

**CASE LAW UPDATE: LATEST AND GREATEST**  
**AUGUST 16, 2013**

**AGENDA**

**8:30 AM: REGISTRATION**

**8:58 AM: INTRODUCTION**

*Assistant Attorney General Nicole T. Wetherton, South Carolina Office of the Attorney General*

**9:00 – 9:30 AM: RECENT DEVELOPMENTS IN CIVIL LITIGATION**

*Deputy Solicitor General Emory Smith, South Carolina Office of the Attorney General*

**9:30 – 10:00 AM: RECENT DEVELOPMENTS IN PCR**

*Senior Assistant Deputy Attorney General Salley Elliott,  
South Carolina Office of the Attorney General*

**10:00 – 10:15 AM: BREAK**

**10:15 – 10:45 AM: RECENT DEVELOPMENTS IN SECURITIES**

*Assistant Attorney General J. Louis Cotè III, South Carolina Office of the Attorney General*

**10:45 – 11:15 AM: RECENT DEVELOPMENTS IN CAPITAL LITIGATION**

*Senior Assistant Deputy Attorney General Don Zelenka,  
South Carolina Office of the Attorney General*

**11:15 – 11:30 AM: BREAK**

**11:30 – NOON: RECENT DEVELOPMENTS IN CRIMINAL APPEALS**

*Assistant Attorney General William Blich, South Carolina Office of the Attorney General*

**NOON – 12:30 PM: RECENT DEVELOPMENTS IN SVP/ICAC**

*Assistant Attorney General Nicole T. Wetherton, South Carolina Office of the Attorney General*

EMORY SMITH

BIOGRAPHICAL INFORMATION

He is a graduate of Furman University and the University of South Carolina Law School. He is currently the Deputy Solicitor General for the Office of the Attorney General and works on many major cases in civil litigation.

## RECENT DEVELOPMENTS IN CIVIL LITIGATION

Emory Smith  
Deputy Solicitor General

I. *Bodman v. State*, 403 S.C. 60, 742 S.E.2d 363 (2013).

This suit in the original jurisdiction of the Supreme Court challenged the exemptions on the sales tax imposed by S.C. Code Ann. § 12-36-2120 and the caps on taxes on certain items imposed by §12-36-2110. The Court granted judgment to the defendants and excerpts of its Opinion are set forth below:

The argument [Mr. Bodman] advances instead [in his challenge to the sales tax exemptions and caps] is that the sheer number of exemptions and caps in sections 12-36-2110 and 12-36-2120 has rendered the statutes arbitrary and thus unconstitutional. Moreover, he points to the wide range of transactions which fall under these statutes as evidence of a lack of a “cohesive scheme,” which accordingly makes the entire group arbitrary and presumably lacking in a rational basis. Yet, in no uncertain terms he argues that the scheme must stand or fall as a whole based solely on the number of “patchwork” exclusions and caps. He even went so far as to explicitly decline the Defendants’ invitation to examine whether individual exemptions and caps are supported by a rational basis. [footnote omitted]

We rejected this very argument in *Ed Robinson Laundry & Dry Cleaning, Inc. v. South Carolina Department of Revenue*, 356 S.C. 120, 588 S.E.2d 97 (2003). There, we considered an identical challenge to the same statutory scheme, where Ed Robinson Laundry contended that the number of exemptions alone rendered section 12-36-2120 arbitrary and therefore unconstitutional. *Id.* at 125-26, 588 S.E.2d at 100. We noted that while the exemptions may be arbitrary in the political or economic sense of the word, that does not mean they are arbitrary in the constitutional sense. *Id.* at 126, 588 S.E.2d at 100. We accordingly held “Robinson’s argument that ‘[t]he sheer number of exemptions demonstrates the exemptions are arbitrary’ is without merit. We are concerned not with size or volume but with content.” *Id.* Because Bodman’s challenge, like Ed Robinson Laundry’s, deals only with size and volume and not content, it must fail.

II. ***Disabato v. S. Carolina Ass'n of Sch. Adm'rs*, 2011-198146, 2013 WL 3723502 (S.C. July 17, 2013):**

In this case, the court made the following ruling regarding the constitutionality of the application of FOIA to the South Carolina Association of School Administrators:

We hold the circuit court erred in finding the FOIA unconstitutional under the First Amendment when applied to SCASA. The FOIA is a content-neutral statute that serves important governmental interests and does not burden substantially more speech than necessary to serve those interests, and therefore, it does not violate SCASA's First Amendment speech and association rights. However, we express no opinion as to whether SCASA is a public body subject to the FOIA and leave that issue for determination on remand. For the foregoing reasons, we reverse the circuit court's dismissal of this case and remand to the circuit court for further proceedings.

III. ***Harleysville Mut. Ins. Co. v. State*, 401 S.C. 15, 29, 736 S.E.2d 651, 658 (2012)**

This suit in the Court's original jurisdiction challenged the constitutionality of a law passed by the General Assembly in 2011 addressing the Commercial General Liability insurance policies for construction related work. The Court found the Act unconstitutional to the extent it applied retroactively. As stated by the Court:

We hold that Act No. 26 substantially impairs the contractual relationship by mandating that all CGL policies be legislatively amended to include a new statutory definition of occurrence and by applying this mandate retroactively. While the dissent believes the new provision merely clarifies existing law, we find the statute fundamentally changes the definition of occurrence.

The Court rejected the argument that the Act violated separation of powers by attempting to change legislatively the opinion of the Supreme Court in "*Crossman I*" while a petition for rehearing was pending as to that decision and before the Court withdrew that

opinion in its decision in *Crossmann Cmities. of N.C., Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 717 S.E.2d 589 (2011) (*Crossmann II*). The Court reasoned as follows:

... a judicial [interpretation] of a statute is determinative of its meaning and effect, and any subsequent legislative amendment to the contrary will only be effective from the date of its enactment and cannot be applied retroactively.” ... see *Steinke v. S.C. Dep’t of Labor, Licensing, & Regulation*, 336 S.C. 373, 520 S.E.2d 142 (1999) (concluding the General Assembly could not retroactively overrule this Court’s interpretation of a statute, but noting that the General Assembly may resolve statutory conflict in future cases).

We find that the General Assembly did not violate the doctrine of separation of powers by enacting Act No. 26. As evidenced by the procedural and legislative history, it is clear the General Assembly wrote and ratified Act No. 26 in direct response to this Court’s decision in *Crossmann I*. Had *Crossmann I* been this Court’s final opinion, the doctrine might have been implicated. However, given that in *Crossmann II* we revised our initial decision in *Crossmann I*, we do not find that the General Assembly, in this instance, retroactively overruled this Court’s interpretation of a statute.

736 S.E.2d at 656. The Court also rejected equal protection and special legislation challenges to the law.

**IV. *S. Carolina Pub. Interest Found. v. S. Carolina Transp. Infrastructure Bank*, 403 S.C. 640, 744 S.E.2d 521 (2013):**

This suit alleged the statutory composition of the Transportation Infrastructure Bank which, of the seven directors, included one member of the House of Representatives appointed by the Speaker, “ex officio” and one member of the Senate appointed by the President Pro Tempore “ex officio.” The Speaker and the President each appoint one director each of the seven but they are not required to be from the legislature. Petitioners claimed that the legislative membership violated dual office

holding prohibitions in the Constitution and that the Legislative appointment authority over four of the seven positions violated separation of powers. The Court rejected both challenges as follows, including a lengthy discussion of the history of the interpretation and application of the separation of powers provision:

This Court, however, has recognized an “ex officio” or “incidental duties” exception [to dual office holding] where “there is a constitutional nexus in terms of power and responsibilities between the first office and the ‘ex officio’ office.” *Segars–Andrews*, 387 S.C. at 126, 691 S.E.2d at 462. Ex officio is defined as “[b]y virtue or because of an office; by virtue of the authority implied by office.” *Black’s Law Dictionary* 267 (3d pocket ed.2006). . . . there must be a “constitutional nexus in terms of power and responsibilities” between the two offices. . . . Because it is within the province of the legislature to incur debt on behalf of the State, we find a sufficient constitutional nexus between the powers and responsibilities of the directors on the Board and members of the General Assembly. . . . [note omitted]

\* \* \*

The preservation of a separation of powers has been a basic tenet of democratic societies at least since Baron de Montesquieu warned that “[t]here would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.” See Montesquieu, *The Spirit of Laws* 152 (Thomas Nugent trans. 1949). Consistent with this notion, the South Carolina Constitution requires the branches of government be “forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other.” S.C. Const. art. I, § 8. “One of the prime reasons for separation of powers is the desirability of spreading out the authority for the operation of the government.” *State ex rel. McLeod v. Yonce*, 274 S.C. 81, 84, 261 S.E.2d 303, 304 (1979). “The legislative department makes the laws[,] the executive department carries the laws into effect, and the judicial department interprets and declares the laws.” *Id.* at 84, 261 S.E.2d at 305. This delineation of powers amongst the branches “prevents the concentration of power in the hands of too few, and provides a system of checks and balances.” *State ex rel. McLeod v. McInnis*, 278 S.C. 307, 312, 295 S.E.2d 633, 636 (1982).

Nevertheless, “[s]eparation of powers does not require that the branches of government be hermetically sealed.” 16A Am.Jur.2d Constitutional Law §

244. Accordingly, allowing some degree of overlap between the branches has been a feature of our government since the founding of the Republic. Our founding fathers embraced the celebrated writings of Montesquieu, yet concluded that a certain amount of encroachment was permissible, even under his ideology:

[I]t may clearly be inferred that, in saying “There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates,” or, “if the power of judging be not separated from the legislative and executive powers,” [Montesquieu] did not mean that these departments ought to have no partial agency in, or no control over, the acts of each other. His meaning, as his own words import, and still more conclusively as illustrated by the example in his eye, can amount to no more than this, that where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted.

*The Federalist* No. 47, at 250–51 (James Madison) (The Gideon ed., 2001). Thus, we have acknowledged that “there is tolerated in complex areas of government of necessity from time to time some overlap of authority and some encroachment to a limited degree.” *McInnis*, 278 S.C. at 313, 295 S.E.2d at 636 (citing *State ex rel. McLeod v. Edwards*, 269 S.C. 75, 83, 236 S.E.2d 406, 409 (1977)).

In South Carolina, this allowance of overlap between the branches is somewhat singular in the extensive involvement of the legislature in the powers of the executive and judiciary. Historically, this State has been considered a “legislative state” with a practice of “[j]oining legislators with executive branch decision makers” for a “commission approach to government.” Cole Blease Graham, Jr., *The South Carolina Constitution: A Reference Guide* 46 (2007).

The path leading to this collaborative governance where the General Assembly wields extensive power is discussed at length by Professor Underwood in his excellent treatise on our State constitution. While recognizing that no one force can be identified as being responsible for “South Carolina’s unique form of government in which the legislative takes a permanent position among the three theoretically equal branches of government,” Underwood does discuss several causative factors. James L. Underwood, *The Constitution of South Carolina, Volume I: The Relationship of the Legislative, Executive, and Judicial Branches* 13 (1986).

Among the historical forces that created the impetus for the acquisition of such powers by the colonial Commons House were abuses by the royal executive that created an inbred suspicion of concentrated executive power in the South Carolina political leadership. In the view of Commons these royal executive excesses threatened the economy of the province, frustrated their own ambitions by reserving choice judicial and other positions for British placemen and threatened the prerogatives of Commons to judge the proper composition of its own membership. The climate favorable to the legislative style of government was enhanced by a small, homogeneous elite who found it convenient to rule as a group through the legislature as a form of committee of peers. Admiration and emulation of the constitutional precedents of British government with its example of growing parliamentary power proved to be a seductive model for the South Carolinians, many of whom were lawyers trained at English Inns of Court.

*Id.* at 21–22. Although our system has retrenched somewhat from the colonial levels of legislative control, [note omitted] the influence of the legislature in the activities of the other branches remains firmly girded in the operation of our government.

Consequently, our rich and unique constitutional history has resulted in a system of government which does not lend itself to a neat, compartmentalized, or “cookie-cutter” approach. Rather, to counteract the destructive forces which can emanate from strictly defined and jealously guarded power bastions, certain “power fusion devices” have developed to enable the branches to work together in a cooperative fashion. *Id.* at 3. A prime example of one of these collaborative devices is the State Budget and Control Board. See *Edwards*, 269 S.C. at 83, 236 S.E.2d at 409.

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*Id.* at 21–22. Although our system has retrenched somewhat from the colonial levels of legislative control, [footnote omitted] the influence of the legislature in the activities of the other branches remains firmly girded in the operation of our government.

With this historical framework in mind, we now turn to Sloan's claim that Section 11–43–140 violates the constitutional separation of powers provision.

In answering this question, our prior decision in *Tall Tower, Inc. v. South Carolina Procurement Review Panel*, 294 S.C. 225, 363 S.E.2d 683 (1987), is particularly instructive. There, we identified two major criteria to determine whether a “creature of legislative enactment” which draws membership from different branches of government, like the Board, is constitutional under a separation of powers challenge: “(1) the legislators should be a numerical minority, and (2) the body should represent a cooperative effort to make available to the executive department the special knowledge and expertise of designated legislators in matters related to their function as legislators.” *Id.* at 230, 363 S.E.2d at 685–86. . .

Here, as discussed above, the statute allows for two directors to be simultaneously members of the General Assembly, which leaves them in the minority. Therefore, we do not agree that because the President Pro Tempore and the Speaker can appoint two other directors, the legislature necessarily dominates the board [footnote omitted] . . . . We believe the composition of the Board at issue here enables it to benefit from the legislator members' wisdom without being dominated by them. Therefore, ever mindful of the presumption of constitutional validity, we conclude the Board's composition satisfies both prongs of *Tall Tower* and thus survives the separation of powers challenge.

**V. *State v. Town of James Island* (2013-CP-10-2959):**

By Consent Order dated July 11, 2013, the Circuit Court declared the annexation by the Town of four parcels was null and void because they were not contiguous as required under S.C. Code Ann. §5-3-305.

**VI. *Yelsen Land Co., Inc. v. State*, 397 S.C. 15, 22-23, 723 S.E.2d 592 (2012)(*Yelsen II*)**

In 1975, in a suit brought by the State against Yelsen, the Supreme Court ruled that the State owned the property at issue on Morris Island. *State v. Yelsen*, 265 S.C. 78, 79, 216 S.E.2d 876, 877 (1975) (*Yelsen I*). Prior to that suit, in 1967, the State Ports Authority had taken title to the property for use as a spoils disposal area, but the SPA was not a party to the 1975 suit. In the *Yelsen II* litigation, *supra*, the Supreme Court rejected Yelsen's argument that its interests were not barred under res judicata by *Yelsen I* because the SPA owned the property then. The Supreme Court addressed that argument as follows:

Res judicata's fundamental purpose is "to ensure that 'no one should be twice sued for the same cause of action.'" *Judy v. Judy*, 393 S.C. 160, 173, 712 S.E.2d 408, 414 (2011) (internal citation omitted). Res judicata bars a second suit where there is (1) identity of parties; (2) identity of subject matter; and (3) adjudication of the issue in the first suit. *Judy*, at 167, 712 S.E.2d at 412. The evidence supports the Master's conclusion that res judicata settles the title issue as between the State and appellant.

The Master also held that the SPA and the State are in privity with regard to appellant's title claim, and that both respondents are entitled to assert against appellant that title to the tidelands is res judicata in light of *Yelsen I*. Appellant asserts, however, that the State and the SPA cannot rely on privity here because "it only applies if [they] were basing their claims on the same set of facts" and that while the State relies on *Yelsen I* the SPA relies on its 1967 statutory taking. For purpose of res judicata, however, the concept of privity rests not on the relationship between the parties asserting it, but rather on each party's relationship to the subject matter of the litigation. *E.g. Richburg v. Baughman*, 290 S.C. 431, 351 S.E.2d 164 (1986) ("The term 'privity' when applied to a judgment or decree means one so identified in interest with another that he represents the same legal rights."). Viewing the subject matter here as appellant's claim of title to the marshlands, and assuming that the State and the SPA are separate entities for purposes of res judicata, we agree with the Master that the State and the SPA are in privity to the extent the issue is appellant's claim of title to the Morris Island tidelands.

Appellant next contends that the SPA waived its right to rely on the *Yelsen I* judgment because it asserted in its motion to intervene that it owned the property pursuant to the 1967 statutory taking. The Master found no waiver, however, because the SPA's proposed answer specifically alleged res judicata and collateral estoppel. Appellant next asserts the State waived its right to rely on res judicata because it did not contest the SPA's claim to ownership based on the 1967 condemnation but instead adopted that view. The Master found, however, that the State did not waive res judicata or collateral estoppel because it specifically pled these doctrines in opposing appellant's motion to amend its complaint after the SPA was allowed to intervene, and because the State pled a continued interest after 1967 by virtue of the Public Trust Doctrine. . . .

**VII. *City of N. Myrtle Beach v. E. Cherry Grove Realty Co., LLC*, 397 S.C. 497, 501-02, 725 S.E.2d 676 (2012), reh'g denied (May 24, 2012)**

In a suit related to prior litigation begun in 1961, the Supreme Court affirmed a jury verdict in favor of the State as to ownership of the bottoms of canals located in North Myrtle Beach. The ownership issues involved the interpretation of a 1963 order and a 1969 settlement of the 1960's litigation. The Court applied the following reasoning:

“As a general rule, judgments are to be construed like other written instruments. The determinative factor is the intent of the court, as gathered, not from an isolated part thereof, but from all the parts of the judgment itself. Hence, in construing a judgment, it should be examined and considered in its entirety. If the language employed is plain and unambiguous, there is no room for construction or interpretation, and the effect thereof must be declared in the light of the literal meaning of the language used.” *Weil v. Weil*, 299 S.C. 84, 90, 382 S.E.2d 471, 474 (Ct.App.1989) (citations and internal quotation marks omitted).

In this case, the original suit was ultimately settled by the 1969 order, which incorporated the parties' quitclaim deeds and stated that it did not affect the 1963 order. Thus, the 1963 order and quitclaim deeds must be interpreted as parts of a single, court-approved settlement agreement.

725 S.E. 2d at 679.

**VIII. *United States v. S. Carolina*, 720 F.3d 518 (4th Cir. 2013)**

The suits challenge the constitutionality of various sections of South Carolina's Act 69, 2011 S.C. Acts, related to immigration. The Lowcountry Immigration Coalition suit was brought by a group of individual and organizational plaintiffs against the Attorney General and the Governor. The other suit was brought by the United States against the State and the Governor. Following the filing of motions for a preliminary injunction and supporting and opposing memoranda, and the holding of oral argument, the District Court issued a preliminary injunction on December 22, 2011 that enjoined Act 69 §4 (transportation and harboring of unlawful immigrants by others and by action taken themselves), §5 (failure to carry alien registration) and §6 (authorization to determine immigration status, reasonable suspicion, procedures, and data collection on motor vehicle stops) including §6(B)(2) (possession or use of counterfeit identification for purpose of proof of lawful presence).

While the appeal of the December 22, 2011 order was pending and before the Appellants' brief was filed, this Court remanded this case to the District Court to afford that court an opportunity to reexamine its opinion in light of the decision in *Arizona v. United States*, 567 U.S. \_\_\_\_, 132 S. Ct. 2492 (2012). Following briefing and oral argument, the District Court issued an order dated November 15, 2012, in which the Court dissolved the preliminary injunction of §6 of Act 69, except as to §6(B)(2), and left the remainder of the preliminary injunction 906 F. Supp. 2d 463 (D.S.C. 2012). The Defendants-Appellants then appealed the November 15 Order. The Fourth Circuit has recently affirmed the District Court's decision. *United States v. S. Carolina*, 2013 WL 3803464 (July 23, 2013).

# **Recent Developments in Civil Litigation**

**Emory Smith**

## ***Bodman v. State*, 742 S.E.2d 36 (2013)**

**“The argument [Mr. Bodman] advances instead [in his challenge to the sales tax exemptions and caps] is that the sheer number of exemptions and caps in sections 12–36–2110 and 12–36–2120 has rendered the statutes arbitrary and thus unconstitutional.”**

**“We . . . held ‘Robinson’s argument that “[t]he sheer number of exemptions demonstrates the exemptions are arbitrary” is without merit. We are concerned not with size or volume but with content.’ [*Ed Robinson Laundry & Dry Cleaning, Inc. v. South Carolina Department of Revenue*, 356 S.C. 120, 588 S.E.2d 97, 100 (2003)] Because Bodman’s challenge, like Ed Robinson Laundry’s, deals only with size and volume and not content, it must fail.”**

***Disabato v. S. Carolina Ass'n of  
Sch. Adm'rs, 2013 WL 3723502 7/17/  
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“We hold the circuit court erred in finding the FOIA unconstitutional under the First Amendment when applied to SCASA. The FOIA is a content-neutral statute that serves important governmental interests and does not burden substantially more speech than necessary to serve those interests, and therefore, it does not violate SCASA's First Amendment speech and association rights. However, we express no opinion as to whether SCASA is a public body subject to the FOIA and leave that issue for determination on remand.

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“We hold that Act No. 26 substantially impairs the contractual relationship by mandating that all [Commercial General Liability] policies be legislatively amended to include a new statutory definition of occurrence and by applying this mandate retroactively.”

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“We find that the General Assembly did not violate the doctrine of separation of powers by enacting Act No. 26. . . . [I]t is clear the General Assembly wrote and ratified Act No. 26 in direct response to this Court's decision in *Crossmann I*. Had *Crossmann I* been this Court's final opinion [a Petition for rehearing was pending when Act 26 passed], the doctrine might have been implicated. However, given that in *Crossmann II* we revised our initial decision in *Crossmann I*, we do not find that the General Assembly, in this instance, retroactively overruled this Court's interpretation of a statute.”

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“This Court, however, has recognized an “ex officio” or “incidental duties” exception [to dual office holding] where “there is a constitutional nexus in terms of power and responsibilities between the first office and the ‘ex officio’ office.” . . . Because it is within the province of the legislature to incur debt on behalf of the State, we find a sufficient constitutional nexus between the powers and responsibilities of the directors on the [Infrastructure Bank] Board and members of the General Assembly. . . .”

## ***Infrastructure, cont.***

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***State v. Town of James Island (2013-CP-10-2959), July 11, 2013***

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“For purpose of res judicata, however, the concept of **privity** rests not on the relationship between the parties asserting it, but rather on each party's relationship to the subject matter of the litigation . . .we agree with the Master that the State and the SPA are in privity to the extent the issue is appellant's claim of title to the Morris Island tidelands.”

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“In this case, the original suit was ultimately settled by the 1969 order, which incorporated the parties' quitclaim deeds and stated that it did not affect the 1963 order. Thus, the 1963 order and quitclaim deeds must be interpreted as parts of a single, court-approved settlement agreement.”

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Salley Elliott is a Senior Assistant Deputy Attorney General of the South Carolina Attorney General's Office. She has supervised the Criminal Appeals and the Post-Conviction Relief Sections since 2003. Ms. Elliott has worked for the South Carolina Attorney General's Office for more than 27 years in her current capacity as well as in other positions including Assistant Director of the Criminal Division, Chief of the Criminal Appeals Section and Assistant Attorney General in the Post-Conviction Relief Section, Opinion Section and Child Support Division.

Ms. Elliott is also a former Chief Staff Attorney for the South Carolina Court of Appeals where she supervised the Court's Staff Attorney Office. Additionally, Ms. Elliott worked as a legislative liaison for a child advocacy project and as a Staff Attorney for Palmetto Legal Services.

A member of the South Carolina Bar since 1979, Ms. Elliott is admitted to practice before the United States Supreme Court, the United States District Court for the District of South Carolina, and the United States Court of Appeals for the Fourth Circuit.

Ms. Elliott received her undergraduate degree in history in 1975 from the University of South Carolina and a Juris Doctorate degree in 1979 from the University of South Carolina School of Law.

# Recent Developments in PCR

Salley Elliott, Senior Assistant Attorney General  
Benjamin Dean, Law Clerk

August 16, 2013

## PLEA OFFERS, COLLATERAL CONSEQUENCES AND SUCCESSIVE CLAIMS

- **Missouri v. Frye**, 132 S. Ct. 1399, 182 L. Ed.2d 379, \_\_\_ U.S. \_\_\_ (March 21, 2012)
- **Lafler v. Cooper**, 132, S. Ct. 1376, 182 L. Ed.2d 398, \_\_\_ U.S. \_\_\_ (March 21, 2012)

### **Issue:**

- Whether the constitutional right to counsel extends to the negotiation and consideration of lapsed or rejected plea offers. If so, what must a defendant demonstrate in order to show that prejudice resulted from counsel's deficient performance?

# PLEA OFFERS, COLLATERAL CONSEQUENCES AND SUCCESSIVE CLAIMS

## Missouri v. Frye:

### **Facts:**

- Frye was charged with driving with a revoked license, a class D felony based upon three prior convictions for that offense.
- Prosecutor sent a letter to defense counsel offering a sentence for a felony plea and also offered to reduce the charge to a misdemeanor and recommend a 90 day sentence. The offer included an expiration date.
- Frye's attorney did not advise Frye of the offer and the offer expired.
- A week before his hearing, Frye was again arrested for the same offense and he pled to a felony without plea agreement and the sentence was greater than the plea offer.

## PLEA OFFERS, COLLATERAL CONSEQUENCES AND SUCCESSIVE CLAIMS

- Frye claimed at post-conviction relief that counsel's failure to inform him of the plea offers constituted ineffective assistance of counsel (IAC). He contended he would have taken the earlier misdemeanor plea offer had he been aware of it.

# PLEA OFFERS, COLLATERAL CONSEQUENCES AND SUCCESSIVE CLAIMS

## Lafler v. Cooper:

### **Facts:**

- Defendant was charged with assault with intent to murder and three other offenses. The prosecution twice offered to dismiss two of the charges and recommend a 51-85 month sentence for the other two charges in exchange for a guilty plea.
- Defendant initially indicated to the court that he wanted to plead guilty but ultimately rejected the offer on the advice of counsel after counsel convinced defendant that the prosecution would be unable to meet the burden of proving assault with intent to murder because the victim was shot below the waist.
- At trial, defendant was convicted on all counts and received a mandatory minimum of a 185-360 month sentence.

# PLEA OFFERS, COLLATERAL CONSEQUENCES AND SUCCESSIVE CLAIMS

## Lafler v. Cooper:

- In State PCR, defendant alleged IAC based upon counsel's advice to reject the plea offer.
- The parties conceded counsel's advice respecting the plea offer constituted deficient performance. Defendant alleged he was prejudiced by having to stand trial.
- State trial court rejected defendant's claim that his attorney's advice to reject the plea constituted ineffective assistance.
- Michigan Court of Appeals affirmed, rejecting the ineffective assistance claim on the ground that defendant knowingly and intelligently rejected the plea offer and chose to go to trial.

# PLEA OFFERS, COLLATERAL CONSEQUENCES AND SUCCESSIVE CLAIMS

## **Holding in Missouri v. Frye:**

- Relying on Hill v. Lockhart, 474 U.S. 52 (1985) and Padilla v. Kentucky, 559 U.S. 356 (2010), the United States Supreme Court determined that the Sixth Amendment right to effective assistance of counsel extends to consideration of plea offers that lapse or are rejected.
- As a general rule, defense counsel has the duty to communicate formal prosecution offers to accept a plea on terms and conditions that may be favorable to the accused.

## **Holding in Lafler v. Cooper:**

- The Sixth Amendment right to counsel extends to all critical stages, including plea bargaining.

# PLEA OFFERS, COLLATERAL CONSEQUENCES AND SUCCESSIVE CLAIMS

## Application of Strickland v. Washington:

- In Missouri v. Frye, counsel's performance was deficient when counsel allowed a favorable plea offer to expire without advising the defendant.
- To show prejudice under Strickland, a defendant must show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence. Specifically, in this case, he must show:
  - that there is a reasonable probability he would have accepted the earlier favorable plea offer; **and**
  - that the plea would have been entered without the prosecution rescinding it or the trial court refusing to accept it.

# PLEA OFFERS, COLLATERAL CONSEQUENCES AND SUCCESSIVE CLAIMS

## **Application of Strickland in Lafler v. Cooper:**

- Deficiency was conceded by the parties.
- To establish prejudice where counsel's advice led to defendant's rejection of a plea offer, defendant must show that:
  - but for deficient advice there is a reasonable probability he would have accepted the plea offer;
  - the prosecution would not have rescinded it;
  - the offer would have been presented to and accepted by the court;
  - the terms of the offer would have been less severe than the judgment and sentence following trial.

## PLEA OFFERS, COLLATERAL CONSEQUENCES AND SUCCESSIVE CLAIMS

- In Lafler, the Court determined that the proper remedy depends upon the case. Here, the remedy was to order the prosecution to reoffer the plea. If defendant accepts the offer, the trial court may exercise its discretion regarding whether to vacate the convictions and resentence pursuant to the terms of the plea agreement, to vacate only some of the convictions and sentences, or to leave the matter undisturbed.
- While the Court declined to define the boundaries of proper exercise of discretion for PCR courts when ruling on these claims, it noted that evolving principles announced over time will provide guidance. The Court specifically indicated that an assessment of the defendant's earlier willingness to enter a guilty plea and any information about the crime that might have been developed after the plea offer would be pertinent to the exercise of discretion.

## PLEA OFFERS, COLLATERAL CONSEQUENCES AND SUCCESSIVE CLAIMS

- Our Supreme Court has addressed facts similar to Missouri v. Frye:
  - Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009) (stating that counsel's failure to communicate a plea offer constituted deficient performance and that counsel's and defendant's testimony that he would have accepted the offer for a lesser sentence established the requisite prejudice).
  - Judge v. State, 321 S.C. 554, 471 S.E.2d 146 (1996), rev'd in part on other grounds (stating that the Sixth Amendment right to effective assistance of counsel applies to the plea bargaining process, including the failure to communicate an offer and the decision to reject a plea offer).

# PLEA OFFERS, COLLATERAL CONSEQUENCES AND SUCCESSIVE CLAIMS

## Issues and Questions:

- How will the PCR court distinguish a later fabricated claim of a favorable offer if the offer or allegation the defendant would have accepted was not documented and is this decision limited to formal, written offers?
- How will the PCR court make a retrospective determination of whether the prosecutor would not have rescinded the offer and the defendant would have accepted it?
- How will the PCR court assess whether an earlier plea offer would have been accepted by the plea court?

# PLEA OFFERS, COLLATERAL CONSEQUENCES AND SUCCESSIVE CLAIMS

## Issues and Questions:

- How will deficient performance be determined when not conceded by the State?
- Does counsel have a duty to advise a defendant whether to accept or reject a plea offer rather than generally advise of terms of the offer and consequences if the offer is accepted or rejected?
- What are the boundaries of proper exercise of discretion when ruling on these claims?
- How will PCR courts assess defendant's earlier willingness to accept the offer?

# PLEA OFFERS, COLLATERAL CONSEQUENCES AND SUCCESSIVE CLAIMS

## Issues and Questions:

- How will information about the crime that might not have been known at the time of the earlier offer be established and/or documented?
- Should these matters be placed on the trial record in anticipation of PCR litigation?
- What does the Court mean when it suggests that “evolving principles announced over time will provide guidance” to the courts when ruling on these issues?
- Does Lafler v. Cooper allow for successive PCR applications, particularly in view of Davie v. State and Judge v. State?

# PLEA OFFERS, COLLATERAL CONSEQUENCES AND SUCCESSIVE CLAIMS

Padilla v. Kentucky, 559 U.S. 356 (March 2010)

- Constitutionally competent counsel would have advised Padilla (a lawful, permanent resident) that his conviction made him subject to automatic deportation. A guilty plea must be set aside if counsel misinforms defendant of the immigration consequences of the conviction.
- Counsel must inform a client whether his plea carries *a risk* of deportation; Padilla has sufficiently alleged that his counsel was constitutionally deficient. Whether he is entitled to relief depends on whether he has been prejudiced, a matter not addressed by the Court but remanded for determination.

# PLEA OFFERS, COLLATERAL CONSEQUENCES AND SUCCESSIVE CLAIMS

- **Retroactivity of Padilla:**

**Chaidez v. U.S.**, 133 S. Ct. 1103 (2013)

On February 20, 2013, the United States Supreme Court ruled that Padilla does not apply retroactively to persons whose conviction became final before its announcement.

**Michael E. Hamm v. State**, 403 S.C. 461, 744 S.E.2d 503 (May 18, 2013)(stating that the U.S. Supreme Court's decision in Padilla does not apply retroactively)

# PLEA OFFERS, COLLATERAL CONSEQUENCES AND SUCCESSIVE CLAIMS

Will Padilla impact our State court decisions, the analysis previously employed and issues previously considered “collateral” to a guilty plea?

- Williams v. State, 378 S.C. 511, 662 S.E.2d 615 (2008)(stating registration on **sexual offender registry** is a collateral consequence of sentencing);
- Page v. State, 364 S.C. 632, 615 S.E.2d 740 (2005)(stating **civil commitment** as a sexually violent predator is a collateral consequence of a guilty plea for which counsel had no legal duty to advise);
- Randall v. State, 356 S.C. 639, 591 S.E.2d 608 (2004)(stating **parole** is a collateral consequence of sentencing of which a defendant need not be specifically advised before entering a guilty plea);
- Jackson v. State, 349 S.C. 62, 562 S.E.2d 475(2002)(stating that participation in **community supervision program** is a collateral consequence of sentencing and counsel was not ineffective in failing to inform defendant about program when advising him to enter plea).
- Michael E. Hamm v. State, 403 S.C. 461, 744 S.E.2d 503 (May 18, 2013)(stating that the U.S. Supreme Court’s rationale in Padilla does not extend to civil commitment proceedings under the sexual predator act and does not apply retroactively)

# PLEA OFFERS, COLLATERAL CONSEQUENCES AND SUCCESSIVE CLAIMS

**Martinez v. Ryan**, 132 S. Ct. 1309, 182 L. Ed.2d 272, \_\_\_ U.S. \_\_\_ (March 20, 2012)

## **Issue:**

- Whether ineffective assistance of counsel in the first PCR action on a claim of ineffective assistance at trial which was not presented to the state court due to PCR counsel error may provide cause to excuse a procedural default in a federal habeas proceeding.

## **Holding:**

- As a matter of **equity**, either lack of counsel or inadequate assistance of counsel in the first post-conviction relief action may establish cause for permitting a defendant to pursue an ineffective assistance of trial counsel claim in **federal** habeas corpus which was not previously litigated in state court.
- Declined to resolve whether a Constitutional mandate exists.
- **Does not apply to state court proceedings.** Jason Kelly v. State, S.C. Sup. Ct. Order dated June 20, 2013. See also Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991)(stating that claim of ineffective PCR counsel does not allow for a successive PCR action).

# PLEA OFFERS, COLLATERAL CONSEQUENCES AND SUCCESSIVE CLAIMS

Hyman v. State, 397 S.C. 35, 723 S.E.2d 373 (2012)

Hyman was charged with drug charges. A favorable plea offer was extended by the prosecutor conditioned on Hyman's agreement that he not view the videotape of the transaction that also depicted a confidential informant whose identity the State sought to conceal. Hyman's counsel viewed the videotape and provided still images of Hyman from the tape to Hyman. Hyman did not accept the offer. However, Hyman pled "straight up" after the jury was chosen.

In PCR, Hyman alleged he received ineffective assistance of counsel and that the state committed a Brady violation by failing to disclose the videotape to him personally before the guilty plea. Thus, the guilty plea was not knowingly and voluntarily entered.

Our Supreme Court held that no Brady violation occurred. Disclosure of the videotape to Hyman's attorney was sufficient. The Court refused to assume the Constitution requires disclosure to a criminal defendant personally.

It further found other requirements for Brady were not met. The videotape was not exculpatory and Hyman failed to prove how the outcome would have been different had he chosen not to plead guilty until after he watched the videotape himself.

## PLEA OFFERS, COLLATERAL CONSEQUENCES AND SUCCESSIVE CLAIMS

**Taylor v. State**, \_\_ S.E.2d \_\_, 2013 WL 3048636 (June 19, 2013)

Taylor alleged that his plea counsel was ineffective for failing to advise Taylor that his plea to CSC 2nd in Georgetown could be used as a predicate offense that would expose him to a sentence of life without parole (LWOP) on Williamsburg County charges. Plea counsel admitted he did not so advise Taylor. Taylor argued that Padilla forecloses our courts from distinguishing direct and collateral consequences.

Our Supreme Court determined that the Padilla claim was a “red herring” and that it need not decide whether failure to advise of recidivist consequences is a direct or collateral consequence of a plea because Taylor failed to demonstrate that he was prejudiced by counsel’s omission in that Taylor would have proceeded to trial regardless of being advised about the possibility of LWOP with later convictions.

# PLEA OFFERS, COLLATERAL CONSEQUENCES AND SUCCESSIVE CLAIMS

**Holden v. State**, 393 S.C. 565, 713 S.E.2d 611 (2011).

- After being offered a plea deal where the prosecution agreed to dismiss charges without a sentencing recommendation, Holden pled guilty to a series of drug-related charges. She was sentenced to ten years in prison.
- Holden claimed at PCR that she only expected a three to four year sentence based upon discussions with counsel and that counsel's advice rendered her plea involuntary.
- The Supreme Court determined that the plea colloquy corrected any mistakes trial counsel might have made, and Holden testified that she was informed of the maximum sentence by the plea judge and signed the sentencing sheet, which included a box to check that indicated that no negotiation had taken place. Thus, Holden knew the judge could sentence her to the maximum and failed to establish prejudice.

# PLEA OFFERS, COLLATERAL CONSEQUENCES AND SUCCESSIVE CLAIMS

**Narcisco v. State**, 397 S.C. 24, 723 S.E.2d 369 (2012)

- Narcisco signed a consent order that waived his right to raise any other post-conviction relief allegations in exchange for a White v. State appeal.
- Our Supreme Court affirmed the issue presented in the White review but remanded the case for a determination of whether the waiver of all other PCR claims was knowing and voluntary.
- The Court noted that the entire colloquy was a transcript seven lines long which failed to include specific questions from the PCR judge about the knowing and voluntary nature of the waiver. The Court also noted that Narcisco used an English-speaking interpreter in his original trial and had a limited command of the English language.
- The Court held that the record did not adequately demonstrate whether Petitioner's waiver was knowing and voluntary. See Spoone v. State, 379 S.C. 138, 665 S.E.2d 605 (2008), for presentation of adequate record of waiver.

# Failure to Investigate

**Taylor v. State**, 2013 WL 3048636 (2013)

- Taylor pursued PCR presenting ineffective assistance of counsel allegations based upon counsel's failure to investigate inaccuracies in the victim's claims about the crime and failure to investigate Taylor's alibi. The PCR court found that Taylor's alibi failed to cover the entire time in question and that Taylor failed to provide the alibi information to his attorney before he entered a guilty plea. Our Supreme Court found that the PCR court's findings were supported by probative evidence and affirmed.

# Failure to Investigate

**Walker v. State**, 397 S.C. 226, 723 S.E.2d 610 (Ct. App. 2012), cert. granted (Mar. 5, 2013).

- **Failure to Investigate Alibi:** In reversing the grant of PCR, the appellate court held that, while counsel was deficient for failing to investigate Walker's girlfriend as an alibi witness, Walker failed to prove prejudice because testimony from the girlfriend was insufficient to establish an alibi. The Court interpreted Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995), to establish a framework for analyzing an alleged failure to interview an alibi witness.
- **Glover Test:** When a PCR applicant alleges failure to investigate, the PCR court must make two findings to determine if counsel's deficient performance constitutes prejudice under Strickland.
  1. The court must determine whether the witness's testimony meets the legal definition of an alibi;
  2. The court must assess the witness's credibility.
- The court must consider the testimony as a whole, take it as true and credible, and view it in the light most favorable to the PCR applicant. Here, the witness testified that Walker was with her "sometime that weekend". The appellate court found that this did not establish an alibi because it left open the possibility that Walker was guilty. Because the testimony did not meet the legal definition of an alibi, the court did not need to reach the second prong and held there was no prejudice.

# Failure to Investigate

## Walker v. State:

### **Failure to Investigate Alcohol Use:**

- The Court held that, while the victim was planning to attend an alcohol treatment program later that week, this evidence went to whether the victim was an alcoholic and could not be used to prove that she was intoxicated at the time of the incident. Rule 404(a), SCRE.
- While evidence of a pertinent trait of character of the victim of the crime offered by an accused is admissible under Rule 404(a)(2), SCRE, in some circumstances, the victim's alcoholism is not a pertinent trait of character in this case.
- The Court also held that evidence of the victim's alcoholism is not admissible under Rule 608(a), SCRE, because it is not evidence of her character for truthfulness or untruthfulness.
- While evidence of a person's intoxication at a specific point in time may be admissible to show credibility, evidence that a person is an alcoholic is not.

# Failure to Investigate

## Walker v. State:

- **Failure to Cross-Examine:** The appellate court upheld the PCR court's finding that trial counsel was deficient for failing to call witnesses and cross-examine the victim about conflicting times. The PCR transcript refers to a police report indicating the victim reported that she stopped at a BP station where Walker kidnapped her at approximately 8 p.m. The videotape showed she was at the BP station at approximately 3:30 in the afternoon. At trial, the victim testified that she was at the station in the afternoon. Trial counsel never presented evidence nor questioned the victim. The Court of Appeals found that there was sufficient probative evidence to uphold the finding that counsel was deficient but the Court declined to find prejudice.
- **Cumulative Effect:** The appellate court declined to reach the question of cumulative error but held that Walker had failed to demonstrate a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Neither of the two instances of deficient performance are related and neither one makes the other more prejudicial.

# Failure to Object/Failure to Request Jury Charge

Vail v. State, 402 S.C. 77, 738 S.E.2d 503 (Ct. App. 2013)

- The Court of Appeals reversed the trial court, finding that Vail's trial counsel's failure to object to prejudicial evidence was ineffective assistance of counsel.
- During a trial where Vail was charged with 2<sup>nd</sup>-degree criminal sexual conduct, witnesses for the State made numerous statements that the appellate court concluded qualified as hearsay. The PCR court found that the statements were not hearsay under various exceptions and rules (such as 801(d)(1) and 803(3), SCRE).
- Our Court of Appeals reversed, finding that the challenged testimony exceeded the limitations provided in Rule 801(d)(1)(B) & (D). Failure to object to corroborative testimony that is inadmissible hearsay is not reasonable trial strategy.

# Failure to Object/Failure to Request Jury Charge

## Gibbs v. State, 2013 WL 2066432 (2013)

- Trial counsel was deficient for failing to contemporaneously object to the introduction of the lineup and the show-up, but Gibbs failed to show prejudice because the trial court admitted the identifications after conducting a thorough Neil v. Biggers, 409 U.S. 188 (1972), pretrial hearing.
- For the show-up identification, the Court held that the inquiry turned upon “whether, under the totality of the circumstances, there was a substantial likelihood of irreparable misidentification.” State v. Moore, 343 S.C. 282 (2000). It found that the show-up did not present a substantial likelihood of irreparable misidentification, and therefore held that Gibbs was not prejudiced.

# Failure to Object/Failure to Request Jury Charge

Gibbs v. State, 2013 WL 2066432 (2013)

- **Failure to ask for alibi instructions:** During trial, Gibbs argued that he was at home watching a specific TV show at the time of the crime. His mother and girlfriend testified that he was at their home watching the show. The State presented two rebuttal witnesses who testified that the only two stations available to Gibbs did not air the show on the night of the robbery.
- Trial counsel did not request a jury instruction on alibi. The PCR and appellate courts determined that while counsel was deficient for failing to request the instruction, no prejudice resulted because the jury charge viewed in its entirety clearly instructed the jury that it was required to prove Gibbs' identity as the perpetrator beyond a reasonable doubt.

# Search and Seizure

**Goins v. State**, 397 S.C. 568, 726 S.E.2d 1 (2012)

- Absent a warrant or exigent circumstances, hotel managers may not consent to a search of a guest's room and counsel's advice to the contrary when assessing the likelihood of a successful suppression motion was inaccurate. Nevertheless, unless a defendant can show that he would have proceeded to trial absent the erroneous advice, post-conviction relief will not be granted.
- Here, our Supreme Court found that Goins failed to establish prejudice based upon counsel's testimony that Goins became interested in entering a guilty plea because the State offered to dismiss distribution charges, not because he feared a negative result at the suppression hearing.

# Search and Seizure

## McHam v. State, 2013 WL 3723690 (2013)

- At trial, counsel made an in limine motion to suppress the drug evidence, which was denied. However, counsel failed to renew the objection when the evidence was offered during the trial. McHam attempted to raise the issue on direct appeal in an Anders brief, but the Court of Appeals dismissed the appeal. McHam filed a PCR application alleging that counsel was ineffective for failing to renew the objection to admission of the evidence.
- The PCR court found that while counsel's failure to renew the objection constituted deficient performance, McHam failed to establish prejudice.
- Our Supreme Court affirmed, finding that while opening a car door constituted a search under the Fourth Amendment, the search was reasonable because traffic stops are inherently dangerous and the governmental interest in officer safety is substantial. It held that the evidence would have been properly admitted even with a renewed objection; thus, no prejudice was established from counsel's inaction.

# Juror Misconduct

**McCoy v. State**, 401 S.C. 363, 737 S.E.2d 623 (2013)

- An exception to the one-year statute of limitations for filing a PCR action is the “discovery rule” where a PCR application based upon newly-discovered evidence may be filed one year after the date of actual discovery or after the date when the facts could have been ascertained by the exercise of reasonable diligence. S.C. Code Ann. §17-27-45(A) (2003).
- In a second PCR action, McCoy asserted newly-discovered evidence of juror misconduct. Our Supreme Court held that allegations of juror misconduct in PCR are determined by:
  1. Whether the juror intentionally concealed information; and
  2. Whether the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party’s peremptory challenges.
- Summary dismissal of PCR without an evidentiary hearing is appropriate only when it is apparent on the face of the application there is no need to develop facts and the applicant is not entitled to relief.

# Right to Jury Trial

**Moore v. State**, 399 S.C. 641, 732 S.E.2d 871 (2012)

- Moore was convicted of armed robbery after a bench trial. The request for a bench trial was made by trial counsel. Moore was not questioned by the trial judge.
- Moore filed a PCR application alleging his attorney was ineffective for waiving his right to a jury trial.
- The PCR order in this case found that Moore made the decision to waive his right to a jury trial of his own accord after a detailed discussion with his attorney, and that trial counsel discussed the jury trial waiver at length with Moore.
- Our Supreme Court reversed, finding that a defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record and may be accomplished by a colloquy between the court and defendant, between the court and defendant's counsel, or both.
- The validity of a defendant's waiver does not turn on his communication with counsel, but rather on the presence of a record supporting the validity of that waiver.

# Right to Jury Trial

## Moore v. State:

- Here, there was no colloquy between the court and Moore's trial counsel or Moore regarding the waiver. It is not sufficient to state, "Yes, my client wants to go to a bench trial and not a jury trial." The trial judge must ask the client.
- In order to determine whether the waiver is knowing and voluntary, the Court examines the particular facts and circumstances in the case, including the background, experience and conduct of the accused.
- **Dissent:** The dissent opined that the trial and PCR transcripts sufficiently established a valid waiver due to the fact that trial counsel testified that he informed Moore of the difference between a bench and a jury trial. The dissent also concluded that, under the ineffective assistance of counsel standard, Moore must show prejudice, which he failed to do here.
- What impact will this decision have on cases such as Brown v. State, 317 S.C. 270, 453 S.E.2d 251 (1994); Harres v. Leeke, 282 SC.131, 318 S.E.2d 360 (1984)?

# Appeal from Probation Revocation

**Fleming v. State**, 399 S.C. 380, 731 S.E.2d 889 (2012)

- Probation revocation counsel is not required to inform a probationer of the right to an appeal absent extraordinary circumstances.
- However, when a defendant requests an appeal from probation revocation and counsel fails to file one, the defendant is entitled to a “belated” appeal without showing the appeal would likely have merit.
- The appellate court noted that the appeal in this case would be of no avail because no objections were raised during the probation revocation.

# Preserving Issues for Appeal

**Burgess v. State**, 402 S.C. 92, 738 S.E.2d 264 (Ct. App. 2013)

- When appealing the grant of PCR, if the PCR court does not explicitly address the issue in the order, it must be raised in a Rule 59(e), SCRCP, motion by the State to preserve the matter for appellate review. The court noted that under Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (2007), it is incumbent upon a party in a PCR action to file a Rule 59(e) motion when the PCR court fails to make specific findings of fact and conclusions of law regarding an issue.

**Smith v. State**, 2012 WL 386620 (Ct. App. 2012)

- Smith's argument was not preserved for appellate review because it was not explicitly ruled on by the PCR judge, and Smith failed to file a Rule 59(e) motion to alter or amend judgment. Under Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (2007), it is incumbent upon a party in a PCR action to file a Rule 59 (e) motion in the event the PCR court fails to make specific findings of fact and conclusions of law.

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## **EDUCATION**

B.S., Clemson University (May 2003)  
Master of Trust and Investment Management, Campbell University (June 2004)  
J.D., Charleston School of Law (May 2007)  
LL.M. Taxation, Boston University (May 2008)

## **BAR ADMISSIONS**

South Carolina

## **EXPERIENCE**

Practiced in the areas of taxation, corporations, estate planning, probate, securities and bankruptcy;  
Southeastern Trust School Certified  
Assistant Attorney General, S.C. Attorney General's Office, Securities Division;  
Certified by the National White Collar Crime Center in Financial Records Examination & Analysis;  
Certified by the National White Collar Crime Center in Financial Investigations Practical Skills.



# Securities Division Update

The Securities Division is a Regulatory Division

We operate under the South Carolina Uniform  
Securities Act of 2005 and Regulations

S.C. Code 35-1-101 *et. seq.*

S.C. Code Regs 13-201 to 13-603



# Securities Division - Registration

The Division currently regulates approximately the following number of properly registered entities/individuals:

– Broker-Dealers	1,681
– Broker-Dealer Agents	136,623
– Investment Advisers	1,691
– Investment Adviser Reps	5,361



# Securities Division – Registration

In the past year:

Registration by Coordination	89
Registration by Qualification	2
Non-Profit Letter of Exemption	39
Reg D Notice Filings	975
Mutual Fund/Unit Investment Trusts	8,294

Common filings: REIT, Oil & Gas Programs,  
Business Development Companies



# Securities Division - Registration

## Recent Developments and Trends in Registration/Corporate Finance

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- SEC enacting provisions in the JOBS Act
  - Reg D, Rule 506 and Rule 144A, repealing the ban on general solicitation
    - Under these exemptions from registration, a requirement has always been that there could be no general solicitation or advertising.
    - Now free to solicit to all, so long as the only purchasers are “accredited investors”



# Securities Division - Registration

## Recent Developments and Trends in Registration/Corporate Finance

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- SEC enacted “Bad Actor” disqualification from Dodd-Frank
  - A “Bad Actor” is prohibited from using a Reg D 506 exemption to raise capital.
  - Someone who has been convicted of, or subject to court or administrative sanctions for, securities fraud or other similar violations of laws.



# Securities Division – Registration

## Recent Developments and Trends in Registration/Corporate Finance

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- Crowdfunding
  - Raising money online through the “crowd”
    - Kickstarter, Indiegogo
  - JOBS Act limits on *Equity* Crowdfunding
    - Raise \$1 million over a 12 month period
    - Limits as to how much an investor may invest (depending on income, max of \$2,000 or \$10,000)
    - Intermediaries must be registered as broker-dealer/funding portal
  - Does this make sense for a large number of companies?



# Securities Division - Registration

- Crowdfunding (cont.)
  - SEC has yet to write the rules required under the JOBS Act, so this is currently not allowed.
  - States getting a head start on the SEC
    - Kansas, Georgia, North Carolina
      - In 2 years, only 6 companies used exemption in Kansas
  - Peer-to-peer lending
    - Similar to crowdfunding
    - Online portal connects persons needed loans to a crowd of investors willing to purchase portions of the loan at a high interest rate



# Securities Division - Enforcement

- Common Violations:
  - Failure to file/unregistered activity
  - False or misleading statements/Fraud
  - Ponzi Schemes
- Common Actions:
  - Cease and Desist Orders
  - Revocation of registration



# Securities Division - Enforcement

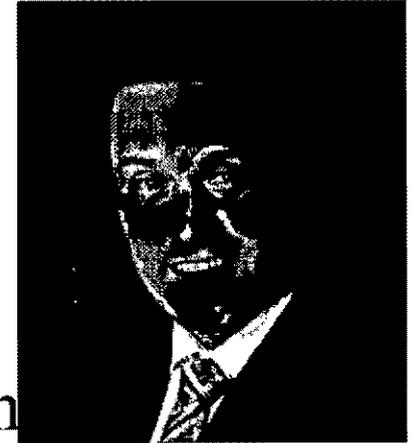
## Recent Enforcement Cases Brought by the Division

Approximately \$262 million dollars involved in securities cases over the last 2 years



# Securities Division - Enforcement

## Jay Brooks Financial



- Financial services firm
  - Registered IA, IA Rep, BD Agent, Insurance
- Wife was opening a private school in Aiken
- In July, 2012, we conducted an audit to follow up on a previous issue with the Division
  - Failure to maintain records/written agreements with clients/could not produce financial statements/charged fees without full knowledge to investor.
  - He never responded to the audit report or the fee



# Securities Division - Enforcement

## Jay Brooks Financial

- November 2012, we received information that he was terminating annuities early -- proceeds were being put into Brooks Real Estate Holdings (BREH owned the land where his wife's school was to be built)
- He came to give testimony to the Division and told us he had 3 investors in the school (there were many more)
- He produced checks that he claimed were refunds to the wronged clients -- they were unused checks
- We later found that he and his wife had misappropriated investor funds for personal use
- Also used investor funds to repay prior investors without their knowledge.



# Securities Division - Enforcement

## Jay Brooks Financial



- 3 classes of investors
  - Invested w/Brooks, solicited about school, but didn't want to invest
  - Invested w/Brooks, and specifically with the school
  - Invested w/Brooks but knew nothing about the school
- Filed a Notice of Intent to Revoke Registrations
- Filed a Civil Complaint
- Filed TRO to freeze his assets and the school's assets
- Filed Lis Pendens on property of the school
- Appointed a receiver to take control
- Revoked his registrations
- Made a criminal referral
- Has been arrested/charged with at least 1 count of securities fraud



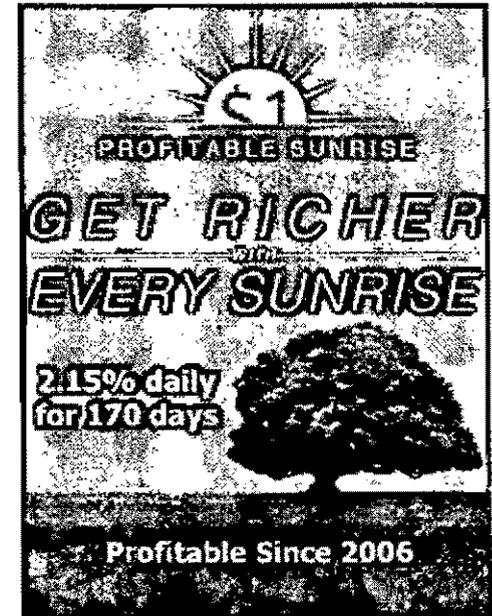
# Securities Division - Enforcement

## Profitable Sunrise (Inter Reef, Ltd.)

- Supposedly 2 Brothers, Roman and Radoslav Novak
- From Czech Republic; Company in Birmingham, UK
- High Yield Investment Program (HYIP) with an element of multi-level marketing
- Operated over a website
- Your investment would earn 1.6% to 2.7%

**EACH DAY(!!!)**, depending on your program

- Investments routed to bank account in Czech Republic
- All funds were “insured against loss,” “risk free,” with “no chance of default.”
- Some profit would go to Religious Organizations





# Securities Division - Enforcement

## Profitable Sunrise (Inter Reef, Ltd.)

Obviously, these were false and misleading statements regarding the investment.

In a nationwide effort, we issued a Cease and Desist Order, and the AG issued a press release to raise awareness of this type of fraud occurring (especially with the influx of crowdfunding and online scams)



# Securities Division - Enforcement

## Invictus University

- Professor at USC-Upstate started a website
  - [invictus-university.com](http://invictus-university.com), would service
  - “investing in this high-tech start-up”
  - Video, in which he discusses the vision, concept and investment opportunity
  - “would you like to become an investor?” Raising \$320 mil
  - “if you missed the opportunity to get in on the ground floor of Microsoft, Intel, Dell, Apple, Google....” don’t miss this opportunity!!
  - Claimed this was just a teaching aid

Unregistered offer or sale of securities



# Securities Division – Enforcement

## Loral Langemeier

- Solicited thousands of investors in the US, South Africa, Canada and Australia
- Investors spend thousands of dollars to participate in her programs, which can make anyone into a millionaire
- In reality, investors are pouring their money into extremely risky startups in which Langemeier has a financial interest
- Issued a Cease and Desist. She has requested a hearing.

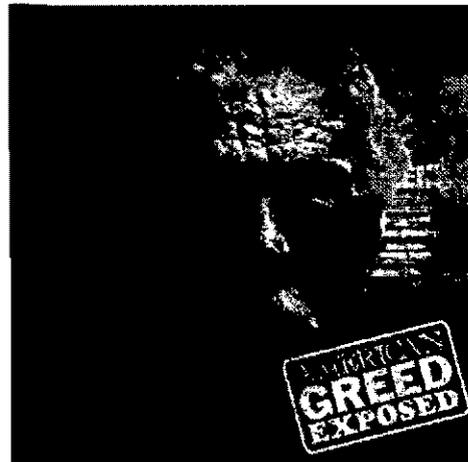




# Securities Division - Enforcement

## Other Cases (examples)

- Ron Wilson featured on CNBC's American Greed
  - \$90 million Gold and Silver Ponzi Scheme



- Cases come from complaints, audits, registrations, experts, national organizations



# Securities Division - Enforcement

## Recent Developments and Trends

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### Holding Professionals (Accountants/Lawyers) Liable

- Negligent Misrepresentations
- §35-1-501 (General Fraud)
- §35-1-505 (Misleading Filings)
- §35-1-604, administrative enforcement if “materially aided, is materially aiding, or is about to materially aid...”

**DONALD J. ZELENKA**

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**EDUCATION:**

B.A. in Economics, The Ohio State University (1974)  
J.D., University of South Carolina School of Law (1977)

**BAR ADMISSIONS:**

South Carolina (1977); Virginia (1979); U.S. Supreme Court (1983); U.S. Court of Appeals for the 4th Circuit (1978), U.S. Court of Appeals for the 11th Circuit (1985); U.S. Court of Appeals for the 3rd Circuit (1986); U.S. District Court for South Carolina (1981).

**PROFESSIONAL EXPERIENCE:**

*Senior Assistant Deputy Attorney General, Chief of the Capital and Collateral Litigation Unit, Office of the Attorney General of South Carolina (1995-present); Chief Deputy Attorney General, Director of the Criminal Division, Office of the Attorney General (1984-1995); Assistant Attorney General, Office of the Attorney General of South Carolina (1979-1984); Staff Research Attorney-Law Clerk, United States Court of Appeals for the Fourth Circuit, Richmond, Virginia (1977-1979).*

**HONORS:**

2011 *Attorney General's Excellence Award*, South Carolina Attorney General's Office; 2007 *Senator Ernest F. Hollings Award for Excellence in Prosecution*; 2006 National Award for "Outstanding Advocacy in Capital Cases;" from the National Association of Government Attorneys in Capital Litigation; 1995 Judge William Shafer National Award for "Excellence in Capital Litigation" from the National Association of Government Attorneys in Capital Litigation; 1991 *Silver Scales of Justice Award* from the South Carolina Victim Assistance Network for public service to victims of crime and survivors. *Sphinx Senior Leadership Honorary for Outstanding Senior Male Students* at The Ohio State University (1974).

**PUBLICATIONS:**

The Appellate Prosecutor: A Practical and Inspirational Guide to Appellate Advocacy, edited by Ronald H. Clark (2005 Trafford). Chapter Contributor; "Research Resources: An Appellate Lawyer's Tools of the Trade," "Inspirational Words for the Appellate Advocate." "Protecting the Record For Your Capital Case: Keeping the Eye on the Ball - It's Only The Beginning," *The Practical Prosecutor*, p. 30-39. (2006 - *National College of District Attorneys*). Co-authored with Robert F. Daley, Jr., *Making the System Fair and Prompt: Recent Changes in Death Penalty Law, Post Conviction Relief and Federal Habeas Corpus*, *South Carolina Lawyer*, July/August 1997.

**TEACHING EXPERIENCE:**

*National Advocacy Center, Columbia, S.C. - Faculty - Appellate Advocacy Course*, Instructor and Featured Presenter; 1999-2007; *Prosecutor's Bootcamp Course*, Faculty - November 2001. Regularly at the South Carolina Solicitor's Association Annual Meetings. Numerous South Carolina Bar and Richland Bar Association C.L.E. programs on Criminal Law and Ethics. Adjunct Clinical Instructor - *U.S.C. School of Law* 1981-1983. Frequent presenter at Association of Government Lawyers in Capital Litigation Meetings. *New York Prosecutors Training Institute*, Featured Speaker - Capital Cases in the United States Supreme Court. February 2002.

**PROFESSIONAL ACTIVITIES:**

*South Carolina Bar Association*: Criminal Law Section Council Member; Law Related Education Committee Member. *Association of Government Attorneys in Capital Litigation* Board of Directors (1985-present).

at 27, 538 S.E.2d at 251. This Court will not reverse a trial court's decision regarding a jury instruction absent an abuse of discretion. Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000).

- A. The trial court issued a jury instruction consistent with evidence presented by both the State and Appellant. The trial court charged the jury that they could return verdicts of not guilty, not guilty by reason of insanity, guilty but mentally ill, and guilty.
  - 1. Therefore, if the jury believed that Appellant could not distinguish moral or legal right from wrong, they could have found him not guilty by reason of insanity. In addition, the jury could have found that Appellant's mental disease or defect prevented him from conforming his conduct to the requirements of the law, regardless of whether he could make the necessary moral or legal distinctions. Nothing in the trial court's inferred malice charge would have prevented the jury from reaching either of these conclusions.
- B. The trial court instructed the jury that inferred malice may arise when the "deed is done with a deadly weapon." The trial court also stated that malice "can be inferred from conduct showing total disregard for human life." Appellant only contests the "deadly weapon" language. However, if the jury rejected Appellant's insanity defense, which it did, the jury could also find that Appellant's conduct showed a total disregard for human life.
- C. Thus, Appellant could not have suffered prejudice from any separate inference that his use of a deadly weapon also gave rise to an inference of malice.

C. Trial Counsel Diggs's Conflict of Interest Claim Due to PCR Claim in Other Murder Case.

- 1. Defendant did not preserve for appellate review, in a death-penalty case, his argument that trial court erred in accepting his purportedly inadequate waiver of an alleged conflict of interest of defense counsel arising from his representation of defendant while defendant asserted claims of ineffective assistance of the same defense counsel in an application for postconviction relief related to an earlier prosecution.
  - A. Defendant avoided the critical first step of preservation, i.e., trying

to convince trial court that it ruled incorrectly, in that defendant emphatically requested that defense counsel continue to represent him and never raised a single objection.

2. Defendant knowingly and intelligently waived any conflict of interest of defense counsel arising from his representation of defendant in a death-penalty case while defendant asserted claims of ineffective assistance of the same defense counsel in an application for postconviction relief related to an earlier prosecution.
  - A. Stanko extensively endorsed defense counsel's continued representation by, inter alia, analogizing the situation to baseball and stating that a mistake by a well-known shortstop in a championship game would not mean that one would not want the shortstop to start the next baseball season.

#### D. JUROR DISQUALIFICATION ISSUE.

1. PRIOR KNOWLEDGE OF CRIMES - Appellant argues that the trial court erred in refusing to disqualify a juror with prior knowledge of Appellant's unrelated crimes who stated unequivocally that she would vote to impose the death penalty in every instance in which the State proved an aggravating circumstance beyond a reasonable doubt.
  - A. 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 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.
  - B. Trial court in a capital case was not required to disqualify, based on prior knowledge of defendant's unrelated crimes, a prospective juror who stated during voir dire that she remembered that

**Capital Litigation 2013 Appellate Caselaw Update**  
**August 14, 2013**

Donald J. Zelenka  
Senior Assistant Deputy Attorney General

- I. State v. Marin (Manuel), \_\_ S.C. \_\_, \_\_ S.E.2d \_\_, 2013 Westlaw 3361970, (S.C. App. July 3, 2013)(affirmed) (on rehearing petition) (RG/AM/DZ)
  - A. Self-Defense Instruction Issue - "Continue to Shoot." Defendant's requested jury instruction that a defendant may continue to shoot as long as he reasonably believes it is necessary to continue to use deadly force was adequately covered by other instructions given regarding self-defense.
    - I. Where homicide defendant contends that he shot the victim in self-defense, it is permissible for a trial court to instruct the jury that a defendant may continue to shoot as long as he reasonably believes it is necessary to continue to use deadly force.
      - A. The Court questions whether the requested charge in this case was an accurate statement of the law. Self-defense is premised on a person's right to use deadly force when, under the circumstances, he reasonably believes such force is necessary to prevent death or serious bodily injury. See State v. Davis, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984) (describing the third element of self-defense-"a reasonably prudent man of ordinary firmness and courage would have ... belie[ved he was in imminent danger]" and requiring for "actual [ ] ... imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself"). Therefore, if the State has not proven the absence of any other element, see *id.*, a person may use deadly force in firing the first shot when he reasonably believes it is necessary to prevent death or serious bodily injury. Under the language requested by Marin, however, a defendant could continue to shoot even if the first shot changed the circumstances to make the use of deadly force no longer reasonable, so long as the initial danger has not "completely ended." Thus, according to Marin's requested charge, the jury could determine that the danger almost completely ended after the first shot, and that no reasonable person would believe it was necessary to continue to shoot; however, the jury would nevertheless be required to find the defendant not guilty because a minimal danger to him remained-that is, the danger had not completely ended.

Because the requested charge required the State to prove the danger had completely ended before it could defeat self-defense, and thus the charge allowed the use of deadly force when it was no longer reasonably necessary to prevent death or serious bodily injury, we question whether the charge contained a correct statement of law.

2. Trial court was not required to give defendant's requested jury instruction that a defendant may continue to shoot as long as he reasonably believes it is necessary to continue to use deadly force in murder prosecution in which defendant claimed he shot victim in self-defense, where jury was otherwise properly instructed that use of deadly force is justified if reasonably necessary to prevent death or serious bodily injury, and trial counsel was permitted to argue that defendant's second shot was reasonably necessary under the circumstances.
  - A. Stand Your Ground Immunity Jury Instruction Issue - Trial court properly refused to instruct jury regarding immunity statute establishing procedure under which a trial court could grant immunity before trial begins.
    1. Murder defendant contending that he shot the victim in self-defense was not entitled to jury instruction under "stand your ground" statute, S. C. Code Section 16-11-450(A) granting immunity from prosecution for a person who acted lawfully in self-defense.
      - A. Immunity provision was not relevant to the work of a jury, but merely established a pre-procedure under which a trial court could grant immunity before trial begins.
      - B. In this case, the trial court fully charged self-defense - the substantive point of law upon which subsection 16-11-450(A) depends. Subsection 16-11-450(A) is a procedural provision that is not relevant to the work of a jury. In fact, if a defendant is entitled to the relief set forth in the sub-section, the defendant is "shielded from trial" and no jury will ever hear the case. 392 S.C. at 410, 709 S.E.2d at 665. Thus, the trial court correctly refused the requested charge and jury was properly charged on the substantive law of self-defense.
2. State v. Sobers (Rashaun), 404 S.C. 263, 744 S.E.2d 588 (S.C. App. 2013)(affirmed) (MB).
  - A. Gang Association Evidence by Defense - Rule 401 - Relevance - Trial court did

not abuse its discretion in finding that evidence suggesting gang associations of murder victim and witnesses was not relevant.

1. Trial court did not abuse its discretion in finding that evidence suggesting gang associations of murder victim and witnesses was not relevant to show defendant's state of mind and fear of being killed by mob, which allegedly surrounded his car, at time defendant fired his gun.

a. Pre-trial, defense counsel informed the trial court it would present evidence of gang activity involving the victim and witnesses. Defense counsel indicated it had pictures from Facebook accounts belonging to Trey and Joshua Fuller that showed the victim and witnesses flashing gang signs. The State argued the evidence of gang activity was irrelevant and unfairly prejudicial. Defense counsel argued the evidence went "to self-defense." According to defense counsel, Sobers pulled his gun and fired after the "mob of people" who had been watching the fight between Devon and the victim surrounded his car and tried to pull him out. Defense counsel maintained Sobers acted in self-defense because "those people are gang members" who had "just beat down another little boy." Defense counsel argued Sobers believed the fight between Devon and the victim was a gang initiation. The trial court asked whether any witness statements indicated any gang-related activity at the scene of the shooting, and the State responded that none of them

b. Sobers never testified that mob was part of gang, or that fact that mob was allegedly part of gang made him more fearful.

2. "We find the trial court did not abuse its discretion in finding the evidence suggesting gang associations of the victim and witnesses was not relevant. We note that although the trial court left open the possibility Sobers could offer gang evidence if he could establish the requisite relevancy, Sobers never testified the mob that surrounded his car was part of a gang. According to Sobers, the mob action caused him to fear for his life and fire his gun, but he never testified he was more fearful because the mob was part of a gang. Thus, Sobers never introduced evidence that would make gang activity relevant."

3. State v. Dukes (Henry), --- S.E.2d ----, 2013 WL 3199992 (S.C.App. June 26, 2013), rehearing denied. (ES).

A. Eyewitness Identification Procedure - Murder defendant's due process rights were

not violated during suppression hearing in which eyewitness and his father testified as to eyewitness's out-of-court identification of defendant to investigating officer.

1. Investigating officer was unavailable to testify that police procedures used during out-of-court identification were not impermissibly suggestive.
2. However, trial court was able to determine from testimony of State's witnesses that nothing police did was suggestive.
  - A. Testimony of eyewitness indicating that he saw photographs in officer's file accidentally while officer was away from table,
  - B. Testimony from eyewitness's father, who was present at meeting with officer, that officer did not suggest which photograph eyewitness should have selected, notwithstanding contradictory evidence in officer's report, which provided that he presented photos of potential suspects to eyewitness one at a time.

4. State v. Murray (Christopher), 404 S.C. 300, 744 S.E.2d 607(S.C. App. June 26, 2013)

A. Jury Instruction - Not Entitled to Instruction on Involuntary Manslaughter.

1. "Involuntary manslaughter" is the unintentional killing of another without malice while: (1) engaged in an unlawful activity not naturally tending to cause death or great bodily harm, or (2) engaged in a lawful activity with reckless disregard for the safety of others.
2. Murray was not entitled to jury charge on involuntary manslaughter, even if jury could reasonably conclude that initial two shots that hit the wall were unintentionally fired.
  - A. Murray stated to police that, after gun fell from his waistband during struggle with victim, he "pulled the gun" on victim, put gun to victim's chest, and shot him.
    1. There was no evidence that victim knew defendant had gun, or that struggle with victim was for control of gun.
  - B. Murray did not testify at trial, but his videotaped interview with two police detectives was shown to the jury. In this interview, Murray stated that after Gibson attacked him in the doorway, a fight took place inside the residence. Murray claimed the gun was

on his waist when he arrived, and he did not “remember taking the gun off [his] waist.” He stated, “The only thing I can think of that might have happened right now is when I was tussling, it fell out.” Murray went on to explain,

I think the gun fell and that's how I got it in my hand. So it probably went off once or twice accidental. And that's whenever I pulled it on [Gibson].

The video showed one of the detectives prompting Murray to “show [him] what happened.” Murray then acted out the fight with one of the detectives, who, following Murray's direction, portrayed the actions of Gibson. The demonstration showed Murray and Gibson standing, with Gibson “leaned over [Murray],” and Murray bent under Gibson's body with his head against Gibson's chest. At that point in the demonstration, Murray said, “I think [the gun] dropped on the floor ... while he was over me.” Murray demonstrated the gun falling to the floor between them, and then explained, “I went down and got it to keep him from getting to it.” Murray gave no indication that Gibson also reached for the gun. As Murray stood up from the demonstration to speak directly to the detective, he said “and from there it went off probably two times.... It just went off, and that's whenever I pulled it up.” Murray then demonstrated the manner in which he “pulled [the gun] up” to Gibson's chest and explained, “[Gibson] was still on me.” When the detective told Murray to “put [the gun] wherever you think it was” when he shot Gibson, Murray held his hand in the shape of a gun—pointed at the detective's chest—and said, “somewhere between his waist and up in here,” demonstrating Gibson's upper chest.

- C. “In this case, however, there is no evidence the struggle was for control of the gun. Murray's gun was in his waistband when he arrived, but there is no evidence Gibson knew Murray had it. Although Murray stated he “got [the gun] to keep [Gibson] from getting to it,” there is no evidence Gibson knew the gun had fallen, much less that Gibson also tried to grab it. This case is distinguishable from Light, Tisdale, and Brayboy, therefore, because the facts provide no basis upon which a jury could find the third shot was unintentionally fired during a struggle over the gun. In addition, Murray admitted he “pulled [the gun] on [Gibson]” and fired the third shot intentionally. On these facts, we hold the trial court correctly refused to charge involuntary manslaughter.”

5. Sigmon (Brad) v. State, 403 S.C. 120, 742 S.E.2d 394 (2013) (Death Penalty PCR Appeal) (affirmed) (MB) (Hearn)

- HOLDINGS; (1) portion of closing argument in which solicitor appeared to be asking jurors to accord some weight to his determination of the appropriateness of a death sentence did not, in context, diminish the jury's role in rendering a death sentence;
- (2) evidence supported PCR court's finding that defendant was not intoxicated during the murders, so as to support a conclusion that defendant was not entitled to a jury instruction on the statutory mitigating circumstance of defendant's age or mentality; and
- (3) jury instruction on nonstatutory mitigating circumstances did not narrow evidence that the jury could consider in mitigation to factors relating specifically to the murders.

A. CLOSING ARGUMENT - Portion of closing argument in which solicitor appeared to be asking jurors, in a capital case, to accord some weight to his determination of the appropriateness of a death sentence did not, in context, diminish the jury's role in rendering a death sentence, which could have meant that the resulting death sentence was not free from the influence of any arbitrary factor; solicitor did not go so far as to compare his undertaking in requesting the death penalty to the jury's decision to ultimately impose a death sentence, and solicitor, during closing argument, often emphasized the important role of the jury in determining the appropriate sentence.

1. "A solicitor's closing argument must not appeal to the personal biases of the jurors nor be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it." Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). "When a solicitor's personal opinion is explicitly injected into the jury's deliberations as though it were in itself evidence justifying a sentence of death, the resulting death sentence may not be free from the influence of any arbitrary factor...." State v. Woomer, 277 S.C. 170, 175, 284 S.E.2d 357, 359 (1981). However, "[i]mproper comments do not automatically require reversal if they are not prejudicial to the defendant." Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). "The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.* at 338, 503 S.E.2d at 166-67.
2. During his closing argument, the solicitor stated:

Now, when we asked for the death penalty, it's a fair and appropriate question for you to say back to me, Solicitor Ariail, why do you think that the death penalty is an appropriate punishment in this case? And I can best summarize it by a response that I got from a juror in another case on voir dire, and that juror said, as to her response in her argument for the death penalty, that they're [sic] are mean and evil people who live in this world, who do not deserve to continue to live with the rest of us, regardless of how confined they are. And that's what the basis of our request for the death penalty is. There are certain mean and evil people that live in this world that do not deserve to continue to live with us.

....

And there are people, there are people who will argue that the death penalty is not a deterrent. But my response as the solicitor of this circuit is, it is a deterrent to this individual and that is what we are asking, is to deter Brad Sigmon and send the message that this type of conduct will not be tolerated in Greenville County, or anywhere in this State. And let that decision that you reach ring like a bell from this courthouse, that people will understand that we will not accept brutal behavior such as this. Thank you.

Trial counsel did not object. At PCR, counsel stated he considered this personal reference inappropriate, and it was his understanding that such statements would be inadmissible. He further noted that if he had not objected to it, it was either because he "missed it or was oblivious."

Nevertheless, the PCR court concluded that the statements would not justify an objection because they did not diminish the role of the jury in rendering a death sentence nor were they inflammatory. Instead, it found the closing argument was overall tailored to the facts within the record regarding the specific crimes at issue.

3. COURT: Although within this portion of the closing the solicitor appears to be asking the jurors to accord some weight to his determination of the appropriateness of the death penalty, we do not believe the statements are objectionable within the context of his entire argument. . . ., we do not find the solicitor's comments

here diminished the role of the jury in sentencing Sigmon to death. Although the solicitor mentioned his own considerations, he did not go so far as to compare his undertaking in requesting the death penalty to the jury's decision to ultimately impose a death sentence. His statements were not designed to diminish the jury's role and therefore, did not result in the prejudice identified in State v. Woomeer. . . .

Although the solicitor here articulated why he chose to request the death penalty, he did not equate his role with that of the jury.

Furthermore, examining the closing argument as a whole, we find the solicitor often emphasized the important role the jury played in determining the appropriate sentence.

- B. STATUTORY MITIGATING CIRCUMSTANCES - Jury Charge - Argues his trial counsel were ineffective in failing to obtain a charge on the statutory mitigating circumstance of age or mentality because evidence at trial established he was intoxicated at the time of the murders.
- I. Although the record supports the conclusion Sigmon ingested drugs and alcohol prior to the murders, it does not establish he was intoxicated when he committed the crimes. At trial, Sigmon presented evidence through testimony of Strube and Dr. Morton that the night before he committed the crimes he smoked crack cocaine and consumed alcohol. Dr. Morton testified that given Sigmon's history of drug use, the effect of the substances could last up to twenty-eight days. However, his testimony focused on Sigmon's other mental instabilities, such as his recurrent major depressive disorder and his chemical dependency disorders, and their psychological effects; it did not pertain to whether Sigmon was intoxicated at the time of the crime. Furthermore, Strube testified that on the night before the murders, he and Sigmon were smoking crack cocaine and drinking beer, but ran out of crack at some point in the evening, and Strube went to sleep. Although this supports the conclusion that Sigmon ingested crack and alcohol in the evening and possibly into the early morning, it does not necessarily indicate Sigmon was still intoxicated when he entered the Larkes' home the next morning.

Additionally, trial counsel stated in his deposition that he did not attribute Sigmon's behavior to intoxication, but to psychological problems. He noted Sigmon's issues with abandonment, which were exacerbated by Becky's behavior during the break-up, stating Sigmon was "wound up like a top when he committed this crime." When asked whether he considered

the drug and alcohol use as evidence of Sigmon's intoxication at the time the crimes were committed, counsel responded, "I absolutely cannot tell you whether we considered intoxication ... I don't remember ever thinking he was drunk."

- ii. The record supports the PCR court's finding that Sigmon was not intoxicated at the time of the murders, and therefore his attorneys were not deficient for failing to argue that his intoxication warranted the charge of mitigating factor .

C. **NON-STATUTORY MITIGATING FACTORS CHARGE** - Argues trial counsel was ineffective for failing to object to the trial court's instructions on non-statutory mitigating circumstances because the charge disparaged the legitimacy of this type of evidence. **DENIED.**

- I. During the sentencing phase of the trial, the court charged the jury to consider non-statutory factors of mitigation as follows:

[A] mitigating circumstance is neither a justification or [sic] an excuse for the murder. It's [sic] simply lessens the degree of one's guilt. That is it makes the defendant less blameworthy, or less culpable.

....

A non-statutory mitigating circumstance is one that is not provided for by statute, but it is one which the defendant claims serves the same purpose. That is to reduce the degree of his guilt in the offense.

- ii. Sigmon argues the instructions improperly narrowed the evidence the jury would consider in mitigation to factors relating specifically to the crime, to the exclusion of other evidence presented, such as Sigmon's adaptability to prison life, acceptance of responsibility for his actions, and remorse for the crimes.
- iii. The Court concludes that "Sigmon analyzes this language in isolation. The court's overall charge to the jury included the instruction that the jury could consider:

whether the defendant should be sentenced to life imprisonment for any reason, or for no reason at all.... In other words you may choose a sentence of life imprisonment if you find a statutory or non-statutory mitigating circumstance, or you may choose a sentence of life imprisonment as an act of mercy.

1. “Thus, the court clearly indicated the jury's power to consider any circumstance in mitigation, and a reasonable juror would have known he could consider any reason in deciding whether to sentence Sigmon to death.
  2. We further disagree with Sigmon's contention that the charge effectively reduced the weight of non-statutory circumstances. The court did not describe those circumstances as "not provided for by law," as Sigmon contends, but instead simply distinguished them from the statutory circumstances by stating they were "not provided for by statute." The qualification seems to have been added for clarity, not to inject a hierarchy into mitigating circumstances. We therefore find trial counsel were not deficient for not objecting to the charge.”
6. State v. Bruce (Roger), 402 S.C. 621, 741 S.E.2d 590 (S.C. App. 2013) (REMANDED) BM)
- A. Trial court's summary overruling of murder defendant's motion to suppress evidence of discovery of victim's body in trunk of victim's car created record inadequate to permit appellate review.
    - I. While trial court apparently ruled that *inevitable discovery* exception to exclusionary rule applied, it did so without basis in evidence.
      1. State presented no evidence that it would have inevitably discovered victim's body by some other means.
      2. Trial court did not determine whether the police violated defendant's Fourth Amendment rights.
  - B. “We remand with instructions that the trial court make findings consistent with this opinion. See State v. Austin, 306 S.C. at 19, 409 S.E.2d at 817 (remanding for determination of whether the defendant “had a reasonable expectation of privacy” because trial court failed to make that determination when it admitted evidence pursuant to an exception to the exclusionary rule); State v. Richburg, 250 S.C. 451, 461, 158 S.E.2d 769, 773 (1968) (emphasizing the need for specific findings of fact when the legality of a search or seizure is raised); State v. Jenkins, 398 S.C. at 230–31, 727 S.E.2d at 769 (remanding issue of whether inevitable discovery doctrine applied).
  - I. If the court determines Bruce had a legitimate expectation of privacy in the trunk of Creel's car, the police violated Bruce's Fourth Amendment rights

by exceeding the scope of his consent, and the evidence should have been suppressed pursuant to the exclusionary rule, **the court shall consider whether the error in admitting the evidence was harmless.** If the court determines it erred and the error was not harmless, it shall grant a new trial. If the court determines it did not err in admitting the evidence, or the error was harmless, Bruce's conviction must be affirmed."

7. State v. Stanko (Stephen), 402 S.C. 252, 741 S.E.2d 708 (2013) DEATH PENALTY DIRECT APPEAL - affirmed (AM). (on certiorari)

HOLDINGS:

- (1) jury instruction that malice could be inferred from the use of a deadly weapon was not warranted;
- (2) Error in trial court's giving of the jury instruction was not reversible error;
- (3) defendant knowingly and intelligently waived any conflict of interest of defense counsel;
- (4) trial court was not required to disqualify a prospective juror based on her knowledge of defendant's prior, unrelated crimes;
- (5) trial court was not required to disqualify a prospective juror based on her views of the death penalty;
- (6) defendant did not meet his burden of showing actual juror prejudice as a result of pretrial publicity and, thus, was not entitled to a change of venue;
- (7) persons who are 65 years of age or older and thus statutorily exempt from service as jurors are not a "distinctive group" for purposes of the fair cross-section requirement; and
- (8) alleged mental abnormalities of defendant did not render him intellectually disabled such that imposition of the death penalty would violate the Eighth Amendment.

A. MALICE INFERRED FROM USE OF DEADLY WEAPON INSTRUCTION -

- I. A jury charge instructing that malice may be inferred from the use of a deadly weapon is no longer good law in South Carolina where evidence is presented that would reduce, mitigate, excuse, or justify the homicide. State v. Belcher, 385 S.C. 597, 600, 685 S.E.2d 802, 803-04 (2009).

- II. In the instant case, Appellant presented evidence he had a brain abnormality. A psychiatric expert testified that he performed a psychiatric evaluation and neurological exam on Appellant, and that Appellant demonstrated mild signs consistent with brain dysfunction, including central nervous system dysfunction. According to this expert, Appellant also demonstrated the typical signs of anti-social personality disorder or psychopathy, and at the time of the crime, "you could argue" Appellant did not understand moral or legal right from wrong, as his brain could not process the events.
- III. "It is unclear what this Court could have included in Belcher to better indicate to the trial court the impropriety of an instruction that malice could be inferred from the use of a deadly weapon in this case. Appellant certainly presented evidence which could have reduced, mitigated, or excused the Victim's murder. The language of Belcher is clear, that when this type of evidence is submitted, an instruction regarding inferred malice from the use of a deadly weapon is improper. See Belcher, 385 S.C. at 612 n. 10, 685 S.E.2d at 810 n. 10 ("We overrule all cases involving a homicide or charge of assault and battery with intent to kill where two factors co-exist: (1) approval of the jury instruction that malice may be inferred from the use of a deadly weapon; and (2) evidence was presented that, if believed, would have reduced, mitigated, excused, or justified the homicide or the charged [assault and \*264 battery with intent to kill.]") Thus, the trial court erred. However, we must determine whether that error requires reversal." (Emphasis added).

B. HARMLESS ERROR IN BELCHER INSTRUCTION.

- I. The State presented uncontested evidence that Appellant shot the Victim, his elderly and un-armed friend, in the back using a pillow as a silencer. Appellant then robbed the Victim, and for the next several days used his automobile to travel across the state, where he engaged in social activities and drinking. Authorities apprehended Appellant in possession of the Victim's vehicle and the gun used in the murder.
  - A. Thus, the evidence of malice in this case is not limited to Appellant's use of a deadly weapon. See Belcher, 385 S.C. at 612, 685 S.E.2d at 810 ("It is entirely conceivable that the only evidence of malice was Belcher's use of a handgun.").
- II. Additionally, we must consider the jury instruction as a whole, and if as a whole the instruction is free from error, any isolated portions which may be misleading do not constitute reversible error. State v. Aleksey, 343 S.C.

defendant had murdered his girlfriend and “left the daughter for dead” and that he had murdered a man after those crimes.

1. Juror stated, in response to a question asked by trial court, that she did not remember much about the previous matter, and juror's responses to questions asked by trial court and defense counsel had no indication that knowledge of the prior crimes would have any bearing on juror's service.
2. JUROR PREDISPOSITION - Appellant argues that the trial court erred in qualifying Juror # 480 because of the juror's unequivocal response that she would vote for death in every case where the State proved murder beyond a reasonable doubt, coupled with an aggravating circumstance proved beyond a reasonable doubt. Juror # 480's initial statements demonstrate a troubling likelihood that her view on this issue would have substantially impaired her performance as a juror. However, we find that the trial court sufficiently rehabilitated Juror # 480.
    - A. During trial counsel's voir dire, Juror # 480 stated that she would always vote to impose the death penalty when murder and a statutory aggravating circumstance were proven beyond a reasonable doubt.
    - B. However, within that same colloquy she stated that she could consider all of the evidence in the case and render any one of the four verdicts she felt was best supported by the evidence.
    - C. Moreover, Juror # 480 responded to the trial court's methodical questioning with an affirmative response that she could in fact consider life imprisonment and the death penalty equally only if the State proved the requisite statutory aggravating circumstance.
    - D. Ultimately, there is evidence in the Record to support the trial court's decision to qualify Juror # 480. Her answers on the whole demonstrate an ability and willingness to be impartial and carry out the law as explained to her. Although Juror # 480 gave two contradictory answers during voir dire, the overall balance of her answers does not demonstrate the type of equivocation evident in State v. Lindsey.
  - E. REFUSAL TO GRANT CHANGE OF VENUE
    1. Defendant who moved for a change of venue in a capital case did not meet

his burden of showing actual juror prejudice as a result of pretrial publicity, specifically Stanko's conviction for murder and sentence of death in an earlier prosecution.

- A. The trial court could deny the motion, even though one seated juror knew of the prior conviction and sentence, and defendant claimed that at least eight seated jurors knew defendant by name.
  - 1. Stanko did not present even one juror who stated that he or she could not ignore pretrial publicity prior to serving as a juror, and the juror who knew of the prior conviction did not claim to know specific details and stated that she could be fair and impartial.

F. JUROR OPT OUT - 65 and Older. Code 1976, § 14-7-840.<sup>1</sup>

- 1. Persons who are 65 years of age or older and thus statutorily exempt from service as jurors are not a "distinctive group" for purposes of Sixth Amendment's requirement that a person charged with a crime be able to draw from a fair cross-section of the community, a prima facie violation of which requires in part a showing that the group alleged to be excluded is a distinctive group in the community.

- A. In the instant case, the trial court excused eighty-five prospective jurors who chose to take advantage of their statutory exemption. Trial counsel objected on the grounds that "**sixty-five is not what sixty-five used to be,**" and that section 14-7-840 was unconstitutional. The trial court rejected trial counsel's argument, and excused the jurors.

- G. Cruel and Unusual Punishment - Alleged mental abnormalities of Stanko, including central nervous system dysfunction and damage in medial gray matter of his brain at four standard deviations below normal, did not render him

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<sup>1</sup>Section 14-7-840 of the South Carolina Code provides:

No person is exempt from service as a juror in any court of this State except men and women sixty-five years of age or over. Notaries public are not considered state officers and are not exempt under this section. A person exempt under this section may be excused upon telephone confirmation of date of birth and age to the clerk of court or the chief magistrate. The jury commissioners shall not excuse or disqualify a juror under this section. The clerk of court shall maintain a list of persons excused by the court and the reasons the juror was determined to be excused.

intellectually disabled such that imposition of the death penalty would violate the Eighth Amendment's prohibition of cruel and unusual punishment.

1. The alleged abnormalities did not show an inability of defendant to communicate or care for himself adequately or show subaverage intellectual functioning, and, instead, defendant's above-average intelligence and his behavior before and after victim's murder showed an ability to formulate and execute deliberate plans.
  - A. Appellant has an intelligence quotient of 143, and a history of criminal behavior consistent with that of a confidence man. Moreover, Appellant's trial counsel admitted there was no definitive evidence of an intellectual disability, stating, "Your honor, hypofrontality is what some experts say is the condition this defendant has." While expert testimony in this case may demonstrate Appellant's inability to adapt, the Record does not show that he is of significant sub-average intellectual functioning.

8. State v. Rivera (Raymondez), 402 S.C. 225, 741 S.E.2d 694 (2013) DEATH PENALTY APPEAL - reversed - DZ.

Holdings:

- (1) trial court violated defendant's constitutional right to testify in his defense at trial, and
  - (2) deprivation of a defendant's constitutional right to testify in his or her defense at trial cannot be harmless and, as such, is **structural error**.
- A. Claim by defendant that trial court erred in a death-penalty case in refusing to honor his request to testify in his own defense at the guilt phase of trial was proper for review on direct appeal, as opposed to postconviction review.
1. State argued that defendant's right to testify was denied by defense counsel's refusal to call him as a witness for strategic purposes.
  2. Record on appeal was adequately developed to permit full consideration of defendant's claim.
    - A. The pertinent facts were undisputed, and defendant's claim was and consistently had been presented as an error by trial court in the appeal, not as a claim of ineffective assistance of counsel.

3. The right of a criminally accused to testify or not to testify is fundamental. Rock v. Arkansas, 483 U.S. 44, 52, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987) (“[F]undamental to a personal defense ... is an accused’s right to present his own version of the events in his own words.” (emphasis added)). “Every criminal defendant is privileged to testify in his own defense, or to refuse to do so.” Id. at 53, 107 S.Ct. 2704 (quoting Harris v. New York, 401 U.S. 222, 230, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971)). “The right to testify on one’s own behalf at a criminal trial has sources in several provisions of the Constitution.” Id. at 51, 107 S.Ct. 2704. “It is one of the rights that ‘are essential to due process of law in a fair adversary process.’ ” Id. (quoting Faretta v. California, 422 U.S. 806, 819 n. 15, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975)). “The right to testify is also found in the Compulsory Process Clause of the Sixth Amendment, which grants a defendant the right to call ‘witnesses in his favor,’ a right that is guaranteed in the criminal courts of the States by the Fourteenth Amendment.” Id. at 52, 107 S.Ct. 2704 (citing Washington v. Texas, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967)). “The opportunity to testify is also a necessary corollary to the Fifth Amendment’s guarantee against compelled testimony.” Id. “ ‘The choice of whether to testify in one’s own defense ... is an exercise of [that] constitutional privilege.’ ” Id. at 53, 107 S.Ct. 2704 (quoting Harris, 401 U.S. at 230, 91 S.Ct. 643) (omission in original). “ ‘A person’s right ... to be heard in his defense—a right to his day in court—[is] basic in our system of jurisprudence; ....’ ” Chambers v. Mississippi, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) (quoting In re Oliver, 333 U.S. 257, 273, 68 S.Ct. 499, 92 L.Ed. 682 (1948) (emphasis omitted)).
  
4. However, the right to present testimony is not without limitation. “The right ‘may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.’ ” Rock, 483 U.S. at 55, 107 S.Ct. 2704 (quoting Chambers, 410 U.S. at 295, 93 S.Ct. 1038). “But restrictions of a defendant’s right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve.” Id. at 55–56, 107 S.Ct. 2704. “In applying its evidentiary rules a State must evaluate whether the interests served by a rule justify the limitation imposed on the defendant’s constitutional right to testify.” Id. at 56, 107 S.Ct. 2704. Evidence rules which “ ‘infringe upon a weighty interest of the accused’ ” but fail to serve any legitimate interest are arbitrary. Holmes v. South Carolina, 547 U.S. 319, 324–26, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006) (quoting United States v. Scheffer, 523 U.S. 303, 308, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998)).
  
5. **“ It is clear from the record that defense counsel actively thwarted**

**Appellant's desire to testify.** Although, as a practical matter, preventing Appellant from testifying may have been an advantageous strategic decision, it had no basis in the law. The circumstances of this case are particularly disturbing, given that Appellant disagreed with counsel's recommendation not to testify, unambiguously indicated to the trial court that he wished to take the stand, and vociferously objected to the trial court's decision not to permit him to testify. It is also clear from the record that the trial judge appeared willing to call Appellant as a court's witness, but ultimately declined to do so because during the peculiar proffer procedure, Appellant indicated his intention to testify about the crime. It is apparent the trial court, like defense counsel, was operating under the paternalistic belief that it wanted to protect Appellant from potentially undermining his own defense."

9. State v Frazier (Devon), 401 S.C. 224, 736 S.E. 2d 301 (S.C. App. 2013) affirmed in part, reversed in part and remanded. (AS).

A. Frasier argued the trial court committed reversible error in :

- (1) declining to charge self-defense;
- (2) declining to charge voluntary manslaughter; and
- (3) charging that malice may be inferred from the use of a deadly weapon.

B. SELF-DEFENSE REQUEST.

1. Self-defense requires four elements:

- (1) the defendant must be without fault in bringing on the difficulty;
- (2) the defendant must have been in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury;
- (3) if his defense is based upon his belief of imminent danger, the defendant must show that a reasonably prudent person of ordinary firmness and courage would have entertained the belief that he was actually in imminent danger and that the circumstances were such as would warrant a person of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm or the loss of his life; and
- (4) the defendant had no other probable means of avoiding the danger.

"[C]urrent law requires the State to disprove self-defense, once raised by the defendant, beyond a reasonable doubt." State v. Wiggins, 330 S.C. 538, 544, 500 S.E.2d 489, 492-93 (1998).

2. Evidence of no probable means of avoiding the danger found by the appellate court.
  - A. “Here, evidence in the record supports Frazier's contention he had no probable means of avoiding the danger other than to fire upon the blue Cadillac. **Frazier testified he fired his weapon because Hood was shooting at him from the car that Baldy was driving. Once the right to fire in self-defense arises, a person is not required to wait until his adversary is on equal terms in order to defend himself.** State v. Starnes, 340 S.C. 312, 322, 531 S.E.2d 907, 913 (2000). Thus, assuming Frazier satisfied the other elements of self-defense, he was not required to risk serious injury by running toward Stalk's apartment or waiting for his alleged assailants to flank or shoot through the Explorer. See also *id.* (providing one “doesn't have to wait until his assailant gets the drop on him, he has the right to act under the law of self-preservation and prevent his assailant [from] getting the drop on him” (internal quotation marks omitted)); State v. Jackson, 227 S.C. 271, 279, 87 S.E.2d 681, 685 (1955) (“[I]t is one's duty to avoid taking human life where it is possible to prevent it even to the extent of retreating from his adversary unless by doing so the danger of being killed or suffering serious bodily harm is increased or it is reasonably apparent that such danger would be increased.”).”
3. The appellate court also found other elements of self-defense.
  - A. First, evidence in the record indicates Frazier was in actual, imminent danger of death or serious bodily injury. No gun was found in the blue Cadillac, but four bullet holes passed through Baldy's car window even though Frazier testified he fired his weapon only three times. Further, the State's expert witnesses explained the gun-shot residue on Baldy's hands and the location of the bullet jackets in the Cadillac could indicate that Baldy fired upon Frazier in addition to Hood. This evidence could reasonably indicate Baldy was a gunman himself.
  - B. Second, evidence in the record could also reasonably support a finding that Frazier was without fault in bringing on the difficulty. According to Frazier, Baldy returned to the apartment armed after attacking Frazier without cause. Frazier testified he was in an argument with Pop Charlie at that time. But that argument was not the proximate cause of Baldy and Hood's shooting. Frazier and Pop

Charlie were not engaged in a physical altercation, and although Frazier's gun was in his pants at the time, nothing in Frazier's story indicates that he was clutching the firearm or that the firearm was visible to Hood or Baldy when he was arguing with Pop Charlie. Frazier testified that when Baldy and Hood fired, his back was to the blue Cadillac, his gun was in his pants, and his hands were not on the weapon. Cf. State v. Slater, 373 S.C. 66, 71, 644 S.E.2d 50, 53 (2007) (holding the defendant was not without fault in bringing on the difficulty because the defendant "carried the cocked weapon, in open view, into an already violent attack in which he had no prior involvement" and his "actions, including the unlawful possession of the weapon, proximately caused the exchange of gunfire, and ultimately the death of the victim").

- C. Because there is evidence in the record from which a jury could find Frazier's conduct was not reasonably calculated to bring on the difficulty, as well as evidence supporting the other elements of self-defense, we reverse his convictions and remand for a new trial.

C. MANSLAUGHTER CHARGE.

1. "Voluntary manslaughter is the intentional and unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation." State v. Smith, 391 S.C. 408, 412–13, 706 S.E.2d 12, 14 (2011). "The sudden heat of passion, upon sufficient legal provocation, ... while it need not dethrone reason entirely, or shut out knowledge and volition, must be such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence." State v. Childers, 373 S.C. at 373, 645 S.E.2d at 236 (internal quotation marks omitted). The sudden heat of passion "must cause a person to lose control." Starnes, 388 S.C. at 598, 698 S.E.2d at 609. "[I]n determining whether an act which caused death was impelled by heat of passion[, as with manslaughter], or by malice[, as with murder], all the surrounding circumstances and conditions are to be taken into consideration, including previous relations and conditions connected with the tragedy, as well as those existing at the time of the killing." State v. Pittman, 373 S.C. 527, 575, 647 S.E.2d 144, 169 (2007).
2. Here, the record is devoid of any evidence Frazier shot Baldy in a "heat of passion." Frazier testified he was "mad" and "worked up" from the earlier beating. However, despite the earlier incident, Frazier testified he never attacked anyone until fired upon. At that time, he ran to the Explorer,

ducked behind it for cover, and then stood and returned fire. Considering the circumstances surrounding the incident, it is clear he shot back as a calculated, strategic move to protect himself. Frazier's story does not establish he fired his weapon in a heat of passion causing an uncontrollable impulse to do violence, and no other evidence in the record could reasonably support such a contention.

3. The trial court properly declined Frazier's request to charge the law on voluntary manslaughter.

D. **INFERRED MALICE** - Frazier argues the trial court erred in permitting an inference of malice based upon his use of a firearm under Belcher.

1. Evidence in the record could reasonably support Frazier's claim of self-defense.
2. Thus, the trial court erred in charging that malice may be inferred from the use of a deadly weapon. See Belcher, 385 S.C. at 612, 685 S.E.2d at 810 (“[W]here evidence is presented that would reduce, mitigate, excuse or justify a homicide ... caused by the use of a deadly weapon, juries shall not be charged that malice may be inferred from the use of a deadly weapon.”); State v. Dickey, 394 S.C. at 499, 716 S.E.2d at 101 (“A person is justified in using deadly force in self-defense when....”).

10. State v. McMillan (Jeremy), 400 S.C. 298, 734 S.E.2d 171 (S.C. App. 2012) (DZ) certiorari pending by State.

A. **REVERSE BATSON CASE** - reversed by Court - new trial ordered.  
The Court of Appeals held that:

- (1) defendant's reason for peremptory strike was race neutral and satisfied defendant's obligation under Batson;
- (2) State failed to prove that defendant's exercise of strike was purposeful racial discrimination; and
- (3) Erroneous grant of state's Batson motion required reversal and remand.

B. In Batson v. Kentucky, 476 U.S. 79, 89, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), the Supreme Court of the United States held the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States forbids a prosecutor from challenging “potential jurors solely on account of their race or on

the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." In Georgia v. McCollum, 505 U.S. 42, 59, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992), the Supreme Court held the Constitution also prohibits a criminal defendant from engaging in purposeful racial discrimination in the exercise of peremptory challenges. Additionally, the Equal Protection Clause prohibits the striking of a venire person on the basis of gender. State v. Evins, 373 S.C. 404, 415, 645 S.E.2d 904, 909 (2007). When one party strikes a member of a cognizable racial group or gender, the trial court must hold a Batson hearing if the opposing party requests one. State v. Haigler, 334 S.C. 623, 629, 515 S.E.2d 88, 90 (1999).

- I. In State v. Evins, our supreme court explained the proper procedure for a Batson hearing:

After a party objects to a jury strike, the proponent of the strike must offer a facially race-neutral explanation. Once the proponent states a reason that is race-neutral, the burden is on the party challenging the strike to show the explanation is mere pretext, either by showing similarly situated members of another race were seated on the jury or that the reason given for the strike is so fundamentally implausible as to constitute mere pretext despite a lack of disparate treatment.

373 S.C. at 415, 645 S.E.2d at 909. The proponent's reason for striking a juror does not have to be clear, reasonably specific, or legitimate—the reason need only be race neutral. State v. Adams, 322 S.C. 114, 123, 470 S.E.2d 366, 371 (1996). "The burden of persuading the court that a Batson violation has occurred remains at all times on the opponent of the strike." Evins, 373 S.C. at 415, 645 S.E.2d at 909. The opponent of the strike must show the race or gender-neutral explanation was mere pretext, which generally is established by showing the party did not strike a similarly-situated member of another race or gender. Adams, 322 S.C. at 124, 470 S.E.2d at 372.

Whether a Batson violation has occurred must be determined by examining the totality of the facts and circumstances in the record." State v. Edwards, 384 S.C. 504, 509, 682 S.E.2d 820, 822 (2009). **Under some circumstances, the explanation given by the proponent may be so fundamentally implausible the trial judge can find the explanation was mere pretext, even without a showing of disparate treatment.** Haigler, 334 S.C. at 629, 515 S.E.2d at 91. "The trial judge's findings of purposeful discrimination rest largely on his evaluation of demeanor and credibility." Edwards, 384 S.C. at 509, 682 S.E.2d at 822. "Often the demeanor of the challenged attorney will be the best and only evidence of

discrimination, and an 'evaluation of the [attorney's] state of mind based on demeanor and credibility lies peculiarly within a trial judge's province.'" *Id.* (quoting *Hernandez v. New York*, 500 U.S. 352, 365, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991)). The judge's findings regarding purposeful discrimination are given great deference and will not be set aside by this court unless clearly erroneous. *Evins*, 373 S.C. at 416, 645 S.E.2d at 909–10. "This standard of review, however, is premised on the trial court following the mandated procedure for a Batson hearing." *State v. Cochran*, 369 S.C. 308, 312, 631 S.E.2d 294, 297 (Ct.App.2006). "[W]here the assignment of error is the failure to follow the Batson hearing procedure, we must answer a question of law. When a question of law is presented, our standard of review is plenary." *Id.* at 312–13, 631 S.E.2d at 297.

C. In response to the State's Batson motion, McMillan initially explained he struck juror 34 because **someone told him juror 34 "displayed attitudes that he believed to be not consistent with being a good and unfair and unbiased juror in this matter."** McMillan also asserted he seated one white male on the jury in response to the State's challenge that he struck five white males from the jury.

D. Responding to McMillan's explanation, the State questioned McMillan's stated reason for dismissing juror 34, arguing:

[U]nless he can articulate some reason, other than somebody told me he wouldn't be a good juror. I don't see where that would be pretextual or an excuse. I mean somebody told me [he] wouldn't be a good juror, well a lot of people tell me if people will be a good juror, but I need to know something about that person. He should have said why would he [sic] be a good juror. What has he said about this case or what's he said about the Defendant or whatever.

E. McMillan's counsel explained that "[i]n consulting with members of the Lee County Defense bar prior to drawing the jury advise [sic] me that they attended church with [juror 34] and that he had displayed to them some views that they believed to be controversial for this case." He further explained, "We were reviewing the juror list and it was indicated to me by members of the Lee County Local Bar, in particular Mr. Severance indicated that [juror 34] would not be a good pick for this jury, in that he has had some interactions with him and he displayed attitudes that he believed to be not consistent with being a good and unfair and unbiased juror in this matter."

F. Judge Howard King found McMillan's reason for striking juror 34 was pretextual,

and therefore, his strike was improper. Following the trial court's quashing of the first jury, McMillan was not allowed to strike juror 34 from the second jury, and juror 34 was impaneled for McMillan's trial.

G. COURT'S HOLDING

1. Here, McMillan's stated reason for striking juror 34 was that he had reason to believe the juror would not be unbiased based on his counsel's conversation with members of the Lee County Bar. **We find this reason, although questionable, is race neutral.** See *id.* at 123, 470 S.E.2d at 371 (stating the defendant's reasons for striking a juror do not have to be reasonably specific or legitimate—the reason need only be race neutral); *Cochran*, 369 S.C. at 321, 631 S.E.2d at 301 (“Because a juror's perceived bias (for whatever reason) lies at the core of virtually every peremptory challenge, courts should intervene only when it is demonstrated that the strike runs afoul of the Constitution.”); *State v. Short*, 327 S.C. 329, 335, 489 S.E.2d 209, 212 (Ct.App.1997) (“The principal function of the peremptory strike is to allow for the removal of a juror in whom the challenging party perceives bias or prejudice, even where the juror is not challengeable for cause.”).
2. We also find the State, as the opponent of the strike, failed to prove McMillan's strike was purposeful racial discrimination. Furthermore, the fact that McMillan “used most of his challenges to strike white jurors is not sufficient, in itself, to establish purposeful discrimination.” *State v. Ford*, 334 S.C. 59, 66, 512 S.E.2d 500, 504 (1999). Therefore, we find the trial court erred in ruling McMillan's stated reason for striking juror 34 was not race neutral and in granting the State's Batson motion.
3. Further, because juror 34 was seated on the second jury, we remand the case for a new trial. . .

11. State v. Daniels (Gregory), 401 S.C. 251, 737 S.E.2d 473 (S.C. App. 2012) Affirmed (BM)

- A. GUILT PHASE INSTRUCTIONAL ERROR - Instruction to jury that “whatever verdict you reach will represent truth and justice for all parties that are involved in this case” was improper.
  1. ACTING FOR THE COMMUNITY - At the pre-charge conference, appellant objected to the trial judge's inclusion of a charge that “You and I are acting for the community and that is why we must see to it that the trial is fair and the verdict is just.

- A. A 'Golden Rule' argument is one in which the jurors are asked to put themselves in the victim's shoes. It is improper because it is meant to destroy the jury's impartiality, and to arouse passion and prejudice. Brown v. State, 383 S.C. 506, 680 S.E.2d 909 (2009). **A charge that the jury is acting for the community, however, is not similar to a Golden Rule argument in that it does not ask the jury to consider the victim's perspective. While appellant has not shown reversible error here, we caution the trial judge to restrict his jury instructions to matters of law.**
2. BURDEN OF PROOF - contends the jury charge unconstitutionally shifted the burden of proof. He specifically objects to the part of the charge in which the judge stated it was his "confirmed opinion" that the verdict would represent "truth and justice for all parties."
- A. Appellate Preservation Issue . To the extent appellant now complains about the "confirmed opinion" part of the charge, he is improperly attempting to expand on appeal the scope of his objection below. E.g., State v. Meyers, 262 S.C. 222, 203 S.E.2d 678 (1974). There was no objection to the "confirmed opinion" language at the charge conference, and appellant stood on his pre-charge objection after the jury instructions were given. It is axiomatic that an objection to a jury charge may not be raised for the first time on appeal. E.g. State v. Rios, 388 S.C. 335, 696 S.E.2d 608 (Ct.App.2010); Rule 20(b), SCRCrimP.
- B. Appellant also now argues the trial judge erred in charging the jury that their verdict would represent the "truth and justice for all parties." The State contends that there was no contemporaneous objection made at trial to this "truth and justice for all" language in the charge. We agree. It is axiomatic that a party cannot raise an objection to a jury charge for the first time on appeal. State v. Rios, supra; Rule 20(b), SCRCrimP.
- C. "Although the issue is not preserved, **we instruct the trial judge to remove any suggestion from his general sessions charges that a criminal jury's duty is to return a verdict that is "just" or "fair" to all parties.** Such a charge could effectively alter the jury's perception of the burden of proof, substituting justice and fairness for the presumption of innocence and the State's burden to prove the defendant's guilt beyond a reasonable doubt. Moreover, to a lay person, the "all parties involved" in a criminal case may well extend beyond the defendant and the State, and include the

victim. These inaccurate and misleading charges risk depriving a criminal defendant of his right to a fair trial.

12. State v. McDonald (Derrick), 400 S.C. 272, 734 S.E.2d 167 (S.C. App. 2012) Affirmed (MB).

A. RIGHT TO CONFRONTATION AND BRUTON - “Another person” - Defendant’s right of confrontation was not violated by admission of non-testifying co-defendant’s statement, where defendant’s name was redacted and neutral phrase “another person” was inserted.

1. Redacted statement only implicated the statement’s maker.
2. It did not limit the participants to three, which would implicate the three defendants on trial, and
3. Court gave limiting instruction.

B. “The Confrontation Clause of the Sixth Amendment, which was extended to the states by the Fourteenth Amendment, guarantees the right of a criminal defendant to confront witnesses against him, and this includes the right to cross-examine witnesses.” State v. Holder, 382 S.C. 278, 283, 676 S.E.2d 690, 693 (2009); see U.S. Const. amends. VI and XIV. In Crawford v. Washington, 541 U.S. 36, 50–51, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the Supreme Court held that testimonial out-of-court statements are not admissible under the Confrontation Clause unless the witness is unavailable and the defendant had prior opportunity to cross-examine the witness.

In Bruton v. United States, 391 U.S. 123, 126–137, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), the United States Supreme Court held a non-testifying co-defendant’s confession that inculcates another defendant is inadmissible at their joint trial, even if the jury is instructed that the confession can only be used as evidence against the confessor, because of the substantial risk that the jury would look to the incriminating extrajudicial statements in determining the other’s guilt. In Richardson v. Marsh, 481 U.S. 200, 207–08, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987), the Supreme Court clarified the rule announced in Bruton is a “narrow” one that applies only when the statement implicates the defendant “on its face,” and the rule does not apply to statements that only become incriminating when linked to other evidence introduced at trial, such as the defendant’s own testimony. In State v. Evans, 316 S.C. 303, 307, 450 S.E.2d 47, 50 (1994), our supreme court held Bruton did not bar a statement that “on its face” did not incriminate Evans even though its incriminating import was certainly inferable from other evidence that was properly admitted against him.

C. At trial, the State argued replacing the co-defendants' names in co-defendant Cannon's written statement with "another person" would resolve any confrontation problem. Cannon's attorney objected on behalf of all three co-defendants, arguing the limited redaction would not satisfy Bruton and State v. LaBarge, 275 S.C. 168, 268 S.E.2d 278 (1980), "because the statement clearly implicates someone else and it's obviously prejudicial to the people who are sitting right here." Further, he stated "there's an easier way to do it, which is simply to not put a reference to what someone else did."

D. The judge ruled in favor of the State. Counsel renewed their objections when the State introduced Cannon's statement into evidence.

I. In summary, Cannon stated he and at least two others decided to "beat [Zoch's] ass because he is a snitch." The group arrived at Zoch's house at approximately 11:30 p.m. on December 12, 2006, and "busted" the side door in, finding Zoch asleep on the couch. Cannon's statement, when redacted, read:

[W]e went to Sonic. I had on a ski mask ... We then left Sonic and went to the Two Notch Walmart [sic] and another person got a ski mask. So we went riding and another person said ["]you know we need to do something with these ski mask[s'], and I ask, and another person ask ["]like what?["] and another person said ["]like beat [Zoch's] ass because he's a snitch["] and I told another person I didn't think he was a snitch. Another person then ask if me and another person wanted to ride and we said whatever.... That was about 11 pm.... We pulled up to [Zoch's] about 11:30 pm.... Another person went to the side door and another person busted it in.... [Zoch] was asleep on the couch and another person yelled ["]hey Bitch,["] and when [Zoch] looked up, another person hit [Zoch] with a glass lamp. Right after that ... another person drag [ged] him off the couch part of the way. Then another person started pressuring another person to hit [Zoch] with the bat that was in the house and another person then hit [Zoch] in the back of [his] head. After that [Zoch] was basicly [sic] crawling trying to get up ... At that time another person kicked [Zoch] in the ribs and ask[ed] [Zoch] where the weed was and [Zoch] was just grunting. That[s] when another person ask[ed] me to check the room and we started pulling draws [sic] and another person flipped the mattress ... Then [Zoch] went unconscious and I got [Zoch] a towel and put it to his head. Another person said, ["]fuck, we don't have anything["] and pushed the Christmas tree over on [Zoch]. Another person then got mad again and took the \*278 house phone. But before another person left, he got some frozen chicken from the freezer and put it on [Zoch]'s head to try and stop the bleeding.\*\*170 After that we went back out the same way we came in.

Cannon also answered some questions in his statement:

- Q. Did you[,] another person[,] and another person have on gloves?  
A. Yes.  
Q. What kind of gloves?  
A. Purple latex and I had on 2 pair WHT [sic] and purple ones on top.  
Q. Where was the bat from that was used to hit [Zoch]? A. It was in [Zoch's] house. I just looked over their [sic] and another person picked it up.  
Q. What were you[,] another person[,] and another person wearing that night?  
A. Black pants and shirts and ski mask.  
Q. What color was the ski mask?  
A. Mine was black and theirs was [sic] black or dark blue.

2. The court also gave the jury a limiting instruction:

Now, some of the evidence in this case may have been admitted solely because of its relationship to the case against one of the defendants. This evidence cannot be considered in the case of any of the other defendants.

D. On appeal, McDonald argues that given the context of the record, Cannon's written statement clearly implicated him as a person involved in the burglary and murder of Zoch. Therefore, its admission violated his rights under the Confrontation Clause. He argues this case is similar to LaBarge, 275 S.C. 168, 268 S.E.2d 278. In LaBarge, the State presented a confession given by his co-defendant that implicated LaBarge in the crimes and, in accordance with Bruton, the statement was redacted in an attempt to exclude all direct references to LaBarge. *Id.* at 170, 268 S.E.2d at 279–80. Where the name “LaBarge” appeared, “Mister X” was substituted; however, in light of other testimony, “Mister X” pointed directly to LaBarge. *Id.* at 170, 268 S.E.2d at 280. Regardless, the court did not specifically hold the redaction would not have satisfied Bruton, but simply stated, “It can be forcefully argued that \*279 the method of redacting was ineffective.” *Id.* Similarly, in State v. Holder, 382 S.C. 278, 285–86, 676 S.E.2d 690, 694 (2009), our supreme court found the substitution of Holder's name with the pronoun “she” was insufficient to obscure her identity because the jury could readily determine the statement referred to her as she was the only female defendant. The court held the redaction was analogous to that in Gray because, despite the redaction, it was apparent the co-defendant was referring to Holder, and the inference was one that could be made even without reliance on the other testimony developed at trial. *Id.* Therefore, the court found the admission of the redacted statement violated Holder's rights under the Confrontation Clause

because her co-defendant did not testify and was not subject to cross-examination. *Id.* at 286, 676 S.E.2d at 694.

- E. In contrast, in United States v. Akinkoye, 185 F.3d 192, 198 (4th Cir.1999), the Fourth Circuit Court of Appeals held the defendants were not prejudiced because the confessions were retyped to replace the defendants' respective names with the neutral phrases "another person" or "another individual." Also, in United States v. Vogt, 910 F.2d 1184, 1191–92 (4th Cir.1990), the Fourth Circuit Court of Appeals held that a redacted statement, in which the co-defendant's name was replaced with the word "client," did not on its face impermissibly incriminate the co-defendant even though the incriminating import was inferable from other evidence. The court further stated that even though it may not be easy for a jury to obey the cautionary instruction, " 'there does not exist the overwhelming probability of their inability to do so that is the foundation of Bruton's [rule].' " *Id.* at 1192 (quoting Richardson v. Marsh, 481 U.S. at 208, 107 S.Ct. 1702).
- F. We find that the neutral phrase "another person" inserted into Cannon's statement avoided any Bruton violation. The redacted statement only implicates the statement's maker, and it does not limit the participants to three, which would implicate the three defendants on trial. Further, the court gave the jury a limiting instruction. Therefore, we find the trial court properly allowed Cannon's redacted statement into evidence.
- G. CRAWFORD ISSUE : McDonald also argues Cannon's written statement was a violation of Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), because the statement was given during the course of an investigation, and McDonald did not have an opportunity to confront and cross-examine Cannon.
1. Counsel for Cannon argued for all three co-defendants concerning redacting Cannon's written statement to the police. Counsel's argument was based on Bruton and did not mention Crawford v. Washington. Counsel did not raise a Crawford violation until hundreds of pages later in the transcript in regard to an oral statement made by Cannon during a polygraph exam. The judge noted this was the first time Crawford was mentioned, and Cannon's previous redacted statement had already been admitted. Counsel stated, "[F]or the record, I'm going to go ahead and put on the record that the other statements should have been suppressed due to Crawford, too." Because the Crawford issue was not raised when Cannon's written statement was redacted and admitted, this issue is not preserved for our review. See State v. Hoffman, 312 S.C. 386, 393, 440 S.E.2d 869, 873 (1994) ("A contemporaneous objection is required to properly preserve an error for appellate review."); State v. Burton, 326 S.C. 605, 609, 486

S.E.2d 762, 764 (Ct.App.1997) (“Failure to object when the evidence is offered constitutes a waiver of the right to object.”); Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (“It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.”); State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (holding an issue is not preserved for appeal where one ground is raised below and another ground is raised on appeal).

A. FEW, C.J., concurring: I concur in the majority opinion insofar as it holds that the use of the term “another person” satisfied the requirements of Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). However, I disagree with the majority’s treatment of Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Crawford relates to the question of whether the Sixth Amendment right of confrontation is implicated by a particular statement. See State v. Ladner, 373 S.C. 103, 111, 644 S.E.2d 684, 688 (2007) (recognizing that Crawford held the confrontation clause is implicated if the statement is testimonial). The State agrees Cannon’s statement is testimonial, and therefore McDonald had the right to confront Cannon. In my opinion, therefore, the Crawford issue the majority holds is unpreserved was never an issue at all, and there is no need to discuss Crawford. The question is properly analyzed under Bruton.



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# **CRIMINAL APPEALS**

# **CASE LAW UPDATE**

**WILLIAM BLITCH**

**S.C. ATTORNEY GENERAL'S OFFICE**

# OVERVIEW

- Co-Defendant Sentences
- Improper Comment on Facts in Jury Charge
- Retroactivity of Omnibus Sentencing
- Reasonable Suspicion to Detain and Search
- GPS Tracking
- Cruel and Unusual Punishment
- Forensic Interviewers

# State v. Pradubsri

- State v. Mizzell, 349 S.C. 326, 563 S.E.2d 315 (2002) requires co-defendant's sentence be allowed into evidence to demonstrate bias or motive to fabricate
- “A long sentence” or “substantial time” is not sufficient
- Case worth watching because State made an argument that evidence of bias was sufficiently demonstrated by showing she sent a letter asking for the deal. Court still found not harmless.

# State v. Cheeks

- “Actual knowledge of the presence of the crack cocaine is strong evidence of a defendant's intent to control its disposition or use.”
- “Strong evidence” charge is improper comment by the judge on the weight of the evidence
- Negates mere presence charge and while proper for argument it is not proper in jury charge

# State v. Brown

- Crime of Grand Larceny committed April 2010 and Omnibus Act redefined crime on June 2010
- Asserted Act should apply retroactively
- Also asserted the statute did not have a specific savings clause
- Act included a Savings Clause
  - does not affect pending actions, . . . , or alter, discharge, release, or extinguish any penalty, forfeiture, or liability incurred under the repealed or amended law
  - Savings Clause Applied to all statutory changes unless expressly stated

# State v. Brown Continued

- Found Act's savings clause applied to all statutory changes unless expressly excluded
- Liability when crime committed so proceed under definition in effect April 2010
- State v. Dawson, 402 S.C. 160, 740 S.E.2d 501 (2013) is a similar case
  - Action is “pending” and penalties are “incurred” at the time the crime is committed
  - Sentencing based on statute in effect prior to Omnibus Act

# State v. Taylor

- Whether Officers had reasonable suspicion to detain and search Appellant
- Factors Officer considered
  - Anonymous tip of drug activity matching description
  - Huddled with another person in what appeared to be illicit activity
  - Attempted to evade officers when they arrived
- Totality of the circumstances approach not consideration of individual factors
- Give due weight to experience of officers

# State v. Adams

- Fourth Amendment and GPS tracking
- Installation and monitoring of tracking device constitutes a search and requires warrant
  - See State v. Jones, 132 S.Ct. 945 (2012)
- Not automatically excluded
- Traffic violations constituted sufficient intervening criminal acts
- Officer's subjective intentions in making traffic stop plays no role in 4<sup>th</sup> Amendment analysis

# State v. Harrison

- Eighth Amendment Cruel & Unusual Punishment
- Reconciling South Carolina law with U.S. Supreme Court holding in Harmelin
- SC Follows Justice Kennedy's Concurrence and majority of other courts considering issue
  - first determine whether a comparison between the sentence and the crime committed gives rise to an inference of gross disproportionality
  - If no gross disproportionality then analysis over and not 8<sup>th</sup> Amendment violation

# State v. Harrison Continued

- Proportionality review continued
  - If gross proportionality exists then look to whether more serious crimes carry the same penalty, or more serious penalties, and the sentences imposed for commission of the same crime in other jurisdictions
  - Intra- and Interjurisdictional Analysis not used to create disproportionality where it otherwise did not exist
  - Provides example using the facts of this case on how to conduct analysis.

# STATE V. KROMAH

- “[A] forensic interviewer is a person specially trained to talk to children when there is a suspicion of abuse or neglect.”
- “The label of expert should be jealously guarded by the court and never loosely bandied about.”
- “We state today that we can envision no circumstance where their qualification as an expert at trial would be appropriate.”
- Provided bullet point list of testimony allowed and testimony to avoid

# STATE V. KROMAH

- Witnesses may not vouch for or offer opinions on the credibility of others, and the work of a forensic interviewer, by its very nature, seeks to ascertain whether abuse occurred at all, i.e., whether the victim is telling the truth, and to identify the source of the abuse.
- “The assessment of witness credibility is within the exclusive province of the jury,” and that witnesses generally are “not allowed to testify whether another witness is telling the truth.”

# STATE V. WHITNER

- Finding section 17–23–175 is a valid legislative enactment (statute allows videotape of forensic interview into evidence)
- Again reminded there can be no vouching or bolstering, by expert witnesses or any witness
- Specifically approved forensic interviewer testimony in this case

# RELEVANT CASE LAW

- State v. Pradubsri, 403 S.C. 270, 743 S.E.2d 98, (Ct. App. 2013)
- State v. Cheeks, 401 S.C. 322, 737 S.E.2d 480 (2013)
- State v. Brown, 402 S.C. 119, 740 S.E.2d 493 (2013)
- State v. Taylor, 401 S.C. 104, 736 S.E.2d 663 (2013)

# Relevant Case Law

- State v. Adams, 397 S.C. 481, 725 S.E.2d 523  
(Ct. App. 2012)
- State v. Harrison, 402 S.C. 288, 741 S.E.2d 727  
(2013)
- State v. Kromah, 401 S.C. 340, 737 S.E.2d 490  
(2013)
- State v. Whitner, 399 S.C. 547, 732 S.E.2d 861  
(2012)



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# Recent SVP/ICAC Cases

Nicole Wetherton

South Carolina Office of the Attorney General



# SVP/ICAC CASES

## SVP

- *In the Matter of the Care and Treatment of Bobbie Manigo*  
398 S.C. 149, 728 S.E.2d 32 (S.C. 2012)
- *In the Matter of the Care and Treatment of Thomas S.*  
402 S.C. 373, 741 S.E.2d 27 (S.C. 2013)
- *State v. Miller*, 404 S.C. 29, 744 S.E.2d 532 (S.C. 2013)

## ICAC

- *State v. Green*, 397 S.C. 268, 724 S.E.2d 664 (S.C. 2013)

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# SVP

- In the Matter of the Care and Treatment of Bobbie Manigo
  - The SVPA does not require a person to be presently confined for a sexually violent offense in order to be subject to the SVP evaluation process.
- In the Matter of the Care and Treatment of Thomas S.
  - The erroneous admission of extensive opinion testimony of a licensed social worker, a lay witness, mandated reversal.
- State v. Miller
  - A defendant's probation is not tolled during the time he was committed in the SVP treatment program.

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# ICAC

- State v. Green
  - Criminal Solicitation of a Minor is neither unconstitutionally overbroad or vague, and therefore, does not violate the First Amendment.
  - Legal impossibility is not a defense to Criminal Solicitation of a Minor and Attempted Criminal Sexual Conduct with a Minor if a law enforcement officer was impersonating a minor.
  - Two photographs of the defendant's penis that were sent to the undercover officer were properly admitted into evidence because they corroborated the testimony offered at trial.

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Questions?

398 S.C. 149

**In the Matter of the Care and Treatment of Bobbie MANIGO, Petitioner.**

No. 27134.

Supreme Court of South Carolina.

Heard March 7, 2012.

Decided June 20, 2012.

**Background:** Sex offender whose most recent offense was indecent exposure was civilly committed, following jury trial in the Circuit Court, Colleton County, John M. Milling, J., under the Sexually Violent Predator Act (SVPA). Sex offender appealed. The Court of Appeals, 389 S.C. 96, 697 S.E.2d 629, Short, J., affirmed. The Supreme Court granted writ of certiorari.

**Holding:** The Supreme Court, Kittredge, J., held that SVPA does not require a person to be presently confined for a sexually violent offense to be subject to the sexually violent predator (SVP) evaluation process.

Affirmed.

Pleicones, J., filed a dissenting opinion.

**1. Appeal and Error ⇨70(8)**

The denial of summary judgment cannot be reviewed by interlocutory appeal.

**2. Certiorari ⇨64(1)**

Sex offender's appeal in civil commitment proceeding under the Sexually Violent Predator Act (SVPA) was from a final judgment, despite offender's erroneous references to the denial of his summary judgment motion, and, therefore, the Supreme Court would address the legal question raised in sex offender's certiorari petition that followed affirmance by the Court of Appeals of the commitment order, i.e., whether he was exempt from SVPA evaluation procedure simply because his most recent offense, indecent exposure, was not explicitly designated as sexually violent; errors claimed by offender on appeal also included two evidentiary challenges from the trial. Code 1976, § 44-48-10 et seq.

**3. Statutes ⇨241(1)**

The "rule of lenity" provides that typically, statutes that are penal in nature must be strictly construed in favor of a criminally accused and against the state.

See publication Words and Phrases for other judicial constructions and definitions.

**4. Appeal and Error ⇨893(1)**

Statutory interpretation is a question of law subject to de novo review.

**5. Statutes ⇨181(1), 184, 208**

The cardinal rule of statutory construction is that the intent of the legislature must prevail if it reasonably can be discerned from the words used in the statute; statute's words must be construed in context and in light of the intended purpose of the statute in a manner which harmonizes with its subject matter and accords with its general purpose.

**6. Statutes ⇨188**

If the language of a statute is plain and unambiguous, court must enforce the plain and clear meaning of the words used.

**7. Statutes ⇨181(2)**

If applying the plain language of a statute would lead to an absurd result, court will interpret the words in such a way as to escape the absurdity; a merely conjectural absurdity is not enough, and the result must be so patently absurd that it is clear that the General Assembly could not have intended such a result.

**8. Mental Health ⇨454**

Sexually Violent Predator Act (SVPA) does not require a person to be presently confined for a sexually violent offense to be subject to the sexually violent predator (SVP) evaluation process; definition of SVP refers to someone who "has been" convicted of a sexually violent offense, and another provision of SVPA requires notice to certain persons prior to release from total confinement of a person who "has been" convicted of a sexually violent offense. Code 1976, §§ 44-48-30(1), 44-48-40.

**9. Mental Health ⇨454**

The Supreme Court would decline to apply the rule of lenity in deciding whether

Sexually Violent Predator Act (SVPA) required a sex offender to be presently confined for a sexually violent offense in order to be subject to the sexually violent predator (SVP) evaluation process; definitional and notice provisions of SVPA were clear and unambiguous on their face in not requiring present confinement for a sexually violent offense in order for that process to commence. Code 1976, §§ 44-48-30(1), 44-48-40.

Appellate Defender LaNelle Cantey Durant, of Columbia, for Petitioner.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Attorney General Deborah R.J. Shupe, and Assistant Attorney General William M. Blitch, Jr., all of Columbia, for Respondent.

Justice KITTREDGE.

[1, 2] We granted a writ of certiorari to review the court of appeals' decision in this matter. *In re Care & Treatment of Manigo*, 389 S.C. 96, 697 S.E.2d 629 (Ct.App.2010). Petitioner challenges his civil commitment to the Department of Mental Health for long-term control, care, and treatment pursuant to the Sexually Violent Predator Act ("SVPA"). Specifically, Petitioner contends that, although he has been convicted of a sexually violent offense, he is exempt from the SVPA evaluation procedure simply because his most recent offense is not explicitly designated as sexually violent. The court of appeals affirmed Petitioner's commitment, finding the language of the SVPA unambiguous and applicable to Petitioner. We affirm.<sup>1</sup>

1. Although the issue of appealability has not been raised by the court of appeals or the parties, the dissent would vacate the decision of the court of appeals because it erroneously addressed the merits of an unreviewable order. The dissent correctly points out that the denial of summary judgment cannot be reviewed by interlocutory appeal. Moreover, Petitioner indicates on certiorari to this Court that the "Court of Appeals erred in denying [his] pretrial summary judgment motion. . . ." We nevertheless elect to reach the merits of the certiorari petition, for the reality is that Petitioner appealed from final judgment, despite the erroneous reference to the

## I.

In 1987, Petitioner was indicted for assault with intent to commit first-degree criminal sexual conduct ("CSC") after making sexual remarks to the victim and touching the victim on her breasts and vagina and pushing her to the ground in an attempt to have sex with her. Petitioner pled guilty to the reduced charge of assault and battery of a high and aggravated nature. Petitioner was sentenced to ten years in prison, suspended upon service of two years in prison and five years of probation. Petitioner was also sentenced to alcohol, drug, and sex counseling.

While on probation following the 1987 conviction, Petitioner was again indicted for assault with intent to commit first-degree CSC. Petitioner knocked on the victim's door, forced his way into the house, grabbed the victim, and put his hand over her mouth. A struggle ensued, during which Petitioner pulled out a knife and pulled the victim into the yard. Once in the yard, Petitioner attempted to remove the victim's nightgown and panties, but the victim fought back and eventually escaped. In February 1990, Petitioner pled guilty to the reduced charge of assault with intent to commit second-degree CSC and was sentenced to twenty years in prison. During confinement, Petitioner committed eighty-three disciplinary infractions, of which three were assaultive and fifteen were for sexual misconduct, including willfully and repeatedly exposing his penis to and masturbating in front of female correctional officers.

In 2004, prior to his release from prison, Petitioner was evaluated by the Department of Corrections multidisciplinary team, which found probable cause that Petitioner was a

denial of his summary judgment motion. The dissent notes that "[o]n direct appeal, petitioner raised a claim of error in the denial of his motion for summary judgment." What the dissent fails to mention is that on direct appeal Petitioner raised two additional evidentiary challenges from the trial. While those evidentiary challenges are now abandoned, they demonstrate that this appeal is from a final judgment. Because the legal issue before us was sufficiently preserved and Petitioner in fact appealed from final judgment, we address the legal question raised in the certiorari petition.

sexually violent predator ("SVP"). Following a hearing, the circuit court also found probable cause that Petitioner was an SVP and ordered Dr. Pam Crawford to perform a psychiatric evaluation. Petitioner was diagnosed with alcohol dependence and borderline intellectual functioning; however, regarding whether Petitioner required inpatient sex-offender treatment, Dr. Crawford concluded insufficient clinical evidence existed to support a finding that, to a reasonable degree of medical certainty, Petitioner was suffering from a sexual disorder, personality disorder, or other mental abnormality that would make it likely he would re-offend.<sup>2</sup> In April 2004, the SVP petition was dismissed and Petitioner was thereafter released from prison. Following his release, Petitioner's participation in sex-offender treatment was poor and he returned to using alcohol.

In October 2005, Petitioner was arrested on four counts of indecent exposure after exposing himself, urinating and masturbating in front of the victim. The victim was an employee of SCE & G who was conducting her route near Petitioner's home on the day of the incidents. Petitioner noticed the victim, turned around, and began walking towards her. Petitioner stood in the roadway and exposed himself to the victim. The victim continued to the next home along her route, and Petitioner walked towards the victim and urinated in front of her. The victim

2. Dr. Crawford was "very concerned" about Petitioner due to his pattern of sexually violent behaviors and history of alcohol abuse. However, given Petitioner's "sustained appropriate behavior" during the eighteen months preceding the evaluation, and that Petitioner received alcohol abuse treatment in prison, his family was "incredibly supportive," he had a job waiting for him, and he would receive mandatory outpatient sex-offender treatment while on probation, Dr. Crawford could not conclude to a reasonable degree of medical certainty that Petitioner required inpatient treatment. Dr. Crawford stated, "When I did my first evaluation I did not say he did not meet the standard, but I said there was not enough clinical information at that point to convince me he had to be inpatient. I still at that time thought he could be outpatient...."
3. Paraphilia is a sexual disorder in which one becomes sexually aroused by having sex with a non-consenting adult. According to current understanding, paraphilia is a lasting disorder that

resumed her route, and Petitioner followed her and exposed himself a third time. Thereafter, Petitioner followed the victim onto a different street, exposed himself, and masturbated in front of her. At that point, the victim called 9-1-1 and reported the incidents. Petitioner pled guilty to one count of indecent exposure and was sentenced to three years in prison, suspended upon nine months in prison and two years of probation.

Prior to his release from prison, Petitioner was again referred for proceedings pursuant to the SVPA. The multidisciplinary team and the prosecutor's review committee found probable cause to believe Petitioner was an SVP. Following a hearing, the circuit court also found probable cause that Petitioner was an SVP and ordered Dr. Crawford to perform another psychiatric evaluation.

This time, Dr. Crawford opined, to a reasonable degree of medical certainty, that Petitioner was dangerous and would likely commit additional sexually violent acts against women. In addition to her previous findings of alcohol dependence and borderline intellectual functioning, Dr. Crawford diagnosed Petitioner with two sexual disorders: paraphilia<sup>3</sup> and exhibitionism.<sup>4</sup>

At trial, Petitioner argued he was not subject to the SVPA evaluation process because he was not presently confined for a sexually violent offense. At the time, section 44-48-40 read:

cannot be cured; however, it can be treated with medication and therapy.

4. Exhibitionism is a sexual disorder in which one is sexually aroused by exposing their genitals for shock value. Dr. Crawford testified her diagnosis of exhibitionism was based on Petitioner's repeated disciplinary infractions in prison, the indecent exposure incident in which he followed and repeatedly exposed himself to the victim, and the circumstances of his 1990 conviction. Moreover, Petitioner's own expert also diagnosed him with exhibitionism and acknowledged that disorder, even unaccompanied by a paraphilia diagnosis, constituted a mental abnormality under the SVPA. See S.C. Code Ann. § 44-48-30(1) (Supp.2011) (defining an SVP as a person who "(a) has been convicted of a sexually violent offense; and (b) suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment").

(A) When a person has been convicted of a sexually violent offense, the agency with jurisdiction must give written notice . . . one hundred eighty days before:

(1) the person's anticipated release from total confinement. . . .

Petitioner argued the legislature did not intend for the SVPA to encompass all offenses, and since Petitioner was serving time for an offense not classified as sexually violent, he was not subject to the SVPA evaluation process as a matter of law. The trial court disagreed and found section 44-48-40(A) does not require the most recent offense to be classified as sexually violent, and Petitioner was subject to the SVPA. The jury found the State proved beyond a reasonable doubt that Petitioner is an SVP. Thereafter, Petitioner was committed to the Department of Mental Health for long-term control, care, and treatment.

Petitioner appealed, arguing the SVP evaluation process is not triggered unless a person is currently confined for a sexually violent offense. Petitioner acknowledged his 1990 CSC conviction was a sexually violent offense but argues he was evaluated following his sentence in connection with that conviction and was determined not to be an SVP. Because the 2006 indecent exposure offense was not a sexually violent offense, Petitioner argues there was no conviction to trigger the SVP evaluation process a second time.

The court of appeals, like the trial court, rejected Petitioner's challenge and found the language of the SVPA was unambiguous and did not require the current offense and sentence to be a statutorily designated sexually violent offense. Rather, the SVPA only requires that a person "has been convicted of a sexually violent offense." The court of appeals relied on a Virginia case,<sup>5</sup> and distinguished the language of the Virginia SVPA

from the language of the South Carolina SVPA.<sup>6</sup> The court of appeals further relied upon the legislative intent set forth in the SVPA which demonstrated a desire to identify and treat individuals suffering from a mental abnormality to prevent future acts of sexual violence:

The General Assembly finds that a mentally abnormal and extremely dangerous group of sexually violent predators exists who require involuntary civil commitment in a secure facility for long-term control, care, and treatment. The General Assembly further finds that the likelihood these sexually violent predators will engage in repeated acts of sexual violence if not treated for their mental conditions is significant.

S.C.Code Ann. § 44-48-20 (Supp.2011).

We granted a writ of certiorari to review the court of appeals' decision.

## II.

[3] Petitioner argues the court of appeals erred because he was not subject to the SVPA since he was not confined for a sexually violent offense. Petitioner argues that, although section 44-48-40 does not use present tense language in reference to confinement, it would lead to an absurd result if a person was subjected to the SVP evaluation process during incarceration for an offense that is not designated as sexually violent. Petitioner further argues the SVPA should be construed strictly against the State pursuant to the rule of lenity.<sup>7</sup> We disagree.

[4-7] "Statutory interpretation is a question of law subject to de novo review." *Transp. Ins. Co. v. S.C. Second Injury Fund*, 389 S.C. 422, 427, 699 S.E.2d 687, 689 (2010). "The cardinal rule of statutory construction is that the intent of the legislature must prevail if it reasonably can be discerned from

5. *Townes v. Virginia*, 269 Va. 234, 609 S.E.2d 1 (2005).

6. The Virginia SVPA by its terms applies only to a person "who is incarcerated for a sexually violent offense." *Id.* at 3. In contrast, the South Carolina SVPA applies to any person who "has been convicted of a sexually violent offense." S.C.Code Ann. § 44-48-40 (emphasis added).

7. The rule of lenity provides that typically, statutes that are penal in nature must be strictly construed in favor of a criminally accused and against the State. See *Cooper v. S.C. Dep't of Prob., Parole and Pardon Servs.*, 377 S.C. 489, 496, 661 S.E.2d 106, 110 (2008) (construing parole statute strictly against the State because it was penal in nature).

the words used in the statute." *Cabiness v. Town of James Island*, 393 S.C. 176, 192, 712 S.E.2d 416, 425 (2011). "These words must be construed in context and in light of the intended purpose of the statute in a manner which harmonizes with its subject matter and accords with its general purpose." *Id.* (internal quotations omitted). "[I]f the language is plain and unambiguous, we must enforce the plain and clear meaning of the words used." *Id.* "But if applying the plain language would lead to an absurd result, we will interpret the words in such a way as to escape the absurdity." *Id.* "A merely conjectural absurdity is not enough; the result must be so patently absurd that it is clear that the General Assembly could not have intended such a result." *Id.* (internal quotations omitted).

[8] The court of appeals correctly found the language of the SVPA is unambiguous and does not require a person to be presently confined for a sexually violent offense to be subject to the SVP evaluation process. The definition of an SVP refers to someone who "has been convicted of a sexually violent offense." S.C.Code Ann. § 44-48-30(1). Further, section 44-48-40 provides notice must be given "[w]hen a person has been convicted of a sexually violent offense." Thus, we must enforce the plain meaning of those sections which, by their terms, do not require a person to be confined for a sexually violent offense for the SVPA evaluation process to commence.

Further, we disagree that applying the plain language of section 44-48-40 would lead to an absurd result. "[A] person's dangerous propensities are the focus of the SVP[A]." *In re Care & Treatment of Corley*, 353 S.C. 202, 207, 577 S.E.2d 451, 453-54 (2003). Accordingly, we believe the application of the SVPA should not turn on whether a person's most recent conviction was specifically designated as sexually violent, particularly where, as here, the most recent conviction is sexually oriented and demonstrates a substantial risk of future offenses. Rather, the determination of whether a person is an SVP must include consideration of all relevant circumstances. See *id.* (affirming admission of indictments notwithstanding appellant's willingness to stipulate to the prior

convictions because "the details of appellant's prior offenses . . . were relevant to the issue of whether appellant was likely to engage in acts of sexual violence again); *White v. State*, 375 S.C. 1, 9-10, 649 S.E.2d 172, 176 (Ct.App. 2008) (noting evidence of prior sexual history, regardless of whether it resulted in a criminal conviction, is directly relevant to determining whether a person is an SVP). We believe it would lead to an absurd result to interpret the SVPA to require the release of an inmate, who has been convicted of a sexually violent offense, presently suffers from a mental abnormality, and is highly likely to re-offend, simply because he happens to be confined for an offense that is not enumerated in section 44-48-30(2). The legislature did not intend for that person to be required to commit another act of sexual violence before becoming subject to the SVPA.

[9] Moreover, we reject Petitioner's invitation to apply the rule of lenity in this context because the terms of section 44-48-40(A) are clear and unambiguous on their face and there is no need to resort to the rules of statutory construction. See *Edwards v. State Law Enforcement Div.*, 395 S.C. 571, 575, 720 S.E.2d 462, 465 (2011) ("When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning."). Further, the rule of lenity is wholly inapposite because the SVPA is a civil, non-punitive scheme. See *In re Treatment & Care of Luckabaugh*, 351 S.C. 122, 135-37, 568 S.E.2d 338, 344-45 (2002); *In re Care & Treatment of Matthews*, 345 S.C. 638, 648, 550 S.E.2d 311, 318 (2001) ("Our [SVPA] specifies the purpose of the Act is civil commitment."); *In re Care & Treatment of Cannupp*, 380 S.C. 611, 617-18, 671 S.E.2d 614, 617 (Ct.App.2009) ("While the [SVPA] bestows some of the rights normally associated with criminal prosecutions, it is not intended to be punitive in nature; rather, it sets forth a civil process for the commitment and treatment of sexually violent predators."). Lastly, assuming any ambiguity, it was resolved by the legislature's 2010 amendment of section 44-48-40(A) substituting "If" for "When," which forecloses the interpretation

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Petitioner advances. See *Stuckey v. State Budget & Control Bd.*, 339 S.C. 397, 401, 529 S.E.2d 706, 708 (2000) (“A subsequent statutory amendment may be interpreted as clarifying original legislative intent.”).

der, I would vacate that decision. *E.g.*, *South Carolina Dept of Transp. v. McDonald's Corp.*, 375 S.C. 90, 650 S.E.2d 473 (2007).

## III.

We find the broad language of section 44-48-40 demonstrates the legislature's intent for the SVPA to include any person who has been convicted of a sexually violent offense and presently suffers from a mental abnormality or personality disorder that makes the person likely to reoffend. Accordingly, we find Petitioner's civil commitment was proper pursuant to the procedure set forth in the SVPA.

AFFIRMED.

TOAL, C.J., BEATTY and HEARN, JJ., concur.

PLEICONES, J., dissenting in a separate opinion.

Justice PLEICONES.

I respectfully dissent. In my opinion, we must vacate the decision of the Court of Appeals because petitioner failed to properly preserve any statutory construction issue for appellate court review. On direct appeal, petitioner raised a claim of error in the denial of his motion for summary judgment.<sup>8</sup> An order denying summary judgment does not finally decide any issue on its merits. *E.g.* *Wright v. Craft*, 372 S.C. 1, 640 S.E.2d 486 (Ct.App.2006). Moreover, the denial of summary judgment cannot be reviewed by an interlocutory appeal nor can such an order be appealed after final judgment. *Olson v. Faculty House of Carolina, Inc.*, 354 S.C. 161, 580 S.E.2d 440 (2003).

Since the Court of Appeals erroneously addressed the merits of an unreviewable or-

8. Petitioner's statement of the issue on appeal was “Did the trial court err in denying appellant's pretrial summary judgment motion when appellant was found not to be a sexually violent predator in 2004 just prior to his release from DOC and had committed no sexually violent offenses according to the Sexually Violent Predator Act since his release?” His sole issue on certiorari is “Whether the Court of Appeals erred by denying petitioner's pretrial summary judgment



398 S.C. 181

In the Matter of Gloria Y.  
LEEY, Respondent.

No. 27137.

Supreme Court of South Carolina.

Submitted May 14, 2012.

Decided June 27, 2012.

**Background:** Office of Disciplinary Counsel (ODC) initiated attorney disciplinary matter against attorney. ODC and attorney entered into agreement for discipline by consent.

**Holding:** The Supreme Court held that misconduct warranted three-year suspension of license to practice law.

Suspension ordered.

**Attorney and Client** ⇔ 59.13(3, 4)

Attorney's failure to comply with statutory trust account requirements, failure to diligently pursue a civil matter on behalf of client, failure to diligently represent a client in a wrongful termination action, failure to diligently act upon notice of appointment in criminal matter, failure to timely communicate with client regarding appeal, failure to make payment following a settlement agreement, and deposit of fee check into personal

motion when petitioner was found not to be a sexually violent predator in 2004 just prior to his release from DOC and had committed no sexually violent offenses according to the Sexually Violent Predator Act since his release?” I note that petitioner's appellate counsel was only able to raise the issue by reference to summary judgment as trial counsel presented the issue to the trial judge through this motion.

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## C

Supreme Court of South Carolina.  
 In the Matter of the Care and Treatment of  
 THOMAS S., Petitioner.  
 Appellate Case No. 2011-194610.

No. 27241.  
 Heard March 5, 2013.  
 Decided April 10, 2013.

**Background:** Individual, who had been committed to Department of Juvenile Justice (DJJ) after he was adjudicated delinquent on charges of first degree criminal sexual conduct with a minor, was subsequently determined to be eligible for release. A jury in the Circuit Court, Horry County, Edward B. Cottingham, J., determined that individual was a sexually violent predator (SVP). Individual appealed. The Court of Appeals affirmed. Certiorari was granted.

**Holding:** The Supreme Court, Pleicones, J., held that erroneous admission of extensive opinion testimony of licensed social worker, a lay witness, mandated reversal.

Reversed and remanded.

## West Headnotes

## [1] Mental Health 257A ↪460(2)

257A Mental Health  
 257A1V Disabilities and Privileges of Mentally Disordered Persons  
 257A1V(E) Crimes  
 257Ak452 Sex Offenders  
 257Ak460 Evidence  
 257Ak460(2) k. Experts. Most Cited Cases  
 Licensed social worker, a lay witness, was improperly permitted to offer expert opinion testimony in proceeding to determine whether individual was sexually violent predator (SVP); question

whether sex offenders entered offense cycle and therefore reoffended if exposed to certain triggers was not matter within purview of lay witness, social worker was not qualified to identify individual's purported triggers or define them, and social worker did not observe individual when he abused his victim, and did not have personal knowledge of reasons he committed that abuse. Code 1976, § 44-48-30(1).

## [2] Mental Health 257A ↪454

257A Mental Health  
 257A1V Disabilities and Privileges of Mentally Disordered Persons  
 257A1V(E) Crimes  
 257Ak452 Sex Offenders  
 257Ak454 k. Persons and offenses included. Most Cited Cases  
 Purpose of the Sexually Violent Predator Act (SVPA) is to involuntarily commit only a limited subclass of dangerous persons and not to broadly subject any dangerous person to what may be an indefinite term of confinement. Code 1976, § 44-48-30.

## [3] Mental Health 257A ↪467

257A Mental Health  
 257A1V Disabilities and Privileges of Mentally Disordered Persons  
 257A1V(E) Crimes  
 257Ak452 Sex Offenders  
 257Ak467 k. Appeal. Most Cited Cases  
 Erroneous admission of extensive opinion testimony of licensed social worker, a lay witness, mandated reversal in proceeding to determine whether individual was sexually violent predator (SVP); issue before jury was whether individual was likely to reoffend, and sole expert in case testified he was not, and only evidence in record of individual's propensity to commit future acts of sexual violence was that of social worker, who was improperly al-

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lowed to give her opinion despite fact state explicitly called her as a non-expert. Code 1976, § 44-48-30(1).

**\*\*27** Appellate Defender LaNelle Cantey DuRant, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson and Assistant Attorney General William M. Blicht, Jr., both of Columbia, for Respondent.

Justice PLEICONES.

**\*374** We granted certiorari to review an unpublished decision by the Court of Appeals which held that trial court did not err in permitting witness Shellenberg to give an opinion. *In re S.*, Op. No. 2011-UP-121 (S.C.Ct.App. filed March 24, 2011). We agree with petitioner and find that Shellenberg, a lay witness, was improperly allowed to offer expert opinion testimony and that this error was not harmless. We therefore reverse and remand for further proceedings.

#### **\*\*28 \*375 FACTS**

In 2004, petitioner was adjudicated delinquent on charges of first degree criminal sexual conduct with a minor and disturbing the schools,<sup>FN1</sup> and committed to the Department of Juvenile Justice (DJJ) for an indeterminate period not to exceed his twenty-first birthday. It appears from the record that petitioner engaged in oral and anal sex, and some fondling, approximately five times over the course of three years, with his step-nephew. Petitioner was aged ten when the first act occurred, and the victim six.

FN1. Although the dispositional order states the disturbing the schools charge was a probation violation, the charging petition itself does not allege probation was at issue. Compare ROA p. 124 with p. 125.

In February 2008, the South Carolina Juvenile Parole Board determined that petitioner was eligible for release. This decision triggered review pursuant to the Sexually Violent Predator Act (SVP

Act).<sup>FN2</sup> S.C.Code Ann. § 44-48-30(5) and § 44-48-40(B) (Supp.2012). Both the multidisciplinary team and the prosecutor's review committee found reason to believe petitioner met the definition of a sexually violent predator (SVP),<sup>FN3</sup> and a court determined that probable cause existed to believe he was an SVP. §§ 44-48-50 to -80. Dr. Neller was appointed by the court as the qualified expert following the court's probable cause determination. § 44-48-80(D).

FN2. South Carolina Code Ann. § 44-48-10 *et seq.* (Supp. 2012).

FN3. See § 44-48-30(1) discussed *infra*.

Following a trial, a jury determined, beyond a reasonable doubt, that petitioner was an SVP. He appealed, the Court of Appeals affirmed, and this certiorari follows.

#### **ISSUE**

Did the Court of Appeals err in affirming the trial court's decision to allow witness Shellenberg to express an expert opinion?

#### **ANALYSIS**

[1][2] The State called three witnesses to testify that petitioner was an SVP, that is, that he (1) had been convicted of or **\*376** adjudicated delinquent for a sexually violent offense and (2) suffers from a mental abnormality or personality disorder that (3) makes him likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment. §§ 44-48-30(1); 6(b). A person is "likely to engage in acts of sexual violence" within the definition of an SVP if his "propensity to commit acts of sexual violence is of such a degree as to pose a menace to the health and safety of others." § 44-48-30(9). The purpose of the SVPA is to involuntarily commit only a "limited subclass of dangerous persons" and not to broadly subject any dangerous person to what may be an indefinite term of confinement. *In re Luckabaugh*, 351 S.C. 122, 568 S.E.2d 338 (2002) citing *Kansas v. Crane*, 534 U.S. 407, 413,

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122 S.Ct. 867, 151 L.Ed.2d 856 (2002); *In re Harvey*, 355 S.C. 53, 584 S.E.2d 893 (2003).

Here, there is no question that petitioner satisfied two of the three requirements for being deemed an SVP: he has been adjudicated delinquent for a sexually violent offense and he has been diagnosed as suffering from a mental abnormality.<sup>FN4</sup> Therefore, the only contested issue at trial was whether that mental abnormality means his "propensity to commit acts of sexual violence is of such a degree" as to place him in the "limited subclass of dangerous persons" who should be "confined in a secure facility for long-term control, care, and treatment."

FN4. Dr. Neller testified that petitioner was a sexual sadist, that is, "a person who ... enjoys humiliating, a person who enjoys harming, a person who becomes sexually aroused by the harm he's inflicting on a person."

The State's first witness was Dr. Neller, a board certified clinical psychologist with an emphasis in forensic psychology. Dr. Neller is the Chief Psychologist with the South Carolina Sexually Violent Predator Program, and was the court-appointed expert in this case. Although Dr. Neller diagnosed petitioner as suffering from a mental abnormality, his professional opinion was that petitioner did not meet the SVP criteria. Dr. Neller testified that the purpose of the SVPA was "to identify, essentially, an extremely dangerous group of sexual offenders" and that he did not see how "most any expert" would \*\*29 place petitioner in that group. When questioned about petitioner's conduct that would appear to demonstrate\*377 to a layperson that he was a danger, e.g., deviant fantasies, downloading a pornographic cartoon depicting violent rape, and repeated disciplinary violations, Dr. Neller testified that none were probative of a likelihood that petitioner would reoffend.

Following Dr. Neller's testimony, the State called Linda Price, an employee of the South Carolina Board of Juvenile Parole. Price's testimony

concerned petitioner "acting out" when she went to inform him that the Board had approved his release. He was calm until she told him that the Board had ordered he pay restitution to the State for expenses it had incurred when it paid for his victim's counseling and medical bills.<sup>FN5</sup> Price testified that petitioner became loud and red-faced, questioned why he should pay restitution, and blamed the victim for his confinement. Price testified she repeatedly told petitioner to hush and sit down, and that before he sat down he "appeared to make a lunge in my direction with his body" and that after sitting he refused to say anything more. She went on to testify to the difficulties in having petitioner's North Carolina relatives agree to take him, and that if he went to North Carolina he would be supervised while on parole but would not be on a public sex offender registry. While there was no objection to Price's testimony on the ground of relevance, it is difficult to understand how this evidence assisted the jury in determining whether petitioner has the required propensity to reoffend such that he is in the small subclass of dangerous offenders who should be involuntarily committed.

FN5. We question the Juvenile Parole Board's authority to order restitution as a condition of parole. While S.C.Code Ann. § 16-3-1260(3) (2003) permits this type of restitution as a condition of parole or community supervision for persons convicted in General Sessions court, under subsection (4), in juvenile proceedings only the family court is authorized to order it as a condition of probation in juvenile proceedings.

The State's final witness was a licensed social worker (Shellenberg) who had worked with petitioner while he was confined in DJJ. She "impeached" Dr. Neller's written report, which stated that petitioner's biological mother had visited monthly, by testifying she only visited twice, by stating Dr. Neller's report failed to include two school disciplinary reports made after the report

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was prepared, and by testifying that petitioner's medications had been changed after the report \*378 was prepared. Finally, Shellenberg testified that eleven "level drops" for disciplinary infractions were omitted from Dr. Neller's report. Shellenberg admitted, however, there was no sexual component to any of petitioner's disciplinary infractions other than the downloading of the pornographic cartoon.

Shellenberg testified that while she was a certified sex offender treatment specialist, she was not qualified to diagnose petitioner, but that Dr. Neller was. Shellenberg testified she was familiar with Dr. Neller's report, and was asked about the report's conclusion that petitioner's responses on certain assessments were consistent with anti-social narcissistic and paranoid features. The State questioned Shellenberg whether she was testifying as an expert witness, and she acknowledged that she was not.

Shellenberg was then asked if she was familiar with petitioner and whether he "seems to display...." Petitioner's attorney immediately objected on the ground the witness was "not an expert in this." The judge overruled the objection, stating:

THE COURT: Well, no—in her area of involvement, I'll let her answer. The jury understands she's not an expert but she has certain competence in her field, and she's entitled to give her opinion.

Go ahead.

Shellenberg's direct examination continued:

Q. Have you seen Thomas display those very features you referred to a minute ago in Dr. Neller's report: Anti-social narcissistic and paranoid features?

A. Yes, and his triggers are entitlement and power and control.

Q. What do you mean by triggers?

A. Um, with sexual offenders there is an offense cycle, and triggers are the things that could send

them into their offense cycle and cause them to possibly re-offend.

Q. Well, what would Thomas' triggers be?

\*\*30 A. Um, entitlement and power and control.

Q. And by entitlement, what do you mean?

\*379 A. The sense of grandiosity and—basically, ah, having more knowledge than, probably, another person, more superior traits.

Q. So, when Dr. Neller refers to Thomas having a grandiose sense of self-importance and expects to be recognized as a superior, is that what you're talking about—

A. Yes, I am.

Q. —by entitlement?

A. Yes.

Q. And what was the second thing?

A. Um, power and control.

Q. Power and control, and how would you describe that?

A. That would be associated with his offense in which the other—the child that he victimized was getting more attention, and Thomas felt powerless, and that is the trigger that caused him to offend.

Q. Would Thomas' reaction to [Price's] discussion with him about planned restitution and the statements he made that [Price] has testified about earlier which you heard?[sic]

A. Yes.

Q. Is that consistent with this control feature that you're describing now?

A. Yes, it is.

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Petitioner contends, and we agree, that Shellenberg's testimony crossed the line from lay to expert in several particulars. As this Court recently explained:

Expert testimony differs from lay testimony in that an expert witness is permitted to state an opinion based on facts not within his firsthand knowledge or may base his opinion on information made available before the hearing so long as it is the type of information that is reasonably relied upon in the field to make opinions. *See* Rule 703, SCRE. On the other hand, a lay witness may only testify as to matters within his personal knowledge and may not offer opinion testimony which requires special knowledge, skill, experience, or training. *See* Rules 602 and 701, SCRE.

*Watson v. Ford Motor Co.*, 389 S.C. 434, 445–46, 699 S.E.2d 169, 175 (2010).

\*380 Here, the question whether sex offenders enter an offense cycle and therefore reoffend if exposed to certain triggers is not a matter within the purview of a lay witness. Nor was Shellenberg qualified to identify petitioner's purported triggers or define them. She did not observe petitioner when he abused his victim, and did not have personal knowledge of the reasons he committed that abuse, nor did she personally observe the interaction between petitioner and Price. Shellenberg was both testifying to matters beyond her firsthand knowledge, and offering her opinion that the interaction with Price was the type of event that could trigger his offense cycle, therefore increasing his likelihood to reoffend. Shellenberg was improperly permitted to offer expert opinion testimony after the State explicitly presented her as a lay witness and after petitioner lodged a timely objection. *Watson, supra*.

[3] The sole issue before the jury was whether petitioner was likely to reoffend, and Dr. Neller, the sole expert in the case testified he was not. The only evidence in the record of petitioner's "propensity to commit [future] acts of sexual viol-

ence" was that of witness Shellenberg, who was improperly allowed to "give her opinion" despite the fact the State explicitly called her as a non-expert. In fact, Shellenberg herself admitted on cross-examination that she was not qualified to diagnose petitioner as an SVP. The erroneous admission of her extensive opinion testimony mandates reversal here. *Compare e.g. State v. Ellis*, 345 S.C. 175, 547 S.E.2d 490 (2001) (improper non-expert opinion testimony which goes to the heart of the case is not harmless).

#### CONCLUSION

The Court of Appeals erred in affirming the jury verdict here. We therefore reverse and remand for further proceedings.

#### REVERSED AND REMANDED.

TOAL, C.J., BEATTY, KITTREDGE and HEARN, JJ., concur.

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**H**

Supreme Court of South Carolina.  
 The STATE, Respondent,  
 v.  
 James C. MILLER, Petitioner.  
 Appellate Case No. 2011-194606.

No. 27271.  
 Heard May 2, 2013.  
 Decided June 19, 2013.

**Background:** The state issued a probation citation approximately two years after defendant's involuntary civil commitment as a sexually violent predator (SVP), intending to afford the circuit court subject-matter jurisdiction to toll defendant's probation for criminal offenses. The Circuit Court, Lexington County, J. Cordell Maddox, Jr., J., issued an order tolling the probation until defendant's release from civil commitment. Defendant appealed. The Court of Appeals, 393 S.C. 59, 709 S.E.2d 135, affirmed. Defendant filed a petition for a writ of certiorari, which the Supreme Court granted.

**Holding:** The Supreme Court, Beatty, J., held that the trial court lacked authority to toll defendant's probation until defendant was released from his involuntary civil commitment.

Reversed.

Pleicones, J., concurred in result only.

See also 385 S.C. 539, 685 S.E.2d 619, and 393 S.C. 248, 713 S.E.2d 253

West Headnotes

**[1] Sentencing and Punishment 350H ⚡ 1802**

350H Sentencing and Punishment  
 350HIX Probation and Related Dispositions  
 350HIX(A) In General

350Hk1802 k. Discretion of court. Most Cited Cases

Determination of probation matters lies within the sound discretion of the trial court.

**[2] Criminal Law 110 ⚡ 1156.6**

110 Criminal Law  
 110XXIV Review  
 110XXIV(N) Discretion of Lower Court  
 110k1156.1 Sentencing  
 110k1156.6 k. Grant of probation or supervised release. Most Cited Cases

An appellate court will reverse a trial court's decision on a probation matter where there has been an abuse of discretion.

**[3] Criminal Law 110 ⚡ 1147**

110 Criminal Law  
 110XXIV Review  
 110XXIV(N) Discretion of Lower Court  
 110k1147 k. In general. Most Cited Cases  
 An "abuse of discretion" occurs when a trial court's ruling is based upon an error of law, such as application of the wrong legal principle; or, when based upon factual conclusions, the ruling is without evidentiary support; or, when the trial court is vested with discretion, but the ruling reveals no discretion was exercised; or when the ruling does not fall within the range of permissible decisions applicable in a particular case, such that it may be deemed arbitrary and capricious.

**[4] Pardon and Parole 284 ⚡ 42.1**

284 Pardon and Parole  
 284II Parole  
 284k42 Constitutional and Statutory Provisions  
 284k42.1 k. In general. Most Cited Cases

**Sentencing and Punishment 350H ⚡ 1823**

350H Sentencing and Punishment

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350HIX Probation and Related Dispositions  
 350HIX(A) In General  
 350Hk1822 Constitutional, Statutory, and  
 Regulatory Provisions  
 350Hk1823 k. In general. Most Cited  
 Cases

In South Carolina, parole and probation are governed by statute. Code 1976, § 24-21-410 et seq.

#### [5] Sentencing and Punishment 350H ⇌ 1946

350H Sentencing and Punishment  
 350HIX Probation and Related Dispositions  
 350HIX(F) Disposition of Offender  
 350Hk1942 Duration  
 350Hk1946 k. Effect of statute or  
 guideline. Most Cited Cases

Although a trial court may extend the length of probation originally given, the total period of probation may not exceed the statutory maximum of five years. Code 1976, § 24-21-440.

#### [6] Sentencing and Punishment 350H ⇌ 1800

350H Sentencing and Punishment  
 350HIX Probation and Related Dispositions  
 350HIX(A) In General  
 350Hk1800 k. In general. Most Cited Cases  
 "Probation," a suspension of the period of incarceration, is clearly part of a criminal defendant's term of imprisonment, as is actual incarceration, parole, and the suspended portion of a sentence. Code 1976, § 24-21-410.

#### [7] Sentencing and Punishment 350H ⇌ 2009

350H Sentencing and Punishment  
 350HIX Probation and Related Dispositions  
 350HIX(I) Revocation  
 350HIX(I)3 Proceedings  
 350Hk2009 k. In general. Most Cited  
 Cases

Whether a violation of probationary terms has occurred and the consequences of any such viola-

tion are matters for the courts. Code 1976, § 24-21-410 et seq.

#### [8] Pardon and Parole 284 ⇌ 50

284 Pardon and Parole  
 284I Parole  
 284k48 Eligibility for Parole or Parole Consideration

284k50 k. Minimum sentence, and computation of term in general. Most Cited Cases

A "no parole offense" is one in which a prisoner must serve at least 85 percent of the actual term of imprisonment imposed. Code 1976, §§ 24-13-100, 24-13-150.

#### [9] Sentencing and Punishment 350H ⇌ 1947

350H Sentencing and Punishment  
 350HIX Probation and Related Dispositions  
 350HIX(F) Disposition of Offender  
 350Hk1942 Duration  
 350Hk1947 k. Interruption and tolling.  
 Most Cited Cases

Trial court lacked authority to toll defendant's probation for criminal offenses until defendant was released from his involuntary civil commitment as a sexually violent predator ( SVP), even though the state argued that defendant was receiving mental-health treatment in the SVP program and was therefore unavailable for community supervision; the state did not allege that defendant violated a condition of his probation, the SVP statutes did not authorize such tolling, and any decision to allow tolling of probations of individuals committed to the SVP program was for the legislature, given that probation was governed by statute. Code 1976, §§ 24-21-410 et seq., 44-48-10 et seq.

#### [10] Sentencing and Punishment 350H ⇌ 1947

350H Sentencing and Punishment  
 350HIX Probation and Related Dispositions  
 350HIX(F) Disposition of Offender  
 350Hk1942 Duration  
 350Hk1947 k. Interruption and tolling.

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#### Most Cited Cases

A tolling of probation must be premised on a violation of a condition of probation or a statutory directive. Code 1976, § 24-21-410 et seq.

\*534 Appellate Defender David Alexander, of South Carolina Commission on Indigent Defense, of Columbia, for petitioner.

Tommy Evans, Jr., of South Carolina Department of Probation, Parole & Pardon Services, of Columbia, for respondent.

#### Justice BEATTY.

This Court granted a petition for a writ of certiorari to review the decision of the Court of Appeals in *State v. Miller*, 393 S.C. 59, 709 S.E.2d 135 (Ct.App.2011), in which it considered the novel question of whether a defendant's probation for a criminal offense should be tolled during his civil commitment pursuant to the Sexually Violent Predator (SVP) Act.<sup>FN1</sup> The Court of Appeals affirmed a circuit court order tolling James C. Miller's probation while he is in the SVP program. We reverse.

FN1. S.C.Code Ann. §§ 44-48-10 to -170 (Supp.2012). Amendments to some of the provisions in the SVP Act were passed by the General Assembly subsequent to the current matter.

#### I. FACTS

On September 6, 2001, Miller pled guilty to committing a lewd act on a child under the age of sixteen and criminal domestic violence of a high and aggravated nature (CDVHAN). For the lewd act conviction, Miller was sentenced to fifteen years in prison, suspended upon the service of ten years in prison and five years of probation. The sentencing sheet on this charge indicates Miller was ordered to undergo sex abuse counseling while in the South Carolina Department of Corrections, and that he was to have no contact with children while on probation. Miller received a concurrent sentence

of ten years in prison for the CDVHAN conviction.

Miller's probation began on or about December 1, 2005.<sup>FN2</sup> However, Miller was not released from custody because, prior to his release from prison, he was referred for review as to whether he should be deemed an SVP and subjected to civil commitment. Miller was ultimately found by a jury to be an SVP. He has been in commitment pursuant to the SVP program and housed at the Edisto Unit since November 29, 2006.<sup>FN3</sup> Miller's commitment was affirmed by the Court of Appeals and this Court. *In re the Care and Treatment of Miller*, 385 S.C. 539, 685 S.E.2d 619 (Ct.App.2009), *aff'd*, 393 S.C. 248, 713 S.E.2d 253 (2011).

FN2. According to a report of the South Carolina Department of Probation, Parole, and Pardon Services, Miller's probation began on December 1, 2005 and was scheduled to end on November 30, 2010.

FN3. An SVP remains under the supervision of the South Carolina Department of Mental Health and is housed in the Edisto Unit on the grounds of the South Carolina Department of Corrections. See S.C. Department of Mental Health webpage, *available at* [http://www.state.sc.us/dmh/dir\\_facilities.htm](http://www.state.sc.us/dmh/dir_facilities.htm).

On August 28, 2008, Miller's probation officer issued a probation citation and supporting affidavit. In the box on the citation form for specifying the alleged violation, it is indicated: "Citation issued to give court subject-matter jurisdiction over indictment number 2001-GS-32-2716." A hearing was held before the circuit court on December 19, 2008, at which the court initially expressed some reservation about tolling probation in a matter involving a civil commitment. However, the court thereafter issued an "Order Tolling Probation" on March 24, 2009.

The Court of Appeals affirmed. *State v. Miller*, 393 S.C. 59, 709 S.E.2d 135 (Ct.App.2011). The

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Court of Appeals held the circuit court did not exceed its discretion in finding Miller was unable to comply with all of the conditions of his probation while committed as an SVP and that he would benefit from supervision while in the community. *Id.* at 63, 709 S.E.2d at 137.

The Court of Appeals further stated this Court has recognized that the circuit court \*535 has the authority to toll probation in at least two instances: (1) partial revocation and continuance, and (2) absconding from supervision. *Id.* The Court of Appeals stated, however, that it was "mindful that in both these instances the probationer has generally committed some affirmative act to violate the conditions of probation." *Id.* The court acknowledged "Miller was civilly committed against his will," but noted "he admitted to committing a lewd act on a minor under the age of sixteen[,] which contributed to the basis for his civil commitment." *Id.*

The Court of Appeals rejected Miller's argument that tolling his probation in these circumstances converts his civil commitment into a punitive commitment by extending the length of his criminal sentence. *Id.* at 64, 709 S.E.2d at 137-38. This Court has granted Miller's petition for a writ of certiorari.

## II. STANDARD OF REVIEW

[1][2] The determination of probation matters lies within the sound discretion of the trial court. See generally *State v. Ellis*, 397 S.C. 576, 726 S.E.2d 5 (2012); *State v. Allen*, 370 S.C. 88, 634 S.E.2d 653 (2006). An appellate court will reverse the trial court's decision where there has been an abuse of discretion. *Allen*, 370 S.C. at 94, 634 S.E.2d at 656.

[3] "An abuse of discretion occurs when the trial court's ruling is based upon an error of law, such as application of the wrong legal principle; or, when based upon factual conclusions, the ruling is without evidentiary support; or, when the trial court is vested with discretion, but the ruling reveals no discretion was exercised; or when the ruling does

not fall within the range of permissible decisions applicable in a particular case, such that it may be deemed arbitrary and capricious." *Id.*

## III. LAW/ANALYSIS

Miller contends the Court of Appeals erred in holding the circuit court properly tolled his probation during his civil commitment as an SVP. Miller asserts the applicable statutes do not specifically authorize such tolling, and he has committed no misconduct that would justify the imposition of equitable tolling because the probation citation was issued only to bring his probation status before the circuit court.

### *Statutory Authority for Probation*

[4] "In South Carolina, parole and probation are governed by statute." *State v. Crouch*, 355 S.C. 355, 360, 585 S.E.2d 288, 291 (2003). Statutory law authorizes the circuit court to suspend the imposition or the execution of a criminal sentence and place the defendant on probation, except for crimes punishable by death or life imprisonment. S.C.Code Ann. § 24-21-410 (2007). <sup>FN4</sup> "Probation is a form of clemency." *Id.*

FN4. Section 24-21-410 was amended in 2010, but the amendment does not affect the current appeal.

[5] "The period of probation or suspension of sentence shall not exceed a period of five years and shall be determined by the judge of the court and may be continued or extended *within the above limit.*" *Id.* § 24-21-440 (emphasis added). Thus, while the court may extend the length of the probation originally given, the total period of probation may not exceed the statutory maximum of five years.

[6][7] "Probation, a suspension of the period of incarceration, is clearly part of a criminal defendant's 'term of imprisonment[.]' as is actual incarceration, parole, and the suspended portion of a sentence[.]" *Thompson v. S.C. Dep't of Pub. Safety*, 335 S.C. 52, 55-56, 515 S.E.2d 761, 763 (1999). Therefore, whether a violation of probationary

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terms has occurred and the consequences of any such violation are matters for the courts. *Duckson v. State*, 355 S.C. 596, 598 n. 2, 586 S.E.2d 576, 578 n. 2 (2003). If a defendant has violated the terms of his probation, the circuit court may revoke the defendant's probation or suspension of sentence, or, in its discretion, the court may require the defendant to serve all or a portion only of the sentence imposed. S.C.Code Ann. § 24-21-460 (2007).

**\*536 Tolling Recognized Under South Carolina Law**

There is no explicit reference to tolling in the statutes governing probation. However, South Carolina's appellate courts have expressly recognized the general authority of the circuit court to toll probation.

[8] In *State v. Dawkins*, 352 S.C. 162, 573 S.E.2d 783 (2002), the circuit court ruled the defendant's probationary term was tolled and therefore did not begin to run until after he successfully completed his mandatory two-year term of service in a community supervision program (CSP) pursuant to S.C.Code Ann. § 21-24-560 (Supp.1998) for his no-parole offense.<sup>FN5</sup> *Id.* at 164-65, 573 S.E.2d at 783-84.

FN5. A "no parole offense" is one in which a prisoner must serve at least 85% of the actual term of imprisonment imposed. See *Dawkins*, 352 S.C. at 164 n. 1, 573 S.E.2d at 784 n. 1; see also S.C.Code Ann. § 24-13-100 (2007) (stating a "no parole offense" refers to "a class A, B, or C felony or an offense exempt from classification as enumerated in Section 16-1-10(d), which is punishable by a maximum term of imprisonment for twenty years or more"); *id.* § 24-13-150(A) (defendant must serve 85% of actual term of imprisonment imposed).

On appeal, this Court noted this was a statutory construction case, and interpreted South Carolina Code section 24-21-560(E), which "provides, '[a]

prisoner who successfully completes a[CSP] pursuant to this section has satisfied his sentence and must be discharged from his sentence.'" *Id.* at 165, 573 S.E.2d at 784 (alterations in original). While observing that "all parties agree the statutory scheme is convoluted," the Court held that a prisoner's successful completion of the mandatory CSP for no-parole offenses completely discharges his sentence, including his five-year probationary period, as this result was mandated by the terms of the statute. *Id.* at 167, 573 S.E.2d at 785. Although this Court reversed the circuit court's tolling of probation, it did so because the probation was subsumed by the CSP, not because tolling is prohibited. The Court stated it "believe[d] the legislature intended mandatory participation in the CSP to serve as a more rigorous term of probation for those convicted of no-parole offenses, in lieu of normal probation." *Id.*

Thereafter, in *State v. Crouch*, this Court generally observed tolling could be appropriate in circumstances involving "absconding or partial revocation and continuance." 355 S.C. at 359 n. 2, 585 S.E.2d at 290 n. 2. The Court found the judge erroneously revoked a sentence and tolled the running of probation when the appellant's probation had already ended. *Id.* at 359-60, 585 S.E.2d at 290-91. However, the Court concluded it need not address whether probationary sentences could be tolled so as to turn concurrent sentences into consecutive ones. *Id.* at 361, 585 S.E.2d at 291.

In *State v. Hackett*, 363 S.C. 177, 609 S.E.2d 553 (Ct.App.2005), the Court of Appeals affirmed a circuit court's ruling that the defendant's probation could be tolled during the period the defendant had absconded from supervision. In doing so, the Court of Appeals reasoned there was no explicit prohibition in section 24-21-440 (providing probation may not exceed five years) on tolling probation. *Id.* at 181, 609 S.E.2d at 555. In addition, in construing the legislative intent, the circuit court could not logically give Hackett credit against his five-year probationary period for the time he absconded, be-

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cause to do so would be to allow Hackett to escape revocation of his probation and any further punishment, "free and clear of all consequences, as long as he manages to elude apprehension for a set amount of time," which "would lead to an absurd result." *Id.* at 181–82, 609 S.E.2d at 555–56. The Court of Appeals relied for support upon *United States v. Green*, in which the federal district court stated, "It would be unreasonable to conclude that a probationer could violate conditions of probation and keep the clock running at the same time, thereby annulling both the principle and purpose of probation." *Id.* at 182–83, 609 S.E.2d at 556 (quoting *United States v. Green*, 429 F.Supp. 1036, 1038 (W.D.Tex.1977)).

#### *Application of Tolling in Current Matter*

[9] In the current appeal, the Court of Appeals stated it was mindful that in instances where the Supreme Court of South Carolina had previously recognized tolling was \*537 appropriate, "the probationer has generally committed some affirmative act to violate the conditions of probation." *Miller*, 393 S.C. at 63, 709 S.E.2d at 137 (emphasis added). Nevertheless, the Court of Appeals appeared to find this standard was met based on Miller's past misconduct: "Miller was civilly committed against his will, [but] he admitted to committing a lewd act on a minor under the age of sixteen[,] which contributed to the basis for his civil commitment." *Id.* We find Miller's past misconduct is irrelevant in this particular analysis, as it would not form the basis for finding a probation violation nor would it support tolling of probation because the conduct occurred before sentencing.

[10] The general rule applied in most jurisdictions is that the tolling of probation is appropriate where the authorities could not supervise the defendant due to the defendant's wrongful acts. It is based on the principle that a defendant should not be allowed to profit from his own misconduct which prevents supervision by probationary authorities. See generally 24 C.J.S. *Criminal Law* § 2153 (2006) ("The period of probation is tolled while the

probationer is a fugitive from justice or serving a sentence imposed by another court. The period during which the probationer is imprisoned for violating his or her probation tolls the probationary term for the duration of the imprisonment." (footnote omitted)). The references to tolling by our own appellate courts have also focused on fault-based grounds. Thus, we conclude that the tolling of probation must be premised on a violation of a condition of probation or a statutory directive.

The State does not allege that Miller has violated a condition of his probation. Indeed, the State makes no allegation of fault by Miller. The State argues only that Miller's probationary period should be tolled because he is receiving mental health treatment in the SVP program and is, therefore, unavailable for community supervision.

The SVP program in this state is administered under the supervision of the Department of Mental Health. See generally S.C.Code Ann. § 44–48–20 (Supp.2012) (providing the General Assembly has found that an involuntary, civil commitment process is desirable for those found to be an SVP and observing that "[t]he civil commitment of [ SVPs] is not intended to stigmatize the mentally ill community"); *id.* § 44–48–30(1)(a)–(b) (defining an SVP as one who (1) "has been convicted of a sexually violent offense," and (2) "suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment").

Notwithstanding its punitive attributes, this Court and many others, to include the United States Supreme Court, have concluded that an SVP program is a civil, non-punitive treatment program. *Seling v. Young*, 531 U.S. 250, 267, 121 S.Ct. 727, 148 L.Ed.2d 734 (2001) (concluding confinement under Washington's SVP program was civil and not intended as punishment); *Kansas v. Hendricks*, 521 U.S. 346, 361–65, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997) (holding a similar SVP program was civil and that involuntary commitment for a mental ab-

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normality was not punitive); *In re Treatment and Care of Luckabaugh*, 351 S.C. 122, 135, 568 S.E.2d 338, 344 (2002) (stating the SVP Act is a civil, non-punitive statutory scheme); *In re Care and Treatment of Matthews*, 345 S.C. 638, 648, 550 S.E.2d 311, 316 (2001) ("Our [ SVP] Act specifies the purpose of the Act is civil commitment."). The SVP program is treated as a civil program for all other purposes, and we see no existing basis for treating this type of civil commitment for persons with mental illness any differently than other forms of civil commitment.

END OF DOCUMENT

Traditionally, a civil commitment, whether in a drug treatment center, mental health clinic, or other facility, does not give rise to tolling, and it appears inconsistent to treat those under civil commitment in the SVP program any differently in the absence of some legislative directive to do so. As it stands now, commitment to the SVP treatment program is indeterminate and could last a life time. Although we certainly appreciate the policy considerations that weigh on both sides in this matter, the decision to carve out a categorical exception for those \*538 committed in the SVP program, as opposed to other forms of civil commitment, is a matter best left to the General Assembly, since probation exists solely by statute, and the General Assembly has not, to date, seen fit to make this exception.

#### IV. CONCLUSION

Based on the foregoing, we reverse the decision of the Court of Appeals, which upheld the tolling of Miller's probation during his civil commitment in the SVP program.

**REVERSED.**

TOAL, C.J., KITTREDGE, J., and Acting Justice  
 JAMES E. MOORE, concur.  
 PLEICONES, J., concurring in result only.

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## Westlaw.

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**H**

Supreme Court of South Carolina.  
 The STATE, Respondent,  
 v.  
 Benjamin P. GREEN, Appellant.

No. 27108.  
 Heard Feb. 23, 2012.  
 Decided April 4, 2012.  
 Rehearing Denied May 3, 2012.

**Background:** Defendant was convicted in the Circuit Court, Aiken County, Doyet A. Early, III, J., of criminal solicitation of a minor and attempted criminal sexual contact. Defendant appealed.

**Holdings:** The Supreme Court, Beatty, J., held that:  
 (1) the criminal solicitation of a minor statute was narrowly tailored to achieve the interest for which it was intended;  
 (2) defendant lacked standing to challenge the criminal solicitation of a minor statute for vagueness;  
 (3) the criminal solicitation of a minor statute was sufficiently precise to provide fair notice to those whom the statute applied;  
 (4) the defense of legal impossibility was not available; and  
 (5) evidence was sufficient to establish specific intent and an overt act in furtherance of attempted criminal sexual contact with a minor.

Affirmed.

West Headnotes

**[1] Constitutional Law 92 ⇨ 1816**

92 Constitutional Law  
 92XVIII Freedom of Speech, Expression, and Press  
 92XVIII(H) Law Enforcement; Criminal Conduct  
 92k1816 k. Solicitation. Most Cited Cases

**Constitutional Law 92 ⇨ 2247**

92 Constitutional Law  
 92XVIII Freedom of Speech, Expression, and Press  
 92XVIII(Y) Sexual Expression  
 92k2244 Children and Minors, Protection of  
 92k2247 k. Solicitation of minors; importing. Most Cited Cases

**Infants 211 ⇨ 1006(12)**

211 Infants  
 2111 In General  
 211k1003 Constitutional, Statutory, and Regulatory Provisions  
 211k1006 Validity  
 211k1006(12) k. Crimes against children. Most Cited Cases

The criminal solicitation of a minor statute was narrowly tailored to achieve the interest for which it was intended, and thus statute was not overbroad and did not violate the First Amendment free speech clause; statute affected only those individuals who "knowingly" targeted minors for the purpose of engaging or participating in sexual activity or a violent crime. U.S.C.A. Const.Amend. 1; Code 1976, § 16-15-342.

**[2] Constitutional Law 92 ⇨ 990**

92 Constitutional Law  
 92VI Enforcement of Constitutional Provisions  
 92VI(C) Determination of Constitutional Questions  
 92VI(C)3 Presumptions and Construction as to Constitutionality  
 92k990 k. In general. Most Cited Cases

**Constitutional Law 92 ⇨ 1002**

92 Constitutional Law  
 92VI Enforcement of Constitutional Provisions

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92VI(C) Determination of Constitutional Questions

92VI(C)3 Presumptions and Construction as to Constitutionality

92k1001 Doubt

92k1002 k. In general. Most Cited

Cases

When the issue is the constitutionality of a statute, every presumption will be made in favor of its validity and no statute will be declared unconstitutional unless its invalidity appears so clearly as to leave no doubt that it conflicts with the constitution.

[3] Constitutional Law 92 ⇨1030

92 Constitutional Law

92VI Enforcement of Constitutional Provisions

92VI(C) Determination of Constitutional Questions

92VI(C)4 Burden of Proof

92k1030 k. In general. Most Cited

The initial burden is on the party challenging the constitutionality of the legislation to show it violates a provision of the Constitution.

[4] Constitutional Law 92 ⇨1505

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(A) In General

92XVIII(A)1 In General

92k1505 k. Narrow tailoring. Most Cited Cases

Constitutional Law 92 ⇨1506

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(A) In General

92XVIII(A)1 In General

92k1506 k. Strict or exacting scrutiny; compelling interest test. Most Cited Cases

Statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society. U.S.C.A. Const.Amend. 1.

[5] Constitutional Law 92 ⇨3905

92 Constitutional Law

92XXVII Due Process

92XXVII(B) Protections Provided and Deprivations Prohibited in General

92k3905 k. Certainty and definiteness; vagueness. Most Cited Cases

The concept of vagueness or indefiniteness rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication. U.S.C.A. Const.Amend. 14.

[6] Criminal Law 110 ⇨13.1

110 Criminal Law

110I Nature and Elements of Crime

110k12 Statutory Provisions

110k13.1 k. Certainty and definiteness. Most Cited Cases

The constitutional standard for vagueness is the practical criterion of fair notice to those to whom the law applies.

[7] Criminal Law 110 ⇨13.1

110 Criminal Law

110I Nature and Elements of Crime

110k12 Statutory Provisions

110k13.1 k. Certainty and definiteness. Most Cited Cases

A law is unconstitutionally vague if it forbids or requires the doing of an act in terms so vague that a person of common intelligence must necessarily guess as to its meaning and differ as to its application.

[8] Criminal Law 110 ⇨13.1

110 Criminal Law

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1101 Nature and Elements of Crime  
 110k12 Statutory Provisions  
 110k13.1 k. Certainty and definiteness.  
 Most Cited Cases  
 One to whose conduct the law clearly applies does not have standing to challenge it for vagueness as applied to the conduct of others.

[9] Constitutional Law 92 ⇨ 739

92 Constitutional Law  
 92VI Enforcement of Constitutional Provisions  
 92VI(A) Persons Entitled to Raise Constitutional Questions; Standing  
 92VI(A)5 Vagueness in General  
 92k738 Criminal Law  
 92k739 k. In general. Most Cited Cases

Infants 211 ⇨ 1006(12)

211 Infants  
 211I In General  
 211k1003 Constitutional, Statutory, and Regulatory Provisions  
 211k1006 Validity  
 211k1006(12) k. Crimes against children. Most Cited Cases

Telecommunications 372 ⇨ 1350

372 Telecommunications  
 372VIII Computer Communications  
 372k1347 Offenses and Prosecutions  
 372k1350 k. Soliciting minor for sex or illegal act; child pornography. Most Cited Cases  
 Defendant lacked standing to challenge the criminal solicitation of a minor statute for vagueness; defendant, who was 27 years old at the time of the offense, knowingly initiated an online chat with a female he reasonably believed was 14 years old, and defendant's sexually explicit conversation was intended for no other purpose than to persuade the victim to engage in sexual activity. Code 1976, § 16-15-342.

[10] Constitutional Law 92 ⇨ 1134

92 Constitutional Law  
 92VIII Vagueness in General  
 92k1132 Particular Issues and Applications  
 92k1134 k. Sex in general. Most Cited Cases

Infants 211 ⇨ 1006(12)

211 Infants  
 211I In General  
 211k1003 Constitutional, Statutory, and Regulatory Provisions  
 211k1006 Validity  
 211k1006(12) k. Crimes against children. Most Cited Cases

The criminal solicitation of a minor statute was sufficiently precise to provide fair notice to those whom the statute applied, and thus was not void vagueness; statute identified its elements as a defendant who was 18 years of age or older, who knowingly contacted or communicated with, or attempted to contact or communicate with a person who was under 18, or a person reasonably believed to be under 18, for the purpose of or with the intent of persuading, inducing, enticing, or coercing the person to engage or participate in a sexual activity or a violent crime, with the intent to perform a sexual activity in the presence of the person under the age of 18. Code 1976, § 16-15-342.

[11] Criminal Law 110 ⇨ 31

110 Criminal Law  
 110II Defenses in General  
 110k31 k. Defenses in general. Most Cited Cases

The defense of legal impossibility was not available to allow defendant to dismiss charges of criminal solicitation of a minor and attempted criminal sexual contact, even though the alleged victim was a member of law enforcement; the solicitation statute specifically provided that the fact that the person reasonably believed to be under the age of 18 was a law enforcement agent was not a defense to the charge, and for the charge of attempted criminal sexual contact the intended victim was not an

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actual minor was irrelevant as the State was only required to prove defendant had the specific intent to commit a sexual battery on a victim between the ages of 11 and 14 years old coupled with some overt act toward the commission of the offense. Code 1976, § 16-15-342(D).

#### [12] Criminal Law 110 ⇨31

##### 110 Criminal Law

###### 110II Defenses in General

110k31 k. Defenses in general. Most Cited Cases

Legal impossibility occurs when the actions that the defendant performs or sets in motion, even if fully carried out as he or she desires, would not constitute a crime, whereas factual impossibility occurs when the objective of the defendant is proscribed by the criminal law but a circumstance unknown to the actor prevents him or her from bringing about that objective.

#### [13] Criminal Law 110 ⇨44

##### 110 Criminal Law

###### 110III Attempts

110k44 k. In general. Most Cited Cases

To prove attempt, the State must prove that the defendant had the specific intent to commit the underlying offense, along with some overt act, beyond mere preparation in furtherance of the intent.

#### [14] Infants 211 ⇨1591

##### 211 Infants

###### 211XII Criminal Acts Against Children

###### 211XII(C) Sex Offenses

211k1591 k. Communication or solicitation for immoral purposes. Most Cited Cases

#### Infants 211 ⇨1594

##### 211 Infants

###### 211XII Criminal Acts Against Children

###### 211XII(C) Sex Offenses

211k1594 k. Indecent contact, touching, or assault in general. Most Cited Cases

#### Telecommunications 372 ⇨1350

##### 372 Telecommunications

###### 372VIII Computer Communications

###### 372k1347 Offenses and Prosecutions

372k1350 k. Soliciting minor for sex or illegal act; child pornography. Most Cited Cases

Evidence was sufficient to establish specific intent and an overt act in furtherance of attempted criminal sexual contact with a minor, as required to support conviction; defendant expressed an intent to engage in sexual contact with 14-year-old female he met on the internet, and defendant committed an overt act by orchestrating a meeting for the sexual encounter.

#### [15] Criminal Law 110 ⇨438(3)

##### 110 Criminal Law

###### 110XVII Evidence

###### 110XVII(P) Documentary Evidence

###### 110k431 Private Writings and Publications

110k438 Photographs and Other Pictures

110k438(3) k. Pictures of accused or others; identification evidence. Most Cited Cases

The trial court's admission of two photographs of defendant's penis was not an abuse of discretion, during prosecution for criminal solicitation of a minor and attempted criminal sexual contact; the photographs corroborated police investigator's testimony and served to establish defendant's intent to solicit minor to engage in sexual activity. Rules of Evid., Rule 401.

#### [16] Criminal Law 110 ⇨438(1)

##### 110 Criminal Law

###### 110XVII Evidence

###### 110XVII(P) Documentary Evidence

###### 110k431 Private Writings and Publications

110k438 Photographs and Other Pictures

110k438(1) k. In general. Most

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The relevancy, materiality, and admissibility of photographs as evidence are matters left to the sound discretion of the trial court.

**[17] Criminal Law 110 ⚡438(1)**

## 110 Criminal Law

## 110XVII Evidence

## 110XVII(P) Documentary Evidence

## 110k431 Private Writings and Publications

## 110k438 Photographs and Other Pictures

110k438(1) k. In general. Most

## Cited Cases

If the offered photograph serves to corroborate testimony, it is not an abuse of discretion to admit it.

**[18] Criminal Law 110 ⚡1169.1(1)**

## 110 Criminal Law

## 110XXIV Review

## 110XXIV(Q) Harmless and Reversible Error

## 110k1169 Admission of Evidence

## 110k1169.1 In General

110k1169.1(1) k. Evidence in general. Most Cited Cases

To warrant reversal based on the wrongful admission of evidence, the complaining party must prove resulting prejudice.

**[19] Criminal Law 110 ⚡1169.1(1)**

## 110 Criminal Law

## 110XXIV Review

## 110XXIV(Q) Harmless and Reversible Error

## 110k1169 Admission of Evidence

## 110k1169.1 In General

110k1169.1(1) k. Evidence in general. Most Cited Cases

Prejudice occurs when there is reasonable probability the wrongly admitted evidence influenced the jury's verdict.

**[20] Criminal Law 110 ⚡795(2.85)**

## 110 Criminal Law

## 110XX Trial

110XX(G) Instructions: Necessity, Requisites, and Sufficiency

110k795 Grade or Degree of Offense; Included Offenses

110k795(2.85) k. Attempt as included offense. Most Cited Cases

Defendant was not entitled to a jury charge on the lesser included offense of attempted assault and battery of a high and aggravated nature, during prosecution for attempted criminal sexual contact; the text from defendant internet chat with the victim indicated that defendant wanted to engage in sexual contact with the victim, who he believed to be 14 years old.

**[21] Criminal Law 110 ⚡814(2)**

## 110 Criminal Law

## 110XX Trial

110XX(G) Instructions: Necessity, Requisites, and Sufficiency

110k814 Application of Instructions to Case

110k814(2) k. Evidence justifying instructions in general. Most Cited Cases

The law to be charged must be determined from the evidence presented at trial.

**[22] Criminal Law 110 ⚡795(2.1)**

## 110 Criminal Law

## 110XX Trial

110XX(G) Instructions: Necessity, Requisites, and Sufficiency

110k795 Grade or Degree of Offense; Included Offenses

110k795(2) Evidence Justifying or Requiring Instructions

110k795(2.1) k. In general. Most Cited Cases

A trial judge is required to charge the jury on a lesser-included offense if there is evidence from which it could be inferred the lesser, rather than the greater, offense was committed.

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[23] Assault and Battery 37 ↩54

37 Assault and Battery  
 37II Crininal Responsibility  
 37II(A) Offenses  
 37k54 k. Aggravated assault. Most Cited Cases

Assault and battery of a high and aggravated nature (ABHAN) is the unlawful act of violent injury to another accompanied by circumstances of aggravation.

**\*\*666** Deputy Chief Appellate Defender, Wanda H. Carter, of Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General William M. Blitch, Jr., of Columbia, Solicitor James Strom Thurmond, Jr., of Aiken, for Respondent.

Justice BEATTY.

**\*273** Benjamin P. Green appeals his convictions for criminal solicitation of a minor <sup>FN1</sup> and attempted criminal sexual conduct ("CSC") with a minor in the second-degree.<sup>FN2</sup> In challenging his convictions, Green contends the trial judge erred in: (1) denying his motion to dismiss the charge of criminal solicitation of a minor on the ground the statute is unconstitutionally overbroad and vague; (2) denying his motions to dismiss and for a directed verdict on the charge of attempted CSC with a minor in the second-degree; (3) admitting certain photographs; and (4) denying his request for a jury charge on attempted assault and battery of a high and aggravated nature ("ABHAN"). We affirm.

FN1. S.C.Code Ann. § 16-15-342 (Supp.2011).

FN2. S.C.Code Ann. § 16-3-655(B)(1) (Supp.2011).

**I. Factual/Procedural History**

On October 13, 2006 at 5:38 p.m., Green

entered a Yahoo! online chat room under the screen name "blak slyder" and initiated an online chat with "lilmandy14sc" ("Mandy"). On Mandy's profile page was a picture of a female sitting on a bed. Unbeknownst to Green, Mandy was actually an online persona created by Investigator Tommy Platt of the Aiken **\*274** County Sheriff's Office as part of the Internet Crimes Against Children Task Force.

In response to Green's initial question, Mandy answered "i hooked up with a 16 year old." Green then asked Mandy, "how young are you?" to which Mandy stated, "14." Green countered that he was "21." <sup>FN3</sup> Immediately thereafter, the chat turned sexual in nature with Green asking Mandy whether she would have sex with him. During the chat, Green sent Mandy two pictures of his penis and stated that he could "show it to [her] in person." <sup>FN4</sup> Green then arranged to meet Mandy at 7:30 p.m. on a secluded road in Beech Island, South Carolina, which is located in Aiken County.

FN3. At the time of the chat, Green was actually twenty-seven years old as his date of birth is December 9, 1978.

FN4. The officers executed a search warrant for Green's home computer and discovered the photographs that Green sent to Mandy during the online chat.

**\*\*667** When Green arrived at the predetermined location, he was met by several law enforcement officers who arrested him. In response to the officers' questions, Green admitted that "he was there to meet a 14-year-old girl." A search of Green's vehicle revealed a cell phone, a bottle of alcohol, two DVDs, condoms, male enhancement cream and drugs, and handwritten directions to the location.

Subsequently, Green was indicted and ultimately convicted by a jury for criminal solicitation of a minor and attempted CSC with a minor in the second-degree. Green appealed his convictions to the Court of Appeals. This Court certified the ap-

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peal from the Court of Appeals pursuant to Rule 204(b) of the South Carolina Appellate Court Rules.

## II. Discussion

### A. Constitutionality of Criminal Solicitation of a Minor Statute

[1] In a pre-trial hearing and at the conclusion of the State's case, Green moved for the trial judge to declare unconstitutional section 16-15-342, the criminal solicitation of a minor statute, on the grounds it is overbroad and vague. Specifically, he claimed the statute is not narrowly tailored \*275 and, as a result, "chills free speech." The judge summarily denied the motion.

On appeal, Green challenges section 16-15-342 as facially overbroad because one can be found guilty under the statute "when he contacts a minor for any one of six activities under 16-15-375(5) or any one of at least twenty-nine activities under 16-1-60." Because the statute does not identify what forms of communication are prohibited, Green claims the content of any communication would "trigger a violation of the statute." Ultimately, Green claims the statute is "so overbroad that it ensnares" protected speech.

In a related argument, Green asserts this lack of specificity demonstrates that the statute is vague. Green contends the provisions of the statute are vague as to "what forms of communications and what content of such communications would be criminalized as solicitations." Because the statute is not sufficiently definite, Green avers that "[a] person of ordinary intelligence would not know what speech, expression or contact would result in a violation of the statute."

[2][3] "When the issue is the constitutionality of a statute, every presumption will be made in favor of its validity and no statute will be declared unconstitutional unless its invalidity appears so clearly as to leave no doubt that it conflicts with the constitution." *State v. Gaster*, 349 S.C. 545, 549-50, 564 S.E.2d 87, 89-90 (2002). "This pre-

sumption places the initial burden on the party challenging the constitutionality of the legislation to show it violates a provision of the Constitution." *State v. White*, 348 S.C. 532, 536-37, 560 S.E.2d 420, 422 (2002).

Applying these well-established rules regarding the constitutionality of a statute, our analysis begins with a review of the text of the challenged statute. Section 16-15-342 provides in pertinent part:

(A) A person eighteen years of age or older commits the offense of criminal solicitation of a minor if he knowingly contacts or communicates with, or attempts to contact or communicate with, a person who is under the age of eighteen, or a person reasonably believed to be under the age of eighteen, for the purpose of or with the intent of persuading, inducing, enticing, or coercing the person to engage or \*276 participate in a sexual activity as defined in Section 16-15-375(5) or a violent crime as defined in Section 16-1-60, or with the intent to perform a sexual activity in the presence of the person under the age of eighteen, or person reasonably believed to be under the age of eighteen.

(B) Consent is a defense to a prosecution pursuant to this section if the person under the age of eighteen, or the person reasonably believed to be under the age of eighteen, is at least sixteen years old.

(C) Consent is not a defense to a prosecution pursuant to this section if the person under the age of eighteen, or the person reasonably believed to be under the age of eighteen, is under the age of sixteen.

(D) It is not a defense to a prosecution pursuant to this section, on the basis of consent or otherwise, that the person reasonably believed to be under the age of \*\*668 eighteen is a law enforcement agent or officer acting in an official capacity.

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S.C.Code Ann. § 16–15–342 (Supp.2011). Section 16–15–375 defines “sexual activity” by identifying six acts, which include “vaginal, anal, or oral intercourse” and “touching, in an act of apparent sexual stimulation or sexual abuse.” S.C.Code Ann. § 16–15–375(5) (2003).

### 1. Overbroad <sup>FN5</sup>

FN5. Although we have not definitively ruled on an overbreadth challenge to the statute at issue, we have implicitly rejected a First Amendment objection. See *State v. Gaines*, 380 S.C. 23, 28 n. 1, 667 S.E.2d 728, 731 n. 1 (2008) (affirming defendant’s convictions for criminal solicitation of a minor and stating, “the First Amendment does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent”).

[4] “It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society.” *Broadrick v. Oklahoma*, 413 U.S. 601, 611–12, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973).

In discussing the overbreadth doctrine, the United States Supreme Court (“USSC”) has stated:

\*277 According to our First Amendment overbreadth doctrine, a statute is facially invalid if it prohibits a substantial amount of protected speech. The doctrine seeks to strike a balance between competing social costs. On the one hand, the threat of enforcement of an overbroad law deters people from engaging in constitutionally protected speech, inhibiting the free exchange of ideas. On the other hand, invalidating a law that in some of its applications is perfectly constitutional—particularly a law directed at conduct so antisocial that it has been made criminal—has

obvious harmful effects. In order to maintain an appropriate balance, we have vigorously enforced the requirement that a statute’s overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute’s plainly legitimate sweep. Invalidation for overbreadth is strong medicine that is not to be casually employed.

*United States v. Williams*, 553 U.S. 285, 292–93, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008) (citations omitted) (emphasis in original). “To put the matter another way, particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute’s plainly legitimate sweep.” *Broadrick*, 413 U.S. at 615, 93 S.Ct. 2908.

In analyzing Green’s constitutional challenge to section 16–15–342, we initially note that speech used to further the sexual exploitation of children has been routinely denied constitutional protection as the State has a compelling interest in preventing the sexual abuse of children. In fact, the USSC has expressly stated that “[o]ffers to engage in illegal transactions are categorically excluded from First Amendment protection.” *Williams*, 553 U.S. at 297, 128 S.Ct. 1830. Moreover, “[c]ourts have recognized that speech used to further the sexual exploitation of children does not enjoy constitutional protection, and while a statute may incidentally burden some protected expression in carrying out its objective, it will not be held to violate the First Amendment if it serves the compelling interest of preventing the sexual abuse of children and is no broader than necessary to achieve that purpose.” *Cashatt v. State*, 873 So.2d 430, 434–35 (Fla.Dist.Ct.App.2004); see *New York v. Ferber*, 458 U.S. 747, 756–57, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982) (recognizing that the prevention of sexual \*278 exploitation of children and abuse of children constitutes a government objective of surpassing importance).

In view of this compelling interest, the question becomes whether section 16–15–342 is nar-

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rowly tailored to achieve the interest for which it was intended. As will be discussed, we find the statute is narrowly drafted to prohibit criminal conduct rather than protected speech.

Significantly, the statute includes the term “knowingly.” Thus, it affects only those individuals who intentionally target minors for \*\*669 the purpose of engaging or participating in sexual activity or a violent crime. Conversely, it does not criminalize any inadvertent contact or communications with minors. See *United States v. Bailey*, 228 F.3d 637, 639 (6th Cir.2000) (concluding that statute proscribing knowing efforts to persuade minors to engage in illegal sexual activity did not violate First Amendment); *State v. Ebert*, 150 N.M. 576, 263 P.3d 918, 922 (Ct.App.2011) (concluding that statute criminalizing child solicitation by electronic communication device was not constitutionally overbroad as “[t]ailoring [was] primarily accomplished through the ‘knowingly’ scienter requirement”; noting that “the statute does not restrict adults from communicating about sex to children, nor does it restrict adults from soliciting sex from one another over the internet,” in fact, “the statute prohibits only that conduct necessary to achieve the State’s interest”); *State v. Snyder*, 155 Ohio App.3d 453, 801 N.E.2d 876, 883 (2003) (finding statute that prohibited adults from using telecommunications device to solicit minor for sexual activity is not “aimed at the expression of ideas or beliefs; rather, it is aimed at prohibiting adults from taking advantage of minors and the anonymity and ease of communicating through telecommunications devices, especially the Internet and instant messaging devices, by soliciting minors to engage in sexual activity”).

Because the statute does not criminalize protected speech and is narrowly tailored to achieve a compelling state interest, we find the statute is not unconstitutionally overbroad as any alleged overbreadth is unsubstantial when considered in relation to “its plainly legitimate sweep.”

#### \*279 2. Vague

In view of our finding, the analysis turns to a determination of whether the statute is void for vagueness.

[5][6][7][8] “The concept of vagueness or indefiniteness rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication.” *City of Beaufort v. Baker*, 315 S.C. 146, 152, 432 S.E.2d 470, 473 (1993) (quoting *State v. Albert*, 257 S.C. 131, 134, 184 S.E.2d 605, 606 (1971)). “The constitutional standard for vagueness is the practical criterion of fair notice to those to whom the law applies.” *Huber v. S.C. State Bd. of Physical Therapy Exam’rs*, 316 S.C. 24, 26, 446 S.E.2d 433, 435 (1994). A law is unconstitutionally vague if it forbids or requires the doing of an act in terms so vague that a person of common intelligence must necessarily guess as to its meaning and differ as to its application. *Toussaint v. State Bd. of Med. Exam’rs*, 303 S.C. 316, 400 S.E.2d 488 (1991). “[O]ne to whose conduct the law clearly applies does not have standing to challenge it for vagueness as applied to the conduct of others.” *In re Amir X.S.*, 371 S.C. 380, 391, 639 S.E.2d 144, 150 (2006) (citing *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982)).

[9] As an initial matter, we find that Green does not have standing to assert a facial challenge for vagueness as the statute provided adequate notice that his conduct fell within that proscribed by section 16–15–342. Green, who was twenty-seven years old at the time of the offense, knowingly initiated an online chat with a female he reasonably believed to be fourteen years old. As evidenced by the text of the chat, Mandy represented her age to be 14, Green acknowledged that she was too young to drive his vehicle, and admitted to the arresting officers that he was there to meet a fourteen-year-old girl. Moreover, Green’s sexually-explicit conversation was intended for no other purpose than to persuade Mandy to engage in sexual activity as defined in section 16–15–675(5).

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[10] Even assuming standing, we find that Green's challenge is without merit. We hold that section 16-15-342 is \*280 sufficiently precise to provide fair notice to those to whom the statute applies. The criminal solicitation statute specifically identifies the following distinct elements: "(1) the defendant is eighteen years of age or older; (2) he or she knowingly contacts or communicates with, or attempts to contact or communicate with; (3) a person who is under the age of eighteen, or a person reasonably believed to be under the age of eighteen; (4) for the purpose of or with the intent of persuading, \*\*670 inducing, enticing, or coercing the person to engage or participate in a sexual activity as defined in Section 16-15-375(5) or a violent crime as defined in Section 16-1-60; or (5) with the intent to perform a sexual activity in the presence of the person under the age of eighteen, or person reasonably believed to be under the age of eighteen." *State v. Reid*, 383 S.C. 285, 301, 679 S.E.2d 194, 202 (Ct.App.2009), *aff'd*, 393 S.C. 325, 713 S.E.2d 274 (2011).

Although each of these terms is not defined, we believe a person of common intelligence would not have to guess at what conduct is prohibited by the statute. We also find the Legislature purposefully did not define "contacts" or "communicates," as we believe it sought to encompass all methods of communications. Unlike the solicitation statutes found in other jurisdictions, the South Carolina statute does not confine the method of solicitation strictly to computers.<sup>FN6</sup> Instead, one charged with this crime could have used a letter, a telephone, \*281 a computer, or other electronic means to communicate with or contact the minor victim.

FN6. See, e.g., La.Rev.Stat. Ann. § 14:81.3(A)(1) (West 2012) ("Computer-aided solicitation of a minor is committed when a person seventeen years of age or older knowingly contacts or communicates, through the use of electronic textual communication, with a person who has not yet attained the age of seventeen

where there is an age difference of greater than two years, or a person reasonably believed to have not yet attained the age of seventeen and reasonably believed to be at least two years younger, for the purpose of or with the intent to persuade, induce, entice, or coerce the person to engage or participate in sexual conduct or a crime of violence as defined in R.S. 14:2(B), or with the intent to engage or participate in sexual conduct in the presence of the person who has not yet attained the age of seventeen, or person reasonably believed to have not yet attained the age of seventeen."); Utah Code Ann. § 76-4-401(2)(a) (Supp.2011) ("A person commits enticement of a minor when the person knowingly uses or attempts to use the Internet or text messaging to solicit, seduce, lure, or entice a minor or another person that the actor believes to be a minor to engage in any sexual activity which is a violation of state criminal law.").

Based on the foregoing, we conclude that Green has not satisfied his burden to prove that section 16-15-342 violates the First Amendment of the Constitution.

We note that other jurisdictions, which have analyzed statutes similar to this state's, have also determined that the statutes are neither unconstitutionally overbroad nor vague. See, e.g., *Cashatt v. State*, 873 So.2d 430 (Fla.Dist.Ct.App.2004); *People v. Smith*, 347 Ill.App.3d 446, 282 Ill.Dec. 674, 806 N.E.2d 1262 (2004); *LaRose v. State*, 820 N.E.2d 727 (Ind.Ct.App.2005); *State v. Penton*, 998 So.2d 184 (La.Ct.App.2008); *State v. Pribble*, 285 S.W.3d 310 (Mo.2009) (*en banc*); *State v. Rung*, 278 Neb. 855, 774 N.W.2d 621 (2009); *State v. Snyder*, 155 Ohio App.3d 453, 801 N.E.2d 876 (2003); *Maloney v. State*, 294 S.W.3d 613 (Tex.Ct.App.2009); *State v. Gallegos*, 220 P.3d 136 (Utah 2009). See generally Marjorie A. Shields and Jill M. Marks, Annotation, *Validity, Construction,*

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*and Application of State Statutes Prohibiting Child Luring as Applied to Cases Involving Luring of Child by Means of Electronic Communications*, 33 A.L.R.6th 373, §§ 4–10 (2008 & Supp.2012) (analyzing state cases that have determined state child-luring statute was constitutionally valid).

Having rejected Green's constitutional challenges, the question becomes whether the trial judge erred in declining to grant Green's motions to dismiss or for a directed verdict as to the charged offenses.

#### B. Motions to Dismiss and for a Directed Verdict

[11] Prior to trial, Green moved to dismiss the charged offenses. In support of this motion and his directed verdict motion, Green claimed it was legally impossible to “carry out the criminal sexual conduct” because the alleged victim was not a minor but, rather, a fictitious person created by Investigator Platt. During trial, Green also established that the picture on Mandy's profile page was actually that of Lynda Williamson, a twenty-four-year-old former probation officer who provided the photograph to an investigator with the Aiken County Sheriff's Office. Because the woman in the picture was “over the age of consent,” Green claimed he could \*282 not be convicted of attempted CSC with minor in the second-degree.

\*\*671 As an additional ground, Green asserted the State failed to prove his specific intent to commit CSC with a minor in the second-degree and an overt act in furtherance of the crime. During his argument, Green pointed to the text of the online chat where he stated that he would not pressure Mandy to do anything that she did not want to do and that she could change her mind about having sex.

On appeal, Green reiterates these arguments in support of his contention that the trial judge erred in denying his motions to dismiss and for a directed verdict. In addition, Green elaborates on his claim of legal impossibility. Citing *United States v. Frazier*, 560 F.2d 884 (8th Cir.1977), Green explains that this defense applies “where the impossibility of

a defendant's successfully committing a crime eliminates the culpability of his having tried to do so.” According to this statement, Green claims he should not have been convicted of the charged offenses as he “could not commit criminal sexual conduct with a fictitious person.”

#### 1. Legal Impossibility

[12] “[L]egal impossibility occurs when the actions that the defendant performs or sets in motion, even if fully carried out as he or she desires, would not constitute a crime, whereas factual impossibility occurs when the objective of the defendant is proscribed by the criminal law but a circumstance unknown to the actor prevents him or her from bringing about that objective.” 21 Am.Jur.2d *Criminal Law* § 156 (2008). “According to some authorities, legal impossibility is a defense to a charge of attempt, but factual impossibility is not.” *Id.* In view of this distinction and Green's arguments, we have confined our analysis of this issue to the defense of legal impossibility.

As we interpret Green's trial and appellate arguments, his claim of legal impossibility encompasses both the solicitation charge and the CSC charge. Specifically, the intent element in the solicitation statute and the necessary intent for the attempted CSC charge warrant a similar analysis with respect \*283 to Green's challenge that no actual minor was involved. Accordingly, we address Green's claims as to both charges.

Section 16–15–342(D) definitively discounts Green's arguments with respect to the solicitation charge as this provision states, “It is not a defense to a prosecution pursuant to this section, on the basis of consent or otherwise, that the person reasonably believed to be under the age of eighteen is a law enforcement agent or officer acting in an official capacity.” S.C.Code Ann. § 16–15–342(D) (Supp.2011). Thus, based on the plain language of the statute, the Legislature clearly intended to eliminate the defense of impossibility as to the charge of criminal solicitation of a minor if a law enforcement officer impersonated the minor. *State v.*

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*Dingle*, 376 S.C. 643, 659 S.E.2d 101 (2008) (recognizing that in interpreting statutes, appellate courts look to the plain meaning of the statute and the intent of the Legislature).

Similarly, the fact that an actual minor was not the subject of Green's intent did not preclude his prosecution and conviction for attempted CSC with a minor in the second-degree.

A person is guilty of CSC with a minor in the second-degree if "the actor engages in sexual battery with a victim who is fourteen years of age or less but who is at least eleven years of age." S.C.Code Ann. § 16-3-655(B)(1) (Supp.2011). "A person who commits the common law offense of attempt, upon conviction, must be punished as for the principal offense." S.C.Code Ann. § 16-1-80 (2003). "Thus, the elements of attempted CSC with a minor in the second degree are: (1) an attempt; (2) to engage in a sexual battery; (3) with a victim; (4) who is fourteen years of age or less; (5) but who is at least eleven years of age." *Reid*, 383 S.C. at 292, 679 S.E.2d at 197.

[13] In discussing attempt crimes, this Court has stated, "In the context of an 'attempt' crime, specific intent means that the defendant consciously intended the completion of acts comprising the choate offense." *State v. Sutton*, 340 S.C. 393, 397, 532 S.E.2d 283, 285 (2000). Accordingly, "[t]o prove attempt, the State must prove that the defendant had the *specific intent* to commit the underlying offense, along with some *overt act*, beyond mere preparation in furtherance of the intent." \*\*672 *State v. Reid*, 393 S.C. 325, 329, 713 S.E.2d 274, 276 (2011) (emphasis in the original).

\*284 Based on the above-outlined definitions, we find Green's actions were sufficient to prove the offense of attempted CSC with a minor in the second-degree. As noted, an attempt crime does not require the completion of the object offense. Thus, Green was not required to complete the sexual battery in order to be prosecuted and convicted of the offense. Accordingly, the fact that the intended vic-

tim was not an actual minor was irrelevant as the State was only required to prove Green had the specific intent to commit a sexual battery on a *victim* between the ages of eleven and fourteen years old coupled with some overt act toward the commission of the offense. *See State v. Curtiss*, 138 Idaho 466, 65 P.3d 207 (Ct.App.2002) (holding that impossibility did not constitute a defense to charge of attempted lewd conduct with a minor under the age of sixteen in a case where detective posed as a fourteen-year-old girl in online chat room); *Hix v. Commonwealth*, 270 Va. 335, 619 S.E.2d 80 (2005) (holding that the fact defendant was communicating with an adult law enforcement officer posing as a child was not a defense to the charge of attempted indecent liberties with a minor).

A decision to this effect is consistent with our state's limited jurisprudence regarding Internet sex crimes. *See Reid*, 383 S.C. at 300, 679 S.E.2d at 201-02 (recognizing "the policy goal of stopping dangerous persons through earlier intervention by law enforcement by punishing the attempted conduct as a crime, especially in any cybermolester type cases where the conduct also clearly manifests or strongly corroborates the intent to commit such a dangerous object crime").

Finally, other state jurisdictions have concluded that a defendant may be prosecuted for criminal solicitation of a minor, as well as attempted sexual offenses, where the online persona is an undercover officer and not an actual minor. *See, e.g., Karwoski v. State*, 867 So.2d 486 (Fla.Dist.Ct.App.2004); *People v. Thousand*, 465 Mich. 149, 631 N.W.2d 694 (2001); *State v. Coonrod*, 652 N.W.2d 715 (Minn.Ct.App.2002); *Shaffer v. State*, 72 So.3d 1070 (Miss.2011); *Johnson v. State*, 123 Nev. 139, 159 P.3d 1096 (2007); *State v. Robins*, 253 Wis.2d 298, 646 N.W.2d 287 (2002).<sup>FN7</sup>

FN7. The majority of federal jurisdictions have also rejected Green's argument with respect to a similar federal statute, 18 U.S.C. § 2422(b), which prohibits a person

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from using the mail or interstate commerce to “knowingly persuade[ ], induce[ ], entice[ ], or coerce[ ]” someone under the age of 18 “to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempt[ ] to do so.” See *United States v. Tykarsky*, 446 F.3d 458, 466 (3d Cir.2006) (“After examining the text of the statute, its broad purpose and its legislative history, we conclude that Congress did not intend to allow the use of an adult decoy, rather than an actual minor, to be asserted as a defense to § 2422(b).”); *United States v. Hicks*, 457 F.3d 838, 841 (8th Cir.2006); (“[A] defendant may be convicted of attempting to violate § 2422(b) even if the attempt is made towards someone the defendant believes is a minor but who is actually not a minor.”); see also *United States v. Gagliardi*, 506 F.3d 140 (2d Cir.2007); *United States v. Farner*, 251 F.3d 510, 513 (5th Cir.2001); *United States v. Meek*, 366 F.3d 705, 717–20 (9th Cir.2004); *United States v. Sims*, 428 F.3d 945 (10th Cir.2005).

**\*285 C. Sufficiency of the Evidence As to Specific Intent and Overt Act in Furtherance of Attempted CSC with a Minor**

[14] Finding that an actual minor was not required for the prosecution of the charge of attempted CSC with a minor, the question becomes whether the State proved that Green possessed the requisite intent and that he engaged in some overt act in furtherance of the charge.

Viewing the evidence in the light most favorable to the State, we conclude the trial judge properly denied Green's motion for a directed verdict as to the charge of attempted CSC with a minor in the second-degree. Green clearly expressed his specific intent to have a sexual encounter with Mandy, a fourteen-year-old female. A review of the online chat reveals that Green was not dissuaded by the

fact that Mandy stated she was fourteen years old. Instead, Green continued the sexually explicit conversation and sent Mandy pictures of his genitals.

In furtherance of his specific intent, Green committed an overt act in orchestrating a meeting for the sexual encounter. Green asked Mandy whether her parents would let \*\*673 her out after dark and whether he could meet her at her home. Ultimately, Green arranged to meet Mandy on a secluded street that night at a specific time. Green then traveled to the predetermined location where he was arrested and found to be in possession of alcohol, condoms, and male enhancement products. Accordingly, the trial judge properly submitted the \*286 charge to the jury. See *State v. Reid*, 393 S.C. 325, 713 S.E.2d 274 (2011) (finding attempted second-degree CSC with a minor charge was properly submitted to the jury where appellant, who through a chat with an online persona created by a law enforcement officer, clearly communicated his desire to have a sexual encounter with a fourteen-year-old girl, arranged to meet the fictitious minor at a designated place and time, and travelled to that location); *State v. Weston*, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006) (recognizing that if there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the appellate court must find the case was properly submitted to the jury).

**D. Admission of Photographs**

[15] In a pre-trial hearing and during the trial, Green objected to the admission of the two photographs of his penis. Green contended the photographs were more prejudicial than probative and, thus, should be excluded. In response, the Solicitor offered the photographs “to show the furtherance of the conduct to solicit sex from the underage child as a form of grooming, as a form of soliciting sex.” The trial judge rejected Green's motion, finding the photographs were “highly relevant” and that “any prejudicial effect” was outweighed.

On appeal, Green contends the trial judge erred in allowing the jury to view these photographs as

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“the prejudicial value of a visual of [his] computer screen name of [“blak slyder”] through pictures of the same far outweighed its probative value.” Although Green concedes the “sexual conversation” in the chat room was relevant, he contends the photographs should have been excluded as they were “inflammatory to both male and female” jurors. He characterizes the admission of these photographs as an “exceptional circumstance” that warrants reversal of his convictions as he was deprived of his constitutional right to a fair trial.

“All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, [the South Carolina Rules of Evidence], or by other rules promulgated by the Supreme Court of South Carolina.” Rule 402, SCRE. Evidence is relevant if it has “any tendency to make the \*287 existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Rule 401, SCRE. “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Rule 403, SCRE.

[16][17][18][19] The relevancy, materiality, and admissibility of photographs as evidence are matters left to the sound discretion of the trial court. *State v. Kornahrens*, 290 S.C. 281, 350 S.E.2d 180 (1986). If the offered photograph serves to corroborate testimony, it is not an abuse of discretion to admit it. *State v. Todd*, 290 S.C. 212, 349 S.E.2d 339 (1986). To warrant reversal based on the wrongful admission of evidence, the complaining party must prove resulting prejudice. *Vaught v. A.O. Hardee & Sons, Inc.*, 366 S.C. 475, 480, 623 S.E.2d 373, 375 (2005). Prejudice occurs when there is reasonable probability the wrongly admitted evidence influenced the jury's verdict. *Id.*

We find the trial judge did not abuse his discre-

tion in admitting the photographs. Although clearly offensive, the photographs corroborated Investigator Platt's testimony and served to establish Green's intent to solicit the minor to engage in sexual activity. Furthermore, the photographs negated Green's claim that he did not intend to have sex with a minor. After sending the photographs, Green commented that “I can show it to you in person.” This comment in conjunction with the photographs provided the jury with evidence of Green's specific intent as to the charged crimes. Accordingly, we agree \*\*674 with the trial judge that the photographs were relevant and that their probative value outweighed any prejudicial impact. *See State v. Martucci*, 380 S.C. 232, 249, 669 S.E.2d 598, 607 (Ct.App.2008) (finding no abuse of discretion where trial judge admitted photographs that were relevant and necessary and were not introduced with the intent to inflame, elicit the sympathy of, or prejudice the jury; recognizing that a trial judge is not required to exclude evidence because it is unpleasant or offensive).

\*288 Moreover, even if the judge erred in admitting the photographs, we find any error to be harmless given that the text of the online chats, the testimony of the investigating officers, and the evidence found in Green's car conclusively established the elements of the crimes for which Green was charged. *See State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) (recognizing that an insubstantial error not affecting the result of the trial is harmless where “guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached”); *State v. Knight*, 258 S.C. 452, 454, 189 S.E.2d 1, 2 (1972) (“[A] conviction will not be reversed for nonprejudicial error in the admission of evidence.”).

#### E. Request to Charge ABHAN

[20] At the conclusion of the State's case, Green requested the judge charge the lesser-included offense of attempted ABHAN. The trial judge denied Green's request on the ground there was “no evidence [or] conduct that could have been

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construed as an ABHAN.”

On appeal, Green asserts the trial judge erred in denying his request to charge as the evidence warranted a charge on attempted ABHAN. Because he believed Mandy was actually a woman in her twenties, based on the online profile picture, and that he did not intend to engage in sexual activity once he met Mandy,<sup>FN8</sup> Green claims he was entitled to a charge on the lesser-included offense of attempted ABHAN.

FN8. In support of this assertion, Green references this Court's decision in *State v. Drafts*, 288 S.C. 30, 340 S.E.2d 784 (1986), wherein this Court reversed the defendant's conviction for assault with intent to commit criminal sexual conduct in the first degree for failure to charge ABHAN based on the defendant's testimony that “he did not want to do anything” with the victim. We find *Drafts* to be inapposite as the defendant in that case admitted “taking indecent liberties” with the female victim, which clearly would have supported an ABHAN charge. *Id.* at 33–34, 340 S.E.2d at 786.

[21][22] “The law to be charged must be determined from the evidence presented at trial.” *State v. Knoten*, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). A trial judge is required to charge the jury on a lesser-included offense if there is evidence from which it could be inferred the lesser, rather \*289 than the greater, offense was committed. *State v. Drayton*, 293 S.C. 417, 428, 361 S.E.2d 329, 335 (1987).

[23] “ABHAN is a lesser included offense of ACSC, notwithstanding that technically ACSC does not contain all of the elements of ABHAN.” *State v. Geiger*, 370 S.C. 600, 606, 635 S.E.2d 669, 672 (Ct.App.2006); see 3 S.C. Jur. *Assault and Battery* § 26 (Supp.2012) (discussing cases involving a jury instruction for ABHAN as a lesser-included offense). “ABHAN is the unlawful act of violent in-

jury to another accompanied by circumstances of aggravation.” *State v. Fennell*, 340 S.C. 266, 274, 531 S.E.2d 512, 516 (2000). “Circumstances of aggravation include the use of a deadly weapon, the intent to commit a felony, infliction of serious bodily injury, great disparity in the ages or physical conditions of the parties, a difference in gender, the purposeful infliction of shame and disgrace, taking indecent liberties or familiarities with a female, and resistance to lawful authority.” *Id.* at 274, 531 S.E.2d at 516–17.<sup>FN9</sup>

FN9. In 2010, after this matter arose, the South Carolina General Assembly codified offenses involving assault and battery and these provisions are now applicable. S.C.Code Ann. § 16–3–600 (Supp.2011).

As previously stated, a person is guilty of CSC with a minor in the second-degree if “the actor engages in sexual battery with a victim who is fourteen years of age or less but who is at least eleven years of age.” S.C.Code Ann. § 16–3–655(B)(1) (Supp.2011).

\*\*675 We find the trial judge properly declined to charge attempted ABHAN. As evidenced by the text of the online chat, Green's clear intent was to engage in sexual activity with Mandy, who he believed to be fourteen years old. After Mandy responded that she was fourteen years old, the conversation turned sexual in nature with Green asking Mandy about her previous sexual experiences, whether she would have sex with him, and sending her the explicit pictures. Moreover, when Mandy asked Green, “u aint like gonna kill me or kidnap me r u?”, Green responded “lol hell no.” Thus, Green intended only to “engage in sexual battery with a victim who is fourteen years of age or less.” Accordingly, there was no evidence demonstrating that Green was guilty of the lesser-included \*290 offense of attempted ABHAN rather than the crime of attempted CSC with a minor in the second-degree.

### III. Conclusion

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In conclusion, we affirm Green's convictions for criminal solicitation of a minor and attempted CSC with a minor in the second-degree as: (1) the criminal solicitation of a minor statute is not unconstitutionally overbroad or vague; (2) the use of a law enforcement officer to impersonate a minor victim was legally permissible to support both convictions; (3) Green had the requisite specific intent and committed an overt act in furtherance of the CSC charge under *Reid*; (4) the challenged photographs were relevant and their probative value outweighed any prejudicial effect; and (5) there was no evidence to support Green's request to charge attempted ABHAN.

**AFFIRMED.**

TOAL, C.J., PLEICONES, KITTREDGE and HEARN, JJ., concur.

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