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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of General Sessions

Clifton Newman, Circuit Court Judge

Appellate Case No. 2018-001852

Opinion No. 2021-UP-259

The State of South Carolina,

Respondent,

v.

James Kester,

Appellant.

PETITION FOR REHEARING

Appellant James Kester respectfully petitions for rehearing pursuant to Rule 221(a), SCACR, on the basis that this Court overlooked and misapprehended material facts and principles of law in its unpublished per curiam opinion affirming Appellant's convictions and sentences on July 7, 2021. *State v. Kester*, 2021-UP-259 (S.C. Ct. App. filed July 7, 2021). Specifically, Appellant is requesting that this Court rehear all five issues raised on direct appeal because the facts presented in this case are distinguishable from the case law cited in the opinion.

I. *Competency to Stand Trial Evaluation was Reasonable and Necessary Based on the Insufficient Colloquy with Appellant and Inadequate Blair Hearing.*

The Trial Court erroneously failed to order a competency to stand trial evaluation or conduct an adequate *Blair* hearing to determine Appellant's competency to stand trial before granting Appellant's request for self-representation despite Appellant's "irrational behavior" and

the Court's failure to review the private psychiatric evaluation. (R. 7, l. 25 – 8, l. 10). *See In re Antonio H.*, 319 S.C. 395, 399, 461 S.E.2d 825, 827 (Ct. App. 1995); *State v. Blair*, 275 S.C. 529, 532-33, 273 S.E.2d 536, 537 (1981); *see generally Pate v. Robinson*, 383 U.S. 375 (1966) (finding when evidence of a defendant's mental deficiencies raise doubt as to his competence, due process requires the judge to order a competency hearing).

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

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

(R. 26, l. 12 – 27, l. 13). The Trial Court previously noted the following question regarding the procedure for determining whether Appellant was mentally ill:

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

(R. 25, ll. 20-25).

Furthermore, the Trial Court also failed to ask any additional questions or conduct any

colloquy regarding the private evaluation. (R. 8, ll. 2-8). Without knowing more information about Appellant's mental health status, the Trial Court and this Court were unable to properly determine whether Appellant was competent to stand trial. The Trial Court also conducted an insufficient colloquy with Appellant regarding his decision to represent himself. *See In re Christopher H*, 359 S.C. 161, 596 S.E.2d 500 (Ct. App. 2004). Therefore, the Trial Court erred in failing to order a competency to stand trial evaluation when it was reasonable and necessary based on the insufficient colloquy and an inadequate *Blair* hearing.

II. *Appellant Did Not Comprehend the Dangers of Self-Representation*

Appellant did not comprehend the dangers of self-representation based on his responses to the Trial Court's questions at the pre-trial hearing and the inadequate colloquy with the Trial Court. *See Gardner v. State*, 351 S.C. 407, 412-13, 570 S.E.2d 184, 186-87 (2002); *see generally United States v. Singleton*, 107 F.3d 1091, 1097 (4th Cir. 1997) (finding appellate courts must consider the defendant's testimony, history, and the circumstances of his decision, as presented to the circuit judge at the time the defendant made his request). Specifically, the Trial Court failed to address Appellant's physical and apparent mental health problems, his lack of legal knowledge, and his *pro forma* answers to *pro forma* questions. (R. 9, l. 4 – 10, l. 12; R. 13, ll. 2-15; R. 16, ll. 3-7; R. 17, ll. 8-13; R. 19, ll. 8-16). *See Gardner*, 351 S.C. at 412-13, 570 S.E.2d at 186-87. The Trial Court also failed to follow the procedure set forth in the advisement of right to self-representation form provided by our Supreme Court titled Faretta Warnings, SCCA 684 (1/14) (found at https://www.sccourts.org/forms/pdf/-SCCA684.pdf).

Notably, Appellant informed the Trial Court regarding his mental and physical health and decision to proceed *pro se*:

> With all that's going on, I'm worried I left out something while they were doing this to my daughter. You said had I been under any

> stress, and I should have said yes. I lost my left eye due to this and I've been trying to get them to get those records that they been telling me a year that they did and that is another thing. Like I said, they've [Defense Counsel] been negligent and that's why I had to do this.

(R. 27, l. 20 – 28, l. 3).

Furthermore, there is also no evidence that Appellant attempted to manipulate the proceedings, as his sole basis for requesting to proceed *pro se* was his belief that retained counsel was providing ineffective assistance of counsel. *See generally McMann v. Richardson*, 397 U.S. 759 (1970) (finding the right to counsel includes the right to effective assistance of counsel). Therefore, the Trial Court erred in finding Appellant knowingly, intelligently, and voluntarily waived his right to counsel. *See Gardner*, 351 S.C. at 412-13, 570 S.E.2d at 186-87.

III. *Appellant Detrimentally Relied on the Trial Court's Erroneous and Prejudicial Confirmation Regarding his number of Available Peremptory Strikes.*

Appellant argued to the Trial Court, "*Your Honor, I might not have struck one of the first for cause thinking I had ten . . . the first couple of ones I may not have struck if I knew I only had five [and] [s]ince I've only got one more, you can seat the juror.*" (R. 84, ll. 9-13) (emphasis added). Appellant exhausted his final strike on juror number 176, David McMahan, who knew, John Montgomery, the former Dean at the University of South Carolina School of Law. (R. 86, l. 1 – 87, l. 4). It is fundamentally unfair that Appellant was prejudiced by the Trial Court's erroneous confirmation that he had ten peremptory strikes prior to jury selection, thereby denying his right to intelligently exercise his peremptory strikes (which is akin to a structural error where prejudice is presumed). Therefore, the Trial Court erred in advising Appellant that he had ten peremptory strikes prior to jury selection because Appellant detrimentally relied on this advice and struck a potential juror before the Court informed Appellant that he only had five strikes and could not intelligently use his peremptory strikes. *See* U.S. Const. Amend. V and VI.

IV. *Unconstitutionally Coercive Allen Charge to the Jury*

The Trial Court instructed the jury:

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

(R. 384, ll. 3-10) (emphasis added). *See State v. Williams,* 386 S.C. 503, 690 S.E.2d 62, n.7 (2010) ("caution[ing] trial judges against using the following language: 'with the hope that you can arrive at a verdict.' Because jurors are not required to reach a verdict after expressing that they are deadlocked, we believe this language could potentially be construed as being coercive."). The Trial Court's response to the jury after rendering their verdict is in direct contradiction with his prior jury instruction: *Compare* "there's no reason for me to believe . . . that more or clearer evidence will be produced on one side or the other" *with* "considering the evidence presented and perhaps in some of your minds a lack of clarity as to what was going on with Mr. Kester there . . ." (R. 384, ll. 3-10; R. 395, ll. 4-6). Therefore, the Trial Court erred in refusing to grant a mistrial after the Court provided an unconstitutionally coercive *Allen*[1] charge to the jury when viewed in its context and under all the circumstances. *See Williams,* 386 S.C. 503, 690 S.E.2d 62, n.7.

V. *Aggregate Sentence is Grossly Disproportionate Constituting Cruel and Unusual Punishment Based on Comparative Sentences and as a De Facto Life Sentence.*

When comparing Appellant's case (i.e., the convictions for assault and battery, first degree, and the victim's injuries) with more serious cases (e.g., convictions for murder; attempted murder, assault and battery of a high and aggravated nature, felony DUI, resulting in death or great bodily injury, etc…), the sentence imposed by the Trial Court is grossly disproportionate and serves as a *de facto* life sentence. *See State v. Harrison*, 402 S.C. 288, 299-300, 741 S.E.2d 727, 733 (2013);

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[1] *Allen v. United States*, 164 U.S. 492 (1896).

see also S.C. Code § 19-1-150 (2019) ("When necessary, in a civil action or other litigation, to establish the life expectancy of a person from any period in his life, whether he is living at the time or not, the table below must be received in all courts and by all persons having power to determine litigation as evidence, along with other evidence as to his health, constitution, and habits, of the life expectancy of the person.").

Furthermore, the rationale applied to Section 17-25-50 of the South Carolina Code of Laws should apply in this case because Appellant is not a repeat offender, the crimes occurred at the same time, and he should not receive a *de facto* life sentence as punishment. *Cf.* S.C. Code § 17-25-50 (2019) (requiring the sentencing court to "treat as one offense any number of offenses which have been committed at times so closely connected in point of time that they may be considered as one offense."); *see also State v. Gordon*, 356 S.C. 143, 155 588 S.E.2d 105, 111 n.12 (2003) (holding S.C. Code "§ 17-25-45 and § 17-25-50 must be construed together in determining whether crimes committed at points close in time qualify for a recidivist sentence" and noting "this does not mean Gordon is not subject to separate sentences for these offenses, merely that he is not subject to a recidivist LWOP sentence as a result of his second trafficking conviction."). Therefore, the Trial Court erred in imposing consecutive sentences that amount to a *de facto* life sentence when the grossly disproportionate aggregate sentence is cruel and unusual punishment based on comparative sentences and closely connected offenses. *See* U.S. CONST. amend. VIII.

[Conclusion and Signature Page to Follow]

CONCLUSION

Based on the forgoing reasons, Appellant respectfully requests that this Court grant the petition to rehear this case, reverse his convictions, and remand to the Richland County Court of General Sessions for a new trial (based on Issues II, III, IV, and V); or if necessary, remand to the Richland County Court of General Sessions for a hearing to determine Appellant's competency to stand trial (based on Issue I).

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CERTIFICATE OF SERVICE

The undersigned Counsel certifies that a true copy of the Petition for Rehearing has been served upon Joshua Edwards, Esquire, via email and by depositing a true and correct copy of the same via first-class mail, postage prepaid to the S.C. Attorney General's Office, P.O. Box 11549, Columbia, SC 29211, this 22nd day of July, 2021.

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SUBSCRIBED AND SWORN TO before me
this 22nd day of July, 2021.

Courtney Powers (L.S.)
Notary Public for South Carolina
My Commission Expires: May 2, 2027.

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The Honorable Jenny A. Kitchings
Clerk of Court, South Carolina Court of Appeals
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Columbia, SC 29211

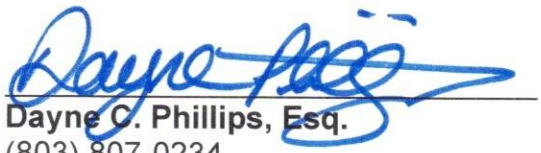
Re: **State v. James Kester**
PETITION FOR REHEARING
Appellate Case No.: **2018-001852**

Dear Ms. Kitchings:

I have enclosed the original Petition for Rehearing in the above-referenced case, along with a Certificate of Service for filing.

Thank you for your assistance with filing these documents. If you have any questions or concerns, please do not hesitate to contact me.

Sincerely,



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Enclosure (noted)
cc: **James Kester**
Joshua Edwards, Esq.