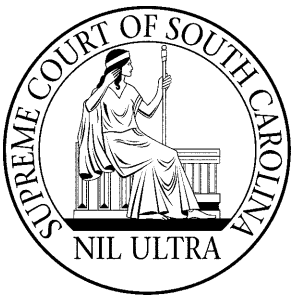

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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 44
October 16, 2013
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Steven Barnes, Appellant.

Appellate Case No. 2010-178247

Appeal from Edgefield County
R. Knox McMahon, Circuit Court Judge

Opinion No. 27322
Heard February 5, 2013 – Filed October 16, 2013

REVERSED

Elizabeth Anne Franklin-Best, of Blume Norris & Franklin-Best, LLC, and Chief Appellate Defender Robert Michael Dudek, both of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, Senior Assistant Attorney General Melody Jane Brown, all of Columbia, and Solicitor Donald V. Myers of Lexington, for Respondent.

JUSTICE PLEICONES: Appellant was convicted of kidnapping and murdering Samuel Sturrup (victim). The jury found two aggravating circumstances,

kidnapping[1] and physical torture,[2] and recommended a death sentence. The judge sentenced appellant to death for the murder, and imposed no sentence for the kidnapping. On appeal, appellant contends the trial court erred in permitting his attorney to call a defense psychiatrist to testify regarding appellant's right to represent himself and in denying his *Faretta*[3] request, in limiting *voir dire* and in qualifying Juror #203, and in refusing to dismiss the indictments because of the State's failure to comply with the Interstate Agreement on Detainers (IAD) Act.[4] We find the trial judge applied the incorrect competency standard in denying appellant's *Faretta* request and reverse.

FACTS

Appellant was approximately twenty-three years old and living in Augusta, Georgia, where he surrounded himself with high school students. Two of the high school boys, Richard Cave and Antonio (Tony) Griffin testified that on Labor Day 2001, appellant called them to meet him at his "green house" in Augusta. The boys were high school seniors, who enjoyed hanging out with appellant because, as Cave testified, appellant had money, girls, and cars. When Cave and Griffin arrived, they found victim already there, along with Charlene "China" Thatcher and appellant's younger half-brother William Harris.

Appellant accused victim of stealing appellant's money, and was beating the victim with his fists, a pole, and a shock absorber. China was also accused and hit, and Griffin obeyed appellant's order to beat victim. As the night progressed, Harris left and appellant called two South Carolina brothers, the Hunsbergers, to come to the green house in Augusta. After the Hunsbergers arrived, everyone left for South Carolina. Appellant, China, Griffin, and Cave followed the Hunsbergers in appellant's car, with the victim in their car trunk, to a remote area of Edgefield County. There, appellant ordered China, Griffin, and Cave to shoot the victim, with appellant administering the *coup de grace*. Appellant told the others they were as guilty as he, and all kept quiet until parts of victim's skeleton and other identifying information were found in November 2001.

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[1] S.C. Code Ann. § 16-3-20(B)(b) (Supp. 2011).
[2] S.C. Code Ann. § 16-3-20(B)(i) (Supp. 2011).
[3] *Faretta v. California*, 422 U.S. 806 (1975).
[4] S.C. Code Ann. §§ 17-11-10 *et seq.* (2003).

China, Griffin, and Cave, all of whom testified in the guilt phase, were serving eighteen-year sentences in Georgia for their assault of victim and faced the potential for additional charges in Georgia and South Carolina.

ISSUE

Did the trial judge commit reversible error in denying appellant's request to waive counsel and proceed *pro se*?

ANALYSIS

Appellant, whose competency to stand trial has never been in question, moved to be allowed to proceed *pro se* on the Friday before the trial was to commence on Monday, citing *Faretta*. Appellant was unequivocal that he was not seeking a delay or a continuance. He asked for all relevant documents to be provided for his review, and asked if he could possibly subpoena the Hunsbergers who were incarcerated in Georgia. After being placed under oath, appellant told the court he was thirty-two years old, had an 11th grade education, had been self-employed, and that he understood the charges against him and the possible sentences. He acknowledged having had an attorney in his other criminal cases, including one before this same judge.[5] Appellant acknowledged he understood he would be held to the same standards as an attorney regarding the rules of court and of evidence.

The trial judge questioned appellant under oath about a specific rule of evidence, his understanding of the prohibition of hybrid representation, his current mental health status,[6] and his familiarity with courtroom procedure and prior experience as a criminal defendant. Appellant demonstrated an understanding of the process of capital *voir dire*, stated his intention to pursue a third-party guilt defense at trial and discussed the relevant case law, the burden of proof, and his right to testify.

---

[5] This is a reference to appellant's conviction for throwing urine on an Edgefield jailer. This Court granted certiorari to review the Court of Appeals' affirmance of appellant's conviction and reversed. *State v. Barnes*, 402 S.C. 135, 739 S.E.2d 629 (2013).

[6] Appellant acknowledged having been treated for post-traumatic stress disorder after being tased by jailors. He testified that while that incident had led to counseling, and that he had suffered "mental health while [he] was younger," he was currently well.

Appellant also appeared to be familiar with the niceties of error preservation, for example, the need to place objections and the court's rulings on the record.

The judge then inquired into appellant's reasons for wanting to proceed *pro se*. Appellant answered that his request to proceed *pro se* was driven by trust issues, and that he had another attorney or two in mind to use as standby counsel in lieu of his appointed attorneys. As an example of the disagreement between appellant and his attorneys leading to his loss of trust in them was their decision not to subpoena the Hunsberger brothers because of counsels' belief that the brothers would invoke their Fifth Amendment right not to testify. Appellant explained that if the brothers did decline to testify, then he would use transcripts of their sworn testimony in the Georgia proceedings under Rule 804(3), SCRE. Appellant also explained his intent to refer to himself in the third person when examining witnesses. Finally, appellant explained that he lost trust in his appointed attorneys because while he had instructed them not to move for a continuance in order to preserve his IAD Act request, he had learned that they had made such requests.

The judge concluded by telling appellant, "I think you're making a mistake, but you have the right to make a mistake. I think you're making an unwise choice, but you have the right to make an unwise choice. I would advise you not to do this . . . ." The judge asked appellant to reconsider the decision and discuss it again with his appointed attorneys. Appellant agreed to do so. After a break, the judge told the attorneys to provide the discovery materials to appellant for his review over the weekend, and announced he was taking the *Faretta* motion under advisement until Monday.

On Monday, the judge qualified the *venire* and set up *voir dire* panels before taking up the *Faretta* request.

At the commencement of the hearing, one of appellant's attorneys (Tarr) referred the court to *Indiana v. Edwards*, 554 U.S. 164 (2008), which holds that a state may impose a higher competency standard for waiver of counsel than it does for competency to stand trial. Tarr stated that "a couple of different experts that we've hired to evaluate [appellant] for purposes of the sentence phase are of the opinion that he is very competent to stand trial, but he lacks the competency to waive his right to counsel and conduct the proceedings on his own." Tarr had Dr. Price, a psychologist previously retained by the defense as a mitigation witness, present and ready to testify regarding appellant's competency to make a *Faretta* waiver.

Appellant immediately objected to Dr. Price's testimony. First, he based his objection on the "doctor/client" relationship and the attendant privilege. He explained that he talked to Dr. Price only for penalty phase mitigation purposes, and stated, "If I'd have known that he was going to be adverse to me, I wouldn't have talked to him." Appellant then distinguished *Edwards*, pointing out that the defendant in that case was before the trial judge on his second or third competency to stand trial hearing when the waiver of counsel issue arose. Appellant continued:

> In this case here, you know, this was never an issue. I brung forth to you – I explained to you in detail when you asked me questions the last time we spoke and I brought forth everything, you know, just like you asked me to do. And the Edwards case is totally different from the factual situation of my case.
>
> And I object to Dr. Price getting on the stand, because, like I say, I'm not giving him no permission to say anything in regards to me, talking about me, because like I say, my attorneys, that's part of my defense, you know, when we get to the penalty phase. Once we get to that phase, then, you know, I consent for him to furnish that information to the jury for migation [sic].

The judge then asked if appellant was asking him to make a decision without adequate information. Appellant answered with a qualified yes, saying that he was entitled to due process and specifically denying his permission for Dr. Price to testify about "things that had been in [appellant's] mental records for years." He again emphasized the doctor/client relationship, and that Dr. Price represented him. Tarr stated that neither he nor Mr. Harte (the lead attorney) nor Dr. Price were "trying to be adversarial" but were instead trying to make the court aware of all the issues. Appellant again objected to any expert testimony from Dr. Price except in the penalty phase and suggested, "if you appoint a state official to conduct that [competency to waive counsel] review, then that's a different story." The judge responded that he did not know of any procedure that would allow him to do so.[7]

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[7] A trial judge has the inherent authority to order an independent examination of a criminal defendant where necessary. *Cf. State v. Cooper*, 342 S.C. 389, 536 S.E.2d

Attorney Harte responded that since *Edwards* failed to state the standard for competency to waive, it did not seem possible to order an evaluation. Appellant reiterated that the question was *Faretta* because his was not an *Edwards* situation as there is no indication that he, unlike the defendant Edwards, is "sick."

Following Dr. Price's testimony, the trial judge denied appellant's request to proceed *pro se* based upon a finding that appellant did not meet the heightened *Edwards* standard for competency to make a *Faretta* waiver. The judge then noted that despite appellant's responses to the *Faretta* inquiry on Friday, the judge was concerned by Dr. Price's testimony regarding appellant's competency. Ultimately he ruled:

> Given the doctor's testimony and his expert opinion that the defendant has not knowingly and intelligently waived his right to counsel,[8] I find the defendant does not have a clear understanding of the dangers of self-representation in the guilt nor the sentencing phase of the trial.
>
> I further find that the defendant does not knowingly, intelligently understand the dangers inherent in self-representation. I feel like I would not be fulfilling my responsibilities under the law to an individual that deserves a fair trial if I allow on this record, and I might add, my observations of Mr. Barnes.
>
> Mr. Barnes has always been during these proceedings respectful to this Court and I've noted him to appear to be respectful, although not necessarily pleased at times, with his attorneys. However, he is prone to ramble. He's prone to act extra-judicious, and by that I mean not appropriate, but to act as if he were conducting his defense on the streets, so to speak, and as we all know, the courtroom is not the place for that kind of

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870 (2000) (trial judge has inherent authority to require expert examination of defendant and order state to pay in order to maintain integrity of judicial process).

[8] Note this is not the proper inquiry under *Edwards*, which does not involve the merits of the *Faretta* waiver but rather the defendant's competency to make such a waiver.

> decorum or demeanor. I think it would be abuse of my discretion to allow him to represent himself in trying to do all I can do to make sure Mr. Barnes in this very serious matter gets a fair trial. So I'm denying your motion.
>
> And I might add, I have not seen anything but his attorneys acting in his best interest throughout the proceedings, both during the requests or expertise, motion hearings, status conferences and otherwise.
>
> Further, I would find that it appears Dr. Price also to be acting not in Dr. Price's best interest but in Mr. Barnes' best interest.
>
> With that being said, I will deny Mr. Barnes' motion under Faretta versus California and deny his right to self-representation and reaffirm the Court's appointment of Mr. Tarr and Mr. Harte.

The dispositive issue in this appeal is whether South Carolina will adopt the higher competency standard permitted by *Edwards* and thus alter the traditional *Faretta* threshold inquiry which permits any defendant competent to stand trial to waive his right to counsel. Since we choose not to adopt *Edwards*' higher standard for competency to waive counsel, and since the trial judge's denial of appellant's request was predicated on this competency standard, we are compelled to reverse. *McKaskle v. Wiggins*, 465 U.S. 168 (1984) (erroneous denial of *Faretta* request is a structural error requiring automatic reversal).

A South Carolina criminal defendant has the constitutional right to represent himself under both the federal and state constitutions.[9] *State v. Starnes*, 388 S.C. 590, 698 S.E.2d 604 (2010). A capital defendant, like any other criminal defendant, may waive his right to counsel. *State v. Starnes*, *supra*; *State v. Brewer*, 328 S.C. 117, 492 S.E.2d 97 (1997). So long as the defendant makes his request prior to trial, the only proper inquiry is that mandated by *Faretta*. *State v. Winkler*, 388 S.C. 574, 698 S.E.2d 596 (2010).

[9] U.S. Const. am. 6; S.C. Const. art. I, § 14.

Recognizing that it may be to the defendant's detriment to be allowed to proceed *pro se*, his knowing, intelligent and voluntary decision "must be honored out of that respect for the individual which is the lifeblood of the law." *Faretta*, 422 U.S. at 834. Under *Faretta*, the trial judge has the responsibility to make sure that the defendant is informed of the dangers and disadvantages of self-representation, and that he makes a knowing and intelligent waiver of his right to counsel. *State v. Reed*, 332 S.C. 35, 41, 503 S.E.2d 747, 750 (1998). The only relevant question is whether the defendant's waiver is knowing and intelligent, not whether it is wise. *Id*. citing *State v. Brewer*, *supra*.

In *Edwards*, the United States Supreme Court held that "the Constitution permits states to insist upon representation by counsel for those competent enough to stand trial under *Dusky*[10] but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves." *Edwards*, 554 U.S. at 178. Since the Court merely agreed that states could set a higher standard for waiver of counsel without offending the federal constitution, it declined to adopt a federal constitutional standard for determining whether a defendant is competent to waive his right to counsel. *Id*.

We decline to adopt a higher competency standard for waiver of the right to counsel 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. *See Boykin v. Alabama*, 395 U.S. 238 (1969). A defendant who is competent to stand trial is also competent to waive these fundamental rights and plead guilty. *Sims v. State*, 313 S.C. 420, 438 S.E.2d 253 (1993). Were we to adopt *Edwards*, we would impose a higher standard for waiver of counsel than is required for a plea of guilty. *E.g., Terry v. State*, 383 S.C. 361, 680 S.E.2d 277 (2009). We do not find public policy supports such a distinction.[11]

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[10] *Dusky v. United States*, 362 U.S. 402 (1960).

[11] The dissent does not adopt the *Edwards* standard, which is predicated on the defendant's severe mental illness, but instead crafts a new test for capital cases only where the trial judge is to assess the defendant's "mental and psychiatric history, demeanor, and the importance of the impending trial" and weigh those findings against the defendant's request that he be allowed to waive his right to counsel. The dissent would allow the trial judge to deny a capital defendant's request to proceed *pro se* if the trial judge believes that allowing self-representation would

The judge erred in applying the *Edwards* competency standard to appellant's request to waive his right of counsel and proceed *pro se*. Accordingly, we are constrained to reverse. *McKaskle*, *supra*.

CONCLUSION

Since the *Faretta* error mandates reversal, we need not reach any of appellant's other issues save that alleging he was entitled to dismissal of all charges under the IAD Act. On the face of this record, it appears appellant waived his speedy trial rights under this Act, and we therefore decline to reverse on this ground. *See New York v. Hill*, 528 U.S. 110 (2000).

Appellant's convictions and sentence are

REVERSED.

BEATTY and HEARN, JJ., concur. TOAL, C.J., dissenting in a separate opinion in which KITTREDGE, J., concurs.

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make the proceeding less fair or the verdict not "especially reliable." The dissent's formulation of the analytical framework for deciding whether to allow a capital defendant to waive his right to counsel is not constitutionally sound, and reflects the paternalistic thinking we rejected in *State v. Brewer*, 328 S.C. 117, 492 S.E.2d 97 (1997).

CHIEF JUSTICE TOAL: I respectfully dissent. I would affirm Appellant's conviction and sentence.

ISSUES PRESENTED

I. Whether the trial court erred in denying Appellant's pre-trial request to represent himself pursuant to *Faretta v. California*.

II. Whether the trial court violated Appellant's Due Process rights by relying on the pre-trial testimony of a doctor retained by Appellant's defense counsel in anticipation of exclusive use during the trial's mitigation phase.

III. Whether the trial court erred by limiting Appellant's trial counsel's voir dire regarding the views of potential jurors regarding the death penalty.

IV. Whether the trial court erred in finding Juror #203 unqualified to sit as a juror.

V. Whether the trial court erred in refusing to dismiss the State's indictments against Appellant due to the State's alleged failure to comply with the Interstate Agreement on Detainers Act (IAD).

ANALYSIS

I. *Faretta v. California*

The majority concludes that the trial court erred in applying the *Indiana v. Edwards* competency standard to Appellant's request to waive his right to counsel and proceed pro se. I disagree.

In *Indiana v. Edwards*, the United States Supreme Court clarified the limits of a defendant's right to self-representation and made it clear that *Faretta v. California*, 422 U.S. 806 (1975), and its progeny, do not stand for the proposition that the right to self-representation trumps other valid constitutional considerations.

554 U.S. 164, 175 (2008) ("[T]he nature of the problem before us cautions against the use of a single mental competency standard for deciding both (1) whether a defendant who is represented by counsel can proceed to trial and (2) whether a defendant who goes to trial must be permitted to represent himself."). Instead, self-representation rights must be assessed against the judiciary's responsibility to ensure the fundamental fairness and integrity of trial proceedings.

The Supreme Court's decision in *Indiana v. Edwards* explained that a defendant may be competent to stand trial, but not competent to conduct her defense at trial, and that trial courts may investigate this variance in competency. In my view, this principle applies uniformly across the spectrum of criminal trials. The facts and circumstances of *Indiana v. Edwards* did not concern a capital proceeding but, from my perspective, these competency considerations become even more pronounced in the capital context in view of the Supreme Court's mandate that these trial include heightened reliability. *See, e.g., Woodson v. North Carolina, infra* ("Because of the qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.").

The framework and determinations examined by the majority in *Indiana v. Edwards* not only guard against compromising the rights of capital defendants whose mental competency is at issue, but protect the integrity of the judicial system as a whole. Thus, I would hold that South Carolina trial courts may "insist upon representation by counsel for those competent enough to stand trial . . . but who still suffer from mental illness to the point where they are not competent to conduct trial proceedings by themselves." *See Edwards*, 554 U.S. at 177–78.

In *Faretta*, the United States Supreme Court explained that, "the Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense." In that case, Anthony Faretta sought to represent himself against charges of grand theft. 422 U.S. at 807. Questioning by the trial court revealed that Faretta had previously represented himself in a criminal prosecution, possessed a high school education, and that Faretta did not want representation from what he described as a public defender office "very loaded down with . . . a heavy case load." *Id.* The trial court granted Faretta's waiver of assistance of counsel, but indicated that the court would reverse the ruling if it later appeared that Faretta could not adequately represent himself. *Id.*

Several weeks later, the trial court held a hearing and inquired into Faretta's ability to conduct his own defense, questioning Faretta specifically regarding the hearsay rule, and state law covering jury voir dire. *Id.* at 808. The trial court ruled that based on Faretta's answers and demeanor, he had not made an intelligent and knowing waiver of his right to assistance of counsel. *Id.* at 808–09. The trial court also held that Faretta did not have a constitutional right to conduct his own defense. *Id.* at 809–10. The trial court rejected Faretta's subsequent requests to represent himself, and required that only a public defender conduct Faretta's defense. *Id.* at 810–11. The jury found Faretta guilty. *Id.* at 811. The California Court of Appeal affirmed the trial court's ruling, and the California Supreme Court denied review. *Id.* at 811–12. The United States Supreme Court reversed, holding:

> There can be no blinking the fact that the right of an accused to conduct his own defense seems to cut against the grain of this Court's decisions holding that the Constitution requires that no accused can be convicted and imprisoned unless he has been accorded the right to the assistance of counsel. For it is surely true that the basic thesis of those decisions is that the help of a lawyer is essential to assure the defendant a fair trial. And a strong argument can surely be made that the whole thrust of those decisions must inevitably lead to the conclusion that a State may constitutionally impose a lawyer upon even an unwilling defendant . . . . But it is one thing to hold that every defendant, rich or poor, has the right to the assistance of counsel, and quite another to say that a State may compel a defendant to accept a lawyer he does not want. The value of state-appointed counsel was not unappreciated by the Founders, yet the notion of compulsory counsel was utterly foreign to them. And whatever else may be said of those who wrote the Bill of Rights, surely there can be no doubt that they understood the inestimable worth of free choice.

Id. at 832–33. The Supreme Court held that an accused who manages his own defense relinquishes many of the benefits associated with counsel, and thus, must "knowingly and intelligently" resign those benefits. *Id.* at 835. However, the Supreme Court explained that the defendant's technical legal knowledge is not relevant to an assessment of his "knowing exercise of his right to defend himself." *Id.* at 835–36 ("In forcing Faretta, under these circumstances to accept against his

will a state-appointed public defender, the California courts deprived him of his constitutional right to conduct his own defense.").

In *McKaskle v. Wiggins*, 465 U.S. 168 (1984), the Supreme Court analyzed an important limitation on a defendant's right to self-representation: the role of standby counsel. In that case, the defendant, Carl Wiggins, claimed that a pro se defendant could insist on presenting his own case completely free from any involvement by standby counsel. *Id.* at 176. Wiggins's argument relied on the *Faretta* decision's sole reference to standby counsel:

> Of course, a State may—even over objection by the accused—appoint a "standby counsel" to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary.

Id. (citation omitted). Wiggins argued that the "if and when" language defined the limits on standby counsel's role, and that *Faretta* did not allow standby counsel to argue with the defendant, make motions to the court contrary to the defendant's wishes, or take other steps not specifically approved by the defendant. *Id.*

The Supreme Court disagreed, and held that the *Faretta* decision did not intend for an absolute bar on standby counsel's unsolicited participation. *Id.* at 176–77 ("The right to appear pro se exists to affirm the dignity and autonomy of the accused and to allow the presentation of what may, at least occasionally, be the accused's best possible defense. Both of these objectives can be achieved without categorically silencing standby counsel."). However, the Supreme Court did set two bright line rules for the participation of standby counsel: first, the pro se defendant is entitled to preserve actual control over the case presented to the jury, and second, participation by standby counsel must not destroy the jury's perception that the defendant is representing himself. *Id.* at 178.

From my perspective, in setting a limitation on a defendant's Sixth Amendment right to self-representation, the Supreme Court recognized that this important trial right must be balanced against the overarching principles that the defendant receive a fair trial, and that courts be allowed to conduct reasonable and orderly proceedings. *See McKaskle*, 465 U.S. at 183–84 ("Nor does the Constitution require judges to take over chores for a pro se defendant that would normally be attended to by trained counsel as a matter of course. *Faretta* recognized as much. The right of self-representation is not a license to abuse the

dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law." (citation omitted)); *see also Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.*, 528 U.S. 152, 162 (2000) ("[T]he government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting in his own lawyer.").

In addition to the self-representation overlay supplied by *Faretta*, *McKaskle*, and *Martinez*, the facts of the instant case must be analyzed in light of the Supreme Court's requirement that capital trials carry an element of enhanced reliability distinct from other criminal proceedings.

In *Woodson v. North Carolina*, 428 U.S. 280 (1976), the United States Supreme Court explained:

> This conclusion rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Id. at 305 (concluding that capital cases required an individualized sentencing determination encompassing the character and record of the accused); *see also Thompson v. Oklahoma*, 487 U.S. 815, 856 (1988) ("Among the most important and consistent themes in this Court's death penalty jurisprudence is the need for special care and deliberation in decisions that may lead to the imposition of that sanction. The Court has accordingly imposed a series of unique substantive and procedural restrictions designed to ensure that capital punishment is not imposed without the serious and calm reflection that ought to precede any decision of such gravity and finality."); Jonathan DeSantis, *David Versus Goliath: Prohibiting Capital Defendants From Proceeding Pro Se*, 49 No. 1 Crim. Law Bulletin ART 5, at 1 (2013) ("It has long been recognized that a capital trial requires 'heightened reliability' with regards to both guilty verdicts and death sentences." (citing *Beck v. Alabama*'s[12] extension of the "heightened reliability" doctrine originally required for capital sentences to capital verdicts.)).

[12] 447 U.S. 625, 638 (1980).

The heightened reliability required of capital verdicts and sentences has led states to adopt stringent requirements for attorneys representing defendants facing the ultimate punishment. For example, Florida requires attorneys serve as lead counsel in at least nine jury trials of "serious and complex cases which were tried to completion," have demonstrated "necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases," and attend a continuing legal education program, within the last two years, devoted to capital defense. Desantis, *supra*, at 3. In South Carolina, section 16-3-26 of the South Carolina Code provides that indigent defendants facing a capital trial must receive at least two court-appointed attorneys. One of the attorneys must have at least five years' experience as a licensed attorney, and at least three years in the actual trial of felony cases. S.C. Code Ann. § 16-3-26 (B)(1) (2003). That section also vests this Court with the authority to "promulgate guidelines on the expertise and qualifications necessary for attorneys to be certified as competent to handle death penalty cases." *Id.* § 16-3-26(F); *see* Rule 421, SCACR ("There shall be two classes of attorneys certified to handle death penalty cases: lead counsel and second counsel . . . . Lead counsel shall have at least five years' experience as a licensed attorney and at least three years' experience in the actual trial of felony cases.").

Obviously, a criminal defendant who waives his right to counsel, and elects to proceed pro se, loses the benefit of counsel equipped with the type of special qualifications discussed *supra*, and this fact could make the difference in the conduct and outcome of his trial. However, this decision is constitutionally permissible provided the defendant makes a knowing and intelligent waiver of the benefit. Nevertheless, in my view, the defendant's right to self-representation is not absolute, and as discussed *supra*, courts may place reasonable restrictions on that right. For example, the Supreme Court has held that trial courts may curtail that right in the interest of providing the defendant with a fair trial, and ensuring that the proceedings do not become a mockery of the criminal justice system. *See, e.g.*, *Martinez*, 528 U.S. at 162 (holding that states may restrict a defendant's self-representation guarantees in recognition of the government's interests in preserving the integrity and efficiency of the process).

These considerations become even more pronounced in the capital context where trials must contain an indicia of reliability higher than any other criminal trial, and where a criminal defendant is likely at a significant disadvantage in meeting the demands of adequate representation. *See, e.g.*, Desantis, *supra*, at 4

("Incarcerated capital defendants electing to proceed pro se also face the prospect of conducting a mitigation investigation from within the confines of prison . . . . [S]ome of the requirements for capital defense counsel detailed in the ABA Standards, such as visiting the scene of the alleged crime, are inherently unavailable to incarcerated defendants.").

In the instant case, Appellant's trial counsel began the self-representation colloquy with the trial court by explaining that different experts hired to evaluate Appellant believed he was "very competent" to stand trial, but lacked the competency to waive his right to counsel and conduct the proceedings on his own. One of these experts, Dr. David Price, testified that Appellant failed to finish high school, and has an intelligence quotient at the "very low part of the low/average range of intellectual functioning." Price also stated that Appellant had a significant psychiatric history including psychiatric disorders, admissions, post-traumatic disorder, paranoia, cognitive difficulties and lapses, and issues with judgment and decision-making. According to Price, these issues interacting with each other impaired Appellant's ability to knowingly and intelligently waive his right to counsel in this case. The trial court denied Appellant's motion to proceed pro se, holding:

> Given the doctor's testimony and his expert opinion that the defendant has not knowingly and intelligently waived his right to counsel, I find the defendant does not have a clear understanding of the dangers of self-representation in the guilt nor the sentencing phase of the trial. I further find that the defendant does not knowingly, intelligently understand the dangers inherent in self-representation. I feel like I would not be fulfilling my responsibilities under the law to an individual that deserves a fair trial if I allow on this record, and I might add, my observation of [Appellant]. . . . [Appellant] has always been during these proceedings respectful . . . . However, he is prone to ramble. He's prone to act extra-judicious, and by that I mean not appropriate, but to act as if he were conducting his defense on the streets, so to speak, and as we all know, the courtroom is not the place for that kind of decorum or demeanor. I think it would be an abuse of my discretion to allow him to represent himself in trying to do all I can to make sure [Appellant] in this very serious matter gets a fair trial. So I'm denying your motion.

In my opinion, the trial court did not err. The trial court's order exemplifies the balancing that must take place in a capital trial when a defendant desires to represent himself.

I respectfully disagree with the majority's assertion that the preceding analysis ignores "state and federal constitutions and precedent."

The majority acknowledges that in *Indiana v. Edwards*, the Supreme Court held that the United States Constitution does not forbid a state from insisting that a defendant proceed to trial with counsel if the defendant is found mentally competent to stand trial but mentally incompetent to conduct the trial herself. *Id.* at 167. In so finding, the Supreme Court relied in part on undisputed medical opinions regarding the effects of mental illness of a defendant's ability to effectively represent herself. *Id.* at 176 ("The American Psychiatric Association (APA) tells us (without dispute) in its *amicus* brief filed in support of neither party that '[d]isorganized thinking, deficits in sustaining attention and concentration, impaired expressive abilities, anxiety, and other common symptoms of severe mental illnesses can impair the defendant's ability to play the significantly expanded role required for self-representation even if he can play the lesser role of represented defendant.'" (citation omitted)). Additionally the Supreme Court noted the right to self-representation will not "affirm the dignity," of a defendant without the mental capacity to conduct her defense. *Id.* ("To the contrary, given that defendant's uncertain mental state, the spectacle that could well result from his self-representation at trial is at least as likely to prove humiliating as ennobling. Moreover, insofar as a defendant's lack of capacity threatens an improper conviction or sentence, self-representation in that exceptional context undercuts the most basic of the Constitution's criminal law objectives, providing a fair trial."). Moreover, the Supreme Court observed the significant concern that "proceedings must not only be fair, they must 'appear fair to all who observe them.'" *Id.* (citing *Wheat v. United States*, 486 U.S. 153, 160 (1988)); *see also Massey v. Moore*, 348 U.S. 105, 108 (1954) ("No trial can be fair that leaves the defense to a man who is insane, unaided by counsel, and who by reason of his mental condition stands helpless and alone before the court.").

We must be mindful that state authorities charged the defendant in *Indiana v. Edwards* with attempted murder, battery with a deadly weapon, criminal recklessness, and theft. *Edwards*, 554 U.S. at 167. These are serious crimes, but none can leave a criminal defendant susceptible to a sentence of death upon conviction. If based on these facts our nation's highest court found the curtailment

of self-representation rights permissible, it is clearly constitutionally acceptable to allow South Carolina trial courts to make this determination for defendants facing the ultimate punishment. *See id.*, 554 U.S. at 177–78 ("We consequently conclude that the Constitution permits judges to take realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so.").

The majority is simply wrong to suggest that the foregoing reasoning ignores applicable constitutional mandates. My view of this case is firmly entrenched in precedent providing for a balancing of the constitutional right to self-representation and the heightened reliability required of capital trials. From my perspective, the aim of a comprehensive self-representation analysis is not to shield competent capital defendants from adverse outcomes, but instead to ensure that trial courts possess the authority to deal appropriately with cases where the mental competence of the defendant is at issue. *Id.* at 178–79 ("[I]nstances in which the trial's fairness is in doubt may well be concentrated in the 20 percent or so of self-representation cases where the mental competence of the defendant is also at issue." (citing Erica J. Hashimoto, *Defending the Right of Self-Representation: An Empirical Look at the Pro Se Felony Defendant*, 85 N.C.L. Rev. 423 (2007)).

I strongly disagree with the majority's assertion that the reasoning, discussed *supra*, abandons "the concepts of individual dignity and autonomy." The importance of a "knowing, intelligent, and voluntary waiver" is without question. However, in the criminal context, it is far from the "sole question." Defendants very clearly have a constitutional right to self-representation, however, this right must bow to the competing concern that "death is different," and trial courts must do everything legitimately within their power to ensure that these trials are fair and that the proceedings and verdict are especially reliable.

In the instant case, the trial court assessed Appellant's mental and psychiatric history, demeanor, and the importance of the impending trial in deciding that Appellant could not adequately represent himself. An abuse of discretion occurs when the decision is controlled by some error of law or based on findings of fact that are without evidentiary support. *See Lewis v. Lewis*, 392 S.C. 381, 390, 709 S.E.2d 650, 654–55 (2011). In my view, neither of these reversible circumstances occurred in the instant case.

II. Pre-Trial Testimony

Appellant asserts that the trial court violated his due process rights by relying on Price's testimony. I disagree.

As discussed, *supra*, Appellant's trial counsel indicated that experts hired to evaluate Appellant held the view that Appellant lacked the competency to waive his right to counsel and conduct the trial proceedings on his own. Appellant's trial counsel then sought to have Price testify to that view. Appellant objected, asserting that Price's testimony would violate "doctor/client" privilege and Appellant's due process rights. The trial court viewed Appellant's objection as an attempt to force the trial court to rule on Appellant's competency without having all information concerning Appellant's mental history.

In my view, Appellant did not fully disclose his mental history and other relevant information regarding his mental state during the trial court's initial inquiry into Appellant's competency to waive his right to counsel. The trial court could not make an accurate ruling on the issue of Appellant's waiver without proper access to all relevant information. Appellant misapprehends the issue as turning on his personal feelings regarding whether he was competent to conduct his own trial proceedings. Instead the issue actually centers on whether the trial court objectively viewed him competent to present a defense that comports with the reliability and integrity of a death penalty trial.

Appellant's argument relies in part on this Court's decision in *State v. Jones*, 383 S.C. 535, 681 S.E.2d 580 (2009). However, in my view, Appellant incorrectly interprets that case.

In *Jones*, the State informed the defense that it intended to introduce "barefoot insole impression" evidence. *Id.* at 540, 681 S.E.2d at 582. In response, the defense retained a renowned expert on this evidence. *Id.* The defense did not intended to call the expert at trial, but the State subpoenaed the expert to testify at trial. *Id.* The defense filed pre-trial motions seeking to quash the State's subpoena and suppress introduction of "barefoot insole impression" evidence. *Id.* The trial court denied both motions, and the jury ultimately convicted the defendant of two counts of murder. *Id.*

The defendant argued on appeal that the State's subpoena violated the work-product doctrine, attorney-client privilege, and his Sixth Amendment right to effective assistance of counsel. *Id.* at 540, 681 S.E.2d at 582–83. The State countered that the trial court did not abuse its discretion in permitting the subpoena given that expert only testified during a pre-trial, *in camera* hearing, the State did not question the expert regarding any matters produced by attorney-client privilege or work-product doctrine, and it would be fundamentally unfair to the State for the defendant to challenge the scientific reliability of "barefoot insole impression" evidence while withholding non-privileged testimony from one of the two renowned experts who the State initially attempted to retain. *Id.* at 541, 681 S.E.2d at 583.

This Court affirmed the trial court's ruling, holding:

> Here, there were only two available expert witnesses on the "barefoot insole impression" evidence. The trial judge recognized this anomaly and properly limited the State to only eliciting non-protected information . . . . Moreover, the State only called [the expert] during an *in camera* hearing for the benefit of the trial judge's ruling on the admissibility of the "barefoot insole impression" evidence. Because [the expert] did not testify during the trial, the State's decision to call [the expert] as a witness could not have affected the jury's assessment of the evidence . . . . Additionally, the State's questioning of [the expert] was confined to general testimony regarding his expertise and his opinion regarding the scientific reliability of the evidence. Significantly, the State did not question [the expert] concerning the specifics of the crime scene evidence . . . . Based on the foregoing, we hold the trial judge's decision denying [the defendant's] motion to quash the State's subpoena of [the expert] did not constitute reversible error.

Id. at 546–47, 681 S.E.2d at 586. In my opinion, the facts and circumstances of the instant case are similar. The trial court allowed the testimony of a witness, presented by the defense, for the benefit of the trial court's ruling on Appellant's competency to waive his right to counsel. This testimony took place following the Appellant's own minimization of his significant psychiatric dysfunction. However, this testimony occurred *in camera*, and the trial court did not permit the State to participate. Therefore, from my perspective, the trial court's decision to allow Price's testimony does not constitute reversible error.

However, the warning this Court issued in *Jones* applies with equal force here. In *Jones*, the Court cautioned that its decision should not be interpreted as establishing a general rule permitting the State to compel the testimony of a non-testifying, consultative defense agent. *Id.* at 547, 681 S.E.2d at 548 ("Taken to its extreme, we believe such a rule could be used by the State as a subversive tactic to circumvent discovery rules."). Thus, the Court limited the *Jones* decision to the specific facts of that case, and adopted a "substantial need" rule for instances where the State seeks to compel a defendant's non-testifying consultative expert. *Id.* In that same vein, the trial court could have ordered a separate evaluation of Appellant instead of allowing Appellant's counsel to present Price's testimony. In my view, this would have been unnecessarily duplicative given that the foundation of the trial court's decision relied on Price's analysis of Appellant's uncontroverted medical history, rather than any type of relationship between Price and Appellant. After all, Appellant's counsel retained Price for mitigation, not for treatment.[13] Nevertheless, trial courts should avoid confusion and order a competency evaluation when necessary to provide further support for the court's ruling regarding a defendant's competency to waive his right to counsel. Moreover, attorneys, especially those providing counsel to defendants facing a capital trial, must take care to be forthright and honest with their clients concerning the use of expert witnesses.

III. Improper Limitation of Voir Dire

Appellant argues that the trial court violated his Sixth, Eighth, and Fourteenth Amendment[14] rights by improperly limiting defense counsel's attempt to voir dire potential jurors regarding their views of the death penalty. In my opinion, this argument is without merit, and the trial court's voire dire limitations did not render Appellant's trial fundamentally unfair.

"The scope of voir dire and the manner in which it is conducted are generally left to the sound discretion of the trial court." *State v. Bixby*, 388 S.C. 528, 542, 698 S.E.2d 572, 579 (2010) (citing *State v. Stanko*, 376 S.C. 571, 575,

[13] Contrary to Appellant's position, the trial court is not a state actor for purposes of a *Jones* analysis, and thus, application of the "substantial need" test would be nonsensical.

[14] U.S. Const. amends. VI, VIII, XIV.

658 S.E.2d 94, 96 (2008)). Furthermore, "[i]t is well established that a trial court has broad discretion in conducting the *voir dire* of the jury and particularly in phrasing the questions to be asked." *Id.* (citing *United States v. Jones*, 608 F.2d 1004, 1009 (4th Cir.1979)). A limitation on juror questioning will not constitute reversible error unless the limitation renders the trial fundamentally unfair. *Id.*

A. Procedurally Barred

Where counsel fails to exhaust all strikes, appellate review of juror qualification issues is barred. *Bixby*, 388 S.C. at 542, 698 S.E.2d at 579; *see also State v. Tucker*, 324 S.C. 155, 163, 478 S.E.2d 260, 264 (1996) (holding "[f]ailure to exhaust all of a defendant's peremptory strikes will preclude appellate review of juror qualification issues"). In the instant case, Appellant's defense counsel used only nine of the ten available strikes during jury selection, thus in my opinion, the Court's consideration of this issue is barred. *See Bixby*, 388 S.C. at 542, 698 S.E.2d at 579 ("Because defense counsel used only seven of the ten available strikes during jury selection, review of this issue is barred.").

B. Trial Court's Permissible Limitations

However, even if this Court's precedent did not bar review of Appellant's arguments, in my view the trial court properly limited the scope of defense counsel's examination of jurors #146, #157, and #183.

1. Juror #157

Appellant's trial counsel attempted to question Juror #157 regarding "some of the factors" that the juror would consider important in making a determination of whether to impose the death penalty. The State objected, and the trial court sustained the State's objection. Appellant's trial counsel then attempted to question the juror regarding her understanding of the term murder. The trial court did not allow the question, finding the juror's opinions of "what the law of murder is" inappropriate for voir dire. Appellant's trial counsel objected to the trial court's refusal to allow him to "instruct the jurors on the definition of murder in the voir dire." The trial court overruled the objection, holding that jurors could not be questioned regarding their conceptions, or misconceptions, regarding the law, citing this Court's decision in *Bixby*, *supra*.

2. Juror #146

During voir dire, Appellant's trial counsel and Juror #146 engaged in the following colloquy:

> Trial counsel: Now, if you were on the jury and you found that there was a murder that there was absolutely no excuse for, you could give meaningful consideration to a life sentence?
>
> Juror #146: Quite honestly, if there was no excuse for it, cold blooded, I couldn't. I've just got to be honest with you. If there are mitigating circumstances or situations, I mean yes, but I'd be lying if I said differently.

Under the State's cross-examination, Juror #146 stated that he would have no predisposition on whether or not he could vote for life or death, and that if he could vote for a death sentence or life imprisonment depending on what the facts of the case warranted.

Trial counsel argued that the juror was not qualified because of his reference to murder committed in "cold blood," and requested further examination of the juror. The trial court allowed trial counsel to re-question Juror #146. Trial counsel then asked Juror #146, "If you found beyond a reasonable doubt that there was a murder with no excuse in cold blood, would it matter to you—would anything else matter to you?" The trial court did not allow this question, finding that it constituted an impermissible question based on a "particular hypothetical," or a "particular set of facts." Trial counsel then explained that he felt the juror had a "misconception" of murder, and that this misconception would interfere with the juror's impartiality. The trial court agreed to provide the definition of murder and explained:

> Before I go back to allowing the lawyers to ask you a few more questions, I do want to tell you that as far as murder is concerned, murder in South Carolina is the unlawful killing of a human being by another human being with malice aforethought, express or implied.

Trial counsel then questioned Juror #146, and the juror explained that he would not make up his mind on a particular case simply because he had convicted the person of murder:

Trial counsel: It's not an automatic decision; you're not one of those jurors that if you find a person guilty of murder, you'd automatically sentence a person to death?

Juror #146: No.

Trial counsel: And if you get—in a death penalty trial an individual's found guilty of murder and you go into that penalty phase, you'd go in there with an open mind because there'd be different types of evidence in that penalty phase, evidence of aggravation, evidence of mitigation, evidence that may show something good or more of the circumstances of the nature of the crime or the particular defendant, or evidence of aggravation that may increase the enormity of the crime, you would consider that.

Juror #146: Yes, sir.

Trial counsel: Before you made your decision?

Juror #146: Yes, sir. And I apologize. I assumed that's what I said.

The trial court found the juror qualified, and as Appellant concedes in his brief, trial counsel used a peremptory challenge to strike Juror #146.

3. Juror #183

Trial counsel attempted to question Juror #183 regarding her religious and moral beliefs in relation the death penalty. Defense counsel asked Juror #183 for her thoughts on the Biblical axiom, "eye for an eye," and whether the juror believed that the death penalty helped to "protect society." The State objected to these questions and the trial court sustained the objections.

Following the conclusion of the voir dire, the trial court excused the juror and heard the State's objection. The State argued that religion is not a proper basis for voir dire, and prospective juror should not have to explain or interpret the Bible. The State also asserted that jurors should not be questioned regarding their view of the death penalty's purposes, and this line of questioning ran afoul of the general prohibition on hypotheticals as part of voir dire. The trial court ruled that trial counsel could legitimately question the juror as to firmly held beliefs for or against the death penalty, but that it was not appropriate to investigate philosophical distinctions and differences *within* a juror's religious belief. The trial court stated explicitly that the court was not prohibiting defense counsel from questioning jurors regarding certain religious or moral beliefs. Notably, the trial court and defense counsel engaged in the following colloquy:

> Trial court: I thought her responses were very clear and that she'd be a good juror when she talked about a case-by-case basis. Further, she said it would be a serious decision. ***I believe you think she's qualified also you said?***
>
> Trial counsel: Yes, your Honor.

(emphasis added).

In my view, this Court's decisions in *State v. Smart*, 278 S.C. 515, 299 S.E.2d 686 (1982), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 69 n.5, 406 S.E.2d 315, 328 n.5 (1991) ("To the extent they require *in favorem vitae* review, the following cases, *inter alia*, are hereby overruled."), and *State v. South*, 285 S.C. 529, 331 S.E.2d 775 (1985), *cert. denied*, 474 U.S. 888 (1985), provide the proper frame for viewing Appellant's arguments.

In *State v. Smart*, 278 S.C. 515, 299 S.E.2d 686 (1982), a jury found the defendant guilty of two murders while committing larceny with a deadly weapon. The defendant appealed on three separate grounds, the issue most pertinent to the instant case being his absence from the courtroom during jury selection. *Id.* at 517, 521, 299 S.E.2d at 687, 689. In *Smart*, the clerk of court conducted the initial jury selection outside the presence of the parties and the presiding judge. *Id.* at 521, 299 S.E.2d at 689–90. The parties and the trial court then examined those jurors chosen. *Id.* The defendant did not object to this procedure at trial, and this Court found that the defendant did not suffer prejudice "by his absence during the simple

drawing of names." *Id.* at 521, 299 S.E.2d at 690 ("Moreover, there is no right of [a] defendant to be present when purely ministerial acts, preparatory to jury selection are performed. (alteration added)).

However, the Court found the voir dire that took place in *Smart* to be lengthy and "superfluous," providing the Court an opportunity to offer guidance regarding a capital defendant's right to examine jurors. *Id.* at 521, 299 S.E.2d at 690. The Court recognized that section 14-7-1020 of the South Carolina Code provided for a trial court's inquiry into "whether a juror is related to either party, has any interest in the cause, has expressed or formed any opinion, or is sensible of any bias or prejudice therein." *Id.* at 522, 299 S.E.2d at 690 ("The manner in which these questions are pursued and the scope of any voir dire beyond their bounds are matters of trial court discretion."). This Court observed that trial court examination prior to counsels' questioning could provide the basis for proper limitation of counsels' questions to relevant matters, holding:

> The unbridled examination of jurors by counsel serves to not only unnecessarily add to the length and expense of the trial, but also serves to antagonize jurors and lessen public respect for jury duty. The extent to which voir dire examination is being permitted by trial judges causes this Court concern and, therefore, this admonition.

Id. at 523, 299 S.E.2d at 691.

In *South*, the defendant argued that the trial court erred in refusing to permit defense counsel to ask the jurors hypothetical questions concerning the death penalty. 285 S.C. at 534, 331 S.E.2d at 778. The Court disagreed, holding that "[c]learly, the questions would have been improper since the purpose of voir dire is to insure each juror can make a decision based on the evidence presented, rather than hypothetical evidence." *Id.*; *see also State v. Patterson*, 290 S.C. 523, 525–26, 351 S.E.2d 853, 854–55 (1986), *cert. dismissed*, 482 U.S. 902 (1987) (relying on *South* to reject the claim that the trial court erred in refusing to allow the defendant to use hypothetical question on voire dire in an attempt to discover hidden biases or prejudices concerning the death penalty).

In my view, the United States Court of Appeals for the Fifth Circuit's decision in *King v. Lynaugh*, 850 F.2d 1055 (5th Cir. 1988), *cert. denied*, 489 U.S. 1093 (1989), is instructive.

In *King*, the defendant argued that the trial court violated his constitutional guarantees to a trial by a fair and impartial jury when the court refused defendant's request to question the jurors, or educate them through voir dire, concerning their knowledge of Texas parole laws. 850 F.2d at 1057. The defendant argued that if the jurors harbored misconceptions regarding Texas law, for instance regarding when a capital murder defendant might be eligible for parole, they would be biased toward imposing the death penalty. *Id.* ("On the other hand, he suggests, proper knowledge about the 20-year minimum prison term prior to parole eligibility in such cases will tend to reassure them that [the defendant] does not pose the future dangerousness to society contemplated by . . . Texas capital punishment law.").

The Fifth Circuit acknowledged that the United States Supreme Court, until that point, had only recognized racial prejudice and widespread and provocative pretrial publicity as acceptable grounds for a constitutional challenge to a trial court's voir dire procedure, and held:

> The Court has emphasized that "[t]he Constitution does not always entitle a defendant to have questions posed during voir dire specifically directed to matters that conceivably might prejudice him." *Ristaino* [*v. Ross*, 424 U.S. 589, 594 (1976)]. A graphic example of the Court's distinction appears in *Ham* [*v. South Carolina*, 409 U.S. 524 (1973)] where a seven-member Court majority rejected the defendant's contention that he was constitutionally entitled to inquire whether jurors were prejudiced toward people with beards . . . . Ham's trial and conviction occurred circa the late 1960's and early 1970's, at the apogee of student and political activism, when the wearing of a beard might well have been thought to prejudice many prospective jurors. Nevertheless, the Court refused to constitutionalize an inquiry which, in its view, would have suggested no principled limits on intrusive appellate review of voir dire. We, likewise, are unable to distinguish possible prejudice based on jurors' misconceptions about parole law from "a host of other possible similar prejudices." The views of a lay venireman about parole are no more likely to be both erroneous and prejudicial than are his views on the defendant's right not to take the stand, the law of parties, the reasonable doubt standard, or any other matter of criminal procedure. It is difficult to conceive how we could constitutionalize the inquiry concerning Texas parole while leaving these similar but also potentially influential matters to

> the broad discretion of the state trial court. In fact, we have previously declined to sanction constitutional challenges to the failure to conduct voir dire on the range of punishment for an offense and the meaning of certain words in the capital murder statute. Interrogating veniremen about Texas parole law raises, if anything, a more attenuated possibility of prejudice than does a question about jurors' attitudes toward people with beards. The specific inquiry does not approach a level of constitutional sensitivity.

Id. at 1059.[15]

In my view, the trial court's limitations in the instant case did not violate Appellant's constitutional rights and comport with this Court's established precedent regarding voir dire's proper contours. The trial court properly restrained Appellant's defense counsel from improperly questioning potential jurors regarding their interpretation of applicable law, or hypothetical situations, and thus there is no reversible error.

IV. Qualification of Juror #203

Appellant argues that the trial court erred in finding Juror #203 unqualified. I disagree.

A prospective juror may be excluded for cause when his views on capital punishment would prevent or substantially impair the performance of his duties as a juror in accordance with instructions and his oath. *State v. Sapp*, 366 S.C. 283, 290–91, 621 S.E.2d 883, 886 (2005). When reviewing the trial court's qualification of prospective jurors, the responses of the challenged juror must be examined in light of the entire voir dire. *Id.* at 291, 621 S.E.2d at 886. The determination of whether a juror is qualified to serve in a capital case is within the sole discretion of the trial judge and is not reversible on appeal unless wholly unsupported by the evidence. *Id.* A juror's disqualification will not be disturbed on appeal if there is a reasonable basis from which the trial court could have

[15] *See State v. Matthews*, 296 S.C. 379, 384, 373 S.E.2d 587, 590 (1988) (relying on *King* in holding that the defendant was not entitled to probe potential jurors' misconceptions regarding the definition of "life imprisonment").

concluded that the juror would not have been able to faithfully discharge his responsibilities as a juror under the law. *Id.* at 291, 621 S.E.2d at 887.

The Record in this case demonstrates that Juror #203 provided conflicting and inconsistent answers regarding her ability to render a death sentence in response to questioning from the trial court, defense counsel, and the State. For example, Juror #203 initially stated that she could sentence a defendant to life imprisonment without parole or the death penalty depending on what the facts of the case "warranted." Juror #203 appeared to confirm her view during defense counsel's initial examination. The State noted during its examination of Juror #203 that she hesitated in answering the trial court whether she could render a death sentence. In response to the State's questions Juror #203 stated that she was "not positively sure," she could take part in a death sentence. However, Juror #203's answer changed during the defense's re-examination and she confirmed that she could "give meaningful consideration to a death sentence as well as a life sentence."

The trial court then re-examined Juror #203 and the juror stated she could be fair and impartial juror and could consider life without parole or the death penalty. Nevertheless, under another re-examination by the State, Juror #203 provided a conflicting answer:

The State:	Let me ask you this: Would your feelings about signing a death verdict do you think that would interfere with your ability to sit as a juror in a death penalty case? I know you've had a lot of hesitation about whether or not you could sign your name and do that. Do you think that your feelings on that would interfere with your ability to be an effective juror in a death penalty case?
Juror #203:	I do.
The State:	You think it would? I understand. Like I said, there's nothing right or wrong about it, it's just what you feel . . . .

Appellant's trial counsel attempted to clarify Juror #203's responses and inquired,

Trial counsel: No matter how it made you feel, if you felt like the death penalty was appropriate, you could sign your name to the form, correct?

Juror #203: Correct.

Trial counsel: Even if it made you feel a little uneasy, if that was your decision, you could sign your name?

Juror #203: Correct.

However, the trial court interceded and questioned Juror #203 further on her positive response to the State's question as to whether the juror's feelings would interfere with her ability to be an effective juror. The trial court and Juror #203 then engaged in the following exchange:

Trial court: Do you feel like because of your beliefs, because of your feelings, your hesitation given the death penalty, that your beliefs would be such that it would—your feelings would be such that it would interfere with your ability to perform your duties as a juror?

Juror #203: Yes, sir.

Trial court: And that's because of your beliefs; is that correct?

Juror #203: Correct.

Trial court: So you do not feel like you could adequately perform your duties as a juror because you would be hindered somewhat because of your beliefs?

Juror #203: Yes, sir.

Trial court: And that's your beliefs that are somewhat exhibited through your hesitancy in your responses to the death penalty questions?

Juror #203: Yes, sir.

The trial court then found Juror #203 unqualified to serve as a juror. The trial court's reasoning bears duplication here:

> I find that [Juror #203] is not qualified. Considering the entire colloquy, even going back to my initial questioning of [Juror #203], there was a very, very long pause when I asked her if she could return a sentence of death. Not only that, her—my observations of her demeanor, being within two feet, I guess, of her and looking down into her face, it appeared somewhat of concern to her, somewhat of a pained, emotional expression on her face . . . . Then beyond equivocation, as I recall, [the State] asked her about signing her name and then asked if she thought her feelings about the death penalty would interfere with her abilities to serve as a juror. And she said, "I do." I came back and attempted to clarify some of her responses because I think some of her responses were inconsistent between our various questioning. And she clearly stated that she felt that her feelings or her beliefs were such that it would interfere with her ability to perform her duties and follow her oath as a juror . . . . I think she did equivocate. I think her views and her responses as a whole would impair her ability to act as an impartial juror. Therefore, considering the voir dire as a whole, I find that [Juror #203] is not qualified.

In my view, this Court's decision in *State v. Lindsey*, 372 S.C. 185, 642 S.E.2d 557 (2007), *cert. denied*, 552 U.S. 917 (2007), is instructive.

In *Lindsay*, the appellant claimed the trial court erred in excusing a juror because of his views regarding the death penalty. *Id.* at 190, 642 S.E.2d at 559–60. During initial questioning, the trial court asked the juror if he could impose the death penalty, and the juror replied, "I really don't know. I really don't know if I could or not." *Id.*, 642 S.E.2d at 560. During the defense counsel's voir dire, the juror stated that he could listen to both sides and render what he felt was the appropriate penalty whether that was life imprisonment or death. *Id.* However, during the State's questioning, the juror equivocated, stating:

> Most of the time I feel it is a better punishment to be in prison for life. I believe that death is not as big of a punishment as going to prison for life and having to stay in prison for the rest of your life.

Id. at 191, 642 S.E.2d at 560. The juror explained that his belief that life without parole was a more serious punishment than death would "most likely," but not "necessarily," lead him to choose life imprisonment over death during the trial's sentencing phase. *Id.*

The trial court ruled that the juror's belief regarding life imprisonment and the death penalty would substantially impair the juror's ability to follow the law as instructed, and noted that when asked about the death penalty the juror "took a very big deep [breath] and exhaled as if he were very uncertain as to whether or not he could do that." *Id.* at 192, 642 S.E.2d at 561 ("The [trial court] concluded 'from watching' him and considering his inconsistent responses, that [the juror] should be excused.").

This Court found the juror's ambivalent views concerning the death penalty supported the trial court's ruling, holding:

> Juror K's equivocal views regarding the death penalty, his responses favoring a life sentence despite the facts of the case, and his noted hesitation when asked if he could vote for death, are a reasonable basis for the trial judge's conclusion that Juror K's views would substantially impair his ability to act as an impartial juror. Considering the voir dire as a whole, we find the trial judge did not abuse his discretion in excusing this juror.

Id. at 193, 642 S.E.2d at 561; *see also State v. Green*, 301 S.C. 347, 355, 392 S.E.2d 157, 161 (1990), *cert. denied*, 498 U.S. 881 (1990) (holding that a trial court's disqualification of a prospective juror will not be disturbed where there is a reasonable basis from which the trial court could have concluded that the juror would not have been able to faithfully discharge his responsibilities as a juror under the law).

Accordingly, in my view, the Record demonstrates evidence supporting the trial court's disqualification of Juror #203. Analogous to the juror in *Lindsay*, Juror #203 provided equivocal views regarding the death penalty, and at times expressly stated that these views would prohibit the juror's ability to perform the required duties. Thus, in my opinion, the trial court did not abuse its discretion in excusing a juror that explicitly stated that the juror's views on capital punishment would prevent the performance of his duties.

V. The Interstate Agreement on Detainers Act (IAD)

Appellant argues that the trial court erred by failing to dismiss the indictments against him because of the State's noncompliance with the Interstate Agreement on Detainers Act (the IAD). I disagree.

The IAD is a compact enabling participating states to obtain custody of prisoners incarcerated in other participating jurisdictions and bring those prisoners to trial. *Reed v. Farley*, 512 U.S. 339, 340 (1994). The central purpose of the IAD is to allow participating states to uniformly and expeditiously dispose of charges pending against prisoners held out-of-state. S.C. Code Ann. § 17-11-10 (2003); *State v. Adams*, 354 S.C. 361, 370, 580 S.E.2d 785, 790 (2004).

The IAD's third article addresses an inmate's request for a final disposition of outstanding charges against her in another state. S.C. Code Ann. § 17-11-10, art. III. Article III provides that an inmate shall be brought to trial within one hundred eighty days following the delivery of written notice to "the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction" of the inmate's place of his imprisonment and request for a final disposition of untried indictments or complaints. *Id.* However, the court having jurisdiction of the matter may grant any necessary or reasonable continuance provided that good cause supports the continuance. *Id.* Section 17-11-10's Article IV provides a similar method for a state to have an inmate incarcerated in another state delivered for the purposes of resolving any untried indictments or complaints. *Id.* § 17-11-10, art. IV. However, article IV's subsection (c) provides that any proceedings enacted via article IV must be commenced within one hundred twenty days of the inmates arrival in the receiving state. *Id.* Nevertheless, as in article III, the presiding court may grant any necessary or reasonable continuance supported by good cause. *Id.*

In the instant case, Appellant made an initial demand pursuant to the IAD on February 12, 2005. Prior to that request, a Georgia court convicted Appellant for kidnapping and sentenced him to life imprisonment. The solicitor informed the trial court that the instant case would proceed as a death penalty case, and, on May 27, 2005, the trial court ruled good cause had been shown as to why the case could not be handled within 180 days. The case was later scheduled for trial in 2008. However, in March 2008, Appellant's defense counsel requested a continuance because of an issue with a mitigation specialist. The Record does not explain the

underlying reason for the significant delay in scheduling the instant case for trial. However, although this type of delay is unacceptable, Appellant fails to demonstrate that the delay resulted in any prejudice, and therefore, the trial court's refusal to dismiss the indictments against Appellant does not warrant reversal.

For example, in *State v. Allen*, 269 S.C. 233, 237 S.E.2d 64 (1977), the State charged the defendants with burglary. The burglary occurred on October 11, 1973, and thirteen days later, Georgia police arrested the defendants in that state on unrelated bank robbery charges. *Id.* at 236, 237 S.E.2d at 65. Subsequently, a Georgia court convicted the defendants and imposed a prison sentence. *Id.* In November 1973, South Carolina authorities issued arrest warrants for the defendants and a South Carolina grand jury indicted the defendants in September 1975. *Id.* at 236, 237 S.E.2d at 65–66. Authorities brought the defendants to South Carolina and provided notice of the charges pending in this state. *Id.* The defendants moved for a continuance, and authorities returned the defendants to Georgia to await trial. *Id.* at 236, 237 S.E.2d at 66. Thereafter, the defendants were brought to South Carolina and tried in March 1976. *Id.* The defendants were convicted and sentenced to life imprisonment. *Id.* at 235, 237 S.E.2d at 65.

The defendants argued, *inter alia*, that their transfer to Georgia prior to trial violated the IAD's article IV (e) which provides:

> If trial is not had on any indictment, information or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment . . . such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

S.C. Code Ann. § 17-11-10, art. IV(e). This Court disagreed, noting that the defendants could not demonstrate that the delay in their case resulted in any prejudice:

> Where a prisoner seeks and obtains a delay of his trial in the receiving State and is returned to the sending State to await trial, it does not mean that he waives his constitutional right to a speedy trial, but it does remove his case from the scope of the automatic dismissal provisions of the statute. In the absence of a showing of prejudice from his return to the sending State after his request for a continuance is granted, the prisoner would not be entitled to a dismissal of the

> charges against him, as a matter of right, under the provisions of the statute. *The record in this case fails to show any prejudice to appellants* from their return to Georgia to await trial, after the trial of the present charges was continued at their request. The trial judge, therefore, properly refused appellants' motions to dismiss the indictments in this case because of the alleged failure to grant a speedy trial.

Allen, 269 S.C. at 239, 237 S.E.2d at 67 (emphasis added).

I also find the United States Supreme Court's decision in *Reed v. Farley*, 512 U.S. 339 (1994), instructive. In that case, the Supreme Court analyzed whether a violation of the IAD's time limitations could serve as the basis of a state prisoner's habeas corpus petition. In December 1982, Orrin Reed was confined to a federal prison in Terre Haute, Indiana, when Indiana state prosecutors charged him with theft. *Id.* at 342. Indiana authorities lodged a detainer against Reed and took custody of him on April 27, 1983. According to the IAD, absent any continuances, Reed's trial should have commenced on or before August 25, 1983. *Id.* The trial court held two pretrial conferences, on June 27 and August 1, 1983. *Id.* At the June 27 conference, the court set a September 13, 1983 trial date, exceeding the IAD's 120-day limit. *Id.* at 343. However, neither the prosecutor nor Reed brought this to the trial court's attention or asked for a different trial date. *Id.* At the August 1 conference, Reed explained his imminent release from federal custody and requested the trial court set bond. *Id.* The trial court set bond at $25,000 and because of a calendar conflict, reset the trial date to September 19. *Id.* Reed did not express any objection to the September 19 trial date. *Id.*

On August 29, four days prior to trial, Reed alleged that Indiana failed to try him within 120 days of his transfer and had therefore violated the IAD. *Id.* at 344. The trial court rejected Reed's argument, explaining:

> Today is the first day I was aware that there was a 120 day limitation on the Detainer Act. The Court made its setting and while there has been a request for moving the trial forward, there has not been any speedy trial request filed, nor has there been anything in the nature of

> an objection to the trial setting, but only an urging that it be done within the guidelines that have been set out.

Id.

On the morning of the trial date, September 19, Reed filed a motion for continuance, arguing he needed additional time for trial preparation as a result of a newspaper article detailing the 1954 to 1980 timeframe of Reed's prior felony convictions. *Id.* The trial court, recognizing the possible prejudice, offered Reed three options: (1) start the trial on schedule; (2) postpone the trial for one week; or (3) continue the trial to a late October date. *Id.* at 345. Reed chose the third option and the trial began on October 18, 1983. The jury convicted Reed of theft, and found him to be habitual offender. *Id.* Reed received consecutive sentence of four years' imprisonment for theft and thirty years imprisonment for the habitual offender conviction. *Id.* One of Reed's primary assertions was that the IAD's time limit effectuated the Sixth Amendment's guarantee of a speedy trial right. *Id.* at 352. Thus, according to Reed, the Supreme Court should view the alleged violation of the IAD as a "fundamental defect," entitling Reed to habeas relief. *Id.*

The Supreme Court disagreed. Much of the Supreme Court's reasoning centered on the appropriate standard for federal habeas relief, and therefore is not related to the instant case. However, in my opinion, the Court's acknowledgement that Reed suffered no prejudice is pertinent. The Court explained:

> Reed's trial commenced 54 days after the 120-day period expired. He does not suggest that his ability to present a defense was prejudiced by the delay. Nor could he plausibly make such a claim. Indeed, asserting a need for more time to prepare for a trial that would be "fair and meaningful . . . . Reed himself *requested* a delay beyond the scheduled September 19 opening. A showing of prejudice is required to establish a violation of the Sixth Amendment Speedy Trial Clause, and that necessary ingredient is entirely missing here.

Id. at 353.

Appellant fails to establish any prejudice resulting from the delay in this case. The Record does not indicate that Appellant requested the trial court clarify the length of the original continuance, or that Appellant renewed his motion during the three year period following the trial court's continuance. More importantly,

Appellant does not demonstrate that the delay adversely impacted his case, or that an earlier trial would have resulted in a different verdict and sentence. *Cf. id.* at 353 n.11 ("As the Court of Appeals noted: 'Had Indiana put Reed on trial within 120 days of his transfer from federal prison, everything would have proceeded as it did. Reed does not contend that vital evidence fell into the prosecutor's hands (or slipped through his own fingers) between August 26 and September 19, 1983.'" (citing *Reed v. Clark*, 984 F.2d 209, 212 (7th Cir. 1993)).

In my opinion, the State complied with the IAD's requirements, and the trial court's continuance satisfied the IAD's continuance provisions. Thus, I would find Appellant's argument regarding the IAD without merit.

CONCLUSION

For the foregoing reasons, I respectfully dissent. In my opinion, this Court should affirm Appellant's conviction and sentence.

KITTREDGE, J., concurs.

The Supreme Court of South Carolina

Re: Amendments to the South Carolina Appellate Court Rules

Appellate Case No. 2013-000773

ORDER

The Commission on Lawyer Conduct and the Commission on Judicial Conduct have proposed a number of amendments to the Rules for Lawyer Disciplinary Enforcement and the Rules for Judicial Disciplinary Enforcement, which are contained in Rules 413 and 502, SCACR. The purpose of the amendments is to clarify a number of rules concerning a hearing panel chair's authority to address administrative matters, the procedures for declaring a matter closed, but not dismissed, the effect of a respondent's failure to appear at a hearing, and the documents which become public following the filing of formal charges.

Rules 413 and 502, SCACR, are hereby amended as set forth in the attachment to this order. The amendments are effective immediately.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

October 9, 2013

Rule 4(g), RLDE, Rule 413, SCACR, is amended to provide:

(g) Powers and Duties of Hearing Panel. A hearing panel shall have the duty and authority to:

(1) designate a member of the panel to serve as the chair of the panel to address administrative matters related to formal proceedings and rule on pre-hearing motions;

(2) conduct hearings on formal charges and make findings, conclusions, and recommendations to the Supreme Court for the disposition of the case, pursuant to Rule 26; and

(3) recommend that a matter be closed, but not dismissed, after the filing of formal charges.

Rule 6(b), RLDE, Rule 413, SCACR, is amended to provide:

(b) Powers and Duties. The Commission may delegate functions to the Commission counsel, including but not limited to the duty and authority to:

(1) advise the hearing panel during its deliberations and draft decisions, orders, reports, and other documents on behalf of the hearing panel;

(2) maintain Commission files to monitor the compliance by lawyers with conditions of deferred discipline, discipline, admission, reinstatement, and readmission;

(3) supervise the receiver and any attorneys appointed pursuant to Rule 31;

(4) supervise other staff necessary to the performance of the Commission's duties; and

(5) perform other duties at the direction of the Commission.

Rule 10, RLDE, Rule 413, SCACR, is amended to provide:

RULE 10
RIGHT TO COUNSEL

The lawyer shall be entitled to retain counsel and to have the assistance of counsel at every stage of these proceedings. The Commission may appoint counsel to represent the lawyer in incapacity proceedings. *See* Rule 28(b)(3). After appearing as counsel for a lawyer in a matter under these rules, counsel for the lawyer may only withdraw upon leave of the chair or the vice chair of the Commission or the chair of the hearing panel after 10 days notice to disciplinary counsel and the lawyer or, prior to formal charges having been filed, upon stipulation of the lawyer, the withdrawing counsel, and disciplinary counsel. Provided, after a matter has been forwarded to the Supreme Court for action, counsel can only withdraw from representation upon leave of the Supreme Court after due notice to the client and disciplinary counsel.

Rule 12(b), RLDE, Rule 413, SCACR, is amended to provide:

(b) When Misconduct Proceedings Become Public. When formal charges are filed regarding allegations of misconduct, the formal charges, any answer, and all other documents related to the proceedings that were filed with or issued by the Commission following the filing of the formal charges shall become public 30 days after the filing of the answer or, if no answer is filed, 30 days after the expiration of the time to answer under Rule 23. Thereafter, except as otherwise provided by these rules or the Supreme Court, all subsequent records and proceedings relating to the misconduct allegations shall be open to the public inclusive of a letter of caution or admonition issued after the filing of formal charges. If allegations of incapacity are raised during the misconduct proceedings, all records, information, and proceedings relating to these allegations shall be held confidential.

Rule 12(e), RLDE, Rule 413, SCACR, is amended to provide:

(e) Protective Orders. In order to protect the interests of a complainant, witness, third party, or respondent, the chair of the hearing panel may, upon application of

any person and for good cause shown, issue a protective order prohibiting the disclosure of specific information otherwise privileged or confidential and direct that the proceedings be conducted in a manner to preserve the confidentiality of the information that is the subject of the application.

Rule 15(e), RLDE, Rule 413, SCACR, is amended to provide:

(e) Quashing Subpoenas. Any attack on the validity of a subpoena shall be heard and determined by the investigative panel or chair of the hearing panel before which the matter is pending. Any resulting order shall not be subject to an interlocutory appeal; instead these decisions must be challenged by filing objections or a brief pursuant to Rule 27(a).

Rule 17(c), RLDE, Rule 413, SCACR, is amended to provide:

(c) Failure to Respond to Notice of Investigation, Subpoena, or Notice of Appearance. Upon receipt of sufficient evidence demonstrating that a lawyer has failed to fully respond to a notice of investigation, has failed to fully comply with a proper subpoena issued in connection with an investigation or formal charges, has failed to appear at and fully respond to inquiries at an appearance required pursuant to Rule 19(c)(3), or has failed to respond to inquiries or directives of the Commission or the Supreme Court, including failing to appear at a hearing in formal proceedings pursuant to Rule 24(b), the Supreme Court may place that lawyer on interim suspension.

Rule 24, RLDE, Rule 413, SCACR, is amended to provide:

RULE 24
FAILURE TO ANSWER; FAILURE TO APPEAR

(a) Failure to Answer. Failure to answer the formal charges shall constitute an admission of the allegations. On motion of disciplinary counsel, the administrative chair may issue a default order setting a hearing to determine the appropriate sanction to recommend to the Supreme Court. The Commission shall notify the parties of the date and time of the hearing and

shall permit them to submit evidence regarding aggravation and mitigation of sanction. A respondent held in default shall not be permitted to offer evidence to challenge the allegations contained in the formal charges deemed admitted by this rule.

(b) Failure to Appear. If the respondent should fail to appear when specifically so ordered by the hearing panel or the Supreme Court, the respondent shall be deemed to have admitted the factual allegations which were to be the subject of such appearance and to have conceded the merits of any motion or recommendations to be considered at such appearance. Absent good cause, the hearing panel or Supreme Court shall not continue or delay proceedings because of the respondent's failure to appear. If the hearing panel determines that the respondent's failure to appear was willful, it shall immediately notify the Supreme Court, which may issue an order of interim suspension pursuant to Rule 17(c). A willful failure to appear before a hearing panel or the Supreme Court may be punished as a contempt of the Supreme Court and may result in an order of interim suspension.

Rule 25(a), (h) and (i) RLDE, Rule 413, SCACR, are amended to provide:

(a) Initial Disclosure. Within 20 days of the filing of an answer, disciplinary counsel and respondent shall exchange:

> **(1)** the names and addresses of all persons known to have knowledge of the relevant facts;
>
> **(2)** non-privileged evidence relevant to the formal charges;
>
> **(3)** the names of expert witnesses expected to testify at the hearing and affidavits setting forth their opinions and the bases therefor; and,
>
> **(4)** other material only upon good cause shown to the chair of the hearing panel.

Disciplinary counsel or the respondent may withhold such information only with permission of the chair of the hearing panel or the chair's designee, who shall authorize withholding of the information only for good cause shown, taking into consideration the materiality of the information possessed by the witness and the position the witness occupies in relation to the lawyer. The chair's review of the

withholding request is to be in camera, but the party making the request must advise the opposing party of the request without disclosing the subject of the request.

(h) Resolution of Disputes. Disputes concerning discovery shall be determined by the chair of the hearing panel. Review of these decisions shall not be subject to review by the hearing panel or to an interlocutory appeal; instead these decisions must be challenged by filing objections or a brief pursuant to Rule 27(a).

(i) Pre-Hearing Conferences. The chair of the hearing panel may require the respondent and disciplinary counsel to participate in a pre-hearing conference in person or by telephone. Either party may request a pre-hearing conference. Scheduling of a pre-hearing conference is at the sole discretion of the chair of the hearing panel.

Rule 26(a), (e), and (f), RLDE, Rule 413, SCACR, are amended to provide:

(a) Scheduling. Upon receipt of the respondent's answer or upon expiration of the time to answer, the chair of the hearing panel of the Commission shall schedule a public hearing and notify disciplinary counsel and respondent of the date, time, and place of the hearing.

(e) Combining Cases for Hearing. Upon motion of either party after 10 days notice to the opposing party, the chair of the hearing panel may combine for hearing two or more formal charges pending against a lawyer which have not been heard or may reconvene to hear additional formal charges against a lawyer filed prior to the hearing panel issuing a panel report concerning formal charges against the lawyer already heard by that panel.

(f) Recommending Closed, but not Dismissed. If the hearing panel finds that the matter should not be dismissed, but it is either impossible or impractical to proceed with the matter because it appears that the respondent is deceased, disappeared, incarcerated, physically or mentally incapacitated, disbarred, or suspended from the practice of law, or for other good cause, the panel may dispense with the hearing and recommend to the Supreme Court that the matter be closed, but not dismissed. If the respondent files a written objection with the Supreme Court and

serves a copy of that objection on disciplinary counsel within 10 days of service of the recommendation that the matter be closed, but not dismissed, the matter shall be remanded to the Commission and the panel will proceed with the hearing. Any objection need not contain any grounds for objecting. If no objection is filed and properly served in accordance with this rule, the Supreme Court shall issue its order declaring the matter closed, but not dismissed, and granting the investigative panel of the Commission the authority to re-open the matter on motion of disciplinary counsel pursuant to the provisions of Rule 19(d)(4)(C).

Rule 30(g), RLDE, Rule 413, SCACR, is amended to provide:

(g) Affidavit to Be Filed. Within 15 days after the effective date of the disbarment or suspension, the respondent shall file and serve an affidavit with the Supreme Court, disciplinary counsel, and the Commission on Lawyer Conduct showing:

> **(1)** Compliance with the provisions of the order of disbarment or suspension and this rule;
>
> **(2)** All other state, federal, and administrative jurisdictions to which the lawyer is admitted to practice; and
>
> **(3)** Residence or other addresses where communications may thereafter be directed.

Rule 32, RLDE, Rule 413, SCACR, is amended to provide:

RULE 32
REINSTATEMENT FOLLOWING A DEFINITE SUSPENSION OF LESS THAN NINE MONTHS

Unless otherwise provided for in the Supreme Court's suspension order, a lawyer who has been suspended for a definite period of less than 9 months shall be reinstated to the practice of law at the end of the period of suspension by filing with the Supreme Court, and serving upon disciplinary counsel and the

Commission on Lawyer Conduct, an affidavit stating that the lawyer:

> (1) is currently in good standing with the Commission on Continuing Legal Education and Specialization and the South Carolina Bar,
>
> (2) has fully complied with the requirements of the suspension order,
>
> (3) has completed the Legal Ethics and Practice Program Ethics School within the preceding year, and
>
> (4) has paid any required fees and costs, including payment of necessary expenses and compensation approved by the Supreme Court to the receiver or the attorney appointed to assist the receiver pursuant to Rule 31, RLDE, to protect the interests of the lawyer's clients for necessary expenses, or to the Lawyers' Fund for Client Protection if the Fund has paid the attorney appointed to assist the receiver under Rule 31(g), RLDE.

If suspended for conduct resulting in a criminal conviction and sentence, the lawyer must also successfully complete all conditions of the sentence, including, but not limited to, any period of probation or parole. In such a case, the lawyer must attach to the affidavit documentation demonstrating compliance with this provision. The affidavit filed with the Supreme Court shall be accompanied by proof of service showing service on disciplinary counsel and the Commission on Lawyer Conduct, and a filing fee of $200.

The lawyer must also provide a statement from the Commission on Lawyer Conduct stating whether any disciplinary investigations are currently pending against the lawyer. If a disciplinary investigation is currently pending against the lawyer, the Supreme Court shall give disciplinary counsel an opportunity to oppose the lawyer's reinstatement pending the conclusion of that investigation. For the purposes of meeting this requirement, a lawyer who files a petition for reinstatement under this rule waives the confidentiality provisions of Rule 12 concerning any pending investigations. When all preconditions set out in this rule are met, the Court shall issue an order of reinstatement. The order shall be public.

Rule 33(f)(9), RLDE, Rule 413, SCACR, is amended to provide:

(9) If suspended for a definite period of 9 months or more, the lawyer has, during the period of suspension, completed and reported continuing legal education and legal ethics/professional responsibility credits equal to those required of regular members of the South Carolina Bar and is currently in good standing with the Commission on Continuing Legal Education and Specialization. The lawyer must also complete the Legal Ethics and Practice Program Ethics School within the year prior to filing the petition for reinstatement. The lawyer shall attach to the petition for reinstatement a statement from the Commission on Continuing Legal Education and Specialization confirming compliance with this requirement.

Rule 4(g), RJDE, Rule 502, SCACR, is amended to provide:

(g) Powers and Duties of Hearing Panel. A hearing panel shall have the duty and authority to:

> **(1)** designate a member of the panel to serve as the chair of the panel to address administrative matters related to formal proceedings and rule on pre-hearing motions;
>
> **(2)** conduct hearings on formal charges and make findings, conclusions, and recommendations to the Supreme Court for the disposition of the case, pursuant to Rule 26; and
>
> **(3)** recommend that a matter be closed, but not dismissed, after the filing of formal charges.

Rule 6(b), RJDE, Rule 502, SCACR, is amended to provide:

(b) Powers and Duties. The Commission may delegate functions to the Commission counsel, including but not limited to the duty and authority to:

> **(1)** advise the hearing panel during its deliberations and draft decisions, orders, reports, and other documents on behalf of the hearing panel;
>
> **(2)** maintain Commission files to monitor the compliance by judges with conditions of deferred discipline and discipline;
>
> **(3)** supervise other staff necessary to the performance of the Commission's duties; and
>
> **(4)** perform other duties at the direction of the Commission.

Rule 10, RJDE, Rule 502, SCACR, is amended to provide:

RULE 10
RIGHT TO COUNSEL

The judge shall be entitled to retain counsel and to have the assistance of counsel at every stage of these proceedings. The Commission may appoint counsel to represent the judge in incapacity proceedings. *See* Rule 28(b)(3). After appearing as counsel for a judge in a matter under these rules, counsel for the judge may only withdraw upon leave of the chair or the vice chair of the Commission or the chair of the hearing panel after 10 days notice to disciplinary counsel and the judge or, prior to formal charges having been filed, upon stipulation of the judge, the withdrawing counsel, and disciplinary counsel. Provided, after a matter has been forwarded to the Supreme Court for action, counsel can only withdraw from representation upon leave of the Supreme Court after due notice to the judge and disciplinary counsel.

Rule 12(b), RJDE, Rule 502, SCACR, is amended to provide:

(b) When Misconduct Proceedings Become Public. When formal charges are filed regarding allegations of misconduct, the formal charges, any answer, and all other documents related to the proceedings that were filed with or issued by the Commission following the filing of the formal charges shall become public 30 days after the filing of the answer or, if no answer is filed, 30 days after the expiration of the time to answer under Rule 23. Thereafter, except as otherwise provided by these rules or the Supreme Court, all subsequent records and proceedings relating to the misconduct allegations shall be open to the public inclusive of a letter of caution or admonition issued after the filing of formal charges. If allegations of incapacity are raised during the misconduct proceedings, all records, information, and proceedings relating to these allegations shall be held confidential.

Rule 12(d), RJDE, Rule 502, SCACR, is amended to provide:

(d) Protective Orders. In order to protect the interests of a complainant, witness, third party, or respondent, the chair of the hearing panel may, upon application of

any person and for good cause shown, issue a protective order prohibiting the disclosure of specific information otherwise privileged or confidential and direct that the proceedings be conducted in a manner to preserve the confidentiality of the information that is the subject of the application.

Rule 15(e), RJDE, Rule 502, SCACR, is amended to provide:

(e) Quashing Subpoenas. Any attack on the validity of a subpoena shall be heard and determined by the investigative panel or chair of the hearing panel before which the matter is pending. Any resulting order shall not be subject to an interlocutory appeal; instead these decisions must be challenged by filing objections or a brief pursuant to Rule 27(a).

Rule 17(c), RJDE, Rule 502, SCACR, is amended to provide:

(c) Failure to Respond to Notice of Investigation, Subpoena, or Notice of Appearance. Upon receipt of sufficient evidence demonstrating that a judge has failed to fully respond to a notice of investigation, has failed to fully comply with a proper subpoena issued in connection with an investigation or formal charges, has failed to appear at and fully respond to inquiries at an appearance required pursuant to Rule 19(c)(3), or has failed to respond to inquiries or directives of the Commission or the Supreme Court, including failing to appear at a hearing in formal proceedings pursuant to Rule 24(b), the Supreme Court may place that judge on interim suspension.

Rule 19(a), RJDE, Rule 502, SCACR, is amended to provide:

(a) Screening. Disciplinary counsel shall evaluate all information coming to disciplinary counsel's attention by complaint or from other sources that alleges judicial misconduct, incapacity, or the inability to participate in a disciplinary investigation or assist in the defense of formal proceedings due to a physical or mental condition. If the information would not constitute misconduct, incapacity, or the inability to participate in a disciplinary investigation or assist in the defense of formal proceedings if it were true, disciplinary counsel shall dismiss the

complaint or, if appropriate, refer the matter to another agency. If the information raises allegations that would constitute judicial misconduct, incapacity, or the inability to participate in a disciplinary investigation or assist in the defense of formal proceedings if true, disciplinary counsel shall conduct an investigation.

Rule 24, RJDE, Rule 502, SCACR, is amended to provide:

RULE 24
FAILURE TO ANSWER; FAILURE TO APPEAR

(a) Failure to Answer. Failure to answer the formal charges shall constitute an admission of the allegations. On motion of disciplinary counsel, the administrative chair may issue a default order setting a hearing to determine the appropriate sanction to recommend to the Supreme Court. The Commission shall notify the parties of the date and time of the hearing and shall permit them to submit evidence regarding aggravation and mitigation of sanction. A respondent held in default shall not be permitted to offer evidence to challenge the allegations contained in the formal charges deemed admitted by this rule.

(b) Failure to Appear. If the respondent should fail to appear when specifically so ordered by the hearing panel or the Supreme Court, the respondent shall be deemed to have admitted the factual allegations which were to be the subject of such appearance and to have conceded the merits of any motion or recommendations to be considered at such appearance. Absent good cause, the hearing panel or Supreme Court shall not continue or delay proceedings because of the respondent's failure to appear. If the hearing panel determines that the respondent's failure to appear was willful, it shall immediately notify the Supreme Court, which may issue an order of interim suspension pursuant to Rule 17(c). A willful failure to appear before a hearing panel or the Supreme Court may be punished as a contempt of the Supreme Court and may result in an order of interim suspension.

Rule 25(h) and (i), RJDE, Rule 502, SCACR, are amended to provide:

(h) Resolution of Disputes. Disputes concerning discovery shall be determined by the chair of the hearing panel. Review of these decisions shall not be subject to

review by the hearing panel or to an interlocutory appeal; instead these decisions must be challenged by filing objections or a brief pursuant to Rule 27(a).

(i) Pre-Hearing Conferences. The chair of the hearing panel may require the respondent and disciplinary counsel to participate in a pre-hearing conference in person or by telephone. Either party may request a pre-hearing conference. Scheduling of a pre-hearing conference is at the sole discretion of the chair of the hearing panel.

Rule 26(a), (e), and (f), RJDE, Rule 502, SCACR, are amended to provide:

(a) Scheduling. Upon receipt of the respondent's answer or upon expiration of the time to answer, the chair of the hearing panel of the Commission shall schedule a public hearing and notify disciplinary counsel and respondent of the date, time, and place of the hearing.

(e) Combining Cases for Hearing. Upon motion of either party after 10 days notice to the opposing party, the chair of the hearing panel may combine for hearing two or more formal charges pending against a judge which have not been heard or may reconvene to hear additional formal charges against a judge filed prior to the hearing panel issuing a panel report concerning formal charges against the judge already heard by that panel.

(f) Recommending Closed, but not Dismissed. If the hearing panel finds that the matter should not be dismissed, but it is either impossible or impractical to proceed with the matter because it appears that the respondent is deceased, disappeared, incarcerated, physically or mentally incapacitated, or for other good cause, the panel may dispense with the hearing and recommend to the Supreme Court that the matter be closed, but not dismissed. If the respondent files a written objection with the Supreme Court and serves a copy of that objection on disciplinary counsel within 10 days of service of the recommendation that the matter be closed, but not dismissed, the matter shall be remanded to the Commission and the panel will proceed with the hearing. Any objection need not contain any grounds for objecting. If no objection is filed and properly served in accordance with this rule, the Supreme Court shall issue its order declaring the matter closed, but not dismissed, and granting the investigative panel of the Commission the authority to re-open the matter on motion of disciplinary counsel pursuant to the provisions of Rule 19(d)(4)(C).

The Supreme Court of South Carolina

In the Matter of William Ashley Boyd, Respondent.

Appellate Case No. 2013-000884

ORDER

On August 9, 2010, the Court definitely suspended respondent from the practice of law for six (6) months. In the Matter of Boyd, 388 S.C. 516, 697 S.E.2d 603 (2010). He was reinstated on June 14, 2011. In the Matter of Boyd, 393 S.C. 159, 711 S.E.2d 898 (2011). The Court placed respondent on interim suspension on July 14, 2011. In the Matter of Boyd, 393 S.C. 367, 713 S.E.2d 296 (2011). On August 29, 2012, the Court disbarred respondent from the practice of law, retroactive to July 14, 2011. In the Matter of Boyd, 399 S.C. 356, 731 S.E.2d 876 (2012).

Pursuant to Rule 5(b)(6), RLDE, Rule 413, SCACR, the Office of Disciplinary Counsel (ODC) filed a Petition to Issue Rule to Show Cause alleging respondent engaged in the unauthorized practice of law on numerous occasions while either suspended or disbarred in violation of the Court's orders. ODC petitioned the Court to issue a rule to show cause to require respondent to appear and show cause why he should not be held in civil and criminal contempt and enjoined, sanctioned, fined, incarcerated, or otherwise punished for his misconduct. The Court granted the Petition to Issue Rule to Show Cause and set this matter for hearing on July 24, 2013. At respondent's request, the matter was rescheduled to August 21, 2013. See Order dated July 23, 2013.

Respondent admits he willfully violated the Court's suspension and disbarment orders by continuing to represent clients he had represented prior to his suspension and/or disbarment and by representing a new client after he was disbarred. Respondent does not dispute any of the facts set forth in the Petition to Issue Rule to Show Cause.

By order dated August 21, 2013, the Court found respondent in criminal contempt of Court and sentenced him to six (6) months imprisonment. The order provided a formal order addressing the finding of contempt and further sanctions would follow.

Accordingly, we order respondent to enter into a repayment agreement with ODC no later than thirty (30) days from the date of his release from prison. In the repayment agreement, respondent shall agree:

1) to pay restitution to all parties harmed by his violation of the suspension and disbarment orders;

2) to pay $719.36 in costs incurred by ODC in investigating and prosecuting this contempt proceeding;

3) to pay the costs incurred by ODC and the Commission on Lawyer Conduct for the investigation and prosecution of the disciplinary matter resulting in respondent's disbarment;[1] and

4) to pay the remaining costs as ordered by the Court on January 27, 2012.

Violation of this order may subject respondent to a further finding of contempt of this Court. Under no circumstances shall respondent petition the Court for reinstatement or any other relief until he has fully complied with the terms of this order and the repayment agreement.

s/ Costa M. Pleicones A.C.J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

[1] The disbarment order required respondent to pay the costs within thirty (30) days of the date of the order. Respondent did not comply with this order.

s/ Kaye G. Hearn J.

Toal, C.J., not participating

Columbia, South Carolina

September 12, 2013

The Supreme Court of South Carolina

In the Matter of Kenneth Gary Cooper, Respondent.

Appellate Case No. 2013-001095

ORDER

By order dated April 25, 2012, the Court suspended respondent from the practice of law for six (6) months and ordered he pay the costs of the disciplinary proceedings, $895.71, within thirty (30) days. In the Matter of Cooper, 397 S.C. 339, 725 S.E.2d 491 (2012). The Court further ordered respondent to enter into a three (3) year monitoring contract with Lawyers Helping Lawyers within thirty (30) days, and to file quarterly treatment compliance reports with the Commission on Lawyer Conduct (the Commission) for the three (3) year period. Id.

On June 25, 2012, respondent executed a cost payment plan with the Commission in which he agreed to make monthly payments in the amount of ten dollars ($10.00) towards the ordered costs. Since the execution of the plan, respondent made one payment of $10.00 on June 25, 2012.

On July 17, 2012, respondent executed a three (3) year monitoring contract with Lawyers Helping Lawyers.[1] Respondent has not filed any of the required quarterly treatment compliance reports.

Pursuant to Rule 5(b)(7), RLDE, Rule 413, SCACR, the Office of Disciplinary Counsel (ODC) filed a Petition to Issue Rule to Show Cause alleging respondent violated the terms of the Court's April 25, 2012, order and the terms of the cost payment plan by failing to pay the ordered costs. In addition, ODC alleged respondent failed to file the quarterly reports as required by the Court's April 25, 2012, order. ODC petitioned the Court to require respondent to show cause why

[1] Among other provisions, the monitoring contract required respondent to make at least weekly contact and once monthly personal contact with his monitor/mentor.

he should not be held in civil and criminal contempt, and enjoined, sanctioned, fined, incarcerated, or otherwise punished for his misconduct.

Respondent filed a return admitting the allegations in the Petition to Issue Rule to Show Cause, but asserting his failure to comply with the Court's order and cost payment plan were not willful.

By order dated July 29, 2013, the Court issued the Rule to Show Cause and set this matter for hearing on September 18, 2013.

Respondent appeared at the September 18, 2013, hearing.[2] Respondent admitted he could have made the monthly payments towards the ordered costs and could have kept in contact with his sponsor as required by his monitoring contract. Respondent testified he did not comply with the terms of the Court's order and cost payment plan because he "had other things on his mind" and did not intend to seek reinstatement to the practice of law.

Having carefully considered the evidence and applicable law, the Court finds respondent willfully violated the Court's order of April 25, 2012, and the terms of his cost payment plan. We hold respondent in civil and criminal contempt of Court.

Regarding the finding of civil contempt, this Court sentences respondent to a term of incarceration not to exceed six (6) months, suspended on the payment of $885.71 to the Commission on Lawyer Conduct not later than 3:15 p.m. on September 20, 2013.[3] Should respondent fail to timely purge this civil contempt sanction, he shall immediately report to the Alvin S. Glenn Detention Center in Richland County, South Carolina, to commence his civil contempt sentence, or to the Bureau of Protective Services at the Supreme Court of South Carolina, which shall arrange for respondent's transportation to the Alvin S. Glenn Detention Center. Upon the purging of the civil contempt sentence, or the service of any period of incarceration not to exceed six (6) months, respondent shall henceforth fully comply with all terms and conditions of the Court's April 25, 2012, order.

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[2] Respondent was represented by counsel.

[3] The Commission shall either notify the Clerk upon receipt of good funds from respondent or notify the Clerk of respondent's non-compliance with this order.

Regarding the finding of criminal contempt, this Court sentences respondent to six (6) months incarceration at the Alvin S. Glenn Detention Center, suspended upon respondent's compliance with the civil contempt sanction and his ongoing compliance with the provisions of the Court's April 25, 2012, order.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

September 19, 2013

The Supreme Court of South Carolina

In the Matter of Steven Robert Lapham, Respondent.

Appellate Case No. 2013-000806

ORDER

By order dated January 15, 2013, the Court placed respondent on interim suspension and appointed James D. Jolly, Jr., attorney to protect respondent's clients' interests. In the Matter of Lapham, 402 S.C. 223, 742 S.E.2d 1 (2013). Pursuant to Rule 5(b)(6) and (7), RLDE, the Office of Disciplinary Counsel (ODC) filed a Petition to Issue Rule to Show Cause alleging respondent: 1) has not cooperated with Mr. Jolly; 2) failed to file the affidavit required by Rule 30, RLDE; 3) and has engaged in the unauthorized practice of law since his suspension. ODC petitioned the Court to require respondent to show cause why he should not be held in civil and criminal contempt and enjoined, sanctioned, fined, incarcerated, or otherwise punished for his misconduct.

The Court granted the Petition to Issue Rule to Show Cause and set this matter for hearing on July 24, 2013. At respondent's request, the matter was rescheduled to September 4, 2013. See Order dated July 23, 2013.

At the hearing, Mr. Jolly testified about his unsuccessful efforts to obtain all of respondent's client files, a list of counties where respondent practiced law, and information regarding respondent's law office bank accounts and liability carrier.[1] Julian L. Stoudemire, Esquire, testified respondent telephoned him after his interim suspension and recommended changes to a proposed family court order. Further

[1] The Chairman of the Commission on Lawyer Conduct issued an order compelling respondent to immediately relinquish all client files, papers, documents, and/or statements for all law office bank accounts and to promptly comply with Mr. Jolly's requests for additional information. The January 30, 2013, Commission order noted respondent's willful failure to comply with the order could result in respondent being punished as contempt of Court.

information provides respondent collected partial payment of a retainer fee from a client after he was placed on interim suspension and that respondent contacted a city prosecutor and court coordinator inquiring about a continuance for a client after he was placed on interim suspension.

Respondent testified that he did not intentionally fail to cooperate with Mr. Jolly and did not willfully intend to violate the Court's order placing him on interim suspension. He explained that, in an effort to protect his clients, he contacted court officials about a continuance and opposing counsel about a proposed order while suspended. Respondent further testified that he collected partial payment of a retainer fee from a client whose criminal case he believed had been dismissed. Respondent admitted he did not file the affidavit required by Rule 30, RLDE, in spite of the Clerk of Court's letter notifying him that the affidavit must be filed within fifteen (15) days of the order of suspension and notice that failure to comply may result in a finding of civil or criminal contempt.

We find respondent willfully violated the Court's January 15, 2013, order placing him on interim suspension by failing to cooperate with Mr. Jolly, failing to file the affidavit required by Rule 30, RLDE, and by engaging in the unauthorized practice of law. By order dated September 4, 2013, the Court found respondent in criminal contempt of Court beyond a reasonable doubt and sentenced him to sixty (60) days imprisonment. The order specified respondent was to be immediately delivered to the Alvin S. Glenn Detention Center upon the conclusion of a meeting with Mr. Jolly and that a formal order addressing civil contempt would follow.[2]

By his conduct cited above, we also find respondent in civil contempt of this Court by clear and convincing evidence and sanction respondent as follows:

1) within two (2) weeks after the completion of his sixty (60) day criminal sentence, respondent shall file the affidavit required by Rule 30, RLDE; and

2) respondent shall fully cooperate with Mr. Jolly until his appointment as attorney to protect respondent's clients' interests is terminated by this Court.

[2] The Court instructed respondent to meet with Mr. Jolly within the confines of the Supreme Court courthouse immediately upon adjournment of the rule to show cause hearing.

Failure to comply with these sanctions shall result in respondent's incarceration until such time as he fully complies with the terms of this order.

s/ Jean H. Toal C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

As indicated by the order of September 4, 2013, we did not find respondent in criminal contempt of Court. However, we concur with the majority's finding of and sanctions for civil contempt.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

Columbia, South Carolina

September 19, 2013

The Supreme Court of South Carolina

In the Matter of Joel Thomas Broome, Respondent.

Appellate Case No. 2013-002140

ORDER

The Office of Disciplinary Counsel asks this Court to place respondent on interim suspension pursuant to Rule 17 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR).

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of this Court.

IT IS FURTHER ORDERED that respondent is hereby enjoined from taking any action regarding any trust, escrow, operating, and any other law office account(s) respondent may maintain at any bank or other financial institution, including, but not limited to, making any withdrawal or transfer, or writing any check or other instrument on the account(s).

s/ Jean H. Toal C.J.
FOR THE COURT

Columbia, South Carolina

October 9, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Leo David Lemire, Appellant.

Appellate Case No. 2009-143752

Appeal From York County
William H. Seals, Jr., Circuit Court Judge

Opinion No. 5177
Heard March 28, 2012 – Filed October 16, 2013

AFFIRMED

Leland B. Greeley, of Leland B. Greeley, P.A., of Rock Hill, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Deborah R.J. Shupe, all of Columbia; and Solicitor Kevin S. Brackett, of York, for Respondent.

THOMAS, J.: Leo David Lemire appeals his convictions for second-degree lynching, conspiracy, and pointing and presenting a firearm. We affirm.

FACTS AND PROCEDURAL HISTORY

Lemire's sister, Kerriann Larmand, owned and operated a locksmith franchise known as Pop-A-Lock, which provided roadside assistance and locksmith services to residential, commercial, and automotive customers. On April 30, 2009, Mrs. Larmand and her husband, co-defendant Francis Larmand (Larmand), became suspicious that Pop-A-Lock service calls were being intercepted, and they set up a "mystery shopper call" in an attempt to identify the culprit.[1] Lemire accompanied Larmand to the location where service was requested, but when no one responded, the two drove to the home of Ryan Lochbaum, a former Pop-A-Lock employee who was terminated for misconduct the previous October. Larmand testified that he drove to Lochbaum's house to see if Lochbaum had a Pop-A-Lock magnet on his car or if any Pop-A-Lock employees were at his house.

Upon arriving at Lochbaum's home, Larmand exited his truck, leaving Lemire inside, and found Lochbaum socializing with neighbors in the driveway. After a heated discussion with Lochbaum, Larmand began to return to his truck. Lochbaum followed Larmand until he saw that Lemire was now outside the truck and walking towards him with a large handgun. Lochbaum then attempted to disarm Lemire, and a struggle ensued among Lochbaum, Lemire, and Larmand. After some neighbors joined the scuffle, Lochbaum was able to wrestle away the gun. Larmand and Lemire subsequently fled the scene. The police stopped Larmand's truck later that night and arrested Lemire for pointing and presenting a firearm. Larmand was arrested the following day.

Lemire was indicted for criminal conspiracy for the purpose of committing the crime[s] of lynching and/or pointing or presenting a firearm, second-degree lynching, and pointing and presenting a firearm.[2] Larmand was charged with the same offenses, and the two were tried together.

During trial, the court charged the jury in part, "It is permissible to infer that all persons present as members of a mob when an act of violence is committed have

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[1] A "mystery shopper call" involves reporting a bogus service request to central dispatch and waiting at the location where service was requested to see if an individual other than a Pop-A-Lock employee arrives to fill the request.

[2] Lemire was also indicted for assault with intent to kill, but the State elected not to proceed on this charge.

aided and abetted the crime and are actually guilty as principals." Lemire objected, arguing the permissive inference in the charge amounted to improper burden shifting. The trial court overruled Lemire's objection.

After over an hour of deliberation, the jury sent the trial court a note asking, "If we think one is guilty of a charge, do we have to automatically vote that the other party is also guilty of the charge?" In response, the trial court responded by recharging the jury on the law of second-degree lynching, pointing and presenting a firearm, and criminal conspiracy. Approximately two and one half hours later, the jury sent a second note inquiring, "Not close on verdict . . . Can we have a copy printout of the statute of the three charges?" Rather than provide a printed copy of the statutes for the respective charges, the trial court gave the jury a written copy of the entire jury charge. Lemire objected, arguing the physical copy of the charge could allow a single juror to "use the written charge to cite and to overcome what the jury has heard in their minds." The trial court overruled Lemire's objection, summoned the foreperson to the courtroom, and stated, "Madam foreperson, we have had [sic] printed out for the jury of [sic] the three charges. What I am going to do is send you back the charge that I have read." After further deliberation, the jury convicted both Lemire and Larmand of all charges. Lemire appealed. [3]

ISSUES

I. Did the trial court err in submitting its entire written charge to the jury?

II. Was Lemire entitled to directed verdicts on the charges of second-degree lynching and conspiracy?

III. Did the trial court err in charging the jurors that they could infer all persons present as members of a mob at the time the act of violence is committed are guilty as principals?

[3] Larmand also appealed his convictions, and the two appeals were initially heard together by this court sitting en banc. A separate opinion was issued on Larmand's appeal. *See State v. Larmand*, 402 S.C. 184, 739 S.E.2d 898 (2013). Subsequently, the court voted to return the case to the original panel for disposition finding en banc review was improvidently granted.

STANDARD OF REVIEW

"In criminal cases an appellate court sits to review errors of law only." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion." *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *Id.*

LAW/ANALYSIS

I. Submission of the Written Charge to the Jury

On appeal, Lemire argues the trial court's decision to send the entire charge in written form to the jury during deliberation was in error because (1) the jury did not request the entire charge but only the statutes pertaining to the charges, (2) the foreperson was given only a single copy of the charge while the remaining jurors remained sequestered in the jury room, (3) the remaining jurors were neither instructed about their rights to read the instructions in their entirety nor admonished not to take portions of the charge out of context, and (4) there was an increased likelihood of prejudice because the written charge was provided when the jurors were struggling to reach a verdict. We disagree.

A. Jury Only Requested the Statutes

"A trial court may, in its discretion, submit its instructions on the law to the jury in writing." *State v. Turner*, 373 S.C. 121, 129, 644 S.E.2d 693, 697 (2007). Furthermore, a party disputing the submission of the written charge must show prejudice to obtain relief on this ground. *Id.* A trial court should use this practice sparingly and only when it will aid the jury and not prejudice the defendant. *State v. Covert*, 382 S.C. 205, 210, 675 S.E.2d 740, 743 (2009). In any event, "[i]t is never appropriate . . . to give only part of the charge to the jury." *Id.* We hold the trial court acted within its discretion in sending a written copy of the entire charge to the jury during its deliberation.

Here, pursuant to the prohibition in *Covert*, the trial court was not at liberty to provide the jury with written copies of only selected portions of its instructions.[4] The trial court could either recite the requested portions to the jury or, as was done here, send a written copy of the entire charge to the jury. At trial, Lemire never advocated that the trial court should reinstruct the jury verbally on the requested written statutes. Thus, the court did not abuse its discretion when it simply chose the other valid alternative as permitted by *Covert*. Recognizing that trial courts must exercise restraint in employing this practice, we nevertheless hold its use here was proper, especially considering the trial court had already re-charged the jurors orally on the relevant statutes when they made their first inquiry during the deliberation. *See* 75A Am. Jur. 2d *Trial* § 978 (2007) (observing that a written copy of the court's charge can be provided to the jurors provided the presiding judge has first read the instructions to them).

B. Single Copy of the Charge Given to the Foreperson

We further hold Lemire has failed to establish reversible error from the trial court's decisions both to supply the jury with only one copy of the written charge and to give that copy to the foreperson for delivery to the jury room. First, Lemire did not request the court provide a separate copy for each juror. Furthermore, we have found no authority, nor has Lemire cited authority, for the proposition that it is error for a trial court to furnish a single copy of its written instructions to the jury during deliberation.[5]

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[4] The Supreme Court of South Carolina decided *State v. Covert*, 382 S.C. 205, 675 S.E.2d 740 (2009), on April 13, 2009, and Lemire's trial took place during October of that same year.

[5] In the standard charges recommended by the South Carolina Supreme Court Staff Attorneys Office, the charge for giving written charges to the jury references a single copy: "I will give you a copy of these instructions in [written] . . . form." The jury charges recommended by the South Carolina Supreme Court Staff Attorneys Office are available on the Charleston County Bar Association website at http://www.charlestonbar.org/CM/ArchivedNewsletters/GSInstructions2.doc (last visited September 23, 2013). These standard charges also note the foreperson's duty to preside in the jury room and serve as the jury's spokesperson in court. *Id.* We do note, however, that these standard charges are not endorsed by the Supreme Court of South Carolina. Instead, they are simply suggestions compiled by the Supreme Court Staff Attorneys Office. A disclaimer before the list of charges reads "These jury charges are merely suggestions. They are not

Additionally, there is no discussion in the record between the trial court and Lemire concerning the trial court's decision to summon only the foreperson to receive the written jury instructions. Because Lemire never objected at trial to the summoning of the foreperson only and never requested the entire jury be present to receive the written charge, this argument is not preserved for appellate review. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("A party may not argue one ground at trial and an alternate ground on appeal."); *see also Kennedy v. S.C. Retirement Sys.*, 349 S.C. 531, 532-33, 564 S.E.2d 322, 323 (2001) ("'Preserving issues for appellate review is a fundamental component of appellate practice. South Carolina appellate courts do not recognize the plain error rule.'" (quoting Jean H. Toal, Shahin Vafai & Robert Muckenfuss, *Appellate Practice in South Carolina* 55 (1999))).[6]

Setting aside the rules of preservation, further, we find Lemire was not prejudiced by the court furnishing the foreperson with a single copy of the charge. Lemire argues in his brief that the prejudice is "readily apparent as the record reflects that the jury sent out a note that said 'Reached a verdict on three charges, deadlocked on the remaining.' Obviously the jury has not carefully read the jury instructions or had taken some of the instructions out of context." We do not agree that the note evidences prejudice. We fail to see how the note is indicative that jury confusion was caused by the trial court's instructions. A number of explanations could exist for the wording of this note. To assume that the note is a sign of prejudice, as Lemire argues, is speculative. *See Green v. State*, 351 S.C. 184, 196, 596 S.E.2d 318, 324 (2002) (refusing to speculate what foreman meant when he related to the trial court the jury had reached a verdict "reluctantly" and holding this statement did not prove defendant was prejudiced).

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required and have not been sanctioned or approved by the South Carolina Supreme Court." *Id.*

[6] We are aware that had all the jurors been summoned into the courtroom with instructions given to each, these matters would probably not be before us now. However, summoning all of the jurors or giving further jury instructions was not requested. To find that Lemire was somehow prejudiced due to something the foreperson or jury may or may not have done requires this court to speculate upon the happenings in the jury room. Nevertheless, guidelines and procedures as to how to submit a written charge to the jury would benefit the bench and bar in the future.

C. Oral Instructions Concerning the Written Jury Charge

Lemire further contends that since a single written copy of the charge was provided to the jury during its deliberation, all the jurors should be instructed about their right to read the entire charge and be admonished not to take any portions out of context. Lemire's entire argument concerning the charge includes the following:

> Your honor, the only hesitation that I have and the objection that I would make for the record is that not knowing the dynamic of the jury, and there being one copy of the charge, I would hesitate a juror or a group of jurors being able to try and use the written charge to cite and to overcome what the jury [sic] has heard in their minds. But I understand the court's position. And I would just object to the written charge as such going back to the jury . . . To pick and choose and pointing different sections of the charge as opposed to other sections. If the other jurors did not wish to read the whole charge. It's about twenty-two pages, twenty-one pages. And that's the reason that I would have, that there is the possibility that there might be some jurors who would emphasize certain sections of that and point to others and see if there's something else in the charge. And they may remember things differently.

Nowhere in his argument concerning the written jury charge did Lemire request the trial court instruct the jury in any manner. Therefore, any error predicated on the trial court's failure to instruct the jury regarding the manner in which the jury should use the written charge is not preserved for appellate review. *See State v. Ford*, 334 S.C. 444, 454, 513 S.E.2d 385, 390 (Ct. App. 1999) ("When a charge is inadequate as given, a party must request further instructions or object on grounds of incompleteness to preserve the issue for review.").

Lemire failed to establish preserved error arising from the trial court's failure to instruct the jury about the written charge. Nonetheless, we address prejudice to respond to the dissent's argument. The dissent contends error arose when the trial court did not instruct the jury to refrain from "picking and choosing" from the written charge. The dissent finds prejudice in the jury's quick deliberation,

claiming this suggests that each juror did not consider the charges as a whole.[7] No other prejudice is identified by the dissent beyond speculation about the happenings within the jury room. There is a general rule against review of internal jury deliberation. *See State v. Franklin*, 341 S.C. 555, 562, 534 S.E.2d 716, 720 (Ct. App. 2000). We recognize that the length of the jury's deliberation could be attributable to a variety of factors, and we decline to speculate about what occurred within the jury room.[8]

Moreover, the dissent assumes that by failing to warn the jury not to "pick and choose" from the jury charge, the jury wholly ignored the rest of the jury charge and simply convicted Lemire based on the requested charges. The dissent notes such a worry was predicated on the trial court's prior failure to recharge the jury on the hand of one is the hand of all while recharging the jury on lynching. We question the appropriateness of considering this argument in light of the fact that Lemire himself argued against the State's request for an additional hand of one is the hand of all instruction and prevailed. *See State v. Stroman*, 281 S.C. 508, 514, 316 S.E.2d 395, 399 (1984) (noting a party cannot complain of error which his own conduct induced). There is no evidence in the record indicating the jury neglected any portion of the charge. Rather, the record indicates the jury deliberated for almost an additional hour after receiving the written instructions. Further, after receiving an *Allen*[9] charge, the jury continued deliberation for another forty minutes before arriving at a verdict. In the *Allen* charge, the trial court instructed the jury to "lay aside all outside matters and reexamine the questions before you based on the law and the evidence in this case." The law and evidence in the case would include the hand of one is the hand of all charge and its limitations. Thus, were we to set aside this court's preservation rules and find error, we find no prejudice.

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[7] We note that Lemire never argued at trial or in his briefs that the quickness of the jury's deliberation evidenced prejudice. Instead, Lemire argued in his brief that prejudice was apparent from the jury's note stating it had reached a verdict on three charges and were deadlocked on the remaining. As previously noted, we do not agree that this note evidences prejudice.

[8] We also note that the brevity of a jury's deliberation is not a ground for the reversal of a criminal conviction. *See State v. Holland*, 261 S.C. 488, 498-99, 201 S.E.2d 118, 123-24 (1973); *State v. Dewitt*, 254 S.C. 527, 534, 176 S.E.2d 143, 147 (1970); *State v. Chandler*, 126 S.C. 149, 154, 119 S.E. 774, 776 (1923).

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

D. Prejudice Due to Lengthy Jury Deliberations

Finally, Lemire maintains the likelihood he would be prejudiced by the trial court's decision to give the written charge to the jury was enhanced because the jury was struggling to reach a verdict. Lemire never argued to the trial court that the likelihood of prejudice resulting from its decision concerning the jury charge would be greater due to the jury's difficulties in reaching a verdict. Thus, this argument is not preserved for review. *See Dunbar*, 356 S.C. at 142, 587 S.E.2d at 694 (noting an issue must be raised to and ruled upon by the trial court to be preserved for appellate review).

This argument also fails on the merits, as such a practice of providing the written charge to the jury has not been considered prejudicial as long as the trial court has already given the charge orally. *See Turner*, 373 S.C. at 129, 644 S.E.2d at 697 ("A trial court may, in its discretion, submit its instructions on the law to the jury in writing."); *see also* 75A Am. Jur. 2d *Trial* § 978 (2007) (noting the general recognition that when a jury requests written instructions, "no good reason exists to deny such a request because giving the instructions might avoid confusion . . . as to the contents of the instructions" and when a written copy of a jury charge is provided during deliberations, "the proper practice would be for a judge to first read the instructions to the panel, as opposed to just merely handing the written instructions to them"); *id.* (acknowledging "a few cases which hold that a trial court commits error if it sends its written instructions with the retiring jury" but further noting that "in this latter group of cases, the courts have ruled that such error was not of sufficient magnitude to warrant reversing a case which was otherwise properly tried"). The trial court demonstrated caution in sending the written instructions to the jury room, as evidenced in the fact that this measure was taken only when it became clear the jurors were still unable to reach a verdict despite having received additional verbal instructions and having engaged in prolonged deliberations. *See Covert*, 382 S.C. at 210, 675 S.E.2d at 743 (2009) (finding it is within the trial court's discretion to submit its instructions on the law to the jury in writing, but this practice should be used sparingly and only when it will aid the jury and not prejudice the defendant). Accordingly, we hold that providing the jury with a written copy of the jury charge did not result in prejudice to Lemire.

II. Directed Verdicts

Lemire argues he was entitled to directed verdicts on the lynching and conspiracy charges. An appellate court reviews the denial of a directed verdict by viewing the

evidence and all reasonable inferences in the light most favorable to the State. *State v. Weston*, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). "If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, [an appellate court] must find the case was properly submitted to the jury." *Id.* at 293-93, 625 S.E.2d at 648. The trial court may not consider the weight of the evidence. *Id*. at 292, 625 S.E.2d at 648.

At trial, however, only Lemire's co-defendant, Larmand, moved for directed verdicts on the lynching and conspiracy charges. Lemire neither requested to join in the motion nor moved for similar relief; therefore, Lemire has not preserved these arguments for review. *See State v. Ward*, 374 S.C. 606, 612, 649 S.E.2d 145, 148 (Ct. App. 2007) (ruling the appellant could not bootstrap an issue for appeal through the objection made by a co-defendant) (citing *Tupper v. Dorchester Cnty.*, 326 S.C. 318, 324 n.3, 487 S.E.2d 187, 190 n.3 (1997)).

III. Jury Charge on Inference

Lemire contends the trial court erred in charging the jurors that they could infer that all persons present as members of a mob when an act of violence is committed are guilty as principals. Lemire argues this instruction, which was taken directly from section 16-3-240 of the South Carolina Code (2003), unconstitutionally shifted the burden of proof, was redundant and confusing in view of other parts of the charge, and amounted to a charge on the facts. We find no error.[10]

Generally, the trial judge is required to charge only the current and correct law of South Carolina. *Sheppard v. State*, 357 S.C. 646, 665, 594 S.E.2d 462, 472-73 (2004); *State v. Brown*, 362 S.C. 258, 261-62, 607 S.E.2d 93, 95 (Ct. App. 2004). A jury charge is correct if it contains the correct definition of the law when read as a whole. *Sheppard*, 357 S.C. at 665, 594 S.E.2d at 473. Jury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error. *State v. Aleksey*, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000). The standard for review of an ambiguous jury instruction is whether there is a reasonable likelihood that the jury applied the challenged instruction in a way that violates the Constitution. *Id.* When a charge is inadequate as given, a party must request further instructions or object on grounds of incompleteness to preserve the issue for review. *Ford*, 334 S.C. at 454, 513 S.E.2d at 390.

[10] Section 16-3-240 was in effect at the time of the incident and at the time of Lemire's trial, but it was repealed in 2010.

Lemire relies on *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009), to support his position that the charge unconstitutionally shifted the burden of proof. *Belcher*, however, concerned a permissive inference of malice, which is not an element of lynching. Furthermore, the trial court instructed the jurors they would first have to find a mob had been formed and Lemire was present as a member of the mob when the victim was attacked before they could find Lemire guilty as a principal as well as an accessory. As to Lemire's arguments that the charge was redundant, confusing, and tantamount to a charge on the facts, these concerns were neither raised to nor ruled upon by the trial court and are therefore not preserved for appeal. *See State v. McKnight*, 352 S.C. 635, 646, 576 S.E.2d 168, 173-74 (2003) (holding an argument not raised to and not ruled on by the trial court was unpreserved for appellate review). Accordingly, the trial court properly overruled Lemire's objection to the jury charge.

CONCLUSION

We hold the trial court acted within its discretion in submitting its entire written charge to the jury when the jury requested copies of the statutes under which Lemire was charged. We further hold Lemire's argument that he was entitled to directed verdicts on the lynching and conspiracy charges are not preserved for appellate review. Additionally, the jury charge on inference was a correct interpretation of the applicable statute in effect at the time of the incident and trial. We decline to address Lemire's argument that the charge was redundant, confusing, and amounted to a charge on the facts because Lemire failed to properly raise this issue below. Based on the foregoing, the trial court's decision is

AFFIRMED.

WILLIAMS, J., concurs.

LOCKEMY, J., dissenting: The supreme court's decision in *State v. Turner*, 373 S.C. 121, 644 S.E.2d 693 (2007), is premised on the requirement that a trial court must consider the individual circumstances of each case when determining *whether* to send a written copy of the jury charge into the jury room. 373 S.C. at 129, 644 S.E.2d at 697 (stating "submission of written instructions to the jury is not appropriate for every case"). I believe this requirement also applies to the manner in which the trial court submits a written charge. *See* 373 S.C. at 129, 644 S.E.2d at 698 (noting "this practice should be carefully exercised by the Bench"). In reviewing the trial court's decision in this case, therefore, we must determine

whether the court acted within its discretion in (1) sending the written charge to the jury at all, and (2) fashioning the manner in which it did so to fit the circumstances. *Id.* I have no disagreement with the trial court's decision to send the written charge to the jury. However, I believe the trial court abused its discretion in failing to address specific concerns raised by Lemire regarding the manner in which the charge would be submitted to the jury, and on the unique facts of this case, the error caused Lemire prejudice. I would reverse and remand for a new trial.

I. The Manner of Sending a Written Charge to the Jury

Lemire makes four arguments on appeal regarding the manner in which the trial court sent the written charge to the jury. I agree with the majority that his first argument—the court erred in sending the entire charge to the jury when it requested only a portion—is without merit. *See State v. Covert*, 382 S.C. 205, 210, 675 S.E.2d 740, 743 (2009) ("It is never appropriate . . . to give only part of the charge to the jury . . . .").

Lemire's other arguments are persuasive. First, he argues the court erred in providing the jury only one copy of the charge. Under some circumstances, providing only one copy may be sufficient. In this case, however, Lemire gave a specific reason the trial court should provide more than one copy,[11] and the circumstances made that reason compelling. It was 8:00 p.m. on the third day of trial. The jury had been deliberating for three and a half hours and had already been recharged once with only a portion of the charge. As Lemire pointed out to the trial court, the written charge was twenty-two pages long. Under these circumstances, there was little chance the entire jury would properly use the one copy provided to them.

Second, Lemire argues the trial court erred in not instructing the jury as to how it should properly use the written charge. Typically, trial courts charge the jury that it must consider the charge as a whole and not focus on some portions to the exclusion of others. Lemire specifically argued this concern to the trial court, explaining his objection was "if a juror was to pick and choose from the charge." Lemire's concern is particularly important under the circumstances of this case because (1) the trial court did not tell the jury this in its initial charge, (2) the jury

[11] Lemire stated, "Your honor, . . . the objection that I would make for the record is that not knowing the dynamic of the jury, and there being only one copy of the charge, I would hesitate [sic] a juror or a group of jurors being able to try and use the written charge."

had already been recharged orally on only a portion of the charge, (3) in that previous recharge, the trial court chose not to include the principle that the hand of one is the hand of all, which was critical to the State's theory of the case, (4) the jury asked for only selected portions of the charge, and (5) the length of prior deliberations and the hour of the night made it particularly likely the jury would "pick and choose." The concern is even greater when dealing with a written charge. In fact, the standard instructions the supreme court provides to circuit judges include this script for judges to use when distributing written instructions to the jury:

> I will give you a copy of these instructions in written . . . form. During your deliberations, you may refer to the instructions to guide your decision-making. You must consider the instructions as a whole and not follow some and ignore others.

In this instance, it was essential that the trial court instruct the jury it must consider the charge as a whole. First, the jury asked for "a copy printout of the statute of the three charges." This request demonstrated the danger that the jury may "pick and choose." Second, the State relied on the principle that the hand of one is the hand of all. The charge on the hand of one principle contains limitations on the jury's use of it, which include (1) "a finding of a prior arrangement, plan, or common scheme is necessary for a finding of guilt" under the principle, (2) a defendant is guilty under the principle only if the act of the other defendant "happens as a probable or natural consequence of" their plan, and (3) "mere presence at the scene of a crime is not sufficient to convict." Although the trial court's oral charge contained these limitations, the court needed to inform the jury when submitting the written instructions that it must consider these limitations in combination with the elements of lynching. If the jury did as it requested and looked only at "the three charges," Lemire would have been denied the benefit of the limitations. Under the circumstances of this case, therefore, Lemire was entitled to what he specifically asked for—to have the jury instructed it could not "pick and choose" from the charge.

Third, Lemire argues the trial court erred in presenting the written charge only to the foreperson, not to the entire jury. In some circumstances, it is permissible for the trial court to speak only to the foreperson. In my opinion, however, delivering a written copy of the jury charge is not one of those circumstances. Rather, the trial court must ensure that the entire jury knows it has received the written charge

and how it may and may not use it. I do not see how that can be accomplished speaking only to the foreperson.

Therefore, I would find the trial court erred in (1) sending the jury only one copy,[12] (2) not instructing the jury to consider the charge as a whole, and (3) presenting the written charge only to the foreperson.[13]

I agree with the majority that Lemire could have been more precise in raising these issues to the trial court. However, I believe Lemire's arguments were sufficient to preserve the issues he raises on appeal. After three and a half hours of deliberations, the jury sent a note stating, "Not close on verdict," and requesting "a copy printout of the statute of the three charges." The trial court immediately announced, without giving either side an opportunity to be heard, "What I'm going to do is print the charge, bring [in] the foreperson, and just give her the charge." The assistant solicitor asked the trial court, "Your honor, can we have a moment to research? I think there may be a case, I'm not sure." The record indicates the trial court did not take any break and counsel had only a few minutes during the hearing to formulate a position on how the court should proceed.

Both defendants objected to the trial court's proposal. Lemire's counsel specifically stated:

> Your honor, the only hesitation that I have and the objection that I would make for the record is that not knowing the dynamic of the jury, and there being one copy of the charge, I would hesitate [sic] a juror or a group of jurors being able to try and use the written charge to cite and to overcome what the jury has heard in their minds. But I understand [] the court's position. And I would just object to the written charge as such going back to the jury. . . . It would have to do with certain—it would have to do if a juror was to pick and

[12] I find this to be error because of the unique circumstances of this case, particularly the late hour and length of deliberations at the time of the jury's request. I do not mean to suggest a trial court must always submit more than one copy.

[13] Those are the concerns raised under the circumstances of this case. In other cases, other circumstances may require the trial court to consider other options.

> choose from the charge, I guess. . . . To pick and choose and pointing different sections of the charge as opposed to other sections. If the other jurors did not wish to read the whole charge. It's about twenty-two pages, twenty-one pages. And that's the reason that I would have, that there is the possibility that there might be some jurors who would emphasize certain sections of that and point to others and see if there's something else in the charge. And they may remember things differently.

Turner requires that a trial court fashion the manner in which it sends the jury a written copy of the charge to fit the individual circumstances of the case, 373 S.C. at 129, 644 S.E.2d at 698, yet our appellate courts have given little guidance on what that proper manner is.[14] Under these circumstances, I believe Lemire adequately raised to the trial court the concerns addressed in this opinion, and thus preserved the issues he presented to this court. The trial court erred by refusing to address any of Lemire's concerns.

II. Prejudice

In *Covert*, our supreme court cautioned the trial bench that the practice of submitting written instructions to the jury "should be used sparingly, and only where it will aid the jury and where it will not prejudice the defendant." 382 S.C. at 210, 675 S.E.2d at 743. It would be difficult to argue that the submission of written instructions did not, in some way, "aid" the jury in this case. Before the submission of the written instructions, the jury had deliberated for almost four hours on the three charges against each defendant. The jury was deadlocked to the point that when the trial court queried whether they were close to reaching a verdict or whether they would like to order dinner that would take nearly an hour to arrive, they replied, "Order dinner. Not Close on Verdict." The jury also requested a written printout of the "Statute of the Three Charges." Less than one

[14] A study performed in 2000 indicated that judges in South Carolina deny requests for written instructions primarily because they are uncertain about South Carolina law regarding the practice. Roger M. Young, *Using Social Science to Assess the Need for Jury Reform in South Carolina*, 52 S.C. L. Rev. 135, 179-80 (2000). While the supreme court has clarified since the study that a trial court "may, in its discretion, submit its instructions on the law to the jury in writing," *Turner*, 373 S.C. at 129, 644 S.E.2d at 697, there is still little guidance on the proper procedure for sending back a jury charge.

hour after receiving one copy of the twenty-two pages of written instructions, the twelve-member jury (the record is silent as to whether they had the benefit of a hearty York County dinner to energize their efforts) received sufficient aid to unanimously reach a verdict on the three charges and become deadlocked on a new mysterious remaining charge. The trial court then gave an *Allen* charge and the jury fully completed its work within an additional forty minutes, bringing out a verdict on the three charges without comment on what happened to the other charge.

My colleagues in the majority find no error in the trial court's actions. Additionally, the majority finds that even if there was error, it was not preserved. I respectfully disagree with the majority as stated above and find that this was error and it was preserved. The much more difficult question is whether the trial court's error prejudiced Lemire. *See State v. Belcher*, 385 S.C. 597, 611, 685 S.E.2d 802, 809 (2009) ("Errors, including erroneous jury instructions, are subject to harmless error analysis."). On these unique facts, I would hold that it did. The process here was somewhat confusing. The trial court's decision to provide the written instructions to the jury was based on a request from the jury for a written copy of the three specific criminal charges. Seemingly complying with that request, the trial court handed the charges to the foreperson out of the presence of the other jurors and stated, "We have printed out for the jury of (sic) the three charges." Although the trial court stated immediately thereafter, "What I am going to do is send you back the charge that I have read," the trial court does not make it clear whether it was referring to the initial charge or the re-charge the court read to the jury only two hours earlier just on the three specific criminal charges. Thus, without guidance, was the jury to take the comments from the trial court literally and only focus on the three charges, or was it free to consider all of the written instructions including those about the hand of one is the hand of all and mere presence?

Specifically as to the foreperson, what was she to do with the instructions? For example, was she to keep the written copy to herself and do as the trial court had done and read the parts she determined appropriate to the rest of the jury? Was she to pass the instructions around for every juror to read in its entirety? The quickness of the jury's decision after the submission of the instructions makes the latter choice unlikely. The foreperson was empowered with apparent authority that went beyond that which is possessed by persons in her position. It is a peril when conversations are carried on between the trial court and only one juror about non-ministerial matters.

For the foregoing reasons, I find it was error to deliver written instructions to a jury after it had engaged in long and divided discussions without guidance as to their proper use. Delivering the written instructions and making verbal comments about them to the foreperson out of the presence of the rest of the jury and without instructions as to their use empowered one juror with improper power. This empowerment was prejudicial to Lemire because it denied him a fair and just trial by twelve jurors hearing the same evidence and the same instructions on the law. I do not determine exactly what the jury did or focused on with the written instructions. At this point, no one knows or may ever know and I decline to speculate on their activities in the jury room. However, it is clear and not speculation that the jurors needed guidance on how to use these instructions from the trial court and not a fellow juror. Not giving this guidance to the entire jury was prejudicial to Lemire. Therefore, I respectfully dissent.