STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Berkeley County
R. Markley Dennis, Jr., Circuit Court Judge

THE STATE,

Respondent,

v.

JESSE WAYLON SAPP,

Appellant

FINAL BRIEF OF RESPONDENT

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III. The trial judge did not err in sustaining the state's objection to the defense counsel's question of co-defendant/accomplice Kathryn Boles "would she like to see Jesse put to death" where it was inappropriate. Further, any alleged error was harmless in light of family members testimony concerning their request not to take Sapp's life. 20

IV. The trial court did not err in failing to *sua sponte* instruct the jury on the statutory mitigating circumstance set out in S.C. Code §16-3-20 (C)(b)(8): "the defendant was provoked by the victim into committing the murder" where no request was made by defense counsel and it was not warranted by the evidence where under the defendant's version he was "provoked" by the anticipation of a lawful arrest on being a fugitive. 24

V. The Court had subject matter jurisdiction to sentence the Appellant to death since the Appellant was indicted for murder and the State made statutory notice of intent to seek the death penalty pursuant to S.C.Code Ann. § 16-3-26 and notice of evidence in aggravation pursuant to § 16-3-

20 which specifically designated the aggravating factors. Contrary to Appellant's claim, *Ring v. Arizona* does not create a new state law subject matter jurisdictional requirement that statutory aggravating factors be placed in the murder indictment, in addition to the elements of murder. Further, this Court's intervening decisions in State v. Downs, State v. Wood and State v. Crisp resolve this same issue adversely to the Appellant. 30

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APPELLANT'S 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.

RESPONDENTS STATEMENT OF THE CASE

This matter comes before this Court on appeal from numerous convictions on May 17, 2003 for:

- Receiving stolen goods (2002-GS-08-1691)
- Possession of Xanax - 3rd offense (2002-GS-08-85)
- Possession with intent to distribute cocaine (2002-GS-08-1684)
- Possession with intent to distribute morphine sulfate (2002-GS-08-1687)
- Possession with intent to distribute Ecstacy-3rd offense (2002-GS-08-1683)
- Unlawful carrying of a pistol (2002-GS-08-1146)
- Murder (2003-GS-08-686)

R. 1574-86. Jesse Waylon Sapp, after a penalty phase hearing before the Honorable R. Markley Dennis, Presiding Judge, and a jury pursuant to S.C. Code Ann. § 16-3-20 found beyond a reasonable doubt the existence of the following statutory aggravating factors:

> 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 office, 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). R. 1895-96. The jury recommended the sentence of death. R. 1895-99. Judge Dennis sentenced Sapp on May 19, 2003 to death for murder, twenty (20) years concurrent for PWID Ecstacy 3rd offense, twenty (20) years concurrent for PWID

cocaine, twenty (20) years concurrent for PWID morphine sulfate, one (1) year for unlawful possession of a weapon, and two (2) years concurrent for possession of Xanax 3rd offense. R. 1903-04.

The Appellant was indicted on October 16, 2002 for each of the drug related offenses. On July 17, 2002, he was indicted for the unlawful carrying of a pistol. On April 9, 2003, Sapp was re-indicted for murder. 2003-GS-08-686. R. 42-43.

The charges arose from a July 7, 2002 incident which resulted in the murder of South Carolina Highway Patrolman Kenneth J. "Jeff" Johnson, a thirteen (13) year member of the Patrol. At approximately 2:30 a.m. on the morning of July 7, 2002, Trooper Johnson was working a license check point on College Park Rd with three fellow troopers, Patrick Sigwald, Steve Grainger, and Roy Barwick. At the checkpoint, a green Dodge Dakota appRched which, unknown to the officers was stolen and contained illegal drugs. Similarly unknown to them, Jesse Sapp was armed with a loaded 40 caliber Smith and Wesson handgun.

As the officers dealt with the driver, Kathryn Boles, Trooper Johnson had Sapp's drivers license and re-appRched the car to return it to him. R. 1087. Sapp got out of the vehicle and shot Trooper Johnson one time below his bulletproof vest. He bled to death at the scene. R. 1089-91. Sapp was injured as a result of the shootings by the troopers. R. 1088-89.

The state made notice of intent to seek the death penalty on July 29, 2002 and April 9, 2003. R 1974. Prior to trial, the prosecution made notice of evidence in aggravation on July 29, 2002 and April 9, 2003. R. 1973.

At trial, the Appellant was represented by court appointed counsel, Paul C. Archer and Robert Johnston. The prosecution was handled by Ralph E. Hoisington, Solicitor, and Blair C.

Jennings, Deputy Solicitor of the Ninth Judicial Circuit. Pretrial hearings were held October 18, 2002, March 26, 2003, and May 2, 2003. On May 9, 2003, the matter began before the Honorable R. Markley Dennis, Jr. The guilt phase verdicts were entered on May 17, 2003.

The penalty phase began on May 18, 2003. In addition to the statutory aggravating factors found set out above, the following statutory mitigating circumstances were given:

> 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.

§ 16-3-20(C)(b)(1), (2), (6) and (7). R. 1888-89. The jury was also instructed to consider non-statutory circumstances. R. 1889.

After the sentences were imposed, a notice of appeal was served on May 27, 2003. This appeal follows.

ARGUMENT

I. When a potential juror becomes emotionally distraught and unable to answer questions about her ability to consider death due to her deep-seated religious beliefs, the trial court properly held that those beliefs prevented or substantially impaired the performance of her duties as a juror.

In his initial argument, Sapp contends the trial judge erred in excusing potential juror Kathleen McNair, #247 for cause. He apparently contends that she was able to put her religious beliefs aside. The trial judge disagreed. As set forth below, the record provides support for the trial judge's disqualification of the juror.

A. What the Trial Judge Ruled

After argument on the state's motion to disqualify juror #247 for cause, Judge Dennis made the following findings and conclusions:

THE COURT: Considering the answers given by Ms. McNair, observing also her demeanor in the courtroom during the examination and the questions propounded by the solicitor, which she never answered, became so emotionally distraught by the question, would that affect your ability to deliberate on a jury, and she never answered the question. Given her answers and her inconsistency or the inconsistency of her answers, given the feelings that she articulated to my questions and to the solicitor's questions that her religious beliefs were very sincere and deep-seated with her in her life, I would conclude that her inability to answer the question affecting her ability to deliberate and constantly apologizing is a human reaction to suggest that she couldn't consider it. And therefore, she felt inadequate because she couldn't. And that would be the only justification for somebody becoming emotionally distraught and apologizing. So given that and given her demeanor and considering the totality and completeness of all of her answers, I

> would agree that she's not qualified.
>
> And the record is clear that Mr. Sapp finds and would argue that she is qualified and has state – clearly, I don't argue with position that she indicated at one point that, yes, she could invoke – award the death penalty. But I believe it would substantially affect her ability to consider both sentences, that is her religious belief.

R. p. 576, l. 15 - p. 577, l. 17.

B. What Ms. McNair's Voir Dire Revealed

During the voir dire proceedings, Ms. Kathleen L. McNair, a black female potential juror, was questioned for qualification. R. 566-576. During the general voir dire of the jurors, she had revealed that she had a health concern because she had lost 95% vision in her right eye and had to use eye drops during the day and her foot was just broken. R. 207-08. She also revealed that she had learned some information about the incident on television and her son-in-law was a policeman. R. p. 242, l. 4 - p. 243, l. 4.

During the individual voir dire, Ms. McNair revealed the following when asked by the trial judge whether she was Type 1 (always vote for death), Type 2 (always vote for life), or Type 3 (depend on facts and circumstances):

> A. Well, as a matter of fact, I don't believe in the death penalty because of my religion.

R. p. 568, ll. 19-20. 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. I'm sorry, but...

R. p. 569, ll. 1-17.

Solicitor Hoisington then asked the next series of questions:

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. When you go back there, you are who you are.

A. I am who I am, uh-huh.

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 by 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. Appropriate is a term that you would have to make a determination after you hear the facts. Are there - - have you had an opportunity to think about the death penalty other than in your - - in the sense of your religion?

A. I did thought about it.

MR. ARCHER: I'm sorry, I would object. I think she's answered all this.

THE COURT: I will allow some leeway, but let's move on, Solicitor. I will allow that one more question. She's basically answered that.

MR. HOISINGTON: Okay.

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 shall not kill.

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

MR. ARCHER: Your Honor, I think she's answered that.

THE COURT: I will allow this. This is a critical issue and I will allow it. Ms. McNair do you need a moment?

(WHEREUPON, the juror was crying.)

MR. HOISINGTON: Your Honor, I don't think I need to question her

anymore. If the record will just reflect - -

THE COURT: The record will reflect Ms. McNair is emotionally distraught at this point.

Ms. McNair, would you prefer me to take a brief break to give you an opportunity to collect yourself, ma'am?

THE POTENTIAL JUROR: (The juror shook her head.)

THE COURT: I need for you to answer, Ms. McNair.

THE POTENTIAL JUROR: I'll try and finish.

THE COURT: Solicitor, as I understand, you have no additional questions?

MR. HOISINGTON: No additional questions. Thank you.

THE COURT: Mr. Archer?

MR. ARCHER: I have no questions.

THE COURT: Ms. McNair, you may step down, please. We'll be with you in just a moment.

THE POTENTIAL JUROR: I'm sorry.

R. p. 570, l. 2 - p. 574, l. 15.

C. The Arguments Below

The prosecutor moved to have venireperson McNair removed for cause. He asserted that her deep-seated religious beliefs would "substantially impair" her ability to sit on the jury. R. 575. He noted she was unable to address the issues and stated she was a type 2 juror initially and only equivocated slightly as to whether she could consider the death penalty which was not enough. He declared that her beliefs would impair it and she could not give the state a fair trial.

R. p. 575, ll. 1-19.

Counsel Archer urged that although she became very emotional, he felt because she answered a number of times that she would impose the death penalty, she should be qualified because it was her last answer. R. 575.

The court noted she never declared she was a type 3 juror. He stated he wanted to review some cases concerning inconsistent responses. Importantly, he noted his concerns were that when she stated she could was going to require her to set aside her religious beliefs and were whether she can truthfully follow the law and fairly consider the circumstances. R. 575-76.

D. Standard of Review

In a capital case, the proper standard in determining the qualification of a prospective juror is whether the juror's 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. Council, 335 S.C. 1, 515 S.E.2d 508, cert. denied, 528 U.S. 1050, 120 S.Ct. 588, 145 L.Ed.2d 489 (1999). See also State v. Longworth, 313 S.C. 360, 438 S.E.2d 219 (1993), cert. denied, 513 U.S. 831, 115 S.Ct. 105, 130 L.Ed.2d 53 (1994) (citing S.C. Code Ann. § 16-3-20(E) (2003)) (in capital case, juror may not be excluded for her attitude against capital punishment unless it would render juror unable to return a verdict according to law).

When reviewing the trial court's qualification or disqualification of prospective jurors, the responses of the challenged jurors must be examined in light of the entire voir dire. Id. The ultimate consideration is that the juror be unbiased, impartial, and able to carry out the law as explained to him. Id. The trial court, when determining if a particular venireperson is to be disqualified, is in the best position to view the juror's demeanor. See Wainwright v. Witt, 469

U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985) (there will be situations where trial court is left with definite impression that prospective juror would be unable to faithfully and impartially apply the law and this is why deference must be paid to trial court who sees and hears the juror). On review, the trial court's disqualification of a prospective juror will not be disturbed where there is a reasonable basis from which the trial 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. Green, 301 S.C. 347, 392 S.E.2d 157, cert. denied, 498 U.S. 881, 111 S.Ct. 229, 112 L.Ed.2d 183 (1990). Accord, State v. Wood, 362 S.C. 135 , 607 S.E.2d 57 (S.C. Dec. 6, 2004). See State v. Council, supra (determination of whether juror is qualified to serve on death penalty case is within sole discretion of trial court and is not reviewable on appeal unless wholly unsupported by the evidence).

In Wood, this Court recently addressed a situation similarly to that presented here with inconsistent and ambiguous responses. There, the potential juror was initially adamant about the opposition to the death penalty, but then revised her opinion upon questioning by defense counsel which appealed to her to serve on the jury to make it demographically and racially balanced. In upholding the disqualification, the Supreme Court concluded that the trial court had a reasonable basis to conclude that the person could not faithfully carry out her duty under the law and the evidence supports the trial court's decision finding Smith disqualified from jury service.

E. Analysis

There is evidence in this record to support the trial court's conclusion that her beliefs founded in her religion substantially impaired her ability to perform as a juror in this matter. First, her initially response was that she did not believe in the death penalty because of her

religion. R. 568. Second, she initially declared based upon her religion she could not consider the law and "I can't decide because of my religion." R. p. 569, ll. 12-19. Third, she declared her religion was based upon deep roots from childhood and teachings "that we shouldn't take someone's life because we cannot make life and should not take it." R. p. 570, ll. 12-17.

She subsequently declared though, "if I put my religion aside, if it wasn't my religion, I believe in it, I will go for the death penalty." She responded that she could deal with being on the jury "because I behave in God" and return a death penalty verdict "if it was appropriate." R. p. 572, ll. 13-18.

However, the depth and influence of her religious belief was unalterably revealed when after she noted that she was a Methodist[1], she stated that the teaching of the religion was "thou shall not kill" and was then asked the essential question on whether it would effect her ability to

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[1] The current policy of the United Methodist Church is found in its "Book of Discipline." On the death penalty, it currently states:

> The Death Penalty
> We believe the death penalty denies the power of Christ to redeem, restore and transform all human beings. The United Methodist Church is deeply concerned about crime throughout the world and the value of any life taken by a murder or homicide. We believe all human life is sacred and created by God and therefore, we must see all human life as significant and valuable. When governments implement the death penalty (capital punishment), then the life of the convicted person is devalued and all possibility of change in that person's life ends. We believe in the resurrection of Jesus Christ and that the possibility of reconciliation with Christ comes through repentance. This gift of reconciliation is offered to all individuals without exception and gives all life new dignity and sacredness. For this reason, we oppose the death penalty (capital punishment) and urge its elimination from all criminal codes.
>
> From the Book of Discipline of The United Methodist Church - 2004. Copywright 2004 by the United Methodist Publishing House.

deliberate on a jury, Ms. McNair began crying and became "emotionally distraught" and unable to answer the question orally. R. p. 573, ll. 6-23. The impact and demeanor of her non-verbal response plainly answered the question.

The trial court's conclusion that these religious beliefs were so deep-seated and the emotional reaction as she attempted to separate herself from those beliefs which she was unable to do is well-supported in this record. Simply put, her beliefs would (and did) substantially impair her ability to discharge her duties as a juror under law. The argument to the contrary ignores the reality of what occurred during the voir dire.

II. The prosecutor's comments about Sapp's crying during the verdict in his penalty phase opening do not require a new sentencing proceeding where (1) the matter was not preserved because there was no timely objection and motion for mistrial and (2) the comment was a proper response to the assertion of remorse made at the conclusion of the guilt phase. Further, a new sentencing proceeding would not be warranted where evidence of his remorse was presented as a factor in mitigation and a no adverse inference instruction was given concerning the right to remain silent.

In the Appellant's second argument, his contention is that the Solicitor's unobjected opening penalty phase comment about Sapp's crying when the verdict was read entitles him to a new sentencing proceeding because he characterized the crying as self-pity rather than remorse. For the reasons set forth below, this matter is not properly before this Court. Further, the brief comment, in light of the mitigation presentation of his remorse, Sapp's own apologies of sorrow to the victim's and a no adverse inference instruction, remove any error from the comments as asserted.

A. How the Issue was Raised

At the close of the guilt phase, Jesse Sapp made a personal closing statement to the jury. R. 1545. In that statement he declared:

> ...I just wanted to say before you leave this courtroom that I'm not some kind of monster or madman. I really don't know what happened that night. And I just wish that we weren't all here today in this situation. I just hope you consider the facts.

R. p. 1545, ll. 6-12.

Apparently, when the jury reached its verdict in the guilt phase, Sapp began crying. See

R. p. 1606, ll. 23-24.

During the opening statement in the penalty phase, Solicitor Hoisington stated the following:

> ....You may have noticed that when Mr. Sapp was convicted, he cried. Ladies and gentlemen, there are all types of tears of sorrow and there are tears of self-pity. "Why me? Why does this have to happen to me?" No sorrow, that's what that was....

R. p. 1606, l. 24 - p. 1507, l. 4. The prosecutor went on to describe the fact that the person seen in court was not the person that was there that night. R. p. 1607, ll. 5-20. He stated it was his intent to give an overview in the next day or two "of who Jesse Sapp really is." R. 1607. No objection was made by the defense to the prosecution comments about "crying" before or after the argument. R. 1604-1616.[2]

B. <u>The Issue is Not Preserved</u>

As noted in the Appellant's brief, there was no timely objection to the opening statement of the prosecutor. In addition, he failed to move for a mistrial based upon the comment. The failure to timely object to comments made during closing argument precludes appellate review of the particular issue. <u>State v. Wiggins</u>, 330 S.C. 538, 550, 500 S.E.2d 489, 496 (1998). In addition, the failure to move for a mistrial o the grounds of improper argument constitutes a waiver of the issue on appeal. <u>State v. Richardson</u>, 358 S.C. 586, 595 S.E.2d 858 (C.A. 2004);

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[2] In Sapp's penalty phase argument, he made another personal statement wherein he stated:

> ...I'm sorry. There's nothing I can do to change it and I'm sorry... I'm sorry. I'm not a bad person....

R. p. 1870, ll. 1-14.

State v. Penland, 275 S.C. 537, 273 S.E.2d 765 (1981). The proper course to be pursued when counsel makes an improper argument is for opposing counsel to immediately object and to have a record made of the precise language complained of and for the court to have a distinct ruling thereon. State v. Richardson, supra.

Since the issue was not preserved, the issue must be denied.

C. New Sentencing is Not Warranted Where He Cried and said He was Sorry

It must be noted that every trial is unique and circumstances arise which must be addressed by either party. Such a circumstance occurred when Sapp began crying when the guilty verdicts were read. It cannot be seriously questioned that crying may reflect both sorrow and remorse evident to the jurors. However, it must also be evident that crying may also and equally suggest other viable emotions - self-pity and fear of the punishment among them.

In his brief before this Court, the Appellant ignores that he was presenting, at the conclusion of the guilt phase in his statement and later crying, evidence which could suggest sorrow and remorse. Similarly, he ignores that underlying the defense presentation in mitigation was his theme of sorrow and remorse for the victims as a non-statutory mitigating factor. See, R. 1829 ("Jesse knew what he did was wrong"), R. 1869-70 (Sapp's comments about being sorry).

In the cases relied upon by Appellant, two themes are presented: (1) the defendant has no duty to prove remorse to avoid the death penalty and (2) the defendant has the right to remain silent and therefore does not have to say he is sorry. See, State v. Sloan, 278 S.C. 435, 298 S.E.2d 92, 95 (1982); State v. Arther, 290 S.C. 291, 350 S.E.2d 187, 191 (1986); State v. Cockerham, 294 S.C. 380, 365 S.E.2d 22, 23 (1988). Compare Six v. Delo, 94 F.3d 469 (8th

Cir.1996) (courtroom demeanor comments) with State v. McClure, 342 S.C. 403, 409, 537 S.E.2d 273, 275 (2000). Unlike any of these cases, the prosecutor was addressing and commenting on what had occurred in the jury's view. As such, it was permissible to challenge the suggestion of his remorse as a mitigating factor.

It should be noted that a defendant's remorse for a capital crime has been held to be a non-statutory mitigating circumstance entitled to consideration by a jury. See; McConnell v. State, 102 P.3d 606 (Nev. 2004)(evidence of remorse is mitigation and evidence of lack of remorse can be used to rebut); People v. Combs, 101 P. 3d 1007 (Cal. 2004)(prosecutor may comment on capital defendant's lack of remorse as relevant to question of whether remorse exists as a mitigating circumstance, so long as he does not suggest the lack of morse is an aggravating factor); State v. Gapen, 819 N.E.2d 1047 (Ohio 1994)(capital defendant's remorse and apology to victims are entitled to weight in mitigation); State v. Thompson, 604 S.,E.2d 850, 864 (N.C. 2004)(submission of mitigating factor that defendant had expressed remorse proper).

In Smith v. State, 756 So. 2d 892, at 911 (Ala. 1998), the court held prosecutorial comment about lack of remorse in argument was presented only to show the existence or lack thereof of a mitigating circumstance was not reversible error. In a related matter, in State v. Simmons, 944 S.W.2d 165 (Mo. Banc 1997), the Court found no error in asking a detective if the capital defendant ever said he was sorry in an interview to rebut "the possible inference of remorse the jury might have made from the fact that Simmons was crying." Simmons, at 176.

In Commonwealth v. Fletcher, 861 A.2d 898 (Pa. 2004), the Pennsylvania court held that a prosecutor's comment in closing that there had been no remorse by the defendant did not constitute an impermissible reference on his right to remain silent, but was made in response to

the defendant introduction of mitigation evidence concerning his character. The court found it was intended to mean the jury should consider his lack of remorse and did not imply any duty to testify. The Pennsylvania prosecutor explicitly limited his remarks to the defendant's non-verbal demeanor and behavior during trial and the morning of the murders. In addition, like in Sapp's case, the jury was instructed on "no adverse inference" instructions. See R. 1877-78. Also, Kandies v. Polk, 385 F.3d 457 (4th Cir. 2004)(remorse as mitigation).

However, in State v. Robinson, 146 S.W.3d 469 (Tenn. 2004), the Court held a prosecutor's argument asserting a lack of remorse as a factor was error, but harmless in view of a cautionary instruction that "it is not proper rebuttal because the defendant did not argue his remorse as a mitigating factor." Id. at 527.

This Court must recognize the power that expressions by a defendant of remorse and sorrow to the jury may have to the outcome. The assertions suggested by the Appellant in his brief suggests that a capital defendant's expressions of sorrow or remorse must go unchallenged by the prosecution. The law, however, makes no such demand, where, as here, the comments were ameliorated by the "no adverse inference" instruction (R. P. 1877, l. 23 - p. 1878, l. 11) and the clear burden of proof instructions for aggravating factors placed upon the state (R. 1878-79, 1884-86) and the fact that the existence of mitigating circumstances need not be found beyond a reasonable doubt. R. 1889. Contrary to the claim, the state did not argue a lack of remorse as a reason to impose the death penalty. Rather, it merely challenged the fact that the existence of his tears equated with the existence of remorse and sorrow for the crimes. New sentencing is not required under the facts of this case.

III. The trial judge did not err in sustaining the state's

objection to the defense counsel's question of co-defendant/accomplice Kathryn Boles on "would she like to see Jesse put to death" where it was inappropriate. Further, any alleged error was harmless in light of family members testimony concerning their request not to take Sapp's life.

In his brief, he contends that the trial court erred in disallowing a response by co-defendant Kathryn Boles on the question of "would she like to see Jesse put to death" (R. P. 1716, l. 11), based upon the precedent of this Court in State v. Wise, 359 S.C. 14, 27, 596 S.E.2d 475, 481 (2004) and State v. Johnson, 338 S.C. 114, 525 S.E.2d 519, 524 (2000). Respondents submit that the judge did not abuse his discretion in sustaining the state's objection to the potential testimony. Further, any alleged error was harmless in light of the relative's testimony making a plea for mercy on his behalf.

How the Issue was Raised

During the penalty phase, the State called Kathryn Boles to testify. During her testimony, she revealed that she was now 21 and had known Sapp since she was 15. R. 1689. She described the events of July 6-7, which resulted in the death of Trooper Johnson. R. 1690-99. She noted that as a result, she had been arrested and then released on bond after four months in jail with certain conditions including drug treatment. R. 1700. Further, on that date, she had pled to "harboring a fugitive" and "possession of Xanax" arising from the incident. R. 1700.

In her testimony she also described meeting Sapp when she was 15 working at an escort service and then described their relationship and problems with drugs and the law. R. 1703-13. She described Sapp's prior arrest for five (5) pounds of marijuana (R. 1704-05) and two (2) incidents when he had pulled a gun on other men who had shown an interest in her. R. 1706-11.

On cross-examination, the defense tried to develop that upon Sapp's arrest, he sought to take responsibility for the drugs in the truck. R. 1713. He also tried to show that Sapp had tried to get her off her drug habit. R. 1714. However, she denied knowing that he was on drugs that night and had not told her he was on morphine, but she assumed it. R. 1715-16.

Pertinent to this issue, the following occurred:

> 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.

R. p. 1716, ll. 4-16. Defense counsel asked Boles no further questions. R. p. 1716, l. 17.

During the penalty phase his mother, Cathy Catchings, testified: "I'm begging you, please don't take my son's life... Please if you kill my son, you're going to devastate the community again and more families. Please don't do it. Please don't kill him." R. p. 1843, ll. 6-12.[3]

James Catchings, the Appellant's nine (9) year old brother testified that he was like a

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[3] At the conclusion of the testimony, the solicitor asked the court to admonish the defense that "they're not supposed to plead not no [sic] execute, but simply to ask for mercy..." The court stated he would make that comment. R. 1844.

father to him. R. 1846. He stated: "if he was gone from me... that would be the worst thing ever if he just was gone." R. 1847-48.

LAW/ANALYSIS

Respondents have not been able to locate any case in the U.S. to hold that it is reversible error to preclude or require a co-defendant-accomplice to express to a jury whether he wants his co-defendant either to die or to make a general plea of mercy on his behalf. The Appellant seeks to enter this thicket because in addition to being an accomplice with him in the crimes that resulted in Trooper Johnson's death, she had a six (6) year relationship with him and had been his girlfriend during that period.

A capital defendant is prohibited from directly eliciting the opinion of family members or other penalty-phase witnesses about the appropriate penalty. State v. Wise, 359 S.C. 14, 596 S.E.2d 8 (2004). In Wise , the Court stated as follows:

> Such questions go to the ultimate issue to be decided by the jury-- life in prison versus the death penalty--and are properly reserved for determination by the jury. State v. Matthews, 296 S.C. 379, 393, 373 S.E.2d 587, 595 (1988) (affirming exclusion of family members' opinion about appropriate penalty and what effect the death penalty would have on them, although defendant could show no prejudice because his mother expressed her opinion to jury despite judge's ruling); State v. Adams, 277 S.C. 115, 283 S.E.2d 582 (1981) (whether death penalty should be imposed is an ultimate issue reserved for jury's determination), overruled on other grounds by Torrence, supra.
>
> Similarly, a capital defendant may not present a penalty-phase witness to testify explicitly what verdict the jury "ought" to reach. Torrence, 305 S.C. at 51, 406 S.E.2d at 319. A capital defendant may not present witnesses merely to testify of their religious or philosophical attitudes about the death penalty. Id.
>
> On the other hand, 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. Torrence, 305 S.C. at 51, 406 S.E.2d at 319. A close relative of a 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. State v. Johnson, 338 S.C. 114, 125-127, 525 S.E.2d 519, 524-525 (2000) (while trial court erred in limiting sister's testimony, defendant was not prejudiced because sister was able to make a general plea for mercy on his behalf and clearly expressed her love and affection for him).

Wise, supra.

The problem with the Appellant's appRch is that Boles was not merely a witness who may know and care for him according to her own testimony, but an accomplice in the criminal deeds which may lead to his ultimate execution and in comparison her own ultimate sentence. Stated another way, by lowering the bar on him, she would necessarily lower the proportional bar on her own fate. Similarly, in contrast, by shifting all the responsibility to him and suggesting death (she wants him to die) rather than life, she may assist in her own fate. The lack of relevance in this setting leads back to the reasonableness of the *dicta* in Matthews when similar questions were not approved. In its discretion, the trial judge did not err in refusing to allow a co-defendant to express whether she wanted her co-defendant to live or die.

Alternately, assuming the question could be asked there was no prejudice arising from the court's actions. Johnson is persuasively on point. In Johnson, 338 S.C. 114, 125-127, 525 S.E.2d 519, 524-525 (2000), the Court held that while trial court erred in limiting the sister's testimony, defendant was not prejudiced because the sister was able to make a general plea for mercy on his behalf and clearly expressed her love and affection for him. As the court stated: "However, despite the trial court's ruling which limited her testimony, Johnson's sister was able to make a general plea for mercy on her brother's behalf. In addition to her testimony concerning their abusive family life, she clearly expressed her love and affection for Johnson at trial. Therefore, we conclude Johnson has failed to demonstrate that he was prejudiced by the trial court's ruling."

Similarly, Kathryn Boles was able to state that she felt that Sapp loved her and although she stated at one point she was not in love with him, she stated "I love him, but I do not want to be with him." R.p. 1716. Like Johnson, Sapp has failed to prove prejudice.

Further, prejudice cannot be shown because "mercy" testimony was presented from his aunt Susan Lantz, his mother Cathy Catchings and his brother James. In particular his mother expressed to the jury her love and requested "please don't kill him." R.p. 1843. Any error was removed by this testimony. A new trial is not warranted.

IV. The trial court did not err in failing to *sua sponte* instruct the jury on the statutory mitigating circumstance set out in S.C. Code §16-3-20 (C)(b)(8): "the defendant was provoked by the victim into committing the murder" where no request was made by defense counsel and it was not warranted by the evidence where under the defendant's version he was "provoked" by the anticipation of a lawful arrest on being a fugitive.

In his fourth assertion, Sapp makes another unpreserved claim that the trial judge erred in failing to instruct on the statutory mitigating circumstance: "the defendant was provoked by the victim into committing the murder" provided in S.C. Code §16-3-20 (C)(b)(8). As set out below, the defense counsel never requested this particular circumstance and did not object to the failure to charge it. State v. Humphries, 325 S.C. 28, 479 S.E.2d 52 (1996) (contemporaneous objection required to preserve issue for appellate review); See, e.g., State v. Longworth, 313 S.C. 360, 438 S.E.2d 219 (1993) (failure to request jury instruction acts as waiver of right to complain about issue on appeal). For this initial reason, relief must now be denied.

Section 16-3-20(C)(b)(6) authorizes the trial judge to instruct the jury on certain statutory mitigating circumstances that may be supported by evidence. The trial judge has a duty to review all statutory mitigating circumstances and instruct the jury as to any circumstances which may be supported by the evidence and not merely those requested by the defendant. State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1990) (citing State v. Bellamy, 293 S.C. 103, 359 S.E.2d 63 (1987)). In deciding which statutory mitigating circumstances may be supported, the trial judge is concerned only with the existence of the evidence, not its weight. Id.

At the conclusion of the sentencing phase, the trial court held a conference with counsel concerning the presentation of instructions and mitigating circumstance. R.p. 18489-1851. In the conference he determine that there was evidence existing to give the following statutory

mitigating circumstances:

> 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.

§ 16-3-20(C)(b)(1), (2), (6) and (7). R. 1850-1851. The court then specifically asked defense counsel if there were any additional requests from Mr. Sapp by way of instruction. R.p. 1851, l. 15-20. Defense counsel Archer advised the court:"no, sir." R.p. 1851, l. 22-25.

The record reveals that the jury was instructed on these factors. R. p.1888-89. The jury was also instructed to consider non-statutory circumstances. R. 1889. There were no exceptions or objections to the jury charge as given by the defense. R.p. 1892-1893.

The judge's procedure was in full compliance with State v. Victor, 300 S.C. 220, 387 S.E.2d 248 (1989) and State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816, 823 (1990), which requires the judge to make an initial determination of which statutory mitigating circumstances have evidentiary support and then to allow the defendant to request any additional statutory mitigating circumstances supported in the record. Here, the judge gave defense counsel an opportunity to request additional statutory mitigating circumstances. Defense counsel did not do

so. Accordingly, Victor and Caldwell were satisfied. Moreover, defense counsel never requested charge on the statutory mitigating circumstances pertaining to provocation. Absent such a request, the issue is not preserved. See, e.g., State v. Longworth, 313 S.C. 360, 438 S.E.2d 219 (1993) (failure to request jury instruction acts as waiver of right to complain about issue on appeal), cert. denied, 513 U.S. 831, 115 S.Ct. 105, 130 L.Ed.2d 53 (1994).

There was no evidence to support the mitigating factor.

Further, the claim that some evidence of the particular factor is present is not borne out by his own brief where he relies upon a redacted portion of his statement 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," citing R.p. 1654, l.2 - 1657, l. 15. [4] What the Appellant ignored is the predicate sentences in the same paragraph:

> "Mr. Sapp continued that since the trooper had his ID, had his drivers license, **Mr. Sapp figured that he had found out that he was wanted for escape from Charleston County**. *Sapp stated then 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.* Mr. Sapp then stated that he got out and ran, got shot..."

R.p. 1656, l. 22 - p. 1657, l. 6. (Emphasis added). It is beyond reasonableness to suggest that a mitigating factor for a trooper being shot is because he is "provoked" because he knows he is going to be arrested by him for being a fugitive. Simply put, the provocation intended in this

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[4] It must be noted that no witness testified that Trooper Johnson had his weapon drawn prior to being shot. Witness Bryan DeWitt testified that he watched the entire incident. He stated that no guns were drawn by the troopers. Particularly, he could see the trooper's hand with no gun out as he appRched the passenger side. R.p. 1148-49. He saw the passenger (Sapp) get out of the car, pull his gun out and shoot. R.p. 1149, 1158. He stated that he saw the trooper walk around to the passenger side of the truck and when the passenger stepped out of the truck, he pulled his gun and shot before his feet hit the ground. R.p. 1149, 1160. In fact, Kathryn Boles, the driver of the stolen vehicle stated she did not believe he had anything in his hand. R.p. 1697.

statutory mitigator can never be the anticipation of a lawful arrest.

The Appellant appears to be correct that a similar issue has not been expressly presented to this court. The exercise of a legal right, no matter how offensive to another, is never in law deemed a provocation sufficient to justify or mitigate an act of violence. State v. Norris, 253 S.C. 31, 168 S.E.2d 564 (1969); State v. Ivey 325 S.C. 137, 142, 481 S.E.2d 125, 127 (1997) (manslaughter not proper where he claims to have shot Officer as the latter was going for his gun: "... and the officer jumped back, and he was going for his gun, and I just panicked and I pulled it out and started shooting...." Ivey also said that he shot Officer because he "was scared." He maintains that because he was in a state of fear and acting in response to Officer going for his gun.). More specifically, State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981), states that a lawful arrest or detention in a lawful manner by an officer will not constitute an adequate provocation for heat of passion reducing the grade of the homicide to manslaughter; nor will other lawful acts of officers while in the discharge of their duties constitute adequate provocation. This is precisely the situation we have in the present case. The issue of the existence of mitigation as provocation can not be presented as a matter of law in this setting of a lawful arrest. See, State v. Green, 66 Ohio St.3d 141, 609 N.E.2d 1253 (Ohio 1993) (A defendant does not act under "duress, coercion, or strong provocation" when she repeatedly stabs a victim who pulls a knife on her as she was robbing him); State v. Coleman 85 Ohio St.3d 129, 707 N.E.2d 476, (Ohio 1999) (Legal problems resulting from defendant's voluntary choice to sell drugs did not qualify as "duress, coercion, or strong provocation," for purposes of weighing aggravating and mitigating circumstances in aggravated murder prosecution arising from defendant's

execution of witness in order to escape prosecution on drug charges).[5] For this additional reason he has failed to show entitlement to the instruction on mitigation as a matter of law.

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[5]Related to this issue is the existence of provocation in the manslaughter setting. See State v. Tyson, 283 S.C. 375, 323 S.E.2d 770 (1984), cert. denied, 471 U.S. 1006, 105 S.Ct. 1873, 85 L.Ed.2d 165 (1985) (evidence that victim was defending himself from armed robbery and got killed in the process not sufficient legal provocation to warrant voluntary manslaughter charge). Furthermore, in State v. Tucker, 324 S.C. 155, 171, 478 S.E.2d 260, 268 (1996), the court held Appellant's financial problems, even if they did lead him to commit crimes, cannot serve as sufficient legal provocation to reduce a murder charge. The provocation must come from some act of or related to the victim in order to constitute sufficient legal provocation. See State v. Franklin, 310 S.C. 122, 125, 425 S.E.2d 758, (Ct.App.1993) ("The provocation of the deceased must be such as naturally and instantly produces in the mind of a person ordinarily constituted the highest degree of exasperation, rage, anger, sudden resentment, or terror, rendering the mind incapable of cool reflection") (emphasis added); State v. Plemmons, 286 S.C. 78, 332 S.E.2d 765 (1985) (need of money does not constitute legal provocation).

V. The Court had subject matter jurisdiction to sentence the Appellant to death since the Appellant was indicted for murder and the State made statutory notice of intent to seek the death penalty pursuant to S.C.Code Ann. § 16-3-26 and notice of evidence in aggravation pursuant to § 16-3-20 which specifically designated the aggravating factors. Contrary to Appellant's claim, *Ring v. Arizona* does not create a new state law subject matter jurisdictional requirement that statutory aggravating factors be placed in the murder indictment, in addition to the elements of murder. Further, this Court's intervening decisions in State v. Downs, State v. Wood and State v. Crisp resolve this same issue adversely to the Appellant.

In his final argument, Sapp raises a claim, for the first time, that the plea court lacked subject matter jurisdiction to sentence the Appellant to death under South Carolina law because his April 9, 2003 indictment for murder did not include and list the statutory aggravating factors. He basis this claim on the decision of Ring v. Arizona, 536 U.S. 584 (2002). Respondents submit that the Ring decision which established a constitutional requirement that juries make factual determinations of aggravating factors in capital cases did not establish any requirement for South Carolina grand juries to pass upon the existence of aggravating factors in an indictment. This same claim has recently been rejected by this Court in State v. Downs, 361 S.C.141, 604 S.E.2d 377 (2004); State v. Wood, 362 S.C. 135 , 607 S.E.2d 57, 2004 Westlaw 2851808 (S.C. 2004), and State v. Crisp, 362 S.C. 412, 608 S.E. 2d 429, 2005 Westlaw 3127977 (S.C. Jan. 24, 2005). His complaint to the contrary must be rejected.[6]

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[6]In his argument, the Appellant relies solely on state law but then relies upon Apprendi v. U. S. , 530 U.S. 466 (2000) and Ring to make a due process type argument rather than one which lies in subject matter jurisdiction. The "Fifth Amendment Indictment Clause", however, this is not applicable to the states. See Hurtado v. California, 110 U.S. 516, 534-35, 4 S.Ct. 111, 120-21, 28 L.Ed. 232 (1884) (due process clause of the Fourteenth Amendment does not incorporate Fifth Amendment right to be charged by a grand jury indictment). The United States Supreme Court has never applied the Fifth Amendment's guarantee to indictment by a grand jury to state prosecutions. Alexander v. Louisiana, 405 U.S. 625, 633, 92 S.Ct. 1221, 1226-27, 31 L.Ed.2d 536, 543-44 (1972); see also Hodgson v. Vermont, 168 U.S. 262, 272, 18 S.Ct. 80, 83, 42 L.Ed. 461, 464 (1897) ("[T]he words 'due process of law' in the Fourteenth Amendment of the Constitution of the United States do not necessarily require an indictment by a grand jury in a

1. The Plea Court had subject matter jurisdiction as a matter of state law.

The record reveals that the Appellant was indicted for murder on April 9, 2003. *State v. Sapp, 2003-GS-08-0686.* R. 1961-62. In the indictment, he was charged

"that Jesse W. Sapp did in Berkeley County on or about the 7th day of July 2002 feloniously, wilfully and unlawfully of his malice aforethought, kill and murder South Carolina Highway Patrol Trooper Kenneth J. Johnson by means of a gunshot wound, and that Trooper Johnson did die in Berkeley 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 of the South Carolina Code of Laws (1976)(as amended)." R.1962, 473.

On April 9, 2003 the prosecution re-served both the notice of intent to seek the death penalty and notice of evidence in aggravation in light of this intervening indictment consistent with S.C.Code Ann. § 16-3-26 (1973)[7] R. 1974. [8] R.1973. In those notices the following pertinent matters were set out:

Notice of Intention to Seek the Death Penalty

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prosecution by a State for murder."); Hurtado v. California, 110 U.S. 516, 538, 4 S.Ct. 111, 122, 28 L.Ed. 232, 239 (1884) (same). In observing that it had never applied the above-noted Fifth Amendment guarantee to states, the Supreme Court expressly stated that "the Due Process Clause ... does not require the States to observe the Fifth Amendment's provision for presentment or indictment by a grand jury." Alexander, 405 U.S. at 633, 92 S.Ct. at 1226-27, 31 L.Ed.2d at 543.

[7] *§ 16-3-26. Punishment for murder: notice to defense attorney of solicitor's intention to seek death penalty; appointment of attorneys for indigent; investigative, expert or other services.*

(A) Whenever the solicitor seeks the death penalty he shall notify the defense attorney of his intention to seek such penalty at least thirty days prior to the trial of the case...

[8] *§ 16-3-26* states in pertinent part: "...Only such evidence in aggravation as the State has informed the defendant in writing before the trial is admissible..."

FURTHERMORE, PLEASE TAKE NOTICE that the State of South Carolina, pursuant to Section 16-3-20(B) and (C) of the South Carolina Code of Laws, hereby gives notice of the following aggravating circumstances:

1. The offender by his act of murder knowingly created a 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. Section 16-3-20(C)(a)(3), South Carolina Code of Laws.

2. The murder of a state or local law enforcement officer during or because of the performance of his official duties. Section 16-3-20(C)(a)(7), South Carolina Code of Laws.

R. 1974.

Notice of Evidence in Aggravation.

Pursuant to § 16-3-20(B) of the South Carolina Code of Laws, the following evidence in aggravation will be offered by the State during the sentencing phase of the death penalty trial of Jesse W. Sapp: . . .

2. All testimony and evidence adduced at the guilt phase that is probative to the issue of the Murder of a State or local law enforcement officer during or because of the performance of his official duties.

3. Any and all evidence relating to the Defendant knowingly creating a 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 all other admissible non-statutory aggravating circumstances.

R.p 1973.

In *State v. Butler*, 277 S.C. 452, 290 S.E.2d 1, 3-4 (1982), the South Carolina Supreme Court held that listing the statutory aggravating circumstances was not required in an indictment. Respondents submit that the court had subject-matter jurisdiction over the murder charge to sentence the Appellant to death. This analysis need not go further on a claim of subject matter

jurisdiction.

At no time during the sentencing hearing or before did the Appellant or his counsel make either a Due Process or "subject-matter jurisdiction" argument based upon any alleged failure to allege the statutory aggravating factors in the indictment or present the matters to the grand jury.

As in Downs, Wood and Crisp, the Appellant's argument is not one of "subject matter jurisdiction," but appears instead to be a Due Process argument. He appears to be attempting to avoid the procedural bar which exists to a free-standing unobjected constitutional claim, by asserting the matter as a "subject matter jurisdiction " argument. However, as stated below, the valid indictment and jurisdictional condition precedent were met, as a matter of state law by the murder indictment and the state's notices of intent to seek the death penalty. His implicit Due Process assertions do not rise to a subject matter jurisdiction claim. Therefore, those arguments are barred. See State v. Perez, 334 S.C. 563, 514 S.E.2d 754 (1999) (issues not raised to and ruled upon by the trial court will not be considered on appeal).

In seeking relief from his sentence of death, petitioner cites to a series of United States Supreme Court cases that, he contends, dictate a conclusion that he was improperly sentenced to death because the aggravating factors supporting his death sentence were not alleged in his indictment for murder. The thrust of each of these cases--generally based on the reasoning espoused in *Apprendi* and developed in *Ring*--is that for a defendant to be subjected to a punishment exceeding that established for the offense of conviction, the jury also must find beyond a reasonable doubt the additional facts subjecting the defendant to the greater punishment. As applied to cases in which a sentence of death is sought, these cases require that the jury find beyond a reasonable doubt the aggravating factors that subject the defendant to the

greater penalty. See *Ring*, 122 S. Ct. at 2432, 2443.

At the time petitioner was indicted and pled guilty, this State followed the process that an indictment for murder afforded the trial court jurisdiction to try and sentence a defendant to death if that penalty were sought by the State.[9] While notice to the defendant certainly was required, that notice was sufficient if provided in a Notice of Intent to Seek the Death Penalty and Notice of Evidence in Aggravation, as contemplated by South Carolina Code Section 16-3-20(B). *See State v. Butler*, 277 S.C. 452, 290 S.E.2d 1, 3-4 (1982).

Petitioner argues that under the holding of *Ring*, this process was insufficient to vest the trial court with jurisdiction to sentence him to death. Although petitioner contends that the trial court was in fact without jurisdiction to impose a capital sentence because the aggravating factors were not set forth in the indictment, the trial court in fact properly exercised jurisdiction over petitioner's sentence because *Ring* does not impact the exercise of jurisdiction over a capital defendant in this State.

2. Because *Ring v. Arizona* nowhere considers or holds that the aggravating factors be set forth in a state court indictment, *State v. Butler* remains the applicable law of this State and the sentence of death comported with due process because the jury considered and found beyond a reasonable doubt certain aggravating factors.

In State v. Crisp, the Court conclusively rejected relief on this ground. Therein, the Court most recently stated the following:

> III. SUFFICIENCY OF INDICTMENT AFTER RING V. ARIZONA
> [4] Appellant contends the circuit court lacked subject matter jurisdiction in his case because the indictment did not identify any aggravating factor which exposed

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[9] The pertinent sentencing statute for murder, §16-3-20, sets forth: "(A) A person who is convicted of or pleads guilty to murder must be punished by death, by imprisonment for life, or by a mandatory minimum term of imprisonment for thirty years...." Therefore the crime of murder carries these statutory sentences, including death.

him to the death penalty. Appellant relies primarily on Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); Jones v. U.S., 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999); and Ring, supra. Under those cases, Appellant argues, aggravating circumstances necessary to impose the death penalty are considered elements of the crime of murder in a capital case. A jury must find the presence of aggravating circumstances beyond a reasonable doubt before the death penalty may be imposed. Concomitantly, Appellant contends, the defendant is entitled to an indictment which gives him pretrial notice of which aggravating circumstances the State intends to rely on at sentencing.
We recently addressed this issue in Downs, 361 S.C. 141, 604 S.E.2d 377. In that case, we stated that :

> [t]he [United States Supreme] Court expressly noted in both Apprendi and Ring that the cases did not involve challenges to state indictments. More important, the Fourteenth Amendment has not been construed to incorporate the Fifth Amendments Presentment or Indictment Clause. State law governs indictments for state-law crimes. Under South Carolina law, aggravating circumstances need not be alleged in an indictment for murder. The aggravating circumstances listed in S.C.Code Ann. § 16-3-20(C)(a) (2003) are sentencing factors, not elements of murder. The circuit court had subject matter jurisdiction to sentence Appellant to death.

Downs, 361 S.C. at ----, 604 S.E.2d at 380-81 (citations omitted).

Appellant argues his case is factually distinguishable from Downs, as previously explained. We do not find persuasive Appellant's effort to distinguish his case from Downs. We also note the State, as required by statute, timely notified Appellant of its intention to seek the death penalty and identified the aggravating circumstances and related evidence the State intended to use at trial. See S.C.Code Ann. §§ 16-3-20(B) and 16-3-26 (2003). Accordingly, we adhere to our opinion in Downs and reject Appellant's arguments for the reasons expressed in that case. The circuit court had jurisdiction in Appellant's case.

State v. Crisp, supra.

Thus, the constitutional protection to ensure that state defendants sentenced to death have the aggravating factors found by a jury beyond a reasonable doubt lies not in the State's Presentment Clause but in the state and federal Due Process Clauses. Viewed in this light,

petitioner received all the protection and process that he was due because--consistent with *State v. Butler* and South Carolina Code §§ 16-3-20(B), 16-3-26 and --he received notice of the prosecution's intent to seek the death penalty and notice of evidence in aggravation that the State would present to the jury and the jury thereafter considered those factors and found them beyond a reasonable doubt. Accordingly, the process followed in this case--and followed in all death penalty cases in this State to date--complies with all relevant constitutional requirements.

His claim of subject matter jurisdiction must be denied.

CONCLUSION

For all the foregoing reasons, the appeal must be dismissed and judgement affirmed.

Respectfully submitted,
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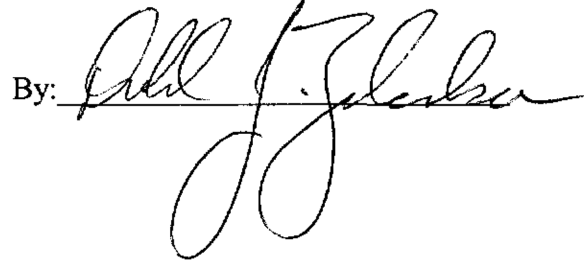
By: 

Columbia, South Carolina
May 19, 2005

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Berkeley County
R. Markley Dennis, Jr., Circuit Court Judge

THE STATE,

Respondent,

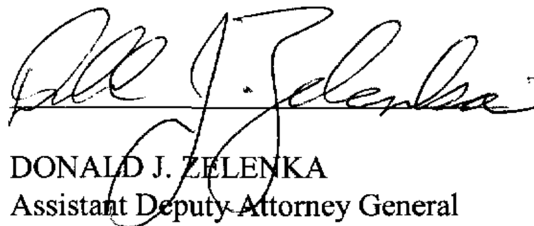
v.

JESSE WAYLON SAPP,

Appellant

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Final Brief of Respondent complies with SCACR 211(b).



DONALD J. ZELENKA
Assistant Deputy Attorney General

May 19, 2005

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that I have served the ***Final Brief of Respondent*** and ***Designation of Matter*** in the foregoing matter on opposing counsel by depositing in the United States mail, postage prepaid, on the following:

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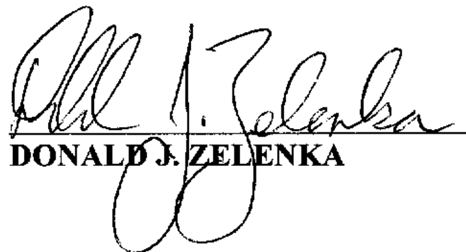
This 19th day of May, 2005.



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