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THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from York County
The Honorable John C. Hayes, III, Circuit Court Judge

THE STATE,

Respondent,

vs.

MAR-REECE ALDEAN HUGHES,

Appellant.

FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE 3

STATEMENT OF FACTS 5

A. Factual Background 5

B. Appellant's Statements 11

C. Appellant's Testimony 15

D. Additional Evidence in Aggravation 16

ARGUMENT 19

I. The trial court did not err in admitting evidence that Appellant stabbed two of his cellmates while awaiting trial when there was clear and convincing evidence that he committed the stabbing and significant evidence that he was not insane at the time of the stabbings 19

A. Factual Background 19

B. Analysis 26

II. The trial court did not err in finding that the prosecution did not violate Rule 5 of the South Carolina Rules of Civil Procedure or Brady v. Maryland when Appellant was not denied any material that would have made a difference in the outcome of the trial 33

A. Factual Background 33

1. Pre-trial Hearings 33

2. Sentencing Phase 36

B. Analysis 49

III. The trial court did not err in allowing into evidence statements made by Appellant to fellow inmates that strongly suggested that Appellant had been the shooter in the murder of Officer McCants because these statements were made without any police involvement 53

A. Factual Background 53

B. Analysis 56

IV. The trial court was correct in refusing to allow into evidence as a mitigating circumstance in the sentencing phase the fact that Appellant's co-defendant Forney received a life sentence in an earlier trial 60

A. Relevant Factual Background 60

B. Analysis 64

V. Appellant's death sentence was neither excessive nor disproportionate to the penalty imposed in similar cases, considering both the circumstances of the crime and the character of the defendant 71

VI. The trial court did not err or abuse its discretion by refusing to grant a mistrial after the victim's mother hurriedly left the courtroom during psychiatric testimony in the sentencing phase 75

A. Factual Background 75

B. Analysis 78

VII. The trial court did not abuse its discretion when it gave an Allen charge to the jury that was both evenhanded and not unduly coercive 81

A. Relevant Facts 81

B. Analysis 83

CONCLUSION 86

TABLE OF AUTHORITIES

CASES

Allen v. United States, 164 U.S. 492, 17 S.Ct. 154 (1896) 81, 82, 83, 84, 85

Anderson v. Leeke, 271 S.C. 435, 248 S.E.2d 120 (1978) 51

Barnes v. Thompson, 58 F.3d 9971 (4th Cir.), cert. denied, 116 S.Ct. 435 (1995) 50

Bell v. Lynaugh, 828 F.2d 1085 (5th Cir.), cert. denied, 484 U.S. 933, 108 S.Ct. 310 (1987) 57

Billotti v. Leqursky, 975 F.2d 113 (4th Cir. 1992), cert. denied, 507 U.S. 984 (1993) 31

Blystone v. Pennsylvania, 494 U.S. 299, 110 S.Ct. 1083 (1990) 68, 69

Boyde v. California, 494 U.S. 370, 110 S.Ct. 1190 (1990) 65

Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963) 33, 49, 50, 51

Brewer v. State, 646 N.E.2d 1382 (Ind. 1995) 58

Brogden v. Blackburn, 790 F.2d 1164 (5th Cir. 1986), cert. denied, 481 U.S. 1042, 107 S.Ct. 1985 (1987) 67, 68, 72

Brogie v. State, 695 P.2d 538 (Okl. Crim. App. 1985) 67, 68, 74

Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993) 50

Colorado v. Connelly, 479 U.S. 157, 107 S.Ct. 515 (1986) 57, 58

Com. v. Haag, 522 Pa. 388, 562 P.2d 289 (1989) 66, 70

Committee v. Williams, 541 Pa. 85, 660 A.2d 1316 (1995) 28

Coulter v. State, 438 So.2d 336 (Ala. Cr. Ap. 1982) 67, 68, 69

Crowder v. State, 491 S.E.2d 323 (Ga. 1997) 66

Dawson v. Delaware, 503 U.S. 159, 112 S.Ct. 1093 (1992) 27

DeJesus v. State, 655 A.2d 1180 (Del. 1995) 58

Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869 (1982) 67

Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368 (1982) 73, 74

Fuller v. Johnson, 114 F.3d 491 (5th Cir. 1997), cert. denied,
118 S.Ct. 399 (1997) 28

Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909 (1976) 65

Haberstroh v. State, 105 Nev. 739, 782 P.2d 1343 (1989) 27

Haney v. State, 603 So.2d 368 (Ala. Ct. Crim. 1991) 74

Hatch v. State, 58 F.3d 1447 (10th Cir. 1995), cert. denied,
116 S.Ct. 1881 (1996) 28, 71

Hatch v. State, 835 P.2d 880 (Ok. Ct. Crim. 1992) 74

Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821 (1987) 64, 66, 67

Illinois v. Perkins, 496 U.S. 292, 110 S.Ct. 2394, 110 L.Ed.2d 243
(1990) 59

In Re Lord, 123 Wash. 2d 296, 868 P.2d 835 (1994) 67

Johnson v. State, 477 So.2d 196 (Miss. 1985), rev'd on other grounds,
486 U.S. 578, 108 S.Ct. 198 (1988) 67, 68, 69, 70

Lane v. State, 933 S.W.2d 504 (Tex. Ct. Crim. 1996) 27

Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954 (1978) 64

Messer v. State, 330 So.2d 137 (Fla. 1976) 67

Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966) 54, 59

Nickel v. Hannigan, 97 F.3d 403 (10th Cir. 1996), cert. denied,
117 S.Ct. 1112 (1997) 58

Pennsylvania v. Ritchie, 480 U.S. 39, 107 S.Ct. 9889 (1987) 50

People v. Bradford, 15 Cal. 4th 1229, 939 P.2d 259 (1997) 27

People v. Dunn, 195 A.D.2d 240, 607 N.Y.S.2d 689 (1994) 58

People v. Dyer, 45 Cal. 3d 26, 753 P.2d 1 (1988) 64, 67, 68, 69, 70

People v. Medina, 11 Cal. 4th 694, 906 P.2d 2 (1995) 27

People v. Page, 156 Ill. 2d 258, 620 N.E.2d 339 (1993) 65, 66, 67, 69, 70

People v. Scott, 15 Cal. 4th 1188, 1221, 939 P.W. 354, 374 (1997) 28

Pulley v. Harris, 465 U.S. 37, 104 S.Ct. 871 (1984) 71

Purvis v. Dugger, 932 F.2d 1414 (11th Cir. 1991), cert. denied,
503 U.S. 940, 112 S.Ct. 1485 (1992) 58

Ross v. Kemp, 756 F.2d 1483 (11th Cir. 1985) 74

Saunders v. Committee, 242 Va. 107, 406 S.E.2d 39 (1991) 27

South Carolina v. Gathers, 490 U.S. 805, 109 S.Ct. 2207 (1989) 65

State v. Anderson, 322 S.C. 89, 470 S.E.2d 103 (1996) 79, 80

State v. Bailey, 298 S.C. 1, 377 S.E.2d 581 (1989) 84

State v. Blackmon, 875 S.W.2d 122 (Mo. Ct. App. 1994) 58

State v. Bond, 345 N.C. 1, 478 S.E.2d 163 (1996) 66

State v. Brogden, 457 So.2d 616 (La. 1984) 67

State v. Bryant, 307 S.C. 458, 405 S.E.2d 806 (1992) 50

State v. Callahan, 263 S.C. 35, 208 S.E.2d 284 (1974) 59

State v. Cooper, 291 S.C. 332, 353 S.E.2d 441 (1986) 64

State v. Crowley, 226 S.C. 472, 85 S.E.2d 714 (1955) 84

State v. Doby, 273 S.C. 704, 258 S.E.2d 896 (1979) 59

State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983) 67

State v. Forney, 468 S.E.2d 641 (S.C. 1996) 59, 60

State v. Gaskins, 284 S.C. 105, 326 S.E.2d 132 (1985) 28

State v. Gerald, 113 N.J. 40, 549 A.2d 792 (1988) 67

State v. Gill, 319 S.C. 283, 460 S.E.2d 417-18 (Ct. App. 1995), aff'd as modified 489 S.E.2d 478 (S.C. 1997) 49

State v. Green, 301 S.C. 347, 392 S.E.2d 157 (1990) 28

State v. Hudgins, 319 S.C. 233, 460 S.E.2d 388 (1995) 71

State v. Humphries, 325 S.C. 28, 479 S.E.2d 52 (1996) 26

State v. Ivey, 325 S.C. 137, 481 S.E.2d 125 (1997) 71

State v. Johnson, 306 S.C. 119, 410 S.E.2d 547 (1991) 71

State v. Jones, 320 S.C. 555, 466 S.E.2d 733 (Ct. App. 1996) 84, 85

State v. Knotts, 111 Ohio App. 3d 753, 677 N.E.2d 358 (1995) 58

State v. Lord, 117 Wash. 2d 829, 822 P.2d 177 (1992) 67

State v. Lunsford, 318 S.C. 241, 456 S.E.2d 918 (Ct. App. 1995) 78

State v. Lynn, 277 S.C. 222, 284 S.E.2d 786 (1981) 84

State v. Middleton, 295 S.C. 318, 368 S.E.2d 457 (1988) 28, 32

State v. Milan-Hernandez, 287 S.C. 183, 336 S.E.2d 476 (1985) 29

State v. Parker, 932 S.W.2d 945 (Tn. 1996) 51

State v. Pauling, 322 S.C. 95, 470 S.E.2d 106 (1996) 84

State v. (Perry Bush) Smith, 298 S.C. 205, 379 S.E.2d 287 (1989) 28

State v. Pleasant, 342 N.C. 366, 464 S.E.2d 284 (1995) 58

State v. Poindexter, 314 S.C. 490, 431 S.E.2d 254 (1993) 29

State v. Rimert, 315 S.C. 527, 446 S.E.2d 400 (1994) 28

State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993) 26

State v. Shaw, 273 S.C. 194, 255 S.E.2d 799 (1979) 64

State v. Simpson, 325 S.C. 37, 479 S.E.2d 57 (1996) 26

State v. Sims, 304 S.C. 409, 405 S.E.2d 377 (1991) 66

State v. Skillicorn, 944 S.W.2d 877 (Mo. 1997) 26

State v. South, 285 S.C. 529, 331 S.E.2d 775 (1985) 71, 78

State v. Stewart, 283 S.C. 104, 320 S.E.2d 447 (1984) 28

State v. Stewart, 288 S.C. 529, 331 S.E.2d 775 (1989) 69

State v. Taylor, 304 N.C. 249, 283 S.E.2d 761 (1981) 27, 28

State v. Tucker, 319 S.C. 425, 462 S.E.2d 263 (1995) 26, 83, 84

State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996) 27, 78

State v. Wagstaff, 202 S.C. 443, 25 S.E.2d 484 (1943) 79, 80

State v. Watts, 321 S.C. 158, 467 S.E.2d 272 (Ct. App. 1996) 78

State v. Whipple, 324 S.C. 43, 476 S.E.2d 683 (1996) 26

State v. (William) Bell, 305 S.C. 11, 406 S.E.2d 165 (1991) 64, 65, 66, 68, 69, 70

State v. Williams, 305 N.C. 656, 292 S.E.2d 243 (1982) 67, 68, 70

State v. Williams, 321 S.C. 327, 468 S.E.2d 626 (1996) 65

State v. Williams, 322 Or. 620, 912 P.2d 364 (1996) 27

United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375 (1985) 50

United States v. Burgos, 55 F.2d 933 (4th Cir. 1995) 85

United States v. Clark, 928 F.2d 733 (6th Cir.), cert. denied, 502 U.S. 846
(1991) 51

United States v. Cropp, 127 F.3d 354, 360 (4th Cir. 1997) 85

United States v. Gordon, 638 F. Supp. 1120 (W.D.La. 1986), aff'd, 812 F.2d 965

(5th Cir.), cert. denied, 483 U.S. 1009, 107 S.Ct. 3238 (1987) 57

United States v. Kluger, 794 F.2d 1579 (10th Cir. 1986) 51

United States v. Machlin, 900 F.2d 948 (6th Cir.), cert. denied, 498 U.S. 840, 111 S.Ct. 116 (1990) 58

United States v. Rohrback, 813 F.2d 142 (8th Cir.), cert. denied, 482 U.S. 909, 107 S.Ct. 2490, 96 L.Ed.2d 381 (1987) 57

United States v. Sawyers, 423 F.2d 1335 (4th Cir. 1970) 85

United States v. Wilson, 901 F.2d 378 (4th Cir. 1990) 51

Walton v. Arizona, 497 U.S. 639, 110 S.Ct. 3047 (1990) 65, 67, 68

White v. Wainwright, 1478, 1484 (11th Cir. 1987) 74

Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733 (1983) 64

OTHER AUTHORITIES

S.C. Code Ann. § 16-3-25 . . . . 1, 71

S.C. Code Ann. § 16-3-20(C)(b)(4)-(5) 69

S.C.R.Crim.P. Rule 5 . . . . 33, 49, 50, 52

S.C.R.Crim.P. Rule 5(a)(2) 50

STATEMENT OF ISSUES ON APPEAL

I.

Whether the trial court erred in admitting evidence that Appellant stabbed two of his cellmates while awaiting trial when there was clear and convincing evidence that he committed the stabbing and significant evidence that he was not insane at the time of the stabbings?

II.

Whether the trial court erred in finding that the prosecution did not violate Rule 5 of the South Carolina Rules of Civil Procedure or Brady v. Maryland when Appellant was not denied any material that would have made a difference in the outcome of the trial?

III.

Whether the trial court erred in allowing into evidence statements made by Appellant to fellow inmates that strongly suggested that Appellant had been the shooter in the murder of Officer McCants because these statements were made without any police involvement?

IV.

Whether the trial court was correct in refusing to allow into evidence as a mitigating circumstance in the sentencing phase the fact that Appellant's co-defendant Forney received a life sentence in an earlier trial?

V.

Whether Appellant's death sentence was excessive or disproportionate to the penalty imposed in similar cases, considering both the circumstances of the crime and the character of the defendant?

VI.

Whether the trial court erred or abused its discretion by refusing to grant a mistrial after the victim's mother hurriedly left the courtroom during psychiatric testimony in the sentencing phase?

VII.

Whether the trial court abused its discretion when it gave an Allen charge to the jury that was both evenhanded and not unduly coercive?

STATEMENT OF THE CASE

Appellant, Mar-reece Aldean Hughes, is presently confined in the Lieber Correctional Institution of the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for York County. Appellant was indicted in the December 1993 term of the Court of General Sessions for York County for murder; armed robbery; criminal conspiracy; possession of a stolen vehicle; and possession of firearm during the commission of a violent crime.

Appellant was represented by Stephen D. Schusterman, Esquire, and Christina C. Brice, Esquire. The State was represented by Thomas E. Pope, Solicitor for the Sixteenth Judicial Circuit, and Kevin S. Brackett, Deputy Solicitor for the Sixteenth Judicial Circuit.

The State served its notice to seek the death penalty and statutory aggravating circumstances on December 13, 1993. The State notified Appellant of the evidence in aggravation to be offered on January 20, 1994, April 27, 1994, and August 28, 1995. Pretrial motions were heard in the case on September 7-8, 1995.

Jury selection was conducted September 11-13, 1995. The case proceeded to trial September 14-22, 1995 before the Honorable John C. Hayes, III, Circuit Judge, and a jury. On September 18, 1995, Appellant was found guilty of all charges. The sentencing phase of the trial began on September 20, 1995. On September 22, 1995, the jury unanimously found the aggravating circumstance of "murder of a local law enforcement officer during or because of his official duties" and recommended that Appellant be sentenced to death. (R. p. 2458). Judge Hayes thereafter sentenced Appellant to death for

murder; thirty (30) years, consecutive, for armed robbery; five (5) years, consecutive, for criminal conspiracy; five (5) years, consecutive, for possession of a stolen vehicle; and five (5) years, consecutive, for possession of firearm during the commission of a violent crime.

A timely notice of intent to appeal was filed. This appeal follows.

STATEMENT OF FACTS

A. Factual Background

Deputy Brent McCants was found dead after he stopped a suspicious vehicle and was shot six times around 10:40 p.m. on September 25, 1992. Earlier that evening around eight o'clock, Sean McMillan and his girlfriend Beth Ann Jayne, both students at Davidson College, pulled into the parking lot of the Bellisimo Restaurant in Charlotte, North Carolina in her grey 1986 Buick Century, New York license tag EMF 313. As they got out of the car, two black men came from behind the restaurant, walked towards their car, and split up at the front of it, one going to Sean's side and one going to Beth Ann's side. (R. p. 918, line 10 - p. 922, line 10; p. 936, lines 4-18; p. 955, line 17 - p. 960, line 8).

Appellant's co-defendant Eric Forney, who was wearing dark sweat pants and a zip-up red hooded sweat shirt, approached Sean, pulled out a gun, put it in Sean's gut region, and said, "I want your money, get on the ground." (R. p. 926, lines 15-24; p. 960, line 4 - p. 962, line 12). Forney then pinned Sean's arm behind his back, frisked him, and took his keys, a watch, and his wallet. (R. p. 926, lines 15-24; p. 941, line 3 - p. 942, line 13; p. 962, lines 12-20).

At the same time, Appellant Hughes, who was wearing dark navy or black clothing, approached Beth Ann, told her three times not to look at him, and then led her around the car to the driver's side where she saw Sean on the ground with a gun to his head, his arm pinned to his back, and Appellant going through his pockets. (R. p. 922, line 22 - p. 924, line 18; p. 938, line 20 - p. 939, line 7).

Forney then got off of Sean, telling him that if he moved he would kill him. (R. p. 963, lines 13-23). Forney then handed Beth Ann a set of keys and told her to open the door. However, they were the wrong keys and so Forney had to get the right set from Sean. When she was finally able to get the door unlocked, Forney got in the driver's side and Appellant got in the passenger side. (R. p. 924, line 22 - p. 926, line 11; p. 963, lines 3-12). Before they drove off, Forney said, "If you move, we'll kill your whore." (R. p. 943, lines 6-20; p. 972, lines 6-13). Sean and Beth Ann then immediately called the police. (R. p. 928, lines 3-5; p. 943, lines 21-24; p. 964, lines 16-18).

After the incident, Sean identified Forney and Beth Ann identified Appellant in photographic lineups. (R. p. 929, line 20 - p. 933, line 22; p. 965, line 2 - p. 968, line 2).

Around ten o'clock on the same night, Michelle and Crystal Ayres were at the Galleria Mall Cinema which is located in the area of I-77 and Dave Lyle Boulevard. (R. p. 975, line 25 - p. 976, line 13; p. 998, lines 3-13; p. 1001, lines 21-24). Crystal, who was working the concession area, testified that two black males, one wearing a red sweat suit, came into the theater and asked if it had a drink machine. After she told them no, they both left. (R. p. 979, lines 11-20; p. 979, line 24 - p. 981, line 10; p. 989, lines 4-12). However, they then came back and asked if the box office was closed. She told them it was closed but that they could go watch a movie. (R. p. 981, lines 11-24). They then walked to where the movies were, opened up the doors, looked in, walked around, and walked back out. (R. p. 982, lines 13-25). Michelle also testified that she saw two

black males enter the theater and then leave about twenty minutes later. (R. p. 1001, line 25 - p. 1002, line 15). The next day, Crystal identified Appellant as one of the men who had come in the theater. (R. p. 983, line 1 - p. 988, line 2; p. 993, line 11 - p. 997, line 3). Michelle testified that Forney was one of the men who had come in the theater that night. (R. p. 1002, line 16 - p. 1005, line 10).

That same night, Sherrie Grimmitt was driving down Dave Lyle Boulevard when she noticed a car behind her with no headlights on. (R. p. 1036, line 16 - p. 1038, line 5). As the car went by her, she saw that two black males were riding in it. The passenger was hunched over in the car. The passenger was wearing a hooded sweatshirt. Soon thereafter she saw a police car which turned around in the median and immediately went after the car that did not have its lights on. The police car pulled the other car over. (R. p. 1037, line 18 - p. 1043, line 25; p. 1044, line 12 - p. 1045, line 13).

At 10:39 p.m. that same night, Deputy Brent McCants called in to inform dispatch that he was stopping a suspicious vehicle with license tag number EMF 313 and to request a check on whether it was stolen. (R. p. 1008, line 16 - p. 1017; p. 1020, line 3 - p. 1034, line 13). (State's Exhibit 14; State's Exhibit 11 for i.d.).

Mary Grant and her sister, Kathy Pittman, were on Dave Lyle Boulevard returning from a football game when they noticed that a police car had pulled a car over. (R. p. 1048, line 2 - p. 1050, line 18; p. 1074, line 23 - p. 1075, line 19). Both testified that they slowed down when they saw something lying beside the patrol car with two people, one crouched down like he was picking something up and the other standing but slightly bent over it. At that time, the one that was bent over looked up, pointed at them,

ran to the car, and got in on the passenger side. Shortly thereafter, the man who was crouched down got up, ran to the car, and got in on the driver's side. (R. p. 1050, line 20 - p. 1051, line 12; p. 1065, line 2 - p. 1068, line 3; p. 1070, line 11 - p. 1071, line 3; p. 1071, line 16 - p. 1072, line 14; p. 1075, line 19 - p. 1076, line 13). As the sisters got parallel to the police car, they saw that it was a patrolman lying beside the car and could tell that he was hurt, so they stopped to help. Before the car pulled away, they got the 313 portion from the license plate and Mary Grant saw that it was a late model grey four door car. (R. p. 1054, line 1 - p. 1056, line 14; p. 1077, line 18 - p. 1079, line 1; p. 1081, lines 1-18). As Mary and Kathy approached the patrolman, they saw that he had been hurt and so Kathy Pittman immediately called for help on the police radio. (R. p. 1056, line 15 - p. 1057, line 22; p. 1059, lines 16-22; p. 1081, line 1 - p. 1082, line 18).

Officer McCants was shot in the head, abdomen, and under the armpit. (R. p. 1305, line 23 - p. 1386, line 3). Although Officer McCants had been shot six times, three of the gunshot wounds were non-penetrating -- they were stopped by his safety vest. One of the fatal gunshot wounds was under Officer McCants' armpit. The bullet travelled upward going through the heart. A second gunshot wound went through the kidney, pancreas, and intestine. The final gunshot wound entered the back of Officer McCants' head. The head wound was also fatal. (R. p. 1528, line 3 - p. 1535, line 21).

At 10:42 p.m., a call for help came in to dispatch from Kathy Pittman who had found Deputy McCants shot on Dave Lyle Boulevard.

Marvin Bohon, a shift lieutenant with the York County Sheriff's Department, responded to the scene after the call for help went out. (R. p. 1088, line 17 - p. 1089, line 8). As he assisted in securing the scene, he found that Deputy McCants' walkie talkie and the ammunition clip from his san brown belt was missing, although he eventually found the clip some ten feet from McCants' body. (R. p. 1089, line 24 - p. 1099, line 6).

Timothy Sanders, a volunteer fireman with a scanner in his truck, was in the parking lot of Celebrations (a night club) that night when he heard Deputy McCants' initial radio call, which was followed by a call saying, "mayday, an officer is down on Dave Lyle." As soon as he heard the broadcast, Mr. Sanders headed toward Dave Lyle where he saw numerous blue lights and emergency officials. After deciding to go look for the suspect vehicle, he then drove to the Holiday Inn in that area where he saw two black males taking "big steps" away from the hotel parking lot. He then came upon a grey Buick with New York tag number "EMF 313" in the same parking lot, so he immediately called the police. Later, he viewed a photo lineup and identified Forney as one of the two men that he had seen walking away from the area where the car was found. (R. p. 1119, line 3 - p. 1130, line 23; p. 1134, lines 2-20).

Dan Ketchel, a reserve officer for the York County Sheriff's Department, responded to the dispatch relaying Mr. Sanders 911 call and talked with Mr. Sanders. (R. p. 1158, line 7 - p. 1160, line 20). He radioed back to the dispatcher that two black males had been seen at the Holiday Inn and identified the suspect vehicle. (R. p. 1160, line 18 - p. 1161, line 1).

At that time, Rock Hill Police Officer Craig Alexander and Officer Joe Long began searching for the suspects. Around midnight, they saw a black male with a red hooded sweat shirt and his hands in his pockets walking down the road. When they stopped in front of him, the man, who was later identified as Forney, ran. After Officer Alexander finally caught him and they were able to frisk him, they found a 9-millimeter weapon with a semi automatic clip on his lower ankle. (R. p. 1174, line 13 - p. 1184, line 20; p. 1320, line 20 - p. 1321, line 8). This gun was positively identified as the one that was used to shoot Deputy McCants. (R. p. 1467, line 23 - p. 1468, line 22). Appellant had possession of this gun in the weeks prior to the murder. (R. p. 1305, line 6 - p. 1307, line 21). The gun was loaded while in Appellant's possession. (R. p. 1308, lines 10-23). After a friend of Appellant's handled the gun in early September, 1992, Appellant wiped the friend's fingerprints off the gun because "you never know what may happen." (R. p. 1308, line 20 - p. 1309, line 10). Police did atomic absorption tests and gun powder residue tests on the hands of Appellant, Forney, and Officer McCants' body. All tests were negative. (R. pp. 1437-39).

Around the same time as Forney's arrest, Appellant was tracked down by blood hounds and the police and SLED. Appellant was found hiding behind a log on a road adjacent to where Forney was arrested. (R. p. 1201, line 1 - p. 1203, line 22). Appellant was then arrested. (R. p. 1205, line 20 - p. 1207, line 25).

Deputy McCants' walkie talkie was found in an area between the two defendants. (R. pp. 1209 - 1210). Also, a black motorolo style walkie-talkie clip which holds a

policeman's walkie-talkie was recovered from underneath the driver's side of the 1986 Buick, New York license tag EMF 313. (R. p. 1410, lines 1-8; p. 1411, lines 3-12).

Appellant's right palm print and right ring finger print were found on the gear shift of grey Buick. (R. p. 1414, lines 7-22; p. 1417, lines 15-20). In order for Appellant to have left these prints, he would have had to be sitting in the driver's seat of car and grasping the gear shift. (R. p. 1419, lines 4-9). Appellant's right little fingerprint was found on the front right passenger door handle, as well. (R. p. 1417, lines 17-21). Forney's prints were not found on the gear shift. (R. p. 1418, lines 16-18).

B. Appellant's Statements

Appellant made numerous statements to the police, the media, and fellow inmates regarding his involvement in the murder of Officer McCants. A summary of the statements of Appellant introduced by the State follows:

(1) When Appellant was resisting arrest in the woods, York County Sheriff Deputy Larry T. Devinney jumped on top of Appellant. Officer Devinney shouted that he was a police officer and told Appellant to lay still. Appellant looked back up at Officer Devinney and said, "I did not shoot anybody." (R. p. 1227, line 20 - p. 1228, line 10; p. 1236, line 17 - p. 1238, line 23).

(2) After Appellant was taken to the Rock Hill Police Station (and read his Miranda rights in the police car while being transported), Appellant was placed in an interview room. Officer James Rockholt was placed in the

interview room to make sure Appellant did not leave. (R. p. 1250, line 18 - p. 1251, line 14). When Appellant came into the interview room, he went to the chair, "put his hands inside his face and said, 'I'm guilty, I'm guilty.'" (R. p. 1251, lines 15-22).

(3) After being read and waiving his Miranda rights again, Appellant was questioned by Rock Hill Police Department Captain Charles Cabaniss and SLED Agent Bruce Bryant. (R. p. 1256, line 5 - p. 1258, line 3). Appellant gave several statements:

(a) First, Appellant maintained that "he was at the Holiday Inn and had been at the Holiday Inn and had never been with Mr. Forney or ever on Dave Lyle Boulevard where the shooting occurred." (R. p. 1258, lines 12-15).

(b) Next, Appellant claimed "he was with Mr. Forney in Charlotte when the car was acquired when they carjacked and robbed the two students and acquired the car, but then Mr. Forney dropped him off at the Holiday Inn and then later came back and picked him up shortly before they were arrested." (R. p. 1258, lines 15-20).

(c) After changing his story several more times, Appellant finally gave a "more complete statement" which the police reduced to writing. This statement was as follows:

Tonight shortly after dark I was at the Revco and met up with Eric. I have known him for 3 or 4 years. He had a gun and we got a couple at the light. He told the girl to give up her money several times and she finally did. I told him that he didn't need to be pointing the gun at her. He took the wallet from the man and I thought he was going to shoot him. He was pointing the gun at him.

After we got the car he was driving and we came to S.C. We went to the Movie Theatre near the Interstate. Sneakers was playing. We stayed only 5 or 10 minutes. We went there because Eric was going to rob it. The woman

> let us in to watch the movie free because it had already started so we didn't rob her.
>
> We left and Eric was still driving. Shortly after we left the police pulled us. The officer walked up to the car. He said something about the lights not being on. The gun was between Eric's legs. The officer was shining his light into the car as he was walking up to the car. I think he asked Eric to get out. The officer then said, "Buddy or Partner have you been drinking." As Eric walked toward the front of the car he turned and started shooting the officer. It seemed like he was running toward him shooting. I heard a lot of shots but I don't know how many. I jumped out of the car and ran around toward the officer. The officer was on the ground when I got there. I think the officer was face down when I got there. I went and felt his pulse at his neck and did not feel anything. While I was doing this Eric was tugging at the officer trying to get something off him. This was from around his belt area.
>
> The officer said something to the effect of '"I've been shot" or something like that.
>
> Eric started hollering for me to come and get in. I got in and we left. We went back toward I-77 and then Eric pulled into the Holiday Inn. We were going to get a room but we saw all the police we ran. I hid in the woods and the police dogs later found me. I was hoping like hell they would miss me.
>
> I not exactly sure about all the details in this statement but they are true to the best of my memory.

(State's Exhibit 56). (R. p. 1263, line 21 - p. 1265, line 5; p. 1267, line 24 - p. 1275, line 14).

(4) While being escorted into the courthouse for his bond hearing on September 29, 1992, Appellant was asked if he had anything to say. Appellant responded that the police "put this on us" and "We were ten

miles away in Charlotte and they got us and brought us back." (R. p. 1485, lines 8-15; p. 1725, line 1 - 1726, line 23). (State's Exhibit 79).

(5) While in the York County Detention Center, Appellant was heard by fellow inmate Harry Jennings saying, "The best feeling I ever had is when I killed that cop." (R. p. 1510, lines 7-18).

(6) While in the York County Detention Center, Sgt. Broadus Strain overheard Appellant tell fellow inmate Bobby Holmes that "he was going to kill him another white boy." (R. p. 1520, lines 18-22). Appellant said that "when he was going to go down the road, he knew some people who could get him a gun at CCI and he was going to kill him another white boy." (R. p. 1520, line 23 - p. 1521, line 5). (See also R. p. 1907, lines 6-12).

(7) York County Detention Center inmate Richard Waldrop testified that he had a conversation with Appellant in which Appellant admitted shooting Officer McCants:

> He had asked me when me and him first got to know each other he told me that -- he asked me what I was in jail for and I explained to him what I was in there for and I asked him what he was in jail for and he told me for shooting a police officer. I didn't ask him nothing about how he done it, but he come out and explained to me how he said the police officer pulled him over, whenever he pulled him over, he said the officer come up and got his license and whenever he got his license and started back towards his patrol car, as he started back to the patrol car he said he leaned out of his car and shot the officer. He said the officer fell and when he did, he jumps out of his car and he said he unloaded the gun in him and about the time he got

> that far I said, "Look, as far as I am concerned I don't even care to hear about all of this."

(R. p. 1919, lines 7-21).

C. Appellant's Testimony

Appellant testified in the guilt phase of the trial. He admitted that he had purchased the gun used to murder Officer McCants. (R. p. 1645, line 3 - p. 1646, line 19). Appellant was familiar with the gun, how it worked, and how to fire it. (R. p. 1667). Appellant claimed that he sold the gun to co-defendant Forney about a week before the murder of Officer McCants. (R. p. 1646, line 20 - p. 1647, line 11).

Appellant testified that on the night of the murder he and Forney decided to "go out and rob some people." (R. p. 1648, lines 1-2). Appellant also admitted he had another knife in his pocket that night. (R. p. 1670, lines 9-10). Appellant admitted he had a "straight razor." (R. pp. 1669, 1673-74). Appellant admitted he and Forney robbed Beth Ann Jayne and Sean McMillan at the Bellisimo Restaurant in Charlotte and stole their car. (R. p. 1648, line 8 - p. 1649, line 17). Appellant also knew Forney had the gun with him when they went out on September 25, 1992. (R. p. 1673). Appellant and Forney then drove down to Rock Hill. Appellant admitted he and Forney then went to Galleria Mall Cinemas. After leaving the cinemas, they then went to a convenience store and Appellant took over the driving of the stolen car. (R. p. 1651, lines 4-16). Appellant testified that they left the parking lot of the convenience store with their lights off. Officer McCants then pulled their car over. (R. p. 1651, line 14 - p. 1652, line 24). Appellant testified that he got out of the car and when Forney was about to get out of the car, Forney started firing out of the vehicle. (R. pp. 1653-54). Appellant then

claimed Forney got out of the car and shot Officer McCants as he stood over him. (R. p. 1658, lines 11-23). Appellant and Forney got back in the car and Appellant drove the car away from the scene. (R. pp. 1659-60). Appellant claimed he never gave or told the police "nothing." (R. p. 1679, line 19 - p. 1680, line 10; p. 1684, lines 7-21; p. 1699, lines 14-17). Appellant did admit he made a statement to the media as he came into the courthouse for his bond hearing. (R. p. 1684, line 22 - p. 1685, line 19).

D. Additional Evidence in Aggravation

In addition to the evidence submitted in the guilt phase, there was significant evidence in aggravation submitted to the jury in the sentencing phase. This included:

(1) Appellant's prior record in North Carolina which included:

(a) two counts of breaking and entering;

(b) discharging a firearm in occupied property;

(c) assault with a deadly weapon with intent to kill; and

(d) numerous other burglary and breaking and entering charges, in which Appellant stole at least seven firearms.

(R. pp. 1871-73; pp. 1876-81).

(2) Appellant's disciplinary records from the North Carolina Department of Corrections which included the following information:

(a) wrongfully taking someone else's personal property;

(b) disobeying a prison official;

(c) cursing an officer;

(d) assault upon another inmate;

(e) improperly receiving property;

(f) sexual offenses;

(g) administrative segregation;

(h) an attempt to escape;

(i) damaging property;

(j) threatening a correctional officer;

(k) possession of a "shank" and assault of a fellow inmate with the shank; and

(l) an increase in his custody security level due to his numerous infractions and violations.

(R. pp. 1887 - 1900).

(3) Appellant's behavior in the York County Detention Center. (State's Exhibit 83).

(4) Appellant's disciplinary record while at the Broad River Correctional Institution which included the following information:

(a) pulling out a sprinkler head causing his cell to flood;

(b) possession of a handcuff key;

(c) possession of a fourteen-inch "shank";

(d) assaulting a correctional officer;

(e) possession of two razor blades; and

(f) setting his mattress on fire.

(R. pp. 2015 - 2025; pp. 2031-32).

(5) Appellant's stabbings of two of his cellmates in the York County Detention Center. As a result of the stabbings, inmate James Williamson died and inmate Chris Gorth was seriously injured. (See R. pp. 1927 - 2000). (See also Argument I below).

ARGUMENT

I.

The trial court did not err in admitting evidence that Appellant stabbed two of his cellmates while awaiting trial when there was clear and convincing evidence that he committed the stabbing and significant evidence that he was not insane at the time of the stabbings.

In his first issue on appeal, Appellant contends that the trial judge erred in admitting into evidence in the sentencing phase Appellant's stabbings of two inmates (one which resulted in the death of the inmate) in the York County Detention Center on April 12, 1993. Appellant's primary argument is that he was allegedly psychotic at the time of the stabbings and not criminally responsible for his actions. This argument is procedurally barred and substantively without merit.

A. Factual Background

After Appellant was arrested for the murder of Officer McCants, he was housed in the York County Detention Center. On April 12, 1993, Appellant stabbed two of his cellmates, James E. Williamson and Christopher M. Gorth. Inmate Williamson died from his stab wounds.[1]

On April 27, 1994, by letter, the Solicitor notified the defense that he would introduce in the sentencing phase evidence of "the murder and assault committed in the York County Detention Center on or about April 12, 1993." (R. p. 2539, lines 16-17) (See also R. pp. 3098 [Letter dated August 28, 1995 from Solicitor Pope to Attorney Schusterman]). On August 14, 1995, the defense filed a pre-trial "Motion to Continue,

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[1] Williamson was stabbed in the throat and literally bled to death. (Tr. pp. 1998-99).

or in the alternative to Prohibit the Introduction of Evidence" in which Appellant sought to prohibit the prosecution from using evidence relating to the prison murder and assault in the murder trial relating to the murder of Officer McCants. (R. pp. 3100-3102) [Motion to Continue or in the Alternative to Prohibit the Introduction of Evidence]). This motion was based upon the alleged fact that "the Defendant has been found to have been insane at the time of the alleged crime." (R. p. 3101 [Motion to Continue, or in the Alternative to Prohibit the Introduction of Evidence, at p. 2]).

Prior to trial, the trial court held an in limine hearing in which Appellant presented the testimony of three mental health experts, Drs. Donald Morgan, Renee Kohanski, and Dafferlin Dupree, who all testified that Appellant was: (1) competent to stand trial; (2) criminally responsible for the murder of Officer McCants; (3) not criminally responsible due to an alleged psychosis for the stabbings of inmates Williamson and Gorth. (R. pp. 2858 - 2945). In this testimony, however, it also was established through cross-examination that Appellant was found to be malingering by the staff of the Gilliam Psychiatric Hospital in February 1994. (R. pp. 2882, 2912-13, 2939; See also R. pp. 3112-3115 [Gilliam Psychiatric Hospital Discharge Summary and Gilliam Psychiatric Hospital Intake Assessment]). The primary concern of the trial judge at this in limine hearing was whether there was any evidence that Appellant was not insane at the time of the jail stabbings. (R. pp. 2946 - 2948). The trial court noted that the doctor's opinions were not binding and that Appellant's sanity was a fact question. (R. p. 2948). The trial court then noted, "I am obviously not making a ruling at this time." (R. p. 2948, lines 11-12). The State then put up a lieutenant with the York County

Detention Center who testified that Appellant understood the rules of the detention center and understood when he broke the rules. He also testified that during April 1993 Appellant did not appear to be crazy or insane. (R. pp. 2973-74). At the end of the in limine hearing, the trial court made the following ruling:

> THE COURT: All right, I find that evidence regarding the character of the defendant is relevant in a penalty phase of a capital trial and such evidence is relevant to sentencing of the defendant and is appropriately admissible for the consideration of the jury. I find there is, in fact, a three prong test as to introduction of such evidence that requires such evidence to be relevant, reliable and not prejudicial. I find that this evidence concerning the particular events meets the three prong test, it is relevant, it is reliable, and I find that it is not prejudicial, at least the prejudicial value does not outweigh the probative value. Obviously, it's prejudicial to a degree or they would not have wanted to introduce it. It wouldn't be relevant if it didn't have some prejudicial value most probably, but I don't think it is prejudicial to the defense that it outweighs the probative value and I think the subsequent conduct and the character of the defendant is very relevant, in fact, the case law says it is. The case law also says that introduction of it is not prejudicial. And I find that the evidence at least prima facie is reliable. Now the State will, of course, have to prove the events and all we have now the indictments, but if it properly provable, it would be introducable. I find that character is not a medical diagnosis. Character rather is defined by Black's as the aggregate of moral qualities which belong to and distinguish an individual. It is the general result of one's distinguishing attributes. it is the opinion generally entertained of a person derived from the common report of the people who are acquainted with him. There is a South Carolina case cited after that particular quote. I have not read it. I don't have access to it it's so old, but I do find that as we tell jurors at trial regarding expert testimony that it is to be considered as other testimony and is given for the purpose of helping the jury understand the evidence and not for the purpose of controlling their judgment. We tell the jury that no mere opinion of an expert can be accepted as in and of itself truthful or

> reliable, but it must be weighed and convince them or their judgments beyond a reasonable doubt, the same force and effect as other facts proven in the case before it can be relied on. I believe the question is whether or not this is a character trait or whether or not the psychosis or psychotic situation in which the defendant as testified to have been in override and makes such evidence or -- I think the question is a question for the jury as to whether or not the testimony proffered by the medical experts that this is not reflective of the defendant's character is a jury question.

(R. p, 2978, line 4 - p. 2980, line 2) (emphasis added).

In the opening statement in the sentencing phase, the assistant solicitor made the following comments:

> It's time for us to tell you about Mr. Hughes' extensive criminal record starting from when he was a young adult and when he could be charged as an adult extending through his behavior in the North Carolina Department of Corrections, where he spent a significant period of his adult life, extending up until the time that he was paroled and released in August of 1992, a month before this time was committed, extending up to the time when he was arrested, what happened out there on the side of the road, which you already know from the first phase, and what happened after Mr. Hughes was arrested and incarcerated in the York County Detention Center. There are a lot of things you don't know. You don't know about what his life was like in the North Carolina Department of Corrections and how he comported himself in the North Carolina Department of Corrections. You don't know how he comported himself in the York County Detention Center. There are many things you don't know. It was almost hinted at, but not directly, when Mr. Felix Wimborn testified that he was placed in the York County Detention Center on April 2, 1993, and released on April 26 of 1993 and I asked him, so how many days were you in the York County Detention Center with Mr. Hughes and he said, "Ten." Well he was in the Detention Center for over twenty days. How could he have only been in there for ten at the same time as Mr. Hughes? It's because, Ladies and Gentlemen, one of those things that you don't know on April 12th, ten days after

> Mr. Wimborn was put into the Detention Center, at about five o'clock in the morning, while other inmates in the same cell with Mr. Hughes were sleeping in their bunks, Mr. Hughes took a contraband knife, a lockblade knife about eleven inches long and drove it into the throat of James Earl Williamson fatally killing him, a senseless, brutal murder, while he was awaiting these charges here. We are going to tell you everything you need to know about Mr. Hughes to make the decision as to whether or not Mr. Hughes deserves to live in this society, whether he is a menace to society, whether he poses a danger in the future to other people, people in jail, guards who work there. You all have to make the decision.

(R. p. 1865, line 9 - p. 1866, line 24) (emphasis added). Appellant did not object to these references to the jailhouse murder in the opening statement.

In the actual sentencing phase, the prosecution introduced significant evidence proving that Appellant stabbed inmates Williamson and Gorth. This included the testimony of Detention Center guards, a doctor who performed the autopsy of inmate Williamson, an inmate in the cell during the stabbings (Waldrop), and inmate Gorth who was stabbed by Appellant. (R. pp. 1903 - 2000). Once again Appellant did not make any contemporaneous objections to exclude the evidence of the jailhouse stabbings based upon any of the grounds asserted in this appeal.[2]

In closing argument, the Solicitor mentioned the jailhouse stabbings several times. (R. p. 2408, lines 17-19; p. 2410, lines 8-12; p. 2471, line 8 - p. 2414, line 5; p. 2415, lines 6-10). The Solicitor's argument focussed heavily upon Appellant's future

[2] The defense, however, did present to the jury the testimony of the three doctors' opinions that Appellant was not criminally responsible for the jailhouse stabbings due to his alleged psychosis.

dangerousness in or out of prison. The defense did not object to the mentioning of the jailhouse murder in the Solicitor's closing argument.

In the trial court's jury instructions in the sentencing phase, the trial court gave the following instructions relating to the jailhouse stabbings:

> I tell you now as to the April 12th, 1993 event in the York County Detention Center, I remind you -- I tell you first that the defendant is not on trial for those events at this time and I remind you that one is presumed innocent of a crime until a jury finds them guilty of the charge beyond a reasonable doubt. And I also tell you that as to the charge of the events of April 12, 1993 there is in law what is known as an affirmative defense that means a defense which the defendant must prove by the greater weight or the preponderance of the evidence. That defense is the defense of not guilty by reason of insanity. Now the defendant has the burden of proving this defense if he his tried or on trial for the offense, but to prove that defense by what's called the greater weight or the preponderance of the evidence. I'm telling you that in your consideration of this matter at this time you must, even though he is not on trial for that offense, you must adhere to these legal principles. As to the affirmative defense of not guilty by reason of insanity, the burden of proof is on the defendant to prove that defense and it must be done by what's called the greater weight or the preponderance of the evidence, that's a lesser standard than beyond a reasonable doubt. I can explain best to you the preponderance of the evidence by asking if you would imagine with me the scale the blindfolded justice holds. you recall they are even, but when a party has the burden of proof to prove an issue by the greater weight or the preponderance of the evidence, the weight of the evidence and you can't mechanically weigh it, you have to weigh it through mental processes, but the weight of the evidence must tip the scales in that person with the burden of proof's favor,that is, the defendant. If the scales remain even or tip back towards The State on that issue, then the defendant has failed to carry that burden of proof. Now as to this affirmative defense, it is our law that it is an affirmative defense to a prosecution for a crime that at the time of the commission of the act constituting the

offense the defendant as a result of mental disease or defect lacked the capacity to distinguish moral or legal right from moral or legal wrong or to recognize the particular act charged as morally or legally wrong. There is an additional matter, another verdict in the event one is tried and raises the issue of mental deficiency, that is not a complete defense, but that is known as a verdict of guilty but mentally ill that is in addition to not guilty by reason of insanity. Here where a defendant claims or is to be or to find a defendant guilty but mentally ill, a jury would have to find at the time of the commission of the act constituting the offense the defendant has the capacity to distinguish right from wrong or to recognize their act as being wrong as defined by law, but because of mental disease or defect they lack sufficient capacity to confirm their conduct to the requirements of the law. No as to this evidence that is the evidence of previous convictions, incarceration, infractions and offense and the events that have occurred after September 25, 1992, I charge you that this evidence should not be considered as substantive evidence of aggravating circumstances, but if you are convinced that the defendant committed those offenses, then you may consider them as evidence of his character, his characteristics, and/or his future dangerousness, but for no other purpose. These may be considered along with all the other evidence and you may give them whatever weight you deem proper and appropriate under the circumstances of this case. Evidence and testimony that the defendant committed a murder and other acts while in prison awaiting his trial on the charges before the court may be considered by you as evidence of the defendant's character and is evidence regarding the defendant's future dangerousness to society. Such testimony and evidence is not being offered as evidence of the defendant's guilt of a statutory aggravating circumstance and, therefore, such evidence is not to be considered by you as proof of a statutory aggravating circumstance. Rather, the evidence has been admitted as evidence of the defendant's character and evidence of the defendant's future dangerousness to society, therefore, you as jury are not required to find proof of these acts beyond a reasonable doubt or even by clear and convincing evidence before considering such evidence as character evidence. Rather, if you, the jury, are convinced that the defendant committed these other offenses, you may consider them as evidence of

> the defendant's characteristics and give them whatever weight that you deem appropriate under the circumstances of the case in determining the appropriate sentence to be issued in this case. The evidence and testimony has been presented to you regarding the mental condition of the defendant on April 12, 1993. Again, you may consider such evidence as evidence of defendant's characteristics and give such evidence whatever weight you deem appropriate in determining the appropriate sentence to be issued in this case.

(R. p. 2440, line 17 - p. 2444, line 10). The defense had no exceptions to the trial court's jury instructions. (R. p. 2452, lines 18-19).

B. Analysis

As an initial matter, it is clear that appellant's first issue on appeal is not properly preserved for appellate review. Although Appellant filed a pre-trial motion and the trial court held an in limine hearing, Appellant did not contemporaneously object to the mentioning of or introduction of evidence proving the April 12, 1993, jailhouse stabbings. Because Appellant did not contemporaneously object to the evidence of the jailhouse stabbings in the sentencing phase, the issue is not preserved for appellate review. See State v. Humphries, 325 S.C. 28, 479 S.E.2d 52, 56 (1996) (failure to contemporaneously object to victim impact evidence renders issue procedurally barred for appellate review); State v. Simpson, 325 S.C. 37, 479 S.E.2d 57, 60 (1996); State v. Whipple, 324 S.C. 43, 476 S.E.2d 683, 687-88 (1996); State v. Tucker, 319 S.C. 425, 428, 462 S.E.2d 263, 265 (1995)[3]; see also State v. Skillicorn, 944 S.W.2d 877, 888

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[3] Additionally, a ruling on an in limine motion alone does not preserve an issue for appeal. State v. Simpson, 325 S.C. at 43, 479 S.E.2d at 59-60; State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993).

(Mo. 1997) (failure to contemporaneously object to admission of subsequent burglaries and robberies after murder).

Furthermore, assuming arguendo that this issue was properly preserved for appellate review, the trial judge did not err in allowing the admission of the jailhouse stabbings in the sentencing phase. First, it is clear that a defendant's future dangerousness is a legitimate issue at the sentencing phase of a capital case. See State v. Tucker, 324 S.C. 155, 173-74, 478 S.E.2d 260, 270 (1996).[4] Accordingly, it is not improper for a prosecutor to argue (if supported by the record) that if a defendant is sentenced to prison, the defendant might kill another prisoner. People v. Bradford, 15 Cal. 4th 1229, 1380, 939 P.2d 259, 350 (1997). Clearly, a murder or assault committed in jail by a defendant awaiting trial is relevant to that defendant's future dangerousness. See e.g. State v. Williams, 322 Or. 620, 631-32, 912 P.2d 364, 370 (1996) (evidence of defendant's fight with another inmate while he was in prison was admissible in penalty phase of a capital case because it was relevant to question of defendant's future dangerousness;[5] People v. Medina, 11 Cal. 4th 694, 766-67, 906 P.2d 2, 44-45 (1995); Lane v. State, 933 S.W.2d 504, 507 (Tex. Ct. Crim. 1996); Saunders v. Comm., 242 Va. 107, 119, 406 S.E.2d 39, 46 (1991); Haberstroh v. State, 105 Nev. 739, 741, 782 P.2d 1343, 1344 (1989) (took hostages at gunpoint in prison); State v. Taylor, 304 N.C.

[4] See Dawson v. Delaware, 503 U.S. 159, 166, 112 S.Ct. 1093, 1098 (1992) (noting that "showing that a defendant represents a future danger to society" is legitimate purpose to be served by evidence in sentencing phase).

[5] The Williams court also noted that "even unadjudicated bad acts" are admissible to show future dangerousness. Williams, 322 Or. at 632, 912 P.2d at 370.

249, 281-84, 283 S.E.2d 761, 781-83 (1981). See also People v. Scott, 15 Cal. 4th 1188, 1221, 939 P.W. 354, 374 (1997); Fuller v. Johnson, 114 F.3d 491, 497-98 (5th Cir. 1997) (membership in prison gang), cert. denied, 118 S.Ct. 399 (1997); Comm v. Williams, 541 Pa. 85, 97-98, 660 A.2d 1316, 1322-23 (1995).

This Court has found that other unadjudicated crimes committed by the defendant are admissible in the penalty phase of a capital case. See e.g. State v. Middleton, 295 S.C. 318, 324, 368 S.E.2d 457, 460-61 (1988); State v. Stewart, 283 S.C. 104, 320 S.E.2d 447 (1984); State v. Gaskins, 284 S.C. 105, 326 S.E.2d 132 (1985); see also State v. Green, 301 S.C. 347, 392 S.E.2d 157 (1990).[6]

Second, Appellant attempts to overcome the obvious admissibility of the jailhouse stabbings by arguing that this evidence should have been prohibited because Appellant was criminally insane at the time of the stabbings. This argument must fail. Appellant places great emphasis on the fact that three doctors gave opinions that Appellant was insane at the time of the prison stabbings. The doctors' opinions, however, are not dispositive of this issue.

Even when a defendant presents expert testimony regarding his alleged insanity at the time of a crime, the State is not required to also produce expert testimony on the issue of insanity; even lay testimony may be sufficient. State v. (Perry Bush) Smith, 298 S.C. 205, 208, 379 S.E.2d 287, 288 (1989); State v. Rimert, 315 S.C. 527, 446 S.E.2d 400 (1994). Even if there is significant expert testimony on a defendant's insanity, it is

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[6] See also Hatch v. State, 58 F.3d 1447, 1465-66 (10th Cir. 1995), cert. denied, 116 S.Ct. 1881 (1996).

not error to present the case to the jury if there is lay testimony supporting a finding of sanity. State v. Poindexter, 314 S.C. 490, 431 S.E.2d 254 (1993). A jury may properly disregard expert testimony. State v. Milan-Hernandez, 287 S.C. 183, 186, 336 S.E.2d 476, 478 (1985).

The trial court clearly did not err in determining that there was sufficient conflicting evidence regarding Appellant's sanity at the time of the jailhouse stabbings to allow the jury to decide. The State elicited the following testimony to support the contention that Appellant was sane at the time of the prison stabbings:

(1) the testimony of Broadus Strain, a guard at the York County Detention Center, who testified:

(a) In March-April, 1993, Appellant seemed to understand the rules and regulations at the detention center;

(b) Appellant did not act out in any unusual or bizarre fashion or give any indication that he was suffering from any sort of mental illness;

(c) He (Strain) overheard Appellant say that "when he [Appellant] got down the road that he would be able to talk to some of his buddies down the road to get a gun and kill him another white boy." (R. pp. 1906-07);

(2) the testimony of Richard Waldrop, an inmate in the cell when Appellant stabbed inmates, Williamson and Gorth, who testified:

(a) Appellant told him (Waldrop) that he had a knife (R. pp. 1920-21);

(b) Appellant told Waldrop "he was seeing a psychiatrist" and that "he had the system down pat that he knew he could beat the

charge." He said he "got the psychiatrist thinking he's crazy." (R. p. 1923);

(c) Appellant talked about killing his cellmates (R. p. 1927); and

(d) Appellant threw the knife used to stab Williamson and Gorth in the commode afterward (R. p. 1933);

(3) the testimony of Christopher Gorth, the surviving inmate Appellant stabbed in the cell, who testified:

(a) he was Appellant's cellmate for three weeks; and

(b) Appellant did not exhibit any unusual, bizarre or crazy behavior (prior to the stabbings) while in the cell with Gorth. (R. pp. 1965-68);

(4) testimony that while a safekeeper in April 1993 at Broad River Road, Appellant was able to:

(a) obtain part of a handcuff key at Reception and Evaluation (R. p. 2018); and

(b) obtained a fourteen-inch shank (R. p. 2019);

(5) testimony of Dr. Kohanski that:

(a) "there's data to support the fact that he [Appellant] didn't have a mental illness" and that "some of it [data] is very compelling both ways." (R. p. 2206);

(6) report of Dr. Kohanski noted evidence that "Mr. Hughes may have been planning this crime by securing a weapon." (R. p. 2243);

(7) the finding by the staff at Gilliam Psychiatric Center at the Kirkland Correctional facility that:

(a) Appellant was malingering in February 1994 (R. pp. 2247, 2281, 2311, 2316); and

(b) no report of mental illness from August 19, 1994 to September 7, 1994. (R. pp. 2318-20, 2324-25);

(8) Dr. Donald Morgan's findings in November/December 1992 and August 1994 that Appellant was criminally responsible/competent (R. pp. 2225-26, 2232, 2279, 2281);

(9) Dr. Donald Morgan's testimony that "there are two sides to it ... some of the inmates talked about things that he said that would look like he planned it and other inmates talked about things about how sick he was." (R. p. 2290);

(10) Dr. Dafferlin Dupree's testimony that Appellant tried to flush the knife down the toilet after the stabbings. (R. p. 2327); and

(11) Dr. Dupree's admission that there is some evidence/statements that may support the theory that Appellant was criminally responsible for the stabbings. (R. pp. 2328-29).

This evidence and testimony clearly supports the trial court's decision to let the jury determine whether Appellant was criminally responsible for the stabbings of inmates Williamson and Gorth. As the Fourth Circuit has noted: "The question of [a defendant's] sanity at the time of the [crime is] a factual one for the jury to decide, not a legal question that would be resolved solely on the basis of psychiatric testimony." Billotti v. Legursky, 975 F.2d 113, 118 (4th Cir. 1992), cert. denied, 507 U.S. 984 (1993).

Appellant also asserts that this evidence of the stabbings should have been excluded because it was improper Lyle evidence and was not proven by clear and

convincing evidence.[7] This identical issue was resolved against Appellant in State v. Middleton, 295 S.C. 318, 325, 368 S.E.2d 457, 461, (1988). As in Middleton, the trial court charged the jury so to ensure that the jury would not use the evidence improperly to establish guilt of aggravating circumstances. Finally, it is clear that the prosecution proved the Detention Center stabbings by at least clear and convincing evidence. (See R. pp. 1903 - 2000).

For all the foregoing reasons, it is clear that Appellant's first issue on appeal is not properly preserved for appellate review and substantively without merit.

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[7] These issues are not properly before this Court because they were not properly preserved below.

II.

The trial court did not err in finding that the prosecution did not violate Rule 5 of the South Carolina Rules of Civil Procedure or Brady v. Maryland when Appellant was not denied any material that would have made a difference in the outcome of the trial.

In Appellant's second issue on appeal, he engages in inflammatory rhetoric[8] in arguing that the prosecution violated Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963) and Rule 5, S.C.R.Crim.P. by not turning over the SLED Summary Report of its investigation of the jailhouse stabbings until the beginning of the penalty phase. Appellant, however, fails to mention that (1) the prosecution turned over the entire SLED file on its investigation (except for the summary); and (2) prior to trial the defense was provided with the substance of the statements made by inmates to SLED investigators when the report of Dr. Donald Morgan dated April 4, 1995 was provided to the defense lawyers. This claim is without merit.

A. Factual Background

1. Pre-trial Hearings

On September 7-8, 1995, the trial court held pre-trial hearings on numerous in limine motions. In these hearings, various discovery motions were discussed.

The prosecution noted that it had complied with discovery, but had withheld "work product." (R. pp. 2496-97). The trial court noted that it would give Appellant additional time if additional information were to come to light. (R. p. 2521).

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[8] See IBOA, at p. 33 ("manipulations of a prosecutor") ("prosecutor's deception"), p. 35 ("ambushing"), p. 36 ("smacks of fraud, deceit, and misrepresentation"), p. 43 ("framed").

In the pre-trial hearing, Dr. Donald Morgan testified that in reaching his determinations regarding Appellant's competency he had considered "a large number of statements from jail personnel as well as other inmates and the summation of that." (R. p. 2879, lines 15-18). Dr. Morgan noted that Appellant had told inmates about a "little green man" who allegedly kept him from sleeping. (R. p. 2881). In this pre-trial hearing, Dr. Morgan's report dated April 4, 1995, was introduced by the defense as Defense Exhibit 2. (R. p. 2867, line 9). In the report (which has a stamp indicating it was received by defense counsel) the following information is recited:

> In reviewing the documents investigating the charges of April 12, 1993, there is an abundance of evidence supporting the psychiatric deterioration of Mr. Hughes. Inmate Randy Whitworth states that another inmate was afraid of MarReece and that he (MarReece) acted "very strange" at times. Inmate Felix Wimborn reports that "MarReece would talk to him (Wimborn) one day and the next day, wouldn't say a thing. He acted very strange at times." Inmate Richard Waldrup reports that he heard Mr. Hughes speaking with another inmate and stating that "he (Marreece) was going to hell, and that he wanted to take some more with him". Statement from John S. Walker states that "During several conversations with MarReece his mind would go and come". Statement from inmate John Patton states that MarReece "wanted to know what kind of time it would carry ... and was talking in circles and wanted Harry to keep talking to him ... He was saying things like they can't do nothing to me and I hate white people... Then he started saying that the green men were starting to fuck with him again. After this MarReece began to talk to himself a little. He was saying things like the little man isn't asleep, I saw his foot move down there. He's playing possum and trying to fuck with my head over there."
>
> There are references to the "green man" from inmates Harry Jennings, Jr. and James Gaithers, Jr. Inmate Gaithers states that "MarReece said he can't rest when the little green man gets on him. Says that same thing (little

> green man) when he gets mad. Called him crazy because of the way he acted. MarReece didn't like white people or policeman. In the statement by Christopher Gorth, one of the victims, he reports that MarReece assaulted him with the knife and then asked me if I was alright [sic], like nothing happened. He then went up in his bunk." Statement by inmate Patton states that after the incident MarReece said, "Damn, I am about ready for breakfast now. Then he asked about the time and wanted to know where the food was and weren't they going to bring any food back there."

(R. pp. 3116-3121 [Report of Finding Mental Capacity, dated April 4, 1995].[9]

In the pre-trial hearing, Dr. Kohanski also noted that she had reviewed documents in which other inmates said Appellant spoke of "the little green man." (R. pp. 2912-13).[10]

Finally, in the pre-trial hearing, Dr. Dupree testified that:

> as part of Judge Hayes' Court Order Doctor Morgan and I were considered his treating physicians and I was actively involved with Doctor Kohanski. She did the day to day treatment of Mr. Hughes and Doctor Morgan and I did the overall general consultation with her and at that time when we staffed him for that evaluation I agreed with Doctor Morgan and Doctor Kohanski that he was not criminally responsible.
>
> Q And were the basis for that conclusion factual as far as the documents, the records that you have, or were your records any different than the records that had been provided to Doctor Morgan or Doctor Kohanski?

---

[9] This Report dated April 4, 1995 was later introduced at trial in the sentencing phase as Defense Exhibit 9. (Tr. p. 2208, line 13).

[10] Dr. Kohanski also signed the report dated April 4, 1995. See Defense Exhibit 9.

> A Only that I believe I had more social history available to me that was coming in bits and pieces. Other than that, no.
>
> Q And you also had access to any other prior physicians who had contact with Mar-Reece Hughes, is that correct?
>
> A That's correct.
>
> Q And the three of you have all made the same finding, is that correct?
>
> A That's correct.
>
> Q And what is that finding?
>
> A That finding is that Mr. Hughes was not responsible for his actions at the time of the alleged offense.

(R. p. 2931, line 15 - p. 2932, line 13).

2. Sentencing Phase

After Appellant was tried and convicted of all charges, the sentencing phase of the trial began on September 20, 1995. (R. p. 1854).

At the beginning of the sentencing phase, the following colloquy occurred:

> MS. BRICE: Your Honor, yesterday I discovered by talking to several potential witnesses that are currently incarcerated in the York County Detention Center that especially in regards to the second murder statements were taken of all the inmates that were housed in Cell Block C during the time of that second incident and I have only been provided with I believe brief statements from the inmates that were incarcerated at that time and I have not been provided with I believe the complete statements of all the inmates that were taken by SLED back at that period of time and I am requesting at this time for all the statements that were taken subsequent to the April, 1993, incident or I want the statements of the potential witnesses to be excluded from testimony. I don't know at this time what

other inmates testified to, how it could have helped my client. I have no way of judging or cross examining based upon statements that other inmates had filed with SLED. So for those reasons, Your Honor, I would ask that all statements of the other inmates be excluded or, in the alternative, I would ask for a continuance in order to interview all the inmates of the sentencing phase in order to interview all of the inmates concerning all of the statements that were taken.

THE COURT: Does The State have any statements other than the three that have been provided?

MR. BRACKETT: I am not which three she is referring to.

MS. BRICE: I have the statements of Christopher Gore, Richard Waldrop and a John Patton, but I am of the opinion that statements were taken of Mr. Jennings who testified here before the court, Mr. Wimborn who testified previously before the court, Mr. Gaithers, Mr. Stroud. These are all statements of inmates who I am of the opinion or I am of the knowledge that did, in fact, give statements, but I have never had access to them nor have I been provided them by The State.

MR. BRACKETT: The only statements that were taken in the form of written statements are the ones that she just said except there was another statement from a Joseph Lowery, who was not incarcerated at the time of the second jail murder and I believe that was given to you as well regarding how the knife came into Mr. Hughes' custody. As far as other statements other inmates were interviewed but refused to give written statements and oral statements were taken, but there's nothing written, that they have written and signed that could be turned over to them.

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. Is that correct?

MS. BRICE: Well, from my knowledge at this point in time I'm not sure that is correct, Your Honor. I have been

told that everyone in Cell Block C gave a statement to SLED.

THE COURT: Did they say they gave a written statement to SLED or a taped or they did just make a statement?

MS. BRICE: I can tell you from a person that I spoke with he informed me that he gave a written statement, that each person was taken in individually and given a statement, but everyone at that time was given a deal concerning the statements that they were giving. And based on that, I think all statements in regards to inmates should be excluded.

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.

MR. POPE: Your Honor, ---

THE COURT: Wait and let me finish ---

MR. POPE: I apologize.

THE COURT: The State is saying that they have already given you everything.

All right, Mr. Pope.

MR. POPE: Your Honor, the SLED file is a bound file, a report in its entirety, if Ms. Brice wants to get it, I'll be glad to hand up the same file that was given to the defense, hand it to the court.

THE COURT: All right. I am going to deny the Motion for Continuance and I am going to look at the file myself and if you would make a short list giving me the names or just tell me right now the names of the three that you say you do have.

* * * *

MS. BRICE: What I am concerned about, Your Honor, is the fact that we have already taken testimony concerning statements of other incidence by my client, 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.

THE COURT: Well, I understand. I am going to review the file.

* * * *

MR. POPE: May it please the court, Your Honor, I have shown Ms. Brice and I'm handing to the court this SLED Report, it even outlines - it has a table of contents - my understanding is included in there a number of inmates did not, in fact, give written statements, but did give statements that are summarized on page 7, but I'm going to hand this up to the court.

(R. p. 1854, line 8 - p. 1857, line 14; R. p. 1858, lines 7-16); R. p. 1859, lines 6-12).

After testimony about some of Appellant's criminal record in North Carolina, the following additional colloquy occurred regarding the SLED summary:

MS. BRICE: Yes, 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 don't have possession off this report. I asked our psychiatrist if she had possession of these records previous to my looking at it today. She saw it for the first time approximately five minutes ago as well, Your Honor. There are 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, the fact that he had told someone else about

flushing a toilet. Another person by the name of James Gaithers, also Mr. Hughes relayed information that he would talk to the 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 Motions hearings on Thursday and Friday in regards to our client's mental capacity or lack thereof at the time of the second murder and I just think it is outrageous that we are finally seeing it for the first time before we go forward with an aggravation phase. If I could approach the bench to provide you with this report.

THE COURT: Certainly. Have you talked with these particular witnesses?

MS. BRICE: No, Your Honor. Your Honor, last week we were, in fact, looking for all of the persons who were incarcerated at the time of the second offense. In fact, the day that Mr. Jennings was present at the Detention Center we were told that he was not here. It was only when we learned after he testified that, in fact, he had been here the whole day. We were prevented from speaking with him on the day that he testified earlier in the week. As far as the other two witnesses, we do not have addresses, but we are at this point in time immediately going forward to trying to find these people and speak with them, but the fact I think I need to stress, Your Honor, is the fact that they had possession of this, it was not provided to us, it clearly goes to the insanity defense, it clearly goes to the inconsistencies and the lack of reliability of my client during the incidents that occurred on that day and I think it would be outrageous for the court to allow the testimony to come in concerning that second incident now knowing that we have not been provided with potentially exculpatory statements by other persons.

* * * *

MS. BRICE: Your Honor, if I may respond before the jury comes in? I would like the court to note that I have received a portion of that report. I have received statements. The only thing I have is the original I think the first eight pages. I submit to Your Honor as an officer of this

court I did not receive those items and my psychiatrist, who was working with The State's own doctors, never saw it.

THE COURT: Well, let me see what you have got. You have got a report that just started with page 9?

MS. BRICE: If I can look at it, I can tell you exactly which page it started with.

THE COURT: While you are coming up here to look at it, my question is did that not put somebody on notice that there were numbers before that?

MS. BRICE: My pages are not numbered, Your Honor.

Your Honor, I don't have any of this all the way through page 17. I don't have this Report of South Carolina Law Enforcement Agent Harry Benson.

THE COURT: Anything else? Can we go ahead and start with the next witness while I am reviewing this?

MS. BRICE: Yes, sir.

THE COURT: All right, bring in the jury.

MS. BRICE: I would move at this point in time for a mistrial based upon prosecutorial errors and misconduct.

THE COURT: I will take that under advisement.

MS. BRICE. Thank you.

(R. p. 1882, line 20 - p. 1884, line 20; R. p. 1885, line 21 - p. 1886, line 22).

After more testimony about Appellant's criminal record in North Carolina, one of Applicant's cellmates in the York County Detention Center, Richard Waldrop, testified. On cross-examination, he was questioned by Appellant's counsel about whether Appellant ever talked about "little green men." (R. pp. 1947-48). After inmate Waldrop's testimony, yet another colloquy about the SLED summary occurred:

COURT: Anything from The State? Why don't we go ahead and take a look at where we are with these SLED records. What does the receipt show having been received by the defense?

MR. POPE: Your Honor, this is a receipt that was in evidence that we also put as an addition to the evidence of aggravation. Your Honor, it's listed as the discovery material. I don't know the item that was put in evidence, the number of that exhibit. One was a SLED file on the jail murder given to Allyson Schusterman on March 8th of '95. It's my understanding it was given to Ms. Schusterman, it also was given to Ms. Brice. Your Honor, I have also reviewing the testimony through the State's witnesses this may have been in the previous hearing I believe it was one or more of the doctors that referred directly to some of the statements of Mr. Gaithers and perhaps Mr. Jennings or Mr. Wimborn, some of these about the little green man. One of the doctors had referenced some statement that I presume they are talking about the little green man that would have been covered with that. Your Honor, our records indicate we have given the SLED file at least twice. Now in looking at the file as it was handed to Ms. Brice and handed up to the court I also notice that the section she was referencing was the officer's summary and, so, I know it has been our standard procedure in the past to not necessarily give the summary. Our intention has been always to give the entire file, but in the light of fairness to the defense it cuts off at that summary and there may be an argument that part of the summary - our position has always been that was, obviously, a work product prepared for us. The other SLED file cases that may or may not have been provided. Again, it has been our intention to provide it all in this particular case and our records indicate that we have, but, again, Ms. Brice has represented to the court she didn't have it, based on the testimony of their witnesses I would say they would have to have knowledge of it, but, again, Your Honor, I am not disputing the specifics of what Ms. Brice says.

THE COURT: Ms. Brice, anything else?

MS. BRICE: Just again, Your Honor, I did not receive the first seventeen pages of that report. The reference that was

made to the little green man was evidenced in a statement made by John Patton.

* * * *

MS. BRICE: These are all records that I would say are vital to our position in regards to that second murder. i don't know how much more stress I could put on the fact that, you know, this one through seven pages would have been extremely important for us to adequately prepare the defense; these documents were not provided to us previously. It is my understanding that they have not even been presented to the State's own physician psychiatrist who evaluated that case.

MR. POPE: May it please the court, Your Honor?

THE COURT: Yes, sir.

MR. POPE: To begin with the defense has constantly characterized the doctors at the State Hospital with the exclusion of Doctor Dupree as The State's own physicians where each time they have been the ones that have called them. Your Honor, I further note that as to State's Exhibit D-2 from the prior hearings, which was a report put in by the defense, that Doctor Dupree was a party to on both dates of the evaluation, it was with Doctor Morgan and Doctor Kohansky, and I'll hand it up to the court, referring to - it doesn't have a page number, but it says, "In reviewing the documents and investigating the charge of April 12, '93 there is an abundance of evidence for the psychiatric deterioration of Mr. Hughes." It goes on then to talk about the different inmates including Mr. Gaithers, Mr. Jennings, ---

THE COURT: Let me see that.

MR. POPE: --- Mr. Stroud, and talks about the little green man. And that is a defense exhibit that was previously put in, Your Honor.

THE COURT: This directly states "John F. Walker states that 'during several conversations with Mar-Reece his mind would come and go.'" This is from Doctor Morgan with

Doctor Kohansky -- it's dated April 4, 1995. Did you receive a copy of this?

MS. BRICE: Your Honor, I have received that report, but, again, Your Honor, The State provided any and all records to the physician. I was not privy to those records and my own investigation trying to gather testimony regarding that second incident in the jail I think they would have been extremely helpful if they had provided me with these documents. The State provided the physician. I don't understand why they could not have provided them to me, which they did not do.

THE COURT: Did Doctor Dupree have -- was she given a copy of this report?

DOCTOR DUPREE: Yes, I received a copy of that report, but I didn't review the records. Doctor Morgan got that.

THE COURT: And counsel for the defense didn't get a copy?

MS. BRICE: Sir?

THE COURT: Did you get a copy of the psychiatric report of Doctor Donald Morgan dated April 4, 1995 and the attached report signed by Renee Kohansky and dated -- it's kind of hard for me to tell which was the date - it says ---

MS. BRICE: Yes, Your Honor, I did receive a copy of that report.

THE COURT: All right, well, that goes into extensive talk about just what we are talking about now, what Wimborn said, what Johnny Walker said, Harry Jennings, it talks about the little green man. Wouldn't this put the defense on notice about these witnesses these individuals having made these statements?

MS. BRICE: Your Honor, it is my position that The State has the burden to provide those documents to me. I don't know if it is incumbent upon the doctors to have to provide that information to me. Is The State not supposed to

provide me with the documents that they are going to present?

THE COURT: Well, what you are saying is that you are concerned about documents they are not presenting -- witnesses they are not presenting. We are concerned about having, as I understand it, your position is that you would have liked to have had a chance to interview and have the opportunity to call as witnesses John Walker, Harry Jennings, James Gaithers, talked about M. H. Stroud, I still can't find Stroud, but I haven't looked that thoroughly. What I am saying is would this not regardless of where it came from did this not put the defense on notice that these individuals had reported to somebody this information?

MS. BRICE: Your Honor, as far as the contents as to what they reported to other people - from what they were talking about on the report I gathered it was in a statement from Mr. Patton.

THE COURT: Well, I am going to let you look at it over lunch and we'll talk about it a little after lunch because it does not convey to me it starts in reviewing the documents and investigating the charges and then it goes over to what Randy Whitworth states, Felix Wimborn reports, Richard Waldrop reports, John S. Walker states, John Patton states, references to the green man from inmate Harry Jennings, Jr. and James Gaithers. How much more notice can you have that these two individuals said something about Mr. Hughes talking about a little green man?

MS. BRICE: Your Honor, it's still my position that it was incumbent upon The State to provide me with the statements whether or not they were actually taken by these people if they were written statements, if they were oral statements taken from these persons, these witnesses, and they wee not provided to me and they knew that they had it and they were not provided to me, Your Honor.

THE COURT: All right. Well, I understand that, but the second part of that is if you have your information from another source and they didn't give it to you, that perhaps was improper, but what prejudice is there to the defendant?

MS. BRICE: Your Honor, that report does not contain addresses, does not contain exactly what was stated to them ---

THE COURT: A lot of ---

MS. BRICE: It makes reference ---

THE COURT: It's in quotation marks.

MS. BRICE: But I don't know whether or not it was written statements, oral statements that was given, whether or not they have possession of it until I started speaking with these people individually and they tell me they gave statements, they gave written statements to people. When I first came into court this morning, that was my major concern was the fact that I was of the opinion that these persons had given statements to SLED, that led the Solicitor bringing out the first seventeen pages of the report and providing it to me this morning. I would like just the first seventeen pages to be made part of the record.

THE COURT: Certainly, we will do that. But I'm still going back to the same thing is if there is something broken, what would fix it; I don't know if you have got -- the situation is healed, if something is broken and it's fixed and it's not fixed in the way it should have been fixed, it's still nonetheless fixed.

MR. POPE: Your Honor, could I go on the record saying that our records indicate that the SLED file was provided.

THE COURT: I don't think there's any question; everybody agrees that the SLED file was, I'm certain; it's just a question of whether those seventeen page were as part of the SLED file.

(R. p. 1951, line 13 - p. 1953, line 5; R. p. 1954, line 12 - p. 1959, line 25).

During the sentencing phase, defense counsel admitted that the SLED summary would not have been beneficial to the defense social worker. (R. p. 2115). During the sentencing proceeding, Doctors Kohanski, Morgan, and Dupree all testified for the

defense. During their testimony, they all relied upon the fact that according to fellow inmates Appellant acted quite strange in prison around the time of the jailhouse killing. (R. pp. 2205, 2234, 2276, 2290-91, 2326-27). Their testimony, in part, relied upon statements of fellow inmates who said Appellant talked about "the little green man." (R. pp. 2234, 2327).

The trial court had inmates Walker, Jennings, and Gaithers, transported to court for the defense to question them. (R. pp. 2255, 2261, 2341-42).

At the end of the sentencing phase, the trial court denied Appellant's motion for a mistrial:

> THE COURT: All right, that Motion is denied and I find that under Rule 5 that whether or not the request for disclosure was or was not fully adhered to that the court has the authority under 5(b)2 to enter such Order as it deems just under the circumstances and I believe at this time that order would be one denying the Motion for a Mistrial. I have listened to the evidence. Mrs. Burry said she did not need the SLED Report, Doctor Kohanski had access to the report, Dr. Morgan had access to the Report, Doctor Barnard Dupree interviewed Mr. Patton and stuck by steadfastly to her diagnosis throughout this matter. There was the opportunity for counsel for the defense to subpoena the SLED agent. We discussed that when this came up if they wanted to render that further. The existence of this report or perhaps not the report, but the evidence of the meat of the report, that is, the gist of the report, i.e., the statements of the particular inmates regarding the April '93 incident were evidenced in an earlier report by Doctor Morgan. It appears that the counsel for the defendant requested from Doctor Kohanski access to these reports at least as early as May 7 of 1995; there has been no Motion to the court requesting further access to those records when Doctor Kohanski indicated that her superior said she could not produce them. There has been no request by counsel for defendant for The State to stipulate to those statements. There was after, at least not

to the court's knowledge, no one has called it to the court's attention, after March 7th and/or March 15th of this year, no request to the Solicitor that I am aware of for the reports Doctor Kohanski indicated she could not provide and, as I have said, no request was made to the court for an Order. I find that there is no prejudice on the failure of The State to provide the fourteen page summary of the report, that at this time the defense has had the opportunity to have available the three individuals we talked about earlier today, I believe that was Jennings, Gaithers and Walker. Additionally, Inmate Wimborn testified during the trial of this case. Additionally, at the start of this trial The State provided a list of the State's witnesses that were read into the record and a copy provided to counsel for defendant. This was in Aiken, I believe, on September 11th and thereon number 4 was Harry Anthony, number 34 was James Gaithers, number 49 was Harry C. Jennings,number 76 was John Patton, number 100 was Willie Stroud, number 106 was John Walker, number 110 was Felix Wimborn and no request was made regarding the nature of those witnesses. So I deny the Motion for a Mistrial.

* * * *

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

MS. BRICE: Your Honor, we would also submit that ---

THE COURT: Well, am I correct first, is that ---

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 by --

THE COURT: Well, now that you have them, what is exculpatory in there?

> MS. BRICE: Well, that Hughes was acting crazy at the time of the incident in the jail. There were specifically three persons who I talked to this morning who were not very willing to speak with me to be honest, but their statements that were written into the SLED Report were talking about how my client was crazy at the time of that incident and that ---
>
> THE COURT: And you have got expert testimony that says that from my understanding unless I haven't been listening to the same thing that the jury has.
>
> MS. BRICE: But it is my understanding I am entitled to exculpatory evidence by the Rules and it should have been provided to me. While I do have testimony by the psychiatrists, I don't feel that 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.

(R. p. 2342, line 18 - p. 2344, line 15; R. p. 2346, line 23 - p. 2348, line 4).

B. Analysis

The trial court did not err in denying Appellant's motion for a mistrial. It is clear that there was no violation of Rule 5 or Brady.

As an initial matter, it appears that Appellant did not claim a Brady violation at trial. Therefore, to the extent Appellant now relies upon Brady, this issue is not preserved.

Furthermore, it is clear that there was no violation of Rule 5 or Brady. First, it appears that the prosecution was under no duty to turn over SLED's summary of their investigation of the jailhouse stabbings. See State v. Gill, 319 S.C. 283, 292-93, 460 S.E.2d 417-18 (Ct. App. 1995), aff'd as modified 489 S.E.2d 478 (S.C. 1997). In Gill, the court ruled that the state was not required pursuant to Rule 5, S.C.R.Crim.P., to

turn over a summary report prepared by police. The court found that such a summary report is excluded from the disclosure requirement of Rule 5 by Rule 5(a)(2), S.C.R.Crim.P. (Excluding "reports, memoranda, or other internal prosecution documents made by ... prosecution agents in connection with the investigation or prosecution of the case.") Similarly, the prosecution was not required to turn over SLED's summary report pursuant to Rule 5.

Second, as noted by the trial court, it is clear that Appellant was given "the gist of the report, i.e., the statements of the particular inmates regarding the April '93 incident were evidenced in an earlier report by Doctor Morgan." (R. p. 2343, lines 8-11). Appellant can hardly claim any prejudice when both his counsel and all three psychiatrists who testified on his behalf had information about his fellow inmates' comments about Appellant's talking about "little green men."

Third, there was no Brady violation. Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963) requires the State to disclose evidence in its possession favorable to the accused and material to guilt or punishment. Pennsylvania v. Ritchie, 480 U.S. 39, 107 S.Ct. 9889 (1987). Impeachment or exculpatory 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. United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375 (1985); Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993); State v. Bryant, 307 S.C. 458, 461, 405 S.E.2d 806, 808 (1992). Brady requires the government disclose only evidence that is not available to the defense from other sources, either directly or through diligent investigation. Barnes v. Thompson, 58 F.3d 9971, 975 n.4

(4th Cir.), cert. denied, 116 S.Ct. 435 (1995); United States v. Clark, 928 F.2d 733, 738 (6th Cir.), cert. denied, 502 U.S. 846 (1991); United States v. Wilson, 901 F.2d 378, 380 (4th Cir. 1990) ("government has no Brady burden when the facts are available to a diligent defense attorney"). Thus, no Brady violation occurs where "a defendant knew or should have known the essential facts permitting him to take advantage of any exculpatory information or where the evidence is available to defendant from another source." United States v. Clark, 928 F.2d 733, 738 (6th Cir.), cert. denied, 502 U.S. 846 (1991); United States v. Kluger, 794 F.2d 1579, 1582-83 (10th Cir. 1986); see also Anderson v. Leeke, 271 S.C. 435, 248 S.E.2d 120 (1978); State v. Parker, 932 S.W.2d 945, 953-54 (Tn. 1996) (holding that state is not required to disclose information that defendant already possessed or is able to obtain). In the present case, not only was the information in the SLED summary available through diligent investigation, it was in the actual possession of the defense in the report of Doctor Morgan dated April 4, 1995. Therefore, there was no Brady violation.[11]

Appellant's contention at trial was that he was prejudiced because the SLED summary revealed that three inmates, John Walker, Harry Jennings, and James Gaithers, stated to SLED investigators that Appellant talked about a "little green man." (R. p. 1882, line 20 - p. 1883, line 23). A brief review of Doctor Morgan's Report dated April 4, 1995, however, reveals that all three of these inmates are discussed in the report. These inmates are quoted as saying that Appellant talked about the "little green man."

[11] Additionally, the defense was given a copy of the SLED Summary at the beginning of the sentencing phase.

(R. p. 3119 [Defense Pre-Trial Hearing Exhibit 2, Defense Trial Exhibit 9]). Therefore, Appellant cannot claim prejudice.

More importantly, it is clear that at trial the defense had an enormous amount of material regarding Appellant's behavior in jail around the time of the jailhouse stabbings. The defense presented significant testimony regarding Appellant's mental health at the time of the stabbings. All three doctors who testified for the defense knew of the statements by Appellant's fellow inmates that Appellant talked about a "little green man." Therefore, it is clear that the SLED summary did not add any significant additional information that would have changed the result of the proceeding.

For all the foregoing reasons, it is clear that Appellant's second issue on appeal is without merit.[12]

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[12] Respondent would also note that Appellant's counsel makes several unsupported statements in the brief on this issue. The most troubling is the following:

> In an effort to circumvent SCRCrimp Rule 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 and those selected statements were written and provided. Why, weren't all statements 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.

(BOA, at p. 39). Respondent has been unable to find support for this contention in the record.

III.

The trial court did not err in allowing into evidence statements made by Appellant to fellow inmates that strongly suggested that Appellant had been the shooter in the murder of Officer McCants because these statements were made without any police involvement.

In Appellant's third issue on appeal, he contends that two of his statements made to fellow inmates in the York County Detention Center should have been excluded because he made these statements when he was allegedly at "the height of his [alleged] psychosis." Appellant fails to mention that trial counsel conceded at trial that Appellant's alleged psychosis affected the weight and not the admissibility of these statements. Appellant also fails to recognize that Appellant's statements to fellow inmates did not involve interrogation or coercion by anyone, including the police. Finally, Appellant ignores the fact that there was significant evidence to support a finding that Appellant was not psychotic when he made the statements. Therefore, this issue is without merit.

A. Factual Background

In the pre-trial hearing defense counsel agreed with the trial court that, absent a constitutional violation caused by police interrogation, Appellant's alleged mental problems did not prevent the admissibility of statements made by Appellant. Instead, any possible mental defects would only impact on the weight the jury would give to Appellant's statements that were not the result of any police interrogation or coercion. (R. pp. 2507 - 2510).

In the pre-trial hearing, the trial court heard extensive testimony about numerous statements Appellant made at various times. The trial court also heard extensive testimony regarding the fact that Appellant was read his Miranda rights at least three

times and waived his rights each time. (R. pp. 2672-87, 2705-10, 2711-14, 2715-34, 2789-2832).

In the pre-trial hearing, the trial court heard numerous statements made by Appellant. One of these statements was made in the York County Detention Center and was overheard by Broadus Strain, a Detention Center sergeant. Sgt. Strain testified that he overheard Appellant tell inmate Bobby Lee Holmes "that when he [Appellant] gets down the road -- he knew some people that could get him a gun to the cell where he could kill him another white boy." (R. p. 2678, lines 7-9). Sgt. Strain testified that he did not do anything to provoke or elicit Appellant's statement to inmate Holmes. (R. p. 2678, line 21 - p. 2679, line 12). On cross-examination, Sgt. Strain testified that Appellant was in control and "knew what he was doing" when he made his statement to inmate Holmes. (R. p. 2682, line 4 - p. 2683, line 2).

During the pre-trial hearing, the trial court also heard extensive testimony about Appellant's mental health and his behavior in the detention center. (See discussion in Argument I).

Toward the end of the pre-trial hearing, the trial court asked defense counsel about the admissibility of Appellant's statements that were not the product of police interrogation. Trial counsel responded:

> MR. SCHUSTERMAN: Your Honor, our position on all the statements are the same. They all revolve around these -- well, I shouldn't say they are the same -- you probably can divide them into two groups, one group being the custodial interrogation, another group being the spontaneous utterances.

> Your Honor, I think that as it relates to -- my opinion is that as it relates to those utterances, I truly as an officer of the court don't believe that they would be inadmissible. I believe that the psychological testimony that we have provided go more to the weight that a jury is to give it rather than to the admissibility of those statements. I've found nothing to indicate -- I have found no cases anywhere to indicate that those statements made, the utterances made by a defendant who is under some type of mental defect or mental illness, would be inadmissible.

(R. p. 2958, line 11 - p. 2959, line 2).

After hearing from the Solicitor (R. pp. 2960-62), the trial court made a detailed ruling on the admissibility of all of Appellant's statements. (R. pp. 2963-67).

At trial, the State introduced, among other statements, two statements made by Appellant to fellow inmates in the York County Detention Center. Sgt. Strain testified that Appellant told inmate Holmes that "he was going to go down the road, he knew some people who could get him a gun at the CCI and he was going to kill him another white boy." (R. pp. 1520-21). Sgt. Strain testified that Appellant was rational and "calmed down" when he was talking to Holmes. (R. pp. 1522-25).

The State also called Harry Jennings, a fellow inmate in the York County Detention Center, to testify. (R. pp. 1487-1518). Jennings testified about a statement Appellant made that "the greatest feeling he ever had was when he shot that cop." (R. p. 1495, lines 4-5).

After an in camera hearing, the trial court ruled that the statement was admissible. (R. pp. 1506-07). Jennings then testified that he heard Appellant say in jail that "the best feeling I ever had is when I killed that cop." (R. p. 1510, lines 14-15).

B. Analysis

In this issue, Appellant asserts that his statements to inmate Holmes (overheard by Sgt. Strain) and inmate Jennings should have been excluded as involuntary because they were allegedly "involuntary delusional verbalizations." (BOA, at pp. 46-47). This argument must fail for several reasons.

First, it is clear that Appellant is now asserting on appeal an argument with which he and the trial court agreed was not correct or even supported by legal authority. (See R. pp. 2507-10; pp. 2958-59). Counsel conceded in discussions with the trial court that Appellant's alleged psychosis would only affect the weight of statements that were not the product of custodial interrogation, but not affect the admissibility of these statements. Appellant should not be allowed to now assert a claim that he admitted at trial was without merit.

Second, as Appellant's counsel correctly noted, Appellant's argument must fail because it suffers from a fatal flaw. The fundamental flaw is that Appellant refers to no evidence of police interrogation or coercion resulting in "overreaching" or outrageous behavior. In fact, both of the statements to which Appellant now objects were not made to the police, but to fellow inmates. It is well settled that for a statement to be found involuntary the court must find that it was the result of coercive government misconduct which is casually related to the statement. Colorado v. Connelly, 479 U.S. 157, 163, 107 S.Ct. 515, 520 (1986) ("absent police conduct casually related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law"). While the physical or mental condition of the accused

remains a pertinent concern as it relates to his vulnerability to government coercion, "mere examination of the confessant's state of mind can never conclude the due process inquiry." Colorado v. Connelly, 479 U.S. at 165, 107 S.Ct. at 521. Rather, the psychological and physical condition of the accused are significant in the "voluntariness calculus" only to the extent that the police exploit such characteristics to elicit incriminating statements from him.[13] Coercive police activity is a "necessary predicate" for a due process violation. Colorado v. Connelly, 479 U.S. at 167, 107 S.Ct. at 522. See also United States v. Rohrback, 8th Cir., 813 F.2d 142, 144, cert. denied, 482 U.S. 909, 107 S.Ct. 2490, 96 L.Ed.2d 381 (1987) ("Connelly makes it clear that such personal characteristics of the defendant are constitutionally irrelevant absent proof of coercion brought to bear on the defendant by the State").

Numerous courts have ruled that a criminal defendant's mental state alone (absent coercive police interrogation) will not provide a basis to exclude as involuntary the defendant's statement to police or a third party. Colorado v. Connelly, supra; Nickel v. Hannigan, 97 F.3d 403, 409-411 (10th Cir. 1996) ("As Connelly makes clear, Mr. Nickel's mental condition, in the absence of any evidence of police coercion, does not alone make his statements to the police involuntary."), cert. denied, 117 S.Ct. 1112 (1997); Purvis v. Dugger, 932 F.2d 1414, 1422 (11th Cir. 1991) (holding that the

[13] Courts generally have refused to consider the mental conditions of the suspect, even those which render him highly susceptible to suggestion, in the absence of either physical or psychological coercion by the government authority. See, e.g., Bell v. Lynaugh, 828 F.2d 1085 (5th Cir.), cert. denied, 484 U.S. 933, 108 S.Ct. 310 (1987); United States v. Gordon, 638 F.Supp. 1120 (W.D.La. 1986), aff'd., 812 F.2d 965 (5th Cir.), cert. denied, 483 U.S. 1009, 107 S.Ct. 3238 (1987).

defendant's confession was voluntary where defendant had a history of schizophrenia, was susceptible to authority figures, and had a childlike mentality, but where there was no evidence of police coercion), cert. denied, 503 U.S. 940, 112 S.Ct. 1485 (1992); United States v. Machlin, 900 F.2d 948, 950-51 (6th Cir.) (holding that defendants' confessions were voluntary when defendants were mentally retarded, but no evidence of police coercion), cert. denied, 498 U.S. 840, 111 S.Ct. 116 (1990); Brewer v. State, 646 N.E.2d 1382, 1385 (Ind. 1995); DeJesus v. State, 655 A.2d 1180, 1196-97 (Del. 1995); State v. Pleasant, 342 N.C. 366, 370-73, 464 S.E.2d 284, 286-88 (1995); State v. Knotts, 111 Ohio App. 3d 753, 677 N.E.2d 358 (1995); People v. Dunn, 195 A.D.2d 240, 244-45, 607 N.Y.S.2d 689, 692-93 (1994); State v. Blackmon, 875 S.W.2d 122, 134 (Mo. Ct. App. 1994) ("A statement which is induced by psychosis or a mental disease which destroys a defendant's volition and makes him confess is not involuntary within the meaning of the due process clause.") (citing Connelly); State v. Doby, 273 S.C. 704, 258 S.E.2d 896, 899 (1979); see also Illinois v. Perkins, 496 U.S. 292, 110 S.Ct. 2394, 110 L.Ed.2d 243 (1990) (finding admissible statements made by an inmate to a jailhouse informant without Miranda warnings, reasoning that Miranda was not meant to protect suspects from boasting about criminal activities in front of persons whom they believe are their cellmates). Because the two challenged statements were made to fellow inmates without any police interrogation, Appellant's argument must fail.[14]

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[14] Because Appellant's two statements to inmates Holmes and Jennings were not the result of police interrogation, State v. Callahan, 263 S.C. 35, 208 S.E.2d 284 (1974), is inapplicable. In Callahan, the statement at issue was the result of interrogation by police.

Third, Appellant did not present any evidence at trial that his statements to inmates Holmes and Jennings were "involuntary delusional verbalizations." Appellant cites to nowhere in the record in which there is testimony that Appellant's statements to his fellow inmates were delusional or involuntary.[15] Importantly, it is clear from the record below that significant evidence suggests that Appellant was not mentally ill. (See Argument I above). For all the foregoing reasons, this issue is without merit.[16]

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[15] Although Dr. Dupree noted in her pre-trial hearing that she believed that Appellant could not give an intelligent statement because he was in a prodromal phase when arrested, she did not testify regarding any statements given by Appellant to his fellow inmates. (Tr. pp. 2836-2838). Importantly, neither of the statements given to inmates Holmes and Jennings were disorganized or bizarre. In fact, Sgt. Strain testified that Appellant "knew what he was doing" when he made the statement to inmate Holmes. (Tr. p. 2682-83).

[16] Appellant's reliance on the decision in his co-defendant's appeal, State v. Forney, 468 S.E.2d 641 (S.C. 1996), is misplaced. In Forney, several of Appellant's statements were excluded under the standards for admitting an unavailable declarant's statements against penal interest and evidence of third party guilt. Obviously, the standards for the admission of an unavailable declarant's statements against penal interest and evidence of a third party's guilt are quite different from the requirements to allow the admission of a defendant's own statement. Therefore, the reasoning of the Court in Forney is inapplicable to the issue of the admission of Appellant's statements in Appellant's own trial.

IV.

The trial court was correct in refusing to allow into evidence as a mitigating circumstance in the sentencing phase the fact that Appellant's co-defendant Forney received a life sentence in an earlier trial.

In Appellant's fourth issue on appeal, he argues that the trial court erred in refusing to allow Appellant to introduce into evidence his co-defendant, Eric Forney's sentence of life. Appellant claims that Forney's sentence of life alone should have been admitted "as a statutory mitigating circumstance to be considered by the jury in" the sentencing phase of Appellant's trial. (BOA, at p. 51). This claim is without merit.

A. Relevant Factual Background

Appellant and his co-defendant, Eric Forney, were charged with the murder of Officer McCants. Co-defendant Forney was tried prior to Appellant. Co-defendant Forney was tried and convicted of murder but was found not guilty of possession of a firearm during the commission of a violent crime.

Prior to trial, Appellant made an in limine motion to restrict the State from trying the defendant as principal actor. (R. p. 2549). The trial court deferred ruling on the motion. (R. p. 2551, lines 3-4).

At the close of Appellant's case in the sentencing phase the following colloquy occurred:

> MS. BRICE: Your Honor, that concludes the testimony. We would also seek to move the indictments, the returned indictments, on the Forney case into evidence at this time.
>
> THE COURT: What says The State?
>
> MR. POPE: The State would object to the relevance of it.

THE COURT: I sustain the objection.

Well, let me hear from -- he says they are not relevant. Tell me why you think they are relevant and let me look over them a little bit for a minute and let you at least tell me why you think they are relevant.

MS. BRICE: Your Honor, I would find they are directly relevant to the sentencing of Mr. Hughes. Mr. Forney, a co-defendant, certainly has no more culpability than Mr. Hughes has in the incident of the murder of Brent McCants. I think it is important for the jury to know that there was a deliberation by another jury that found that Mr. Forney got a life -- was found to be awarded a life sentence.

THE COURT: What was Mr. Forney found guilty of?

MS. BRICE: The same charges that Mr. Hughes was found guilty of, particularly, the murder, Your Honor.

THE COURT: What was he found guilty of?

MS. BRICE: He was found guilty of unlawful carrying of a pistol, of armed robbery, of criminal conspiracy, and of murder, Your Honor.

THE COURT: Was he not charged with the possession of a firearm during the commission of those?

MS. BRICE: The indictments I read was the indictments I have before me. I believe he was charged with what the court just stated for the record. I do not believe that he was found guilty by the twelve jurors in his case.

THE COURT: Was your client found guilty of possession of a handgun at the time of the armed robbery?

MS. BRICE: Yes, Your Honor, I don't know on what basis, but ---

THE COURT: I know; is that not a significant difference that they found that Mr. Forney did not have the gun at the time? I want to make sure I am right on what I am saying. Can the Solicitor help me with that?

MR. POPE: Yes, sir.

THE COURT: I don't have the indictments. It is my recollection that he was charged and the jury considered ---

MR. POPE: Considered possession of firearm during the commission of a violent crime and that's in ---

THE COURT: On both murder and armed robbery and returned verdicts of not guilty.

MR. POPE: That is correct.

MS. BRICE: Your Honor, I believe the case law and the statute is clear that anything that would tend to show a mitigating circumstance should be called to the attention of the jury and I believe that this is a mitigating circumstance that his co-defendant got a life sentence.

THE COURT: But is there not any significance in the fact that jury found that at the time of the murder and armed robbery they determined Mr. Forney did not have the gun and that they had found at the time of the armed robbery your client did have the gun or a gun?

MS. BRICE: Your Honor, it would be our position and our argument that this is a mitigating circumstance. It should be brought to the attention of the jury.

THE COURT: I deny the motion.

MR. POPE: Your Honor, for the record I would like to put in the record too that Mr. Forney's jury did not find for life. The jury deliberated an extensive period of time and were unable to return a verdict and because of that the court gave him a verdict of life. I think that should be noted from the standpoint they did not ultimately reach a deliberation on that particular point. I would just like that in the record.

THE COURT: It is my recollection that they found on Mr. Forney also they did find some statutory aggravating circumstances, but did not give the death penalty, and I

can't remember whether they found any mitigating circumstances or not.

What about that, Mr. Schusterman?

MR. SCHUSTERMAN: Your Honor, just so that the record is complete, I don't have any problem with everything Mr. Pope says is true and can be conveyed to the jury, the fact the jury did deliberate, that they returned aggravating circumstances, but then were not able to unanimously vote for death. I think that the overall concept whether or not a particular charge was found guilty or not this all comes out of this same event when we all can see that this all comes out of an event on September 25, 1992 at 10:43. One of the mitigating factors, Your Honor, is the relative culpability, one of the statutory mitigating circumstances is the relative culpability of a co-defendant. So to that degree the jury, I think, has a right to know under that concept that this man here within in the scheme of things, within this event, got a life sentence. And then if you start -- if the court begins to then say, well, isn't it true that one charge he was found guilty or not, we 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, but what the court, in fact, is doing is saying that because they found him guilty of the unlawful carrying of a gun that somehow they must have attributed him to being the shooter or the trigger man and that's not necessarily true. 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. Thank you, sir.

THE COURT: I deny the introduction of those. Please make them a part of the record as a court's exhibit so we will have those.

(Court's Exhibits 15, 16, 17, 18 marked and filed.)

(R. p. 2334, line 16 - p. 2339, line 6).

B. Analysis

The trial court did not err in refusing to allow into evidence the fact that Appellant's co-defendant was sentenced to life imprisonment by the trial judge after his sentencing jury could not reach a unanimous decision on his sentence. The sole function of the jury in the sentencing phase of a capital trial is to decide which sentence to impose upon the defendant. That determination must be based upon the specific circumstances of the crime and the characteristics of the individual defendant. E.g., Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821 (1987); Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733 (1983); State v. Shaw, 273 S.C. 194, 255 S.E.2d 799 (1979). As this Court observed in State v. Bell, 305 S.C. 11, 19, 406 S.E.2d 165, 170 (1991):

> [t]he sentencing jury in a capital case may not be precluded from considering as mitigating evidence any aspect of the defendant's character or record and any circumstances of the crime that may serve as a basis for a sentence less than death. Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987); State v. Cooper, 291 S.C. 332, 353 S.E.2d 441 (1986).

305 S.C. at 19, 406 S.E.2d at 170. However, despite the broad latitude generally given to a capital defendant regarding the evidence he may present in the sentencing phase, the trial judge still has "the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of the offense." Lockett v. Ohio, 438 U.S. 586, 604 n. 12, 98 S.Ct. 2954, 2965 n. 12 (1978) (emphasis added); People v. Dyer, 45 Cal.3d 26, 69-71, 753 P.2d 1, 26-27 (1988). See

also Walton v. Arizona, 497 U.S. 639, 652, 110 S.Ct. 3047, 3056 (1990); State v. William Bell, supra.

The decision of what factors should be deemed relevant is a matter to be determined under state law. E.g. State v. Williams, 321 S.C. 327, 337, 468 S.E.2d 626, 632 (1996) (whether parole eligibility is relevant to sentencing determination is a matter of state law). See Walton v. Arizona, supra; Boyde v. California, 494 U.S. 370, 377, 110 S.Ct. 1190, 1196 (1990); People v. Page, 156 Ill.2d 258, 271, 620 N.E.2d 339, 347 (1993); see also Gregg v. Georgia, 428 U.S. 153, 192, 96 S.Ct. 2909, 2934 (1976). This Court has held that "[e]vidence relating to the circumstances of the crime is relevant in a capital sentencing proceeding if it provides 'information relevant to the defendant's moral culpability'." State v. (William) Bell, 305 S.C. at 20, 406 S.E.2d at 170 (emphasis added) (citing South Carolina v. Gathers, 490 U.S. 805, 812, 109 S.Ct. 2207, 2211 (1989)). Applying these legal principles to the present case, it is clear that there was no error and that the trial judge's ruling must be affirmed.

Initially, the State submits that Appellant's claim must be rejected because it is not at all clear that Appellant and his co-defendant were equally culpable. To the contrary, the State's evidence clearly suggested that Appellant was the triggerman in the murder of Office McCants. Some of Appellant's own statements revealed that Appellant actually shot Officer McCants.

More importantly, assuming arguendo that Appellant and his co-defendant were equally culpable, Appellant's fourth issue on appeal must be rejected because evidence that another jury could not reach a unanimous decision regarding the sentence to impose

upon Forney simply is not a relevant mitigating circumstance in Appellant's sentencing proceeding.

In William Bell, supra, this Court held that a co-defendant's demeanor was not a mitigating circumstance under Hitchcock v. Dugger, supra. The Court also upheld the trial judge's refusal to allow Bell to introduce his co-defendant's prior criminal record, which had been proffered as relevant to the statutory mitigating circumstances in § 16-3-20(C)(b)(4) & (5). In doing so, this Court held that "... the proffered evidence of [the co-defendant's] prior record, absent any evidence establishing its logical relevance to the circumstances of the crime, is not probative on the issue of Appellant's moral culpability." 305 S.C. at 20, 406 S.E.2d at 170. Although this Court in William Bell did not address the precise issue raised by Appellant; following the reasoning of that decision, it is clear that the evidence of Forney's life sentence was irrelevant to Appellant's moral culpability. Thus, this evidence was properly excluded. Id.

The overwhelming majority of courts which have considered the issue have held that evidence of a co-defendant's acquittal or sentence of life imprisonment[17] is not a relevant mitigating circumstance. See e.g., State v. Bond, 345 N.C. 1, 33-34, 478 S.E.2d 163, 180-81 (1996);[18] People v. Page, 156 Ill.2d 258, 270-72, 620 N.E.2d 339, 347-348 (1993); Com. v. Haag, 522 Pa. 388, 405-06, 562 P.2d 289, 298 (1989);[19]

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[17] Respondent has been unable to find any cases in which the co-defendant received a life sentence after the jury could not reach a sentencing decision.

[18] See also Crowder v. State, 491 S.E.2d 323, 325 (Ga. 1997).

[19] The State would note that this Court has previously found Com. v. Haag to be persuasive authority in construing a statutory mitigating circumstance. See State v. Sims, 304 S.C. 409, 405 S.E.2d 377, 385 (1991).

People v. Dyer, 45 Cal.3d 26, 69-71, 753 P.2d 1, 26-27 (1988); State v. Gerald, 113 N.J. 40, 105, 549 A.2d 792, 826 (1988); Brogden v. Blackburn, 790 F.2d 1164, 1169 (5th Cir. 1986), cert. denied, 481 U.S. 1042, 107 S.Ct. 1985 (1987); Johnson v. State, 477 So.2d 196, 218 (Miss. 1985), rev'd on other grounds, 486 U.S. 578, 108 S.Ct. 198 (1988); Brogie v. State, 695 P.2d 538, 546-47 (Okl. Crim. App. 1985); State v. Brogden, 457 So.2d 616, 626 (La. 1984); Coulter v. State, 438 So.2d 336, 345 (Ala. Cr. Ap. 1982); State v. Williams, 305 N.C. 656, 686-87, 292 S.E.2d 243, 261-62 (1982);[20] but see Messer v. State, 330 So.2d 137 (Fla. 1976). There are numerous sound reasons for this Court to adopt the position of the overwhelming majority of courts and reject Appellant's argument.

First, Appellant's claim fails to give jury trials the proper respect which they deserve. As the Mississippi Supreme Court observed in Johnson v. State: "[e]ach case tried by a separate jury must stand on its own. Otherwise, the jury trial is pointless." 477 So.2d at 218. Furthermore, in order to comply with the Eighth Amendment, the imposition of the death penalty requires an individualized consideration of the defendant's character and the circumstances of the crime. See Walton v. Arizona, 497 U.S. at 652, 110 S.Ct. at 3056; Eddings v. Oklahoma, 455 U.S. 104, 110-112, 102 S.Ct. 869, 875 (1982); State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983); People v. Page, 156 Ill.2d at 271, 620 N.E.2d at 347. Moreover, "[t]he requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all relevant

[20] See also In Re Lord, 123 Wash. 2d 296, 331-32, 868 P.2d 835, 857 (1994) (citing State v. Lord, 117 Wash. 2d 829, 914, 822 P.2d 177, 225 (1992)).

mitigating evidence." Blystone v. Pennsylvania, 494 U.S. 299, 307, 110 S.Ct. 1078, 1083 (1990) (emphasis added). See also Walton v. Arizona, supra.

Yet, evidence that a co-defendant received a sentence of less than death, following a separate trial in front of a different jury, is not a relevant mitigating circumstance. It has no bearing on the defendant's character, record or the nature of his participation in the crime. Brogden v. Blackburn, 790 F.2d at 1169; People v. Dyer, 45 Cal. 3d at 69-71, 753 P.2d at 27; Brogie v. State, 695 F.2d at 546-547; Coulter v. State, supra. The fact a co-defendant received a lesser sentence simply "is not a mitigating circumstance. It does not reduce the moral culpability of the killing nor make it less deserving of the penalty of death than other [capital] murderers." State v. Williams, 305 N.C. at 686, 292 S.E.2d at 261; People v. Dyer, 753 P.2d at 27. Cf. William Bell, supra.

As noted by many courts, the fact a co-defendant received a life sentence, following a separate trial in front of a different jury, is no more relevant than if he had been sentenced to death. See Coulter v. State, supra; People v. Dyer, supra; Johnson vs. State, supra; Brogden v. Blackburn, supra. Thus, in order for Forney's sentence of life imprisonment to have any meaning in Appellant's case, it would have been necessary to develop all of the facts at Forney's trial for Appellant's jury.

For instance, Appellant's jury did not know what different evidence had been presented at Forney's trial.[21] It was also unaware of any defenses Forney may have asserted or what matters he may have offered in mitigation of sentence. "Requiring the

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[21] One significant difference was the fact that Forney always contended that Appellant was the shooter. Also, as noted above, Forney was found not guilty of the counts of possession of a firearm during the commission or attempt to commit a violent crime.

sentencer to examine and compare the relative culpability of the defendants and the circumstances in aggravation and mitigation applicable to each would unnecessarily complicate an already difficult task." People v. Page, 156 Ill.2d at 272, 620 N.E.2d at 348. See also People v. Dyer, 753 P.2d at 27. In short, Appellant has not offered any compelling reason for this Court to depart from its reasoning in State v. William Bell, supra, and hold that Appellant should have been allowed to inform the resentencing jury of Forney's life sentence, as a supposed non-statutory mitigating circumstance.

Another flaw to Appellant's argument is that if evidence of a co-defendant's lesser sentence is a relevant mitigating circumstance, the State submits it would have the right to introduce as an aggravating circumstance evidence that a co-defendant had received the death penalty. See State v. Stewart, 288 S.C. 529, 331 S.E.2d 775 (1989) (both State and defendant entitled to fair trial). Obviously, a defendant who asserts that his participation was less than that of his co-defendant, see § 16-3-20(C)(b)(4)-(5), will argue that evidence of that co-defendant's sentence is an irrelevant and arbitrary factor. Cf. People v. Dyer, supra; People v. Page, supra; Johnson v. State, supra. Thus, the position Appellant espouses would only lead to further and unnecessary litigation of this issue.

Therefore, because the Eighth Amendment does not require this Court to needlessly complicate the sentencing phase of capital trials with irrelevant evidence, see Blystone v. Pennsylvania, supra, the State would urge this Court to hold that evidence Forney had been sentenced to life imprisonment for the murder of Officer McCants was irrelevant to Appellant's moral culpability. Therefore, such evidence was not a relevant

mitigating circumstance under State v. (William) Bell, supra. See Brogden v. Blackburn, supra; People v. Dyer, supra; People v. Page, supra; Johnson v. State, supra; State v. Williams, supra; Com. v. Haag, supra.

V.

Appellant's death sentence was neither excessive nor disproportionate to the penalty imposed in similar cases, considering both the circumstances of the crime and the character of the defendant.

In Appellant's fifth issue on appeal, he contends that, pursuant to S.C. Code Ann. § 16-3-25, his "sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." (BOA, at p. 56). This claim is without merit.[22]

First, as an initial matter, it is clear that Appellant's sentence is neither excessive and disproportionate to the penalty imposed in similar cases. See, e.g., State v. Ivey, 325 S.C. 137, 481 S.E.2d 125 (1997) (murder of Orangeburg police officer while officer was attempting to arrest defendant); State v. Hudgins, 319 S.C. 233, 460 S.E.2d 388 (1995) (murder of police officer during traffic stop after defendant and co-defendant stole a truck)[23]; State v. Johnson, 306 S.C. 119, 410 S.E.2d 547 (1991) (murder of state highway trooper after trooper had stopped defendant's vehicle); State v. South, 285 S.C. 529, 331 S.E.2d 775 (1985) (murder of West Columbia police officer).

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[22] To the extent Appellant asserts a violation of the Eighth Amendment or Fourteenth Amendment, this claim is also without merit. Pulley v. Harris, 465 U.S. 37, 104 S.Ct. 871 (1984) (holding that there is no constitutional requirement to conduct comparative proportionality review); Hatch v. State, 58 F.3d at 1466-67.

[23] In Hudgins, each co-defendant claimed that the other was the triggerman. Hudgins' co-defendant, Terry Cheek, pled guilty to accessory after the fact. Hudgins was sentenced to death. This Court affirmed the conviction and found that Hudgins' sentence did not violate S.C. Code Ann. § 16-3-25. Hudgins, 319 S.C. at 239, 460 S.E.2d at 391-92.

Second, Appellant's co-defendant's sentence of life imprisonment after his jury could not reach a unanimous verdict as to his sentence does not render Appellant's death sentence excessive or disproportionate. It is clear that, contrary to Appellant's assertion, Appellant's case does not afford this Court with "the exact same set of facts and evidence" as Forney's case. (BOA, at p. 57). A brief review of the transcript of Appellant's case and Forney's case demonstrates how the jury in Appellant's case could have determined that Appellant was deserving of the death penalty. Both Appellant and Forney testified at their trials. The jury in Forney's case apparently believed that Forney was not the triggerman of the murder of Officer McCants. Unlike Appellant, Forney consistently contended that he was not the shooter. The jury found Forney not guilty of the crime of possession of a firearm during the commission of a violent crime. The jury in Appellant's case apparently determined that Appellant was the triggerman. Unlike Forney, Appellant made several statements that clearly suggest that he actually shot and killed Officer McCants. Unlike the jury in Forney's case, the jury in Appellant's case found him guilty of possession of a firearm during the commission of a violent crime. Additionally, it is clear that the evidence of aggravation in Appellant's case was more substantial than in Forney's case. In particular, Appellant had (1) a significant criminal record; (2) a long history of rules violations in prison; and (3) he stabbed two fellow inmates while awaiting trial. See Brogdon v. Blackburn, 790 F.2d at 1170 ("Sentencing hearings in capital cases focus not only upon the circumstances of the underlying crime, but also upon the personal attributes of each of the defendants."). This brief review

demonstrates that Appellant's assertion that he and Forney had "the same degree of culpability" is not supported by the record.

An acceptance of Appellant's argument would make it impossible for the State to ever obtain a death sentence when co-defendant's each claim the other was the triggerman and one of the defendants does not receive the death penalty.[24] In order to resolve such disputes, a jury has to make credibility determinations. To award Appellant a life sentence merely because his co-defendant received a life sentence would be an implicit rejection of Appellant's trial jury's credibility determinations and their evaluation of Appellant's character. Because the jury's decision was based on the observation of all the witnesses and evidence at trial, including Appellant's credibility, this Court should not overturn this informed sentence.

Appellant relies upon Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368 (1982) which specifically forbids imposition of the death penalty on a defendant who may have aided and abetted a felony in the course of which a murder was committed by others, but who did not himself kill, attempt to kill, intend to kill or contemplate that life would be taken. Enmund is no help to Appellant. Even under Appellant's testimony, he and Forney went out with a gun and a knife and a razor blade. Appellant admitted that he knew Forney had the gun Appellant allegedly sold to Forney. Appellant was a full participant in the robbery of Beth Ann Jayne and Sean McMillan in which Forney held a gun on Sean McMillan and forced Beth Ann to open the car at gun point. Appellant

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[24] In fact, Appellant made a motion to prohibit the State from pursuing the death penalty against Appellant. (Tr. pp. 2533-35).

also admitted driving Forney away from the scene of the murder. It is clear under Enmund that Appellant was sufficiently involved in the murder (even under his own testimony) to constitutionally authorize the application of the death penalty to him. See Hatch v. State, 835 P.2d 880, 884 (Ok. Ct. Crim. 1992); Haney v. State, 603 So.2d 368, 386-87 (Ala. Ct. Crim. 1991); White v. Wainwright, 1478, 1484 (11th Cir. 1987); Ross v. Kemp, 756 F.2d 1483, 1489 (11th Cir. 1985); Brogie v. State, 695 P.2d 538, 547-48 (Ok. Ct. Crim. 1985). For all the foregoing reasons, Appellant's fifth issue on appeal is without merit.

VI.

The trial court did not err or abuse its discretion by refusing to grant a mistrial after the victim's mother hurriedly left the courtroom during psychiatric testimony in the sentencing phase.

In his sixth issue on appeal, Appellant contends that the trial court erred when it failed to grant a mistrial after the mother of Trooper McCants hurriedly left the courtroom during the cross-examination of a defense psychiatrist and flung open the door in the back of the courtroom. This claim is without merit.

A. Factual Background

After forensic psychiatrist Renee S. Kohanski testified in the sentencing phase, the following matters were put on the record:

> 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 inter-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 here at the bench by counsel for the defendant for a mistrial.
>
> Do you want to elaborate on that?
>
> MR. SCHUSTERMAN: Your Honor, I think you articulated the facts for the record as we observed. I would add that I was not participating in either the direct or cross examination. 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 distressing 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 a 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 emotional testimony yesterday that her behavior does rise to the level of persuading fourteen jurors as her commenting on the facts. For that reason we make a motion for a mistrial.
>
> 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 my mind.

(R. p. 2250, line 17 - p. 2252, line 9). The solicitor responded by noting that he had no knowledge the victim's mother and sister would abruptly leave the courtroom and cause the back door to slam as they left. (R. p. 2252, line 22 - p. 2253, line 9). After hearing further argument from defense counsel, the trial court denied the mistrial motion but offered to give a curative instruction to the jury:

> THE COURT: I would like to go on the record that because of the emotional posture of any case like this and particularly this one I have had several discussions with the solicitor and they have bent over backwards to try to prevent this sort of thing. I certainly want the record to reflect that. We have discussed it and the Solicitor's Office for the record, you can't see the layout of this courthouse, but it is such that it is very difficult for the -- well, I'll put it like this, the witnesses and Mrs. McCants and the jury all have to use the same hallway for the entrance and exiting the building and the Solicitor's Office has been very cooperative in trying to make sure that those twains never

> meet and to my knowledge they have not, so I certainly find no fault with the Solicitor.
>
> I'm not going to grant the Motion for a Mistrial. I think it was a very unfortunate thing. If it were to happen again, we would have to look at it differently. If the defense wishes to prepare and you don't have to do it right now, a curative instruction of some sort, we will take a look at that before my charge and we are going to go over the charge in just a minute. I don't think that the jury could be more well aware of Mrs. McCants' emotional involvement than they were about this time yesterday when she testified, so it would appear to me even though it was uncalled for and bordered on being disruptive and it was momentarily disruptive apparently, I think that it appeared, I mean it could have been taken as frustration as much as anything, and the jury already knows how she feels about this matter, and while it was not testimonial testimony to an extent, and while it may be interpreted as it could be perhaps a negative comment on the testimony of the witness who was testifying, taking the totality of the circumstances and all the context in which we find ourselves after two weeks of trial almost, if you count the pre-trial motions, I don't find that it was prejudicial to the extent that it would warrant the granting of a mistrial.

(R. p. 2253, line 23 - p. 2255, line 9) (emphasis added).

Later, during the charge conference in the sentencing phase, the trial court revisited the issue of whether the defense wanted the court to give a curative instruction "regarding the episode of Mrs. McCants leaving the courtroom yesterday." (R. p. 2402, lines 11-14). The following colloquy then followed:

> MR. SCHUSTERMAN: Your Honor, we have talked about that and, obviously, there is a certain dilemma in curative instruction that you may be drawing more attention.
>
> THE COURT: So that's why I will not give one voluntarily, that's why I asked if you wanted one and if you drafted

> one, I would consider it, but I am not going to sui sponte give any such for that very reason.
>
> MR. SCHUSTERMAN: And we certainly appreciate that, Your Honor, and after discussing it, we have decided that it would probably be best left alone and we would ask that a curative instruction not be given.
>
> THE COURT: Does The State want anything in that regards?
>
> MR. POPE: No, sir, Your Honor.

(R. p. 2402, line 15 - p. 2403, line 4).

B. Analysis

Appellant's argument that the trial court erred and abused its discretion in refusing to grant the mistrial motion is both procedurally barred and substantially without merit.

As an initial matter, it is clear that this issue was waived by Appellant. After Dr. Kohanski's testimony, the court offered to give a curative instruction. Later, before the charge to the jury, the trial court again offered to give a curative instruction. This offer was refused by Appellant. Because Appellant refused the trial court's offer of the curative instruction, this issue is procedurally barred. State v. Tucker, 324 S.C. 155, 169, 478 S.E.2d 260, 267 (1996) (defendant waived issue because he refused the trial court's offer of a curative instruction); State v. South, 285 S.C. 529, 537, 331 S.E.2d 775, 780 (1985); State v. Watts, 321 S.C. 158, 164-65, 467 S.E.2d 272, 276 (Ct. App. 1996) (after making mistrial motion, defendant waived any complaint regarding challenged testimony when he rejected the trial court's offer to strike the testimony or give a curative instruction); State v. Lunsford, 318 S.C. 241, 245, 456 S.E.2d 918, 921 (Ct. App. 1995).

Assuming arguendo that this issue is not procedurally barred, the trial court did not abuse its discretion in refusing to grant a mistrial. "The decision whether to grant a mistrial because of a [victim's family member's] outburst rests within the sound discretion of the trial court and will not be reversed absent an abuse of discretion or manifest prejudice to the complaining party." State v. Anderson, 322 S.C. 89, 91-92, 470 S.E.2d 103, 105 (1996) (citing State v. Wagstaff, 202 S.C. 443, 25 S.E.2d 484 (1943)).

In Anderson, this Court found that the trial court did not abuse its discretion in denying a mistrial motion after the sister of the murder victim (while testifying) asked the defendant, "Why, Shawn? Why did you do it? ... He didn't have to take her life." Once the jury was removed, the victim's sister allegedly bawled and screamed, "He didn't have to do it. She had so much to live for." This Court found that the incident was very limited in time and scope and that the victim's sister's outburst "was, in large part, an expression of grief over the death of her sister, and the jury likely understood it as just that." Anderson, 322 S.C. at 93, 470 S.E.2d at 106. This Court held that because "the trial judge was in the best position to asses the degree to which the jury may have been prejudiced by the outburst, he did not abuse his discretion in denying Anderson's mistrial motion." Id. at 93, 470 S.E.2d at 105-06.

Similarly, in Wagstaff, this Court addressed in dicta the effect of a rape victim's mother's emotional outburst. At the end of her testimony, the victim's mother rushed toward the defendant screaming, "I could tear your eyes out." The defendant argued that the trial court erred in not granting a mistrial based on the outburst. Although the Court

found the issue was not properly preserved, the Court nevertheless considered that granting a mistrial would have been inappropriate. After noting that a mistrial should be granted when there is "manifest necessity" to do so, the Court stated:

> We believe the jury could readily understand that the witness in question might have a hostile attitude toward the accused, because of the natural effect of the circumstances on her emotions, although there was nothing whatever in her testimony tending to show his guilt, and hence her attitude was based solely upon the testimony of others.... When all the circumstances of the instant case are considered we believe it is clear that even if a motion for a mistrial had been made the trial Judge would not have been justified in granting it, in the proper exercise of his discretion. There was certainly no manifest or absolute necessity for such action.

Wagstaff, 202 S.C. at 453-54, 25 S.E.2d at 488-89.

In the present case, it is clear that the trial court did not abuse its discretion by denying the mistrial motion. As in Anderson, the incident was very limited in time and scope. More importantly, the actions were obviously expressions of grief and frustration over the death of Trooper McCants which the jury surely understood as just that. See Anderson, 322 S.C. at 93, 470 S.E.2d at 106; Wagstaff, 202 S.C. at 453-54, 25 S.E.2d at 488-89. Finally, it is clear that the trial court did not err in not giving a curative instruction after the defense requested that he not give one. See Anderson, 322 S.C. at 94, 470 S.E.2d at 106 (noting that "a curative instruction ... could have focused the jury's attention on the outburst, thus increasing the possibility of improper prejudice to the defendant.").

For all the foregoing reasons, this issue is procedurally barred and substantially without merit.

VII.

The trial court did not abuse its discretion when it gave an Allen charge to the jury that was both evenhanded and not unduly coercive.

In Appellant's last issue on appeal, he asserts that the trial court erred by giving an allegedly coercive Allen[25] charge in the sentencing phase of the trial. Specifically, by taking a myopic view of the charge, Appellant asserts the charge was not "even-handed" because it supposedly "focused on those jurors who held the minority view." (Appellant's Brief, at pp. 68 - 69). This claim is procedurally barred and substantively without merit.

A. Relevant Facts

After the conclusion of testimony, closing arguments and jury instructions in the sentencing phase, the jury began deliberations at approximately 4:25 p.m. on September 22, 1995. (R. p. 2452). At 8:30 p.m. the trial court received a note from the jury which read:

> 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?

(R. p. 3039 [Court's Exhibit 32]). (R. p. 2453). The trial court then had a colloquy with counsel for the State and Appellant. Counsel for Appellant made a general objection to any Allen charge being given because "they are coercive in nature." (R. p. 2453, line 25 - p. 2454, line 1). Additionally, Appellant's trial counsel objected to the phrase in

[25] Allen v. United States, 164 U.S. 492, 17 S.Ct. 154 (1896).

the proposed Allen charge that "it is the jury's duty to agree on a verdict." (R. p. 2454, lines 7-21). After this colloquy, the trial court gave the following Allen charge:

> Well, by law I cannot tell you where to go from here, but I can ask and make a suggestion that you continue deliberations in an attempt to reach a verdict. 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. No juror, however, should surrender their honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a unanimous verdict.
>
> I ask you to remember that after full deliberation and consideration of the evidence it is your duty to agree upon a verdict if you can without disobeying your individual judgment and conscience.
>
> And with these instructions I am going to ask that you in response to your question "Where do we go from here." I am going to ask that you retire to your jury room and do some further deliberations.

(R. p. 2455, line 10 - p. 2456, line 14). The jury returned to the jury room and continued deliberations at 9:15 p.m. (R. p. 2456, lines 11-15). After the trial court gave the Allen charge, Appellant's trial counsel reasserted the same two objections to the

charge that he made prior to the charge. (R. p. 2457, lines 1-14).[26] At approximately 11:00 p.m., the trial court sent a note to the jury asking: "Would the jury like to continue to work tonight or break until in the morning?" (R. p. 3040 [Court's Exhibit 34]). The jury wrote back: "We will answer your note in a few minutes." (Court's Exhibit 33). Nothing in the record indicates any objection to the judge's note to the jury or the jury's response. At approximately 11:30 p.m. the jury returned to the courtroom to report its verdict. (R. p. 2457, line 20 - p. 2458, line 3).

B. Analysis

In this issue, Appellant raises for the first time the argument that the Allen charge was not even-handed because it allegedly "focused on those jurors who held the minority view." As an initial matter, this issue is procedurally barred. State v. Tucker, 319 S.C. 425, 427-28, 462 S.E.2d 263, 264-65 (1995). In Tucker, the defendant objected generally to an Allen charge given by the trial court in the sentencing phase of a death penalty case. The defendant made a general objection that the Allen charge was coercive in nature and requested that the jury be informed of the consequences of not being able to reach a unanimous decision (i.e. the defendant would be sentenced to life). On appeal, the defendant in Tucker argued that the trial court should have told the jury not to reveal their vote and that the trial court, knowing only one juror prevented the jury from a unanimous decision, erred in giving an Allen charge. This Court found the arguments on appeal to be procedurally barred because a party cannot argue one ground below and

[26] After Appellant was sentenced to death, his trial counsel once again reasserted that the Allen charge was generally coercive. (Tr. p. 2467, line 15 - p. 2468, line 6).

then argue another ground on appeal. Tucker, 319 S.C. at 428, 462 S.E.2d at 265 (citing State v. Bailey, 298 S.C. 1, 377 S.E.2d 581 (1989)). Similar to the situation in Tucker, Appellant raised a general objection to the Allen charge given by the trial court. On appeal, however, in arguing that the Allen charge was improper, he raises a new ground for the first time. Accordingly, Appellant's assertion that the Allen charge improperly focused on the jurors who held the minority view[27] is procedurally barred. Tucker, supra; Bailey, supra; State v. Crowley, 226 S.C. 472, 85 S.E.2d 714 (1955) (objection must be on specific ground).[28]

Assuming arguendo that this issue were not procedurally barred, the Allen charge given was even-handed and did not focus unduly on the juror who held the minority view. Clearly, a trial judge has a duty to urge the jury to reach a verdict, but he may not coerce it. State v. Pauling, 322 S.C. 95, 99, 470 S.E.2d 106, 108-09 (1996) (citing State v. Lynn, 277 S.C. 222, 284 S.E.2d 786 (1981).

The Allen charge given by the trial court required both those jurors in the majority and the minority to reconsider their views in light of the opinions of the other jurors. In fact, the language that Appellant points to in asserting that the charge focused impermissible on the jurors in the minority -- "Each juror who finds himself in the minority shall reconsider his views in the light of the opinions of the majority, and each

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[27] The jurors in Appellant's case did not reveal to the court what their vote was. Nor did they reveal whether the majority was in favor of a death sentence or life. See State v. Jones, 320 S.C. 555, 558-59, 466 S.E.2d 733, 734-35 (Ct. App. 1996).

[28] Additionally, any assertion that the trial judge somehow coerced the jury to reach a verdict by sending a note for the jury asking whether they wanted to continue deliberating or break until the morning is procedurally barred because it was not raised at trial.

juror who finds himself in the majority shall give equal consideration to the view" -- actually has been approved by the Fourth Circuit. See United States v. Sawyers, 423 F.2d 1335, 1342-43 & n. 7. This language to which Appellant objects is actually part of the Allen charge that the Fourth Circuit offered as an example of a balanced Allen charge in Sawyers. This Allen charge was created by the Judicial Conference of the United States Courts. Sawyers, 423 F.2d at 1342 n. 7 (quoting Supplement to Report of the Committee on the Operation of the Jury System of the Judicial Conference of the United States 2 (1969)). See also United States v. Burgos, 55 F.2d 933, 936-37 (4th Cir. 1995). Importantly, the trial court in the present case also made clear that jurors should not change their minds if this does violence to any one of your individual judgments and that "no juror...should surrender their honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a unanimous verdict." (R. pp. 2455-56). These instructions strongly factor against a finding of coercion. See Burgos, 55 F.3d at 939 ("The most egregious mistake that can be made in the context of an Allen charge is for a [trial] court to suggest in any way, that jurors surrender their conscientious convictions."); United States v. Cropp, 127 F.3d 354, 360 (4th Cir. 1997) (same); see also State v. Jones, 320 S.C. 555, 558-59, 466 S.E.2d 733, 735 (Ct. App. 1996). Because the Allen charge clearly was directed at both the jurors in the majority and minority and because it emphasized that jurors should not surrender their conscientious convictions, the trial court did not err in giving the non-coercive Allen charge. Accordingly, because this issue is procedurally barred and substantively lacking, this issue is without merit.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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April 6, 1998.

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from York County
The Honorable John C. Hayes, III, Circuit Court Judge

THE STATE,

Respondent,

vs.

MAR-REECE ALDEAN HUGHES,

Appellant.

PROOF OF SERVICE

I, ~~Robert F. Daley, Jr.,~~ DJZ. Counsel for the Respondent, certify that I have served the within Final Brief of Respondent on Appellant by depositing three (3) copies of the same in the United States mail, postage prepaid, addressed to his attorneys of record as follows:

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I further certify that all parties required by Rule to be served have been served this 6th day of April, 1998.

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Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 210(b), SCACR.

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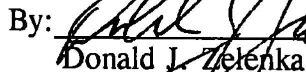
By: 
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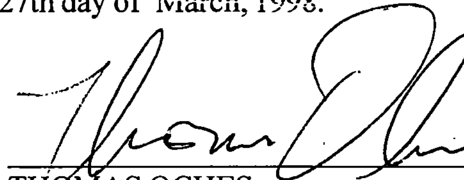
APPELLANT.

CERTIFICATE OF SERVICE

I certify that a true copy of the Record on Appeal in the above referenced case has been served upon Donald J. Zelenka, Esquire, this 27th day of March, 1998.



THOMAS OCHES
Investigator

SUBSCRIBED AND SWORN TO before me
this 27th day of March, 1998.

Karen D. Elliott (L.S.)
Notary Public for South Carolina

My Commission Expires: March 13, 2007