

# APPENDIX A

421 S.C. 622  
Supreme Court of South Carolina.

[The STATE](#), Respondent,  
v.  
Luzenski Allen COTTRELL, Appellant.  
Appellate Case No. 2015-000731

Opinion No. 27754

Heard May 24, 2017

Filed December 20, 2017

Rehearing Denied February 16, 2018

Synopsis

Background: Defendant was convicted in the Circuit Court, Horry County, of, inter alia, murder, based on incident in which defendant allegedly shot and killed police officer during [Terry](#) stop. Defendant appealed. The Supreme Court, [376 S.C. 260, 657 S.E.2d 451](#), reversed and remanded for new trial. On remand, defendant was convicted in the Circuit Court, [Larry B. Hyman, Jr., J.](#), of murder and was sentenced to death. Defendant appealed.

Holdings: The Supreme Court, [Hearn, J.](#), held that:

[1] trial court acted properly and in accordance with its broad discretionary authority in removing defendant's appointed attorneys and replacing them with new counsel, and thus trial court did not violate defendant's right to counsel;

[2] two certain jurors were not "mitigation impaired," and thus were qualified to serve on jury in capital-murder case;

[3] risk of confusion and prejudicial effects of detective's testimony substantially outweighed its probative value, and thus exclusion of detective's testimony did not violate defendant's due process rights, Confrontation Clause rights, or Fourth Amendment right against unreasonable seizures;

[4] focus for jury in determining lawfulness of [Terry](#) stop was

reasonableness of manner in which police officer acted, and thus testimony of detective was properly excluded to prevent it from unduly prejudicing or confusing jury;

[5] defendant's due process rights were not violated by trial court's refusal to issue express instruction that jury could not infer malice from defendant's use of deadly weapon;

[6] trial court's decision not to inform parties that note sent by jury during sentencing deliberations indicated specific numerical split did not violate defendant's right to assistance of counsel, fair jury trial, or non-arbitrary verdict; and

[7] trial court's error, if any, in not informing parties of specific contents of note sent by jury during sentencing deliberations was harmless.

Affirmed.

[Few, J.](#), filed opinion concurring in result only.

\*\*427 Appeal From Horry County, The Honorable [Larry B. Hyman, Jr.](#), Circuit Court Judge

Attorneys and Law Firms

[Keir M. Weyble](#) and Sheri L. Johnson, both of Cornell Law School, of Ithaca, New York, and [Robert M. Dudek](#), of Columbia, for Appellant.

Attorney General Alan Wilson, Senior Assistant Deputy Attorney General [Donald J. Zelenka](#) and Assistant Attorney General [J. Anthony Mabry](#), all of Columbia, and Solicitor Jimmy A. Richardson, of Conway, for Respondent.

Opinion

JUSTICE [HEARN](#):

\*628 Appellant Luzenski Allen Cottrell was convicted and sentenced to death by an Horry County jury for the 2002 murder of Myrtle Beach police officer Joe McGarry. On appeal, Cottrell now raises five issues, all of which involve rulings largely addressed to the trial judge's discretion. Finding no abuse of discretion by the trial judge, we affirm his conviction and sentence.

## FACTS

Shortly after midnight on December 29, 2002, McGarry and fellow police officer Mike Guthinger entered a Dunkin Donuts in the city of Myrtle Beach. Both officers were in uniform and on duty, completing a traffic stop a short time earlier before deciding to get coffee. Upon entering Dunkin Donuts, McGarry immediately recognized Cottrell, who was ordering coffee \*629 at the register with two companions, Diane Lawson and Fred Halcomb. McGarry was familiar with Cottrell, having had several previous encounters with him, including arresting Cottrell for possession with intent to distribute marijuana earlier that year. More significantly, Lt. Amy Prock of the Myrtle Beach Police Department had recently notified McGarry that Cottrell had been identified as a possible suspect<sup>1</sup> in the shooting death of Rick Hartman, whose body had been found in a rural part of Horry County roughly a month earlier.

<sup>1</sup> Halcomb was also identified as a suspect in Hartman's death, but he was not immediately recognizable to the officers.

Upon recognizing Cottrell, McGarry informed Guthinger that Cottrell was identified as a suspect in a shooting and that he was possibly carrying a gun. Rather than proceed in line to get coffee, McGarry and Guthinger exited the Dunkin Donuts and approached Cottrell on the sidewalk as he stepped out the door. McGarry asked Cottrell whether he remembered him, and then inquired as to whether he had taken care of the previous charges for which McGarry had arrested him. Cottrell indicated they were all taken care of. At that point, McGarry asked Cottrell for his identification and informed him he was going to run an NCIC check to see if Cottrell had any outstanding warrants.

While waiting for a response from the dispatcher after calling in Cottrell's information, McGarry indicated to Cottrell that he was going to perform a pat-down for weapons. Cottrell told McGarry "no" before turning and walking away toward another vehicle driven by Donnie Morgan, who was part of Cottrell's group but unknown to the officers at the time. Cottrell's right hand was somewhere near the front of his waistband as he turned and walked away.<sup>2</sup> McGarry then immediately \*\*428 began yelling for Cottrell to stop and show his \*630 hands. When Cottrell did not comply, McGarry

unholstered his weapon and again commanded Cottrell to show his hands. With Cottrell's back still turned to him, McGarry reholstered his weapon and rushed towards Cottrell from behind, struggling to grab Cottrell's right hand which was near the front of his waistband, while McGarry's left hand was somewhere on Cottrell's upper back or shoulder, attempting to gain control of him.

<sup>2</sup> Cottrell was wearing an oversized, baggy jersey, which Guthinger testified made it impossible for him to see whether he had a concealed handgun underneath, though he also stated that such oversized clothing was often worn for the purposes of concealing illegal weapons. Though there was no eye witness testimony to confirm it, the State's theory was that at some point while waiting for the NCIC to come back, McGarry caught a glimpse or saw the imprint of a concealed handgun on Cottrell's person, thereby causing McGarry's rapid change in demeanor and his instructions to Cottrell to keep his hands visible.

The pair stumbled and separated as they slid toward the rear of the Morgan vehicle. As they regained their balance and squared up, Cottrell raised a .45 caliber handgun and fired a shot, striking McGarry in the face from eight to twelve inches away. The shot incapacitated McGarry, who fell backwards and struck his head on the pavement.<sup>3</sup>

<sup>3</sup> Guthinger testified he witnessed Cottrell raise his gun and shoot McGarry, and that the sound of the first shot was simultaneous with the muzzle blast he saw from the gun's muzzle. Guthinger then heard a second shot but did not see a muzzle flash. Experts confirmed that McGarry's weapon fired a shot, and Lawson, who witnessed the events from the passenger seat in Halcomb's vehicle, testified that McGarry's weapon discharged while he was falling backwards after being shot by Cottrell.

Immediately upon seeing Cottrell shoot McGarry, Guthinger drew his weapon and fired several shots at Cottrell, striking him in the leg as Cottrell sought cover behind Morgan's car.<sup>4</sup> Guthinger and Cottrell continued to exchange gunfire, and numerous vehicles and nearby buildings were struck by bullets. At some point during the shootout, Cottrell told Guthinger he was surrendering, prompting Guthinger to leave his protected position to place him under arrest. However, as he approached, Cottrell reloaded his firearm and resumed shooting at Guthinger, who retreated to cover and called for backup.

4 There was some dispute as to when Cottrell was shot. The defense produced an expert who testified that Cottrell was shot from the front, attempting to convince the jury that McGarry fired the first shot and struck Cottrell. Guthinger testified that he shot Cottrell, and that Cottrell was moving without any signs of injury immediately after shooting McGarry, and only after Guthinger fired at him did Cottrell begin hopping or limping on one leg. In a statement to police following the shooting, Cottrell stated he believed it was Guthinger who shot him, not McGarry. Lawson also confirmed that it was Cottrell who fired the first shot, while McGarry then fired as he was falling to the ground.

\*631 Cottrell fled the scene and responding officers engaged in a high speed chase through Myrtle Beach until his getaway vehicle was brought to a halt using stop sticks to disable the tires, and he was placed under arrest. Police recovered the .45 caliber weapon that was forensically matched to the bullet which killed McGarry, along with another loaded .357 revolver in the backseat. Officers attempted to perform CPR on McGarry, but he passed away in the Dunkin Donuts parking lot.

#### PROCEDURAL HISTORY

Cottrell was first tried for the murder of McGarry in 2005. At that trial, the jury found him guilty of murder, assault with intent to kill, resisting arrest, and grand larceny. Cottrell appealed the murder conviction, and this Court reversed, finding the trial court erred in refusing to give the jury an instruction on voluntary manslaughter in addition to murder. [State v. Cottrell, 376 S.C. 260, 265, 657 S.E.2d 451, 454 \(2008\)](#) (hereinafter referred to as [Cottrell I](#)). The other convictions remained, but Cottrell was granted a new trial on the murder charge.

Weeks prior to the scheduled start of Cottrell's second trial in March 2012, the solicitors representing the State had separate conversations with Cottrell's appointed attorneys, at which time each accused co-counsel of misconduct and questioned their ability to adequately represent Cottrell in light of their difficulty working together. The solicitors made the trial judge aware of these allegations, and he conducted discussions in chambers with the appointed attorneys, who both confirmed they had indeed made the allegations brought to light by the State. Both attorneys also indicated they felt their inability to work together jeopardized Cottrell's defense.

\*\*429 In a pre-trial hearing, the trial judge expressed his

concerns over the allegations made by Cottrell's attorneys, questioning whether it was possible for them to effectively represent Cottrell. Cottrell's attorneys stated they could put their differences aside and work together so the case could proceed, but acknowledged they would defer to the trial judge's decision. One of the attorneys admitted that the allegations were probably sufficient to solidify post-conviction relief if the case went \*632 forward. The trial judge then gave Cottrell an opportunity to discuss the matter with his attorneys. After their discussion, Cottrell reiterated he felt confident in his attorneys' ability to represent him, but that he would defer to the trial judge's decision. Ultimately, due to his concerns for Cottrell's representation and the ability of the attorneys to overcome their problems just two weeks before trial, the trial judge decided to relieve both attorneys. After appointing new defense counsel,<sup>5</sup> the trial judge afforded Cottrell more than two years before rescheduling the trial so that his new attorneys would have adequate time to prepare.

5 There is no dispute over replacement counsel's qualifications to represent Cottrell.

Cottrell was eventually tried and found guilty of murder, and the case proceeded to sentencing. During the sentencing phase, the jury heard evidence of Cottrell's prior bad acts, including a prior conviction for the murder of Jonathan Love in Marion County, as well as testimony surrounding Hartman's murder, which the State asserted Cottrell was responsible for although the case had not yet been tried.<sup>6</sup>

6 After Cottrell's second trial and conviction for the murder of McGarry, the State decided not to further pursue charges against Cottrell for the Hartman murder.

After deliberating for approximately two hours over Cottrell's sentence, the jury sent a note to the trial judge indicating there were eleven jurors for the death penalty and one for life, asking, "What is the next step?" The trial judge did not disclose to the parties what the split was at that time, instead reading a redacted version without the numerical count, and informing them that he would instruct the jury to continue deliberations. Because the jury had only been deliberating for two hours, the trial judge concluded it was too early to give an [Allen](#)<sup>7</sup> charge. The jury continued its deliberations and ultimately returned with a unanimous recommendation that Cottrell be sentenced to death.<sup>8</sup> Cottrell now raises five issues in his appeal to this Court.

7 [Allen v. United States](#), 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896).

8 The jury found three aggravating circumstances present to warrant the imposition of the death penalty: (1) a prior murder conviction; (2) the killing of a police officer in the line of duty; and (3) conduct that created a great risk of death to more than one person in a public place. See [S.C. Code Ann. § 16-3-20\(C\) \(2015\)](#).

#### \*633 ISSUES PRESENTED

I. Did the trial judge's removal of Cottrell's appointed attorneys violate his right to counsel and due process under the Sixth and Fourteenth Amendments?

II. Was Cottrell's right to a fair and reliable sentencing determination violated as a result of the qualification and seating of two jurors whose expressed views prevented or substantially impaired their ability to consider constitutionally relevant mitigating evidence?

III. Did the trial judge err in excluding the testimony of Detective Nathan Johnson on the grounds that the risk of prejudice substantially outweighed its probative value?

IV. Did the trial judge err by refusing to instruct the jury not to infer malice exclusively from the use of a deadly weapon?

V. Did the trial judge err by refusing to disclose the contents of a jury note to Cottrell's defense counsel during sentencing deliberations?

#### ANALYSIS

##### I. REMOVAL OF ATTORNEYS

[1] Cottrell contends that the removal of his appointed counsel without any factual findings on the record was an unnecessary termination of his existing attorney-client relationship and a violation of his Sixth Amendment \*\*430 rights. On the other hand, the State asserts the removal of Cottrell's counsel was an appropriate exercise of discretion by the trial judge. Given the trial judge's discretionary authority and his duty to ensure the integrity of the judicial process and safeguard Cottrell's right to effective counsel, we find the trial judge did not abuse his

discretion in removing Cottrell's attorneys and appointing new counsel.

[2] [3] [4] An accused has the right to assistance of counsel. [U.S. Const. amend. VI](#). However, the Sixth Amendment right to counsel is “circumscribed by the trial court's obligation to safeguard the integrity of the proceedings and ensure trials \*634 are conducted according to the ethical standards of the profession.” [State v. Sanders](#), 341 S.C. 386, 389, 534 S.E.2d 696, 697 (2000). Thus, a motion to relieve counsel is left to the discretion of the trial judge and will not be disturbed absent an abuse of discretion. [State v. Justus](#), 392 S.C. 416, 418, 709 S.E.2d 668, 670 (2011). In determining whether to remove a defendant's attorneys, a court must balance a defendant's right to choose his own counsel “against the need to maintain the highest ethical standards of professional responsibility.” [Sanders](#), 341 S.C. at 390, 534 S.E.2d at 698. The Fourth Circuit has explained that a trial judge must be allowed “substantial latitude” and broad discretion in disqualifying a defendant's chosen lawyer so the trial judge may “rule without fear that it is setting itself up for reversal on appeal.” [U.S. v. Howard](#), 115 F.3d 1151, 1155 (4th Cir. 1997).

Cottrell characterizes the trial judge's removal of his counsel as arbitrary and unsupported by any basis in the record, citing to [United States v. Gonzales-Lopez](#), 548 U.S. 140, 147–48, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006), for the proposition that the removal of his attorneys was a structural error under the Sixth Amendment. We disagree.

While Cottrell is correct in asserting that the *erroneous* deprivation of a defendant's counsel of choice is a structural error in violation of the Sixth Amendment, the key qualifying language in that statement of law requires that the removal of defendant's chosen counsel be erroneous. In [Gonzales-Lopez](#), the United States Supreme Court noted that the right to counsel of choice is not absolute and is subject to several limitations, but because the government conceded that the district court *erroneously* deprived respondent of his counsel of choice and without proper justification, the broad discretion normally afforded to trial judges was not applicable. [Id.](#) at 152, 126 S.Ct. 2557. Importantly though, the [Gonzales-Lopez](#) court made clear that its holding did not cast any doubt or place any qualifications upon its prior holdings that “limit the right to counsel of choice and recognize the authority of trial courts to establish criteria for admitting lawyers to argue before them.” [Id.](#) at 151, 126 S.Ct. 2557. Reaffirming its earlier holdings, the Court further noted this right to counsel of choice does not

extend to defendants represented by appointed counsel. *Id.* The Court also reiterated the wide latitude that must be \*635 afforded to trial courts in balancing the right to counsel of choice with the needs of fairness, and its “interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them.” *Id.* at 152, 126 S.Ct. 2557.

In this case, we believe the trial judge acted properly and in accordance with his broad discretionary authority in removing Cottrell's appointed attorneys. We agree with Cottrell's argument that his relationship with appointed attorneys, once established, should be afforded the same level of deference as that which is afforded to clients with retained counsel; however, that does not overcome the strong language from *Gonzales-Lopez*, *Sanders*, and the long line of other authorities delineating the wide latitude a trial judge possesses in balancing the right to counsel of choice with safeguarding the integrity of the judicial process. Here, the record reflects the trial judge removed Cottrell's attorneys to ensure Cottrell received a fair trial with adequate representation and to maintain the integrity of the judicial process. And, unlike *Gonzales-Lopez*, the State does not concede that the trial judge erroneously removed counsel—precluding a finding that the removal of Cottrell's attorneys was necessarily a structural \*\*431 error and instead requiring the Court to apply an abuse of discretion standard.

As Cottrell points out, *Sanders* grants the trial judge discretion in removing counsel, but he contends there must first be an evidentiary hearing with findings of fact before the judge can make such a decision. Indeed, this Court explained in *Sanders* that “as a procedural safeguard, an evidentiary hearing is appropriate to determine whether there is evidence to support counsel's removal.” 341 S.C. 386, 391, 534 S.E.2d 696, 698. In *Sanders*, the trial judge removed one of the defendant's attorneys after the State indicated the attorney would be called as a witness to testify about her interactions with another State witness. Rather than holding a hearing to determine whether the attorney was a “necessary witness” to disqualify her under the Rules of Professional Conduct, the trial judge merely relied on the State's assertion and removed the attorney.

\*636 In Cottrell's case, these concerns are mitigated because in addition to the *in camera* discussions, the trial judge did in fact hold a hearing to allow Cottrell and his attorneys to be heard on the matter. We acknowledge it is somewhat problematic that the record does not indicate with specificity

what the allegations of misconduct and disagreement actually entail, but the attorneys' confirmation that the accusations were made and the absence of any rebuttal weighs in favor of affirming the trial judge's decision. Moreover, once one of Cottrell's attorneys admitted on the record that he believed Cottrell would likely prevail on PCR based on these allegations, we find the trial judge had little choice but to remove the attorneys to preserve the integrity of the trial in accordance with *Gonzales-Lopez* and *Sanders*. The right to counsel is not so absolute that it requires a trial judge to preside over a trial, exhausting the time of attorneys, jurors, and judicial staff despite an admission by a defendant's attorney that the integrity of the verdict is in doubt due to conduct falling below the accepted standards of the legal profession.

Based on the above analysis, we find the trial judge acted within the limits of his discretionary powers and did not violate Cottrell's Sixth Amendment right to counsel by removing his appointed attorneys and replacing them with new counsel. Had the attorneys denied the allegations or objected to the trial judge's remedy of removal, more complete findings of fact may have been appropriate, but the limited findings in the record are bolstered by the attorneys' acquiescence to the trial judge's ruling. Though deference is afforded to a defendant's attorney-client relationship once established, that relationship is limited by a trial judge's obligation to safeguard the integrity of the judicial process, as the trial judge did here. Thus, we find no error in the trial judge's removal and replacement of Cottrell's appointed attorneys.

## II. JUROR QUALIFICATION

[5] Cottrell next argues the trial court erred in qualifying Jurors 148 and 450 after they made statements during the jury selection process indicating they would not consider evidence of a defendant's background in determining whether to impose the death penalty. After reviewing the record and \*637 the entirety of each juror's *voir dire*, we affirm the trial judge's decision to qualify the jurors.

[6] [7] [8] Determinations of whether a juror is qualified are left to the sole discretion of the trial judge who has the opportunity to see and hear the jurors. *State v. Dickerson*, 395 S.C. 101, 115, 716 S.E.2d 895, 903 (2011). In reviewing the trial judge's qualification of jurors, the juror's responses must be examined in light of the entire *voir dire*, and the trial judge's decision will not be reversed unless it is wholly unsupported by the evidence. *Id.* “The ultimate consideration is that the

juror be unbiased, impartial, and able to carry out the law as explained to him.” [State v. Sapp, 366 S.C. 283, 291, 621 S.E.2d 883, 887 \(2005\)](#).

A full review of the *voir dire* process shows that neither of the jurors in question was “mitigation-impaired,” and both identified themselves as “Type C” jurors, meaning they would not always vote for life or always vote for death. The jurors further stated they would wait until all evidence was presented before determining the appropriate sentence \*\*432 based on aggravating and mitigating evidence.<sup>9</sup> Both jurors expressed a willingness to follow the trial judge’s instructions regarding the law, and both indicated they would not automatically impose the death penalty. See [Dickerson, 395 S.C. at 116, 716 S.E.2d at 903](#) (“The circuit judge was more persuaded by the juror’s consistent affirmation he would follow the law and wait to hear all of the evidence than by his apparent confusion over the State’s burden, and we believe his ultimate determination of [the juror’s] qualification to serve is supported by the \*638 record.”). During the sentencing phase of Cottrell’s trial, the trial judge repeatedly instructed the jurors that they would be required to consider any mitigating circumstance of any nature whatsoever, and explained what mitigating evidence could entail.

<sup>9</sup> For example, Juror 450 explained to defense counsel, “Again, I think that everything is based on individual acts, and so overall to say that the death penalty is for everybody, I just don’t think that’s how it should be.” Keeping in mind that the jurors had not yet been given any instructions on the law, we read the colloquies with Cottrell’s attorneys asking whether the jurors would consider a defendant’s background when determining the appropriate sentence and their responses of “no” to signify the jurors’ intent to treat all defendants fairly and equally, and base their decision upon the facts of the case. To laypersons, the notion of equal treatment for all under the law is a touchstone of our justice system, and until a juror is fully informed that he may determine the appropriate sentence based on the unique backgrounds or characteristics of the defendant, it is not surprising that a juror would state that he intends to treat all defendants equally, regardless of their background.

Based on the deference appellate courts afford to trial judges in matters of jury selection, and looking at the entirety of the *voir dire* process, along with the clear instructions given by the trial judge, we affirm the trial judge’s qualification of Jurors 450 and 148.

### III. TESTIMONY OF NATHAN JOHNSON

Cottrell asserts the trial judge violated his due process rights, the Confrontation Clause, and his Fourth Amendment right against unreasonable seizures by excluding the testimony of Detective Nathan Johnson. We disagree.

#### A. Background

Horry County Detective Nathan Johnson began investigating the murder of Rick Hartman after his body was found in November 2002. Johnson identified Cottrell as a possible suspect in the murder and notified the Myrtle Beach Police Department to inform its officers that Cottrell was a suspect and requested any additional information about him. MBPD Lt. Prock relayed this message to McGarry, knowing that he was personally familiar with Cottrell after arresting him for PWID earlier that year. McGarry had no contact or conversations with Johnson, instead only hearing from Prock that Cottrell was a possible suspect in a shooting death.

In a pre-trial hearing, the State proffered testimony from Johnson, Prock, and Guthinger in an effort to establish that McGarry had reasonably articulable suspicion to conduct a [Terry](#)<sup>10</sup> stop during his encounter with Cottrell as a matter of law. Much of Johnson’s pre-trial testimony was dedicated to the facts he relied on in identifying Cottrell as a “suspect” in Hartman’s murder, including Hartman’s escort business, his relationship with Cottrell, and the circumstances surrounding his homicide. Lastly, Johnson explained that the entirety of his \*639 interactions with members of MBPD was to inform them there had been a homicide, a shooting was involved, and that he was looking at a couple of suspects, one of them being Cottrell.

<sup>10</sup> [Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 \(1968\)](#).

At trial, the State called upon Prock to testify that she relayed Johnson’s request to McGarry. In response to Prock’s testimony, Cottrell sought to call Johnson to testify regarding the information he knew about Cottrell’s involvement in the Hartman murder, arguing that Johnson did not have reasonable suspicion to identify Cottrell as a “suspect,” making McGarry’s [Terry](#) stop an unlawful seizure. The trial judge excluded Johnson’s testimony on the basis that particular information about the Hartman murder investigation was not relevant, and even if it were, its prejudicial effect and potential to mislead or confuse the jury substantially outweighed \*\*433 its probative value. However, the trial judge left the door open for Cottrell

to call any witness he wished, including Johnson, to contradict or impeach anything that Prock testified to regarding the information that was passed to McGarry. After Prock testified, Cottrell did not call Johnson to contradict or impeach any of her statements.

Cottrell now argues the trial judge's ruling violated his constitutional right to present a defense, and his due process and Fourth Amendment rights. According to Cottrell, the lawfulness of McGarry's actions and Cottrell's level of culpability are dependent on whether Johnson possessed reasonable suspicion himself. Thus, Cottrell argues that the jury should have determined, as a matter of fact, whether Johnson possessed reasonable suspicion for a *Terry* stop.

#### B. Discussion

[9] [10] [11] [12] The right to present a complete defense is violated by the exclusion of defense evidence pursuant to a state rule of evidence only in rare circumstances. *Nevada v. Jackson*, 569 U.S. 505, 133 S.Ct. 1990, 1992, 186 L.Ed.2d 62 (2013). The right to present a defense is not without limits, and the right does not allow criminal defendants to present any evidence regardless of its admissibility under the rules of evidence. See *U.S. v. Lancaster*, 96 F.3d 734, 744 (4th Cir. 1996). Trial judges are afforded wide latitude in determining whether evidence is admissible. \*640 *State v. Torres*, 390 S.C. 618, 624, 703 S.E.2d 226, 229 (2010). “To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof.” *Fields v. Regional Medical Center Orangeburg*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005).

[13] [14] [15] “The trial judge is given broad discretion in ruling on questions concerning the relevancy of evidence, and his decision will be reversed only if there is a clear abuse of discretion.” *State v. Aleksey*, 343 S.C. 20, 35, 538 S.E.2d 248, 256 (2000). Even where evidence is relevant, it may still be excluded if the danger of unfair prejudice substantially outweighs its probative value. *Id.*; *Rule 403, SCRE*. The decision whether to admit evidence under this rule is again left to the sound discretion of the trial judge, and the decision will only be set aside in extraordinary circumstances where the discretion has been plainly abused. *United States v. Simpson*, 910 F.2d 154, 157 (4th Cir. 1990).

We reject Cottrell's broad assertions that his constitutional rights were violated by the exclusion of Johnson's testimony. Unquestionably, his right to present a defense and the confrontation clause are still subject to the rules of evidence, and Cottrell does not challenge the constitutionality of those rules. See *Taylor v. Illinois*, 484 U.S. 400, 410, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988) (“The accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence.”). On the various grounds which Cottrell challenges the exclusion of Johnson's testimony—though we find no error in the trial judge's ruling—Cottrell must still establish prejudice, and we find none here. See *State v. Jenkins*, 412 S.C. 643, 651, 773 S.E.2d 906, 909 (2015).

[16] From an evidentiary standpoint, we find no error in the trial judge's assessment that the risk of prejudice or confusion substantially outweighed the probative value, if any, of Johnson's testimony because McGarry's reasonable suspicion to conduct a *Terry* stop was not solely dependent on Johnson's request. It is well-established that reasonable suspicion is judged according to the complete facts and circumstances \*641 known to the officer at the time the seizure is made. See *U.S. v. Cortez*, 449 U.S. 411, 417–18, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981). In this case, McGarry had knowledge beyond that which Johnson possessed, including the specifics of Cottrell's prior arrest, his connection to the drug trade, an allegation that Cottrell had held a woman hostage over an unpaid debt, and an outstanding charge in New York for attempted murder. Furthermore, the observations McGarry made on the night of his murder were unique to him, and Johnson had no knowledge as to what McGarry witnessed, such as whether Cottrell was illegally carrying \*\*434 a concealed weapon or the movement of Cottrell's hand toward his waistband, that spurred him to seize Cottrell. Lastly, for the purposes of the Fourth Amendment, we find the seizure did not occur at the moment McGarry began interacting with Cottrell, nor when McGarry informed him that he would like to perform a pat-down for weapons; rather, the seizure occurred only when McGarry placed his hands on Cottrell in an effort to restrict his movement, and at that time, witnesses corroborated that Cottrell's right hand was located near his waist band—an indicator to an experienced officer like McGarry that Cottrell may have been reaching for a weapon. See *California v. Hodari D.*, 499 U.S. 621, 626–29, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991) (finding a suspect was not seized when he did not submit to a police officer's authority after receiving orders to stop, and the seizure only occurred once the officer tackled the suspect). Because Johnson's identification of Cottrell as a suspect was not the sole piece of information



known to McGarry, it reduces the probative value of Johnson's testimony. On the other hand, the trial judge found Johnson's testimony about the Hartman murder would have necessarily led to a "trial within a trial" that would not only confuse the issues and mislead the jury, but would cause substantial prejudice to Cottrell by exposing the jury to a litany of other crimes and bad acts which the parties had earlier agreed to keep unknown to the jury. Thus, we find no abuse of discretion in the trial judge's conclusion that the risk of confusion and prejudicial effects of Johnson's testimony substantially outweighed its probative value.

[17] Additionally, based on the evidence presented, we find Cottrell was not entitled to a jury charge on reasonable \*642 suspicion, but rather, the focus for the jury in determining the lawfulness of the stop was the reasonableness of the manner in which McGarry acted. While the lawfulness of an arrest is within the province of the jury's deliberation, our manslaughter jurisprudence does not dictate that the existence of reasonable suspicion is necessarily a component for the jury to consider—the inquiry may be limited to analyzing the manner in which the officer acted, and whether he used a proportionate amount of force. This point is illustrated by the fact that *both* parties asked the trial judge to rule on the lawfulness of McGarry's *Terry* stop as a matter of law in pre-trial hearings. While the trial judge declined to rule at that time, preferring to see how the issue would develop at trial and what evidence the parties would offer, his reason for excluding Johnson's testimony is clarified by his post-trial order, where the trial judge found McGarry possessed reasonable suspicion as a matter of law. We are confident that after hearing Johnson's testimony, the trial judge was able to determine that Johnson himself possessed a reasonable suspicion, and therefore, his testimony was properly excluded to prevent it from unduly prejudicing or confusing the jury, instead allowing the jury to limit its inquiry to the reasonableness of the manner in which McGarry acted.

[18] In summary, we find Cottrell's argument that the trial judge violated his rights to present a defense and to confront a witness are without merit. "A defendant's right to present a defense is not absolute: criminal defendants do not have a right to present evidence that the district court, in its discretion, deems irrelevant or immaterial." *United States v. Prince-Oyibo*, 320 F.3d 494, 501 (4th Cir. 2003). The trial judge stated appropriate reasons to exclude Johnson's testimony based on Rules 401 and 403, SCRE, and because Cottrell has not shown an abuse of discretion, we affirm the trial judge's evidentiary ruling.<sup>11</sup>

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Additionally, we find it difficult to discern what prejudice Cottrell suffered from the exclusion of Johnson's testimony and do not see a reasonable probability that the jury's verdict was influenced by the exclusion of Johnson's testimony. Not only does Johnson's testimony further support finding McGarry possessed reasonable suspicion and affirm the lawfulness of his actions, its admission would have also led to the introduction of evidence that Cottrell acted with malice when he killed McGarry, negating the existence of legal provocation or self-defense.

#### \*643 IV. JURY INSTRUCTION ON MALICE

[19] During the jury charge conference, Cottrell requested that the trial judge charge the jury not to infer malice from the use of a \*\*435 deadly weapon, in accordance with Cottrell's reading of *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009). The trial judge agreed to remove any instruction permitting the jury to infer malice from the use of a deadly weapon, but he refused to issue an express instruction that the jury could not infer malice from the use of a deadly weapon, noting that the jury has the right to make inferences from the evidence if it chooses to do so.

Cottrell argues that his due process rights were violated by the trial judge's refusal to affirmatively instruct the jury not to infer malice from the use of a deadly weapon because it allowed the prosecution to shirk its burden of proof during closing arguments by telling the jury to infer malice from Cottrell's gun. We disagree.

[20] [21] A trial court is required to charge the current and correct law in South Carolina. *State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011). An appellate court will only reverse a trial court's decision regarding a jury charge if there is an abuse of discretion. *State v. Pittman*, 373 S.C. 527, 570, 647 S.E.2d 144, 166 (2007). This Court's landmark decision in *State v. Belcher* departed from the then-common practice of charging the jury that it may imply malice from the use of a deadly weapon, even where the defendant presents evidence that he used the weapon in self-defense. 385 S.C. 597, 685 S.E.2d 802 (2009). *Belcher* created a new standard whereby jurors could no longer be charged to infer malice from the use of a deadly weapon where evidence is presented that would reduce, mitigate, excuse, or justify the homicide. *Id.* at 600, 685 S.E.2d at 804. In an instructive footnote, the Court clarified that its opinion was narrowly tailored to apply to the jury charge only, but did not "restrict the State from arguing to the jury for a finding of malice from the use of a deadly

weapon, nor restrict a defendant from arguing the absence of malice or the presence of reasonable doubt in this regard.” *Id.* at 612, n. 9, 685 S.E.2d at 810, n. 9.

\*644 Here, the trial judge fully complied with *Belcher* and did not charge the jurors that they could infer malice from Cottrell's use of the weapon. He instructed only that malice could be inferred from conduct showing a total disregard for human life. Accordingly, we find the trial judge did not abuse his discretion because his jury instructions complied with *Belcher*, and the additional charge requested by Cottrell was not supported by any authority. Furthermore, contrary to Cottrell's assertion that his case is similar to *Belcher* where it was entirely conceivable that the only evidence of malice was the defendant's use of a handgun, there is ample evidence in the record here that would allow the jury to infer malice based on Cottrell's conduct showing a total disregard for human life, including his indiscriminate shooting that struck several vehicles and a restaurant across the street, thereby endangering members of the public. Thus, we affirm the trial judge's instructions.

#### V. CONTENTS OF THE JURY NOTE

[22] Lastly, Cottrell argues the trial judge's refusal to inform defense counsel of the contents of the jury note indicating the jury's numerical division during sentencing deliberations violated his right to assistance of counsel, a fair jury trial, and a non-arbitrary verdict. We disagree.

[23] Section 16-3-20(C) states that the trial judge must impose a life sentence if a capital sentencing jury cannot reach a recommendation after a reasonable deliberation. The determination of whether a jury has engaged in a “reasonable deliberation” is a matter committed to the trial judge's discretion. *Tucker v. Catoe*, 346 S.C. 483, 489, 552 S.E.2d 712, 715 (2001). In *Tucker*, the jury deliberated late into the night and resumed the next day; that afternoon, the foreman sent a note to the judge stating that the jury was unable to reach a verdict at that time and asking for a recharge on the juror's responsibilities. *Id.* at 491, 552 S.E.2d at 716. The judge then issued an *Allen* charge, which this Court found was unconstitutionally coercive under the totality of the circumstances, specifically finding the charge impermissible because it singled out the lone juror in the minority. *Tucker*, 346 S.C. at 493, 552 S.E.2d at 717. Additionally, the Court was critical of the judge's treatment of notes he received from the jury. The \*645 judge did not disclose the contents of the first note, which \*\*436 stated the jury was deadlocked at 10–2

in favor the death penalty, but simply told the parties the jury wished to rehear testimony. *Id.* at 495, 552 S.E.2d at 718. The jury sent a second note the following day informing the judge it was divided 11-1 and that it was “hopelessly deadlocked” and not likely to ever get a unanimous verdict. *Id.* Emphasizing that it was relying on a “combination of withholding pertinent information from the parties, thereby depriving them of the facts necessary to make informed decisions; failing to instruct the jury to omit from its future communication any reference to the nature of its division; and giving an unconstitutionally coercive *Allen* charge, with its emphasis on a collective result,” the Court granted the defendant a new sentencing proceeding. *Id.*

Unlike in *Tucker*, the note sent by the jury in Cottrell's case did not state that it was hopelessly deadlocked. The note simply indicated what the jurors' vote was and inquired as to the next step. The trial judge acted within his discretion and determined that the jury had not yet reached a deadlock after “reasonable deliberation” because it had only been deliberating for two hours at that point. Without a deadlock, the trial judge found it was not appropriate to give an *Allen* charge, instead simply telling the jury to continue with its deliberations. Furthermore, the trial judge followed the Court's instructions in *Tucker* and advised the jury not to notify him of its specific vote counts in future notes. The trial judge notified the parties of the contents of the jury's note, withholding only the numerical split.

Cottrell cites to *United States v. Maraj*, 947 F.2d 520, 525 (1st Cir. 1991), and *State v. Tremblay*, 820 A.2d 571, 575–76 (Me. 2003) to demonstrate that the trial judge violated Cottrell's rights by not disclosing the numerical split. In both cases, the courts found the respective trial judges should have disclosed knowledge of numerical splits to the parties because it deprived them of an opportunity to be adequately heard before the trial judges responded to the juries' inquiries. However, in both *Maraj* and *Tremblay*, the courts found the failure to disclose the numerical split was harmless error and the defendants suffered no prejudice. See *Maraj*, 947 F.2d at 526 (holding whether the failure to disclose the numerical split \*646 was viewed under the more strict standard for constitutional violations or under less stringent standard applicable to most trial errors, the error was harmless); *Tremblay*, 820 A.2d at 577 (explaining that because the note indicated the jury “reached a relative standstill in deliberations and needed further instructions on how to proceed,” and was not “substantive inquiry into fact or law” the court's limited disclosure of the contents made the defendant less susceptible to prejudice).

[24] Accepting Cottrell's argument that the trial judge should have disclosed the numerical split, we agree with the State that the decision is subject to a harmless error analysis. Because the trial judge concluded the jury had not yet reached a deadlock such that he needed to give an *Allen* charge, even if Cottrell had been notified of the numerical split, there was nothing further for him to do at the time to protect his rights. See *Maraj*, 947 F.2d at 526 (“Moreover, had the full note been contemporaneously disclosed, there was nothing more that defense counsel could appropriately have done to protect their clients' rights. On this record, we fail to see any realistic possibility that the partial nondisclosure prejudiced the defense, contributed even fractionally to the convictions, influenced the jury en route to the verdicts, swayed the trial's outcome, or adversely affected the appellants' substantial rights.”). Accordingly, we affirm the trial judge's ruling.

#### PROPORTIONALITY REVIEW

[25] Pursuant to [South Carolina Code Section 16-3-25\(C\) \(2015\)](#), this Court must review the proportionality of Cottrell's death sentence. From our review of the record, we find the sentence was not imposed as a result of passion, prejudice, or any other arbitrary factor. The evidence clearly supports the jury's finding of statutory aggravating circumstances. See [S.C. Code Ann. § 16-3-20\(C\)](#). Lastly, the death penalty has been imposed in similar cases where the aggravating circumstances involved the death of a police officer. See \*\*437 *Sapp*, 366 S.C. at 294, 621 S.E.2d at 888; *Aleksey*, 343 S.C. at 36, 538 S.E.2d at 256.

#### \*647 CONCLUSION

Based on the foregoing, we find the trial court committed no reversible error and Cottrell's conviction and sentence for the murder of Officer McGarry are AFFIRMED.

[BEATTY](#), C.J., [KITTRIDGE](#) and [JAMES](#), JJ., concur. [FEW](#), J., concurring in result only in a separate opinion.

#### JUSTICE [FEW](#):

I concur in the result reached by the majority. I disagree, however, with two points in the majority's analysis.

#### I. Removal of Attorneys

First, I disagree that a trial court has “discretion” to remove trial counsel over the defendant's objection as an exercise of the court's duty to ensure the defendant receives a fair trial. This Court has never before recognized such discretion, nor has any court of which I am aware. In each case cited by the majority to support its holding, the trial court made a specific factual finding that the attorney was legally disqualified due to a conflict of interest or a likelihood the attorney would be a witness at trial. The trial court's failure to make such specific findings in this case is the error we address in this appeal,<sup>12</sup> and clearly distinguishes each of those cases from this one. The majority has taken those cases far out of their proper context, and the cases do not support the majority's holding.

#### <sup>12</sup>

Cottrell's own statement of the issue before us is, “The trial court's removal of the lawyers appointed to represent [Cottrell], over the objection of both [Cottrell] and his lawyers, and *in the absence of any findings justifying this interference* with an established attorney-client relationship, violated [Cottrell's] rights to counsel and due process under the Sixth and Fourteenth Amendments....” Appellant's Br. 10 (emphasis added).

For example, the majority states “the Sixth Amendment right to counsel is ‘circumscribed by the trial court's obligation to safeguard the integrity of the proceedings and ensure trials are conducted according to the ethical standards of the profession,’ ” quoting *State v. Sanders*, 341 S.C. 386, 389, 534 S.E.2d 696, 697 (2000). *Sanders*, however, involved an allegation the attorney would be called as a “necessary witness” in the trial, \*648 and thus was legally disqualified pursuant to [Rule 3.7 of the South Carolina Rules of Professional Conduct](#). *Id.*; see [Rule 3.7](#), RPC, Rule 407, SCACR (providing, “A lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness....”). In *Sanders*, we actually reversed the trial court's decision to remove counsel even though the trial court's ruling was based on a finding of legal disqualification. 341 S.C. at 390, 534 S.E.2d at 698. *Sanders* does not support the existence of “discretion” to remove an attorney without any finding of a legal basis for disqualification.

*Sanders* relied on *United States v. Howard*, 115 F.3d 1151 (4th Cir. 1997), and *United States v. Williams*, 81 F.3d 1321 (4th Cir. 1996). In *Williams*, the district court disqualified counsel based on its finding counsel had a conflict of interest. 81 F.3d at 1323. Williams then offered to supply auxiliary counsel to cross-examine the witness whose testimony provided the primary basis for counsel's conflict, but the district court elected not to permit the arrangement. *Id.* Later, Williams claimed the witness would not testify because she would assert a privilege, and thus the potential conflict was not a concern. *Id.* The district court rejected the argument and permitted the government to call the witness. *Id.* Thus, when the Fourth Circuit stated “disqualification of Williams's counsel was well within the district court's discretion,” 81 F.3d at 1325, the appellate court was referring to the trial court's discretion to reject the arrangement proposed to eliminate the conflict, not discretion to remove counsel when no disqualifying reason existed.

In *Howard*, which the majority in this case quotes directly, the district court made two separate factual findings to support its conclusion counsel was legally disqualified—counsel had a conflict of interest and counsel was likely to be a necessary witness. 115 F.3d at 1155. However, the defendant attempted to waive the conflict and argued \*\*438 counsel would not be required to testify. *Id.* Reviewing the district court's decision not to permit the waiver and not to accept the argument counsel would not testify, the Fourth Circuit stated the “right to be represented by an attorney of his own choosing ... is circumscribed by ... the obligation of trial courts to safeguard the integrity of the proceedings before them,” and “a trial court ‘must have sufficiently broad discretion to rule without \*649 fear that it is setting itself up for reversal on appeal’ if it disqualifies a defendant's chosen lawyer.” *Id.* (quoting *Williams*, 81 F.3d at 1324). Therefore, the “discretion” referred to by the Fourth Circuit is not the discretion to do what the trial court did here, but only that “district courts ‘must be allowed substantial latitude’ in rejecting waivers of this sort.” *Id.*

The majority also relies on *State v. Justus*, 392 S.C. 416, 709 S.E.2d 668 (2011). In *Justus*, the “the solicitor filed a motion entitled ‘Motion to Have the Court Determine Whether Defense Counsel has an Actual Conflict of Interest.’ ” 392 S.C. at 417, 709 S.E.2d at 669. The motion was based on the solicitor's contention that defense counsel represented the State's lead investigator, who was a potential witness in the

case. 392 S.C. at 417-18, 709 S.E.2d at 669. At a hearing on the motion, the defense attorney testified she represented the investigator only for a limited purpose, which had been completed, and she was no longer representing him. 392 S.C. at 418, 709 S.E.2d at 669. The resolution of the motion, therefore, turned on the factual question of whether the defense attorney continued to represent the investigator, and thus whether or not a conflict of interest would arise if he testified. We stated,

We acknowledge that it is a close question whether [counsel]'s representation of [the investigator] was ongoing or had concluded. Moreover, it is fairly debatable whether [the witness]'s potential testimony presented an actual conflict of interest. However, given the conflicting evidence before the trial court, and giving deference to its findings of fact, we find no abuse of discretion in the disqualification of [counsel].

392 S.C. at 419, 709 S.E.2d at 670.

The “discretion” to which we referred in *Justus* was discretion to make the factual finding necessary to determine if a potential conflict of interest existed, not to simply remove counsel with no finding of legal disqualification. As it did with *Sanders* and *Howard*, the majority has taken *Justus* out of context, and *Justus* does not support the majority's holding.

Based on *Sanders*, *Howard*, and *Justus*, the majority treats the trial court's ruling to dismiss counsel as one “largely addressed to the trial judge's discretion,” and states “we \*650 believe the trial judge acted ... in accordance with his broad discretionary authority in removing Cottrell's appointed attorneys.” I strongly disagree with the majority's characterization of the trial court's authority. In my opinion, a trial court may not terminate the attorney-client relationship between a criminal defendant and his counsel over the defendant's objection without first making specific findings that a valid basis for disqualification exists. See generally *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147-48, 126 S.Ct. 2557, 2563, 165 L.Ed. 2d 409, 419 (2006) (“The right to select counsel of

one's choice ... has been regarded as the root meaning of the constitutional [Sixth Amendment's] guarantee. ... Deprivation of the right is 'complete' when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received. To argue otherwise is to confuse the right to counsel of choice—which is the right to a particular lawyer regardless of comparative effectiveness—with the right to effective counsel—which imposes a baseline requirement of competence on whatever lawyer is chosen or appointed.”); [Faretta v. California, 422 U.S. 806, 819-20, 95 S.Ct. 2525, 2533, 45 L.Ed. 2d 562, 572-73 \(1975\)](#) (“The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails.... To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment.”).<sup>13</sup>

13

It makes no difference that counsel was appointed. *See Morris v. Slappy*, 461 U.S. 1, 23 n.5, 103 S.Ct. 1610, 1622 n.5, 75 L.Ed. 2d 610, 627 n.5 (1983) (Brennan, J., concurring) (“But the considerations that may preclude recognition of an indigent defendant's right to choose his own counsel ... should not preclude recognition of an indigent defendant's interest in continued representation by an appointed attorney with whom he has developed a relationship of trust and confidence.... [A]n indigent defendant has an important interest in a relationship that he might develop with his appointed attorney.”); *see also Cuyler v. Sullivan*, 446 U.S. 335, 344-45, 100 S.Ct. 1708, 1716, 64 L.Ed. 2d 333, 344 (1980) (stating, in a different context, “we see no basis for drawing a distinction between retained and appointed counsel that would deny equal justice to defendants who must choose their own lawyers”).

\*\*439 That does not mean the trial court's error requires a new trial. First, I would remand this case to the trial court and require the court to make findings as to whether a valid basis for disqualification exists. Even without a remand, however, I would not reverse the trial court and order a new trial. I \*651 would instead affirm on the narrow basis that the facts in this record do not require a new trial.

As then Solicitor Hembree stated at the hearing the trial court conducted to address this question, this was an “extreme situation.” Prior to the hearing, both Solicitor Hembree and then deputy solicitor Richardson submitted memoranda to the trial court in which they described separate conversations each had with Cottrell's first and second chair attorneys. Solicitor

Hembree's memo documents the statement of first chair counsel that “in her career practicing law she had never worked with any lawyer more dishonest or unethical than [second chair]” and “she could not wait to get this case concluded just to get away from him.” Deputy Richardson's memo documents the statement of second chair that first chair “was lazy, not easily motivated, and drank too much.” Deputy Richardson's memo states second chair “said that he had to take the lead on getting started for this trial because [first chair] would never request discovery, look into getting experts, and investigate the details of the shooting or possibilities of misconduct” by officer McGarry.<sup>14</sup>

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*See State v. Cottrell*, 376 S.C. 260, 265, 657 S.E.2d 451, 454 (2008) (finding the evidence presented at Cottrell's first trial supported the “reasonable inference ... that [officer McGarry] reacted in an impermissibly aggressive manner, physically assaulting and then shooting [Cottrell] when he exercised his constitutional right to walk away” and “evidence in this case presented a jury question whether the arrest was lawful but effectuated through the victim's unnecessary use of violence”).

The trial court met privately with each defense attorney before the hearing. At the hearing, the trial court stated he was able to verify “the memoranda which were provided to me are correct” that both defense attorneys had accused the other of “what I consider to be serious misconduct.” The court explained that “each of defense counsel believed that the allegations were correct” and “both counsel told me that in their opinion ... [Cottrell's] defense was being jeopardized.” While I believe the trial court erred by not making specific findings, the court explained, “I have been very careful not to go into the specifics ..., but there have been allegations involving dishonesty, unethical conduct, personal problems \*652 that should be addressed, all sorts of things that I believe ... would be of grave concern.”

In a written order, the trial court stated first chair “made serious allegations of dishonesty and unethical conduct against her co-counsel,” and second chair “challenged [first chair's] competence, work ethic, and personal life.” The court stated, “Each acknowledged having made the statements against co-counsel and that they believed the statements to be true.”

In conclusion, the trial court should have made specific findings on the record, and given that it did not do so, this Court should remand with a requirement that those findings be made now. However, I acknowledge the trial court was in a

very difficult position. In ten years as a trial judge in which I presided over hundreds of criminal trials and numerous capital cases, I never faced an “extreme situation” like this. I am not sure how I would have handled it if I had. Reading this record convinces me that a dilemma of this magnitude will almost never arise. While I steadfastly disagree with the majority's characterization of the trial court's power to resolve this problem as one of “wide latitude” or “considerable discretion,” I do believe that on these unique facts the failure of the trial court to make specific findings that \*\*440 would form the basis for a legal disqualification does not warrant a new trial.

## II. Contents of the Jury Note

That it is error for a trial court to refuse to inform defense counsel of the contents of a note from the jury should require no explanation. In my view, a trial court has no authority to refuse to inform trial counsel of any information regarding the conduct of a trial. If this Court takes seriously the duty of counsel to provide effective assistance under the Sixth Amendment, then we must also recognize the elementary principle that counsel must have available the information necessary to fulfill that duty. The idea that a trial court may unilaterally decide not to provide such information to trial counsel in any proceeding—particularly the sentencing phase of a capital trial—is absurd.

As to whether this obvious error requires reversal, Cottrell has not articulated any action trial counsel could have taken if the information was disclosed that would have changed the \*653 way the trial court conducted the sentencing hearing or altered its outcome. I agree, therefore, with the majority's conclusion the error was harmless.

## All Citations

421 S.C. 622, 809 S.E.2d 423

# APPENDIX B

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS  
2003-GS-26-00020

COUNTY OF HORRY

State of South Carolina, )

PLAINTIFF, )

vs. )

TRANSCRIPT OF RECORD

Luzenski Allen Cottrell, )

DEFENDANT. )

March 8, 2012  
Conway, South Carolina

Before:

The Honorable Larry B. Hyman

Appearances:

BY: J. Gregory Hembree, Esq.  
Attorney for StateBY: Jimmy A. Richardson, II, Esq.  
Attorney for StateBY: Melissa R. Armstrong, Esq.  
Attorney for Luzenski Allen CottrellBY: Stuart M. Axelrod, Esq.  
Attorney for Luzenski Allen CottrellBrenda R. Babb  
Circuit Court Reporter



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## EXHIBITS

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EV.</u>
C-1	January 6, 2012 Memorandum from JAR		14
C-2	January 6, 2012 Memorandum from J. Gregory Hembree		14

Motion Hearing - March 8, 2012

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1           The Court: Ladies, gentlemen, we are here today  
2 as a continuation of my hearing which was conducted on, a  
3 status conference rather which was conducted on last  
4 Monday. At that hearing I carried over a matter concerning  
5 some discovery, however, a matter more pressing has, has  
6 come to the Court's attention. At that hearing the  
7 Solicitor handed up two, I guess we could refer to them as  
8 memos, for my consideration. They were marked as Court's  
9 Exhibits 1 and 2, I have the original exhibits which I have  
10 retrieved from the Clerk of Court. I want them introduced  
11 into this proceeding.

12           In that memorandum, or those memorandums, were  
13 one from Deputy Solicitor Jimmy Richardson, one from the  
14 Solicitor Mr. Greg Hembree. They were handed up to me  
15 because the Solicitor's office had become aware of a  
16 serious rift or problem developing in the defense team  
17 which the Solicitor's office, according to the memorandum,  
18 caused him, the Solicitor, concern about the defendant's  
19 ability to be effectively represented by this defense team.

20           I have reviewed both of the memorandum in detail.

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1 I met with both members of the defense team separately and  
2 privately to discuss this. It would appear to me from my  
3 discussions, or I am satisfied from my discussions with  
4 counsel, that the memorandum which were provided to me are  
5 correct. Each one contains allegations made by members of  
6 the defense team against co-counsel alleging what I  
7 consider to be serious misconduct.

8 I have made, let me make this clear, absolutely  
9 no investigation to determine whether or not there was any  
10 truth to the allegations. My only concern was whether the  
11 allegations had been made. It became very clear that the  
12 allegations had been made, that each of defense counsel  
13 believed that the allegations were correct, and more  
14 importantly, I inquired of each of the defense counsel  
15 whether or not he or she felt that this problem that has  
16 developed, or the issues that have developed between them,  
17 was affecting Mr. Cottrell's defense, whether or not Mr.  
18 Cottrell's defense was being, the word I use was  
19 jeopardized. Both counsel told me that in their opinion  
20 that was true, that his defense was being jeopardized.

21 It is this Court's responsibility to make sure  
22 above all things that Mr. Cottrell is being effectively  
23 defended in this case and that he is receiving, that he  
24 will receive a fair trial, that is of the utmost importance  
25 to me and, Mr. Cottrell, I want you to know that.

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1           This case is scheduled to begin, after several  
2 continuations, on March the 26th, the 26th day of this  
3 month. Substantial effort has been put into preparing the  
4 Court, Clerk's office, Sled, for the trial of this case,  
5 however, I have grave concerns as to whether or not this  
6 case can proceed.

7           I want to hear from counsel concerning this. My  
8 inclination is, and I quite frankly feel that I have no  
9 alternative but to continue this case and relieve one or  
10 both counsel in this matter and hire a substitute. I  
11 understand that that is going to result in a substantial  
12 delay in this trial, probably a delay of a year or more,  
13 but my concern that Mr. Cottrell receive adequate  
14 representation in this matter and my duty to protect him in  
15 that regard compels me to take that position.

16           Now first I would like to hear from the State of  
17 South Carolina in this regard if the State chooses to make  
18 any comment or to wade in on this issue. Mr. Hembree?

19           Mr. Hembree: Yes, Your Honor, very briefly.  
20 You know the State's general feeling and desire to get this  
21 case tried as soon as we possibly could. That's been our  
22 position throughout, the Court's well aware of that,  
23 however, I will tell the Court I, co-counsel and I,  
24 understood that this was a distinct possibility that a  
25 continuance was, and a lengthy continuance, was a distinct

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1 possibility when we began down this path and felt compelled  
2 to submit our concerns to the Court and we understand that.  
3 We, but we also, like the Court, have the responsibility to  
4 ensure that Mr. Cottrell receive a fair trial, that he is  
5 adequately represented, that he is effectively represented.  
6 We have an interest as, as, as officers of the Court, as  
7 prosecutors, but also from a selfish standpoint, if you  
8 want to call it that, we've tried this case once already.  
9 We don't want to try it a third time, and we firmly believe  
10 that based on the, the circumstances that we find ourselves  
11 in today that a, a post conviction relief would be granted  
12 if we went forward with the trial, and because of that we  
13 would rather do it right, absolutely do it right than do it  
14 fast. It's a whole lot more important to do it right than  
15 do it fast so we would, we would, we would request a  
16 continuance in this case and in addition to, I understand  
17 the Court's position, but our position would be that we  
18 believe that a continuance is appropriate. We believe  
19 that new defense counsel should be assigned. We would, we  
20 would make that request to the Court based on the  
21 circumstances that we find ourselves in.

22           It's an extreme situation. It's not one that we  
23 took lightly or one that we felt good about. It's not a  
24 situation where you want to go revealing private  
25 conversations with other lawyers. I don't know that I've

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1 ever done that in my whole career but it's a death penalty  
2 case and because of the, you know, the magnitude of this  
3 case and the seriousness of it, we just had no other choice  
4 and we would, we would as I say, we would request that a  
5 continuance be granted and new counsel be assigned.

6 The Court: All right, Ms. Armstrong, may I hear  
7 from you?

8 Ms. Armstrong: Yes, Your Honor. I would defer  
9 to the Court's judgment in this, however, I would like to  
10 reiterate that as far as I'm concerned I can set aside my  
11 personal misgivings about dealing with co-counsel and one  
12 thing I have never questioned is his commitment to Mr.  
13 Cottrell, notwithstanding some impressions that I've gotten  
14 and may have been wrong about.

15 The Court: All right, and the thing that  
16 concerns me mostly, Ms. Armstrong, is in our discussions, I  
17 think you were very candid with me and I appreciate your  
18 candor, when we, we discussed this issue, but what really  
19 concerns me is that even though you assured me that you are  
20 willing to soldier on with this matter and that you were  
21 likewise committed to Mr. Cottrell, that in your opinion  
22 the relationship has worked or will work to Mr. Cottrell's  
23 detriment or the detriment of his defense; is that still  
24 your position?

25 Ms. Armstrong: Your Honor, having a chance to

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1 reflect and think about it a little more and knowing that  
2 notwithstanding our differences, Mr. Axelrod wants to give  
3 Mr. Cottrell the best possibly defense. I do believe that  
4 it is possible for Mr. Axelrod and I to sit down face to  
5 face and discuss it and see if we can set aside our  
6 negative opinions and move forward. I think, I think it's  
7 a possibility.

8 The Court: Ms. Armstrong, we're only two and a  
9 half weeks from trial.

10 Ms. Armstrong: That's correct, Your Honor, and  
11 no work has stopped. We may have to reschedule an  
12 evaluation of Mr. Cottrell that was scheduled for today,  
13 that would have to be rescheduled, and we would need for  
14 the office that was subpoenaed for documents to provide  
15 what Mr. Skidmore has found missing in a timely fashion.

16 The Court: All right, thank you. Mr. Axelrod,  
17 I'll hear from you.

18 Mr. Axelrod: I think the Court's right that  
19 what's most important is Allen's defense. I think that  
20 Solicitor Hembree raises valid points. I think his memo  
21 solidifies probably a PCR. I think it just does, I mean  
22 reading what I read. I defer to the Court and I'll ask the  
23 Investigator be here, I want Allen to be here, I think that  
24 maybe the Court should inquiry of Allen. I don't know what  
25 to say, Your Honor, I just say I would defer to what the

Motion Hearing - March 8, 2012

9

1 Court thinks is best, thank you.

2           The Court:    Okay, Mr. Cottrell, you have heard  
3 my concerns and I believe I've made my position clear to  
4 you. I want you to receive the best defense possible. I  
5 do not want to continue this case. If I replace your  
6 attorneys it's going to result in a delay in this case and  
7 it is a very important case, it's a capital case. It's  
8 probably going to result in a substantial delay of this  
9 case so I do not undertake this lightly; however, I am  
10 really concerned that their differences of opinion as to  
11 the way to proceed in this case and that perhaps the  
12 theories shared by your co-counsel may be in conflict.

13           Tell me. Mr. Cottrell, if you have any comments  
14 to make to the Court concerning this issue?

15           Defendant Cottrell:    Your Honor, I know from my  
16 knowledge from speaking with both my attorneys that I know  
17 Mr. Axelrod's strategy. I know that he's been preparing  
18 diligently for my trial. We've spoken on numerous  
19 occasions about how he would like to proceed and I feel  
20 confident in his ability to represent me as the attorney  
21 for this trial.

22           I just became aware of this rift between the two  
23 attorneys. I had no idea that it was there. It does cause  
24 me concern as well but if I could I would like to speak  
25 with both of them, you know. I haven't had a chance to do



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10

1 that since I found out and if I could speak with both of  
2 them?

3 The Court: All right, well we will take a brief  
4 recess, will ten, fifteen minutes, is that how much time  
5 you need?

6 Defendant Cottrell: That would be fine, Your  
7 Honor.

8 The Court: Okay, we'll take a moment. There's  
9 a place, I think, back here where you can speak to them.  
10 We'll just be at ease for about fifteen minutes, okay.

11 (Whereupon, a recess was taken and the following  
12 takes place on the record after the recess.)

13 The Court: Okay, Mr. Cottrell, have you had  
14 adequate time to speak to your attorney? The sheriff's  
15 deputy came out and told me that you were ready to come  
16 back in, have you had all the time you need?

17 Defendant Cottrell: Yes, sir, I have.

18 The Court: Well would you like to say anything  
19 else to me?

20 Defendant Cottrell: Just that I spoke with both  
21 of them and they said that they would be able to work  
22 together, you know, but ultimately it would up to you, Your  
23 Honor.

24 The Court: All right.

25 Defendant Cottrell: I would just like to

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1 reiterate that I do feel confident about the  
2 representation.

3 The Court: Well you tell me that you even say  
4 you still had some concern?

5 Defendant Cottrell: Right, because I had no  
6 idea that this was going on between the two of them. So, I  
7 understand that, you know, a case like this is stressful  
8 for all parties involved and, you know, I know that the  
9 work that Mr. Axelrod has done in the first part of the  
10 trial of this case, I don't think it can be matched by  
11 anybody else.

12 The Court: Well, Mr. Cottrell, as I told you  
13 my, my main concern is that you receive an effective and  
14 adequate defense and I also have a concern that that is  
15 absolutely necessary in order to, for this case to survive  
16 the ultimate review that it would be placed under if you  
17 are convicted. The State has concerns, I am torn with  
18 this, with this case. We have been struggling to get it to  
19 Court to get it tried. There have been several  
20 continuances granted. We have had status conferences,  
21 motion hearings throughout the year towards that end,  
22 however, and I understand your position, however, there are  
23 serious allegations that have been made by your co-counsel  
24 against the other co-counsel.

25 The Solicitor's job is to try this case but he

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1 also has an ethical responsibility to bring allegations of  
2 misconduct to the Court's attention and these are very  
3 serious. There's always, in every substantial case, some  
4 degree of friction between the Solicitor's office and the  
5 defense. I am accustomed to having the Solicitors complain  
6 what the defense counsel is doing and the same thing from  
7 the defense counsel complaining about the Solicitors, but  
8 those are usually just minor things having to do with  
9 strategy and things of that nature. This goes beyond that.

10           The Solicitor has an ethical duty to bring it to  
11 my attention. I am quite sure that he has complied with  
12 his ethical responsibility. I am not certain what my  
13 ethical responsibility is having had these matters brought  
14 to my attention. I'm afraid I do know what my ethical  
15 responsibility is and that's to report it and let it be  
16 flushed out by someone else. As I've said I have been very  
17 careful not to go into the specifics other than general  
18 allegations, but there have been allegations involving  
19 dishonesty, unethical conduct, personal problems that  
20 should be addressed, all sorts of things that I believe on  
21 review would be matters that would be of grave concern to a  
22 PCR judge, and there again I'm not suggesting, Mr.  
23 Cottrell, that there will be a conviction in your case, I'm  
24 not telling you that I've prejudged your case. I'm telling  
25 you that if it reaches that point that could certainly be a

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1 problem.

2 I don't think that I have had, I have any  
3 alternative than to relieve counsel in this matter, both  
4 attorneys. I am going to appoint someone, I'm going to  
5 give them adequate opportunity to pick up your defense and  
6 they will, I'm sure, proceed in the same fashion or very  
7 much the same fashion. You certainly have input into that.  
8 They will have access to all the materials that have been  
9 gathered so far. They have will have access to these two  
10 attorneys to discuss strategy and make that type of  
11 decision and they will discuss it with you, I'm sure. But  
12 I am going to relieve counsel in this matter. I'm going to  
13 continue this case until such time as the trial will be  
14 appropriate.

15 I make no ruling at this point as to whether or  
16 not I intend today or tomorrow to appoint new counsel. I'm  
17 going to give some more thought to that as to who should  
18 represent you. I am going, in that order, and I do so now  
19 order that whoever is appointed that counsel cooperate with  
20 them, turn over all the materials that have been gathered  
21 so far and anything that they have, their complete files on  
22 you to new counsel. That is my ruling, I will prepare an  
23 order.

24 Gentlemen, I'm sorry, ladies, gentlemen, I'm  
25 sorry, but that is just what I must do, thank you.

1           Madam Clerk:    Sir, before everybody leaves  
2 exhibits were picked up by the county police and your  
3 investigator from our office and can they be returned back  
4 now because the new parties are going to probably want to  
5 see it at that time.   Lorie Rabon and Carmen --

6           The Court:    I would like to have the exhibits  
7 placed in possession of the Clerk of Court so that they  
8 would be available for new counsel.   I'm going to make  
9 copies, photostatic copies of the exhibits that, 1 and 2,  
10 that were handed up last week, parts of this record.   I  
11 think that these Exhibits Number 1 and 2, which I have the  
12 originals of, will, would be in the same record but I still  
13 want to make sure that that becomes a part of this record.  
14 Thank you very much, ladies and gentlemen.

15                       (Whereupon, Court's Exhibits Numbers 1 and 2  
16 marked for identification.)

17           Mr. Richardson:   Your Honor, one other thing  
18 we've got dealing with that discovery issue, we have turned  
19 over supplement K, L, C, B, which is numerous reports.   I  
20 just would ask that either Ms. Armstrong or Mr. Axelrod  
21 sign these originals so that we can know for whoever who is  
22 going to take over this case what evidence has been given  
23 out.   We've got everything else signed.

24           The Court:    They may, they may acknowledge  
25 receipt of those matters, thank you.

End of requested transcript.....

CERTIFICATE OF REPORTER

I, the undersigned Brenda R. Babb, official court reporter the South Carolina Court Administration, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all proceedings had and evidence introduced in the hearing of the captioned case, relative to appeal, in the Court of General Sessions for Horry County, South Carolina.

I do further certify that I am neither kin, counsel nor interest to any party hereto.

March 30, 2012

Brenda R. Babb

Brenda R. Babb, CVR  
OFFICIAL REPORTER

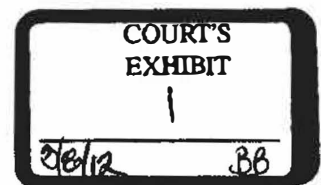
January 6<sup>th</sup>, 2012

Talked with Stuart for a few minutes before our status conference. He repeated his dissatisfaction with his co-counsel Lisa Armstrong. He repeated that Lisa was lazy, not easily motivated and drank too much. Stuart said that he had to take the lead on getting started for this trial because Lisa would never request discovery, look into getting experts, and investigate the details of the shooting or possibilities of misconduct by the MBPD.

Stuart also said that he decided to storm ahead and take this case on himself. He realized he was second chair but that he was going to do the work because Armstrong was either incapable or too lazy to start.

I do not remember the first date that Stuart mentioned his problems with Armstrong to me but I know he has expressed concerns over her abilities more than a few times.

JAR



## MEMORANDUM

**TO:** State v. Cottrell File  
**FROM:** J. Gregory Hembree, Solicitor *JGH*  
**RE:** Conversation with defense counsel  
**DATE:** February 21, 2012

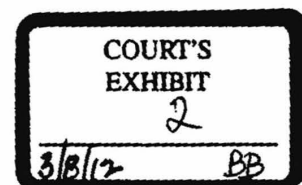
This morning we had a status conference scheduled for the case above referenced.

When I walked into my office at approximately 8:45 Lisa Armstrong was sitting in our lobby. Lisa asked me to confirm the time for our hearing and I advised her that it was scheduled for 9:30 and sat down for a minute to chat. We discussed a few of the things that we intended to cover at the hearing and then Lisa offered how sorry she was that my office had to work with her co-counsel, Stuart Axelrod, on a regular basis. I agreed with her that he was very difficult to work with and that his clients frequently received stiffer prison sentences due to his advice and approach.

Lisa then went into a rather lengthy discussion that in her career practicing law she had never worked with any lawyer more dishonest or unethical than Mr. Axelrod. She went on to say that they were not working together at all and that she could not wait to get this case concluded just to get away from him. From her demeanor it was clear that she strongly disliked her co-counsel.

Ms. Armstrong also stated that Mr. Axelrod was fixated on the wrong strategy for this type of case and that he wouldn't listen to her advice regarding guilt phase strategy. I agreed with her that what I perceived his strategy was not the strategy I would use if I were defending the case. She never specifically revealed any strategy and I made my judgment based upon what Mr. Axelrod has revealed to others along with what I anticipate his strategy to be based on the discovery he has requested.

After that conversation and knowing what Mr. Axelrod said to Deputy Solicitor Richardson about Ms. Armstrong, I became very concerned about the defendant's ability to be effectively represented by this defense team.





STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF HORRY )  
 )  
 State of South Carolina )  
 )  
 )  
 )  
 vs. )  
 )  
 )  
 )  
 Luzenski Allen Cottrell )  
 \_\_\_\_\_ )

IN THE COURT OF GENERAL SESSIONS  
 FOR THE FIFTEENTH JUDICIAL CIRCUIT

INDICTMENT NO. 2003-GS-26-0020

**ORDER REMOVING DEFENSE  
 COUNSEL AND CONTINUING CASE**

FILED  
 HORRY COUNTY  
 12 MAR 19 PM 12:10  
 MELANIE HUGHES-WARD  
 CLERK OF COURT

This matter comes before the court at a scheduled status hearing held on March 15, 2012. Jury selection in this capital murder case was to begin on March 26, 2012. The purpose of the hearing was to resolve any outstanding motions or discovery matters. At the end of the hearing Solicitor Gregory Hembree stated that he and his Deputy Solicitor James A. Richardson had recent conversations with the defense team which raised serious concerns about the defendant's ability to be effectively represented by defense counsel. After much consideration, I must agree.

Solicitor Hembree offered into the record two written statements by Deputy Solicitor Richardson and himself. The Solicitor's statement describes a lengthy conversation with defense counsel Lisa Armstrong, during which Mrs. Armstrong made serious allegations of dishonesty and unethical conduct against her co-counsel Stuart Axelrod. She further expressed her concerns about counsel's inability to coordinate trial strategy. Deputy Solicitor Richardson's statement referenced several conversations with Mr. Axelrod in which he made serious accusations against Ms. Armstrong. His accusations challenged her competence, work ethic, and personal life.

The court is now placed in the very uncomfortable position of complying with its ethical responsibility as to these accusations. Due to the serious nature of the allegations, I spoke to each of

the Defendant's attorneys privately in my chambers. Each acknowledged having made the statements against co-counsel and that they believed the statements to be true. On further inquiry, both advised that they were of the opinion that conduct of co-counsel had jeopardized the defense of this case.

I re-convened the hearing on March 8, 2012, during which I expressed my concern that the defendant could not be effectively represented by his present attorneys. Ms. Armstrong stated that since having last talked with me, she and Mr. Axelrod had determined that they could try to set aside their differences and continue to represent the defendant. This is a capital case two weeks from trial. I see no way to repair the relationship of co-counsel and the damage done to the defense.

I have carefully explained my concerns to the defendant. He stated that he thought his attorneys could resolve their problems and continue with his defense. However, my duty at this point is to protect this defendant by taking the course most likely to assure that he will be effectively represented and his constitutional rights will be preserved. I am not unaware of the delay and expense to be caused by my decision. Nevertheless, I must take the extreme measure of relieving counsel and appoint new counsel.

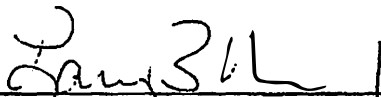
**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that attorney Lisa Armstrong and Stuart Axelrod are relieved as counsel for the defendant.

**IT IS FURTHER ORDERED, ADJUDGED AND DECREED** upon notice of appointment of new counsel they shall turn over to new counsel all file-materials within 10 days.

**IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that the Office of Indigent Defense Capital Case Division shall assume the duty of defense in this case. Upon assignment to specific attorneys the Office of Indigent Defense shall notify this court of such assignments to obtain formal appointment orders.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the trial of this case is continued until further order of this court.

AND IT IS SO ORDERED.

  
\_\_\_\_\_  
Larry B. Hyman, Jr., Presiding Judge  
Fifteenth Judicial Circuit

Conway, South Carolina  
March 13, 2012

# APPENDIX C

MARCH 14, 2012

The Supreme Court of South Carolina  
 Attn: Daniel E. Shearouse, Clerk of Court  
 Post Office Box 11330  
 Columbia, S.C. 29211

~~2012-13-11-18-8~~  
~~2012-13-11-18-8~~

Re: State v. Luzenski Allen Cottrell  
 2003-GS-26-0020

**RECEIVED**

MAR 10 2012

S.C. SUPREME COURT

Honorable Clerk of Court,

Enclosed please find the original of my PRO SE MOTION TO MAINTAIN PRESENT LEAD COUNSEL in the above-referenced case in Horry County. This MOTION is being filed subsequent to the hearing held in Horry County on Thursday, March 8, 2012.

By copy of this letter, I am informing this Court that I have forwarded copies of same to all parties:

Stuart AXELROD, Attorney for Defendant  
 Lisa Armstrong, Attorney  
 Horry County Solicitor, Mr. Hembree

Please file this original with the Court, and I, very respectfully, ask that you return a copy to me clock-stamped for my files.

Respectfully... I am,

Luzenski Allen Cottrell, Defendant - Pro Se  
 Luzenski Allen Cottrell #6020  
 Lieber C.I. (RB#219)

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

---

DEATH PENALTY CASE, Horry County  
Larry B. Hyman, Circuit Court Judge

---

STATE OF SOUTH CAROLINA,

VS.

LUZENSKI ALLEN COTTRELL,  
DEFENDANT

Indictment No. 2003-GS-26-0020

---

PRO SE  
MOTION TO MAINTAIN LEAD COUNSEL IN DEATH  
PENALTY CASE

---

COMES NOW, Luzenski Allen Cottrell, Defendant in the above-captioned and referenced case, acting Pro Se, who moves this Most Honorable Court to Maintain Present Lead Counsel, Stuart Axelrod, in said case.

In the hearing convened on Thursday, March 8, 2012, Mr. Axelrod and 2nd counsel, Lisa Armstrong, were removed as Appointed Counsel. The Defendant, acting Pro Se, herein moves this Court to MAINTAIN Mr. Axelrod as LEAD COUNSEL. In support thereof, the Defendant would show the following:

---

(1) With trial less than two(2) weeks away, a hearing for preliminary matters was convened before the Honorable Judge Hyman, Circuit Court Judge, on Thursday, March 8, 2012;

(2) During said hearing, Lisa Armstrong, Attorney for the Defendant, made all parties in the Court aware of the fact that she had prior conversations with the Office of the Solicitor, unknown to the Defendant, Lead Counsel and/or the Court;

(3) Attorney Armstrong made further statements insinuating and/or alleging her own personal feelings and beliefs that LEAD COUNSEL Stuart Axelrod had acted unethically in this case;

(4) As a result of statements made by Attorney Armstrong, Judge Hyman removed both Attorneys for the Defense, Axelrod and Armstrong, from the case and continued the case until new counsel could be appointed on the Defendant's behalf;

(5) The Defendant, HEREIN PRO SE, now states that Attorney Armstrong has not acted with his best interest in mind. She knowingly and willingly spoke to the Office of the Solicitor outside of both his and LEAD COUNSEL's knowledge, understanding and approval. Attorney Armstrong further expressed views and opinions contradictory to that of the Defendant and had never discussed any of such prior to her statements before the Court; and

(6) The Pro Se Defendant herein states that Attorney Stuart Axelrod, to the best of Defendant's present knowledge and understanding, has prepared a viable defense and case on the Defendant's behalf to argue and rebut the charges filed by the State. The PRO SE Defendant presently believes that Attorney Axelrod has prepared a Defense based on the facts and evidence in his possession and has NOT acted contrary to any judicial ethics or standards.

THESE STATEMENTS MADE, the presently PRO SE Defendant, Luzenski Allen Cottrell, HEREIN REQUESTS that Attorney Stuart Axelrod remain as LEAD COUNSEL in the above-captioned and referenced case.

The PRO SE Defendant further requests that This Most Honorable Court remove Attorney Lisa Armstrong from the case.

IT IS SO MOTIONED AND REQUESTED.

Respectfully submitted,

Luzenski Allen Cottrell #6020  
Luzenski Allen Cottrell, Pro Se Defendant  
Lieber C.I. (RB#219)  
P.O. BOX 205  
RIDGEVILLE, S.C. 29472

Dated: March 14, 2012  
RIDGEVILLE, S.C.

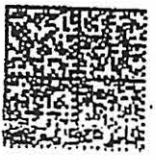


L. COTTRELL # 60225  
LIEBER C.I. (RB# 219)  
P.O. Box 205  
RIDEVILLE, S.C. 29472



The Supreme Court of S.C.  
Attn: Daniel E. Shearouse,  
Clerk of Court  
Post Office Box 11350  
Columbia, S.C. 29211

FIRST CLASS



REC-1  
MAR 15 1972  
MAIL ROOM