STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LANCASTER COUNTY

Court of General Sessions
Brian M. Gibbons, Circuit Court Judge

Appellate Case No. 2016-001045

THE STATE,

Respondent,

v.

JERMAINE D. GRIER,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

A Lancaster County Grand Jury indicted Appellant for possession of contraband by county or municipal prisoner. (R.137-138.) On May 11–12, 2016, Appellant proceeded to a trial before the Honorable Brian M. Gibbons and a jury. Mark Grier, Esquire, represented Appellant, and Assistant Solicitors Lisa Collins, Cara Walker, and Cassity Brewer represented the State. The jury found Appellant guilty, and Judge Gibbons sentenced him to eight years' imprisonment. (R. 136).

Appellant filed a timely Notice of Appeal and subsequently submitted a Brief in support of his appeal. This Brief of Respondent follows.

STATEMENT OF FACTS

On November 16, 2015, Officer LaQuentin Smith was preparing to transport Appellant, an inmate at the Lancaster County Detention Center (LCDC), to court. (R. 52, line 16–R. 54, line 12). As part of the process, Officer Smith testified the officers ask the inmates to stick their hands through an opening in the door used to deliver food trays, handcuff them, and then ask them to turn around with their backs to the door so the officers can wrap a chain around them and lock it. (R. 54, lines 13–23). He testified that when he and two other officers asked Appellant to open his hands while they were sticking out of the food door, as part of the process to ensure he did not have anything in his hands, Appellant pulled his left hand back into the cell and placed it inside his jumpsuit. (R. 56, lines 13–21). Officer Smith again asked Appellant to place his left hand through and open it; Appellant complied and nothing was in his left hand. (R. 56, lines 21–24). After the officers completed the process of belly chaining Appellant, Officer Smith notified his supervisor, Sergeant Matthew Kennington, that he suspected Appellant may have something in his jumpsuit and should be searched. (R. 57, lines 12–15).

Sergeant Kennington then searched Appellant's jumpsuit and removed a twisted metal piece of a pen that appeared to have been sharpened down to the tip. (R. 57, line 21–R. 58, line 12; R. 76, line 20–R. 77, line 19). He testified that under the LCDC rules and regulations, the object would qualify as contraband, and he opined that it could have been used "both as a weapon or something to get a cuff off." (R. 77, line 23–R. 78, line 6).

Appellant was charged with violating section 24-7-155 of the S.C. Code and proceeded to a jury trial before the Honorable Brian M. Gibbons. Pretrial, defense counsel brought up an issue with the indictment, explaining that the evidence he had received through discovery suggested the metal object found on Appellant appeared to be used as a way to unlock handcuffs;

however, he pointed out the indictment alleged Appellant was in possession of a weapon. (R. 26, lines 1–25). The trial judge agreed the indictment described the metal piece as an illegal weapon. (R. 27, lines 22–24). Defense counsel then pointed out that section 24-3-965 provides that the offense of possession of contraband other than weapons or illegal drugs must be tried exclusively in magistrate's court. (R. 28, lines 16–20). The State noted that section 24-3-965 was not the code section Appellant was charged under; rather, he was charged pursuant to section 24-7-155. (R. 28, line 21–R. 29, line 4). The trial judge characterized Appellant's motion as a motion to quash and denied it. (R. 29, lines 17–20).

The State began its case by calling Captain Larry Deason of the LCDC to testify regarding the procedure it uses to notify inmates of the rules they must abide by while in custody. (R. 40, line 11–R. 41, line 22). He explained that when an inmate arrives at the LCDC, he receives a copy of the rules during the booking process and must sign a form confirming that receipt. (R. 41, line 23–R. 42, line 1). He testified the rules were formulated by him and the facility director (Deborah Horne) based on statutes, Department of Corrections regulations, and experience with officer and inmate safety and security over the years. (R. 42, lines 2–20). The rules are compiled in a handbook that is approximately six to seven pages long and includes a list of what inmates can have in their cells and a section on contraband with a definition. (R. 42, line 21–R. 43, line 4). Specifically, the contraband rule is based on Regulation 33.1 of the S.C. Code of Regulations from the Department of Corrections. (R. 43, lines 9–15). Captain Deason explained in more detail that when an inmate is booked into the facility, someone shows him the rules and regulations he must follow, asks if he has any questions, has him sign on an electronic pad, and gives him a copy of those rules and regulations to take with him to his cell. (R. 44, line 19–R. 47, line 12).

Sergeant Richard Plyler testified he gave Appellant a copy of the rules and regulations, Appellant said he understood it, and he signed for it. (R. 50, lines 15–21). The State then moved Appellant's signature page into evidence over objection. (R. 51, lines 1-10). Officer Smith testified next and on cross-examination, defense counsel asked whether he had described the object as something that it appeared Appellant could have used to unlock his cuffs. (R. 62, lines 17–19). Officer Smith answered that he had explained to Appellant that it was possible the object could have been used to open his cuffs, but he also testified, "Well, it could be used as both, as a weapon or as a key the way it was made." (R. 62, line 17–R. 63, line 2). Sergeant Nicholas Tuley testified that he observed Sergeant Kennington pull the metal object out of Appellant's pocket. (R. 68, line 2–R. 70, line 9).

After the State rested, defense counsel renewed his motion to quash the indictment, claiming "the testimony was that it was possible that it could be used as a weapon but there's no evidence that it was, in fact, used as a weapon or presented as a weapon." He again argued section 24-3-965 should have been considered such that the matter would be brought in magistrate court instead of general sessions. (R. 85, lines 9–24). The trial court again denied his motion to quash. (R. 86, lines 6–13). Appellant next argued for a directed verdict, claiming there was "no evidence that has been presented that there was any display of the contraband list at all." (R. 86, lines 6–23). The State argued the conspicuous display was accomplished by individually handing each inmate a copy of the rules and regulations. (R. 87, lines 1–4). The trial judge found that the presentation of evidence that each inmate is handed a piece of paper with the rules and regulations printed on it is sufficient to get past the directed verdict stage. (R. 87, lines 13–20).

The following morning, defense counsel added to his directed verdict motion by arguing that while he conceded the regulations were made available to his client, the statute uses the word "visible," which he believes takes it beyond "available." (R. 90, line 18–R. 91, line 14). The State countered that it was both displayed and visible by being physically printed and handed to each inmate. (R. 91, lines 16–21). The solicitor noted that in this case visible to visitors was not an issue because the case does not deal with visitors bringing contraband into the detention center. (R. 91, line 21–R. 92, line 1). Further, she opined that the intention of the Legislature was to make sure the inmates are aware of the expectations while there. (R. 92, lines 1–3). The solicitor pointed out that when the statute was amended recently, the Legislature did not change it to state that the rules must be displayed on a wall or door and that because all the statute requires is "displayed conspicuously," she can think of no more conspicuous way to display to the inmates. (R. 92, lines 11–19). The trial judge noted the first part of the statute applied to visitors, which was not the case here, and that the second part dealt with possession of contraband by an inmate—what this case was about. (R. 92, line 20–R. 93, line 8). He agreed with the State that there is no better notice than actually handing the inmate a document defining contraband, and he subsequently denied Appellant's directed verdict motion again. (R. 93, line 23–R. 94, line 15). Defense counsel clarified with the trial judge that he would be allowed to argue this issue to the jury. (R. 94, lines 16–24).

During the charge conference, defense counsel asked the trial judge to charge section 24-3-965 as a lesser included offense. (R. 95, lines 23–25). Specifically, he argued that the jury would be making a factual determination as to whether the metal object found on Appellant was a weapon and, if the jury found it was not, the offense would fall under section 24-3-965. (R. 96, lines 2–19). The State argued first that section 24-3-965 is not a lesser included offense of

section 24-7-155. (R. 96, lines 21–23). The solicitor argued the officers testified the object was a weapon and had a sharp end, but that whether it was a weapon or not, it was covered under Regulation 33-1. (R. 97, lines 3–11). Defense counsel argued that if the jury believed it was a lock pick then it was not a weapon. (R. 98, lines 16–18). The trial judge denied the motion, finding the requested section was not a lesser included offense. (R. 98, lines 19–21). Defense counsel then requested a charge on criminal intent and the State argued that no intent was required by the statute; however, the trial judge, "in an abundance of caution," granted Appellant's request. (R. 99, line 17–R. 100, line 8).

In his closing argument to the jury, defense counsel argued vigorously that even though the rules were made "available" to Appellant, they were not "visible" as required by the statute. (R. 113, lines 4–20). He reminded the jury that the statute "says they must be displayed in a conspicuous place and available and visible." (R. 113, lines 20–22). He reasoned that the statute required "visible" rather than just "available" because illiterate inmates who would not be able to read a copy they have in their cell would have the benefit of discussing the rules with other inmates and it would "bring[] a consciousness of the rules to the inmate that just hand[ing] them a piece of paper and sending them back to their cell does not give to them." (R. 114, lines 4–25).

The trial judge charged the jury on the State's burden of proof, the presumption of innocence, reasonable doubt, the roles of the judge and jury, direct evidence, circumstantial evidence, criminal intent, actual and constructive possession, credibility of witnesses, and the elements of the crime as set forth in section 24-7-155. (R. 118–128). At no time during the jury charges did the trial judge instruct the jury to decide whether the object was a weapon. He merely read the statute, which contained the word "contraband." (R. 125, lines 4–14). Neither

party had any exceptions to the charge as given. (R. 128, lines 10–14). The jury found Appellant guilty, and the trial judge sentenced him to eight years' imprisonment. (R. 129, 136).

ARGUMENT

I.

The trial judge properly denied Appellant's directed verdict motion where, when viewed in a light most favorable to the State, the State presented sufficient evidence from which a reasonable jury could conclude that Regulation 33-1 of the Department of Corrections designating matters considered contraband was displayed in a conspicuous place available and visible to inmates because each inmate is shown a printed copy of the rules, asked if he has any questions, given a copy to take with him to his cell, and asked to sign a form acknowledging understanding and receipt.

Appellant argues the trial judge erred by denying his motion for directed verdict, claiming the statute required the facility to display Regulation 33-1 in a conspicuous place available and visible to visitors and inmates and that the State failed to show this. On the contrary, to the extent conspicuous display of the Regulation was actually an element of the offense, the trial judge properly determined that giving each inmate a copy of the rules and having him sign for it was sufficient to satisfy the intent of the Legislature as set forth in the statute. Thus, the trial judge correctly denied Appellant's directed verdict motion and this Court should affirm.

It is axiomatic that in ruling on a motion for a directed verdict, the trial court is concerned only with the existence of evidence, not its weight. *State v. Weston*, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). When reviewing a denial of a directed verdict, an appellate court views the evidence and all reasonable inferences in the light most favorable to the State. *Id.* "If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, this Court must find the case was properly submitted to the jury." *Id.* at 292–93, 625 S.E.2d at 648. Ultimately, the question is whether, in view of the evidence in the light most favorable to the State, a rational trier of fact could find all the elements beyond a

reasonable doubt. *State v. Robinson*, 310 S.C. 535, 539, 426 S.E.2d 317, 318 (1992) (finding any rational trier of fact could have found all the elements of the crime beyond a reasonable doubt in affirming the denial of a motion for directed verdict and citing *Jackson v. Virginia*, 443 U.S. 307 (1979)). The task of the trial court is to simply determine "whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt." *State v. Bennett*, 415 S.C. 232, 237, 781 S.E.2d 352, 354 (2016). The reviewing court should affirm if in viewing the evidence in the light most favorable to the State, "the evidence could induce a reasonable juror to find [the defendant] guilty." *State v. Pearson*, 415 S.C. 463, 474, 783 S.E.2d 802, 807 (2016).

Initially, the State challenges Appellant's assertion that a "conspicuous display" is a material element of the offense. An indictment is sufficient when it (1) states the offense "with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer and whether he may plead an acquittal or conviction thereon; and **apprises the defendant of the elements of the offense that is intended to be charged**." *State v. Gentry*, 363 S.C. 93, 102–03, 610 S.E.2d 494, 500 (2005) (emphasis added). Here, the indictment provides:

> That [Appellant,] a prisoner of a county or municipal jail, prison, work camp or overnight lockup facility, did in Lancaster County, South Carolina, on or about November 16, 2015, unlawfully possess a quantity of matter declared by the superintendent of the facility to be contraband, to wit: a sharpened metal piece derived from a writing pen, an illegal weapon, in violation of [S.C. Code Ann.] § 24-7-155.

(R. 137–38). The language of the indictment does not include a requirement that the facility display Regulation 33-1 in a conspicuous place available and visible to visitors and inmates. The State submits that because no such requirement was presented in the indictment, it is not an

element of the offense as suggested by Appellant. If Appellant did consider "conspicuous display" an element of the offense, he should have challenged the sufficiency of the indictment on those grounds when he made his pretrial motion to quash rather than solely basing it on section 24-3-965 providing that the offense of possession of contraband other than weapons or illegal drugs must be tried exclusively in magistrate's court. To the extent "conspicuous display" should have been included as an element of the offense, it was not included in the indictment and Appellant waived any challenge to the sufficiency of the indictment by not challenging it on these grounds pretrial. At the directed verdict stage, it is too late for Appellant to argue the failure to prove an alleged element that was not set forth in the indictment. *See Gentry*, 363 S.C. at 102–03, 610 S.E.2d at 500 ("A challenge to the indictment on the ground of insufficiency must be made before the jury is sworn as provided by § 17–19–90.").

Appellant cites *Cole v. Manning*, 240 S.C. 260, 125 S.E.2d 621 (1962), to support his argument that "conspicuous display" is a material element of the offense. However, *Cole* involves a case where a visitor was charged with furnishing a prisoner with contraband. Its applicability to this case is limited to showing that the purpose of the "conspicuous" requirement of the statute is simply notice. In the stipulations listed by the parties in *Cole*, the word "notice" is used three times, making it clear that is the rationale behind the "conspicuous" requirement. It is easy to see why publishing in a conspicuous place would be the best way to give members of the public notice of what is prohibited at a prison, though not necessarily the exclusive way. However, the best way to accomplish that notice to the prisoners themselves is through the procedure in place at the LCDC where each inmate receives a copy. Just because the parties stipulated to the conspicuous display in *Cole* does not mean the notice in Appellant's case had to

be given on a wall. Giving a copy to each inmate was properly found by the trial judge to be sufficient notice to comply with the statute's requirement.

Even if this Court finds "conspicuous display" means only posting the regulations on a wall and that it is indeed an element of the offense, the State submits that such a display would only apply to the first part of the offense, which involves a visitor or outside person furnishing contraband to an inmate, as was the situation in *Cole*. For purposes of the second part of the offense—the only part that is pertinent to this case—the inmate would simply need notice of the rules and regulations. That notice is accomplished by the procedure in place at the LCDC, which is to hand a copy of the rules to each inmate upon booking into the facility and have him sign off that he has received it, as Appellant did here. As the State argued at trial, and the trial judge agreed, there is no better notice for an inmate than receipt of an actual copy of the rules. The State would argue, in fact, that there would be no better way to give notice to all inmates. Inmates are housed in different areas of the facility and it would be impossible to find a place to post a sign that all inmates were sure to see. As we know from the record in this case, Appellant was in a private hall where he even had food delivered to his cell. (R. 54, line 15–R. 55, line 10). It would be absurd to think that posting a sign somewhere in a common area would be a better display of the rules than giving each inmate a copy to keep in his own cell. Finally, to the extent the jury agreed with Appellant and his strong closing argument that "visible" means something more than giving a copy of the rules to each inmate, it was up to the jury as the fact-finder to determine if the statute had been satisfied, and the jury found that it was.

Appellant also seems to argue there is a difference between being provided with a copy of the rules and being provided with a copy of Regulation 33-1. For the first time on appeal, Appellant is arguing he was only provided the rules and regulations for the LCDC, not

Regulation 33-1. This issue was not raised at trial and is therefore not preserved for this Court's review. Not only did defense counsel not argue this particular issue, he waived it by conceding the issue in stating, "[N]ot only do those regulations have to be available, **which I have to concede they were available to my client[;] I did not argue that** . . . ." (R. 90, line 25–R. 91, line 2).[1] At no time did he argue Regulation 33-1 was not part of the rules and regulations that the facility made available to Appellant. Thus, the issue distinguishing between "rules" and Regulation 33-1 is not preserved. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge.").

[1] Defense counsel also stated during his closing argument, "If all the statute intended was that they be available, well, I would have to concede that, you know, these regulations were made available, but that's not what the statute says." (R. 113, lines 17–20).

II.

The trial judge correctly declined to charge the jury with S.C. Code section 24-3-965 as a lesser included offense of the offense charged. Appellant's argument that not charging the offense was an *Apprendi* violation is not preserved, but even if preserved, the trial court's decision not to charge the offense did not violate *Apprendi.*

Appellant argues the trial judge erred in declining his request to instruct the jury on section 24-3-965 as a lesser included offense and not allowing the jury to determine whether the object in question was a weapon, claiming this allowed enhanced sentencing in violation of *Apprendi*.[2] However, the trial court correctly denied Appellant's request to charge the jury with section 24-3-965, properly finding it was not a lesser included offense of section 24-7-155. This Court should affirm its decision.

Appellant first states that the trial judge correctly denied his motion to quash the indictment "finding that the determination of whether the metal pen piece was a weapon was a finding of fact that needed to be made by the jury." (App.Br.8). However, a careful reading of the record shows that after the trial judge stated that whether the metal piece was a weapon was a finding of fact, he then specifically said, "But not even getting to that, if it's contraband it's contraband, so we don't even have to consider when it's not--or whether or not it's a weapon or not [sic]. So on that basis then that [sic] I respectfully deny your motion to quash the indictment." (R. 29, lines 8–19) (emphasis added). As Appellant correctly points out in his brief, the jury was not given the opportunity to determine if the metal pen piece was a weapon as the trial judge did not instruct the jury to do so and did not charge the jury with section 24-3-965 as requested by Appellant. This was the proper decision. The jury acts as the sole fact-finder in any trial, and its jobs here was to determine whether the object was contraband and whether

[2] *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

Appellant was in possession of it. The jury had to base its decision on the evidence presented at trial, and the evidence presented through officer testimony was that the metal object was sharpened to the end, was not something that was allowed to be held by inmates, could have been used to open his handcuffs, and could also have been used as a weapon. The State does not disagree with Appellant that the two statutes effectively created two classes of contraband; however, the State indicted Appellant soley for the class including weapons based on the characteristics of the object found.

Lesser included argument

If there is any evidence in the record from which the jury could infer the accused is guilty of the lesser included offense instead of the crime charged, the trial court must charge the jury on the lesser included offense. *State v. Gilmore*, 396 S.C. 72, 76–77, 719 S.E.2d 688, 690 (Ct. App. 2011). *See Dempsey v. State,* 363 S.C. 365, 371, 610 S.E.2d 812, 815 (2005) ("[A] judge is required to charge a jury on a lesser-included offense 'if there is any evidence from which it could be inferred the lesser, *rather than the greater*, offense was committed.'" (quoting *State v. Gourdine,* 322 S.C. 396, 398, 472 S.E.2d 241, 242 (1996))).

At trial, Appellant argued that section 24-3-965 should have been charged to the jury as a lesser included offense of section 24-7-155. He has now abandoned that argument on appeal by conceding that the former section is NOT a lesser included of the latter. "The judge declined to charge § 24-3-965 . . . . While not a lesser included offense, the trial judge erred in not submitting a special verdict form to the jury to determine if the contraband was a weapon." (App.Br.9). Now on appeal, Appellant argues the trial judge erred in not submitting a special verdict form to the jury to determine "if the contraband was a weapon." However, he did not ask for a special verdict form and, thus, that particular argument is not preserved for appellate

review. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge.").

Even if this Court somehow finds the issue is preserved, there is no evidence to support the notion that the object was not a weapon. Thus, no evidence was provided from which the jury could infer Appellant was only guilty of section 24-3-965 rather than section 24-7-155. Simply because the object could be used as a key or pick to unlock handcuffs only means it is both a tool and a weapon, NOT that it is not a weapon. Similarly, if Appellant had a gun in his possession but evidence was presented that he could have used the butt of the gun to break open his handcuffs or his cell door, it does not render the gun NOT a weapon; it is still a weapon. A sharpened, metal object is a weapon, no matter what it may or may not have been intended to be used for. Therefore, the offense Appellant proposed as a lesser included does not fit the standard from *Gilmore* and *Dempsey* above, and his argument fails on the merits.

Apprendi argument

Appellant also now attempts to raise an *Apprendi* argument on appeal, but it is not preserved for appellate review because it was not raised to the trial court. *See Dunbar*, 356 S.C. at 142, 587 S.E.2d at 693 ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge."). Appellant never mentioned *Apprendi* to the trial judge; therefore, he is precluded from raising it on appeal. However, even if this Court finds it is preserved, it is without merit. The statute in question here is different from the drug statute in *Dervin*[3] and the firearm statute in *Apprendi*. Appellant argues the statutory maximum a judge may impose, based on *Apprendi*, must be based solely on the facts reflected in the jury

[3] *Dervin v. State*, 386 S.C. 164, 687 S.E.2d 712 (2009).

verdict or admitted by the defendant. He claims that here the trial judge improperly sentenced him because he used the statutory range from the statute he was charged with, section 24-7-155, instead of the statute he requested, section 24-3-965. He likens this situation to the one in *Apprendi* and *Dervin*. But a close look at *Dervin* and other cases in South Carolina reveals why this case is different. Dervin was charged with trafficking cocaine between 200 and 400 grams. *Dervin*, 386 S.C. at 166, 687 S.E.2d at 712. At two points during the trial, the judge instructed the jury that Dervin could be convicted of trafficking if she was in possession of ten grams or more of cocaine. *Id.* Our Supreme Court found, based on *Apprendi*, that Dervin could not be exposed to a greater penalty than what was authorized by the jury verdict and, thus, Dervin could only have been sentenced based on possession of between ten and twenty-eight grams. *Dervin*, 386 S.C. at 168–69, 687 S.E.2d at 714. The Court found trial counsel ineffective and remanded for resentencing. *Dervin*, 386 S.C. at 169, 687 S.E.2d at 714.

Similary, in *State v. Simuel*, 357 S.C. 378, 593 S.E.2d 178 (Ct. App. 2004), the indictment under which he was charged provided that the punishment for escape was six months to two years unless the person was captured outside of the state, in which case the sentence increased to between one and three years. Simuel's indictment simply charged that he escaped confinement or custody and did not allege he was captured out of state. Thus, defense counsel argued Simuel's sentence could not be enhanced. The trial judge disagreed and found that enhancement was not an element of the crime and sentenced him to thirty months. The Court of Appeals reversed and remanded the case, finding that the trial court erred in enhancing the penalty when the enhancement element was not charged in the indictment or submitted to the jury, relying on *Apprendi*.

Here, Appellant was charged with being an inmate in possession of contraband, which was an illegal weapon. The testimony presented at trial was that the object was a weapon, regardless of whether it also could have been used as a tool to unlock handcuffs. The description of the object was a metal pen piece that had been sharpened to the end. Not only was the jury not instructed to make a finding as to whether the object was a weapon, it was not necessary for the jury to do so. Therefore, there was no fact used by the court to increase his sentence beyond the statutory maximum that had to be charged and proven to the jury as there was in *Apprendi*, *Dervin*, and *Simuel*. All the jury needed to be instructed on, and ultimately reach a verdict on, was whether Appellant possessed contraband because that contraband was a weapon, regardless of intended use. Once the jury reached its verdict, it was the responsibility of the trial judge to sentence him according to the statute he was charged under. No enhancement occurred. As noted above, all the testimony presented was that the object was a weapon, even if it also could have been used to unlock handcuffs. The only issue was whether Appellant possessed contraband, and the jury found he did.

Apprendi does not stand for the proposition that when two or more statutory provisions may apply, the proper default provision is the one with the lowest penalty; rather, *Apprendi* analyzes the competing provisions based on the number of facts/elements. The *Apprendi* Court cited to *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999), for the proposition that under the Fifth and Sixth Amendments, "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Apprendi*, 530 U.S. at 476. The statutory maximum penalty for the statute under which Appellant was charged was ten years. Because his sentence was not enhanced beyond the statutory maximum sentence with any additional fact, *Apprendi* is not applicable.

Sentencing is a judiciary function tempered by any applicable statutory restrictions. *State v. De La Cruz*, 302 S.C. 13, 393 S.E.2d 184 (1990). No evidence was submitted at trial that the object was not a weapon. Instead, Appellant elicited testimony that the weapon could also be used as a tool. Weapon is a broad term that is defined in the Code as "any . . . type of device, or object which may be used to inflict bodily injury or death." S.C. Code Ann. § 16-23-405(A) (2015). While the officers admitted the object could have been used as both a weapon AND a key to unlock handcuffs, nobody testified it was NOT a weapon. Accordingly, the fact that it was a weapon was undisputed (the jury even had the opportunity to view the sharpened metal pen piece as it was entered into evidence without objection) and Appellant's sentence is within the statutorily prescribed maximum sentence allowable under the statute.

Here, the "fact" that increased the penalty and brought the charge into general sessions court rather than magistrate was alleged in the indictment. If the indictment had only said the object was contraband, not that it was a weapon, and after the guilty verdict the trial court had then enhanced the sentence because it was a weapon, that would be the type of scenario present in *Simuel*. However, that is not the case. Because the indictment included what Appellant mischaracterizes as a sentencing enhancement from the beginning, no *Apprendi* violation occurred, the trial court properly sentenced him within the range of his charged offense, and this Court should affirm.

The bottom line is that the metal object was a weapon, as alleged in the indictment. The fact that the judge mentioned to the attorneys, outside the presence of the jury, that the jury would be making the determination of whether the object was a weapon is of no moment. The jury's role was to decide if the State met the elements of the offense—possession of contraband by an inmate—with the contraband being a weapon. By finding Appellant possessed

contraband, the jury necessarily found it was a weapon. Appellant's conviction should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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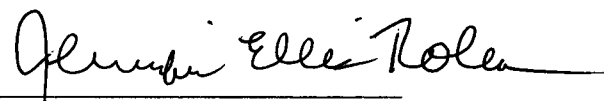
BY: 
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ATTORNEYS FOR RESPONDENT

April 25, 2017

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LANCASTER COUNTY

RECEIVED
APR 25 2017
SC Court of Appeals

Court of General Sessions
Brian M. Gibbons, Circuit Court Judge

Appellate Case No. 2016-001045

THE STATE,

Respondent,

v.

JERMAINE D. GRIER,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies the Final Brief of Respondent complies with Rule 211(b), SCACR.

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April 25, 2017