RECEIVED
May 21 2021
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Honorable Eugene C. Griffith Circuit Court Judge

Appellate Case No. 2019-001008

THE STATE, ...RESPONDENT

v.

TIMOTHY RAY JONES, JR., ...APPELLANT.

INITIAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General
S.C. Bar No. 14244

TOMMY EVANS, JR.
Assistant Attorney General
S.C. Bar No. 65282

Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-6305

S. R. HUBBARD, III
Solicitor, Eleventh Judicial Circuit
205 E. Main Street, 3rd Floor
Lexington, South Carolina 29072
(803) 785-8352

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Rules

Other Authorities

APPELLANT'S STATEMENT OF ISSUES ON APPEAL

1. Whether the judge abused his discretion by qualifying Juror No. 156, Zachary Gantt, since his belief that death was "the only appropriate penalty" for murder of multiple children, his refusal to give meaningful consideration to mitigating circumstances, and his predisposition against recommending a list sentence for any reason or no reason at all, including as an act of mercy, prevented or substantially impaired the performance of his duties as a juror in accordance with his instructions and his oath?

2. Whether the judge abuse his discretion by excusing Juror No. 338, Rachna Prasad, when she was qualified to serve because, while her responses indicated she had concerns regarding a not guilty by reason of insanity (NGRI) verdict since she did not know the consequences of such a verdict, she unequivocally stated she could give meaningful consideration to a potential NGRI verdict?

3. Whether the judge erred by refusing to instruct the jury about the effect of a not guilty by insanity (NGRI) verdict, and also by refusing to allow appellant to voir dire jurors properly instructed jurors on the effect of a NGRI verdict since due process and the Eighth Amendment mandated truthful information when the jury was also the sentence?

4. Whether the judge erred by denying appellant's motion to suppress evidence obtained as a result of an illegal roadblock conducted by two bored police officers with minimal oversight and excessive discretion, in violation of the Fourth Amendment?

5. Whether the judge violated appellant's rights under the federal and state constitutions to present any relevant mitigating evidence during the penalty phase of his capital trial by excluding testimony of a forensic psychologist to show the state's expert, who claimed appellant was malingering, improperly scored and interpreted the tests on which she relied to make this devastating accusation where the defense expert's testimony was relevant to appellant's character, "professionally and personally destroy[ed]" the state's expert by showing her incompetence, and undermined the reliability of the testimony of another expert who relied upon the state's expert in forming his opinion that appellant

6. Whether the judge violated appellant's Eighth Amendment right to present admissible evidence in mitigation and his Fifth and Fourteenth Amendment right to due process by excluding relevant mitigating evidence from appellant's family, Social Historian Deborah Gray, and veteran law enforcement officer Barry Sowards?

7. Whether the judge erred by excluding the penalty phase videotaped testimony of Cynthia Jones Turner, appellant's mother, since this was mitigating evidence appellant had a right to present to the sentencing jury pursuant to the Eighth Amendment to the United States Constitution?

8. Whether the judge erred by admitting horrific autopsy photographs of the dead child victims, since the photographs impermissibly invited a death sentence upon the arbitrary factor of passion, particularly where the court acceded to the solicitor's demand that the autopsy photographs only be viewed in the privacy of jury deliberations, so noticeable juror reactions would not be seen, and the autopsy photographs also should have been excluded, pursuant to Rule 403, SCRE?

RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON APPEAL

1. Whether the trial judge abuse his discretion in overruling the defense objection in qualifying and seating Juror No. 156 Zachary Gantt, who upon careful questioning by the Judge, Solicitor and defense counsel confirmed that he would fairly consider the case as a whole and abide to the instructions of law given by the Judge?

2. Whether the trial judge abuse his discretion by excusing Juror No. 338 Rachna Prasad because she maintained she needed to know the consequences of a verdict of not guilty by reason of insanity (NGRI) in order to consider the verdict option, when the trial judge would not be able to answer her question and maintain the integrity of jury proceedings since the jury cannot consider sentencing in deciding guilt-phase options and cannot weigh-in on the consequences of a NGRI verdict?

3. Whether the trial judge erred and violated Jones' protections under the Eighth Amendment and Due Process Clause, in refusing to instruct the jury in a capital case on the consequences of a NGRI verdict when the consequences of the verdict is not a matter for jury consideration or input, capital or otherwise ?

4. Whether the trial judge erred in denying the defense's motion to suppress evidence stemming from a lawful search and seizure occurring at a lawful out-of-state security checkpoint stop, such action not being a violation of Jones' Fourth Amendment rights?

5. Whether the trial judge erred in not allowing the defense to offer a late-revealed forensic pathologist to testify that Jones was not actually malingering when numerous doctors had already testified to this fact making this testimony needlessly cumulative?

6. Whether the trial judge erred in not allowing certain evidence offered in mitigation in violation of Jones's Fifth, Eighth, or Fourteenth Amendment rights when the evidence not allowed was properly found inadmissible under ordinary rules existing to foster reliability in the trial process, specifically, the trial judge did not err in finding irrelevant testimony offered through witnesses Roberta Thornbery and Timothy Jones, Sr., and (2)

only disallowed needlessly repetitive testimony of social historian Deborah Gray, and her use of statements from other individuals not offered for the truth of the matter when there was no applicable hearsay exception available?

7. Whether the trial judge erred in excluding a video of Jones' mother Cynthia Turner to be introduced during the penalty phase when it had no relevance to the sentencing proceeding, and was just being offered in order to sway the emotions of the jury by fostering sympathy for another but not Jones?

8. Whether the trial judge erred in allowing into evidence during the sentencing phase photographs of the recovery of the victims' remains where Jones had packaged and left the children's bodies, and autopsy photographs detailing Jones' treatment of the victims, when these photographs corroborated testimony from witnesses, showed circumstances of the crime, and revealed evidence of Jones' character, which supported the judge's finding that the probative value of the evidence substantially outweighing any possibility of unfair prejudice to Jones?

STATEMENT OF THE CASE

A Lexington County grand jury true-billed five indictments against Appellant, Timothy Ray Jones, Jr. ("Jones") at the January 2015 term, for the murder of his five children. (R. pp. *). On December 9, 2015, the State served notice of intent to seek the death penalty. (R. p. *). This Court assigned exclusive jurisdiction over the circuit court proceedings to the Honorable Eugene C. Griffith by Order dated December 20, 2016. (R. p. *). The following attorneys represented Appellate at trial: Boyd Young, Esquire, Robert Madsen, Esquire, Bill McGuire, Esquire, and Casey Secor, Esquire. The Honorable S.R. Hubbard, III, Solicitor for the Eleventh Judicial Circuit, represented the State at trial, along with Deputy Solicitors Shawn Graham and Suzanne Mayes.

On April 29, 2019, Appellant was arraigned and entered a plea of not guilty by reason of insanity. (Tr. pp. 120-121). A jury trial followed with opening statements presented on May 14, 2019. On June 4, 2019, the jury convicted on all five counts murder. (R. pp. *). The sentencing phase began on June 6, 2019. (Tr. p. 5161). On June 13, 2019, the jury returned a verdict that the State had proven beyond a reasonable doubt a required statutory aggravating circumstance which authorized consideration of a death sentence, in particular: "Two or more persons were murdered by the Defendant by act or pursuant to one scheme or course of conduct in the murder of five children eleven years of age or younger," (Tr. pp. 5965, line 3-25; see also Tr. p. 5959, line 14- [/ 5960, line 8), and recommended death, (Tr. p. 5966, lines 1-2). That same day Judge Griffith imposed the death sentence as required by the jury's decision. (Tr. p. 5971, lines 8-22). Jones timely appealed.

This matter is now before the Court for review.

STATEMENT OF FACTS

On August 28, 2014, Timothy Ray Jones, Jr., ("Jones") murdered his five children at his residence in Lexington County. (Tr. pp. 120, line 15 to Tr. p. 121, line 8). The deceased victims were Merah Gracie, age 8, Elias Xavier (Eli), age 7, Nahtahn Hehseyd, age 6, Gabriel Asher (Gabe), age 2, and Abigail Elizabeth (Elaine), age 1. (Tr. p. 3295, lines 9-14). The facts occurring prior to and after the murder of these children, according to the evidence presented at trial, are as follows:

Monday, May 5, 2014 – Sunday, June 22, 2014

Ms. Amy Shearer, Nahtahn's K5 parent liaison, brought him into the health room and stated that Nahtahn told her that Jones had grabbed him by the throat the night before and threw him up against the wall. (Tr. p. 5319, lines 16-17; Tr. pp. 5322, line 24 to Tr. p. 5323, line 12). They found "several bruises on his shins and 2 small bruises on [his] right forearm, one small nickel sized bruise on his right jaw light brown and reddish in color." (Court's Exhibit 99, p. 87; Tr. p. 5323, lines 20-24). He also had a scab on his left knee. (State's Exhibit 177, Tr. p. 3240, lines 8-13). Ms. Shearer immediately contacted the Department of Social Services (DSS). (Tr. p. 4130, lines 22-25, Tr. p. 5776, lines 6-8).

DSS caseworker Sherry Henry interviewed Nahtahn and Merah at school while the school nurse and Ms. Shearer were present. (Tr. p. 5776, lines 19-24, Tr. p. 5777, lines 91-14). "Nahtahn told the caseworker that he had to do exercises for punishment, but that his father [would] also spank him with a belt." (Court's Exhibit 99, p. 87). Merah confirmed Nahtahn's account and told the caseworker that her brother Nahtahn was "spanked because he messed up her brother's [train] track." (Court's Exhibit 99, p. 87).

The caseworker interviewed Jones over the phone while he was at work and then later in person at the school. (Tr. p. 4109, lines 9-15). Jones explained away the marks on Nahtahn, saying he had "kind of jerked him up by the collar and spanked him" after [Nahtahn] broke a train set. (Tr. p. 4110, lines 5-14). Present was also a detective from the Lexington County Sheriff's Department. (Tr. p. 4109, lines 18-23, Tr. p. 4113, lines 10-17). He did not find sufficient evidence to remove the children nor arrest Jones. (Court's Exhibit 99, p. 87). The caseworker also did a home visit on May 5, 2014 and then another unannounced home visit on May 15, 2014. (Tr. p. 4111, line 19 to Tr. p. 4113, line 10; Tr. p. 4114, lines 13-22).

Monday, July 16, 2014

After DSS completed their investigation they noted:

> Mr. Jones is a single father of five. Caseworker observed the home to have an excessive amount of religious items. Father was interviewed but they didn't feel he intentionally tried to harm his son. Mr. Jones believes Nahtahn destroyed the track on purpose. Home was observed to be cluttered and unkempt but denied that it presented any safety concerns. All the children reported observing their father grab Nahtahn by his chin. Marks observed on the child's face. Photos taken and placed in file.

(Tr. pp. 4116, line 17 to Tr. p. 4117, line 11; Court's Exhibit 99, p. 90).

DSS concluded the case was founded as that there was "substantial risk of physical abuse," but closed the case with no services. (Tr. pp. 4117, line 4 to Tr. p. 4118, line 19; Tr. p. 5776, lines 9-12). DSS' final determination was that the house was clean and appropriate and all of the children's basic needs were being met. The school stated that the children were getting to school on time and attending regularly. (Court's Exhibit 99, p. 90).

Thursday, August 7, 2014

A few weeks later, another DSS complaint was made, this time by Mary Tanner, a friend of Ms. Joy Lorick, an individual who once watched the children. (Tr. pp. 4118, line 25 to Tr. p. 4119, line 2; Tr. pp. 4137, line 12 to Tr. p. 4238, line 8; Tr. p. 4313, lines 6-8; Tr. p. 5036, lines 8-11; Tr. p. 5780, lines 21-25). Mary Tanner reported that Lorick had told her how Jones beat Eli and regularly left extensive bruising, and that he did not feed the children adequately. (Tr. p. 4119, lines 3-7; Tr. p. 5780, lines 21-25). DSS contacted Ms. Lorick directly and she told them that Jones would bring home a twenty-piece chicken nugget dinner to feed all five children. (Tr. p. 4119, lines 3-7; Tr. p. 4928, lines 16-19). Ms. Lorick also informed DSS that Jones said that he did not want to send his children to public school because he did "not want the school to report the beatings". (Court's Exhibit 99, p. 98; Tr. p. 4320 line 8-12).

DSS once again came to Jones' house for an investigation. They asked to observe the children and they took pictures of all of the children except one. (Tr. p. 2691, lines 6-15). Nahtahn refused to allow them to photograph him. (Tr. pp. 2691, line 14 to Tr. p. 4320, line 4).

Wednesday, August 13, 2014

Once DSS completed their investigation, they determined:

> Dad appears to be overwhelmed as he is unable to maintain the home but children appear to be clean groomed and appropriately dressed . . . Continue to investigate and monitor.
>
> What [we] are . . . worried about: . . . CM reported that the father may be overwhelmed and it is unknown if he has family living in SC to assist him with the children.

(Court's Exhibit 99, p. 98; Tr. p. 5781, lines 3-6).

Monday, August 18, 2014

When school began, Merah started the third grade, Eli the second grade, and Nahtahn the first grade at Saxe Gotha Elementary School. (Tr. p. 2578, lines 2-19; Tr. 2593, lines 2-14). The two younger children Gabe and Elaine were cared for by a neighbor, Ms. Christina Ehlke. (Tr. p. 2659, lines 19-23). A school director reported that Jones understood all the conversations they had and was able to converse with her in a clear and rational manner when he came to pick up his children. (Tr. pp. 2580, line 19 to Tr. p. 2581, line 5).

Thursday, August 21, 2014

Jones was accepted to medical school on August 21, 2014. (Court's Exhibit 118, p. 119; Tr. pp. 3608, line 22 to Tr. p. 3609, line 2). His ex-wife, Amber Kyzer, said, "I believe he was going for pediatric doctor, something along those lines." (Tr. p. 3299, lines 8-12). Jones had previously attended Mississippi State for college and graduated with a 3.81 GPA, was a Presidential Scholar, and was a member of the Honor Society Phi Kappa Phi all while working part time to support his wife and children. (Tr. p. 4640, lines 15-19). "He had lots of interests, languages. I mean, he's very bright and bright people tend to have a variety of interest[s]." (Tr. p. 4642, lines 3-5).

Thursday, August 28, 2014

On the afternoon of August 28, 2014, Jones picked up his three oldest children from the Boys and Girls Club at Saxe Gotha Elementary, and the two younger children from Ms. Ehlke. (Tr. p. 2584, lines 8-9; Tr. p. 3109, lines 2-5; Tr. p. 4668, lines 8-12). He purchased food for himself and the children. (Tr. p. 4668 lines 18-20). After dinner, Jones decided to do some work

on his computer. (Tr. p. 4668, lines 18-22). Once he attempted to turn it on, he discovered that several outlets were not working. (Tr. p. 4668, lines 20-25). He immediately blamed the children, and he asked them if any of them were messing with the outlets. (Tr. p. 4669, lines 1-16). When he questioned his three older children, Merah and Eli immediately denied any involvement, but Nahtahn hesitated so Jones accused him. (Tr. p. 4669, lines 6-8). Since Nahtahn would not confess, Jones decided to make him go through a series of military exercise drills that he referred to as "PTing." (Tr. p. 4669, lines 18-20). He intended to put him through these drills until he confessed. (Tr. p. 4669, lines 19-21).

During these drills, the children's mother, Mrs. Amber Kyzer, called as she normally did around 7:00 p.m. to speak to the children. (Tr. p. 3311, lines 14-25). She spoke to Nahtahn and asked him "what was wrong," and he answered, "It was an accident mommy." (Tr. p. 3312, lines 1-12; Tr. p. 4672, lines 1-2). Jones got enraged because he told his mother in those few minutes what he was taking hours to get out. (Tr. pp. 3312, line 22 to Tr. p. 3312, line 5; Tr. p. 4672, lines 2-4). Amber told Jones to go easy on him, Jones told her to "shut the fuck up." (Tr. p. 3313, lines 3-5). Jones was not going to allow his ex-wife to tell him how to raise his kids. (Tr. p. 4672, lines 15-16). He hung up on her and did not answer her six or seven attempts to call him back. (Tr. pp. 3313, line 20 to Tr. p. 3314, line 8). He realized he was not getting anything out of Nahtahn so he sent him to bed. (Tr. p. 4673, lines 19-22).

Minutes later Jones went in to check on Nahtahn, and Jones shook him until he lost his balance and collapsed. (Tr. p. 4673, line 24 to Tr. p. 4674, line 2). Nahtahn then fell to the floor and died. (Tr. p. 4674, line 3). Jones went into a panic, (Tr. p. 4674, line 10) and he started to call 911 but then thought that they would believe that he killed him. (Tr. p. 4674, line 10-18). He woke up Merah and Eli and told them that Nahtahn was not breathing, and then sent them to

watch TV. (Tr. p. 4674, lines 22-24). He then watched a rape scene from the movie "American History X" on YouTube. (Tr. p. 4676, lines 1-3). Then at 1:50 a.m., Jones took Merah to a convenience store where he purchased ten packs of cigarettes. (Tr. p. 4555, lines 7-13). While returning home, Jones stated he started hearing voices telling him to kill the other four children. (Tr. p. 4555, lines 16-19; Tr. p. 4796, lines 6-10). Once he got home, he thought that since he was going to prison for Nahtahn's death and their mother did not want them, they would end up in foster care. (Tr. p. 4679, lines 15-18). He thought it would be better if they were just all together. (Tr. p. 4556, lines 10-15). So he made a conscious decision to kill the remaining four children. (Tr. p. 4556, lines 13-15). "[T]hen he smoked one to two bowls of spice . . . ." (Tr. p. 4797, line 4).

He killed seven-year-old Eli first. (Tr. p. 4794, lines 6-7). As he placed his hands around Eli's neck to strangle him, Eli asked him, "Dad, take me with you." (Tr. p. 3113, lines 1-6; Tr. p. 4797, lines 12-13). He then went to eight-year-old Merah, and before he strangled her to death, he told her he "would see her again in heaven." (Tr. p. 3113, lines 8-15; Tr. p. 4797, lines 21-22). He approached the two youngest children next, two-year-old Gabe and one-year-old Elaine. (Tr. pp. 3113, line 22 to Tr. p. 3114, line 11). Since his hands were too large to strangle them he decided to use a belt. (Tr. pp. 3113, line 24 to Tr. p. 3114, line 11). He wrapped the belt around both of their necks and tightened it until they both died of strangulation. (Tr. pp. 3113, line 22 to p. 3114, line 11).

After committing these murders, Jones panicked. (Tr. pp. 4797, line 15 to Tr. p. 4798, line 3). He first attempted to commit suicide by overdosing on "spice." (Tr. p. 4680, lines 9-11). That attempt failed, as he woke up the next day, so he at that point began formulating a plan to dispose of the bodies. (Tr. p. 3116, lines 12-14).

Friday, August 29, 2014

When Jones woke the next morning, his paranoia kicked in, and he panicked and wondered, "What do I do now?" (Tr. p. 4798, lines 1-17). He knew it was just a matter of time before he was arrested. (Tr. p. 4556, lines 1-6). So he decided that he might as well take a trip to Las Vegas. (Tr. p. 4556, lines 3-6). Jones wrapped the five bodies into blankets and stacked them up in his vehicle. (Tr. p. 3117, lines 8-20). He placed them behind the drivers and passenger seats. (Tr. p. 3117, lines 17-20). He then drove aimlessly to Birmingham, Alabama and then back to Lexington. (Tr. p. 4681, lines 18-23). He never made it to Las Vegas because "he knew he would be found by the police." (Tr. p. 4798, lines 1-7).

Jones received a text from Ms. Ehlke on August 29, 2014 asking if the two youngest children were coming to her house that day. (Tr. p. 2671, line 1). He texted back, "Don't worry about this morning. I'll see you later this week." (Tr. p. 2671, lines 1-12). Ms. Ehlke asked Jones, "So are they coming Monday, or when?" (Tr. p. 2671, line 16). Jones later told her that he would see her on "Tuesday." (Tr. p. 2671, lines 20-23).

Monday, September 1, 2014

Three days later, on Labor Day, Jones did an internet search for "dog search for body in landfill." (Tr. p. 3566, lines 5-9). He wanted to know if a cadaver dog would be able to find a body if it was placed in the stench of a landfill. (Tr. p. 4691, line 25 to Tr. p. 4692, line 3). He also searched for "cleaning pool with muriatic acid," (Tr. p. 3566, lines 6-9), and did extensive research on campgrounds around the Southeast. (Tr. p. 3566, lines 10-19). He pulled up a page on findlaw.com entitled, "Five countries with no U.S. extradition treaty." (Tr. p. 3566, lines 21-24).

Jones called Ms. Ehlke and told her he had taken the kids and left the state because they needed a fresh start and they would not be coming back." (Tr. p. 5002, lines 1-8). He told her that she could take what she wanted out the house to use as pay for the money he owed her. (Tr. p. 2672, line 13 to Tr. p. 2673, line 2).

Tuesday, September 2, 2014

School resumed after the Labor Day holiday. (Tr. p. 2595, lines 6-9). Ms. Janet Ricard, Assistant Principal of Saxe Gotha Elementary School, noticed Merah, Eli, and Nahtahn were not present at school. (Tr. p. 2595, lines 6- 15). She called Jones and got no answer, but she did not leave a message because he usually called back. (Tr. p. 2595, lines 15-25). After receiving no return call she called him again and left a message late on September 2, 2014. (Tr. p. 2595, line 17 to Tr. p. 2596, line 3).

Ms. Ehlke called Jones to ask him if he could give the landlord permission for her to go into the house to clean up and take what was left. Jones answered, "Sure go ahead and clean up." (Tr. p. 2677, lines 2-6).

Jones failed to show up for work, and as it was typical for employees at his company to email their superiors informing them that they are not coming in, his employer, Mr. Jim McConnell, sent him a text asking him if he forgot to send an email. (Tr. p. 2641, lines 14-25). He did not get a response so he sent another text later that day, still did not get a response. (Tr. p. 2642, lines 7-12).

Wednesday, September 3, 2014

After the three oldest children failed to show up to school for the third day in a row, the school administrators decided to call persons listed as emergency contacts. (Tr. p. 2598, lines 12-15). They called a co-worker of Jones, Kevin McKinney, and the children's great-grandmother,

Roberta Thornsberry. (Tr. p. 2599, lines 6-13). Ms. Thornsberry informed them that she had had no contact with Jones and she was alarmed because they were supposed to visit her for the weekend, and they never showed up. (Tr. pp. 2599, line 21 to Tr. p. 2600, line 2). Mr. McKinney informed them he had not heard from Jones and went riding around looking for them. (Tr. p. 2599, line 21 to Tr. p. 2600, line 2).

When Jones again failed to show up for work, his employer, Jim McConnell, testified that he texted him at 8:11 a.m. the morning of September 3rd. (Tr. p. 2644, lines 12-16). In this text he said, "Trying to get in touch with you. Please give me a call when you get this." (Tr. p. 2644, lines 18-22). When he failed to get a response, he sent another text at 12:11 p.m., simply asking, "Hey are you there?" (Tr. pp. 2644, line 24 to Tr. p. 2645, line 1). He sent one final one at 7:02 p.m.: "Please give me a call." (Tr. p. 2645, lines 2-4).

Jones was spotted on video surveillance later that day going into Walmart. (Tr. p. 3067, lines 1-24). The receipt later revealed Jones purchased a dust mask, 3M goggles, a jab saw, muriatic acid and a five gallon Walmart pail. (Tr. p. 2853, lines 3-15; Tr. p. 3071, lines 17-21).

Thursday, September 4, 2014

Appellant again failed to show up for work for the fourth day in a row. (Tr.p. 2645, lines 1-16). He never contacted his supervisors to give them an explanation as to why he has failed to show up to work. (Tr. p. 2645, lines 8-9). These unexplained absences revealed that he was never returning so, they began the process of termination. (Tr. p. 2645, lines 12-14).

The children also failed to show up to school for a fourth day in a row. (Tr. p. 2600, lines 3-9). School officials were now very alarmed. (Tr. p. 2600, lines 3-9). Ms. Ricard decided to

call the Lexington County Sheriff's Department in order to request a welfare check of their residence. (Tr. p. 2600, lines 6-9). She and Principal Ms. Beth Houck met at Jones' residence with Lexington County deputy and a Constable. (Tr. p. 2600, lines 17-22). They approached the front door knocked but there was no answer. (Tr. pp. 2601, line 5 to Tr. p. 2602, line 18).

Ms. Ricard testified that after the welfare check she became extremely concerned. (Tr. p. 2602, line 20). She felt her heart drop because at that point they had had no contact with Jones or the children since the previous Thursday. (Tr. p. 2602, lines 20-23). In her mind she felt "they all had disappeared, they all just vanished." (Tr. p. 2602, line 20-23).

Lexington County Sheriff Department later called Jones' father Timothy Jones, Sr., and the children's mother, Ms. Amber Kyser. (Tr. p. 2710, lines 8-18). They both informed law enforcement that they have not heard from Appellant and did not know the children's whereabouts. (Tr. p. 2710, lines 16-18). Based on that information the sheriff's department placed Jones' vehicle and the children in the National Crime Information Center (NCIC). (Tr. p. 2710, lines 9-25).

Jones went to the Dollar General in Orangeburg and purchased trash bags. (Tr. p. 2792, lines 5-9; Tr. 3638, lines 15-18). These were the bags the children were eventually placed in. (Tr. p. 2792, lines 5-9).

Jones was spotted in an Exxon in Camden where he bought cheese sticks, curly fries, and thirty dollars' worth of gas. (Tr. p. 3082, lines 6-7). All the while, his deceased children were lying in the back seat of his car in the trash bags. Jones then proceeded to drive to Spartanburg, Atlanta, Folly Beach, and Lake City. (Tr. p. 4682, lines 1-6).

Friday, September 5, 2014

The school district office personnel were contacted by Saxe Gotha administration inquiring as to what should they do since they felt the children were missing. (Tr. p. 2603, lines 2-7). The children's great-grandmother, Ms. Thornsberry, asked the principal if she could make a missing person's report. (Tr. p. 2710, lines 6-18). The district office informed them that it must be made by a family member. (Tr. p. 2603, lines 2-6). They directed her to the Lexington County Sheriff's Department. (Tr. p. 2603, lines 6-7).

Saturday, September 6, 2014

Jones entered a Bypass Liberty, a gas station and convenience store, in Greenville, Alabama. (Tr. pp. 2723, line 12 to Tr. p. 2725, line 20). The casher, Ms. Linda Watkins, testified that Jones got to the pumps and sat in his car for five or six minutes. (Tr. p. 2727, lines 2-3). He then got out of his car and walked into the store. (Tr. p. 2727, lines 3-10). An awful smell followed him around the store. (Tr. p. 2727, lines 4-7). He walked to the counter and bought six packs of Newport Red 100's, one bottle of water, one gallon of water and a Starbucks double shot energy drink. (Tr. p. 2728, lines 14-18). Before he left he asked her if there was a place where he could camp and she told him about the Sherling Lake Campgrounds. (Tr. p. 2725, lines 2-23). He then got into his car and drove to the direction of the campgrounds. (Tr. p. 2734, lines 21-25). Later that day he went to an ATM in Camden, Alabama. (Tr. p. 3639, lines 2-5).

Around 7 p.m. that night, Deputy Charles Johnson and Deputy Wayne Thompson received permission from Undersheriff Marty Patterson of the Smith County Sheriff's Department in Mississippi to conduct a license checkpoint. (Tr. pp. 2740, line 24 to Tr. p. 2741, line 1). This checkpoint was on Highway 18 East in Smith County, Mississippi. (Tr. p. 2741, line

4). During this checkpoint, both deputies stopped every car coming through. (Tr. p. 2742, lines 12-17). During these checkpoints, the officers checked driver's licenses, made sure there was proper child restraint and made sure the drivers had insurance. (Tr. p. 2742, lines 23-24).

Jones got to the checkpoint and Deputy Johnson approached his vehicle. Deputy Johnson testified that once Jones rolled down his window he smelled burned marijuana and another awful smell. (Tr. p. 2743, lines 8-21). He inquired about the smell, and Jones informed him that it was trash. (Tr. p. 2743, lines 8-21). Deputy Johnson asked Jones for his driver's license and because of the smell of marijuana requested him to pull over to the side of the road. (Tr. p. 2744, lines 21-25). Deputy Johnson then asked him to step out of the vehicle. (Tr. p. 2745, lines 1-2). Jones had red glassy eyes and slurred speech, so Deputy Johnson suspected that he was under the influence. (Tr. p. 2745, lines 6-10). While Jones was standing behind the police vehicle, he gave Deputy Johnson permission to search his vehicle. (Tr. p. 2745, lines 18-21). During this search Deputy Johnson found contraband on the floor, and a Starbucks can bent as a pipe to smoke marijuana. (Tr. p. 2746, lines 3-8; Tr. p. 2753, lines 19-21). Jones was charged for driving under the influence and possession of drug paraphernalia. (Tr. p. 2748, lines 4-10).

Deputy Johnson ran Jones' driver's license that listed the name Timothy Jones, Jr. His license number was flagged by NCIC. (Tr. p. 2751, lines 9-14). The hit told the deputy Jones was suspected to be traveling with five children, but he was alone instead. (Tr. p. 2751, lines 9-14). The deputy searched the rear of the vehicle and found chemicals and thought Jones was going to set up a meth lab so the deputy called Undersheriff Patterson and requested his presence at the checkpoint. (Tr. p. 2752, lines 1-14).

Once Undersheriff Patterson arrived at the scene, he testified that he smelled a foul odor coming from somewhere. (Tr. p. 2783, lines 10-13). He asked one of the deputies where that smell was coming from and was informed that it was coming from Jones' vehicle. (Tr. p. 2783, lines 10-13). As the undersheriff approached the vehicle where the lowered driver's side window was, he believed the smell to be that of decomposition. (Tr. p. 2783, lines 15-19). He then took his flashlight and looked around Jones; vehicle. (Tr. p. 2784, lines 10-14). He observed bleach trash bags, muriatic acid, charcoal lighter fluid, and a five-gallon bucket with a roll of tape inside. (Tr. p. 2784, lines 10-17). He looked behind the driver's and passenger seats and saw large areas of carpet that looked to have been cleaned with bleach. (Tr. p. 2784, lines 18-22). He testified that this was a red flag because he thought, "why would anyone pour bleach in a Cadillac Escalade ruining the carpet?" (Tr. p. 2784, lines 18-24). He called the Lexington County Sheriff's Department while still on the scene and spoke to Deputy Jessie Laintz. (Tr. p. 2785, lines 15-23).

Deputy Laintz informed him that they were worried about the welfare of the children, and Undersheriff Patterson informed him that they did not see any children with Jones. (Tr. p. 2786, lines 14-17). He asked Deputy Jamie McClellan to go to Jones and inquire about the children. (Tr. p. 2786, lines 19-20). At first, Jones told him that he had no children. (Tr. p. 2786, lines 14-25). The undersheriff then directed Deputy McClellan to ask him again. (Tr. p. 2763, lines 1-18). The second time, Jones told him that he had three children who were in South Carolina with their mother. (Tr. p. 2787, lines 5-9). This was determined to be untrue as their mother was actively looking for them. (Tr. p. 2787, lines 7-9). Jones was transported to Magee General Hospital for a

blood draw and then to the Sheriff's Department for booking. (Tr. p. 2769, lines 4-21; Tr. p. 2788, lines 3-13).

Once Undersheriff Patterson knew that there were children missing, he ordered the deputies to stop searching the vehicle. (Tr. p. 2788, lines 19-20). He testified that he wanted Jones' vehicle off the side of the road and ordered that the car be towed to the Smith County Multipurpose building. (Tr. p. 2788, lines 19-24). He ordered a deputy to stay with the vehicle and not let anyone touch or get around it or anything else. (Tr. p. 2788, lines 19-22; Tr. p. 2789, lines 2-8).

During processing for the DUI arrest, Undersheriff Patterson told Jones that he wanted to talk to him about the children. Jones told him that "All you need to know is in the SUV." (Tr. p. 2789, lines 13-16).

Sunday, September 7, 2014

Agent Stacy Jones crime scene investigator for the Mississippi Bureau of Investigation (MBI) arrived to process Jones' vehicle. (Tr. p. 2836, lines 9-24). She pulled numerous items from the vehicle including the Jones' passport, college diploma, and all of the kids' social security cards and birth certificates. (Tr. p. 2881, lines 5-6; Tr. p. 2851, lines 10-16; Tr. pp. 2851, line 18 to Tr. p. 2852, line 23). She also found numerous receipts that were used to create a timeline of Jones' travels since the incident. (Tr. p. 2952, lines 11-24). They also found and collected blood samples from on the center console, and human tissue and hair was found in the tailgate. (Tr. p. 2866, lines 9-12). Agent Jones found a sheet of paper that was on a clipboard in the front seat. (Tr. p. 2847, lines 13-16). The sheet of paper said, "head to campground," "melt bodies," "saw the bones to dust or small pieces." (Tr. p. 2848, lines 5-7). Then the paper had boxes that says, "Day 1 burn up bodies," "Day 2 sand down bones," and "Day 3 MB with a

smiley face" with "dissolve and discard." (Tr. pp. 2848, line 24 to p. 2849, line 21). Agent Jones took photographs of the vehicle revealing the condition of the car at the time it was stopped, including the floor of the vehicle that had been bleached. (Tr. p. 2866, lines 1-3).

From the car search and the smell of decomposition, the officers knew something had happened to at least one of the children. However, they were not certain at that point that they had all been harmed. (Tr. p. 2993, lines 23-24). Jones' father later arrived in Smith County at police headquarters to assist law enforcement in the search for the children. (Tr. p. 2988, lines 19-25). They asked for his assistance because there was a possibility that at least one of the children was still alive. They thought that his father might get Jones to give them their location. (Tr. pp. 2988, line 25 to Tr. p. 2989, line 3).

Sheriff Crumpton testified that Jones seemed to be "strung out, high." Jones would go from screaming to crying and then back to yelling. In addition, his sweating was "unbelievable." (Tr. p. 2990, lines 9-19). However, he was responsive and he did answer questions. (Tr. pp. 2991, line 23 to p. 2992, line 4).

After the officers read Jones his *Miranda* rights, they interviewed him. (Tr. p. 2989, lines 16-24). Present were Smith County Sheriff Charlie Crumpton, Lt. Eric Johnson of the MBI, Undersheriff Patterson, and Jones' father. From that interview and the anger he showed toward Nahtahn, Sheriff Crumpton testified that he thought it was Nahtahn who was dead but not the rest of the children. (Tr. p. 2994, lines 7-12). Jones' father asked him where the children were and Jones first stated he had loaded them in the car and put them out on the road between his house and Walmart. (Tr. p. 2941, lines 18-20). They knew that was untrue so his father asked him again about the children. He gently placed his hands around his father's neck and then said nothing else. (Tr. p. 2799, lines 9-15).

Back in South Carolina, Special Agent David Mackey of the Federal Bureau of Investigation (FBI) met with Detective Adam Creech and other members of the Lexington County Sheriff's Department. (Tr. p. 2997, lines 2-6; Tr. p. 3096, lines 8-15). They knew that Jones was in custody in Mississippi, and they planned to go to Mississippi to interview him. (Tr. p. 3097, lines 6-18). Lexington County Deputy Adam Creech, South Carolina Law Enforcement Division (SLED) investigator Dave Lawrence and Federal Bureau of Investigation (FBI) special agent David Mackey decided to drive to Mississippi the next day. (Tr. pp. 3097, line 13 to Tr. p. 3098, line 1). Since SLED agent Lawrence was a polygrapher, he was not going to be part of the interview itself. (Tr. p. 3098, lines 6-7).

Monday, September, 8, 2014

Jones was interviewed by Deputy Creech, and Special Agent Mackey. (Tr. p. 3641, lines 14-21). Their plan was to convincingly accuse Jones in an attempt to locate the children. (Tr. p. 3099, lines 10-12). During questioning, Jones demonstrated none of earlier behaviors that presented themselves during the prior interrogation. (Tr. pp. 3103, line 22 to Tr. p. 3104, line 2). Upon being advised of his *Miranda* rights, Jones stated that he thought he maybe suffered from the same mental illness as his mother. (Tr. p. 3103, lines 10-12). Special Agent Mackey testified at the beginning of the interview, Jones began to talk about Nahtahn and Eli. (Tr. p. 3104, lines 7-8). Jones also made statements that Nahtahn said that he wanted to kill him. (Tr. p. 3104, lines 9-10). Jones also said that his children were colluding against him and they had it out for him. (Tr. p. 3104, lines 11-12). He was acting like he was afraid of his children. (Tr. p. 3104, lines 12-13).

They showed Jones the Walmart receipt and asked him what he used or was going to use the supplies for. (Tr. p. 2942, lines 11-15). He told them they were for tree limbs. (Tr. p. 3104,

lines 20-22). Jones then said that he was going to use the muriatic acid, goggles and the five-gallon bucket to etch PVC. (Tr. p. 3104, lines 22-24). Special Agent Mackey told him that he did not believe him. He showed him the note found in his car and asked Jones to read what he wrote about sanding down the bones and discarding the bodies. Jones denied knowing what any of that was about. (Tr. pp. 3104, line 24 to Tr. p. 3105, line 5).

The Special Agent then asked Jones about the blood evidence found in the car. Jones then told them that it was from an animal. Detective Creech tells him that it tested positive as human blood. (Tr. p. 3106, lines 16-19). Jones then tells them that he cut himself. They tell him that it was a large amount of blood and that his explanation did not make sense. (Tr. p. 3106, lines 19-22). Special Agent Mackey testified that he then laid down the photographs of the children. Jones cried heavily and asked them to take the photos away. (Tr. p. 3107, lines 3-6). Jones told them that he dropped the kids off a Walmart. (Tr. p. 3107, lines 7-8). Agent Mackey then shows Jones the Walmart receipt again, and that the items purchased matched what was written in the note that was found in the vehicle. (Tr. p. 3108, lines 6-10). At that time Jones said, "Let's cut to the chase." He then walked the detectives through what he did to the children. (Tr. p. 3108, lines 19-21).

Jones discussed the "P-Ting" that he put Nahtahn though and he thought that was what killed him. (Tr. p. 3111, lines 3-13). After he found Nahtahn, he said that the voices in his head told him no one would believe him. These voices told him he was just going to have to kill the rest of the children. (Tr. p. 3111, lines 18-22).

Jones admitted that he used his hands to strangle Eli and Merah. (Tr. p. 3112, lines 18-19; Tr. p. 3113, lines 8-9). Jones informed them that his hands were too big to strangle Gabe and Elaine, (Tr. p. 3113, lines 21-25) so he wrapped a belt around both of their necks to strangle

them. (Tr. p. 3114, lines 1-11). He also told them that if Nahtahn had come off, none of his children would be dead. (Tr. p. 3115, lines 1-6).

Jones told them he wrapped the bodies in bedsheets and stacked them into his car behind the drivers and passengers seats on the floorboard. (Tr. p. 3115, lines 11-15). He went to Walmart and bought the jab saw, acid and the bucket to get rid of the bodies. (Tr. p. 3117, lines 10-14). Jones told them that the note was some ideas he had come up with when he was devising a plan to discard the children's bodies. But he ultimately could not bring himself to go through with it so he bought the trash bags to put them in. (Tr. p. 3116, lines 23-25). He returned their bodies to where he had initially stacked them up behind the driver's and passenger seat on the floorboard. (Tr. p. 3117, lines 10-20). Jones also talked about the smell, that there was obviously a strong odor, but he bought air-fresheners and adapted to the smell. (Tr. p. 3117, lines 23-25). He expressed to them that part of him felt bad, but another part of him had said, "fuck it" they are already dead. (Tr. p. 3118, lines 10-13). They asked him if he would assist them in locating the children and Jones volunteered to show them where they were because he thought they deserved a good burial. (Tr. p. 3127, lines 9-11).

Tuesday, September 9, 2014

Sheriff Crumpton, other Smith County deputies, Agent Johnson from MBI, Lexington County Deputy Creech, SLED Agent Lawrence and FBI Special Agent Mackey took Jones to search for the children's bodies. (Tr. p. 2999, lines 17-25). They drove some two-hundred miles to rural Alabama. (Tr. p. 2801, line 1). They ended up in a much-wooded area near the small town of Pine Apple, Alabama. (Tr. p. 2830, lines 10-12).

Once they arrived, Jones took them almost directly to where he left the bodies. Sheriff Crumpton testified that once they got to the area he could smell the decomposing bodies. (Tr. p. 3007, lines 11-13). Jones starting crying and told the officers where they were. The walked some sixty to seventy yards and found each of the bodies over a knoll. (Tr. p. 2970, lines 14-20). Sheriff Crumpton decided that Jones was no longer needed at the scene so he ordered his deputies to take him back to Mississippi. (Tr. p. 2970, lines 14-20).

Once the bodies were found, the Alabama Bureau of Investigation was called to close down the area. (Tr. pp. 2950 line 22 to Tr. p. 2951, line 3). SLED agents arrived later to process the scene. SLED crime scene investigator Brittany Pickle testified that she met up with Sargent Novak of the Lexington County Sheriff's Department and they decided to ride together to Alabama so she could process the scene and move the bodies. (Tr. p. 3147 lines 16-20). Once at the scene, she marked each bag with a number for identification purposes and opened each bag to determine there were human remains in each one. They then moved each bag into a bag with a zipper that could be tied with a seal that would not be moved until the autopsy. (Tr. p. 3158, lines 13-23). The bags containing the bodies were then transported to the local coroner's office in Alabama and placed in the morgue until the Lexington County Coroner could get there and transport the bodies back to South Carolina for autopsy. (Tr. p. 3159, lines 21-25; Tr. p. 3160, lines 3-7).

Thursday, September 11, 2014

All five autopsies were performed by Dr. Janice Ross of the Newberry Pathology Associates. (Tr. p. 3219, lines 2-4; Tr. p. 3220, lines 16-18). Dr. Ross testified that Eli's trash bag was torn, which was consistent with animal foraging. (Tr. p. 3221, lines 14-15). He was clothed in a short-sleeved shirt, which had a Saxe Gotha Elementary logo, a pair of size medium

shorts and a pair of white underwear. His body had decomposed considerably and skin discoloration and some tissue loss due to animal foraging was found. (Tr. pp. 3221, line 20 to. Tr. p. 3222, line 1). She found a fracture of the hyoid bone, which indicated he was strangled. (Tr. p. 3224, lines 14-19). Dr. Ross determined Eli's cause of death was asphyxia due to strangulation. (Tr. p. 3225, line 16). The manner of death was determined to be a homicide. (Tr. p. 3226, line 1).

Merah was found inside a blue sleeping bag, wearing no clothing . (Tr. pp. 3168, line 22 to p. 3169, line 1). The bag she was in was torn irregularly due animal scavenging. (Tr. p. 3226, line 14). Her left hand was absent and she had tissue loss on her left forearm. (Tr. p. 3228, lines 1-3). To a reasonable degree of medical certainty, Dr. Ross determined Merah's cause of death to be homicide by way of some type of violence. (Tr. p. 3231, lines 2-3).

Gabriel was discovered wearing one pair of underwear and wrapped in a comforter and a pink sheet. (Tr. p. 3231, lines 16-17). There was decomposition changes and skin discoloration. (Tr. p. 3232, lines 9-10). On the right side of the neck, there was an impression that included two parallel lines. (Tr. p. 3232, lines 12-14). It was an impression that could be a type of ligature from something that was a little bit wide, like a belt. (Tr. p. 3233, lines 7-9). The parallel lines ran for some distance and they came together underneath the chin, and they disappeared. (Tr. p. 3233, lines 17-19). There WAs a shape of a "V" that would be consistent with a cinching. (Tr. p. 3234, lines 6-10). With a reasonable degree of medical certainty, the cause of death of Gabriel was probable strangulation, (Tr. p. 3235, lines 6-8), and the manner of death a homicide. (Tr. p. 3235, lines 13-14).

As for Elaine, she was found wrapped in two blue multicolored Disney Pixar Cars 2 sheets. (Tr. p. 3169, lines 15-19). There was some decomposition changes including skin

discoloration. (Tr. p. 3236, line 16). To a reasonable degree of medical certainty, Dr. Ross determined the cause of death as homicide by violence. (Tr. p. 3237, line 8).

Nahtahn was wearing no clothing, and was wrapped in a Ninja Turtles comforter. (Tr. pp. 3169, line 22 to p. 3170, line 1). He had tissue loss and an incised wound on his left lower thigh area right above the knee: an incised wound is a wound made by a sharp instrument consistent with a saw. (Tr. p. 3238, lines 16-20). With a reasonable degree of medical certainty, Dr. Ross determined the cause of death of Nahtahn to be homicide by violence. (Tr. p. 3244, lines 5-11).

ARGUMENT

I.

The trial judge did not abuse his discretion in overruling the defense objection to qualifying and seating Juror No. 156, Zachary Gantt. The juror, after careful questioning by the judge, solicitor and defense counsel, repeatedly confirmed he would fairly considered the case as a whole and abide by the instructions of law as given by the trial judge.

Jones argues that, during individual *voir dire*, Juror Gantt (1) "indicated he could not give meaningful consideration to mitigating circumstances," (2) demonstrated a "predisposition against" returning a sentence of life imprisonment "for any reason or no reason at all, including as an act of mercy," and (3) indicated "needing a reason to vote for a life sentence," which Jones asserts "improperly placed the burden on the defense." (FBOA at 5). Jones submits the juror's responses indicated that the juror would not follow the law as instructed; therefore, the trial judge's ruling finding the juror qualified is erroneous and "wholly unsupported by the record." (FBOA at 5). The record rebuts that assertion. The trial judge correctly reviewed the responses as a whole and found the juror was open to hear "all the facts" before making his decision. (Tr. p. 1595). Consequently, there was no error in either qualifying the juror or in later seating the juror over the defense's objection. The record fully and fairly – in fact quite plainly – supports the trial judge's decision. Jones's argument of error relies upon parsed, isolated and random portions of the record, contrary to the way this Court's has expressly stated it will review the matter, *i.e.,* that *voir dire* will be reviewed as a whole. Jones cannot show an abuse of discretion, and is not entitled to any relief.

Standard of Review:

"The determination whether a juror is qualified to serve in a capital case is within the sole discretion of the trial judge and is not reversible on appeal unless wholly unsupported by the

evidence." *State v. Blackwell*, 420 S.C. 127, 145, 801 S.E.2d 713, 722 (2017) (quoting *State v. Woods,* 382 S.C. 153, 159, 676 S.E.2d 128, 131 (2009)). This Court has established that, as part of the review, "[d]eference must be paid to the trial court who sees and hears the juror." *State v. Evins*, 373 S.C. 404, 418, 645 S.E.2d 904, 911 (2007) (citing *State v. Green*, 301 S.C. 347, 392 S.E.2d 157(1990)). *See also State v. Cottrell*, 421 S.C. 622, 637, 809 S.E.2d 423, 431 (2017) (recognizing the discretion and observing it is "the trial judge who has the opportunity to see and hear the jurors") (citing *State v. Dickerson*, 395 S.C. 101, 115, 716 S.E.2d 895, 903 (2011)). This Court has also established that in order to effect a fair review, it will evaluate the juror's answers "in light of the entire *voir dire*." *Id.*

Discussion:

"In reviewing an error as to the qualification of a juror, this Court engages in a three-step analysis." *Blackwell,* 420 S.C. at 144, 801 S.E.2d at 722 (citing *State v. Green*, 301 S.C. at 352, 392 S.E.2d at 159). These steps form a graduated process of review as follows: (1) determining whether the appellant used his allowed peremptory challenges prior to the presenting of the juror for selection; and, if so, (2) determining whether the judge actually erred in qualifying the juror; and, if so, (3) determining whether appellant has shown the seating of the juror "deprived him of a fair trial." *Id.* Here, the clerk called Juror Gantt after the defense exhausted the allowed peremptory challenges. (Tr. p. 2389). Further, the defense renewed the challenge for cause when the juror was called. (Tr. p. 2389). The issue is procedurally available, but it is substantively without merit. The question to resolve is whether the trial judge abused his discretion in qualifying Juror Gantt for service. *Blackwell, supra.* The record proves that he did not.

"[A] prospective juror may be excluded for cause when his views on capital punishment are such as would prevent or substantially impair the performance of his duties as a juror in

accordance with his instructions and his oath." *State v. Sapp*, 366 S.C. 283, 290-291, 621 S.E.2d 883, 886 (2005) (citing *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S.Ct 844 (1985)). "The ultimate consideration is that the juror be unbiased, impartial, and able to carry out the law as explained to him." *Sapp*, 366 S.C. at 291, 621 S.E.2d at 887.

Defense counsel argued the trial judge should not find the juror qualified as the defense considered him "substantially impaired in his ability to follow the law." (Tr. p. 1593, lines 1-2). The defense argued the juror: (1) was "mitigation impaired," (2) would not consider evidence other than those "around the facts of the case, around the killings," and, (3) "could not respect the right of other jurors to give a life penalty for any reason or no reason or to … consider mercy," rather would insist on having facts. (Tr. p. 1592, line 25- p. 1593, line 18).

The State, noting a similar juror with similar response was qualified without objection, (Tr. p. 1593, lines 20-23),[1] agreed that the juror in responding "was kind of all over the board" and "wanted to hear was facts," but also noted the juror "didn't shut the door on mitigation." (Tr. pp. 1593-94). The State argued that a juror is not mitigation impaired simply for looking

---

[1] The transcript shows juror Dinah Washington, Juror No. 457, was in the first group questioned on May 6, 2019. (Tr. p. 1060, lines 15-24). Ms. Washington, who formerly worked in medical at the South Carolina Department of Corrections and was also at the time of trial a chaplain, (Tr. p. 1071, lines 5-13; p. 1079, lines 18-21; p. 1088, lines 10-17), gave these responses regarding mitigation:

> [Defense counsel] Do you think that the background and character of a person is relevant in deciding what the appropriate punishment should be?
>
> A. No, sir.
>
> Q. You think it should be just what happened?
>
> A. Yes, sir

(Tr. p. 1081, lines 9-14). Defense counsel did not lodge any objection to qualification, and the juror was found qualified. (Tr. p. 1094, lines 11-20).

for some "bearing on the crime," using a clear example that random facts – *i.e.,* "do you know that back in the day he used to love ponies," – would be treated differently than, for instance, "prior relationships" and family dynamics that perhaps do have some bearing. (Tr. p. 1594). Bottom line, the solicitor argued, was that the juror confirmed that "he is going to be listening to those facts." (Tr. p. 1594). The defense argued there was "no nexus required for mitigation." (Tr. p. 1594). However, the judge correctly looked at the totality of the exchanges, and in particular, the consistency in the juror's responses:

> He stated repeatedly he wanted to hear all the facts, all the facts before he makes a huge decision of taking someone's life. I find him qualified based on the totality of all of his testimony. I think that is, considering what he presented, questions both sides asked him.

(Tr. p. 1595, lines 8-13).

The record shows the juror's responses fully support the judge's decision. The whole of the *voir dire* shows an open juror willing to fairly listen to both sides, and consider both sides, in light of the instructions given by the court. For example, he stated:

- I believe anybody is innocent until proven guilty, (Tr. p. 1568, line 23);
- I believe that all the evidence and the facts should be presented and taken into consideration when you are talking about somebody's life especially what this case deals with, (Tr. p. 1568, line 25 – p. 1569, line 3);
- Responded "Yes" when asked if he could be fair to both Jones and the State, and not favor one party over the other, (Tr. p. 1572, line 22 – 15773, line 12);
- Affirmed that he could give "meaningful consideration" to both aggravating and mitigating factors, (Tr. p. 1575);
- Affirmed that each juror made his or her individual choice in sentencing, (Tr. p. 1576);
- Affirmed that he could impose either life or death, (Tr. p. 1576);

- When asked about mitigation, "Like I said, I think every ounce of information, evidence, facts, mitigating, everything, needs to be taken into consideration before the final decision." (Tr. p. 1580, lines 1-3);

- "I want to hear facts. You are talking about somebody's life." (Tr. p. 1581, lines 2-3);

- "Like the Judge said, you have got life sentence in prison or death penalty, no in between. I want to hear everything before I make my final decision." (Tr. p. 1581, lines 11-13);

- When asked whether before imposing death he would "need to weigh their whole life, their good, their bad, their past, their further," responded, "me personally, I want to hear everything, everything," adding, "you are talking about somebody's life." (Tr. p. 1586, lines 7-10);

- When asked about respecting another's "right to have their own choice even if it is different from" his own, the juror responded, "Of course." (Tr. p. 1588, line 20);

- And, as to mitigation, "there is nothing wrong to me with getting all the facts, all the evidence, (Tr. p. 1591, lines 21-22).

Additionally, the juror stated that he had understood the judge's admonition not to talk about the case and confirmed that he had not. (Tr. p. 1567-68). This lends even further support to his ability and willingness to follow the court's directions.

Jones's argument to this Court rests on parsed statements taken out of context, or simply urges the Court not to credit statements supporting qualification. That is contrary to settled law and unsupportive of error. When the whole of the answers are reviewed in the instant matter, the record supports the juror could and would abide by the judge's instructions on the law, and could and would make a sincere judgment on whether the sentence should be life or death.

In Jones's argument, he points to the back and forth in the *vior dire* process. (See FBOA, pp. 14-16). That is expected. In picking apart the lengthy exchange for phrases he believes may support his position, Jones fails to account for the broader context of the discussion. Most all prospective jurors are attempting to answer questions concerning concepts and procedures that

they know little or nothing about. It should be expected that many of the answers will demonstrate that disadvantage. *See, for example, State v. Bell*, 302 S.C. 18, 25, 393 S.E.2d 364, 368 (1990) ("The other two jurors initially misunderstood the bifurcation of the trial, but later, after clarification, responded that they could impose either the death penalty or a life sentence. The trial judge, therefore, did not abuse his discretion in qualifying the challenged jurors."); *State v. Green*, 301 S.C. 347, 354-55, 392 S.E.2d 157, 161 (1990) ("With regard to Mr. Brown, we find that while his responses indicated some confusion on his part, he demonstrated the ability to consider all evidence before reaching a decision."); *State v. Gilbert,* 277 S.C. 53, 56-57, 283 S.E.2d 179, 180-81 (1981) (finding no abuse of discretion in qualifying jury, noting that after "confusing inquiries made by appellants' trial counsel, the juror stated that she would give due consideration to any mitigating factor that the court instructed her to consider."). In short, a juror's answers should be considered in light of their lack of training in the law, and the lack of instruction by the court, when considering qualification. After all, jurors are not instructed on the law during *voir dire. State v. Bixby*, 388 S.C. 528, 543, 698 S.E.2d 572, 580 (2010) ("such information is disseminated to jurors by way of jury instructions, not questioning on voir dire"). The goal is not to stake out someone who will accept Jones' position, the goal is to ensure each juror will fairly listen. *Sapp, supra.*

Jones' argument is tellingly. It shows heavy dependence on negative interpretation of isolated phrases. Fair reading of the full context is needed. For instance, Jones asserts "the juror stated he would automatically vote for the death penalty if the state proved beyond a reasonable doubt that the defendant murdered multiple children." (FBOA, p. 14). In support of the assertion, he then cites a portion of an answer that the juror "personally" believed that "if you took somebody's life and took their choice to live or not, purposefully and willing then I think …

you forfeit your chance to have a choice to live or not." (Tr. p. 1583, lines 4-8). In fact, the juror questioned how to answer in the isolation the Jones now depends upon. The exchange at issue is this:

> Q. And then we have the aggravation circumstances where we have multiple children killed. Are you with me on that?
>
> A. Yes, sir.
>
> Q. Some people say, based on that, if I find beyond a reasonable doubt guilty, guilty, murder, multiple children, the only appropriate penalty for me is the death penalty. Is that where you are?
>
> A. *It is hard to, when you ask me these questions I go back to the evidence*. Like, when I hear the evidence I can give you a legitimate reason. I mean, if that is the case then me, personally, yes, if you took somebody's life and took their choice to live or not, purposefully and willingly then I think that your, *you forfeit your chance to have a* ***choice*** *to live or not*.
>
> Q. Okay. When they forfeit their chance to have a choice to live or not, are you telling me that that choice is going to be up in the hands of the jury or do you think that the appropriate punishment is death?
>
> A. I think *if the jury comes to the verdict of a death* penalty then the punishment should be death, yes.

(Tr. p. 1583, line 19 – p. 1584, line 14) (emphasis added).

Jones' claim of an automatic penalty of death response is elusive. Even so, the passage shows the trial judge did not abuse his discretion in rejected Jones' interpretation. There is a sound and logical reason that this Court must review the entirety of the *voir dire* and give deference to the judge on the scene. The above passage proves the point. Jones is likewise wrong on his remaining claims.

Jones next claims that the juror would not consider any and all mitigation. (FBOA, p. 15). Again, the record does not support such an unyielding conclusion. There are two parts to the analysis which undermine his position.

First, as always, context is key. Within this same portion of the exchange, the juror responded that he would listen and he would consider both penalties. The juror qualified the answer that Jones finds so telling, stating, "*I am thinking*, it needs to be within a recent timetable." (Tr. p. 1591 , line 12) (emphasis added). And underscoring the seriousness of the decision he would be asked to make, the juror responded, "there is nothing wrong to me with getting all the facts, all the evidence." (Tr. p. 1591, lines 21-22). In follow up, solicitor explored this aspect a bit further, having already prefaced this exchange with the clear statement that mitigation factors "don't have to be proven beyond a reasonable doubt," (Tr. p. 1590, line 23- p. 1591, line 1), engaging the juror as follow:

> Q. Well, let me ask you this. What if there is a position that says, look, what we want to show you going way back has a lot to do to explain with this event. Would you be willing to consider that and hear it?
>
> A. Yes, I don't see why it could do any wrong. But, like I said, for me personally, you know, what happened twenty years ago when you are in elementary school doesn't have anything to do with your decision making now. Do you know what I mean. I really don't know how to word that or explain that any better. But like I said, I will be willing to, I mean when you are talking about somebody's life, like I said, if the Defense wants to give up their facts, the Prosecutors wants to give their facts, I am willing to listen to both before making an ultimate decision.
>
> Q. And ultimately, no matter what though, you could render a verdict for life or death?
>
> A. Yes, sir.

(Tr. p. 1591, line 23 – p. 1592, line 15).

Second, the referenced exchange is *before* the charge on the law that Jones *depends upon*. (See FBOA, p. 15, citing Tr. p. 5955, line 12 – p. 5956, line 23). As noted above, the law is given by the trial judge in instructions. *Bixby*, 388 S.C. at 543, 698 S.E.2d at 580.

Lastly, Jones argues that the juror would not consider an act of mercy at sentencing. (FBOA, p. 15). But a careful reading of Jones' own argument defeats his claim. Jones submits that the juror stated "he could not respect another juror who" could not "give a reason" for their sentence determination and concludes the juror is "impaired" to give mercy – noting several witnesses later in the trial proceedings "asked for mercy" for Jones. (FBOA at 16). However, whether the juror could "respect" or could not "respect" another juror's decision that could not be explained in no way inhibits this juror's consideration of the evidence or this juror's own personal decision. This juror explained his logic, "there is a reason to why [in] everything we do." (Tr. p. 1587, lines 9-10).[2] In fact, the juror expressed, "I don't see how you can be here and be fair to both parties if" one would indicate simply "I feel merciful. What is right is right and what is wrong is wrong." (Tr. p. 1590, lines 9-12). Many lines have been written in legal precedent attempting to define the concept, parameters and place for mercy in capital sentencing. The Supreme Court has firmly stated "there is no such constitutional requirement of unfettered sentencing discretion in the jury, and States are free to structure and shape consideration of mitigating evidence" in their individual sentencing structures. *Boyde v. California*, 494 U.S. 370, 377 (1990). *Accord Kansas v. Marsh*, 548 U.S. 163, 181 (2006) (concluding "that the Kansas capital sentencing system, which directs imposition of the death penalty when a jury finds that aggravating and mitigating circumstances are in equipoise, is constitutional.").[3] This Court has explained: "It is proper to instruct a jury in a capital sentencing phase that it may

---

[2] Of note, is that the juror extended his philosophy to include why someone makes the choice to murder, stating: "There is a reason why behind every choice we make." (Tr. p. 1578, line 24). The juror did not qualify the philosophy with a requirement that the reason be "logical" or "acceptable" or "fully developed" or anything else. Simply, that it must be.

[3] In *Marsh*, the Court noted that Kansas used jury instructions that explained that mercy can be used in consideration of a mitigation circumstance, and that "appropriateness of the exercise of mercy can itself be a mitigating factor…." *Id.,* at 176.

recommend a life sentence for any reason or no reason at all, including as an act of mercy. A jury's consideration of mercy, *if proper evidence of mercy is admitted*, is well recognized in the sentencing phase of a capital case." *Rosemond v. Catoe*, 383 S.C. 320, 330, 680 S.E.2d 5, 10 (2009) (emphasis added). *See also California v. Brown,* 479 U.S. 538, 543 (1987), *modified by Boyde v. California*, 494 U.S. 370 (1990) ("to the extent that the instruction helps to limit the jury's consideration to matters introduced in evidence before it, it fosters the Eighth Amendment's 'need for reliability in the determination that death is the appropriate punishment in a specific case.' ") (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976)). Again, in context, it is infinitely reasonable to consider the juror's response as expecting a fair process for individualized sentencing based on the proceedings.

Further, the juror's responses underscored that mercy is mercurial, whether it is earned or freely given, "can't really answer, it depends on the situation." (Tr. p. 1590, lines 1-5). While Jones interprets this as "impaired" to give mercy, it cannot be said to be an abuse of discretion to interpret it simply as the juror would want to be fair to both sides and decide the matter on the case, not an unexplained feeling against the penalty. After all, the jury is supposed to deliberate, and it cannot be a deliberation without input. See DELIBERATION, Black's Law Dictionary (11th ed. 2019) ("The act of carefully considering issues and options before making a decision or taking some action; esp., the process by which a jury reaches a verdict, as by analyzing, discussing, and weighing the evidence.").

Even so, if taken only at face value, this opinion could not possibly be a detriment to Jones because, as Jones concedes, there is no burden of proof to establish a mitigating circumstance. (See FBOA, p. 16). If, for example in a worst case scenario, one juror does not agree to exercise mercy because another juror cannot or will not engage in a discussion on

mercy, it does not matter to the defendant – there is no numerical weighing of circumstances in this jurisdiction, and each juror makes his own determination. If not unanimous, death cannot be imposed. It simply does not matter whether a juror disagrees with the method another takes to arrive at a sentencing decision. If the juror does not agree death is appropriate, that is the end of the matter. Again, it would not be to Jones's detriment.

Lastly, Jones suggests that the juror's reference to the defense counsel's "job to give the reason," does not produce the "smoking gun" he suggests. Again, context is key:

> Q. And the Judge is going to tell you, the law is you can give a life sentence for any reason or no reason. And it sounds like to me if a Juror says I don't have a reason, I think life is the appropriate punishment, that would be in conflict with your view on how it should work?
>
> A. Well, I think it is, I could be wrong saying this, this is how I am feeling right now. I believe it is y'all's job to give us the reason, to give us the facts.
>
> Q. Sure.
>
> A. And when we have the facts, we feel the way from the facts because of the reasons that we give.

(Tr. p. 1587, line 17-1588, line 2).

He was not wrong. While there is no legal burden of proof, the sentencing phase provides the defendant with the opportunity to present evidence: "In aggregate, our precedents confer upon defendants the right to present sentencers with information relevant to the sentencing decision and oblige sentencers to consider that information in determining the appropriate sentence." *Marsh*, 548 U.S. at 175; *see also Eddings v. Oklahoma,* 455 U.S. 104, 113–14 (1982) ("Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence.") (emphasis in original). The trial judge also explained the process to the juror advising the jury "will hear testimony of a wide variety of mitigating factors." (Tr. p.

1574, lines 22-23). The trial judge also advised the juror that the death penalty is not automatic, and the juror responded that he understood that the death penalty was not automatic. (Tr. p. 1575, lines 13-14). Rather, sentencing would be "[o]ne choice or the other. You consider all aspects of the aggravating factors and the mitigating factors," which, again, the juror affirmed that he understood. (Tr. p. 1575, lines 15-18).

Simply, as this Court has said many times before, the trial judge is in the best position to determine if the suspect answer is disqualifying or whether the juror can be fair. *See Dickerson*, 395 S.C. at 116, 716 S.E.2d at 903 ("The circuit judge was more persuaded by the juror's consistent affirmation he would follow the law and wait to hear all of the evidence than by his apparent confusion over the State's burden, and we believe his ultimate determination of Juror 370's qualification to serve is supported by the record."); *Green*, 301 S.C. at 354, 392 S.E.2d at 161 ("we find that while his responses indicated some confusion on his part, he demonstrated the ability to consider all evidence before reaching a decision"). When considered in the totality, the record supports that the trial judge did not abuse his discretion in finding Juror Gantt qualified. Jones is not entitled to any relief.

II.

The trial judge did not abuse his discretion in excusing Juror No. 338, Rachna Prasad, because, based on her assertions, she could not fairly consider a verdict of not guilty by reason of insanity without knowing the consequences of that verdict. Jones' plea was not guilty by reason of insanity and the juror would have to consider that verdict. Because the consequences of a not guilty by reason of insanity verdict are not matters to be determined by the jury, the jury may not be instructed on the consequences. The trial judge reasonably found that the juror's responses warranted excusal to ensure a fair trial. Jones cannot show an abuse of discretion in that decision.

Jones argues that, during individual *voir dire*, Juror Prasad stated she could consider the various potential verdict but "merely expressed confusion as to why jurors were not told the consequences of such a verdict." (FBOA at 27). Contrary to Jones' position, the record does not support that the juror "merely expressed" a passing concern for a general rule as to why jurors were not instructed on sentencing consequences outside penalty phase relevance. The juror particularly tied her consideration of a not guilty by reason of insanity verdict to being informed of the consequences of that verdict:

> [defense counsel] …we were talking about the potential verdict of not guilty by reason of insanity. And it sounds like you had a concern about that, not knowing what would happen if somebody was found not guilty by reason of insanity. And not knowing what would happen, would that cause you to perhaps not consider that verdict?
>
> A. I would need to know what happened to consider that verdict.

(Tr. p. 1254, lines 6-13).

While defense counsel made the argument that the juror did not say she would not consider the verdict option, (see Tr. p. 1268, lines 16-19), the trial judge disagreed with defense counsel's assessment of qualification based on his own observation and consideration of the juror's *voir dire* responses. The record supports the trial judge did not abuse his discretion in excusing the juror.

Further, Jones's argument to this Court suffers from not only a lack of record support, but also the blending of concepts and concerns. Jones focuses in large part on the penalty-phase qualification, but the disqualifying answers go to the guilt-phase considerations. South Carolina law vests the judge with the authority to determine whether a juror will be able to discharge his duties to provide a fair trial in the initial phase of determining guilt. *State v. Gulledge*, 277 S.C. 368, 370, 287 S.E.2d 488, 489 (1982) ("The trial judge has the duty to assure himself that every juror is unbiased, fair and impartial."); S.C. Code Ann. § 14-7-1020 ("If it appears to the court that the juror is not indifferent in the cause, he must be placed aside as to the trial of that cause and another must be called."). The trial judge did so here on facts well-supported by the record. Jones shows no error and is not entitled to any relief.

Standard of Review:

"An appellate court will not disturb the trial court's disqualification of a prospective juror when there is a reasonable basis from which the trial court could have concluded the juror would not have been able to faithfully discharge his responsibilities as a juror under the law." *State v. Wise*, 359 S.C. 14, 23–24, 596 S.E.2d 475, 479 (2004). The trial court's decision, based on personal interaction and/or observance of the juror, is entitled to deference on appeal. *State v. Evins*, 373 S.C. 404, 418, 645 S.E.2d 904, 911 (2007) (citing *State v. Green*, 301 S.C. 347, 392 S.E.2d 157(1990)). *See also State v. Cottrell*, 421 S.C. 622, 637, 809 S.E.2d 423, 431 (2017) (it is "the trial judge who has the opportunity to see and hear the jurors") (citing *State v. Dickerson*, 395 S.C. 101, 115, 716 S.E.2d 895, 903 (2011)). Further, "[i]n reviewing the trial court's qualification or disqualification of prospective jurors, the responses of the challenged jurors must be examined in light of the entire *voir dire.*" *State v. Green*, 301 S.C. at 354, 392 S.E.2d at 161.

"The determination of whether a juror is qualified to serve on a death penalty case is within the sole discretion of the trial judge and is not reviewable on appeal unless wholly unsupported by the evidence." *State v. Council*, 335 S.C. 1, 10, 515 S.E.2d 508, 512–13 (1999). Further, it is an abuse of discretion if "the trial court's ruling is based on an error of law." *State v. Stanko*, 376 S.C. 571, 575, 658 S.E.2d 94, 96 (2008).

Discussion:

Jones fails to give due consideration to the *discretion* granted a trial judge in carrying out his duty to determine if a juror should be excused. Further, Jones fails to give due consideration that a trial judge ensures that the potential jurors could, if needed, fairly serve in *both* phases.

"The constitutional standard of fairness requires that a defendant have a panel of impartial, indifferent jurors." *Council*, 335 S.C. at 10, 515 S.E.2d at 512 (citing U.S. Const. Amend. 14; *State v. Bell,* 302 S.C. 18, 393 S.E.2d 364, *cert. denied,* 498 U.S. 881, 111 S.Ct. 227, 112 L.Ed.2d 182 (1990)). "The trial judge has the duty to assure himself that every juror is unbiased, fair and impartial." *State v. Gulledge*, 277 S.C. 368, 370, 287 S.E.2d 488, 489 (1982). "The ultimate consideration is that the juror be unbiased, impartial, and able to carry out the law as explained to him." *State v. Sapp*, 366 S.C. 283, 291, 621 S.E.2d 883, 887 (2005). This is true for both phases of a capital trial, though the qualification questions and individual responses applicable to each phase differ slightly because the juror's duty in each phase is different. Even so, the goal is shared – to secure jurors who will give fair consideration of the evidence and law on the issues to be placed before them.

"The authority and responsibility of the trial court is to focus the scope of the voir dire examination as set forth in S.C. Code Ann. § 14-7-1020 (Supp.1995)." *State v. Hill* (*David Clayton*), 331 S.C. 94, 103, 501 S.E.2d 122, 127 (1998) (citing *State v. Plath,* 281 S.C. 1, 313

S.E.2d 619 (1984)). Section 14-7-1020 directs that a trial judge "must" excuse a juror "[i]f it appears to the court that the juror is not indifferent to the cause" to be tried.

In short, before sentencing is the trial, and a trial judge must determine whether a juror is qualified to sit on the jury. If not qualified, or if "substantially impaired," a court should excuse the juror. That is a call distinctly reserved to the trial judge, and the trial judge must make that call based on his determination from the *voir dire* responses. S.C. Code Ann. § 14–7–1020 ("If it appears *to the court* that the juror is not indifferent in the cause, he must be placed aside as to the trial of that cause and another must be called.") (emphasis added); *see also State v. Franklin,* 267 S.C. 240, 248, 226 S.E.2d 896, 899 (1976) (noting the phrase "if it appears to the court" supports the trial court's discretion). The trial judge's factual determination will not be disturbed on appeal unless it is "wholly unsupported" by the record, *Council*, 335 S.C. at 10, 515 S.E.2d at 512–13, or his decision is premised on an error of law, *Stanko*, 376 S.C. at 575, 658 S.E.2d at 96 (2008). That is consistent with the Supreme Court's precedent in these matters.

The Supreme Court of United States has recognized that "[d]espite its importance, the adequacy of *voir dire* is not easily subject to appellate review." *Mu'Min v. Virginia*, 500 U.S. 415, 424 (1991) (quoting *Rosales-Lopez*, 451 U.S. 182, 188 1634 (1981)). The Court likened the task to credibility determinations made by the fact-finder at trial: "The trial judge's function at this point in the trial is not unlike that of the jurors later on in the trial. Both must reach conclusions as to impartiality and credibility by relying on their own evaluations of demeanor evidence and of responses to questions." *Id.* The Court in *Rosales-Lopez* further resolved that "[i]n neither instance can an appellate court easily second-guess the conclusions of the decision-maker who heard and observed the witnesses." 451 U.S. at 188, 101 S.Ct. at 1634.

In similar fashion, this Court also defers to the trial judge, but does not abandon review. The review is, however, highly restricted – an appellant must show a complete lack of factual support. *Council*, *supra*. No reading of the record allows Jones to show a lack of record support.

Because the juror at issue here clearly stated she would have to know what she is not entitled to know for a guilt-phase determination, she did not respond in a way that would support she would apply the law as given. *See generally State v. Bennett*, 328 S.C. 251, 257, 493 S.E.2d 845, 848 (1997) ("The ultimate consideration is that the juror be unbiased, impartial and able to carry out the law as explained to him."). Given the juror's responses, the trial judge, as required by statute, made a thoughtful and factually-supported finding as to whether the juror was genuinely "indifferent in the cause" and could fairly follow the law. Consequently, the trial judge did not abuse his discretion in excusing the juror.

The record shows that even though the juror was initially informed that if the jury returned a "not guilty" verdict, "the case ends, it stops right there," (Tr. p. 1238, lines 8-9; p. 1241, lines 4-6), she still had significant questions and wanted knowledge that would not be a concern for the jury in the guilt phase. Jury involvement in sentencing is only triggered with a guilty verdict, and, at that point, there are only two choices for the jury, life without parole or death. (See Tr. p. 1238, lines 9-12; p. 1241, lines 6-10). The juror stated she could consider either of those sentences at that time. (See Tr. p. 1243, lines 12-22). However, that is not the reason that the judge disqualified the juror. The reason rested in a revealed impairment in the juror's duty prior to sentencing – a revealed impairment in being able to fairly consider the verdict of not guilty by reason of insanity. The juror was told that Jones had pleaded not guilty by reason of insanity. (Tr. p. 1240, lines 13-20). She initially affirmed that she could consider all of the four verdict possibilities anticipated – guilty, guilty but mentally ill, not guilty by

reason of insanity, or simply not guilty. (Tr. p. 1240, lines 16-25). But in response to questions from the defense, the juror indicated a death sentence may be warranted to thwart future violence in "potential escape or potential freedom." (Tr. p. 1244, lines 17-25). Then when asked about the insanity defense, the juror responded she would want to know, "what does insanity actually mean." (Tr. p. 1248, lines 19-24). When asked if she would consider a verdict on insanity as essentially "letting someone off," she responded:

> I guess, my questions would be behind the insanity of what is the measure of insanity, what are you defining as insanity. Was insanity, you know, what was the mind-frame during that time that the actions were taken. So in my line of work measurement is huge. So what does insanity actually mean?

(Tr. p. 1248, lines 19-24).

Defense counsel questioned the juror further and asked whether, if she heard expert testimony and supporting evidence, would she "still have some hesitation because it would kind of be lettering someone off still?" (Tr. p. 1249, line 25 – p. 1249, line 2). Even with that clarification, the juror responded:

> It would depend on the information provided and the plan of action after that. So obviously you, claimed insanity you wouldn't just become part of society again. What would then be that plan. So you have been declared insane and then what, now what, essentially.

(Tr. p. 1249, lines 9-13).

Defense counsel veered into the following exchange: "[s]ome people might fear that if they don't really know, if they are not told what that means it kind of lets the guy out into society," and asked the juror, "Do you think that?" (Tr. p. 1249, lines 15-17). The juror immediately asked "[s]o are you saying if they have been declared insane they should still be part of society." (Tr. p. 1249, lines 18-19). The exchanged stopped when the deputy solicitor objected, noting to the trial judge that he had previously ruled on the matter. (Tr. p. 1249, lines

21-25). The trial judge instructed defense counsel to rephrase, but that brought out a response from the juror that she had a question. The trial judge excused the juror for a moment and spoke to counsel. (Tr. p. 125, lines 7-17). Defense counsel explained his continued foray into the matter was "in response to her comments about I would have concerns about what the plan was." (Tr. p. 1250, line 21- p. 1251, line 2). The trial judge, knowing the juror's background (to which she had earlier alluded in her responses), noted on the record:

> She is a risk reward panelist because what she does for a living, she evaluates the risk and reward and benefit, all the costs, all of that. She talks like a person who works for the insurance company because she is.

(Tr. p. 1251, lines 3-7).

The deputy solicitor noted that this line of information had been previously addressed. Simply, "it is beyond what her job as a Juror would be." (Tr. p. 1251, lines 16-17). Defense counsel asserted the defendant "has the right" to inquire when the juror "has some fear or reservation or hesitation." (Tr. p. 1253, lines 1-2). The deputy solicitor correctly noted, "She has answered that question, she does have a fear of it." (Tr. p. 1253, lines 4-5). The trial judge suggested a question: "Because you have a concern as to what the plan may be and I can't say what the plan is. Could you still consider" the potential verdict." (Tr. p. 153, lines 21-23). Defense counsel agreed to pose that question. (Tr. p. 1253, line 24). That was indeed a good question as that elicited a response that clarified her impairment. This exchanged followed:

> [defense counsel]: So we left off, we were talking about the potential verdict of not guilty by reason of insanity. And it sounds like you had a concern about that, not knowing what would happen if somebody was found not guilty by reason of insanity. And not knowing what would happen, would that cause you to perhaps not consider that verdict?
>
> A. I would need to know what happened to consider that verdict.

(Tr. p. 1254, lines 6-13).

The clarity of that response is undeniable.

At this point, the record not only supports, but well and fully supports, the trial judge's decision to excuse the juror in this case. Even so, there is yet more support in the record for the trial judge's determination.

The trial judge advised the juror that he was responsible for instructions and explanations of law, and also explained that "[t]he end result plan is not allowed to be given at trial," and explained that defense counsel was asking "would that affect your ability to consider it. So you are not going to have –" (Tr. p. 1255, lines 1-8). The juror then sought to pose her own question which the trial judge allowed. (Tr. p. 1255, lines 9-10). She asked:

> A. So in the case of the death penalty, you know death is the result.
>
> THE COURT: That is the result.
>
> A. And if you know the life sentence without parole, you know that is the result.
>
> THE COURT: Correct.
>
> A. But in the case of not guilty by reason of insanity, you don't know the result.
>
> THE COURT: Don't know the result.
>
> A. I don't understand.
>
> THE COURT: That is just the Court rules.
>
> Q. So the result of that you would always be in the dark with regard to the result of a not guilty by reason of insanity verdict. Knowing you would always be in the dark about that, not knowing what would happen, would that cause you to maybe not consider that verdict as a true verdict. Would you vote for it not knowing what would happen?
>
> A. I have no words honestly because without knowing what the result is how can you choose that option?

> Q. So it sounds like you do have some reservations about choosing that option, not knowing the result.
>
> A. It is just not knowing the result. You know the result of the other options but you don't know the result of that option.

(Tr. p. 1255, line 1- p. 1256, line 7).

Defense counsel asked a few other questions about a life penalty, considering mitigation, and other penalty-phase-related questions. (See Tr. p. 1256, line 13 –p. 1266, line 22).[4] At the conclusion, the deputy solicitor expressed the State's position that the juror was not qualified

---

[4] Interestingly, it does not appear to bother Jones that this Juror did not think, much like Juror 156 referenced in Issue I, that in the sentencing phase, a juror should go on mere "feeling" of what the punishment should be:

> Q. Okay. And another Juror might actually say, I don't have a reason, the Judge said we could vote for the life penalty for any reason, no reason or mercy alone. And somebody might say, after hearing everything, after seeing everything, it just doesn't fit with me. You know, after I contemplate the rest of my life, I don't want to have the burden of having killed another human being. And I just don't want to do it. And they could actually say I don't really have a reason to put in words. Does that sound fair that people could say that?
>
> A. No.
>
> Q. They should have a reason?
>
> A. Your life in this trial doesn't matter. So your opinion, your, I don't want to think belief, but your belief of how it is going to affect you as a person isn't, is not what, is not what is at stake right now.

(Tr. p. 1261, lines 7-22). She continued, "I don't know whether it is fair or not but I understand that it is possible that they could say" they could not "put it into words but the death penalty is just not right for me" deciding with "no reason." (Tr. p. 1261, line 23-1262, line 5). Defense counsel continued, "could you let them have that, stick with it, does that sound fair that they should be able to say that, retain that position if they don't even have a reason," and the answer was a concise, "no." (Tr. p. 1262, lines 12-17; see also Tr. p. 1264, lines 8-12). Neither juror indicated they would engage in coercion of any kind to change such a vague assertion by another. Yet, in regard to this juror, Jones apparently does not find this extremely similar response as the one given by Juror 156 objectionable. Jones actually reinforces how important it is to view *voir dire* in context and how discretion is fully warranted for the trial judge in such circumstances.

based on her responses indicated that it was important to her to know the consequences of a not guilty by reason of insanity verdict. (Tr. p. 1267, lines 15- p. 1268, line 1). Defense counsel maintained that the juror did not clearly say she would not consider the verdict without knowledge of the consequences, but did agree that "[i]f she is substantially impaired, she has got to go but that was not her statement … she is qualified." (Tr. p. 1268, lines 16-19). Defense counsel suggested either telling this juror and future jurors that "exactly what happens by statute or say … we can't tell you exactly what would happen but we can tell you there is a plan, a vehicle in place to take care of that per statute under South Carolina law." (Tr. p. 1268, line 23- p. 1269, line 3). The solicitor responded if its introduced in *voir dire*, it is likely to come up in trial, and that is improper. (Tr. p. 1269, lines 11-18). The problem was they were not "off the path" of where they should be as a result of the juror having "asked a very bright question." (Tr. p. 1269, lines 18-20). He summarized:

> She said, well, what happens in this situation. And unfortunately Your Honor can't answer it. And if the jury sent a question out you couldn't answer it. And our problem is, what she said is, in order to consider that she wants that information. So that is why, Judge, if she gets on the jury and we get a conviction and we get death obviously there is going to be other lawyers over on this side and will go, why wasn't that address. Why wasn't the State arguing for this and not the Defense. I think it is tainted at this point, that is the problem. She seems to be a very fine person trying hard. But you have got something on the record now, Judge, I think, you can't erase it now. I think it is a problem and it is a problem that if it isn't addressed now it is going to come back to bite us later.

(Tr. p. 1269, line 20- p. 1270, line 9).[5] Defense counsel agreed with the solicitor that "this is going to come up continually whether they are in voir dire or you are going to get a note from the

[5] Jones appears to argue the solicitor was simply raising a specter of danger in possible reversible, and, presumably, he infers that would be incorrect. (See FBOA at 23). The solicitor, though, was properly and rightly concerned about finality of the proceedings given this Court's precedent establishing that it would be error for a court to give such instruction. *See, e.g., State v. Poindexter*, 314 S.C. 490, 431 S.E.2d 254 (1993)(no right to instruction where consequence is not before the jury): *State v. McGee*, 268 S.C. 618, 620, 235 S.E.2d 715, 716 (1977)(judge

jury room, from the Foreman, and we have to figure out how to intelligently answer this." (Tr. p. 1270, line 23 – p. 1271, line 2). Defense counsel further suggested that they were entitled to tell the jury, though the State wished to keep the jurors "in the dark" and perhaps argue confusion to prevent disclosure later on in the proceedings. (Tr. p. 1271, lines 3-9).[6] The solicitor correctly noted: "The law says they can't go there," and the judge responded, "I agree" and further noted:

> And, you know, if you start looking at all of the things that jurors aren't told, let's make certain Mr. Jones is not shackled, orange, we are not telling them he is in custody, I mean there is a lot of things that jurors aren't told because it would impact their decision.
> …
> We want to decide, what they decide based upon what they are presented with.

(Tr. p. 1271, lines 17-25).[7]

---

properly refused to instruct on sentencing when jury had not responsibility to determine punishment); *State v. Huiett*, 271 S.C. 205, 246 S.E.2d 862 (1978) (instruction on possibility of release from custody if found not guilty by reason of insanity prejudiced defendant and constituted reversible error).

[6] *See* note 2, *supra*, for cases in this jurisdiction that hold the opposite of what defense counsel argued. Far from supporting some suggestion of ill-intent, the record shows the solicitor rightfully attempted to preserve fairness in not just jury selection, but the trial proceedings as a whole. The solicitor correctly argued the prejudice to the defendant in revealing the consequence of the verdict, even where the defendant did not. (See Tr. p. 1272, lines 1-10). Comment, Rule 3.8 of Rule 407, SCACR ("A prosecutor has the responsibility of a minister or justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.").

[7] This Court's precedent fully supports the trial judge's comments, as well. *See State v. McGee,* 268 S.C. 618, 621, 235 S.E.2d 715, 716 (1977) ("since the jury had nothing to do with the punishment for rape, the trial judge properly refused to instruct the jury with regard to the penalty for such crime"). *Accord Shannon v. United States*, 512 U.S. 573, 579 (1994) ("providing jurors sentencing information invites them to ponder matters that are not within their province, distracts them from their factfinding responsibilities, and creates a strong possibility of confusion."). In fact this Court has found that revealing the consequences – presumably truthfully, which would be "the trial judge must order the person who was the defendant committed to the South Carolina State Hospital for a period not to exceed one hundred twenty days" and examination will determine if longer "hospitalization" is warranted – may clearly and negatively influence a jury. *See State v. Huiett*, 271 S.C. at 210, 246 S.E.2d at 865 ("We agree

Defense counsel again suggested that the juror's responses were not indicative of saying she could not consider the verdict (though, perhaps somewhat tellingly, did not address whether the juror was substantially impaired). (Tr. p. 1272, lines 11-17). But, as the solicitor pointed out, "she said she needed that information in order to make that determination," and the trial judge has already determined he could not provide the juror that information. (Tr. 1272, lines 18-24). Ultimately, the judge excused the juror:

> THE COURT: Ms. Prasad, I and the lawyers have been talking and of the answers and questions that I did not give you an explanation of what would happen on all four potential verdicts and haven't done that to the other jurors either. You ask very good questions.
>
> JUROR: That's my job.
>
> THE COURT: Well, since I can't answer your question and that is a big concern of you being able to go forward and make a decision I am going to excuse you from jury service and let you go and thank you for your help and thank you for your patience.
>
> JUROR: Thank you.

(Tr. p. 1274, lines 8-19).

After the juror left the courtroom, the trial judge placed on the record, "I excused her because I couldn't answer her question." (Tr. p. 1274, lines 22-23).

Jones has not and cannot show an abuse of discretion on this record. The trial judge's critical fact-finding is well and fully supported by the record. Nor can Jones show an error of law.

---

with appellant that the error was sufficiently prejudicial to warrant reversal. At the first trial of this case without the commitment charge a mistrial was declared when the jury could not reach a verdict after seven hours. Here, with the commitment charge, the jury was able to return a guilty verdict after only thirteen minutes. The prejudice to appellant is manifest.").

On appeal, Jones concentrates, incorrectly, on sentencing-phase concerns for this issue. He weaves into his "relevant facts" description of Ms. Prasad's responses, general questions concerning sentencing, (see FBOA at 18-19, 22), and also depends, in his standard of review, on the law that jurors must be excluded if their "views on capital punishment" would impair fair service, (see FBOA at 24-25). Even his request for a *new trial* is premised specifically on *Gray v. Mississippi*, 481 U.S. 648 (1987), (*see* FBOA at 28), but the issue there was qualification for *sentencing* and even the relief was reversal *of the death sentence*. 481 U.S. at 668. This is not a juror excused for her "views on capital punishment." Jones' reliance on *Gray* is wholly misplaced.

To put a fine point on it, *Gray* neither supports a finding of error in a qualification dispute over a non-jury sentencing matter, nor does it support relief in the form or the grant of a new trial. *Gray* was pointed directly toward a "views on capital punishment" issue and only addressed sentencing relief. In fact, in *Ross v. Oklahoma*, 487 U.S. 81 (1988), issued approximately one year later, this limitation was reinforced by the Court's description of the case – the Court "decline[d] to extend the rule of *Gray* beyond its context: the *erroneous* '*Witherspoon exclusion'* of a qualified juror in a capital case." 487 U.S. at 87. A "*Witherspoon* exclusion" refers to the principle that a court may not excuse potential jurors "simply because they voice general objections to the death penalty or express conscientious or religious scruples against its infliction…" *Sapp*, 366 S.C. at 290, 621 S.E.2d at 886 (citing *Witherspoon v. Illinois,* 391 U.S. 510 (1968)). Jones's argument mixes concepts and lacks factual or legal support. Jones' complaint is not a matter of disqualification for the *sentencing-phase* as he would argue; rather, he argues *sentencing-phase* concerns when the trial judge excused the juror to preserve fairness in the *guilt-phase*.

"[A] prospective juror may be excluded for cause when his views *on capital punishment* are such as would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Sapp*, 366 S.C. at 290-291, 621 S.E.2d at 886 (emphasis added) (citing *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S.Ct 844 (1985)). That principle is reflected in S.C. Code Ann § 16-3-20 (E), which provides: "In a criminal action in which a defendant is charged with a crime which may be punishable by death, a person may not be disqualified, excused, or excluded from service as a juror by reason of his beliefs or attitudes *against capital punishment* unless such beliefs or attitudes would render him unable to return a verdict according to law." (emphasis added). Further, S.C. Code § 16-3-20-(D) alters the field a bit in securing the ability for defense counsel to ask questions. That provision "does not, however, enlarge the *scope* of *voir dire* as it is clearly delineated in Section 14–7–1020, Code." *State v. Smart*, 278 S.C. 515, 522, 299 S.E.2d 686, 690 (1982), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991) (emphasis in original). In short, the majority of Jones' argument and the precedent upon which he relies is inapposite. This Court has, however, had cause to consider a trial court's similar determination that a juror would have "prevented or substantially impaired the performance of his duties as a juror," in *State v. Tucker*, 334 S.C. 1, 11, 512 S.E.2d 99, 104 (1999), and found no abuse of discretion. *Tucker* is instructive.

In *Tucker*, the trial judge disqualified a potential juror "[d]uring the general qualifying of the jury pool" when the juror advised that his religion prevented him from "sit[ting] in judgment of another person." *Id.,* at 11, S.E.2d at 103. Defense counsel objected to the trial judge excusing the juror and argued that it was error to have denied defense counsel the opportunity to "rehabilitat[e] the juror during individual voir dire as to this view on the death penalty and the

special circumstances which might allow him to sit as a juror." *Id.,* at 11, 512 S.E.2d at 104. This Court rejected the argument. The record reflected that the trial judge found the juror disqualified "without regard to his view on the death penalty," and based the disqualification "solely upon the fact that his religious beliefs would not allow him to sit as a juror and that the special circumstances which might allow him to serve should require four days of counseling." *Id.* In light of that record this Court concluded that "[t]he trial court properly excluded" the juror "because his religious beliefs which prohibit judging another person would have prevented or substantially impaired the performance of his duties as a juror." *Id.* This is similar to the excusal at issue. The trial judge determined that the juror's ability to fairly serve as a juror in the case, based on her responses, would have interfered, substantially, in discharging her duty as a juror.

The record fully and fairly supports the trial judge's decision factually, and Jones fails to show any error of law. There is no abuse of discretion in the trial judge's excusing the juror. Jones is not entitled to any relief.

III.

Special capital *voir dire* provisions exist to determine whether a potential juror can fairly consider during the penalty phase both the possibility of a life sentence or the possibility of a death sentence. Neither Due Process nor the Eighth Amendment compel a state court to allow a potential juror during capital *voir dire* to be advised of the result of a not guilty by reason of insanity verdict because sentencing is not a jury concern where such a verdict is returned.

Jones argues that jurors are tasked with the sentencing decision in capital cases; thus, they should be told what happens to a defendant found not guilty by reason of insanity. (FBOA at 29). The disconnect is obvious. A capital jury does not determine *any* sentence if a verdict of not guilty or not guilty by reason of insanity is returned. There is no penalty phase and there is not even a question of fact-finding for an aggravating circumstance. *See* S.C. Code Ann. § 16-3-20 (B) "When the State seeks the death penalty, *upon conviction or adjudication of guilt* of a defendant of murder, the court shall conduct a separate sentencing proceeding.") (emphasis added); *see also* S.C. Code Ann. § 16-3-20 (C) ("If the jury does not unanimously find any statutory aggravating circumstances or circumstances beyond a reasonable doubt, it shall not make a sentencing recommendation."). Further, there is no right to use *voir dire* to find a jury predisposed to the defendant's position. *See, e.g., State v. Poindexter,* 314 S.C. 490, 492, 431 S.E.2d 254, 255 n. 2 (1993) ("*voir dire* is not to be used as a means of pre-educating or indoctrinating a jury or … impaneling a jury with particular predispositions" consequently "the discovery and elimination of biased or prejudiced jurors during *voir dire* does not require that they first be informed of the consequences of each potential verdict."). Jones does not show any necessity to educate a jury on a result that should not be contemplated in the guilt-phase. He is not entitled to any relief.

Further, though, in attempt to show reversible error, Jones claims due process and Eighth Amendment protections, and then makes various assertions of prejudice and prosecutorial

overreaching. His criticisms sorely miss the mark. All of his assertions rest on one line of cases involving life without parole instructions that only become relevant *in the penalty phase*. (FBOA at 29). Rather than support his argument, it highlights its error.[8] The State appropriately argued the existing state law that there is no jury consideration of the consequence of a not guilty by reason of insanity verdict, and, since there could be no jury decision on sentencing in regard to a not guilty verdict, instruction is not only unnecessary but potently harmful to a defendant's right to a fair trial.

Standard of Review:

"[T]he scope of voir dire and the manner in which it is conducted are generally left to the sound discretion of the trial court." *State v. Bixby,* 388 S.C. 528, 542, 698 S.E.2d 572, 579 (2010) (quoting *State v. Stanko,* 376 S.C. 571, 575, 658 S.E.2d 94, 96 (2008)). To find a limitation on questioning to be reversible error, the limitation must result in a "fundamentally unfair" proceeding. *Hill (David Mark)*, 361 S.C. at 310, 604 S.E.2d at 702–03 (citing *Morgan v. Illinois*, 504 U.S. 719, 730 (1992)).[9]

---

[8] This also highlights its strain. Jones seems to argue the failure to advise the jury of a fact that they cannot consider somehow "favored the state." (See FBOA at 29). Yet, this Court has found just the opposite. Disclosure of the consequences of a not guilty by reason of insanity verdict carries grave consequences *for the defendant. See State v. Huiett*, 271 S.C. at 210, 246 S.E.2d at 865 ("We agree with appellant that the error was sufficiently prejudicial to warrant reversal. At the first trial of this case without the commitment charge a mistrial was declared when the jury could not reach a verdict after seven hours. Here, with the commitment charge, the jury was able to return a guilty verdict after only thirteen minutes. The prejudice to appellant is manifest.").

[9] Jones claims a *de novo* standard of review for this issue citing *Simmons v. South Carolina*, 512 U.S. 154 (1994). (FBOA at 33). In particular, he claims because it is a "Due Process Clause and Eighth Amendment" truthfulness-to-sentencing-jurors issue the *de novo* standard applies. *Simmons* did not address the instruction in light of the Eighth Amendment. 512 U.S. at 162 n. 4. *Simmons* limited consideration to due process, specifically the ability to "deny or explain" "information" in the sentencing phase. *Id.,* at 162. *Simmons* does not speak to *de novo* review. Even so, the basic premise for this assertion fails. This issue neither implicates due process in consideration of evidence in the sentencing phase, (s*ee, e.g., Lockett v. Ohio,* 438

Discussion:

At its most basic, "the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." *Irvin v. Dowd,* 366 U.S. 717, 722 (1961). Initial questioning through *voir dire* is the principle method for protecting that right: it "serves the dual purposes of enabling the court to select an impartial jury and assisting counsel in exercising peremptory challenges." *Mu'Min v. Virginia*, 500 U.S. 415, 431 (1991).

As referenced in the preceding issue, "[t]he trial judge has the duty to assure himself that every juror is unbiased, fair and impartial." *State v. Gulledge*, 277 S.C. 368, 370, 287 S.E.2d 488, 489 (1982); *see also* S.C. Code § 14-7-1020 (trial judge tasked with questioning jurors to determine if "the juror is not indifferent in the cause" such that the juror must be excused from service). "The ultimate consideration is that the juror be unbiased, impartial, and able to carry out the law as explained to him." *State v. Sapp*, 366 S.C. 283, 291, 621 S.E.2d 883, 887 (2005).

Capital trial proceedings do not change the nature of the guilt phase. Simply because a bifurcated proceeding allows for *additional* evidence *in the separate sentencing proceeding* does not show the need to relax protections on the scope and focus of the guilt phase. *See* S. C. Code § 16-3-20 (B) ("In the sentencing proceeding, the jury or judge shall hear additional evidence in extenuation, mitigation, or aggravation of the punishment."); *Williams v. State*, 320 Ark. 67, 70, 894 S.W.2d 923, 924 n. 1 (1995) (rejecting argument that bifurcation supports "a policy in favor of informing juries of the consequences of a verdict of not guilty by reason of mental disease or defect" because the "procedures merely provide for additional information that may be given juries at the sentencing phase of the trial and which may have been inadmissible at the guilt

---

U.S. 586 (1978)), or the Eighth Amendment at all as it is not a sentencing issue (the Eighth Amendment prohibits "cruel and unusual *punishments*" U.S. Const. amend. VIII (emphasis added)). Jones' position lacks support in the law or in fact.

phase"). Guilt is not based on character, sympathy, or request for nullification or compromise. Guilt, if found at all, must be grounded in the relevant evidence going to the elements of the offense as properly admitted at trial. *See generally Victor v. Nebraska*, 511 U.S. 1, 5 (1994) ("The government must prove beyond a reasonable doubt every element of a charged offense.") (citing *In re Winship,* 397 U.S. 358 (1970)); *State v. Smith,* 309 S.C. 442, 447, 424 S.E.2d 496, 499 (1992) (improper testimony on character "so destructive" as to be reversible error); Rule 401, SCRE (" ' Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."); Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice ...."); Rule 404(b), SCRE ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.").

Jones' arguments fail because he begins from an incorrect premise. The sentencing process a capital trial juror would participate in after a guilty verdict is ultimately only whether the murderer deserves life imprisonment or death. *State v. Plath*, 281 S.C. 1, 14, 313 S.E.2d 619, 627 (1984) (in sentencing-phase, jurors tasked with "mak[ing] the 'either/or' selection" of penalties). Jones' argument that information is being improperly hidden from the jurors' sentencing consideration is wrong. Rather than withholding information relevant to the jurors' duty, as Jones suggests, the precise information Jones complains was not provided relates to a matter *not in the jury's province.* The jury actually has *no function* in regarding sentencing after a finding of not guilty by reason of insanity. *State v. Poindexter*, 314 S.C. 490, 431 S.E.2d 254 (1993). However, Jones suggests to this Court that *Poindexter* left open the possibility of instructing the jury in capital cases. (See FBOA at 34-35). Jones grossly misread *Poindexter*.

Poindexter generally notes that "the consequences [after the verdict] need not be brought to the jury's attention unless the jury has a statutory right to fix or recommend punishment." *Id.,* at 492, 431 S.E.2d 254. This Court simply found that the jury did not have that duty in Poindexter's case. *Id.* The Court did not establish that capital proceedings converts the consideration of all post-verdict consequences into matters for the jury's determination. The Court's reference to *State v. McGee,* 268 S.C. 618, 235 S.E.2d 715 (1977), is instructive.

In *McGee,* this Court noted the "information as to the penalty is of no aid to the jury in determining whether the defendant committed the crime charged." *Id.,* at 620, 235 S.E.2d at 716. However, an instruction on the consequences of a not guilty by reason of insanity verdict was not at issue. Rather, at issue was jury participation in sentencing under a former provision of law in a non-capital matter. The facts show that McGee stood trial for two charges, rape and burglary. At that time, the burglary statute provided a sentence of "life imprisonment unless the jury recommends mercy, whereupon the punishment shall be reduced to a term of not less than five years." *Id.,* at 620, 235 S.E.2d at 716. A sentence for rape, however, did not have a jury determination affecting sentencing. *Id.* The Court decided "since the jury had nothing to do with the punishment for rape, the trial judge properly refused to instruct the jury with regard to the penalty for such crime." *Id.,* at 621, 235 S.E.2d at 716. However, the jury did have a duty to make a determination in regard the burglary sentence, a statutory provision for a determination of mercy. *Id.,* at 620, 235 S.E.2d at 716. This Court reasoned that, "[s]ince the jury was not given the opportunity to recommend mercy and a sentence of less than life imprisonment is illegal in the absence of such recommendation," the trial court committed reversible error – but only as to that charge. *Id.* The Court reversed the conviction and the sentence for burglary, but it affirmed the rape conviction and sentence. *Id.* This is a prime and clear example of what

Poindexter meant. Jones cannot show a similar statutory provision that would give a potential juror an opportunity to weigh in on disposition *after* a verdict of not guilty by reason of insanity to affect the resulting consequences. It simply does not exist.

In regard to the "statutory right" referenced in *Poindexter*, the Court also cited for support *State v. Huiett*, 271 S.C. 205, 246 S.E.2d 862 (1978). *Huitt* directly references the instruction on consequences from a verdict of not guilty by reason of insanity, but the case does not help Jones. In *Huiett*, the *defendant* claimed error in the trial court instructing the jury:

> Unlike the first trial, however, at this trial the judge instructed the jury that if a verdict of not guilty by reason of insanity was restored appellant would be transferred to the State Hospital for observation. The jury was further instructed that if appellant was then or subsequently found not to be mentally ill, he would be released.

Id., at 206, 246 S.E.2d at 863. The Court noted "[t]he jury deliberated thirteen minutes and returned a verdict of guilty." *Id.* This Court agreed with the defendant that prejudice from the improper change was reflected in the change of circumstances between his two trials:

> We agree with appellant that the error was sufficiently prejudicial to warrant reversal. At the first trial of this case without the commitment charge a mistrial was declared when the jury could not reach a verdict after seven hours. Here, with the commitment charge, the jury was able to return a guilty verdict after only thirteen minutes. The prejudice to appellant is manifest.

Id., at 210, 246 S.E.2d at 865. Also of note, the prejudice was so distinct to this Court that it found a curative charge insufficient to address the harm:

> Although the trial judge attempted to disclaim his commitment charge by instructing the jury not to consider it in their deliberations, this disclaimer was not sufficient to remove the prejudice to appellant. If the jury should not have considered the commitment charge it should never have been given.

Id.

Consequently, the relevant state precedent does not support the interpretation of *Poindexter* that Jones offers. Further undermining his position, Jones does not indicate one case

that rests on Due Process and the Eighth Amendment addressing instruction on the consequences of a not guilty by reason of insanity verdict. However, as a general matter of "due process," if that is considered or defined as the ability to respond or at least not to have a comment stand unanswered, that ability is already provided in our case law. For example, in *State v. Valenti*, 265 S.C. 380, 388, 218 S.E.2d 726, 729 (1975), the instruction was properly denied, but when prosecutor mentioned, defendant moved for either the requested instruction or mistrial. A curative instruction was so crafted. *Id.* The case reflects no great detail but the gist appears to be that if improper referenced is made, then remedial efforts are warranted. The bigger problem is what may be said at that point. Most likely, a proper instruction would be to disregard because it is unlikely that a court could fashion a fair and truthful charge that would address the resulting consequence. *State v. Percy*, 507 A.2d 955, 957 n. 2 (Vt. 1986) (reflected the charge to cure as "don't let [what might happen in the event of an insanity verdict] enter into your verdict. What happens to Mr. Percy as a result of your verdict, whether it's not guilty, guilty or not guilty by reason of insanity, is not your worry. That's my problem. At that point, I decide what happens next and you should not be in any way influenced in your determination about whether your verdict will cause him to be let go, as they say, or anything else. You should only be concerned with whether he's not guilty to one or both of the offenses, or not guilty by reason of insanity.").

Jones references a smattering of cases in support of his more general argument for the instruction, and offers a compilation, *Instructions in State Criminal Case in which Defendant Pleads Insanity as to Hospital Confinement in Event of Acquittal,* 81 A.L.R.4th 659 (Originally published in 1990). That is a good resource for exploring the "*View that instruction is generally inappropriate and unnecessary*," in Section 5. The Section includes, along with our state precedent, cases from Alabama, Arizona, Arkansas, Delaware, Idaho, Illinois, Indiana, Iowa,

Kentucky, Maine, Michgan, Mississippi, Montana, Nebraska, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Texas, Vermont, Virginia, Washington, and Wyoming. These number 27. However, apart from the solid number of jurisdictions adopting this logic, the number is far less important than the reason expressed for adoption of that position: maintaining the integrity of the guilt determination process. There is a distinct and real fear of distraction of the sworn duty to determine guilt should an instruction be given. *See, e.g., Madison v. State*, 697 S.W.2d 106, 107 (Ark. 1985) ("matters relating to the disposition of the defendant, tend to draw the attention of the jury away from their chief function as sole judges of the facts, open the door to compromise verdicts and to confuse the issue or issues to be decided.") (quoting *Pope v. United States,* 298 F.2d 507, 508 (CA 5th Cir.1962)); *People v. Meeker*, 407 N.E.2d 1058, 1065 (Ill.App. 3d 1980) ("We decline to adopt as a general rule of law a requirement that the jury be given an instruction which relates the consequences of a verdict of not guilty by reason of insanity. Such an instruction would inject into the trial and the deliberations of the jury extraneous and irrelevant matters that would have no bearing on defendant's guilt or innocence."); *State v. Hamann*, 285 N.W.2d 180, 186 (Iowa 1979) (recognizing "[t]he majority rule is that the jury should not be informed of the effective of such a verdict" noting "an instruction to the jury regarding the post-trial disposition of a defendant found not guilty by reason of insanity is irrelevant to the jury's proper function. It could only serve to confuse the jury or invite it to consider improperly defendant's post-trial disposition. A jury might improperly consider defendant's post-trial disposition even in the absence of an instruction on that subject. But this does not justify our aiding and abetting it in that role. Rather, such a possibility merely tends to illustrate the necessity of precisely informing the jury of its proper function."); *Edwards v. Com.,* 554 S.W.2d 380, 383–84 (Ky. 1977) ("declin[ing] … to

join the minority" view supporting instruction as it "has no legitimate bearing on the issue of fact to be decided by the jury when the defense of insanity has been raised, that issue being whether the defendant was mentally responsible when the criminal act was done, and could, we feel, divert the jury's attention from the resolution of this issue"); *Hand v. State*, 354 A.2d 140, 141 (Del. 1976) ("Jurors should not be encouraged or permitted by the Court to allow the nature of the punishment, or the absence thereof, to enter into their judgment. The issue of insanity is a factual question which should be determined on the basis of the evidence alone; and in deciding that question, the jury should not be influenced by a consideration of the possible or probable disposition of the defendant as the result of an insanity finding."). This logic, though expressed some years ago, remains solidly valid. *See Williams*, 894 S.W.2d at 924("The rationale announced in the annotation [81 ALR4 th 659] for rejecting such an instruction is consistent with that adopted by this court—it would permit or encourage the jury to base its verdict on speculation regarding the defendant's subsequent disposition rather than on the law and evidence as to his mental responsibility at the time of the crime. For twenty-five years, this court has adhered to this sound reasoning, and we decline Williams' suggestion to repudiate it now.").

Jones also blends his sentencing concerns, which he ties to *Simmons*, with a study that reflects a collection of information on whether jurors would "correctly identify dispositional outcomes of a NGRI verdict. (FBOA at 43). Perhaps the most disturbing of these numbers, taken at face value for the sake of argument, proves the State's point – "70.6% reported that knowing the outcomes would influence their decisions." (FBOA at 43). Whether that is in favor of the defense or in favor of the prosecution, it is conflict with court rules to consider the mental state for culpability, not compromise. Injecting arbitrariness in – as one court has described – "merely substitute[ing] one unacceptable area of speculation" for a different one:

> …if it is proper to inform the jury that commitment to a mental institution results from a verdict of not guilty by reason of insanity, it would be equally appropriate that the jury be aware of the statutory provisions for subsequent release. Because of the numerous approaches authorized by 15 M.R.S.A. s 104 to resolve this subsequent issue of 'whether (a person found not guilty by reason of insanity may be released or discharged) without likelihood that he will cause injury to himself or to others due to mental disease or mental defect,' no instruction could adequately postulate the impact of such a verdict on the appellant's future tenure in the institution. We agree with the Delaware Court (responding to a similar contention) that '(s)uch instruction would have substituted one unacceptable area of speculation and conjecture for another.' Garrett v. State, 320 A.2d 745, 750 (Del.1974).

State v Wallace, 333 A2d 72, 79 (Me. 1975). *See also People v. Goad*, 421 Mich. 20, 32, 364 N.W.2d 584, 589–90 (Mich. 1984) (agreeing with *Wallace* given "the numerous possible contingencies under the statutory scheme" it is impossible to give fair instruction).[10]

To his credit, Jones admits that the Supreme Court of the United States has directed the federal courts not to instruct on consequences of such verdict. (See FBOA at 41). The Court shares the basic reasoning of the state court as set out above. In *Shannon v. United States*, 512 U.S. 573 (1994), the Court acknowledged, "providing jurors sentencing information invites them to ponder matters that are not within their province, distracts them from their factfinding responsibilities, and creates a strong possibility of confusion." *Id.,* at 579. The Court rejected the concept that Jones appears to embrace, and its reasoning is sound:

> We also are not persuaded that the instruction Shannon proposes would allay the fears of the misinformed juror about whom Shannon is concerned. "[I]f the

---

[10] This holds true for our statutory scheme, as well. Presumably, a defendant would not be able to modify the actual terms of the statute in conveying information to potential jurors. The statute only provides for a *required maximum* of one hundred and twenty days in the South Carolina State Hospital, and additional proceedings determine release or further commitment. S.C. Code § 17-24-40. Logic supports that such information would not be particularly helpful to any defendant charged with a particularly violent crime, but how much more so for a capital defendant where concern of continuing danger arises. *See also People v. Meeker*, 407 N.E.2d at 1065 ("If the instruction tendered here were given it would still appear the jury could prevent defendant's release only by finding him guilty. … we find the instruction so uncertain regarding the possibility of post-verdict confinement that it would not benefit defendant if it were given.").

> members of a jury are so fearful of a particular defendant's release that they would violate their oaths by convicting [the defendant] solely in order to ensure that he is not set free, it is questionable whether they would be reassured by anything short of an instruction strongly suggesting that the defendant, if found NGI, would very likely be civilly committed for a lengthy period." *United States v. Fisher,* 10 F.3d 115, 122 (CA3 1993), cert. pending, No. 93–7000. An accurate instruction about the consequences of an NGI verdict, however, would give no such assurance. Under the IDRA, a postverdict hearing must be held within 40 days to determine whether the defendant should be released immediately into society or hospitalized. See 18 U.S.C. §§ 4243(c), (d). Thus, the only mandatory period of confinement for an insanity acquittee is the period between the verdict and the hearing. Instead of encouraging a juror to return an NGI verdict, as Shannon predicts, such information might have the opposite effect—that is, a juror might vote to convict in order to eliminate the possibility that a dangerous defendant could be released after 40 days or less. Whether the instruction works to the advantage or disadvantage of a defendant is, of course, somewhat beside the point. Our central concern here is that the inevitable result of such an instruction would be to draw the jury's attention toward the very thing—the possible consequences of its verdict—it should ignore.

Id., 512 U.S. at 585–86.

But again, Jones' issue also suffers from lack of support for a "due process" or an "Eighth Amendment" claim. There is nothing to respond to for due process to be triggered, and the Eighth Amendment applies to sentencing, or execution, but not to a "not guilty" verdict – there is no criminal punishment at issue. The mixed concepts in Jones' position show the weakness of each one, especially when together they still do not make a claim. Moreover, the Court has recently resolved a similar issue that is helpful in resolution of this issue.

In *Winkler v. State,* 418 S.C. 643, 795 S.E.2d 686 (2016), this Court considered, in context of an ineffective assistance of counsel, whether an instruction to advise an actual sentencing jury what would occur if they did not agree. The matter of deficiency was handled easily, and rejected, as there was no "applicable precedent" that "supported making an objection" to the court's failure to instruct. 418 S.C. at 653-54, 795 S.E.2d at 691-92. However, this Court went on to consider whether a court was compelled to answer a question if posed by the juror:

> Even if a jury asks a specific question about a point of law, when the point is not applicable to the jury's deliberations, the trial court should not answer the question. *See generally State v. Weaver*, 265 S.C. 130, 137, 217 S.E.2d 31, 34 (1975) ("There was no duty of the trial judge to instruct the jury as requested by the appellant because such charge was not applicable to any issue in the case."). Therefore, the mere fact the jury asked the specific question did not require the trial court to answer it. Rather, *whether the trial court should have answered the question depended on whether the point of law about which the jury asked was applicable to the jury's deliberations.*

Id., 418 S.C. at 655, 795 S.E.2d at 693.

As Jones does here, Winkler relied upon *Simmons v. South Carolina, supra.* The Court found that reliance was similarly "misplaced because in that case the answer to the jury's question *was necessary to enable the jury to understand and fully deliberate one of the key factual issues in the case*." *Id.* When the instruction request – in *Winkler*, the effect of not agreeing on a verdict – "was not applicable to the jury's deliberations, and informing the jury of that consequence could have created a risk of *undermining* the deliberations." *Id*. Specifically, the Court expressed "concern[] that informing the jury what the sentence will be if they do not reach a verdict creates a risk that some juror's attention may be diverted away from the duty to deliberate, and perhaps even alert a juror that he or she can control the sentence by refusing to deliberate." *Id.,* 418 S.C. at 656, 795 S.E.2d at 693. The situation here is extremely close and certainly prompts the same concerns of diversion and arbitrary action. Further, in *Winkler,* an actual capital sentencing procedure at issue, there could not be an Eighth Amendment issue because, again very much like the situation here, there was no sentencing information withheld that could have affected a sentence deliberation. *Id.,* 418 S.C. at 656-57, 795 S.E.2d at 694.

Jones simply cannot show sound support for his arguments. He is not entitled to any relief.

IV.

The security checkpoint that stopped Jones was legal so the trial court committed no error in allowing evidence stemming from Jones's lawful seizure.

Standard of Review:

In criminal cases the appellate court sits to review errors of law only. *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827 (2001). In criminal cases, the appellate court is bound by factual findings of the trial court unless an abuse of discretion is shown. *State v. Blackwell-Selim,* 392 S.C. 1, 3, 707 S.E.2d 426, 427 (2001). The trial court's decision will not be disturbed on appeal absent a clear showing of an abuse of discretion. *Mitchell Supply Co. v. Gaffney,* 297 S.C. 160, 162-63, 375 S.E.2d 321, 322-323 (Ct. App. 1988). An abuse of discretion occurs when the trial court's order is controlled by an error of law or when there is not evidentiary support for the trial court's factual conclusions. *Stokes – Craven Holding Corp. v. Robinson,* 416 S.C. 517, 536, 787 S.E.2d 485, 495 (2016). Subject matter jurisdiction is limited by the territorial reach of the courts. *State v. Dudley,* 354 S.C. 514, 524, 581 S.E.2d 171, 176, (2003), (quoting *Rios v. State,* 733 P.2d 242, 245 (Wyo. 1987)).

Relevant Facts:

On September 6, 2014, while on patrol during a slow night in Smith County Mississippi. Deputies Charles Johnson and Wayne Thompson determined their resources would be better served by establishing a safety checkpoint. Per verbal policy of the Smith County Sheriff's Department in Raleigh Mississippi, they decided to contact Undersheriff Marty Patterson in order to gain permission to establish this safety checkpoint.[11] (Tr. p. 2740 line 24- p. 2741 line 1). They decided to pick Mississippi State Highway 18 due to its location near the city limits,

[11] Smith County Sheriff Charlie Crumpton was on a weekend vacation with his family and could not be reached. (Suppression hearing tr. p. 66 lines 12-13)

adequate lighting and the fact there were wide shoulders on both sides of the highway in order for someone to pull over without blocking the highway. (Tr. p. 2780 lines 19-22). This section of highway has been used in the past for safety checkpoints so there was no problem using this area of highway 18 again. (Suppression hearing tr. p. 68 lines 21-25).

Both Deputy Johnson and Thompson testified that this safety checkpoint was solely to check driver's licenses, proof of insurance and child restraints. (Suppression hearing tr. p. 93 lines 7-9). They both was parked on the side of the road with the blue lights flashing with one Deputy pointed in one direction the other in the other direction. (Suppression hearing tr. p. 152 lines 5-8). The road was never blocked and the deputies used their flashlights for the purpose of stopping oncoming vehicles. Both deputies were wearing reflective gear and stopped every car that approached the safety checkpoint per policy. (Suppression hearing tr. p. 95 line 8 – p. 97 line 2). During the night five cars were stopped prior to Jones each was asked to reveal their driver's license and proof of insurance. (Suppression hearing tr. p. 98 lines 8-9). They used their flashlights to observe the use of any child safety restraints. The stops were minimal and once everything checked out each of these vehicles were allowed to proceed. (Suppression hearing tr. p. 97 lines 13-25) .

Deputy Johnson testified that Jones stopped and as he approached Jones rolled down his driver's side window. Deputy Johnson could immediately smell what he thought to be burned marijuana and another awful smell. (Tr. p. 2743 lines 8-21). He asked about the smell, and Jones informed him that the smell was that of garbage. (Tr. p. 2743 lines 16-19). He shined the light into Jones face and noticed that he had red glassy eyes and his speech was slurred. (Tr. p. 2743 lines 6-8). He asked Jones had he been drinking, and Jones denied drinking. (Suppression hearing tr. p. 99 lines 6-7). Deputy Johnson testified that he still suspected Jones to be under the

influence so he requested that he pull over to the side of the road. He asked Jones to step out of the car and to walk to the rear of his vehicle. (Suppression hearing p. 99 lines 7-9). He was joined by Deputy Thompson who inquired about the smell also. Jones also informed him that it was garbage. Where Deputy Thompson asked, "who would haul garbage in a new Escalade?" (Suppression hearing tr. p. 135 lines 19-20). Deputy Johnson requested permission to search his vehicle, which Jones granted. As Deputy Johnson approached Jones's vehicle, Jones began to follow him. He was stopped by both Deputy Johnson and Thompson and told to remain in the rear of his vehicle for safety purposes. (Suppression hearing tr. p. 99 line 19 – p. 100 line 1).

While searching the vehicle Deputy Johnson found on the floorboard a bag containing "Scooby Snax." (Suppression hearing tr. p. 102 lines 2-3). Deputy Johnson testified that due to him being a narcotics officer he knew those to be spice or synthetic marijuana, which was illegal in the state of Mississippi. (Tr. p. 2747 lines 16-23). He retrieved the bag of marijuana and inquired to Jones if he knew what that was. Jones informed him that it was potpourri, and then told him what he thought was the chemical makeup. (Tr. p. 2747 lines 3-15). Deputy Johnson again further searched the vehicle and found another bag of "Scooby Snax" and an energy drink can bent in a way commonly used to smoke marijuana. (Tr. p. 2748 lines 4-8). Due to his condition, the marijuana, and can found in his vehicle, Deputy Johnson arrested Jones for the offenses of driving under the influence (DUI), possession of a controlled substance, and possession of drug paraphernalia. (Tr. p. 2748 lines 9-10) .

After placing Jones into the back of his police vehicle Deputy Johnson further searched Jones's vehicle. He went into the rear of the SUV and found chemicals. Deputy Johnson then thought Jones was attempting to create a methamphetamine lab. (Tr. p. 2752 lines 16-21). He then checked Jones's driver's license and the vehicle license plate in NCIC. The vehicle came

back a hit, however, Jones was supposed to be with five children. Jones was found alone. (Tr. p. 2751 lines 10- 14). Since he thought Jones was creating methamphetamine lab, he decided to contact Undersheriff Patterson requesting his presence at the checkpoint. (Tr. p. 2752 lines 21-24).

When Undersheriff Patterson arrived at the scene he immediately smelled something and asked the deputies were the smell was coming from. (Tr. p. 2783 lines 10-13). Deputies informed him that it was coming from Jones's vehicle. (Tr. p. 2783 lines 13-14). Once Undersheriff Patterson got to the driver's side window he immediately knew this was not a chemical smell, but a smell of decomposition. (Tr. p. 2783 lines 14-19). He was then informed about the NCIC hit so he called the Lexington County Sheriff's Department and spoke to Deputy Jessie Laintz. He informed Undersheriff Patterson that he was worried about the welfare of the children. Undersheriff Patterson informed Deputy Laintz that they did not find any children, Jones was alone. (Tr. p. 2786 lines 14-16). He informed Undersheriff Patterson that they are currently searching for five children. Undersheriff Patterson then ordered Deputy Jamie McClellan to ask Jones about the children. (Tr. p. 2786 lines 19-20). Jones informed them that he did not have any children. (Tr. p. 2786 lines 21-25). They knew that was not true so they asked Jones again about the children. Jones informed them that he had three children, and they was with their mother. (Tr. p. 2787 lines 5-7). Deputy Laintz told him that is not true, because they spoke to their mother, and she had not seen them. (Tr. p. 2787 lines 7-9).

Because of all of the items found in the car during the search, the blood and chemicals and the fact there were five children missing, Undersheriff Patterson told the other deputies to stop the search and secure the location. (Suppression hearing tr. p. 112 lines 17-21). A wrecker was requested to the scene to tow away the car. This would have been done anyway due to

Jones' DUI arrest. (Suppression hearing tr. p. 113 lines 21-23). Jones's vehicle was ultimately towed to the Smith County Multipurpose Building. He ordered a deputy to remain with the vehicle until it could be searched the next day by a member of the MBI. (Tr. p. 2789 lines 4-8).

Discussion:

Jones is currently seeking a new trial and suppression of all evidence discovered as a result of this checkpoint. Respondent submits that the deputies involved with the checkpoint followed verbal policy, complied with acceptable procedure by stopping each vehicle, and requesting to view licenses, proof of insurance and child vehicle restraints. This is considered a valid checkpoint pursuant to United States Supreme Court and Mississippi Appellate Court decisions. Jones is not entitled any suppression of evidence nor a new trial resulting from being stopped at this checkpoint.

Jones argues that the Smith County Sheriff Department only has two criteria pertaining to checkpoints. Undersheriff Patterson testified as to the complete verbal criteria. It consists of substantially more than is listed within Jones's brief. According to Undersheriff Patterson in order to be able to have a safety checkpoint within Smith County you must follow these guidelines:

1. You must have a safe place in order to stop vehicles. A place where vehicles can pull over on the side so oncoming traffic would not be blocked;
2. During the commission of the checkpoint the deputies must have their blue lights on at all times;
3. You must have two or more vehicles at the checkpoint;
4. You must check every vehicle that comes through;
5. You must have your safety clothing on and what is used is a reflective vest;
6. You must first get permission before the checkpoint can take place. This approval must come from the Sheriff and if he is not available from the Undersheriff.

(Tr. p. 2780 lines 10-13). Deputies Johnson and Thompson verified – through the testimony presented – that they followed each of the criteria during the commission of this safety checkpoint.

Jones cites *Delaware v. Prouse,* but it fails to offer him support. In *Prouse*, a Delaware police officer did a random stop of a vehicle. During a search this officer found inside the vehicle a quantity of marijuana. The Supreme Court decided a random stopping of a vehicle without probable cause must be considered a violation of the Fourth Amendment. The Court also set out that a particular law enforcement practice may be judged by balancing its intrusion on the individual's Fourth Amendment interest against its promotion of legitimate governmental interests. *Delaware v. Prouse,* 440 U.S. 648, 654 (1979).

In the Mississippi Court of Appeals case of *Briggs v. State*, 741 So.2d 986 (1999), the state court decided that the issue of (a) roadblock type checkpoints where every vehicle is stopped versus, (b) random stops of individual vehicles not under any suspicion seems to serve as the dividing line between constitutionally-permissible police activity and unreasonable intrusions into the personal security of motorists. *Briggs,* 741 So.2d at 989.

In *U.S. v. Martinez-Fuerte,* the Supreme Court upheld the stopping of motorist on permanent checkpoints in order to check if individuals were being brought to this country illegally. In *Martinez-Fuerte,* the court decided:

> Stops for a brief questioning routinely conducted at permanent checkpoints are consistent with the Fourth Amendment and need not be authorized by warrant.

U.S. v. Martinez-Fuerte, 428 U.S. 543, 566, 96 S.Ct. 3074, 3087 (1976).

Jones argues that the reason for this checkpoint was due to the boredom of the two deputies. There was no testimony revealing that either deputy was "bored." In his testimony and

in his affidavit Deputy Johnson specifically stated, "Things were quiet that night and Deputy Wayne Thompson and I decided to conduct a traffic safety checkpoint off Hwy 18 East, outside the city limits." (Deputy Johnson's affidavit p. 1). There was no statement made by Deputy Johnson nor Thompson that stated they were "bored." Being in law enforcement there is never a time when individuals are "bored," this is due to the fact their life is constantly on the line. However, there could be down times were they are receiving no calls, so instead of sitting around doing nothing, these deputies decided to do a safety checkpoint. This was done to ensure that all individuals driving on roads within their jurisdiction have a valid driver's license and insurance.

In *City of Indianapolis v. Edmond,* the Supreme Court made the determination that these safety checkpoints are a lawful means to protect highway safety, which is the responsibility of local law enforcement. In *Edmond* the Court specifically stated:

> We nonetheless acknowledged the States' "vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles, that these vehicles are fit for safe operation, and hence that licensing, registration, and vehicle inspection requirements are being observed." Accordingly, we suggested that "[q]uestioning of all oncoming traffic at roadblock-type stops" would be a lawful means of serving this interest in highway safety.

City of Indianapolis v. Edmond, 531 U.S. 32, 39 (1999) (quoting *Prouse,* 440 U.S. at 663). Again, there is no support for a finding that the roadblock existed to satisfy the deputy's boredom. This was done due to the necessity of ensuring motorists have proper licensing and insurance in order for the roads to remain safe. No officer said that they did more than check licenses, insurance and child restraints, which is lawful, and not in violation of the Fourth Amendment.

Jones has also argued that the Supreme Court constantly repudiated safety checkpoints as the one done in this case. They make this argument because there were no prior plan or written

criteria done prior to the checkpoint. Jones argues that the location was random unlike prior cases. It is Jones's position that this checkpoint was so random it should be compared to the facts in *Prouse.* However, the relevant cases related to checkpoints allows for the checkpoint that occurred in the present case. The checkpoint in this case was only for checking of licenses and insurance information. The checkpoint in these circumstances does not offend the precedent from the United States Supreme Court or that of the Mississippi Appellate Courts. However, having a pre-planned stop, or written criteria was never a standard and unmoving prerequisite for a valid checkpoint, but critical is that it is not general crime control. It was not a general crime control effort, but specifically, as the testimony shows, a roadway safety measure. Within all of these cases, the valid stops reflect that the stop was not random; that every vehicle was checked; and the primary purpose are for verifying licenses and insurance information. These actions were done by the Smith County deputies in the present case. There exist no violation of Jones's right under the Fourth Amendment. He was lawfully detained at this checkpoint.

This safety checkpoint cannot be consider identical to a random stop. There was a criteria that was followed and the location was familiar to the Undersheriff and was approved. The amount of manpower used in other cases cannot be compared because of the small size of the Smith County Sheriff Department.[12] The amount of manpower used and the location will always be up to local law enforcement due to their knowledge of the town and the amount of officers that can be expended for safety checkpoints. For purposes of Fourth Amendment analysis, the choice among such reasonable alternatives remains with the governmental officials who have a unique understanding of, and responsibility for, limited public resources, including a finite number of police officers. *Mich. Dept. of State Police v. Sitz,* 496 U.S. 444, 454 (1990). The

[12] Deputy Johnson testified that there are only seven or eight deputies in this department. (Suppression hearing tr. p. 89 lines 1-2)

location is also up to local law enforcement, this is due to the fact only the Smith County Sheriff's Department would know the safest location for this checkpoint. Each Deputy has testified that this location off Hwy. 18 was used in previous checkpoints, this due to the fact it was just outside the city limits which gave them adequate lighting, and there was room on each side of the road for cars can pull over without blocking traffic. The location used was never an issue in any case regarding the legality of checkpoints. In *Martinez-Fuerte*, the United States Supreme Court stated:

> The location of a fixed checkpoint is not chosen by officers in the field, but by officials responsible for making overall decisions as to the most effective allocation of limited enforcement resources. We may assume that such officials will be unlikely to locate a checkpoint where it bears arbitrarily or oppressively on motorist as a class. And since field officers may stop only those cars passing the checkpoint, there is less room for abusive or harassing stops of individuals than there was in the case of roving-patrol stops.

Martinez-Fuerte, 428 U.S. at 559, 96 S.Ct. at 3083. It is obvious that this was not some random checkpoint placed on this highway on a whim of these law enforcement officers. There exist a verbal criteria that was followed, and the location was previously used because of the ability to safety pull individuals off to the side if necessary.

Jones appears to argue that there exist no evidence that reveals a connection of the site of the checkpoint and claimed purpose for licensed checks. They argue that there were no complaints about speeding or loud music being played on that road that would give law enforcement the reason to place the checkpoint at that location. But he overstates the record. His fear of single, arbitrary stops is at odds with the testimony. There is a need to make sure individuals are licensed in order to assure the safety of drivers on the roads. Courts have constantly held that this is the responsibility of law enforcement.

Jones also argued that the reason for this checkpoint was unnecessary. This is due to the fact that Sheriff Crumpton testified that people driving without a license were not a major problem within their county. (Suppression hearing tr. p. 79 lines 5-7). The Court has stated that, "consideration of the constitutionally of such seizures involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." *Brown v. Texas,* 443 U.S. 47, 51-52, 99 S.Ct. 2637, 2640 (1979). Jones argues that this is an arbitrary decision that came without any supervision which violates his Fourth Amendment rights. "A central concern in balancing these competing considerations in a variety of settings has been to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field. *Id.*

Yet, the need for these checkpoints was to diminish the amount of unlicensed drivers in the state of Mississippi, as testified by Ms. Molly Miller, a special assistant attorney general who is a traffic safety resource prosecutor. She was introduced during the suppression hearing as an expert in the field of traffic safety procedures and guidelines for the state of Mississippi. (Suppression hearing Tr. p. 15 lines 21-23). During her testimony Ms. Miller stated that people driving in Mississippi without a license is a "pretty big problem." (Suppression hearing Tr. p. 40 lines 21-24). She testified that there are a lot of businesses like chicken plants where people would come in to work and do not have a driver's license and would never get a license. (Suppression hearing Tr. p. 41 lines 1-7). She even stated that this is a common issue that comes up frequently from law enforcement and is discussed frequently. (Suppression hearing Tr. p. 41 line 23 – p. 42 line 6). She also explained that a checkpoint is an effective tool for looking out for the public safety, by making sure everyone is properly licensed. (Suppression hearing Tr. p. 43

lines 19-23). If it gets an impaired driver off the road then that makes an effective checkpoint. (Suppression hearing Tr. p. 43 line 25 – p. 44 line 2).

Yes, Sheriff Crumpton testified that it was a minimal problem within Smith County Mississippi. This is small county only with a population of 16,800. (Suppression hearing tr. p. 87 line 2). The knowledge of these checkpoints are the reason that this is a minimal problem within the county. Sheriff Crumpton testified that ninety percent of the time they can do it for a little while and nothing happens. (Suppression hearing tr. p. 78 lines 21-22). On the night in question six people were stopped, only one, Jones, was arrested. (Suppression hearing tr. p. 98 lines 8-9). That means sixteen percent of people that night were taken in and arrested. The average percentage of success in this Smith County checkpoint was greater than those in *Sitz* and *Martinez-Fuerte.*[13] In *Sitz* and *Martinez-Fuerte* the United States Supreme Court decided that the checkpoints in both of these cases were legal and not in violation of the Fourth Amendment. The license checkpoints have of course been proven effective. Driving without a license is a "minor problem" in Smith County due to these checkpoints. As the Court stated during the suppression hearing:

> THE COURT: Well, isn't it arguable that the fact that they've had prior checkpoints that have no violations, that the driver's in the area drive with the conscientiousness of being aware that a safety checkpoint may be about and, therefore, have no license with them and they just learn they better carry their license because the police can set up roadblocks here and there without notification in the paper in Mississippi. . . . .
>
> THE COURT: It may be very effective that five years ago we had more tickets for no driver's license because of the – the effectiveness of the roadblocks, people carry their licenses more now. (Suppression hearing Tr. p. 193 lines 7-19)

[13] The arrest percentage in *Sitz* was 1.6%. *Sitz,* 496 U.S. at 455, 110 S.Ct. at 2487. In *Martinez-Fuerte* the arrest percentage was .12%. *Sitz,* 496 U.S. at 455, 110 S.Ct. at 2488.

Jones is of the belief that since Sheriff Crumpton testified that this is not an ongoing problem that they should just stop safety checkpoints all together. The checkpoints are the reasons that this is not a problem in Smith County and to stop the program would bring about a something that has been testified as a problem in most of Mississippi.

Jones argues that this roadblock is not any different than what occurred in *Prouse.* There, the Supreme Court ruled that a random stop for the check of a driver's license was unconstitutional. Their argument was that since they failed to do this weeks in advance like the checkpoints in other cases this must be deem to be random as in *Prouse* therefore in violation of the Fourth Amendment. No United States Supreme Court or Mississippi Appellant Court decision stated that a roadblock to be legal must be planned in a set time-frame in advance.[14] Jones also argues the area selected was done without minimal effort. Deputies Johnson and Thompson followed all of the verbal criteria established by the Smith County Sheriff's Department. They got prior approval from Undersheriff Patterson; they found a safe location where cars can be pulled over to the side without blocking the road; actually a location that has been used in previous checkpoints; they wore their reflective protective vest; they had on their blue lights during the checkpoint; they stopped each vehicle; and, they only checked for license, proof of insurance and to check child restraints. Jones also argues that there were no claimed purpose for the driver's license checks. "The State arguably has an interest in ensuring that drivers of vehicles are properly licensed and that vehicles are properly registered and periodically inspected. The interest is not the same as that of keeping intoxicated operators off the roads, but it is nevertheless a legitimate state interest." *Briggs v. State,* 741 So.2d 986, 989 (1999). Sheriff Crumpton voiced the reasoning during his testimony for these checks. Which

[14] *Dale v. State*, roadblock set up twenty minutes prior to Jones's arrest was deemed constitutional. *Dale v. State,* 785 So.2d 1102 (2001).

seem to be working since Smith County is doing better than the rest of Mississippi regarding unlicensed drivers.

Jones also attempts to equate this checkpoint to that was done in the United States Supreme Court case of *City of Indianapolis v. Edmond,* 121 S.Ct. 447, 121 S.Ct. 447 (2000). In *Edmond* the United States Supreme Court decided that because the primary purpose of the Indianapolis checkpoint program is ultimately indistinguishable from the general interest of crime control this checkpoint violated the Fourth Amendment. *Edmond,* 531 U.S. at 48, 121 S.Ct. at 458. In *Edmonds* the Supreme Court ruled that in order to determine if the checkpoint violated the Fourth Amendment you must look at the primary purpose of the checkpoint. The checkpoint in *Edmonds* is very different to the checkpoint in the present case.

> In *Edmonds,* the officer stopping the vehicle would tell the driver that this is a "drug checkpoint." The officer then looks for impairment and conducted an open view examination. Then a narcotics – detection drug dog walks around the outside of each stopped vehicle. Prior to approaching the checkpoint there is a sign, "NARCOTICS CHECKPOINT – MILE AHEAD, NARCOTICS K-9 IN USE BE PREPARED TO STOP." There are a group of cars that is stopped and not every car is stopped. And when they get to a specific number other traffic proceeds without interruption.

Edmonds, 531 U.S. 32, 34, 121 S.Ct. 447, 450-451.

During their suppression hearing testimony, Sheriff Crumpton, Undersheriff Patterson, and Deputies Johnson and Thompson each said that these checkpoints were safety checkpoints only. They were required to stop each vehicle, they are only allowed to check driver's licenses and proof of insurance. If there is more probable cause that a crime is being committed then they are requested to drive to the side of the road. If there is no sign of any crime and they produce all of the inquired information they were free to proceed. The only observation in the vehicle was to check if there are proper child restraints. It is clear this is a safety checkpoint. These stops were

clearly for that purpose. Nothing presented can refute the intentions of the Smith County Deputies. This case is nothing like *Edmonds,* there is no comparison.

Within his brief Jones states that Deputy Johnson conceded that his individual intent was to stop individuals who have done nothing wrong to keep himself from being "bored." Being "bored" was never mentioned by either officer. They stated that it was a "slow night" that does not translate to being "bored." When no action is occurring these officers decided to ask for permission to conduct a safety checkpoint for the protection of the roads in their community, and to make sure persons are following the law. It is duty of law enforcement officers to make sure the roads are safe.

Jones also argues that there were no statistics to justify how many cars seats were inspected at 8:00pm. The "effectiveness" of a particular checkpoint is rarely stated as to any degree of how many arrest are made, but rather since every driver passing through is checked for a valid driver's license, checkpoints themselves are "very effective" in serving the governmental interest of road safety. *Rogowski v. State,* 145 So.2d 1232, 1236 (2014).

Jones made invalid claims against these officers in an attempt to show that this was more than a safety checkpoint. Jones accused Deputies of shining the light into the face of every driver. The deputies testified they used flashlights to stop vehicles, check for child restraints, and to safely assist vehicles to the side of the road if necessary. The evidence reveals that the only person's face a light was shown was Jones. That was due to the fact Deputy Johnson smelled marijuana coming from his vehicle. This established probable cause that a crime was being committed allowing him to further investigate.

Jones also accused the officers of being prepared to ask pointed questions in order to establish probable cause. Every officer testified that they only asked for driver's license and

proof of insurance. The only person who got pointed questions was Jones due to the smell of marijuana and decomposition coming from inside his vehicle.

Within his brief Jones also attempts to accuse the Deputies of having more of an incentive for stopping vehicles other than safety checks because the Deputies admitted to having a portable breathalyzer machine at the scene. They testified that this was only to be used if they suspected someone to be under the influence of alcohol. (Suppression hearing tr. p. 130 lines 24 – p. 131 line 1). In *Sitz* the United States Supreme Court decided:

> The balance of the state's interest in preventing drunken driving, the extent to which this system can reasonably be said to advance that interest, and the degree of intrusion upon individual motorist who are briefly stopped, weighs in favor of the state program. We therefore hold that it is consistent with the Fourth Amendment.

Sitz, 496 U.S. at 455, 110 S.Ct. at 2488. The United States Supreme Court in *Sitz* understood the need to stop drunk drivers on our roads in order to protect the public. Having a portable breathalyzer was not in violation of any law, nor was in violation of any of Jones's Constitutional rights.

Jones complains that the checkpoint was not established due to complaints from neighbors of, speeding, loud music, or traffic accidents. In his brief Jones also stated that neither officer had on body cameras nor did they have a dash camera. In all cases relating to safety checkpoints there exist no element of prior complaints coming from citizens to justify checkpoints. The United States Supreme Court and Appellant Court of Mississippi understood the need for law enforcement to be assured that all citizens within their jurisdiction observe the local laws. That means being licensed to drive and to have the proper insurance and child restraints in case of an accident. There was a growing problem of individuals driving in Mississippi without a license as stated by Mississippi Assistant Attorney General Molly Miller.

One of the best ways to combat unlicensed drivers are security checkpoints as the one done by the Smith County deputies. In *Prouse* the United States Supreme Court determined:

> That this holding does not preclude the state of Delaware or other states from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion. Questioning of all oncoming traffic at **roadblock-type stops is one possible alternative.**

Prouse, 440 U.S. at 663, 99 S.Ct. at 1401(emphasis added). As for the lack of body or dash cameras Sheriff Crumpton testified as to how small a county is Smith County. If the county does not have the funding to afford body or vehicle cameras that should not be held against them. Jones has not denied any of the events that occurred. He argues as to whether or not the checkpoint that he was initially stopped was lawful. Therefore, any lack of body or dash cameras videos are irrelevant.

Jones also argues that the lack of warning signs as in other checkpoint cases makes this checkpoint unlawful. And the method of the checkpoint regarding how many officers are present or whether there are signs alerting drivers of the checkpoint or the use of body and/or dash cameras are up to the local municipality. This is due to the limited funding these smaller counties may have available. For purposes of Fourth Amendment analysis, the choice among such reasonable alternatives remains with the governmental officials who have a unique understanding of and a responsibility for, limited public resources, including a finite number of police officers. *Sitz,* 496 U.S. at 454, 455, 110 S.Ct. at 2487.

Within his brief Jones requests that this verdict be subject to reversal and that the trial court determine what other ways the evidence found during Jones's checkpoint arrest can be allowed into evidence. During the suppression hearing the Solicitor Hubbard argued that if you throw out the stop and evidence stemming from the checkpoint you throw out the entire case.

Within his brief Jones makes it seems like that was the total of the Solicitor's argument. The Solicitor's argument was much broader than what was stated in Jones's brief. He argued that Jones use of the exclusionary rule is an attempt to reverse this decision for the granting of a new trial. The solicitor argued that the exclusionary rule was created to punish bad police conduct. That the sole purpose of the rule is to deter Fourth Amendment violations in where suppression fails to yield appreciable deterrents exclusion is unwarranted. (Suppression hearing Tr. p. 189 lines 5-13) The Solicitor argued that the trial court was being asked to punish Mississippi officers for following Mississippi law so that evidence found can't be used in the State of South Carolina. (Tr. p. 189 lines 14-18) The Solicitor's explanation of the exclusionary rule to the trial Court was absolutely correct. The Respondent argues that since the checkpoint occurred in Mississippi to determine if the exclusionary rule should apply only decisions from the United States Supreme Court and Appellate Courts of Mississippi should apply. These Mississippi law enforcement officers were applying Mississippi state law. If the events that would give rise to a criminal charge occurred beyond the territorial reach then the government cannot grant to its courts the authority to apply its criminal laws to those events, then the judiciary of that government is said to have "jurisdiction" over the offense. 4 Crim. Proc. §16.1 (4th Ed.)

Jones is requesting this Court to exclude evidence discovered by Mississippi law enforcement officers while lawfully applying Mississippi law. The exclusionary rules does not exist for the punishment of law enforcement officers doing their duty and properly applying the law for their jurisdiction. To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule

serves to deter deliberate, reckless or grossly negligent conduct, or in some circumstances recurring or systemic negligence. *Herring v. U.S.,* 555 U.S. 135, 144, 129 S.Ct. 695, 702 (2009).

The balancing test that should be used by the courts to determine the exclusion of evidence should be, to permit the introduction of evidence obtained in the reasonable good faith belief that a search or seizure was in accord with the Fourth Amendment. *U.S. v. Leon,* 468 U.S. 897, 909, 104 S.Ct. 3405, 3413 (1984), quoting, *Illinois v. Gates,* 462 U.S. 255, 103 S.Ct. 2317, 2340 (1983). During this safety checkpoint Deputy Johnson and Thompson followed all of the verbal criteria existing within the Smith County Sheriff's Department. In the Mississippi Court of Appeals case of *Dale v. State* the Lafayette County Sheriff had no set departmental procedures oral or written that officers must follow during a road block, and the Court still deemed that was not in violation of the Fourth Amendment. The Court ruled in *Dale*:

> This was a stationary roadblock in which every car that drove through it was stopped. There was no discretion here on the part of the officers as the officers did not choose who to stop and who not to stop. It should also be noted the Mississippi Supreme Court has previously upheld roadblocks where there were no set procedures stating law enforcement officer's discretion was limited by stopping everyone.

Dale v. State, 785 So.2d 1102, 1106 (2001), citing, *Drane v. State,* 493 So.2d 294 (1986). Deputy Johnson and Thompson testified they stopped every vehicle which the Mississippi Courts believes takes away the randomness outlawed in *Prouse.* The procedures of stopping each driver is a very effective means of determining whether drivers are properly licensed. By doing so, many people are stopped and each person's license is examined. This is far more effective than the random stops the Supreme Court outlawed in the *Prouse* case. *Dale,* 785 So.2d at 1106.

In the instant case the deputies followed all of the procedures concerning safety checkpoints that has been established by the country sheriff. They also allowed each vehicle to

proceed after only briefly stopping in order to produce a valid driver's license and proof of insurance. Jones was only detained because as Deputy Johnson testified upon approaching the vehicle and speaking to Jones he smelled what he thought to be burned marijuana. This reveals sufficient probable cause that a crime is being committed to detain for further investigation. These officers followed procedure and the current law. The exclusionary rule was not created to punish law enforcement officers following the law. When investigators "act with an objectively 'reasonable good faith belief' that there conduct was lawful," the exclusionary rule will not apply. *U.S. v. Chavez,* 894 F.3d 593, 608 (2018), quoting, *Davis v. U.S.,* 564 U.S. 229, 236-237, 131 S.Ct. 2419 (2011).

Jones argues that there exist insufficient probable cause for the stop. The Supreme Court had decided that a stop at a roadblock does constitutes as a seizure. A Fourth Amendment "seizure" occurs when a vehicle is stopped at a checkpoint. Checkpoint stops are "seizures" within the meaning of the Fourth Amendment. *Martinez-Fuerte,* 428 U.S. at 556, 96 S.Ct. at 3082.

Probable cause exist when "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *U.S. v. Grubbs,* 547 U.S. 90, 95, 126 S.Ct. 1494, 1499 (2006). Jones was stopped lawfully at a safety checkpoint. Deputy Johnson testified that as he approached Jones's vehicle he smelled burned marijuana. That was sufficient enough for a further investigation. Any further detention must be based on consent or probable cause. *Martinez-Fuerte,* 428 U.S. at 567, 96 S.Ct. at 3087. During both suppression hearing and trial testimony, Deputy Johnson testified that when he approached Jones's vehicle he smelled what he thought was burned marijuana. Once he smelled the marijuana he had sufficient probable cause to detain Jones.

Deputy Johnson testified that since he was the county chief narcotic officer he knew the smell of marijuana. (Suppression hearing tr. p. 100 lines 20-21) In *U.S. v. Ortiz,* 422 U.S. 891, 95 S.Ct. 2585 (1975) The United States Supreme Court concluded that officers are entitled to draw reasonable inferences from facts in light of their knowledge and their prior experiences. *Ortiz,* 422 U.S. at 897, 95 S.Ct. at 2589. Once there was what Deputy Johnson knew from his experience was the smell of marijuana he had the right to further detain Jones. Probable cause is a practical, non-technical concept, based upon the conventional considerations of everyday life on which reasonable and prudent men, not legal technicians act. It arises when the facts and circumstances within an officer's knowledge, or of which he has reasonably trustworthy information, are sufficient to justify a man of average caution in the belief that a crime has been committed and that particular individual committed it. *Mack v. State,* 237 So.3d 778, 786 (2017) Police officers who had extensive experience in narcotics investigation who smelled odor of burned marijuana in defendant's automobile after they had stopped vehicle for a driver's license check had probable cause to search defendant's vehicle. *Miller v. State,* 373 So.2d 1004 (1979). Deputy Johnson then testified that upon request Jones gave him consent to search the vehicle. It is equally well settled that one of the specifically established exceptions to the requirements of both warrant and probable cause is a search that is conducted pursuant to consent. *Schneckloth v. Bustamonte,* 412 U.S. 218, 219, 93 S.Ct. 2041, 2043-44 (1973). Once Jones consented to the search he waived all Fourth Amendment protections. Therefore, the "Scooby Snax" found within his vehicle was sufficient evidence for an arrest. After his arrest for DUI any search incident to the arrest was lawful. Among the exceptions to the warrant requirement is a search incident to a lawful arrest. *Arizona v. Gant,* 556 U.S. 332, 338, 129 S.Ct. 1710, 1716 (2009).

Once Undersheriff Patterson ordered that the vehicle to be impounded, which would have been done regardless due to Jones being arrested for DUI, (Suppression hearing tr. p. 174 lines 8-18) the Smith County Sheriff's Department with the assistance of the MBI received a search warrant for the vehicle. (Tr. p. 2838 lines 14-19) At that time the MBI had the ability to search the vehicle and recover any evidence within Jones's vehicle relating to the murder of this five children.

The safety checkpoint followed all of the verbal criteria established by the Smith County Sheriff's Department. There was absolutely no testimony by Deputies Johnson or Thompson that boredom was the reason that the checkpoint was created. During the checkpoint all that was asked by law enforcement was permission to view driver's licenses and proof of insurance, and to check in the vehicle for proper child restraints. If all of those things were proper the driver was allowed to proceed. This occurred for the five drivers that approached the checkpoint prior to Jones.

When Jones approached the checkpoint Deputy Charles Johnson of the Smith County Sheriff's Department testified that he immediately smelled what he thought to be burned marijuana. Once he recognized the smell of marijuana he had probable cause to further detain Jones. After Jones pulled over and exited his vehicle Jones gave Deputy Johnson consent to search. At that time he relinquished any Fourth Amendment protections regarding the search of his vehicle.

The checkpoint followed the decisions made by the United States Supreme Court and Mississippi Appellant Courts. All of the evidence obtained was gathered lawfully and allowed in evidence lawfully by the trial court. Jones is not entitled to a new trial. The decisions of the trial Court should be affirmed.

V.

The trial court did not err in not allowing Jones to bring in a forensic pathologist to testify that he was not malingering since numerous doctors for the state and defense had already testified that he was no malingering, thereby making this testimony cumulative.

Standard of Review:

In criminal cases the appellate court sits to review errors of law only. *State v. Wilson,* 345 S.C. 1, 5, 545 S.E.2d 827 (2001). The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion. *State v. Gaster,* 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). In criminal cases, the appellate court is bound by factual findings of the trial court unless an abuse of discretion is shown. *State v. Blackwell-Selim,* 392 S.C. 1, 3, 707 S.E.2d 426 (2001). The trial court's decision will not be disturbed on appeal absent a clear showing of an abuse of discretion. *Mitchell Supply Co. v. Gaffney,* 297 S.C. 160, 162-163, 375 S.E.2d 321, 322-323 (Ct. App. 1988) An abuse of discretion occurs when the trial court's order is controlled by an error of law or when there is not evidentiary support for the trial court's factual conclusions. *Stokes – Craven Holding Corp. v. Robinson,* 416 S.C. 517, 536 S.E.2d 485, 495 (2016). Error is harmless when it could not reasonably have affected the result of trial. *State v. Simmons,* 423 S.C. 552, 566, 816 S.E.2d 566, 573 (2018).

Relevant Facts:

Dr. Richard Frierson the court appointed forensic psychiatrist questioned Jones's I.Q. score of 87. He determined that a person receiving a computer science degree especially finishing Summa Cum Laude from Mississippi State cannot possibly have an I.Q. of 87. Due to this result, requested Jones be examined by a neurophysiologist, (Tr. p. 4585 line 20 – p. 4586 line 5), so Dr. Frierson enlisted the assistance of Dr. Kimberly Kruse. He requested she gather additional information to help with differential diagnosis and to conceptualize Jones. (Tr. p. 4911

lines 11-15). Dr. Kruse described her role as to assist Dr. Frierson's clinical opinion by providing objective data. (Tr. p. 4913 lines 21-23).

Dr. Kruse examined Jones on February 22, 2019. She testified that she first administered three test, Dot Counting Test, Rey 15 item memory test, and the Rey 15 item recognition trial. (Tr. p. 4916 lines 12-18). Dr. Kruse also testified that she administered the Structured Inventory of Malingered Symptomatology (SIMS) test, Structured Interview of Reported Symptoms (SIRS) test, and the Miller Forensic Assessment of Symptoms (M-Fast) test.

Dr. Kruse testified that the SIMS test is a structured interview for malingered symptomology. (Tr. p. 4928 lines 15-16). She testified that it helps if individuals are overreporting or underreporting symptoms. She thought that Jones performed within normal ranges except for the area of psychosis. (Tr. p. 4928 lines 19-23). She stated that Jones final score was a six and anything over a one is clinically significant. (Tr. p. 4929 lines 1-2) She testified that even low levels of endorsement of such inconsistent bizarre of typical symptoms is highly suggestive of malingered psychosis. (Tr. p. 4929 lines 3-5). She stated that Jones systems are inconsistent with schizophrenia, yet meant to mimic those with schizophrenia. (Tr. p. 4929 lines 15-16).

Dr. Kruse testified that the SIRS test was created to break down a patients reported symptoms into different areas. (Tr. p. 4929 line 25 – p. 4930 line 1). This test is purely looking to see if there is psychosis. (Tr. p. 4930 lines 1-2). There is also the category of probable and absurd symptoms, which he had the highest rate of responding. The test found that to be in the definite range of malingered symptomology. (Tr. p. 4930 lines 15-18).

The M-Fast test also yielded a significant score of the likelihood of malingering. (Tr. p. 4931 lines 1-2). Jones report of symptoms was beyond that of individuals with schizophrenia

would typically respond to, and also an unusual symptom course. If you look at symptoms over the course of time, his report of symptoms did not match up with those individuals with known psychotic disorders. (Tr. p. 4931 lines 12-17) Dr. Kruse made the determination that all three of these test reveal that Jones was malingering. (Tr. p. 4931 lines 21-23)

Dr. Kruse was the only person that did any personality assessment or any testing of psychosis any validity of how he is reporting symptoms, and any testing to rule out or rule in malingering. (Tr. p. 4927 lines 14-19)

Dr. Frierson used the testing results of Dr. Kruse to make his final analysis. Through he never determined Jones as malingering he made some determinations regarding his mental health. Dr. Frierson determined that Jones suffered from a substance induced psychotic disorder from spice or synthetic cannabinoids. He also diagnosed him with severe cannabis use disorder, and a mild alcohol use disorder. (Tr. p. 4558 lines 22-25). Dr. Frierson actually testified that not for the spice they would not even be in court. (Tr. p. 4559 lines 17-21)

Dr. Frierson used facts right after Jones's arrest to determine Jones suffered from a substance induced psychotic disorder. Twenty-four hours after Jones's arrest it was stated that Jones was sweating profusely, foaming at the mouth, screaming one minute and not making a lot of sense. (Tr. p. 4589 lines 8-11) Dr. Frierson believed that all of those things could be a presentation of an acute psychotic episode of schizophrenia. However, without any sort of treatment twenty-four hours later Jones was back to pretty much his normal self. His father actually stated that, "I saw my Tim again." (Tr. p. 4589 lines 12-17) Dr. Frierson believed that this behavior was not caused by schizophrenia or a psychotic disorder due to schizophrenia. Dr. Frierson stated that this illness would not get better without any treatment, nor does not get better on its own. (Tr. p. 4589 lines 17-20)

Upon the conclusion of the testimony of Dr. Kruse and Dr. Frierson in the guilt phase of the trial, the State decided to argue at closing that Jones was malingering. Upon the final verdict of guilty Dr. Julie Dorney, a forensic psychologist who testified on the behalf of Jones decided to contact her colleague Dr. Andrina Flores. Dr. Flores received the testing results and watched the video of Dr. Kruse's testimony. She wrote and submitted an eleven page affidavit to Jones referencing all of what she perceived as errors of Dr. Kruse testing and final results. Within this affidavit Dr. Flores also accused Dr. Kruse of violating numerous ethical principles. In this affidavit she was going to contact Dr. Kruse and possibly report her to the Board of Medical Examiners for these ethical violations.

Dr. Flores was then subpoenaed to testify during the penalty phase of this trial. The State objected to any testimony of Dr. Flores. The trial court decided to allow Jones to proffer Dr. Flores testimony then later decide later if she would be allowed to testify.

During her testimony Dr. Flores testified regarding the mistakes and possible unethical behavior or Dr. Kruse. The trial court admonished her for this testimony because he believed it was pitting witnesses. The trial court would allow her to testify about her findings, however, he did not want any testimony regarding any mistake made by Dr. Kruse. Dr. Flores testified as to her new findings from the testing given by Dr. Kruse. It was her medical opinion that Jones was not malingering, testing was consistent with a person with schizophrenia or a delusional disorder.

At the conclusion of Dr. Flores proffered testimony Jones argued that in the sentencing phase all mitigation evidence is admissible, and mental illness is a statutory mitigator. Jones argued that the Eighth Amendment requires the admission of mitigating evidence, and the relaxation of the rules of evidence. Jones also argued that Dr. Kruse left the jury with a false impression that Jones was malingering which can be devastating accusation in a death case.

The State vehemently objected due to the fact Dr. Flores had already threatened Dr. Kruse of reporting her to the ethical board which is borderline to witness intimidation. This cause Dr. Kruse into being reluctant in testifying in order to answer to these accusations. The State also argued to the fact that Dr. Flores was coming up to testify at the last minute without warning, the State did not have an opportunity to prepare for this testimony.

Jones now argues that the arguments of the State during trial supports the necessary reasoning of why excluding the testimony of Dr. Flores constituted reversible error. He argues that the testimony of Dr. Flores would "destroy" the scientific and objective basis of Dr. Kruse opinion that Jones was malingering. The State submits that the testimony would be cumulative to that of other doctors who testified that Jones was not malingering and suffering from a mental illness. The State argues that Dr. Kruse's assessment that Jones was malingering was not a major factor in the final decision of the jury. This is due to the fact there was an extraordinary amount of evidence revealing that Jones knew moral and legal right from wrong when he committed the offense. This is what the jury must find in order to make a determination if Jones was not guilty by reason of insanity. The State also believes that sufficient evidence was presented revealing that Jones had the capacity to appreciate the criminality of his conduct or was able to conform his conduct to the requirements of the law.[15] The State submits that due to the evidence of Jones's mental state presented by the State and Defense, the denial of her testimony did not prejudice Jones. Even if the denial of her testimony was done in error that error is harmless. The decision of the trial court regarding this matter does not afford Jones a reversal of his death sentence.

[15] *See,* S.C. Code Ann. §16-3-20(C)(b)(6)(2020).

Discussion

Jones argues that the results of the testing of Dr. Kimberly Kruse was unethical or at best negligent. They make the presumption that the testimony of Dr. Flores would have "picked apart" or "ensure that Dr. Kruse never steps into a criminal courtroom again." The State would argue that any evidence presented by Dr. Flores would have been viewed as all other evidence presented before the jury. The jury would have been obligated to observe Dr. Flores testimony, and qualifications, to make an opinion against all the other witnesses. The jury's responsibility would be to compare the opinions and viewing the case as a whole to come to a verdict.

Jones within their brief attempts to make Dr. Kruse look unqualified to make an opinion of as malingering. Dr. Kimberly Kruse has been chief neuropsychologist and hospitalist at Prisma Health for eleven years. She is also affiliated with Kershaw County Hospital System and Compass Health. Her job was to use psychological instruments, neuropsychological testing instruments to determine if patients meet criteria for psychological or neuro-cognitive disorders. (Tr. p. 4912 lines 14-24) Dr. Kruse has been qualified in the South Carolina judicial system approximately seventy-five times as an expert in the field of neuropsychology that spans civil, criminal and probate court matters. (Tr. p. 4913 lines 4-7) Dr. Kruse is a neuropsychologist. This allowed her to give an opinion as to Jones's traumatic brain injury. Something Dr. Flores was not qualified to make. (Tr. p. 5630 lines 5-15)

Jones argues that the Solicitor objected to Dr. Flores' testimony because she would "professionally and personally destroy" Dr. Kruse; and, that she would "pick apart" Dr. Kruse. This argument had nothing to do with Dr. Kruse's findings, this has to do with Dr. Flores basically accusing Dr. Kruse of unethical behavior, and threatening to report her to the ethical board. During cross-examination Dr. Flores stated:

> "Now let me explain how the process works because this does not necessarily go to filing. I have not contacted the licensing board. The ethical regulations for psychologist state that first, I must contact Dr. Kruse, inform her of my concerns. Depending on her response if her response is not satisfactory, the next piece is then I would have to go and follow-up." (Tr. p. 5638 lines 16-22)

So it would have to be to her "satisfaction" as to whether or not she would actually file an ethical violation. This equates to witness intimidation. The fact Dr. Flores would make the determination as to whether or not Dr. Kruse's license would be in jeopardy. This has nothing to do with her findings and should not be allowed. In *State v. Inman*, this Court stated:

> "Improper intimidation of a witness may violate a defendant's due process right to present his defense witnesses freely if the intimidation amounts to 'substantial government interference with a defense witness' free and unhampered choice to testify."

State v. Inman, 395 S.C. 539, 562, 720 S.E.2d 31, 43 (2011), quoting, *United States v. Saunders,* 943 F.2d 388 (1991).

Inman, was all about the intimidation by the Solicitor of a defense expert witness. However, it should apply against the defense equally. No expert witness should be afraid to testify or defend their findings because of fear of retaliation from another witness with accusations of unethical behavior. This is what the Solicitor was referring to when he made his argument. He never doubted the Dr. Kruse's findings, however, he argued against the intimidation of his witness. It was the opinion of the Solicitor that since his witness is now being intimated from coming back and defending her findings Dr. Flores should not be allowed to present her findings before the jury. The statement by the Solicitor had nothing to do with the truthfulness of Dr. Kruse's testimony it had all to do with fairness. A witness who essentially intimidate another witness by reporting them for an ethical violation, thereby causing their opinion not to be questioned should not be allowed to testify before a jury and relay only their opinions.

It was very clear to the trial court that Dr. Kruse was being at least influenced if not intimidated to testify. This was stated during Jones's argument to allow Dr. Flores testimony before the jury:

MR. YOUNG: Well, it would be improper to put Dr. Kruse up to testify to the same thing again anyway. Nobody has made any threats against Dr. Kruse.

THE COURT: I'm considering filing an ethical violation is not a threat?

MR. YOUNG: No, sir. I mean, Judge, we all operate under the threat if we do something unethical - -

THE COURT: **Oh, it's a threat.**

MR. YOUNG: No. I mean, it's a fact of life. We all operate - -

THE COURT: **You're telling me that the fact that there's been a presentation that an ethical violation may be coming down the pike wouldn't influence her somewhat?**

MR. YOUNG: The fact that somebody says I think there's problems with you testimony and if you did something unethical, I'm duty bound to report it. No that's not a threat that's a fact.

THE COURT: **Sounds like a threat to me. I'm a little older than you.** (Tr. p. 5644 line 10 – p. 5645 line 3)

Jones wishes to equate this action and testimony as a "battle of the experts." This is hardly that, this can easily be considered as witness intimidation. For that reason alone it would definitely be proper for the trial court to not allow Dr. Flores to testify before the jury.

The State also argues that the exclusion of Dr. Flores does not violate the Eighth Amendment due to the fact prior to her proffered testimony numerous doctors on both sides testified as to Jones's mental illness. There is no reversible error when evidence was obtained through other witnesses. *State v. Mercer,* 381 S.C. 149, 672 S.E.2d 556 (2009).

Prior to the proffered testimony of Dr. Flores numerous doctors testified and provided records concerning the mental illness of Jones. Dr. Tora Brawley found Jones not to be

malingering. (Tr. p. 4652 lines 2-5) Dr. Bhushane Agharker diagnosed Jones as having schizophrenia as well as minor neuro-cognitive disorder. (Tr. p. 3777 lines 22-24) Dr. Agharker requested the assistance from Dr. Erin Bigler an expert in neuropsychology. (Tr. p. 3935 lines 18-19) Dr. Bigler stated there is a connection between a traumatic brain injury and the development of schizophrenia. (Tr. p. 3947 lines 9-11) Dr. Donna Maddox testified that she diagnosed Jones as suffering from schizophrenia. (Tr. p. 5379 lines 4-6) Dr. Beverly Wood chief of psychiatry at the South Carolina Department of Corrections diagnosed Jones with schizoaffective disorder. (Tr. p. 4719 lines 8-10) Dr. Julie Dorney testified that Jones has schizophrenia and schizo-affective disorder, mood disorder or bipolar side (Tr. p. 4789 lines 5-8) Dr. Richard Frierson a state witness testified that Jones was very sensitive to abandonment. He was abandoned by his mother and when his ex-wife left him that's a bigger threat to him than somebody who didn't have that childhood history. (Tr. p. 4578 lines 18-22) With all of these experts testifying as to the existence of a mental illness the exclusion of Dr. Flores did not cause Jones any prejudice because the question was not if Jones was mentally ill, but did he know at the time he committed the offense a legal and moral wrong from a legal or moral right. The defendant has the burden of proving the defense of insanity by a preponderance of the evidence. S.C. Code Ann. §17-24-10(B)(2020). That determination is made by the jury and Jones failed to prove this by a preponderance of the evidence.

It is an affirmative defense for Jones to prove, at the time of the commission of the act constituting the offense, the defendant as a result of mental disease or defect, lacked the capacity to distinguish moral or legal right from moral or legal wrong or to recognize the particular act charged as morally or legally wrong. S.C. Code Ann. §17-24-10(A) (2020). In *State v. Bundy* this Court decided that it was proper for the trial court to give the following charge to the jury:

> "In order to relieve himself from responsibility for a criminal act by reason of mental unsoundness, the prisoner must show that he was under a mental delusion by reason of mental disease and that at the time of the act he did not know that the act he committed was wrong, or criminal or punishable, either the one or the other. Because, notwithstanding his mind may be diseased, **if he is still capable of forming a correct judgment as to the nature of the act as to its being morally or legally wrong, he is still responsible for his act and punishable as if no mental disease existed at all."**

State v. Bundy, 24 S.C. 439 (1886)(emphasis added).

Jones has not proven he did not know a moral and legal right from a moral and legal wrong. In order for the jury to make a determination as to the capacity of Jones to appreciate the criminality of his conduct and his ability to conform his conduct was impaired, the jury must look at this case as a whole. The jury must consider not only the mental illness of Jones but his actions during and after he committed this offense. If he made attempts to hide or destroy evidence or lied to his family or law enforcement, this proves that he knew what he did was wrong and did have the ability to conform his conduct but chose not to.

The actions of Jones prior and after he committed these murders revealed his mental illness did not cause him to commit this offense, and that he knew the wrongfulness of his actions. Mr. Wise who supervised the boys and girls club the after school program the three older children were enrolled, testified that she never had a reason to be concerned about Jones's mental health or well-being. (Tr. p. 2588 lines 10-13) She saw Jones almost daily when he went to pick up the children so she had an ample opportunity to see if a mental health issue was presented by Jones. Another person that saw Jones almost on a daily basis was his former supervisor Jim McConnell. Mr. McConnell testified that he never observed anything in him or his behavior that caused him to be concerned about Jones's mental status. (Tr. p. 2647 lines 6-9). Ms. Christiana Ehlke the babysitter of the two youngest children also testified that she never had any concerns

about Jones's mental status. She actually stated that she thought that Jones was very intelligent. (Tr. p. 2684 lines 2-6) A lay witness may testify as to a defendant's mental state. *State v. Williams,* 386 S.C. 503, 516, 690 S.E.2d 201, 62, 69 (2010).

After Jones committed these murders he developed a plan and actually wrote it out. This reveals that he was aware that what he did was legally and morally wrong, and attempted to escape arrest and prosecution. After his arrest in his vehicle during a lawful search law enforcement found a handwritten note that stated, "head to campground melt bodies," "sand to dust small pieces," "day one burn bodies," "day two sand down bones," "day three MB and dissolve and discard."[16](Tr. p. 2924 lines 2-6) Also found in Jones's vehicle was a Walmart receipt dated September 3, 2014. Six days after committing these murders Jones purchased dust masks, 3M goggles, jab saw, multiple saw blades, muriatic acid, and a five gallon pail. (Tr. p. 2853 lines 3-15) These were items that Jones wish to use to dispose of the bodies. Found in his vehicle was his passport, and he made internet searches regarding countries with extradition treaties with the United States. Upon being arrested Jones also lied to law enforcement. At the safety checkpoint upon being arrested for possession of synthetic marijuana he was questioned about the whereabouts of the children. He initially told law enforcement that he did not have any children. (Tr. p. 2786 lines 14-17) Then he told them that he only had three children who was with their mother. (Tr. p. 2787 lines 5-9) Then he told them that he dropped off the children at the Walmart near his house. (Tr. p. 2941 lines 18-20) All of these actions reveals that Jones knew moral and legal right from a moral and legal wrong. So the testimony regarding Jones's mental illness does not excuse the fact he understood moral and legal right from wrong and was able to conform his conduct to the requirements of the law. So the testimony of Dr. Flores was not

[16] Dr. Frierson would later testify that Jones informed him that "MB" meant Mexican border. (Tr. p. 4693 line 24 – p. 4694 line 2)

necessary since multiple doctors had already testified as to Jones's mental illness in the guilt and penalty phases of this trial. Only one doctor, Kruse, mentioned that Jones was malingering. The fact that Jones was accused of malingering was not as big of a factor as Jones presents. Even the trial court recognized that "overall malingering has been mentioned, but it's not been the focus of the whole trial at all." (Tr. p. 5641 lines 12-14)

The examination and testing was done by Dr. Kruse on February 22, 2019. Dr. Flores received the report of Dr. Kruse and test results from Jones. (Tr. p. 5610 lines 1-4) The main argument and what gave the court pause was the late date that Dr. Flores was being called to testify. Jones had these results prior to trial and have spoken to Dr. Kruse. They could have easily allowed Dr. Flores to review these test results prior to trial. Dr. Flores and Dr. Dorney who was called by Jones during the guilt phase work near each other. Dr. Flores subleases an office from Dr. Dorney's practice. (Tr. p. 5609 lines 10-11) So Jones had access to Dr. Flores to allow her the review these test results in order to express her opinion as to the scores and what was incorrect about these results prior to trial. Jones either thought this inquiry was not necessary or this was part of their strategy in order to surprise the State.

Jones argues that the Eighth Amendment requires a relaxing of the rules of evidence in the admission of evidence during the sentencing portion of a capital murder case. Just because this is a capital case does not mean that the trial court is immune from excluding evidence that violates South Carolina law or can be considered not relevant.

During Dr. Flores proffered testimony she went in depth of what she thought were mistakes made by Dr. Kruse. This amounted to Jones pitting witnesses against each other which is not allowed pursuant to South Carolina law. See, *State v. Sapps*, 295 S.C. 484, 369 S.E.2d 145 (1988)(It is improper for the solicitor to cross-examine a witness in such a manner as to force

him to attack the veracity of another witness,) *Burgess v. State,* 329 S.C. 88, 495 S.E.2d 445 (1998)(No matter how a question is worded, anytime a solicitor askes a defendant to comment on the truthfulness or explain the testimony of the adverse witness, the defendant is in effect being pitted against the adverse witness. This kind of argumentative questioning is improper.) Much of Dr. Flores testimony were pitted against the findings of Dr. Kruse instead of relying on her own findings. She testified that Dr. Kruse had omitted a validity section of the PAI. (Tr. p. 5610 lines 14-15) She also testified that she had a feeling something was being hidden from her report. (Tr. p. 5611 lines 22-23) This occurred to the point that the trial court had to limit Dr. Flores testimony to only her findings and not any possible error of Dr. Kruse. (Tr. p. 5615 lines 4-8) It was proper for the court to exclude this testimony. The affidavit signed by Dr. Flores also should not be allowed to be admitted for the same reasons. Any evidence that pits one witness against another rather it be for prosecution or the defense violates South Carolina law and should not be permitted.

If this court finds that the exclusion of Dr. Flores testimony was done in error you should determine that any error was harmless. The Constitution entitles a criminal defendant to a fair trial not a perfect one. *U.S. v. Hasting,* 461 U.S. 499, 508-509, 103 S.Ct. 1974, 1980 (1983). In *Delaware v. Van Arsdall,* 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed2d 674 (1986), and *State v. Mercer,* 381 S.C. 149, 672 S.E.2d 556 (2009), the exclusion of cumulative evidence can be considered harmless.

In *Van Arsdall,* the United States Supreme Court decided that, "Whether such an error is harmless in a particular case depends on . . . whether the testimony was cumulative. *Van Arsdall,* 475 U.S. at 684, 106 S.Ct. at 1438. In *Mercer,* this court recognized that Jones sustained no prejudice from the exclusion of this cumulative evidence. *Mercer*, 381 S.C. at 163, 672 S.E.2d at

563. As stated earlier within this section there were numerous doctors that have testified that Jones was not malingering and he suffered from numerous mental illnesses. Jones expressed closing arguments made by the solicitor in the guilt and penalty phase that emphasized that Jones was malingering. Closing arguments cannot be considered evidence. See, *Sosebee v. Leeke,* 293 S.C. 531, 535, 362 S.E.2d 22, 24 (1987). All that the jury must consider regarding competency, mental illness or malingering are the expert testimony given by doctors that testified regarding Jones's mental health. Many of the witnesses testified that Jones was not malingering including Dr. Frierson, a State witness. The trial court was proper in not allowing Dr. Flores' testimony in evidence since her testimony was cumulative of many of the other doctors who have already testified. As the trial court reiterated the fact that Dr. Kruse found Jones was malingering was minor compared to the other overwhelming evidence revealing that he was aware of his actions at the time he committed these murders and he knew moral and legal right from wrong as revealed by his actions after he committed these murders by attempting to destroy and hide bodies, lying to law enforcement, and summoning up a plan to flee to Mexico. So the cumulative nature of Dr. Flores testimony caused no prejudice once it was excluded by the trial court so any error that this presented should be considered harmless.

VI.

The trial court did not violate due process nor the Appellant's Fifth and Fourteenth Amendment rights by excluding certain irrelevant testimony of Roberta Thornberry and Timothy Jones, Sr.

Standard of Review:

In criminal cases the appellate court sits to review errors of law only. *State v. Wilson,* 345 S.C. 1, 5, 545 S.E.2d 827 (2001) The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion. *State v. Gaster,* 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). In criminal cases, the appellate court is bound by factual findings of the trial court unless an abuse of discretion is shown. *State v. Blackwell-Selim,* 392 S.C. 1, 3, 707 S.E.2d 426 (2001). The trial court's decision will not be disturbed on appeal absent a clear showing of an abuse of discretion. *Mitchell Supply Co. v. Gaffney,* 297 S.C. 160, 162-163, 375 S.E.2d 321, 322-323 (Ct. App. 1988) An abuse of discretion occurs when the trial court's order is controlled by an error of law or when there is not evidentiary support for the trial court's factual conclusions. *Stokes-Craven Holding Corp. v. Robinson,* 416 S.C. 517, 536 S.E.2d 485, 495 (2016).

Relevant Facts:

During the guilt phase of trial Jones attempted to get into evidence the past abuse of his grandmother Ms. Roberta Thornbery and his father Mr. Timothy Jones, Sr. The trial court ruled that their past was not relevant in what the jury must determine relating to guilt or innocence or a verdict of not guilty by reason of insanity. Upon Jones being found guilty of the five counts of murdering of his own children, the penalty phase of the trial began pursuant to South Carolina

law.[17] During the penalty phase Jones once again requested the trial court to allow the jury to hear the background of abuse that occurred to Ms. Thornbery at the hands of her step-father.

The trial court allowed Jones to argue why this evidence is relevant regarding the actions of Jones in the murdering of his five children. Jones argued that the defense has an obligation under the guidelines under the American Bar Association (ABA) to conduct an investigation in a capital defense going back at least two generations. This is because people are a consequence of their upbringing. Jones argued that what happened to Ms. Thornbery when she was a child was important because she essentially became his default mother. (Tr. p. 5458 lines 2-6)

Jones argued that under the Supreme Court's case law mitigation is anything the defense offers as a reason to give the defendant life, and suggested that the jury can look at what Ms. Thornbery went though and say Jones's death is something this family does not deserve. (Tr. p. 5459 lines 14-19)

The State argued that what has happened to Mrs. Thornbery occurred before Jones was even born. This had no impact on Jones's mental state when he committed this offense. So, it should have no impact on this trial. The State also argued that Jones is attempting to create sympathy for this witness. The State argued that Mrs. Thornbery's testimony would be another arbitrary factor which had nothing to do with the penalty and the decision the jury has to reach. (Tr. p. 5462 lines 4-8).

The trial court finally decided that Mrs. Thornbery childhood and the behavior of her step-father was not relevant and should not be presented to the jury by Ms. Thornbery. (Tr. p. 5463 lines 5-7) The trial court found that interjecting this information would create a whole other

---

[17] When the State seeks the death penalty, upon conviction or adjudication of guilt of a defendant of murder, the court shall conduct a separate proceeding. S.C. Code Ann. §16-3-20(B)(2020).

layer of irrelevant facts. (Tr. p. 5463 lines 12-13) The fact that at age three Mrs. Thornbery was dropped at an orphanage was not relevant and just confused things. (Tr. p. 5463 lines 15-18)

Jones further argued that the exclusion of this information violates his due process rights under the Fifth and Fourteenth amendments, and his right to a fair trial under the sixth amendment. He argued that pursuant to the ABA they are required to gather evidence of Jones's family going back three generations. The trial court noticed that defendant's counsel did go back thoroughly three generations of Jones's family history. (Tr. p. 5465 lines 12-14) However, the concern was relevance. The court allowed Jones to mention that she came from a broken home and traumatic history. However, the details of what she experienced was not relevant. (Tr. p. 5465 lines 18-21)

As for the testimony of Ms. Deborah Gray, the social historian, the trial court ruled that she could testify as to Mrs. Thornbery's childhood. However, she was not allowed to get into the details. (Tr. p. 5648 lines 5-8) The trial court stated, "too much details is too much details. And the jury, I don't think, needs all the details of her childhood, but the fact that she had Tim, Sr. at age 12, I think is probative and not undue prejudicial to the state." (Tr. p. 5648 lines 21-25)

The State argued that much of what Ms. Gray could present would be hearsay. (Tr. p. 5649 lines 7-13). The trial court responded that Ms. Gray must give facts and not go into details. The trial court stated that Ms. Gray should, "put some rails on the alley where you don't go in the gutter." (Tr. p. 5649 lines 21-24) The trial court also informed Jones's counsel that, "I'm going to allow you some latitude and if I say you know, 'just move on,' that means you've gotten too detailed." (Tr. p. 5650 lines 3-5)

Jones now argues that the trial court erred in excluding relevant testimony by forcing Jones to convey the social history in a condensed way through a third party. Jones also argues

that they were rushed though their portion of the penalty phase by the trial court telling them to "move on." Jones claims this denied his right to due process. The State submits that the trial court was correct in not allowing the testimony of Ms. Thornbery. The State submits that the trial court was correct in not allowing this testimony into evidence. Irrelevant testimony should not be allowed into evidence regardless if it is meant for mitigation. Jones wish to allow testimony regarding the childhood of Ms. Thornbery. This evidence was introduced only to enflame the emotions of the jury, it had no probative value nor did it reveal any reasons Jones committed his crimes. No evidence should be allowed before the jury for the sole reason to raise their emotion. If the evidence has no probative value, or is not relevant to Jones in mitigation it should not be allowed into evidence. Rule 403, SCRE. The trial court was correct in not allowing Mrs. Thornbery to get into her troubled childhood since it is was not relevant to the present case nor could be used in mitigation.

Jones also argued that the trial court erred in not allowing the testimony of Deputy Barry Sowards. Deputy Sowards was one of three law enforcement officers who was responsible for transporting Jones from Mississippi to South Carolina. During this transport they stopped to rest at a Krystals. Two of the officers went inside the establishment, Deputy Sowards remained with Jones. Deputy Sowards had a firearm in his lap. Jones inquired about the gun. He told Deputy Sowards that the did not need that weapon because he was not going to hurt anyone. Deputy Sowards informed him that the gun was not for him but for "everyone trying to kill you."(Tr. p. 5346 lines 8-16)

Jones argued that the response from deputy Sowards was relevant as to reveal how the public felt about Jones, and how he would be treated in prison if given a life sentence. The trial court ruled this was not relevant to Jones's character, or the belief of the public against him.

Rather, the statement goes to the training of the officer. It was his job to protect Jones and that is only what Deputy Sowards was informing him of, this testimony was not relevant. The court was correct in their decision that Deputy Sowards was just relaying to Jones what was his duty as a law enforcement officer. This statement had nothing to do with what was possibly waiting for Jones in prison if given a life sentence.

The State submits that the proffered testimony would simply raisie the emotion of the jury. It had no probative value in mitigation of punishment. The testimony of deputy Sowards was also not relevant to Jones's mitigation and was properly not allowed into evidence. The State requests affirm the lower court's ruling. Discussion:

Relevance

Jones is the belief that all evidence being presented in mitigation in a death penalty case is relevant. Jones cites the United States Supreme Court Case of *Eddings v. Oklahoma,* 455 U.S. 104, 112 S.Ct. 869 (1982). In *Eddings,* he Supreme Court ruled that, the sentencer may not refuse to consider, as a matter of law any relevant mitigating evidence. *Eddings,* 455 U.S. at 114. The evidence regarding the unfortunate abuse of Mrs. Thornbery as a child was not relevant because Jones was not yet born. Jones argues that it was relevant due to the fact that Mrs. Thornbery essentially became Jones's mother when his biological mother left the home. There was no testimony given by Mrs. Thornbery, Tim, Sr. or the social historian Ms. Deborah Gray revealed that she ever abused Jones. The past abuse of Mrs. Thornbery had no effect upon Jones's character, prior record, or the circumstances of the offense. Since it was not relevant to any of these matters the trial court was allowed to exclude any testimony by Mrs. Thornbery regarding her abusive childhood. The trial court may properly exclude irrelevant evidence that

does not have any bearing on Jones's character, prior record, or the circumstances of the offense. *Lockett v. Ohio,* 438 U.S. 586 n. 12 (1978).

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Rule 401 SCRE. Evidence is relevant if it tends to make more or less probable a fact in issue. *State v. Huggins,* 336 S.C. 200, 519 S.E.2d 574 (1999). Jones wished to present these matters before the jury because according to them since Mrs. Thornbery took part in raising Jones. So her harsh upbringing had an effect on Jones. The fact at issue was the mental state of Jones at the time he committed this offense. The fact Mrs. Thornbery was sexually and physically abused by her step-father had no bearing on Jones murdering his five children. The abuse of Mrs. Thornbery occurred prior to Jones's birth. There was no evidence that Mrs. Thornbery ever abused or harmed Jones more harshly than any parent raising a child. The facts of Jones's grandmother's childhood and what his father and her husband's had to endure because of his grandmother's PTSD does not make him murdering his children more or less probable. Although case law allows the expanding of Rule 403[18], it does not allow this introduction of evidence that is not relevant to the actual case.

Jones attempted to introduce the irrelevant childhood trauma or Mrs. Thornbery because his childhood was not so extreme to evoke sympathy from the jury to the point of mercy in order for the jury not to sentence Jones to death. Evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental

[18] Although relevant, evidence may be excluded if it probative value is substantially outweighted by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Rule 403 SCRE.

problems, may be less culpable than defendants who have no such excuse. *Penry v. Lynaugh,* 492 U.S. 302, 319, 109 S.Ct. 2934, 2947 (1989) *rev'd on other grounds, Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242 (2002). Jones did not have a worse childhood than most. Jones wanted to bring in irrelevant evidence of his parents and grandparents childhood to play on the emotions of the jury. In order to sway the jury that due to his grandparents and parents upbringing which occurred before Jones's birth or as an infant, it had some impact and a reason as to why he committed these heinous crimes.

Deborah Gray the social historian testified as to the childhood of Jones. She did testify as to problematic behavior of Mrs. Thornbery due to her drinking and the PSTD she suffered duet to her abuse by her step-father. However, none of his behavior was ever pointed to Jones personally. There was an event where shot at her husband Larry, and her and Larry was arrested for possession of marijuana. (Tr. p. 5693 lines 3-9). Mrs. Thornbery also attempted to run over Larry with her vehicle, and during Thanksgiving dinner she stabbed Larry with a butter knife. When these fights occurred Jones would go into his room and pull the covers over his head. All of this occurred when Jones was between the ages of three and ten.

Tim Sr. got remarried when Jones was twelve years old. (Tr. p. 5705 lines 4-8) Ms. Gray testified that Jones did feel somewhat unwanted by his step-mother, and Tim Sr. got arrested one time for a misdemeanor domestic battery when he got into a fight with his wife. (Tr. p. 5705 line 22 – p. 5706 line 21)

But during the testimony, Ms. Gray explained what seemed to be a normal childhood. Jones went through things that many children go though. At age twelve he would hang around skateboard friends and he really got into religion. Tim, Sr. told him that his thinking about religion was kinda warped so Jones stopped going to church. (Tr. p. 5707 lines 1-22). Jones did

tell her that he was sexually assaulted by someone in the neighborhood. (Tr. p. 5709 lines 12-16) He never told anyone. so there are no records of this ever occurring.

After the death of his aunt, his father did drink and became more combative. He would throw things but he never abused Jones during this emotional period. Ms. Gray testified that Jones made good grades during school until he got rebellious when he was in the eleventh grade and started drinking and doing drugs. (Tr. p. 5736 lines 3-22) After he got discharged from the Navy. he started doing drugs smoking marijuana and using heroin and cocaine. (Tr. p. 5741 lines 1-7) He got arrested and did a sixteen month term in prison. After this prison term he found religion again and turn his life around.

Again, the apparent reason why Jones wished his grandmother to testify as to her troubled childhood. It was for the sole reason to raise the emotions of the jury. The trial judge was correct in not allowing this information into evidence. The trial judge is given broad discretion in ruling on questions concerning the relevancy of evidence, and his decision will not be reversed only if there is a clear abuse of discretion. *State v. Alexander,* 303 S.C. 377, 380, 401 S.E.2d 146, 148 (1991). There was not an abuse of discretion here because it is clear the information relating to Mrs. Thornbery and her harsh upbringing had no relevance to Jones and his actions of August 28, 2014. It is clear that the only reason Jones wanted his grandmother to bring out this evidence is to raise emotions or pity from the jury. Evidence should not be allowed before the jury if there are only being raised for emotions when there is no probative value to the evidence.

Jones argues that according to the ABA they have a responsibility to find the social history of a defendant going back three generations. According to the American Bar Association

guidelines for the Appointment and Performance of Counsel in Death Penalty Cases defense counsel shall:

> Collect information relevant to the sentencing phase of trial including, but not limited to: medical history, (mental and physical illness or injury or alcohol and drug use, birth trauma and developmental delays); educational history (achievement, performance and behavior, special education needs including cognitive limitations and learning disabilities); military history (type and length of service, conduct, special training); employment and training history (including skills and performance and barriers to employability); family and social history (including physical, sexual or emotional abuse); prior adult and juvenile record; prior correctional experience (including conduct or supervision and in the institution/education or training/clinical services); and, religious and cultural influences.

ABA Guidelines for the Appointment and Performance of Counsel in death penalty cases, 11.4.1(2)(C)

Counsel is not obligated to go back three generations in the gathering of family history. Although Appellant's counsel did research back three generations it still is not automatically admissible if there is no relevance.

Jones also argues that it was improper for the trial court to exclude the testimony of Deputy Barry Sowards. It was their argument that this testimony reveals that if Jones is given a life sentence Jones would spend it either in solitary confinement or his life would be at risk. Jones also wanted to argue that he was not a danger to the community because he told Deputy Sowards that they did not have to worry about him. This evidence is not relevant as a mitigating circumstance. The trial court was correct in ruling that it is Deputy Sowards job to protect Jones as it is his job to protect all citizens. The fact he simply stated that the gun was not for his protection but for Jones's protection applies to all citizens not just Jones. This conversation did not reveal any lack of danger that the community may have from Jones, nor does it prove what would be Jones's outcome if he was to be given a life sentence. This decision by the trial court

was not erroneous and should be upheld. In the sentencing phase of a capital murder trial, the scope of the probative value is much broader than the guilt phase. *State v. Kornahrens,* 290 S.C. 281, 289, 350 S.E.2d 180, 186 (1986). However, the courts ability to exclude evidence not bearing on the defendant's character or his prior record is not limited. *State v. Dickerson,* 395 S.C. 101, 716 S.E.2d 895 (2011). A trial judge has broad discretion in ruling on questions concerning the relevancy of evidence and his decision will be reversed only if there is a clear abuse of discretion. *State v. Alexander,* 303 S.C. 377, 380, 401 S.E.2d 146, 148 (1991). Although relevant, evidence may be excluded if its probative value is substantially outweighted by the danger of unfair prejudice. Unfair prejudice within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily an emotional one. *Alexander,* 303 S.C. at 382, 401 S.E.2d at 149.

Penalty Phase

Jones also argues that during their portion of the penalty phase of this trial they were being rushed by the trial court. That the trial court mentioning for them to "move along" rushed Jones and made the jury think that this information was not relevant. The trial court did not rush the defendant's portion of the sentencing phase. They had ample opportunity to present sufficient evidence in mitigation, to sway the jury not to sentence Jones to death.

During the sentencing phase of trial, Jones presented eleven witnesses including Jones's grandmother, father, step-mother, two step-brothers and his step-sister. Two home videos and over thirty photographs of Jones's family were introduced into evidence. The social historian Deborah Gray testified concerning all of the background history of not only Jones but both parents, his grandmother, and his step-grandfather who was not a blood relative.

The trial court did not rush Jones's case. The trial court did what he said he was going to do. The trial court informed Appellant's counsel that he was going to make this statement any time Jones got to detailed. The court reasoned that it was not necessary getting too detailed into irrelevant matters. The abusive life of Mrs. Thornbery had nothing to do with Jones's mental state at the time of the crime nor relevant in mitigation.

The court expressed to Jones's counsel to "move along" when they got too detailed about non-relevant facts. The trial court told Jones to "move along" during testimony that Mrs. Thornbery's step-father used to throw boiling hot water on her and then beat her. (Tr. p. 5672 lines 10-15) He also told them to "move along" when there was testimony that Mrs. Thornbery step-father would beat her to point of unconsciousness. (Tr. p. 5674 lines 15-20) The court also expressed to Appellant's counsel to "move along" when they got into the school absences of Tim, Sr. (Tr. p. 5682 lines 2-9) There was also the discussion of Tim, Sr. knowing that Appellant's mother was a prostitute when Jones was an infant. The court asked for counsel to "move along" during this testimony. The court also expressed to Jones that they were getting into too much detail when Jones's mother lost her second baby. There was testimony that there was talk among the family that she self-aborted. There was no proof of this and the trial court thought that they should not get into this type of speculative testimony. (Tr. p. 5690 line 19 – p. 5691 line 5) He also asked Appellant's counsel to "move along" when there was testimony that Jones's mother would hide in a closet saying "her father is coming to get her." (Tr. p. 5685 lines 6-10) Even though the court expressed to Jones to "move along," the trial court never once told the jury to disregard this testimony or asked that it be struck from the record. The jury was allowed to consider all of this evidence, although it could possibly irrelevant to the case before this jury.

During the penalty phase, the trial court also allowed testimony concerning the Larry Thornaberry even though he was not a blood relative. (Tr. p. 5678 lines 12-19) The trial court also allowed testimony regarding the troubled childhood of Jones's mother, who stopped caring for him when he was an infant. (Tr. p. 5682 line 25 – p. 5684 line 2).The record reveals a hefty amount of evidence in mitigation that was actually presented for the jury to have mercy on Jones if they wished to do so. The fact Jones was ultimately sentenced to death does not excuse the fact the trial court allowed Jones to place on ample amount of evidence concerning Jones's background. There was never an issue of the exclusion of evidence in order for the jury to make a fair determination if Jones should be given a life sentence or sentenced of death.

Hearsay

According to the rules of evidence, "hearsay" is defined as a statement other than one made by the declarant while testifying at the trial or hearing offered in evidence to prove the truth of the matter asserted. Rule 801(c) SCRE. Though Ms. Deborah Gray was introduced as an expert in licensed clinical social work, she never gave any opinion regarding her findings that could be traced back to the unfortunate childhood of Mr. Thornbery. She recited facts received from third parties. Her entire testimony consist of hearsay testimony. The trial court did let her get into this information; therefore, the limitations made by the trial court was lawful. Since the trial court would have been within their legal right not to allow this information into evidence at all.

An expert witness may state an opinion based on facts not within his or her firsthand knowledge. *In re Manigo,* 389 S.C. 96, 106, 697 S.E.2d 629, 634 (2010). Expert witness testimony is a widely-recognized exception to the rule against hearsay testimony. *State v. Hutto,*

325 S.C. 221, 481 S.E.2d 432, 436 (1997). As stated by the Fifth Circuit of the United States Court of Appeals in *U.S. v. Williams:*

> The rationale for the exception to the rule against hearsay is that the expert because of his professional knowledge and ability, is competent to judge for himself the reliability of the records and statements on which he bases his expert opinion moreover the opinion of expert witnesses must invariably rest at least in part, upon sources that can never be proven in court. An expert's opinion is derived not only from records and data, but from education and from a lifetime of experience. Thus, when the expert witness has consulted numerous sources, and uses that information together with his own professional knowledge and experience to arrive at his opinion that opinion is regarded as evidence in its own right and not as hearsay in disguise.

U.S. v. Williams, 447 F.2d 1285, 1292 (1971)

The hearsay exception for experts was solely created for an expert to use records and interviews to pose an opinion regarding certain matter that a lay person does not have the qualifications nor expertise to offer. If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill experience, training or education, may testify thereto in the form of an opinion or otherwise. Rule 702 SCRE.

Ms. Gray only testified to one opinion from her testimony part of which came from the findings of Dr. Bigler. (Tr. p. 5702 lines 5-16) She opined that due to the violence in his home Jones had this period of fear, that she called "flight or fight." She testified that Jones was constantly afraid and would cry many times. This was a period in his life between ages three and ten. It was her opinion that the violence that existed caused these problems that started even when he was a toddler. The evidence concerning Mrs. Thornbery's childhood began after he was born. All of this hearsay testimony that Ms. Gray testified about that existed before this Appellant was born is not relevant. The trial court was correct in limiting the testimony in an

attempt not to allow this witness to go into too much detail. This hearsay, and irrelevant testimony was not the source of her expert opinion.

Jones argued that if what Ms. Gray was testifying to, was hearsay that that would have been remedied by allowing Ms. Thornbery, and Tim, Sr. testify first-hand about their experiences. The State argues that the trial court was correct in not allowing this testimony because it was irrelevant. The court allowed Ms. Gray to get into the background of Ms. Thornbery, Tim, Sr., Jones's mother Carolyn, and Roberta's husband Larry Thornbery who is not even a blood relative. The trial court did not have to do this because this was hearsay evidence that was the bases of her opinion.

The only hearsay evidence that was admissible for Ms. Gray's testimony was the information relating to Jones that occurred after he was born. This information was the source of Ms. Gray's opinion regarding the "flight or fight." This opinion is based on the fights and arguments that occur in the home in the presence. The purpose of these fights was not relevant, so the abusive childhood of Roberta was never relevant so the trial court limiting this information was definitely lawful.

For all these reasons, Jones has failed to show he is entitled to relief on this issue.

VII.

The trial court did not err in excluding the video of Jones's mother Ms. Cynthia Turner during the penalty phase due to the fact this video was not relevant and was just offered into evidence to sway the emotions of the jury.

Standard of Review:

In criminal cases the appellate court sits to review errors of law only. *State v. Wilson,* 345 S.C. 1, 5, 545 S.E.2d 827 (2001). In criminal cases, the appellate court is bound by factual findings of the trial court unless an abuse of discretion is shown. *State v. Blackwell-Selim,* 392 S.C. 1, 3, 707 S.E.2d 426, 427 (2001). The trial court's decision will not be disturbed on appeal absent a clear showing of an abuse of discretion. *Mitchell Supply Co. v. Gaffney,* 297 S.C. 160, 162-63, 375 S.E.2d 321, 322-23 (Ct. App. 1988). An abuse of discretion occurs when the trial court's order is controlled by an error of law or when there is not evidentiary support for the trial court's factual conclusions. *Stokes – Craven Holding Corp. v. Robinson,* 416 S.C. 517, 536 S.E.2d 485, 495 (2016)

Relevant Facts:

Ms. Cynthia Turner, Jones' mother, currently a patient in a mental hospital in New York. On April 1, 2019, the trial court approved Jones's request for a material witness court order allowing Ms. Turner's attendance in South Carolina for Jones's trial. (Tr. p. 3919 line 9 – p. 3920 line 1) Ms. Turner agreed to waive any hearing that she is in entitled to in New York and accepted going to South Carolina to testify. The mental health hospital challenged this order due to the fact they would not have anyone available to escort her, and she was not well enough to travel alone. (Tr. p. 3919 lines 16-20). An emergency hearing was held on May 8, 2019, and the request for Ms. Turner to travel to South Carolina to testify in Jones's case was denied. (Tr. p. 3919 lines 21-25).

Once her ability to travel to South Carolina was denied, Jones decided to have someone interview her and record it on video tape. (Tr. p. 3919 lines 22-23). The Prosecution was notified of this video tape statement; however, the taping occurred on May 10, 2014 during jury selection. (Tr. p. 3920 lines 6-7). This made the Solicitor unavailable to be able to participate in the recorded question and answer session.

This session took place on May 10, 2014. During questioning, Ms. Turner was asked many personal questions about her upbringing, and her marriage to Jones's father. Jones was mentioned a very few times. Mr. Turner stated that she was born in Racine Wisconsin but grew up in Chicago. She was one of nine children, and her father left the home when she was fifteen. She explained that he mother and father drank a lot and she drank at one time but she has since quit drinking about five or six years ago. Ms. Turner is not close to her mother nor any of her siblings. She stated that she never talks to them.

Ms. Turner stated that she met Jones's father either through a friend of his that was in their class in high school or through his family. She said that she did not know him that well, but they were together for five years and then got married. She explained that she did not get along with her mother-in-law, however, they used to prostitute together in Chicago. She explained that her mother-in-law had a temper and did not want her son to be married to her. She explained that the reason they got divorced was because she and Jones's father constantly got into fights. However, they never argued about who would get custody of Jones. She eventually lost custody of Jones to his father but cannot remember the reason why she lost custody. She eventually moved out of the home.

Ms. Turner stated that she had another child named Lydia who was stillborn and a son Daniel. She did not know his whereabouts. She stated that she gave many of her children away

for adoption. There were many things that Ms. Turner did not remember. She never remembered what it was like being a young mother nor why it was left up to Jones's father to raise him.

During this video, Jones was only twice mentioned, once when they were discussing why his father had custody, and another time when they were discussing a meeting that she had with Jones when he was an adult. Ms. Turner does not know Jones since she left the home when he was a toddler. She did not even know how many children he had or if they were boys or girls.

During the trial, Jones sought to introduce the video of his mother as evidence. Jones wanted the jury to see her in order to make a determination as to Jones' mental health issues. Jones argued that since the doctors testified that schizophrenia was hereditary this would allow the jury to form an opinion as to Jones's state of mine at the time he committed the offense. The Solicitor argued that first, due to Ms. Turner's mental health issues she was probably not competent to testify, and the Court should make that determination. Second, the Solicitor argued the State never disputed that Ms. Turner was not mentally ill; however, this does not prove that Jones suffers from the identical mental illness at the identical level as Ms. Turner. The Solicitor also argued that they were never given the opportunity to cross-examine Ms. Turner. Jones argued that they could have had someone present, or submitted questions. The Solicitor explained to the court that there had no one available due to the fact this video was made during jury selection.

The trial court decided to watch the video and then issue a ruling. After reviewing the video, the trial court decided that this video was not relevant and excluded it from being introduced into evidence. (Tr. p. 3927 lines 20-25) During the penalty phase, Jones again attempted to enter the video into evidence. He argued that this video should be allowed to be entered as evidence in mitigation. Jones believed that this revealed whether or not he has a

mental illness, so it should be allowed into evidence as mitigation. Jones also argued that it would give the jury a true impression of Ms. Turner. So they would not have the impression that she is in a "straightjacket drooling on herself," which is not an accurate portrayal of mental illness. Jones also argued that this would prove the testimony of the doctors regarding the genetic link of mental illness. The State argued that this video has no probative value and should be excluded pursuant to Rule 403. The introduction of this video would only to inflame the emotion of the jury.

Jones argued that the fact his mother could not come to the trial is a reason for a juror to have mercy and not give death. The trial court decided that Jones would not be prevented from making that argument, and the jury did not need to see the video for him to do so. Jones felt that Rule 403 should be cautiously invoked against a person facing the death penalty. The trial court found that this video is boarder than 403. There are too many unknowns concerning Ms. Turner's medical condition which the State has never challenged. Ms. Turner has a severe mental health issues which is why she is now institutionalized. The trial court ruled that Jones is welcomed to argue she is not present at the trial due to her mental illness. However, that the video is inflammatory and not proper to be introduced in the penalty phase of the case.

Discussion:

Relevancy

Jones argues that all information being introduced in mitigation in a death penalty case must be allowed. He cites *Eddings v. Oklahoma* in which the Supreme Court decided:

> Just as the state may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any **relevant** mitigating evidence.

Eddings v. Oklahoma, 455 U.S. 104, 114 (1982) (emphasis added).

The key to this matter is relevancy. That is the reason the trial court did not allow the video into evidence. For information to be allowed to be introduced, including evidence in mitigation, it must be relevant to the individual case. This video was not relevant for the purposes that Jones was requesting the trial court to allow this evidence in mitigation. The United States Supreme Court in *Lockett v. Ohio,* stated that "nothing in this opinion limits the traditional authority of a court to exclude as irrelevant evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." *Lockett v. Ohio,* 438 U.S. 586 (1978) fn. 12. The video is not relevant to Jones's character, his prior record, the circumstances of the offense, or his mental state at the time he committed this offense. It also does not prove the existence of any mental illness that he may have. It is just a video that Jones wishes to introduce to create emotion among the jury. No evidence should be allowed to be introduced for only the purpose as to inflame the emotions of the jury.

For this video to be allowed into evidence it must be relevant for the reasons Jones has argued. For evidence to be relevant to an inquiry, need not conclusively prove the ultimate fact in issue but only have "any tendency to make the existence of any fact that is consequence to the determination of the action more probable or less probable that it would be without the evidence." *McKoy v. North Carolina,* 494 U.S. 433, 439, 110 S.Ct. 1227, 1231 (1990), quoting, *New Jersey v. T.L.O.,* 469 U.S. 325, 345, 105 S.Ct. 733, 744 (1985).

During the trial, Jones argued that the video should be allowed into evidence because the video would be powerful evidence that bore directly to Jones's mental illness. That seeing Ms. Turner on this video would corroborate the experts concerning the inheritability of schizophrenia. The State never disagreed to the fact that mental illness is hereditary. The State's witness Dr. Richard Frierson testified himself that Jones had a family history of mental illness.

(Tr. p. 4550 lines 1-3). He also testified that a family history of mental illness make somebody more likely to eventually have a mental illness. (Tr. p. 4550 lines 4-8) Dr. Frierson also talked about Jones's child abuse and trauma that would have more likely for a person to have certain mental illnesses. (Tr. p. 4550 lines 14-17). Thus, the State's witness agreed to certain aspects of what Jones' argued that the video should be introduced to show. This makes this video irrelevant due to the fact this has never been made an issue regarding the State's case.

Jones also argued that the video was necessary to determine the credibility of their experts. Dr. Bhushane Aghardar, a witness for Jones, testified that there is a ten to fifteen percent chance for a person who had one parent with schizophrenia would get the illness. (Tr. p. 3785 lines 19-23) Therefore, there is an eighty-five to ninety percent chance that a person who has a parent with schizophrenia will not get the disease. This video does not prove that Jones has schizophrenia. Jones wishes to argue that this video would reveal how he could become in the future due to this disease. Dr. Aghardar testified there are different levels of schizophrenia. He used the example of Nobel Prize winner for Economics Dr. John Nash who suffered from schizophrenia. (Tr. p. 3780 lines 15-19). This video does not prove that Jones has the disease nor does it prove that in the future he would end up in the identical spectrum as his mother. Jones also argues that this video's content reveals Ms. Turner's background. Since she did not raise Jones, her background has no relevance in the development of Jones's character.

This video also does not prove that Jones knew a moral or legal right from wrong at the time he committed this offense. Pursuant to the South Carolina Code, "the judge shall consider, or he shall include in his instructions to the jury for it to consider, mitigating circumstances otherwise authorized or allowed by law and the following statutory aggravating and mitigating circumstances which may be supported by the evidence." S.C. Code Ann. §16-3-20(c)(2020)

One of the mitigating circumstances that is listed by law is, "The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired." S.C. Code Ann. §16-3-20(C)(b)(6)(2020). The video of Jones's mother in no way establishes what Jones was thinking at the time of the incident.

Other evidence, was, however, in the record. During his testimony State's witness Dr. Richard Frierson discussed factual evidence that he opined disproves Jones was not competent at the time he committed this murder. Dr. Frierson testified that schizophrenia never changed his opinion that Jones could recognize legal right from legal wrong or a moral right from a moral wrong. (Tr. p. 4688 lines 5-8). If this video was for the purpose to reveal that Jones suffered from schizophrenia this was not relevant concerning competency. Dr. Frierson testified that mental illness by itself does not equate to insanity. It has to impair your ability to distinguish right from wrong, legally and morally. (Tr. p. 4692 lines 21-24). Throughout the discussion, however, facts were discussed concerning Jones and his ability to "appreciate the criminality of his conduct or to conform…."

Jones requested the trial court to introduce the video of Ms. Turner; however, this video in no way establishes what Jones was thinking at the time of the incident. It in no way reveals that Jones was able to distinguish legal right from legal wrong or a moral right from a moral wrong. Dr. Frierson testified that on August 28-29, 2014, Jones was able to distinguish legal and moral right from legal and moral wrong. (Tr. p. 4945 lines 14-17.)

Dr. Frierson revealed factual examples as to why Jones knew a legal right from a legal wrong, or a moral right from a moral wrong. Jones failed to call 911 when Nahtahn collapses. Jones's reason for not calling 911 to summon help for his son was, "I was afraid I was going to get myself locked up." This was considered a legal wrong. (Tr. p. 4689 lines 5-17) Jones also

misled other people about his actions. He first called the babysitter Christina Ehlke and told her he would be back for babysitting the next Tuesday. Then he told her they were moving. Dr. Frierson thought this was to be a moral wrong, because she cared for the children and it would be very upsetting when she found out what he had done. (Tr. p. 4689 line 23 – p. 4690 line 20) Jones also spoke to his father telling him there was a change of plans. This was a legal and moral wrong. Tr. p. 4690 line 24 – p. 4691 line 8. Jones's ignored all of his great-grandmother Roberta's calls and texts. This again is what Dr. Frierson considered a legal and moral wrong. (Tr. p. 4691 lines 13-20).

Jones on September 1, 2014, did an internet search regarding South Carolina dumps and if a cadaver dog is able to pick up bodies dumped in a landfill. He was going to dispose of evidence. This was a clear indication that someone who knew what they did was wrong and was trying to hide it. This would be consistent with a fear of getting caught, a legal wrong. (Tr. p. 4691 line 21 – p. 4692 line 10).

Jones also researched the extradition laws to figure out where to run. He feared the legal problems in the United States, so he was trying to find a place to run. (Tr. p. 4693 lines 2-6) Jones knew he was in trouble and wanted to get out of the country. In the car law enforcement found a hand written note by him which stated, "Lexington camping MB." Dr. Frierson testified that he thought the "MB" meant Myrtle Beach, however, Jones told him that it meant "Mexican Border." (Tr. p. 4693 lines 8-19) Jones planned to camp and get rid of the bodies then make an attempt to escape to Mexico. In his car was his passport which revealed some ability to organize. Another note that was found in Jones's vehicle that stated, "Day one, burn up bodies, day two, sand down bones, day three, MB smiley face dissolve and discard." All of these actions is that of a legal wrong because he has formulated a plan to dispose of bodies and run to Mexico. (Tr. p.

4693 line 17 – p. 4694 line 12). There was another note that revealed Jones wanted to tie up loose ends. This note mentioned Christine, and Jim Mc. This was Christine Ehlke the babysitter and his superior at his job Jim McConnell. It also had "SG" which stood for Saxe Gotha Elementary the school his children attended. It also mentioned Amber who was his children's pediatrician. It mentioned his grandmother and bills that he needed to pay before he left. This revealed planning and thinking what he needed to do. (Tr. p. 4695 line 13 – p. 4696 line 11)

Jones also went to Walmart and purchased items he wish to use to dismember and dispose of the bodies. Jones bought, a jab saw, goggles, dust mask, a five gallon bucket, and muriatic acid. This is what Dr. Frierson considered being a legal wrong. (Tr. p. 4697 lines 4-13) Jones also told Lexington county investigators that voices in his head told him "nobody will ever believe that he didn't murder him. Now he you need to kill the rest of the children and get out of town." That is a legal wrong. Dr. Frierson testified that these were not voices but just anxious thoughts. These were not psychotic auditory hallucinations because they do not give three-step commands. (Tr. p. 4698 lines 16-19)

The moral wrongfulness comes from protecting family members, downloading the rape scene from the movie "American History X" which reveal Jones realization that other inmates would find his actiond morally wrong. In the back of the police car Jones cries out, "God forgive me." Asking God for forgiveness is really direct evidence that he realized the moral wrongfulness. In another statement that Jones made, "I don't deserve to go to the children's burials." That indicates that he really realize the moral wrongfulness of what he had done. (Tr. p. 4699 lines 1-14) Jones also feels ashamed of what he has done. Feeling a sense of shame indicates knowledge of moral wrongfulness. (Tr. p. 4700 lines 1-3)

Jones also decided to tell law enforcement untruths. He first told them that the smell of the decomposition in his vehicle was garbage. He also told them that he did not have any children; then said he had three children in Columbia with their mother; then he stated he left the kids at Walmart. These lies would be considered a legal wrongfulness. (Tr. p. 4700 lines 4-17) While being questioned by a Lexington County Deputy and an FBI agent, Jones lied about why he bought the saw, he told them they were for tree limbs. He did not give the truth about why he was trying to destroy evidence which would be a legal wrong. (Tr. p. 4700 lines 18-25).

Within Jones's brief he mentioned the aspects of the video that applied to Ms. Turner's life. These things had nothing to do with Jones. This video hardly mentioned Jones because they never had any connection. She gave up custody of Jones when he was three; however, she does not remember when this happened or why. This video does not offer proof of any mental illness Jones may have or his mental state at the time of the offense. This video contains no relevance pertaining to Jones mitigation so the trial court was lawful in not allowing its introduction.

Rule 403

The trial court ruled that this video was in violation of rule 403 of the South Carolina rules of evidence, therefore, it was not admissible. Rule 403 of the South Carolina rule of evidence states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 403 SCRE

Appellant court reviews a trial judge's ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives great deference to the trial court. *State v. Torres,* 390 S.C. 618,

625, 703 S.E.2d 226, 230 (2010). *Eddings* does not limit a court's ability to exclude evidence not bearing on the Defendant's character, his prior record, or the circumstances of the crime as being irrelevant. *State v. Dickerson,* 395 S.C. 101, 122, 716 S.E.2d 895, 906 (2011). A trial judge decision regarding the comparative value and prejudicial effect of evidence should be reversed only in exceptional circumstances. *State v. Collins,* 409 S.C. 524, 534, 763 S.E.2d 22, 28 (2014). The determination of the prejudicial effect of the evidence must be based on the entire record, and the result will generally turn on the facts of each case. *State v. Gillian,* 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007).

Jones wishes to argue that this video reveals that Ms. Turner has schizophrenia, but this was never disputed by the State. Jones also argues that this video reveals how ill equipped that Ms. Turner was to be a mother. Plenty of testimony that revealed more examples of Ms. Turner's unfitness as a mother than the video. The video does not reveal any evidence regarding Ms. Turner's lack of maternal instincts. Physicians testified that mental illness is hereditary, there was also evidence that was brought out that Ms. Turner left Jones at the age of three and had contact with Jones only once since. This video does not reveal anything regarding this mitigating information which was provided to the jury through other means.

Dr. Aghardar spoke of the abuse Jones's mother did to him as a baby. These things were not revealed in this video. Dr. Aghardar who did use the video for his research and his final diagnoses never spoke how abandonment of this mother effected Jones later in life. Dr. Julie Dorney a trial witness for Jones testified the developmental effects of Jones in a way psychologically, neurologically and in relationships and attachments had on Jones when he was abandoned by his mother. However, Dr. Dorney did not view the video, she got her information from records and the report of the social historian Deborah Gray. The video is not relevant in

order to see the attachment issues that could have existed in Jones. Other evidence are way more in-depth as to the abuse by Ms. Turner than this video.

The records and testimony of social historian Deborah Gray revealed traumatic occurrences that was inflicted by Ms. Turner to Jones while he was an infant. Ms. Grey testified that through her investigation she discovered that Ms. Turner would tell Jones to shut the F-up when he cried. She kept him in a locked room screaming not allowing his grandmother take care of him. She refused to feed him because she didn't want a fat baby, and as a baby would give Jones laxatives to "cleanse his soul." She would also put the baby in ice water because she wanted him to listen and also put the baby in winter clothing in the middle of summer because she did not want the baby skin to see light. (Tr. p. 5685 line 15 – 5686 line 12)

Ms. Gray also testified that when Jones was two and a half Ms. Turner took him to Florida. She later called Timothy Jones, Sr. because she got arrested and needed bail. She did not know where Jones was. He was later found at her mother's house. That's when Tim Sr. sued and received custody. On the video, Ms. Turner does not remember raising Jones as a baby or why Tim Sr. received custody. This video has absolutely no probative value when it comes to revealing the abuse and abandonment inflicted upon Jones at the hands of his mother. Jones wishes to introduce this video for the sole purpose of raising the emotions of the jury. This video contained absolutely no probative value as it pertains to mitigation.

In determining if there exist a violation of Rule 403, the trial court needs to balance the probative value against any unfair prejudice this evidence will present to the jury. Though the State argues the evidence of the video of Ms. Turner is not relevant to any mitigation that is being offered, even if relevant, its unfair prejudice outweighs any probative value it may have. A trial court may exclude relevant evidence if the danger of unfair prejudice substantially

outweighs its probative value. Probative value means, "the measure of the importance of that tendency to [prove or disprove] the outcome of the case. It is the weight that a piece of relevant evidence will carry in helping the trier of fact to decide the issues." *State v. Thompson,* 420 S.C. 386, 398, 803 S.E.2d 44, 50 (Ct. App. 2017), quoting, *State v. Gray,* 408 S.C. 601, 610, 759 S.E.2d 160, 165 (2014). Unfair prejudice means an undue tendency to suggest decision on an improper basis. *State v. Wiles,* 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009). Jones argues that the jury needed to see Ms. Turner's bizarre behavior to confirm the diagnosis and support Jones's expert's diagnosis of Jones. There was never any dispute raised by the State that Ms. Turner was mentally ill. The video tended to prove something that was never in dispute. This video has no probative value as to the mental capacity of Jones. It does not reveal that Jones sufferers from the identical mental illness or that any mental illness that he may have is on the same level or will ever raise to her level. It also does not reveal the mindset of Jones at the time he committed this offense, nor reveals if he knew the difference of a moral or legal right from wrong when he committed this offense.

This video has no probative value, all it was intended to do is to inflame the emotions and passions of the jury. If it does not have any probative value and is prejudicial then it should not be allowed into evidence. The admission of irrelevant and prejudicial evidence undermines confidence in the outcome of the trial. *Holmon v. State,* 381 S.C. 491, 493, 381 S.E.2d 171, 172 (2009). The trial court did the correct thing by not allowing this video into evidence as mitigation in the penalty phase of this trial.

Cross-examination

During trial the State argues that they were never given an opportunity to cross-examine Ms. Turner as part of this video. Jones argued that there were opportunities that existed for the

State to cross-examine Ms. Turner, or they could have submitted questions they wished her to be asked. This witness was not available until after the trial had begun. The video was made on May 10, 2014, after the commencement of the trial. The States position is that it was too late for a quality cross-examination since they were pre-occupied with the most important portion of any trial, the selection of the jury. Due to this lack of an opportunity to allow the State to conduct a proper cross-examination, this video should not be allowed to become testimony. The decision to exclude this video was lawful.

Jones has a right to present a witness in his own defense, however that right does not come with it the right to immunize the witness from reasonable and appropriate cross-examination. *Lawson v. Murray,* 837 F.2d 653, 656 (4th Cir. 1988). The Fifth Amendment provides no immunity from cross-examination for a witness who elects to testify. *Brown v. United States,* 356 U.S. 148, 156, 78 S.Ct. 622 (1958). Although the State will continue to argue that this evidence was not relevant, the State should still have been allowed to cross-examine this witness. Arriving at the truth is a fundamental goal of our legal system, and cross-examination is an indispensable tool in search for truth. *Davis v. Alaska,* 415 U.S. 308, 316, 94 S.Ct. 1105, 1110 (1974).

Jones was arrested on September 6, 2014, the case was called for trial on April 29, 2019. The trial Court signed a material witness order on April 1, 2019, three weeks before the beginning of the trial. Ms. Turner agreed to waive any hearing on April 17 only twelve days before the trial was going to commence. The facility refused to allow Ms. Turner to be released. An emergency hearing was then held on May 8, 2019, after the trial had began. At that time it was ordered that a videotape of Ms. Turner be made. This video was made on May 10 while the State was selecting a jury for this trial.

This case was pending for five years, and Jones waited two weeks prior to the beginning of trial to make an effort to get Ms. Turner to South Carolina to testify. An emergency hearing was held during jury selection, and the video was not made until the selecting of the jury had already commenced. The State should not be punished due to Jones waiting till the last minute to conduct this video recording. Important public policy protects even the prosecution's right to fair trials and the pursuit of the truth, so that similar principle should govern whether the recalcitrant witness was offered by the prosecution or by the defendant. *Murray,* 857 F.2d at 656.

Competency

During the attempt of Jones to introduce this video the State raised the possibility that this witness was not competent to testify due to her current state of mental illness. (Tr. p. 3920 line 25 – p. 3921 line 4) Within Rule 601 of the South Carolina Rules of Evidence in order to be competent to testify as a witness the person must have the ability to (1) perceive the event with a substantial degree of accuracy; (2) remember it; (3) communicate about it intelligibly; and, (4) be mindful of the duty to tell the truth under oath. *State v. Needs,* 333 S.C. 134, 143, 508 S.E.2d 857, 861 (1998).

The party opposing the witness has the burden of providing a witness is incompetent. *Id.* The State was never given the opportunity to challenge the competency of the witness. The video was made during jury selection, so this was done after the commencement of the trial. The trial court was also never given an opportunity to determine if Ms. Turner was competent to testify. The determination of a witness' competency to testify is a question for the court, and the trial court's decision will not be overturned absent an abuse of discretion. *State v. Camele,* 293 S.C. 302, 360 S.E.2d 307 (1987).

This witness is currently a patient in a mental health hospital, and her competency was never examined by a forensic psychiatrist. This witness was never questioned on her ability to determine the truth and if it is wrong to tell a lie. She also was not questioned in her ability to understand what it is to testify under oath. Due to Ms. Turner being a patient in a mental health facility, the Solicitor raised concerns regarding her competency. For a person who is mentally ill who is a currently institutionalized, competency becomes an issue. Jones argued that she was never found incompetent to testify; however, no evidence exist that she was ever examined by a forensic psychiatrist to make any type of determination regarding competency. The State was never given an opportunity to raise any objections to her testimony because of her competency, nor was the trial court ever given an opportunity to address her competency. This was a valid concern raised by the State during Jones's motion to allow her video into evidence which could not be addressed by the Court. Jones never gave the Court nor the State an opportunity to examine her mental ability to testify. So this video should have not been allowed into evidence until the State was given an opportunity to challenge her competency, or the court could make a determination. Since the State nor the trial court was ever given the opportunity, the question regarding her competency remains. This video should have not been allowed into evidence.

Harmless Error

The State would argue that the trial court was correct in not allowing the video of Ms. Turner into evidence. However, if this court finds that this was done in error the State argues that this error should be considered harmless. Most trial errors, even those which violate a defendant's constitutional rights, are subject to the harmless error analysis. *State v. Rivera,* 402 S.C. 225, 741 S.E.2d 694, 705 (2013) The harmless error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or

innocence and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error. *Delaware v. Van Arsdall,* 475 U.S. 673, 106 S.Ct. 1431 (1986).

In *State v. Graham*, this court determined what should be considered when making a determination of the harmless error. In *Graham,* this court decided:

> Whether such an error is harmless in a particular case depends upon a host of factors…the factors include the importance of the witness testimony in the prosecution's case whether testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony or the witness on material points, the extent of cross-examination otherwise permitted, and of course the overall strength of the prosecutors case.

State v. Graham, 314 S.C. 383, 386, 444 S.E.2d 525, 528 (1994)

The State argues that the importance of the video is minimal due to the fact Ms. Turner does not remember many things concerning Jones. She does not remember raising him as an infant, or why she lost custody. She did not even realize how many children had. Jones argues that this video is necessary to prove that schizophrenia is hereditary, to determine the credibility of the witnesses, as to whether he was not guilty by reason of insanity, to dispel to the jury notions of institutionalize people, and reveal the feelings of abandonment Jones felt when his mother left him when he was an infant.

The things Jones wishes to prove though this video are not mentioned, so this video does not prove. The fact that schizophrenia is hereditary was never disputed by the State. The State did dispute that Jones suffers from that mental health disease. That is not proven by this video. This video proves that Ms. Turner suffers from this mental illness; however, that fact was never in dispute. The State always admitted that Ms. Turner currently suffers from schizophrenia. That is what this video proves but it does not prove that Jones suffers from this illness. It also does not

prove the credibility of any of the witnesses. First, because most of the doctors that were called by Jones had not viewed the video, and second, it only proves that Ms. Turner is the only one suffering from the mental illness not Jones. This video does not prove that he did not know legal right from legal wrong or moral right from moral wrong at the time he committed the offense. So it does not prove not guilty by reason of insanity. Nor does it prove any effects of any abandonment by Ms. Turner since she does not even remember when she left Jones or as to why his father received custody.

Some of the evidence Jones wish to present through this video is cumulative. Jones wish to present that he suffered from abandonment issues due to his mother leaving him at such a young age. However, this was testified to by Dr. Julie Dorney who did not watch the video. So the jury has already heard this evidence from Dr. Dorney without the aid of the video. The video does not bring any new evidence the jury had not already heard. Jones also wishes to bring in this evidence in order to reveal that he also suffers from schizophrenia. This diagnoses was testified by Dr. Aghardar, and Dr. Maddox. This video did not reveal the mental illness of Jones and other evidence Jones attempts to bring out though this video was testified to by two doctors, so it is cumulative.

Jones also wishes to use this video to reveal the abuse Jones suffered at the hands of Ms. Turner. This video does not reveal this abuse because Ms. Turner does not remember taking care of Jones as an infant. This abuse however, was presented to the jury through the testimony of Jones's father Timothy Jones Sr. and the social historian Deborah Gray.

Any error that could occur from not allowing this video into evidence can also be considered harmless because this video would not affect the result of the penalty phase of this trial. Error is harmless when it could not reasonably have affected the result of the trial. *State v.*

Reeves, 301 S.C. 191, 391 S.E.2d 241 (1990). Jones argues that this video would reveal that he has schizophrenia; that it would prove the doctors who testified that mental illness is hereditary; that it would dispel the thoughts that the jury might have in a person who is mentally ill; and would go to the abandonment issues that Jones feels because his mother left him as an infant.

This video does not reveal what mental health issues Jones is suffering from. It does reveal that Ms. Turner suffers from a mental illness which was never in dispute. There is no statement within this video that reveals any mental health illness of Jones. Dr. Bhushan Aghardar was the only expert called by Jones who viewed the video. He did not have much to say regarding the video only that it reveals that Ms. Turner suffers from schizophrenia which was never in dispute. Any abandonment issues Jones may suffered is not displayed by this video since Ms. Turner does not even remember when she left Jones or why his father ended up with custody. Any testimony regarding any abandonment issues was given by Dr. Dorney who did not view the video. This video does not reveal the mental state of Jones at the time he committed this offense so it cannot reveal competency. All of the abuse suffered by Jones as an infant at the hands of his mother was revealed by Ms. Gray the social historian, and his father Timothy Jones, Sr., during testimony. It was never stated within this video.

This video did not reveal any evidence that was not previously testified to. It did not reveal any of the alleged mental health issues that was suffered by Jones due to the fact he was hardly mentioned. Ms. Turner did not raise Jones and had no involvement in his life, so she was not able to reveal any information regarding his personal history or upbringing. The exclusion of this evidence had no bearing on the final result of the trial. The information that was generated that was related to Jones personally was revealed by family members who knew him personally or witnesses who testified from records which revealed Jones's personal life and mental health

history. Ms. Turner did not have the ability to do either, so this video would not have been substantial in the final determination. It revealed very little evidence concerning Jones and raised issues that were never in dispute. Its exclusion did not reasonably effected the outcome of the trial; therefore, if its exclusion is considered an error that error was certainly harmless, and should not result in a reversal of the final decision of the jury.

VIII.

The trial judge did not abuse his discretion in admitting autopsy photographs of the five murdered children for the jury's review during the penalty phase. The trial judge correctly found the probative value substantially outweighed the risk of any possible unfair prejudice to Appellant as the photographs corroborated testimony of witnesses, and additionally showed the circumstances of the crime and the character of the person who committed the crime, factors which a jury may consider during the sentencing phase of a capital trial.

Standard of Review:

The materiality, relevance, and admissibility of evidence are within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *State v. Rosemond,* 335 S.C. 593, 596, 518 S.E.2d 588, 589 (1999). An abuse of discretion occurs when the conclusions of the trial court lack evidentiary support or are controlled by an error of law. *State v. Anderson,* 386 S.C. 120, 126, 687 S.E.2d 35, 38 (2009). The relevancy, materiality, and admissibility of photographs as evidence are matter left to the sound discretion of the trial court. *State v. Nance,* 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996). "A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances." *State v. Collins*, 409 S.C. 524, 534, 763 S.E.2d 22, 28 (2014). "In the sentencing phase of a capital murder trial, the scope of the probative value is much broader than the guilt phase." *State v. Torres,* 390 S.C. 618, 623, 703 S.E.2d 226, 229 (2010) (citing *State v. Kornahrens,* 290 S.C. 281, 289, 350 S.E.2d 180, 186 (1986)).

Relevant Facts:

During the penalty phase Jones moved to exclude photographs of the scene where the bodies were found and autopsy photos. Defense counsel argued that the introduction of these photographs would violate Rules 401 and 402 of the South Carolina Rules of Evidence, submitting that the photographs were not necessary to substantiate any material facts or

conditions during the penalty phase. (Tr. p. 5126 line 24 – p. 5127 line 3). Further, defense counsel argued that these photographs were not needed to prove the statutory aggravating factors in order for the jury to impose a sentence of death since the State already proved during the guilt phase that Appellant was responsible for the murder of more than one person and the murder of children under the age of eleven, both of which are statutory aggravating factors which allows a jury to impose a sentence of death.[19] Defense counsel also argued that these photographs were not relevant because the trial court ruled that were not relevant during the guilt phase. It was their opinion that it was "the law of the case." (Tr. p. 5128 line 21 – p. 5129 line 2). Finally, defense counsel argued that the photos do not reveal the conditions of the bodies as Jones left them, noting there was expert testimony by Dr. Ross that heat caused "accelerated decomposition." (Tr. p. 5129 lines 8-15).

The State argued that in the penalty phase of a capital case photos are always allowed into evidence to show the "bodies of the victims in the same condition as [the defendant] … left them," and how he left them, as "[i]t shows his character, the work of his hands." (Tr. p. 5130 lines 18-25). Since Jones left them on the side of the road to decompose they are admissible because – he left them to rot, "put them in bags and left them out in the hot sun, he did that deliberately … [h]e knew it would enhance and speed up decomp." (Tr. p. 5131, lines 1-4). This reveals something about who he is, "his character," and makes these photos relevant. (Tr. p. 5131, lines 2-4). These photos could be considered prejudicial, but not unfairly so, and the high probative value outweighs any danger of unfair prejudicial effect.

---

[19] The judge shall consider, or he shall include in his instructions to the jury for it to consider, mitigating circumstances otherwise or allowed by law and the following statutory aggravating and mitigating circumstances which may be supported by the evidence: (a) Statutory aggravating circumstances: . . . (9) Two or more persons were murdered by the defendant by one act or pursuant to one scheme or course of conduct. (10) The murder of a child eleven years of age or under. S.C. Code Ann. §16-3-20 (C)(a)(9-10) 2020.

The Solicitor expressed that Dr. Ross could use the photos to reveal the decomposition. To explain the cause of death but not the manner. She could also use these photos to explain the difficulty explaining the cause of death of Nahtahn, Abigail, and Merah. These three children she had to rule them as a death by homicidal violence, because their bodies were too decomposed to name an exact cause of death. (Tr. p. 5132 lines 11-20).

The Solicitor informed the court there were 569 photos. (Tr. p. 5132 line 23). He offered just "a few … for each child and anything [Dr. Ross] needs to best present her testimony. (Tr. p. 5132, lines 23-25). He chose to select the ones that he felt were relevant to reveal the acts of Jones, his character, and the facts of the crime itself, things that must be shown during the penalty phase of a death penalty case. (Tr. p. 5133, lines 1-8). The Solicitor decided to request to introduce photographs that reveals how Jones placed the children in the garbage bags. This goes directly to the circumstances of the crime and directly to Jones's character. (Tr. p. 5150 lines 8-11) The Solicitor also argued that he wish to request the introduction of photos revealing how Jones left the bodies to decompose. That also reveals his character because that was what he intended. (Tr. p. 5150 lines 18-21). Lastly, the Solicitor argued, though the defense suggests the photographs could be submitted in black and white, that Jones tried to introduce photos in the guilt phase to support a mental illness, and the defense "weren't even will to use black and white" photos. (Tr. p. 5153 lines 13-18).

The trial court ruled that pursuant to rule 401, 402, and 403 of the South Carolina Rules of Evidence the photos at the scene depict the bodies in the condition as Jones left them. They all are of similar nature, graphicness, and the depiction of each of the children collectively. As for the autopsy photos the trial court decided that the character and conduct of cramming children in the bags is a lack of respect for those bodies. Jones packed the children in bags, contorting the

bodies in different positions, and placed them in the woods. The State has the right to show the jury what he did, and the road pictures did not show that. (Tr. p. 5156, line 13 – p. 5157, line 9).

Discussion:

"To constitute *unfair* prejudice, the photographs must create a 'tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one." *State v. Kelley,* 319 S.C. 173, 178, 460 S.E.2d 368, 370-71 (1995) (quoting *State v. Alexander,* 303 S.C. 377, 377, 401 S.E.2d 146, 149 (1991) (emphasis added). In discussing similar evidentiary rulings in their cases Pennsylvania courts have often quoted:

> A criminal homicide trial is, by its very nature, unpleasant and the photographic images of the injuries inflicted are merely consonant with the brutality of the subject of inquiry. To permit the disturbing nature of the images of the victim to rule the question of admissibility would result in exclusion of all photographs of the homicide victim, and would defeat one of the essential functions of a criminal trial, inquiry into the intent of the actor. There is no need to so overextend an attempt to sanitize the evidence of the condition of the body as to deprive the Commonwealth of opportunities of proof in support of the onerous burden of proof beyond a reasonable doubt. Further, the condition of the victim's body provides evidence of the assailant's intent, and, even where the body condition can be described through testimony from a medical examiner, such testimony does not obviate the admissibility of photographs.

Com. v. Robinson, 864 A.2d 460, 502 (Pa. 2004) (quoting *Com. v. Rush,* 646 A.2d 557, 560 (Pa. 1994)).

The State argued that these photographs at the crime scene are necessary to corroborate testimony. "If the offered photograph serves to corroborate testimony, it is not an abuse of discretion to admit it." *State v. Collins,* 409 S.C. 524, 534, 763 S.E.2d 22, 27 (2014) (quoting *State v. Nance,* 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996)). During the penalty phase Detective Dave Lawrence of the South Carolina Law Enforcement Division (SLED) testified as what he saw when the bodies were found. He testified that he and other law enforcement officers

were led to a scene in a remote location in Alabama. He actually said that it was so remote that, "you could go miles without seeing a house." (Tr. p. 5182 lines 17-20). They drove down a dirt and gravel road about forty or fifty yards from the main highway; there were nothing but trees surrounding them. (Tr. p. 5184 lines 14-25). He testified that they got out of their cars walked to a clear area that looked like an old logging area. The children were located about one hundred and fifty yards away from where they stopped. (Tr. p. 5185 lines 1-5). He stated that the bodies were labeled and slowly lifted and placed into a body bag. (Tr. p. 5192 lines 20-24). They then cut open the bags just enough to see if they there were human remains inside. Once it appeared to be human remains they stopped looking. (Tr. p. 5193 lines 2-10). He testified that he was actually one of the individuals that look inside each bag to identify its contents. (Tr. p. 5193 lines 22-23).

Dr. Ross's testimony was also was corroborated by the autopsy photographs. Dr. Ross, testified that the body of Elias arrived wearing a Saxe Gotha Elementary tee shirt; there was some evidence of animal activity and tissue loss to one arm. (Tr. p. 5222 lines 1-14). Merah was found in a blue sleeping bag, not wearing any clothes, and missing one arm. (Tr. p. 5223 lines 3-24). Gabriel was found in a bag face down knees underneath him. His right leg was disarticulated at the knee his foot going in the opposite direction. This was because he was stuffed in the garbage bag. (Tr. p. 5225 lines 12-23). There was also a photograph of the ligature marks she testified to during the guilt phase. (Tr. p. 5226 lines 16-19). Abigail was wrapped in sheets. She was wearing a portion of a diaper. (Tr. p. 5227 lines 3-10). Nahtahn was found wrapped in a "ninja turtles" comforter wearing nothing. He had an injury to elbow (she did not know if it was pre or post-mortem). He also had a wound in which the bone was exposed – a wound that appeared to have been "caused by a sharp instrument like a saw or knife." (Tr. p. 5232 lines 2-4).

All of this testimony was aided by reference to the autopsy photographs, and corroborated the evidence. "It is well settled in this state that '[i]f the photograph serves to corroborate testimony, it is not an abuse of discretion to admit it.' " *State v. Torres,* 390 S.C. at 623, 703 S.E.2d at 229 (quoting State v. Nance, 320 S.C. at 508, 466 S.E.2d at 353).

These photographs were also relevant to reveal the character of Jones. The purpose of the penalty phase of a death penalty case is to determine if aggravating circumstance exist that should warrant death. The Jones' character must become an issue, rather it be mitigating or damaging. As the South Carolina Supreme Court stated in *State v. Shaw*:

> The purpose of the bifurcated trial proceeding is to permit the introduction of evidence at the pre-sentence hearing that normally would be inadmissible at the guilt determination proceeding. The pre-sentence hearing is for the introduction of additional evidence in extenuation, mitigation, or aggravation of punishment. The statute does not exclude from the consideration of the sentencing authority any evidence received at the guilt determination stage. To the contrary, the sentencing authority is required to consider all the evidence received at the guilt determination stage regarding the circumstances of the crime and the characteristics of the individual defendant together with additional evidence, if any, in extenuation, mitigation or aggravation of punishment.

State v. Shaw, 273 S.C. 194, 208, 255 S.E.2d 799, 806 (1979).

The Solicitor argued that the crime scene and the autopsy photographs were admissible in order to reveal the character of Jones. In particular, autopsy photographs may be presented to the jury in an effort to show the circumstances of the crime and character of the defendant. *Torres,* 390 S.C. at 624, 703 S.E.2d at 229 (finding "close-up" autopsy photographs were admissible: "The net effect of the photographs was to show what Torres did to the [victims] which goes straight to circumstances of the crime."). These photos also will reveal the condition as Jones left them where he knew because of the conditions their bodies will quickly decompose. In determining whether to recommend a sentence of death, the jury may be permitted to see

photographs which depict the bodies of the murder victims in substantially the same condition in which the defendant left them. *Kornahrens, supra; see also State v. Woomer,* 278 S.C. 468, 299 S.E.2d 317 (1982). Jones argued that the condition of the bodies that were found at the side of the road in Alabama was not in the condition as he left them. He argues that it is highly prejudicial for the trial court to allow those photographs into evidence. Though testimony of law enforcement and the admission by Jones himself he led the officer to the site where he dumped those bodies. There is proof that Jones dumped the bodies of his children on a remote country road on September 6, some nine days after the murder took place. There was testimony from officers that at the time he was stopped in Mississippi there was already the smell of decomposition within Jones's vehicle. Jones dumped these bodies right before he was caught at the Mississippi safety checkpoint. He did not lead the officers to these bodies until three days later, twelve days after they were murdered. There is no doubt Jones left those bodies in that remote area so they would never be found. There was little doubt that leaving their bodies in such a remote wooded area in Alabama during the September heat will cause them to decompose at a faster rate than normal. Especially since they were already decomposing prior to him dumping them. There was also no doubt that while in this very rural wooded area animals would begin to feeding on their bodies. Jones left these bodies in an area where it would be inevitable they would arrive in the condition they were found. The photographs made at the recovery scene and autopsy were definitely relevant, revealing the character of Jones.

During a death penalty trial the character of the defendant is important so the jury can come to an informed decision regarding the penalty. Evidence in mitigation regarding Jones's lifestyle, education, family unit, and prior offenses are relevant. However, also relevant are the circumstances of the crime he committed and at what lengths did Jones go in order to commit his

crime and avoid prosecution. Regarding his character what the jury must further consider is the age of these victims all under the age of 9 and the fact he murdered his own children, and threw them on the side of the road to rot. The conditions of these bodies were highly relevant for the jury to make the determination if Jones should receive the ultimate punishment, the loss of his life.

The fact that these photos were gruesome should not be a final determining factor as to their relevance. It has long been established that "[a] trial judge is not required to exclude relevant evidence merely because it is unpleasant or offensive." *State v. Martucci,* 380 S.C. 232, 250, 669 S.E.2d 598, 607 (Ct. App. 2008). *See also, Farris v. State,* 328 So.2d 640, 641 (Ala.Crim.App. 1976) ("The colored photograph in question is clearly ghastly ; but, gruesomeness is not grounds for excluding this type of evidence, if relevant . . . This photograph was properly admitted into evidence notwithstanding the unpleasant subject matter. We cannot and should not, gloss over the fact that violent death is itself loathsome.") Simply, gruesomeness alone does not render the photograph inadmissible. *State v. Collins,* 409 S.C. 524, 535-36, 763 S.E.2d 22, 28 (2014). Courts and juries cannot be too squeamish about looking at unpleasant things, objects or circumstances in proceedings to enforce the law and especially if truth is on trial. The mere fact that an item of evidence is gruesome or revolting, if it sheds light on, strengthens or gives character to other evidence sustaining the issues in the case, the court should not exclude it. *Nichols v. State,* 267 Ala. 217, 100 So.2d 750, 756 (1958). Although the photos were graphic, the facts in this case were graphic, and there is no suggestion that their admission had an undue tendency to suggest a decision on an improper basis. *State v. Holder*, 382 S.C. 278, 290-91, 676 S.E.2d 690, 697 (2009). In a murder prosecution, the trial court did not abuse its discretion in admitting a graphic photo of the victim's decomposed body where "everything

depicted by the photograph was . . . testified to in detail by the witness." *State v. Edwards,* 194 S.C. 410, 412, 10 S.E.2d 587, 588 (1940).

The Solicitor provided to the trial court the South Carolina Supreme Court case of *State v. Collins.* In *Collins,* a ten year old boy was brutally murdered by a gang of pit bulls. The forensic pathologist stated that he had massive injuries. He testified that:

> The victim suffered a "tremendous number" of bite marks on his legs and had "extensive" loss of skin and soft tissue on his upper body and his face, including his ears and nose, which were "completely eaten away" by the dogs. Areas of the boy's chest and his arm had also been eaten, exposing the bone. The boy's jugular vein on the left side was torn in half, causing significant blood loss leading to his death.

Collins, 409 S.C. at 529, 763 S.E.2d at 25.

The owner of the dogs was ultimately charged with the offense of involuntary manslaughter, and three counts of owning a dangerous animal. During trial, the Solicitor decided to enter into evidence the pre-autopsy photos of the victim. They did this in order to support the assertions about the dangerous propensities of the dogs. *Id.* at 409 S.C. at 532, 763 S.E.2d at 27. Jones was ultimately convicted on all counts. The South Carolina Court of Appeals decided to reverse the conviction due to the introduction of the pre-autopsy photos. This Court reversed the decision of the Court of Appeals. This Court decided:

> "The evidence was highly probative, corroborative, and material in establishing the elements of the offenses charged; its probative value outweighed its potential prejudice; and, the appellate court should not have invaded the trial court's discretion in admitting this crucial evidence based on its emotional reaction to the subject matter presented." *Id.*

If this Court sees fit to rule in favor of the gruesome photographs being admitted into evidence of a case involving an accusation of involuntary manslaughter, then it should be proper for the trial court to allow photos during the penalty phase of a capital murder case.

"The purpose of the bifurcated proceeding in a capital case is to permit the introduction of evidence in the sentencing proceeding which ordinary would be inadmissible in the guilt phase." To that end "the trial court may permit the introduction of additional evidence in extenuation, mitigation or *aggravation.*" *Kornahrens,* 290 S.C. at 289, 350 S.E.2d at 185 (emphasis in original). The trial judge did not abuse his discretion, or commit any error, in admitting the photographs in these circumstance.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the judgment, conviction, and sentence of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General
S.C. Bar No. 14244

TOMMY EVANS, JR.
Assistant Attorney General
S.C. Bar No. 65282

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-6305

S. R. HUBBARD, III
Solicitor, Eleventh Judicial Circuit

s/Melody J. Brown
BY: _____

s/Tommy Evans, Jr.
BY: _____

ATTORNEYS FOR RESPONDENT

May 21, 2021
Columbia, South Carolina