THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of General Sessions

Clifton Newman, Circuit Court Judge

Appellate Case No. 2018-001852

Case No. 2017-GS-40-5220; 5223; 5224; 5226-5227; 5229-5232

The State of South Carolina,

Respondent,

v.

James Kester,

Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On September 13, 2017, the Richland County Grand Jury indicted Appellant James Kester for twelve counts of Attempted Murder. R. 451 – 468.

On October 4, 2018, Appellant appeared before the Honorable Clifton Newman for a pre-trial hearing based on his request to represent himself and to relieve his retained counsel, John Delgado and Bill Nettles; who were also present at the hearing. Assistant Solicitor Vance Eaton appeared on behalf of the State. The Court granted Appellant's motions to relieve counsel and to represent himself. R. 29, ll. 4-6.

On October 8, 2018, Appellant proceeded to trial *pro se* with standby counsel, John Delgado and Bill Nettles, before the Honorable Clifton Newman and a jury. R. 31. Assistant Solicitors Vance Eaton and Samuel McGlothin prosecuted the case on behalf of the State.

On October 10, 2018, the jury found Appellant guilty on eight counts of Assault and Battery, First Degree, and one count of Assault and Battery, Third Degree. R. 386, l. 13 – 389, l. 10. The jury also found Appellant not guilty on three counts of Attempted Murder. R. 386, ll. 20-24; R. 388, ll. 17-21; R. 389, ll. 3-7.

On October 12, 2018, the Trial Court sentenced Appellant to ten years imprisonment for each conviction of Assault and Battery, First Degree, and thirty days imprisonment on the conviction for Assault and Battery, Third Degree. R. 439, ll. 2-23. The Trial Court further ordered Appellant to serve the sentences consecutively. R. 439, ll. 24-25.

RELEVANT FACTS

Background

The State's theory of the case: Appellant intentionally struck twelve people with his car at a cemetery. Specifically, the State sought to prove that Appellant went to the funeral because of his deceased daughter's prior involvement with the South Carolina Department of Mental Health, and the funeral's connection to a woman who worked at the S.C. Department of Mental Health. Appellant consistently maintained that he "blacked out" and did not intend to hurt anyone.

Pre-Trial Hearing

On October 4, 2018, Appellant appeared before the Honorable Clifton Newman for a pre-trial hearing with his attorneys, John Delgado and Bill Nettles. R. 1. Assistant Solicitor Eaton informed the Trial Court that "[Appellant] is first up next week on twelve counts of attempted murder from July 2017" and that Appellant "intends to represent himself[.]" R. 4, 6-11.

Defense Counsel Delgado acknowledged their representation of Appellant: "We are counsel in this case, and we do think it would be a mistake" for Appellant to represent himself. R. 4, ll. 20-21. Delgado further explained, "We know his case well enough that we'd say he needs counsel and we'd like him to stay with us." R. 5, ll. 3-4.

In response to the Trial Court's questions, Appellant maintained that he wanted to represent himself and that his current lawyers could remain as stand-by counsel. R. 5, l. 22 – 6, l. 14. Appellant informed the Trial Court that he was sixty-six years old, retired/unemployed, and had studied "three years of college at the University of South Carolina." R. 6, ll. 15-24. Appellant also told the Trial Court that he had "several different jobs" during his life: Landscaping, Allen Chemical Company, caretaker for his

mother, and "took care of my daughter [for] about twenty years because she got ruined by the Department of Mental Health." R. 6, l. 22 – 7, l. 14.

Appellant further maintained that he had never been treated for alcohol, drugs, or mental illness. R. 7, ll. 15-24; R. 8, ll. 12-18. Assistant Solicitor Eaton interjected, "**In this case there was a retained psychiatrist**, Your Honor." R. 7, l. 25 – 8, l. 1 (emphasis added). The Trial Court then asked Defense Counsel, "Okay, and what was his finding, Mr. Delgado?" Delgado replied, "[Appellant] was competent to give testimony, competent to stand trial." R. 8, ll. 2-8. The Trial Court asked Appellant if he agreed with Delgado's statement about the psychiatrist's findings, and he responded, "Yes, sir." R. 8, ll. 9-10.

Appellant again denied ever being treated for alcohol, drugs, or mental illness. R. 8, ll. 12-18. Appellant also maintained that he fully understood and comprehended the nature of the hearing. R. 8, ll. 19-21. The Trial Court further explored, "Are you aware of any physical, any emotional or nervous problems, or anything that might affect your ability to understand what we are assessing here today, sir?" and Appellant replied, "I understand completely." R. 8, l. 22 – 9, l. 1.

The Trial Court next inquired, "Have you ever studied the law before?" and Appellant replied, "I've read law books about the law, and **I don't know too much about it.**" R. 9, ll. 4-12 (emphasis added). The Trial Court continued questioning Appellant, "Have you ever been in criminal court before?" In response, Appellant provided the following explanation of his experience from a Magistrate Court Jury Trial:

> **No, Sir. I had one small misdemeanor and that's all.** That was 1990 . . . For some reason, the police arrested me and charged me with four things and I defended myself, and they stacked the charges so much that I - - I was

> acquitted on two of them and two I was not. I think I had three weekends in jail and that was the extent of it.

R. 9, l. 13 – 10, l. 12 (emphasis added).

The Trial Court then advised Appellant that he was charged with twelve counts of attempted Murder, and Appellant indicated that he understood the charges and maximum possible sentences. R. 10, ll. 15-20. Appellant also told the Trial Court, "I've got a Five Million Dollar bond, and I see guys who have been there [Alvin S. Glenn Detention Center] for killing - - I see guys with two or three killings who get out on a Hundred to a Hundred and Fifty Thousand [dollar bond]." R. 11, ll. 8-12. This response prompted the Trial Court to reiterate that his questions were related to the possible punishment for Appellant's charges. R. 11, ll. 13-20.

The Trial Court continued and asked Appellant if he knew the elements for attempted murder, and Appellant responded, "Yes, sir." R. 11, ll. 21-24. The Trial Court also broadly reviewed the definition of attempted murder with Appellant. The Trial Court further inquired of Appellant, "How do you want to get rid of [the charges for attempted murder]?" Appellant provided the following response:

> Well, you know, **to me I've been incompetent up to now, and now I'm trying to get the discovery. I'm trying to get from the State a few things. I didn't get the discovery until a few days ago.**
>
> **When I called** [Defense Counsel,] **they never took my call but maybe two times in fifteen months I've been incarcerated. You know, so I nodded off on it.**
>
> You know, they've got a lot of things. They've got a Hundred Thousand Dollars which is a lot of money, and I don't expect to get all if I paid (sic) that much but, I mean, I know I have got no justice from my lawyers.

> **I think** [Defense Counsel] **they have been negligent** and due diligence I know has been fairly minimum, and since there's no due diligence.

R. 13, ll. 2-15 (emphasis added).

The Trial Court noted Defense Counsels' experience as criminal defense lawyers and warned Appellant, "you are charged with crimes for which you can get a lifetime." R. 13, l. 16 – 14, l. 24. The Trial Court also informed Appellant that hybrid counsel is not allowed: "You will be on your own in trying your case except for being able to consult with [Defense Counsel]." R. 15, l. 25 – 16, l. 1.

The Trial Court continued with the colloquy, "It may be that you are familiar with the rules of criminal procedure" and Appellant interjected, "**I'm not too familiar with that.**" R. 16, ll. 3-7 (emphasis added). The Trial Court then asked, "Are you familiar with the rules of evidence?" Appellant replied, "The rules of evidence in my case would be - - I'm pretty sure I know that, yes, sir." R. 16, ll. 8-10.

The Trial Court further questioned Appellant about "hearsay" and the knowledge required to understand the rules of evidence. R. 16, l. 19 – 17, l. 7. Appellant responded simply, "Well, **I may not be that familiar with it but I know what it is.**" R. 17, ll. 8-9 (emphasis added).

The Trial Court asked, "Do you have any motions that you plan to make concerning anything?" and Appellant stated, "**I might need a little help or something about that.**" R. 17, ll. 10-13 (emphasis added). The Trial Court proceeded to explain that Appellant had the right to decide whether to testify, and if he did testify, the State could ask him questions. R. 17, ll. 17-25.

The Trial Court continued questioning Appellant, "Are you ready to go to trial on

Monday?" In response, Appellant stated:

> Like I said, **I just got some stuff today that I probably should have got a long time ago or maybe within a few days.** [Defense Counsel] said he just got it from the prosecution. **I've got to get up to speed on it but I think I am though. I've got to do some preparation but I think I am though.**

R. 19, ll. 8-16 (emphasis added).

In discussing the jury selection process, Appellant indicated that he would have ten peremptory strikes, and the Trial Court confirmed, "**you'll have ten.**" R. 19, l. 23 – 20, l. 9 (emphasis added). The Trial Court further explained Appellant's constitutional trial right not to testify, the State's burden of proof, Appellant's right to present a defense, and standby counsel's role during the trial. R. 20, l. 8 – 21, l. 11.

The Trial Court reiterated that Appellant had "highly skilled lawyers" who "have given good results to many clients". R. 23, ll. 1-4. In response, Appellant stated that "I didn't see it with me though. **Like I said, I'm playing catch up right now with some stuff they are giving me - - right now.**" R. 23, ll. 5-7 (emphasis added). The Trial Court asked Appellant if he needed more time regarding the decision to represent himself, and Appellant replied, "I've made up my mind, yes." R. 23, ll. 22-25.

After confirming Appellant's request to represent himself and to have stand-by counsel, the Trial Court told Appellant, "[I]f you change your mind and you decide that you want to - - that you are over your head and you better let the lawyers take over just let me know at any point in time[.]" R. 24, ll. 1-15. Notably, Appellant indicated his lack of experience and knowledge of the State's case:

> **I've been there [in jail] for fifteen months . . . and this is really my first stay in jail, . . .the lawyers know the facts . . . [A]s far as mental, ... I've never had a trial.** I've

> never been on any anti-psychotic drugs. That's what they demolish my daughter with, and I tried to stop it but they banned me from even seeing her for six hundred days. That is what they did. So when she got out she didn't even know what her name was.

R. 24, l. 23 – 25, l. 8 (emphasis added).

The Trial Court noted the following question regarding whether Appellant was mentally ill:

> All right. **So with regard to Mr. Kester, to be judged mentally ill a person needs to be in a mental institution until they are judged to be in a condition to be transferred to the general population or transferred from a mental ward or mental place to regular population. Is that your understanding**?

R. 25, ll. 20-25 (emphasis added). An "unidentified person" in the courtroom responded, "Yes, Your Honor. That is a minor step in the whole process." R. 26, ll. 1-2.

Appellant's provided the following response to the Trial Court about his knowledge of the plea negotiations between Defense Counsel and the State:

> Yeah, [Defense Counsel] they tried to get them [the State] to reduce the charges for a plea bargain, and - - and, like I said, my daughter was given so much toxic drugs that she couldn't take it anymore.
>
> So people who have got mental problems, people with poor mental health, I mean, I got - - I got that in writing. One day she drank straight forty glasses of water her brain was cooked so bad. In the middle of the night she'd be hollering, please help. . . . I mean, I tried different things and I got arrested at the time for going to visit her when they denied it, and they threw the case out because they did have a trespass in the Department of Mental Health. They went to the General Assembly and got a (inaudible) and solely because of me.
>
> I mean, after they threw my case out I went to the General Assembly. I don't even think they are allowed to do that to one individual but they did it anyway.

R. 26, l. 12 – 27, l. 13.

After the Trial Court explained that he does not know the specific facts of Appellant's case, Appellant further noted:

> With all that's going on, I'm worried I left out something while they were doing this to my daughter. **You said had I been under any stress, and I should have said yes.** I lost my left eye due to this and I've been trying to get them to get those records that they been telling me a year that they did and that is another thing. Like I said, **they've been negligent and that's why I had to do this.**

R. 27, l. 20 – 28, l. 3 (emphasis added). Appellant reiterated, "Well, they rarely took my phone calls over all the time but two times. Maybe they will now, you know." R. 28, ll. 21-22. The Court ultimately ruled, "I am granting your motion to relieve them [Defense Counsel] and for you to proceed to represent yourself. Be sure to be ready to go on Monday at this point." R. 29, ll. 4-6.

Additional Pre-Trial Matters

On October 8, 2018, Assistant Solicitor Eaton called Appellant's case for trial. R. 40, ll. 11-14. The Trial Court asked if there were any additional matters to address before *voir dire* and jury selection, and Assistant Solicitor Eaton listed issues related to the 911 call, the waiver of Appellant's right to counsel, the voluntariness of Appellant's statements, and the seized items related to a search warrant. R. 40, l. 22 – 41, l. 19. Notably, Assistant Solicitor Eaton told the Trial Court, "**There's also the question of . . . whether Mr. Kester knowingly and intelligently waived his right to counsel**[.]" R. 41, ll. 4-6 (emphasis added).

The Trial Court then asked Appellant, "Mr. Kester, what's your position concerning the 9-1-1 call and the statements you made to the police and the search

warrant?". Appellant responded, "They can play it. I'm not waiving anything on this . . . You know, **I just got discovery a few days ago. I'm having to play catch-up on everything.**" R. 41, l. 20 – 42, l. 1 (emphasis added). Notably, the Trial Court did not address the issue of whether Appellant knowingly and intelligently waived his right to counsel.

Appellant had no questions for the testifying law enforcement officer regarding the voluntariness of his statement and provided no argument to the Trial Court regarding the admissibility of his statements. R. 46, ll. 3-10. The Trial Court subsequently asked Appellant, "Well, do you want the jury to know that you've been arrested by the Department of Mental Health before [since it is referenced in Appellant's recorded statement]?", and Appellant replied, "Yes, I do." R. 48, ll. 1-4.

Appellant also had no questions for the testifying law enforcement officer regarding the existence of probable cause for the search warrant and provided no argument to the Trial Court regarding the admissibility of the seized evidence. R. 52, l. 9 – 54, l. 7.

Appellant again had no questions for the testifying witness regarding the authenticity of the 9-1-1 recorded phone calls and provided no argument to the Trial Court regarding the admissibility of the recordings. R. 58, ll. 1-7.

Jury Selection

Appellant had no questions or arguments regarding the Trial Court's *voir dire* of the venire. R. 76, ll. 11-15. After Appellant had struck one potential juror, the Trial Court interjected, "**The strikes are actually five and five, not five and ten.**" R. 77, l. 4 – 78, l. 3 (emphasis added). After Appellant struck a second potential juror, the Trial

Court reminded Appellant that he had three strikes remaining. R. 78, ll. 22-25. Appellant responded, "I thought I had ten", and the Trial Court admitted, "**Initially I did as well but not for attempted murder.**" R. 79, ll. 3-14 (emphasis added).

Appellant subsequently argued to the Trial Court, "Your Honor, I might not have struck one of the first for cause thinking I had ten . . . the first couple of ones **I may not have struck if I knew I only had five** [and] [s]ince I've only got one more, you can seat the juror." R. 84, ll. 9-13 (emphasis added). Appellant exhausted his final strike on juror number 176, David McMahan, who knew, John Montgomery, the former Dean at the University of South Carolina School of Law. R. 86, l. 1 – 87, l. 4. At the conclusion of jury selection, Appellant provided no additional arguments to the Trial Court. R. 96, ll. 5-7.

Trial

During the trial, Appellant did not ask a majority of the witnesses any questions on cross-examination and made very few objections to the State's evidence.

Jury Note I

On October 10, 2018, the Trial Court read aloud a note sent by the jury during deliberations:

> We, the jurors, are in a need of a way to assign the pictures to the names of each of the victims. We also need chalk. There's a couple of asterisks. Can we have the electronic files that have the names assigned. Another asterisk. We only have pictures of nine of the victims, but verdicts needed for twelve.

R. 360, ll. 15-23. The Trial Court allowed the jury to have chalk and heard arguments from the State and Appellant regarding the jury's request for the electronic files and additional pictures. R. 360, l. 24 – 379, l. 1. Appellant objected, arguing that the

submission of these requests is creating additional evidence. R. 373, l. 16; R. 377, ll. 13-14. The Trial Court ultimately decided to send the indictments to the jury, denied the State's request to attach pictures to the indictments, and instructed the jury based on his rulings. R. 377, l. 15 – 380, l. 6.

Jury Note II / Hung Jury

After continuing to deliberate, the jury sent out a second note stating, "We, the jury, have not come to a unanimous verdict concerning all twelve counts and at this point **we represent a hung jury**." R. 380, ll. 19-22 (emphasis added). The State indicated that the jury "can render a verdict on some charges and others can mis-try." R. 381, ll. 2-3. The State also noted, "[I]t's, of course, in your discretion to give an *Allen* charge." R. 381, ll. 3-4. Appellant moved for a mistrial and objected to the Trial Court instructing the jury with an *Allen* charge. R. 381, ll. 6-14. The Trial Court then instructed the jury with an *Allen* charge. R. 382, l. 1 – 385, l. 15. Specifically, the Trial Court's response and instruction to the jury are as follows:

> Madam Forelady and Members of the Jury, you sent out a note saying: We, the jury, have not come to a unanimous verdict concerning all twelve counts. At this point we represent a hung jury.
>
> As I stated to you in the jury charge, jury instructions, the verdict of the jury must be a unanimous verdict as to each and every count. Well, not as to each and every count, but as to each and every indictment and each indictment must be considered separately. So you have twelve different indictments for which you can render a verdict on and each is to be considered separately.
>
> When a matter is in dispute, it isn't always easy for even two people to agree. I'm sure if you're married you know that. So when twelve people must agree, it becomes even more difficult. In most cases absolute certainty cannot be reached or expected; however, you have a duty to make

every reasonable effort to reach a unanimous verdict as to each indictment. In doing so, you should consult with one another, express your own views and listen to the opinions of your fellow jurors, tell each other how you feel and why you feel that way and you discuss your differences with an open mind.

Although the verdict on each indictment must be unanimous, every one of you has a right to your own opinion. The verdict you reach must be your own verdict, the result of your own convictions, and you certainly should not give up your firmly held beliefs merely to be in agreement with your fellow jurors. The majority should consider the minority's opinion and the minority should consider the majority's opinion. You should carefully consider and respect the opinion of each other and reevaluate you position, if necessary, for reasonableness, correctness and impartiality. You must lay aside all outside matters and reexamine the question before you based on the law and evidence in this case.

As to any particular indictment that you may be able to – unable to agree on, I must declare a mistrial as to that particular indictment. In that case, it does not mean that anyone wins, it just means that at some future time I or another judge will try that particular indictment or this entire case if you do not agree on any indictments with some other jury sitting where you now sit. The same participants will come and the same lawyers will and/or the self-represent Defendant will ask basically the same questions and get basically the same answers and we'll go through the process again. And you were selected from the same source and from the same - - in the same manner that any future jury will be and **there's no reason for me to believe** that the case will ever be submitted to twelve more intelligent, impartial, conscientious and competent jurors than you **or that more or clearer evidence will be produced on one side or the other.**

I, therefore, ask that you return to your deliberations with the hope that you can arrive at a verdict within a reasonable amount of time as to each indictment. If there are indictments that you've reached a unanimous verdict on, we will receive those indictments. If you're a hung jury as to each and every indictment, you will inform

> the Court of that. If you're able to reach a verdict on every indictment, inform the Court of that.
>
> So please return to the jury room.

R. 382, l. 3 – 384, l. 16. Appellant renewed his objection. R. 384, l. 17 – 385, l. 15.

Verdict

On the same day, the jury found Appellant guilty on eight counts of Assault and Battery, First Degree and one count of Assault and Battery, Third Degree. R. 386, l. 13 – 389, l. 10. The jury also found Appellant not guilty on three counts of Attempted Murder. R. 386, ll. 20-24; R. 388, ll. 17-21; R. 389, ll. 3-7. After the verdict, the Trial Court noted, "So considering the evidence presented and perhaps in some of your minds a lack of clarity as to what was going on with Mr. Kester there . . . ." R. 395, ll. 4-6. The Court delayed sentencing. R. 395, ll. 18-19.

Sentencing

On October 12, 2018, the State requested the Trial Court impose consecutive, maximum potential sentences for each conviction at the sentencing hearing. R. 428, ll. 2-4; R. 433, ll. 15-17. Appellant reiterated to the Trial Court, "**I've been under immense stress from my daughter just dying within a year** and all I went through with her, with what they did to her." R. 429, ll. 1-3 (emphasis added). Appellant also argued, "I believe . . . you aren't supposed to sentence for separate things if it's one thing... Aren't they all sentenced like it's one so - - and not separate?" R. 429, ll. 7-11. In response, the Trial Court replied, "no". R. 429, ll. 12-14. Appellant also noted local comparative cases and stated, "[W]e need to compare some of the other cases in the area." R. 429, ll. 21-23; R. 431, ll. 13-16. Appellant further noted that he blacked out and did not intend for the

incident to occur: "**I have PTSD. That's what I've had over the last twenty years.**" R. 435, ll. 17-18 (emphasis added).

The Trial Court acknowledged Appellant's possible mental health issue: "**If you needed some type of therapy, mental health for yourself or medication** or whatever you might have needed, if you needed it, it would have been best for you to have taken that course rather than decide to plow into this group of people." R. 437, ll. 18-24 (emphasis added). Appellant subsequently interjected, "I think the people who did this to my daughter should be brought to justice. They poisoned her, they made malicious lies up about me." R. 438, ll. 16-18.

The Trial Court ultimately sentenced Appellant to ten years imprisonment for each conviction of Assault and Battery, First Degree, and thirty days imprisonment on the conviction for Assault and Battery, Third Degree. R. 439, ll. 2-23. The Trial Court further ordered Appellant to serve the sentences **consecutively**. R. 439, ll. 24-25 (emphasis added).

ARGUMENT

I. THE TRIAL COURT ERRED IN FINDING APPELLANT KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY WAIVED HIS RIGHT TO COUNSEL BY FAILING TO CONDUCT A COMPETENCY TO STAND TRIAL HEARING BEFORE GRANTING APPELLANT'S REQUEST FOR SELF-REPRESENTATION.

Standard of Review for Waiver of Right to Counsel

Whether a defendant has knowingly, intelligently, and voluntarily waived his right to counsel is a mixed question of law and fact which appellate courts review de novo. *United States v. Lopez-Osuna*, 242 F.3d 1191, 1198 (9th Cir. 2000). Specifically, appellate courts review a circuit judge's findings of historical fact for clear error; however, [appellate courts] review the denial of the right of self-representation based upon those findings of fact de novo. *United States v. Bush*, 404 F.3d 263, 270 (4th Cir. 2005). Accordingly, appellate courts must consider the defendant's testimony, history, and the circumstances of his decision, as presented to the circuit judge at the time the defendant made his request. *United States v. Singleton*, 107 F.3d 1091, 1097 (4th Cir. 1997).

Right to Self-Representation

In *Faretta v. California*, 422 U.S. 806, 819-21 (1975), the United States Supreme Court held that criminal defendants have a fundamental right to self-representation under the Sixth Amendment. *See* U.S. Const. Amend. VI. To invoke the right of self-representation, the defendant must clearly and unequivocally assert his desire to proceed *pro se* and such request must be made knowingly, intelligently and voluntarily. *United States v. Frazier-El*, 204 F.3d 553, 558 (4th Cir. 2000). Where a defendant invokes his right of self-representation before trial, the only inquiry the circuit judge may undertake

is that required by the *Faretta* opinion. *See State v. Barnes*, 407 S.C. 27, 35, 753 S.E.2d 545, 550 (2014). Thus, the only basis upon which a circuit judge may deny a defendant's pre-trial motion to proceed *pro se* is if the court determines the defendant has not knowingly, intelligently, and voluntarily waived his right to counsel. *State v. Reed*, 332 S.C. 35, 41, 503 S.E.2d 747, 750 (1998).

Whether a defendant has intelligently waived his right to counsel depends upon the particular facts and circumstances surrounding each case, including the background, experience, and conduct of the accused. *Singleton*, 107 F.3d at 1097. The United States Supreme Court has emphasized "the competence that is required of a defendant seeking to waive his right to counsel is the competence to *waive the right*, not the competence to represent himself." *Godinez*, 509 U.S. at 399 (emphasis in original). In other words, whether a defendant is capable of effectively representing himself has no bearing upon his ability to elect self-representation. *Id.* at 400; *see also Faretta*, 422 U.S. at 836 (holding a defendant's "technical legal knowledge . . . [is] not relevant to an assessment of his knowing exercise of the right to defend himself").

Although a defendant's decision to proceed *pro se* may ultimately be to his detriment, such requests "must be honored out of that respect for the individual which is the lifeblood of the law." *Barnes*, 407 S.C. at 35-36, 753 S.E.2d at 550 (internal quotation omitted); *see also Frazier-El*, 204 F.3d at 558 (noting a defendant's right of self-representation generally must be honored, regardless of whether he would benefit from advice of counsel). In other words, "[a] decision can be made intelligently, with an understanding of the consequences, without the decision itself being a wise one." *Reed*, 332 S.C. at 41, 503 S.E.2d at 750. Notably, our Supreme Court has held:

> The ultimate test of whether a defendant has made a knowing and intelligent waiver of the right to counsel is not the trial judge's advice, but the defendant's understanding. A determination by the trial judge that the accused lacks the expertise or technical legal knowledge to proceed *pro se* does not justify a denial of the right to self-representation; the *only* relevant inquiry is whether the accused made a knowing and intelligent waiver of the right to counsel.

State v. Brewer, 328 S.C. 117, 119, 492 S.E.2d 97, 98 (1997) (internal citations omitted) (emphasis added).

Furthermore, to determine if an accused has sufficient background to comprehend the dangers of self-representation, courts consider a variety of the following factors:

(1) The accused's age, educational background, and ***physical and mental health***;

(2) Whether the accused was previously involved in criminal trials;

(3) Whether the accused knew the nature of the charge(s) and of the possible penalties;

(4) Whether the accused was represented by counsel before trial and whether that attorney explained to him the dangers of self-representation;

(5) Whether the accused was attempting to delay or manipulate the proceedings;

(6) Whether the court appointed stand-by counsel;

(7) Whether the accused knew he would be required to comply with the rules of procedure at trial;

(8) Whether the accused knew of the legal challenges he could raise in defense to the charge(s) against him;

(9) Whether the exchange between the accused and the court consisted merely of *pro forma* answers to *pro forma* questions; and

(10) Whether the accused's waiver resulted from either coercion or mistreatment.

Gardner v. State, 351 S.C. 407, 412-13, 570 S.E.2d 184, 186-87 (2002) (emphasis added).

"The typical remedy for failing to show a knowing and intelligent waiver of counsel is to remand to the trial court for an evidentiary hearing to determine whether the waiver was, in fact, knowingly and intelligently made." *In re Christopher H*, 359 S.C. 161, 596 S.E.2d 500 (Ct. App. 2004) (citing *State v. Dixon*, 269 S.C. 107, 236 S.E.2d 419 (1977)). "However, [appellate] court[s] can grant an appellant a new trial without an evidentiary hearing if it is clear that a hearing on remand would serve no useful purpose." *Id.* (citing *State v. Cash*, 304 S.C. 223, 225, 403 S.E.2d 632, 634 (1991)).

Standard of Review for Competency to Stand Trial

In *State v. Burgess*, 356 S.C. 572, 575, 590 S.E.2d 42, 44 (Ct. App. 2003), this Court found "[t]he question of whether to order a competency examination falls within the discretion of the trial [court] whose decision will not be overturned on appeal absent a clear showing of an abuse of that discretion." "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *State v. Colden*, 372 S.C. 428, 435, 641 S.E.2d 912, 917 (Ct. App. 2007). Notably, "[The 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." *State v. Wilson*, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001).

Competency to Stand Trial

Due process prohibits the conviction of a person who is mentally incompetent. *In re Antonio H.*, 319 S.C. 395, 399, 461 S.E.2d 825, 827 (Ct. App. 1995) (citing *Jeter v. State*, 308 S.C. 230, 417 S.E.2d 594 (1992) and *Pate v. Robinson*, 383 U.S. 375 (1966)). In *State v. Blair*, 275 S.C. 529, 532-33, 273 S.E.2d 536, 537 (1981), our Supreme Court

held that the defendant's failure to request a competency hearing did not constitute a waiver of his right to a hearing where the defendant's sanity was the crucial issue.

In *Blair*, 275 S.C. at 533, 273 S.E.2d at 538, our Supreme Court held that "[t]he standard for determining whether an accused is entitled to a competency to stand trial hearing has been set forth in a recent case interpreting *Pate v. Robinson.*" The United States Supreme Court noted, "The import of our decision in *Pate v. Robinson* is that evidence of a defendant's irrational behavior, his demeanor at trial and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but that even one of these factors, standing alone, may, in some circumstances, be sufficient." *Drope v. Missouri*, 420 U.S. 162, 180 (1975).

In *Barnes*, our Supreme Court "decline[d] to impose a higher competency standard upon an individual who wishes to waive his right to an attorney and represent himself at trial than that required for the waiver of other fundamental constitutional rights afforded a criminal defendant, such as the right against compulsory self-incrimination; the right to trial by jury; and the right to confront one's accusers." *Id.*, 407 S.C. at 36, 753 S.E.2d at 550. Therefore, the Court held that "[a] defendant who is competent to stand trial is also competent to waive these fundamental rights and plead guilty." *Id.* (citing *Sims v. State*, 313 S.C. 420, 438 S.E.2d 253 (1993)).

The test for determining whether a criminal defendant is competent to stand trial is "whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as a factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402 (1960). Section 44-23-410(A) of the South Carolina Code of Laws provides, in pertinent

part: "Whenever a [trial court] has reason to believe that a person on trial before him, charged with the commission of a criminal offense . . . , is not fit to stand trial because the person lacks the capacity to understand the proceedings against him or to assist in his own defense as a result of a lack of mental capacity, the [court] shall . . . order [an evaluation] . . . ." *See Blair*, 275 S.C. 529, 273 S.E.2d 536 (interpreting the language of. S.C. Code § 44-23-430 as mandatory, which provides that the court *shall* set a competency hearing after ordering an evaluation of defendant's competency under S.C. Code § 44-23-410)).

In reversing the order of the trial judge and remanding the case for a competency to stand trial hearing, South Carolina appellate courts follow a procedure enunciated in *State v. Hamilton*, 251 S.C. 1, 7, 159 S.E.2d 607 (1968):

> There, this Court remanded for a hearing to determine whether the police had probable cause to make the arrest in a murder case. This Court stated if, after the hearing, it was determined probable cause did not exist, an order reversing the conviction should be entered and a new trial granted. If, on the other hand, the hearing revealed the officers did have probable cause, the conviction would be upheld.

Blair, 275 S.C. at 534, 273 S.E.2d at 538.

Discussion

In this case, the Trial Court erred in finding Appellant knowingly, intelligently, and voluntarily waived his right to counsel. R. 29, ll. 4-6; *Cf. State v. Samuel*, 422 S.C. 596, 813 S.E.2d 487 (2018). Specifically, the Trial Court erroneously failed to conduct a competency to stand trial hearing before granting Appellant's request for self-representation based on Appellant's "irrational behavior" and the Court's knowledge of a private psychiatric evaluation. R. 7, l. 25 – 8, l. 10. *See In re Antonio H.*, 319 S.C. at

399, 461 S.E.2d at 827; *Blair*, 275 S.C. at 532-33, 273 S.E.2d at 537; *see generally Pate*, 383 U.S. 375 (finding when evidence of a defendant's mental deficiencies raise doubt as to his competence, due process requires the judge to order a competency hearing).

Although Appellant's retained counsel and subsequent stand-by counsel, John Delgado, informed the Trial Court that the private psychiatric evaluation found Appellant competent to stand trial, the Trial Court failed to obtain a copy of the evaluation for his review, provided no follow up questioning, and did not issue a ruling on this issue. R. 8, ll. 2-8. Notably, the Trial Court ignored the Assistant Solicitor's question on the morning of trial regarding whether Appellant waived his right to counsel: "*There's also the question of . . . whether Mr. Kester knowingly and intelligently waived his right to counsel*[.]" R. 41, ll. 4-6 (emphasis added). The State's uncertainty as to whether this issue had been fully heard and ruled upon at the pre-trial hearing is compelling evidence in Appellant's favor.

However, the Trial Court did previously provide a confusing question regarding Appellant's competency and/or criminal responsibility during the first pre-trial hearing:

> [W]ith regard to Mr. Kester, to be judged mentally ill a person needs to be in a mental institution until they are judged to be in a condition to be transferred to the general population or transferred from a mental ward or mental place to regular population. Is that your understanding?

R. 25, ll. 20-25. An "unidentified person" in the courtroom responded, "Yes, Your Honor. That is a minor step in the whole process." R. 26, ll. 1-2.

Appellant's responses regarding the connection between his daughter and the S.C. Department of Mental Health, along with the existence of a private competency to stand trial evaluation requested by Defense Counsel, necessitated more than the Trial Court

simply asking for the result of the evaluation (i.e., requiring an evidentiary hearing). Specifically, the Trial Court failed to review any additional evidence (e.g., the private evaluation), ask any further questions (e.g., no inquiry into the information related to the private evaluation and Appellant's mental health), or rule on Appellant's competency to stand trial.

As further evidence, Appellant's response to the Trial Court about his knowledge of the plea negotiations between Defense Counsel and the State:

> Yeah, [Defense Counsel] they tried to get them [the State] to reduce the charges for a plea bargain, and - - and, like I said, my daughter was given so much toxic drugs that she couldn't take it anymore.
>
> So people who have got mental problems, people with poor mental health, I mean, I got - - I got that in writing. One day she drank straight forty glasses of water her brain was cooked so bad. In the middle of the night she'd be hollering, please help. . . . I mean, I tried different things and I got arrested at the time for going to visit her when they denied it, and they threw the case out because they did have a trespass in the Department of Mental Health. They went to the General Assembly and got a (inaudible) and solely because of me.
>
> I mean, after they threw my case out I went to the General Assembly. I don't even think they are allowed to do that to one individual but they did it anyway.

R. 26, l. 12 – 27, l. 13.

After the Trial Court explained to Appellant that he does not know the specific facts of his case, Appellant further noted:

> With all that's going on, I'm worried I left out something while they were doing this to my daughter. *You said had I been under any stress, and I should have said yes.* I lost my left eye due to this and I've been trying to get them to get those records that they been telling me a year that they

> did and that is another thing. Like I said, *they've been negligent and that's why I had to do this.*

R. 27, l. 20 – 28, l. 3 (emphasis added). Appellant subsequently reiterated to the Trial Court after the jury verdict, "*I've been under immense stress from my daughter just dying within a year* and all I went through with her, with what they did to her." R. 429, ll. 1-3 (emphasis added).

Appellant further noted when explaining that he blacked out and did not intend for the incident to occur, "*I have PTSD. That's what I've had over the last twenty years.*" R. 435, ll. 17-18 (emphasis added). Notably, The Trial Court acknowledged Appellant's possible mental health issue: "*If you needed some type of therapy, mental health for yourself or medication* or whatever you might have needed, if you needed it, it would have been best for you to have taken that course rather than decide to plow into this group of people." R. 437, ll. 18-24 (emphasis added). Appellant interjected, "I think the people who did this to my daughter should be brought to justice. They poisoned her, they made malicious lies up about me." R. 438, ll. 16-18.

In *Samuel*, "[t]he judge noted she found Samuel to be 'incredibly articulate' and 'exceptionally bright'" and there was evidence Samuel was attempting to manipulate the proceeding. *Id.*, 422 S.C. at 600, 813 S.E.2d at 489. Our Supreme Court stated in *Barnes* that Barnes's "competency to stand trial has never been in question." *Id.*, 407 S.C. at 31, 753 S.E.2d at 547. In *Reed*, "The judge was convinced by the medical reports and testimony that [Reed] does not have a pervasive paranoia or paranoid behavior that affects his ability to interact and to cooperate." *Id.*, 332 S.C. at 40, 503 S.E.2d at 749. Whereas in *Prince v. State*, "The record ... indicate[d] petitioner was mentally disturbed at the time of his plea." *Id.*, 301 S.C. 422, 424, 392 S.E.2d 462, 463 (1990).

Our Supreme Court has also acknowledged the careful nature in which judges must weigh the evidence in deciding whether a defendant has knowingly, intelligently, and voluntarily waived the right to counsel: "We fully recognize the delicate balance a circuit judge must try to achieve in safeguarding a defendant's constitutional right to represent himself and the almost sure disaster that will result from his self-representation." *Samuel*, 422 S.C. at 605, 813 S.E.2d at 492.

The Trial Court's response to the jury after rendering their verdict is proof of why courts must "delicate[ly] balance" the waiver of the right to counsel: "*So considering the evidence presented and perhaps in some of your minds a lack of clarity as to what was going on with Mr. Kester there . . . .*" R. 395, ll. 4-6. It is undisputed that depending on the evidence presented, one of the factors a presiding judge may have to address in deciding whether a defendant has waived the right to counsel is whether the defendant is competent to stand trial. *See Barnes*, 407 S.C. at 36, 753 S.E.2d at 550.

Unlike the cases cited above, the Trial Court in this case failed to conduct an evidentiary hearing regarding Appellant's competency to stand trial. Without knowing more information about Appellant's mental health status, this Court is unable to properly determine whether Appellant was competent to stand trial. Therefore, the Trial Court erred in finding Appellant knowingly, voluntarily, and intelligently waived his right to counsel. *See In re Christopher H*, 359 S.C. 161, 596 S.E.2d 500 (Ct. App. 2004); *Blair*, 275 S.C. at 534, 273 S.E.2d at 538.

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II. THE TRIAL COURT ERRED IN FINDING APPELLANT KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY WAIVED HIS RIGHT TO COUNSEL BECAUSE APPELLANT DID NOT COMPREHEND THE DANGERS OF SELF-REPRESENTATION BASED ON HIS RESPONSES TO THE TRIAL COURT.

To establish a valid waiver of counsel, *Faretta* requires the accused be: (1) advised of his right to counsel; and (2) adequately warned of the dangers of self-representation. *See Prince*, 301 S.C. at 424, 392 S.E.2d at 463 (citing *Faretta v. California*, 422 U.S. at 819-21). Furthermore, to determine if an accused has sufficient background to comprehend the dangers of self-representation, courts consider a variety of the following factors:

(1) The accused's age, educational background, and *physical and mental health*;

(2) Whether the accused was previously involved in criminal trials;

(3) Whether the accused knew the nature of the charge(s) and of the possible penalties;

(4) Whether the accused was represented by counsel before trial and whether that attorney explained to him the dangers of self-representation;

(5) Whether the accused was attempting to delay or manipulate the proceedings;

(6) Whether the court appointed stand-by counsel;

(7) Whether the accused knew he would be required to comply with the rules of procedure at trial;

(8) Whether the accused knew of the legal challenges he could raise in defense to the charge(s) against him;

(9) Whether the exchange between the accused and the court consisted merely of *pro forma* answers to *pro forma* questions; and

(10) Whether the accused's waiver resulted from either coercion or mistreatment.

Gardner, 351 S.C. at 412-13, 570 S.E.2d at 186-87 (emphasis added). Additionally, Appellant incorporates by reference the case law set forth in issue one of this brief.

Discussion

Even if this Court disagrees with Appellant's argument presented in issue one, the Trial Court also erred in finding Appellant knowingly, intelligently, and voluntarily waived his right to counsel because Appellant did not comprehend the dangers of self-representation based on his responses to the Trial Court's questions at the pre-trial hearing. *See Gardner*, 351 S.C. at 412-13, 570 S.E.2d at 186-87; *see generally Singleton*, 107 F.3d at 1097 (finding appellate courts must consider the defendant's testimony, history, and the circumstances of his decision, as presented to the circuit judge at the time the defendant made his request).

Specifically, the Trial Court did not take in account Appellant's physical and apparent mental health, his lack of legal knowledge and defenses, and his *pro forma* answers to *pro forma* questions. *See Gardner*, 351 S.C. at 412-13, 570 S.E.2d at 186-87. At the pre-trial hearing, Appellant also told the Trial Court that he had "several different jobs" during his life: Landscaping, Allen Chemical Company, caretaker for his mother, and "took care of my daughter [for] about twenty years because she got ruined by the Department of Mental Health." R. 6, l. 22 – 7, l. 14. Appellate also noted at various stages of the trial that he had problems with his eye and ability to hear.

The Trial Court also inquired, "Have you ever studied the law before?" and Appellant replied, "I've read law books about the law, and *I don't know too much about it.*" R. 9, ll. 4-12 (emphasis added). The Trial Court further explored, "Have you ever been in criminal court before?" and Appellant provided the following explanation of his experience from a Magistrate Court Jury Trial:

> *No, Sir. I had one small misdemeanor and that's all.* That was 1990 . . . For some reason, the police arrested me and

> charged me with four things and I defended myself, and they stacked the charges so much that I - - I was acquitted on two of them and two I was not. I think I had three weekends in jail and that was the extent of it.

R. 9, l. 13 – 10, l. 12 (emphasis added). The Trial Court also questioned Appellant, "How do you want to get rid of [the charges for attempted murder]?" In response, Appellant stated:

> Well, you know, *to me I've been incompetent up to now, and now I'm trying to get the discovery. I'm trying to get from the State a few things. I didn't get the discovery until a few days ago.*
>
> *When I called* [Defense Counsel,] *they never took my call but maybe two times in fifteen months I've been incarcerated. You know, so I nodded off on it.*
>
> You know, they've got a lot of things. They've got a Hundred Thousand Dollars which is a lot of money, and I don't expect to get all if I paid (sic) that much but, I mean, I know I have got no justice from my lawyers.
>
> *I think* [Defense Counsel] *they have been negligent* and due diligence I know has been fairly minimum, and since there's no due diligence.

R. 13, ll. 2-15 (emphasis added).

The Trial Court continued with the colloquy, "It may be that you are familiar with the rules of criminal procedure" and Appellant interjected, "*I'm not too familiar with that.*" R. 16, ll. 3-7 (emphasis added). The Trial Court further questioned Appellant about "hearsay" and the knowledge required to understand the rules of evidence. R. 16, l. 19 – 17, l. 7. Appellant responded, "Well, *I may not be that familiar with it but I know what it is.*" R. 17, ll. 8-9 (emphasis added).

The Trial Court also asked, "Do you have any motions that you plan to make concerning anything?" Appellant replied, "*I might need a little help or something about*

that." R. 17, ll. 10-13 (emphasis added). The Trial Court continued questioning Appellant, "Are you ready to go to trial on Monday?", and Appellant replied:

> Like I said, *I just got some stuff today that I probably should have got a long time ago or maybe within a few days.* [Defense Counsel] said he just got it from the prosecution. *I've got to get up to speed on it but I think I am though. I've got to do some preparation but I think I am though.*

R. 19, ll. 8-16 (emphasis added).

In response to the Trial Court's acknowledgement and support of retained counsel's experience and results in criminal cases, Appellant stated that "I didn't see it with me though. *Like I said, I'm playing catch up right now with some stuff they are giving me - - right now.*" R. 23, ll. 5-7 (emphasis added). Appellant further noted his lack of experience and knowledge of the State's case:

> *I've been there [in jail] for fifteen months . . . and this is really my first stay in jail, . . .the lawyers know the facts . . . [A]s far as mental, ... I've never had a trial.* I've never been on any anti-psychotic drugs. That's what they demolish my daughter with, and I tried to stop it but they banned me from even seeing her for six hundred days. That is what they did. So when she got out she didn't even know what her name was.

R. 24, l. 23 – 25, l. 8 (emphasis added). The Trial Court subsequently asked Appellant, "Mr. Kester, what's your position concerning the 9-1-1 call and the statements you made to the police and the search warrant?". Appellant responded, "They can play it. I'm not waiving anything on this . . . You know, *I just got discovery a few days ago. I'm having to play catch-up on everything.*" R. 41, l. 20 – 42, l. 1 (emphasis added).

Notably, Assistant Solicitor Eaton raised this issue to the Trial Court on the morning of trial, "*There's also the question of . . . whether Mr. Kester knowingly and*

intelligently waived his right to counsel[.]" R. 41, ll. 4-6 (emphasis added). The State's uncertainty after the pre-trial hearing as to whether Appellant waived his right to counsel is compelling evidence when highlighted by the Trial Court's failure to even acknowledge the Solicitor's question raising the issue. The Trial Court also failed to follow the advisement of right to self-representation form provided by our Supreme Court titled Faretta Warnings, SCCA 684 (1/14) (found at https://www.sccourts.org/forms/pdf/-SCCA684.pdf).

There is also no evidence that Appellant was attempting to manipulate the proceedings, and his sole basis for requesting to proceed *pro se* was his belief that retained counsel was providing ineffective assistance of counsel. *See generally McMann v. Richardson*, 397 U.S. 759 (1970) (finding the right to counsel includes the right to effective assistance of counsel). Therefore, the Trial Court erred in finding Appellant knowingly, intelligently, and voluntarily waived his right to counsel. *See Gardner*, 351 S.C. at 412-13, 570 S.E.2d at 186-87; *see generally Singleton*, 107 F.3d at 1097 (finding appellate courts must consider the defendant's testimony, history, and the circumstances of his decision, as presented to the circuit judge at the time the defendant made his request).

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III. THE TRIAL COURT ERRED IN ADVISING APPELLANT THAT HE HAD TEN PEREMPTORY STRIKES PRIOR TO JURY SELECTION BECAUSE APPELLANT DETRIMENTALLY RELIED ON THIS ADVICE AND STRUCK A POTENTIAL JUROR BEFORE THE TRIAL COURT INFORMED APPELLANT THAT HE ONLY HAD FIVE STRIKES.

A criminal defendant has the right to a fair trial by an impartial jury under the federal and state constitutions. *See* U.S. Const. Amend. VI; *see also* S.C. Const. art. I, § 14; *State v. Salters*, 273 S.C. 501, 257 S.E.2d 502 (1979. This guarantee includes the right to a selection process that is unbiased and fair to the defendant and the jurors. *See Powers v. Ohio*, 499 U.S. 400, 410-16 (1991). Section 14-7-1110 of the South Carolina Code of Laws provides, in pertinent part:

> Any person who is arraigned for the crime of murder, manslaughter, burglary, arson, criminal sexual conduct, armed robbery, grand larceny, or breach of trust when it is punishable as for grand larceny, perjury, or forgery is entitled to peremptory challenges *not exceeding ten*, and the State in these cases is entitled to peremptory challenges not exceeding five. Any person who is indicted for any crime or offense other than those enumerated above has the right to peremptory challenges *not exceeding five*, and the State in these cases is entitled to peremptory challenges not exceeding five.

S.C. Code Ann § 14-7-1110 (Peremptory challenges in criminal cases) (emphasis added).

Discussion

In this case, the Trial Court erred in advising Appellant that he had ten peremptory strikes prior to jury selection because Appellant detrimentally relied on this advice and struck a potential juror before the Court informed Appellant that he only had five strikes. *See* U.S. Const. Amend. V and VI; *see also State v. Jones*, 343 S.C. 562, 541 S.E.2d 813 (2001) (finding "Appellant reasonably relied upon the [court's] representation that [it] intended to give that charge to the jury. The decision to alter the charge, after the argument,

was fundamentally unfair."); *State v. Johnson*, 418 S.C. 587, 795 S.E.2d 171 (Ct. App. 2016) (finding "the trial court's decision was fundamentally prejudicial to Appellant because Appellant crafted his closing argument in reliance on the trial court's adamancy that it would not charge 'the hand of one is the hand of all' during the charge conference.").

In discussing the jury selection process during the pre-trial hearing, Appellant indicated that he would have ten peremptory strikes, and the Trial Court confirmed, "*you'll have ten.*" R. 19, l. 23 – 20, l. 9 (emphasis added). After Appellant had struck one potential juror, the Trial Court interjected, "*The strikes are actually five and five, not five and ten.*" R. 77, l. 4 – 78, l. 3 (emphasis added). After Appellant struck a second potential juror, the Trial Court reminded Appellant that he had three strikes remaining. T. 78, ll. 22-25. Appellant responded, "*I thought I had ten*", and the Trial Court admitted, "*Initially I did as well but not for attempted murder.*" R. 79, ll. 3-14 (emphasis added).

Appellant subsequently argued to the Trial Court, "*Your Honor, I might not have struck one of the first for cause thinking I had ten . . . the first couple of ones I may not have struck if I knew I only had five [and] [s]ince I've only got one more, you can seat the juror.*" R. 84, ll. 9-13 (emphasis added). Appellant exhausted his final strike on juror number 176, David McMahan, who knew, John Montgomery, the former Dean at the University of South Carolina School of Law. R. 86, l. 1 – 87, l. 4.

It is fundamentally unfair that Appellant was prejudiced by the Trial Court's erroneous confirmation that he had ten peremptory strikes. Therefore, the Trial Court erred in advising Appellant that he had ten peremptory strikes prior to jury selection because

Appellant detrimentally relied on this advice and struck a potential juror before the Court informed Appellant that he only had five strikes. *See* U.S. Const. Amend. V and VI.

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IV. THE TRIAL COURT ERRED IN REFUSING TO GRANT A MISTRIAL BECAUSE THE COURT PROVIDED AN UNCONSTITUTIONALLY COERCIVE *ALLEN* CHARGE TO THE JURY WHEN VIEWED IN ITS CONTEXT AND UNDER ALL CIRCUMSTANCES.

In determining whether to grant a mistrial, our Supreme Court has noted that "[t]he less than lucid test is . . . whether the mistrial was dictated by manifest necessity or the ends of public justice, the latter being defined as the public's interest in a fair trial designated to end in just judgment." *State v. Prince,* 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983).

"An *Allen* charge is an instruction advising deadlocked jurors to have deference to each other's views, that they should listen, with a disposition to be convinced, to each other's arguments." *State v. Lee-Grigg*, 374 S.C. 388, 418 n.1, 649 S.E.2d 41, 57 n.1 (Ct. App. 2007) (internal quotation marks omitted), aff'd, 387 S.C. 310, 692 S.E.2d 895 (2010) (citing *Allen v. United States*, 164 U.S. 492 (1896) (holding that a trial judge may give a charge urging jurors who appear to be "deadlocked" to reach a verdict)). "The typical judicial mechanism for encouraging an indecisive jury is the *Allen* charge, in which jurors are instructed on, among other things, their duties to approach the evidence with an open mind and consider the opinions of their fellow jurors." *State v. Robinson,* 360 S.C. 187, 193, 600 S.E.2d 100, 103 (Ct. App. 2004).

"Whether an *Allen* charge is unconstitutionally coercive must be judged 'in its context and under all the circumstances.'" *Tucker v. Catoe,* 346 S.C. 483, 490, 552 S.E.2d 712, 716 (2001) (quoting *Lowenfield v. Phelps,* 484 U.S. 231, 237 (1988)). In *Tucker,* our Supreme Court adopted the standard set by the United States Supreme Court in *Lowenfield* to determine whether an *Allen* charge is unconstitutionally coercive. The following factors to be considered are as follows:

(1) The charge did not speak specifically to the minority juror(s);

(2) The judge did not include in his charge any language such as "You have got to reach a decision in this case;"

(3) There was no inquiry into the jury's numerical division, which is generally coercive; and

(4) While the jury returned a verdict shortly after the supplemental charge, which suggests a possibility of coercion, weighing against this is the fact that trial counsel did not object either to the inquiry into whether the jurors believed further deliberation would result in a verdict, nor to the supplemental charge.

Tucker, 346 S.C. at 492, 552 S.E.2d at 716 (citing *Lowenfield,* 484 U.S. at 237).

In *State v. Williams*, our Supreme Court cautioned trial judges "against using the following language:"

> '*[W]ith the hope that you can arrive at a verdict.*' Because jurors are not required to reach a verdict after expressing that they are deadlocked, we believe this language could potentially be construed as being coercive. Furthermore, to alleviate problems in future cases where the jury is deadlocked, we would advise trial judges to instruct the jurors not to disclose their numerical division.

Id., 386 S.C. 503, 690 S.E.2d 62 (2010) n.7 (emphasis added); *see also Dawson v. State*, 352 S.C. 15, 20, 572 S.E.2d 445, 447 (2002) (stating an *Allen* charge cannot be unconstitutionally coercive, "but must instead be even-handed, directing both the majority and the minority to consider the other's views").

Discussion

In this case, the Trial Court erred in refusing to grant a mistrial after the Court provided an unconstitutionally coercive *Allen* charge to the jury when viewed in its context and under all the circumstances. *See Williams,* 386 S.C. 503, 690 S.E.2d 62, n.7. Specifically, the Trial Court instructed the jury:

> *[T]here's no reason for me to believe . . . that more or clearer evidence will be produced on one side or the other.* . . I, therefore, ask that you return to your deliberations with the *hope that you can arrive at a verdict within a reasonable amount of time as to each indictment.*

R. 384, ll. 3-10 (emphasis added). *Id.* ("caution[ing] trial judges against using the following language: 'with the hope that you can arrive at a verdict.' Because jurors are not required to reach a verdict after expressing that they are deadlocked, we believe this language could potentially be construed as being coercive.").

Here, after deliberating for approximately four hours, the jury sent out a second note stating, "*We, the jury, have not come to a unanimous verdict concerning all twelve counts and at this point we represent a hung jury.*" R. 380, ll. 19-22 (emphasis added). The State indicated that the jury "can render a verdict on some charges and others can mis-try." R. 381, ll. 2-3. The State further noted, "[I]t's, of course, in your discretion to give an *Allen* charge." R. 381, ll. 3-4. Appellant moved for a mistrial and objected to the Trial Court instructing the jury with an *Allen* charge. R. 381, ll. 6-14.

The Trial Court then provided the above instruction the jury, and Appellant renewed his objection. R. 382, l. 1 – 385, l. 15. Approximately two hours later, the jury found Appellant guilty on eight counts of Assault and Battery, First Degree and one count of Assault and Battery, Third Degree. R. 386, l. 13 – 389, l. 10. The jury also found Appellant not guilty on three counts of Attempted Murder. R. 386, ll. 20-24; R. 388, ll. 17-21; R. 389, ll. 3-7.

The Trial Court's response to the jury after rendering their verdict is in direct contradiction of with his prior jury instruction: *Compare* "there's no reason for me to believe . . . that more or clearer evidence will be produced on one side or the other" *with*

"considering the evidence presented and perhaps in some of your minds a lack of clarity as to what was going on with Mr. Kester there . . . ." R. 384, ll. 3-10; R. 395, ll. 4-6. Therefore, the Trial Court erred in refusing to grant a mistrial after the Court provided an unconstitutionally coercive *Allen* charge to the jury when viewed in its context and under all the circumstances. *See Williams,* 386 S.C. 503, 690 S.E.2d 62, n.7.

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V. THE TRIAL COURT ERRED IN IMPOSING CONSECUTIVE SENTENCES THAT AMOUNT TO A *DE FACTO* LIFE SENTENCE BECAUSE THE GROSSLY DISPROPORTIONATE AGGREGRATE SENTENCE IS CRUEL AND UNUSUAL PUNISHMENT BASED ON COMPARATIVE SENTENCES AND CLOSELY CONNECTED OFFENSES.

The Eighth Amendment to the United States Constitution, which applies against the States by virtue of the Fourteenth Amendment, provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. The Eighth Amendment prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime. *Solem v. United States*, 463 U.S. 277, 284 (1983).

"[I]n analyzing proportionality under the Eight[h] Amendment outside the capital context, South Carolina courts shall first determine whether a comparison between the sentence and the crime committed gives rise to an inference of gross disproportionality." *State v. Harrison*, 402 S.C. 288, 299-300, 741 S.E.2d 727, 733 (2013). *See also State v. Pittman*, 373 S.C. 527, 565, 647 S.E.2d 144, 164 (2007) ("To establish that evolving standards of decency preclude his punishment, [Appellant] bears the 'heavy burden[]' of showing that our culture and laws emphatically and well nigh universally reject it." (first alteration by court) (quoting *Harris v. Wright*, 93 F.3d 581, 583 (9th Cir. 1996)).

"In the rare instance that this threshold comparison gives rise to such an inference, intrajurisdictional and interjurisdictional analysis is appropriate. Courts may then look to whether more serious crimes carry the same penalty, or more serious penalties, and the sentences imposed for commission of the same crime in other jurisdictions. Courts should use this comparative analysis to confirm the gross disproportionality inference, and not to develop an inference when one did not initially exist." *Harrison*, 402 S.C. at 299-300,

741 S.E.2d at 733 (citing *Harmelin*, 501 U.S. at 1005 ("The proper role for comparative analysis of sentences, then, is to validate an initial judgment that a sentence is grossly disproportionate to a crime...This conclusion neither 'eviscerates' Solem, nor 'abandons its second and third factors.'").

Discussion

In this case, the Trial Court erred in imposing consecutive sentences that amount to a *de facto* life sentence when the grossly disproportionate aggregate sentence is cruel and unusual punishment based on comparative sentences and closely connected offenses. R. 439, ll. 24-25. *See* U.S. CONST. amend. VIII; *Harrison*, 402 S.C. at 299-300, 741 S.E.2d at 733; *see also* S.C. Code § 19-1-150 (2019) ("When necessary, in a civil action or other litigation, to establish the life expectancy of a person from any period in his life, whether he is living at the time or not, the table below must be received in all courts and by all persons having power to determine litigation as evidence, along with other evidence as to his health, constitution, and habits, of the life expectancy of the person.").

During sentencing, Appellant argued, "I believe . . . you aren't supposed to sentence for separate things if it's one thing... Aren't they all sentenced like it's one so -- and not separate?" R. 429, ll. 7-11. In response, the Trial Court replied, "no". R. 429, ll. 12-14. Appellant also noted local comparative cases and argued, "[W]e need to compare some of the other cases in the area." R. 429, ll. 21-23; R. 431, ll. 13-16. According to the life expectancy table in the South Carolina Code of Laws, Appellant's received a *de facto* life sentence. *See* S.C. Code § 19-1-150.

When comparing Appellant's case (i.e., the assault and battery, first degree, convictions and the injuries of the victims) with more serious cases (e.g., convictions for

murder; attempted murder, assault and battery of a high and aggravated nature, felony DUI, resulting in death or great bodily injury, etc...), the sentence imposed by the Trial Court is grossly disproportionate. *See Harrison*, 402 S.C. at 299-300, 741 S.E.2d at 733. The same rationale applied to Section 17-25-50 of the South Carolina Code of Laws should apply in the instant case because Appellant is not a repeat offender, the crimes occurred at the same time, and he should not receive a *de facto* life sentence as punishment. *Cf.* S.C. Code § 17-25-50 (2019) (requiring the sentencing court to "treat as one offense any number of offenses which have been committed at times so closely connected in point of time that they may be considered as one offense."); *see also State v. Gordon*, 356 S.C. 143, 155 588 S.E.2d 105, 111 n.12 (2003) (holding S.C. Code "§ 17-25-45 and § 17-25-50 must be construed together in determining whether crimes committed at points close in time qualify for a recidivist sentence" and noting "this does not mean Gordon is not subject to separate sentences for these offenses, merely that he is not subject to a recidivist LWOP sentence as a result of his second trafficking conviction.").

Therefore, the Trial Court erred in imposing consecutive sentences that amount to a *de facto* life sentence when the grossly disproportionate aggregate sentence is cruel and unusual punishment based on comparative sentences and closely connected offenses. *See* U.S. CONST. amend. VIII; *see also State v. Smith*, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981) ("It is apparent here the sentencing judge did not exercise any discretion but based his ruling on an erroneous view of the law. It is an equal abuse of discretion to refuse to exercise discretionary authority when it is warranted as it is to exercise the discretion improperly.").

CONCLUSION

Based on the foregoing reasons, Appellant James Kester respectfully requests that this Court reverse the circuit court and remand to the Richland County Court of General Sessions for a new trial (Issues II, III, IV, and V). However, if necessary, Appellant respectfully requests that the Court remand to the Richland County Court of General Sessions for a hearing to determine Appellant's competency to stand trial (Issue I). *See Blair*, 275 S.C. at 534, 273 S.E.2d at 538; *In re Christopher H*, 359 S.C. 161, 596 S.E.2d 500 (Ct. App. 2004).

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of General Sessions

Clifton Newman, Circuit Court Judge

Appellate Case No. 2018-001852

Case No. 2017-GS-40-5220; 5223; 5224; 5226-5227; 5229-5232

The State of South Carolina,

Respondent,

v.

James Kester,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned Counsel certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR.

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