STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Pickens County
Edward W. Miller, Circuit Court Judge

THE STATE,

Respondent,

v.

JERRY BUCK INMAN,

Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

P.O. Box 11549
Columbia, SC 29211
(803) 734-3601

WILLIAM WALTER WILKINS, III
Solicitor, Thirteenth Judicial Circuit

305 E. North St., Suite 325
Greenville, SC 29601
(864) 467-8282

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

STATE RULES

OTHER AUTHORITIES

APPELLANT'S STATEMENT OF ISSUES ON APPEAL

1.

The judge committed reversible error by accepting Inman's guilty plea, despite defense counsel insistence that the judge's refusal to allow jury sentencing was preserved for review by the Supreme Court on direct appeal, because the defense's position rendered the plea conditional and thus invalid under South Carolina law.

2.

The judge committed reversible error at sentencing by refusing to grant a mistrial and recuse the Solicitor's Office from any further involvement in the case, despite finding prosecutorial misconduct, where the Solicitor threatened a key defense witness after the judge granted the defense a continuance to obtain a new expert because of his misconduct.

3.

The judge committed reversible error at sentencing by refusing to allow the defense to cross-examine the Solicitor and his Deputy on the issue of prosecutorial misconduct, as the Solicitor's intent was directly relevant to that issue.

RESPONDENT'S STATEMENT OF THE CASE

The Death of Tiffany Souers and Arrest of Jerry Buck Inman

During the guilty plea, the prosecution introduced a 12 page "summary of the facts supporting all charges." R. 938, August 19, 2008 Tr. p. 28. [Court Exhibit One].

On May 25, 2006, Tiffany Marie Souers, a rising junior at Clemson University was living in an off-campus apartment complex called the Reserve. R. 938, Tr. 28. On that date, her roommates were gone. Inman saw the victim on her outside porch.

Around 1 a.m., Inman enters the apartment by climbing over the porch rail where he had seen her standing earlier in the day. R. 939, Tr. 29. He enters the victim's bedroom, wakes her, and they struggle. Inman binds the victim's hands. He then asks her for her pocketbook, ATM and credit cards. After finding the items, he sexually assaults the victim and kills her by tightening a bikini suit top around her neck. Inman then flees the apartment.

Inman stops at the SunTrust Bank in Clemson and unsuccessfully attempts to use the victim's ATM card four times; 3:22 a.m., 3:29 a.m., 3:31 a.m., and 3:32 a.m. R. 940-41, Tr. 30-31. Next, he attempts to use the ATM card at Wachovia Bank at 3:37 and 3:38 a.m. R. 941, Tr. 31.

The photographs taken by the bank machines show Inman with a bandanna over his face, but a Chevrolet Blazer or GMC Jimmy is identified in the background due to the grill work. R. 941, Tr. 31.

Inman then returns to his home in Tennessee, discarding items along the route.

Tiffany's body is found on May 26, 2006 at 1:30 p.m. when a roommate returns. R. 942, Tr. 32. The partially clad body was in the bedroom.

An autopsy determines that the victim died as a result of asphyxia due to ligature strangulation. R. 943, Tr. 33. The bikini top was tightly twisted around her neck cutting off the blood flow. The pathologist found that the victim's wrist and hands had injuries consistent with being restrained during a struggle. R. 943, Tr. 33. Thirdly, the pathologist confirmed the existence of evidence of traumatic sexual intercourse. R. 943, Tr. 33.

A DNA profile was developed from the sperm fraction of the semen found on the apartment carpet. The DNA from the vaginal swabs from the autopsy matched the carpet DNA. The DNA profiles were sent to CODIS, the National DNA Database. On June 5, 2006, the profiles matched profiles from North Carolina and Florida - both belonging to Inman. R. 944-45, Tr. 34-35.

A search for Inman located him in Dandridge, Tennessee. He was taken into custody on June 6, 2006 at 11:45 p.m. R. 945, Tr. 35.

After his arrest, he orally admitted the crimes. On June 7, 2006, he next gave a written statement. R. 946-47, Tr. 36-37. He said he killed her because he knew she could recognize him. R. 947-48, Tr. 37-38.

Another statement was made to SLED Agents on June 7, 2006 at 3:52 a.m. R. 948-950, Tr. 38-40. In that statement, he declared that he had ended up in Clemson looking for a place to rob. In this statement, he said that he had parked at the apartment complex and the first door he tried was opened. He said he went inside and found the girl sleeping and they started fighting. He said he then tied her hands behind her back with a piece of clothing. He asked her for money and she took her wallet out of her purse. He said he got her credit card and asked for the PIN number but he forgot it. He said he had sex with her after that. He said he put a bandanna over his face but could not get money at the ATM.

Inman stated he had seen a girl on the balcony earlier that day, but then claimed when he went back after 1 a.m. he didn't think anyone was there and did not mean for anyone to get hurt. "I was just looking for some money." R. 950, Tr. 40.

After DNA samples were obtained from Inman, the profiles were all compared. It was concluded that the DNA developed from the vaginal swabs and carpet cuttings were consistent with Inman. R. 951, Tr. 41. "The probability of randomly selecting an unrelated individual having a DNA profile matching is approximately one in 240 quadrillion." R. 951, Tr. 41.

The Procedural History

The Appellant, Jerry Buck Inman, was indicted at the November 2006 term of the Court of General Sessions for Pickens County for murder (2006-GS-39-2225), kidnapping (2006-GS-39-2224), criminal sexual conduct in the first degree ((2006-GS-39-2223), and burglary in the first degree ((2006-GS-39-2222). The circumstances of the charges involve the May 26, 2006 murder of Tiffany Souers.

The State, through Solicitor Robert M. Ariail of the Thirteenth Judicial Circuit timely noticed Inman of its intent to seek the death penalty on August 22, 2006 pursuant to S.C. Code, Section 16-3-26 (1976). ROA, p. _.

On March 13, 2007, the Honorable Edward W. Miller was assigned by Order of the South Carolina Supreme Court to the case. On August 19, 2008, a hearing concerning Inman's competency to stand trial was held. The Appellant was determined to be competent to stand trial.

The Mode of Trial Motion and Preliminary Proceedings.

On August 17, 2007, Inman filed a Motion to Determine the Mode of Trial. In the motion counsel informed the judge of an intent to enter a guilty plea to murder and demand a jury trial

for sentencing. ROA. 1202. The state informed the court that it did not consent to this position in light of precedent of this Court. ROA 1204.

A hearing was held on September 14, 2007 concerning the mode of trial motion. The State opposed the motion asserting under Rule 14 (b), South Carolina Rules of Criminal Procedure, its consent was required as a matter of state law before a plea could be entered waiving the right to a jury trial on criminal charges. The State informed Judge Miller it would not consent. ROA 800-830.

The trial judge denied the request to attempt to enter a guilty plea to the charges. ROA, 830. Sept. 14, 2007 Tr.p. 54. A written order was entered on November 15, 2007. ROA _.

The Petitioner filed a notice of appeal from the November 15, 2007 Order to the South Carolina Supreme Court. On January 9, 2007, without requiring a response or pleading from the State, the South Carolina Supreme Court entered its Order dismissing the notice of appeal "without prejudice. " In the Order dismissing the notice of appeal, the Supreme Court stated "a criminal defendant cannot appeal until sentence is imposed, " and "an appellate court will not make an adjudication where there is no actual controversy" and "in the case at hand , appellant has failed to show that a judicial controversy exists." ROA _.

The Petitioner's counsel next sought certiorari to the United States Supreme Court. In his certiorari petition, he raised the following questions:

1. WHETHER A CAPITAL DEFENDANT'S 6th AMENDMENT RIGHT INCLUDES THE RIGHT TO JURY TRIAL SENTENCING AFTER ENTRY OF A GUILTY PLEA?

2. WHETHER A CAPITAL DEFENDANT'S 8TH AMENDMENT RIGHT TO PRESENT MITIGATION IS VIOLATED BY AN ORDER PROHIBITING THE DEFENDANT FROM PLEADING GUILTY?

3. WHETHER A CAPITAL DEFENDANT'S 14TH AND 6TH AMENDMENT RIGHT TO PRESENT A COMPLETE DEFENSE IS VIOLATED BY AN

ORDER THAT PROHIBITS THE DEFENDANT FROM USING HIS GUILTY PLEA AS MITIGATION DURING THE SENTENCING PHASE OF TRIAL?

The Respondent State of South Carolina made a Brief in Opposition on May 8, 2008 and asserted the following counter-statement:

1. WHERE THE STATE APPELLATE COURT WITHOUT PREJUDICE REJECTED A PREMATURE ATTEMPT TO FILE A NOTICE OF APPEAL BECAUSE THERE WAS NO FINAL JUDGEMENT WHEN NO SENTENCE HAD BEEN IMPOSED AND NO ADJUDICATION OR ACTUAL CONTROVERSY, THIS COURT LACKS JURISDICTION UNDER 28 U.S.C. SECTION 1257 BECAUSE THERE IS NO FINALITY.

On June 8, 2008, the United States Supreme Court denied the petition for writ of certiorari. Inman v. State of South Carolina, No. 07-1298, 128 S.Ct. 2098 (June 8, 2008).

The Proceedings Prior to the Guilty Plea

On August 19, 2008, a competency hearing was held. Judge Miller was again informed that Inman sought to tender a guilty plea to murder. R. 913, August 19, 2008, Tr.p. 3, l. 20-21. The hearing initially concerned Inman's competency to stand trial was held.[1] The Appellant was determined to be competent to stand trial.

Inman then entered guilty pleas to the charges on that date. R. 911-975, August 19, 2008 Tr. p. 1- 65. He was represented by James W. Bannister, John W. DeJong, and Symmes W. Culbertson of the Greenville Bar. Judge Miller stated that sentencing was deferred until September 6. Id. Tr.p. 54.

The September Sentencing Proceeding

[1]Dr. Donna Schwartz-Watts testified as a defense expert at the competency portion. She stated that he was competent to understand the proceedings and had the capacity to communicate with counsel. R. 916, August 19, 2008 Tr.p. 6. She found he had a history of having a "mood disorder" and being treated for depression. She stated from the first time she met Inman in September 2006 he had a desire to plead guilty and knows what he is doing. She stated that he had made it clear to her that he wished to receive a death sentence and felt he deserved to die for what he had done. R. 920-11, August 19, 2008 Tr.p. 10-11.

On September 8-11, 2008, Judge Miller held a non-jury sentencing proceeding as a result of the guilty plea to murder. Testimony was received from state witnesses Holly Bergman, Christina Morello, G.W. McCoig, Jeffrey Kindley, S._____ C_____, V____ P_____, Michael Hannon, Rhonda Jackson, J_____ G____ and Dr. Eric Christensen. R., September 8, 2008 Tr. P. 1-243.[2] The defense in mitigation initially presented Dr. David Price, Dr,. Marti Loring and Claude Tournay, James Aiken, D_____ B_____ and Rev. David Hensley. R., Sept. 8, 2008 Tr.p. 255-410.

The State's Case at Sentencing.

Evidence was presented through the victim's roommate, Holly Bergman, that Tiffany Souers was a Clemson civil engineering major and a dedicated student. R., Tr. 39-40. She was described as being close to her family and would constantly be on the telephone with her mother and with her siblings. She was able to give good advice. She was described further as very outgoing and easily made friends. R., Tr. 41-42. In describing how Tiffany's death affected her, it was like losing a sister. R., Tr. 43. The violence of her death made it more difficult. R., Tr. 43-44.

On cross-examination, it was pointed out that Tiffany was also involved in national charity organizations. She was also described as a dedicated member of the Catholic Church. R., Tr. 47.

Another roommate, Christina Morello, similarly described Tiffany Souers. She presented photographs of school events at Clemson that they participated in. R., Tr. 50-52. She described the victim's contagious laugh. R., Tr. 53. She also helped in the community in addition to her school work. Her death affected Ms. Morello in many ways. R., Tr. 54-55.

[2]The "September 8, 2008 Tr." encompasses the proceedings from September 8-11, 2008.

She noted that everyone who met Tiffany was her friend. In addition, she was the type of person that showed compassion and cared for others. R., Tr. 57.

Chief Deputy G. W. McCoig of the Jefferson County Sheriff's Department in Dandridge Tennessee testified concerning the arrest of Inman on June 6, 2006. R., Tr. 60. He stated he stopped after a brief car chase and placed him under arrest. R., Tr. 64-65. After reading his Miranda rights, Inman spoke with the officer. During the conversation about the college student, Inman described himself: "after that shit right there, I'm a f__ing animal. R., Tr. 68, ll. 21-25.

SLED Agent Jeffrey Kindley testified he responded to Tennessee after Inman's arrest. Inman made a statement, after waiving Miranda rights. R., Tr. 80-86. He described the belongings from Ms. Souers apartment being thrown out as he was driving. back to Tennessee and hiding the sheets in the woods. R., Tr. 90-91. In describing with Inman the extradition process and whether the charges qualified for the death penalty Inman stopped him and declared: "That's what I want. I killed a 20-year old college student with everything to live for. And he said he deserved the death penalty." R., Tr. p. 94, ll. 1-5, p. 98, l. 22 - p. 99, l. 2.

S.___ C.___ described an event with Inman which occurred December 14, 1987. R., Tr. 101. She stated that she was awakened in her apartment by a man with a revolved. She described being tied up by him and being told for her to tie up her roommate. R., Tr. 103. With a gun to her head and hands tied, she was penetrated vaginally and anally. R., Tr. 105. The assault lasted 20 minutes. Her roommate was forced to watch. He took money and keys, then threatened to kill them if they called the police. As a result, Inman pled guilty to the crime. R., Tr. 108.

The prosecution published Inman's prior convictions. These included:

1. Dec. 14, 1987 - Sexual Battery - S._ C._ - 30 years (8-18-1989)

2. Robbery - 30 years

3. Armed Burglary - 30 years

4. Grand Theft Motor Vehicle - 5 years

5. Kidnapping (2 counts) - 30 years

6. Aggravated Assault - 5 years

7. July 10, 1998 - Second Degree Sexual Assault - 20 years - (N.C.) - 9-26-88

8. Attempted Escape - February 5, 1991 - one years

R., Tr. 112-13.

B._ B._ P._ testified concerning a May 23, 2006 incident with Inman. R., Tr. 120. She described taking her daughter to the bus stop that morning. She described returning home at lunch when someone came from behind her, covered her mouth and put a knife to her throat. R., Tr. 122. She screamed and he placed her on the floor tying her hands behind her back. R., Tr. 123. He stated he had found $250, after she had denied having cash in the house. He then forced her into the bedroom from the kitchen. He then forced her pants and underwear down and saw she was on her period. R., Tr. 126-27. At that point, he put her into a bedroom closet and told her he was going to take her car and stash it. R., Tr. 127. After he left she was able to get to the phone and hit re-dial. The police determined that he had entered the house by cutting a hole in the floor. R., Tr. 129. Two weeks later, she saw Inman's photo on CNN and identified him as her attacker. R., Tr. 129-130.

Michael Hannon of the Tennessee Bureau of Investigations testified that he responded to Chief McCoig on June 6, 2006 concerning Inman. R., Tr. 139-140. He described getting a waiver from Inman on June 7, 2006 at 12:30 a.m. R., Tr. 143-46. Subsequently, he stated he

spoke with Inman concerning an incident in Rainsville, Alabama. R., Tr. 151-52, 157-163. In the statement he gave concerning the May 23, 2006 incident, Inman described breaking into the house by cutting a hole in the vent. R., Tr. 163. He stated he entered the house and found a blue bank bag with cash. However, once inside, the owner returned. He confirmed he intended to have sex with her, but she told him she was on her period and he put her into a closet. R., Tr. p. 163, ll. 10-17. He took the money bag and her car which he drove a short distance and parked it and then switched back to his car. R., Tr. 163. He described leaving Alabama and then going to South Carolina. R., Tr. p. 163, ll. 22-25. He stated that when he got to South Carolina, he was not there a whole day before the incident with Tiffany in Clemson. R., Tr. 163-64.

Rhonda Jackson, an investigator with the DeKalb County Sheriff's Department in 2006, testified that they developed a suspect from the interview she had with B._ P._ after she called when she saw the picture of Inman on CNN. R., Tr. 169. After she gave Chief McCoig the details of the crime, he agreed to interview Inman about the incident. She subsequently came to Pickens County and interviewed him on June 8, 2006. R., Tr. 173-181. Inman gave a detailed statement about the entry into the home and his intent to rape her and the fact he could not do so "because she told me she was on her period... she was a single mom and had a little..." R., Tr. p. 183, ll. 2-5. He described leaving.

J._ G._ from Sevierville, Tennessee testified on May 22, 2006, she woke up and found someone on top of her with a knife to her throat around 5:00. R., Tr. 193. He asked her where the money and jewelry was located and she showed him. When they returned to the bedroom, he tied her hands with her bra behind her back. R., Tr. 196. Her little girl was crying. He demanded that if she cooperated no one would get hurt. R., Tr. 196, ll. 19-23. With her knees on the floor, the man unsuccessfully attempted to rape her from the rear, and then turned her

over, continuing to hold the knife against her neck. R., Tr. p. 197, ll. 13-20. At that point, he raped her. R., Tr. p. 197, l. 23 - p. 198, l. 12. He then took her to the bathroom and made her clean herself with shampoo twice. R., Tr. 198. He continued to make them get items and place them on bed. He then placed her and her daughter into the bathroom. R., Tr. 200. After ten (10) minutes she left the bathroom, got her purse, and then called the police. R., Tr. 200. She next saw him about 2 weeks later on the evening news. R., Tr. 201.

Michael Hannon testified about a subsequent statement Inman made after his arrest describing the rape of the mother with the child in the bedroom. R., Tr. 214-15.

On September 9, 2008, Dr. Eric Christiansen, the forensic pathologist, testified about the cause and manner of death of Tiffany Souers. He certified that she died as a result of asphyxia due to ligature strangulation. R., Tr. p. 223, ll. 8-9. A bathing suit top was used. He stated she was rendered unconscious before she died. R., Tr. 232. He found evidence of trauma or traumatic sexual relations in damage to her body. R., Tr. 234. She had extensive bruising around both wrists which suggested a struggle while restrained and bruising above her ankles.

The Defense Case in Mitigation
Dr. David Price

Dr. David Price , an expert in forensic psychology, clinical psychology and neuropsychology, testified about an evaluation of Inman.[3] He affirmed stated that he had an opinion that at the time of the crime, a factor in the commission of the crime, Inman was under the influence of mental and emotional disturbance, and that his capacity to conform his conduct to the requirements of law was substantially impaired. R., Tr.p. 258. He stated that he had reviewed 15 three to four inch thick notebooks which included records about his family, his incarceration, newspapers, and his mental health treatment records of over 3,000 pages. He confirmed Inman was the subject of mental health treatment for the 19 years he was incarcerated.

[3] Prior to the beginning of the mitigation testimony, Solicitor Ariail returned to an earlier motion he had made concerning expert witnesses requesting the disclosure of the underlying data. Id. R., Tr.p. 250. In particular, he noted that the experts would be testifying about their opinions based upon underlying data that had not been provided to the State. Solicitor Ariail stated that the disclosure would speed up the process. As he stated: "if fact we don't know what it is [and] I'm not sure who their experts are." R., Tr.p. 250, l. 8-11. He requested first, a reasonable amount of time prior to the testimony of the experts of the underlying data upon which they are going to rely, pointing out Dr. Schwartz-Watts prior disclosed report which noted data that the state did not have. He stated this was necessary for appropriate and meaningful cross-examination. Second, he requested that since they do not have the documents, that when the experts arrive that he underlying data is brought with them to court. R., Tr.p. 251. Lastly, Solicitor Ariail stated, in a manner to give the court a heads up about the manner that some witnesses had testified in the past. In particular, he pointed out that Dr. Loring, who had a Ph. D. In social work, had a testimonial style that was a "rambling recitation of rank hearsay." R., Tr.p. 251, l. 17-21. As such, he declared it was difficult to keep things clear on what was her opinion under SCRE Rule 703 and what was "hearsay." Solicitor Ariail noted that he was not objecting to "opinions", but did have objection to the parroting of totally uncorroborated hearsay. R., Tr.p. 252-253.

Counsel Bannister objected to the disclosure of the reports and data, contending that would be "per se ineffective." R., Tr.p. 253, l. 23-25. The Solicitor stated that he did not want a "report," but the data underlying the opinion, i.e, if the expert says that they looked at prison records from Florida, I want to see the prison records that they reviewed, which is allowed and required under SCRE Rule 703. R., Tr.p. 254. The Court stated he would return to this issue later.

R., Tr.p. 259. He opined that Inman had a number of mood disorders, including dysthymia (sustained or intermittent depression for over 2 years), major depressive disorder - recurrent type, major depressive disorder - with psychotic features, bipolar disorder and psychorhythmic disorder. R., Tr.p. 260. He noted that Inman had prior diagnosis of personality disorders, including schizoid personality disorder and he opined that he could also be diagnosed with dissociative identity disorder and sexual paraphilia. R., Tr.p. 260. He noted the presence in the records of multiple suicide attempts, suicide ideation and withdrawal. R., Tr.p. 261. He rated him of the Global Assessment of Functioning with a 30 as someone with serious impairment with the ability to communicate and with judgment and profound impairment in overall ability to function. Id. Dr. Price stated the schizoid personality disorder was illustrated by the fact he was an introvert with intermittent relationships within his family.

In the social history, Dr. Price noted that Inman had a genetic predisposition for the mental disorders because his mother had paranoid schizophrenia and father was an alcoholic. R., Tr.p. 265. He stated Inman was raised in a turbulent and unstable environment, began using drugs at age 10, ran away at age 13, living on the streets at 15 and in jail at 17. Id. He noted that this disorder is often associated with depression.

Concerning dissociative identity disorder, he stated that Inman was not very forthcoming about his illness. However, Dr. Price learned that in discussion with treatment providers and his pastor, Inman will assume a different effect and response which is like changing from one identity to another. He stated that the primary identity is a passive-dependant and depressed person that has difficulty with guilt. R., Tr.p. 268-269. He stated that the evidence of depression , self-mutilation by tattooing and suicidal ideation supports the diagnosis. R., Tr.p. 269. Also that he traveled in his series of sexual assaults is consistent. R., Tr.p. 269.

Dr. Price describe Inman as a serial rapist. He felt it "astounded " him that he was not similarly diagnosed in Florida. He felt the Rapid Risk Assessment for Sexual Offender Recidivism (RRASOR) suggested that he clearly met that criteria. R., Tr.p. 271-272.

Dr. Price found that Inman had significant records for being sexually abused, physically abused, living in an unstable environment with a mother with periods of anger who they thought was depressed. R., Tr.p. 272-273. Dr. Price felt that Inman had one stable relationship - his maternal grandfather who died when he was young. He was abandoned by his father who had sexually abused him and began to act out of conflict at age 10 with drugs, failing school, and winding up on the street. R., Tr.p. 273. In reviewing Inman's crimes, he found similarity from the victim's crimes with Inman's own experiences where his sister was also subject to bondage when she was tied up and the rapes tended to follow a certain pattern - hand tied , kneeling down, lean forward over the bed in an awkward position, suggesting that he was acting out what had happened to him. R., Tr.p. 275. This was part of his "compulsive rape." R., Tr.p. 275. He stated that Inman felt 'shame and loathing about this rape and murder." R., Tr.p. 276. This similar feeling was consistent throughout his records, noting that he had attempted suicide on 7 occasions (six while incarcerated). Id. Dr. Price described the various ways he attempted to kill himself including slit wrist, cutting his jugular vein, swallowing barbed-wire, and trying to starve himself. R., Tr.p. 279.

Dr. Price stated that Inman's stated that "I killed a 20 year old college student with everything to live for - I deserve to get the death penalty[4]" statement is consistent with Inman's history and also reflected in his unhappiness and hopelessness while in prison. R., Tr.p. 280-81.

[4]See also, R., Tr.p. 299, Defense exhibit 11.

Dr. Price opined that he is a national expert in malingering. He felt that Inman was not malingering based upon his extensive psychiatric history. He noted that Inman instead minimizes the problems and is protective of his parents failings in raising him. R., Tr.p. 283. He felt that Inman had tried to hinder Price's effort to get a life sentence. R., Tr.p. 283. He noted that Inman had talents in being a tattoo artist and had carpentry skills.

Concerning his interaction in prison, Dr. Price found that Inman grew up in prison and was afraid about being released. Particularly, he had stated that after release he had planned to work for a year or two give the money to his mother and then commit suicide. R., Tr.p. 284. Dr. Price concurred with a North Carolina doctor that Inman was a lost soul who would continue to be lost based upon his bad genetic loading with the history of a paranoid schizophrenic mother and alcoholic father. He had been physically and sexually abused and abandoned by his father in the unstable environment. He began getting into trouble at age 10 with drug use, by 13 he was running away and on the streets. Inman had a long history of mood disorder and his family had never been able to teach him to develop normal heterosexual relationships. He had a schizoid personality disorder, developed a dissociative identity disorder and developed sexual paraphilia. R., Tr.p. 285. [5]

[5] At that point, the defense proffered a series of exhibits. The Solicitor - noting that no foundation had been laid and they were not authenticated or certified - stated that the exhibits were pure hearsay. R., Tr.p. 287.

Counsel Bannister asserted that since this was a penalty phase of a capital case "rules of evidence are more lax than they would be in the guilt phase of a trial." R., Tr.p. 288, l. 1-4. He opined that it would be more expedient to simply mark the exhibits and have them put in the record so the judge could read them He felt that they should come in as medical records or business records from the prison. Exhibits 3 - 20 were then marked. Dr. Price stated these exhibits were considered by him in making his opinion. R., Tr.p. 291. See R., Tr.p. 294-304.

On cross-examination, Dr. Price conceded that he did not bring the 15 notebooks with him that he reviewed to prepare his opinion and testimony. R., Tr.p. 304-305. He stated that he received the material from counsel Bannister's office. Importantly, he admitted that he was influenced by every document he read. Id. At that point, Solicitor Ariail renewed his request to see all the notebooks that Dr. Price reviewed. R., Tr.p. 306. During the questioning, Dr. Price confirmed that as to child abuse, sometimes Inman would report it happened and other times he would not report it. Id. R., Tr.p. 307-308. He admitted that the history showed the Inman had the ability to make choices inasmuch as he did not kill the victim in Florida, said he would not harm the child in Tennessee, did not kill the North Carolina inmate, but did kill Souers. R., Tr.p. 308-309. Concerning death, Dr. Price stated that Inman did not want to die, but thought that the death penalty was the appropriate penalty and that he was remorseful for it, thinking of himself as "scum." R., Tr.p. 311.

The defense adjourned for the evening seeking to resolve the record production of material reviewed by Dr. Price and the requested disclosure to the State pursuant to SCRE Rule 705. R., Tr.p. 320-323.

Dr. Marti Loring

The testimony of Dr. Marti Loring, a LCSW licensed clinical social worker and board certified expert in traumatic stress is involved in arguments II and III. Respondent incorporates the procedural history set out in that portion by reference to those arguments. For purposes of this portion, on September 8, 2009, Dr. Loring was called to testify in mitigation. R., September 8, 2008 Tr.p. 324-325. After she was initially voir dired, she was qualified as an expert in areas of abuse, trauma, social histories and forensic interviewing. Id. R., P. 326. However, it was developed during the state questioning that Dr. Loring had failed to comply with the state

licensing law for out of state licensed social workers. Id. R., Tr.p. 328, l. 1-3.See S.C. Code Ann. § 40-63-200. The prosecution in making the objection to her qualification provided the statute to Judge Miller noting that it carried civil and criminal sanctions. R., Sept. 8, 2008 Tr.p. 328, l.. 19-25. Although she was granted immunity, Dr. Loring initially invoked her Fifth Amendment and initially refused to testify after receiving advised from personal counsel Bill Godfrey, even after being granted immunity.

Mitigation Continues

Claude Tournay

The defense then called Claude Tournay of the Florida Department of Corrections. He testified that he had reviewed the sexual offender screening and that in 2004 it was determined that he could not find enough criteria to determine a "paraphilic sexual disorder" or diagnosis. Id R., Tr.p. 357, l. 21-25. He testified that in January 2004, he found sadistic behavior, child molestation abnormal sexual behavior and that Inman was being treated for major depression disorder, recurrent. R., Tr.p. 358. Tounay stated that a April 2004 letter from the Florida Department of Corrections stating that Inman - convicted of rape - was a sexually violent predator would have required the Department of Children and Family Services to send three psychologists to review and examine the inmate and determine whether he was a threat to society. If so , he would have been civilly committed to and institution for crimes which occurred after 1993. Id. R., Tr.p. 360. However, Inman's crime had happened before October 1993. However, as a psychiatry inmate, the department made a referral to Tennessee and arrangements for Inman to continue his treatment for his depression. Id. R., Tr.p. 362-63.

James Aiken

James Aiken, an expert regarding the assessment of inmate classification and expert in prison management and prison classification, testified that based upon his record review, Inman would be automatically in a “high security status” due to the life without parole sentence he would receive, that crime he was convicted and his cumulative behavior patterns while previously confined. R. Tr.p. 369. He also noted that Inman had some security threat group and gang related issues that concerned Aiken a great deal. Id. R., Tr.p. 369. He noted the presence of a Swastika tattoo, which suggests in the prison setting membership in a Nazi gang and security threat group. Id. R., Tr.p. 371. Because Inman is a “multiple sex offender,” Aiken testified that it gave him added concern because gangs and security threat groups hate them “and will kill them because they have such a distaste for them.” R., Tr.p. 371-372. This is because he has the tattoo and is a multiple sex offender. R., Tr.p. 372.

Aiken stated that because of these factors the correctional department would have to put Inman in a security envelope of a single cell with no free movement or interaction with other inmates since they do not know who would put a hit on him. He would have to be moved with a security escort and 23 hour lock up. R., Tr.p. 376. He stated no other inmate could have access to him because it would violate “the duty to protect.” R., Tr.p. 377. Aiken stated that Inman’s security status would be “SL-3" which is the highest level.

On cross- Aiken added that his security level is also increased by the fact of publicity and that it was a high profile case that would be known within the inmate population that Inman was a multiple sex offender. Aiken also found significant in his prior prison record evidence of self-mutilation and multiple disciplinaries , including attempted suicide and attempted escapes. He noted that some of his disciplinaries included possession of weapons for either to do harm or for his own protection.

Family Member

The Appellant's older sister testified about her relationship with Inman. She stated that she had a fond memory of him playing "pee-wee" football and she was a cheerleader. She described them getting ready for their roles on Saturday mornings and the family routine. R., Tr.p. 388-89. She also testified about in winter going out from their home in the country across the street into a wooded area and sliding along a creek. She stated that one time they were out there with their cousins and Inman fell through a soft piece of ice and he cried all the way home, noting that he cried frequently as a child. R., Tr.p. 390. She described "sibling rivalry" and fights over jeans between Inman and his sisters because he would wear their jeans and leak ink on them. She stated that he had "seizures" where he would daze, his body stiffen and shake and would sometimes be accompanied by a high fever. R., Tr.p. 392-93. She stated this set him apart from others and prompted a lack of friends. She said that the family moved frequently and lived in Tennessee, Florida, Texas, and North Carolina. R., Tr.p. 393.

She said that Inman loved pets. She felt, however that Inman did not like himself. She stated that at one time Inman had to share a bedroom with his grandfather to whom he was very close and would talk together for hours. The grandfather passed away when he was 16, which was a turning point in his life. R., Tr.p. 395. Afterwards, Inman began staying out late, became more withdrawn and once ran away from home and was found sleeping outside a church. R., Tr.p. 396.

In describing their mother, she said that she suffered from bipolar disorder and schizophrenia. She said that the mother was affected by her medication and would hear things, talk to herself, and would freak out over the smallest thing. R., Tr.p. 396-97.

The sister described events when he was age three and living in a trailer in Florida. She stated that she started receiving inappropriate presents such as see through nightgowns. Later they

moved to another house in Florida and she claimed that her other grandfather, Mr. Inman Sr. would come into the bedroom she shared with the Appellant [she was 5 and he was 3] and the grandfather would blindfold her and tie her hands to the bed and turn her over and she recalled that it was sexual abuse. She described that the grandfather would leave her in the top bunk and go to the bottom bunk. While she did not know what was happening to the Inman, she heard him crying and they both were threatened. Id. She stated that the step-grandfather also messed with her. R., Tr.p. 400. She described a conversation that she once had with Inman when she stated that she had been sexually abused and he stated that he had been abused also. R., Tr.p. 400-401.

Rev. David Hensley

Reverend David Hensley, Inman's pastor, was presented to testify. However, Inman objected to his testimony based upon the priest -penitent privilege which Inman refused to waive. Id. R., Tr.p. 402-405. Rev. Hensley then only described the fact that he met with Inman the Friday before with his Bible, grape juice, wafer, and poured water over Inman's head. R., Tr.p. 405.

April 20, 2009 Proceedings

On April 20, 2009, the matter was re-convened for the sentencing hearing. At the outset, counsel Godfrey for Dr. Loring returned with a motion requesting that she be released from her out of state subpoena or for alternate relief. **R., 446-47, April 20, 2009 Tr.p. 8-9.**[6] At the hearing, Judge Miller stated that he wanted the defense to consider calling Dr. Loring as a witness in mitigation. He stated that she was ready willing and able to come testify voluntarily. Counsel Bannister stated that he had certain motions and that they were not in a position to call her as a

[6]As set forth below in Argument One, Judge Miller had refused to vacate his certification of Dr. Loring as an material out of state witness at proceedings on April 14, 2009. See R. 1021-1034, April 14, 2009, Tr.p. 1-14.

witness.[7] Counsel called Public Defender John Mauldin as a witness on the misconduct claim. Mr. Mauldin testified about the circumstances concerning the Michael Laney case. R. 510-549, Tr.p. 72-111. It was essentially his position that the Solicitor office had agreed to a life sentence based upon a desire to have a misconduct claim dropped concerning its questioning of an expert witness, Dr. Everington on the issue of mental retardation. [8]

This was a matter that the state disputed within its questioning. R. 549-555, Tr.p. 111-117. The record revealed that the objection to Dr. Everington's testimony in Laney was not to her qualification as an expert in mental retardation, but that she was not qualified in S.C. to administer IQ tests and that only a licensed psychologist could do that type of interpretation. R. 556, Tr. 118. The claimed terms of a proposed agreement were set out in State Exhibit 25. R. 565-66, Tr.p. 127-128. However, the initial negotiation was not successful and rejected by the state. R. 566-67, Tr.p. 128-129. It was developed that the Laney motions based upon alleged prosecutorial misconduct were never ruled upon by a judge and were withdrawn after the death notice was withdrawn. Mauldin confirmed that the stated reason for the state's withdrawal was the victim's family concerns and endless litigation on mental health issues..." R. 578-79, Tr.p. 140-141.

---

[7]The defendant made a motion to recuse the 13th Circuit Solicitors Office based upon a claimed prosecutorial misconduct based upon the incidents concerning Dr. Loring. R. 499-501, Tr.p. 61-63, a motion to determine the role of Solicitor Ariail and the Prosecution team, and a motion to suspend proceedings. Solicitor Ariail responded in writing and orally concerning the claim that they were involved in Dr. Loring's potential arrest and included an affidavit from Mr. Geary in Georgia to support the position. R. 506-07, Tr.p. 68-69. Response to Motion, R. 1243.

[8]In its response to the motion, the Solicitor's office presented a different version of the circumstances that lead up to the life sentence. *Response to Renewed Motion for Mistrial*. R. 1207. The questioning concerning Dr. Everington was whether she had exceeded the scope of her qualifications as an expert witness - a claim that was ultimately supported by the Board of Psychology. *Exhibit 2 to Response.* ROA. _ . The pleading also addressed other collateral issues raised concerning the motions and its contested factual issues.

Laney's other lawyer, Troy Tessier also testified concerning the Laney matter. R. 580-87, Tr.p. 142-149.

Susan Allen, a juror in the Edens and Holloway case, testified about a dinner the Solicitor's office held for the jurors in the case after the trial was completed. R. 588-89, Tr.p. 150-151. She stated the issues raised by the office was to seek out what factors influenced them the most in not giving the death penalty. R. 592-93, Tr.p. 154-155. On cross-examination, the voluntary contact concerning the dinner was pointed out consistent with Judge Hayes instructions to jurors. R. 595, Tr.p. 157.

Judge Miller again made inquiry of the defense concerning the defense of its intent to call a social historian, noting this case is going forward. The court was concerned because Dr. Loring is present and ready to go, "but we are not going to set this case up for failure." R. 603-04, Tr.p. 165-166.

Judge Miller then denied the defense request to call Solicitor Ariail and other prosecutors concerning the raising of an improper issue related to the lack of licensing of Dr. Loring and why the issue was not raised in the earlier trial. R. 604-05, Tr.p. 166-167.

Desa Ballard , a lawyer who concentrates on legal ethics and professional responsibility, testified that the Solicitor had violated a number of rules of professional responsibility in connection with his earlier examination of Dr. Loring. R. 611, Tr.p. 173.

At the conclusion of the testimony, Judge Miller stated that he would not suspend the proceedings. R. 633, Tr.p. 195. He further stated that Dr. Loring was going to come and he would not remove them as advocates in the case. R. 633, Tr.p. 195.

The April 21, 2009 Proceeding

On Tuesday, April 21, 2009, defense counsel Bannister again advised Judge Miller that the defense was not going to call Dr. Loring as a witness. R. 639, April 20, Tr. p. 201. Judge Miller stated that he was considering calling Dr. Loring as a "court's witness." Id. R. 639, Tr. p. 201, ll. 5-6. He stated that his client had pled guilty and asked him to be the sole fact finder in the case. [Defense counsel Bannister concurred with that statement: "That's correct."]. Id. R. 639, Tr. p. 201, ll. 11-14. The judge stated that Dr. Loring was the first choice by the defense and "I believe that she can testify without fear." R. 640, Tr. p. 202, ll. 15-16. After Loring's counsel confirmed that she had gone over the subject matter the prior evening, Judge Miller stated that she had earlier spent up to 9 to 10 hours preparing. Counsel Godfrey stated that she had previously stated she had reviewed the files 4 to 5 hours, reviewed the file yesterday, has her charts and pictures since they had talked about her testifying as a witness and she had advised him that she felt protected by the court. Id. R. 641, Tr. p. 203, ll. 7-21.

Counsel Bannister renewed his motion for a mistrial based upon the prosecutorial misconduct claim. Id. R. 642, Tr. 204. He requested that a life without parole sentence he entered under the 5th Amendment Double Jeopardy Clause. Id. R. 643, Tr. 205.

The State opposed the motion, citing Fields v. J. Haynes Waters Builders, 376 S.C. 545, 658 S.E.2d 80, 86 (2008), which allowed a court in qualifying an expert witness to look at the statutory requirements for licensing.[9] The State argued that there was no prejudice from the conduct. Dr. Loring is there and able to testify which shows there was no witness intimidation. She was neither threatened nor intimidated. Further, the State noted that this was a bench trial

[9] The State made a written "Response to Renewed Motion for Mistrial and Memorandum" which is incorporated by reference. R. 1214-1241 "Response").

where the trial judge is presumed to be able to differentiate what it feels is improper. R. 645, Tr. 207.

Judge Miller initially rejected the double jeopardy motion. He concluded that there was no evidence the State deliberately goaded the defense to make the mistrial motion. R. 645, Tr. p. 207, ll. 15-19. However, he did not accept the State's position on Fields because there is no question that whether a person is licensed in particular state is a significant factor in determining whether they should be qualified, but when the Solicitor brought up the criminal sanctions, it was improper. R. 646, Tr. 208. However, the trial judge found it was immediately addressed and resolved with the grant of immunity. R. 646, Tr. p. 208, ll. 4-7. Judge Miller opined in light of the administrative order, Baggerly and Fields, that there was no criminal conduct in the witness who arrives solely to testify as an expert witness. R. 646, Tr. p. 208, ll. 15-18. Relying upon U.S. v. Golding, 168 F.3d 700 (4th Cir. 1999) for a reversal the remarks must be improper (which he found) and such comments or remarks must have prejudicially affected the defendant's substantial rights so as to deprive him of a fair trial.

Judge Miller noted that this was not a jury trial, but a bench trial and the result might have been different. He found that the defendant's rights were not prejudicially affected. Particularly, he found that Dr. Loring was prepared to testify before it occurred and is prepared to testify now according to her attorney. R. 647, Tr. p. 209, ll. 21-25. Judge Miller stated that in his capacity as fact-finder he is interested in hearing everything that might bear on his decision. He does not find "deliberate prosecutorial misconduct." R. 648, Tr. 210. Counsel Bannister asserted that had they been provided a jury with the plea, the result would have been different,

Counsel Bannister next moved for a continuance. He stated that on September 11 when Dr. Loring took the 5th, the matters were suspended and he was directed to either fix the problem

with Dr. Loring or find another social historian. Counsel stated that while he thought it was a red herring until the Supreme Court spoke on the issue, the issue was still decided against them on the licensing issue. The only available expert he asserted he could find was Jan Vogelsang who he sought funding for on January 2 and had less than 4 months to prepare. R. 651-52, Tr. 213-14. As he asserted at the April 14 hearing, he declared she could not be prepared by April 20. R. 653, Tr. 215.

Judge Miller noted that there had been discussions throughout that this case was to restart on April 20. R. 653, Tr. p. 215, ll. 21-25. He stated that according to Ms. Vogelsang's affidavit she would not be prepared to testify until the first quarter of 2010. R. 654, Tr. p. 216, ll. 1-13 [It was April 2009 at that time].

Judge Miller stated that Dr. Loring was prepared to testify and had done all her work. He noted that she had been on the case a long time and the court wanted to hear from her. However, he stated that he would not allow the prosecutors to intimidate her. R. 654-55, Tr. 216-17. Judge Miller stated that this case will be finished this week and Vogelsang could be put up. R. 655, Tr. 217.

Counsel Bannister stated he needed a ruling on his continuance and thought he was being told it was denied.

Judge Miller clarified that he would break to let them meet with Dr. Loring since she was present and was prepared to go forward. R. 655, Tr. p. 217, ll. 13-19.

April 22, 2009 Proceeding

On Wednesday April 22, the defense returned to its case in mitigation. R. 656, Tr. 218.

Kenneth McArthur

Kenneth McArthur, Inman's step-father, testified that he has known Inman since he was four years old. R. 657, Tr. 219. He stated that the September hearing was very stressful for McArthur and his wife, Vera, because of the potential sentence. He stated Vera had been hospitalized in January due to the stress. He stated they love Inman and enjoy having the opportunity to see him in prison. R. 657, Tr. p. 219, ll. 17-24.

At that point, based upon their prior motions, counsel Bannister declared that he was not calling further witnesses. R. 658, Tr. p. 220, ll. 8-12.

The Court Declares Its Intent to Call Dr. Loring

Judge Miller then declared his intent to call Dr. Loring. R. 658, Tr. p. 220, ll. 14-17. He stated that (1) she would aid the fact-finder in the resolution of the case, (2) she was the number one choice for social historian in the case, but the defense has stated it had no contact with her since September, (3) she has been rehabilitated and despite the fact that she refused to testify in September because of her feelings of intimidation (which he ruled was prosecutorial misconduct which did not rise to the level to require reversal or mistrial) which is cured in part by her presence today. "I think it's necessary to put her up to ensure that these claims of due process violations are put to rest." R. 658-59, , Tr. p. 220, l. 14 - p. 221, l. 6.

Defense counsel Bannister objected citing Riddle v. State, 314 S.C. 1, 443 S.E.2d 557 (1994) and SCRE Rule 614. While admitting the right to call a witness was within the court's discretion, he contended it was limited in State v. Anderson, 304 S.C. 551, 406 S.E.2d 152 (1991) to a situation in a criminal case where four prerequisites exist:

> (1) the prosecution must be unwilling to vouch for the veracity or integrity of the witness; (2) a close relationship must exist between the accused and the potential court's witness, *e.g.*, accomplices and family members; (3) there must be evidence that the prospective witness was an eyewitness to the transaction upon which the prosecution is based, gave a sworn statement concerning the

> pertinent facts, and the statement has been contradicted or it is probable that it will be contradicted; and (4) the testimony the witness is to relate must be material, such that without the testimony a miscarriage of justice would likely result.

R. 659-660, Tr. 221-22. Counsel contended that the prerequisites were not met in this case. R. 660, Tr. p. 222, ll. 15-22.

After the defense renewed its motions, the trial judge reminded the defense that Dr. Loring was here voluntarily. R. 661, Tr. p. 223, l. 13.

Judge Miller noted that the notes to SCRE Rule 614 recognize that it is different that the requirements in State v. Anderson, supra. R. 661, Tr. p. 223, ll. 20-24. Second, the trial judge noted that the defense did not contact Dr. Loring and it was not until January that the Court saws the request for funding of a different expert after three (3) months. R. 662, Tr. p. 224, ll. 1-3. Further, Judge Miller noted that he had not been informed that Ms. Vogelsang would not be prepared to testify for another year from that date. R, 662, Tr. p. 224, ll. 3-8. However, being aware of that, the defense did not re-contact Dr. Loring to see if she could be rehabilitated and if she would testify.

> It leads me to the conclusion that counsel for the Defendant is more interested in pursuing the misconduct issue than in presenting a full defense. And as a result the assertion that due process is violated is disingenuous because defense counsel has perpetrated the failure to prepare for the social history.

R. 662, Tr. p. 224, ll. 11-16. At that point, Judge Miller called Dr. Loring.

Dr. Marti Loring - Court Witness

Upon the questioning by Judge Miller, Dr. Loring initially indicated that it would not be necessary to have Solicitor Ariail removed from the courtroom to make her feel comfortable. R. 663, Tr. p. 225, ll. 9-20. After revealing her educational and employment background, Dr. Loring

was qualified as an expert "in the field of social history, trauma, and abuse." R. 664-65, Tr. p. 226, l. 21 - p. 227, l. 11. After some initial questioning, Dr. Loring stated that she was willing to testify and to do her best, noting that she had not received attorney guidance [from the defense team, not her personal lawyer Mr. Godfrey], had not seen Inman nor had interviewed anyone else since the six months. She admitted she had checked on the well being of health of the step-father, mother, and sister, but had no case discussion with them. R. 667, Tr. 229.

Counsel Bannister made an objection as to "how the witness was procured" and the process as a court witness. R. 668, Tr. 230.

Dr. Loring presented a genogram [Court Exhibit 4] and described in narrative form the different types of interaction between the family members and their problems with drugs, alcohol, mental illness, sexual abuse and violence. R. 670-680, Tr. 232-242. Dr. Loring also presented a timeline of Inman's life. [Court Exhibit 5] R. 680-82, Tr. 242-44. Dr. Loring further presented a group of photographs and material suggesting as a child that Inman was "still miserable and crying" (R. 682, Tr. p. 244, ll. 22-25) and had indicators of sexual abuser. R. 683, Tr. p. 245, ll. 2-6. She stated that he had headaches and suffered from head beatings, that he accidentally burned his genitals with spilled bleach without medical attention, that he was firmly spanked as a child, that he had seizures, that he was exposed to violence in 1980 involving a dog fight with a cat, that his leg was burned in 1981 in a motorcycle accident. R. 684-86, Tr. 246-48. He also began drug use including alcohol, huffing gas, marijuana, cocaine, and LSD beginning in 1981. R. 686, Tr. 248.

Inman was exposed in 1984-1986 to a sexually abusive step-brother who was later convicted as a pedophile. R. 686, Tr. 248. Dr. Loring noted she was unable to locate any pictures of Jerry smiling or happy after age 7. R. 687, Tr. 249. In addition, Dr. Loring found that Inman

would play with matches and set fire to his step-brother's mattress, which is a symptom of sexual abuse. R. 687-88, Tr. 249-50. Family members gave him alcohol between 1984-1986.

Dr. Loring described while he was 15, his maternal grandfather suffered a painful and bloody death with throat cancer. R. 688, Tr. 250. She described the closeness between them and apparent guilt Inman felt for his death.

His life in prison was based upon a series of thefts and behaviors and the encouraged use of alcohol lead to the downhill path. R. 689, Tr. 251.

Dr. Loring noted that around 11 or 12, Inman was asking his mother for help, but because of her problems, she could not hear it. After he was caught looking into a neighbor's window, his windows were nailed shut. R. 689-690, Tr. 251-52.

Inman's suicide attempts were again described by her. R. 690, Tr. 252.

Dr. Loring stated Inman was released in 2005 and was out 9 months before the tragedy. He was described as anxious and lost, unable to hold a job or relate to women. R. 690, Tr. 252. However, he was able to mentor his sister's son, who idolized him and was able to get him to stop huffing gas. R. 690-91, Tr. 252-53.

When the Court asked for anything else Dr. Loring might feel was important, counsel Bannister objected based upon "attorney-client" privilege. R. 691, Tr. p. 253, ll. 17-21. Judge Miller directed her to <u>not</u> talk about anything she talked with counsel about. R. 691-92, Tr. p. 253, l. 25 - p. 254, l. 2. A break was then taken and she was allowed to confer with counsel Godfrey. R. 692, Tr. 254.

Dr. Loring then concluded that Inman's early history revealed that he was seen in a "trance-like state" as a child, including the time period it was alleged he was abused as a child. R. 693, Tr. p. 255, ll. 4-18. This history was consistent with his later history of bipolar and having

major depression with psychotic features. However, she felt the second half of her conclusions may be interwoven with attorney-client matters. R. 694, Tr. p. 256, ll. 6-14. Counsel Bannister continued his objection to potential disclosure. R. 694-95, Tr. 256-57.

Judge Miller then declared that he was concerned that he was not getting all the information "because of legal gamesmanship." R. 696, Tr. p. 258, ll. 5-7. He noted she was no longer under "intimidation" and that because of the immunity there was no valid 5th Amendment claim. The defense had made no effort to contact her. Judge Miller repeated that he believed the defense position was disingenuous when the mistrial motion was based upon their reliance on her expertise which they had felt was significant. R. 696-97, Tr. 258-59.

The defense then briefly cross-examined Dr. Loring that it would not be uncommon for new data to become available over seven (7) months. R. 697-98, Tr. 259-60. Dr. Loring stated that she had not reviewed any psychological profile prepared by the government in the case to her recollection. R. 698-99, Tr. 260-61.

Defense counsel Bannister ended his questioning. He then re-affirmed his prior motions. R. 699-700, Tr. p. 261, l. 4 - p. 262, l. 5.

Judge Miller re-affirmed his earlier order denying the prosecutorial misconduct motion. R. 700, Tr. p. 262, ll. 6-23. Importantly, he declared: "The defense counsel now is participating in the limitation of this evidence [of Dr. Loring] that they intended to offer, which contributes to any Constitutional violation that might exist." R. 700, Tr. p. 262, ll. 20-23.

The prosecution, through Deputy Solicitor Strom, briefly cross-examined Dr. Loring. She confirmed that the genogram and timeline were prepared by her in September for her testimony. R. 701, Tr. 263. Dr. Loring clarified her earlier testimony about Inman's father killing dogs and Jerry giving a neighbor a stray dog to care for. R. 703, Tr. 265. She confirmed that Inman

experienced a bad childhood - exposure to violence, sexual abuse, and loss. Dr. Loring admitted that she had reviewed his criminal history including the assaults on females and in prison. R. 706-07, Tr. 268-69. however, she had not reviewed the particular criminal incident in this case. R. 708-09, Tr. 270-71. Dr. Loring was then released. R. 711, Tr. 273.

Counsel Bannister again closed his mitigation case and renewed his prior motions. R. 719, Tr. 281. These included his motion for jury trial sentencing and objection to the trial court calling Dr. Loring as a witness. R. 719-20, Tr. p. 281, l. 8 - p. 282, l. 4.

Closing Arguments and Inman's Request in Sentencing

Closing arguments were then made. R. 720-731, Tr. 282-293 (Solicitor Ariail). Appellant Inman made a personal statement briefly noting his prior history of possibly being molested and abuse is shared with millions, that he had been prison his entire life, that he can't be rehabilitated and had escaped twice. R. 731, Tr. p. 293, ll. 12-22. He declared "in all reality, there's only one viable sentence to impose for someone like me. And I ask that you impose that sentence." R. 731-32, Tr. p. 293-94, l. 1. Counsel Bannister then made his argument plea in mitigation. R. 732-39, Tr. 294-301.

Judge Miller then took a recess. He then made inquiry of Inman concerning his right to testify. Inman declared he did not wish to testify. R. 740-41, Tr. 302-03. He stated he had discussed it with his lawyers earlier today. R. 741, Tr. p. 303, ll. 5-8.

Judge Miller was advised by the defense to consider statutory mitigators #2 ("the murder was committed while the defendant was under the influence of mental or emotional disturbance"), #6 ("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 #7 ("age or mentality of the defendant at the time of the crime'). R. 742, Tr. p. 304, ll. 3-4.

The Sentencing

At 6:23 p.m., Judge Miller returned to the courtroom. He entered an Order sentencing the Appellant to death finding the statutory aggravating factors of burglary in the first degree, kidnapping and criminal sexual conduct in the first degree. R. 743-755, Tr. 305-317. Judge Miller further entered a written sentencing order on April 22, 2009. R. 1045-1053. He also sentenced Inman to thirty (3) years consecutive for burglary in the first degree, 30 years consecutive for criminal sexual conduct in the first degree, and no sentence for kidnapping. R. 754-55, Tr. 316-17.

A motion to reconsider and new trial was made by counsel on April 23, 2009. ROA _. Judge Miller denied the motion on July 17, 2009 and filed July 28, 2009. R. 1248.

A timely appeal was filed on August 4, 2009. This appeal follows.

ARGUMENT

I. Where there is a mandatory appeal in death penalty cases, the entry of an unconditional guilty plea to murder by Jerry Buck Inman - consistently expressing an intent and desire to be sentenced by Judge Miller rather than a jury in a capital proceeding - is not made into a "conditional plea" by the interruptions by defense counsel during the plea process that an issue on jury sentencing was preserved for appeal - despite the trial court's refusal to conclude that it was preserved and prosecution's protestation that it was waived from appeal. When Inman ultimately declared that "I just want to enter the plea and get it over with and go on from here with the sentencing phase" after the court declared he did not want a plea dependent upon any claimed right to raise the jury issue on appeal, he entered an unconditional plea to murder.

In his first argument, the Appellant, through appellate counsel, contends he is entitled to have his guilty plea to murder vacated because he characterizes it as a conditional guilty plea because during the plea his defense counsel declared the trial court could not give an opinion on whether the jury sentencing after a guilty plea issued was preserved for appeal or how the Supreme Court would rule. Four salient issues come into play. First, S.C. Code Ann. § 16-3-25 (1976), expressly creates a mandatory appeal in death penalty cases to the South Carolina Supreme Court, including guilty pleas. Accord, State v. Shaw, 273 S.C. 194, 255 S.E.2d 799 (1979).[10] Second, this Court has held that a guilty plea waived jury sentencing as a matter of state

[10] The Court has addressed appeals in the following guilty plea cases where death sentences were given. See also; **State v. Patterson** , 278 S.C. 319, 295 S.E.2d 264 (1982) (conviction and sentence reversed and case remanded); **State v. Truesdale** , 278 S.C. 368, 296 S.E.2d 528 (1982) (conviction and sentence reversed and case remanded); **State v. Wilson**, 306 S.C. 498, 413 S.E.2d 19 (1992) (sentence of death affirmed).**State v. Ray**, 310 S.C.431, 427 S.E.2d 171 (1993) (conviction affirmed, sentence reversed and case remanded for new resentencing proceeding).**State v. Passaro,** 350 S.C 499, 567 S.E.2d.862 (SCSCT July 29, 2002) (affirmed waiver of right to appeal and held a sentencing review). **State v. Downs**, 361 S.C. 141, 604 S.E.2d 377 (Oct. 25, 2004)(affirmed convictions and death sentence), rehearing denied Dec. 14, 2004. Cert not sought. **State v. Crisp**, 363 S.C. 412, 608 S.E.2d 429 (S.C. Jan. 24, 2005) (reversed entry of plea based upon plea judge's comments); **Mahdi (Mikal) v. State**, 383 S.C. 135, 678 S.E.2d 807 (June 15, 2009) (affirm conviction and sentence on writ of certiorari from conviction).**State v. Allen (Quincy Jovan)**, 386 S.C. 93, 687 S.E. 2d 21 (Nov. 16, 2009), cert den. May 24, 2010 (affirmed).

law, citing § 16-3-20(B). **State v. Patterson** , 278 S.C. 319, 295 S.E.2d 264 (1982) (conviction and sentence reversed and case remanded); **State v. Truesdale** , 278 S.C. 368, 296 S.E.2d 528 (1982) (conviction and sentence reversed and case remanded); **State v. Downs**, 361 S.C. 141, 604 S.E.2d 377 (Oct. 25, 2004)(affirmed convictions and death sentence),.**State v. Allen (Quincy Jovan)**, 386 S.C. 93, 687 S.E. 2d 21 (Nov. 16, 2009), cert den. May 24, 2010 (affirmed). Third, he abandoned the issue in the appeal that he claimed was preserved for appellate review - entitlement to jury sentencing at the entry of a guilty plea in a capital case. Finally, during the plea colloquy, despite the comments of his counsel attempting to qualify the trial judge's statement, Jerry Buck Inman ultimately made unqualified and unequivocal statements expressing both a desire to plead guilty and a desire and intent to be sentenced by the particular trial judge rather than a jury.[11] Because the entry of the plea was unconditional - despite the fact that an appeal exists and is mandatory in capital proceedings, the plea to murder should be affirmed.

How the Issues Were Presented Below

At the August 19, 2008 proceeding, Judge Miller questioned Inman concerning his desire to enter a guilty plea and be sentenced by Judge Miller rather than a jury. R. 927, Aug. 19, 2008 Tr. p. 17. Inman declared he was there "to enter a guilty plea." Id. R. 927, Tr. p. 17, l. 4. Judge Miller went through the elements and punishment for the charges of murder, criminal sexual conduct in the first degree and kidnapping. R. 927, Id. Tr. 17-19. He stated he was there to plead guilty. Id. R. 929, Tr. p. 19, ll. 10-13. Particularly, Judge Miller made the following inquiry:

[11]Respondent would note that the alleged "condition" was abandoned in this appeal. The Appellant is not raising a claim that he had any constitutional right to have jury sentencing from his guilty plea. To the contrary, he concedes that he is not entitled to jury sentencing. See Initial Brief of Appellant, p. 9, ¶ 2. (The court will have noted the undersigned do not raise this issue on appeal).

[20]THE COURT: That it would be a bifurcated proceeding with a jury that would hear the guilt phase and, also, the same jury would hear then if a guilty verdict was returned, they would hear the sentencing phase and make a decision about that.

Do you understand that?

DEFENDANT INMAN: Yes, sir.

THE COURT: Do you understand that if you enter a plea of guilty that you waive and give up your right to a jury trial to have a jury decide the guilt phase? And, by doing that, you give up your right to have a jury decide the sentencing phase.

Do you understand that?

MR. BANNISTER: Do you understand that?

DEFENDANT INMAN: Yes, sir.

THE COURT: Okay. And do you understand that you could impanel a jury, and that you could get in front of that jury in the guilt phase and admit your guilt and have that jury decide your sentence?

Do you understand that?

MR. BANNISTER: Judge, I would object to that question, the way it's asked. I don't believe he's got that right, if I'm understanding it the way you're asking it.

THE COURT: Well, I don't want to be - - make it [21]confusing.

But if you were to impanel a jury in the guilt phase, you could testify and admit to your guilt in front of that jury and have that jury then in a sentencing phase sentence you.

Do you understand that?

DEFENDANT INMAN: Yes, sir.
THE COURT: Okay. And do you - -

MR. BANNISTER: Judge - -

THE COURT: - - understand by doing that that you give up that right?

Yes, sir, Mr. Bannister.

MR. BANNISTER: Judge I need to, I guess at least, put on the record, at this point, that in March, we raised the issue that the Defendant sought to enter a guilty plea, as he's doing today, and then proceed to a jury trial sentencing. And we believe that that was an option that he should be entitled based on the fact of his Sixth Amendment right to a jury trial, his Eighth Amendment right to present mitigation, and his Fourteenth Amendment right to present a complete defense.

You determined, prior to this proceeding, that he did not have that option. I believe that that issue has been preserved for review. But to the extent that I need to state it again for the record, I'm saying that we raised that [22]issue and we believe it's part of this case no matter what going forward. But that's been part of my explanation to him about where we go.

So, with that on the record, go ahead.

THE COURT: Well, I want to tell you, Mr. Inman, that, in South Carolina, we do not have conditional guilty pleas. And the law is very clear about that. Whether or not this issue is preserved for appeal is not something that I will address, and I have no control over it.

Do you understand that?

DEFENDANT INMAN: Yes, sir.

THE COURT: All right. Now, and I would tell you that there are - - I have no - - and I don't have an opinion about whether or not what your attorney claims - - what he thinks about the preservation of that issue for appeal is. But I can tell you that the law is very clear. There are no conditional pleas. And if you enter a plea of guilty, you can't do it on a condition.
Do you understand that?

You can't hold something out in abeyance by entering this guilty plea.

Do you understand that?

DEFENDANT INMAN: Yes, sir.

THE COURT: All right.

MR. BANNISTER: And, Judge, I guess what I want to [23]say is, I want to be sure that there's a clear distinction on the record between what you're asking him to waive, which is his ability to stand up in front of a jury and tell them he's guilty versus going through a formal guilty plea and then proceeding to a jury trial having entered the guilty plea. He cannot do that. But I think the way the question was worded to him, it sounded like that was an option. And it's simply not. I mean - -

THE COURT: Well, I don't want to get into confusing semantics. But if you enter this plea and I accept it, you are giving up your right to have a jury impaneled.

And let me tell you, there are significant rights which attach to the selection of a jury in a capital case. And part of that is already in place. A lengthy and comprehensive juror questionnaire has been sent to potential jurors. That has been provided to your counsel and to the State. They are able to learn many things about jurors. And, additionally, at the time, if you were to go forward with a jury tail, you and the State would have an opportunity to individually question potential jurors to make a - - to find out information about whether or not they could follow the law and be impartial in your case.

Do you understand that?

DEFENDANT INMAN: Yes, sir.

THE COURT: And if you enter this plea and I accept this plea, you are giving that right up.

Do you understand that?

DEFENDANT INMAN: Yes, sir.

THE COURT: All right. And are you doing this of your own free will?

DEFENDANT INMAN: Yes, sir.

THE COURT: Okay. Has anybody - - this is what you want to do?

DEFENDANT INMAN: Yes.

THE COURT: It's not at someone elses (sic) suggestion; is that correct?

DEFENDANT INMAN: Yes, sir.

THE COURT: It is at someone elses (sic) suggestion?

DEFENDANT INMAN: No. I mean, that's correct.

R. 930-34, August 19, 2008 Tr. p. 20, l. 1 - p. 24, l. 15.

Judge Miller then went over the other specific constitutional rights Inman was waiving including, the burden of proof beyond a reasonable doubt, the right of confrontation and cross-examination, and the right to challenge seized evidence. Id. R. 934-35, Tr. 24-25.

Inman then advised the Court that he still desired to enter his plea and admitted that he was guilty. R. 936, Tr. p. 26, ll. 1-4.

The State, through Solicitor Ariail, next made a statement concerning the factual basis for the pleas based upon the stipulated facts. R. 937, Tr. 27-41. After the recitation of facts, Inman agreed to the stipulated facts. R. 952, Tr. p. 42, ll. 1-12. At that point the following occurred concerning the jury trial issue:

[42]THE COURT: I just want to - - do you understand that if I accept this plea, you are giving up your right to have a jury make this determination on your sentence with respect to the murder case?
Do you understand that?

DEFENDANT INMAN: Yes.

THE COURT: And - -

MR. BANNISTER: Judge, for the record, since we're going back into the jury trial rights, let me just say again that we previously made a motion - -

THE COURT: It's well documented and I - -

MR. BANNISTER: I think that I have to restate it, though, just for the record.

THE COURT: All right. Go ahead.

MR. BANNISTER: He's been put in a position where he's got to make a choice between Constitutional provisions, one is the Fourteenth Amendment, Sixth Amendment, and Eighth Amendment right to present a complete defense, which would include the mitigation of his guilty plea. The other is the right to a jury trial and have a sentencer determine what sentence he would receive. He has to choose between those two.

We say the choice itself is unconstitutional. And we - - I'm just stating that again for the record. You've already decided that that's not the case. And I just want to make sure it is preserved.

Thank you, Your Honor.

THE COURT: Now, again, Mr. Inman, let me tell you that the law in South Carolina is clear that there are no conditional guilty pleas.

Do you understand that?

DEFENDANT INMAN: Yes, sir.

THE COURT: And whether or not that issue is preserved for appeal is not for me to decide.

Do you understand that?

DEFENDANT INMAN: Yes, sir.

THE COURT: An Appellate Court will make that determination, the Supreme Court of the State of South Carolina.

Do you understand that?

DEFENDANT INMAN: Yes, sir.

THE COURT: But you understand that a jury's verdict would have to be unanimous.

Do you understand that?

DEFENDANT INMAN: Yes, sir.

THE COURT: All 12 persons on the jury would have to agree to a verdict.

Do you understand that?

DEFENDANT INMAN: Yes, sir.

THE COURT: And you understand that if one of the 12 people couldn't make up their mind that the law would require that the sentence would be life.

Do you understand that?

DEFENDANT INMAN: Yes, sir.

THE COURT: And you're giving that right up and you're requesting that the Court be the fact finder and the determiner of the sentence; is that right?

DEFENDANT INMAN: Yes.

THE COURT: Has anybody made any promise, prediction, or prophesy to you about what they think my sentence might be?

DEFENDANT INMAN: No, sir.

THE COURT: And I want to tell you right now that this is the first time I've been exposed to these facts, and that I have not made up my mind, and that I will listen fairly and impartially to everything that's presented to me.

Do you understand that?

DEFENDANT INMAN: Yes, sir.

THE COURT: But, at the same time, you don't get the right to send me a questionnaire, and you don't get the right to question me the way you would jurors.

Do you understand that?

DEFENDANT INMAN: Yes, sir.

THE COURT: **And you still want to go forward?**

DEFENDANT INMAN: Yes, sir.

THE COURT: Is there any other questions that should be propounded to Mr. Inman, at this time, that anyone can think of?

MR. ARIAIL: The only thing I would suggest, Your Honor, I would like to put on the record from the State's perspective - - and I think based on the current events taking place in some related cases - - the Court has made no indication to the State of any - - any indication as to which sentence would be appropriate. Therefore, it is our understanding that we are moving forward with the Court able to conclude to impose either sentence available based upon what your determination of the facts is.

THE COURT: All right. Do you understand what he just said?

DEFENDANT INMAN: Yes, sir.

THE COURT: Is there any other questions that need to be propounded that you can think of, Mr. Bannister?

MR. BANNISTER: No, sir, Your Honor.

THE COURT: Mr. Inman, do you have any questions you want to ask of me?

DEFENDANT INMAN: No.

THE COURT: All rights. Well, I'm going to accept this plea to these four cases as being freely, voluntarily, and intelligently made with the advice of three very competent attorneys with whom Mr. Inman states he is well satisfied. And I find there is a substantial factual basis for the plea.

R. 952-56, Tr. p. 42, l. 13 - p. 46, l. 15.

After the plea was entered, Solicitor Ariail expressed a concern that defense counsel's injection of his comments about preservation of an appeal was an attempt to make it a conditional plea. He asked Judge Miller to direct to Mr. Inman a specific question "does he understand by waiving and giving up those rights that he is, from the law's perspective waiving the right to be tried by a jury in the sentencing phase?" R. 957, Tr. p. 47, ll. 3-14. Defense counsel Bannister

objected to the question. R. 957, Tr. p. 47, l. 15. The Court suggested that he had already asked that question, but not in the specific language the State requested. R. 957, Tr. p. 47, ll. 16-19.

The following colloquy continued:

[47]MR. BANNISTER: Well, that's saying the condition here is that he give up an appellate right that he would have. Every defendant that appears in court still has the right to appeal his guilty plea. And so - -

THE COURT: And that's absolutely correct.

MR. BANNISTER: So the condition that they're asking to put on there is one from the State, that is that he [48] give up rights that he would normally otherwise have.

THE COURT: That is not what they're saying. But what the law - - And, Mr. Inman, I direct this to you. Because in the end, you get advice from your attorneys. But this decision is yours. I don't - - the law is clear in South Carolina that you cannot enter a conditional guilty plea, which means you cannot plead guilty and reserve some issue with respect to the guilt phase for the Appellate Courts to rule on.

Mr. Bannister may disagree with me.

MR. BANNISTER: And I want to state, for the record, that I do.

THE COURT: Okay.

MR. BANNISTER: And I have advised him that I believe this issue is preserved and will survive the guilty plea.

THE COURT: Mr. Inman, I want to tell you that we disagree on that with respect to that, that by your entering this plea that it has - - I believe - - and, of course, I'm not the final word on this issue, because the Supreme Court will be the final word. But I believe that you're giving up that right, so.

And I'll ask you again, because if you want - -

MR. BANNISTER: I'm sorry, Your Honor. Are you giving him - - I mean, I just have to object. Because I [49]think, at this point, what you are doing is giving your opinion about what an Appellate Court might do,. And I think that's entirely inappropriate. I mean, I object to - - I don't think you can

give him an opinion about what an Appellate Court might do with that issue.

THE COURT: Mr. Bannister, I've tried to be very plain that I don't have an opinion about what they would do.

But I want to tell you, Mr. Inman, and this - - without arguing legal semantics with you, South Carolina, clearly, states that they do not allow conditional guilty pleas. so if there is some question in your mind, I would - - about this issue, I would urge - - I would allow you to withdraw your plea at this time. And we've got the jury coming. We can go forward with that. You can handle it in that fashion.

I just want - - Mr. Bannister may be convinced that he's got An appellate issue. And I don't know whether he does or not. but I'm telling you I believe the law in South Carolina is clear that guilty pleas are unconditional.

MR. BANNISTER: I guess - - what is the condition, though, that you're telling him that the - - what is the conditional part of this plea?

I mean, he has unconditionally entered his guilty [50]plea. We're having an argument with - - I guess the three of us are trying to decide whether the issue I've raised - - or that we"ve raised prior to this is or is not appealable. I'm trying to see what - - what is the condition exactly that you're asking him to give up?

In general, I agree with you. He can't have a conditional guilty plea. But what, specifically, is the condition that he is presently - -

THE COURT: Mr. Bannister, I'm not going to get into a legal argument with you on the record about this issue. Your client has entered the plea. I don't want him to do it - - <u>I want him to be aware that you cannot reserve - - I mean, you can go over the law with him about what the courts review when they look at guilty please</u>.

MR. BANNISTER: That's right.

And I think that's my province, which is why I have this - -

THE COURT: **<u>Well, if this is a big issue, then I'm about to not accept the plea</u>.**

MR. BANNISTER: **Well, all I can tell you is that I believe he's entered an unconditional plea at this point**. And I'm having a hard time seeing what is the condition that he's put on. I mean, I agree with you that it's - - that he cannot enter a conditional plea. So on that, we're all in agreement.

[51]THE COURT: Well, Mr. Inman, clearly, there is some disagreement about the preservation of this issue that your attorneys have raised. I'm not involved in it. And I don't have an opinion about it. Whether or not Mr. Bannister can do that successfully is something that the Supreme Court will answer. The State does not believe that he can. He believes that he can.

But I don't want you - - I want your plea to be - - you've got to understand it's unconditional, that you enter that, and whether or not that happens on appeal is really of no concern here. I want your plea to not be dependent on that issue.

So I'd ask you now, is your plea predicated on that issue? Is it dependent on that issue?

MR. BANNISTER: If you want a moment, we can talk.

DEFENDANT INMAN: We need to talk.

R. 957-961, Tr. p. 47, l. 19 - p. 51, l. 16.

After the break, a conference was held between Inman and his defense counsel. R. 961, Tr. p. 51, ll. 17-25. The Court returned to the record. At that point, Mr. Inman declared that he wanted to continue on with the plea proceedings. R. 962, Tr. p. 52, ll. 1-3.

THE COURT: And while this may not be a - - all I'm trying to determine is that your entry of this plea is not based on or predicated on some issue that you think you might prevail on or might not prevail on in an Appellate Court.

Do you understand what I'm saying to you?

DEFENDANT INMAN: Yes, Sir.

THE COURT: That the only basis for the plea should be you're knowing - - your knowledge of your rights, intelligent nature of your

plea, your ability to understand what's going on, and your admission to the facts that you believe the State could prove against you. And whether or not you can prevail on an appellate issue should have nothing to do with your entry of this plea.

Do you understand that?

DEFENDANT INMAN: Yes, Sir.

THE COURT: Okay. So whether or not you're successful or not successful at some higher court on some issue that might be raised should have nothing to do with why you're entering this plea.

Is that clear?

DEFENDANT INMAN: Yes.

R. 962, Tr. p. 52, ll. 4-25. More particularly, Judge Miller asked Inman the following:

THE COURT: All right. So tell me, in your own words, if you would, sir, why are you entering this plea?

DEFENDANT INMAN: I just want to enter the plea and get it over with, just go on from here with the sentencing phase.

THE COURT: All right. Do you have any questions you want to ask me about any of your rights?

DEFENDANT INMAN: No.

THE COURT: And you have had enough time to speak with your attorneys about the issue of the jury trial versus a guilty plea; is that correct?

DEFENDANT INMAN: Yes.

THE COURT: Do you think you fully comprehend and understand all the differences?

DEFENDANT INMAN: Yes.

THE COURT: And this is what you want to do?

DEFENDANT INMAN: Yes, sir.

R. 963, Tr. p. 53, ll. 1-17.

ANALYSIS

To be valid, a guilty plea must be unconditional. *Easter v. State*, 355 S.C. 79, 584 S.E.2d 117 (2003). As this Court recently stated, it is axiomatic that conditional pleas may not be accepted in South Carolina. *See In re Johnny Lee W.*, 371 S.C. 217, 220, 638 S.E.2d 682, 684 (2006); *see also State v. Peppers*, 346 S.C. 502, 504, 552 S.E.2d 288, 289 (2001) (court could not accept guilty plea where appellant conditioned guilty plea upon right to appeal constitutionality of indictment); *State v. Truesdale*, 278 S.C. 368, 370, 296 S.E.2d 528, 529 (1982) (conditional plea is a practice not recognized in South Carolina and a practice of which this Court expressly disapproves). If "an accused attempts to attach any condition or qualification" to a guilty plea, then "the trial court should direct a plea of not guilty." *Truesdale*, 278 S.C. at 370, 296 S.E.2d at 529.

As to whether a plea is conditional is a question of fact. In Truesdale, the Court conditional that a guilty plea was conditional where it was conditioned upon a continuing assertion made before the plea that the jury was unconstitutionally selected in an equivocating statement. The appellant in Truesdale sought to reserve his right to raise in the appeal issues concerning a change of venue, a limitation on the use of peremptory challenges and certain restrictions on disqualification of the jurors for cause. There, the claims were prior claims of constitutional rights or waivers which happened before the plea. The Court stated that it was improper for appellant to seek to preserve the constitutional issues set out while entering a guilty plea. It was settled law that a guilty plea acts as a waiver of all *prior* claims of constitutional rights. *Truesdale.*

In *State v. O'Leary*, 302 S.C. 17, 393 S.E.2d 186 (1990), the Court determined that an attempt to condition a guilty plea for driving while under suspension on a reserved right to appeal the constitutionality of a statute regarding notice to drivers who licenses are suspended was an improper conditional plea and should be vacated. The "condition" that the appellant sought to challenge undermined the factual guilt of the appellant for the crime itself. The court reasonably found this condition to the guilty plea improper.

In *State v. Peppers*, supra, the appellant after a guilty plea to child abuse and neglect sought to appeal raising constitutional challenges against the neglect statute based upon her actions concerning an unborn child. At the plea, her counsel sought to preserve a motion to quash the indictment before the plea. Therein the court claimed he was protected on the record.[12] The court rejected her plea counsel attempt to preserve claims related to the merits of her guilt based upon claims concerns notice and viability.

In *State v. Downs*, the court found that Downs had not entered a conditional plea when he deferred a decision on whether to present evidence of mental illness. The court found that this was only a sentencing issue and did not go to guilt - thus it was unconditional. In *Easter v. State*, the court similarly concluded that the guilty plea made to a series of crimes was not conditional because he sought to challenge the application of the habitual offender statute for a life without parole sentence. Finding that he did not dispute his guilt, the issue concerning a sentence enhancement was wholly separate from his guilty plea. In *State v. Johnny Lee W.*, the Court concluded that the juvenile's plea should not have been accepted because at the plea the juvenile

[12]As shown above, Judge Miller was not declaring that Inman's counsel was "protected" on the issue as the plea was entered. To the contrary, he consistently stated that while his counsel seemed to believe he was protected the state did not. Further, he specifically and consistently stated that Inman was not entitled to jury sentencing in a guilty plea and would be sentenced by a judge.

sought to reserve his right to appeal the denied issue of the constitutionality of whether the statute for disturbing schools was too broad which would undermine his guilt on the offense - correctly vacating the pleas as conditional.

Here, the pleas were not "conditional." Unlike the cases where conditional pleas were found, nothing in Inman's plea could be seen as any attempt to undermine any conclusion of factual guilt. Further, unlike other "conditional" cases, nothing was sought to be preserved concerning any claimed constitutional violation which occurred prior to the plea, such as errors in juror qualification, a denial of a change of venue, or the admissibility of inculpatory statements. The guilty plea here was freely and voluntarily entered, knowing that he was admitting the crimes unconditionally. Further, he was consistent in his affirmation that by entering his plea, he was agreeing to be sentenced by the judge, not a jury of 12.

Instead, the record reveals it was counsel's attempt during the guilty plea to assert that an issue of jury sentencing in a guilty plea was preserved for an appeal - although the trial judge expressly asserted that there are no conditional pleas and that if he enters a plea he was giving up his right to have a jury impaneled and that he could not state that the jury issue was preserved. R. 932-33, 952-56, 958-961, Tr.p. 22-23, 42-46, 48-51. Particularly, the ultimate responses by appellant Inman, prior to the acceptance of the plea after consultation on whether the plea was predicated upon any issue seeking to preserve the jury sentencing issue - which the court stated that if it's a big issue , then he was not about to accept the plea - reflected he was not entering a conditional plea and sought to have Judge Miller sentence him rather than a jury - an not dependant on that issue of preservation:

THE COURT: **All right. So tell me, in your own words, if you would, sir, why are you entering this plea?**

DEFENDANT INMAN: **I just want to enter the plea and get it over with, just go on from here with the sentencing phase.**

R. 963, Tr.p. 53.

Finally, it must be pointed out that the Appellant is expressly not raising any constitutional claim of a right to jury sentencing in guilty pleas. Assuming that it was an attempt to preserve the guilty plea - jury sentencing issue, it was abandoned in this appeal. Since he is not seeking to raise the issue, he was not trying to invoke the condition. This abandonment is consistent with Inman's ultimate statement to the plea judge.[13]

In conclusion, Judge Miller properly concluded that the guilty plea was not dependant or conditioned upon any asserted claimed by counsel that he could raise an issue about jury sentencing on the mandatory appeal. Instead, it was based upon Inman's desire to plead guilty and be sentenced by Judge Miller - a decision he consistently expressed during the plea process. Judge Miller did not err in accepting the guilty plea.

[13]In the appeal, appellant complains that the trial judge's failure to specifically declare that the jury sentencing issue could not be raised in an appeal amounted to an erroneous statement of existing law. He cited *State v. Owens*, 362 S.C. 175, 607 S.E.2d 78 (2004) in support of this assertion. However, in *Owens*, it addressed different comments by the sentencing judge concerning what a jury would do. Here, the judge comments were consistently that the entry of the plea waived his jury trial rights and that the issue of whether any claim was preserved was for the appellate court. Judge Miller's response was not an erroneous statement of existing law.

II. A sentencing mistrial and recusal of the Solicitor's Office was not required when during voir dire concerning the qualifications of an out of state social worker, that there was a licensing statute in South Carolina that carried civil and criminal sanctions where the trial court concluded that the Solicitor comments were inappropriate but did not rise to the level of intentional and deliberate misconduct and did not prejudicially effect the substantial rights of the defendant since the witness was granted immunity immediately by the prosecutor and was willing to testify in the continued hearing and did testify.

A new sentencing proceeding is not warranted where Dr. Marti Loring ultimately agreed to testify at the April 2009 hearing. Certain facts support the sentencing judge's rejection of the mistrial request:

- After Judge Miller qualified Dr. Loring, Solicitor Ariail *immediately* gave Dr. Loring immunity for any actions relating to the defense of Mr. Inman and her testimony. R., September 8, 2008 Tr.p. 328-333.
- Her initial refusal to testify decision during the September 2008 proceeding was done after she consulted with independent counsel - Bill Godfrey - and acted upon his advice concerning her potential culpability under the social worker licensing statutes and the effect it could have on her Georgia license. R., Sept. 8, 2008, Tr.p. 336, l. 16-24.
- Although Solicitor Arial had apprised Judge Miller of the existence of both civil and criminal sanctions for a failure to comply with the social worker licensing requirements for out of state license, he never indicated that he *would* seek criminal sanctions. R., Sept. 8, 2008, Tr. p. 328, l. 11-23, p. 33, l. 24- p. 331, l. 2. Concerning the April 2009 material witness subpoena, Judge Miller had signed an order certifying that she was a material witness and did not revoke the order upon request during the April 2009 hearing. R. 1034, April 14, 2009, Tr.p. 14, l. 5-11.

The Appellant contends that the prosecution's actions during the qualification of Dr. Marti Loring, a Georgia licensed forensic social worker, by challenging her qualifications because she had not complied with the South Carolina licensing requirements for an out of state licensed social worker and advising the judge that it carried civil and criminal sanctions was prosecutorial misconduct that mandated a mistrial and recusal of the 13th Circuit Solicitor's Office. Upon review of the applicable statutes concerning the licensing of social workers and her actions in South Carolina, Dr. Loring attempted to invoked her Fifth Amendment rights ***after receiving legal advice from independent counsel Bill Godfrey*** - even after the State had agreed to grant immunity concerning her actions in defense of Inman. Although Judge Miller ultimately determined that Solicitor Ariail erred in his comment to the trial court concerning the potential sanctions for non-compliance with the state statutory licensing requirements, the plea judge concluded that a mistrial was not mandated nor was removal of the Solicitor's Office required.

In *Webb v. Texas,* 409 U.S. 95, 98, 93 S.Ct. 351, 34 L.Ed.2d 330 (1972), the Supreme Court established a standard for finding a constitutional violation for witness intimidation: "the unnecessarily strong terms used by the judge could well have exerted such duress on the witness' mind as to preclude him from making a free and voluntary choice whether or not to testify." Similarly, *Webb* was applied to a case where the prosecutor sent a Secret Service agent to communicate *ex parte* with a potential witness and threaten prosecution if he testified. "[T]he Government's action here substantially interfered with any free and unhampered determination the witness might have made as to whether to testify and if so as to the content of such testimony." *United States v. Thomas,* 488 F.2d 334, 336 (6th Cir.1973). The prosecutor's conduct in the instant case simply does not rise to the level of intimidation present in *Webb* and *Williams.* Here, the prosecutor advised the judge during the qualification of the Georgia social worker of the

statutory requirements for licensing and that it carried civil and criminal sanctions. After qualification as an expert, the Solicitor then granted immunity to the witness for her actions in this case. The judge then proceeded to briefly question the witness and quickly allowed independent counsel to advise her of her rights. However, after the consultation with independent counsel, she initially asserted a Fifth Amendment claim. At that stage, since independent counsel had intervened and gave advice concerning potential criminal liabilities, the act by the prosecutor cannot be seen as constitutionally prejudicial. More powerfully, when court reconvened months later, Dr. Loring was willing to testify and did testify as a court witness.

The prosecutor's conduct was not unconstitutional, especially considering the ethical obligation, imposed on prosecutors by the ABA's model guidelines:

> to advise a witness who is to be interviewed of his or her rights against self-incrimination and the right to counsel whenever the law so requires. It has been held proper for a prosecutor to so advise a witness whenever the prosecutor knows or has reason to believe that the witness may be the subject of a criminal prosecution.

ABA Standards for the Administration of Criminal Justice § 3-3.2(b).

Regardless of the prosecutor's motives or the propriety of waiting until the witness was called to the stand to inform the court of his concerns, the trial judge properly applied Supreme Court precedent in its holding that the prosecutor did not commit error requiring a mistrial and/or recusal. Accord, *Davis v. Straub,* 430 F.3d 281 (6th Cir 2005). See also, *Annotation, Admonitions against perjury or threats to prosecute potential defense witness, inducing refusal to testify, as prejudicial error,* 88 ALR 4th. 388 (1991). [14]

HOW THE ISSUE WAS RAISED BELOW

[14]It should be noted that the annotation makes a distinction concerning prosecutorial statements contrasting statements that they *would* bring criminal charges if the witness testified contrasted

On September 10, 2008, Dr. Marti Loring, a LCSW licensed clinical social worker and board certified expert in traumatic stress was called to testify. R., September 8, 2008 Tr.p. 324-325. Evidence was presented that Dr. Loring had done research therapy focused on abuse trauma. She stated that she had a Masters degree from Bryn Mawr College School of Social Work and a PhD Sociology with a major in Social Psychology from Emory University. R., Sept. 8, 2008 Tr.p. 325. She stated that she had testified in South Carolina before and courts in other states. She stated that she had been previously qualified in areas of abuse, trauma, social histories and forensic interviewing. Id. R., P. 326. She declared that she had never failed to be qualified as an expert in those areas. Id. Dr. Loring was then offered as an expert in the field of trauma, abuse, forensic and therapeutic interviewing and as a social historian in capital sentencing cases. Id. R., Tr.p. 327, ll. 1-3.

Solicitor Ariail's Voir Dire of Dr. Loring.

Then Solicitor Ariail voir dired her on whether as part of her services in this case had she performed services under her licensed clinical social worker status, which she admitted that she did by interviewing Inman and having conversations with him. Id. Tr.p. 327, l. 9-17. She admitted that a fee for those services was being paid to the Center for Mental Health, but denied that she was getting any money for her services. Id. R., Tr.p. 327, ll. 18-25. She declared that she was not licensed in South Carolina. Id. R., Tr.p. 328, ll. 1-3. However, she stated that "custom" is that her

---

with statements that they potentially *could* bring criminal charges. Here, the prosecutor granted immunity - wholly removing the possibility of prosecution in this case. In fact, he stated that he was bring the statute to the court's attention for the purpose of voir dire "and that's as far as its gotten. And whether or not I present an indictment is a totally separate issue," in response to the claim that she will need to assert the Fifth Amendment by answering the questions the defense would propound to ask. Id. R., Tr.p. 330-331. The prosecutor then granted immunity. Id, R., Tr. p. 333.

license is honored across the country whenever she goes into different states. Id. R., Tr.p. 328, ll. 7-10.

Solicitor Ariail then directed Judge Miller's attention to S.C. Code Ann. § 40-63-200 which concerned the unauthorized practice of social work.[15] Id. R., Tr.p. 328, l. 11-14. He next noted that a person practicing social work within the state must be licensed prior to performing the services, citing specifically S.C. Code Ann. § 40-63-30. R., September 8, 2008 Tr.p. 328-329. He noted to Judge Miller that it carried both civil and criminal penalties for violation. He stated that based upon that, he would submit that she is "not qualified as an expert in this state to testify or render those services until she gets licensed." R., Sept. 8, 2008 Tr.p. 328, ll. 19-23. Judge Miller asked that he be provided with a copy of the statute after Solicitor Ariail referred to it. Id. R., Tr.p. 328, l. 25.

Defense Counsel Bannister's Response

In response, defense counsel Bannister mistakenly cited S.C. Code "§ 40-63-130 (2)" asserting that it stated that "any person licensed or registered to practice social work under the laws of another state that imposes substantially the same requirements as this chapter for practicing social work on the satisfactory presentation of evidence may practice." R., Sept. 8, 2008 Tr.p. 329, l. 12-13. However, defense counsel neglected to point out two salient facts - that

---

[15] **§ 40-63-200. Unauthorized practice; penalty**

(A). A person who practices or offers to practice as a social worker in this State in violation of this chapter or a regulation promulgated under this chapter or who knowingly submits false information to the board for the purpose of obtaining a license is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned for not more than one year, or both.

(B). A person violating any other provision of this chapter or a regulation promulgated under this chapter is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned for not more than one year, or both.

the statute required that the out of state social work licensee to present the "evidence" to the State Board of Social Work Examiners - *which had not been done by Dr. Loring* - and that the cited § 40-63-130 had been rewritten in 2002 and the cited requirements were abrogated from what Mr. Bannister misstated to the sentencing court, likely due to an apparent failure to review the supplements to the Code and amendments and revisions to the section.[16] Counsel Bannister stated

[16]The applicable statute in 2008 set forth the following conditions precedent concerning and out of state social worker from practicing social work in South Carolina without a South Carolina license:

§ 40-63-30. License as prerequisite to practice or offer to practice; providing social work services through telephone or electronic means.

(A) No individual shall offer social work services or use the designation "Social Worker", "Licensed Baccalaureate Social Worker", "Licensed Masters Social Worker", "Licensed Independent Social Worker--Clinical Practice", "Licensed Independent Social Worker--Advanced Practice", or the initials "LBSW", "LMSW", or "LISW" or any other designation indicating licensure status or hold themselves out as practicing social work or as a Baccalaureate Social Worker, Masters Social Worker, or Independent Social Worker unless licensed in accordance with this chapter.

(B) A person providing social work services to a client in this State, through telephonic, electronic, or other means, regardless of the location of the social worker, who is not licensed in this State, is practicing without a license.

S.C. Code § 40-63-30. 2002 S.C Acts and Joint Resolutions, Act 189, §1. (Effective March 12, 2008).

Current South Carolina law addresses out of state licenses in § 40-63-260 and 280. In particular, in pertinent part, these state:

§ 40-63-260. Applicants licensed in another jurisdiction; licensure; equivalent designations recognized.

(A) In order for a social worker currently licensed in another jurisdiction to obtain a license as a social worker in this State, the applicant must:

(1) have submitted a written application in the form prescribed by the board;

(2) be at least twenty-one years of age;

(3) be of good moral character;

(4) have received a baccalaureate, masters, or doctorate degree in social work from a program accredited by a nationally recognized accrediting body for social work programs, or from a social work program

whose standards are at least equivalent to the minimum standards required by the nationally recognized accrediting body as approved by the board;

(5) have successfully passed an examination prescribed by the board;

(6) have presented to the board evidence that all social work licenses possessed by the applicant are current and in good standing;

(7) have presented to the board proof that no professional licenses granted to the applicant in any other state have been suspended, revoked, or restricted for any reason except nonrenewal or for the failure to obtain the required continuing education; and

(8) have paid all applicable fees specified by the board.

(B) An applicant for licensure under this section is only eligible for licensure at the equivalent designation recognized in the jurisdiction in which he or she is currently licensed.

S.C. Code Ann, § 40-63-260(as amended March 12, 2002). Importantly, the General Assembly revised the erroneously cited §40-63-30 and addressed person exempt from licensure requirement in § 40-63-290. In particular, its states:

§ 40-63-290. Persons exempt from licensure requirement.

Nothing in this chapter prevents:

(1) members of the clergy and licensed, registered, certified, or qualified professionals including, but not limited to, physicians, elementary or secondary teachers, nurses, psychologists, licensed professional counselors, licensed marriage and family therapists, and licensed psychoeducation specialists and attorneys from practicing their professions and delivering similar services within the scope of their respective practices ***provided they do not hold themselves out to the public by any title or description as being social workers***;

(2) employees of licensed hospitals in this State from performing services commonly within the definition of social work if the services are performed within the course of and scope of their employment as an employee of the hospital, and the employee is not identified in any way as a social worker;

(3) persons from rendering services that are the same as or similar to those within the scope of practice provided for in this chapter **if the person receives no remuneration from any source for the rendering of the service and the person is not identified in any way as a social worker;**

(4) students who are engaged in field placements or other closely supervised practice while enrolled in accredited programs of study leading to social work degrees from practicing social work;

(5) employees of the State of South Carolina from performing services commonly within the definition of social work if the services are performed within the course of and scope of their employment with the State, and if he has been specifically

trained to perform these services **and the employee is not identified in any way as a social worker;**

(6) social workers so licensed in another jurisdiction may, after notice to the board, practice within the scope of their licenses during or immediately

that Dr. Loring was licensed in Georgia and he opined that was sufficient to qualify her. Id. R., Tr.p. 329, ll. 19-23. Counsel made a general reference to an administrative order by the Chief Justice addressed the issue. He complained that the specter it raises by the Solicitor injecting that the witness would potentially be subject to criminal sanctions from matters she would testify about may put her in a position to assert her Fifth Amendment privilege.

Counsel Bannister complained that this was an inappropriate attempt to intimidate the witness with the authority that the Solicitor has to indict. Id. R., Tr.p. 330, ll. 14-21.

Solicitor Arial's Reaction.

In response, Solicitor Ariail stated that he was raising the licensing issue for the purpose of voir dire. He noted that whether or not he presented an indictment against her was a totally separate issue. Id. R., Tr.p. 331, ll. 1-2.

Judge Miller's Qualification of Dr. Loring as an Expert.

Judge Miller opined that the intent of the statute, § 40-63-200, was to prevent unlicensed persons from opening an office and practicing social work and treatment. Id. R., Tr.p. 331, l. 3-16. He declared that he distinguished what Dr. Loring has done as a retained expert for the defense from that definition of the statute of § 40-63-20. He overruled the objection and concluded that Dr. Loring can testify. R., Tr.p. 331, ll. 17-21.

The Initial Defense Objection under <u>Williams</u> as Prosecutorial Misconduct

---

following a declared or recognized emergency for a period not to exceed sixty days.

S.C. Code Ann. § 40-63-260(March 12, 2002). Dr. Loring never met these any of these conditions precedent prior to her testimony. As the Solicitor correctly stated the unauthorized practice of social work in South Carolina carries criminal penalties pursuant to S.C. Code Ann. § 40-63-200 and civil penalties in accordance with S.C. Code Ann. § 40-63-210 and §40-1-210. See R., Sept.8, 2008 Tr.p. 328, ll. 15-23.

After the court determined that Dr. Loring was qualified, [R., Sept. 8, 2008, Tr.p 331, ll. 3-21], counsel Bannister took a break. Id. R., Tr.p. 22-23. He then returned and cited State v. Williams, 485 S.E.2d 99, at 102-103 referencing witness intimidation. He complained that Solicitor Ariail's attempt to make the testimony potentially fit within the criminal statute was an attempt to intimidate the witness and thereby violates the defendant's due process rights. He claimed that this was a substantial governmental interference. Counsel Bannister then declared that he did not believe that she would be able to testify absent some assertion from the Solicitor that he would either grant immunity or have some sort of protection for her for it not to be an issue.

Solicitor Ariail Grants Immunity to Dr. Loring Related to the Inman case.

The prosecution expressly granted immunity from prosecution for her particular acts related to Mr. Inman's case since the trial judge had concluded that she was qualified as a witness that could testify in the area of social work as to the Inman case. R., Sept. 8, 2008 Tr.p. 333, ll. 2-23. However, he acknowledged that he did not have authority to grant immunity concerning other acts which might have already occurred. Id. R., Tr.p. 333-335. However, he noted that the issue he had raised was whether or not she qualifies as a witness under the laws of South Carolina - not whether she whether she should have been indicted and "if somebody wanted to indict her for violating the statute, they could have already done that many, many times based upon her prior testimony - that's not the issue." Id. R., Tr.p. 333, ll. 12-19. As the Solicitor stated: " if the issue is now being raised that her testimony is somehow being curved because of the vast power of this office, then I'll gladly grant her immunity from whatever violations she may be ..." Id. R., Tr.p. 333, ll. 20-23.

The Court then inquired of defense counsel Bannister if that was satisfactory, and counsel Bannister initially declared: "yes," but suggested that it was a red herring to start with. *Id.* R., Tr.p. 333, ll. 25.

Dr. Loring's Initial Reaction to Immunity

Dr. Loring summarized her understanding of the Solicitor's grant of immunity. She stated that the State is not going to indict for giving improper information that she gathered in this case for any reason of being a social worker licensed in Georgia. Judge Miller clarified that the Solicitor as chief prosecutor has declared on the record that he will grant you immunity for the testimony and the underlying work she did to arrive at her opinions. Id. R., Tr.p. 334-335.

Dr. Loring then stated that she had become alarmed and concerned by what she had heard. Judge Miller then stated that he was going to take a break and allow her to consult with a lawyer. He stated : "I want you to have an opportunity to compose yourself, feel confident that ... your presentation or your testimony will not be impacted or impaired by the legal discussion..." Id. R., Tr.p. 335, ll. 19-25.

Dr. Loring's Invocation of the 5th Amendment after consultation with counsel Godfrey.

After Dr. Loring consulted with her personal counsel [Bill Godfrey], she returned to court and pled the Fifth Amendment, stating that "she felt threatened as a witness in this case, and in other cases in which I've testified in South Carolina at this time." Id. R., Tr.p. 336, ll. 17-24. Judge Miller restated that the Solicitor had granted her immunity so that she would not be prosecuted for your work in this case. Id. R., Tr.p. 337, ll.1-3. She provided the court with a list of prior cases that she had testified in South Carolina and noted that this issue had been raised once before and "it was immediately put to rest." Id. R., Tr.p. 338, ll. 4-7.

Counsel for Dr. Loring cited Lanzetta v. U.S., 306 U.S. 451 (1939)[17] and asserted that the prosecution should have raised this issue pre-trial[18] and not during the voir dire for the first time which chilled her right to testify and was a violation of due process. Id. R., Tr.p. 340. Solicitor Ariail confirmed that it was full immunity as to this case. R., Tr.p. 341.

Dr. Loring, after another break, stated that she had been advised that she had been threatened in regards to her previous cases. Id. R., Tr.p. 344, ll. 9-10. **She stated that her (legal) advice was "that to testify when I'm told that I would be in violation of a criminal statute would affect my professional reputation in other cases and jurisdictions. Id. R., Tr.p. 344, ll. 9-15.**

Judge Miller's Rejection of Any Fifth Amendment Privilege after Immunity.

[17]Lanzetta concerned whether due process notice was complied with in the violation of a New Jersey statute which made it a penal offense to be a "gangster." Counsel Godfrey cited: "persons may not be required at peril of life, liberty or property to speculate concerning meaning of penal statute, but all are entitled to be informed concerning what the state commands or forbids," from Lanzetta. Id. R., Tr.p. 340, l. 1-3. The New Jersey statute making it a penal offense to be a gangster, defined as any one not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime in any state, was found violative of due process clause because of its vagueness and uncertainty in regard to persons within its scope.

[18]Respondent would question how this particular issue on qualifications could be raised "pre-trial" in this particular non-jury setting where expert witness are done with the court ex parte and there is no discovery unless a written report is made by an expert witness - which was not done here. It only became an issue when the witness was called and advised the Court and solicitor that she was not licensed in S.C., a fact that under state law could have been remedied by compliance with the statutes. Further, Respondent questions how a solicitor in representing the sovereign could ignore the express legislative mandates set out in the licensing statutes which specifically includes the act of testifying, particularly when he became aware of them and applicability to Dr. Loring. Certainly, there can be no dispute that a party could bring out the fact that she was not licensed in S.C. also as a ground of impeachment, in addition to her failure to comply with the licensing requirements for out of state licensed social workers.

During witness Desa Ballard's testimony, she claimed the information challenging the qualification should have been handled out of the presence of the witness where she would not be intimidated. R. 618, April 20, 2009 Tr.p. 180, l. 12- 17.

Judge Miller concluded that Dr. Loring had no Fifth Amendment privilege in this matter which would allow her refusal to testify. Id. R., Tr.p. 340-41.[19] In addition, Judge Miller took the extraordinary step of granting immunity in the other cases "insofar as I am able to do." R., Tr.p. 344, ll. 15-22.[20] See also, R., Tr.p. 346, ll. 6-12 ('while ... judicial immunity may not be generally recognized in South Carolina, I think the fact that I'm putting it out there would carry some weight"). He opined that the statute cited by the Solicitor was not intended to prevent the testimony she had been hired to give. Particularly, Judge Miller relied upon, by analogy, the order of the South Carolina Supreme Court in *Re: Act No. 385 of 2006-relating to defining the "practice of medicine*", Order , 2006-08-24-01 (S.C.S.Ct. August 24, 2006) (court temporarily delays judicial enforcement of Act 385 insofar as the Act requires a physician to obtain a license to practice medicine in South Carolina before offering expert medical testimony in a South Carolina administrative or court proceeding). Judge Miller concluded that the Supreme Court, if asked, would have issued the same order in this case related to social workers as it had previously done toward physicians. Judge Miller acknowledged that he had previously signed an *ex parte* order authorizing specific funding for Dr. Loring and concluded that he would not have signed the

[19]Counsel Godfrey took the position that since Solicitor Ariail had placed her on notice of the existence of this statute and its penalties for the failure to comply, with the intent to intimidate and hinder her testimony. He stated that she was fearful "in the back of her mind" that she could be indicted for her prior testimony in other counties where she had been qualified as an expert. Id. R., Tr.p. 342-43.

[20]In the *Initial Brief of Appellant*, p. 14, the Appellant asserts that the judge had no authority to grant immunity citing *State v. Needs*, 333 S.C. 134, 508 S.E.2d 857 (1999) and *State v. Thrift*, 312 S.C. 282, 440 S.E.2d 341 (1994). Respondent agrees that this is an executive function, not a judicial function.

order if he felt her testimony was either inappropriate or illegal. R., Tr.p. 346. At that point he requested that she continue conferring with counsel. R., Tr.p. 346. [21]

Return To Dr. Loring Issue And Defense Motion for Mistrial.

On September 11, 2008, defense counsel made a motion for a mistrial based upon the Solicitor's voir dire of Dr. Loring on whether she was licensed in South Carolina as a social worker and whether she had met with Inman. Counsel Bannister referred to State v. Williams (Brad), 326 S.C. 130, 485 S.E.2d 99 (1997) and the fact that Solicitor Ariail had cited a statute that it was a crime to practice social work without a South Carolina license. He also cited to State v. Needs, 333 S.C 134, 508 S.E.2d 857 (1998), asserting it held that a "prosecutor may not lob baseless threats or charges at a potential witness. R., Tr.p. 411-12. After the prior proceedings with Dr. Loring were summarized by defense counsel and the trial judge, defense counsel stated that there was an attempt made to see if an administrative order from the Supreme Court could be acquired for this particular statute, but learned that it was not a possibility. R., Tr.p. 414, ll. 8-19. He also found analogous the case of *Baggerly v. CSX Transportation, Inc*, 370 S.C. 362, 635 S.E.2d 97 (2006) where the court concluded a civil engineering expert witness was not prohibited from testifying when he was not licensed in this state, consistent with the statutory requirements for practicing engineering. R., Tr.p. 415.

Counsel Bannister requested a mistrial contending that the proceedings were tainted to the extent they could not get a fair trial whether Dr. Loring either waives her Fifth Amendment

[21]At that point counsel Bannister sought to get the Solicitor to state whether he actually believed that Dr. Loring had committed a criminal act pursuant to the statute he cited. He contended that the Solicitor "set up " Dr. Loring by asking predicate questions on whether she had interviewed anyone in S.C. R., Tr.p. 347-348.

privilege or is forced to testify under threat of contempt. He advised the Court that she had concerns about the effect on her reputation and whether it was a reportable event for malpractice purposes. Counsel stated that Dr. Loring had interviewed witnesses in Tennessee and Michigan. He asserted that the issue was whether there was governmental interference, whether it was substantial, and whether it prejudiced the defendant. R., Tr.p. 416, ll. 19-23.

Judge Miller asserted that he did not have to make that decision. Rather, he stated there were three alternatives on how they would proceed that day. First he stated that he was not aware if Dr. Loring had a change of heart and that he had asked a certain lawyer to speak with her. He stated he could require the case to go forward without her testimony which he felt would necessitate the Supreme Court sending it right back. He stated he could declare a mistrial as requested or he could continue the case, remove Dr. Loring as a potential witness and have the defense obtain a new social historian expert and give the defense as much time as needed. R., Tr.p. 417, ll. 3-15.

Defense counsel Bannister urged a mistrial based upon prosecutorial misconduct. He asserted it implicated the 14th Amendment right to due process, his right to a full and complete defense and compulsory process and the confrontation clause, in addition to the 6th Amendment right to competent counsel and 8th Amendment right to a full and fair presentation of mitigation. In addition to relying upon State v. William(Brad) and State v. Needs, he cited State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105 (2000) which he asserted held that deliberate prosecutorial misconduct raised a irrebuttable presumption of prejudice.

He stated that in determining whether there was prosecutorial misconduct, he noted that the prosecution had raised a similar argument about the criminality of the statute in *State v. Michael Laney* and asserted that the Solicitor was required to withdraw a similar motion in that

case. He also stated that he wanted the Court to consider *State v. Cockman*, [State v Edens and Holloway] another case that Solicitor Ariail prosecuted where Dr. Loring testified, but this question was not asked concerning licensing. The defense contended that the prosecution did not want Dr. Loring to testify because he was afraid of what she would say so he used this tactic to intimidate her. R., Tr.p. 419.

The defense also sought support from the A.B.A. Criminal Justice Standards, The Prosecution Function, Standard 3-5.7 concerning fair treatment of witnesses and SCACR Rule 407, Rule 3.8 and 8.4. R., Tr.p. 420. He asserted that if the ethics were violated, then the prosecutor has intimidated a witness. Counsel Bannister asserted that § 16-9-340 makes it a felony of up to 10 years for any person to attempt to intimidate a witness. R., Tr.p. 421, ll. 11-17. He stated that this should require a mistrial and for the Solicitor to be recused from the case. R., Tr.p. 421, ll. 15-22.

The defense further contended that this was misconduct because the solicitor had failed in a duty to know the law, citing cases that generally hold a lawyer who failed to perform minimal or adequate research may be subject to malpractice. R., Tr.p. 422-23. He contended that after the Laney trial, the prosecution was on notice to research the issue, aware that Dr. Loring was going to testify and should have brought it up pretrial. R., Tr.p. 423. Counsel questioned what research the prosecution had done since the defense had earlier (mis) quoted a statute that the defense claimed included an exemption that should have applied to Dr. Loring. R., Tr.p. 424, ll. 1-9. But see, S.C. Code Ann. § 40-63-260, 290. He stated that he was entitled at least to a continuance to further investigate this issue. In addition, he sought the recusal of the Solicitor and setting aside the notice of the death penalty and to sentence to life without parole in light of the intentional conduct. R., Tr.p. 426.

Solicitor Ariail responded that initially it must be determined if Dr. Loring will testify. R., Tr.p. 426. Second, he asserted that it needed to be determined why she would not testify the decision and whether it involved something outside of the case, such as whether she is concerned about her Georgia license being impacted. He stated that this could be cured by compliance by notifying the Board that she is here and going to testify and that it was an emergency situation. R., Tr.p. 427. Accord, § 40-63-290. Therefore, the statute would be complied with. Further, if the case is continued, Dr. Loring can become licensed. Id. He stated that Dr. Loring does not have a concern about being prosecuted because she has been given immunity. R., Tr.p. 428, ll. 7-14. He noted that when this issue came up, they were in voir dire about her qualifications to testify. He noted that the issue was whether that licensing requirement for social workers was such that it would require the person to be licensed prior to testifying. See S.C. Code Ann. § 40-63-20 (23), (24), (25), (26) (statutory definitions of "practice of baccalaureate social work," "practice of independent social work-advance practice ," "practice of independent social work-clinical practice" and "practice of masters social work.").[22] Solicitor Ariail sought to distinguish Baggerly because engineering was vastly different than social work and the purpose on hading up the statute was to enlighten the Court with the provisions and the fact of the criminal provisions designated the significance the legislature placed upon the licensing requirements. He noted that he was addressing the sanctions to the court, not to Dr. Loring, He stated that he had never moved to indict her, even though she would have violated the statute from a prior case. He asserted that this was a red herring.

[22] " Practice of independent social work-advance practice " and "Practice of independent social work-clinical practice" include "expert testimony" in their definitions. §40-63-20 (24), (25).

He restated that they could have a continuance have her get a license, have her testify or if the delay is too long, to declare a mistrial. R., Tr.p. 429-430.

Counsel Bannister then stated that if it was as easy as the Solicitor stated to just make a telephone call to get a license and that he should have read the statute, then it implicates his right to have effective counsel under the 6th Amendment. R., Tr.p. 430.

On behalf of Dr. Loring, counsel Bill Godfrey declared that Dr. Loring sees this issue as a major storm and was upset about testifying in this case. R., Tr.p. 431. He stated that she is licensed in Georgia and has been put on notice by the Solicitor that she was violating a criminal statute.

Upon the Court's inquiry, Mr. Godfrey declared that Dr. Loring was going to take the 5th Amendment. R., Tr.p. 431, ll. 20-21. Judge Miller then questioned how does she invoke this when she has been granted immunity. R., Tr.p. 431-32. He stated that she had testified in other cases and that there was no statute of limitations. "No one is able to assure her that there are not similar laws in [Tennessee and Michigan]" where she had interviewed people. He stated that she has to declare each year if anything of a criminal or quasi-criminal nature comes up and it could affect her license in Georgia. R., Tr.p. 532.

Judge Miller deferred the decision on how to handle Dr. Loring's refusal to testify. However, Judge Miller stated that counsel Bannister was not in violation of Strickland v. Washington, 466 U.S. 668 (1984) based upon the issue he raised. Judge Miller then declared that he was not going to grant a mistrial. He requested that counsel seek another social historian. However, he did not rule out Dr. Loring's participation and also stated that if she determines she does not want to participate, he would allow him to show how he was prejudiced. R., Tr.p. 435. The court then adjourned.

April 14, 2009 Proceeding

On April 14, 2009, a hearing was convened. Counsel Godfrey, on behalf of Dr. Marti Loring advised the court concerning his client's being subject to out of state witness subpoena proceedings and subpoenaed for the April 20 hearings when she had been under the understanding that she had been released and the defense did not intend to call her. R. 1021-24, April 14, 2009 Tr.p. 1-4. Judge Miller noted that it was his opinion that even without the immunity that had been granted, Dr. Loring had not committed any crime in her potential testimony based upon the decisions on the Supreme Court in the Administrative order and Baggerly v. CSX Transportation, Inc, 370 S.C. 362, 635 S.E.2d 97 (2006), involving physicians and engineers as expert witnesses. R. 1025-26, April 14, 2009 Tr.p. 5-6. Counsel Godfrey opined that Dr. Loring felt threatened and urged that she was not a material witness in the case. Solicitor Ariail asserted that the trial court needed this witness available for the court. Judge Miller was advised at that point that Dr. Loring had not had any conversations with counsel. R. 1032, April 14, 2009 Tr.p. 12.

Counsel Bannister stated that he had sought a different mitigation expert and the court had signed an order for funding. R. 1033, Tr.p. 13. However, he advised the court that his expert would not be prepared to go forward on April 20 when the hearing in sentencing was scheduled. R. 1034, April 14, 2009 Tr.p. 14.

At that point, Judge Miller declared that the date had been pending for seven months by agreement. He stated that he was not going to withdraw his certification that she was a material witness in this case in support of the out of state subpoena. R. 1034, Tr.p. 14, ll. 5-11.

April 20, 2009 Proceedings.

On April 20, 2009, the matter was re-convened for the sentencing hearing. At the outset, counsel Godfrey for Dr. Loring returned with a motion requesting that she be released or for alternate relief. R. 446-47, April 20, 2009 Tr.p. 8-9. He stated that trial court had previously declined to withdraw its earlier certification that she was a material witness. He described proceedings subsequent to that date in Georgia when the Georgia authorities attempted to enforce the out of state subpoena and Judge Miller intervened. He noted that the Georgia circumstances represented further intimidation of her. He urged that she was not a proper witness any more as she was no longer part of the defense team. R. 451, April 20, 2009 Tr.p. 13. If not able to release her, counsel Godfrey argued in the alternative that the matter be suspended so that he can investigate what happened in Georgia and the circumstances surrounding the circumstances of the threats. R. 452-53, Tr.p. 14-15.

Counsel Bannister asserted that the defendant's right to witnesses was again chilled by these acts on the part of the state. Judge Miller, however, questioned how it would be chilled since he had declared that he did not intend to call her as his witness. R. 456-57, Tr.p. 18-19. Solicitor Ariail noted in response that the affidavit of Mr. Geary reflects that the Solicitor's Office had nothing to do with the actions in Atlanta and in fact communicated after the judge's email to have the authorities stand down, when the Atlanta authorities thought Dr. Loring was evading service of the subpoena. R. 460-61, Tr.p. 22-23.

Judge Miller subsequently stated that at the September hearing that noted that he had not completely ruled Dr. Loring out of the case. R. 467, Tr.p. 29. Counsel Bannister stated that absent the September 11, 2008 events, she would have been their witness, but in light of the Solicitor's conduct and the newer events in Georgia, they did not intend to call her as a witness. Whether she is a witness for other purposes was left to the judge. R. 468, Tr.p. 30.

Dr. Loring was called and testified at the motion hearing. She described the events the prior week in Atlanta when she learned that a subpoena was being served at her home. R. 472-73, Tr.p. 34-35. After getting the paperwork on her return home from writing, she contacted counsel Godfrey since the hearing date on the document in Georgia was missed. She then learned the police had been at her house, but the neighbors explained that she was not home. R. 477-78, Tr.p. 39-40.

She then stated that she had discussions with her counsel and Georgia authorities that she was glad to come to S.C. if the judge wanted her to be here. R. 479, Tr.p. 41, ll. 10-24. She stated she arrived last night to be sure to be here. R. 479-80, Tr.p. 41-42. Upon questioning from counsel Bannister, she stated that she was upset and frightened when she learned about the events in Georgia, did not purposely avoid service of the subpoena and would have been at the Georgia hearing. R. 481, Tr.p. 43.

Further, while she found the chain of events alarming, she came prepared for whatever the judge asks with all her equipment and what they had done in her role as mitigation expert. R. 483-84, Tr.p. 45-46.

On cross-examination by Deputy Solicitor Strom, Dr. Loring admitted that she had been made aware that on April 14, Judge Miller had not rescinded the certification to be a material witness. R. 487-88, Tr.p. 49-50. She stated that when she learned about the Georgia hearing when she returned on the 16th to her home, the time had already passed. R. 489-91, Tr.p. 51-53. Ultimately, she called Mr. Godfrey who she asked to contact Judge Miller who seemed to understand "where I was coming from and what I was willing to do." R. 491, Tr.p. 53.

Judge Miller questioned her concerning a letter that the Department of Labor Licensing and Regulation had issued dated April 16, 2009. She stated that the letter assuaged her fears

before the other activities occurred. R. 495-97, Tr.p. 57-59. [Court Exhibit 3, ROA 1201]. He then asked Dr. Loring to remain.

Judge Miller then addressed that he had been contacted by Bill Godfrey the evening of April 16 and advised the police in Georgia had been trying to arrest Dr. Loring . He stated he later called Ben Norris with Georgia law enforcement who advised him that he had been advised to stand down concerning the bench warrant. He then called Mr. Geary with the District Attorneys Office who advised him that he had received a call from S.C. to stand down and the problem was solved. R. 497, Tr.p. 59.

Judge Miller then stated that he wanted the defense to consider calling Dr. Loring as a witness in mitigation. He stated that she was ready willing and able to come testify voluntarily. Counsel Bannister stated that he had certain motions and that they were not in a position to call her as a witness.[23] Counsel called Public Defender John Mauldin as a witness on the misconduct claim. Mr. Mauldin testified about the circumstances concerning the Michael Laney case. R. 510-549, Tr.p. 72-111. It was essentially his position that the Solicitor office had agreed to a life sentence based upon a desire to have a misconduct claim dropped concerning its questioning of an expert witness, Dr. Everington on the issue of mental retardation. [24]

---

[23]The defendant made a motion to recuse the 13th Circuit Solicitors Office based upon a claimed prosecutorial misconduct based upon the incidents concerning Dr. Loring. R. 499-501, Tr.p. 61-63, a motion to determine the role of Solicitor Ariail and the Prosecution team, and a Motion to Suspend Proceedings. Solicitor Ariail responded in writing and orally concerning the claim that they were involved in Dr. Loring's potential arrest and included an affidavit from Mr. Geary in Georgia to support the position. R.506-07, Tr.p. 68-69. Response to Motion, ROA 1243.

[24]In its response to the motion, the Solicitor's office presented a different version of the circumstances that lead up to the life sentence. *Response to Renewed Motion for Mistrial*. ROA ----. The questioning concerning Dr. Everington was whether she had exceeded the scope of her qualification as an expert witness - a claim that was ultimately supported by the Board of Psychology. *Exhibit 2 to Response.* ROA. _ . The pleading also addresses other collateral issues raised concerning the motions and its contested factual issues.

This was a matter that the state disputed within its questioning. R. 549-555, Tr.p. 111-117. The record revealed that the objection to Dr. Everington's testimony in Laney was not to her qualification as an expert in mental retardation, but that she was not qualified to administer IQ tests and that only a licensed psychologist could do that type of interpretation. R. 556, Tr.p. 118. The terms of a proposed agreement were set out in State Exhibit 25. R. 565-66, Tr.p. 127-128. However, the initial negotiation was not successful and rejected by the state. R. 566-67, Tr.p. 128-129. It was developed that the Laney motions based upon alleged prosecutorial misconduct were never ruled upon by a judge and were withdrawn after the death notice was withdrawn. Mauldin confirmed that the stated reason for the state's withdrawal was the victim's family concerns and "endless litigation on mental health issues..." R. 578-79, Tr.p. 140-141.

Laney's other lawyer, Troy Tessier also testified concerning the Laney matter. R. 580-587, Tr.p. 142-149.

Susan Allen, a juror in the Edens and Holloway case, testified about a dinner the Solicitor's office held for the jurors in the case after the trial was completed. 588-89, Tr.p. 150-151. She stated the issues raised by the office was to seek out what factors influenced them the most in not giving the death penalty. R. 592-93, Tr.p. 154-155. On cross-examination, the voluntary contact concerning the dinner was pointed out consistent with Judge Hayes instructions to jurors. R. 595, Tr.p. 157.

Judge Miller again made inquiry of the defense concerning the defense of its intent to call a social historian, noting this case is going forward. The court was concerned because Dr. Loring is present and ready to go, "but we are not going to set this case up for failure." R. 603-04, Tr.p. 165-166.

Judge Miller then denied the defense request to call Solicitor Ariail and other prosecutors concerning the raising of an improper issue related to the lack of licensing of Dr. Loring and why the issue was not raised in the earlier trial. R. 604-05, Tr.p. 166-167.

Desa Ballard , a lawyer who concentrates on legal ethics and professional responsibility, testified that the Solicitor had violated a number of rules of professional responsibility in connection with his earlier examination of Dr. Loring. R. 611, Tr.p. 173.

At the conclusion of the testimony, Judge Miller stated that he would not suspend the proceedings. 633, Tr.p. 195. He further stated that Dr. Loring was going to come and he would not remove them as advocates in the case. R. 633, Tr.p. 195.

The April 21, 2009 Proceeding

On Tuesday, April 21, 2009, defense counsel Bannister advised Judge Miller that the defense was not going to call Dr. Loring as a witness. R. 639, April 20, Tr. p. 201. Judge Miller stated that he was considering calling Dr. Loring as a "court's witness." Id. R. 639, Tr. p. 201, ll. 5-6. He stated that his client had pled guilty and asked him to be the sole fact finder in the case. [Defense counsel Bannister concurred with that statement: "That's correct."]. Id. R. 639, Tr. p. 201, ll. 11-14. The judge stated that Dr. Loring was the first choice by the defense and "I believe that she can testify without fear." R. 640, Tr. p. 202, ll. 15-16. After Loring's counsel confirmed that she had gone over the subject matter the prior evening, Judge Miller stated that she had earlier spent up to 9 to 10 hours preparing. Counsel Godfrey stated that she had previously stated she had reviewed the files 4 to 5 hours, reviewed the file yesterday, has her charts and pictures since they had talked about her testifying as a witness and she had advised him that she felt protected by the court. Id. R. 641, Tr. p. 203, ll. 7-21.

Counsel Bannister renewed his motion for a mistrial based upon the prosecutorial misconduct claim. Id. R. 642, Tr. 204. He requested that a life without parole sentence he entered under the 5th Amendment Double Jeopardy Clause. Id. R. 643, Tr. 205.

The State opposed the motion, citing Fields v. J. Haynes Waters Builders, 376 S.C. 545, 658 S.E.2d 80, 86 (2008), which allowed a court in qualifying an expert witness to look at the statutory requirements for licensing.[25] The State argued that there was no prejudice from the conduct. Dr. Loring is there and able to testify which shows there was no witness intimidation. She was neither threatened nor intimidated. Further, the State noted that this was a bench trial where the trial judge is presumed to be able to differentiate what it feels is improper. R. 645, Tr. 207.

Judge Miller initially rejected the double jeopardy motion. He concluded that there was no evidence the State deliberately goaded the defense to make the mistrial motion. R. 645, Tr. p. 207, ll. 15-19. However, he did not accept the State's position on Fields because there is no question that whether a person is licensed in particular state is a significant factor in determining whether they should be qualified, but when the Solicitor brought up the criminal sanctions, it was improper. Tr. 208. However, the trial judge found it was immediately addressed and resolved with the grant of immunity. R. 646, Tr. p. 208, ll. 4-7. Judge Miller opined in light of the administrative order, Baggerly and Fields, that there was no criminal conduct in the witness who arrives solely to testify as an expert witness. R. 646, Tr. p. 208, ll. 15-18. Relying upon U.S. v. Golding, 168 F.3d 700 (4th Cir. 1999) for a reversal the remarks must be improper (which he

[25] The State made a written "Response to Renewed Motion for Mistrial and Memorandum" which is incorporated by reference. ROA __ ("Response"). **[Designated, but not in ROA prepared by Appellant]**.

found) and such comments or remarks must have prejudicially affected the defendant's substantial rights so as to deprive him of a fair trial.

Judge Miller noted that this was not a jury trial, but a bench trial, and a jury trial result might have been different. He found that the defendant's rights were not prejudicially affected. Particularly, he found that Dr. Loring was prepared to testify before it occurred and is prepared to testify now according to her attorney. R. 647, Tr. p. 209, ll. 21-25. Judge Miller stated that in his capacity as fact-finder he is interested in hearing everything that might bear on his decision. He does not find "deliberate prosecutorial misconduct." R. 648, Tr. 210. Counsel Bannister asserted that had they been provided a jury with the plea, the result would have been different,

Counsel Bannister next moved for a continuance. He stated that on September 11 when Dr. Loring took the 5th, the matters were suspended and directed to either fix the problem with Dr. Loring or find another social historian. Counsel stated that while he thought it was a red herring until the Supreme Court spoke on the issue, the issue was still decided against them on the licensing issue. The only available expert he asserted he could find was Jan Vogelsang who he sought funding for on January 2 and had less than 4 months to prepare. R. 651-52, Tr. 213-14. As he asserted at the April 14 hearing, he declared she could not be prepared by April 20. R. 653, Tr. 215.

Judge Miller noted that there had been discussions throughout that this case was to restart on April 20. R. 653, Tr. p. 215, ll. 21-25. He stated that according to Ms. Vogelsang's affidavit she would not be prepared to testify until the first quarter of 2010. R. 654, Tr. p. 216, ll. 1-13 [It was April 2009 at that time]

Judge Miller stated that Dr. Loring was prepared to testify and had done all her work. He noted that she had been on the case a long time and the court wanted to hear from her. However,

he stated that he would not allow the prosecutors to intimidate her. R. 654-55, Tr. 216-17. Judge Miller stated that this case will be finished this week and Vogelsang could be put up. R. 655, Tr. 217.

Counsel Bannister stated he needed a ruling on his continuance and thought he was being told it was denied.

Judge Miller clarified that he would break to let them meet with Dr. Loring since she was present and was prepared to go forward. R. 655, Tr. p. 217, ll. 13-19.

Subsequently, Dr, Loring testified as a court witness. R. 658, Tr. p. 220, ll. 14-17. He stated that (1) she would aid the fact-finder in the resolution of the case, (2) she was the number one choice for social historian in the case, but the defense has stated it had no contact with her since September, (3) she has been rehabilitated and despite the fact that she refused to testify in September because of her feelings of intimidation (which he ruled was prosecutorial misconduct which did not rise to the level to require reversal or mistrial) which is cured in part by her presence today. "I think it's necessary to put her up to ensure that these claims of due process violations are put to rest." R. 658-59, Tr. p. 220, l. 14 - p. 221, l. 6. Her testimony is summarized in this Initial Brief of Respondent at pages 26-30, infra.

STANDARD OF REVIEW

The decision to grant or deny a mistrial is within the sound discretion of the trial judge. *State v. Vazquez,* 364 S.C. 293, 613 S.E.2d 359 (2005). The court's decision will not be overturned on appeal absent an abuse of discretion amounting to an error of law. *State v. Harris,* 340 S.C. 59, 530 S.E.2d 626 (2000); *State v. Kelsey,* 331 S.C. 50, 502 S.E.2d 63 (1998); *see also State v. Arnold,* 266 S.C. 153, 157, 221 S.E.2d 867, 868 (1976) (noting the general rule of this State is that "the ordering of, or refusal of a motion for mistrial is within the discretion of the trial

judge and such discretion will not be overturned in the absence of abuse thereof amounting to an error of law.").

" 'The power of a court to declare a mistrial ought to be used with the greatest caution under urgent circumstances, and for very plain and obvious causes' stated into the record by the trial judge." *State v. Simmons,* 352 S.C. 342, 354, 573 S.E.2d 856, 862 (Ct.App.2002) (quoting *State v. Kirby,* 269 S.C. 25, 236 S.E.2d 33 (1977)); *see also State v. Patterson,* 337 S.C. 215, 522 S.E.2d 845 (Ct.App.1999) (stating mistrial should only be granted in cases of manifest necessity and with the greatest caution for very plain and obvious reasons). The granting of a motion for a mistrial is an extreme measure which should be taken only where an incident is so grievous that prejudicial effect can be removed in no other way. *State v. Beckham,* 334 S.C. 302, 513 S.E.2d 606 (1999); *Adams,* 354 S.C. at 377, 580 S.E.2d at 793.

A mistrial should only be granted when "absolutely necessary," and a defendant must show both error and resulting prejudice in order to be entitled to a mistrial. *Harris,* 340 S.C. at 63, 530 S.E.2d at 628; *Simmons,* 352 S.C. at 354, 573 S.E.2d at 862; *see also State v. Council,* 335 S.C. 1, 515 S.E.2d 508 (1999) (finding mistrial should not be granted unless absolutely necessary; to receive mistrial, defendant must show error and resulting prejudice). "The less than lucid test is therefore declared to be whether the mistrial was dictated by manifest necessity or the ends of public justice." *State v. Prince,* 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983). "Whether a mistrial is manifestly necessary is a fact specific inquiry." *State v. Rowlands,* 343 S.C. 454, 457, 539 S.E.2d 717, 719 (Ct.App.2000). Additionally, in a bench trial context, the reviewing Court must consider whether there were less drastic alternatives available to the trial judge than declaring a mistrial. Harris v. Young, 607 F.2d 1081, 1085 (4th Cir. 1979).

In considering "prosecutorial misconduct," the United States Supreme Court has stated that prosecutors must "refrain from improper methods calculated to produce a wrongful conviction." *Berger v. United States,* 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935). The appropriate standard of review for prosecutorial misconduct is the narrow one of due process and not the broad exercise of supervisory power. *See Darden v. Wainwright,* 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986). *See also Donnelly v. DeChristoforo,* 416 U.S. 637, 642, 94 S.Ct. 1868, 1871, 40 L.Ed.2d 431 (1974) (not every trial error which might call for supervisory power violates fundamental fairness). The Supreme Court has recognized that prosecutorial misconduct may "so infec[t] the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo,* 416 U.S. at 643, 94 S.Ct. 1868. A defendant's due process rights are violated when a prosecutor's misconduct renders a trial "fundamentally unfair." *Darden v. Wainwright,* 477 U.S. at 181, 106 S.Ct. 2464. *See also Greer v. Miller*, 483 U.S. 756, 765, 107 S.Ct. 3102, 97 L.Ed.2d 618 (1987); *Williams v. Stewart,* 441 F.3d 1030, 1042 (9th Cir.2006) (*citing Donnelly v. DeChristoforo,* 416 U.S. at 643, 94 S.Ct. 1868 as articulating standard for prosecutorial misconduct).

The Supreme Court has found that prosecutorial misconduct may occur in a variety of unique factual settings. *See United States v. Williams,* 504 U.S. 36, 60, 112 S.Ct. 1735, 118 L.Ed.2d 352 (1992) (Stevens, J., concurring) ("[l]ike the Hydra slain by Hercules, prosecutorial misconduct has many heads"). Each of these settings may have its own peculiar standards for finding prosecutorial misconduct and for determining whether a constitutional violation occurred as a result of such misconduct. *Compare Berger v. United States,* 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 (1935) (prosecutor's improper comments during trial and closing argument constituted misconduct and prejudice was probable); *Mooney v. Holohan,* 294 U.S. 103, 55 S.Ct. 340, 79

L.Ed. 791 (1935) (knowing use of perjured testimony was misconduct); *Miller v. Pate,* 386 U.S. 1, 87 S.Ct. 785, 17 L.Ed.2d 690 (1967) (prosecutor's knowing use of false evidence likely to have important effect on jury's determination and warrants habeas relief); *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (prosecutor's misstatements of law in argument to jury was misconduct); and *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) (prosecutor's withholding of relevant exculpatory evidence violates constitutional due process) *with United States v. Valenzuela-Bernal,* 458 U.S. at 860, 867, 102 S.Ct. 3440 (deportation of defense witness by government did not violate Fifth or Sixth Amendment where respondent made no showing that witness's testimony was material and favorable to defense); *Darden v. Wainwright*, 477 U.S. at 181-182 and n. 14, 106 S.Ct. 2464 (prosecutor's comments in closing argument did not so infect trial with unfairness as to violate due process, and therefore no issue of whether misconduct was harmless error). However, courts have held no prejudice is shown when the witness eventually testifies. *People v. Hill*, 952 P.2d 673 (Cal. 1978); *Wynne v. Renico*, 279 F.Supp.2d 866 (E.D. Mich. 2003).

The Supreme Court has also recognized that government interference with a defense witness's free and unhampered choice to testify may amount to a violation of due process. *See Webb v. Texas,* 409 U.S. 95, 97-98, 93 S.Ct. 351, 353-354, 34 L.Ed.2d 330 (1972) (defense witness intimidated into not testifying by remarks of trial judge); *Washington v. Texas,* 388 U.S. at 19, 87 S.Ct. 1920 (right to present witness to establish defense is fundamental to due process; and right denied by Texas state statute prohibiting co-participants in same crime from testifying for each other when testimony was relevant and material to defense). *See Earp v. Ornoski,* 431 F.3d 1158, 1167-1168 (9th Cir.2005) (prosecutor's intimidating threats to witness to prevent witness from testifying may amount to misconduct; case remanded for evidentiary hearing)

(*citing Webb v. Texas*, 409 U.S. at 98, 93 S.Ct. 351). *See also United States v. Vavages,* 151 F.3d at 1189 (prosecutor's conduct is governed by *Webb*).

Where prosecutorial misconduct has occurred, the relevant question then is whether the misconduct so infected the trial with unfairness as to make the resulting conviction a denial of due process. *See Darden v. Wainwright,* 477 U.S. at 181, 106 S.Ct. 2464. *See also Karis v. Calderon,* 283 F.3d 1117, 1128 (9th Cir.2002) (claim of prosecutorial misconduct is analyzed under prejudice standard set forth in *Brecht v. Abrahamson,* 507 U.S. 619, 638 n. 9, 113 S.Ct. 1710, 123 L.Ed.2d 353 [1993] regardless of type of harmless error review conducted by the state courts).[26]

Witness Intimidation by Prosecutor Standards.

The South Carolina Supreme Court has held that "Improper intimidation of a witness may violate a defendant's due process right to present his defense witnesses freely if the intimidation amounts to 'substantial governmental influence with a defense witness's free and unhampered choice to testify." A defendant must first demonstrate substantial interference with the witness's testimony and then show a resulting prejudice to the defendant. Similar to the analysis of prosecutorial misconduct, a two prong test applies to alleged governmental interference. *State v. Williams*, 326 S.C. 130, 485 S.E.2d 99 (1997) (citing *United States v. Saunders*, 943 F.2d 388, 392 (4th Cir. 1991)).

ANALYSIS

[26]Courts have held that reversible misconduct has *not* been shown when independent counsel has met with the defense witness and advised the witness to invoke the Fifth Amendment. Accord, *Pascua v. State*, 145 P.3d 1031 (Nev. 2006); *U.S. v. Simmons*, 699 F.2d 1250 (D.C. Cir. 1983); *State v. Koller*, 274 N.W.2d 651 (Wis. 1979); *U.S. v. Hooks, 848 F.2d 785 (7th Cir. 1988) (*concluding that the decision not to testify was entirely the witnesses based upon the advice of counsel**)**.

The prosecution has to make threats to a defense witness in order to prevent them from testifying at all for substantial interference to take place. *Williams*, 326 S.C. at 134, 485 S.E.2d at 101. [*In this case, Solicitor Ariail did not make any threats but instead advised the Court of the witness's lack of licensing in South Carolina carried civil and criminal sanctions.*[27]] An expert witness's professional license status is appropriate for a trial judge to consider when determining whether or not the witness is qualified as an expert in the area in which he or she has been tendered. *Fields v. J. Haynes Waters Builders, Inc., et al.*, 376 S.C. 545, 556-557, 658 S.E.2d 80, 86 (2008). However, the Court has recognized that the mere possession of a license or the lack of it does not answer the question of whether the witness can be qualified as an expert witness.

The immediate grant of immunity by the Solicitor after Judge Miller declared she was a qualified witness removed any improper "government interference" concerns. Simply put the government was no longer interfering with her decision to testify. At that point, Solicitor Arial's comment to Judge Miller about "criminal sanctions" was completely removed as a factor related to her testimony. It was not impeding or interfering in any manner with her decision. As the Court noted in *Williams*, an error of substantial interference can be "cured by subsequent governmental advice that the witness was free to talk to the defense." *Williams* at 135, 485 S.E.2d at 102 (citing *United States v. Terzado-Madruga*, 897 F.2d 1099 (11th Cir. 1990)). Solicitor Ariail explained to the witness that she would receive immunity for all aspects of her work on this case. The Court also explained to her the immunity for her testimony. Furthermore, Dr. Loring later testified during the hearing that she was concerned about her reputation, not prosecution by the State.

[27]In his pleading and argument to the trial court, Solicitor Arial stated that this was to emphasize the importance that the General Assembly had placed upon the licensing requirements.

Respondent agrees that this case could have been much different if Solicitor Ariail had not granted her immunity for her work in Inman's case. The Appellant's problem is that he writes his argument as if immunity was not granted in a timely manner - yet it was. The interference with the decision to testify then became one of Dr. Loring's own making after discussion of the applicable licensing statutes in South Carolina with her lawyer with resulted in the erroneous decision to invoke the Fifth Amendment after immunity and initial refusal to testify. As stated above, the licensing statutes exist and require certain steps to be taken by out of state licensed social workers and Dr. Loring's apparent failure to comply previously was of her own doing - not the prosecutions - a fact that independent counsel most likely advised her. However, those actions had nothing to do with the state of her testimony after the grant of immunity in Inman's case.

Nevertheless, in April, after seeking to not testify through quashing the subpoena, Judge Miller demanded that she appear as a court witness which she agreed to do. As stated below, this action supported the showing of a lack of prejudice.

The Appellant claims that *deliberate* prosecutorial misconduct raises an irrebuttable presumption of prejudice. State v. Quattlebaum, 338 S.C. 441, 447, 527 S.E.2d 105, 109 (2000). First, no misconduct, much less deliberate misconduct, has occurred since the South Carolina Supreme Court has held that license status is an appropriate factor for the trial judge to consider when considering the expertise of a witness. Fields 376 S.C. at 556-557, 658 S.E.2d at 86 (2008). Respondent does not question that the prosecutor deliberately questioned the social worker concerning whether she was licensed in South Carolina and performed social work in S.C. Respondent further does not question that Solicitor Arial was aware of the licensing statute when he asked these questions and sought to use the answers to challenge her qualifications and intentionally noted that it had civil and criminal sanctions - which the statutes do possess.

Respondent further notes that at the time, no decision in S.C. had interpreted the requirements for the practice of social work or the applicability of the particular statutes. Nevertheless, Judge Miller qualified Dr. Loring despite Solicitor Ariail's argument. Further, Solicitor Ariail then granted immunity. This was not interference with a witness testifying, but allowance by the State at that stage. It should be noted, however, that an expert witness's lack of licensing or compliance with state rules in their profession affects his or her credibility and/or competency and is a proper subject for cross-examination and for comment during closing argument. Howle v. PYA/Monarch, Inc., 344 S.E.2d 157, 161 (SC Ct. App. 1986). Plainly, the state could have pointed out after qualification that Dr. Loring had not complied with the conditions precedent for approval to practice temporarily in S.C.

Second, Quattlebum is hardly analogous with the facts before this Court. In Quattlebaum, the prosecutor intentionally recorded a privileged communication between a defendant and his attorney, did not timely disclose this recording to the defense for two years, and actually denied the existence of the recording in a preliminary hearing according to the decision of the Court. Here, the State has merely questioned Dr. Loring concerning her licensing status which is a valid line of question for both voir dire and ultimately impeachment. It was the comment concerning the inclusion of civil and criminal sanctions within the statute - a statement of fact supported by the statutes themselves that the Appellant takes issue with. Furthermore, the State has also offered Dr. Loring immunity for her testimony in this case. [28]

B. Showing of Prejudice Required But Not Met

[28]However, Dr. Loring could have complied with the minimal reporting requirements with the licensing statute at any time.

The second requirement to prove improper intimidation of a witness is a resulting prejudice to the defendant. *State v. Williams*, 326 S.C. 130, 485 S.E.2d 99 (1997). No prejudice exists in this case. The simple answer is the Solicitor immediately removed the potential threat or intimidation by the grant of immunity in the case. The second action is that even after the grant of immunity, upon advice of counsel, she attempted to invoke the Fifth Amendment - thus suggesting the licensing statute was more than a mere "red herring," but a matter of potential substance. However, prejudice was removed when Dr. Loring testified as a court witness after the defense refused to call her as a witness.

While the decision is vested in the discretion of the trial court, a mistrial is proper only where it is dictated by "manifest necessity" or "the public's interest in a fair trial designated to end in just judgment." State v. Prince, 279 S.C. 30, 301 S.E.2d 471 (1983).

The defense has failed to recognize two important distinguishing factors in this case as compared to the numerous cases that they cite for governmental interference. First, this case is in the setting of a bench trial. [29] Second, the witness here is an expert witness, not a fact witness with

[29] Two cases in which a mistrial was actually granted in a bench trial were located. In Harris v. Young, 607 F.2d 1081 (4th Cir. 1979), the judge, sitting as the fact finder, granted a mistrial in a criminal habeas corpus case because the Commonwealth of Virginia did not fully comply with an order compelling discovery.. The defendant was tried again before the same judge at a bench trial and was found guilty. The defendant raised the issue of double jeopardy on appeal and in his habeas corpus action. The Fourth Circuit held that jeopardy attaches in a bench trial after the judge began to hear evidence. Id at 1084. The Court also held that there were less drastic remedies for the discovery violation than declaring a mistrial. Id.

In Douglas v. Maryland,360 A.2d 474 (1976), the trial judge presiding over a bench trial declared a mistrial on its own motion because the judge believed his objectivity had been compromised by the behavior of two prosecution witnesses in violation of an order of sequestration. The defendant was retried by a jury at a later date but the Maryland court found that double jeopardy had attached because the mistrial was improvidently granted. In that decision, the Maryland court acknowledged that a judge whose impartiality has been compromised is the same as if a juror's impartiality is injured as well. However in the Douglas case, the Court found that because the problematic witnesses were for the State, this benefitted the defendant and there was no manifest necessity for a mistrial. 360 A.2d 474, 477.

specific and unique testimony. The Fourth Circuit Court of Appeals has addressed the difference between a bench trial and a jury trial. Satterfield v. Zahradnick, 572 F.2d 443 (4th Cir. 1978). There, a prosecutor commented on the defendant's failure to testify during a bench trial. On appeal the Fourth Circuit noted that, "while such a comment may influence a jury beyond the reach of a curative instruction, a trial judge is well aware that no inferences are to be drawn from a defendant's failure to testify and can be presumed to disregard any improper comments to the contrary." Id. Even if the Solicitor had, as the defense suggests would have been proper, raised this issue before the sentencing hearing began, the Court would have been exposed to the same information and the same argument by the State against Dr. Loring's qualification as an expert. The Court is infinitely less susceptible to prejudice if the State's *actual voir dire* of the witness was improper in some way, which the State denies that it was.

The defense below relied on cases that are simply not analogous with the present case. For example, the defense cited *United States v. Thomas*, 488 F.2d 334 (6th Cir. 1973) for the assertion that the government's later statement that the witness would not be prosecuted was not sufficient to overcome prejudice to the defendant. The defense failed to address the egregiousness of the misconduct in Thomas as compared to this case. The Court held in Thomas that it was not the fact that the government explained potential liability while the witness was on the stand, but the fact that the government sent an agent to admonish the witness in an ex parte communication during a recess that was the actual wrongdoing by the prosecutor. Id. Clearly, the ex parte communication in Thomas is easily distinguishable from the facts present in this case.

The Appellant cites *State v. Needs*, 333 S.C. 134, 508 S.E.2d 857, 863 (1999), as standing for the proposition that a prosecutor may not "lob baseless threats or charges at a potential

defense witness in an effort to prevent a defense witness from testifying." *Initial Brief of Appellant*, p. 20. However, a prosecutor is similarly under the ethical obligation as a prosecutor:

> to advise a witness who is to be interviewed of his or her rights against self-incrimination and the right to counsel whenever the law so requires. It has been held proper for a prosecutor to so advise a witness whenever the prosecutor knows or has reason to believe that the witness may be the subject of a criminal prosecution.

ABA Standards for the Administration of Criminal Justice § 3-3.2(b).[30]

The problem with appellate review is that we view matters retrospectively through hindsight. While, we all may wish in hindsight that Solicitor Ariail would not have stated when objecting to her qualifications due to non-compliance with South Carolina licensing: "and, in

---

[30] The conduct of prosecutors, like the conduct of judges, is unquestionably governed by *Webb*. *See also United States v. Blackwell*, 694 F.2d 1325, 1334 (D.C.Cir.1982). Equally well established, however, is that perjury warnings are not improper *per se* and that "the Sixth Amendment is not implicated every time a prosecutor or trial court offers advice regarding the penalties of perjury." *United States v. Davis*, 974 F.2d 182, 187 (D.C.Cir.1992). "Indeed, there are circumstances when warnings about the possibility and consequences of a perjury charge are warranted-even prudent." *Id.* A defendant's constitutional rights are implicated only where the prosecutor or trial judge employs coercive or intimidating language or tactics that substantially interfere with a defense witness' decision whether to testify. *See United States v. Harlin*, 539 F.2d 679, 681 (9th Cir.1976); *see also Davis*, 974 F.2d at 187 ("[A defendant's] rights are not trenched upon by mere information or advice about the possibility of a perjury prosecution, but by deliberate and badgering threats designed to quash significant testimony."); *Blackwell*, 694 F.2d at 1334 ("[W]arnings concerning the dangers of perjury cannot be emphasized to the point where they threaten and intimidate the witness into refusing to testify.").

The substantial interference inquiry is extremely fact specific. Among the factors courts consider in determining the coercive impact of perjury warnings are the manner in which the prosecutor or judge raises the issue, the language of the warnings, and the prosecutor's or judge's basis in the record for believing the witness might lie. *See, e.g., Davis*, 974 F.2d at 187-88; *United States v. Viera*, 839 F.2d 1113, 1115 (5th Cir.1988) (en banc). At least in the case of trial judges, we also scrutinize whether the warning indicates an expectation of perjury. *See Harlin*, 539 F.2d at 681. Where, under the totality of the circumstances, " 'the substance of what the prosecutor communicates to the witness is a threat over and above what the record indicates is necessary, and appropriate, the inference that the prosecutor sought to coerce a witness into silence is strong.' " *United States v. Pierce*, 62 F.3d 818, 832 (6th Cir.1995) (quoting *United States v. Jackson*, 935 F.2d 832, 847 (7th Cir.1991)).

addition to that it carries penalties for both civil and criminal penalties for violation." R., September 8, 2008 Tr.p. 328, l. 19-20, is that not a correct statement of fact? And didn't Solicitor Ariail state at that time ; "I would submit that she's not qualified as an expert in this state to testify or render those services until she gets licensed." Id. R., Tr.p. 328, l. 21-23. This was not a threat that there would be criminal action brought against Dr. Loring - but a request that she comply with the state law requirements.

This Court should study exactly what happened in the record at R., Tr.p. 327-333, what was actually said and not said, not as it has been paraphrased. Also, this Court should be cognizant that at the time of this colloquy by Solicitor Ariail to Judge Miller, the application of the civil and criminal sanctions for non-compliance with S.C. Code §40-63-200, 260, 290 had not been stayed by this Court. A greater question is whether Solicitor Ariail had an ethical duty to bring this to the court's attention or could he ignore it under those discrete circumstances.

Unfortunately, the case was diverted from its reasonable course due to the fact that Dr. Loring was not licensed in South Carolina. However, that diversion was ultimately corrected when she returned in April 2009 and offered to testify, albeit as a "court witness" since the defense refused to call her. See *People v. Hill*, 952 P.2d 673 (Cal. 1978)(no prejudice flows from act of misconduct where intimidated witness testifies); *Wynne v. Renico*, 279 F.Supp.2d 866 (E.D. Mich. 2003) (no prejudice where alleged "intimidated witness" testifies).

Further, after the solicitor's comment to Judge Miller, Dr. Loring was able to consult with independent counsel - Bill Godfrey - who gave her advice on multiple occasions after reviewing the statutes and caselaw and the immunity that she had received. Since the threat of prosecution had been removed, the Solicitor's actual comment was no longer the concern. What factors actually led to her refusal to testify subsequent to the grant of immunity can only be speculation

since contempt proceedings were never pursued against her. However, she was ultimately willing to testify for the defense - and ultimately did for the court.

The Service of an Out of State Material Witness Order

The Appellant seeks to tie the fact that the State sought an out of state material witness subpoena for the April 2009 hearing as a further sign of "witness" intimidation. This is a remarkable assertion since the record reveals that Judge Miller, prior to the Atlanta witness proceedings, certified that she was a material out of state witness and authorized service upon her.[31] Further, Judge Miller refused to revoke his certification of her as a witness when counsel Godfrey appeared on her behalf to quash or revoke it at the April 14, 2009 hearing. April 14, 2009 Tr.p. 1-16. Finally, when the April 20, 2009 hearing began, Judge Miller continued to request her presence - ultimately calling her as a court witness. The fact of seeking to secure a witness through the use of a subpoena can not be considered "witness intimidation."

The Appellant cites to *State v. Jones*, 383 S.C. 535, 681 S.E.2d 580. 586 (2009) suggesting that if the state seeks to compel a defendant's consultative expert to testify on its behalf, the State must prove it has a substantial need for the expert. However, the subpoena for her appearance was that she was a "material" witness - not as a state witness.[32] As stated at the

[31]The Appellant contends that the arrival of the Georgia police at her home attempting to secure service of the Georgia bench warrant after Dr. Loring did not apparently appear at a hearing on the out of state subpoena was a sign of intimidation. However, these matters should not be imputed to solicitor as trying to intimidate her from testifying when in fact it was to secure her attendance in S.C. Dr. Loring agreed to voluntarily return to S.C. Further, the Georgia authorities had been directed to "stand down" by South Carolina authorities.

[32]Solicitor Ariail stated at the April hearing that the reason that they sought Dr. Loring with the out of state subpoena was because two issues remained opened - first the issue of Dr. Loring not testifying in an effort to preserve the prosecutorial misconduct issue because if she does testify that issue is negated and because the defense had declared that the potential replacement social worker would not be prepared by the April hearing date. The Solicitor stated that he wanted to

September hearing, the issue concerning Dr. Loring remained opened about her failure to testify and the potential prejudice arising from that failure. R. 431-35, 452, September 2008 Tr.p. 431-435, April 14, 2009, Tr.p. 14. Clearly, the trial court was reasonable in concluding that Dr. Loring remained a material witness in the case.

Here, the State made a motion on April 1, 2009 for attendance of an out of state witness. See *Petition for Attendance of An Out of State Witness*, filed April 1, 2009. ROA1249-1251. In the motion, the State asserted that Dr. Loring was a necessary and material witness and declared in the petition that the state would withdraw the motion if the defense assures the witnesses presence and that the witness had previously been retained by the defense. Judge Miller signed the certificate and subpoena pursuant to the Uniform Act to Secure the Attendance of Witnesses. April -, 2009. ROA , p. ____ . (Certificate and Subpoena). Judge Miller refused to revoke the certificate on April 14, 2009 at the hearing.

Dr. Loring was not called as a "state" witness. R. 641, April 20, 2009 Tr.p. 203. Judge Miller called her as a court witness - opining that her testimony was necessary for his determination - not as a state witness. R. 658-662, April 20, Tr.p. 220–224. She testified as an expert as a court witness. R. 664-719, Tr.p. 226-281.

Recusal of the Solicitor's Office was Properly Denied.

The Appellant asserts that the Solicitor's Office should have been recused because the Solicitor in the case of *State v. Michael Laney* before Judge Welmaker had made an assertion concerning the lack of a state license for an unlicensed psychology professor Dr. Caroline Everington. However, a review of the transcript attached to the Appellant's motion concerning the

---

avoid a post-conviction relief issue by insuring that the witness was present and available to testify for the defense. R. 602-03, April 20, 2009 Tr.p. 164-165.

Everington testimony reveals that it concerned licensing of psychologist, that Dr. Everington was not licensed and that the issue raised concerned her qualifications as a matter of state law to give certain tests and evaluations for mental retardation - not her qualifications as an expert in mental retardation. Further, there was no "finding" in *Laney* that this was "misconduct" as the Appellant suggests. *Initial Brief of Appellant*, p. 22. [33] The motions were never ruled upon in *Laney*. R. 576-78, April 20, 2009 Tr.p. 138-140. The claim is without support in the record that the *Laney* case put the State "on notice that his actions constituted prosecutorial misconduct" to inquire of an expert witness concerning a lack of licensing and its ramifications .[34]

---

[33]Dr. Everington was qualified as an expert in the field of mental retardation without objection and she testified fully on direct to the Court. However, in her testimony she interpreted the results of I.Q. tests as a part of her diagnosis. The interpretation of I.Q. tests is a function restricted by state law to licensed psychologists. The Solicitor asked her if she was a licensed psychologist and she testified no. At that point, the Solicitor objected to her testimony on the basis that she had exceeded the area of her qualification as an expert by interpreting these tests. There was no effort to prevent her testimony as an expert in the field of Mental Retardation. The issue concerned Dr. Everington's ability to interpret the results of I.Q. tests as a part of the basis of her opinion as an expert as the State claimed only a licensed psychologist can interpret the results of I.Q. tests under S.C. law and she was not so licensed. See S.C. Code Ann. § 40-55-50 (A)(1)(a), (b),(c). See Renewed Motion for Mistrial, Exhibit C [State's Memorandum in Opposition to Motion.]. ROA, p. *_-_*. Defense Exhibit D-37. R. 522, April 20, 2009 Tr.p. 84. This was not an issue on an out of state witness being barred from rendering expert testimony in the field of her expertise as in Baggerly. This concerned a S.C. resident, duly qualified as an expert in mental retardation, and testifying to the Court without objection as to her licensing. R. 555-56, April 20, 2009 Tr.p. 117-118. The objection raised as to her testimony by the State was that she used methodology that was outside the scope of her field of expertise that only a licensed psychologist could use and thus, she was testifying outside the scope of her qualification as an expert witness.

The portion of her testimony sought to be excluded was the use of her interpretation of the results of I.Q. tests that the statute prohibited her from doing. She was still available to testify as to her opinion using methodology within her qualified field of expertise. R. 552-53, April 20 Tr.p. 114-115.

The defense in Laney filed motions alleging prosecutorial misconduct over those questions being asked of Dr. Everington and the State filed a response. No ruling issued on these matters.

[34]The Respondent concedes that defense counsel in *Laney* did make a motion claiming it was misconduct to challenge the expertise of Dr. Everington to test and evaluate certain matters under

CONCLUSION

The plea judge correctly concluded that a mistrial was not required because it was not absolutely necessary. Dr. Loring - initially concerned about the possibility that she was in violation of the law because of her failure to comply with the licensing conditions - agreed to voluntarily appear and make herself available in April 2009 to testify. While the Appellant makes much of the Solicitor's prior attempt to impeach the ability of another witness in a different case concerning the effect of her failure to satisfy licensing requirements, the failure to meet the licensing must be seen as a legitimate inquiry on the examination of any expert by either the state or defense. Similarly, when the claimed intimidation of criminal sanctions was removed by the grant of immunity, the decision not to testify at that time could not be seen as a product of the risk of criminal sanction. Rather, the trial judge reasonably concluded that it was not deliberate intentional misconduct and did not effect the substantial rights of Inman. To the contrary, the plea judge reasonably concluded that when the defense counsel actively sought to limit the evidence from Dr. Loring - evidence that they intended to offer in September 2008 - at the April 2009 hearing when he was available and willing to testify - their actions removed their ability to claim that they were deprived of the testimony by the action of the prosecutor.[35] R. 700, April 20, 2009 Tr.p. 262. His claim is without merit.

III. Reversible error was not committed when the hearing judge refused to allow defense counsel call Solicitor Ariail or his deputies on the claim of prosecutorial misconduct on their intent in questioning Dr. Loring concerning the lack of a South Carolina social work license and its effect when qualifying Dr. Loring.

S.C. law. ROA , p.1057, 1146. Defense Exhibit 35, 43. (Laney transcripts) However, the motion was abandoned.

[35]Defense counsel was advised that Dr. Loring was willing to testify without any fear or apprehension before she was aware of the subpoena. R. 599, April 20, 2009 Tr.p. 161.

Judge Miller did not abuse his discretion in refusing to have members of the solicitor's office testify about their "intent" in its questioning and objection to Dr. Loring's qualification as an expert witness. The Appellant contends that it was reversible error under *State v. Quattlebaum*, 338 S.C. 441, 527 S.E.2d 105 (2000) to deny the defense the right to call the solicitor or his deputies concerning whether the questioning of Dr. Loring concerning the lack of a South Carolina social work license to determine whether it was deliberate intentional prosecutorial misconduct. Particularly, in the brief, he claims that he was entitled to call Solicitor Ariail and his deputies and staff to show the Solicitor's intent in questioning Dr. Loring and advising the judge concerning the licensing statute and its sanctions. He contends that since the lower court found that the conduct was "prosecutorial misconduct" but not intentional, mistrial was not required - which deprived him of evidence.

The record reveals that during the April 2009 proceedings, defense counsel Bannister stated an intent to call Solicitor Ariail and Deputy Solicitor Strom as witnesses. R. 604-05, April 20, 2009 Tr.p. 166-167.[36] He stated that the purpose was limited to the issue of prosecutorial misconduct and when they got notice of it and why they did not raise the same issue with respect to Dr. Loring in a trial after the Dr. Everington issue in the Laney case.

Judge Miller stated that he was going to deny the motion. He declared that he was not going to recuse them as advocates and make them witnesses in the case. R. 605, April 20, 2009 Tr.p. 167. When the defense further objected, Judge Miller cited *State v. Lyles*, 379 S.C. 328, 665 S.E.2d 201 (Ct App. 2008). As the Court stated therein:

> However, "[i]n the exercise of this right [to present a defense], the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of

[36]See also R. 502-09, April 20, 2009 Tr.p. 64-71.

> guilt and innocence." *Chambers,* 410 U.S. at 302, 93 S.Ct. 1038. "The right to present a defense is not unlimited, but must 'bow to accommodate other legitimate interests in the criminal trial process.' " *Hamilton,* 344 S.C. at 359, 543 S.E.2d at 594 (quoting *Rock v. Arkansas,* 483 U.S. 44, 55, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987) (quoting *Chambers,* 410 U.S. at 295, 93 S.Ct. 1038)). " 'The accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence.' " *Montana v. Egelhoff,* 518 U.S. 37, 42, 116 S.Ct. 2013, 135 L.Ed.2d 361 (1996) (quoting *Taylor v. Illinois,* 484 U.S. 400, 410, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988)) (brackets in original). Defendants are entitled to a fair opportunity to present a full and complete defense, but this right does not supplant the rules of evidence and all proffered evidence or testimony must comply with any applicable evidentiary rules prior to admission. *Hamilton,* 344 S.C. at 359, 543 S.E.2d at 594.

State v. Lyles, 379 S.C. 328, 342-343, 665 S.E.2d 201, 209 (Ct. App.,2008). See R. 606, April 20, 2009 Tr.p. 168, ll. 8-18.

The sentencing judge did not commit error in refusing to allow that the defense call either Solicitor Ariail or Deputy Solicitor Strom as witnesses. The Appellant claims that this act deprived him of the ability to show their "intent" in bringing up the licensing statute during Dr. Loring's testimony. However, the lower court reasonably concluded that there was a legitimate interest in not making them witnesses on this collateral issue. Judge Miller stated that the solicitor was an advocate in this action not a witness. While the hearing judge implicitly concluded essentially that the social worker licensing statute had no effect as to sanctions when a witness who was qualified as an expert ignored the statutory requirements, testimony concerning the earlier objection to the qualification was not necessary. Simply put, the actual conduct was on the record before the court when Solicitor Ariail actually made the comment.

In support of his claim, the defendant was able to present testimony from John Mauldin, Troy Tessier, Susan Allen and Desa Ballard in support of their misconduct and mistrial motion. Certain salient factors were presented through that testimony on the issue:

- In the *Laney* case - Judge Welmaker had never ruled that the questioning of Dr. Everington as an unlicensed psychologist was prosecutorial misconduct and the motion was abandoned.
- The basis for the life sentence in Laney was contested and the reasoning on the record was not due to a claimed misconduct - but the mental status of Laney.
- While Dr. Loring had testified in an earlier case, no issue was presented at that time concerning the licensing statute.
- The material witness motion was made by Solicitor Ariail and certified by Judge Miller.

It is evident that Solicitor Ariail's objection to the qualification of Dr. Loring should be seen to speak for itself, but Judge Miller qualified her as an expert witness over the state's objection. This was not similar to the *Quattlebaum* case.

In *Quattlebaum,* this Court held that the defendant should have been permitted to call solicitor and deputy solicitor to testify *in camera* regarding their use of information contained in improperly obtained videotape of defendant's conversation with his attorney, and their knowledge of circumstances surrounding use of defendant's cellmate as informant. The Court concluded that the refusal to permit the defendant to do so was not harmless, as it could not be determined whether prosecutors' testimony would have been merely cumulative.

The advocate-witness rule is codified in the Model Rules of Professional Conduct, SCACR Rule 407, Rule 3.7. The advocate-witness rule provides, with some exceptions, that an attorney should not participate in a trial as an attorney if the attorney is likely to be a necessary witness. Nothing in this section or in the commentary suggests that a defense counsel can force

the disqualification of a prosecutor simply by stating that he plans to call the prosecutor as a witness or by actually calling him as a witness.

Cases dealing with the specific subject of the prosecutor as a witness in a criminal case are collected in Annot., 54 A.L.R.3d 100 (1973). It appears from this annotation that generally if a prosecutor plans to testify *for the state* in a prosecution of a defendant, the prosecutor should withdraw from the case. Courts, however, have made exceptions, as where the testimony of the prosecutor will relate only to a formal matter about which there is no dispute. As stated in the annotation, the few courts that have addressed the issue have indicated generally that a defendant may not force the disqualification or removal of a prosecutor from the case by announcing plans to call the prosecutor. Annot., 54 A.L.R.3d 100, §§ 2(a), 16 (1973).

Here, the testimony from either members of the Solicitor's office was not necessary on the issue of prosecutorial misconduct. Judge Miller did not abuse his discretion is refusing to require testimony from the Solicitor's office on their "intent" in objecting to Dr. Loring's expert testimony on the basis of the licensing statute. Accord, April 20, 2009 Tr.p. 71, l. 1-10. Similarly, inasmuch as the trial judge had approved the out of state subpoena, their testimony was not required where the certification was done based upon the pleadings before the court. [37] The intent of the Solicitor was resolved when he granted immunity after the judge rejected the position that South Carolina licensing was required for her expertise. Further testimony was not required or necessary.

---

[37]It is noted that the prosecution made a response to the claims concerning the attempt to serve Dr. Loring in Georgia and their lack of direct involvement. In particular, the April 17, 2009 Affidavit of Chief Assistant District Attorney Don Geary, Stone Mountain Judicial Circuit, DeKalb County Georgia was filed on April 19, 2009 with the "Response to the Renewed Motion for Recusal of the Thirteenth Circuit Solicitor's Office. ROA, * - *. See also, R. 506-07, April 20, 2009 Tr.p. 68-69. Within the affidavit, Geary explains the direction in the service of the Georgia subpoena after receiving the material witness packet.

CONCLUSION

For all the foregoing reasons the appeal must be dismissed and judgment of conviction affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

WILLIAM WALTER WILLIAMS, III
Solicitor, Thirteenth Judicial Circuit
305 E. North St., Suite 325
Greenville, SC 29601
(864) 467-8282

By: _____
DONALD J. ZELENKA
ATTORNEY FOR RESPONDENT

June 21, 2011

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Pickens County
Edward W. Miller, Circuit Court Judge

THE STATE,

Respondent,

v.

JERRY BUCK INMAN,

Appellant.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007 Order of the South Carolina Supreme Court entitled " Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

DONALD J. ZELENKA
Assistant Deputy Attorney General

June 21, 2011

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, counsel for the Respondent, certify that I have served the within ***Final Brief of Respondent*** in the foregoing action on the Appellant by depositing two (2) copies of the same in the InterAgency Mail to Robert M. Dudek, Chief Appellate Defender, S.C. Commission on Indigent Defense, Division of Appellate Defense, 1330 Lady Street, Suite 401, Columbia, SC 29201 this 21st day of June, 2011.

_____

DONALD J. ZELENKA
Assistant Deputy Attorney General