STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Appeal from Lexington County

Honorable Eugene C. Griffith, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TIMOTHY RAY JONES, JR.,

APPELLANT.

APPELLATE CASE NO. 2019-001008

INITIAL REPLY BRIEF OF APPELLANT

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1.

The state ignored Juror No. 156's unequivocal responses that showed he believed death was "the only appropriate penalty" for the murder of multiple children, could not give meaningful consideration to mitigating circumstances, and opposed a life sentence as an act of mercy or for no reason at all.

The state concedes the issue is "procedurally available" since appellant "exhausted [his] allowed peremptory challenges" and "renewed the challenge for cause when the juror was called" during jury selection. BOR at 28. However, it claims the trial judge did not abuse his discretion by qualifying Juror No. 156 since the juror "repeatedly confirmed he would fairly consider[] the case as a whole and abide by the instructions of law as given by the trial judge." BOR at 27. In support of its argument, the state relies exclusively on the juror's earlier generalized statements as opposed to his later unequivocal responses to specific questioning by the solicitor and defense counsel.

The state maintained appellant argued "the juror would not consider any and all mitigation" and that the record "does not support such an unyielding conclusion." BOR at 33. Appellant's summary of the juror's statements demonstrates the juror "was willing to consider circumstances involving the facts of the offense or surrounding the crime." BOA at 14-15. However, the juror made clear that he would not consider mitigation evidence that was not "within a recent timetable" and did not involve the facts of the crime. Tr. 1591, ll. 5-18. For example, the juror stated, "[F]or me personally . . . what happened twenty years ago when you [were] in elementary school doesn't have anything to do with your decision making now." Tr. 1591, l. 23 – 1592, l. 5. He further asserted, "[W]hen we are here for . . . the murders of these

kids, [the mitigation evidence] needs to be involved around this . . . The mitigating factors that have something to do with the case." Tr. 1591, ll. 5-18. These statements were all made while the solicitor was attempting to rehabilitate the juror after he was questioned by defense counsel.

The juror's earlier generalized statements that he wanted "to hear everything" before deciding the proper sentence are insufficient to cure his later unequivocal response that the only mitigating evidence he was willing to consider was circumstances that were limited to the facts of the offense and occurred "within a recent timetable." Tr. 1586, ll. 2-10; Tr. 1591, ll. 5-22; See State v. Bennett, 328 S.C. 251, 257, 493 S.E.2d 845, 848 (1997) (finding "juror's earlier generalized statements that he could be fair and impartial and follow the law insufficient to cure his later, unequivocal response that if the other eleven jurors voted for death, he would 'have to go with the majority of the jury.'").

It is apparent that Juror No. 156's views on mitigating circumstances prevented or substantially impaired the performance of his duties as a juror in accordance with the law, the instructions, and his oath. Juror No. 156's views on mitigating circumstances prevented him from following the law as instructed by the judge. See Eddings v. Oklahoma, 455 U.S. 104, 113-114 (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 state further argued appellant's "claim of an automatic penalty of death response is elusive" and a review of the entirety of *voir dire* shows the trial judge did not abuse his discretion. BOR at 33. However, again, while the juror's generalized statements made it appear he could be fair and impartial and follow the law as instructed, his responses when later asked

specific questions uncovered that he would automatically vote for the death penalty for a defendant found guilty of the murder of multiple children, such as appellant.

During his initial questioning by the trial judge, Juror No. 156 maintained that while he was a "type three" juror, he could "quickly bring [himself] to a type one" "depending on the facts." Tr. 1571, ll. 6-9. A "type one" juror was defined as "I feel that the Death Penalty is the appropriate penalty when the defendant has been convicted beyond a reasonable doubt of aggravated murder." R. p. * (Court's Exhibit No. 64). When questioned regarding the specific facts of this case (a defendant found guilty of the murder of multiple children), Juror No. 156 asserted, "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 . . . you forfeit your chance to have a choice to live or not." Tr. 1583, l. 10 – 1584, l. 8. The only way to interpret this response is that the juror would automatically vote for the death penalty for a defendant found guilty of the murder of multiple children. Under such facts, the juror admitted he was "type one."

Moreover, the state argued Juror No. 156's responses concerning mercy did not indicate the juror was unwilling to consider "an act of mercy at sentencing." BOR at 35. Instead, the state maintained the juror's statements could be interpreted as him merely wanting "to be fair to both sides and decide the matter on the case, not an unexplained feeling against the [death] penalty." BOR at 36. This is directly contradicted by the juror's responses to questions posed by defense counsel. While the juror understood that "solely on the basis of mercy a juror can choose life," he unequivocally stated he could not respect another juror who said, "I am going to choose life because I want to be merciful." Tr. 1590, ll. 6-11. He asserted, "I don't see how you can be here and be fair to both parties if some[one] says, well, I feel merciful." Tr. 1590, ll. 6-

11. It is apparent from these statements that the juror firmly believed mercy should play no role in the sentencing decision. His refusal altogether to consider mercy substantially impaired his duty as a juror to consider a life sentence for any reason or no reason at all, including as an act of mercy, as instructed by the trial judge. See Tr. 5958, ll. 4-17.

Additionally, the state maintained Juror No. 156's refusal to respect another juror's decision to bestow mercy without a reason "could not possibly be a detriment to Jones [appellant]" given there is no burden of proof to establish a mitigating circumstance and, if not a unanimous decision, death cannot be imposed. BOR at 36-37. However, the juror's responses in this regard are problematic because, as argued above, they indicate the juror strongly believed mercy should play no role in the sentencing decision. Consequently, despite the burden of proof, appellant was prejudiced because such beliefs substantially impaired the juror's duty to consider a life sentence for any reason or no reason at all, including as an act of mercy, as instructed by the judge, particularly where appellant presented seven witnesses who asked for mercy on appellant's behalf. See Tr. 5474, ll. 10-21 (Roberta Thornsberry); Tr. 5522, l. 16 – 5523, l. 1 (Timothy Jones, Sr.); Tr. 5717, l. 7 – 5719, l. 10 (Amber Kyzer); Tr. 5839, l. 25 – 5842, l. 20 (Julie Jones); Tr. 5857, l. 20 – 5858, l. 6 (Tyler Jones); Tr. 5868, ll. 6-15 (Travis Jones); Tr. 5885, l. 4 – 5886, l. 8 (Jacqueline Rangel).

Lastly, the state argued the juror "was not wrong" to believe it was defense counsel's "job to give [the jury] the reason" to recommend a sentence of life without parole. BOR at 37; See Tr. 1587, ll. 17-24. In support of its argument, the state cited to Kansas v. Marsh, 548 U.S. 163, 175 (2006), and asserted that the sentencing phase "provides the defendant with the *opportunity* to present evidence" relevant to the sentencing decision. BOR at 37 (emphasis added). The state's reliance on Marsh to support this assertion is misplaced. In Marsh, the

Supreme Court addressed whether the Kansas death penalty statutory scheme was constitutional where it directed imposition of the death penalty when the jury determined the "mitigators do not outweigh aggravators, including where the aggravating circumstances and mitigating circumstances are in equipoise." Kansas v. Marsh, 548 U.S. 163, 173 (2006). Unlike Kansas, South Carolina is *not* a "weighing state." Furthermore, while the defendant has an *opportunity* to present evidence during the sentencing phase to support a sentence other than death, no defendant is required to present evidence during the sentencing phase. Here, the juror placed a burden upon appellant to give him a *reason* to return a verdict other than death. The Supreme Court's decision in Marsh and its language that defendants have the right to present sentencers with information relevant to the sentencing decision does not mean that defendants must do so or that jurors may place a burden upon defendants to do so.

Additionally, the state wholly overlooked appellant's argument that the juror's view improperly placed the burden on appellant to show why death would not be a proper sentence as well as the law concerning the burden of proof. See State v. Bell, 293 S.C. 391, 405, 360 S.E.2d 706, 713 (1987) ("There is no burden of proof on a capital defendant with regard to evidence of mitigating circumstances."). The juror's belief that the defense must give the jury a reason to recommend a sentence of life without parole substantially impaired his ability to perform his duties in accordance with the law, the instructions, and his oath.

The trial judge's error in qualifying Juror No. 156, a clearly unqualified juror, in this case requires a new trial. See Bennett, 328 S.C. at 257-258, 493 S.E.2d at 848 (erroneous qualification of juror who was seated on the jury that ultimately recommended a death sentence required a remand for resentencing).

2.

The state ignored Juror No. 338's unequivocal responses that she could give meaningful consideration to a potential not guilty by reason of insanity (NGRI) verdict.

Viewing the entire *voir dire*, the trial judge's decision to disqualify Juror No. 338 is wholly unsupported by the record. The juror's responses show she was unbiased, impartial, and able to carry out the law as explained by the judge. Despite expressing some confusion as to why jurors are not told the consequences of a not guilty by reason of insanity verdict and some concerns in that respect, Juror No. 338 unequivocally stated on several occasions that she could give meaningful consideration to a potential NGRI verdict. There is no reasonable basis from which the trial judge could have concluded the juror would not have been able to faithfully discharge her responsibilities as a juror under the law.

On appeal, the state repeatedly argued appellant "blend[ed] concepts" by discussing Juror No. 338's responses to questions concerning the penalty phase as well as the guilt phase. BOR at 40, 51. However, the standard of review, as acknowledged by the state, requires this Court to review the trial judge's disqualification of the prospective juror "in light of the entire *voir dire*." See BOR at 40 (citing State v. Green, 301 S.C. 347, 354, 392 S.E.2d 157, 161 (1990)). Consequently, appellant briefly summarized the juror's statements regarding the penalty phase, as well as her responses concerning a NGRI verdict, in support of his argument that the juror was unbiased, impartial, and able to carry out the law as explained by the judge.[1] Oddly, the state

[1] Interestingly, the state also argued appellant "fails to give due consideration that a trial judge ensures that the potential jurors could, if needed, fairly serve in *both* phases." BOR at 41 (emphasis in original). Appellant's argument clearly asserts Juror No. 338 was qualified to serve in both phases as her responses show she was unbiased, impartial, and able to carry out the law as explained by the judge. Appellant's argument was not limited to any one phase but focused on the prospective juror's responses related to the guilt phase and a potential NGRI verdict as that is why the trial judge disqualified the juror.

criticized appellant for utilizing case law addressing the qualification and disqualification of prospective jurors due to responses concerning the sentencing phase, as opposed to the guilt phase. Not only are such cases relevant and controlling to the issue argued here, but the state also relied upon case law specific to juror qualifications for capital sentencing proceedings. The state's critique is badly flawed at best.

In support of its argument, the state relied heavily upon this Court's opinion in State v. Tucker, 334 S.C. 1, 512 S.E.2d 99 (1999). BOR at 52-53. In Tucker, this Court held the trial judge properly excluded a prospective juror because the juror's religious beliefs, which prohibited judging another person, would have prevented or substantially impaired the performance of his duties as a juror. Id. at 10-11, 512 S.E.2d at 103-104. In so holding, this Court emphasized that the trial judge excused the prospective juror "without regard to his view on the death penalty." Id. at 11, 512 S.E.2d at 104. Rather, the juror was excused because his religious beliefs would not allow him to sit as a juror and the "special counseling" that might allow him to serve would take four days. Id.

The state argued the excusal of the prospective juror in Tucker "is similar to the excusal" of Juror No. 338 in this case because the trial judge here "determined that the juror's ability to fairly serve as a juror . . . , based on her responses, would have interfered, substantially, in discharging her duty as a juror." BOR at 53. Tucker is unhelpful to the state's argument. Unlike the prospective juror in Tucker, who was unable to carry out the law as explained by the judge because of his religious beliefs, Juror No. 338's responses, based on a review of the entire *voir dire*, showed she was unbiased, impartial, and able to carry out the law.

When questioned by the judge, the juror unequivocally stated that she could give meaningful consideration to all four potential verdicts, including not guilty, not guilty by reason

of insanity, guilty but mentally ill, and guilty. Tr. 1240, ll. 13-25. She understood that a not guilty by reason of insanity verdict meant the defendant "had some mental defect or disease" which prevented him from "distinguish[ing] legal or moral right from wrong." Tr. 1248, ll. 5-13. When questioned further by defense counsel about a potential NGRI verdict, the juror again unequivocally stated that she could "truly consider" such a verdict if she were presented with "testimony from expert witnesses describing what that [NGRI] meant and evidence supporting" the verdict. Tr. 1248, l. 25 – 1249, l. 3.

While unequivocally stating she could give meaningful consideration to a potential not guilty by reason of insanity verdict, the juror expressed concerns about not knowing the outcome of such a verdict and confusion as to why jurors were told the outcome of the two potential verdicts during the penalty phase, specifically a recommendation of death or life without the possibility of parole, but not the outcome of a NGRI verdict. Tr. 1249, ll. 4-14; Tr. 1255, ll. 1-21; Tr. 1256, ll. 2-10. As discussed in Issue 3, Juror No. 338, like all the other jurors, should have been told the consequences of a NGRI verdict so appellant could conduct adequate *voir dire*. In Poindexter, this Court wrote, "[T]he consequences need not be brought to the jury's attention unless the jury has a statutory right to fix or recommend punishment." State v. Poindexter, 314 S.C. 490, 492, 431 S.E.2d 254, 255 (1993) (citing State v. Huiett 271 S.C. 205, 246 S.E.2d 862 (1978) and State v. McGee, 268 S.C. 618, 235 S.E.2d 715 (1977)). Here, because the jury was responsible for sentencing, the judge should have told the juror the result of an NGRI verdict. Despite keeping this information from the juror, she still said she could be fair and consider all four possible verdicts.

Tellingly, the state wholly ignored appellant's reliance on State v. Leonard, 248 S.E.2d 853 (N.C. 1978), where the North Carolina Supreme Court held the trial court erred by failing to

disqualify "three prospective jurors who indicated that they would not be willing to return a verdict of not guilty by reason of insanity even though the defendant introduced evidence that would satisfy them that she was insane at the time her sister was killed." Id. at 855. The court asserted, "In the case before us, those jurors who stated that they could not acquit the defendant even though her insanity was proven to them were committed to disregarding the evidence presented to them as well as the court's instructions on the law arising from that evidence." Id. at 856.

Unlike the jurors in Leonard, Juror No. 338 never indicated she would be unwilling to return a verdict of not guilty by reason of insanity even though appellant presented evidence that would satisfy her that he was insane at the time he killed his children. In fact, she expressly stated the opposite. When questioned by defense counsel, the juror unequivocally asserted that she could "truly consider" such a verdict if she were presented with "testimony from expert witnesses describing what that [NGRI] meant and evidence supporting" the verdict. Tr. 1248, l. 25 – 1249, l. 3.

Because the trial judge abused his discretion by excusing Juror No. 338 when she was qualified to serve, this Court should reverse appellant's convictions and death sentence and remand for a new trial.

3.

The state offers no justification for hiding the truth about NGRI verdicts from jurors.

The state fails to give any principled reason for why capital jurors cannot be told the truth about the consequences of an NGRI verdict. The state offers no real "why" but for one galling exception. The state—the entity trying to have Tim Jones put to death—argues that it is not in appellant's best interest. See BOR at 55, n.8, 59, and n.10. This Court should easily see past the state's renewed attempt to keep the truth about sentencing in capital cases from jurors.

The state can give no answer to the question, "Why not just tell the jury the truth?" because, just like in the Simmons line of cases -- Simmons v. South Carolina, 512 U.S. 154 (1994), Shafer v. South Carolina, 532 U.S. 36 (2001), and Kelly v. South Carolina, 534 U.S. 246 (2002) -- it wants to capitalize on the pervasive notion among lay people that the defendant will go free. The state complains about "injecting arbitrariness" into the guilt phase. BOR at 62. The Eighth Amendment guarantees that a defendant will not be executed because of an arbitrary factor. See State v. Butler, 277 S.C. 543, 546, 290 S.E.2d 420, 421 (1982). Here, the state cannot complain about a defendant being executed because of an arbitrary factor when it is the defendant who is requesting the instruction.

The state argues that "[c]apital trial proceedings do not change the nature of the guilt phase." BOR at 56. This statement ignores *voir dire* and jury selection, which are much different in capital cases than any other criminal case in our state. The guilt phase is fundamentally altered by the scope of *voir dire* and the jurors' foreknowledge that they can consider different verdicts and may ultimately decide whether the defendant lives or dies. Jurors already know that the effect of a not guilty verdict in a capital trial is to turn loose on society a defendant who the state considers so dangerous he should be put to death. Refusing to tell the

jury about the consequences of an NGRI verdict invites the jury to speculate that rendering an NGRI verdict will also turn the defendant loose.

The same, tired argument concerning "staking out" used by the solicitor at trial is used by the state on appeal. The state argues "[t]here is no right to use *voir dire* to find a jury predisposed to the defendant's position." BOR at 54. Appellant seeks no such right or advantage. Capital *voir dire* is already used to eliminate jurors who cannot render either a death or life verdict. Appellant sought to use *voir dire* to eliminate jurors who cannot also render an NGRI verdict. The defense in a capital case cannot eliminate these jurors if it cannot discover incorrect, preconceived notions about an NGRI verdict—especially when those preconceptions grossly favor the state's desired outcome.

In an attempt to spin State v. Poindexter, 314 S.C. 490, 431 S.C. 254 (1993) as a favorable case for the state, it refers to the Poindexter Court's citation of State v. McGee, 268 S.C. 618, 235 S.E.2d 715 (1977). See BOR at 57-59. Closer analysis reveals that McGee supports appellant's position, not the state's. McGee, like Poindexter, stated the jury should not be told of the punishment "where the right to fix punishment is exclusively within the province of the court. . . ." McGee at 620, 235 S.E.2d at 716. In appellant's case, the right to fix punishment did not rest "exclusively" with the court and the jury knew this from the beginning of jury selection. The state argues the McGee Court's holding that because the jury had no sentencing function on one of the counts (rape), the refusal to tell the jury the punishment for rape was not erroneous somehow helps the state's position. Appellant faced five counts of the same charge—capital murder. An NGRI verdict was one of four possible verdicts for this charge. McGee held that the jury should have been told the penalty for burglary, for which the jury did have a sentencing function. This holding in McGee supports appellant's contention that

where the jury has a role to play in sentencing, it should be told the truth about the possible outcomes of each verdict it is asked to consider.

The state also misreads State v. Huiett, 271 S.C. 205, 246 S.E.2d 862 (1978) and seems to imply with its discussion of prejudice that the charge appellant requested would do him more harm than good.[2] BOR at 59. The trial judge's coercive charge in Huiett shows the prejudice that appellant asked to eliminate—the jurors' fears that they would be blamed for setting the defendant free.

Appellant disputes the state's contention that the twenty-two (22) jurisdictions cited by appellant in which an NGRI instruction is given amounts to "a smattering of cases." BOR at 60. Using the compilation of cases given to this Court *by appellant*, the state counts twenty-seven (27) states that refuse to give the instruction. BOR at 60-61. The state did not dispute that the trend is to allow the instruction and the most recent case cited by the state from other jurisdictions in this part of its argument is from 1995 (appellant's is from 2013). BOR at 61-62.

The state complains about appellant's citation to a study authored by Dr. Frierson. BOR at 62. The state argues that because 70% of jurors reported that knowing the outcome would influence their decision, truth about the outcome should be hidden from all potential jurors. These types of jurors are precisely who should be weeded out by a properly conducted *voir dire*. Jurors who cannot render a death verdict are weeded out by the state during *voir dire*. Allowing jurors to retain their speculations does nothing to find jurors who can properly consider all potential verdicts.

The state's reliance on Winkler v. State, 418 S.C. 643, 795 S.E.2d 686 (2016) is additionally misplaced. Winkler dealt with whether the jury's question about the effect of a hung

[2] The state also misuses Shannon v. United States, 512 U.S. 577 (1994) in the same vein.

jury should be answered during the sentencing phase of a capital trial. Winkler, 418 S.C. at 650-59, 795 S.E.2d at 690-95. This Court held the jury's question about nonunanimous verdicts should not be answered. Id. This Court was concerned with the duty to deliberate. Id. Telling the jury that the consequence of a hung jury would be life in prison would give pro-life jurors an incentive not to deliberate to control the outcome and disrupt the deliberative process. Id.

The concern from Winkler about undermining the deliberative process does not exist in this case. To render an NGRI verdict in the guilt phase of appellant's trial, the jury must be unanimous. No one juror could control the outcome as in the sentencing phase. The effect of a hung jury would be a retrial. The effect of the jury knowing the consequences of an NGRI verdict would be a fair trial. Jurors should be told the truth. This Court should reverse.

4.

The state still cannot explain how the Mississippi roadblock was constitutional under the Fourth Amendment.

As defense counsel argued at trial about this roadblock, "So if this was legal, they're all legal." Supp. Tr. 191, ll. 16-19. The state provided nothing to refute this assertion. The goal of the police was not a search tailored to a regulatory goal such as an examination of a driver's license. The admitted purpose, no way around it, was the prevention of general crime, including drug possession and driving while impaired. Further, the directives to Smith County officers operating these intrusive roadblocks failed to prevent one-sided abuses of power.

A roadblock must limit the discretion of law enforcement officials responsible for its operation. Delaware v. Prouse, 440 U.S. 648, 654-57 (1979). In Prouse, the State of Delaware relied on similar arguments as the respondent does in the instant case, namely that the state's interest in suspicionless stops "as a means of promoting public safety upon its roads more than outweighs the intrusion entailed." Id. at 659. The Prouse Court determined, "The marginal contribution to roadway safety possibly resulting from a system of spot checks cannot justify subjecting every occupant of every vehicle on the roads to a seizure—limited in magnitude compared to other intrusions but nonetheless constitutionally cognizable—at the unbridled discretion of law enforcement officials." Id. at 660-61. "To insist neither upon an appropriate factual basis for suspicion directed at a particular automobile nor upon some other substantial and objective standard or rule to govern the exercise of discretion 'would invite intrusions upon constitutionally guaranteed rights based on *nothing more substantial than inarticulate hunches.*'" Id. (internal citations omitted emphasis added). Even "inarticulate hunches" are

more substantial than the reason for this roadblock: boredom.[3] See Brown v. Texas, 443 U.S. 47, 50-51 (1979) (holding that the Fourth Amendment requires "a plan embodying explicit, neutral limitations on the conduct of individual officers.").

The state failed to present evidence that the roadblock was "carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." In State v. Hicks, the Tennessee Supreme Court identified two factors that are critical to finding that officers' discretion is properly limited: (1) the decision to set up the roadblock in the first instance cannot have been made by the officer or officers actually establishing the checkpoint, and (2) the officers on the scene cannot decide for themselves the procedures to be used in operating the roadblock. 55 S.W.3d 515, 533 (Tenn. 2001). See also United States v. Huguenin, 154 F.3d 547 (6th Cir. 1998) (criticizing pretextual roadblock); Whalen v. State, 500 S.W.3d 710 (Ark. 2016) (holding that the state failed to present evidence that the checkpoint "was carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers" as required by Brown); Commonwealth v. Buchanon, 122 S.W.3d 565, 566 (Ky. 2003) (finding roadblock unconstitutional); State v. Olgaard, 248 N.W.2d 392 (S.D. 1976) (holding that a roadblock for drunk drivers violated the Fourth Amendment because its location was not a management decision).

For the Smith County, Mississippi roadblock, the bored officers came up with the idea for the roadblock and determined its location. Tr. 76, ll. 18-22; Tr. 78, ll. 6-15; Tr. 118, ll. 3-7.

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[3] The state takes umbrage at appellant's suggestion that these police officers were bored. BOR at 72 (stating that individuals in law enforcement can never be bored because their lives are on the line). Being bored is not a character flaw but it is not a legal reason to set up a roadblock. Further, appellant would never attack the police in general, and the defense did not at trial. However, the behavior of these specific officers having sex with inmates at the county jail -- disregarding the most basic of law enforcement rules -- proved they were willing to break regulations, the law, and compromise the respect they were otherwise entitled to as law enforcement officers. Tr. 60, ll. 3-7; Tr. 80, ll. 13-21.

Notably, the state's expert Molly Miller testified there is no "requirement in Mississippi that the location of the checkpoint be established by somebody other than the deputies setting up the checkpoint."[4] Tr. 47, ll. 15-20; Tr. 48, l. 22 – 49, l. 3. This contravenes Martinez-Fuerte:

> 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 motorists 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. Moreover, a claim that a particular exercise of discretion in locating or operating a checkpoint is unreasonable is subject to post-stop judicial review.

United States v. Martinez-Fuerte, 428 U.S. 543, 559 (1976). The Huguenin court discussed how "[a]t a checkpoint, every single person is stopped, not just those persons who have violated a traffic law." 154 F.3d at 557. Citing Prouse, the Sixth Circuit indicated its belief that "this pretextual seizure invokes the 'kind of standardless and unconstrained discretion [that] is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent.'" Huguenin, 154 F.3d at 559. All pertinent decisions regarding the procedures used in operating the checkpoint, beyond basic guidelines regarding vests and lighting, were left to the unfettered discretion of the field officers here.

The lack of any limitation on the discretion of police officers made this roadblock unconstitutional. There were no "explicit, neutral limitations on the conduct of individual officers" as required by City of Indianapolis v. Edmond. 531 U.S. 32, 49 (2000) (quoting Brown

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[4] Mississippi is no stranger to controversy surrounding improper roadblocks. A class action lawsuit discovered discriminatory purposes in roadblocks used by Mississippi police. C.J. Ciaramella, *A Mississippi County Has Agreed to Stop Using Illegal Roadblocks in Black Neighborhoods,* Reason, https://reason.com/2019/10/04/a-mississippi-county-has-agreed-to-stop-using-illegal-roadblocks-in-black-neighborhoods/ (last accessed June 9, 2021).

v. Texas, 443 U.S. 47 (1979)). In Michigan Dept. of State Police v. Sitz, the Supreme Court emphasized the importance of having proper guidelines to effectuate a roadblock's purpose without undue police discretion. 496 U.S. 444, 450-53 (1990). The Sixth Circuit in Huguenin held that "the objective intrusion into defendants' privacy was not limited by appropriate operating procedures, but was unnecessarily high due to the lack of limitations on the officers' discretion." 154 F.3d at 560. As the Supreme Court stated in Martinez-Fuerte, "[t]he principal protection of Fourth Amendment rights at checkpoints lies in appropriate limitations on the scope at the stop." 428 U.S. at 566-67 (1976). The actions of Johnson and Thompson raise the specter of wholesale law enforcement campaigns involving mass highway stops at roadblocks simply approved by county sheriffs, absent the protections of a warrant or individualized suspicion or even substantive policies.

Where suspicionless automobile seizures have been permitted, the United States Supreme Court has required a limitation on officer discretion at the roadblock so that officers may not arbitrarily decide how invasive the intrusion shall become or arbitrarily subject some to initial seizures but not others. See Sitz, 496 U.S. at 450-51 (all cars entering roadblock must be checked in same manner). The directives to officers performing at-will roadblocks in Smith County do not adequately provide guidelines that assure equal treatment of all stopped motorists.

The state's position, sanctioning total field-officer discretion, is not only contrary to United States Supreme Court precedent, it also contradicts the decisions of many other jurisdictions that have addressed this or similar issues regarding checkpoints and roadblocks. See, e.g., State v. Legg, 536 S.E.2d 110 (W.Va. 2000) (concluding that conservation officers' stop of every car in a certain area to check for game, weapons, and hunting license was unconstitutional where the officers' only directive was to work the area); Commonwealth v.

Bothman, 941 S.W.2d 479 (Ky. Ct. App. 1996) (recognizing the importance of a systematic plan and supervisory control over establishment and operation of a checkpoint); Campbell v. State, 679 So.2d 1168 (Fla. 1996) (per curiam) (holding that specific and detailed written guidelines are required before police can establish a constitutional roadblock); Hagood v. Town of Town Creek, 628 So.2d 1057 (Ala. Crim. App. 1993) (concluding that roadblock was unconstitutional where the operating officers had complete discretion to move it and did so); Crandol v. City of Newport News, 386 S.E.2d 113 (Va. 1989) (acknowledging that key factors in determining the legality of a checkpoint include proof of **advance decisions by superior officers** as to the time and location of the roadblock, adequate training of officers, and on-site supervision of the officers conducting the roadblock) (emphasis added). None of these states have suffered the phenomenon predicted by the state that roads would become increasingly more dangerous. BOR at 77. Rather, by providing clear direction to local law enforcement agencies as to the requirements of a constitutional checkpoint, these courts have enabled those agencies to better police the roads and highways of their communities, while safeguarding the constitutional rights of motorists.

In Mississippi, sheriffs "are final policymakers with respect to all law enforcement decisions made within their counties." Brooks v. George Cty., Miss., 84 F.3d 157, 165 (5th Cir. 1996) (citing Huddleston v. Shirley, 787 F.Supp. 109, 112 (N.D. Miss. 1992); Miss. Code Ann. § 19–25–1, et seq. Miller testified that there was no statewide law requiring the location of the checkpoint to be determined by "somebody other than the deputies setting up the checkpoint." Tr. 47, ll. 15-20. Furthermore, no data is preserved following the stops. Tr. 80, l. 23 – 81, l. 3. The county sheriff agreed with the assertion that the only analysis post-roadblock is "pretty much, just, we did a roadblock and everybody was safe." Tr. 79, ll. 20-22.

Johnson's affidavit indicated that he typically sets up roadblocks on Friday and Saturday evenings. R. p. *. (Court's Exhibit 13). Johnson testified that he was both capable and willing to extend the roadblock beyond its pretextual purpose. He freely used his flashlight to "light up in the inside [of the cars] to make sure [there were] no safety issues and stuff like that." Tr. 97, ll. 6-14. During cross-examination, after being asked if he "spotted [Jones] in the face with a flashlight when he was getting his paperwork," the following exchange occurred:

> Q: Is that a normal thing to do with all drivers, kind of pop them with the light, I think the way - -
>
> A: **If I suspect something, you know, or whatever.**

Tr. 129, ll. 6-15. (emphasis added). This roadblock was constitutionally indefensible.

Miller contended that motorists driving without a license was a "[p]retty big problem" in Mississippi. Tr. 40, ll. 17-20. The state adopted this opinion in its brief. BOR at 75 – 76. Miller was unable to provide any specific information pertaining to unlicensed drivers in her state. She demurred when asked to provide a percentage of people who drive without a license. Tr. 41, ll. 21-23. She was unable to refer to any data to substantiate her claim that checkpoints were effective methods of finding unlicensed drivers. Tr. 46, l. 13 – 47, l. 14. She admitted that her unsubstantiated belief that driving without a license is a "[p]retty big problem" was partially based on anecdotal evidence. Tr. 41, ll. 8-14. Contrary to her unsupported opinions, Charles Crumpton characterized the alleged unlicensed motorists' problem as "[v]ery minor." Tr. 79, ll. 5-14.

The state posits that in Smith County, "[t]he knowledge of these checkpoints are [sic] the reason that this is a minimal problem within the county." BOR at 76. Without evidence, it suggests that "[d]riving without a license is a 'minor problem' in Smith County due to these checkpoints." BOR at 76. This unproven conclusion relies purely on supposition and is

unsupported by the record. Miller's remaining testimony, however, demonstrates the ease at which these roadblocks could result in arrests and citations beyond the pretextual purposes.

Miller stated that a roadblock which "gets an impaired driver off the road" was an effective roadblock. Tr. 43, l. 16 – 44, l. 3. She surmised that officers "could also be looking for impaired drivers" in addition to their license checks. Tr. 44, ll. 15-23; Tr. 45, ll. 1-4. Miller also admitted that drug smugglers can be caught at roadblocks as well. Tr. 44, ll. 4-9. Proving defense counsel's point that these roadblocks serve up motorists on a silver platter, Miller unequivocally testified that there was no limit to what officers can check for at a roadblock. Tr. 44, ll. 24-25. Johnson's testimony mirrored that expert opinion wherein he stated that if anything else comes up at a roadblock, they "go farther in the investigation of it." Tr. 120, ll. 11-20.

Lack of good faith

The state posits that "good faith" saves this illegal roadblock. BOR at 82. In United States v. Leon, 468 U.S. 897 (1984), the Supreme Court established what is now recognized as the "good faith" exception to the warrant requirement. Id. at 913. In Leon, the Court held that evidence seized in good faith reliance upon a search warrant that was later found to be defective was admissible at trial. Id. at 913. This exception has evolved since the Court's decision in Leon, and it functions to permit the prosecution to introduce evidence obtained in the violation of the Fourth Amendment when the officers obtaining the evidence acted in good faith. Davis v. United States, 564 U.S. 229, 232 (2011) (holding that the "good faith" exception did not require suppression when officers conducted a search "in objectively reasonable reliance on binding appellate precedent."). Davis has not been cited by any Mississippi state appellate courts in a

published opinion.[5] Although it never references the language from Davis regarding "binding appellate precedent," the state seems to suggest that the exclusionary rule should not apply.

The majority in the controversial Davis decision reasoned that the purpose of the exclusionary rule is not to "redress the injury" caused by an unconstitutional search but to deter future Fourth Amendment violations by law enforcement. Davis, 564 U.S. at 236 (quoting Stone v. Powell, 428 U.S. 465 (1976)). Therefore, exclusion is only proper when the deterrence benefits of suppression outweigh its heavy societal costs. Id. at 2427. Notably, at the oral argument in Davis, counsel for Davis conceded "the police did nothing wrong" when asked by Chief Justice Roberts.[6] Appellant makes no such concession here, thus distinguishing the "good faith" exception in its applicability. To the extent that Mississippi law would sanction an unlimited, discretion-less roadblock by bored officers, such a decision would be so outside the bounds of federal law as established by the Supreme Court such that Davis and "good faith" could not apply. At the Davis oral argument, Justice Sotomayor questioned:

> If there [is] a circuit split and a police officer knows that other circuits are saying this is unconstitutional, why are we taking away the deterrent effect of having thoughts occur to the officer about thinking through whether there's a better way and a legal way to do things?

Davis Oral Argument 37:04 – 38:27.

Justice Kennedy pointed out the irony in the government's position that "the defendant who lives in the circuit that is most clearly wrong is treated worst." Davis Oral Argument 36:11 – 36:22. In this case, there can be no good faith reliance on bad law. The alternative is that states

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[5] South Carolina, by comparison, has applied Davis in holding that the exclusionary rule may not apply in some situations. State v. Brown, 401 S.C. 82, 736 S.E.2d 263 (2012).

[6] Audio of Oral Argument in Davis v. U.S. from March 21, 2011 (Docket No. 09-11328) at 5:35 – 5:40 (available at https://www.oyez.org/cases/2010/09-11328).

are incentivized to avoid federal law and can realistically ignore it. True good faith would have been erring on the side of caution. Instead, an application of Davis in this case invites mischief - reliance on Mississippi state court opinions that are in direct contravention of well-established Fourth Amendment jurisprudence from the United States Supreme Court and would result in a perverted system that essentially nullifies the import of our country's highest Court.

A state court decision is "contrary to" Supreme Court precedent if "the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases." Williams v. Taylor, 529 U.S. 362, 405 (2000). An "unreasonable application" of Supreme Court precedent is not one that is merely "incorrect or erroneous" Lockyer v. Andrade, 538 U.S. 63, 75 (2003); see also Williams, 529 U.S. at 410; rather, "[t]he pivotal question is whether the state court's application of the [relevant Supreme Court precedent] was unreasonable," Harrington v. Richter, 562 U.S. 86, 101 (2011). Unreasonable applications of United States Supreme Court precedent should not be entitled to Davis good faith deference.

This case involves a suspicionless stop without adequate justification. Unlawful stops have severe consequences much greater than the inconvenience suggested by the state. In Mississippi in particular, the courts have given officers an array of instruments to probe and examine drivers. When courts condone unconstitutional actions, citizens are targeted in an arbitrary manner. "We also risk treating members of our communities as second-class citizens." Utah v. Strieff, 136 S.Ct. 2056 (2016) (Sotomayor, J., dissenting).

In instances where state court opinions conflict with federal law, the former cannot be unreasonable and still be enforced. If the state of Mississippi is not complying with federal law,

the courts' objectively unreasonable interpretation of United States Supreme Court precedent cannot be the basis for upholding this illegal search and seizure.[7]

In White v. State, the Mississippi Supreme Court adopted the Leon good-faith exception to the exclusionary rule. White v. State, 842 So.2d 565, 570–73 (Miss. 2003) (invalidating telephonic search warrants but finding that the exclusionary rule should not apply to evidence seized pursuant to such warrants, because the officers thought the procedure was valid). However, the court intimated that this exception to exclusion should apply only in select circumstances, such as where the officer's reliance on an invalidated search warrant was "objectively reasonable." White, 842 So.2d at 577 (citation omitted). The court further explained:

> [W]e admonish all law enforcement officers and prosecutors to understand that our adoption today of the Leon "good faith" exception should not be interpreted, in any way, as an opportunity for them to be less diligent or less thorough in following the mandates of the United States Constitution, the Mississippi Constitution, or case law interpretations thereof, regarding search and seizure.

Id. at 576. White does not sanction the good-faith exception where the officer is mistaken about the suspect's general right to be free from unreasonable searches. Id. at 576–77.

"[T]he Fourth Amendment's meaning [does] not change with local law enforcement practices—even practices set by rule. While those practices 'vary from place to place and from time to time,' Fourth Amendment protections are not 'so variable' and cannot 'be made to turn upon such trivialities.'" Virginia v. Moore, 553 U.S. 164 (2008) (quoting Whren v. United States, 517 U.S. 806, 815 (1996)). The police in Smith County trampled over the Fourth

[7] This case also demonstrates a major shortcoming of Davis. If state courts issue decisions that clearly contravene United States Supreme Court precedent in order to give officers cover to violate citizens' Fourth Amendment rights, that cannot be good faith. That amounts to nullification.

Amendment rights of appellant and other drivers in a manner so unreasonable that no good faith exception can save this illegal roadblock. The evidence seized as a result of this unconstitutional abuse of power should have been suppressed, and appellant should receive a new trial.

5.

The testimony of a forensic psychologist, which the solicitor recognized as evidence that would have "destroy[ed]" the state's expert's opinion that appellant was malingering mental illness, was relevant to and probative of the matters presented during the sentencing phase, did not involve pitting witnesses, and was not cumulative to the testimony of any other witness.

Introduction

When the trial judge refused to allow the jury to hear testimony from Dr. Adriana Flores, a forensic psychologist, to rebut a witness called by the state, Dr. Kimberly Kruse, who insisted appellant was malingering mental illness, the trial judge violated appellant's rights under the federal and state constitutions. After evaluating appellant, Dr. Kruse issued a report regarding her testing, which did not conclude or even allege that appellant was malingering. In light of Dr. Kruse's surprising and very damaging testimony that appellant was malingering, Dr. Flores' evaluation of Dr. Kruse's work was highly relevant, probative, and offered timely. Contrary to the trial judge's determination and respondent's argument on appeal, calling an expert witness to counter the testimony of another expert witness is not pitting even when the expert witness challenges the methodology used by the other witness. Furthermore, Dr. Flores' obligation to report Dr. Kruse for violations of the Ethical Principles of Psychologists and Code of Conduct was not witness intimidation or a basis to exclude Dr. Flores' testimony. Finally, no other witness testified to the problems with Dr. Kruse's testing and interpretations; therefore, Dr. Flores' testimony was not cumulative to any other witness.

Brief facts

During the guilt phase, in rebuttal to appellant's presentation, the state called Dr. Kruse, a clinical neuropsychologist, as a witness. Tr. 4910, ll. 19-20; Tr. 4911, ll. 5-8; Tr. 4912, ll.1-2.

Dr. Kruse separated herself from the psychiatrists who testified by claiming that psychiatry was subjective whereas neuropsychology was objective. Tr. 4935, ll. 6-16. She informed the jury that her testimony was the product of testing that was "based in psychometrics neuroscience," "scientific," and "very objective." Tr. 4933, ll. 24-25; Tr. 4934, ll. 23-25. According to Dr. Kruse, her testimony was simply "representing the data." Tr. 4934, ll. 14-16.

After bolstering the *objectivity* of her testimony, Dr. Kruse informed the jury her testing revealed appellant's responses were "highly suggestive of malingered psychosis," "in the probable range" for malingered symptomology, in the "definite range of malingered symptomology" for "probable and absurd symptoms," and "yielded a significant score for the likelihood of malingering." Tr. 4929, ll. 1-6; Tr. 4930, ll. 2-19; Tr. 4930, l. 25 – 4931, l. 2; Tr. 4975, ll. 8-9. Her overall conclusion was appellant was malingering mental illness. Tr. 4931, ll. 18-23; Tr. 4936, ll. 1-2; Tr. 4977, l. 24 – 4978, l. 5. Further, she testified that based on her objective scientific testing, appellant did not suffer from a neuro-cognitive disorder, psychosis, schizophrenia, schizoaffective disorder, or bipolar disorder. Tr. 4924, ll. 1-2; Tr. 4933, ll. 6-8; Tr. 4935, ll. 22-25; Tr. 4941, ll. 6-7; Tr. 4945, ll. 9-17; Tr. 4974, ll. 8-13; Tr. 4975, ll. 18-25.

Thereafter, appellant called Dr. Flores during the penalty phase to counter Dr. Kruse's testimony. Respondent mischaracterized the evidence in the record by claiming that Dr. Julie Dorney contacted Dr. Flores "[u]pon the final verdict of guilty." See BOR at 90. According to the testimony, Dr. Dorney discussed the matter with Dr. Flores after the solicitor cross-examined Dr. Dorney with Dr. Kruse's report. Tr. 5632, ll. 10-23. The solicitor's cross-examination of Dr. Dorney foreshadowed Dr. Kruse's eventual opinion testimony that appellant was malingering despite the fact that Dr. Kruse never indicated as such in her report. Tr. 5632, ll. 10-23. Concerned that the testing was "being misinterpreted," Dr. Dorney approached her colleague, Dr.

Flores, regarding the matter. Tr. 5632, ll. 10-23. As the record demonstrates, it was *not* the guilty verdict that prompted Dr. Dorney to discuss the matter with Dr. Flores; rather, it was the solicitor's cross-examination that provoked Dr. Dorney's contact with Dr. Flores.

Of course, Dr. Dorney's fears regarding Dr. Kruse's flawed testimony were borne out. Therefore, the defense sought to present Dr. Flores as a witness during the penalty phase to counter Dr. Kruse's testimony. During her proffer, Dr. Flores explained in painstaking detail how Dr. Kruse's testing and interpretations of the testing were flawed. For example, the raw data from tests used by Dr. Kruse to screen for malingering revealed appellant's score was below that designated to indicate potential malingering. Tr. 5616, l. 2 – 5617, l. 13. On another test for malingering, Dr. Kruse repeatedly scored appellant incorrectly, which resulted in an inflated number that was indicative of malingering. Tr. 5620, l. 5 – 5621, l. 16. Contrary to respondent's contention that "[i]t was [Dr. Flores'] medical opinion that [appellant] was not malingering," Dr. Flores concluded that based upon her review of the data, there was not enough information to conclude appellant was malingering. Cf. BOR at 90 with Tr. 5629, ll. 3-6.

Despite respondent's assertion on appeal that appellant "ma[d]e the presumption that the testimony of Dr. Flores would have 'picked apart' or 'ensure[d] that Dr. Kruse never steps into a criminal court room again,'" it was actually the solicitor who recognized the devastating impact of Dr. Flores' testimony about the validity of Dr. Kruse's testing and her interpretations of the testing.[8] See BOR at 92. At trial, the solicitor objected to Dr. Flores testifying. The solicitor admitted Dr. Flores' testimony would "destroy" Dr. Kruse's testimony. Tr. 5599, l. 25. The

[8] Later, respondent acknowledged the solicitor's objections to Dr. Flores' testimony concerned how she would critique Dr. Kruse's testing and interpretations of the testing. BOR at 92. However, respondent distorted the record to assert the solicitor's "argument had nothing to do with Dr. Kruse's findings," but concerned Dr. Flores' explanation that she had an ethical obligation to report Dr. Kruse. See BOR at 92.

solicitor characterized Dr. Flores' testimony as "pick[ing] apart" Dr. Kruse's testing and interpretations of the testing. Tr. 5599, ll. 20-24. According to the solicitor, Dr. Flores' testimony would be so devastating to Dr. Kruse, she would "never step[] into a criminal courtroom again." Tr. 5600, ll. 1-3. On appeal, respondent inaccurately accused appellant of *presuming* the impact of Dr. Flores' testimony, abandoned the argument made by the solicitor at trial, and argued simply that Dr. Flores' testimony was cumulative. BOR at 91. Additionally, respondent argued "any evidence presented by Dr. Flores would have been viewed as all other evidence presented before the jury." BOR at 92.

The trial judge sustained the solicitor's objection to Dr. Flores' testimony. Thus, the jurors deliberated on this life-or-death decision without the benefit of hearing from a forensic psychologist about the errors and omissions in the work of the state's key witness, Dr. Kruse. Appellant presented substantial evidence regarding his mental health during the guilt and penalty phases, and his mental health was a factor mitigating against death. Dr. Kruse told the jurors that appellant was faking mental illness, which she never mentioned in her report or in her discussion with defense counsel. Due to the judge's improper ruling, the jury never heard from Dr. Flores regarding the errors made by Dr. Kruse in her testing and the interpretations of the tests she performed. Without Dr. Flores' testimony explaining how Dr. Kruse erred, the jury was left to make its life-or-death decision believing appellant was faking.

***Not* offered to support NGRI or GBMI**

Throughout the brief, respondent argued the exclusion of Dr. Flores' testimony was not error because the state presented evidence that appellant "knew moral and legal right from wrong" and "had the capacity to appreciate the criminality of his conduct or was able to conform his conduct to the requirements of the law." See e.g., BOR at 91; BOR at 95-98. This argument

ignores the issue presented on appeal. These matters go to whether appellant was not guilty by reason of insanity or guilty but mentally ill, which had been decided during the guilt phase.[9] Appellant has not challenged the exclusion of Dr. Flores' testimony during the guilt phase. In fact, Dr. Flores was not even presented as a witness until the sentencing phase. Thus, the jury's guilty verdicts are of no consequences to the analysis of the issue presented.

Dr. Flores' testimony was relevant during the sentencing phase as mitigating evidence. First, under the South Carolina death penalty statute, statutory mitigating circumstances include if the murder was "committed while the defendant was under the influence of mental or emotional disturbance," S.C. Code Ann. § 16-3-20 (C)(b)(2), and a defendant's "mentality ... at the time of the crime," S.C. Code Ann. § 16-3-20 (C)(b)(7). Additionally, the "statutorily listed mitigating circumstances are not exclusive." State v. Linder, 276 S.C. 304, 311, 278 S.E.2d 335, 339 (1981). In fact, according to the United States Supreme Court, the sentencer must "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record or any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 604 (1978). The trial judge is required to submit to the jury *any* evidence proffered by a defendant in mitigation of the death penalty. State v. Patterson, 290 S.C. 523, 530, 351 S.E.2d 853, 857 (1986).

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[9] Respondent appears to be parroting an illogical reason given by the trial judge. When defense counsel explained he wanted to present evidence of appellant's mental illness during the sentencing phase, the trial judge noted that doing so would be "kind of odd" because "[t]he jury has already determined they didn't believe" appellant was schizophrenic. Tr. 5122, ll. 17-20. Additionally, the judge opined that because of the jury's "straight guilty verdict," it "appear[ed] that's what the jury has decided, is they didn't buy any of the mental stuff or they weren't compelled to go with it." Tr. 5122, l. 21 – 5123, l. 11. Such statements, just like the argument presented by respondent on appeal, demonstrate a failure to comprehend the distinction between insanity as a defense and mental illness as a mitigating factor to impose a sentence less than death.

Dr. Flores refuted Dr. Kruse's conclusion that appellant was malingering mental illness by explaining how Dr. Kruse employed flawed methodology in her testing. Whether appellant had a mental illness was relevant to the jury's considerations during the penalty phase because mental illness is a statutory mitigating circumstance. Further, Dr. Flores' testimony was "any evidence" related to appellant's character and the circumstances of the offense as it related directly to appellant's mental state because it refuted the state's contention that appellant was faking his mental illness. Pursuant to the federal and state constitutions, appellant was entitled to present Dr. Flores as a witness to challenge Dr. Kruse's testimony that he was malingering mental illness.

***Not* too late**

On appeal, respondent argued the judge's exclusion of Dr. Flores was not error because of "the late date that Dr. Flores was being called to testify." BOR at 98. After noting that appellant had Dr. Kruse's report prior to trial, respondent argued that appellant's failure to contact Dr. Flores prior to trial meant "either ... this inquiry was not necessary or this was part of their strategy to surprise the state." BOR at 98. The record easily refutes this contention.

First and foremost, it was Dr. Kruse who surprised the defense by testifying differently from her report and from her discussion with defense counsel by opining that appellant was malingering. Tr. 4947, l. 19 – 4948, l. 16; Tr. 4947, ll. 22-24; Tr. 5641, ll. 19-23. As a result, the defense was not on notice that Dr. Kruse would claim that her testing revealed appellant was malingering until she actually testified. Therefore, defense counsel, despite possession of Dr. Kruse's report and discussion with her prior to trial, were not on notice of the necessity of refuting her testing methodology or conclusions.

Second, Dr. Flores did not become known to the defense until immediately prior to their attempt to call her as a witness. As Dr. Flores explained, the defense did not seek out her assistance. When the state's cross-examination of Dr. Dorney with Dr. Kruse's report suggested the state construed the report as concluding appellant was malingering mental illness and the possibility that Dr. Kruse's testimony would include a diagnosis of malingering, Dr. Dorney sought help from Dr. Flores. After Dr. Flores reviewed the raw data, Dr. Kruse's report, and Dr. Kruse's testimony, Dr. Flores requested to assist the defense because she was so astounded by Dr. Kruse's improper methodology and incorrect conclusions regarding the psychological testing of appellant. As soon as the defense received Dr. Flores' affidavit, the defense provided it to the solicitor.

Furthermore, the solicitor had ample time to prepare to cross-examine Dr. Flores and prepare for rebuttal. The defense began their mitigation case on Monday, June 10, 2019. Tr. 5371, l. 20. That morning, the defense provided the solicitor with an affidavit from Dr. Flores. Tr. 5483, ll. 18-19. The following day, the solicitor moved to bar Dr. Flores from testifying. Tr. 5598, l. 10; Tr. 5598, l. 24 – 5599, l. 12. The evidence portion of the penalty phase concluded on June 12, 2019. Tr. 5788, l. 21; Tr. 5886, l. 12. Thus, the solicitor was aware of Dr. Flores and the substance of her testimony on the first day of the defense's presentation. The solicitor had plenty of time to prepare to cross-examine Dr. Flores. As the solicitor already had Dr. Kruse as an expert witness, the solicitor easily could have relied on Dr. Kruse for assistance with preparing the cross-examination and as a rebuttal witness. Calling Dr. Flores as a witness during the penalty phase to counter Dr. Kruse's testimony was not too late.

***Not* pitting**

Respondent argued that when Dr. Flores testified "in depth of what she thought were mistakes made by Dr. Kruse," the proffered testimony amounted to "pitting witnesses against each other which is not allowed pursuant to South Carolina law." BOR at 98. According to respondent, "[m]uch of Dr. Flores['] testimony [was] pitted against the findings of Dr. Kruse instead of relying on her own findings." BOR at 99. In sum, respondent argued "[a]ny evidence that pits one witness against another [whether] it be for prosecution or the defense violates South Carolina law and should not be permitted." BOR at 99. Respondent is simply wrong as to what pitting means.

Pitting witnesses involves asking a witness to attack another witness's veracity. See e.g., State v. Sapps, 295 S.C. 484, 486, 369 S.E.2d 145, 145-146 (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."). Dr. Flores never commented on Dr. Kruse's veracity. Instead, Dr. Flores did exactly as all experts do when there is a classic "battle of the experts." Dr. Flores challenged the methodology and interpretations employed by Dr. Kruse to arrive at her conclusions. Such testimony is admissible. See Williams v. Standard Oil Co., 127 S.C. 430, 121 S.E. 363, 364 (1924) (permitting a party to show that an expert witness put up by the other side has made mistakes in other cases of the same sort); See also Network Publications, Inc. v. Bjorkman, 756 So.2d 1028, 1031 (Fla. Dist. Ct. App. 2000) (explaining "that an expert may properly explain his or her opinion on an issue in controversy by outlining the claimed deficiencies in the opposing expert's methodology"); Griffin v. State, 504 So.2d 186, 189 (Miss. 1987), overruled on other grounds by West v. State, 553 So.2d 8 (Miss. 1989) (holding that an expert witness may offer his opinion with regard to whether another expert reached the correct diagnosis); Shillingford v.

New York City Transit Authority, 46 N.Y.S.3d 110, 111 (N.Y. App. Div. 2017) (reversing where the lower court excluded testimony from an expert where the "expert merely disagreed with the defendants' expert's methodology and conclusions, presenting a battle of the experts for the jury to resolve").

Presenting Dr. Flores as an expert witness to testify regarding the flaws in Dr. Kruse's testing methodology was *not* pitting witnesses because Dr. Flores never commented on the veracity of Dr. Kruse. Her proffered testimony went solely to the errors and omissions committed by Dr. Kruse when she conducted her allegedly "objective" and "scientific" testing. The trial judge erred in ruling the proposed testimony involved pitting witnesses, and respondent's reliance upon this ruling on appeal reeks of desperation.

***Not* witness intimidation**

On appeal, respondent picked up the mantle from the solicitor of claiming Dr. Flores engaged in witness intimidation. In her affidavit, Dr. Flores explained that Dr. Kruse "may have violated" certain "ethical principles that psychologists are to abide by." R. p. *(Court's Exhibit #123). Dr. Flores expressed her intention to follow the ethical guidelines and communicate with Dr. Kruse regarding her concerns. R. p. *(Court's Exhibit #123). Although defense counsel did not elicit any testimony from Dr. Flores regarding her ethical obligations during the proffer, the state questioned Dr. Flores almost exclusively on this portion of her affidavit. Tr. 5634, ll. 8-12. Dr. Flores told the solicitor she had "multiple concerns about competence, about interpretational data, [and] about not submitting evidence that should have been submitted" by Dr. Kruse. Tr. 5634, ll. 2-25. According to Dr. Flores, there were "a lot" of "fairly excessive and concerning" "issues" about Dr. Kruse's testing, report, and testimony. Tr. 5635, ll. 11-16. Regarding her

ethical duty to contact Dr. Kruse and report her, Dr. Flores explained she was "more concerned about protecting the public than ... about protecting [Dr. Kruse's] reputation." Tr. 5638, ll. 7-9.

According to respondent, the fact that the code of ethics for psychologists required Dr. Flores to discuss the matter with Dr. Kruse and file a complaint if Dr. Kruse's response was not satisfactory "equate[d] to witness intimidation." [10] BOR at 93. From this, the state exaggerated by claiming as "fact" that "Dr. Flores would make the determination as to whether or not Dr. Kruse's license would be in jeopardy." BOR at 93. What was clear from the testimony was that Dr. Flores would decide only whether to file a complaint. Someone else would decide the fate of Dr. Kruse's license. Nevertheless, fearful of Dr. Flores filing a complaint, Dr. Kruse allegedly refused to testify for the state as a rebuttal witness in the sentencing phase. According to respondent, Dr. Flores was intimidated and refused to return to court to defend her findings because she feared Dr. Flores would file an ethics complaint against her. BOR at 93. Put another way, Dr. Flores' affidavit "cause[d] Dr. Kruse into being reluctant in testifying in order to answer these accusations." BOR at 91. In respondent's view, due to Dr. Kruse's fear, the judge properly excluded Dr. Flores as a matter of "fairness." BOR at 93.

Just as the solicitor did, respondent cited State v. Inman, 395 S.C. 539, 720 S.E.2d 31 (2011), to support its position. BOR at 93. The prosecutor in Inman intimidated the defense's social historian by alleging that her testifying without a South Carolina license in social work constituted a criminal offense even after the prosecutor knew that failure to comply with the licensing requirements did not preclude a witness from testifying. State v. Inman, 395 S.C. 539,

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[10] At another point in the brief, respondent argued that "Dr. Flores had already threatened Dr. Kruse [with] reporting her to the ethical board which is *borderline* to witness intimidation." BOR at 91 (emphasis added). Thus, it appears respondent conceded Dr. Flores' ethical obligation to report Dr. Kruse was not "equal to" to witness intimidation; however, respondent later changed course and equated the two.

563, 720 S.E.2d 31, 44 (2011). Due to the Inman prosecutor's conduct, the social historian refused to testify because she feared being arrested. Id. In holding the solicitor engaged in prosecutorial misconduct by intimidating the witness, this Court acknowledged the solicitor's fundamental power to assert charges against a person the solicitor believes has committed a crime. Id. at 562, 720 S.E.2d at 44. This Court held the solicitor's conduct "unequivocally constituted witness intimidation." Id. at 563, 720 S.E.2d at 44. Instead of addressing the matter in a hearing outside of the witness's presence, the solicitor's challenge to the witness as soon as she took the stand could "only be viewed as an intimidation tactic." Id.

As demonstrated, contrary to respondent's claim, Inman does not stand for the proposition that "[n]o expert witness should be afraid to testify or defend their findings because of fear of retaliation from another witness with accusations of unethical behavior." See BOR at 93. In fact, most expert witnesses are governed by some licensing authority. See Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 556, 658 S.E.2d 80, 86 (2008) (explaining that licensing may be a consideration for qualifications of an expert but a lack of license does not bar a witness from being qualified). Most licensing authorities provide mechanisms for allegations of unethical conduct. See e.g., S.C. Code Ann. § 40-1-80(a) (explaining the Department of Labor, Licensing, and Regulation may investigate statutory and regulatory violations "if a person files a written complaint"); Osman v. South Carolina Department of Labor, 382 S.C. 244, 676 S.E.2d 672 (2009) (discussing medical disciplinary proceedings involving the State Board of Medical Examiners of the South Carolina Department of Labor, Licensing, and Regulation). Thus, expert witnesses, who are governed by licensing authorities that investigate and prosecute allegations of misconduct, testify with the full understanding that if they violate statutory, regulatory, or ethical standards governing their licenses, they may be investigated and

disciplined. Every day in courtrooms across this country, expert witnesses, confident in their findings, testify and defend their findings, knowing full well that they risk being reported for unethical conduct if they engage in unethical conduct.

Here, Dr. Kruse prepared a report and testified with the understanding that she would be required to *defend* her findings, as all expert witnesses are required to do during a trial. Presumably, she was aware of her statutory, regulatory, and ethical responsibilities at the time of her testing, preparing of the report, and testifying. Therefore, she was cognizant of the fact that *anyone* could file a complaint regarding her conduct if it violated those responsibilities. With that understanding in mind, Dr. Flores' statement in her affidavit that she was required by the ethical rules governing her profession to file a complaint about Dr. Kruse's testing methodology could hardly be a surprise to Dr. Kruse. Neither Dr. Flores nor defense counsel possessed some awesome and singular power to file a complaint against Dr. Kruse as the solicitor did in Inman. Dr. Flores' authority was the same as anyone else's in this regard. Finally, respondent's argument that Dr. Kruse refused to testify as a rebuttal witness because she feared a complaint being filed suggests Dr. Flores' complaints that Dr. Kruse violated her ethics were well-founded. In "fairness," which respondent argued was the reason for excluding Dr. Flores as a witness, the jury should have been permitted to hear from Dr. Flores and make its own decision.

***Not* cumulative**

In its brief, respondent argued both that (1) the judge did not err in excluding Dr. Flores' testimony because it was cumulative to testimony from other witnesses and (2) that any error was harmless beyond a reasonable doubt because it was cumulative to testimony from other witnesses. Respondent's argument fails on both accounts.

First, concerning whether error existed at all due to the testimony of other witnesses, respondent argued "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 [appellant]'s mental illness." BOR at 94. Respondent argued "the testimony of Dr. Flores was not necessary since multiple doctors had already testified as to [appellant]'s mental illness in the guilt and penalty phases of this trial." BOR at 97-98. According to respondent, "[t]here is no reversible error when evidence was obtained through other witnesses." BOR at 94. Additionally, respondent argued any error in excluding Dr. Flores' testimony was harmless because it was cumulative. BOR at 99. According to respondent, "there were numerous doctors that have testified that [appellant] was not malingering and he suffered from numerous mental illnesses." BOR at 100.

In conducting its analysis, respondent yet again distorted the issue on appeal by failing to appreciate that the excluded evidence went to whether Dr. Kruse's testimony that appellant was malingering psychosis was based on sound science, not whether appellant was not guilty by reason of insanity or guilty but mentally ill. In order for evidence to be cumulative, it must be the equivalent of the evidence presented. See Fields v. Regional Medical Center Orangeburg, 363 S.C. 19, 31, 609 S.E.2d 506, 512 (2005) (discussing harmless error, but equating cumulative with equivalent). Here, the excluded evidence was Dr. Flores' assessment of Dr. Kruse's testing and interpretations. No other witness provided such evidence or its equivalent.

In support of its cumulative argument, respondent claimed "Dr. Tora Brawley found [appellant] not to be malingering." BOR at 94-95. Dr. Brawley was the only doctor specifically named by respondent as having provided information regarding whether appellant was malingering. Respondent's summary of the other doctors' testimony concerned mental illness,

but not whether appellant was faking mental illness. See BOR at 94-95. Most critical to the issue presented, Dr. Brawley's examination of appellant had nothing to do with Dr. Kruse's testing. Dr. Brawley never testified; thus, the jury never heard from her. The solicitor used every opportunity to undermine the testing conducted by Dr. Brawley and the results she reached. See e.g., Tr. 3961, l. 24 – 3962, l. 2; Tr. 3962, l. 22 – 3963, l. 8; Tr. 3964, ll. 4-7. Additionally, Dr. Brawley's testing concerned cognition, *not* psychosis, and the solicitor made sure the jury knew the limitations of Dr. Brawley's testing. Tr. 4763, l. 20 – 4768, l. 7; Tr. 4847, ll. 3-10; Tr. 4848, ll. 3-12; Tr. 4852, ll. 2-19. If it were not clear to the jury previously, the solicitor made it crystal clear when he asked Dr. Kruse if Dr. Brawley or any other psychologist conducted the kind of testing she did to rule in or out malingering as to psychosis. Tr. 4927, ll. 20-22; see also Tr. 4998, ll. 13-15 (Solicitor's argument that no one on the defense team "tested to see if there's any underlying psychosis," but Dr. Kruse did). Thus, the testimony offered regarding Dr. Brawley's conclusion addressed only whether appellant was malingering his cognitive abilities and *not* whether he was malingering psychosis. Dr. Kruse claimed he was malingering psychosis, and Dr. Flores' proffered testimony destroyed Dr. Kruse's assessment. The excluded testimony was not cumulative to any other evidence in the record.

Apparently recognizing how the solicitor's closing arguments demonstrated the exact harm caused to appellant by the exclusion of Dr. Flores' testimony, respondent argued this Court could not consider the closing arguments in its harmless error analysis. BOR at 100 ("Closing

arguments cannot be considered evidence.").[11] To the contrary, this Court often considers closing arguments in determining whether a defendant suffered harm from a trial error. See e.g., Rutland v. State, 415 S.C. 570, 578, 785 S.E.2d 350, 354 (2016) (stating "[a]ny question as to whether petitioner was prejudiced may be answered by looking to the solicitor's reliance on [the witness's unimpeached] trial testimony"). Here, the solicitor's closing arguments in both phases demonstrate how the exclusion of Dr. Flores' testimony allowed the solicitor to sow seeds of doubt regarding appellant's mental illness during the guilty phase and reap his harvest in the sentencing phase by asking the jury to reject evidence of appellant's mental illness even to spare his life.

In his closing argument at the conclusion of the guilt phase, the solicitor reminded the jurors that Dr. Kruse was the only person to test appellant for psychosis and that her tests were "scientific" and "objective" in contrast to the subjective testimony from the defense's expensive hired guns. Tr. 4998, ll. 13-19. The solicitor urged the jurors to reject Dr. Dorney's opinion because she failed to rely upon Dr. Kruse's "objective" and "scientific" testing. Tr. 5004, ll. 16-22. Then, in closing at the conclusion of the penalty phase, the solicitor encouraged the jurors to ignore mental illness as a mitigating circumstance because appellant was faking as Dr. Kruse testified. Tr. 5910, ll. 17-25; Tr. 5912, ll. 10-13.

Perhaps the best judge of the impact Dr. Flores' testimony would have had on the case was the solicitor himself. He "strenuously" objected to Dr. Flores' testimony because it would

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[11] Incorrectly, respondent argued that "[a]ll that the jury must consider regarding competency, mental illness or malingering are the expert testimony given by the doctors that testified regarding [appellant]'s mental health." BOR at 100. Competency is a matter for the judge, not the jury. See S.C. Code Ann. § 44-23-410 (establishing the procedures for determining competency to stand trial). Regarding mental illness, jurors may consider expert *and* lay testimony. State v. Lewis, 328 S.C. 273, 278, 494 S.E.2d 115, 117 (1997).

build a record "geared at destroying [the] professional credibility and personal integrity of Dr. Kimberly Kruse." Tr. 5598, l. 24 – 5599, l. 2. According to the solicitor, Dr. Flores' testimony was "geared as an attack on Dr. Kruse." Tr. 5483, ll. 21-22. The solicitor acknowledged that Dr. Flores would "pick apart Dr. Kruse." Tr. 5599, ll. 21-24. Dr. Flores' testimony would "professionally and personally destroy" Dr. Kruse. Tr. 5599, l. 25. The devastation would be so great that Dr. Kruse would "never step[] into a criminal courtroom again." Tr. 5600, ll. 1-3. In conclusion, the exclusion of Dr. Flores was not harmless beyond a reasonable doubt because she would have destroyed the "scientific" and "objective" basis of Dr. Kruse's belated opinion that appellant was malingering mental illness, a critical issue during the penalty phase.

6.

The state offers no sound legal basis to support the trial judge's exclusion of relevant mitigating evidence.

During the penalty phase of appellant's capital trial, the judge excluded some mitigating evidence altogether and forced other mitigating evidence to be delivered in a condensed, hurried, and sanitized fashion. Specifically, the trial judge excluded the presentation of events occurring prior to appellant's birth, primarily during the lives of his paternal grandmother, Roberta Thornsberry, and his father, Tim Jones, Sr., as told by them firsthand. The judge also excluded the testimony of a career law enforcement officer regarding his observations of appellant that concerned appellant's lack of future dangerousness and genuine remorse. Respondent argued the trial judge properly excluded and minimized this powerful mitigating evidence because (1) it was not relevant, (2) the danger of unfair prejudice substantially outweighed the probative value, and (3) the evidence as presented from the social historian was inadmissible hearsay. Respondent's arguments fail on all accounts.

Relevant evidence

After quoting Rule 401, SCRE, respondent argued that appellant "wished to present these matters before the jury because according to [him] since Mrs. Thornbery [sic] took part in raising [appellant] ... her harsh upbringing had an effect on [appellant]." BOR at 106. According to respondent, this evidence was not relevant because "[t]he fact at issue was the mental state of [appellant] at the time he committed this offense." BOR at 106. Certainly, appellant's mental state at the time of the murders was for the jury's consideration during the penalty phase; however, relevant evidence for the penalty phase is not limited to only such evidence. Harkening back to the definition of relevance contained within Rule 401, SCRE, respondent also

argued the life stories of appellant's father and grandmother were not relevant because those did "not make him murdering his children more or less probable." BOR at 106. Contrary to this assertion, there was no dispute appellant killed his children; therefore, relevancy determinations were not to be judged against this metric.

Respondent also argued the testimony of Deputy Barry Sowards was "not relevant[12] as a mitigating circumstance." BOR at 109. Respondent based this argument on the fact that Deputy Sowards' job was to protect all citizens, including appellant. BOR at 109. In respondent's view Deputy Sowards' testimony "did not reveal any lack of danger that the community may have from [appellant]." BOR at 109.

In its brief, respondent ignored controlling precedent from the United States Supreme Court regarding relevant evidence for purposes of capital sentencing proceedings. While Rule 401, SCRE, has a place in the analysis, the United States Supreme Court has provided greater refinement on what constitutes relevant evidence in capital sentencing proceedings. "Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value." Tennard v. Dretke, 542 U.S. 274, 284 (2004) (internal quotation omitted). "Once this low threshold for relevance is met, the Eighth Amendment requires that the jury be able to consider and give effect to a capital defendant's mitigating evidence." Id. at 285.

The firsthand accounts from Roberta and Tim Sr., regarding events occurring prior to appellant's birth were relevant to the jury's consideration of the death penalty. While appellant was not alive during these events, there can be little doubt that the events shaped the lives of

[12]Although respondent referred to the language of Rule 403, SCRE, immediately after discussing the testimony of Deputy Sowards, respondent failed to argue the testimony was properly excluded based upon Rule 403, SCRE. See BOR at 110.

Robert and Tim Sr., who in turn shaped appellant's life. Learning the heartbreaking details of their lives would have humanized appellant. The details would have shown appellant's value and worth extended beyond the brutal killings of his children. Thus, the evidence had a tendency to prove some fact or circumstances that a factfinder could determine had mitigating value.

Career law enforcement officer Barry Sowards would have provided the jury with relevant mitigating evidence going directly to appellant's genuine remorse and lack of future dangerousness. Sowards' testimony that appellant showed genuine remorse during the trial, including crying during distressing moments, was relevant to the jury's consideration of whether appellant showed remorse, which is mitigating evidence. See State v. Northcutt, 372 S.C. 207, 221, 641 S.E.2d 873, 880 (2007) (trial court erroneously excluded evidence of remorse); State v. Allen, 386 S.C. 93, 102, 687 S.E.2d 21, 26 (2009) (holding the sentencing process conducted before a judge complied with the requirements of due process where Allen was permitted to offer mitigating evidence, including evidence of his remorse); See also Jones v. Polk, 401 F.3d 257, 263-264 (4th Cir. 2005) (holding the state trial court erred by excluding substantive evidence of Jones' remorse because such evidence was "relevant, admissible mitigating evidence" and concluding the state supreme court unreasonably applied controlling federal law when it determined the error was harmless beyond a reasonable doubt); State v. Jones, 451 S.E.2d 826, 847 (N.C. 1994) (holding that evidence of Jones' remorse "should have been admitted as relevant mitigating evidence in the sentencing phase of his capital trial"). Notably, respondent did not address this portion of Sowards' testimony in its brief.

Respondent did address Sowards' testimony about his possession of a gun for the purpose of protecting appellant from others. According to respondent, this was not "relevant as a mitigating circumstance." BOR at 109. Respondent's interpretation was that the testimony did

not "reveal any lack of danger" to the community. BOR at 109. To the contrary, Sowards' testimony that he did not fear appellant and did not have the gun for protection from appellant revealed a seasoned law enforcement officer determined appellant posed very little risk of committing dangerous crimes in the future. Consideration of a capital defendant's future dangerousness is a relevant consideration for a capital sentencing jury. See Kelly v. South Carolina, 534 U.S. 246 (2002).

Danger of unfair prejudice

Respondent also argued the trial judge properly excluded the first-person accounts regarding the life stories of appellant's father and paternal grandmother because the testimony would "play on the emotions of the jury." BOR at 107. According to respondent, "the apparent reason why [appellant] wished his grandmother to testify as to her troubled childhood ... was for the sole reason to raise the emotions of the jury." BOR at 108. Respondent maintained appellant wanted to introduce "evidence of his parents[']and grandparents[']childhood[s] to play on the emotions of the jury ... to sway the jury that due to his grandparents[']and parents[']upbringing which occurred before [appellant]'s birth or as an infant, it had some impact and a reason as to why he committed these heinous crimes." BOR at 107. Just as respondent ignored controlling precedent from the United States Supreme Court regarding relevancy for capital sentencing proceedings, respondent ignored controlling precedent regarding the application of Rule 403, SCRE, as well.

This Court made clear that the "[a]pplication of Rule 403 should be cautiously invoked against a capital defendant in the penalty phase, especially in light of the due process implications at stake when a capital defendant seeks to introduce mitigation evidence." State v. Mercer, 381 S.C. 149, 161, 672 S.E.2d 556, 562 (2009). Additionally, this Court took the

opportunity to "remind[] the bench and bar of the importance of a meaningful mitigation defense and, concomitantly, the ability of a capital defendant to fully present mitigation evidence." Id. at 161 n.7, 672 S.E.2d at 562 n.7.

Here, the probative value of the excluded evidence substantially outweighed the danger of unfair prejudice, especially when viewed through the lens of protecting a capital defendant's right to due process during the sentencing phase. The probative value of the evidence was high as it concerned the lives of the people who raised appellant. While there was a limited danger of the evidence injecting emotion into the proceedings, there can be little doubt that sentencing proceedings in capital murder trials are emotional by nature. Pursuant to Payne v. Tennessee, 501 U.S. 808 (1991), the prosecution always presents heart wrenching victim impact testimony. Such testimony naturally evokes sadness and grief. The sentencing phase is also the time when the prosecution explores evidence in aggravation, which often appeals to emotions, including fear that the defendant will commit a future crime and a desire for vengeance to right the wrong. Likewise, mitigation evidence arouses the jurors' emotions by detailing a defendant's sad and troubled life. Thus, controlling precedent from the United States Supreme Court and this Court mandate presenting this evidence, even highly emotional evidence, to the jury. This practice ensures the jury is not "precluded from considering, as a mitigating factor, any aspect of a defendant's character or record or any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 604 (1978).

The harm of real unfair prejudice stemmed from the trial judge's conduct during the social historian's testimony. Not only did the trial judge repeatedly admonish and denigrate the defense's mitigation evidence, which telegraphed to the jury that the judge discredited the evidence, the trial judge forced the evidence to be presented in a hurried and sanitized way. In

support of its claim that appellant's mitigation case was not "rushed by the trial court," respondent noted that appellant presented testimony from eleven witnesses.[13] BOR at 110. The number of witnesses who testified is not dispositive of whether the judge forced the defense's presentation to be shortened and sanitized. Instead, a review of what the trial judge actually did is necessary.

As detailed in appellant's brief, the trial judge repeatedly interrupted the social historian's testimony to tell the defense to "keep moving" or to warn the defense that the testimony was "too detailed" for the judge's liking. See e.g., Tr. 5672, ll. 8-18; Tr. 5674, ll. 15-20; Tr. 5679, ll. 11-16; Tr. 5682, l. 8; Tr. 5690, ll. 6-9; Tr. 5691, ll. 7-9. These admonitions did not occur simply to avoid cumulative testimony or to keep the trial moving; these admonitions occurred during particularly moving portions of the testimony, such as when appellant's mother self-aborted appellant's sibling. See e.g., Tr. 5690, ll. 23-25. While respondent is correct that the judge "never once told the jury to disregard this testimony or ... [strike it] from the record," the judge did not need to take such measures to make it clear to the jury that the evidence was unworthy of consideration. See BOR at 11. The judge denigrated the entirety of the mitigation presentation and made his disdain for appellant's mitigation case apparent for the jurors.

Hearsay

Respondent argued the social historian Deborah Grey's "entire testimony consist[ed] of hearsay." BOR at 112. Further, respondent argued that because Grey did not offer any opinions, the rule allowing experts to testify based on hearsay was not applicable. BOR at 112. Later

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[13] In its brief, respondent commented twice that appellant's step-grandfather, Larry Thornsberry, was "not a blood relative," but was allowed to testify. BOR at 110, 112. The reason for pointing out the non-blood relation is not clear from the brief. Nevertheless, to the extent respondent contends that only blood relatives may testify during capital sentencing proceedings, respondent is simply wrong.

respondent claimed Grey "testified to one opinion," specifically that "due to the violence in his home, [appellant] had this period of fear that she called 'flight or fight.'" BOR at 113. To the contrary, Grey provided her opinion regarding the *patterns* of violence, mental illness, drug abuse, sexual abuse, and abandonment. She opined on how those patterns impacted appellant. For example, Grey explained that due to appellant's background, he

> had problems with attachment, problems with relationships and boundaries, difficulty with lack of trust, with socialization, not being able to make good friends, ... difficulty understanding and perceiving other people's emotional states, empathy, difficulty identifying and expressing emotions of [his] own, problems with low self-esteem and shame and feelings of not belonging.

Tr. 5743, l. 21 – 5744, l. 5. Thus, Grey could testify about what she learned from others. State v. Franklin, 318 S.C. 47, 50, 456 S.E.2d 357, 359 (1995). Furthermore, the rules of evidence must be used cautiously so as not to impair a capital defendant's due process rights, particularly in the presentation of mitigation evidence. See State v. Mercer, 381 S.C. 149, 161, 672 S.E.2d 556, 562 (2009).

By excluding relevant and highly probative mitigating evidence, the trial judge violated appellant's right to due process. When the judge forced appellant to present his social history in a condensed and sterile way through a third person when individuals with firsthand accounts were available to provide the compelling testimony and repeatedly disparaged defense counsel, the social historian, and the evidence presented by instructing defense counsel to "keep moving" when the testimony was "too detailed," the judge violated appellant's right to due process. Finally, when the judge excluded the testimony of a veteran law enforcement officer concerning appellant's expressions of genuine remorse and lack of future dangerousness, the judge violated appellant's right to due process. Appellant is entitled to a new sentencing phase trial.

7.

The state's argument that the penalty phase videotaped questioning of appellant's mother, Cynthia Turner, was "not relevant" and was just offered to "sway the emotions of the jury" is untenable given Supreme Court precedent.

The state first argues that the solicitor was unavailable to participate in "the recorded question and answer session" during jury selection, and that he was therefore unable to cross-examine Ms. Turner due to jury selection. BOR at 116-117; 127-129. This is indeed a red herring as is the attempt to blame the defense for the timing of Ms. Turner's testimony where the defense did everything it could to have her testify live before the jury but her New York mental health facility objected to her traveling. The state had every opportunity to participate in the recorded question and answer session and to cross-examine appellant's mother, Ms. Turner.

By motion dated March 28, 2019, the defense had the trial judge issue an ex parte certificate regarding an out-of-state witness dated April 1, 2019 for the material witness attendance of appellant's mother to testify at his trial "which is scheduled to begin on April 29, 2019 and to continue for period of 5 weeks." R. p. *; Tr. 3919, l. 9 – 3920, l. 3. The mental health facility where Ms. Turner lived objected to her traveling to South Carolina to testify. The New York Judge, the Honorable Stephen Dougherty, therefore held an emergency hearing on May 8, 2019. Judge Dougherty ordered the videotaped testimony of Cynthia Turner to be taken on May 9, 2019 or May 10, 2019 since she was not going to be transported to South Carolina over the objection of her mental health facility to testify live as a defense witness. Tr. 3910, l. 9 – 3920, l. 3; R. p. *. The jury trial in appellant's case began in Lexington County on May 14, 2019 with opening statements. The penalty phase began on June 6, 2019.

The salient point is that the solicitor's office had many more attorneys than the defense in this case, and they could have easily sent an Assistant Solicitor to cross-examine Ms. Turner, or cross-examined her by Skype, if they so desired. Casey Secor, one of lead defense attorneys who gave the penalty phase closing argument in this case, was able to travel to New York to participate in the videotaped deposition[14] of Ms. Turner in person. The solicitor's office *chose* not to participate in the deposition, or even go "on Skype" on a laptop and participate and cross-examine her. Tr. 3920, l. 4 – 3923, l. 1. Any claim that the state *could not* participate and *could not* cross-examine Ms. Turner cannot survive minimal scrutiny.[15]

The state notes that it never disputed that Ms. Turner was not mentally ill, but that this did not prove appellant suffered from the "identical mental illness at the identical level as Ms. Turner." BOR at 117. Relevant evidence is not defined as evidence that conclusively proves a fact. "'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.

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[14] For ease of reference for this issue, appellant refers to the videotaped question and answer session with Ms. Cynthia Turner as a "deposition." Had the solicitor's office sent an assistant solicitor to participate, that solicitor would have been able to question or cross-examine Ms. Turner in the same manner as during a videotaped deposition.

[15] The state urges in passing that Ms. Turner may not have been competent to testify as a witness *citing* State v. Needs, 333 S.C. 134, 143, 508 S.E. 857, 861 (1998). BOR at 129-130. Defense counsel told the judge Cynthia Turner had never been declared incompetent. Further, she was also not testifying as a fact witness in the normal trial sense, and her videotaped testimony, which was watched in camera by the trial judge and which is on file with this Court, was believable and persuasive. The trial judge erred by reasoning it was inadmissible because it showed appellant's mother in "terrible shape," and that it somehow was "inflammatory" and "prejudicial." Tr. 5810, l. 1 – 5811, l. 24. Ms. Turner's testimony was relevant mitigating evidence because it showed her true mental illness, and there is a "strong genetic link between mental illness, especially where a parent has severe mental illness." Tr. 5811, l. 5 – 5812, l. 3. The deposition did not have to show "identical mental illness at the identical level as Ms. Turner" to be relevant.

Compelling videotaped evidence showing appellant's mentally ill mother honestly answering questions would have brought home to the jury the depth of mental illness involved, and it would have made that point in a way no words could ever convey: "A picture paints a thousand words." A capital defendant has a federal constitutional right to present any relevant mitigation evidence to the sentencer. Lockett v. Ohio, 438 U.S. 586, 604-605 (1978). The path extended to a capital defendant to introduce mitigation evidence pursuant to the Eighth Amendment to the United States Constitution is wide. Bowman v. State, 422 S.C. 19, 32, 809 S.E.2d 232, 239 (2018).

The state also argues that the videotaped deposition should have been excluded pursuant to Rule 403, SCRE because "the introduction of the video would only inflame the emotion of the jury." BOR at 118. Again, the "[a]pplication of Rule 403 should be cautiously invoked against a capital defendant in the penalty phase, especially in light of the due process implications at stake when a capital defendant seeks to introduce mitigating evidence." State v. Mercer, 381 S.C. 149, 161, 672 S.E.2d 556, 562 (2009).

In addition, the videotaped deposition would not have "inflamed" the emotions of the jury. Inflaming emotions connotes working the jury into a frenzied state such that it returns a verdict on an improper basis, such as an arbitrary factor. See State v. Burkhart, 371 S.C. 482, 487-489, 640 S.E.2d 450, 453 (2007) (Evidence that an inmate serving life imprisonment had many privileges which included access to the yard, work, education, meals, canteen, phone, library, recreation, mail, television, and outside visitors injected an impermissible arbitrary factor into sentencing).

Emotions during the penalty phase of a capital trial based upon evidence necessary to prove aggravating circumstances or other evidence in aggravation and mitigating evidence about

a defendant's troubled upbringing are going to be part of almost every capital trial. This cannot be the basis for excluding mitigating evidence. While the state acknowledges that it may not preclude the sentencing jury from considering any relevant mitigating evidence pursuant to Eddings v. Oklahoma, 455 U.S. 104, 114 (1982), it still stubbornly insists that the deposition of appellant's mother, Ms. Turner, was not relevant. Mental illness in families cannot be helped, and that is what makes it so powerful and compelling when considering a young child had to try and cope in its midst.

The state's argument that the Cynthia Turner videotaped session was not probative of appellant's mental state at the time he committed the crimes is just tunnel vision caused by an irresistible impulse to affirm. BOR 119-121. It misses the broader point that the mental illness of appellant's mother affected appellant, and that dysfunction in appellant's background was part of who he was and became. It was up to the sentencing jury what weight it chose to give this relevant mitigating evidence in its life or death decision. Appellant had a right to have the jury consider it though, and the judge erred in ruling to the contrary. See Eddings v. Oklahoma, 455 U.S. 104, 114 (1982); Lockett v. Ohio, 438 U.S. 586, 604-605 (1978).

Testimony from family members while a defendant is on trial for his life is naturally going to be discounted by the sentencing jury as self-serving. The Cynthia Turner videotaped deposition could not be so easily discounted or as easily dispatched. It is on file with this Court. It was compelling evidence that appellant's mother was severely mentally ill. The jury must have been allowed to consider this evidence of mental illness, and to respond to this evidence in a reasoned, moral manner, and to weigh such evidence in its calculus of whether appellant was deserving of a sentence of less than death. See Brewer v. Quarterman, 550 U.S. 286, 296 (2007).

In the post-conviction relief context, this Court would find it unreasonable or inexplicable for trial counsel not to fully investigate a defendant's background and the mental health problems of his family members, given the long held belief of this society that defendants who commit criminal acts that are attributable to a disadvantaged background or to emotional and mental problems may be less culpable than defendants who have no such excuse. Council v. State, 380 S.C. 159, 174, 670 S.E.2d 356, 363-364 (2008), *citing* Penry v. Lynaugh, 492 U.S. 302, 319 (1989); Eddings v. Oklahoma, 455 U.S. 104, 115 (1982) (evidence of a difficult family life and emotional disturbance evidence is typically introduced by defendants in mitigation).

Importantly, in Weik v. State, 409 S.C. 214, 409, 761 S.E.2d 757 (2014), this Court rejected the post-conviction judge's finding that evidence of mental illness and dysfunction during Weik's childhood would only have constituted a "fancier case in mitigation." Evidence of the mental illness suffered in particular by the defendant's father, Russell Weik, was compelling mitigating evidence.

The Cynthia Turner videotaped deposition was captivating evidence of her mental illness in mitigation that appellant had the right to present to his sentencing jury. Its exclusion mandates that appellant be granted a new sentencing trial. Eddings v. Oklahoma, supra.

8.

Generic arguments that the ghastly autopsy photographs corroborated testimony and were not "unfairly prejudicial" ignore the fact that the calculated manner in which the horrific photographs were used by the solicitor contributed to making them an impermissible arbitrary factor, and they should have been excluded, pursuant to Rule 403, SCRE.

Respectfully, the state makes the same generic arguments that can be made in every capital case as to photographs. They "show the bodies of the victims in the same condition as [the defendant] ... left them ..." BOR at 136-137. The photographs were corroborative of the pathologist's testimony. BOR at 139-140. The photographs revealed "the character of Jones." BOR at 140-142. The photographs should not be excluded merely because they are "unpleasant or offensive." BOR at 142-144.

The solicitor told the jury in his closing penalty phase argument that, when deciding "the appropriate sentence ... look in the bag [at the photographs]," "open the bag [and look at the photographs]," "[l]ook in these bags [at the photographs] and you'll find the answer." Tr. 5915, l. 23 – 5917, l. 8. A juror earlier in the trial had looked at a much milder crime scene photograph, become hysterical, and burst into tears. The defense asserted it believed the juror had become physically sick in the jury room after the jury was excused. The solicitor did not want this to happen again, so he introduced the objectionable, horrific autopsy photographs, which are on file with this Court, in a manner where the jurors would view them for the first time in the privacy of the jury room where their reactions would remain private.

Appellant will not repeat his argument from his initial brief which describes these photographs. This Court will view the photographs for itself. Their probative value was substantially outweighed by the danger of unfair prejudice under Rule 403, SCRE. Appellant

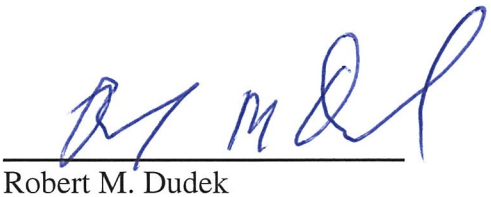
would only reiterate that the solicitor's "look in the bag and you'll find the answer" closing argument, beyond any doubt, was calculated to acquire a death sentence based on emotion, passion, and prejudice – an impermissible arbitrary factor. See State v. Haselden, 353 S.C. 190, 577 S.E.2d 445 (2003).

Such an arbitrary factor is forbidden under the Eighth Amendment to the United States Constitution, and pursuant to this Court's independent review obligations, S.C. Code § 16-3-25(C)(1). State v. Burkhart, 371 S.C. 482, 487-489, 640 S.E.2d 450, 453 (2007) pales in comparison to what occurred here. The calculated manner in which the ghastly, horrific autopsy photographs were used in this case constitutes one of the extremely rare cases where a new sentencing phase trial should be granted to remedy a death sentence invited by an impermissible arbitrary factor.

CONCLUSION

By reason of the arguments in the initial brief of appellant, and in this reply brief, appellant's convictions should be reversed and this case remanded to the Lexington County Court of General Sessions for a new trial. In the alternative, appellant's death sentence should be reversed, and this case remanded to the Lexington County Court of General Sessions for a new sentencing phase trial.

This 30th day of June, 2021.



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