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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Lexington County

Honorable Eugene C. Griffith, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TIMOTHY RAY JONES, JR.

APPELLANT

APPELLATE CASE NO. 2019-001008

FINAL BRIEF OF APPELLANT

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2.

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

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STATEMENT OF THE CASE

In January 2015, a Lexington County grand jury indicted appellant Timothy Ray Jones, Jr., for five counts of murder for the deaths of his five children. R. 8356. On December 9, 2015, the state served its notice that it intended to seek the death penalty and the circuit court entered an Order to that effect. R. 8352. The Honorable Eugene C. Griffith, Jr., was assigned the case and held numerous pretrial hearings. Notable for this appeal were hearings held on January 31, 2019, regarding neuropsychological testing and on March 11-14 and 19, 2019, regarding appellant's motion to suppress evidence obtained from an illegal roadblock. R. 6434; R. 6556.

On April 29, 2019, appellant's case came on for trial. R. 1. Rick Hubbard, Suzanne Mayes, and Shawn Graham represented the state. R. 1. Boyd Young, Robert Madsen, Bill McGuire, and Casey Secor represented appellant. R. 1. The jury was selected on May 13, 2019. R. 2362, l. 3; R. 2384, l. 1 – 2392, l. 5. Opening statements in the guilt phase were made on May 14, 2019. R. 2556, l. 18 – 2572, l. 3. On June 4, 2019, the jury found appellant guilty on all five counts. R. 5097, ll. 5-11.

After the elapse of the twenty-four-hour waiting period, the sentencing phase began on June 6, 2019. R. 5161, ll. 1-3. On June 13, 2019, the jury recommended a sentence of death. R. 5965, l. 6 – 5966, l. 4. Judge Griffith sentenced appellant to death. R. 5971, ll. 8-22.

This appeal follows.

ARGUMENT

1.

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

Introduction

Viewing the entire *voir dire*, the trial judge's decision to qualify Juror No. 156 is wholly unsupported by the record. The juror's responses indicated he could not give meaningful consideration to mitigating circumstances. His responses further showed a predisposition against recommending a life sentence for any reason or no reason at all, including as an act of mercy. This juror's views prevented or substantially impaired his ability to perform his duties as a juror in accordance with law, his instructions, and his oath. By needing a reason to vote for a life sentence, the juror improperly placed the burden on the defense to show why death would be an improper sentence. Based on the juror's views, he was unable to carry out the law as explained by the judge. Appellant's right to a fair and reliable sentencing determination was violated as a result of the unqualified juror serving on the jury that sentenced appellant to death. Appellant's convictions and death sentence must be reversed.

Relevant Facts

During individual *voir dire*, Juror No. 156 indicated he was a "type three" juror "but depending on the facts I can quickly bring myself to type one." R. 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. 7634. (Court's Exhibit No. 64). A "type three" juror was defined as "I feel that either Life Without Parole or the Death Penalty might be the appropriate penalties when the defendant has been convicted beyond a reasonable doubt of aggravated murder." R. 7634. (Court's Exhibit No. 64). Despite the juror's initial response, it was clear upon further questioning that he was in reality a "type one" juror and mitigation impaired.

The juror initially stated he could give meaningful consideration to evidence in aggravation and any mitigating evidence presented. R. 1573, l. 13 – 1575, l. 12. He claimed, "I think every ounce of information, evidence, facts, mitigating, everything, needs to be taken into consideration before the final decision" on punishment. R. 1579, l. 15 – 1580, l. 3.

However, when later asked if he believed death was "the only appropriate penalty" for a defendant found guilty of the murder of multiple children, the juror admitted, "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." R. 1583, l. 10 – 1584, l. 8. The juror essentially admitted he believed in "an eye for an eye." R. 1584, ll. 4-8.

Upon further questioning, the juror stated he believed mitigation evidence "needs to be within a recent timetable" and "have something to do with the case." R. 1591, ll. 5-18. While he believed "how you are raised" and the "life you came from" has "a play in it," when determining punishment for "the murders of these kids," he maintained mitigation evidence "needs to be involved around" the crime. R. 1591, ll. 9-18. The juror later asserted, "[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." R. 1591, l. 23 – 1592, l. 5.

Juror No. 156 said he understood the "ultimate decision" on whether to impose life without parole or the death penalty is an individual moral judgment and that each "juror can decide for themselves what is or is not mitigating." R. 1586, ll. 18-23; R. 1588, ll. 6-9. However, he said he could not respect another juror who did not have a reason to support his or her individual moral judgment. He did not believe such jurors were "taking [it] seriously." R. 1589, ll. 5-15. The juror later stated he could not respect another juror who determined life without parole was "the appropriate punishment" but could not give a reason as to why he or she felt that way. He asserted, "I believe if you are going to make a decision like that you should be able to at least explain it and explain why you feel that way." R. 1587, ll. 2-16. When he later expanded upon his answer, he said he believed it was defense counsel's "job to give us a reason" why life without parole is "the appropriate punishment." R. 1587, ll. 17-24.

The juror understood that "solely on the basis of mercy a juror can choose life." R. 1589, l. 22 – 1590, l. 2. For him whether mercy is "freely given" or "something that is earned" "depends on the situation." R. 1590, ll. 3-5. He again said he could not respect another juror who chose life simply because he or she wanted to be merciful. R. 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." R. 1590, ll. 10-11.

Appellant ultimately moved to disqualify Juror No. 156. Defense counsel argued the juror was "substantially impaired in his ability to follow the law" and was "mitigation impaired." R. 1592, l. 25 – 1593, l. 2. As far as mitigation, counsel asserted the juror believed what appellant did twenty years ago does not matter. The only mitigation evidence the juror was

willing to consider were circumstances involving the "facts of the case" or "the killings." R. 1593, ll. 5-8.

Defense counsel further argued the juror was "impaired in his ability to follow the law in that he . . . could not respect the right of other jurors to give a life penalty for any reason or no reason or . . . for another juror to consider mercy." R. 1593, ll. 10-14. Counsel concluded that "those impairments substantially impair his ability to follow the law as given by Your Honor because he would not allow a juror to say, for me mercy is appropriate. He says, *no, we have got to have facts*." R. 1593, ll. 14-17 (emphasis added). Based on those reasons, appellant moved to excuse him. R. 1593, l. 18.

Solicitor Hubbard admitted Juror No. 156 "was kind of all over the board." R. 1593, l. 24. He asserted, "But the big thing he [the juror] wanted to hear was facts. He is a facts guy." R. 1593, l. 25 – 1594, l. 1. The solicitor argued the juror should be qualified despite the fact that the juror admitted there were "some types of mitigation" he was "not interested in." The juror did not completely "shut the door on mitigation." R. 1594, ll. 1-4. Hubbard maintained, "Something twenty years ago he [the juror] has a hard time understanding. I get that and I think a lot of people can understand that. They want to see how does it tie into the crime and ultimately what I particularly try to do is let them know, that is exactly what the Defense is going to try to do is [show] that it does have a bearing on the crime. So he is looking for that bearing, that is it. Not just facts for the information, for the sake of information." R. 1594, ll. 4-12.

In brief response, defense counsel argued that "no nexus" is required between mitigation evidence and the offense committed. However, Juror No. 156 required such a nexus. Therefore, his ability to give meaningful consideration to mitigation was substantially impaired. R. 1594, ll. 21-24.

The judge reasoned Juror No. 156 was qualified "based on the totality of all his testimony." The judge emphasized that the juror "said repeatedly he wanted to hear all of the facts, all the facts before he makes a huge decision of taking someone's life." R. 1595, ll. 7-14. The judge later denied defense counsel's challenge for cause of Juror No. 156. R. 2389, ll. 1-9.

Juror No. 156 was seated as the twelfth juror over defense counsel's challenge for cause *after* appellant had exhausted all ten of his peremptory challenges. See R. 2384, l. 2 – 2389, l. 11. He was on the jury that sentenced appellant to death. See R. 5968, ll. 8-11.

During his penalty stage closing argument, defense counsel urged the jury to be merciful and recommend a sentence of life without parole. He also explained that a juror could vote for a life sentence for no reason or any reason at all. He asserted:

> As we talked about in the jury selection, *the law gives each of you the power to sentence Tim [appellant] to life for any reason, no reason or based on mercy alone. And when we talk about any reason, it means just that, any reason.* It could be a reason that was presented to you during the trial, but it doesn't have to be. It could be something that you just saw, even if no one else saw it. Something that you felt, even if no one else felt it. Something that you identify that you think is mitigating, you think warrants a sentence of life.
>
> . . .
>
> *No reason is another way that you can vote for life. You don't need a reason.* You can say I've considered everything. I agree that the aggravating circumstances have been proven and there is mitigation. And I don't know why, I can't put my finger on it, but, for me, in this case, a sentence of life without parole is the correct sentence. And if someone says to you well, what's your reason? You can say I'm voting for life and I don't need a reason. *And, finally, mercy alone. The law empowers you to vote for life for mercy alone, which means that you could find that all the aggravation has been proven, which it has. And you could say I've heard everything that was presented to me, there's nothing mitigating, nothing that I feel about Tim [appellant] and his family, but I have decided that for me, life is the appropriate punishment. I am going to vote for life based on my individual sense of mercy because I think it's right in this case.*

. . .

> Some of you may decide that Tim [appellant] is not worth your mercy, but ask yourself if the family of these innocent children, if they are worth your mercy. Because bestowing mercy upon Tim in this case is bestowing mercy upon the people who loved these children, who suffer their loss every day. . . . But you also understand that blessed are the peacemakers and blessed are the merciful. See that justice is done, but let mercy be your first concern. You can punish Tim [appellant] severely with a sentence of life imprisonment without the possibility of parole while being merciful to the people who love him and loved these children, who mourn them every day. The heartbreak of this family is unfathomable. There do not have to be any more deaths. There do not have to be any more funerals. Every member of these children's families have come here and asked you for mercy for Tim, which is mercy for them. This family is carrying too much sorrow already.

R. 5936, l. 22 – 5939, l. 20 (emphasis added).

The judge later instructed the jury that it must give meaningful consideration to mitigating circumstances, including any aspect of the character or history of the defendant that tends to show he should be sentenced to life imprisonment. The judge further instructed the jury that it could recommend a sentence of life without parole for any reason or no reason at all or even as an act of mercy. Specifically, he stated:

> I instruct you that even if you find the presence of at least one statutory aggravating circumstance, you must remain openminded as to the appropriate punishment to impose. And that the finding of an aggravated circumstance does not create the presumption that you should impose the death penalty. The death penalty is only an option. It is not a requirement. It is never mandatory for you to impose that sentence. *Our law requires that you give meaningful consideration not only to the aggravating circumstances but also to mitigating circumstances which the evidence shows.*
>
> *I instruct you that in a capital murder case, you* ***must*** *consider mitigating circumstances.* There are two types of mitigating circumstances. There are statutory mitigating circumstances and nonstatutory mitigating circumstances. A statutory mitigating circumstance is a fact, an incident, a detail or

an occurrence which the South Carolina Legislature has declared by statute would reduce the severity of the offense of murder.

. . .

*You **must** also consider any nonstatutory mitigating circumstances.* A nonstatutory mitigating circumstance is one which is not provided for by statute, but is one which serves the same purpose. And that is *a fact or circumstance of the crime **or any aspect of the character or history of the Defendant** that tends to show that he should be sentenced to life imprisonment without the possibility of parole rather than death.*

A mitigating factor can be anything, any single factor that you, any juror, determined to be a mitigating circumstance. I remind you, also, it's not necessary for you to find the existence of any mitigating circumstances unanimously or beyond a reasonable doubt. Each of you are free to find the existence of mitigating circumstances based upon any evidence that has been presented to you during this trial, even if no one mentioned that a certain fact amounted to a mitigating circumstance.

I instruct you that Mr. Jones [appellant] does not bear the burden of proving any mitigating evidence or factors. Because I remind you, the jury does not have to unanimously agree on any mitigating circumstances or factors. The jurors are allowed and can find separate mitigating factors. Each juror is free to give whatever weight he or she feels appropriate to any aggravating or mitigating circumstances.

. . .

*It is also permissible for a Juror to decide that life without parole is the appropriate punishment **for any reason or for no reason at all**.* You're not required to make a finding that the mitigating factors outnumber the aggravating factors. *You are free to impose a sentence of life without parole **for absolutely no reason**, even if you find the existence of aggravating circumstances and find no mitigating circumstances. This is what's traditionally been referred to as a sentence based upon mercy.* In other words, you may choose to recommend a life imprisonment without the possibility of parole if you find a statutory or nonstatutory circumstance or *you choose to recommend life imprisonment **as an act of mercy**.*

R. 5955, l. 4 – 5958, l. 17 (emphasis added).

Standard of Review

"A juror must be excused from service if 'the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" State v. Dickerson, 395 S.C. 101, 114, 716 S.E.2d 895, 902 (2011) (quoting Wainwright v. Witt, 469 U.S. 412, 424 (1985)); See Adams v. Texas, 448 U.S. 38, 45 (1980); State v. Green, 301 S.C. 347, 354, 392 S.E.2d 157, 160 (1990). "Determinations of whether a juror is qualified to serve on a panel are left to the sole discretion of the circuit court." Dickerson, 395 S.C. at 115, 716 S.E.2d at 903 (citing Green, 301 S.C. at 354, 392 S.E.2d at 160). "In reviewing the circuit court's decision, [this Court] must examine the juror's responses in light of the entire *voir dire* and will not reverse the court's decision unless it is wholly unsupported by the evidence." Id. (citing Green, 301 S.C. at 354, 392 S.E.2d at 160-161). "The ultimate consideration is that the juror be unbiased, impartial and able to carry out the law as explained to him." State v. Bennett, 328 S.C. 251, 257, 493 S.E.2d 845, 848 (1997) (citing Green, 301 S.C. at 354, 392 S.E.2d at 161).

Discussion

The trial judge erred in qualifying Juror No. 156. The juror was not qualified because he could not give meaningful consideration to mitigating circumstances as instructed by the judge. The only mitigating evidence the juror was willing to consider were circumstances involving the facts of the offense or surrounding the crime. See R. 1591, l. 5 – 1592, l. 5. Additionally, the juror was not qualified because he could not consider voting for a life sentence for any reason or no reason at all, including merely as an act of mercy. This juror needed a reason to vote for a life sentence. By needing a reason to vote for a life sentence, the juror improperly placed the burden on the defense to show why death was not the proper sentence. Moreover, the juror was very

clear that he could not respect another juror's decision to vote for a life sentence for any reason, no reason, or as an act of mercy indicating his ability to follow the law as instructed by the judge was substantially impaired.

"A venireman must be excused if his opinions would prevent or substantially impair the performance of his duties as a juror in accordance with his oath and instructions." State v. Green, 301 S.C. 347, 352, 392 S.E.2d 157, 159 (1990) (citing Wainwright v. Witt, 469 U.S. 412 (1985)). In determining whether a juror was erroneously qualified, this Court uses a "three step analysis." Id. First, "an appellant must show that he exhausted all of his peremptory challenges." Id. (citing State v. South, 285 S.C. 529, 331 S.E.2d 775 (1985); State v. Hardee, 279 S.C. 409, 308 S.E.2d 521 (1983); State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983); and State v. Britt, 237 S.C. 293, 117 S.E.2d 379 (1960)). If an appellant exhausted all of his peremptory challenges, then this Court will determine whether the juror was erroneously qualified, depriving the appellant of a fair trial. Id. at 352, 392 S.E.2d at 160. Appellant exhausted all ten of his peremptory challenges and, therefore, satisfies the first step of the analysis. See R. 2384, l. 2 – 2389, l. 11.

The second step of the analysis requires this Court to "examine the disputed juror to see if the juror was erroneously qualified." Green, 301 S.C. at 352, 392 S.E.2d at 160. In Dickerson, this Court exclaimed, "A juror must be excused from service if 'the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" Dickerson, 395 S.C. at 114, 716 S.E.2d 895 at 902 (quoting Wainwright, 469 U.S. at 424); See Adams v. Texas, 448 U.S. 38, 45 (1980); State v. Green, 301 S.C. 347, 354, 392 S.E.2d 157, 160 (1990).

Juror No. 156's views on the death penalty and mitigating circumstances prevented or substantially impaired the performance of his duties as a juror in accordance with his instructions and his oath. Specifically, the juror was not qualified because he stated he would automatically vote for the death penalty for a defendant found guilty of the murder of multiple children and, further, he could not give meaningful consideration to mitigating circumstances as instructed by the judge.

A capital defendant may challenge for cause any juror who would automatically vote for a death sentence. Morgan v. Illinois, 504 U.S. 719, 729 (1992). "If even one such juror is impaneled and the death sentence is imposed, the State is disentitled to execute the sentence." Id. Initially, the juror said, "I think every ounce of information, evidence, facts, mitigating, everything, needs to be taken into consideration before the final decision [on the proper sentence]." R. 1580, ll. 1-3. However, upon further questioning, the juror stated he would automatically vote for the death penalty if the state proved beyond a reasonable doubt that the defendant murdered multiple children. Specifically, when asked if he believed death was "the only appropriate penalty" for a defendant found guilty of the murder of multiple children, the juror admitted, "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." R. 1583, l. 10 – 1584, l. 8.

Despite admitting he would automatically vote for the death penalty for a defendant found guilty of the murder of multiple children, such as appellant, upon further questioning, the juror claimed he wanted "to hear everything" before deciding the proper sentence. R. 1586, ll. 2-10. Yet, during follow up questioning by Solicitor Hubbard, the juror unequivocally stated that the only mitigating evidence he was willing to consider were circumstances involving the facts

of the offense or surrounding the crime. See R. 1591, l. 5 – 1592, l. 5. Specifically, he asserted, "I am thinking, *it needs to be within a recent timetable.* Anything else, to me, how you are raised has a play in it, [the] life you came from has a play in it. But *when 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.*" R. 1591, ll. 5-18 (emphasis added). He later continued, "[F]or me personally, you know, *what happened twenty years ago when you [were] in elementary school doesn't have anything to do with your decision making now.*" R. 1592, ll. 3-5 (emphasis added).

It is apparent that Juror No. 156's views on the death penalty and mitigating circumstances prevented or substantially impaired the performance of his duties as a juror in accordance with the law, the instructions, and his oath. The trial judge instructed the jury, "*Our law requires that you give meaningful consideration not only to the aggravating circumstances but also to mitigating circumstances which the evidence shows. I instruct you that in a capital murder case, you* ***must*** *consider mitigating circumstances. . . . You* ***must*** *also consider any nonstatutory mitigating circumstances.* A nonstatutory mitigating circumstance is one which is not provided for by statute but is one which serves the same purpose. And that is *a fact or circumstance of the crime* ***or any aspect of the character or history of the Defendant*** that tends to show that he should be sentenced to life imprisonment without the possibility of parole rather than death." R. 5955, l. 12 – 5956, l. 23 (emphasis added). Juror No. 156's views on mitigating circumstances prevented him from following the law as instructed by the judge.

This Court held in Rosemond v. Catoe, 383 S.C. 320, 330, 680 S.E.2d 5, 10 (2009), "It is proper to instruct a jury in a capital sentencing phase that it may recommend a life sentence for any reason or *no reason at all, including as an act of mercy.* A jury's consideration of mercy, if

proper evidence of mercy is admitted, is well recognized in the sentencing phase of a capital case." (emphasis added). The following seven defense witnesses asked for mercy on appellant's behalf: Roberta Thornsberry, appellant's grandmother, R. 5474, ll. 10-21; Timothy Jones, Sr., appellant's father, R. 5522, l. 16 – 5523, l. 1; Amber Kyzer, appellant's ex-wife, R. 5717, l. 7 – 5719, l. 10; Julie Jones, appellant's stepmother, R. 5839, l. 25 – 5842, l. 20; Tyler Jones, appellant's half-brother, R. 5857, l. 20 – 5858, l. 6; Travis Jones, appellant's half-brother, R. 5868, ll. 6-15; and Jacqueline Rangel, appellant's stepsister, R. 5885, l. 4 – 5886, l. 8.

Juror No. 156 unequivocally stated that he could not respect another juror who "after being presented with the facts" could not give a reason as to why he or she believed "life is the appropriate punishment." R. 1587, l. 2 – 1589, l. 21. He asserted, "[Y]ou *have to explain why* you feel a certain why." R. 1587, ll. 12-16 (emphasis added). Moreover, the juror further stated he could not respect another juror who said, "I am going to choose life because I want to be merciful." R. 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." R. 1590, ll. 6-11. The juror's need for a reason to consider a life sentence and 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 R. 5958, ll. 4-17.

Additionally, the juror's view that it was defense counsel's "job to give us the reason" to vote for a life sentence improperly placed the burden on appellant to show why death would not be a proper sentence. See R. 1587, ll. 17-24. "There is no burden of proof on a capital defendant with regard to evidence of mitigating circumstances." State v. Bell, 293 S.C. 391, 405, 360 S.E.2d 706, 713 (1987). The trial judge in this case specifically instructed the jury "that Mr. Jones [appellant] does not bear the burden of proving any mitigating evidence or factors." R.

5957, ll. 8-9. 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 third step of the analysis requires this Court to determine whether the error in qualifying the juror deprived appellant of a fair trial and warrants reversal. Green, 301 S.C. at 352-353, 392 S.E.2d at 160. In examining whether an appellant received a fair trial, this Court must focus on those jurors who were ultimately seated. Id. at 353, 392 S.E.2d at 160 (citing Ross v. Oklahoma, 487 U.S. 81 (1988)). Juror No. 156 was seated as the twelfth juror over defense counsel's challenge for cause and was a member of the jury that convicted appellant and sentenced him to death. Since this juror's "views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath" for the reasons argued above, qualifying this juror deprived appellant of a fair trial.

In State v. Bennett, 328 S.C. 251, 257, 493 S.E.2d 845, 848 (1997), this Court held a juror who unequivocally stated "that if the other eleven jurors voted for death, he would 'have to go with the majority of the jury'" was unqualified to serve in the sentencing phase of a capital trial. The unqualified juror in Bennett, as in the present case, was seated on the jury that ultimately recommended a death sentence after the defense had exercised all of its peremptory challenges. Id. at 256, 493 S.E.2d at 848. In Bennett, the judge's error in qualifying the juror required a remand for resentencing, all that was sought by Bennett on appeal. Id. at 258, 493 S.E.2d at 848. Likewise, the trial judge's error in qualifying Juror No. 156, a clearly unqualified juror, in this case requires a new trial. Respectfully, this Court should reverse appellant's convictions and death sentence and remand for a new trial.

2.

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

Introduction

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.

Relevant Facts

Juror No. 338 identified herself as a "type three" juror. R. 1238, ll. 18-21. She agreed this type of juror "is someone who wants to hear everything. I have not made up my mind, I don't have any preconceived notion. I want to hear everything and then make up my mind [on the proper sentence]." R. 1238, l. 22 – 1239, l. 1. The juror initially stated she could give meaningful consideration to affirmative defenses and all four potential verdicts during the guilt phase, including not guilty, not guilty by reason of insanity (NGRI), guilty but mentally ill (GBMI), and guilty. R. 1239, l. 15 – 1241, l. 3. She also maintained she could give meaningful

consideration to aggravating factors and any mitigating circumstances. R. 1242, l. 21 – 1243, l. 4.

When asked whether she would automatically vote for the death penalty if the defendant were found guilty of the murder of "innocent children, killed one after the other," the juror hesitated. She said, "I am not sure how I feel about a life for a life." R. 1247, ll. 1-10. She explained, "[W]hen somebody does something that heinous you don't want them to be a part of society. But then again, are you kind of almost being hypocritical" when you say "okay, if they did this to someone now you do this to them."[1] R. 1247, ll. 11-20.

Defense counsel then inquired further about the juror's views on a potential not guilty by reason of insanity verdict. The following colloquy occurred between counsel and the juror:

> Q: [L]ike the Judge said, we don't know a whole lot of facts here. Just the death of innocent children and not guilty by reason of insanity would mean that a person would admit to the killing. And the only way they could be found not guilty by reason of insanity is if you found the person, because they had some mental defect or disease that they couldn't distinguish legal or moral right from wrong. Does that make sense?
>
> A: It does.
>
> Q: And some people might say, if the evidence is there and the person definitely did the killing that is not an issue, I can't really consider not guilty by reason of insanity. It sounds like kind of letting somebody off. Do you agree with that?
>
> A: I guess, my questions would be behind the insanity of what is the measure of insanity, what are you defining as insanity. Was insanity, you know, what was the mind frame during that time that the actions were taken. So in my line of work, measurement is huge. So what does insanity actually mean.

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[1] The trial judge earlier told Juror No. 338: "Got two choices, life without parole or death. And if a jury reaches a verdict unanimously on either one that sentence will be carried out. So unanimous to death, the death penalty is carried out. If the jury is unanimous on life then life without parole is carried out. That means the balance of their life and don't get out." R. 1241, ll. 9-15.

Q: If you were to hear testimony from expert witnesses describing what that [NGRI] meant and evidence supporting that [verdict], is that something that you could truly consider?

A: *With that type of information,* ***sure.***

Q: And if you, if in your mind you thought they did present enough information to support that verdict, is that a verdict you could really consider or would you still have some hesitation because it would kind of be letting someone off?

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

Q: Some people might fear that if they don't really know, if they are not told what that means it kind of lets the guy out into society. Do you think that?

A: So you are saying if they have been declared insane they should still be part of society?

. . .

Q: Sure. What I am saying is, if you and eleven other jurors, let's say you all voted not guilty by reason of insanity, some people might have a fear in voting that way because they think the person gets put out back in society like you said. Is that a fear that you have?

A: So here is my question and maybe I don't understand.

R. 1248, l. 5 – 1250, l. 7. (emphasis added).

Assistant Solicitor Graham objected, and the juror was excused from the courtroom. R. 1250, ll. 8-17. The assistant solicitor argued, "I don't think it is appropriate to go down this line of questioning." R. 1251, ll. 16-21. He emphasized that the judge "never tells a juror what happens" if a defendant is found not guilty by reason of insanity. R. 1251, l. 18.

Defense counsel made clear that he did not intend to tell the juror the consequences of a NGRI verdict. He merely wished to ask her "would she maybe not fully consider NGRI because she might have some fear about not knowing what would happen." R. 1251, l. 22 – 1252, l. 1. The judge ruled that if the juror asked about the outcome of a NGRI verdict, counsel should say he is not allowed to answer that question and "blame it" on the judge. R. 1252, ll. 7-18.

Despite objections from the state, the trial judge told defense counsel he could ask the juror, "Because you have a concern as to what the plan may be and I can't say what the plan is, [c]ould you still consider [a NGRI verdict?]" R. 1253, ll. 14-25.

When the juror returned to the courtroom, defense counsel asked her, "So we left off, we were talking about the potential verdict of not guilty by reason of insanity. And it sounds like you had a concern about that, not knowing what would happen if somebody was found not guilty by reason of insanity. And not knowing what would happen, would that cause you to perhaps not consider that verdict?" R. 1254, ll. 6-11. The juror responded, "I would need to know what happened to consider that verdict." R. 1254, ll. 12-13.

After the assistant solicitor objected again, the following exchange took place between the trial judge and the juror:

> THE COURT: The end result plan is not allowed to be given in a trial. Okay. It is not. So he [defense counsel] is asking you, if that were the case then would that affect your ability to consider it [a verdict of not guilty by reason of insanity]. So you are not going to have - -
>
> A: Can I ask a question?
>
> THE COURT: You may.
>
> A: So in the case of the death penalty, you know death is the result.
>
> THE COURT: That is the result.

A: And if you know the life sentence without parole, you know that is the result.

THE COURT: Correct.

A: But in the case of not guilty by insanity, you don't know the result.

THE COURT: Don't know the result.

A: I don't understand.

THE COURT: That is just the Court rules.

Q [Defense Counsel]: So the result of that you would always be in the dark with regard to the result of a not guilty by reason of insanity verdict. Knowing you would always be in the dark about that, not knowing what would happen, would that cause you to maybe not consider that verdict as a true verdict. Would you vote for it not knowing what would happen?

A: I have no words honestly because without knowing what the result is how can you choose that option.

Q: So it sounds like you do have some reservations about choosing that option, not knowing the result.

A: It is just not knowing the result. You know the result of the other options but you don't know the result of that option.

R. 1255, l. 4 – 1256, l. 10.

The judge then instructed defense counsel to "move on." R. 1256, ll. 11-12.

The juror responded that a defendant's background and upbringing were relevant in determining punishment. R. 1256, l. 22 – 1257, l. 21. To her, mercy "is something we, as humans, choose to give or not to give." R. 1258, ll. 1-12. She understood that each juror may have his or her own reason to vote for life without parole and that the jurors did not need to agree on why a defendant should be sentenced to life instead of death. R. 1260, l. 1 – 1261, l. 6. The juror further understood that a juror could "vote for the life penalty" for no reason at all. R.

1261, l. 23 – 1262, l. 6. She agreed that a juror should not give up his or her consciously held belief concerning the proper sentence "just because they were coerced." R. 1265, ll. 5-14. She would respect another juror's individual moral judgment and she would expect others to respect hers. R. 1265, l. 15 – 1266, l. 15.

Before questioning the juror, Assistant Solicitor Graham asked to approach the bench. R. 1266, l. 25. The trial judge eventually excused the juror from the courtroom. R. 1267, ll. 2-12. The assistant solicitor argued Juror No. 338 was not qualified because "she has already said that, when she was questioned about not guilty by reason of insanity, that she wanted to know what was going to happen if she found that verdict and that would be important to her in deciding it and Your Honor is never going to be able to tell her that. So she is going to have an unanswered question and . . . I think that she expressed that she would not be able to consider that verdict sufficiently enough without us having to delve further." R. 1267, l. 15 – 1268, l. 1.

Defense counsel argued the juror was qualified. He asserted, "I don't believe she ever said, I cannot consider not guilty by reason of insanity. She indicated that she would have some concern not knowing, she said it did not make sense to her." R. 1268, ll. 3-7. Counsel argued the juror's "ultimate response" was "not I can't consider" a not guilty by reason of insanity verdict. Rather, she merely "said, I would have a concern." R. 1268, ll. 7-13. He emphasized that a lot of potential jurors have concerns in this case and that "is not a disqualified issue." R. 1268, ll. 14-16.

Solicitor Hubbard repeatedly argued that if appellant were convicted and sentenced to death and this juror served on the jury "we are going to be doing this again," suggesting appellant's convictions and sentence would be reversed on appeal. R. 1269, l. 22 – 1270, l. 9; R. 1272, ll. 1-10.

Defense counsel reasserted, "First off she [the juror] responded to Your Honor's questions. She could consider all the verdicts. There was one verdict she had a problem with. She said that she would have concern not knowing the results of it [a NGRI verdict] but she never said that is a verdict that I can't consider. She never said that." R. 1272, ll. 11-17. Before the judge ruled, defense counsel asked the judge to consider a comparison. He said, "A good way to look at this would be, what if a [j]uror said, well, so all twelve death, all twelve life, we know what happens, what happens if we, what if we don't agree, we have a non-unanimous jury. What happens then . . . Well, because that person would always be eligible to serve and would always be qualified even if they had that concern just like this [j]uror." R. 1273, l. 17 – 1274, l. 4.

The judge excused Juror No. 338 because he "couldn't answer her question" about the outcome of a not guilty by reason of insanity verdict. R. 1274, ll. 22-23. He told the juror, "Well, since I can't answer your question and that is a big concern of your being able to go forward and make a decision I am going to excuse you from jury service and let you go." R. 1274, ll. 8-18.

Defense counsel noted his objection to excusing Juror No. 338. He again asserted the juror was qualified based on her answers. He said, "She is very logical, rational, expressed a concern not knowing what would happen as a result of the NGRI verdict. She was having concerns in this case and just having concerns doesn't disqualify somebody." R. 1275, ll. 3-11.

Standard of Review

"A prospective juror may be excluded for cause when his or her views on capital punishment would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." State v. Evins, 373 S.C. 404, 418, 645 S.E.2d

904, 911 (2007) (citing S.C. Code Ann. § 16-3-20(E) (juror may not be excused in a death penalty case unless his beliefs or attitudes against capital punishment would render him unable to return a verdict according to law)).

"Determinations of whether a juror is qualified to serve on a panel are left to the sole discretion of the circuit court." State v. Dickerson, 395 S.C. 101, 115, 716 S.E.2d 895, 903 (2011) (citing State v. Green, 301 S.C. 347, 354, 392 S.E.2d 157, 160 (1990)). "On review, the [circuit] court's disqualification of a prospective juror will not be disturbed where there is a reasonable basis from which the [circuit] court could have concluded that the juror would not have been able to faithfully discharge his responsibilities as a juror under the law." State v. Sapp, 366 S.C. 283, 291, 621 S.E.2d 883, 887 (2005) (citing State v. Green, 301 S.C. 347, 392 S.E.2d 157).

"In reviewing the circuit court's decision, [this Court] must examine the juror's responses in light of the entire *voir dire* and will not reverse the court's decision unless it is wholly unsupported by the evidence." Dickerson, 395 S.C. at 115, 716 S.E.2d at 903 (citing Green, 301 S.C. at 354, 392 S.E.2d at 160-161). "The ultimate consideration is that the juror be unbiased, impartial and able to carry out the law as explained to him." State v. Bennett, 328 S.C. 251, 257, 493 S.E.2d 845, 848 (1997) (citing Green, 301 S.C. at 354, 392 S.E.2d at 161).

Discussion

The trial judge abused his discretion by excusing Juror No. 338 when she was qualified to serve because her responses indicated she could give meaningful consideration to a not guilty by reason of insanity verdict. The juror merely had concerns regarding a NGRI verdict given that she would not know the consequences of such a verdict. However, a review of the entire *voir*

dire shows the juror was unbiased, impartial, and able to carry out the law as explained by the judge.

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. R. 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." R. 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. R. 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. R. 1249, ll. 4-14; R. 1255, ll. 1-21; R. 1256, ll. 2-10. It is common for jurors to wonder about what will happen to a defendant upon a guilty or not guilty verdict. However, jurors are instructed that they must decide whether a defendant is guilty or not guilty without concern regarding the potential sentence. See State v. Poindexter, 314 S.C. 490, 492, 431 S.E.2d 254, 255 (1993) ("The function of the jury is to determine whether a defendant is guilty or not guilty, and the consequences of a conviction are of no aid in determining whether the defendant committed the offense.").

"A juror who reveals that he is unable to accept a particular defense or penalty recognized by law is prejudiced to such an extent that he can no longer be considered competent. One who is unwilling to accept as a defense, if proved, that which the law recognizes as such should be removed from the jury when challenged for cause." State v. Leonard, 248 S.E.2d 853, 855-856 (N.C. 1978) (internal citation and quotation marks omitted). In Leonard, 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.

In this case, again, Juror No. 338 unequivocally stated on several occasions that she could meaningfully consider a not guilty by reason of insanity verdict. She merely expressed confusion as to why jurors were not told the consequences of such a verdict. Unlike the prospective 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.

"The ultimate consideration is that the juror be unbiased, impartial and able to carry out the law as explained to him." Bennett, 328 S.C. at 257, 493 S.E.2d at 848. Based on a review of the entire *voir dire*, Juror No. 338 met this criteria and was thus qualified to serve.

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. See Gray v. Mississippi, 481 U.S. 648, 665-668 (1987) (holding even a single erroneous exclusion of a prospective juror based solely on his or her general views about the death penalty requires that any death sentence thereafter be set aside).

3.

In a capital case where the jury is the sentencer, both Due Process and the Eighth Amendment require that jurors be told the truth about the effect of a verdict of not guilty by reason of insanity and that a defendant be allowed to *voir dire* properly instructed jurors on whether they can render such a verdict.

Introduction

Every jury in civil court knows that it will decide damages and liability. Jurors know they will decide damages while they are listening to the evidence and deliberating liability. For over 300 years, South Carolina has trusted jurors to decide both liability and damages outcomes at the same time, but juries in all but the smallest subset of criminal cases are purposefully kept ignorant of sentencing outcomes and decide only criminal liability. Death penalty cases are the small, different subset. Jurors know from the beginning of the laborious selection process that they will decide the defendant's sentencing outcome.

The state has a history of trying to hide information about sentencing outcomes from capital jurors. Obscuring the truth about life sentences allowed the state to capitalize on popular misconceptions about parole to affect jurors' judgment. These misconceptions favored the state and the state vigorously opposed telling jurors the truth at trial and before this Court. Only after three reversals from the United States Supreme Court did the state abandon this effort with respect to parole eligibility. See Simmons v. South Carolina, 512 U.S. 154 (1994); Shafer v. South Carolina, 532 U.S. 36 (2001); Kelly v. South Carolina, 534 U.S. 246 (2002).

In this death penalty case, the state again vigorously opposed giving truthful information to jurors about the outcomes of the choices they were required to make. The state opposed the truth because, once again, popular misconceptions favored the state's desired outcome—death.

Appellant asserts that Due Process and the Eighth Amendment require only telling jurors the truth when they are held responsible for the outcome and allowing appellant to discover any jurors in *voir dire* who are incapable of rendering such a verdict.

How the Issue Arose at Trial

On April 11, 2019, appellant filed his Motion to *Voir Dire* Potential Jurors Regarding the Consequence of Not Guilty by Reason of Insanity and Guilty But Mentally Ill and for Jurors to Be Instructed as to the Consequence of a Verdict of Not Guilty by Reason of Insanity and Guilty But Mentally Ill. R. 8270. On April 24, 2019, appellant filed a supplement to the motion. R. 8284. In appellant's briefing, he argued that because of the significant risk of misconceptions among potential jurors, due process and the higher reliability required by the Eighth Amendment required explanation of the truth about the consequences of an NGRI ruling and allowing appellant to discover any inability of jurors to render such a verdict. R. 8270-8341. Appellant cited the relevant federal and South Carolina authority in his motions and also provided the court with law from numerous jurisdictions that either require or allow such instructions and *voir dire*. R. 8270.

The solicitor, at the outset, opposed the jury even learning appellant pleaded not guilty by reason of insanity until opening statements. R. 81, l. 14 – 89, l. 8. Defense counsel sought to have appellant arraigned before the jury and enter his NGRI plea. R. 81, l. 2 – 83, l. 4. The state vigorously opposed any such plan because it would "undercut" the *voir dire* method the solicitor claimed the judge had agreed to use. R. 88, l. 19 – 90, l. 4. The solicitor argued, based on State v. Stanko, 376 S.C. 571, 658 S.E.2d 94 (2008), that appellant was only entitled to *voir dire* the potential juror on the entire list of mitigating factors. R. 91, l. 16 – 103, l. 5. The judge said he would not allow the defense to "streamline and focus on just insanity." R. 104, ll. 19-21.

Appellant again brought his motion to the trial judge's attention before *voir dire* and Judge Griffith responded, "Y'all keep dreaming, I mean, I thought we answered that." R. 210, ll. 12-16. Appellant argued the jury needed to be instructed before *voir dire* so the defense could ask the jurors whether they could "fairly consider" an NGRI verdict. R. 210, l. 23 – 211, l. 24. R. 225, l. 16 – 226, l. 8. The solicitor opposed giving any instruction on the consequences, arguing that, "They just need to know he is insane and therefore he cannot be held guilty so, State, your evidence fails." R. 211, l. 25 – 213, l. 4. The state argued that because the court did not know how long the defendant would be committed, that the jury should be told nothing. R. 211, l. 25 – 213, l. 4. R. 223, ll. 1-13. In response to the defendant's request to *voir dire* potential jurors, the solicitor claimed, "that would be staking-out." R. 226, ll. 9-10. The judge ruled, "I am going to go with the broad brush of the factors, I don't know how we are going to deal with this specifically like you are asking." R. 229, ll. 7-16.

The first juror in *voir dire* was excused because he was a student. R. 283, l. 12 – 284, l. 6. The NGRI issue arose again with the next juror called, Juror 174. R. 307, l. 20 – 308, l. 7. Appellant asked the juror whether he could consider an NGRI verdict in a case involving the murder of children and the state objected, citing Stanko. R. 307, l. 20 – 308, l. 7. Appellant argued that jurors who could not consider an NGRI verdict were not qualified. R. 309, ll. 1-7. The judge told the defense they could only ask about all four verdicts and was "very close to a problem with staking." R. 310, ll. 5-10.

Juror 24 said, "I just, I don't see the insanity all together." R. 632, l. 11. After another question from the judge, she said she could give meaningful consideration to the possible verdicts once it was explained. R. 632, l. 22 – 633, l. 10. When the solicitor questioned Juror 24 about the mental health verdicts, she said she could not render an NGRI verdict. R. 656, ll. 10-

18. After further explanation, Juror 24 said, "And I might not be able to answer yet but like, when people are not guilty by insanity, like roam the streets, are they just like free to go . . . To me, innocent or not guilty means they are just free and ready to go, like walk down the street." R. 657, l. 25 – 658, l. 6. The judge then excused her. R. 658, ll. 9-25.

After the juror left, the solicitor argued that the "questioning went too far, we should not have gotten to that point where she had a question." R. 659, l. 12 – 660, l. 5. Appellant argued, "Just tell them the truth, Judge, just tell them what the statute says, the truth." R. 660, ll. 9-10. Appellant renewed his motion "to instruct the jurors about the results of" an NGRI verdict. R. 663, ll. 18-25. Judge Griffith replied, "I am not going to give that instruction, that is too much. And you are protected on the record but I am not going to go there." R. 664, ll. 1-3. Appellant objected again during the examination of Juror 457 and the court said, "I have been clear about my ruling, the record is protected." R. 1100, ll. 4-9.

During the examination of Juror 338, she stated she understood the definition of NGRI, but to consider the verdict, "It would depend on the information provided and the plan of action after that. . . . What would then be that plan. So you have been declared insane and then what, no what, essentially." R. 1249, ll. 4-14. When the juror tried to clarify what the "plan" was, the state objected. R. 1249, ll. 15-25. Juror 338 was excused, and, after argument, the court ruled it would not tell her the "plan." R. 1253, l. 6 – 1254, l. 3. The juror stated she "would need to know what happened to consider that verdict." R. 1254, ll. 12-13. The state again objected. R. 1254, ll. 14-22. The following colloquy then occurred between Juror 338 and Judge Griffith:

> A. Can I ask a question?
>
> THE COURT: You may.
>
> A. So in the case of the death penalty, you know death is the result.

THE COURT: That is the result.

A. And you know the life sentence without parole, you know that is a result.

THE COURT: Correct.

A. But in the case of not guilty by insanity, you don't know the result.

THE COURT: Don't know the result.

A. I don't understand.

R. 1255, ll. 9-20. As explained in Issue 2 above, the court improperly excused Juror 338 over appellant's objection, including renewal of the defense motion on the consequences of NGRI. R. 1270, l. 10 – 1274, l. 19. Appellant continued to request throughout the trial that the judge tell the jury about the consequences of an NGRI verdict and each time that request was denied. R. 2419, l. 6 – 2420, l. 9; R. 2546, l. 7 – 2547, l. 16; R. 5052, l. 19 – 5053, l. 11.

Standard of Review

The standard of review is *de novo* because it is a question of law whether the Due Process Clause and the Eighth Amendment require truthful information about the effect of a not guilty by reason of insanity verdict in a capital case. See Simmons v. South Carolina, 512 U.S. 154, 168-69 (1994) (recognizing general deference paid to states on informing juries about sentencing, but treating due process question of entitlement to parole eligibility charge when state argues future dangerousness as a question of law).

Prior South Carolina Decisions Do Not Foreclose Instructing a Jury on the Consequences of NGRI in a Capital Case

In refusing appellant's request, Judge Griffith primarily relied on the state's interpretation of State v. Poindexter, 314 S.C. 490, 431 S.E.2d 254 (1993). Poindexter was not a death penalty

case. Poindexter at 491, 431 S.E.2d at 254. The defendant clocked out of his job and shot a co-worker who he thought was the son of Dr. Martin Luther King and was involved with Jesse Helms in a conspiracy regarding the war in Kuwait. Id. at 491, n.1, 431 S.E.2d at 255, n.1. The jury found Poindexter guilty but mentally ill and he was sentenced to life imprisonment. Id. at 491-92, 431 S.E.2d at 254-55.

As in this case, Poindexter asked the court to inform the jury "either during *voir dire*" or, at the latest, by special instructions, of the consequences on an NGRI verdict. Id. at 492, 431 S.E.2d at 255. This Court affirmed the trial judge's refusal to instruct the jury, holding the request conflicted "with our prior decisions which hold that the consequences of a verdict are of no concern to the jury." Id.

The Poindexter Court made a critical observation in reaching its decision that is crucial to appellant's case. The Court observed that the result could have been different if the jury bore some responsibility for the defendant's outcomes. Id. The Court wrote that "the consequences need not be brought to the jury's attention unless the jury has a statutory right to fix or recommend punishment." Id. Because Poindexter's jury bore no such responsibility, the trial judge was under no duty to inform them of the consequences. Id.

Here, the jury was statutorily the decision-maker when it came to punishment. The jury knew from the outset that it would bear responsibility for deciding appellant's outcome. The Poindexter Court recognized that this consideration was vitally important during *voir dire*, stating that its "holding should not be read as precluding questions designed to determine whether a juror is so biased or prejudiced that he could not apply the law as charged. The purpose of *voir dire* is to select a fair and impartial jury." Id. at n.2.

Poindexter relies on a case that vividly demonstrates what happens when a jury is left with the impression that returning a verdict of NGRI will free a defendant: State v. Huiett, 271 S.C. 205, 210, 246 S.E.2d 862, 865 (1978). Huiett killed a man with an ax in front of a witness with no explanation. Huiett at 205-06, 246 S.E.2d at 863. His only defense was insanity. Id. His first trial, before the Honorable Rodney A. Peeples, ended with a hung jury. Id. Judge Peeples again presided over Huiett's retrial a week later. Id.

The jury at Huiett's retrial deliberated only thirteen minutes before returning a verdict of guilty. Id. at 206, 246 S.E.2d at 863. The difference was the trial judge charged the jury on all of the chances the defendant would have to be freed if they returned an NGRI verdict. Id. at 206-07, 246 S.E.2d at 863. The charge given by the court gave four discrete examples of ways the defendant could be freed into society, including if a solicitor did not initiate admission procedures to the hospital. Id. After emphasizing all of the ways the defendant could be freed, the judge then told the jury it was none of their concern. Id. The defendant objected to the charge, and knowing before closing arguments that it would be given, counsel argued to the jury that the State Hospital would never release him. Id. at 208-09, 246 S.E.2d at 864. This Court reversed, finding the commitment charge prejudiced the defendant and cited the short deliberations by the jury as proof. Id. at 210, 246 S.E.2d at 865.

The trial judge's coercive charge in Huiett played on the jurors' worst fears—that they would be blamed for setting the very dangerous defendant free or that through bureaucratic incompetence, the defendant would go free. The other case relied on by Poindexter shows the state actively trying to capitalize on such fears by telling the jury that a defendant accused of murdering two girls would go free if they returned an NGRI verdict. State v. Valenti, 265 S.C. 380, 383, 218 S.E.2d 726, 727 (1975). The judge in Valenti had earlier refused to charge the

jury on the consequences of an NGRI verdict which was affirmed without discussion. Id. After the solicitor told the jury that Valenti would go free, the judge gave a curative instruction the content of which is not revealed in the opinion. Id. This Court upheld the curative instruction and affirmed the conviction. Id.

The trial judge here also heavily relied on the State's improper interpretation of State v. Stanko, 376 S.C. 571, 658 S.E.2d 94 (2008). The State continually urged upon Judge Griffith that Stanko prohibits specific questioning of jurors about the insanity defense and that jurors must be asked about all defenses, even those clearly inapplicable to appellant's case. R. 91, l. 16 – 103, l. 5.

The state's interpretation of Stanko was wrong and the trial court erred in accepting it without any critical analysis. The Stanko Court specifically stated that it was not reaching the question of whether jurors could be asked about the insanity defense. Stanko at 577, 658 S.E.2d at 97. This Court wrote, "[C]ontrary to the dissent's view, our holding in no way imposes an absolute ban on questioning jurors about their views on the insanity defense." Id. This Court emphasized that its ruling was based on the standard of review. Id. This Court also questioned whether the issue was preserved because defense counsel abandoned it. Id. The trial court here incorrectly accepted the state's position that Stanko forbade questioning about the insanity defense—which was appellant's only defense.

The Stanko decision is further distinguishable because of the vague *voir dire* discussed in the opinion. Id. at 575, 658 S.E.2d at 96. The issue before this Court was whether the trial court erred in allowing the defense to ask the jurors "about their feelings and viewpoints" on the insanity defense. Id. Appellant's request here was focused, grounded on principles of Due Process and the Eighth Amendment, and tied specifically to the heart of the case. See Ham v.

South Carolina, 409 U.S. 524, 527 (1973) (reversing because defendant had a Due Process right to ask jurors about racial bias during *voir dire*). Appellant sought to inform jurors of the truth of the consequences of an NGRI verdict and whether they could consider such a verdict. Appellant did not ask to probe jurors' "feelings," only whether they could follow the law when given the truth about what the law required.

Many States Allow an Instruction on the Consequences of an NGRI Verdict

Whether by statute or judicial opinion, many states allow some kind of jury instruction on the consequences of an NGRI verdict. The American Bar Association's Standards endorse giving an instruction about an NGRI verdict's consequences when requested by a party. See ABA Criminal Justice Standards on Mental Health, § 7-6.8 (2016).

Twenty-two states hold that the instruction is necessary, at a minimum, upon the defendant's request. See Alaska Stat. Ann. § 12.47.040 ("When the jury is instructed as to the verdicts under (a) of this section, it shall also be instructed on the dispositions available under AS 12.47.050 and 12.47.090."); People v. Dennis, 215 Cal. Rptr. 750, 753 (Ct. App. 1985) (holding that instruction on consequences of NGRI verdict shall be given on defendant's request); People v. Tally, 7 P.3d 172, 184 (Colo. App. 1999) ("Jurors should be informed of the consequences of a finding that a defendant is insane, i.e., that such defendant will be committed to a mental institution until it is determined that he or she is no longer insane."); Roberts v. State, 335 So. 2d 285, 289 (Fla. 1976) ("If letting jurors know the consequences of their Guilty verdicts does not lead to an impermissible focus upon the Results of their finding rather than on the finding itself, how can it be said that knowledge of the consequences of an Acquittal by reason of insanity will have this undesirable effect?"); Haw. Rev. Stat. Ann. § 704-402 ("When the defense provided for by subsection (1) is submitted to a jury, the court shall, if requested by the

defendant, instruct the jury as to the consequences to the defendant of an acquittal on the ground of physical or mental disease, disorder, or defect excluding responsibility."); Passwater v. State, 989 N.E.2d 766, 773 (Ind. 2013) (approving a modified instruction on NGRI consequences to be given at a defendant's request); Kan. Stat. Ann. § 22-3428 ("In any case in which the defendant lacked the required mental state pursuant to K.S.A. 22-3220, and amendments thereto, is relied on, the court shall instruct the jury on the substance of this section."); Ky. RCr 9.55 ("On request of either party in a trial by jury of the issue of absence of criminal responsibility for criminal conduct, the court shall instruct the jury at the guilt/innocence phase as to the dispositional provisions applicable to the defendant if the jury returns a verdict of not criminally responsible by reason of mental illness or retardation, or guilty but mentally ill."); State v. Leeming, 612 So. 2d 308, 315 (La. Ct. App. 1992) ("Instruction explaining the consequences of a verdict of not guilty by reason of insanity must be given if requested by defendant or jurors."); Erdman v. State, 553 A.2d 244, 250 (Md. 1989) ("The view that a jury has the need and right to know the consequences of a verdict of not criminally responsible is bottomed on possible prejudice to the defendant. Therefore, we think that the instruction is to be given only when duly requested by the defendant."); Commonwealth v. Mutina, 323 N.E.2d 294, 301 (Mass. 1975) ("If jurors can be entrusted with responsibility for a defendant's life and liberty in such cases as this, they are entitled to know what protection they and their fellow citizens will have if they conscientiously apply the law to the evidence and arrive at a verdict of not guilty by reason of insanity -- a verdict which necessarily requires the chilling determination that the defendant is an insane killer not legally responsible for his acts."); Mo. Ann. Stat. § 552.030 (requiring instruction when requested by defendant); Kuk v. State, 392 P.2d 630, 634 (Nev. 1964) ("We think that the jury should know the consequences of such a verdict."); State v. Blair, 732 A.2d 448, 451 (N.H.

1999) ("We have previously stated that a jury charged with ascertaining a defendant's sanity should be instructed about consequences of a 'not guilty by reason of insanity' verdict because such consequences are not commonly known."); State v. Krol, 344 A.2d 289, 304–05 (N.J. 1975) ("The trial judge should, however, instruct the jury as to the consequences of a verdict of not guilty by reason of insanity so that the jury does not act under the mistaken impression that defendant will necessarily be freed or be indefinitely committed to a mental institution."); N.Y. Crim. Proc. Law § 300.10. (requiring charge, "However, because of the lack of common knowledge regarding the consequences of a verdict of not responsible by reason of mental disease or defect, I charge you that if this verdict is rendered by you there will be hearings as to the defendant's present mental condition and, where appropriate, involuntary commitment proceedings."); Commonwealth v. Mulgrew, 380 A.2d 349, 351 (Pa. 1977) ("Today, we . . . hold that it is proper to instruct the jury concerning the possibility of commitment proceedings being initiated against the defendant if such defendant is acquitted of the criminal charge filed against him by reason of an insanity defense."); Tenn. Code Ann. § 33-7-303 ("The criminal court, in a trial before a jury in which the issue of insanity at the time of the commission of the offense is raised, shall instruct the jury before it begins deliberation as to the provisions of this section."); State v. Shickles, 760 P.2d 291, 297 (Utah 1988), abrogated on other grounds by State v. Doporto, 935 P.2d 484 (Utah 1997) ("Although we agree with the general proposition that a jury need not be instructed on the penalties attached to particular crimes since it is not the jury's prerogative to determine the appropriate sentence, that principle does not apply when a case concerns possible verdicts of not guilty by reason of insanity or guilty and mentally ill because it most assuredly is the jury's duty to return a proper verdict, and to do that it must understand the alternatives."); State v. Daggett, 167 W. Va. 411, 415, 280 S.E.2d 545, 549 (1981) ("We recently

held that a defendant relying upon the defense of not guilty by reason of insanity was entitled to an instruction which correctly informs the jury of the consequences of a verdict of not guilty by reason of insanity.").

Our neighboring states, Georgia and North Carolina, require the instruction upon request. See O.C.G.A. § 17-7-131(b)(3)(A) (directing the trial judge to tell the jury, "I charge you that should you find the defendant not guilty by reason of insanity at the time of the crime, the defendant will be committed to a state mental health facility until such time, if ever, that the court is satisfied that he or she should be released pursuant to law."); State v. Hammonds, 224 S.E.2d 595, 604 (N.C. 1976). Hammonds, in particular, is instructive because it was a death penalty case. Hammonds, 224 S.E.2d at 596. After examining the relevant precedent, the Court mandated the giving of an instruction upon a defendant's request. Id. at 603-04. The court stated, "To allow a jury to speculate on the fate of an accused if found insane at the time of the crime only heightens the possibility that the jurors will fall prey to their emotions and thereby return a verdict of guilty which will insure that defendant will be incarcerated for his own safety and the safety of the community at large." Id. at 603.

The cases from states holding that the instruction is unnecessary are collected in Instructions in State Criminal Case in which Defendant Pleads Insanity as to Hospital Confinement in Event of Acquittal, 81 A.L.R.4th 659 § 5. While this annotation finds that a large number of jurisdictions do not allow an instruction, it states that "an apparent trend" exists toward allowing the instruction. Id. at § 2(a). Of the states listed as refusing the instruction, nine no longer have the death penalty. See https://deathpenaltyinfo.org/state-and-federal-info/state-by-state. Even in Texas, where the legislature passed a statute prohibiting informing jurors of the consequences of an NGRI verdict, the courts allow defendants to explore the subject on *voir*

dire. See Robison v. State, 888 S.W.2d 473, 476 (Tex. Crim. App. 1994). Especially given the capital nature of this case, South Carolina should follow the modern trend and join the states which allow the instruction.

The United States Supreme Court: Shannon and the Simmons Line of Cases

In the wake of the acquittal of John Hinkley for the shooting of President Reagan, Congress passed the Insanity Defense Reform Act ("IDRA"). Shannon v. United States, 512 U.S. 577 (1994). In Shannon, the Court dealt with a non-capital defendant's request for an instruction on the consequences of NGRI. Id. at 577-78. Shannon accompanied a police officer to the station, told an officer he no longer wanted to live, then walked across the street and shot himself in the chest. Id. at 577. The government prosecuted Shannon for unlawful possession of a firearm by a felon after Shannon survived his suicide attempt. Id. The district judge denied Shannon's request for a consequences instruction. Id.

Shannon based his challenge on only two legal grounds: (1) the statutory interpretation of the IDRA, and (2) "a matter of general federal practice." Id. at 580. The Court affirmed the refusal to give the instruction, finding no mandate from Congress to require district courts to give one. Id. at 580-87. The Court did not address any argument concerning Due Process, much less the Eighth Amendment because the case was non-capital. Id. Shannon left open the possibility of judges giving a consequences instruction if necessary in particular cases stating that the ruling should not "be misunderstood as an absolute prohibition on instructing the jury with regard to the consequences of an NGI verdict." Id. at 587-88.

Importantly for this case, the Court began its legal analysis by distinguishing Shannon from capital cases—especially the then-recently decided case of Simmons v. South Carolina, 512 U.S. 154 (1994). Shannon, 512 U.S. at 579, n.4. The first sentence of the Court's legal analysis

says, "It is well established that **when a jury has no sentencing function**, it should be admonished to reach its verdict without regard to what sentence might be imposed." Id. (emphasis added) (internal quotations omitted). The Court dropped a footnote after "function" in this sentence. Id. This footnote distinguishes the holding and reasoning of the "well established" approach when dealing with capital cases. Id. at n.4. The Court's footnote stated, "Particularly in capital trials, juries may be given sentencing responsibilities," and cited Simmons for this proposition. Id.

The Simmons line of cases was a shameful period in South Carolina's death penalty jurisprudence when the state sought to keep truthful information about a defendant's eligibility for parole from juries. This Court adopted the state's reasoning when it affirmed Simmons' death sentence over a challenge to the trial court's refusal to tell the jury that Simmons was ineligible for parole. State v. Simmons, 310 S.C. 439, 427 S.E.2d 175 (1993). This Court affirmed the trial judge's response to the jury's question about parole that they should consider the terms life imprisonment and death sentence "in their plain and ordinary meaning." Id. at 444-45, 427 S.E.2d at 178-79.

The United States Supreme Court reversed. Simmons v. South Carolina, 512 U.S. 154 (1994). The Court first recited the basic principle of the Due Process Clause with respect to capital cases that it "does not allow the execution of a person 'on the basis of information which he had no opportunity to deny or explain.'" Id. at 161 quoting Gardner v. Florida, 430 U.S. 349, 362 (1977). Accepting that "[i]t can hardly be questioned that most juries lack accurate information about the precise meaning of 'life imprisonment' as defined by the States," the Court held that Due Process required the giving of "truthful information relating to parole" to capital juries. Id. at 168-69.

The Court noted that Simmons gave the trial judge a survey showing that only 7.1% of potential jurors believed that a defendant sentenced to life imprisonment would die in prison. Id. at 159. Similarly, appellant here gave the trial judge a survey conducted by the court's own expert, Dr. Frierson, about the lack of knowledge of the effect of an NGRI verdict. R. 8284-8341. (Supplement to Mot. *Voir Dire* Jurors Consequences of NGRI Verdict). Dr. Frierson's article was titled "Juror Knowledge and Attitudes Regarding Mental Illness Verdicts" and was published in the Journal of the American Academy of Psychiatry and the Law. R. 8284-8341. (Supplement to Mot. *Voir Dire* Jurors Consequences of NGRI Verdict). Dr. Frierson wrote, "A common misperception held by the public is that defendants found NGRI are released into the community just as any other acquitted individuals would be." R. 8290. (Supplement to Mot. *Voir Dire* Jurors Consequences of NGRI Verdict).

Dr. Frierson's study found that 37.5% of jurors could not correctly identify the dispositional outcome of an NGRI verdict. R. 8292. (Supplement to Mot. *Voir Dire* Jurors Consequences of NGRI Verdict). Even among jurors who could correctly define NGRI, 13.5% believed defendants would go home after such a verdict. R. 8292. (Supplement to Mot. *Voir Dire* Jurors Consequences of NGRI Verdict). Eighty-four percent (84%) of jurors believed they should be told the outcome. R. 8293. (Supplement to Mot. *Voir Dire* Jurors Consequences of NGRI Verdict). Even if a judge told them to disregard the outcomes, 70.6% reported that knowing the outcomes would influence their decisions. R. 8293. (Supplement to Mot. *Voir Dire* Jurors Consequences of NGRI Verdict).

The Simmons Court also rejected the state's argument that juries should not be told that a defendant was ineligible for parole because it was "inherently misleading." Simmons, 512 U.S. at 166. The state argued that "future exigencies" such as legislative reform, commutation,

pardons, and clemency could result in the defendant's release. Id. The Court held that none of these possibilities, remote though they were, justified withholding the truth about parole from a sentencing jury. Id. at 166-68. The solicitors here made the same arguments the Supreme Court rejected in Simmons. They argued that the length of any commitment was unknown and that justified keeping all information from the jury. R. 211, l. 25 – 213, l. 4. Appellant argued that the jury should be told the truth about the statutory commitment procedures and that appellant could be committed for the rest of his life. R. 214, l. 1 – 220, l. 15. As the Supreme Court reasoned in Simmons, "such an instruction is more accurate than no instruction at all, which leaves the jury to speculate. . . . " Id. at 166. Judge Griffith's acquiescence to the state's interpretation left the jury to speculate that he might leave the courtroom a free man if they rendered an NGRI verdict and appellant without any means to respond—the same situation which violated Due Process in Simmons.

Seven years after Simmons, the state again urged a trial judge and this Court to continue withholding truthful information about parole eligibility from juries. Shafer v. South Carolina, 532 U.S. 36 (2001). Again, the United States Supreme Court reversed, concluding "that South Carolina's Supreme Court misinterpreted Simmons. . . ." Id. at 48. And a year later, the Court reversed again on nearly the same issue in Kelly v. South Carolina, 534 U.S. 246 (2002). The Shafer Court cited with approval Chief Justice Finney's declaration that if the decision whether to tell jurors about parole was one of policy, then the policy should be one "which gives jurors the simpl[e] truth: no parole." Shafer, 532 U.S. at 47 quoting State v. Shafer, 340 S.C. 291, 311, 531 S.E.2d 524, 534 (2000) (Finney, C.J., dissenting).

The lesson from Simmons, Shafer, and Kelly in rejecting the state's arguments to the contrary is that capital defendants have a Due Process right to a jury that makes decisions based

on accurate information, not speculation. Removal of speculation prevents the state from capitalizing on jurors' misconceptions and fears from popular media where, unlike in real life, the insanity defense is often used and is often successful.[2] Just like in Simmons, the state has no principled argument against telling jurors the truth.

The Eighth Amendment's Heightened Reliability Requirement Requires Accurate Information for Sentencing Juries in Cases with Mentally Impaired Defendants

The Eighth Amendment also requires telling jurors the truth about the effect of an NGRI verdict. As Justice O'Connor wrote, the Supreme Court "has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake." Eddings v. Oklahoma, 455 U.S. 104, 117-18 (1982) (O'Connor, J., concurring). This Court recognizes the Eighth Amendment's heightened reliability requirement in death penalty cases. See State v. Barnes, 407 S.C. 27, 39, 753 S.E.2d 545, 551 (2014) (recognizing "the Supreme Court's mandate that these trials include heightened reliability.") (Toal, C.J., dissenting). See also Woodson v. North Carolina, 428 U.S. 280, 305 (1976) ("Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.").

"The Eighth Amendment prohibits the State from inflicting the penalty of death upon a prisoner who is insane." Ford v. Wainwright, 477 U.S. 399, 410 (1986). In two lines of cases

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[2] A perfect example is the movie *Primal Fear*, starring Richard Gere and Edward Norton. Norton tricks everyone, including his lawyer, Gere, that he is insane and beats a murder charge and the movie ends with him taunting Gere. No jury wants to be remembered as the one who was tricked into turning a monster loose. See, e.g., Christopher J. Rauscher, Note, "I Did Not Want a Mad Dog Released"—The Results of Imperfect Ignorance: Lack of Jury Instructions Regarding the Consequences of an Insanity Verdict in *State v. Okie*, 63 Me. L. Rev. 593, 602-04 (2011) (detailing media portrayals of insanity defenses).

dealing with intellectual disability and the lack of cognitive development of juveniles, the Supreme Court has reasoned that the Eighth Amendment's heightened reliability standard plays a role when mentally impaired defendants face death sentences. With respect to intellectual disability, the Court wrote that such defendants' "reduced capacity" increases the risk that a death sentence will be imposed despite factors which call for a lesser penalty. Atkins v. Virginia, 536 U.S. 304, 320-21 (2002). See also Hall v. Florida, 572 U.S. 701, 709 (2014) ("A further reason for not imposing the death penalty on a person who is intellectually disabled is to protect the integrity of the trial process."). In its decision forbidding the execution of persons under the age of eighteen, the Court noted that "[i]f trained psychiatrists with the advantage of clinical testing and observation refrain, despite diagnostic expertise, from assessing any juvenile under 18 as having antisocial personality disorder, we conclude that States should refrain from asking jurors to issue a far graver condemnation—that a juvenile offender merits the death penalty." Roper v. Simmons, 543 U.S. 551, 573 (2005).

This Court in Poindexter recognized that a jury in a capital case may need to be told the truth about the consequences of an NGRI verdict. See Poindexter at 492, 431 S.E.2d at 255. This Court in Huiett recognized the severe prejudice to a defendant when a jury's false impressions about the effect of an NGRI verdict are not corrected. See Huiett at 210, 246 S.E.2d at 865. Hiding information about the effect of an NGRI verdict violates Due Process and increases the risk that an insane person will be executed in violation of the Eighth Amendment. Telling jurors the truth carries no such risk. This Court should reverse.

4.

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

Relevant Facts

The sheriff of Smith County, Mississippi, Charlie Crumpton, had a very simple verbal policy for roadblocks that allowed his officers ultimate discretion while employing insufficient oversight. R. 6621, l. 6 – 6622, l. 23. Sheriff Crumpton only had two requirements: (1) two or more officers be present; and (2) they receive verbal approval from their supervisor. Id. Although not part of the limited policy, the officers often wore reflective vests and attempted to locate a stretch of road where cars could be pulled off onto both sides of the road. Id. All vehicles were stopped. Id.; R. 6624, l. 24 – 6625, l. 17.

Crumpton testified pre-trial about the purpose of a Smith County safety checkpoint:

> Well, it is a safety checkpoint. We are checking for driver's license checkpoints, insurance which is required by law, safety violations in the car such as seatbelts and child restraints, those types of things.

Id. Marty Patterson, the Under-Sheriff, confirmed the alleged purposes. R. 6722, ll. 11-15. Crumpton indicated that roadblocks were done routinely in his county. R. 6622, ll. 24-25.

Crumpton noted that roadblocks had previously been put in place at the location in question in this case, Highway 18 east of Raleigh. R. 6623, ll. 11-25; R. 6703, ll. 7-18. At this location, space existed on either side of the road for cars to pull off, although Crumpton testified that if the roadblock were done at a place with no areas to pull off, it would still not be in violation of the county's policy. R. 6624, ll. 1-4; R. 6639, ll. 16-19. Crumpton's officers had the discretion to choose both the timing and the location of their roadblocks. R. 6633, ll. 3-15.

Even though every car arriving at a Smith County roadblock is stopped, Crumpton testified that only about ten percent of drivers are issued a ticket or arrested. R. 6633, ll. 16-25. Driving without a license was not a major problem in his county. R. 6634, ll. 1-12. Crumpton described it as a "very minor" safety issue. R. 6634, ll. 5-14. Charles Johnson, an officer under Crumpton, reiterated those statistics. R. 6678, ll. 2-22. He indicated that at most roadblocks, no tickets were issued. Id.

Following a roadblock when no tickets were issued and no arrests made, officers were not required to turn in a log indicating a roadblock was conducted. R. 6634, ll. 15-22. Further, any tickets given during a roadblock did not denote that they were the result of a roadblock. R. 6634, l. 25 – 6636, l. 16.

When Crumpton was out of town, as he was in 2014 when appellant was stopped, the Under-Sheriff, Marty Patterson, was the supervisor who approved roadblocks. R. 6623, ll. 1-10. On the night appellant was stopped, Patterson gave approval to two deputies to conduct the roadblock.

Because "[t]hings were quiet" on September 6, 2014, Deputies Charles Johnson and Wayne Thompson asked permission from Patterson to conduct a roadblock. R. 6645, l. 20 – 6646, l. 4; R. 6671, ll. 10-17; R. 6702, ll. 21-24. Patterson agreed. R. 6645, l. 20 – 6646, l. 4; R. 6671, ll. 10-17; R. 6702, ll. 21-24. Johnson again related the scant requirements for setting up a roadblock: notify a supervisor and have two or more officers present. R. 6644, l. 13 – 6645, l. 12; R. 6646, ll. 12-19. Johnson provided an affidavit the month after appellant's arrest confirming that they decided to have a roadblock because "[t]hings were quiet that night and [Johnson and Thompson] decided to conduct a traffic safety checkpoint." R. 8259. (Johnson Affidavit; Court's Exhibit 13). The affidavit explained the scant requirements, namely that

"officers ... just seek approval from the supervisor." Id. The affidavit plainly stated: [t]here are no formal authorization procedures." Id.

Seemingly in contravention of his affidavit, Johnson offered his thoughts pre-trial as to why the supervisor was required to be notified:

> Well, we won't just say it's a slow night. We just got to call and ask him can we set up a checkpoint, and he'll say yes or no. See, the reason why we do it is because, you know, by being like, say for instance, they got some kind of investigation going on or whatever. They don't want you in the area. You got to let them know what area you're going to.

R. 6672, ll. 3-17.

Johnson also testified that they referred to roadblocks as safety checkpoints in his office because they "don't block the road." R. 6674, ll. 7-16. Instead, they just stopped every car that came through. R. 6706, ll. 15-21. When asked if this particular roadblock was conducted based on complaints by neighbors of speeding, loud music, or traffic accidents, Johnson replied in the negative. R. 6675, l. 2 – 6676, l. 2. His affidavit also admitted that he had neither a body camera nor a dash camera in his car the night appellant was pulled. R. 8259-8260. (Court's Exhibit 13, paragraph 8).

Wayne Thompson was the second and only other officer present at the roadblock. R. 6646, ll. 23-25. Both men turned on their cars' blue lights and wore vests. R. 6650, ll. 3-23. There were no signs indicating that a roadblock was in place or that motorists should slow down. R. 6680, ll. 17-22. Drivers could only notice it after coming around a curve. R. 6682, ll. 12-25. Johnson testified that officers routinely look inside the cars that are stopped at roadblocks. R. 6678, ll. 12-22. When asked about the purpose of the roadblocks, Johnson distanced himself from the notion that they were only done on slow nights to combat boredom:

> The purpose of doing a safety checkpoint is to check the driver's license and insurance and seatbelt, and to make sure the child is restrained in the car.

R. 6648, ll. 4-9. He further pointed out how the purpose of the roadblocks is to ensure drivers are generally "following road safety laws." R. 6648, ll. 10-12. At each roadblock, Johnson testified that he would ask to see a driver's license and insurance. R. 6652, ll. 6-25. Then, in furtherance of general crime prevention, Johnson would shine his flashlight inside the car "to make sure no safety issues [existed] and stuff like that." Id. If there were no safety problems, drivers were allowed to leave. Id. On cross-examination, Johnson noted his absolute discretion to explore infractions beyond an expired license or lapsed registration. R. 6684, ll. 13-23. When asked if shining his flashlight in a driver's eyes was a normal thing to do with all drivers, Johnson responded that he does that "[i]f [he] suspect[s] something." Id.

Indicating that the roadblocks were about more than just checking licenses, Johnson also testified about how prepared he was should a driver appear to be under the influence of alcohol. R. 6685, l. 22 – 6686, l. 24. He was equipped with a portable device capable of detecting alcohol. Id. If the machine registered alcohol, the driver was taken to the sheriff's office for another "blow test." Id.

On the night of September 6, 2014, approximately four or five cars preceded appellant. R. 6653, ll. 5-9. When appellant pulled up to the roadblock in his Cadillac Escalade and stopped, Johnson shined a flashlight in his eyes while he was getting his license and registration. R. 6684, ll. 6-12. In line with prior testimony regarding generalized crime control, Johnson claimed to have smelled marijuana and also alleged that appellant's eyes were red and glassy. R. 6653, l. 23 – 6654, l. 10; R. 6655, ll. 18-23. Even though appellant complied with the request to provide his driver's license, Johnson ordered appellant to pull over onto the shoulder of the road and get out

of the car. Id. According to Johnson, appellant allowed him to search the car. R. 6654, ll. 11-18.

Johnson found Scooby Snax in appellant's car.[3] R. 6656, l. 20 – 6657, l. 7. According to Johnson, appellant indicated that it was potpourri and began listing the chemical compounds in its makeup. Id. Another bag of spice as well as an energy drink can were located in the Escalade. R. 6660, ll. 7-24. After noticing slurred speech in addition to the red and glassy eyes, Johnson believed appellant was under the influence of a controlled substance. R. 6657, ll. 8-23. He testified that he did not believe appellant was able to safely drive his car away from the roadblock. R. 6662, ll. 2-12. As a result of the above, Johnson arrested appellant for possession of paraphernalia, DUI and possession of a controlled substance. Id.; R. 6667, l. 22 – 6668, l. 1.

At that point, Johnson put appellant in his police car and continued to search the Escalade. R. 6662, ll. 20-25. He candidly testified, "[n]ormally that's what we do." Id. He opened the back hatch of the Escalade and found chemicals. R. 6662, l. 20 – 6663, l. 6. He called Patterson and asked him to come to the roadblock. Id. When Patterson arrived, five to ten minutes later, he told Johnson that the car smelled like blood. R. 6663, l. 15 – 6664, l. 19. He advised them to stop the search and the roadblock. Id.; R. 6712, l. 24 – 6713, l. 6. The Escalade was towed from the scene. R. 6667, ll. 5-21. Johnson testified that the Escalade license plate registered a hit on NCIC for five children from Lexington, South Carolina. R. 6665, ll. 10-21.

After hearing the testimony of the four officers, the parties argued the motion. R. 6735 – 6753; R. 8348. (Motion to Suppress Evidence and Fruits from Unlawful Roadblock, filed April 12, 2019). The state primarily referred to Mississippi law. Rogowski v. State, 145 So. 3d 1232 (Miss. Ct. App. 2014). Relying on the suggestion that the state's interest in public safety

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[3] Johnson testified that Scooby Snax was spice, a controlled substance. R. 6657, ll. 1-16.

outweighed intrusions into personal liberties, the assistant solicitor posited that the roadblock was valid. R. 6735, l. 12 – 6738, l. 7.

After letting the assistant solicitor handle the argument, Solicitor Hubbard announced, "Your Honor, I, as the Solicitor, would like to be heard." R. 6743, ll. 8-9. Instead of giving a legal justification for the stop, Solicitor Hubbard told Judge Griffith that if the court excluded the evidence gathered as a result of the stop, the case would be "thrown out." R. 6743, l. 19 – 6744, l. 5. "[T]he remedy that they're seeking is [the] exclusionary rule. And Your Honor knows what that means. You throw out the stop and you throw out all of our evidence and you throw out all of the statements and you throw out finding the bodies, you throw out the case." R. 6743, l. 23 – 6744, l. 4.

Defense counsel questioned whether Mississippi "has a special Fourth Amendment jurisprudence" and wondered if "the United States Constitution applies in a special way in Mississippi." R. 6738, l. 9 – 6743, l. 7. Counsel correctly summarized the relevant testimony from the officers and noted the apparent intent, both illegitimate and unreasonable, behind the stop:

> The location of this checkpoint had nothing to do with tickets in the area, speeding in the area, complaints about crime in the area, DUI's in the area. They all said it was chosen for one single thing. It had some concrete on both sides, or some concrete on the side of the road and they could get people out of their cars and maintain two lanes of traffic. Also [what] was crystal clear is the discretion to set the roadblock, the location and the time was with the officers. And that is a factor in U.S. Supreme Court cases. The reason Kraus[4] was, the practice in Kraus was condemned by the U.S. Supreme Court was because there was too much officer discretion.

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[4] This was a scrivener's error. Counsel was citing "Prouse." See Delaware v. Prouse, 440 U.S. 648 (1979).

R. 6740, l. 16 – 6741, l. 3. Counsel reiterated that the officers had full discretion, a factor that merited consideration by the trial court.

The trial judge ruled that the roadblock was both consistent with Mississippi law and complied with the Fourth Amendment. R. 6759, l. 25 – 6765, l. 25. The ruling was classified as a final ruling by the trial judge. R. 6766, l. 15 – 6768, l. 13. Defense counsel continued to lodge contemporaneous objections throughout the trial to the admission of evidence gleaned from the illegal roadblock. See, e.g., R. 2426, l. 25 – 2427, l. 7; R. 2439, l. 19 – 2445, l. 13; R. 2517, l. 13 – 2518, l. 20; R. 2706, l. 15 – 2708, l. 7; R. 2749, l. 23 – 2750, l. 2; R. 2751, ll. 15-21; R. 2781, ll. 3-14; R. 2839, ll. 22-24; R. 2847, ll. 10-12; R. 2950, ll. 6-10; R. 3076, l. 23 – 3077, l. 5; R. 3123, ll. 5-14; R. 3149, ll. 1-6; R. 3171, l. 4 – 3172, l. 24; R. 3545, ll. 10-18; R. 3612, l. 21 – 3614, l. 2; R. 4900, l. 24 – 4901, l. 22; R. 5101, l. 19 – 5102, l. 13.

Standard of Review

The trial court's factual findings are entitled to deference and are reviewed for clear error. See State v. Counts, 413 S.C. 153, 160, 776 S.E.2d 59, 63 (2015).

Discussion

Roadblocks are criminal investigatory seizures of citizens going about their business in their daily lives without cause or suspicion. The dominant reason for the roadblock in question in Smith County was to catch people who were breaking the law and general crime prevention. The evidence at the pre-trial hearing did nothing to distinguish between license checks and general crime prevention. To the contrary, testimony was elicited that the officers present at the roadblock were prepared to respond to general crimes. In fact, the given reason for conducting the roadblock—boredom—flatly indicated that law enforcement in Mississippi was more

interested in passing the work night than enforcing the "minor problem" of motorists driving without a license.

"Boredom" does not satisfy the Fourth Amendment. The Fourth Amendment requires that searches and seizures be reasonable. A search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing. Chandler v. Miller, 520 U.S. 305, 308 (1997). A vehicle stop at a highway checkpoint is a seizure within the meaning of the Fourth Amendment. Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 450 (1990). The Fourth and Fourteenth Amendments are implicated in this case because stopping an automobile and detaining its occupants constitutes a "seizure" within the meanings of those Amendments, even though the purpose of the stop is limited and the resulting detention is quite brief. United States v. Martinez-Fuerte, 428 U.S. 543, 556-558 (1976); United States v. Brignomi-Ponce, 422 U.S. 873, 878 (1975). The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of reasonableness upon the exercise of discretion by government officials, including law enforcement agents, in order "'to safeguard the privacy and security of individuals against arbitrary invasions...'" Marshall v. Barlow's, Inc., 436 U.S. 307, 312 (1978), quoting Camara v. Municipal Court, 387 U.S. 523, 528 (1967).

The Supreme Court of the United States prohibits roadblocks such as the one implemented in Mississippi. In City of Indianapolis v. Edmond, 531 U.S. 32 (2000), the Court held that a checkpoint with the primary purpose of detecting evidence of ordinary criminal wrongdoing violated the Fourth Amendment.[5] Id.

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[5] At the oral argument in Edmond, the Court engaged in extensive questioning as to whether the same rationale that was being advanced by the City of Indianapolis to stop every car at a roadblock could also be applied to pedestrians absent reasonable suspicion in a high-crime area. Transcript of Oral Argument at 9-22, City of Indianapolis v. Edmond, 531 U.S. 32 (2000) (No. 99-1010)

In Edmond, the city of Indianapolis operated "vehicle checkpoints" in an effort to interdict unlawful drugs. Id. at 35. Unlike the verbal policy here, the police in Edmond had a written policy requiring at least one officer to approach the car at the roadblock, advise the driver that he or she is being stopped briefly at a drug checkpoint, and ask the driver to produce a license and registration. Id. The officers checked for signs of impairment and conducted "an open-view examination" from outside the car. Id.

The officers were allowed to conduct a search of the car if they received consent or developed "the appropriate quantum of particularized suspicion." Id. at 35. They were directed not to stop any car out of sequence. Id. The city stipulated that each stop, absent reasonable suspicion or probable cause, would last no more than five minutes. Id.

An affidavit from one of the officers provided additional details on the checkpoints that were held to be illegal. According to Marshall Depew, an Indianapolis law enforcement officer, the location for each roadblock was selected weeks in advance based on crime statistics and traffic flow. Id. The stops were generally conducted during daylight hours and identified with lighted signs advising drivers of the checkpoint. Id.

The City of Indianapolis conceded that the primary purpose of their roadblocks was interdicting illegal narcotics. Id. at 40. Unlike the Mississippi officers, the Indianapolis police kept data and supporting documentation for their roadblocks. Id. at 31.

"Because the primary purpose of the Indianapolis narcotics checkpoint program is to uncover evidence of ordinary criminal wrongdoing, the program contravenes the Fourth Amendment." Id. at 41-2. The Court refused to accept the suggestion that the stops in Sitz and Martinez-Fuerte involved similar purposes -- arresting those suspected of committing crimes -- and pointedly held:

> If we were to rest the case **at this high level of generality**, there would be little check on the ability of the authorities to construct roadblocks for almost any conceivable law enforcement purpose. Without drawing the line at roadblocks designed primarily to serve the general interest in crime control, the Fourth Amendment **would do little to prevent such intrusions from becoming a routine part of American life.**

Id. at 42 (emphasis added). In holding that "the severe and intractable nature of the drug problem" was an insufficient justification for the stops in Indianapolis, the Edmond Court noted:

> But the gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose. Rather, in determining whether individualized suspicion is required, we must consider the nature of the interests threatened and their connection to the particular law enforcement practices at issue. We are particularly reluctant to recognize exceptions to the general rule of individualized suspicion where governmental authorities primarily pursue their general crime control ends.

Id. at 42-3. The Court plainly stated that it was unwilling to bypass constitutional protections based on the alleged safety concerns:

> The detection and punishment of almost any criminal offense serves broadly the safety of the community, and our streets would no doubt be safer but for the scourge of illegal drugs.
>
> ...
>
> The problem with this argument is that the same logic prevails any time a vehicle is employed to conceal contraband or other evidence of a crime. This type of connection to the roadway is very different from the close connection to roadway safety that was present in Sitz and Prouse.

Id. at 43.

Twenty years prior, in Delaware v. Prouse, the United States Supreme Court invalidated a discretionary, suspicionless stop for a spot check of a driver's license and vehicle registration. 440 U.S. 648 (1979). In Prouse, the officer's conduct was found to be unconstitutional primarily

because he exercised "standardless and unconstrained discretion." Id. at 661. The Court suggested that "[q]uestioning of all incoming traffic at roadblock-type stops" would be a lawful means of serving the government's interest in highway safety. Id. at 663. However, the Court also distinguished such a hypothetical roadblock from a general purpose of investigating crime.

In Prouse, an officer in Delaware stopped a car and seized drugs in plain view on the car floor. 440 U.S. at 650. At trial, Prouse moved to suppress the drugs. Id. Quite candidly, the officer testified:

> [P]rior to stopping the vehicle he had observed neither traffic or equipment violations nor any suspicious activity, and that **he made the stop only in order to check the driver's license and registration**.

Id. (emphasis added). The officer characterized the stop as "routine," and his explanation for conducting the stop largely mirrored that of Johnson and Thompson: "I saw the car in the area and wasn't answering any complaints, so I decided to pull them off." Id. at 650-51. The trial court granted the motion to suppress. Id. at 651. The appellate court in Delaware affirmed, holding:

> [A] random stop of a motorist in the absence of specific articulable facts which justify the stop by indicating a reasonable suspicion that a violation of the law has occurred is constitutionally impermissible and violative of the Fourth and Fourteenth Amendments to the United States Constitution.

Id.

Regarding the governmental interest in regulating cars and drivers, the Supreme Court questioned "whether in the service of these important ends the discretionary spot check is a sufficiently productive mechanism to justify the intrusion upon Fourth Amendment interests which such stops entail." Id. at 659. The Court answered that question in the negative and

expressed doubt whether discretionary stops are effective in quelling the problems that supposedly lead to their practice:

> Given the alternative mechanisms available, both those in use and those that might be adopted, we are unconvinced that the incremental contribution to highway safety of the random spot check justifies the practice under the Fourth Amendment.

Id. The Court also indirectly repudiated roadblocks such as the one in Mississippi that were allegedly designed to check licenses, noting that "finding an unlicensed driver among those who commit traffic violations is a much more likely event than finding an unlicensed driver by choosing randomly from the entire universe of drivers." Id. "The contribution to highway safety made by discretionary stops selected from among drivers generally will therefore be marginal at best." Id. at 660.

The roadblock in Mississippi was, in all material respects, no different than the discretionary stop in Prouse. The officers admitted that it was a slow night, and, therefore, they wanted to conduct a roadblock. Far from selecting the roadblock weeks in advance like the checkpoint that still failed to pass constitutional muster in in Edmond, the officers simply picked the most convenient place stopping multiple cars with minimal effort. No evidence supported any connection between the selection of the site for the roadblock and the claimed purpose of conducting driver's license checks. Much like in Prouse, the level of intrusion, coupled with mostly unlimited discretion and no forethought, meant that this stop and seizure violated the Fourth Amendment.

The primary purpose of the Indianapolis narcotics checkpoints was to advance "the general interest in crime control." Edmond at 44, citing Prouse, 440 U.S. at 659, n. 18. The Supreme Court "decline[d] to suspend the usual requirement of individualized suspicion where the police seek to employ a checkpoint *primarily for the ordinary enterprise of investigating*

crimes." Edmond at 44 (emphasis added). Wholly applicable to appellant's case, the Court indicated its staunch unwillingness to "sanction stops justified only by the generalized and ever-present possibility that interrogation and inspection may reveal that any given motorist has committed some crime." Id.

During pre-trial arguments, the state never suggested that Thompson and Johnson had probable cause to stop appellant's car. Therefore, under Edmond, supra, the officers' subjective intentions are subject to consideration. In Edmond, the Supreme Court reinforced its holding in Whren v. United States, 517 U.S. 806 (1996) that searches in the absence of probable cause can be analyzed in conjunction with the officers' intent in mind. Edmond at 45. For cases such as appellant's where the officers lacked probable cause and instead simply conducted a roadblock for lack of anything better to do, "programmatic purposes may be relevant to the validity of Fourth Amendment intrusions taken pursuant to a general scheme without individualized suspicion." Id. at 45-6. The Court straightforwardly held that "Whren does not preclude an inquiry into programmatic purpose in such contexts." Id.

The solicitor here made the same argument rejected in Edmond. Indianapolis maintained that its checkpoint was justified based on its lawful secondary purpose of keeping impaired motorists off the road and verifying licenses and registrations. Notably, the Court in Edmond held "*[i]f this were the case, however, law enforcement authorities would be able to establish checkpoints for virtually any purpose so long as they include a license or sobriety check.*" Id. at 46 (emphasis added). Accordingly, this Court must examine the available evidence to determine the primary purpose of the checkpoint program. Id.

The best evidence came from Johnson's affidavit, which conceded his individual intent that night: stop drivers who have not done anything wrong on an otherwise slow night in order to

keep himself from being bored. If that is the standard for which law enforcement can stop cars in America without probable cause or reasonable suspicion, then the Fourth Amendment is a nullity. As defense counsel succinctly put it: "So they can just do it anytime, anywhere. All they have to do is stop all the cars, don't say it's for drugs. That's about it. So if this was legal, they're all legal." R. 6746, ll. 16-19. Roadblocks such as the one in Mississippi would allow law enforcement the unfettered ability to stop a car without individualized probable cause in violation of the Fourth Amendment. The police cannot stop a car to perform a general search without a suspicion that a specific crime has been violated; if that is what transpired, then the roadblock is just a general effort to stop crime in contravention of Edmond. These kinds of checkpoints are similar to the hated "general warrant" that caused the Founders to draft the Fourth Amendment. See Carpenter v. United States, ___ U.S. ___, 138 S. Ct. 2206, 2243, 201 L. Ed. 2d 507 (2018) (Thomas, J., dissenting and discussing the general warrant and the Founders' intent).

In Mississippi, the seizure of cars was for something other than the stated purpose of checking licenses and was therefore pretextual. No statistics were provided to justify how many car seats were being inspected at 8:00 p.m. on a Saturday night. The stated purpose disappeared when Johnson and Thompson were examined under oath pre-trial. Like Crumpton, they suggested the purpose was to check licenses. However, both their testimony and their actions illuminated the reality facing drivers in Mississippi. With zero oversight and full discretion, police in Smith County, Mississippi, conducted roadblocks in order to seek out general crimes.

Armed with flashlights, the officers were ready and willing to shine their lights in drivers' faces to check for red eyes. Capable of holding motorists as long as they liked in the absence of a policy directing otherwise, the officers were prepared to ask pointed questions in

order to establish probable cause if needed. Looking to combat their boredom, officers had a portable machine at the ready to check if people were intoxicated. These roadblocks were not designed to fix a "very minor" problem; rather, they were put in place in order to cast a wide net to catch unsuspecting drivers *en masse*. There was no reason to extend the purpose of this roadblock unless the stop was being converted to something beyond the claimed purpose and with the intent of performing a criminal investigation. Free from the limitations that traditionally require a traffic violation before pulling someone over, law enforcement in Smith County trampled on the Fourth Amendment under the guise of tackling a largely nonexistent problem.

Under the pretense of stopping people to check their licenses, Johnson and Thompson stopped cars without a supervisor present and seemingly with minimal accountability to search for other crimes. Because the Fourth Amendment prevents such a search from occurring overtly, the license checkpoints provided the cover that failed to fool the Edmond Court.

Facing a "slow night," the officers chose to establish a means of stopping multiple cars without probable cause in order to investigate general crimes. Johnson even testified that more often than not, he will not issue any tickets at roadblocks. The alleged reason for conducting the roadblocks—license checkpoints—was practically nonexistent. If police officers preferred to keep the roadways safe, they could have parked on the side of the highway and pulled over people who were speeding or committing other traffic violations. Instead, Johnson and Thompson engaged in a fishing expedition. As such, the roadblock in this case was illegal, and all evidence seized should have been suppressed as the fruit of the poisonous tree. See Wong Sun v. United States, 371 U.S. 471, 484-85 (1963). This evidence included, at a minimum: appellant's car and all items seized therein; any testimony regarding the condition of the car or appellant's condition; appellant's statements; all evidence discovered as a result of the stop and

appellant's statements, including evidence concerning the children's bodies and their location. The amount of evidence that would be excluded requires reversal. The solicitor told the trial judge that the stop, the statements, and the bodies would be excluded. R. 6743, l. 23 – 6744, l. 4. While the state may now argue that some pieces of evidence could have been discovered in other ways, that task should be left for the trial court to determine after reversal and based on a full factual record.

Appellant should be granted a new trial.

5.

The trial judge violated appellant's rights under the federal and state constitutions to present any relevant mitigating evidence during the penalty phase of his capital trial by excluding the testimony of a forensic psychologist to show the state's expert, who claimed appellant was malingering, improperly scored and interpreted the tests on which she relied to form her opinion where the defense expert's testimony was relevant to appellant's character, "professionally and personally destroy[ed]" the state's expert by showing her incompetence, and undermined the reliability of the testimony of another expert who relied upon the state's expert in forming his opinion that appellant was not schizophrenic.

Introduction

The state sought the death penalty against appellant for the killing of his five children. Appellant never disputed he committed the horrific acts that resulted in the deaths of his children. Instead, appellant defended against the state's case by pleading not guilty by reason of insanity. Appellant presented significant evidence, including expert testimony, to support his defense. The solicitor responded by alleging appellant was faking his symptoms of psychosis and made this a central theme of its case against appellant. Although the state's expert, Dr. Kimberly Kruse, never diagnosed appellant as malingering, she informed the jurors that appellant was malingering his symptoms in order to feign mental illness. Importantly, Dr. Richard Frierson, who conducted the criminal responsibility examination of appellant pursuant to a court order, relied heavily upon Dr. Kruse's test results to opine that appellant was sane and had the capacity to conform.

Ultimately, the jury rejected appellant's insanity defense and found him guilty. Nevertheless, appellant's mental health remained a matter for the jury to consider during the

penalty phase of his capital trial. However, the judge refused to allow the jury to hear important evidence challenging the testing methodology employed by the state's expert, Dr. Kruse. Specifically, the defense presented an expert – Dr. Adriana Flores – who reviewed Dr. Kruse's work and found serious fundamental flaws in her administration and interpretation of the tests she used to arrive at her conclusion of malingering. The jury, which never heard of the severe flaws in the methodology used by Dr. Kruse, sentenced appellant to death.

Relevant Facts

Guilt phase

In his opening statement, the assistant solicitor set out to undercut appellant's insanity defense with an accusation of malingering. Well aware that appellant would present expert testimony to prove he was insane, the state asked the jurors to evaluate the expert testimony by asking two questions: (1) whether the expert was searching for the truth or a defense or an excuse; and (2) whether the expert relied upon "verifiable facts" or only upon what appellant said. R. 2560, ll. 1-13.

Appellant presented significant evidence to prove he was not sane at the time he killed his children. Dr. Julie Dorney, an expert in forensic psychiatry, opined that appellant "did not recognize the legal wrongfulness of what he was doing regarding Nahtahn's behavior and his punishment of Nahtahn" and "regarding the deaths of the other four children," appellant "did not have the ability or capacity to distinguish moral right from moral wrong." R. 4758, ll. 7-17; R. 4807, ll. 9-14; R. 4859, ll. 16-25; R. 4879, ll. 22-24; R. 4893, l. 23 – 4894, l. 2. In short, appellant was not guilty by reason of insanity.

Dr. Dorney explained appellant began experiencing auditory hallucinations at the age of ten. R. 4775, ll. 23-25. Although the voices went away with distraction, such as school or work,

the voices increased significantly around the time of his divorce, which was shortly before the deaths of his children. R. 4776, ll. 13-24. He had mood swings throughout his life. R. 4775, ll. 11-12. Initially, his mood would cycle every thirty to sixty days, but when he entered the Navy, the length of his mood cycles shortened significantly. R. 4775, ll. 12-15. Appellant experienced negative intrusive thoughts that were recurrent and racing. R. 4777, ll. 11-15. In the summer of 2014, appellant began experiencing general delusional thinking and paranoid beliefs about his family, which "escalated until the day of the offense." R. 4780, l. 10 – 4781, l. 2; R. 4810, l. 17 – 4811, l. 3; R. 4813, ll. 9-11. Around that time, appellant also exhibited manic behavior and displayed grandiose thinking. R. 4781, l. 3 – 4783, l. 4; R. 4791, ll. 21-25. On the opposite end of the spectrum, appellant experienced periods of depressed mood, suicidal thinking, hopelessness, and lack of concentration. R. 4783, ll. 5-18; R. 4792, ll. 6-14.

On the night of the killings, appellant "suffered from psychotic thinking, specifically delusional thinking and hallucinations." R. 4806, ll. 21-25. Additionally, he had a manic episode that was consistent with bipolar disorder. R. 4807, ll. 3-6. Ultimately, Dr. Dorney diagnosed appellant with schizoaffective disorder, which he had on the day of the offense. R. 4789, ll. 23-25; R. 4807, ll. 5-9. Dr. Dorney "was always looking for malingering," but she found nothing to support that he was faking symptoms. R. 4788, ll. 10-20. Further, Dr. Dorney relied upon neuropsychological testing by Dr. Tora Brawley that showed appellant was not malingering related to memory. R. 4847, l. 22 – 4848, l. 2.

The assistant solicitor cross-examined Dr. Dorney with a report of neuropsychological testing conducted by Dr. Kimberly Kruse. Dr. Dorney admitted that according to a symptom validity screening tool used by Dr. Kruse, appellant's score on the subcategory related to atypical symptoms of psychosis was clinically significant and triggered the administration of a second

test, called SIRS, which also serves as a screening tool for malingering. R. 4852, l. 20 – 4853, l. 12. According to Dr. Kruse, regarding the SIRS test, on the subscale for improbable and absurd symptoms, appellant scored in the "definite range," and on the subscales for rare symptoms and symptom combinations, appellant scored in the "probable range." R. 4853, ll. 10-21. Dr. Dorney questioned why the testing was administered in light of appellant not reporting active symptoms at the time of testing. R. 4854, ll. 1-20; R. 4855, ll. 6-7. After noting that Dr. Kruse did not diagnose appellant as malingering, Dr. Dorney explained that she did not rely upon Dr. Kruse's testing to arrive at her opinion. R. 4854, ll. 10-20.

In addition to the direct evidence of his insanity presented through Dr. Dorney, appellant called other expert witnesses to testify as to his mental illness.

When appellant's marriage began to deteriorate in 2012, he sought the help of a counselor – April Hames in Columbia. R. 3866, ll. 11-18. Appellant wanted help with "[a]nxiety, depressed mood, feelings of inferiority, poor sleeping, marital relationship, trouble in childhood memories, unable to trust others, fighting and arguing with others, bad temper, anger problems, unfairly treated by others, suspicious of others, family quarreling and feeling rejected by family." R. 3868, ll. 9-16. Appellant informed the counselor that he had "a monster inside" him that had gotten out. R. 3871, ll. 4-5. The counselor interpreted this to mean that appellant had externalized an internal feeling related to his lack of bonding with his mother. R. 3871, ll. 22-25. Appellant discussed how the monster would talk to him. R. 3874, ll. 24-25. He reported "impairment in both his occupational and social functioning." R. 3879, ll. 11-14. She diagnosed appellant with recurrent major depressive disorder and unspecified nonpsychotic mental disorder. R. 3892, l. 19 – 3893, l. 17. While the counselor noticed appellant had disorganized thoughts, she determined they were "appropriate to the time and place." R. 3908, ll. 12-18.

An expert in adult and forensic psychiatry from Emory University, Dr. Bhushane Agharkar opined that appellant suffered from schizophrenia and a minor neuro-cognitive disorder. R. 3771, ll. 1-3; R. 3777, ll. 18-25. Appellant's mother suffered from schizophrenia, which placed appellant at a greater risk of developing schizophrenia as well. R. 3785, l. 9 – 3786, l. 5. Additionally, appellant's grandmother was diagnosed with schizoaffective disorder. R. 3786, ll. 22-25. As a result, appellant had a "significant genetic loading" for schizophrenia. R. 3787, ll. 7-12. The abuse appellant suffered as a child also created a risk factor for appellant to develop schizophrenia. R. 3787, l. 13 – 3788, l. 15. Appellant's high intellectual functioning allowed him to mask his symptoms, which appellant was motivated to do because he feared being institutionalized like his mother. R. 3800, ll. 1-24. In a forensic context, Dr. Agharkar always considered malingering. R. 3804, ll. 16-18. He determined appellant was not faking his symptoms based upon appellant's history, brain damage, presentation of symptoms, and his responsiveness to medications. R. 3804, ll. 19-20.

After Dr. Agharkar examined appellant, he requested Dr. Erin Bigler, an expert in neuropsychology, review appellant's brain imaging because of the connections between problems with the brain and mental illness. R. 3933, ll. 21-23; R. 3935, ll. 16-19. "[T]he moment [Dr. Bigler] looked at [appellant]'s scan, [he] could tell that there was a significant traumatic brain injury and that he had a skull defect." R. 3936, ll. 6-8; R. 3949, ll. 21-24; See, also, R. 7480 (Dr. Snyder's report); R. 7495 (Dr. Snyder's power point); Defense Exhibit 135 (CD-Dr. Bigler images) and Defense Exhibit 137 (Power point) both on file with this Court. Dr. Bigler immediately saw "the skull defect in the left frontal area of his head." R. 3937, ll. 19-21. "[T]he frontal area [of appellant's brain was] flattened out." R. 3942, ll. 23-24. An injury to the brain at the age of fifteen, like the one appellant suffered, disrupts the final maturation

aspects that occur as one transitions from adolescence to adulthood.[6] R. 3951, l. 18 – 3952, l. 12. Additionally, one of appellant's temporal horns was substantially larger than the other, and the shape of the hippocampus was different on the right side than on the left side. R. 3945, ll. 10-22. This showed hippocampal atrophy. R. 3945, ll. 22-24; R. 3947, ll. 21-23.

This part of the brain was "a critical brain structure for emotional control and regulation." R. 3945, l. 24 – 3946, l. 2. The frontal lobe was "very important" for "executive function, complex reasoning, decision making, problem solving, emotional regulation." R. 3953, ll. 22-24. The temporal lobe was "very important also for emotional regulation and certain aspects of cognition." R. 3953, l. 25 – 3954, l. 1. However, these areas were not "dedicated areas to motor problems or particular sensory problems," therefore, "there may not be any outward manifestations" of the individual's brain damage. R. 3954, ll. 1-6. Although a "wide spectrum of changes" was possible with frontal lobe damage, Dr. Bigler explained such damage "may affect social emotional functioning," "ability to regulate mood," inability to be adaptive to environmental changes, disinterest, "lack of motivation, [and] lack of drive." R. 3954, ll. 9-23. An injury to the frontal lobe could affect a person's intelligence, but appellant's injury was unlikely to have done so because "at age 15, basic intellectual and cognitive functions are pretty well established." R. 3954, l. 24 – 3955, l. 3. Rather, the type of injury appellant suffered would affect behavior. R. 3955, ll. 3-5.

Dr. Bigler explained that the brains of individuals diagnosed with schizophrenia showed "changes in the frontal areas, the temporal lobe areas, the corpus callosum, the amygdala and the hippocampus." R. 3946, ll. 14-19. "Schizophrenia is a brain disorder. It is not some ethereal

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[6] Appellant was in a serious car accident when he was fifteen-years old. R. 4383, ll. 9-10. As a result of the accident, appellant suffered a head injury that was so severe it left him with a noticeable indentation in his forehead. R. 4384, ll. 4-13.

mental illness that happens independent of the brain. It is a brain disorder." R. 3947, ll. 3-6. Thus, there is a "connection between having a traumatic brain injury and the development of schizophrenia." R. 3947, ll. 9-11. According to the literature, "problems with hearing voices and delusions" result from "changes that occur in the front and temporal lobe regulatory systems." R. 3957, ll. 4-9. "Auditory processing [is] a temporal lobe function." R. 3957, l. 11.

Dr. Travis Snyder, a neuroradiologist, examined MRI scans of appellant's brain at the request of Dr. Bigler and Dr. Agharkar.[7] R. 2455, l. 1; R. 2466, ll. 21-24; R. 3936, ll. 9-10; Defendant's Exhibit #2, R. 7480; Defendant's Exhibit #3, R. 7495. He found "a large left frontal depressed skull fracture," which indicated appellant suffered a severe traumatic brain injury at some point during his life. R. 2467, ll. 16-17. Additionally, he found three areas of hemorrhage. R. 2469, ll. 13-14. The hemorrhages were consistent with disruption of the axons or the fiber tracts of the brain. R. 2469, ll. 18-25. Further, appellant's brain showed areas of cortical thinning and scarring. R. 2471, ll. 11-13. He noted that thinning of the cortex was associated with schizophrenia and schizoaffective disorders. R. 2472, ll. 16-18. Dr. Snyder also found that appellant's right hippocampus was smaller than the left, which was consistent with a history of head trauma. R. 2473, ll. 11-21. The enlargement of appellant's temporal horns was positively correlated to schizophrenia. R. 2475, l. 25 – 2476, l. 3. Another finding by Dr. Snyder that was consistent with schizophrenia was evidence of thinning of the corpus collosum. R. 2476, ll. 7-15. Frontal lobe injuries, such as the one appellant experienced, often result in "cognitive problems," "problems with executive functions," "personality changes, risk taking, disinhibition and behavior spontaneity." R. 2480, ll. 16-21.

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[7] The testimony of Dr. Travis Snyder was recorded during the state's case-in-chief outside the presence of the jury and played for the jury during the defense's case-in-chief. R. 2454, ll. 22-23; R. 3618, l. 20 – 3619, l. 13. Defense Exhibits #2 and #3 are on file for viewing.

Dr. Donna Maddox, an expert in forensic psychiatry, evaluated appellant on September 13, 2014, the day after he was sent to the Department of Corrections for safekeeping as a pre-trial detainee. R. 5377, l. 21 – 5378, l. 4; R. 5383, ll. 10-13. On that day, appellant "was clearly psychotic." R. 5378, ll. 4-5; R. 5418, ll. 15-16. "There was no question in [her] mind." R. 5378, l. 5; R. 5418, l. 16. Thereafter, Dr. Maddox consulted with the defense regarding appellant's treatment. R. 5378, ll. 11-23. Based on her evaluations of appellant, she diagnosed him with schizophrenia. R. 5379, ll. 4-6. Unlike someone whose psychosis is the product of substance use, appellant's psychosis did not "clear up" with the removal of the substance and treatment. R. 5379, ll. 10-20. Dr. Maddox explained that "the main thing" that differentiates schizophrenia from substance-induced psychosis is a deterioration of function for those who suffer from schizophrenia. R. 5380, ll. 6-9. Appellant's ability to function continued to deteriorate, indicating he was schizophrenic and not suffering from psychosis brought about by substance abuse. R. 5380, ll. 10-16.

When appellant's auditory hallucinations disappeared due to the high doses of anti-psychotic medications he received, he expressed to Dr. Maddox that "he felt like part of him was gone." R. 5384, ll. 13-14. This was an indication that appellant was not malingering. R. 5385, l. 22. Further, Dr. Maddox concluded that appellant under-reported his symptoms. R. 5394, ll. 12-17. Part of this was because appellant lacked insight – "[h]e can't tell when he's having symptoms." R. 5395, ll. 10-12. The state attacked Dr. Maddox for not considering Dr. Kruse's testing that showed "there was no psychosis" but found "signs of malingering." R. 5404, ll. 9-11; R. 5418, l. 20 – 5419, l. 4.

Dr. Beverly Wood, the chief of psychiatry at the South Carolina Department of Corrections, had evaluated and treated appellant since September 2014. R. 4715, ll. 5-7; R.

4716, l. 12 – 4717, l. 11. Although Dr. Wood did not examine appellant for criminal responsibility, she diagnosed him with schizoaffective disorder and started him on a regimen of anti-psychotic medications. R. 4718, l. 18 – 4721, l. 15; R. 4735, ll. 6-10. Dr. Wood observed appellant display "flight of ideas," "pressured speech," and disregard for his personal hygiene, which indicated appellant suffered from a mental illness. R. 4728, ll. 16-20; R. 4729, ll. 6-8; R. 4729, ll. 18-25. Appellant informed Dr. Wood that the medication helped decrease his auditory hallucinations. R. 4728, ll. 10-15. Dr. Wood "never saw anything in his behavior" that made her think appellant was faking. R. 4722, l. 17 – R. 4723, l. 14.

Although Dr. Richard Frierson, who examined appellant as the court's evaluator, determined appellant was not insane at the time of the killings, Dr. Frierson diagnosed appellant with substance-induced psychotic disorder from spice or synthetic cannabinoids. R. 4545, ll. 4-11; R. 4549, ll. 11-17; R. 4558, ll. 21-24. In other words, he recognized that appellant was psychotic at the time he killed his children. R. 4559, ll. 14-22. Dr. Frierson relied heavily upon neuropsychological testing conducted by Dr. Kimberly Kruse in arriving at his opinion regarding appellant's mental state and diagnosis.[8] R. 4586, l. 23 – 4587, l. 9; R. 4638, ll. 20-25. Although "[i]t was a very strong consideration," Dr. Frierson did not diagnose appellant as malingering. R. 4598, l. 25 – 4599, l. 1.

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[8] On January 31, 2019, Judge Griffith presided over a pre-trial hearing to determine whether appellant would be required to submit to neuropsychological testing by Dr. Kimberly Kruse as requested by Dr. Richard Frierson. R. 6434. Dr. Kruse wanted to administer the MMPI because it had "validity scales," which would allow her to decide whether appellant was faking his symptoms. R. 6442, ll. 1-21; R. 6445, ll. 1-8; R. 6450, l. 12 – 6451, l. 2. Judge Griffith ruled that appellant must submit to the testing. R. 6469, l. 4 – 6470, l. 22. When Judge Griffith suggested the defense retain its own neuropsychologist to perform similar testing, the solicitor objected due to the effects of re-testing. R. 6478, l. 1 – 6480, l. 3. The solicitor suggested the defense have an expert examine the raw data of the testing conducted by Dr. Kruse and use it to cross-examine and impeach Dr. Kruse. R. 6480, l. 4 – 6481, l. 9.

After appellant presented significant evidence to show he was not guilty by reason of insanity, the state presented Dr. Kimberly Kruse, a clinical neuropsychologist, who obtained her doctorate from "Argosy University in Tampa" who claimed appellant was faking psychosis. R. 4910, ll. 19-20; R. 4911, ll. 5-8; R. 4912, ll.1-2. Dr. Frierson asked her to perform a psychological assessment of appellant to assist him with a differential diagnosis. R. 4911, ll. 9-15. Without objection, she was qualified as an expert in the field of neuropsychology. R. 4913, ll. 8-14. On February 22, 2019, Dr. Kruse evaluated appellant. R. 4914, ll. 8-12. Dr. Kruse distinguished herself from the psychiatrists who had testified on behalf of appellant. According to Dr. Kruse, there were "research studies and articles" concerning the "subjectivity" of psychiatry. R. 4935, ll. 6-12. She alleged that "because of the subjectivity involved," the error rate in psychiatry "can be up to a rate of about 50 percent." R. 4935, ll. 9-13. She gloated that "one strength of [her] field" was its ability "to provide objective testing data to help support or not support diagnoses." R. 4935, ll. 14-16.

Dr. Kruse also delved into the importance of the specific tests she used and how the tests provided impartial and objective data on which to base opinions. The tests were "based in psychometrics neuroscience." R. 4933, ll. 24-25. Not only were the tests "scientific," they were also "very objective." R. 4934, ll. 23-25. Dr. Kruse said that the tests she used were "scientifically peer reviewed testing measures." R. 4934, ll. 4-5. She explained that the tests were "normed in populations" and not available to the public at large because they were copyrighted materials. R. 4933, ll. 19-24. The information was collected in a standardized way, and it was scored in a standardized way. R. 4934, ll. 17-19. She felt "comfortable on the stand" because she was "representing the data," which "speaks for itself." R. 4934, ll. 14-16.

Dr. Kruse conducted validity testing to determine if she had valid information based on appellant's self-report. R. 4926, ll. 12-24. The testing was to help her determine if appellant was "able" or "willing to give a straightforward account of symptoms and if those are consistent with known psychiatric populations." R. 4927, ll. 2-5. She claimed to be the only person who administered these tests or these types of tests to appellant, stating she was the "only one that has done any personality assessment or any testing of psychosis, any validity of how he's reporting symptoms, any testing to rule out malingering, rule in malingering." R. 4927, ll. 11-19.

According to Dr. Kruse, on the SIMS test, appellant "performed within normal ranges in all of the areas except for the area of psychosis, which was a score of six." R. 4928, ll. 9-23. Dr. Kruse wanted to be "very explicit" regarding the significance of this score and claimed to have "copied out of the manual the sentence that goes with the score he obtained." R. 4928, l. 23 – 4929, l. 1. She claimed the manual indicated that "anything over a one [was] clinically significant" and "even low levels of endorsement of such inconsistent, bizarre and/or atypical symptoms is highly suggestive of malingered psychosis, even in the rarity and with which such symptoms are endorsed by actual psychiatric patients." R. 4929, ll. 1-6; R. 4975, ll. 8-9. In her own words, Dr. Kruse explained appellant described symptoms that were "inconsistent with schizophrenia, yet, meant to mimic those of schizophrenia." R. 4929, ll. 13-16. The tests showed appellant was "not reliable." R. 4929, ll. 17-20.

Dr. Kruse alleged the SIRS test showed "the same theme." R. 4929, ll. 21-24. She claimed the test was "purely really looking for psychosis" and that appellant reported symptoms not typically endorsed by individuals with schizophrenia or other psychotic disorders. R. 4930, ll. 1-8. According to the subsets for "symptom combinations" and "[r]are symptoms," she claimed appellant was "in the probable range" for malingered symptomology, and for "probable

and absurd symptoms," he was in the "definite range of malingered symptomology." R. 4930, ll. 2-19.

Turning to the M-Fast, Dr. Kruse claimed it "yielded a significant score for the likelihood of malingering." R. 4930, l. 25 – 4931, l. 2. Appellant scored the highest in "unusual hallucinations." R. 4931, ll. 1-9. She described his score as "significant" in this category. R. 4931, ll. 9-11. According to Dr. Kruse, appellant's "report of symptoms was beyond that that individuals with schizophrenia would typically respond to." R. 4931, ll. 12-14. Finally, she claimed appellant reported "unusual symptom course," meaning that "his report did not match up with those individuals with known psychotic disorders" in terms of how the symptoms progressed over the course of time. R. 4931, ll. 14-17. Based on "all three" of the tests she administered to appellant, she concluded appellant's reporting was "highly suggestive of malingered psychopathy." R. 4931, ll. 18-23. Later, she put a finer point on it and claimed she found malingering. R. 4936, ll. 1-2; see also R. 4977, l. 24 – 4978, l. 5 (stating "there's a preponderance of evidence supporting that there is a reasonable degree of scientific certainty to assume that malingering does play a role in the presentation here").

Dr. Kruse administered the MMPI-2, MCMI-III, and the PAI Protocol, personality testing, to appellant. R. 4936, ll. 3-12. The MMPI-2 was "the number one used test in forensic settings to gather information" in the United States and Canada because it was a "[h]ighly respected," "highly valid, [and] highly reliable test." R. 4937, ll. 6-9. On the L scale of the MMPI-2, which Dr. Kruse called "[t]he lie scale," appellant scored a 74. R. 4937, ll. 9-12. She claimed this meant appellant was not a reliable historian. R. 4937, ll. 12-14. Dr. Kruse determined appellant provided answers that showed "[s]chizo-typal characteristics." R. 4938, ll. 6-15.

On the MCMI-III, she "found a high degree of self-revealing inclinations," which she determined were "overreporting [of] symptoms." R. 4938, ll. 16-19. She struggled to interpret the data on this test because of a "hodgepodge of symptoms" appellant cited. R. 4938, l. 20 – 4939, l. 16. She agreed with the solicitor that some of the symptoms were not "really related to one another" and "some of them were even contradictory." R. 4939, ll. 7-9.

According to Dr. Kruse, the PAI Protocol showed appellant was overreporting and underreporting symptoms. R. 4939, ll. 17-22. "[I]n the area of underreporting, it would be that he would not admit to things that most people will admit to." R. 4939, ll. 22-24. She claimed appellant's defensiveness was "very high." R. 4940, ll. 7-8. He overreported symptoms in the area of psychosis, which Dr. Kruse called "reality testing." R. 4940, ll. 9-12. Ultimately, Dr. Kruse concluded from these three tests that appellant was not a credible historian. R. 4940, ll. 13-25. Although she was forced to admit that these three tests did not look for malingering, she claimed the tests "represent a pattern of behavior similar to that found in the earlier testing," including "a tendency to overreport symptoms" and "underreport shortcomings." R. 4940, ll. 13-25.

Overall, Dr. Kruse, using her scientific and objective data, concluded appellant "did not meet the criteria for a neuro-cognitive disorder." R. 4924, ll. 1-2; R. 4935, ll. 22-25; R. 4941, ll. 6-7; R. 4941, ll. 6-7; R. 4974, ll. 8-13. Despite his traumatic brain injury, Dr. Kruse told the jurors that appellant's brain was "basically okay" and he did not have a "broken brain." R. 4924, ll. 3-7; R. 4941, ll. 7-14. Further, Dr. Kruse claimed her "testing data did not suggest" appellant suffered from psychosis, schizophrenia, schizoaffective disorder, or bipolar. R. 4933, ll. 6-8; R. 4945, ll. 9-17; R. 4975, ll. 18-25; R. 4935, ll. 22-25. Instead, Dr. Kruse opined that appellant "was more of an anti-social and borderline personality." R. 4941, ll. 16-18. Although she was

unable to diagnose him with borderline personality disorder because he did not satisfy the criteria, she determined he fell within the category of unspecified personality disorder. R. 4942, ll. 8-20; R. 4977, ll. 1-4.

When defense counsel questioned Dr. Kruse about her failure to diagnose appellant with malingering in her report, Dr. Kruse claimed she was "very careful about the way" she wrote her reports. R. 4948, ll. 1-9. She would list out a diagnosis if she were the sole evaluator, but she did not make a diagnosis on her report in this case because she "was providing assistance to Dr. Frierson with [her] data," and "he was the one that formulated the diagnosis." R. 4948, ll. 8-11; R. 4977, ll. 8-23.

Concerning her testing of appellant, Dr. Kruse did not rely upon the computer-generated reports that were specific to the tests she administered "because [the computer is] not a doctor." R. 4955, ll. 11-12. Rather, she interpreted the data. R. 4955, ll. 10-11; R. 4955, ll. 20-25. Yet, she admitted that she would include portions of the computer-generated report into her report if they were "relevant to the diagnosis." R. 4956, ll. 14-22; R. 4957, ll. 1-13. Dr. Kruse was forced to admit that her report included two paragraphs from the computer-generated report but omitted a third paragraph from the computer-generated report. This third paragraph concerned negative impression management, which was part of the validity scales that addressed faking of symptoms. R. 4958, l. 15 – 4959, l. 19. This paragraph, as generated by the computer, indicated there was "no evidence to suggest that [appellant] was motivated to portray himself in a more negative or pathological light than the clinical picture would warrant." R. 4959, ll. 9-13.

Additionally, Dr. Kruse omitted from her report a paragraph from the computer-generated report that indicated appellant's answers suggested that he "experiences unusual perceptual or sensory events," "including full blown hallucinations as well as unusual ideas that

may include magical thinking or delusional beliefs." R. 4960, ll. 4-24. She omitted that the data showed appellant "may be involved in a wide variety of activities in a somewhat disorganized manner, may experience accelerated thought processes." R. 4960, l. 25 – 4961, l. 3. According to the computer-generated report, the data indicated that appellant's "diagnostic possibilities" were "delusional disorder, bipolar disorder, and schizophrenia paranoid type." R. 4962, ll. 8-16. The computer-generated report for the MMPI stated a "severe psychological disorder [was] reflected" and that appellant "might suffer hallucinations, blunted or inappropriate affect, hostile and irritable behavior," "difficulty managing routine affairs, poor memory, concentration problems and inability to make decisions." R. 4965, ll. 1-10.

Not only had Dr. Kruse omitted these computer-generated paragraphs from these tests, she admitted she did the same with the PAI. R. 4965, l. 20 – 4967, l. 4. She explained that "as the doctor, [she had] to make sense of all this information." R. 4966, ll. 15-16. In doing so, she relied primarily upon her conclusion that the data indicated appellant was "not a valid historian." R. 4966, ll. 16-17. Therefore, she simply omitted the conclusions the computer-generated report contained that did not support her opinion. R. 4966, l. 16 – 4967, l. 18. Her opinion was based upon "psychometrics and neuroscience and brain-based behavioral patterns." R. 4976, ll. 20-23.

In addition to the state's presentation of Dr. Kruse, the state elicited testimony from Dr. Frierson regarding Dr. Kruse's testing of appellant. According to Dr. Frierson, "[t]here was evidence on [Dr. Kruse's] tests that would suggest he was feigning or exaggerating symptoms." R. 4658, ll. 1-2. Interestingly, however, Dr. Frierson did not diagnose appellant as malingering because he "felt in judging that, that rather than maybe exaggerating symptoms to be found insane, he was exaggerating symptoms to convince himself he's mentally ill so that he could live with what he did." R. 4658, ll. 2-7. Having "diagnosed malingering lots" in the past, Dr.

Frierson "was actually surprised by [appellant's] tests." R. 4658, ll. 9-12. Dr. Frierson did not "get the sense" that appellant was faking symptoms of mental illness in order to be found insane. R. 4658, l. 13 – 4659, l. 3.

According to Dr. Frierson, appellant complained "he saw things on the wall, Teenage Mutant Ninja Turtles." R. 4665, ll. 14-15. These "fantastical-type hallucinations" were "very atypical for mental illness" but "very common in malingering." R. 4665, ll. 19-21. Yet, Dr. Frierson gave appellant "the benefit of the doubt" because being "locked in a cell for 23 hours a day with nothing to do and no distractions" "can cause people to start imagining that they're seeing things."[9] R. 4665, ll. 21-25.

During the closing argument of the guilt phase, the solicitor relied heavily upon Dr. Kruse's testimony to defeat appellant's insanity defense. The solicitor argued that although it was the defense's burden to prove appellant was not guilty by reason of insanity, the defense failed to test appellant for psychosis; instead, Dr. Kruse was the only person who did so. R. 4998, ll. 13-15. The solicitor claimed the testing conducted by Dr. Kruse was "scientific" and "objective." R. 4998, ll. 18-19. The solicitor questioned why the defense expert, Dr. Dorney, would not want to team up with someone like Dr. Kruse, just as Dr. Frierson did. R. 4998, ll. 15-17. He questioned why the defense would not want such testing, and then he posited an answer, "[m]aybe they knew what they were going to get." R. 4998, ll. 21-22. The solicitor recalled that Dr. Dorney had Dr. Kruse's report, but she "totally ignore[d] Dr. Kruse," which told the jury everything it needed to know when answering the question posed by the assistant solicitor during

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[9] Dr. Julie Dorney also determined appellant's visual hallucinations were more akin to those experienced by people who have sensory deprivation, which was consistent with appellant having been in solitary confinement for a significant period of time. R. 4777, ll. 16-25.

his opening statement -- whether Dr. Dorney was looking for the truth or a defense. R. 5004, ll. 16-22.

According to the solicitor, Dr. Kruse's tests revealed "no psychosis," "no schizophrenia," and "no schizo-affective disorder." R. 4998, ll. 23-25. Further, the solicitor noted that Dr. Kruse determined appellant was "malingering," that he was "looking and trying to make himself look mentally ill" and "looking for schizophrenia." R. 4999, ll. 2-4. Dr. Kruse considered appellant "unreliable" and "not a reliable historian." R. 4999, ll. 13-14.

Penalty phase[10]

During the penalty phase, the solicitor objected to appellant calling Dr. Adriana L. Flores as an expert witness to refute Dr. Kruse. R. 5483, l. 18 – 5484, l. 25; R. 5598, l. 24 – 5599, l. 2. The solicitor alleged the proposed testimony was "an attack on Dr. Kruse." R. 5483, ll. 21-22. In the state's view, Dr. Flores would challenge "both the professional credentials and, really, the personal integrity of Dr. Kimberly Kruse." R. 5484, ll. 1-2; R. 5598, l. 24 – 5599, l. 2. According to the solicitor, it was "outrageous" and "outlandish." R. 5484, ll. 2-3; R. 5484, ll. 20-21; R. 5599, l. 7. Although the solicitor claimed no plan to call any additional witnesses at that point, the state indicated that Dr. Kruse was "concerned about whether she [could] even come back" and testify based upon Dr. Flores' concerns. R. 5484, ll. 4-11; R. 5484, ll. 22-25; R. 5600, ll. 6-8. The solicitor claimed he could not "call a reply witness" because Dr. Kruse was "concerned there [was] a threat on her career and her license to testify." R. 5485, l. 24 – 5486, l. 2. Apparently realizing he had subpoena power, the solicitor deemed it "ridiculous" because Dr.

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10 Importantly, the state moved to incorporate the entirety of the guilt phase into the penalty phase, which was granted over defense counsel's objection. R. 5175, ll. 4-24. Defense counsel objected to the inclusion of the testimony of Dr. Frierson and Dr. Kruse because the judge's order regarding their evaluations was limited to consideration of guilt phase matters. R. 5175, ll. 14-22; see also R. 5122, l. 17 – 5126, l. 20.

Kruse would "have to bring a lawyer" and the solicitor would "have to compel her" attendance and testimony as a reply witness. R. 5486, ll. 2-3; R. 5600, ll. 8-13.

Eventually, the solicitor admitted that nothing would prevent Dr. Flores from filing an ethical complaint even if she did not testify. R. 5599, ll. 13-15. However, according to the solicitor, Dr. Kruse "ha[d] the right to have legal counsel to cross-examine this" and that appellant's trial was "not the time or place for that." R. 5599, ll. 16-18. Acknowledging that Dr. Flores worked with Dr. Dorney, the solicitor claimed Dr. Flores had "not touched a single bit of this case, yet, she's going to come in and pick apart Dr. Kruse without the benefit of all the notes and things that Dr. Kruse used to justify her opinion." R. 5599, ll. 20-24. Based upon the information the solicitor had, he determined that Dr. Flores would "professionally and personally destroy" Dr. Kruse if she were allowed to testify. R. 5599, l. 25.

The solicitor also claimed the defense was "going to build this record for appellate purposes and, also, to use against Dr. Kruse to ensure Dr. Kruse never steps into a criminal courtroom again." R. 5600, ll. 1-3. The solicitor characterized it as "obscene" and "an obscene use of the court process." R. 5600, ll. 3-4.

According to the solicitor, "[i]t borders on witness tampering, threatening a witness." R. 5484, ll. 11-12; R. 5600, l. 5. The solicitor characterized Dr. Flores' proposed testimony as "a personal attack" that ended "with a threat that she feels, under the APA Ethical Guidelines, she has to directly contact Dr. Kruse, confront her about all of her errors and mistakes and potentially report her for ethical violations." R. 5484, ll. 16-20; R. 5599, ll. 7-9. According to the solicitor, "Dr. Kruse would [from] then forward, therefore, have to always reveal she's had an ethical allegation against her. It will be a permanent stain on her personal and professional integrity." R. 5599, ll. 9-12.

Ultimately, the solicitor objected to the testimony as not relevant and noted Dr. Flores was "not on a witness list." R. 5484, ll. 22-23.

Defense counsel explained that Dr. Flores would testify "regarding errors and incorrect conclusions regarding the testimony of Dr. Kruse." R. 5485, ll. 2-4; R. 5600, ll. 17-19. Dr. Flores would not testify as to Dr. Kruse's character. R. 5485, ll. 4-6. Specifically, Dr. Flores reviewed Dr. Kruse's testing and was prepared to testify about "significant problems, errors and misreports with regard to Dr. Kruse's testing." R. 5485, ll. 7-10.

The judge inquired as to how Dr. Flores' testimony was "relevant to this portion of the case" in light of the fact that the solicitor had not called Dr. Kruse as a witness in the penalty phase. R. 5485, ll. 15-18. Defense counsel explained that the solicitor was relying upon Dr. Kruse's testimony in the penalty phase to support its position that Jones was "not schizophrenic, that he doesn't have schizophrenia, that he is a liar." R. 5485, ll. 19-21. Dr. Flores refuted Dr. Kruse's conclusions, upon which the solicitor was relying during the penalty phase to counter appellant's mitigation. R. 5485, ll. 19-23.

The judge ruled:

> Well, my concern, is several fold is, she wasn't on the witness list. We've been getting ready for a year and a half, close to two years. Since we've put this thing on the trial docket, we have continued it twice. I mean, there's a multitude of experts who've testified for the Defense and several for the State. Two or three from the State and more from the Defense. I mean, where does it end. If this lady comes to testify, then the State finds someone else that's not on the witness list, you know to respond to this, to respond to that and to respond to this. We've got to draw the line somewhere. My belief is that she's not on the witness list. Therefore, she shouldn't be allowed to testify because we're six weeks into the trial. I mean, we've got to draw the line somewhere. And it seems like, when we started either phase of the case it ought to be drawn. And we've already started the second phase and the witness isn't identified. So it's almost two trials in.

R. 5486, ll. 4-21.

In response to the judge's concerns about the witness list, defense counsel explained that Dr. Flores did not come to their attention until the weekend, and that the information regarding her proposed testimony was provided to the state as soon as the defense learned of it. R. 5486, l. 22 – 5487, l. 2. In fact, Dr. Flores contacted the defense team to inform them that the test relied upon by Dr. Kruse was "flawed" and the "testing results [were] incorrect." R. 5601, ll. 12-14. Dr. Flores reviewed the raw data and re-scored it properly. R. 5602, ll. 2-6.

Further, defense counsel noted the solicitor called a witness who was not on the witness list, which was allowed by the trial judge upon *voir dire* of the jurors about the witness. R. 5487, ll. 3-7. The solicitor admitted to having called a witness who was not on the witness list, but claimed the witness was "a chain witness who took item A and gave it to one person to another. Something like that. Somebody that did not know anything about the case." R. 5487, ll. 10-13. The solicitor claimed the witness's testimony was of "no substance." R. 5487, l. 16. Nevertheless, the judge maintained that he would not allow Dr. Flores to testify because they were "too far in the game to call in new players."[11] R. 5487, l. 24 – 5488, l. 3.

Immediately prior to the proffer of Dr. Flores' testimony, the solicitor moved "to have it sealed so that when this goes before the high court that it's not released to the public to protect the integrity of Dr. Kruse, who is not here, nor is her counsel." R. 5603, l. 24 – 5604, l. 2. Defense counsel objected to the request. R. 5604, ll. 3-4. The judge indicated he was going to grant the motion "because it's kind of out of the blue." R. 5604, ll. 5-6. He then inquired of what harm would occur "if the Appellate Court can see it, but the general public can't." R. 5604,

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[11] Although there was considerable debate regarding whether Dr. Kruse was listed on the witness list that was provided to the jurors, ultimately, the judge agreed the jury was not aware that Dr. Kruse was a potential witness in the case. R. 180, l. 22 – 183, l. 2; R. 237, l. 21 – 238, l. 7; R. 5645, l. 9 – 5647, l. 17; Court's Exhibit #63, R. 7628.

ll. 6-8. The defense responded that there was no reason to seal the record, and that if Dr. Kruse did nothing wrong, she had nothing to worry about. R. 5604, ll. 9-12. The judge then compared the proffered testimony of Dr. Flores to a judge accusing a lawyer of "unethical conduct," which would mean the lawyer would have "to live with that red mark on his head." R. 5604, ll. 13-22. The defense relented, and the judge indicated he would seal the record "out of an abundance of caution."[12] R. 5604, ll. 23-25.

Dr. Flores was qualified as an expert in forensic psychology without objection from the state. R. 5608, ll. 19-24. She and Dr. Dorney knew each other from working at Georgia Regional Hospital together. R. 5609, ll. 5-10. Subsequently, Dr. Flores subleased an office from Dr. Dorney's practice. R. 5609, ll. 10-11. When Dr. Dorney testified during the guilt phase, she became aware that although there was no mention of malingering in Dr. Kruse's report, there were allusions to malingering during the testimony of the state's experts. R. 5609, ll. 15-25. As a result, Dr. Dorney asked Dr. Flores to review the testing conducted by Dr. Kruse. R. 5609, l. 15 – 5610, l. 4.

Dr. Kruse's findings on the Personality Assessment Inventory (PAI) immediately raised alarms for Dr. Flores because Dr. Kruse had "omitted a validity section on it." R. 5610, ll. 5-16. The PAI tests for "validity and disease." R. 5610, ll. 16-17. The test assesses "an individual's response style" to "determine whether the individual" is underreporting problems or overreporting problems. R. 5610, ll. 17-24. In other words, it tests for malingering. R. 5610, ll. 24-25. Dr. Flores explained that a psychologist would enter the individual's responses to the test into the computer, which would generate a report with findings. R. 5610, l. 25 – 5611, l. 3. Those findings include the positive response style *and* the negative response style – always. R.

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[12] On October 16, 2020, this Court granted appellant's motion to unseal. The state did not oppose appellant's motion.

5611, ll. 2-13; R. 5611, ll. 13-15. The negative response style findings concern "whether there was any indication of the person attempting to portray themselves as worse off than they may actually be." R. 5611, ll. 9-11. Dr. Kruse's report related to her testing of appellant included the paragraph on positive response style, but it omitted the paragraph on negative response style. R. 5611, ll. 15-20.

Additionally, Dr. Flores was concerned about Dr. Kruse's interpretation of the L scale on the MMPI. R. 5612, ll. 13-16. "The L scale is very similar to the positive response style indexing the PAI," which "informs the evaluator as to whether or not the individual attempted to portray themselves in a better light." R. 5612, ll. 18-20. Specifically, Dr. Kruse's interpretation of the L scale was appellant engaged in dishonest test taking or extreme defensiveness. R. 5613, ll. 5-6.

Based upon these two reporting irregularities, Dr. Flores requested and received the raw data of the testing conducted by Dr. Kruse. R. 5613, ll. 10-15. When the defense offered Dr. Flores' notes showing how she re-scored the raw data to be admitted for purposes of the proffer, the solicitor objected. R. 5613, l. 16 – 5614, l. 7. The judge admonished the defense for "pitting witnesses" if Dr. Flores intended to testify about "mistakes Dr. Kruse made." R. 5614, ll. 9-11. The judge refused to consider Dr. Flores' concerns of mis-scoring because it was "pitting a witness." R. 5615, ll. 1-8. According to the judge, it was not proper for Dr. Flores to testify that Dr. Kruse mis-scored. R. 5615, ll. 8-12.

Dr. Flores examined the raw data for the M-FAST and SIMS tests, which "are both considered screeners for malingering, for an individual overreporting psychological problems that they may not have or exaggerating the level of severity." R. 5616, ll. 2-5. These tests simply screen a person for malingering and do not provide conclusive results. R. 5616, ll. 5-9.

Thus, if a person scores above a designated "cut off," then the evaluator should follow up with more comprehensive measurers of malingering, such as the Structured Interview of Reporting Symptoms (SIRS). R. 5616, ll. 9-17. Dr. Flores explained that "even if somebody scores high on the SIRS," the person should not be classified as malingering unless the entirety of the "clinical picture," which would include the validity indicators on the MMPI or PAI or other relevant data, points to malingering. R. 5616, l. 18 – 5617, l. 1.

On the SIMS test, one of the screeners for malingering, appellant scored 12. R. 5618, ll. 2-4. Per the protocol for the SIMS, a person who scores greater than 14 is potentially malingering and further testing should be done. R. 5618, ll. 5-13. Thus, there was no need to administer further testing as appellant's total score did not indicate a risk of malingering. Dr. Flores readily admitted that appellant's score of 6 on the psychosis subscale was elevated, which meant it was "suspect for the individual reporting on that particular subscale potentially some symptoms that may not exactly be genuine with regards to psychosis." R. 5619, ll. 5-12. However, the best indicator of potential malingering was the total score, not an individual score, as the test creators explained. R. 5619, ll. 12-19. In fact, the test creators noted that the psychotic subscale had a higher error rate of misclassifying an honest responder as a malingerer. R. 5619, ll. 20-25. Thus, the accuracy of the scores on the subscales was not a good indicator of malingering, and the total score was the best indicator of potential malingering. R. 5620, ll. 1-4.

Dr. Flores faulted Dr. Kruse's scoring of the M-FAST test as well. R. 5620, ll. 5-11. Specifically, appellant told Dr. Kruse that he was not experiencing voices at the time of the test and that although he had previously heard voices, those had improved with medication. R. 5620, ll. 12-15. Dr. Kruse scored these responses as a 1; however, "a one means affirming the individual is reporting this issue." R. 5620, ll. 13-18. Dr. Flores explained that appellant should

have scored zero because he denied having the problem. R. 5620, ll. 18-20. Dr. Kruse made this error four times on appellant's test. R. 5620, l. 20. Due to these errors, Dr. Kruse claimed appellant scored an 8, which is two points above the cut-off score indicating the potential for malingering. R. 5620, ll. 21-24. Had Dr. Kruse scored correctly, appellant would have scored a 4, two points *below* the cut-off. R. 5621, l. 24 – 5622, l. 5. In light of this score, there was no need to administer the SIRS test to appellant. R. 5621, ll. 14-16.

Based upon Dr. Kruse's scoring errors on the M-FAST test, Dr. Flores was concerned about the reliability of Dr. Kruse's scoring on the SIRS, which is a much more complex test to score. R. 5621, l. 17 – 5622, l. 9. However, unlike the M-FAST, which required Dr. Flores to write down appellant's responses to the questions posed, the SIRS did not require written answers, which "made it difficult to discern whether or not it had been accurately scored." R. 5622, ll. 10-13.

According to Dr. Flores' review of appellant's score on the F scale of the MMPI, "there was no indication of overreporting or malingering of problems." R. 5625, ll. 4-10. Notably, on the MMPI, appellant provided no answer when asked how often he heard voices without knowing the source of the voices. R. 5627, ll. 14-16. Dr. Flores expected that someone who was malingering mental illness would respond to hearing voices frequently because that is a symptom that is widely known to be associated with mental illness. R. 5627, ll. 14-23. Appellant's failure to answer the question was "consistent with no malingering." R. 5628, ll. 3-4. Similarly, the negative response style for the PAI showed no evidence of making himself seem worse than he was. R. 5625, ll. 10-14. Dr. Flores explained there was no indication of malingering based upon the MMPI and PAI. R. 5625, ll. 21-22. "[O]n the contrary, there's an indication that [appellant]

was actually attempting to make themselves look as less – as having less problems as they actually would." R. 5625, ll. 22-25.

Dr. Flores explained that the subscales for the MMPI and PAI showed elevations in schizophrenia and paranoia. R. 5627, ll. 2-6. Those elevated scores indicated appellant likely experienced problems in those two areas at some point. R. 5627, ll. 6-13. Further, Dr. Flores explained that according to the neuropsychology literature, "individuals with traumatic brain injury ... are at higher risk of experiencing psychosis" and their hallucinations tend to be "atypical," meaning they are "less likely to been seen in individuals ... with schizophrenia." R. 5628, ll. 5-16. Dr. Flores concluded that based upon her review of the data, there was not enough information to conclude appellant was malingering. R. 5629, ll. 3-6. Finally, according to Dr. Flores, a person not experiencing any symptoms and being medicated should not be tested for malingering. R. 5617, ll. 18-25.

On cross-examination, Dr. Flores reported that after testifying, Dr. Dorney expressed concern that Dr. Kruse would testify that appellant was malingering despite the fact that Dr. Kruse's report never indicated appellant was malingering. R. 5632, ll. 10-23. Based upon this potential incongruity, Dr. Dorney worried that the testing was "being misinterpreted." R. 5632, ll. 10-23. Dr. Flores made clear that she re-scored the tests conducted by Dr. Kruse because Dr. Kruse had failed to provide the entire PAI report. R. 5633, ll. 20-24.

Dr. Flores explained that she is obligated – ethically – to contact Dr. Kruse about her report. R. 5634, ll. 14-15. Due to her profession's code of ethics, Dr. Flores was required to contact Dr. Kruse to note her "multiple concerns about competence, about interpretational data, about not submitting evidence that should have been submitted." R. 5634, ll. 16-25. The serious

concerns with the methodology employed by Dr. Kruse and revealed by her selective reporting were "fairly excessive and concerning." R. 5635, ll. 13-14.

Dr. Flores explained that her area of expertise is in conducting the tests that Dr. Kruse administered. R. 5636, ll. 1-2. Not only does Dr. Flores administer the tests on a routine basis, but she trains post-doctoral students on the proper administration and scoring of the tests. R. 5636, ll. 2-7. Dr. Flores had "some very serious concerns" "with what Dr. Kruse did." R. 5637, ll. 21-25. As explained by Dr. Flores, she, along with Dr. Kruse, took an "oath to pursue no harm," but there was the potential for harm in this case, especially in light of the state's pursuit of the ultimate penalty in reliance on Dr. Kruse's opinion. R. 5638, ll. 1-3.

After the proffer, the defense moved to call Dr. Flores as a witness during the penalty phase. R. 5640, ll. 12-14. Acknowledging that the mental health evidence presented during the guilt phase addressed "the very narrow mental health issue about not guilty by reason of insanity or guilty but mentally ill as it related to the crime," the defense emphasized that "[i]n the sentencing phase where all mitigating evidence is admissible and mental illness is a statutory mitigator, the Eighth Amendment require[d] the admission of mitigating evidence and a relaxation of the rules of evidence." R. 5640, ll. 14-21. "Dr. Kruse left the jury with a false impression that [appellant] was malingering, which can be a devastating accusation in a death case." R. 5640, ll. 21-24. Of course, Dr. Kruse's accusation that appellant was faking mental illness would carry over to the sentencing phase, and Dr. Flores could show the jury that the accusation was based upon Dr. Kruse's erroneous methodology. R. 5640, ll. 24-25. Further, Dr. Flores' testimony was "mitigating evidence for character, remorse, and mental illness." R. 5641, ll. 1-2; R. 5643, ll. 5-10.

The judge determined that malingering was not "a big issue" or "gigantic issue." R. 5641, ll. 3-8. He noted that Dr. Frierson had not testified that appellant was malingering. R. 5641, ll. 4-5. Further, the judge insisted that it did not appear "throughout the entire trial that the accusation was, ... [appellant] has got us all fooled. He's malingering." R. 5641, ll. 8-11. In the judge's view, it was possible that testimony about malinger[ing] went to "a symptom or two," but had "not been the focus of the whole trial." R. 5641, ll. 11-14. Misunderstanding, respectfully, the purpose of the sentencing phase, the judge placed emphasis upon his belief that evidence of appellant malingering "was [not] the entire reason the jury, after 15 days of testimony, found him guilty." R. 5641, ll. 14-17.

Defense counsel explained that although Dr. Frierson did not testify that appellant was malingering and that prior to trial Dr. Kruse told defense counsel that appellant was not malingering based on all of the data, Dr. Kruse testified that appellant was "consistently across the board malingering." R. 5641, ll. 18-23. Dr. Flores' testimony was necessary to counter this false impression. R. 5641, ll. 23-25.

The solicitor noted that Dr. Kruse "was crossed at length ... on the very issues" addressed by Dr. Flores. R. 5642, ll. 8-13. Still, the solicitor lamented that if Dr. Flores were to testify, then the state would not have a witness to call in reply because Dr. Kruse was "under a threat of an ethical violation" and did not "want to come back in this courtroom." R. 5642, ll. 13-16. Additionally, the solicitor argued "this [was] the reverse of Inman.[13]" R. 5643, ll. 24-25. The

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13 State v. Inman, 395 S.C. 539, 720 S.E.2d 31 (2011). The solicitor's comparison is ill-founded. The prosecutor in Inman, intimidated a defense witness 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. Id. at 563, 720 S.E.2d at 44. Further, the prosecutor's conduct prevented the defense witness from testifying. Id. Here, Dr. Flores indicated in her affidavit that she was required by the ethical rules governing her profession to file a complaint about Dr.

solicitor claimed the defense had "brought in somebody out of the blue, no notice to attack a witness from the first phase," and placed Dr. Kruse "in a position where she can't even come in this courtroom and defend herself." R. 5644, ll. 2-9.

The judge considered Dr. Flores' statement that she was required to file an ethical complaint if Dr. Kruse's responses to her inquiry regarding the testing errors was not satisfactory to be a threat. R. 5644, ll. 13-14; R. 5644, l. 17; R. 5644, ll. 20-22; R. 5645, ll. 2-3. After making this finding, the judge refused to permit the jury to hear Dr. Flores' testimony. R. 5645, ll. 21-25; R. 5646, ll. 7-8.

During the solicitor's closing argument, he continued, as he did during the guilt phase, to denigrate appellant's mental illness as a reason to spare his life. After noting the evidence offered to sentence appellant to life imprisonment included "his DNA," "his violent past," and "his broken homes," which were part and parcel of appellant's development of mental illness, the solicitor argued appellant was "not the product of a bad DNA milkshake" that resulted in him being a murderer. R. 5908, ll. 3-16. Specifically, the solicitor asked the jurors to compare appellant's background and character with that of his relatives who "didn't become a murderer." R. 5908, ll. 3-16. He noted that appellant's family supported him during the trial, and he theorized that such support was necessary for them to cope. R. 5909, ll. 5-8. The solicitor proposed that the family had "to absolutely embrace the notion that he is sick, that he is insane" in order to "deal with that kind of pain." R. 5909, ll. 8-13. According to the solicitor, appellant

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Kruse's testing methodology. The requirement that she file a complaint was far from a "threat" despite the solicitor's hyperbolic allegation and the judge's finding after his ill-fitting comparison to a complaint filed by a judge against a lawyer for violation of the Rules of Professional Conduct. The solicitor's insistence that Dr. Kruse refused to testify if needed as a reply witness because of Dr. Flores' statement that she was required to report her is a non sequitur. Unlike Inman where it was the future testimony of the witness that was at issue, here, the conduct giving rise to Dr. Flores' complaint had already occurred and Dr. Kruse's refusal to testify a second time would not erase Dr. Kruse's unethical conduct.

manipulated his family to believe he was mentally ill by blaming his schizophrenic mother's abandonment of him. R. 5910, ll. 17-25; R. 5912, ll. 10-13.

The solicitor also denigrated the presentation by Deborah Grey, the defense's social historian, because she did not inform the jurors of "anything good" about appellant. R. 5911, ll. 17-21. He explained the jurors "weren't supposed to" hear of anything good about appellant's background. R. 5911, l. 21. Important for the solicitor's argument was his claim that Grey's "job was to find all the darkness in that family, expound upon it and feed it to the experts who were trying to tell you there's something wrong with [appellant]." R. 5911, ll. 21-24. One of those experts was "Dr. Maddox, who testified, oh, he's schizophrenic. I could tell he was psychotic day one." R. 5911, l. 24 – 5912, l. 1. The solicitor chided her for not conducting "much of an evaluation," which contrasted greatly with Dr. Frierson, who relied upon Dr. Kruse's inaccurate test results. R. 5912, ll. 1-3.

Thereafter, the solicitor discounted the entire mental health presentation during the penalty phase by remarking that the jury had "been down that road" already. R. 5912, l. 4. Now, he surmised the defense wanted the jurors to consider appellant "just a little child" so they would "forget these kids" and punish appellant by sending him "to his room" so he could "think about what he's done." R. 5912, ll. 4-8. Instead of imposing a life sentence on appellant, the solicitor asked the jurors to impose death so that appellant's death would have purpose:

> A dying man, a dying man can have a purpose. But I will tell you something, your verdict, your judgment, if you speak death, if you believe what fits this crime, this God awful crime, maybe, maybe, as it's cast out across the media in its headlines and it's on TV, maybe somebody will hear. Maybe there's another dad .... Maybe some other father will go my God, that's me, maybe he'll stop and get off that track that [appellant] took. Maybe.

R. 5912, l. 21 – 5914, l. 7.

Standard of Review

"A ruling on the admissibility of evidence is within the sound discretion of the trial court and will not reversed absent an abuse of discretion. An abuse of discretion occurs when the trial court's ruling is based on an error of law.'" State v. Mercer, 381 S.C. 149, 160, 672 S.E.2d 556, 562 (2009) (quoting State v. Washington, 379 S.C. 120, 123-124, 665 S.E.2d 602, 604 (2008)).

Discussion

The United States Constitution guarantees a criminal defendant the right to present a complete defense through the Due Process Clause of the Fourteenth Amendment and the Sixth Amendment. Crane v. Kentucky, 476 U.S. 683, 690 (1986); State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 402 (1986) (holding the Sixth Amendment "constitutionalizes" the right to present a defense in a criminal trial). "[T]he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" Crane, 476 U.S. 683, 690 (quoting California v. Trombetta, 467 U.S. 479, 485 (1984)). South Carolina's Constitution provides similarly: "Any person charged with an offense shall enjoy the right ... to be fully heard in his defense...." S.C. Const. art. I, § 14; see also S.C. Code Ann. § 17-23-60 ("Every person accused shall, at his trial, be allowed ... to produce witnesses and proofs in his favor....").

"Few rights are more fundamental than that of an accused to present witnesses in his own defense." Taylor v. Illinois, 484 U.S. 400, 408 (1988) (citing Chambers v. Mississippi, 410 U.S. 284, 302 (1973)). "'The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts.'" Id. at 408-409 (quoting United States v. Nixon, 418 U.S. 683, 709 (1974)). "'The right to offer the testimony of witnesses ... is in plain terms the right to present a defense, the right to present the defendant's version of the facts as

well as the prosecution's to the jury so it may decide where the truth lies.'" Id. at 409 (quoting Washington v. Texas, 388 U.S. 14, 19 (1967)). The United States Supreme Court declared, "'[t]his right is a fundamental element of due process of law.'" Id.

"'The sentencing stage is the most critical phase of a death penalty case.'" Weik v. State, 409 S.C. 214, 234, 761 S.E.2d 757, 767 (2014) (quoting Romano v. Gibson, 239 F.3d 1156, 1180 (10th Cir. 2001)). "The purpose of the bifurcated proceeding in a capital case is to permit the introduction of evidence in the sentencing proceeding which ordinarily would be inadmissible in the guilt phase." State v. Kornahrens, 290 S.C. 281, 289, 350 S.E.2d 180, 185 (1986). "In the sentencing proceeding, the trial court may permit the introduction of additional evidence in extenuation, mitigation or aggravation." Id.

The South Carolina death penalty statute lists several mitigating circumstances. Of those, three apply to appellant and are relevant for the issue presented. See R. 5956, ll. 5-15 (trial judge instructing the jury on the relevant mitigating circumstances). For example, it is a statutory mitigating circumstance if the murder were "committed while the defendant was under the influence of mental or emotional disturbance." S.C. Code Ann. § 16-3-20 (C)(b)(2). Further, it is a statutory mitigating circumstance if "[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired." S.C. Code Ann. § 16-3-20 (C)(b)(6). Finally, a defendant's "mentality ... at the time of the crime" is a statutory mitigating circumstance. S.C. Code Ann. § 16-3-20 (C)(b)(7). However, the "statutorily listed mitigating circumstances are not exclusive." State v. Linder, 276 S.C. 304, 311, 278 S.E.2d 335, 339 (1981).

Additionally, 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); see also Eddings v. Oklahoma, 455 U.S. 104, 112 (1982); Skipper v. South Carolina, 476 U.S. 1, 4 (1986). "[C]onsideration of the character and record of the individual offender and the circumstances of a particular offense" is "a constitutionally indispensable part of the process of inflicting the penalty of death." Woodson v. North Carolina, 428 U.S. 280, 304 (1976). "When the choice is between life and death, the Eighth Amendment bars any sentencing procedure which creates a risk of death being imposed even though there may be factors that call for a less severe penalty." State v. Stewart, 288 S.C. 232, 234, 341 S.E.2d 789, 790 (1986).

"The holdings in Lockett and Eddings ... addressed other factors in mitigation, evidence of which was disallowed." State v. Patterson, 290 S.C. 523, 529, 351 S.E.2d 853, 856 (1986). "In Lockett the Court struck down an Ohio statute which 'did not permit the sentencing judge to consider, as mitigating factors, [the defendant's] character, prior record, age, lack of specific intent to cause death and her relatively minor part in the crime.'" Id. "In Eddings the Court reversed the sentence of death, holding the trial judge erred in excluding evidence of the 16-year old defendant's 'violent background.'" Id. at 529, 351 S.E.2d at 856-857. As this Court explained, "Lockett ... require[d] submission to the jury of *any* evidence proffered by a defendant in mitigation of the death penalty." Id. at 530, 351 S.E.2d at 857 (emphasis in original); see also State v. Hughes, 336 S.C. 585, 592, 521 S.E.2d 500, 504 (1999) (explaining that "[t]he sentencing jury is charged with considering all possible relevant information about the individual defendant whose fate it must determine").

"The jury is entitled to hear this evidence so that it may 'give a "reasoned moral response to the defendant's background, character, and crime"' and prevent it from reacting out of an 'unguided emotional response.'" State v. Dickerson, 395 S.C. 101, 122, 716 S.E.2d 895, 906

(2011) (quoting Penry v. Lynaugh, 492 U.S. 302, 328 (1989)). "Evidence is relevant if it tends to establish or to make more or less probable some matter in issue upon which it directly or indirectly bears." State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986); see also Rule 401, SCRE. Further, "[e]vidence which assists a jury at arriving at the truth of an issue is relevant and admissible unless otherwise incompetent." Id. (citing Toole v. Salter, 249 S.C. 354, 154 S.E.2d 434 (1967)); see also Rule 402, SCRE.

In another case arising out of Lexington County, this Court held a trial judge abused his discretion when he excluded the testimony of an expert in neurology and psychiatry based upon the state's objection that it was surprised by the proposed testimony. State v. Mercer, 381 S.C. 149, 160-161, 672 S.E.2d 556, 562 (2009). Mercer proffered testimony from Dr. John Steedman that a SPECT scan of Mercer's brain revealed an abnormality. Id. The radiologist who reviewed the scan initially noted a questionable abnormality. Id. In light of Dr. Steedman offering a stronger finding of an abnormality, the state objected to the testimony "on the basis of Rule 403, SCRE, and a so-called 'discovery order' violation." Id.

This Court explained that "[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." Id. at 161, 672 S.E.2d at 562. According to this Court, "[t]he probative value of Dr. Steedman's excluded testimony was, as a matter of law, not substantially outweighed by its potential for prejudice, as a result of the purported late disclosure or otherwise." Id. 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. "The trial courts, vested with considerable discretion in evidentiary matters, must not

neglect the due process implications involved in a capital defendant's right to present mitigation evidence." Id. Quite simply, "'the Constitution ... prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends they are asserted to promote.'" State v. Rivera, 402 S.C. 225, 244, 741 S.E.2 694, 704-705 (2013) (quoting Holmes v. South Carolina, 547 U.S. 319, 326 (2006)).

Appealing his death sentence imposed by a Lexington County jury, Northcutt challenged the trial judge's exclusion of a letter Northcutt wrote to his wife "expressing remorse for the death of their child." State v. Northcutt, 372 S.C. 207, 220, 641 S.E.2d 873, 880 (2007). During the sentencing phase of the trial, Northcutt's wife "testified of a series of phone calls she received from [Northcutt] while he was in pre-trial confinement." Id. Her testimony "implied [Northcutt] never expressed concern for her or their deceased child or remorse for his actions." Id. at 220-221, 641 S.E.2d at 880. When defense counsel attempted to cross-examine the wife about a letter she received from Northcutt nine days after the murder, which expressed remorse and sorrow for his actions, the trial judge excluded the evidence. Id. at 221, 641 S.E.2d at 880.

This Court held the trial judge erred in doing so, explaining "[t]he prosecution had opened the door for [Northcutt] to present evidence of his remorse." Id. Criminal defendants are "entitled to rebut the state's argument and correct the false impression the state conveyed to the jury." Id. Further, "[t]he state cannot preclude the jury from considering any relevant mitigating evidence the defendant proffers in support of sentence less than death." Id. (internal quotation omitted).

In the case sub judice, the trial judge violated appellant's federal and state constitutional rights to present *any* evidence in mitigation of a death sentence by refusing to permit Dr. Flores to testify during the penalty phase of appellant's trial. The proffer of Dr. Flores' testimony

revealed she was an undisputed expert in forensic psychology and qualified to testify about the testing conducted by Dr. Kruse. Painstakingly, Dr. Flores reviewed the numerous tests administered by Dr. Kruse. Using her expertise in the matter, she refuted Dr. Kruse's conclusion that appellant was malingering. Dr. Flores explained how Dr. Kruse repeatedly scored the tests improperly and drew conclusions counter to the instructions provided by the test creators. Importantly, Dr. Flores detailed how Dr. Kruse omitted from her report computer-generated paragraphs that were beneficial to appellant.

In all likelihood, the trial judge's decision to exclude the testimony of Dr. Flores was the product of his failure to understand the fundamental concept of mitigating evidence as shown by his ruling on defense counsel's motion to exclude the testimony of Dr. Frierson and Dr. Kruse from the penalty phase. R. 5122, ll. 17-20. During the argument on this motion, defense counsel explained his intent to present evidence regarding appellant's mental illness during the sentencing phase, and the judge noted that doing so would be "kind of odd" because "[t]he jury has already determined they didn't believe" appellant was schizophrenic. R. 5122, ll. 17-20. Despite defense counsel's explanation that the state argued appellant may be schizophrenic, yet still criminally responsible, the judge opined that the jury's "straight guilty verdict appears 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." R. 5122, l. 21 – 5123, l. 11. These statements demonstrate the judge's failure to comprehend the distinction between insanity as a defense and mental illness as used as a mitigating factor to impose a sentence less than death. Based upon the judge's fundamental misunderstanding, the judge was unable to deduce how Dr. Flores' testimony attacking the methodology employed by Dr. Kruse was relevant to the life-or-death decision the jury was required to make.

Similarly, the judge showed his misapprehension of relevant evidence for purposes of a capital sentencing proceeding when he expressed his opinion that evidence of appellant malingering was not "the focus of the whole trial" and "was [not] the entire reason the jury, after 15 days of testimony, found him guilty" as a basis for excluding the testimony of Dr. Flores during the sentencing phase. See R. 5641, ll. 11-17. In addition, the judge's statement that malingering was not "a big issue" in the case when discussing the admissibility of Dr. Flores' testimony demonstrated the judge's failure to understand the significance of an expert witness claiming a defendant in a capital trial is faking mental illness. See R. 5641, ll. 3-8.

Finally, by prohibiting defense counsel from "pitting witnesses" during the proffer of Dr. Flores, the judge exemplified his unfamiliarity with the evidence not only permitted, but required, during a capital sentencing proceeding.[14] See R. 5614, ll. 9-11; R. 5615, ll. 1-12. Dr. Flores' testimony was relevant as it constituted mitigating evidence. Not only did her testimony address three statutory mitigating circumstances, but it was evidence offered by the defendant to support a verdict other than death. Dr. Flores' testimony was necessary to refute the false impression that appellant was malingering left by Dr. Kruse.

By excluding Dr. Flores' testimony because she was not on the witness list, the judge abused his discretion and violated appellant's constitutional rights. Not only had Dr. Kruse surprised the defense by testifying differently from her report and from her discussion with defense counsel by opining that appellant was malingering, but Dr. Flores did not become known

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[14] Pitting witnesses involves asking a witness to attack another witness's credibility. See Burgess v. State, 329 S.C. 88, 91, 495 S.E.2d 445, 447 (1998); State v. Brown, 297 S.C. 27, 28-29, 374 S.E.2d 669, 670 (1988); State v. Sapps, 295 S.C. 484, 486, 369 S.E.2d 145, 145-146 (1988); State v. Hariott, 210 S.C. 290, 298, 42 S.E.2d 385, 388-389 (1947); State v. Daise, 421 S.C. 442, 458-459, 807 S.E.2d 710, 718 (Ct. App. 2017); State v. Benning, 338 S.C. 59, 63, 524 S.E.2d 852, 855 (Ct. App. 1999). This issue was a classic "battle of the expert," which has nothing to do with pitting witnesses.

to the defense until immediately prior to their attempt to call her as a witness.[15] Importantly, the defense did not seek out the assistance of Dr. Flores. Rather, Dr. Flores requested to assist the defense because she was so astounded by Dr. Kruse's improper methodology and incorrect conclusions regarding the psychology testing of appellant. The requirement that a jury be *voir dired* on knowledge of a witness must yield to a capital defendant's right to present any mitigating evidence. See Mercer, 381 S.C. at 160-161, 672 S.E.2d at 562. See State v. Nathari, 303 S.C. 188, 194, 399 S.E.2d 597, 601 (1990) (holding the testimony of the state's forensic toxicologist was properly admitted even where the witness was not on the witness list because the witness's name appeared on a witness list from the first trial and the state called her as an expert in response to the defendant's objection to the testimony of a lay witness on the same subject); cf. State v. Beckham, 334 S.C. 302, 312-313, 513 S.E.2d 606, 611 (1999) overruled on other grounds by State v. Wright, 391 S.C. 436, 443, 706 S.E.2d 324, 327 (2011) (finding no error in a trial judge's decision to allow a witness to testify where the state failed to disclose the name of the witness because disclosure was unnecessary under Rule 5(e), SCRCrimP, because the witness did not place the defendant at the scene of the crime).

Any attempt by the state to argue this error was harmless beyond a reasonable doubt must be rejected. Although defense counsel performed admirably in his cross-examination of Dr. Kruse about the deficiencies in her report, defense counsel was ill-equipped to address the nuances of the psychological tests confronting him. He noted that Dr. Kruse's report omitted

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[15] On cross-examination, Dr. Kruse admitted that in her report, she did not diagnose appellant as malingering. R. 4947, l. 19 – 4948, l. 16. She also admitted that she discussed her report with defense counsel prior to her testimony. R. 4947, ll. 22-24. Later, when defense counsel argued in favor of calling Dr. Flores as a witness, defense counsel stated, "And when I met with Dr. Kruse before trial, she was emphatic that she was saying that he was not malingering based on all of the data. However, when she testified, what she said was he's consistently across the board malingering." R. 5641, ll. 19-23.

certain paragraphs that were generated by the computer, but he was unable to expound upon why omission of those paragraphs was significant. In fact, defense counsel's cross-examination of Dr. Kruse in which he pointed out the portions of the computer-generated report that she omitted allowed Dr. Kruse to bolster her own credentials by informing the jurors that she could not rely upon a computer to conduct the analysis, but must do so herself – as a doctor. Defense counsel cross-examined Dr. Kruse on her scoring, but he was unable, due to lack of expertise, to show how Dr. Kruse had improperly scored the tests, which formed the basis for her opinion. The cross examination was a far cry from "destroy[ing] the professional and personal integrity" of Dr. Kruse as the solicitor admitted would occur if Dr. Flores were permitted to testify.

Just as defense counsel's cross-examination of Dr. Kruse did not reveal the significant shortcomings and failings with Dr. Kruse's testing, interpretation of the testing, and ultimate opinion on the matter, no other witness provided the jurors with the information that Dr. Flores would have if the judge had not excluded her testimony improperly. Other experts opined that appellant was not malingering, but none of those doctors had performed the "objective" and "scientific" testing to determine if appellant were malingering. None of those doctors were appointed by the court to conduct the evaluation, as Dr. Kruse was; thus, Dr. Kruse's opinion appeared less biased and more impartial because she was considered a witness for the court, instead of a witness paid tens of thousands of dollars by the defense.[16]

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16 On cross-examination, the state questioned Dr. Travis Snyder as to how much he was getting paid to review records and testify. R. 2506, ll. 17-18. Dr. Snyder responded that he had been paid $4270 so far. R. 2506, ll. 19-20. The state asked Dr. Jonathan Lipman what he charged for his involvement in the case, and Dr. Lipman explained he charged $275 per hour for time out of the office, $375 per hour for court or deposition, and expenses. R. 3444, ll. 3-8. Dr. Bhushan Agharkar charged a discounted rate of $400 per hour, and his bill prior to testifying was "around $25,000." R. 3771, ll. 12-20. In his closing argument, Solicitor Hubbard told the jurors he could not pronounce Dr. Agharkar's name and knew him "as the $25,000.00 dollar doctor from Atlanta." R. 490, ll. 24-25. He further rhetorically asked the jurors if Dr. Aghakar was "worth

Additionally, in light of Dr. Flores' testimony challenging the methodology employed and conclusion reached by Dr. Kruse, Dr. Flores' testimony also challenged the opinion of Dr. Frierson, who relied upon Dr. Kruse. The state relied heavily upon the opinions of these two doctors to defeat appellant's insanity defense. In fact, throughout the trial, the state improperly bolstered the testimony of Dr. Frierson and Dr. Kruse by emphasizing repeatedly that the two were not hired by the state or the defense, but were appointed by the court. See e.g., R. 3962, l. 22 – 3963, l. 8; R. 3964, ll. 4-7.

Further, during the closing argument of the guilt phase, the solicitor zeroed in on the testimony of Dr. Kruse to defeat appellant's insanity defense by arguing the defense had failed to test appellant for psychosis, despite having the burden to prove the defense. R. 4998, ll. 13-15. The state emphasized that Dr. Kruse was the *only* person who did so. R. 4998, ll. 13-15. Drawing contrasts with the defense evidence of schizophrenia that relied upon appellant's self-report, the solicitor repeated the words used by Dr. Kruse when she testified – her testing was "scientific" and "objective." R. 4998, ll. 18-19.

Suggesting that defense counsel and the defense expert, Dr. Dorney, did not believe appellant was mentally ill, the solicitor told the jurors that the reason why Dr. Dorney did not team up with someone like Dr. Kruse and the reason why the defense did not conduct testing on appellant for psychosis and malingering was because "[m]aybe they knew what they were going to get." R. 4998, ll. 15-22. He also used Dr. Kruse's report, which was not relied upon by Dr. Dorney, as a reason the jurors should disbelieve Dr. Dorney. He claimed Dr. Dorney's decision to not rely upon Dr. Kruse's "objective" and "scientific" testing was because she was not looking

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that $25 grand" and if the jurors got their "money's worth out of that." R. 4991, ll. 13-15. Dr. Erin Bigler had billed approximately $5000 at the time he testified. R. 3935, ll. 1-9. Dr. Julie Dorney charged $400 per hour. R. 4757, ll. 20-23.

for the truth, only a defense. R. 5004, ll. 16-22. Although the solicitor focused little of his closing argument during the sentencing phase on appellant's mental illness, he encouraged the jurors to reject mental illness as a mitigating circumstance because appellant, whom the solicitor claimed was faking mental illness as Dr. Kruse testified, manipulated his family to believe he was mentally ill. R. 5910, ll. 17-25; R. 5912, ll. 10-13. Interestingly, the solicitor echoed the trial judge when he treated evidence of appellant's mental health as having already been rejected by the jury, and therefore, not of any consequence for the penalty decision. R. 5912, l. 4 (the solicitor arguing the jury had "been down that road" already in reference to appellant's mental illness).

The solicitor's intense argument at trial in support of his motion to exclude supplies all necessary reasoning of why excluding the evidence constituted reversible error. The solicitor accurately predicted that Dr. Flores' testimony would "professionally and personally destroy" Dr. Kruse. The solicitor accurately predicted Dr. Flores' testimony would "attack the professional credentials" of Dr. Kruse. The solicitor accurately predicted that Dr. Flores' testimony would "pick apart Dr. Kruse." The solicitor accurately predicted that Dr. Flores' testimony would "build this record for appellate purposes" and likely "ensure Dr. Kruse never steps into a criminal courtroom again" for fear of being cross-examined on her improper methodology. Dr. Kruse left the jury with the false impression that appellant faked his mental illness. The solicitor seized upon Dr. Kruse's "scientific" and "objective" testing first to argue that the jury should reject appellant's insanity defense, and second to argue the jury should discount appellant's mitigation evidence in order to impose the death penalty. Presenting the testimony of Dr. Flores that destroyed the "scientific" and "objective" basis of Dr. Kruse's

belated opinion that appellant was malingering was critical to enabling appellant to overcome the false stain left by Dr. Kruse's flawed testimony.

6.

The court violated appellant's right to due process of law pursuant to the Fifth and Fourteenth Amendments to the United States Constitution and the mandate for heightened reliability in capital cases pursuant to the Eighth Amendment.

Introduction

The trial judge erred by excluding relevant mitigating evidence in the form of appellant's social history, forcing appellant to convey his social history to the jurors in a condensed and sanitized way through a third person when individuals with firsthand accounts were ready and willing to provide the compelling testimony, and repeatedly denigrating the defense presentation by instructing defense counsel to "keep moving" when the testimony was "too detailed" about the tragedies and traumas that befell appellant and his family. Additionally, the trial judge erred by excluding relevant mitigating evidence that a veteran law enforcement officer, who was present for the duration of appellant's capital trial, determined appellant posed no danger in the future, but was in danger from the public at large of being harmed for his crimes, and showed genuine remorse.

In light of the trial judge's erroneous rulings to exclude relevant mitigating evidence, the jury heard a condensed, sanitized, and third person account of appellant's social history. The judge pointedly refused to allow appellant's father and grandmother to testify regarding tragic and life-altering events that occurred in their lives prior to appellant's birth. In the judge's view, the testimony was irrelevant to the life-or-death decision before the jury because appellant was not alive at the time the events occurred. Later, when the judge reversed course and permitted some of the events that occurred prior to appellant's birth to be presented, he restricted the presentation to the social historian, instead of the people who actually lived through the events

and could provide the best narrative of what occurred and explain how those events affected their lives. Further, the judge constantly interrupted the social historian's testimony to scold defense counsel to "keep moving" when the judge surmised the testimony was "too detailed" or involved "too many examples" of the tragedies suffered by appellant and his family. The judge's erroneous ruling to exclude relevant mitigating evidence coupled with his constant rapprochements of defense counsel and the social historian violated appellant's right to due process of law.

Relevant Facts

In the guilt phase, the judge repeatedly ruled that appellant's social and family history prior to appellant's birth was not relevant; thus, he excluded any testimony regarding matters that occurred prior to appellant's birth. R. 4712, ll. 14-15. The judge explained that "[f]actually," evidence related to anything occurring prior to appellant's birth was irrelevant. R. 4712, ll. 14-18. The judge was, respectfully, particularly fond of this ruling because it was "easy" to apply. R. 4712, ll. 14-18.

Proffer of Roberta Thornsberry

During the penalty phase, defense counsel sought to present evidence of events occurring prior to appellant's birth, including during the lives of his paternal grandmother, Roberta Thornsberry, and his father, Tim Jones, Sr. R. 5452, ll. 12-18. The state objected. R. 5452, ll. 20-21. The judge noted that he had "consistently, in guilt/innocence side of the case directed the defense to only ask questions from [appellant]'s birth forward." R. 5453, ll. 4-8. He wanted to know why the defense "should be able to go back further than that" "in mitigation." R. 5453, ll. 9-11. Defense counsel proffered Roberta's testimony.

Roberta was born in 1951 in Kentucky to Bernadine Maloney. R. 5453, l. 21 – 5354, l. 1. When Roberta was only three years old, her mother left her and her siblings. R. 5454, ll. 2-6. Roberta was in an orphanage for several years thereafter. R. 5454, ll. 7-15. One Christmas, Roberta's father picked her and her siblings up from the orphanage. R. 5454, ll. 16-19. However, when he sought to return them, the orphanage was closed. R. 5454, ll. 20-22. He then left the children "on the Court House steps with a note saying he couldn't wait. [They] had to go back." R. 5454, ll. 22-24.

When Roberta was eight years old, Bernadine showed up at the orphanage with Ted Montaine, whom she had married, to take Roberta and her siblings home. R. 5455, ll. 6-15. The very next day, Montaine began sexually molesting Roberta and her sisters. R. 5455, ll. 16-19.

When Roberta was eleven years old, she discovered she was pregnant by Montaine. R. 5455, l. 25 – 5456, l. 2. Roberta gave birth to Tim Jones, Sr., when she was only twelve years old. R. 5456, ll. 3-7. Montaine then took Roberta and Tim Sr., from their home. R. 5456, ll. 8-11. Over the next few years, Roberta gave birth to two more children who were fathered by Montaine. R. 5456, ll. 20-22. Montaine moved Roberta and the children around the country as he tried to keep people away from them. R. 5457, ll. 3-8. He continued to sexually and physically abuse her. R. 5456, ll. 8-14. Montaine exploited Roberta and her body by forcing her into occupations that could benefit him financially. R. 5456, l. 23 – 5457, l. 2. Roberta "became like his little prisoner" until she was seventeen years old and able to escape. R. 5455, ll. 23-24.

Argument on admissibility

After the proffer, defense counsel explained that the guidelines established by the American Bar Association for representation of defendants charged with capital crimes and Supreme Court case law applying those guidelines obligated counsel "to conduct a thorough

investigation" of the defendant's life history," going back "at least, two generations." R. 5457, ll. 16-21; R. 5464, ll. 8-19. Such an investigation was necessary because "people are a consequence of where they come from. In large degree, that the patterns that exist in families and the events that occur within families can be extraordinarily impactful on the lives of other family members and can carry on ... in positive and negative ways." R. 5457, l. 21 – 5458, l. 2. Further, counsel explained that Roberta's life experiences were relevant to appellant because she was his grandmother and "default mother" after his biological mother left. R. 5458, ll. 2-6. The jury needed to know the "traumas and frailties of the people who [appellant] came from and how a child would have been affected by being raised by people like this." R. 5458, ll. 6-10.

Additionally, defense counsel explained, "[t]he definition of mitigation under the United States Supreme Court law is, anything the defense offers as a reason to give the defendant life or to not give him death and they can look to his family history." R. 5459, ll. 13-16. According to defense counsel, the jury could "bestow mercy" upon appellant in light of Roberta's life experiences. R. 5459, ll. 17-20. Roberta would admit that she experienced horrific trauma, which affected the other people in her life, including appellant. R. 5460, ll. 21-24. Defense counsel explained that "a person's family history, where they come from, what makes them up, not only genetically, but also the people that create the environment in which [they] grow is the essence of mitigation." R. 5461, ll. 4-8. Excluding the testimony regarding Roberta's life denied appellant of his rights to due process and a fair trial. Importantly, the exclusion also violated the Eighth Amendment's requirement of heightened reliability and individualized sentencing in capital cases. R. 5464, l. 19 – 5465, l. 11. Finally, defense counsel noted this Court's admonition in State v. Mercer, 381 S.C. 149, 672 S.E.2d 556 (2009), that "Rule 403 should be cautiously invoked against a capital defendant in the penalty phase" "[e]specially in light of the

due process implications at stake when [a] capital defendant seeks to introduce mitigation evidence." R. 5465, l. 22 – 5466, l. 5.

The state argued that what happened to Roberta was not "the issue" because she was "not the defendant in this case." R. 5461, ll. 11-24. In the state's view, "what happened to her before [appellant's birth was] not relevant" and was being used to create "sympathy for the witness and injecting another arbitrary factor" into the case. R. 5462, ll. 4-8. According to the state, Roberta's life story had "nothing to do with the penalty and the decision the jury ha[d] to reach as far as the defendant." R. 5462, ll. 6-8.

The judge did not "believe that her childhood and her step-father's behavior" was "relevant to the jury's side and the issue that's before them." R. 5463, ll. 3-7. In his view, it "create[d] a whole other issue, then there's another issue behind it." R. 5463, ll. 7-8. He elaborated that Roberta's life story "create[d] a whole other layer of facts that aren't relevant" to appellant. R. 5463, ll. 12-13. Not only did the judge find the evidence was "not relevant," he determined it "confuse[d] things." R. 5463, ll. 17-18; R. 5465, ll. 16-18. The judge indicated he would allow the defense to present evidence that Roberta was from a "broken home" and had experienced a "traumatic history." R. 5465, ll. 18-20. In the judge's view, "[t]he details of that [were] not relevant." R. 5465, ll. 20-21.

Roberta Thornsberry's testimony

In accordance with the judge's ruling, directly from Roberta, the jury heard only that Roberta had a "very difficult" life prior to appellant's birth, and that she suffered trauma and abuse on many occasions. R. 5466, l. 20 – 5467, l. 2. While discussing events that occurred after appellant's birth, Roberta explained that appellant called her "mom" after his birth mother left because Roberta took on that role. R. 5469, ll. 10-14.

Proffer of Tim Jones, Sr.

The defense also proffered the testimony of Tim Jones, Sr., during the penalty phase due to the judge's ruling on the admissibility of evidence about matters occurring prior to appellant's birth. Tim Sr., explained that his mother was Roberta, who was twelve years old when he was born. R. 5493, ll. 10-23. His biological father, Ted Montaine, was also his step-grandfather. R. 5493, ll. 12-19. Tim Sr., had "quite a few memories" of Montaine beating Roberta. R. 5494, ll. 1-5. The most vivid memory was when Montaine "shoved her right through the wall" for forgetting her keys. R. 5494, ll. 3-5. He recalled Montaine beat Roberta with a hammer, on which he placed "a little rag" so that "it wouldn't bust her head open." R. 5494, ll. 5-9. Montaine would beat Roberta to the point of unconsciousness, then throw water on her face "to bring her back" so that he could continue beating her. R. 5494, ll. 6-7. Tim Sr., never felt safe and secure in his home, and he was terrified for his mother. R. 5495, l. 23 – 5495, l. 3.

Roberta, Montaine, and Tim Sr., moved constantly because Montaine was "running from the law." R. 5494, ll. 17-22. When Tim Sr., was approximately five years old, Roberta and he left Montaine. R. 5495, ll. 4-10. However, Montaine continued to terrorize them as they were always running from him. R. 5495, ll. 11-18. Roberta then married Larry Thornsberry. R. 5495, ll. 18-24. Roberta also had "violent episodes" while married to Larry. R. 5496, ll. 1-17. Roberta and Larry divorced, and Roberta married Phillip Caliendo. R. 5496, ll. 20-22. During her marriage to Phillip, her violent episodes got worse. R. 5496, ll. 23-25. For example, one day Tim Sr., arrived home from school to find that Roberta had "busted the whole house up" and Phillip was in the hospital due to a heart attack. R. 5497, ll. 3-9. Eventually, Roberta and Phillip divorced, and Roberta re-married Larry. R. 5497, ll. 10-12.

However, Roberta continued to suffer from her tormented past; she began drinking. R. 5499, ll. 10-22. At times, she would become violent and threaten to harm her loved ones, including Tim Sr. R. 5499, l. 12 – 5500, l. 10. Roberta also tried to harm herself. Tim Sr., recalled that Roberta took some pills once to commit suicide. R. 5501, l. 25 – 5502, l. 17. Tim Sr., saved her life. R. 5501, l. 25 – 5502, l. 17. During one of Roberta's violent episodes, the police arrived at the family's home. R. 5500, ll. 11-22. Tim Sr., was so distraught over his mother's conduct that he begged the police to arrest her, but they refused. R. 5500, ll. 13-22.

In 1979, Tim Sr., who was around thirteen years old and living near O'Hare Airport, witnessed a terrible plane crash. R. 5497, l. 16 – 5498, l. 15. As he and a friend were in a field, they felt an explosion. R. 5498, ll. 1-3. He then saw "body parts everywhere." R. 5498, ll. 4-15. It was around this age that Tim Sr., entered the drug trade with his relatives. R. 5498, ll. 16-25. During the proffer, Tim Sr., also shared that he had a sister named Elaine who died from cancer but struggled with substance abuse while alive. R. 5502, l. 24 – 5503, l. 9. Finally, he explained that numerous people in appellant's family died as a result of suicide, including two paternal uncles, a paternal cousin, a maternal uncle, and two maternal cousins. R. 5503, ll. 15-20.

Argument on admissibility

At the conclusion of the proffer, the defense requested to elicit this testimony from Tim Sr., in front of the jury. R. 5505, ll. 8-10. The judge responded, "Whether I'm right or wrong, I'm sticking with my ruling" in reference to his earlier ruling that evidence of events or experiences prior to appellant's birth were inadmissible as (1) irrelevant and (2) if relevant, then its probative value was outweighed by danger of confusion of the issues. R. 5505, ll. 11-12. In accordance with defense counsel's request, the judge noted the objection. R. 5505, ll. 13-16.

Tim Jones, Sr.'s testimony

The jury then heard a version of the life of Tim Sr., which began when he met appellant's mother at the age of sixteen and resulted in appellant's birth eighteen months later. R. 5507, ll. 8-15; R. 5507, ll. 21-23. Tim Sr. described his brief marriage to Cynthia Turner as she began her decline into schizophrenia. R. 5508, l. 14 – 5509, l. 2. According to Tim Sr., appellant loved school and excelled academically. R. 5510, ll. 19-22. After the birth of appellant's children, Tim Sr., showered them with attention and affection. R. 5511, l. 18 – 5518, l. 4. He even had a pool installed at his house so that the grandchildren could learn to swim. R. 5512, ll. 20-24. He was devastated by their deaths. R. 5518, ll. 7-14.

Argument on admissibility of appellant's social history

Considering the judge's restrictions on the admissibility of mitigation evidence, defense counsel sought to proffer the testimony of Deborah Grey, the social historian. R. 5488, ll. 17-23. The state objected *to a proffer*, requesting that her report be used as the proffer. R. 5488, l. 24 – 5489, l. 12. Defense counsel countered that a proffer was necessary because Grey would testify "from the perspective of social work and child development" "to illuminate patterns, events in families" in order to understand the subject of the social history. R. 5489, l. 21 – 5490, l. 8. Counsel insisted that the only way for the judge to rule on the admissibility of the testimony would be through a proffer, not the report generated by Grey. R. 5490, ll. 8-21.

Appearing to grow frustrated, the judge insisted the defense was "proffering proffers," and that if it were necessary for him to hear directly from Grey, then he would. R. 5491, ll. 20 – 5492, l. 6. Defense counsel offered that they were "not trying to frustrate" the judge. The judge acknowledged that while they were not intending to do so, they were. R. 5492, ll. 7-9. He then

remarked, "And I've got a smile on my face." R. 5492, ll. 9-10. Later, he insisted what he had said "was a joke" and he respected the job defense counsel was doing. R. 5492, ll. 15-16.

After the proffer of Grey, the solicitor objected to Grey's testimony as "typical hearsay." R. 5594, ll. 13-23. The solicitor posed no objection to "[p]atterns of abuse, whether it's sexual, alcohol, psychological or whatever," but he objected to any reference by Grey of how she obtained the information and to "all the minute details." R. 5594, ll. 13-23; see also R. 5649, ll. 7-13.

The judge instructed the defense to "come up with a way for this lady to say, this lady's summary of Ms. Thornsberry's mental history, Ms. Jones – Cynthia Jones' history, there's a lot of information in there – without going through every single minute detail." R. 5593, l. 24 – 5594, l. 4. The judge informed counsel he was "concerned about ... the details." R. 5594, ll. 10-12. The judge cautioned the defense that the jury would be "more prone to ... tune you out" if too much information was provided. R. 5595, ll. 10. Thereafter, the judge indicated he was "kind of inclined" to allow the jury to hear that Roberta had Tim Sr., at the age of twelve. R. 5596, ll. 3-6. He also indicated he would allow the defense "to have some of that" in reference to the abusive childhood Roberta experienced, but he warned, "too much is too much" and the defense would need to "pare it down." R. 5596, ll. 6-11.

Later, the judge explained the defense could "present some limited facts from the social historian." R. 5647, ll. 21-24. However, he indicated he did not "like all the minute details." R. 5648, ll. 5-8. While Grey could testify that Roberta birthed Tim Sr., when she was only twelve years old, the judge excluded details such as "she went to an orphanage at age three." R. 5648, ll. 5-11. He determined it "sound[ed] more proper and easier to present to the jury" if the defense kept it to "she grew up in an orphanage, she came from a broken home." R. 5648, ll. 5-

11. He would allow that "there was emotional, physical abuse and sexual abuse" in Roberta's past, but excluded "the details of that." R. 5648, ll. 15-17. He determined broad categories were "pliable for mitigation purposes as opposed to she was tortured and put in a bathtub by Montaine and that he would keep her in there in cold water." R. 5648, ll. 17-21. The judge offered another example – the defense could inform the jury of several suicides on both sides of appellant's family but could not "get into the details of each suicide." R. 5649, ll. 19-22. The judge wanted the defense to "present some mitigating facts without becoming the Dr. Phil show." R. 5649, ll. 2-3.

Defense counsel objected to the judge's request that the jury learn of appellant's social history in "a condensed and sanitized way." R. 5651, ll. 2-17. Counsel explained that his "preemptively condensing it or sanitizing it would be contrary to [his] obligations to [appellant] in being a zealous advocate." R. 5651, ll. 13-17. Defense counsel wanted "to provide an unadulterated story to the jury." R. 5651, ll. 23-24. Counsel was obligated to provide as much information to the jury for them to decide if appellant was redeemable or if he was deserving of their mercy. R. 5652, ll. 7-9.

Nevertheless, the judge stuck to his ruling that the defense needed to "use a broader brush rather than a detailed brush" because "too much details is too much details." R. 5648, ll. 13-14; R. 5648, l. 21. The judge wanted the defense to "[p]ut up some rails on the alley where you don't go in the gutter." R. 5649, ll. 23-24. The judge informed counsel that if the testimony got "too detailed," he would say, "let's move on." R. 5652, ll. 18-19. According to the judge, the jury could watch Dr. Phil later and "perhaps, this would be a good episode." R. 5652, l. 25 – 5653, l. 2. The judge said that while the trial was "being live streamed," he cautioned they were "not working as an audition for Dr. Phil." R. 5653, ll. 4-6. In light of the judge's ruling that he

would instruct defense counsel to "move on" when the judge determined the testimony was revealing too many details, defense counsel explained that he objected to each instance, and the judge agreed to accept the preliminary objection as objections to each time he instructed the defense to "move on." R. 5656, ll. 3-11. Specifically, counsel asked, "So every time you tell me to move on, you accept that as an objection and response from me?" R. 5656, ll. 7-8. The judge responded affirmatively. R. 5656, l. 9.

Thereafter, the judge informed the jurors that "[t]he next witness did a lot of work and as we go, I may tell them to move on." R. 5657, ll. 9-10. Noting that the jury had been waiting for forty-five minutes, the judge explained that part of what the parties did during that time was address the next witness's testimony. R. 5657, ll. 3-13. He explained that he "heard more, but there's a lot," and that the jury would understand more of what he was saying as the witness testified. R. 5657, ll. 3-13.

Deborah Grey's testimony

Grey then told the jurors some of what the judge forbade Roberta and Tim Sr., from telling them. However, it was delivered in a clinical and sanitized way. Grey explained that Roberta was the youngest of five children. R. 5671, ll. 10-12. Roberta's mother "was in a series of difficult relationships and relinquished those five children." R. 5671, ll. 12-13. When Roberta was about three years old, she and two of her siblings went to an orphanage. R. 5671, ll. 17. Thereafter, Roberta always felt unwanted and abandoned. R. 5671, ll. 17-20. Grey also relayed to the jurors that Roberta's father picked her up from the orphanage one Christmas, but when he tried to return her, the orphanage was closed. R. 5671, l. 20 – 5672, l. 2. He left Roberta and her sister on the steps with a note pinned to their chests. R. 5672, ll. 2-5.

Grey told the jurors that Roberta's mother married Ted Montaine. R. 5672, ll. 6-7. As Grey began describing Roberta's recollections of Montaine's physical abuse of her mother and of Roberta, the judge interrupted, explaining these were the details he did not want revealed and for counsel to "[k]eep moving."[17] R. 5672, ll. 8-18. The jury did get to hear that "Ted Montaine used to throw boiling water on her mother, that he threw her mother down the stairs, [and] that he beat Roberta too." R. 5672, ll. 12-15. After Roberta returned from the orphanage to her mother's home, Montaine began molesting her at the tender age of eight. R. 5672, l. 20 – 5673, l. 6. Montaine impregnated Roberta when she was eleven. R. 5673, ll. 7-13. She gave birth to Tim Sr., when she was twelve. R. 5673, ll. 18-20.

Additionally, Montaine took Roberta from her home. R. 5673, ll. 23-25. Reinforcing her fears of abandonment, no one, including Roberta's mother, looked for her or tried to rescue her from Montaine. R. 5674, ll. 6-11. Roberta gave birth to a second child when she was fourteen years old. R. 5673, l. 25. This second child was followed by a third child two years later. R. 5674, l. 1. Montaine then falsified records so he could marry the underage Roberta. R. 5674, ll. 1-5.

As Grey informed the jurors how Tim Sr., saw Montaine "beating and choking his mother" frequently, including to the point of unconsciousness, the judge interrupted and told

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17 In addition to the proffer of Roberta on this point, Deborah Grey's proffer included that Roberta observed Montaine "beat and torture her mother over an extended period of time." R. 5560, ll. 2-3. Further, the jury never heard how Montaine would beat Roberta with a hammer, including tying her to a chair and beating her until she passed out. R. 5561, ll. 15-17. Montaine would throw cold water on Roberta to revive her so he could beat her some more. R. 5561, ll. 17-18. Montaine would use this technique when choking Roberta as well – he would choke her until she passed out, revive her, and choke her again. R. 5561, ll. 19-20. To assist with the aftermath of his beatings, Montaine would force Roberta to strip naked and get into the bathtub. R. 5561, ll. 20-23. This allowed him to "hose her off" after a fierce beating and prevent blood from being left all over the house. R. 5561, ll. 23-24.

counsel to "[k]eep moving."[18] R. 5674, ll. 15-20. Grey was allowed to tell the jurors that Montaine forced a teenaged Roberta into prostitution until she finally escaped from him when she was seventeen. R. 5674, l. 23 – 5675, l. 3. Roberta "was rescued by her knight in shining armor," Larry Thornsberry. R. 5675, ll. 11-16. However, she still feared Montaine so she, Larry, and her three children crisscrossed the country for years to evade Montaine. R. 5675, ll. 11-22.

Grey conveyed to the jury how Roberta began to abuse alcohol, which would trigger violent rages. R. 5677, ll. 2-8. Roberta would destroy their home and threaten to kill her family members while armed with a gun. R. 5677, ll. 13-22. Despite law enforcement involvement, Roberta was never arrested. R. 5677, ll. 22-25.

After Roberta and Larry divorced, Roberta married Phillip Caliendo. R. 5678, ll. 20-24. Nevertheless, Roberta's violent rages continued. R. 5679, ll. 2-12. As Grey was describing an incident during which "all hell broke loose" during one of Roberta's rampages, the solicitor objected, and the judge ordered the defense to "keep moving."[19] R. 5679, ll. 11-16. Grey then quickly described how Roberta would destroy the family home during her rampages. R. 5679, ll. 17-22. Once, Tim Sr., arrived home from school to learn that Phillip was in the hospital having suffered a heart attack. R. 5679, ll. 23-25.

After her short and volatile marriage to Phillip, Roberta re-married Larry. R. 5680, ll. 1-5. Unfortunately, the violence and substance abuse that were prevalent throughout their first

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[18] During her proffer, Grey echoed Tim Sr.'s proffer that Montaine often beat Roberta with a hammer and often beat Roberta to the point of unconsciousness so that he could revive her and beat her again. R. 5561, ll. 12-19.

[19] Grey's proffer revealed that Roberta's violence toward Phillip Caliendo included an incident in which her violent rampage caused him to suffer a heart attack. R. 5566, ll. 11-17.

marriage continued into their second marriage. R. 5680, ll. 19-22. This environment was "normal" for Tim Sr. R. 5680, ll. 23-25.

Grey described how the school records showed that Tim Sr., was "having some difficulties" in junior high, which led to a school social worker's intervention. R. 5681, ll. 19-23. Tim Sr., went on to miss an extraordinary number of days in the ninth grade. R. 5682, ll. 1-2. Despite the absences, Tim Sr., entered the tenth grade where he missed forty days during the first semester. R. 5682, ll. 2-4. Thereafter, he simply stopped attending school. R. 5682, ll. 4-5. Counsel asked if "based on his life experiences at that point, was that surprising to [Grey] that he was starting ...." R. 5682, ll. 6-7. The judge interrupted, "Keep moving."[20] R. 5682, l. 8.

Later, Grey explained how appellant's mother, Cynthia, behaved strangely, and how the strange behaviors increased when she was pregnant with appellant. R. 5685, ll. 4-6. As Grey described how Roberta found Cynthia "standing and staring at herself in front of the mirror" unable "to tear herself away," the judge abruptly told counsel to "keep moving."[21] R. 5685, ll. 6-11.

After appellant's birth, "[t]here were times when Cynthia would take off and she'd be gone for days and they wouldn't know where she was." R. 5689, ll. 16-22. Cynthia told Grey that "during this period of time, she was prostituting and that her husband was aware of that." R. 5690, ll. 1-4. As Grey explained that Cynthia was also dancing at a strip club, the solicitor interjected, but failed to make an actual objection; yet, the judge instructed the defense to "[k]eep

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[20] It is difficult to determine what testimony the defense sought to elicit here based upon the proffer and context.

[21] During the proffer, Grey explained that Cynthia was "charged with looking after" Tim Sr.'s younger brother, but the brother "was outside with no clothes on and Cynthia was nowhere to be found." R. 5578, ll. 14-16.

moving" because the testimony was "getting too detailed." R. 5690, ll. 6-9. Shortly thereafter, Grey described how Roberta went to the bathroom one day because a pregnant Cynthia called out to her. As Grey began to provide more information, the judge, sua sponte, exclaimed, "That's too much detail." R. 5690, ll. 23-25. Grey quickly narrated that Cynthia "was taken to the hospital and she lost the baby." R. 5691, l. 1. When asked what the family lore revealed about this event, Grey answered, "They believed that she had self-aborted." R. 5691, ll. 2-5. Although the solicitor offered no basis, he did object. R. 5691, l. 6. The judge admonished defense counsel: "I had wanted to kind of minimize that. Keep moving. Lost the baby. Please keep moving."[22] R. 5691, ll. 7-9.

During a break in Grey's testimony, defense counsel objected to the judge's interruptions and rulings. Counsel explained "the presentation of social history" was "being guided by Solicitor Hubbard's objections and that what he is okay with is allowed to come in and when something he does like or that he thinks is impactful ... there's an objection and the Court tells [defense counsel] to move along." R. 5694, l. 17 – 5695, l. 2. Due to the procedure adopted by the judge and his abdication of his discretion to the solicitor, defense counsel was a mere "puppet" presenting only what the state would allow the jury to hear. R. 5695, ll. 2-6. To this, the judge responded that he did not "think [it] was necessary" for Grey to give "two or three" examples "when one will do." R. 5695, ll. 26-29. He stated that such instances were when counsel was "getting detailed." R. 5695, l. 19. The judge elaborated: "I didn't want the testimony that Tim and Roberta thought it was self-aborted. I don't think that was necessary.

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22 In addition to Roberta's proffer concerning this matter, Grey's proffer revealed that when Roberta arrived in the bathroom, Cynthia was in the tub, laughing hysterically. R. 5589, ll. 12-21. The room was covered in blood. R. 5589, l. 21. The family believed Cynthia "actually murdered this child." R. 5590, ll. 1-3. This was "part of family lore" and "one more of those bizarre behaviors" described by family when talking about Cynthia. R. 5590, ll. 3-6.

She lost the baby in the hospital. I mean, I just didn't find that relevant to the facts here because Tim wasn't apprized of any of that." R. 5695, ll. 29-34. Bluntly stated, the judge thought the evidence of self-mutilation was "getting a little too graphic for a social history." R. 5697, ll. 2-6.

The judge determined the self-abortion had no impact on appellant. R. 5696, l. 23. In response, counsel noted that no one would want an infant in an environment where self-abortion occurred. R. 5697, ll. 7-14. Even if the person would not have a conscious memory of the event, no one would want to be in such an environment because "horrific events can impact a person." R. 5697, ll. 20-23. The judge remarked that defense counsel was "trying to teach a college class." R. 5698, ll. 5-6. The judge continued by explaining that Grey could explain to the jury that traumatic and violent events affect a child's development, but he would not allow Grey "to give every single detail of the violence he was exposed to and how that changed his development." R. 5698, ll. 10-18. Further, the judge clarified that he was "trying to guide the testimony, streamline it," not based on any objections of the state. R. 5699, ll. 4-9. Thereafter, Grey's testimony resumed.

Based upon the prior colloquy, defense counsel questioned Grey about the impacts of violence upon a child too young to remember the violence. R. 5700, ll. 1-9. Grey began explaining how babies react to stress and provided an analogy. R. 5700, l. 10 – 5701, l. 17. The judge interrupted, despite having approved such a question and answer, stating the defense was "getting in another example" that was "[t]otal[ly] different than [the] question." R. 5701, ll. 18-21. Again, based upon the judge's prior approval of questions about the impact of violence on children, Grey discussed brain development of young children. R. 5702, ll. 1-8. Specifically, Grey explained how babies who experience trauma over time "get sort of frozen in this fight or flight place." R. 5701, l. 25 – 5702, l. 1. Relying upon Dr. Erin Bigler's research, Grey

explained that "between the time of birth and three years old," a child's brain develops from twenty-five percent of brain volume to ninety percent brain volume. R. 5702, ll. 5-8. The solicitor objected because Grey was quoting another expert who had testified. R. 5702, ll. 9-12. The judge agreed Grey could not testify to the subject and instructed counsel to "[a]sk [his] next question." R. 5702, ll. 13-16.

When Grey discussed appellant's involvement in the church and what she had learned from appellant's pastor that was significant to appellant's social history, the state objected on the basis of hearsay and that the pastor had testified. R. 5742, ll. 16-17. The judge agreed and ordered counsel to "rephrase [the] question so we can continue on." R. 5742, ll. 18-20. He ordered Grey to "get to the point [of] what she thinks is special about something." R. 5742, ll. 24-25. Thereafter, Grey discussed how appellant "took the Bible absolutely literally and he took it as a guidebook for how he should be living his life." R. 5743, ll. 11-14.

After Grey testified, defense counsel noted that "a great deal of information" that was "elicited or attempted to [be] elicit[ed] through Ms. Grey, the social historian," was information the defense "intended to elicit through lay witnesses, including Ms. Thornsberry and Timothy Jones, Sr." R. 5814, l. 23 – 5815, l. 3. Counsel admitted that "Grey was able to get in some of the information that Tim Sr., and Roberta were not able to get into, but still some of that very personal information was restricted by order of the court subsequent to objections by the state." R. 5815, ll. 3-7. Defense counsel renewed the objection to any limitation on social history as a limitation on the presentation of mitigation. R. 5815, ll. 7-9. Mitigation includes anything the defense offers to support a sentence of less than death. R. 5815, ll. 10-13. When defense counsel offered case citations in support of his objection, the judge interrupted, "All right, that's

an appellate argument now. You made a case cite. I don't need to hear what the case said." R. 5815, ll. 13-22.

Counsel argued the evidence was not presented in a way that would allow the jury to give effect to it. R. 5815, l. 24 – 5816, l. 1. The judge said that he gave the defense "a lot of leeway," and if he had given the leeway the defense wanted, the trial would go through the next month. R. 5816, ll. 5-6. Defense counsel explained the reason for the length of Grey's testimony was because the judge had excluded the testimony from the lay witnesses, which would have been a more effective way to present it. R. 5816, ll. 8-16. Simply put, defense counsel argued that the judge's limitations on the presentation of appellant's social history violated his right to present mitigation in the most effective way possible, including through the first-person narrative of lay witnesses. R. 5814, l. 23 – 5816, l. 16.

Further, counsel argued that the judge's repeated instructions to "move on" likely left the jury with the impression that defense counsel acted improperly, incompetently, or distrustfully. R. 5816, ll. 16-25; R. 5817, ll. 10-15. Specifically, defense counsel explained that while he attempted to present the information to the jury in the most effective way possible given the judge's unreasonable limitations, there was a significant risk that the jury interpreted the judge's repeated admonitions to defense counsel to mean counsel did "something wrong" or was incompetent. R. 5816, ll. 13-25. Finally, defense counsel explained the even greater danger that the jury would find him "not trustworthy" based upon the trial judge's constant interruptions on the presentation of evidence. R. 5817, ll. 10-15. The judge disagreed, claiming "[i]t was explained and demonstrated there's a huge family history and we couldn't tell every minute detail of it." R. 5817, ll. 5-9.

The solicitor chimed in that the trial judge was "in a unique position, unlike the Appellate Court, where [he could] actually watch the tenure of what [was] going on in the courtroom, including the jurors." R. 5817, ll. 20-23. The solicitor suggested that "sometimes the longer a witness goes on, the more it actually undercuts the purpose." R. 5817, ll. 23-25. The solicitor believed the judge had "to gauge how much is too much for this jury as well." R. 5818, ll. 1-2. The judge was required to "manag[e] the court time" in the solicitor's view. R. 5818, ll. 2-4. Most illuminating, the solicitor claimed the jury did not "want anymore," which was made "clear." R. 5818, ll. 4-6. To this, the judge added "the jury made a noticeable reaction when that second genogram was put up and Dr. Grey was going to read all the details of it." R. 5818, ll. 7-9. The judge claimed the jury's "reaction [was] that they had enough and they wanted to conclude." R. 5818, ll. 11-12.

Proffer of Barry Sowards

Barry Sowards was a member of the law enforcement team that transported appellant from Mississippi to South Carolina. R. 5345, ll. 22-24. During the transport, the team stopped for food. R. 5345, l. 22 – 5346, l. 1. While Sowards remained in the police car with appellant, he had an automatic weapon on his lap. R. 5346, ll. 7-11. Appellant informed Sowards that he did not need automatic weapons for him and that he was not going to hurt them. R. 5346, ll. 11-14. Sowards responded that the weapons were not for appellant; rather, the weapons were "for everyone trying to kill [appellant]." R, 5346, ll. 14-16.

Argument on admissibility

The state argued to exclude Sowards' testimony, explaining that what the public thought of appellant was not relevant. R. 5339, ll. 16-20; R. 5339, l. 24 – 5340, l. 3. Defense counsel argued Sowards' testimony that he needed the weapon to protect appellant from others

concerned appellant's character. R. 5338, ll. 16-21. Further, defense counsel argued "that the Supreme Court has consistently said that anything can be mitigation" and the proffered testimony was mitigation. R. 5339, ll. 21-25.

Initially, the judge indicated he would allow Sowards to testify that (1) appellant informed him that he did not need the weapon because appellant would not harm him, and (2) Sowards responded he had the weapon to protect appellant from others. R. 5342, ll. 16-21. However, when the judge returned from a break, he changed his mind. R. 5343, ll. 21-22. The solicitor argued, at this point, that Sowards' response to appellant would "inject[] an arbitrary factor" into the case. R. 5343, ll. 14-20. Further, the solicitor argued that by eliciting the testimony, defense counsel had made "a tactical decision ... to interject that into this case." R. 5343, ll. 23-25. The judge questioned why counsel wanted the evidence, noting, "It's almost like an intentional PCR." R. 5344, ll. 1-2. Defense counsel responded that the testimony went to character and mitigation. R. 5344, ll. 3-4. Further, counsel argued the evidence supported a sentence less than death because appellant would "have to spend the rest of his life in prison in protective custody" due to the nature of his offense. R. 5347, ll. 2-7. Nevertheless, the judge determined the proffered testimony was inadmissible. R. 5346, ll. 18-19. In the judge's view, Sowards' response was "his personal opinion and not relevant" to appellant's character. R. 5347, ll. 11-16.

Barry Sowards' testimony

Barry Sowards was a career law enforcement officer. R. 5354, l. 22 – 5355, l. 12. As the fugitive task force sergeant for Lexington County, he transported appellant where appellant needed to go, and he stood guard during appellant's trial. R. 5356, ll. 4-9; R. 5357, ll. 1-6; R. 5358, ll. 12-24. Sowards personally transported appellant from Mississippi following his arrest.

R. 5357, ll. 7-13. Basically, he had been involved in appellant's life for almost five years. R. 5356, ll. 6-9. During the transport, Sowards "had a H&K UMP automatic weapon on [his] lap." R. 5358, ll. 8-9. Appellant told Sowards he did not need the weapon for him and that he was not going to hurt him. R. 5358, ll. 9-11.

At times during the trial, Sowards observed appellant crying. R. 5365, ll. 16-17. When defense counsel asked if Sowards believed those were "crocodile tears," the solicitor objected on the basis of speculation. R. 5365, ll. 18-19. The judge sustained the objection. R. 5365, l. 20. Defense counsel next asked whether Sowards believed appellant's remorse was real. R. 5365, ll. 21-22. Again, the state objected on the basis of speculation. R. 5365, l. 23. And again, the judge sustained the objection. R. 5365, l. 24.

After Sowards' testimony, defense counsel made clear that the proposed testimony regarding appellant's remorse was being offered in mitigation of the death penalty. R. 5367, l. 19 – 5368, l. 2. The judge indicated that he sustained the state's objection to the testimony as speculation. R. 5368, ll. 5-7.

Discussion

Generally, the sentencing phase of a capital trial is the most critical. Weik v. State, 409 S.C. 214, 234, 761 S.E.2d 757, 767 (2014) (quoting Romano v. Gibson, 239 F.3d 1156, 1180 (10th Cir. 2001)). During the sentencing phase, the jury learns information that was not admissible during the guilt phase. State v. Kornahrens, 290 S.C. 281, 289, 350 S.E.2d 180, 185 (1986). More precisely, the sentencing phase includes evidence in extenuation, mitigation, and aggravation. Id.

According to well-established Supreme Court precedent, the jury 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); see also Skipper v. South Carolina, 476 U.S. 1, 4 (1986); Eddings v. Oklahoma, 455 U.S. 104, 112 (1982); Woodson v. North Carolina, 428 U.S. 280, 304 (1976). Therefore, the "statutorily listed mitigating circumstances are not exclusive." State v. Linder, 276 S.C. 304, 311, 278 S.E.2d 335, 339 (1981).

"When the choice is between life and death, the Eighth Amendment bars any sentencing procedure which creates a risk of death being imposed even though there may be factors that call for a less severe penalty." State v. Stewart, 288 S.C. 232, 234, 341 S.E.2d 789, 790 (1986). As this Court explained, "Lockett ... require[d] submission to the jury of *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) (emphasis in original); see also State v. Hughes, 336 S.C. 585, 592, 521 S.E.2d 500, 504 (1999) (explaining that "[t]he sentencing jury is charged with considering all possible relevant information about the individual defendant whose fate it must determine"). "The state cannot preclude the jury from considering any relevant mitigating evidence the defendant proffers in support of sentence less than death." State v. Northcutt, 372 S.C. 207, 221, 641 S.E.2d 873, 880 (2007) (internal quotation omitted).

"[S]entencing juries must be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual, notwithstanding the severity of his crime or his potential to commit similar offenses in the future." Abdul-Kabir v. Quarterman, 550 U.S. 233, 247 (2007). The Supreme Court's "line of cases in this area has long recognized that before a jury can undertake the grave task of imposing a death sentence, it must be allowed to consider a defendant's moral culpability

and decide whether death is an appropriate punishment for that individual in light of his personal history and characteristics and the circumstances of the offense." Id. at 263-264.

"The ABA Guidelines provide that investigations into mitigating evidence 'should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.'" Wiggins v. Smith, 539 U.S. 510, 524 (2003) (citing ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C)(1989)). As explained by the Court, the Guidelines provided that counsel should consider presenting evidence of a defendant's medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences. Id. See also Rompilla v. Beard, 545 U.S. 374 (2005) (addressing trial counsel's duty to investigate a capital defendant's background to develop mitigation evidence even when the defendant is not helpful and actively obstructs the investigation); Council v. State, 380 S.C. 159, 172, 670 S.E.2d 356, 363 (2008) (citing the ABA Guidelines when discussing counsel's duty to investigate and present mitigating evidence).

"A mitigating counter-narrative that incorporates a capital defendant's social history and immediate life circumstances is now recognized as the centerpiece of an effective penalty phase trial." Craig Haney, Evolving Standards of Decency: Advancing the Nature and Logic of Capital Mitigation, 36 Hofstra L. Rev. 835, 844 (Spring 2008). The Supreme Court mandated "that defense attorneys uncover, analyze, and present the defendant's mitigating social history." Id. Examining a defendant's medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences are the necessary starting points. Id. at 876. The scope must broaden to

include intergenerational sources which is important as "it allows attorneys and experts to better understand the true nature and dynamics of the extended family into which the defendant was born." Id.

"The jury is entitled to hear [mitigating] evidence so that it may 'give a "reasoned moral response to the defendant's background, character, and crime"' and "prevent it from reacting out of an 'unguided emotional response.'" State v. Dickerson, 395 S.C. 101, 122, 716 S.E.2d 895, 906 (2011) (quoting Penry v. Lynaugh, 492 U.S. 302, 328 (1989)). It is a long held societal belief 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." California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring). Understanding the defendant's disadvantaged background and emotional, mental, or psychological problems is necessary to the "moral inquiry into the culpability of the defendant." Id.

"Evidence is relevant if it tends to establish or to make more or less probable some matter in issue upon which it directly or indirectly bears." State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986); see also Rule 401, SCRE. Further, "[e]vidence which assists a jury at arriving at the truth of an issue is relevant and admissible unless otherwise incompetent." Schmidt, 288 S.C. at 303, 342 S.E.2d at 403 (citing Toole v. Salter, 249 S.C. 354, 154 S.E.2d 434 (1967)); see also Rule 402, SCRE. "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 trial courts, vested with considerable discretion in evidentiary matters, must not neglect the due process implications involved in a capital defendant's right to present mitigation evidence." Id. Quite simply, "'the Constitution ... prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends they are asserted to promote.'" State v. Rivera, 402 S.C. 225, 244, 741 S.E.2 694, 704-705 (2013) (quoting Holmes v. South Carolina, 547 U.S. 319, 326 (2006)); see also Green v. Georgia, 442 U.S. 95, 97 (1979) (explaining "the hearsay rule may not be applied mechanistically to defeat the ends of justice" because the Due Process Clause and the Eighth Amendment require a sentencing jury to consider all mitigating evidence).

"Application 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). 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.

Confronting an issue similar to the one presented in the case sub judice, the Supreme Court of Mississippi reversed a death sentence where the trial judge excluded testimony from an expert in social work regarding her conclusions and observations based on the extensive social history she completed. Fulgham v. State, 46 So.3d 315, 335-337 (Miss. 2010). The expert had reviewed documents and interviewed numerous people to prepare the social history. Id. at 335. In her proffer, the expert testified to four observations she had made, which included a lack of parental bonding, substance abuse by Fulgham's mother and two stepfathers, lack of biological father's support, and the love Fulgham and her children shared even after her incarceration. Id.

The trial judge excluded the testimony because it was not outside the knowledge of a layperson and the jury could arrive at the same conclusions based on other evidence presented. Id. After concluding it was improper to exclude the evidence as it was proper under the state's evidentiary rule governing experts, the Mississippi Supreme Court explained, "the proffered testimony was offered as mitigation, and mitigating evidence is admissible if it relates to the character and background of the defendant and the circumstances surrounding the crime." Id. at 336 (internal quotation omitted). The court elaborated, the "proposed testimony would have provided the jury with additional observations and a cohesive overview of the mitigation evidence presented by the other three witnesses." Id. Her "testimony was especially relevant, since she had reviewed various documents and conducted interviews prior to offering her expert observations and/or opinions." Id.

Further, the court noted that "[w]here the sentencer is not permitted to consider all mitigating evidence, there is a risk of erroneous imposition of the death sentence." Id. "In the sentencing phase of a capital murder trial, the stakes are life and death." As a result, "[a] defendant is permitted to introduce virtually any relevant and reliable evidence touching upon the defendant's background and character, or the crime itself, which is offered as a basis to persuade a jury to return a sentence of less than death." Id. The court "caution[ed] prosecutors and trial judges about limiting mitigation evidence offered by a defendant when it is presented fairly, and is relevant to the defendant's character, background, or the circumstances surrounding the crime." Id.

The trial judge erred by excluding testimony from Roberta and Tim Sr., regarding events that occurred prior to appellant's birth during the sentencing phase of appellant's capital murder

trial. While the jury ultimately heard limited portions of the testimony proffered by Roberta and Tim Sr., when Grey testified, the surrogate was a poor one.

The jury needed to hear the firsthand heartbreaking account of Roberta being abandoned at an orphanage when she was three years old only to be reclaimed by her mother when she was eight years old so that she could be savagely raped and beaten by her stepfather. The jury needed to hear the firsthand account of Roberta becoming pregnant at the age of eleven and birthing her first child, Tim Sr., when she was only twelve years old, a mere child herself. The jury needed to hear the firsthand accounts of the suffering endured by Roberta and Tim Sr., including the vicious sexual assaults and physical beatings Roberta suffered at the hands of Montaine, which Tim Sr., observed. The jury needed to hear the firsthand account of how Montaine forced Roberta into prostitution when she was a teenager. The jury needed to hear the firsthand account of how a young Tim Sr., observed his father shove his mother through a wall for forgetting her keys and how his father would beat his mother with a hammer. The jury needed to hear the firsthand account of a thirteen year old Tim Sr., coming upon a plane crash and seeing body parts strewn across a field. The jury needed to hear the firsthand account of the impact of the trauma Roberta suffered for the rest of her life, which included drunken rampages of property destruction and threatening the lives of her loved ones. Finally, the jury needed to hear the firsthand account of appellant's biological mother's self-abortion of appellant's younger brother. See R. 3985, l. 20 – 3986, l. 25; R. 3986, l. 12 – 3987, l. 7; R. 3991, l. 11 – 4008, l. 9.

"[A] mitigating counter-narrative provides a more comprehensive and valid framework for understanding the defendant and his behavior." Craig Haney, Evolving Standards of Decency: Advancing the Nature and Logic of Capital Mitigation, 36 Hofstra L. Rev. 835, 879 (Spring 2008). "A painstakingly investigated, elaborately detailed, coherent thematic, well-

presented social history can lead jurors to life rather than death sentences by affecting the way they allocate blame and culpability in a capital trial." Id. The social history "helps to humanize the defendant." Id. It shows the jurors that the defendant is "someone whose value and worth extends beyond the worst things he has done and the sum total of the risk factors to which he has been exposed." Id. at 880. "[C]ontextualizing the defendant's behavior in terms of his social history and present circumstances also illustrates and underscores the various ways in which forces the defendant did not choose and over which he had little or no control – deprivation, trauma, and other life-altering risk factors – help to account for the course of his life." Id. at 881.

Solicitor Hubbard seized upon the judge's erroneous limitation on the presentation of social history in his closing argument. He demeaned the social history presentation by remarking that Grey "supposedly chronicled" appellant's "whole life," but she left "out anything good." R. 5911, ll. 17-19. Insinuating that appellant received "all kinds of accolades in school" that the jury never heard, Solicitor Hubbard informed the jurors that they were not "supposed to" hear about anything good that happened to appellant. R. 5911, ll. 17-21. According to the solicitor, it was Grey's "job ... to find all the darkness in that family, to expound upon it and feed it to the experts who were trying to tell [the jury] there's something wrong with [appellant]." R. 5911, ll. 21-25. Capitalizing on the judge's improper limitation on mitigation evidence, Solicitor Hubbard not only discredited the social history presented to the jurors as incomplete, but he called into question the opinions of every expert who relied on the allegedly incomplete social history.

The judge's treatment of defense counsel and Grey, the social historian, telegraphed to the jury – and not subtly – the judge's view that the evidence presented was unworthy of consideration. Repeatedly, the judge reproached defense counsel and the social historian for

providing evidence that was "too detailed" by telling the two to "keep moving." See e.g., R. 5672, ll. 8-18; R. 5674, ll. 15-20; R. 5679, ll. 11-16; R. 5685, ll. 6-11; R. 5690, ll. 6-9; R. 5690, ll. 23-25; R. 5691, ll. 7-9; R. 5701, ll. 18-21; R. 5702, ll. 13-16; R. 5742, ll. 18-20; R. 5742, ll. 24-25. Quite simply, he denigrated the entirety of the mitigation presentation. The judge's disdain for appellant's mitigation case was made apparent to the jury through the judge's repeated admonitions to defense counsel to "keep moving" during the examination of Grey. See Sosebee v. Leeke, 293 S.C. 531, 535, 362 S.E.2d 22, 24 (1987) (holding "[a] trial judge must refrain from any comment which tends to indicate his opinion as to the weight or sufficiency of the evidence, the credibility of witnesses, the guilt of an accused, or any fact in controversy"). See also State v. Larmond, 244 N.W.2d 233, 236 (Iowa 1976) (explaining that a presiding judge must avoid any conduct by which the jury could infer bias against either party and jurors are particularly sensitive to a judge's views; therefore, "a trial court may not telegraph to a jury, by purposeful exclamations, gestures, or facial expressions, his approval or disapproval, belief or disbelief, in the testimony of witnesses or arguments of counsel"); State v. Hamilton, 731 P.2d 863, 870 (Kan. 1987) (granting a new trial where "the judge's injection of himself and his personal beliefs and observations into the trial proceedings" prejudiced the defendant's constitutional right to a fair trial); State v. Guido, 191 A.2d 45, 54 (N.J. 1963) (holding a trial court intervened unnecessarily and in such a way that could prejudice the jury's approach to the factual issues); Veal v. State, 268 S.W.2d 345, 346 (Tenn. 1954) (holding that "[t]he influence of the trial judge on the verdict of the jury is so great that no action nor word of the trial judge should be allowed to indicate the judge's conclusion of guilt or innocence").

To the extent the solicitor's hearsay objections may serve as a basis to support the trial judge's ruling to exclude substantial evidence of appellant's social history in favor of a

condensed and sanitized version, it must be noted the state also objected to the jury hearing this information directly from Roberta and Tim Sr., which would have eliminated any hearsay concerns. Thus, the state's objections to Grey testifying to hearsay ring hollow. Further, Grey was qualified as an expert witness in licensed clinical social work, and under Rule 703, SCRE, an expert may rely upon facts and data that may not be admissible, such as hearsay. See State v. Franklin, 318 S.C. 47, 50, 456 S.E.2d 357, 359 (1995) (addressing the admissibility of a mental examination as a statutory exception to the rule against hearsay). Thus, Grey could testify about what she learned from others – hearsay – to show the basis for her opinion, including what she learned from Roberta, Tim Sr., and another expert in the case, Dr. Bigler. See In re Manigo, 389 S.C. 96, 106, 697 S.E.2d 629, 634 (Ct. App. 2010).[23] Finally, the rules of evidence must be used cautiously so as not to impair a capital defendant's due process rights, particularly in the context of presentation of mitigation evidence. See State v. Mercer, 381 S.C. 149, 161, 672 S.E.2d 556, 562 (2009).

There was very little danger that the jury would be confused about the issues in the case or that court time would be wasted by allowing the jurors to learn of the significant events in the lives of Roberta and Tim Sr., prior to appellant's birth. See Rule 403, SCRE. The evidence revealed that Roberta was a significant force in appellant's life as she was his de facto mother starting at age two when his biological mother left. Thus, what occurred in her life prior to appellant's birth shaped her and shaped how she raised appellant. Obviously, Tim Sr., appellant's father and primary caretaker throughout his life, was a significant figure in

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[23] Additionally, numerous other experts reviewed and relied upon the social history prepared by Grey, which included the accounts of others as to what transpired before and after appellant's birth in rendering their opinions. See R. 3773, l. 10 – 3776, l. 25; R. 3796, l. 23 – 3799, l. 9 (testimony of Bhushan Agharkar regarding social history evidence); R. 4548, l. 6 – 4548, l. 25 (testimony of Richard Frierson regarding social history evidence); R. 4760, l. 20 – 4761, l. 23 (testimony of Julie Dorney regarding social history evidence).

appellant's life, and what occurred prior to appellant's birth affected Tim Sr.'s parenting of appellant. The evidence proffered was not so far removed as to have no impact on appellant. Cf. People v. Caffey, 792 N.E.2d 1163, 1208-1209 (Ill. 2001) (affirming the exclusion of evidence from a licensed clinical social worker regarding the psychiatric hospitalizations of defendant's grandmother that occurred prior to defendant's birth where there was no evidence the defendant was exposed to the behavior and where the jury heard much of the excluded information from other witnesses).

The trial judge violated appellant's right to due process of law by suppressing relevant mitigating evidence, forcing appellant to deliver 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 disparaging defense counsel, the social historian, and the evidence presented by instructing defense counsel to "keep moving" when the testimony was "too detailed" about the heartbreaking traumas that happened to appellant and his family. Contrary to the judge's ruling, the testimony was highly relevant to the life-or-death decision before the jury as it presented the jury with a reason not to condemn appellant to death. It was the essence of mitigating evidence. The evidence was relied upon by numerous experts in arriving at their opinions regarding appellant's mental health. Despite the judge's later ruling to allow the jurors to hear some evidence, the judge forced the defense to present the evidence from a third party, which was less relatable for the jurors, and in a way to remove any ugliness from the jury's view. Further, the judge's repeated admonishments and instructions to defense counsel to "keep moving" throughout the testimony of the social worker telegraphed to the jury that the trial judge thought the evidence offered no value to deciding whether appellant should

die for his crimes. The judge's erroneous exclusions, limitations, and degradations of appellant's social history presentation violated appellant's right to due process of law.

The trial judge's exclusion of testimony from veteran law enforcement officer Barry Sowards that (1) he had a gun to protect appellant from others due to the gravity of appellant's crimes and (2) he believed appellant showed *genuine* remorse violated appellant's right to due process of law and his guarantee of heightened reliability in capital cases pursuant to the Eighth Amendment. The jurors heard that Sowards informed appellant that he did not have the gun to protect the police from appellant. Thus, the jurors heard one part of the conversation between appellant and Sowards regarding the automatic weapon Sowards maintained on his lap while the transport caravan stopped on its way from Mississippi to South Carolina. However, the judge prevented the jurors from hearing the second part of that conversation – that Sowards needed the gun to protect appellant from others who would harm him due to the horrifying nature of his crimes. Effectively, the judge barred the jurors from learning that appellant posed very little risk in the future due in part to the abhorrence felt by others. 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); Simmons v. South Carolina, 512 U.S. 154 (1994); State v. Shafer, 352 S.C. 191, 573 S.E.2d 796 (2002); State v. Young, 319 S.C. 33, 459 S.E.2d 84 (1995).

Sowards had grown to know appellant over the course of five years. Further, Sowards spent over ten hours a day with appellant during the capital trial, which lasted for approximately six weeks. Sowards' opinion that appellant showed genuine remorse was not speculative as it was based upon Sowards' rationally based perception of appellant over an extended period of time. Sowards' testimony on this point was necessary to rebut the state's contention that appellant was "faking" in order to manipulate those around him. Not only did the solicitor allege

appellant faked mental illness in order to be rendered not guilty by reason of insanity, but the solicitor also alleged appellant manipulated his family members in order to obtain their support during his capital trial. Sowards' credentials as a member of law enforcement hardened by decades of experience coupled with his constant presence in the courtroom where he served to protect appellant and the jurors would have provided powerful incentives for the jurors to trust and believe Sowards' observations on the genuineness of appellant's displays of emotion during the trial, which included his crying during poignant moments. Remorse is mitigating evidence. See State v. Northcutt, 372 S.C. 207, 221, 641 S.E.2d 873, 880 (2007). Nevertheless, the trial judge denied the jurors the opportunity to hear from Barry Sowards, a law enforcement officer who had heard and seen it all, that appellant showed genuine remorse for killing his children.

In conclusion, the trial judge grievously erred by excluding relevant mitigating evidence from appellant's social history from the individuals with firsthand knowledge of the events, requiring appellant to present his abbreviated and sterilized social history from a third person, continually admonishing defense counsel during the presentation, and suppressing testimony from a seasoned law enforcement officer concerning appellant's lack of future dangerousness and display of genuine remorse.

7.

The court erred by excluding the penalty phase videotape testimony of Cynthia Jones Turner, appellant's mother, since this was mitigating evidence of mental illness and other mitigating factors appellant had the right to present to the sentencing jury.

Relevant Facts

The defense had the trial judge issue an out-of-state court order for the attendance of appellant's mother, Cynthia Jones Turner, to testify at his trial as a material witness. R. 3919, l. 9 – 3920, l. 3. The court order was issued on April 1, 2019. R. 8263.

Defense counsel Young told the judge that Cynthia Turner agreed to waive a hearing in New York on April 17, 2019 and to come to South Carolina to testify. "The facility where she's at then interjected and said they wanted to challenge her waiver in agreeing to come to South Carolina and they would not allow anybody to accompany her to South Carolina and that she was not able to go to South Carolina on her own unescorted. There was an emergency hearing held in New York on the 8th of May, 2019. And at that time, it was ordered that a videotape testimony be taken of Cynthia Turner because she would not be allowed to leave the [s]tate. And we made the State aware of the video being, taking place. They did not participate. And we took the video, I believe, it was later that same day, the 8th or was it the next day." R. 3919, l. 7 - 3920, l. 7. Defense counsel then verified that the videotaped testimony was taken on May 10, 2019. R. 3920, ll 1-7.

The solicitor asserted he had not seen the videotape testimony, and he seemed to argue that it was not relevant. The solicitor said, "They've already gotten in she has schizophrenia. I think they mentioned it in their opening. They've covered that. Again, no one has relied on this video for a diagnosis on Mr. Jones. We don't have any problem stipulating whatever problem

she has. But, Your Honor, to me, to put up a video where she's interviewed, the State's not there, the Court's not there, it's just making a spectacle of this woman. It's to elicit sympathy. It does nothing to help the jury as finders of fact to determine whether the Defendant was insane at the time he killed his children. She's not a material witness. And, frankly, Judge, she's not even a competent witness. That's why they wouldn't release her. Because you couldn't even put her on the stand if she came down here because of her diagnosis. She can't even testify."

Defense counsel responded that Cynthia had not been declared incompetent "and the State elected to not go or submit any questions or attend by video, all of which they were aware of at the time this video was taken." The solicitor interjected, "While we were striking a jury." Defense counsel Young answered, "They could have opened up this laptop, gone on Skype, and said—or they could have submitted questions, here's some questions we want to ask." R. 3920, l. 4 – 3923, l. 1.

Defense counsel Young told the judge that the videotape testimony was very relevant to issues before the jury. "[T]here's been testimony about the inheritable nature of schizophrenia, the disease. This is her video. This is a video of her and how she is. It's not a sideshow. It's his mother. It's relevant to determination about the credibility of the experts. It's relevant to a determination as to his mental health. And it's relevant, ultimately, to a determination of whether or not he is or is not, not guilty by reason of insanity. R. 3920, l. 4 – 3923, l. 1.

The judge said he would watch the video overnight and make a decision on its admissibility. R. 3923, ll. 3-17.

The following morning, the judge ruled that the videotape testimony was not admissible. He found it was not relevant. R. 3926, l. 1 – 3927, l. 8. Defense counsel Young objected to the judge's ruling, noting again that Cynthia Turner was appellant's mother and "that video was

watched and referenced during Dr. Agharkar's testimony—and other experts have viewed the video . . . and are prepared to testify as to how it's relevant to—to their opinion." The judge refused to alter his ruling that the videotape testimony of Cynthia Turner was not admissible. R. 3926, l. 1 – 3930, l. 1.

During the penalty phase trial, the defense moved to introduce the videotape of the testimony of appellant's mother, Cynthia Turner. Counsel noted the judge had previously ruled Cynthia was a "material witness," and a subpoena for her presence at trial had been issued.

As seen, a hitch in the plan developed when the facility where Cynthia was housed in New York state objected to Cynthia testifying live in South Carolina. Officials at the New York mental health facility maintained that it would not be safe for Cynthia to travel to South Carolina. Therefore, the defense made arrangements for the testimony of Cynthia Turner to be videotaped at the New York facility. The solicitor's office in Lexington was notified of the problem with the material witness subpoena being honored for live testimony in South Carolina, and of the alternative arrangement that had been made to obtain her testimony in New York. Nonetheless, the solicitor's office chose not to send an assistant solicitor to participate in the deposition of Cynthia, or to cross-examine her by Skype.

Defense counsel Young requested to publish the videotape testimony of Cynthia Turner. The solicitor again objected on the grounds of relevance. The judge excused the jury from the courtroom. R. 5810, ll. 1-9.

Defense counsel Young stated that the judge had ruled that the Cynthia Turner testimony was not relevant to the guilt phase issues of not guilty by reason of insanity or guilty but mentally ill. Defense counsel argued that this was the penalty phase of a trial and Cynthia's

testimony was relevant to mental illness, schizophrenia in particular, and it was mitigating evidence. R. 5810, ll. 11-20.

The judge stated that: "Everybody says she's horribly mentally ill, institutionalized. I mean, nobody has challenged that. How is that relevant to what's going on in this trial seeing the condition she's in in the interview?" R. 5810, ll. 21-25.

Defense counsel answered that the videotape testimony was an accurate portrayal of her mental illness. Cynthia Turner was appellant's mother, and she was severely mentally ill. There was a genetic link between mental illness in a parent and child. R. 5811, ll. 1-24.

The judge repeated that he thought Cynthia was "in a terrible state." The judge said he did not know how the testimony was relevant. R. 5811, ll. 1-24. Defense counsel repeated that Cynthia had been diagnosed with schizophrenia and that her testimony was mitigating evidence during the penalty phase of this capital trial. Further, defense counsel explained that viewing Turner, an acknowledged schizophrenic, would dispel the notion that institutionalized persons were tied up in straitjackets and drooling. R. 5811, ll. 1-5. Additionally, he argued her testimony was relevant as mitigating evidence during the penalty phase due to the "strong genetic link between mental illness, especially where a parent has severe mental illness." R. 5811, ll. 5-10; R. 5811, l. 25 – 5812, l. 3.

The court was well aware of appellant's legal arguments concerning mitigation evidence as shown by his impatience with defense counsel's citation of the leading United States Supreme Court cases in the argument presented by defense counsel in support of a full presentation of appellant's social history, which occurred contemporaneously with defense counsel's argument on the admissibility of the video of Cynthia Turner. As discussed in Issue 6, the defense noted the right to present mitigating evidence during the capital phase of a death penalty trial had

repeatedly been held to be a fundamental right by the United States Supreme Court. Counsel cited Rompilla v. Beard, 545 U.S. 374 (2005); Wiggins v. Smith, 539 U.S. 510 (2003); Williams v. Taylor, 529 U.S. 362 (2000); Porter v. McCollum, 558 U.S. 30 (2009); Eddings v. Oklahoma, 455 U.S. 104 (1982); Abdul Kabir v. Quarterman, 550 U.S. 233 (2007) in support of the defense's right to present mitigating evidence to the sentencing jury. R. 5811, ll. 1-24; R. 5811, l. 1 – 5815, l. 19. The judge responded, "All right, that's an appellate argument now. You made a case cite. I don't need to hear what the case said." R. 5815, ll. 20-22. Nevertheless, the judge persisted in his ruling that the video of Cynthia Turner was irrelevant and added that the video was "inflammatory and prejudicial." R. 5819, ll. 6-11; R. 5822, ll. 6-9.

Defense counsel repeated that the videotaped testimony of appellant's mother, Cynthia Jones Turner, was mitigating evidence that the defense had the right to present to the jury in a death penalty case. The judge responded, "I think it's inflammatory and prejudicial. The State can't cross-examine a video. When we had an earlier hearing, you said something to the effect the State could have gone to New York or wherever—upstate New York somewhere, if I remember right." R. 5819, ll. 6-11. Defense counsel Young reminded the judge of precisely what occurred: "We asked the State to participate either in person or offered them an opportunity to be present by a video link or submit questions that we would ask. They chose not to participate in any way." The solicitor responded that "we were in during the jury selection at that time." R. 5818, l. 22 – 5819, l. 19.

Defense counsel Young reminded the judge that "Your Honor issued a material witness warrant for her. We went to effect that warrant. We were told that we were not going to be allowed to have her transported pursuant to this Court's order. It was then ordered that her

testimony be videotaped. We informed the State that's what we intended to do." R. 5818, l. 22 – 5820, l. 23.

The solicitor urged that the videotape testimony should be excluded "under [Rule] 403, I think it's a train wreck." Defense counsel Young again countered, "Mitigation is any reason not to give death. The fact that his own mother couldn't come to his trial is likely a reason for a Juror not to give death." The judge curtly ruled, "I'm not letting it in then. You talked me into it." R. 5821, ll. 2-23.

The defense objected and stated that the judge was excluding relevant mitigation evidence and that Rule 403, SCRE should not be used to exclude permissible mitigation evidence during the penalty phase of a capital trial. R. 5821, ll. 2-23. The defense then marked the videotape as Court's Exhibit #90. R. 5821, l. 2 – 5822, l. 13. The videotape testimony of Cynthia Jones Turner is before this Court to review.

The Excluded Testimony

After Cynthia was placed under oath, she testified that she was born in Racine, Wisconsin, which was in Kenosha County. She grew up in Chicago, Illinois. They moved a lot while the family lived in Wisconsin. Tape at 00:26.

Cynthia remembered that her father moved to Texas while they were living in Illinois. She was about fifteen years old at the time. "He just left the family and my mom, and he went by himself." Tape at 2:06. She visited her father two times while he lived in Texas. Her father thought appellant was "a nice kid." She said her father drank a lot. Tape at 2:50.

Cynthia said she drank whisky for about five years during her life, but that she no longer drank. She did remember her mother "got real mad" about her drinking. Tape at 4:04. Cynthia stopped drinking about "five or six years ago" with the help of medication "and shots." Tape at

5:23. Cynthia confirmed that she had nine brothers and sisters: "Martha, Domingo, Linda, Arthur, Sheila, me, Ambrose, and Horton Christopher." She was not close to any of her siblings. She did not keep up with them at all once they became adults. Tape at 7:05.

As for appellant's father, Tim, Sr., Cynthia did not specifically remember how she met him. She thought she met him at school through somebody who was Tim, Sr.'s friend. She thought Tim, Sr. had a lot of friends. When asked if Cynthia felt lonely not having friends, she answered, "No...I really don't know about that. Otherwise, I would've told you. But I don't really know him that good. I really don't." Cynthia said she did not know Tim, Sr., well before they married. She did think Tim, Sr., got along with his family. Tape at 9:03-11:24.

Cynthia did remember that she did not get along with Tim's mother, Roberta. She was not sure why they did not get along. Tape at 11:25.

Conversely, Cynthia said Tim, Sr., got along "close with her [Roberta]. I don't get along with her because she gets really angry. Like she loses control of her temper. And sometimes she doesn't mean it and sometimes it's real terrible that you can't think of how bad that is. She doesn't see it as a problem, but she wants people just to leave her alone. She was okay, pretty good...I got along with her for a little while, but I don't get along with her." Tape at 11:25-12:39.

Cynthia was asked if she remembered any particular time she lost her temper with Roberta. Cynthia recalled, "I made her mad about some money because I had no money to pay her, and I didn't know Tim was supposed to pay her." She recalled Roberta being mad at Tim, Sr., over money. Tape at 12:40.

Cynthia also remembered living with Roberta for a while. She knew that Roberta was working as a prostitute while living in Illinois. "I did it too, though. But I don't do it no more. I

would work at the same place she would." Cynthia did not recall what city it was where they worked as prostitutes, but she did remember working as a dancer at the Torch Club. Tape at 14:46.

Cynthia continued to work as a prostitute after she married Tim, Sr. "That's all I remember. Yeah. Me and Tim...it seems like I was trying to make me help out Tim with money, and we got along, and then it would make us upset and sad." Tape at 14:30. The following occurred during the video tape testimony with Cynthia Tuner:

> Interviewer: Why did you and Timmy's dad, big Tim, decide to get a divorce?
>
> Cynthia: Me and Tim kept on breaking up and then go out again, breaking up and going out again. And I said that's not good. He thought that too. Tim was tired of my family. Yeah, he knew them pretty good.
>
> Interviewer: So, tell me some more about that. Did he get along with your family?
>
> Cynthia: He tried to, but they really didn't feel like he fit in. I was like oh, no.
>
> Interviewer: Were you disappointed?
>
> Cynthia: Kind of embarrassed me in a way, yeah.
>
> Interviewer: How did it embarrass you?
>
> Cynthia: Um, when Tim and my family would talk about trying to get along, and I was like please don't start any arguments with me, Tim, cause I get along with them and then they didn't get along with him...[mumbles]. Pretty good, but you know he wanted to stay with his mom because she really didn't like him being married and all that kind of stuff...
>
> Interviewer: Did Tim, Sr., your husband, argue with people in your family?
>
> Cynthia: No.

Interviewer: When you and your husband, Tim, Sr., decided to get a divorce did you ever argue about or disagree about who would raise Timmy?

Cynthia: No, we never did that. We never talked like that about that…I never even mentioned it to Tim because I knew…I didn't know what to do about that kind of stuff.

Interviewer: Why was Tim, Sr. the one who raised Timmy after you got a divorce?

Cynthia: I don't know. Tim got married again, yeah.

Interviewer: What was it like becoming a mom at such a young age?

Cynthia: I don't know.

Interviewer: Do you remember any feelings you had about becoming a new mom when you first became a mother when you had Timmy?

Cynthia: No.

Interviewer: Have you had any other children besides Timmy?

Cynthia: My daughter, Lydia. She died. My son named Donald. Um, I'm not too sure about the kids…about my children…[mumbles] about all that.

Interviewer: Did you have any other children besides Timmy with Tim, Sr.

Cynthia: No.

Interviewer: Do you remember of Timmy, Donald, and Lydia, do you remember, where they were born? Where was Timmy born?

Cynthia: He was born at home in Roberta's house when she bought a house…I think she bought that house, I'm not sure. But I think she sold it back to them or something like that. That's what I don't know.

Tape at 16:50-21:01

Cynthia remembered that Lydia was born "at home—I don't know why…I was drinking, and I think it affected her, is what I thought." The following occurred between defense counsel and Cynthia:

> Interviewer: Do you know how Lydia died?
>
> Cynthia: No.
>
> Interviewer: How old was she?
>
> Cynthia: Newborn.
>
> Interviewer: How did you feel when she died?
>
> Cynthia: Terrible. I cried a lot. Yeah, it made me sad.
>
> Interviewer: Did you ever have a miscarriage or lose a baby?
>
> Cynthia: I think I just loved Lydia out of all my children, my daughter.
>
> Interviewer: Do you remember getting pregnant with another boy after Timmy named William or Billy?
>
> Cynthia: Um, I don't know. I didn't give all my kids names. Because I gave them away for adoption.
>
> Interviewer: Why did you give your children away for adoption?
>
> Cynthia: Because I was gonna stay to date, and we didn't really make any marriage references or anything like that…we just um, thought that was okay, yeah.
>
> Interviewer: Do you know who raised your other children?
>
> Cynthia: No.
>
> Interviewer: Over the years, did you ever want Donald or Timmy in your life more?
>
> Cynthia: Yeah, I miss them. There were such nice-looking little children when they were little babies and stuff like that. I thought they were pretty good looking.

Interviewer: Do you love Timmy?

Cynthia: Yeah, he's a nice kid. But I don't understand how he did that about his kids. Did Roberta mention that?

Interviewer: No.

Tape at 21:55-24:20.

After Cynthia divorced Tim, Sr., she said she never saw appellant again. Cynthia then recalled seeing appellant again. "Well, I can't remember where they were living in Kentucky or something like that, and I went over there. And he was driving. Timmy was driving, and he was driving and...to bring his kids from their house. He had an apartment, I think." Tape at 24:30.

Cynthia recalled that after she divorced Tim, Sr., she moved to Florida. In Florida, she would "just hang out with a bunch of people, and we would drink." Tape at 26:10. After Florida, Cynthia recalled moving to New York. The following occurred on examination of Cynthia:

Interviewer: And how did you decide to move to New York?

Cynthia: I don't know. I just wanted to find a place to live so I could stay somewhere instead of keep on moving around.

Interviewer: So, you know that your son, Timmy, is charged with the murder of his five children, your grandchildren?

Cynthia: Right, mhm.

Interviewer: How does that make you feel?

Cynthia: Sad. Yeah, that's bad to murder all five of his children. What were they? Boys? Girls?

Interviewer: Boys and girls.

Cynthia: What?

Interviewer: Two girls, three boys. Do we have your permission to show this video to the jury during Timmy's trial?

Cynthia: Sure, sure. Is Timmy gonna see it?

Interviewer: Yes.

Cynthia: Oh okay. Yeah.

Interviewer: Is there anything else you want to say?

Cynthia: No.

Tape at 27:51

Standard of Review

When reviewing whether a trial court erred in the admission or exclusion of evidence, the appellate court examines whether the trial court abused its discretion. State v. Blackwell, 420 S.C. 127, 136, 801 S.E.2d 713, 718 (2017). "An abuse of discretion occurs when the court's decision is unsupported by the evidence or controlled by an error of law." Id.

Discussion

Relevance

Cynthia's testimony – and the jury's ability to see Cynthia for themselves in, as the judge described it, a "terrible state" – was just relevant mitigating evidence. It was powerful mitigating evidence that bore directly on appellant's mental illness. The state fought the notion that appellant was mentally ill at every turn and accused him of malingering. Seeing Cynthia would have corroborated appellant's mental health experts concerning the inheritability of schizophrenia, and it bore directly on statutory mitigators. See R. 5956, ll. 5-15 (trial judge instructing the jury on the relevant mitigating circumstances); S.C. Code Ann. § 16-3-20 (C)(b)(2) ("mental or emotional disturbance"); S.C. Code Ann. § 16-3-20 (C)(b)(6) ("[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct

to the requirements of the law was substantially impaired"); S.C. Code Ann. § 16-3-20 (C)(b)(7) ("mentality ... at the time of the crime").

A line of cases from the United States Supreme Court "in this area has long recognized that before a jury can undertake the grave task of imposing a death sentence, it must be allowed to consider a defendant's moral culpability and decide whether death is an appropriate punishment for that individual in light of his personal history and characteristics and the circumstances of the offense." Abdul-Kabir v. Quarterman, 550 U.S. 233, 263-264 (2007). Thus, the sentencing phase of a capital trial focuses the jury's attention on evidence that aggravates and mitigates the offense. State v. Kornahrens, 290 S.C. 281, 289, 350 S.E.2d 180, 185 (1986). The Court defines mitigating evidence as "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); see also McKoy v. North Carolina, 494 U.S. 433, 442 (1990); Skipper v. South Carolina, 476 U.S. 1, 4 (1986); Eddings v. Oklahoma, 455 U.S. 104, 112 (1982); Woodson v. North Carolina, 428 U.S. 280, 304 (1976). Further, the jury must not be precluded from considering such evidence. Lockett, 438 U.S. at 604. Put another way, the Eighth Amendment and Due Process "require submission to the jury of *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) (emphasis in original); see also State v. Northcutt, 372 S.C. 207, 221, 641 S.E.2d 873, 880 (2007) (providing that the trial court may not prevent "the jury from considering any relevant mitigating evidence the defendant proffers in support of sentence less than death"). The trial judge ignored these fundamental Eighth Amendment concepts.

While the definition of relevant evidence from Rule 401, SCRE, has some part to play in capital sentencing proceedings, the Supreme Court provided that "[r]elevant 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.

Justice O'Connor explained that a defendant's disadvantaged background or psychological problems are mitigating because society views "defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems," as "less culpable than defendants who have no such excuse." California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring). Understanding the defendant's disadvantaged background and emotional, mental, or psychological problems is necessary to the "moral inquiry into the culpability of the defendant." Id. Thus, South Carolina's capital sentencing scheme includes consideration of a defendant's mental health among the statutory mitigating circumstances. See S.C. Code Ann. § 16-3-20 (C)(b)(2) ("mental or emotional disturbance"); S.C. Code Ann. § 16-3-20 (C)(b)(6) ("[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired"); S.C. Code Ann. § 16-3-20 (C)(b)(7) ("mentality ... at the time of the crime").

In the death penalty PCR case of Weik v. State, 409 S.C. 214, 216-17, 761 S.E.2d 757, 758 (2014), the defendant suffered from schizophrenia. Trial counsel called three mental health experts during the sentencing phase who all testified that Weik was a paranoid schizophrenic.

Id. This Court reversed the case in PCR because trial counsel failed to call Weik's family members to present a full social history. Id.

At sentencing in Weik, just like in appellant's case, the state disputed the diagnosis of schizophrenia with expert witnesses. Weik at 218, 761 S.E.2d at 759. This Court found that evidence from family members uncovered in PCR "would have demonstrated Petitioner's genetic predisposition to schizophrenia and helped explain his auditory and visual hallucinations at the time." Id. at 238-39, 761 S.E.2d at 769-70. The evidence about Weik's family revolved around his father, Russell. Id. at 223-30, 761 S.E.2d at 761-65. At PCR, the court heard the testimony of witnesses about Russell's bizarre behavior and heard from Russell himself. Id.

This Court found that "Russell's testimony revealed he was extremely delusional, and his testimony would often wander in a manner similar to the descriptions of Petitioner's behavior given by defense psychiatrists and psychologists in support of their contention that Petitioner suffers from schizophrenia." Id. at 238-39, 761 S.E.2d at 770; See also Kayer v. Ryan, 923 F.3d 692, 711 (9th Cir. 2019) (reversing death sentence in federal habeas because of failure to present mitigating evidence, including the testimony of a mentally ill aunt who heard voices and thought voices were normal); Commonwealth v. Hughes, 865 A.2d 761, 812 (Pa. 2004) (finding defendant was entitled to hearing based on strength of mitigating evidence uncovered, including mother's schizophrenia). Appellant's jury was deprived of the same type of testimony as Weik's jury. The jury did not see Cynthia's bizarre behavior which would have corroborated the defense mental health experts' description of schizophrenia.

Appellant's mental illness was the centerpiece of his mitigation case. Although appellant presented numerous experts to opine on his mental health, lay witnesses often prove to be the most powerful. They are not just "hired guns." Importantly, this Court has held numerous times

that expert testimony is not necessary to prove insanity or sanity; lay testimony may be sufficient. See e.g., State v. Lewis, 328 S.C. 273, 278, 494 S.E.2d 115, 117 (1997). In fact, a jury may disregard expert testimony on the issue of a defendant's sanity. Id.; see also State v. Poindexter, 314 S.C. 490, 494, 431 S.E.2d 254, 256 (1993) (holding "[t]he jury was free to rely on circumstantial evidence to find Poindexter sane even though expert testimony favored finding that he was insane").

The videotape of appellant's biological mother was relevant to the sentencing proceedings under both the rules of evidence and the constitutional principles applicable to capital sentencing trials. The video captured Cynthia's inability to emote, even as she described horrific traumas in her life, such as stillbirth and surrendering multiple children for adoption. Cynthia confessed to working as a prostitute without even being asked or prompted. Most people would shy away from admitting to working as a prostitute, but Cynthia conveyed the information without the least bit of hesitancy or trepidation. Similarly, Cynthia expressed no unwillingness to admit she did not name all of her children because she gave them away for adoption. When asked why she did so, she indicated that she was only interested in the men who fathered those children for dating purposes, not marriage. Cynthia's explanation would embarrass some, but she conveyed this information matter-of-factly.

On the video, Cynthia's inability to conceptualize time was evident as she tried to provide information about the years in which she was abusing alcohol or how long she knew appellant's father before the two divorced, but it was clear she was unable to do so. Indeed, Cynthia's brain had been ravaged by her disease, which was plain when she relayed that she did not know her mother well despite having lived with her throughout her childhood.

Not only did the video provide a powerful view of his mother's severe mental illness, the video let the jury see Cynthia express her relationship she shared with appellant in her own unusual words with the flat, almost nonchalant affect described by the experts. When asked what it was like to be a young mother, Cynthia responded guilelessly that she did not know, despite the fact that she was a teenager when she gave birth to appellant. She plainly stated how she simply abandoned appellant with no discussion of who should care for him. Her casual demeanor was a far cry from what one would expect from a mother and grandmother in her situation. Due to the genetic component of schizophrenia, the jury's ability to view Cynthia's unusual conduct was relevant to the jury's consideration of mental illness as a mitigating circumstance for appellant. In essence, the video supported the defense experts' diagnosis of appellant as schizophrenic and undermined the state's attempt to persuade the jury that appellant was malingering.

Further, Cynthia's description of her relationship with appellant – virtually non-existent almost from his birth – was relevant to the jury's consideration of appellant's background and character. See Eddings, 455 U.S. at 115 (holding there was no doubt that the evidence Eddings offered, including a difficult family history and emotional disturbance, were "relevant mitigating evidence"); State v. Dickerson, 395 S.C. 101, 122, 716 S.E.2d 895, 907 (2011) (explaining that evidence of a capital defendant's relationship with his family is mitigating evidence); State v. Cauthern, 967 S.W.2d 726, 738-739 (Tenn. 1998) (holding the trial court erred by excluding a letter written by the defendant's son to the defendant, which showed his family loved and supported him, because the letter was relevant to the defendant's background and character and was a potential basis upon which a juror could decline to impose the death penalty). The trial judge erred in finding Cynthia's testimony irrelevant

Rule 403, SCRE

Despite this Court's admonition that in capital cases, "'the Constitution ... prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends they are asserted to promote,'" the trial judge improperly excluded the videotape of appellant's biological mother as "inflammatory and prejudicial." See State v. Rivera, 402 S.C. 225, 244, 741 S.E.2 694, 704-705 (2013) (quoting Holmes v. South Carolina, 547 U.S. 319, 326 (2006)); see also Green v. Georgia, 442 U.S. 95, 97 (1979) (explaining "the hearsay rule may not be applied mechanistically to defeat the ends of justice" because the Due Process Clause and the Eighth Amendment require a sentencing jury to consider all mitigating evidence); State v. Mercer, 381 S.C. 149, 161, 161 n.7, 672 S.E.2d 556, 562, 562 n.7 (2009) (reiterating that "[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 and "reminding 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").

Other courts have admonished trial courts for rigidly applying evidentiary and procedural rules in capital sentencing proceedings. The Supreme Court of Tennessee held the trial court abused its discretion by preventing a capital defendant's parents from testifying during the penalty phase based upon strict adherence to the state's sequestration rule. State v. Jordan, 325 S.W.3d 1, 48-49 (Tenn. 2010). Previously, the Tennessee court had "recognized the probative value of a capital defendant's family members' testimony about their relationship with the defendant." Id. at 50. Thus, the proposed testimony of the defendant's parents that they loved the defendant and would be devastated at a sentence of death was relevant and probative. Id. at

38. In light of the federal constitution's requirement that a capital sentencing jury be allowed to consider "'any aspect of a defendant's character or record and any circumstances of the offense that the defendant proffers as a basis for a sentence less than death,'" the Tennessee court held the "[d]efendant's parents should have been allowed to testify at the sentencing hearing despite their attendance at [d]efendant's trial." Id. at 50 (quoting Lockett, 438 U.S. at 604).

An earlier case dealing with the same mechanistic and arbitrary application of sequestration rules that resulted in a federal habeas reversal of a death sentence is Dutton v. Brown, 812 F.2d 593 (10th Cir. 1987). Dutton's mother violated the trial judge's sequestration order during the guilt phase. Dutton, 812 F.2d at 594-95. Dutton called his mother as a witness during sentencing, but the trial judge sua sponte refused to let the mother testify because she violated the sequestration order. Id.

The Tenth Circuit, sitting *en banc*, found the trial judge erred in refusing to allow the mother's testimony as mitigating evidence and reversed the federal district court's refusal to grant habeas relief. Id. at 599-602. Dutton's trial strategy was to show the jury that he was easily dominated and influenced by older men. Id. at 598. Dutton's mother would have testified that he was a slow learner, immature, and a follower. Id. at 599-602. The Tenth Circuit found the lack of this testimony was a constitutional deprivation and reversed Dutton's death sentence. Id.

Allowing the jury to hear and observe Cynthia was even more vital in appellant's case than the testimony of the parents in Jordan or the mother in Dutton. Whether appellant had schizophrenia and to what extent it played a role in the killings was the central issue in both the guilt and sentencing phases. Every mental health expert agreed schizophrenia is strongly inheritable from parents. If not hearing a mother say their child was a follower was reversible

error, then not seeing Cynthia's bizarre and disturbing behavior for themselves must be reversible error. It is one thing to hear appellant's mother coldly and clinically described as schizophrenic by mental health experts; it is quite another to see it for yourself.

When looking at Rule 403, SCRE, the starting point is determining the probative value of the evidence offered. "'Probative' means '[t]ending to prove or disprove.'" State v. Gray, 408 S.C. 601, 609, 759 S.E.2d 160, 165 (Ct. App. 2014). "'Probative value' is the measure of the importance of that tendency to the outcome of a case." Id. at 610, 759 S.E.2d at 165. The probative value of evidence is directly related to how important that evidence is in assisting the jury in rendering a verdict. Id. Thus, when analyzing the probative value of evidence, the court must consider the importance of the evidence as it relates to the issues presented in the case. State v. Lee, 399 S.C. 521, 528, 732 S.E.2d 225, 228 (Ct. App. 2012).

After determining the probative value of the evidence, the court must next evaluate the danger of unfair prejudice presented by the evidence. "The determination of prejudice must be based on the entire record and the result will generally turn on the facts of each case." State v. Wilson, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001). "'Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest [a] decision on an improper basis.'" State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998) (quoting United States v. Bonds, 12 F.3d 540, 567 (6th Cir. 1993)). According to the United States Supreme Court, "[t]he term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." Old Chief v. United States, 519 U.S. 172, 180 (1997). "Rule 403 only requires suppression of evidence that results in unfair prejudice – prejudice that damages an opponent for reasons other than its

probative value, for instance, an appeal to emotion." United States v. Mohr, 318 F.3d 613, 619-620 (4th Cir. 2003).

Once a court has determined the probative value and the danger of unfair prejudice of the evidence, the court must balance the two. State v. Dial, 405 S.C. 247, 260, 746 S.E.2d 495, 502 (Ct. App. 2013). When juxtaposing the prejudicial effect against the probative value, the determination must be based on the entire record and will turn on the facts of each case. State v. Collins, 409 S.C. 524, 534, 763 S.E.2d 22, 27-28 (2014) (citing State v. Lyles, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct. App. 2008)). Only after balancing the probative value and the danger of unfair prejudice may the court determine if the danger of unfair prejudice outweighs the probative value of the proffered evidence as required by Rule 403, SCRE.

As discussed supra, the video of Cynthia confirmed what other witnesses indicated – she suffered from schizophrenia, a severe mental illness. Further, at least one of the defense experts, Dr. Bhushan Agharkar, watched the video of Cynthia and used it in formulating his diagnosis of appellant. R. 3786, ll. 3-17. Thus, the video was probative as corroborative of other evidence in the record. In the video, Cynthia explained how she was ill-equipped to be a mother and never mentioned custody when she divorced appellant's father. When she described loving only her daughter, Cynthia, in her own words, confirmed what other witnesses had only suggested. Not only was the video highly probative of the statutory mitigating circumstances concerning mental health, but the video was highly probative of appellant's character and background as it was shaped by Cynthia's schizophrenia, unfitness as a parent, and abandonment.

Although the judge never articulated how the evidence was "inflammatory" or "prejudicial," the solicitor argued the defense sought to elicit sympathy with the videotape of Cynthia. Cynthia's abandonment of appellant was not offered as an indictment of Cynthia to

garner sympathy for appellant. Rather, it was offered to corroborate the defense mental health experts in light of the genetic component of schizophrenia and to show that Cynthia's mental illness made it impossible for her to care for appellant, which resulted in no parent-child bond between the two and ever-lasting feelings of abandonment for appellant. Quite often, people suffering from severe mental illness, such as schizophrenia, are unable to parent their children due to the mental illness. See S.C. Dep't of Soc. Servs. v. Williams, 412 S.C. 458, 469, 772 S.E.2d 279, 284–85 (Ct. App. 2015) (finding that DSS proved by clear and convincing evidence a statutory ground for TPR because mother, who suffered from mental illness suggestive of schizophrenia, was likely unable to ever care for the child because of the failure to treat her mental illness). The video posed little danger of unfair prejudice in the form of sympathy for appellant due to Cynthia's severe mental illness or of the life that likely awaits appellant from his inherited illness.

Balancing the high probative value of the video as providing corroborating and substantive evidence of statutory and non-statutory mitigating circumstance against the low danger of unfair prejudice required admission of the video into evidence. The jury needed to see Cynthia's bizarre behavior to confirm her diagnosis and support the defense experts' diagnosis of appellant. The video dispelled any misconceptions the jurors had about how individuals with severe mental illness functioned. Any danger of unfair prejudice from the video was extremely low and unable to substantially outweigh the video's high probative value to the life-or-death decision being made by the jurors. See Mercer, 381 S.C. at 161, 672 S.E.2d at 562 ("reminding 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").

Cross-examination

While a defendant's right to cross-examine witnesses derives from the Sixth Amendment to the United States Constitution, the state's right to cross-examine witnesses "is required for the accurate determination of guilt or innocence and in order to prevent fraud upon the court." Keller v. State, 662 S.W.2d 362, 365 (Tex. Crim. App. 1984); see also State v. Brown, 549 S.W.2d 336, 341-342 (Mo. 1977) (explaining "the administration of criminal justice requires the state to call witnesses and requires the state to be able to cross-examine witnesses called by the defense"). Nevertheless, in light of the dearth of case law addressing the state's right to cross-examine a witness, appellant will use cases concerning a criminal defendant's right to confront his accusers. Necessarily, a criminal defendant's constitutional right to cross-examine must be broader in scope and more stringently guarded than the state's right. Thus, if the case law bears out that a criminal defendant's right to cross-examine would not have been denied in the case sub judice, then the state's right to cross-examine could not have been denied.

"[T]he Confrontation Clause 'guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" State v. Stokes, 381 S.C. 390, 401-402, 673 S.E.2d 434, 439 (2009) (quoting United States v. Owens, 484 U.S. 554, 559 (1988)). "Thus, it is **the opportunity** to cross-examine that is constitutionally protected." Id. at 402, 673 S.E.2d at 440 (emphasis added).

In the instant case, the state had the opportunity to cross-examine Cynthia. The state had the ability to travel to New York, just as defense counsel did. Additionally, the state had the ability to cross-examine Cynthia by video at the time she spoke to defense counsel. The state had the requisite technology necessary, which trial counsel pointed to the state's laptop during

his argument. Additionally, during the current pandemic, court business has been conducted remotely through technology, including oral arguments before this Court. Finally, the state had the ability to submit questions through defense counsel. Despite these opportunities, the state availed itself of none. Therefore, using the analysis required in order to protect a defendant's right pursuant to the Confrontation Clause, the state's right to cross-examine Cynthia, who was not permitted to travel to South Carolina due to health reasons, was not violated by the presentation of Cynthia's testimony via video where the state had multiple opportunities to cross-examine Cynthia. See also State v. Johnson, 422 S.C. 439, 453, 812 S.E.2d 739, 746 (Ct. App. 2018) (holding that "modifying a defendant's truest exercise of the Sixth Amendment right via in-person confrontation is inappropriate" "in the absence of an important public policy or at least an exceptional circumstance," such as when a "witness's health prevents him or her from traveling"); State v. Nelson, 431 S.C. 287, 847 S.E.2d 480 (Ct. App. 2020) (holding court erred in refusing a continuance because a key defense witness was hospitalized).

Here, the judge refused to allow appellant to present relevant and probative evidence in the form of testimony from his severely mentally ill mother. Not only was the evidence relevant to and probative of the statutory mitigating circumstance of appellant's own mental illness, but it was relevant to and probative of the non-statutory mitigating circumstances of appellant's background and character as shown through his mother's abandonment and neglect. In his closing argument, defense counsel argued that the jury should spare appellant's life based upon the mitigating circumstances that "[h]e was born to a terribly sick and traumatized woman, who abandoned him when he was three years old as schizophrenia highjacked her brain." R. 5936, ll. 23-25. Yet, the jury never saw the most powerful evidence of Cynthia's schizophrenia or how it

stripped her of all emotion as she discussed the deaths of her own child and of her grandchildren because the judge suppressed the video of her testimony.

Despite the numerous opportunities available to the state to cross-examine Cynthia, the state never used a single one, but bemoaned, incorrectly, that presentation of the video would deny the state its right to cross-examine Cynthia. The judge's exclusion of the video improperly "limit[ed] the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the [death] penalty." See McKleskey v. Kemp, 481 U.S. 279, 306 (1987). This Court should reverse.

8.

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

Relevant Facts

Defense counsel Madsen told the judge that in twenty-two years of practicing criminal law, "hundreds of murder trials," that the autopsy photographs the state desired the jury to view in this case were "the worst I've ever seen. They're just absolutely horrific. They are nightmarish. It would certainly add an element into the trial that would inflame the heat of passion. I mean, I don't know how you can't look at those photographs and they not get you mad, not get you upset." R. 5127, ll. 19-25. Defense counsel also argued that introduction of the autopsy photographs was not necessary "to substantiate any material facts or conditions during the penalty phase," and counsel argued they were also inadmissible under a Rule 403, SCRE analysis. R. 5126, l. 21 – 5127, l. 16.

Counsel argued under Rule 403, SCRE that the photographs were going to elicit undue prejudice and sympathy, and that they were gratuitous. R. 5127, l. 19 – 5129, l. 23. Counsel told the judge that these photographs introduced an impermissible arbitrary factor into the penalty phase trial and that they should not be admitted. R. 5130, ll. 1-9.

The solicitor argued the photographs showed "his character, the work of his hands." The solicitor said, "Now, the fact he put them in bags and left them out in the hot sun, he did that

deliberately. That shows his character. He knew it would enhance and speed up decomp. All of that is relevant." R. 5130, l. 11 – 5133, l. 11.

The solicitor cited to State v. Kornahrens, 290 S.C. 281, 289, 350 S.E.2d 180, 185-86 (1986), in support of his position that the autopsy photographs were admissible. R. 5133, ll.13-15. In Kornahrens, this Court wrote, "We find no error in the admission in the sentencing phase of the photographs and slides. While not pleasant to look at, they show what *the defendant himself did to the bodies and nothing more*. The appearance of the bodies as the defendant left them has not been *altered by decomposition or by any other outside force*. While these photographs and slides most likely would have been inadmissible in the guilt phase, under the facts of this case, they were relevant in the sentencing phase to show the circumstances of the crime and the character of the defendant." State v. Kornahrens, 290 S.C. 281, 289, 350 S.E.2d 180, 186 (1996). (emphasis added).

The photographs and slides in Kornahrens were of the gravesite and of the bodies of the victims after they had been moved to the autopsy laboratory. Groups of the photographs reflected the gravesite as it appeared at various stages during recovery of the bodies. An autopsy photograph showed one victim's body lying on the table in the same condition in which it was found.

The solicitor also cited to State v. Collins, 409 S.C. 524, 763 S.E.2d 22 (2014), a dog mauling case in support of his argument that the autopsy photographs were admissible. The solicitor argued, "There were pre-autopsy photos of a child victim who was mauled by dogs. And they were relevant to the extent the injuries [and] served to corroborate the testimony." R. 5133, l. 17 - 5134, l. 1.

The solicitor maintained, "We're showing the condition of the bodies, how they are dressed, how they appear. And, Judge, frankly, if wildlife got to them because that man left them for wildlife to get to. He left them there to decompose. He left them there to rot and he left them for the wild. And that shows something about who he is. So our argument is he made them relevant." R. 5133, l. 23 – 5134, l. 12.

The judge then referred back to guilt phase discussions about the photographs. R. 5135, l. 13 – 5136, l. 23. During the guilt phase, prior to the testimony of pathologist Dr. Janice Ross, the autopsy photographs were discussed. The solicitor said he wanted to enter one photograph from the autopsy photographs of "the cut to Nahtahn's knee." R. 3198, l. 8 – 3200, l. 25. He identified the photograph as State's Exhibit #177 for identification, "It is a closeup shot." "Dr. Ross can testify as to the saw marks." The solicitor said the photograph was evidence of malice, and "highly probative of that continuing malice of all the kids that he attempted to cut or saw, the one we have evidence of that, clear evidence, was Nahtahn. So I think it's highly probative of malice I have to prove. Their argument is it was an accident. So that's my argument on 403." R. 3200, ll. 5-25. Defense counsel Young then told the judge if the court allowed the state to introduce State's Exhibit #177: "I think it would be upon us to put others in." R. 3201, ll. 12-15. The defense objected to State's Exhibit #177, but if the court admitted it, "In light of the Court's ruling, we would move – we intend to offer five pictures taken from the autopsies, one of each child, as they were photographed at the time of the autopsy." R. 3202, ll. 9-22.

The solicitor objected to the remaining photographs being entered into evidence, claiming he thought it would be reversible error. The solicitor argued that the defense was trying to diminish the shock value from the photographs by allowing them to be viewed earlier in the trial. R. 3202, l. 23 – 3204, l. 6.

Defense counsel stated that the photographs the defense would introduce showed appellant's mental illness for riding around for nine days in the car with rotting corpses. The solicitor responded, "[T]hey don't need the photos for that. Just riding around with rotting corpses in the testimony is fine." The solicitor argued the autopsy photographs were too prejudicial for that purpose. R. 3202, l. 23 – 3208, l. 20. The judge noted that the photographs were very graphic and that the penalty phase would be the proper time for the jury to view them. R. 3209, ll. 17-19. "I don't believe they're appropriate now." R. 3212, l. 24 – 3214, l. 5.

During the penalty stage, the solicitor maintained that the crime scene photographs showed the character and circumstances of the crime, and he argued that the autopsy photographs were also admissible for that purpose. R. 5146, ll. 17-21. The judge ruled that he found the photographs were admissible, pursuant to Rule 401, Rule 402, and Rule 403, SCRE. "Certainly, they're prejudicial. But weighing everything, those are allowed, this group." The judge noted the continuing defense objection to the autopsy photographs. R. 5146, l. 22 – 5147, l. 15.

Defense counsel again told the judge that the photographs were introducing an arbitrary factor into the case that was impermissible. R. 5147, l. 16 – 5155, l. 8. As a secondary position, the defense argued that the photographs should still be limited to only black and white photographs, rather than the color photographs of the autopsy. R. 5154, l. 17 – 5157, l. 19. The judge said that he would not alter his ruling that the color photographs of the autopsy were admissible. R. 5156, l. 13 – 5158, l. 15. "The color ones aren't any less graphic than the black and white ones. A couple of the black and whites almost look more graphic to me. Those are tough. But under the circumstances of the case, they're admissible." R. 5158, ll. 16-20.

During the penalty phase testimony of SLED agent Dave Lawrence, Lawrence testified that he went to Mississippi and Alabama after appellant was arrested at the roadblock in

Mississippi. R. 5178, l. 3 – 5185, l. 22. Lawrence testified about the recovery of the bodies in Alabama. Lawrence testified that the bags containing the bodies of the victims were opened at his direction. R. 5192, l. 3 – 5193, l. 21. When the solicitor published photographs of Nahtahn, State's Exhibit #211, #211A-211D, a juror began crying and the solicitor asked the court to take a break. The jury was then excused. R. 5198, l. 19 – 5199, l. 7. Defense counsel moved for a mistrial, noting the emotional impact of the photograph was exactly what the defense expected to happen. R. 5199, ll. 12-20. The solicitor responded that the crying juror was an alternate, and he contended she was not "sobbing uncontrollably." R. 5199, l. 9 – 5200, l. 8. The judge also observed that the crying juror was an alternate, and he ruled a mistrial was not a manifest necessity. The judge did not disagree with the defense that "she had to be helped from the courtroom," and he asked a member of the SLED detail to check on the juror. R. 5200, l. 9 – 5201, l. 11. The judge later spoke with SLED agent Remion, who ultimately reported that the juror could go on with the trial. R. 5204, l. 20 – 5205, l. 23.

The solicitor then stated his plan for the autopsy photographs was not to publish them in open court. He said the jury could look at them "as they see fit." He claimed: "But I will not publish [the autopsy photographs] out of respect for the jury." R. 5202, ll. 15-25.

Defense counsel Young then told the judge that the autopsy photographs were "a hundred times worse than anything they have seen so far" and that the state did not want to publish them because it knew of the emotional reactions of the jurors that would occur. R. 5203, l. 7 – 5204, l. 6. The state wanted the emotional impact from the autopsy photographs to achieve a death sentence on an improper basis. R. 5204, ll. 4-6. The judge stated the photographs were emotional, but he denied the mistrial motion based on the crime scene recovery photographs. R. 5204, ll. 7-19.

During the testimony of pathologist Janice Ross, the autopsy photographs of the five children were admitted, all over objection. As to Elias, the state introduced State's Exhibit #212A, #212B, and #212C. Dr. Ross confirmed she photographed the condition of the body and that there was "animal activity" on "one of the limbs, I think it was the arm, had some tissue lost." She also identified "a logo for the elementary school Saxe Gotha." R. 5222, l. 5 – 5223, l. 24. All of the autopsy photographs are on file with this Court for viewing. State's Exhibit #212A showed the body wrapped in a black garbage bag, with tan outer clothing. State's Exhibit #212B showed the exposed body in Saxe Gotha elementary school garb. State's #212C was a horrific view of the victim's body with tissue eaten away, laying on an open garbage bag. The blackened face, exposed skull, and the appearance of a missing ear are especially horrific in the photograph.

As to Merah, the state introduced State's Exhibits #213, #213A, and #213B over objection. R. 5224, l. 3 – 5225, l. 6. Both photographs of the victim are horrific. The child's head is bent in a bizarre fashion with her mouth open and teeth showing in photograph #213A. Photograph #213B shows the nude body in a "sleeping bag" with its decomposition "and animal activity as to her left arm and the missing arm." R. 5224, ll. 15-21.

As to Gabriel, the state introduced State's Exhibits #214, #214A, #214B, #214C, #214D, #215E, and #214G over objection. R. 5225, l. 7 – 5226, l. 24. "He is face down with his knees underneath him, but the right leg we noted had been disarticulated at the knee, so the foot was coming the opposite direct as normal." A girl's slipper was in the bag although Gabriel was a boy, as well as a diaper. R. 5225, l. 7 – 5226, l. 24.

As to Abigail, the state introduced State's Exhibits #215A and #215B over objection. R. 5227, l. 1 – 5228, l. 1. Dr. Ross testified that the child was "wrapped in a couple of sheets" and

that she unwrapped the child to show her in photograph #215B, which was a horrific photograph of the nude, discolored child laying on sheets in the photograph. R. 5227, l. 23 – 5228, l. 1.

The state also introduced the autopsy photographs of Nahtahn, which were State's Exhibits #216, #216A, #216B, and #216C. Dr. Ross only noted an injury to the elbow. R. 5228, ll. 19-20. Photograph #216B showed the nude body of the child victim which was very discolored. It had different shades of grey and black, and part of the face looked to have been removed. Photograph #216C was a horrific exposed injury on the victim, which was sickening to look at for even very experienced death penalty counsel.

Again, the photographs were all introduced over objection but were not shown to the jury at the time they were introduced.

Closing Argument

During the solicitor's closing argument, he repeatedly referred to the autopsy photographs. The solicitor told the jurors:

> Dad, the man who murdered them. So who is he? What does he merit? What's the appropriate sentence? Well, I'm going to tell you, folks, if you want to know what he thought of Merah, you're going to need to **look in bag** two just like those officers did. You haven't seen these photos. You got a glimpse in the body recovery photos, but when you see these photos, you'll know the condition he left these children in. He left them for the wild. He left them to rot. He abandoned his children after he murdered them. You want to know what he thought of Merah, **open the bag**. Do what Dave Lawrence and those officers did, **open the bag**. If you want to know what he did to bag one, Elias. This child was found with his Saxe Gotha shirt, the power of One. Look, **open the bag**. If you have any doubt, *any doubt about the appropriate sentence for that man,* **look in the bag**. Gabriel, that little boy crammed in a bag, crammed in a bag. Look if you have *any doubt what's appropriate*, what fits this crime. And Abigail, why? **Look, look in the bag**. Look what he did to that little child. And, please, folks, don't forget Nahtahn, who's crammed in a bag with Ninja Turtle bedding, crammed in that bag. And you're going to notice something, both Nahtahn and Merah, no clothes. There's nothing

> sexual here, but it's his dad's hatred. Who was he going to chop up first? Nahtahn. He was going to chop them up. It's not because he had a change of heart. You don't buy a saw that you use to cut sheetrock to cut bodies up with, that's why. And muriatic acid won't eat up a body, but you'll find that bottle's empty. But two people are stripped down, I want to tell you, it's to be destroyed, so he can destroy them. *But you have any doubt*, **look in the bags**. If you have any doubt about what is appropriate, what this monstrous crime deserves, if you have any inkling that there might be a doubt in your mind and your heart, just **look in these bags and you'll find the answer.**

R. 5915, l. 23 – 5917, l. 8 (emphasis added).

Standard of Review

Relevance, materiality, and admissibility of photographs are matters within the sound discretion of the trial court, and a ruling will be disturbed only upon showing of an abuse of discretion. State v. Torres, 390 S.C. 618, 623, 703 S.E.2d 226, 228 (2010); State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996), *cert denied*, 520 U.S. 1200 (1997). The purpose of the sentencing phase in a capital trial is to "direct the jury's attention to the specific circumstances of the crime and the characteristics of the offender." State v. Matthews, 296 S.C. 379, 390, 373 S.E.2d 587, 594 (1988), *cert denied*, 489 U.S. 1091 (1989).

Discussion

In State v. Johnson, 338 S.C. 114, 525 S.E.2d 519 (2000), this Court noted that, notwithstanding the sometimes gory nature of autopsy photographs, they are nonetheless admissible where they reveal the true nature of the attack and allow the jury to determine the existence of physical torture. State v. Johnson, 338 S.C. 114, 129-130, 525 S.E.2d 519, 527 (2000).

It was undisputed in this case that the gory nature of the photographs was not admissible to reveal the true nature of any attack by appellant, and there was no allegation of physical

torture. As seen, there was also very little description to almost none from Dr. Ross regarding the conditions of bodies and the autopsy findings. The photographs that are on file with this Court and as argued above were horrific, and the solicitor admitted the bodies had been altered by animal activity, attacks, and other forces of nature – bugs. It cannot be simply said that, "while not pleasant to look at, the bodies were in the condition the defendant left them."

Further, there should respectfully be no doubt, given the solicitor's closing arguments, that the photographs were meant to acquire a death sentence on the basis of emotion, passion, and prejudice. That was impermissible. In State v. Haselden, 353 S.C. 190, 577 S.E.2d 445 (2003), this Court found no legitimate purpose for the admission of a photograph of the decedent child's dilated anus. The court noted that it was not uncommon for the anus to relax and open post-mortem. The photograph was therefore impermissibly introduced to insinuate sexual abuse, and it should not have been admitted since its extremely prejudicial nature outweighed its probative value.

The solicitor's "look in the bag" closing argument in this case left no doubt that the photographs from the autopsy constituted undue prejudice. They suggested a decision between life and death on an improper basis, an emotional one. See State v. Franklin, 318 S.C. 47, 55, 456 S.E.2d 357, 361 (1995).

The defense correctly argued that the photographs were inadmissible under Rule 403, SCRE and that they constituted an arbitrary factor. The autopsy photographs in this case were an impermissible, arbitrary factor, forbidden under the Eighth Amendment to the United States Constitution, and pursuant to this Court's duty under S.C. Code § 16-3-25 (C)(1) to ensure that the sentence of death was not imposed under the influence of passion, prejudice, or other arbitrary factors.

CONCLUSION

By reason of arguments 1, 2, 3, and 4, appellant's convictions should be reversed, and this case remanded to the Lexington County Court of General Sessions for a new trial.

By reason of arguments 5, 6, 7, and 8, appellant's death sentence should be vacated, and this case remanded to the Lexington County Court of General Sessions for a new sentencing trial.

This 19th day of August, 2021

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S.C. SUPREME COURT

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

August 19, 2021

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