ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Berkeley County

R. Markley Dennis, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JESSIE WAYLON SAPP,

APPELLANT

FINAL BRIEF OF APPELLANT

JOSEPH L. SAVITZ, III
Acting Chief Attorney

South Carolina Office
of Appellate Defense
1205 Pendleton Street, Room 306
Columbia, S. C. 29201
(803) 734-1330

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE 2

ARGUMENT

1. The judge erred by excusing potential juror Kathleen McNair for cause, since her religious beliefs regarding capital punishment would not have prevented nor substantially impaired the performance of her duties as a juror in accordance with her instructions and her oath 4

2. The judge erred by allowing the solicitor to argue at the start of the sentencing phase that Sapp had shown "[n]o sorrow" after the jury found him guilty of murder 10

3. The judge erred by forbidding Sapp's girlfriend, who was called as a State's witness at sentencing, to testify that she did not want to see Sapp "put to death" 13

4. The judge erred by failing to obtain a waiver of, or instruct the jury on, the statutory mitigator provided by S.C. Code §16–3–20 (C)(b)(8): "The defendant was provoked by the victim into committing the murder" 16

5. The lower court was without subject–matter jurisdiction to sentence Sapp to death, since the indictment charging him with murder did not contain the two statutory aggravating circumstances upon which the State relied in seeking the death penalty 18

CONCLUSION 20

TABLE OF AUTHORITIES

CASES

Adams v. Texas, 448 U.S. 38 (1980) 7

Apprendi v. New Jersey, 530 U.S. 466 (2000) 19

Browning v. State, 320 S.C. 366, 165 S.E.2d 358 (1995) 19

Childs v. State, 257 Ga. 243, 357 S.E.2d 48 (1987) 14

Darden v. Wainwright, 477 U.S. 168 (1986) 8

Gardner v. Florida, 430 U.S. 349 (1977) 15

Gray v. Mississippi, 481 U.S. 648 (1987) 8

Lockhart v. McCree, 476 U.S. 162 (1986) 7

Ring v. Arizona, 536 U.S. 584 (2002) 19

State v. Arther, 290 S.C. 291, 350 S.E.2d 187 (1986) 10

State v. Bennett, 328 S.C. 251, 493 S.E.2d 845 (1997) 7

State v. Bowers, 65 S.C. 207, 43 S.E. 656 (1903) 19

State v. Brown, 289 S.C. 581, 347 S.E.2d 882 (1986) 10, 11

State v. Butler, 277 S.C. 452, 290 S.E.2d (1982) 19

State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1990) 17

State v. Cockerham, 294 S.C. 380, 365 S.E.2d 22 (1988) 11

State v. Davis, 309 S.C. 326, 422 S.E.2d 133 (1992) 7

State v. Elmore, 286 S.C. 70, 332 S.E.2d 762 (1985) 9

State v. Fortin, 178 N.J. 540, 843 A.2d 974 (2004) 19

State v. Hawkins, 292 S.C. 418, 357 S.E.2d 10 (1987) 11

State v. Hicks, 330 S.C. 207, 499 S.E.2d 209 (1998) 10

State v. Hughey, 339 S.C. 439, 529 S.E.2d 721 (2000) 17

State v. Johnson, 293 S.C. 321, 360 S.E.2d 317 (1987) 11, 15

State v. Johnson, 338 S.C. 114, 525 S.E.2d 519 (2000) 14

State v. McClure, 342 S.C. 403, 537 S.E.2d 273 (2000) 11

State v. Patrick, 289 S.C. 301, 345 S.E.2d 481 (1986) 10

State v. Sloan, 278 S.C. 435, 298 S.E.2d 92 (1982) 10, 11, 12

State v. Southerland, 316 S.C. 377, 447 S.E.2d 862 (1994) 16

State v. Truesdale, 278 S.C. 368, 296 S.E.2d 528 (1982) 12

State v. Victor, 300 S.C. 220, 387 S.E.2d 248 (1989) 17

State v. Wilkes, 353 S.C. 462, 578 S.E.2d 717 (2003) 19

State v. Wise, 359 S.C. 14, 596 S.E.2d 475 (2004) 15

United States v. Jackson, 327 F.2d 273 (4th Cir. 2003) 9

United States v. Tipton, 90 F.3d 861 (4th Cir. 1996) 9

Wainwright v. Witt, 469 S.C. 412 (1985) 7, 8

Witherspoon v. Illinois, 391 U.S. 510 (1968) 7, 8

STATUTES

S.C. Code Section 16–3–10 19

S.C. Code Section 16-3-20 12

S.C. Code Section 17–19–20 18

S.C. Code Section 17–19–30 18

CONSTITUTIONAL PROVISIONS

Article I, Section 11, South Carolina Constitution 18

United States Constitution, Fourteenth Amendment 7

United States Constitution, Sixth Amendment 7

STATEMENT OF ISSUES ON APPEAL

1. The judge erred by excusing potential juror Kathleen McNair for cause, since her religious beliefs regarding capital punishment would not have prevented nor substantially impaired the performance of her duties as a juror in accordance with her instructions and her oath.

2. The judge erred by allowing the solicitor to argue at the start of the sentencing phase that Sapp had shown "[n]o sorrow" after the jury found him guilty of murder.

3. The judge erred by forbidding Sapp's girlfriend, who was called as a State's witness at sentencing, to testify that she did not want to see Sapp "put to death."

4. The judge erred by failing to obtain a waiver of, or instruct the jury on, the statutory mitigator provided by S.C. Code §16–3–20 (C)(b)(8): "The defendant was provoked by the victim into committing the murder."

5. The lower court was without subject–matter jurisdiction to sentence Sapp to death, since the indictment charging him with murder did not contain the two statutory aggravating circumstances upon which the State relied in seeking the death penalty.

STATEMENT OF THE CASE

On April 9, 2003, a Berkeley County grand jury indicted Jessie Waylon Sapp for the murder of Highway Patrol Trooper Kenneth J. Johnson. The State's evidence indicated that Sapp shot Johnson once in the abdomen as Johnson approached the stolen vehicle in which Sapp was a passenger. He had in his possession a substantial amount of controlled substances and was also on escape. Sapp himself was severely wounded by Johnson's fellow officers as he attempted to flee the scene on foot. In addition to murder, the State also indicted Sapp for several drug offenses and unlawful possession of a pistol.

The solicitor elected to seek the death penalty, relying on two statutory aggravating circumstances:

> (1) The offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person; and
>
> (2) The murder of a federal, state, or local law enforcement officer or former federal, state, or local law enforcement officer, peace officer or former peace officer, corrections officer or former corrections officer, including a county or municipal corrections officer or a former county or municipal corrections officer, a county or municipal detention facility employee or former county detention facility employee, or fireman or former fireman during or because of the performance of his official duties.

S.C. Code §16–3–20 (C)(a)(3) and (7). Judge R. Markeley Dennis, Jr., presided at Sapp's jury trial May 9 through 17, 2003. The State contended that Sapp had murdered Trooper Johnson because he did not want to return to jail. The defense suggested that Johnson had been killed by a bullet from another trooper's gun, but introduced no evidence during the guilt phase. The jury found Sapp guilty as charged.

At sentencing, the defense relied on four statutory mitigators:

> (1) The defendant has no significant history of prior criminal conviction involving the use of violence against another person;
>
> (2) The murder was committed while the defendant was under the influence of mental or emotional disturbance;
>
> (3) The capacity of defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and
>
> (4) The age or mentality of the defendant at the time of the crime.

Section 16–3–20 (C)(b)(1), (2), (6) and (7). There was evidence Sapp was intoxicated from a combination of drugs and alcohol at the time of the incident. The jury recommended death, and the judge sentenced Sapp accordingly.

ARGUMENT

I.

The judge erred by excusing potential juror Kathleen McNair for cause, since her religious beliefs regarding capital punishment would not have prevented nor substantially impaired the performance of her duties as a juror in accordance with her instructions and her oath.

The twelfth potential juror was Kathleen McNair, a black female. ROA p. 566, lines 17 & 18. She stated, "I don't believe in the death penalty because of my religion." ROA p. 568, lines 18–20. The judge then questioned her as follows:

> Q. But the law of South Carolina would be, and I would instruct you, that the death penalty may be warranted in some cases.
>
> A. I understand . . .
>
> Q. But you're saying, as a juror, you couldn't consider that law?
>
> A. No, I couldn't just because of my belief. That's all.
>
> Q. Your belief would prevent you?
>
> A. It is my religion, that's it. But otherwise, you know, . . . it should be that way. But to me, I can't.
>
> Q. You could never do that?
>
> A. I can't decide on that because of my religion.

ROA p. 569, lines 1–17. The solicitor next asked:

> Q. The beliefs that you hold are strongly held, is that correct?
>
> A. It is.

Q. Okay. And it would do a disservice to you to ask you to go against those beliefs, would it not?

A. Well, I think so because of my deep roots, religion from childhood . . . I was taught even as a child, you know, that we shouldn't take someone's life because we cannot make life and we should not take it. And it was like that in our household and always has been so . . .

Q. Would it then be impossible, if you sat on a jury, for you to consider the death penalty based on your beliefs? And let me take it one step further: if you are sitting on a jury with the other eleven jurors and they all said the death penalty and you sort of believed, well, maybe the death penalty if it ever is appropriate might be appropriate here, could you sign your name on the death penalty verdict saying, "I'm calling for the death of the defendant?"

A. Oh, this is hard.

Q. You are not required to.

A. I probably will. But because of my beliefs – – what I'm telling you, I probably would because of the type of crime.

Q. You are saying you probably would call for the death penalty if you thought it was appropriate?

A. Yes, because of the crime.

Q. Okay. So, depending on the circumstances of the crime, you would set aside your religion?

A. Oh – –

Q. Again, we're not trying to put you in a position you can't be in.

A. I understand . . .

Q. So, that's why we ask you up front. So tell me about it again, just tell me what your feelings are about the death penalty.

A. If I put my religion aside, if it wasn't my religion, I believe in it, I will go for the death penalty.

Q. Yes, ma'am. But do you understand you don't have to put your religion aside?

A. I understand. . .

Q. Now, knowing you do not have to put your religion aside, would that put you in a position that you couldn't deal with being on the jury and having to determine the death penalty?

A. I could deal with it. I know I can deal with it because I believe in God. So, I could deal with it.

Q. Could you do it if you thought it were appropriate? Could you return a death penalty verdict and sign your name on a death penalty warrant?

A. If it was appropriate, yes . . .

Q. What religion are you?

A. I'm a Methodist.

Q. And what is the teaching of that religion regarding the death penalty?

A. "Thou shalt not kill."

Q. Would that affect your ability to deliberate on a jury?

ROA p. 570, line 2 – p. 573, line 12. At this point, defense counsel objected and McNair began sobbing. ROA p. 573, lines 13–23. The defense did not question her. ROA p. 574, lines 11 & 12.

The solicitor asked the judge to remove McNair for cause. Specifically, he felt that her religious beliefs would substantially impair her ability to sit on a death penalty case. ROA p. 574, line 25 – p. 575, line 9. Defense counsel disagreed. ROA p. 575, lines 11–16;

ROA p. 577, lines 11–17. The judge granted the State's motion, based on McNair's answers and demeanor. ROA p. 576, line 15 – p. 577, line 10. Accordingly, he excused her from further service. ROA p. 577, line 19 – p. 578, line 2.

In Witherspoon v. Illinois, 391 U.S. 510 (1968), the United States Supreme Court held that a state infringes a capital defendant's right under the Sixth and Fourteenth Amendments to trial by an impartial jury when it excuses for cause all those members of the venire who express conscientious objections to capital punishment. In Wainwright v. Witt, 469 S.C. 412 (1985), the Court modified Witherspoon and held that "the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment . . . is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instruction and his oath'." 469 U.S. at 424, quoting Adams v. Texas, 448 U.S. 38, 45 (1980). See, also, State v. Bennett, 328 S.C. 251, 493 S.E.2d 845 (1997), and State v. Davis, 309 S.C. 326, 422 S.E.2d 133 (1992).

This standard does not require that a juror's bias be proved with "unmistakable clarity." Id. However:

> It is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law.

Lockhart v. McCree, 476 U.S. 162, 176 (1986). Moreover:

> The state's power to exclude for cause jurors from capital juries does not extend beyond its interest in removing those jurors who would "frustrate the state's legitimate interest in administering constitutional capital sentencing schemes by

not following their oath."

Gray v. Mississippi, 481 U.S. 648, 658 (1987), quoting Wainwright v. Witt, 469 U.S. at 423. Exclusions for cause which violate the Witherspoon–Witt standard cannot be harmless error. Id.

In Wainwright v. Witt, the Court held that a prospective juror was properly excused for cause when she answered the prosecutor's questions as follows:

> Q. Do you have any religious beliefs or personal beliefs against the death penalty?
>
> . . .
>
> A. I am afraid of being a little personal, but definitely not religious.
>
> Q. Now, would that interfere with you sitting as a juror in this case?
>
> A. I am afraid it would...
>
> Q. Would it interfere with judging the guilt or innocence of the defendant in this case?
>
> A. I think so.
>
> Q. You think it would?
>
> A. I think it would.

469 U.S. at 415–16. In Darden v. Wainwright, 477 U.S. 168, 178 (1986), a prospective juror responded affirmatively when asked by the judge, "Do you have any moral or religious, conscientious moral or religious principles in opposition to the death penalty so strong that you would be unable without violating your own principles to vote recommend a death penalty regardless of the facts?" The Supreme Court observed, "The precise wording of the question asked of [the juror], and the answer he gave, do not by themselves compel

the conclusion that he could not under any circumstance recommend the death penalty." Id. The same holds true here.

The fact that McNair believed her religion was opposed to the death penalty is, in the final analysis, irrelevant. The real issue is whether she was willing to temporarily set aside that belief in deference to the rule of law. (In this regard, the solicitor's statement to McNair that "You don't have to put your religion aside" is both misleading and wrong.) McNair plainly stated that she could set aside her religious beliefs and sentence someone to death "[i]f it was appropriate." Compare State v. Elmore, 286 S.C. 70, 332 S.E.2d 762, 763 (1985) (juror "repeatedly stated she was opposed to the death penalty" and "never stated she could, in fact, impose the death penalty"); United States v. Jackson, 327 F.2d 273, 295 (4th Cir. 2003) (juror gave "ambiguous answers to questions about his beliefs on the death penalty"); and United States v. Tipton, 90 F.3d 861, 880 (4th Cir. 1996) (Prospective jurors "each expressed reservations, never retracted, sufficient to warrant the... determination that they would substantially impair the juror's performance of duty to vote for the death penalty *if the evidence and law so dictated*").

Accordingly, the judge erred by excusing McNair for cause. Since the error cannot have been harmless, the Court should reverse Sapp's death sentence and remand for resentencing.

II.

The judge erred by allowing the solicitor to argue at the start of the sentencing phase that Sapp had shown "[n]o sorrow" after the jury found him guilty of murder.

Sapp began crying when the jury found him guilty of Trooper Johnson's murder. ROA p. 1606, lines 23 & 24. In his opening argument at sentencing, the solicitor pounced:

> Ladies and gentlemen, there are all types of tears in the world. Tears of compassion; there are tears of sorrow and there are tears of self-pity. I submit to you the ones you saw were self-pity. "Why me? Why does this have to happen to me?" No sorrow, that's what that was.

ROA p. 606, line 24 – p. 607, line 4. Defense counsel did not object to this argument. Nevertheless, it is clearly improper for a solicitor to argue at sentencing that a capital defendant has failed to demonstrate remorse during the guilt phase.

Since the death penalty was reinstated in 1977, this Court has held - consistently and unequivocally - that the State may not seek a death sentence by arguing that the defendant has not apologized for his crimes or otherwise expressed remorse. Every capital defendant has a right to "put the State to its proof." State v. Brown, 289 S.C. 581, 347 S.E.2d 882, 887 (1986). A defendant has no burden of proof at sentencing. State v. Patrick, 289 S.C. 301, 345 S.E.2d 481 (1986). The State always carries "the overall burden of proof." State v. Hicks, 330 S.C. 207, 499 S.E.2d 209, 215 (1998).

In State v. Sloan, 278 S.C. 435, 298 S.E.2d 92, 95 (1982), the solicitor asked the jury, "Has anyone said to you he's sorry, sorry for what he did?" In State v. Arther, 290 S.C. 291, 350 S.E.2d 187, 191 (1986), the solicitor stated:

> Remorse. You've heard the evidence. You know what happened. Remorse. Did he say, "I'm sorry, I didn't mean to do it. I didn't appreciate the criminality of my conduct at the

time."... Have you heard that from him?

In State v. Hawkins, 292 S.C. 418, 357 S.E.2d 10, 13 (1987), the State argued, "I ask you to consider all of the evidence. You have seen no remorse."

In State v. Johnson, 293 S.C. 321, 360 S.E.2d 317, 319 (1987), the solicitor asked, "Don't you think he ought to apologize?" In State v. Cockerham, 294 S.C. 380, 365 S.E.2d 22, 23 (1988), the State argued, "[D]oes he look sorry to you?... Have you seen any remorse?" In Diddlemeyer, 371 S.E.2d at 795, the solicitor stated:

> When would [the death penalty] be appropriate if not in this case? He knew what he was doing. Planned, schemed and designed to do it and never, ever, after having done it showed remorse.

See, also, State v. McClure, 342 S.C. 403, 537 S.E.2d 273 (2000), and State v. Brown, 289 S.C. 581, 347 S.E.2d 882 (1986). The Court reversed the death sentences in each of these cases, observing on several occasions that, as far as trial errors are concerned, such arguments are "especially egregious." See for example State v. Hawkins, 357 S.E.2d at 13, and State v. Sloan, 298 S.E.2d at 95.

In short, the State cannot argue lack of remorse as a reason to impose the death penalty, particularly where the accused does not testify. "[R]emorse is not an appropriate matter for consideration by the jury when a defendant pleads not guilty and does not testify." State v. Hawkins, 357 S.E.2d at 13. In State v. Johnson, 360 S.E.2d at 319, the Court explained, "Comments by the prosecution upon an accused's failure to express remorse invite the jury to draw an adverse inference merely because the defendant did not appear penitent." This argument is particularly unfair in South Carolina, "where a defendant must plead not guilty to have his sentence determined by a jury." State v.

Sloan, 298 S.E.2d at 95 (emphasis in original), citing S.C. Code Section 16-3-20 (B); see also State v. Truesdale, 278 S.C. 368, 296 S.E.2d 528 (1982).

Since the solicitor expressly argued that Sapp's purported failure to display "sorrow" for his crimes during the guilt phase justified a death sentence, the Court should reverse that sentence and remand for resentencing.

III.

The judge erred by forbidding Sapp's girlfriend, who was called as a State's witness at sentencing, to testify that she did not want to see Sapp "put to death."

The driver of the vehicle in which Sapp was a passenger the night Trooper Johnson was killed was Sapp's girlfriend, Kathryn Boles, who worked as a stripper in Columbia. ROA p. 1690, lines 6 & 7. Sapp had met Boles several years earlier, when she worked for an escort service. ROA p. 1701, lines 4–14. Boles was a State's witness during the sentencing phase of Sapp's trial. She was then in rehab for drug and alcohol addiction. ROA p. 1689, lines 11–21.

At the time of the incident, Boles testified, Sapp "didn't have a job" and made his money as "a drug dealer." ROA p. 1692, lines 6–10. Her opportunity to view the shooting itself was somewhat limited, since she was on the other side of the truck talking to another trooper. ROA p. 1696, line 8 – p. 1698, line 22. The real reason the State called Boles as a witness was presumably to depict Sapp's poor character. She testified that he had previously been arrested with five pounds of marijuana. ROA p. 1704, line 9 – p. 1705, line 13. Boles also related two separate incidents where Sapp had pulled guns on other men who were interested in her. ROA p. 1706, line 15 – p. 1711, line 25.

The following exchange occurred during the cross–examination of Boles:

> DEFENSE COUNSEL: Do you think Jesse was in love with you?
>
> BOLES: Yes, I do.
>
> Q. Were you in love with Jesse?
>
> A. No, I was not.

> Q. But you did like him, obviously. You hung around with him.
>
> A. I love him, but I do not want to be with him.
>
> Q. Okay. Would you like to see Jesse put to death?
>
> SOLICITOR: That's inappropriate, you honor.
>
> THE COURT: Sustained. Don't answer the question. That's an inappropriate question.

ROA p. 1716, lines 4–16. Defense counsel asked Boles no further questions. ROA p. 1716, line 17.

In State v. Matthews, 296 S.C. 379, 373 S.E.2d 587, 595 (1988), the Court held that the trial judge had properly prohibited defense counsel "from asking members of [the defendant's] family which sentence they thought [he] should receive," because this line of questioning "went to the ultimate issue to be decided by the jury – life imprisonment versus the death penalty – and was properly reserved for jury determination." [Emphasis in original.] In State v. Torrence, 305 S.C. 45, 406 S.E.2d 315, 318 (1991), the Court distinguished Matthews and adopted the Georgia Supreme Court's distinction between a plea for mercy and an opinion on the ultimate question to be decided by the jury:

> [A]lthough a defendant may present witnesses who know and care for him and are willing on that basis to ask for mercy on his behalf, a defendant may not present witnesses to testify merely to their religious or philosophical attitudes about the death penalty… Nor is a defendant entitled to present the opinion of a witness about what verdict the jury "ought" to reach.

Childs v. State, 257 Ga. 243, 357 S.E.2d 48, 60 (1987) (citation omitted). In State v. Johnson, 338 S.C. 114, 525 S.E.2d 519, 524 (2000), the Court held that it was error for

the judge to prohibit defense counsel from asking the defendant's sister "whether she wanted [him] to die."

In State v. Wise, 359 S.C. 14, 596 S.E.2d 475, 481–2 (2004), the Court recently summarized the law relating to this issue:

> [A] capital defendant may present witnesses who know and care for him, and who are willing on that basis to plead with the jury for mercy on his behalf. Thus, a close relative of a defendant, such as his mother, may make a general plea for mercy for the life of her son. [Citation omitted.] A close relative of defendant, such as his sister, may be asked whether she wants the defendant to die, which is akin to asking her to make a general plea for mercy and not explicitly directed toward eliciting her opinion of what verdict the jury should reach. [Citation omitted.]

Boles had known Sapp for approximately six years at the time of his trial and had been his girlfriend for much of that period. Compare State v. Wise. The question she was asked by defense counsel – "Would you like to see Jessie put to death?" – is indistinguishable from the type of question approved by the Court in Johnson and Wise.

Moreover, evidence that Boles did not want Sapp to die was admissible to rebut the balance of her testimony, which the State elicited in aggravation of punishment. Due process prohibits a defendant from being sentenced to death "on the basis of information which he had no opportunity to deny or explain." Gardner v. Florida, 430 U.S. 349, 362 (1977).

For these reasons, the Court should reverse Sapp's death sentence and remand for resentencing.

IV.

<u>The judge erred by failing to obtain a waiver of, or instruct the jury on, the statutory mitigator provided by S.C. Code §16–3–20 (C)(b)(8): "The defendant was provoked by the victim into committing the murder."</u>

The State's primary eyewitnesses testified during the guilt phase, "I saw the trooper walk around to the passenger's side of the truck and . . . I don't know if he opened the door or if the passenger [Sapp] opened the door. When the passenger stepped out of the truck, he pulled his gun and shot before his feet even hit the ground." ROA p. 1159, line 22 – p. 1160, line 3. At the sentencing phase, a SLED agent who had interrogated Sapp testified that "Sapp stated . . . that he saw the trooper come up with his gun out and that he, Mr. Sapp, pulled out his gun and shot and the trooper shot." ROA p. 1654, line 2 – p. 1657, line 15.

Taken together, this testimony was evidence that the victim had opened the passenger's door with his gun drawn, even though Sapp had not, by all appearances, committed any criminal offense. At most, at that point Trooper Johnson may have suspected that, like Kathryn Boles, Sapp had an open container of alcohol. ROA p. 1085, line 9 – p. 1087, line 3.

S.C. Code §16–3–20 (C)(b)(8) provides, as a mitigating circumstance, that "[t]he defendant was provoked by the victim into committing the murder." This mitigator does not appear to have been interpreted by the Court. Obviously, it is not coextensive with voluntary manslaughter, given the prohibition against arguing residual doubt at sentencing. See <u>State v. Southerland</u>, 316 S.C. 377, 447 S.E.2d 862 (1994).

In State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816, 823 (1990), the Court held, "The trial judge has a duty to review all statutory mitigating circumstances and instruct the jury as to any which may be supported by the evidence and not merely those requested by the defendant." The Court later adopted the following procedure in State v. Victor, 300 S.C. 220, 387 S.E.2d 248, 250 (1989):

> Once the trial judge has made an initial determination of which statutory mitigating circumstances are supported by the evidence, the defendant shall be given an opportunity on the record: (1) to waive the submission of those he does not wish considered by the jury; and (2) to request any additional mitigating statutory circumstances supported by the evidence that he wishes submitted to the jury.

See, also, State v. Hughey, 339 S.C. 439, 529 S.E.2d 721 (2000).

The judge erred by failing to obtain a waiver of, or instruct the jury on, the "provocation" mitigator provided by Section 16–3–20(c)(b)(8). For this reason, the Court should reverse Sapp's death sentence and remand for resentencing.

V.

The lower court was without subject–matter jurisdiction to sentence Sapp to death, since the indictment charging him with murder did not contain the two statutory aggravating circumstances upon which the State relied in seeking the death penalty.

The body of the indictment charging Sapp with murder reads as follows:

> Jessie W. Sapp did in Berkeley County on or about the 7th day of July, 2002 feloniously, willfully and unlawfully of his malice aforethought, kill and murder South Carolina Highway Patrol Trooper Kenneth J. Johnson by means of a gunshot wound and... Trooper Johnson did die in Berkeley County or Charleston County as a proximate result of that gunshot wound on or about the 7th day of July, 2002. This action being in violation of Section 16–3–10, South Carolina Code of Laws (1976), as amended.

ROA p. *. The indictment alleges neither of the two aggravating circumstances upon which the State relied to obtain a death sentence.

Article I, Section 11, of the South Carolina Constitution provides in relevant part:

> No person may be held to answer for any crime [such as murder]... unless on a presentment or indictment of a grand jury of the county where the crime has been committed...

S.C. Code Section 17–19–20 states:

> Every indictment shall be deemed and judged sufficient and good in law which, in addition to allegations as to time and place, as required by law, charges the crime substantially in the language of the common law or of the statute prohibiting the crime or so plainly that the nature of the offense charge may be easily understood and, if the offense be a statutory offense, that the offense be alleged to be contrary to the statute in such case made and provided.

Section 17–19–30 adds:

> Every indictment for murder shall be deemed and judged sufficient and good in law which, in addition to setting forth

> the time and place, together with a plain statement, divested of all useless phraseology, of the manner in which the death of the deceased was caused, charges that the defendant did feloniously, willfully and of his malice aforethought kill and murder the deceased.

An indictment must contain the necessary elements of the offense intended to be charged. State v. Wilkes, 353 S.C. 462, 578 S.E.2d 717 (2003); Browning v. State, 320 S.C. 366, 165 S.E.2d 358 (1995).

Although the crime of "murder" is defined in Section 16–3–10, it remains a common–law offense in South Carolina. State v. Bowers, 65 S.C. 207, 43 S.E. 656 (1903). Punishment for murder – particularly capital punishment – is a legislative creation. S.C. Code Section 16–3–20.

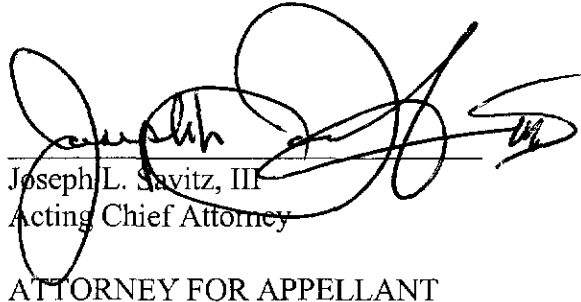
Under Ring v. Arizona, 536 U.S. 584 (2002), capital murder in South Carolina now consists of common–law murder plus at least one statutory aggravating circumstance. (State v. Butler, 277 S.C. 452, 290 S.E.2d (1982), is no longer viable.) In other words, an aggravating circumstance is now one of the elements of capital murder. "Ring… fundamentally altered the constitutional significance of aggravating factors that expose a defendant to the death penalty." State v. Fortin, 178 N.J. 540, 843 A.2d 974, 1033 (2004). Under Ring and Apprendi v. New Jersey, 530 U.S. 466 (2000), the lower court was without jurisdiction to sentence Sapp to death, since the indictment charging him with murder did not contain the two statutory aggravators upon which the State relied in seeking the death penalty.

For this reason, the Court should vacate Sapp's death sentence and remand for non–capital resentencing.

CONCLUSION

Based on the foregoing arguments, Jessie Waylon Sapp asks the Court to reverse his death sentence and remand for resentencing.

Respectfully submitted,



Joseph L. Savitz, III
Acting Chief Attorney

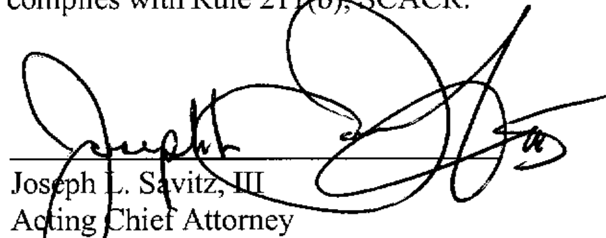
ATTORNEY FOR APPELLANT

May 19, 2005

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

May 19, 2005



Joseph L. Savitz, III
Acting Chief Attorney

S.C. Office of Appellate Defense
1205 Pendleton Street, Room 306
Columbia, SC 29201
(803) 734-1330

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Berkeley County

R. Markley Dennis, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

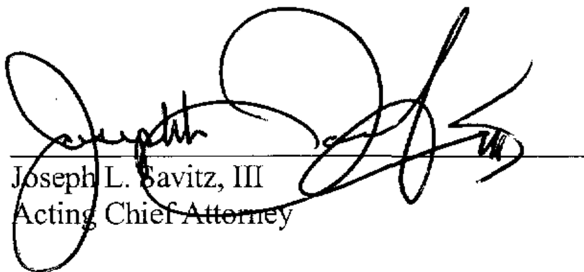
V.

JESSIE WAYLON SAPP,

APPELLANT

CERTIFICATE OF SERVICE

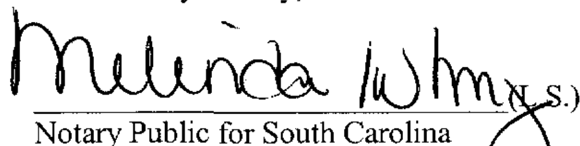
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Donald J. Zelenka, Esquire, this 19th day of May, 2005.



Joseph L. Savitz, III
Acting Chief Attorney

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 19th day of May, 2005.



(L.S.)
Notary Public for South Carolina

My Commission Expires: November 16, 2008 .