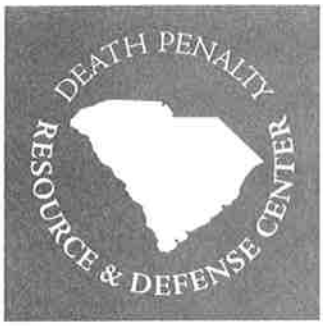

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, South Carolina 29211

December 21, 2009

Dear Mr. Shearouse:

I am writing on behalf of the Death Penalty Resource & Defense Center, a non-profit organization dedicated to improving the quality of death penalty representation in South Carolina. I would like to make two important points regarding Proposed South Carolina Criminal Rule 141(C):

> After a jury or juror has been dismissed, no person or entity, including but not limited to counsel, defendants, witnesses, victims, or anyone acting on their behalf shall initiate contact with, directly or indirectly, any juror regarding that juror's service on any case. However, upon a motion and hearing showing the necessity of contacting or interviewing one or more jurors, the court may permit such contact upon specified terms and conditions.
>
> **Notes:** Section (a) and (c) are new. Section (c) is included because of a growing concern regarding post trial contact with jurors. Section (b) is substantially the language of Rule 22, SCRCrimP, but clarifies that an attorney or *pro se* defendant will not make any personal reference or appeal to a jury at any time.

Although this rule would impact all criminal cases, my comments are specifically directed to its assured detrimental effects in capital cases.

First, Proposed Rule 141(C) would seriously impede investigation of claims related to juror bias, juror misconduct, and jury tampering. For example, in *State v. Bryant*, 354 S.C. 390, 581 S.E.2d 157 (2003), the defendant, James Bryant, was convicted of murder and armed robbery and sentenced to death. *Id.* at 391, 581 S.E.2d at 158. One day after the jury recommended its sentence, defense counsel learned that improper contact may have been made with members of the jury pool. After further investigation, defense counsel uncovered that members of the prosecution and/or their agents had contacted jurors' relatives after the jurors were death penalty qualified. Representatives of the state informed the jurors' family members that "they were trying to get a death penalty conviction" and inquired about the family members'

views on whether or not the jurors could vote for the death penalty. *Id.* at 392, 581 S.E.2d at 158-59. During the trial, some of the jurors were aware that police investigators had contacted their family members and neighbors. *Id.* at 393-94, 581 S.E.2d at 159-60. The South Carolina Supreme Court granted Mr. Bryant a new trial, unanimously ruling that the state's indirect contact with jurors violated Mr. Bryant's Sixth and Fourteenth Amendment rights to a fair trial by a panel of impartial and indifferent jurors. *Id.* at 396-97, 581 S.E.2d at 161.

Proposed Rule 141(C) will prejudice future cases like Mr. Bryant's by making it harder to investigate such claims. The rule will do nothing to prevent violations like this one from occurring in the first place – indeed, the state's actions in Bryant were already clearly inappropriate before the current rule was proposed. Instead, the rule will merely hinder defendants' efforts at uncovering, presenting and rectifying these errors. As such, the rule would actually provide a greater incentive for the state to engage in prejudicial pre-trial contact with jurors. Obviously, if the defendant cannot investigate the claim post-trial, how would anyone ever find out? Although the proposed rule does allow for post-trial contact with jurors upon "a motion and hearing showing the necessity of contacting or interviewing one or more jurors," there is no guaranty that a defendant will gain appropriate access to investigation since no guidance or standard is given to direct the courts' consideration of post-trial motions. It is unacceptable to leave this determination to the subjective and unfettered discretion of the trial judge, particularly in capital cases where the stakes are so high. Moreover, the use of the word "necessity" in the rule suggests that the defendant must make some sort of *prima facie* showing before he should be permitted to investigate – a task which will be virtually impossible if he is not allowed to have post-trial contact with jurors in advance of the hearing. Finally, the note section of the proposed rule states that "[s]ection (C) is included because of a growing concern regarding post-trial contact with jurors." This cryptic warning seems calculated to convey that all post-trial contact with jurors is disfavored, and, therefore, that motions filed under this rule should rarely, if ever, be granted.

Mr. Bryant's case is not the only example of the importance of post-trial juror investigation. There have been several racial bias claims uncovered during capital post-conviction investigations in South Carolina. For example, in *Bennett v. State*, a former juror, during a discussion with post-conviction counsel about the jury's decision-making process, stated that he believed Mr. Bennett committed the crime charged because he was "just a dumb nigger." *See* PCR Transcript Pages, attached as Exhibit A. In *Binney v. State*, former juror Henry Viquez, a native of Costa Rica and naturalized citizen of the United States, was pressured to vote for death by his fellow jurors who called him names, said "why don't you go back to your

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own country?," and told Mr. Viquez that he would go to jail if he did not vote to impose a death sentence. *See* Viquez Deposition Pages, attached as Exhibit B. Both the *Bennett* and *Binney* cases are still being litigated. Proposed Rule 141(C) imposes an unacceptable restriction on post-trial investigation, and it will very likely sweep a number of potentially meritorious claims under the rug.

Second, the proposed rule would prevent academic research. The Capital Jury Project is a research program designed to develop information about how jurors process information and make decisions in capital cases. Data is collected through post-trial interviews with capital jurors who voluntarily participate in the studies. South Carolina has made an important contribution to the project, resulting in a number of empirical studies that have been cited in opinions by the United States Supreme Court and other courts.

For example, Professors Eisenberg and Wells conducted a study of South Carolina jurors who served in capital cases which "confirm[ed] that jurors' deliberations emphasize dangerousness and that misguided fears of early release generate death sentences." Eisenberg & Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1538, 1560 (1998). This study has been cited thirteen times by various courts, including the United States Supreme Court in *Simmons v. South Carolina*, 114 S.Ct. 2187, 2193, 512 U.S. 154, 163, 129 L.Ed.2d 133 (1994), holding that, when the state raises a capital defendant's future dangerousness, Due Process requires the trial court to instruct the jury that a life sentence carries no possibility of parole. This study and others like it have been lauded by courts as "the best available insight into jury behavior." *People v. LaValle*, 817 N.E.2d 485, 501 (N.Y. 2004) (discussing Eisenberg & Wells, *Deadly Confusion*, and Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, COLUM. L. REV. 1538 (1998)); *see also, Strickler v. Greene*, 527 U.S. 263, 305, 119 S.Ct. 1936, 1960, 144 L.Ed.2d 286 (Souter, J., concurring) (1999) ("common experience, supported by at least one empirical study, see Bowers, Sandys, & Steiner, *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making*, 83 Cornell Law Review 1476, 1486-1496 (1998), tells us that the evidence and arguments presented during the guilt phase of a capital trial will often have a significant effect on the jurors' choice of sentence"). Proposed Rule 141(C) would cut off an important avenue of academic research that currently helps us obtain a deeper understanding of the nature of juror reasoning and its effects in capital cases.

The best way to protect jurors from post-trial harassment or embarrassment is simply to inform jurors that they are not required to speak with anyone about their service if they do not

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wish to do so. Jurors are frequently so instructed under the current practice and told that they may call the court or clerk's office if they have any questions or concerns about this instruction following their service. Anyone seeking to contact a juror post-trial should simply be required to identify themselves, state the nature of their inquiry, and ask if the juror wishes to speak voluntarily. If the juror declines to speak, he or she should not be harassed. This is the general procedure set forth by statute for capital cases. See S.C. Code § 16-3-21. A similar procedure is required by the local civil rules of the Federal District Court for the District of South Carolina. *See* Local Civil Rule 47.05 ("Attorneys or party litigants who choose to contact a juror after such juror has been permanently dismissed and has left the Courthouse premises, do so at their own peril. Under no circumstances shall an attorney, party litigant, or any person acting therefor, ask questions or make comments to a member of that jury that are calculated to harass or embarrass a juror or to influence the juror's actions in any future jury service").

On behalf of the Death Penalty Resource & Defense Center, I am respectfully requesting that the Court consider these comments and reject Proposed Rule 141(C) as it is currently drafted. I am also requesting the opportunity to speak at the public hearing concerning these proposed rules on January 5, 2010.

Very truly yours,

Emily C. Paavola

Emily C. Paavola
Executive Director

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EXHIBIT A

STATE OF SOUTH CAROLINA | COURT OF COMMON PLEAS

COUNTY OF RICHLAND | 2006-CP-40-5751

JOHNNY O. BENNETT :

:

-VS- : TRANSCRIPT OF RECORD

:

THE STATE OF SOUTH CAROLINA :

MAY 27, 2008
LEXINGTON, SOUTH CAROLINA

B E F O R E:

THE HONORABLE JAMES R. BARBER, III, JUDGE.

A P P E A R A N C E S:

ROBERT E. LOMINACK, ESQUIRE
DEREK ENDERLIN, ESQUIRE
ATTORNEYS FOR THE APPLICANT

WILLIAM EDGAR SALTER, III, ESQUIRE
AL SIMON, ESQUIRE
ATTORNEYS FOR THE STATE

DAPHNE D. HELMS
CIRCUIT COURT REPORTER

THE WITNESS: ADAM HUMPHREY. H-U-M-P-H-R-E-Y.

DIRECT EXAMINATION

BY MR. LOMINACK:

Q. GOOD MORNING, MR. HUMPHREY.

A. GOOD MORNING.

Q. MY NAME IS ROBERT LOMINACK, AND OBVIOUSLY WE'VE MET BEFORE. AND I'M NOT PUTTING YOU ON TRIAL HERE, AND I'LL TRY TO DO THIS AS QUICKLY AS I CAN. HOW ARE YOU EMPLOYED RIGHT NOW?

A. SELF -- SELF-EMPLOYED.

Q. AND WHAT DO YOU DO?

A. CARPENTRY.

Q. AND IS THAT WHAT YOU WERE DOING BACK IN THE SUMMER OF 2000 AS WELL?

A. YES.

Q. ALL RIGHT. IF YOU COULD---

THE COURT: HOW OLD ARE YOU, MR. HUMPHREY?

THE WITNESS: 35.

BY MR. LOMINACK:

Q. AND YOU WERE A JUROR IN MR. BENNETT'S RESENTENCING. IS THAT RIGHT?

A. RIGHT.

Q. IN THE SUMMER OF 2000.

A. YES.

Q. YEAH, IF YOU COULD ANSWER---

A. OKAY.
Q. ---SO THE COURT REPORTER CAN GET DOWN YOUR RESPONSES. AND DO YOU RECALL MEETING WITH ME?
A. YES, I DO.
Q. AND THERE WAS A YOUNG WOMAN WITH ME?
A. UH-HUH. YES, SIR.
Q. OKAY. AND DID YOU RECOGNIZE THAT WOMAN WHO WAS IN THE COURTROOM EARLIER?
A. YES, I DID.
Q. OKAY. AND WOULD YOU AGREE THAT THAT WAS LAST SUMMER IN JULY?
A. RIGHT.
Q. OKAY. AND WE MET WITH YOU AT YOUR HOUSE; RIGHT?
A. CORRECT.
Q. AND WE ASKED YOU ABOUT YOUR EXPERIENCES AS A JUROR IN MR. BENNETT'S RESENTENCING CASE.
A. RIGHT.
Q. AND QUESTIONS ABOUT SEQUESTRATION; RIGHT?
A. RIGHT.
Q. AND YOUR THOUGHTS ON THE CASE.
A. YES.
Q. AND THE EVIDENCE.
A. RIGHT.
Q. OKAY. AND THE ATTORNEYS.
A. YES.

Q. ALL RIGHT. AND DO YOU RECALL ME ASKING YOU THE QUESTION, INDICATING THAT THIS WAS A STRANGE CRIME AND WHY DID YOU THINK THAT MR. BENNETT HAD KILLED THE VICTIM?

A. I DON'T RECOLLECT THE EXACT WORDS, BUT I REMEMBER, YES, I GUESS.

Q. OKAY. AND DO YOU RECALL ANSWERING THAT BY---

MR. SALTER: OBJECT -- I'M GOING TO FINALLY OBJECT NOW. HE'S LEADING THE WITNESS. I MEAN, FOR THE MOST PART IT'S NOT A BIG DEAL SINCE WE'RE SITTING NON-JURY.

THE COURT: ALL RIGHT. JUST DON'T LEAD HIM.

BY MR. LOMINACK:

Q. DO YOU RECALL WHAT YOUR ANSWER WAS?

A. YES.

Q. AND WHAT WAS YOUR ANSWER TO THAT QUESTION?

A. I DON'T -- I DON'T REALLY RECALL WHICH QUESTION THAT I ANSWERED WHAT YOU'RE GOING TO MAKE ME SAY BUT -- I DON'T RECALL.

Q. OKAY. DO YOU RECALL EVER SAYING, "BECAUSE HE WAS JUST A DUMB NIGGER"?

A. SOME WORDS LIKE THAT, YES.

Q. OKAY. OKAY. WOULD YOU LIKE TO CHANGE ANY OF THE WORDS THAT I JUST SAID?

A. YEAH. YOU KNOW, I APOLOGIZE FOR SAYING THAT ONE WORD, BUT AFTER GOING THROUGH THAT THING FOR AN ENTIRE WEEK AND ALL THE EVIDENCE PILING UP AGAINST HIM, THAT WAS JUST THE WAY I

FELT ABOUT IT.

Q. ALL RIGHT. AND I DON'T WANT TO PUT WORDS IN YOUR MOUTH. YOU'RE NOT -- I DIDN'T MISSTATE WHAT YOU SAID; RIGHT?

A. NO, I SAID THAT.

Q. YOU'RE NOT HAPPY THAT YOU SAID IT.

A. NO, I'M NOT.

MR. LOMINACK: OKAY. COURT'S INDULGENCE. NOTHING FURTHER FOR NOW, YOUR HONOR. THANK YOU, MR. HUMPHREY.

THE COURT: MR. SALTER, ANYTHING?

MR. SALTER: YES, SIR, JUST BRIEFLY.

CROSS-EXAMINATION

BY MR. SALTER:

Q. MR. HUMPHREY, YOU WERE APPROACHED BY MR. LOMINACK AND THIS WOMAN?

A. RIGHT.

Q. CORRECT? HOW DID THEY GO ABOUT IDENTIFYING THEMSELVES?

A. WELL, I WAS OUTSIDE WEED-EATING THE FRONT YARD AND, YOU KNOW, THEY WALKED UP WITH A BUNCH OF BOOKS AND THIS AND THAT, AND I REMEMBER HIM SAYING HIS NAME AND, YOU KNOW, HE WAS WITH AN ATTORNEY'S OFFICE AND, YOU KNOW -- AND IMMEDIATELY, YOU KNOW, THAT PERKED UP MY EARS BECAUSE, YOU KNOW, SOMEBODY SHOWING UP AT MY HOUSE---

Q. ALL RIGHT.

A. ---YOU KNOW, AND THAT'S ALL I CAN RECALL AS FAR AS IDENTIFYING HIM.

EXHIBIT B

ROUGH DRAFT

DEPOSITION OF HENRY VASQUEZ

TAKEN MAY 15, 2007

SPARTANBURG COUNTY COURTHOUSE

(Defendant's Exhibit Nos. 1 and 2 were premarked for identification.)

MR. MABRY: My name is Anthony Mabry. I'm an Assistant Attorney General with the State Attorney General's Office in Columbia, South Carolina. Also with me is Ed Salter, who is a Senior Assistant Attorney General, and also Emily Paavola, who is an attorney representing Jonathan Binney. This is a post conviction relief matter. We have noticed the deposition of Henry Viquez. I want to put on the record at this time the reason this deposition is being taken. Mr. Viquez was a juror in the death penalty case, the State versus Jonathan Kyle Binney, **oogask11526. Neither myself, nor Mr. Salter, nor any member of the Attorney General's Office, nor anyone at their direction prior to receiving a statement from Mr. Binney's attorneys signed by Mr. Viquez had we approached or directed anyone to approach a juror in this case.

A. And coming down, eventually coming down all the way to 11 to 1.

Q. Okay. All right. And do you have any idea how long before you reached the unanimous verdict of death was it -- how long before that unanimous verdict, before you-all came in with the unanimous verdict was that it was 11 to 1 where you were the last person, it was 11 for death and you still wanted to talk about it or you wanted to discuss it. Do you remember how long before you reached the verdict?

A. No, I don't remember. Specifically how long, no.

Q. Could it be an hour, two hours or do you know?

A. I really don't remember.

Q. All right. So tell me -- the other jurors wanted to vote for the death penalty. Is that correct?

A. Correct.

Q. All right. And my understanding you wanted to continue to discuss it?

A. I wanted to vote for life.

Q. You wanted to vote for life?

A. Life.

Q. All right. Tell me then what took place during those -- tell me what you remember occurring I guess when

you-all got to that point in the discussions. It was 11 for death, and you wanted to vote for life. Did you want

to continue to discuss it and they didn't want to discuss it?

A. They wanted to go home.

Q. Okay. They wanted to go home?

A. Yeah.

Q. Did they tell you they wanted to go home?

A. Yes.

Q. And what took place? What discussions took place?

A. Well, they start -- everybody against me.

Q. Everybody was against you?

A. Yeah. And I ask questions, you know, about everything. We have to go --

Q. You asked questions about -- the evidence?

A. You know, evidence, and let's go, you know --

Q. Go over it again?

A. Because I wanted to be sure 100 percent what we are going to do, and that's what I was for.

Q. You was for -- 100 percent for doing, being sure?

A. What's right.

Q. What's right. Okay. I understand that.

And I guess did you-all deliberate some

more? Did you discuss it some more?

A. Yeah, we did, and coming to the point to start vote and to see again, and it was a lot of pressure and

telling I can go to jail if I vote no guilty or death penalty, it's 11 to 1. They can put me in jail. They started doing a lot of things.

Q. Okay. Let me stop you there.

A. The jury told me that, people on the jury.

Q. All right. You were on the jury.

A. Yeah.

Q. All right. It's 11 for the death penalty, and you're wanting to go over the evidence some more to make sure you're doing the right thing. Is that correct?

A. That's correct.

Q. All right. What, if anything, did -- because that's not -- I didn't see that in your Affidavit anywhere. Tell me what the other jurors said to you or what --

A. Call me names.

Q. Somebody called you a name?

A. Yes. And why I am here, why I'm not going back to my country.

Q. Okay. Well, let me stop you.

A. Okay.

Q. Who called you a name?

A. I cannot remember names.

Q. All right. Was it a male juror or female juror?

A. Both.

Q. Both.

Okay. How many jurors? How many jurors called you a name?

A. A couple that I can remember.

Q. A couple?

A. Yeah.

Q. What name did they call you?

A. Like illegal or foreign, you know, names -- that's what you ask me?

Q. Yeah, I want to know what names they called you. I wasn't there, and I don't know. So I want to hear what name they called you.

A. My goodness. Well, names specifically I can't remember, but I can remember the one lady told me if I don't choose death penalty because like he did it. **Check

Q. A lady said --

A. A lady, yeah.

Q. A lady juror said you're not voting for the death penalty because you don't think he did it?

A. No. She said I did it is like saying he did

it, like I agree with him, why he did it, maybe I did it myself.

Q. Maybe you did what yourself?

A. Well, he --

Q. Slow down. I'm sorry.

MS. PAAVOLA: I think you said, **he

abused his own daughter.

*****check

A. Yeah, he abused his own daughter, and she tried to say maybe I don't decide he's guilty because I did it is saying like -- what's his name -- **check

Q. **Binney?

A. Binney did it. In other words, what she tried to say, I don't want the death penalty because I did the same.

Q. You did the same thing as he did. Is that what she was saying?

A. Yes.

Q. So she said -- she accused you of doing the same thing that Binney had done? **check

A. Yes, because that's why I don't want death penalty.

Q. Okay. All right. And how did you respond to that?

A. No. I told her, I said, I don't look at it

that way. I look at it because it's a person here. If it's one of something you like to try to do it the same way like we did it to them. We tried to do the best *thing for both sides. I want to be sure 100 percent sure what we are going to do because that's why we are here. They wanted to go home. **I want to have family.

Q. They said they wanted to go home?

A. Yeah, because they have family, they have children, they're waiting for me. I said, I have family. I'm going back to Costa Rica. I can't go because I am here.

Q. So you told him, you got family, too, and you can't go back.

A. Yeah. See, and the name, see, I can't remember.

Q. You can't remember what names they called you?

A. Yeah.

Q. But they called you some kind of name?

A. Yes.

Q. And somebody -- do you remember anything else that they said?

A. One, a black girl, she say if I not decide to vote they're going to have a new trial.

Q. Okay.

A. And they can't *** me for saying no.

Q. She said --

A. She said if I say no --

Q. Right?

A. If I say no and go 11/1, and stay like that, --

Q. Right.

A. -- after we finish, they can come to me and condemn me for saying no.