STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED
May 14 2021
S.C. SUPREME COURT

Appeal from Horry County

Honorable Robert E. Hood, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JEROME JENKINS, JR.,

APPELLANT.

APPELLATE CASE NO. 2019-001280

FINAL REPLY BRIEF OF APPELLANT

ROBERT M. DUDEK
Chief Appellate Defender

KATHRINE H. HUDGINS
Appellate Defender

ADAM SINCLAIR RUFFIN
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

ARGUMENT IN REPLY

1.

This Court post-*Torrence* has reversed in death penalty cases where it held the judge's improper comments had a likelihood of affecting the defendant's decision to plead guilty or go to trial. Further, appellant should not have to plead guilty and be sentenced to death to challenge the unconstitutionality of our death penalty statute under the circumstances of this case that made a plea of guilty impossible. 1

2.

Dr. Maddox should have been allowed to testify as an expert that her opinion that appellant was acting under the influence of McKinley Daniels or James Daniels was based in large part on the admission of McKinley Daniels that he told appellant to shoot the store clerk, Ms. Stull. The "alternatives" to allowing this testimony proposed by the trial judge and the state on appeal were impractical, and ineffective. 4

3.

The court erred by ruling defense counsel could not inform the jury during his penalty phase closing argument 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. This was accurate sentencing information and the court therefore placed an unreasonable limitation on appellant's right to a meaningful closing argument. 8

4.

The court abused its discretion by refusing to disqualify or 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. The juror should have been excused given all of the unusual circumstances. 14

5.

The court erred by refusing to disqualify juror 350, Lauren Stephens, since her belief that giving 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. 19

6.

The trial court understood defense counsel's argument that appellant was being unconstitutionally punished as a pre-trial detainee when he was put on death row and in maximum security prison. The court also understood that was the basis of appellant's motion to exclude evidence of appellant's misconduct while he was illegally detained in those places. 23

7.

The trial judge erred in excluding evidence of the Lee Correctional Institution riot because the state opened the door to this evidence by introducing appellant's disciplinary record at the maximum security prisons he was held in as a pre-trial detainee, and appellant not participating in the riot was mitigation evidence of appellant's adaptability to prison life that should have been admitted....................................30

CONCLUSION....................................33

TABLE OF AUTHORITIES

Cases

Batson v. Kentucky, 476 U.S. 79 (1986) 16

Baumholser v. Amax Coal Co., 650 F.2d 550 (7th Cir. 1980) 4

Bell v. Wolfish, 441 U.S. 520 (1979) 23, 26, 29

Blakely v. Washington, 542 U.S. 296 (2004) 2, 3

Caldwell v. Mississippi, 472 U.S. 320 (1985) 11

Eddings v. Oklahoma, 455 U.S. 104 (1982) 30

Gardner v. Florida, 512 U.S. 349 (1977) 12

Hayes v. State of Missouri, 120 U.S. 68 (1887) 16

Hurst v. Florida, 577 U.S. 92 (2016) 3

Ingraham v. Wright, 430 U.S. 651 (1977) 23

Jerry Buck Inman, #5256 v. State, 2012-CP-39-918, (filed April 21, 2020) 2, 3

Jones v. United States, 527 U.S. 373 (1999) 9

Kingsley v. Hendrickson, 576 U.S. 389 (2015) 23

Lewis v. United States, 146 U.S. 370 (1892) 16

Meachum v. Fano, 427 U.S. 215 (1976) 25, 26

Olim v. Wakinekona, 461 U.S. 238 (1983) 25, 26

Pointer v. United States, 151 U.S. 396 (1894) 16

Ross v. Oklahoma, 487 U.S. 81 (1988) 15

Simmons v. State, 512 U.S. 154 (1994) 12

Skipper v. South Carolina, 476 U.S. 1 (1986) 30, 32

State v. Adams, 277 S.C. 115, 283 S.E.2d 582 (1981) 9, 12

State v. Bennett, 328 S.C. 251, 493 S.E.2d 845 (1997) 21, 22

State v. Bennett, 369 S.C. 219, 632 S.E.2d 281 (2006) 22

State v. Bixby, 388 S.C. 528, 698 S.E.2d 572 (2010) 14, 15, 19

State v. Bowers, 428 S.C. 21, 832 S.E.2d 623 (Ct. App. 2019) 24

State v. Bowman, 366 S.C. 485, 623 S.E.2d 378 (2005) 30, 31

State v. Britt, 237 S.C. 293, 117 S.E.2d 379 (1960) 15

State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019) 10

State v. Burkhart, 371 S.C. 482, 640 S.E.2d 450 (2007) 17, 31

State v. Cheeks, 401 S.C. 322, 737 S.E.2d 480 (2013) 10

State v. Copeland, 278 S.C. 572, 300 S.E.2d 63 (1982) 9

State v. Crisp, 362 S.C. 412, 608 S.E.2d 429 (2005) 1

State v. Downs, 361 S.C. 141, 604 S.E.2d 377 (2004) 2, 3

State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983) 15

State v. Franklin, 318 S.C. 47, 456 S.E.2d 357 (1995) 4

State v. Grant, 275 S.C. 404, 272 S.E.2d 169 (1980) 10

State v. Green, 301 S.C. 347, 392 S.E.2d 157 (1990) 15, 16

State v. Hardee, 279 S.C. 409, 308 S.E.2d 521 (1983) 15

State v. Hendricks, 408 S.C. 525, 759 S.E.2d 434 (Ct. App. 2014) 24

State v. Hudgins, 319 S.C. 233, 460 S.E.2d 388 (1995) 14, 15

State v. Johnson, 293 S.C. 321, 360 S.E.2d 317 (1987) 5

State v. Northcutt, 372 S.C. 207, 641 S.E.2d 873 (2007) 5, 30, 32

State v. Owens, 362 S.C. 175, 607 S.E.2d 78 (2004) 1

State v. Pierce, 289 S.C. 430, 346 S.E.2d 707 (1986) 1

State v. Sloan, 278 S.C. 435, 298 S.E.2d 92 (1982) 5

State v. South, 285 S.C. 529, 331 S.E.2d 775 (1985) 15

State v. Stroman, 281 S.C. 508, 316 S.E.2d 395 (1984) 28

State v. Terry, 339 S.C. 352, 529 S.E.2d 274 (2000) 6

State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) 1, 9

State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996) 14, 15, 19

United States v. Lawson, 653 F.2d 299 (7th Cir. 1981) 4

United States v. Sampson, 335 F. Supp. 2d 166 (D. Mass. 2004) 9, 11

United States v. Smith, 481 F. Supp. 3d 933 (D. Alaska 2020) 9, 11, 12

Williamson v. Stirling, 912 F.3d 154 (4th Cir. 2018) 29

Rules and Statutes

Rule 804(b)(3), SCRE 4

S.C. Code § 14-7-1110 ..... passim

S.C. Code § 16-3-20(B) 2

S.C. Code § 16-3-20(C) 8, 10

S.C. Code § 16-3-25(C)(1) 17

S.C. Code § 24-3-80 27

U.S. CONST. amend. VI 18

U.S. CONST. amend. XIV 18

S.C. CONST. Art. 1, § 14 18

Other Authorities

SCDC Policy SK-22.02 (August 20, 2018) 29

ARGUMENT IN REPLY

1.

This Court post-*Torrence* has reversed in death penalty cases where it held the judge's improper comments had a likelihood of affecting the defendant's decision to plead guilty or go to trial. Further, appellant should not have to plead guilty and be sentenced to death to challenge the unconstitutionality of our death penalty statute under the circumstances of this case that made a plea of guilty impossible.

The state argues that appellant's reliance on State v. Pierce, 289 S.C. 430, 434, 346 S.E.2d 707, 710 (1986), "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." IBOR at 17, n. 5. However, post-State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991), this Court also reversed based on extraneous prejudicial comments made by the trial judge in State v. Crisp, 362 S.C. 412, 608 S.E.2d 429 (2005) and State v. Owens, 362 S.C. 175, 607 S.E.2d 78 (2004).

Appellant Crisp in 2005 also relied on State v. Pierce, 289 S.C. 430, 346 S.E.2d 707 (1986) in urging that his convictions and sentence be reversed. In State v. Crisp, this Court noted it had reversed in State v. Owens, 362 S.C. 175, 607 S.E.2d 78 (2004) "on virtually identical facts." State v. Crisp, 362 S.C. 412, 416, 608 S.E.2d 429, 432 (2005). The state seeks to distinguish State v. Crisp and State v. Owens by arguing in conclusory fashion that "the trial judge's remarks [here] did not cause appellant to waive his Sixth Amendment right to a jury trial." IBOR at 17.

Appellant's remark that there was "no chance" that he would plead guilty and receive the death penalty following the judge's remarks showed he felt foreclosed from his *choice* of pleading guilty, pursuant to S.C. Code § 16-3-20(B), based on the court's comments about pleading guilty and receiving a death sentence if he pled guilty. This is what actually happened.

Further, while the state denigrates appellant's argument that State v. Downs, 361 S.C. 141, 604 S.E.2d 377 (2004), would be decided differently today, and also dismisses the trial judge's order in Jerry Buck Inman, #5256 v. State, 2012-CP-39-918, (filed April 21, 2020) ruling our death penalty statute unconstitutional in this respect, the state's position in regards to both cases is, respectfully, misguided. State v. Downs had been briefed in 2004, prior to the decision of the United States Supreme Court in Blakely v. Washington, 542 U.S. 296 (2004), and this Court did not rely on or consider Blakely when affirming the convictions and death sentence in Downs.

However, as the opinion of Justice Scalia in Blakely made clear, the finding of the sentencing judge that Blakely acted with "deliberate cruelty," and therefore that a sentence above the statutory maximum could be imposed so long at the judge found that additional factor existed, violated the defendant's Sixth Amendment right to a trial by jury.

Appellant here faced a Hobson's choice of pleading guilty where a judge, rather than a jury, would have decided the existence of a statutory aggravating circumstance that made him eligible for the death penalty, and his sentence or whether he would face jury sentencing without the benefit of the strongest mitigating evidence possible—that he pled guilty and accepted responsibility for his crimes.

However, unless appellant wished to be sentenced to death, which he did not, he was forced to forgo his option of pleading guilty given the judge's comments about pleading guilty

and a death sentence following that plea. Given that appellant was forced to forgo pleading guilty in this case, the argument that our death penalty statute is unconstitutional following the decisions of the United States Supreme Court in Blakely v. Washington, 542 U.S. 296 (2004) as presently also argued in Jerry Buck Inman, #5256 v. State, 2012-CP-39-918, (filed April 21, 2020) which is pending before this Court in the briefing stage, and Hurst v. Florida, 577 U.S. 92 (2016), should be considered by this Court on this direct appeal. Again, State v. Downs would have been decided differently had this Court had the opportunity to consider Blakely and Hurst at that time.

2.

Dr. Maddox should have been allowed to testify as an expert that her opinion that appellant was acting under the influence of McKinley Daniels or James Daniels was based in large part on the admission of McKinley Daniels that he told appellant to shoot the store clerk, Ms. Stull. The "alternatives" to allowing this testimony proposed by the trial judge and the state on appeal were impractical, and ineffective.

Appellant has argued that even if the admission by McKinley Daniels that he told appellant to shoot Trisha Stull was not admissible as a statement against interest pursuant to Rule 804(b)(3), SCRE, an expert [Dr. Maddox] may still base her opinion "on testimony which is not admissible, so long as that evidence is of the type reasonably relied on by experts in the field." State v. Franklin, 318 S.C. 47, 57-58, 456 S.E.2d 357, 363 (1995), *citing* Baumholser v. Amax Coal Co., 650 F.2d 550 (7th Cir. 1980); United States v. Lawson, 653 F.2d 299 (7th Cir. 1981). The admission by Daniels is the type of evidence reasonably relied upon by a forensic psychiatrist such as Dr. Maddox. See Defense Exhibit 12 pertaining to appellant operating under the "domination of another" wherein it stated that "Mr. Daniels admits he told JJ [Appellant Jerome Jenkins] to kill Ms. Stull." Report at 14. R. 3557.

The state in its brief proposes alternatives to allowing this expert testimony from Dr. Maddox. It argues that appellant could have made a closing statement to the jury, without being subject to cross-examination. wherein he would have told the jury that McKinley Daniels told him to shoot the store clerk. This, in the state's view, was a practical substitute for Dr. Maddox's expert testimony. IBOR at 28-29.

Assuming the trial judge would actually have allowed appellant to say this in a statement to the jury, anything appellant said to the jury about McKinley Daniels telling him to shoot the

store clerk would have been viewed by the jury as being totally "self-serving." The solicitor would surely have argued that in closing also. Statements made by the defendant are going to be largely discounted by the jury knowing the substantial self-interest the defendant has in the outcome of his trial.

Further, blaming Daniels for the crime in this manner almost surely would have been considered against appellant by the jury as evidence of his lack of remorse and not accepting responsibility for his actions. Remorse or lack of remorse on the part of the defendant can be a powerful factor in a death penalty case. See State v. Northcutt, 372 S.C. 207, 220-21, 641 S.E.2d 873, 880-81 (2007) (letter written by Northcutt expressing remorse for the death of his child was admissible in response to evidence of his alleged lack of remorse); State v. Johnson, 293 S.C. 321, 360 S.E.2d 317 (1987) (comments by the prosecution upon an accused's failure to express remorse invite jury to draw an adverse inference merely because the defendant did not appear penitent); See, also, State v. Sloan, 278 S.C. 435, 298 S.E.2d 92 (1982).

The state also argues that McKinley Daniels' admission was not a statement against penal interest because he had already been sentenced when he made the admission that he ordered appellant to shoot the store clerk to Dr. Maddox and because Daniels was intellectually disabled. IBOR at 27-28; R. 2163, ll. 15-20; (Defense exhibit 12, report at 14) R. 3557. However, neither fact stripped Daniels' admission that he ordered appellant to shoot the store clerk of its trustworthiness. Despite the fact that Daniels was intellectually disabled, and the fact that he was talking to Dr. Maddox, who was a defense witness for appellant, there was simply no evidence McKinley Daniels concocted an admission to murder for an ulterior purpose.

The suggestion by the state that defense counsel should have called McKinley Daniels as a witness and questioned him about his admission to Dr. Maddox was also an unavailing

alternative since Daniels likely would have invoked his Fifth Amendment privilege against self-incrimination. Further, calling Daniels as a "hostile witness" would have been a very risky strategy by the defense. Respectfully, the trial judge's casual acquiescence of the solicitor's position that McKinley Daniels was not "unavailable" in this case was erroneous.

The state's reliance upon State v. Terry, 339 S.C. 352, 529 S.E.2d 274 (2000), regarding a statement against penal interest is also misplaced. In Terry, the defendant was seeking to introduce his own statement as a statement against penal interest to avoid cross-examination. Applicable case law, as was discussed in State v. Terry, almost never allows a criminal defendant to introduce his own statement as a statement against his penal interests. Terry is simply inapposite.

Here, the state would have had every right to cross-examine Dr. Maddox about the circumstances under which McKinley Daniels admitted that he told appellant to shoot the store clerk, Trisha Stull. If the state wanted more than the cross-examination of Dr. Maddox about the circumstances surrounding the admission, it could have called McKinley Daniels as a witness if it had reason to believe that Daniels would not have invoked his Fifth Amendment privilege against self-incrimination upon the advice of his counsel.

Without allowing Dr. Maddox to testify her expert opinion that appellant was acting under the dominion of another was based in large part on McKinley Daniels' admission that he told appellant to shoot Ms. Stull made her opinion appear to be without any foundation, where the jury was naturally going to consider Dr. Maddox a "hired gun" anyway. This was another totally ineffective substitute to allowing Dr. Maddox to testify that McKinley Daniels' admitted that he told appellant to shoot the store clerk. Appellant was denied his fundamental right to

present a defense, and a complete defense, given this highly prejudicial evidentiary error limiting Dr. Maddox's expert testimony.

3.

The court erred by ruling defense counsel could not inform the jury during his penalty phase closing argument 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. This was accurate sentencing information and the court therefore placed an unreasonable limitation on appellant's right to a meaningful closing argument.

Appellant's counsel was prohibited from telling the jury during closing argument that if it was unable to reach a unanimous verdict as to the death penalty or life imprisonment without parole, the judge would sentence appellant to life without parole. Respondent urges the proposed argument was an incorrect statement of state law, was contrary to precedent, and inconsistent with the trial judge's sentencing phase jury charge. IBOR at 29-38. Each reason urged by respondent is incorrect. The proposed argument was an accurate statement of the law found in S.C. Code § 16-3-20(C). The proposed argument was not contrary to the cases holding that a trial judge is not required to instruct the jury that if it is unable to reach a verdict, the judge would be required to impose a sentence of life without parole. The proposed argument was also not contrary to the instructions given to the jury by the trial judge. Counsel properly objected to the judge's prohibition on closing argument. R. 2298, ll. 11-12. The prohibition placed an unreasonable limitation on a meaningful closing argument. The trial judge's error was compounded by an unbalanced unanimity instruction. The issue is properly before this Court on appeal. The prohibition on closing argument requires a new sentencing hearing.

While South Carolina and federal cases hold that the Eighth Amendment does not *require* that a jury be instructed as to the consequences of their failure to agree on sentencing, none of

these cases *forbid* the instruction. See State v. Adams, 277 S.C. 115, 124, 283 S.E.2d 582, 587 (1981), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991); State v. Copeland, 278 S.C. 572, 300 S.E.2d 63 (1982); Jones v. United States, 527 U.S. 373 (1999). Some federal district courts have instructed the jury with the consequences of their failure to agree on sentencing. See United States v. Sampson, 335 F. Supp. 2d 166 (D. Mass. 2004); United States v. Smith, 481 F. Supp. 3d 933, 939 (D. Alaska 2020). As noted by the court in Smith, both the Eighth and Tenth Circuit Courts of Appeals propose instructing the jurors as to the effect of non-unanimity in their model instructions.

The present case does not involve a jury instruction. Instead, in the present case, counsel for appellant was prohibited from explaining to the jury the consequences of non-unanimity. The Smith court, citing Sampson, 335 F.Supp.2d at 240–41, specifically mentioned the defense's ability to argue non-unanimity to the jury with reasonable limits, writing:

> This Court finds that with appropriate safeguards, an instruction on the effect of non-unanimity will not unreasonably hamper the government's interest in a unanimous jury verdict. The Court intends to place reasonable limits on the defense's ability to argue this issue to the jury and will not overly emphasize the effect of non-unanimity in its instructions to the jury. The Court agrees with the reasoning of the District of Massachusetts, which "chose to inform the jury of the consequences of deadlock for several reasons":
>
> First, viewing this instruction as part of the overall instructions regarding deliberations, the court believed that the government's interest in a unanimous verdict was adequately protected. Second, informing the jurors of the consequences of deadlock emphasized the individual responsibility of each juror. Ensuring that jurors were cognizant of this responsibility was also an important government interest. Third, the instruction also ensured that jurors undertook their deliberations accurately understanding the consequences of their actions. Declining to instruct the jury on the consequences of a deadlock could result in jurors deliberating based on a misunderstanding of the law rooted in speculation and incorrect assumptions.

481 F. Supp. 3d at 939 (n. 22 and n. 23 omitted).

In the present case, prohibiting defense counsel from explaining the consequences of deadlock to the jury in closing argument may have resulted in jurors deliberating based on a misunderstanding of the law rooted in speculation and incorrect assumptions. While the Eighth Amendment does not require a jury instruction on non-unanimity, the instruction is not prohibited. The prohibition on counsel's closing argument in the present case, however, violates Due Process and the heightened standard of reliability required by the Eighth Amendment. The proposed argument in the present case is an accurate statement of S.C. Code § 16-3-20(C). The proposed closing argument is not contrary to any of the cases that hold that a jury instruction on non-unanimity is not required. As the cases do not prohibit a non-unanimity instruction, defense counsel should not be prohibited from arguing the consequences of non-unanimity in closing argument.

Alternatively, even if a non-unanimity instruction to the jury by the judge was prohibited, that prohibition should not apply to closing arguments made to the jury by counsel. This Court, addressing improper jury instructions, has found that although prohibited in a jury instruction, a fact could be argued by either side in closing argument. See State v. Grant, 275 S.C. 404, 408, 272 S.E.2d 169 (1980) (evidence of flight); State v. Cheeks, 401 S.C. 322, 328-29, 737 S.E.2d 480, 484 (2013) (actual knowledge of the presence of a drug is strong evidence of a defendant's intent to control its disposition or use); State v. Burdette, 427 S.C. 490, 502, 832 S.E.2d 575, 582 (2019) (inference of malice). The trial court erred in limiting defense counsel's closing argument.

The proposed closing argument is not contrary to the judge's instruction. The judge instructed the jury that their decision to impose a sentence of life without parole must be

unanimous. R. 2339 l. 23 – 2340, l.16. The proposed argument would simply have informed the jury what would happen *if* they were unable to reach a unanimous verdict. As the court in Smith noted with regard to the jury instruction:

> The Court does not view such an instruction as "an open invitation for the jury to avoid its responsibility and to disagree," for the jurors will be well-instructed that they have a responsibility to try and reach a unanimous sentencing decision. As courts have repeatedly stated, jurors are presumed to follow the instructions that they are given. The Court has no reason to believe that the jurors in this case will not fulfill their duty to deliberate in an effort to reach unanimity. Moreover, the Court intends to reasonably restrict legal argument on this topic by counsel.

481 F. Supp. 3d at 940 (n. 27 and n. 28 omitted).

The jury in the present case is presumed to have followed the instruction to try and reach a unanimous verdict. The proposed closing was not contrary to that charge. The judge instructed the jury that their decision to impose a sentence of life without parole must be unanimous. The unanimous language, however, was not equally used in reference to a death sentence. The unbalanced instruction in combination with the prohibition on explaining the consequences of non-unanimity could reasonably have caused the jury to mistakenly believe that either death was the only option if they could not agree or that some lesser sentence, including parole eligibility, could be imposed if they could not agree or that a mistrial would have to be granted and the case tried again if they could not agree. The Eighth Amendment is violated when the decision to impose the death penalty is based on a mistaken belief. Caldwell v. Mississippi, 472 U.S. 320 (1985). The prohibition on closing argument in combination with the unbalanced instruction in the present case violated the Eighth Amendment.

In Smith the court wrote:

> To prevent jurors from misunderstanding the law, the *Sampson* court instructed that

> If, after making all reasonable efforts, at the conclusion of your deliberations on a particular count, you have not reached unanimous agreement on whether the prosecution has proven that the death penalty is justified, you will not be a hung jury. And in contrast to the conventional criminal case, this case will not have to be tried again because the jury did not reach a unanimous verdict. Rather, if you are unable to reach a unanimous verdict on whether the government has proven the death penalty is justified on a particular count, the law provides that I must sentence Mr. Sampson to life in prison without possibility of release on that count, and I will do so.

481 F. Supp. 3d at 939–40 (n. 24 omitted). No such instruction was given or requested in the present case. Instead, defense counsel asked to explain the consequences of deadlock to the jury in closing argument. The proposed closing could have prevented confusion, as discussed in Smith. The judge prohibited defense counsel from explaining the consequences of deadlock, referring to State v. Adams, 277 S.C. 115, 283 S.E.2d 582 (1981). R 2295, l. 19 – 2296, l. 1. As discussed above, Adams involved a jury instruction rather than closing argument. Defense counsel properly noted his objection. R. 2298, ll. 11-12. Despite relying on a case dealing with a jury instruction rather than closing argument, the judge understood the request from defense counsel was to explain to the jury, in closing argument, the consequences of deadlock. The challenge to the prohibition as an unreasonable limitation on a meaningful closing argument is preserved for appellate review.

The jury was left to speculate as to what would happen if it did not agree on a verdict. In Simmons v. State, 512 U.S. 154, 161 (1994), the Court wrote, "The Due Process Clause does not allow the execution of a person 'on the basis of information which he had no opportunity to deny or explain.' Gardner v. Florida, 512 U.S. 349, 362, 97 S.Ct. 1197, 1207, 51 L.Ed.2d 393 (1977). In this case, the jury reasonably may have believed that petitioner could be released on parole if he were not executed." In the present case, as noted above, there are several mistaken

assumptions the jury may have reasonably made if it did not return a death sentence. Defense counsel had no opportunity to explain the consequence of deadlock. The trial judge's prohibition on closing argument violated appellant's right to present a meaningful closing argument and violated Due Process. The error requires a new sentencing hearing.

4.

The court abused its discretion by refusing to disqualify or 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. The juror should have been excused given all of the unusual circumstances.

Juror 161 should have been excused or disqualified based on a combination of factors. Juror 161 first told the judge that he worked for the Myrtle Beach Police Department. R. 13, ll21-25. Juror 161 later told the judge that was detention officer with the power to arrest. R. 51, ll. 1-4. Juror 161 believed he had the power to arrest. Juror 161 was a detention officer at MBDC who, in his role as a detention officer, saw a BOLO and still shots of appellant at the time of the crime. R. 276 ll. 3-6. Juror 161 admitted to "reading up on the case." R. 276 l. 7. Juror 161 was an employee at MBDC when appellant was jailed there during bike week in 2012. The juror's employment at MBDC was particularly problematic in this case because the State presented evidence that while appellant was a pre-trial detainee, he allegedly struck prison employees, disrespected them and threw fluids on them. See State's Exhibit 153. R. 3731. Juror 161 was seated on the jury. Appellant exhausted all ten of the peremptory strikes provided by S.C. Code § 14-7-1110. The challenge to Juror 161 is not procedurally barred. Appellant did not waive the challenge to the juror by seating the juror.

Respondent correctly cites State v. Bixby, 388 S.C. 528, 542, 698 S.E.2d 572, 579 (2010); State v. Tucker, 324 S.C. 155, 162, 478 S.E.2d 260, 264 (1996); and State v. Hudgins, 319 S.C. 233, 460 S.E.2d 388 (1995), for the proposition that appellate review of juror

qualification issues is barred when counsel fails to exhaust all peremptory strikes. In Bixby and Tucker, the appellant only used seven of his ten peremptory strikes. While the number is unclear from the opinion in Hudgins, the Court refused to address the challenge to the qualification of several jurors because the appellant failed to exhaust all of his peremptory strikes. In contrast, in the present case, appellant exhausted all ten of his peremptory strikes. R. 1436, ll. 13-14. Appellate review of the challenge to Juror 161 is not barred by the fact that appellant did not use one of the ten peremptory strikes, to which he is statutorily entitled pursuant to S.C. Code § 14-7-1110, to strike Juror 161.

In State v. Green, 301 S.C. 347, 352, 392 S.E.2d 157, 159–60 (1990), the Court wrote:

> In reviewing an error as to the qualification of a juror, we engage in a three step analysis. First, as reflected by several South Carolina cases, an appellant must show that he exhausted all of his peremptory challenges. State v. South, 285 S.C. 529, 331 S.E.2d 775 (1985); State v. Hardee, 279 S.C. 409, 308 S.E.2d 521 (1983); State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983); State v. Britt, 237 S.C. 293, 117 S.E.2d 379 (1960). If appellant failed to exhaust all of his challenges, this Court need not examine whether a juror was erroneously qualified. If however, all peremptory challenges have been used, we move to a second step and examine the disputed juror to see if the juror was erroneously qualified. Finally, if a juror was erroneously qualified, then under an elementary principle of appellate review, the appellant must demonstrate that this error deprived him of a fair trial.

In Green, the majority found that appellant failed to show that the error in qualifying the juror deprived appellant of a fair trial because the challenged juror was not seated on the jury. The Green majority relied on the holding in Ross v. Oklahoma, 487 U.S. 81 (1988), that in examining whether an appellant received a fair trial, the Court will focus on those jurors who were ultimately seated. The present case is distinguished from Ross and Green because Juror 161 was seated on the jury. Applying the three-step analysis discussed in Green, appellant exhausted all of his peremptory strikes, the judge erred in refusing to disqualify or excuse for

cause Juror 161, and the error deprived appellant of a fair trial. The challenge to Juror 161 is properly before this Court and not procedurally barred.

As the dissent noted in Green:

> The statutorily created right to peremptory challenges is one of the most important of the rights reserved to an accused, and it "long has served the selection of an impartial jury." Pointer v. United States, 151 U.S. 396, 408, 14 S.Ct. 410, 414-15, 38 L.Ed. 208 (1894), *overruled in part,* Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the *court's control.* (Emphasis added.) Lewis v. United States, 146 U.S. 370, 378, 13 S.Ct. 136, 139, 36 L.Ed. 1011 (1892). While challenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality, the peremptory challenge permits rejection for a real or imagined partiality that is less easily designated or demonstrated. Hayes v. State of Missouri, 120 U.S. 68, 70, 7 S.Ct. 350, 351, 30 L.Ed. 578 (1887). It is often exercised upon the "sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another." Lewis, *supra,* 146 U.S. at 376, 13 S.Ct. at 138.

301 S.C. at 362, 392 S.E.2d at 165 (n. 1 omitted). As noted by the Court in Green, the exercise of peremptory strikes is one of the most important of the rights reserved to an accused. Pursuant to S.C. Code § 14-7-1110, appellant is entitled to exercise ten peremptory strikes within the law but otherwise without restriction. The cases cited by respondent requiring exhaustion of strikes do not apply in this case as appellant exhausted his ten strikes. Additionally, the cases do not support respondent's position that the challenge to Juror 161 is procedurally barred because appellant could have used a peremptory strike. A requirement that appellant use one of his important peremptory strikes for Juror 161, who should have been disqualified or excused for cause, would reduce appellant's statutory right to exercise peremptory challenges in the way

deemed best by appellant in violation of S.C. Code § 14-7-1110. The issue is properly before this Court.

Respondent also argues that, "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." IBOR, p. 40. Appellant's decision to seat Juror 161 was not a strategic judgment when the juror should have been disqualified or excused for cause. Faced with the reality that seven other jurors, in addition to Juror 161, were found qualified over defense objection, (Jurors 179, 350, 229, 325, 86,10 and 286), and the desire to conserve and exercise peremptory challenges in the way most beneficial to appellant, counsel chose not to use an important peremptory strike for Juror 161. The failure to strike should not waive the challenge to a juror who should have been disqualified or excused for cause.

Appellant objected to the qualification of Juror 161 based on his employment as a detention officer at the MBDC. R. 283, ll. 7-11. The qualification of Juror 161 was precisely what appellant attempted to avoid when he filed pre-trial motion #58 to disqualify past or present correctional officers from the jury. As argued by appellant in pre-trial motion #58, a correctional officer would have knowledge of the details of prison life, and this knowledge would insert an arbitrary factor into the jury's sentencing considerations in violation of State v. Burkhart, 371 S.C. 482, 640 S.E.2d 450 (2007) and S.C. Code § 16-3-25(C)(1). Pre-trial motion #58, R. 3558. Additionally, counsel for appellant was legitimately concerned about bias because of allegations that while appellant was a pre-trial detainee, he struck prison employees, disrespected them and threw fluids on them. As a direct result of his employment at the MBDC, the general basis of the objection to his qualification, Juror 161 had knowledge about the details of jail life that would

insert an improper arbitrary factor into the jury's sentencing consideration. As a direct result of his employment at the MBDC, there was a legitimate concern about bias in regard to alleged actions by appellant as a pre-trial detainee. These issues are encompassed in the general objection to the qualification of Juror 161 based on his employment at the MBDC. The judge was well aware of all of the objections to the qualification of Juror 161 and had the opportunity to rule on those objections. The issue is properly preserved for appellate review and properly before this Court.

Given all of the unusual circumstances surrounding Juror 161 in his role as a detention officer at the MBDC and the specific facts of this case where the State presented evidence of appellant's alleged violent behavior toward prison employees when appellant was a pre-trial detainee, the trial judge abused his discretion by not excusing or disqualifying the juror. The failure to excuse or disqualify Juror 161 deprived appellant to the right to an impartial jury as guaranteed by both our state and federal constitutions. U.S. CONST. amends. VI and XIV; S.C. CONST. Art. 1, § 14. The error requires a new trial.

5.

The court erred by refusing to disqualify juror 350, Lauren Stephens, since her belief that giving 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.

Juror 350 was not qualified to serve because she needed a reason to impose a life-sentence. Viewing the entire *voir dire*, the trial judge's decision to qualify Juror 350 is wholly unsupported by the record. The challenge to the qualification of Juror 350 is not procedurally barred. Appellant did not waive the challenge to the juror by seating the juror.

As discussed with regard to the challenge to Juror 161 above, respondent cites State v. Bixby, 388 S.C. 528, 542, 698 S.E.2d 572, 579 (2010); and State v. Tucker, 324 S.C. 155, 162, 478 S.E.2d 260, 264 (1996), for the proposition that appellate review of juror qualification issues is barred when counsel fails to exhaust all peremptory strikes. In Bixby and Tucker, the appellant only used seven of his ten peremptory strikes. In contrast, in the present case, appellant exhausted all ten of his peremptory strikes. R. 1436, ll. 13-14. Appellate review of the challenge to Juror 350 is not barred by the fact that appellant did not use one of the ten peremptory strikes, to which he is statutorily entitled pursuant to S.C. Code § 14-7-1110, to strike Juror 350. Appellant's reply arguments in issue four above apply with equal force to this issue, and appellant will avoid repetition by repeating them.

Respondent again also argues that, "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 [her] on the jury." IBOR pp. 50-51. Appellant's decision to seat Juror 350 was not a strategic judgment when the

juror should have been disqualified. Seating a challenged juror does not waive the issue for appellate review. Defense counsel, conserving and exercising his statutorily entitled peremptory challenges in the way most beneficial to appellant, chose not to use an important peremptory strike for Juror 350. The challenge to Juror 350 is not waived.

Juror 350 was unqualified because she required a reason to recommend a life sentence. During the individual *voir dire* of Juror 350 the following took place:

> Q: Let me ask you in regards to the death penalty - - let me back up. You do understand that in South Carolina 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 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?
>
> A: Yes.

R. 565, l. 21 – 566, l. 12. The question asked was specific to the life sentence, and the juror answered that it was not morally correct to give a life sentence for any reason or no reason at all. Upon re-questioning the following took place:

> 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 means?
>
> 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 what is presented in court.

R. 570, l. 24 – 571, l. 2.

Viewing the entire *voir dire*, it is clear that Juror 350 believed that it was not morally correct to impose a life sentence for no reason at all and the requirement to have a reason to impose a sentence was not limited to a death sentence. Juror 350 unequivocally stated that it would not necessarily be morally correct to give a life sentence for any reason or no reason just because that is what she wanted to do. R. 566, ll. 7-12; R. 570, ll. 16-20. The juror's "not morally correct" statement showed that she needed a reason for a life sentence verdict. The juror's need for a reason to consider a life sentence *prevented or substantially impaired her duty as a juror to consider a life sentence for any reason or no reason at all, including as an act of mercy as instructed by the judge*. Additionally, the juror's view improperly placed the burden on the defense to show why death would not be an appropriate sentence.

In State v. Bennett, 328 S.C. 251, 257, 493 S.E.2d 845, 848 (1997), this Court found that "the juror's earlier generalized statements that he could be fair and impartial and follow the law insufficient to cure his later, unequivocal response that if the other eleven jurors voted for death,

he would 'have to go with the majority of the jury.'"[1] As in Bennett, in the present case the juror's generalized statement that she would follow the instructions given by the judge was insufficient to cure her unequivocal statement that it would not necessarily be morally correct to give a life sentence for any reason or no reason just because that is what she wanted to do. The juror's responses indicated that she would not be able to follow the law as instructed but instead would need a reason to vote for a life sentence. An act of mercy, as defense counsel urged, was something that potentially came from within each juror, it was *not* something earned or something that was going to be revealed by the evidence at trial as this juror demanded. R. 2323, l. 21 – 2324, l. 4. The judge's ruling that Juror 350 was qualified to serve was wholly unsupported by the record. Appellant should be granted a new trial.

[1] This Court's holding in State v. Bennett, 369 S.C. 219, 632 S.E.2d 281 (2006), Bennett II, that the trial court's refusal to allow the defense to ask the "vote with the majority" voir dire question was not reversible error does not change the holding of State v. Bennett, 328 S.C. 251, 257, 493 S.E.2d 845, 848 (1997) that a juror who would simply vote with the majority was not qualified.

6.

The trial court understood defense counsel's argument that appellant was being unconstitutionally punished as a pre-trial detainee when he was put on death row and in maximum security prison. The court also understood that was the basis of appellant's motion to exclude evidence of appellant's misconduct while he was illegally detained in those places.

Respondent argues that the trial judge did not err in allowing evidence of appellant's misconduct while he was housed in maximum-security prisons as a pre-trial detainee because defense counsel's objection at trial was based on the Eighth Amendment proscription against cruel and unusual punishment. IBOR at 72. Respondent maintains that the Eighth Amendment is applicable only to convicts and not pre-trial detainees. See Ingraham v. Wright, 430 U.S. 651, 664 (1977) (holding that Eighth Amendment was "designed to protect those convicted of crimes" and "does not apply to the paddling of children as a means of maintaining discipline in public schools").

However, respondent acknowledges that pre-trial detainees do have a right to be free from punishment. IBOR at 72; Bell v. Wolfish, 441 U.S. 520, 535 (1979) (recognizing that a pre-trial detainee "may not be punished prior to an adjudication of guilt in accordance with due process of law"); Kingsley v. Hendrickson, 576 U.S. 389 (2015) (holding that a pre-trial detainee claiming that excessive force was used against him in violation of his constitutional rights need only show that the force used against him was objectively unreasonable).

Respondent's argument is misplaced because it was clear from the record that defense counsel's objection was that appellant was being *unconstitutionally punished.* R. 2990, l. 21 – 2991, l. 2; R. 3002, l. 25 – 3004, l. 3. Defense counsel's references to the Eighth Amendment instead of the Due Process Clause did not change the fact that the state was unconstitutionally

punishing appellant by detaining him in a maximum security prison, *and on death row as a pre-trial detainee*, and that was the defense's objection. Further, appellant's Motion to Rescind the Safekeeping Order and Release Defendant to County Detention Center filed October 17, 2018 did argue that the manner in which appellant was being held in the Department of Corrections also violated his right to Due Process. See Motion to Rescind at 2; R. 3588.

Appellant was being punished, and this punishment was unconstitutional because of his status as a pre-trial detainee. Respondent is engaging in a game of "gotcha" by arguing that defense counsel cited the incorrect constitutional provision. See State v. Bowers, 428 S.C. 21, 29, 832 S.E.2d 623, 627 (Ct. App. 2019) (noting that "issue preservation is not a 'gotcha' game" and that "[i]nstead of being hyper-technical, [appellate courts] approach preservation with a practical eye"); State v. Hendricks, 408 S.C. 525, 531, 759 S.E.2d 434, 437 (Ct. App. 2014) (holding that hearsay objection was preserved where the basis for the objection was apparent from the context and it was clear that both the state and trial judge understood the objection to have been based on hearsay). The argument that defense counsel made was clear: the state unconstitutionally punished appellant, which he had a right to be free from, where they housed him in the most restrictive prisons in the state. This Court should, respectfully, address the merits of appellant's argument since the trial court understood it.

Respondent makes the similar argument that appellant arguing due process in his brief is an abandonment of trial counsel's argument at trial. Again, while defense counsel referenced the Eighth Amendment at trial, he clearly articulated to the trial judge that appellant was being *unconstitutionally punished because he was a pre-trial detainee*. Appellant is making the same conceptual argument on appeal.

The trial judge did not rule against appellant *because of* his alleged reliance on the "incorrect" constitutional provision but instead ruled that the state had not violated appellant's "constitutional rights" and that appellant's pre-trial detention in maximum security prisons was "appropriate."[2] R. 3134, l. 18 – 3135, l. 1. This ruling was erroneous because the state was punishing appellant, who was a pre-trial detainee, by confining him in a maximum-security prison and on death row. The requested and proper remedy was not to allow evidence of appellant's misconduct while he was illegally housed to be introduced against him in furtherance of a death sentence.

Respondent further argues that appellant's objection to evidence of his misconduct which occurred while he was illegally and unconstitutionally confined in a maximum-security prison from being used against him was "premised on the notion that appellant had a right to remain in the detention center." IBOR at 73. That is incorrect. Appellant has at no point argued that he had a right to remain at the detention center. Appellant has maintained that he had a right to be free from unconstitutional punishment as a pre-trial detainee. Appellant was moved back to the detention center closer to trial to allow defense counsel better access to him, but the damage had been done at that point.

Respondent relies on Olim v. Wakinekona, 461 U.S. 238 (1983) and Meachum v. Fano, 427 U.S. 215 (1976) to support his position that appellant had no right to be detained in a particular location. However, Olim and Meachum both dealt with convicted prisoners, not pre-trial detainees and are thus substantially different from appellant's situation. The Supreme Court in Olim faced a due process challenge brought by a convicted prisoner in Hawaii who was transferred to a prison in California. Olim, 461 U.S. at 240. The defendant in Olim was already

---

[2] Respondent stated in his initial brief that "appellant's brief does not reference this ruling." IBOR at 64, n. 26. However, in appellant's brief this ruling was quoted in full. See BOA at 62.

serving a life sentence for numerous crimes including murder and escape and was still given a hearing where he was represented by counsel prior to being transferred to the California prison. Id. The Olim Court held that "[j]ust as an inmate has no justifiable expectation that he will be incarcerated in any particular prison within a State, he has no justifiable expectation that he will be incarcerated in any particular State." Id. at 245.

In Meachum, the Supreme Court dealt with convicted inmates who were transferred from one Massachusetts prison to another that had "less favorable conditions." Meachum, 427 U.S. at 216. The Meachum Court noted that "*given a valid conviction*, the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him and subject him to the rules of its prison system so long as the conditions of confinement do not otherwise violate the Constitution." Id. at 224 (emphasis added). The Court continued:

> Neither, in our view, does the Due Process Clause in and of itself protect *a duly convicted prisoner* against transfer from one institution to another within the state prison system. *Confinement 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.*

Id. at 225 (emphasis added).

Both Olim and Meachum are readily distinguishable from this case. First, while a convicted inmate does not have a right to be housed at a particular institution, pre-trial detainees quite clearly have the constitutional right to be free from punishment. Wolfish, 441 U.S. at 535. Respondent either ignores or misconstrues appellant's status as a pre-trial detainee in comparing his illegal detention on death row prior to his conviction with convicted inmates who were moved from one prison to another.

Furthermore, unlike in Meachum where the Court said that "confinement in any of the State's institutions is within the normal limits or range of custody which the conviction has

authorized," nothing about appellant's situation was within the "normal limits." Id. at 225. The trial judge said he was shocked to learn appellant was being housed on death row. He also asserted that he had never seen a case before where a pre-trial detainee was incarcerated with convicts who had already been sentenced to death. R. 1864, ll. 9 – 25.

Respondent also contends that appellant cannot complain on appeal of the evidence introduced against him because appellant's own conduct caused the problem. However, appellant's conduct was not the reason the state repeatedly failed to comply with the established procedures regarding safekeepers. The state consistently and routinely failed to comply with their own procedures in continuing to house appellant as a safekeeper which was something appellant had no control over. Defense counsel was not even informed of the numerous times that the state extended appellant's safekeeping status. R. 2993, l. 9 – 2995, l. 10.

Respondent's contention in this regard is backwards because it was in fact the state that sought to benefit from their own misconduct. The state acted unconstitutionally in punishing appellant as a pre-trial detainee by placing him under greater restrictions than death row convicts. The state then sought to benefit from this illegality by using appellant's disciplinary infractions while being housed under extremely oppressive and unconstitutional conditions against him. The state should not have been allowed to benefit from its illegal conduct. The trial judge erred by allowing the state to introduce evidence against appellant which *the state's misconduct* in fact created.

Next, respondent argues that appellant's position is contrary to the legislature's intent because the safekeeper statute provides that no inmate housed in SCDC as a safekeeper "shall have a right or cause of action against the State . . . by reason of having been committed and detained in the state prison system." IBOR at 73; S.C. Code § 24-3-80. Respondent

misconstrues this statutory language. This provision of the statute bars an inmate from suing the state in civil court for placing him in SCDC as a safekeeper. Appellant did not attempt to sue the state for his pre-trial dentition in SCDC and therefore, this statutory provision is inapplicable. Instead, appellant only objected to the state benefiting from its illegal and unconstitutional punishment of him by using his misconduct while he was illegally detained against him during his capital trial.

Finally, respondent claims that the "location of appellant's misconduct was irrelevant to the admissibility of evidence of his misconduct." IBOR at 74. Again, however, appellant was only located in maximum security prisons because the state was unconstitutionally punishing him as a pre-trial detainee. This was unconstitutional punishment which the state should not have been allowed to exploit. Respondent clearly understands the concept that "a party may not complain on appeal of error or object to a trial procedure which his own conduct has induced," because respondent argued that this was what appellant was doing here. IBOR at 73; State v. Stroman, 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984). Respondent simply misunderstands which party engaged in misconduct. It was the state that engaged in misconduct by illegally punishing appellant -- as a pre-trial detainee -- which was the reason the "location of appellant's misconduct" was relevant.

This Court should address the merits of this issue because the issue is preserved for appellate review. Respondent's procedural arguments are based on an impractical and hyper-technical interpretation of issue preservation rules. The state and trial judge were both aware of what defense counsel was arguing. It was abundantly clear from the record that defense counsel argued appellant was unconstitutionally punished by the state because he was a pre-trial detainee,

and appellant therefore should not have been housed in a maximum security prison and on death row as a pre-trial detainee.

Appellant was unconstitutionally punished from the time he was placed into a maximum-security prison at SCDC until the time he was moved back to the county jail to prepare for his jury trial. The judge erred by allowing the state to use appellant's disciplinary infractions while he was illegally housed in SCDC against him. Appellant's sentence of death should therefore be reversed, and this case remanded for a new sentencing trial. See Bell v. Wolfish, 441 U.S. 520 (1979); Williamson v. Stirling, 912 F.3d 154 (4th Cir. 2018); S.C. Exec. Order No. 2000-11 (Feb. 16, 2000); SCDC Policy SK-22.02 (August 20, 2018).

7.

The trial judge erred in excluding evidence of the Lee Correctional Institution riot because the state opened the door to this evidence by introducing appellant's disciplinary record at the maximum security prisons he was held in as a pre-trial detainee, and appellant not participating in the riot was mitigation evidence of appellant's adaptability to prison life that should have been admitted.

In appellant's brief, he argued that the Lee Correctional Institution riot evidence, in which seven inmates were killed in a single day at the same prison where appellant was incarcerated as a pre-trial detainee, was admissible in *fair response* to evidence of appellant's bad acts while he was being unconstitutionally punished by the state. The state opened the door to this evidence of prison dangerousness by introducing evidence of appellant's disciplinary infractions while he was illegally confined in maximum security prisons as a pre-trial detainee. See State v. Northcutt, 372 S.C. 207, 220-21, 641 S.E.2d 873, 880-81 (2007) (holding that letter written by defendant expressing remorse for killing his daughter was admissible in sentencing phase of death penalty trial because the state opened the door to such evidence by previously introducing evidence that the defendant lacked remorse). Furthermore, because appellant did not participate in the riot, this was proper mitigating evidence of appellant's adaptability to prison. See Skipper v. South Carolina, 476 U.S. 1, 8-9 (1986) (holding that evidence of defendant's adaptability to prison was admissible in mitigation). This was mitigating evidence appellant had the right to offer in fair response to the state's evidence meant to show he could not adapt to prison. See, also, Eddings v. Oklahoma, 455 U.S. 104 (1982).

Respondent focused in his brief on the general rule that evidence of general prison conditions is not admissible in capital cases. IBOR at 90-94; State v. Bowman, 366 S.C. 485,

623 S.E.2d 378 (2005). Respondent contended that appellant "did not wish to present 'narrowly tailored' evidence of prison conditions" but rather "wanted to present evidence supporting counsel's impression that [Lee Correctional was] 'a bad place.'" IBOR at 92. However, appellant did not seek to introduce evidence of general prison conditions. Appellant only sought to introduce evidence of the Lee riot in which seven inmates were killed in a single day. This evidence was necessary in response to the state's evidence of appellant's maladjustment to prison so that the jury could understand the precarious situation appellant was in as a pre-trial detainee housed in a maximum security prison, and yet he was able to adapt under the worst circumstances.

Appellant was not seeking to introduce evidence of general prison conditions. Appellant recognizes that this Court has previously held that evidence of general prison conditions is not admissible. See State v. Burkhart, 371 S.C. 482, 640 S.E.2d 450 (2007); State v. Bowman, 366 S.C. 485, 623 S.E.2d 378 (2005). In this case, appellant sought to introduce a minimum response which was warranted under the highly unusual circumstances of appellant's case. Specifically, evidence of the Lee riot and the fact that appellant did not participate in that riot was admissible to show the dangerousness of the environment appellant was forced to live in, and adapt to, as a pre-trial detainee.

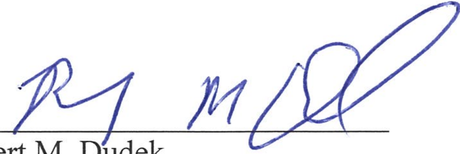
Respondent ignored the fact that the state opened the door to evidence of the Lee riots by attempting to capitalize on its violation of appellant's constitutional right to be free from punishment as a pre-trial detainee. Respondent instead offered only the conclusory remark that "rather than a fair response to the prosecution's evidence of misconduct by appellant while incarcerated, this evidence was irrelevant to appellant's individual characteristics." IBOR at 85. However, contrary to respondent's assertion, the Lee riot was relevant to appellant because he

did not participate in the riot. R. 1924, l. 22 – 1925, l. 12. This was mitigating evidence of appellant's adaptability to prison life.

Respondent further contended that appellant was not prejudiced by the exclusion of the Lee riot evidence because Dr. Maddox, appellant's expert witness, offered an explanation for appellant's disciplinary problems while he was housed at Lee. IBOR at 93. However, any explanation of appellant's misbehavior in prison was incomplete without the jury hearing the Lee riot evidence. Furthermore, evidence of appellant's lack of participation in the riot was proper mitigating evidence of his adaptability to prison, and the absence of this evidence prejudiced appellant by preventing him from responding to the state's evidence of appellant's inability to adjust to prison. Therefore, the trial judge erred in excluding this important mitigating evidence in fair response to the state's introduction of appellant's disciplinary infractions while housed in maximum security prisons as a pre-trial detainee. See Skipper v. South Carolina, 476 U.S. 1 (1986); State v. Northcutt, 372 S.C. 207, 641 S.E.2d 873 (2007).

CONCLUSION

By reason of the arguments in the final brief of appellant, and the arguments in this reply brief, appellant's convictions and sentence should be reversed and this case remanded to the Horry County Court of General Sessions for a new trial.



Robert M. Dudek
Chief Appellate Defender

Kathrine H. Hudgins
Appellate Defender

Adam Sinclair Ruffin
Appellate Defender

ATTORNEYS FOR APPELLANT

This 14th day of May, 2021.

RECEIVED

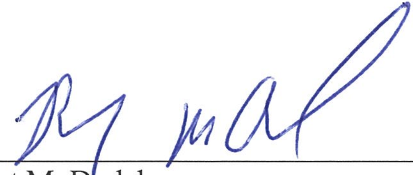
May 14 2021

S.C. SUPREME COURT

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Reply Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

May 14, 2021.



Robert M. Dudek
Chief Appellate Defender

Kathrine H. Hudgins
Appellate Defender

Adam Sinclair Ruffin
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589