ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

RECEIVED
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S.C. SUPREME COURT

THE STATE,

RESPONDENT,

V.

MARION ALEXANDER LINDSEY,

APPELLANT

FINAL BRIEF OF APPELLANT

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

STATEMENT OF THE CASE

Appellant was indicted by the Spartanburg County Grand Jury for the offense of murder. R. 2177. The state served its notice of intent to seek the death penalty.

Appellant's case came on for trial on May 17, 2004 before the Honorable John C. Few and a jury. R. 1. Michael Bartosh, Doug Brennan, and Karen Quimby represented appellant. The solicitors were Trey Gowdy, Barry Barnett, and Donnie Willingham. R. 1.

The jury found appellant guilty of murder. R. 718 – 719. At the conclusion of the penalty phase the jury recommended a sentence of death. R. 2169, l. 10 –2170, l. 5. Judge Few then sentenced appellant to death. R. 2174, ll. 1 – 14.

This appeal follows.

STATEMENT OF FACTS

Appellant and his wife Nell had separated. Celeste Nesbitt testified appellant's wife "was like a younger sister to me." They even referred to each other as sisters in public. R. 1517, ll. 13 – 24. Nesbitt had known appellant for about six years at the time of his separation from his wife. R. 1518, ll. 3 – 7.

Nesbitt testified that appellant and his wife had separated on prior occasions. However, this was "the first time she did not let him see the kids." R. 1540, ll. 5 – 8. Nesbitt also remembered appellant's wife telling her "since I'm filing for divorce, I'm taking him off my insurance." R. 1540, ll. 5- 15.

At the time of this separation, the decedent wife was living with her mother, and the couple's two children, Alex and Trey Lindsey. The children were three years old and seven years old respectfully. R. 1520, l. 20 – 1521, l. 15.

Appellant's mother, Virginia Lindsey, verified that the decedent was not allowing appellant to see his children after this separation, but that appellant made efforts to care for them. Tr. 1675, l. 4 –1677, l. 4. Appellant's cousin, Christopher Wilkins, also testified that appellant was very close to his children, and that he was not allowed to see them. Tr. 1677, l. 22 – 1679, l. 17.

The decedent worked at the Spartanburg Regional Hospital. On September 18, 2002 Nesbitt and her two children were going to visit her grandmother who was a patient at Spartanburg Regional Hospital. As Nesbitt pulled into the parking lot of the hospital at 5:45 p.m., the decedent called her on Nesbitt's cell phone and asked for a ride home. Nesbitt agreed to give the decedent a ride home. She told the decedent that she would wait for her to get off of work after she had visited her grandmother. R. 1518, l. 5 - 1521, l. 15.

After the decedent got off of work, Nesbitt, her mother, the decedent and Nesbitt's two daughters drove onto the highway to take the decedent home. Nesbitt remembered that, "I was in the driver's seat. My mother was in the passenger seat. Nell was in the rear driver's back seat. My oldest daughter was in the middle. And my youngest daughter was in her car seat on the passenger back seat." R. 1521, l. 24 – 1522, l. 3.

Nesbitt recalled, "as we crossed Howard Street, I said to Nell I thought I saw Tresse's car. She said I thought I saw it too." R. 1523, ll. 2 – 9. Tresse was apparently appellant's new girlfriend. R. 1523, l. 10 – 1524, l. 5.

Nesbitt testified, "as we were pulling up to her mother's house, she said that is him [appellant] driving the car. Don't stop. Keep going. I continued to go on down the street. I pulled into my mother's yard which she lived on the same street. I pulled in and pulled back out and turned around. As I was turning around, he [appellant] had made a U-turn and turned facing me." R. 1524, ll. 14 – 19.

Nesbitt said she stopped in the middle of the road, and she rolled her window down. Nesbitt recalled, "he [appellant] said hey, Celeste. I said hey, Myron. He said where are you going. I said to take my mother to meet my sister. He said have you talked to Nell. And I said three days ago." R. 1525, ll. 1 – 4.

Nesbitt had tinted windows, and the tinted windows apparently made it a little harder to see into the car. R. 1525, l. 10 – 1526, l. 3. Nesbitt remembered, "my youngest daughter was speaking to him. And he finally acknowledged [her] and spoke to her. [1] Then he asked

[1]Nesbitt later admitted that one of her daughters called appellant "Uncle Ron." She denied that this daughter was also talking to appellant, and that her daughter attempted to climb between the two front seats to talk to appellant. "She was asleep," Nesbitt testified. R. 1539, ll. 3 – 12.

who was in the back seat. I said nobody but Keysha. And he said where is your oldest daughter. I said she laying back there asleep. He said is somebody else back there. I said no. He said roll the window down and let me see. I told him no, the window was broken." R. 1526, ll. 2 – 8.

Nesbitt said when appellant again asked to see who was in the backseat she "sped off . . . I went to the police department.[2] I sped off. Nell asked me if should I call my grandmother or call 911. I said call 911. She said well, take me to the police station. I said that's where we're going. I went as fast as I could. I ran all the stop signs, ran the red light, jumped the railroad track, hit Main Street and went straight to the police department." R. 1527, l. 20 – 1528, l. 1.

Nesbitt drove into the parking lot of the Inman Police Station, and she pulled "in beside one of the police cars that was already there." R. 1528, ll. 12 – 19. Nesbitt recalled, "[I] jumped out. And I tried to get Nell to get out. She told me, she was talking to 911 on the phone. And I was like 'Nell, get out. Nell, get out.' As I was asking her to get out, he [appellant] was pulling into the parking lot. He jumped out of the car and ran toward the back of the car. As he ran towards the back of my car, I backed up towards the front of the police car. *I saw him pull a gun out and stick the gun to the rear passenger windshield of the car and shot into the car.* I then fell to the ground and hollered for help. The police car that I was parked beside had a rear door that was open. I crawled [into] the back door and

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[2]Nesbitt acknowledged that when appellant asked to look in her backseat before she sped away that he was not in "a rage," and that she could understand what he was saying. R. 1536, ll. 2 – 5.

crawled inside of the Inman police car and laid on the floor board. I heard shots but I saw nothing else." R. 1532, l. 12 – 1533, l. 1. (emphasis added).

Nesbitt remembered "after the shooting took place and I heard the officer say that we got him [appellant] down, I crawled out [of] the police car." Nesbitt recalled, "my oldest child was screaming that Nell was dead. He [the police officer] took us and told us to go to the side of the building."[3] R. 1536, ll. 2 – 23.

Pathologist Dr. David Wren testified the decedent was shot four times. He removed three bullets from the decedent's head. The first gunshot wound was to the back of the decedent's head. "It was three and a quarter inches from the top of the head and about three quarters of an inch to the left of midline." The second wound was to the "left temporal region." The third gunshot wound was "near the nape of the neck which was the back of the neck." "[T]he other gunshot wound that I found was a grazing gunshot wound in the lower postural neck midline." Tr. 1654, l. 2 – 1657, l. 10.

Inman police officer Harvey Godfrey went to Inman police station that day "to meet with one of our drug informers to show him picture lineups." R. 1562, l. 4 – 1564, l. 15. Godfrey said as he was getting out of his vehicle at the police station, he received a dispatch about a "rolling domestic." Godfrey explained that a "rolling domestic" was a domestic dispute between two people either in "one vehicle or two vehicles." R. 1565, ll. 2 – 11.

Godfrey remembered that the two vehicles – Nesbitt's and appellant's -- pulled in to the parking lot of the police station at that time. Godfrey recalled that a women jumped out

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[3] Strangely the police did not keep the automobile in their possession. Nesbitt remembered she had the windows repaired from the "gunshot. And there was a bullet hole in the backbench of the car, not the baby seat, but the car seat. Nesbitt later sold the car to a friend of hers." R. 1537, l. 4 – p. 1538, l. 8.

of the car and came running towards him. Godfrey testified, "she [Nesbitt] was hollering something to the affect that he's going to get her or something like that. At that point, I turned and looked back towards her car. And I saw a black male with a handgun pointing towards her car. And I saw a black male with a handgun pointing it at the back glass. At that time, I reached for my gun and hollered don't. And he fired two rounds into the back glass." R. 1567, ll. 6 – 11.

"At that point, I was taking cover behind the car." Godfrey said he "saw two more flashes that appeared to be from a gun." Godrey said that "several seconds later, he came back out in front of the car pointing the firearm at me. And I fired four rounds." R. 1567, ll. 19 – 24. As seen, the decedent was shot four times. As will be seen infra, the fifth bullet, the bullet not found, and the only bullet fired from appellant's gun that did not hit the decedent, was used when appellant apparently tried to commit suicide immediately after he shot his wife.

Godfrey testified that he knew that he had shot appellant. He told other police officers "to cover him." R. 1571, l. 6 – 1572, l. 17. Godfrey remembered "he [appellant] was [the] only person in the parking lot other than the people who was in the car, Ms. Nesbitt and myself." R. 1572, ll. 11 – 17.

Godfrey described witnessing the shooting:

> "[W]hen I turned and focused back this way, she [Nesbitt] said he [appellant] was going to get her. I was looking to see who he was. At that point, *he was standing there with a gun pointing directly in the back glass right here. Before I could reach my weapon, he had done fired two shots in the back glass.* I went down here. I came across here. And I saw him running between the two cars. *I saw two more shots. At that point, I lost sight of him.* He was somewhere up here in front. I started down. I hollered at Celeste to see if she saw him.

> She said no. I started in between the two cars going towards the front of the car. When he came out from in front on the other side there pointing a gun at me and that's when I fired four rounds. He hit the ground at that point."

R. 1575, l. 19 – 1576, l. 8. (emphasis added).

Guy Carter was an Inman police officer. He remembered hearing shots fired outside and leaving the police station with his weapon drawn during the incident. He remembered Godfrey yelling "cover that mother fucker. I said where is he, Benny. He said he is on the ground in front of the patrol car." R. 1579, l. 4 – 1580, l. 8. Carter testified he covered appellant until the ambulance arrived. Carter knew appellant was bleeding but he could not tell "where the blood was coming from." R. 1580, l. 16 – 1582, l. 7.

Spartanburg EMS paramedic Joseph Stewart remembered finding appellant with gunshot wounds. One was a head injury. R. 1668, l. 8 – 1669, l. 18.

While Stewart was treating appellant "he [appellant] said he shot himself in the head." Appellant was then transported to the hospital. R. 1674, ll. 1 – 13.

Randy Bogan processed the parking lot of the police station following the shooting. R. 1585, l. 13 – 1586, l. 17. Bogan identified photographs - - State's Exhibit 27 – 31 - - showing shots that went through the "*backside of the back window of the vehicle from the rear driver side*," and also from "the driver's side rear window where Ms. Lindsey was seated." R. 1588, l. 4 – 1590, l. 2. (emphasis added).

Bogan testified he recovered four shell casing in the parking lot. R. 1590, ll. 3 – 17. Bogan also collected a thirty-eight-caliber pistol and a nine-millimeter pistol. R. 1592, l. 23 – 594, l. 15. As seen, Dr. Wren testified the decedent was shot twice in the head, once in

the neck, and she had a grazing wound to the head. Bogan testified he found that one bullet that went through the back seat into the trunk. R. 1600, l. 2 – 1601, l. 15.

Bogan confirmed that five bullets were fired from appellant's thirty-eight-caliber pistol. Bogan accounted for four of those bullets as seen above, and Bogan said he did not know what happened to the fifth bullet. "I don't know if it may have been shot up in the air or what happened." R. 1605, l. 9 – 1606, l. 9. Similarly SLED firearm expert Danny Defreeze testified he was not able to account for the fifth bullet, the bullet which appellant apparently used in the attempt to shoot himself in the head. R. 1622, l . 12 – 1623, l. 9.

During the penalty phase of the trial Nesbitt's eleven-year-old daughter, Kiera Potlow, testified that she was sitting in the middle in the backseat at the time of the shooting. The decedent was sitting beside her behind Nesbitt who was driving. Her sister was in the car seat on her other side, the passenger side of the car. R. 1753, l. 16 – 1755, l. 18.

Potlow testified she was sleeping and that she ducked under her sister's seat when the shooting started. R. 1755, l. 14 – 1756, l. 13.

The Jury View

Defense counsel Bartosh objected to a jury view of the automobile. As seen above, the police strangely released the processed automobile, and Mary Lyles purchased it, and had the broken windows replaced with clear glass. R. 1806, l. 10 – 1808, l. 6. Lyles acknowledged she put a trailer hitch on the car after she bought it, but she denied she was responsible for any back bumper damage. R. 1808, l. 20 – 1809, l. 4.

Bartosh said he assumed the solicitor wanted the jury to see the "size of the back seat, the portion of the back seat, so that they can appreciate the size." The judge stated that he also assumed the solicitor wanted to show "the size of the back seat in relation to the

location of that bullet hole is I believe what they have said in the past is the primary reason they want the jury to see this." R. 1886, ll. 14- 25.

Defense counsel argued:

> [O]ur argument would be that can be accomplished in a less prejudicial ways. They already introduced several photographs showing the scene that they wish to take the jury out including the location of the bullet hole. There is one picture where the bullet hole has a dowel rod pointing through the hole.
>
> What that doesn't show, Your Honor, it shows the position of the car seat but it is incomplete if that is what they're trying to do. You don't know how much space Ms. Lindsey took up. All they are left with is the car sear and the backseat. If they are trying to get an idea of how close she was to the car seat, you cannot do that.
>
> It is really an incomplete demonstration if that is what they're trying to do. I would suggest that there are other ways. There are other less prejudicial ways that they can accomplish that. They can do a sketch showing a - -

R. 1887, ll. 1 – 20.

The judge interrupted defense counsel, stating, "it is not my job to tell the state my favorite way for them to go about doing what they want to do. The judge added, "the question is not whether there are less prejudicial ways to accomplish what they want to do. The question is whether the way that they have chosen has the potential for unfair prejudice that substantially outweighs the probative value. R. 1887, l. 23 – 1888, l. 2.

Defense counsel again stated that the prejudicial value of the jury view outweighed its probative value. Defense counsel noted that the jury was going to look into a car where a woman had been shot to death. R. 1888, ll. 2- 22.

The judge responded "I don't see any unfair prejudice, zero." R. 1888, l. 23 – 1889, l. 3. The judge offered that he had observed the car and that blood could not be seen on the seat. The judge stated while he was not making a finding of fact, "the bullet hole is maybe three inches outside the furthest point that Ms. Lindsey would have taken up if she was sitting up straight." R. 1889, l. 4 - 1890, l. 2.

The judge ruled that the jury view was important for the jury to understand the aggravating circumstance "that might cut both ways." R. 1890, ll. 3- 20. The judge then overruled appellant's Rule 403, SCRE objection. R. 1890, ll. 3 – 20.

The judge told the attorneys that he would send the bailiffs outside the courthouse to "make sure the jury don't talk." R. 1890, l. 24 - 1891, l. 7. Defense counsel told the judge that appellant did not wish to watch the jury view. The judge responded that he thought that South Carolina Law required the defendant to be present at every stage. However, the solicitor informed the judge that a jury view was not the taking of evidence, and that appellant's presence was not required "so long as the judge accompanies the jury . . ." R. 1891, l. 14 – 1893, l. 16.

The judge then swore the bailiffs to not allow any person to speak during the jury view. R. 1894, l. 12 – 1896, l. 6. The judge told the jurors they would go down the back stairs of the courthouse "each of you will an opportunity to view it. We will get back in line, you will come straight back in." R. 1896, ll. 11 – 17.

The jury view and measurements

Following the jury view, defense counsel placed his objection on the record as to what occurred during the jury view:

Mr. Bartosh: The other thing, Your Honor, Mr. Mauldin, [a juror] I believe, was using his arm as a dowel or a measurement. He measured both the front driver's seat and the back seat of the automobile I'm assuming to get an idea of the position of the people. Of course, Ms. Nesbitt was not in the car.

The Court: Right. I saw Mr. Mauldin doing something. He was standing beside the driver's door. The driver's door was closed. The driver's side rear door was open. And he reached his hand through the opening. It looked like he had his hand on the seat back of the driver's seat. Other than that, I couldn't tell what he was doing.

Mr. Bartosh: I think - -

You want to describe it?

Ms. Quimby: I was standing more towards the rear of the vehicle. His arm was through the back door opening. He rested it on the back of the driver's seat. But he also was trying to do an angle. It looked like he was trying to match up his elbow. He was trying to figure out the angles. We wanted to bring that to the attention of the Court.

The Court: Okay. Is there anything significant about that?

Mr. Bartosh: Your Honor, jurors aren't supposed to conduct their own investigation.

The Court: They are supposed to look at the evidence.

Mr. Bartosh: Exactly, they are supposed to view the evidence. But we feel in this case, he started to conduct his own investigation as to angles and things like that.

The Court: Uh, well, I think the jury has to ultimately get around to looking carefully at those angles cause that's a very key piece of evidence that relates to the aggravating circumstance that is alleged.

Mr. Bartosh: Yes, but my point is, it is not his responsibility to conduct his own investigation and determine on his own what the angles are. They can look at the

> evidence and what the police officer testified to as to angles and distance and measurements and things like that, but a juror cannot conduct his own investigation.
>
> The Court: So the suggestion is that if the juror examines the evidence that I have decided that they can examine too closely, under the Court's supervision, then he is conducting his own investigation?
>
> Mr. Bartosh: No, sir. What I am suggesting is this, they can go out. They can look in the car. They can open the door. They can look inside the car. They can look at all the items that they want to. But once they start trying to determine distances on their own, by their own estimates and see angles by their estimates, then I think that is improper. They certainly are entitled to view it. I would also suggest, Your Honor, he was the only one that did.
>
> The Court: Specifically, what it is that he did that you say that I need to attend to is to use his arm?
>
> Mr. Bartosh: What he did was he stuck his arm from the door jam to determine the length from the door jam to the middle of the head rest in the front. He did the same thing in the back. He stuck it, he put his arm, he was attempting to use the length of his arm to estimate distance is what it appeared to me.

R. 1898, l. 5 – 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. 1901, l. 22 – 1902, l. 8.

The judge asked defense counsel "what do you propose I do?" Defense counsel responded, "replace him with an alternative, Your Honor . . . that would be the simple remedy." R. 1902, ll. 13 – 21.

The judge stated he could not replace Mauldin without finding he was not fair or impartial, and he asked, "what is wrong with trying to figure out how far it was? What is wrong with that. We are going to do that." R. 1902, l. 17 – 1903, l. 17.

Defense counsel again argued that trying to figure out distances or measurements went beyond a jury view. R. 1903, ll. 9 – 21. The solicitor asked "what is the difference between a jury using part of his body for measurement purposes and the other fourteen to using their mind to do the exact thing." R. 1903, l. 22 – 1904, l. 6.

The following then occurred between defense counsel and the trial judge:

> Mr. Bartosh: Suppose one of them had pulled out their pocket and pulled a tape measurer and measured it. I don't think that would have been proper.
>
> The Court: I am going to then remove from the jury every juror who pulled a tape measurer out of their pocket during that viewing and conducted a measurement. I think where this line is drawn is the jury is entitled to view and analyze the evidence based on the basic characteristics that every person brings into their role as jurors. Of course, that includes their common sense and the things that are in their mind.
>
> That common sense would include how each different person analyzes the things that come before them during the course of their lives. Some people can look at an object and estimate its size or its distance without the need of any kind of measuring device.

R. 1904, ll. 7 – 24.

Defense counsel then renewed his request that Juror Mauldin be replaced with an alternate. R. 1906, ll. 16 – 23.

The subject of the jury view would again be discussed following the directed verdict motion on the aggravating circumstance that concerned the jury view. The judge stated he

had cases his law clerk had brought to his attention. R. 1981, l. 4 – 1982, l. 14. The judge would later repeat that he was "pretty satisfied there is not any problem with that juror." R. 2095, ll. 21 – 25.

Defense counsel once again disagreed, stating, "if a juror performs an experiment, it is improper." R. 2099, l. 1 – 2100, l. 2. Counsel said "the only remedy that I can see would be to replace him with an alternate." R. 2100, ll. 2 – 5.

The judge then repeated that he did not think that juror Mauldin did anything improper. The judge denied the motion to replace Mauldin with an alternate. R. 2100, l.. 6 – 2101, l.2.

Closing argument

In his closing argument the solicitor argued the great risk of danger of aggravator to the jury. He said:

> You have touched the car. You have looked in and seen the dimensions in the back seat. If you study the picture, you will see that five foot seven or five foot eight Nell Lindsey took up her share of that back seat.

R. 2109, ll. 12 – 16.

Directed Verdict Motion

Defense counsel moved for a directed verdict arguing no reasonable juror could find the state had proved all of the elements of the aggravating circumstance beyond a reasonable doubt. R. 1971, l. 23 – 1972, l. 14. Counsel cited State v. Locklair, 341 S.C. 352, 535 S.E.2d 420 and others in arguing that directed verdict should be granted in this case. R. 1972, l. 15 – 1973, l. 22.

Counsel noted that there were five shots in this case. Four of the shots struck the victim "and the fifth struck Mr. Lindsey." R. 1973, l. 20 – 1974, l. 1.

Counsel also argued that a pistol used in a public place could be hazardous to the lives or more than one person "depending on how it is used . . . Great risk does not mean mere possibility but likelihood or high probability. Firing a gun into a crowd can create a great risk of death to more than one person. Shooting someone from fairly close range does not by itself create a great risk of death to more than one person simply because others may be in the vicinity. Your Honor, that is what I would say we have in this case. You had a, you had someone firing at a fairly short distance at one person. It has to be higher than that." R. 1975, ll. 15 – 25.

The solicitor stated that in State v. Locklair there was evidence defendant attempted to fire the gun several times but the safety was on. R. 1977, ll. 21 – 25. The solicitor argued appellant knew children were in the car, and that the police officer testified appellant pointed the gun at him. R. 1978, l. 1 – 1979, l. 9.

The judge stated appellant "fired shots into the window from two different angles while the vehicle was parked in a public place." R. 1979, l. 20 – 1980, l. 10. The judge denied the motion for a directed verdict. R. 1980, l. 13 – 1981, l. 6.

ARGUMENT

1.

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

Relevant Facts

Potential juror John Krisher was called for *voir dire*. Mr. Krisher initially stated that he did not know if he could impose the death penalty. R. 320, l. 8 - 321, l. 7. However, in response to defense counsel's questions, Mr. Krisher said that he could impose the death penalty and sign a death verdict if he thought it was appropriate. R. 325, l. 9 - 326, l. 18. When the solicitor questioned Mr. Krisher, he said that he believed a life sentence without parole was a harsher punishment than death. He said that because of his belief that a life sentence was a more severe punishment than death, he would "not necessarily but most likely" impose a life sentence for murder. R. 327, l. 7 - 328, l. 23. In response to further defense questions, Mr. Krisher repeated that he could impose either life or death depending on the circumstances of the case. R. 331, ll. 1-21.

The state moved to disqualify Mr. Krisher on the basis that his belief that a life sentence was harsher punishment than death would impair his ability to apply the law. R. 332, ll. 2-10. Appellant argued that while the law reserves capital punishment for aggravated murders, Mr. Krisher's view that a life sentence without parole was worse

punishment than death would not impair his ability to follow the court's instructions. R. 332, l. 11 - 334, l. 25.

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

Discussion

The trial court abused its discretion by excusing Mr. Krisher for cause. A potential juror in a capital trial may not be removed because of his personal views for or against the death penalty unless those views would render him unable to return a verdict according to the law. S.C. Code § 16-3-20(E). The juror must be excused only if his opinions will prevent or substantially impair the performance of his duties as a juror in accordance with his oath and instructions. Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844 (1985); State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996) (jurors who would not sign death verdicts were properly excluded); State v. Wood, 362 S.C. 135, 607 S.E.2d 57 (2005) (juror who adamantly opposed death penalty was properly removed, even after pretextual defense *voir dire* about racial demographics caused her to superficially change her answers).

Appellant understands that the appellate court should defer to the trial court's discretion in reviewing the exclusion of potential jurors whose answers to *voir dire* questions about the death penalty were unclear, ambiguous, or contradictory. Wainwright v. Witt, above; United States v. Tipton, 90 F.3d 861 (4th Cir. 1996), cert. denied, 520

U.S. 1253, 117 S.Ct. 2414 (1997); United States v. Barnette, 211 F.3d 803 (2000). That is not the case here.

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

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

instructions, and that under the proper circumstances, he could vote for the death penalty and sign a death verdict.

This is not a case where the juror had moral or religious reservations about the death penalty. Mr. Krisher merely proposed, during the course of a theoretical discussion, that life without parole might be a more severe punishment than death. His initial hesitation, if any, did not demonstrate an unwillingness to consider capital punishment. Rather, his pause was a normal, natural response to being confronted unexpectedly with a question of profound import. Mr. Krisher established his mental bearings as the examination progressed, and he answered subsequent questions thoughtfully and confidently.

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

he lives another thirty years." Dave Lindorff, *For Ira Einhorn, A Fate Worse Than Death*, SALON.COM, news/features, Oct. 18, 2002.

More recently, during the sentencing hearing of serial bomber Erich Rudolph, victim Diane Derzis told Mr. Rudolph that he had chosen "a fate worse than death" by accepting a life sentence and that she wished him "a very long life." *Rudolph Gets Life Sentence*, MONTGOMERY, ALA., ADVISOR, July 19, 2005 (elec. ed). Members of a Louisiana family interviewed about the fate of a former police officer who had murdered a family member expressed the same sentiment. *Family of Victim of Murderous Cop Doesn't Want Death Penalty*, LOUISIANA TIMES-PICAYUNE, July 27, 2005 (elec. ed).

If the state wanted to remove Mr. Krisher from the jury, it should have exercised a peremptory strike against him. Vacillating responses to questions about the death penalty are valid reasons for the use of a peremptory strike, as illustrated in several cases interpreting Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986). This Court stated in State v. Tucker, 334 S.C. 1, 512 S.E.2d 99 (1999), that:

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

Similarly, in State v. Shuler, 344 S.C. 604, 545 S.E.2d 805 (2001), a potential juror said that she could follow the law and impose a death sentence under the proper circumstances, but her *voir dire* answers were "weak, timid, and almost inaudible." Id. at 344 S.C. 617-618, 545 S.E.2d 811-812. The solicitor conceded that the juror's answers did not warrant a challenge for cause. Id. at 344 S.C. 618-619, 545 S.E.2d 812. He used

a peremptory strike to excuse her and cited the hesitant answers to defend a Batson challenge. Id. This Court ruled that the juror's equivocation, hesitancy, and uneasiness in answering the solicitor's questions were race-neutral justifications for the use of a peremptory strike. Id. at 344 S.C. 620, 545 S.E.2d 813. This Court did *not* rule that the juror was unqualified *per se*.

The Supreme Court of California considered a juror with opinions like Mr. Krisher's in another Batson case, People v. McDermott, 28 Ca.4th 946, 51 P.3d 874 (2002). In McDermott, the prosecutor asked a potential juror if the death penalty was a more severe punishment than a life sentence without parole. Initially, the juror said, "I really can't say . . . I don't know . . . They are both bad." Id. at 28 Cal.4th 976, 51 P.3d 893-894. When pressed to choose which punishment would be worse, the juror replied, "Maybe I would say life in prison . . . So they could have a chance to think about what they did." And, when asked if she would ever give a death sentence, she replied, "I don't know that I would . . . why I would . . . or if I would." Id.

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

Mr. Krisher's personal feelings about the death penalty may have justified the state's use of a peremptory strike to remove him from the jury. However, as in Shuler and McDermott, his answers did not render him ineligible to serve. He was generally neutral on the issue of punishment. He did not oppose the death penalty on principle, and he only thought that a life sentence without parole may be a worse punishment than death. He testified that he could follow the law, vote for either sentence in the appropriate circumstances, and sign his verdict. He was a qualified juror. The trial court abused its discretion by removing him from appellant's jury pool. Appellant should receive a new trial. See Gray v. Mississippi, 481 U.S. 648, 658, 107 S.Ct. 2045, 2051 (1987), reaffirming Davis v. Georgia, 429 U.S. 122, 97 S.Ct. 399 (1976) (the erroneous exclusion for cause of a qualified juror in a capital case cannot be harmless error).

2.

The judge erred by refusing to replace Juror Mauldin with an alternate where Mauldin was conducting his own measurements during a jury view of the automobile in which the decedent was shot. A juror conducting his own measurements or experiments during a jury view is improper. Further, it was undisputed that the "great risk of death to more than one person" was the sole aggravator, and a crucial determination for the jury to make.

As seen, the judge and the attorneys agreed that the jury view was requested by the state on the basis of the aggravating circumstance. Defense counsel moved to replace Juror Mauldin with an alternate because Mauldin was conducting his own measurements during the jury view. It is elementary that a juror cannot conduct his own independent experiments, measurements, or investigation outside of the evidence presented in court that is not subject to challenge by cross-examination. See State v. Ballew, 83 S.C. 82, 63 S.E. 688 (1909); Baroody v. Anderson, 195 S.C. 422, 11 S.E.2d 860 (1940); Stone v. City of Florence, 203 S.C. 527, 28 S.E.2d 409 (1943).

Further, a jury view was not the offering of evidence, and consequently Juror Mauldin taking his own measurements during the jury view of the car was all the more prejudicial. There was not any way to challenge the measurements or point to a different way of looking at physical evidence that was evidence. See State v. Mouzon, 326 S.C. 199, 485 S.E.2d 918 (1997).

However, even if the automobile had been admitted into evidence it would have been improper for Juror Mauldin to conduct his own experiments or measurements on the automobile outside of the courtroom. There was not any way for the defense to challenge

experiments or measurements that occurred outside of the courtroom, or in the jury room. See Sturkie v. Constance, 309 S.C. 426, 424 S.E.2d 545 (Ct. App. 1992).

It is beyond dispute that defendant must be given the opportunity to challenge or rebut evidence presented, and a juror conducting his own measurements or experiments outside of court constitutes misconduct because a defendant is unable to challenge the validity of these measurements or experiments. See Russell v. State, 99 Nev. 265, 661 P.2d 1293 (1983).

Here, Juror Mauldin conducted improper independent measurements of the automobile in an apparent attempt to see, on his own, how close another person was to the decedent when she was shot. That was very improper. See State v. Ballew, 83 S.C. 82, 63 S.E. 688 (1909); Baroody v. Anderson, 195 S.C. 422, 11 S.E.2d 860 (1940); Stone v. City of Florence, 203 S.C. 527, 28 S.E.2d 409 (1943).

Moreover, the relief requested, to simply replace Juror Mauldin with an alternate, was entirely reasonable. Cf. Ex parte Tony Thomas, 666 So.2d 855 (Ala. 1995); Bell v. State, 63 Cal. App. 4th 1919, 74 Cal. Rptr.2d 541 (1998).

The critical issue in this case was whether appellant knowingly created a great risk of death to someone other than the decedent when he intentionally shot her. That was the sole aggravator. Thus, Juror Mauldin's measurements or experiments goes to the heart of this case, and the trial judge erred by refusing to replace Juror Mauldin with an alternative.

There is not any way to determine what happened in the jury room, and removing a juror who did something improper, as Mauldin did here by making his own measurements, is the reason we have alternate jurors to prevent such an arbitrary factor from entering into

the sentencing determination. "[T]he evaluation of the consequences of an error in the sentencing phase of a capital case are more difficult because of the discretion that is given to the sentencing jury. A capital jury can recommend a life sentence for an reason or no reason at all." State v. McClure, 342 S.C. 403, 409, 537 S.E.2d 273, 275 (2000).

3.

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

Appellant unquestionably shot his wife at close range. There was no evidence appellant meant to harm anyone other than his estranged wife, and there was no evidence that he knowingly created a risk of death to more than one person. Knowingly creating a risk of death to more than one person is an element of the statutory aggravating circumstance.[4] S.C. Code § 16-3-20(C)(a)(3) is the statutory aggravating circumstance "where the offender by his act of murder knowingly created a risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person."

This case is vastly different from State v. Locklair, 341 S.C. 352, 534 S.E.2d 420 (2000) which was the subject of the trial debate. In Locklair, this Court considered a shooting where there was evidence the defendant continued to try to fire his gun after he had already shot and killed his estranged girlfriend. This Court wrote that:

> "According to witness Nichols' testimony, Locklair put more than one person at great risk of danger because he attempted to fire the gun several times, but the safety was on. After he shot Bridges, Locklair pointed the gun at Williams' home where there were children inside. Nichols was forced to tackle Locklair to stop him and Robert Williams, the victim's stepfather, had to struggle with Locklair to retrieve the gun. According to the trial testimony, the gun was dropped several

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[4] This aggravating circumstance is often referred to as the "great risk of danger" aggravating circumstance, although our statute provides the defendant must "knowingly create" a great risk of death." S.C. Code §16-3-20.

> times during the struggle with shots being fired in different directions. Also, at the very least, Nichols and Robert Williams, were placed in great danger as they attempted to stop Locklair from firing and retrieve the gun. Finally, Locklair put many people in at great risk of danger. Nichols, Robert William, Betty Williams, Dewey Morgan, and several children playing in the street were all within firing range when the shooting occurred."

State v. Locklair, 341 S.C. 52, 367, 535 S.E.2d 420, 428 (2000).

There is not any similar evidence in this case. This case is also much different than State v. Ivey, 325 S.C. 137, 481 S.E.2d 12 (1997) where the shooting occurred at the Orangeburg Mall. Ivey shot inside the mall and the bullet ricochet, hitting an officer. Mr. Ivey escaped, and police officers chased him out of the mall shooting at him.

Here, conversely, as defense counsel argued, appellant shot his wife at close range. He fired four shots through the windows at close range, and he hit the decedent four times. The fifth shot fired from the gun was a suicide attempt that did not threaten anyone else. Appellant told the EMS worker that he tried to shoot himself in the head. R. 1973, l. 20 – 1974, l. 1.

Any assertion appellant knowingly created a great risk of danger to anyone other than his wife was sheer speculation. It was improper for a trial judge to accept mere speculation as to what might have happened to others. See White v. State, 403 So.2d 331–337 (Fla. 1981); See, also, Lewis v. State, 377 So.2d 640, 646 (Fla. 1979); Kampff v. State of Florida, 371 So.2d 1007, 1009 (Fla 1978) ("great risk" in the statute means not a mere possibility but a likelihood or high probability [of death]).

As counsel here argued, "Great risk does not mean mere possibility but likelihood or high probability. Firing a gun into a crowd can create a great risk of death to more

than one person. Shooting someone from fairly close range does not by itself create a great risk of death to more than one person simply because others may be in the vicinity. Your Honor, that is what I would say we have in this case. You had a, you had someone firing at a fairly short distance at one person. It has to be higher than that." R. 1975, ll. 15 – 25.

In State v. Stewart, 197 Neb. 497, 250 N.W.2d 849 (1977), the court considered a similar statutory aggravating circumstance that the defendant knowingly created a great risk of death to another. The court noted that in State v. Simants, 197 Neb. 549, 250 N.W.2d 881, 896 (1977), the court had stated, "we interpret [this aggravating circumstance] to cover those situations where the act of the defendant jeopardizes the lives of more than two other persons, such as the use of bombs or explosive devices, the indiscriminate shooting into groups, or at a number of individuals, or other like situations." State v. Stewart, 297 Neb. At 523, 250 N.W.2d at 865.

This Court in Locklair held that a gun, depending on the way it is used, "can be a weapon or device which normally would be hazardous to the lives of more than one person." Again, however the evidence in this case is vastly different than Locklair on the knowingly created a risk of death to others element. While the officer testified appellant pointed the gun towards or at him, appellant did not shoot the officer where the officer seemed to imply that appellant could have shot him if he had so desired.

In Hallman v. State, 560 So.2d 223, 225-226 (Fla.1990), the Florida Supreme Court held that the trial judge improperly found the aggravating circumstance that the defendant knowingly created a great risk of death to many persons. In Hallman, the defendant took a taxi cab to a federal savings and loan. Hallman took the cab driver inside the bank with him

during the robbery. After robbing the bank, he told the cab driver to stay inside the bank. When Hallman reached the taxi, he discovered the cab driver had the ignition key. Hallman attempted to go back into the bank, but the door was locked. A security guard fired at Hallman through the cab's rear window and missed. Hallman fired back twice, mortally wounding the security guard.

The Hallman court noted that it was improper for the trial judge to list ten people who were in the area of the shoot-out and could have been struck since the shoot-out occurred near a busy thoroughfare. The shots were fired at close range, and that the chance a bystander would be struck by a stray bullet was insufficient to justify this aggravating circumstance. The Florida Supreme Court agreed with Hallman that such speculation was improper, and that the trial court should not have found the existence of this aggravating circumstance.

Although the Florida statute differs from our state's in that it states great risk of death to many persons, rather than to more than one person, the point remains that such speculation as to what might have occurred is improper. See, White v. State, supra.

In White v. State, the defendant and several accomplices bound the occupant of the home and seven other people as they arrived. They shot each of the captives in the head at close range, killing six and wounding two others. The court found it improper for the trial judge to find the aggravating circumstance that the defendant knowingly created a great risk of death to many persons. The trial judge had speculated what might have happened to additional neighbors, delivery people or others who could have come to the house during the several hours that the occupants were held hostage.

The Arizona court in State v. McCall, 139 Ariz. 147, 677 P.2d 920, 932-933 (1983), considered a case where the three victims were shot in bed close enough to each other that the shooting of any one placed the other two in grave risk of danger. However, the court reasoned that the shooting was not random or indiscriminate, but purposeful and intentional.

In Pope v. State, 256 Ga. 195, 345 S.E.2d 831, 845 (1986), the court found evidence insufficient to establish the statutory aggravating circumstance that the defendant knowingly created a great risk of death to more than one person in a public place by means of a weapon or device normally hazardous to the lives of more than one person. The court reasoned that a pistol used in a public place may be hazardous to the lives of more than one person, depending on how it is used. The court wrote that "great risk" does not mean a mere possibility, but a likelihood or high probability. The court noted that the defendant shot at a pharmacist, and did not create a great risk of death to more than one person. The court explained that firing into a crowd can create a great risk of death to more than one person, but shooting someone from a fairly close range does not create a great risk of death to more than one person.

This is not a case where appellant opened fire in a crowded public place, or where, as in Locklair, there was evidence he knowingly created a risk of death to more than one person by continuing to try to fire the gun where children and adults were potentially in the line of fire. Appellant did not make any attempt to shoot anyone other than then decedent. He shot the decedent through the car window four times, and all four shots hit the decedent. The fifth shot was an apparent suicide attempt through a shot to the head that was unsuccessful. Cf., State v. Doss, 116 Ariz. 156, 568 P.2d 1054 (1977), State v. McMurtery, 136 Ariz. 93, 664 P.2d 637 (1983). See, also, 64 A.L.R.4th 837.

It is also elementary that criminal statutes are construed strictly against the state and in favor of the defendant. Hair v. State, 305 S.C. 77, 406 S.E.2d 332 (1991), citing State v. Cutler, 274 S.C. 376, 264 S.E.2d 420 (1980). The judge here erred in submitting this "great risk of death" statutory aggravating circumstance for the jury's consideration given the facts of this case. Aggravating circumstances are intended to narrow the list of candidates eligible or deserving of the death penalty. Extending Locklair, respectfully, to the breaking point as the solicitor urged at trial, does not serve that narrowing function.

4.

The death sentence should be vacated as both excessive and disproportionate since this case involves a domestic dispute involving child visitation, and imposing a death sentence in this case is excessive and disproportionate in this single-victim domestic dispute case.

Appellant's death sentence should be vacated because it is disproportionate and excessive when compared to similar cases.

Under S.C. Code § 16-3-25(C), this Court must review each death sentence to determine (1) whether it was imposed under the influence of passion, prejudice or any other arbitrary factor; (2) whether the evidence supports the finding of a statutory aggravating factor; and (3) whether the sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. See State v. Copeland, 278 S.C. 572, 300 S.E.2d 63 (1982). Appellant's sentence should fail the statutorily-mandated review because the evidence did not support the jury's finding of the only alleged aggravating factor, see Argument 3, supra, and because his death sentence is disproportionate and excessive when compared to other cases.

Appellant's case had two distinguishing features: it involved a single victim, and it resulted from an ongoing domestic dispute. A survey of this Court's death penalty opinions reported in recent decades yields only one case, State v. Locklair 341 S.C. 352, 535 S.E.2d 420 (2000), discussed below, comparable to appellant's case on both points but still distinguishable. Otherwise, his case is not similar to other capital cases involving either single victims or family-related crimes.

Single Victims Appellant's case is dissimilar to reported capital cases with single victims. These cases most often concerned either the death of a police officer, e.g., State v. Wood, 362 S.C. 135, 607 S.E.2d 57 (2004); State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000); State v. Hill, 331 S.C. 94, 501 S.E.2d 122 (1998), or a "random" murder accompanied by violent crimes such as rape, kidnapping, burglary, or robbery, e.g., State v. Moore, 357 S.C. 458, 593 S.E.2d 608 (2004) (death sentence for murder of convenience store clerk during robbery); State v. Simpson, 325 S.C. 37, 479 S.E.2d 57 (1997) (same); State v. Humphries, 325 S.C. 28, 479 S.E.2d 52 (1996) (same).

A significant number of single-victim capital cases involved crimes against the very young or old, such as the sexual assault and murder of a young child in State v. Downs, 361 S.C. 141, 604 S.E.2d 377 (2004) (death sentence for rape and strangling of six-year-old boy), or of an elderly person, in State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999) (death sentence for murder of 72-year old widow who was raped, forced to drink cleaning fluid, her head wrapped in duct tape and left to suffocate) and State v. Holmes, 320 S.C. 259, 464 S.E.2d 334 (1995) (death sentence for beating, rape and murder of 86-year old victim).

Many single-victim cases alleged a shocking degree of violence and depravity by the defendant, as in State v. Stokes, 345 S.C. 368, 548 S.E.2d 202 (2001) (death sentence for murder-for-hire with kidnapping, brutal gang-rape, pre- and post-mortem mutilation of breasts and genitalia, shooting, and scalping of victim), State v. Gardner, 332 S.C. 389, 505 S.E.2d 338 (1998) (death sentence for kidnapping, rape, and murder of young woman shot five times in the face); State v. Charping, 333 S.C. 124, 508 S.E.2d 851 (1998) (death sentence for abduction, rape, torture and drowning of woman); State v.

Nance, 320 S.C. 501, 466 S.E.2d 349 (1996), cert. denied, 518 U.S. 1026, 116 S.Ct. 2566 (1996) (home invasion of elderly couple in which husband was stabbed multiple times and forced to watch rape and murder of wife).[5] Appellant's case is not comparable to these. The shooting alleged in his case was not accompanied by any other crimes. His alleged victim was not a law enforcement officer, was not especially vulnerable because of age or physical condition, and was not burglarized, robbed, raped, or tortured. Finally, the facts of appellant's alleged crime do not remotely resemble the horrors recounted in Downs, Council, Holmes, Stokes, Gardner, Charping, and Nance. Appellant's death sentence, in light of these cases, is disproportionate.

"Domestic" cases. Appellant's case is also unlike reported capital cases involving domestic or family disputes. Family-related murders that resulted in a death sentence uniformly involved extreme violence or multiple victims. In State v. Weik, 356 S.C. 76, 587 S.E.2d 683 (2002), for example, the defendant allegedly broke into his estranged girlfriend's home and killed her with five rounds of three-inch 00-buckshot discharged at close range from an 12-gauge automatic hunting weapon, as their son cowered nearby. The jury sentenced him to death after finding the aggravating circumstances of torture and burglary.

In State v. Passaro, 350 S.C. 499, 567 S.E.2d 862 (2002), the defendant received a death sentence for killing his young daughter by strapping her in a car seat and setting the car on fire in the parking lot of his ex-wife's condominium complex. The sole issue on appeal was whether the prisoner could waive automatic appeals in a death penalty case,

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[5] , PCR granted, Nance v. Frederick, 358 S.C. 480, 596 S.E.2d 62 (2004), vacated and remanded, Ozmint v. Nance, 543 U.S. 1043, 125 S.Ct. 868 (2005).

but this Court determined that the death sentence was appropriate. 350 S.C. 499, 508, 567 S.E.2d 862, 867.

Aside from cases alleging extreme violence, like Weik and Passaro, the family-related capital cases had multiple victims. In State v. Shuler, 353 S.C. 176, 577 S.E.2d 438 (2003), the defendant was convicted of the triple murder of his former girlfriend, her 13-year-old daughter, and her mother. The jury imposed a death sentence after finding the aggravating circumstances of multiple victims, burglary, and physical torture.

In State v. Hughey, 339 S.C. 439, 529 S.E.2d 721 (2000), the jury recommended a death sentence after convicting the defendant of burglary, grand larceny of a vehicle, and the double murder of his ex-girlfriend and another woman. In State v. Rosemond, 335 S.C. 593, 518 S.E.2d 588 (1999), a death sentence was imposed for the double murder of the defendant's girlfriend and her ten-year-old daughter. And, in State v. Kelly, 331 S.C. 132, 502 S.E.2d 99 (1998), the defendant received a death sentence for the double murder of his estranged wife and her daughter's fiancée, and also was convicted of assault and battery with intent to kill the daughter during the same incident. See also State v. Ard, 332 S.C. 370, 505 S.E.2d 328 (1998), overruled in part on other grounds by State v. Shafer, 340 S.C. 291, 531 S.E.2d 524 (2000), overruled by Shafer v. South Carolina, 532 U.S. 36, 121 S.Ct. 1263 (2001) (death sentence for double murder of pregnant girlfriend and viable fetus; aggravating circumstance was multiple victims); State v. Williams, 321 S.C. 327, 468 S.E.2d 626 (1996) (death sentence for double murder of wife and adopted son; aggravating circumstances were multiple victims and murdering for financial gain in the form of life insurance benefits).

State v. Locklair. As noted, one recent "domestic" case superficially resembles appellant's, but the similarity fades on closer inspection. In Locklair, supra, the defendant received a death sentence for murdering his girlfriend while he was out on bond awaiting trial for the murder of the girlfriend's husband. Locklair is superficially like appellant's case because it did not involve an extreme level of violence, as in Weik or Passaro, above, and because there was a single victim in each of Locklair's cases. Unlike Locklair, however, the state did not allege that appellant was a serial murderer. The only aggravator alleged against appellant was the creation of a public danger, which, as shown in Argument 3, supra, should have failed at the directed verdict stage.

The creation of a public danger also was alleged in Locklair, but, again, the cases are distinguishable. Locklair attempted to fire his gun several times at different targets. Two witnesses, besides the victim, tried to intervene at close range and were endangered. After Locklair shot his victim in the back, he stepped over her body and continued to try to shoot at a house occupied by children. He stopped shooting only after one of the witnesses wrestled him to the ground. During the confrontation, the gun was dropped several times and spontaneously discharged. 341 S.C. 356, 535 S.E.2d 422. This Court ruled that the facts supported the jury's finding that Locklair had "knowingly created a great risk of danger to more than one person in a public place" under S.C. Code § 16-3-20-(C)(a)(3). 341 S.C. 366, 535 S.E.2d 428. Appellant's case differs from Locklair because appellant did not create a general public danger and did not threaten anyone beyond the victim.

Appellant understands that this Court, in conducting its proportionality review, does not compare capital cases to those where the defendant received only a sentence of

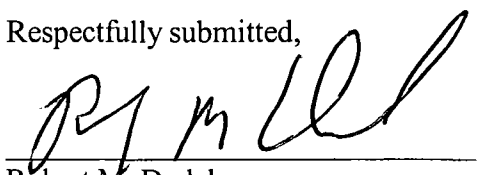
confinement. S.C. Code § 16-3-25(E); Copeland, above. Nevertheless, appellant feels compelled to point out that the only reported cases comparable to his case are those in which a sentence of confinement, rather than a death sentence, was imposed. See State v. Gorum, 428 S.E.2d 884, 311 S.C. 332 (1993) (life sentence for shooting death of wife, in public place, after learning that she would not reconcile with defendant).[6] Appellant's case, like these, is distinguishable from death penalty cases in both nature and degree. His death sentence is disproportionate and should be vacated.

[6] See also State v. Harris, 275 S.C. 463, 272 S.E.2d 636 (1980), conviction aff'd in PCR, Harris v. State, 354 S.C. 382, 581 S.E.2d 154 (2003) (life sentence for shooting death of girlfriend and her ex-husband in public place); Myers v. State, 359 S.C. 40, 596 S.E.2d 488 (2004), cert. denied, Nov. 8, 2004 (30-year sentence for murder of girlfriend in public bar where she worked); Jackson v. State, 355 S.C. 568, 568 S.E.2d 562 (2003) (life sentence for shooting death of estranged wife, partly over child-visitation dispute); State v. Ballington, 346 S.C. 262, 551 S.E.2d 280 (Ct. App. 2001), cert. denied, Jan. 10, 2002 (life sentence for murder of estranged wife after she threatened to pursue sole custody of child); State v. Taylor, 333 S.C. 159, 508 S.E.2d 870 (1999) (life sentence for strangling death of wife); State v. Gadsden, 314 S.C. 229, 442 S.E.2d 594 (1994) (life sentence for stabbing death of wife).

CONCLUSION

By reason of argument one, appellant's conviction should be reversed, and this case remanded to the Spartanburg County Court of General Sessions for a new trial. In the alternative, by reason of arguments two and three, a new sentencing trial should be granted. By reason of argument four, appellant's death sentence should be vacated.

Respectfully submitted,



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October 25, 2006

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

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October 25, 2006

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

THE STATE,

RESPONDENT,

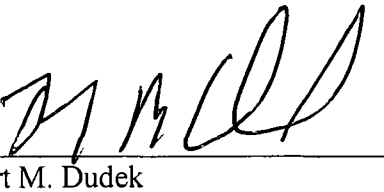
V.

MARION ALEXANDER LINDSEY,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Donald J. Zelenka, Esquire, this 25th day of October, 2006.



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ATTORNEYS FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 25th day of October, 2006.

(L.S.)

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