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MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, S.C.

STATE OF SOUTH CAROLINA) COUNTY OF BERKELEY)	IN THE COURT OF GENERAL SESSIONS FOR THE NINTH JUDICIAL CIRCUIT WARRANT NO.: 2016A0810400692 INDICTMENT NO: 2016-GS-08-02603
STATE OF SOUTH CAROLINA) Plaintiff,) -versus-) MICHAEL COLUCCI,) Defendant.)	**MOTION FOR EXPANDED AND INDIVIDUAL *VOIR DIRE***

Michael Colucci respectfully requests this Court approve the use of expanded and/or individual *voir dire* to protect his South Carolina and United States Constitutional rights to have his case heard by a fair and impartial jury.

BACKGROUND

Michael Colucci is charged in Indictment Number 2016-GS-08-02603 with one count of Murder alleging that while he, with malice aforethought, murdered his wife, Sara Colucci, with a garden hose. Media coverage of the incident and Mr. Colucci's arrest has been extensive. Opinions of Mr. Colucci's guilt have been expressed in media reports and on social media. Rare is a report or comment found that is factually accurate. At the time of Mr. Colucci's arrest and on numerous occasions thereafter, law enforcement officials provided a limited narrative of the incident, disclosing only the evidence that supported their theory of criminal responsibility–murder. Exculpatory evidence that existed at the time of Mr. Colucci's arrest and exculpatory evidence gathered thereafter was not disclosed.

RELIEF SOUGHT

In light of the pervasive media accounts and social media interest in his case, Mr. Colucci requests this Court allow expanded *voir dire* to ensure the selection of a fair and impartial jury.

ARGUMENT

EXPANDED AND INDIVIDUAL *VOIR DIRE* IS WARRANTED AND APPROPRIATE IN THIS HIGH-PROFILE AND SENSITIVE CASE

South Carolina Rules of Criminal Procedure fail to provide direction with respect to *voir dire* unless the death penalty is sought.[1] Instead, the "[t]he scope of voir dire and the manner in which it is conducted are generally left to the sound discretion of the trial court." *State v. Bixby*, 388 S.C. 528, 542, 698 S.E.2d 572, 579 (2010) (citing *State v. Stanko*, 376 S.C. 571, 575 (2008). In *Bixby*, the trial court permitted counsel to ask questions of each potential juror. *See also State v. Jones*, 273 S.C. 723, 727, 259 S.E.2d 120, 122-23 (1979) (trial court questioned jurors individually). A few years prior to *Bixby*, the South Carolina Supreme Court decided *State v. Evins*, 373 S.C. 404, 645 S.E.2d 904 (2007). *Evins*, like *Bixby*, involved a case that garnered significant pre-trial publicity at the local level. In that case, counsel for both sides conducted thorough *voir dire* of the jurors. Those jurors who indicated exposure to pre-trial publicity, indicated during expanded and individual *voir dire* that they were capable of setting that information aside. *See also State v. Caldwell*, 300 S.C. 494, 388 S.E.2d 816 (1990); *State v. Tucker*, 334 S.C. 1, 512 S.E.2d 99 (1999).

[1] S.C. Code Ann. § 16-3-20(D) (Supp. 2010).

Other jurisdictions, including the U.S. Supreme Court, have approved and recognized the efficacy of expanded and individual *voir dire*, particularly in high-profile or sensitive cases such as this, where there is significant pretrial publicity. Where, due to pretrial publicity or local community issues, the risk of juror bias involves bias specific to the defendant or to the case, the Court deemed voir dire inquiry into a particular subject required. *Skilling v. United States*, 561 U.S. 358 (2010).

In *Skilling*, the expanded *voir dire* involved individual questioning of jurors by the trial court, with counsel permitted to ask follow-up questions. *Id.* at 372-74. The Court noted the "efficacy" of the district court's use of the "extensive screening questionnaire and follow-up voir-dire." *Id.* at 384.

> The District Court conducted voir dire, moreover, aware of the greater-than-normal need, due to pretrial publicity, to ensure against jury bias. At Skilling's urging, the court examined each prospective juror individually, thus preventing the spread of any prejudicial information to other venire members. *See Mu'Min*, 500 U.S. at 425. To encourage candor, the court repeatedly admonished that there were "no right and wrong answers to th[e] questions. The court denied Skilling's request for attorney-led *voir dire* because, in its experience, potential jurors were "more forthcoming" when the court, rather than counsel, asked the question. The parties, however, were accorded an opportunity to ask follow-up questions of every prospective juror brought to the bench for colloquy. Skilling's counsel declined to ask anything of more than half of the venire members questioned individually, including eight eventually selected for the jury, because, he explained, "the Court and other counsel have covered" everything he wanted to know.

Id. at 389 (lower court citations omitted).

The foregoing method of expanded and individual *voir dire* as approved in *Skilling* has been followed and used by other courts. *See, e.g.*, *United States v. Blankenship*, 79 F.Supp.3d 613 (S.D.W. Va. 2015) (jurors individually questioned and both parties submitted questions for the court to ask); *United States v. Dimora*, No. 01:10cr387, Doc. No. 602, at 12675-84(N.D. Ohio Oct. 31, 2011) (court allowed expanded scope voir dire and individual questioning of jurors in highly

publicized case); *State v. Addison*, 87 A.3d 1, 57 (N.H. 2014) (expanded and individual *voir dire* permitted); *see also State v. Anderson*, 754 S.E.2d 761, 765 (W. Va. 2014) (when trial court determines that prospective jurors have been exposed to information which may be prejudicial, trial court shall permit individual questioning of jurors); *United States v. Dellinger*, 472 F.2d 340, 372-77 (7th Cir. 1972) (where pretrial publicity was extensive, trial court's failure to question jurors individually about such publicity was error), *cert. denied*, 410 U.S. 970 (1973); *Commonwealth v. Toolan*, 951 N.E.2d 903, 918 (Mass. 2011) (insufficient *voir dire* in case with extensive pretrial publicity).

The American Bar Association (ABA) also champions the merits and use of individual *voir dire*. The ABA "black letter" standard on how to conduct voir dire examination is as follows:

> (a) Questioning of jurors should be conducted initially by the court, and should be sufficient, at a minimum, to determine the jurors' legal qualifications to serve.
>
> (b) Following initial questioning by the court, counsel for each side should have the opportunity, under the supervision of the court and subject to reasonable time limits, to question jurors directly, both individually and as a panel.
>
> (c) *Voir dire* examination should be sufficient to disclose grounds for challenges for cause and to facilitate intelligent exercise of peremptory challenges.
>
> (d) Where there is reason to believe the prospective jurors have been previously exposed to information about the case, or for other reason are likely to have preconceptions concerning it, counsel should be given liberal opportunity to question jurors individually about the existence and extent of their knowledge and preconceptions.
>
> (e) Jurors should be examined outside the presence of other jurors on sensitive matters or prior exposure to potentially prejudicial material.
>
> (1) Sensitive matters are those matters which might be potentially embarrassing or intrusive into the juror's private life, feelings or beliefs, or those matters which if discussed in the presence of the jury panel, might prejudice or influence the panel by exposing other potential jurors to improper information.

> (2) Examination of the prospective juror with respect to that juror's prior exposure to potentially prejudicial material should be conducted in accordance with ABA Standards for Criminal Justice relating to Fair Trial and Free Press.
>
> (f) It is the responsibility of the court to prevent abuse of *voir dire* examinations.

ABA Standards for Criminal Justice: Discovery and Trial by Jury § 15–2.4 (3d ed.1996).

Similarly, Standard 8-5.4 provides:

> If it is likely that any prospective jurors have been exposed to prejudicial publicity, they should be individually questioned to determine what they have read and heard about the case and how any exposure has affected their attitudes toward the trial. Questioning should take place outside the presence of other chosen and prospective jurors and in the presence of counsel. A record of prospective jurors' examinations should be maintained and any written questionnaires used should be preserved as part of the court record.

ABA Standards for Criminal Justice: Fair Trial and Public Discourse § 8-5.4 (2013).

The standards set forth by the ABA mirror the holdings of federal and state courts across the United States. Namely, the right of a criminal defendant to identify and exclude prospective jurors who are unable or unwilling to apply the presumption of innocence and the standard of proof beyond a reasonable doubt as well as those who are tainted by pre-trial publicity. Without case-specific expanded and individual *voir dire*, it is difficult, if not impossible, to determine whether a seated jury is impartial. Identification of jurors who are unable or unwilling to follow the law as well as those tainted by pre-trial publicity should trump any efficiency concerns this, or any trial court, may have.

CONCLUSION

The use of expanded and individual *voir dire* in this case, as in *Shilling* and the other cases cited, is warranted and appropriate. To permit a juror who refuses to apply the presumption of innocence, hold the government to its burden of proof beyond a reasonable doubt or who is tainted by the court of public opinion to sit on a criminal jury would perpetrate a gross injustice. Therefore, the Court should grant the Mr. Colucci's motion for expanded and individual *voir dire*.

Respectfully submitted,

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