South Carolina Bar
Continuing Legal Education Division

2024 SC BAR CONVENTION

Criminal Law Section

"Criminal Practice in the Post-Covid World: New Challenges and Old Problems"

Friday, January 19

SC Supreme Court Commission on CLE Course No. 240019

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Continuing Legal Education Division

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Legislative and Judicial Updates

The Honorable William McKinnon
Representative Micajah P. "Micah" Caskey, IV
Senator Gerald Malloy

Criminal Law Update

Court of Appeals

January

- *State v. Tony O. Singleton*, Appellate Case No. 2019-001391, Opinion No. 5961
    - Defendant Tony Singleton appealed his conviction for first-degree criminal sexual conduct with a minor. Defendant contended that the trial court erred in 1) admitting a photograph of the ten-year-old victim into evidence, 2) denying his mistrial motion, and 3) failing to instruct the jury on third-party guilt. The court of appeals affirmed the conviction.
    - Defendant was the live-in boyfriend of victim's mother for approximately eight years. Defendant was charged with first-degree criminal sexual conduct with a minor when it was discovered that victim, then 10 years old, was pregnant.
    - The court of appeals declined to decide whether the trial court erred in admitting the photograph of the victim when she was ten years old. The court determined that, even if the trial court had erred in admitting the photograph, the error was harmless. The state presented overwhelming evidence of Defendant's guilt.
    - During Defendant's opening statement, Victim began crying audibly and was escorted out of the courtroom. Defendant moved for a mistrial at the time, arguing Victim's display of emotion had prejudiced his right to a fair trial. The trial court denied Defendant's motion, noting that a similar episode could have occurred while Victim was testifying. No curative instruction was given. The court of appeals determined that the trial court did not abuse its discretion in denying Defendant's motion for a mistrial. Victim did not address Defendant directly or comment on the crime. The trial court described the incident as "minimal." The court of appeals noted that the trial court was in the best position to determine whether a mistrial was warranted, and held it did not abuse its discretion in this case.
    - Defendant argued that the trial court erred in failing to instruct the jury on third party guilt because sufficient evidence was presented to warrant instruction. A trial court's refusal to give an instruction must be erroneous and prejudicial to the defendant to warrant reversal. *State v. Marin*, 415 S.C. 475, 482, 783 S.E.2d 808, 812 (2016). Additionally, "to be admissible, evidence of third-party guilt must be 'limited to such facts as are inconsistent with [the defendant's] own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence.'" *State v. Cope*, 405 S.C. 317, 341, 748 S.E.2d 194, 206 (2013). Defendant claims that evidence other people had sex with Victim is sufficient to warrant an instruction on third-party guilt. However, that evidence would not be inconsistent with Defendant's guilt, nor would it raise an inference or presumption as to Defendant's innocence.
- *State v. Kenneth Lamont Robinson, Jr.* Appellate Case No. 2018-001269, Opinion No. 5960
    - Defendant Kenneth Lamont Robinson Jr. appealed his convictions for murder and attempted murder. Defendant contended that the trial court erred in 1) refusing to

remand jurisdiction to the family court, 2) admitting gang-related evidence throughout trial, 3) failing to instruct the jury on the lesser-included offense of voluntary manslaughter, 4) failing to instruct the jury to consider defendant's age during deliberations, and 5) sentencing Defendant to fifty years' imprisonment.

- Defendant and 2 other men gave chase to a car they believed had fired at them while they were talking outside of Defendant's home. After losing sight of the car for a time, defendant and his co-passengers pulled up beside an identical car at a red light. Over defendant's objection, one of the men fired into the car next to them. The bullets struck Victim Kedana Brown, who later died. Defendant was arrested several days later. After considering the eight factors laid out in *Kent v. United States*[1], the family court determined that it was in the best interest of Defendant and the public that he be tried as an adult. Jurisdiction was transferred to general sessions court. One of the other passengers in the car later admitted to pulling the trigger, despite previously insisting Defendant had been the shooter. Defendant moved to transfer his case back to the family court on the basis of this admission, arguing it would have affected the family court's decision to transfer his case. The trial court refused to transfer jurisdiction to family court. Defendant was tried and convicted in the court of general sessions.
- Defendant argued that the use of statements that he had been the shooter amounted to a "fundamental misapprehension of the case." Consequently, his co-defendant's admission that he had in fact been the shooter warranted another waiver hearing from the family court. The court of appeals disagreed. The family court's waiver of jurisdiction over a juvenile is reviewed under an abuse of discretion standard. In this case, the family court weighed all the *Kent* factors, considered the recommendations and conclusions of two doctors, and outlined its reasons for transferring jurisdiction in a fourteen-page transfer order. Furthermore, the admission by a co-defendant that Defendant was not the shooter did not diminish the seriousness of the crimes or Defendant's culpability. For this reason, the new evidence would not have changed the outcome of the family court's transfer determination. Therefor, the trial court had a reasonable factual basis to deny Defendant's motion to transfer jurisdiction and did not abuse its discretion in doing so. The court of appeals affirmed the trial court on this issue.
- Defendant argued that under Rule 404(b), SCRE, the trial court erred in admitting evidence of his gang affiliation during his trial. The court of appeals agreed. Rule 404(b) allows prior bad act evidence to be admitted if the proponent of the evidence demonstrates that it shows motive or intent. Such prior bad act evidence is admissible under Rule 404(b) unless its "probative value is substantially outweighed by the danger of unfair prejudice."[2] The court of appeals drew on *Johnson v. State*, the only South Carolina case to address whether gang-related evidence is admissible under 404(b) to prove motive and intent, in making its decision. In this case, the gang-related evidence was not necessary to explain why the victim was shot. Witnesses testified that the shooting was provoked by an earlier shooting at defendant's home. Consequently, gang-related evidence "was

[1] Kent v. United States, 383 U.S. 541, (1966).
[2] State v. Kenneth Lamont Robinson, Jr, quoting Rule 403 SCRE

not logically relevant to any material fact at issue."[3] Additionally, the gang-related evidence was inadmissible under Rule 403 because the risk of unfair prejudice outweighed its probative value. This was reversible error.
    - The court of appeals affirmed in part, reversed in part, and remanded for a new trial.

February

- *The State v. Brandon Jerome Clark*, Appellate Case No. 2019-001477, Opinion No. 5968
    - Defendant Brandon Jerome Clark appealed his conviction for first degree criminal sexual conduct with a minor. Defendant contended that the trial court erred in "(1) limiting his cross-examination of the person who conducted a recorded interview with the alleged victim, (2) admitting the recording of that interview into evidence, (3) excluding his expert on these sorts of recorded interviews, (4) denying a directed verdict, and (5) not finding a violation of Brady v. Maryland, 373 U.S. 83 (1963)."[4]
    - Defendant was accused of molesting his former girlfriend's five-year-old daughter. Daughter was interviewed when she was five years old and was around seven at the time of trial. During the necessary pre-trial hearing, Defendant did not object to Daughter's interview being admitted into evidence. After the interview was played for the jury, Defendant argued that "the interview did not satisfy the standard for admission and sought to attack the interviewer's method and neutrality."[5] Testimony about the interviewer's method and technique were excluded. Defendant was also not allowed to offer an expert witness's opinion on how the interview was conducted.
    - Defendant made several arguments as to why the trial court erred in admitting the interview into evidence, but they were not raised until the day after the recording was admitted and played to the jury. Consequently, they were not preserved for appellate review. However, the court of appeals noted its decision would be the same on the merits. The circuit court did not abuse its discretion in concluding the standard for admission was satisfied because Daughter described things that "would be beyond the understanding and experience of someone her age."[6] The trial court was affirmed on this issue.
    - Defendant argued that the trial court erred in excluding his expert witness because he sought to elicit testimony on daughter's credibility, not veracity. Furthermore, Defendant contended he was treated differently than the State in having his expert excluded while the State's was not. The court of appeals determined Defendant's expert testimony could not be allowed under South Carolina precedents baring testimony on the veracity of an interview. In contrast, the State's expert offered testimony on behavior exhibited by abuse victims. This kind of testimony was recognized as appropriate in *State v. Anderson*, and the testimony was admitted accordingly. The trial court was affirmed on this issue.

[3] State v. Kenneth Lamont Robinson, Jr. Page # needed
[4] The State v. Brandon Jerome Clark
[5] Id.
[6] Id.

- Defendant argued that a nurse's testimony about the timing of the alleged abuse was improper hearsay. Without the interview, there was no evidence of penetration, an element of first degree criminal sexual conduct, and Defendant was entitled to a directed verdict. However, the trial court was correct in its determination that the interview was admissible under Rule 803(4), SCRE as a statement for the purposes of medical diagnosis or treatment. In the light most favorable to the state, evidence was presented on all necessary elements of defendant's guilt. The trial court was affirmed in denying his motion for a directed verdict.
- Defendant argued that the trial court erred in not finding that there had been a *Brady* violation in his trial. Some evidence was not produced until after trial began, and there evidence in the form of an officers notes was destroyed leaving the court unable to determine if it was exculpatory. However, evidence presented at trial did not indicate that the officer's notes contained information that was material to guilt or punishment. As a result, the trial court correctly determined that Defendant did not establish a *Brady* violation. The trial court was affirmed on this issue.
- Defendant's convictions and sentences were affirmed.

March

- *Cary G. Ryals v. State of South Carolina*, Appellate Case No. 2018-000570, Opinion No. 5971
  - Petitioner Cary G. Ryals contended the post-conviction relief (PCR) court erred in failing to find his trial counsel was ineffective. Counsel failed to object to Petitioner being tried in prison garb and shackles and did not request a continuance to provide street clothes for Petitioner. The court of appeals reversed and remanded for a new trial.
  - Petitioner was tried in prison attire while wearing shackles and handcuffs around his wrist. The court of appeals has held that "'the Constitution forbids the use of visible shackles during the penalty phase, as it forbids their use during the guilt phase, unless that use is justified by an essential state interest – such as in court room security – specific to the defendant on trial.'"[7] There is a reasonable probability the result would have been different had counsel objected to Petitioner's appearing in handcuffs.
  - The court of appeals reversed the PCR court and remanded for a new trial.

April

- *The State v. Calvin D. Ford*, Appellate Case No. 2019 – 001912, Opinion No. 5974
  - Defendant Calvin d. Ford appealed his convictions for murder, possession of a weapon during a violent crime, and possession of a weapon by a felon. Specifically, Defendant contends that the trial court erred in 1) failing to sit as the fact-finder during his immunity hearing under the Protection of Persons and

[7] Cary G. Ryals v. State of South Carolina (quoting state v. heyward, d, 432 S.C. 296, 324, 852 S.E.2d 452, 466 (Ct. App. 2020))

Property act (the Act), 2) determining that the Act did not provide immunity from prosecution for possession of a weapon during a violent crime and unlawful possession of a weapon by a person convicted of a violent crime, 3) allowing the State to introduce a witness' prior consistent statement, and 4) sentencing Defendant to five years imprisonment for possession of a weapon during a violent crime and life imprisonment without the possibility of parole for murder. The court of appeals affirmed the admission of a prior consistent statement, vacated Defendant's conviction for possession of a weapon during a violent crime, and remanded for the circuit court to make specific findings of fact to determine whether Defendant is entitled to immunity for murder, possession of a weapon during a violent crime, and unlawful possession of a weapon by a person convicted of a violent crime.

- Defendant was indicted for the murders of Jamal Burgess and Damien Alston, Victims 1 and 2, respectively. Defendant was also indicted for possession of a weapon during a violent crime, and unlawful possession of a weapon by a person convicted of a violent crime. Defendant moved for immunity from prosecution under section 16-11-450, including a sworn statement from a witness in his motion. The witness claimed to have seen Defendant pick up a gun off the ground after Victim 2 dropped it and fire the weapon in self-defense. At the immunity hearing, Defendant called his cousin, Witness Everette Ford, to testify at the immunity hearing. Witness testified that Victim 1 drew a gun and Victim 2 dropped a gun, at which point Victim 1 began firing. Witness claimed that Defendant then picked up the gun Victim 2 dropped and fired in self-defense. The State produced witness Felicia Gore, who claimed to have seen Defendant draw a gun of his own. Witness Sharika Gore for the State testified that she had not seen Victim 1 or Defendants' Witness at the party, but had seen Defendant with a gun. She was unsure where it had come from. The trial court found that Defendant did not establish that he was entitled to immunity by a preponderance of the evidence. On cross examination at trial, Defendant exposed numerous inconsistencies between witness Sharika Gore's recorded statement, immunity hearing testimony, and direct examination testimony. Defendant used portions of the recorded statement and immunity hearing testimony to refresh Gore's recollection. The State moved to introduce Gore's entire recorded statement. The State argued Defendant had alleged a recent fabrication, and the rules of evidence allowed the entire statement to be introduced because Defendant had used portions of it to cross-examine Gore. The trial court admitted the entire statement over Defendant's objection. Defendant was found guilty on the aforementioned charges.
- Defendant argued he had not alleged a recent fabrication of Gore's testimony at trial, he had impeached her credibility with prior inconsistent statements. The court of appeals found that Defendant's questions implied Gore had collaborated with Felicia Williams to fabricate a version of events or been improperly influenced by Williams. Furthermore, Defendant compounded the implication by repeating his questioning until Gore admitted discussing the incident with others. As a result, Rule 801(d)(1)(B), SCRE allowed the State to introduce Gore's full

statement.[8] The trial court did not abuse its discretion and was affirmed on this issue.

- The State conceded that Defendant should not have been sentenced for possession of a weapon during a violent crime because he was sentenced to life without parole for murder. Accordingly, the court of appeals vacated Defendant's five-year sentence on that charge.
- Defendant argued that the trial court erred in failing to make findings of fact on the elements of self-defense and determining the Act did not provide immunity for the weapons charges. Our supreme court precedents are clear that a trial court, sitting as a fact-finder, must make specific findings supporting its decision. The record in this case contained no such finds. Additionally, a finding of immunity for murder would necessarily mean a defendant was lawfully armed in self-defense. As a result, a defendant would be immune from prosecution on related weapons charges. Accordingly, the court of appeals remanded for the trial court to make specific findings determining whether or not the defendant is entitled to immunity on all charges.

- *The State v. Isaiah Gadson, Jr.*, Appellate Case No. 2018-001041, Opinion No. 5979
  - Appellant Isaiah Gadson, Jr. appealed his 2018 convictions for murder, first degree criminal sexual conduct, kidnapping, and armed robbery in 1980. Specifically, appellant contended the trial court erred by allowing evidence that he raped another victim in a separate incident in 1983. Finding the trial court did not err in admitting the evidence, the court of appeals affirmed appellant's convictions.
  - Defendant's case was re-opened in 1999 when Beaufort County created a cold case task force. In 2002, a SLED DNA profiler was able to develop a DNA profile in the case that eliminated one person of interest. In 2016, SLED reported that it had received a match to the profile from CODIS, the national DNA database. The evidence was returned to SLED for testing. Two buccal swabs of appellant's DNA were also sent. Appellant's DNA matched the profile generated from the evidence.
  - Appellant failed to contemporaneously object to testimony about the 1983 assault at trial. The court of appeals determined the question of whether the evidence was properly admitted was not preserved for review. However, the court noted that had the question been preserved it would find the trial court did not abuse its discretion in admitting the evidence under Rule 404(b), SCRE. The testimony was relevant to appellant's identity and his modus operandi. The assaults shared numerous unique characteristics, such as the assailant apologizing after the fact and asking victims if they'd enjoyed being assaulted. The court of appeals found these facts established the "logical connection" between the assaults required for admissibility.[9] The court also determined that the trial court did not abuse its discretion in balancing the probative value and prejudicial effect of the 1983 assault evidence under Rule 403.[10]

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[8] The State v. Calvin D Ford

[9] State v. Isaiah Gadson Jr. (citing State v. Perry, 430 S.C. 24, 41, 842 S.E.2d 654, 663 (2020).

[10] Id. (citing State v. Brooks, 428 S.C. 618, 635, 837 S.E.2d 236, 245

- Apellants convictions were affirmed

May

- The State v. James Elbert Daniels, Jr., Appellate Case No. 2018-001630, Opinion No. 5986
  - Appellant Daniels appealed his convictions for murder and armed robbery. Appellant argued that law enforcement elicited incriminating statements from him in violation *Miranda* rights. The court of appeals affirmed his convictions.
  - On three separate occasions in 2015, appellant served as a scout in armed robberies. Appellant was developed as a suspect and drove to his girlfriend's house to interview him. Appellant and his girlfriend both agreed to be taken back to the precinct for interviews. They were transported, without handcuffs, to the precinct in separate cars. Appellant was questioned for approximately thirty minutes without being read his *Miranda* rights. Once he suspected appellant may have been involved in the robberies, the interrogating officer read him his *Miranda* rights. Appellant waived his rights, though he did not sign a written waiver. After being advised of his rights, appellant identified the other men who robbed the stores. Appellant was questioned again the next day at the detention center after being informed of his *Miranda* rights.
  - "'Appellate review of whether a person is in custody is confined to a determination of whether the ruling by the trial judge is supported by the record.'"[11]
  - Appellant argued that police used an unconstitutional "question first" technique to elicit incriminating statements in the initial interview, rendering his waiver involuntary. However, the trial court's determination that appellant was not in custody when he gave his initial statement was supported by evidence in the record and was upheld accordingly. it was only after appellant was given *Miranda* warnings that appellant admitted his involvement in the robberies. Additionally, his post-*Miranda* statements were not involuntary nor were they made under unconstitutionally coercive conditions. The interview lasted approximately an hour and a half. Appellant was not threated or deprived of anything While no waiver was signed, audio recording of the interview indicates defendant understood his *Miranda* rights.

June

- The State v. Sydney St. Clair Moorer, Appellate Case No. 2019-001636, Opinion No. 5988
  - Appellant Sydney S. Moorer appealed his convictions for kidnapping and conspiracy to kidnap. This appeal was from Appellant's 2019 re-trial after a 2016 mistrial. Appellant argued that the trial court erred in 1) transferring venue of his case back to Horry County, 2) denying his motion for directed verdict on both charges, and 3) qualifying Grant Fredericks as an expert in forensic video analysis

(Ct. App. 2019).

[11] Stave v. James Elbert Daniels, Jr. (quoting State v. Evans, 354 S.C. 579, 583, 582 S.E.2d 407, 409 (2003)).

and allowing him to testify that appellant's truck appeared going to and from the place of victim's disappearance. The court of appeals affirmed on all issues.

- Appellant had a brief affair with victim Heather Elvis in 2013. Appellant and victim communicated regularly via cell phone until the relationship ended when appellant's wife learned about the affair. Weeks after the affair ended, Appellant called victim from a payphone shortly before midnight one evening. The call lasted just under 5 minutes. Victim would call the pay phone several times afterwards but receive no answer. Hours later, victim called appellants cell phone twice. The second call lasted a little over four minutes. Victim proceeded to an area five minutes away from appellants home. She called his phone 4 more times, but there was no answer. Victim's car was found unattended at 4 a.m. that night. There has been no more activity from victim's cell phone, and she has never been found. In the process of the investigation, two surveillance videos were found. They showed a truck going towards, and then coming back from, the area where victim disappeared. On behalf of the state, a forensic video analyst testified that the vehicle in the video's was appellant's truck.
- Appellant moved to change venue from Horry County after his 2016 mistrial. In light of significant pre-trial publicity and social media exposure at the time, the trial court granted the motion and transferred venue to Georgetown County. Three years later in 2019, the State moved to transfer venue back to Horry County. The State noted that two juries had been empaneled in the case, for related obstruction charges and the trial of appellant's wife, and that social media activity had died down. The trial court granted the motion and venue was transferred back to Horry County. Appellant court moved to transfer venue from Horry County on the first day of his re-trial. The motion was denied. The trial court did not abuse its discretion in denying appellant's motions to transfer venue for Horry County. The court examined the jury pool and excused anyone who said they could not be impartial due to knowledge of the case. No members of the venire who had knowledge of the case or knew a witness were seated on the petit jury. The trial court was affirmed on this issue.
- Appellant argued that the trial court erred in denying his motion for a directed verdict because the State did not offer direct or substantial circumstantial evidence he kidnapped, or conspired with his wife to kidnap, victim. However, the State presented substantial circumstantial evidence. The State demonstrated appellant had motive to kidnap and harm victim to appease his wife, victim disappeared near his home, and that what appeared to be appellants truck was seen going to and from the area where victim disappeared. The State also presented evidence that appellant and his wife conspired to kidnap victim, with appellant's wife controlling his phone and the pair tracking victim's whereabouts. The trial court was affirmed on this issue.
- Appellant argued that the trial court erred in qualifying Grant Fredericks as an expert in forensic video analysis and allowing him to testify that it was appellant's truck in the surveillance videos. Appellant did not timely object to the expert's qualification or the conclusion he testified to. As a result, the trial court's admission of the expert testimony was affirmed.

- The State v. Anthony Anderson, Appellate Case No. 2019-001406, Opinion No. 5989

- Appellant appealed his convictions for two counts of murder, possession of a weapon during the commission of a violent crime, and aggregate sentence of sixty years imprisonment. Appellant contended that the trial court erred in 1) finding that he willingly, intelligently, and voluntarily waived his rights to counsel and against self-incrimination, and 2) not admitting a statement from an unavailable third-party under a hearsay exception. The court of appeals affirmed the trial court on both issues.
- Appellant's mother called the police when her son came to her home crying and apparently delusional. After talking to Williamsburg County Police, Horry County officers arrested appellant. After reading appellant his *Miranda* rights, an investigator interviewed appellant for approximately one hour. The investigator had been made aware by appellant's mother that he had suffered a brain injury in 1995 and appeared delusional that night. During the interview, appellant admitted to shooting his uncle and grandmother. The trial court denied Appellant's motion to suppress his statements made during the interview. At trial, appellant sought to introduce statements made by Devin Hedman. Appellant claimed Hedman confessed to the murder, exonerating him. Hedman's statement claimed the victims had been killed in 2010, when they actually died in 2011. The trial court denied appellants motion to compel compulsory process on Hedman and his motion to admit Hedman's statement.
- Appellant argued that the investigator had a duty to take additional precautions to ensure appellant understood his *Miranda* rights. The investigator was aware Appellant had a prior brain injury and had appeared delusional. Additionally, appellant stuttered, indicated he believed the victims had wanted to kill him, and gave nonsensical responses during the interview. However, these behaviors did not indicate defendant failed to understand the circumstances of the interview or his rights. Mental deficiency alone is not enough to render a statement involuntary in South Carolina. Furthermore, no coercive tactics were used during appelant's interview. At the outset of the interview, appellant was read his *Miranda* rights and asked if he understood them. He then signed a waiver of his rights. The interview room was relatively comfortable, only appellant and the detective were present, and appellant was provided with a beverage. At no point did appellant attempt to stop the interview or ask for an attorney, and he was not threatened or offered anything to elicit his statement. This evidence supports the trial court's decision to deny appellant's motion to suppress his statements.
- Appellant argued the State should have brought his motion to compel compulsory process to the trial court's attention sooner, but the State had no obligation. Appellant could have requested a hearing on the motion before trial. Furthermore, "[a] statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement."[12] In this case, the trial court identified numerous inconsistencies with Hedman's statement. Hedman claimed to have killed the victims in 2010, to have shot one victim through the wall, and thrown the gun behind a dumpster near the end of the road. Victims were actually killed in 2011, there were bullet holes in the walls of victims' home, and there

[12] Rule 804(b)(3), SCRE

was no dumpster at the end of the road where Hedman claimed there was one. Evidence supported the trial court's determination that Hedman's statement was not corroborated and, consequently, not admissible.

- Wilton Q. Greene v. State, 440 S.C. 165, 889 S.E.2d 636 (Ct. App. 2023), Appellate Case No. 2018-000339, Opinion No. 5991
    - Petitioner argued that the post-conviction relief (PCR) court erred in finding he received effective assistance of counsel. Counsel failed to object to the admission of Petitioner's prior robbery conviction or request a limiting instruction at his trial for kidnapping and armed robbery. The PCR court found that there was overwhelming evidence against Petitioner. The court of appeals reversed the post-conviction relief court and remanded for a new trial.
    - Victim Bing Ho Zhang agreed to give Petitioner a ride to a fast food restaurant. While driving, victim directed his car towards an oncoming police car. Upon exiting, Victim told the officer that Petitioner had pulled a knife, directed him to go to the bank, and taken his wallet. Petitioner maintained that he sold Victim drugs and agreed to hold his wallet as collateral. Petitioner fled when the car came to a stop and was later apprehended.
    - At trial, Petitioner testified against the advice of counsel. No arguments had been made about the admissibility of Petitioner's prior conviction. However, the trial court and trial counsel agreed it constituted an impeachable offense. Asked about his prior conviction at trial, Petitioner testified that he had pled guilty to strong arm robbery. Petitioner's counsel had not requested any limiting instruction regarding the prior conviction. When asked if they had any exceptions to the charge before it was delivered to the jury, Petitioner's trial counsel made no objection. Petitioner was convicted of armed robbery and kidnapping.
    - A post-conviction relief action was timely filed. The PCR court heard testimony from trial counsel as to why he did not object to the admission of Petitioner's former conviction or limit its similarity to the offense for which defendant was on trial. Trial counsel explained "I know I have done that on other cases. I don't know why I didn't do it on this one."[13] Regarding prior convictions, Rule 609(a)(1) of the SCRE provides that "'evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused . . . .'"[14] The state has the burden of showing the probative value outweighs the prejudicial effect. [15] Trial courts apply a five-factor test when weighing the probative value of the evidence against its prejudicial effect.[16] Presumably because trial counsel made no attempt to challenge the trial court when it suggested Petitioner's past conviction was admissible, the trial court conducted no balancing on the record. Case law requires "'[a]n on-the-record analysis is especially needed when undertaking a balancing that involves a prior similar offense under Rule 609(a)(1).'"[17] The court of appeals could not

[13] Greene v. State, 440 S.C. 165, 173, 889 S.E.2d 636, 640 (Ct. App. 2023).
[14] Id. (quoting SCRE Rule 609(a)(1))
[15] Id. (quoting Robinson, 426 S.C. at 593, 828 S.E.2d at 210).
[16] Id. (Citing State v. Colf, 337 S.C. 622, 627, 525 S.E.2d 246, 248 (2000). (Check cite)
[17] Id. (quoting State v. Elmore, at 239, 628 S.E.2d at 275.)

determine that the required balancing occurred, and the trial court's decision may have been different had trial counsel objected. As a result, the PCR court erred in determining counsel's failure to object was not deficient performance.

- Petitioner argued that trial counsel's failure to request a limiting instruction allowed the jury to impermissibly consider his prior conviction as character evidence. There was a strong similarity between Petitioner's robbery conviction and the armed robbery charge he was facing at trial. Consequently, the conviction was highly prejudicial, "particularly in the absence of a limiting instruction addressing impeachment versus propensity."[18] The PCR court erred in determining trial counsel's performance was not deficient in failing to request a limiting instruction.
- Petitioner arguewd that the PCR court erred in determining there was overwhelming evidence of guilt in his case. The jury heard two different versions of events from Petitioner and victim. Victim's testimony pointed towards a robbery, while Petitioner's pointed to a drug deal gone bad. Petitioner and Victim were the only witnesses. The prosecution admitted the case was a "swearing match" between Petitioner and Victim. [19] The jury deliberated for five hours and became deadlocked on one charge., resulting in an *Allen* charge.[20] Because Petitioner and Victim were the only witnesses, the court of appeals could not say there was no "'reasonable possibility [counsel's errors] contributed in any way to [Petitioner's] convictions.'"[21] The jury's struggle to determine who was telling the truth was evidenced by its deadlock on one charge and the necessity of an *Allen* charge, as well as its request to hear Petitioner and Victim's testimony. As a result, the PCR court's finding of overwhelming evidence of guilt was erroneous.

- The State v. Kayla Marie Cook, 440 S.C. 308, 891 S.E.2d 35 (Ct. App. 2023), Appellate Case No. 2019-001417, Opinion No. 5995.
  - Appellant Kayla Marie Cook appealed her conviction for homicide by child abuse. Appellant contended that the trial court erred in 1) refusing to grant a mistrial and 2) allowing evidence to be introduced showing Victim had suffered an arm injury two to four weeks before her death. The court of appeals affirmed.
  - Appellant called her neighbor, Miriam Meyers, over to her home one morning because Victim wasn't breathing. Victim was blue, cold to the touch, and was not breathing. Meyers and another neighbor who arrived performed CPR on Victim. Victim was transported to the hospital, where Dr. Alexander Vinuya tried an hour and a half to revive her before pronouncing her dead. At trial, the State's leading investigator testified that "[t]he forensic interview, along with all the other evidence in the case, reinforced the fact that [Cook] did cause Minor's death."[22] There was also testimony from multiple witnesses concerning an injury to Victim's arm weeks before her death. The jury was twice instructed to consider the testimony pertaining to the arm injury only for purposes of extreme indifference.

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[18] Id. at 181, 889 S.E.2d at 644.
[19] Id. at 181, 889 S.e.2d at 645.
[20] Id.
[21] Id. at 182, 889 S.E.2d at 645 quoting Martin v. State, 427 S.C. 450, 456, 832 S.E.2d 277, 280 (2019)
[22] State v. Cook, 440 S.C. 308, 315, 891 S.E.2d 35, 39 (Ct. App. 2023)

- Appellant moved for a mistrial based on the investigator's statement, but the trial court denied her motion. A curative instruction was given stating that the testimony was stricken and not to be considered in deliberations. On appeal, Appellant argued that this statement was inadmissible hearsay which could not be cured by any instruction. However, the trial court gave a curative instruction explaining to the jury that the statement was stricken from the record. The significance of this was reiterated before deliberations began, when the jury was told "'[a]ny evidence that has been stricken from the record . . . may not be considered by you in this case. You must treat it as if it was not presented at all.'"[23] The investigator's testimony was not referenced again at trial. The testimony, coupled with the curative instruction, did not rise to the "extreme, urgent, and grievous level necessitating a mistrial."[24]
- Appellant contended the trial court erred in admitting evidence of the prior arm injury, claiming it was not relevant. However, a defendant's alleged prior acts of abuse towards a victim are admissible under the "common scheme or plan" exception in a homicide by child abuse case.[25] Prior acts which are not the subject of a conviction must be established by clear and convincing evidence.[26] Additionally, the evidence must logically relate to the crime charged.[27] In this case, the prior act was logically related as part of a pattern of abuse. Additionally, there was clear and convincing testimony from Appellant's neighbor that Victim identified Appellant as having caused the injury.

July

- The State v. Tammy Caison Moorer, 439 S.C 525, 888 S.E.2d 725 (Ct. App. 2023)
  - Appellant Tammy Caison Moorer appealed her convictions for kidnapping and conspiracy to kidnap. Appellant contends the trial court erred in 1) failing to grant her motion for a directed verdict, 2) admitting text messages that were sexually explicit and referenced drug use, 3) allowing a forensic video analysis expert to testify that Appellant's truck was shown on surveillance video going to and from the area where Victim was last seen, 4) excluding Appellants' alibi witnesses because appellant failed to comply with Rule 5(e)(1) of the South Carolina Rules of Criminal Procedure, and 5) excluding several defense witnesses who violated a sequestration order. The court of appeals affirmed.
  - Appellant's husband, Sydney Moorer, had a brief affair with Victim Heather Elvis in 2013. Husband and Victim communicated regularly via cell phone until the relationship ended when appellant's wife learned about the affair in early November. Appellant took control of Husband's phone upon learning of the affair and kept it until Victim disappeared in mid-December. Weeks after the affair ended, Husband called victim from a payphone shortly before midnight one evening. The call lasted just under 5 minutes. Victim would call the pay phone

[23] Id. at 317, S.E.2d at 39
[24] Id.
[25] Id. at 319, S.E.2d at 41 (citing State v. Martucci, 380 S.C. at 256, 669 S.E.2d at 611.)
[26] Id.
[27] Id.

several times afterwards but receive no answer. Hours later, Victim called Husband's cell phone twice. The second call lasted a little over four minutes. Victim proceeded to an area five minutes away from appellants home. She called Husband's phone 4 more times, but there was no answer. Victim's car was found unattended at 4 a.m. that night. There has been no more activity from Victim's cell phone, and she has never been found. In the process of the investigation, two surveillance videos were found. They showed a truck going towards, and then coming back from, the area where victim disappeared. On behalf of the state, a forensic video analyst testified that the vehicle in the video was an F-150 like the one owned by Appellant.

- Appellant argued that the trial court erred in denying her motion for a directed verdict because the State presented no direct or substantial circumstantial evidence Victim was kidnapped. Appellant contended the State's evidence raised only a mere suspicion she was involved in Victim's disappearance. She pointed to the fact that there were no signs of struggle at Victim's last known location or in her truck as support for her argument. However, the State produced substantial circumstantial evidence that Victim disappeared against her will by showing Victim abruptly stopped going to work, abandoned her car and everything in her apartment, and has not used her phone since the night of her disappearance.[28] Furthermore, the State produced substantial circumstantial evidence Appellant was involved by showing that 1) Apellant sent Victim and others angry texts about the affair, 2) Husband called Victim's manager at work and Appellant demanded Victim be fired, 3) Appellant controlled Husband's phone after discovering the affair through the night of Victim's disappearance, and 4) Appellant admitted to being with Husband when he received a call from Victim the night of her disappearance, among other things.
- Appellant argued that the admission of text messages which referenced her marijuana use amounted to improper character evidence under Rule 404, SCRE. Additionally, Appellant argued the messages were unduly prejudicial under Rule 403, SCRE. Appellant also objected to the state's introduction of her internet searches for "cougar life" and a series of sexually explicit texts Appellant sent to a much younger man from Husband's phone in late 2013, arguing these also constituted improper and unduly prejudicial character evidence. While the messages referencing drug use did amount to prior bad act evidence, they were logically relevant to the State's argument that Husband had purchased a pregnancy test for Victim, not Appellant. The State's theory was that Appellant and Husband had lured Victim to the landing to take a pregnancy test. The State also contended that Victim's potential pregnancy was part of Appellant's motive for killing her. The prejudicial effect of the text messages did not substantially outweigh their probative value as to the State's theory of Appellant's motive.[29] Appellant's texts with a younger man were character evidence and prior bad act evidence. However, they were relevant and logically pertinent to show appellant's

[28] State v. Moorer, 439 S.C. 525, 539, 888 S.E.2d 725, 732 (Ct. App. 2023).
[29] Id. at 541, 888 S.E.2d 733

motive for the kidnapping, her anger at Husband, her desire for her revenge, and her control over Husband's phone at the time of Victim's disappearance.[30]

- Appellant argued the trial court erred in allowing the State's expert to testify to his identification of her truck because his opinion was unreliable. "Our state supreme court has set out four factors to be considered in determining the admissibility of novel scientific evidence: (1) publications and peer review; (2) prior application of the method to the type of evidence in the case; (3) quality control procedures utilized; and (4) consistency of the method with recognized scientific law and procedures."[31] The State's expert testified to his methodology and the verification and testing inherent in it. His expertisae was based on experience. The expert's conclusions were reviewed by another certified forensic video examiner and his headlight spread analysis was a peer reviewed technique. Furthermore, Rule 702 states expertise can be based on experience. The trial court did not abuse its discretion in admitting the expert's testimony. The testimony satisfied the four enumerated Jones factors and met the reliability standard of rule 702.
- Appellant contended that the trial court's exclusion of her alibi witnesses was an extreme and disproportionate remedy for the witnesses' violation of a sequestration order. Appellant's alibi witnesses watched a live feed of the trial and saw the testimony of two of the State's witnesses. Testimony from the Appellant's alibi witnesses was excluded. Appellant was not allowed to proffer the witnesses. The trial court was within its authority to exclude the witnesses. One of the witnesses had previously accessed the internet in the sequestration room. All the witnesses were warned they should not have any access to the internet and no sanction was imposed. After the witnesses disregarded this admonition, the court made no error in excluding them. The court of appeals did note that the trial court should have allowed the Appellant to proffer the witnesses. The proffer would have enhanced the review of the materiality of the evidence, though such review was not necessary in this case.

- Mack Washington, Jr. v. State of South Carolina, Appellate Case No. 2018-000182, Opinion No. 5997
  - Petitioner Mack Washington, Jr. appealed the denial of his post-conviction relief (PCR) application. Petitioner contended that the PCR court erred in in failing to find that trial counsel was ineffective. Trial counsel failed to preserve the issue of an improper closing argument for direct appeal. Trial counsel failed to object when the solicitor referred to a pattern of conduct and asked the jury "who among us is safe?"[32] Trial counsel did not accept a curative instruction. The court of appeals reversed the PCR court and remanded for a new trial.
  - Victims Frank and Joan Klem (Victims) were robbed at the Rice Planters Inn in Walterboro in 2012. Two men followed them back to their room. One of the men grabbed Joan and pulled a knife on her, while another demanded the couples keys and wallets. The robbers fled in Victims' car, which contained luggage, golf clubs, and rifles. In connection with the incident, Petitioner was indicted for

[30] Id.
[31] Id. at 544, 888 S.E.2d at 735 (citing State v. Jones, 273 S.C. 723, 730-32, 259 S.E.2d 120, 124-25 (1979)).
[32] Washington v. State, Opinion 5997

possession of a weapon during a violent crime, two counts of kidnapping, and two counts of armed robbery. In closing argument, the solicitor stated "[h]e has a pattern of robbing old folks, intimidating old folks, kidnapping old folks, holding them up. And also, trying to manipulate Captain Jamison. I ask you, this day, who is safe from the force that is [Petitioner]? Who among us is safe, ladies and gentlemen?"[33] Trial counsel moved for a mistrial outside of the presence of the jury. The motion was denied, and trial counsel declined a curative instruction because he did not want to call further attention to the comments.

- Petitioner contended that the term "pattern" impermissibly referred to his prior record. The State argued that the term "pattern" was used as it related to the two victims in the present case. The term was not used in relation to any statute, and the court of appeals looked to the definition supplied by the legislature in relation to stalking and harassment: "'Pattern' means two or more acts occurring over a period of time, however short, evidencing a continuity of purpose."[34] The solicitor's intention to refer to Petitioner's present crimes was not in keeping with the meaning of the term and could not change what the jury would reasonably assume. As a result, there was no evidence to support the PCR court's determination that the solicitor's references to a pattern referred only to the incidents presented to the jury. Because trial counsel did not object until after the solicitor finished her clothing and the jury was dismissed for a brief recess, his objection was not contemporaneous. This was deficient performance.
- Trial counsel testified that he declined a curative instruction in order to avoid drawing further attention to the solicitor's comments. However, given the impropriety of the solicitor's remarks, evidenced by trial counsel's testimony he thought the remarks were grounds for a mistrial, trial counsel should have known declining the curative instruction was not a valid strategy. The court of appeals determined that the solicitor's comments about the pattern rose "to the level of being so egregious as to warrant a mistrial or 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'"[35] Furthermore, there was not overwhelming evidence of Petitioner's guilt.
- For these reasons, the PCR court's denial of Petitioner's application for relief was reversed and the case remanded for a new trial.

- Jerome Campbell v. State of South Carolina, Appellate Case No. 2018-000464, Opinion No. 5999
  - Petitioner Jerome Campbell appealed an order of the post-conviction relief (PCR) court dismissing his claim of ineffective assistance of counsel. Petitioner argued that the PCR court erred in failing to find trial counsel was ineffective for failing to object to the trial court's mutual combat charge. The court of appeals affirmed the PCR court.
  - Petitioner was caught up in "a convoluted web of familial and domestic quarrels."[36] In one dispute, Petitioner told his niece's boyfriend that he would kill him after he refused to visit with Petitioner's mother and sister with their newborn

[33] Id.
[34] S.C. Code Ann. § 16-3-1700(D) (2015).
[35] Id. at 12, quoting Randall, 356 S.C. at 642, 591 S.E.2d at 610
[36] Campbell v. State, page 1

child. In another, a relative of Petitioner's niece's boyfriend told Petitioner's mother he was going to kill Petitioner. The quarrels escalated to the point that a gun fight erupted between Petitioner and several other individuals. Victim Michael German was killed in the gun fight. Petitioner was tried and convicted of one count of murder and three counts of assault with intent to kill. Petitioner filed a PCR application, which was denied because the PCR court found the trial court's instruction on mutual combat was supported by the evidence.

- Petitioner argued that trial counsel was deficient in failing to object to the trial court's mutual combat charge. In this case, the willingness of Petitioner and the other combatants to engage in armed combat created an inference of mutual combat. This necessitated that a corresponding charge be given to the jury. Accordingly, trial counsel's failure to object to the charge did not fall below an objective standard of reasonableness.
- Petitioner argued that trial counsel's failure to object to the mutual combat charge was also deficient because the charge shifted the burden of proof on self-defense to Petitioner. Mutual combat acts as a bar to self-defense because one engaged in mutual combat is not without fault in bringing on the difficulty. When a charge on mutual combat is warranted, it may be given alongside a charge for self-defense. Because the State presented evidence to warrant a charge on mutual combat, trial counsel was not deficient in failing to object to the charge.
- The PCR court's dismissal of Petitioner's application was affirmed.

August

- Dominic A. Leggette v. Sate of South Carolina, Appellate Case No. 2018-001793, Opinion No. 6007
    - Petitioner Dominic A. Leggette contended that the post-conviction relief (PCR) court erred in finding trial counsel provided effective assistance. Petitioner argued that counsel was ineffective in failing to object to the trial court's instruction on voluntary manslaughter as a lesser included offense to murder because the evidence did not warrant a charge on voluntary manslaughter. The court of appeals affirmed the PCR court.
    - Petitioner was from the uptown area of Andrews, SC. Petitioner and other men from his neighborhood were involved in a long-standing feud with men from the west side area of Andrews. On August 9 and August 11 of 2008, the two groups fought each other. On August 13, 2008, Petitioner and his friends encountered several men from the west side, including Victims Antonio Tisdale and Al Ingram, at a bar. Victims spotted Petitioner across the bar and began following him. Petitioner turned and opened fire on Victims, killing Antonio Tisdale and wounding Al Ingram. When law enforcement arrived, several bystanders said "Dominic just shot Tony." [37] Petitioner was indicted for murder and assault and battery with intent to kill (ABWIK). At trial, the jury was instructed on murder, voluntary manslaughter, self-defense, ABWIK, and assault and battery of a high and aggravated nature (ABHAN). Petitioner was convicted of voluntary manslaughter and ABHAN. He was sentenced to 30 years on both charges to run

[37] Leggette v. State, 2023 WL 4919529, pg. 1, (Ct. App. 2023)

concurrently. He applied for post-conviction relief. The PCR court found that the voluntary manslaughter instruction was supported by the facts. As a result, trial counsel was not deficient for failing to object to the instruction.

- Petitioner argued the PCR court erred in finding that trial counsel was not ineffective in failing to object to the voluntary manslaughter instruction because it was not supported by the evidence. Petitioner claimed there was no evidence he acted in the heat of passion because evidence "did not show he was 'out of control as a result of his fear,' 'was acting under an uncontrollable impulse to do violence,' 'lacked control over his actions,' or was engaged in any argument or altercation with Tisdale."[38] He also argued the state failed to show sufficient legal provocation. Based on the evidence, "the question of whether Petitioner acted in a sudden heat of passion is a close one."[39] However, "instruction on a lesser offense is appropriate when "any evidence" supports the lesser charge."[40] In this case, "[p]etitioner admitted that Tisdale and Ingram running after him caused him to be fearful and frightened; he was already scared and did not know what to do because the prior incidents indicated hostilities between the opposing groups were escalating."[41] The prior troubles between Petitioner and the westside group and the menacing acts of the westside men amount to sufficient evidence to support the PCR court's finding that trial counsel was not deficient in failing to object to the voluntary manslaughter charge.
- The PCR court's order denying relief is and dismissing Petitioner's PCR application is affirmed.

- The State v. Johnathan Lamar Hillary, Appellate case No. 2019-001048, Opinion No. 6015
  - Appellant Johnathan Lamar Hillary appealed his convictions for murder, armed robbery, kidnapping, and possession of a weapon during a violent crime. Appellant argued that the trial court erred by 1) admitting a statement he made to law enforcement that was not voluntary, 2) admitting evidence of a separate robbery allegedly committed by Appellant, and 3) improperly imposing a sentence for kidnapping given that Appellant was also convicted and sentenced for murder. The court of appeals affirmed in part and vacated in part.
  - Victim Timothy Buckley was reported missing by his daughter in fall of 2016. Victim's truck was found abandoned on 29th Street in Myrtle Beach. The passenger side was bloodied. Victim's body was recovered in mid-November, he was killed by a gunshot to the head. Georgia police officers, upon request from Horry County law enforcement, tracked Appellant to an Atlanta townhouse. Upon searching the home, officers found a revolver with a serial number matching that of a revolver owned by Victim. They also found a holster with a broken snap, similar to one owned by Victim. Credit cards and identification belonging to one Bocar Bah were also found. Two Horry County detectives drove to Atlanta to interrogate Appellant. During the interrogation, detectives told Appellant that they would tell everybody he was a "cold blooded killer," exaggerated the quantity and

[38] Id. at 5
[39] Id. at 6.
[40] Id.
[41] Id.

quality of evidence against Appellant, and posed potential narratives to him. They also told him a South Carolina jury would give him the death penalty. Appellant proceeded to give a statement wherein he claimed Victim picked him up, attempted to sexually assault him, and pulled a gun. Appellant also admitted to shooting Victim. At trial, the State introduced testimony from Bocar Bah. Bah testified that he had been lured into meeting a woman and was ambushed by Appellant. The trial court admitted the testimony because it found that the robbery of Bah and alleged attempted robbery of Victim were part of a common scheme or plan based on numerous similarities. Appellant was found guilty on all charges. He was sentenced to life for murder in addition to thirty years for kidnapping, to run concurrently.

- Appellant argued his statement to law enforcement concerning Victim's death was not voluntarily made. However, under South Carolina law his statement was voluntary. Appellant was not promised leniency by the detectives. Instead, detectives at most assured Appellant "that they would put in the proverbial good word for him."[42] If detectives had followed through, it could provide Appellant only with the "mere hope" of leniency based on his cooperation.[43] Additionally, "glancing references to the death penalty do not automatically render a statement involuntary."[44] The detectives tactics did not appear to overbear Appellant's will, and the record provides some evidence to support the trial court's finding of voluntariness. The trial court was affirmed on this issue.
- Appellant contended that the trial court erred in admitting evidence concerning the robbery of Bocar Bah. While the trial court did err in admitting the evidence, the error was ultimately harmless. The fact that the defendant previously committed the same crime is not enough to meet the logical connection standard for admission under the common scheme or plan exception to rule 404(b).[45] Something in the criminal process must logically connect the other crimes to the crime charged.[46] There was an "almost complete lack of evidence" that appellant's alleged robbery of Bah and Victim's killing were "common to each other in any particularly meaningful way."[47] Consequently, the "criminal process" in the two crimes could not be connected.[48] However, the only element that could have been tainted by the testimony was malice. The court of appeals found "beyond a reasonable doubt that there is overwhelming evidence in the record from which the jury would have inferred malice regardless."[49] Consequently, the error was harmless.
- Appellant contended that he should not have been sentenced for kidnapping and murder. This issue was not preserved for appeal. However, principles of judicial economy favored vacating Appellants sentence for kidnapping in this case.

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[42] State v. Hillary, 2023 WL 5250223, pg. 6.
[43] Id.
[44] Id.
[45] Id. at 8.
[46] Id.
[47] Id.
[48] Id.
[49] Id. at 10.

September

- Robin Gray Reese v. State of South Carolina, Appellate Case No. 2019-000141, Opinion No. 6024
    - Petitioner Robin G. Reese appealed the order denying her request for post-conviction relief (PCR). She argued that the PCR court erred in finding she was not prejudiced by being shackled during much of her trial, including going to and from the witness stand. She also contended that the PCR court erred in finding counsel was not ineffective for failing to object to testimony from the lead investigator concerning the guilt of multiple parties. The court of appeals reversed and remanded for a new trial.
    - The PCR court found that trial counsel was ineffective for failing to object to Petitioner's shackles. However, it found that Petitioner was not prejudiced because the jury only saw Petitioner in shackles briefly and there was overwhelming evidence against her. The charges in this case stemmed from Petitioner's allegedly violent behavior. The jury could have inferred form the Petitioner's shackles that the court was concerned she would have a violent outburst. The appearance of the shackles after opening statements could also imply that Petitioner did something between opening statements and testimony to warrant being shackled. This was prejudicial to Petitioner. Furthermore, the evidence against Petitioner was not overwhelming. There were allegations that the first of two altercations caused Victim's death, with accounts of a second altercation being exaggerated to protect another participant. Witnesses were not interviewed until three days after the other participant's arrest. Petitioner contended she only attempted to kick Victim and threw a chair at him. Victim's DNA was on the chair, but the state's expert could not say how it got there. Based on the facts of the case and trial counsel's error, Petitioner demonstrated prejudice and the PCR court's order was reversed and remanded.

Supreme Court

January

- The State v. Jaron Lamont Gibbs, 438 S.C. 542, 885 S.E.2d 378 (2023)
    - Petitioner Jaron Lamont Gibbs appealed his convictions for murder and possession of a weapon during a violent crime. Petitioner appealed, contending the trial court erred in 1) allowing Detective Michael Arflin to testify about single and double action revolvers and 2) allowing the state to references Arflin's testimony in its closing argument. The court of appeals affirmed Petitioner's convictions. The supreme court affirmed the court of appeals opinion as modified.
    - Petitioner shot Victim at an intersection as he pointed a revolver into a car with 3 people in it. Petitioner contended at trial that he had put the gun in the car to offer it as payment for a gambling debt, and it went off when one of the passengers pushed it away. The State argued Petitioner intentionally shot the gun into the vehicle over a drug deal that had occurred earlier. At trial, Detective Michael Arflin testified about the firing of single and double action revolvers. In closing, the State

argued that "guns do not accidentally go off" and referenced Detective Arflin's testimony.[50]

- Petitioner contended that Detective Arflin's testimony involved "scientific, technical, or other specialized knowledge" and should have been offered by an expert.[51] Additionally, Petitioner argued the court of appeals erroneously found Detective Arflin's testimony admissible under Rule 701, SCRE and overemphasized Detective Arflin's personal knowledge of revolvers.[52] However, the court of appeals relied instead on rule 602, SCRE, in holding Detective Arflin gave admissible lay testimony. This was error. While Rule 602 requires a witness' testimony to be grounded in their personal knowledge, the rule does not provide a license for a lay witness to testify about any subject they have personal knowledge of. Instead, even if a witness has a personal knowledge, "the general rule is that the witness must be qualified as an expert to testify about matters requiring scientific, technical, or other specialized knowledge."[53] However, Detective Arflin's testimony amounted to "nothing more than the most rudimentary explanation of how someone discharges a revolver."[54] Therefor, the trial court did not abuse its discretion in determining expert testimony was not required.
- The solicitor's statement in closing that "guns do not accidentally go off" was a permissible argument about how the jury should apply testimony to the facts of the case. The solicitor followed her statement by explaining why it was highly unlikely the shooting was accidental given how revolvers operate. Additionally, this argument was in response to Petitioner's contention that the gun went off accidentally. The trial court did not err in allowing the State to reference Detective Arflins testimony in closing argument.

- Maunwell Ervin v. State of South Carolina, 438 S.C. 559, 885 S.E.2d 387 (2023)
  - The State petitioned for a writ of certiorari to review the award of post-conviction relief (PCR) to Respondent Maunwell Ervin. Respondent was tried for trafficking in cocaine and possession of a firearm during commission of a violent crime. Respondent was acquitted of the firearm charge at his first trial, but the jury could not reach a verdict and the trial court declared a mistrial as to the charge of trafficking in cocaine. A second trial yielded a second mistrial. A negotiated plea agreement was reached under which Respondent would plead guilty to a lesser included charge and receive the minimum sentence. No direct appeal was taken. Respondent filed for PCR from his guilty plea. The PCR court granted relief on Respondent's claim of ineffective assistance of counsel, premised on trial counsel's failure to raise a double-jeopardy objection based on the rule established in Yeager v. United States, 557 U.S. 110 (2009).[55]
  - However, the PCR court misapplied Yeager. Yeager requires the court to conduct a two-step analysis. First, the court must consider what, if any, issues a jury had to decide in reaching a verdict. Then, the court must determine whether any

[50] The State v. Jaron Lamont Gibbs, 438 S.C. 542, 553, 885 S.E.2d 378, 384 (2023).
[51] Id. at 547, 885 S.E.2d at 381.
[52] Id. at 548, 885 S.E.2d at 381.
[53] Id. at 550, 885 S.E.2d at 382.
[54] Id. at 552, 885 S.E.2d at 383.
[55] Ervin v. Sate of South Carolina, 438 S.C. 559, 563, 885 S.E.2d 387, 389 (2023).

necessarily decided issue was an element of the offense for which the state sought re-prosecution. In Respondent's case, the jury did not necessarily have to decide on any essential elements of the drug trafficking charge in order to acquit him of the firearms charge. As a result, the supreme court reversed the PCR court and reinstated Respondent's negotiated guilty plea and sentence.

February

- Jerry Buck Inman v. State of South Carolina, 439 S.C. 97, 886 S.E.2d 204 (2023).
    - Both parties appealed the PCR court's grant of relief to Respondent-Petitioner Jerry Buck Inman. Respondent-Petitioner pled guilty to kidnapping, murder, first-degree burglary, and first-degree criminal sexual conduct. He subsequently filed for PCR. The PCR court granted relief solely based on its finding that section 16-3-20 (B) of the South Carolina Code (2015) was unconstitutional. The supreme court reversed the order of the PCR court on that issue and remanded for the PCR court to address Respondent-Petitioner's remaining issues.
    - Section 16-3-20 (B) applies only after a defendant has knowingly and voluntarily waived their right to a jury trial. Our supreme court has addressed arguments that section 16-3-20 (B) is unconstitutional and has repeatedly held the statute constitutional.[56]

March

- State v. Randy Wright, 439 S.C. 101, 886 S.E.2d 206 (2023)
    - Respondent Randy Wright was convicted of assault and battery of a high and aggravated nature (ABHAN). The court of appeal's reversed Respondent's conviction, holding that 1) the trial court erred in denying his request that the jury be polled individually and 2) denial of the request was reversible per se. The supreme court affirmed, noting several points.
    - The denial of a defendant's request for individual polling is reversible per se.
    - A request for individual polling must be made immediately after the verdict is published. When collective polling is conducted, the request for individual polling must take place immediately after the collective polling is concluded.
    - Trial counsel does not have an affirmative duty to request that the trial court poll the jury in a criminal case.
- The State v. Craig Carl Busse, 439 S.C. 104, 886 S.E.2d 208 (2023)
    - Petitioner Craig Carl Busse was convicted of second-degree criminal sexual conduct with a minor. Petitioner appealed, contending the deputy solicitor improperly vouched for the victim's credibility in his closing argument. The court of appeals affirmed Petitioner's conviction, and the supreme court affirmed the court of appeals.
    - At trial, the victim testified about years of abuse at the hands of Petitioner. The victim specifically testified about Petitioner's erectile dysfunction. During closing, the deputy solicitor said "what was compelling to me, how does she

[56] Jerry Buck Inman v. State of South Carolina, 439 S.C. 97, 99-100, 886 S.E.2d 204, 206 (2023).

know that?"[57] Petitioner argued this amounted to vouching. However, the phrase "was compelling to me" in this context did no more than tell the jury the solicitor believed the evidence was important to their decision.[58]

April

- The State v. Russell Levon Johnson, 439 S.C. 331, 887 S.E.2d 127 (2023)
    - Respondent Russell Levon Johnson was convicted of criminal domestic violence in the first degree. The court of appeals reversed Respondent's conviction, holding that the trial court erred in failing to issue a limiting instruction. The supreme court reversed the court of appeals and reinstated Respondent's conviction
    - Respondent beat Victim Tonya Richburg with a metal pole, a hammer, and attempted to break her neck before he passed out on the bed. These beatings were delivered at separate times throughout the day in Marion, Marlboro, and Dillon counties after Respondent convinced Victim to take a ride in his car.
    - Respondent moved in limine to exclude any evidence of domestic violence occurring in Dillon or Marlboro Counties, arguing the trial court lacked jurisdiction to hear allegations from other counties. The court took the matter under advisement. At trial, Victim testified over Respondent's objection about events that occurred in Marlboro and Dillon Counties. After the State rested, the trial court ruled that no limiting instruction was necessary and venue was proper in Marion County. Respondent Objected. Later, the trial court gave a charge with no limiting instruction. Respondent did not object.
    - The court of appeals held Respondent preserved his request for a limiting instruction by objecting to the court's final ruling that a limiting instruction was not required, and that it was unnecessary for him to have renewed his objection at the end of the jury charge. However, evidence of Respondent's acts in Dillon and Marlboro Counties was admissible as part of the res gestae of both the Marion County Kidnapping and the Marion County domestic violence. Respondent preserved the issue of a limiting instruction, but was not entitled to one.
- The State v. Mary Ann German, 439 S.C. 449, 887 S.E.2d 912 (2023)
    - Appellant Mary Ann German was convicted of felony driving under the influence (DUI) resulting in death and sentenced to 11 years incarceration. Appellant had moved to suppress evidence of her blood alcohol content (BAC) gained from a warrantless blood draw taken from her at the hospital. The trial court denied her motion, having found that the police had probable cause to suspect Appellant of DUI and properly obtained the blood draw pursuant to section 56-5-2946, South Carolina's implied consent statute. Appellant filed an appeal of her conviction, and the court of appeals sought certification under Rule 204(b), SCACR. The supreme court agreed to consider whether section 56-5-2946 is constitutional. The supreme court held that section 56-5-2946 is facially constitutional, but unconstitutional as applied to appellant. However, the trial court did not err in

[57] State v. Busse, 439 S.C. 104, 108, 886 S.E.2d 208, 210 (2023).
[58] Id. at 114, 886 S.E.2d at 213-14.

denying Appellant's motion to suppress because police acted in good faith on existing precedent at the time. Appellants conviction was affirmed.

- Appellant was transported to the hospital after being involved in a serious car accident. A state trooper went to the hospital to obtain a blood draw from Appellant. Once at the hospital, based on his observations at the scene and information from other officers, the officer arrested Appellant for felony DUI. The trooper read appellant her rights, though he inadvertently read the misdemeanor advisement of rights form, but Appellant refused to cooperate or sign the advisement. The trooper ordered a blood draw, no warrant was sought. Appellants BAC was .275%.
- In order to be constitutional, a warrantless blood draw pursuant to section 56-5-2946 generally must rely on the consent exception to the warrant requirement.[59] Because consent must be given voluntarily under the totality of circumstances, implied consent cannot justify a categorical exception to the warrant requirement wherein no fact specific inquiry on a case by case basis is necessary. Accordingly, "the trial court should have conducted an inquiry into Appellant's consent to determine whether her Fourth Amendment rights were violated."[60] Under the totality of circumstances, Appellant did not consent to the blood draw. It constituted an unreasonable search and seizure.

- The State v. Ontavious Deranta Plumer, 439 S.C. 346, 887 S.E.2d 134 (2023)
  - Petitioner-Respondent Ontavious Deranta Plumer was convicted of attempted murder and possession of a weapon during a violent crime. He was sentenced to life without parole for attempted murder and an additional five years for the weapons offense. The court of appeals affirmed the trial court's refusal to charge self-defense and vacated Petitioner-Respondent's five-year weapons sentence. Cross-petitions were granted for certiorari, and the supreme court affirmed as modified.
  - During a drug deal, Petitioner-respondent pulled a pistol in an apparent attempt to rob Victim Oshamar Wells. Victim reached for his own gun and began shooting, and both men were wounded.
  - Petitioner-Respondent argued that the court of appeals erred in affirming the trial court's refusal to instruct the jury on self-defense. In South Carolina, one must "have been without fault in bringing on the difficulty" to claim self-defense.[61]The supreme court has held that "intentionally bringing a loaded, unlawfully possessed, illegal pistol to an illegal drug transaction is calculated to produce a 'violent occasion.' "[62] The record shows that Petitioner-Respondent did take a loaded firearm to an illegal drug transaction. As a result, he was not entitled to an instruction on self-defense.
  - The State conceded that Petitioner-Respondent's five-year weapon sentence was illegal because section 16-23-490(A) provides that the additional sentence for possession of a weapon during a violent crime does not apply when "a life

[59] State v. German, 439 S.C. 449, 467, 887 S.E.2d 912, 921 (2023).
[60] Id.
[61] State v. Plumer, 439 S.C. 346, 350, 887 S.E.2d 134, 136 (2023).
[62] Id.

sentence without parole is imposed for the violent crime."[63] However, the State argued the issue was not preserved for appellate review. The supreme court held that, in cases where the State concedes a sentence imposed by the trial court is illegal, the appellate court may correct that sentence even if the defendant did not object at trial. The appellate court may correct the sentence even if there is no real risk of incarceration beyond the legal sentence.

May

- The State v. Guadalupe Guzman Morales, 439 S.C. 600, 889 S.E.2d 551 (2023)
    - Respondent Guadalupe Guzman Morales was convicted of first and second-degree criminal sexual conduct with a minor. The court of appeals held that the trial court erred in admitting evidence that Respondent had sexually assaulted the victim's sister and reversed the trial court. The supreme court reversed the court of appeals and reinstated Respondent's convictions, having found that the issues pertaining to the evidence had not been preserved for appellate review.
    - Before trial, the State proffered testimony from Victim's sister that respond had sexually assaulted her. The trial court did not rule immediately. After the first day of trial, the State requested a "final ruling" on the admissibility of the sister's testimony. [64] The trial court said the testimony would be admissible. Three other witnesses testified before Victim's sister. When victim's sister testified at trial, Respondent did not object. When additional evidence is offered between a preliminary ruling and the admission of the evidence ruled upon, an additional, contemporaneous objection is necessary to preserve an issue. Respondent's failure to make a contemporaneous objection renders the issue unpreserved, both under the then-applicable *Wallace* standard and the current *Perry* standard for admissibility of evidence of other crimes.

June

- The State v. Travis Latrell Lawrence, 439 S.C. 611, 889 S.E.2d 557 (2023)
    - Petitioner Travis Latrell Lawrence was convicted of murder. Petitioner claimed self-defense and subpoenaed his co-defendant Terrell Bennett to support his argument. Bennett invoked his Fifth Amendment right while awaiting his own trial. The trial court prevented Bennet's testimony, and the court of appeals affirmed the trial court. The supreme court affirmed the court of appeals. The court found that Bennett faced a hazard of self-incrimination and properly invoked his Fifth Amendment right.
    - Bennett was questioned by the court in camera with counsel present. Neither counsel for Petitioner or the State were present. The supreme court determined "the hazards of incrimination were openly apparent."[65]
    - The supreme court noted that "the trial court should observe two more procedural precautions: (1) unless the witness is the defendant in the case on trial, the trial

[63] S.C. Code Ann. 16-23-490(A).
[64] State v. Morales, 439 S.C. 600, 604, 889 S.E.2d 551, 554 (2023).
[65] State v. Lawrence, 439 S.C. 611, 618, 889 S.E.2d 557, 561 (2023).

court should not allow a 'blanket' invocation of the Fifth Amendment, and (2) under normal circumstances, the trial court should allow counsel for both the witness and the party calling the witness to be present at the *in camera* examination."[66]

- Justin Jamal Lewis v. State of South Carolina, 439 S.C. 635, 889 S.E.2d 570 (2023)
    - Petitioner Justin Jamal Lewis was convicted of distribution of heroin after representing himself at trial. He then filed a post-conviction relief (PCR) application alleging pre-trial counsel was ineffective. The PCR court dismissed Petitioner's application. The supreme court reversed the PCR court in part and remanded for further proceedings.
    - Petitioner requested to represent himself on the morning of his trial. After a *Faretta* hearing, Petitioner was allowed to represent himself with pre-trial counsel serving as standby counsel. After his conviction, Petitioner filed a PCR claim alleging his pre-trial counsel had been ineffective in various ways. The PCR court dismissed Petitioner's application with prejudice, finding he was not entitled to PCR on the basis of ineffective assistance of counsel because he had represented himself at trial.
    - The supreme court explained "[w]e have never adopted a bright-line rule forbidding pro se defendants from alleging ineffective assistance of pretrial counsel, and we decline to do so today. Rather, we acknowledge a pro se defendant may present a colorable claim of pretrial ineffective assistance of pretrial counsel."[67]
- The State v. Jon Smart, 439 S.C. 641, 889 S.E.2d 573 (2023)
    - Petitioner Jon Smart was sentenced as a juvenile to life without parole. Petitioner sought resentencing after *Miller v. Alabama*, and the circuit court re-sentenced him to life without parole. Petitioner appealed. The supreme court affirmed Petitioner's sentence.
    - At the re-sentencing of a juvenile originally sentenced to life without parole pursuant to *Aiken v. Byars*, "there is no burden of proof or persuasion placed on either party and there is no presumption for or against any sentence."[68] From the record, it is apparent the resentencing court imposed its life sentence de novo with no burden placed on either side. In accordance with *Aiken*, the resentencing court considered testimony from an expert psychologist and reviewed his record, heard testimony from four witnesses called by the State and Petitioner, and heard arguments from attorneys from both sides in light of the *Aiken* factors. The resentencing court provided to Petitioner with an "individualized hearing where the mitigating hallmark features of youth" were fully explored.[69] The resentencing court soundly exercised its discretion in imposing a life without parole sentence.
- The State v. Richard Passio, Jr., 440 s.C. 1, 889 S.E.2d 584 (2023)
    - Petitioner Richard Passio, Jr. was convicted of murder and sentenced to thirty years imprisonment. Petitioner appealed, arguing the circuit court erred in denying his motion for a directed verdict and admitting a screenshot of his

[66] Id. at 619, 889 S.E.2d at 561.
[67] Lewis v. State, 439 S.C. 635, 640, 889 S.E.2d 570, 572 (2023).
[68] State v. Smart, 439 S.C. 641, 645, 889 S.E.2d 573, 575 (2023).
[69] Id. at 648, 889 S.E.2d at 577.

facebook page. The court of appeals affirmed the trial court. The supreme court affirmed the court of appeals, but held that admitting the screenshot was harmless error.
    - The evidence presented at trial, viewed in the light most favorable to the State, provided a sufficient basis for a reasonable juror to find Petitioner guilty beyond a reasonable doubt. As a result, denial of Petitioner's motion for directed verdict was proper.
    - The State introduced Petitioner's facebook page during his father's testimony for impeachment purposes. This was error because "a witness may not be impeached by extrinsic evidence of a collateral matter."[70] However, the evidence against Petitioner was substantial. The supreme court found there was no good faith argument to be had that the picture affected the outcome. Accordingly, the error was harmless.
- Anthony A. Jones, II v. State, 440 S.C. 14, 889 S.E.2d (2023)
    - Petitioner Anthony A. Jones plead guilty to first-degree burglary and armed robbery. Both crimes were committed before Petitioner turned eighteen. Petitioner was eighteen at the time of his plea. He was sentenced to fifteen years for first-degree burglary and 10 years for armed robbery, to run concurrently. Petitioner filed a PCR action asserting that his counsel had been ineffective and that subsection 63-19-20(1), which transferred his case to circuit court, was unconstitutional. The PCR court denied Petitioner's application. Petitioner appealed, solely challenging the constitutionality of subsection 63-19-20(1).
    - The PCR court erred in determining Petitioner's constitutional claim was a trial court error not cognizable for PCR. A person convicted of a crime may initiate a PCR proceeding when claiming their rights under either the U.S. or South Carolina Constitution were violated.[71] After evaluating the merits of Petitioner's claim, the supreme court determined subsection 63-19-20(1) is constitutional. However, the supreme court directed circuit courts to consider the *Aiken* factors when sentencing juveniles under subsection 63-19-20(1). The circuit court properly considered those factors, and Petitioner's sentences were affirmed.
- The State v. Tappia Deangelo Green, 440 S.C. 292, 890 S.E.2d 761 (2023)
    - Petitioner Tappia Deangelo Green was convicted of robbery, kidnapping, and possession of a weapon during a violent crime. The court of appeals affirmed. The supreme court affirmed in part and vacated in part.
    - At trial, Petitioner offered for the first time an exculpatory story concerning the charges he faced. The state questioned Petitioner about his post-arrest silence for impeachment purposes. On appeal, Petitioner contended that questioning his silence post-*Miranda* violated his right to due process in violation of *Doyle v. Ohio.* The State contended Petitioner was never given his *Miranda* warnings, and consequently his post-arrest silence could be used for impeachment.
    - The State must prove by a preponderance of the evidence that a defendant was not read their *Miranda* rights if they wish to impeach the defendant with their post-arrest silence. The trial court's ruling was supported by evidence produced by the State, and Petitioner's motion for mistrial was properly denied.

[70] State v. Passio, 440 S.C. 1, , 889 S.E.2d 584 (2023)
[71] Jones v. State, 440 S.C. 14, 23-24, 889 S.E.2d 590, 596 (2023).

July

- State v. Timothy Ray Jones, Jr, 440 S.C. 214, 891 S.E.2d 347 (2023)
    - Appellant Timothy Ray Jones was convicted of five counts of murder and was sentenced to death. On direct appeal, Appellant raised issues around juror qualification, voir dire, jury instruction rulings, and evidentiary rulings. The supreme court found no error with the trial courts juror qualification, voir dire, or jury instruction rulings. While the trial court erred in respect to certain evidentiary rulings, the errors were harmless. Appellant's conviction and death sentence were affirmed.
    - Appellant had sought to introduce expert testimony to support his not guilty by reason of insanity (NGRI) defense during the sixth week of his trial. Appellant's expert had not been on the witness list. The supreme court determined it was error to exlude the witnesses testimony because its probative value was not substantially outweighed by prejudice to the State. However, the error was harmless. Appellant presented seven other expert witnesses during the guilt phase to testify in support of his NGRI defense. This testimony was incorporated into the sentencing phase and was submitted to the jury as mitigation. It is not likely the testimony of the additional expert would have affected the jury's decision to impose the death penalty.
    - At trial, appellant sought to introduce a statement made by one of the officers who transported him from Mississippi to South Carolina. When Appellant told the officer that the officer did not need a weapon because Appellant was not going to hurt him, the officer replied the weapons were for everyone else who wanted to kill Appellant. The supreme court affirmed the trial court's ruling that this was not relevant to appellant's future dangerousness.
    - At trial, defense counsel asked the officer on the stand if he believed Appellant was crying out of genuine remorse for his crimes. The State objected to this line of questioning and the trial court sustained the objection. The supreme court held that any error in sustaining the objection was harmless. A fleeting mention of Appellant's remorse would not have affected the jury's decision to impose the death penalty.
    - The trial court also limited testimony by Appellant's grandmother and father about Appellant's family history. The supreme court affirmed the trial court, finding any error was harmless because another witness for the defense testified to the relevant aspects of Appellant's family history.
    - The trial court excluded testimony from Cynthia Turner about her own schizophrenia diagnosis and the hereditary nature of the condition. Neither of these things were in dispute in Appellants trial. Consequently, the supreme court affirmed the trial court's ruling.
    - The trial court admitted photos from victims' autopsies. These photos had no probative value because they did not depict the bodies in substantially the same condition Appellant left them, but rather after days of decomposition. However, this error was harmless because, in light of the horrific facts of the case, the supreme court found they did not affect the jury's decision to impose the death penalty.

- The State v. John Ernest Perry, Jr, 440 S.C. 396, 892 S.E.2d 273 (2023)
    - Respondent John Ernest Perry, Jr was convicted of attempted murder. At trial, the jury requested a charge on intent. The trial court charged the jury that "when the intent to do an act that violates the law exists motive becomes immaterial. The court of appeals, holding that the trial court improperly instructed the jury on general intent for attempted murder, reversed and remanded for a new trial. The supreme court found that the error in the charge was harmless and reversed the court of appeals.
    - Generally, prosecutions cannot be maintained for attempts to commit general intent crimes. The trial judge had an obligation to instruct the judge on specific intent. However, a disinterested eyewitness corroborated the officer's testimony that Respondent fired directly at him. The witness had observed this from his nearby window. Because this evidence of specific intent was offered, the supreme court could not say beyond a reasonable doubt that the jury found only general intent. Therefor, the supreme court held the error harmless.

August

- The State v. Carmie Josette Nelson, 440 S.C. 413, 891 S.E.2d 508 (2023)
    - Petitioner Carmie Josette Nelson was found guilty of murder and sentenced to life imprisonment. The court of appeals affirmed Petitioner's conviction. The supreme court reversed, finding that the probative value of admitted autopsy photos was substantially outweighed by the danger of unfair prejudice.
    - The information to be gained from the photographs was not in dispute Petitioner was not disputing the way in which victim was murdered or the number of wounds on her body. Petitioner did not even cross examine the doctor who performed the autopsy when he was called by the State. The location, number, type of wounds sustained by the victim, and the inference of malice could have been established by other convincing evidence. The supreme court found that the doctor's testimony established both how victim was killed and that she was killed with malice.
- The State v. Charles Dent,
    - Respondent-Petitioner Charles Dent was convicted of first-degree criminal sexual conduct (CSC) with a minor and two counts of disseminating obscene material to a minor. Respondent-Petitioner appealed, and the court of appeals remanded on the grounds that the trial court erred in failing to give a requested circumstantial evidence charge. The supreme court agreed that the trial court erred in not giving the requested charge, but found such error was harmless. The supreme court remanded to the court of appeals for consideration of Respondent-Petitioner's remaining issues on appeal.
    - The State presented mostly direct evidence at trial, consisting of testimony from the victim and approximately two hours of forensic interviews conducted with the victim. Additionally, the instruction as a whole accurately charged the law to be applied to the case. Failure to give a charge on circumstantial evidence is not reversible error when the charge as a whole properly conveys the applicable law.
- The State v. Tyrone Anthony Wallace, Jr., 440 S.C. 537, 892 S.E.2d 310 (2023)

- Petitioner Tyrone Anthony Wallace Jr. appealed his convictions for murder and kdinapping. Petitioner challenged the trial court's qualification of the State's witness as an expert under Rule 702 of the SCRE. The court of appeals affirmed the trial courts ruling, and the supreme court affirmed the court of appeals' holding.
- The State called Investigator Dylan Hightower to testify regarding cell site location date linking Petitioner to sites of criminal activity. The investigator testified extensively about his credentials, including an internship, various classes, and training sessions spanning multiple weeks. The trial court then required Investigator Hightower to make a full proffer of his testimony because the ruling was going to depend on "the science of it." The trial court questioned Investigator Hightower about how he came to his conlusions throughout his proffer. Because the trial court conducted a robust examination of the witness, the supreme court concluded the trial court understood its responsibility as gatekeeper and acted within its discretion.

September

The State v. Jeroid Price, 2023 WL 5734348

- The supreme court issued a common-law writ of certiorari to review a sealed circuit court order reducing Defendant Jeroid Price's sentence and releasing him after he served nineteen years of a thirty five year murder sentence. The supreme court remanded Defendant to the custody of the South Carolina Department of Corrections.
- Section 17-25-65 of the South Carolina Code allows a circuit court to reduce an inmate's sentence under certain circumstances. The State must file a written motion, send a copy to the chief judge of the circuit within five days, and the chief judge or another judge appointed to the county must hold a public hearing on the record. Nonoe of these procedures were followed.
- The law did not permit the circuit judge to hold a closed hearing with only the solicitor and defense counsel present, nor did it allow him to seal the "order reducing sentence." The South Carolina Constitution requires circuit court proceedings to be public courts of record. Furthermore, a court may not seal any portion of a court record unless a specific section of the law authorizes it. The circuit judge in this case made no effort to determine if the law allowed sealing the record in this case.
- The failure to notify the victim's family about the proceedings to reduce defendant's sentence violated the Victim's Rights Act and the Victim's Bill of Rights.

The State v. Robert Lee Miller, III, no citation yet.

- Petitioner Robert Lee Miller III was convicted of murder. Petitioner confessed twice to his friends and twice to law enforcement. All four confessions were admitted at trial. Petitioner appealed, contending that his final confession to law enforcement was coerced.
- Petitioner was advised of his *Miranda* rights and signed a waiver of those rights prior to his final confession. Despite being young, Petitioner had already had run-ins with the law and had been advised of his *Miranda* rights before. Petitioner was found to be very "street smart" by the trial court, which weighed in favor of the supreme courts finding of voluntariness. Petitioner appeared relaxed, laughing and joking during the interview. Petitioner was advised throughout the interview that he could stop talking to officers at

any time. As a result, there was evidence to support the trial court's determination Petitioner's confession was voluntary.

South Carolina Bar
Continuing Legal Education Division

2024 SC BAR CONVENTION

Criminal Law Section

Friday, January 19

Legal and Procedural Issues: Plea Affidavits in Transfer Court, Using SC Code 17-23-120-150 for Paper Pleas, and Indictments—Their Sufficiency & Motions You Can Make Involving Them

Jimmy A. Richardson, II
Daniel Goldberg
Dayne C. Phillips
John Lafitte Warren, III

Indictments – Constitutional Provisions, Statutes, and Rules

S.C. Const. art. I, § 11: No person may be held to answer for any crime the jurisdiction over which is not within the magistrate's court, unless on a presentment or indictment of a grand jury of the county where the crime has been committed, except in cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger. The General Assembly may provide for the waiver of an indictment by the accused. Nothing contained in this Constitution is deemed to limit or prohibit the establishment by the General Assembly of a state grand jury with the authority to return indictments irrespective of the county where the crime has been committed and that other authority, including procedure, as the General Assembly may provide.

S.C. Code Ann. § 17-19-10: No person shall be held to answer in any court for an alleged crime or offense, unless upon indictment by a grand jury, except in the following cases:

(1) when a prosecution by information is expressly authorized by statute;
(2) in proceedings before a police court or magistrate; and
(3) in proceedings before courts martial.

S.C. Code Ann. § 17-19-20: Every indictment shall be deemed and judged sufficient and good in law which, in addition to allegations as to time and place, as required by law, charges the crime substantially in the language of the common law or of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood and, if the offense be a statutory offense, that the offense be alleged to be contrary to the statute in such case made and provided.

S.C. Code Ann. § 17-19-90: Every objection to any indictment for any defect apparent on the face thereof shall be taken by demurrer or on motion to quash such indictment before the jury shall be sworn and not afterwards.

Rule 4(a), SCRCrimP: An application to the court for an order shall be by motion which, unless made during a hearing or trial in open court with a court reporter present, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

25949 - State v. Gentry

/opinions/HTMLFiles/SC/25949.htm

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Ricky Dennis Gentry, Appellant.

Appeal From Spartanburg County
J. Derham Cole, Circuit Court Judge

Opinion No. 25949
Heard May 25, 2004 - Filed March 7, 2005

AFFIRMED

John Dennis Delgado and Kathrine Haggard Hudgins, both of Columbia, for appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, and Assistant Attorney General Deborah R.J. Shupe, all of Columbia; and Solicitor Harold W. Gowdy, III, of Spartanburg, for respondent.

JUSTICE MOORE: Appellant appeals his convictions for accessory before the fact of armed robbery and accessory before the fact of assault and battery with intent to kill (ABIK), claiming the trial court was without subject matter jurisdiction to hear the accessory charges against him and claiming the trial court erred by failing to grant a directed verdict on the accessory charges. We affirm.

PROCEDURAL BACKGROUND/FACTS

On March 31, 2001, Shawn Bobo was shot to death outside his home. His wife, Shanna, was shot four times, but survived her injuries. Appellant was indicted for murder, ABIK, armed robbery, accessory before the fact to murder, accessory before the fact to armed robbery, and accessory before the fact to ABIK. Appellants accessory charges related to the robbery and shooting of Shawn. Following a trial, the jury found appellant guilty of accessory before the fact to armed robbery and accessory before the fact to ABIK. He was found not guilty of the remaining charges. Appellant was sentenced to thirty years imprisonment for accessory before the fact to armed robbery and to twenty years, concurrent, for accessory before the fact to ABIK.

The State presented evidence appellant and several others, including Tommie Smith (Tommie), discussed robbing the victim of cocaine. One of those present, Stanley Moore (known as Rico), testified appellant said he would kill the victim and then pulled out his gun of which Tommie took possession. Rico testified he, appellant, Tommie, and Michael Osbey (Osbey) all rode in the car to the victims house. Rico testified the plan, which appellant had agreed to, was for Osbey to come in and shoot everyone. Appellant and Tommie talked to

the victim and went inside the victims house. A few minutes later, appellant ran out the front door and motioned Osbey to come inside. Appellant, Tommie, and Osbey later ran to get in the car. Tommie and Osbey had the guns and appellant had a bag of cocaine.

Shanna testified she was shot four times by Tommie and Osbey. She stated appellant was not in the kitchen during a struggle for the gun between Tommie and the victim. She further stated she stabbed at appellant behind the recliner in the living room.

In appellants first statement to police, he indicated he was present when Tommie pulled a gun on the victim and when the victim and Tommie began struggling for the gun. Appellant stated he was stabbed by Shanna and that, as he was running out of the front door, he saw Osbey running towards the back door. In his second statement to police, appellant admitted he went to the victims house to rob him of cocaine and that the plan was for Tommie to pull out a gun while appellant took the cocaine. After leaving the house, appellant heard shots fired when he was trying to catch up with Rico. He stated that when Osbey and Tommie got in the car, Osbey had the cocaine. They never split up the cocaine.

At the close of the States case, appellant moved for a directed verdict on the accessory charges because the State had failed to prove appellant was not present when the crimes were committed.[1] The trial court denied the motion because there was conflicting evidence on the presence issue.

During appellants case, Tommie testified he initiated the plan of robbing the victim and that appellant agreed to the plan and supplied the weapons. The plan was for appellant to pretend he was buying drugs. Appellant was present when Tommie pulled the gun on the victim and told the victim they were going to take the drugs. Tommie and the victim began to struggle for the gun and Shanna stabbed him. Then, Osbey came in and started shooting. Tommie testified appellant left before the shooting started. However, appellant came back inside the house after Osbey had entered and grabbed the cocaine. The three left the house together with over nine ounces of cocaine, worth approximately $9,000.

Appellant testified he agreed with Tommie to purchase cocaine from the victim and later agreed to rob the victim. After they passed the victims house, appellant testified he told the others that he did not want to rob the victim. Appellant testified he agreed to buy the drugs as long as Tommie did not try to rob the victim. Tommie assured appellant he would not, but Tommie pulled out a gun as the victim was taking out the cocaine. Tommie and the victim began to struggle and appellant hid behind a couch to stay out of the way of the gun. Shanna ran by him and cut him on his back. Appellant ran out the front door. Osbey was already getting out of the car. Rico was pulling out of the driveway and appellant waved his hand in an attempt to have Rico stop. By the time he got to the edge of the yard, which is near the street, appellant heard a series of shots. He continued down the street and heard more shots. When Osbey later entered the car, he had the cocaine.

At the close of appellants case, appellant renewed his motion for a directed verdict. The motion was denied. The jury found appellant guilty of accessory before the fact of armed robbery and accessory before the fact of ABIK.

ISSUES

I. Did the indictments failure to allege the element absence from the scene of the crime deprive the trial court of subject matter jurisdiction to hear the accessory before the fact charges?

II. Did the trial court err by failing to direct a verdict for appellant on the charges of accessory before the fact to armed robbery and accessory before the fact to ABIK when no evidence was presented that appellant was absent from the scene of the crime?

III. Did the trial court err by failing to direct a verdict in appellants favor on accessory before the fact to armed robbery when the alleged subject of armed robbery was a quantity of illegal narcotics?

DISCUSSION

I. Subject Matter Jurisdiction

Appellant argues the accessory before the fact indictments deprived the trial court of subject matter jurisdiction because the indictments did not allege the element absence from the scene of the crime. Before addressing the specific facts of this case, we first address the confusion that has arisen in past jurisprudence

between the sufficiency of the indictment and the subject matter jurisdiction of the trial court.

Recently, the United States Supreme Court, in United States v. Cotton, 535 U.S. 625 (2002), held that a defective indictment does not deprive a court of jurisdiction.[2] The Supreme Court explained that *Ex parte* Bain, 121 U.S. 1 (1887), was the progenitor of the view that a defective indictment deprived a court of its jurisdiction. Bain, however, is the product of an era in which [the Supreme Court]s authority to review criminal convictions was greatly circumscribed. At the time it was decided, a defendant could not obtain direct review of his criminal conviction in the Supreme Court. Cotton, 535 U.S. at 629-630. As a result, the Supreme Courts desire to correct obvious constitutional violations led to a somewhat expansive notion of jurisdiction, which was more a fiction than anything else. *Id.* at 630.

The Supreme Court further stated that Bains elastic concept of jurisdiction is not what the term jurisdiction means today, *i.e.* the courts statutory or constitutional power to adjudicate the case. *Id.* This latter concept of subject-matter jurisdiction, because it involves a courts power to hear a case, can never be forfeited or waived. Consequently, defects in subject-matter jurisdiction require correction regardless of whether the error was raised [below]. *Id.*

The Supreme Court stated that its cases after Bain have held that a defective indictment does not affect the jurisdiction of the trial court to determine the case presented by the indictment. The Supreme Court then overruled Bain to the extent it held a defective indictment deprives a court of jurisdiction.

Turning to South Carolina jurisprudence, we note this Court has held that subject matter jurisdiction is the power of a court to hear and determine cases of the general class to which the proceedings in question belong, Pierce v. State, 338 S.C. 139, 526 S.E.2d 222 (2000); and that issues related to subject matter jurisdiction may be raised at any time. Brown v. State, 343 S.C. 342, 540 S.E.2d 846 (2001). The lack of subject matter jurisdiction may not be waived, even by consent of the parties, and should be taken notice of by this Court. *Id.* However, as was done by the Supreme Court in Bain, this Court broadened the meaning of jurisdiction in State v. Munn, 292 S.C. 497, 357 S.E.2d 461 (1987). Prior to Munn, the rule was that any objection to the sufficiency of the indictment, *i.e.* that the indictment was defective, had to be made before the jury was sworn. *See* State v. Young, 243 S.C. 187, 133 S.E.2d 210 (1963)[3] (challenge directed to the sufficiency of the indictment rather than to the jurisdiction of the Court to try the offense charged needed to be raised by a motion to quash before the jury was sworn). This rule was effectively altered by the Munn decision.

In Munn, citing 41 Am. Jur. 2d *Indictments and Informations*, 299 (1968), we stated that defects in the indictment that are of such a fundamental character as to make the indictment wholly invalid are not subject to waiver by a defendant. We concluded that, subject to certain minor exceptions, the trial court lacks subject matter jurisdiction to convict a defendant for an offense when there is no indictment charging him with that offense when the jury was sworn. This language conflated the meaning of subject matter jurisdiction and mixed two separate questions, *i.e.* whether the trial court has the power to hear a case and whether the indictment is sufficient.[4]

While our broadened definition of subject matter jurisdiction occurred more recently than during the time of Bain,[5] we find the Supreme Courts comments in Cotton instructive. As noted by the Supreme Court in Cotton and the Missouri Supreme Court in State v. Parkhurst, 845 S.W.2d 31 (Mo. 1992), subject matter jurisdiction of the circuit court and the sufficiency of the indictment are two distinct concepts and the blending of these concepts serves only to confuse the issue. Circuit courts obviously have subject matter jurisdiction to try criminal matters. To end the confusion that was created by Munn, we now conclusively hold that if an indictment is challenged as insufficient or defective, the defendant must raise that issue before the jury is sworn and not afterwards. *See* S.C. Code Ann. 17-19-90 (2003) (Every objection to any indictment for any defect apparent on the face thereof shall be taken by demurrer or on motion to quash such indictment before the jury shall be sworn and not afterwards.). However, a defendant may for the first time on appeal raise the issue of the trial courts jurisdiction to try the class of case of which the defendant was convicted.[6]

As stated in State v. Faile, 43 S.C. 52, 59-60, 20 S.E. 798, 801 (1895), *overruled on other grounds by* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (citations omitted):

> The indictment is the charge of the state against the defendant, the pleading by which he is informed of the fact, and the nature and scope of the accusation. When that indictment is presented, that accusation made, that pleading filed, the accused has two courses of procedure open to him. He may question the propriety of the accusation, the manner in which it has been presented, the source from which it proceeds, and have these matters promptly and properly determined; or, waiving them, he may put in issue the truth of the accusation, and demand the judgment of his peers on the merits of the charge. If he omits the former, and chooses the latter, he ought not, when defeated on the latter, --when found guilty of the crime charged, --to be permitted to go back to the former, and inquire as to the manner and means by which the charge was presented.

The indictment is a notice document. A challenge to the indictment on the ground of insufficiency must be made before the jury is sworn as provided by 17-19-90. If the objection is timely made, the circuit court should judge the sufficiency of the indictment by determining whether (1) the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer and whether he may plead an acquittal or conviction thereon; and (2) whether it apprises the defendant of the elements of the offense that is intended to be charged. State v. Wilkes, 353 S.C. 462, 578 S.E.2d 717 (2003); *see also* S.C. Code Ann. 17-19-20 (2003) (sufficiency of indictment). In determining whether an indictment meets the sufficiency standard, the court must look at the indictment with a practical eye in view of all the surrounding circumstances. State v. Adams, 277 S.C. 115, 283 S.E.2d 582 (1981). Further, whether the indictment could be more definite or certain is irrelevant. State v. Knuckles, 354 S.C. 626, 583 S.E.2d 51 (2003).

We note that our holding today, while overruling several cases,[7] is in line with modern jurisprudence.[8]

Addressing the instant case, appellant argues the indictments failure to allege the element absence from the scene of the crime deprives the trial court of subject matter jurisdiction to hear the accessory before the fact charges. Because appellant did not raise the sufficiency of the indictments before the jury was sworn, he cannot now raise this issue on appeal. The issue is not preserved for our review.

II. Absence From Scene of the Crime

Appellant argues the trial court erred by failing to direct a verdict on the accessory charges when no evidence was presented that he was absent from the scene of the crime.

A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. State v. Curtis, 356 S.C. 622, 591 S.E.2d 600 (2004). In reviewing a motion for directed verdict, the trial judge is concerned with the existence of the evidence, not with its weight. *Id.* On appeal from the denial of a directed verdict, an appellate court must view the evidence in the light most favorable to the State. *Id.* If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the Court must find the case was properly submitted to the jury. *Id.*

Regarding the accessory before the fact to armed robbery charge, the testimony indicates appellant was present during the time Tommie pulled a gun on the victim and informed the victim they were going to take the cocaine. Rico testified appellant left the victims house with the cocaine indicating appellant assisted in completing the armed robbery. Further, appellant, in his first statement to police, did not mention the cocaine and, in his second statement, he stated that he was in the car with Rico when Osbey entered the car with the cocaine. Therefore, there was conflicting evidence whether appellant was present during the taking of the cocaine from the victims possession.[9]

Regarding the crime of accessory before the fact to ABIK, Rico testified appellant motioned Osbey to enter the victims home pursuant to the plan for Osbey to come in and shoot everyone. Rico also indicated appellant was present during the shooting. However, Tommie and appellant testified appellant was *not* present during the shooting.

Given the conflicting evidence on both charges, the trial court appropriately submitted the charges to the jury and properly denied the directed verdict motion. *See* State v. Curtis, *supra* (defendant not entitled to directed verdict when State has produced evidence of offense charged; if there is any direct evidence or substantial circumstantial evidence reasonably tending to prove guilt of accused, Court must find case was properly submitted to jury).

III. Illegal Drugs as Subject of Armed Robbery

Appellant argues the trial court erred by failing to direct a verdict in his favor on accessory before the fact to armed robbery where the alleged subject of the armed robbery was a quantity of illegal narcotics. However, illegal drugs may be the subject of an armed robbery. *See, e.g.,* State v. Oliver, 434 S.E.2d 202 (N.C. 1993) (drugs may be subject of armed robbery); Guy v. State, 839 P.2d 578 (Nev. 1992), *cert. denied*, 507 U.S. 1009 (1993) (drugs can be subject of robbery).

Appellant also argues the State did not introduce any testimony regarding the value of the narcotics. However, Tommie testified the cocaine taken from the victims home had a value of approximately $9,000. Accordingly, the State introduced evidence that something of value had been taken from the victim.

AFFIRMED.

TOAL, C.J., WALLER and BURNETT, JJ., concur. PLEICONES, J., dissenting in a separate opinion.

APPENDIX

While perhaps not a complete listing of all the cases affected by this decision, the following cases are overruled to the extent they combine the concept of the sufficiency of an indictment and the concept of subject matter jurisdiction, *i.e.* a trial courts power to hear a charge:

1. Koon v. State, 358 S.C. 359, 595 S.E.2d 456 (2004).
2. Thompson v. State, 357 S.C. 192, 593 S.E.2d 139 (2004).
3. Mathis v. State, 355 S.C. 87, 584 S.E.2d 366 (2003).
4. State v. Knuckles, 354 S.C. 626, 583 S.E.2d 51 (2003).
5. Cohen v. State, 354 S.C. 563, 582 S.E.2d 403 (2003).
6. Cutner v. State, 354 S.C. 151, 580 S.E.2d 120 (2003).
7. State v. Wilkes, 353 S.C. 462, 578 S.E.2d 717 (2003).
8. Hooks v. State, 353 S.C. 48, 577 S.E.2d 211 (2003).
9. Joseph v. State, 351 S.C. 551, 571 S.E.2d 280 (2002).
10. State v. Parker, 351 S.C. 567, 571 S.E.2d 288 (2002).
11. Odom v. State, 350 S.C. 300, 566 S.E.2d 528 (2002).
12. State v. Primus, 349 S.C. 576, 564 S.E.2d 103 (2002).
13. State v. Timmons, 349 S.C. 389, 563 S.E.2d 657 (2002).
14. State v. Owens, 346 S.C. 637, 552 S.E.2d 745 (2001).
15. State v. Elliott, 346 S.C. 603, 552 S.E.2d 727 (2001).
16. State v. Lynch, 344 S.C. 635, 545 S.E.2d 511 (2001).
17. Brown v. State, 343 S.C. 342, 540 S.E.2d 846 (2001).
18. State v. McFadden, 342 S.C. 629, 539 S.E.2d 387 (2000).
19. Locke v. State, 341 S.C. 54, 533 S.E.2d 324 (2000).
20. Knox v. State, 340 S.C. 81, 530 S.E.2d 887 (2000).
21. Weinhauer v. State, 334 S.C. 327, 513 S.E.2d 840 (1999).
22. Browning v. State, 320 S.C. 366, 465 S.E.2d 358 (1995).
23. Johnson v. State, 319 S.C. 62, 459 S.E.2d 840 (1995).
24. Hopkins v. State, 317 S.C. 7, 451 S.E.2d 389 (1994).
25. Slack v. State, 311 S.C. 415, 429 S.E.2d 801 (1993).[10]
26. State v. Evans, 307 S.C. 477, 415 S.E.2d 816 (1992).
27. State v. Munn, 292 S.C. 497, 357 S.E.2d 461 (1987).
28. State v. Beachum, 288 S.C. 325, 342 S.E.2d 597 (1986).
29. Summerall v. State, 278 S.C. 255, 294 S.E.2d 344 (1982).
30. State v. Langford, 223 S.C. 20, 73 S.E.2d 854 (1953).
31. State v. Hann, 196 S.C. 211, 12 S.E.2d 720 (1940).
32. State v. Lazarus, 83 S.C. 215, 65 S.E. 270 (1909).
33. State v. Campbell, 361 S.C. 529, 605 S.E.2d 576 (Ct. App. 2004).
34. State v. Walton, 361 S.C. 282, 603 S.E.2d 873 (Ct. App. 2004).
35. State v. Gonzales, 360 S.C. 263, 600 S.E.2d 122 (Ct. App. 2004).
36. State v. Perry, 358 S.C. 633, 595 S.E.2d 883 (Ct. App. 2004).
37. State v. Barnett, 358 S.C. 199, 594 S.E.2d 534 (Ct. App. 2004).
38. State v. Bryson, 357 S.C. 106, 591 S.E.2d 637 (Ct. App. 2003).
39. State v. Smalls, 354 S.C. 498, 581 S.E.2d 850 (Ct. App. 2003).
40. State v. Wright, 354 S.C. 48, 579 S.E.2d 538 (Ct. App. 2003).
41. State v. Bullard, 348 S.C. 611, 560 S.E.2d 436 (Ct. App. 2002).
42. State v. Hamilton, 344 S.C. 344, 543 S.E.2d 586 (Ct. App. 2001).
43. *In re* Jason T., 340 S.C. 455, 531 S.E.2d 544 (Ct. App. 2000).
44. State v. Ervin, 333 S.C. 351, 510 S.E.2d 220 (Ct. App. 1998).

JUSTICE PLEICONES: I respectfully dissent.

I agree with the majority that the question of the sufficiency of an indictment is not a matter of subject matter jurisdiction, and that in this case the indictments, while flawed, were sufficient to confer jurisdiction. I write separately, however, because in my view the circuit court lacks subject matter jurisdiction to conduct a trial of a criminal charge where there has been no presentment of an indictment by the grand jury. See State v. Evans, 307 S.C. 477, 415 S.E.2d 816 (1992) (valid indictment or waiver of presentment prerequisite for circuit courts subject matter jurisdiction). Further, in my view, the circuit court lacks subject matter jurisdiction to accept a plea of guilty unless there has been a presentment or a written waiver of presentment. S.C. Const. art. I, 11; State v. Lazarus, 83 S.C. 215, 65 S.E. 270 (1909); S.C. Code Ann. 17-23-120 to -150 (1985); compare e.g., State v. Mitchell, 1 Bay (1 S.C.L.) 267 (1792) (S.C. Const. art. 3, 2, required serious criminal cases come before the court of general jurisdiction through the medium of a grand jury, by indictment).

In my view, the majority misapprehends the function of an indictment when it holds that its purpose is merely to serve as notice to the defendant of the charges against him. An indictment serves multiple functions: to enable the accused to repel or rebut the charge, to protect him from a future prosecution for the same charge, [11]and to enable the court to pronounce its judgment. State v. Halder, 2 McCord (13 S.C. L.) 377 (1823). While it may be that the first and second reasons for requiring an indictment inure solely to the defendants benefit, and therefore may be waived by him, the third requirement is for the benefit of the circuit court, and is not subject to waiver by the defendant. Compare State v. Pollard, 255 S.C. 339, 179 S.E.2d 21 (1971) (defendant may waive constitutional provision intended for his benefit). Further, unlike the other state constitutional provisions which benefit an accused,[12] Article I, 11 contains a limitation on waiver: The last sentence of this section states The General Assembly may provide for the waiver of an indictment by the accused. Pursuant to this grant of authority, the legislature has enacted statutory waiver provisions. S.C. Code Ann. 17-23-120 through -150. In my opinion, we must honor the limitation on an accuseds right to waive the requirements of this constitutional provision.[13] Finally, even if we were to find that a defendant might waive this constitutional requirement, such a waiver would be valid only if made knowingly, intelligently, and voluntarily. I am concerned about the increase in post-conviction filings that would result from our abandonment of the requirement of an indictment or a written waiver of presentment, the resulting appellate proceedings, and the inevitable grants of relief. I believe the limited resources of the judicial branch are better served by requiring compliance on the front end with this clear, unambiguous, and long-standing constitutional prerequisite to a criminal proceeding.[14]

I also disagree with the majoritys decision to affirm the denial of appellants directed verdict motions on the charges of accessory before the fact. I take a more expansive view of what constitutes presence at the scene than does the majority. Appellant accompanied the codefendants to the scene and entered the home with prior knowledge of their plan to commit a crime. Presence at the scene by prearrangement to aid, encourage, or abet in the perpetration of the crime constitutes guilt as a principal. State v. Leonard, 292 S.C. 133, 355 S.E.2d 270 (1987). It is not necessary that the person participate in the actual crime or even observe it in order to be present at the scene and guilty as a principal. See, e.g., State v. Gates, 269 S.C. 557, 238 S.E.2d 680 (1977) (getaway driver guilty as principal in armed robbery). In my opinion, the evidence here is susceptible only of the inference that appellant was present at the scene aiding, encouraging, and/or abetting the codefendants, and therefore the directed verdicts should have been granted. State v. Smith, 316 S.C. 53, 447 S.E.2d 175 (1993) (absence from scene is element of accessory before the fact).

For the reasons given above, I respectfully dissent.

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[1]The elements which must concur to justify the conviction of one as an accessory before the fact are as follows: (1) that the defendant advised and agreed, or urged the parties or in some way aided them, to commit the offense; (2) *that the defendant was not present when the offense was committed*; and (3) that the principal committed the crime. State v. Smith, 316 S.C. 53, 447 S.E.2d 175 (1993) (emphasis added).

[2]Cotton argued that because his federal indictment omitted the threshold levels of drug quantity that enhances the statutory maximum sentence, the trial court was without jurisdiction to impose a sentence for an offense not charged in the indictment.

[3]*Cert. denied*, 379 U.S. 868 (1964).

[4]*See also* Mathis v. State, 355 S.C. 87, 584 S.E.2d 366 (2003) (in finding court lacked subject matter jurisdiction to convict petitioner of first degree burglary, this Court stated S.C. Code Ann. 17-19-90 (2003) applies to indictment defects that do not affect the subject matter jurisdiction of the circuit court and does not limit a courts consideration of indictment defects that affect subject matter jurisdiction, no matter when such issues are raised).

[5]*But see* State v. Carroll, 30 S.C. 85, 8 S.E. 433 (1889) (implying question of jurisdiction raised where indictment missing element of the offense).

[6]We note that a presentment of an indictment or a waiver of presentment is not needed to confer subject matter jurisdiction on the circuit court. However, an indictment is needed to give notice to the defendant of the charge(s) against him. *See* S.C. Const. Art. I, 11 (No person may be held to answer for any crime the jurisdiction over which is not within the magistrates court, unless on a presentment or indictment of a grand jury of the county where the crime has been committed . . .); S.C. Code Ann. 17-19-10 (2003) (No person shall be held to answer in any court for an alleged crime or offense, unless upon indictment by a grand jury . . . .). A defendant must object if he is not presented with the indictment or if he has not waived his right to presentment. If the defendant does not object, he is deemed to have waived the right to presentment. *See* State v. Pollard, 255 S.C. 339, 179 S.E.2d 21 (1971) (individual may waive any provision of the Constitution intended for his benefit).

[7]See Appendix.

[8]Few jurisdictions combine the concepts of subject matter jurisdiction of the trial court and the sufficiency of the indictment. *See, e.g., Ex parte* Cole v. State, 842 So.2d 605 (Ala. 2002) (when first-degree robbery indictment fails to set forth essential element of offense of second-degree robbery, insufficiency of factual basis for guilty plea to second-degree robbery may be attacked on basis court lacked subject matter jurisdiction to accept the plea); State v. Bullock, 574 S.E.2d 17 (N.C. App. 2002) (when indictment does not allege essential elements of crime charged, trial court does not have subject matter jurisdiction); State v. Presler, 176 N.E.2d 308 (Ohio App. 1960) (court did not have subject matter jurisdiction where indictment did not state element of the offense).

[9]Armed robbery occurs when a person commits robbery, which is defined as the felonious or unlawful taking of money, goods, or other personal property of any value from the person of another or in his presence by violence or by putting such person in fear, while armed with a deadly weapon. Joseph v. State, 351 S.C. 551, 571 S.E.2d 280 (2002).

[10]*Abrogated on other grounds by* Simpson v. State, 329 S.C. 43, 495 S.E.2d 429 (1998).

[11] A claim of double jeopardy is ordinarily judged by comparing the allegations made in the second indictment with those made in the first. E.g., State v. Shirer, 20 S.C. 392 (1894).

[12] Compare S.C. Const. art. VI, 8, permitting governor to suspend certain public officers upon indictment, or upon the waiver of such indictment if permitted by law . . . .

[13]It is the right to waive presentment, as provided by statute, that is the personal right of the accused and he may waive only the place of its execution, not the execution itself. State v. Evans, *supra*.

[14] The Constitutional requirement that no man be tried on serious criminal charges save upon the grand jurys presentment of a true billed indictment has its roots in the English common law. As this Court acknowledged in 1932:

> The Grand Jury is of very ancient origin in the history of England . . .it was at the time of the settlement of this country *an informing and accusing body only* . . . And in the struggles which in those times arose in England between the powers of the King and the rights of the subject, it often stood as a barrier against persecution in his name.
>
> (italics in original)

State v. Bramlett, 166 S.C. 323, 164 S.E. 873 (1932).
The Grand Jury exists not merely to investigate and accuse, but acts as a curb on the unbridled power of the sovereign.

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Beth Padgett

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