

ORIGINALS

4/6/98

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

**APPEAL FROM YORK COUNTY
Court of General Sessions**

**File Number 93-GS-46-4296
93-GS-46-4299
93-GS-46-4301
93-GS-46-4303**

The State,.....Respondent.

vs.

Mar-Reece Aldean Hughes,.....Appellant.

FINAL BRIEF OF APPELLANT.

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STATEMENT OF ISSUES ON APPEAL

1. Did the Trial Judge err in admitting into evidence during the sentencing phase an unadjudicated unrelated post-McCants murder as "character" evidence in violation of the appellant's Eighth Amendment rights?
2. Did the Trial Judge commit error in allowing the jury to consider inflammatory and unreliable impeachment evidence which was suppressed and not made available by the prosecution although specifically requested by the defense thereby denying the defendant material information in violation of SCRCP 5 and Brady v. Maryland, 37 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)?
3. Did the Trial Judge err in failing to exclude incriminating statements or utterances of the appellant which were given during the height of his mental illness as they were not knowingly or intelligently made?
4. Was error committed in failing to introduce as evidence the life sentence of the appellant's codefendant, Eric Dwayne Forney as a mitigating factor?
5. Did the Trial Judge err in failing to set aside the sentence of death for Mar-Reece Aldean Hughes as disproportionate to that of his co-defendant who had previously received a life sentence?
6. Did the Trial Judge err in failing to grant a mistrial due to the prejudicial emotional courtroom outburst of Myra McCants during the appellant's presentation of testimony during the sentencing phase?

7. After due deliberations by the jury during the sentencing phase, did the trial judge commit error by giving an unduly coercive instruction to the jurors who were holding out for a life sentence?

STATEMENT OF THE CASE

On December 13, 1993, a York County Grand Jury indicted Mar-Reece Aldean Hughes and Eric Dwayne Forney for the murder of Brent McCants. Mr. McCants, a law enforcement officer, was shot to death on September 25, 1992. On December 13, 1993, the Solicitor served the Appellant with notices of intent to seek the death penalty and of the evidence in aggravation. The Grand Jury also indicted the Appellant and Forney on December 13, 1993, for possession of a firearm during the commission of or attempt to commit a violent crime, criminal conspiracy, armed robbery and possession of a stolen vehicle.

Judge John C. Hayes presided over the Appellant's trial in York County. He heard pretrial motions on September 7 and 8. Motions were again heard on September 14, 1995. Jury selection began on September 11, 1995, in Aiken County and lasted three days.

The guilt phase commenced on September 11, 1995. The defense told the jury, "The killer in this case was Eric Dwayne Forney. That's who murdered Brent McCants. That's who had the propensity for violence." (ROA 916, lines 9-12). The jury found the Appellant guilty of murder, criminal conspiracy, armed robbery, possession of a firearm during the commission of a crime, and possession of a stolen vehicle, on September 18,

1995.

The sentencing phase occurred on September 20, 1995. The judge submitted three statutory aggravating circumstances: (1) murder while in the commission of a robbery while armed with a deadly weapon, (2) murder was committed while in the commission of a larceny with the use of a deadly weapon, and (3) murder of a local law enforcement officer during or because of the performance of his official duties. (ROA 2434, Tr. page 2434; lines 8-15). The Appellant testified he did not shoot Officer McCants. The Appellant testified Eric Forney was the triggerman. (ROA 1654, Tr. page 1654 lines 1-9; ROA 1658, Tr. page 1658 lines 7-21).

The jury sent a note to the judge after several hours of deliberations as to the sentence to be imposed, stating they were deadlocked. The judge delivered an Allen charge. At approximately 11:00 p.m., the judge sent a note to the jury inquiring as to whether they wanted to continue deliberating or continue the next morning. The jury reached an unanimous verdict approximately one-half hour later.

The jury found murder of a law enforcement officer during the performance of his duties as an aggravating factor, and sentenced the Appellant to death. The judge affirmed their decision.

Forney was found guilty at trial on March 7, 1994 of murder, criminal conspiracy, and armed robbery, before Judge Hayes, and received a life sentence.

STATEMENT OF FACTS

Mar-Reece Aldean Hughes was born on January 27, 1966. Mar-Reece Hughes had 26 siblings. (ROA page 2066; Tr. page 2066, line 21) There are 16 living children remaining in the Hughes family. (ROA page 2066; Tr. page 2066, lines 22). On August 12, 1992, Mar-Reece Aldean Hughes was released from a prison facility in Central, North Carolina. (ROA page 1900; Tr. pg. 1900, lines 15-16) He had began serving a sentence in North Carolina in 1983. (ROA page 1644; Tr. page 1644, lines 8-10) Following his release, he resided with several family members in Winston-Salem prior to his move to Charlotte, North Carolina with his brother, Marshall Hughes. (ROA page 1646; Tr. page 1646, lines 1-2)

Prior to going to Charlotte, Mar-Reece, who had been in prison since 1983 and accustomed to living life with protection, purchased a handgun in Winston-Salem. (ROA page 1645; Tr. page 1645, lines 7-14). Once in Charlotte with his brother, Marshall, he had to dispose of the weapon because it was against his brother's house rules. (ROA page 1647; Tr. page 1647, lines 2-5)

During the Labor Day holiday weekend of 1992, Mar-Reece Hughes traveled to Franklinton, North Carolina to visit an acquaintance from prison. (ROA page 1305; Tr. page 1305, lines 6-11). A prison guard named, Lt. LeRoy Perry. (ROA page 1644; Tr. page 1644, lines 19-20) As he

displayed the handgun to Lt. Perry; he described its operation. (ROA page 1308; Tr. page 1308, lines 3-9) This gun was particularly distinguishable due to the fact that the gun had the grips on the handle removed. (ROA page; Tr. page 1308, line 5). He informed Lt. Perry that the reason the grips were removed was in case the gun jammed it could be easily manipulated to firing position. (ROA page 1308; Tr. page 1308, lines 7-9). Mr. Hughes offered the handgun to Lt. Perry who informed Mr. Hughes that he was not interested in any "protection". (ROA page 1314; Tr. page 1314, lines 12-13). Mr. Hughes wiped the handles of fingerprints and put the gun away. (ROA page 1308; Tr. page 1308, line 20) Lt. Perry purchased a one way ticket for Mr. Hughes to Charlotte at the bus station. (ROA page 1309; Tr. page 1309, lines 5-6). Sometime later, Mr. Hughes ran into a former inmate, Eric Dwayne Forney, who was also living in Charlotte. (ROA page 1647; Tr. page 1647, lines 14-23). Mr. Hughes asked Mr. Forney if he was interested in purchasing the handgun and sold it to him for \$45.00 (ROA page 1647; Tr. page 1647, lines 6-11).

Dwayne Forney asked Mar-Reece Hughes whether he wanted to make some money. (ROA page 1648; Tr. page 1648, lines 4-5). So, on the evening of September 26, 1992, Mar-Reece Hughes and Eric Dwayne Forney walked up to the Bellissimo Restaurant in Charlotte, North Carolina. (ROA page 1648; Tr. page 1648, lines 10-11). Beth Ann Jayne and Sean

McMillan pulled into the parking lot of the Bellissimo restaurant. (ROA page 921; Tr. page 921, lines 8-23). Eric Forney and Mar-Reece Hughes approached the couple and their vehicle. (ROA page 1648; Tr. page 1648, lines 13-14). Eric Dwayne Forney pulled the gun from behind his shirt and forced Sean McMillan onto the ground. (ROA page 1649; Tr. page 1649, lines 3-7). Mar-Reece Hughes approached Beth Ann Jayne who was exiting the passenger side of the vehicle. (ROA page 922; Tr. page 922, line 21; and ROA page 1648; Tr. page 1648, line 15-16)). He told her that "take your time, take your time" and escorted her to the driver side of the vehicle. (ROA page 948; Tr. page 948, lines 16-19; ROA page 1649; Tr. page 1649, lines 13-17). Upon coming around the vehicle, Beth Ann Jayne observed Sean McMillan lying face down on the ground with Eric Forney targeting the gun to the back of his head. (ROA page 941; Tr. page 941, lines 20-24) Eric Forney threatened them, "if you move, I'll kill you," (ROA page 942; Tr. page 942, line 4) Ms. Jayne testified that, at no time, did Mar-Reece Hughes have the gun in his possession, (ROA page 945; Tr. page 945, lines 23-25) nor did he make any verbal threats toward her or her boyfriend. (ROA page 946; Tr. page 946, line 19) She testified that Eric Forney, in addition to threatening to kill her boyfriend, threatened to kill her: "If you move, I'll kill your whore." (ROA page 943; Tr. page 943, lines 19-20) Mar-Reece Hughes and Eric Forney robbed Beth Ann Jayne and Sean

McMillan of their 1986 Buick Century. (ROA page 909; Tr. page 909, lines 8-11).

Mar-Reece Hughes accompanied Mr. Forney as he drove the vehicle to Rock Hill, South Carolina. (ROA 1649; Tr. page 1649, lines 19-20). They first went to a movie theater at Galleria Mall, off interstate 77. (ROA page 979; Tr. page 979, lines 11-19). They entered the theater about 10:10 p.m. (ROA page, 980; Tr. page 980, line 2). Leaving a short time later, they continued their sojourn down Dave Lyle Boulevard in Rock Hill, South Carolina, (ROA page 1650; Tr. page 1650, line 22) stopping at a convenience store to buy a drink. (ROA page 1651; Tr. page 1651, line 7) After leaving the convenience store, they switched drivers and Mar-Reece Hughes got behind the steering wheel of the Buick. (ROA page 1651; Tr. page 1651, line 9).

They continued back down Dave Lyle Boulevard towards I-77, inadvertently neglecting to turn on the headlights of the vehicle. (ROA page 1652; Tr. page 1652, lines 18-22). A sheriff's patrol car approaching in the opposite lane, spotted the vehicle, proceeded to make a U-turn and pulled behind the Buick. (ROA page 1040; Tr. page 1040, lines 20-24)

The patrol car was driven by Deputy Sheriff, Brent McCants. Officer McCants pulled the 1986 Buick on a routine traffic stop. (ROA page 908; Tr. page 908, lines 20-25) Prior to exiting his vehicle, Officer McCants

radioed to dispatch, (ROA page 909; Tr. page 909, lines 2-3) calling in the tag number of the 1986 Buick. (ROA page 909; Tr. page 909, lines 4-5) Upon reaching the vehicle, Officer McCants asked Mar-Reece Hughes to stand in the front of the vehicle leaving Eric Forney seated in the Buick. (ROA page 1653; Tr. page 1653, line 14). Upon exiting the vehicle, Mar-Reece Hughes left the door to the Buick open. (ROA page 1654; Tr. page 1654, line 9). When Officer McCant's returned to the vehicle to get the registration, Eric Forney began firing. (ROA page 1654; Tr. page 1654, line 3). Eric Dwayne Forney's first shot was to the chest of Brent McCants' bullet proof vest. (ROA page 1536; Tr. page 1536, lines 4-6). There were two fatal shots.(ROA page 2538; Tr. page 2538, lines 6-14; ROA page 1540; Tr. page 1540, lines 6-10). The force of the initial fatal shot, resulted in Officer McCants falling to his knees and face down on the side of the road with his head turned to the Galleria Mall on Dave Lyle Boulevard. (ROA page 1060; Tr. page 1060, lines 18-20). While McCants was falling, Eric Dwayne Forney slid across the bench seat of the Buick and emptied the gun by discharging eight bullets, six of which were fired into Brent McCants. (ROA page 1658; Tr. page 1658, lines 14-17). All of the bullets came from the same gun. (ROA page 1469; Tr. page 1469, lines 2-5) As Officer McCants was being shot, Mar-Reece Hughes stood in the front of the vehicle witnessing the shots being fired. (ROA page 1658; Tr.

page 1658, line 21) Mr. Hughes went to the officer and felt for his pulse on his neck. (ROA page 1659; Tr. page 1659, lines 3-4). As he did so, Dwayne Forney took Officer McCants' walkie talkie. (ROA page 1659; Tr. page 1659, lines 13-15).

Mar-Reece Hughes returned to the vehicle (ROA page 1660; Tr. page 1660, lines 4-5). and they headed down Dave Lyle Boulevard onto Interstate 77 and headed back to Charlotte. (ROA page 1660; Tr. page 1660, lines 2-3). Back at the scene, some passersby had stopped in an attempt to offer assistance to Brent McCants. (ROA page 909; Tr. page 909, lines 20-25; ROA page 910; Tr. page 910, lines 1-3). Their actions were to no avail. (ROA page 909; Tr. page 909, lines 21-22) Deputies arrived and began a massive man hunt for the person or persons responsible for the killing of a fellow officer. (ROA page 910; Tr. page 910, lines 1-2)

Mar-Reece Hughes and Eric Dwayne Forney exited the interstate. (ROA page 1660; Tr. page 1660, line 9) pulling into a Holiday Inn parking lot. (ROA page 1128; Tr. page 1128, lines 1-21). Mar-Reece Hughes knew he had to get away from Eric Dwayne Forney. (ROA page 1660; Tr. page 1660, line 17). He exited the vehicle attempting to make his escape from Forney. (ROA page 1149; Tr. page 1149, lines 5-12; page 1660, lines 17-25). Both men were spotted leaving the parking lot. (ROA page 1131; Tr. page 1131, lines 11-13)

Eric Dwayne Forney was located first. (ROA page 1178; Tr. page 1178, lines 2-14) He was found with the handgun used in the homicide in his possession. (ROA page 1180; Tr. page 1180, lines 2-8). The gun had been reloaded. (ROA page 1472; Tr. page 1472, lines 8-19). Eric Forney was attempting to remove the gun from his pant leg as he was apprehended. (ROA page 1191; Tr. page 1191, lines 10-24; and ROA page 1325; Tr. page 1325, lines 1-12)) He was tackled and arrested. (ROA page 1191; Tr. page 1191, lines 4-6). His statement to police implicated Mar-Reece Hughes as the triggerman. (ROA page 1282; Tr. page 1282, lines 19-25).

Mar-Reece Hughes was tracked down with dogs and was apprehended later. (ROA page 1202; Tr. page 1202, lines 13-21). When he was found and led into the police car he stated "I did not shoot anybody." (ROA page 1238; Tr. page 1238, line 22). He was taken to the police station where he was interrogated. (ROA page 1230; Tr. page 1230, line 14). Officer Scott Rockholt was seated in an interrogation room where Mr. Hughes sat with his hands to his face and stated "I'm guilty. I'm guilty." (ROA page 1251; Tr. page 1251, lines 21-22). A statement was taken, (ROA page 1263; Tr. page 1263, line 23) wherein he implicated Eric Dwayne Forney as the triggerman. (ROA page 1261; Tr. page 1261, lines 6-7).

On December 13, 1993, the state obtained indictments against Mar-

Reece Hughes for murder and armed robbery and included in that indictment is a second count of possession of a firearm in the commission of a violent crime, conspiracy and possession of a stolen vehicle. On December 13, 1993, the solicitor served notice of his intent to seek the death penalty, notice of statutory aggravating circumstances, and notice of evidence in aggravation of punishment. (See also; ROA pp.2990-2997, [Indictment of Appellant; Notice of Intent to Seek the Death Penalty; and Notice of Evidence in Aggravation]).

While in jail awaiting trial, Mar-Reece Hughes underwent a series of psychiatric evaluations and observations. He was sent for observation to the William S. Hall Psychiatric Institute (hereinafter referred to as WSHPI) from October 26, 1992 through December 22, 1992. (ROA page 1573; Tr. page 1573, lines 9-14). Upon discharge he was diagnosed with Adjustment Disorder with Depressed Mood. (ROA page 1573; Tr. page 1573, lines 19-20). He was released back into the custody of the York County Detention Center. While in the Detention Center he began visits at Catawba Mental Health through Piedmont Medical Center. (ROA page 1576; Tr. page 1576, lines 10-14) Attempts to safekeep Mr. Hughes were unsuccessful as his irrational and psychotic behavior intensified. He was regularly put into solitary confinement. (ROA page 2676; Tr. page 2676, lines 20-24) He complained of being spoken to by "little green men." (ROA page 2209; Tr.

page 2209, lines 10-13) Others in his cell block were frightened of him and described his behavior as horrifyingly irrational. (ROA page 2208; Tr. page 2208, lines 23-25)

On April 12, 1993, at the height of his psychosis, Mar-Reece Hughes slashed the throat of a fellow inmate while he slept and attacked his other two inmates with a knife. (ROA page 1966; Tr. page 1966, lines 2-17; and ROA page 1978; Tr. page 1978, lines 9-14) Inmate James Williamson died of his wounds. (ROA page 1998; Tr. page 1998, lines 22-24). Inmate Christopher Gorth was stabbed several times. (ROA page 1966; Tr. page 1966, lines 16-17). The other inmate, Richard Waldrup, was unharmed. When the prison guards arrived at the cell Mr. Hughes asked "when breakfast would be served." (ROA page 2899; Tr. page 2899, lines 17-24)

He was sent to Broad River Road Reception and Evaluation Center following this incident. He was then placed on "Death Row" at Broad River Correctional Institute for safekeeping. (ROA page 2267; Tr. page 2267, line 17) He returned to Gilliam Psychiatric Hospital in February of 1994 due to questions as to his competence, in that, he was "rambling tangentially and easily angered." (ROA page 2194; Tr. page 2194, lines 16-23; and ROA page 2267; Tr. page 2267, lines 21-24) On August 29, 1994, pursuant to Order of Judge John Hayes he was to be re-evaluated at WSHPI due to his apparent lack of competency. (ROA page 2268; Tr. page 2268, lines 8-16;

and ROA page 2271; Tr. page 2271, line 1-2).

After being evaluated at WSHPI, Mar-Reece Hughes was diagnosed by all three psychiatrists, two of whom represented and were retained by the state of South Carolina, as suffering from paranoid schizophrenia (ROA page 2272; Tr. page 2272, line 6-16). All three psychiatrists believed that he was not criminally responsible in the murder of Mr. Williamson in that he was insane and could not comprehend the culpability of his conduct. (ROA page 2211; Tr. page 2211, line 8-9) It was stated in their report of findings that Mr. Hughes was "beyond conforming his conduct to right or wrong due to his severity and inability to control his mental illness." (ROA 2275; Tr. page 2275, lines 12-14)

After the appointment and release of 9 attorneys to represent Mr. Hughes from September of 1992, the trial was ready to proceed in September of 1995.¹ Judge Hayes held pretrial motions and in camera hearings from September 7 through September 8 and September 14, 1995. There were over 50 motions filed by the defense. Judge Hayes denied the appellant's motion to suppress the second murder. (See also; ROA page 3100-3102, [motion to suppress the second murder]). It was his finding that

¹ List of Attorney's appointed to represent Mar-Reece Hughes include Yale Zamore, Edward Jackson, Tom McKinney, Kenneth M. Robinson, Donald M. Brown, Jr., Alford Haselden, Richard Lewis, Terry B. Millar, Bruce M. Poore. (See Also, ROA pp. 3051-3069 [Orders of appointment and Orders relieving representation])

the second murder was evidence of the appellant's character.

Jury selection began in Aiken County on September 11, 1995 as the Appellant's prior motion for change of venue was granted by the Court. On September 8, 1995, Mar-Reece Hughes was determined to be competent to stand trial. Jury selection concluded on September 13, 1995. The guilt phase of the trial began on September 14, 1995.

In his opening statement, defense counsel told the jury, "My client has tendered a not guilty plea." (ROA page 913; Tr. page 913, lines 22-23) "He did not murder Brent McCants." (ROA page 913; Tr. page 913, lines 23-24)." He went on to state that the evidence would reveal that the person responsible for the murder of Brent McCants was not Mar-Reece Hughes but Eric Dwayne Forney. (ROA page 916; Tr. page 916, lines 9-10)

The guilt phase concluded on September 18, 1995. (ROA page 1844; Tr. page 1844, line 4). The jury having deliberated for 5 and a half hours entered a verdict on all charges of guilty. (ROA page 1838; Tr. page 1838, lines 11-12). (See also; ROA page 2998, [Jury Verdict dated September 18, 1995]). Sentencing began on September 20, 1995 after a statutory twenty-four hour waiting period. (ROA page 1862; Tr. page 1862, lines 10-13)

Evidence presented during the sentencing phase included impact evidence presented by the victim's family and character evidence of the

Appellant associated with the homicide of James Williamson. (ROA page 1848; Tr. page 1848, lines 5-9, Tr. page 2950, lines 18-22) The Appellant offered mitigating evidence of the early childhood death of his mother, his virtual abandonment by his father after his mother's death, the sexual abuse of his sisters, and the mental illness of several family members. This included an older and younger brother who also suffered from a form of schizophrenia and Mar-Reece's own isolation and ignorance of his own mental illness, paranoid schizophrenia. (ROA page 1849; Tr. page 1849, lines 1-25; and ROA page 1850; Tr. page 1850, lines 18-23)

During the sentencing phase, the state presented a parade of former jail house acquaintances of Mr. Hughes. As testimony was being taken, it was discovered by the defense that in preparation of testimony and evidence, a report was prepared by the state. This report was not offered to the Appellant despite a specif request by defense counsel for the entire report. (ROA page 1882; Tr. page 1882, lines 20-24). The first 17 pages of this SLED report was made a court exhibit.² (ROA pp.3003-3037, [SLED Report]). Several motions were filed by the defense requesting disclosure of evidence. (ROA pp. 3041-3042; 3048-3050, [Brady Motion filed August 14, 1995,

². The Sled Report contains two portions. The first seventeen pages which were made part of the record and which was not provided to attorney's for Appellant prior to court. The Sled Report also contains the subsequent pages of the report that was provided to the attorney's for the Appellant.

Motion for Production of evidence filed August 14, 1995, Motion to require SLED to provide all reports, analyses of evidence, etc, filed August 14, 1995]). The solicitor's office maintained in pretrial motions that all discovery had been submitted to the defense. (ROA page 2496; Tr. page 2496, lines 16-25; and ROA page 2497; Tr. page 2497, lines 1-19). During the sentencing phase it was discovered that there were other witnesses to the detention center assault whose names had not been provided to the defense. (ROA page 1883; Tr. page 1883, lines 2-16). Furthermore, there were findings that were made in the report that were furnished to the state's doctors, Dr. Morgan and Dr. Kohanski, but were not provided to the defense counsel or doctor. (ROA page 2342; Tr. page 2342, lines 24-25; and ROA page 2343; Tr. page 2343, lines 1-2) Defense counsel again renewed its objection to the inclusion of evidence and testimony which had not been provided to them prior to trial. (ROA page 2342; Tr. page 2342, line 17). In addition, the Defense moved for a mistrial based upon prosecutorial misconduct. These motions were denied. (ROA page 2342; Tr. page 2342, line 18).

During the sentencing phase as defense counsel was presenting compelling psychiatric testimony, the mother of the victim, Myra McCants, disrupted the courtroom by abruptly and noisily arising from her chair, grunting in disgust and exiting the courtroom in an inappropriate manner by

slamming the rear double doors of the courtroom. (ROA page 2250; Tr. page 2250, lines 20-25). Her conduct and exit was followed and mimicked by her sister. (ROA page 2251; Tr. page 2251, lines 24-25; and ROA page 2252; Tr. page 2252, lines 1-9) The attorneys for the Appellant again renewed their request for a mistrial due to the physical testimony given by the victim's mother and the obvious distraction and disdain impacted upon the jury. (ROA page 2251; Tr. page 2251, lines 22-23). The motion for mistrial was denied. (ROA page 2254; Tr. page 2254, line 12).

The Appellant did not testify during the sentencing phase. (ROA page 2339; Tr. page 2339, lines 15-18) The judge instructed the jury as to the aggravating circumstances, explaining them as being that the murder was committed while in the commission of a robbery while armed with a deadly weapon; that the murder was committed while in the commission of a larceny with the use of a deadly weapon; and murder of a law enforcement officer during or because of the performance of his official duties. (ROA page 2434; Tr. page 2434, lines 8-15).

The defense counsel had requested that the court also enter as evidence of mitigation the sentence of Eric Dwayne Forney. (ROA p. 3038, [Sentence of Eric Dwayne Forney, Case Number 93-GS-4297, dated March 10, 1994]). The court denied the entry of this evidence. (ROA page 2339; Tr. page 2339, lines 3-5) The jury deliberated for approximately

four hours, then sent a note to the courtroom stating, "We, the jury, are unable to come to a unanimous decision on the sentence to be imposed" (ROA p.3039, Written Communication from Jury to Trial Judge indicating deadlock as to the sentence to be imposed)). (ROA page 2453; Tr. page 2453, lines 10-13). The judge gave an Allen charge and instructed the jurors that it was their duty to return a sentence. (ROA pages 2455 through 2456; Tr. page 2455, lines 5-25 and Tr. page 2456, lines 1-14.)

At approximately 11:00 p.m., the Court wrote a note to the jury stating "would the jury like to continue to work tonight or break until the morning." (ROA p.3040, [written communication from trial judge to jury]) The jury recommended death at 11:30 after receiving the note from the Court. (ROA page 2458; Tr. page 2458, lines 2-3). (See also; ROA p. 3000, [Jury Sentence, dated September 20, 1995]). Before the jury, the counsel for the appellant questioned the disproportionality of the sentence in that Eric Dwayne Forney had received a life sentence. (ROA page 2462; Tr. page 2462, lines 21-25; and ROA page 2463; Tr. page 2463, lines 1-6) The judge affirmed the jury's decision and sentenced the appellant to death. (ROA page 2465; Tr. page 2465; lines 1-10). (See also; ROA p.3001 [Sentence of Appellant, dated September 20, 1995]).

ARGUMENT

The trial judge erred in admitting during the sentencing phase as "character" evidence an unadjudicated unrelated post-McCants murder in violation of the appellant's Eighth Amendment rights.

It was inevitable that the jury would reach an arbitrary finding of death for Mar-Reece Hughes when the unrelated unadjudicated murder was presented to the jury. The court created a means by which it would ensure the imposition of a sentence of death by opening a floodgate of evidence to be presented to the jurors under the guise that it was character evidence.

Black's law dictionary defines character: " 'Character' is what a man is." It defines reputation as " 'Reputation' is what he is supposed to be in what people say he is." " 'Character' depends on attributes possessed and 'reputation' on attributes which others believe one to possess." The trial judge confused reputation with character. Character evidence is relevant to prove that the only deserving penalty is death for a defendant's heinous and atrocious behavior during the commission of the crime upon which he is on trial. The State must structure its capital sentencing procedure to permit consideration of the *individual* characteristics of the offender and his crime. **Emphasis Added.** California v. Remos, 463 U.S. 992, 77 L. Ed. 2d 1171, 103 S. Ct. 3446 (1983); State v. Shaw, 273 S.C. 194, 206, 255 S.E. 2d 799,

805, (S.C. 1979).

The trial court is to protect and ensure a fair trial to an accused. That responsibility becomes even more awesome when presiding over a capital case. There is not a more important case before a court than one where the life of an individual may be taken. A capital defendant must be treated as a "uniquely individual human being." Booth v. Maryland, 482 U.S. 496, 96 L. Ed. 2d 440, 107 S.Ct. 2529 (1987), 482 U.S., at 504, 96 L.Ed. 2d 440, 107 S.C. 2529 (quoting Woodson v. North Carolina, 428 U.S. 280, 304 49 L.Ed. 2d 944, 96 S.Ct. 2978 (1976)). "Where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Zant v. Stephens, 462 U.S. 862, 77 L. Ed 2d 235, 103 S.Ct. 2733 (1983); Furman v. Georgia den. 501 U.S. 1277, 115 L.Ed. 2d 1110, 112, S.Ct. 29 (1991).

The court is to monitor the jury and minimize the potential risk that the imposition of a sentence of death will be the result of prejudice, passion or any other arbitrary factor. South Carolina Code Section 16-3-20(c). "The imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases." Lockett v. Ohio, 438 U.S. 586, 98 S.

Ct. 2954, 57 L. Ed. 2d 973 (1978). The Eighth Amendment prohibits the arbitrary imposition of the death penalty. Payne v. Tennessee, 501 U.S. 808, 115 L. Ed. 2d 720, 111 S. Ct. 2597, reh. den. 501 US 1277, 115 L. Ed. 2d 1110, 112 S. Ct. 28. "The Constitution requires a jury to make an individualized determination as to whether the defendant should be executed based on the 'character of the individual and the circumstances of the crime.'" Payne, id.; Booth, supra; (quoting Zant v. Stephens, 462 US 862, 879, 77 L.Ed. 2d 235, 103 S.Ct. 2733 (1983)).

The conclusion is unavoidable that the death sentence imposed in this case lacked not only an individualized consideration but also lacked the requisite focus on the specific circumstances of the crime.

A defendant's "character and *immediate* characteristics of the crime may constitutionally be considered, other factors are irrelevant to the capital sentencing decision unless they have 'some bearing on the defendant's personal responsibility and moral guilt.'... 'factors about which the defendant was unaware, and that were irrelevant to the decision to kill,' the Court concluded, it has nothing to do with the 'blameworthiness of a particular defendant...the victim impact evidence relates 'directly to the circumstances of the crime, the prosecution may not introduce such evidence at a capital sentencing hearing because it 'creates an impermissible risk that the capital sentencing decision will be made in an arbitrary manner.'" Zant, supra; at 505, 96 L.Ed.2d 440, 107 S.Ct. 2529.

The stabbing of James Williamson and Christopher Gorth was irrelevant to Mr. Hughes culpability, state of mind or his predisposed character at the time of

the murder of Officer Brent McCants. The defense argued that the evidence to be presented was not indicitive of Mar-Reece Hughes's character and therefore was unreliable. This conclusion was supported by the expert testimony of Dr. Harold Morgan, Dr. Renee Kohanski and Dr. Dafferlin Dupree who each found that Mar-Reece Hughes's psychosis was not indicative of character.

The following testimony supports this conclusion:

MS. BRICE: In your opinion, Doctor Morgan, was Mar-Reece Hughes' character on the night of the murder of Mr. Williamson and the assault on Mr. Gorth, were those indications of his true character or were those indications of a character based upon psychotic episode?

DR. MORGAN: I believe that at the time he was psychotic and that his behavior was under the influence of his psychosis and you have to separate out of mental illness from character, that is to say some people when they are mentally ill, particularly paranoid people, bipolar people, or manic, do extremely bizarre and often irrational and sometimes very aggressive things. But when they are, and you have to separate that from their general character, not that people with major mental illness can't have a bad character, obviously, they can have a bad character, but when they are under the influence of their illness, it is their illness that is directing their behavior, not their underlying character structure.

MS. BRICE: In your opinion, was the character of Mr. Hughes on that evening was that a reliable indication of his character?

DR. MORGAN: His behavior on that evening really does not speak to his character at all because it was in our opinion he was frankly psychotic.

(ROA pages 2868-2869; Tr. pp 2868, lines 18-25 through Tr. pp. 2869, lines 1-16).

MS. BRICE: And when someone is acting out and delusional or in a psychotic state is that a good indication or an indication as to his character?

DR. MORGAN: No.

MS. BRICE: Could you explain why?

DR. MORGAN: We all have character or personality and when we have an illness superimposed on that whether it is a physical illness, like a serious heart attack diabetes, or a psychiatric illness, we are trying to cope with that illness so when you are treating someone immediately after a serious heart attack, you might see a very passive, irritable individual, but as soon as he recovers from that and goes back to his normal life, he may be an overbearing, domineering boss. So during any acute stress it is not a time to talk about the person's overall character whether it is an acute stress of a loss or acute stress of a physical injury or an acute stress of a psychiatric injury.

MS. BRICE: Would the incident that occurred on April of 1993 be a good indicator as to Mr. Hughes' character? Would that tend to indicate what Mr. Hughes' character is?

DR MORGAN: Well, that incident was in my opinion directed by his mental illness, so I don't think that one could judge his character based on that. If you want to judge his character, you have to look at his developmental history, his work history, his adjustment, overall, not just that one point in time.

(ROA pages 2276-2277; Tr. page 2276, lines 18-25 through Tr. page 2277, lines 1-19).

This conclusion was reiterated by Dr. Kohanski.

MS. BRICE: And based upon your diagnosis of being gross psychotic and knowing the actions and behaviors that Mr. Hughes exhibited surrounding the murder and the assault on Mr. Gorth how do you think that indicates his character? How do you think that goes to his character?

DR. KOHANSKI: We can't speak about Mr. Hughes' character at that time character is something which is determined in the absence of psychosis. In a psychotic state if you feel that people are out to hurt you or out to kill you how you are interacting with the world is not a true representation of who you are.

MS. BRICE: So based on your observations and your diagnosis you would find that any character that he exhibited on that day may have been unreliable?

DR. KOHANSKI: It was not a representation of the character; it was a representation of his psychosis.

(ROA pages 2900-2901; Tr. page 2900; lines 23-25 through 2901, lines 1-

13).

MS. BRICE: And when someone is having a psychotic episode is that reflective of their character?

DR. KOHANSKI: No, it's not reflective of their character. It's reflective of a disorganized at times incoherent state."

(ROA page 2210; Tr. page 2210, lines 17-20).

Dr. Dafferlin Dupree, who testified for the defense, concurred with Dr. Kohanski and Dr. Morgan.

MS. BRICE: As to Mr. Hughes behavior and actions on the night or the day of the assault on Mr. Williamson and Mr. Gorth, were those actions and behavior were those an indication as to the character of Mr. Hughes?

DR. DUPREE: No, those actions were a direct result of mental illness and not reflective of his character.

(ROA page 2932; Tr. page 2932, lines 14-19)

The court reasoned that the jailhouse slaying was admissible evidence to illustrate Mar-Reece Hughes character. Insanity is not character. The Court in State v. Milian-Hernandez, 336 S.E. 2d 476, 287 S.C. 183 (S.C. 1985) stated that presumption of sanity is in itself insufficient to create a jury issue when the defendant has presented evidence of insanity. Psychotic behavior is an unreliable indicator of a persons character.

Even if the Court determines that the unrelated unadjudicated second murder was an indicator of character, it should have been excluded as it was not offered to show motive, knowledge, intent, or a plan or scheme on the part of the appellant. "It is well settled that evidence of other crimes is generally inadmissible to prove the bad character of the accused to show that he acted in conformity therewith. Such evidence is admissible, however, when it tends to establish (1) motive; (2) intent; (3) absence of mistake or accident; (4) a common scheme or plan or (5) identity." State v. Johnson, 306 S.C. 119, 125, 410 S.E. 2d 547 551 (S.C. 1991; State v. Lyle, 125 S.C. 406 118 S.E. 803 (1923). The unrelated jailhouse slaying should have been excluded because it lacked conformity of the criteria set forth in Johnson, supra, to render bad character evidence admissible. The jailhouse incident occurred a year and a half later. Mar-Reece Hughes lacked the mental capacity for criminal intent to murder Williamson or to assault Gorth. There was no mistake and no common scheme. The jailhouse slaying was not an identifying murder as Mr. Hughes acted out of psychosis.

The court is to properly limit the jury's consideration of additional crimes. Additional offenses are to be solely offered as evidence of the Appellant's characteristics as they may bear logical relevance to the crime upon which he is on trial. State v. Ricky George, 1996 WL 496804 (S.C.

1996). The admission of the Williamson murder to prove Mr. Hughes's character at the time of the McCant's murder is unreliable, nebulous and far reaching.

In State v. Arthur, 290 S.C. 291, 350 S.E. 2d 187 (S.C. 1986), the Court reversed the Appellant's sentence of death due to the improper admission of a hearsay affidavit. There, the solicitor introduced an arrest warrant on a murder charge that was subsequently dismissed. The Court has found that "a formal charge that was ultimately dismissed by the prosecutor is irrelevant." An adjudicated indictment where there is a possibility of acquittal should likewise be held inadmissible due to its unreliability and its overwhelming prejudicial affect upon a jury.

A "prior criminal conviction is admissible as additional evidence during the sentencing phase." *id*, 297, quoting State v. Gaskins, 284 S.C. 105, 326 S.E. 2d 132 (1985), State v. Plath, 281 S.C. 1, 313 S.E. 2d 619 (1984). Here, there was no criminal conviction of the jailhouse slaying. There was no predisposed characteristic to commit crime. Rather, the evidence merely demonstrated that Mr. Hughes was predisposed to act as an untreated delusional paranoid schizophrenic.

The standard for admission of evidence of other crimes must be clear and convincing. State v. Conyers 268 S.C. 276 233 S.E. 2d 95 (S.C. 1977); 1 Wharton's Criminal Evidence,(13th ed.) Section 263; 22A C.J.S. Criminal

Law s 690; State v. Lyle, supra. The admission of testimony that a defendant previously attempted a similar crime is not error when it is presented to prove the individual characteristic and his predisposition to commit similar crimes. State v. Stewart, 320 S.E. 2d 447, 283 S.C. 104 (1984).

"It is now the overwhelming majority rule that relevant evidence may be excluded for undue prejudice even though no specific exclusionary rule requires exclusion... We now adopt the language ...of Federal Rule of Evidence 403 that 'although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.' FED R. EVID. 403. As noted in the comment to the Federal Rule, "[u]nfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, not necessarily, an emotional one." Emphasis Added. State v. Alexander, 303 S.C. 377, 382, 401 S.E. 2d 146, 149, (S.C. 1991)

Upon admission of the slaying of Williamson and stabbing of Gorth, the jurors focus on the McCant's murder became disoriented and the reason for the sentence became clouded. Hughes was not sentenced to death for his participation in Officer McCant's murder. Rather, his death sentence was imposed due to emotion, fear and the horror jurors felt for Mr. Hughes. The sentence reached was a result of passion and prejudice. This is further

supported by the sentence of life jurors imposed upon Mar-Reece Hughes co-defendant, Eric Dwayne Forney. No additional evidence was offered by the Solicitor to elevate Mar-Reece Hughes' individual culpability beyond that of Eric Forney.

II.

The trial judge erred in not excluding inflammatory and unreliable inculpatory and impeachment evidence not made available by the prosecution to the defense, although requested, thereby denying the defendant material information necessary to the preparation of his defense in violation of SCRCP 5 and *Brady v. Maryland*, 37 U.S. 83, 83 S.Ct. 1194, 10 L. Ed. 2d 215 (1963)

It is a well settled issue that an accused rights are protected and the entitlement to a fair trial was guaranteed under the Due Process Clause of the Fifth and Fourteenth Amendments to the Constitution. Today, the notions of justice and fair play are often surrendered to the manipulations of a prosecutor whose only objective is to gain a conviction. The prosecution practiced selective discovery in deciding which evidence to provide to defense counsel based on whim and fancy. Conformity with the doctrines of fundamental fairness was not practiced by the prosecution, creating fundamental unfairness to the Appellant. The trial court failed to guarantee and safeguard Mar-Reece Hughes' constitutional right to have access to evidence, instead, it rewarded the prosecution's deception.

The state must disclose "evidence in its possession which is favorable to the accused and material either to *guilt or punishment*." Emphasis added. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L. Ed. 2d 215(1963). Unlike *Brady*, the evidence suppressed by the solicitor was material to guilt and punishment.

In United States v. Agurs, 427 U.S. 97, 106, 49 L.Ed. 2d 342, 351, 96 S.Ct. 2392 (1976), the court elaborated on its Brady ruling and made specific findings as to what constituted a material suppression prejudicial to an accused. It held that there is:

"[N]o duty to provide the defense counsel with unlimited discovery of everything known by the prosecutor, if the subject matter of a request is material, or indeed if a substantial basis for claiming materiality exists it is reasonable to require the prosecutor to respond either by furnishing the information or by submitting the problem to the trial judge. When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable."

Mar-Reece Hughes demanded disclosure in no less than five motions. The requests for disclosure were specific. Those motions include a general Brady motion, a motion for continuance for failure to provide the defense with the "substance of any oral statements allegedly made by the Defendant to any prosecution agent or any other person (filed August 14, 1995), a motion for a list of prosecution witnesses (filed August 14, 1995), a motion for production of "all information regarding any alleged oral statement made by the Defendant including the contents of the statement, to whom the statement was made, and when the statement was made and a list of witnesses intended to be called by the Solicitor's office to testify regarding any alleged oral statement (filed August 14, 1995), and a motion to require

SLED to provide all reports and analyses of evidence, filed August 14, 1995. (ROA pp.3041-3050).

Proper and specific notice was provided to the solicitor. The solicitor made a conscience and independent decision not only to deprive the defendant of his constitutional rights but also to willfully and intentionally conceal witnesses and their testimony during the in camera hearings. The solicitor was motivated by his primary interest in ambushing the defense and obtaining a death penalty conviction.

The solicitor made available to the defense a portion of a SLED report. The report furnished was incomplete, in that, the first 17 pages of the report were withheld. The segregated first 17 pages contained incriminating oral statements made by Mar-Reece Hughes, a list of witnesses who may have heard those statements, when those statements were made, what Mar-Reece Hughes's conduct was like at the time the statements were made, and impeachment evidence. This information was vital to the defenses' ability to determine his voluntariness of the statements and to lead to new witness information.

The disclosed SLED report contained written statements of witnesses describing incidents surrounding the jailhouse assault. The undisclosed report contained additional witnesses who gave varying and comprehensive statements relevant to the appellant's state of mind and sanity when the

statements were made. This undisclosed information was material to the finding of guilt and the imposition of Mar-Reece Hughes's punishment. The undisclosed information also contained impeachment testimony. It contained impeachment evidence for those witnesses that were called and included additional witnesses who the defense could have called to testify for additional impeachment evidence.

The lack of disclosure rises above harmless error and smacks of fraud, deceit and misrepresentation. The outcome of this misrepresentation is an improper sentence of death for Mar-Reece Hughes. The Solicitor repeatedly affirmed to the defense and to the court that the entire SLED report had been furnished. This was a lie. The solicitor knew it was a lie. However, the defense had no choice but to believe that the entire report had been provided based on the numerous declarations made by the prosecution that they had conformed with Brady.

This deceit handicapped the defense by effectively frustrating their ability to adequately prepare cross examination, to prepare their defense, to investigate the witnesses who did testify, to investigate those witnesses who did not testify and why, to impeach witnesses (as many were jailhouse inmates) or to determine the veracity and reliability of those who did testify.

Evidence which may be used to impeach a witness's credibility is favorable to an accused under Brady. State v. Hinson, 293 S.C. 406, 361 S.E. 2d 120

(S.C. 1987); Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L. Ed. 2d 104 (1972).

In United States v. Bagley, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L. Ed. 2d 481, 490 (1985) the prosecutor failed to disclose evidence that the defense might have used to impeach witnesses. The undisclosed SLED report contained impeachment evidence, particularly as to Harold Jennings, in regards to Mr. Hughes' lack of sanity and reliability at the time the incriminating statements were made. The Court in Bagley set forth a standard of materiality:

"The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome.

The Government notes that an incomplete response to a specific request not only deprives the defense of certain evidence, but also has the effect of representing to the defense that the evidence does not exist. In reliance on the misleading representation, the defense might abandon lines of independent investigation, defenses, or trial strategies that it otherwise would have pursued.

And the more specifically the defense requests certain evidence, thus putting the prosecutor on notice of its value, the more reasonable it is for the defense to assume from the nondisclosure that the evidence does not exist, and to make pretrial and trial decisions on the basis of this assumption.

The reviewing court should assess the possibility that such effect might have occurred in light of the totality of the

circumstances and with an awareness of the difficulty of reconstructing in a post-trial proceeding the course that the defense and the trial would have taken had the defense not been misled by the prosecutor's incomplete response."

Bagley, supra., U.S., 682, L. Ed. 494. Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S.Ct. 2052 (1984).

In an effort to circumvent SCRCrimP 5, the solicitor made a conscience decision as to whose statements would be transcribed and whose statements would not. The concern was disclosure. The solicitor deliberately and carefully chose the witness statements to be transcribed. Selected statements were written and provided. Why were all statements were not transcribed, particularly, those who the solicitor knew he would call to testify? The answer rests in the solicitor's motivation. The motivation was not to protect privacy and the integrity of their investigation. The motivation was to prevent and avoid disclosure of impeachment evidence.

This is evidenced in the following colloquy:

MR. POPE: Your Honor, my understanding is that SLED did an investigation of the jail murder, a standard SLED investigation, and that was turned over in its entirety to the defense.

(ROA page 1856; Tr. page 1856, lines 4-7).

THE COURT: The State is saying they have given you all they have. I'm going to ask them

to make a diligent search of their file to make sure that they have, in fact, given all statements.

(ROA page 1856; Tr. page 1856, lines 21-24)

MS. BRICE: What I am concerned about Your Honor is...the fact that these statements were unreliable due to his mental illness and I think that it would certainly help the defense, it would make us more effective in defending Mr. Hughes to present a full picture as to whether or not he was sane at the time of the second murder.

(ROA page 1858; Tr. page 1858, lines 7-14)

THE COURT: The whole request for this has to do with the ability of the experts to accurately diagnose Mr. Hughes, is that correct?

(ROA page 2346; Tr. page 2346, lines 23-25)

MS. BRICE: No sir, I don't think so and the reason why is because it is our position that they should have provided us with exculpatory evidence going to the fact that there were other persons that had given statements to the SLED Officer. We did not know about the statements that were within that summary and it is my position that it should have been provided to us....It is my understanding I am entitled to exculpatory evidence by the Rules and it should have been provided to me. I don't think I should have been limited in my ability to speak with select persons that the Solicitor's Office is saying that I should or should not talk to. They made a decision themselves I should not talk to these people.

(ROA page 2347-2348; Tr. page 2347, lines 3-9; Tr. page 2347, lines 22-25 through Tr. page 2348 lines 1-4).

Ms. Brice made the additional argument on this violation:

MS. BRICE: Your Honor, I have had during this break the opportunity to review the SLED Report that was provided prior to the jury coming in this morning. Your Honor, I have not been provided with the written Report of the SLED Department. There were, in fact, three statements that were given which all show the fact that my client was insane at the time of the offense. I asked our psychiatrist if she had had possession of these records previous to my looking at it today. She saw it for the first time approximately five minutes ago. There were three witnesses, one being a John H. Walker, who in this report stated that during several conversations with Mar-Reece his little man would come and go. Harry Jennings, the fellow that testified earlier, talked about the little green man that Mar-Reece saw.. Another person by the name of James Gaithers, also relayed information that he would talk to little green man and everyone in the cell was calling him crazy. Your Honor, as an officer of the court, I am telling you I do not have these reports. It clearly goes to the fact that we were posing back in the Motion hearings on Thursday and Friday in regards to our client's mental capacity or lack thereof at the time of the second murder and ...we are finally seeing it for the first time before we go forward with an aggravation phase.

(ROA page 1882; Tr. page 1882, lines 20-25 through 1883, lines 1-22).

In State v. Gill, 319S.C. 283, 460 S.E. 2d 412 (S.C. App. 1995), aff'd as modified, 489 S.E. 2d 478 (S.C. 1997), the court stated that a defense was not entitled to a SLED summary as Rule 5(a)(1)(C), SCRCrimP, specifically excludes discovery or inspection of "reports, memoranda or

other internal prosecution documents made by...prosecution agents in connection with the investigation or prosecution of the case." However unlike Gill, Mar-Reece Hughes was given a portion of the summary report by prosecution. It is the appellant's position that if a part of a SLED report was made available then it all should have been made available. If the appellant was not entitled to the entire report, then the prosecution should have made known to the defense that they were only receiving a portion of the report so the matter could have been resolved by the court rather than the discretion of the prosecution. The prosecution should never have made the representation that the entire report had been provided knowing that to be untrue. Mr. Hughes and his counsel had every reason to believe that the report received was complete.

The SLED report which was furnished was not numbered. The defense's requests for discovery of witnesses and statements were silenced upon receipt of what the defense believed to be a complete SLED report. The defense believed the report contained all the statements and witnesses of the prosecution. This false belief resulted in an abandoning areas of independent investigation. It was reasonable for the defense to assume that the withheld information and witness statements did not exist. The presentation, preparation and investigation by the defense would have been substantially and materially different had they not been led to believe they

had all information. The conclusion is inescapable that the trial as well as the defenses' presentation, investigation and preparation would have taken a different direction had the defense been provided with the complete report.

The fraud and misrepresentation of the State resulted in a deprivation of the Appellant's right to a fair trial guaranteed under the Due Process Clause of the Fifth and Fourteenth Amendments to the Constitution. There was no fundamental notion of fair play. Therefore, there was no justice. "Where there has been a suppression of evidence which results in the deprivation of the defendant's right to a fair trial a reversal will result."

Hinson, supra., .

III.

The trial judge erred in failing to exclude incriminating delusional and spontaneous statements which were given during the height of appellant's psychosis as they were not credible, voluntary or intelligently made.

The Fourteenth Amendment forbids the use of involuntary confessions that are obtained in a coercive manner. Mar-Reece Hughes concedes that statements made at the time of arrest were voluntary. However, the incriminating spontaneous statements made during the height of his psychosis were involuntary and unreliable. Yet, they were admitted as evidence of his guilt in the murder of Brent McCants. This admission was error.

There was a specific finding that the custodial and pre-custodial confessions were voluntary. The trial judge specifically addressed why he considered those statements voluntary. However, the trial judge failed to address why the statements which were made during the height of psychosis were voluntary and reliable.

The statements in question are as follows:

KEVIN BRACKETT: In the middle of February did you have occasion to hear a conversation between some inmates regarding drinking and partying and that sort of thing?

HARRY LEWIS JENNINGS, JR.: Yes, sir.

KEVIN BRACKETT: And what did Mr. Hughes say?

HARRY LEWIS JENNINGS, JR.: He said the greatest feeling he ever had was when he shot that cop.

(ROA page 1494-1495; Tr. page 1494; lines 15-18 through Tr. page 1495; lines 3-5)

KEVIN BRACKETT: Sir, I am going to call your attention specifically to the middle of February back in 1993. Sometime in February, 1993, did you have occasion, sir, to remove Mr. Hughes from his cell.

BROADUS LEE STRAIN: Yes, sir.

(ROA page 1519; Tr. page 1519, lines 17-21)

KEVIN BRACKETT: All right, once he was in the cell did you have an occasion to overhear Mr. Hughes talking?

BROADUS LEE STRAIN: Yes, sir, he said he was going to kill him another white boy.

(ROA page 1520; Tr. page 1520, lines 12-13 and Tr. page 1520 lines 21-22).

Once a trial judge determines that a statement is voluntary, the trial judge must support that determination by giving the basis for those findings. Emphasis added. State v. Callahan, 263 S.C. 35, 208 S.E. 2d 284 (S.C. 1974). The record is void of reasoning by the trial judge. In addressing the incriminating non-interrogational statements the trial court held:

"So as to those statements I find that they are voluntary and/or they were given as a result of a waiver of his Miranda warnings."

(ROA page 2967; Tr. page 2967, lines 14-17).

The trial judge failed to state what circumstances, findings or factors he considered in rendering the jail house statements voluntarily and intelligently made.

Counsel Schusterman stated:

I cannot imagine that the Supreme Court said that as long as Miranda is read to somebody that regardless of their mental condition that obviates any need for a knowing and voluntary waiver.

(ROA page 2962-2963; Tr. page 2962, lines 22-25; Tr. page 2963, line 1).

"Mental deficiency alone is not a basis for rendering a confession involuntary." State v. Tyner 273 S.C. 646, 656, 258 S.E. 2d 559, 564, (S.C. 1979) citing In Re Williams, 265 S.C. 295, 217 S.E. 2d 719 (1975). However, a conviction based upon an involuntary delusional verbalization is a deprivation of due process of law. "A confession is not admissible unless it was voluntarily made." State v. von Dohlen, 471 S.E. 2d 689 (S.C. 1996); State v. Childs, 299 S.C. 471, 385 S.E. 2d 839 (1989). The purpose behind excluding the admissibility of evidence obtained without regard to its probative value is to preserve the reliability of the verdicts issued by the trier of guilt or innocence. Jackson v. Denno, 378 U.S. 368, 12 L. Ed. 2d

908, 1 A.L.R. 3d 1205 (1964).

"A confession may be introduced into evidence upon proof of its voluntariness by a preponderance of the evidence." State v. Middleton, 295 S.C. 318, 322, 368 S.E. 2d 457, 459, (S.C. 1988); Lego v. Twomey, 404 U.S. 477, 92 S.Ct. 619, 30 L.Ed. 2d 618 (1972); State v. Neeley, 271 S.C. 33, 244 S.E. 2d 522 (1978); State v. Smith, 268 S.C. 349, 234 S.E. 2d 19 (1977). No evidence was presented by the prosecution to meet its burden of finding voluntariness. No evidence was presented by the prosecution to assist the trial judge in arriving at his finding that the incriminatory delusional statements were credible and trustworthy. Insufficient evidence was presented by the state to meet its burden of showing these statements were voluntary and credible and not part of a delusional fantasy.

The trial judge entered no findings to provide basis or reasoning as to why these psychotic utterances and declarations were knowingly, voluntarily and intelligently made. The trial judge erred in finding that delusional verbalizations are admissible voluntary statements. The trial judge also failed to provide an appropriate or complete finding. The finding entered was too general to form a proper review. Callahan, *supra*.

The same trial judge who presided over Mar-Reece Hughes also presided over Eric Dwayne Forney. When Forney attempted to admit these admissions, the trial court properly excluded them. The trial judges'

exclusion was affirmed on appeal based on the following reasoning:

"[P]roffered evidence included the following statements allegedly made by Hughes to others: 1) 'Hughes has said to me on more than one occasion that he was the one that shot and killed Deputy McCants.' (jailhouse informant); 2) '[Hughes] said he shot Brent McCants and that he would shoot any cracker.' (jailhouse informant); 3) '[Hughes] was just bragging about the way he shot the police, that he shot him in the chest and then he got out of the car and shot him in the back of the head' (jailhouse informant); 4) '[Hughes] just blurted out, I'm guilty, I'm guilty.' (investigating officer); 5) '[Hughes] said he was going to get him another white boy before they fried him.' (prison guard)." The Court held that these statements were properly excluded in the Forney trial due to questionable veracity. It further concluded "There is no independent evidence corroborating Hughes's statements that he killed McCants....Accordingly, the statement denying responsibility is in fact more trustworthy than the incriminating statements to jailhouse information. State v. Forney, 468 S.E. 2d 641, 644-645, (S.C. 1996); United States v. Guillette, 547 F.2d 743 (2d Cir. 1976).

Logical reasoning would dictate that if these statements were not admissible due to questionable credibility and trustworthiness during the trial of the co-defendant Eric Dwayne Forney, these statements would likewise be inadmissible for the same reasons during the trial of Mar-Reece Hughes. As in Forney's trial, there was no independent evidence corroborating that Hughes killed McCant's.

On appeal, the conclusion of the trial judge as to the voluntariness of a confession will not be reviewed unless so erroneous as to show abuse of discretion." Von Dohlen, supra, 695; State v. Livingston, 223 S.C. 1, 73

S.E. 2d 850 (1952), cert. denied, 345 U.S. 959, 73 S.Ct. 944, 97 L.Ed. 1379 (1953). The lack of evidence presented to meet the standard that statements are voluntary and credible and the trial judge's absence of any basis or reasoning as to why the declarations were knowingly, voluntarily and intelligently made, coupled with this same trial judge's ruling of inadmissibility in the trial of the codefendant, renders the ruling erroneous and a blatant abuse of discretion. Here, the determination as to the voluntariness was left to the jury. The failure by the trial judge to make a reliable finding as to voluntariness resulted in the violation of the Appellant's right to due process.

IV

The trial judge erred in failing to instruct the jury as to the life sentence of the appellant's codefendant, Eric Dwayne Forney, as a mitigating factor.

Eric Dwayne Forney was sentenced to life for the murder of Brent McCants on March 10, 1994. (ROA p.3038, [Sentence of Eric Dwayne Forney, Case Number 93-GS-46-4297, dated March 10, 1994]). The defense attempted to enter into evidence Forney's sentence of life as a statutory mitigating circumstance to be considered by the jury in evaluating the life or death sentence of Mar-Reece Hughes. (ROA page 2334; Tr. page 2334, line 17). Its admission into evidence was improperly denied. The trial judge has the duty to review all statutory mitigating circumstances and instruct the jury as to any which may be supported by the evidence and not merely those which are requested by the defendant. S.C. Code Ann. Section 16-3-20 (C)(1976). The admission of co-defendant Eric Dwayne Forney's life sentence was supported by the evidence.

To find Mar-Reece Hughes guilty of Brent McCant's murder, the prosecution relied upon the legal theory that the "hand of one is the hand of all." (ROA page 1746; Tr. page 1746, line 16). It was the prosecution's position during the guilt phase that the actors could not be segregated based upon their individual participation and culpability during the commission

of the crime. Yet, the prosecution changed this position during the sentencing phase and argued that codefendant's participation, culpability and sentence bore no relationship to that of Mar-Reece Hughes.

While the appellant recognizes that a capital defendant must be treated as a uniquely individualized human being thereby focusing a jury's attention upon him, it is illogical and inconceivable to find it rational to exclude evidence which directly correlates to the circumstances of the crime and the potential individual culpability of the accused. The trial judge should have allowed the jury to consider the codefendant's life sentence as but one factor in totality of the circumstances to base a finding of life or death. Unlike the guilt phase of the trial, in the sentencing phase, particularly where the death penalty is being considered, each participant's individual culpability is material to the imposition of the death penalty. Justice requires a presentation of the truth to the fact finder.

In making a determination of which mitigating circumstances have evidentiary support, the statute directs the trial court not to interfere with the jury's province and is not to withhold aggravating or mitigating circumstances which may be supported by the evidence. State v. Plath, 281 S.C. 1, 313 S.E. 2d 619 (S.C. 1984), Williams v. State, 237 Ga. 399, 228 S.E. 2d 806 (1976), State v. Humphries, 479 S.E. 2d 52 (S.C. 1996); State v. Victor, 300 S.C. 220, 387 S.E. 2d 248 (1989). Attorney Schusterman

argued:

"...[W]e acknowledge the fact that they can give a life sentence for any reason or no reason at all, and we are invading their province to then begin telling them, well, isn't this an entire different situation...So as an overall umbrella under a mitigating circumstance for the jury to know that this man received a life sentence they may categorically reject that, they may say well, yes, Mr. Forney didn't do the shooting, we think Mr. Hughes did, and reject it, but they may not and I submit that is not for the court to determine, but for the jury to make a determination as to the total facts and situation and that they make a fully informed decision."

(ROA page 2338-2339; Tr. page 2338, lines 11-25 through Tr. page. 2339, lines 1-2).

In deciding which statutory mitigating circumstances may be supported, the trial judge is concerned only with the existence of the evidence, not its weight. State v. Bellamy, 293 S.C. 103, 359 S.E. 2d 63 (S.C. 1987); State v. Pierce, 289 S.C. 430, 346 S.E. 2d 707 (1986); State v. Butler, 277 S.C. 452, 290 S.E. 2d 1 (1982). "The trial judge has a duty to review the statutory mitigating circumstances and submit any which may be supported by the evidence. State v. Johnson, 306 S.C. 119, 135, 410 S.E. 2d 547, 557 (S.C. 1991). The culpability of Eric Dwayne Forney was in evidence. His verdict, likewise should have been introduced as evidence in mitigation.

The construction of S.C.Code Ann. Section 16-3-25 (1976) is

consistent with the constitutional requirement of Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L. Ed. 2d 1 (1982) and Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 2964-2965, 57 L. Ed. 2d 973 (1978) which held: "...[T]hat the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, 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." State v. Hyman, 276 S.C. 559, 570, 281 S.E. 2d 209, 215 (S.C. 1981).

The jury should have been able to consider that Mar-Reece Hughes's codefendant received a life sentence for his participation in Brent McCant's murder. For Mar-Reece Hughes, the admission of the codefendant's sentence could have been a double-edged sword. It could have been found by the jury that the life sentence of the codefendant is justification of a sentence of death for Mr. Hughes. Or, it could have been found by the jury that the life sentence of the codefendant warranted a sentence of life for Mar-Reece Hughes due to his lesser degree of participation. When the choice is between life and death, the Eighth Amendment bars any sentencing procedure which creates a risk that the death penalty will be imposed; especially when there may be factors that call for a less severe penalty. State v. Stewart, 288 S.C. 232, 341 S.E. 2d 789, (S.C. 1986)

The weight of Mr. Forney's sentence as a factor for the imposition of the sentence of death should have been considered. The jury was prohibited during the sentencing phase from making a true choice between life and death. By excluding Eric Dwayne Forney's sentence, the trial court minimized the risk that a life sentence would be returned. The trial court violated Mar-Reece Hughes constitutional right with its exclusion. There is a chance that the death penalty would not have been imposed had the jury been able to consider that the codefendant received a life sentence. A verdict can not speak the truth when the truth has been muted. By excluding evidence of Mar-Reece Hughes's co-defendant's sentence, the trial court robbed the jury of an important mitigating factor, thus, violating his Constitutional Rights under the Eighth Amendment.

V.

The death penalty imposed upon Mar-Reece Hughes violates the Eighth and Fourteenth Amendments of the United States Constitution as it is disproportionate with regard to the sentence imposed upon the co-defendant who received a life sentence for the same crime.

The Code of Laws of South Carolina, Section 16-3-20, Cum. Supp. 1978, states that the sentences of death imposed against appellants must conform to the requirements outlined in said Section. Further, the duty falls upon the Court under Section 16-3-25, Cum. Supp. 1978, to review the entire record and transcript, the report of the trial judge, and the arguments of counsel to determine (1) whether the sentences of death were imposed under the influence of passion, prejudice, or any other arbitrary factor; (2) whether the evidence supports the sentencing authority's findings of statutory aggravating circumstances; and (3) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. The Appellant is basing his argument on the third factor.

In State v. Shaw, 255 S.E. 2d 799 (1979), the Court was unable to compare the case with any other similar cases. It stated that "there will be a first case for each type or category of capital cases that may appear and that first case necessarily cannot be compared to any other similar cases.

the first case must stand alone, otherwise comparative sentence review would be forever impossible." In the case at hand, the Court has the luxury of having comparable cases available for it to review. In fact, the case of the co-defendant, Eric Dwayne Forney, affords the Court the exact same set of facts and evidence in which to compare the proportionality of sentences imposed on each defendant. The co-defendant received a life sentence.

According to the Code of Laws of South Carolina, Section 13-3-25, whenever the death penalty is imposed, the sentence shall be reviewed. The Supreme Court of South Carolina shall consider the punishment as well as any errors and with regard to the sentence, the Court shall determine whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases. The Appellant contends that his sentence is both excessive and disproportionate in comparison to the life sentence imposed upon his co-defendant. the Appellant recognizes that the mere fact that he received a more severe sentence than did other defendants does not render the punishment cruel and unusual. For example, the Court in People v. Johnson, 47 Ca. 3d 1194, 255 Cal. Rptr. 569, 767 P.2d 1047 (1989), held that the defendant's sentence was not disproportionate to that of his co-defendant. However, in this case, the Defendant was found to be the actual killer, and the co-defendant, who was merely an accomplice, receiving a negotiated sentence in return for an agreement to testify. In the case at

hand, the Appellant was never tried solely on the exact role in the crime; rather, he was tried under the felony murder rule under the concept of the "hand of one is the hand of all." therefore, the jury was not asked to determine the Appellant's individual culpability. If the co-defendant received a life sentence for the same degree of culpability as that of the Appellant, the Appellant, in this case, should have received the same sentence. Furthermore, the Appellant cites State v. Gregory, 340 N.C. 365, 459 S.E. 2d 638 (1995), where the Court held that the sentences of death imposed upon a defendant was not disproportionate to the penalty imposed upon the co-defendant where the co-defendant pleaded guilty to non-capital offenses for his participation in the same crimes in return for his truthful testimony against the defendant. Additionally, the details of the plea bargain were before the jury and the co-defendant was cross-examined about the sentence he would receive, enabling the jury to consider this evidence as a mitigating circumstance. The jury in Appellant's trial was not made aware of the sentence of the co-defendant and the co-defendant was not available for cross examination by the defense counsel, making the ultimate sentencing of the jury in violation of the Eighth and Fourteenth amendments as disproportionate to that of the co-defendant. According to the opinions of Justice Brennan, Justice Marshall, Justice Blackmun, and Justice Stevens, in Tison v. Arizona, 481 U.S. 137, 95 L.Ed. 127, 107 S.Ct. 1676, "the

Court's failure to examine the full range of relevant evidence is troubling not simply because of what that examination would have revealed, but because until today such an examination has been treated as constitutionally required whenever the Court undertakes to determine whether a given punishment is disproportionate to the severity of a given crime." In Solem v. Helm, 463 U.S. 277, 292, 77 L.Ed. 2d 637, 103 S.Ct. 3001 (1983), the Court summarized the essence of such an inquiry: "In sum, a court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." South Carolina holds an individual strictly liable for killing under a felony murder rule, regardless of the actual role the defendant plays in the crime. Here, the Appellant's actual role in the crime was not determined and he was sentenced based solely on his presence at the crime scene. In reversing the Florida Supreme Court, in Enmund v. State, 399 So. 2d 1362 (1981), the Supreme Court took note of the "overwhelming evidence" of society's rejection of the death penalty for accomplice liability in felony murders." 458 U.S., at 794, 73 L.Ed. 2d 1140, 102 S.Ct. 3368. The Court observed that, in imposing the death penalty upon Enmund, the Florida Supreme Court had failed to focus on

"Enmunds own conduct...[and] on his culpability." *Id.*, at 798, 73 L.Ed. 2d 1140, 102 S.Ct. 3368. The Court then explained, and rejected, the felony-murder doctrine as a theory of capital culpability. "Enmund did not kill or intend to kill and thus his culpability is plainly different from that of the robbers who killed; yet the State treated them alike and attributed to Enmund the culpability of those who killed the Kerseys. This was impermissible under the Eighth Amendment." *Ibid.*

In the case at hand, there was no testimony proving that the Appellant was the shooter. In fact, the Appellant took the stand and testified that the co-defendant was the person responsible for the murder. Furthermore, other relevant testimony included a time line and testimony placing the weapon in the hands of the co-defendant during the hours leading up to the shooting and then following the shooting. Therefore, the individual culpability of the Appellant was not considered.

The Framers of the Constitution provided in the Eighth Amendment the limiting principles otherwise absent in the prevailing theories of punishment. Once such principle is that the States may not impose punishment that is disproportionate to the severity of the offense or to the individual's own culpability. In light of this, the sentence of death is completely disproportionate to that of the co-defendant, Eric Dwayne Forney, and in violation of Mar-Reece Hughes Eighth Amendment Rights.

VI.

The trial judge erred in failing to grant a mistrial due to the prejudicial emotional courtroom outburst performed by the mother of the victim during the appellant's presentation of critical and complex psychiatric testimony during the sentencing phase.

Common sense dictates that a defendant is entitled to a calm and rational judicial atmosphere during his trial. This calm is necessary to minimize the possibility that a verdict will be rendered on emotion rather than reason. Generally, misconduct of a spectator during a criminal trial is not deemed sufficient to grant a new trial unless an accused's rights are prejudiced. The courtroom lost its rational and judicial integrity when it became a stage for the antics of Myra McCant's, the mother of the victim.

The Court: I would like the record to reflect, and it has been called to my attention, but it didn't have to be, that about 5:04 during the testimony of Doctor Kohanski, while she was being cross examined by the Solicitor, the decedent's mother arose from her seat, walked hurriedly and deliberately to the back of the courtroom, flung open the glass panel inner door and before they had time to close, hit the latch on the outer wooden door causing it to make a very loud sound sounding like a door was being slammed. I did observe that and as soon as that happened a Motion was timely made at the bench by counsel for the defendant for a mistrial.

(ROA page 2250-2251, Tr. page 2250; lines 15-25 through Tr. page 2251;

lines 1-3).

Mr. Schusterman further elaborated on the court's findings:

MR SCHUSTERMAN: I will tell the court that as an officer of the court that when that second loud noise was heard, the second door opening, that fourteen jurors turned their heads and what I find particularly disturbing about it is I think that at some point given the relationship now that Ms. McCants has thrown herself into it as being a witness, the emotional testimony of yesterday, and now her behavior today I think rises to the level as to commenting on the facts that are coming into the court's deliberation and that would be the basis for the mistrial. It's not merely court conduct, but at some point a person can hold such a role within a trial as she had in this particular case the court will note.

THE COURT: Let me also say, I neglected to say, that another lady who I think was earlier identified as her sister, who has been sitting with her, a lady with silver gray hair, exited right behind her with about the same speed of exit and my thought was sort of yours it was very much it appeared to the court to be a non-verbal expression, which I characterized as quite a few things, in regards to the testimony of the witness, but suffice it to say, the implication was certainly negative. I will say no more than that about the various adjectives that come to mind."

(ROA pages 2251-2252; Tr. page 2251, lines 5-25 through Tr. page 2252

lines 1-9)

Ms. McCants's contempt for the defendant became all too clear when

she chose, before the jury, to abruptly vacate the courtroom during the vital psychiatric testimony of Dr. Kohanski. As the jurors turned their heads and watched this mother leave the courtroom in disgust and contempt, obviously showing her disbelief in the testimony being rendered which was a vital mitigating factor substantiated by accredited professionals, they became prejudiced. Ms. McCant's was testifying through her actions as to her opinion of Dr. Kohanski's testimony. Her physical testimony communicated that she did not approve of, nor did she believe what was being presented. The implication and impact upon the jury was negative. It is the duty of the trial judge to see that the integrity of his court is not obstructed by any person or persons whatsoever. Shearer v. Dishon, 240 S.C, 472, 126 S.E. 2d 514 (1962). Ms. McCant's actions obstructed the integrity of the courtroom, and the condonation of those actions by the trial judge prejudiced the rights of the Appellant.

This outburst was calculated to have a specific effect upon the jury. Her message was one of hate, contempt and malice. It was deliberate, not spontaneous. Ms. McCants had already participated and spectated in the previous trial of the co-defendant and, no doubt, knew that her conduct would serve to prejudice the jury. The court recognized the negative effect upon the jury. It was obvious that the jury did not ignore this eruption. The entire courtroom felt the impact as though it were an exclamation point

at the end of a sentence. All those present sensed the contempt of Ms. McCants not only for the testimony, but also for the entire proceeding and Mar-Reece Hughes.

It is reasonable, then, to conclude that the emotional outburst affected the jury's verdict. In State v. Stewart, 295 S.E. 2d 627, 278 S.C. 296 (S.C. 1982) the Court, in addressing whether an emotional outburst warranted a mistrial found that there must first be an investigation into whether or not there was a prejudicial effect upon the jury. The court concluded that there was a negative impact upon the jury due to the non-verbal testimony. The appellant would submit that such an outburst results in not only a negative impact but also a prejudicial effect upon a jury.

Ms. McCant's outburst assisted in preventing the Appellant from having a fair and impartial trial. Ms. McCants diverted attention away from the sympathetic and sensitive testimony being presented in favor of the accused. Ms. McCant's behavior was angry and hostile. Her conduct served as a commentary to influence the jury about her impression of a witness's credibility.

It appears that although the judge was aware of the prejudicial effect upon individual jurors, the return of a sentence was more important. The priority of delivering a potentially tainted sentence was superior to the importance of preserving the sanctity of the courtroom and justice for the

Appellant.

The right to a fair trial by an impartial jury in a criminal prosecution is guaranteed by the Sixth Amendment to the U.S. Constitution and by Article 1, Section 14, of the S.C. Constitution. While this right does not require a "perfect" trial, the very heart of a "fair trial" embodies a disciplined courtroom wherein an accused's fate is determined solely through the exercise of calm and informed judgment." State v. Stewart, supra, 630-631. The embodiment of calm and discipline became non-existent the minute Ms. McCants created a devastating disturbance by loudly and deliberately exiting the courtroom. As a result, the Appellant's right to a fair trial was violated.

VII.

After due deliberations by the jury during the sentencing phase, the trial judge erred by giving an unduly coercive instruction to the jurors who were holding out for a life sentence.

The jury began their sentencing phase deliberations at 4:25 p.m. (ROA page 2452; Tr. page 2452, line 15). The court received a letter from the jury at 8:30 p.m. stating "We, the jury, are unable to come to a unanimous decision on the 'sentence to be imposed for the defendant. This being the case, Where do we go from here?"

The trial judge gave the following instruction:

"I can tell you all of you have a duty to consult with one another and to deliberate with a view to reaching an agreement, if this can be done without violence to any one of your individual judgments. Each of you as jurors must decide the case for yourself, but only after impartial consideration of the evidence with your fellow jurors. During the course of your continued deliberations each of you should not hesitate to re-examine your own views and change your opinion if convinced that your opinion is erroneous. Each juror who finds himself or herself to be in the minority should reconsider their views in light of the opinions of the jurors of the majority and conversely, each juror finding themselves in the majority should give equal consideration to the views of the minority."

(ROA page 2455-2456; Tr. page 2455, lines 12-25 through Tr. page 2456, lines 1-2)

The defense objected to the Allen charge as unduly coercive (Tr. 2467, lines 15-25). The jury reconvened at 9:15 p.m.. At approximately 11:00 p.m. the trial judge forwarded to the jury room an unsolicited letter which read "Would the jury like to continue to work tonight or break until in the morning? (See also; ROA p.3040 [Written communication to Jury from Trial Judge]). Obviously, the jury was still deadlocked in their deliberations. The jury returned to the courtroom at 11:30 p.m. to report its verdict. (ROA page 2458; Tr. page 2458, lines 2-3)

In Allen v. United States, 164 U.S. 492, 17 S.Ct. 154 (1896), the Supreme Court approved an instruction which required the jury to return to the jury room, reconsider their own views and those of jurors who felt differently. "Any criminal defendant, and especially any capital defendant, being tried by the jury is entitled to the uncoerced verdict of that body." Lowenfield v. Phelps, 484 U.S. 331, 108 S.Ct. 546, 552 (1988). In reviewing an Allen charge, the consideration is whether the coercive instruction by the trial judge caused a juror to abandon his or her conviction for a reason other than based on the trial or the argument of other jurors." McMillan v. State, 253 Ga. 520, 322 S.E. 2d 278 (1984); United States v. Sawyers, 423 F.2d 1335 (4th Cir. 1970).

The trial judge was not evenhanded in his charge. He focused on those jurors who held the minority view. He directed those who were in the minority to "reconsider" their convictions to those of the majority while directing the majority to merely "consider" the views of the minority. This was error. The trial judge interjected his will upon the will of the minority jurors who were holding out for a life sentence.

The individual integrity of those minority jurors holding out for a life sentence was compromised when they were charged to "reconsider" their convictions in favor of the majority. A jury is comprised of individuals who each bring with them certain beliefs and convictions. The charge requested reconsideration of individual convictions by the minority who were holding out for a life sentence. "Without reference to both sides of the coin, a strong statement of the duty of agreement may readily be construed by those jurors in the minority as requiring a deferential surrender to the views however unreasoned they may be of the majority." U.S. v. Rogers, 289 F. 2d 433, 436 (4th Cir. 1961).

The individuals who were holding out for a life sentence were further pushed by the trial judge to reach a unanimous decision when he forwarded them a note inquiring as to whether they desired to continue through the night or reconvene in the morning. This note could only serve to sway those minority jurors to the belief that they would not be able to go

home or leave the jury room without first coming to some consensus with the majority. They were led to believe there would be no finality, thus, sided with the majority so as to fulfill their duties as jurors. This unsolicited communication was wrong because it influenced the minority jurors to return a verdict. A verdict was entered 30 minutes after receipt of the written communication from the trial judge.

This written message failed to inquire as to whether the jury was still deadlocked. It should also be noted that upon polling the jury members, several were openly crying and one juror hesitated for quite some time before raising his hand to indicate that the death penalty was, in fact, his verdict. This emotional display by the jurors gives weight to the notion that the instructions given by the judge, coupled with his subsequent actions, served to coerce the jury into an unanimous decision.

The influence of the court upon the individuals in the minority to reconsider their convictions diminished the credibility of the unanimous verdict. The will of the individual minority jurors who held out for a life sentence was overborne by the will of the trial judge. The coercive charge lessened the probability that the verdict returned was one based upon the evidence of trial and argument of jurors rather than the will of the trial judge. Under the circumstances of this case, the instruction given by the trial judge, along with the written communication two hours later, served to

be unduly coercive of those minority jurors holding out for a sentence of life.

CONCLUSION

The trial judge erred in admitting evidence of an unadjudicated, unrelated murder as "character" evidence in violation of the Appellant's Eighth Amendment Rights. The stabbing of James Williamson and Christopher Gorth was irrelevant to the culpability of the Appellant, as there was sufficient testimony by expert witnesses, that this crime was not indicative of the Appellant's "character", in that the Appellant was acting under a delusional and psychotic state. Psychotic behavior is an unreliable indicator of a persons character. Furthermore, this evidence was not offered to show motive, knowledge, intent, or a plan or scheme on the part of the Appellant. The unrelated murder should have been excluded as it lacked conformity to the criteria set forth by case law. Even if this murder met the criteria to render it admissible as "character evidence", the fact that it was an unadjudicated crime where there was certainly a possibility of acquittal, makes this evidence prejudicial upon its admission to the jury. The prejudicial effect resulted in a sentence of death imposed upon the Appellant. The sentence was a product of emotion, fear and horror. The admission of the unadjudicated offense resulted in a sentence void of the requisite consideration of the individual characteristics of the Appellant.

The trial judge erred in admitting evidence not made available by the prosecution to the defense, thereby denying the Appellant material

information necessary to the preparation of his defense, in direct violation of SCRCF, Rule 5 and Brady. An accused's rights are protected and a fair trial guaranteed under the Due Process Clause of the Fifth and Fourteenth Amendments of the United States Constitution. Conformity with these rights was not practiced by the prosecution. The solicitor deliberately withheld portions of a SLED report despite numerous motions for production filed by the defense. This report contained incriminating oral statements made by the Appellant, a list of witnesses who may have heard said statements, the conduct of the Appellant at the time said statements were made and other impeachment evidence. As the defense made no less than eight motions for this material, the prosecution's conduct of withholding this information rises above harmless error. In fact, their deceit handicapped the defense to adequately prepare cross examination, to investigate those witnesses listed, to gather impeachment evidence, or to determine the veracity or reliability of those who may testify. The prosecution explained away their failure to produce this information claiming that the Rule of Evidence specifically excludes discovery of reports, memoranda or other internal prosecution documents made by the prosecution's agents in connection with an investigation of a case. This argument fails. The prosecution produced a portion of the report they claim they did not have to produce. If part of the SLED report was made available in discovery,

then the Appellant is entitled to have the entire document. Or, the prosecution should have made it known that only a portion of the report was being provided so that the matter could have been resolved by the court as opposed to the discretion of the prosecution. The prosecution, in fact, made the representation that the entire report had been provided. This fraud and misrepresentation resulted in a deprivation of the Appellant's right to a fair trial which is guaranteed under the Due Process Clause of the Fifth and Fourteenth Amendments to the Constitution.

The trial judge erred in admitting incriminating, delusional and spontaneous statements made by the Appellant at the height of his psychosis, as they were not credible, voluntary or intelligently made. Once the trial judge made the determination that these statements were voluntary, he must support that determination by giving the basis for his findings. There were no reasons or basis given for the admissibility of these statements, only that they were voluntary. However, no evidence was given to prove or even suggest that these statements were credible or trustworthy. In addition, these same statements were held inadmissible in the trial of Appellant's co-defendant, Eric Dwayne Forney.

The trial judge erred in failing to instruct the jury that the Appellant's co-defendant received a life sentence. During the guilt phase of the trial, the prosecution argued the legal theory that "the hand of one is the hand of all",

claiming that the participants in a crime cannot be segregated based on their individual involvement. However, during the sentencing phase, the prosecution argued that the co-defendant's participation, culpability and sentence bore no relationship to that of the Appellant. There is a duty to review all statutory mitigating circumstances and instruct the jury as to any which may be supported by the evidence. The culpability of Eric Dwayne Forney was in evidence. Likewise, his verdict should have been introduced into evidence as a mitigating factor. The jury should have been able to consider the co-defendant's sentence as one factor in the totality of the evidence presented in determining a sentence of life or death. In the sentencing phase of a trial, particularly where the death penalty is an issue, each person's individual culpability is material. The life sentence of the co-defendant is an important mitigating factor as the Appellant contends that his participation was that of a lesser degree.

The imposition of the death penalty is in violation of the Eighth and Fourteenth Amendments to the Consitution, if it is disproportionate. Here, the sentence of death for Mar-Reece Hughes was disproportionate to the life sentence imposed upon the co-defendant for the same crime. A sentence of death must be reviewed and deemed to be imposed without the influence of passion or prejudice. The evidence must support the findings of statutory aggravating circumstances. And finally, it must be determined whether the

sentence is excessive to the penalties imposed in similar cases. Here, we have the sentence imposed upon the co-defendant for the same crime.

There was never a determination as to the individual culpability to the Appellant. If the co-defendant received a life sentence for the same degree of culpability as the Appellant under the "hand of one is the hand of all" theory, then the proportionality of the sentences should be the same. There is no evidence or testimony proving the Appellant to be the actual shooter. Conversely, the Appellant testified on his own behalf, stating that the co-defendant was the person responsible for the death of the officer. The co-defendant did not testify at his trial. Where there is evidence that the culpability of the co-defendant was greater than that of the Appellant, the sentence should be reviewed as disproportionate. The sentence of death is a clear violation of the Eighth and Fourteenth Amendments to the Constitution as disproportionate to that of the co-defendant for the same crime and the same degree of culpability.

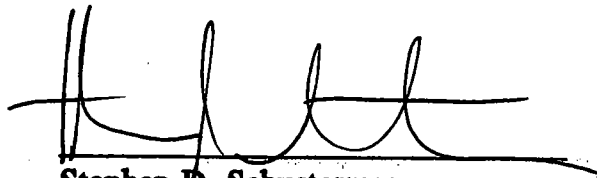
The trial judge erred in failing to declare a mistrial after a highly prejudicial, emotional outburst displayed by the victim's mother during critical and complex testimony as to the psychiatric condition of the Appellant. Ms. McCants abruptly exited the courtroom drawing the attention of the jurors away from the testimony. This outburst resulted in her communicating to the jury her disapproval and disbelief as to the

evidence being presented. The implication and impact on the jury was that of prejudice. Ms. McCants's actions were calculated. The court recognized the negative effect this outburst had on the jury. The outburst had an emotional impact on the jury's verdict. This outburst denied the Appellant from having a fair and impartial trial.

The trial judge erred by delivering an unduly coercive instruction to jurors holding out for a life sentence after they had deliberated for several hours. After sending a note to the court communicating their inability to reach a unanimous decision, over the objection of the defense, the trial judge delivered an Allen charge. The Appellant contends that this instruction was unduly coercive. The charge focused only on those jurors that were holding out for a life sentence. The charge specifically addressed the individual integrity of the minority jurors suggesting that only they should reconsider their convictions. The trial judge further pushed these minority jurors when he forwarded an unsolicited note after several more hours of deliberation asking if they wished to continue to deliberate or start again in the morning. This note, coupled with the earlier instruction swayed minority jurors away from their convictions toward the convictions held by the majority to bring some finality to the proceedings. The chain of events by the court in procuring an unanimous verdict from the jury diminished the credibility of the verdict. The convictions and beliefs of the minority jurors was

overshadowed by the will of the trial judge thereby violating the rights of the Appellants to a fair, impartial and unanimous verdict.

For the reasons stated herein, this Court is respectfully requested to reverse the decisions of the lower court and remand this matter for further determination and action.



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March 20 1998.

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM YORK COUNTY
Court of General Sessions

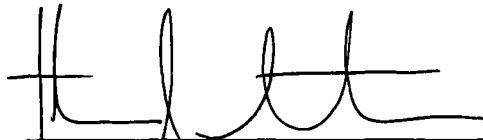
John C. Hayes, III, Circuit Court Judge

Case No.: 93-GS-46-4296
93-GS-46-4299
93-GS-46-4301
93-GS-46-4303

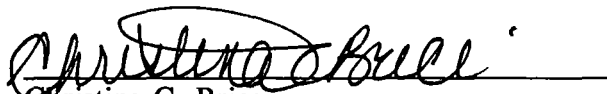
CERTIFICATE OF COUNSEL

The undersigned certify that this Final Brief complies with Rule 210 (b), South Carolina Appellate Court Rules.

March 20, 1998



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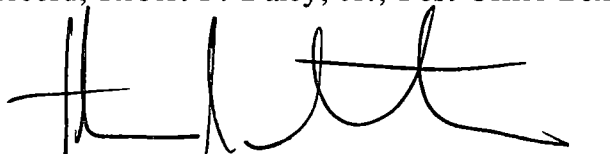
v.

Mar-Reece Aldean Hughes, ... Appellant.

CERTIFICATE OF SERVICE

The undersigned certify, they have served the Final Brief of the Appellant on The State of South Carolina by depositing a copy of it in the United States Mail, postage prepaid, on April 6, 1998 addressed to the attorney of record, Robert F. Daley, Jr., Post Office Box 11549, Columbia, South Carolina 29211.

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