

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Horry County

Steven H. John, Circuit Court Judge

RECEIVED

MAY 22 2012

S.C. Supreme Court

THE STATE,

RESPONDENT,

V.

STEPHEN CHRISTOPHER STANKO,

APPELLANT

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1.

Whether the court erred by instructing the jury that malice could be inferred from the use of a deadly weapon where appellant raised the defense of insanity which constitutes an excusable homicide and puts the existence of malice in issue factually, and the instruction in this case was in direct violation of the reasoning and logic of State v. Belcher?

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STATEMENT OF THE CASE

Appellant was indicted by the Horry County grand jury for the murder and armed robbery of Henry Turner. R. p. 3506. After numerous pretrial hearings appellant's case came to trial on November 14, 2009 before the Honorable Steven H. John, and a jury. William I. Diggs and Brana J. Williams represented appellant. J. Gregory Hembree, Francis A. Humphries Jr., and Jimmy A. Richardson, II were the solicitors. R. p. 1.

At the conclusion of the guilt stage the jury found appellant guilty of murder and armed robbery. R. 2482 ll. 2-25. After a twenty-four hour waiting period, the sentencing hearing commenced. The jury recommended a sentence of death, and that sentence was imposed by the trial judge. R. 2896 ll. 14-23; R. 2905 l. 12 – 2906 l. 19.

This appeal follows.

ARGUMENT

1.

The court erred by instructing the jury that malice could be inferred from the use of a deadly weapon where appellant raised the defense of insanity which constitutes an excusable homicide and puts the existence of malice in issue factually, and the instruction in this case was in direct violation of the reasoning and logic of *State v. Belcher*.

Relevant Facts

At the conclusion of the guilty phase the trial judge gave the jury four verdict options:

- (1) Not guilty by reason of insanity;
- (2) Guilty but mentally ill;
- (3) Guilty of murder and armed robbery; or
- (4) Not guilty

R. 2474 l. 14- 2476 l. 7.

The defense presented expert testimony that appellant's crimes, the murder of his girlfriend, and then shortly thereafter his friend, Henry Turner, were done without any foresight, caution, or thinking of the consequences. For example, appellant took his girlfriend's credit card to an ATM where he knew he would be photographed. Similarly, appellant went to church with a woman in Augusta a couple of days after the murder where the church service was televised. All of this was where any rational person would have known he was the subject of a giant manhunt and he would have been taking precautions not to be apprehended. R. 1845 l. 1 - 1871 l. 25.

Psychiatrist, Dr. Thomas Sachy testified, in camera, as the defense laid the foundation for its not guilty by reason of insanity defense that appellant did not know legal and moral right from wrong at the time he committed the crimes. R. 1898, l. 1- 1902, l. 25. Dr. Sachy is a neuropsychologist in private practice in Georgia. R. 2176, ll. 20-21. After completing his undergraduate degree at the University of Calgary, Sachy earned a Master of Science in Biology from Georgia State University and a medical degree from the Medical College of Georgia in Augusta. R. 2176, l. 24 – 2177 l. 4. After graduating medical school, Sachy completed a Psychiatry residency and a Behavioral Neurology Fellowship at MUSC. R. 2177, ll. 8-11. He then completed a Fellowship in Forensic Psychiatry at Emory University. R. 2177, ll. 11-12

Following Dr. Sachy's in camera testimony defense counsel asked the judge to conclude the defense had made out a *prima facie* showing that appellant was insane. The trial judge ruled appellant could pursue his insanity defense assuming Dr. Sachy's testimony was consistent before the jury, which as seen infra it was. R. 1909 l. 1- 1910, l. 4.

Appellant presented an abundance of evidence showing appellant had an abnormal brain, particularly in the frontal lobes which control a person's judgment, his impulses, and his ability to feel empathy for others. Dr. Bernard Albiniak had a Master's of Science in Physiological and Developmental Psychology. R. 1913, ll. 3-4. He was a professor of psychology at Coastal Carolina University, and he specialized in physiological and developmental psychology. Dr. Albiniak testified that physiological psychology was a study of relating "brain function and brain structure to human behavior." R. 1912 l. 12- 1913 l. 9.

Dr. Albiniaik attributed appellant's brain problems to several sources. One was that his mother had a complicated pregnancy when appellant was born in Guantanamo Bay, Cuba. The physicians were concerned about the reduced oxygen supply to appellant's brain during "the birthing process, and feared for his survival, the way I read the record." Dr. Albiniaik also testified:

The second incident occurred when he was about sixteen years old. He got hit in the back of the head with a beer bottle, the rear of the head, and the bad part about that is, the brain floats in the skull. It's not solid. It floats in your skull. If you get hit in the rear of the head it drives the brain forward, and it hits his frontal bone, and that would mean the damage won't necessarily be at the rear—the skull will be—but the damage will be on the frontal lobes of the brain, when it drives forward, and he lost consciousness during that episode, which is never a good thing.

R. 1951 l. 10- 1952 l. 1

Dr. Albiniaik explained that appellant's abnormal brain in the frontal lobes could not repair itself: "Its simply lost, and that's lost forever." R. 1943 ll. 13-24. Dr. Albiniaik explained that where the frontal lobe was missing tissue "there is some loss of function in the frontal lobes, and primarily impulse control, decision-making, those important functions..." Dr. Albiniaik testified that if there was a real or perceived provocation: "[T]his individual is more likely to act out than you or I would be." R. 1943 l. 23- 1944, l. 1. Dr. Albiniaik's findings were based on P.E.T. scan done by Dr. Joseph Chon-Sang Wu, who would later testify as a defense witness. R. 1944 ll. 3-6; R. 1954 l. 21- 1956 l. 13.

The jury had earlier heard testimony from Brent Turvey, an expert in crime scene analysis and reconstruction, that appellant's relationship with the decedent was a "complete fraud." R. 1872, l. 19 – 1873, l. 22. Turvey said that appellant did not go to the decedent's

house with the intention of killing him. R. 1860, ll. 9-20. Turvey also related that the decedent's girlfriend received a telephone call from the decedent shortly after appellant arrived telling her appellant was there, and appellant was telling him about his allegedly dead father. They talked about it all night. R. 1860, 21 – 1861, l. 4.

Turvey opined that the decedent was an alcoholic, and a photograph of the crime scene, his house, showed a Yuening beer was on the table along with two cigarette butts in an ashtray. R. 1589, ll. 2-23; R. 1860, ll. 13-16. The decedent's son had already seen the news about appellant and the murder of his girlfriend on the 11:00 news. R. 1534, l. 9 – 1535, l. 23. Dr. Albiniak testified “all kinds of things” could have been perceived as a threat to appellant when he shot the decedent. R. 1955, l. 5 – 1957, l. 2. Dr. Albiniak told the solicitor on recross-examination that it was “unlikely, but its possible” that the “stimulus” that caused appellant to shoot the decedent may not have been the decedent himself. R. 1956, l. 24 – 1957, l. 2.

Dr. Ruben Gur is a psychiatrist with secondary “appointments in Neurology and in Radiology, and I also work at the Philadelphia V.A. Hospital in the Behavioral Services section. I direct the Brain Behavior laboratory at the University of Pennsylvania, and head the Center for Neuroimaging in Psychiatry.” R. 2012 ll. 17-22. Dr. Gur had a degree from the Hebrew University of Jerusalem in Israel and he did his post-doctoral fellowships at Stanford University and the University of Pennsylvania. R. 2012 l. 23- 2013 l. 11.

Dr. Gur concluded appellant had two types of problems, “the frontal lobe problem, and the medial gray matter, limbic system problem.” R. 2061 ll. 5-9. Dr. Gur said “the damage in the medial gray matter, and especially at four standard deviations below normal, we don't see it in normal people. It just doesn't happen ... its extreme.” R. 2061 l. 24- 2062

l. 9. Regarding appellant's frontal lobes Dr. Gur stated that "[L]ess than one percent, or maybe a quarter of a percent of healthy people may have those kind of values." R. 2062 ll. 10-15.

Defense counsel asked Dr. Gur:

Q. Based on your results, with the results that you found in Defendant Stanko's brain, do you think the – is it consistent to say, or can you say that you think that it would be natural that he would pre-plan things, or be very active?

A. It's a difficult question to answer. *The reduced volume in the amygdala will increase his vulnerability to react to a perceived threat.* The frontal lobe reduction will reduce his ability to control it, but there are – most of the damage is in the inferior orbital frontal part, so the more intellectual part of planning is still intact.

Q. Okay. And with the perceived threat, the frontal lobe being more damaged, would that – does that mean that it can't do as good a job to determine whether perceived threat is or is not?

A. Yes. It would—

Q. If it's real or if it's not. That's what I meant to say.

A. Yes. *If the frontal lobe is damaged it will diminish its ability to distinguish real from perceived threat that is really not real.*

R. 2070 l. 9- 2071 l. 3.

Dr. Joseph Chon-Sang Wu was a professor of the Department of Psychiatry and Human Behavior at the University of California at Irvine, College of Medicine. Dr. Wu completed a two-year fellowship in P.E.T. Scan Imaging of the brain and he was the Clinical Director of the University of California at Irvine Brain Imaging Center. R. 2105 l.

15- 2106 l. 13. Dr. Wu explained to the jury on the P.E.T. Scan video that the base of the frontal lobe of appellant's brain was abnormal. R. 2136, l. 11- 2137 l. 19.

Dr. Wu also testified that: "[T]his is the primary lesion or injury that Mr. Stanko's brain shows, the floor of the frontal lobe defect or injury ... this part of the frontal lobe is very important part of the frontal lobe which involves things such as impulse control and judgment." R. 2138 ll. 7-25. Dr. Wu also said an injury to this part of the brain impaired "[a]n individual's ability to exercise judgment, [and] impulse control. " Dr. Wu analogized this type of brain defect to a computer in a Lexus or Toyota going "haywire" where you "[h]ave an out-of-control brain, the way this Lexus went out of control and ended up killing the C.H.P. California Highway Patrol officer and his family." R. 2140 l. 13- 2141 l. 13.

Dr. Wu explained that the inner shell of appellant's brain: "[I]s more than four standard deviations below normal, which is probably less than one in – so that means nine hundred ninety-nine out of a thousand people, maybe even more, would have a brain bigger than Mr. Stanko's in this part of the brain." Dr. Wu repeated that this part of the brain controls "moral judgment, impulsivity, and aggression." R. 2153 l. 15- 2154 l. 8.

Dr. Thomas Sachy, a neuropsychiatrist, then testified consistently with his in camera testimony that appellant was legally insane at the time he committed the crimes. R. 2204 l. 13- 2206 l. 24; R. 2208 l. 6- 2212 l. 5; R. 2219 ll. 6-16; R. 2254 l. 10- 2255 l. 1. Dr. Sachy told the jurors "you don't have any choice on how your brain works." R. 2205 ll. 3-12. "[W]hen someone's brain is damaged, and it effects their behavior or cognition, they have no choice. That's happened to them. Its done, and an act of God has happened." R. 2205 ll. 3-12.

Dr. Pamela Crawford testified for the state that her initial involvement in this case was as a consultant for SLED. R. 2280 l. 14- 2281 l. 12. Dr. Crawford said that appellant had a severe personality disorder with anti-social and narcissistic features. R. 2292 ll. 12-16. The state presented the testimony of Dr. William Brannon. Dr. Brannon disagreed with Dr. Sachy's findings and he opined appellant's MRI was a normal image. R. 2326 l. 25- 2327 l. 9.

Dr. Kenneth Spicer testified as a state's witness and he disputed findings that appellant's PET scans were abnormal. R. 2353 ll. 9-18. Dr. Spicer also questioned the manner in which the PET scanning on appellant was done and he opined that experts had to be careful of "overcalling" their findings. R. 2402 l. 20- 2410 l. 20.

State v. Belcher

During the charge conference defense counsel argued that the court should not instruct the jury that malice can be inferred by the use of a deadly weapon based on this court's opinion in State v. Belcher. The same rationale in this insanity case applied to the reasoning of self-defense in Belcher, and the defense therefore requested that this inference of malice be deleted from the judge's charge. R. 2478 ll. 4-14.

The judge then stated that he had read State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009), thoroughly and he disagreed that it was proper to delete the inference of malice charge based on the facts of this case. The judge ruled "the Supreme Court didn't indicate that in the slightest." R. 2478 l. 23- 2479 l. 1

Discussion

In State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009) this Court held that a jury instruction that malice may be inferred from the use of a deadly weapon is no longer good law in South Carolina where there is evidence presented that would *reduce, mitigate, excuse* or justify the killing. Insanity is a disability that excuses the crime. LaFave, Substantive Criminal Law, §9.1(a)(4) Excuses and other conditions at p. 8 (2d ed. 2003). “**Excusable homicides include** those in which the killing was accidental and in which no one involved was criminally negligent or reckless **and those committed by the criminally insane.**” McAninch, Fairey, and Coggiola, The Criminal Law of South Carolina, Offenses Against the Person, at p. 77 (5th Ed. 2007). (emphasis added). Another jury verdict option, guilty but mentally ill, was a verdict finding that reduces or mitigates the crime.

Further, as seen above, there was an plethora of evidence in this case of appellant’s brain abnormalities which prevented him from exercising judgment and controlling his impulses. Thus, for the same reasons that the inference of malice from the use of a deadly weapon had no place where there was evidence of self-defense as in Belcher, the jury instruction that the jury could infer malice from the use of a deadly weapon was erroneous and highly prejudicial in this case also.

That inference of malice from the use of a deadly weapon instruction had to confuse the jury where the jury had before it extensive evidence that appellant was not guilty by reason of insanity -- he did not know the difference between legal right and wrong -- and evidence that because of his brain abnormalities he could not exercise judgment and control his impulses as a normal person would be expected to do.

The trial judge must charge “the current and correct law.” S.C. Const. V, §17; State v. Adams, 277 S.C. 115, 120, 283 S.E.2d 582, 585 (1981). The purpose of jury instructions is to enlighten the jury and to aid it at arriving at a correct verdict. State v. Leonard 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987). Further, “[s]uperimposing a correct state of law over an erroneous charge only fosters confusion and prejudice.” State v. Robinson, 306 S.C. 399, 401-402, 412 S.E.2d 411, 413 (1991); State v. Patrick, 289 S.C. 301, 308, 345 S.E.2d 481, 485 (1986). Moreover, trial judge’s should not give jury instructions which do not fit the facts of the case as such charges may tend to confuse the jury. State v. Leonard, supra.

Belcher controlled in this case and the trial judge respectfully was incorrect in reasoning that a not guilty by reason of insanity defense was not contemplated by Belcher. The jury had to be hopelessly confused with an instructions on not guilty by reason insanity and competing instruction that it could infer malice from the use of a deadly weapon.

As in Belcher the erroneous instruction that malice may be inferred from the use of a deadly weapon cannot be considered harmless here. There was abundant evidence that appellant had abnormalities in the part of his brain, the frontal lobes, where appellant’s judgments and impulses were supposed to be controlled. As in a self-defense case where self-defense excuses the homicide, it is impossible to determine how the jury attempted to reconcile that it could infer malice from appellant’s use of a deadly weapon against evidence that he was incapable of distinguishing between moral and legal right and wrong and incapable of controlling his actions because of his brain abnormalities. See, State v. Belcher 385 S.C. 597, 611, 685 S.E.2d 802, 809-810 (2009). Under the judge’s charge, the jury had every right to find malice merely from the use of a deadly weapon.

The erroneous inference of malice from the use of a deadly weapon jury instruction was reversible error because it was not harmless beyond a reasonable doubt. See, Rose v. Clark 478 U.S. 570 (1986). It also cannot be correctly held that the erroneous inference of malice instruction could not have contributed to the verdict given its obviously confusing nature in this case. See, Plyler v. State 309 S.C. 408, 424 S.E.2d 477 (1992). Appellant should be granted a new trial.

The court erred by accepting appellant's truncated and inadequate waiver of his attorney's conflict of interest in this case where defense counsel represented appellant in his prior trial at which appellant was sentenced to death, and defense counsel was the subject of a pending accusation of ineffective assistance of counsel in PCR. The court's direction to defense counsel and appellant not to discuss the prior case was impractical and erroneous where the murders were committed closely together, and the insanity defenses at both trials were inextricably entwined.

Relevant Facts

On March 4, 2009 a pre-trial hearing was held. The trial judge stated that he was aware appellant had filed a post-conviction relief action alleging trial counsel Diggs provided ineffective assistance of trial counsel during his first trial.¹ R. 2957, ll. 17-25. The judge noted: "It seems to me, at least questionable, if not inconsistent, that Mr. Diggs remain as trial attorney and in this particular case when a post-conviction relief action has been filed against him by Mr. Stanko." R. 2958, ll. 1-6.

Defense counsel Diggs said he had not seen the post-conviction relief application and he did not have any input into the substance of that application. The judge then levied the following prohibition if Diggs remained appellant's attorney:

And obviously, you know, *there are boundaries obviously that you cannot communicate with Mr. Stanko about that.* You don't represent him in that particular matter and obviously he's filed a complaint in that matter or at least a PCR application that alleges at least in part of it ineffective assistance of counsel, so you being the – not the responding

¹ This Court noted in its prior opinion that appellant raised an insanity defense during the first trial. State v. Stanko, 376 S.C. 571, 658 S.E.2d 94 (2008).

party, but obviously *there are issues and things that you may not discuss with him*, but you can certainly, I assume, and have – and if you haven't, you certainly need to, communicate with him about your continued representation of him regarding this particular case. Have you done that?

R. 2958, ll. 12-23. (emphasis added).

Defense counsel Diggs responded that he understood appellant wanted him to remain as his attorney. R. 2958, l. 24 - 5, l. 3.

The judge then addressed appellant about “some inconsistency or *if not a downright disqualification of Mr. Diggs in this matter regarding you filing a post-conviction relief application in the previous case* that arose out of Georgetown and his continued representation of this particular matter.” R. 2959, l. 8- 2961, l. 10. (emphasis added). Appellant then told the judge that the PCR application was filed by Appellate Defender Kathrine Hudgins “in order to stop the death watch...”² Appellant told the judge that he intended to file an amended PCR application. R. 2959, l. 8 - 2961, l. 10.

The judge asked appellant if he intended to adopt the PCR application filed by Appellate Defender Hudgins. Appellant answered vaguely: “Not completely, no, sir. I had requested that issue whenever I spoke with her and [co-appellate counsel] Mr. Savitz that is not the way I had agreed that the immediate application was going to be filed. There is an issue that's still – *and I really can't discuss it right now.*” R. 2960, ll. 2-12. (emphasis added).

Appellant also said until he met with the two attorneys who had been appointed to represent him in his capital PCR case – the Ling murder -- that he could not be sure what

else would be filed on his behalf. Appellant also noted that defense counsel Diggs was going to present a very similar defense in this case as he did in the prior death penalty trial and appellant speculated that if Counsel Diggs made legal errors he would acknowledge that “he should have done something differently during the first trial.” R. 2960, l. 15 - 2961, l. 10.

Appellant offered that he had planned to meet with one of his PCR attorneys, Bill Godfrey, on Friday but that meeting had been cancelled. Appellant asked the judge if the only way he could keep defense counsel Diggs as his attorney was to waive an ineffective assistance of counsel claim against him. The judge responded that he was not asking appellant to waive his claims against Diggs. Appellant said he trusted Diggs and co-counsel Brana Williams. R. 2962, l. 19- 2963, l. 10. The judge asked appellant that when he filed an amended PCR application, if he did file an amended application, to inform his attorney who would forward a copy of the amended application to the trial judge for his consideration. R. 2963, ll. 11-20.

Defense counsel Diggs said this was “not an ego thing. I don’t have a problem with him making that allegation [of ineffective assistance of trial counsel].” Defense counsel then asked the judge to “monitor” his representation of appellant during the trial: “[I]f you see maybe a conflict in theories, you know, that I may be advancing and you see that I may be undermining, you know, the overall state, I guess, of Mr. Stanko’s case against the State of South Carolina, you might want to re-visit that issue, but I personally don’t have a problem.” R. 2964, ll. 10-21.

² Appellant was apparently referring to the 180 day death penalty statute of limitations in federal habeas if South Carolina becomes an “opt in” state in the future.

The judge ruled that he would allow defense counsel Diggs to continue as appellant's attorney "[w]ith the ability for the Court to re-visit it in the future should there be issues in the amended application that either give the Court any concern or Mr. Stanko, or Mr. Diggs concerns as to Mr. Diggs continued representation in this matter." R. 2964, l. 22-2965, l. 5.

Defense counsel Williams was uneasy with this situation. She asked the judge about the ramifications of defense counsel Diggs being removed in the future as trial counsel. The judge recognized that there was certainly "the potential for that happening." Williams worried that the defense may not be able to adjust "if we continue to proceed with this and all of a sudden Mr. Diggs is yanked out of the case, there is a major hole left in Mr. Stanko's defense." R. 2967, ll. 14-20.

The judge acknowledged the potential for that occurring, but he maintained: "We aren't anywhere close to that. I've not indicated that I would remove Mr. Diggs. I wanted to raise the issue." R. 2967, ll. 3-23. The judge said that he thought there was a good level of interaction and trust between defense counsel Diggs and appellant and that barring something unusual he was not going to conflict defense counsel Diggs off appellant's second death penalty trial. R. 2968, ll. 2-14.

Discussion

As seen, the judge instructed counsel Diggs not to communicate with appellant about the pending ineffectiveness allegations against him in the post-conviction relief case involving the first murder trial where appellant also asserted an insanity defense. The judge initially -- and appellant submits correctly -- observed that it appeared there should be "[a] downright disqualification of Mr. Diggs in this matter..." R. 2959, l. 8- 2961, l. 10.

Appellant indicated that counsel Diggs may have learned from his mistakes during the first insanity defense trial. However, counsel Diggs told the judge the court may want to “revisit” the disqualification issue if “you see maybe a conflict in theories... that I may be advancing and you see that I may be undermining... the overall state... of Mr. Stanko’s case against the state of South Carolina...” R. 2964, ll. 10-21.

The truncated waiver in this case was inadequate since appellant was essentially offering the same not guilty by reason of insanity defense he unsuccessfully offered during the Ling death penalty trial, and as seen *infra* appellant was not warned – **at all** -- of the risks he was raising and the potential PCR issues he effectively was waiving

While there is no case from this state directly on point as to whether an attorney who represented a defendant during a previous capital trial should be allowed to represent the defendant during a second capital trial – where he is offering the same defense that had already failed – and where that attorney is a target of a pending allegation in post-conviction relief that he provided ineffective assistance of counsel during the first capital trial.

It is elementary that a defendant has a right to conflict free counsel. *See*, SC Code 1976, § 20-7-110(2); *See also*, Von Moltke v. Gillies, 332 U.S. 708, 725 (1948); U.S. v. Wheat, 813 F.2d 1399 (Cal. 1987). “The effective assistance of counsel is a necessary requisite of due process of law.” Rogers v. State, 261 S.C. 288, 290, 199 S.E.2d 761 (1973), citing, State v. Cowart, 251 S.C. 360, 162 S.E.2d 535 (1968).

An attorney should not represent a defendant where counsel’s adequacy is in question. *See*, People v. Norris, 46 Ill.App.3d 536, 541, 361 N.E.2d 105, 110 (Ill. App. 1977).

For example, other courts have held that it is a conflict of interest for counsel to represent a client at a PCR hearing where the claim is against him or another member of counsel's office. Adams v. State, 380 So.2d 421, 422 (Fla. 1980) ("Because of these allegations, the public defender of the Nineteenth Judicial Circuit has a *hopeless conflict of interest* which precludes his representation of James Adams in this proceeding") (emphasis added); at sentencing hearings where there is an potential IAC claim against counsel, People v. Fields, 88 Ill.App.3d 821, 410 N.E.2d 1178 (Ill. App. 1980); Owens v. State, 792 So.2d 650, 654 (Fla. App. 2001) ("In this case, defense counsel could not effectively represent appellant during sentencing as to both cases when he faced a possible ineffectiveness of counsel claim. The more counsel said, the more he put into the record which could later be used against him in the ineffectiveness claim."); at post-trial plea withdrawals where counsel or a member of counsel's office represented defendant at the plea hearing, People v. Norris, 46 Ill.App.3d at 541, 361 N.E.2d at 110 ("Although an attorney should not argue his own inadequacy or that of his office, he is under a duty to withdraw as counsel when the issue arises."); and at trial where defendant is denied his pre-trial motion for new representation and subsequently files a federal action against counsel's office, Odum v. State, 283 Ga.App. 291, 293, 641 S.E.2d 279, 281 (Ga. App. 2007) ("If raised pre-trial, a potential conflict of interest is sufficient to bar that representation.").

The United States Supreme Court has stated that "courts have an independent interest in assuring compliance with ethical standards and the appearance of fairness." United States v. Wheat, 486 U.S. 153, 153 (1988). The body of law surrounding conflict

of interest issues indicates a strong desire to maintain the indicia of fairness and propriety.

To cure a conflict of interest, a defendant can make an informed waiver. Holloway v. Arkansas, 435 U.S. 475, 483 n. 5, (1978). The waiver of a constitutional right, including the right against self-incrimination or the right to jury trial, must be knowingly and intelligently made with a full understanding the breadth of the conflict and potential consequences of continued representation. Brady v. United States, 397 U.S. 742 (1970). In Wroten v. State, 301 S.C. 293, 391 S.E.2d 575 (1990), this Court stated that “the ultimate test” for whether a waiver of right to counsel is effective is the defendant’s *understanding* of the risks involved. *Id.* at 294. (emphasis added).

Here, appellant was not questioned *at all* about any potential risks he faced by having counsel Diggs represent him and essentially offer the same defense that was unsuccessful during the first death penalty trial. Further, counsel Diggs and appellant were advised it would be improper to talk about the PCR claims where here the murders occurred a short time apart and the facts of both murders were inextricably entwined since the state’s case was that appellant killed Ling and was using Turner to hide out and plan his next move. Diggs also wanted the judge to advise him if the judge thought his continued representation became problematic during the trial. That placed the trial judge in an untenable situation of “monitoring” the adequacy of defense counsel’s representation which was a confusion of his judicial role.

In United States v. Swartz, 975 F.2d 1042 (4th. Cir. 1992), where counsel also represented a co-defendant to Swartz's detriment, the Court articulated the proper line of questioning for an effective conflict waiver:

“[T]he court must personally address each defendant and inform him of the potential hazards of representation by a single attorney, as well as his right to separate representation. In turn, the defendants are free to ask the court questions about the nature and consequences of the representation:

Most significantly, the court should seek to elicit *a narrative response* from each defendant that he has been advised of his right to effective representation, that he understands *the details of his attorney's possible conflict of interest and the possible perils of such a conflict*, that he has discussed the matter with his attorney or if he wishes with outside counsel, and that he voluntarily waives his Sixth Amendment protections.”

Id at 1049; citing, U.S. v. Akinseye, 802 F.2d 740, 745 (Md. 1986)

The Court's questioning of appellant here was limited to whether he wanted Mr. Diggs to continue representing him. R. 2961, ll. 16-23. While a defendant's relationship with his appointed counsel should be considered before that attorney is removed, the right to counsel of choice can be overcome by a showing of actual conflict or serious potential conflict. State v. Goldsberry, 419 Md. 100, 118, 18 A.3d 836, 847 (Md. 2011); United States v. Wheat, 486 U.S. at 159 (“the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers.”).

The law requires that the record reflect a defendant's *full understanding* of any negative consequences arising from the conflict. U.S. v. Swartz, 975 F.2d at 1049.

Because, appellant's previous sentence was the death penalty, anything that affects his appeal process from that case is of extreme importance.

Appellant essentially told the judge that his decision to keep counsel Diggs, even though there were pending allegations of ineffective assistance of counsel against him was because he believed that any other attorney besides Diggs may not believe in his defense – which had failed to first time during the Ling trial. R. 2963, ll. 4-10.

Because both the right to counsel and the right to counsel free from conflicts and “devoted to the interests of his client” are derived from the Sixth Amendment, the standard for determining whether a conflict of interest is effectively waived should be at least as thorough as an effective waiver for a right to counsel. See Von Moltke v. Gillies, 332 U.S. at 725; United States v. Wheat, 813 F.2d. 8, ll. 22-25.

Appellant gave two analogies in order to explain his desire to maintain Diggs that serve to illustrate his misunderstanding of the conflict and potential drawbacks:

- (A) There's a Solicitor that was in this case [Fran Humphries] that had been sanctioned for previous misconducts, but he's still a solicitor; and
- (B) If you have Derek Jeter – a good baseball player -- and in the ninth inning of the final game of the World Series he commits an error that costs his team the game, that does not mean you do not “want him back starting next season.”³ R. 2962, ll. 9-18.

Neither example evidences an understanding of the consequences of keeping counsel Diggs as appellant's counsel. They both merely assert that appellant understands that being charged with an ineffective assistance of counsel claim does not prevent Mr.

³ Baseball fans have no right to PCR Jeter by accusing him of professional incompetence and malpractice and forcing a replay of the game lost through his error. The Virginia Supreme Court characterizes a

Diggs from maintaining his position as an attorney or his reputation. This is especially true given the judge's unworkable instruction to appellant and counsel Diggs not to discuss the prior case. The prior case involved a murder committed shortly before the murder in this case where all of this was part and parcel of a continuing chain of events, where the defense in this case was the same as the Ling case. It respectfully appears the unworkable instruction -- with a promise to possibly revisit the conflict issue later during the trial -- was unprecedented if not, respectfully, also bizarre.

Given the nature of the trial and the severity of the sentence, the trial court should have thoroughly questioned appellant about the extent of his understanding of the conflict and its potential consequences. The attempted waiver in this case did not do so. Again, this was appellant's second death penalty trial where he offered an insanity defense where the two murders were committed very close together. The brief disjointed conflict waiver colloquy in this case was legally inadequate and appellant should be granted a new trial.

Finally, based on the cases cited above, and what occurred in this case, appellant respectfully submits that this Court should erect a per se bar prohibiting counsel in a death penalty case from representing the same defendant in a subsequent death penalty trial where counsel is the subject of a pending PCR as a result of the first death penalty trial.

3.

The trial court erred in denying appellant's motion to disqualify Juror # 480 because she had knowledge of appellant's prior convictions, including his sentence of death, his

criminal lawyer being held ineffective as "professional disgrace." Mu'Min v. Commonwealth, 239 Va.

present charges, and because she said she would vote for death in every instance if there were an aggravating circumstance.

Relevant Facts

Defense counsel used all ten of his peremptory challenges and, therefore, could not keep Juror # 480 off of the jury. During jury qualification, defense counsel sought to disqualify ten prospective jurors because they had knowledge of appellant's prior case and/or this present case. He eventually struck the first nine during jury selection. These ten prospective jurors were # 612⁴ R. 30, l. 4 – R, l. 10, # 281 R. 54, l. 24 – 79, l. 19, # 446 R. 144, l. 11 – 164, l. 25, # 67, R. 229, l. 23 – 246, l. 8, # 298 R. 296, l. 22 – 316, l. 4, # 466 R. 316, l. 11 – 330, l. 13, # 330 R. 454, l. 6 – 480, l. 23, # 510 R. 494, l. 9 – 511, l. 24, # 103 R. 558, l. 4 – 574, l. 3, and # 236 R. 624, l. 24 – 646, l. 13.

Juror # 612 explained during voir dire that she read about Stanko in newspaper reports and on the internet and learned that “he went to trial for the murder of the girlfriend, and that he was convicted and waiting for a date [to be executed].” R. 47, l. 24 – 48, l. 8. She candidly offered: “It’s difficult not to have an opinion when somebody has been convicted once” and that when someone is “waiting for the date” it “kind of seems redundant” to spend government funds to try them for a different charge. R. 33, l. 20 – 35, l. 5.

When Juror # 281 was questioned during voir dire regarding her knowledge of Stanko she stated, “I know Mr. Stanko took Henry Turner’s life, and then went down to Georgetown, I think to a girlfriend’s house, and took either the girlfriend or the

433, 452, 389 S.E.2d 886, 898 (1990).

⁴ Page numbers refer to the jury voir dire transcripts dated November 9-12, 2009.

daughter's life as well, and there was some other foul play involved." R. 59, ll. 4-17. This prospective juror also explained that she worked for five years with Henry Turner's son, Roger, at Dick's Pawn Shop. R. 60, l. 22 – 61, l. 16. When defense counsel questioned her she stated that she knows "he's already been tried and convicted," but she could not recall the sentence Stanko received. R. 71, ll. 11-25.

Juror # 446 testified during voir dire that she heard about Stanko's case on T.V. and read about it in the newspaper and learned "that he killed his girlfriend and he raped her daughter, and he killed Mr. Turner." She stated that she did not know anything "more particular than that." R. 150, ll. 14-24.

Juror # 67 admitted while being questioned by the court that his knowledge of Stanko's conviction for the other crime had led him to believe that Stanko was guilty of the current charges as well. R. 235, ll. 5-22. After further discussion with the court, the prospective juror stated that he could put this opinion aside and decide the case solely on information received in the courtroom. R. 236, ll. 2-7. When asked by defense counsel to elaborate on his knowledge of Stanko, Juror # 67 explained that he knew "that he was charged and found guilty of . . . [the] murder of his girlfriend" and that the sentence Stanko received "was the death penalty." R. 241, ll. 3-14.

Prospective Juror # 298 told the court during voir dire that she remembers the headlines in the news regarding Stanko's previous case and knows Stanko was charged with "the murder of his girlfriend, I guess, and the rape of somebody." R. 301, l. 22 – 302, l. 24.

During voir dire, Juror # 466 likewise testified that she had previous knowledge of Stanko. She stated, "I knew that there was – let me recall – a death of a woman, and

assault on a juvenile, and possibility a subsequent death of another individual.” R. 320, l. 17 – 321, l. 2.

When questioned by the court during voir dire, Juror # 330 explained, “I remember the Defendant being accused of taking the lives of two individuals, and I believe he had already been tried for one of those, and that she was a librarian, I believe.” R. 458, ll. 1-17. When prodded further by defense counsel, this prospective juror admitted that she knew Stanko “was found guilty” in the first murder trial and that “I believe it was death,” referring to the sentence he received. R. 468, ll. 2-16.

Prospective Juror # 510 similarly testified that she remembers hearing about Stanko. She stated, “I know there was another trial . . . I don’t know a lot of the facts about it though.” When questioned by the court if she remembered the result of that trial, the juror responded, “I think they imposed the death penalty.” R. 500, ll. 3-16.

Prospective Juror # 103 also admitted that she had heard about Stanko’s previous case. When asked by the court what she remembered, she testified, “Well, that he was convicted for the one in Georgetown, and that, you know, they thought that he killed a man in Horry County.” When prodded further by the court regarding whether she remembered the sentence Stanko received in the Georgetown trial, the prospective juror responded, “Death.” R. 562, l. 22 – 563, l. 9.

Juror # 480, whom appellant could not strike, said during voir dire that what she remembered about appellant was “that he had murdered his girlfriend, and left the daughter for dead.” He “then came into Conway and murdered a man in Conway.” R. 630, ll. 12-16. Later, she said she knew appellant had been sentenced to death. R. 635, ll. 14-20.

The prospective juror also said she would be predisposed to vote for the death penalty as opposed to life imprisonment if the State presented evidence of an aggravating circumstance. She said she would do so in every case. After she said this, the trial court was able to get the juror to say she could consider life or the death penalty. R. 639, l. 18 – 681, l. 23.

Defense counsel argued that the juror was not qualified because of her prior knowledge of appellant, his death sentence, and her position on imposing the death penalty. The trial court found her qualified. R. 644, l. 7 – 646, l. 13.

As stated, during jury selection, defense counsel struck all of the above jurors with the exception of Juror # 480 because he had used all ten of his strikes by that time.⁵ R. 1296, l. 18 – 1315, l. 11. Before Juror # 480 was seated defense counsel noted on the record that he had exhausted his strikes.⁶ R. 1313, ll. 16-21. The jury was empanelled, withdrawn from the courtroom and defense counsel said he had the same objections to the jurors as he previously stated. R. 1322, l. 20 – 1324, l. 10.

After a change of venue motion was heard, defense counsel put on the record that if he had not been out of strikes, he would have used a peremptory strike to excuse Juror # 480. He said she had prior knowledge of the case and she knew of appellant's death

⁵ Juror # 236 was also struck before Juror # 480 to complete defense counsel's ten strikes. R. 1300, ll. 3-15. Juror #236 had heard appellant's name and knew his name was connected to a murder. R. 1413, l. 23 – 1414, l. 12. The juror also named. Solicitor Hembree, went to the same church as the solicitor, and her husband was in Bible study with him. In addition, Juror #236's son had been murdered and she acknowledged it impacted her daily. R. 1408, l. 25 – 1410, l. 5.

⁶ Exhausting all ten strikes is necessary for appellate review of juror qualification issues this Court held 3-2 in State v. Bixby, 388 S.C. 528, 698 S.E.2d 572 (2010). See, also, State v. Bennett, 301 S.C. 347, 392 S.E.2d 157 (1990).

sentence. R. 1386, l. 6 – 1387, l. 15. Prior knowledge that appellant was under a death sentence would jeopardize the juror’s sense of responsibility. R. 1388, ll. 7-24. In addition, knowledge that another jury sentenced appellant to death and of the prior charges put appellant’s character into issue. R. 1388, l. 25 – 1389, l. 20. There was no presumption of innocence in appellant’s case because he had an imposed death sentence. R. 1412, l. 22 – 1413, l. 20.

The juror’s prior knowledge disqualified her

The trial court’s decision not to disqualify juror #480 was in error. In Mitchell v. State, 298 S.C. 186, 379 S.E.2d 123 (1989) this Court wrote:

In a criminal case, the State cannot attack the character of the defendant unless the defendant herself first places her character in issue. State v. McElveen, 280 S.C. 325, 313 S.E.2d 298 (1984). State v. Swords, 279 S.C. 554, 309 S.E.2d 750 (1983). State v. Gamble, 247 S.C. 214, 146 S.E.2d 709 (1966). Further, evidence of prior bad acts is inadmissible to show criminal propensity or to demonstrate that the accused is a bad person. State v. Johnson, 293 S.C. 321, 360 S.E.2d 317 (1987).

In State v. Ross, 272 S.C. 56, 59, 249 S.E.2d 159, 161 (1978), this Court noted that “[c]haracter evidence is so highly prejudicial that it is usually excluded under hard and fast rules.” In Mitchell v. State, supra, defense counsel was held ineffective for failing to object to improper character evidence. In State v. Gamble,⁷ supra, a conviction in a death penalty case was reversed because the defendant’s character was put into issue when other crimes were brought into evidence which were not related to the crime for which the defendant was being tried.

In State v. Johnson, *supra*, another death penalty case, the defendant's conviction for murder was reversed because excessive evidence of a prior murder was introduced into evidence. As this Court held in State v. Gore, 283 S.C. 118, 322 S.E.2d 12 (1984), when the prior bad act is strikingly similar to the one for which the defendant is being tried the danger of prejudice is enhanced. The "inevitable tendency of such evidence is to raise a legally spurious presumption of guilt in the minds of the juror." State v. Lyle, 125 S.C. 406, 412, 118 S.E. 803, 807 (1923).

The prejudice of the juror's prior knowledge of appellant's other case and this case was again raised by defense counsel after the jury returned their guilty verdict. He noted the jury only deliberated for thirty (30) minutes and *that Juror #480 probably told the eleven other jurors of appellant's death sentence in the other case.* (R. 2487, l. 17 – 2488, l. 11). The trial court never instructed the juror not to tell the other jurors of appellant's prior death sentence. And these jurors were never qualified in respect to whether they could set aside knowledge of appellant's death sentence.

The Supreme Court of Illinois, People v. Walker, 91 Ill.2d 502, 517, 64 Ill.Dec. 531, 440 N.E.2d 83 (1982), dealt with the issue of the jury's knowledge of a prior death sentence as follows:

The State argues that evidence of defendant's prior death sentence was properly before the jury since, in a capital case, the focus should be on both the character and record of the accused. (Lockett v. Ohio 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); Ill. Rev. Stat. 1979, ch. 38, par 9-1(c).) This argument ignores the significant fact that the evidence in question was introduced

⁷ Gamble was reversed on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).

during the first phase of the sentencing hearing. At this time the question for the jury to determine is whether, on the basis of a statutory aggravating factor, defendant is eligible to receive the death sentence; not whether, in light of his character or record, he should receive this penalty. That defendant received the death sentence for a prior murder has absolutely no relevance to the issue of whether he is eligible to receive that penalty for the instant offense.

More importantly, as noted by defendant, introduction of this evidence may well have improperly influenced the jury's decision in two respects. In determining his eligibility for the death penalty, the jury was aware that another jury had previously resolved the identical issue adversely to defendant. If a juror was uncertain as to whether defendant was qualified for the death sentence, the knowledge that 12 other people determined he was could have swayed the juror's verdict in favor of death.

Further, the jury's awareness of defendant's prior death sentence would diminish its sense of responsibility and mitigate the serious consequences of its decision. Assuming that defendant was already going to be executed, the jurors may consider their own decision considerably less significant than they otherwise would.

In a capital case, a "high standard of procedural accuracy" is required in determining whether or not [the death] penalty will be imposed."

People v. Walker, 91 Ill.2d 502, 517, 64 Ill.Dec. 531, 440 N.E.2d 83 (1982).

The possibility that the jury may have found defendant eligible for this penalty on the basis of an irrelevant and prejudicial non-statutory aggravating factor should not be tolerated. People v. Davis, 97 Ill. 2d 1, 26-27, 452 N.E.2d 525, 537, 72 Ill. Dec. 272, 284 (1983).

In West v. State of Mississippi, 463 S.E.2d 1048, 1052-1053 (1985) the state supreme court held that it was reversible error for the solicitor to bring up during the guilt phase of the defendant's trial evidence of other murders which were not related to the murder for which the defendant was on trial. If the solicitor in the present case brought up

evidence of appellant's prior crimes and death sentence or during the guilt phase of this trial, it would have been grounds for a mistrial. There is no difference in seating a juror who knows this information from the outset. To believe the juror in this case did not convey this information to the other jurors, especially when she was not instructed otherwise, denies the frailty of human nature.

Juror # 480's knowledge of appellant's character evidence and prior bad acts along with his sentence of death was compounded by her willingness to sentence a defendant to death in every instance of an aggravating circumstance being presented. Due process under the Fourteenth Amendment and the Sixth Amendment to the United States Constitution demands that a defendant be given a fair trial by a panel of impartial, indifferent jurors. Witherspoon v. Illinois, 391 U.S. 510 (1968); Adams v. Texas, 448 U.S. 38 (1980); Wainwright v. Witt, 469 U.S. 412 (1985); Ross v. Oklahoma, 487 U.S. 81 (1988). It only takes one juror who believes a death sentence should be imposed in every instance to invalidate a death sentence. Ross v. Oklahoma, *supra*.

The juror's unequivocal response that she would vote for death in every case when an aggravating circumstance was coupled with murder disqualified her. In such an instance, the prospective juror may be challenged for cause. Morgan v. Illinois, 504 U.S. 719 (1992); State v. Bennett, 328 S.C. 251, 493 S.E.2d. 845 (1997). In Bennett, this Court remanded the case for resentencing when a juror said he would have to go with the majority. Critically, this Court noted language in Morgan that general questions of fairness and impartiality were insufficient to detect unqualified jurors. The trial court's attempt to rehabilitate Juror # 480's statement about imposing death was insufficient to cure the juror's unequivocal response. She was told she could only impose death if she found an aggravating

circumstance and that she could impose a life sentence. But she was not questioned or told of the role of mitigating circumstances- a necessary requirement of a capital sentencing system.

“Any juror who states that he or she will automatically vote for the death penalty without regard to the mitigating evidence is announcing an intention not to follow the instructions to consider the mitigating evidence and to decide if it is sufficient to preclude imposition of the death sentence”
Morgan v. Illinois, 504 U.S. at 738, 112 S.Ct. at 2234.

Jurek v. Texas, 428 U.S. 262, 271 (1976); Mills v. Maryland, 486 U.S. 367 (1988).

In Witherspoon v. Illinois, 391 U.S. 510 (1968) the United States Supreme Court held that prospective jurors could not be excused from jury service if they were opposed to the death penalty unless those jurors make it “unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision to the defendant’s guilt.” 391 U.S. at 522-23 n. 21 (emphasis in original). Later, in Wainwright v. Witt, 469 U.S. 412 (1985) the Court held that the test for excluding a prospective juror is whether that juror’s attitude concerning capital punishment would “substantially impair” his or her ability to render a fair and impartial verdict.

In State v. Lindsey, 372 S.C. 185, 642 S.E.2d 557 (2007) this Court upheld the trial judge’s decision to exclude a juror because the juror gave “equivocal views regarding the death penalty, his responses favoring a life sentence despite the facts of the case, and his noted hesitation when asked if he could vote for death...” 372 S.C. at 193, 642 S.E.2d at 561.

In appellant's case, Juror # 480 was unequivocal in stating she would impose death in every instance when an aggravating circumstance was present. The fact that the trial judge got her to say she would consider either a life sentence or death sentence does not mean she would impose a life sentence. She just turned out to be as equivocal as the juror in State v. Lindsey but in direction of favoring death instead of life. Her ability to render a fair and impartial verdict was substantially impaired. She should have been excluded as a juror based upon her knowledge of applicant's prior crimes and sentence of death and her views in favor of the death penalty. Seating this juror called into question the reliability of a sentence of death under the Sixth and Eight Amendment to the United States Constitution and the due process clause of the Fourteenth Amendment.

Finally to the extent the state may rely on State v. Atkins, 303 S.C. 214, 222, 399 S.E.2d 760, 764-765 (1990) and State v. Bell, 302 S.C. 18, 393 S.E.2d 364 (1990), for the proposition the judge did not abuse his discretion by seating Juror 480 where she knew of appellant's prior murder conviction and death sentence, appellant submits after Morgan v. Illinois, 504 U.S. 719 (1992) such a practice can no longer be permitted. The issue was only summarily addressed in passing in State v. Atkins, 303 S.C. 214, 222, 399 S.E.2d 760, 764-765 (1990) and State v. Bell, 302 S.C. 18, 23, 393 S.E.2d 364, 367 (1990) but it is now apparent following Morgan that appellant's right to an impartial jury includes the right to identify and have removed death prone jurors such as Juror # 480. Appellant's death sentence must be vacated.

The Court abused its discretion by refusing to grant a change of venue where appellant's prior death penalty trial in Georgetown County, and the present murder, were the subject of very wide-spread publicity, since appellant was entitled to a fair trial by a jury that was not contaminated.

Relevant Facts

Before the instant (Turner) trial, appellant was tried, convicted, and sentenced to death for the Ling murder in Georgetown County in 2005. Prior to his arrest for the Ling and Turner murders, appellant was the subject of a nationwide manhunt and featured on Americas Most Wanted and countless other TV programs and newspaper articles. R. 1383, ll. 1-3; R. 468, ll. 5-16.⁸

During voir dire, the trial court judge asked each potential juror if they had been exposed to any pretrial publicity. Out of the 112 potential jurors questioned by the court, 56 knew about appellant through pretrial publicity.⁹ Of the 45 qualified jurors, 27 knew

⁸ All page numbers under this issue refer to the transcript dated November 13, 2009.

⁹ R. 1308, l. 1; R. 1333, ll. 14-17; R. 1358, ll. 22-25; R. 1393, ll. 16-20; R. 1414, ll. 9-12; R. 1424, ll. 21-24; R. 1457, ll. 18-21; R. 1479, ll. 17-19; R. 1488, ll. 14-17; R. 1515, ll. 14-16; R. 1552, ll. 9-10; R. 1565, ll. 14-16; R. 1576, ll. 6-24; R. 1594, l. 25 - 1595, l. 2; R. 1608, ll. 3-10; R. 1629, ll. 17-18; R. 1656, ll. 6-10; R. 452, ll. 6-8; R. 468, ll. 5-16; R. 485, ll. 14-18; R. 500, ll. 10-16; R. 527, ll. 6-14; R. 551, ll. 12-19; R. 563, ll. 4-9; R. 586, ll. 9-18; R. 598, ll. 4-8; R. 615, ll. 13-16; R. 630, ll. 7-16; R. 651, l. 15 - 652, l. 5; R. 661, ll. 2-13; R. 702, l. 23 - 703, l. 4; R. 755, ll. 20-25; R. 775, ll. 2-11; R. 788, ll. 15-21; R. 801, l. 25 - 802, l. 5; R. 845, ll. 9-12; R. 854, ll. 10-14; R. 872, ll. 13-22; R. 880, ll. 1-6; R. 899, l. 25 - 900, l. 1; R. 920, ll. 5-10; R. 935, l. 23 - 936, l. 6; R. 963, ll. 4-6; R. 971, ll. 3-25; R. 1003, l. 17 - 1004, l. 12; R. 1027, ll. 22-23; R. 1036, ll. 17-24; R. 1048, ll. 17-25; R. 1062, l. 15 - 1063, l. 11; R. 1103, ll. 14-19; R. 1134, ll. 11-13; R. 1143, ll. 1-11; R. 1159, ll. 1-3; R. 1166, ll. 4-12; R. 1205, ll. 17-24; R. 1212, ll. 4-6.

about appellant's previous trial, conviction and death sentence.¹⁰ Of the seated jurors, at least eight knew the appellant by name and one, Juror #480, as seen above, knew of appellant's previous murder conviction and sentence.¹¹

In support of its change in venue motion at trial, defense counsel requested that the judge discharge the current panel and bring in jurors from another county or area "where they're not going to be so highly exposed to the newspaper articles and that kind of thing that the jurors in this area were exposed to." R. 1386, ll. 1-5. See S.C. Code §17-21-85; State v. Manning, 329 S.C. 1, 495 S.E.2d 191 (1997). The defense explained that if "you run Mr. Stanko's name through search engines . . . there are hundreds, literally hundreds, of hits that come up and articles that have been written and published about this particular prosecution – this particular Defendant." R. 1382, ll. 17-24.

Additionally, defense counsel argued that it is very rare that a nationwide manhunt would involve a defendant from Horry County and Georgetown County, but that occurred in this case. R. 1383, ll. 1-5. "[T]here were television news reports nationwide about . . . the ability of law enforcement and the efforts that were being undertaken at the time to capture him." R. 1383, ll. 6-9. "[T]here were considerable publicity outlets at the initial trial down in Georgetown, all of which covered not only the Georgetown incident, but also the Horry County incident." R. 1383, ll. 10-14.

¹⁰ R. 1308, l. 1; R. 1333, ll. 14-17; R. 1358, ll. 22-25; R. 1414, ll. 9-12; R. 1424, ll. 21-24; R. 1457, ll. 18-21; R. 1515, ll. 14-16; R. 1552, ll. 9-10; R. 1576, ll. 6-24; R. 1594, l. 25-1595, l. 2; R. 458, ll. 12-16; R. 500, ll. 10-16; R. 527, ll. 6-14; R. 563, ll. 4-9; R. 630, ll. 7-16; R. 755, ll. 20-25; R. 788, ll. 15-21; R. 801, L. 25 - 802, l. 5; R. 872, ll. 13-22; R. 880, ll. 1-6; R. 899, l. 25 - 900, l. 1; R. 935, ll. 23-25; R. 935, l. 23 - 936, l. 6; R. 1003, l. 17 - 1004, l. 12; R. 1103, ll. 14-19; R. 1143, ll. 1-11; R. 1166, ll. 4-12; R. 1212, ll. 4-6.

¹¹ R. 84, ll. 22-25; R. 102, l. 21; R. 168, l. 22; R. 264, ll. 11-15; R. 278, ll. 9-10; R. 402, l. 17- 403, l. 5; R. 437, l. 21- 438, l. 5; R. 635, ll. 16-20; R. 708, ll. 13-19.

Further, “given the number of people that actually showed up here – the number of people who demonstrated some knowledge – not only about the case, but about the death sentence that has been imposed, and that’s still in effect against Mr. Stanko – I would submit, it’s just not possible to me that [the] reliability requirement [mandated for death penalty cases] under the Eight Amendment [can been met] in this particular setting.” R. 1384, ll. 12-19.

Defense counsel noted that he was forced to use all of his ten peremptory strikes to keep individuals off the jury who had prior knowledge of appellant and his previous conviction and sentence and, therefore, could not strike Juror # 480. Defense counsel explained that they would have also struck Juror 480 “because she has prior knowledge of the case and she did know about Mr. Stanko’s death sentence.” R. 1386, l. 6 – 1387, l. 15. “Someone who knows that this defendant is under a death sentence, they’re just not going to be able to take as seriously the responsibilities in this case.” R. 1388, ll. 7-10.

Defense counsel also reminded the judge that one of the prospective jurors who knew of Stanko’s previous death sentence stated that she did not understand why this second trial was “not a waste of time.” R. 1388, ll. 11-15. She did not understand why the court did not “go ahead and carry out the sentence that’s been imposed.” R. 1388, ll. 16-18.

Defense counsel argued this prospective juror demonstrated the lack of responsibility jurors who had prior knowledge of Stanko’s previous death sentence would feel in this case. It’s just “human nature.” R. 1388, ll. 19-20. “Mr. Stanko’s character is already at issue.” R. 1389, l. 4.

Appellant also argued that the sheer number of potential jurors qualified by the court with specific knowledge of the prior case compelled appellant to use all of his preemptory challenges for reason alone. R. 1386, ll. 6-7; 1393, ll. 3-23; 1248, ll. 11-17. The defense was forced to strike individuals who were not death prone because of their prior knowledge of appellant's criminal history. "We had to actually strike jurors that we otherwise would've wanted to have on this jury because of their softness, so to speak, on the issue of the death penalty. But, we had felt like we had to strike them because of the prior knowledge of the case." R. 1393, ll. 3-23.

Defense counsel stated that the defense did not have the ability to exercise appellant's preemptory challenges in the manner that it normally would because of the widespread knowledge of appellant's prior murder in the venire. R. 1414, ll. 14-18. Appellant argued that this is "an infringement of his Sixth Amendment right to counsel and the right to be [able] to develop a strategy that's designed to defend someone in a capital setting." R. 1415, ll. 8-11.

Counsel further noted the defense was forced to seat a juror who was a victim of an armed robbery because the available preemptory challenges *had to be used* to remove jurors who had knowledge of appellant's crime spree. R. 1391, ll. 15-18. That prior knowledge of appellant's conviction or criminal history is the "[t]ype of knowledge that puts this defendant's character at issue to the point that there is nothing that could be done to rehabilitate him and to show that he's innocent. There's no presumption of innocence here, or any presumption with respect to his character." R. 1413, ll. 14-20.

In denying appellant's motion, the trial judge ruled that the voir dire was adequate and each potential juror had been thoroughly questioned by the court, the state, and the defense and said that they could be both fair and impartial. R. 1421, l. 18 – 1423, l. 14.

Discussion

A criminal defendant is entitled to an impartial jury, "free of prejudice, passion, excitement, and tyrannical power." Chambers v. Florida, 309 U.S. 227, 236-237 (1940); Ristaino v. Ross, 424 U.S. 589 (1976); State v. Gaskins, 284 S.C. 105, 326 S.E.2d 132 (1985). It is the trial judge's duty to ensure that the jury is fair and unbiased. State v. Gaskins, supra. The failure to ensure juror impartiality "violates even the minimal standards of due process." Irvin v. Dowd, 366 U.S. 717, 722 (1961).

The denial of a motion to change venue based on pretrial publicity may violate due process. Patton v. Yount, 467 U.S. 1025 (1984); Murphy v. Florida, 421 U.S. 794 (1975); Irvin v. Dowd, supra; Rideau v. Louisiana, 373 U.S. 723 (1963). To establish such a violation, the defendant must either demonstrate "identifiable prejudice" or circumstances that involved "such a probability that prejudice will result that that [the trial] is deemed inherently lacking in due process." Estes v. Texas, 381 U.S. 532, 542-543 (1965); Rideau, supra.

A motion to change venue is within the sound discretion of the trial court. State v. Manning, 329 S.C. 1, 495 S.E.2d 191 (1997); Sheppard v. State, 357 S.C. 646, 594 S.E.2d 462 (2004). There is no error if the jurors "had the ability to set aside any impressions or opinions" created by the publicity and to make their decision based on the evidence presented at trial. Sheppard; Manning. However, the jurors' own assurances that they are "equal to the task cannot be dispositive of the accused's rights." Murphy v.

Florida, supra, 421 U.S. at 800. In certain cases, exposure to inflammatory pretrial publicity creates such a presumption of prejudice "the jurors' claims that they can be impartial should not be believed." Patton v. Yount, supra, 476 U.S. at 1031

This Court has held that when jurors have been exposed to pretrial publicity, the trial court's denial of a change of venue is not reversible absent extraordinary circumstances. State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1990); Sheppard, supra; Manning, supra. Appellant's case is extraordinary because of the volume and saturation of the news coverage. Nearly one-half of the perspective jurors questioned by the court and the resulting petit jury had heard about the case through regular coverage; from every local news outlet, spanning years between the incident date until the morning of trial. The sheer pervasiveness of the coverage, is sufficient, in this case, to create a presumption of prejudice. See Irvin v. Dowd; Rideau v. Louisiana; Patton v. Yount, all supra.

This case was the most infamous and widely publicized case in Horry County that appellant is aware of, and if ever a case called for a change of venue it was this case. See, State v. Davis, 138 S.C. 532, 137 S.E.2d 139 (1927) (murder conviction reversed because of intense feelings against Davis following the murder in Fairfield County). As defense counsel argued he was forced to seat a juror who was a victim of an armed robbery because the available peremptory challenges *had to be used* to remove jurors who had knowledge of appellant's crime spree. R. 117, ll. 15-18. That prior knowledge of appellant's conviction or criminal history is the "[t]ype of knowledge that puts this defendant's character at issue to the point that there is nothing that could be done to rehabilitate him and to show that he's innocent. There's no presumption of innocence

here, or any presumption with respect to his character.” R. 139, ll. 14-20. Appellant used all ten of his peremptory challenges to remove jurors who knew of the prior crime and even then had a juror deciding his fate that knew he had already been convicted of another murder and sentenced to death.

While appellant cannot pierce the privacy of the jury room, the juror was never instructed not to talk to other jurors about her knowledge of the prior trial. Further, as seen above, appellant had to accept jurors he otherwise would have struck because he had to remove potential jurors who were keenly aware of the prior murder. Appellant should now receive a new trial before an impartial tribunal.

5.

The trial court erred in excusing 85 perspective jurors during roll call because they were sixty-five or older given that such excusals violated the fair cross-section requirement of the Sixth Amendment by allowing the arbitrary removal of jurors on a basis unrelated to their ability to serve.

Relevant Facts

When the court and the state at trial sought to excuse a juror during roll call because she was sixty-five years of age or older the defense strongly objected:

The Court: Norma Allen is over sixty-five. All right, 14-7-840, exemption from jury service, “No person is exempt from service as a juror in any court of the State except men and women sixty-five years of age or over.” All right, what is in this affidavit, there’s a statement that Ms. Allen is seventy years old. She suffered a stroke in June 2004, unable to drive. What is the State’s position?

Mr. Hembree: No objection to her being excused, Your Honor.

The Court: The Defense position?

Mr. Diggs: You Honor, with all due respect, we understand the juror’s situation and are sympathetic to it, but our position has to be that, you know, sixty-five is not what sixty-five used to be, and we lose a lot of wisdom and experience in this situation, and we object to excusing anybody pursuant to that statute simply because it denies –

The Court: So you’re saying that 14-7-840 is unconstitutional?

Mr. Diggs: Well, it is unconstitutional and it’s just bad policy as well.

The Court: All right. I would respectfully decline to grant your motion to state that 14-7-840 is unconstitutional. 14-7-840 says, "No person is exempt from service as a juror in any court of this state except for men and women sixty-five years of age or over." The wording of that states that, therefore, if you read it, men and women over the age of sixty-five—I'm sorry—men and women sixty-five of age or over are exempt. It is clear, explicit. It is not—and I would respectfully decline to grant your motion to declare it unconstitutional. That person is excused.

Mr. Diggs: Your Honor, could—and, *of course, we based it on the fact that the segment—that segment of the population right now is growing, is significant in size more so than it was when that statute was written. Also, I'm asking for permission to apply that to every person so I don't—I mean every person over sixty-five so I don't have to make a motion every time that—*

The Court: If you have—no sir. If you have an objection to that particular person, you're going to need to raise it.

Mr. Diggs: All right, even if it's the same—

The Court: This person is—the date of birth, so it's clear, is January 25, 1939, age seventy, and further regarding this particular juror, there is information that the juror suffered a stroke in June of 2004.

Mr. Diggs: Well, and I understand that, and it may be that that might be a different ground for excusing her, but she didn't say in there that she was incapacitated because of the stroke. My wife has had a stroke, but she could certainly serve on a jury.

The Court: Very good. That juror is excused. Thank you very much.

Mr. Hembree: Your Honor, I think Mr. Diggs is trying to argue diminished age. I'm concerned about that.

The Court: All right. I do find 14-7-840 to be constitutional.

After this first excusal of a prospective juror because of her age, the court excused eighty-four other prospective jurors because they were sixty-five or older over the defense's objections.¹² The defense did not object to the excusal of other prospective jurors who were age sixty-five or older if they had a legitimate reason for seeking to be excused such as a medical condition, a previously planned trip, involvement in law

¹² Juror 14, R. 3170, l. 11 – 3171, l. 1; Juror 25, R. 3174, ll. 8-18; Juror 29, R. 3175, ll. 7-25; Juror 39, R. 3176, l. 25 – 3177, l. 11; Juror 52, R. 3180, l. 23 – 3181, l. 7; Juror 58, R. 3184, l. 18 – 3185, l. 3; Juror 62, R. 3185, l. 12 – 3186, l. 1; Juror 63, R. 3186, ll. 2-13; Juror 66, R. 3186, ll. 16-25; Juror 71, R. 3187, ll. 6-13; Juror 74, R. 3187, l. 20 – 3188, l. 2; Juror 82, R. 3189, l. 19 – 3190, l. 2; Juror 88, R. 3190, ll. 6-14; Juror 96, R. 3192, ll. 13-21; Juror 97, R. 3192, l. 22 – 3193, l. 6; Juror 141, R. 3202, ll. 3-11; Juror 147, R. 3203, ll. 9-14; Juror 152, R. 3204, ll. 6-13; Juror 160, R. 3204, l. 24 – 3205, l. 6; Juror 161, R. 3205, ll. 7-14; Juror 168, R. 3206, l. 15 – 3207, l. 1; Juror 169, R. 3207, ll. 2-11; Juror 173, R. 3208, ll. 2-9; Juror 178, R. 3210, ll. 9-15; Juror 194, R. 3211, ll. 14-21; Juror 196, R. 3211, l. 23 – 3211, l. 5; Juror 205, R. 3212, ll. 19-25; Juror 206, R. 3213, ll. 1-7; Juror 211, R. 3213, ll. 15-21; Juror 214, R. 3214, ll. 3-8; Juror 182, R. 3214, R. 3214, l. 21 – 3215, l. 1; Juror 189, R. 3215, ll. 14-21; Juror 225, R. 3217, ll. 14-19; Juror 232, R. 3218, ll. 9-19; Juror 235, R. 3219, ll. 12-17; Juror 244, R. 3222, l. 19 – 3223, l. 1; Juror 273, R. 3229, ll. 1-7; Juror 283, R. 3230, ll. 2-9; Juror 285, R. 3230, l. 22- 3231, l. 5; Juror 296, R. 3230, ll. 9-15; Juror 301, R. 3234, l. 22 – 3235, l. 4; Juror 306, R. 3235, l. 20 – 3236, l. 3; Juror 312, R. 3236, ll. 9-15; Juror 336, R. 3238, ll. 12-18; Juror 353, R. 3241, l. 24 – 3242, l. 5; Juror 355, R. 3242, ll. 15-22; Juror 356, R. 3242, ll. 15-22; Juror 365, R. 3244, l. 24 – 3245, l. 5; Juror 367, R. 3245, ll. 7-13; Juror 371, R. 3245, l. 24 – 3246, l. 5; Juror 395, R. 3250, ll. 4-11; Juror 404, R. 3252, ll. 5-12; Juror 434, R. 3257, ll. 7-14; Juror 435, R. 3257, ll. 15-23; Juror 447, R. 3260, ll. 16-24; Juror 465, R. 3263, ll. 17-23; Juror 476, R. 3268, l. 18 – 3269, l. 2; Juror 483, R. 3269, l. 21 – 3270, l. 3; Juror 520, R. 3274, ll. 12-19; Juror 525, R. 3275, ll. 17-23; Juror 526, R. 3275, l. 24 – 3276, l. 5; Juror 556, R. 3281, ll. 13-20; Juror 560, R. 3281, l. 22 – 3282, l. 4; Juror 591, R. 3286, l. 22 – 3287, l. 11; Juror 599, R. 3287, l. 21 – 3288, l. 2; Juror 623, R. 3291, l. 22 – 3292, l. 3; Juror 663, R. 3296, l. 20 – 3297, l. 2; Juror 665, R. 3298, ll. 4-10; Juror 666, R. 3297, ll. 11-18; Juror 674, R. 3298, ll. 7-17; Juror 675, R. 3298, ll. 15-22; Juror 681, R. 3300, ll. 3-9. Juror 7, R. 3309, ll. 13-23; Juror 61, R. 3311, l. 24 – 3312, l. 5; Juror 304, R. 3324, l. 24 – 3325, l. 5; Juror 436, R. 3333, ll. 2-9; Juror 551, R. 3340, ll. 4-11; Juror 584, R. 3342, ll. 16-24; Juror 697, R. 3352, ll. 12-19. Juror 49, R. 3389, ll. 10-20; Juror 50, R. 3389, l. 21 – 3390, l. 7; Juror 151, R. 3391, ll. 13-22; Juror 532, R. 3402, l. 18 – 3403, l. 2; Juror 697, R. 3411, ll. 12-19.

enforcement, being unable to fill out the questionnaire, or having to care for a family member.¹³ There were a total of eighteen of these prospective jurors.

Only two prospective jurors, #38 and #510, waived their right to be exempted from serving on the jury because of their age. R. 531, l. 16 – 532, l. 4; R. 494, l. 17 – 495, l. 5. However, prospective Juror #38 was found not qualified to serve by the court for other reasons. R. 535, ll. 13-20.

While Juror #510 was found qualified by the court, she was later struck by defense counsel during jury selection because of her knowledge about Stanko's previous murder trial. R. 511, ll. 12-24. Another prospective juror over sixty-five, Juror #90, came in for jury qualification but requested to be exempted from service because the trial was close to the Thanksgiving holiday, not because of her age. R. 556, ll. 1-24. This prospective juror asked to be called at a later date recognizing her ability to serve on a jury. R. 557, ll. 5-6.

South Carolina Code Section 14-7-840

The above code section reads:

No person is exempt from service as a juror in any court of this State except men and women sixty-five years of age or over. Notaries public are not considered state officers and are not exempt under this section. A person exempt under this section *may be excused upon telephone confirmation of date of birth and age to the clerk of court or the chief magistrate*. The jury commissioners shall not excuse or

¹³ Juror 174, R. 3208, ll. 10-17; Juror 394, R. 3249, l. 20 – 3250, l. 3; Juror 445, R. 3260, ll. 7-14; Juror 175, R. 3268, ll. 10-17; Juror 523, R. 3275, ll. 7-15; Juror 527, R. 3276, ll. 6-16; Juror 541, R. 3279, ll. 8-15; Juror 569, R. 3282, l. 22 – 3283, l. 5; Juror 605, R. 3288, ll. 16-23; Juror 613, R. 3289, l. 17 – 3290, l. 2; Juror 614, R. 3290, ll. 3-11; Juror 630, R. 3292, l. 23 – 3293, l. 9; Juror 646, R. 3294, l. 21 – 3295, l. 3; Juror 653, R. 3296, ll. 7-14; Juror 678, R. 3299, ll. 3-11; Juror 679, R. 3299, ll. 12-19; Juror 680, R. 3299, l. 20 – 3300, l. 2; Juror 687, R. 3300, ll. 12-23.

disqualify a juror under this section. The clerk of court shall maintain a list of persons excused by the court and the reasons the juror was determined to be excused.

(emphasis added). It is clear that under this section a prospective juror age sixty-five or older may, when summoned, request an exemption. The section does not automatically disqualify such jurors, and if they do not seek an exemption, the court may later find them qualified to serve on a jury. Therefore, the basis of the exemption of such citizens as jurors is arbitrary and unrelated to their ability to serve. Their age alone is the only requirement that needs to be satisfied in order for them to be exempted as jurors in this state.

Discussion

The United States Supreme Court long ago recognized that “[it] is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community.” Taylor v. Louisiana, 419 U.S. 522, 527 (1975), citing Smith v. Texas, 311 U.S. 128, 130 (1940). The Court has further stated that “The selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial.” Taylor v. Louisiana, 419 U.S. at 528.

The Court noted, however, that “The States are free to grant exemptions from jury service to individuals in case of special hardship or incapacity and to those engaged in particular occupations the uninterrupted performance of which is critical to the community’s welfare.” Taylor v. Louisiana, 419 U.S. at 534 *citing* Rawlins v. Georgia, 201 U.S. 638 (1906). Such exemptions, the Court stated, do not pose substantial threats that the remaining pool of jurors will not be representative of the community. *Id.* This is

something defense counsel acknowledged at trial when it declined to object to perspective jurors sixty-five or older who had a legitimate reason for seeking an excusal.

In order to establish a prima facie violation of the fair-cross-section requirement, the appellant must show (1) that the group alleged to be excluded is a distinctive group in the community; (2) that the representation of this group in the venire from which the juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process. Duren v. Missouri, 439 U.S. 357, 364 (1979).

Citizens sixty-five or older do make up a distinctive group in the community. The most compelling fact is that clearly a community made up of entirely of citizens under the age of sixty-five would be significantly different than a community comprised of all citizens. People sixty-five or older frequently share the same generational values and experiences. They have been alive through the same major world and national events and cultural changes. They are often more involved in their community and bring invaluable insight and wisdom to the jury simply based on their maturity. In addition, older citizens are often more rational and sensible as a result of their age. Therefore, such exemption dilutes the quality of community judgment represented by the jury in criminal trials. See Taylor v. Louisiana, 419 U.S. at 535.

The representation of citizens sixty-five or older in the venire from which the jury was selected in this case was not fair and reasonable in relation to the number of such persons in the community. This Court can take judicial notice that, according to the U.S. Census Bureau, the population of citizens sixty-five or older in Horry County in 2009, the year the trial took place, was 18.0 percent. U.S. Census Bureau, State and County

QuickFacts, <http://quickfacts.census.gov/qfd/states/45/45051.html> (Last visited July 26, 2011). This is a significant portion of the county's population. However, *only one of the qualified jurors was sixty-five or older*, almost completely eliminating the representation of 18.0 percent of the community's population in the venire from which the jury was ultimately selected.

This elimination of such a significant portion of the county's population is both unfair and unreasonable. It is untenable to advocate, as defense counsel argued, that in this day and age with the improvements in the fields of health and medical care, that all citizens age sixty-five and older can be automatically exempt over the telephone because of the fact that are simply sixty-five years old or older.

A large majority of sixty-five year old seniors today are healthy both physically and mentally and have the capacity to competently serve on a jury. Therefore, it is unreasonable to systematically exempt such citizens.

This argument is analogous to Taylor v. Louisiana, 419 U.S. at 534 where the Court held that: "It is untenable to suggest these days that it would be a special hardship for each and every woman to perform jury service or that society cannot spare any women from their present duties." Just as a change in societal views of the role of women and their occupations made the exclusion of women from jury service unreasonable in the 1970s, the improvement of medical care and the overall health of our nation's seniors has made the exclusion of citizen's sixty-five or older unreasonable today. A significant amount of such citizens are wholly qualified to serve on a jury.

The third element is easily satisfied in this case. It is clear that the underrepresentation of citizens sixty-five or older in the venire from which the jury was

ultimately selected is from their systematic exemption during roll call. The percentage of the original 700 prospective jurors who were identified by the court as age sixty-five or older was approximately 15 percent, a percentage that better reflects the percentage of such citizens in Horry County in 2009.

When excluding only the prospective jurors sixty-five or older who had a valid reason for excusal, the percentage merely drops to 12.5 percent, a percentage that is still clearly more reflective of the 18.0 percent found in the community than 0.02 percent, the percentage of citizens sixty-five or older that was ultimately in the qualified venire from which the jury was selected.

State v. Rogers, 355 N.C. 420, 449, 562 S.E.2d 859, 877-878 (2002) involved a similar challenge but on an equal protection basis. As the North Carolina Supreme Court previously noted, “The adverse effects of growing old do not strike all equally or at the same time, and it is only sensible to allow trial judges to consider the individual when a prospective juror seeks to be excused because of his or her age.” Rogers, 355 N.C. 420, 449, 562 S.E.2d 859, 877-878 (2002). Because Section 14-7-840 allows for the arbitrary excusal of perspective jurors sixty-five or older when requested without first considering the individual’s justifiable reasons for seeking to be exempt, such as a medical condition, it fails to satisfy the rational basis test. As previously noted, a significant number of prospective jurors sixty-five and older are wholly qualified and both physically and mentally competent to serve on a jury. Today, with the advancement of medical care and the overall health of U.S. citizens, it should be expected that such prospective jurors serve unless other grounds for an exemption or disqualification is provided. Therefore, it is irrational to automatically exempt perspective jurors sixty-five or older upon request.

Our Supreme Court should follow the North Carolina Supreme Court in its ruling that the excusal of “prospective jurors present in the courtroom who are over the age of sixty-five must reflect a genuine exercise of judicial discretion.” Rogers, 355 N.C. at 448, 562 S.E.2d at 877.

Based on these arguments, the trial court erred in its systematic exclusion of perspective jurors sixty-five or older in violation of the Sixth and Fourteenth Amendments, and appellant should, therefore, be granted a new trial.

The court erred by ruling that appellant's execution as a brain damaged and mentally ill man would not violate the Eighth Amendment to the United States Constitution, since the evolving standards of decency should now shield an appellant with significant diminished capacity, as well as the mentally retarded from the death penalty.

Mental illness has long been statutorily recognized as a mitigating circumstance, just as mental retardation was prior to Atkins v. Virginia, 536 U.S. 304 (2002). See S.C. Code §16-3—20(C)(b)(2)(6) & (7). Likewise, the youth of the offender was similarly a statutory mitigating circumstance. See S.C. Code §16-3—20(C)(b) (7).

Mental illness or brain damage that causes a defendant to be unable to exercise judgment and control his impulses would surely also be a non-statutory mitigating circumstance. However, just as the mentally retarded and minors who commit murder can no longer be executed under the Eighth Amendment's "evolving standards of decency," the same conclusion should be reached for a brain damaged defendant such as appellant whose brain damage or brain defects severely lessen his ability to control his impulses. Roper v. Simmons, 543 U.S. 551 (2005); Atkins v. Virginia, *supra*.

At the October 8, 2009 at a pre-trial hearing defense counsel moved to declare S.C. Code §16-3-20 unconstitutional as it applied to appellant who had a structural and functional brain defects. "We've got experts in this case both who will testify one as to the structure and one as to the function. It's been measured scientifically." R. 3082, ll. 7-19.

Defense counsel told the judge that the defense would offer scientific evidence comparing appellant's brain to:

[P]eople with good mental health, a big database which has been put together to show . . . the healthy brain . . . the mentally healthy individual should look like in terms of structure and how it should function under certain situations. What this case is going to show is that Mr. Stanko has this condition of hypofrontality. Its not something he chooses to have. Its something that he just has. We can speculate a little bit about how it got there and what causes it, and there will be evidence about that, but the fact of the matter is its something that exists in this case, again just like a missing limb might be existing from someone born with an obvious physical defect. We can see that. We are learning how to see those types of defects when they exist inside the brain, and that's what we've got in this case.

R. 3082, l. 16- 60, l. 11.

Defense counsel noted that the current status of the law was that appellant could be executed notwithstanding his brain defects. Counsel reminded the judge that in the United States we no longer execute the mentally retarded or minors: "We don't execute them because we know through maybe more obvious observable evidence that there's a problem with these people; their brains aren't working properly, and so we're going to cut them some slack and we, as an evolving society, we don't execute these people, because the Eighth Amendment would protect them. We are better than that." R. 3083, ll. 12-23.

Defense counsel argued that, when it came to a bar on the death penalty, that appellant's brain defects should not be treated any differently than mental retardation or young people whose brains had not yet fully developed: "If someone's brain is not

functioning properly because of their young age or because of mental retardation, then it's a proper thing that we do not execute, my argument is that in this case the same rationale should apply. We shouldn't execute people who have brain defects and that's what we have in this case..." R. 3084, ll. 4-24.

Solicitor Hembree argued: "This is not a condition that has been recognized by our Supreme Court like mental retardation or like that of a juvenile." The solicitor said that if there was evidence appellant had the requisite brain defects "the appropriate place and time for that issue to be argued and determined would be at the appellate level and we'd request that this issue—I mean excuse me, this motion be denied at this time." R. 3086, l. 5- 3087, l. 4. The judge denied the motion. R. 3087, ll. 5-23.

Discussion

In Winick, The Supreme Court's Evolving Death Penalty Jurisprudence: Severe Mental Illness as the Next Frontier, 50 B.C. L. Rev. 785, 785 (May 2009), Professor

Bruce Winick wrote:

The U.S. Supreme Court's recent death penalty jurisprudence displays the Court's willingness to invalidate the death penalty for certain offenses or classes of offenders, including those with mental retardation and those who were under eighteen at the time of the offense. The Court has noted that the death penalty in these cases constitutes a disproportionate punishment because it fails to adequately serve the two primary goals of the Cruel and Unusual Punishments Clause: retribution and deterrence. Because the cognitive and volitional impairments caused by severe mental illness result in a parallel diminution in culpability and deferability, severe mental illness is an appropriate next frontier at which to apply the Court's emerging concept of proportionality. Social attitudes have only recently begun to shift toward opposing the death penalty for those with severe mental illness at the time of the offense. Nonetheless, the Court's recent death penalty

cases teach that the Court may independently determine that execution of these offenders is a disproportionate punishment if it concludes that executing such offenders does not adequately serve the goals of retribution and deterrence.

In Roper v. Simmons, supra the Court concluded the death penalty is a disproportionate punishment for juveniles, and hence cruel and unusual punishment. The Court noted that juveniles are more susceptible to immature and irresponsible behavior, so their conduct is not as morally reprehensible as that of adults because they are still developing mentally and as human beings. Second, juveniles are more vulnerable to the influence of others and lack control over their immediate surroundings. Finally, since a juvenile's personality and sense of identity are still developing, it makes even the commission of a heinous crime insufficient evidence of an "irretrievably depraved behavior" or person.

Mentally retarded individuals also lack the capacity to appreciate the full consequences of their behavior. In Atkins v. Virginia, the Court therefore found a "per se" finding of diminished responsibility that exempts mentally retarded individuals from the death penalty.

Defense counsel here correctly argued that appellant's brain defects, which were discussed at length above in issue one, exempted him from the death penalty under the Eighth Amendment's "evolving sense of decency" standard. As seen, appellant's brain defects were attributed to his mother's complicated pregnancy when appellant was born in Guantanamo Bay, Cuba and he received reduced oxygen to his brain. There was also evidence that appellant was hit in the back of the head when he was about sixteen-years-

old with a beer bottle which damaged his frontal lobes. There was testimony appellant's frontal lobes could not repair themselves. R. 1543, l. 10- 1544, l. 1.

Dr. Ruben Gur also testified that appellant's damaged frontal lobes diminished his ability to distinguish between real and perceived threats. Dr. Gur also opined that appellant's brain abnormalities were extreme. R. 1653, l. 6- 1663, l. 3. Dr. Wu analogized appellant's brain defects to a computer in a Lexus or Toyota going "haywire" where you have "an out of control brain..." R. 1732, l. 13- 1733, l. 13.

In Gregg v. Georgia, 428 U.S. 153, 173 (1976), the plurality of the Court fashioned a three pronged analysis for determining whether a punishment constitutes cruel and unusual punishment under the Eighth Amendment. The first question is whether the punishment conforms to contemporary standards of decency. The second is whether the punishment is disproportionate to the offense, and the third is whether the punishment goes beyond what is necessary to accomplish any legitimate penological objective.

As stated, our state's death penalty statute considers mental or emotional distress, capacity to appreciate, and age and mentality of the defendant as mitigating circumstances. We are not a weighing state and our legislature has deemed that any one juror can prevent a defendant from being sentenced to death. It is elementary that a jury may sentence a defendant to life imprisonment for "any reason or no reason at all, simply as an act of mercy." Rosemond v. Catoe, 383 S.C. 320, 680 S.E.2d 5, 10 (2009).

South Carolina juries, obviously depending somewhat on geography, do not often return death sentences for defendants where there is strong evidence they are severely mentally ill. Further, such death sentences are not likely to be carried out: *e.g.* Fred

Singleton, Donney Council, Jamie Wilson. Moreover, often such mental illness are not wholly appreciated until the post-conviction relief stage. There is reason to believe that South Carolinians do not favor the execution of the mentally ill or those who are brain damaged for circumstances beyond their control because such punishment for conduct beyond their control is considered disproportionate.

As to penological objectives -- retribution and deterrence -- the execution of the brain damaged and the severely mentally ill does not contribute to either goal. People who commit crimes because they are brain damaged or severely mentally ill are not going to be deterred by the fear of execution since they are unable to control their impulses in the manner a normal person is able to do so. Further, to execute the brain damaged and severely mentally ill therefore also constitutes the unnecessary infliction of pain and suffering that goes beyond any legitimate consideration of retribution.

Executing this brain damaged appellant, where there is strong evidence his brain defects prevented him from controlling his impulses would violate our contemporary standards of decency and therefore the Eighth Amendment to the United States Constitution.

Other jurisdictions

While Florida's proportionality analysis differs from this Court's in some respects, Florida has held that evidence of the respective defendant's severe mental illness made the death sentence a disproportionate punishment. See Offord v. State, 959 So.2d 187 (Fla. 2007), Crook v. State, 908 So.2d 350 (Fla. 2005), Green v. State, 975 So.2d 1081 (Fla. 2008).

In State v. Nelson, 173 N.J. 417, 483, 803 A.2d 1, 41 (2002) where the defendant's sentence was vacated on other grounds, the concurring Justice Zazzali, joined by Justice Long wrote that there were additional and compelling justifications for not executing the defendant: "I agree with defendant that her execution for crimes that are inextricably bound to her mental illness violates our State Constitution. The State's legitimate penological interests that purportedly are served by the death penalty are unconstitutionally diminished if the State executes such a mentally ill and psychologically disturbed person. In defendant's case, it is constitutionally inadequate for a jury to consider her severe mental illness as merely a mitigating factor to be weighed among other aggravating and mitigating factors."

In Corcoran v. State, 774 N.E.2d 495, 502-03 (Ind. 2002), Justice Rucker wrote in dissent:

"[I] do not believe a sentence of death is appropriate for a person suffering a severe mental illness. Recently the Supreme Court held that the executions of mentally retarded criminals are 'cruel and unusual punishments' prohibited by the Eighth Amendment of the United States Constitution. Atkins v. Virginia, 536 U.S. 304 (2002). There has been no argument in this case that Corcoran is mentally retarded. However, the underlying rationale for prohibiting executions of the mentally retarded is just as compelling for prohibiting executions of the seriously mentally ill, namely evolving standards of decency. In that regard I associate myself with the dissenting opinion of Justice Pfeifer of the Ohio Supreme Court who noted:

"Mental illness is a medical disease. Every year we learn more about it and the way it manifests itself in the mind of

the sufferer. At this time, we do not and cannot know what is going on in the mind of a person with mental illness. As a society, we have always treated those with mental illness differently from those without. In the interest of human dignity, we must continue to do so.... I believe that executing a convict with a severe mental illness is a cruel and unusual punishment.”

Ohio v. Scott, 92 Ohio St.3d 1, 748 N.E.2d 11, 20 (2001) (Pfeifer, J., dissenting).

Appellant strongly and respectfully submits that just as mentally retarded people and juveniles can no suffer the death penalty for the crime of murder, so to appellant, with his extreme brain defects should not, under our “evolving sense of decency,” be eligible for execution under the Eighth Amendment to the United States Constitution.

CONCLUSION

By reason of the foregoing argument, appellant's convictions should be reversed and this case remanded to the Horry County Court of General Sessions for a new trial. In the alternative, appellant should be granted a new sentencing trial.

Respectfully submitted,

BY: 

Robert M. Dudek
Chief Appellate Defender

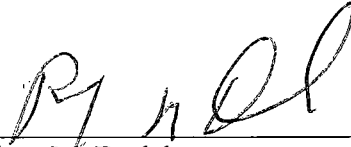
Robert M. Pachak
Appellate Defender
ATTORNEYS FOR APPELLANT

This 22nd day of May, 2012

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

May 22nd, 2012

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

Robert M. Dudek
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STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Horry County
Steven H. John, Circuit Court Judge

THE STATE,

RESPONDENT,

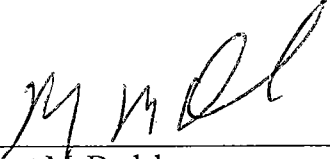
V.

STEPHEN CHRISTOPHER STANKO,

APPELLANT

CERTIFICATE OF SERVICE

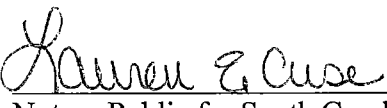
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Donald J. Zelenka, Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, South Carolina 29201, this 22nd day of May, 2012.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 22nd day of May, 2011.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: August 23, 2014.