

Charge to the Jury

THE COURT: All right. Let the record
20 reflect that these proceedings are being held outside the
21 presence of the jury and all parties of the trial are
22 present.

23 Have both sides read the Charge of the
24 Court?

25 MS. SHERRI WALLACE: Yes, sir.
Sandra M. Halsey, CSR, Official Court Reporter
5637

1 MR. S. PRESTON DOUGLASS: Yes, your
2 Honor.

3 THE COURT: Okay. I believe the
4 defense wishes the failure to testify portion removed; is
5 that correct?

6 MR. RICHARD C. MOSTY: Yes, sir.

7 THE COURT: Does the State have any
8 objection?

9 MS. SHERRI WALLACE: No, we don't,
10 your Honor. But we would request that you inquire of the
11 defendant if that is her desire as well.

12 THE COURT: Is that your desire, Mrs.
13 Routier?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: All right.

16 MS. SHERRI WALLACE: Thank you, your
17 Honor.

18 THE COURT: Will the State still
19 object to my removing that from the Charge?

20 MS. SHERRI WALLACE: No. Provided the
21 defense doesn't want it in, and they've objected. We
22 just heard them, we will concur in that.

23 THE COURT: All right. Fine then.

24 The motion is granted, by the Court. The defense's
25 motion is granted. We will remove that portion of the
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5638

1 Charge as to the failure to testify.
2 The rest of the Charge is satisfactory
3 to both sides?

4 MR. S. PRESTON DOUGLASS: No, your
5 Honor. If I might respond.

6 THE COURT: Oh, I'm sorry.

7 MR. S. PRESTON DOUGLASS: The
8 defendant objects to the anti-sympathy charge as written
9 in, as in total presented in the Charge. I would provide
10 McFarland_v._State, which references the charge, and it _____

11 also cites *Wheatfall_versus_State*, in regards to an _____
12 anti-sympathy charge.
13 And in *Wheatfall*, which is a Court of _____
14 Criminal Appeals case, 1994, it says that the giving of
15 that charge may not be error, but the Court specifically
16 said that it does not pass on whether there is any
17 statutory authority to give that charge. And I believe,
18 as the Court knows, there is no statutory authority for
19 giving that charge.
20 Thus, giving that charge is purely
21 discretionary with the Court, and in that regard I would
22 submit it should not be presented.
23 Let me expound on it a little bit. If
24 you have a charge as required by *Penry*, which says that _____
25 you are to consider mitigating circumstances. And in the
Sandra M. Halsey, CSR, Official Court Reporter
5639

1 Charge you say, "And as the Court has instructed the
2 jury," you're going to say that they shall consider
3 mitigating circumstances, which I think is appropriate.
4 And if you say, on one hand you want
5 them to consider mitigation, and in that Charge you say
6 that mitigation includes anything about the defendant's
7 background, character, or anything personal about the
8 defendant, and then on the other hand you say, "Well, you
9 cannot consider sympathy," then you are contradicting the
10 *Penry* charge and you're contradicting the mitigating _____
11 evidence charge.
12 And because there's no statutory
13 authority for being in the Charge, I believe it's
14 improper to give it.
15 It's discretionary, and there is no
16 statutory basis for giving it. And, we object on that
17 basis.
18 THE COURT: Okay. Objection
19 overruled.
20 Anything other than that?
21 MR. RICHARD C. MOSTY: Let me say one
22 thing to that. I disagree with Mr. Douglass putting it
23 in the discretionary part. What the Court held in that
24 case was there was not an abuse of discretion, but the
25 statutory objection I don't believe was raised in that
Sandra M. Halsey, CSR, Official Court Reporter
5640

1 case. And that's the thrust of our objection is no
2 statutory authority.
3 MR. S. PRESTON DOUGLASS: If I might
4 just add one thing to be clear. The Court specifically

5 said nobody raised, in that case, the fact that there's
6 no statutory authority, as if it was willing to say we'll
7 revisit that issue, because there was no authority to
8 give that charge.

9 THE COURT: All right. Thank you.

10 MS. SHERRI WALLACE: And Judge --

11 THE COURT: Other than that -- yes,

12 Ms. Wallace.

13 MS. SHERRI WALLACE: I said the State
14 concurred in the request to remove the failure to
15 testify. We're not asking for it to be removed, but
16 understand that the defense is. And we're satisfied with
17 it in, but if they want it out, we understand your
18 ruling.

19 THE COURT: Thank you. Other than

20 that, does the defense have any objection?

21 MR. RICHARD C. MOSTY: Yes. We object
22 to the instruction on parole. That it is an inaccurate
23 statement of the law that she would have to serve 40
24 years. It also contradicts with the second full
25 paragraph of the Charge which says that the sentence is
Sandra M. Halsey, CSR, Official Court Reporter
5641

1 mandatory death or confinement in the penitentiary for
2 life. And all it does -- all the Charge does is suggest
3 that, in fact, there is some parole law applicable to the
4 case, and we object to including it in there.

5 THE COURT: Overruled. Other than
6 that is there any defense objection to the Charge?

7 MR. DOUGLAS MULDER: I just want to
8 reurge all of the arguments made.

9 THE COURT: Is the rest

10 satisfactory -- other than that, is the Charge

11 satisfactory to the defense?

12 MR. S. PRESTON DOUGLASS: Yes, sir.

13 THE COURT: All right. And so, Ms.

14 Halsey, if you will be kind enough to mark this as the
15 next Court Exhibit, Court's Exhibit D. All right. Make
16 this Exhibit D.

17

18 (Whereupon, the

19 Exhibit was

20 Marked for

21 Identification

22 Only, as Court's

23 Exhibit D.)

24

25 THE COURT: All right. So, we're

1 going to bring the jury in. I'll read the Charge of the
2 Court, then we will have arguments now.
3 So we get everyone in a row here, so
4 to speak. Who will argue for the defense -- who is going
5 to open for the State? Mr. Shook?
6 MS. SHERRI WALLACE: I will, your
7 Honor.
8 THE COURT: Ms. Wallace. All right.
9 And by agreement, 90 minutes a side.
10 What warnings do you want, Ms.
11 Wallace?
12 MS. SHERRI WALLACE: If you could let
13 me know when I've used 30 minutes, and 15 minutes
14 thereafter.
15 THE COURT: Okay. And who will argue
16 for the defense? What order?
17 MR. CURTIS GLOVER: Doug, are you
18 going to open?
19 MR. DOUGLAS MULDER: Yeah, I'll open,
20 Judge.
21 MR. CURTIS GLOVER: I'm following him,
22 Judge.
23 THE COURT: Pardon?
24 MR. CURTIS GLOVER: I'll follow him,
25 Judge.
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5643

1 THE COURT: Okay. How long do you
2 want, Mr. Mulder?
3 MR. DOUGLAS MULDER: I don't need to
4 be called. I don't know how long I'm going to use, maybe
5 half an hour, maybe 45 minutes.
6 THE COURT: Well, do you want me to
7 let you know when you have used certain time limits, or
8 gone past a certain time?
9 MR. DOUGLAS MULDER: No, that's quite
10 all right. Thanks.
11 THE COURT: All right. Well, then,
12 who will follow that?
13 MR. S. PRESTON DOUGLASS: After Mr.
14 Glover, then I will. I just need 10 minutes.
15 Well, Mr. Mulder, I will warn you at
16 the end of each 30 minute segment; is that clear? So
17 everybody will know the time they're using.
18 Now, we will break -- the jury is
19 going to need to break about an hour and 15 minutes. I

20 will try to wait until somebody -- whenever we can break,
21 but they're not going to be able to sit for three hours.
22 MR. DOUGLAS MULDER: Well, if you're
23 going to do that, then I suggest that you break at the
24 end of Sherri --
25 THE COURT: Mr. Mulder, I will
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5644

1 determine when we break.
2 MR. DOUGLAS MULDER: Well, Judge,
3 listen, that's fine with me, but I just don't want to be
4 interrupted in the middle of my argument.
5 THE COURT: Well, we hope that you're
6 not.
7 MR. DOUGLAS MULDER: Well, I want that
8 understood, Judge.
9 THE COURT: Thank you. All right.
10 MR. DOUGLAS MULDER: I want that
11 understood, Judge. I don't want to be interrupted in the
12 middle of my argument. Now, if you want to recess prior
13 to the time that she reaches -- at the conclusion of her
14 argument, that's fine and dandy. I don't want to be
15 interrupted in the middle of my argument.
16 THE COURT: If the jury wants to
17 break, Mr. Mulder, we will break. And we'll have plenty
18 of time.
19 MR. RICHARD C. MOSTY: You know, I
20 don't think that that's an unfair request, that Mr.
21 Mulder's argument not be interrupted.
22 THE COURT: Gentlemen, let's don't
23 get -- I normally don't interrupt people in the middle of
24 their argument.
25 MR. DOUGLAS MULDER: Well, if I argue
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5645

1 for 45 minutes that's going to take it to an hour and
2 half.
3 THE COURT: Well, all right. If I see
4 a juror with their hand up, we're going to be breaking.
5 I just want to warn you of that.
6 MR. DOUGLAS MULDER: Well, Judge, I
7 suggest you take that up with the jury before I get up to
8 argue, it's real simple.
9 THE COURT: I have. Thank you.
10 And we understand that there will be a
11 total of 90 minutes per side. Total.
12 With that understanding, let's bring
13 the jury in, please.

14 MR. RICHARD C. MOSTY: Could we wait a
15 minute, your Honor? Could I check on something?

16 THE COURT: Yes. All right.

17 MR. RICHARD C. MOSTY: Will that be
18 okay?

19 THE COURT: All right.

20 MR. RICHARD C. MOSTY: Your Honor, we
21 object to starting until Mr. Routier gets here. I think
22 that's not an unreasonable request after a five week
23 trial.

24 THE COURT: Thank you. Overruled.

25 Let's bring the jury in, please.

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5646

1 Well, when do you think he will be
2 here?

3 MR. RICHARD C. MOSTY: If the Court
4 will give me a few minutes, I can go check.

5 THE COURT: All right. Go ahead and
6 check and see where he is.

7 Just hold the jury a minute to see
8 where Mr. Routier is.

9

10 (Whereupon, a short pause
11 in the proceedings was had,
12 after which time, the
13 proceedings were resumed
14 as follows:)

15

16 THE COURT: All right. Are they here?

17 I thought they were coming up the stairs.

18 Let the record reflect these

19 proceedings are being held outside the presence of the
20 jury and all parties of trial are present.

21 These proceedings today began at 9:00

22 A.M. sharp. It's now 14 minutes after 9:00. We have
23 recessed for five minutes.

24 And Mr. Mosty, what is the result of
25 your search for the Routier family?

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5647

1 MR. RICHARD C. MOSTY: I have someone
2 going to check on him. The place where he is staying
3 does not have a phone.

4 THE COURT: Well, it's 9:15 now.

5 MR. RICHARD C. MOSTY: His brother is
6 going, on his way there.

7 THE COURT: All right. Thank you.

8 Well, it's 9:15 now. The Court feels that we have waited
9 long enough. We have a jury in the jury room ready to
10 go. We have three hours of argument ahead of us. So,
11 the Court is now going to proceed.

12 If you will bring the jury in, please.

13

14 (Whereupon, the jury

15 Was returned to the

16 Courtroom, and the

17 Proceedings were

18 Resumed on the record,

19 In open court, in the

20 Presence and hearing

21 Of the defendant,

22 As follows:)

23

24 **THE COURT:** All right. Be seated,

25 please. Let the record reflect that all parties in the

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5648

1 trial are present and the jury is seated.

2 Ladies and gentlemen of the jury, what

3 is going to happen now is, I am going to read to you the

4 Charge of the Court. That's the law in the case. Then

5 you will hear arguments for both sides. Then the case

6 will be yours to decide.

7 The Charge of the Court: Ladies and

8 gentlemen of the jury: By your verdict returned in this

9 case you have found the defendant, Darlie Lynn Routier,

10 guilty of the offense of capital murder. It is necessary

11 now for you to determine, from all of the evidence in the

12 case, the answers to certain questions called Special

13 Issues in this charge.

14 The mandatory punishment for capital

15 murder is death or confinement in the penitentiary for

16 life. You are instructed that in answering the special

17 issues you may take into consideration all of the facts

18 shown by the evidence admitted before you in the full

19 trial of this case and the law as submitted to you in

20 this Charge.

21 During your deliberations in this

22 phase of the trial you must not consider, discuss or

23 relate any matters not in evidence before you. You

24 should not consider or mention any personal knowledge or

25 information you may have about any fact or person

Sandra M. Halsey, CSR, Official Court Reporter

5649

1 connected with the case which is not shown by the
2 evidence.
3 You are instructed that if any
4 evidence has been introduced during the course of this
5 trial concerning the defendant's involvement in offenses
6 or bad acts, other than the offense on trial, you cannot
7 consider such evidence for any purpose unless you first
8 find from the evidence beyond a reasonable doubt that the
9 defendant committed these other offenses, or bad acts, if
10 there were any, and even then you may only consider the
11 same in determining the answers to the Special Issues.
12 If you do not so find or believe from the evidence, or if
13 you have a reasonable doubt thereof, you must wholly
14 disregard such evidence.
15 You are further instructed that you
16 are not to be swayed by mere sentiment, conjecture,
17 sympathy, passion, prejudice, public opinion or public
18 feeling in considering all the evidence before you in
19 answering the Special Issues.
20 The burden of proof in Special Issue
21 Number 1 rests upon the State, and it must prove the
22 affirmative of such issue beyond a reasonable doubt.
23 A reasonable doubt is a doubt based on
24 reason and common sense after a careful and impartial
25 consideration of all of the evidence in the case. It is
Sandra M. Halsey, CSR, Official Court Reporter
5650

1 the kind of doubt that would make a reasonable person
2 hesitate to act in the most important of his own affairs.
3 Proof beyond a reasonable doubt,
4 therefore, must be proof of such a convincing character
5 that you would be willing to rely and act upon it without
6 hesitation in the most important of your own affairs.
7 In the event you have a reasonable
8 doubt as to the answer to Special Issue Number 1, after
9 considering all of the evidence before you, and these
10 instructions, you will answer the Special Issue, "no."
11 In deliberating on Special Issue
12 Number 1, you shall consider all evidence admitted at the
13 guilt or innocence stage and the punishment stage
14 including evidence of the defendant's background or
15 character, or the circumstances of the offense that
16 militates for or mitigates against the imposition of the
17 death penalty.
18 You are instructed that you may not
19 answer Special Issue Number 1, "yes," unless all jurors
20 unanimously agree to such answer. Further you may not
21 answer this Special Issue, "no," unless 10 or more jurors
22 agree. It is not necessary that members of the jury

23 agree on what particular evidence supports a negative
24 answer, that is, an answer of "no" to Special Issue
25 Number 1.

Sandra M. Halsey, CSR, Official Court Reporter
5651

1 You are further instructed that if the
2 jury makes an affirmative finding to Special Issue Number
3 1, that is, an answer of "yes," then the jury shall
4 answer Special Issue Number 2.
5 You will answer Special Issue Number 2
6 yes or no. You may not answer Special Issue Number 2
7 "no" unless all jurors unanimously agree to such answer.
8 And you may not answer such issue "yes" unless 10 or more
9 jurors agree to such answer. The jury, however, need not
10 agree on what particular evidence supports an affirmative
11 finding on Special Issue Number 2.
12 In answering Special Issue Number 2,
13 you are instructed that you shall consider mitigating
14 evidence as evidence that a juror might regard as
15 reducing the defendant's moral blame worthiness.
16 And then we have the two Special
17 Issues, which I will read now. Special Issue Number 1:
18 Is there a probability that the defendant would commit
19 criminal acts of violence that would constitute a
20 continuing threat to society?
21 If the jury returns an affirmative
22 finding on the issues submitted above, then you shall
23 answer the following Special Issue:
24 Special Issue Number 2: Taking into
25 consideration all of the evidence, including the
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5652

1 circumstances of the offense, the defendant's character
2 and background, and the personal moral culpability of the
3 defendant, is there a sufficient mitigating circumstance
4 or circumstances to warrant that a sentence of life
5 imprisonment, rather than a death sentence be imposed?
6 You are further instructed that your
7 verdict shall be arrived at by due deliberation and not
8 by drawing lots or any other method of chance.
9 The answers to the Special Issues
10 shall be signed by the presiding juror.
11 You are the exclusive judges of the
12 facts proved, the credibility of the witnesses, and of
13 the weight to be given to their testimony. But you are
14 bound to receive the law from the Court, which is herein
15 given you, and to be governed thereby.
16 And that is signed by me, Mark Tolle,

17 Presiding Judge.

18 Now, the next two pages contain the

19 Special Issues. And depending upon your answer, the

20 presiding juror will sign, of course, the bottom of the

21 issue, assuming it's answered, and depending upon the

22 instructions, you will answer one or both of these

23 issues, depending upon the answers thereto. And Mr.

24 Wilson (sic) will sign the ones that you decide upon, and

25 if he will print his name, please.