

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

ORIGINAL

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

THE STATE,

Respondent,

V.

MARION ALEXANDER LINDSEY,

Appellant

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S.C. SUPREME COURT

FINAL BRIEF OF RESPONDENT

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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. R., 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." R., 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.

R., Tr. p. 2155-56. On May 24, 2004 the jury found the existence of the statutory mitigating circumstance and recommended a sentence of death. R., 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. R., Tr. p. 2173, ll. 17-21. He then sentenced Lindsey to death in the manner provided by law. R., 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....

R., 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. R., Tr. p. 323, ll. 4-11. He further indicated that he was a victim of verbal domestic violence. R., 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, R., 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. R., 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....

R., 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.

R., 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.

R., 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. R., 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." R., 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. R., 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.” R., 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. R., Tr. 335. Barnette found Krisher hesitant about the life sentence, the burden of proof and the death sentence. See R., Tr. 328-29. Barnette noted that Krisher concluded that he “wouldn’t look at the facts of the case”. R., Tr. p. 335, ll. 6-9, referring to R., 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. R., 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. R., 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.” R., 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. R., 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.

R., Tr. p. 337, l. 19 - p. 338, l. 3. Krisher was found disqualified and excused from jury service.

R., 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. R., Tr. p. 1452, ll. 8-13.

Both Solicitor Gowdy and defense counsel Bartosh stated there was no objection. R., 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. R., Tr. p. 338, 1452. The record is silent concerning any defense objection. Instead, 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. R., 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 to the trial court's conclusion. R., 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.” R., 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. R., Tr. p. 331, ll. 16-21. Also, R., 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.” R., 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

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).

reservation. 90 F.3d at 880-81.

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." R., 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", [R., Tr. 327], and the life without parole is a "better option." [R., 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. R., 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 venireperson'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. R., 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. R., 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. R., 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..." R., 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.” R., 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.” R., 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. R., Tr. 1725-26. However, he deferred his final decision until it was actually offered. R., 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. R., Tr. 1879-1880. Also, R., Tr. p. 1894, ll. 1-8. The record reveals that Ms. Nesbitt was then asked to place the car seat in the vehicle. R., 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. R., 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. R., 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. R., 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. R., 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.” R., 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.”

R., 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.” R., 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. R., 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. R., Tr. 1897.

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

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. R., Tr. 1897-98. The Solicitor declared he did not see her but pause for less than a second. R., Tr. 1901.

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.

R., 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.” R., 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. R., 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.” R., 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...” R., Tr. p. 1902, l. 17 - p. 1903, l. 17.

Bartosh asserted the jury view was for viewing and juror Mauldin went beyond that. R., 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. R., 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 include⁴ 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.

R., 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.

R., Tr. p. 1904, l. 25 - p. 1906, l. 15.

Counsel Bartosh re-asserted his objection. R., 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. R., Tr. p. 1906, ll. 23-25. He asked someone on the defense team to find law that supports his position. R., 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). R., 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. R., 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. R., 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. R., 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....

R., 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. R., 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. R., Tr. 1522. she further described her car having tinted windows. R., 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. R., 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. R., Tr. 1573. There was a female (the homicide victim) in the left rear seat who appeared to be dead. R., Tr. 1574.

Spartanburg Deputy Sheriff Randy Bogan took photographs of the scene. R., 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.

R., 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. R., Tr. 1599. State Exhibit 50 showed the bullet hole that goes through the backseat, described as “being center-ways of the backseat.” R., 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. R., Tr. 1601-02. Exhibits, 54, 55, 56 and 58 showed the dowel revealing the angle from the seat into the trunk. R., 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. R., Tr. 1756. She testified that she was not on the floor board, but ducked to the edge of the car seat. R., 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. R., 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. R., 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.” R., 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. R., Tr. 2109-10. According to the prosecution’s theory, “he fired two bullets in the direction of two children.” R., Tr. p. 2110, ll. 16-18. Also, R., 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. R., 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.” R., Tr. p. 2135, ll. 18-22. See also, R., 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. R., Tr. 1890. As Solicitor Gowdy stated, it was to see the dimensions of the car. R., 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." R., 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

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.

dismissed.

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. R., 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. R., 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. R., 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. R., 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. R., 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.” R., Tr. 1977. He noted that in Locklair, the attempted firing with the safety on satisfied the factor. R., 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.” R., 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. R., 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. R., 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.

R., 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. R., 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, R., 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. R., Tr. 2164-65.

The jury found the existence of the statutory aggravating circumstance and recommended the death sentence. R., 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. R., Tr. p. 2172, ll. 5-12. Judge Few denied the motion. R., 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

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, R., Tr.p. 1743-45 (opening by Deputy Solicitor Willingham).

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 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 the instant situation has already been addressed and approved by this Court by reliance upon footnote 4 in Locklair. As noted above, it

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.

cited three cases from outside South Carolina. Indeed, in each of those cited cases, other 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].

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].

By its own terms, the Appellant must create a great risk of death “to more than **two other** 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

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.”

circumstances, “[a] pistol used in a public place may be hazardous to the lives of more than one 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

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.

when he shot victim); State v. Burns, 979 S.W.2d 276 (Tenn. 1998) (evidence supported 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

¹²Respondent incorporates herein by reference the entirety of Argument III above concerning the sufficiency of the aggravating circumstance of “great risk of death.”

that tape reveals that this act was more than a single victim incident, although only one victim 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. R., 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. R., 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. R., 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. R., 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

¹³Lindsey stated to the paramedics that he had shot himself in the head. R., Tr. p. 1674. Lindsey sustained wounds to his hip and legs. R., Tr. p. 1669.

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. R., Tr. p. 1654-1657.

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. R., 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. R., Tr. p. 1775-1781, 1823. The victim had made calls contacting lawyers concerning a divorce. R., Tr. p. 1782. The Appellant referred to his wife as "bitch" and threatened to kill her if "I catch you doing anything." R., 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. R., Tr. p. 1918-1921, 1924-1926.

Evidence also revealed that the Appellant was involved in the sale and distribution of crack cocaine. R., 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. R., Tr. p. 1931. She stated that she directed Lindsey that "there was to be no contact with the victim who is Nell Lindsey. R., 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. R., 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. R., 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. R., Tr. p. 1954-1965. This testimony the impact on his life and her children's lives. R., 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

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.2d883(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); ,

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 sentence must be denied.

CONCLUSION

For all of the foregoing reasons, this Court should affirm the Appellant's conviction and sentence.

Respectfully submitted,

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September 22, 2006

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

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

THE STATE,

Respondent,

V.

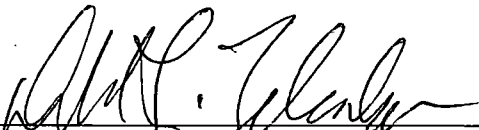
MARION ALEXANDER LINDSEY,

Appellant

CERTIFICATE OF COMPLIANCE

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

This 22nd day of September, 2006.


DONALD J. ZELENKA
Assistant Deputy Attorney General
ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that I have served the *Final Brief of Respondent* in the foregoing action by depositing two (2) copies in the InterAgency mail to Robert M. Dudek, Division of Appellate Defense, P.O, Box 11589, Columbia, South Carolina 29211 this 22nd day of September, 2006.


DONALD J. ZELENKA