

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

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S.C. SUPREME COURT

**Appeal from Horry County
Honorable D. Robert E. Hood, Circuit Court Judge**

THE STATE,

Respondent,

v.

JEROME JENKINS, JR.,

Appellant

Appellate Case No. 2019-001280

INITIAL BRIEF OF RESPONDENT

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- I. **The trial judge properly refused to find S.C. Code Ann. § 16-3-20(B) (2019) unconstitutional because it requires a defendant to plead not guilty if he wishes to be sentenced by a jury in a capital case since Appellant did not have a constitutional or statutory right to have his guilty plea accepted, this Court has previously rejected similar claims in other capital cases, and because much of Appellant’s argument – including his reliance on *Ring v Arizona* and *Hurst v. Florida* - is not preserved for appellate review since it was not presented to the trial judge.....7**

- II. **The trial judge did not abuse his discretion by refusing to allow Dr. Donna Schwartz-Maddox, the defense’s forensic psychiatrist, to testify that co-defendant McKinley Daniels made a statement to her that he told Appellant to kill victim Stull because although Dr. Maddox could rely on this statement in reaching her opinion that Appellant was acting under the dominion of Daniels and his brother during the crimes, Daniels’ statement was inadmissible since neither Daniels nor Appellant were unavailable witnesses under Rule 804(a), SCRE. Also, Appellant was not prejudiced by the judge’s ruling because either he or Daniels could have testified to the statement, and the trial judge ruled that Appellant could inform the jury Daniel told him to kill Ms. Stull in his statement to the jury.....18**

- III. The trial judge properly refused to allow Appellant to inform jurors in closing argument that the trial judge would impose a sentence of life imprisonment if they failed to reach a unanimous verdict on the appropriate sentence because this ruling was consistent with this Court's precedent, neither the Eighth Amendment nor Due process require that jurors be informed of the consequence of the failure to reach a unanimous verdict as to sentence, and the proposed argument was both an incorrect statement of State law and inconsistent with the trial judge's sentencing phase jury charge. 29
- IV. Assuming *arguendo* that the issue is preserved for appellate review, the trial judge did not abuse his discretion by not excusing Juror 161 for cause 39
- V. The trial judge did not abuse his discretion by refusing to excuse Juror 350 because of her alleged inability to impose a life sentence "for any reason, or no reason at all, or simply as an act of mercy," since a review of her voir dire responses reflects that she was not life or mercy impaired 49
- VI. The Court should not address the merit of Appellant's claim of trial judge error in allowing the State to the introduce evidence of Appellant's misconduct while incarcerated prior to trial because he was incarcerated at maximum security prison and on death row as a pre-trial detainee where (1) the argument below was based on the assertion that housing him in SCDC as a pretrial detainee violated the Eighth Amendment proscription against cruel and unusual punishment, but the United States Supreme Court has held that the Eighth Amendment does not apply to pretrial detainees; (2) Appellant's due process argument is not properly preserved for this Court's review because it was not raised in the trial court; (3) a pretrial detainee has no constitutional right to be incarcerated in a particular prison or jail; (4) Appellant is attempting to take advantage of alleged error his conduct has induced; (5) his present claim is contrary to the legislative intent behind enactment of S.C. Code Ann. § 24-3-80 (2020); and (6) the location of his confinement is irrelevant to the admissibility of evidence of his misconduct because the disciplinary infractions for which he was convicted

	demonstrate his violent character, regardless of where he committed them. Alternatively, the trial judge properly allowed the State to introduce evidence of his pretrial misconduct while incarcerated because he was incarcerated at maximum security prison and on death row as a safekeeper as the result of his own misconduct, and his attacks on his status as a safekeeper do not provide a statutory, evidentiary, or a constitutional basis for excluding evidence of his misconduct that clearly demonstrates his future dangerousness	56
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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

1. Whether the court erred by refusing to declare the state's death penalty statute, S.C. Code § 16-3-20(B), unconstitutional to the extent it mandates that the sentencer is the judge and not a jury, since the statute denied appellant jury sentencing with the benefit of the strongest mitigating evidence that he pled guilty and accepted responsibility for his crimes particularly where the judge indicated he would sentence appellant to death if he pled guilty, and since appellant on direct appeal is entitled the benefit of S.C. Code § 16-3-20(B) being declared unconstitutional as to those defendants who were denied jury sentencing after pleading guilty?
2. Whether the court erred by refusing to allow forensic psychiatrist Donna Schwartz-Maddox to testify that co-defendant McKinley Daniels admitted that he told appellant to kill victim Stull, since Dr. Maddox relied upon this statement in forming her expert opinion that appellant was acting under the dominion of Daniels and his brother during the crimes, it was a statement against interest under Rule 804(b)(3), SCRE giving it indicia of reliability, and the judge erroneously excluded this mitigating evidence as hearsay during the penalty phase?
3. Whether the court erred by ruling defense counsel could not inform the jury during his penalty phase closing argument that if the jury could not reach a unanimous verdict on the death penalty or a life imprisonment without parole recommendation that the court would sentence appellant to life imprisonment without the possibility of parole since this was accurate sentencing information and the court therefore placed an unreasonable limitation on appellant's right to a meaningful closing argument?
4. Whether the court abused its discretion by refusing to excuse Juror 161, Harry Johnson, since he was a Myrtle Beach Detention Center [MBDC] officer who had received an e-mail with a BOLO on appellant and still shots in real time regarding the crime, appellant had been incarcerated in MBDC while the juror was an officer there, and where appellant was incarcerated at J. Reuben Long Detention Center in the same county where Juror 161 worked in law enforcement, since the juror should have been excused given all of these unusual circumstances?
5. Whether the court erred by refusing to disqualify Juror 350, Lauren Stephens, since her belief that the vote for a sentence had to be based on the trial evidence, and that a life sentence verdict for any reason or no reason at all was not "necessarily morally correct," showed she was an unqualified juror because she believed giving a life sentence as a simple act of mercy was morally incorrect?
6. Whether the court erred by refusing to exclude evidence of appellant's pre-trial misconduct in the Department of Corrections, where appellant's imprisonment in a maximum security prison and on death row as a pre-trial detainee constituted unconstitutional punishment, and cruel and unusual punishment, since the state should not have been able to exploit this illegality by admitting evidence of appellant's misconduct in maximum security prisons to urge death as a proper punishment?

7. Whether the court erred by excluding evidence of the Lee County Correctional Institution riot, where appellant was housed at the time, in which seven inmates were killed since this evidence was admissible in response to and to explain the state's evidence of appellant's misconduct, his inability to cope, while being held in dangerous maximum security prisons as a pre-trial detainee?

RESPONDENT'S COUNTER-STATEMENT OF ISSUES ON APPEAL

I. Did the trial judge properly refuse to find S.C. Code Ann. § 16-3-20(B) (2019) unconstitutional because it requires a defendant to plead not guilty if he wishes to be sentenced by a jury in a capital case since Appellant did not have a constitutional or statutory right to have his guilty plea accepted, this Court has previously rejected similar claims in other capital cases, and because much of Appellant's argument – including his reliance on *Ring v Arizona* and *Hurst v. Florida* - is not preserved for appellate review since it was not presented to the trial judge.

II. Did the trial judge abuse his discretion by refusing to allow Dr. Donna Schwartz-Maddox, the defense's forensic psychiatrist, to testify that co-defendant McKinley Daniels made a statement to her that he had told Appellant to kill victim Stull because although Dr. Maddox could rely on this statement in reaching her opinion that Appellant was acting under the dominion of Daniels and his brother during the crimes, Daniels' statement was inadmissible since neither Daniels nor Appellant were unavailable witnesses under Rule 804(a), SCRE. Also, was Appellant prejudiced by the judge's ruling because either he or Daniels, and the trial judge ruled that Appellant could inform the jury Daniel told him to kill Ms. Stull in his statement to the jury.

III. Did the trial judge properly refuse to allow Appellant to inform jurors in closing argument that the trial judge would impose a sentence of life imprisonment if they failed to reach a unanimous verdict on the appropriate sentence where this ruling was consistent with this Court's precedent, neither the Eighth Amendment nor Due process require that jurors be informed of the consequence of the failure to reach a unanimous verdict as to sentence, and the proposed argument was both an incorrect statement of State law and inconsistent with the trial judge's sentencing phase jury charge.

IV. Assuming *arguendo* that the issue is preserved for appellate review, despite Appellant's failure to strike Juror 161 when he had all of his peremptory challenges available, did the trial judge abuse his discretion by not excusing Juror 161 for cause.

V. Assuming *arguendo* that the issue is preserved for appellate review, despite Appellant's failure to strike Juror 350 when he had peremptory challenges available, did the trial judge abuse his discretion by refusing to excuse Juror 350 because of her alleged inability to impose a life sentence "for any reason, or no reason at all, or simply as an act of mercy," since a review of her voir dire responses reflects that she was not life or mercy impaired.

VI. Whether the Court should address the merits of Appellant's claim that the State should not have been permitted to introduce evidence of Appellant's misconduct while incarcerated prior to trial because he was incarcerated at maximum security prison and on death row as a pre-trial detainee, where (1) the argument below was based on the assertion that housing him in SCDC as

a pretrial detainee violated the Eighth Amendment proscription against cruel and unusual punishment, but the United States Supreme Court has held that the Eighth Amendment does not apply to pretrial detainees, only those who were convicted of a crime(s); (2) Appellant's due process argument is not properly preserved for this Court's review because it was not raised in the trial court; (3) a pretrial detainee has no constitutional right to be incarcerated in a particular prison or jail; (4) Appellant is attempting to take advantage of alleged error he has induced; (5) his present claim is contrary to the legislative intent behind enactment of S.C. Code Ann. § 24-3-80 (2020); and (6) the location of his confinement is irrelevant to the admissibility of evidence of his misconduct because the disciplinary infractions for which he was convicted demonstrate his violent character, regardless of where he committed them?

VII. Did the trial judge properly allow the State to introduce evidence of Appellant's misconduct while incarcerated prior to trial because he was incarcerated at maximum security prison and on death row as a pre-trial detainee as the result of his own misconduct, and Appellant's attacks on his status as a safekeeper do not provide a statutory, evidentiary, or a constitutional basis for excluding evidence of his misconduct that clearly demonstrates his future dangerousness.

VIII. Did the trial judge properly exclude evidence of the Lee Correctional Institution riot because this Court has previously held that, and because rather than a fair response to the prosecution's evidence of misconduct by Appellant while incarcerated, this evidence was irrelevant to Appellant's individual characteristics

STATEMENT OF THE CASE

Respondent accepts Appellant's Statement of the Case for purposes of this appeal.

STATEMENT OF FACTS

A. The guilt phase.

Viewed in the light most favorable to the prosecution, the direct and circumstantial evidence presented in the guilt phase of Appellant's trial was that on the night of January 2, 2015, at 9:30 p.m., Bala Parachuri and Jimmy McZeke were working as the clerks of the Sunhouse convenience store at the intersection of Highway 905 and Red Bluff Road, in Horry County. This is only a few miles from Loris, S.C. Mr. Parachuri and McZeke could see police blue-lights flashing in the distance because a Dollar Tree store just a few hundred yards away had just been robbed, and police were at that location working the crime scene. See *Tr. 1495-98; 1512-41; 1543-48; 1561-63*.

At that time, a friend entered the store and told McZeke and Mr. Parachuri they needed to close the store because of the nearby robbery. This friend then left. So, Mr. Parachuri instructed McZeke to lock the ice box outside the store and start turning off the lights to the gas pumps, as well as those at the back of the store. While McZeke was turning off lights at a switch box in the back of the store, two armed, masked men entered the store carrying 9 mm semi-automatic firearms. One of the men was Appellant Jerome Jenkins, Jr. (a/k/a. J.J.). The other armed man was McKinley Daniels. *Tr. 1495-98; 1512-41; 1543-48; 1561-63*; State's Ex. 52-58.

As soon as the two masked assailants entered the store, one began firing shots at McZeke, who was at the back of the store, even though he did nothing to provoke an attack. McZeke immediately ran into the store bathroom, as bullets were fired into a store wall near him. He was struck in the head and cut by broken glass from the gunshots. McZeke locked the bathroom door

and laid down on the bathroom floor. One of the men then fired a bullet that went through the bathroom door and into the bathroom where McZeke was lying. *Tr. 1498-1503; 1512-41; 1543-48; 1561-63*; State's Ex. 52-58.

Appellant and McKinley Daniels then turned their attention to Mr. Parachuri. They robbed him of the money in his cash register at gunpoint. Mr. Parachuri did not resist the armed robbery and had his hands up throughout the crime. As Appellant and Daniels were about to leave the store with the cash, they both men fired their 9 mm pistols multiple times at Mr. Parachuri, whose hands were still in the air. He was struck in several locations, including his head, neck, multiple times in his chest, and his groin or leg. He had a total of six entrance gunshot wounds, one of which could have been a re-entry. All but one were through and through gunshot wounds. He died almost immediately from the head and chest wounds. All of these crimes were captured on the store's surveillance video. *Tr. 1504-1511; 1512-41; 1543-48; 1561-70*; State's Ex. 52-58.

After murdering Mr. Parachuri, both men left the store with the cash they had stolen. Their co-conspirator, James Daniels, McKinley Daniels' brother, was waiting nearby in the getaway car, a grey sedan. The three men then fled the area in this car. *Tr. 1512-41; 1530-41; 1554-57; 1561-63; 1588-59*; State's Ex. 52-58.

McZeke waited about fifteen minutes before he finally left the store bathroom. Once outside the bathroom, all he could see was smoke from the gunshots, and he could not see Mr. Parachuri. So, he snuck along a wall inside the store, ran out the door, jumped in his car, and drove to the nearby Dollar Tree where police were still working that robbery. He immediately notified police of the armed robbery of the Sunhouse and police responded there. Mr. Parachuri was dead when the officers arrived. They found him lying on the floor behind the store's cash register. There were three bullet holes in the back wall of the store where Appellant and Daniels had tried to kill

McZeke when they first entered the store. Another bullet hole was found in the bathroom door. A total of nine fired 9 mm shell casings were found on the store floor. It was later determined that the fired shell casings were fired by two different 9 mm pistols. Four total fired projectiles and one partial projectile were also recovered inside the store. *Tr. 1499-1503; 1512-41; 1543-48; 1561-63.*

The pathologist found that Mr. Parachuri had been shot at least five times and possibly a sixth separate time in his arm. There were six entrance wounds and five exit wounds. Only one fired projectile was recovered from his body, the shot to the groin/leg area. This bullet would later prove significant in the investigation because it was fired by a High Point 9 mm, which was one of the two weapons used in the robbery/murder, as were several fired shell casings recovered in the store. The store surveillance camera footage would also prove significant in identifying the perpetrators. *Tr. 1504-41; 1575-85; State's Ex. 52-58.*

Mr. Parachuri's murder remained unsolved for several weeks. On February 5, 2015, investigators with the Horry County Public Safety Department (HCPD) reviewed the surveillance video of Mr. Parachuri's murder, in an effort to find something significant that would help solve the case. One investigator noticed a person of interest enter the store approximately twenty minutes before the murder, purchase an item, and leave the store in a gray sedan. *Tr. 1548-58; 1561-70; State's Ex. 52-58.*

Another investigator with HCPD walked into the room while the surveillance video was being viewed by other detectives. He immediately recognized the person of interest as James Daniels. This investigator told others present that the individual in the store twenty minutes before Mr. Parachuri's murder was James Daniels and that he knew this because he and Daniels are distant cousins. The investigator also told the other investigators that James Daniels had just gotten out of

prison before the string of convenience store robberies and murders, and so had James' brother, McKinley Daniels. The investigator likewise told the other investigators that James Daniels drove a gray sedan similar to the one seen in the surveillance videotape and that it was owned by James' girlfriend. *Tr. 1548-58; 1561-70; State's Ex. 52-58.*

Police traced James Daniels' residence to that of his girlfriend. Investigators then traveled to that residence, where they found the grey sedan parked in the driveway of James Daniels' girlfriend. A search warrant was obtained, and police seized the grey sedan. In the search, police recovered a ski hat, a dark gray hooded sweatshirt that James Daniels had worn, and a blue bandanna similar to that worn in the armed robbery and murder. *Tr. 1531-36; 1554-55; 1557; 1587-90.* A search warrant was likewise executed at Appellant's residence. There, police recovered a pair of black tennis shoes. *See Tr. 1537-39.* Police questioned James Daniels, who admitted presence at the murder and armed robbery. He was arrested following this interview and charged with murder, attempted murder, and armed robbery. *Tr. 1590.*

Police then interviewed James' older brother, McKinley, who was likewise arrested. Appellant became a suspect and was interviewed based on information provided by the Daniels brothers. In his first interview, he denied involvement and refused to talk to police. Following his arrest, however, he initiated contact with an investigator and gave a statement. Inv. Gregory Len testified on cross-examination that he was investigating three armed robberies at the time, two of which resulted in murder. Appellant gave a total of four statements. A redacted version of one statement (State's Ex. 75) was published to the jury. In that statement, he admitted to his involvement in the crimes. *Tr. 1604-07; 1611-17; 1623-24.*

B. The sentencing phase.

The State presented significant evidence of aggravation in the sentencing phase. First, the

State introduced evidence that Appellant had been previously convicted of burglary in the second degree and grand larceny in October of 2011 and convicted of distribution of a controlled substance in May of 2013. *Tr. 1801-04.*

The jury also learned that the January 2, 2015 offenses went unsolved for several weeks, in spite of diligent investigation by a task force, and they were only solved after two more armed robberies and an additional murder were committed on January 25, 2015. Specifically, the State introduced evidence Appellant and his co-defendants robbed the Scotchman on Lake Arrowhead Rd., near Kingston Plantation. Approximately an hour later, they robbed the Sunhouse in Conway, S.C.

In the Sunhouse robbery, the clerk, Trish Stull, was murdered. Like Mr. Parachuri, she was shot with a 9 mm handgun. Both of these crimes were also recorded on surveillance video, and both crimes were committed by what appeared to be the same two men who murdered Mr. Parachuri. In these January 25th crimes, only one assailant was armed with a pistol. Appellant and McKinley Daniels committed the armed robbery of the Sunhouse convenience store in Conway, and Appellant murdered Trish Stull during that armed robbery by shooting her with a 9 mm pistol.¹ A forensic firearms analyst from SLED opined that two fired shell casings recovered from the scene of the January 25 armed robbery of the Sunhouse convenience store in Conway (State's Exs. 132-33) were fired by the same weapon as the casings recovered at Sunhouse where Mr. Parachuri was murdered. Further, the jury heard an un-redacted version of Appellant's statement to police (State's Ex. 144), which was the third interview of him, as well as a statement he gave on his fourth

¹ In reviewing still photographs taken from the Scotchman and Sunhouse surveillance videos, it was clear that one assailant was wearing a gray hooded sweatshirt, red pants, and dark colored shoes with shiny or reflective laces. This was James Daniels. A pair of dark low-cut tennis shoes was worn by the other assailant and a pair of shoes matching those shoes was recovered in a search of Appellant's residence. *Tr. 1762-77; 1789-92.*

interview (State's Ex. 146). He admitted in one of the interviews that he was the only one with a gun in the Scotchman armed robbery. *Tr. 1728-35; 1738-49; 1751-79; 1783-99; 1805-12; 1825-26; 1832; 1838-43.*

Although the girlfriend of Appellant's brother worked at the Scotchman and although James Daniels told him to "kill the B," Appellant denied that it was an "inside job" and he did not murder the clerk. *Tr. 1840-43.* Still, the clerk, Barbara McDowell, testified that during the armed robbery of the Scotchman, one of the men threatened to shoot her if she could not open the register. She ultimately opened it, and the assailants stole roughly \$ 25.00 or \$ 26.00. *Tr. 1728-35;* State's Ex. 52-58.

The State also presented a limited amount of victim impact evidence through Visweswara Cheedipudi, a close friend of Mr. Parachuri for eighteen years. *Tr. 1854-61.* Finally, even though the State did not introduce evidence of any of the disciplinary infractions that Appellant committed at the J. Reuben Long Detention Center, it presented extensive evidence of his disciplinary infractions while held as a safekeeper by SCDC, which is discussed in Arguments VI and VII.

STANDARD OF REVIEW

"In criminal cases, appellate courts sit to review errors of law only, and are therefore bound by the trial court's factual findings unless clearly erroneous." *State v. Robinson*, 410 S.C. 519, 526, 765 S.E.2d 564, 568 (2014). *See also State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). **Issues I-II, VI & VII:** When reviewing an evidentiary ruling, the appellate court gives great deference to the trial judge because the reception or exclusion of evidence is a matter left largely to the trial judge's sound discretion. *State v. Bixby*, 388 S.C. 528, 556, 698 S.E.2d 572, 587 (2010). An abuse of discretion occurs when the trial judge's conclusions lack evidentiary support or are controlled by an error of law. *State v. Elders*, 386 S.C. 474, 480, 688 S.E.2d 857, 861 (Ct. App.

2010). Likewise, “[i]n appeals of pretrial rulings, [the appellate court] is ‘bound by fact findings in response to motions preliminary to trial when the findings are supported by the evidence and not clearly wrong or controlled by error of law.’” *Reed v. Becka*, 333 S.C. 676, 684, 511 S.E.2d 396, 400 (Ct. App. 1999) (quoting *State v. Amerson*, 311 S.C. 316, 320, 428 S.E.2d 871, 873 (1993)).

Issue III: The trial judge is vested with broad discretion in dealing with the range and propriety of closing arguments and ordinarily his rulings on such matters will not be disturbed. *See State v. Chaffee*, 285 S.C. 21, 29, 328 S.E.2d 464, 468 (1984) *cert. denied*, 471 U.S. 1009 (1985).

Issues IV-V: The determination whether a juror is qualified to serve in a capital case is within the discretion of the trial judge and is not reversible on appeal unless wholly unsupported by the evidence. *State v. Dickerson*, 395 S.C. 101, 115, 716 S.E.2d 895, 903 (2011).

ARGUMENTS

I. The trial judge properly refused to find S.C. Code Ann. § 16-3-20(B) (2019) unconstitutional because it requires a defendant to plead not guilty if he wishes to be sentenced by a jury in a capital case since Appellant did not have a constitutional or statutory right to have his guilty plea accepted, this Court has previously rejected similar claims in other capital cases, and because much of Appellant’s argument – including his reliance on *Ring v Arizona* and *Hurst v. Florida* - is not preserved for appellate review since it was not presented to the trial judge.

Notwithstanding Appellant’s argument to the contrary, the trial judge properly refused to find S.C. Code Ann. § 16-3-20(B) (2019) unconstitutional because it requires a defendant to plead not guilty if he wishes to be sentenced by a jury in a capital case. Appellant did not have a constitutional or statutory right to have his guilty plea accepted. Also, this Court has previously rejected similar claims in other capital cases, and much of Appellant’s argument – including his reliance on *Ring v Arizona*, 536 U.S. 584 (2002), and *Hurst v. Florida*, 577 U.S. 92 (2016) - is not preserved for appellate review since it was not presented to the trial judge.

A. How issue was raised in the trial court.

At a March 7, 2019, status conference, the trial judge asked whether or not there had been any plea offers or whether any plea offers were still “on the table.” The Deputy Solicitor stated, “There are no plea offers. There has never been a plea offer in it. Once we served notice, we have no intention absent an order of incompetency or something by the Court to retract that notice.” However, he noted that Appellant’s lead trial counsel had said “we can take care of this if you let him plead to life and offers that in a discussion. And he has been relentless in working for his client in that regard, I will tell you that.” *03/07/19 Tr. 15-16.*

After the prosecution left the courtroom, the trial judge had an ex parte discussion with Appellant in the presence of both attorneys. Of relevance to the present issue, Appellant asked the trial judge if the State could “make me go to trial,” without offering a plea bargain. The trial judge told him that he could plead guilty as charged. *03/07/19 Tr. 24-25.* An exchange then occurred as follows:

THE DEFENDANT: So if I plead guilty to the death sentence, I would be on death row?

THE COURT: Yeah.

THE DEFENDANT: Not a chance.

THE COURT: Right. So, you know, you say can they make me. The issue with plea negotiations and judges is this, is that I can't make -- this morning, I taught a fourth grade class government, okay.

So let's go back to fourth grade. Fourth grade government is the way I look at things, right. In the fourth grade government, it says the legislative branch is over here; the executive branch is over here, and the judicial branch is over here.

Your prosecutors are in the executive branch of government. ... [T]he law does not allow me the power to make them give you a plea offer.

THE DEFENDANT: No, I understand that. I was just asking was it legal --

THE COURT: Yeah, they don't have to offer --

THE DEFENDANT: -- to refuse.

THE COURT: As long as they have the statutory notice in place for the death penalty, they don't have to offer you any -- make you any plea offer at all, yeah. There's nothing I can do to stop them from doing that. Does that make sense?

Now, they can change their mind. You know, I don't know that they're going to. I doubt that they are. But I promise you that Mr. Wilson has probably asked them to more times than he cares to remember.

THE DEFENDANT: Oh, I know that. I can say that because he's asked me will I take a life sentence.

03/07/19 Tr. 25, line 8 – 26, line 13.

At an April 25-26, 2019, motion hearing, Appellant's lead counsel, Mr. Wilson, argued a motion to find § 16-3-20(B) unconstitutional because it required a judge to determine the appropriate sentence in capital cases where the defendant pleads guilty. *See R. ____*. Counsel argued that § 16-3-20(B) deprives a defendant of "his Constitutional right to have a trial by jury on the sentencing of his case if he elects to plead guilty to all of his charges." He argued that there were "two separate trials" because the guilt and sentencing phases were bifurcated. Thus, § 16-3-20(B) deprived him of his Fifth and Sixth Amendment right to a jury trial on sentencing. Counsel further stated that Appellant would otherwise plead guilty to all of the charges against him because he did not contest his guilt of those charges. ***04/25/19 Tr. 192-94.***

The trial judge thought that this issue had been rejected in another capital case. Although the Deputy Solicitor was unfamiliar with that case, he observed that Rule 14(b), SCRCrim.P., governed a defendant's waiver of his right to a jury trial, that a defendant cannot plead guilty without waiving the right to a jury trial, and that the State would not agree to allow Appellant to enter a guilty plea without waiving his right to a jury trial. ***04/25/19 Tr. 194-95.***

Counsel replied that the State's response made his position "clearer," and that Appellant

was “not asking for any special favors.” He wanted to plead guilty but the State would not allow him to do so. Yet, counsel agreed with the trial judge’s observation that he was “mixing two rules:” Rule 14 and the death penalty statute. *04/25/19 Tr. 195-96.*

The trial judge stated that he would not permit the State to bar someone from pleading guilty as indicted. However, “with [guilty pleas to] death penalty offenses, then the judge does the sentencing.” Although he understood why counsel made the motion, he felt that that “the only way to actually ... create that issue, is for him to plead and for me to sentence him, ... for you to have it preserved for appeal; otherwise, ... I’m not sure that the issue is even preserved.” *04/25/19 Tr. 196-97.* After listening to further argument by the State, the trial judge denied the motion because he found that the statute is constitutional. *04/25/19 Tr. 198.*

Following jury selection, counsel stated that he and co-counsel had discussions with Appellant “over the last ... several weeks” about what the State’s evidence would show. Because § 16-3-20(B) did not permit jury sentencing following a guilty plea, counsel and Appellant discussed how he wished to proceed. Counsel then stated that the defense had decided to “explain to the jury ... that we are not pleading not guilty, ... that we admit guilt as to the issues in this case, but that the only way we could have a jury do the sentencing is to go through this process, which means the State has to present evidence and we have to wait and let the jury hear the aggravating and mitigating factors in order to make their decision.” As a result, counsel asked the trial judge to address Appellant and determine whether this was Appellant’s understanding and whether he agreed to this strategy. *Tr. 1455-56.*

The trial judge first ascertained that both attorneys agreed with this strategy, that both attorneys felt this strategy was in Appellant’s best interest, that they had discussed it with him, that he understood their discussions, that he was in agreement with the strategy, and that he was freely

and voluntarily agreeing to it. *Tr. 1456-59*. Next, the trial judge stated that he would allow counsel to follow the strategy if Appellant agreed to it. *Tr. 1459-60*. Then, the trial judge conducted an on-the-record colloquy with Appellant in which he addressed this strategy and established that Appellant fully agreed with the proposed strategy, that he had not been threatened or coerced, that he was not under the influence of any medication impairing his ability to understand the strategy, and that his agreement was freely, knowingly and voluntarily given. In the course of this colloquy, the trial judge stated, “I completely understand the strategy that is employed. I think it is a very good strategy, and a very positive strategy.” *Tr. 1460-64*.

Counsel thereafter informed jurors in his opening statement that Appellant was guilty of the crimes charged and that there was a trial because it was the only way Appellant could have a jury determine the proper sentence. *Tr. 1492*.

B. Discussion

Section 16-3-20 (B), provides, in pertinent part that:

If trial by jury has been waived by the defendant and the State, or if the defendant pleaded guilty, the sentencing proceeding must be conducted before the judge. In the sentencing proceeding, the jury or judge shall hear additional evidence in extenuation, mitigation, or aggravation of the punishment.

Appellant contends that this section violates his Sixth Amendment right to jury sentencing. Before addressing the substance of his argument, Respondent notes that he did not present the trial judge with any argument that the United States Supreme Court’s decisions in *Ring* and *Hurst* mandated jury sentencing following a guilty plea to murder in capital cases. Nor did he assert that the trial judge’s agreement with Appellant that he would be on death row if he pled guilty to the death penalty was improper. “To be preserved for appellate review, an issue must be both presented to and passed upon by the trial court.” *State v. Watts*, 321 S.C. 158, 167, 467 S.E.2d 272, 278 (Ct.App. 1996). Additionally, “[a] party may not argue one ground at trial and an alternate ground

on appeal.” *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003). *See also State v. Patterson*, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) (“Appellant is limited to the grounds raised at trial”). “Error preservation requirements are intended ‘to enable the lower court to rule properly after it has considered *all relevant facts, law, and arguments.*’” *Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) (quoting *I’On v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000)) (emphasis added). Because Appellant failed to present these matters to the trial judge, he is barred from raising them on appeal. *Id.*

Alternatively, Respondent submits that Appellant’s argument is not meritorious for several reasons. First, he did not have a statutory or constitutional right to have his guilty plea accepted. Rule 14(b), SCRCrim.P., expressly states that “[a] defendant may waive his right to a jury trial only with the approval of the solicitor and the trial judge.” *See also State v. Chisolm*, 312 S.C. 235, 439 S.E.2d 850 (1994) (solicitor was not required to plea bargain with appellant charged with murder when appellant wished to plead to voluntary manslaughter). Further, the Supreme Court of the United States has unequivocally held that “[t]here is, of course, no absolute right to have a guilty plea accepted.” *Santobello v. New York*, 404 U.S. 257, 262 (1971) (citing *Lynch v. Overholser*, 369 U.S. 705, 719 (1962)). Rather, the constitutional right protected by the Sixth Amendment is the right to plead not guilty and have a jury trial. *North Carolina v. Alford*, 400 U.S. 25, 39 (1970) (“The States in their wisdom may take this course by statute or otherwise and may prohibit the practice of accepting pleas to lesser included offenses under any circumstances”) Thus, Appellant’s constitutional attack on the sentencing requirement of § 16-3-20(B) cannot be meritorious because although the decision to seek the opportunity to plead guilty remains with the capital defendant, there is no absolute right to have the plea accepted, and the State in this case refused to accept a plea. *Id.*

Second, neither *Ring* nor *Hurst* render § 16-3-20(B)'s requirement for judge sentencing following a guilty plea unconstitutional. In *Ring*, the Supreme Court found that Arizona's capital sentencing scheme violated the Sixth Amendment right to a jury trial in capital prosecutions because it "allow[ed] a sentencing judge sitting without a jury to find an aggravating circumstance necessary for imposition of the death penalty." *Id.* at 609.² Applying its reasoning from *Apprendi*,³ the Court concluded that "[c]apital defendants, no less than non-capital defendants, ... are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Id.* 536 U.S. at 589. The Court held that "[b]ecause Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' " a defendant has a right to submit those factors to a jury for determination. *Id.* at 609. Thus, *Ring* held that when a defendant exercises his right to a jury trial on a capital offense, he is entitled to have a jury determine any aggravating factors necessary to impose a death sentence.

The Court in *Hurst* applied *Ring* to Florida's capital sentencing scheme. In Florida, "[a] person who ha[d] been convicted of a capital felony [would] be punished by death" only if an additional sentencing proceeding "result[d] in findings by the court that such person [would] be punished by death." Fla. Stat. § 775.082(1) (2010) (amended 2016). Under this statute, if a jury convicted the defendant of a capital murder, a sentencing judge would conduct an evidentiary hearing before the jury, and the jury would issue an "'advisory sentence' of life or death without specifying the factual basis of its recommendation." *Hurst*, 577 U.S. at 95 (citation to statute

² Under Arizona law "following a jury adjudication of a defendant's guilt of first-degree murder, the trial judge, sitting alone, determin[e] the presence or absence of the aggravating factors required" to impose the death penalty. *Ring*, 536 U.S. at 588.

³ See *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (holding that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt").

omitted). “Notwithstanding the recommendation of the jury, the court, after weighing the aggravating and mitigating circumstances, [would then] enter a sentence of life imprisonment or death.” Fla. Stat. § 921.141(3) (2010) (amended 2016). Therefore, even though the trial court afforded some weight to the jury’s recommendation, the jury’s role was “advisory only,” *id.* at 99, and “[l]ike Arizona at the time of *Ring*, Florida [did] not require the jury to make the critical findings necessary to impose the death penalty.” *Hurst*, 577 U.S. at 98. Because this procedure allowed a judge to increase a defendant’s maximum penalty based on his own fact-finding following a jury trial, the Supreme Court held that *Hurst*’s death sentence violated the Sixth Amendment. *Id.* at 98-100.

In five capital cases decided before Appellant’s trial, this Court squarely addressed and rejected arguments that South Carolina’s sentencing scheme is unconstitutional in light of *Ring*. The first of these cases was *State v. Downs*, 361 S.C. 141, 604 S.E.2d 377 (2004), where the appellant pled guilty to “to murder, kidnapping, and first-degree criminal sexual conduct with a minor. The plea court found three statutory aggravating circumstances and sentenced the appellant to death. *Id.* 361 S.C. at 143, 604 S.E.2d at 378. On appeal, this Court rejected his claim that *Ring* “render[ed] unconstitutional the requirement in ... § 16-3-20(B) ... that the sentencing proceeding be held before the judge when a defendant pleads guilty to murder.” *Id.* at 146, 604 S.E.2d at 380.

The Court found that:

The capital-sentencing procedure invalidated in *Ring* does not exist in South Carolina. Arizona’s statute required the judge to factually determine whether there existed an aggravating circumstance supporting the death penalty regardless whether the judge or a jury had determined guilt. Ariz.Rev.Stat. § 13–703(C) (2001) (amended 2002); *Ring*, 536 U.S. at 597, 122 S.Ct. at 2437, 153 L.Ed.2d at 569. In South Carolina, conversely, a defendant convicted by a jury can be sentenced to death only if the jury also finds an aggravating circumstance and recommends the death penalty. S.C.Code Ann. § 16–3–20(B) (2003); *Sheppard v. State*, 357 S.C. 646, 652, 594 S.E.2d 462, 466 (2004).

In any event, *Ring* did not involve jury-trial waivers and is not implicated when a defendant pleads guilty. Other courts have also reached this conclusion. *See, e.g., Leone v. Indiana*, 797 N.E.2d 743, 749-50 (Ind. 2003); *Colwell v. Nevada*, 118 Nev. 807, 59 P.3d 463, 473-74 (2003); *Illinois v. Altom*, 338 Ill.App.3d 355, 362, 272 Ill.Dec. 751, 788 N.E.2d 55, 61 (5 Dist.), *app. denied*, 204 Ill.2d 663, 275 Ill.Dec. 77, 792 N.E.2d 308 (2003).

Downs, 361 S.C. at 146, 604 S.E.2d at 380.

The Court has adhered to its ruling in *Downs* in the four subsequent cases. *See State v. Inman*, 395 S.C. 539, 556, 720 S.E.2d 31, 40 (2011); *State v. Allen*, 386 S.C. 93, 101-02, 687 S.E.2d 21, 25-26 (2009) (rejecting argument that that § 16-3-20(B) violates Eighth Amendment and due process); *State v. Crisp*, 362 S.C. 412, 417-18, 608 S.E.2d 429, 432-33 (2005); *State v. Wood*, 362 S.C. 135, 143, 607 S.E.2d 57, 61 (2004). In *Crisp*, the Court further explained that:

The constitutionality of Section 16–3–20(B) does not rest on a defendant's desire for a particular outcome, his sense of remorse, or his rationale for committing a particular crime. Instead, it rests, *inter alia*, on whether the statute comports with the right to a jury trial as established by this Court and the United States Supreme Court in interpreting the state and federal constitutions. *See* U.S. Const. amend VI; S.C. Const. art. I, § 14. Accordingly, we adhere to our opinion in *Downs* and reject Appellant's arguments for the reasons expressed in that case. Section 16–3–20(B) is not unconstitutional in light of *Ring*, *supra*, and a capital defendant may be sentenced only by a judge pursuant to that statute after knowingly and voluntarily waiving his right to a jury trial.

Crisp, 362 S.C. at 418-19, 608 S.E.2d at 433.

Hurst does not require this Court to revisit the above precedent because it is not a new rule. Rather, the Court in *Hurst* merely “applied *Ring* and decided that Florida's capital sentencing scheme impermissibly allowed ‘a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty.’ ” *McKinney v. Arizona*, 140 S.Ct. 702, 707 (2020).⁴ Additionally, the United States Supreme Court

⁴ Many other courts had similarly recognized *Hurst* was nothing more than an application of *Ring* before *McKinney*. *See, e.g., Dunlap v. Paskett*, No. 1:99-CV-559, 2019 WL 1274862, at *5 (S.D. Ohio Mar. 20, 2019) (*Hurst* “simply applied *Apprendi* and *Ring*.”); *United States v. Con-ui*, No.

has clearly recognized that “nothing prevents” waiver of the right to a jury trial, other than showing a knowing and intelligent decision: “[i]f appropriate waivers are procured, States may continue to offer judicial factfinding as a matter of course to all defendants who plead guilty.” *Blakely v. Washington*, 542 U.S. 296, 310 (2004) (rejecting argument that “*Apprendi* works to the detriment of criminal defendants who plead guilty by depriving them of the opportunity to argue sentencing factors to a judge”). It has reasoned, logically, that its precedent could not “possibly work to the detriment of those who are free, if they think its costs outweigh its benefits, to render it inapplicable.” *Id.* See also *Lewis v. Wheeler*, 609 F.3d 291, 309 (4th Cir. 2010) (rejecting an argument that *Ring* established “that a defendant who pleads guilty to capital murder and waives a jury trial under the state’s capital sentencing scheme retains a constitutional right to have a jury determine aggravating factors”); *Nunley v. Bowersox*, 784 F.3d 468, 472 (8th Cir. 2015) (citing *Lewis* as persuasive).

Appellant’s contention that § 16-3-20(B) precludes a defendant from offering mitigation evidence to the jury of his willingness to accept responsibility by pleading guilty was rejected by this Court in *Crisp*. See 362 S.C. at 418-19, 608 S.E.2d at 433. Also, this argument is factually inaccurate because counsel told jurors in his guilt phase opening statement that Appellant was guilty of the crimes charged and that there was a trial because it was the only way Appellant could have a jury determine the proper sentence. **Tr. 1492.**

3:13-CR-123, 2017 WL 1393485, at *2 (M.D. Pa. Apr. 18, 2017) (“*Hurst* merely applied *Ring*’s holding”); *Sneed v. Jenkins*, No. 5:17 CV 83, 2017 WL 564821, at *4 (N.D. Ohio Feb. 13, 2017) (*Hurst* “neither expanded the *Apprendi/Ring* rule nor announced a new rule.”); *State v. Lotter*, 917 N.W.2d 850, 864 (Neb. 2018) (“*Hurst* merely applied *Ring*.”); *Ex parte Bohannon*, 222 So. 3d 525, 532 (Ala. 2016) (“*Hurst* applies *Ring*”); *Runyon v. United States*, 228 F.Supp.3d 569 (E.D. Va. 2017). *Accord Lee v. State*, 244 So. 3d 998, 1003 (Ala. Crim. App. 2017) (“Because the decision in *Hurst* did not create a new rule, Lee’s *Ring/Hurst* claim was subject to the procedural bars” in state’s post-conviction relief procedure).

Appellant's attack on the trial judge's comments in an *ex parte* exchange with Appellant as to why there was no plea bargain in his case (03/09/19 Tr. 24-26) is a red herring and takes the comments out of context. Rather than indicating that the trial judge was predisposed to imposing a death sentence if Appellant pled guilty, he was merely explaining that the State could seek the death penalty without offering Appellant the opportunity to plead to a life sentence and that a death sentence was still possible if he entered a plea without the State withdrawing its notice of intent to seek the death penalty. Obviously, this is factually correct as *Inman*, *Allen* and *Mahdi* make clear. See also *State v. Ray*, 310 S.C. 431, 427 S.E.2d 171 (1993) (death sentence following plea under *Alford*).

Even assuming *arguendo* that this Court disfavors such comments by a trial judge, there is absolutely no prejudice to Appellant from those comments. Unlike the comments that this Court found to be reversible error in *Crisp*, 362 S.C. at 415-16, 608 S.E.2d at 432, and *State v. Owens*, 362 S.C. 175, 607 S.E.2d 78, 80 (2004), the trial judge's remarks did not cause Appellant to waive his Sixth Amendment right to a jury trial.⁵

Finally, although he concedes that this Court has already addressed the issue, he relies on the PCR judge's Order in *Jerry Buck Inman*, #5256 v. *State*, 2012-CP-39-918 (filed April 21, 2020)

⁵ Appellant's reliance on *State v. Pierce*, 289 S.C. 430, 434, 346 S.E.2d 707, 710 (1986), *overruled on other grds*, *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991), for the proposition that he does not have to prove that he was prejudiced by the trial judge's comments ignores that *Pierce* was decided before the Court abolished *in favorem vitae* review in *Torrence* and cases were often reversed based on the absence of an objection to a trial error. See *State v. Torrence*, 305 S.C. 45, 60-71, 406 S.E.2d 315, 329 (1991) (Toal, J., concurring in result) ("This doctrine requires this Court to review the entire record for legal error, and assume error when unobjected-to but technically improper arguments, evidence, jury charges, etc. are asserted by the defendant on appeal in a demand for reversal or a new trial. [W]e have long recognized the doctrine could be abused in a given case and serve to work an injustice, which the doctrine was created specifically to prevent. Nevertheless, we have retained the doctrine until today because of its once important utilitarian value in certain cases in halting an unjust execution or reversing an erroneous conviction").

in which the judge flagrantly disregarded this Court's binding precedent and found that §16-3-20(B) was unconstitutional under *Hurst*. He erroneously relies on this aberrant Order. Not only is that Order contrary to this Court's precedent, it cannot stand in light of the United States Supreme Court's explanation in *McKinney* that *Hurst* did not create a new rule. The State has appealed the wrongly decided grant of relief in *Inman* and that decision should be reversed for the reasons set forth in Petition for Writ of Certiorari filed in that case. See *Jerry Buck Inman, #5256 v. State*, Appellate Case No. 2020-000881. Therefore, the trial judge's ruling must be affirmed.

II. The trial judge did not abuse his discretion by refusing to allow Dr. Donna Schwartz-Maddox, the defense's forensic psychiatrist, to testify that co-defendant McKinley Daniels made a statement to her that he told Appellant to kill victim Stull because although Dr. Maddox could rely on this statement in reaching her opinion that Appellant was acting under the dominion of Daniels and his brother during the crimes, Daniels' statement was inadmissible since neither Daniels nor Appellant were unavailable witnesses under Rule 804(a), SCRE. Also, Appellant was not prejudiced by the judge's ruling because either he or Daniels could have testified to the statement, and the trial judge ruled that Appellant could inform the jury Daniel told him to kill Ms. Stull in his statement to the jury.

Appellant maintains that the trial judge erroneously refused to allow Dr. Donna Schwartz-Maddox, the defense's forensic psychiatrist, to testify that co-defendant McKinley Daniels admitted that he told Appellant to kill victim Stull. Respondent submits that there was no abuse of discretion because although Dr. Maddox could rely on this statement in reaching her opinion that Appellant was acting under the dominion of Daniels and his brother during the crimes, the statement was inadmissible since neither Daniels nor Appellant were unavailable witnesses under Rule 804(a), SCRE. Also, Appellant was not prejudiced by the judge's ruling because either he or Daniels could have testified to the statement, and the trial judge ruled that he could inform the jury Daniels told him to kill Ms. Stull in his statement to the jury.

A. How issue arose at trial.

Before Dr. Maddox's sentencing phase testimony, the trial judge heard the State's

objection to portions of her report (Defense Exhibit 12, R. ____ - __) *in camera*. The State first objected to Appellant's statement to Dr. Maddox, "I followed a tyrant, a leader with no soul" as self-serving hearsay. The parties argued whether his statement was admissible. Appellant's counsel asserted that it was admissible because it was made to an expert, who relied on it in reaching her opinion that Appellant acted under the domination of his co-defendants. Although the trial judge found that Dr. Maddox could properly rely on the statement as a basis for her conclusion, he ruled that the statement was inadmissible hearsay. **Tr. 2150-57; 2159-61.**

In response to questioning by the trial judge, counsel argued that Dr. Maddox should be allowed to testify about co-defendant McKinley Daniels' statement to her that he told Appellant to kill the other murder victim in the case, Trisha Stull. He cited to *Green v. Georgia*, 442 U.S. 95 (1979), for the proposition that "even though it is hearsay, if it is related to an issue, and especially in the penalty phase of the case, that ... the rules are more relaxed about allowing that testimony coming in than would ordinarily be." So, counsel argued that "it would be admissible ... under that [theory]." **Tr. 2162-63;** Defense Exhibit 12 at 14, **R. ____**. Counsel also argued that this statement was admissible under Rule 803(4), SCRE, because Dr. Maddox would testify that it was part of the basis of her opinion that Appellant was acting under the dominion of others, which was a mitigating circumstance relied on by the defense. Counsel also argued the statement was admissible as a statement by a co-conspirator made in furtherance of the conspiracy. The trial judge found that Rule 801(d)(2)(E), SCRE, was inapplicable because the statement was not being offered against a party to the conspiracy. **Tr. 2161-64.**

Then trial judge rejected counsel's suggestion that Daniels' statement was not being offered for the truth of the matter asserted, since it formed part of the basis for Dr. Maddox's opinion. **Tr. 2164-65.** The trial judge also stated that Daniels' statement was not admissible simply

because it was made to an expert who relied on it as a basis for her opinion. She could testify that she relied on her interview of Daniels as a basis for her opinion because “[t]he rules are clear that experts are allowed to rely on hearsay, but any statement he made to her was inadmissible hearsay. The trial judge also gave an example of how Dr. Maddox could testify about the basis of her opinion without testifying to the hearsay statement by Appellant. *Tr. 2165-67*.

The Deputy Solicitor agreed with the trial judge that Daniels’ “specific statements about the circumstances of the crime” were being offered for the truth of the matter asserted and argued they were offered to support a statutory mitigating circumstance for which no evidence had then been presented. Also, it could not be admitted as the statement of a co-conspirator because it was not being offered against a party to the conspiracy and because the conspiracy ended before the statement was made. The trial judge agreed it was inadmissible under Rule 801(d)(2)(E), SCRE, because it was not being offered against a party to the conspiracy. In response to the trial judge’s questioning, counsel indicated that evidence Appellant acted under duress or under the domination of another person was contained in the two statements by Appellant that the State had introduced because Appellant “had told Detective Lent that he was under gunpoint ... by these individuals, [and told] that if he didn't participate, they would shoot him.” *Tr. 2167-70*.

During the course of further argument on the admissibility of Appellant’s statement to Dr. Maddox, the trial judge indicated that if Appellant wanted to tell jurors “I followed a leader, a tyrant with no soul”⁶ in his closing statement authorized by S.C. Code Ann. §16-3-28 (2019), the trial judge would allow him to do so “without cross-examination.” *Tr. 2170-71*. The Deputy Solicitor observed that Rule 803(4), SCRE, provided that the admissibility of statements made after litigation commences were in the trial judge’s discretion. *Tr. 2172-73*. Counsel argued that

⁶ Again, this was his statement to Dr. Maddox.

the Supreme Court's decision in *Green* supported his claim that Appellant's statement to Dr. Maddox was admissible because she was an expert and not a lay witness. **Tr. 2173-74.**

The trial judge stated that he had read *Green* and found that "it stands for the proposition that the rules should not be so ... mechanistically applied as to prevent the ends of justice and prevent someone from being able to present mitigation in the penalty phase of a death penalty case." The Deputy Solicitor indicated that this was why he had not objected to hearsay statements to which the defense's social worker had testified, but maintained *Green* did not stand for the proposition that the rules of evidence are inapplicable in the sentencing phase of a capital trial. **Tr. 2176.** The trial judge then made the following comments:

Here is what I don't understand: Why can't Dr. Maddox say based upon my interview of Jerome Jenkins, based upon the hours I spent with him, based upon my interview with McKinley Daniels, based upon the discovery, based upon the school records, all of these different things, none of which are admissible in court, right? The school records are not admissible in court. All of these things, which are inadmissible in court, experts are allowed to form their opinion based upon documents and/or statements and/or other things that are inadmissible. Why can't you say based upon all of that information, I believe that Mr. Jenkins was under the dominion and control or the domination of another person and, you know, I've interviewed these people and read their statements, read this and read that. If the State wants to get up and open that door, then they can get up and open that door. They know what the answers will be before they do it. But, ... just because [experts] are allowed to rely on it does not make it, per se, admissible in court

Tr. 2177, line 5 – 2178, line 1.

The trial judge reiterated that if Appellant wanted to tell the jury the same thing that he had told Dr. Maddox in his closing statement, he could do so. **Tr. 2178.** The Deputy Solicitor noted that "[t]he defense subpoenaed McKinley Daniels here. He was here and prepared and could have testified as to some of those issues, and for whatever reason, declined to not." The trial judge found that Daniels was not an unavailable witness and that the defense could have presented Daniels and cross-examined him as a hostile witness. **Tr. 2179.**

The following morning, counsel read a previously filed memorandum on the admissibility of the statements into the record, in which he again relied on *Green*. He also argued that, if necessary, the trial judge could give a limiting instruction but one was unnecessary because the statements were not being offered for their truthfulness but as a basis for Dr. Maddox's opinion. Relying on *Green* and *Chambers v. Mississippi*, 410 U.S. 284, 302-03 (1973), counsel claimed that excluding Daniels' statement violated Appellant's right to due process because South Carolina law did not clearly bar an expert from testifying to statements made by a criminal defendant which formed the basis of the expert's opinion and, here, Daniels' statement had "assurances of trustworthiness because it is a statement against his interest, and he provided the same information on multiple occasions." ***Tr. 2184-89.***

The State, however, distinguished *Green* and *Chambers* because the statement in *Green* was a statement against penal interest, and made by a witness that the State had presented in its case-in-chief, whereas Daniels' statement was not made before being charged with a crime. Rather, it was made to defense investigators after his arrest and "in preparation for testimony by the expert." Likewise, the statement in *Chambers* had substantial assurances of trustworthiness and was "not made in preparation for litigation." The statements here simply were not trustworthy. ***Tr. 2189-92.***

The trial judge ruled that he would permit "Dr. Maddox to say that she's interviewed these people and that is the basis of her forming her opinion, but she's not allowed to get into the specific statements, unless the state opens the door." ***Tr. 2192.*** Dr. Maddox told the trial judge that she understood his ruling. The judge then cited to *People v. Powell*, 6 Cal.5th 136, 425 P.3d 1006 (2018), in which the Court held that "the self-serving statements to the expert psychologist by the defendant in [the penalty phase of] a death penalty case ... were inadmissible." ***Tr. 2193.***

Of importance to the present issue, Dr. Maddox, who was qualified as an expert in forensic psychiatry (*Tr. 2196*), thereafter testified that she had consulted with the defense's social worker, Dr. Andrews, one of SCDC's mental health clinicians, and she had spoken to Appellant's mother. Also, she had reviewed the incident reports, "some investigative notes," and "the statements and discovery" related to Appellant's charges, Appellant's school records, family history records and all SCDC records relating to Appellant's prior incarceration. *Tr. 2203-04*. Finally, she had interviewed Appellant three times, and she had interviewed his co-defendant, McKinley Daniels, on the Monday before her testimony. *Tr. 2203; 2250*.

Dr. Maddox diagnosed Appellant with Post-Traumatic Stress Disorder (PTSD), an unspecified depression disorder, substance abuse disorder, and a learning disability. *Tr. 2209; 2242-49*. She further opined that Appellant's brain was not fully developed at the time of the murder because he was only twenty. *Tr. 2249-50*. She testified that she learned through interviewing McKinley Daniels that the Daniels brothers were both older than Appellant, that both had more extensive criminal histories, and that McKinley Daniels had been released from prison only four months before the murders. Appellant, who lived across the street from McKinley, was having financial difficulties. Also, McKinley cared about Appellant and would console him when he and his wife had problems. In her expert opinion, Appellant was "absolutely" under the influence of James or McKinley Daniels. *Tr. 2250-54*.

The trial judge subsequently instructed jurors on the statutory mitigating circumstance that "the defendant acted under duress or under the dominion of another person." *Tr. 2333, lines 17-18*. See § 16-3-20 (C)(b)(5).

B. The trial judge did not abuse his discretion by excluding Daniels' statement.

Dr. Maddox was correctly allowed to give her opinion that Appellant acted under the

influence of James or McKinley Daniels and that she based this opinion, in part, on her interview of McKinley Daniels. “Rule 703, SCRE, allows an expert giving an opinion to rely on facts or data that are not admitted in evidence or even admissible into evidence.” *Wright v. Hiester Constr. Co.*, 389 S.C. 504, 523, 698 S.E.2d 822, 832 (Ct.App.2010) (citing *Jones v. Doe*, 372 S.C. 53, 62, 640 S.E.2d 514, 519 (Ct.App.2006)). “However, Rule 703 does not allow the admission of hearsay evidence simply because an expert used it in forming his opinion; the rule only provides the expert can give an opinion based on facts or data that were not admitted into evidence. *Jones*, 372 S.C. at 62–63, 640 S.E.2d at 519.” *Allegro, Inc. v. Scully*, 409 S.C. 392, 410, 762 S.E.2d 54, 63–64 (Ct. App. 2014), *rev'd*, 418 S.C. 24, 791 S.E.2d 140 (2016). *See also Hundley ex rel. Hundley v. Rite Aid of S.C., Inc.*, 339 S.C. 285, 295, 529 S.E.2d 45, 50 (Ct.App.2000) (Rule 703, SCRE allows an expert to “base his opinion on information, whether or not admissible, made available to him before the hearing if the information is of the type reasonably relied upon in the field to make opinions”).

Appellant contends that Daniels’ statement was admissible under Rule 804(b)(3), SCRE, as a statement against penal interest. “Rule 804(b)(3), SCRE, provides an exception to the hearsay rule for a statement against a declarant's pecuniary or proprietary interest, or one that would subject the declarant to civil or criminal liability, when the declarant is unavailable as a witness.” *Dodd v. Berlinsky*, 344 S.C. 172, 176-77, 543 S.E.2d 237, 239-40 (Ct. App. 2001). “An abuse of discretion standard is applied to a trial judge's ruling on the issue of whether a statement is admissible as a declaration against penal interest.” *State v. Kinloch*, 338 S.C. 385, 388, 526 S.E.2d 705, 706 (2000). Here, Appellant cannot show an abuse of discretion because he does not meet the threshold requirement for admission of a statement against penal interest, which is an unavailable declarant. *See* Rule 804(a), SCRE.

“The party offering the statement bears the burden of establishing unavailability.” *Dodd*, 344 S.C. at 177, 543 S.E.2d at 240 (citing *Kinloch*, 338 S.C. at 391 n. 6, 526 S.E.2d at 708 n. 6). “[U]navailability as a witness” includes scenarios where the declarant “is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance ... by process or other reasonable means.” Rule 804(a)(5), SCRE. Yet, the declarant is not “unavailable” simply because he or she is absent from the hearing. *Kinloch*, 338 S.C. at 391 n. 6, 526 S.E.2d at 708 n. 6. *See also State v. Terry*, 339 S.C. 352, 356, 529 S.E.2d 274, 277 (2000) (defendant who has procured his own unavailability by invoking his protection against self-incrimination was not unavailable as a witness and could not introduce his custodial statement pursuant to Rule 804(b)(3)).

Here, the State observed that the defense had subpoenaed Daniels and he had been present in the courtroom, but Appellant chose not to call him as a witness. More importantly, the trial judge found that he was not an unavailable witness and that the defense could have presented Daniels and cross-examined him as a hostile witness. *Tr. 2179*.⁷ It is axiomatic that a witness who is present at trial and under subpoena, but thereafter released from the subpoena, is not unavailable to the party who subpoenaed him. Thus, Appellant cannot show that Daniels was “unavailable”, and his statement was not admissible under Rule 804(b)(3). *See Com. v. Spatz*, 610 Pa. 17, 67-69,

⁷ Appellant suggests that “the facts surrounding McKinley Daniels being brought to the courthouse and him ultimately not testifying were vague.” This contention ignores both that neither defense attorney suggested otherwise, and that the trial judge, who presided over the trial, specifically found that Daniels was not an unavailable witness and nothing *in the record* contradicts his finding. As a result, this Court is bound by this factual finding because it is not clearly erroneous. *Robinson*, 410 S.C. at 526, 765 S.E.2d at 568. *See also Clemons v. Mississippi*, 494 U.S. 738, 766 (1990) (Blackmun, J., concurring in part and dissenting in part) (“The trial judge who hears the witnesses live, observes their demeanor and in general smells the smoke of the battle is by his very position far better equipped to make findings of fact which will have the reliability that we need and desire”).

18 A.3d 244, 273-74 (2011) (former inmate who allegedly confessed to the capital murder of which defendant was convicted was not unavailable as required for admission of his statement under Rule 804(b)(3), where inmate was in the courtroom during capital murder trial, but defendant decided not to call him as a witness after conferring privately with him); *Dodd*, 344 S.C. at 177, 543 S.E.2d at 240; *Kinloch*, 338 S.C. at 391 n. 6, 526 S.E.2d at 708 n. 6 (“Although we need not rest our decision on this basis, we are also concerned with Kinloch's failure to demonstrate Milligan's “unavailability”). *See also Wilson v. Galt*, 1983-NMCA-074, ¶ 41, 100 N.M. 227, 236, 668 P.2d 1104, 1113 (admissions of declarant who had settled before trial were properly excluded under Rule 804(b)(3) because she was not unavailable where she was under subpoena and available to appear and testify); *State v. Poitra*, 266 N.W.2d 544, 547 (N.D. 1978) (declarant was not “unavailable under Rule 804 where his testimony was obtained by deposition).

Appellant correctly notes that the record does not reflect whether Daniels would have testified, if called as a witness, or “whether he would have invoked his Fifth Amendment right against self-incrimination in the face of being questioned about his admission he told appellant to shoot Ms. Stull during the robbery.” However, this does not demonstrate Daniels’ unavailability because “[a] judge may not invoke a witness's Fifth Amendment privilege; and... a witness who is not also a defendant can invoke that privilege only after the incriminating question has been put.” *State v. McGuire*. 272 S.C. 547, 253 S.E.2d 103 (1979).⁸ Also, Appellant bore the burden of establishing Daniels’ unavailability. *Dodd*, 344 S.C. at 177, 543 S.E.2d at 240.

Further, the Supreme Court’s decision in *Green* is easily distinguishable In *Green*, the

⁸ The witness’ assertion of the privilege does not need to be made before the jury. Moreover, neither the State nor a defendant may call a witness whom the party knows will invoke the Fifth Amendment solely for the purpose of requiring the witness to invoke the privilege before jury. *State v. Hughes*, 328 S.C. 146, 150-52, 493 S.E.2d 821, 822-24 (1997).

petitioner sought to prove in the sentencing phase that although he was convicted of murder, “he was not present when the victim was killed and had not participated in her murder.” *Id.* at 96. In support of his defense, he sought to introduce a statement by a witness who had testified at the co-defendant’s trial that the co-defendant admitted to the witness he shot the murder victim twice. The trial judge excluded this statement as hearsay Georgia law. *Id.* The Supreme Court granted certiorari and vacated the sentence and remanded the case. The Court held that:

Regardless of whether the proffered testimony comes within Georgia's hearsay rule, under the facts of this case its exclusion constituted a violation of the Due Process Clause of the Fourteenth Amendment. The excluded testimony was highly relevant to a critical issue in the punishment phase of the trial, see *Lockett v. Ohio*, 438 U.S. 586, 604-605, 98 S.Ct. 2954, 2964-2965, 57 L.Ed.2d 973 (1978) (plurality opinion); *id.*, at 613–616, 98 S.Ct., at 2969–2970 (opinion of BLACKMUN, J.), and substantial reasons existed to assume its reliability. Moore made his statement spontaneously to a close friend. The evidence corroborating the confession was ample, and indeed sufficient to procure a conviction of Moore and a capital sentence. The statement was against interest, and there was no reason to believe that Moore had any ulterior motive in making it. Perhaps most important, the State considered the testimony sufficiently reliable to use it against Moore, and to base a sentence of death upon it. In these unique circumstances, “the hearsay rule may not be applied mechanistically to defeat the ends of justice.” *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S.Ct. 1038, 1049, 35 L.Ed.2d 297 (1973). Because the exclusion of Pasby's testimony denied petitioner a fair trial on the issue of punishment, the sentence is vacated and the case is remanded for further proceedings not inconsistent with this opinion.

Green, 442 U.S. at 97 (footnotes omitted).

Despite Appellant’s assertion that circumstances supported the reliability of Daniels’ statement and that there was no reason to believe that Daniels had an ulterior motive in making it, none of the circumstantial guarantees of trustworthiness surrounding the statement in *Green* are present in Daniels’ statement. Daniels was not under oath when he made the statement. Instead, his statement was made to Dr. Maddox to assist in preparation for Appellant’s capital trial. Also, Appellant’s own Statement of the Case reflects that Daniels had already been tried, convicted, and sentenced to forty-five years imprisonment when he made the statement to Dr. Maddox. So, he did

not and could not potentially expose himself to further criminal liability by making the statement. Moreover, he was found to be intellectually disabled at his trial. *See* Brief of Appellant, p. 4 n. 1. Accordingly, it was not “a statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.” Rule 804(b)(3), SCRE.

And, unlike the petitioner in *Green*, Appellant could have presented the jury with Daniels’ statement. Because Daniels was under a defense subpoena and present at the trial, Appellant could have called him as a witness but apparently decided not to do so for strategic reasons. *See State v. Riddle*, 291 S.C. 232, 235, 353 S.E.2d 138, 140 (1987) (even under *in favorem vitae* review, Court was “not required ... to review the strategic decisions of defense counsel”).

Appellant cannot show any prejudice from the trial judge’s ruling because he could have presented Daniels’ testimony. Similarly, Appellant was available and could have testified. *See Terry*, 339 S.C. at 356, 529 S.E.2d at 277. “While no inference of guilt can be drawn from [Appellant’s] refusal to avail himself of the privilege of testifying, he has no right to set forth to the jury all the facts which tend in his favor without laying himself open to cross-examination upon those facts.” *Fitzpatrick v. United States*, 178 U.S. 304, 315 (1990). Another reason he cannot show any prejudice is that the trial judge twice stated that if Appellant wanted to tell the jury the same thing that he had told Dr. Maddox in his closing statement, he could do so, and he would not be subject to cross-examination. *See Tr. 2170-71; 2178*. Although this would constitute proper argument under § 16-3-28, *see State v. Moore*, 357 S.C. 458, 462-63, 593 S.E.2d 608, 610-11 (2004), the State did not object when the trial judge told Appellant he could say this in his

argument, P and Appellant cannot complain of any error in the trial judge's offer to permit such an argument under § 16-3-28 because the error inured to his benefit.

Therefore, Appellant cannot show a prejudicial abuse of discretion resulting from the trial judge's ruling and that ruling must be affirmed.

III. The trial judge properly refused to allow Appellant to inform jurors in closing argument that the trial judge would impose a sentence of life imprisonment if they failed to reach a unanimous verdict on the appropriate sentence because this ruling was consistent with this Court's precedent, neither the Eighth Amendment nor Due process require that jurors be informed of the consequence of the failure to reach a unanimous verdict as to sentence, and the proposed argument was both an incorrect statement of State law and inconsistent with the trial judge's sentencing phase jury charge.

Notwithstanding Appellant's argument to the contrary, the trial judge properly refused to allow Appellant to inform jurors in closing argument that the trial judge would impose a sentence of life imprisonment if they failed to reach a unanimous verdict on the appropriate sentence because the trial judge's ruling was consistent with this Court's precedent. Also, neither the Eighth Amendment nor Due process require that jurors be informed of the consequence of the failure to reach a unanimous verdict as to sentence, and counsel's proposed argument was both an incorrect statement of State law and inconsistent with the judge sentencing phase jury charge.

A. How issue arose at trial.

The trial judge held a sentencing phase charge conference in which he reviewed his proposed jury instructions, allowed the parties to make requests-to-charge, and provided the parties with a copy of his jury instructions. *Tr. 2280-96*. Toward the end of this charge conference, Appellant's lead counsel noted that the proposed jury instructions omitted "the unanimity of the jury verdict, that it does not have to unanimous as to life." The trial judge agreed that counsel had made "a correct statement of law" but stated that there was a controlling case that held "you do not inform them that if they are a hung jury then I sentence the person to life." The Deputy Solicitor

indicated that this case had been provided to counsel that morning. The trial judge indicated that he was referring to *State v. Adams*, 277 S.C. 115, 283 S.E.2d 582 (1981). **Tr. 2295-96.**

Counsel then asked the trial judge if he could argue this in closing because prospective jurors were told in *voir dire* that “the jury verdict doesn't have to be unanimous as to life, that one vote for life would result in life.” The trial judge agreed that this was “an accurate legal statement.” Yet, the Deputy Solicitor pointed out that this was why he had objected to the defense asking jurors in *voir dire* “to avoid their duty to deliberate by saying you can be the holdout, you have to know that if all you do is hold out, it will answer the question for you, and that is a violation of the duty to deliberate.” **Tr. 2296.**

An exchange then occurred as follows:

THE COURT: ... I don't know how you are going to phrase it.

MR. WILSON: Well, ... what I would say to them is that the verdict for life is not -- does not have to be unanimous.

THE COURT: Well, that is in direct contradiction to what I'm going to tell them, so.

MR. WILSON: Well, if I say that one vote for life would result in a life sentence.

THE COURT: That's not necessarily true either, because if there is no unanimity as to aggravating circumstances, then the options for the Court are 30 to life.

MR. WILSON: But even if they find unanimity on aggravating factors, they can still have one juror who ... votes for life. My understanding is then the law would be that it would still be a recommendation of life; it would have to be.

THE COURT: Here is what the law says: If members of the jury, after a reasonable deliberation, cannot agree on a recommendation as to whether or not the death sentence should be imposed on a defendant found guilty of murder, the trial judge shall dismiss the jury and shall sentence the defendant to life imprisonment as provided in Subsection A.

There is a case specifically on point where the jury -- the defense wanted

that charge given to the jury, and the supreme court said that that was not for the jury to consider.

Tr. 2296, line 23 – 2298 line 1.

Counsel agreed with the Deputy Solicitor’s comment that a unanimous verdict was not required by § 16-3-20(C). Instead, this was required as a matter of criminal procedure. However, counsel took exception to this requirement and did not make further argument. ***Tr. 2298.***

B. Discussion.

The trial judge is vested with broad discretion in dealing with the range and propriety of closing arguments and ordinarily his rulings on such matters will not be disturbed. *See Chaffee*, 285 S.C. at 29, 328 S.E.2d at 468. Here, Appellant cannot prove an abuse of discretion. His proposed closing argument was based on § 16-3-20(C), which provides, in pertinent part that:

If members of the jury after a reasonable deliberation cannot agree on a recommendation as to whether or not the death sentence should be imposed on a defendant found guilty of murder, the trial judge shall dismiss such jury and shall sentence the defendant to life imprisonment as provided in subsection (A).

For almost forty years, this Court has repeatedly made clear that this portion of § 16-3-20(C) “is addressed to the trial judge only and need not be divulged to the jury.” In *State v. Adams*, 277 S.C. 115, 124, 283 S.E.2d 582, 587 (1981), this Court rejected the appellant’s argument the trial judge erred by not instructing “the jury initially that if they failed to agree to the verdict, then the court would be required to sentence him to life imprisonment.” The Court held that the portion of § 16-3-20(C) “addressing the legal effect given to the existence of an unalterably divided jury is addressed to the trial judge only and need not be divulged to the jury.” *Id.* The Court adhered to *Adams* in *State v. Copeland*, 278 S.C. 572, 300 S.E.2d 63 (1982), *cert. denied*, 460 U.S. 1103, 103 S.Ct. 1802 (1983), in rejecting Copeland’s claims that the “the trial judge erred in denying his request to instruct the jury of the actual effect of failure to reach a unanimous agreement as to

punishment, and in instructing the jury that unanimity is required before a life sentence can be imposed.” The Court held that “[t]he trial judge correctly stated the applicable law” and then quoted *Adams. Id.*

Thereafter, the United States Supreme Court rejected the petitioner’s argument that he was entitled to an instruction as to the effect of jury deadlock” in the sentencing phase of his federal capital trial in *Jones v. United States*, 527 U.S. 373, 375 (1999).⁹ *Jones* held that “the Eighth Amendment does not require that the jurors be instructed as to the consequences of their failure to agree.” 527 U.S. at 381. The Court explained that:

To be sure, we have said that the Eighth Amendment requires that a sentence of death not be imposed arbitrarily. See, e.g., *Buchanan v. Angelone*, 522 U.S. 269, 275, 118 S.Ct. 757, 139 L.Ed.2d 702 (1998). In order for a capital sentencing scheme to pass constitutional muster, it must perform a narrowing function with respect to the class of persons eligible for the death penalty and must also ensure that capital sentencing decisions rest upon an individualized inquiry. *Ibid.* The instruction that petitioner requested has no bearing on what we have called the “eligibility phase” of the capital sentencing process. As for what we have called the “selection phase,” our cases have held that in order to satisfy the requirement that capital sentencing decisions rest upon an individualized inquiry, a scheme must allow a “broad inquiry” into all “constitutionally relevant mitigating evidence.” *Id.*, at 276, 118 S.Ct. 757. Petitioner does not argue, nor could he, that the District Court’s failure to give the requested instruction prevented the jury from considering such evidence.

Jones, 527 U.S. at 381. The *Jones* Court further found that the jury was not “ ‘affirmatively [misled]” by the district court’s ruling:

We also have held that a jury cannot be “affirmatively misled regarding its role in the sentencing process.” *Romano v. Oklahoma*, 512 U.S. 1, 9, 114 S.Ct. 2004, 129 L.Ed.2d 1 (1994). In no way, however, was the jury affirmatively misled by the District Court’s refusal to give petitioner’s proposed instruction. The truth of the matter is that *the proposed instruction has no bearing on the jury’s role in the sentencing process. Rather, it speaks to what happens in the event that the jury is unable to fulfill its role*—when deliberations break down and the jury is unable to produce a unanimous sentence recommendation. Petitioner’s argument, although

⁹ The petitioner who had been sentenced to death under the Federal Death Penalty Act of 1994, 18 U.S.C. § 3591. *Id.*

less than clear, appears to be that a death sentence is arbitrary within the meaning of the Eighth Amendment if the jury is not given any bit of information that might possibly influence an individual juror's voting behavior. That contention has no merit. *We have never suggested*, for example, that *the Eighth Amendment requires a jury be instructed as to the consequences of a breakdown in the deliberative process*. On the contrary, we have long been of the view that “[t]he very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves.” *Allen v. United States*, 164 U.S. 492, 501, 17 S.Ct. 154, 41 L.Ed. 528 (1896). We further have recognized that in a capital sentencing proceeding, the Government has “a strong interest in having the jury express the conscience of the community on the ultimate question of life or death.” *Lowenfield v. Phelps*, 484 U.S. 231, 238, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988) (citation and internal quotation marks omitted). *We are of the view that a charge to the jury of the sort proposed by petitioner might well have the effect of undermining this strong governmental interest*.

Id. at 381-82 (emphasis added and footnotes omitted). The Court also found applicable federal statutes do not require the instruction, and it declined to exercise its “supervisory powers” to require the instruction. 527 U.S. at 381, 383.

More recently, a majority of this Court found that trial counsel - who was also Appellant’s lead counsel - was not ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984) for failing to object to the trial judge's refusal to answer questions from the sentencing jury about what would happen to the defendant if it failed to reach unanimous decision. *See Winkler v. State*, 418 S.C. 643, 651, 795 S.E.2d 686, 690-91 (2016). Relying on *Adams* and *Copeland*, the Court in *Winkler* found that there was no basis under South Carolina law or the United States Constitution for counsel to object. *Id.* at 651-52, 795 S.E.2d at 691. Citing *Jones and Evans v. Thompson*, 881 F.2d 117, 123 (4th Cir. 1989), this Court found that “counsel's understanding was also consistent with federal precedent.” *Id.* at 652, 795 S.E.2d at 691-92. *See also id.* at 653-55, 795 S.E.2d at 692-93.

Additionally, this Court found that there was no merit to the petitioner’s reliance on *Simmons v. South Carolina*, 512 U.S. 154 (1994). The Court observed that “[d]ue process required the jury's question to be answered in *Simmons* because the jury needed to know the law related to

petitioner's parole eligibility to properly deliberate over the factual question of future dangerousness. In *Simmons*, therefore, the answer to the jury's question was directly applicable to the jury's deliberations.” *Id.* at 656, 795 S.E.2d at 693. In contrast, the Court saw

little possibility that answering the jury's question could assist the jury in deliberations. A juror's knowledge that if the jury does not reach a verdict the court will impose a sentence of life in prison will not help the juror understand the evidence, or assist the jury in reaching a verdict. Rather, we are concerned that informing the jury what the sentence will be if they do not reach a verdict creates a risk that some juror's attention may be diverted away from the duty to deliberate, and perhaps even alert a juror that he or she can control the sentence by refusing to deliberate.

Id. The Court further observed that *Jones* had “addressed this concern.” *Id.* See also *id.* at 656-57, 795 S.E.2d at 693-94.

Finally, the Court found that trial court’s instruction on two occasions during a modified *Allen* charge¹⁰ that the “the decision of the jury must be unanimous” did not provide counsel with a basis to object because S.C. Const. art. V, § 22¹¹ requires all jury verdicts to be unanimous. *Id.* at 657-58, 795 S.E.2d at 694. The Court added, “Because a *verdict* must be unanimous, the *jury* may not recommend life unless it reaches a unanimous verdict. The fact that subsection 16-3-20(C) requires the trial court to impose a life sentence if the jury is not unanimous does not change the correctness of the statement “the decision of the *jury* must be unanimous.” *Id.* at 658, 795 S.E.2d at 694.

In an effort to end-run this well settled and well-reasoned precedent, Appellant contends that counsel did not make a request-to- charge, but asked the trial judge whether he could make the proposed argument that “was an accurate statement of the law in regard to capital sentencing.”

¹⁰ See *Allen v. United States*, 164 U.S. (1896).

¹¹ “All jurors in any trial court must agree to a verdict in order to render the same.”

True, the arguments of counsel “are not to be judged as having the same force as an instruction from the [trial] court.” *Boyde v. California*, 494 U.S. 370, 384-85 (1990). Still, counsel’s proposed argument was contrary to both the above precedent and the trial judge’s jury instructions, a copy of which counsel had when he asked to make the proposed argument. It was not an accurate statement of the applicable law. Accordingly, the trial judge did not abuse his discretion by prohibiting it. *See, e.g., Empress Casino Joliet Corp. v. Balmoral Racing Club, Inc.*, 831 F.3d 815, 836 (7th Cir. 2016) (“The district judge did not abuse his discretion in not allowing a closing argument contrary to the jury instructions”); *Cave v. State*, 476 So.2d 180, 186 (Fla.1985) (“Counsel may not contravene the law and the jury instructions in arguing to the jury”); *State v. Oates*, 12 S.W.3d 307, 312 (Mo. 2000) (“It is improper for counsel to inform the jury as to the substantive law of the case, to read statutes to the jury, or to argue questions of law inconsistent with the jury instructions”); *State v. Perez-Cervantes*, 141 Wash.2d 468, 6 P.3d 1160, 1164 (Wash. 2000) (argument must be confined to the law as set forth in the jury instructions). *Cf. State v. Liberte*, 336 S.C. 648, 657, 521 S.E.2d 744, 749 (Ct. App. 1999) (finding prejudice from the State’s improper argument “was not cured by the court’s instruction to the jury” because the State’s closing argument “effectively invited the jury to disregard the trial court’s instructions on reasonable doubt”). Indeed, an argument “of the sort proposed by [Appellant] “might well have ... undermin[ed]” the State’s “ ‘strong interest in having the jury express the conscience of the community on the ultimate question of life or death.’ ” *See Jones*, 527 U.S. at 382.

Appellant also relies on Chief Justice Pleicones’ concurring opinion in *Winkler*. Yet, this opinion is inapposite. Chief Justice Pleicones’ ultimate concern was that *Adams* and *Copeland* did not speak to the situation in *Winkler*, where jurors affirmatively asked about the effect of their inability to agree on a unanimous verdict. *See Winkler*, 418 S.C. at 674, 795 S.E.2d at 703

(Pleicones, C.J., concurring) (“The issue before us is not whether jury's should be given a pre-deliberation charge on the effect of their failure to reach a sentencing verdict but whether jurors who repeatedly raise questions should be told the truth. In my opinion, the majority's concerns reflect a lack of faith in our jurors, and in the jury system as a whole”). *See also id.* at 673, 795 S.E.2d at 702 (“In my opinion, none of the cases relied upon by the majority are precedents that excuse a reasonable advocate operating under prevailing professional norms from requesting that this jury's repeated questions be answered”). Chief Justice Pleicones opined that “the failure to answer this jury's questions reasonably led jurors to believe either (1) that they had no option but to return a unanimous verdict of life or death, thereby coercing them, or (2) that the consequence of a failure to agree on one of these two choices would result in an entirely different sentence, that is, a term of years or probation, leaving Winkler in a similar situation to *Simmons*.” *Id.* at 674-75, 795 S.E.2d at 703. The concern expressed by this concurrence simply is not present in Appellant’s case because the jury never had a question on the effect of an inability to agree on a unanimous sentencing verdict.

Appellant’s claim that “the judge's unanimity instructions were not balanced, which could also have fostered confusion,” is not properly before this Court because he did not present the same argument to the trial judge. *See Watts*, 321 S.C. at 167, 467 S.E.2d at 278; *Bradley v. Washington Fid. Nat. Ins. Co.*, 170 S.C. 509, ___, 171 S.E. 243, 247 (1933) (Supreme Court would not consider anything relating to counsel's argument to jury, where matter was not presented to trial judge); *Dunbar*, 356 S.C. at 142, 587 S.E.2d at 694 (“[a] party may not argue one ground at trial and an alternate ground on appeal”).¹² Moreover, his contention is without merit. He suggests that the

¹² Appellant’s claims that the refusal to allow the proposed argument “placed an unreasonable limitation on a meaningful closing argument that requires a new sentencing trial” under *Herring v. New York*, 422 U.S. 853 (1975), and that some death penalty statutes in other jurisdictions

instructions were defective because “[i]n the first section the judge used the word unanimously with regard to a sentence of life without parole and to statutory aggravators but not to a sentence of death. In the second section the judge only used the word unanimously with regard to a sentence of life but not to a sentence of death.” Respondent submits that he has parsed the instructions too finely. The Supreme Court, however, has mandated that:

[An ambiguous] instruction “may not be judged in artificial isolation,” but must be considered in the context of the instructions as a whole and the trial record. *Cupp v. Naughten*, *supra*, 414 U.S., at 147, 94 S.Ct., at 400–01. In addition, in reviewing an ambiguous instruction such as the one at issue here, we inquire “whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way” that violates the Constitution.

Estelle v. McGuire, 502 U.S. 62, 72 (1991) (citing *Boyde*, 494 U.S. at 380).¹³ This Court applies the same standard. *See State v. Aleksey*, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000).

Applying the appropriate standard, Appellant’s contention fails because when viewed as a whole, there is no “reasonable likelihood that the jury has applied the challenged instruction” so as to conclude that if they were not unanimous on the sentencing verdict a “death sentence was the only possible verdict” or that “the failure to reach a unanimous verdict of death meant appellant had to be retried or sentenced to a lesser sentence.” When the charge is viewed as a whole, *Estelle*, 502 U.S. at 72, the only reasonable likelihood is that a reasonable juror would have understood

require a jury instruction on the consequences of deadlock as to sentencing are likewise not preserved for the Court’s review for the same reason. *Id.* Moreover, both contentions lack merit for the reasons set forth above. Even though the Court abandoned *in favorem vitae* review of capital cases and imposed a contemporaneous objection requirement almost twenty years ago in *Torrence*, see *Torrence*, 305 S.C. at 60-71, 406 S.E.2d at 324-29 (Toal, J., concurring in result), Appellant has not complied with the Court’s error preservation rules as to these arguments. As a result, they are not properly before the Court.

¹³ “Although a defendant need not establish that the jury was more likely than not to have been impermissibly inhibited by the instruction, a capital sentencing proceeding is not inconsistent with the Eighth Amendment if there is only a possibility of such an inhibition.” *Boyde*, 494 U.S. at 380.

that any verdict it reached had to be unanimous; that the jury could only recommend a sentence of death if it found the State have proven the existence of a statutory aggravating circumstance beyond a reasonable doubt; that the State had to establish each element of each statutory aggravating circumstance found by the jury relied beyond a reasonable doubt; and that if the jury could not unanimously agree that the State has proven at least one of these statutory aggravating circumstances beyond a reasonable doubt, then the jury deliberations were at an end. *Tr. 2327-31*.

On the other hand, if the jury found at least one statutory aggravating circumstance beyond a reasonable doubt, the jury would then determine the appropriate punishment: the death penalty or LWOP. A reasonable juror would have further understood that he or she had to remain “open minded as to the appropriate punishment” even if the jury found the existence of a statutory aggravating circumstance beyond a reasonable doubt because “the finding of an aggravating circumstance does not create the presumption that [the jury] should impose the death penalty;” that “the death penalty is only an option;” that in determining the proper punishment, each juror was to consider any of enumerated statutory mitigating circumstances and any non-statutory mitigating circumstance supported by the evidence “even if no one mentioned that a certain fact amounted to a mitigating circumstance; that Appellant did not have any burden of proof with respect to mitigating circumstances; that jurors did not have to unanimously agree on the existence of a mitigating circumstance or find the circumstance beyond a reasonable doubt; that “[t]he law requires that each individual juror decides based upon his or her own life experiences whether life imprisonment or the death penalty is the appropriate punishment in that juror's mind; therefore, each juror is free to give as much weight as they deem appropriate to all of the circumstances of the case;” that “ the existence of an alleged statutory or non-statutory mitigating circumstance, or both, is not an automatic ban to the imposition of the death penalty; and that “[i]t is also permissible

for a juror to decide that life without parole is the appropriate punishment for any reason, or for no reason at all ... even if you find the existence of a of an aggravating circumstance and no mitigating circumstance.” *Tr. 2331-35. See also Tr. 2338-42.*

Therefore, there was no abuse of discretion in refusing to allow the proposed argument.

IV. Assuming *arguendo* that the issue is preserved for appellate review, the trial judge did not abuse his discretion by not excusing Juror 161 for cause.

Appellant argues the trial judge abused his discretion in not excusing Juror 161 for cause because he was employed by the City of Myrtle Beach Jail as a guard; Appellant was incarcerated pre-trial in the same county that the juror worked in, though not the same jail; the juror had received a BOLO about this case at the time it occurred; the juror had read newspaper accounts about the case at the time it occurred; and Appellant had been incarcerated briefly in 2011/2012 at the City Jail “during biker week,” while the juror worked there. Appellant argues that Juror 161 was biased and could not fairly consider the evidence of prison misconduct that would come in during the sentencing phase because he would side with prison guards. He likewise argues that Juror 161 would know about prison conditions, discuss this with other jurors, and this would introduce an arbitrary factor into the jury’s deliberations over the death penalty.

Respondent submits that this argument is not preserved for appellate review and that the Court should be considered either procedurally barred and/or waived because Juror 161 was the first juror presented and Appellant could have used a peremptory challenge to remove him. Alternatively, Respondent submits that there was no error and that the record supports the trial judge’s determination that Juror 161 was not biased and should not have been removed for cause.

A. Lack of Preservation or waiver of alleged error.

As a threshold matter, Respondent submits that this issue should be considered either procedurally barred and/or waived. This Court has previously required a party that exhaust all of

his strikes before an argument may be made against a seated juror. *See State v. Bixby*, 388 S.C. 528, 542, 698 S.E.2d 572, 579 (2010) (“Where counsel fails to exhaust all strikes, appellate review of juror qualification issues is barred”); *State v. Tucker*, 324 S.C.155, 162, 478 S.E.2d 260, 264 (1996) (same); *State v. Hudgins*, 319 S.C. 233, 460 S.E.2d 388 (1995) (same), *cert. denied*, 516 U.S. 1096 (1996). Here, Juror 161 was not seated because Appellant had exhausted all of his strikes. To the contrary, he still had all ten of his peremptory strikes remaining when Juror 161 was seated because Juror 161 was the very first juror seated on the jury. *See Tr. 1425-50; R. _____*, Jury Strike Sheet.

Even if not procedurally barred, the issue should be deemed waived because the record reflects that Appellant and his counsel exercised strategic judgment in deciding not to strike the juror and intentionally seating him on the jury. *See Riddle*, 291 S.C. at 235, 353 S.E.2d at 140 (even under *in favorem vitae* review, the Court held that “We are not required ... to review the strategic decisions of defense counsel”). *Cf. Torrence*, 305 S.C. at 65, 406 S.E.2d at 326 (Toal, J., concurring in result) (discouraging structure that allows counsel to hold back issue for appeal). Especially, where the juror challenged here on appeal, Juror 161, is the very first juror seated on the jury and Appellant had all ten strikes available to remove the juror and chose not to. The fault, if any, lies in his decision not to use one of his strikes, not with qualification.¹⁴

B. There was no abuse of discretion.

Even assuming *arguendo* that the Court finds the issue preserved for appellate review,

¹⁴ As discussed, *infra*, Appellant’s choice not to exercise one of his ten remaining strikes to remove Juror 161, but instead seating him as the first juror on the jury, belies his claim that the juror was biased and should have been excused for cause. Juror 161 was the only African-American juror seated on the jury. Appellant is African-American. Surely, there would be a Post-Conviction Relief claim that counsel was ineffective if counsel had seated a jury with no African-American jurors on it.

Respondent submits that there was no error and that the record supports the trial judge's determination that Juror 161 was not biased and should not have been removed for cause.

During general voir dire of the entire jury panel, Juror 161 informed the court that he was a guard at Myrtle Beach Police Department City Jail. When asked if he was a commissioned law enforcement officer, he initially said he was not. *Tr. 13-14*. Later during general qualification, he stood back up and informed the court that he had misunderstood the question, and his testimony at this point shows he believed he was a commissioned law enforcement officer. The trial judge asked if he was commissioned and had arrest powers and Juror 161 stated that he believed he was or the statute said he was. *Tr. 50-51*.

The trial judge thereafter asked to see the juror's law enforcement commission and the juror showed the trial judge his city identification card, which was not a law enforcement commission. Judge Hood found the Juror Johnson was not a commissioned law enforcement officer with arrest powers who would be disqualified from service under S.C. Code Ann. § 14-7-820. *Tr. p. 50-51*. See *State v. Hughey*, 339 S.C. 439, 529 S.E.2d 721 (2000) (a juror's perception of himself as a law enforcement officer will not disqualify such juror, unless the juror is in fact vested with the same powers as a law enforcement officer).

On individual *voir dire*, Juror 161 testified he was a Type C. Juror, *i.e.* a juror who would not automatically vote for life or death in a murder case, but would consider both the aggravating and mitigating circumstances before reaching a sentencing recommendation. He also testified he did not believe the death penalty was appropriate in every murder case; that he would be fair to both sides and consider all of the evidence before reaching a decision on penalty; that he did not know Appellant, had not had any contact with Appellant, did not know the attorneys on either side, and did not know any of the witnesses in the case in any fashion. He also testified he did not work

on this case in any fashion, as it was in another jurisdiction, and he did not respond to the BOLO he received as he had no information about the case. Further, he testified that he would set aside anything he had read or seen about the case and decide the case strictly on the evidence presented during the trial. *Tr.* 272-84. At the end of the individual *voir dire*, trial counsel objected to the seating of Juror 161, arguing he was not qualified to serve because of his employment at the Myrtle Beach Detention Center. No other timely objection was made. *Tr. p.* 283.¹⁵

The trial judge ruled as follows:

I'll find him qualified. He answered all of the questions very directly, very candid in his response. He was unequivocal. He said he could listen to both sides. He testified under oath that he did not know Mr. Jenkins. He did testify he saw a BOLO in the case years ago, and I don't believe that rises to the level of disqualification. He did not work on the case, was not involved in the arrest, didn't process him through it. He was a detention officer in a different jurisdiction than the one who originally arrested Mr. Jenkins. So, I'll find him qualified.

Tr. 283-84. As discussed, Juror 161 was the first juror presented and Appellant seated him, without objection. *Tr.* 1425-50.

In the sentencing phase, the State did not introduce any evidence Appellant had been incarcerated at the Myrtle Beach City Jail or that Appellant committed any misconduct there. *Tr.* 1728-1950. While the State called SCDC correctional officers to testify to Appellant's prison

¹⁵ At an August 15, 2017 motions hearing, counsel argued that Jenkins' Motion Number 58. This was a "motion to disqualify past or present correctional officers [who] are not *per se* disqualified, I just think that in a case like this where the defendant is obviously incarcerated in the Department of Corrections, has been for now almost two years, ... and ... because of some of the issues that are going to arise about perhaps the defendant's conduct while he's in the correctional facility, that corrections officers ought not be allowed just to serve on this particular jury. I'm not saying that they should be disqualified from all cases; I don't think that's true. But I do think because of the particular issues in this case that are likely to come, especially in the sentencing phase of this case ... that correctional officers ought not to be allowed to serve." 08/15/17 *Tr.* 156-57. Recognizing that it's an exemption not exclusion, the trial judge denied the *per se* exclusion and decided to deal with this on *voir dire*, if a person chose not to assert the exemption. Counsel accepted this ruling. 08/15/17 *Tr.* 157-59. Appellant did not raise a bias or arbitrary factor objection as to Juror 161 at the time of his qualification. See *Tr.* 283.

disciplinary violations and introduced those convictions, Appellant called two SCDC correctional officers who testified to Appellant's good behavior while in state prison institutions and two experts who explained his prison disciplinary violations were due to undiagnosed and untreated mental disorders and childhood and adult trauma. *Tr. 1877-1950; 2050-2279*.

“In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, ‘indifferent’ jurors.” *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). However, “the law is well settled that the defendant has no right to a trial by any particular jury or jurors and has the right only to a trial by a competent and impartial jury.” *State v. Rogers*, 263 S.C. 373, 382, 210 S.E.2d 604, 609 (1974). The determination whether a juror is qualified to serve in a capital case is within the discretion of the trial judge, whose decision will not be reversed “unless it is wholly unsupported by the evidence.” *State v. Dickerson*, 395 S.C. 101, 115, 716 S.E.2d 895, 903 (2011). The *voir dire* must be examined in its entirety to determine whether the trial court erred in its qualification or disqualification of a juror. *Id*; *State v. Drayton*, 293 S.C. 417, 422, 361 S.E.2d 329, 332 (1987). Absent special circumstances, the requirement of bias or prejudice is met through a general *voir dire* as to bias and prejudice. *State v. Gibbs*, 267 S.C. 365, 228 S.E.2d 104 (1976). “The ultimate consideration is that the juror be unbiased, impartial, and able to carry out the law as explained to him.” *State v. Council*, 335 S.C. 1, 10, 515 S.E.2d 508, 512-13 (1999). *See also* S.C. Code Ann. § 14-7-1020 (2020).¹⁶

¹⁶ Section 14-7-1020 (2020) provides that:

The court shall, on motion of either party in the suit, examine on oath any person who is called as a juror to know whether he is related to either party, has any interest in the cause, has expressed or formed any opinion, or is *sensible of any bias or prejudice* therein, and the party objecting to the juror may introduce any other competent evidence in support of the objection. If it appears to the court that the juror is *not indifferent* in the cause, he must be placed as to the trial of that cause and another must be called.

S.C. Code Ann. § 14-7-1030 states that “[a]ll objections to jurors, called to try prosecutions ... in the various courts of this State, if not made before the juror is empaneled for or charged with the trial of the prosecution, action, issue, or question arising out of an actions or special proceeding, is waived, and if made thereafter is of no effect.” These requirements apply to disqualifications that were known by a party, or which could have been determined with due diligence, before the swearing of a jury. *State v. Williams*, 266 S.C. 325, 223 S.E.2d 38 (1976); *State v. DeYoung*, 209 S.C. 482, 41 S.E.2d 100 (1947). So, the only issued preserved for appellate review is the one raised at the time of the juror’s qualification: i.e., that the juror’s employment disqualified him. **Tr. 283.** There was no objection the juror was biased; that the juror would introduce an arbitrary factor into the jury’s deliberations because of his *alleged* knowledge of prison conditions; that the juror should not be qualified because he had received a BOLO about the case on his phone or that he had read something about the case in the paper. Appellant also did not move to strike the juror for cause for any of these reasons. *See Tr. 283.* Therefore, these issues now argued by Appellant are not preserved for appellate review. *Id*; *see also Watts*, 321 S.C. at 167, 467 S.E.2d at 278; *Dunbar*, 356 S.C. at 142, 587 S.E.2d at 694 (“A party may not argue one ground at trial and an alternate ground on appeal”).

Moreover, Juror 161 was not disqualified by statute and should not have been excused for cause. First, Appellant concedes that Juror 161 was not statutorily exempt or disqualified based on his employment with the City Jail because he was not a commissioned law enforcement officer with arrest powers and did not work for SCDC or Horry County.¹⁷ Second, Appellant was housed

(Emphasis added).

¹⁷ This was also conceded by Appellant at the pre-trial motion hearing in August of 2017. **08/16/17 Tr. 256-59.** *See also* BOA at 38-40 (describing the concession at the pre-trial hearing that

pre-trial at the J. Rueben Long Detention Center, the Horry County Detention Facility, not the City Jail where the juror worked. Third, Juror 161 did not meet or know Appellant from his brief stay at the City Jail in 2011/2012 “during biker week.” Fourth, Juror 161 testified under oath that he did not work on this case in any capacity, that he did not know any of the police officer, county jail guards or state prison guards listed as witnesses and that he would set aside anything he had seen or heard about the case and decide the case solely based on the evidence presented in the case. Further, Juror 161 testified he would be fair to both sides, that he could consider both aggravating and mitigating evidence presented by both sides, and that he would meaningfully consider both aggravating and mitigating circumstances. *Tr. 272-83*.

Appellant never asked the juror whether he would favor prison guards over appellant in regard to any prison misconduct admitted at trial. *Cf. Lynch v. Carolina Self Storage Centers, Inc.*, 409 S.C. 146, 760 S.E.2d 111 (Ct. App. 2014) (in submitting voir dire questions to the trial court to determine potential juror bias, it is the responsibility of the attorneys trying the case to submit precise voir dire questions that are reasonably comprehensible to the average juror). As a result, any contention now that he would be biased is merely speculative because there is no evidence in the record the juror would favor the state prison correctional officers or guards called by the State over the two correctional officers or guards called by him in mitigation, or that he would otherwise be biased in favor of the prosecution. Indeed, the record supports the opposite conclusion because Juror 161 testified that he had carefully reviewed the list of witnesses in the case and did not know any of the potential witnesses in the case which would include prison guards, county jail guards, or police officers/investigators. He also testified he did not know Appellant, counsel for appellant, or the attorneys for the State. *Tr. p. 275*. Further and as discussed, the State did not introduce

correctional officers were not disqualified by statute but had an exemption they could exercise).

evidence that Appellant was incarcerated in the Myrtle Beach City Jail in 2011/2012 or that he appellant committed any misconduct at the Myrtle Beach City Jail.

A juror must be excused only if his opinions would prevent or substantially impair the performance of his duties as a juror in accordance with his oath and the court's instructions. *State v. George*, 323 S.C. 496, 476 S.E.2d 903 (1996). When a juror unequivocally states he is not conscious of any bias or prejudice and he can give the defendant and the State a fair and impartial trial and render a verdict according to the law and evidence, there is no abuse of discretion in the trial court's decision to qualify the juror. *State v. Hardee*, 279 S.C. 409, 308 S.E.2d 521 (1983); *State v. Franklin*, 267 S.C. 240, 226 S.E.2d 896 (1976). Here, there was no abuse of discretion in qualifying Juror 161 based on supposed bias.

Appellant also argues the juror should have been excused or disqualified from the case because he received an e-mail or BOLO over his phone at the time of the crime, containing still photos, and read about the case in the newspaper at the time it occurred, in January of 2015. The issue of whether pretrial publicity prevents a defendant from receiving a fair trial, has been addressed on a number of occasions by this Court and by the United States Supreme Court, and on each occasion this Court and the United States Supreme Court have stated the constitutional standard of fairness only requires that a defendant have a panel of impartial jurors. *Irvin*, 366 U.S. at 722. The trial judge's determination of the neutrality of prospective jurors should not be disturbed on appeal absent manifest error. *DeLee v. Knight*, 266 S.C. 103, 111-112, 221 S.E.2d 844, 847 (1975) (citing *Irvin*); see also *State v. Simpson*, 325 S.C. 37, 41, 479 S.E.2d 57, 59 (1996) ("A juror's competence is within the trial judge's discretion and is not reviewable on appeal unless wholly unsupported by the evidence"). Deference should be given to the trial judge's decision to qualify or disqualify a prospective juror as the trial judge is able to actually see and hear the jurors

in assessing their demeanor, credibility, and impartiality. *State v. Evins*, 373 S.C. 404, 418, 645 S.E.2d 904, 911 (2007); *see also Patton v. Yount*, 467 U.S. 1025, 1038 (1984). A trial judge's determinations on the impartiality of a prospective juror are presumed to be correct and are entitled to special deference on appeal). "The findings of the trial court on questions of fact relating to the fitness of a juror are conclusive, and will not be disturbed on review unless manifestly erroneous." *State v. Maxey*, 218 S.C. 106, 110, 62 S.E.2d 100, 102 (1950). "This principle of law is so well established it hardly becomes necessary to cite authority to sustain it." *Id.*

When an issue of prejudicial pretrial publicity is raised, it is sufficient for purposes of the Sixth Amendment right to an impartial jury and the Fourteenth Amendment right to due process, for a trial court to query the jury venire about whether they have been exposed to pretrial publicity concerning the case - not the specific content - and if so, whether they have formed fixed opinions as a result thereof that would prevent them from assessing the guilt of the defendant with an open mind. *MuMin v. Virginia*, 500 U.S. 415, 417, 424-32 (1991). *See also State v. Stanko*, 402 S.C. 252, 271, 741 S.E.2d 708, 718 (2013) (court did not err in denying change of venue where jurors stated they would put aside any knowledge of the case, and follow the law as instructed).

Again, Juror 161 testified that he did not work on this case in any capacity, whatsoever. Also, he was a jail guard at the City of Myrtle Beach Police Department and the case was investigated by the Horry County Police Department. He did not do anything in response to the e-mail/BOLO he received in January of 2015, and he did not participate in any arrest or booking of appellant. **Tr. 276-78.** Appellant was initially held at the J. Reuben Long Detention Center and SCDC, not the City jail. The juror had no information regarding the BOLO to provide to anyone, and he did not know anyone related to the BOLO. Likewise, he did not know appellant and had no connection with him in any way, shape or form. Importantly, he testified he could set aside the

fact that he had received an e-mail or BOLO about the case at the time it occurred and what it contained and also what he had read or heard about the case at the time in the news, and decide this case solely based on the evidence presented during the trial. *Tr. 275-77*. As a result, there was no basis to disqualify him or excuse him for cause for this reason. *See DeLee*, 266 S.C. at 111-112, 221 S.E.2d at 847; *Stanko*, 402 S.C. at 271, 741 S.E.2d at 718.

Nor is there any merit to Appellant's suggestion that the juror should have been excused or disqualified because he would have introduced an arbitrary factor into the jury's deliberations because he would have been aware of general prison conditions and would have shared those with other jurors. This claim lacks merit because Juror 161 was a guard at the City jail and not in a prison, and he had never been employed as a state prison guard or correctional officer. Instead, he worked as a truck driver and at a warehouse before his employment with the City of Myrtle Beach. See Juror Questionnaire, Juror 161, *R. ____*. There simply is no evidence in the record the juror was aware of general conditions of confinement at a state prison institution or the conditions at the state prison institution where appellant was confined. *Tr. 13-14; 272-82; see also* Juror Questionnaire, Juror 161, *R. ____*. Nor is there any evidence this juror would share his personal knowledge of the city jail with other jurors or in fact did so. To the contrary, Juror 161 testified that he would decide this case based only on the evidence presented during the trial. As a result, this argument has no merit.

Finally, the claim that the juror should have been excused or disqualified under a statutory disqualification, S.C. Code Ann. § 14-7-820 (2020)¹⁸ or offered a statutory exemption under S.C.

¹⁸ Section 14-7-820 reads as follows:

No clerk or deputy clerk of the court, constable, sheriff, probate judge, county commissioner, magistrate or other county officer, or any person employed within the walls of any courthouse is eligible as a juryman in any civil or criminal case; provided, that no person may be disqualified under this section except as

Code Ann. § 24-3-930 (2020).¹⁹ In fact, Appellant ultimately concedes that neither the statutory disqualification nor the statutory exemption is applicable to Juror 161. BOA at 44-45. Therefore, the trial judge could not have abused his discretion.

V. The trial judge did not abuse his discretion by refusing to excuse Juror 350 because of her alleged inability to impose a life sentence “for any reason, or no reason at all, or simply as an act of mercy,” since a review of her voir dire responses reflects that she was not life or mercy impaired.

Appellant’s contention that the trial judge abused his discretion by refusing to excuse Juror 350 because of her alleged inability to impose a life sentence “for any reason, or no reason at all, or simply as an act of mercy,” lacks merit. This argument is based on a misreading or misinterpretation of the record. Appellant bases his argument on the juror’s answer to two questions that came on the heels of yet another question. However, there was no abuse of discretion because a review of her voir dire responses reflects that the juror was confused and was still answering the previous question, and that she was not life or mercy impaired.

A. Voir dire of Juror #350.

At the time of her service as a juror in this case, Juror 350 was a college student at Clemson University, home for the summer. *Tr.* 555-573; Juror Questionnaire, Juror 350, *R.* _____. During

determined by the court.

Once the trial judge determines that a potential juror is employed in any capacity within this statute, he must disqualify that person from jury service. *State v. Reed*, 293 S.C. 515, 362 S.E.2d 13 (1987). This Court has adopted a functional rather than rigid formalistic approach in interpreting and applying the provisions of this statute. *State v. Cooper*, 291 S.C. 332, 353 S.E.2d 442 (1986).

¹⁹ Section 24-3-930 provides that “All guards, keepers, officers and other employees who are employed at the state prison system are exempted from serving on juries and from military or street duty.” This exemption does not apply to Juror 161, who was a guard at the Myrtle Beach City Jail. Also, Appellant did not argue at trial that the trial judge should have offered the juror this exemption, even though the statute is inapplicable. Accordingly, his argument is barred under *Dunbar* and § 14-7-1030.

her death penalty qualification, Appellant's counsel asked her if she could impose a life sentence for any reason or no reason at all. She testified she could, but that would probably not be a morally correct. Appellant now argues the answer disqualifies her because she could never impose a life sentence for any reason or no reason if that decision was immoral.

However, the two questions to the juror on which he now relies followed almost immediately on the heels of another question appellant asked her: Whether she understood that the decision to sentence someone to death or life imprisonment was a moral decision, to which she agreed. Appellant then asked whether she could impose a life sentence for any reason on no reason and she responded she could but it would not necessarily be a moral decision if you based it on no reason or some reason not in the evidence. Yet, the juror explained that what she meant by her answer was she could not sentence someone to death as opposed to life except based on the evidence in the case because it would not be fair to sentence the defendant to death based on something arbitrary. *Tr. 570-73*.

B. The issue is procedurally barred or waived.

First, this issue related to this juror is not preserved for review or waived for the reasons set forth in Argument IV. At the time this juror was presented, Appellant had available peremptory challenges that he did not use to remove the questioned juror. This Court has previously required a party that exhaust all of his strikes before an argument may be made against a seated juror. *See Bixby*, 388 S.C. at 542, 698 S.E.2d at 579 (“Where counsel fails to exhaust all strikes, appellate review of juror qualification issues is barred”); *Tucker*, 324 S.C. at 162, 478 S.E.2d at 264. Because he still had strikes and could have used one on her, this claim is procedurally barred. *See Tr. 1425-50; R. _____*, Jury Strike Sheet.

Even if not procedurally barred, the issue should be deemed waived because the record

reflects that Appellant and his counsel exercised strategic judgment in deciding not to strike the juror and intentionally seating him on the jury. *See Riddle*, 291 S.C. at 235, 353 S.E.2d at 140 (even under *in favorem vitae* review, the Court held that “We are not required ... to review the strategic decisions of defense counsel. *Cf. Torrence*, 305 S.C. at 65, 406 S.E.2d at 326 (Toal, J., concurring in result) (discouraging structure that allows counsel to hold back issue for appeal).

C. There was no abuse of discretion.

Second, as discussed above, and discussed more fully herein, the record of the entire voir dire shows the juror was confused by the question or a principle of South Carolina law and in her answers was stating she would not impose a death sentence verses a life sentence without basing that decision on some evidence in the record. *Tr. 555-73*.

Jurors in capital cases should be excluded if their views on capital punishment would “prevent or substantially impair” their ability to follow their oath and the trial court's instructions on the law. Jurors should be excluded for cause either if they “in no case would vote for capital punishment, regardless of [their] instructions,” or if they would “automatically vote for the death penalty in every case [and] will fail in good faith to consider ... aggravating and mitigating circumstances.” *Morgan v. Illinois*, 504 U.S. 719, 729-30 (1992). *See also State v. Sapp*, 366 S.C. 283, 290-91, 621 S.E.2d 883, 886 (2005) (citing *Wainwright v. Witt*, 469 U.S. 412, 424 (1985).

The determination of whether a juror is qualified to serve in a capital case is within the discretion of the trial judge, whose decision will not be reversed “unless it is wholly unsupported by the evidence.” *Dickerson*, 395 S.C. at 115, 716 S.E.2d at 903. The *voir dire* must be examined in its entirety to determine whether the trial court erred in its qualification or disqualification of a juror. *Id*; *Drayton*, 293 S.C. at 422, 361 S.E.2d at 332. “The ultimate consideration is that the juror be unbiased, impartial, and able to carry out the law as explained to him.” *Sapp*, 366 S.C. at

291, 621 S.E.2d at 887.

Appellant's argument with regard to this juror is without merit. It is undisputed this juror was properly qualified pursuant to the precedent of both the United States Supreme Court and this Court regarding whether she could impose a life or death sentence. *See Witherspoon v. Illinois*, 391 U.S. 510 (1968); *Wainwright*, 469 U.S. at 424-25 (the test for exclusion requires neither automatic decision-making by the juror nor "unmistakable clarity" as to the juror's beliefs); *Utecht v. Brown*, 551 U.S. 1 (2007). The juror testified that she could impose a life or death sentence depending on the evidence and circumstances of the case; that she was a "Type C" juror as described in the "Juror Questionnaire;" that she was not a juror who would always vote for life or always vote for death regardless of the evidence; and that she would wait until all the evidence was in and determine the sentence based on consideration of aggravating and mitigating evidence or circumstances. *Tr. 557-73*.

Appellant's argument that Juror 350 should not have been death penalty qualified because she was "life sentence for any reason or no reason" or "mercy" impaired based on her answer to two isolated questions is in contravention of the proper standard of review for the trial judge and for this Court on appellate review because, as discussed, the *voir dire* must be examined in its entirety to determine whether the trial court erred in its qualification or disqualification of a juror. *Dickerson*, 395 S.C. at 115, 716 S.E.2d at 903.

When her *voir dire* responses are viewed in their entirety, it is clear that the trial judge's ruling must be affirmed. *Id.* Juror 350 was simply confused, based on an earlier question asked by Appellant regarding whether the juror understood that it was a "moral" decision whether to impose the death penalty or life in prison, and she was explaining what she would consider in making the

moral decision whether or not to sentence someone to death.²⁰ The entire voir dire also shows the juror was a Type C juror and she was not life sentence impaired and could impose a life sentence based any reason, no reason, or simply as an act of mercy. *Tr. 555-73*.

The answer Appellant points to in an attempt to disqualify the juror came almost immediately on the heels of the question about making a “moral” decision to impose the death penalty verses life in prison. The verbatim colloquy was as follows:

Q: Let me ask you in regards to the death penalty - - let me back up. You do understand that in South Carolina that you are never required to vote for the death penalty?

A: Yes.

Q: It is a *moral* decision you would make after hearing any aggravating and/or mitigating circumstances after His Honor instructs you on the law?

A: Yes.

Q: And you would make that decision on your own?

A: Yes.

Q: And do you also understand you could give a life sentence for any reason or no reason just because that is what you want to do?

A: Yes, but that is not necessarily *morally* correct.

Q: It is not *morally* correct?

²⁰ When jurors are summoned for capital jury service, they typically have little, if any, idea of what they will be asked or instructed by the court to consider as far as determining whether someone is sentenced to death or life. They have little, if any, idea what is relevant or required to consider in a capital sentencing proceeding, as they are not trained jurists or trained capital litigators or attorneys. They have not reviewed years of United States Supreme Court or South Carolina Supreme Court precedent regarding what is relevant in determining whether to sentence a defendant to death or life without parole, and they have not been trained or even instructed on the law. Also, they are not fully instructed on the law by the court after they are selected as potential jurors, but only in a limited fashion. Again, they are only instructed in a general limited sense after they are selected to serve on the jury panel itself. It is only before they retire to deliberate on a sentencing recommendation that they are fully instructed on the law and how they determine whether to sentence someone to death or life. Jurors are presumed to follow the law as instructed by the trial court. *Weeks v. Angelone*, 528 U.S. 225, 234 (2000) (citing *Richardson v. Marsh*, 481 U.S. 200, 211 (1987)); *State v. Pierce*, 289 S.C. 430, 346 S.E.2d 707 (1986).

A: Yes.

Tr. 565, line 21 – 566, line 12 (emphasis added). The juror went on to explain her answer which showed some confusion over what she was being asked; and, in answering the question, she was actually referring to the decision to impose *death* as opposed to life:

Q: I apologize, I need to ask you a follow-up. I asked you earlier about - - I was explaining to you that as a juror you had the right to give life for any reason or no reason, and your response was that that might not be morally correct?

A: Yes.

Q: Can you explain to me what that meant?

A: I believe that for someone to decide *whether or not the death penalty is appropriate or not* should be decided on facts and evidence, not just because I want to or I don't want to. If someone were to decide for that reason, that is not morally correct.

Q: So even though the Court instructed you that you could do that, you are saying that is not something you could do?

A: I mean, I could, but I wouldn't want to because of the fact I wouldn't want to be, like, *that is the reason to give them a death penalty*. It is more so what what is presented in court.

Tr. 570, line 8 – 571, line 2 (emphasis added). The Solicitor followed up with the juror:

Q: [Juror, at the end - - I think I understand what you are talking about. At the end of part two, at the end of it, what Mr. Wilson is telling you is that there is no time in South Carolina that we ever say you got to find for the death penalty.]

A: Yes.

Q: There is going to be aggravating factors, things that would probably make you more mad, and then there will be mitigators that will make you less mad. At the end of all of those things, a concept of law is that you can, at that point, just say, look I wish to give mercy, and the judge is going to instruct you on all of those. You may be a person that says at the end of it I believe the death penalty is the appropriate sentence. You may say I believe that life imprisonment is appropriate. You or someone else may hey, I think it is bad enough, but I choose - -

A: Yes.

Q: -- to give mercy. If the judge instructs you on that, will you follow Judge Hood's instructions?

A: Yes.

Tr. 571, line 7 – 572, line 4.

At the conclusion of her entire *voir dire*, the trial judge found as follows:

I believe she's qualified. She came in as a "C", stayed as a "C". This morally not statement, I took that to mean people shouldn't just base their decisions on what someone looks like or something else, you need to listen to the facts and circumstances of each case and follow the law, listen to the aggravation and mitigation that may be presented. She said she is willing and able to do that, and that she would consider all of that. And she said very clearly she impose either sentence depending upon the facts and circumstances.

Tr. 573, lines 11-21.

This Court should defer to the trial judge, who saw and heard the juror's testimony, as his decision to qualify the juror is supported by the record. *Evins*, 373 S.C. at 418, 645 S.E.2d at 911 ("Deference must be paid to the trial court who sees and hears the juror") (citation omitted). Here, the juror was not life sentence or mercy impaired and the decision to qualify her is not wholly unsupported by the evidence, which is the standard. *See Dickerson*, 395 S.C. at 115, 716 at 903; *Maxey*, 218 S.C. at 110, 62 S.E.2d at 102.

Finally, Respondent notes that the trial judge instructed jurors that they were are the judges of the facts, but he was the judge of the law, and under their oaths as jurors they must apply the law as he instructed it to them (***Tr. 2341***); that they "must" consider both aggravating and mitigating evidence in determining the appropriate sentence; he defined what mitigating evidence was and he instructed jurors that they "must" consider both statutory and non-statutory mitigating evidence. Likewise, he appropriately defined both statutory and non-statutory mitigating evidence. Further, the trial judge instructed jurors that Appellant had no burden of proof to prove mitigating circumstances. (***Tr. 2332-2336***). The jury could sentence appellant to life even if they found an

aggravating circumstance and no mitigating circumstance; and that each juror could give whatever weight each chose to any mitigating circumstance. *Tr. 2332-36*. Also, the trial judge instructed jurors that the law required each individual juror decide based on his or her own life experiences whether the death penalty or life imprisonment was appropriate in that juror's mind. Therefore, each juror was free to give as much weight as they deem appropriate to all of the circumstances of the case. Finally, he instructed jurors that they could impose a life sentence for absolutely no reason at all or any reason and he explained they could return a life sentence if they found a statutory and/or non-statutory mitigating circumstance or simply as an act of mercy. *Tr. 2335-36*.

Based on the entire voir dire of the juror, and given these mandatory instructions, the juror would have meaningfully considered a life sentence for any reason or no reason at all including as an act of mercy. Appellant's contrary claim is without merit.

VI. The Court should not address the merit of Appellant's claim of trial judge error in allowing the State to introduce evidence of Appellant's misconduct while incarcerated prior to trial because he was incarcerated at maximum security prison and on death row as a pre-trial detainee where (1) the argument below was based on the assertion that housing him in SCDC as a pretrial detainee violated the Eighth Amendment proscription against cruel and unusual punishment, but the United States Supreme Court has held that the Eighth Amendment does not apply to pretrial detainees; (2) Appellant's due process argument is not properly preserved for this Court's review because it was not raised in the trial court; (3) a pretrial detainee has no constitutional right to be incarcerated in a particular prison or jail; (4) Appellant is attempting to take advantage of alleged error his conduct has induced; (5) his present claim is contrary to the legislative intent behind enactment of S.C. Code Ann. § 24-3-80 (2020); and (6) the location of his confinement is irrelevant to the admissibility of evidence of his misconduct because the disciplinary infractions for which he was convicted demonstrate his violent character, regardless of where he committed them. Alternatively, the trial judge properly allowed the State to introduce evidence of his pretrial misconduct while incarcerated because he was incarcerated at maximum security prison and on death row as a safekeeper as the result of his own misconduct, and his attacks on his status as a safekeeper do not provide a statutory, evidentiary, or a constitutional basis for excluding evidence of his misconduct that clearly demonstrates his future dangerousness.

The Court does not have to reach the merits of Appellant's contention that the State to introduce evidence of Appellant's misconduct while incarcerated prior to trial because he was

incarcerated at maximum security prison and on death row as a pre-trial detainee for six reasons. The argument below was based on the assertion that housing him in SCDC as a pretrial detainee violated the Eighth Amendment proscription against cruel and unusual punishment, but the United States Supreme Court has held that the Eighth Amendment does not apply to pretrial detainees, only those who were convicted of a crime(s). Also, Appellant's due process argument is not properly preserved for this Court's review because it was not raised in the trial court; a pretrial detainee has no constitutional right to be incarcerated in a particular prison or jail; Appellant is attempting to take advantage of alleged error he has induced; his present claim is contrary to the legislative intent behind enactment of S.C. Code Ann. § 24-3-80 (2020); and the location of his confinement is irrelevant to the admissibility of evidence of his misconduct because the disciplinary infractions for which he was convicted demonstrate his violent character, regardless of where he committed them. Moreover, it is clear that there is no merit to Appellant's argument, even if the Court chooses to address it.

A. Pretrial hearings.

August 4, 2015

At an August 4, 2015, motions hearing before the Honorable R. Ferrell Cothran, Jr., the State moved to obtain a safekeeping certificate, so that custody of Appellant could be transferred from the J. Reuben Long Detention Center to the South Carolina Department of Corrections (SCDC) as a safekeeper. The Deputy Solicitor argued that the State had complied with the requirements of § 24-3-80 (2020),²¹ by serving Appellant and counsel with the request by certified

²¹ Section 24-3-80, which is entitled "Detention of prisoner when authorized by Governor," provides that:

The director of the prison system shall admit and detain in the Department of Corrections for safekeeping any prisoner tendered by any law enforcement officer

mail. The Deputy Solicitor also noted that trial counsel objected to the State's motion. *08/04/15*

Tr. 3-4; R. ____ - ____ (Motion for Safekeeping Certificate). The State then explained that the statute permits transfer of a county prisoner to SCDC

... if there is a concern for the safety of the defendant, there is a risk of escape, or he poses a danger to himself or perhaps other inmates in the local detention facility. The solicitor, Jimmy Richardson, has attested he has no objection to that. And then from there, it's up for the governor to decide whether or not he wants to have him held in a state facility versus a county facility. We have complied with the terms of the statute and I think it's now up for Mr. Wilson to respond to respond to that certificate.

08/04/15 Tr. 4-5.

Trial counsel argued that it would be "really difficult" for counsel to meet with Appellant to prepare for trial, if Appellant was moved outside of Horry County, "no matter when the trial might occur." This was particularly true if SCDC housed him in Columbia or the upstate. Counsel also disagreed with the State's position that Appellant posed a threat while in the county facility. Counsel was aware that Appellant "was in a fight with another inmate ... and he was punished in prison for that by being put into some kind of solitary confinement" *08/04/15 Tr. 5.* However, counsel asserted that this was the only incident of which counsel was aware. Further, both of Appellant's co-defendants had been transferred to out of the detention center. So, counsel did not believe that Appellant was a danger to himself or other inmates at the jail. *08/04/15 Tr. 5-6.*

The Deputy Solicitor noted that counsel's argument concerning his ability to meet with Appellant to prepare for trial was "not a novel argument" because it is present whenever a pretrial

in this State by commitment duly authorized by the Governor, provided, a warrant in due form for the arrest of the person so committed shall be issued within forty-eight hours after such commitment and detention. No person so committed and detained shall have a right or cause of action against the State or any of its officers or servants by reason of having been committed and detained in the state prison system.

detainee is a safekeeper. Likewise, this is taken into account by SCDC and the Governor “when they facilitate a safekeeping certificate.” The Deputy Solicitor stated he did not see where the statute provided counsel with the ability to challenge the safekeeping decision in circuit court because it is “a pretrial detention safety issue with the officers involved in it.” Also, the State had affidavits from the Horry County Sheriff and the Director of Detention, Tom Fox, “concerning seized contraband, letters concerning escape attempts, use of drones, letters asking for help, hacksaws and things like that” *08/04/15 Tr. 6-7.*

Counsel asserted that the affidavits’ references to escape attempts “for the most part refer[red] to the codefendants,” and that nothing connected Appellant to an escape attempt. *08/04/15 Tr. 7.* Yet, the Deputy Solicitor observed that SCDC’s regulations accepts pretrial detainees as safekeepers if the individual is a high escape risk, exhibits “extremely violent and uncontrollable behavior,” or the individual “must be removed from the county facility to protect the individual from the general population and from other detainees.” The Deputy Solicitor pointed out that the packet he submitted (*R. ____ - __*) showed two assaults by Appellant, including an incident in which Appellant stabbed another inmate “several times” with a pencil or “writing implement, and the Sheriff’s Department indicated that he had roughly eight disciplinary infractions even though he had only been in the detention center a relatively short period of time. *08/04/15 Tr. 8-9.*

Judge Cothran found that the State had met its burden and he granted the State’s motion. Still, he informed counsel that “in the event that if he is sent somewhere else and you don’t have access to him, you can apply to the Court at that time and I’m sure the Judge will make whatever accommodations necessary with the Department of Corrections that you have adequate access to him.” *08/04/15 Tr. 10, lines 11-16.*

January 8, 2019

Although Judge Hood held a number of hearings between the August 4, 2015, hearing and Appellant's trial, Appellant did not move to rescind the safekeeper Order until a January 8, 2019 hearing. At that hearing, counsel stated that Appellant had been transferred from the county detention center to Lee Correctional Institution (LCI) as a safekeeper in 2015. He had remained there until "a couple months ago when he was ... sent to Kirkland where he is ... on death row..." Counsel contended that pretrial detention on death row was unconstitutional and violated the Eighth Amendment. *01/08/19 Tr. 3-4.*

Counsel further contended that the State had violated the safekeeper Order signed by Gov. McMaster "in every respect and continues to violate it" because SCDC had regulations that were developed by SCDC based on South Carolina Executive Order 2000-11, but which were inconsistent with section 5 of the Executive Order. Section 5 provides that "Safekeeping orders for detention in the Department of Corrections are valid for no more than 120 days from the date of issuance A safekeeping order may be renewed for up to 90 days upon a showing of good cause and/or no material change in circumstances." Counsel further argued that there was no statutory authority for SCDC to draft the regulations and that there was no authority to exceed the ninety day extension provided for in Executive Order 2000-11. Still, Appellant had been a safekeeper "for almost three years." *01/08/19 Tr. 4-6.*

Moreover, counsel contended that even if SCDC had the authority to promulgate regulations based on the Governor's order, they failed to comply with their own regulations because the regulations required SCDC to reapply for an extension to keep Appellant in

safekeeping. This required renewal of the entire process, which was not done.²² *01/08/19 Tr. 7-8.*

Based on the failure to comply with Executive Order 2000-11 or SCDC's regulations, counsel argued that the trial judge should order that Appellant be transferred back to J. Rueben Long Detention Center. *01/08/19 Tr. 8-9.*

The Deputy Solicitor noted that any contention that Appellant was erroneously placed in SCDC as a safekeeper was moot because the State initially complied with all of the procedural requirements of Executive Order 2000-11, including notice to counsel, and Judge Cothran's ruling was not challenged on procedural grounds. He conceded that he had not been asked to submit another packet for a ninety day renewal of Appellant's status as a safekeeper and explained there was no basis for Horry County to request a renewal. Instead, SCDC had requested the renewals. *01/08/19 Tr. 9-12.* The Deputy Solicitor also pointed out that "the conflict ... is the intersection between this executive order which does not say we have to do it all over again every time and the directives from [SCDC] on how to interpret the executive order." *01/08/19 Tr. 12-13.*

The Deputy Solicitor did not know why Appellant was transferred from LCI to death row and explained that the reason for the transfer was internal to SCDC. He also stated that while he had obtained the Warden's Jacket for Appellant, he only had correspondence and not information as to why Appellant was transferred. *01/08/19 Tr. 13-14.* Counsel observed that Appellant had been incarcerated in supermax at LCI before he was transferred to death row, and counsel contended that this violated of Appellant's Eighth Amendment right against cruel and unusual punishment. *01/08/19 Tr. 15-17.*

The trial judge found that he needed information from SCDC before he ruled. Therefore,

²² This required SCDC to obtain an arrest warrant, a mental evaluation, and a medical evaluation, as well as notice to counsel. None of those things were done.

he took the matter under advisement. He also ordered that the person who comes from SCDC to “bring whatever they have on [Appellant].” *01/08/19 Tr. 17-19.*

January 22, 2019

The follow-up hearing was held on January 22, 2019. At the outset of the hearing, the Deputy Solicitor introduced Appellant’s disciplinary records as Court’s Ex. 1, *R. ____ - __*, the current safekeeper order signed by Gov. McMaster, as Court’s Ex. 2, *R. ____ - __*. He then noted that Court’s Ex. 1 reflected that Appellant had been convicted of numerous disciplinary violations since December 31, 2015. These included “multiple possessions of weapons, striking employees, threats to inflict death or bloodily harm to staff in safekeeping.” *01/22/19 Tr. 3-7.*

Next, the State presented the Warden of Kirkland Correctional Institution (KCI), Willie Davis, who testified that he was familiar with both SCDC’s process for handling safekeepers and Appellant. *01/22/19 Tr. 9.* Warden Davis gave this explanation of SCDC’s normal role with safekeepers:

... [I]t’s usually high profile case or a troublesome inmate at a county facility. And the county usually goes to the governor's office and asks for permission for SCDC to accept responsibility for this inmate.

Usually, we house them at Lee Correctional Institution, but when the inmate becomes troublesome, assaultive towards staff, there's only really one other place SCDC can house these guys and keep them separated and it's in our old supermax building, which is at Kirkland.

Currently, we have 36 death row inmates back in the building, but we also house other troublesome inmates back in the building, also. It's a 50 bed unit.

01/22/19 Tr. 9-10.

Warden Davis was at LCI when Appellant first came there as a safekeeper and he reviewed Appellant’s disciplinary record before receiving Appellant at KCI. Appellant was transferred to KCI based on his disciplinary record and in an effort to deter his various assaults on SCDC staff

at LCI. These offenses included use of a weapon or a homemade knife, “a bunch of throwing and exposure of bodily fluids on an employee,” five instances of “striking an employee,” and three charges of “assault and battery on employees.” *01/22/19 Tr. 10-12. See also 01/22/19 Tr. 26-31* (detailing his disciplinaries).

On cross-examination, Warden Davis testified that SCDC’s “mission statement is to protect public, staff and inmates. If we can't protect them in that order, then we fail in the system.” He also explained that by “troublematic” inmates, he meant those who have committed “[m]ultiple as well as serious” offenses. *01/22/19 Tr. 14*. Warden Davis further testified that when Appellant first arrived at SCDC as a safekeeper, he was placed in “[r]estricted housing” at LCI, which was the most secure area of LCI. He remained there until he was transferred to KCI on September 20, 2018,²³ because “he ha[d] some behavior issues that ... need[ed] to be resolved.” *01/22/19 Tr. 19-22*.²⁴

While housed at KCI “he still ha[d] all [of] his privilege[s] that he would have if he was at Lee,” if not more because of “staffing issues” at LCI. For instance, he had recreation twice a week at KCI, whereas he *might not* have had any at LCI. *01/22/19 Tr. 22*. In response to the trial judge’s concern that Appellant have access to his attorneys between the pretrial hearing and the trial, Warden Davis assured the court that there would be no problem as long as counsel called and scheduled a meeting. Also, counsel could contact SCDC general counsel and he was available if a problem arose. *01/22/19 Tr. 35-41*.

Following Warden Davis’ testimony, counsel argued that the State violated the Governor’s

²³ See *01/22/19 Tr. 25-26*; Court’s Ex. 1, *R. _____*.

²⁴ Appellant points out that he was never in general population LCI. While true, it proves nothing and ignores both his status as a safekeeper and his lengthy disciplinary record.

safekeeping order by keeping Appellant in safekeeping for more than one hundred and twenty days plus a single ninety-day extension, and that this violated his constitutional rights. He further argued that transferring Appellant to KCI without notice to counsel was another violation and that placing him on death row as a pretrial detainee just adds to the injury.” Finally, counsel maintained that he would not have sufficient access to Appellant to adequately prepare for trial because Appellant was housed on death row. So, he asked the trial judge to consider the need for reasonable access to Appellant. *01/22/19 Tr. 42-45*.²⁵

In response, the Deputy Solicitor argued that section 5 of Executive Order 2000-11 did not require additional notice to defense counsel when an extension of the original safekeeping order was sought. *See S.C. Exec. Order 2000-11, § 5*. Further, counsel was given notice when the State initially sought to have Appellant classified a safekeeper and was heard by the court, but the court granted the State’s request. *01/22/19 Tr. 45-46*. Counsel then renewed his previously stated argument. *01/22/19 Tr. 46*.

At the conclusion of this hearing, the trial judge ruled as follows:

I'm going find that Mr. Jenkins being housed in safekeeping is appropriate and has been appropriate and continues to be appropriate based upon the information that was provided today and the information that was provided at the last hearing.

At this point in time, I do not find that his constitutional rights have been violated. And that based upon things that have occurred, which are out of all of our control, his being in safekeeping is appropriate.

01/22/19 Tr. 93-94.²⁶

²⁵ The Deputy Solicitor stated that having Appellant placed in safekeeping was justified by his conduct. On the separate issue of pretrial preparation, he agreed that Appellant should be transferred back to J. Reuben Long Detention Center closer to the time of trial, so that counsel could prepare for trial. Also, he had already spoken to the Sheriff about security. *01/22/19 Tr. 41-42*.

²⁶ Appellant’s brief does not reference this ruling.

The only caveat to this ruling was that Appellant would be returned to Horry County on March 4 (for his May trial), and the trial judge wanted to ensure that counsel would have adequate access to Appellant to prepare for trial. He felt Warden Davis understood this and it would not be a problem. *01/22/19 Tr. 94-95.*

April 25, 2019

At an April 25, 2019 hearing to determine the admissibility of a letter written by Appellant that corrections officer had seized, the State presented Tom Fox. Mr. Fox testified that he was the director of the J. Reuben Long Detention Center in 2015. On March 30, 2015, he received a report stating that Appellant had “attempted to interfere with a head count ... [by trying] to block a window in one of the units where the officer couldn't have a clear vision to count the number of people in there.” This was “a security violation.” He explained that attempts to block a head count are “typically used in escape schemes” because the inmate is testing to see whether the facility is diligent in conducting head counts, so as to account for all inmates who are supposed to be present. *04/25/19 Tr. 93-95.* Because of this situation, Appellant was considered a security threat who required additional scrutiny. *04/25/19 Tr. 98; 105.*

Appellant's codefendants, McKinley and James Daniels, were also incarcerated in the detention center at the time and officers had witnessed the brothers “passing papers back and forth. As a result, officers searched their cells and seized documents revealing an “escape plan,” including a letter with “instructions [on] how to insert hacksaw blades into mail and have it mailed into the detention center.” *04/25/19 Tr. 96-97; State's Ex. F, R. ____.* However, Mr. Fox testified on cross-examination that he did not have any direct information that Appellant was involved in the escape plan with his co-defendants. *04/25/19 Tr. 105-06.*

B. Events at trial.

Before the sentencing phase began, the Deputy Solicitor informed the trial judge that the State intended to offer proof of Appellant's future dangerousness through the testimony of five or six SCDC correctional officers. They would testify they were attacked by Appellant, "hit with a contraband shank[,] or had urine or feces thrown on them." The officers would only testify to "their specific instances" of offenses for which he had been convicted while in SCDC. The State also intended to introduce a video from an extraction team showing "SCDC personnel using chemical ammunitions and efforts to get Mr. Jenkins out of his cell and then taking him to ... the medical section." This would be offered through the group leader, Capt. Commander. The Deputy Solicitor wanted the court to be aware that there was a statement made on the video telling Appellant he was going to death row. *Tr. 1689-92. See also* Argument VII.

The State then explained the manner in which it intended to present evidence through Mr. Fox about how Appellant went to SCDC and that he would not discuss the escape attempt involving the co-defendants. *Tr. 1692-93.* Trial counsel objected, arguing that it was "misleading to the jury and prejudicial to the defendant" for the State to present only that Appellant was moved to SCDC while not presenting the reason that he was moved. Counsel also argued that the real reason Appellant was made a safekeeper was because his co-defendants had threatened Mr. Fox and the co-defendants were attempting to escape. Counsel recognized that he could explore this on cross-examination but argued that it was improper for the State to introduce part of the reason for Appellant's transfer without introducing "all of it." *Tr. 1694-95.*

The Deputy Solicitor observed that he could not present all of the evidence for having Appellant moved because he wanted to protect the record. Specifically, he noted that if the State introduced evidence Appellant had stabbed a former cellmate in the eye with a pencil, this would create a conflict of interest for trial counsel because counsel had represented the cellmate. *Tr.*

1695-96.

The trial judge found that the jury needed to hear some explanation about why Appellant was in SCDC as opposed to the detention center. He then ruled that the State could introduce evidence through Mr. Fox and that Appellant would be able to cross-examine him about whether he was moved because of the co-defendants. *Tr. 1696.*²⁷

Mr. Fox subsequently testified before the sentencing phase jury. He testified without objection that he was familiar with § 24-3-80 and that this statute gives SCDC “the authority to accept pretrial inmates from local jurisdictions based on affidavits and a governor's order.” *Tr. 1846-47.* Counsel, however, asked to be heard after following exchange:

Q And based upon Mr. Jenkins' conduct, did you fill out an affidavit and engage the governor's office for this particular defendant?

A Yes, we did.

Tr. 1847, lines 4-9.

Outside the jury's presence, counsel objected to this testimony and argued that Appellant had been placed in SCDC because of the conduct of his co-defendants, but Mr. Fox's testimony suggested to jurors that he was placed in SCDC because of his own conduct. Counsel maintained this was “not true.” *Tr. 1847-48.* In response to the trial judge's statement that he thought the State was not going to introduce evidence of Appellant's conduct at the detention center and why he was “sent into safekeeping,” the Solicitor stated that the State was not going to ask about the particulars of Appellant's conduct and had advised Mr. Fox not to mention them. The Solicitor again noted the reason for that was Mr. Wilson's conflict of interest. *Tr. 1848.*

²⁷ After listening to the parties argue the State's request for a Rule 403 analysis on the reference to death row in the body cam, the trial judge directed the State not to mention it in opening. *Tr. 1697-1703.*

When the trial judge suggested that it was a lie to say Appellant as in safekeeping because of his own conduct, the Solicitor observed that a person can only be placed in safekeeping based on his own conduct and noted that Mr. Fox did an affidavit based on Appellant's own conduct. However, the State was "not going into any of that." *Tr. 1848-49*. Counsel argued that jurors had already heard that Appellant was set to safekeeping because of his own conduct and moved for a mistrial because the "bell" could not be "unrung." *Tr. 1849*. The Solicitor suggested that the challenged testimony did not rise to the level of justifying a mistrial and listed some of Appellant's offenses that resulted in him being sent to SCDC as a safekeeper. *Tr. 1849*.

Although the trial judge stated that "we're not going into any of that, that is not the issue," he denied the motion for a mistrial because he found that the challenged testimony did not rise to the level of manifest necessity. Still, he agreed to give jurors a curative instruction directing them not to consider Appellant's conduct at the detention center. Counsel took exception to this ruling. The trial judge also instructed Mr. Fox not to mention the conduct. *Tr. 1850-52*. When the jury returned, the trial judge gave a curative instruction directing jurors to disregard "testimony alleging something about Mr. Jenkins' conduct while at J. Reuben Long Detention Center," striking that testimony from the record, and telling them this testimony could not be considered in their deliberations. *Tr. 1852*.

In still another hearing outside of the jury's presence, the trial judge revisited the admissibility of evidence of Appellant's misconduct in SCDC before the State presented any evidence. Initially, he ruled that the extraction video was inadmissible. He then addressed evidence that Appellant had been placed on death row. Because of the potential for prejudice, he suggested telling jurors he was moved to SCDC's most secure facility. *Tr. 1863-65*. The Solicitor stated his intention was to only present evidence of individual interactions with Appellant and not discuss

movement or a facility. *Tr. 1866.*

Counsel agreed with the trial judge's exclusion of the video, but he argued that none of the SCDC officers should be permitted to testify because Appellant should never have been in SCDC's custody, that this level of custody violated the Eighth Amendment, and the State should not "benefit" from his unlawful transfer of Appellant. Counsel again premised his argument by suggesting that Appellant only engaged in misconduct because he was placed in SCDC's custody. *Tr. 1866-67.*

The Solicitor argued that Appellant had received two pretrial hearings on the question of whether it was proper for SCDC to hold him as a safekeeper, including one hearing before the trial judge. Following each hearing, the court ruled that he was properly a safekeeper. Also, the Solicitor again pointed out that Appellant was in fact transferred to SCDC based on his own misconduct. This included "assaultive behavior, stabbing [a cell mate] in the eye with a pencil, [and] threatening to kill another inmate." While the conduct of the co-defendants was considered, it was also Appellant's conduct. *1867-69.*

Counsel then suggested that "part of the problem" was that the order sending him to safekeeping expressly considered the co-defendants' conduct in addition to that of Appellant and counsel again suggested their conduct resulted in him becoming a safekeeper. *Tr. 1869.* The trial judge observed that the conduct of the codefendants was not the "only issue" resulting in transferring Appellant (*Tr. 1869, line 16*) and he ruled that the State could present evidence of misconduct in SCDC:

I'm going to allow the SCDC officers to testimony. I believe their testimony is directly relevant and appropriate of the issues that are at hand in the juror's determination of whether or not the appropriate sentence is life or death.

The safekeeping arguments have been argued. They were argued to the original judge who made the finding of safekeeping, which was not me. They were reargued

to me at some point along in the future, ... which I [ruled] upon -- pretty sure there is a written order as to that issue, and so I'm going to allow them to testify as we planned. But I do not want the video in, and I don't want any mention of "death row", okay.

Tr. 1870, lines 3-16. The Deputy Solicitor stated that he understood. *Tr. 1870, line 17.*

The State thereafter introduced a copy of Appellant's disciplinary infractions resulting in convictions as State's Ex. 153, (R. ____ - __) through Michael Stobbe, the branch chief of SCDC inmate records. State's Ex. 153 reflected convictions for twenty-six disciplinary violations.²⁸ The State also presented testimony from five correctional officers, concerning the following violations:

- On September 13, 2018, Appellant threw a cup of "unknown liquid" on former C.O. Sekou Bolden and a nurse. Four days later, Appellant again threw a cup of "unknown liquid" on C.O. Bolden and Appellant cut him on his right forearm with a sharp object. This cut required C.O. Bolden to receive medical attention. He had to use mace on Appellant in the latter incident (*Tr. 1884-87*);
- On September 17, 2018, there were a lot of problems with inmates throwing fluids on guards. So the guards began closing all of the "food service flaps" to the inmates' cells. Because Appellant refused to close his food flap, he was forcibly removed from his cell by C.O. Damon Greene and other officers. As he was being taken to see mental health, Appellant shoved C.O. Greene against a fence and threatened to kill him (*Tr. 1888-90*);
- After Appellant's restraints were removed and he was secured in his cell on

²⁸ The convicted offenses listed in State's Ex. 153 included (1) "throwing/exposure of any [body fluids]" on September 13, 2018; (2) "striking an employee with" on July 25, 2018; (3) "possession of a weapon" on July 25, 2018; (4) "striking an employee with" on June 13, 2018; (5) "possession of a weapon" on June 13, 2018; (6) assault and battery of an employee on June 13, 2018; (7) "possession of a weapon" on April 24, 2018; (8) "possession of a weapon" on December 30, 2017; (9) "possession of a weapon" on August 28, 2017; (10) "possession of a weapon" on July 21, 2017; (11) "possession of a weapon" on January 17, 2017; (12) "riot" on January 19, 2016; (13) "throwing/exposure of any" on January 19, 2016; (14) "throwing/exposure of any" on January 11, 2016; (15) "throwing/exposure of any" on December 31, 2015; (16) "disrespect" on August 7, 2018; (17) "threatening to inflict [harm]" on June 13, 2018; (18) "poss. or/attempt to poss" on December 30, 2017; (19) "poss. or/attempt to poss" on September 8, 2017; (20) "poss. or/attempt to poss" on August 28, 2017; (21) "threatening to inflict [harm]" on July 21, 2017; (22) "poss. or/attempt to poss" on January 17, 2017; (23) "refusing or failing obey" on March 2, 2016; (24) "evading a security device" on January 11, 2016; (25) "refusing or failing obey" on January 11, 2016; and (26) "poss. or/attempt to poss" on January 9, 2016. *R. ____ - __.*

July 25, 2018, “he began swinging a piece of metal through the food service flap.” This object struck C.O. Jason Fields on the right forearm and C.O. Fields immediately “stepped back.” This resulted in bruising and some bleeding. Appellant then threw the metal object at C.O. Fields, striking and cracking his face shield. The officers then recovered the object that was thrown. Appellant’s conduct on that day posed a danger to C.O. Fields (*Tr. 1895-99*);

- On January 11, 2016, C.O. Vanessa Fox was picking up trays from after feeding. After Appellant gave his tray to her, he repeatedly refused her commands to remove his hand from the food flap, so that she could close it. He became angry and told her that if she did not move from his door, “he was going to throw feces or urine on me.” They continued arguing briefly until Appellant took a “squeeze bottle” and squeezed feces at her. It struck under C.O. Fox’s face shield, and feces got on her face as well as in her and in her eyes. Although C.O. Fox gave him “another directive to move, and ... put chemical emission into the food flap,” Appellant grabbed more feces and continued to try to throw it on me.” C.O. Fox “immediately went to medical,” to get the feces out of her mouth and eyes. She was still receiving medical treatment for her eyes at the time of trial. Appellant’s conduct on that day posed a danger to her (*Tr. 1900-03*); and
- While Capt. Thomas Commander and another correctional officer were attempting to secure another inmate’s food flap on September 20, 2018, Appellant threw a homemade knife and a “crank radio” at Capt. Commander. Both items struck Capt. Commander’s leg. When the officers attempted to secure Appellant’s food flap, he began hitting the officers with his crocs and he broke out a window. Once he was restrained, the officers took him to medical. As they were walking, Appellant told Capt. Commander, “If you don't ship me, I'm going to kill one of your officers” (*Tr. 1908-09*). *See also* Argument VII.

C. Discussion.

Appellant makes three challenges to introduction of evidence of his misconduct as a pretrial detainee. Each of these challenges is based on being transferred to the custody of SCDC as a safekeeper. Respondent submits that none of his arguments provide a statutory, evidentiary, or a constitutional basis for excluding evidence of his misconduct that clearly demonstrates his future dangerousness. Also, the Court needn’t address the merits of his claims for at least six reasons.

1. This Court does not have to reach the merits of Appellant’s Argument VI.

First, the argument below was based on the assertion that housing him in SCDC as a pretrial detainee violated the Eighth Amendment proscription against cruel and unusual punishment. See US Const. amend. VIII. However, the United States Supreme Court has held Eighth Amendment does not apply to pretrial detainees because they have not yet been convicted of the charged offense(s). See *Ingraham v. Wright*, 430 U.S. 651, 671-72 n. 40 (1977) (“Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions... [T]he State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law. Where the State seeks to impose punishment without such an adjudication, the pertinent constitutional guarantee is the Due Process Clause of the Fourteenth Amendment”) (citation omitted). See also *Bell v. Wolfish*, 441 U.S. 520, 535 n. 16 (1979) (“The Court of Appeals properly relied on the Due Process Clause rather than the Eighth Amendment in considering the claims of pretrial detainees. Due process requires that a pretrial detainee not be punished. A sentenced inmate, on the other hand, may be punished, although that punishment may not be ‘cruel and unusual’ under the Eighth Amendment”).

Second, Appellant has now abandoned any reliance upon the Eighth Amendment²⁹ and relies, instead, on *Wolfish* and due process. However he failed to present the due process argument to either Judge Cothran or Judge Hood, the trial judge. Hence, his argument is not properly before this Court on appeal. See *State v. Prioleau*, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001) (an

²⁹ In South Carolina, for issue preservation, assuming the “statement of the issue” is sufficient, the issue must also be argued fully in the initial brief of appellant to be preserved for the Court’s consideration. See Rule 208(b)(1)(E), SCACR; *Jinks v. Richland County*, 355 S.C. 341, 343, 585 S.E.2d 281, 282 n. 3 (2003); *First Savings Bank v. McLean*, 314 S.C. 361, 444 S.E.2d 513 (1994) (issues not argued in the brief are deemed abandoned and will not be considered on appeal).

objection should be addressed to the trial court in a sufficiently specific manner that brings attention to the exact error); *Watts*, 321 S.C. at 167, 467 S.E.2d at 278 (“To be preserved for appellate review, an issue must be both presented to and passed upon by the trial court”); *Dunbar*, 356 S.C. at 142, 587 S.E.2d at 694 (“A party may not argue one ground at trial and an alternate ground on appeal”). Third, the present argument is premised on the notion that Appellant had a right to remain in the detention center. No such right exists. Whether an inmate is a convicted prisoner or pretrial detainee, he has no constitutional right to be incarcerated in a particular prison or jail. *See Olim v. Wakinekona*, 461 U.S. 238, 245-46 (1983) (“an inmate has no justifiable expectation that he will be incarcerated in any particular prison within a State”), *abrogated on other grounds*, *Sandin v. Conner*, 515 U.S. 472 (1995); *cf. Meachum v. Fano*, 427 U.S. 215, 225 (1976) (“[c]onfinement in any of the State's institutions is within the normal limits or range of custody which the conviction has authorized the State to impose”).

Fourth, this Court has repeatedly held that “ ‘a party may not complain on appeal of error or object to a trial procedure which his own conduct has induced.’ ” *State v. Stroman*, 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984) (quoting *State v. Worthy*, 239 S.C. 449, 465, 123 S.E.2d 835 (1962)); *State v. Babb*, 299 S.C. 451, 455, 385 S.E.2d 827, 829 (1989). There can be no clearer example of a party attempting to take advantage of alleged error he has induced than Appellant’s effort to obtain relief based upon his own misconduct.

Fifth, § 24-3-80 expressly states, in pertinent part, that “*No person so committed and detained shall have a right or cause of action against the State or any of its officers or servants by reason of having been committed and detained in the state prison system.*” (Emphasis added). Thus, Appellant’s challenge to his status as a safekeeper is contrary to the explicit language of the statute, which unambiguously and plainly expresses the General Assembly’s intent that a

safekeeper does not possess a right or cause of action against the State by reason of having been committed and detained in the State prison system.³⁰ Given the above-quoted mandatory language of the statute, it is clear that the General Assembly could not have intended for a capital inmate to be able to utilize his status as a safekeeper as a basis for excluding otherwise clearly relevant and admissible evidence of misconduct by that inmate in the sentencing phase of his trial and on direct appeal because this leads to an absurd result. *Lancaster Cty. Bar Ass'n v. S.C. Comm'n on Indigent Def.*, 380 S.C. 219, 222, 670 S.E.2d 371, 373 (2008) (“In construing a statute, this Court will reject an interpretation when such an interpretation leads to an absurd result that could not have been intended by the legislature”).

Sixth, Respondent submits that the location of Appellant’s confinement is irrelevant to the admissibility of evidence of his misconduct. *Accord Olim*, 461 U.S. at 245-46. The disciplinary infractions for which he was convicted demonstrate his violent character, regardless of where he committed them. Without *any* evidence of specific wrongful actions by prison staff that supposed precipitated misconduct by Appellant, his complaint is one of prison conditions, generally, which is inadmissible for the reasons set forth in Argument VII. If anything, his willingness to repeatedly engage in violent or otherwise disruptive conduct, in spite of being transferred to LCI - a much more secure facility than the county detention center – dramatically underscores his exceptionally

³⁰ The first rule of statutory construction is to “ascertain and effectuate” the intent of the legislature. *Rainey v. Haley*, 404 S.C. 320, 323, 745 S.E.2d 81, 82 (2013). “Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.” *Id.* There is no ambiguity, whatsoever, in the above quoted sentence. Here, the General Assembly’s use of the phrase “shall have” inexorably leads to the conclusion that this prohibition is absolute. See *State v. Foster*, 277 S.C. 211, 212, 284 S.E.2d 780, 780 (1981) (“Taken literally, the word ‘shall’ is mandatory”); *S.C. Dep't of Motor Vehicles v. Dover*, 423 S.C. 153, 162, 813 S.E.2d 532, 537 (Ct. App. 2018) (same); *Sloan v. Hardee*, 371 S.C. 495, 499, 640 S.E.2d 457, 459 (2007) (“Words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation”).

violent character and future dangerousness.³¹ Accordingly, all of the arguments advanced in Argument VI are without merit.

2. Judge Cothran’s grant of the initial request to have Appellant transferred to SCDC as a safekeeper is supported by the record.

Further and notwithstanding Appellant’s arguments to the contrary, the record supports Judge Cothran’s finding that the State met its burden to have Appellant classified as a safekeeper and transferred to SCDC’s custody. As noted above, the first sentence of § 24-3-80 states, “The director of the prison system shall admit and detain in [SCDC] for safekeeping any prisoner tendered by any law enforcement officer in this State by commitment duly authorized by the Governor, provided, a warrant in due form for the arrest of the person so committed shall be issued within forty-eight hours after such commitment and detention.” Executive Order 2000-11 derives its authority from § 24-3-80, and it establishes the criteria and procedures by which the Governor of South Carolina may transfer an individual held in a pretrial confinement facility, like Appellant,

³¹ There does appear to be some tension between the provisions of Executive Order 2000-11 and the SCDC policies and procedures governing as to whether the entire process of S.C. Exec. Order 2000-11, § 1 must be followed when seeking renewal of a safekeeping order. *Compare* S.C. Exec. Order 2000-11, § 5 (Feb. 16, 2000) (no express requirement) *with* SCDC Policy SK-22.02, § 2.1. *See* <http://public.doc.state.sc.us/policy/SK-22-02.htm.pdf>. (Last visited Feb. 8, 2021). However, this Court should not address this tension because it does not impact the admissibility of Appellant’s misconduct as a pretrial detainee.

Instead, as made clear by *Al-Shabazz v. State*, 338 S.C. 354, 367-68, 527 S.E.2d 742, 749 (2000), any such claim is appropriately addressed only in the grievance process established by SCDC and the Administrative Procedure Act appeal. *Id.* (“A claim regarding sentence-related credits or other condition of imprisonment does not fall into this category [of claims proper in PCR]. A successful claim, while it may affect the duration of the sentence or the quality of life in prison, will not affect the validity of the underlying conviction or sentence”). *See also id.* at 369, 527 S.E.2d at 750 (“Placing review of [sentence-related credits or custody status] cases within the ambit of the APA will ensure that an inmate receives due process, which consists of notice, a hearing, and judicial review. It also will provide an orderly and consistent framework for resolving such matters”). Regardless, Court’s Ex. 2 from the January 22, 2019 hearing (**R. ____**) makes clear that Gov. McMaster continued to sign orders maintaining Appellant’s safekeeper status.

to SCDC's custody. Section 1 of Executive Order 2000-11 provides that “[a]n individual held in a county pretrial confinement facility may be transferred to the custody of the South Carolina Department of Corrections by commitment duly authorized by the Governor pursuant to § 24-3-80, if the individual: (1) is a high escape risk; (2) exhibits extremely violent and uncontrollable behavior; and/or (3) must be removed from the county facility to protect the individual from the general population or other detainees.” S.C. Exec. Order 2000-11, § 1 (Feb. 16, 2000).³²

Because the elements of § 1 are listed in the disjunctive, only one element need be satisfied to warrant designation as a safekeeper. *See, e.g., Michau v. Georgetown Cty. ex rel. S.C. Ctys. Workers Comp. Tr.*, 396 S.C. 589, 595, 723 S.E.2d 805, 808 (2012) (“As this Court has recognized, the ‘use of the word ‘or’ in a statute ‘is a disjunctive particle that marks an alternative’ ”). Contrary to Appellant’s arguments, the State’s showing met these requirements. In support of the motion to obtain a safekeeper certificate and have Appellant transferred to SCDC’s custody, Horry County Sheriff Phillip E. Thompson submitted an affidavit stating that he believed that “Inmate Jerome Jenkins is capable of and has proven during his incarceration in the J. Reuben Long Detention

³² The initial application for safekeeper status is controlled by section 2 of Executive Order 2000-11, which requires the application to include “(1) a properly issued arrest warrant for the individual; (2) an affidavit from the chief county law enforcement officer providing the reason(s) why the individual should be committed to the custody of the Department of Corrections; (3) a certificate prepared by the circuit solicitor indicating concurrence with the proposed safekeeping transfer; (4) a certificate of service indicating that notice of the application of safekeeping has been filed by the county has been given to the individual's attorney.” S.C. Exec. Order 2000-11, § 2. The Director of SCDC then reviews the application and makes a recommendation to the Governor as to whether the pre-trial detainee ought to be transferred to SCDC for safekeeping. *Id.* The Governor makes the final determination as to whether the county’s application will be granted. *See* S.C. Exec. Order 2000-11, § 3 (Feb. 16, 2000). A safekeeping order is valid for one-hundred and twenty days from the date that it is issued and may be renewed for a period of ninety days “upon a showing of good cause and/or no material change in circumstances.” S.C. Exec. Order 2000-11, § 5 (Feb. 16, 2000). If the order is not renewed, the pretrial detainee must be transferred back to the county jail. *Id.* Appellant did not contend in the trial court that these requirements were not met. Accordingly, his assertion that there was no evidence either a mental health or a medical evaluation were ever performed is procedurally barred under *Watts and Dunbar, supra*.

Center his violent uncontrollable behavior and is a high escape risk.” See State’s Ex. F, **R. ____**.

Sheriff Thompson supported his conclusion by stating that while awaiting trial on two counts of murder, three counts of armed robbery, one count of attempted murder and a weapons charge:

... [O]n March 3, 2015, Jenkins purposely interfered with head count by blocking the window and not allowing the officer to complete her count. The act was suspicious and possibly testing how persistent the head count attempt would be for future escape attempt, Jenkins was moved to administrative segregation. On April 11, 2015, staff members intercepted a written escape plan that involved Jenkins and his two codefendants, McKinley and James Daniels to have hacksaws blades smuggled in to the facility to aid in their escape. On June 7, 2015, Jenkins threatens to assault another inmate and is moved to administrative segregation, on June 11, 2015 a letter is intercepted from Jenkins threatening to kill a person if he gets out and contains plans to swallow razor blades to be transported out of the facility.

On June 9, 2015, Director of Detention Tom Fox received information from an inmate confidential informant housed with Jenkins and his co-defendants that they were planning another escape attempt by utilizing a drone to drop hacksaw blades in to a recreation yard. On June 20, 2015, Jenkins violently assaulted another inmate with a pencil and is moved to maximum security. On June 28, 2015, Jenkins faked a heart attack and was taken to medical and then returned to maximum security, actions consistent with testing the security of medical movements for future escape attempts.

State’s Ex. F, **R. ____**.

Additionally, the State informed Judge Cothran at the August 4, 2015 hearing that Appellant had eight disciplinary infractions while at J. Reuben Long Detention Center, including an assault and a threat to assault. In the assault, he stabbed another inmate in the eye with a pencil during a fight. **08/04/15 Tr. 8-9.**³³

Appellant downplays the significance of the infractions he committed that resulted in the change of status to safekeeper. First, he contends that he was not a “high escape risk” and suggests

³³ The State chose not to present evidence that Appellant stabbed another inmate in the eye with a pencil because this would have created a conflict of interest for trial counsel, who had represented the inmate. **Tr. 1695-96**. The present argument underscores the truth to the adage that no good deed goes unpunished.

that it is a “self-serving stretch on its face” to say the disruption of a head count supports this factor. Similarly, he suggests that the violent act of stabbing another inmate in the eye during a fight was relatively trivial. He also points out that Mr. Smith later admitted at an April 25, 2019 hearing that the written escape plan was a letter between Appellant's two co-defendants and that Appellant was not connected to this by any direct evidence. See *04/25/19 Tr. 105-06*.

True, there was *no direct evidence* tying Appellant to the escape attempt letter. Yet, his obstruction of the headcount created the threat of a possible intent to escape. More importantly, each of Appellant’s contentions ignore two extremely important points that the United States Supreme Court emphasized in *Wolfish*. First, “[C]entral to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves.” *Wolfish*, 441 U.S. at 546-47 (quoting *Pell v. Procunier*, 417 U.S. 817, 823 (1974)). The second point is that:

Prison administrators ... should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security. Such considerations are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters.” We further observe that, on occasion, prison administrators may be “experts” only by Act of Congress or of a state legislature. But judicial deference is accorded not merely because the administrator ordinarily will, as a matter of fact in a particular case, have a better grasp of his domain than the reviewing judge, but also because the operation of our correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial.

441 U.S. at 547-48 (citations omitted and emphasis added).

When the proper deference is accorded to the State’s showing in this case, it is clear that Judge Cothran did not abuse his discretion in granting the change in Appellant’s status to safekeeper because Appellant’s conduct fell within the first two criteria of § 1 of Executive Order

2000-11. As the Supreme Court has made clear in *Wolfish*, the determination of whether his actions constituted a threat to prison security was a decision best suited for the detention center and Sheriff to make, as opposed to defense counsel or the judiciary. *Id.* See also *Procunier v. Martinez*, 416 U.S. 396, 404-05 (1974) (“Suffice it to say that the problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. For all of those reasons, courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact reflects no more than a healthy sense of realism”) (footnote omitted).

3. Appellant’s procedurally barred reliance on due process and *Wolfish* does not provide him a basis for relief.

Nor does Appellant’s reliance on his rights under the Due Process Clause of the Fourteenth Amendment and the Supreme Court’s decision in *Wolfish* provide him a basis for relief. Even if this argument was not procedurally barred, it lacks merit.

The Supreme Court in *Wolfish* “examine[d] the constitutional rights of pretrial detainees ...” *Wolfish*, 441 U.S. at 523. The Court found that pretrial detainees had a constitutional right “to be free from punishment” that stemmed from the Due Process Clause of the Fourteenth Amendment. *Id.* at 535 & n. 16.³⁴ The Court explained that “[i]n evaluating the constitutionality of conditions or restrictions of pretrial detention that implicate only the protection against deprivation of liberty without due process of law” - like those raised by Appellant below - “the proper inquiry is whether those conditions amount to punishment of the detainee.” *Id.* at 535. See

³⁴ However, the presumption of innocence “has no application to a determination of the rights of detainee during confinement before his trial has even begun.” *Id.* at 533.

also id. at 535-39. To prevail on such a claim a pretrial detainee must show (1) “an expressed intent to punish on the part of detention facility officials,” or (2) “ ‘whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it].’ ” *Id.* at 538 (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963)). *See also id.* at 539 n. 20.

The Court added that reviewing courts must remember that “these inquiries spring from constitutional requirements and that judicial answers to them must reflect that fact rather than a court's idea of how best to operate a detention facility.” *Id.* at 539. The Court likewise stressed that:

The Government also has legitimate interests that stem from its need to manage the facility in which the individual is detained. *These legitimate operational concerns may require administrative measures that go beyond those that are, strictly speaking, necessary to ensure that the detainee shows up at trial.* For example, the Government must be able to take steps to maintain security and order at the institution and make certain no weapons or illicit drugs reach detainees. *Restraints that are reasonably related to the institution's interest in maintaining jail security do not, without more, constitute unconstitutional punishment, even if they are discomforting and are restrictions that the detainee would not have experienced had he been released while awaiting trial.* We need not here attempt to detail the precise extent of the legitimate governmental interests that may justify conditions or restrictions of pretrial detention. It is enough simply to recognize that in addition to ensuring the detainees' presence at trial, *the effective management of the detention facility once the individual is confined is a valid objective that may justify imposition of conditions and restrictions of pretrial detention and dispel any inference that such restrictions are intended as punishment.*²³

^{F_n23} In determining whether restrictions or conditions are reasonably related to the Government's interest in maintaining security and order and operating the institution in a manageable fashion, courts must heed our warning that “[s]uch considerations are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters.”

Wolfish, 441 U.S. at 540 & n. 23 (emphasis added) (footnote 22 omitted). *See also id.* at 547

(stating prison officials “should be accorded wide-ranging deference in adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security”); *Hudson v. Palmer*, 468 U.S. 517, 526 (1984) (recognizing prison administrators must “take all necessary steps to ensure the safety” of prison staff, visitors, and inmates in a “volatile ‘community’”). Finally, the Court in *Wolfish* admonished that “Governmental action does not have to be the only alternative or even the best alternative for it to be reasonable, to say nothing of constitutional.” *Id.* at 542 n. 25.

Applying these principles, Appellant’s due process challenge fails. He did not present *any evidence* at trial of any specific wrongful actions by prison staff at KCI that supposedly precipitated misconduct by him. *See Fitzpatrick*, 178 U.S. at 315 (“While no inference of guilt can be drawn from [Appellant’s] refusal to avail himself of the privilege of testifying, he has no right to set forth to the jury all the facts which tend in his favor without laying himself open to cross-examination upon those facts”). Further, he was transferred to the maximum security unit at KCI on September 20, 2018 to maintain security in KCI in an effort to deter his various assaults on SCDC staff at LCI. These offenses included use of a weapon or a homemade knife, “a bunch of throwing and exposure of bodily fluids on an employee,” five instances of “striking an employee,” and three charges of “assault and battery on employees.” *01/22/19 Tr. 10-12. See also 01/22/19 Tr. 26-31* (detailing his disciplinaries).

Thus, Appellant’s reliance on *Williamson v. Stirling*, 912 F.3d 154 (4th Cir. 2018), is misplaced. There, on appeal from the district court’s grant of summary judgment, the Fourth Circuit determined that Williamson had alleged both generalized and individualized restrictions in violation of his right to due process - by two of the Respondents - that a jury could find constituted punishment. *Id.* at 171-86. Also, Williamson did not display the same amount of extraordinarily

serious violent or otherwise disruptive behavior as Appellant. To the contrary, he was placed in solitary confinement for over three years “because of a single incident of unrealized and unrepeatable threats.” The Fourth Circuit concluded that “[a] reasonable jury could readily find such a response to be excessive — and thus punitive — in relation to the State's interest in preventing Williamson from carrying out the threats.” *Id.* at 179.³⁵

Further, Appellant cannot show any prejudice resulting from the trial judge’s ruling because Dr. Maddox, his forensic psychiatrist, provided an explanation for his misbehavior while awaiting trial, she informed jurors that Appellant was on death row and that he had been at LCI for three years, and she explained some of the conditions of his confinement. She testified that Appellant did not receive treatment for a diagnosis of oppositional defiant disorder after age ten, until he went into SCDC on safekeeper status at LCI, in 2015. *Tr.* 2222-23. She then explained to jurors that inmates “in safekeeper status ... are not technically Department of Corrections inmates, but they are treated by the Department of Corrections staff.” Although SCDC staff was supposed to check on him weekly to determine that he was doing okay, the notes in his records from LCI reflected that he was seen on October 27, 2015; on August 8, and 22, 2016; on September 11, 2016; in December 2016; and only twice in 2017. In 2018, he complained that he was only getting only three hours of sleep a night, whereas most people require six hours of sleep. Dr. Maddox opined this lack of sleep is “usually indicative of mental illness.” *Tr.* 2223-24.

She further testified that:

³⁵ As an aside, Respondent notes that should this case reach federal habeas corpus and Appellant raises the claim, Williamson would not be controlling precedent on whether relief should be granted because under 28 U.S.C. § 2254(d)(1), the determination to be made is whether the state court decision is “contrary to, or involved an unreasonable application of, clearly established Federal law.” “[C]learly established Federal law” is limited to Supreme Court authority that “squarely addresses” the claim at issue and provides a “clear answer.” *Wright v. Van Patten*, 552 U.S. 120, 125-26 (2008).

He started complaining of anxiety attacks, so at that point he was seen by the physicians there. Eventually, he got into a lot of trouble at Lee County. His behavior was very reckless. Lots of -- he would throw urine on officers, throw orange juice on some of staff, he was getting into a lot of trouble there. There was one emergency that I saw, he was seen one night at 1 o'clock in the morning by mental health. Finally, he had been requesting to see a psychiatrist. He started in January of 2018. He started putting in slips in January of 2018 saying, look, I'm having a hard time, I need help. He wasn't seen until July by Dr. Woods, even though the requests had been made repeatedly. She diagnosed him with an unspecified anxiety disorder, meaning she knew he had anxiety, but didn't have enough history to make a more specific diagnosis. She prescribed an antidepressant, Zoloft on the street. That is indicated for depression and anxiety. He had difficulties from that. So he wrote a number of slips and asked to be seen again because he couldn't take the medication.

He was eventually switched to an antipsychotic medication. It is not always given for psychosis. You could have paranoia, that doesn't mean you are psychotic, but it has indications for mood and psychosis and indication for paranoia, and he was prescribed that. What is significant about that is when he left the prison and was transferred back to the jail, the prison didn't give his medicines. He started on this medication. He was not given medications. I had called the prison a number of times to see why he wasn't given the prescription, and it took months before those medications were given to him.

Tr. 2224, line 20 – 2226, line 5.

Dr. Maddox testified that “[p]rison is a dangerous place, and there [are] assaults and you witness things. Sometimes you may be the victim; sometimes you may be the perpetrator.” *Tr. 2228*. She later explained that Appellant was at LCI for “over three years” without receiving medication despite a diagnosis of “mild chronic anxiety disorder.” *Tr. Tr. 2230*. “Once he got mental health treatment, he was transferred to Kirkland.” *Tr. 2229*.

As noted, Dr. Maddox diagnosed Appellant with PTSD, an unspecified depression disorder, substance abuse disorder, and a learning disability. *Tr. 2209; 2242-49*. She further opined that Appellant’s brain was not fully developed at the time of the murder because he was only twenty. *Tr. 2249-50*. She explained that PTSD “is a lifelong illness” and “it affects how we think” Also, “[i]t has components of a behavior disorder that people can become aggressive at times.”

Tr. 2243.

Additionally, one of the “features” of depression “is irritable mood.” Her review of Appellant’s records from LCI reflected that he was “very irritable,” and she opined that “he was testing limits” with his refusal to allow officers to close the flap on the cell door. She testified, “If you closed the flap, you were cut off from a lot of communication.” *Tr. 2244.*

Finally, to the extent this Court finds that the trial judge erred by allowing the State to introduce any or all of the challenged evidence, Respondent submits that any error in permitting the evidence of Appellant’s pretrial misconduct is harmless beyond a reasonable doubt because it could not have impacted the sentence imposed. *See Lowry v. State*, 376 S.C. 499, 508, 657 S.E.2d 760, 765 (2008) (“Harmless error review looks to the basis on which the jury actually rested its verdict. From this perspective, in order to conclude that the error did not contribute to the verdict, the Court must ‘find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record’”). Given Dr. Maddox’ testimony, the overwhelming evidence supporting the convictions for murder, armed robbery and the statutory aggravating circumstances, as well as the trial judge’s instructions that jurors could only impose a death sentence if it unanimously found that the State had proven at least one of the statutory aggravating circumstances beyond a reasonable doubt (*see Tr. 2329-32; 2338-40*),³⁶ the admission of this evidence could not have affected the sentence imposed. *Id.*

VII. The trial judge properly excluded evidence of the Lee Correctional Institution riot because this Court has previously held that evidence of general prison conditions not directly related to the accused are inadmissible, and because rather than a fair response to the prosecution’s evidence of misconduct by Appellant while incarcerated, this evidence was irrelevant to Appellant’s individual characteristics.

³⁶ “A jury is presumed to follow its instructions.” *Weeks*, 528 U.S. at 234 (citing *Richardson*, 481 U.S. at 211).

Appellant’s final contention is that the trial judge erred by excluding evidence of the LCI riot. Respondent submits that there was no abuse of discretion because this Court has previously held that evidence of general prison conditions not directly related to the accused are inadmissible, and because rather than a fair response to the prosecution’s evidence of misconduct by Appellant while incarcerated, this evidence was irrelevant to Appellant’s individual characteristics.

A. Events at trial.

Capt. Thomas Commander testified that he has worked at SCDC for twenty-three years.³⁷ He had contact with Appellant on September 20, 2018, when he attempted to secure the food flap on Appellant’s cell after Appellant and another inmate refused to permit their food flaps to be secured. While Capt. Commander and another correctional officer were attempting to secure the other inmate’s food flap, Appellant threw a homemade knife and a “crank radio” at Commander. Both items struck Commander’s leg. *Tr. 1908-09.*

So we with went down to Mr. Jenkins, tried to secure his flap, which he had tied off with the sheet he had ripped. We had to untie his sheet. While we were doing that, he was hitting us with his crocs. He was trying to stop us from closing the flap, and once we finally -- he broke his window out. Once we finally regrouped and came back, got Mr. Jenkins restrained and moved out of the room, took him for medical. On the way to medical, ... Mr. Jenkins told me, If you don't ship me, I'm going to kill one of your officers, so.

Tr. 1909, lines 3-13.

Counsel indicated that he had a matter to put on the record, and the trial judge heard his subsequent objection outside of the jury’s presence. *Tr. 1909.* Counsel objected to Commander’s testimony about Appellant being shipped to a different institution because it suggested he was being sent to a better prison. Counsel also objected to “this whole thing with safekeeping” and

³⁷ As noted in Argument VI, the State had informed the trial judge that it had a video of this incident and the judge ruled the video inadmissible. *See also Tr. 1691-92; 1697-1703; Tr. 1863-64.*

argued that, taken collectively, it was “creating an atmosphere towards this defendant in the minds of the jury” and depriving Appellant of a fair trial. Counsel then renewed his mistrial motion “based on the collective objections I've made regarding this testimony and regarding the other issues that I raised earlier.” *Tr. 1909-10*.

The trial judge denied the mistrial motion and observed that Capt. Commander’s testimony was that Appellant threatened to kill Commander or another officer unless he sent Appellant elsewhere. “This is not SCDC saying we're going to ship you, or we've made an executive decision to ship you, or your conduct is so bad we're going to ship you, nor did he say anything about you are going to death row or anything of that nature at all.” The trial judge also noted that this was why the Deputy Solicitor had brought the statement to the trial judge’s attention before Commander testified. Therefore, he found that Appellant’s statement was “directly relevant to the issues before this jury as to the appropriate sentence to be imposed.” *Tr. 1910*.

Commander admitted on cross-examination that there had been riots in the twenty-three years he had been at LCI and there had been “pretty bad riots” there. The Deputy Solicitor objected when counsel attempted to elicit that there had recently been a riot at LCI. The trial judge excused the jury when counsel indicated that he wished to be heard on the matter. *Tr. 1912-13*. The trial judge and counsel then had the following colloquy:

THE COURT: Where are we going?

MR. WILSON: Your Honor, the reason I think this is relevant is that the solicitor has made a point of bringing officer after officer to testify about the conduct of Mr. Jenkins ... in SCDC. What I'm trying to show here is that it ain't all Mr. Jenkins. This prison is bad. It is bad, and that they have more trouble up there than they know how to handle, period, and I want to bring that out in this officer's testimony.

THE COURT: What does other people’s trouble created at SCDC have to do with Mr. Jenkins?

MR. WILSON: No, sir. I'm not trying to find out what other people do. I'm trying to show that the prison, this system, Lee is a bad place, it is a dangerous place ... and that Jenkins was put there through no fault on his own, I would suggest to this Court, other than the fact that the Court ordered him to go there.

THE COURT: If you ask that question --

MR. WILSON: I understand. ... I'm not objecting to him doing anything he wants to do. My thing, though, is I can't sit here, let them put up officer after officer to testify about what Jenkins did in this system and not challenge them on what the system is like in the first place. ... I don't know how to not do that. That is the predicament they have placed me in when they called these witnesses from the Department of Corrections and when Jenkins is there through no fault of his own other than the fact --

THE COURT: Why do [you] say he is there at no fault of his own, that they put you in this situation? That is not accurate. They did not create this conduct that has been testified to this morning.

MR. WILSON: Your Honor, respectfully, my suggestion is that when they placed him in SCDC, which I've always maintained was a violation of his Eighth Amendment right, when they placed him on death row, placed him in maximum as a pretrial detainee, they created this situation.

THE COURT: But they did not create the conduct that has been testified to this morning; your client did.

MR. WILSON: My client --

THE COURT: [No one] in the State told Mr. Jenkins to not close his flap or not allow his flap to be closed.

MR. WILSON: I don't dispute that, Your Honor. And what I'm saying is that they placed him in circumstances where this kind of conduct would have occurred, and because of the very nature of where he is placed; that is my argument.

Tr. 1913, line 6 – 1915, 1. 8.

When the Deputy Solicitor noted that he was specifically objecting to evidence any reference to other inmates being killed in the LCI riot but was not attempting to limit counsel's cross-examination of the witness or bar the defense from presenting witnesses to say they got along well with Appellant, counsel stated, "That is exactly what I do want to talk about." ***Tr. 1915.*** The

trial judge observed that this had “absolutely nothing to do with what is the right punishment or what is the wrong punishment,” but he allowed counsel to make a proffer. *Tr. 1915-16.*

Counsel’s proffer reflected that he wished to present that there was a riot at LCI roughly a year and a half before the trial in which seven inmates were killed. Appellant was housed as a safekeeper in LCI at the time but was not involved in the riots. Commander disagreed with counsel’s suggestion that Appellant had sent for him when the incident in which Appellant refused to permit officers to close the flap on the cell door. Instead, Commander repeated the account he had given on direct examination and emphasized that everything occurred after he got to Appellant’s cell and he ordered that Appellant be “maced.” *Tr. 1916-20.*

Also, Commander is the senior officer at LCI. As a result, he had dealt with Appellant more than once over a food flap incident and he had to deal with incidents in which Appellant threw feces on other correctional officers. Asked whether he would agree that “the reputation of Lee throughout the state of South Carolina Department of Corrections system is that Lee is the most dangerous prison in the State,” Commander replied, “From people on the outside, yes. But from the inside, no.” *Tr. 1920-21.*

The Deputy Solicitor stated that the reputation of the prison was close to prison conditions and that it was irrelevant to this case. *Tr. 1921-22.* In response to counsel’s argument that the proffer was relevant, the trial judge observed that the jury did not even know that Appellant was housed at LCI until counsel’s cross-examination of Commander. Counsel argued that jurors did know he was incarcerated in SCDC because of the officers who had testified, and he argued that his point was that “all of these prisons are not equal.” In response to the trial judge’s question, however, he admitted that this was simply his opinion and that he did not have any witness to prove it. When counsel indicated that he “very well may have someone later today or tomorrow

... who is an officer, who may say that,” the trial judge stated he would rule on the matter when the witness was presented. *Tr. 1922-23.*

Following the trial judge’s finding that the proffered evidence was irrelevant, counsel indicated that he understood the State’s position but contended that:

the problem is that the very conditions in which Mr. Jenkins was placed by that safekeeping order created all kinds of problems for him that he was trying to deal with, which is why he was acting out. I mean, what else could he do? He was there by court order, and he wasn't getting the rights or privileges that he was supposed to have, so then he started doing things against that by not closing the flap, by demanding that they give sheets back, that kind of stuff, which led to these violations.

Tr. 1923, line 24 – 1924, line 10.

Asked why he did not ask questions eliciting this information, counsel stated that “I want to show that Lee is a bad place, that he was there and he was trying to deal with what was there. Counsel admitted that he did not have any evidence connecting Appellant to the LCI riots. Although familiar with the riot, Commander likewise did not have any evidence suggesting that Appellant was involved in the riot. Rather, the riot was confined to two dorms and Appellant was not in either of those dorms. *Tr. 1924-25.*

The trial judge thought that anyone who followed the news was probably familiar with the LCI riot since it was national news. He also stated that counsel could ask questions that tried to explain “what is happening to [Appellant] or what is not happening to him at SCDC is what is causing these issues with the food flaps.” Thus, he would allow counsel to question the witness on “issues of his confinement and what occurred or did not occur, and/or what should have occurred or what was not occurring,” but he found that evidence relating to the riots was irrelevant and inadmissible. *Tr. 1925-26.*

When the jury returned, counsel asked Commander about whether Appellant repeatedly

complained about the food that was served and his sheets being taken from him. Commander explained that the sheets were taken “because of his negative behavior. They were taken because he was placed on 72-hours scrib out.” Appellant would then sleep in his jumpsuit on the mattress. Commander denied that officers took his mattress. *Tr. 1997*.

B. Discussion.

Quoting applicable United States Supreme Court precedent, this Court explained in *Bowman v. State (Bowman II)*, 422 S.C. 19, 35-36, 809 S.E.2d 232, 241 (2018) that:

“[I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.” *Woodson v. North Carolina*, 428 U.S. 280, 304, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) (internal citation omitted). “ ‘The sentencer cannot be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.’ ” *McCleskey*, 481 U.S. at 304, 107 S.Ct. 1756 (quoting *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978)). In short, the Eighth Amendment demands that a capital defendant be given wide latitude to present any relevant evidence of potentially mitigating value that might convince the jury to impose a sentence of life in prison instead of death.

(Emphasis in original). Still, “[e]vidence admitted during the sentencing phase of a capital murder trial must be relevant to the character of the defendant or the circumstances of the crime.” *State v. Torres*, 390 S.C. 618, 625, 703 S.E.2d 226, 229 (2010).

In *State v. Bowman (Bowman I)*, 366 S.C. 485, 498, 623 S.E.2d 378, 385 (2005), *abrogated on other grounds*, *State v. Evans*, 371 S.C. 27, 637 S.E.2d 313 (2006), the appellant claimed that the State was erroneously allowed to cross-examine his expert on adaptability to life about prison conditions. This Court found that the claim was not preserved for appellate review because it was not presented to the trial judge. *Id.* However, this Court stated that:

We take this opportunity ... to caution the State and the defense that the evidence presented in a penalty phase of a capital trial is to be restricted to the individual

defendant and the individual defendant's actions, behavior, and character. *Generally, questions regarding escape and prison conditions are not relevant to the question of whether a defendant should be sentenced to death or life imprisonment without parole.* We emphasize that how inmates, other than the defendant at trial, are treated in prison; and whether other inmates have escaped from prison, is inappropriate evidence in the penalty phase of a capital trial. *We admonish both the State and the defense that the penalty phase should focus solely on the defendant and any evidence introduced in the penalty phase should be connected to that particular defendant.*

366 at 498-99, 623 S.E.2d at 385 (emphasis added).

In *State v. Burkhart*, 371 S.C. 482, 488, 640 S.E.2d 450, 453 (2007), the Court “note[d] ... that evidence of the defendant's characteristics may include prison conditions if *narrowly tailored to demonstrate the defendant's personal behavior* in those conditions.” (Emphasis added). Nevertheless, the Court emphasized that “ ‘[s]uch determinations as the time, place, manner, and conditions of execution or *incarceration* ... are reserved ... to agencies other than the jury.’ ” *Id.* at 487-88, 640 S.E.2d at 453 (citing *State v. Plath (Plath II)*, 281 S.C. 1, 15, 313 S.E.2d 619, 627 (1984) (emphasis added by Court). The Court found that the State’s presentation of expert testimony concerning prison conditions was an arbitrary factor that required a new sentencing proceeding. *Id.* at 488-89, 640 S.E.2d at 453. *See also Plath II*, 281 S.C. at 15, 313 S.E.2d at 627; *State v. Bryant*, 372 S.C. 305, 316, 642 S.E.2d 582, 589 (2007) (holding that the trial judge properly refused to permit an expert to opine that the death penalty was more merciful than a sentence of LWOP and stating the Court “remain[ed] firm in our view that testimony seeking to portray life imprisonment as preferable to capital punishment is improper, particularly where, as here, the expert's testimony did not focus specifically on the defendant, but on prison conditions generally”). *Cf. Bowman II*, 422 S.C. at 40, 809 S.E.2d at 243 (although “reaffirming the rule forbidding evidence of general prison conditions,” the Court “simply note[d] that it is not without exception”); *id.* at 41-42, 809 S.E.2d at 244-45 (counsel’s failure to object to State’s cross-examination on

prison conditions generally was not deficient under *Strickland* where State's otherwise improper evidence was invited by counsel's reasonable strategic decision to introduce evidence of prison conditions).

Applying this standard to the present argument, it is clear the trial judge's ruling must be affirmed. The trial judge expressly permitted Appellant to elicit evidence "of his confinement and what occurred or did not occur, and/or what should have occurred or what was not occurring." The trial judge merely barred evidence of the riot, in which Appellant had no involvement, or general prison conditions. Appellant did not wish to present "narrowly tailored" evidence of prison conditions that "demonstrate[d] the defendant's personal behavior in those conditions." See *Burkhart*, 371 S.C. at 488, 640 S.E.2d at 453. Rather, he wanted to present evidence supporting counsel's impression that to show that LCI "is a bad place" and that LCI "is the most dangerous prison in the State." Thus, the trial judge's ruling is consistent with this Court's distinction between evidence a capital inmate is adaptable to prison life, which is admissible under *Skipper v. South Carolina*, 476 U.S. 1, 4-5, 7 (1986) (holding evidence of adaptability to life in prison is constitutionally relevant), as recognized by *Chaffee v. State*, 294 S.C. 88, 91, 362 S.E.2d 875, 877 (1987),³⁸ and evidence of prison conditions, generally, which is inadmissible. *Burkhart*, 371 S.C. at 487-88, 640 S.E.2d at 453; *Bowman I*, 366 S.C. at 498-99, 623 S.E.2d at 385.

So, Appellant could have testified that the reason for his misbehavior was because of the manner in which correctional officers, other SCDC staff, or even inmates treated him. However, he exercised his constitutional right to remain silent and not testify, so the jury did not hear any such evidence. See *Fitzpatrick*, 178 U.S. at 315 ("While no inference of guilt can be drawn from

³⁸ Again, Appellant was incarcerated at LCI as a safekeeper because of his own misconduct while incarcerated at a J. Rueben Long Detention Center.

[Appellant's] refusal to avail himself of the privilege of testifying, he has no right to set forth to the jury all the facts which tend in his favor without laying himself open to cross-examination upon those facts"). *See also Moore v. Stirling*, 952 F.3d 174, 179 (4th Cir. 2020), *cert. denied*, ___ S.Ct. ___, 2020 WL 6385899 (2020) ("As Moore chose not to testify at trial, the version of the events that he testified to during the PCR hearing—and had told trial counsel—was never before the jury").³⁹

Moreover, Appellant cannot show any prejudice resulting from the trial judge's ruling. *See Lowry*, 376 S.C. at 508, 657 S.E.2d at 765. As discussed in Argument VI, Dr. Maddox's testimony offered an explanation for his misconduct at LCI: i.e., he was not treated for mental illnesses that caused him to be irritable and aggressive. She also informed jurors that Appellant was on death row and that he had been at LCI for three years, and she explained some of the conditions of his confinement. At worst, in light of her testimony, the overwhelming evidence supporting the convictions for murder, armed robbery and the statutory aggravating circumstances, as well as the trial judge's instructions that jurors could only impose a death sentence if it unanimously found that the State had proven at least one of the statutory aggravating circumstances beyond a reasonable doubt (*see Tr. 2329-32; 2338-40*), the admission of this evidence could not have affected the sentence imposed. *Id.* *See also State v. Mercer*, 381 S.C. 149, 160-62, 672 S.E.2d 556, 561-63 (2009) (barring expert from opining that a "SPECT Scan" of Mercer's brain revealed an

³⁹ Additionally, Commander disagreed with counsel's suggestion that "the reputation of Lee throughout the state of South Carolina Department of Corrections system is that Lee is the most dangerous prison in the State." His testimony reflects that although this may be true "[f]rom people on the outside, yes. But from the inside, no." Appellant admittedly had no evidence to support counsel's belief and he did not proffer a witness to support this contention. Accordingly, even if evince of general prison conditions was admissible, there was no evidence that LCI was the worst prison in SCDC. *See State v. Jackson*, 384 S.C. 29, 34, 681 S.E.2d 17, 19 (Ct. App. 2009) ("Generally, the failure to make a proffer of excluded evidence will preclude review on appeal").

“abnormality” was harmless, where doctor testified at length concerning Mercer's cognitive deficiencies” and “refer[red] to the SPECT Scan results as ‘ confirmatory” of Mercer's learning disorder[;] ... [and] ... the SPECT Scan abnormality—was already in evidence without objection”).

CONCLUSION

For all of the foregoing reasons, this Court should affirm the Judgment, conviction and sentence.

Respectfully submitted,

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