STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

SHANE ADAM BURDETTE,

APPELLANT

APPELLATE CASE NO. 2015-000513

Appeal from Oconee County

J. Cordell Maddox, Circuit Court Judge

Opinion No. 2017-UP-237

PETITION FOR REHEARING

On June 7, 2017, this Court affirmed Appellant's convictions and sentences in an unpublished opinion. State v. Burdette, 2017-UP-237 (S.C. Ct. App. filed June 7, 2017). This Court heard argument on the issues presented just one month prior to issuance of the opinion. Pursuant to Rule 221(a), SCACR, Appellant respectfully requests this Court rehear the matter due to the significant points overlooked and misapprehended by this Court, explained in greater detail below, in rendering its decision.

Introduction

Appellant raised five issues on appeal. The first and second issues concerned the admissibility of statements made to law enforcement during custodial interrogation. The third issue

involved the trial judge's failure to qualify a witness as an expert. The fourth issue related to an erroneous jury instruction. The fifth concerned a sentencing error arising from a mistake of law. In rendering its opinion, this Court combined Appellant's first and second issues into one and affirmed. This Court found no error concerning the failure to qualify the witness as an expert. Although this Court held the jury instruction was erroneous, this Court determined the error was harmless. Finally, this Court held the sentencing error was not preserved for review.

Appellant requests rehearing on all issues, except the matter concerning the expert witness. Additionally, Appellant maintains the distinction between the first and second issues in light of the differing legal principles and standards involved. Appellant accepts this Court's determination that the jury instruction was erroneous, but Appellant requests rehearing as to the harmless error analysis. Finally, Appellant requests application of an exception to the error preservation rules in order to address the merits of his sentencing error.

Inadmissibility of statements – totality of the circumstances

On appeal, Appellant challenged the trial judge's ruling permitting the state to introduce multiple statements he made while in custodial interrogation. Specifically, Appellant argued the statements were inadmissible based on the totality of the circumstances, including (1) the first officer, who advised him of his rights, informing Appellant the rights did *not* mean anything, (2) Appellant's intoxication, (3) the length of the interrogation, and (4) the officers' failure to honor his request for counsel. This Court erroneously affirmed the trial judge's ruling by parsing the circumstances in order to consider them individually instead of in totality. Additionally, this Court erred by concluding the subsequent reading of Miranda warnings cured the taint of the initial officer's statement that the rights did not mean anything. Appellant respectfully requests rehearing regarding these matters.

In Jackson v. Denno, 378 U.S. 368, 376 (1964), the United States Supreme Court held that "a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession." To introduce a statement produced during custodial interrogation, the prosecution must prove by a preponderance of the evidence that the statement was made freely and voluntarily, and taken in compliance with Miranda v. Arizona, 384 U.S. 426 (1966). State v. Goodwin, 384 S.C. 588, 601, 683 S.E.2d 500, 507 (Ct. App. 2009); State v. Miller, 375 S.C. 370, 378, 652 S.E.2d 444, 448 (Ct. App. 2007).

In South Carolina, a court must examine the totality of the circumstances surrounding the custodial statement. The examining court must answer the question: did totality of the circumstances surrounding the custodial statement defeat the defendant's will? State v. Moses, 390 S.C. 502, 513, 702 S.E.2d 395, 401 (Ct. App. 2010).

> Courts have recognized appropriate factors that may be considered in a totality of the circumstances analysis: background; experience; conduct of the accused; age; maturity; physical condition and mental health; length of custody or detention; police misrepresentations; isolation of a minor from his or her parent; the lack of any advice to the accused of his constitutional rights; threats of violence; direct or indirect promises, however slight; lack of education or low intelligence; repeated and prolonged nature of the questioning; exertion of improper influence; and the use of physical punishment, such as the deprivation of food or sleep.

Id. at 513-514, 702 S.E.2d at 401 (internal citations omitted).

This Court's determination that "the subsequent readings of the Miranda warnings and [Appellant]'s waivers cured any taint" runs afoul of decisions from the United States Supreme Court and the South Carolina Supreme Court.

In 1966, the United State Supreme Court issued its landmark decision Miranda v. Arizona, 384 U.S. 436 (1966). As explained by the Court in Duckworth v. Eagan, 492 U.S. 195, 201 (1989), Miranda established "certain procedural safeguards that require police to advise criminal suspects of

their rights under the Fifth and Fourteenth Amendments before commencing custodial interrogation." In Miranda, the Court delineated four specific warnings: "(1) the right to remain silent; (2) that anything he says can be used against him in a court of law; (3) that he has the right to the presence of an attorney, and (4) that if he cannot afford an attorney one will be appointed for him prior to any questioning if he wants." Miranda, 384 U.S. at 479. Concerned that the circumstances surrounding a custodial interrogation can quickly overbear one's will, the Court held advising an individual of his right to consult with a lawyer and to have the lawyer present during interrogation was "an absolute prerequisite to interrogation." Id. at 471.

It was undisputed that the first officer on the scene, John Towery, advised Appellant of his rights, but also said, "This does not mean anything, it's just somethin' the law [says] we gotta do." R. 9, ll. 8-11. When asked if he "took away all the meaning of the rights advisements" by saying "it doesn't mean anything," Towery responded, "It coulda been." R. 9, ll. 12-15. The officers' provisions of Miranda warnings *subsequent* to Towery's cavalier admonition that the warnings did "not mean anything" were tainted by Towery's improper and coercive conduct, and that taint was not removed by the subsequent provision of warnings. Two cases illustrate this point – Seibert and Navy.

In Missouri v. Seibert, 542 U.S. 600 (2004), the United States Supreme Court confronted a case very similar to the one presented in the instant matter. An officer questioned Seibert without giving her Miranda warnings. After obtaining some information from Seibert, the officer took a short break. Id. at 604-605. The officer then turned on a tape recorder and gave Seibert the Miranda warnings. He also obtained a written waiver of those rights from her. The officer resumed questioning of Seibert, ultimately obtaining a confession. Id. at 605. The Court explained "[t]he object of question-first is to render Miranda warnings ineffective by waiting for a particularly

opportune time to give them, after the suspect has already confessed." Id. at 611. The "threshold issue when interrogators question first and warn later is thus whether it would be reasonable to find that in these circumstances the warnings could function 'effectively' as Miranda requires." Id. at 611-612. The Court held "when Miranda warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and deprive a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them." Id. at 613-614 (internal quotation omitted). Thus, "these circumstances must be seen as challenging the comprehensibility and efficacy of the Miranda warnings to the point that a reasonable person in the suspect's shoes would not have understood them to convey a message that she retained a choice about continuing to talk." Id. at 617.

Our Supreme Court confronted this issue in State v. Navy, 386 S.C. 294, 688 S.E.2d 838 (2010). After the death of Navy's son, officers interrogated him regarding the child's death. Thereafter, Navy gave a statement in which he described noticing the child having breathing problems and his ensuing panic. Id. at 297-298, 688 S.E.2d at 839. Afterwards, officers informed Navy that the child had suffocated and that there was evidence of broken ribs. Navy inquired if he was under arrest and was told he was not. The officers then engaged in follow-up questioning. "At this juncture, the nature of the interrogation and [Navy]'s status changed, and what had begun as a voluntary question and answer session matured into custodial interrogation." In this first statement, Navy admitted to popping the child on the back and possibly patting the child on the mouth. Id. at 298-299, 688 S.E.2d at 840.

Officers then advised Navy of his Miranda warnings. Thereafter, Navy gave his second statement, this time in writing. The statement mirrored the first except Navy admitted to placing his hand over the child's mouth to stop the crying multiple times, including possibly covering the nose

area as well, popping the child on the back causing the child to cry out real loud, and feeling frustrated because the child was crying. Id. at 299-300, 688 S.E.2d at 840.

Officers contacted the pathologist who stated the description provided by Navy in his second statement could not have caused the child's death. In response to this information, Officers obtained a third written statement from Navy. Navy then admitted that he could have held his hand over the child's nose and mouth for longer than he first said, perhaps a minute or two. Id. at 300, 688 S.E.2d at 840-841.

The Court held the first statement was admissible because the record contained evidence to support the trial judge's finding that Navy was not in custody. According to the Court, it was "debatable whether a reasonable person would have believed himself to be in custody at the time the first statement was given." Id. at 301, 688 S.E.2d 841.

However, the second and third statements were inadmissible as they were obtained in violation of the rule announced in Seibert. Courts examine four factors to determine whether a constitutional violation occurred in this setting, including (1) the completeness and detail of the questions and answers in the first interrogation; (2) the timing and setting of the first and second interrogations; (3) the continuity of police personnel; and (4) the degree to which the interrogator's questions treated the second round as continuous with the first. Navy, 386 S.C. at 302, 688 S.E.2d at 841-842.

The Court found the officers initiated the questioning with the knowledge of the cause of death and with the intention of eliciting a confession. After obtaining Navy's first statement, officers introduced the suffocation and healing rib information to Navy. Then, officers "began an unwarned custodial interrogation designed to elicit incriminating information." After receiving those incriminating statements, officers permitted Navy a break, and then gave him his Miranda

warnings. The interrogation resumed with the same officers immediately. The officers made no attempt to cure by warning Navy that his statement made prior to the administration of the warnings may not be admissible or by providing a substantial break in time or change in circumstances. The Court found all four Seibert factors met. Navy, 386 S.C. at 303, 688 S.E.2d at 842.

As explained by the United States Supreme Court and the South Carolina Supreme Court, provision of complete and accurate Miranda warnings *cannot remove the taint from the prior improper police conduct.* Although Towery read Appellant his rights, he did so while telling Appellant the rights were *meaningless*. This statement went beyond what happened in Navy and Seibert where there was no advisement of rights at all. Rather, Towery's statement affirmatively and authoritatively removed any power from the rights. Towery was quite prophetic in his statement that the advisement of rights did not mean anything – the officers' subsequent conduct bore this out. Contrary to this Court's holding, the taint could not be removed by subsequent advisement of rights to Appellant over the course of a twelve-hour marathon interrogation that ceased only when Appellant requested rest.

Although this Court agreed that the length of interrogation[1] and Appellant's intoxication[2] were factors to consider in determining if the statements were voluntarily made, this Court did "not

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[1] Appellant was interrogated for well over twelve hours. He first encountered Towery around 7 a.m. He was in police custody continuously from that point forward. He was finally placed into the detention after he told the officers he was tired, which occurred sometime after the conclusion of his final written statement of that day – 7:54 p.m. R. 484. While it is true the interrogation was not continuous, his detention certainly was. The interrogation continued the following day when law enforcement removed Appellant from the jail and re-initiated contact.

[2] A defendant's level of intoxication is a factor to consider when determining whether a defendant waived his rights in a knowing and voluntary manner. See State v. Young, 875 P.2d 1119, 1122 (N.M. Ct. App. 1994). However, in some cases, intoxication *alone* may result in an involuntary and unknowing waiver. See e.g., State v. Saxon, 261 S.C. 523, 529, 201 S.E.2d 114, 117 (1973)(holding when the level intoxication was "such that [the accussed] did not realize what he was saying," then the statement is not voluntary); Gladden v. Unsworth, 396 F.2d 373, 380-381

find either rendered the statements involuntary." Based on this wording, it appears this Court considered those factors independently. Further, it appears this Court considered those factors independent of the taint of Towery's statement that the Miranda warnings did not mean anything. Finally, this Court "further" found the request for Appellant to sign his statement after he invoked his right to counsel did not render his statement involuntary. Again, it appears this factor was considered independently. Appellant respectfully requests this Court rehear the matter to consider how the totality of the circumstances impacted the voluntariness of the waiver.

The totality of the circumstances surrounding the custodial interrogations in the present case requires exclusion of his statements to law enforcement. Towery's statement that the rights did not mean anything completely nullified his advisement of rights. Towery's statement runs counter to the very purpose of providing the rights and the Constitutional requirement that individuals be advised of their rights. Appellant was interrogated for over twelve hours, allowed rest, and the interrogation continued the following day. Further, at least two of Appellant's interrogators admitted he appeared to be under the influence. Finally, the officers failed to honor Appellant's request for counsel near the end of the first interrogation.[3] This was a clear indication to Appellant that Towery was absolutely correct and the advisement of rights really did "not mean anything." The totality of these circumstances requires exclusion of Appellant's statements to law enforcement.

(9th Cir. 1968)(explaining that "[i]f by reason of ... use of drugs or extreme intoxication, the confession could not be said to be the product of a rational intellect and a free will, ..., it is not admissible"); Logner v. State, 260 F.Supp. 970, 975-976 (M.D.N.C. 1966)(holding a confession inadmissible where the defendant "was under the influence of alcohol and drugs to such an extent as to affect his judgment" because "[a] person who has lost control of his mental faculties is incapable of making an admissible confession").

[3] This fact is raised as a separate issue, where it is discussed in greater detail. Nevertheless, the officers' failure to honor Appellant's request for counsel is a factor to consider in determining whether his statements to police were voluntary.

Inadmissibility of statements – invocation of right to counsel

On appeal, Appellant challenged the trial judge's decision permitting the introduction of a statement given by Appellant during custodial interrogation where the police requested Appellant sign his statement *after* he requested counsel because the officers' conduct violated Appellant's rights pursuant to the Fifth and Fourteenth Amendments to the Constitution. Concerning this issue, this Court found "the request for [Appellant] to sign his statement after he invoked his right to counsel did not render that statement or subsequent statements involuntary." Appellant respectfully requests rehearing on this matter. Specifically, Appellant requests the officers' failure to honor his request for counsel be considered among the totality of the circumstances factors for determining voluntariness of waivers, as discussed supra. Additionally, Appellant requests this Court consider this matter as a free-standing issue in light of the different body of law implicated by the improper conduct.

Near the end of the interrogation culminating in Appellant's first written statement, the police asked Appellant to take a polygraph. R. 49, l. 24 – R. 50, l. 1; R. 482-483. Appellant responded that he wanted a lawyer. R. 24, ll. 8-15. Despite one officer's claim that the police stopped talking to Appellant "[a]t that point in time," a second officer was clear that *after* Appellant requested an attorney, the second officer asked him to sign the statement he had prepared and swear to it. R. 24, ll. 16-18; R. 50, ll. 2-7. Only when the police had the signed statement did the interrogation cease per Appellant's request for the presence of counsel. R. 50, ll. 8-10.

"[T]he right to have counsel present at [an] interrogation is indispensable to the protection of the Fifth Amendment privilege." Miranda, 384 U.S. at 469. This right to counsel includes "not merely a right to consult with counsel prior to questioning, but to have counsel present during any

questioning." Id. at 470. According to the Supreme Court, a defendant may waive his rights. Id. at 444.

> If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.

Id. at 444-445. The Fifth Amendment guarantees the right to speak with counsel upon request in a custodial setting. U.S. Const. Amend. V; Edwards v. Arizona, 451 U.S. 477 (1981). If a suspect invokes his right to counsel, police interrogation ***must*** cease unless the suspect himself initiates further communication with police. Id.; see also Davis v. United States, 512 U.S. 452, 458 (1994).

The Supreme Court "set forth a 'bright-line rule' that *all* questioning must cease after an accused requests counsel." Smith v. Illinois, 469 U.S. 91, 98 (1984)(citing Solem v. Stumes, 465 U.S. 638, 646 (1984))(emphasis in original). This purpose of the prohibition is to eliminate "explicit or subtle, deliberate or unintentional" conduct by police that "might otherwise wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance." Id. (citing Oregon v. Bradshaw, 462 U.S. 1039, 1044 (1983); Fare v. Michael C. 442 U.S. 707, 719(1979)).

It simply cannot be denied in this case that Appellant invoked his right to counsel and the police failed to cease all interrogation by asking Appellant to sign the written statement. Appellant was entitled to consult with counsel at any time during the interrogation, including what the police perceived to be nearing the end – the signing of the statement. In fact, a suspect signing a written statement may be the most important part of an interrogation from a police perspective due to the

talismanic significance of a signature. There was no suggestion, or even argument, that Appellant's request for counsel was anything but clear and unambiguous. The police knew Appellant sought legal advice, but instead of honoring that request, as the officers knew they were required to do pursuant to the United States Constitution, the officers continued the interrogation by asking Appellant to sign the statement. As a result, Appellant's statements to police should have been excluded from consideration by the jury.

"Where nothing about the request for counsel or the circumstances leading up to the request would render it ambiguous, all questioning must cease." Smith, 469 U.S. at 98. "[A]n accused's subsequent statements are relevant only to the question whether the accused waived the right he had invoked." Id. The fact that Appellant signed the statement cannot be used to determine that he waived his earlier unambiguous invocation. See Edwards, 451 U.S. at 484 (holding a valid waiver "cannot be established by showing only that [the accused] responded to further police-initiated custodial interrogation").

Inferred malice from the use of a deadly weapon – not harmless

Although this Court held the trial judge erred by instructing the jury that malice may be inferred from the use of a deadly weapon because evidence was presented tending to reduce, mitigate, excuse, or justify the homicide, this Court held Appellant "suffered no prejudice" from the erroneous charge. According to this Court, "the erroneous charge could not have contributed to the jury's verdict of the lesser-included offense, voluntary manslaughter." This ruling was based solely upon the fact that malice is not an element of voluntary manslaughter. Appellant respectfully requests rehearing on whether the erroneous jury instruction was harmless in light of the overall instructions given and Appellant's assertion of the defense of accident.

When instructing the jury regarding murder, the judge explained the state must prove malice. The judge defined malice as "hatred, ill will, or hostility towards another person. It is the intentional doing of a wrongful act without just cause or excuse and with an intent to inflict an injury or under circumstances that the law will ... infer an evil threat or intent." R. 453, ll. 8-13. Further, he instructed the jury that "[m]alice aforethought may be expressed or inferred." R. 453, l. 20. After explaining "[e]xpress malice," the judge told the jury that "[m]alice may be inferred from conduct showing a total disregard for human life. Inferred malice may also arise when the deed is done with a deadly weapon." R. 453, ll. 8-10. He also defined a deadly weapon for the jury. R. 454, ll. 11-21.

The judge then told the jury: "You are going to have to choose between murder and voluntary manslaughter and involuntary manslaughter." R. 454, ll. 22-24. He failed to mention the fourth choice – not guilty. He reiterated this limited number of choices: "So there are going to be *three* choices that you have to make a determination." R. 454, ll. 24-25 (emphasis added).

Next, the judge instructed the jury that if the jury determined the state failed to prove Appellant committed murder, then the next step would be consideration of voluntary manslaughter. R. 455, ll. 1-7. The judge explained that voluntary manslaughter was "included within the offense of murder as a lesser charge." R. 455, ll. 6-7. The trial judge told the jurors that "[t]o prove voluntary manslaughter, the state must prove beyond a reasonable doubt that the defendant took the life of another in the sudden heat of passion based on sufficient legal provocation." R. 455, ll. 8-11. He defined these terms, but he never told the jury that malice was not an element of voluntary manslaughter. Instead, his instruction specifically omitted this fact.

Finally, the judge told the jurors they had "the option of dealing with involuntary manslaughter," which the judge stated "again" was "a lesser included offense." R. 456, ll. 22-24.

He told the jurors that involuntary manslaughter was "a lesser included charge of voluntary." R. 457, ll. 4-5. Immediately thereafter, he defined involuntary voluntary, explaining that it was a killing "without malice." R. 457, ll. 6-13. The phrase "without malice" appeared twice in his instruction on involuntary manslaughter. R. 457, ll. 6-13.

Additionally, Appellant's defense to the murder charge was accident. Recognizing the evidence presented supported the instruction, the judge informed the jury that Appellant had "raised the defense of accident." R. 459, ll. 18-19. The judge instructed the jury that "[a]n act may be excused on the ground of accident if it is shown that the act was unintentional, that the defendant was acting lawfully and that reasonable care was used by the defendant in the handling of the weapon." R. 459, ll. 19-23.

After deliberating for about one hour, the jury requested "a better understanding between voluntary and involuntary." R. 466, ll. 21-24. The jury also requested additional instruction on murder. R. 467, l. 3. Thereafter, the judge instructed the jury on the three offenses using most of the same language of his earlier charge. R. 468, l. 1 – R. 472, l. 7. Included within the re-instruction was the language that permitted the jury to infer malice from the use of a deadly weapon. R. 469, ll. 5-6. The re-instruction also included the language that voluntary manslaughter was "included" within murder as a "lesser offense." R. 469, ll. 13-15. Although defining voluntary manslaughter to include the sudden heat of passion and sufficient legal provocation, the judge did not inform the jury that voluntary manslaughter was the killing of another without malice. R. 469, ll. 16-22. Just as the judge did previously, he instructed the jurors that involuntary manslaughter was the killing of another without malice. R. 471, ll. 3-11.

In State v. Belcher, 385 S.C. 597, 600, 685 S.E.2d 802, 803-804 (2009), the South Carolina Supreme Court overruled prior law and held "that a jury charge instructing that malice

may be inferred from the use of a deadly weapon is no longer good law in South Carolina where evidence is presented that would reduce, mitigate, excuse or justify the homicide."

Belcher was convicted of murder and possession of a firearm during the commission of a violent crime following the shooting of his cousin. Belcher, 385 S.C. at 600, 685 S.E.2d at 803. The jury was charged with the offenses of murder and voluntary manslaughter, as well as self-defense. Id. The Court noted that of special importance was the jury instruction that permits an inference of malice from the use of a deadly weapon. Id. Belcher argued on direct appeal that because the evidence presented a jury question on self-defense, the trial judge committed error by charging the jury that it may infer malice from the use of a deadly weapon. Belcher, 385 S.C. at 601, 685 S.E.2d at 804. Belcher asserted that the permissive inference charge violated South Carolina common law and the state's constitutional prohibition against charging juries on the facts. Belcher, 385 S.C. at 602, 685 S.E.2d at 804.

After an extensive review of the South Carolina's jurisprudence in this area, the Court discovered that when the permissive inference charge first developed in the late nineteenth century it was subject to "some qualification," specifically "the recognition that some facts will not permit the inference of malice from the use of a deadly weapon." Belcher, 385 S.C. at 604, 685 S.E.2d at 806. The Court stated, "We are persuaded . . . that this qualification relates to homicide prosecutions where the evidence shows the death may have been something less than murder—that is, mitigated, excused or justified." Belcher, 385 S.C. at 605, 685 S.E.2d at 806. The Court recognized that it later "began a slow, and at first almost imperceptible, retreat" from established law and that "by the 1970s, juries were routinely charged in any murder prosecution involving a deadly weapon that 'malice is presumed from the use of a deadly weapon.'" Belcher, 385 S.C. at 605-608, 685 S.E.2d at 806-807.

Believing that the earlier cases more closely reflected the "proper application of the charge," the Court concluded "that instructing a jury that 'malice may be inferred by the use of a deadly weapon' [was] confusing and prejudicial where evidence [was] presented that would reduce, mitigate, excuse or justify the homicide. A jury charge [was] no place for purposeful ambiguity." Belcher, 385 S.C. at 611, 685 S.E.2d at 809.

In light of the evidence of self-defense presented at Belcher's trial and it was "conceivable that the only evidence of malice was Belcher's use of a handgun," the Court held the permissive inference charge was not harmless error and Belcher was entitled to a new trial. Belcher, 385 S.C. at 612, 685 S.E.2d at 810. Specifically, the Court stated the prejudice resulting from the charge was "highlight[ed]" because evidence of self-defense was presented. Id.

In ruling that the trial judge's erroneous jury instruction permitting malice to be inferred from the use of a deadly weapon was harmless beyond a reasonable doubt solely because Appellant was convicted of voluntary manslaughter, this Court failed to consider the actual language charged to the jury, the erroneous language being charged twice, the evidence supporting the defense of accident, and the heightened risk of a compromise verdict based upon the erroneous charge. The jury instruction regarding voluntary manslaughter informed the jurors that voluntary manslaughter was a "lesser-included" offense of murder, but did not inform the jurors that it was a killing without malice. Juxtaposing the judge's instruction on voluntary manslaughter with the instruction on involuntary manslaughter – a "lesser-included" offense involving a killing without malice – evidences just how harmful the instruction was. At a minimum, the state has not proven beyond a reasonable doubt that the erroneous jury charge did not contribute to the verdict.

Sentencing errors & preservation

This Court refused to grant Appellant relief from his consecutive five-year sentence, which was the undisputed product of the trial judge's mistake of law, based upon trial counsel's failure to object. According to this Court, the issue "was not preserved for appellate review." Appellant respectfully requests this Court rehear this matter in light of appellate precedent permitting appellate review of sentencing errors.

The trial judge explained that he was sentencing Appellant to a term of five years' imprisonment to be served consecutively to the other sentence based upon the trial judge's understanding that the sentence must be served consecutively. R. 475, ll. 8-9; R. 476, ll. 13-15. After hearing aggravating and mitigating factors, the judge again expressed his understanding of the law that he was required to sentence Appellant to a consecutive term of five years' imprisonment concerning the weapons charge: "The way the law is set up is, obviously, I don't have any real leeway. The possession of a weapon charge is consecutive." R. 477, ll. 5-7. Thus, the trial judge sentenced Appellant to a consecutive term of years based upon a mistake of law. Appellant is entitled to vacation of his sentence and a remand for resentencing in light of the judge's mistake of law.

In concluding this issue was not preserved for review, this Court cited State v. Johnston, 333 S.C. 459, 462, 510 S.E.2d 423, 425 (1999), for the proposition that a challenge to sentencing must be raised at trial in order to be preserved for appellate review. While Johnston certainly stated that a sentencing error must be raised at trial in order to be preserved for review on appeal, the Johnston Court *also* provided for exceptions to the preservation requirement. This Court overlooked the exceptions in Johnston, its progeny, and other cases permitting exceptions to the strict rules of error

preservation. Appellant respectfully requests rehearing for consideration and application of the exceptions to error preservation rules to his case.

It is undisputed that pursuant to statute, a person who was in possession of a firearm during the commission of a violent crime and is convicted of a violent crime "must be imprisoned five years, in addition to the punishment for the principal crime." S.C. Code Ann. § 16-23-490(A). Further, the statute provides that "[t]he court may impose this mandatory five-year sentence to run consecutively or concurrently." S.C. Code Ann. § 16-23-490(B). It is also undisputed the trial judge erred in determining that he was required to sentence Appellant to a term of years to be served *consecutively* to the sentence for the principal crime. See Major v. South Carolina Dept. of Probation, Parole, and Pardon Services, 384 S.C. 457, 466, 682 S.E.2d 795, 799 (2009)(stating a sentencing court has the ability to order whether a sentence is consecutive or concurrent and citing section 16-23-490(B)).

In his brief, Appellant acknowledged there was no objection to the sentence at the time of imposition, but requested this Court comply with appellate precedent permitting review of unobjected-to sentencing errors in the interest of judicial economy or where an exceptional circumstance exists.[4] In Johnston, 333 S.C. at 462, 510 S.E.2d at 425, the South Carolina Supreme Court held "a challenge to sentencing must be raised at trial, or the issue will not be preserved for appellate review." However, the Court held the case presented an "exceptional circumstance," which permitted the Court to review the sentence imposed, find error, and remand for resentencing. Id. at 463-464, 510 S.E.2d at 425. In that case, the Court explained the state conceded the trial court committed error by imposing an excessive sentence. Id. at 463, 510 S.E.2d at 425. Despite

[4] If the case were affirmed on procedural basis, defense counsel could not articulate any strategic reason for failing to object at a post-conviction relief proceeding, State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991), and the prejudice is manifest.

the state's argument that Johnston could pursue a remedy for the error through post-conviction relief, the Court held that if it were to "unyieldingly enforce[] PCR as the only avenue of relief in th[e] case, there is a real threat that [Johnston would] remain incarcerated beyond the legal sentence due to the additional time it [would] take to pursue such a remedy." Id. at 464, 510 S.E.2d at 425. In a footnote, the Court explained that its holding was "not intended to disrupt ... settled rules on issue preservation and PCR applications." Id. at 464 n.3, 510 S.E.2d at 425 n.3. According to the Court, the facts of Johnston were "unique" and "demand[ed] an expedited result." Id. A review of the facts in Johnston reveal striking similarities to the case at hand.

Johnston was convicted of conspiracy to possess marijuana with the intent to distribute, and the state provided the maximum sentence for the conspiracy conviction was one-half the penalty for the substantive offense. Id. at 461, 510 S.E.2d at 424. The substantive offense carried a maximum penalty of ten years; therefore, the maximum sentence the trial court could have imposed upon Johnston was five years. Id. at 462, 510 S.E.2d at 424. However, the judge sentenced Johnston to ten years in prison – double the maximum permitted by law. Id. Despite the obvious error, trial counsel did not object to the sentence. Id.

Appellant's sentence of a consecutive term of five years' imprisonment is based on an error of law, just like the sentence imposed upon Johnston. In its brief, the state conceded the judge was incorrect in his belief that the statute *required* imposition of consecutive sentencing, just as the state conceded the judge committed a legal error in fashioning a sentence in Johnston. However, the state argued that Appellant's sentence of fifteen years' imprisonment for manslaughter would permit him an opportunity to seek relief through PCR. Contrary to the state's assertion, there exists a real danger that Appellant will be required to serve a longer sentence than intended due to the judge's mistake of law. Appellant's fifteen-year sentence requires service of eighty-five percent, or

12.75 years, prior to release. Thereafter, Appellant's five-year sentence will begin, which must be served "day-for-day" pursuant to the statute. Appellant began serving his sentence in 2013, and has served approximately one-third of his sentence for voluntary manslaughter already. In light of the length of time required to pursue and exhaust direct appeal remedies and the length of time required to pursue and exhaust post-conviction relief remedies, there is a serious risk that Appellant will have served the full 12.75 years required for his voluntary manslaughter conviction prior to receiving the sentencing relief to which he is entitled. In light of these "unique facts," this Court should apply the "exceptional circumstances" exception of Johnston and review Appellant's sentencing issue.

In addition to the "exceptional circumstances" exception to the error preservation rules for sentencing mistakes as expressed in Johnston, this Court recognized that South Carolina appellate courts have summarily vacated sentences for kidnapping where the sentences were precluded by statute. State v. Vick, 384 S.C. 189, 202, 682 S.E.2d 275, 282 (Ct. App. 2009). As noted by this Court, "[a]dditionally," the appellate courts "have at times considered an issue in the interest of judicial economy." Id. In reaching the unpreserved issue in Vick and vacating the kidnapping sentence, this Court explained its decision was due to multiple factors, including the state conceding the sentence was erroneously imposed, that the appellate courts previously recognizing "there may be exceptional circumstances allowing" appellate review to consider an improper sentence even when no challenge was made at trial, appellate courts previously summarily vacating improper sentences, and "in the interest of judicial economy." Id. at 203, 682 S.E.2d at 282.

In State v. Bonner, 400 S.C. 561, 565-567, 735 S.E.2d 525, 527-528 (Ct. App. 2012), this Court explained in great detail some of the error preservation exceptions applicable to sentencing errors. According to this Court, Johnston "identified two exceptional circumstances warranting consideration of an appellant's improper sentence for the first time on appeal." Id. at 566, 735

S.E.2d at 527 (internal citation omitted). First, an exceptional circumstance exists when the state concedes the trial court committed a sentencing error. Id. Second, an exceptional circumstance exists when there is a real threat a defendant will remain incarcerated beyond the legal sentence due to the additional time it will take to pursue PCR. Id. Thereafter, this Court held review of Bonner's sentence was "appropriate" because both parties had fully briefed the issue and acknowledged that Bonner could raise the sentencing issue to the court at some future time by filing an application for PCR. Id. at 567, 735 S.E.2d at 528. Additionally, this Court noted Bonner's case presented "an exceptional circumstance" because the state conceded the trial court committed an error by imposing an improper sentence. Id.

Based upon the clear statutory language and the abundance of case law on the matter presented, the judge based his sentencing structure on a mistake of law. Appellant respectfully requests this Court rehear this matter, consider the exceptions to the error preservation rules, and address the merits of the issue, which would require vacating his sentence for possession of a weapon during the commission of a violent crime.

Conclusion

Appellant respectfully requests this Court rehear his case based on the significant points overlooked and misapprehended by this Court in rendering its opinion.

Respectfully Submitted,

Susan B. Hackett

SUSAN B. HACKETT
Appellate Defender

This 22nd day of June, 2017.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Oconee County

J. Cordell Maddox, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

SHANE ADAM BURDETTE,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon Susannah R. Cole, Esquire, at the Rembert C. Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Shane Adam Burdette, #356957, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 22nd day of June, 2017.

Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE ME this 22nd day of June, 2017.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.