The Supreme Court of South Carolina

In the Matter of Paula Jill Wright, Petitioner

Appellate Case No. 2017-000496

ORDER

Petitioner is currently admitted to practice law in South Carolina, and has now submitted a resignation under Rule 409 of the South Carolina Appellate Court Rules. The resignation is accepted.

If petitioner is currently representing any South Carolina clients, petitioner shall immediately notify those clients of the resignation by certified mail, return receipt requested. Further, if petitioner is currently counsel of record before any court of this State, petitioner shall immediately move to be relieved as counsel in that matter.

Within twenty (20) days of the date of this order, petitioner shall:

(1) surrender the certificate of admission to the Clerk of this Court. If petitioner cannot locate this certificate, petitioner shall provide the Clerk with an affidavit indicating this fact and indicating that the certificate will be immediately surrendered if it is subsequently located.

(2) provide an affidavit to the Clerk of this Court showing that petitioner has fully complied with the requirements of this order.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

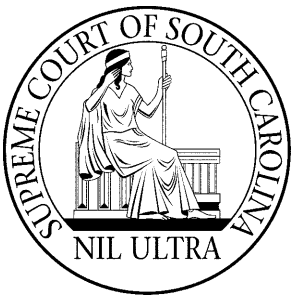
s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina

March 23, 2017



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 13
March 29, 2017
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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The Supreme Court of South Carolina

Bobby Wayne Stone, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2013-001968

ORDER

We deny both Petitions for Rehearing. We also deny the motion to stay remittitur. The attached opinion is substituted for the previous opinion, which is withdrawn. The only changes in the substituted opinion are to the second full paragraph on the twenty-sixth page of the majority opinion.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ Costa M. Pleicones A.J.

Columbia, South Carolina

March 29, 2017

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Bobby Wayne Stone, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2013-001968

ON WRIT OF CERTIORARI

Appeal from Sumter County
R. Markley Dennis, Jr., Trial Judge
Howard P. King, Resentencing Judge
Michael G. Nettles, Post-Conviction Relief Judge

Opinion No. 27701
Heard March 23, 2016 – Refiled March 29, 2017

AFFIRMED

Emily C. Paavola, of Justice 360, of Columbia, and John H. Blume, III, of Cornell Law School, of Ithaca, New York, for Petitioner.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General Alphonso Simon, Jr., all of Columbia, for Respondent.

JUSTICE FEW: Bobby Wayne Stone shot and killed Charlie Kubala of the Sumter County Sheriff's Office. After we affirmed his murder conviction and death sentence, Stone filed an application for post-conviction relief (PCR) alleging he received ineffective assistance of counsel. The PCR court denied relief. We granted certiorari, and now affirm.

I. Facts and Procedural History

Stone began the day of February 26, 1996, by purchasing beer and two firearms—a .410 bore shotgun and a competition-grade .22 caliber semi-automatic pistol. He spent the remainder of the day roaming through the woods, drinking the beer and shooting the guns. Later that afternoon, Stone wandered into the backyard of Ruth Griffith. In Stone's statement to the police, he said he and Griffith were "old drinking buddies." Griffith denied that, and claimed she knew Stone only because he previously dated her niece and had been to Griffith's house to pick up her niece. Griffith's adult daughter, Mary Ruth McLeod, was living with Griffith and was at the house when Stone arrived. McLeod asked Stone—who was standing in the yard holding a beer can and his newly-purchased pistol—to leave the property. Stone complied, but McLeod had already called 911. Sergeant Charles Kubala arrived at Griffith's house at 6:06 p.m. By then, Stone had returned to the woods, so Sergeant Kubala checked the scene, spoke with McLeod and Griffith, and left.

A short time later, Griffith heard gunshots in her yard and then someone banging on the inside door of her side porch. McLeod had left the house, so Griffith called her neighbor—Landrow Taylor—who came over and called 911 from inside Griffith's home. Sergeant Kubala once again responded to the call, arriving at 7:07 p.m. Stone was still on the side porch, banging on the door and holding his pistol in his hand. Taylor and Griffith remained inside while Sergeant Kubala went around the house toward the side porch. From inside, Taylor and Griffith heard someone yell "halt" or "hold it," followed immediately by three or four gunshots. Stone struck Sergeant Kubala with two of the shots—once in the neck and once in the ear—and Sergeant Kubala died on the scene.

After hours of searching, Sumter County Sheriff's officers found Stone in the woods, lying motionless between two logs with the murder pistol beneath his body. Early the next morning, Stone gave a statement in which he confessed to the

shooting. He claimed it was an accident, however, explaining, "I just turned from the house door and the gun went off on the porch and I ran."

At the 1997 trial, Stone was represented by Cameron B. Littlejohn Jr. and James H. Babb. The jury convicted Stone of murder, first-degree burglary, and possession of a weapon during a violent crime. The jury found the statutory aggravating circumstance for the murder of a law enforcement officer and recommended Stone be sentenced to death. We affirmed Stone's convictions, but reversed his death sentence and remanded the case for a new sentencing proceeding. *State v. Stone*, 350 S.C. 442, 567 S.E.2d 244 (2002). In the 2005 resentencing proceeding, he was again represented by Littlejohn and Babb. For the second time, the jury recommended Stone be sentenced to death. On appeal, he was represented by Joseph L. Savitz III. We affirmed the death sentence. *State v. Stone*, 376 S.C. 32, 655 S.E.2d 487 (2007).

Stone filed an application for PCR alleging he received ineffective assistance of counsel during his 1997 trial, his 2005 resentencing proceeding, and his subsequent appeal. The PCR court denied relief on all claims.

Stone filed a petition for a writ of certiorari, which we granted as to three sets of issues: (1) whether Stone's trial and appellate counsel were ineffective in dealing with victim impact evidence, (2) whether Stone's trial counsel was ineffective in investigating and presenting evidence of brain damage, and (3) whether Stone's trial counsel was ineffective in investigating and presenting evidence of the accident theory of the case. We affirm as to all issues.

II. Sixth Amendment

The Sixth Amendment guarantees every criminal defendant the reasonably effective assistance of counsel. U.S. CONST. amend. VI.; *Strickland v. Washington*, 466 U.S. 668, 683, 104 S. Ct. 2052, 2061, 80 L. Ed. 2d 674, 691 (1984); *Von Dohlen v. State*, 360 S.C. 598, 603, 602 S.E.2d 738, 740 (2004). We measure counsel's performance by "an objective standard of reasonableness." *Weik v. State*, 409 S.C. 214, 233, 761 S.E.2d 757, 767 (2014) (quoting *Wiggins v. Smith*, 539 U.S. 510, 521, 123 S. Ct. 2527, 2535, 156 L. E. 2d 471, 484 (2003)). As we analyze whether Stone's counsel met the Sixth Amendment standard, the law requires we presume counsel rendered adequate assistance and exercised reasonable professional judgment. *Strickland*, 466 U.S. at 690, 104 S. Ct. at 2066,

80 L. Ed. 2d at 695; *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). To overcome this presumption and prevail on his ineffective assistance of counsel claim, Stone must satisfy the *Strickland* test, which requires that he prove: "(1) counsel's representation fell below an objective standard of reasonableness and (2) but for counsel's error, there is a reasonable probability that the outcome of the proceeding would have been different." *Williams v. State*, 363 S.C. 341, 343, 611 S.E.2d 232, 233 (2005) (citing *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. E. 2d at 693).

III. Victim Impact Evidence

Stone makes two categories of arguments regarding the performance of his trial and appellate counsel as to the admissibility of victim impact evidence offered by the State during the resentencing proceeding. First, he argues trial counsel was ineffective in not objecting to portions of the testimony of law enforcement officers the State presented as victim impact evidence. The second category relates to the testimony of Teresa Kubala-Hanvey, Sergeant Kubala's widow. Kubala-Hanvey testified she attempted suicide after hearing this Court reversed the first death sentence and remanded for a new sentencing proceeding. As to Kubala-Hanvey's testimony, Stone makes two arguments. First, he contends trial counsel—while he did object—was ineffective in omitting several grounds for the objection. Second, Stone argues his appellate counsel was ineffective in not addressing in his brief the only ground on which trial counsel objected. As to both categories of arguments, we find Stone met his burden of proof under the first prong of *Strickland*, but not under the second prong.

A. Law Enforcement Officers' Testimony

The State offered seven victim impact witnesses during the resentencing proceeding. Several of them were colleagues of Sergeant Kubala at the Sumter County Sheriff's Office. These officers testified extensively about the impact of Sergeant Kubala's death on them personally, on the Sheriff's office generally, and on the community as a whole. Stone argues five particular components of the officers' testimony were inadmissible, and contends his trial counsel was deficient in not objecting when the State offered each into evidence. First, Major Gary Metts testified about a golf tournament organized in Sergeant Kubala's honor. Second, Major Metts explained that the tournament proceeds are used to fund college scholarships for the children of law enforcement officers killed in the line

of duty.[1] Third, Major Metts testified the Sheriff's Office maintained an "Explorer Group," a program designed to help children, for which Sergeant Kubala volunteered. Major Metts testified the program "collapsed" after Sergeant Kubala's death. Fourth, Captain Gene Edward Hobbs recounted to the jury how he went to Sergeant Kubala's house to tell Kubala-Hanvey about her husband's death. Fifth, Captain Hobbs described how the Sheriff's Office takes new recruits to visit the location where Sergeant Kubala died and to his gravesite to "talk about the consequences of the job."

Under South Carolina law, "victim impact evidence is relevant for a jury to 'meaningfully assess the defendant's moral culpability and blameworthiness.'" *State v. Hughey*, 339 S.C. 439, 457, 529 S.E.2d 721, 730-31 (2000) (quoting *Payne v. Tennessee*, 501 U.S. 808, 825, 111 S. Ct. 2597, 2608, 115 L. Ed. 2d 720, 735 (1991)), *overruled on other grounds by Rosemond v. Catoe*, 383 S.C. 320, 330, 680 S.E.2d 5, 10 (2009). The State may present victim impact evidence for the purpose of demonstrating "the 'uniqueness' of the victim and the specific harm committed by the defendant." *Hughey*, 339 S.C. at 457, 529 S.E.2d at 730 (quoting *State v. Rocheville*, 310 S.C. 20, 27, 425 S.E.2d 32, 36 (1993)). In *State v. Bennett*, we explained that evidence of "the specific harm caused by the defendant" can "includ[e] the impact of the murder on the victim's family and 'a quick glimpse of the life which the defendant chose to extinguish.'" 369 S.C. 219, 228, 632 S.E.2d 281, 286 (2006) (quoting *Payne*, 501 U.S. at 825, 822, 111 S. Ct. at 2608, 2607, 115 L. Ed. 2d at 735, 733). Under *Payne*, "if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no *per se* bar." 501 U.S. at 827, 111 S. Ct. at 2609, 115 L. Ed. 2d. at 736. However, when victim impact "evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." 501 U.S. at 825, 111 S. Ct. at 2608, 115 L. Ed. 2d at 735.

We begin our analysis of whether counsel's performance was deficient under the Sixth Amendment for not objecting to these five components of testimony by observing that the "admission or exclusion of evidence" in a capital trial is within

[1] Stone actually argues four objectionable components, combining our first and second categories as one. As our discussion of this issue will indicate, however, we believe we can more effectively analyze Stone's claims if we treat the golf tournament and the use of its proceeds as separate categories.

the "discretion of the trial court." *State v. Wise*, 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004). We have specifically applied that principle to the admission of victim impact evidence in the penalty phase, stating, "A trial judge has considerable latitude in ruling on the admissibility of evidence." *State v. Bixby*, 388 S.C. 528, 554-55, 698 S.E.2d 572, 586 (2010) (discussing our review of the trial court's decision to admit "a seven minute video showing portions of [the officer's] funeral"). In this context, we examine trial counsel's performance.

At the PCR trial, Stone's PCR counsel asked trial counsel whether he considered objecting to Captain Hobbs' testimony, to which he replied,

> I considered objecting to a lot of this, but Judge King was being very liberal in what he was allowing in from the standpoint of victim's testimony. I mean I felt if he allowed in what Ms. Kubala said about her reaction to the appeal that he was probably going to allow this in. I didn't want to be perceived by the jury as—as jumping up and objecting to everything like I was trying to hide something. So yes, I did consider it. I didn't consider my chances of winning that objection . . . to be very good and I mean there's a lot of leeway that the courts have allowed in—in this kind of testimony.

Stone's PCR counsel also asked trial counsel whether he considered objecting to Major Metts' testimony. He replied,

> I considered objecting to a lot of this, but I did not feel that the objection would be sustained. I didn't want to be perceived as—as trying to hide things and . . . I just think Judge King would have—would have let it in.

Trial counsel is repeatedly required during any trial—particularly a capital trial—to make split-second decisions on many subjects, including whether to object to testimony. There are a variety of reasons counsel may soundly choose not to make such an objection, including the reality that not all evidence offered by the State is harmful to the defendant. Under certain circumstances, therefore, counsel may employ a strategy of not objecting—even when counsel has a good argument for exclusion—if counsel reasonably perceives the benefits of doing so are outweighed

by some other consideration. *See Watson v. State*, 370 S.C. 68, 72–73, 634 S.E.2d 642, 644 (2006) (finding counsel's performance was not deficient in making the decision not to object to "inadmissible" testimony because his strategy—that doing so "might lead to the more damaging introduction" of other evidence—was sound). The necessity of making these and other strategic decisions is part of the difficulty of trying any case, and these difficulties are intensified in a capital trial.

For these and other reasons, we defer to reasonable strategies employed by counsel at trial. As the Supreme Court explained in *Strickland*,

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.

466 U.S. at 689, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694-95 (citations omitted).

Stone argues trial counsel's decision not to object was an invalid strategic decision because the reasons counsel gave for employing the strategy were not sound. As we have often stated, counsel's strategic decisions will not be found to be deficient performance if he articulates a valid reason for employing the strategy. *E.g.*, *Smith*

*v. Stat*e, 386 S.C. 562, 567-68, 689 S.E.2d 629, 632-33 (2010); *Caprood v. State*, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000); *Stokes v. State*, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992). The necessary converse of this principle is that counsel's decision to employ a certain strategy will be deemed unreasonable under the Sixth Amendment if the reasons given for the strategy are not sound. *See Dawkins v. State*, 346 S.C. 151, 157, 551 S.E.2d 260, 263 (2001) (finding counsel's performance was deficient in making a decision not to object to the admission of testimony when the underlying strategy was not sound).

Stone's trial counsel gave three reasons for not objecting to the law enforcement officers' testimony. First, trial counsel stated "Judge King was being very liberal in what he was allowing in from the standpoint of victim's testimony." Second, trial counsel stated—specifically as to Captain Hobbs—he "felt if [Judge King] allowed in what [Kubala-Hanvey] said about her reaction to the appeal that he was probably going to allow this in." Third, trial counsel stated he "didn't want to be perceived by the jury as . . . as jumping up and objecting to everything like [he] was trying to hide something." We agree with Stone that none of counsel's reasons for not objecting were sound strategic reasons.

As to the first reason, although the trial court has wide discretion in making a ruling on the admissibility of victim impact evidence, counsel has potentially good arguments for its exclusion. *See supra*, discussion of *Bennett*, *Hughey*, and *Payne*. This is particularly true when the State offers evidence that pushes the limits of permissible victim impact. *See United States v. Fields*, 516 F.3d 923, 947 (10th Cir. 2008) ("Including the community in the victim-impact inquiry is fraught with complication."). Of the five components of victim impact evidence to which Stone argues his counsel should have objected, we find the fourth component—Captain Hobbs' testimony about informing Sergeant Kubala's widow of his death—would almost certainly have been properly admitted. While we stress that such decisions are within the discretion of the trial court, we can hardly imagine a more direct impact of a victim's death than the events and circumstances surrounding his family learning of it. *See Bennett*, 369 S.C. at 228, 632 S.E.2d at 286 (explaining that permissible victim impact evidence includes "'the specific harm caused by the defendant,' including the impact of the murder on the victim's family").

On the other hand, we find the second component—the use of the proceeds from the golf tournament—and the fifth component—the testimony about taking new recruits to Sergeant Kubala's gravesite—are more likely to have been excluded.

We find it difficult to relate this evidence to the definitions we have previously given of permissible victim impact evidence because these two components show primarily the general impact of Sergeant's Kubala's death on the community, as opposed to showing his unique qualities or a specific harm caused by the murder. *See supra*, discussion of *Bennett* and *Hughey*. *But see Bixby*, 388 S.C. at 556, 698 S.E.2d at 587 (finding the admission of victim impact evidence permissible "because it showed the traditional trappings of a law enforcement officer's funeral, demonstrating the general loss suffered by society").

The other two components—the golf tournament itself and the "collapse" of the "Explorer Program"—are close calls, subject to the discretion of the trial court. These two components do show more than the victim's uniqueness and the specific impact of the murder, but they also illustrate the qualities of Sergeant Kubala that made him special and unique. For instance, that his colleagues would hold a golf tournament in his honor, and his extensive involvement in the "Explorer Program" such that it could not continue in his absence, show the kind of person Sergeant Kubala was. *See Riddle v. State*, 314 S.C. 1, 11-12, 443 S.E.2d 557, 563-64 (1994) (holding testimony about victim's standing in the community was allowable "to establish the victim as a unique human being").

We do not intend with this discussion to define which of the five components would have been permissible for the trial court to admit within its discretion. Rather, we discuss them to demonstrate that, with varying degree, the admission of each one was debatable. Without an objection, however, there can be no debate; and the trial court has no opportunity to exercise its discretion. Here, even if the trial court was being "liberal" in allowing victim impact testimony, trial counsel should have objected to those components of the law enforcement officers' testimony as to which counsel felt he had a reasonably persuasive argument for exclusion. If he had objected in those instances, the trial court may have sustained the objection. But in any event, counsel would have at least tested the trial court's discretion. *See Ard*, 372 S.C. at 331, 642 S.E.2d at 597 ("When evaluating the reasonableness of counsel's conduct, 'the court should keep in mind that counsel's function . . . is to make the adversarial testing process work in the particular case.'" (quoting *Strickland*, 466 U.S. at 690, 104 S. Ct. at 2066, 80 L. Ed. 2d at 695)). The fact the trial court has such wide discretion does not justify the decision not to object. Rather, the debate that precedes the exercise of that discretion is part of the adversarial process *Ard* and *Strickland* require trial counsel to test.

In this case, counsel testified he made the decision not to object for reasons other than the strength of his argument for exclusion. In fact, we read counsel's testimony to say he made the decision not to object *despite* his belief that he had good grounds for the objection. A capital defendant would generally prefer to exclude victim impact evidence where possible because it is favorable to the State. This was not a situation in which trial counsel made several unsuccessful objections and then decided further objections were futile. Instead, the transcript reveals trial counsel did not make a single objection during either Major Metts' or Captain Hobbs' testimony. Under these circumstances, counsel's belief the trial court would overrule his objection does not justify the decision not to make it.

As to the second reason, trial counsel claims he did not object to Captain Hobbs' testimony, in part, because the trial court allowed Kubala-Hanvey to testify about her suicide attempt. This is not a valid explanation. In addition to the reasons we explained above, the transcript reveals Captain Hobbs testified the day before Kubala-Hanvey. The trial court's rulings during her testimony could not possibly have affected trial counsel's earlier decision not to object to Captain Hobbs' testimony.

Trial counsel's other explanation for not objecting—his concern the jury might think he "was trying to hide something"—is also not valid. *See Dawkins*, 346 S.C. at 157, 551 S.E2d at 263 (holding counsel's failure to object because he did not want to confuse or upset the jury was not a valid strategic decision); *Gallman v. State*, 307 S.C. 273, 276-77, 414 S.E.2d 780, 782 (1992) (holding trial counsel's failure to object because he did not want to "give the jury the idea that something was being hidden" was not a valid strategic decision). If trial counsel was truly concerned about the effect his objections would have on the jury, he should have sought a determination as to admissibility outside the jury's presence. *See Dawkins*, 346 S.C. at 157, 551 S.E.2d at 263 ("To eliminate the possibility of confusing or upsetting the jury, counsel could have sought a determination as to the inadmissibility of the . . . testimony out of the hearing of the jury . . . .").

Trial counsel failed to articulate any valid strategic reason for not objecting to important victim impact testimony the trial court had the discretion to exclude. Therefore, the decision not to object does not meet an objective standard of reasonableness, and Stone has satisfied the first prong of *Strickland*.

B. Testimony Regarding Widow's Suicide Attempt

In addition to the law enforcement officers, the State also called members of Sergeant Kubala's family to testify about the impact of his death. One of these witnesses was Teresa Kubala-Hanvey, his widow. Kubala-Hanvey testified about her relationship with Sergeant Kubala and the impact his death had on her and her children. Near the end of her testimony, the solicitor asked Kubala-Hanvey if there was "anything significant in your life that you'd like to tell the jury about?" Kubala-Hanvey responded, "I'm ashamed of it, but I'll tell them." She then narrated the events leading up to her suicide attempt. She testified,

> February the 11th, 2003, I woke up very depressed. They had called and told me that they were going to retry this case over again, that the supreme court had overturned it, and they called. They ended up having to, leaving a message. We had gone away. It was our first anniversary, Mike and I's first anniversary, and we had gone and taken the kids to the beach, and we got back on that first anniversary, that was on my answering machine, and so I had to deal with, and my husband, Mike, now he was working for UPS and got hurt on the job, and he was going through [workers' compensation] and stuff, and we were trying to sell his house because we had two house payments when we got married, and the UPS wouldn't take, take him back, so he lost his job and had to find another job, and everything just blew up. So that morning I got up, and Mike was still asleep.

At that point, Stone's trial counsel requested a bench conference, in which he made an off-the-record objection. After the bench conference, the trial court stated it would "allow the defense to put the matters on the record at a later time." Kubala-Hanvey continued,

> I decided I couldn't take any more, so I took the bottle of Tylenol PM and decided I was just going to end my life.

She went on to say attempting suicide was "stupid," her stint in the hospital as a result of the attempt was an "eye opener," and the experience made her realize she didn't "have [as] many problems as [she] thought she did."

After Kubala-Hanvey's testimony, the State called its one remaining witness and rested its case. Then the trial court allowed Stone's counsel to put his objection on the record. Counsel stated,

> It was apparent from her testimony that the causation factor there was not what had happened seven years earlier, but the fact that the legal proceeding was about to occur again. Your Honor, do you think the break in time, I mean the period from 1996 to 2003 certainly lessens the direct effect that she would otherwise be allowed to testify about. We think the fact that she was able to testify about this attempted suicide was extremely prejudicial to the defendant and that testimony should have been excluded.

The trial court ruled the objection was timely, but overruled the objection. The trial court stated, "I think that it was relevant, and for that reason I did overrule [your objection]."

On direct appeal to this Court, Stone argued the trial court erred by permitting the victim's widow to testify about her suicide attempt. 376 S.C. at 33, 655 S.E.2d at 487. In his brief, Stone's appellate counsel stated the issue as, "Did the victim's widow's testimony regarding her suicide attempt impermissibly inject an arbitrary factor into the jury's deliberations?" in violation of South Carolina Code subsection 16-3-25(C)(1) (2015).[2] 376 S.C. at 35, 655 S.E.2d at 488. The Court stated Stone's "argument before this Court goes along quite different lines" from the argument Stone made at trial, and on this basis found the issue unpreserved, and affirmed. 376 S.C. at 35-36, 655 S.E.2d at 488-89.

[2] Subsection 16-3-25(C)(1) requires that this Court "shall determine . . . [w]hether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor."

Stone contends trial counsel—while he did object—was deficient in omitting several grounds for the objection. Stone also argues his appellate counsel was deficient in failing to brief on appeal the only ground on which trial counsel did object. We agree that both trial and appellate counsel were deficient. At a minimum, trial counsel should have objected to the testimony as impermissible victim impact testimony.[3] *See generally Foye v. State*, 335 S.C. 586, 590, 518 S.E.2d 265, 267 (1999) (holding trial counsel was deficient in failing to preserve an issue for appeal).[4] Appellate counsel was deficient for two reasons. First, he failed to present the only argument trial counsel made. *See generally Patrick v. State*, 349 S.C. 203, 209, 562 S.E.2d 609, 612 (2002) (finding "counsel was deficient in failing to adequately raise or address the merits of the issue" on appeal); *Simpkins v. State*, 303 S.C. 364, 368, 401 S.E.2d 142, 144 (1991) (stating "failing to raise [a meritorious] issue clearly establishes ineffective assistance"), *overruled on other grounds by State v. Stokes*, 381 S.C. 390, 403-04, 673 S.E.2d 434, 441 (2009). Second, the only argument he did present was one this Court is already required to consider pursuant to subsection 16-3-25(C)(1).

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[3] According to the transcript of the resentencing proceeding, just before overruling trial counsel's objection, the trial court stated, "In my view [the suicide attempt] was partially related to the situation of . . . Sergeant Kubala, and I think he is the appropriately the victim in fact of testimony." The second half of this sentence makes little sense, which causes us to wonder if the trial court actually stated something to the effect of, "I think this is appropriately victim impact testimony." This does make sense, especially in the context of the court's overall ruling and trial counsel's argument that the murder did not cause the suicide attempt. Even if this is what the trial court ruled, however, trial counsel was deficient in failing to make the proper grounds for the objection sufficiently clear that appellate counsel and this Court could see the correct objection was made. This, in turn, should remind trial lawyers and trial courts of the dangers of off-the-record sidebar conferences on important issues such as objections to victim impact evidence. *See York v. Conway Ford, Inc.*, 325 S.C. 170, 173, 480 S.E.2d 726, 728 (1997) ("An objection made during an off-the-record conference which is not made part of the record does not preserve the question for review.").

[4] Stone also argues trial counsel should have objected on the ground the testimony "improperly injected appellate review into the jury's deliberations," and appears to suggest two additional bases for objection, which we view as subparts of the argument the testimony was impermissible victim impact testimony.

Stone was entitled to have the admissibility of Kubala-Hanvey's description of her suicide attempt litigated before this Court on direct appeal. His lawyers failed to place that issue before us. We find this failure does not meet an objective standard of reasonableness, and Stone has satisfied the first prong of the *Strickland* test.

C. Prejudice of Victim Impact Evidence

To demonstrate prejudice under the second prong of *Strickland*, Stone must prove that if counsel had not been deficient, "there is a reasonable probability the outcome of the proceeding would have been different." *Williams*, 363 S.C. at 343, 611 S.E.2d at 233. As to trial counsel's deficiency in failing to object to the testimony of Major Metts and Captain Hobbs and in failing to properly object to the testimony of Kubala-Hanvey, Stone would satisfy the second prong if he proved there is a reasonable probability that either (1) the trial court would have sustained an objection, which would in turn have changed the outcome of the resentencing proceeding, or (2) this Court would have reversed the death sentence on the basis of one of the preserved objections and remanded for a third sentencing proceeding. As to appellate counsel's deficiency in failing to brief the objection trial counsel made, Stone would satisfy the second prong if he proved there is a reasonable probability that this Court would have reversed the death sentence and remanded for a third sentencing proceeding. We find Stone did not prove prejudice under the second prong of *Strickland* as to any of these scenarios.

As to the outcome of the resentencing proceeding, we find that none of the five components of the officers' testimony, nor Kubala-Hanvey's testimony about her suicide attempt, were so compelling that the exclusion of the evidence was likely to result in the jury not making a recommendation of death. The officers' testimony requires little explanation; we simply do not find it to be significant enough to change the jury's verdict if the jury had not heard it.

Kubala-Hanvey's testimony regarding her suicide attempt does warrant explanation. We begin with the PCR court's finding that the testimony was "not unduly prejudicial." While this finding is not dispositive as to whether it alone influenced the jury's decision, it is helpful to understanding whether the testimony was likely to improperly divert the jury away from its consideration of Stone's moral culpability and blameworthiness. *See Hughey*, 339 S.C. at 457, 529 S.E.2d at 730-31 (stating "victim impact evidence . . . is only inadmissible where it is so unduly prejudicial that it renders the trial fundamentally unfair"); *State v. Byram*,

326 S.C. 107, 118, 485 S.E.2d 360, 366 (1997) (contrasting victim impact evidence that is "relevant for the jury to meaningfully assess appellant's moral culpability and blameworthiness" from evidence "so unduly prejudicial as to render [the] trial fundamentally unfair"). As the following discussion of our own findings demonstrates, there is ample evidence to support the PCR court's finding.

We find the exclusion of Kubala-Hanvey's testimony about the suicide attempt was not likely to have changed the result of the resentencing proceeding. First, Kubala-Hanvey explained several additional unrelated circumstances that caused her stress that day. Second, she testified her actions were "stupid" and that she later concluded, "I saw I don't have [as] many problems as I thought I did, as other people do. You always find people that are in worse shape than you are." If her testimony about her suicide attempt improperly exaggerated the effect the murder or the reversal had on her, this testimony diminished it. Finally, the suicide attempt was mentioned only once and the State did not address it at all during its closing argument.

As to whether this Court would likely have reversed the death sentence on the basis of a properly preserved and briefed objection, we begin our discussion with the same observation we made earlier: "A trial judge has considerable [discretion] in ruling on the admissibility of [victim impact] evidence." *Bixby*, 388 S.C. at 555, 698 S.E.2d at 586. PCR counsel argues, "A suicide attempt is on its face highly emotional. It was, in essence, a form of emotional blackmail for the jury, the subtext being that a decision for life may be unbearable for Kubala-Hanvey, causing her to attempt suicide again." The argument overstates the factual and contextual basis on which it is made. Even were we to find the admission of the testimony was an abuse of the discretion we give trial judges on victim impact evidence, Stone would still be required to demonstrate prejudice, *see State v. Byers*, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011) ("To warrant reversal based on the wrongful admission of evidence, the complaining party must prove resulting prejudice.").

As we noted in *Hughey*, the Supreme Court set forth the standard for demonstrating prejudice as to victim impact evidence—"so unduly prejudicial that it renders the trial fundamentally unfair." 339 S.C. at 457, 529 S.E.2d at 731 (quoting *Payne*, 501 U.S. at 825, 111 S. Ct. at 2608, 115 L. Ed. 2d at 735). Applying this standard, we have affirmed trial courts' admission of victim impact evidence time and again. In *Bixby*, we affirmed the trial court's admission of a

seven minute video showing footage of a slain officer's funeral as proper victim impact evidence. 388 S.C. at 555, 698 S.E.2d at 586. In *Hughey*, we affirmed the trial court's admission of narrative responses from family members describing their relationship with the victim as proper victim impact evidence. 339 S.C. at 457, 529 S.E.2d at 731. In *State v. Powers*, we affirmed the trial court's admission of testimony from the victim's wife and daughter regarding the victim's uniqueness and the impact of his death on the family. 331 S.C. 37, 45-46, 501 S.E.2d 116, 120 (1998). Applying the *Hughey* standard to the evidence in this case, we find we would not have reversed Stone's death sentence. As we previously discussed, there are several reasons the evidence did not have the impact *Payne* and *Hughey* require for a demonstration of prejudice, not the least of which is Kubala-Hanvey's own testimony. She immediately called her attempt "stupid" and explained to the jury, "I don't have [as] many problems as I thought I did, as other people do." Considering the context in which the testimony was given—as we must—we find Kubala-Hanvey's testimony was not so unduly prejudicial that it rendered the trial fundamentally unfair. Therefore, we would not have reversed the death sentence on the ground the trial court admitted this testimony over a proper objection.

Stone also argues Kubala-Hanvey's testimony "improperly injected appellate review into the jury's deliberations," relying on *Caldwell v. Mississippi*, 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d. 231 (1985). In *Caldwell*, the Supreme Court held "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." 472 U.S. at 328–29, 105 S. Ct. at 2639, 86 L. Ed. 2d at 239. The district attorney in *Caldwell* was permitted—over opposing counsel's objection—to explain to the jury that their decision was "automatically reviewable by the Supreme Court." 472 U.S. at 325–26, 105 S. Ct. at 2638, 86 L. Ed. 2d at 237. In ruling on the objection, the trial court stated—in front of the jury—"I think it proper that the jury realizes that [the sentence] is reviewable automatically as the death penalty commands." 472 U.S. at 325, 105 S. Ct. at 2630, 86 L. Ed. at 237. The Supreme Court explained that such "state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court" would result in "unreliability" and "bias in the favor of death sentences." 472 U.S. at 330, 105 S. Ct. at 2640, 86 L. Ed. 2d at 240.

The admission of Kubala-Hanvey's description of her suicide attempt bears little resemblance to what happened in *Caldwell*. First, no one told this jury its sentence

was automatically reviewable. To the extent Kubala-Hanvey's testimony made any suggestion to the jury concerning appellate review, it was only by implication. Second, and more importantly, any suggestion the testimony made was not a "state-induced suggestion," and unlike *Caldwell*, the trial court did not comment on and validate such a suggestion. Kubala-Hanvey's testimony did not inject appellate review into the jury's deliberations on any level close to what the prosecutor and the judge did in *Caldwell*, and thus we would not have reversed Stone's death sentence on this ground.[5]

Despite proving instances of deficient performance by trial and appellate counsel regarding victim impact evidence, we find Stone has not proven a reasonable probability the outcome of the resentencing proceeding or the appeal from his death sentence would have been different. Thus, we find Stone did not satisfy the second prong of *Strickland*.

IV. Evidence of Brain Damage and Intellectual Impairment

Stone argues trial counsel was deficient in not thoroughly investigating Stone's brain damage and in not presenting evidence of Stone's low intellectual functioning during the resentencing proceeding. At the PCR trial, Stone's counsel proved through expert testimony Stone suffers from brain damage and significant intellectual impairment. Appellate counsel in this appeal began her Statement of the Case in the Brief of Petitioner, "There is no dispute that Bobby Wayne Stone suffers from organic brain damage and intellectual impairment." The State did not contest this statement in its brief or at oral argument. We begin our analysis of this claim, therefore, with the recognition—in hindsight—that Stone does in fact suffer from organic brain damage and significant intellectual impairment.

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[5] We also reject Stone's argument that Kubala-Hanvey's testimony was an improper opinion of what the appropriate sentence should be under *Booth v. Maryland*, 482 U.S. 496, 508–09, 107 S. Ct. 2529, 2535–36, 96 L. Ed. 2d 440, 451-52 (1987) (holding a witness' opinion as to what the appropriate sentence should be was inadmissible), *overruled in part by Payne*, 501 U.S. at 828-30, 111 S. Ct. at 2610-11, 115 L. Ed. 2d at 737-39, and his argument that her testimony was an inadmissible opinion as to the ultimate issue in the case under *Wise*, 359 S.C. at 27, 596 S.E.2d at 481 ("A capital defendant is prohibited from directly eliciting the opinion of family members or other penalty-phase witnesses about the appropriate penalty.").

Stone correctly argues "evidence of mental impairments such as brain damage or low intellectual functioning" has "powerful mitigating effect." *See Sears v. Upton*, 561 U.S. 945, 945–46, 130 S. Ct. 3259, 3261, 177 L. Ed. 2d 1025, 1028 (2010) (stating "significant frontal lobe brain damage" that caused "perform[ance] at or below the bottom first percentile in several measures of cognitive functioning and reasoning" is "significant mitigation evidence"); *Tennard v. Dretke*, 542 U.S. 274, 288, 124 S. Ct. 2562, 2572, 159 L. Ed. 2d 384, 397-98 (2004) ("Evidence of significantly impaired intellectual functioning is obviously evidence that 'might serve "as a basis for a sentence less than death."'" (quoting *Skipper v. South Carolina*, 476 U.S. 1, 5, 106 S. Ct. 1669, 1671, 90 L. Ed. 2d 1, 7 (1986))); *Hooks v. Workman*, 689 F.3d 1148, 1205 (10th Cir. 2012) ("Evidence of organic brain damage is something that we and other courts, including the Supreme Court, have found to have a powerful mitigating effect." (citations omitted)).

The expert evidence presented at the PCR hearing places Stone's brain damage squarely in this category of powerful mitigating evidence. For example, Ruben C. Gur, Ph.D.—a neuropsychologist and professor at the University of Pennsylvania—performed an assessment of Stone's brain structure and function. Dr. Gur described numerous abnormalities in Stone's brain, including "abnormalities . . . in regions [of the brain] that are very important for regulating behavior," and stated "the kind of structural abnormalities observed in the frontal regions of Mr. Stone's brain interfere with executive functions such as abstraction and mental flexibility, planning, moral judgment, and emotion regulation . . . and impulse control." He further described a "reduced metabolism in the amygdala," which he called his "most striking finding." He stated,

> A damaged amygdala will misinterpret danger signals and when excited it will issue false alarms . . . . When Mr. Stone's amygdala becomes activated, his frontal lobe is unlikely to be capable of exercising control as a normal one would, because his frontal lobe is not only damaged but his cortex is already operating at full capacity in its hyper-vigilant state. The frontal lobe is unable to do its job and act as the brakes on . . . primitive emotional impulses . . . .

Fred L. Bookstein, Ph.D.—a University of Washington professor of morphometrics, which predicts patterns of behavior based on measurements of body parts—reviewed measurements of the parts of Stone's brain, particularly the corpus callosum. Dr. Bookstein concluded that abnormalities he found in these measurements would lead to "poor judgment" and "difficulties in impulse control."

Finally, Stone presented the testimony of James R. Merikangas, M.D.—a board certified neurologist and psychiatrist. Dr. Merikangas testified Stone suffers from "organic brain damage." He explained,

> [Stone's] brain is anatomically abnormal. His frontal lobes are smaller than normal. His ventricles, which are the fluid-filled spaces inside the brain, are abnormally large . . . . The ventricles enlarge in a condition called hydrocephalus, which is dripping water on the brain. But it's a sign that the brain has lost brain tissue or never had brain tissue to the extent that the space is filled with fluid in excess . . . . And the corpus callosum, which is the white matter track that connects the left hemisphere to the right hemisphere, in the case of Mr. Stone, has at least three different abnormalities . . . .

Dr. Merikangas further explained that as a consequence of this brain damage Stone has "cognitive problems and difficulty with impulse control." He continued,

> And the pattern of function in Mr. Stone's brain is distinctly abnormal. He has decreased functioning in the limbic system, the system that has to do with emotional control, and the amygdala, the system that has to do with reactions to fear, recognition, and startle.

Under cases like *Sears*, *Tennard*, and *Hooks*, Stone's trial counsel would have been obligated to present to the jury this evidence of brain damage and the effects it would have on his behavior. However, Stone's trial counsel could not have presented this evidence to the jury because they did not know about his brain damage. The question, therefore, is whether counsel should have known about it, or more specifically, whether trial counsel's investigation was reasonable under the Sixth Amendment even though trial counsel did not discover Stone's brain damage.

We first address the suggestion that trial counsel must always undertake a medical investigation for organic brain damage in any capital case. In other words, must trial counsel—as a part of every death penalty defense—obtain neuropsychological testing and neuroimaging such as MRI and PET scans, which are the objective tests from which Doctors Gur, Bookstein, and Merikangas were able to reach a definitive diagnosis in Stone of organic brain damage. The answer is clearly "no." We are aware of no court that has adopted such a standard, and not even Stone's own presentation of evidence supports such a suggestion. The American Bar Association's *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, on which Stone consistently relies in this appeal, do not require neuropsychological testing and neuroimaging in every case. Guideline 10.7—which governs counsel's investigation of the case—simply requires counsel to investigate all reasonable mitigation evidence. *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* 10.7 (rev. 2003).[6] Moreover, appointed counsel—as trial counsel was here—is not permitted to obtain any testing that requires funding until counsel demonstrates to the trial court that such testing is reasonably necessary under the specific facts of the case. Subsection 17-3-50(B) of the South Carolina Code (2014) provides counsel may obtain up to five hundred dollars to pursue "investigative, expert, or other services . . . reasonably necessary for the representation of the defendant." Under subsection 17-3-50(C), however, counsel may obtain more than five hundred dollars "only if the court certifies, in a written order with specific findings of fact, that . . . payment in excess of the limit is appropriate because the services provided were reasonably and necessarily incurred."

Therefore, counsel's performance cannot be found deficient simply because they did not seek neuropsychological testing or neuroimaging. Rather, we measure counsel's performance by an objective standard of reasonableness. *Weik*, 409 S.C.

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[6] The Supreme Court of the United States and this Court have relied on the ABA Guidelines to determine whether counsel's performance was reasonable under the first prong of *Strickland*. *See e.g., Wiggins*, 539 U.S. at 524, 123 S. Ct. at 2536-37, 156 L. Ed. 2d at 486-87 (citing the ABA Guidelines, "to which we long have referred as 'guides to determining what is reasonable'"); *Ard*, 372 S.C. at 332, 642 S.E.2d at 597 (stating the ABA "has specifically provided guidelines for defense counsel's performance regarding investigation of a capital case," and then citing the ABA Guidelines in holding counsel's performance was unreasonable).

at 233, 761 S.E.2d 767 (quoting *Wiggins*, 539 U.S. at 521, 123 S. Ct. at 2535, 156 L. E. 2d at 484). In *Wiggins*—a case involving the sufficiency of trial counsel's investigation of the defendant's background—the Supreme Court held there are no "specific guidelines for appropriate attorney conduct," but "the proper measure of attorney performance remains simply reasonableness under prevailing professional norms." 539 U.S. at 521, 123 S. Ct. at 2535, 156 L. Ed. 2d at 484. In *Porter v. McCollum*, 558 U.S. 30, 130 S. Ct. 447, 175 L. Ed. 2d 398 (2009), the Supreme Court held that "under . . . prevailing professional norms . . . , counsel had an 'obligation to conduct a thorough investigation of the defendant's background.'" 558 U.S. at 39, 130 S. Ct. at 452, 175 L. Ed. 2d at 405 (quoting *Williams v. Taylor*, 529 U.S. 362, 396, 120 S. Ct. 1495, 1515, 146 L. Ed. 2d 389, 420 (2000)); *see also Ard*, 372 S.C. at 331, 642 S.E.2d at 597 ("Without a doubt, 'a criminal defense attorney has a duty to investigate . . . .'"). As the Supreme Court did in *Wiggins*,

> [W]e focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence of [Stone's] background *was itself reasonable*. In assessing counsel's investigation, we must conduct an objective review of their performance, . . . which includes a context-dependent consideration of the challenged conduct as seen from "counsel's perspective at the time."

539 U.S. at 523, 123 S. Ct. at 2536, 156 L. Ed. 2d at 485-86 (citations omitted). In doing so, "every effort [must] be made to eliminate the distorting effects of hindsight," 539 U.S. at 523, 123 S. Ct. at 2536, 156 L. Ed. 2d at 486 (quoting *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065, 80 L.E.2d at 694), and we must recognize "a strong presumption that counsel rendered adequate assistance," *Ard*, 372 S.C. at 331, 642 S.E.2d at 596 (citing *Strickland*, 466 U.S. at 690, 104 S. Ct. at 2066, 80 L. E. 2d at 695).

Stone argues trial counsel was aware of numerous "red flag" indicators of Stone's brain damage during the investigation leading up to the resentencing proceeding. From these indicators, Stone argues, trial counsel should have seen the "need for further investigation" and to "seek basic neurological testing," "obtain neuroimaging," or "consult with experts." Stone contends these indicators were located in four sources: Stone's medical records, Stone's school records, Stone's siblings' school records, and expert testimony in the case.

First, Stone's medical records are not included in the Appendix before us because they were not admitted into evidence at the PCR trial. It is, therefore, impossible for this Court to find indicators in Stone's medical records that trial counsel should have further investigated Stone's brain damage. From testimony that describes the contents of Stone's medical records, we find little evidence the medical records contain any indication Stone suffered from brain damage. There is evidence the records contained one emergency report involving a head injury, but there was no indication the incident created a potential for brain damage or had any impact on Stone's neuropsychological health.

Stone's brief to this Court demonstrates the weakness of his argument. The brief states,

> [T]rial counsel possessed medical records for Bobby Stone, which showed that he was treated at the emergency room on numerous occasions. For example, when he was thirteen years old, Stone was treated at the hospital because he fell and injured his ribcage. At age fourteen, he experienced another fall during which he cut his right foot. The following year, he appeared in the ER complaining of pains in his left chest and broken ribs. Stone fell again at age sixteen, resulting in a fractured foot. Later that same year, Stone "fell about eight feet and ha[d] pain in his chest and back." At age twenty-seven, Stone was in a motor vehicle accident resulting in back pain. The following year, he was working on a car when the motor fell about a foot onto his head. Stone reported that a bolt went into his right ear. Emergency room staff noted abrasions, blood coming from the ear canal, cranial swelling and tenderness.

The brief contains no other argument as to how the medical records indicate potential brain damage. The one reference to a head injury—with little evidence as to its severity—is not a sufficient indicator of potential brain damage on the facts of this case to require a finding that trial counsel was deficient in not pursuing further testing. Moreover, Stone's experts at the PCR trial unanimously agreed his brain damage was "congenital," meaning it was present from birth. Thus, there is

no chance Stone's brain damage was caused by this incident that occurred when he was twenty-eight years old.

From what the Appendix indicates about his medical history, Stone had remarkably little experience with head injuries. Therefore, we find no evidence that the medical records should have alerted trial counsel that Stone might have organic brain damage.

As to the second and third sources, PCR counsel argues Stone's school records and those of his siblings "contained numerous references to academic failure, impaired intellectual functioning and potential brain damage." These references include (1) Stone failed the first, fourth, and sixth grades; (2) he dropped out of school at age 17 after completing only the ninth grade; (3) his IQ scores declined from 86 in 1975 when Stone was ten years old to a range of 69 to 75 in 1979 when he was fourteen; (4) his reading, spelling, and math scores in the seventh grade placed him in the first to fourth percentile among his peers; and (5) his original classification of "learning disabled" was downgraded to "educable mentally handicapped."[7] Stone's siblings' school records likewise indicated academic and intellectual deficits.

During the course of representing Stone, trial counsel employed several experts and other consultants, including a licensed clinical social worker, a psychologist, and a forensic psychiatrist. None of these professionals advised trial counsel to investigate brain damage. Stone has shown no specific basis for his argument that trial counsel should have realized further testing was warranted.

Trial counsel is not required to be omniscient. Rather, we evaluate counsel's performance in the realistic context of representing a capital defendant. As the Supreme Court stated in *Wiggins*, "we must conduct an objective review of their performance, . . . which includes a context-dependent consideration of the challenged conduct as seen 'from counsel's perspective at the time.'" 539 U.S. at

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[7] Educable mentally handicapped is a classification of mentally handicapped individuals for special education purposes. The educable mentally handicapped are "pupils of legal school age whose intellectual limitations require special classes or specialized education instruction to make them economically useful and socially adjusted." S.C. Code Ann. § 59-21-510 (2004).

523, 123 S. Ct. at 2536, 156 L. Ed. 2d at 486. The PCR court found Stone "fail[ed] in meeting [his] burden with regard to showing counsel's investigation was not reasonable." We find ample evidence to support the PCR court's ruling. *See Ard*, 372 S.C. at 331, 642 S.E.2d at 596 ("This Court will uphold factual findings of the PCR court if there is any evidence of probative value to support them."). Stone has not persuaded us trial counsel's performance was unreasonable.

Stone's fourth argument—that trial counsel should have known from the testimony of their expert to investigate brain damage—is also not persuasive. Trial counsel retained a licensed clinical social worker—TeAnne Oehler—to investigate Stone's background and make a psychological or psycho-social evaluation. Oehler reviewed Stone's medical and school records; conducted numerous interviews with Stone, his family members, and others; and thoroughly investigated Stone's social, family, and personal history. The fact that Oehler never recommended neuropsychological testing or neuroimaging supports—not undermines—the reasonableness of counsel's decision not to pursue the testing.

Stone also argues "trial counsel failed to present even the mitigating evidence that they did have in their possession." We rely on Stone's brief to this Court to identify which items of mitigating evidence Stone now contends should have been presented, but were not. Stone makes two primary arguments. First, he argues Stone "consistently struggled with academic failure, very low psychological functioning, problems with visual-motor coordination, and deficits in adaptive functioning skills, among other things." He then states, "Oehler incorrectly testified at trial that Stone 'didn't have too much difficulty in school until about the sixth grade,' and that his academic record included no suggestion of possible mental retardation." Second, Stone argues trial counsel "failed to adequately prepare Oehler's testimony, preventing the jury from hearing an accurate account of Stone's academic difficulties and intellectual impairments."

We have examined in detail the mitigating evidence trial counsel did present during the resentencing proceeding, and we have compared it with mitigating evidence Stone's PCR counsel presented in the PCR trial. We find the evidence does not support Stone's arguments. Oehler presented the jury a bleak picture of Stone's life—including many of the same difficulties, struggles, and academic failures that Stone argues trial counsel failed to present. Oehler's extensive testimony on these subjects includes the following,

> There was a significant history of depression among family members. One aunt had a history of schizophrenia. . . . And there is a history of depression among other family members. His sisters, one sister in particular, has a history of depression and has been outpatient, as well as inpatient psychiatric care off and on through the years. . . . [His psychiatric history] describes a family life where it was one crisis after another, and a home life that was not emotionally secure . . . because of a history of depression that was severe. Family members weren't able to carry out their roles in the family because they were frequently disrupted by . . . the psychiatric hospitalizations.

Oehler described how this difficult family structure led to problems with school and employment,

> There's not just one family member who had difficulty in terms of judicial involvement or in terms of a history of depression or exposure to violence or problems in school, but it showed that for several generations on either side of the family, there's a significant history of alcoholism, of drug use, of problems with school, problems with employment. In this family, there's frequent changing of jobs, if people are employed. There's just not, very few family members have significant stable employment . . . .

Oehler further described "inadequate supervision during the day" and "nights where the children [did not have] a good sleep" such that "Stone, as a young child, frequently fell asleep in school and was unable to concentrate." She described "very poor life skills" and "poor structure" for Stone as a result of there not being "values in this family" that "you need to get an education," "you need to get a job," "you need to obey the law."

Particularly as to school, Oehler described "a history of learning disability," and stated "he didn't have the ability, according to these school records, to pay attention, to concentrate, to focus on information and to be able to internalize that

to move forward with a plan." She testified all of this "absolutely" affected his judgment and his decision-making.

Oehler's presentation of Stone's social, family, and personal history was not perfect. PCR counsel argues in their brief she made two statements that might not have been accurate. First, Oehler stated Stone "didn't have too much difficulty in school until about the sixth grade," when in fact he did have difficulties. However, we read Oehler's statement of "not too much difficulty" as an effort to contrast those early years from the more significant difficulties he had in school after the sixth grade, and we find the contrast was effective. PCR counsel's second claim—that Oehler "incorrectly testified . . . that his academic record included no suggestion of mental retardation"—is itself a misstatement. Oehler's actual testimony—on cross examination by the solicitor over the objection of trial counsel—was "there's no *documentation* of mental retardation." In any event, PCR counsel does not argue Stone is mentally retarded. Stone also argues Oehler failed to give the jury Stone's numerical IQ scores. However, her overall presentation of Stone's "learning disability," her frequent references to his "problems with school," and her detailed descriptions of his poor "school performance" gave the jury a reasonably clear picture of the effects of Stone's low IQ, even if the jury didn't know the scores themselves.

As to Stone's claim that trial counsel failed to properly investigate and present evidence of his brain damage and present evidence of his low intellectual functioning, we find the PCR court's ruling that trial counsel's performance did not fall below an objective standard of reasonableness is supported by the evidence.

V. Accident Theory of the Case

Part of trial counsel's strategy was to present the theory that Stone did not intend to shoot and kill Sergeant Kubala. PCR counsel stated in their brief:

> It is important at the outset to note that Stone does not take issue with trial counsel's basic strategy. It was a plausible defense (in fact it was the only plausible defense), it was advocated by their client, and it was consistent with the evidence and Stone's statements to law enforcement.

However, Stone argues trial counsel failed to properly implement the strategy because they did not thoroughly investigate and present evidence supporting the accidental shooting theory. We disagree.

A. During the Guilt or Innocence Phase

As part of their investigation, trial counsel retained Don Girndt, a former agent of the South Carolina Law Enforcement Division (SLED) with expertise in firearms. Girndt examined the murder weapon and visited the crime scene. Girndt informed trial counsel it was impossible to determine whether the shooting was accidental or intentional. Rather than put Girndt on the stand to testify, trial counsel chose to elicit facts that supported the accident theory through cross examination. Girndt assisted trial counsel by sitting with trial counsel during the State's presentation of evidence and offering advice on how to effectively cross examine the State's witnesses, including firearms expert Ira Parnell—also a former SLED agent. During cross examination, Parnell admitted "the trigger pull on [Stone's pistol] was very light." Trial counsel also asked Parnell, "One final thing. [Stone's pistol] being a target gun set up with very light trigger pull, the play in the trigger was very slight as opposed to a gun with a heavy pull; isn't that right?" Parnell responded, "That's true."

Trial counsel also elicited facts supporting the accident theory on cross examination of other witnesses. Deputy John Prince testified he arrived at the scene "within probably two minutes at the most" and "the left side of the house where Sergeant Kubala was found [was] completely dark." Ray MacKessy, the State's crime scene technician, testified the porch wall was boarded up in a way that made it difficult for Stone to see someone approaching the porch.

The only facts PCR counsel argues trial counsel should have presented regarding the accident theory—but did not present—related to the trajectory of the bullets. As PCR counsel argues, this evidence indicates Stone "shot from waist level." However, the fact Stone shot from the waist does not support the theory he shot accidentally. At the PCR trial, PCR counsel presented the testimony of Wayne Hill—an expert in homicide reconstruction. Hill testified the bullets fired from Stone's waist striking Sergeant Kubala in the neck and ear "are more consistent with somebody who is doing what's called cowboy action shooting, whereas you would know from the Western shooting from the hip." We find it difficult to

imagine *three* accidental shots fired from the hip to another man's head. Trial counsel was wise not to present this evidence.

During closing, trial counsel used these facts—not including that Stone shot from the hip—to argue the accident theory of the case. Specifically, trial counsel argued the State failed to meet its burden as to the malice element of murder because Sergeant Kubala simply surprised Stone, who—in his drunken state—turned and accidentally shot Kubala. Trial counsel stated, "The little porch is boarded up to an elevation that was . . . taller than Sergeant Kubala. . . . If Sergeant Kubala is walking right next to the house, how is Bobby Stone going to see him? How was Bobby Stone going to hear him if Bobby Stone is knocking on the door?" Trial counsel continued, "He's in the dark and suddenly he is startled by a voice. And he turns and as he told you in his statement, the hair trigger done again went off. Apparently three shots."

We find trial counsel's approach to the accident theory in general, and hiring of Girndt in particular, was reasonable. First, trial counsel's investigation of the accident theory is consistent with the ABA Guidelines. Guideline 11.4.1—which relates to counsel's investigation of the case—states,

> Counsel should conduct independent investigations relating to the guilt/innocence phase and to the penalty phase of a capital trial. Both investigations should begin immediately upon counsel's entry into the case and should be pursued expeditiously.

ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 11.4.1.A (1989).[8]

Regarding the use of expert witnesses, section 7 of Guideline 11.4.1 provides,

> Counsel should secure the assistance of experts where it is necessary or appropriate for: (A) preparation of the defense; (B) adequate understanding of the prosecution's case; (C) rebuttal of any portion of the prosecution's case

[8] During Stone's 1997 trial, the applicable version the ABA Guidelines was the 1989 version.

> at the guilt/innocence phase or the sentencing phase of the trial; (D) presentation of mitigation.

ABA Guidelines 11.4.1.7.

Trial counsel's investigation of the accident theory began with hiring Girndt, an expert. Girndt provided valuable assistance to trial counsel by examining the evidence, informing trial counsel of his opinion, and advising trial counsel how to effectively cross examine the State's witnesses. The PCR court found trial counsel was not deficient in their investigation. We find ample evidence to support this finding.

Stone does not argue trial counsel should have called Girndt to testify. In light of Girndt's opinion that he could not say the shooting was accidental, trial counsel's decision not to present his testimony to the jury was clearly reasonable. Stone argues, however, trial counsel should have found another expert—one who would testify the shooting was an accident. The PCR court found trial counsel was reasonable in making the decision not to pursue another expert. The evidence supports this finding, and we agree. The "prevailing norms" that guide our judgment as to whether counsel's performance was reasonable do not require counsel to pursue a second expert after a qualified expert has given an adverse opinion. *See Poyner v. Murray*, 964 F.2d 1404, 1419 (4th Cir. 1992) ("The mere fact counsel did not shop around for a psychiatrist willing to testify to the presence of more elaborate or grave psychological disorders simply does not constitute ineffective assistance."); *Pruett v. Thompson*, 996 F.2d 1560, 1574 (4th Cir. 1993) (holding counsel was not ineffective for failing to further investigate a theory after counsel had good cause to believe the theory was incredible). After trial counsel learned Girndt was unable to give an opinion that supported the accident theory, trial counsel's decision not to seek an expert with a different opinion was reasonable.

Moreover, Stone did not demonstrate the availability of such a witness. PCR counsel presented Hill and Dr. Merikangas at the PCR trial to support the accident theory. Hill's only testimony favorable to the accident theory was that there was no physical evidence contradicting Stone's version of what happened. We find Hill's opinion to be no more favorable to Stone than Girndt's opinion. In fact, Hill's opinion did not withstand cross examination at the PCR trial. First, Hill admitted the facts and circumstances do not exclude the possibility that Stone intentionally

aimed and fired the gun. Second, Hill admitted it would take three separate trigger pulls to fire the semi-automatic pistol three times. Trial counsel would prefer not to see these key admissions from his own expert. We likewise find Dr. Merikangas—a neurologist and psychiatrist—to be unconvincing on the accident theory. The weakness of Hill and Merikangas's testimony underscores the reasonableness of trial counsel's decision not to use Girndt or an expert similar to Hill at trial.

We find Stone did not prove trial counsel's performance fell below an objective standard of reasonableness in investigating or presenting evidence to support the accident theory of the case.

B. During the Resentencing Proceeding

Stone also argues trial counsel failed to properly support the accident theory in the 2005 resentencing proceeding. The PCR court found trial counsel's performance in this respect was reasonable. The evidence supports the finding. At the time of the resentencing proceeding, Girndt was still unable to testify the shooting was accidental. Trial counsel once again decided to use cross examination to establish the few facts that supported the accident theory, and he once again argued those facts in closing. We find trial counsel fulfilled his obligation to thoroughly investigate and present evidence of the accident theory of the case.

VI. Conclusion

We find trial and appellate counsel's performance was reasonable in almost every respect. In several respects, as we have explained, counsel's performance did not meet an objective standard of reasonableness, and thus was deficient under the first prong of *Strickland*. As to each of these failures, however, Stone did not prove a reasonable probability the outcome would have been different as required by the second prong. As to each claim that his counsel was ineffective under the Sixth Amendment, therefore, Stone did not meet his burden under *Strickland*. The PCR court's denial of post-conviction relief is **AFFIRMED.**

BEATTY, C.J., KITTREDGE and HEARN, JJ., concur. Acting Justice Costa M. Pleicones, dissenting in a separate opinion.

ACTING JUSTICE PLEICONES: I respectfully dissent.

I agree with the majority that appellate counsel was deficient in failing to properly appeal meritorious objections made at petitioner's resentencing hearing regarding Sergeant Kubala's wife's suicide testimony. However, in my opinion, appellate counsel's error prejudiced petitioner. I would find the widow's suicide statement inadmissible under the United States Supreme Court's test for constitutionally permissible penalty phase testimony. And in my opinion, had appellate counsel properly raised the issue on appeal, there is a reasonable probability this Court would have reversed petitioner's death sentence. Accordingly, as explained below, I would find the PCR judge erred in denying petitioner relief.

The traditional two-part *Strickland* analysis applies to claims of ineffective assistance of appellate counsel. *Southerland v. State*, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999); *see also Strickland v. Washington*, 466 U.S. 668 (1984). However, "[i]n order to show that he was prejudiced by appellate counsel's performance, a PCR applicant must show that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Bennett v. State*, 383 S.C. 303, 309–10, 680 S.E.2d 273, 276 (2009) (citing Cherry v. State, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989).

The seminal case allowing a state to introduce victim impact statements at a sentencing proceeding is *Payne v. Tennessee*. *See* 501 U.S. 808 (1991). This allowance, however, is not unfettered, as *Payne* also establishes that in order to be admissible, victim impact statements must be relevant to the crime in question by showing "the specific harm *caused by the defendant.*" *Id.* at 825–27 (emphasis supplied). Further, where victim impact evidence is so unduly prejudicial that it renders the sentencing proceeding fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief. *Id.* at 25 (citing *Darden v. Wainwright*, 477 U.S. 168, 179–183 (1986).

Resentencing counsel based his objection to the widow's statements on the grounds that according to her own testimony, the suicide attempt was due to her reaction to this Court's ruling, not Sergeant Kubala's death seven years prior. Thus, resentencing counsel argued, "the causation factor" was too remote, and her statements were "highly prejudicial."

In overruling counsel's objection to the testimony, the resentencing judge ruled the statement was "partially related" to the shooting of Sergeant Kubala. I disagree, and find that to the contrary, nothing in the widow's testimony related her suicide attempt to the specific harm caused by petitioner.

Notably, the widow never mentioned Sergeant Kubala or his death during her detailed testimony regarding her suicide attempt. Instead, the widow's testimony established her suicide attempt—seven years after Sergeant Kubala's death—was the result of her emotional turmoil caused by this Court's decision to reverse petitioner's original death sentence, which occurred at a time she was experiencing financial and familial difficulties. In my view, the testimony was simply unrelated to the death of Sergeant Kubala; therefore, it was irrelevant and inadmissible, and had appellate counsel properly appealed the relevancy objection made at resentencing, there is a reasonable probability that this Court would have reversed petitioner's death sentence. *See Payne*, 501 U.S. at 825, 827; *Bennett v. State*, 383 S.C. at 309–10, 680 S.E.2d at 276 (citation omitted); *see also Coleman v. State*, 558 N.E.2d 1059, 1062 (Ind. 1990) (holding a victim's mother's statement that she attempted suicide after the crime was "irrelevant" and "highly prejudicial," but was not a violation of the Eighth Amendment to the United States Constitution *because the statement was not made in front of the sentencing jury*).

Further, as to resentencing counsel's argument that the widow's suicide statement was "highly prejudicial," it is my opinion that pursuant to S.C. Code Ann. § 16-3-25(C)(1) (2003), the Court would have also likely reversed petitioner's death sentence on this ground had it been properly presented on appeal. *See* § 16-3-25(C)(1) (stating in the case of a death sentence imposition, this Court "shall consider the punishment" and determine "whether the sentence of death was imposed under the influence of passion, prejudice, *or any other arbitrary factor*, . . ." (emphasis supplied)); *Coleman v. State*, 558 N.E.2d at 1062; *see also Payne*, 501 U.S. at 825 (finding a victim impact statement that is "unduly prejudicial" is a Due Process violation under the Fourteenth Amendment); *see also Evitts v. Lucey*, 469 U.S. 387, 396–97 (1985) (holding, to be effective, appellate counsel must give assistance of such quality as to make appellate proceedings fair).

The prejudicial impact of the widow's suicide testimony results, *inter alia*, by imparting to the jury: (1) pressure to resentence petitioner to death lest his widow endure additional unbearable suffering as a result of their decision; *see* § 16-3-25(C)(1); (2) raises the specter of appellate review into the deliberation; *see*

Caldwell v. Mississippi, 472 U.S. 320, 328–29 (1985) ("[I]t is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere"); *see also, e.g.*, *State v. Tyner*, 273 S.C. 646, 659, 258 S.E.2d 559, 566 (1979) (holding remarks by a prosecutor about appellate safeguards may require reversal where it suggests to the jury that it may pass the responsibility for a death sentence on to a higher court); and (3) the notion that Sergeant Kubala's widow believed the death penalty was the appropriate sentence; *cf. State v. Wise*, 359 S.C. 14, 27, 596 S.E.2d 475, 481–82 (2004) ("a capital defendant may not present a penalty-phase witness to testify explicitly what verdict the jury 'ought' to reach" (citation omitted)); *State v. Adams*, 277 S.C. 115, 283 S.E.2d 582 (1981) (holding whether death penalty should be imposed is an ultimate issue reserved for jury's determination), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991).

In summary, I agree with the majority that appellate counsel was deficient; however, in my opinion, petitioner was prejudiced by the deficiency because had appellate counsel argued the grounds raised by resentencing counsel, there is a reasonable probability this Court would have reversed petitioner's death sentence. Moreover, I note that the majority opinion appears to reflect a misunderstanding of this Court's role in reviewing a PCR judge's order on certiorari. Specifically, I find the majority's decision to omit almost entirely from its opinion discussion of the PCR judge's rulings, in lieu of discussing at length petitioner's arguments, fails to provide sufficient context or analysis to support the majority's dispositions on the issues before it.

I would reverse the PCR judge's order and require petitioner receive a new resentencing hearing.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Retail Services & Systems, Inc., d/b/a Total Wine & More, Appellant,

v.

South Carolina Department of Revenue and ABC Stores of South Carolina, Respondents.

Appellate Case No. 2014-002728

Appeal From Aiken County
Doyet A. Early III, Circuit Court Judge

Opinion No. 27709
Heard November 5, 2015 – Filed March 29, 2017

REVERSED

Dwight Franklin Drake and Brian Montgomery Barnwell, both of Nelson Mullins Riley & Scarborough, LLP, of Columbia, and Baylen Thomas Moore, of Columbia, for Appellant.

Burnet Rhett Maybank, III and James Peter Rourke, both of Nexsen Pruet, LLC, of Columbia; Counsel for Litigation G. David Crocker, General Counsel for Litigation Milton Gary Kimpson and Counsel for

Litigation Carol I. McMahan, all of South Carolina Department of Revenue, of Columbia, for Respondents.

ACTING JUSTICE TOAL: Appellant Retail Services & Systems, Inc. Retail Services & Systems, Inc., d/b/a Total Wine & More (Retail Services) appeals the trial court's decision granting summary judgment to Respondents South Carolina Department of Revenue (SCDOR) and ABC Stores of South Carolina (ABC Stores). We reverse.

ANALYSIS

Retail Services owns and operates three separate liquor store locations in Charleston, Greenville, and Columbia, South Carolina. SCDOR is charged with the administration of South Carolina's statutes concerning the manufacturing, sale, and retail of alcoholic liquors. S.C. Code Ann. §§ 61-2-10 & -20. Retail Services petitioned SCDOR to open a fourth store in Aiken, however, SCDOR refused to grant Retail Services a fourth liquor license under sections 61-6-140 and -150 of the South Carolina Code,[1] which limit a liquor-selling entity to three retail liquor licenses. Additionally, ABC Stores lobbies before the General Assembly on behalf of its members who are owners and holders of retail dealer licenses. Therefore, Retail Services brought this action against SCDOR and ABC Stores seeking a

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[1] *See* S.C. Code Ann. § 61-6-140 (2009) ("No more than three retail dealer licenses may be issued to one licensee . . . . No more than three retail dealer licenses may be issued for the use of one corporation, association, partnership, or limited partnership."); *id.* § 61-6-150 ("No person, directly or indirectly, individually or as a member of a partnership or an association, as a member or stockholder of a corporation, or as a relative to a person by blood or marriage within the second degree, may have any interest whatsoever in a retail liquor store licensed under this section except the three stores covered by his retail dealer's licenses, as provided for in [s]ection 61-6-140. The prohibitions in this section do not apply to a person having an interest in retail liquor stores on July 1, 1978.").

declaratory judgment that these provisions of the South Carolina Code are unconstitutional.

Appellant argues that sections 61-6-140 and -150: (1) exceed the scope of the General Assembly's police power provided for in article VIII-A of the South Carolina Constitution[2] because the licensing limits do not promote the health, safety, or morals of the State, but merely provide economic protection for existing retail liquor store owners; (2) violate its rights to equal protection[3] under the law by creating arbitrary distinctions, in that the three-store limit unfairly treats large retailers differently from small retailers and that section 61-6-150's "grandfather clause," unfairly discriminates against those that did not have an interest on or before July 1, 1978, and unfairly differentiates between owners of stores that sell liquor for on-site consumption and those that sell liquor for off-site consumption; and (4) violate its due process rights[4] because they unfairly prevent Appellant from operating in its chosen field of business.

The trial court found the provisions constitutional because (1) they are within the scope of the State's police power; and (2) they satisfy the rational basis test, which, because they do not infringe on a fundamental right or implicate a suspect class, is all that is required. Therefore, the circuit court granted Respondents' motions for summary judgment. Appellant appealed the circuit court's decision. We now review the circuit court's decision and reverse.

"This Court has a limited scope of review in cases involving a constitutional challenge to a statute because all statutes are presumed constitutional and, if possible, will be construed to render them valid." *Curtis v. State*, 345 S.C. 557,

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[2] *See* S.C. Const. art. VIII-A, § 1 ("In the exercise of the police power the General Assembly has the right to prohibit and to regulate the manufacture, sale, and retail of alcoholic liquors or beverages within the State.").

[3] S.C. Const. art. I, § 3 (providing no person "shall . . . be denied the equal protection of the laws").

[4] S.C. Const. art. I, § 3 (providing no person "shall . . . be deprived of life, liberty, or property without due process of law . . . .").

569, 549 S.E.2d 591, 597 (2001) (citing *Davis v. Cnty. of Greenville*, 322 S.C. 73, 77, 470 S.E.2d 94, 96 (1996)).

While article VIII-A, section 1 of the South Carolina Constitution contains a broad mandate to the General Assembly with respect to regulating the sale and retail of alcohol in South Carolina, this ability to regulate is not as far-reaching as Respondents maintain. *See State ex rel. George v. City Council of Aiken*, 42 S.C. 222, 20 S.E. 221, 230 (1894) ("[I]f the act is not a police measure, it is unconstitutional."). We find that sections 61-6-140 and -150 of the South Carolina Code are unconstitutional because they exceed the scope of the General Assembly's police powers.[5]

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[5] For many years, our precedents embraced Lochner-era principles justifying court invalidation of almost all legislative restrictions on private business. However, in *R.L. Jordan Co.*, the Court replaced this test with a rational relationship test. 338 S.C. at 477–78, 527 S.E.2d at 765 ("Accordingly, we overrule our cases which apply the traditional approach, and adopt this standard for reviewing all substantive due process challenges to state statutes: 'Whether it bears a reasonable relationship to any legitimate interest of government.'" (footnote omitted)). Under the Lochner approach, the state could regulate prices charged by businesses for goods and services whenever the business was "'affected with a public interest.'" *R.L. Jordan Co. v. Boardman Petroleum, Inc.*, 338 S.C. 475, 477, 527 S.E.2d 763, 764–75 (2000) (quoting *Gwynette v. Myers*, 237 S.C. 17, 115 S.E.2d 673 (1960); *see Lochner v. New York*, 198 U.S. 45 (1905). We have a number of precedents regulating businesses in this broad fashion. *See, e.g.*, *State Dairy Comm'n of S.C. v. Pet, Inc.*, 283 S.C. 359, 363, 324 S.E.2d 56, 58 (1984) (finding that the wholesale milk industry was not so affected with the public interest as to authorize price regulation or price control by the State), *overruled by R.L. Jordan Co.*, 338 S.C. at 475, 527 S.E.2d at 763. As of 2000, we formally abandoned the Lochner-era test, yet in this case some fourteen years later, Respondents offer economic protectionism as the sole justification of this extreme business regulation. We reference this background merely to provide historical context to the type of extreme industry regulation Respondents ask this Court to uphold, and not as the dissent suggests, to resolve this matter on due process grounds.

Under the current paradigm, the government may "regulate any trade, occupation or business, the unrestrained pursuit of which might affect injuriously the public health, morals, safety or comfort; and in the exercise of the power particular occupations may be . . . required to be conducted within designated limits." *Denene, Inc. v. City of Charleston*, 359 S.C. 85, 98, 596 S.E.2d 917, 924 (2004) (quoting *City of Charleston v. Esau Jenkins*, 243 S.C. 205, 210–11, 133 S.E.2d 242, 244 (1963)). This mandate is especially broad with respect to regulating liquor:

> In the exercise of the police power the General Assembly has the right to prohibit and to regulate the manufacture, sale, and retail of alcoholic liquors or beverages within the State. The General Assembly may license persons or corporations to manufacture, sell, and retail alcoholic liquors or beverages within the State under the rules and restrictions as it considers proper . . . .

S.C. Const. art. VIII-A, § 1.

Here, the circuit court justified the three-license restrictions on corporations as "preserving the right of small, independent liquor dealers to do business." Moreover, counsel for Respondents repeatedly stated to this Court during oral arguments that the *only* justification for these provisions is that they support small businesses. The record does not contain any evidence of the alleged safety concerns incumbent in regulating liquor sales in this way. Without any other supportable police power justification present, economic protectionism for a certain class of retailers is not a constitutionally sound basis for regulating liquor sales. *See Bacchus Imports v. Dias*, 468 U.S. 277, 276 (1984) ("State laws that constitute mere economic protectionism are . . . not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor."); *McCullough v. Brown*, 41 S.C. 220, 247–48, 19 S.E. 458, 472–73 (1894), *overruled on other grounds by State ex rel. George*, 41 S.C. at 254, 20 S.E. at 233 (holding that if a statute regulating alcoholic liquors is enacted for economic purposes rather than "as a police regulation of the business of selling intoxicating liquors," it is unconstitutional).

Not only is there no indication in this record that these provisions exist for any other reason than economic protectionism, the provisions themselves and statutory scheme to which they belong lend further support to Appellant's position. As Appellant points out, the provisions do not limit the number of liquor stores that can be licensed in a certain area—only the number than can be owned by one person or entity.[6] Another provision governs the specific placement of retail establishments away from churches, schools and playgrounds. *See* S.C. Code Ann. § 61-6-120. Therefore, Respondents' contention that the provisions advance the safety and moral interests of the State, no doubt a legitimate State interest, is unavailing with respect to sections 61-6-140 and -150.

While the dissent contains a learned and well-reasoned analysis of constitutional challenges to statutes restricting the sale of liquor, the dissent acknowledges that Respondents and the trial court justified the three-license restrictions on corporations as "preserving the right of small, independent liquor dealers to do business." Appellant argues that this proves that this statutory restriction exists solely for economic protectionism and is thus invalid. The dissent acknowledges that this argument has some appeal, but claims the restriction must be evaluated alongside the numerous other justifications expressed for the statutes before proceeding to cite justifications offered in case from New Hampshire (1972), Massachusetts (1978), and New Jersey (1964 and 2009). While the dissent provides that economic protectionism is merely one of the police justifications for this type of regulation and there are other valid police purposes attributable to these provisions, this contention is not supported by the record below, as it was in the records of the cases cited from other states. As noted previously, Respondents'

[6] In fact, another provision of the statutory scheme provides DOR with the discretion to "limit the further issuance of retail dealer licenses in a political subdivision if it determines that the citizens who desire to purchase alcoholic liquors therein are more than adequately served because of (1) the number of existing retail stores, (2) the location of the stores within the subdivision, or (3) other reasons." S.C. Code Ann. § 61-6-170 (2009).

experienced counsel repeatedly stated to this Court during oral arguments that the *only* justification for these provisions is that they support small businesses.[7]

Ultimately, the Respondents' and dissent's position amounts to "it's just liquor," which is not a legitimate basis for regulation. Under this rationale, market regulation—no matter how oppressive—cannot ever be said to be unconstitutional. While we acknowledge that the State is granted broad powers with respect to regulating liquor sales, this is an example of market regulation that exceeds constitutional bounds. Therefore, we reverse the trial court's decision granting summary judgment to Respondents, and find sections 61-6-140 and -150 unconstitutional as violative of the General Assembly's police powers under article VIII-A, section 1 of the South Carolina Constitution.[8]

HEARN, J., concurs. BEATTY, C.J. and Acting Justice Costa M. Pleicones, concurring in result only. KITTREDGE, J., dissenting in a separate opinion.

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[7] I note that this argument was exclusively relied upon during oral arguments by Respondents' very experienced counsel, not just as a consequence of the Court's questioning. Counsel was not prohibited from propounding any other basis for the regulation, and therefore should be held to his statements to the Court that this is a protectionist statute.

[8] We need not reach Appellant's equal protection and due process arguments as the police power argument is dispositive of the issues on appeal. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 518 S.E.2d 591 (1999) (finding appellate courts need not reach remaining issue when one issue is dispositive).

JUSTICE KITTREDGE: I respectfully dissent. In my view the majority miscomprehends the law governing this dispute, as well as the record before the Court. I would affirm the trial court's grant of summary judgment to Respondents South Carolina Department of Revenue (SCDOR) and ABC Stores of South Carolina (ABC Stores), thereby reaching the same conclusion as virtually every other court[9] to have reviewed restrictions such as those found in sections 61-6-140[10] and -150[11] (the Statutes) of the South Carolina Code. Indeed, our standard of review mandates that result.

I.

"This Court has a limited scope of review in cases involving a constitutional challenge to a statute because all statutes are presumed constitutional and, if possible, will be construed to render them valid." *Curtis v. State*, 345 S.C. 557, 569, 549 S.E.2d 591, 597 (2001) (citing *Davis v. County of Greenville*, 322 S.C. 73, 77, 470 S.E.2d 94, 96 (1996)). "Moreover, when the constitutionality of a

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[9] *See infra* Part II; *cf. Grand Union Co. v. Sills*, 204 A.2d 853, 862 (N.J. 1964) (noting that state anti-tied house legislation, which prohibits manufacturers, wholesalers, and retailers of alcoholic beverages from having common ownership, has repeatedly withstood constitutional challenges).

[10] "No more than three retail dealer licenses may be issued to one licensee . . . . No more than three retail dealer licenses may be issued for the use of one corporation, association, partnership, or limited partnership." S.C. Code Ann. § 61-6-140 (2009).

[11] "No person, directly or indirectly, individually or as a member of a partnership or an association, as a member or stockholder of a corporation, or as a relative to a person by blood or marriage within the second degree, may have any interest whatsoever in a retail liquor store licensed under this section except the three stores covered by his retail dealer's licenses, as provided for in Section 61-6-140. The prohibitions in this section do not apply to a person having an interest in retail liquor stores on July 1, 1978." *Id.* § 61-6-150.

statute is challenged, *every presumption will be made in favor of its validity*. . . . A 'legislative act will not be declared unconstitutional unless its repugnance to the constitution is *clear and beyond a reasonable doubt*.'" *Segars-Andrews v. Judicial Merit Selection Comm'n*, 387 S.C. 109, 118, 691 S.E.2d 453, 458 (2010) (per curiam) (emphasis added) (quoting *Joytime Distribs. & Amusement Co. v. State*, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999)). Therefore, to prevail, Appellant Retail Services & Systems, Inc. "must overcome this Court's mandate to sustain a legislative enactment if there is 'any reasonable hypothesis to support it.'" *Ed Robinson Laundry & Dry Cleaning, Inc. v. S.C. Dep't of Revenue*, 356 S.C. 120, 124, 588 S.E.2d 97, 99 (2003) (quoting *D.W. Flowe & Sons v. Christopher Constr. Co.*, 326 S.C. 17, 23, 482 S.E.2d 558, 562 (1997)).

That mandate is even stronger in the realm of alcohol regulations because, "within the area of its jurisdiction, the State has virtually complete control over the . . . structure of the liquor distribution system." *North Dakota v. United States*, 495 U.S. 423, 431 (1990) (plurality opinion) (internal quotation marks omitted). Furthermore, "[g]iven the special protection afforded to state liquor control policies by the Twenty-first Amendment, they are supported by a strong presumption of validity and should not be set aside lightly." *Id.* at 433.

Although the majority pays lip service to this well-established principle, the majority proceeds to ignore it in favor of some unspoken standard more closely resembling strict scrutiny.[12] I would not disregard the legal standard that governs our review of this case.

II.

A. Police Power

As the majority is constrained to admit, the state constitution grants the General Assembly almost plenary authority to regulate the sale of alcohol:

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[12] "To survive strict scrutiny" a law "must meet a compelling state interest and be narrowly tailored to effectuate that interest." *In re Treatment & Care of Luckabaugh*, 351 S.C. 122, 140–41, 568 S.E.2d 338, 347 (2002).

> In the exercise of the police power the General Assembly has the right to prohibit and to regulate the manufacture, sale, and retail of alcoholic liquors or beverages within the State. The General Assembly *may license persons or corporations to manufacture, sell, and retail alcoholic liquors or beverages within the State under the rules and restrictions as it considers proper* . . . . The General Assembly may prohibit the manufacture, sale, and retail of alcoholic liquors and beverages within the State, and may authorize and empower state, county, and municipal officers, all or either, under the authority and in the name of the State, to buy in any market and retail within the State liquors and beverages . . . under such rules and regulations[] as it considers expedient.

S.C. Const. art. VIII-A, § 1 (emphasis added). However, this Court's recognition of the General Assembly's broad power to regulate alcohol predates the Constitution of 1895. We prefaced our consideration of a challenge to an 1893 law restricting the sale of alcohol with the following:

> [I]n our opinion the following propositions embody the principles governing this case: (1) That liquor, in its nature, is dangerous to the morals, good order, health, and safety of the people, and is not to be placed on the same footing with the ordinary commodities of life, such as corn, wheat, cotton, tobacco, potatoes, etc. (2) That the State, under its police power, can itself assume entire control and management of those subjects, such as liquor, that are dangerous to the peace, good order, health, morals, and welfare of the people, even when trade is one of the incidents of such entire control and management . . . . (3) That the [Dispensary A]ct of 1893 is a police measure.

State ex rel. George v. Aiken, 42 S.C. 222, 231–32, 20 S.E. 221, 224 (1894). We then went on to state,

> "The police power of the State is fully competent to regulate the business [of retail alcohol sales], to mitigate its evils, or to suppress it entirely. . . . As it is a business attended with danger to the

> community, it may, as already said, be entirely prohibited, or be permitted under such conditions as will limit to the utmost its evils. The manner and extent of regulation rest in the discretion of the governing authorities."

Id. at 233–34, 20 S.E. at 225 (quoting *Crowley v. Christensen*, 137 U.S. 86, 91 (1890)).

Appellant nonetheless argues that the Statutes exceed this broad grant of authority because they do not relate to the health, safety, or morals of the State, but merely provide economic protection for existing liquor retailers. The majority agrees, claiming there is no evidence in the record that the Statutes exist for a reason other than to protect liquor store owners from competition. If that were true, I might be inclined to join the majority. However, one does not have to scour the record for long to find other justifications for the Statutes.

The trial court noted that numerous reasonable hypotheses have been put forward for how limiting the number of retail liquor stores in which a person may have an interest or the number of retail liquor licenses an entity may be issued affects the health, safety, or morals of the State. Despite the majority's repeated assertions to the contrary, these extend far beyond "preserving the right of small, independent liquor dealers to do business." For instance, the Supreme Judicial Court of Massachusetts stated,

> Concentration of retailing in the hands of an economically powerful few has been thought to intensify the dangers of liquor sales stimulations, thereby threatening *trade stability* and *promotion of temperance*. Regulation of the number of licenses issued, therefore, aims at controlling the tendency toward concentration of power in the liquor industry; preventing monopolies; avoiding practices such as *indiscriminate price cutting* and *excessive advertising*; and preserving the right of small, independent liquor dealers to do business.

Johnson v. Martignetti, 375 N.E.2d 290, 297 (Mass. 1978) (emphasis added).[13]

[13] The statute at issue in *Johnson* "provide[d], in substance, that no person or

Appellant argues that the stated justification of "preserving the right of small, independent liquor dealers to do business" proves that the Statutes exist solely for the purpose of economic protectionism and are therefore invalid. I acknowledge this argument has some appeal, but the argument ignores the fact that the justification of protecting small liquor retailers is listed *after* several non-protectionist motives, such as promoting temperance by discouraging business practices that promote alcohol consumption. As the Supreme Court of New Hampshire, which was quoted by the experienced trial judge, stated, "[T]he issue here is whether the limitation confers a public benefit, not whether it also incidentally confers a private benefit. . . . That a law is popular [among small retailers] is insufficient to make it unconstitutional." *Granite State Grocers Ass'n v. State Liquor Comm'n*, 289 A.2d 399, 402 (N.H. 1972).

The Supreme Court of New Jersey has also upheld that state's limitation on the issuance of retail liquor licenses against a claim that the limit "has no observable public purpose and was enacted solely for the benefit of private interests." *Grand Union Co. v. Sills*, 204 A.2d 853, 860 (N.J. 1964). The court rejected the idea that the restriction's incidental impact on private businesses rendered it invalid, stating, "[T]he fact that [a law limiting a person to two retail liquor licenses] was sponsored or supported by organizations, whose private interests happened to coincide with the public interests as determined by the Legislature, in nowise impaired its validity or effectiveness." *Id.* The court noted that the limitation prevented the growth of chain liquor stores—stores that "would economically be the most capable of local advertising and price cutting through private brands" and whose "mode of operation furthers absentee ownership in this highly susceptible branch of trade." *Id.* at 859. The court also noted that the legislature had reasonably concluded such practices were "inimical to temperance and trade stability." *Id.* Therefore, the restriction was a valid exercise of New Jersey's inherent power "to curb relationships and practices calculated to stimulate sales [of liquor] and impair the State's policy favoring trade stability and the promotion of

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combination of persons, directly or indirectly, sh[ould] be granted more than three liquor licenses for the sale of alcoholic beverages to be consumed away from the premises." *Johnson*, 375 N.E.2d at 293. Massachusetts law currently limits a person or entity to seven retail alcohol licenses. Mass. Gen. Laws ch. 138, § 15.

temperance." *Id.* at 860. More recently, the court even declared the constitutionality of the state's two-license limit[14] "beyond dispute." *Circus Liquors, Inc. v. Governing Body of Middletown Twp.*, 970 A.2d 347, 352 (N.J. 2009).

Although the majority acknowledges these justifications, it claims they cannot be found in the record before this Court. Yet in its answer to Appellant's complaint, ABC Stores used language almost identical to that from *Johnson*, quoted above, listing various justifications for the Statutes. These include promoting trade stability and temperance by protecting against the dangers of aggressive sales tactics like price cutting and excessive advertising. Therefore, the justifications the majority claims were sufficient for the courts of Massachusetts, New Hampshire, and New Jersey[15] to find a valid exercise of police power exist in the record before this Court—whether the majority admits it or not.[16]

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[14] N.J. Stat. Ann. § 33:1-12.31.

[15] Numerous federal courts have also upheld licensing restrictions similar to those found in the Statutes. *See, e.g.*, *Parks v. Allen*, 426 F.2d 610, 614 (5th Cir. 1970) (upholding a city ordinance limiting a family to two retail liquor licenses as a valid exercise of the city's police power).

[16] I acknowledge that Respondents did not focus on non-economic justifications for the Statutes during oral argument. I suggest the focus and limitations of oral argument were driven by the many questions posed by the Court, which seemed to have a singular focus on establishing economic protectionism as the only motive for the Statutes. Moreover, the majority's claim that Respondents repeatedly asserted during oral argument that protecting small businesses was the *only* justification for the Statutes is simply not true. The record before this Court also includes the pleadings, the extensive record from the trial court, and the briefs—all of which make clear the many proper justifications for the Statutes. Furthermore, although the record contains numerous valid justifications for the Statutes, "in determining whether there is a legitimate government purpose, *the actual motivations of the enacting governmental body are entirely irrelevant*." *Lee v. S.C. Dep't of Nat. Res.*, 339 S.C. 463, 470 n.4, 530 S.E.2d 112, 115 n.4 (2000) (emphasis added) (citing *Bibco Corp. v. City of Sumter*, 332 S.C. 45, 53, 504

At bottom, the majority disagrees with the General Assembly's policy decision limiting to three the number of licensed retail liquor stores in which a person may have an interest and the number of retail liquor licenses an entity may be issued.[17] Fair enough. "However, it is not within our province to weigh[]in on the wisdom of legislative policy determinations." *Town of Hilton Head Island v. Kigre, Inc.*, 408 S.C. 647, 649–50, 760 S.E.2d 103, 104 (2014) (per curiam); *accord Grand Union Co.*, 204 A.2d at 860 (noting that it is not the role of the court to act as a "superlegislature" or concern itself with the wisdom of legislative enactments). We sit only in judgment of a statute's conformity with, or repugnance to, the constitution. *See, e.g.*, *City of Rock Hill v. Harris*, 391 S.C. 149, 154, 705 S.E.2d 53, 55 (2011) ("The power of our state legislature is plenary, and therefore, the authority given to the General Assembly by our Constitution is a limitation of legislative power, not a grant. This means that 'the General Assembly may enact any law not expressly, or by clear implication, prohibited by the State or Federal Constitution[].'" (quoting *Moseley v. Welch*, 209 S.C. 19, 27, 39 S.E.2d 133, 137

S.E.2d 112, 116 (1998)); *cf. FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993) (noting that when considering an equal protection challenge to a statutory classification subject to rational basis review, "because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature" and "the absence of legislative facts" in the record to support the legislature's decision "has no significance" (citations and internal quotation marks omitted)).

[17] I note that legislative attempts to amend or repeal the Statutes have been unsuccessful. *See* H.R. 3375, 121st Gen. Assemb., 1st Reg. Sess. (S.C. 2015) (repealing the Statutes and imposing limits on retail liquor licenses based on county population); S. 404, 120th Gen. Assemb., 1st Reg. Sess. (S.C. 2013) (increasing the limits in the Statutes from three licenses to ten licenses). It appears Appellant is therefore attempting to accomplish through the Court what it has been unable to achieve properly through the General Assembly. Regrettably, Appellant has persuaded a majority of my colleagues to take the bait and act as a superlegislature, thereby enabling Appellant to bypass the General Assembly entirely.

(1946))); *accord Grand Union Co.*, 204 A.2d at 860 ("Our function is to determine whether the Legislature has gone beyond the outer limits of its constitutional power. . . . [W]hile some may consider other regulatory courses to be preferable, we cannot say that the course chosen by the Legislature . . . is entirely without [a] rational basis."). The fact that other ways, perhaps even better ways, may exist to accomplish the General Assembly's goals is therefore of no import because "[w]e do not sit as a superlegislature to second guess the wisdom or folly of decisions of the General Assembly." *Keyserling v. Beasley*, 322 S.C. 83, 86, 470 S.E.2d 100, 101 (1996). Given the numerous expressed justifications for the licensing limitations, Appellant has fallen short of refuting every "reasonable hypothesis" in favor of the Statutes' constitutionality. Thus, under our deferential standard of review,[18] Appellant's claim that the Statutes exceed the General Assembly's police power to regulate the sale of alcohol must fail.

B. Equal Protection and Due Process

Because I would find the Statues to be a legitimate exercise of the State's police power,[19] I would next consider Appellant's challenge to the Statutes under South

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[18] As already noted, the majority largely ignores this standard. The majority's assertion that Respondents' police power argument is "unavailing" because other statutes already regulate various aspects of the liquor trade is further evidence that the majority has improperly injected strict scrutiny principles into its analysis. *Compare In re Treatment & Care of Luckabaugh*, 351 S.C. at 140–41, 568 S.E.2d at 347 (stating that laws impairing fundamental rights must be narrowly tailored to achieve a compelling state interest), *with id.* at 140 n.7, 568 S.E.2d at 347 n.7 (noting that laws challenged under the state constitution are typically subject to rational basis review).

[19] As far as I can tell, no other court has held that such laws exceed a state's police power. When restrictions on the sale of alcohol have been struck down, it has generally been on some other discrete constitutional or statutory ground. *See, e.g.*, *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276 (1984) (declaring a state law taxing certain alcoholic beverages produced in-state differently from beverages produced out-of-state to be violative of the Commerce Clause and noting that the state justified the law solely on the basis of promoting the local beverage industry);

Carolina's Equal Protection and Due Process Clauses.[20] For the reasons expressed below, I would find Appellant has also failed to prove the Statutes violate these constitutional provisions.[21]

Rice v. Alcoholic Bev. Control Appeals Bd., 579 P.2d 476, 494–95 (Cal. 1978) (holding that California's liquor price-fixing statute violated federal antitrust law).

[20] "The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws." S.C. Const. art. I, § 3. On appeal, Appellant does not refer to the Equal Protection and Due Process Clauses of the United States Constitution, basing its arguments instead on the South Carolina Constitution.

[21] I find the majority's reference to due process jurisprudence puzzling because, after all, the majority purports to not consider Appellant's due process challenge to the Statutes. Questions of relevancy aside, the majority's interpretation of these precedents is sorely lacking. I do not believe the majority fully appreciates what it says when it claims that *Lochner v. New York*, 198 U.S. 45 (1905), justified "court invalidation of almost all legislative restrictions on private business." That could hardly be further from the truth. In *Lochner*, the U.S. Supreme Court expressed skepticism about economic regulations that were ostensibly enacted under the police power but were, "in reality, passed from other motives." 198 U.S. at 64. The Court therefore invalidated a regulation it determined violated employers' and employees' due process rights to contract with one another over terms of employment. *Id.* Of course, the U.S. Supreme Court later repudiated *Lochner*, which it has characterized as standing for the discredited proposition "that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely." *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963). When we ourselves repudiated the *Lochner* standard—in a case cited and relied upon by the majority—we noted that most restrictions on private economic conduct failed to survive constitutional scrutiny under the *Lochner* approach. *R.L. Jordan Co. v. Boardman Petrol., Inc.*, 338 S.C. 475, 476–77, 527 S.E.2d 763, 764 (2000). We then adopted the "modern rule," which "gives great deference to legislative judgment on what is reasonable to promote the public welfare when

1. Equal Protection

Appellant has not proven that the classifications created by the Statutes violate the Equal Protection Clause.

> This Court [has] recognize[d] that the determination of whether a classification is reasonable is initially one for the legislature and will not be set aside by the courts unless it is plainly arbitrary. The requirements of equal protection are satisfied as long as (1) the classification bears a reasonable relation to the legislative purpose sought to be effected; (2) the members of the class are treated alike under similar circumstances and conditions; and (3) the classification rests on some reasonable basis.

Fraternal Order of Police v. S.C. Dep't of Revenue, 352 S.C. 420, 430, 574 S.E.2d 717, 722 (2002) (quoting *Gary Concrete Prods., Inc. v. Riley*, 285 S.C. 498, 504, 331 S.E.2d 335, 338–39 (1985)) (internal quotation marks omitted). Regardless of how Appellant defines the classifications at issue, because neither a suspect classification, such as race, nor a fundamental right is implicated, the classifications created by the Statutes need only be rationally related to a legitimate state interest. *Id.* at 430–31, 574 S.E.2d at 722 (quoting *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976)).

Appellant has not proven any of the factors necessary to succeed on this claim. There is no evidence Appellant is being treated differently from others within its classification—entities with three retail liquor licenses in South Carolina.[22]

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reviewing economic and social welfare legislation." *Id.* at 477, 527 S.E.2d at 765 (citation omitted). Thus, by refusing to give proper deference to the General Assembly's judgment, it is the majority that summons *Lochner*'s ghost, not me.

[22] According to SCDOR, one entity in South Carolina currently has four retail liquor licenses, held pursuant to the "grandfather clause" in section 61-6-150. However, section 61-6-150's grandfather clause refers to the limit on the number of licensed retail liquor stores in which a person may have an interest; it does not apply to section 61-6-140's limit on the number of retail liquor licenses an entity

Moreover, although Appellant may be treated differently than, say, owners of restaurants, "[t]he fact that [a] classification may result in some inequity does not render it unconstitutional." *Davis v. County of Greenville*, 313 S.C. 459, 465, 443 S.E.2d 383, 386 (1994) (citing *Cerny v. Salter*, 311 S.C. 430, 432, 429 S.E.2d 809, 811 (1993)). While restaurants and liquors stores may both sell alcohol, common sense dictates that the former, which sell single servings of alcohol for on-site consumption and must comply with numerous regulations inapplicable to liquor stores,[23] and the latter, which sell large quantities of alcohol for off-site consumption, implicate the dangers associated with the sale and consumption of alcohol in vastly different ways.[24] Further, as explained above in the discussion on the scope of the State's police power, limiting the number of licensed retail liquor stores in which a person may have an interest or the number of retail liquor licenses an entity may be issued has repeatedly been held to be rationally related to the government's interest in regulating the sale of alcohol. Finally, the government's interest in these regulations is clearly legitimate, a fact exemplified by the State's constitution. *See* S.C. Const. art. VIII-A, § 1; *see also Davis v. Query*, 209 S.C. 41, 57–58, 39 S.E.2d 117, 124–25 (1946) (citations omitted) (noting that government regulations of alcohol have been almost universally upheld). Therefore, Appellant's equal protection claim fails.

2. Due Process

For similar reasons, Appellant's due process challenge fails. "When an act is challenged under the due process clause, this 'Court only requires the act to be

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may be issued. *See* S.C. Code Ann. §§ 61-6-140 to -150. In fact, ABC Stores acknowledged during oral argument that section 61-6-150's grandfather clause does not permit a person or entity to hold more than three retail liquor licenses.

[23] *See* 4 S.C. Code Ann. Regs. 61-25 (Supp. 2016) (imposing regulations on retail food establishments).

[24] *Cf. Ind. Petrol. Marketers & Convenience Store Ass'n v. Cook*, 808 F.3d 318, 324–25 (7th Cir. 2015) (rejecting an equal protection challenge to a law allowing only certain types of stores to sell cold beer and stating that policy arguments against the law were matters for the state legislature, not the federal courts).

reasonably designed to accomplish its purposes, unless some fundamental right or suspect class is implicated.'" *In re Treatment & Care of Luckabaugh*, 351 S.C. 122, 140, 568 S.E.2d 338, 347 (2002) (quoting *State v. Hornsby*, 326 S.C. 121, 125–26, 484 S.E.2d 869, 872 (1997)). Furthermore, "to prove a denial of substantive due process, a party must show that he was arbitrarily and capriciously deprived of a cognizable property interest rooted in state law." *Grimsley v. S.C. Law Enforcement Div.*, 396 S.C. 276, 283, 721 S.E.2d 423, 427 (2012) (citing *Worsley Cos. v. Town of Mount Pleasant*, 339 S.C. 51, 56, 528 S.E.2d 657, 660 (2000)).

Appellant has attempted to broadly phrase the interest at stake in this case as the ability to pursue its chosen line of business. However, as the trial court correctly noted, there is no fundamental right to own a certain number of liquor stores in South Carolina. *See, e.g.*, *Query*, 209 S.C. at 56, 39 S.E.2d at 124 (noting that a liquor store owner "has no vested right to operate . . . in any manner other than that dictated by the state"). Retail liquor licenses themselves are not even property, but "mere permits, issued or granted in the exercise of the police power of the State to do what otherwise would be unlawful to do[,] and to be enjoyed only so long as the restrictions and conditions governing their continuance are complied with." *Feldman v. S.C. Tax Comm'n*, 203 S.C. 49, 57, 26 S.E.2d 22, 25 (1943) (citation omitted). Therefore, absent a fundamental right or suspect class, as with Appellant's equal protection challenge the Statutes need only satisfy the rational basis test.

As explained above, the Statutes "bear[] a reasonable relationship to a legitimate interest of government, and the Legislature has not engaged in an arbitrary or wrongful act in enacting the [S]tatute[s]." *Sloan v. S.C. Bd. of Physical Therapy Exam'rs*, 370 S.C. 452, 484, 636 S.E.2d 598, 615 (2006), *overruled on other grounds by Joseph v. S.C. Dep't of Labor, Licensing & Regulation*, 417 S.C. 436, 790 S.E.2d 763 (2016). Thus, the Statutes easily clear that hurdle.

The fact that restrictions such as those found in the Statutes need only satisfy the rational basis test explains why they repeatedly "have been held not to violate the due process or equal protection rights of liquor licensees." John D. Geathers & Justin R. Werner, *The Regulation of Alcoholic Beverages in South Carolina* 138 (2007). The Statutes plainly satisfy this test, as "many sound reasons have been

advanced to support restrictions on the number of liquor licenses allowed any one business interest." *Johnson*, 375 N.E.2d at 297. I find Appellant's arguments to the contrary unpersuasive.

III.

The Statutes are clearly rationally related to the legitimate government purpose of regulating the sale of alcohol.[25] Accordingly, Appellant has failed to satisfy the heavy burden required to have this Court declare the Statutes unconstitutional. I would therefore not ignore "this Court's mandate to sustain a legislative enactment

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[25] In its closing paragraph the majority claims my argument amounts to nothing more than "it's just liquor." Although not dispositive, the fact that the Statutes regulate liquor *is* important, as this Court and others have recognized that liquor is a unique commodity amenable to unique restrictions. *See, e.g.*, *Query*, 209 S.C. at 56–57, 39 S.E.2d at 124 (noting that the retail liquor trade is no "ordinary business" and liquor is "a peculiar problem upon which . . . the police power operates with less restraint than upon other commodities"); *State ex rel. George*, 42 S.C. at 232, 20 S.E. at 224 (stating that liquor "is not to be placed on the same footing with the ordinary commodities of life, such as corn, wheat, cotton, tobacco, potatoes, etc."); *Granite State Grocers Ass'n*, 289 A.2d at 401 (dismissing the claim that alcohol is "an economic commodity similar to cabbages and candlesticks" and noting that the state considered alcohol to be "a thing apart, a commodity with a potential for social harm unlike [other goods]"). It is also the only good singled out for regulation by the State in both the federal and state constitutions. *See* U.S. Const. amend. XXI, § 2; S.C. Const. art. VIII-A, § 1. Therefore, restrictions on the sale of alcohol may be constitutional even though they would not be if directed toward other goods. *See State ex rel. George*, 42 S.C. at 234, 20 S.E. at 225 ("It is because liquor is not regarded as one of the ordinary commodities that the [Dispensary A]ct of 1892, prohibiting its sale, was, as to that matter, construed to be constitutional. We can not for a moment believe that the court would have declared an act constitutional that prohibited entirely the sale of corn, cotton, or other ordinary commodities.").

if there is any reasonable hypothesis to support it,"[26] and would affirm the judgment of the trial court.

[26] *Ed Robinson Laundry & Dry Cleaning, Inc*, 356 S.C. at 124, 588 S.E.2d at 99 (citation and internal quotation marks omitted).

The Supreme Court of South Carolina

RE: Amendment to the South Carolina Appellate Court Rules

O R D E R

Pursuant to Article V, § 4 of the South Carolina Constitution, Rule 430(b)(10) of the South Carolina Appellate Court Rules is amended to read as follows:

> (10) has completed the Course of Study on South Carolina Law specified by Rule 402(c) of the South Carolina Appellate Court Rules. The Course of Study may not be taken prior to the filing of a complete application with the Clerk of the Supreme Court. An applicant who has completed the Bridge the Gap program administered by the South Carolina Bar prior to March 29, 2017, may use this completion to satisfy the requirement of this subsection.

This amendment is effective immediately.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
March 29, 2017

The Supreme Court of South Carolina

In the Matter Daniel Crawford Patterson, Respondent.

Appellate Case Nos. 2017-000631 and 2017-000632.

ORDER

The Office of Disciplinary Counsel asks this Court to place respondent on interim suspension pursuant to Rule 17 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). The petition also seeks appointment of the Receiver pursuant to Rule 31, RLDE, Rule 413, SCACR.

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

IT IS FURTHER ORDERED that Peyre Thomas Lumpkin, Esquire, Receiver, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain. Mr. Lumpkin shall take action as required by Rule 31, RLDE, to protect the interests of respondent's clients. Mr. Lumpkin may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating account(s) of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that Peyre Thomas Lumpkin, Esquire, Receiver, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Peyre Thomas Lumpkin, Esquire, Receiver, has been duly

appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Lumpkin's office.

Mr. Lumpkin's appointment shall be for a period of no longer than nine months unless an extension of the period of appointment is requested.

Within fifteen days of the date of this order, respondent shall serve and file the affidavit required by Rule 30, RLDE. Should respondent fail to timely file the required affidavit, he may be held in civil and/or criminal contempt of this Court as provided by Rule 30, RLDE.

s/ Donald W. Beatty C.J.
FOR THE COURT

Columbia, South Carolina

March 21, 2017

The Supreme Court of South Carolina

In the Matter of William E. Whitney, Jr., Respondent.

Appellate Case No. 2017-000607

ORDER

Respondent has submitted a Motion to Resign in lieu of Discipline pursuant to Rule 35 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules. We grant the Motion to Resign in Lieu of Discipline. In accordance with the provisions of Rule 35, RLDE, respondent's resignation shall be permanent.

The Lawyers' Fund for Client Protection is directed to pay restitution to three of respondent's former clients using funds held on behalf of respondent as outlined in Disciplinary Counsel's Return to Respondent's Motion for Permanent Resignation in lieu of Discipline.

Within fifteen (15) days of the date of this order, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, and shall also surrender his Certificate of Admission to Practice Law to the Clerk of Court.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
March 23, 2017

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Clyde Bowen Davis, Appellant.

Appellate Case No. 2013-002207

Appeal From Greenville County
Letitia H. Verdin, Circuit Court Judge

Opinion No. 5476
Heard December 6, 2016 – Filed March 29, 2017

AFFIRMED

Ryan Lewis Beasley, of Greenville, for Appellant.

Attorney General Alan McCrory Wilson, Assistant Deputy Attorney General Samuel Creighton Waters, Assistant Attorney General Joshua Richard Underwood, and Assistant Attorney General James Clayton Mitchell, III, all of Columbia, for Respondent.

WILLIAMS, J.: Clyde Bowen Davis appeals his conviction for conspiracy to traffic 100 grams or more but less than 200 grams of methamphetamine, arguing the circuit court erred in (1) refusing to dismiss Count II of the superseding indictment, (2) failing to find the State abused the grand jury process, (3) failing to find the State withheld material, exculpatory evidence, (4) admitting an unduly

suggestive out-of-court identification, and (5) admitting an investigator's testimony that included hearsay from a confidential informant (CI). We affirm.

FACTS/PROCEDURAL HISTORY

From 2009 to 2011, law enforcement officials were involved in "Operation Icehouse," a complex, interagency investigation into the sale of methamphetamine in upstate South Carolina. During the operation, investigators used CIs to make controlled purchases of the drug from suspected dealers, and they soon learned Michael Robinson was selling methamphetamine he had purchased from either Amy Brock or Nicholous "Nick" Dendy.[1]

In September or October 2010, Investigator Chad Ayers and another officer with the Greenville County Sheriff's Office met with Brock at her Greenville home. Brock admitted she had been buying methamphetamine from Dendy after meeting him through Robinson. During a typical deal, Brock told the investigators that Dendy would either come inside her home or meet her outside in the driveway. After giving money to him, Brock alleged Dendy would take it to a silver car, which she believed was being driven by Dendy's cousin, and retrieve the methamphetamine for her. Brock stated that, although she never learned his name, she had seen Dendy's cousin in his car when she met Dendy in the driveway to buy methamphetamine.

About a month after their first visit, Investigator Ayers and another officer returned to Brock's home. They showed her a color photograph of Clyde Davis from a copy of his South Carolina Department of Motor Vehicles (DMV) driving record and folded down any identifying information. When Investigator Ayers asked Brock who the man was, she identified him as Dendy's cousin. Then, on or around September 8, 2010, South Carolina Law Enforcement Division (SLED) Agent Brunson Ashley Asbill had a CI complete a controlled purchase of methamphetamine from Davis at Davis's home.

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[1] Through controlled purchases by other CIs, investigators also found Brian Sekerchak had been buying methamphetamine from Brock and selling it to others. Additionally, investigators discovered Joshua Byers had sold methamphetamine to Brock three to five times and he once bought an ounce of the drug from Dendy.

On December 13, 2011, the state grand jury returned a superseding indictment against Davis relating to his alleged involvement in the sale of methamphetamine.[2] Count I accused Davis of conspiracy to traffic 100 grams or more but less than 200 grams of methamphetamine in violation of subsection 44-53-375(C)(3) of the South Carolina Code (Supp. 2016), in Greenville and Pickens counties with Dendy, Brock, Robinson, Sekerchak, and Byers. Count II alleged Davis distributed methamphetamine in Greenville County in violation of subsection 44-53-375(B) of the South Carolina Code (2010) (amended 2016), on or around September 8, 2010.

During pretrial motions, Davis moved to dismiss the superseding indictment, arguing the state grand jury had no subject matter jurisdiction and the State presented no evidence amounting to probable cause on Count II. Additionally, Davis filed a motion to sever Count I from Count II of the indictment and a *Brady v. Maryland*[3] motion, alleging the State failed to disclose information relating to the CIs in the investigation. Davis also moved to suppress Brock's out-of-court identification of Davis, arguing the identification process was unduly suggestive.

At the motions hearing, the circuit court denied Davis's motion to dismiss the superseding indictment; however, the State consented to Davis's motion to sever the charges and agreed to proceed only on Count I for conspiracy to traffic methamphetamine. Additionally, the court denied Davis's *Brady* motion. After conducting a *Neil v. Biggers*[4] hearing, the court also denied Davis's motion to suppress Brock's out-of-court identification of Davis.

The case was called for a jury trial in Greenville County on September 17, 2013. During the two-day trial, each of Davis's alleged co-conspirators—all having pled guilty to various related charges—testified for the State in exchange for a recommendation for a lesser sentence. The State began its "historical case," of what law enforcement coined as the "Greenville Conspiracy," with testimony from

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[2] The state grand jury filed its first indictment on November 8, 2011. Count I of that indictment accused Davis of conspiring to traffic twenty-eight grams or more but less than 100 grams of methamphetamine.

[3] 373 U.S. 83 (1963).

[4] 409 U.S. 188 (1972).

two CIs involved in purchases of methamphetamine from Robinson, Sekerchak, Byers, and Dendy, and from a cooperating defendant in a separate trafficking conspiracy who had bought methamphetamine from Sekerchak and Brock.

Byers, one of Brock's suppliers, testified he met Davis one time through his cousin's boyfriend in a vehicle at a local car wash. While Byers sat in the back seat, he claimed Davis gave approximately one gram of methamphetamine to his cousin's boyfriend in the driver seat. Byers said his cousin's boyfriend then passed the drugs back to him, which he later resold.

Sekerchak testified he and his brother purchased methamphetamine from Brock and Dendy on numerous occasions, which they would resell. Sekerchak stated he waited in the car while his brother went into Brock's house to give them the money. According to Sekerchak, Davis drove up in either a black Honda or silver Dodge Charger and Dendy came outside to exchange the money for methamphetamine. Sekerchak stated Dendy and Brock sometimes mentioned they had to wait on Davis to deliver the drugs.

Robinson testified he purchased an "eight-ball," or 3.5 grams, of methamphetamine a week from Dendy, which he resold to others for about a year. During that period, Robinson also said he bought about 1.5 grams of methamphetamine from Brock every week. Robinson maintained he never met Davis.

Brock testified she bought between a "half-eighth" to a quarter ounce, or approximately 7.0 grams, of methamphetamine up to several times a week from Dendy and his cousin from spring 2010 to October or November 2010. She stated she was able to see the person in a silver car on numerous occasions because roughly half of the deals occurred in her driveway during daylight hours. When the State showed Davis's DMV driving record to Brock in the courtroom, she reaffirmed her prior identification of Davis as Dendy's supplier.

Dendy testified he sold between 3.0 and 3.5 grams of methamphetamine, which he got from Davis, to Robinson on at least fifteen occasions. Dendy stated he first met Brock during a visit to Robinson's home. After they developed a buyer-seller relationship, Dendy stated he would go to Brock's house to collect her money and then call Davis to bring the amount of methamphetamine that Brock requested. Dendy testified Brock asked for a quarter ounce of the drug nine to ten times and an eight-ball five to six times. When Davis arrived, Dendy said he would go out to

meet him and exchange the money for methamphetamine. Dendy confirmed that Brock would sometimes come outside next to where he and Davis completed the transactions. On cross-examination, Dendy admitted Davis was not his cousin.

Last, the State called Agent Asbill, the SLED investigator who initiated the CI's undercover purchase of methamphetamine from Davis. When the State began to elicit testimony from Agent Asbill about the CI's purchase, Davis made multiple objections that such testimony was inadmissible hearsay from a nontestifying witness and violated his confrontation rights. The circuit court overruled the objections, stating Agent Asbill could testify about his personal observations and experiences during the controlled purchase.

During his testimony, Agent Asbill did not reveal the CI's identity to the jury. Agent Asbill testified that he and another officer searched the CI, placed a transmitting device on him, and gave him documented government money. Thereafter, Agent Asbill stated that, while he was parked at a nearby school, the CI went to Davis's residence on Dobb Street, spent a period of time there, and received a phone call. Agent Asbill also noted he saw a silver Chrysler 300 in the area, but he did not see who was driving the car. The State then requested a bench conference outside the jury's presence to discuss its desire to ask Agent Asbill if he could identify the voices in the CI's wired recording of the controlled purchase. After Agent Asbill informed the circuit court that he could not determine who was speaking in the recording, the State conceded the issue. Once the jury returned, the following colloquy took place:

The State:	We were discussing a controlled purchase against the target Clyde Davis. What were the results of that controlled purchase?
Agent Asbill:	The confidential informant returned to us with a purchase of methamphetamine.
The State:	And how much methamphetamine was it?
Agent Asbill:	Approximately 3.5 grams.

The State:	And was that paid for with documented government funds?
Agent Asbill:	That is correct.
The State:	Is that the only controlled purchase attempted against Clyde Davis?
Agent Asbill:	Yes, sir. The only one I'm aware of.

At the conclusion of trial, the jury found Davis guilty of conspiracy to traffic 100 grams or more but less than 200 grams of methamphetamine. The circuit court sentenced Davis to a mandatory twenty-five years' imprisonment and issued a $50,000 fine. Davis subsequently filed a "motion for verdict in arrest of judgment" and a motion for a new trial. In his motions, Davis argued Agent Asbill's testimony regarding the CI's alleged undercover purchase was inadmissible hearsay and violated his confrontation rights. Davis also contended Brock's out-of-court identification was a result of unduly suggestive police tactics, and thus, was inadmissible. The circuit court denied both motions by written order on October 3, 2013. This appeal followed.

ISSUES ON APPEAL

I. Did the circuit court err in refusing to dismiss Count II of the superseding indictment?

II. Did the circuit court err in failing to find the State abused the state grand jury process?

III. Did the circuit court err in failing to find the State violated Davis's due process rights under *Brady*?

IV. Did the circuit court err in admitting Brock's out-of-court identification of Davis?

V. Did the circuit court err in admitting Agent Asbill's testimony concerning the CI's alleged controlled purchase from Davis?

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Jenkins*, 412 S.C. 643, 650, 773 S.E.2d 906, 909 (2015). The decision of whether to admit or exclude evidence is within the sound discretion of the circuit court. *State v. Jackson*, 384 S.C. 29, 34, 681 S.E.2d 17, 19 (Ct. App. 2009). Likewise, the determination of whether to admit an eyewitness's identification is at the discretion of the circuit court. *State v. Moore*, 343 S.C. 282, 288, 540 S.E.2d 445, 448 (2000). This court will not disturb the circuit court's admissibility determinations absent a prejudicial abuse of discretion. *State v. Adkins*, 353 S.C. 312, 326, 577 S.E.2d 460, 468 (Ct. App. 2003). "An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support." *State v. Irick*, 344 S.C. 460, 464, 545 S.E.2d 282, 284 (2001).

LAW/ANALYSIS

I. Count II of the Superseding Indictment

Davis first argues the state grand jury lacked subject matter jurisdiction over Count II because the charge for distribution of methamphetamine in Greenville County did not have multi-county significance.[5]

During oral argument, Davis's counsel informed the court that Count II was eventually dismissed after the filing of this appeal. Therefore, we find any issue arising from Count II of the superseding indictment is moot. *See Sloan v.*

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[5] At the outset, the State points out that Davis only served a notice of appeal from the circuit court's order denying his motions for verdict in arrest of judgment and a new trial. Thus, the State contends Issues 1–3 are not preserved for this court's review because Davis did not raise them to the circuit court in his post-trial motions. Upon our review of the case law, we do not believe Davis was required to file a motion for a new trial to preserve arguments previously presented to and passed upon by the circuit court. *See State v. Holliday*, 333 S.C. 332, 339, 509 S.E.2d 280, 283 (Ct. App. 1998) ("A motion for new trial is not necessary to preserve for review on appeal a question which has been fairly and properly raised in the trial court and passed upon there." (quoting *Bowers v. Watkins Carolina Express, Inc.*, 259 S.C. 371, 376, 192 S.E.2d 190, 192 (1972))).

Greenville Cty., 356 S.C. 531, 552, 590 S.E.2d 338, 349 (Ct. App. 2003) ("[M]oot appeals result when intervening events render a case nonjusticiable. . . . A case becomes moot when judgment, if rendered, will have no practical legal effect upon [the] existing controversy." (second alteration in original) (internal citations omitted)).

II. Abuse of the Grand Jury Process

Davis next asserts the circuit court erred in refusing to dismiss the superseding indictment due to several instances of the State's abuse of the grand jury process.

"A grand jury is not a prosecutor's plaything and the awesome power of the State should not be abused but should be used deliberately, not in haste." *State v. Capps*, 276 S.C. 59, 61, 275 S.E.2d 872, 873 (1981). However, "[g]rand jury proceedings are presumed to be regular unless clear evidence indicates otherwise." *State v. Moses*, 390 S.C. 502, 520, 702 S.E.2d 395, 405 (Ct. App. 2010).

In his motion to dismiss the superseding indictment, Davis stated, "Count II should also be dismissed because the State abused the grand jury process by not presenting evidence that would amount to probable cause." Specifically, Davis claimed the State presented no evidence concerning the CI's veracity or reliability in the alleged controlled purchase of methamphetamine.

On appeal, however, Davis maintains the State abused the state grand jury proceedings when it allowed Investigator Ayers to falsely testify that Agent Asbill's CI completed another controlled purchase from Davis at the suggestion of Dendy.[6] Moreover, Davis contends on appeal that the State had Brock and Investigator Ayers falsely testify before the state grand jury that Brock identified Davis through a "photo line-up"—suggesting a line-up including more than one person—when she was only shown Davis's photograph from his DMV record.

Because Davis argues different issues on appeal from the one presented to the circuit court, we find they are not preserved for our review. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."). To the extent Davis

[6] We address the merits of this claim under *Brady* in Part III, *infra*.

again contends on appeal that the State abused the grand jury process by failing to produce sufficient evidence amounting to probable cause on Count II, we find the issue is moot as discussed in Part I, *supra*.

III. Due Process

Davis argues the circuit court erred in failing to dismiss the indictment when the State failed to preserve and turn over material exculpatory evidence in violation of his due process rights. We disagree.

"The *Brady* disclosure rule requires the prosecution to provide the defendant with any evidence in the prosecution's possession that may be favorable to the accused and material to guilt or punishment." *State v. Anderson*, 407 S.C. 278, 286, 754 S.E.2d 905, 909 (Ct. App. 2014). "[A]n individual asserting a *Brady* violation must demonstrate the evidence was (1) favorable to the accused; (2) in the possession of or known by the prosecution; (3) suppressed by the State; and (4) material to the accused's guilt or innocence, or was impeaching." *Id.* at 287, 754 S.E.2d at 909. "Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *State v. Von Dohlen*, 322 S.C. 234, 241, 471 S.E.2d 689, 693 (1996).

At the pretrial motions hearing, Davis claimed the State failed to turn over requested discovery pursuant to Rule 5, SCRCrimP, regarding an alleged drug transaction between Agent Asbill's CI and Dendy. Investigator Ayers testified to the state grand jury that law enforcement sent the CI to purchase methamphetamine from Dendy who, in turn, sent the CI to purchase the drug from his supplier, Davis. Therefore, Davis argued evidence concerning this purchase was exculpatory because it showed the CI never completed a transaction with Davis and that no conspiracy agreement existed between the alleged co-conspirators.

Upon our review of the record, we find Davis failed to establish that his due process rights were violated under *Brady*. We first note the State claimed it possessed no discovery to offer to the defense on this alleged transaction because it was aborted and never occurred. In addition, the State maintained the CI only completed one controlled purchase from Davis, which is the underlying crime for Count II of the indictment for distribution of methamphetamine. Therefore, even if

evidence that a transaction between the CI and Dendy did not occur is favorable to the defense, we find Davis has failed to show it was in the State's possession or somehow suppressed.

Furthermore, the State did not call the CI as a witness, and it did not discuss this alleged transaction at trial. We fail to see how the fact that Davis did not sell methamphetamine to the CI on this particular occasion would have led to a different result regarding his guilt or innocence on his conspiracy to traffic methamphetamine charge with his five alleged co-conspirators. *See Von Dohlen*, 322 S.C. at 241, 471 S.E.2d at 693. Therefore, we affirm the circuit court's denial of Davis's *Brady* motion.

IV. Brock's Identification

Davis contends the circuit court erred in failing to suppress Brock's out-of-court identification of him to investigators. We disagree.

"A criminal defendant may be deprived of due process of law by an identification procedure [that] is unnecessarily suggestive and conducive to irreparable mistaken identification." *State v. Traylor*, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004). "An in-court identification of an accused is inadmissible if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification." *Id.* "Single person show-ups are particularly disfavored in the law." *Moore*, 343 S.C. at 287, 540 S.E.2d at 448.

In *Neil v. Biggers*, the United States Supreme Court set forth a two-pronged test to determine whether due process requires the suppression of an eyewitness identification. 409 U.S. at 198–200. To ensure due process, *Neil v. Biggers* requires courts to assess, on a case-by-case basis, the following: (1) whether the identification resulted from unnecessary and unduly suggestive police procedures, and if so, (2) whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. *State v. Liverman*, 398 S.C. 130, 138, 727 S.E.2d 422, 426 (2012).

> Under the totality of the circumstances, the factors to be considered in assessing the reliability of an otherwise unduly suggestive identification procedure are: (1) the witness's opportunity to view the perpetrator at the time

> of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the perpetrator, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation.

Id.

In the instant case, following its in camera hearing, the circuit court seemed to find the investigators' strategy of showing only one photograph of Davis to Brock was unduly suggestive and "concerning" because Davis "was already known to law enforcement" prior to the identification. Moving to the second prong of the *Neil v. Biggers* test, the court found that, under the totality of the circumstances, Brock's out-of-court identification was reliable enough to submit to the jury. In its analysis, the court found Brock identified Davis with a high level of certainty. Moreover, the court noted Brock had numerous opportunities to see Davis, and at least part of the time, she observed him at a very close range, albeit through a car windshield. The court also explained a great deal of time had not passed between Brock's identification and the last time she had seen Davis.

On appeal, Davis argues the court abused its discretion in its analysis of the reliability factors. First, Davis asserts Brock never spoke to Dendy's supplier or observed him for a considerable period of time. Second, Davis contends Brock's degree of attention was insufficient because she was merely a casual observer and admitted to being under the influence of methamphetamine during the drug deals. Third, Davis points out Brock gave no prior description of Dendy's supplier to authorities. Fourth, Davis argues Brock never revealed her level of certainty to authorities after making the identification. Fifth, Davis claims the length of time of a month or two between when investigators first contacted her and the identification was substantial.[7]

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[7] While concurring with the circuit court's analysis, the State concedes Brock never provided a physical description of Dendy's cousin before the single photograph identification but claims the procedure was a "confirmation identification" accepted by our supreme court in *Liverman*. *See* 398 S.C. at 141–42, 727 S.E.2d at 427–28 (stating "[t]he suggestive nature of a show-up is mitigated by the witness's prior knowledge of the accused" and concurring with other jurisdictions that consider the procedure as "merely confirmatory"). Regarding the second factor,

While meritorious disagreement exists on the *Neil v. Biggers* reliability factors, we cannot say the circuit court committed a prejudicial abuse of discretion in admitting Brock's prior identification of Davis because its decision was supported by the evidence. Brock testified she saw Dendy's cousin on multiple occasions with the car window down during daylight hours. Brock's level of certainty was high because she directly identified the man in the photograph as Dendy's cousin when investigators asked who it depicted. Indeed, the investigators did not suggest a response by asking Brock if it was Dendy's cousin. Moreover, given that Brock testified the five-to-ten minute transactions took place several times a week over the span of several months and she saw Dendy's cousin on about half of those occasions, the length of time between her encounters with the suspect and her identification to the investigators was not so prolonged to be unreliable. Therefore, we affirm the circuit court's decision to admit the identification.

V. Agent Asbill's Testimony

Davis argues Agent Asbill's testimony that the CI completed a controlled purchase at his residence was inadmissible hearsay and violated his confrontation rights. We agree.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. As a general rule, hearsay is inadmissible unless an exception applies. Rule 802, SCRE; *see also* Rules 803 and 804, SCRE (providing exceptions to the hearsay rule).

In the instant case, Agent Asbill testified his CI went to Davis's residence, spent some time there, received a phone call, and returned to him with approximately 3.5 grams of methamphetamine. Agent Asbill also said the CI paid for the drugs with government funds. When the State questioned whether this was the only controlled purchase attempted against Davis, he replied, "Yes, sir."

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the State claims Brock had a high level of attention because she was a drug user who had a vested interest in knowing who was providing her with methamphetamine.

During his testimony, however, Agent Asbill stated he was parked at a nearby school during the alleged transaction between the CI and Davis. Moreover, law enforcement had no visual surveillance of Davis's residence, and Agent Asbill told the circuit court he could not identify the voices in the CI's wired recording. Consequently, Agent Asbill had no personal knowledge concerning the CI's activities during the purchase of methamphetamine. As a result, Agent Asbill was allowed to relay to the jury the CI's multiple implied statements to him upon return for debriefing that he had, in fact, gone to Davis's residence and purchased methamphetamine.[8] Therefore, we find the circuit court erred in admitting the portion of Agent Asbill's testimony in which he had no personal knowledge of the CI's activities during the controlled purchase because it was inadmissible hearsay without an exception under our rules of evidence. *See* Rule 802, SCRE.

Furthermore, we find the admission of this portion of Agent Asbill's testimony violated Davis's constitutional right to confront witnesses against him. The Confrontation Clause of the Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI. This bedrock procedural guarantee is applicable to the states under the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 406 (1965).

The United States Supreme Court has held the Confrontation Clause prohibits the admission of out-of-court testimonial statements of a witness unless the witness is unavailable to testify and the defendant had a prior opportunity to cross-examine

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[8] Nevertheless, the State argues Agent Asbill never repeated any statements from the CI to the jury and that the facts of this case are similar to *State v. Sachs*, 264 S.C. 541, 216 S.E.2d 501 (1975). In *Sachs*, our supreme court found officers' testimony that the defendant's sister accompanied them to a courthouse, typed affidavits for search warrants, and delivered a package containing drugs to the defendant's home was not inadmissible hearsay. *Id.* at 567–68, 216 S.E.2d at 515. The court reasoned the testimony was based upon the officers' personal observations of the defendant's sister and no conversations between them were related to the jury. *Id.* In the instant case, however, Agent Asbill testified as to the CI's activities at Davis's residence that he did not personally observe from his car parked at a nearby school. Therefore, the jury could only infer from Agent Asbill's testimony that the CI communicated to him, in some form, that he successfully purchased methamphetamine at Davis's residence.

the witness. *Crawford v. Washington*, 541 U.S. 36, 68 (2004). The *Crawford* Court stated the "core class of 'testimonial' statements" includes: (1) ex parte in-court testimony or its functional equivalent, (2) extrajudicial statements contained in formalized testimonial materials, (3) statements made under circumstances that would lead an objective witness to reasonably believe that the statement would be available for use at a later trial, and (4) statements taken by police officers in the course of interrogations. *State v. Ladner*, 373 S.C. 103, 112, 644 S.E.2d 684, 688–89 (2007) (citing *Crawford*, 541 U.S. at 51–52). However, the Court noted the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Crawford*, 541 U.S. at 59 n.9. Accordingly, "an out of court statement is not hearsay if it is offered for the limited purpose of explaining why a government investigation was undertaken." *State v. Brown*, 317 S.C. 55, 63, 451 S.E.2d 888, 894 (1994) (citing *United States v. Love*, 767 F.2d 1052, 1063 (4th Cir. 1985)).

We find the CI's implied statements to investigators that he completed a drug deal at Davis's residence were testimonial because an objective witness would reasonably believe the government would use such statements in a later trial—as they did in this case. *See Crawford*, 541 U.S. at 51–52; *see also, e.g.*, *United States v. Cromer*, 389 F.3d 662, 675 (6th Cir. 2004) ("Tips provided by confidential informants are knowingly and purposely made to authorities, accuse someone of a crime, and often are used against the accused at trial. The very fact that the informant is confidential—*i.e.*, that not even his identity is disclosed to the defendant—heightens the dangers involved in allowing a declarant to bear testimony without confrontation. The allowance of anonymous accusations of crime without any opportunity for cross-examination would make a mockery of the Confrontation Clause."). Moreover, Agent Asbill's testimony about the controlled purchase was not offered for context or background information as to why authorities were investigating Davis. *See Crawford*, 541 U.S. at 59 n.9; *Brown*, 317 S.C. at 63, 451 S.E.2d at 894. Upon our review of the record, we cannot locate any trial testimony from Agent Asbill providing background information such as the date of the alleged controlled purchase or how it played into the investigation of Davis and the other co-conspirators. Therefore, we find the CI's statements regarding the controlled purchase were offered to prove the truth of the matter asserted: Davis was a drug dealer. Because Davis had no opportunity to cross-examine the CI, we find the circuit court's admission of this hearsay violated Davis's Sixth Amendment right to confrontation.

VI. Harmless Error

The State asserts any error in the admission of the hearsay was harmless. We agree.

"A violation of the Confrontation Clause is not per se reversible but is subject to a harmless error analysis." *State v. Gracely*, 399 S.C. 363, 375, 731 S.E.2d 880, 886 (2012) (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986)).

> Whether such an error is harmless in a particular case depends upon a host of factors . . . . These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and[] of course, the overall strength of the prosecution's case.

Van Arsdall, 475 U.S. at 684.

In this case, Agent Asbill's testimony about the CI's controlled purchase of 3.5 grams of methamphetamine had little significance to the State's case against Davis for conspiracy to traffic 100 grams or more of the drug with his five co-conspirators. Focusing on that charge, we find the State presented cumulative testimony from Brock, Dendy, and Sekerchak regarding Davis's involvement in the conspiracy. Indeed, their testimony corroborated each other's allegation that Davis drove to Brock's home and delivered methamphetamine to Dendy on numerous occasions over a substantial period of time. Robinson also testified he purchased a large amount of methamphetamine from Dendy, who confirmed in his testimony that he was selling the drugs for Davis.

From the co-conspirators' testimony, the jury had more than enough evidence to find Davis conspired to traffic 100 grams or more of methamphetamine. Moreover, Davis rigorously cross-examined the co-conspirators, especially Dendy on the issue of whether Davis was his cousin. *Cf. Gracely*, 399 S.C. at 375–77, 731 S.E.2d at 886–87 (finding a Confrontation Clause error was not harmless when the circuit court disallowed the defendant from questioning his co-conspirators

about the possible mandatory minimum sentences they avoided by testifying for the State because the case relied exclusively on their credibility). Upon our review of the entire trial transcript, we find the circuit court's error in admitting hearsay during Agent Asbill's testimony was harmless beyond a reasonable doubt.

CONCLUSION

Based on the foregoing analysis, Davis's conviction for conspiracy to traffic methamphetamine is

AFFIRMED.

THOMAS and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Otis Nero, Appellant,

v.

South Carolina Department of Transportation, Employer,

AND

State Accident Fund, Carrier, Respondents.

Appellate Case No. 2015-001277

Appeal From The Workers' Compensation Commission

Opinion No. 5477
Heard November 17, 2016 – Filed March 29, 2017

REVERSED

Stephen J. Wukela, of Wukela Law Firm, of Florence, for Appellant.

John Gabriel Coggiola, of Willson, Jones, Carter & Baxley, P.A., of Columbia, for Respondent.

MCDONALD, J.: In this appeal from the Appellate Panel of the South Carolina Workers' Compensation Commission (the Appellate Panel), Otis Nero argues the Appellate Panel erred in failing to find (1) his employer, the South Carolina Department of Transportation (SCDOT), received adequate notice of his

workplace accident and (2) he demonstrated reasonable excuse for—and SCDOT was not prejudiced by—any late formal notice. We reverse.

Facts and Procedural History

On June 20, 2012, Nero was working on a SCDOT road crew supervised by lead man Benjamin Durant and supervisor Danny Bostick. Nero's work, along with that of four or five other members of the crew, involved pulling a thirty-foot-long two-by-four "squeegee board" to level freshly poured concrete. At some point during the day, Bostick pulled Nero off the squeegee board temporarily because Nero appeared overheated. After a break, Nero returned to pulling the squeegee board.

At approximately 3:00 p.m., after finishing their work and cleaning up, the crew, including Nero, Durant, and Bostick, was talking and joking near the supervisor's truck when Nero lost consciousness and fell to the ground. Nero regained consciousness, stood up, told his supervisors he was fine, and drove home. Once home, Nero passed out again while sitting in his driveway. His wife immediately took him to the hospital where he was admitted and treated.

At the emergency room, Nero filled out a "History and Physical Report" and stated, "I passed out talking to my boss." Nero was initially seen by his primary care physician, Dr. Robert Richey. After a series of tests, Dr. Richey determined Nero had cervical stenosis and referred Nero to a neurosurgeon, Dr. William Naso, who performed a fusion surgery.

On July 9, 2012, prior to his surgery, Nero provided the human resources department with his "SCDOT Certification of Health Care Provider for Employee's Serious Health Condition (Family Medical Leave Act)" paperwork. Nero did not mention the squeegee incident in this submission, and under the section designated "approximate date condition commenced," Nero stated, "several years—neck and syncope." During his deposition, Nero testified he had not been treated for any back or neck problems prior to the squeegee board incident.

On January 6, 2014, Nero filed a request for a hearing, alleging he suffered injuries to his neck and shoulders while pulling the squeegee board on June 20, 2012. The single commissioner found Nero's claim compensable as an injury by accident that aggravated a preexisting cervical disc condition in Nero's neck. The single commissioner further determined Nero had a "reasonable excuse" for not formally

reporting his work injury because (1) his lead man and supervisor were present and knew of pertinent facts surrounding the accident sufficient to indicate the possibility of a compensable injury, (2) the lead man and supervisor followed up with Nero, and (3) SCDOT was aware Nero did not return to work after the June 20, 2012 incident. Further, SCDOT was notified Nero was hospitalized and ultimately had neck surgery. Finally, the single commissioner found SCDOT was not prejudiced by the late formal reporting of the injury.

SCDOT appealed to the Appellate Panel. The Appellate Panel reversed the single commissioner, finding that although Nero's supervisors witnessed him pass out, Nero never reported that the squeegee board accident involved a "snap" in his shoulders and neck. The Appellate Panel further found Nero's excuse for not formally reporting was not reasonable and SCDOT was prejudiced because Nero's late reporting deprived it of the opportunity to investigate the incident and whether Nero's work aggravated his preexisting cervical stenosis.

Standard of Review

The Administrative Procedures Act (APA) establishes the standard for our review of Appellate Panel decisions. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981). Under the APA, this court can reverse or modify the decision of the Appellate Panel when the substantial rights of the appellant have been prejudiced because "the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." *Transp. Ins. Co. & Flagstar Corp. v. S.C. Second Injury Fund*, 389 S.C. 422, 427, 699 S.E.2d 687, 689–90 (2010); *see also* S.C. Code Ann. § 1–23–380(5)(d)–(e) (Supp. 2016). "The Appellate Panel is the ultimate fact finder in workers' compensation cases, and if its findings are supported by substantial evidence, it is not within our province to reverse those findings." *Mungo v. Rental Unif. Serv. of Florence, Inc.*, 383 S.C. 270, 279, 678 S.E.2d 825, 829–30 (Ct. App. 2009). "The mere possibility of drawing two inconsistent conclusions from the evidence does not prevent a finding from being supported by substantial evidence." *Olson v. S.C. Dep't of Health & Envtl. Control*, 379 S.C. 57, 63, 663 S.E.2d 497, 501 (Ct. App. 2008). "Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action." *Taylor v. S.C. Dep't of Motor Vehicles*, 368 S.C. 33, 36, 627 S.E.2d 751, 752 (Ct. App.

2006) (quoting *S.C. Dep't of Motor Vehicles v. Nelson*, 364 S.C. 514, 519, 613 S.E.2d 544, 547 (2005)).

Law and Analysis

I. Adequate Notice

Nero argues the Appellate Panel erred when it found SCDOT did not receive adequate notice under section 42–15–20(A) of the South Carolina Code (2015). We agree.

Section 42–15–20 sets forth the requirement that an employee provide timely notice of an accident to an employer, stating, in pertinent part:

> (A) Every injured employee or his representative immediately shall on the occurrence of an accident, or as soon thereafter as practicable, give or cause to be given to the employer a notice of the accident and the employee shall not be entitled to physician's fees nor to any compensation which may have accrued under the terms of this title prior to the giving of such notice, unless it can be shown that the employer, his agent, or representative, had knowledge of the accident or that the party required to give such notice had been prevented from doing so by reason of physical or mental incapacity or the fraud or deceit of some third person.
>
> (B) Except as provided in subsection (C), no compensation shall be payable unless such notice is given within ninety days after the occurrence of the accident or death, unless reasonable excuse is made to the satisfaction of the commission for not giving timely notice, and the commission is satisfied that the employer has not been prejudiced thereby.

"Section 42–15–20 requires that every injured employee or his representative give the employer notice of a job-related accident within ninety days after its

occurrence." *Bass v. Isochem*, 365 S.C. 454, 472–73, 617 S.E.2d 369, 379 (Ct. App. 2005); *see also McCraw v. Mary Black Hosp.*, 350 S.C. 229, 237, 565 S.E.2d 286, 290 (2002) ("Pursuant to S.C. Code Ann. § 42–15–20 (1985), notice to the employer must be given within 90 days after the occurrence of the accident upon which the employee is basing her claim."). "Generally, the injury is not compensable unless notice is given within ninety days." *Bass*, 365 S.C. at 473, 617 S.E.2d at 379. "The burden is upon the claimant to show compliance with the notice provisions of section 42–15–20." *Id.*; *Lizee v. S.C. Dep't of Mental Health*, 367 S.C. 122, 127, 623 S.E.2d 860, 863 (Ct. App. 2005) ("The claimant bears the burden of proving compliance with these notice requirements.").

"Section 42–15–20 provides no specific method of giving notice, the object being that the employer be actually put on notice of the injury so he can investigate it immediately after its occurrence and can furnish medical care for the employee in order to minimize the disability and his own liability." *Hanks v. Blair Mills, Inc.*, 286 S.C. 378, 381, 335 S.E.2d 91, 93 (Ct. App. 1985). The provision for notice should be liberally construed in favor of claimants. *Mintz v. Fiske-Carter Constr. Co.*, 218 S.C. 409, 414, 63 S.E.2d 50, 52 (1951); *Etheredge v. Monsanto Co.*, 349 S.C. 451, 458, 562 S.E.2d 679, 683 (Ct. App. 2002). "Its purpose is at least twofold; first, it affords protection of the employer in order that he may investigate the facts and question witnesses while their memories are unfaded, and second, it affords the employer opportunity to furnish medical care of the employee in order to minimize the disability and consequent liability upon the employer." *Mintz*, 218 S.C. at 414, 63 S.E.2d at 52. In *Etheredge*, this court concluded "notice is adequate, when there is some knowledge of accompanying facts connecting the injury or illness with the employment, and signifying to a reasonably conscientious supervisor that the case might involve a potential compensation claim." 349 S.C. at 459, 562 S.E.2d at 683; *contra Sanders v. Richardson*, 251 S.C. 325, 328, 162 S.E.2d 257, 258 (1968) (explaining that just because an employer has knowledge of the fact that an employee becomes ill while at work "does not necessarily, of itself, serve the employer with notice that such illness constituted or resulted in a compensable injury").

Our review of the record confirms Nero never formally reported his injury to his employer. Nero was able to communicate with SCDOT because he submitted the necessary paperwork for benefits under the Family and Medical Leave Act[1]

[1] 29 U.S.C.A. §§ 2601–2654 (2009 & Supp. 2011).

(FMLA). As Nero has not alleged any mental condition, physical issue, or third party prevented his formal reporting, we must determine whether SCDOT had knowledge of Nero's accident pursuant to section 42–15–20(A).

Nero submits the following facts in support of his argument that SCDOT had adequate notice of his workplace injury. On June 20, 2012, Bostick was concerned about Nero due to both the heat and his age and temporarily pulled Nero off of the squeegee board. After finishing for the day, though while still on the clock, Nero lost consciousness and fell to the ground—Durant and Bostick both witnessed the incident. After regaining consciousness and driving home, Nero passed out a second time. His wife immediately took him to the hospital where he was admitted, treated by a neurosurgeon, and diagnosed with cervical stenosis. He underwent neck surgery approximately two months later. Durant and Bostick were both aware that Nero was hospitalized and had surgery. In fact, they spoke with Nero while he was in the hospital. Nero never returned to work thereafter.

SCDOT argues Nero omitted several crucial facts contrary to his argument that a reasonably conscientious manager should have been aware of a potential compensation claim. First, "and most importantly," SCDOT points to the "SCDOT Certification of Health Care Provider for Employee's Serious Health Condition (Family Medical Leave Act)" (Exhibit 1), signed by Nero and Dr. Richey and delivered to the human resources department on July 9, 2012.[2] Exhibit 1 states the approximate date Nero's condition commenced was "several years—neck and syncope."[3] Next, SCDOT contends Nero never actually reported his injury to his employer, despite speaking to both Bostick and Durant while hospitalized. Finally, SCDOT remarks on the medical evidence in the record. In the "Patient Health History Questionnaire" Nero prepared and signed for Dr. Naso, Nero stated his problems were not related to his job and this was not a worker's compensation injury. Dr. Naso initially commented, "I do not think his syncope is related to

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[2] Bostick testified that had he been aware of the contents of Exhibit 1, he would have further investigated the accident.

[3] SCDOT failed to note that Exhibit 1 also indicated Nero required neck surgery and that his beginning date for incapacity was listed as June 20, 2012.

cervical spine pathology." However, Dr. Richey testified Nero's preexisting cervical spine condition was aggravated by his pulling of the squeegee board and that this, along with Nero's work in the heat, caused the syncope.

At his deposition, Nero testified the injury to his upper back and shoulders was a result of pulling the squeegee over a concrete pad.

> Q: And tell me what happened during that process of you pulling the squeegee board?
>
> A: I got a pain in between pulling the squeegee board when they take someone off it that put more stress in there, due to whoever is left on the squeegee has got less to help pull it.
>
> Q: Yes Sir.
>
> A: But you also still got to keep going [be]cause if you don't keep going—you're going to blotch up. So I was doing that, I felt like a pressing like a, you know, snap back there between my shoulder and my neck. . . .
>
> Q: Okay. Now did you tell him, "Hey Mr. Bostick, I—I think I've hurt my neck just now"?
>
> A: No, I didn't tell him that.
>
> Q: Okay, when he took you off, what did you do?
>
> A: I just step out of the way, got off to see—out of the cement, took a little break, and then I went right back.

Nero further testified that while he was pulling the squeegee, he felt "like a bone snapped or something snapped—or popped." Nero spoke with Bostick and Durant while he was in the hospital but did not report that he felt "a snap[ping], crackling, and popping sensation" in his neck. Nero testified he told Bostick, "I think he asked me what . . . was wrong. I said I am in the hospital. I said ever since I fell out, I said, I've been here ever since."

Although Nero never formally reported his injuries to his supervisors, Durant and Bostick both witnessed Nero fall to the ground, unconscious, after completing the physically challenging squeegee board work. *See Hanks*, 286 S.C. at 381, 335 S.E.2d at 93 ("Section 42–15–20 provides no specific method of giving notice, the object being that the employer be actually put on notice of the injury so he can investigate it immediately after its occurrence and can furnish medical care for the employee in order to minimize the disability and his own liability."). Significantly, Durant's reason for not reporting Nero's incident to Bostick was that Bostick was "right there." We find the substantial evidence in the record does not support the Appellate Panel's finding that Nero failed to put SCDOT on notice of a potential injury. *See Etheredge*, 349 S.C. at 459, 562 S.E.2d at 683 (concluding "notice is adequate, when there is some knowledge of accompanying facts connecting the injury or illness with the employment, and signifying to a reasonably conscientious supervisor that the case might involve a potential compensation claim"). Because our supreme court has long held that this notice provision is to be liberally construed in favor of claimants, we find the Appellate Panel erred in reversing the single commissioner's determination that SCDOT received adequate notice under section 42–15–20(A).

II. Reasonable Excuse

Nero next contends the Appellate Panel erred in finding he failed to establish a "reasonable excuse" for any notice deficiency and that SCDOT was prejudiced by this lack of notice. We agree.

Section 42–15–20(B) provides in relevant part that "no compensation shall be payable unless such notice is given within ninety days after the occurrence of the accident or death, unless reasonable excuse is made to the satisfaction of the commission for not giving timely notice, and the commission is satisfied that the employer has not been prejudiced thereby." Once reasonable excuse has been established, it is the employer's burden to demonstrate prejudice from the absence of formal notice. *Lizee*, 367 S.C. at 129–30, 623 S.E.2d at 864. However, "lack of prejudice does not justify compensation unless the requirement of reasonable excuse is also satisfied." *Gray v. Laurens Mill*, 231 S.C. 488, 492, 99 S.E.2d 36, 38 (1957). When determining whether prejudice exists, the Appellate Panel should be cognizant that the notice requirement protects the employer by enabling it to "investigate the facts and question witnesses while their memories are unfaded, and

. . . to furnish medical care [to] the employee in order to minimize the disability and consequent liability upon the employer." *Mintz*, 218 S.C. at 414, 63 S.E.2d at 52.

Here, Nero's reason for not formally reporting his workplace incident was that his supervisors were present when he lost consciousness. Moreover, Durant and Bostick talked with Nero while he was hospitalized and were aware of his treatment and subsequent surgery, as well as the fact that he never returned to work after his collapse. Further, as the single commissioner recognized, Durant testified he never reported the incident to his own supervisor, Bostick, because it happened in Bostick's presence.

> Q: I'm looking at [these] instructions you guys got about injuries on the job. As the lead man, do you get to choose—you have some discretion in choosing what injuries to report and what injuries not to report?
>
> A: Do we get—no. I don't care if it's—if it—whatever it is, it is, if it's small or whatever else.
>
> Q: I mean, a guy hurts his thumb, you've got to report it?
>
> A: If you hurt your thumb and you feel like you need medical attention, you need to go report it.
>
> . . . .
>
> Q: But do you have any responsibility as the lead man to report injuries?
>
> A: Do I have any? Yes, if it happens right here with me, I have a responsibility to report it.
>
> Q: What if I say, look here, lead man, it's just my thumb. Don't worry about it. I don’t want to report it.
>
> A: Well—

> Q: Can you say, no, we're not going to tell the supervisor?
>
> A: No, I am not going to do that because there's too much that [can] come back and bite you.
>
> Q: All right. Well, let me ask you, when [Nero] passed out that day, did you tell your supervisor about it?
>
> A: He was right there.
>
> . . . .
>
> Q: Safe to say, after that day, when you knew that Nero had passed out, you felt like that it had been reported wherever it needed to be reported on the count of the fact that your supervisor was standing right there?
>
> A: Well, not only that, I mean, being real, it probably done got back to whoever it need[ed] to get back to when he was out of work.

In reversing the single commissioner's finding that Nero provided a "reasonable excuse" for not formally reporting his work injury, the Appellate Panel found:

> Although Claimant's supervisors witnessed Claimant's syncope episode, Claimant never reported the alleged accident from pulling the squeegee board, which was the basis of his claim. Claimant was given several opportunities to report his work accident and even submitted FMLA paperwork . . . indicating that his problem lasted for several years instead of requesting workers' compensation.

Although Nero failed to give SCDOT formal notice, his excuse was reasonable because his supervisors were both present at the time of his injury and were aware of his treatment. In fact, Durant's reason for not reporting Nero's incident to Bostick was that Bostick was "right there" during the incident. Therefore, the

substantial evidence in the record does not support the Appellate Panel's finding that Nero failed to provide a "reasonable excuse" for failing to provide timely notice pursuant to section 42–15–20(B). Further, because SCDOT was aware Nero never returned to work following the June 2012 syncopal episode and knew of his hospitalization and surgical treatment, no prejudice can be established.

Conclusion

Based on the foregoing analysis, the decision of the Appellate Panel is

REVERSED.

LOCKEMY, C.J., and KONDUROS, J., concur.