THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of General Sessions

Clifton Newman, Circuit Court Judge

Appellate Case No. 2021-001226

Opinion No. 2021-UP-259 (S.C. Ct. App. filed July 7, 2021)

The State of South Carolina,

Respondent,

v.

James Kester,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the South Carolina Court of Appeals on October 1, 2021. *See* (App. 572).

QUESTIONS PRESENTED

I. Did the Court of Appeals err in affirming the Trial Court's ruling that Petitioner waived his right to counsel by failing to order a competency to stand trial evaluation before granting his request for self-representation based on Petitioner's colloquy with the Trial Court?

II. Did the Court of Appeals err in affirming the Trial Court's ruling that Petitioner waived his right to counsel when he did not comprehend the dangers of self-representation?

III. Did the Court of Appeals err in affirming the Trial Court's incorrect statement to Petitioner prior to jury selection that he had ten peremptory strikes when Petitioner detrimentally relied on this information and struck a potential juror before the Trial Court informed him that only had five strikes?

IV. Did the Court of Appeals err in affirming the Trial Court's refusal to grant a mistrial when the Trial Court provided an unconstitutionally coercive *Allen* charge to the jury when viewed in its context and under all the circumstances?

V. Did the Court of Appeals err in affirming the Trial Court's imposition of consecutive sentences that constituted a *de facto* life sentence when the grossly disproportionate aggregate sentence is cruel and unusual punishment based on comparative sentences and closely connected offenses?

STATEMENT OF THE CASE

A. *Procedural History*

On September 13, 2017, the Richland County Grand Jury issued indictments against Petitioner James Kester for twelve counts of Attempted Murder. (R. 451 – 468).

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

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

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

On October 12, 2018, the Trial Court sentenced Petitioner to ten (10) years imprisonment for each conviction of Assault and Battery, First Degree, and thirty (30) days imprisonment on the conviction for Assault and Battery, Third Degree. (R. 439, lines 2-23). The Trial Court ordered Petitioner to serve the sentences consecutively. (R. 439, lines 24-25).

On October 17, 2018, standby counsel timely filed a Notice of Appeal in the South Carolina Court of Appeals. The State filed its Final Brief of Respondent on October 2, 2019. (App. 531 – 558). Petitioner filed its Final Brief of Appellant on October 4, 2019. (App. 484 – 530).

On July 7, 2021, the South Carolina Court of Appeals affirmed Petitioner's convictions and sentences. *State v. Kester*, Op. No. 2021-UP-259 (S.C. Ct. App. filed July 7, 2021). (App. 559 – 563). Petitioner filed a petition for rehearing on July 22, 2021. App. (564 – 571). The Court of Appeals issued an Order denying the petition for rehearing on October 1, 2021. (App. 572).

Petitioner seeks a writ of certiorari to review the Court of Appeals' decision.

B. *Background*

The State's theory of the case: Petitioner intentionally struck twelve people with his car at a cemetery. Specifically, the State sought to prove that Petitioner went to the burial service because of his deceased daughter's prior involvement with the South Carolina Department of Mental Health (SCDMH), and the funeral's connection to a woman who had worked at the SCDMH. Petitioner consistently maintained that he "blacked out" and did not intend to hurt anyone with his car, essentially arguing the defense of accident.

C. *Waiver of Right to Counsel*

On October 4, 2018, Petitioner appeared before the Trial Court for a pre-trial hearing with his attorneys, John Delgado and Bill Nettles. (R. 1.) Assistant Solicitor Eaton informed the Trial Court that "[Petitioner] is first up next week on twelve counts of attempted murder from July 2017" and that Petitioner "intends to represent himself[.]" (R. 4, lines 6-11). Defense Counsel Delgado acknowledged their representation of Petitioner: "We are counsel in this case, and we do think it would be a mistake" for Petitioner to represent himself. R. 4, ll. 20-21. Delgado further explained, "*We know his case well enough that we'd say he needs counsel* and we'd like him to stay with us." R. 5, lines 3-4 (emphasis added).

In response to the Trial Court's questions, Petitioner maintained that he wanted to represent himself and that his current lawyers could remain as stand-by counsel. (R. 5, line 22 – 6, line 14).

Petitioner informed the Trial Court that he was sixty-six years old, retired/unemployed, and had studied "three years of college at the University of South Carolina." (R. 6, lines 15-24). Petitioner also told the Trial Court that he had "several different jobs" during his life: Landscaping, Allen Chemical Company, caretaker for his mother, and "took care of my daughter [for] about twenty years because she got ruined by the Department of Mental Health." (R. 6, line 22 – 7, line 14).

Petitioner further maintained that he had never been treated for alcohol, drugs, or mental illness. (R. 7, lines 15-24; R. 8, lines 12-18). Assistant Solicitor Eaton interjected, "In this case *there was a retained psychiatrist*, Your Honor." (R. 7, line 25 – 8, line 1) (emphasis added). The Trial Court then asked Defense Counsel, "Okay, and what was his finding, Mr. Delgado?" Delgado replied, "[Petitioner] was competent to give testimony, competent to stand trial." R. 8, ll. 2-8. The Trial Court asked Petitioner if he agreed with Delgado's statement about the psychiatrist's findings, and he responded, "Yes, sir." (R. 8, lines 9-10). Petitioner also maintained that he fully understood and comprehended the nature of the hearing. (R. 8, lines 19-21). The Trial Court further explored, "Are you aware of any physical, any emotional or nervous problems, or anything that might affect your ability to understand what we are assessing here today, sir?" and Petitioner replied, "I understand completely." (R. 8, line 22 – 9, line 1).

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

> *No, Sir. I had one small misdemeanor and that's all.* That was 1990 . . . For some reason, the police arrested me and charged me with four things and I defended myself, and they stacked the charges so much that I - - I was acquitted on two of them and two I was not. I

think I had three weekends in jail and that was the extent of it.

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

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

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

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

(R. 13, lines 2-15) (emphasis added). The Trial Court noted Defense Counsels' experience as

criminal defense lawyers and informed Petitioner that hybrid counsel is not allowed: "You will be on your own in trying your case except for being able to consult with [Defense Counsel]." (R. 15, line 25 – 16, line 1).

The Trial Court continued with the colloquy, "It may be that you are familiar with the rules of criminal procedure" and Petitioner interjected, "*I'm not too familiar with that.*" (R. 16, lines 3-7) (emphasis added). The Trial Court then asked, "Are you familiar with the rules of evidence?" Petitioner replied, "The rules of evidence in my case would be - - I'm pretty sure I know that, yes, sir." (R. 16, line 8-10). The Trial Court further questioned Petitioner about "hearsay" and the knowledge required to understand the rules of evidence. (R. 16, line 19 – 17, line 7). Petitioner responded simply, "*Well, I may not be that familiar with it but I know what it is.*" (R. 17, lines 8-9) (emphasis added). The Trial Court asked, "Do you have any motions that you plan to make concerning anything?", and Petitioner stated, "*I might need a little help or something about that.*" (R. 17, lines 10-13) (emphasis added).

The Trial Court proceeded to explain that Petitioner had the right to decide whether to testify, and if he did testify, the State could ask him questions. (R. 17, lines 17-25). The Trial Court continued questioning Petitioner, "Are you ready to go to trial on Monday?" In response, Petitioner stated:

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

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

The Trial Court reiterated that Petitioner had "highly skilled lawyers" who "have given good results to many clients". R. 23, ll. 1-4. In response, Petitioner stated that "I didn't see it with

me though. *Like I said, I'm playing catch up right now with some stuff they are giving me - - right now.*" (R. 23, lines 5-7) (emphasis added). The Trial Court asked Petitioner if he needed more time regarding the decision to represent himself, and Petitioner replied, "I've made up my mind, yes." R. 23, ll. 22-25.

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

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

(R. 24, line 23 – 25, line 8 (emphasis added). Petitioner also provided the following response to the Trial Court about his knowledge of the plea negotiations in his case:

> 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, line 12 – 27, line 13) (emphasis added).

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

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

(R. 27, line 20 – 28, line 3) (emphasis added). Petitioner reiterated, "Well, they rarely took my phone calls over all the time but two times. Maybe they will now, you know." (R. 28, lines 21-22). The Court ultimately ruled, "I am granting your motion to relieve them [Defense Counsel] and for you to proceed to represent yourself. Be sure to be ready to go on Monday at this point." (R. 29, lines 4-6). During the trial, Petitioner did not ask a majority of the witnesses any questions on cross-examination and made very few objections to the State's evidence.

During the sentencing hearing, Petitioner reiterated to the Trial Court: "*I've been under immense stress from my daughter just dying within a year and all I went through with her, with what they did to her.*" (R. 429, lines 1-3) (emphasis added). Petitioner further noted that he blacked out and did not intend for the incident to occur: "*I have PTSD. That's what I've had over the last twenty years.*" (R. 435, lines 17-18) (emphasis added). The Trial Court acknowledged Petitioner's mental health issue: "*If you needed some type of therapy, mental health for yourself or medication or whatever you might have needed, if you needed it, it would have been best for you to have taken that course rather than decide to plow into this group of people.*" (R. 437, lines 18-24) (emphasis added). Petitioner subsequently interjected, "*I think the people who did this to my daughter should be brought to justice. They poisoned her, they made malicious lies up about*

me." (R. 438, lines 16-18).

D. Remaining Facts

The remaining facts necessary for an understanding of the issues raised in this appeal are summarized within each issue section.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S RULING THAT PETITIONER WAIVED HIS RIGHT TO COUNSEL BY FAILING TO ORDER A COMPETENCY TO STAND TRIAL EVALUATION BEFORE GRANTING HIS REQUEST FOR SELF-REPRESENTATION BASED ON PETITIONER'S COLLOQUY WITH THE TRIAL COURT.

Due process prohibits the conviction of a person who is mentally incompetent. *See In re Antonio H.*, 319 S.C. 395, 399, 461 S.E.2d 825, 827 (Ct. App. 1995) (citing *Jeter v. State*, 308 S.C. 230, 417 S.E.2d 594 (1992) and *Pate v. Robinson*, 383 U.S. 375 (1966)). In *State v. Blair*, this Court held that a defendant's failure to request a competency hearing did not constitute a waiver of his right to a hearing where the defendant's sanity was the crucial issue. *See State v. Blair*, 275 S.C. 529, 532-33, 273 S.E.2d 536, 537 (1981). The *Blair* Court held that "[t]he standard for determining whether an accused is entitled to a competency to stand trial hearing has been set forth in a recent case interpreting *Pate v. Robinson.*" *Id.* Notably, the United States Supreme Court explained that "[t]he import of our decision in *Pate v. Robinson* is that evidence of a defendant's irrational behavior, his demeanor at trial and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but that even one of these factors, standing alone, may, in some circumstances, be sufficient." *Drope v. Missouri*, 420 U.S. 162, 180 (1975).

In *State v. Barnes*, this Court "decline[d] to impose a higher competency standard upon an individual who wishes to waive his right to an attorney and represent himself at trial than that required for the waiver of other fundamental constitutional rights afforded a criminal defendant, such as the right against compulsory self-incrimination; the right to trial by jury; and the right to confront one's accusers." *State v. Barnes*, 407 S.C. 27, 36, 753 S.E.2d 545, 550 (2014). Therefore, the *Barnes* Court held that one of the factors a presiding judge may have to address in deciding

whether a defendant has waived the right to counsel is whether the defendant is competent to stand trial, and "[a] defendant who is competent to stand trial is also competent to waive these fundamental rights and plead guilty." *Id.* (citing *Sims v. State*, 313 S.C. 420, 438 S.E.2d 253 (1993)).

The test for determining whether a criminal defendant is competent to stand trial is "whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as a factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402 (1960). Section 44-23-410(A) of the South Carolina Code of Laws provides, in pertinent part: "Whenever a [trial court] has reason to believe that a person on trial before him, charged with the commission of a criminal offense . . . , is not fit to stand trial because the person lacks the capacity to understand the proceedings against him or to assist in his own defense as a result of a lack of mental capacity, the [court] shall . . . order [an evaluation] . . . ." *See Blair*, 275 S.C. 529, 273 S.E.2d 536 (interpreting the language of S.C. Code § 44-23-430 as mandatory, which provides that the court *shall* set a competency hearing after ordering an evaluation of defendant's competency under S.C. Code § 44-23-410)).

Discussion

In this case, the Court of Appeals erred in affirming the Trial Court's failure to order a competency to stand trial evaluation or conduct an adequate *Blair* hearing to determine Petitioner's competency to stand trial before granting his request for self-representation based on the following reasons: (1) Petitioner's responses during the colloquy with the Trial Court; and (2) the Trial Court's failure to obtain and review the private psychiatric evaluation; and (3) the Trial Court's inadequate colloquy with Defense Counsel regarding the private psychiatric evaluation. (R. 4, line 20 – 8, line 10). *See In re Antonio H.*, 319 S.C. at 399, 461 S.E.2d at 827; *Blair*, 275 S.C. at 532-

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

Petitioner's responses regarding the connection between his daughter and the SCDMH, along with the existence of a private competency to stand trial evaluation, necessitated more than the Trial Court simply asking for the result of the evaluation (i.e., required an evidentiary hearing). Specifically, the Trial Court failed to review any additional evidence (e.g., the private evaluation), ask any further questions (e.g., no inquiry into the information related to the private evaluation and Petitioner's mental health).

For example, Petitioner provided numerous non-responsive answers and references to his daughter and SCDMH. (R. 26, line 12 – 27, line 13). The Trial Court also asked the following question regarding the appropriate procedure for determining whether Petitioner was mentally ill, (R. 25, lines 20-25). Petitioner informed the Trial Court that he had been stressed, had a significant medical issue, and maintained Defense Counsel's negligence in preparing for trial is why he requested to represent himself. (R. 27, line 20 – 28, line 3).

After the verdict, Petitioner emphasized to the Trial Court: "*I've been under immense stress from my daughter just dying within a year and all I went through with her, with what they did to her.*" (R. 429, lines 1-3) (emphasis added). Petitioner informed the Trial Court that he had a long history of Post-Traumatic Stress Disorder (PTSD) when explaining that he blacked out and did not intend for the incident to occur: (R. 435, lines 17-18). In response, The Trial Court stated that Petitioner should have sought mental health treatment prior to the incident. (R. 437, lines 18-24).

The Trial Court erred in finding Petitioner knowingly, voluntarily, and intelligently waived his right to counsel because of the Court's failure to conduct an adequate evidentiary hearing

regarding Petitioner's competency to stand trial or inquire further about the private competency evaluation. (R. 8, lines 2-8; R. 29, lines 4-6). Without knowing more information about Petitioner's mental health status, the Trial Court and Court of Appeals were unable to properly determine whether Petitioner was competent to stand trial. Therefore, the Court of Appeals erred in affirming the Trial Court's ruling that Petitioner waived his right to counsel by failing to order a competency to stand trial evaluation before granting his request for self-representation based on Petitioner's colloquy with the Trial Court.

II. THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S RULING THAT PETITIONER WAIVED HIS RIGHT TO COUNSEL WHEN HE DID NOT COMPREHEND THE DANGERS OF SELF-REPRESENTATION.

In *Faretta v. California*, 422 U.S. 806, 819-21 (1975), the United States Supreme Court held that criminal defendants have a fundamental right to self-representation under the Sixth Amendment. *See* U.S. Const. Amend. VI. To invoke the right of self-representation, the defendant must clearly and unequivocally assert his desire to proceed *pro se* and such request must be made knowingly, intelligently, and voluntarily. *United States v. Frazier-El*, 204 F.3d 553, 558 (4th Cir. 2000). Where a defendant invokes his right of self-representation before trial, the only inquiry the circuit judge may undertake is that required by the *Faretta* opinion. *See State v. Barnes*, 407 S.C. 27, 35, 753 S.E.2d 545, 550 (2014). Thus, the only basis upon which a circuit judge may deny a defendant's pre-trial motion to proceed *pro se* is if the court determines the defendant has not knowingly, intelligently, and voluntarily waived his right to counsel. *State v. Reed*, 332 S.C. 35, 41, 503 S.E.2d 747, 750 (1998).

Whether a defendant has intelligently waived his right to counsel depends upon the particular facts and circumstances surrounding each case, including the background, experience, and conduct of the accused. *United States v. Singleton*, 107 F.3d 1091, 1097 (4th Cir. 1997). The United States Supreme Court has emphasized "the competence that is required of a defendant seeking to waive his right to counsel is the competence to *waive the right*, not the competence to represent himself." *Godinez*, 509 U.S. at 399 (emphasis in original). Notably, to establish a valid waiver of counsel, *Faretta* requires the accused be: (1) advised of his right to counsel; and (2) adequately warned of the dangers of self-representation. *See Prince*, 301 S.C. at 424, 392 S.E.2d at 463 (citing *Faretta v. California*, 422 U.S. at 819-21).

Furthermore, to determine if an accused has sufficient background to comprehend the dangers of self-representation, courts consider a variety of the following factors: (1) The accused's

age, educational background, and *physical and mental health*; (2) Whether the accused was previously involved in criminal trials; (3) Whether the accused knew the nature of the charge(s) and of the possible penalties; (4) Whether the accused was represented by counsel before trial and whether that attorney explained to him the dangers of self-representation; (5) Whether the accused was attempting to delay or manipulate the proceedings; (6) Whether the court appointed stand-by counsel; (7) Whether the accused knew he would be required to comply with the rules of procedure at trial; (8) Whether the accused knew of the legal challenges he could raise in defense to the charge(s) against him; (9) Whether the exchange between the accused and the court consisted merely of *pro forma* answers to *pro forma* questions; and (10) Whether the accused's waiver resulted from either coercion or mistreatment. *See Gardner v. State*, 351 S.C. 407, 412-13, 570 S.E.2d 184, 186-87 (2002) (emphasis added).

Discussion

In this case, Petitioner 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*, 351 S.C. at 412-13, 570 S.E.2d at 186-87; *see generally Singleton*, 107 F.3d at 1097 (finding appellate courts must consider the defendant's testimony, history, and the circumstances of his decision, as presented to the circuit judge at the time the defendant made his request). Specifically, the Trial Court failed to address Petitioner's physical and apparent mental health problems, his lack of legal knowledge, and his *pro forma* answers to *pro forma* questions. (R. 9, line 4 – 10, lines 12; R. 13, lines 2-15; R. 16, lines 3-7; R. 17, lines 8-13; R. 19, lines 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 this Court titled Faretta Warnings, SCCA 684 (1/14), located

on the South Carolina Judicial Branch's website (https://www.sccourts.org/forms/pdf/-SCCA684.pdf). Notably, Petitioner informed the Trial Court regarding his mental and physical health and decision to proceed *pro se*. (R. 27, line 20 – 28, line 3). There is also no evidence that Petitioner 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).

At the pre-trial hearing, Petitioner told the Trial Court that he "took care of my daughter [for] about twenty years because she got ruined by the Department of Mental Health." (R. 6, line 22 – 7, line 14). Petitioner also noted at various stages of the trial that he had problems with his eye and ability to hear. Petitioner admitted that he did not know much about the law and previously had one small misdemeanor. (R. 9, line 4 – 10, line 12). Petitioner also admitted that he was "not too familiar" with the rules of criminal procedure or hearsay. (R. 16, line 19 – 17, line 9). Petitioner also stated that he "might need a little help" with legal motions. (R. 17, lines 10-13). Petitioner further noted his lack of experience and knowledge of the State's case and provided more non-responsive statements regarding his daughter and SCDMH. (R. 24, line 23 – 25, line 8).

Based on Petitioner's responses to the Trial Court's questions at the pre-trial hearing and the inadequate colloquy with the Trial Court, the Trial Court erred in finding Petitioner knowingly, intelligently, and voluntarily waived his right to counsel. *See Gardner*, 351 S.C. at 412-13, 570 S.E.2d at 186-87. Therefore, the Court of Appeals err in affirming the Trial Court's ruling that Petitioner waived his right to counsel when he did not comprehend the dangers of self-representation.

III. THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S INCORRECT STATEMENT TO PETITIONER PRIOR TO JURY SELECTION THAT HE HAD TEN PEREMPTORY STRIKES WHEN PETITIONER DETRIMENTALLY RELIED ON THIS INFORMATION AND STRUCK A POTENTIAL JUROR BEFORE THE TRIAL COURT INFORMED HIM THAT HE ONLY HAD FIVE STRIKES.

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

Background

During the pre-trial hearing, Petitioner indicated that he would have ten peremptory strikes, and the Trial Court confirmed, "*you'll have ten.*" (R. 19, line 23 – 20, line 9) (emphasis added).

After Petitioner had struck a potential juror during jury selection, the Trial Court interjected, "*The strikes are actually five and five, not five and ten.*" (R. 77, line 4 – 78, line 3) (emphasis added). After Petitioner struck a second potential juror, the Trial Court reminded Petitioner that he had three strikes remaining. (R. 78, lines 22-25). Petitioner responded, "*I thought I had ten*", and the Trial Court admitted, "*Initially I did as well but not for attempted murder.*" (R. 79, lines 3-14) (emphasis added).

Petitioner subsequently argued to the Trial Court, "Your Honor, I might not have struck one of the first for cause thinking I had ten . . . t*he 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, lines 9-13) (emphasis added). Petitioner 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, line 1 – 87, line 4).

Discussion

In this case, Petitioner detrimentally relied on the Trial Court's erroneous and prejudicial confirmation regarding his number of available peremptory strikes. *See* U.S. Const. Amend. V and VI; *see also State v. Jones*, 343 S.C. 562, 541 S.E.2d 813 (2001) (finding "Petitioner reasonably relied upon the [court's] representation that [it] intended to give that charge to the jury. The decision to alter the charge, after the argument, was fundamentally unfair."). It is fundamentally unfair that Petitioner 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).

The Trial Court erred in advising Petitioner that he had ten peremptory strikes prior to jury selection because Petitioner detrimentally relied on this advice and struck a potential juror before the Court informed Petitioner that he only had five strikes and could not intelligently use his peremptory strikes. Therefore, the Court of Appeals erred in affirming the Trial Court's incorrect statement to Petitioner prior to jury selection that he had ten peremptory strikes when Petitioner detrimentally relied on this information and struck a potential juror before the Trial Court informed him that only had five strikes. *See* U.S. Const. Amend. V and VI.

IV. THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S REFUSAL TO GRANT A MISTRIAL WHEN THE TRIAL COURT PROVIDED AN UNCONSTITUTIONALLY COERCIVE *ALLEN* CHARGE TO THE JURY WHEN VIEWED IN ITS CONTEXT AND UNDER ALL CIRCUMSTANCES.

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

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

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

Id., 386 S.C. 503, 690 S.E.2d 62 (2010) n.7 (emphasis added); *see also Dawson v. State*, 352 S.C. 15, 20, 572 S.E.2d 445, 447 (2002) (stating an *Allen* charge cannot be unconstitutionally coercive,

"but must instead be even-handed, directing both the majority and the minority to consider the other's views").

Background

After deliberating for approximately four hours, the jury sent out a second note stating, "*We, the jury, have not come to a unanimous verdict concerning all twelve counts and at this point we represent a hung jury.*" (R. 380, lines 19-22) (emphasis added). Petitioner moved for a mistrial and objected to the Trial Court instructing the jury with an *Allen* charge. (R. 381, lines 6-14). The Trial Court then instructed the jury with an *Allen* charge. (R. 382, line 1 – 385, line 15). Notably, the Trial Court instructed the jury as follows: "*[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, lines 3-10). *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."). Petitioner renewed his objection. (R. 382, line 1 – 385, line 15). Approximately two hours later, the jury rendered their verdict. (R. 386, line 13 – 389, line 10).

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 Court of Appeals erred in affirming the Trial Court's refusal to grant a mistrial when the Trial 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.

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

V. THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S IMPOSITION OF CONSECUTIVE SENTENCES THAT CONSTITUTED A *DE FACTO* LIFE SENTENCE WHEN THE GROSSLY DISPROPORTIONATE AGGREGRATE SENTENCE IS CRUEL AND UNUSUAL PUNISHMENT BASED ON COMPARATIVE SENTENCES AND CLOSELY CONNECTED OFFENSES.

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

When comparing Petitioner'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); *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.").

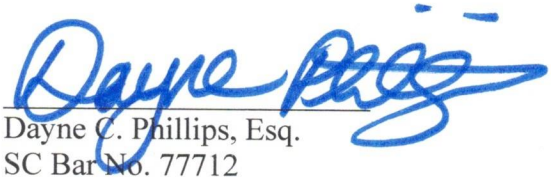
Furthermore, the rationale applied to Section 17-25-50 of the South Carolina Code of Laws should apply in this case because Petitioner is not a repeat offender, the crimes occurred at the same time, and he should not receive a *de facto* life sentence as punishment. *Cf.* S.C. Code § 17-

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 Court of Appeals erred in affirming the Trial Court's imposition of consecutive sentences that constituted 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

Based on the foregoing reasons, Petitioner respectfully requests the Court to grant the petition for writ of certiorari. Specifically, Petitioner asks the Court to reverse his convictions and sentences, 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 his competency to stand trial (based on Issue I).

Respectfully submitted,



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