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OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
THE SUPREME COURT  
OF THE  
UNITED STATES

**CAPTION:** SOUTH CAROLINA, Petitioner v. DEMETRIUS GATHERS

**CASE NO:** 88-305

**PLACE:** WASHINGTON, D.C.

**DATE:** March 28, 1989

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THE SUPREME COURT OF THE UNITED STATES

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SOUTH CAROLINA, :

                  Petitioner                    :

                  v.                                :            No. 88-305

DEMETRIUS GATHERS                                :

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Washington, D.C.

Tuesday, March 28, 1989

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:04 o'clock a.m.

APPEARANCES:

DONALD J. ZELENKA, ESQ., Chief Deputy Attorney General of South Carolina; on behalf of the Petitioner.

WILLIAM ISAAC DIGGS, ESQ., Columbia, South Carolina; on behalf of the Respondent.

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P R O C E E D I N G S

(11:04 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 88-305, South Carolina v. Demetrius Gathers. Mr. Zelenka, you may proceed whenever you're ready.

ORAL ARGUMENT OF DONALD J. ZELENKA

ON BEHALF OF THE PETITIONER

MR. ZELENKA: Mr. Chief Justice, and may I please the Court.

This case presents an opportunity for the Court to revisit the role of the victim in capital sentencing proceedings and prevent further eroding of that role in the criminal justice equation of punishment. Particularly this case presents the narrow issue of whether the prosecutor's argument during the sentencing phase violates the Eighth Amendment of the United States Constitution when it focuses on the characteristics of the victim, as well as the defendant, rather than only the defendant when the characteristics are directly drawn from the evidence admitted at the trial and obvious to the jury.

In September 1986, Richard Haynes, a 32 year old black male, was brutally beaten, his possessions ransacked. He was sexually assaulted and murdered by



1 Demetrius Gathers and his accomplices. The beatings  
2 occurred at a city park when Haynes had gone to review  
3 religious materials that he had set out on the park  
4 bench when he was accosted for the first time in  
5 reckless disregard of his rights to free expression in  
6 practicing his religion.

7 In the sentencing phase, the prosecutor  
8 commented upon evidence that was admitted to the trial  
9 obvious to the jury from the guilt phase the victim was  
10 a religious person, that he was a registered voter, and  
11 he read from a prayer card in evidence referred to as  
12 the Game Guy's Prayer about a person wanting a fair  
13 chance in life and giving others that same fair chance.  
14 The Supreme Court of South Carolina, relying on this  
15 Court's decision in Booth, asserted that these comments  
16 on the personal characteristics of the defendant were  
17 not necessary for an understanding of the crime, and  
18 therefore violated the Eighth Amendment.

19 We submit that the Eighth Amendment was not  
20 violated by these prosecutor's comments and that the  
21 Eighth Amendment allows a Jury in any capital punishment  
22 situation to have an understanding as to who the victim  
23 was and what he was doing at the time he was brutally  
24 murdered. The Eighth Amendment, we submit, does not  
25 preclude comments that are directly related.

1 Yes, sir?

2 QUESTION: If so, why can't you put in  
3 evidence to that effect?

4 MR. ZELENKA: We submit that to that extent  
5 Booth is wrong, that evidence --

6 QUESTION: Yes, but assuming -- assuming  
7 Booth is right, if you can't get in evidence, why can  
8 you make comments?

9 MR. ZELENKA: You certainly should be able --

10 QUESTION: I mean, I can understand -- I can  
11 understand half your argument if you just say that Booth  
12 is wrong, but -- but you're also trying to make the  
13 argument that even if Booth is right, you should win in  
14 this case. Right?

15 MR. ZELENKA: That's correct. The evidence --

16 QUESTION: Well, do you know any other area  
17 where we say the -- no evidence of that is admissible,  
18 and it, indeed, is unconstitutional to admit evidence of  
19 that during the trial. However, the prosecutor may  
20 comment upon that during -- during his summation. Do  
21 you know of any other area where -- where we make that  
22 kind of a distinction?

23 MR. ZELENKA: I don't think in any area such  
24 as this the -- excuse me -- the elements of what that  
25 particular victim were related directly here to the

1 circumstances of the crime that were admissible for that  
2 purpose as the res justified --

3 QUESTION: Well, that's fine, and he could  
4 make the argument if it had to do with the  
5 circumstance. But he wasn't making that argument. He  
6 was calling attention to the characteristics of the  
7 victim in an effort to get the jury to impose a higher  
8 penalty.

9 MR. ZELENKA: He was referring --

10 QUESTION: And if we've said that you can't  
11 take into account the characteristics of the victim,  
12 then -- then that's just wrong, isn't it?

13 MR. ZELENKA: well, the characteristics of  
14 the victim that -- that Booth was concerned with were  
15 characteristics that were not relevant in any way to the  
16 circumstances of the crime.

17 QUESTION: Well, how was the contents of the  
18 prayer card relevant to the circumstances of the crime?  
19 Gathers didn't read the prayer card.

20 MR. ZELENKA: No, we don't submit --

21 QUESTION: You read the whole prayer card to  
22 the jury.

23 MR. ZELENKA: He read the whole prayer card  
24 to the jury merely --

25 QUESTION: How -- how is that relevant to the

1 circumstances of the crime?

2 MR. ZELENKA: It was relevant to the  
3 circumstances of the crime that the prayer card was on  
4 the scene and was strewn about his body at the time the  
5 crime occurred.

6 QUESTION: Well, how were the contents of the  
7 card relevant?

8 MR. ZELENKA: They were relevant merely to  
9 show in the same way any sort of analogy is relevant --  
10 to show the characteristics of the event itself, the  
11 characteristics of the defendant, as well as the  
12 characteristics --

13 QUESTION: Well, that's your conclusion. I  
14 don't see how it related to the characteristics of the  
15 crime.

16 MR. ZELENKA: That's the conclusion based  
17 upon the interpretation we submit the solicitor was  
18 actually trying to place upon the prayer card itself.

19 QUESTION: Did the evidence show that the  
20 defendant had an opportunity to examine the prayer card  
21 at the time he was committing these offenses?

22 MR. ZELENKA: Certainly. The -- the evidence  
23 -- and it's not contradicted -- that when the defendant  
24 came upon the scene, Mr. Richard Haynes was changing  
25 from some religious clothes at that time and his -- the



1 prayer card, as well as a couple of Bibles, were set out  
2 on the park bench. The assault then began to occur, and  
3 after Mr. Gathers had knocked the individual unconscious  
4 by beating him across the head with a bottle, they then  
5 went through his belongings looking for something of  
6 value to steal.

7 QUESTION: The prayer card.

8 MR. ZELENKA: The prayer card was among those  
9 belongs.

10 QUESTION: Was received in evidence.

11 MR. ZELENKA: which was received in evidence  
12 in the guilt phase without objection. It was -- and the  
13 defendant was not killed at that particular time. In  
14 fact, the -- excuse me. The victim was not killed at  
15 that particular time. The defendant left and then he  
16 returned to the scene, accomplished a further assault  
17 and --

18 QUESTION: After he had looked at all these  
19 items.

20 MR. ZELENKA: After those items had been  
21 looked at and scattered about. That is correct.

22 QUESTION: Did the -- did the Supreme Court  
23 of South Carolina say that it was error to consider this  
24 evidence or simply error for the prosecutor to comment  
25 on it?

1 MR. ZELENKA: The Supreme Court did not say  
2 anything about error in considering the evidence. What  
3 it said was the extensive -- excuse me -- the extensive  
4 comments on the victims character violated Booth v.  
5 Maryland because they did not see -- read Booth as  
6 reading circumstances of the crime to allow such sort of  
7 interpretation on --

8 QUESTION: So, but it didn't suggest that the  
9 evidence couldn't be considered.

10 MR. ZELENKA: It never suggested that the  
11 evidence could not be considered. That's correct. It  
12 merely interpreted this Court's --

13 QUESTION: Mr. Zelenka, was there any  
14 evidence that the defendant read the prayer card?

15 MR. ZELENKA: There was evidence that he  
16 looked at the cards, looked at the materials, looking  
17 for something to steal.

18 QUESTION: He was looking at all this stuff  
19 when he was looking for valuable material.

20 MR. ZELENKA: There's no direct testimony the  
21 defendant sat and read the card and then made an  
22 informed decision that he would then kill the -- the  
23 victim, Mr. Haynes.

24 QUESTION: What time of day did this occur?

25 MR. ZELENKA: It occurred on a -- a fall day,

1 and it occurred approximately 10:00 o'clock at night.

2 The evidence --

3 QUESTION: Was it a lighted area? Was it  
4 something you could read small print on a prayer card  
5 quite readily in the dark?

6 MR. ZELENKA: We don't have any information  
7 in this --

8 QUESTION: So, you really don't know whether  
9 he read --

10 MR. ZELENKA: -- record that he could read  
11 small print --

12 QUESTION: -- the card or not.

13 MR. ZELENKA: -- on the prayer card. What we  
14 do have is testimony presented in the record that they  
15 did review these particular materials and they could see  
16 various items.

17 QUESTION: Well, they reviewed them while  
18 they were looking for money and jewelry and that sort of  
19 stuff.

20 MR. ZELENKA: Yes, and that the victim --

21 QUESTION: But you -- and you -- you would  
22 infer from that that they stopped and picked up the  
23 prayer card and read it. It's rather lengthy too, as I  
24 remember it -- read the whole thing.

25 MR. ZELENKA: I wouldn't infer that they read

1 exactly the entirely prayer card, no. We aren't even  
2 asserting that. We're asserting that the prayer card  
3 was merely utilized in this case as an analogy about a  
4 person's right to life and right to be free from this  
5 sort of attack that he had.

6 QUESTION: Would the defendant have been able  
7 to put in evidence in South Carolina to show that the  
8 victim really was not at all the kind of man that's  
9 described in the prayer card, but really was -- was a  
10 fraud and -- and did not practice his religion at all?

11 MR. ZELENKA: That issue was not addressed in  
12 this particular case because the defendant never sought  
13 to rebut any of that information. He admitted it. In  
14 fact, during the --

15 QUESTION: What is your view of the South  
16 Carolina law? Would that be permissible --

17 MR. ZELENKA: My view of the South Carolina  
18 law on the basis of Gardner v. Florida, the state would  
19 have had to have allowed the admission of that testimony  
20 if the state was pursuing that same sort of evidence  
21 affirmatively. In the decision of State v. Gaskins,  
22 which the defendant has cited --

23 QUESTION: Right.

24 MR. ZELENKA: -- that dealt with the  
25 situation in which a death row inmate was killed by



1 another inmate who was contracted by the victim's family  
2 in the other case to -- to have him murdered. In that  
3 case, the South Carolina Supreme Court had a situation  
4 that the information was that he had already been sent  
5 to death row for the particular murder, and then based  
6 upon that information, the culpability of the victim for  
7 his particular heinous crimes was clear to the jury.  
8 The situation has never been presented as to whether --

9 QUESTION: Well, the defendant --

10 MR. ZELENKA: -- (inaudible) is directly  
11 rebuttable.

12 QUESTION: Can the defendant put in as a  
13 mitigating factor the fact that the man he killed was a  
14 particularly bad person?

15 MR. ZELENKA: If that is related to the  
16 circumstance of the crime, certainly he could --

17 QUESTION: Well, no. Say it isn't -- it is  
18 unrelated just as -- as here I guess it's not  
19 particularly related. Can he just put in the fact the  
20 man -- the man he killed was -- you know, had been  
21 convicted of crimes and one thing and another, and  
22 therefore the killing doesn't seem all that bad?

23 MR. ZELENKA: One reading of the Gaskins  
24 decision would imply that it could not be done, but it  
25 was in fact done in Gaskins.

1 QUESTION: I see.

2 MR. ZELENKA: It wasn't until the Supreme  
3 Court in this particular decision, when it noted accord  
4 with -- with Gaskins, that they asserted possibly that  
5 that information could not be admissible. However, the  
6 particular situation was not raised in this case. They  
7 never sought to challenge that.

8 In fact, the defense counsel endorsed it in  
9 his closing argument. He utilized religion as a sense  
10 of mitigation and utilized this defendant's particular  
11 characteristics for religion and for his Christian faith  
12 should be something that should cause there to be  
13 mitigation in the minds of the jury generally.

14 In the guilt phase, he argued essentially  
15 that perceived mental illness on the part of the victim  
16 was something that the jury should consider and  
17 acknowledge.

18 The defense counsel, we submit, also and more  
19 fluently presented the situation as to religion as to  
20 whether that should be a factor the jury should  
21 consider. And they tried to utilize that in mitigation  
22 of this particular case.

23 QUESTION: Was that after the prosecution's  
24 summation?

25 MR. ZELENKA: Yes, sir. It was after the

1 prosecution's summation.

2 QUESTION: To what issue -- to what disputed  
3 issue in the case was the voter registration card  
4 relevant?

5 MR. ZELENKA: The voter registration card was  
6 not relevant to any disputed issue in the case. It  
7 merely presented a glimpse of the individual that was  
8 the victim in this particular case.

9 QUESTION: So, in any -- your position is  
10 that anytime there's a robbery and a murder and the  
11 victim's wallet is involved, you can go through the  
12 wallet and --and use that as circumstances of the crime  
13 in order to get around the Booth holding?

14 MR. ZELENKA: No, we don't assert that. Here  
15 the -- the voter registration card was another piece of  
16 material that was cast aside the victim's body in this  
17 particular case. It's something that the defendant  
18 could have known and could have considered at the time  
19 before he went back to commit that particular crime.  
20 The voter registration card and the fact that one is a  
21 voter does not necessarily stand for anything other than  
22 that is a particular trait that this victim had.

23 QUESTION: Don't you think that's a rather  
24 flukish rule of law that -- that whether I get the death  
25 penalty because -- because the jury is -- is allowed to

1 consider an argument by the prosecution that the -- my  
2 victim is a particularly virtuous -- particularly  
3 virtuous -- person, that all depends on what happens to  
4 be in the fellow's wallet when I go through it?

5 MR. ZELENKA: Well, I think --

6 QUESTION: It's absolutely flukish. Is -- is  
7 that really the kind of rule you're asking us to --

8 MR. ZELENKA: I --

9 QUESTION: If it happens to get into the  
10 -- into the -- into the guilt phase of -- of the trial  
11 just -- just accidentally, then -- then it's free game  
12 in the -- in the argument to the -- to the jury on -- on  
13 penalty.

14 MR. ZELENKA: I think in this situation the  
15 voter registration card was merely utilized by the  
16 prosecution to reflect that Richard Haynes was an  
17 individual. He was a person. He wasn't just a -- a  
18 carcass, something that the jury could not ever consider  
19 or think about in that particular phase. The way he --

20 QUESTION: Well, it doesn't let us do that in  
21 other -- in other situations.

22 MR. ZELENKA: Well, it does let you consider  
23 who a victim is we submit in any particular case in the  
24 same way as if there are two or three victims in an  
25 automobile accident. The defendant might not know how



1 many people are in the car, but the result of it is he  
2 is facing more culpability because of what his action  
3 did.

4           Similarly, in this case, because he was on a  
5 park bench in Charleston, South Carolina was a factor  
6 the jury could consider because he thought he would be  
7 free from any sort of assault at that time. That is  
8 something that the prosecution should allow the jury to  
9 consider, and because he was practicing his religion at  
10 that time and would not have expected to be accosted in  
11 this way, that is something the jury should be allowed  
12 to consider in making a decision as to the defendant's  
13 particular culpability.

14           The voter registration card, we submit, was  
15 merely an analogy that the prosecution tried to use to  
16 focus on that Richard Haynes was a living person. At  
17 that time he had traits and he had qualities. The  
18 defendant in this case, Demetrius Gathers, was not we  
19 submit and he was not urged we submit to have received  
20 the death penalty because Richard Haynes was a  
21 registered voter or because he was a religious person.  
22 He was to receive the death penalty because of what he  
23 had done to Richard Haynes who was a human being with  
24 particular traits.

25           QUESTION: This evidence was admitted at the

1 guilty phase. Is that correct?

2 MR. ZELENKA: All this evidence was admitted  
3 at the guilty phase without objection. It was introduced  
4 then into the penalty phase without objection by the  
5 defense attorney, and it wasn't until after the  
6 prosecution's closing argument that the defense attorney  
7 at that time suggested that the prayer card be removed  
8 from the -- from going to the jury at that particular  
9 time.

10 We submit the Eighth Amendment does not  
11 require a state to neutralize and redact the victim from  
12 the trial where properly admitted evidence reveals  
13 personal characteristics of the victim. The evidence,  
14 we submit, is relevant to the circumstances of the  
15 crime. It's relevant to the information as to the  
16 particular moral culpability of the defendant by  
17 reflecting upon the person who he chose to kill on that  
18 particular date.

19 In capital cases the sentencer's attempt must  
20 be to make a unique and individualized judgment  
21 regarding the crime and regarding the penalty the  
22 defendant deserves. The jury in any capital case is  
23 free to consider a myriad of factors to determine  
24 whether death is the appropriate punishment.

25 In this Court's decisions, it's clear that

1 the defendant has virtually free rein to introduce  
2 anything in evidence that he considers mitigating to his  
3 particular factor. If the defendant, under this Court's  
4 decisions, considered certain information to be  
5 relevant, its admissibility should be allowed to be  
6 introduced. The circumstances of the offense, we submit,  
7 must include who the victim was and what he was doing at  
8 the time the crime occurred.

9 Here, unlike Booth, the comments did not  
10 focus on the reputation of the victim and the effect on  
11 his family, but rather on the circumstances of the crime  
12 over which the defendant could have had knowledge and  
13 control, the apparent selection and choice of a  
14 vulnerable victim in September of 1986. To redact this  
15 information from the penalty phase would make Richard  
16 Haynes a mere abstraction, we submit, and at most this  
17 thumbnail sketch was presented of Richard Haynes gave  
18 the jury a quick glimpse of the life the defendant chose  
19 to extinguish.

20 As the defense can humanize the defendant in  
21 any case, we submit the prosecution should equally be  
22 able to humanize the victim to allow for correct balance  
23 in the criminal justice process and the assessment of  
24 the offense from the victim's viewpoint, we submit, is  
25 germane to any jury's decision as to the appropriateness

1 of the punishment.

2 In this case concerns that Booth has as to  
3 whether this information can be guided were accomplished  
4 in this particular setting. During the prosecution's  
5 closing argument, the solicitor advised the jury that  
6 the sympathy for the victim is not the way you make a  
7 determination as to the appropriateness of the  
8 punishment. You must focus on the characteristics of  
9 the defendant and the circumstances of the particular  
10 crime. That is the direction the prosecutor was giving  
11 when he made his particular closing argument.

12 Further, the Judge, when he gave his Jury  
13 charge in this case, said that to make your  
14 determination, you should refer to the culpability of  
15 the defendant in his action involving the death and  
16 criminal sexual conduct of the victim, Richard Haynes.

17 The trial judge further charged: you should  
18 not be swayed by prejudice, by passion, or by other bias  
19 or motive in the particular jury charges. This  
20 information gave the jury a guided choice as to the  
21 utilization of this information and the determination as  
22 to the appropriateness of the penalty in the particular  
23 case.

24 The concerns that Booth had of the effect of  
25 the murder on the victim's family, again, were not



1 present in this case. The articulation of the members  
2 of the victim's family in trying to reflect their  
3 collateral suffering that they had as a result of the  
4 murder in the case was not presented here.

5 We submit that Booth should not apply to this  
6 particular case because --

7 QUESTION: Well, I take it you -- you think  
8 Booth shouldn't apply to any characterization of the  
9 victim.

10 MR. ZELENKA: That's correct.

11 QUESTION: That -- just -- just the family.

12 MR. ZELENKA: The characteristics made by the  
13 family and the characteristics of the crime made by the  
14 victim's family. That is correct, that Booth should be  
15 very limited to those particular situations.

16 QUESTION: You think -- you think Booth on  
17 its face was so limited?

18 MR. ZELENKA: Booth on its face was probably  
19 not so limited based upon certain language that was  
20 within Booth. However, footnote 10 of Booth, we submit,  
21 allowed for that sort of limitation to be done. And we  
22 submit that that is an appropriate determination and  
23 that these characteristics presented in this case, as  
24 presented in other cases that arise out of the facts of  
25 the particular murder itself, are subject to a proper,

1 appropriate comment by a prosecutor.

2 QUESTION: Well, do you think that -- do you  
3 think then that the -- the prosecution should be able to  
4 introduce evidence about the character of the victim  
5 wholly aside from any -- any circumstances of the crime?

6 MR. ZELENKA: In our argument where we think  
7 that Booth is wrong, we think that the characteristics  
8 of a victim independent of those directly related to the  
9 crime should weigh into a proper sentencing  
10 determination by the jury. That is correct.

11 QUESTION: But you think -- going that far is  
12 inconsistent with Booth you think.

13 MR. ZELENKA: Going that far is probably  
14 inconsistent with the first part of Booth. That's  
15 correct. But the situation in Booth, the factual  
16 situation the Court was presented with, is certainly not  
17 the situation we're presenting here to the Court. That  
18 evidence went significantly beyond any relevancy that  
19 related to the circumstances of the crime or  
20 particularly the circumstances of the particular victim  
21 in that case. It put them in a vulnerable position.

22 In conclusion, we would submit that the  
23 Eighth Amendment does not preclude the types of the  
24 comments that were related to the circumstances of the  
25 crime and the characteristics of the defendant in this

1 particular case. The prosecutor was merely attempting  
2 to humanize the victim and balance the -- the sort of  
3 mitigating evidence that was presented in this case  
4 dealing with the entire background of the defendant, his  
5 relationship with his family members, his ability to be  
6 a rock to some family members and to be essentially a  
7 nonviolent and friendly person that was presented by  
8 those particular family members in this particular case.

9 The vulnerability of the victim was the  
10 essence of the argument done in this case, that the victim  
11 was just a member of society, an individual that had an  
12 identity was the attempted argument that the prosecutor  
13 was trying to make. The use of this info conveys our  
14 common humanity with those who suffer from this sort of  
15 crime and keeps us from thinking of them as faceless  
16 abstractions. We submit that Richard Haynes, who was  
17 brutally murdered in 1986, was a real and a unique  
18 person. It is only just that the jury should be  
19 permitted to consider that fact in making its  
20 determinations.

21 QUESTION: Thank you, Mr. Zelenka.

22 Mr. Diggs?

23 ORAL ARGUMENT OF WILLIAM ISAAC DIGGS

24 ON BEHALF OF THE RESPONDENT

25 MR. DIGGS: Thank you, Mr. Chief Justice.

1 May It please the Court.

2 I'd like to draw the Court's attention to  
3 page 66 -- or excuse me -- page 17 of the joint appendix  
4 concerning the testimony and the lighting. Justice  
5 O'Connor, you asked was it likely that Mr. Gathers read  
6 this Game Guy's Prayer and the voter registration card  
7 prior to his committing these acts. The question was:  
8 "What was the lighting like. Was it dark?" The answer  
9 is: "It was dark out there." So, it's very unlikely, I  
10 submit, that this individual stood there and read this  
11 card and began to formulate an intent to kill as a  
12 result of his knowledge that this man was a Christian  
13 and that he was a registered voter.

14 Also, I'd like to point out that in its  
15 presentation, the state has conceded that the voter  
16 registration card in this case was not relevant to a  
17 sentencing determination because it wasn't relevant to  
18 the circumstances of the crime or the characteristics of  
19 the defendant. And as we'll reach a little bit further  
20 in the argument, we would submit that the use of a voter  
21 registration card to invoke a death sentence from a  
22 sentence -- a death sentence from a sentencing authority  
23 is a constitutionally impermissible basis for imposing a  
24 sentence of death.

25 QUESTION: Do you think a jury is very likely



1 to find a voter registration card critical in deciding  
2 whether to impose life or death?

3 MR. DIGGS: Absolutely not unless they're  
4 asked to do that in a closing argument by the solicitor,  
5 and that's what I'm submitting is a fair reading --

6 QUESTION: Well, do -- do you think the jury  
7 is likely to accede to the solicitor's suggestion that  
8 although in -- if there -- if it weren't for this voter  
9 registration card, he shouldn't get the death penalty?  
10 Since the voter registration card is before you, he  
11 should.

12 MR. DIGGS: I think that a solicitor, a  
13 skillful and experienced solicitor, could take a piece  
14 of evidence like that and in the nature of the argument  
15 that was advanced in this case, that he is a -- he is  
16 one of us, his life, because of that, is more valuable  
17 and --

18 QUESTION: But --

19 MR. DIGGS: -- therefore based on that a  
20 death -- a death sentence would be appropriate.

21 QUESTION: Well, I can see the solicitor  
22 relying on a number of factors, but the idea that it all  
23 turns on the voter registration card, which I thought  
24 perhaps was your position, makes little sense to me.

25 MR. DIGGS: Justice Rehnquist, the solicitor

1 argued that these factors -- and if you look at this  
2 argument in context, the Game Guy's Prayer card -- the  
3 fact that this man was a Christian and the fact that he  
4 was a registered voter who believed in his community and  
5 participated in the process, cry out from the grave in  
6 support of a sentence of death. That's the way it was  
7 couched, and that's the way that evidence was used in  
8 this case.

9           And what we're saying is unless the state can  
10 demonstrably show in some constitutionally permissible  
11 way that those factors were relevant to the commission  
12 of this crime and in some way reflect on the  
13 characteristic of the defendant that it is a -- they are  
14 constitutionally impermissible bases --

15           QUESTION: What's your authority for that  
16 proposition?

17           MR. DIGGS: Well, I would cite the Court to  
18 the language in Booth v. Maryland itself where this  
19 Court cites Zant v. Stephens. And I would rely on Zant  
20 v. Stephens for the proposition that constitutionally  
21 protected rights and choices, such as religion and  
22 politics, cannot have attached to them aggravating  
23 labels by a state in a capital sentencing scheme.

24           Now, given that proposition, the -- the exact  
25 reverse would be true with regards to the victim in the

1 case. And -- and I'll explain to you why, because in  
2 the United States, you and I all -- we all have the  
3 right to the -- the right to free speech, the right to  
4 assemble with other people, and the right to choose or  
5 reject a religion. And it would not be permissible, I  
6 would submit to you, to have an individual feel or be  
7 told that his life somehow has less value to it because  
8 he has or she has rejected a particular religion that  
9 the solicitor perhaps has accepted.

10 If I go into an unsafe area of a community, I  
11 want to feel like I am receiving the full protection of  
12 the law as well as other people who may be members of  
13 other religions separate and apart from the -- the one  
14 that I happen to profess or reject. And so, I would  
15 submit that religion and politics, constitutionally  
16 protected freedom of choice type protections that we  
17 have, could never be used as a basis in and of  
18 themselves for the imposition of a death sentence.

19 QUESTION: In this case, I take it the two  
20 cards you complain about were received in evidence at  
21 the guilt phase without objection.

22 MR. DIGGS: That's correct.

23 QUESTION: And the jury properly looked at  
24 them.

25 MR. DIGGS: That's correct.

1 QUESTION: The same jury served as the  
2 sentencing jury. Is that right?

3 MR. DIGGS: That's right.

4 QUESTION: Do you suppose that it could be  
5 said that in view of the evidence of the extreme  
6 brutality of this crime and the circumstances of it,  
7 that any reference by the prosecutor to these items was  
8 harmless?

9 MR. DIGGS: Justice O'Connor, I don't think  
10 that it would be fair to characterize this as merely a  
11 reference. The solicitor, if you look at the Joint  
12 appendix, took up an entire page reading that Game Guy's  
13 Prayer and -- and the entire three-quarters of a page --

14 QUESTION: Well, the jury had read it  
15 already, for goodness sakes. It isn't as though they  
16 didn't know what was in it. It had been in evidence.  
17 They knew what was there.

18 MR. DIGGS: It had been in evidence, and he  
19 reread the card, the Game Guy's Prayer, in the context  
20 of using that card and Mr. Haynes' belief in it in and  
21 of itself as a basis for imposing a death sentence in  
22 the case.

23 Now, the evidence could be admitted. There  
24 is certainly evidence in record that not only Mr.  
25 Gathers but other people rummaged through this victim's



1 personal belongings. And it's -- It's conceded that the  
2 Game Guy's Prayer and the voter registration card was  
3 there. Those items were properly admitted into evidence  
4 or were not objected to simply because they were  
5 evidence that the individual assailants in this case  
6 rummaged through looking for things of value to steal.  
7 I don't --

8 QUESTION: But they were also admitted at the  
9 guilt phase, weren't they?

10 MR. DIGGS: That -- that was on the question  
11 of guilt. It wasn't --

12 QUESTION: Weren't they also admitted at the  
13 penalty phase?

14 MR. DIGGS: Well, it was a wholesale  
15 admission of all of the evidence that was admitted at  
16 the guilt phase.

17 QUESTION: So, they were admitted at the  
18 penalty --

19 MR. DIGGS: That's correct. That's correct.

20 But I would submit that simply because  
21 evidence like that is admitted to show you that perhaps  
22 there was an attempted robbery here that the subject  
23 matter of that evidence can then be spring-boarded or  
24 bootstrapped up to a reason for imposing a death  
25 sentence as was done in the closing argument here. The

1 evidence was properly admitted to show what happened at  
2 the -- at the criminal assault stage of this case. But  
3 I would submit that the subject matter of that material  
4 cannot in and of itself be used as a basis for imposing  
5 a death sentence because it is a religious consideration  
6 and a political consideration which are constitutionally  
7 protected rights.

8 I think where the state's case in this  
9 particular --

10 QUESTION: Of course, I take it your position  
11 would be the same under Booth if the victim was -- was  
12 blind or helpless or an infant. The jury doesn't have  
13 -- can't consider any of that.

14 MR. DIGGS: Of course, it can consider it if  
15 those handicaps reflect on the characteristic of the  
16 defendant. Of course.

17 If it -- If it can be demonstrated that the  
18 blindness didn't contribute to the -- to the offense  
19 --for example, suppose you go out and you got a blind  
20 child out playing basketball. Some kids come up and  
21 they realize that he can't really see that well, and  
22 they see his bicycle parked over. And so, he can see  
23 well enough that he can avoid running into objects, but  
24 he can't really identify people. The individuals kind  
25 of sidekick the ball down the hill. And while the child

1 goes to pick it up, they ride off on his bicycle. Now,  
2 the blindness of the child, of course, can be introduced  
3 into -- at that point. It becomes relevant to the moral  
4 culpability of the defendants.

5 But if that same child were walking down the  
6 street and suddenly hit as a car passed by as a result  
7 of a random shooter in that car, the shooter -- the --  
8 the actor shooting that gun, having no knowledge or  
9 indication that that child is blind, shoots him and  
10 kills him, then the blindness has nothing to do with the  
11 circumstances of the crime or the characteristics of the  
12 defendant.

13 QUESTION: So, if you shoot a gun -- so, if  
14 you shoot a gun and you hit school children and you  
15 shoot a gun and you hit dope dealers, is the penalty the  
16 same?

17 MR. DIGGS: The -- the culpability --

18 QUESTION: Constitutionally.

19 MR. DIGGS: The culpability certainly takes  
20 into account a child versus an adult, and certainly that  
21 could be considered.

22 QUESTION: It does under Booth in your view.

23 QUESTION: Why should it do that in your view?

24 MR. DIGGS: I believe that it is something  
25 that reflects on the characteristic of the defendant.

1 QUESTION: Only if you know, only if you  
2 know. I understood --

3 MR. DIGGS: That's right. That's correct.

4 QUESTION: -- Justice Kennedy's question to  
5 be a random shot.

6 MR. DIGGS: That -- okay, I'm sorry. I  
7 misunderstood that. A random shooting, that's correct.

8 QUESTION: Random shooting --

9 MR. DIGGS: Culpability would be the same.

10 QUESTION: And I take it your position would  
11 be the same if the jury simply mentioned this on its  
12 own. Somebody on the jury said this is a decent man in  
13 the community or this was an innocent child. So long as  
14 the shooting is random, that's irrelevant and reversible  
15 error under the Constitution.

16 MR. DIGGS: I'm not sure that I follow that  
17 --that question. Could you --

18 QUESTION: Suppose the jury on its own  
19 considers factors that the Booth case tells us the  
20 prosecution cannot mention, i.e., the victim was a  
21 decent person in the community --

22 MR. DIGGS: Uh-hum.

23 QUESTION: -- or a blind person or an infant  
24 or a president -- all of those things --

25 MR. DIGGS: Well --



1 QUESTION: -- would be grounds for reversal I  
2 take it if the jury considered them on their own as  
3 opposed to the prosecution mentioning them?

4 MR. DIGGS: I think that the -- you know,  
5 that's why we have juries. That's why we have  
6 sentencing authorities to take into account every  
7 consideration that's relevant to the circumstances of  
8 that crime.

9 QUESTION: So now -- so now we have the  
10 position that the jury can consider things that the  
11 prosecution can't mention?

12 MR. DIGGS: Well, I don't -- unless it's  
13 obvious that -- that the jury is going to do that and  
14 --and you can cure that by some kind of limiting  
15 instruction, I don't see how you could go into the jury  
16 room and prevent deliberations on certain aspects of the  
17 case.

18 QUESTION: Well, I'm talking about what the  
19 constitutional duty of a jury is. Suppose you have a  
20 well-instructed jury. The jurors read Booth.

21 MR. DIGGS: Well, the -- I think what you're  
22 going to have to do is allow each side to present the  
23 evidence that's presentable under the rules of evidence  
24 in the case, let that case go to the jury with proper  
25 instructions that are applicable to the evidence that

1 has been introduced, and then allow the Jury to -- to  
2 consider the circumstances of this crime and the  
3 characteristics of the defendant and make a decision as  
4 to what the sentence should be.

5 QUESTION: Why would you request an  
6 instruction from the judge? Ladies and gentlemen of the  
7 Jury, necessarily during the -- during the guilt phase  
8 there's been some evidence admitted that shows some of  
9 the characteristics of the defendant. It shows he was  
10 an eight year old and blind.

11 MR. DIGGS: Characteristics of --

12 QUESTION: I enjoin you not to consider those  
13 characteristics because it has nothing to do with the  
14 --for purposes of the guilt phase, for purpose of the  
15 penalty, I enjoin you to not consider any of those  
16 characteristics.

17 MR. DIGGS: Do you mean the characteristics  
18 of the victim or the defendant?

19 QUESTION: Of -- of the victim. Of the  
20 victim.

21 MR. DIGGS: Well, at --

22 QUESTION: You should get an instruction like  
23 that, shouldn't you?

24 MR. DIGGS: I don't think that we're talking  
25 about at the guilt phase of a proceeding where the

1 question at issue is the guilt or innocence of the  
2 accused.

3 QUESTION: I'm sorry. At -- at the penalty  
4 phase you should get an instruction, ladies and  
5 gentlemen of the jury, you've learned during the trial  
6 incidentally that this was an eight year old, blind boy  
7 who happened to be killed, but you should not take that  
8 into account for purposes of determining how severely  
9 this person should be punished since he didn't know that  
10 it was an eight year old, blind boy.

11 MR. DIGGS: I don't think -- when I mentioned  
12 limiting instructions, of course, I'm not talking about  
13 that situation. I think that to be -- a jury has to be  
14 permitted to consider the circumstances of the crime and  
15 the characteristics of a defendant, and --

16 QUESTION: Well, why? You say we can't tell  
17 them to -- we can't ask them to consider it, but you  
18 --you want to let them violate the law.

19 MR. DIGGS: I don't think that if it has -- I  
20 think it if has nothing to do -- I would submit if it  
21 has nothing to do with the circumstances of the crime  
22 and the characteristics of the -- of the defendant, then  
23 it has no relevancy to the moral culpability of the  
24 defendant.

25 QUESTION: So, the jury should not consider

1 It and it would be okay to -- and probably desirable to  
2 instruct the jury not to consider it.

3 MR. DIGGS: If -- if the evidence showed that  
4 it did not in some way cast light on the moral  
5 culpability of the accused, then that's correct.

6 QUESTION: (Inaudible).

7 QUESTION: Well, of course, you assume that  
8 moral culpability of the accused has nothing to do with  
9 the identity of the victim.

10 MR. DIGGS: If --

11 QUESTION: That's your definition of moral  
12 culpability.

13 MR. DIGGS: If the victim is aware -- I mean,  
14 if the victim's characteristics are known to the accused  
15 and some way can be shown to be an impetus for the  
16 murderous act, then it certainly would be proper --

17 QUESTION: What if in this case the evidence  
18 showed that it was broad daylight and the defendant read  
19 every word of the voter registration card and the  
20 prayer, and then went on and did what he did?

21 MR. DIGGS: If you could -- if you could  
22 fairly infer from that record that the defendant read  
23 that card and said I don't like Christians and I don't  
24 like voters --

25 QUESTION: No, no. He just read it. He knew



1 fully what he had here in the way of a potential victim,  
2 a poor, old fellow who maybe had some rather oddball  
3 religious characteristics sitting on the park bench  
4 trying to change his clothes.

5 MR. DIGGS: Well --

6 QUESTION: And he reads all that and then  
7 does the terrible things that he did to this victim.

8 MR. DIGGS: I would -- I would answer that by  
9 saying if the prosecution can't demonstrate that that  
10 knowledge was in some way responsible for the accused's  
11 actions --

12 QUESTION: You don't think that the knowledge  
13 goes to the moral culpability of the defendant who knows  
14 what he has here in the way of a victim and then  
15 cold-bloodedly does the things that this person did to  
16 this old man?

17 MR. DIGGS: Justice O'Connor, I don't think  
18 that his moral culpability would be enhanced because he  
19 selected a Christian as opposed to some other individual  
20 to murder. I would submit that's --

21 QUESTION: We don't know the nature of the  
22 religious belief, just some poor, old soul who had these  
23 characteristics. You don't think that relates to the  
24 moral culpability of this defendant?

25 MR. DIGGS: I would submit that it would not

1 be permitted to be so under the Constitution, under the  
2 language that this Court wrote in the Zant v. Stephens  
3 case.

4 QUESTION: What if the defendant goes in and  
5 rapes and murders a mother with sleeping children  
6 nearby? You don't think it goes to his moral culpability  
7 that he knows the circumstances?

8 MR. DIGGS: That he knows the circumstances  
9 that this -- that --

10 QUESTION: Victim is a mother and is going to  
11 leave orphan children when he's finished. You don't  
12 think that goes to his moral --

13 MR. DIGGS: Absolutely it does go to it.  
14 Absolutely. That certainly is circumstance of the  
15 crime. It's something that the defendant knew about when  
16 he undertook to engage in this murderous act anyway.

17 QUESTION: And precisely so here with this  
18 poor, old fellow on the park bench.

19 MR. DIGGS: Well, he knew that the victim in  
20 this case had personal effects that were rummaged  
21 through. We knew that -- or Mr. Gathers knew the victim  
22 had these items in his possession. He rummaged through  
23 them looking for something to steal, probably money.  
24 And I would submit that none of the items that Mr.  
25 Haynes had in his possession at the time reflect really

1 on the moral culpability of this defendant because it  
2 can't be shown that they were an impetus for the murder  
3 in this case.

4 QUESTION: But you can't show that the -- the  
5 mother with her young children -- you probably can't  
6 show that the young children were an impetus for the  
7 murder. It might be quite the contrary.

8 MR. DIGGS: Well, I think it goes -- in that  
9 situation, it clearly goes to moral culpability because  
10 he's aware of the fact. He's aware of obvious  
11 ramifications of this act of murder.

12 QUESTION: So, if this -- if this fellow on  
13 the park bench had had a small son with him, that could  
14 have come in, but the rest couldn't.

15 MR. DIGGS: That's right. Absolutely because  
16 it would have been obvious to the defendant. Obviously  
17 if you kill a parent that's going to leave a -- an  
18 orphan child, it goes to the question of culpability.

19 But that -- you know, that's not what we have  
20 in this case. We have a situation where the victim  
21 happened to be in possession of certain items and they  
22 happen to relate to religion and to politics, a voter  
23 registration card. It -- there is an argument in the  
24 record that shows that the solicitor utilized those  
25 items as a basis for imposing a sentence of death in the

1 case, and I would submit that's constitutionally  
2 impermissible. That's the position of the Respondent.

3 Now, the State of South Carolina can't  
4 realize -- and I think this goes to a lot of the  
5 questions that we've -- that I have received in the last  
6 few minutes. The State of South Carolina has a common  
7 law definition of murder, and it was in effect long  
8 before even the Constitution of the United States was  
9 adopted here. So, before we ever even had an Eighth  
10 Amendment or a Fourteenth Amendment, South Carolina had  
11 that -- had adopted that common law definition of  
12 murder. And through this day even, it remains  
13 unchanged, and it's the law of the state now. It was  
14 the law of the state at the time Mr. Haynes was killed.

15 And that definition of murder codified by the  
16 general assembly, by the legislature in South Carolina,  
17 at Title 16 of our code defines murder as the unlawful  
18 killing of another human being with malice aforethought.

19 Now, if you look -- if you research the crime  
20 of murder in South Carolina, you find a lot of cases  
21 that deal with that element of malice aforethought, but  
22 you don't find in that same research any cases that deal  
23 with the element of human being. And I think this is  
24 where the state's case here falls down. Proverbially  
25 they can't see the forest for the trees in this case



1 because under South Carolina law now, as it always has,  
2 values a human life the same, any human life --

3 QUESTION: Well, then you would think the  
4 South Carolina Supreme Court in this case would have  
5 relied on the principle you're talking about rather than  
6 relying on our federal constitutional decision in Booth.

7 MR. DIGGS: Well, basically the law in South  
8 Carolina is that a victim's characteristics are  
9 irrelevant to a sentencing consideration because all  
10 individuals have that same right of protection in South  
11 Carolina not to be murdered unlawfully or not to be  
12 killed unlawfully. And therefore, the Supreme Court of  
13 South Carolina, as has the legislature in -- in the  
14 state as well, declared that personal characteristics of  
15 a victim simply aren't relevant in a sentencing  
16 proceeding unless they can be shown to be related --

17 QUESTION: Mr. Diggs, has that always been  
18 the law of South Carolina. I notice this was a 32 year  
19 old black male. And was the death penalty imposed in  
20 cases where the defendant and the victim were both black  
21 with frequency in South Carolina throughout its history?

22 MR. DIGGS: Well, I -- I assume that it was.  
23 I'm not -- I can't give you a definitive answer.

24 QUESTION: Perhaps the prosecutor had a  
25 special burden here if it wasn't so because he had a



1 black on both -- I take it the defendant was black, was  
2 he not also?

3 MR. DIGGS: That's correct.

4 QUESTION: Yes.

5 MR. DIGGS: But the position that the  
6 Respondent takes in the case is that because human life  
7 is valued equally in South Carolina under this statute,  
8 and because the status of the law at the time of this  
9 case, as reflected in the adoption of the statute back  
10 in 1977, if you look at the aggravating circumstances  
11 that the general assembly has adopted which permits --  
12 the presence of which permits the state to seek a death  
13 penalty, they have nothing to do with victims'  
14 characteristics because victims aren't valued equally.  
15 We have other aggravating circumstances such as robbery,  
16 kidnapping, events of that sort that warrant the state  
17 seeking the death penalty.

18 In fact, under South Carolina law I would  
19 submit that the state with the presence of aggravating  
20 circumstances is faced with a situation where the death  
21 penalty is warranted -- is warranted but for the  
22 presence of certain mitigating circumstances which the  
23 sentencer in the case decides warrants the dispensing of  
24 mercy to the accused.

25 And for that reason, the status of the law

1 --the Supreme Court in Gaskins, State v. Gaskins, held  
2 that victim's personal characteristics -- the fact that  
3 Rudolph Tyner, who himself was a death row inmate in  
4 South Carolina, was killed while he resided on death row  
5 by Mr. Gaskins and the fact that he had confessed to  
6 prior murders was irrelevant when the decision came to  
7 be made about whether Mr. Gaskins was to live or to die.  
8 And the sentence imposed in Gaskins, of course, was  
9 --was the death penalty.

10           Now, in its reply brief, the state argues  
11 that Gaskins is really unclear. We don't really know  
12 what the law is in South Carolina because that opinion  
13 is not clearly -- doesn't clearly state the status of  
14 the law. But I would submit you ultimately have to look  
15 at the language in the Gathers' opinion where it cites  
16 Gaskins for the proposition that evidence of a victim's  
17 bad character is inadmissible in a sentencing phase  
18 trial.

19           I'd move on to the second point that the  
20 Respondent would like to make, and that is given the  
21 status of the law in South Carolina, there was really no  
22 mechanism there in place for us to challenge or rebut  
23 the evidence that the solicitor or the points the  
24 solicitor urged in his argument to test the accuracy and  
25 the reliability of them.

1           Now, Skipper v. South Carolina is a case that  
2 attorneys in South Carolina think is a very important  
3 case. And, of course, the concurring opinion in Skipper  
4 talks about the need to be able to confront and test the  
5 reliability and the accuracy of information that's being  
6 used as a basis for a death sentence. And in South  
7 Carolina -- of course, that case relies on Gardner v.  
8 Florida.

9           QUESTION: Well, I assume you wouldn't be  
10 able to get in -- if the theory on which this were  
11 admitted were -- were not just that these were  
12 characteristics of the victim, which the jury can take  
13 into account, but rather they were characteristics of  
14 the victim that the defendant knew of and therefore the  
15 jury can take it into account, I suppose you wouldn't be  
16 able to introduce any rebuttal evidence unless you could  
17 also show that the defendant knew of that.

18           For instance, if you had rebuttal evidence  
19 that showed that this fellow really wasn't a good  
20 Christian -- he just pretended to be a Christian -- that  
21 wouldn't make any difference so long as the defendant  
22 didn't know that he was a phony Christian --

23           MR. DIGGS: Well, I think under my --

24           QUESTION: It gets curiouser and curiouser.

25           MR. DIGGS: Under my argument, that's correct.

1 QUESTION: Yes.

2 MR. DIGGS: But if the law is that the  
3 evidence is admissible anyway regardless of whether it  
4 reflects on circumstances of the crime or  
5 characteristics of the defendant, then you would  
6 obviously have a right and a duty to go out and solicit  
7 or dig up the information that shows the contrary and  
8 introduce it at -- at the sentencing phase in mitigation.

9 Unless the Court has any further questions, I  
10 believe that would be all that I have this morning.  
11 Thank you.

12 QUESTION: Thank you, Mr. Diggs.

13 Mr. Zelenka, do you have rebuttal?

14 REBUTTAL ARGUMENT OF DONALD J. ZELENKA

15 MR. ZELENKA: I just have a few points on  
16 rebuttal, Mr. Chief Justice.

17 Concerning the -- the lighting in the area, I  
18 would refer the Court to joint appendix page 26 and 27  
19 which is the testimony of Mr. Hardrick on what he saw  
20 when he came upon the scene that the defendant -- that  
21 the victim had a Bible and some paper, that it was just  
22 sitting on the bench, and that he had occasion to go  
23 through those belongings. We would submit --

24 QUESTION: But is there any -- is there any  
25 -- is it clear from the record one way or another that

1 you can see to read the card at that time?

2 MR. ZELENKA: It's not clear that you could  
3 see to read the card --

4 QUESTION: Well, you have --

5 MR. ZELENKA: -- (inaudible) time.

6 QUESTION: You have some testimony that it  
7 was dark.

8 MR. ZELENKA: There was testimony that it was  
9 dark. There was also testimony that on down the path,  
10 accomplices could see what the defendant was doing to  
11 the victim.

12 QUESTION: Well, that may be so, but that  
13 --that's a long ways from saying you could read a card.

14 MR. ZELENKA: That's correct. And there's  
15 also --

16 QUESTION: Or would -- or would recognize a  
17 voter's registration card.

18 MR. ZELENKA: Well, he testified that --

19 QUESTION: I suppose you could recognize  
20 money.

21 MR. ZELENKA: If you can recognize money, you  
22 can probably recognize other items that you took out and  
23 you threw around the area we would submit --

24 QUESTION: Mr. Zelenka, this --

25 MR. ZELENKA: -- including a Bible and other



1 items.

2 QUESTION: This goes to a -- a very basic  
3 point. I haven't -- I had not understood your briefs to  
4 be making the argument that the reason this can be  
5 introduced, the fact that he was a good Christian, is  
6 only because the defendant knew he was a good Christian.  
7 Is that your point --

8 MR. ZELENKA: No.

9 QUESTION: -- that you -- it isn't.

10 MR. ZELENKA: No, that's not our point at all.

11 QUESTION: It's you can show he's a good  
12 Christian whether the defendant knew he was a good  
13 Christian or not. Isn't that it?

14 MR. ZELENKA: That's correct. The -- that's  
15 our basic point.

16 QUESTION: Right.

17 MR. ZELENKA: It's also our point that the  
18 defendant knew --

19 QUESTION: And is -- is -- is --

20 MR. ZELENKA: -- that he appeared to be a  
21 religious person at the time he committed the acts, that  
22 that was some knowledge that he had at the time and  
23 during the accomplishment of the acts.

24 QUESTION: But that -- is that essential for  
25 the -- for the admissibility in -- in -- in your view,

1 that the reason it's admissible is because the defendant  
2 knew he was a good Christian when he killed him?

3 MR. ZELENKA: Well, I don't know if the  
4 defendant knew he was a --

5 QUESTION: Or only because the person he  
6 killed happened to be a good Christian?

7 MR. ZELENKA: There was no evidence in  
8 particular that they knew whether he was a Christian or  
9 not.

10 QUESTION: There wasn't.

11 MR. ZELENKA: Just that he was a religious  
12 person with those materials at the park bench at that  
13 time. And that was something the defendant knew before  
14 the final blow was struck.

15 QUESTION: Do we know that they knew that he  
16 was a voter?

17 MR. ZELENKA: We only know that he --

18 QUESTION: That he had a voter registration  
19 card among all that junk.

20 MR. ZELENKA: -- (inaudible) voter  
21 registration card was taken out and placed upon --

22 QUESTION: We don't know that they read it or  
23 that they even knew what it was.

24 MR. ZELENKA: There is no testimony that --  
25 by anyone that they particularly read the card, just

1 that it was taken out. It was on the scene, maliciously  
2 threw -- thrown beside the body.

3 QUESTION: So -- so, at least as to that  
4 argument of the prosecutor, you have to defend the  
5 position that it didn't matter whether they knew he was  
6 a voter and a good citizen or not. He was a good  
7 citizen, and they should be able to get that in so long  
8 as there's evidence that has been admitted at the -- at  
9 the guilt phase that shows it.

10 MR. ZELENKA: That it reflected that it was --

11 QUESTION: Well, but, Mr. --

12 MR. ZELENKA: -- a part of the victim.

13 QUESTION: But, Mr. Zelenka, apart from the  
14 card that was in his possession, what evidence was there  
15 that he was a good Christian?

16 MR. ZELENKA: There's no evidence in the  
17 record apart from --

18 QUESTION: I mean, how do we know that he  
19 subscribed to the -- to the tenets of the card in his  
20 possession? I mean, maybe --

21 QUESTION: Well, he had a Bible, didn't he?

22 MR. ZELENKA: He had a Bible set out on the  
23 scene. He had angels set out on the scene. He has  
24 these religious tracts on the scene, and at the time  
25 they came upon him, he was changing from apparently a

1 robe -- It was actually a sheet I believe -- and --

2 QUESTION: And the -- and the defendant said  
3 -- at least said that he knew that there -- that he had  
4 Bible. He could see that well.

5 MR. ZELENKA: That's correct. He could -- In  
6 fact, there were two Bibles recovered from the  
7 particular --

8 QUESTION: Yes, but there's a great deal more  
9 on the card than just reference to a Bible or a sheet.

10 MR. ZELENKA: There's a great deal on the  
11 card --

12 QUESTION: And it took -- how long did it  
13 take to read that card to the jury? It took several --  
14 It must have taken several minutes. It's a long --

15 MR. ZELENKA: No, I don't think it would have  
16 taken several minutes, but it would have probably taken  
17 between 45 seconds to a minute reading that card.

18 But, again, that card was already in evidence  
19 for the jury --

20 QUESTION: Well, I understand it's in  
21 evidence. I'm not --

22 MR. ZELENKA: But what the card stood for we  
23 submit is a fair chance in life.

24 QUESTION: This is clearly -- this is the  
25 kind of character he was because he carried this card.

1 MR. ZELENKA: This is the kind of character  
2 that any potential victim is, that they're looking for a  
3 fair chance in life and that that fair chance they would  
4 also give another individual. That is essentially a  
5 standard --

6 QUESTION: Counsel --

7 MR. ZELENKA: -- that each of us morally  
8 looked to in making any decision. That is a standard  
9 that society looks to to give each individual a fair  
10 chance. That is what the solicitor was doing. He was  
11 utilizing that card for rhetorical comment not saying  
12 that the defendant ascribed to each and every part of  
13 that card, but it did reflect what an individual was and  
14 it did reflect --

15 QUESTION: Is there any --

16 MR. ZELENKA: -- that this individual was a  
17 person.

18 QUESTION: Is there anything in the record to  
19 show that defendants could read?

20 MR. ZELENKA: There's nothing in the record  
21 to show that he could read. There is matters in the  
22 record that he did go to school.

23 QUESTION: Is there anything in the record to  
24 say that they did read it?

25 MR. ZELENKA: That they did read the



1 particular card?

2 QUESTION: Yes.

3 MR. ZELENKA: There's evidence in the record  
4 that they looked through the materials at that  
5 particular time.

6 QUESTION: Looking for something to steal is  
7 the testimony you called our attention to.

8 MR. ZELENKA: That's correct, looking for  
9 something to steal.

10 I have no further responses.

11 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
12 Zelenka.

13 The case is submitted.

14 (Whereupon, at 11:56 o'clock a.m., the case  
15 in the above-entitled matter was submitted.)  
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

No. 88-305 - SOUTH CAROLINA, Petitioner V. DEMETRIUS GATHERS

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and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Judy Freilicher  
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