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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

On Petition for Writ of Certiorari to the Court of Appeals

Frank R. Addy, Jr., Circuit Court Judge

Appellate Case No. 2026-002059

THE STATE,

Petitioner-Respondent,

v.

KENDRICK MONTREZ LEE,

Respondent-Petitioner.

THE STATE'S RETURN TO CROSS PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUES ON CERTIORARI

Petitioner-Respondent's Issue Statements

I. "Did the trial court err by requiring Ken Lee, a black man, to face trial by an all-white jury and denying his timely request for a continuance to a term of court when the pool of jurors actually appearing for jury service reflected a cross-section of the community?" (Lee Pet. 1).

II. "Did the trial court err by denying Ken Lee's *Batson* motion when the prosecution impermissibly relied on criminal history to strike the shole black juror while seating white jurors with criminal records?" (Lee Pet. 1).

III. "Did the trial court err by not granting a mistrial after making improper opening remarks to the jurors that violated *State v. Beaty*, 423 S.C. 26, 813 S.E.2d 502 (2018) and *State v. Daniels*, 401 S.C. 251, 737 S.E.2d 473 (2012)?" (Lee Pet. 1).

IV. "Did the trial court err by not providing an instruction pursuant to *State v. King*, 158 S.C. 251, 155 S.E. 409 (1930), regarding the jurors' obligation to resolve any doubt between the greater and lesser offenses, in favor of the accused, when that jury instruction was not required but permissible?" (Lee Pet. 1).

V. "Did the trial court err by providing the jurors a 'cascading' verdict form, rather than structuring the verdict form in a manner requested by Ken Lee, which would have mitigated the trial court's error in the opening instructions and ensured the jurors gave due consideration [to] the lesser included offenses?" (Lee Pet. 1).

VI. "Did the trial court err by not quashing the State's notice of intent to seek life without parole when the enhanced sentence[] was based on a conviction involving marijuana when Ken Lee objected to this charge being used to enhance the sentence when South Carolina has decriminalized marijuana and marijuana one day will likely be legal throughout the United States?"[1] (Lee Pet. 2).

The State's Counterstatement

I. Whether the merits of Lee's various appellate issues should be considered or addressed on certiorari when the Court of Appeals did not address the merits of any of Lee's issues because it reversed Lee's conviction and sentence as well as remanding for a new trial on a different issue,[2] which the Court of Appeals determined was dispositive of the issues Lee now raises on certiorari.

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[1] This issue is listed as "Question VII" in Respondent-Petitioner's "Questions Presented" section in his Cross Petition. (Lee Pet. 2).

[2] The issue on which the Court of Appeals ruled is the subject of the State's Petition for Writ of Certiorari, which is also pending with this Court.

STATEMENT OF THE CASE

In April 2021, an Abbeville County grand jury indicted both Kendrick Lee ("Lee") and his uncle, Travis Arnett Lee ("Travis"),[3] for assault and battery of a high and aggravated nature (ABHAN). (App'x 11-12, 13-14). On September 25-28, 2023, Lee and Travis proceeded to a jury trial before the Honorable Frank R. Addy, Jr. (App'x 25, 101, 207, 297, 538).

After a jury and two alternate jurors were selected but before they were sworn, Lee made a *Batson* motion based on the State striking the sole Black juror—Juror 191—presented from the jury panel.[4] (App'x 52-53). After lengthy discussions concerning why the State struck Juror 191, the trial court noted that Juror 191 would have been the second alternate juror if the State had not struck him and asked the State to reconsider allowing Juror 191 to sit as the second alternate juror. (App'x 74). The State responded that if that was what was needed to move the case forward, then the State would not object. (App'x 75). The State reemphasized that striking Juror 191 had nothing to do with race but was rather based on his two prior convictions for assault. (App'x 75).

When the jury and the remaining jury panel returned to the courtroom, the trial court informed Juror 191 that he would be an alternate juror. (App'x 77-78). Juror 191 had trouble hearing the trial court and informed the trial court that he could only hear out of one ear. (App'x 78). The trial court asked Juror 191 whether he had been able to hear everything that had been going on in the courtroom, to which he replied "[s]ome of it." (App'x 78-79). The trial court instructed Juror 191 to rejoin the jury panel and then dismissed the jury panel, including Juror 191. (App'x 79-80). After the jury panel left, the trial court stated:

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[3] Travis did not appeal his conviction or sentence.

[4] The trial court moved the jury and the two alternate jurors to the jury room before hearing this motion. (App'x 51-52).

> The record will reflect that in conversing with [Juror 191], I think it already reflects that [Juror 191] was extremely hard of hearing, that did not come to the attention of the Court, obviously, until the Court was toying with the idea, or looking to put him on [the jury] in order to—to address the—the alleged *Batson* violation. He obviously remarked that he only heard some of what was said during the course of voir dire.
>
> [Lee's counsel] did indicate that in other cases, judges have made accommodations to people who are hard of hearing. And I'm certainly open to such an accommodation if feasible. But based on [Juror 191's] difficulty hearing me, and based upon the fact that I could not be sure that he had heard all the voir dire, that he had heard all the names of the witnesses called, that he had been able to physically answer correctly, I went back on my initial idea of sitting him as an alternate juror.
>
> And the Court does find that the State's stated reasons for excusing the jurors that they excused were not pretext. There was no *Batson* violation, there was no discrimination. The fact that juror 191 had previously been convicted of several assaults as well as other crimes and because this is an assault case as well, that is a—the Court finds that that is a racially neutral reason to strike him.
>
> And that the seating and—or that the seating of juror 188, that that was because she had that disorderly conduct conviction that the strike against juror 191 was not pretextual. It's an apples and oranges comparison in this Court's mind.
>
> And of course[,] I've had a chance to consider the credibility of the proponents of the strike. And do find that there are reasons for excusing the jurors that they excused. I do find that those were valid and not in violation of *Batson*. Obviously fraudulent checks as we used to describe it is a crime of moral turpitude and in involves dishonesty. That's a different animal from a simple disorderly conduct where maybe somebody's had a little bit too much to drink. But obviously the defendant's objection is noted.
>
> And the Court wishes to note that as a practical matter, juror 191 was—may not be a—may not have been as deaf as a fence post, but he was darn—darn close.

(App'x 82-83).

The following day, during discussion of Lee's motion to quash the jury for a different reason, the trial court also stated that "if [Juror 191] couldn't hear the voir dire that I posed to him,

that creates a problem if he were to become an alternate." (App'x 117). Lee did not agree that Juror 191 was "deaf as a fence post" and took issue that the trial court did not entertain accommodating Juror 191's hearing issues. (App'x 118-119). The trial court responded that even if Juror 191 could have been accommodated, Juror 191 had indicated that he did not hear all the voir dire, which was a problem. (App'x 119).

The jury found both Lee and Travis guilty of ABHAN. (App'x 669-670). The trial court sentenced Lee to LWOP under section 17-25-45(B) of the South Carolina Code. (App'x 1).

Lee timely filed a notice of appeal in the Court of Appeals. On appeal, Lee argued the trial court erred by (1) denying his request for a continuance; (2) denying his *Batson* motion; (3) failing to determine whether Juror 191's hearing issues could be accommodated; (4) failing to grant a mistrial based on the trial court's allegedly improper opening remarks; (5) failing to charge the jury under *State v. King*, 158 S.C. 251, 155 S.E. 409 (1930); (6) providing the jury with a "cascading" verdict form; and (7) failing to quash the State's notice of intent to seek life without the possibility of parole under the two/three strikes law. *State v. Lee*, Op. No. 6151 at *1 n.1 (S.C. Ct. App. filed July 1, 2026).

In its published opinion, the Court of Appeals held that the trial court "erred by failing to determine whether [Juror 191's] hearing issues could be accommodated." *Lee*, Op. No. 6151 at *1. The Court of Appeals correctly noted that in South Carolina, the determination of a juror's competence is within a trial court's discretion and *not reviewable* on appeal unless wholly unsupported by the evidence. *Lee*, Op. No. 6151 at *5. The Court of Appeals then reviewed the trial court's determination of Juror 191's competence, reversing the trial court's determination despite evidence provided by Juror 191 to support that determination. *Id*. The Court of Appeals noted the trial court's "valid concern" about whether Juror 191 heard all the voir dire questioning

but found error as the trial court did not make an effort to conduct an individual voir dire for this second alternate juror. *Id*. The Court of Appeals held that because the trial court failed to engage in an inquiry of whether Juror 191's obvious hearing issues could be accommodated, the record did not indicate whether a reasonable accommodation would have allowed that juror to render efficient service; thus, the record lacked evidence to support the trial court's disqualification of Juror 191. *Id*. at *5-*6. The Court of Appeals reversed the determination of the trial court and remanded the case for a new trial. *Id*. at *6. The Court of Appeals declined to rule on the remaining six issues because its ruling on the trial court's disqualification of Juror 191 was dispositive. *Id*. at *6 n.4.

The State filed a timely petition for rehearing on the merits of the Court of Appeals opinion, and Lee filed a timely cross-petition for rehearing arguing that the Court of Appeals should have ruled on all seven issues. (State's PFR; App. PFR). The Court of Appeals denied both petitions. (PFR Or.).

This appeal followed.

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only and are bound by the trial court's factual findings unless those findings are clearly erroneous. *State v. Edwards*, 384 S.C. 504, 508, 682 S.E.2d 820, 822 (2009). Thus, on review, appellate courts are limited to determining whether the trial court abused its discretion. *Id*. An abuse of discretion occurs when the trial court's decision is unsupported by the evidence or controlled by an error of law. *State v. Black*, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012). An appellate court "does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial court's ruling is supported by any evidence." *Edwards*, 384 S.C. at 508, 682 S.E.2d at 822.

ARGUMENT

I. The merits of Lee's various appellate issues should not be considered or addressed on certiorari because the Court of Appeals did not address them in its opinion, instead holding that the one issue the Court of Appeals did address was dispositive of Lee's remaining issues.

The Court of Appeals *did not* address the merits of any of Lee's many issues in his cross petition because the Court of Appeals found that the one issue it did rule on was dispositive of the issues Lee now raises to this Court. *See Lee*, Op. No. 6151 at *6 n.4. To the extent Lee is attempting to raise merits-based appellate issues that the Court of Appeals did not address, the merits of those issues should not be considered or addressed at this time. Instead, this matter should be remanded to the Court of Appeals in the event—and only in the event—that this Court grants the State's Petition for Writ of Certiorari *and* reverses the Court of Appeals' opinion. Lee's cross petition should be denied.

Generally, this Court does not consider an issue on certiorari unless that issue was first considered and addressed by the Court of Appeals. *See generally Baggott v. S. Music, Inc.*, 330 S.C. 1, 6, 496 S.E.2d 852, 855 (1998) ("[W]e generally do not consider issues which were not addressed by the Court of Appeals . . . ."). Therefore, a remand to the Court of Appeals would typically be the appropriate relief when the Court of Appeals declined to address an appellate issue based on a decision it reached on a different issue in the same case, which this Court subsequently reverses on certiorari. *See State v. Larmand*, 415 S.C. 23, 33, 780 S.E.2d 892, 896 (2015) (remanding a case to the Court of Appeals following this Court's reversal of the Court of Appeals' decision on one issue for the Court of Appeals to address the merits of several other previously unaddressed issues); *S.C. Second Inj. Fund v. Am. Yard Prod.*, 330 S.C. 20, 24, 496 S.E.2d 862, 864 (1998) ("In view of the conclusion of the Court of Appeals, other issues raised by the parties

were not addressed; therefore, this matter is remanded to the Court of Appeals for consideration of those issues.").

Here, the Court of Appeals *did not* address the merits of any of the issues Lee raises to this court in his cross petition. Instead, the Court of Appeals ruled on one of the seven issues Lee raised to that court, and granted him the relief he sought, namely reversing his conviction and sentence with a remand for a new trial. Pursuant to Rule 220(b) of the South Carolina Appellate Court Rules, appellate courts must address in writing "every point distinctly stated in the case *which is necessary to the decision of the appeal* . . . ." (emphasis added). As the Court of Appeals noted in its opinion, its disposition of one of the seven issues Lee raised to that court on appeal resulted in a reversal and remand of the entire case for a new trial. *See Lee*, Op. No. 6151 at *6 n.4. Therefore, as the Court of Appeals' opinion currently stands, the disposition of the remaining six issues—the same issues Appellant now raises in his cross petition—was not necessary for the outcome the Court of Appeals reached, which provides Appellant with the relief he sought. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding that appellate courts need not address all issues when the disposition of one issue is dispositive).

Further, as the Court of Appeals' opinion currently stands, discussion of the remaining issues would constitute an advisory opinion on questions for which no meaningful relief can be granted. South Carolina appellate courts do not issue advisory opinions. *See Dodge v. Dodge*, 332 S.C. 401, 420, 505 S.E.2d 344, __ (Ct. App. 1998) ("State appellate courts will not issue advisory opinions on questions for which no meaningful relief can be granted."); *see also Gainey v. Gainey*, 279 S.C. 68, 69, 301 S.E.2d 763, 764 (1983) (stating appellate courts "will not issue advisory opinions on questions for which no meaningful relief can be granted").

Therefore, because the Court of Appeals did not address the merits of any of the six issues Lee raises to this Court due to the Court of Appeals granting Lee the relief he sought under the one issue the Court of Appeals actually ruled on, it would be premature for this Court to consider or address the merits of these six issues on certiorari. *See Baggott*, 330 S.C. at 6, 496 S.E.2d at 855 (explaining the Supreme Court "generally do[es] not consider issues which were not addressed by the Court of Appeals"). Instead, should this Court grant certiorari based on the State's Petition regarding the one issue the Court of Appeals actually ruled on in this case *and* also reverse the Court of Appeals' opinion, the appropriate relief would then—and only then—be to remand this case to the Court of Appeals for consideration on the merits of the remaining six issues raised to that court. *See Larmand*, 415 S.C. at 33, 780 S.E.2d at 896 ("[B]ecause the court of appeals did not address the remainder of [Larmand]'s arguments on appeal, we remand the matter to the court of appeals for further action not inconsistent with this opinion."). Thus, Lee's cross petition should be denied.

[*conclusion and signature block on following page*]

CONCLUSION

Based on the foregoing, the State requests that this Court deny Respondent-Petitioner's Cross Petition for Writ of Certiorari. Further, for the reasons included in the State's Petition for Writ of Certiorari, the State further requests that this Court grant the State's Petition for Writ of Certiorari, determine that the Court of Appeals erred in holding that the trial court abused its discretion by finding Juror 191 disqualified to serve as the second alternate juror, and remand this case to the Court of Appeals for consideration of the remaining six issues on appeal.

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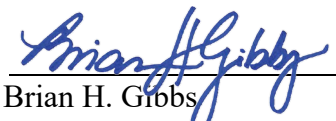
By: 
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