ORIGINAL

RECEIVED
DEC 1 2 2006
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Spartanburg County

Edward W. Miller, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

FREDRICK ANTONIO EVINS,

APPELLANT

FINAL BRIEF OF APPELLANT

ROBERT M. DUDEK
Deputy Chief Attorney for Capital Appeals

AILEEN P. CLARE
Assistant Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEYS FOR APPELLANT.

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE 2

ARGUMENTS

1.

The court erred by denying appellant's motion for a change of venue, when the majority of potential jurors had been exposed to extensive pretrial publicity, and where the news media had linked appellant's current charges to another, unrelated murder 4

2.

The court erred by ruling that the state's two peremptory strikes against African-Americans were not racially motivated. (Issues 2 and 3) 16

4.

The court erred by granting the state's motions to exclude African-American venire members Patricia Murphy and Sabrina Jenkins, when they were qualified to serve. (Issues 4 and 5) 24

6.

African-American potential juror Aaron Gray testified he could impose the death penalty and sign his name to a jury verdict. The fact Gray had pending charges was grounds for a preemptory challenge by the solicitor, but it was not grounds for disqualification where Gray said he could impose the death penalty, and that his pending charge would not cause him to favor either side 35

7.

The defense correctly argued the nude photographs of the victim being introduced during the sentencing phase were going to inflame the passions of the jury. A death sentence should not be returned on the basis of passion. The photographs, particularly the nude photographs showing that the victim had defecated on herself went beyond any legitimate purpose in this case.......... 40

CONCLUSION.......... 44

TABLE OF AUTHORITIES

CASES

Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986) 19, 20, 39

Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999), cited in Sapp at 366 S.C. 291, 621 S.E.2d 887 28

Chambers v. Florida, 309 U.S. 227, 60 S.Ct. 472 (1940) 14

Estes v. Texas, 381 U.S. 532, 85 S.Ct. 1628 (1965) 14

Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197 (1977) 43

Gray v. Mississippi, 481 U.S. 648, 107 S.Ct. 2045 (1987) 39

Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639 (1961) 14, 15

J.E.B. v. Alabama Ex Rel. T.B., 511 U.S. 127, 114 S.Ct. 1419 (1994) 20

Murphy v. Florida, 421 U.S. 794, 95 S.Ct. 2031 (1975) 14, 15

Patton v. Yount, 467 U.S. 1025, 104 S.Ct. 2885 (1984) 14, 15

Payton v. Kearse, 329 S.C. 51, 495 S.E.2d 205 (1998) 20

Purkett v. Elem, 514 U.S. 765, 115 S.Ct. 1769 (1995) 20

Rideau v. Louisiana, 373 U.S. 723, 83 S.Ct. 1417 (1963) 14, 15

Ristaino v. Ross, 424 U.S. 589, 96 S.Ct. 1017 (1976) 14

Sheppard v. State, 357 S.C. 646, 594 S.E.2d 462 (2004) 14, 15

State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996) 20, 21

State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1990) 15

State v. Counsel, 335 S.C. 1, 515 S.E.2d 508 (1998) 38, 39

State v. Davis, 309 S.C. 326, 422 S.E.2d 133 (1992), cert. denied, 508 U.S. 915, 113 S.Ct. 2355 (1993) 28, 29

State v. Gaskins, 284 S.C. 105, 326 S.E.2d 132 (1985) 14

State v. Haigler, 334 S.C. 623, 515 S.E.2d 88 (1999) 20

State v. Haselden, 353 S.C. 190, 577 S.E,2d 445 (2003) 43

State v. Hughey, 339 S.C. 439, 529 S.E.2d 721 (2000) 43

State v. Longworth, 313 S.C. 360, 438 S.E.2d 219 (1993) 38

State v. Manning, 329 S.C. 1, 495 S.E.2d 191 (1997) 14, 15

State v. Patrick, 289 S.C. 301, 345 S.E.2d 481 (1986) 42

State v. Rosemond, 335 S.C. 593, 518 S.E.2d 588 (1999) 42

State v. Sapp, 366 S.C. 290, 621 S.E.2d 883 (2005) 28, 29

State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996) 42

State v. Warren, 273 S.C. 159, 255 S.E.2d 668 (1979) 39

State v. Wood, 362 S.C. 135, 607 S.E.2d 57 (2004) 38

Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844 (1985) .... passim

STATUTES

S.C. Code § 16-3-20(E) (2003) 28, 33, 38

S.C. Code § 16-3-25 (1985) 43

RULES

Rule 407, SCACR, Rules of Prof. Conduct, Rule 1. 10 (e) 38

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XIV 20

STATEMENT OF ISSUES ON APPEAL

1.

Whether the court erred by denying appellant's motion for a change of venue when the majority potential jurors had been exposed to extensive pretrial publicity, and where the news media had linked appellant's current murder charges to another, unrelated murder?

2

Whether the court erred by ruling that the state's preemptory strike against African-American potential juror Annie Davis was racially neutral, and did not violate Batson v. Kentucky, since Davis was a death penalty qualified juror, and the solicitor's purported explanation that she would be adversely affected and unable to be impartial because two of her sons were killed in a DUI traffic accident was not supported by the record?

3.

Whether the court erred by ruling the solicitor's preemptory challenge against African-American potential juror Johnny Young was racially neutral, and did not violate Batson v. Kentucky, where the solicitor explanation that Young was a "life–prone juror" was not supported by the record?

4.

Whether the court erred by excusing African-American potential juror Patricia Murphy for cause where Murphy strongly testified that she could impose the death penalty upon a murderer, since she was a qualified juror under the Wainwright v. Witt standard?

5.

Whether the court erred by disqualifying African-American potential juror Sabrina Jenkins for cause under the Wainwright v. Witt standard where solicitor even acknowledged

it appeared Jenkins had strong pro-death penalty views, since defense counsel correctly noted a pattern of striking African-American jurors had developed, and the solicitor's "concern" that Jenkins may be too strongly in favor of the death penalty was an apparent subterfuge?

6.

Whether the court erred by disqualifying potential African-American juror Aaron Gray for cause where Gray testified he could impose the death penalty and sign the verdict form, where that he did not have any bias against the police, the state or for attorneys from the Public Defender's Office that he did not know, since Gray was a death qualified juror under the Wainwright v. Witt standard, and he was otherwise a qualified juror against any allegation of bias?

7.

Whether the court erred by admitting highly inflammatory crime scene photographs, 70, 71,72,74,75,76,77, and 80, particularly the photographs showing the nude victim had defecated on herself since this strongly invited a verdict based upon passion?

STATEMENT OF THE CASE

Appellant was indicted by the Spartanburg County grand jury for offenses of murder, kidnapping, criminal sexual conduct in the first degree and grand larceny. R. 2766 - 2771. As will be seen infra, the defense moved for a change of venue arguing they could not get a fair trial in Spartanburg County, because of extensive pre-trial publicity, and the fact appellant had graphically been linked in the media to another unrelated murder -- "the Huff murder." R. 2065, l. 2 – 2069, l. 11.

Appellant's case came on for trial on November 8, 2004 before the Honorable Edward W. Miller, and a jury. Karen M. Quimby, Thomas A.M. Boggs, and Christopher Brough represented appellant. R. 1.

At the conclusion of the guilt phase the jury found appellant guilty of each offense. R. 2042, ll. 6 – 18.

At the conclusion of the penalty phase on November 19, 2004 the jury returned a sentence of death. R. 2583, l. 22 – 2584, l. 13. Judge Miller then sentenced appellant to death for murder, thirty years imprisonment for criminal sexual conduct in the first degree and five years imprisonment for grant larceny. R. 2587, l. 9 – 2588, l. 8.

This appeal follows.

ARGUMENT

1.

The court erred by denying appellant's motion for a change of venue, when the majority of potential jurors had been exposed to extensive pretrial publicity, and where the news media had linked appellant's current charges to another, unrelated murder.

The state's case was that the decedent, Rhonda Ward, was kidnapped from her place of business, Cigarette's 4 Less, on Drayton Road at about 6:50 a.m. on February 13, 2003. R. 1393, l. 9 1403, l. 20. Her nude body was found on February 15, 2003 off of Gano Road. R. 1464, l. 7 – 1465, l. 22.

Appellant moved for a change of venue because of extensive and inflammatory pretrial publicity, noting particularly an article published in the local newspaper on the first morning of jury selection and a television broadcast on the previous evening. R. 118, l. 10 - 123, l. 24; R. 2765. The court received an additional eighteen newspaper articles dated between September 2002 and August 2003 in support of the motion to change venue. R. 2711 - 2756. Several of the articles connected the case, and appellant by extension, to the September 2002 murder of Demaris Huff in nearby Duncan Park. R. 2750.

The Huff murder was first reported in the Spartanburg newspaper during September 2002. R. 2735. On February 15, 2003, the paper reported that Ms. Ward was missing and feared abducted. R. 2736. The following day, an article reported that Ms. Ward's body may had been located. R. 2737. Prominently headlined articles appeared on February 17 and 18 confirming Ms. Ward's identity and cause of death. R. 2738 - 2739. On February 19, the paper reported that Ms. Ward's car had been found. R. 2740.

Appellant's arrest was reported in an article dated March 1, 2003, under the headline, "Murder suspect had already been jailed" referring to the Huff murder. Articles on March 22 and April 6 also connected the Huff and Ward cases. R. 119, l. 20 - 120, l. 25.

The March 22, 2003, article ran under the headline, "Huff's neighbors, colleagues feel a sense of relief." The article reported that Huff's neighbors and co-workers were relieved when appellant, having been arrested for the Ward murder, was also charged in the Huff case. R. 2759. A separate article on the same day ran under the prominent headlines, "Man charged in killing of Duncan Park woman," and "SECOND MURDER CHARGE: Evins is already jailed in store worker's death." R. 2758. An internal headline in that article read, "Suspect's record includes several sex offenses." R. 2754.

The article published April 6, 2003, included a general discussion of sexual predators that focused on appellant, with prominent photographs of both Ms. Huff and Ms. Ward and detailed discussions of each case. R. 121, ll. 13-19; R. 2761. The article was the lead local story with the headline, "Suspected Huff killer has long, brutal past." The first paragraph read as follows:

> Fredrick Antonio Evins, the man accused of murdering library worker Damaris Huff and cigarette store manager Rhonda Ward Goodwin, cut a brutal swath across Spartanburg County for literally his entire life.

The article continued with detailed accounts of appellant's history since the age of 19, when he was accused of sexually assaulting a girl in DSS custody. It included a map and diagram of the areas where Huff's and Ward's bodies were located, with inserts of the victims' photographs.

Companion pieces to the April 6, 2003, article memorialized Demaris Huff and Rhonda Ward Goodwin in detail. Internal headlines included, “Goodwin’s [Ward’s] dreams cut short,” and “Goodwin’s love, generosity and drive toward a better life brought families together.” R. 2761.

On April 13, 2003, the newspaper implicated appellant in a *third* murder in the area. R. 2750. This article reported that Margaret Shands’ body had been discovered, partially disrobed, face down in some roadside brush. The coroner reported that there was no evidence of strangulation, stabbing, or violent sexual assault. Despite the evidentiary differences between the Shands, Huff, and Ward murders, the newspaper reminded the public that appellant had lived near Shands and was charged for killing Huff and Ward.

An article published June 22, 2003, again, generally discussed sex offenders but focused on appellant and his arrest for the Huff and Ward murders. R. 121, ll. 1-7; R. 2752 - 2754.

Appellant's indictment was reported on July 11, 2003, under the prominent headline, "Grand jury indicts murder suspect," as follows:

> Frederick Evins, the man accused of murdering library worker Damaris Huff and cigarette store manager Rhonda Ward Goodwin, was indicted by a grand jury Thursday on charges related to both crimes."

R. 2755.

The article recounted the facts of both the Ward and Huff murders. Under the internal headline, "Gowdy weighs whether to seek death penalty," the solicitor was quoted as saying, "These are a couple of crimes that shocked the conscience of the

community," and "We feel like the evidence will clearly show Mr. Evins committed these crimes." R. 2755.

An article published August 30, 2003, reported that the solicitor intended to seek the death penalty in the Ward case and repeated that appellant was accused of both murders. R. 122, ll. 5-15. It was the lead local story, with the prominent headline, "Gowdy seeks death penalty for Evins," above a photograph of appellant. R. 2756. The first paragraph connected the Ward and Huff murders:

> Prosecutors will seek the death penalty against Spartanburg resident Fredrick Antonio Evins, the man accused of murdering library worker Demaris Huff and cigarette store manager Rhonda Ward Goodwin.

R. 2756

This article included a graphic, detailed factual account of each crime, with quotes from Rhonda Ward's mother.

In his venue motion, defense counsel reminded the court that the Huff case was widely reported because of Ms. Huff's standing in the community as a librarian and resident of an upscale neighborhood. R. 119, ll. 5-12. The primary suspect in Ms. Huff's murder had been her husband until appellant was arrested for the Ward murder. As shown by the news clippings submitted by counsel, appellant's arrest for the Huff murder, after being charged in the Ward murder, was widely and sensationally reported. R. 119, ll. 13-20. Counsel stated that "for a long period of time, to live in this county . . . you either never watched TV or read the paper if you did not know about either one of these cases." R. 122, ll. 12-15.

A new article describing the cases appeared on November 8, 2004, the first morning of jury selection. Under the headline, "Evins facing murder trial," the article reported that a jury would be selected in the Ward case. In the fourth paragraph, the article reminded the public that appellant faced similar charges in the Huff case. R. 2757. Defense counsel argued that the new article was particularly prejudicial, since "if a juror knew about these cases through the extensive publicity back in February, March, April, May, June, July, and August of 2003, even if it had been pushed in the back of their mind, it has been resurrected by the article today." R. 123, ll. 6-12. Counsel argued that evidence from the Huff case that would not be admissible in the guilt phase of this trial had been "interjected" into the case by the articles. He concluded that the paper has "actually, done what the law would not allow any of the participants to do." R. 123, ll. 13-20.

The trial court agreed that the news articles were "irresponsible journalism" but ruled that appellant had not made a "sufficient showing that we can't get an untainted jury to try this case." R. 123, l. 25 - 124, l. 16.

Of the sixty-three potential jurors interviewed during voir dire, thirty-seven were exposed to pretrial publicity. Eight of them spontaneously associated, or confused, this case with the Demaris Huff case during voir dire. Only two -- Barbara Brendle, # 24, and John Williamson, juror # 389 -- were excused because of their exposure to pretrial publicity. The following venire members were exposed to pretrial publicity through television, radio, or print news outlets:

> Susan Kanipe, juror # 194, heard news accounts about the case when it happened. She heard that a person met the victim in the parking lot of her workplace, that both of

them left in the victim's car, and that her body was found in an apple orchard. She later heard that a suspect had been arrested. R. 1135, l. 16 - 1136, l. 25. Ms. Kanipe was seated on the jury.

Michael Henline, juror # 149, was familiar with the charges, including "that it happened, where it happened," from newspaper articles. He remembered the Drayton location because he formerly worked at Drayton Mills. R. 706, ll. 7-25; R. 715, l. 5 - 718, l. 3. Mr. Henline was seated on the jury.

Mark Roller, juror # 316, recalled television and news coverage from the time of the incident. R. 355, l. 23 - 356, l. 20. Mr. Roller was seated on the jury.

Donald Bower, juror # 19, heard about the case when it happened, and he heard that the court was calling a jury for "murder case in Spartanburg." R. 387, l. 21 - 388, l. 7. Mr. Bower was seated on the jury.

Neddie Richards, juror # 306, heard from a radio broadcast on the morning of trial that the court was calling jurors for a case involving a food mart. R. 423, l. 20 - 424, l. 24. Mr. Richards was seated on the jury.

Pamela Ridings, juror # 309, heard on radio or television that a jury was to be selected but did not recall coverage from the time of the incident. R. 624, ll. 6-20. Ms. Ridings was seated on the jury.

Betty Kirby, juror # 204, heard about the case from television when it happened, and recalled that it involved "the murder of a lady." She remembered that a "lady was found in Cleveland Park back a couple of years ago." R. 923, l. 14 - 924, l. 7; R. 931, l. 24 - 934, l. 11. Ms. Kirby was seated on the jury.

Linda Means, juror # 246 (seated as alternate), told the court that she reads the paper every day. She recalled specific facts including the location, the abduction and later recovery of a body. She had read about this case and about "another incident in Duncan Park (the Huff murder)." R. 892, l. 9 - 894, l. 8.

Myra Nichols, juror # 268, heard about the charges from television news broadcasts. She told the court that she "guessed" she could set aside her exposure "if she had to." R. 253, l. 18 - 254, l. 16; R. 260, l. 11 - 261, l. 5.

James Foster, Jr., juror # 105, heard about the case through news media when it happened. On the day before jury selection, he had briefly seen a television news broadcast showing appellant's picture. Questioned by the court, he recited facts pertaining to the Duncan Park murder, not the present case. He said that it was "his understanding" that the trial would involve "the Duncan Park murder." R. 871, l. 24 - 873, l. 2; R. 881, l. 9 - 882, l. 15.

Rosetta Higgins, juror # 154, heard television reports and beauty-shop gossip about the case. She heard that the police looking for the victim's body. She later heard that the body had been located and that an arrest had been made. She confused the two cases during her interview: "I might be talking about two different things. I thought it was in Duncan. They said the lady was in Drayton and one was in Duncan Park or something. I don't know." R. 1036, ll. 3-24; R. 1044, l. 23 - 1045, l. 18; R. 1050, ll. 2-21.

Emily Bivens, juror # 14, heard about this case when it happened. She saw appellant's picture in the newspaper and remembered the Cigarettes 4 Less location. She also recalled reading about a librarian who was killed in Duncan Park. She was disqualified because of a former working relationship with appellant. R. 973, l. 12 - 977, l. 24.

Norma McMakin, juror # 244, read an entire newspaper article about the upcoming trial. The article named the attorneys and defendant and mentioned "the two cases" in Duncan Park and at a convenience store. R. 659, l. 10 - 660, l. 1; R. 669, l. 19 - 670, l. 9.

Beverly Shulte, juror # 210, read newspaper articles about an abduction in Drayton and the recovery of a body. She recalled that the articles connected this case to a case involving "another female" who was jogging in a park. R. 1054, l. 19 - 1055, l. 20; R. 1060, l. 19 - 1062, l. 2.

Carole Hightower, juror # 155, heard news accounts and workplace gossip about the case, specifically that "they

were able to connect [the defendant] to another case" involving a librarian. She saw a television broadcast about the arrest. R. 1152, l. 11 - 1053, l. 21.

Cynthia McCrary, juror # 237, heard from television news coverage that "the defendant was caught on surveillance tape" at a cigarette store "forcing Ms. Ward into her car" and that her body was found in a peach orchard. She recalled hearing that a suspect had been arrested. R. 1026, l. 9 - 1028, l. 6.

Katherine Dunleavy, juror # 86, read in the newspaper that a woman who worked at the Cigarettes 4 Less store "was kidnapped and they found her . . . body in a peach orchard." She had also read a recent article stating that a jury would be selected. R. 501, l. 15 - 502, l. 21.

William Horton, juror # 163, recalled factual specifics from the incident, including the cigarette store location and that it involved an alleged abduction, from both television and print news media. R. 294, l. 8 - 295, l. 11.

Patricia Murphy, juror # 258, saw on television that "they had him in custody" and that "he" had murdered a lady from "Cigarettes 4 less place." R. 370, l. 10 - 371, l. 7.

Sabrina Jenkins, juror # 182, saw a television broadcast about the case when it happened. She recalled that a woman was kidnapped from Cigarettes 4 Less, and that her body was later found in an apple or peach orchard. R. 509, l. 5 - 510, l. 7.

Leslie Putze, juror # 296, read in the newspaper that a lady who worked at Cigarettes 4 Less in Drayton "went missing and then her body was later found." She heard from television that the trial was scheduled to begin. R. 585, l. 17 - 586, l. 11.

Sandra Chapman, juror # 56, watched a television broadcast at the time of the incident showing photographs of the crime scene and the victim. R. 478, l. 21 - 479, l. 22; R. 487, l. 13 - 488, l. 7.

Annie Davis, juror # 78, heard about the charges and saw appellant's photograph on television. R. 273, l. 5 - 275, l. 3.

Joel Williams, juror # 388, read in the newspaper on the morning of trial that the court was calling jurors for a "murder over by Drayton Mills." R. 318, l. 5 - 319, l. 24.

Joann Ertzberger, juror # 91, heard news accounts of the general facts of the case when it happened. R. 1074, ll. 1-20.

Douglas Fowler, juror # 107, heard talk and read newspaper articles about the case when it happened. He read an entire recent newspaper article discussing the upcoming trial. R. 1087, l. 3 - 1088, l. 18.

Jimmy Norman, juror # 269, vaguely recalled news reports at the time of the incident and about an arrest. He read the recent newspaper article about the upcoming trial, including the general facts of the case. R. 1096, ll. 3-23; R. 1105, l. 10 - 1106, l. 8.

Tina Godfrey, juror # 118, heard a radio broadcast about the upcoming trial and jury selection. She told the court that she "may have" heard something about the facts. She recognized appellant when she saw him in the courtroom. She mistook him for a news reporter because she had seen him on the news. R. 1163, l. 7 - 1165, l. 3.

Jackie Hostetler, juror # 165, heard television broadcasts "talking about Mr. Evins and that he's the one they are saying . . . done the crime." R. 1208, l. 13 - 1209, l. 6.

P.S. Cecil, juror # 54, read the headlines from the article that appeared the day before trial. He knew that he had been summoned for jury selection in a death penalty trial. R. 549, ll. 2-21; R. 557, l. 10 - 558, l. 21.

Aaron Gray, juror # 124, heard about the case on television when it happened. The broadcast showed appellant "in handcuffs" following his arrest. R. 771, l. 20 - 772, l. 10.

Larry Ford, juror # 101, heard about "the abduction" through the news media when it happened. R. 801, ll. 2-8.

Elizabeth Hill, juror # 156, told the court that she had heard about the case "on the news" but erroneously thought that

> the victim had been "gunned down" rather than stabbed. R. 823, l. 10 - 824, l. 1.
>
> John Williamson, juror # 389, heard about the case through print and television news. He heard that a lady who worked at a cigarette store had been kidnapped and murdered. He also heard "about a lady in Cleveland Park, about the same -- basically, it somehow got twisted in that." He said that it would "be hard" to base his decision on the evidence because of his media exposure and was disqualified without objection. R. 980, l. 9 - 981, l. 21; R. 988, l. 3 - 993, l. 6; R. 996, l. 10 - 999, l. 19.
>
> Michael McGrath, juror # 241, also recalled specific details from news media coverage; the court disqualified him because he was related to the Demaris Huff family. R. 312, l. 24 - 316, l. 5.
>
> Barbara Brendle, juror # 24, heard about the case through the newspaper and television. What she "remembered the most" was the Huff murder in Duncan Park, near her home. She was frightened after the Huff murder because of its close proximity. She was relieved when a news reporter approached her at Duncan Park and informed her about appellant's arrest in the Huff case. R. 729, l. 25 - 732, l. 4; R. 739, l. 23 - 740, l. 17. The court disqualified Ms. Brendle over the state's objection. R. 747, l. 24 - 748, l. 12.

Of the twelve final petit jurors, seven had been exposed to pretrial publicity. One juror (Betty Kirby, # 204) and one alternate (Linda Means, # 246) also recalled coverage of this case in connection to the Demaris Huff / Duncan Park case. The exposed petit jurors were Mark Roller, # 316; Donald Bower # 19; Neddie Richards, # 306; Pamela Ridings # 309; Michael Henline # 149; Betty Kirby # 204; Susan Kanipe # 194; and Linda Means, # 246 (alternate). R. 1322, l. 2 - 1323, l. 5; R. 1331, l. 1 - 1338, l. 25.

Appellant renewed the motion to change venue motion after jury selection but before the jury was seated, noting that more than half of the venire and nearly two-thirds

of the petit jury had been exposed to publicity. The court denied the motion. R. 1321, l. 13 - 1325, l. 20. This was an abuse of discretion.

A criminal defendant is entitled to an impartial jury, "free of prejudice, passion, excitement, and tyrannical power." Chambers v. Florida, 309 U.S. 227, 236-237, 60 S.Ct. 472, 476-477 (1940); Ristaino v. Ross, 424 U.S. 589, 96 S.Ct. 1017 (1976); State v. Gaskins, 284 S.C. 105, 326 S.E.2d 132 (1985). It is the trial judge's duty to ensure that the jury is fair and unbiased. Gaskins. The failure to ensure juror impartiality "violates even the minimal standards of due process." Irvin v. Dowd, 366 U.S. 717, 722, 81 S.Ct. 1639 (1961).

The denial of a motion to change venue based on pretrial publicity may violate due process. Patton v. Yount, 467 U.S. 1025, 104 S.Ct. 2885 (1984); Murphy v. Florida, 421 U.S. 794, 95 S.Ct. 2031 (1975); Irvin v. Dowd, supra; Rideau v. Louisiana, 373 U.S. 723, 83 S.Ct. 1417 (1963). To establish such a violation, the defendant must either demonstrate "identifiable prejudice" or circumstances that involved "such a probability that prejudice will result that that [the trial] is deemed inherently lacking in due process." Estes v. Texas, 381 U.S. 532, 542-543, 85 S.Ct. 1628, 1632-1633 (1965); Rideau, supra.

A motion to change venue is within the sound discretion of the trial court. State v. Manning, 329 S.C. 1, 495 S.E.2d 191 (1997); Sheppard v. State, 357 S.C. 646, 594 S.E.2d 462 (2004). There is no error if the jurors "had the ability to set aside any impressions or opinions" created by the publicity and to make their decision based on the evidence presented at trial. Sheppard; Manning. However, the jurors' own assurances that they are "equal to the task cannot be dispositive of the accused's rights." Murphy v. Florida, supra, at 421 U.S. 800, 95 S.Ct. 2036. In certain cases, exposure to

inflammatory pretrial publicity creates such a presumption of prejudice "the jurors' claims that they can be impartial should not be believed." Patton v. Yount, supra, at 476 U.S. 1031, 104 S.Ct. 2889.

This Court has held that when jurors have been exposed to pretrial publicity, the trial court's denial of a change of venue is not reversible absent extraordinary circumstances. State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1990); Sheppard, supra; Manning, supra. Appellant's case is extraordinary because the pretrial publicity connected the current offense to a separate local murder and portrayed appellant as a serial killer. At least one petit juror, Betty Kirby, had read about both crimes and connected them mentally. R. 920 - 938. She could not be expected to disregard the image created by the articles of appellant as a sexual predator and serial killer. As noted above, other venire persons also connected or confused the two cases.

Appellant's case also is extraordinary because of the volume and saturation of the news coverage. Nearly two-thirds of the jury pool and the resulting petit jury had heard about the case through regular coverage, from every local news outlet, spanning many months between the incident date until the morning of trial. The sheer pervasiveness of the coverage, together with the public connection to an unrelated murder, is sufficient, in this case, to create a presumption of prejudice. See Irvin v. Dowd; Rideau v. Louisiana; Patton v. Yount, all supra. Appellant should receive a new trial before an impartial tribunal.

2.

The court erred by ruling that the state's two peremptory strikes against African-Americans were not racially motivated. These strikes violated the core precepts of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986). (Issues 2 and 3).

Annie Davis, # 78, was one of the twelve African-American venire members. During the court's *voire dire* examination, Davis said that two of her sons had been killed in an automobile accident. She said that she had not formed any opinion about appellant's guilt or innocence, although she had heard about the case. R. 272, l. 16 - 274, l. 2. Davis initially vacillated about whether she could be objective, since she hadn't "got over" the memory of her sons' deaths. R. 274, l. 3 - 276, l. 12. As to sentencing, Davis told the court that she would listen to both sides and could impose a life sentence or the death penalty, depending on the circumstances. R. 277, l. 3 - 279, l. 20. Finally, she agreed that she could "honor [her] oath and serve as a fair and impartial juror," and that she would "approach jury service with an open mind to find the truth from the evidence and apply the law as . . . instructed." R. 279, l. 21 - 280, l. 3. She said that it would be "hard" to serve on the jury, but she would do her best. R. 280, ll. 7 - 8.

During defense counsel's *voir dire*, Davis said that she remembered Solicitor Barnette from her sons' case. She said that she was not biased in Solicitor Barnette's favor because he prosecuted the person who has caused her sons' deaths. R. 281, l. 1 - 282, l. 19. She said that, in her opinion, "most" killings were murder, but she that she could follow the law as instructed by the judge. She said that she could disregard what she'd heard about the case and base her decision solely on the evidence presented. R. 285, l. 1 - 287, l. 24.

During the solicitor's *voir dire*, Davis said that it used to "bother" her to return to the courthouse. She said that it "brought memories back" but that she "can deal with it." R. 288, l. 16 - 289, l. 1. She said that Solicitors Barnette and Crooks' association with her sons' case would not influence her. R. 289, ll. 2-5. She said that she "wouldn't want to pick" the death penalty, "but if it was the right sentence, [she] could do it." R. 290, ll. 9-15. Davis was qualified for service without objection. R. 290, l. 20 - 291, l. 1.

Johnny Young, # 399, was one of the African-American venire members. During the court's *voir dire*, he said that he had heard some talk about the case when it happened but had not seen any news reports about it. Young told the court that he would probably not be influenced by what he had heard. He said that he had not formed an opinion about appellant's guilt or innocence. R. 1272, l. 6 - 1275, l. 16. Young told the court that he could probably impose a life sentence under the appropriate circumstances. He initially hesitated when asked about the death penalty, stating, "that's a tough one . . . I've never really thought about it . . . I don't know." R. 1276, l. 7 - 1278, l. 23. He said that although he "like[d] life better than death," he could impose a death sentence under some circumstances and sign the verdict form if that was his decision. R. 1278, l. 24 - 1280, l. 25.

Young said that he was a "type three" juror who would not automatically vote for life or death, but would consider all of the evidence before making a decision. He agreed that he could "follow [his] oath to serve as a fair and impartial juror and approach jury service with an open mind." R. 1281, l. 1 - 1282, l. 4. When the court asked Young if there was any reason that he could not serve, he said that it was "a bad time" because he had recently started a new job. R. 1282, ll. 10-23.

During defense counsel's *voir dire*, Young repeated that he could impose a death sentence under some circumstances and would not automatically choose life over death. R. 1283, l. 1 - 1286, l. 22. During the solicitor's *voir dire*, Young said that he had started the new job after a long period of unemployment. He said, however, that he would think about the case, and not his job situation, in the courtroom. R. 1288, l. 8 - 1290, l. 23. Regarding the death penalty, Young said:

> I never really thought about it until I got here. And when I got here, all this just jumped out at me. I mean, you know, I hadn't never thought about the fact of killing somebody.

R. 1279, ll. 5 - 6.

He immediately said that his conscience would not prevent him from imposing death "if I thought that's what I needed to do." R. 1293, ll. 21 - 24. The state objected to Young's qualification on the basis that his opinions on capital punishment were "couched in a provisional way." The court qualified Young over the state's objection. R. 1298, ll. 6 - 23. The state later conceded that Young was qualified to serve under Wainwright v. Witt.

Seven of the original twelve African-American venire members remained after two were excluded for prior convictions and three were removed on the state's motions during *voire dire.* The state exercised a total of five peremptory strikes during petit jury selection. Two of the state's five strikes removed African-Americans Annie Davis and Johnny Young from the jury. R. 1308, l. 21 - 1309, ll. 21-23; R. 1310, ll. 19-21; R. 1311; ll. 14-16; R. 1333, ll. 18-21; R. 1335, l. 25 - 1336, l. 3; R. 1336, l. 24 - 1337, l. 2.

After jury selection but before the jury was seated, appellant challenged the strikes against Davis and Young, and requested race-neutral justifications pursuant to Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986). R. 1315, ll. 6-7.

The solicitor did not argue that Annie Davis was not qualified under Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844 (1985). He stated that Davis' sons had been killed in a felony DUI accident. He said that Davis had remembered that the person who "killed" her sons had received only six years in prison. R. 1315, ll. 8-14. He argued, "why should a mother who lost two sons to somebody who got six years be asked to give death to [another daughter] who lost one life." He struck Davis because he didn't "want her weighing and balancing why [her] son's life was worth six years and the state is trying to put Fredrick Evins to death." R. 1315, ll. 9-15. The court ruled that this was a race-neutral reason to strike Davis.

The solicitor *conceded* that Johnny Young was qualified to serve under Wainwright v. Witt, supra, but argued that Young was still a "life-prone juror," since he had said that imposing the death penalty would be "killing somebody." The solicitor said that Young "is clearly life prone [and] that's whey we struck him." R. 1316, l. 20 - 1317, l. 4. Defense counsel responded that Young had answered all of the questions posed by the court. Even after the solicitor's "pounding," Young had consistently stated that he could impose death under the appropriate circumstances, which was the appropriate standard by which to measure his fitness to serve. R. 1317, ll. 5-19. The court ruled that the solicitor's justification for the strike against Young was race-neutral. R. 1317, ll. 18-19.

The court abused its discretion by ruling that the state's reasons for striking Davis and Young were race-neutral.

The Equal Protection Clause of the Fourteenth Amendment prohibits the striking of a potential juror on the basis of race or sex. Batson, supra; J.E.B. v. Alabama Ex Rel. T.B., 511 U.S. 127, 114 S.Ct. 1419 (1994). The purposes of Batson and its progeny are to ensure the defendant a fair trial before a jury of his peers; to protect potential jurors from discrimination; and to safeguard public confidence in the court system. State v. Haigler, 334 S.C. 623, 515 S.E.2d 88, 90 (1999).

When a party challenges jury composition under Batson, the court must hold a hearing. The proponent of the strike must submit a race- or gender-neutral explanation. State v. Haigler, 334 S.C. 623, 515 S.E.2d 88 (1999). Then, the opponent of the strike must show that the explanation was a "mere pretext" to conceal a racist or sexist motive. State v. Adams, 322 S.C. 114, 124, 470 S.E.2d 366, 372 (1996); Purkett v. Elem, 514 U.S. 765, 115 S.Ct. 1769 (1995). As stated in Payton v. Kearse, 329 S.C. 51, 55, 495 S.E.2d 205, 207 (1998):

> Pretext generally will be established by showing that similarly situated members of another race were seated on the jury. Under some circumstances, the race–neutral explanation given by the proponent may be so fundamentally implausible that the judge may determine... that the explanation was mere pretext even without a showing of disparate treatment." accord State v. Adams, supra, at 322 S.C. 124, 470 S.E.2d 372.

Although one African-American juror and one African-American alternate were seated, the solicitor's reasons for striking Annie Davis and Johnny Young were pretexts to conceal his intent to eliminate African-Americans from the jury.

The solicitor's assertion that **Annie Davis** was biased because of the six-year sentence imposed on in her sons' case is not supported by the record. At no time during her *voir dire* did Davis mention the sentence received by the person who "killed" her sons. She said that she had attended the sentencing hearing, and she recalled the solicitor's involvement, but there was no discussion about the nature of the charges or the length of the sentence. R. 271, l. 13 - 291, l. 25. Davis never suggested that she would compare the value of the victims' lives. Rather, she affirmatively and repeatedly stated that the solicitor's involvement in her sons' case would not affect her judgment. R. 281, l. 1 - 282, l. 16; R. 288, l. 4 - 289, l. 5. Moreover, a tragic traffic accident, even a felony DUI, is hardly comparable to what the state contended was a kidnapping, rape, and deliberate murder, for sentencing purposes.

Charlie Gwinn, a white man seated as an alternate, had recently been "beat up by a drunk." He received notice of the trial date, but when he arrived for the trial, he was told that the case had been resolved on the previous day. R. 1007, l. 1 - 1008, l. 1. The solicitor did not strike Mr. Gwinn based on his potential bias as a crime victim whom the solicitor's office had neglected or mistreated. The solicitor's justification for striking Davis was a pretext to remove her from the jury because of her race. It violated Batson v. Kentucky, supra.

Johnny Young's initial responses to questions about the death penalty were guarded and thoughtful because it was a serious topic that he had never confronted. As any rational person would, Young considered the issue "a tough one." However, after explanations and questions from the court and both parties, he affirmatively stated that he could impose death in the right circumstances and that he could sign his name to a death

verdict. R. 1277, l. 15 - 1282, l. 4; R. 1283, l. 11 - 1286, l. 5; R. 1287, l. 8 - 1288, l. 1; R. 1290, l. 25 - 1293, l. 24.

Young's initial *voir dire* responses were not substantially more hesitant or life-prone than several white jurors. For example, Michael Henline, # 149, a white man who was seated on the petit jury without objection, also stated that it would be "difficult" to impose the death penalty, and that the crime would have to be "extremely heinous" to warrant death. He said that "it should be difficult for anybody to be a part of putting another person to death." R. 718, l. 13 - 719, l. 24; R. 723, ll. 4-6. When the solicitor asked Henline if, knowing that life was always an option, he could ever impose death, he replied, "I think so," then, "Yes, I could," and finally, "It's possible." R. 725, ll. 6-15.

Similarly, when Pamela Ridings, # 309, a white woman who was seated on the jury, was first asked if she could impose death, she replied, "I don't know." R. 627, ll. 18-25. She later explained, "If I understand everything that has happened and without a shadow of a doubt, you know, I could say, you know, yes, you deserve the death penalty." R. 633, ll. 21-24.

Another white juror, Susan Kanipe, replied, "I don't know . . . I mean, I just don't know" when first asked if she could impose death. R. 1139, ll. 12-20. When asked the same question, Robert Perry, # 284, a white man who was seated on the jury, also replied, "I don't know . . . I'm not sure." R. 147, ll. 12-25. Perry later explained that he "believed in" capital punishment "but only in certain cases." R. 153, ll. 16-25. The solicitor asked Perry, "knowing you've always got the option of giving somebody life, would you ever choose death?" Perry replied, "See, that's what I'm saying. It's not a very light thing to walk into." R. 158, ll. 14-24.

A number of potential jurors were guarded in their initial opinions on capital punishment, finally agreeing that they could impose death. Only venireman Johnny Young was struck on this basis. Young told the court that he could fulfill his duties as a juror. The solicitor's justification for striking him was pretext to remove him because of his race. The prejudice to appellant was compounded because Young was the only African-American man presented for jury selection, thus the only potential juror who resembled appellant in both race and gender.

The solicitor's peremptory strikes against Annie Davis and Johnny Young were racially motivated. His explanations for the strikes were pretextual and invalid. Appellant should receive a new trial before an impartial jury of his peers.

4.

<u>The court erred by granting the state's motions to exclude African-American venire members Patricia Murphy and Sabrina Jenkins, when they were qualified to serve. (Issues 4 and 5).</u>

Appellant is African-American. Twelve of his sixty-three potential jurors also were black. Two of these were disqualified because they refused to impose the death penalty: John Foster, # 102, and Mary James, # 180. R. 132, l. 20 - 144, l. 8; R. 839, l. 11 - 849, l. 11.

Two more black venire members were disqualified without objection because prior convictions made them ineligible to serve: Rita Pearson, # 281, and Shelton Benjamin, # 11. R. 653, l. 3 - 655, l. 24; R. 1202, l. 3 - 1206, l. 10. The state successfully moved to disqualify three more blacks, over appellant's objections: Patricia Murphy, # 258, Sabrina Jenkins, # 182, and Aaron Gray, # 134. R. 368, l. 17 - 385, l. 5; R. 507, l. 12 - 528, l. 10; R. 769, l. 21 - 792, l. 7. The state exercised peremptory strikes against three of the five remaining black venire members: Annie Davis, # 78, Rosetta Higgins, # 154, and Johnny Young, # 399. R. 1333, ll. 18-21; R. 1335, l. 25 - 1337, l. 2 (<u>See</u> argument 2, <u>below</u>). After the state removed half of the African-American venire members, only one, Lizzie Frawley, # 108, was seated on the petit jury, and one, Linda Means, # 246, was seated as an alternate. R. 1333, ll. 12-17; R. 1338, ll. 3-8.

Patricia Murphy, # 258, was an African-American venire member. During the court's *voir dire*, Murphy said that she had seen news reports about the incident. She said that she had not formed an opinion about appellant's guilt and could disregard what she had heard about the case. R. 379, l. 10 - 372, l. 22. She said that she could impose a life

sentence on a defendant guilty of murder after considering aggravating and mitigating circumstances. Initially, Murphy said that she would not impose the death penalty. R. 374, ll. 1-12. The following colloquy between Murphy and the court ensued:

> Q. Okay. Is there any circumstance at all where you think you could give the death penalty?
>
> A. It depends on what the severity of the case is, it depends on it.
>
> Q. Well, would you, after listening to all the facts and circumstances . . . could you return -- are you telling me that there are cases where you could return a verdict of death?
>
> A. Yes, there are.

R. 374, l. 23 - 375, l. 12.

Murphy initially said that she could not sign a death verdict because she feared her name would be publicized. When the court assured her that her name and address would not be conveyed to the public, she said that she could sign a death verdict if the circumstances warranted it. R. 375, l. 2 - 376, l. 24. The court asked her which of the three types of jurors she considered herself, as follows:

> Q. All right. Now, do you recall the sheet of the three jurors that I asked y'all to review, the three types of jurors?
>
> A. Yes.
>
> Q. Can you just tell me where you would classify yourself in the list?
>
> A. Probably the second one.
>
> Q. Now, the second one is someone who could never -
> -

A. Wait a minute.

Q. Do you want to take a look at it?

A. I would be the third one.

Q. The third one, which indicates that before you would make a decision with respect to that, you would want to hear all the facts and circumstances.

A. *Absolutely.*

R. 376, l. 25 - 377, l. 18 (emphasis added).

Murphy stated that she could "honor [her] oath and serve as a fair and impartial juror . . . and . . . approach jury service with an open mind to find the truth from the evidence and apply the law as . . . instructed." R. 377, l. 20 - 378, l. 2. Her only reservation was that other people might perceive her as biased because of her past work-related association with some potential witnesses. She insisted that she could be fair and impartial despite her past relationships. R. 378, ll. 5-20.

During the solicitor's *voir dire*, Murphy was asked to clarify her views on capital punishment, as follows:

Q. When the judge first asked you about the death penalty, you seemed very clear and very resolute that you do not believe in the death penalty. And then he asked you again and you said, yes, and then you said, maybe. . . . So what are your views on the death penalty?

A. Well, I feel like to me . . . if you've got a psycho running around here killing people, I don't think they deserve to live. I mean, of course, I'm not supposed to be judgmental, but that's just my feeling. You know, you don't kill a lot of people and then expect to live . . . .

Q. You mentioned a serial killer . . . Is that the only circumstance under which you could see yourself giving the death penalty, if someone killed more than one person or were a serial killer.

A. Basically, no . . .

R. 380, l. 7 - 381, l. 24.

The solicitor continued to ask Murphy about her initial response to the court:

Q. What made you tell the judge initially that you did not believe in the death penalty?

A. I guess, basically, my religion, thinking -- you know, weighing the pro's and con's of it, I guess.

Q. What made you change your answer the second time he asked?

A. I don't know. I guess with the information he told me about being protected and all that, you know. Sometimes things are scary, you hear a lot of things and you think people are going to maybe come after you because you're a juror.

R. 382, ll. 3-16.

Murphy said her concerns about her personal safety would be "in the back of her mind" during jury service, because "this is a small town and people can find you quickly," but she said her concerns would not affect her jury service. R. 382, ll. 12-24. The solicitor did not assure Murphy that she would be protected but immediately asked the following question:

Q. If I were to tell you that you would always have a choice of life in prison, never get out, spend the rest of your life in prison or death, would you pick life in prison?

A. Uh-huh.

Q. Always?

A. Uh-huh.

Q. If you've always got that, you'll always pick life in prison?

A. Uh-huh.

R. 382, l. 25 - 383, l. 8.

The state moved to disqualify Murphy based on these questions. Appellant argued that Murphy was qualified. She stated that she could vote for either life or death, depending on the circumstances, and that she could honor her oath. The court granted the state's motion and disqualified Murphy over appellant's objection. R. 383, l. 19 - 384, l. 23. This ruling was error.

Murphy was fully qualified to serve as a juror under S.C. Code § 16-3-20(E) and Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844 (1985). Under S.C. Code § 16-3-20(E), a juror may not be excused in a death penalty case unless his beliefs or attitudes against capital punishment would render him unable to return a verdict according to law. And, under Wainwright v. Witt, "a prospective juror may be excluded for cause when his views on capital punishment are such as would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." State v. Sapp, 366 S.C. 290-291, 621 S.E.2d 883, 886 (2005), citing Wainwright v. Witt. The "ultimate consideration is that the juror be unbiased, impartial, and able to carry out the law as explained to him." State v. Davis, 309 S.C. 326, 422 S.E.2d 133 (1992), cert. denied, 508 U.S. 915, 113 S.Ct. 2355 (1993), overruled on other grounds, Brightman v.

State, 336 S.C. 348, 520 S.E.2d 614 (1999), cited in Sapp at 366 S.C. 291, 621 S.E.2d 887.

Murphy's qualms about imposing death arose only from concern about her personal safety and not her impartiality or ability to follow the law. Rather than assuring her safety as a member of the executive branch with the police at his disposal, the solicitor exploited Murphy's fears in order to remove her from the jury because of her race. She had affirmatively stated that she could follow the law as instructed and could return a death sentence under the appropriate circumstances. See Davis and Sapp, supra. She was qualified to serve under the Wainwright standard, and the court abused its discretion by excluding her. See Gray v. Mississippi, 481 U.S. 648, 107 S.Ct. 2045 (1987).

Sabrina Jenkins was another African-American venire member. During the court's *voir dire*, Jenkins said that she had heard about the case on the news, but that she could disregard what she had seen about it. R. 509, l. 5 - 510, l. 7. She said that she had not formed any opinion about appellant's guilt. She stated that she could serve as a fair and impartial juror and reach a verdict based solely on the facts and law presented in court. R. 510, ll. 11-25. She stated that she could find the defendant guilty or not guilty depending on the evidence. She stated that, if the case reached the penalty phase, she could return either a life sentence or a death sentence after considering all of the aggravating and mitigating circumstances. R. 511, l. 15 - 17. She said that she was a "type three" juror who would "listen to all the facts and circumstances" before reaching a verdict. r. 513, ll 3-25.

During the solicitor's *voir dire*, Jenkins was asked an open-ended question about the death penalty, as follows:

> Q. What are your beliefs or views on capital punishment.
>
> A. Well, what I believe is to give someone the death penalty, if you purposely kill somebody -- you know, it could have been another situation that could have handled it. Than I see it as if -- I could see the death penalty. But for life, I say that if there wasn't no way out, you had to do what you had to do, you know. You had to kill -- you had to murder someone right then, you know, if you had to do it right then. And then you had to do what you had to do. There wasn't no way out of it, you know.
>
> Q. Like self-defense or something.
>
> A. Like self-defense, that's what I say, life. But I say death penalty, if you purposely did it and you know what you was doing and could have avoided it, then I think you deserve the death penalty.
>
> The solicitor's remaining questions couched the penalty phase solely in terms of unintentional or intentional behavior, rather than aggravation and mitigation. He gave Jenkins those two choices -- intentional killing or not -- and asked her what the punishment should be:
>
> Q. Let me ask, you, understanding that murder is intentionally killing another person, do you think that the death penalty should always be imposed in that case?
>
> A. Yeah.
>
> Q. So laying aside the self-defense or involuntary manslaughter or vehicular manslaughter, if you intentionally killed somebody with malice aforethought, which is an evil or depraved or

wicked spirit, the death penalty should be the punishment?

A. Yeah.

R. 518, l. 14 - 519, l. 5.

The court asked several follow-up questions:

Q. Not ever case in South Carolina that is murder is a capital case. You cannot -- the state may not pursue the death penalty in every murder case. Do you understand that?

A. Uh-huh.

Q. Now -- so what I'm asking you is, do -- you told the Solicitor that you though that every time somebody committed murder, they should get the death penalty.

A. Well -- . . . Let me rephrase that. Se, I told him what I though about intentionally doing it and defending yourself.

Q. Okay. Well . . . If you act in self-defense, you are not guilty of murder. Okay.

A. Yeah, you're right.

Q. And there are cases where there can be the intentional and wrongful killing of another person with malice aforethought, which is murder, but doesn't have an aggravating circumstance attached to it. So they cannot seek the death penalty. And then there's a capital case where there must be an aggravating circumstance . . .

Do you mean to tell me -- you told me before that you could consider all the aggravating and mitigating circumstances and return a verdict of life in prison. . . . In that circumstance, after considering all of the evidence, could you return a verdict of life in prison or . . . could you only give the death sentence.

A. I could give life in prison. . . . I don't understand the answer you're looking for.

Q. [Y]ou told me . . that you could give a life sentence and then later, you said that you would always give death.

A. I'd always give death?

Q. Yes. So I'm just trying to clear that up . . .

A. Well, see, like I said . . . You know, if you intentionally kill somebody, you know what you were doing, death penalty, but self-defense, life sentence.

Q. All right. So every time, if you intentionally kill somebody, the death sentence? I'm just asking . . .

A. . . . Yes.

R. 521, l. 4 - 524.

Defense counsel did not object to Jenkins' qualifications. However, the solicitor said, "Regrettably, I think she's unqualified." R. 524, ll. 12-26.

Defense counsel argued in response that Jenkins had consistently and correctly answered the court's questions on whether she could give life or death based on the circumstances. He argued that the solicitor injected the issue of self-defense, which is not a factor in capital sentencing, in order to purposely confuse Jenkins about the law and make her appear unqualified to serve. He said that Jenkins was using self-defense as an example only, and that she "said she would follow your charge on the law if she received it, which means when you explain what the law is, then she's willing to apply it." R. 524, l. 22 - 525, l. 19.

The solicitor argued that once he explained the definition of murder to Jenkins, she was "unequivocal" that "death is automatic." R. 525, l. 21 - 526, l. 2. He said, "I almost cannot believe my ears that they want to qualify a juror who says . . murder automatically equals the death penalty." In reply, defense counsel noted that it was "strange" that the solicitor would challenge a "pro-state" juror. R. 526, ll. 3-12. The court conceded that the solicitor had been "masterful, in his fair seeking of a qualified juror " but nevertheless granted the state's motion to disqualify Jenkins. R. 526, ll. 21-23.

Defense counsel objected to Jenkins' disqualification. Referring to both Murphy and Jenkins, counsel said that the solicitor had established a pattern of manipulating qualified African-American venire members into contradicting their initial qualifying statements that they could "go either way" based on the circumstances. The court overruled his objection and removed Jenkins from the venire. R. 527, ll. 2-11. This ruling was error.

Jenkins was a qualified juror under S.C. Code § 16-3-20(E) and Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844 (1985). Her replies to the court during its initial examination were certain and affirmative. Her views only *appeared* to change after the solicitor purposely confused her with an inaccurate statement of the law. His questions suggested that there were only two possible verdicts, murder or self-defense, and he asked Jenkins to assign a penalty for each. With the understanding that there were only two possible crimes and two possible penalties, Jenkins naturally assigned the harsher penalty to the more serious offense. She was using self-defense hypothetically, as an example, after having told the court that she would consider both mitigating and aggravating factors in sentencing.

The solicitor's treatment of Murphy and Jenkins, especially considering his peremptory strikes (discussed infra), show a systematic attempt to eliminate as many African-Americans from the jury as possible. Judging by her *voir dire* answers, Jenkins' presence on the jury would have benefited the state, if anybody. The only viable reason for the state's motion to disqualify her was racial. The court abused its discretion by removing her from the jury. She was qualified under the Wainwright standard, and the court committed reversible error by disqualifying her for cause. Appellant should receive a new trial before an impartial jury of his peers.

6.

African-American potential juror Aaron Gray testified he could impose the death penalty and sign his name to a jury verdict. The fact Gray had pending charges was grounds for a preemptory challenge by the solicitor, but it was not grounds for disqualification where Gray said he could impose the death penalty, and that his pending charge would not cause him to favor either side.

Relevant Facts

Gray testified during *voir dire* that he had seen appellant "in handcuffs on the news" but that he did not remember anything else about the case. R. 771, l. 5 – 772, l. 10. Gray said he could be a fair and impartial juror. R. 772, ll. 11 – 17.

Gray admitted that he was not in general in favor of the death penalty, but that he could return a verdict of death. R. 775, ll. 8 – 23. Gray also said that he could sign his name to the death verdict form. R. 776, ll. 11 – 22.

On cross-examination by the solicitor Gray acknowledged that he had reservations about the death penalty. He acknowledged that he was twenty-three years old, and that he could not think of a case that he knew of where he thought the death penalty should be imposed. R. 779, l. 8 – 780, l. 24. Gray said his beliefs are spiritual.

However, on continued questioning by the solicitor Gray said he was "[o]pen, you know, that I could give the death." Gray flatly stated, "I can give the death penalty." R. 781, l. 2 – 782, l. 24. Gray told the solicitor that the "heinousness of the crime" and the "seriousness" of the crime would control his decision whether to give "the death penalty." R. 782, l. 21 – 784, l. 12.

Gray admitted he had a pending charge against him in Spartanburg. Mr. Bartosh of the Public Defender's Office represented him. R. 784, l. 4 – 785, l. 1. Gray said he knew appellant's present attorneys – of whom Bartosh was not one -- worked for the Public Defender's Office. However, he did not know before that there was any connection between Bartosh and the defense attorneys in this case. R. 785, ll. 2 – 7.

Gray also said he did not have any animosity towards the sheriff's department who made the arrest in his own case. R. 785, ll. 1- 23.

When questioning by the defense counsel Boggs, Gray repeated that he could vote for the death penalty. Gray said he did not have any animosity towards anybody involved in this case, and he promised that he could be a fair and open-minded juror. R. 788, ll. 6 – 25.

The solicitor argued that he did not think Gray was qualified under the Wainwright v. Witt, supra, standard. The solicitor also said that when combined with the fact Gray had a pending charge against him that he should be disqualified for cause. R. 789, l. 8 – 790, l. 6.

Defense counsel Boggs argued that Gray was qualified to serve on the jury. Gray had said "if the facts warrant it, I can pass on the death penalty." Gray had also testified under oath that he can be fair. R. 790, ll. 7 – 14.

The following then occurred:

> The Court: [W]ell, I agree with - - and I personally liked him and thought he was a very pleasant young man. I just think it puts him in a very awkward position because of his situation. And I may be making an error here, but I am going to disqualify him.
>
> Mr. Boggs: I'd ask the court to inquire into that. If you would just ask him questions and whatever the court feels after that. But he said he could put that aside. Every juror

> that's going to serve is going to have to have something he puts aside.
>
> The Court: I am going to find that the potentials for him - - for his bias is too overwhelming to put him on the jury. And I find he is disqualified. He is represented by the same law office that represents Mr. Evins in this case. And I think that - - I hadn't thought it all the way through, but if there's not a conflict there, it's all the way through, but if there's not a conflict there, it's dancing on the line. And it certainly has the appearance of an impropriety. I am going to disqualify him.
>
> Is there anything else you want to put on the record with respect to that?
>
> I fully appreciate your position on this.
>
> Mr. Boggs: I think I've pretty well covered it.

R. 790, l. 15 – 791, l. 12.

The judge then disqualified Gray as a juror. R. 791, l. 20 – 792, l. 4.

Discussion

Appellant understands that in Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844 (1985), the court noted that deference must be given to the trial court who sees and hears the juror. However, as seen above, the judge seemed more concerned about the fact appellant was represented by the public defender's office, and that appellant also had an attorney from that office.

First, as to death penalty qualifications, since that was part of the motion to excuse Gray for cause, Gray said that he could impose the death penalty, and that he could sign his name to the death penalty verdict form. Gray said the "heinousness" or "seriousness of the crime" would govern his decision whether to vote for the death penalty.

Gray was a qualified juror under the Wainwright v. Witt standard. Gray could not be excused for cause unless his attitude against capital punishment would render him unable to return a verdict according to the law, or would substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. See State v. Counsel, 335 S.C. 1, 515 S.E.2d 508 (1998); State v. Longworth, 313 S.C. 360, 438 S.E.2d 219 (1993); S.C. Code §16-3-20 (E) (2003).

Further, this is not a case where the trial judge could sense Gray was crafting his answers to get on the jury because he was an African-American. Cf, State v. Wood, 362 S.C. 135, 607 S.E.2d 57 (2004). The judge said he "personally liked him and thought he was a very pleasant young me." The judge also acknowledged, "[I] may be making a error here, but I am going to disqualify him." R. 790, ll.7-19. There was not any indication in this record that Gray was anything other than genuine.

As seen, the judge also took into strong consideration the fact Gray had a pending charge against him. Again, however, Gray did not know that appellant's attorneys were associated with his attorney, Michael Bartosh. Gray testified that he did not have any animosity towards the police department that arrested him, and the judge's concern about a "conflict" does not seem justified just because two totally unrelated men had been arrested, on unrelated charges, and both had attorneys – different attorneys – from the public defender's office. See, Rule 407, SCACR, Rules of Prof. Conduct, Rule 1. 10 (e).

The fact of an arrest is not "for cause" disqualifying. It may well have justified a preemptory challenge from the solicitor, but it should have not been a grounds for disqualification as a juror for cause. The solicitor was not entitled to that kind of assistance from the trial court.

Moreover, it would seem intuitive that a juror with pending charges would be more likely to curry favor with the solicitor than a juror without pending charges. Regardless, that was a judgement call for the solicitor and defense counsel, and not a proper reason for the trial court to disqualify for cause.

Considering this record as a whole, Gray was a qualified juror by his answers under Wainwright v. Witt and State v. Counsel. He was also qualified as an unbiased juror. The judge stated he "liked" Gray, and this certainly means he found him sincere. As stated, the judge acknowledged he might be making an error by excluding Gray for cause, and respectfully the trial judge should have left any lingering doubt to the attorneys as a matter for exercising a peremptory challenge.

Appellant should be granted a new trial and because Gray was erroneously excused where he was a death qualified juror. See Gray v. Mississippi, 481 U.S. 648, 107 S.Ct. 2045 (1987). Appellant had the right to an impartial jury of his peers, and the disqualification of Gray for cause must be considered in light of the fact that appellant strongly argues above that five African-American jurors were wrongfully removed under Batson v. Kentucky, Wainwright v. Witt and Gray v. Mississippi, supra. This record shows appellant was denied a fair and impartial jury of his peers. See State v. Warren, 273 S.C. 159, 255 S.E.2d 668 (1979) (right to a fair and impartial jury by a cross-section of the population is among the most basic of rights).

7.

The defense correctly argued the nude photographs of the victim being introduced during the sentencing phase were going to inflame the passions of the jury. A death sentence should not be returned on the basis of passion. The photographs, particularly the nude photographs showing that the victim had defecated on herself went beyond any legitimate purpose in this case.

During the penalty phase the following occurred:

> Mr. Gowdy: We would be intending to submit State's Exhibit Nos. 71, 72, 74, 75, 76, 77, and 80.
>
> Mr. Boggs: We object to simply this as being over - - there's no reason to put that in other than to inflame the jury.
>
> Mr. Gowdy. That's how he left her.
>
> Mr. Boggs: It's the same body connotation in here.
>
> Mr. Gowdy; *You can't see the fact that a women died with feces on her because of what he did.*
>
> *Mr. Boggs: I object to that one, and the only reason would be to inflame the jury.*
>
> The Court: *You're generally objection to all of them?*
>
> *Mr. Boggs: Yes, because of the same purpose. If it's an odd location, it's okay. I mean, I know they can put how the body was found. That's the same reason for this, State's Exhibit No. 71.*
>
> The Court: Well, the state agrees that she's - -
>
> Mr. Gowdy: But you can also see the stab wound on the back of the arm.
>
> The Court: Oh, okay.
>
> Well, over the defense's objection, I'm going to let it in.

Mr. Gowdy: Thank you, Your Honor.

(Whereupon, the bench conference was concluded.)

Mr. Barnette: Your Honor, the state would call Randy Bogan to the stand.

R. 2330, l. 1 – 2331, l. 5.

Bogan then testified and identified the photographs of the victim taken on Gano Road where her body was found. R. 2332, l. 15 – 2333, l. 3. Over defense objection, State's Exhibit 70, 71 72, 74, 75, 76, 77, and 80 were all admitted into evidence. R. 2333, ll. 6 – 9. Those photographs are on file for this Court to review.

The following then occurred with Bogan:

Q. Okay. I'm showing you State's Exhibit no. 71, can you tell us what this is a picture of, sir?

A. That's the body of Rhonda Ward as we found it on Gano Road. She was laying face down, as I stated a few days ago. She was nude and had defecated on herself.

Q. Okay. Let me show you what's been marked as State's Exhibit No. 72, can you describe what this picture is, sir?

A. Yes, sir. That's just another angle of Rhonda War's body from just a different view.

R. 2333, l. 21 – 2334, l. 5.

* * *

Q. Let me show you State's Exhibit No. 70?

A. That's just another angle of Rhonda Ward as we found her on Gano Road laying face down.

Q. And what had she done to herself?

A. She had defecated on herself, and you can see that in the photograph.

Mr. Gowdy: Thank you, sir.

Please answer any questions the defense may have for you.

Ms. Quimby: No questions, Your Honor.

The Court: All right. Officer, you may stand down.

Mr. Gowdy: Your Honor, the state rests in the sentencing phase.

R. 2335, l. 24 – 2336, l. 11.

State's Exhibit 70 and 71 show the victim's nude body laying face down in the dirt, and they clearly show that she had defecated on herself. State's Exhibit 72 was also a photographic of the nude victim. State's Exhibit 74 appears to be a photograph of the victim laying face up which would mean it was staged. State's Exhibit 75 and 76 show injuries to the victim's hand and arm and State's Exhibit 77 and 80 are equally nauseating and inflammatory. Again, those photographs are on file before this Court's consideration.

Appellant recognizes that during the sentencing phase the scope of probative value of evidence is much broader. See State v. Rosemond, 335 S.C. 593, 518 S.E.2d 588 (1999). Photographs of the victim's body during the sentencing phase are admissible to demonstrate (1) the circumstance of the crime; and (2) the character of the defendant. See State v. Tucker, 324 S.C. 155, 168, 478 S.E.2d 260, 267 (1996).

However, gruesome or grotesque photographs which are going to inflame or impassion the jury are not admissible. They invite a death sentence upon an improper basis. See State v. Patrick, 289 S.C. 301, 345 S.E.2d 481 (1986).

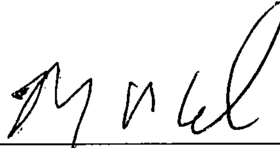
Photographs showing the decedent had defecated upon herself went well beyond any legitimate purpose during the sentencing phase. C.f. State v. Hughey, 339 S.C. 439, 529 S.E.2d 721, 733 (2000). A death sentence must be based on "reason rather than caprice or emotion." Gardner v. Florida, 430 U.S. 349, 357 – 358, 97 S.Ct. 1197, 1204 (1977). Further, this Court's mandatory review pursuant to S.C. Code § 16-3-25 (1985), also mandates that this Court must conclude a death sentence was not the result of passion, prejudice, or any other arbitrary factor.

Defense counsel correctly objected to the photographs, particularly those nude photographs depicting the fact the victim had defecated upon herself, because they were going to inflame the jury. This Court rejected the state's argument in State v. Haselden, 353 S.C. 190, 577 S.E,2d 445 (2003) that a photograph of the victim's dilated anus was properly admitted. Appellant should be granted a new sentencing hearing.

CONCLUSION

By reason of the foregoing arguments, appellant's conviction should be reversed in this case remanded to the Spartanburg County Court of General Sessions with an order to change venue. In the alternative, appellant's conviction should be reversed and this case remanded to the Spartanburg County Court of General Sessions for a new trial. In the second alternative, appellant's death sentence should be vacated and a new sentencing trial ordered.

Respectfully submitted,



Robert M. Dudek
Deputy Chief Attorney for Capital Appeals

Aileen P. Clare
Assistant Appellate Defender

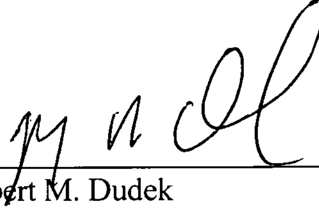
ATTORNEYS FOR APPELLANT.

December 12, 2006

CERTIFICATE OF COUNSEL

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

December 12, 2006



Robert M. Dudek
Deputy Chief Attorney for Capital Appeals

Aileen P. Clare
Assistant Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211-1589
(803) 734-1343

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Spartanburg County

Edward W. Miller, Circuit Court Judge

THE STATE,

RESPONDENT,

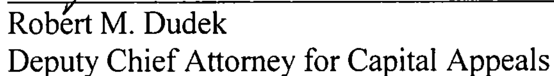
V.

FREDRICK ANTONIO EVINS,

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 Derrick K. McFarland, Esquire, this 12th day of December, 2006.



Robert M. Dudek
Deputy Chief Attorney for Capital Appeals

Aileen P. Clare
Assistant Appellate Defender

ATTORNEYS FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 12th day of December, 2006.

______________________________(L.S.)
Notary Public for South Carolina

My Commission Expires: November 16, 2008 .