of you will an opportunity to view it. We will get back in line, you will come straight back in.” Tr. p. 1896, ll. 11 – 17.

The jury view and measurements

Following the jury view, defense counsel placed his objection on the record as to what occurred during the jury view:

Mr. Bartosh: The other thing, Your Honor, Mr. Mauldin, [a juror] I believe, was using his arm as a dowel or a measurement. He measured both the front driver's seat and the back seat of the automobile I'm assuming to get an idea of the position of the people. Of course, Ms. Nesbitt was not in the car.

The Court: Right. I saw Mr. Mauldin doing something. He was standing beside the driver's door. The driver's door was closed. The driver's side rear door was open. And he reached his hand through the opening. It looked like he had his hand on the seat back of the driver's seat. Other than that, I couldn't tell what he was doing.

Mr. Bartosh: I think - -

You want to describe it?

Ms. Quimby: I was standing more towards the rear of the vehicle. His arm was through the back door opening. He rested it on the back of the driver's seat. But he also was trying to do an angle. It looked like he was trying to match up his elbow. He was trying to figure out the angles. We wanted to bring that to the attention of the Court.

The Court: Okay. Is there anything significant about that?

Mr. Bartosh: Your Honor, jurors aren't supposed to conduct their own investigation.

The Court: They are supposed to look at the evidence.

Mr. Bartosh: Exactly, they are supposed to view the evidence. But we feel in this case, he started to conduct his own investigation as to angles and things like that.

The Court: Uh, well, I think the jury has to ultimately get around to looking carefully at those angles cause that's a very key piece of evidence that relates to the aggravating circumstance that is alleged.

Mr. Bartosh: Yes, but my point is, it is not his responsibility to conduct his own investigation and determine on his own what the angles are. They can look at the evidence and what the police officer testified to as to angles and distance and measurements and things like that, but a juror cannot conduct his own investigation.

The Court: So the suggestion is that if the juror examines the evidence that I have decided that they can examine too closely, under the Court's supervision, then he is conducting his own investigation?

Mr. Bartosh: No, sir. What I am suggesting is this, they can go out. They can look in the car. They can open the door. They can look inside the car. They can look at all the items that they want to. But once they start trying to determine distances on their own, by their own estimates and see angles by their estimates, then I think that is improper. They certainly are entitled to view it. I would also suggest, Your Honor, he was the only one that did.

The Court: Specifically, what it is that he did that you say that I need to attend to is to use his arm?

Mr. Bartosh: What he did was he stuck his arm from the door jam to determine the length from the door jam to the middle of the head rest in the front. He did the same thing in the back. He stuck it, he put his arm, he was attempting to use the length of his arm to estimate distance is what it appeared to me.

Tr. p. 1898, l. 5 – p. 1900, l. 22.

The judge asked defense counsel what he thought “they did that went beyond the view.” Defense counsel responded “it wasn’t they, Your Honor it was Mr. Mauldin . . . he conducted measurements on his own, he went beyond viewing.” Tr. p. 1901, l. 22 – p. 1902, l. 8.

The judge asked defense counsel “what do you propose I do?” Defense counsel responded, “replace him with an alternative, Your Honor . . . that would be the simple remedy.” Tr. p. 1902, ll. 13 – 21.

The judge stated he could not replace Mauldin without finding he was not fair or impartial, and he asked, “what is wrong with trying to figure out how far it was? What is wrong with that. We are going to do that.” Tr. p. 1902, l. 17 – p. 1903, l. 17.

Defense counsel again argued that trying to figure out distances or measurements went beyond a jury view. Tr. p. 1903, ll. 9 – 21. The solicitor asked “what is the difference between a jury using part of his body for measurement purposes and the other fourteen to using their mind to do the exact thing.” Tr. p. 1903, l. 22 – p. 1904, l. 6.

The following then occurred between defense counsel and the trial judge:

Mr. Bartosh: Suppose one of them had pulled out their pocket and pulled a tape measurer and measured it. I don’t think that would have been proper.

The Court: I am going to then remove from the jury every juror who pulled a tape measurer out of their pocket during that viewing and conducted a measurement. I think where this line is drawn is the jury is entitled to view and analyze the evidence based on the basic characteristics that every person brings into their role as jurors. Of course, that includes their common sense and the things that are in their mind.

That common sense would include how each different person analyzes the things that come before them during the course of their lives. Some people can look at an object and estimate its size or its distance without the need of any kind of measuring device.

Tr. p. 1904, ll. 7 – 24.

Defense counsel then renewed his request that Juror Mauldin be replaced with an alternate. Tr. p. 1906, ll. 16 – 23.

The subject of the jury view would again be discussed following the directed verdict motion on the aggravating circumstance that concerned the jury view. The judge stated he had cases his law clerk had brought to his attention. Tr. p. 1981, l. 4 – p. 1982, l. 14. The judge would later repeat that he was “pretty satisfied there is not any problem with that juror.” Tr. p. 2095, ll. 21 – 25.

Defense counsel once again disagreed, stating, “if a juror performs an experiment, it is improper.” Tr. p. 2099, l. 1 – p. 2100, l. 2. Counsel said “the only remedy that I can see would be to replace him with an alternate.” Tr. p. 2100, ll. 2 – 5.

The judge then repeated that he did not think that juror Mauldin did anything improper. The judge denied the motion to replace Mauldin with an alternate. Tr. p. 2100, l. 6 – p. 2101, l. 2.

Closing argument

In his closing argument the solicitor argued the great risk of danger of aggravator to the jury. He said:

You have touched the car. You have looked in and seen the dimensions in the back seat. If you study the picture, you will see that five foot seven or five foot eight Nell Lindsey took up her share of that back seat.

Tr. p. 2109, ll. 12 – 16.

Directed Verdict Motion

Defense counsel moved for a directed verdict arguing no reasonable juror could find the state had proved all of the elements of the aggravating circumstance beyond a reasonable

doubt. Tr. p. 1971, l. 23 – p. 1972, l. 14. Counsel cited State v. Locklair, 341 S.C. 352, 535 S.E.2d 420 and others in arguing that directed verdict should be granted in this case. Tr. p. 1972, l. 15 – p. 1973, l. 22.

Counsel noted that there were five shots in this case. Four of the shots struck the victim “and the fifth struck Mr. Lindsey.” Tr. p. 1973, l. 20 –p. 1974, l. 1.

Counsel also argued that a pistol used in a public place could be hazardous to the lives or more than one person “depending on how it is used . . . Great risk does not mean mere possibility but likelihood or high probability. Firing a gun into a crowd can create a great risk of death to more than one person. Shooting someone from fairly close range does not by itself create a great risk of death to more than one person simply because others may be in the vicinity. Your Honor, that is what I would say we have in this case. You had a, you had someone firing at a fairly short distance at one person. It has to be higher than that.” Tr. p. 1975, ll. 15 – 25.

The solicitor stated that in State v. Locklair there was evidence defendant attempted to fire the gun several times but the safety was on. Tr. p. 1977, ll. 21 – 25. The solicitor argued appellant knew children were in the car, and that the police officer testified appellant pointed the gun at him. Tr. p. 1978, l. 1 – p. 1979, l. 9.

The judge stated appellant “fired shots into the window from two different angles while the vehicle was parked in a public place.” Tr. p. 1979, l. 20 –p. 1980, l. 10. The judge denied the motion for a directed verdict. Tr. p. 1980, l. 13 – p. 1981, l. 6.

ARGUMENT

1.

The court erred by excusing potential Juror Krisher for cause, and by ruling that Krisher's belief that life imprisonment without parole was more substantial punishment than the death penalty was incompatible with South Carolina Law, since Krisher testified that he could impose the death penalty and sign the death form and he was a qualified juror.

Relevant Facts

Potential juror John Krisher was called for *voir dire*. Mr. Krisher initially stated that he did not know if he could impose the death penalty. Tr. p. 320, l. 8 - p. 321, l. 7. However, in response to defense counsel's questions, Mr. Krisher said that he could impose the death penalty and sign a death verdict if he thought it was appropriate. Tr. p. 325, l. 9 - p. 326, l. 18. When the solicitor questioned Mr. Krisher, he said that he believed a life sentence without parole was a harsher punishment than death. He said that because of his belief that a life sentence was a more severe punishment than death, he would "not necessarily but most likely" impose a life sentence for murder. Tr. p. 327, line 7 - p. 328, l. 23. In response to further defense questions, Mr. Krisher repeated that he could impose either life or death depending on the circumstances of the case. Tr. p. 331, ll. 1-21.

The state moved to disqualify Mr. Krisher on the basis that his belief that a life sentence was harsher punishment than death would impair his ability to apply the law. Tr. p. 332, ll. 2-10. Appellant argued that while the law reserves capital punishment for

aggravated murders, Mr. Krisher's view that a life sentence without parole was worse punishment than death would not impair his ability to follow the court's instructions. Tr. p. 332, l. 11 - p. 334, l. 25.

The court disqualified Mr. Krisher over appellant's objection because his "opinion [about the death penalty] is contrary to South Carolina law and . . . would substantially impair his ability to follow my instructions in fairly deliberating as to what the sentence ought to be." The judge also stated, as an additional justification, that Mr. Krisher hesitated when the judge initially asked if he could impose death. Tr. p. 336, l. 3 - p. 338, l. 11.

Discussion

The trial court abused its discretion by excusing Mr. Krisher for cause. A potential juror in a capital trial may not be removed because of his personal views for or against the death penalty unless those views would render him unable to return a verdict according to the law. S.C. Code § 16-3-20(E). The juror must be excused only if his opinions will prevent or substantially impair the performance of his duties as a juror in accordance with his oath and instructions. Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844 (1985); State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996) (jurors who would not sign death verdicts were properly excluded); State v. Wood, 362 S.C. 135, 607 S.E.2d 57 (2005) (juror who adamantly opposed death penalty was properly removed, even after pretextual defense *voir dire* about racial demographics caused her to superficially change her answers).

Appellant understands that the appellate court should defer to the trial court's discretion in reviewing the exclusion of potential jurors whose answers to *voir dire*

questions about the death penalty were unclear, ambiguous, or contradictory. Wainwright v. Witt, above; United States v. Tipton, 90 F.3d 861 (4th Cir. 1996), cert. denied, 520 U.S. 1253, 117 S.Ct. 2414 (1997); United States v. Barnette, 211 F.3d 803 (2000). That is not the case here.

The solicitor successfully and erroneously argued that Mr. Krisher's view that a life sentence without parole was a worse punishment than death was illegitimate and contrary to South Carolina law. Mr. Krisher's views, however, are not like the opinions expressed by the jurors excused under Tipton in Barnette and United States v. Jackson, 327 F.3d 273 (4th Cir. 2003). The potential juror in Barnette stated that he would be able to follow the law, but also stated that he preferred one sentence over the other and would "weigh heavily on not wanting to go to the death penalty unless it was *very, very, very, very, very* well warranted." Barnette at 211 F.3d 811 (emphasis added). The Fourth Circuit held, under Witt and Tipton, that the juror's responses left the record unclear as to his opinion on the death penalty and that the trial judge did not commit reversible error by excluding him, since the judge had the opportunity to view the juror first-hand. It applied the same principle in Jackson, where a potential juror was excused after he said that that he would not automatically vote against the death penalty but stated that he could not sign a death verdict. Jackson at 327 F.3d 295. The Court ruled that, given the juror's flatly inconsistent answers, the lower court did not abuse its discretion by removing him. Id.

Mr. Krisher's opinion about the death penalty, unlike the jurors in Barnette and Jackson, was not ambiguous, contradictory, or unclear. He did not express a general opposition or ambivalence towards capital punishment, but just a personal opinion about

its relative severity. He stated without qualification that he could follow the court's instructions, and that under the proper circumstances, he could vote for the death penalty and sign a death verdict.

This is not a case where the juror had moral or religious reservations about the death penalty. Mr. Krisher merely proposed, during the course of a theoretical discussion, that life without parole might be a more severe punishment than death. His initial hesitation, if any, did not demonstrate an unwillingness to consider capital punishment. Rather, his pause was a normal, natural response to being confronted unexpectedly with a question of profound import. Mr. Krisher established his mental bearings as the examination progressed, and he answered subsequent questions thoughtfully and confidently.

The idea that life confinement might be a more severe punishment than death is not unique to Mr. Krisher; it is fairly common, even among the victims of violent crime who do not oppose capital punishment on principle. In 2002, after spending more than twenty years as a fugitive overseas, 62-year-old Ira Einhorn was tried for the 1977 Philadelphia murder of Holly Maddox. Mr. Einhorn had been tried *in absentia* and sentenced to death in 1993. He was located in France years later, but that country refused to extradite him unless Pennsylvania granted a new trial and withdrew the death sentence. Pennsylvania complied, and Mr. Einhorn was extradited, convicted and sentenced to life without the possibility of parole. After the trial, Holly Maddox's brother (who was not reported to have opposed the 1993 death sentence) said, "You know that life without parole is a terrible punishment, worse than being executed . . . We [the family] want him in an environment where every day will be longer than the previous one . . . and we hope

he lives another thirty years." Dave Lindorff, *For Ira Einhorn, A Fate Worse Than Death*, SALON.COM, news/features, Oct. 18, 2002.

More recently, during the sentencing hearing of serial bomber Erich Rudolph, victim Diane Derzis told Mr. Rudolph that he had chosen "a fate worse than death" by accepting a life sentence and that she wished him "a very long life." *Rudolph Gets Life Sentence*, MONTGOMERY, ALA., ADVISOR, July 19, 2005 (elec. ed). Members of a Louisiana family interviewed about the fate of a former police officer who had murdered a family member expressed the same sentiment. *Family of Victim of Murderous Cop Doesn't Want Death Penalty*, LOUISIANA TIMES-PICAYUNE, July 27, 2005 (elec. ed).

If the state wanted to remove Mr. Krisher from the jury, it should have exercised a peremptory strike against him. Vacillating responses to questions about the death penalty are valid reasons for the use of a peremptory strike, as illustrated in several cases interpreting Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986). This Court stated in State v. Tucker, 334 S.C. 1, 512 S.E.2d 99 (1999), that:

"Where the solicitor perceives a person will have difficulty imposing the death penalty, he may exercise a peremptory challenge against the juror upon this ground . . ." Id. at 334 S.C. 8, 512 S.E.2d 102, citing State v. Green, 301 S.C. 347, 392 S.E.2d 157 (1990) and State v. Elmore, 300 S.C. 130, 386 S.E.2d 769 (1989).

Similarly, in State v. Shuler, 344 S.C. 604, 545 S.E.2d 805 (2001), a potential juror said that she could follow the law and impose a death sentence under the proper circumstances, but her *voir dire* answers were "weak, timid, and almost inaudible." Id. at 344 S.C. 617-618, 545 S.E.2d 811-812. The solicitor conceded that the juror's answers did not warrant a challenge for cause. Id. at 344 S.C. 618-619, 545 S.E.2d 812. He used

a peremptory strike to excuse her and cited the hesitant answers to defend a Batson challenge. Id. This Court ruled that the juror's equivocation, hesitancy, and uneasiness in answering the solicitor's questions were race-neutral justifications for the use of a peremptory strike. Id. at 344 S.C. 620, 545 S.E.2d 813. This Court did *not* rule that the juror was unqualified *per se*.

The Supreme Court of California considered a juror with opinions like Mr. Krisher's in another Batson case, People v. McDermott, 28 Ca.4th 946, 51 P.3d 874 (2002). In McDermott, the prosecutor asked a potential juror if the death penalty was a more severe punishment than a life sentence without parole. Initially, the juror said, "I really can't say . . . I don't know . . . They are both bad." Id. at 28 Cal.4th 976, 51 P.3d 893-894. When pressed to choose which punishment would be worse, the juror replied, "Maybe I would say life in prison . . . So they could have a chance to think about what they did." And, when asked if she would ever give a death sentence, she replied, "I don't know that I would . . . why I would . . . or if I would." Id.

The prosecutor did not challenge the juror for cause but used a peremptory strike to remove her. In response to the defendant's Batson challenge, the prosecutor argued that the juror's stated opinions made her "unfavorable on the penalty issue" and were a race-neutral reason to strike her. The California Supreme Court affirmed, holding that the juror's "responses generally indicated neutrality on the death penalty, [but] she expressed considerable doubt that the death penalty was a harsher punishment than life in prison without the possibility of parole," which was a valid reason to exercise a peremptory strike. Id.

Mr. Krisher's personal feelings about the death penalty may have justified the state's use of a peremptory strike to remove him from the jury. However, as in Shuler and McDermott, his answers did not render him ineligible to serve. He was generally neutral on the issue of punishment. He did not oppose the death penalty on principle, and he only thought that a life sentence without parole may be a worse punishment than death. He testified that he could follow the law, vote for either sentence in the appropriate circumstances, and sign his verdict. He was a qualified juror. The trial court abused its discretion by removing him from appellant's jury pool. Appellant should receive a new trial. See Gray v. Mississippi, 481 U.S. 648, 658, 107 S.Ct. 2045, 2051 (1987), reaffirming Davis v. Georgia, 429 U.S. 122, 97 S.Ct. 399 (1976) (the erroneous exclusion for cause of a qualified juror in a capital case cannot be harmless error).

The judge erred by refusing to replace Juror Mauldin with an alternate where Mauldin was conducting his own measurements during a jury view of the automobile in which the decedent was shot. A juror conducting his own measurements or experiments during a jury view is improper. Further, it was undisputed that the “great risk of death to more than one person” was the sole aggravator, and a crucial determination for the jury to make.

As seen, the judge and the attorneys agreed that the jury view was requested by the state on the basis of the aggravating circumstance. Defense counsel moved to replace Juror Mauldin with an alternate because Mauldin was conducting his own measurements during the jury view. It is elementary that a juror cannot conduct his own independent experiments, measurements, or investigation outside of the evidence presented in court that is not subject to challenge by cross-examination. See State v. Ballew, 83 S.C. 82, 63 S.E. 688 (1909); Baroody v. Anderson, 195 S.C. 422, 11 S.E.2d 860 (1940); Stone v. City of Florence, 203 S.C. 527, 28 S.E.2d 409 (1943).

Further, a jury view was not the offering of evidence, and consequently Juror Mauldin taking his own measurements during the jury view of the car was all the more prejudicial. There was not any way to challenge the measurements or point to a different way of looking at physical evidence that was evidence. See State v. Mouzon, 326 S.C. 199, 485 S.E.2d 918 (1997).

However, even if the automobile had been admitted into evidence it would have been improper for Juror Mauldin to conduct his own experiments or measurements on the automobile outside of the courtroom. There was not any way for the defense to challenge

experiments or measurements that occurred outside of the courtroom, or in the jury room. See Sturkie v. Constance, 309 S.C. 426, 424 S.E.2d 545 (Ct. App. 1992).

It is beyond dispute that defendant must be given the opportunity to challenge or rebut evidence presented, and a juror conducting his own measurements or experiments outside of court constitutes misconduct because a defendant is unable to challenge the validity of these measurements or experiments. See Russell v. State, 99 Nev. 265, 661 P.2d 1293 (1983).

Here, Juror Mauldin conducted improper independent measurements of the automobile in an apparent attempt to see, on his own, how close another person was to the decedent when she was shot. That was very improper. See State v. Ballew, 83 S.C. 82, 63 S.E. 688 (1909); Baroody v. Anderson, 195 S.C. 422, 11 S.E.2d 860 (1940); Stone v. City of Florence, 203 S.C. 527, 28 S.E.2d 409 (1943).

Moreover, the relief requested, to simply replace Juror Mauldin with an alternate, was entirely reasonable. Cf. Ex parte Tony Thomas, 666 So.2d 855 (Ala. 1995); Bell v. State, 63 Cal. App. 4th 1919, 74 Cal. Rptr.2d 541 (1998).

The critical issue in this case was whether appellant knowingly created a great risk of death to someone other than the decedent when he intentionally shot her. That was the sole aggravator. Thus, Juror Mauldin's measurements or experiments goes to the heart of this case, and the trial judge erred by refusing to replace Juror Mauldin with an alternative.

There is not any way to determine what happened in the jury room, and removing a juror who did something improper, as Mauldin did here by making his own measurements, is the reason we have alternate jurors to prevent such an arbitrary factor from entering into

the sentencing determination. “[T]he 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. A capital jury can recommend a life sentence for an reason or no reason at all.” State v. McClure, 342 S.C. 403, 409, 537 S.E.2d 273, 275 (2000).

The court erred by refusing to direct a verdict on the “great risk of death” aggravator since appellant shot his wife at close range and there was no evidence appellant knowingly created a risk of death to more than one person.

Appellant unquestionably shot his wife at close range. There was no evidence appellant meant to harm anyone other than his estranged wife, and there was no evidence that he knowingly created a risk of death to more than one person. Knowingly creating a risk of death to more than one person is an element of the statutory aggravating circumstance.⁴ S.C. Code § 16-3-20(C)(a)(3) is the statutory aggravating circumstance “where the offender by his act of murder knowingly created a risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person.”

This case is vastly different from State v. Locklair, 341 S.C. 352, 534 S.E.2d 420 (2000) which was the subject of the trial debate. In Locklair, this Court considered a shooting where there was evidence the defendant continued to try to fire his gun after he had already shot and killed his estranged girlfriend. This Court wrote that:

“According to witness Nichols’ testimony, Locklair put more than one person at great risk of danger because he attempted to fire the gun several times, but the safety was on. After he shot Bridges, Locklair pointed the gun at Williams’ home where there were children inside. Nichols was forced to tackle Locklair to stop him and Robert Williams, the victim’s stepfather, had to struggle with Locklair to retrieve the gun. According to the trial testimony, the gun was dropped several

⁴ This aggravating circumstance is often referred to as the “great risk of danger” aggravating circumstance, although our statute provides the defendant must “knowingly create” a great risk of death.” S.C. Code §16-3-20.

times during the struggle with shots being fired in different directions. Also, at the very least, Nichols and Robert Williams, were placed in great danger as they attempted to stop Locklair from firing and retrieve the gun. Finally, Locklair put many people in at great risk of danger. Nichols, Robert William, Betty Williams, Dewey Morgan, and several children playing in the street were all within firing range when the shooting occurred.”

State v. Locklair, 341 S.C. 52, 367, 535 S.E.2d 420, 428 (2000).

There is not any similar evidence in this case. This case is also much different than State v. Ivey, 325 S.C. 137, 481 S.E.2d 12 (1997) where the shooting occurred at the Orangeburg Mall. Ivey shot inside the mall and the bullet ricochet, hitting an officer. Mr. Ivey escaped, and police officers chased him out of the mall shooting at him.

Here, conversely, as defense counsel argued, appellant shot his wife at close range. He fired four shots through the windows at close range, and he hit the decedent four times. The fifth shot fired from the gun was a suicide attempt that did not threaten anyone else. Appellant told the EMS worker that he tried to shoot himself in the head. Tr. p. 1973, l. 20 –p. 1974, l. 1.

Any assertion appellant knowingly created a great risk of danger to anyone other than his wife was sheer speculation. It was improper for a trial judge to accept mere speculation as to what might have happened to others. See White v. State, 403 So.2d 331–337 (Fla. 1981); See, also, Lewis v. State, 377 So.2d 640, 646 (Fla. 1979); Kampff v. State of Florida, 371 So.2d 1007, 1009 (Fla 1978) (“great risk” in the statute means not a mere possibility but a likelihood or high probability [of death]).

As counsel here argued, “Great risk does not mean mere possibility but likelihood or high probability. Firing a gun into a crowd can create a great risk of death to more

than one person. Shooting someone from fairly close range does not by itself create a great risk of death to more than one person simply because others may be in the vicinity. Your Honor, that is what I would say we have in this case. You had a, you had someone firing at a fairly short distance at one person. It has to be higher than that.“ Tr. p. 1975, ll. 15 – 25.

In State v. Stewart, 197 Neb. 497, 250 N.W.2d 849 (1977), the court considered a similar statutory aggravating circumstance that the defendant knowingly created a great risk of death to another. The court noted that in State v. Simants, 197 Neb. 549, 250 N.W.2d 881, 896 (1977), the court had stated, "we interpret [this aggravating circumstance] to cover those situations where the act of the defendant jeopardizes the lives of more than two other persons, such as the use of bombs or explosive devices, the indiscriminate shooting into groups, or at a number of individuals, or other like situations." State v. Stewart, 297 Neb. At 523, 250 N.W.2d at 865.

This Court in Locklair held that a gun, depending on the way it is used, “can be a weapon or device which normally would be hazardous to the lives of more than one person.” Again, however the evidence in this case is vastly different than Locklair on the knowingly created a risk of death to others element. While the officer testified appellant pointed the gun towards or at him, appellant did not shoot the officer where the officer seemed to imply that appellant could have shot him if he had so desired.

In Hallman v. State, 560 So.2d 223, 225-226 (Fla.1990), the Florida Supreme Court held that the trial judge improperly found the aggravating circumstance that the defendant knowingly created a great risk of death to many persons. In Hallman, the defendant took a taxi cab to a federal savings and loan. Hallman took the cab driver inside the bank with him

during the robbery. After robbing the bank, he told the cab driver to stay inside the bank. When Hallman reached the taxi, he discovered the cab driver had the ignition key. Hallman attempted to go back into the bank, but the door was locked. A security guard fired at Hallman through the cab's rear window and missed. Hallman fired back twice, mortally wounding the security guard.

The Hallman court noted that it was improper for the trial judge to list ten people who were in the area of the shoot-out and could have been struck since the shoot-out occurred near a busy thoroughfare. The shots were fired at close range, and that the chance a bystander would be struck by a stray bullet was insufficient to justify this aggravating circumstance. The Florida Supreme Court agreed with Hallman that such speculation was improper, and that the trial court should not have found the existence of this aggravating circumstance.

Although the Florida statute differs from our state's in that it states great risk of death to many persons, rather than to more than one person, the point remains that such speculation as to what might have occurred is improper. See, White v. State, supra.

In White v. State, the defendant and several accomplices bound the occupant of the home and seven other people as they arrived. They shot each of the captives in the head at close range, killing six and wounding two others. The court found it improper for the trial judge to find the aggravating circumstance that the defendant knowingly created a great risk of death to many persons. The trial judge had speculated what might have happened to additional neighbors, delivery people or others who could have come to the house during the several hours that the occupants were held hostage.

The Arizona court in State v. McCall, 139 Ariz. 147, 677 P.2d 920, 932-933 (1983), considered a case where the three victims were shot in bed close enough to each other that the shooting of any one placed the other two in grave risk of danger. However, the court reasoned that the shooting was not random or indiscriminate, but purposeful and intentional.

In Pope v. State, 256 Ga. 195, 345 S.E.2d 831, 845 (1986), the court found evidence insufficient to establish the statutory aggravating circumstance that the defendant knowingly created a great risk of death to more than one person in a public place by means of a weapon or device normally hazardous to the lives of more than one person. The court reasoned that a pistol used in a public place may be hazardous to the lives of more than one person, depending on how it is used. The court wrote that "great risk" does not mean a mere possibility, but a likelihood or high probability. The court noted that the defendant shot at a pharmacist, and did not create a great risk of death to more than one person. The court explained that firing into a crowd can create a great risk of death to more than one person, but shooting someone from a fairly close range does not create a great risk of death to more than one person.

This is not a case where appellant opened fire in a crowded public place, or where, as in Locklair, there was evidence he knowingly created a risk of death to more than one person by continuing to try to fire the gun where children and adults were potentially in the line of fire. Appellant did not make any attempt to shoot anyone other than then decedent. He shot the decedent through the car window four times, and all four shots hit the decedent. The fifth shot was an apparent suicide attempt through a shot to the head that was unsuccessful. Cf., State v. Doss, 116 Ariz. 156, 568 P.2d 1054 (1977), State v. McMurtery, 136 Ariz. 93, 664 P.2d 637 (1983). See, also, 64 A.L.R.4th 837.

It is also elementary that criminal statutes are construed strictly against the state and in favor of the defendant. Hair v. State, 305 S.C. 77, 406 S.E.2d 332 (1991), citing State v. Cutler, 274 S.C. 376, 264 S.E.2d 420 (1980). The judge here erred in submitting this “great risk of death” statutory aggravating circumstance for the jury's consideration given the facts of this case. Aggravating circumstances are intended to narrow the list of candidates eligible or deserving of the death penalty. Extending Locklair, respectfully, to the breaking point as the solicitor urged at trial, does not serve that narrowing function.

4.

The death sentence should be vacated as both excessive and disproportionate since this case involves a domestic dispute involving child visitation, and imposing a death sentence in this case is excessive and disproportionate in this single-victim domestic dispute case.

Appellant's death sentence should be vacated because it is disproportionate and excessive when compared to similar cases.

Under S.C. Code § 16-3-25(C), this Court must review each death sentence to determine (1) whether it was imposed under the influence of passion, prejudice or any other arbitrary factor; (2) whether the evidence supports the finding of a statutory aggravating factor; and (3) whether the sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. See State v. Copeland, 278 S.C. 572, 300 S.E.2d 63 (1982). Appellant's sentence should fail the statutorily-mandated review because the evidence did not support the jury's finding of the only alleged aggravating factor, see Argument 3, supra, and because his death sentence is disproportionate and excessive when compared to other cases.

Appellant's case had two distinguishing features: it involved a single victim, and it resulted from an ongoing domestic dispute. A survey of this Court's death penalty opinions reported in recent decades yields only one case, State v. Locklair 341 S.C. 352, 535 S.E.2d 420 (2000), discussed below, comparable to appellant's case on both points but still distinguishable. Otherwise, his case is not similar to other capital cases involving either single victims or family-related crimes.

Single Victims Appellant's case is dissimilar to reported capital cases with single victims. These cases most often concerned either the death of a police officer, e.g., State v. Wood, 362 S.C. 135, 607 S.E.2d 57 (2004); State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000); State v. Hill, 331 S.C. 94, 501 S.E.2d 122 (1998), or a "random" murder accompanied by violent crimes such as rape, kidnapping, burglary, or robbery, e.g., State v. Moore, 357 S.C. 458, 593 S.E.2d 608 (2004) (death sentence for murder of convenience store clerk during robbery); State v. Simpson, 325 S.C. 37, 479 S.E.2d 57 (1997) (same); State v. Humphries, 325 S.C. 28, 479 S.E.2d 52 (1996) (same).

A significant number of single-victim capital cases involved crimes against the very young or old, such as the sexual assault and murder of a young child in State v. Downs, 361 S.C. 141, 604 S.E.2d 377 (2004) (death sentence for rape and strangling of six-year-old boy), or of an elderly person, in State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999) (death sentence for murder of 72-year old widow who was raped, forced to drink cleaning fluid, her head wrapped in duct tape and left to suffocate) and State v. Holmes, 320 S.C. 259, 464 S.E.2d 334 (1995) (death sentence for beating, rape and murder of 86-year old victim).

Many single-victim cases alleged a shocking degree of violence and depravity by the defendant, as in State v. Stokes, 345 S.C. 368, 548 S.E.2d 202 (2001) (death sentence for murder-for-hire with kidnapping, brutal gang-rape, pre- and post-mortem mutilation of breasts and genitalia, shooting, and scalping of victim), State v. Gardner, 332 S.C. 389, 505 S.E.2d 338 (1998) (death sentence for kidnapping, rape, and murder of young woman shot five times in the face); State v. Charping, 333 S.C. 124, 508 S.E.2d 851 (1998) (death sentence for abduction, rape, torture and drowning of woman); State v.

Nance, 320 S.C. 501, 466 S.E.2d 349 (1996), cert. denied, 518 U.S. 1026, 116 S.Ct. 2566 (1996) (home invasion of elderly couple in which husband was stabbed multiple times and forced to watch rape and murder of wife).⁵ Appellant's case is not comparable to these. The shooting alleged in his case was not accompanied by any other crimes. His alleged victim was not a law enforcement officer, was not especially vulnerable because of age or physical condition, and was not burglarized, robbed, raped, or tortured. Finally, the facts of appellant's alleged crime do not remotely resemble the horrors recounted in Downs, Council, Holmes, Stokes, Gardner, Charping, and Nance. Appellant's death sentence, in light of these cases, is disproportionate.

"Domestic" cases. Appellant's case is also unlike reported capital cases involving domestic or family disputes. Family-related murders that resulted in a death sentence uniformly involved extreme violence or multiple victims. In State v. Weik, 356 S.C. 76, 587 S.E.2d 683 (2002), for example, the defendant allegedly broke into his estranged girlfriend's home and killed her with five rounds of three-inch 00-buckshot discharged at close range from an 12-gauge automatic hunting weapon, as their son cowered nearby. The jury sentenced him to death after finding the aggravating circumstances of torture and burglary.

In State v. Passaro, 350 S.C. 499, 567 S.E.2d 862 (2002), the defendant received a death sentence for killing his young daughter by strapping her in a car seat and setting the car on fire in the parking lot of his ex-wife's condominium complex. The sole issue on appeal was whether the prisoner could waive automatic appeals in a death penalty case,

⁵ , PCR granted, Nance v. Frederick, 358 S.C. 480, 596 S.E.2d 62 (2004), vacated and remanded, Ozmint v. Nance, __ U.S. __, 125 S.Ct. 868 (2005).

but this Court determined that the death sentence was appropriate. 350 S.C. 499, 508, 567 S.E.2d 862, 867.

Aside from cases alleging extreme violence, like Weik and Passaro, the family-related capital cases had multiple victims. In State v. Shuler, 353 S.C. 176, 577 S.E.2d 438 (2003), the defendant was convicted of the triple murder of his former girlfriend, her 13-year-old daughter, and her mother. The jury imposed a death sentence after finding the aggravating circumstances of multiple victims, burglary, and physical torture.

In State v. Hughey, 339 S.C. 439, 529 S.E.2d 721 (2000), the jury recommended a death sentence after convicting the defendant of burglary, grand larceny of a vehicle, and the double murder of his ex-girlfriend and another woman. In State v. Rosemond, 335 S.C. 593, 518 S.E.2d 588 (1999), a death sentence was imposed for the double murder of the defendant's girlfriend and her ten-year-old daughter. And, in State v. Kelly, 331 S.C. 132, 502 S.E.2d 99 (1998), the defendant received a death sentence for the double murder of his estranged wife and her daughter's fiancée, and also was convicted of assault and battery with intent to kill the daughter during the same incident. See also State v. Ard, 332 S.C. 370, 505 S.E.2d 328 (1998), overruled in part on other grounds by State v. Shafer, 340 S.C. 291, 531 S.E.2d 524 (2000), overruled by Shafer v. South Carolina, 532 U.S. 36, 121 S.Ct. 1263 (2001) (death sentence for double murder of pregnant girlfriend and viable fetus; aggravating circumstance was multiple victims); State v. Williams, 321 S.C. 327, 468 S.E.2d 626 (1996) (death sentence for double murder of wife and adopted son; aggravating circumstances were multiple victims and murdering for financial gain in the form of life insurance benefits).

State v. Locklair. As noted, one recent "domestic" case superficially resembles appellant's, but the similarity fades on closer inspection. In Locklair, supra, the defendant received a death sentence for murdering his girlfriend while he was out on bond awaiting trial for the murder of the girlfriend's husband. Locklair is superficially like appellant's case because it did not involve an extreme level of violence, as in Weik or Passaro, above, and because there was a single victim in each of Locklair's cases. Unlike Locklair, however, the state did not allege that appellant was a serial murderer. The only aggravator alleged against appellant was the creation of a public danger, which, as shown in Argument 3, supra, should have failed at the directed verdict stage.

The creation of a public danger also was alleged in Locklair, but, again, the cases are distinguishable. Locklair attempted to fire his gun several times at different targets. Two witnesses, besides the victim, tried to intervene at close range and were endangered. After Locklair shot his victim in the back, he stepped over her body and continued to try to shoot at a house occupied by children. He stopped shooting only after one of the witnesses wrestled him to the ground. During the confrontation, the gun was dropped several times and spontaneously discharged. 341 S.C. 356, 535 S.E.2d 422. This Court ruled that the facts supported the jury's finding that Locklair had "knowingly created a great risk of danger to more than one person in a public place" under S.C. Code § 16-3-20-(C)(a)(3). 341 S.C. 366, 535 S.E.2d 428. Appellant's case differs from Locklair because appellant did not create a general public danger and did not threaten anyone beyond the victim.

Appellant understands that this Court, in conducting its proportionality review, does not compare capital cases to those where the defendant received only a sentence of

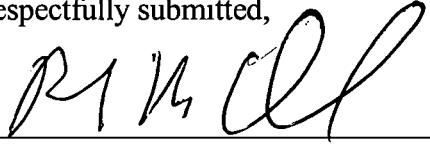
confinement. S.C. Code § 16-3-25(E); Copeland, above. Nevertheless, appellant feels compelled to point out that the only reported cases comparable to his case are those in which a sentence of confinement, rather than a death sentence, was imposed. See State v. Gorum, 428 S.E.2d 884, 311 S.C. 332 (1993) (life sentence for shooting death of wife, in public place, after learning that she would not reconcile with defendant).⁶ Appellant's case, like these, is distinguishable from death penalty cases in both nature and degree. His death sentence is disproportionate and should be vacated.

⁶ See also State v. Harris, 275 S.C. 463, 272 S.E.2d 636 (1980), conviction aff'd in PCR, Harris v. State, 354 S.C. 382, 581 S.E.2d 154 (2003) (life sentence for shooting death of girlfriend and her ex-husband in public place); Myers v. State, 359 S.C. 40, 596 S.E.2d 488 (2004), cert. denied, Nov. 8, 2004 (30-year sentence for murder of girlfriend in public bar where she worked); Jackson v. State, 355 S.C. 568, 568 S.E.2d 562 (2003) (life sentence for shooting death of estranged wife, partly over child-visitation dispute); State v. Ballington, 346 S.C. 262, 551 S.E.2d 280 (Ct. App. 2001), cert. denied, Jan. 10, 2002 (life sentence for murder of estranged wife after she threatened to pursue sole custody of child); State v. Taylor, 333 S.C. 159, 508 S.E.2d 870 (1999) (life sentence for strangling death of wife); State v. Gadsden, 314 S.C. 229, 442 S.E.2d 594 (1994) (life sentence for stabbing death of wife).

CONCLUSION

By reason of argument one, appellant's conviction should be reversed, and this case remanded to the Spartanburg County Court of General Sessions for a new trial. In the alternative, by reason of arguments two and three, a new sentencing trial should be granted. By reason of argument four, appellant's death sentence should be vacated.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R M Dudek', written over a horizontal line.

Robert M. Dudek
Assistant Appellate Defender

Aileen P. Clare
Assistant Appellate Defender

John Michael Bartosh
Spartanburg County Public Defender's Office

ATTORNEYS FOR APPELLANT.

This 15th day of August, 2005.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Spartanburg County
John C. Few, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MARION ALEXANDER LINDSEY,

APPELLANT

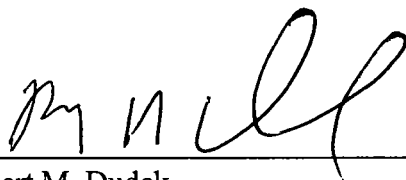
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictment;
- (2) State's 27-31(photographs of the car)
- (3) Entire Trial Transcript
- (4) All Pre-Trial Transcripts

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

August 15th, 2005



Robert M. Dudek
Assistant Appellate Defender

Aileen P. Clare
Assistant Appellate Defender

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ATTORNEYS FOR APPELLANT.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Appeal from Spartanburg County
John C. Few, Circuit Court Judge

SC SUPREME COURT

THE STATE,

RESPONDENT,

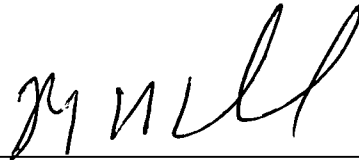
V.

MARION ALEXANDER LINDSEY,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Donald J. Zelenka, Esquire, this 15th day of August, 2005.



Robert M. Dudek
Assistant Appellate Defender

Aileen P. Clare
Assistant Appellate Defender

John Michael Bartosh
Spartanburg County Public Defender's Office

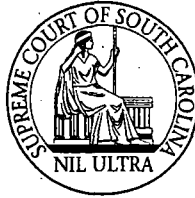
ATTORNEYS FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 15th day of August, 2005.

Melinda Whmy (L.S.)

Notary Public for South Carolina

My Commission Expires: November 16, 2008.



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

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COLUMBIA, SOUTH CAROLINA 29211

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August 12, 2005

Assistant Appellate Defender Robert M. Dudek
Office of Appellate Defense
1205 Pendleton Street, Rm. 306
Columbia, SC 29201

Re: The State v. Lindsey, Marion Alexander

Dear Counsel:

Enclosed is the order issued in the above entitled matter.

Very truly yours,

Brenda F. Shealy
CHIEF DEPUTY CLERK

BFS/dmh

Enclosure

cc: Assistant Deputy Attorney General Donald J. Zelenka

The Supreme Court of South Carolina

The State,

Respondent,

v.

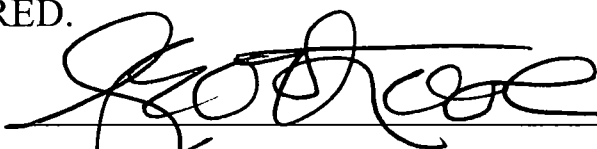
Marion Alexander Lindsey,

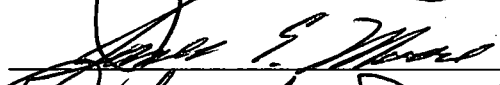
Appellant.

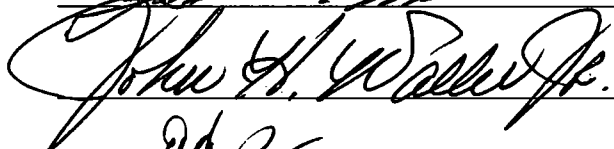
ORDER

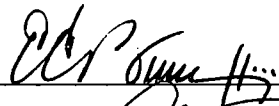
Appellant requests a fourth thirty day extension of time in which to serve and file appellant's initial brief and designation of matter to be included in the record on appeal. The State does not oppose the motion. The motion is granted. Appellant shall serve and file his initial brief and the designation of matter to be included in the record on appeal within thirty days of the date of this order.

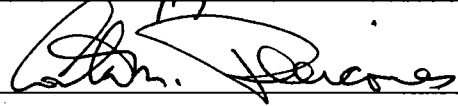
IT IS SO ORDERED.



C.J.


J.


J.


J.


J.

Columbia, South Carolina

August 12, 2005

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Spartanburg County

John C. Few, Circuit Court Judge

RECEIVED

JUL 14 2005

S.C. SUPREME COURT

THE STATE,

RESPONDENT,

V.

MARION ALEXANDER LINDSEY,

APPELLANT

**PETITION FOR EXTENSION TO FILE
INITIAL BRIEF OF APPELLANT AND
DESIGNATION OF MATTER**

The undersigned counsel would respectfully requests an extension a final extension of thirty days in which to file the initial brief of appellant and designation of matter in the above-referenced death penalty case. In support of this motion, counsel would respectfully show the Court:

1. The initial brief of appellant and designation of matter in this case are due to be served and filed today, having been extended by three prior of this Court.

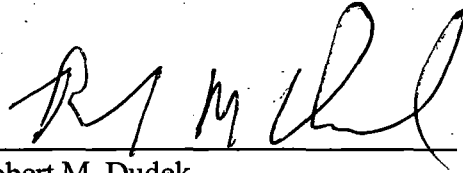
2. Counsel in filing a two issue merits brief in the lengthy voluntary manslaughter case of State v. Allen Marty Cornwell with the Court of Appeals today, July 14, 2005. Counsel will file a two issue brief with the Court of Appeals tomorrow, July 15, 2005 in the remand case of State v. Jerry Davis. Counsel will also file the reply brief with

the Court of Appeals tomorrow, July 15, 2005 or Monday, July 18, 2005 at the latest, in the homicide by child abuse case of State v. Kenneth Navy. In addition, counsel filed a merits brief in the murder case of State v. Dana Lockamy with the Court of Appeals this Monday, July 11, 2005. Counsel also filed an initial brief in the lengthy murder trial case of State v. Jody Ward with the Court of Appeals last Thursday, July 7, 2005. Counsel has conversed with his client, and is also concluding his work on the competency to be executed appeal of State v. Hastings Arthur Wise to be submitted to this Court next week. Counsel is working with co-counsel Aileen Clare on this death penalty case, and the brief in this case will be filed early if completed. As indicated by his signature below, counsel for the state does not oppose this request.

3. Counsel had hoped that the last extension request would be last order needed. However, counsel has been unable to properly have the brief ready for this Court today, although he has been working on this case and many other murder or serious crime cases since the last extension request. Counsel is well aware of Justice Waller's order on extensions in death penalty cases. Counsel does not request this extension for purposes of delay, but out of absolute necessity.

WHEREFORE, the undersigned counsel would respectfully request a final extension of thirty days in which to file the initial brief of appellant and designation of matter in this death penalty case.

Respectfully submitted,



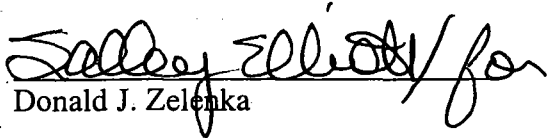
Robert M. Dudek
Assistant Appellate Defender

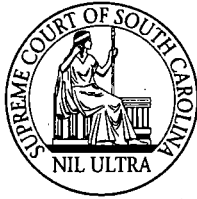
S.C. Office of Appellate Defense
1205 Pendleton Street, Room 306
Columbia, SC 29201
(803) 734-1330

Attorney for Appellant

July 14, 2005

I DO NOT OPPOSE THIS REQUEST:


Donald J. Zelenka



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

June 14, 2005

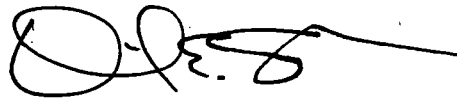
Assistant Appellate Defender Robert M. Dudek
Office of Appellate Defense
1205 Pendleton Street, Rm. 306
Columbia, SC 29201

Re: The State v. Lindsey, Marion Alexander

Dear Counsel:

Enclosed is the order issued in the above entitled matter.

Very truly yours,



CLERK

DES/dmh

Enclosure

cc: Assistant Deputy Attorney General Donald J. Zelenka

The Supreme Court of South Carolina

The State,

Respondent,

v.

Marion Alexander Lindsey,

Appellant.

ORDER

Counsel for appellant seeks a third extension of time in which to serve and file appellant's initial brief and designation of matter in this case. The State does not oppose the request. The motion is granted. Counsel for appellant shall serve and file appellant's initial brief and designation of matter within thirty days of the date of this order.

IT IS SO ORDERED.



FOR THE COURT

Columbia, South Carolina

June 14, 2005

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Spartanburg County

John C. Few, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MARION ALEXANDER LINDSEY,

APPELLANT

**PETITION FOR EXTENSION TO FILE
INITIAL BRIEF OF APPELLANT AND
DESIGNATION OF MATTER**

The undersigned counsel would respectfully requests an extension of thirty days in which to file the initial brief of appellant and designation of matter in the above-referenced death penalty case. In support of this motion, counsel would respectfully show the Court:

1. The initial brief of appellant and designation of matter in this death penalty case are due to be served and filed on Friday, June 10, 2005, having been extended by two prior orders of this Court.

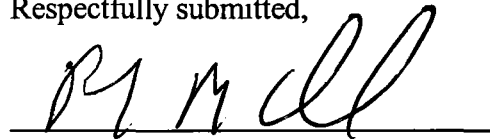
2. Counsel will today file a four issue merits brief with the Court of Appeals in the murder case of State v. Thaddeus Curry. Counsel within the last six working days also filed a brief with the Court of Appeals in the case of State v. Justin Allen (four issues) and a brief in State v. Williams. Counsel filed three rehearing petitions within this same six day time

frame with the Court of Appeals: State v. Dushun State, State v. Lucius Staten, and State v. Landreus Cowan. Counsel has also been doing preparation work for filing with this Court in the near future in the death penalty competency to be executed remand cases of State v. Hastings Arthur Wise and State v. William E. Downs, Jr.. Counsel continues to work on the present death penalty case with Aileen Clare of this office. Counsel intends to travel to the Spartanburg Courthouse within the next week or two to view exhibits – and listen to the 911 tape – in this case. Counsel at the present time also has a very high caseload of mostly murder cases, and he has death penalty oversight responsibilities for this office. Counsel is well aware of Justice Waller's order on extensions in death penalty cases. Consistent with that order this extension request is made in good faith, out of absolute necessity, and not for purposes of delay. Absent exigent circumstances that cannot be anticipated, counsel and co-counsel Aileen Clare intend to make this the final extension request in this case.

3. As indicated by signature below, counsel for the state consents or does not oppose this request.

WHEREFORE, the undersigned counsel would respectfully request a thirty day extension in which to file the initial brief of appellant and designation of matter in this case.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R M Dudek', written over a horizontal line.

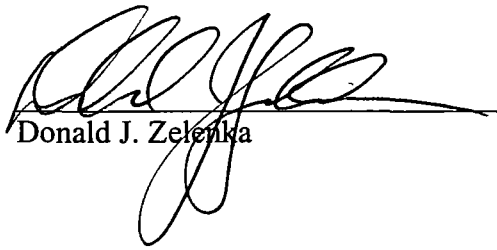
Robert M. Dudek
Assistant Appellate Defender

S.C. Office of Appellate Defense
1205 Pendleton Street, Room 306
Columbia, SC 29201
(803) 734-1330

Attorney for Appellant

June 10, 2005

I DO NOT OPPOSE THIS REQUEST:



Donald J. Zelenka

The Supreme Court of South Carolina

The State,

Respondent

v.

Marion Alexander Lindsey,

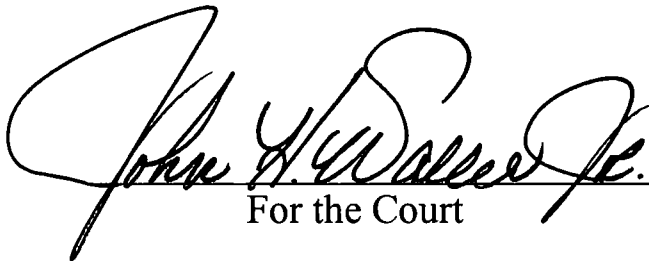
Appellant.

The Honorable John C. Few
Spartanburg County
Trial Court Case No. 2002-GS-42-04753

ORDER

For good cause having been shown, the time for serving and filing the Initial Brief of Appellant and Designation of Matter in the above entitled matter is hereby extended until June 10, 2005.

IT IS SO ORDERED.

 J.
For the Court

Columbia, South Carolina

May 12, 2005

cc: Assistant Appellate Defender Robert M. Dudek
Assistant Deputy Attorney General Donald J. Zelenka

The Supreme Court of South Carolina

The State,

Respondent

v.

Marion Alexander Lindsey,

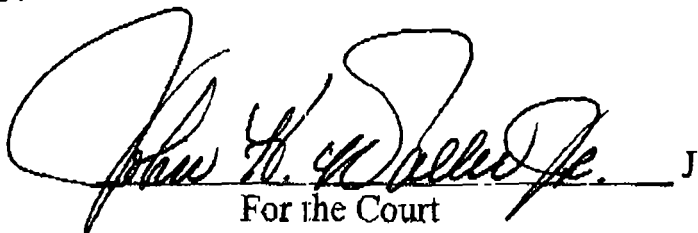
Appellant.

The Honorable John C. Few
Spartanburg County
Trial Court Case No. 2002-GS-42-04753

ORDER

For good cause having been shown, the time for serving and filing the Initial Brief of Appellant and Designation of Matter in the above entitled matter is hereby extended until June 10, 2005.

IT IS SO ORDERED.


For the Court

Columbia, South Carolina

May 12, 2005

cc: Assistant Appellate Defender Robert M. Dudek
Assistant Deputy Attorney General Donald J. Zelenka

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Spartanburg County

John C. Few, Circuit Court Judge

THE STATE,

RESPONDENT

V.

MARION ALEXANDER LINDSEY,

APPELLANT

**PETITION FOR EXTENSION TO FILE
INITIAL BRIEF OF APPELLANT AND
DESIGNATION OF MATTER**

The undersigned counsel would respectfully requests an extension of thirty days in which to file the initial brief of appellant and designation of matter in the above-referenced *death penalty* case. In support of this motion, counsel would respectfully show the Court:

1. The initial brief of appellant and designation of matter in this case are due to be served and filed today, having been extended by two prior orders of this Court.

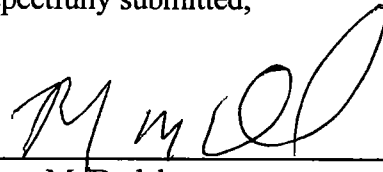
2. Counsel filed the initial brief of appellant in State v. Stanley Eppenger with the Court of Appeals on Monday, May 9, 2005. Counsel also filed a reply brief with that Court that same day in State v. Jeffrey Weston. Counsel is working on this case, and counsel has a very heavy caseload of mostly murder and death penalty cases at this time. In addition, counsel has death penalty oversight responsibilities with this office. Counsel is well aware

of Justice Waller's order on extensions in death penalty cases. Consistent with that order this extension request is made in good faith, out of absolute necessity, and not for purposes of delay.

3. As indicated by signature below, counsel for the state consents or does not oppose this request.

WHEREFORE, the undersigned counsel would respectfully request a thirty day extension in which to file the initial brief of appellant and designation of matter in this case.

Respectfully submitted,



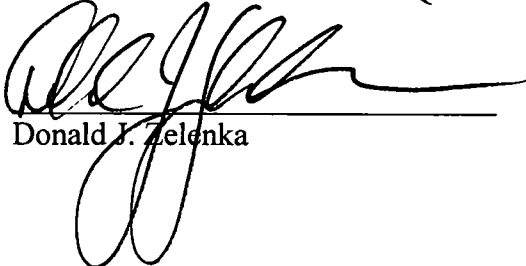
Robert M. Dudek
Assistant Appellate Defender

S.C. Office of Appellate Defense
1205 Pendleton Street, Room 306
Columbia, SC 29201
(803) 734-1330

Attorney for Appellant

May 11, 2005

I DO NOT OPPOSE THIS REQUEST:



Donald J. Zelenka

The Supreme Court of South Carolina

The State,

Respondent

v.

Marion Alexander Lindsey,

Appellant.

The Honorable John C. Few
Spartanburg County
Trial Court Case No. 2002-GS-42-04753

ORDER

For good cause having been shown, the time for serving and filing the Initial Brief of Appellant and Designation of Matter in the above entitled matter is hereby extended until May 11, 2005.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



CLERK

Columbia, South Carolina

April 13, 2005

cc: Assistant Appellate Defender Robert M. Dudek
Assistant Deputy Attorney General Donald J. Zelenka

ORIGINAL

South Carolina Office of Appellate Defense

Joseph L. Savitz, III
Acting Chief Attorney

Wanda P. Hagler
Acting Deputy Chief Attorney

1205 Pendleton Street, Room 306
Columbia, S.C. 29201

Telephone: (803) 734-1330
Fax: (803) 734-1397

Robert M. Pachak
Robert M. Dudek
Tara S. Taggart
Aileen P. Clare
Eleanor Duffy Cleary
Assistant Appellate Defenders

April 11, 2005

RECEIVED

APR 11 2005

S.C. SUPREME COURT

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

Re: The State v. Marion Alexander Lindsey (capital case)

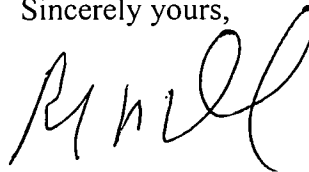
Dear Mr. Shearouse:

The initial brief of appellant and designation of matter in the above referenced case is due to be served and filed today. However, because of my current caseload, I have been unable to complete this brief for service. For that reason, I would respectfully request an extension of thirty days in which to serve and file this initial brief.

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

Thank you for your assistance in this matter. Should you have any questions, please do not hesitate to contact me.

Sincerely yours,



Robert M. Dudek
Assistant Appellate Defender

RMD/mwl

cc: Donald J. Zelenka, Esquire

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Spartanburg County

Honorable John C. Few, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MARION ALEXANDER LINDSEY,

APPELLANT

ORDER

On motion of Robert M. Dudek, attorney for appellant, it is hereby

ORDERED that State's Exhibit 21 (A) (Enhanced CD), be released to the Office of the Attorney General, or its designee, for transporting to the Supreme Court of South Carolina for purposes of review by the Court for the above-captioned case.

JEAN H. TOAL, CHIEF JUSTICE

By  _____
CLERK

Columbia, South Carolina

March 23, 2005

Copies to: The Honorable Marc Kitchens
Robert M. Dudek, Esquire
Donald J. Zelenka, Esquire

South Carolina Office of Appellate Defense

ORIGINAL

Joseph L. Savitz, III
Acting Chief Attorney

Wanda P. Hagler
Acting Deputy Chief Attorney

1205 Pendleton Street, Room 306
Columbia, S.C. 29201

Telephone: (803) 734-1330
Fax: (803) 734-1397

Robert M. Pachak
Robert M. Dudek
Tara S. Taggart
Aileen P. Clare
Eleanor Duffy Cleary
Assistant Appellate Defenders

March 22, 2005

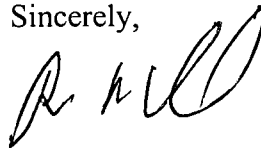
The Honorable Daniel E. Shearouse
Clerk, S.C. Supreme Court
PO Box 11330
Columbia, SC 29211

Re: The State v. Marion Alexander Lindsey

Dear Mr. Shearouse:

Enclosed is a proposed order in the above case. By copy of this letter, we are also forwarding a copy of this proposed order to Donald J. Zelenka. Thank you for your assistance in this matter.

Sincerely,



Robert M. Dudek
Assistant Appellate Defender

RMD/mwl

cc: Donald J. Zelenka

SC SUPREME COURT

MAR 22 PM 4:18

RECEIVED

South Carolina Office of Appellate Defense

RECEIVED

2005 FEB 15 PM 4:17

Joseph L. Savitz, III
Acting Chief Attorney

1205 Pendleton Street, Room 306
Columbia, SC 29201

Wanda P. Hagler
Acting Deputy Chief Attorney

Telephone (803) 734-1330
Fax: (803) 734-1397

SC SUPREME COURT
Robert M. Pachak
Robert M. Dudek
Tara S. Taggart
Aileen P. Clare
Eleanor Duffy Cleary
Assistant Appellate Defenders

February 15, 2005

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

Dear Mr. Shearouse:

The following case falls under the 60 day rule for appeals, and the date we received the transcript is listed to the side.

The State v. Marion Alexander Lindsey

2/10/05

I would appreciate you beginning our time limits from the above dates, and if you need additional information, or have any questions please contact me.

Thank you for your assistance in this matter.

Sincerely,

Karen D. Elliott

Karen D. Elliott
Legal Assistant

South Carolina Office of Appellate Defense

Joseph L. Savitz, III
Acting Chief Attorney

1205 Pendleton Street, Room 306
Columbia, SC 29201

Wanda P. Hagler
Acting Deputy Chief Attorney

Telephone (803) 734-1330
Fax: (803) 734-1397

Robert M. Pachak
Robert M. Dudek
Tara S. Taggart
Aileen P. Clare
Eleanor Duffy Cleary
Assistant Appellate Defenders

January 7, 2005

Ms. Desiree Allen
S.C. Court Administration
1015 Sumter Street, 2nd Floor
Columbia, South Carolina 29201-3739

Dear Ms. Allen:

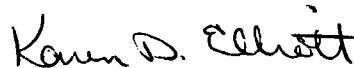
Below is a list of transcript(s) that were requested by this office. Pursuant to Supreme Court Rule 206(e), the allotted time of sixty (60) days has lapsed to either receive the transcript or an extension to deliver same.

<u>Court Reporter</u>	<u>Due Date</u>	<u>Case Name</u>
Ms. Theresa Johnson	10/24/04	Marion Alexander Lindsey

Trial Date: May 24, 2004 (Sentencing Death Pen

I would appreciate your confirming in writing as to the status of the above-referenced transcript(s). If you should have any questions, please do not hesitate to contact me.

Sincerely,



Karen D. Elliott
Legal Assistant

xc: S.C. Supreme Court
Attorney General's Office

RECEIVED
2005 JAN -7 PM 4:21
SC SUPREME COURT

South Carolina Office of Appellate Defense

Joseph L. Savitz, III
Acting Chief Attorney

Wanda P. Hagler
Acting Deputy Chief Attorney

1205 Pendleton Street, Room 306
Columbia, SC 29201

Telephone (803) 734-1330
Fax: (803) 734-1397

Robert M. Pachak
Robert M. Dudek
Tara S. Taggart
Aileen P. Clare
Eleanor Duffy Cleary
Assistant Appellate Defenders

January 7, 2005

Ms. Desiree Allen
S.C. Court Administration
1015 Sumter Street, 2nd Floor
Columbia, South Carolina 29201-3739

Dear Ms. Allen:

Below is a list of transcript(s) that were requested by this office. Pursuant to Supreme Court Rule 206(e), the allotted time of sixty (60) days has lapsed to either receive the transcript or an extension to deliver same.

<u>Court Reporter</u>	<u>Due Date</u>	<u>Case Name</u>
Ms. Theresa Johnson	12/20/04	Marion Alexander Lindsey

Trial Date: May 17-20, 2004 (Jury Selection)

I would appreciate your confirming in writing as to the status of the above-referenced transcript(s). If you should have any questions, please do not hesitate to contact me.

Sincerely,



Karen D. Elliott
Legal Assistant

xc: S.C. Supreme Court
Attorney General's Office

RECEIVED
2005 JAN -7 PM 4:21
SC SUPREME COURT

South Carolina Office of Appellate Defense

Joseph L. Savitz, III
Acting Chief Attorney

1205 Pendleton Street, Room 306
Columbia, SC 29201

Wanda P. Hagler
Acting Deputy Chief Attorney

Telephone (803) 734-1330
Fax: (803) 734-1397

Robert M. Pachak
Robert M. Dudek
Tara S. Taggart
Aileen P. Clare
Eleanor Duffy Cleary
Assistant Appellate Defenders

January 7, 2005

Ms. Desiree Allen
S.C. Court Administration
1015 Sumter Street, 2nd Floor
Columbia, South Carolina 29201-3739

Dear Ms. Allen:

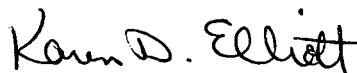
Below is a list of transcript(s) that were requested by this office. Pursuant to Supreme Court Rule 206(e), the allotted time of sixty (60) days has lapsed to either receive the transcript or an extension to deliver same.

<u>Court Reporter</u>	<u>Due Date</u>	<u>Case Name</u>
Ms. Theresa Johnson	12/20/04	Marion Alexander Lindsey

Trial Date: May 21-24, 2004 (Trial transcript)

I would appreciate your confirming in writing as to the status of the above-referenced transcript(s). If you should have any questions, please do not hesitate to contact me.

Sincerely,



Karen D. Elliott
Legal Assistant

xc: S.C. Supreme Court
Attorney General's Office

RECEIVED
2005 JAN -7 PM 4:21
SC SUPREME COURT

RECEIVED
2004 OCT 21 PM 4:39

South Carolina Office of Appellate Defense

Joseph L. Savitz, III
Acting Chief Attorney

1205 Pendleton Street, Room 306
Columbia, SC 29201

Wanda P. Hagler
Acting Deputy Chief Attorney

Telephone (803) 734-1330
Fax: (803) 734-1397

SC SUPREME COURT
Robert M. Pachak
Robert M. Dudek
Tara S. Taggart
Aileen P. Clare
Eleanor Duffy Cleary
Assistant Appellate Defenders

October 20, 2004

Ms. Theresa Johnson
Circuit Court Reporter
Post Office Box 2812
Greenville, SC 29602

Dear Ms. Johnson:

Our office has been requested to perfect the appeal arising out of:

The State v. Marion Alexander Lindsey

Indictment #: 02-GS-42-4753

County: Spartanburg

Date of Trial: May 17-20, 2004 (Jury Selection)

Presiding Judge: John C. Few

It is my understanding that you were the court reporter at this time. That being the case, I request that you send this office the original trial transcript along with your bill. If you send a copy to this office, please bill us accordingly. To ensure prompt payment of this bill, please prepare it on the enclosed CID FORM 3500 (Substitution for SCCA DI-4) and include the original criminal case number (Indictment number) where the space is provided.

It has been brought to our attention that the State Printing Office experiences problems when the transcript is prepared on onionskin paper. **PLEASE DO NOT USE ONIONSKIN PAPER.**

We request that the lines on the paper be numbered from 1-25, and that you include in the transcript any and all recorded motions, pre and post-trial. Additionally, please transcribe the jury selection, and the State and defense counsel's opening and closing arguments. We have found that even if there are no objections, we need to review both opening and closing arguments for appeal.

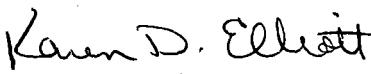
Ms. Theresa Johnson
October 20, 2004
Page Two

If you are aware of the existence of co-defendants not listed in the prior captioned case, please contact us prior to transcribing the transcript. In this manner, we can consult our records to ensure that in ordering a transcript, a duplication has not occurred. In addition, if the Attorney General's Office has already requested an original transcript, please notify us.

I am sorry for any inconvenience this may cause, but I appreciate your assistance in this matter. If you have any questions, or problems, please contact me.

Thank you for your kind cooperation in this matter.

Sincerely,

A handwritten signature in cursive script that reads "Karen D. Elliott".

Karen D. Elliott
Legal Assistant

xc: S.C. Supreme Court
Attorney General's Office

South Carolina Office of Appellate Defense

RECEIVED

2004 OCT 21 PM 4:39

Joseph L. Savitz, III
Acting Chief Attorney

1205 Pendleton Street, Room 306
Columbia, SC 29201

Wanda P. Hagler
Acting Deputy Chief Attorney

Telephone (803) 734-1330
Fax: (803) 734-1397

Robert M. Pachak
Robert M. Dudek
Tara S. Taggart
Aileen P. Clare
Eleanor Duffy Cleary
Assistant Appellate Defenders

SC SUPREME COURT

October 20, 2004

Ms. Theresa Johnson
Circuit Court Reporter
Post Office Box 2812
Greenville, SC 29602

Dear Ms. Johnson:

Our office has been requested to perfect the appeal arising out of:

The State v. Marion Alexander Lindsey

Indictment #: 02-GS-42-4753

County: Spartanburg

Date of Trial: May 21-24, 2004 (Trial transcript)

Presiding Judge: John C. Few

It is my understanding that you were the court reporter at this time. That being the case, I request that you send this office the original trial transcript along with your bill. If you send a copy to this office, please bill us accordingly. To ensure prompt payment of this bill, please prepare it on the enclosed CID FORM 3500 (Substitution for SCCA DI-4) and include the original criminal case number (Indictment number) where the space is provided.

It has been brought to our attention that the State Printing Office experiences problems when the transcript is prepared on onionskin paper. **PLEASE DO NOT USE ONIONSKIN PAPER.**

We request that the lines on the paper be numbered from 1-25, and that you include in the transcript any and all recorded motions, pre and post-trial. Additionally, please transcribe the jury selection, and the State and defense counsel's opening and closing arguments. We have found that even if there are no objections, we need to review both opening and closing arguments for appeal.

Ms. Theresa Johnson

October 20, 2004

Page Two

If you are aware of the existence of co-defendants not listed in the prior captioned case, please contact us prior to transcribing the transcript. In this manner, we can consult our records to ensure that in ordering a transcript, a duplication has not occurred. In addition, if the Attorney General's Office has already requested an original transcript, please notify us.

I am sorry for any inconvenience this may cause, but I appreciate your assistance in this matter. If you have any questions, or problems, please contact me.

Thank you for your kind cooperation in this matter.

Sincerely,

A handwritten signature in cursive script that reads "Karen D. Elliott".

Karen D. Elliott
Legal Assistant

xc: S.C. Supreme Court
Attorney General's Office

South Carolina Office of Appellate Defense

Joseph L. Savitz, III
Acting Chief Attorney

Wanda P. Hagler
Acting Deputy Chief Attorney

1205 Pendleton Street, Room 306
Columbia, S.C. 29201

Telephone: (803) 734-1330
Fax: (803) 734-1397

Robert M. Pachak
Robert M. Dudek
Tara S. Taggart
Aileen P. Clare
Eleanor Duffy Cleary
Assistant Appellate Defenders

October 19, 2004

Michael Bartosh, Esquire
Spartanburg County Public Defender
258 North Church St.
Spartanburg, South Carolina 29306

Doug Brannon, Esquire
Attorney at Law
175 Magnolia St., Suite 101
Spartanburg, South Carolina 29306

RECEIVED
2004 OCT 19 PM 4:36
SC SUPREME COURT

Re: The State v. Marion Alexander Lindsey (capital case)

Gentlemen:

Doug advised our office that jury selection in this case was from May 17, 2004 until May 20, 2004. The trial started on May 21, 2004 and ended on May 24, 2004. I have also been advised that there was a status conference with Judge Few on April 9, 2004. I would kindly request that you check your records a final time for any pretrial or post-trial motions hearing dates. I would also request that you fax or e-mail any additional pretrial or post-trial motion dates, or just a written or e-mailed confirmation that the above dates constitute all of the hearing dates in this case. My e-mail address is elliottk@infoave.net.

The Court looks with strong disfavor upon having to order an additional transcript once the briefing process has begun. I therefore thank you in advance for your cooperation.

Sincerely,



Karen D. Elliott
Legal Assistant

cc: Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court

REPORT OF THE TRIAL JUDGE
OF THE
COURT OF GENERAL SESSIONS FOR SPARTANBURG COUNTY,
SOUTH CAROLINA

The State v. Marion Alexander Lindsey

RECEIVED

Docket No. 02-GS-42-4753

AUG 25 2004

A. Data Concerning the Defendant

S.C. SUPREME COURT

1. Name Lindsey Marion Alexander 2. Date of Birth _____
Last First Middle Mo. Day Yr.
3. Social Security Number [] Unknown
4. Sex: M ☒ F ☐ 5. Race: W ☐ B ☒
Other (Specify): _____
6. Education – Highest Grade Completed:
1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16
(Circle One) (College)
7. Do you have an opinion as to the defendant's intelligence level?
Yes ☒ No ☐
If so, is it
a. Below Average ☒
b. Average ☐
c. Above Average ☐
8. Was a psychiatric evaluation performed? Yes ☒ No ☐
a. If performed, by whom? Pratap Narayan, Margaret Melikian
b. If performed, is defendant
(1) Able to distinguish right from wrong? Yes ☒ No ☐
(2) Able to cooperate intelligently in his
own defense? ☒ ☐
c. If performed, were character or behavior
disorders found?
(If answer is yes, please elaborate)
malingering and borderline intellectual functioning determined by
Pratap Narayan

depression, cognitive deficits, and low intellectual functioning determined by Margaret Melikian

9. Does the defendant have a record of prior convictions?

Yes [X]

No []

a. If so, either attach hereto a record manifesting such prior conviction(s) or list the offense(s), the date(s) of the offense(s) and the sentence(s) imposed:

Offense

Date of Offense

Sentence Imposed

1. See attached rap sheet

2. _____

3. _____

4. _____

5. _____

6. _____

10. Was the defendant a resident or nonresident of the county in which trial was held?

Resident [X]

Nonresident []

B. Data Concerning Pre-Trial Matters

1. The defendant was arrested on September 18, 2002

2. Was a preliminary hearing requested? Yes [] No [] unknown

3. Was a preliminary hearing conducted? Yes [] No [] unknown

4. The defendant was indicted at the October 7, 2002 Term of Court of General Sessions for Spartanburg County, South Carolina.

5. List each charge alleged in the indictment.

a. Murder

b. _____

c. _____

- d. _____
- e. _____
- f. _____
6. The defendant was arraigned on _____, 20 .
If not arraigned, did the defendant waive arraignment?
Yes [X] No []
7. Was the defendant provided with a true copy of the whole indictment at least three days prior to his trial thereupon?
Yes [X] No []
- a. If not, did the defendant waive this right to a three-day sight of the indictment?
Yes [] No []
8. Did the Solicitor notify the defendant at least thirty days before trial that the State would seek the imposition of the death penalty upon the defendant?
Yes [X] No []
9. Did the Solicitor make known to the defendant in writing prior to trial the evidence in aggravation of punishment thereafter introduced by the State during the trial or during the sentencing proceeding?
Yes [X] No []
10. Did the defendant move for a change of venue?
Yes [] No [X]
- a. If so, was the venue changed?
Yes [] No []
(1) If so, designate the county _____.

C. Data Concerning the Trial

1. The defendant was brought to trial in the Court of General Sessions for Spartanburg County, South Carolina, on May 17, 2004 during the May 17, 2004 Term of that Court.
2. How did the defendant plead? Guilty [] Not Guilty [X]
3. List each offense of which the defendant was convicted and each offense of which the defendant was acquitted:

a. The offense(s) of which the defendant was convicted:

(1) Murder

(2) _____

(3) _____

(4) _____

(5) _____

b. The offense(s) of which the defendant was acquitted:

(1) N/A

(2) _____

(3) _____

(4) _____

(5) _____

4. On what date and at what time did the conviction(s) occur?

May 21, 2004, at 4:30 o'clock, p.m.

D. Data Relating to Sentencing Proceeding

1. Before whom was the defendant's sentencing proceeding conducted?

the trial jury [X] the trial judge [X]
a new jury [] a new trial judge []

a. If conducted before the trial jury,

(1) On what date and at what time was the sentencing proceeding held?

May 22, 2004, at 4:30 o'clock, p.m.

(a) If such proceeding was conducted less than twenty-four hours after the defendant's conviction, did the defendant waive the twenty-four hour waiting period?

Yes [] No []

b. If conducted before the trial judge or a new trial judge,

(1) And if the defendant was convicted by a jury,

(a) Did the defendant and the State waive having the trial jury recommend sentence?

Yes [] No [X]

"1" If not, was the sentencing proceeding conducted by the trial judge because the case, due to nonprejudicial error, had been remanded to the trial court for resentencing based upon the record and argument of counsel?

Yes [] No []

(b) On what date and at what time was the sentencing proceeding held?

May 22, 2004, at 4:30 o'clock, p.m.

"1" If such proceeding was conducted less than twenty-four hours after the defendant's conviction, did the defendant waive the twenty-four hour waiting period?

Yes [] No []

(2) And if the defendant was convicted upon a plea of guilty, on what date was the sentencing proceeding held?

N/A, 2004.

c. If conducted before a new jury,

(1) On what date was the sentencing proceeding held?

N/A, 2004.

(2) Was such proceeding conducted by the same judge who presided over the defendant's trial?

Yes [] No []

2. Which of the following statutory aggravating circumstances were instructed, if the sentencing proceeding was conducted before a jury, and which of those circumstances were found, irrespective of whether or not that proceeding was conducted before a jury or a trial judge?

	<u>Instructed</u>	<u>Found</u>
a. Murder was committed while in the commission of		
(1) Rape	[]	[]
(2) Assault with intent to ravish	[]	[]
(3) Kidnapping	[]	[]
(4) Burglary	[]	[]
(5) Robbery while armed with a deadly weapon	[]	[]

	<u>Instructed</u>	<u>Found</u>
(6) Larceny with use of a deadly weapon	☐	☐
(7) Housebreaking	☐	☐
(8) Killing by poison	☐	☐
b. Murder was committed by a person with a prior record of conviction for murder.	☐	☐
c. The offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.	☒	☒
d. The offender committed the offense of murder for himself or another for the purpose of receiving money or any other thing of monetary value.	☐	☐
e. The murder of a judicial officer, former judicial officer, solicitor, former solicitor, or other officer of the court during or because of the exercise of his official duty.	☐	☐
f. The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.	☐	☐
g. The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.	☐	☐
3. Was (were) the aggravating circumstance(s) found supported by the evidence?		
Yes ☒ No ☐		
4. Was there evidence of mitigating circumstances?		
Yes ☒ No ☐		

5. If so, which of the following mitigating circumstances was in evidence?

- a. The defendant has no significant history of prior criminal activity involving the use of violence against another person. []
- b. The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance. [X]
- c. The victim was a participant in the defendant's conduct or consented to the act. []
- d. The defendant was an accomplice in a murder committed by another person and his participation was relatively minor. []
- e. The defendant acted under duress or under the domination of another person. []
- f. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. []
- g. The age or mentality of the defendant at the time of the crime(s). [X]
- h. The defendant was provoked by the victim into committing murder. []
- i. The defendant was below the age of eighteen at the time of the crime(s). []
- j. Other. []

Please explain if (j) is checked.

6. If tried with a jury, was the jury instructed to consider the circumstances in 5 as mitigating circumstances?

Yes [X] No []

7. Was the jury provided in writing for its deliberation the statutory instructions as to aggravating and mitigating circumstances?

Yes [X] No []

8. As trial judge, did you, prior to imposing the sentence of death upon the defendant, find as an affirmative fact that the death penalty was warranted under the evidence of the case and was not a result of prejudice, passion or any other arbitrary factor?

Yes [X] No []

E. Data Relating to Offense(s)

1. Was there evidence that the defendant, at the time the offense(s) was (were) committed, was

a. Under the influence of alcohol? Yes [] No [X]

b. Under the influence of narcotics
or other dangerous drugs? Yes [] No [X]

2. Was (were) any weapon(s) used in the commission of the crime of murder?

Yes [X] No []

- a. If so, check each weapon used

(1) Poison	[]
(2) Pistol	[X]
(3) Rifle	[]
(4) Shotgun	[]
(5) Blunt instrument	[]
Describe _____	
(6) Sharp instrument	[]
Describe _____	
(7) Motor vehicle	[]
(8) Other	[]
Describe _____	

3. Cause of death. Gunshot wounds to the head

4. County in which the body was found. Spartanburg

5. County in which the murder occurred if different from county in which the body was found. _____

F. Data Relating to Victim

1. What was the victim's age? 27
2. Was the victim related by blood or marriage to the defendant/
Yes [X] No []
 - a. If so, what was the relationship? spouse
3. Was the victim the same race as the defendant? Yes [X] No []
4. Was the victim the same sex as the defendant? Yes [] No [X]
5. Was the victim physically harmed or tortured? Yes [X] No []

If yes, state nature of harm or extent of torture:

Four gunshot wounds to the head and neck

G. Data Concerning Defense Counsel

1. Who was (were) the defendant's attorney(s) and what was (were) his (their) mailing address(es)?
 - a. N. Douglas Brannon, 175 Magnolia Street, Suite 101, Spartanburg, SC 29306
 - b. J. Michael Bartosh, 258 North Church Street, Spartanburg, SC 29306
 - c. Karen Quimby, 258 North Church Street, Spartanburg, SC 29306
 - d. _____
2. Did the defendant retain his own counsel or did the court appoint defense counsel?

Retained by defendant	[]
Appointed by court	[X]

 - a. Specify for each such counsel, the date retained or appointed, the number of years as a licensed attorney and the number of years of actual felony trial experience.

<u>Name</u>	<u>Date retained Or appointed</u>	<u>Years experience as attorney</u>	<u>Years felony trial exp.</u>
(1) <u>N. Douglas Brannon</u>	3/9/04	3 ½	3
(2) <u>J. Michael Bartosh</u>	3/9/04	17	15
(3) <u>Karen Quimby</u>	mid-March 2004	6	3+
(4) _____			

3. Identify by name each attorney who, at the time of his appointment, was employed by the Public Defender's Office.

J. Michael Bartosh

Karen Quimby

4. Did each counsel serve throughout the trial? Yes ☒ No ☐

a. If not, explain in detail. _____

H. General Considerations

- Was race raised by the defense as an issue in the trial? Yes ☐ No ☒
- Did race otherwise appear as an issue in the trial? Yes ☐ No ☒
- Were members of the defendant's race represented on the petit jury? Yes ☒ No ☐
- Were members of the defendant's race represented on the jury venire? Yes ☒ No ☐
- Was there any evidence that members of the defendant's race were systematically excluded from the jury? Yes ☐ No ☒
- Was the jury instructed to exclude race as an issue? Yes ☐ No ☒
- Was there extensive publicity in the community concerning this case? Yes ☒ No ☐

8. Was the jury instructed to disregard such publicity? Yes ☒ No ☐
9. Was the jury sequestered? Yes ☒ No ☐
10. Was the jury instructed to avoid any influence of passion, prejudice or any other arbitrary factor when recommending sentence? Yes ☒ No ☐
11. Your general comments concerning the appropriateness of the sentence imposed in this case.
I believe the death penalty is appropriate given the horrific nature of the crime and the defendant's prior record of similar crimes.
12. If the defendant is a female, is she currently pregnant? Yes ☐ No ☐
- a. If so, the anticipated delivery date is _____.
13. This report was submitted to the defendant's counsel for such comments as he (they) desired to make concerning the factual accuracy of the report and
- a. His (their) comments are attached ☐
- b. He (they) stated he (they) had no comments ☒
- c. He has (they have) not responded ☐

I. Chronology of Case

		Elapsed Days
1. Date of offense	<u>9/18/02</u>	_____
2. Date of arrest	<u>9/18/02</u>	_____
3. Date trial began	<u>5/17/04</u>	_____
4. Date sentence imposed	<u>5/24/04</u>	_____
5. Date post trial motions ruled on	<u>5/24/04</u>	_____
6. Date trial judge's report completed	<u>6/04/04</u>	_____
7. *Date received by Supreme Court	_____	_____
8. *Date sentence		

Supreme Court



Judge, Court of General Sessions

Spartanburg County, South Carolina

~~Spartanburg County, South Carolina~~

Date 8/23/04

CONVICTED OF A FELONY ACCORDING TO THE SOUTH CAROLINA CODE OF LAWS.

THEREFORE, THIS PERSON IS INELIGIBLE TO SHIP, TRANSPORT, OR RECEIVE ANY FIREARM OR AMMUNITION AFFECTED BY INTERSTATE OR FOREIGN COMMERCE, AS DEFINED BY THE GUN CONTROL ACT OF 1968 (18.U.S.C. 922(G)).

** END OF IDENT **

REQUESTED FOR CRIMINAL JUSTICE PURPOSES
FOR COMPLETE CRIMINAL HISTORY, PERFORM ICHR INQUIRY USING SID NUMBER OR FBI NUMBER.

REQUEST FORWARDED TO NCIC
ANY OUT-OF-STATE IDENT INFORMATION TO FOLLOW FROM NCIC VIA YOUR TERMINAL
** END OF MESSAGE **

IN Tue May 25, 2004 15:14:06 000321174532/246
OUT Tue May 25, 2004 15:14:11 SPTJ02 MSB# 06306 SAN: OMMGCNNYTAVA

TO: SPTJ02-06307 Tue May 25, 2004 15:14:13 OMMGCNNYTAVA
FROM: III-03220 Tue May 25, 2004 15:14:08
7L0100F60019162QM
SC042015A

THIS NCIC INTERSTATE IDENTIFICATION INDEX RESPONSE IS THE RESULT OF YOUR
INQUIRY ON NAM/LINDSEY, MARION ALEXANDER SEX/M RAC/B DOB/
SOC/ PUR/C

NAME	FBI NO.	INQUIRY DATE
LINDSEY, MYRONE ALEXANDER	635599VA6	2004/05/25

SEX	RACE	BIRTH DATE	HEIGHT	WEIGHT	EYES	HAIR	BIRTH PLACE	PHOTO
M	B	1973/10/18	506	185	BRO	BLK	SOUTH CAROLINA	N

FINGERPRINT CLASS	PATTERN CLASS
PO PM 12 PO PO	WU WU RS WU WU WU WU LS WU LS
PM PI OI PI 16	RS WU

ALIAS NAMES	
LINDSAY, MARION ALEXANDER	LINDSEY, MARION ALEXANDER
LINDSEY, MARION ALEXANDER	LINDSEY, MARION ALEXANDER

SOCIAL SECURITY

IDENTIFICATION DATA UPDATED 02/10/23

THE CRIMINAL HISTORY RECORD IS MAINTAINED AND AVAILABLE FROM THE FOLLOWING:

SOUTH CAROLINA - STATE ID/SC00942550

THE RECORD(S) CAN BE OBTAINED THROUGH THE INTERSTATE IDENTIFICATION INDEX BY USING THE APPROPRIATE NCIC TRANSACTION.

END

IN Tue May 25, 2004 15:14:08

OUT Tue May 25, 2004 15:14:16

SPTJ02 MSG# 06307

000321205457/245

SAN: OPH6CNNYTAVA

TO: SPTJ02-06308 Tue May 25, 2004 15:14:42 OPH6CNNYTBDN
FROM: SCCH-04101 Tue May 25, 2004 15:14:42

ICHR REQUEST FOR RAP SHEET

ORI-SC042015A FBI-535599VA6 PUR-C

ATN-WILLINGHAM, DONNIE

AUTHORIZED CRIMINAL JUSTICE AGENCY USE ONLY. CONTACT CONTRIBUTING AGENCY FOR SPECIFIC/MORE DATA ABOUT CHARGES AND/OR DISPOSITIONS. BECAUSE ADDITIONS OR DELETIONS MAY BE MADE AT ANY TIME, A NEW COPY SHOULD BE REQUESTED WHEN NEEDED FOR SUBSEQUENT USE.

PAGE-01 DATE-05/25/2004 TIME-15:14:41

REQ ORI-SC042015A 7TH JUDICIAL CIRCUIT

SID-SC00942550 FBI-535599VA6

NAME-LINDSEY, MYRONE ALEXANDER SEX-M RACE-B

HEIGHT-506 WEIGHT-185 EYES-BRO HAIR-BLK SKIN- BORN-SC

FPC-POPM12POPOPMPIIDPI16 HENRY-12 0 31 W MOD

M 24 W III 15

PHOTOGRAPH AVAILABLE

1-FINGERPRINT IMAGES ON THIS SUBJECT ARE STORED ON SCAFIS

DATE RECORD ENTERED--03/16/1994

DATE OF LAST UPDATE--10/07/2002

ADDITIONAL IDENTIFIERS

NAME	BIRTH DATES	MARKS	SOC SEC	MISC NUM
LINDSEY, MARION ALEXANDER				
LINDSEY, MARION ALEXANDER				
LINDSAY, MARION ALEXANDER				

CONTRIBUTOR/SUBJECT

DOA/RCVD CHARGE/DISPOSITION/ETC

LINDSEY, MYRONE ALEXANDER

02/23/1994

SC0420000 SPARTANBURG CNTY SO

CASE-062461

CIT-16-3-620

DOC-94GS4203934 WARR-0875052

ARREST CHARGE 01-ASSAULT
WITH INTENT TO KILL
PHOTOGRAPH AVAILABLE

COURT CHARGE 01-ASSLT/8 WITH
INTENT TO KILL
COURT DISP-CONVICTED;2 YRS
SUS 1 YR & 1 YR PROB REST
1,439.46, PAY PER PROB
CONFLICT RES COUNSELING

COURT DATE-12/14/1995

LINDSEY, MARION ALEXANDER
SCSHP0300 SC HIWAY DEPT DIST 3
WARR-S898152

06/28/1994

ARREST CHARGE 01-DRIVING
UNDER SUSPENSION
OFFENSE DATE-06/28/1994
PHOTOGRAPH AVAILABLE

WARR-S898153

ARREST CHARGE 02-SPEEDING
OFFENSE DATE-06/28/1994

LINDSEY, MARION ALEXANDER
SC0420000 SPARTANBURG CNTY SO
CASE-062461
WARR-E596297

07/06/1995

ARREST CHARGE 01-POINTING A
FIREARM
PHOTOGRAPH AVAILABLE

CIT-16-23-410 FELONY
DOC-00GS42 WARR-E596297

COURT CHARGE 01-POINTING AND
PRESENTING FIREARMS AT A

PERSON
COURT DISP-NON-CONVICTION;
NOLLE PROSSED
COURT DATE-12/15/1995

SC0040150 PERRY RECPT & EVAL
CASE-227647
CIT-16-3-620 FELONY

12/15/1995 CUSTODY STATUS-RECEIVED
START DATE-12/15/1995

COURT CHARGE 01-ASSAULT AND
BATTERY WITH INTENT TO
KILL
COURT DISP-CONVICTED;2Y SUSPE
NDED TO 1Y AND 1Y PROBATIO
N

LINDSAY, MARION ALEXANDER
SC0420000 SPARTANBURG CNTY
CASE-062461

08/02/1996

LINDSEY, MARION ALEXANDER 01/30/1997
SCSHP0300 SC HIWAY DEPT DIST 3
WARR-U560200

ARREST CHARGE 01-FOLLOWING
TOO CLOSE
PHOTOGRAPH AVAILABLE

WARR-U680151

ARREST CHARGE 02-DRIVING
UNDER SUSPENSION 4TH

CIT-56-1-460 MISDEMEANOR
00C-97GS4200756 WARR-U680151

COURT CHARGE 01-DRIVING UNDER
SUSP(LICENSE NOT SUSP
DUI)-2ND
COURT DISP-CONVICTED;60 DAYS
& 500.00 SUSP 250.00, 2
YRS PROB, MAY TERMINATE
COURT DATE-03/18/1997

LINDSEY, MARION ALEXANDER 09/27/1999
SC0420900 INMAN PD
ATN-
WARR-F941732 @

ARREST CHARGE 01-RECEIVING

STOLEN GOODS
OFFENSE DATE-09/27/1999

LINDSEY, MARION ALEXANDER 09/15/2000
SC0420000 SPARTANBURG CNTY SO
CASE-62461
ATN-
WARR-6541980

ARREST CHARGE 01-TRAFFICKING
COCAINE
OFFENSE DATE-09/15/2000
PHOTOGRAPH AVAILABLE

WARR-6541979

ARREST CHARGE 02-TRAFFICKING
COCAINE
OFFENSE DATE-09/15/2000

WARR-6335842

ARREST CHARGE 03-TRAFFICKING
COCAINE
OFFENSE DATE-09/15/2000

LINDSEY, MARION ALEXANDER 02/09/2001
SC0420000 SPARTANBURG CNTY SO

CASE-62461
ATN-
WARR-6605364

DOC-R84 WARR-6605364

ARREST CHARGE 01-CRIMINAL
DOMESTIC VIOLENCE
OFFENSE DATE-02/09/2001
PHOTOGRAPH AVAILABLE
COURT CHARGE 01-CRIMINAL
DOMESTIC VIOLENCE 1ST
OFFENSE
COURT DISP-CONVICTED;\$425
COURT DATE-03/06/2001
ATN-

LINDSEY, MARION ALEXANDER 09/24/2002
SC0420000 SPARTANBURG CNTY SO
CASE-062461
ATN-
WARR-H252531
CIT-16-3-10-FELONY

ARREST CHARGE 01-MURDER
OFFENSE DATE-09/24/2002
PHOTOGRAPH AVAILABLE

@ - WARRANT OCCURS WITH MORE THAN ONE SID NUMBER

BASED ON SEARCH OF SCLED CJICS CCH FILE USING FBI/535599VA6
REQUESTED FOR CRIMINAL JUSTICE PURPOSES

SCLED CJICS RECORD INDICATES SUBJECT HAS NO OUT-OF-STATE ARREST INFORMATION
INQUIRY WILL BE FORWARDED TO: N C I C W A N T E D P E R S O N S

INDIVIDUAL PROHIBITED FROM POSSESSING OR ACQUIRING HANDGUN IN
SOUTH CAROLINA

INFORMATION SUBMITTED TO SLED CCH PURSUANT TO 16-23-10 (C) AND 23-31-110
(C) OF THE SOUTH CAROLINA CODE OF LAWS INDICATES THIS INDIVIDUAL HAS BEEN
CONVICTED OF A CRIME OF VIOLENCE AND IS NOT PERMITTED TO POSSESS OR
ACQUIRE A HANDGUN.

INDIVIDUAL PROHIBITED FROM POSSESSING OR ACQUIRING FIREARM OR AMMUNITION
PURSUANT TO FEDERAL GUN CONTROL ACT OF 1968

INFORMATION SUBMITTED TO SLED CCH INDICATES THIS INDIVIDUAL HAS BEEN
CONVICTED OF A FELONY ACCORDING TO THE SOUTH CAROLINA CODE OF LAWS.
THEREFORE, THIS PERSON IS INELIGIBLE TO SHIP, TRANSPORT OR RECEIVE ANY
FIREARM OR AMMUNITION AFFECTED BY INTERSTATE OR FOREIGN COMMERCE, AS
DEFINED BY THE GUN CONTROL ACT OF 1968 (18.U.S.C. 922(G)).

** S C CCHICS END OF RECORD **

IN Tue May 25, 2004 15:14:42 000321352163/246
OUT Tue May 25, 2004 15:15:08 SPT3C2 MSG# 06308 SAN: OPH6CNNYT5DN

TO: SPT3C2-06309 Tue May 25, 2004 15:15:09 OPH6CNNYT5DN
FROM: NC2K-03228 Tue May 25, 2004 15:14:48
1L0100F60019172QW
SC042015A

NO NCIC WANT FBI/535599VA6
NO NCIC WANT SOC/247517558

IN Tue May 25, 2004 15:14:48 000321357370/246
OUT Tue May 25, 2004 15:15:09 SPT3C2 MSG# 06309 SAN: OPH6CNNYT5DN

South Carolina Office of Appellate Defense

RECEIVED

JUN 29 PM 4:16

Joseph L. Savitz, III
Acting Chief Attorney

1205 Pendleton Street, Room 306
Columbia, S.C. 29201

Wanda P. Hagler
Acting Deputy Chief Attorney

Telephone: (803) 734-1330
Fax: (803) 734-1397

Robert M. Padhak
Robert M. Dudek
Tara S. Taggart
Aileen P. Clare
Eleanor Duffy Cleary
Assistant Appellate Defenders

SOUTH CAROLINA SUPREME COURT

June 29, 2004

Michael Bartosh, Esquire
Spartanburg County Public Defender
258 North Church St.
Spartanburg, South Carolina 29306

Doug Brannon, Esquire
Attorney at Law
175 Magnolia St., Suite 101
Spartanburg, South Carolina 29306

Re: The State v. Marion Alexander Lindsey (capital case)

Dear Counsel:

As you know, our office has taken over representation of Mr. Lindsey on his capital appeal to the South Carolina Supreme Court. It is imperative pursuant to the enclosed order of former Chief Justice Finney that our office be informed in writing of all pre-trial, trial, motions and post-trial hearings. The order also provides that this office must be given the date of each hearing, the judge, the county in which the hearing was held, the name of the court reporter and a brief description of the hearing.

I appreciate your prompt attention since the Supreme Court looks with strong disfavor upon an extension request in a death penalty case that is mandated by a missing hearing. We are aware of only the following hearings:

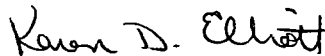
1. Sentence of Death Imposed May 24, 2004

Michael Bartosh
Doug Brannon
June 29, 2004
Page 2

I am requesting that each of you search your records thoroughly and let me know each hearing date, with the information listed in Justice Finney's order, that is not listed above. If we have all the hearing dates, the county in which the hearing took place and the judge, we can usually locate the correct court reporter. Nonetheless, I would appreciate your assistance with the name of the court reporter, as well. If you feel comfortable sending us your billing records, we can go through the records and locate hearing dates.

If you have any questions or need additional information, please do not hesitate to contact me. Kindly understand that the Supreme Court does not relieve you from continuing to represent Mr. Lindsey until we have this information in our possession. I appreciate and thank you in advance for your immediate attention so that we can properly represent Mr. Lindsey on appeal.

Sincerely yours,



Karen D. Elliott
Legal Assistant

cc: Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court

South Carolina Office of Appellate Defense

Joseph L. Savitz, III
Acting Chief Attorney

Wanda P. Hagler
Acting Deputy Chief Attorney

1205 Pendleton Street, Room 306
Columbia, SC 29201

Telephone (803) 734-1330
Fax: (803) 734-1397

Robert M. Pachak
Robert M. Dudek
Tara S. Taggart
Aileen P. Clare
Eleanor Duffy Cleary
Assistant Appellate Defenders

June 22, 2004

Ms. Theresa Johnson
Circuit Court Reporter
Post Office Box 2812
Greenville, SC 29602

Dear Ms. Johnson:

RECEIVED
2004 JUN 22 PM 4:17
SC SUPREME COURT

Our office has been requested to perfect the appeal arising out of:

The State v. Marion Alexander Lindsey

Indictment #: 02-GS-42-4753

County: Spartanburg

Date of Trial: May 24, 2004 (Sentencing Death Penalty)

Presiding Judge: John C. Few

It is my understanding that you were the court reporter at this time. That being the case, I request that you send this office the original trial transcript along with your bill. If you send a copy to this office, please bill us accordingly. To ensure prompt payment of this bill, please prepare it on the enclosed CID FORM 3500 (Substitution for SCCA DI-4) and include the original criminal case number (Indictment number) where the space is provided.

It has been brought to our attention that the State Printing Office experiences problems when the transcript is prepared on onionskin paper. **PLEASE DO NOT USE ONIONSKIN PAPER.**

We request that the lines on the paper be numbered from 1-25, and that you include in the transcript any and all recorded motions, pre and post-trial. Additionally, please transcribe the jury selection, and the State and defense counsel's opening and closing arguments. We have found that even if there are no objections, we need to review both opening and closing arguments for appeal.

Ms. Theresa Johnson

June 22, 2004

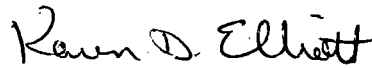
Page Two

If you are aware of the existence of co-defendants not listed in the prior captioned case, please contact us prior to transcribing the transcript. In this manner, we can consult our records to ensure that in ordering a transcript, a duplication has not occurred. In addition, if the Attorney General's Office has already requested an original transcript, please notify us.

I am sorry for any inconvenience this may cause, but I appreciate your assistance in this matter. If you have any questions, or problems, please contact me.

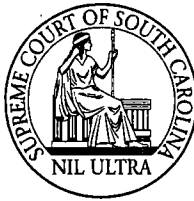
Thank you for your kind cooperation in this matter.

Sincerely,

A handwritten signature in cursive script that reads "Karen D. Elliott".

Karen D. Elliott
Legal Assistant

xc: S.C. Supreme Court
Attorney General's Office



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

June 7, 2004

The Honorable John C. Few
Greenville County Courthouse, Suite 318
305 East North Street
Greenville, SC 29601-2120

Re: The State v. Lindsey, Marion Alexander

Dear Judge Few:

As you know, the trial judge must submit a Death Penalty Sentencing Report to the Supreme Court on all death penalty cases. Please find enclosed a copy of this questionnaire for your convenience in completing the report in the above matter.

Very truly yours,

Daniel E. Shearouse
DS

CLERK

DES/dmh

Enclosure

FILED
CLERK OF COURT
SPARTANBURG COUNTY

2004 JUN -4 PM 4:52

MARC KITCHENS

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of General Sessions

John C. Few, Circuit Court Judge

Case No. 02-GS-42-4753

The State Respondent,

v.

Marion Alexander Lindsey. Appellant.

NOTICE OF INTENT TO APPEAL

Marion Alexander Lindsey appeals his conviction and sentence in this case. The sentence was imposed by the Honorable John C. Few, on May 24, 2004. This appeal is taken from this conviction and sentence and the order of the Honorable John C. Few of May 24, 2004, which denied appellant's motion for a new trial.

June 4, 2004



Mike Bartosh
Spartanburg County Public Defender
258 North Church Street
Spartanburg, S.C. 29306
(864) 596-2561
Attorney for Appellant

Other Counsel of Record:
Harold W. (Trey) Gowdy, III, Esquire
Solicitor, Seventh Judicial Circuit Solicitor's Office
180 Magnolia Street
Spartanburg, S.C. 29306
(864) 596-2575
Attorney for Respondent

Doug Brannon, Esquire
175 Magnolia Street, Ste. 101
Spartanburg, S.C. 29306
(864) 585-1339
Attorney for Appellant

FILED
CLERK OF COURT
SPARTANBURG COUNTY

2004 JUN -4 PM 4:52

MARC KITCHENS

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of General Sessions

John C. Few, Circuit Court Judge

Case No. 02-GS-42-4753

The State Respondent,

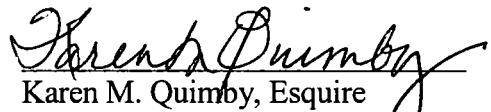
v.

Marion Alexander Lindsey, ...Appellant.

PROOF OF SERVICE

I certify that I served the Notice of Intent to Appeal on the State of South Carolina by personally serving its attorney of record, Howard W. (Trey) Gowdy, III, Esq., Solicitor, Seventh Judicial Circuit at the Office of the Solicitor, 180 Magnolia Street, Spartanburg, S.C. 29306, and to the Appellant's co-counsel of record, Doug Brannon, Esquire, 175 Magnolia Street, Suite 101, Spartanburg, S.C. 29306.

June 4, 2004


Karen M. Quimby, Esquire
Spartanburg County Public Defender
258 North Church Street
Spartanburg, S.C. 29306
(864) 596-2561

FILED
CLERK OF COURT
SPARTANBURG COUNTY

2004 JUN -4 PM 4:52

THE STATE OF SOUTH CAROLINA
In The Supreme Court

MARC KITCHENS

APPEAL FROM SPARTANBURG COUNTY
Court of General Sessions

John C. Few, Circuit Court Judge

Case No. 02-GS-42-4753

The State Respondent,

v.

Marion Alexander Lindsey, ...Appellant.

ACCEPTANCE OF SERVICE

I certify that I was personally served with the Appellant's Notice of Intent to Appeal on June 4, 2004 at the Seventh Judicial Circuit Solicitor's Office, 180 Magnolia Street, Spartanburg, S.C. 29306.

June 4, 2004


Harold W. (Trey) Gowdy, III, Esquire
Seventh Judicial Circuit Solicitor
180 Magnolia Street
Spartanburg, S.C. 29306
(864) 596-2575
Attorney for Appellant

WITNESSES

J. Yown

Spartanburg Co. Sheriff Dept.

1. SENTENCE MADE ☒

2. REPORT ENDED ☒

3. RECORD PULLED ☒

4. INDEXED ☒

5. CHECKED WARRANTS ☒

6. CHECKED SIGNATURE ☒

ASSESSMENT AND
FINE CARD MADE ☒
ARREST WARRANT NUMBER

H25253 TRAFFIC VIOLATIONS COPY ☒

Computer

DOCKET NO. 02-03-42-4753

The State of South Carolina

County of Spartanburg

Trey Gowdy, Solicitor

COURT OF GENERAL SESSIONS

OCT 07 2002

TERM

THE STATE
vs.

ACTION OF GRAND JURY

True Bill
Wade Wilkins
Foreperson of Grand Jury

Date: 10/3/02

VERDICT

guilty

Ashley Driscoll
Foreperson of Petit Jury

Date: 5/21/04

Marion Alexander Lindsey

A/K/A MARIONA ALEXANDER LINDSEY

Indictment for

MURDER

SC Code 16-03-0010, 0020

CDR Code 116

Class FEL-EXM

MARC KITCHENS

2003 SEP 23 PM 3:49

FILED
CLERK OF COURT
SPARTANBURG COUNTY

A CERTIFIED COPY

Marc Kitchens

CLERK OF COURT
SPARTANBURG COUNTY

BY: *Gail M. [unclear]*

DATED 6-4-04

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

INDICTMENT

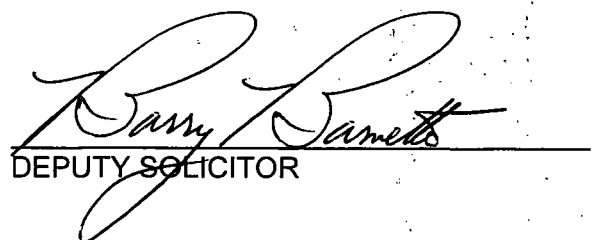
OCT 03 2002

At a Court of General Sessions, convened on _____, the
Grand Jurors of Spartanburg County present upon their oath:

MURDER

The Defendant, Marion Alexander Lindsey, did in Spartanburg County on or about September 18, 2002, feloniously, willfully, and with malice aforethought, kill one Ruby Lindsey, by shooting the victim with a gun, and the victim died as a proximate result thereof, all in violation of Section 16-3-0010, 0020, Code of Laws of South Carolina, (1976, as amended).

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


DEPUTY SOLICITOR

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

THE STATE,

vs.

MARION ALEXANDER LINDSEY,

Defendant.

COURT OF GENERAL SESSIONS

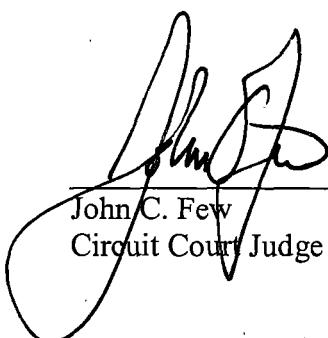
02-GS-42-4753

DEATH SENTENCE

Defendant has been found by the jury to be guilty of the offense of murder. The jury has recommended that Defendant should be sentenced to death.

It is, therefore, the judgment and sentence of the court that Defendant, Marion Alexander Lindsey, be taken to the Spartanburg County Detention Center, and thence to the State Department of Corrections, henceforth to be kept in close and safe confinement until the 26th of July, 2004, upon which day between the hours of six o'clock p.m. and six o'clock a.m. on _____, or upon an Order of Execution issued by the South Carolina Supreme Court, Defendant, Marion Alexander Lindsey, shall suffer death in the manner provided by law.

AND IT IS SO ORDERED.


John C. Few
Circuit Court Judge

Spartanburg, South Carolina
May 24, 2004

MARC KITCHENS

2004 MAY 24 PM 3:51

A CERTIFIED COPY

Marc Kitchens

CLERK OF COURT
SPARTANBURG COUNTY
BY: Phil M. [unclear]
DATED 6/4/04

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

COURT OF GENERAL SESSIONS

THE STATE,

02-GS-42-4753

vs.

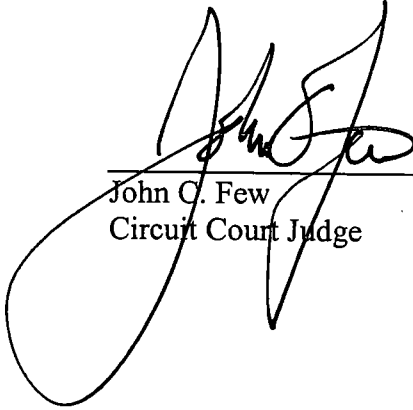
MARION ALEXANDER LINDSEY,

AFFIRMATION OF
DEATH SENTENCE

Defendant.

I find that the evidence of this case warrants the imposition of the death penalty
and its imposition is not a result of prejudice, passion, or any other arbitrary factor.

IT IS SO ORDERED.



John C. Few
Circuit Court Judge

Spartanburg, South Carolina
May 24, 2004

MARC KITCHENS

2004 MAY 24 PM 3:51

A CERTIFIED COPY



CLERK OF COURT
SPARTANBURG COUNTY
BY: 
DATED 6/4/2004

SPARTANBURG COUNTY PUBLIC DEFENDER OFFICE

MICHAEL BARTOSH
CHIEF PUBLIC DEFENDER

*de atk
penalty*

258 NORTH CHURCH STREET
SPARTANBURG SC 29306



TELEPHONE (864) 596-2561
FAX (864) 596-2284

June 4, 2004

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

Re: State v. Marion Alexander Lindsey
Case No. 02-GS-42-4753
Death Penalty Case

Dear Mr. Shearouse:

Enclosed for filing is a Notice of Intent to Appeal in the above case. Also enclosed are the following:

1. Proof of Service of the Notice of Intent to Appeal on the Respondent; and
2. Copy of the indictment, verdict, and sentence to be challenged on appeal.

Because Mr. Lindsey was convicted and sentenced to death, I am filing this Notice of Appeal in the Supreme Court pursuant to Rule 203(d)(1)(A), SCACR.

Sincerely yours,

Michael Bartosh

Mike Bartosh
Attorney for Appellant

RECEIVED

Encl: Notice of Intent to Appeal
Proof of Service
Copy of Indictment, Judgment, and Sentence

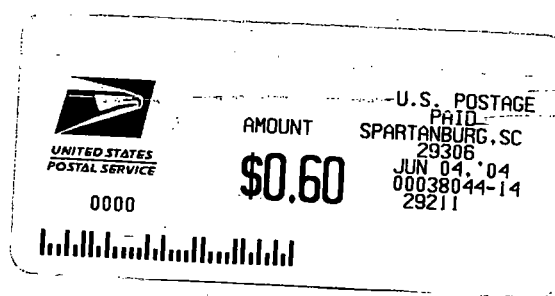
JUN 07 2004

S.C. SUPREME COURT

cc: Harold W. (Trey) Gowdy
Solicitor
Seventh Judicial Circuit Solicitor's Office
180 Magnolia Street
Spartanburg, S.C. 29306
(864) 596-2575
Attorney for Respondent

Doug Brannon, Esquire
175 Magnolia Street, Suite 101
Spartanburg, S.C. 29306
(864) 585-1339
Attorney for Appellant

OFFICE OF PUBLIC DEFENDER
258 NORTH CHURCH ST.
SPARTANBURG, SOUTH CAROLINA 29306



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

29211+11330 05



SPARTANBURG COUNTY PUBLIC DEFENDER OFFICE**MICHAEL BARTOSH****CHIEF PUBLIC DEFENDER****258 NORTH CHURCH STREET
SPARTANBURG SC 29306****TELEPHONE (864) 596-2561
FAX (864) 596-2284**

June 4, 2004

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

Re: State v. Marion Alexander Lindsey
Case No. 02-GS-42-4753
Death Penalty Case

RECEIVED
JUN 04 2004
S.C. SUPREME COURT

Dear Mr. Shearouse:

Enclosed for filing is a Notice of Intent to Appeal in the above case. Also enclosed are the following:

1. Proof of Service of the Notice of Intent to Appeal on the Respondent; and
2. Copy of the indictment, verdict, and sentence to be challenged on appeal.

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Sincerely yours,

Mike Bartosh
Attorney for Appellant

Encl: Notice of Intent to Appeal
Proof of Service
Copy of Indictment, Judgment, and Sentence

cc: Harold W. (Trey) Gowdy
Solicitor
Seventh Judicial Circuit Solicitor's Office
180 Magnolia Street
Spartanburg, S.C. 29306
(864) 596-2575
Attorney for Respondent

Doug Brannon, Esquire
175 Magnolia Street, Suite 101
Spartanburg, S.C. 29306
(864) 585-1339
Attorney for Appellant

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of General Sessions

John C. Few, Circuit Court Judge

Case No. 02-GS-42-4753

The State Respondent,

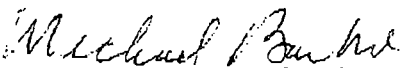
v.

Marion Alexander Lindsey Appellant.

NOTICE OF INTENT TO APPEAL

Marion Alexander Lindsey appeals his conviction and sentence in this case. The sentence was imposed by the Honorable John C. Few, on May 24, 2004. This appeal is taken from this conviction and sentence and the order of the Honorable John C. Few of May 24, 2004, which denied appellant's motion for a new trial.

June 4, 2004


Mike Bartosh
Spartanburg County Public Defender
258 North Church Street
Spartanburg, S.C. 29306
(864) 596-2561
Attorney for Appellant

Other Counsel of Record:

Harold W. (Trey) Gowdy, III, Esquire
Solicitor, Seventh Judicial Circuit Solicitor's Office
180 Magnolia Street
Spartanburg, S.C. 29306
(864) 596-2575
Attorney for Respondent

Doug Brannon, Esquire
175 Magnolia Street, Ste. 101
Spartanburg, S.C. 29306
(864) 585-1339
Attorney for Appellant

RECEIVED
JUN 04 2004
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of General Sessions

John C. Few, Circuit Court Judge

Case No. 02-GS-42-4753

The State Respondent,

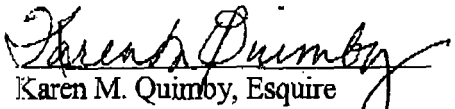
v.

Marion Alexander Lindsey, ... Appellant.

PROOF OF SERVICE

I certify that I served the Notice of Intent to Appeal on the State of South Carolina by personally serving its attorney of record, Howard W. (Trey) Gowdy, III, Esq., Solicitor, Seventh Judicial Circuit at the Office of the Solicitor, 180 Magnolia Street, Spartanburg, S.C. 29306, and to the Appellant's co-counsel of record, Doug Brannon, Esquire, 175 Magnolia Street, Suite 101, Spartanburg, S.C. 29306.

June 4, 2004


Karen M. Quimby, Esquire
Spartanburg County Public Defender
258 North Church Street
Spartanburg, S.C. 29306
(864) 596-2561

WITNESSES

J. Yown

Spartanburg Co. Sheriff Dept.

1. SENTENCE MADE ☒

2. REPORT ENTERED ☒

3. INFO PULLED ☒

4. INDEXED ☒

5. CHECKED WARRANTS ☒

6. CHECKED SIGNATURE ☒

ARREST WARRANT NUMBER

H25263 TRAFFIC VIOLATIONS CUFF

Computer

02-03-42-4753

The State of South Carolina

County of Spartanburg

Trey Gowdy, Solicitor

COURT OF GENERAL SESSIONS

OCT 07 2002

TERM

THE STATE

VS.

Marion Alexander Lindsey

A/K/A MARIONA ALEXANDER LINDSEY

ACTION OF GRAND JURY

True Bill

Meda B. Williams

Foreperson of Grand Jury

Date: 10/3/02

VERDICT

guilty

Ashley Driscoll

Foreperson of Petit Jury

Date: 5/21/04

Indictment for

MURDER

SC Code 16-03-0010, 0020

CDR Code 116

Class FEL-EXM

MARC KITCHENS

2003 SEP 23 PM 3:49

CLERK OF COURT
SPARTANBURG COUNTY

A CERTIFIED COPY

Marc Kitchens

CLERK OF COURT
SPARTANBURG COUNTY

BY: *Paul M. [Signature]*

DATED 6-4-04

STATE OF SOUTH CAROLINA)

COUNTY OF SPARTANBURG)

COURT OF GENERAL SESSIONS

THE STATE,)

02-GS-42-4753

vs.)

MARION ALEXANDER LINDSEY,)

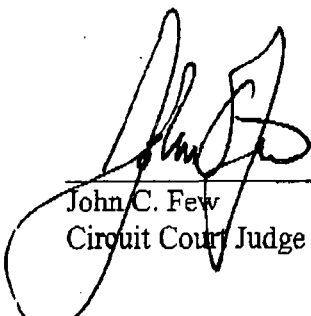
DEATH SENTENCE

Defendant.)

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It is, therefore, the judgment and sentence of the court that Defendant, Marion Alexander Lindsey, be taken to the Spartanburg County Detention Center, and thence to the State Department of Corrections, henceforth to be kept in close and safe confinement until the 26th of July, 2004, upon which day between the hours of six o'clock p.m. and six o'clock a.m. on _____, or upon an Order of Execution issued by the South Carolina Supreme Court, Defendant, Marion Alexander Lindsey, shall suffer death in the manner provided by law.

AND IT IS SO ORDERED.


John C. Few
Circuit Court Judge

Spartanburg, South Carolina

May 24, 2004

MARIE KITCHENS

19:08 PM 42 JUN 10 2004

A CERTIFIED COPY

Marc KitchensCLERK OF COURT
SPARTANBURG COUNTY
BY: Paul M. Pappert D.C.
DATED 6/4/04

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

THE STATE,

vs.

MARION ALEXANDER LINDSEY,

Defendant.

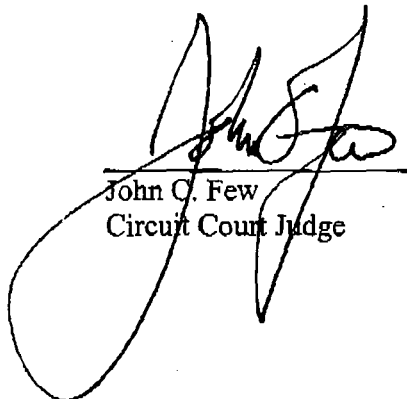
COURT OF GENERAL SESSIONS

02-GS-42-4753

AFFIRMATION OF
DEATH SENTENCE

I find that the evidence of this case warrants the imposition of the death penalty
and its imposition is not a result of prejudice, passion, or any other arbitrary factor.

IT IS SO ORDERED.



John C. Few
Circuit Court Judge

Spartanburg, South Carolina
May 24, 2004

MARC KITCHENS

2004 MAY 24 PM 3:51

A CERTIFIED COPY



Marc Kitchens

CLERK OF COURT
SPARTANBURG COUNTY
BY  D.C.
DATED 6/4/2004

258 North Church Street
Spartanburg, SC 29306
Telephone: 864-596-2581
Fax: 864-596-2284

**SPARTANBURG COUNTY
PUBLIC DEFENDER OFFICE**

Fax

Daniel Shearouse
To: *Clerk of Court* From: *Karen Quimby*
Fax: *(803) 734-1499* Pages: (including cover sheet) *7*
Phone: *(803) 734-1080* Date: *6/4/04*
Re: *St. Vs. Lindsey* CC:

☐ Urgent ☐ For Review ☐ Please Comment ☐ Please Reply ☐ Please Recycle

• Comments:

Hard copy to follow by mail.

KQ

IF YOU DO NOT RECEIVE ALL PAGES OR ANY PART OF THIS TRANSMISSION
IS ILLEGIBLE, PLEASE CONTACT OFFICE IMMEDIATELY.