

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Horry County

Honorable Robert E. Hood, Circuit Court Judge

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S.C. SUPREME COURT

THE STATE,

RESPONDENT,

V.

JEROME JENKINS, JR.,

APPELLANT.

APPELLATE CASE NO. 2019-001280

FINAL BRIEF OF APPELLANT

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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?

STATEMENT OF THE CASE

Appellant Jerome Jenkins was indicted at the April 23, 2015 term of the Horry County grand jury for the offenses of murder, attempted murder, and armed robbery for an incident which occurred in Horry County on January 2, 2015. R. 3733. Appellant was twenty years-old when the crime occurred.¹ R. 2082, ll. 9-10. After numerous pre-trial hearings, appellant's case was called to trial on May 6, 2019 before the Honorable Robert Hood, and a jury. Ralph Wilson and Brana Williams represented appellant. Solicitor Jimmy Richardson and Deputy solicitor Scott Hixson represented the state. R. 1.

On May 11, 2019, the jury found appellant guilty of murder, attempted murder, and armed robbery. R. 1672, l. 15 – 1673, l. 6. After a twenty-four-hour waiting period, the sentencing phase trial began on May 13, 2019. R. 1681, ll. 1-2.

On May 16, 2019, the jury returned with a sentence of death. R. 2348, l. 17 – 2349, l. 16. Judge Hood then sentenced appellant to death on the murder count, thirty years' imprisonment for attempted murder, and thirty years' imprisonment for armed robbery. R. 2363, ll. 6-15.

This appeal follows.

¹ Conversely, older co-defendant McKinley Daniels was 33 years old at the time of the crime on January 2, 2015. Supp. R. 1; Incarcerated Inmate Locator, SCDC website. He was represented by William McGuire. He was found to be intellectually disabled and ineligible for the death penalty. He was sentenced to forty-five imprisonment for murder, and thirty years concurrent for armed robbery. Supp. R. 1 Older co-defendant James Daniels was 27 years old at the time of the crimes. Supp. R. 2; Incarcerated Inmate Locator, SCDC website. He was tried before Judge Robert Hood from August 27-30, 2018. He was by represented by Barbara Pratt. Daniels was convicted of murder and armed robbery and sentenced to life imprisonment. Incarcerated Inmate Locator, SCDC website. Supp. R. 2.

ARGUMENT

1.

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.

Relevant Facts

An on-the-record status conference was held on March 7, 2019 before the Honorable Robert E. Hood. Ralph Wilson and Brana Williams represented appellant. Scott Hixson was the deputy solicitor. R. 3140. The judge noted that the status conference was being held about sixty days before the beginning of the trial. R. 3142-3156. The deputy solicitor said that appellant was now back in the local detention center in accordance with the judge's latest order. R. 3142, l. 20 – 3143, l. 3.

After some preliminary matters were discussed, the judge stated, “[O]ne of the things that I need to understand is are there any plea offers that are on the table? Is there a plan on any plea offers? Have plea offers expired? Is that not an option at all? Where is the State with that?” R. 3154, l. 12 – 3155, l. 3.

Deputy solicitor Hixson responded, “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. As such, there has not been and there are none and as

such, there's not set to expire." R. 3154, l. 12 – 3155, l. 3. Hixson also told the judge that defense counsel Wilson had told him "[W]e 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." R. 3155, ll. 8-14.

After appellant confirmed to the judge that he had been moved back to J. Reuben Long Detention Center, the judge told appellant they were in "what I would call crunch time, you're about sixty days out from trial." The judge told appellant he had him moved back to the county detention center so his attorneys would have "more access to you." R. 3163, ll. 10-18. The following then occurred between appellant and the judge:

THE DEFENDANT: I have a question. Is it legal for *them to make me go to trial?*

THE COURT: Make you go to trial?

THE DEFENDANT: *Basically, they made me go to trial. I didn't get no plea or nothing. So is it legal?*

THE COURT: *I mean, you have the right to plead guilty if you want to plead guilty.*

THE DEFENDANT: *Plead guilty to the death sentence?*

THE COURT: *Right. I mean, we both are kind of smiling at each other as we say that, but I mean, there are some people that believe criminal defendants do not have a right to plead guilty. You know, I don't think you can stop somebody from pleading guilty as charged. But, you know –*

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. I don't -- the 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.

THE COURT: Right. Okay. What else? What else you want to talk to me about?

THE DEFENDANT: That's it.

R. 3163, l. 19 – 3165, l. 16.

Following this exchange, a Jackson v. Denno hearing was held about six weeks later on April 25, 2019. Ralph Wilson and Brana Williams represented appellant. Solicitor Jimmy Richardson and deputy solicitor Scott Hixson represented the state. R. 3237.

During the motion hearing, defense counsel Wilson referenced to his motion to find S.C. Code § 16-3-20 (b) unconstitutional and to “allow the defendant to plead guilty and be sentenced by a jury of his peers.” R. 3428, ll. 18-22; R. 3480. (Motion to Declare Statute Unconstitutional). Defense counsel told the judge that “this defendant would today plead guilty to all of the charges that the State has against him. He is not denying any of the charges. *He would plead guilty to all of those charges, but he’s simply saying I want to be sentenced by a jury, not by the Court.*” R. 3429, l. 23 – 3430, l. 9. (emphasis added).

Deputy solicitor Hixson told the judge the state would not allow appellant to plead guilty and have jury sentencing. Appellant would have to waive jury sentencing in order to plead guilty. Defense counsel repeated that appellant wanted to plead guilty and “[h]e’s not asking for any special favors. He’s not asking for anything. He is saying I’m guilty of everything you said I have done, and here I am. I’m pleading guilty. *The State is saying you can’t even do that because we have to agree to it.*” R. 3431, ll. 21-25. (emphasis added).

The deputy solicitor responded that the statute did not allow appellant to plead guilty and have jury sentencing, and he claimed: “*It is not that we want you to keep you from accepting responsibility*, it is, yeah, I want to get rid of this because the evidence of guilt appears to be overwhelming, but I want to go through all of the effort of getting capital jury, and I think that is what the statute and rule [Criminal Procedure Rule 14] contemplates.”² R. 3433, ll. 13-25. The judge then ruled that the statute was not unconstitutional. “If he wants to plea, *I’m not going to stop him, but we’re not going to have a sentencing jury that is in place.* The statute could not be any clearer about that. It is not confusing. It is not, you know—if that is something—you know, I just think that the statute is just as clear as it can be, you know. So I don’t know that he has a Constitutional right to a jury trial on sentencing issues.” R. 3434, ll. 1-12; R. 3428, l. 18 – 3434, l. 13. (emphasis added).

Standard of Review

“In criminal cases, appellate courts sit to review only errors of law.” State v. Sams, 410 S.C. 303, 307, 764 S.E.2d 511, 513 (2014); see also State v. Baccus, 367 S.C. 41, 625 S.E.2d 216 (2006); State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001). “[T]he conduct of a trial is largely within the discretion of the presiding judge, to the end that a fair and impartial trial may be had.”

² Rule 14(b), SCRCrimP states “a defendant may waive his right to jury trial only with the approval of the solicitor and the trial judge.”

State v. Heath, 232 S.C. 384, 391, 102 S.E.2d 268, 272 (1958). “An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.” State v. Douglas, 369 S.C. 424, 429-30, 632 S.E.2d 845, 848 (2006).

“All statutes are presumed constitutional and will, if possible, be construed so as to render them valid.” State v. Harrison, 402 S.C. 288, 292–93, 741 S.E.2d 727, 729 (2013). As such, appellate review of a trial court’s ruling on the constitutionality of a statute is limited. Id. “A legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear beyond a reasonable doubt.” State v. Harrison, 402 S.C. 288, 293, 741 S.E.2d 727, 729 (2013).

Discussion

Acceptance of responsibility by pleading guilty is the most powerful mitigating evidence available to a criminal defendant. For example, the federal sentencing guidelines provide for a substantial downward departure if a defendant accepts responsibility for his crime and pleads guilty. “[I]f the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by two levels.” See U.S.S.G §3E1.1(a) 18 U.S.C.A. Acceptance of Responsibility.

U.S.S.G§ 3E1.1(b) further provides an additional, one-level downward adjustment if the defendant’s offense level prior to the application of U.S.S.G §3E1.1(a) is 16 or greater and he: (2) *timely [notifies the] authorities of his intention to enter a plea of guilty*, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently. See United States v. Lancaster, 112 F.3d 156, 158 (4th Cir. 1997).

Acceptance of responsibility is universally considered in mitigation of punishment. After conviction, it does not violate a defendant’s right against self-incrimination to force him to accept

responsibility for his crime in order to have the benefits of treatment programs that likely will lessen the maximum time he must serve. See McKune v. Lile, 536 U.S. 24, 122 (2002). Further, parole boards routinely consider a defendant's acceptance of responsibility or his refusal to admit his guilt.

In the realm of capital punishment, "individualized consideration [is] a constitutional requirement." Therefore, the defendant has the right to have the jury consider any evidence in mitigation of punishment. Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586, 605 (1978); Zant v. Stephens, 462 U.S. 862, 879 (1983).

While a sentencing judge cannot sentence a similarly situated co-defendant more harshly because he exercised his right to a jury trial, rather than entering a plea of guilty and accepting responsibility for his crime, sentencing consideration for a defendant that pleads guilty is an everyday event, and a rational event. Cf. Davis v. State, 336 S.C. 329, 520 S.E.2d 801 (1999).

Appellant unquestionably had the right to a particularized consideration of his evidence in mitigation by the jury. Lockett v. Ohio, *supra*. Here, however, as defense counsel correctly argued, appellant was forced to waive jury sentencing, and accept judge sentencing, in order to have his most powerful mitigating evidence -- his plea of guilty -- considered during the penalty stage.

However, the plea of guilty and sentencing in this case would be before a judge who had already confirmed to appellant that he would be pleading "guilty to a death sentence." R. 3163, l. 19 – 3165, l. 16. This is respectfully extraordinarily significant since this Court has reversed trial judges in capital cases for telling or instructing a defendant that the sentencer may not follow the law. For example, in State v. Pierce, 289 S.C. 430, 434, 346 S.E.2d 707, 710 (1986), this Court reversed where the trial judge told a capital defendant that while the jury could not hold it against him if he did not testify: "I tell you that the jury, will hold it against you, the fact that you did not testify ... I am going to charge them that the law does not permit them to hold it against you, but

they are human beings and you know and I know that any twelve people who have been called upon to resolve some dispute cannot help but have it in their mind and wonder why he did not tell us his side of it.” This Court held these comments by the trial judge were “erroneous, improper and contrary to South Carolina law,” and it reversed and remanded for a new trial. State v. Pierce, 289 S.C. 430, 434, 346 S.E.2d 707, 710 (1986),³ overruled on other grounds State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).

In State v. Crisp, 362 S.C. 412, 415-16, 608 S.E.2d 429, 432 (2005), this Court also reversed where the defendant pled guilty to murder, and was sentenced to death where the judge had told the defendant if he went to trial that there were jurors who would claim to be for the death penalty so they could get on the jury, in order to “let someone go” or express “their agenda against the death penalty.” This Court held, *citing* “virtually identical facts” in State v. Owens, 362 S.C. 175, 607 S.E.2d 78, 80 (2004): “Although the trial court must strive to ensure that a criminal defendant's waiver of the right of a jury trial is knowing and voluntary, the court should never inject its personal opinion into that decision. The comments here impermissibly did so.”

So here were the trial judge’s remarks improper to appellant that he would “be pleading guilty to the death sentence.” The judge, just like the jury, would have had the legal obligation pursuant to S.C. Code §16-3-20 (C) to determine whether an aggravating circumstance was proven beyond a reasonable doubt, and then to consider the mitigating circumstances before arriving at his

³ Although the prejudice from the judge’s improper remarks about sentencing appellant to death if he pled guilty in this case is apparent, it is telling that this Court summarily dispatched a lack of prejudice claim by the state in Pierce where the defendant did not testify despite the judge’s “warning” that the jury would hold it against him. “Although Pierce did not testify, he had the right to make that decision free of any influence or coercion from the trial judge. It is virtually impossible to determine the actual effect the judge's improper statements had on Pierce; but we do not agree with the state's position that, because Pierce did not testify, the judge's comments are harmless error.” State v. Pierce, 289 S.C. 430, 434, 346 S.E.2d 707, 710 (1986).

verdict and sentence. The fact that appellant immediately responded: “Not a chance,” given the trial judge’s confirmation that a plea of guilty was going to result in a death sentence, showed the power of the judge’s improper remark in this case. Appellant had the right under the mandate of Lockett v. Ohio to present his sentencing judge or jury with any mitigating evidence as a reason to impose a sentence of less than death.

Appellant understands this issue has previously been raised before this Court in the jury trial capital case of State v. Wood, 362 S.C. 135, 607 S.E.2d 57 (2004) absent the improper remarks from the trial judge here which had to steer this appellant away from pleading guilty since he wanted to live. In Wood, the defendant argued that Ring v. Arizona 536 U.S. 584 (2002) rendered S.C. Code §16-3-20 (B) unconstitutional inasmuch as it required a sentencing proceeding be held before a judge when a defendant pled guilty to murder in a capital case. This Court determined that the statute was not unconstitutional reasoning that “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.Sat. §13-703(C).” “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.” State v. Wood, 362 S.C. 135, 143, 607 S.E.2d 57, 61 (2004).

This Court also reasoned that it had held in the guilty plea capital case of State v. Downs, 361 S.C. 141, 604 S.E.2d 377 (2004) that Ring did not involve jury-trial waivers and therefore was not implicated when a defendant plead guilty. State v. Wood, 362 S.C. 135, 143, 607 S.E.2d 57, 61 (2004). Recently, however, in an order filed April 21, 2020, in Jerry Buck Inman v. State, 2012-CP-39-918, Circuit Court Judge Alexander Macaulay ruled that the Sixth Amendment of the United States Constitution protected a defendant’s right to be tried by an impartial jury, and that S.C. Code

§16-3-20 (B), which mandated -- following a plea of guilty -- that “the sentencing proceeding must be conducted before the judge” was unconstitutional under “that test laid down in Hurst v. Florida, 577 U.S. ___, 136 S.Ct. 616 (2016).”⁴ The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose sentence a sentence of death. Since S.C. Code §16-3-20 (B) mandates that a judge and not a jury determines whether a statutory aggravating circumstance necessary for consideration of the death penalty exists, S.C. Code §16-3-20 (B) is unconstitutional to that extent. R. 3536.

The reliance of this Court in State v. Wood, 362 S.C. 135, 143, 607 S.E.2d 57, 61 (2004) on its reasoning in State v. Downs, 361 S.C. 141, 604 S.E.2d 377 (2004) that a waiver of jury sentencing solved the Sixth Amendment right to jury sentencing problem cannot survive the holding of Hurst v. Florida, 577 U.S. ___, 136 S.Ct. 616 (2016) that a jury must make the critical findings needed for the imposition of a death sentence. That appellant’s jury determined the existence of a statutory aggravating circumstance or circumstances does not change the fact that appellant was denied the strongest mitigating evidence possible that he pled guilty and accepted responsibility for his crimes *since judge only sentencing was mandated by the statute*, S.C. Code §16-3-20 (B), *upon a plea of guilty*. This violated appellant’s constitutional right to jury sentencing wherein it has long been held that he was entitled to have his sentencing jury consider any evidence which mitigated against a sentence of death. See Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586, 605 (1978).

Further, it would be illogical and incorrect on direct appeal, as here, pursuant to Griffith v. Kentucky, 479 U.S. 314, 328 (1987) to grant any defendant who pled guilty in South Carolina and

⁴ The order also noted that Article I, Section 14, of the South Carolina Constitution of 1895 provided that “the right of trial by jury shall be preserved inviolate” and that “any person charge with an offense shall enjoy the right to a speedy and public trial.” Order at 58, R. 3538.

was denied jury sentencing in a capital case a new trial such as in Jerry Buck Inman v. State 2012-CP-39-918 at 56. (filed April 21, 2020), and not grant appellant a new trial where he requested to plead guilty, and have jury sentencing, and he was denied that right. R. 3536.

Appellant understands the unusual procedural posture of this case at the time the initial brief was filed on July 13, 2020. Jerry Buck Inman v. State, 2012-CP-39-918 at 56 (filed April 21, 2020) resulted in the PCR applicant, Jerry Buck Inman, being granted a new trial on collateral review because he was denied jury sentencing after he pled guilty in that capital case. R. 3536. While there was no decision from this Court affirming the circuit court's order in Inman v. State, 2012-CP-39-918 at 56 (filed April 21, 2020), R. 3536, as it was pending on a cross-appeal, it would respectfully be a denial of the essential demands of fairness to deny appellant a new trial in this procedural posture -- particularly where this Court rejected Inman's argument on direct appeal that by accepting his guilty plea, while allowing Inman to challenge the constitutionality of the death penalty statute on direct appeal, the trial court had made his guilty plea an illegal conditional plea under our state's precedents. See State v. Inman, 395 S.C. 539, 555, 720 S.E.2d 31, 40 (2011), *citing* State v. Downs, 361 S.C. 141, 145, 604 S.E.2d 377, 379 (2004) and State v. Truesdale, 278 S.C. 368, 370, 296 S.E.2d 528, 529 (1982).

Consequently, to demand that Appellant Jerome Jenkins plead guilty in this case to preserve his constitutional argument given this Court's holding in State v. Inman, 395 S.C. 539, 555, 720 S.E.2d 31, 40 (2011), rejecting that argument, and for this Appellant Jerome Jenkins to hope for a different result on appeal, respectfully, would violate the essential demands of fairness.

Appellant should be granted a new trial.

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.

Relevant facts

The defense sought to show in its case in mitigation that appellant, as a young man, operated under the dominion of older co-defendant McKinley Daniels and, to a lesser extent, the older James Daniels. Prior to the testimony of forensic psychiatrist Dr. Donna Schwartz-Maddox,⁵ Deputy solicitor Hixson objected to Dr. Maddox testifying as to certain information in her report, Defense Exhibit 12, being conveyed to the jury that the state considered hearsay. R. 3544; R. 2150, l. 21 – 2163, l. 20. Specifically, the state objected to Dr. Maddox’s testimony under the opinion section of 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.” R. 3557. Ms. Stull was a victim in one of the convenience store robberies.

Defense counsel Wilson told the judge that Dr. Maddox would testify that co-defendant McKinley Daniels’ admission that he told appellant to kill Ms. Stull was part of the basis of Dr. Maddox’s opinion that appellant was acting under the dominion of others, which was a mitigating circumstance in this case. R. 2161, l. 13 – 2166, l. 12; R. 2167, l. 25 – 2170, l. 11.

⁵ Hereinafter, “Dr. Maddox” for ease of reference.

The judge stated he had read Green v. Georgia, 442 U.S. 95 (1979), and “it stands for the proposition that the rules [against hearsay] should not be so—in their words—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.” R. 2174, l. 1 – 2176, l. 12. However, the judge reasoned that Dr. Maddox could just testify: “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.” R. 2177, ll. 5-20.

The judge noted that appellant also had the right to address the jury, and he offered at one point that while it would be “self-serving hearsay” for Dr. Maddox to testify in this regard that appellant could just tell the jury in his **penalty phase** allocution, if he chose, that Daniels told him to kill Ms. Stull, and that would serve the same purpose as the expert testimony of Dr. Maddox.

While the trial judge, most respectfully, at times during the trial talked in a sort of stream of consciousness style, the right of a defendant to address the jury during a capital trial is not without limits. For example, in State v. Moore, 357 S.C. 458, 462-63, 593 S.E.2d 608, 610-11 (2004), this Court held that it was not error for the trial court to prohibit the defendant from arguing to the jury in his statement pursuant to S.C. Code §16-3-28 that “he was on trial for his life” during the guilt phase of the trial. This Court held that this could have confused or misled the jury that it could consider punishment during the guilt phase. Further, it would not appear that this Court would approve of a procedure where a defendant during a capital trial could tell the jury pursuant to S.C. Code §16-3-28 that a co-defendant had threatened to shoot him or kill him if he did not shoot the victim where that evidence was not otherwise before the jury. Regardless, in the final analysis, the judge ruled he was not going to allow Dr. Maddox to

present this testimony because he considered it hearsay during the penalty phase of the trial. R. 2178, l. 6 – 2179, l. 2.

Defense counsel repeatedly argued that Dr. Maddox was an expert, and that she could rely on matters other experts normally relied on as experts, and that she was retained here to assist the defense with its mitigation case. Defense counsel cited to Green v. Georgia, 442 U.S. 95 (1979), on the rules of hearsay being loosened in the interests of justice during the penalty phase of a death penalty trial. R. 2151, l. 19 – 2174, l. 13; R. 2177, l. 5 – 2179, l. 15.

Deputy Solicitor Hixson interjected that the defense had subpoenaed McKinley Daniels and “[h]e was here and prepared and could have testified as to some of those issues, and for whatever reason, [he] declined or not. So it is not an unavailability issue.” R. 2179, ll. 3-7. The judge then stated that McKinley Daniels would not be deemed an unavailable witness for purposes of his admissibility analysis. “They could have put him on the witness stand and treat him (sic) as hostile and say isn’t it true you told Donna Maddox that you told Jerome to kill Trisha Stull, and they would have been stuck with his answer, you know.” R. 2179, ll. 8-15.

The following day, Defense Counsel Wilson argued that Dr. Maddox as an expert had relied on McKinley Daniels’ statement that he told appellant to shoot Ms. Stull, and that Dr. Maddox as an expert had the right to include that fact in her testimony. Defense counsel said the evidence was not being admitted to prove the truth of the matter asserted under Rule 801(c), SCRE, but instead it was admissible as evidence an expert relied on under Rule 703, SCRE. R. 2184, l. 14 – 2186, l. 7.

Defense counsel again noted that rules of evidence were relaxed in capital sentencing proceedings, pursuant to Green v. Georgia, 442 U.S. 95 (1979), as a matter of due process. R. 2184, l. 25 – 2189, l. 8. The deputy solicitor also maintained that McKinley Daniels’ admission

that he told appellant to shoot victim Stull did not qualify as a statement against penal interest because he made it to defense investigators. The solicitor argued that defense investigators were not “criminal investigators.” “It was made in preparation for testimony by the expert.” R. 2189, l. 10 – 2190, l. 7.

The judge again ruled, “At this point in time, based upon the case law presented to me, the rules of evidence as have been applied and the case law that the Court has reviewed, I’ll allow 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.” R. 2192, ll. 15-22.

Dr. Maddox told the trial judge that she “totally understood” his ruling. The judge then said he wanted to cite a case for the record, which was People v. Powell, 6 Calf.5th 136 (2018), wherein the court ruled “[t]hat the self-serving statements to the expert psychologist by the defendant in a death penalty case, in the penalty phase, were inadmissible.” R. 2193, ll. 12-20.

The testimony of Dr. Maddox

Dr. Maddox was qualified before the jury as an expert in forensic psychiatry without objection. R. 2196, ll. 17-20. Dr. Maddox testified she had been a witness for the prosecution in the past. R. 2201, l. 18 – 2202, l. 9.

Dr. Maddox interviewed appellant three times, and she had also spoken with his co-defendant, McKinley Daniels. R. 2203, ll. 7-22. Dr. Maddox said while obtaining background history on appellant, she discovered appellant’s father had been sentenced to thirty years in prison when appellant was born, and that appellant was referred for mental health treatment when he was eight years old. R. 2205, l. 5 – 2206, l. 4. The mental health psychiatrist at that time, Dr. Devenyi, opined appellant had depression. “His mother would view his behavior as

bad instead of mentally ill or something that needed treatment. She [Dr. Devenyi] noted that his mother was very punitive. She was not supportive to him.” R. 2206, ll. 1-11.

Dr. Maddox testified that appellant was “very hyperactive,” but his mother would not allow him to be medicated or sedated. R. 2207, l. 6 – 2208, l. 7. Instead, appellant was often beaten with a “hose pipe, ax handle, rake with tape attached to the end of it, belts, a fan belt, those sorts of things.” Appellant was subjected to teasing and humiliation as a result of these beatings. R. 2208, l. 9 – 2209, l. 2. Appellant had a learning disability, and he also suffered “a few head injuries.” R. 2215, ll. 3-15.

Dr. Maddox testified about appellant’s problems while on “safekeeper status” in this case. She stated appellant had difficulty sleeping, and that he started complaining of anxiety attacks. Finally, he started requesting to see a psychiatrist. He started in January of 2018. Appellant was prescribed Zoloft, an anti-depressant, and he was eventually “switched to an anti-psychotic medication.” R. 2223, l. 3 – 2226, l. 9.

Dr. Maddox diagnosed appellant as suffering from post-traumatic stress disorder. R. 2242, l. 17 – 2244, l. 3. She also diagnosed appellant as having an unspecified depressive disorder. R. 2244, l. 4 – 2245, l. 6. In addition, Dr. Maddox diagnosed appellant as suffering from substance abuse disorder based upon him using Xanax and marijuana. R. 2245, l. 7 – 2246, l. 10.

Dr. Maddox testified she reviewed incident reports and discovery, and that she had information on the co-defendants, and she had interviewed McKinley Daniels. R. 2250, l. 19 – 2251, l. 13. “Part of what a forensic psychiatrist does is we look to see if your mental illnesses have anything to do with your crime. In my opinion, he has mental illness, and that is important. He was suffering from emotional disturbance, but in my opinion, they were not part of this

crime. I did not find it [a connection] between these mental illnesses and the actual killing. I didn't see those as related. Although it was important, it told you who he was going into this situation, like some of the things he had been through, access to the guns, those sorts of things." R. 2250, l. 13 – 2251, l. 13.

Dr. Maddox testified that McKinley Daniels was in his thirties and James Daniels was in his late twenties. "So they were substantially older than Mr. Jenkins." R. 2251, ll. 14-21. McKinley and James Daniels also had significant criminal records. When she interviewed McKinley Daniels, they discussed the fact that he had gotten out of prison a mere four months earlier. He lived across the street from a trailer where appellant and his girlfriend were living. "McKinley had no place to live, so he lived there. He stated that at that time that his trailer was kind of the center. People would come by because he was home. People would come in and out, and that is how he met Mr. Jenkins, just through the neighborhood." R. 2252, ll. 2-16.

Dr. Maddox testified that this was a difficult time for appellant because they did not have heat, running water, or electricity in the trailer and that appellant's girlfriend, Lonice, would withhold the baby, Geo, from him "as leverage" whenever they were fighting. R. 2252, l. 17 – 2253, l. 17. The following occurred between defense counsel and Dr. Maddox:

Q: Do you have an opinion as to whether or not J.J. was under the influence of James or McKinley Daniels?

A: Yes. It is my opinion he was, absolutely.

MR. WILSON: Bear with me one second, Your Honor. Thank you very much. Answer any questions the Solicitor may have for you.

R. 2254, ll. 3-8.

On cross-examination, Dr. Maddox said she had spent over forty hours going over records, interviewing people, and doing background investigation in this case. R. 2256, l. 22 –

2257, l. 9. Dr. Maddox confirmed she had diagnosed appellant as having post-traumatic stress disorder and that was aggravated by the prison environment. “When you are in an environment, prison doors are clanging, there’s always inmates yelling, there is a lot of people that don’t sleep at night.” R. 2264, l. 20 – 2265, l. 9.

Standard of Review

The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion.” State v. Hatcher, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (“quoting State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)). “An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.” Id.; see also State v. Brockmeyer, 406 S.C. 324, 340, 751 S.E.2d 645, 653 (2013). Similarly, a trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion. State v. White, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009)

Discussion

Rule 703, SCRE states, “The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in a particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.” See, also State v. Franklin, 318 S.C. 47, 57, 456 S.E.2d 357, 362-363 (1995). Dr. Maddox was allowed to testify only that in her opinion appellant was acting under the dominion or influence of McKinley and James Daniels. R. 2254, ll. 3-5. However, a defense expert, such as Dr. Maddox during the penalty phase of a capital trial, was going to be viewed by jurors as a “hired gun” retained to say whatever was helpful to the defense to prevent a death sentence. The

admission by Daniels that he told appellant to shoot Ms. Trisha Stull was the type of information that was reasonably relied upon by a forensic psychiatrist in forming her opinion. Dr. Maddox's opinion that appellant was "under the influence of James or McKinley Daniels" rang hollow and without effect without Dr. Maddox's testimony that this opinion was based in part on the admission by McKinley Daniels that he told appellant to shoot Trisha Stull. The trial judge charged the jury, the statutory mitigating circumstance that "the defendant acted under duress or under the dominion of another person." R. 2333, ll. 17-18; See S.C. Code § 16-3-20 (C)(b)(5).

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 may still base her opinion "on hearsay testimony which is not admissible, so long as that evidence is the type reasonably relied upon 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., 630 F.2d 550 (7th Cir.1980). State v. Lawson, 653 F.2d 299 (7th Cir.1981). In State v. Franklin, this Court also noted, "[A]n expert's specific knowledge is neither determinative of his qualifications as an expert nor of the admissibility of his opinions into evidence, but bears on the weight to be given his testimony." *Citing* Henson v. State, 535 N.E.2d 1189, 1193 (Ind. 1989).

Here, Dr. Maddox not only scoured incident reports and discovery material to get background information on McKinley and James Daniels, she also personally interviewed McKinley Daniels. The facts – the admission by McKinley Daniels that he told appellant to shoot Ms. Stull – on which Dr. Maddox based her opinion that appellant was acting under the domination of others on that admission, were admissible and critical evidence that Dr. Maddox as an expert in forensic psychiatry had the right to impart to the jury. A raw opinion that Dr. Maddox thought appellant was operating under the dominion of others without this factual

anchor that McKinley Daniels admitted he told appellant to shoot Ms. Stull made her opinion appear to be without any foundation.

Defense counsel correctly argued that any doubt on the proper evidentiary ruling in the final analysis was resolved by the United States Supreme Court's holding in Green v. Georgia, 442 U.S. 95 (1979). In Green, the Court held that the exclusion of proper testimony of a witness that the second defendant confided to that witness that he killed the victim after ordering the defendant to run an errand was relevant to the critical issue in the punishment phase of the trial, and that the exclusion of that testimony denied the defendant a fair trial on the issue of punishment. The Supreme Court stated, "Regardless of whether the proper 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." *Citing Lockett v. Ohio*, 438 U.S. 586, 604-605 (1978).

The Court also observed that there were substantial reasons that existed to assume the statement's reliability. One of those included the fact that it was a statement that was against interest and there was no reason to believe that the declarant had an ulterior motive in making it. Green v. Georgia, 442 U.S. 95, 97 (1979).

The same is true here as to the reliability of McKinley Daniel's admission that he told appellant to shoot Ms. Stull. It was a statement against interest admissible pursuant to Rule 804 (b)(3), SCRE, since it was a "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.”

The admission that McKinley Daniels told appellant to shoot Ms. Stull while they were in the process of robbing the convenience store was an admission to murder under the theory of accomplice liability. See State v. Dickman, 341 S.C. 293, 295, 534 S.E.2d 268, 295 (2000), quoting “State v. Crowe, 258 S.C. 258, 188 S.E.2d 379 (1972)(if two or more combine together to commit an unlawful act and a homicide is committed by one of the actors as a probable or natural consequence of the acts done in pursuance of the common design, all present participating in the unlawful undertaking are as guilty as the one who committed the fatal act).”

Further, the facts surrounding McKinley Daniels being brought to the courthouse and him ultimately not testifying were vague. The solicitor successfully urged that because McKinley Daniels was brought to the courthouse, purportedly under subpoena from defense counsel, and because he did not testify that he could not be deemed “unavailable” for purposes of Rule 804(b)(3), SCRE. However, the record is silent on whether Daniels would have testified 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. See State v. Wannamaker, 346 S.C. 495, 501, n. 1, 552 S.E.2d 284, 287, n. 1 (2001)(witness who invoked her Fifth Amendment privilege was “unavailable” for purposes of Rule 804(b)(3), SCRE).

Consequently, the judge’s rapid agreement with the Deputy Solicitor that Daniels could not be considered “unavailable” was error given the record in this case. Defense counsel correctly and repeatedly argued that the testimony of Dr. Maddox in this regard was admissible pursuant to Green v. Georgia, 442 U.S. 95, 97 (1995) at a minimum.

The judge here erroneously excluded Dr. Maddox's expert testimony that one basis of her expert opinion that appellant was operating under the domination of others was the fact that McKinley Daniels admitted he told appellant to shoot Ms. Trisha Stull, and appellant obviously complied with that order by shooting her. See Rule 703, SCORE. This was compelling mitigating evidence appellant had the right to have his sentencing jury consider. Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586, 604-605 (1978); Green v. Georgia, 442 U.S. 95, 97 (1995). Appellant should be granted a new sentencing trial.

3.

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

Relevant facts

Prior to closing arguments in the penalty phase, counsel for appellant, Ralph Wilson, asked if he could tell the jury that, if it was unable to reach a unanimous verdict on the death penalty or life imprisonment without parole, the court would sentence appellant to life imprisonment without the possibility of parole. R. 2295, l. 11 – 2298, l. 12. The trial judge denied the motion stating, “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 was not for the jury to consider.” R. 2297, l. 16 – 2298, l. 1. Defense counsel noted his exception. R. 2298, ll. 11-12.

Standard of Review

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. State v. Patrick, 289 S.C. 301, 306, 345 S.E.2d 481, 484 (1986).

Discussion

Counsel Wilson did not ask the judge to charge the jury on the consequences that would result if the jury was unable to unanimously agree as to sentence. Instead, counsel asked to tell the jury, in closing argument in the penalty phase, that if it were unable to unanimously agree, the judge would sentence appellant to life without parole. This was an accurate statement of the law in regard to capital sentencing. The judge's refusal to allow counsel for appellant to explain to the jury an accurate statement of the law placed an unreasonable limitation on a meaningful closing argument that requires a new sentencing trial. See Herring v. New York, 422 U.S. 853 (1975).

After the finding of a statutory aggravating circumstance, S.C. Code Ann. § 16-3-20 (C) provides, "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).*" (emphasis added). Telling the jury in closing argument of the penalty stage of a capital case that if they are unable to reach a unanimous verdict, the judge will sentence appellant to life in prison without the possibility of parole was an accurate statement of the law.

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. 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); Evans v. Thompson, 881 F.2d 117 (4th Cir. 1989). In Winkler v. State, 418 S.C. 643, 795 S.E.2d 686 (2016), this Court found that counsel,

who was the same counsel in the present case, was not ineffective for failing to object when the judge refused to answer the jury's questions about the consequences of a failure to reach a unanimous verdict. None of the above cases, however, prohibit instructing the jury on the consequences of deadlock – if it is unable to agree on the recommendation, the judge will sentence the defendant to life without parole.

In fact, the death penalty statutes in some states require a jury instruction regarding the consequences of deadlock as to sentencing. See Whalen v. State, 492 A.2d 552, 562 (Del. 1985); State v. Williams, 392 So. 2d 619, 633, 633-35 (La. 1980) (on rehearing); State v. Ramseur, 524 A.2d 188, 282-83 (N.J. 1987). In Lowenfield v. Phelps, 484 U.S. 231 (1988), the jury was instructed on the consequences of deadlock. “The court also charged the jury that if it were unable to reach a unanimous recommendation, the court would impose a sentence of life imprisonment without the possibility of probation, parole, or suspension of sentence.” 484 U.S. at 234.

In People v. LaValle, 3 N.Y.3d 88, 817 N.E.2d 341 (2004), the Court of Appeals of New York found that a statute requiring an instruction that if the jury failed to agree, the court would sentence the defendant to life imprisonment with parole eligibility after serving a minimum of 20 to 25 years, was unconstitutional pursuant to their state constitution. The Court of Appeals of New York also found that the absence of any instruction regarding the consequence of deadlock would also be unconstitutional under their state constitution writing:

We further conclude that the absence of any instruction is no better than the current instruction under our constitutional analysis, and thus we decline to adopt Jones. Like the flawed deadlock instruction, the absence of an instruction would lead to death sentences that are based on speculation, as the Legislature apparently feared when it decided to prescribe the instruction. **As the studies previously cited indicate, jurors might fear that the failure to reach a unanimous verdict would lead to a defendant's release, retrial or sentence to an even lesser term than the one currently prescribed in the deadlock**

scenario. Indeed, a key motivation for jurors to vote for the death penalty is undoubtedly their fear that a defendant will otherwise pose a danger on the streets. (see Garvey, 98 Colum. L. Rev. at 1559–1560; see also Blume, Garvey and Johnson, *Future Dangerousness in Capital Cases: Always “At Issue,”* 86 Cornell L. Rev. 397 [2001]). Our State Constitution does not permit a death sentence imposed by jurors who may have chosen that option based on rank speculation about a defendant's eventual release into society.

People v. LaValle, 3 N.Y.3d 88, 128–29, 817 N.E.2d 341, 365–66 (2004) (emphasis added).

South Carolina law does not require a consequences of deadlock instruction and such an instruction was not requested in the present case. The case’s holding that a consequences of deadlock instruction is not required certainly does not prohibit counsel from telling the jury that if they are unable to agree on sentence, the judge will sentence to life without parole. Even some matters that are prohibited as jury instructions are still permissible for argument by counsel.

Recently in State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019), this Court held that regardless of the evidence presented at trial, a trial court shall not instruct the jury that it may infer the existence of malice when the deed was done with a deadly weapon. This Court noted, however, that:

Of course, whether the deed was done with a deadly weapon or not, the State and the defendant are free to argue the existence or nonexistence of malice based on the evidence in the record. For example, if evidence is introduced that the deed was done with a deadly weapon, the State is free to argue to the jury that it should infer the existence of malice based on that fact and any other facts that would naturally and logically allow a jury to conclude the defendant acted with malice aforethought. Similarly, if the deed was not done with a deadly weapon, a defendant is free to argue the absence of malice based on that fact and any other facts that would naturally and logically allow a jury to conclude the State failed to prove beyond a reasonable doubt that the defendant acted without malice aforethought. “It is axiomatic that some matters appropriate for jury argument are not proper for charging. ‘Do jurors need the court's permission to infer something? The answer is, of course not.’” Belcher, 385 S.C. at 612 n.9, 685 S.E.2d at 810 n.9 (quoting Bruce A. Antkowiak, *The Art of Malice*, 60 RUTGERS L. REV. 435, 476 (2008)).

Burdette, 427 S.C. at 503, 832 S.E.2d at 582–83 (n. 2 omitted).

The trial judge erred by prohibiting counsel from telling the jury that if it was unable to agree on the sentence, the judge would sentence the defendant to life without parole. During the charge conference counsel for appellant stated, “Your Honor, the only other thing is – It’s not here, the unanimity of the jury verdict, that it does not have to be unanimous as to life.” R. 2295, ll. 11-13. The trial judge declined the instruction to the jury, citing Adams. R. 2295, l. 14 – 2296, l. 1.

Counsel for appellant then asked, “So in our closings, we can’t argue that?” R. 2296, ll. 3-4. When asked what he wanted to argue, counsel answered, “During voir dire, that was one of the things that we were saying. *During voir dire, the jury verdict doesn’t have to be unanimous as to life, that one vote for life would result in life.*” R. 2296, ll. 6-9. *The judge agreed that was an accurate statement of the law.* R. 2296, l. 10. The state still objected. R. 2296, ll. 15-22.

The judge then asked counsel how he was going to phrase the argument and counsel answered, “Well, I mean, what I would say to them, is that the verdict for life is not – does not have to be unanimous.” R. 2296, l. 25 – 2297, l. 2. The trial judge responded, “Well, that is in direct contradiction to what I’m going to tell them, so.” R. 2297, ll. 3-4. Counsel answered, “Well, if I say that one vote for life would result in a life sentence.” R. 2297, ll. 5-6. The judge then noted, “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.” R. 2297, ll. 7-10. Counsel responded, “But even if they find unanimity on aggravating factors, they can still have one juror who finds – 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.” R. 2297, ll. 11-15. The trial judge then read S.C. Code Ann. § 16-3-20 (C) and stated, “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 was not for the jury

to consider.” R. 2297, l. 23 – 2298, l. 1. The trial judge erred in prohibiting counsel from telling the jury that if it was unable to agree on the sentence, the judge would sentence the defendant to life without parole.

The trial judge’s reliance on Adams is misplaced for two reasons. First, Adams concerned an instruction to the jury, and not closing argument by counsel. Second, the Court in Adams did not hold that the consequences of deadlock were not something for the jury to consider. Instead, the Court in Adams found that the instruction was not required writing:

The language of the statute provides that where a sentence of death is not recommended by the jury, a life sentence must be given. The situation implicitly envisioned here is that normally the jury will unanimously either recommend life or death. The undecided jury is the exception. That portion of the statute 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.

Adams, 277 S.C. at 124, 283 S.E.2d at 587.

That portion of the statute is addressed to the trial judge only because once the jury is deadlocked, only the trial judge can impose a life sentence.

Additionally, the dissent in Winkler v. State, 418 S.C. 643, 671, 795 S.E.2d 686, 701–02 (2016), questioned the continued validity of Adams and Copeland writing:

In finding legal error here, the majority relies on State v. Adams, 277 S.C. 115, 283 S.E.2d 582 (1981) *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991), and State v. Copeland, 278 S.C. 572, 300 S.E.2d 63 (1982) as the state precedents. *Both of these older cases stand (if they continue to stand at all) for the proposition that a capital sentencing jury need not be instructed before beginning deliberations on the effect of a non-unanimous verdict.* The federal precedent relied upon by the majority is a United States Supreme Court decision deciding the same pre-deliberation issue under the Eighth Amendment. *See Jones v. United States*, 527 U.S. 373, 119 S.Ct. 2090, 144 L.Ed.2d 370 (1999). Here, of course, we are not dealing with a pre-deliberation instruction request nor with an Eighth Amendment claim, *but rather with the question whether due process required this jury's mid-deliberation questions be answered truthfully. The majority acknowledges these three cases are distinguishable, but states there are three reasons why “that difference does not*

change our decision.” In my opinion, none of these three reasons creates an error of law in the PCR judge's finding that trial counsel were deficient.

(emphasis added).

Again, Adams, Copeland, Jones, and Winkler involved jury instruction, not closing argument by counsel. None of these cases prohibit discussing deadlock consequences in closing argument, and closing arguments are fundamentally different than jury instructions. See Kelly v. South Carolina, 534 U.S. 246 (2002)(right to parole ineligibility instruction not indirectly satisfied by defense counsel’s comments concerning permanence of life sentence).

Further, the judge’s unanimity instructions were not balanced, which could also have fostered confusion. In instructing the jury, the trial judge charged:

Now, if you do find one or more statutory aggravating circumstances, you would then move on to the next form, which asks which punishment you conclude to be the most appropriate: Life in prison without the possibility of parole, or the death penalty. If you *unanimously decide that life imprisonment without parole is the proper sentence*, then, Mr. Foreman, you should sign that form. If this selection is made by you, this section of the verdict form only has to signed by the foreman, and your deliberations comes to an end.

The last form you will have should be signed by each juror if you, the jury, *unanimously decided that the statutory aggravating circumstances have been proven beyond a reasonable doubt*, and that a punishment of death should be handed down. I remind you that there is no significance to the order in which the sentences appear on the verdict form, one must simply come before the other.

Tr. 2339, l. 23 – 2340, l. 16 (emphasis added).

Later the judge instructed the jury:

So the next two forms are – after you do the aggravating circumstances form, if you find aggravating circumstances, then you fill out one of these two forms, and that is: We, the jury, *unanimously recommend to the Court a sentence of life* – fill out that form, only the foreperson signs it. The last form is: We the jury, recommend the sentence of death. Again, you have to list out the aggravating circumstance that exist, if any, and you agree are proven beyond a reasonable doubt, then each one of you would need to sign it, okay.

R. 2342, ll. 11-21 (emphasis added).

In 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. The structure of the instruction makes the prohibition on closing argument even more prejudicial.

The trial judge prohibited counsel from explaining to the jury the consequences of deadlock. Counsel was prohibited from telling the jury that a life sentence does not require unanimity. Again, the prohibition combined with the portion of the jury instruction that only discussed unanimity with regard to a life sentence and not a death sentence may reasonably have created confusion for the jury. The jury could have concluded that if their decision as to sentence was not unanimous, the death sentence was the only possible verdict. Further, as seen above, the jury could have thought that the failure to reach a unanimous verdict of death meant appellant had to be retried or sentenced to a lesser sentence. In any event, appellant submits the jury was entitled to hear truthful accurate information about the consequences of non-unanimity in deciding what sentence to pronounce.

The trial judge's refusal to allow counsel to tell the jury that if it were unable to unanimously agree as to the sentence, the judge would sentence appellant to life without parole placed an unreasonable limitation on the right to a meaningful closing argument. The South Carolina Constitution provides, "The right of trial by jury shall be preserved inviolate. Any person charged with an offense shall enjoy the right to a speedy and public trial by an impartial jury; to be fully informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to be fully heard in his defense by himself or by his counsel or by both." S.C. Const. Art. I, § 14. The

trial judge's prohibition on closing argument prevented appellant from being fully heard in his defense.

In State v. Mouzon, 321 S.C. 27, 31, 467 S.E.2d 122, 124–25 (Ct. App. 1995), the South Carolina Court of Appeals wrote:

As the United States Supreme Court noted in Herring v. New York, 422 U.S. 853, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975), in a criminal trial, which is in the end basically a factfinding process, no aspect of such advocacy could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment. The Court further elaborated on the role of closing argument as a basic and fundamental right of the accused to make his defense:

In Herring v. New York, 422 U.S. 853, 862 (1975), the Court wrote:

It can hardly be questioned that closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions. And for the defense, closing argument is the last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt. See In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368.⁶

Further, it is elementary that the Eighth Amendment is violated when the decision to impose the death penalty is made in an arbitrary manner, or “out of a whim, passion, prejudice, or mistake.” Caldwell v. Mississippi, 472 U.S. 320, 329-30 (1985). In a concurring opinion in Simmons v. South Carolina, 512 U.S. 154, 172 (1994), Justice Souter wrote:

The Eighth Amendment entitles a defendant to a jury capable of a reasoned moral judgment about whether death, rather than some lesser sentence, ought to be imposed. The Court has explained that the Amendment imposes a heightened standard “for reliability in the determination that death is the appropriate punishment in a specific case,” Woodson v. North Carolina, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976) (plurality opinion of Stewart, Powell, and STEVENS, JJ.); see also, *e.g.*, Godfrey v. Georgia, 446 U.S. 420, 427-428,

⁶ This Court affirmed in State v. Mouzon, 326 S.C. 199, 485 S.E.2d 918 (1997), holding the denial of the defendant's request for final closing argument was reversible error.

100 S.Ct. 1759, 1764-1765, 64 L.Ed.2d 398 (1980); Mills v. Maryland, 486 U.S. 367, 383-384, 108 S.Ct. 1860, 1869-1870, 100 L.Ed.2d 384 (1988). Thus, it requires provision of “accurate sentencing information [as] an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die,” Gregg v. Georgia, 428 U.S. 153, 190, 96 S.Ct. 2909, 2933, 49 L.Ed.2d 859 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.), and invalidates “procedural rules that ten[d] to diminish the reliability of the sentencing determination,” Beck v. Alabama, 447 U.S. 625, 638, 100 S.Ct. 2382, 2390, 65 L.Ed.2d 392 (1980).

The jury in the present case did not have accurate sentencing information because the trial judge erroneously refused to allow Defense Counsel Wilson to accurately explain to the jury the consequences of deadlock and consequences of non-unanimity. As a result, the jury could have reasonably come to the mistaken conclusion that non-unanimity had to result in a death sentence, or that the defendant would have to be retried, or that another jury would have to decide his sentence as explained above. The judge’s prohibition on closing argument failed to meet the heightened standard for reliability required by the Eighth Amendment.

In addition, in Simmons, the United States Supreme Court held that a capital defendant's due process rights were violated when his jury's question regarding parole eligibility was not answered, leaving it to reasonably believe he would be released on parole if not executed. 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, 430 U.S. 349, 362 (1977). In this case, the jury reasonably may have believed that petitioner could be released on parole if he were not executed. Simmons, 512 U.S. at 161. The death sentence in the present case was based on information appellant had no opportunity to deny or explain. In this case, the jury was left to speculate as to what would happen if it did not agree on a verdict. Respectfully, as seen above, the speculation encompasses a variety of scenarios the jury does not know will not occur if it does not reach a verdict. The trial judge’s prohibition on appellant’s closing

argument here therefore violated appellant's right to present a meaningful closing argument, and it violated Due Process.

Finally, our death penalty state statute prohibits a death sentence from being imposed on the basis of an arbitrary factor. In State v. Burkhardt, 371 S.C. 482, 488–89, 640 S.E.2d 450, 453 (2007), this Court wrote, “A capital jury may not impose a death sentence under the influence of any arbitrary factor. S.C.Code Ann. § 16-3-25(C)(1) (2003). When the jury is invited to speculate about irrelevant matters upon which a death sentence may be based, § 16-3-25(C)(1) is violated. State v. Sloan, 278 S.C. 435, 298 S.E.2d 92 (1982).”

In the present case the judge prohibited counsel for appellant from accurately explaining to the jury the consequences of deadlock and non-unanimity, as stated in S.C. Code § 16-3-20(C). The judge's instructions to the jury did not explain the consequences of non-unanimity. Experience teaches that courts have to be very wary of vague jury instructions in death penalty cases since the concepts of a death penalty trial – as almost always illustrated by voir dire – are foreign to most jurors. Therefore, misunderstanding of jury instructions during the penalty stage of death penalty cases is not uncommon, and the imagination of jurors to worry about what happens if they cannot reach a unanimous verdict is a very real concern. These mistaken beliefs can constitute an arbitrary factor when a death sentence results from the mistaken beliefs of the jurors about what occurs if they cannot reach a unanimous verdict.

Closing arguments are critically important in criminal trials. The importance is heightened for closing argument in the penalty phase of a capital case in which a jury is asked to impose a sentence of death or life in prison without the possibility of parole. In making such a profound determination juries should have accurate information. The jury in the present case did

not have accurate information about the consequences of deadlock and non-unanimity with regard to sentence.

The trial judge erred in refusing to allow counsel for appellant to explain to the jury, in closing argument of the penalty phase, the consequences of deadlock and non-unanimity, pursuant to the statute. The prohibition placed an unreasonable limitation on appellant's right to present a meaningful closing argument as argued above. The error respectfully requires reversal of the death sentence and a remand for a new sentencing trial.

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, since the juror should have been excused given all of these unusual circumstances.

Relevant facts

On April 21, 2017, appellant filed pre-trial motion #58, a motion to disqualify past or present correctional officers from the jury. R. 3558. In his written motion appellant acknowledged State v. Hughey, 339 S.C. 439, 448, 529 S.E.2d 721, 726 (2000), overruled on other grounds by Rosemond v. Catoe, 383 S.C. 320, 680 S.E.2d 5 (2009), where this Court held that a juror who was a correctional officer was not *disqualified* from serving on the jury as a law enforcement officer pursuant to S.C. Code § 14-7-820 but rather had an *exemption*, pursuant to S.C. Code § 24-3-930, from jury duty that he could claim or waive.

Here, appellant argued, however, that because a correctional officer would have knowledge of the details of prison life, this knowledge would insert an improper and arbitrary factor into the jury's sentencing considerations in violation of State v. Burkhardt, 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. The defense, as will be seen infra, was legitimately concerned that evidence of appellant's behavior while incarcerated as a pre-trial detainee would be introduced during the penalty stage to urge death as the proper punishment. Appellant, citing Johnson v. Mississippi, 486 U.S. 578 (1988),

in the motion, argued that such an improper and arbitrary factor violated the Eighth Amendment's constitutional prohibition against cruel and unusual punishment. Pre-trial motion #58, R. 3558.

During a pre-trial hearing on August 15, 2017, pursuant to the written pre-trial motion #58, appellant moved to disqualify past or present correctional officers from the jury. R. 2761, l. 22 – 2762, l. 12. Counsel specifically based the motion on the fact that correctional officers should be disqualified in this case because of evidence that may be introduced, especially during the sentencing phase, about appellant's conduct while in the correctional facility. R. 2762, ll. 2-12. The judge withheld ruling stating, "Okay. All right. Well, before I even make you respond to that, let's deal with that when we get there. So, let's see – most of the jury panel I qualify across the state have zero." R. 2762, ll. 13-16. The judge went on to state:

And then we can get in there and if somebody says, well, I used to work at a prison ***or I used to work at the county jail or whatever then we can cross that bridge and you can make your motion***, you know, at that time. Based upon the gathering of all of that information from a person. There's certainly a big difference between somebody ***who worked at an office, you know, for SCDC and somebody that worked inside a prison*** and so, *let's develop all that* see how many that are currently working at a facility have an exemption if they want it. I can't imagine that they wouldn't take it - - -

R. 2762, l. 20 – 2763, l. 5. (emphasis added).

The solicitor replied, "Your Honor, our concern was for the Court to create a statutory exemption that doesn't exist and creates potential for reversible error, because as Your Honor pointed right out, they're exempt, they're not excluded." R. 2763, ll. 10-13. The judge then ruled as to appellant's motion: "Your motion is denied as to creating a per se rule but, as it comes to each – if we actually have some that are in the pool, we can take them up individually as I will allow you to rehash or re-flesh out that argument at that point in time." R. 2763, ll. 21-25.

At the start of jury selection in May 2019, the judge asked if any member of the jury panel was “a clerk of court, deputy clerk of court, constable, sheriff *or commissioned law enforcement officer*, probate judge, county commissioner, magistrate or other county officer or employed within the walls of any courthouse?” This ineligibility or disqualification to serve on a jury provision is contained in S.C. Code §14-7-820. R. 12, l. 23 – 13, ll. 3. Juror 161, Mr. Johnson, stood and told the judge he worked for the Myrtle Beach Police Department. The judge asked him if he was commissioned, and he responded, “No.” R. 13, l. 20 – 14, l. 2. The judge advised the juror that he needed to stay. R. 14, l. 3.

Later in the jury selection process Juror 161 advised the judge that he misunderstood the question and that he was in fact commissioned as a detention officer. R. 50, l. 25 – 51, l. 2. The following took place between the judge and the juror:

The Court: Do you have the power to arrest?

Juror: Yes, I do.

The Court: Where is your commission card?

Juror: I can show you my ID card.

The Court: Usually detention officers do not have the power to arrest.

Juror: The statute states we do have the power to arrest.

The Court: You have to have a commission. *This is not a commission, so you need to stay with us.* Thank you.

R. 51, ll. 3-13. (emphasis added).

The judge, knowing Juror 161 was a detention officer, but reasoning he was not disqualified, did not offer to extend to the juror the exemption found in S.C. Code § 24-3-930 provided for guards, keepers, officers, and other employees who are employed at the state prison system. S.C. Code § 24-3-930 provides: “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.”

During the individual voir dire of Juror 161 the judge asked him if he knew anything about the case. R. 276, ll. 3-5. Juror 161 answered, “**Yeah. I received an e-mail or BOLO, still shots. I’ve been reading up on the case.** R. 276, ll. 6-7. (emphasis added). The judge asked, “When was that?” R. 276, l. 8. The juror indicated this had been *right when the incident happened* in January or early 2015. R. 276, ll. 9-11. (emphasis added).

The juror told the judge that he had not heard anything else about the case since then. When the judge asked if he was involved in the arrest, booking or anything else, Juror 161 responded: “Out of our jurisdiction.” R. 276, l. 12 – 277, l. 13. The judge then asked the juror, “Now, taking in mind the information you just told me, can you disregard the information you just told me and based your decision in this case solely on the evidence that is presented here in this courtroom and disregard anything that you may have heard or seen about the case?” R. 277, ll. 14-19. The juror answered, “Yes.” R. 277, l. 20.

Defense counsel objected to Juror 161 serving on the jury, “Your Honor, it is our position that given his employment and employer, and that he actually works at the Myrtle Beach Detention Center [MBDC], that he is not qualified to serve as a juror based on employment.” R. 283, ll. 7-11. The judge then asked counsel if appellant had ever been in the MBDC. R. 283, ll. 12-13. Defense counsel conferred with appellant, and she then informed the judge that appellant had in fact been jailed at MBDC during bike week in 2012 when this juror was an employee there. R. 283, ll. 14-24.

The judge responded:

I’ll find him qualified. He answered all of the questions 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 that he saw a BOLO in the case years ago, and I don't believe that rises to a 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.**

R. 283, l. 25 – 284, l. 11. (emphasis added).

Juror 161 was seated on the jury. R. 1431, ll. 14-18.

Standard of Review

All criminal defendants have the right to a trial by an impartial jury. U.S. CONST. amends. VI and XIV; S.C. CONST. Art. I, § 14. To protect both parties' right to an impartial jury, the trial judge must ask potential jurors whether they are aware of any bias or prejudice against a party. State v. Kelly, 331 S.C. 132, 502 S.E.2d 99 (1998).

A *voir dire* examination must be reviewed in its entirety to determine whether the trial court erred in its qualification or disqualification of prospective jurors. The presiding judge for cause shown may excuse any person from jury duty at any term of court if the judge considers it advisable. State v. Gaskins, 284 S.C. 105, 326 S.E.2d 132 (1985) *cert. denied*, 471 U.S. 1120 (1985). The decision whether to excuse a juror for cause is committed to the sound discretion of the trial court. State v. Plath, 277 S.C. 126, 284 S.E.2d 221 (1981);⁷ State v. Drayton, 293 S.C. 417, 422, 361 S.E.2d 329, 332 (1987).

Discussion

The trial judge abused his discretion by finding Juror 161 qualified under these unusual circumstances when the *voir dire* was considered in its entirety, as it must be, and by refusing to

⁷ Gaskins was overruled on other grounds – *in favorem vitae* abolished – in State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). Plath was overruled on other grounds in State v. Short, 333 S.C. 473, 511 S.E.2d 358 (1999).

excuse him for cause. It was clear above that the judge thought he was considering the totality of the circumstances when he refused to excuse Juror 161 from service on this case. S.C. Code Ann. § 14-7-860(A) states: “The presiding judge for cause shown may excuse any person from jury duty at any term of court if the judge considers it advisable.”

Here, Juror 161 was a detention center officer, who was, or thought he was, a commissioned law enforcement officer who stood when the judge asked if anyone was “a commissioned law enforcement officer.” The judge found that Juror 161 was not a commissioned law enforcement officer and therefore he was not technically disqualified in accordance with his *voir dire* question pursuant to S.C. Code § 14-7-820. The judge also did not offer Juror 161 the exemption as a prison guard seemingly apparently because the juror was also not technically entitled to claim the exemption as a *city* rather than a *state* prison guard. See S.C. Code § 24-3-930. This was unfortunately literally a distinction without a difference given the importance of not having prison guards or detention officers on the jury given the facts of this case.

Juror 161 was employed as a detention officer at MBDC in the same county where appellant had been detained following his arrest, and he still was detained at J. Ruben Long Detention Center in Horry County at the time of trial. Juror 161 had seen a BOLO on appellant sent out by law enforcement and still shots of appellant sent out by law enforcement in real time when the crimes happened. Further, Juror 161 had been reading about this case. When the judge asked if appellant had ever been detained at MBDC, defense counsel informed the judge that appellant had, in fact, been detained there during bike week in 2012 when Juror 161 was employed at that detention center. When considering *all of these factors*, the judge should have

excused or disqualified appellant for cause. State v. Kelly, 331 S.C. 132, 502 S.E.2d 99 (1998); State v. Gaskins, 284 S.C. 105, 326 S.E.2d 132 (1985).

Defense counsel was very concerned about appellant's problems while he was incarcerated as a pre-trial detainee. Counsel therefore filed pre-trial motion 58 to disqualify past or present correctional officers from serving of appellant's jury in this death penalty case. R. 3558. Correctional officers or prison guards, like police officers, surely have a bond based upon their collective experience of having to deal with people under stressful circumstances of incarceration, for both the inmates and the guards. The defense in this case knew appellant's alleged misconduct included striking prison employees, disrespecting them, possessing a weapon, and throwing fluids on them. See State's Exhibit 153. R. 3731. Defense counsel, as seen, even cited a special knowledge of prison conditions as inserting an improper and arbitrary factor into the jury's sentencing considerations in this case in violation of State v. Burkhart, 371 S.C. 482, 640 S.E.2d 450 (2007) and S.C. Code Ann. § 16-3-25(C)(1), as well as the Eighth Amendment to the United States Constitution. R. 3559-3560.

The judge should have disqualified Juror 161, not because of his employment at the MBDC alone, but because of the fact that through his employment he had viewed a BOLO and still shots of the appellant. Additionally, and respectfully, when the juror advised the judge that he believed that, as a detention center employee, he had the power to arrest, and that he was a commissioned law enforcement officer, the judge should have allowed Juror 161 the opportunity to take the exemption found in S.C. Code § 24-3-930 provided for guards, keepers, officers, and other employees who were employed at the state prison system since he was not technically disqualified pursuant to S.C. Code § 14-7-820.

As noted above, in State v. Hughey, 339 S.C. 439, 448, 529 S.E.2d 721, 726 (2000), overruled on other grounds by Rosemond v. Catoe, 383 S.C. 320, 680 S.E.2d 5 (2009), this Court found that a juror who was employed at McCormick Correctional Institution was not *disqualified* from serving on the jury on the basis of his employment but rather had an *exemption*, pursuant to S.C. Code § 24-3-930, from jury duty that he could claim or waive. S.C. Code § 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.” (emphasis added). The Court in Hughey additionally found that the correctional officer’s *belief* that he was a member of law enforcement was not enough to disqualify him in that case pursuant to S.C. Code § 14-7-820. S.C. Code § 14-7-820 provides that, “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 determined by the court.”

As seen, the judge here improvised when he asked if anyone in the venire was “a commissioned law enforcement officer.” Juror 161 thought he was a commissioned law enforcement officer, and for reasons unclear in this record, the judge ruled he was not.

Importantly, though, this Court also held in State v. Hughey, 339 S.C. 439, 449-450, 529 S.E.2d 721, 726-727 (2000), that it had “[a]dopted a *functional rather than a rigid formalistic approach in interpreting and applying the provisions of this statute*, [S.C. Code §14-7-820].” This Court nonetheless found that the juror’s belief in Hughey that he was a member of law enforcement was **not enough alone** to disqualify him. The present case is distinguished from Hughey because Juror 161 here saw a BOLO and still shots of appellant as a result of his

employment at the MBDC. There was no mention that the correctional officer in Hughey saw anything pertaining to the specific defendant as a result of his employment at McCormick Correctional Institution. Appellant also had been incarcerated at MBDC in the past when Juror 161 was a prison guard there, and distinguishing factor from Hughey.

In addition to being exposed in real time to the BOLO and still shots of appellant as a detention center guard at the time of the crimes, Juror 161 was interested enough in this local case that he continued to read about it. As stated, all of these circumstances together should have caused the judge to disqualify or excuse Juror 161 for cause.

Appellant was entitled to an impartial jury in this most difficult capital case where defense counsel knew in advance appellant's conduct – his misbehavior as a pre-trial detainee – could be admitted into evidence (and it was) during the penalty phase of the trial. The pre-trial motion showed the strong effort of the defense to ensure that correctional officers or guards were not on appellant's jury since they naturally were going to ally or strongly sympathize with the prison guards who were the victims of the prison misconduct as discussed in issue six, infra. As seen above, this conduct included allegedly striking prison employees, disrespecting them, possessing a weapon, and throwing fluids on them. See State's Exhibit 153. R. 3731.

Juror 161 was a prison guard at MBDC, in the same county, Horry County, where appellant was being detained. Juror 161 was exposed to a law enforcement BOLO and a still shot of appellant in a real time. Appellant had also been incarcerated in MBDC while Juror 161 was a guard there. Juror 161 had also read about this case in the media, internet or elsewhere. The judge, given all of these unusual circumstances taken together, abused his discretion by not excusing or disqualifying Juror 161 in this case. See *State v. Kelly*, 331 S.C. 132, 502 S.E.2d 99 (1998); *State v. Gaskins*, 284 S.C. 105, 326 S.E.2d 132 (1985) *cert. denied*, 471 U.S. 1120

(1985); State v. Plath, 277 S.C. 126, 284 S.E.2d 221 (1981); State v. Drayton, 293 S.C. 417, 422, 361 S.E.2d 329, 332 (1987). Appellant should be granted a new trial.

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.

Relevant facts

Viewing the entire *voir dire*, the trial judge’s decision to qualify Juror 350 is wholly unsupported by the record. Juror 350 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. Juror 350 required a reason to vote for a life sentence. The juror’s responses indicated a predisposition against a life sentence for any reason or for no reason at all, including as an act of mercy. This juror’s views prevented or substantially impaired her from performing her duties as a juror in accordance with the instructions and oath. By needing a reason to vote for a life sentence, the juror improperly placed the burden on the defense to show why death would not be a proper sentence. Based on the juror’s “not morally correct” statement, she was unable to carry out the law as explained by the judge. Appellant’s right to a fair and reliable sentencing determination was violated as a result of the unqualified juror serving on the jury that sentenced appellant to death.

During the individual *voir dire*, Juror 350 indicated that she was a “C” type juror. R. 565, ll. 7-12. When asked what being a type “C” juror meant she answered, “So, for me, I believe that it depends on what is presented, depends how to be prosecuted and also to what extent the crime was committed. Someone who was maybe not directly involved, but indirectly wouldn’t need death, but prison. But I think it depends what would be presented.” R. 565, ll. 15-20.

Upon questioning she indicated that she understood that a vote for the death penalty is never required. R. 565, ll. 21-25. The juror agreed that the sentencing decision was a moral decision made after hearing aggravating and/or mitigating circumstances and instructions on the law from the judge. R. 566, ll. 1-4. The juror agreed that she would make the decision on her own. R. 566, ll. 5-6.

Defense counsel then asked, “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?” R. 566, ll. 7-9. The juror answered, “Yes, but that is not necessarily morally correct.” R. 566, ll. 10-11. Defense counsel followed up asking, “It is not morally correct?” R. 566, l. 11. The juror answered, “Yes.” R. 566, l. 12.

After the judge questioned the juror about being the victim of a car robbery, defense counsel raised the “not morally correct” assertion about the law, and the judge asked the juror to step out of the room. R. 567, l. 9 – 569, l. 8. The judge then asked about the assertion⁸ and defense counsel answered, “I’ll tell you my recollection, but I believe her recollection is way better than mine. What I was asking her was about her opinion on the death penalty, and I asked her about a life sentence, the law said she could give a life sentence for any reason or no reason, just for an act of mercy, and she said that would not be morally correct. So before I went into that with her, I wanted to stop and ask you.” R. 569, ll. 14-21. When the judge asked the solicitor what he recalled he answered, “She said – and Mr. Wilson is right, he had asked her you realize that you could give life out of mercy, and she said that may not be morally correct. It is my understanding she is still looking at all of the facts and circumstances, and that may be, may not be.” R. 569, l. 22 – 570, l. 3.

⁸ The judge stated that he was making a note about the fact that the juror had been robbed when she made the “morally incorrect” statement and he missed the context. R. 569, ll. 9-13.

Defense counsel was then allowed to question the juror further: “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 a right to give life for any reason or no reason, and your response was that might not be morally correct?**” R. 570, ll. 9-13. The juror answered, “**Yes.**” R. 570, l. 14. (emphasis added). When asked to explain her answer the juror said, “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. If someone were to decide for that reason, that is not morally correct.**” R. 570, ll. 15-20. Defense counsel asked, “So even though the Court instructed you that you could do that, you are saying that is not something you could do?” R. 570, ll. 21-23. The juror answered, “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 the death penalty. It is more so what is presented in court.” R. 570, l. 24 – 571, l. 2. The juror’s response indicates that she needed a reason to decide to vote for a life sentence, and that a simple act of mercy would not be a morally correct reason to give a life sentence.

The solicitor attempted to rehabilitate the juror and the following exchange took place between the prosecutor and the juror:

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 may say, 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.

R. 571, l. 15 – 572, l. 4.

Notably, the prosecutor did not ask the juror if she could consider a life sentence for no reason at all. Defense counsel argued that the juror was not qualified stating:

My position is that she's not qualified, and I think that mercy – *the Court would instruct her that mercy is something that she could consider*, and based on what I understand her answers to be, that *she's saying that that would not be morally correct for her*, and my position is that if she can't consider that as an option – not that she has to choose it, because she doesn't have to choose it, *but to say it is morally incorrect suggests that she can't consider it and it is not an option and, therefore, she would be disqualified*. That is my position.

R. 572, ll. 12-23. (emphasis added).

The solicitor argued:

Your Honor, I took a very different meaning from it. She clarified it saying I just don't want to vote willy-nilly. This is the first time any of these people ever qualified for a death penalty jury, and she's saying, look, I can consider everything, but I don't want to base it on what someone looks like, how someone feels or testifies. That is what she was meaning. She clearly – when we talked again, she understands that mercy is an option and she said she can follow the Court's instructions, so I think she's qualified.

R. 572, l. 24 – 573, l. 10.

The juror, however, never changed her 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. R. 566, ll. 7-12; R. 570, ll. 16-20. The judge found the juror qualified stating:

I believe she's qualified. She came in a "C", stayed as a "C". This morally not [correct] 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 could impose either sentence depending upon the facts and circumstances.

R. 573, ll. 11-21.

Juror 350 was seated on the jury. R. 1433, ll. 1-5. Defense counsel Wilson urged the jury in his penalty stage trial closing argument to comprehend the true concept of mercy: “The solicitor said that he doesn’t deserve mercy. None of us do. None of us deserve mercy, because mercy is not earned. You can’t earn mercy. It’s something that is given from the giver; it is not from the receiver. It is not something that the receiver does to earn it, it comes from in here (indicates) from the giver. Because if we all had to deserve or earn mercy, we would be in a lot of trouble.” R. 2323, l. 21 – 2324, l. 4. Counsel Wilson told the jury that the judge would instruct it that “an act of mercy” alone was a proper reason to sentence appellant to life rather than death. R. 2325, l. 16-22.

The judge in the present case then instructed the jury: “It is permissible for a juror to decide that life without parole is the appropriate punishment *for any reason, or no reason at all*. You are not required to make a finding that the mitigating factors outnumber the aggravating factors [in] your own mind. You are free to impose a sentence of *life imprisonment for absolutely no reason*, even if you find the existence of an aggravating circumstance. This is what has been traditionally referred to as a ‘sentence based on mercy.’ In other words, you may choose to recommend life imprisonment without the possibility of parole if you find a statutory or non-statutory mitigating circumstance, or *you may choose to recommend life imprisonment as an act of mercy*.” R. 2335, l. 1 – 2326, l. 5.

Standard of Review

A juror must be excused from service if “the juror's views would ‘prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.’” State v. Dickerson, 395 S.C. 101, 114, 716 S.E.2d 895, 902 (2011) *citing* Wainwright v.

Witt, 469 U.S. 412, 424 (1985) (quoting Adams v. Texas, 448 U.S. 38, 45, (1980)); See, also, State v. Green, 301 S.C. 347, 354, 392 S.E.2d 157, 160 (1990).

Discussion

The trial judge erred in qualifying Juror 350. The juror was not qualified because she could not consider voting for a life sentence for any reason or for no reason at all, including merely as an act of mercy. This juror needed a reason to vote for a life sentence. By needing a reason to vote for a life sentence, the juror improperly placed the burden on the defense to show why death would not be a proper sentence.

In determining whether a juror was erroneously qualified, this Court uses a three-step analysis. State v. Green, 301 S.C. 347, 392 S.E.2d 157 (1990). First, appellant must have exhausted all of his peremptory challenges. State v. South, 285 S.C. 529, 331 S.E.2d 775 (1985). If appellant exhausted all of his peremptory challenges, then this Court will determine if the juror was erroneously qualified, depriving appellant of a fair trial. Green supra. Appellant exhausted all ten of his peremptory challenges and meets the first step of the analysis. R. 1436, ll. 13-14.

As to the second step, Juror 350 was erroneously qualified because she needed a reason to vote for a life sentence. In State v. Dickerson, 395 S.C. 101, 114, 716 S.E.2d 895, 902 (2011), this Court wrote, “A juror must be excused from service if the juror’s views would ‘prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.’ Wainwright v. Witt, 469 U.S. 412, 424, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985) (quoting Adams v. Texas, 448 U.S. 38, 45, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980)); *see also* State v. Green, 301 S.C. 347, 354, 392 S.E.2d 157, 160 (1990).”

In Rosemond v. Catoe, 383 S.C. 320, 330, 680 S.E.2d 5, 10 (2009), this Court wrote, “It is proper to instruct a jury in a capital sentencing phase that it may recommend a life sentence for any reason *or no reason at all, including as an act of mercy.*”

Juror 350, however, 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 wrote:

In Wainwright, *supra*, the United States Supreme Court rejected the notion that a prospective juror in a capital case could only be challenged for cause if it were demonstrated the juror “unequivocally stated she would automatically be unable to give a death sentence,” 469 U.S. at 419, 105 S.Ct. at 849. More recently, the Court recognized that a capital defendant may challenge for cause any prospective juror who indicates he or she will automatically vote for death in every case. Morgan v. Illinois, 504 U.S. 719, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992). “If even one such juror is impaneled and the death sentence is imposed, the State is disqualified to execute sentence.” *Id.* at 729, 112 S.Ct. at 2230. The Morgan court rejected the state’s claim that general questions of fairness and impartiality were in all cases sufficient to detect unqualified jurors, stating:

... such jurors could in all truth and candor respond affirmatively, personally confident that such dogmatic views are fair and impartial, while leaving the specific concern unprobed. 504 U.S. at 735, 112 S.Ct. at 2233.

In Bennett, 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.’”

Bennett, 328 S.C. at 257, 493 S.E.2d at 848.⁹ 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.

⁹ 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.

The court erred by refusing to exclude evidence of appellant's pre-trial misconduct in the Department of Corrections, since appellant's imprisonment in 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.

Relevant facts

August 4, 2015

On that August day 2015, the state sought to move appellant from the J. Reuben Long Detention Center into the South Carolina Department of Corrections ("SCDC") as a "safekeeper." R. 2462, l. 25 – 2464, l. 3. The motion was heard before the Honorable R. Ferrell Cothran, Jr.¹⁰ R. 2460. Defense counsel, Ralph Wilson, objected to the motion. Wilson raised two primary concerns at the time: (1) if appellant was moved outside of Horry County it would be much more difficult for defense counsel to meet with him in preparation for appellant's capital trial; and (2) appellant was not a danger to himself or other inmates at the jail. R. 2464, l. 5 – 2465, l. 13.

The solicitor responded that he had affidavits from the county sheriff and Tom Fox, the director of J. Reuben Long Detention Center, "concerning seized contraband, letters concerning escape attempts, use of drones, letters asking for help, hacksaws, and things like that." R. 2466, ll. 5 – 13. Defense counsel pointed out that the affidavits referred to by the solicitor primarily dealt with conduct by appellant's *co-defendants* and appellant was not involved in the alleged

¹⁰ This hearing was held prior to the Honorable Robert E. Hood being appointed as the trial judge in this case.

conversations about attempting to escape from the jail. R. 2466, ll. 14 – 21. The solicitor argued that besides risk of escape, another important factor in putting a pre-trial detainee in safekeeping was if they “exhibit extremely violent and uncontrollable behavior.” R. 2467, ll. 8 – 16. The solicitor then claimed that appellant had been involved in two fights with other inmates including an incident in which he allegedly stabbed another inmate with a pencil. However, the solicitor immediately qualified this by telling the judge, “it was a **straight up fight**, don’t get me wrong.” R. 2467, ll. 16 – 25. (emphasis added).

The judge granted the state’s request to move appellant into the Department of Corrections. The judge further ruled that defense counsel could request a change later if he did not have adequate access to appellant while being housed in SCDC. R. 2469, ll. 9 – 16. Appellant was then transferred from J. Rueben Long Detention Center to Lee Correctional Institution as a “safekeeper.”

January 8, 2019

Defense counsel Wilson moved to rescind the safekeeping order on appellant and move appellant back to the J. Rueben Long Detention Center. R. 2990, ll. 14 – 21. Wilson informed the court that appellant had been moved to Lee Correctional Institution in 2015 for “safekeeping” and remained at Lee until “a couple months ago” when appellant was moved to death row at Kirkland Correctional Institution. R. 2990, l. 21 – 2991, l. 2. Wilson argued that this pre-trial confinement was unconstitutional in violation of appellant’s Eighth Amendment right against cruel and unusual punishment. R. 2991, ll. 3 – 9.

Wilson further argued that the state was in violation of the governor’s order establishing guidelines for housing a pre-trial detainee as a “safekeeper.” Specifically, Wilson argued that the Department of Corrections did not have the authority pursuant to the governor’s order to

promulgate its own regulations regarding “safekeepers,” and even if they did have such authority, the regulations the Department of Corrections had established violated the governor’s order. R. 2991, l. 10 – 2992, l. 18. Wilson pointed out that the governor’s order stated that orders for safekeeping were only valid for one hundred and twenty days and could be renewed for ninety days upon a showing of good cause or if there had not been a material change in circumstances. R. 2992, ll. 18 – 24. Appellant had been in safekeeping for over three years which was far beyond the one hundred and twenty days plus a ninety-day extension as allowed by the order. R. 2992, l. 25 – 2993, l. 8.

Defense counsel argued that even if SCDC had the authority to promulgate regulations for safekeeping based on the governor’s order, they had failed to comply with their own regulations in appellant’s case. Specifically, counsel argued that their regulations *required that every ninety days the Department of Corrections would have to reapply to keep appellant in safekeeping which included the requirement to notify defense counsel*. Counsel stated that he had never received a single notification that the Department of Corrections was applying to extend appellant’s “safekeeper” status beyond the original one hundred and twenty-day period, nor had counsel signed any document indicating he had received such notice as also required by the SCDC regulations on safekeepers. R. 2993, l. 9 – 2995, l. 10.

Counsel also pointed out that the SCDC regulations required that the inmate have a mental health evaluation prior to the renewal and counsel was not aware of any mental health evaluations that had been performed on appellant for this purpose. See SCDC Policy SK-22.02 (August 20, 2018) available at <http://www.doc.sc.gov/policy/SK-22-02.htm.pdf>. Counsel asked the judge to order that appellant be returned to the J. Reuben Long Detention Center. R. 2995, l. 11 – 2996, l. 12.

The assistant solicitor conceded that when the Horry County Sheriff initially petitioned for appellant to be placed in safekeeping, the full hearing, including notice to appellant's counsel, **was only done one time**. R. 2996, l. 15 – 2998, l. 17. The solicitor argued that the ninety-day extension was something that could be done by Director Bryan Stirling, who was the director of SCDC, and that the renewal of appellant's safekeeping status could be done every ninety days without having a full hearing or notifying defense counsel. R. 2998, l. 18 – 3000, l. 2. According to the solicitor, Stirling had in fact made a written request for renewal every ninety days that appellant had been in safekeeping. R. 3000, ll. 9 – 17.

The judge asked why appellant was being housed on death row. The solicitor responded that *he did not know*, but his belief was that it was based on appellant's conduct while at Lee. R. 3000, l. 18 – 3001, l. 19. Defense counsel pointed out that before appellant was sent to death row he was already being housed in "supermax" and had been housed in maximum security ever since he was transferred from J. Reuben Long to SCDC. Counsel argued that as a pre-trial detainee this was an unconstitutional violation of appellant's Eighth Amendment right against cruel and unusual punishment. R. 3002, l. 25 – 3004, l. 3.

The judge then indicated that he believed the questions he had about appellant's housing status needed to be answered by someone from SCDC who had knowledge and access to appellant's files there. R. 3004, l. 10 – 3005, l. 17. The parties then agreed to revisit this issue later when someone from SCDC could be present to testify regarding appellant's safekeeping status. R. 3006, l. 2 – 3013, l. 22.

January 22, 2019

The parties reconvened that day to again take up the issue of appellant's safekeeping status. R. 3044, l. 17 – 4, l. 3045. At that hearing, the solicitor provided the judge with

appellant's disciplinary records from SCDC while in safekeeping and also brought the warden of Kirkland Correctional Institution to testify. R. 3046, l. 1 – 3047, l. 18. The solicitor told the judge that appellant had a total of thirty-five “convicted disciplinary actions” while he had been in the Department of Corrections. R. 3047, l. 19 – 3048, l. 8.

Willie Davis, the warden at Kirkland, testified regarding appellant's disciplinary records while appellant was a pre-trial detainee in SCDC. R. 3048, l. 24 – 3050, l. 15. Davis testified that generally “safekeeper” inmates are housed at Lee Correctional unless they become “troublematic.” According to Davis, when a “safekeeper” becomes “troublematic,” they are moved from Lee to the “supermax” unit at Kirkland. R. 3050, l. 16 – 3051, l. 3. Davis testified that the supermax unit at Kirkland was also the current location of South Carolina's death row. R. 3051, ll. 4 – 6. Davis testified that appellant was moved from Lee to death row because of his disciplinary infractions while he was housed at Lee. R. 3052, l. 9 – 3053, l. 24.

Davis acknowledged that when appellant initially came to SCDC as a pre-trial detainee, he was never placed into “general population.” Instead, appellant was taken straight to “restricted housing,” or “lockup,” at Lee. Davis further admitted that the restricted housing unit where appellant was confined was the most secure housing unit at Lee.¹¹ Jan. 22, 2019 tr. 18, l. 7 – 21, l. 13. Davis further admitted that appellant remained in restricted housing the entire time he was at Lee until he was transferred to death row, which was even more restrictive. In fact, Davis testified that death row was the most restrictive place in the Department of Corrections.¹² R. 3062, ll. 14 – 22.

¹¹ Davis stated that appellant “probably never received any” recreation time at Lee outside of his prison cell because of “staffing issues.” R. 3063, ll. 6 – 16.

¹² According to Davis, death row inmates were only permitted to leave their cells for one hour on Mondays, Wednesdays, and Fridays. R. 3059, l. 21 – 3060, l. 4. However, because appellant

The solicitor argued that appellant being placed in safekeeping was justified by his conduct. The solicitor agreed, however, that it would be proper for appellant to be moved out of safekeeping and back to J. Reuben Long Detention Center closer to the time of his trial in order to adequately prepare with defense counsel. R. 3082, l. 17 – 3083, l. 23. Wilson argued as an initial matter that the state had violated the governor’s safekeeping order by keeping appellant in safekeeping for longer than one hundred and twenty days plus a single ninety-day extension. R. 3083, l. 25 – 3084, l. 8. Furthermore, counsel argued that after appellant was already being unconstitutionally held at Lee Correctional, he was then transferred to death row at Kirkland Correctional without notice to counsel or the court. R. 3084, ll. 9 – 18. Lastly, counsel argued that he would not have sufficient access to appellant while being housed on death row in order to adequately prepare for trial. R. 3084, l. 19 – 3086, l. 13.

The solicitor responded by arguing that the governor’s safekeeping order did not require that defense counsel be notified every time the state sought to renew an inmate’s safekeeping status. In this case, the solicitor argued that defense counsel was notified, and a hearing was held when the state initially sought to place appellant into safekeeping. The solicitor maintained that there was no requirement after this initial hearing to notify defense counsel of their renewal of appellant’s safekeeping status every ninety days. R. 3086, l. 15 – 3087, l. 7. Wilson argued however that the safekeeping order only permitted the state to seek a single ninety-day extension of an inmate’s safekeeping status before having to start the safekeeping process all over again. R. 3087, ll. 8 – 16.

was a pre-trial detainee and not a convicted inmate sentenced to death, he received even less recreation time and **was only permitted to leave his cell for one hour on Tuesdays and Thursdays.** R. 3063, l. 22 – 3064, l. 1. A “general population” inmate, on the other hand, would be permitted to go to the cafeteria three times each day for meals, attend educational programs, have canteen privileges and also recreation every day. R. 3061, ll. 12 – 19.

Ultimately the judge ruled:

Now, at this point in time, I'm going [to] find that [appellant] 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.

R. 3134, l. 18 – 3135, l. 1.

The judge ruled that the state had to move appellant back to J. Reuben Long Detention Center no later than the week of March 4, 2019 since the trial was scheduled for the week of May 6, 2019. R. 3135, ll. 2 – 5.

April 25, 2019

On that day in late April 2019, another pre-trial hearing¹³ was held to determine, in part, the admissibility of a letter supposedly written by appellant to his mother that was seized by an officer at the J. Reuben Long Detention Center. R. 3325, l. 10 – 3328, l. 9. The state called Tom Fox as a witness who was the director of the Detention Center at the time that appellant was initially arrested. R. 3328, l. 19 – 3329, l. 19.

Tom Fox testified that while he was the director of the jail, he was provided with information that appellant “attempted to interfere with a head count” by standing in front of appellant’s cell window so that the guard could not count the number of inmates inside. R. 3330, ll. 16 – 25. Fox claimed that attempting to interfere with a head count was an indication of a possible escape attempt because the inmate might be trying to determine how accurate and diligent the guards are in their head counts. R. 3331, ll. 1 – 25. Fox also maintained that he

¹³ While this hearing was not specifically about appellant’s safekeeper status, it provides important contextual information about why appellant was initially transferred to SCDC as a pre-trial detainee.

“received reports and information regarding possible escape schemes with co-defendants.” R. 3332, ll. 1 – 8. Fox also testified that the jail intercepted a letter detailing how to smuggle hacksaws into the jail through the mail. R. 3332, l. 12 – 3333, l. 5.

The solicitor introduced State’s Exhibit F, which was the safekeeping packet originally submitted by the state in its request to place appellant into the Department of Corrections as a pre-trial detainee. This packet contained reports from jail guards which stated that co-defendant James Daniels was seen passing papers to co-defendant McKinley Daniels. As a result of this, officers went through the Daniels brothers’ legal mail and discovered a letter containing information on how to smuggle hacksaws into the jail through the mail. R. 3637. Fox *admitted* on cross-examination that he did not have any direct information that appellant was involved in the escape plan with the co-defendant Daniels brothers. R. 3341, l. 4 – 3342, l. 9.

At trial

Prior to the sentencing phase trial, the state informed the trial judge that it intended to introduce numerous instances of appellant’s disciplinary infractions while he was in SCDC as a pre-trial detainee. R. 1689, l. 23 – 1690, l. 13. Defense counsel vigorously opposed this motion continuing to argue that appellant’s confinement in maximum security prisons was unconstitutional and that the state should not be permitted to benefit from that illegality by using appellant’s disciplinary infractions while at SCDC in order to urge the jury to sentence appellant to death. R. 1699, l. 6 – 1700, l. 10.

The trial judge expressed his concern regarding appellant’s pre-trial confinement on death row stating that he was “*in shock*” when he learned that appellant had been moved to death row. The trial judge remarked: “I’ve never heard of a pretrial detainee being put on death row in my life.” R. 1864, ll. 9 – 16. However, despite the trial judge admitting that appellant’s

pre-trial confinement on death row was “shocking,” he also stated: “I’m not saying that was a wrong decision.” R. 1864, ll. 16 – 25. The judge ultimately permitted the state to introduce numerous instances of appellant’s disciplinary conduct while he was a pre-trial detainee in maximum security prison.

The state called Tom Fox as a witness during the sentencing phase trial. When the solicitor asked Fox whether appellant’s conduct at the J. Reuben Long Detention Center led him to petition the Governor to move appellant to SCDC for “safekeeping,” defense counsel objected. R. 1846, l. 15 – 1847, l. 9. Counsel argued that appellant was placed into “safekeeping” as a result of the conduct of his co-defendants, not his own conduct. R. 1847, l. 16 – 1848, l. 4. The solicitor responded that he only intended to elicit testimony that appellant was placed into “safekeeping,” but not elicit testimony as to why appellant was placed into “safekeeping.” R. 1848, ll. 10 – 24.

The trial judge, however, pointed out that the solicitor’s question to Fox immediately before defense counsel’s objection was that appellant was placed into safekeeping *based on his own conduct*. The solicitor stated: “That is all we’re going to say about it.” The judge responded: “**But that is still a lie.**” R. 1849, l. 25 – 1850, l. 4. (emphasis added).

Defense counsel moved for a mistrial based on the jury hearing improper testimony that appellant was moved into “safekeeping” because of his own conduct rather than the conduct of his co-defendants. R. 1849, ll. 16 – 23. The judge denied counsel’s motion for a mistrial and instructed the jury to disregard the question and answer given. R. 1850, l. 13 – 1852, l. 25.

Defense counsel moved to exclude and strike all testimony regarding appellant’s alleged disciplinary infractions while in SCDC because it was unconstitutional for the state to place appellant in SCDC as a pre-trial detainee to begin with. R. 1866, l. 11 – 1867, l. 21. The

solicitor responded by referring to the pre-trial hearings held on August 4, 2015 and January 22, 2019 where the trial judge had found appellant's pre-trial confinement in the Department of Corrections to be proper. R. 1867, l. 23 – 1868, l. 9. The solicitor asserted that appellant was in fact moved to SCDC as a result of his own conduct. R. 1868, l. 10 – 1869, l. 2. Defense counsel maintained that the primary reason appellant was moved to safekeeping was because of the conduct of *his co-defendants*, which was improper. Counsel further argued that the state should not be permitted to benefit from illegally housing appellant as a pre-trial detainee in maximum security prisons, including death row, by admitting evidence of appellant's disciplinary infractions while there. R. 1869, l. 3 – 1870, l. 2.

Ruling and evidence

The judge ruled that the SCDC officers would be allowed to testify regarding appellant's alleged disciplinary violations while he was confined there: "I believe their testimony *is directly relevant and appropriate of the issues that are at hand in the jurors' determination of whether or not the appropriate sentence is life or death.*" R. 1870, ll. 3 – 16. (emphasis added). The solicitor then introduced a copy of appellant's disciplinary infractions through SCDC Records Division Employee Michael Stobbe while he was a pre-trial detainee over defense counsel's renewed objections. R. 1877, l. 9 – 1878, l. 24; R. 3731.

State's Exhibit 153, SCDC Disciplinary Report, showed that appellant had been "convicted" of the following disciplinary infractions: (1) "throwing/exposure of any" 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 h” [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 h” 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. 3731.

Several correctional officers from SCDC then testified to numerous specific instances of appellant’s disciplinary infractions while he was a pre-trial detainee in maximum security prison. Sekou Bolden testified that he was a correctional officer at SCDC while appellant was in safekeeping there. R. 1879, ll. 10 – 17. Bolden testified that on September 13, 2018, appellant threw a cup of “unknown liquid” on him and a nurse. R. 1884, ll. 2 – 13. Bolden testified that four days later, appellant again threw a cup of “unknown liquid” on him and also cut him on his right forearm with a sharp object. R. 1884, l. 22 – 1885, l. 13.

Another SCDC correctional officer, Damon Greene, also testified regarding some of his interactions with appellant. According to Greene, on September 17, 2018, SCDC was having a lot of problems with the inmates on “lockup” throwing fluids on guards so the guards were in the process of closing all of the “food service flaps” to the inmates’ cells. R. 1889, ll. 8 – 19. Greene stated that appellant refused to close his food flap, so the guards forcibly removed appellant from his cell to take him to “see mental health.” R. 1889, ll. 21 – 25. Greene

maintained that while he was escorting appellant to “mental health,” appellant shoved Greene against a fence and threatened to kill him. R. 1890, ll. 1 – 9.

Jason Fields testified that appellant threw a metal object at him through the “food service flap” which caused some bleeding and bruising to Fields while Fields was a correctional officer for SCDC. R. 1895, l. 25 – 1899, l. 1. Vanessa Fox testified that on January 11, 2016, while working at SCDC, appellant threw feces in her face through his food service flap. R. 1901, l. 1 – 1902, l. 12. Fox said that the feces got in her eyes and mouth, so she went to the doctor to be tested for certain diseases like hepatitis to make sure she had not contracted anything from appellant. R. 1902, l. 20 – 1903, l. 17.

Thomas Commander testified that on September 20, 2018 while the guards were attempting to secure another inmate’s food service flap, appellant reached out of his flap and threw a homemade knife and a “crank radio” at Commander striking him on the leg. R. 1908, l. 11 – 1909, l. 3. Commander also stated that appellant tried to prevent the guards from closing his food service flap and assaulted them with his “cros” [shoes] while they were attempting to secure his food flap. Finally, Commander claimed that after they restrained appellant and began escorting him to medical, appellant told Commander: “If you don’t ship me, I’m going to kill one of your officers.” R. 1909, ll. 3 – 13.

Defense counsel objected and moved for a mistrial. The jury was removed, and the judge denied the mistrial motion, stating Commander’s testimony went to “a direct statement by Mr. Jenkins, according to Captain Commander, where Mr. Jenkins stated, If you don’t ship me, I’m going to kill one of your officers.” The judge said he understood defense counsel’s mistrial motion but stated, “This is completely different than SCDC made an executive decision to put him on death row based upon his conduct while he was housed in Lee . . .” Tr. 1908, l. 15 –

1911, l. 21. When the jury reentered, the solicitor concluded by having Commander testify he considered appellant's actions a danger to his safety. Tr. 1913, ll. 3 – 6.

Standard of Review

The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion.” State v. Hatcher, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (“quoting State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)). “An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.” Id.; see also State v. Brockmeyer, 406 S.C. 324, 340, 751 S.E.2d 645, 653 (2013).

Discussion

A. The trial court erred in granting the state's initial request to transfer appellant into SCDC as a pre-trial detainee because the state failed to show that appellant was a high escape risk or that he exhibited extremely violent and uncontrollable behavior.

S.C. Code Ann. § 24-3-80 provides:

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 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.

S.C. Code Ann. § 24-3-80.

On February 16, 2000, then-Governor James H. Hodges signed Executive Order 2000-11 which established the current standards for housing a pre-trial detainee in SCDC for safekeeping. S.C. Exec. Order No. 2000-11 (Feb. 16, 2000). This executive order permits a pre-trial detainee to be transferred to prison for safekeeping if he: “(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 No. 2000-11 § 1 (Feb. 16, 2000).

At the initial safekeeping hearing conducted on August 4, 2015, the state failed to show that appellant fell within any of these three categories and therefore, appellant was improperly transferred into SCDC as a pre-trial detainee. Appellant was not a “high escape risk.” The only piece of evidence before the court, which appears to be a self-serving stretch on its face, regarding appellant’s risk of escape was that he allegedly interfered with a headcount on a single occasion by standing in his doorway while a guard was attempting to count the number of inmates inside his cell. This incident allegedly occurred on March 3, 2015 – five months before the initial safekeeping hearing. R. 3637. According to the affidavit submitted by the Horry County Sheriff: “The act was suspicious and possibly testing how persistent the head count attempt would be for future escape attempt...” The Sheriff’s affidavit noted that as a result of this incident, appellant was moved to “administrative segregation.” *Id.* The affidavit also referenced a “written escape plan . . . to have hacksaws blades [sic] smuggled into the facility to aid in their escape.” However, as Tom Fox, the director of J. Reuben Long admitted at a subsequent hearing, this written escape plan *was a letter between appellant’s two co-defendants* and there was no direct evidence linking appellant to that escape plan. R. 3341, l. 4 – 3342, l. 9.

The state also failed to show that appellant exhibited “extremely violent and uncontrollable behavior.” Although there were allegations that appellant was involved in two fights with other inmates, the solicitor’s own comment to the judge that “it was a straight up fight” shows that this was not unusual for a county jail. County jails routinely experience fights between inmates which do not rise to the level of “extremely violent and uncontrollable behavior.” On the contrary, the alleged altercations between appellant and other inmates were

not out of the ordinary, especially when it was nothing more than a “straight up fight” between two inmates.

Finally, there was nothing in the record to suggest that appellant needed to be moved out of J. Reuben Long to protect him from other inmates at the jail. In fact, the state did not argue this as a reason to place appellant into SCDC as a pre-trial detainee. Therefore, the judge erred in granting the state’s request to move appellant into SCDC for “safekeeping” because the state failed to show that appellant fell within one of the narrow categories of pre-trial detainees outlined in the governor’s safekeeping order. However, even if appellant was properly moved into safekeeping after this initial hearing, as will be shown below, the state unconstitutionally and illegally extended appellant’s confinement in maximum security prisons as a pre-trial detainee far beyond what was legally permissible.

B. The trial court erred by refusing to exclude evidence of appellant’s misconduct – his inability to cope with maximum security prison as a pre-trial detainee -- after it abused its discretion by refusing to rescind appellant’s safekeeping status. The state had failed to comply with SCDC’s regulations regarding renewal requests of safekeeper inmates by failing to notify appellant’s trial counsel a single time it sought to renew appellant’s safekeeper status, including its failure to notify defense counsel that appellant was being moved from the maximum security unit at Lee Correctional to death row as a pre-trial detainee.

In order for a county jail to transfer a pre-trial detainee into safekeeping with the Department of Corrections, the county must apply to the Director of SCDC and also notify the inmate’s attorney. S.C. Exec. Order No. 2000-11 § 2 (Feb. 16, 2000). The executive order further provides:

The application must 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.

Id. The Director of SCDC must review the application and make a recommendation to the governor as to whether the pre-trial detainee ought to be transferred to the Department of Corrections for safekeeping. Id. The governor makes the final determination as to whether the county's application will be granted. S.C. Exec. Order No. 2000-11 § 3 (Feb. 16, 2000).

Safekeeping orders are only valid for *one-hundred and twenty days* from the date of issuance. However, a safekeeping order 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 No. 2000-11 § 5 (Feb. 16, 2000). (emphasis added). If the safekeeping order is not renewed, the pre-trial detainee must be transferred back to the county jail. Id. Furthermore, “[m]entally ill or retarded individuals are not eligible for safekeeping in the Department of Corrections.” S.C. Exec. Order No. 2000-11 § 6 (Feb. 16, 2000).

The Department of Corrections has also developed its own internal policies and procedures regarding the handling of pre-trial detainees who enter SCDC pursuant to a safekeeping order issued by the governor. SCDC Policy SK-22.02 (August 20, 2018) available at <http://www.doc.sc.gov/policy/SK-22-02.htm.pdf>. According to this policy, the safekeeping order can be renewed for “90 days at a time,” *but only if* the county repeats the process outlined in the preceding sections which require, *inter alia*, *notification to the detainee's attorney and a signed document by the detainee's attorney indicating he has received the request to extend his client's safekeeping status*. The policy also requires the county to present a mental health evaluation and a medical evaluation to the director of SCDC. Furthermore, the county must also show “good cause” as to why the safekeeping order should be extended. SCDC Policy SK-22.02, § 2 (August 20, 2018). (emphasis added).

Male “safekeepers” were to be processed either at Lee Correctional or Kirkland Correctional Institution. The policy further provides that “[s]afekeepers will be placed in a Restrictive Housing Unit and will not be allowed routine contact with other inmates.” SCDC Policy SK-22.02, § 3.2 (August 20, 2018). This policy explicitly states that it does not apply to death row prisoners. Id. at § 8.

In this case, the state failed to comply with the SCDC policy regarding the renewals of appellant’s initial safekeeping order. SCDC’s policy requires that renewals of an inmate’s safekeeping order must comply with the same procedure as the initial safekeeping application, including notification to the inmate’s attorney of the renewal request. The solicitor in this case **admitted** that the state had not complied with this requirement. R. 2998, l. 18 – 3000, l. 2.

In other words, the state sought and received numerous unlawful extensions of appellant’s pre-trial confinement in a maximum-security prison. As the solicitor plainly admitted, appellant was moved from the maximum-security unit at Lee where he was already being confined to his cell for twenty-four hours a day, seven days a week, onto death row without notification to the court or his counsel. This was, respectfully, unconscionable. The trial judge acknowledged the shocking nature of these circumstances but still failed to grant appellant relief.

Additionally, there was no indication that a mental health evaluation or a medical evaluation was ever performed on appellant as required by the SCDC policy on “safekeepers.” This requirement is significant because pursuant to the governor’s order outlining the current procedures for moving a pre-trial detainee into SCDC for “safekeeping,” mentally ill and retarded individuals are not eligible for “safekeeping.” S.C. Exec. Order No. 2000-11 § 6 (Feb. 16, 2000). By not conducting mental health and medical evaluations on appellant, the state could

not show that appellant was even eligible for pre-trial confinement in a maximum-security prison. Therefore, appellant's continued confinement in SCDC as a pre-trial detainee beyond the initial one-hundred-and-twenty-day period originally authorized by the governor was illegal.

C. The trial court erred by allowing the state to introduce evidence of appellant's alleged disciplinary infractions because he was being unconstitutionally punished by being confined in maximum security prisons, including death row, as a pre-trial detainee.

Finally, appellant's pre-trial confinement in the most restrictive housing unit at one of the most restrictive prisons in this state amounted to unconstitutional punishment, and the state should not have been permitted to benefit from this illegality by using appellant's disciplinary infractions while unlawfully confined to urge the jury to sentence appellant to death. It is without question that appellant's confinement on this state's death row as a pre-trial detainee who had not been convicted of any crime was punishment. This was abundantly clear where the warden of Kirkland Correctional, Willie Davis, testified that *appellant was under even greater restrictions than the inmates who had been convicted and sentenced to die by lethal injection or electrocution*. As Davis testified, inmates who had been convicted and sentenced to death were permitted to leave their cells for one hour a day, *three days a week*. Tellingly, appellant, who had been convicted of nothing, was only permitted to leave his cell for one hour a day, *two days a week*. R. 3059, l. 21 – 3060, l. 4; R. 3063, l. 22 – 3064, l. 1. An inmate who is confined to a more restrictive environment than convicts who have been sentenced to die can only be construed as punishment.

In Williamson v. Stirling, 912 F.3d 154 (4th Cir. 2018), the Fourth Circuit Court of Appeals dealt with the South Carolina safekeeping statute in an inmate's civil rights lawsuit pursuant to 42 U.S.C. § 1983. Williamson was a pre-trial detainee who was held in solitary confinement in the Department of Corrections for three-and-a-half years pursuant to a

safekeeping order signed by then-Governor Haley. Williamson, 912 F.3d at 159. The District Court granted summary judgment to the defendants, including the county sheriff and the director of SCDC, Bryan Stirling. The Fourth Circuit vacated the District Court's granting of summary judgment as to the sheriff and Director Stirling and remanded for further proceedings. Id.

Williamson was arrested for murder and armed robbery and initially held at the Barnwell County jail without bond. Id. at 160. The jail subsequently intercepted a letter from Williamson in which he allegedly confessed to the murder and "threatened violence against ten law enforcement officers and Judge Early of the State's Second Judicial Circuit, which includes Barnwell County." Id. As a result of this letter, the county sheriff submitted an application to the director of SCDC to place Williamson into safekeeping. Id. at 162. After Director Stirling reviewed the application, he recommended to Governor Haley that the application be approved. Governor Haley approved the application and signed an order which placed Williamson in safekeeping status. He was transferred to the "Maximum Security Unit . . . at Kirkland Correctional Institution." Id.

While in safekeeping, "Williamson was solitarily confined in his cell approximately twenty-three hours a day five days a week, and twenty-four hours a day two days a week." Id. at 163. Williamson had almost no human contact during his safekeeping confinement which lasted approximately one thousand and three hundred days. Id. The Williamson Court noted that Barnwell County officials and Director Stirling were required to renew Williamson's safekeeper status every ninety days in order to prolong his incarceration at SCDC, but the record was incomplete regarding these renewal requests. Id.

Williamson began developing significant mental health problems while in safekeeping, and SCDC records showed that he began to receive treatment for those problems. Id. at 163-164.

However, there was no indication in the record that Director Stirling ever mentioned Williamson's deteriorating mental condition in his numerous renewals of Williamson's status as a "safekeeper" despite mentally ill persons being ineligible for safekeeping. Id.; S.C. Exec. Order No. 2000-11 § 6 (Feb. 16, 2000). The Court found that both Director Stirling and the county sheriff were significantly involved in maintaining Williamson's confinement as a "safekeeper" and therefore, Williamson had made the requisite showing to expose them to liability for violating his due process rights. Id. at 171-172. The Court ultimately concluded:

Williamson has shown that a genuine issue of material fact exists as to whether his treatment as a pretrial safekeeper actually amounted to punishment that was unconstitutional under [Bell v. Wolfish, 441 U.S. 520 (1979)]. More specifically, the evidence would support a jury finding that his extended period of solitary confinement was not attributable to a nonpunitive rationale, or that it was excessive in relation to that purpose.

Williamson v. Stirling, 912 F.3d 154, 179 (4th Cir. 2018).

The Court thus held that Williamson was entitled to a trial on both his substantive and procedural due process claims based on his safekeeping status as a pre-trial detainee in the Department of Corrections. Id. at 185.

In Bell v. Wolfish, 441 U.S. 520 (1979), the Supreme Court dealt with the scope of rights possessed by an incarcerated pre-trial detainee. Wolfish was a class action lawsuit challenging certain conditions of confinement brought by inmates of a jail that was designed for the purpose of housing federal pre-trial detainees. Wolfish, 441 U.S. at 523-524. The Wolfish Court found that the correct constitutional provisions for analyzing whether a pre-trial detainee's conditions of confinement amounted to punishment were the due process clauses of the Fifth and Fourteenth Amendments. That is because it is a violation of due process for a state to punish a person who has not yet been convicted of a crime. Id. at 535.

While it was undisputed that persons accused of crimes may be incarcerated prior to conviction in order to secure their presence at trial, the Wolfish Court noted the “distinction between punitive measures that may not constitutionally be imposed prior to a determination of guilt and regulatory restraints that may.” Id. at 536-537. The Court articulated a test as to whether a particular deprivation of liberty of a pre-trial detainee amounts to punishment:

[I]f a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to “punishment.” Conversely, if a restriction or condition is not reasonably related to a legitimate goal-if it is arbitrary or purposeless-a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees.

Id. at 539.

The Court ultimately dismissed the inmates’ complaints regarding their conditions of confinement as not amounting to punishment. Specifically, the Court found that the jail’s practice of confining two inmates to *a single cell* did not amount to punishment. It noted: “Inmates generally are locked into their rooms from *11 p.m. to 6:30 a.m.* and for brief periods during the afternoon and evening head counts. During the rest of the day, they may move about freely between their rooms and the common areas.” Wolfish, 441 U.S. at 541. The Court concluded that because the pre-trial detainees were only confined to their two-man cells for seven to eight hours a day “[d]uring most or all of which they presumably [were] sleeping” and that “[n]early all of the detainees [were] released within 60 days” from the jail, their confinement did not amount to punishment.” Id. at 543.

The conditions of confinement in Wolfish pale in comparison to the conditions experienced by appellant. Appellant was not confined to his cell for seven to eight hours a day. While in the Restricted Housing Unit at Lee, he was confined in his cell twenty-four hours a day. Appellant was not released from such confinement after a period of sixty days either. Instead, he

remained solitarily confined for over three years. Furthermore, although appellant was permitted to be outside of his cell for one hour a day on Tuesdays and Thursdays while he was a pre-trial detainee on death row, this was less than the inmates who had been convicted and sentenced to death. Such a denial of a pre-trial detainee's due process right to be free from punishment, and free from cruel and unusual punishment in violation of the Eighth Amendment was, to the best of appellant's knowledge, unparalleled.

The trial judge was certainly not alone in his sentiment that appellant's confinement on death row as a pre-trial detainee was "shocking." As the judge remarked, he had never heard of such a situation in his many years of practicing criminal law and his time as a Circuit Court Judge. R. 1864, ll. 9 – 16. Unfortunately, the trial judge failed to act on his shock. Instead of taking the proper course of action by rescinding appellant's safekeeping status and returning appellant to the county jail, the judge allowed the state to exploit this illegality by using appellant's disciplinary infractions while he was illegally incarcerated in a maximum-security prison against him.

The trial judge erred because he failed to exclude appellant's disciplinary infractions which were used by the state to urge the jury to sentence appellant to death. Appellant's initial transfer from J. Reuben Long Detention Center into SCDC was not a mere "regulatory restraint" as referred to in Wolfish, *supra*. Appellant was moved to SCDC based primarily on the conduct of his co-defendants which included a letter between the two of them regarding an escape attempt. The director of the jail acknowledged the lack of evidence that appellant was involved with this escape plan. Furthermore, appellant's alleged involvement in a "straight up fight" with two other inmates was woefully insufficient to support him being placed in a maximum-security prison for over three years.

The state further failed to follow the proper procedures for continuing to renew appellant's safekeeping status every ninety days by never notifying defense counsel and never conducting a mental health evaluation or medical evaluation. Presumably, the purpose of the notice requirement is to ensure that a pre-trial detainee who is housed in SCDC is afforded his due process rights to be free from punishment. The requirement for a mental health evaluation is to ensure that a mentally ill defendant is not improperly housed in a maximum-security prison when he has not been convicted of any crime.

In this case, 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 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).

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 fair 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.

Relevant facts

The state continued its assault on appellant's conduct in maximum security prison as a pre-trial detainee by calling Captain Thomas Commander. R. 1907, l. 19 – 1908, l. 3. Captain Commander had been a Department of Corrections employee for over twenty-three years. Commander testified on September 20, 2018, while at Lee Correctional Institution, that appellant and another inmate “refused to allow the food flaps to be secured, so what we did, we went around and secured all the food flaps except the ones who refused.” Commander testified that appellant then “threw a homemade weapon, a knife, homemade knife, at me striking me on the leg and also a radio, a crank radio striking me on the leg.” Commander said when the correctional officers tried to restrain appellant, appellant broke his window out and told Commander: “If you don't ship me, I'm going to kill one of your officers...” R. 1908, l. 15 – 1909, l. 13.

At this point, defense counsel objected and moved for a mistrial. The jury was removed, and the judge denied the mistrial motion. The judge reasoned that Commander's testimony was limited -- it went to “a direct statement by Mr. Jenkins, according to Captain Commander, where Mr. Jenkins stated, If you don't ship me, I'm going to kill one of your officers.” The judge said he understood defense counsel's mistrial motion but he maintained: “This is completely different

than SCDC made an executive decision to put him on death row based upon his conduct [the ongoing argument about appellant ever being a “safekeeper”] while he was housed in Lee . . .” R. 1908, l. 15 – 1911, l. 21.

When the jury reentered, the solicitor concluded by having Commander testify he considered appellant’s actions a danger to his safety. R. 1913, ll.3-6.

On cross-examination, Commander confirmed he had been at Lee Correctional Institution for twenty-three years and two months. Commander acknowledged they had had “pretty bad riots” at Lee. R. 1912, ll. 11-18. At this point, Deputy Solicitor Hixson objected to testimony in front of the jury about Lee Correctional, which he claimed was not related to appellant. The jury was then excused from the courtroom. R. 1912, l. 18 – 1913, l. 5.

The following occurred between the judge and defense counsel Ralph Wilson:

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 the -- 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 -- 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 -- 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 mean, 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 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: None [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.

R. 1913, l. 6 – 1915, l. 8. (emphasis added).

The judge then told defense counsel to proffer the prison riot evidence. Captain Commander then testified that seven peoples were killed during the 2011 prison riot at Lee Correctional Institution. The seven that were killed were all inmates. R. 1916, l. 9 – 1917, l. 7.

Appellant was housed at Lee as a “safekeeper” during the riot. Commander did not claim that appellant was involved in the riot in any way or that he was to blame in any manner for the riot. R. 1916, l. 24 – 1917, l. 13.

Commander said he was in essence “the warden of this building” when the incident about the food flap occurred. Commander admitted he was not present when appellant was sprayed with mace during this incident. Commander, however, admitted he was the one that ordered “the

mace” to be sprayed. R. 1918, l. 11 – 1920, l. 15. Commander offered that he was the “caretaker” for prison staff and “I dealt with Jenkins on more than one occasion.” R. 1920, l. 6 – 1921, l. 16. Commander admitted that Lee Correctional Institution had the reputation as the most dangerous prison in South Carolina “[f]rom people on the outside, yes,” but he claimed, “But from the inside, no.” R. 1921, ll. 17-22.

Deputy solicitor Hixson then claimed that this “condition of confinement type of things” about how dangerous Lee Correctional Institution was at the time was improper, and irrelevant evidence. Defense counsel continued to argue that the proffered prison riot evidence was relevant. However, the judge ruled that the evidence regarding the prison riots at Lee and the fact seven inmates were killed was not relevant. R. 1922, l. 10 – 1923, l. 23.

Defense counsel repeated that appellant had been placed into maximum security prison by a safekeeping order, and that “*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, that led to these violations.” (emphasis added). Defense counsel wanted to show what a bad, out-of-control prison environment Lee Correctional Institute was for the jury when appellant was placed there, and how appellant had to deal with these highly unusual problems. R. 1923, l. 2 – 1924, l. 21.

The judge then reasoned and ruled that because appellant was not involved in the riots at Lee Correctional Institution, that evidence about Lee being a bad prison environment was not relevant. R. 1924, l. 14 – 1926, l. 24.

Commander then briefly testified in the presence of the jury that appellant's sheets were taken from him because of his "negative behavior," and Commander acknowledged that appellant was seeing a psychiatrist and a physician at the time of his confinement in Lee. R. 1927 l. 5 – 1928, l. 12. The solicitor had no further questions of Commander. R. 1928, ll. 14-16.

Standard of Review

The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Hatcher, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) ("quoting State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id.; see also State v. Brockmeyer, 406 S.C. 324, 340, 751 S.E.2d 645, 653 (2013).

"It is firmly established that otherwise inadmissible evidence may be properly admitted when opposing counsel opens the door to that evidence." State v. Page, 378 S.C. 476, 482-83, 663 S.E.2d 357, 360 (Ct.App. 2008). Testimony in response must be "proportional and confined to the topics to which counsel had opened the door." Bowman v. State, 422 S.C. 19, 42, 809 S.E.2d 232, 244 (2018)

Discussion

As seen above, defense counsel showed the trial court that appellant was illegally put in maximum security prison and on death row as a "safekeeper." Appellant was not an escape risk, and he certainly was not moved out of J. Reuben Long Detention Center in Conway as a result of threats from a lynch mob or any other such threat for his personal safety.

Once appellant was made a "safekeeper," it was undisputed that the prosecution did not follow Department of Corrections' regulations to have appellant reevaluated every ninety days

after notice to defense counsel. Defense counsel correctly argued he had to respond to the state's evidence of appellant's misconduct in prison under these circumstances. The state was allowed to profit from its illegality in putting appellant in maximum security prison as a pre-trial detainee, who was convicted of nothing, and then to exploit that illegality by placing evidence of appellant's misconduct in prison before the jury to urge his execution as the proper punishment.

Appellant, given these highly unusual circumstances, should have been allowed, in fair response, to introduce evidence that while he was in Lee County Correctional Institution, there was a prison riot, in which seven inmates were killed. This evidence would have shown the sentencing jury this dark reality of the environment that appellant, as a pre-trial detainee, convicted of nothing, had to deal with. It would have allowed the jury to see the very dangerous daily environment that appellant dealt with, and it would have placed his inability to cope into some context and perspective for the jury.

The situation here is analogous to what was before the United States Supreme Court in Skipper v. South Carolina, 476 U.S. 1 (1986). In State v. Skipper, 285 S.C. 42, 328 S.E.2d 58, 61-62 (1985), this Court had held the testimony of the defendant's future adaptability to prison through the testimony of his former wife, his mother and his own testimony pertaining to Skipper's behavior during the seven months he spent in prison awaiting trial was irrelevant. In accordance with this Court's precedent of State v. Koon, 278 S.C. 528, 298 S.E.2d 769 (1982), at the time such evidence of a defendant's ability to adjust to prison was not relevant. However, the prosecutor was able to claim that Skipper would pose a disciplinary problem if sentenced to prison based upon his prior misconduct in jail. However, Skipper was not allowed to introduce evidence he could adjust to prison.

The Supreme Court reversed this Court's holding that evidence of Skipper's future adaptability to prison -- through evidence of his good behavior in prison -- was inadmissible. Basing its holding in Eddings v. Oklahoma, 455 U.S. 104 (1982), and Lockett v. Ohio, 438 U.S. 586 (1978), the United States Supreme Court reasoned this evidence of prison adaptability was admissible since the sentencing jurors could not be precluded from considering, as a mitigating factor, any evidence of a defendant's character or record or any of the circumstances of his defense that the defendant proffered as a basis for a sentence of less than death. Skipper v. South Carolina, 476 U.S. 1, 8-9 (1986).

Similarly, as a due process matter, the Supreme Court held in Kelly v. South Carolina, 534 U.S. 246 (2002) that the defendant's future dangerousness was put at issue by the state during Kelly's sentencing hearing through the introduction of evidence of his prison misbehavior. This triggered the defendant's due process right to a jury instruction on his parole ineligibility. Kelly's dangerous behavior in prison warranted the jury instruction that life meant life without parole as a due process matter. See, also, Shafer v. South Carolina, 532 U.S. 36 (2001), and Simmons v. South Carolina, 512 U.S. 154 (1994), wherein the United States Supreme Court also held that evidence of the defendant's future dangerousness led to his due process right to have a jury instruction that life imprisonment carried with it no possibility of parole.

In this case defense counsel correctly argued that the state's admission of appellant's misconduct in SCDC while he was incorrectly or illegally confined as a "safekeeper," and while he was illegally, continuously held in prison as a "safekeeper" -- without the proper notice to defense counsel, and without his continuing right to a hearing being observed -- made this

evidence on the dangerousness of maximum security prisons and the Lee County prison riot evidence, in which seven inmates were killed, admissible in fair response.

The state's prison misconduct evidence under these circumstances opened the door, at a minimum, to this prison dangerousness evidence. Appellant submits that under the highly unusual facts of this case regarding appellant being a "safekeeper" as a pre-trial detainee that this prison riot Lee Correctional evidence was admissible. However, in the alternative, a party may introduce otherwise inadmissible evidence in rebuttal when an opponent introduces evidence as to a particular fact or transaction. State v. Young, 364 S.C. 476, 486-87, 613 S.E.2d 386, 391-92 (Ct. App. 2005).¹⁴

"It is firmly established that otherwise inadmissible evidence may be properly admitted when opposing counsel opens the door to that evidence." State v. Page, 378 S.C. 476, 482-83, 663 S.E.2d 357, 360 (Ct.App. 2008). Testimony in response must be "proportional and confined to the topics to which counsel had opened the door." Bowman v. State, 422 S.C. 19, 42, 809 S.E.2d 232, 244 (2018). The judge erred by excluding this evidence of the Lee County prison riot in response to the state's evidence of appellant's maladjustment to maximum security prison as a pre-trial detainee. The jurors had to understand the highly unusual environment in maximum security prison given the unusual circumstances under which appellant, as a pre-trial detainee, was placed there.

Prison adaptability

It is most important to note, that appellant was not advocating, and is not advocating herein, for the admission of general prison conditions evidence, which this Court has already

¹⁴ This Court held in State v. Young, 378 S.C. 101, 106, 661 S.E.2d 387, 389 (2008), that Young did not open the door to evidence of his prior CDV conviction and his CSC conviction by testifying that he "hated to see woman cry."

held is inadmissible. See State v. Burkhardt, 371 S.C. 482, 640 S.E.2d 450 (2007); State v. Bowman, 366 S.C. 485, 623 S.E.2d 378 (2005). The defendant loses when the “prison is not such a bad place argument” is made during the penalty stage. However, the Lee Correctional riot evidence here was admissible in fair response since the jury had no way of understanding appellant’s predicament given the conditions surrounding him as a pre-trial detainee absent that evidence.

Dr. Craig Haney, who is a social psychologist and distinguished professor at the University of California, Santa Cruz, has studied the psychological impact of prison life on individuals extensively. In his paper, The Psychological Impact of Incarceration: Implications for Post-prison adjustment, Haney examined “the unique set of psychological changes that many prisoners are forced to undergo in order to survive the prison experience.”

Specifically, Haney recognized that because prisons are often dangerous places, inmates will often adopt “a tough convict veneer” in order to avoid being taken advantage of by other inmates. This is the result of many inmates believing that unless they are perceived by their fellow inmates as having the capability to inflict violence on others, they will be exploited and dominated by the other inmates during their sentence. Id. at 81.

Often inmates feel compelled to embrace the informal norms of prison life in order to cope with living in a prison. Because prison culture discourages weakness, inmates must adopt a tougher persona to avoid being preyed on by other inmates. Haney wrote:

In extreme cases, the failure to exploit weakness is itself a sign of weakness and seen as an invitation for exploitation. In men’s prisons it may promote a kind of hypermasculinity in which force and domination are glorified as essential components of personal identity.

Id. at 83. Haney also noted that inmates who are subjected to “supermax” incarceration are even more vulnerable to the psychological trauma associated with imprisonment than other inmates

who live in “general population.” Id. at 85. Haney wrote that long periods of confinement in supermax facilities can lead to many of the following problems:

[A]n impaired sense of identity; hypersensitivity to stimuli; cognitive dysfunction . . . ; irritability, anger, aggression, and/or rage; other-directed violence, such as stabbings, attacks on staff, property destruction, and collective violence; lethargy, helplessness and hopelessness; chronic depression; self-mutilation and/or suicidal ideation, impulses, and behavior; anxiety and panic attacks; emotional breakdowns; and/or loss of control; hallucinations, psychosis and/or paranoia; overall deterioration of mental and physical health.

Id. at 85-86.

Dr. Haney has previously examined numerous studies on the effects of solitary confinement on prisoners and found that inmates who spent extended periods of time in isolation were more likely to have “psychological reactions consistent with PTSD, including suspicion, distrust, forceful and self-seeking behavior, inhibition, anxiety, submissiveness, depression, lack of self-insight, and higher levels of hostility.” Craig Haney & Mona Lynch, Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement, 23 N.Y.U. Rev. L. & Soc. Change 477, 521 (1997). Furthermore, Dr. Haney noted that in one of the most extensive studies done on prisoners in solitary confinement, one third of the inmates studied exhibited “aggressive fantasies (specifically aimed at guards) and impulse control problems.” Id.

In fact, a study done in two federal prisons found that the highest incidence of inmate on guard assaults occurred in the “detention/high security housing units.” Id. at 527. That study found that a staggering seventy-one percent of all the assaults on prison staff occurred in the “detention unit” which housed less than ten percent of the inmates. Id. Dr. Haney ultimately concluded that it was improbable that the higher incidence of disciplinary problems in high security units within prisons was a result of the inmates simply being the “worst of the worst.” Id. at 529. Instead, Dr. Haney wrote:

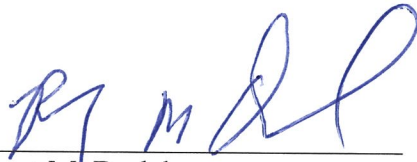
A comprehensive assessment of the extensive clinical data collected on this issue, including the nature and extent of the psychic indices of stress employed, the unique and consistent psychopathological reactions that have been found, and the harmful secondary effects that have been documented in virtually every study on the question, point to the damaging psychological effects of punitive, isolated prison housing itself.

Id.

Appellant here only wanted a minimum of fair response through evidence of the Lee Correctional Institution riot in which seven inmates were murdered while appellant was being housed there as a pre-trial detainee. This was a very unusual case, and the evidence of the dangerousness of the maximum-security Lee County prison environment appellant was forced to adapt to – in response to the state’s evidence of his maladjustment to prison – would not have gone further. It was very limited in scope in fair response after the state opened the door to it. Appellant should be granted a new sentencing trial due to the erroneous exclusion of this admissible evidence. See Skipper v. South Carolina; Simmons v. South Carolina; Shafer v. South Carolina; Kelly v. South Carolina; State v. Page, 378 S.C. 476, 482-83, 663 S.E.2d 357, 360 (Ct.App. 2008).

CONCLUSION

By reason of foregoing arguments 1, 4, and 5, appellant's conviction should be reversed, and this case remanded to the Horry County Court of General Sessions for a new trial. In the alternative, by reason of arguments 2, 3, 6, and 7, appellant's death sentence should be reversed, and this case remanded to the Horry County Court of General Sessions for a new sentencing trial.



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ATTORNEYS FOR APPELLANT

This 14th day of May, 2021.

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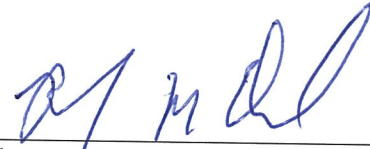
May 14 2021

CERTIFICATE OF COUNSEL

S.C. SUPREME COURT

The undersigned certifies that to the best of my ability this Final 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."

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