

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Appeal from Spartanburg County

Roger L. Couch, Special Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

ANDRES ANTONIO TORRES,

APPELLANT

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**FINAL BRIEF OF RESPONDENTS**

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HENRY D. McMASTER  
Attorney General

JOHN W. McINTOSH  
Chief Deputy Attorney General

DONALD J. ZELENKA  
Assistant Deputy Attorney General

BRENDAN J. McDONALD  
Assistant Attorney General

HAROLD W. GOWDY, III  
Solicitor

South Carolina Office of Attorney General  
Capital and Collateral Litigation Unit  
P.O. Box 11549  
Columbia, SC 29211-1549  
(803) 734-3030

ATTORNEY(S) FOR RESPONDENTS

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## **QUESTION(S) PRESENTED**

- I. Whether the trial court committed reversible error during the sentencing phase of the trial by allowing the State to introduce crime scene and autopsy photographs of victims.
  
- II. Whether the trial court committed reversible error at sentencing by allowing the introduction of a video recording of Appellant being pepper-sprayed and subdued in the detention center following his conviction in the guilty phase of the trial.

## **INTRODUCTION**

Ray and Ann Emery were found badly beaten and bludgeoned to death in the bedroom of their home in Spartanburg County's Drayton community. (R. 1891-95, 1918). Following a brief investigation, their neighbor, Andres Antonio Torres ("Appellant"), a twenty-seven (27) year old with thirty-nine (39) prior convictions, was charged with two counts of murder, two counts of armed robbery, one count of first degree criminal sexual conduct, one count of burglary and one count of attempt to burn. (R. 2224-41, R. 2899-2971). Appellant stood trial in Spartanburg County on October 13<sup>th</sup> through 23<sup>rd</sup> of 2008. (R. 1583-2784). The jury found Appellant guilty on all charges and imposed a sentence of death. (R. 2195-98, 2775-79).

## **STATEMENT OF THE CASE**

Appellant was indicted by the Spartanburg County Grand Jury during the June 11, 2007, February 25, 2008 and August 4, 2008 Terms of Court under the following indictment numbers: (1) #07-GS-42-2773 (Armed Robbery); (2) #07-GS-42-2775 (Armed Robbery); (3) #07-GS-42-2776 (Burglary); (4) #07-GS-42-2777 (Murder); (5) #07-GS-42-2778 (Murder); (6) #08-GS-42-0880 (Criminal Sexual Conduct, First Degree); (7) #08-GS-42-4677 (Attempt to Burn). (R. 2899-2912). On October 13, 2008, Appellant's case was called to trial before the Honorable Roger L. Couch in the Spartanburg County Court of General Sessions where he was represented by attorneys Clay Allen, Kathy Hodges, and John Reckenbeil. (R. 49-61). On October 19, 2008, Appellant was convicted of all charges in the guilt phase of the trial. (R. 2195-98). The State sought the death penalty based on the following statutory aggravators: (1) murder and criminal sexual conduct; (2) murder and burglary; (3) murder and robbery while

armed with a deadly weapon; (4) murder and larceny with use of a deadly weapon; (5) murder for the purpose of receiving money or a thing of value; and (6) murder of two or more persons pursuant to one's scheme or course of conduct. (R. 2924-27). Defense counsel put forth the following statutory mitigators: (1) the defendant had no significant history of prior criminal conviction involving the use of violence against another person; (2) the murder was committed while the defendant was under the influence of mental or emotional disturbance; (3) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and (4) the age or mentality of the defendant at the time of the crime. Two days later, he was sentenced to death pursuant to section 16-3-25 of the South Carolina Code. (R. 2775-79). The Notice of Appeal was filed on October 23, 2008.

#### **STATEMENT OF THE FACTS**

At approximately 7:00 AM on May 11, 2007, the Union County 9-1-1 dispatch received a phone call reporting an accident near the Buffalo community. (R. 1664). Eyewitnesses to the accident reported seeing a van driving erratically, running off the road hitting a fire hydrant, and crashing into a fence. (R. 1663-64). Observers reported the driver, a short, stocky male wearing khaki pants and a yellow shirt, fled the scene, catching a ride with a bystander at a neighboring convenience store. (R. 1665, 1673, 1684).

When police reached the scene they found the van filled with a variety of personal items including purses, wallets, clothing, jewelry and a computer. (R. 1613). They also found the identification of Mrs. Ann Emery, the person to whom the vehicle was registered. (R. 1613). Upon running the license plate number, Corporal Jeff Wright of

the Union County Sheriff's Office called the Spartanburg County Sheriff's Office and asked that they check on the Emery's residence. (R. 1612-13).

Responding to Corporal Wright's request, Deputies Danny Jones and Jeff Valentine arrived at the Emery's residence just before 8:30AM. (R. 1613). After knocking on the door and getting no response, Deputies Jones and Valentine walked around the house and found an unlocked sliding glass door. (R. 1614). Opening the door, the deputies immediately noticed the home was hot and smelled of "either kerosene or gasoline." (R. 1615).

Upon entering the home, the deputies observed an overturned gas can and a clear pool on the hardwood floor. (R. 1615). In the kitchen, the broiler was turned on and the oven door was open. (R. 1625, 1649). The burners on the stove were left on high, with a trail of gasoline leading from the bedroom to the kitchen. (R. 1632-33). In the living room, a bloody hammer was resting atop the television. (R. 1891).

Continuing down the hall, the deputies saw a body facedown in the bed. (R. 1616). As trained, the deputies continued down the hall so as not to disturb the crime scene, secured the area and called the homicide division. (R. 1616).

Upon arriving at the crime scene, investigators discovered an additional body next to the bed. (R. 1635). The bodies were later identified as Ray and Ann Emery (R. 1654). They were badly beaten and bludgeoned with a hammer. (R. 1654). Blood was everywhere. (R. 1654). According to forensic psychiatrist Donna Schwartz-Watts, who testified on Appellant's behalf, the crime scene was the most violent she had ever observed in her 20 years of practice. (R. 2593).

Ray Emery, who slept with the aid of a breathing device, was found facedown with the apparatus still attached to his face. (R. 1892). The back of his skull was crushed. (R. 1779-84). His wife Ann, was found in the floor with her legs to her chest, half-naked; her dental bridge sticking out of her neck. (R. 1635, 1800). Her face was completely unrecognizable and her eye was missing. (R. 1786-87). Both bodies were covered in gasoline. (R. 1786).

The ensuing investigation quickly focused on Appellant. (R. 1955). Consequently, investigators Jason Bryant and Reid Lindsey were sent to Appellant's grandmother's house, where Appellant was known to stay. (R. 1523). Appellant's grandmother answered the door at which time Appellant, who was sitting on the couch, indicated he knew why the investigators were there. (R. 1528). After a brief conversation with Appellant and his grandmother, investigators Bryant and Lindsey recovered the shoes and clothing Appellant was wearing earlier in the day. (R. 1956). Appellant then voluntarily accompanied the detectives to the Sheriff's Office to be questioned. (R. 1525). He received his Miranda warnings in the squad car. (R. 1529).

At the Sheriff's office, investigator Lindsey confronted Appellant asking him if he committed the murders at the Emery's residence. (R. 1503). Appellant asked for an attorney and questioning ceased. (R. 1504). Shortly thereafter, Appellant was charged with two counts of Murder, two counts of Robbery and one count of Burglary. (R. 2146-49). While awaiting trial, Appellant was further charged with Criminal Sexual Conduct and Attempt to Burn. (R. 2149-51). The State sought the death penalty based on six of the aggravating circumstances put forth in section 16-3-20(C)(a) of the South Carolina Code, namely: (1) murder and criminal sexual conduct; (2) murder and burglary; (3)



murder and robbery while armed with a deadly weapon; (4) murder and larceny with use of a deadly weapon; (5) murder for the purpose of receiving money or a thing of value; and (6) murder of two or more persons pursuant to one's scheme or course of conduct. (R. 2924-27).

### **GUILT PHASE**

During the guilt phase of the trial the State presented a variety of forensic evidence implicating Appellant. Specifically, the State presented testimony from SLED Agent and DNA expert Matt Fitts, who concluded the semen taken from a vaginal swab of Ann Emery, matched the DNA profile of Appellant to a probability of one in one-hundred ten quadrillion. (R. 2074). Fitts also testified Ann Emery was a major contributor of the DNA found on the hammer recovered from the crime scene. (R. 2069). He further stated a minor contributor consistent with the DNA of both Ray Emery and Appellant was found on the hammer. (R. 2070). DNA evidence taken from Appellant's clothing and shoes also indicated blood from Appellant and the victims. (R. 2076-78, 2080-81). Blood found on a jewelry box discovered in the van wrecked by Appellant matched the DNA profile of Ray Emery to a probability of one in four-hundred twenty quadrillion. (R. 2079). There was testimony from fingerprint analyst Hugh Murphy that Appellant's fingerprints were found both on and inside the van. (R. 1825). Appellant also left a fingerprint on a flowerpot that was stained with the blood of Ray Emery. (R. 1825, 2073-74). Additionally, SLED Agent Vicki Hallman testified the footprints at the crime scene were consistent with the tread on the shoes Appellant gave investigators Bryant and Lindsey. (R. 2047).

Meanwhile, the defense chose to rely upon challenging the State's burden of proof declining to present evidence or call witnesses. (R. 2125). At the charge conference, defense counsel requested the trial court charge the jury on "mere presence" and "larceny as a lesser-included offense of armed robbery." (R. 2117-21). The trial court denied defense counsel's request and the jury was charged. (R. 2121, 2146-69). Thereafter, the jury found Appellant guilty on all charges—two counts of murder, two counts of armed robbery, one count of criminal sexual conduct, one count of burglary, and one count of attempt to burn. (R. 2197-98). Defense counsel then exercised, pursuant to section 16-3-20(B) of the South Carolina Code, its option to wait twenty-four (24) hours before beginning the sentencing phase. (R. 2200).

## **SENTENCING PHASE**

### I. The State's Case for seeking the Death Penalty

In support of the death penalty, the State sought the aforementioned statutory aggravators: (1) murder and criminal sexual conduct; (2) murder and burglary; (3) murder and robbery while armed with a deadly weapon; (4) murder and larceny with use of a deadly weapon; (5) murder for the purpose of receiving money or a thing of value; and (6) murder of two or more persons pursuant to one's scheme or course of conduct. The State also introduced a variety of evidence showing Appellant's character and the circumstances surrounding the crime, as well as victim impact testimony.

Demonstrating Appellant's character, the State elicited testimony from Ashley Harley, who, on the night of the murders, received a phone call from Appellant, wherein he threatened to kill her in her sleep. (R. 2253). In that same vein, the State introduced a video taken during trial in which Appellant refused to comply with the requests of

corrections officers, leading to his being pepper-sprayed. (R. 2290, 2297-99). The State also presented Appellant's criminal record showing thirty-nine (39) previous convictions and detailed his parole and probation violations. (R. 2225-39, 2317-28). Finally, the State, in an effort to show both Appellant's character and the circumstances surrounding the crime, introduced crime scene and autopsy photographs. (R. 2352-72).

## II. Video Recording from the Spartanburg County Detention Center

During the twenty-four (24) hour waiting period, Appellant was involved in an altercation with the corrections officers at the Spartanburg County Detention Center. (R. 2290, 2297-99). The altercation occurred when officers, pursuant to detention center policy, attempted to search Appellant before moving him to a new cell, asking Appellant to spread his legs and step back so they could pat him down. (R. 2289-90). Appellant refused to comply despite the officers repeated requests. (R. 2289-90). The officers then, for liability purposes, retrieved a camera to record the incident and after refusing additional requests for compliance, pepper-sprayed Appellant. (R. 2298-99).

Upon reviewing the recording, the State informed defense counsel of its intent to introduce the recording in the sentencing phase of the trial. (R. 2205). Defense counsel sought to suppress the evidence in a motion in limine arguing the recording was irrelevant pursuant to Rule 401, SCRE. (R. 2208). The trial court deferred ruling on the motion after which, the sentencing phase of the trial began. (R. 2208-09).

During the sentencing phase, the State attempted to introduce the recording as evidence of Appellants character and adaptability to prison life. (R. 2205, 2285). Defense counsel objected, this time on the grounds that the use of pepper spray was contrary to the detention center's force policy thereby rendering the recording irrelevant

under Rule 401, SCRE. (R. 2275). Defense counsel maintained in the alternative that even if the recording was relevant under Rule 401, SCRE, it was inadmissible pursuant to Rule 403, SCRE. (R. 2275). After a short proffer regarding the detention center's force policy, the trial court overruled defense counsel's objection. (R. 2285).

Following the court's ruling, defense counsel again objected, this time arguing an alleged Miranda violation. (R. 2291-93). The trial court overruled defense counsel's objection. (R. 2296). Thereafter, defense counsel lodged a third objection asserting the introduction of the recording would amount to an "arbitrary factor" for arriving at a sentence of death pursuant to section 16-3-25(C)(1) of the South Carolina Code. (R. 2294-95). This objection was also overruled and the jury viewed the recording. (R. 2297, 2297-99).

### III. The Autopsy and Crime Scene Photographs

Later during the sentencing phase, another evidentiary issue arose regarding the admission of photographs.<sup>1</sup> Specifically, defense counsel, outside the presence of the jury and pursuant to Rule 403, SCRE, objected to the State's introduction of autopsy and crime scene photographs arguing the prejudicial nature of the photos would significantly outweigh their probative value. (R. 2352). Elaborating, defense counsel stated, "we . . . object to all the photographs on, on the bases (sic) that they, they are much more prejudicial than probative at this point in the trial [but] [i]n fairness and in candor . . . these are not the worse (sic) of the worst photographs." (R. 2352).

The State responded to defense counsel's objection noting that the purpose of the sentencing phase is to determine the proper punishment in relation to the crime. (R.

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<sup>1</sup> This issue had previously been addressed in chambers after which the objections and arguments were put on the record. (R. 2352).

2352). Continuing, the State maintained the jury is allowed to review both the circumstances of the crime and character of the defendant in reaching that conclusion. (R. 2352). Finally, the State added that Rule 403, SCRE, addresses “unfair prejudice” and as Appellant had already been convicted of the offense, the prejudice flowing from the admission of the photos would be *de minimis*. (R. 2352).

The trial court, while admitting a majority of the photographs on the basis that they fairly depicted the scene or the bodies after the event, utilized its discretion and excluded two photographs concluding they were duplicitous. (R. 2353). The trial court also excluded a third photograph taken from the dissection portion of the autopsy concluding it was highly prejudicial. (R. 2353). Following the trial court’s ruling, the jury was called into the courtroom at which point the State, first through Dr. David Wren and then through Officer Dominick Baird, entered the photographs into evidence and published them to the jury. (R. 2355-72).<sup>2</sup>

#### IV. The Defense Case for Mitigation

Following admission of the autopsy photos, the State rested and defense counsel began the mitigation portion of the trial. (R. 2372). Defense counsel relied on the following statutory mitigators as provided for in section 16-3-20(C)(b) of the South Carolina Code: (1) the defendant had no significant history of prior criminal conviction involving the use of violence against another person; (2) the murder was committed while the defendant was under the influence of mental or emotional disturbance; (3) the capacity of the defendant to appreciate the criminality of his conduct or to conform his

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<sup>2</sup> During this process, defense counsel renewed their previous objections. (R. 2355). Defense counsel also renewed their objections at the end of the State’s case. (R. 2372).

conduct to the requirements of law was substantially impaired; and (4) the age or mentality of the defendant at the time of the crime.

Defense counsel offered testimony from a cast of family, social workers, a corrections expert and mental health professionals maintaining that Appellant, who was diagnosed as bipolar at age seven, had a troubled childhood. (R. 2378-2712). There was also evidence Appellant suffered from Intermittent Explosive Disorder (“IED”) a mental disorder in which one, with little provocation, gets disproportionately upset and potentially violent.<sup>3</sup> (R. 2568-69). Additionally, defense Counsel offered testimony from Dr. Alex Morton discussing the problems associated with Appellant’s substance abuse and self-medication, particularly with respect to alcohol, methamphetamine and Clonopin.<sup>4</sup> (R. 2573, 2585).

Following the close of defense counsel’s mitigation case, the jury was charged and returned a verdict in favor of death finding the State proved all six of the statutory aggravators it previously advanced. (R. 2775-76). Thereafter, defense counsel filed a timely notice of appeal.

### **STANDARD OF REVIEW**

The materiality, relevance and admissibility of evidence are within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. State v. Rosemond, 335 S.C. 593, 596, 518 S.E.2d 588, 589 (1999). “An abuse of discretion occurs when the conclusions of the trial court lack evidentiary support or are controlled by an error of law.” State v. Anderson, 386 S.C. 120, ---, 687 S.E.2d 35, 38 (2009). Moreover, the trial court is afforded considerable latitude in ruling on the

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<sup>3</sup> Interestingly enough, forensic psychiatrist Dianna Schwartz-Watts, who testified in the mitigation case, noted she did not believe Appellant suffered from IED. (R. 2584-86).

<sup>4</sup> Clonopin is a form of Benzodiazepine used to treat anxiety similar to Xanax or Valium. (R. 2491).

admissibility of evidence and its rulings will not be disturbed absent a showing of probable prejudice. State v. Kornahrens, 290 S.C. 281, 288, 350 S.E.2d 180, 185 (1986).

## ARGUMENTS

- I. The trial court correctly found the risk of unfair prejudice to Appellant did not substantially outweigh the probative value of the photographs as the photographs corroborated testimony of witnesses, showed the circumstances of the crime and the character of the person committing it, factors which a jury may consider during the sentencing phase of a capital trial

Appellant contends the trial judge erred in admitting the autopsy photographs into evidence pursuant to Rule 403, SCRE, however, this contention is incorrect as it ignores the vast majority of precedent set forth by this Court. Rule 403, SCRE, provides in relevant part, that “evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]” Rule 403, SCRE. “Unfair prejudice” has been explained as a “tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.” Rosemond, 335 S.C. at 597, 518 S.E.2d at 590.

In applying the Rule 403, SCRE balancing test during the sentencing phase of a capital case, the scope of the probative value is much broader than it would be otherwise. Id. at 596, 518 S.E.2d at 590. As noted in State v. Kornahrens, 290 S.C. 281, 289, 350 S.E.2d 180, 185 (1986), “the purpose of the bifurcated proceeding in a capital case is to permit the introduction of evidence in the sentencing proceeding which ordinarily would be inadmissible in the guilt phase.” To that end, “the trial court may permit the introduction of additional evidence in extenuation, mitigation or *aggravation*.” Id. (emphasis in original). A jury may be able to see photographs depicting the bodies of murder victims in substantially the same condition in which the defendant left them.

Rosemond, 335 S.C. at 596, 518 S.E.2d at 590. Additionally, both autopsy and crime scene photographs may be presented to the jury in an effort to show the circumstances of the crime and character of the defendant. Id. at 597, 518 S.E.2d at 590. Moreover, if a photograph corroborates testimony, it is not an abuse of discretion to admit it. State v. Nance, 320 S.C. 501, 508, 466 S.E.2d 349, 353 cert. denied 518 U.S. 1026 (1996).

The photographs in question are clearly probative as they corroborated the testimony of Dr. David Wren and Investigator Dominick Baird. Dr. Wren, who performed the autopsy, gave detailed testimony regarding the nature of the injuries and the means Appellant used to inflict them. (R. 2356-64). Specifically, the photos corroborated Dr. Wren's testimony regarding the number of wounds suffered by Ray Emery—at least eight—and the cause of death—both sharp and blunt force trauma to the back of the head. (R. 1786, 2356-61). The photographs also corroborated Dr. Wren's testimony regarding the extent of Ann Emery's injuries. As was the case with her husband, the photographs corroborated Dr. Wren's testimony that the cause of death was sharp and blunt force trauma to the head. (R. 1787-92). It further corroborated his testimony that the wounds were consistent with that of a hammer. (R. 1793).

Likewise, the crime scene photographs corroborated Investigator Baird's testimony. Specifically, the photographs in question, while admittedly graphic, accurately depict the Emery's in substantially the same condition in which Appellant left them—bloodied, beaten and dead. (R. 2368-71). As noted above, Ray Emery's skull was crushed by the repeated blows to his head, specifically near the top of the neck and the ears, this is accurately portrayed in the photographs. (R. 1779-84). With regard to Ann Emery, the photographs simply illustrated the sheer ferocity with which the crime



was committed. She was missing her eye. (R. 1786). Her face was unrecognizable, her mouth was where her cheek should be, her dental bridge was essentially sticking out of her neck. (R. 1786-87). Quite simply, this was the condition in which Appellant left his victims—battered, beaten and dead.

The photographs also helped the jury understand the circumstances of the crime and the character of the person committing it. There was no evidence to suggest the Emery's had any ill will towards Appellant. In fact, Ray Emery had recently given Appellant a ride to the grocery store to buy groceries. (R. 2344). Nonetheless, he was killed in his sleep, his breathing machine still attached to his face, while his wife was raped and beaten beyond recognition. (R. 1892, 1786-87). Appellant then took as much as he could carry, doused the Emery's and their house in gas, and stole their van. The photographs simply memorialized the brutal death of two completely undeserving people, while simultaneously displaying Appellant's complete disregard for human life. Accordingly, the trial court did not err in admitting either the crime scene or the autopsy photographs.<sup>5</sup>

- I. The trial court properly admitted the video recording of Appellant being pepper-sprayed as it was evidence of Appellant's character and adaptability to prison-life, two factors which a jury can properly consider in the sentencing phase of a capital trial

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<sup>5</sup> A review of relevant case law also dictates this result. In Rosemond, this Court ruled that photographs taken of the victims at both the crime scene and autopsy were admissible pursuant to Rule 403, SCRE, finding the probative value of the photographs, outweighed the risk of unfair prejudice to the appellant as the photographs corroborated previous testimony regarding the wounds sustained by the victims. Rosemond, 335 S.C. at 597, 518 S.E.2d at 590; see also State v. Tucker, 324 S.C. 155, 168, 478 S.E.2d 260, 267 (1996) (holding photographs depicting victims at the crime scene were not unduly prejudicial as they went to both the circumstances of the crime and character of the victim); State v. Williams, 321 S.C. 327, 338, 468 S.E.2d 626, 632 (1996) (upholding the admission of autopsy photographs where they illustrated the extent of the wounds to victims' bodies and depicted the manner in which they were committed).

Appellant further contends the trial court erred in admitting a video recording of his being pepper sprayed for failure to comply with the commands of corrections officers. Specifically, Appellant points to section 16-3-25(C)(1) of the South Carolina Code and Rule 403, SCRE, as authority for exclusion of the video recording claiming it was both an arbitrary factor for arriving at a sentence of death under section 16-3-25(C)(1) and failed the Rule 403, SCRE balancing test.<sup>6</sup> The State addresses Appellant's contention regarding section 16-3-25(C)(1) and Rule 403, SCRE, in tandem.

It is essential the jury have before it, "all possible relevant information about the individual defendant whose fate it must determine." State v. Skipper, 285 S.C. 42, 47-48 328 S.E.2d 58, 61 (1985) reversed on other grounds, 476 U.S. 1 (1986) (internal quotation omitted). The attention of the jury must be focused on both the specific circumstances surrounding the crime and the characteristics of the person committing it. State v. Stewart, 283 S.C. 104, 107, 320 S.E.2d 447, 450 (1984). In evaluating these questions, a jury may review the defendant's future danger to society, his prospects for rehabilitation and restoration to a useful place in society. State v. Tucker, 324 S.C. 155, 174, 478 S.E.2d 260, 270 (1996). A jury may also consider the "defendant's adaptability to prison life." State v. Burkhart, 371 S.C. 482, 488, 640 S.E.2d 450, 453 (2007).

A. Admission of the Jailhouse Video

In the present case, the trial court, in an effort to give the jury "all possible relevant information" regarding Appellant, allowed the introduction of the recording to show his character and adaptability to prison life. As noted in Burkhart, Tucker, and Stewart, these factors are in no way arbitrary, but are important factors to be considered

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<sup>6</sup> Section 16-3-25(C)(1) of the South Carolina Code provides that the Supreme Court of South Carolina should review "[w]hether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor."

by the jury in the sentencing phase of a capital trial. Employing the Rule 403, SCRE balancing test, it is clear the risk of unfair prejudice to Appellant did not substantially outweigh the probative value of the video recording. In fact, nothing could have been more probative with respect to the issue of Appellant's character and adaptability to prison life than this video. Appellant refused to comply with an order requiring him to surrender to a search. (R. 2298-99). The search, as explained to Appellant at the time, was required under detention center policy, whenever an inmate was transferred from one cell to another. (R. 2298). This fact was repeatedly stressed to Appellant over the entirety of the eight minutes leading up to his being pepper-sprayed. (R. 2298). Nonetheless, Appellant chose not to comply with the corrections officer's request evidencing his disregard for authority in an environment predicated on order, a system in which members of the mitigation team urged, he could thrive. (R. 2527-28, 2594-95).

Moreover, despite Appellant's contention to the contrary, his failure to comply with procedures and regulations is not new. As noted in the testimony of Deputy Clerk Charlena Tinsley, Appellant, who at the time of sentencing was twenty-seven (27) years old, had thirty-nine (39) previous convictions, evidencing a long-term pattern of disregard for the law and law enforcement officers. (R. 2224-41, 2587). Furthermore, Appellant violated the terms of his probation and parole failing to hold down a job, attend mental health counseling and attend substance abuse counseling. (R. 2318-21, 2325-27). Clearly, disobeying the law and law enforcement is not new to Appellant, but is instead the norm.

Accordingly, the recording was not an arbitrary factor for arriving at a sentence of death, nor did the risk of unfair prejudice to Appellant substantially outweigh the

recording's probative value. Instead, the recording clearly demonstrated Appellant's character and adaptability to prison life—completely relevant factors for a jury's consideration in the sentencing phase of a capital case. As such, the trial court did not abuse its discretion in admitting the recording and its' ruling should therefore be affirmed.

B. The Closing Argument Issue

Appellant also maintains the video recording “might not be unduly prejudicial when viewed in isolation” but may be prejudicial when viewed against the entirety of the record, specifically pointing to the State's reference to the recording during closing arguments. During closing, the State linked the recording to the likelihood of Appellant's future dangerousness and inability to adapt to prison life, stating:

[T]he night your verdicts are rendered, the night that he begins to serve whichever of the two sentences you impose on him, you saw on videotape his character. It was a very simple request. That guard was polite. He wasn't just professional. He was polite. Tried to talk him into complying. You got to get patted down. It's the rule. And you saw Torres reaction and this is . . . the middle of trial.

(R. 2731). Appellant alleges this amounts to improper argument.

As an initial matter, this issue is not preserved for appellate review as defense counsel failed to object during closing arguments. See State v. Richardson 358 S.C. 586, 597, 595 S.E.2d 858, 863-64 (Ct. App. 2004) (holding failure to object to comments made during closing arguments precludes appellate review). In addressing the merits of Appellant's argument, the State submits it was not improper to link the recording to the factors of future dangerousness and inability to adapt to prison life. The recording itself was in evidence and the factors of future dangerousness and inability to adapt to prison life were clearly issues for the jury to consider. See Tucker, 324 S.C. at 174, 478 S.E.2d

at 270 (finding the jury may evaluate the defendant's future danger to society); Burkhart, 371 S.C. at 488, 640 S.E.2d at 453 (concluding a jury may consider the defendant's adaptability to prison life). Despite Appellant's contention that the recording placed an undue emphasis on the incident itself, the recording was accompanied by a variety of evidence demonstrating Appellant's disregard for the law. Furthermore, the incident was cast against the backdrop of Appellant's mitigation case providing the jury with a fair portrait of the character and circumstances surrounding the crime. See Burkhart, 371 S.C. at 487, 640 S.E.2d at 453 (holding the sole function of the jury in the sentencing phase of a capital trial is to make a sentencing determination based upon the character of the defendant and the circumstances of the crime). Accordingly, the State properly admitted the video recording of Appellant being pepper-sprayed.

#### **CONCLUSION**

As the trial court correctly found the risk of unfair prejudice to Appellant did not substantially outweigh the probative value of the autopsy photographs and the trial court properly admitted the video recording of Appellant being pepper-sprayed, the State asks this Court uphold the conviction and sentence of Appellant.

Respectfully Submitted,

HENRY D. McMASTER  
Attorney General

JOHN W. McINTOSH  
Chief Deputy Attorney General

DONALD J. ZELENKA  
Assistant Deputy Attorney General

BRENDAN J. McDONALD  
Assistant Attorney General

HAROLD W. GOWDY, III  
Solicitor

South Carolina Office of Attorney General  
Capital and Collateral Litigation Unit  
P.O. Box 11549  
Columbia, SC 29211-1549  
(803) 734-3030

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Brendan McDonald  
ATTORNEY(S) FOR RESPONDENTS

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

---

Appeal from Spartanburg County  
Roger L Couch, Special Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

ANDRES ANTONIO TORRES,

APPELLANT

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**CERTIFICATE OF SERVICE**

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The undersigned attorney hereby certifies that a true copy of the Final Brief of Respondent in the above referenced case has been served upon Joseph L. Savitz, III, Esquire, at the South Carolina Office of Indigent Defense, P.O. Box 11589, Columbia, SC 29211-1589, on this 1<sup>st</sup> day of June, 2010.

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Brendan McDonald  
ATTORNEY FOR RESPONDENTS

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**CERTIFICATE OF COUNSEL**

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The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR. The undersigned also certifies that the Final Brief is in compliance with the South Carolina Supreme Court's Order of August 13, 2007.

HENRY D. McMASTER  
Attorney General

JOHN W. McINTOSH  
Chief Deputy Attorney General

DONALD J. ZELENKA  
Assistant Deputy Attorney General

BRENDAN J. McDONALD  
Assistant Attorney General

HAROLD W. GOWDY, III  
Solicitor, Fifth Judicial Circuit

By: \_\_\_\_\_  
BRENDAN J. McDONALD  
Office of the Attorney General  
Post Office Box 11549  
Columbia, SC 29211  
(803) 734-6305



ATTORNEYS FOR RESPONDENT

June 1, 2010.  
Columbia, South Carolina.