The Supreme Court of South Carolina

In the Matter of Maureen Feran Freedland, Respondent.

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 12, 1980, Maureen Feran Freedland was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Clerk of the South Carolina Supreme Court, dated January 14, 2003, Ms. Freedland submitted her resignation from the South Carolina Bar. We accept Ms. Freedland's resignation effective December 31, 2002.

Ms. Freedland shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court her certificate to practice law in this State.

In addition, she shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of her resignation.

Ms. Freedland shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that she has fully complied with the provisions of this order. The resignation of Maureen Feran Freedland shall be effective upon full compliance with this

order. Her name shall be removed from the roll of attorneys.

s/Jean H. Toal C.J.

s/James E. Moore J.

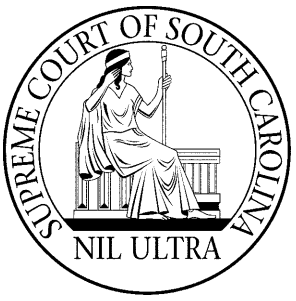
s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

February 7, 2003



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

FILED DURING THE WEEK ENDING

February 18, 2003

ADVANCE SHEET NO. 6

Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.judicial.state.sc.us

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Wesley Floyd and John New, Appellants.

Appeal From Lee County
Marc H. Westbrook, Circuit Court Judge

Opinion No. 25593
Heard January 7, 2003 – Filed February 10, 2003

REVERSED AND REMANDED

Assistant Appellate Defender Aileen P. Clare, of South Carolina Office of Appellate Defense, of Columbia, for appellants.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, and Senior Assistant Attorney General Harold M. Coombs, Jr., all of Columbia; and Solicitor Cecil Kelley Jackson, of Sumter, for respondent.

JUSTICE PLEICONES: Appellants were jointly tried and convicted of two counts of taking a hostage and one count of carrying a weapon while an inmate. Each received two consecutive sentences of life without the possibility of parole for the hostage-takings, and a consecutive ten-year sentence for the weapons offense. On appeal,[1] appellants contend the trial court erred in dismissing a juror who had indicated he would not take a religious oath. We agree, and reverse and remand.

FACTS

Following jury selection, the trial judge announced that he had been informed that one of the jurors selected (Juror 126) told court personnel that he thought there were "some constitutional problems about having to swear."

Juror 126 was brought into the courtroom. The trial judge had the clerk of court read the oath that she administers to jurors to Juror 126:

> You shall well and truly try the issues joined in the case and a true verdict give according to the evidence so help you God.

Juror 126 stated he had trouble with the phrase "so help you God" because he was not religious, and because he thought it violated the constitutional requirement of separation of church and state. The judge asked Juror 126 if he would have trouble taking the oath. The juror responded by asking whether he had an "alternative to doing that?" The judge answered, "Well, if you sit on the jury, you have to take that oath." Juror 126 then said, "I'm not comfortable with that."

---

[1] Appellants' appeals were consolidated for oral argument because they raised two identical issues. At oral argument, their attorney conceded the second issue.

Juror 126 was excused from the courtroom, and the judge ruled:

> And our South Carolina Supreme Court has said that before you can be a juror, our law says before you can be a juror, you've got to take that oath and that is the bottom line. Before you do anything else, that's the bottom line. He's got to be able to take that oath. And if we come in here first thing tomorrow and she starts giving the oath and he says he is not going to take it, I have no choice but to eliminate him as a juror.

When court resumed the next day, the trial judge excused Juror 126 and replaced him with an alternate juror. Appellants' attorneys' objections to the juror's removal were overruled.

ISSUE

> Whether the trial judge erred in dismissing a juror who was unwilling to take a religious oath?

ANALYSIS

The State concedes that South Carolina cannot, consonant with the federal constitution, condition juror service upon the taking of a religious oath.[2] See 47 Am. Jur. 2d Jury § 177 (1995). In fact, South Carolina law specifically permits a juror to make an affirmation rather

[2] Some state constitutions explicitly proscribe religious qualifications for juror service. See e.g., Ariz. Const. art. 2, § 12; Cal. Const. art. I, § 4; Mo. Const. art. I, § 5; N.M. Const. art. VII, § 3; N.C. Const. art. I, § 28; N.D. Const. art. I, § 3; Or. Const. art. I, § 6; Tenn. Const. art. I, § 6; Utah Const. art. 1, § 4; Wash. Const. art. I, § 11; W.Va. Const. art. 3, § 11; Wyo. Const. art. 1, § 18.

than swear an oath. S.C. Code Ann. § 14-7-1130 (Supp. 2002).[3] The trial judge erred in holding that jurors were required to take the oath used by the clerk of court,[4] and in dismissing Juror 126.

The dismissal of Juror 126 constituted a violation of the juror's constitutional rights. Cf., Batson v. Kentucky, 476 U.S. 79 (1986) (Equal Protection violated where peremptory challenges exercised in a racially discriminatory manner); J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994) (gender discrimination in exercise of peremptories is Equal Protection violation); State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996) (when a trial judge erroneously upholds a discriminatory juror strike, the juror's Fourteenth Amendment equal protection rights have been violated). Further, Juror 126 was erroneously removed over appellants' objections. Appellants may therefore appeal this violation of their right to a fair and impartial jury.[5] Id.

CONCLUSION

Appellants were denied a fair and impartial jury when the trial judge erroneously excused a juror who objected to taking a religious oath. Accordingly, their convictions and sentences are reversed, and the cases remanded.

REVERSED AND REMANDED.

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[3] An affirmation in lieu of an oath has been permitted in South Carolina courts since at least 1731. See 1731 Act No. 522, § 28, reported in Statutes of South Carolina, vol. III, p. 281 (1838).

[4] The oath used here is a variation on the oath contained in Form 3, the "Uniform Juror Information Pamphlet," promulgated pursuant to Rule 84, SCRCP.

[5] Juror 126 was improperly removed from appellants' jury because of his religious beliefs. Where the jury that tries the complaining party is affected by this type of constitutional error, the line of cases which hold a defendant is entitled only to a fair and impartial jury but has no right to trial by a particular jury, do not apply. See State v. Adams, *supra*.

TOAL, C.J., MOORE, WALLER, and BURNETT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of David B. Crosland, III, Respondent.

Opinion No. 25594
Submitted January 28, 2003 - Filed February 10, 2003

DISBARRED

Henry B. Richardson, Jr., of Columbia, for the Office of Disciplinary Counsel.

Mr. David B. Crosland, III, of Cornelius, North Carolina, pro se.

PER CURIAM: By way of the attached orders of the North Carolina State Bar, respondent was suspended from the practice of law in North Carolina for three years and eventually disbarred.

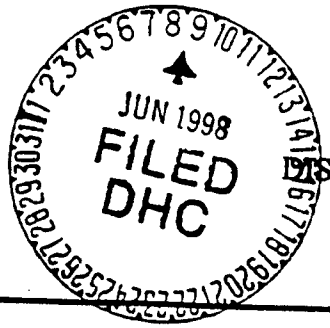
Respondent and the Office of Disciplinary Counsel were asked to inform the Court as to any reasons that the sanctions imposed by the North Carolina State Bar should not be imposed by this Court pursuant to Rule 29, RLDE, Rule 413, SCACR. Disciplinary Counsel filed a response asking that identical sanctions be imposed by this Court and that the sanctions run consecutively. Respondent also filed a response in which he maintained

imposition of reciprocal discipline would result in grave injustice. We find respondent's arguments unconvincing, if not troubling.

We hereby suspend respondent for three years from the practice of law in this state and disbar him, the sanctions to run concurrently. Within fifteen (15) days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR, and shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court.

DISBARRED.

TOAL, C.J., MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.



NORTH CAROLINA

WAKE COUNTY

BEFORE THE
DISCIPLINARY HEARING COMMISSION
NORTH CAROLINA STATE BAR
98 DHC 5

THE NORTH CAROLINA STATE BAR, Plaintiff	)	FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER OF DISCIPLINE
v.	)	
DAVID B. CROSLAND, III, Attorney, Defendant	)	

This matter came on to be heard on April 30, 1998 before a hearing committee of the Disciplinary Hearing Commission composed of Richard T. Gammon, Chair; Kenneth M. Smith, and Catharine Sefcik. A. Root Edmonson represented the North Carolina State Bar and Rick D. Lail represented the defendant, David B. Crosland, III. Based upon the pleadings, the stipulations of the parties and the evidence presented at the hearing, the hearing committee makes the following:

FINDINGS OF FACT

1. The plaintiff, the North Carolina State Bar, is a body duly organized under the laws of North Carolina and is the proper party to bring this proceeding under the authority granted it in Chapter 84 of the General Statutes of North Carolina, and the Rules and Regulations of the North Carolina State Bar promulgated thereunder.

2. The defendant, David B. Crosland, III (hereinafter Crosland), was admitted to the North Carolina State Bar on April 29, 1985 and is, and was at all times referred to herein, an Attorney at Law licensed to practice in North Carolina, subject to the rules, regulations, and Rules of Professional Conduct of the North Carolina State Bar and the laws of the State of North Carolina.

3. Crosland was properly served with process and the hearing was held with due notice to all parties.

4. From June 12, 1993 through February 25, 1997, Crosland obtained controlled substances by fraud on at least 24 occasions by forging the signatures of his wife and father on prescriptions, giving false information to other doctors to procure prescriptions or altering prescriptions for uncontrolled substances to call for controlled substances.

5. On March 3, 1997, Crosland was indicted by a grand jury in Mecklenburg County for 24 felony counts of obtaining controlled substances by fraud in violation of N.C. Gen. Stat. §90-108(a)(10).

6. On May 2, 1997, upon his plea of guilty, Crosland was convicted of four of the felony counts of obtaining controlled substances by fraud contained in the March 3, 1997 indictment.

7. The crimes committed by Crosland were crimes showing professional unfitness pursuant to N.C. Gen. Stat.§84-28(b)(1). The crimes were serious crimes as defined by 27 NCAC 1B, § .0103(40).

Based upon the foregoing Findings of Fact, the hearing committee enters the following:

CONCLUSIONS OF LAW

1. All parties are properly before the hearing committee and the committee has jurisdiction over Crosland and the subject matter.

2. Crosland's conduct, as set out in the Findings of Fact above, constitutes grounds for discipline pursuant to N.C. Gen. Stat. §84-28(b)(1) & (2) as follows:

(a) By forging the signatures of his wife and father on prescriptions, giving false information to other doctors to procure prescriptions and altering prescriptions for uncontrolled substances to call for controlled substances, Crosland is subject to discipline pursuant to N.C. Gen. Stat. §84-28(b)(2) in that Crosland engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 1.2(c) and committed criminal acts that reflect adversely on his honesty, trustworthiness, or fitness as a lawyer in other respects in violation of Rule 1.2(b) of the NC Rules of Professional Conduct

(b) By pleading guilty to and being convicted of obtaining controlled substances by fraud in violation of N.C. Gen. Stat. §90-108(a)(10) Crosland is subject to discipline pursuant to NCGS §84-28(b)(1).

Based upon the foregoing Findings of Fact and Conclusions of Law and upon the evidence and arguments of the parties concerning the appropriate discipline, the hearing committee hereby makes the additional

FINDINGS OF FACT REGARDING DISCIPLINE

1. Crosland's misconduct is aggravated by the following factors:

a. Crosland engaged in a pattern of misconduct;

b. Crosland committed four serious offenses in that he was convicted of four serious felonies involving fraud or deceit;

c. On June 5, 1997, Crosland entered into a consent order which was also signed by Hon. Robert P. Johnston, Superior Court Judge (hereafter, June 5, 1997 consent order). Pursuant to the June 5, 1997 consent order, Crosland was ordered to totally refrain from the use of all mind altering substances including prescription medications and alcohol except as specifically prescribed by Dr. V. Alan Lombardi. Crosland, by his own admission, violated the June 5, 1997 consent order in that he consumed alcohol on January 15, 1998 when he was charged in Cabarrus County for driving while impaired. Crosland registered a .13 on a breathalyzer test upon his arrest.

d. Crosland failed to notify a PALS representative or his probation officer of his violation of the consent order of June 5, 1997 and his Jan. 15, 1998 arrest for driving while impaired.

2. Crosland's misconduct is mitigated by the following factors:

a. The absence of a prior disciplinary record;

b. Personal problems;

c. Physical and mental addiction to controlled substances;

d. Interim rehabilitation; and

e. Remorse.

3. The aggravating factors outweigh the mitigating factors.

Based upon the foregoing aggravating and mitigating factors and the arguments of the parties, the hearing committee hereby enters the following

ORDER OF DISCIPLINE

The defendant, David B. Crosland, III, is hereby suspended from the practice of law for three years.

1. At any time after one year from the effective date of this order, Crosland may seek a stay of the remaining active period of the suspension pursuant to the procedures described in 27 NCAC 1B §.0125(b) provided he demonstrates by his petition affidavit, and proves by clear, cogent and convincing evidence to the Disciplinary Hearing Commission if need be, the following:

a. That Crosland has complied with all the provisions set forth in the June 5, 1997 consent order for at least six months prior to petitioning for the stay.

b. That, no later than July 1, 1998, Crosland provided written notice to Judge Johnston and his probation officer of his violation of the June 5, 1997 consent order and his arrest for driving while impaired on Jan. 15, 1998 and that Crosland has sent copies of the written notifications to the Secretary of the North Carolina State Bar.

c. That Crosland has provided written reports every three months, beginning June 1, 1998, to the Secretary of the North Carolina State Bar describing his compliance with the June 5, 1997 consent order, this order of discipline and his progress in recovery.

2. If any portion of the suspension of Crosland's license is stayed as set out in paragraph 1, the stay shall continue only so long as Crosland complies with the following:

a. That Crosland submit to and pay for chemical drug screens, urine or blood, for narcotic drugs or other illicit drugs through National Confederation of Professional Services or other like service approved by the North Carolina State Bar. Crosland must provide the written lab results to the Secretary of the North Carolina State Bar to insure compliance with this order.

b. That Crosland continue to submit written reports every three months to the Secretary of the North Carolina State Bar as to his compliance with the June 5, 1997 consent order, this order of discipline and his progress in recovery, including the lab results of all random drug screens ordered by the National Confederation of Professional Services (or like service approved by the North Carolina State Bar). The written reports shall be due on June 1, Sept. 1, Dec. 1 and March 1 throughout any period of stayed suspension.

c. That Crosland comply with all terms of the June 5, 1997 consent order.

3. If Crosland does not seek a stay of any portion of the three year suspension of his law license, or if the stay is lifted and the suspension is later reinstated for any reason, as a condition of reinstatement of his license at the end of the three year suspension, Crosland shall demonstrate by clear, cogent and convincing evidence:

a. That he has abstained from alcohol and mind-altering drugs, except those prescribed by a physician who is familiar with Crosland's medical history and who has been provided with a copy of this order, for at least six months preceding the date on which Crosland petitions for reinstatement.

b. Crosland is not suffering from any physical or mental condition that substantially impairs his judgment as a lawyer or his ability to engage in the practice of law in North Carolina without endangering the public.

c. Crosland has paid the costs of this action.

4. Crosland shall comply with 27 NCAC 1B §.0124 of the North Carolina State Bar's Discipline & Disability Rules entitled: "Obligations of Disbarred or Suspended Attorneys."

5. Crosland shall pay the reasonable costs of this action as assessed by the Secretary of the North Carolina State Bar by August 1, 1998.

Signed by the undersigned chair with the full knowledge and consent of the other members of the hearing committee this the 5th day of June 1998.

Richard T. Gammon

Richard T. Gammon, Chair
Hearing Committee

THIS CERTIFIES THAT THE FOREGOING 5 PAGES ARE TRUE AND ACCURATE COPIES OF THE OFFICIAL RECORDS OF THE NORTH CAROLINA STATE BAR.

L. Thomas Lunsford

Secretary, N.C. State Bar

WAKE COUNTY

NORTH CAROLINA

BEFORE THE
DISCIPLINARY HEARING COMMISSION
OF THE
NORTH CAROLINA STATE BAR
02 DHC 4

THE NORTH CAROLINA STATE BAR Plaintiff v. DAVID B. CROSLAND, ATTORNEY Defendant	FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER OF DISCIPLINE

THIS MATTER came on to be heard and was heard on April 26, 2002 before a duly assigned Committee of the Disciplinary Hearing Commission composed of Joseph G. Maddrey, Chair; F. Lane Williamson and Lorraine Stephens. The case was continued until May 1, 2002 for the presentation of closing arguments with consent of all parties. Terry Sherrill represented the defendant, David B. Crosland and Carolin Bakewell appeared for the N.C. State Bar. Based upon the pleadings and the evidence introduced at trial, the Hearing Committee hereby enters the following:

FINDINGS OF FACT

1. The Plaintiff, the North Carolina State Bar, is a body duly organized under the laws of North Carolina and is the proper party to bring this proceeding under the authority granted it in Chapter 84 of the General Statutes of North Carolina, and the Rules and Regulations of the North Carolina State Bar promulgated thereunder.

2. The Defendant, David B. Crosland (Crosland), was admitted to the North Carolina State Bar in 1985, and is, and was at all times referred to herein, an attorney at law licensed to practice in North Carolina, subject to the rules, regulations and Rules of Professional Conduct of the North Carolina State Bar and the laws of the State of North Carolina.

3. During all or part of the periods relevant hereto, Crosland was engaged in the practice of law in the State of North Carolina.

4. On or about Aug. 12, 1996, Crosland established a solo law practice and opened trust account number 2000000851370 at First Union National Bank (First Union trust account). The account remained open until Sept. 11, 1998.

5. Crosland's practice was devoted almost exclusively to handling personal injury claims for plaintiffs

6. Crosland's standard contract entitled him to deduct a fee of 33 1/3% of each client's bodily injury recovery. Although Crosland's standard contract entitled him to take a higher percentage fee if the case went to trial or was appealed, Crosland settled nearly all of his cases short of trial and seldom, if ever, appeared in court.

7. Crosland's standard contract with his clients entitled him to deduct a flat fee of $100 - $250 from his clients' medical pay recovery, depending upon the amount of the recovery.

8. Beginning on Aug. 23, 1997 and continuing through Sept. 11, 1998, when the First Union trust account was closed, the balance in the account was insufficient to reimburse all clients whose funds should have been in the account.

9. As of Aug. 31, 1998, the balance in the First Union trust account was $3,824.24. Crosland should have maintained a trust account balance of $8,105.21 for his clients as of Aug. 31, 1998, and the account was thus $4,280.97 short.

10. In May 1997, before the trust account shortages occurred, Crosland was convicted of four felony counts of obtaining prescription drugs by fraud.

11. On April 30, 1998, after a hearing at which Crosland appeared and was represented by counsel, the Disciplinary Hearing Commission suspended Crosland's law license for three years, based upon his felony convictions.

12. By January or February 1998, before the disciplinary hearing, Crosland had stopped coming to work on a regular basis.

13. Crosland's non-attorney staff, including his bookkeeper Whitney Hawkins, and office manager, Annette Cash, resigned prior to April 30, 1998. Tim Stanley, who was an associate and was the only other attorney with the firm, ceased his employment with Crosland in June 1998.

14. Some of the trust account shortages which occurred prior to Sept. 11, 1998 resulted when Crosland paid himself fees in excess of 33 1/3% of the clients' settlement.

15. The shortages which occurred in the trust account before Sept. 11, 1998 were the result of Crosland's negligent failure to keep and refer to

appropriate trust account records, his failure to supervise staff and his failure to ensure that the trust account was regularly reconciled.

16. The State Bar failed to show by clear, cogent and convincing evidence that the trust account shortages that occurred before Sept. 11, 1998 were the result of intentional dishonesty by Crosland, although he benefited from some of the transactions which caused the shortages.

17. On Sept. 11, 1998, Crosland withdrew the entire remaining balance of $3,824.24 from the trust account, all of which belonged to his clients, and knowingly used those sums for his own benefit without his clients' consent.

18. As of Sept. 11, 1998 Crosland knew that he should have been holding $2,162.80 in his trust account on behalf of a client named Brenda Little.

19. Crosland had deposited Ms. Little's $2,162.80 into his trust account on March 3, 1997 to be held pending resolution of a disputed medical lien.

20. Crosland never settled the lien dispute on Ms. Little's behalf. On various occasions before Sept. 11, 1998, Ms. Cash reminded Crosland that Ms. Little's funds remained in his trust account and that he needed to settle the lien dispute or return the funds to Ms. Little.

21. Crosland did not consult any trust account records or documents, nor did he speak with any of his former employees to discuss the ownership of the funds in the account before withdrawing the $3,824.24 from the trust account. He had no reasonable basis for believing that the balance in the trust account represented earned fees or money otherwise belonging to him.

22. Pursuant to the 1998 disciplinary order, Crosland was required to refund all sums held in his trust account on behalf of clients and others as part of the wind down of his law practice.

23. Crosland was aware of the terms of the 1998 disciplinary order.

24. Crosland violated the 1998 disciplinary order by failing to deliver to his clients all funds in his trust account to which his clients were entitled.

25. On May 6, 1999, Ms. Little filed a grievance against Crosland with the N.C. State Bar.

26. Crosland's response to Ms. Little's grievance was due in late August 1999.

27. Crosland did not obtain any extensions of time in which to respond to Ms. Little. Nevertheless, Crosland did not respond to Little's complaint until December 2001.

28. Crosland became addicted to prescription drugs in approximately 1992 and continued to abuse prescription drugs at least through 1999. As of the time of the April 1998 disciplinary hearing, he was also using cocaine and thereafter was treated for cocaine addiction.

29. Crosland did not present convincing evidence that his drug use and addictions caused or contributed to his violations of the Revised Rules of Professional Conduct.

Based upon the foregoing Findings of Fact, the Hearing Committee hereby makes the following:

CONCLUSIONS OF LAW

1. By withdrawing $3,824.24 in client funds from his trust account on Sept. 11, 1998 and using those funds for his own benefit without his clients' consent, Crosland committed a criminal act that reflect adversely on his honesty, trustworthiness or fitness as a lawyer, in violation of Rule 8.4(b) of the Revised Rules of Professional Conduct, engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of Rule 8.4(c) of the Revised Rules of Professional Conduct and failed to hold client and/or fiduciary funds in trust in violation of Rule 1.15-2 of the Revised Rules of Professional Conduct.

2. By failing to promptly deliver to his clients all property to which the clients were entitled, Crosland knowingly disobeyed the 1998 order of the Disciplinary Hearing Commission, in violation of Rule 3.4 of the Revised Rules of Professional Conduct. This conduct also violated of the Disciplinary Hearing Commission's 1998 order and therefore constituted contempt of the Commission.

3. By failing to maintain a balance in the trust account at all times between Aug.23, 1997 and Sept. 11, 1998 which was sufficient to cover all sums owed to his clients, Crosland failed to hold client funds in trust in violation of Revised Rule 1.15-2.

In addition to the foregoing Findings of Fact and Conclusions of Law, the Hearing Committee hereby makes the following:

ADDITIONAL FINDINGS OF FACT RELEVANT TO DISCIPLINE

1. During the April 30, 1998 disciplinary hearing, Crosland falsely testified that he had never used illegal drugs, such as cocaine and marijuana.

2. In June 1999, while employed as a paralegal by John Hanzel, an attorney in Cornelius, Crosland created letterhead and business cards which referred to himself as "David B. Crosland, Esq." without Hanzel's knowledge. Crosland distributed the business cards and letterhead to members of the public. Crosland also referred to various individuals whom Hanzel was representing as "my client" in letters which he wrote to Allstate Insurance Company in June 1999.

3. Crosland willfully failed to comply with the Chair's order of discovery entered herein by failing to produce the following items to Counsel for the Plaintiff: 1) income tax records for the years 1996 – 2001; 2) copies of all documents relating to his personal and operating bank accounts for the years 1996 – 1998; 3) copies of documents relating to medical and psychiatric treatment for the period 1993 – 2001.

4. Although Crosland represented in his December 2001 response to the Grievance Committee that he was prepared to make restitution to Brenda Little, he failed to do so and Ms. Little is now deceased.

5. Crosland's misconduct is mitigated by the following factors:

   a. personal or emotional problems.
   b. remorse.

6. Crosland's misconduct is aggravated by the following factors:

   a. prior disciplinary offenses.
   b. dishonest or selfish motive.
   c. a pattern of misconduct.
   d. multiple offenses.
   e. bad faith obstruction of the disciplinary proceedings by intentionally failing to comply with rules or orders of the disciplinary agency.
   f. substantial experience in the practice of law.
   g. indifference to making restitution.

7. Crosland's use of cocaine is an aggravating factor, as it involves illegal cnduct.

Based upon the foregoing Findings of Fact, Conclusions of Law, the mitigating and aggravating factors and the arguments of counsel, the Hearing Committee hereby enters the following:

ORDER OF DISCIPLINE

1. The Defendant, David B. Crosland III, is hereby disbarred from the practice of law beginning 30 days from service of this order upon him.

2. Prior to filing a petition for reinstatement, Crosland shall serve upon the counsel the following items

a) his personal and operating bank account records for the period 1997 – 98.

b) his state and federal income tax returns, including all schedules, W-2s and attachments, for the period 1996 – 2001.

c) Copies of all medical records relating to any treatment or consultation which Defendant received for substance abuse and/or any psychiatric condition, for the period 1996 – 2001.

3. Crosland shall pay the costs of this proceeding within 60 days of service of the order upon him.

4. Prior to filing a petition for reinstatement of his law license, Crosland shall make restitution in the following amounts to the following clients or their estates:

Wayne Allison	$100
Cecil Campbell	$800
Latiecha Davis	$390
Lewis Funderburk	$125
Alice Henderson	$999.75
Chrystal Hood	$500
Brenda Little	$2,162.80
William Little	$542.48
Nicholas Mambrino	$310
Anthony McCormick	$149.20
Erica Newsome	$312.29
Sunny Oziogu	$90
Walter Rose	$1,000
Shakiga Spears	$235
Jesse West	$64

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THIS CERTIFIES THAT THE ... PAGES ARE TRUE AND ... COPIES OF THE OFFICIAL RECORDS OF THE NORTH CAROLINA STATE BAR.

Secretary, N.C. State Bar

Signed by the Chair with the consent of the other Hearing Committee members, this the 1 day of May 2002.

Joseph G. Maddrey, Chair

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Jeffrey Thomas Haselden, Appellant.

Appeal From Lexington County
Gary E. Clary, Circuit Court Judge

Opinion No. 25595
Heard December 5, 2002 - Filed February 18, 2003

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED

Assistant Appellate Defender Robert M. Dudek, of S.C. Office of Appellate Defense, of Columbia; for Appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General S. Creighton Waters, all of Columbia; and Solicitor Donald V. Myers, of Lexington; for Respondent.

JUSTICE WALLER: Appellant, Jeffrey Haselden, was convicted of the murder of his two-year old son, Joshua.[1] The jury found the aggravating

[1] Haselden was divorced and had custody of his two children, Felicia and Joshua.

circumstances that the murder was committed while in the commission of physical torture, and that the murder was of a child under eleven years of age; it recommended a sentence of death. We affirm the murder conviction, but reverse and remand for a new sentencing proceeding.

FACTS

Shortly after midnight on Thursday, May 13, 1999, Haselden's girlfriend, Rebecca Tindall, called 9-1-1 in Lexington County to report that she had found two-year old Joshua Haselden on the floor of his bedroom not breathing. When paramedics arrived, they found Tindall administering CPR on Joshua. Haselden advised paramedics they had checked on Joshua twenty minutes prior to calling 9-1-1 and he had been fine. Joshua had noticeable swelling and bruising throughout his abdomen, from the waistline to the ribcage. Joshua was taken to the hospital where he was pronounced dead at 1:40 AM.

At trial, Tindall testified she had just finished giving Joshua his bath and putting him to bed when Haselden arrived home from running an errand for her. She heard Haselden yell at Joshua to "get his ass back to bed." She and Haselden then went to Joshua's room to check on him as he had a habit of sticking things up his nose. They retrieved a foreign object from his nose, after which Haselden hit Joshua in the head four or five times. "Haselden had a golf ball on his key chain and he hit him in the top of the head with it. Then [Haselden] pulled [Joshua] up and was shaking him and then he pushed him at me and told me to put him to bed and not to kiss him good night either." Sometime around 11:00 PM, she went to put some laundry in the dryer. She heard Haselden yell "Goddammit Josh," and heard a noise like a thud. She went into Josh's room and saw Haselden swinging his arm hitting Josh hard in the stomach area three or four times and hollering, "Do you hear me boy, do you hear me?" She grabbed Haselden's shirt and told him that was enough. Haselden told her he'd punish his son the way he wanted to, and pushed her, causing her to stumble and fall, knocking both her and Joshua to the ground. Haselden told her to get out and she complied. A few minutes later, she went back down the hallway and saw Joshua still lying on the floor. She started to go in and pick him up, but Haselden told her Josh

was fine and to leave him alone. They went back to Haselden's bedroom and had sex, after which she snuck back into Joshua's room and found him limp and began screaming for Haselden. Haselden told her to call 9-1-1.

An autopsy was performed on May 14, 1999. There was a bruise on the right side of Joshua's forehead which was consistent with being hit with a golf ball key chain. An internal examination of Joshua's scalp revealed a total of eight areas of bruising, only one of which was visible from the outside. There were a number of bruises on the lower legs, and significant bruises on the abdomen. The pathologist, Dr. Sexton, found "extensive injuries inside the abdomen." He opined the abdominal bruises were consistent with a blow from the knuckles and, in his opinion, the bruising could not have resulted from doing CPR. He concluded that there were at least six blows to the abdomen. Further examination revealed internal bruising under the skin near the belly button, and a lot of blood in the abdominal cavity which had been caused by several areas of the intestine being separated from the mesentery (the structure that holds the intestines together). Dr. Sexton concluded there were two causes of death either of which could have been fatal; internal bleeding in the abdomen and swelling in the brain caused by the blows to the head.

The jury convicted Haselden of murder and found the aggravating circumstances that the murder was committed while in the commission of physical torture, and that the murder was of a child under eleven years of age; it recommended a sentence of death.

ISSUES

1. Did the trial court err in allowing the testimony of Haselden's ex-wife concerning his golfing and fishing habits?

2. Was Haselden entitled to a parole ineligibility charge?

3. Were autopsy photographs of Joshua improperly admitted?

1. EX-WIFE'S TESTIMONY

During the guilt or innocence phase of trial, the state called Haselden's ex-wife, Robin Lucas. The two had married shortly after the birth of their daughter, Felicia, when Lucas was eighteen years old, and Haselden was twenty-four. Lucas testified that they did not have a stable marriage. Joshua was born in December 1996. The solicitor asked Lucas whether Haselden was working when Joshua was born, and Lucas replied that he "worked all the time." The solicitor continued, "If he wasn't working, what was he doing?" to which she replied, over defense counsel's objection of irrelevancy, that "he was fishing or golfing with his friends or at his mothers." She further testified that Haselden did not spend much time with her or Joshua.

Haselden argues his ex-wife's testimony concerning his golfing and fishing habits constituted an improper attack on his character. We disagree.

Initially, Haselden did not object to this testimony on the grounds that it was improper character evidence below. He objected only on the basis of relevancy. Accordingly, this issue is not preserved for review. State v. Byram, 326 S.C. 107, 485 S.E.2d 360 (1997) (defendant may not argue one ground below and another on appeal). In any event, Haselden has not demonstrated reversible error.

Character evidence is not admissible to prove the accused possesses a criminal character or has a propensity to commit the crime with which he is charged. Rule 404(a), SCRE, states the general rule that "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion." State v. Brown, 344 S.C. 70, 543 S.E.2d 552 (2001). Evidence Haselden had a tendency to golf, fish, or go to his mother's house is simply not evidence which would tend to prove he had a tendency toward abusing and murdering his two-year old son. Brown, supra (whatever negative connotation appellant's gambling may have had, it did not imply any propensity on his part to commit the violent crime with which he was charged, such that any error in its admission was harmless beyond a reasonable doubt).

In any event, even assuming this evidence was objectionable, this Court has held that where there is other properly admitted evidence of conduct demonstrating the particular character trait in question, there is no reversible error. State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300 (2001). Whether an error in the admission of evidence is harmless generally depends upon its materiality in relation to the case as a whole. State v. Reeves, 301 S.C. 191, 391 S.E.2d 241 (1990). The erroneous admission of character evidence is harmless beyond a reasonable doubt if its impact is minimal in the context of the entire record. State v. Forney, 321 S.C. 353, 468 S.E.2d 641 (1996).

Here, Haselden's girlfriend Tindall was questioned as to how she began dating Haselden. She explained that she began as a babysitter for the children. The solicitor asked where Haselden would be when she was babysitting, to which she responded, "he would either be playing golf or working." Further, Haselden admitted on cross-examination that he played a lot of golf. State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993) (any error in admission of evidence cumulative to other unobjected-to evidence is harmless); State v. Johnson, 298 S.C. 496, 499, 381 S.E.2d 732, 733 (1989) (admission of improper evidence is harmless where it is merely cumulative to other evidence). We find any error in admission of this evidence was clearly harmless beyond a reasonable doubt.

2. **PAROLE INELIGIBILITY CHARGE**

Haselden next asserts the trial court erred, at sentencing, in refusing to instruct the jury that if sentenced to life imprisonment, he would be ineligible for parole. We agree.

At trial, Haselden requested a parole ineligibility charge pursuant to Simmons v. South Carolina, 512 U.S. 154 (1994). In Simmons, the United States Supreme Court held that where the evidence raises an issue of future dangerousness, due process requires the jury be instructed of a defendant's parole ineligibility. The trial court refused the request. Haselden's sentencing phase took place approximately one month prior to the United States Supreme Court's opinion in Shafer v. South Carolina, 532 U.S. 36, 121 S.Ct. 1263 (2001)(remanding to this Court for a determination whether the

evidence and argument raised the issue of future dangerousness). Haselden moved for a new sentencing hearing under Shafer, contending the state had placed his future dangerousness at issue. The trial court denied the motion. Thereafter, the United States Supreme Court decided Kelly v. South Carolina, 534 U.S. 246, 122 S.Ct. 726 (2002), which, as we recently recognized in State v. Shafer, Op. No. 25562 (S.C. S.Ct. filed Nov. 25, 2002)(Shearouse Adv. Sh. No. 39 at 38), expanded the law of what evidence or argument raises future dangerousness. Haselden contends he was entitled to a parole ineligibility instruction under Kelly, Shafer, and Simmons. We agree.

In Kelly, the United States Supreme Court stated "[a] jury hearing evidence of a defendant's demonstrated propensity for violence reasonably will conclude that he presents a risk of violent behavior, whether locked up or free, and whether free as a fugitive or as a parolee." 534 U.S. at __, 122 S.Ct. at 731. The Kelly Court went on to state that "evidence of dangerous 'character' may show 'characteristic' future dangerousness. . . [e]vidence of future dangerousness under Simmons is evidence with a tendency to prove dangerousness in the future; its relevance to that point does not disappear merely because it might support other inferences or be described in other terms." 534 U.S. at ___, 122 S.Ct. at 732. The Court then analyzed the specifics of the prosecution's argument in that case, to wit: (1) the prosecution expressed its hope the jurors would "never in [their] lives again have to experience . . . [b]eing some thirty feet away from such a person;" (2) the prosecution characterized Kelly as a dangerous bloody butcher; (3) the prosecution stated Kelly was "more frightening than a serial killer" and that "murderers will be murderers." The Court found that "Kelly's jury, like its predecessor in Simmons, [was] invited to infer 'that petitioner is a vicious predator who would pose a continuing threat to the community.'" 534 U.S. at __, 122 S.Ct. at 732-33.

Here, although the state did not directly argue Haselden's future dangerousness, it is patent that the evidence presented and argument thereon placed Haselden's future dangerousness in issue. As in Kelly, the solicitor here argued that he hoped the jury would never in its lives be thirty feet away from a baby-killer. The solicitor compared Haselden to a Dr. Jekyll and Mr. Hyde, and called him the "evil Mr. Haselden." The solicitor also referred to

the Night Stalker Special Task Forces Unit Haselden was in while in the army, and its motto, "Death waits in the dark." During penalty phase, a correctional officer from Lee County Correctional Institute testified that while in county safekeeping awaiting trial, there was an incident in which Haselden had to be restrained with pepper spray. Further, during the guilt phase of trial, the state elicited testimony from Haselden's girlfriend, Becky Tindall, that immediately after Joshua's death, Haselden had threatened her babies, saying "it would be ashamed [sic] if something happened to one of your babies, wouldn't it Becky," and that he had told her he had ways of eliminating people, having been in special forces.

The above evidence clearly raises inferences of future dangerousness, placing Haselden within the ambit of Kelly. Accordingly, he was entitled to a jury instruction that, if sentenced to life imprisonment, he would be ineligible for parole. Accordingly, we reverse and remand for a new sentencing proceeding.

3. **GRUESOME AUTOPSY PHOTOS**

Finally, Haselden asserts the trial court erroneously admitted several autopsy photographs (Exhibits 23-26, 29, and 31-33) of Joshua. In particular, he objects to Exhibit 29, an enlarged photo of Joshua's anus. Although we find the remaining photos were properly admitted, we agree with Haselden that exhibit 29 was irrelevant to any issue at sentencing. Accordingly, we hold that it may not be admitted at resentencing.

The relevance, materiality and admissibility of photographs are matters within the sound discretion of the trial court and a ruling will be disturbed only upon a showing of an abuse of discretion. State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996), cert. denied, 520 U.S. 1200 (1997). The purpose of the sentencing phase in a capital trial is to "direct the jury's attention to the specific circumstances of the crime and the characteristics of the offender." State v. Matthews, 296 S.C. 379, 390, 373 S.E.2d 587, 594 (1988), cert. denied, 489 U.S. 1091, 109 S.Ct. 1559, 103 L.Ed.2d 861 (1989). Photographs may be offered as evidence in extenuation, mitigation, or aggravation. State v. Ard, 332 S.C. 370, 505 S.E.2d 328 (1998). In State v.

Rosemond, 335 S.C. 593, 518 S.E.2d 588 (1999), this Court held that in the sentencing phase, the scope of the probative value of such photos is much broader than at the guilt or innocence phase. In State v. Johnson, 338 S.C. 114, 525 S.E.2d 519 (2000), we noted that, notwithstanding the sometime gory nature of autopsy photographs, they are nonetheless admissible where they reveal the true nature of the attack, and allow the jury to determine the existence of physical torture. 338 S.C. at 129-130, 525 S.E.2d at 527. Further, there is no abuse of discretion if the offered photograph serves to corroborate testimony. Id.

The majority of the challenged photographs were necessary to corroborate the pathologist's testimony, to understand the true nature of the attack on Joshua, and were relevant to demonstrate the aggravating circumstance of physical torture.

Exhibits 23 and 24 are photographs of the left and right side of Joshua's head. The pathologist testified that he had to dissect from ear to ear and "reflect the scalp forward" to be able to see the large areas of bruising which could not be seen from outside. Exhibit 25 is a photo of the back of Joshua's head, and more clearly reveals the extent of the bruising. Exhibit 26 is a photo of Joshua's brain from the top of the head. Dr. Sexton testified that the color of the brain, and the lack of blood on top was significant as it demonstrated that the brain had swollen so much that it had actually pressed the blood out and decreased the function of the brain.

Exhibits 31, 32, and 33 are photos of Joshua's abdominal area. Exhibit 31 shows bruising under the skin in the abdominal muscles, and bruises to the soft tissue area. Exhibit 31 demonstrates the hemorrhage in the soft tissue in the fatty layer. Exhibit 32 shows blood inside the abdomen. Sexton testified that all of the blood inside the abdomen contributed to the cause of death by loss of blood and that the blood had come from tears in the messentry (which holds the intestines in) which had been torn or separated due to the force of the blows. Exhibit 33 is a photo of the intestine, after it had been removed from Joshua, and demonstrates the bruising and areas of the intestine which had separated from the messentry. Sexton also testified that Joshua would

have most probably been in pain both from the head injuries and the abdominal injuries.

We find the above photos were properly admitted for the purposes of demonstrating the extent of bruising which was not visible from an external review, and they served to corroborate the pathologist's testimony, as well as to prove the existence of the aggravating circumstance of physical torture. Accordingly, the trial court did not abuse its discretion in admitting these photos.

However, as to Exhibit # 29, the photo of Joshua's dilated anus, we find no legitimate purpose for its admission at the sentencing phase of trial.

At guilt phase, Dr. Sexton noted that Joshua's anus was dilated to the extent that he could put three fingers in the anus, which was abnormal, but he found no indication of any anal injury, and nothing to indicate any sexual assault.[2] He testified that it was not uncommon for the anus to relax and open post-mortem. During his guilt phase closing argument, the solicitor explained Sexton's testimony, noting that Sexton opined you cannot really tell precisely when somebody died from taking a rectal temperature. "One reason you can't tell is because Josh's rectum, two years old, easily accepts three fingers, easily accepts three fingers. I know some of ya'll have children. I don't remember which ones in particular. I know y'all have seen a rectal thermometer. And I know y'all know that a rectal thermometer is not as big around as three fingers. Sexton told you what that was all about."

At sentencing, the state introduced the photo of Joshua's anus, and again asked Sexton, "Joshua's anus easily accepted three fingers, is that correct?" Haselden's relevancy objection was overruled. On cross-exam, Sexton reiterated that there was no trauma to the anus that he could see, and that rectal dilation was not unusual after death.

[2] The reason for this line of inquiry, at guilt phase, had to do with the precise time of Joshua's death. Dr. Sexton testified that Joshua's rectal temperature in the emergency room was 87 degrees. The defense was attempting to demonstrate that this body temperature indicated that Joshua had been dead for quite some time, thereby making it less probable that Haselden was the perpetrator of the injuries.

Haselden argues Exhibit 29 was simply irrelevant to any issues before the sentencing phase jury and served only to inflame the jury and leave them with the impression that, perhaps, Joshua had been sexually abused. We agree.

Exhibit 29 did not go to the circumstances of the crime, the characteristics of the defendant, nor to the existence of aggravating circumstances. The sole purpose of the photo was to insinuate that perhaps there was sexual abuse when, in fact, there was absolutely no evidence of such an assault. We find the extremely prejudicial nature of this photograph clearly outweighs any probative value; accordingly, Exhibit 29 may not be admitted at resentencing.

Haselden's murder conviction is affirmed; the case is remanded for a new sentencing proceeding.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

TOAL, C.J., MOORE, BURNETT and PLEICONES, JJ., concur.

The Supreme Court of South Carolina

In the Matter of John Earl Duncan, Petitioner.

ORDER

On June 12, 2000, petitioner was placed on indefinite suspension. In the Matter of Duncan, 340 S.C. 622, 533 S.E.2d 894 (2000). Petitioner has now filed a petition for reinstatement. The Committee on Character and Fitness recommends the petition be granted. We grant the petition and reinstate petitioner to the practice of law in South Carolina.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

February 7, 2003

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Pamela Grubbs, Appellant.

Appeal From Bamberg County
Thomas W. Cooper, Jr., Circuit Court Judge

Opinion No. 3599
Heard January 14, 2003 – Filed February 18, 2003

REVERSED AND REMANDED

Assistant Appellate Defender Robert M. Dudek, of Columbia; for Appellant.

Attorney General Henry Dargan McMaster; Chief Deputy Attorney General John W. McIntosh; Assistant Deputy Attorney General Donald J. Zelenka; Assistant Attorney General Derrick K. McFarland, of Columbia; Solicitor Barbara R. Morgan, of Aiken; for Respondent.

CURETON, J.: Pamela Grubbs appeals her murder conviction arguing she is entitled to a new trial because the circuit court erred in refusing to admit expert testimony regarding the battered spouse syndrome and in refusing to charge the jury the law of voluntary manslaughter. We reverse and remand for a new trial.

FACTS

Grubbs and Clifford Smith lived together in a common law relationship. Grubbs admitted Smith intended to sever the relationship. Late on the evening of November 18, 1998, the Bamberg County Sheriff's Department received a call to respond to the couple's residence. The caller reported "a shooting and an intruder." When the police arrived, they found Smith dead on the sofa in the living room. Smith died as the result of five gunshot wounds to the right side of his body.

Grubbs made numerous conflicting statements regarding the events leading to Smith's death. In her first written statement made several hours after the incident, Grubbs stated Smith left the home in the early evening to find the title to a truck at work. Before Smith left, Grubbs told him she was afraid of being alone. Smith left Grubbs a portable telephone in the bedroom and told her he would call before returning home. After falling asleep in the bedroom, Grubbs stated she was awakened by the sound of the bedroom door opening and saw a person's shadow in the doorway. Grubbs said she shouted Smith's name and pulled a pistol from under her pillow as the figure leaned over her as she lay in bed. The intruder did not respond and she shot him. Grubbs stated the intruder then ran into the living room where she fired the bullets remaining in the gun. Grubbs stated she then turned on the light and discovered the intruder was Smith. Grubbs stated the shooting occurred at 10:30 p.m. She called her brother and waited for him to arrive before calling the sheriff's department at 11:28 p.m.

During the investigation, Officer Tom Darnell concluded the physical evidence at the scene did not match Grubbs's story. Darnell testified the

physical evidence indicated no gunshots were fired in the bedroom. Instead, all the wounds Smith received were consistent with being shot while lying on his side on the sofa.

In her next statement, Grubbs told the police she arrived home from work just before 5:00 p.m. on November 18th. Smith arrived home shortly thereafter and they argued about a truck title. Grubbs went to bed. Smith later entered the bedroom, hovered over the bed, and yelled at Grubbs. He then turned around and walked out. Grubbs followed with the gun, approached him, and shot him. In her final pretrial statement, Grubbs supplemented this statement stating that when Smith argued with her in the bedroom, he pushed her around and hit her in the eye.

At trial, Grubbs testified Smith argued with her about putting the title to her car in his name. When Grubbs refused to change the name on the title, Smith pushed her onto the couch and left the house. After she went to bed, she woke up when the bedroom door cracked open and a figure was on top of her and hit her in the stomach and eye. Grubbs testified she never saw the face of her attacker and could only identify the outline of his body. Grubbs testified that after being hit, she screamed and the figure ran into the living room. Grubbs retrieved her pistol and went into the living room. As Grubbs approached the couch, she stated the figure jumped at her and she fired the gun. Grubbs maintained throughout the trial that she did not know her attacker was Smith until she turned the lights on in the living room.

Grubbs was convicted and sentenced to thirty-five years imprisonment. She appeals.

LAW/ANALYSIS

I. Failure to admit expert testimony

Grubbs argues the trial court erred in refusing to admit the testimony of her expert witness regarding battered spouse syndrome. We agree.

Grubbs testified to numerous instances of physical and mental abuse perpetrated on her by Smith, including a physical altercation in 1997, after which Grubbs obtained an order of protection against Smith.

Grubbs sought to introduce the testimony of Dr. Lois Veronen. Veronen concluded Grubbs fit the profile of one suffering from battered spouse syndrome. Veronen also opined the syndrome could explain why Grubbs gave conflicting statements. During Veronen's *in camera* testimony, the following colloquy ensued:

> [Defense]: [Are you] aware that Ms. Grubbs stated on numerous occasions during cross that this shooting was an accident and not really admitting or stating that she recognized Mr. Smith as being the abuser/ intruder[?]
>
> [Veronen]: Correct.
>
> [Defense]: Is that something – how does that play with being a – a victim of the battered woman's syndrome?
>
> [Veronen]: Well, I think it plays very directly because her sense of self and her role as an actor has been so diminished in her relationship that she cannot say that she is defending herself. She has to make her intimate partner a stranger in order to defend herself. He cannot be Cliff whom she was fighting with. He has to be an intruder. The sense of having a right to defend herself against her partner's violence – she has lost that in the process of this relationship.

Veronen testified further that women who suffer from battered spouse syndrome rarely disclose their abuse to others. The colloquy continued:

> [Defense]: In this particular case, is it possible that during the initial questioning after this incident that [Grubbs] was still trying to protect [Smith].
>
> [Veronen]: Well, trying to protect [Smith] but trying to protect the image of their relationship as well – that this was a loving relationship.
>
> [Defense]: Could that possibly be the case almost two years later?
>
> [Veronen]: In part, we see, you know, there's - there's cracks in it. There's some insight into the nature of this relationship, but it's not a full recognition of this relationship as being abusive.
>
> [Defense]: So [Grubbs] could be still possibly protecting that image of the relationship on today.
>
> [Veronen]: Correct.

The trial court refused to allow Veronen's testimony because it conflicted with Grubbs' own testimony at trial that she did not know her attacker at the time she fired the gun. The court stated: "If a defendant does not recognize the intruder as the abuser, then the defense does not apply . . . ." The court further explained:

> [T]he jury would have to ignore the rationale expressed by [Grubbs] as she explained to this jury why she did not believe [Smith] to be her abuser and would have to supplant the testimony which it has heard under oath by . . . [Grubbs] herself with the supposition of an opinion of that put forth by [Grubbs'] expert. I find that that would be an intrusion into the province of the jury. As I've said, [Grubbs] may very well be a battered woman, but

> under the facts of this case as testified to by [Grubbs] herself, those facts do not bear out the presentation of that defense or the expert testimony supporting it to this jury and the State's motion to suppress that line of testimony is therefore granted.

We find the trial court erred in excluding the testimony. Rule 702, SCRE, allows a party to present expert testimony to the finder of fact if "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Rule 702, SCRE. A trial court's decision to admit or exclude expert testimony will not be disturbed absent an abuse of discretion. Mizell v. Glover, 351 S.C. 392, 406, 570 S.E.2d 176, 183 (2002). A trial court's ruling on the admissibility of an expert's testimony constitutes an abuse of discretion where the ruling is manifestly arbitrary, unreasonable, or unfair. Means v. Gates, 348 S.C. 161, 166, 558 S.E.2d 921, 924 (Ct. App. 2001).

The battered spouse syndrome was first recognized in South Carolina by our supreme court in State v. Hill, 287 S.C. 398, 339 S.E.2d 121 (1986). In Hill, the court held that expert testimony about battered spouse syndrome is admissible to establish a claim of self-defense in a homicide case. Hill, 287 S.C. at 399-400, 339 S.E.2d at 122. The court acknowledged the emerging trend in other jurisdictions that find "the testimony is relevant to the issue of self-defense and highly probative of the defendant's state of mind at the time of the incident." Id. at 400, 339 S.E.2d at 122. Therefore, "[i]f the jury accepted the [defendant's] version of what happened, that would make the proffered expert testimony not only relevant, but critical." Id. at 399-400, 339 S.E.2d at 122.

In Robinson v. State, the court examined the battered spouse syndrome in relation to the specific elements of self-defense in a homicide case. 308 S.C. 74, 417 S.E.2d 88 (1992). The court found "the unique perceptions of a defendant suffering from battered woman's syndrome are generally compatible with the law of this State regarding self-defense." Id. at 78, 417 S.E.2d at 91. The court concluded: "Our interpretation of the relationship between the battered woman's syndrome and self-defense is cursory, at best,

and should not be construed as this Court's last word on the subject. Our law will continue to evolve as the scientific community's understanding of the battered woman's syndrome develops and society's comprehension of the condition becomes more sophisticated." Id. at 80, 417 S.E.2d at 92.

Furthermore, section 17-23-170 of the South Carolina Code governs the admissibility of expert testimony of the battered spouse syndrome:

> (A) Evidence that the actor was suffering from the battered spouse syndrome is admissible in a criminal action on the issue of whether the actor lawfully acted in self-defense, defense of another, defense of necessity, or defense of duress. This section does not preclude the admission of testimony on battered spouse syndrome in other criminal actions.

S.C. Code Ann. § 17-23-170 (Supp. 2001).

Grubbs's defense at trial was self-defense. In one of her pre-trial statements, Grubbs claimed Smith pushed her and punched her in the eye. Grubbs also testified to a pattern of past abuse perpetrated by Smith. In closing arguments, Grubbs's counsel argued self-defense. The trial court charged the jury the law of self-defense. Precisely because Grubbs's trial testimony conflicted with her own defense, and the proffered expert testimony was relevant to explain this conflict, the jury was entitled to consider the testimony. See State v. Knoten, 347 S.C. 296, 306-09, 555 S.E.2d 391, 396-98 (2001) (finding a jury question existed regarding which of a defendant's conflicting statements to believe; thus, entitling defendant to a jury charge relevant to a pretrial, inconsistent statement). The jury needed the expert's testimony to assist it in evaluating Grubbs' state of mind at the time of the shooting. The expert offered testimony that Grubbs's conflicting statements resulted from the syndrome. Without the expert's testimony, the jury had no way of putting the differing versions of Grubbs' statements into context. We find Veronen's testimony was necessary to assist the jury in understanding the issues involved in the case, and the trial court erred in excluding the evidence.

II. Voluntary Manslaughter Charge

Grubbs also argues the trial court erred in refusing to charge the jury the law of voluntary manslaughter. We agree.

At trial, the State argued Grubbs was not entitled to a jury charge on voluntary manslaughter because, through her trial testimony, she "disavowed herself of the manslaughter element . . . ." The trial court agreed finding that "a person charged with an offense [does not have] the right to submit various inconsistent theories of a defense and kind of throw them up on the wall to see what sticks . . . ."

The law to be charged must be determined from the evidence presented at trial. Knoten, 347 S.C. at 302, 555 S.E.2d at 394. When determining whether a defendant is entitled to a voluntary manslaughter charge, the court views the facts in the light most favorable to the defendant. State v. Byrd, 323 S.C. 319, 321, 474 S.E.2d 430, 431 (1996). Fighting is sufficient legal provocation to warrant giving a voluntary manslaughter charge. State v. Davis, 278 S.C. 544, 546, 298 S.E.2d 778, 779 (1983).

Voluntary manslaughter is defined as:

> [T]he unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation. Heat of passion alone will not suffice to reduce murder to voluntary manslaughter. Both heat of passion and sufficient legal provocation must be present at the time of the killing. The sudden heat of passion, upon sufficient legal provocation, which mitigates a felonious killing to manslaughter, while it need not dethrone reason entirely, or shut out knowledge and volition, must be such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool

> reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence.

State v. Cole, 338 S.C. 97, 101-02, 525 S.E.2d 511, 513 (2000) (internal citations and quotations omitted).

In Knoten, Knoten was charged with numerous crimes including murder. 347 S.C. at 299, 555 S.E.2d at 393. Knoten gave several conflicting statements including one in which he claimed the victim armed herself with a knife, and threatened and cut Knoten. Id. at 301, 555 S.E.2d at 393-94. Knoten's conflicting statements were introduced at trial. Id. at 302, 555 S.E.2d at 394. Also at trial, Knoten recanted his statements, claiming a co-worker committed the murder. Id. at 301-02, 555 S.E.2d at 393-94.

The trial court refused to charge the jury the law of voluntary manslaughter. Id. Our supreme court reversed finding the jury could have believed Knoten's statement claiming the victim threatened and cut him. Id. at 306-09, 555 S.E.2d at 396-98. Notwithstanding the conflicting statements, the court concluded Knoten was entitled to a charge of voluntary manslaughter because one of his statements asserted facts entitling him to the charge. Id. at 305-06, 555 S.E.2d at 398.

We likewise find Grubbs's inconsistent statements do not negate her right to a charge of voluntary manslaughter where one of her statements asserted facts entitling her to the charge. Because a jury could believe the facts as represented by Grubbs in her statement alleging Smith pushed her and punched her in the eye, and in light of the testimony of long term abuse of Grubbs by Smith, a charge on voluntary manslaughter was appropriate. Thus, the trial court erred by failing to charge voluntary manslaughter to the jury.

CONCLUSION

We find the trial court erred in refusing to admit the expert testimony regarding battered spouse syndrome. We likewise find the trial court erred in

refusing to charge the jury the law of voluntary manslaughter. Accordingly, Grubbs's conviction is reversed and the case is remanded for a new trial.

REVERSED AND REMANDED.

HEARN, C.J., ANDERSON, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Gerrod Lewis, Appellant.

Appeal From Dorchester County
Luke N. Brown, Jr., Circuit Court Judge

Opinion No. 3600
Heard November 7, 2002 - Filed February 18, 2003

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Assistant Appellate Defender Eleanor Duffy Cleary, of Columbia, for Appellant

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, Assistant Attorney General Christie Newman Barrett; and Solicitor Walter M. Bailey, Jr., for Respondent

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CONNOR, J.: Gerrod Lewis was indicted for first degree criminal sexual conduct, two counts of kidnapping, grand larceny of a vehicle, and armed robbery. He appeals the jury's verdict finding him guilty on all charges. We affirm in part, reverse in part, and remand.

FACTS

On June 21, 1999, Jane Doe[1] and Gill Armstrong were traveling with their infant daughter from Virginia to their home in Florida. They stopped at a hotel off I-95 in St. George about 11:00 p.m. After checking in, Armstrong went to a nearby restaurant to get some food. When he returned, he noticed three men standing in the breezeway near his room. Assuming they were hotel guests, he proceeded back to his room. After putting the food in the room, Armstrong went back outside to the vending machines for drinks.

At the vending machine, a man whom Armstrong later identified as Timothy Washington, placed a gun to his head and demanded money. Lewis and Shermaine Elmore were with Washington. Armstrong recognized the three as the same men he had seen in the breezeway minutes earlier. The three assailants demanded that Armstrong take them to his room.

As the men entered the room, Doe was getting out of the shower clad only in a towel. Their daughter was asleep on the bed. The assailants demanded money. When they realized Armstrong and Doe had only fourteen dollars, they became enraged and began searching the room. They did not find anything else in the room.

Lewis and Washington then took turns sexually assaulting Doe in the bedroom while Elmore held Armstrong at gunpoint in the bathroom. Washington then took Doe into the bathroom and sexually assaulted her in

[1] To protect the female victim's identity, she has been referred to as Jane Doe.

Armstrong's presence. Thereafter, the assailants took Armstrong's keys and stole his car. The car was found a few days later near St. George.

Lewis and Washington were tried together, and both were found guilty of all charges. The trial court sentenced Lewis to five years for grand larceny and thirty years concurrently on each of the remaining charges.

ISSUES

I. Did the trial court err by failing to suppress Armstrong's in-court identification of Lewis?

II. Did the trial court err in refusing to allow Lewis to strike a juror previously stricken by his co-defendant?

LAW/ANALYSIS

I.

Lewis first argues he is entitled to a new trial because the trial court erred in failing to suppress the in-court identification Armstrong made of him. He contends the trial court erred in not holding a hearing to determine the reliability of the in-court identification and that the identification was unduly suggestive and unreliable. Lewis asserts the error in allowing the in-court identification was not harmless. We hold the trial court did not err in failing to hold a hearing and admitting the in-court identification of Lewis.

Armstrong was unable to return to South Carolina from Florida before the trial. Therefore, law enforcement had no opportunity to conduct a lineup prior to trial to determine if Armstrong could identify any of the three assailants.

Before jury selection Lewis's counsel asked the court to require police or the solicitor to conduct a photo lineup to determine if Armstrong could identify his client or, in the alternative, for the court to suppress any in-court identification of Lewis. The trial court refused.

Subsequently, Lewis requested an *in camera* hearing prior to Armstrong's in-court identification. He wanted the court to determine whether the identification was reliable. The trial court denied Lewis's motion.

An in-court identification of an accused is inadmissible if an out-of-court confrontation such as a showup, lineup, or photo array was so unduly suggestive that it created a very substantial likelihood of irreparable misidentification. State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300 (2001), cert. denied, ___ U.S. ___ (2002). The United States Supreme Court has crafted a two-pronged inquiry for the trial court to use in determining the admissibility of an out-of-court identification. Neil v. Biggers, 409 U.S. 188 (1972). '"[A] court must first determine whether the identification process was unduly suggestive. . . . [It] next must determine whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed.'" State v. Moore, 343 S.C. 282, 287, 540 S.E.2d 445, 447 (2000) (quoting Curtis v. Commonwealth, 396 S.E.2d 386, 388 (Va. Ct. App. 1990)).

Recently, the South Carolina Supreme Court has set forth the rule trial courts should use in deciding the reliability of in-court identifications. State v. Ramsey, 345 S.C. 607, 550 S.E.2d 294 (2001). In Ramsey, the Court stated:

> Where identification is concerned, the general rule is that a trial court must hold an *in camera* hearing when the State offers a witness whose testimony identifies the defendant as the person who committed the crime, and the defendant challenges the in-court identification as being tainted by a previous, illegal identification or confrontation.

Id. at 613, 550 S.E.2d at 297. The Court limited this rule to situations where an in-court identification was the product of an unlawful confrontation or lineup. Id.

However, in this case the police did not conduct any kind of pretrial identification which could have contributed to a misidentification of Lewis during trial. Our research reveals no South Carolina case requiring a trial court to conduct an *in camera* hearing to determine the reliability of an in-court identification, where law enforcement has conducted no pretrial out-of-court identification. Nor has Lewis cited any such case.

"Generally, the decision to admit an eyewitness identification is at the trial judge's discretion and will not be disturbed on appeal absent an abuse of such, or the commission of prejudicial legal error." Moore, at 288, 540 S.E.2d at 448. We find no abuse of discretion or prejudicial legal error because the trial court failed to conduct a Neil v. Biggers hearing or to suppress Lewis's in-court identification.

Ultimately, the reliability and credibility of the in-court identification was a question for the jury, as it was the sole judge of the facts and the credibility of the witnesses. State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001). Lewis's counsel subjected Armstrong to extensive cross-examination concerning the accuracy and reliability of his in-court identification. Armstrong explained the extent of his opportunity to view Lewis at the time of the crime, the degree of attention he paid, and the accuracy of his prior description of Lewis. In his direct testimony, Armstrong unhesitatingly identified Lewis as one of the assailants, and even though he admitted that a year and a half had elapsed since the crime, he testified he was nevertheless "positive" about his identification.

Therefore, the trial court committed no error on this issue.

II.

Lewis additionally argues he is entitled to a new trial because the trial court refused to allow him to strike a juror previously stricken by his co-defendant.

During jury selection Lewis exercised peremptory strikes on nine white jurors. His co-defendant, Washington, also separately struck nine white jurors, including juror 304, a white female. At the end of jury selection, the State requested a Batson[2] hearing. Each defendant separately presented reasons for his respective strikes. Washington explained he struck juror 304 because she was a housewife. The trial court found several jurors, including juror 304, had been struck for reasons not race-neutral or gender-neutral.[3] The parties then began selecting a second jury.

Juror 304 was presented again. Washington accepted the juror, but Lewis attempted to strike her. At that point, the trial court asked the attorneys to approach the bench and told Lewis's attorney he could not strike the juror because the court had already held that the reason for the previous strike was pretextual. Lewis therefore accepted the juror. After finishing the second jury selection process, Lewis moved to quash the jury and re-select another jury because he was not allowed to exercise a peremptory strike. The following colloquy occurred:

> **Mr. Loy [Lewis's counsel]:** Your Honor, my motion is to strike the jury and re-pick based on the following, Your Honor: Juror Number 304 was called, when she was called I exercised a strike, struck her, you called us to sidebar, indicated as you

[2] Batson v. Kentucky, 476 U.S. 79 (1986).

[3] Lewis does not appeal the trial court's decision to quash the first jury after finding the parties exercised strikes in a discriminatory fashion.

had earlier ruled that that was not a race-neutral or gender-neutral strike.

The Court: I did.

Mr. Loy: That I couldn't strike her for any reason whatsoever, and in fact was compelled to seat her on the jury. I didn't want to make the argument there, I attempted to preserve my objection to that instruction by saying pursuant to your instruction at the bench. However, Your Honor, I think if I have independent grounds to strike her separate and apart from what we did last time --

The Court: No, sir. You don't get to pick and choose. When you put on there that that's the reason you struck her the first time and I ruled that was not gender or race neutral, that means you cannot strike her. Now, put anything you want to on the record.

Mr. Loy: That's my argument, Your Honor. My argument is that if I have independent reasons for striking her, such as if something --

The Court: I don't know what the independent reason is. You're stuck with what you gave me the first time. I had already ruled you couldn't put her, but I'll let you put anything you want to on the record.

Mr. Loy: I think, You[r] Honor, it's akin, although this is not the case, that if I had heard her in the hallway saying they ought to just hang both of those guys and be done with it, that I wouldn't be compelled to seat her on the jury. That's my

argument, I think I should have been allowed to strike her.

The Court: I'll be glad to let you put down whatever independent reason you would have used.

Mr. Loy: Your Honor, the reason I would have used, the reason I would have struck her was based solely on her demeanor when she came forward on the manner in which she looked at our table versus the State's table entirely independent of what happened during our first jury selection process.

The Court: All right. Anything else?

Mr. Loy: No. That's it, Your Honor.

The Court: I deny your motion. Anything further?

Mr. Loy: Not from [sic] on behalf of Mr. Lewis, Your Honor.

Neither the State nor the defendant may exercise peremptory challenges in a racially discriminatory manner. State v. Hicks, 330 S.C. 207, 499 S.E.2d 209 (1998) (citing Batson v. Kentucky, 476 U.S. 79 (1986), and Georgia v. McCollum, 505 U.S. 42 (1992)). The United States Supreme Court let individual states fashion a remedy for striking a juror based upon race. Batson, 476 U.S. at 99 n.24.

In State v. Jones, 293 S.C. 54, 58, 358 S.E.2d 701, 704 (1987), abrogated on other grounds by State v. Chapman, 317 S.C. 302, 454 S.E.2d 317 (1995), our Supreme Court held that if the trial court finds a Batson violation, "the process of selecting the jury shall start *de novo*." The Court stated, "members of the tainted jury and all persons who were struck shall be

placed back in the jury venire. The jury selection process shall start anew using this 'reconstructed' venire." Id. at 58 n.3, 358 S.E.2d at 704 n.3.

Later, in State v. Franklin, 318 S.C. 47, 51, 456 S.E.2d 357, 359 (1995), the Court addressed the procedure the trial court should follow when "a party attempts to strike from the second venire a person previously ruled stricken in violation of Batson." The Court recognized the *de novo* jury selection procedure established in Jones but held, to protect a venireperson's constitutional rights and to prevent rewarding a party for improper conduct, that it was not error for the trial court to disallow a party's second attempt to strike a juror who was previously improperly removed from the jury.

However, in this case, Lewis did not strike juror 304 during the first selection process. His co-defendant Washington did. Thus, Lewis argues he should have been able to strike juror 304, independent of his co-defendant's earlier actions. Lewis alleges the trial court erred in imputing the co-defendant's unconstitutional strike to him, thereby prohibiting Lewis from striking the juror. Moreover, he claims his strike could have been for an intervening, independent reason.

The State contends Franklin controls these facts because a defendant does not have the right to repeatedly strike a prospective juror on an unconstitutional basis. However, Franklin did not address a situation where co-defendants exercise strikes independent of each other. In Franklin, the issue facing the Court was the "claimed right [of an offending party] to unconstitutionally strike a prospective juror over and over again . . . ." Id. at 54, 456 S.E.2d at 361. The Court reasoned that allowing the trial court the discretion to seat an improper juror prevented "'giv[ing] the offending party exactly what he wanted, namely,' a jury panel which unconstitutionally excludes a particular juror." Id. at 53, 456 S.E.2d at 360 (quoting People v. Moten, 603 N.Y.S.2d 940, 947 (N.Y. Sup. Ct. 1993)).

Here, Lewis was not the "offending party." Lewis did not strike juror 304 during the first selection process. Furthermore, there is no evidence Lewis attempted to strike the juror on an unconstitutional basis during the second selection process. The trial court's discretionary remedy for an

improper peremptory strike must not infringe on either the juror's or the defendant's constitutional rights. Id. at 53, 456 S.E.2d at 360. Lewis is constitutionally entitled to a fair and impartial jury. S.C. Const. art. I, § 14; see State v. Harris, 340 S.C. 59, 62, 530 S.E.2d 626, 627 (2000) ("The Sixth and Fourteenth Amendments of the United States Constitution guarantee a defendant a fair trial by a panel of impartial and indifferent jurors."). Lewis's entitlement to an impartial jury was not met where the trial court prohibited Lewis from striking a juror he had not previously challenged.

Moreover, Lewis presented an intervening, independent reason to strike the juror. See Franklin, 318 S.C. at 54, 456 S.E.2d at 361 (stating a defendant is "not prohibited from bringing to light facts justifying striking the prospective juror which arose after the initial Batson hearing"). Lewis stated he attempted to strike the juror because of her demeanor when she came forward. However, the trial court did not even consider Lewis's explanation for the attempted strike, given the court's earlier ruling that Lewis was "stuck with what [he] gave [the trial court] the first time." This was error. Because Lewis did not strike the juror the first time, he should have been allowed to strike the juror the second time, subject to scrutiny by the court only if the State moved for a Batson hearing. He should also have been allowed to present evidence concerning an intervening reason and had the trial court rule on that.

The State contends the trial court "properly refused to allow Lewis to use subterfuge to discriminate against juror [number 304] for a second time." There is no evidence the reason advanced by Lewis to strike the juror was "subterfuge."

The trial court should have allowed Lewis to exercise a peremptory challenge during the second selection process given Lewis had not already stricken the juror and may have had an intervening reason to later strike the juror. Lewis should not have been held responsible for the unconstitutional strike exercised by his co-defendant. Cf. State v. Carriker, 269 S.C. 553, 238 S.E.2d 678 (1977) (finding the objections of one defendant are not imputable to a co-defendant).

CONCLUSION

The trial court's denial of Lewis's motion to hold an in camera hearing to determine the reliability of an in-court identification is affirmed. However, based on the foregoing analysis concerning the jury selection, we reverse and remand this case for a new trial.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

STILWELL, J., concurs and ANDERSON, J., dissents in separate opinion.

ANDERSON, J. (dissenting): I respectfully dissent. The majority concludes the trial court did not err by denying Lewis's request for an in camera hearing and the trial court should have allowed Lewis to strike a previously stricken juror. I disagree. I VOTE to AFFIRM.

FACTS/PROCEDURAL BACKGROUND

On June 21, 1999, Jane Doe[4] and Gill Armstrong were traveling from Virginia to their home in Florida with their infant daughter. They checked in at the Economy Inn off I-95 in St. George around 11:00 p.m. Leaving Doe and the infant daughter in the hotel room, Armstrong went to the Huddle House to pickup food. When he returned, he noticed three men standing in the breezeway near his room. Assuming they were hotel guests, Armstrong proceeded to his room and was not suspicious of their presence. After putting the food in the hotel room, Armstrong went back outside to the nearby soda machines without completely closing his door.

[4] To protect the female victim's identity, she has been referred to as Jane Doe.

At the soda machines, a man whom Armstrong identified as Timothy Washington placed a gun to his head. Gerrod Lewis and Shermaine Elmore accompanied Washington. Armstrong recognized the three men as the same men he had seen in the breezeway a few minutes earlier. Washington demanded to go to Armstrong's hotel room.

As the men entered the hotel room, Doe was getting out of the shower clad only in a towel. The infant daughter was asleep on the bed. The men wanted money. When they realized Armstrong and Doe had only fourteen dollars, they became enraged and searched the room. Once they could not find anything of value, Lewis and co-defendant Washington took turns sexually assaulting Doe in the bedroom while co-defendant Elmore held Armstrong at gunpoint in the bathroom. Then Washington took Doe into the bathroom and sexually assaulted her in front of Armstrong. After sexually assaulting Doe, the men took Armstrong's keys and stole his car. The car was found burned a few days later near St. George.

ISSUES

I. Did the trial court err by failing to suppress Armstrong's identification of Lewis?

II. Did the trial court err in refusing to allow Lewis to strike a previously stricken juror?

LAW/ANALYSIS

I. Identification of Lewis

Lewis argues he is entitled to a new trial because the trial court erred in failing to suppress Armstrong's in-court identification of him. Lewis contends the identification was unduly suggestive and unreliable, and the error was not harmless. I disagree.

A. Line-up

Lewis asserts the trial judge's failure to suppress the identification was error because the State refused to conduct a non-suggestive lineup before the defendant was brought into the courtroom for trial. I find this argument has no merit.

Before trial, Lewis made a motion to either require a photographic lineup or suppress any identification of him. In connection with the photographic lineup, his counsel stated,

> We think as a matter of fundamental fairness [the solicitor's office] should have done a lineup, either live or in person. . . . They should still be compelled to do a photographic lineup. It's not something we have the opportunity to do, obviously as defense, but I do think as a matter of due process and fundamental fairness they should have done that.

In denying the motion for a photographic lineup, the trial judge explained, "I can't require the solicitors or the police officers to do a photo lineup. You know, in many cases there's not a photo lineup. And I don't know of any law that would require them to do it, so I have to deny your motion legally."

I agree with the trial judge. There is neither a law requiring the solicitor to conduct a photographic lineup, nor a law allowing the judge to order one. Thus, this issue has no merit.

B. In Camera Hearing

Lewis alleges the trial court erred by denying his request for an in camera hearing to determine the reliability of Armstrong's identification of him in court. I agree.

The issue posited is novel. Precedentially and by rule language the issue of **pre-trial** mandatory in camera hearings for identification evidence is

extant. Here, we analyze and decide whether an in camera hearing is mandatory in regard to identification evidence that relates solely to an **IN-COURT IDENTIFICATION**.

When Lewis's motion to compel a lineup was denied, he asked for an in camera hearing prior to the identification being made before the jury. The trial court denied Lewis's motion:

> [Lewis's counsel]: My re-request at this point is for an in camera hearing prior to them doing that so the Court can make its own determination as to whether or not that's a reliable identification. If it's so unreliable under the circumstances, they shouldn't allow --
>
> The Court: That means I'm going to have to try the case twice, which I'm not going to do. You've got your right to move during the trial at any time to suppress any evidence or identification. I'm not going to have a hearing beforehand.

"The standard for determining the admissibility of a[n] . . . identification is 'whether the identification procedure "was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."' " State v. Patterson, 337 S.C. 215, 228, 522 S.E.2d 845, 851 (Ct. App. 1999) (citing State v. Gambrell, 274 S.C. 587, 590, 266 S.E.2d 78, 80 (1980); see also Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968)). "A criminal defendant may be deprived of due process of law by an identification procedure that is unnecessarily suggestive and conducive to irreparable mistaken identification." State v. Blassingame, 338 S.C. 240, 251, 525 S.E.2d 535, 541 (Ct. App. 1999) (citing Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967); Patterson, 337 S.C. at 228, 522 S.E.2d at 851-52).

In Patterson, we stated:

> Some general guidelines emerge from these [pre-trial identification] cases as to the relationship between suggestiveness

> and misidentification. It is, first of all, apparent that the primary evil to be avoided is "a very substantial likelihood of irreparable misidentification." . . . While the phrase was coined as a standard for determining whether an in-court identification would be admissible in the wake of a suggestive out-of-court identification, with the deletion of "irreparable" it serves equally well as a standard for the admissibility of testimony concerning the out-of-court identification itself. It is the likelihood of misidentification which violates a defendant's right to due process. . . . Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous.

337 S.C. at 228-9, 522 S.E.2d at 852 (quoting Neil v. Biggers, 409 U.S. 188, 198 (1972)) (brackets in original).

In State v. Mansfield, 343 S.C. 66, 538 S.E.2d 257 (Ct. App. 2000), this court articulated the rule:

> To determine whether an identification is reliable, it is necessary to consider the factors set forth in Neil v. Biggers: 1) the opportunity of the witness to view the criminal at the time of the crime; 2) the witness's degree of attention; 3) the accuracy of the witness's prior description of the criminal; 4) the level of certainty demonstrated by the witness at the confrontation; and 5) the amount of time between the crime and the confrontation. The corrupting effect of a suggestive identification is to be weighed against these factors. After the trial court determines the witness's identification is reliable, the witness is permitted to testify before the jury.

Mansfield, 343 S.C. at 78-79, 538 S.E.2d at 263 (internal citations omitted).

In U.S. v. Hill, 967 F.2d 226 (6th Cir. 1992), the Sixth Circuit Court of Appeals held the factors in Neil v. Biggers apply to in-court identifications as well as pre-trial identifications. The court elucidated:

> In this case, the court had to make an ex ante determination of whether to allow a witness, who had never before positively identified the defendant in person, to make an identification in court. We hold that the Biggers analysis applies to such in-court identifications for the same reasons that the analysis applies to impermissibly suggestive pre-trial identifications. The due process concerns are identical in both cases and any attempt to draw a line based on the time the allegedly suggestive identification technique takes place seems arbitrary. All of the concerns that underlie the Biggers analysis, including the degree of suggestiveness, the chance of mistake, and the threat of due process are no less applicable when the identification takes place for the first time at trial.

Id. at 232.

"[While] there was no obligation to stage a lineup, . . . there was, however, an obligation to ensure that the in-court procedure here did not simply amount to a show-up." U.S. v. Archibald, 734 F.2d 938, 941 (2d Cir. 1984).

In the recent case of State v. Cheatham, 349 S.C. 101, 561 S.E.2d 618 (Ct. App. 2002), we held:

> Where there is an issue as to whether or not an in-court identification by a witness is of independent origin and based upon observations of a suspect other than in the course of any improper confrontation or line-up, the defendant is entitled to an in camera hearing. Thus, our supreme court has "adopted a per se rule requiring the court to hold an in camera hearing when the state offers witnesses whose testimony identifies the defendant as the person who committed the crime and the defendant

> challenges the in-court identification as being tainted by a previous illegal identification."

Id. at 116, 561 S.E.2d at 626 (citing State v. Williams, 258 S.C. 482, 485, 189 S.E.2d 299, 300 (1972); State v. Simmons, 308 S.C. 80, 82-83, 417 S.E.2d 92, 93 (1992); State v. Cash, 257 S.C. 249, 185 S.E.2d 525 (1971)); see also State v. Ramsey, 345 S.C. 607, 613, 550 S.E.2d 294, 297 (2001) (stating the general rule that a trial court must hold an in camera hearing when the State offers a witness whose testimony identifies the defendant as the person who committed the crime and the defendant challenges the in-court identification).

Further, "[h]earings on the admissibility of confessions or statements by an accused, and pretrial identifications of an accused shall in all cases be conducted out of the hearing of the jury." Rule 104(c), SCRE. The rule "requires all hearings regarding the admissibility of pretrial identifications (to include any assertion that an in-court identification should be excluded as a result of a pretrial identification) to be heard outside the presence of the jury." Cheatham, 349 S.C. at 115-6, 561 S.E.2d at 626 (citing Simmons, 308 S.C. 80, 417 S.E.2d 92 (1992)). "Rule 104(c) unambiguously mandates hearings on the admissibility of out of court identifications of the accused shall in all cases be held outside the presence of the jury." Id. at 117, 561 S.E.2d at 627.

I respectfully remind the Bench and Bar of the mandate to hold an in camera hearing to determine the reliability of an in-court identification when requested. In Cheatham, we edified: "We reaffirm the per se rule requiring the court to hold an in camera hearing when the state offers witnesses whose testimony identifies the defendant as the person who committed the crime and the defendant challenges the in-court identification as being tainted by a previous illegal identification." Id. at 117-18, 561 S.E.2d at 627.

The judge was required to hold an in camera hearing to establish the reliability of the in-court identification. Experimentally and realistically, the conduct of the criminal trial should be imbued with fairness and equanimity to all parties. In a trial setting, I conclude that basic rules of judicial veracity mandate an in camera hearing on the admissibility of the in-court

identification of the accused. To allow the fact-finder to hear the in-court identification testimony **BEFORE** admission into evidence stretches credulity because in the event of **INADMISSIBILITY**, the jury has already heard the testimony in full. The inquiry then is the efficacy of the judge's ruling striking testimony and instructing the jury to disregard the testimony. The rule promulgated by the majority is a prosecutorial halcyonian conquest.

Thus, the denial of the motion to suppress was error without an in camera hearing. It does not follow, however, that Lewis is entitled to a new trial. I must determine if the error was harmless.

C. Harmless Error

"[I]f the identification is corroborated by either circumstantial or direct evidence, then the harmless error rule might be applicable." State v. Simmons, 308 S.C. 80, 83, 417 S.E.2d 92, 94 (1992) (citing Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)); see also Cheatham, 349 S.C. at 117, 561 S.E.2d at 627 (stating Simmons rule that harmless error rule may be applicable if identification is corroborated by either circumstantial or direct evidence).

In State v. Ramsey, 345 S.C. 607, 550 S.E.2d 294 (2001), the defendant did not challenge the testimony of three witnesses who testified they had "no doubt" Ramsey was wearing a striped sweater on the day of the murder. Id. at 614, 550 S.E.2d at 298. Given this direct evidence, our supreme court held that failure to conduct an in camera hearing was harmless error.

Similarly in the present case, there was direct evidence that corroborated Armstrong's identification of Lewis. Even without Armstrong's testimony, the State presented co-defendant Elmore who testified in detail about Lewis's involvement in the crime. Elmore said that he, Lewis, and Washington had walked to the Economy Inn from a nearby convenience store. He verified the details of the occurrence in the hotel room, including the fact that Lewis sexually assaulted Doe. Thus, even though the trial judge erred in not conducting the in camera hearing, the error was harmless and does not require reversal.

II. Viability of Previously Stricken Juror

Lewis claims he is entitled to a new trial based on the court's refusal to allow him to strike a previously stricken juror. I disagree.

During jury selection, Lewis's counsel struck nine white jurors. Co-defendant Washington's counsel also struck nine white jurors, including juror number 304, a white female. At the end of the selection, the State requested a Batson[5] hearing. Lewis and Washington's attorneys separately presented their reasons for each of the strikes. The State argued the explanations were a pretext for purposeful discrimination. The judge found that several jurors, including juror number 304, had been struck for pretextual reasons.

Juror number 304 was called again when the second jury was selected. Washington's attorney accepted the juror, but Lewis's attorney attempted to strike her. At that point, the trial judge asked the attorneys to approach the bench and told Lewis's lawyer he could not strike juror number 304 for any reason. Lewis's lawyer then accepted the juror. After the jury was excused, Lewis's counsel moved to strike the jury and re-pick because he was denied his right to exercise a peremptory strike. The following colloquy occurred:

> Mr. Loy [Lewis's counsel]: Your Honor, my motion is to strike the jury and re-pick based on the following, Your Honor: Juror Number 304 was called, when she was called I exercised a strike, struck her, you called us to sidebar, indicated as you had earlier ruled that that was not a race or gender-neutral strike.
> The Court: I did.
> Mr. Loy: That I couldn't strike her for any reason whatsoever, and in fact was compelled to seat her on the jury. I didn't want to make the argument there, I attempted to preserve my objection to that instruction by saying pursuant to your instruction at the bench. However, Your Honor, I think if I have independent

[5] Batson v. Kentucky, 476 U.S. 79 (1986).

grounds to strike her separate and apart from what we did last time –

The Court: No, sir. You don't get to pick and choose. When you put on there that that's the reason you struck her the first time and I ruled that was not gender or race neutral, that means you cannot strike her. Now, put anything you want to on the record.

Mr. Loy: That's my argument, Your Honor. My argument is that if I have independent reasons for striking her, such as if something –

The Court: I don't know what the independent reason is. You're stuck with what you gave me the first time. I had already ruled you couldn't put her, but I'll let you put anything you want to on the record.

Mr. Loy: I think, You[r] Honor, it's akin, although this is not the case, that if I had heard her in the hallway saying they ought to just hang both of those guys and be done with it, that I wouldn't be compelled to seat her on the jury. That's my argument, I think I should have been allowed to strike her.

The Court: I'll be glad to let you put down whatever independent reason you would have used.

Mr. Loy: Your Honor, the reason I would have used, the reason I would have struck her was based solely on her demeanor when she came forward on the manner in which she looked at our table versus the State's table entirely independent of what happened during our first jury selection process.

The Court: All right. Anything else?

Mr. Loy: No. That's it, Your Honor.

The Court: I deny your motion. Anything further?

Mr. Loy: Not from [sic] on behalf of Mr. Lewis, Your Honor.

In Batson v. Kentucky, 476 U.S. 79, 80 (1986), the United States Supreme Court declared striking a juror solely on the basis of race is unconstitutional. Batson left the remedy for striking a juror based only upon race to each state. Batson, 476 U.S. at 99, n. 24. South Carolina first addressed the remedy for Batson violations in State v. Jones, 293 S.C. 54,

358 S.E.2d 701 (1987) (abrogated on other grounds by State v. Chapman, 317 S.C. 302, 454 S.E.2d 317 (1995)). In Jones, our supreme court held that when there is a Batson violation, the jury shall be quashed and "the process of selecting the jury shall start de novo." Jones, 293 S.C. at 58, 358 S.E.2d at 704. The court stated "members of the tainted jury and all persons who were struck shall be placed back in the jury venire [and] [t]he jury selection process shall start anew using this 'reconstructed' venire." Id. at 58, n. 3, 358 S.E.2d at 704, n. 3.

In State v. Franklin, 318 S.C. 47, 456 S.E.2d 357 (1995), our supreme court addressed the procedure when a party attempts to strike from the second venire a person previously stricken in violation of Batson. The court noted "[t]he majority of jurisdictions addressing the question of whether the trial judge may seat a juror improperly excluded in violation of Batson have found no error in seating such a juror. The rationale for allowing the trial judge the discretion to seat the improper juror is sound." Franklin, 318 S.C. at 52, 456 S.E.2d at 360. The court quoted People v. Moten, 603 N.Y.S.2d 940 (1993) as follows:

> To hold otherwise would inadvisably reward a party for his own improper conduct, as would the declaration of a mistrial, which, in my view is an inappropriate remedy where the court is confronted with a valid Batson . . . challenge. The declaration of a mistrial, as an alternative to a difficult decision involving a remedy for a Batson . . . violation, merely avoids the critical issue and is inappropriate since such a declaration would *give the offending party exactly what he wanted, namely, a different jury panel*. Thus, it would reward him for the very discrimination which Batson . . . [was] designed to prevent.

Franklin, 318 S.C. at 52, 456 S.E.2d at 360 (quoting Moten, 603 N.Y.S.2d at 947) (brackets in original).

The court further noted that "the defendant's constitutional right to a fair and impartial jury is [not] in any way violated by this procedure." Id. at 53, 456 S.E.2d at 360. The court held that "once a new venire has been

selected . . . it is within the trial judge's discretion to fashion the appropriate remedy under the particular facts of each case and, as long as neither party's constitutional rights are infringed, that remedy may include the seating of an improperly challenged juror." Id. at 53, 456 S.E.2d at 360 (citing Jefferson v. State, 595 So.2d 38, 41 (Fla. 1992)).

In the present case, the jury selection process began anew after the first jury was set aside. Lewis does not challenge the trial judge's ruling that juror number 304 was first stricken in violation of Batson. Instead, he professes he had an independent reason for striking the juror during the second jury selection, namely "her demeanor when she came forward on the manner in which she looked at our table versus the State's table entirely independent of what happened during our first jury selection process."

The trial judge should have allowed Lewis to state on the record his reason(s) for wanting to strike the juror during the second jury selection and not after the jury selection was completed. However, there was no error in seating the juror. Lewis was not denied his peremptory challenge. Instead, he was prohibited from exercising it in a racially discriminatory manner. The trial judge properly refused to allow Lewis to discriminate against juror number 304 during the second jury selection. Further, I find no evidence that Lewis suffered any prejudice from having juror number 304 on the jury.