The Supreme Court of South Carolina

RE: Operation of the Trial Courts During the Coronavirus Emergency

Appellate Case No. 2020-000447

ORDER

(a) Purpose. The purpose of this order is to provide guidance on the continued operation of the trial courts during the current coronavirus (COVID-19) emergency. The measures contained in this order are intended to allow essential operations to continue while minimizing the risk to the public, litigants, lawyers and court employees.

In the past, the South Carolina Judicial Branch has shown great resilience in responding to hurricanes, floods, and other major disasters, and this Court is confident that the same will be true in this emergency. This emergency, however, differs from these prior emergencies in many aspects. The current emergency will significantly impact every community in South Carolina while the prior emergencies, although potentially horrific for the individuals and communities directly impacted, did not. The impact of the prior emergencies could be minimized or avoided by traveling away from the site of the disaster; this is not the case for the current emergency. Further, in the prior emergencies, the circumstances giving rise to the emergency involved a single event with a beginning and a predictable end. This is not the case for the coronavirus, and even conservative estimates indicate the direct impacts of this pandemic will continue for many months.

In light of the extraordinary challenges presented by the current emergency, this Court finds it necessary to supplement and, in some situations, to alter significantly, the current practices regarding the operation of the trial courts. In the event of a conflict between this order and the South Carolina Rules of Civil Procedure (SCRCP), the South Carolina Rules of Criminal Procedure

(SCRCrimP), the South Carolina Rules of Family Court (SCRFC), the South Carolina Rules of Probate Court (SCRPC), the South Carolina Rules of Magistrates Court (SCRMC), the South Carolina Court-Annexed Alternative Dispute Resolution Rules (SCADR), South Carolina Rules of Evidence (SCRE) or any other rule or administrative order regarding the operation of a trial court, this order shall control.

(b) Terminology. The following terminology is used in this order.

(1) Judge: a judge of the circuit court, family court, probate court, magistrate court and municipal court, including masters-in-equity and special referees.

(2) Remote Communication Technology: technology such as video conferencing and teleconferencing which allows audio and/or video to be shared at differing locations in real time.

(3) Summary Court: the magistrate and municipal courts.

(4) Trial Court: the circuit court (including masters-in-equity court), family court, probate court, magistrate court and municipal court.

(c) General Guidance. This section provides general guidance applicable to all trial courts or to several court types, and later sections will provide guidance that is limited to one court type. While this order remains in effect, the following general guidance shall apply:

(1) Jury Trials. All jury selections and jury trials in all criminal and civil cases are continued until further notice.

(2) Non-Jury Trials. The appropriate Chief Judge for Administrative Purposes, or in the case of any court that does not have a Chief Judge for Administrative Purposes, the appropriate judge responsible for scheduling matters, may authorize a non-jury trial to occur if the parties consent, or the matter involves an emergency or other circumstance warranting immediate resolution. To proceed, the Chief Judge or the appropriate judge responsible for scheduling matters must find that the trial can be conducted in a manner to minimize the risk such as limiting the persons present to the parties, counsel and necessary witnesses, or that the trial may be conducted using

remote communication technology to avoid the need for a physical appearance of all or some of the parties, counsel or witnesses. If an in-person non-jury trial is conducted, only attorneys, the parties, and necessary witnesses will be allowed to appear. Hearings must be staggered to minimize the number of people appearing at the same time.

(3) Hearings. A hearing on a motion or other matter may be conducted using remote communication technology to avoid the need for a physical appearance by any party, witness or counsel. Only if a judge determines that the hearing cannot be conducted adequately using remote communication technology and the matter involves an emergency or other circumstance warranting immediate determination, will an in-person hearing be conducted. If an in-person hearing is conducted, only attorneys, the parties, and necessary witnesses will be allowed to appear. The total number of participants should not exceed ten (10) people. Hearings must be staggered to minimize the number of people appearing at the same time.

(4) Minimizing Hearings on Motions. While the practice has been to conduct hearings on virtually all motions, this will not be possible during this emergency. If, upon reviewing a motion, a judge determines that the motion is without merit, the motion may be denied without waiting for any return or other response from the opposing party or parties. In all other situations except those where a motion may be made on an ex parte basis, a ruling shall not be made until the opposing party or parties have had an opportunity to file a return or other response to the motion. A trial judge may elect not to hold a hearing when the judge determines the motion may readily be decided without further input from the lawyers. If a hearing is held, the hearing shall be conducted in the manner specified by (c)(3) above. Consent motions should be decided without a hearing; in the event a party believes that the order issued exceeds the scope of the consent, the party must serve and file a motion raising that issue within ten (10) days of receiving written notice of entry of the order.

(5) Determination of Probable Cause Following Warrantless Arrest. When a warrantless arrest has occurred, the arresting officer shall provide the appropriate judge with an affidavit setting forth the facts on which the warrantless arrest was made within eight (8) hours of the arrest. The judge shall consider this affidavit and, if appropriate, may have the officer or

others supplement the affidavit with sworn testimony given over the telephone or other remote communication technology. The judge may administer any necessary oath using the telephone or other remote communication technology. If the judge finds a lack of probable cause for the arrest, the defendant shall be released. The goal is to have this determination of probable cause be made within twenty-four (24) hours of the arrest. Only in the most extraordinary and exceptional circumstances should this determination not be made within forty-eight (48) hours of the arrest. If this determination is not made within forty-eight (48) hours after arrest, the judge making the determination shall explain in writing the facts and circumstances giving rise to this delay, and a copy of this explanation shall be provided to the Office of Court Administration.

(6) Preliminary Hearings in Criminal Cases. Until further order of this Court, preliminary hearings will not be conducted.

(7) Remote Administration of Oaths. Where this order authorizes a hearing, trial or other matter to be conducted using remote communication technology, any oath necessary during that hearing, trial or other matter may be administered by the same remote communication technology. While it is preferable that the person administering the oath have both audio and visual communication with the person taking the oath, the oath may be administered if only audio communication is available, provided the person administering the oath can reasonably verify the identity of the person taking the oath. Notaries who are authorized to administer oaths may administer oaths utilizing remote communication technology in the case of depositions. Nothing in this order shall be construed as authorizing remote administration of oaths for any other purpose than those contained in this order.

(8) Scheduling Orders. All deadlines under all existing scheduling orders are hereby extended for forty-five (45) days following the date on which the Governor lifts or rescinds the emergency orders relating to the coronavirus emergency. This does not prevent a judge from issuing a new scheduling order, if appropriate.

(9) Extensions of Time and Forgiveness of Procedural Defaults.

(A) Extensions of Time. This crisis will increase the need for extensions to be granted. While this order remains in effect, no filing fee will be required for a motion for an extension for any motion filed on or after the date of this order. Further, since it is important for lawyers and self-represented litigants appearing before the trial courts to have time to take actions to protect themselves and their families, the due dates for all trial court filings due on or after the effective date of this order are hereby extended for thirty (30) days.

(B) Forgiveness of Procedural Defaults Since March 13, 2020. In the event a party to a case or other matter pending before a trial court was required to take certain action on or after March 13, 2020, but failed to do so, that procedural default is hereby forgiven, and the required action shall be taken within thirty (30) days of the date of this order. If a dismissal or other adverse action has been taken, that adverse action shall be rescinded.

(C) Extensions by Consent. The provision in Rule 6(b), SCRCP, which permits the granting of only one extension of time by agreement of counsel, is suspended. Counsel may agree to further extensions of time without seeking permission from the court, and parties are strongly encouraged to do so upon request.

(D) Limitation. The provisions of (A) thru (C) above shall not extend or otherwise affect the time for taking action under Rules 50(b), 52(b), 59, and 60(b), SCRCP, or Rule 29, SCRCrimP. Further, these provisions do not extend or otherwise affect the time for the serving of a notice of appeal under the South Carolina Appellate Court Rules, or the time to appeal from a lower court to the circuit court.

(10) Alternatives to Court Reporters and Digital Courtrooms. A trial or hearing in the court of common pleas (including the master-in-equity court), the court of general sessions or the family court is usually attended by a court reporter (before the master-in-equity this is usually a private court reporter) or is scheduled in one of the digital courtrooms with a court

reporter or court monitor. While every effort will be made to continue these practices, this may not be possible as this emergency progresses. In the event such resources are not reasonably available, a trial or hearing authorized under this order may proceed if a recording (preferably both audio and video) is made. The judge shall conduct the proceedings in a manner that will allow a court reporter to create a transcript at a later date. This would include, but is not limited to, making sure the names and spelling of all of the persons speaking or testifying are placed on the record; ensuring exhibits or other documents referred to are clearly identified and properly marked; controlling the proceeding so that multiple persons do not speak at the same time; and noting on the record the start times and the time of any recess or adjournment.

(11) Courthouses.

(A) Filings. To the extent possible, courthouses should remain open to accept filings and payments, and to report criminal information to the South Carolina Law Enforcement Division and the National Crime Information Center. For the acceptance of documents or payments submitted by delivery to the courthouse, this may be accomplished by providing access to a portion of the courthouse even if the rest of the courthouse is closed to the public; providing an alternate location where the documents or payments may be delivered; or by providing a drop box where filings may be deposited. Adequate signage should be provided at the courthouse to alert persons about how to make filings by delivery, and this information should also be posted to the court's website, if available.

(B) Closure. In the event of the closure of a courthouse, information about the closure shall be provided by signage at the courthouse, and on the court's website if available.

(C) Quarantine of Incoming Paper Documents. To protect the safety of the staff of the trial courts, incoming paper documents, whether delivered or mailed to the trial court, may be quarantined for a period of up to forty-eight (48) hours once the documents are

physically received by the trial court.[1] Once the quarantine period has ended, these documents will be file stamped with the date on which they were received, and court staff will then process the documents.

(12) Statute of Limitations, Repose and Other Similar Statutes. This Court is aware this emergency has already affected the ability of litigants to commence legal actions and this adverse impact will most likely increase significantly as this pandemic progresses. The Judicial Branch has raised this concern to the leadership of the General Assembly as this issue relates to the statute of limitations, statutes of repose and similar statutes such as S.C. Code Ann. § 15-36-100. While this Court has recognized the existence of judicial authority to toll a statute of limitations in other situations, it would be inappropriate for this Court to consider at this time what relief, if any, may be afforded to a litigant who is unable to file a civil action or take other actions under these statutory provisions due to this emergency.

(13) Service Using AIS Email Address. A lawyer admitted to practice law in this state may serve a document on another lawyer admitted to practice law in this state using the lawyer's primary email address listed in the Attorney Information System (AIS).[2] For attorneys admitted pro hac vice, service on the associated South Carolina lawyer under this method of service shall be construed as service on the pro hac vice attorney; if appropriate, it is the responsibility of the associated lawyer to provide a copy to the pro hac vice attorney. For documents that are served by email, a copy of the sent email shall be enclosed with the proof of service, affidavit of service, or certificate of service for that document. This method of service may not be used for the service of a summons and complaint, subpoena, or any other pleading or document required to be personally served under Rule 4 of the South Carolina Rules of Civil Procedure, or for any document subject to mandatory e-filing under Section 2 of the South Carolina

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[1] One scientific study has reported that the coronavirus can live for up to 24 hours on cardboard.
https://www.medrxiv.org/content/10.1101/2020.03.09.20033217v1.full.pdf.

[2] The email addresses for lawyers admitted in South Carolina can be accessed utilizing the Attorney Information Search at:
https://www.sccourts.org/attorneys/dspSearchAttorneys.cfm.

Electronic Filing Policies and Guidelines. In addition, the following shall apply:

(A) Documents served by email must be sent as an attachment in PDF or a similar format unless otherwise agreed by the parties.

(B) Service by email is complete upon transmission of the email. If the serving party learns the email did not reach the person to be served, the party shall immediately serve the pleading or paper by another form of service in Rule 5(b)(1), SCRCP, or other similar rule, together with evidence of the prior attempt at service by email.

(C) In those actions governed by the South Carolina Rules of Civil Procedure, Rule 6(e), SCRCP, which adds five days to the time a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, shall also apply when service is made by email under this provision.

(D) Lawyers are reminded of their obligation under Rule 410(g), SCACR, to ensure that their AIS information is current and accurate at all times.

(14) Signatures of Lawyers on Documents. A lawyer may sign documents using "s/[typed name of lawyer]," a signature stamp, or a scanned or other electronic version of the lawyer's signature. Regardless of form, the signature shall still act as a certificate under Rule 11, SCRCP, that the lawyer has read the document; that to the best of the lawyer's knowledge, information, and belief there is good ground to support it; and that the document is not interposed for delay.

(15) Optional Filing Methods. During this emergency, clerks of the trial courts may, at their option, permit documents to be filed by electronic methods such as fax and email. If the clerk elects to do so, the clerk will post detailed information on the court's website regarding the procedure to be followed, including any appropriate restrictions, such as size limitations,

which may apply. Documents filed by one of these optional filing methods shall be treated as being filed when received by the clerk of court and a document received on or before 11:59:59 p.m., Eastern Standard Time, shall be considered filed on that day. These optional filing methods shall not be used for any document that can be e-filed under the South Carolina Electronic Filing Policies and Guidelines. If a trial court does not have a clerk of court, the court shall determine whether to allow the optional filing methods provided by this provision.

(16) Certification in Lieu of Affidavit. If a statute, court rule or other provision of law requires an affidavit to be filed in an action, the requirement of an affidavit may be satisfied by a signed certification of the maker stating, "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment by contempt."

(d) Court of General Sessions. The following additional guidance is provided regarding the Court of General Sessions:

(1) Rule 3(c), SCRCrimP. Based on this emergency, the ninety (90) day period provided by Rule 3(c), SCRCrimP, is hereby increased to one-hundred and twenty (120) days.

(2) County Grand Juries. While a physical meeting of the members of the county grand jury shall not be held, the Solicitor or the Attorney General is hereby authorized to present an indictment to the grand jury using remote communication technology such as video conferencing and teleconferencing, and any necessary oath may be administered using this same remote communication technology pursuant to (c)(7) above.

(3) Guilty Pleas. If consented to by both the defendant and the prosecutor, a hearing on a guilty plea may be held subject to the standards specified in (c)(3) above. If the defendant will participate by remote communication technology, the trial court must make a determination that the defendant is knowingly and intelligently waiving his right to be physically present for the plea. If the defendant's counsel will participate by remote communication technology, the trial court must determine that the defendant is knowingly and intelligently waiving any right to have counsel

physically present, and the court must ensure that the defendant has the ability to consult privately with counsel during the plea proceeding as may be necessary. Finally, if other persons will address the court or testify during the plea proceedings by remote communication technology, the court must find that the defendant is knowingly and intelligently waiving any right to have those persons physically present for the plea.

(e) Court of Commons Pleas. The following additional guidance is provided regarding the Court of Common Pleas, including the Master-in-Equity Courts:

(1) Isolation and Quarantine Orders. As this pandemic continues, it is possible the provisions of the South Carolina Emergency Health Powers Act, S.C. Code Ann. §§ 44-4-100 to 44-4-570, may be triggered as it relates to isolation and quarantine orders. Therefore, the Chief Judges for Administrative Purposes for Common Pleas should familiarize themselves with the procedures for judicial review and petitions under that Act, most notably section 44-5-540, and begin to formulate a strategy to meet the timelines specified in that statute for judicial action.

(2) Procedural Guidance Regarding Filing. While the trial court case management system does not have a case type and subtype for these matters, the clerks of court should use "Nature of Action Code 699 (Special/Complex Other)" for these matters, and these matters will be exempt from any ADR requirement. Detailed instructions for attorneys to Electronically File in these cases are available at https://www.sccourts.org/efiling/ARGs/ARG-26%20Quarantine%20Petitions.pdf. It is also anticipated that all of these hearings will be conducted using remote communication technology. In coordination with the Pro Bono Program of the South Carolina Bar, a list of lawyers willing to serve as counsel for individuals or groups of individuals who are or are about to be isolated and quarantined under section 44-5-540(F), has been compiled.

(f) Family Court. The following additional guidance is provided regarding the Family Court:

(1) Granting of Uncontested Divorces. The Family Court may grant an uncontested divorce without holding a hearing where:

(A) The parties submit written testimony in the form of affidavits or certifications of the parties and corroborating witnesses that address jurisdiction and venue questions, date of marriage, date of separation, the impossibility of reconciliation and the alleged divorce grounds.

(B) The written testimony must include copies of the parties' and witnesses' state-issued photo identifications.

(C) Any decree submitted by any attorney shall be accompanied by a statement, as an officer of the court, that all counsel approve the decree and that all waiting periods have been satisfied.

(D) Should either party request a name change in connection with a request for divorce agreement approval, that party shall submit written testimony to the Family Court in the form of an affidavit or certification addressing the appropriate questions for name change and the name which he or she wishes to resume. This relief shall be included in any proposed Order submitted to the Court for approval at the time of the submission of the documents related to the relief requested.

(2) Approval of Settlement Agreements and Consent Orders without a Hearing.

(A) General Orders. Consent orders resolving all matters, regardless of whether filed or heard prior to or after the declaration of this public health emergency, may be issued without the necessity of holding a hearing. Examples include consent orders resolving motions to compel, discovery disputes, motions to be relieved as counsel, or consent Orders appointing a Guardian ad Litem or addressing Guardian ad Litem fee caps. Any proposed order or agreement must be signed by the parties, counsel for the parties, and the Guardian ad Litem, if one has been appointed.

(B) Temporary Orders. Temporary consent orders resolving all matters, regardless of whether filed or heard prior to or after the declaration of this public health emergency, may be issued without requiring a hearing. Any proposed order or agreement must be signed

by the parties, counsel for the parties, and the Guardian ad Litem, if one has been appointed, and may be submitted and issued without the necessity of filing supporting affidavits, financial declarations or written testimony.

(C) Final Orders. Final consent orders approving final agreements in all matters, regardless of whether filed or heard prior to or after the declaration of this public health emergency, may be issued without requiring a hearing. These final consent orders include marital settlement agreements, custody and visitation settlement agreements and enforcement agreements. Any proposed order or agreement must be signed by the parties, counsel for the parties, and the Guardian ad Litem, if one has been appointed.

These Consent Orders shall be submitted together with all of the following:

(i) The final agreement, such as a marital settlement agreement, signed by the attorneys and the parties.

(ii) Updated signed Financial Declarations for each party.

(iii) An affidavit or certification from the Guardian ad Litem, if one has been appointed, addressing the best interests of the children.

(iv) Written testimony of all parties in the form of affidavit or certification addressing and answering all questions the Family Court would normally ask the parties on the record, including but not limited to affirmations from the parties that:

a. The party has entered into the Agreement freely and voluntarily, understands the Agreement, and desires for the Agreement to be approved by the Court, without the necessity of a hearing.

b. Setting forth the education level obtained by the party, the employment status of the party and the health of the party.

c. There are no additional agreements, and neither party has been promised anything further than that set out in the Agreement.

d. The party fully understands the financial situation of each of the parties, the underlying facts, terms and effect of the Agreement.

e. The party has given and received full financial disclosure.

f. The party has had the benefit of an experienced family law attorney.

g. The party has had the opportunity to ask any questions relating to procedures and the effect of the Agreement.

h. The party is not acting under coercion or duress, and the party is not under the influence of any alcohol or drug.

i. That the Agreement is fair and equitable, it was reached by the parties through arms-length negotiations by competent attorneys and the agreement represents some sacrifices and compromises by each party.

j. The Agreement is in the best interests of the children, if there are any.

k. That the parties have entered into a marital settlement agreement in full and final settlement of all issues arising from the marriage which have been raised

or which could have been raised in the proceeding, other than issues relating to grounds for divorce.

l. The party is aware of the applicable contempt sanctions associated with non-compliance.

(D) Consent Orders under S.C. Code Ann. § 63-7-1700(D). Where all the parties consent and the Family Court determines a child may be safely maintained in the home in that the parent has remedied the conditions that caused the removal, and the return of the child to the child's parent would not cause an unreasonable risk of harm to the child's life, physical health, safety, or mental well-being, the Family Court may order the child returned to the child's parent without holding a hearing.

(3) Hearings Generally. With respect to all contested hearings in family court, including agency matters and private actions, both temporary and permanent, all hearings should be conducted in accordance with section (c)(3) of this order.

(g) Probate Court. The following additional guidance is provided:

Certification in Lieu of Affidavit. In the probate court, the certificate in section (c)(16) may also be used for a marriage license application under S.C. Code Ann.§ 20-1-230, including any application which may be submitted electronically, or for any of the probate court forms available at www.sccourts.org/forms which are either an affidavit or require an oath or affirmation to be administered.

(h) Summary Court. The following additional guidance is provided regarding the Summary Courts:

(1) Bond Hearings in Criminal Cases. Bond hearings, which shall be conducted in the manner specified by (c)(3) above, should be held at least once a day. In addition to the normal factors for determining whether the defendant will be required to post a bond or will be released on a personal recognizance, the judge should consider the need to minimize the detention center population during this emergency. Further, judges should consider

home detention or other options to help reduce detention center population. The summary court shall uphold victims' rights in accordance with the South Carolina Constitution, including seeking to ensure that a victim advocate/notifier is available for all bond hearings, subject to the rights of the defendant under the United States Constitution and the South Carolina Constitution.

(2) Transmission of Warrants for General Sessions Offenses. Warrants for general sessions offenses shall continue to be forwarded to the clerk of the court of general sessions as provided for Rule 3, SCRCrimP. As to an arrest warrant for a defendant who is already in the custody of the South Carolina Department of Corrections, or a detention center or jail in South Carolina, this Court hereby authorizes these defendants to be served with the warrant by mail. Therefore, if it is determined that the defendant is already in custody, the judge shall annotate the warrant to reflect that a copy has been mailed to the defendant, mail a copy of the annotated warrant to the defendant, and immediately forward the annotated warrant and any allied documents to the clerk of the court of general sessions for processing under Rule 3, SCRCrimP.

(3) Guilty Pleas. If consented to by both the defendant and the prosecutor, a hearing on a guilty plea may be held by the summary court. If the defendant will participate by remote communication technology, the trial court must make a determination that the defendant is knowingly and intelligently waiving his right to be physically present for the plea. If the defendant's counsel will participate by remote communication technology, the trial court must determine that the defendant is knowingly and intelligently waiving any right to have counsel physically present, and the court must ensure that the defendant has the ability to consult privately with counsel during the plea proceeding as may be necessary. Finally, if other persons will address the court or testify during the plea proceedings by remote communication technology, the court must find that the defendant is knowingly and intelligently waiving any right to have those persons physically present for the plea.

(i) Effective Date and Revocation of Prior Order and Memoranda. This order is effective immediately. It shall remain in effect until modified or rescinded

by this Court. This order replaces the following order and memoranda previously issued.

(1) Memoranda of the Chief Justice dated March 16, 2020, which are labeled as "Trial Courts Coronavirus Memo," and "Summary Courts Coronavirus Memo."

(2) Order dated March 18, 2020, and labeled "Statewide Family Court Order."

s/ Donald W. Beatty C.J.

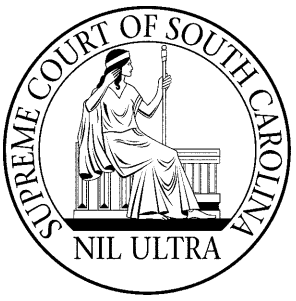
s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
April 3, 2020



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 14
April 8, 2020
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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The Supreme Court of South Carolina

The State, Respondent,

v.

Alice Bellardino, Petitioner.

Appellate Case No. 2018-001872

ORDER

The Court granted Petitioner's request to hear this declaratory judgment matter in our original jurisdiction and held summary courts have the inherent authority to order competency evaluations to protect defendants' due process rights. The State has filed a petition for rehearing, and the Department of Mental Health and the Department of Disabilities and Special Needs have filed a motion to intervene or, in the alternative, a motion to file an amicus curiae brief. We deny the motion to intervene and the motion to file an amicus curiae brief, deny the petition for rehearing, withdraw the prior opinion, and substitute the attached opinion.

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
April 8, 2020

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Alice Bellardino, Petitioner.

Appellate Case No. 2018-001872

ORIGINAL JURISDICTION

Opinion No. 27924
Submitted October 4, 2019 – Filed October 23, 2019
Re-Filed April 8, 2020

JUDGMENT DECLARED

Elizabeth Fielding Pringle, Kieley Marie Sutton, and Constantine George Pournaras, of Columbia, for Petitioner.

Attorney General Attorney General Alan McCrory Wilson and Deputy Attorney General Donald J. Zelenka, of Columbia; and Dana M. Thye, of Columbia, for Respondent.

PER CURIAM: We granted Petitioner's request to hear this declaratory judgment action in our original jurisdiction. Petitioner asks us to declare section 44-23-410 of the South Carolina Code (2018) unconstitutional because it precludes summary courts from ordering competency evaluations when there is a question of a defendant's competence to stand trial. Because we hold section 44-23-410 does not preclude summary courts from ordering competency evaluations, we decline to hold section 44-23-410 unconstitutional.

FACTS

Petitioner was charged with disorderly conduct, and the case was called for trial in the City of Columbia municipal court. At trial, Petitioner's attorney moved for a competency evaluation. Following a hearing on the issue, the municipal court found there was reason to believe Petitioner lacked the capacity to understand the proceedings against her or to assist in her own defense as a result of a lack of mental capacity. Although the court found Petitioner was entitled to a competency evaluation, the court held it did not have the authority to order a competency evaluation because the language of section 44-23-410 (2018) limits the authority to order evaluations to circuit courts and family courts. Accordingly, the court denied the motion for a competency evaluation and stayed all proceedings in Petitioner's case.[1]

LAW

"A person who is: (1) found [in public] in a grossly intoxicated condition or otherwise conducts himself in a disorderly or boisterous manner . . . is guilty of a misdemeanor" entitled "public disorderly conduct." S.C. Code Ann. § 16-17-530(A) (Supp. 2019). Subsection 16-17-530(A) provides that "upon conviction," the defendant "must be fined not more than one hundred dollars or be imprisoned for not more than thirty days." Summary courts[2] "shall have exclusive jurisdiction

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[1] Petitioner's request to the circuit court to order an evaluation was denied because the case was not before that court.

[2] The term "summary court" is poorly defined in our code of laws. According to subsection 16-3-1510(6) of the South Carolina Code (2015), "'Summary court' means magistrate or municipal court." That is a precise definition, but technically, the definition applies only to title 16, chapter 3, article 15. § 16-3-1510. Historically, "summary court" was a descriptive term used to distinguish a

of all criminal cases in which the punishment does not exceed a fine of one hundred dollars or imprisonment for thirty days." S.C. Code Ann. § 22-3-540 (2007).[3] Therefore, a defendant charged with disorderly conduct may not be tried in circuit court, but must be tried in the exclusive jurisdiction of the summary court.

However, a person who lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing a defense may not be subjected to a trial. *Drope v. Missouri*, 420 U.S. 162, 171 (1975). This prohibition is "fundamental to an adversary system of justice." *Id*. at 172. The conviction of an accused person who is legally incompetent violates due process, and state procedures must be adequate to protect this right. *Pate v. Robinson*, 383 U.S. 375, 378 (1966). Therefore, a summary court must have the power to order that an expert evaluate a defendant the court suspects lacks competency, to determine whether the court's suspicion is valid. Otherwise, due process prevents the court from proceeding to trial.

Section 44-23-410(A) (2018) provides, in part:

> Whenever a judge of the circuit court or family court has reason to believe that a person on trial before him, charged with the commission of a criminal offense or civil contempt, is not fit to stand trial because the person lacks the capacity to understand the proceedings against him or to assist in his own defense as a result of a lack of mental capacity, the judge shall: (1) order examination of

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magistrate or municipal court from a court of record. A "court of record" must record all proceedings—word for word—for appellate review. A magistrate court, however, need only summarize what occurred for appellate review. *See* S.C. Code Ann. § 22-3-730 (2007) ("All proceedings before magistrates shall be summary or with only such delay as a fair and just examination of the case requires."). Thus, a magistrate court is by definition "summary" in some contexts, but it is by description "summary" in all contexts.

[3] Section 22-3-540 uses the term "Magistrates," but as we explained in footnote 2, the magistrate court is a summary court.

> the person [by the Department of Mental Health or the Department of Disabilities and Special Needs]; or (2) order the person committed for examination and observation to an appropriate facility of the Department of Mental Health or the Department of Disabilities and Special Needs."

Nothing in section 44-23-410 references summary courts or their authority to order competency evaluations. Rather, section 44-23-410 provides procedural requirements for circuit courts and family courts ordering competency evaluations. However, there is also nothing in section 44-23-410 prohibiting a summary court from ordering an evaluation. To construe the section as prohibiting a summary court from ordering an evaluation when the court suspects the defendant is not competent would render the section unconstitutional. "We will not construe statutes to be unconstitutional when susceptible to a constitutional interpretation." *Hampton v. Haley*, 403 S.C. 395, 408, 743 S.E.2d 258, 265 (2013) (citing *Joytime Distributors & Amusement Co., Inc. v. State,* 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999)).

Because a competency determination is required by due process when the trial court suspects the defendant lacks competence, we construe section 44-23-410 to merely set forth the formal procedure to be followed in circuit and family court, and not to limit the authority of summary courts to order an evaluation. Because it is necessary to protect the due process rights of defendants, summary courts must have the inherent authority to order competency evaluations.

The question becomes who must pay for the evaluation. Pursuant to section 44-23-410, when such an evaluation is ordered by a circuit or family court, the examination must be provided or paid for by the Department of Mental Health (DMH) or the Department of Disabilities and Special Needs (DDSN). There is no such provision for an evaluation ordered by the summary court. As we have explained, summary courts have the inherent power to order an evaluation, but the courts do not have the inherent authority to order DMH or DDSN to pay for one. However, summary courts do have the authority to require *a party* to pay for the examination. *See State v. Cooper*, 342 S.C. 389, 400, 536 S.E.2d 870, 876 (2000) ("[T]he trial judge in this case has the inherent authority to require an expert examination of an indigent and direct which *party* should pay for the examination.") (emphasis added). In *Cooper*, this Court stated, "As a party to the lawsuit, the Attorney General, acting as an embodiment of the State, becomes

subject to the authority of the court. Once the State subjects itself to the jurisdiction of the court, the court has the authority to direct the State to employ and compensate experts in order to maintain the integrity of the judicial process." 342 S.C. at 399-400, 536 S.E.2d at 876. Thus, unless the Legislature otherwise addresses the payment for examinations ordered by summary courts, the prosecuting entity may be ordered to pay the costs of the evaluation of indigent defendants as a condition of going forward with the case. Otherwise—as the summary court ordered here—the prosecution may not go forward.

JUDGMENT DECLARED.

BEATTY, C.J., KITTREDGE, HEARN, FEW and JAMES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of William Thomas Moody, Respondent.

Appellate Case No. 2020-000172

Opinion No. 27960
Submitted March 11, 2020 – Filed April 8, 2020

RESTITUTION ORDERED

John S. Nichols, Disciplinary Counsel, and Sabrina C. Todd, Senior Assistant Disciplinary Counsel, both of Columbia, for the Office of Disciplinary Counsel.

J. Calhoun Watson, of Robinson Gray Stepp & Laffitte, LLC, of Columbia, for Respondent.

PER CURIAM: In this attorney disciplinary matter, Respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (the Agreement) pursuant to Rule 21, RLDE, Rule 413, SCACR.[1] In the Agreement, Respondent admits misconduct, consents to an order imposing restitution, and consents to payment of the costs incurred in the investigation and prosecution of this matter by ODC and the Commission on Lawyer Conduct (the Commission). We accept the Agreement, order Respondent to pay $5,128 in restitution, and order Respondent to pay the costs incurred in the investigation and prosecution of this matter. The facts, as set forth in the Agreement, are as follows:

[1] The Court disbarred Respondent in 2014. *In re Moody*, 410 S.C. 334, 764 S.E.2d 519 (2014). The conduct in this matter occurred prior to his disbarment and was not the subject of Respondent's disbarment.

Facts

In May 2012, Respondent represented A.K., the defendant in an automobile accident lawsuit in magistrate's court. Following the trial, judgment was entered for the plaintiff in the amount of $5,128. That same day, A.K. gave Respondent a check, made payable to Respondent, for the full amount of the judgment. Respondent endorsed and cashed the check, but did not disburse the proceeds to the plaintiff's attorney. A.K. paid the judgment a second time in 2014 to prevent his license from being suspended.

Law

Respondent admits that by his conduct he violated Rule 1.15(d), RPC, Rule 407, SCACR (failing to promptly disburse funds that a client or third party is entitled to receive), and Rule 8.4(e), RPC, Rule 407, SCACR (prohibiting conduct prejudicial to the administration of justice).

Respondent also admits his conduct constitutes grounds for discipline pursuant to Rule 7(a)(1) and (5), RLDE, Rule 413, SCACR (violating or attempting to violate the Rules of Professional Conduct).

Conclusion

We find Respondent's misconduct warrants the payment of restitution to A.K. *See* Rule 7(b)(5), RLDE, Rule 413, SCACR (allowing the sanction of "restitution to persons financially injured, [and] repayment of unearned or inequitable attorney's fees or costs advanced by the client"). Accordingly, we accept the Agreement and order Respondent to pay $5,128 in restitution to A.K. Additionally, within thirty (30) days of the date of this opinion, Respondent shall pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission or enter into a reasonable payment plan with the Commission to pay the same.

RESTITUTION ORDERED.

BEATTY, C.J., KITTREDGE, HEARN, FEW and JAMES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of William Thomas Moody

Appellate Case No. 2020-000171

Opinion No. 27961
Submitted March 11, 2020 – Filed April 8, 2020

RESTITUTION ORDERED

John S. Nichols, Disciplinary Counsel, and Sabrina C. Todd, Senior Assistant Disciplinary Counsel, both of Columbia, for the Office of Disciplinary Counsel.

William Thomas Moody, of Pawleys Island, *pro se*.

PER CURIAM: In this attorney disciplinary matter, Respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (the Agreement) pursuant to Rule 21, RLDE, Rule 413, SCACR.[1] In the Agreement, Respondent admits misconduct, consents to an order imposing restitution, and consents to payment of the costs incurred in the investigation and prosecution of this matter by ODC and the Commission on Lawyer Conduct (the Commission). We accept the Agreement, order Respondent to pay $7,644.50 in restitution, and order Respondent to pay the costs incurred in the investigation and prosecution of this matter. The facts, as set forth in the Agreement, are as follows:

[1] The Court disbarred Respondent in 2014. *In re Moody*, 410 S.C. 334, 764 S.E.2d 519 (2014). The conduct in this matter occurred prior to his disbarment and was not the subject of Respondent's disbarment.

Facts

With the assistance of a previous attorney, Complainants L.B., V.B., and R.P. (the Complainants) filed a civil action against several defendants in connection with a residential building lot on which they hoped to build a home. In late 2010, Respondent began representing the Complainants in the matter and remained their counsel through trial in April 2013.

When Respondent first began representing the Complainants, he accepted a $5,000 deposit, which he placed in his firm's trust account. Over several months, Respondent issued invoices to the Complainants and paid these invoices from the Complainants' trust account funds. In the final two years of the representation, the Complaints paid Respondent as he invoiced them for work already performed. A month before trial, Respondent issued an invoice to the Complainants that included an unpaid prior balance of $644.50, in addition to new charges. No particular invoices were identified as unpaid. In fact, the Complainants had paid all prior invoices, including the two most recent invoices, the sums of which totaled $644.50. The Complainants did not notice the discrepancy and paid the new invoice in full as requested.

The Complainants accepted a $15,000 settlement offer during trial. Respondent paid his firm for his final invoice from the settlement proceeds, but failed to give the Complainants credit for a $3,000 payment made shortly before trial that should have been reflected on the final invoice.

Respondent also issued a $4,000 check to a construction company from the settlement proceeds. The construction company did not perform any work for the Complainants or in relation to their legal matter. A copy of a canceled check shows the preprinted memo line was marked through and the name of another client (Client B), from whom Respondent had misappropriated trust account funds, was handwritten in the memo section.[2] The construction company had performed work for Client B. Respondent did not restore the $4,000 improperly disbursed from the Complainants' trust account funds.

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[2] The Court's 2014 opinion disbarring Respondent refers to this client as "Client B." *In re Moody*, 410 S.C. at 336, 764 S.E.2d at 520.

Law

Respondent admits that by failing to properly credit the Complainants for their payment of the two prior invoices totaling $644.50, and by then billing for and accepting payment for those invoices a second time, he charged and collected unreasonable fees in violation of Rule 1.5(a), RPC, Rule 407, SCACR (fees). Respondent also admits he violated Rule 1.5(a), RPC, when he failed to give the Complainants credit for their final $3,000 payment made prior to trial. Respondent further admits that by disbursing $4,000 to Client B from the Complainants' trust account funds, he violated Rules 1.15(d) and (g), RPC, Rule 407, SCACR (safekeeping client property).

Respondent also admits his conduct constitutes grounds for discipline under Rule 7(a)(1), RLDE, Rule 413, SCACR (violating or attempting to violate the Rules of Professional Conduct).

Conclusion

We find Respondent's misconduct warrants the payment of restitution to the Complainants. *See* Rule 7(b)(5), RLDE, Rule 413, SCACR (allowing the sanction of "restitution to persons financially injured, [and] repayment of unearned or inequitable attorney's fees or costs advanced by the client"). Accordingly, we accept the Agreement and order Respondent to pay $7,644.50 in restitution to the Complainants. Additionally, within thirty (30) days of the date of this opinion, Respondent shall pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission or enter into a reasonable payment plan with the Commission to pay the same.

RESTITUTION ORDERED.

BEATTY, C.J., KITTREDGE, HEARN, FEW and JAMES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of John Brandon Walker, Respondent.

Appellate Case No. 2020-000192

Opinion No. 27962
Submitted March 18, 2020 – Filed April 8, 2020

RECIPROCAL SUSPENSION

John S. Nichols, Disciplinary Counsel, and Julie K. Martino, Assistant Disciplinary Counsel, both of Columbia, for the Office of Disciplinary Counsel.

Nathan Maxwell Crystal, of Crystal & Giannoni-Crystal, LLC, of Charleston, for Respondent.

PER CURIAM: By order of the Appellate Division of the Supreme Court of New York, Respondent was suspended from the practice of law in New York for four months. *In re Walker*, No. M-6828, 2020 N.Y. Slip Op. 00835 (N.Y. App. Div. Feb. 4, 2020).

Respondent's New York suspension was related to his pleading guilty to reckless assault in the third degree, a Class A misdemeanor in New York. The criminal charge arose from Respondent's physical assault of the Complainant in his home after he drank excessively and "blacked out." The Complainant suffered bruises on her neck, throat, ribcage, and both wrists; contusions on her head; and a scaphoid fracture. A special referee appointed by the New York Supreme Court found the Complainant's assertions that she feared for her life during the attack were credible; Respondent's actions "were aberrational and not in his character"; and Respondent's deep remorse and acceptance of responsibility "were . . . palpable at

the hearing." The special referee recommended Respondent receive a public censure. However, in light of the seriousness of Respondent's conduct, the New York Supreme Court found "a period of suspension for such an assault [was] warranted in order to maintain the honor and integrity of the profession and deter others from similar misconduct."

We find reciprocal suspension from the practice of law in South Carolina for four months is appropriate in this matter. We order the reciprocal suspension be imposed retroactively to March 5, 2020 (the date Respondent's New York suspension commenced), and that his South Carolina suspension run concurrently with his New York suspension.

RECIPROCAL SUSPENSION.

BEATTY, C.J., KITTREDGE, HEARN, FEW and JAMES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Justin Jamal Warner, Appellant.

Appellate Case No. 2017-001313

Appeal From Anderson County
R. Lawton McIntosh, Circuit Court Judge

Opinion No. 5717
Heard December 11, 2019 – Filed April 8, 2020

AFFIRMED

Chief Appellate Defender Robert Michael Dudek, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Deputy Attorney General Donald J. Zelenka, Senior Assistant Deputy Attorney General Melody Jane Brown, Senior Assistant Attorney General W. Edgar Salter, III, all of Columbia; Assistant Attorney General Samuel Marion Bailey, of Bluffton; and Solicitor David Rhys Wagner, Jr., of Anderson, all for Respondent.

HILL, J.: Justin Jamal Warner appeals his convictions for murder, attempted armed robbery, and possession of a weapon during a violent crime. He challenges the trial

court's admission of expert testimony regarding cell site location information (CSLI), denial of his motion to suppress evidence of his cell phone records, denial of his motion for a pretrial hearing as to his probation officer's identification of him from a surveillance video, and admission of five maps created by the expert depicting cell tower locations Warner's phone had accessed. Finding no error in any of these rulings, we affirm.

I.

At 10:13 p.m. on April 30, 2015, a surveillance camera at the BP convenience store at Exit 40 on Interstate 85 in Anderson County recorded a person entering the store. The person approached the cashier, Mradulaben Patel (who owned the store with her husband of thirty-eight years, Pravinchandra). The person appeared to ask about buying a cigar and can then be seen flipping open his wallet and presenting it to Ms. Patel, presumably showing his identification. When Ms. Patel presented the cigar, the person handed Ms. Patel payment, and, as Ms. Patel opened the cash register, the person pulled a handgun from his pants pocket, pointed it at Ms. Patel, and attempted to reach into the cash register drawer. When Ms. Patel tried to push the gun away, the person shot her. The person left the store and wiped down the front door handle with his shirt. The incident took less than three minutes. Ms. Patel died several days later.

After releasing a portion of the video to local media, police received a Crimestoppers tip identifying Justin Jamal Warner as the perpetrator and relaying remarkable detail about the crime. Police discovered Warner's date of birth matched the date of birth Ms. Patel entered into the cash register seconds before the murder. Investigators also discovered Warner was on probation in Georgia, so they sent clips of the video to his probation officer, Nathan Goolsby, who identified Warner as the perpetrator. Warner's palm print from his probation file was matched to a latent palm print taken from the counter beside the cash register.

Warner turned himself in to the probation office. He arrived in a silver Dodge Challenger, a search of which revealed a "flip" style wallet similar to the wallet seen in the video. Police also found cigar wrappers in the car bearing a purchase price of ninety-nine cents, the same price of the cigars the cash register receipt showed Ms. Patel sold moments before being killed. Police further determined the Challenger was similar to a car seen on a store surveillance video facing the parking lot shortly before the crimes occurred. They also noted the suspect in the surveillance video

appeared to have markings on his upper arm consistent with tattoos Warner has in the same area.

An Anderson County magistrate issued a search warrant to T-Mobile for Warner's cell phone records. At trial, the State offered FBI Special Agent David Church as an expert in historical cell site analysis and cell phone record analysis. Warner objected, contending Church's methodology of linking phone records to a cell phone's location did not meet the threshold reliability standard Rule 702, SCRE, requires for expert testimony. The trial court overruled Warner's objection, and Church gave opinion testimony that Warner's phone had "pinged" off T-Mobile cell towers near the crime scene shortly before and after Ms. Patel was shot. The jury deliberated a little over two hours before finding Warner guilty on all counts.

II.

A. Admissibility of CSLI Expert Opinion Testimony

Warner asserts the trial court erred in admitting Church's expert testimony interpreting the CSLI evidence, arguing it did not meet the reliability requirement of Rule 702, SCRE. We review evidentiary rulings for abuse of discretion, meaning we will only disturb them if they have caused prejudice and are the result of legal error or have inadequate factual support. *Fields v. J. Haynes Waters Builders, Inc*., 376 S.C. 545, 555, 658 S.E.2d 80, 85–86 (2008).

i. CSLI Evidence and Methodology

Before we address whether Church's testimony cleared the reliability hurdle of Rule 702, SCRE, we take a step back to consider the background of CSLI evidence. Cell phones operate much like two way radios, connecting with other phones by way of radio frequency signals that are picked up and transmitted by the carrier's cell phone towers. A typical basic tower has a three sided antenna with each side covering a 120 degree "wedge." The term "cell" or "cellular" derives from the design of the calling networks, which are divided into hexagon-shaped geographic areas called cells, much like a honeycomb. The cell tower is located at the spot where three cells meet. Blank, *The Limitations and Admissibility of Using Historical Cellular Site Data to Track the Location of a Cellular Phone*, 18 Rich. J. L. & Tech. 3, 5 (2011). The coverage area of a cell generally depends upon the number of antennas on the tower, the height of the antenna, its elevation above sea level, topography, and

obstructions. "One cell may cover an area up to thirty miles from the site, for a total coverage area of approximately 2,700 square miles." *Id*. In urban areas, cell sites may exist every one-half to one mile, while in rural areas they may be several miles or more apart.

When a call is made, the cell phone connects or "pings" to the cell tower with the strongest signal, which is generally the closest tower. But not always. Signal strength can depend on many things, including the height of the cell tower, wattage output of the phone or the tower antenna, the angle and direction of the antenna, maintenance, range of coverage, network traffic, topography, and whether the phone is outdoors or indoors. *Id.* at 7.

Church described how cell phone records track the number being called; the date, time, and duration of the call; and the approximate location of the phone at the time of the call. He explained the cell phone carrier maintains records of the addresses and coordinates of its cell towers, which he matches to the phone records and then creates a map depicting the geography of the relevant calling history. Church testified he had over 800 hours of training in CSLI, including training by all the major cell phone carriers with their compliance personnel and network engineers. As a certified FBI instructor, he has taught CSLI analysis to state, local, and federal agencies. Church has worked on over 150 investigations and testified as an expert on CSLI eleven previous times.

When explaining why CSLI analysis was reliable, Church testified cell phone companies keep records for billing purposes to ensure efficient network operation and customer satisfaction. He also explained carriers are required to be able to provide the tower a phone used when it called 911, so emergency personnel can locate the caller's approximate location. The trial court pointedly asked Church, "[Y]ou said to [the solicitor], yes, it's reliable. Besides the boilerplate response, how do you determine that it's, in fact, reliable?" Church replied in part,

> [U]sing common sense and investigative knowledge and your expertise in knowing how a network operates, determine where to go look for a phone. And we successfully do that, you know, every week, our unit does. So to me . . . the practical application of it is the best study.

Church was careful to note CSLI evidence can only show the approximate location of a phone at a given time. He analyzed Warner's call records and the location of the cell towers Warner's phone had pinged. He ascertained which side of the tower was being used and the direction the radio signal emitting from the tower was traveling. From this, Church created a report that included a series of maps illustrating the route Warner's phone traveled on April 30, the date of the crime. The maps depicted the phone's tower usage and showed that between 7:53 p.m. and 9:45 p.m. Warner's phone traveled north along I-85 from the Atlanta area to just north of the crime scene and then north to the Pelham Road area in Greenville. The phone then began traveling south along I-85. At 10:11 p.m., the phone pinged the north side of a tower located south of I-85 near Highway 25. This tower is located three-and-a-half miles north of the crime scene, as the crow flies. At 10:19 p.m., the phone used the northern side of a tower located near the exit where I-85 and Highway 81 intersect. This tower stands two-and-a-half miles south of the crime scene. Church noted a phone could be anywhere in that general area, even a bit behind the direction the tower sector was pointing, given radio waves are not linear. Church concluded that, in his opinion, the phone was in the "general vicinity" of the crime scene around the time the crime occurred, though of course he could not say who had the phone.

ii. Rule 702, SCRE Reliability Requirements for Expert Opinion Evidence

Before admitting expert testimony, trial courts, as the gatekeepers of evidence, must ensure the proffered evidence is beyond the ordinary knowledge of the jury; the witness has the skill, training, education, and experience required of an expert in his field; and the testimony is reliable. *Watson v. Ford Motor Co*., 389 S.C. 434, 445–46, 699 S.E.2d 169, 174–75 (2010); Rule 702, SCRE. If the trial court is satisfied the proposed expert evidence meets these criteria, it must then consider whether the probative value of the evidence is substantially outweighed by its potential for unfair prejudice or other Rule 403, SCRE, considerations. *State v. Council*, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999).

CSLI evidence is more technical in nature than scientific. It still falls within Rule 702, SCRE, and must be screened for reliability. *State v. White*, 382 S.C. 265, 274, 676 S.E.2d 684, 688 (2009); *see also State v. Prather*, Op. No. 27954 (S.C. Sup. Ct. filed Mar. 11, 2020) (Shearouse Adv. Sh. No. 10 at 30). Due to the wide range of nonscientific fields and topics, our supreme court has declined to set forth general

reliability guidelines, instead opting to consider each case on its facts. *White*, 382 S.C. at 274, 676 S.E.2d at 688.

In South Carolina, a trial court minding the Rule 702 gate must assess not only (1) whether the expert's *method* is reliable (i.e., valid), but also (2) whether the *substance* of the expert's testimony is reliable. *See Council*, 335 S.C. at 20, 515 S.E.2d at 518 (trial court must determine whether underlying science is reliable); *Watson*, 389 S.C. at 446, 699 S.E.2d at 175 (trial court "must evaluate the substance of the testimony and determine whether it is reliable"). South Carolina has not adopted *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 594–95 (1993), by name, nor has it revised Rule 702, SCRE, to incorporate the *Daubert* framework. Nevertheless, our approach is "extraordinarily similar" to the federal test. Young, *How Do You Know What You Know?*, 15 S.C. Law. Rev. 28, 31 (2003).

In *Daubert*, the United States Supreme Court declared the "overarching subject" of the Federal Rule of Evidence 702 inquiry to be "the scientific validity—and thus the evidentiary relevance and reliability—of the principles that underlie a proposed submission. The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate." 509 U.S. at 594–95. Four years later, the Court walked this declaration back a few steps, noting conclusions and methodology are "not entirely distinct from one another." *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997). *Joiner* held the trial court did not abuse its discretion under Rule 702 by excluding the testimony of medical experts whose conclusions were not supported by the data and experiments upon which they relied. As the court explained: "Nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." *Id*.

The substance of an expert's testimony is reliable if it adheres to the rigors of the method. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999). As long as the trial court is satisfied the expert's testimony consists of a reliable method faithfully and reliably applied, the gate of admissibility should be opened. The correctness of the conclusion reached by an expert's faithful application of a reliable method (and the credibility of the expert who reached it) is for the jury, for the trial judge must remain at the gatepost and not tread on the advocate's or the jury's turf. *State v. Jones*, 423 S.C. 631, 639–40, 817 S.E.2d 268, 272 (2018) ("There is always a possibility that an expert witness's opinions are incorrect. However, whether to

accept the expert's opinions or not is a matter for the jury to decide. Trial courts are tasked only with determining whether the basis for the expert's opinion is sufficiently reliable such that it be may offered into evidence.").

Warner's reliability challenge is single-minded: he appeals the trial court's qualification of Church only on the ground that the CSLI methodology is unreliable. Church testified *in limine* that eleven courts had qualified him as an expert. The number of times a court has qualified a witness as an expert or found a method reliable will almost never be relevant to the trial court's Rule 702 task, as what matters is the method's endorsement by the relevant field, not the bench. *See Daubert*, 509 U.S at 593–95 (explaining reliability of scientific evidence can be shown by acceptance of method by relevant scientific community).

When the trial court asked Church why CSLI was reliable, in addition to the response we earlier quoted, Church added, "the best way we know it's reliable is because we do this on a daily basis. . . . and we regularly find people that we are looking for, or help look for, by analyzing those records." This answer may appear to resemble the "*ipse dixit*[1] of the expert" that *Joiner* found fatal to reliability. But on closer inspection, Church's reply reveals the root of CSLI's reliability: it works.

We conclude the trial court was well within its discretion in admitting Church's CSLI testimony as a reliable expert opinion. Church's expertise was based on his vast experience with historical cellular records, as well as his knowledge of and experience with how cellular phones, towers, and networks operate. The reliability of the CSLI methodology was demonstrated by Church's own experience. The text of Rule 702 states expertise can be based on experience. Indeed, the terms "non-scientific expert testimony" and "experience based expert testimony" are interchangeable. *See White*, 382 S.C. at 270 n. 4, 676 S.E.2d at 686 n. 4. After all, expert and experience share the same Latin root, *expiri* (to test; to try). *See also Kumho*, 526 U.S. at 156 (stating that "no one denies that an expert might draw a conclusion from a set of observations based on extensive and specialized experience").

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[1] The phrase "*ipse dixit*," which translates as "he himself said it," was coined by Cicero, who used it to belittle the reasoning and argumentative powers of the followers of Pythagoras. When asked to justify their positions, the followers would just say "*ipse dixit*," opting out of the merits of the debate altogether. Cicero, *De Natura Deorum*, I.V. (H. Rackham trans., Loeb Classical Library 1933).

The reliability of experience-based expertise is often proven by its success. *See, e.g.*, *White*, 382 S.C. at 271, 676 S.E.2d at 687 (dog handler deemed reliable in part because of his record of some 750 tracks with the same dog). A leading commentator has stressed that when an expert's opinion is based on inferences derived from historical facts (and that—along with the technical knowledge of how cell networks work—is all CSLI is, in essence), a judge should measure reliability as follows: "[T]he judge should insist on a foundation demonstrating that the expert's technique 'works'; that is, the methodology enables the expert to accurately make the determination as to which she proposes to testify. The foundation must include a showing of the results when the technique was used on prior occasions. Do the outcomes demonstrate a connection between facts *A* and *B*?" 1 *McCormick on Evid*ence § 13 (8th ed.) (2020). Church's testimony about his successful results did precisely that. Our supreme court has emphasized the importance of empirical verification to reliability. *See, e.g.*, *State v. Chavis*, 412 S.C. 101, 108, 771 S.E.2d 336, 339 (2015) ("[E]vidence of mere procedural consistency does not ensure reliability without some evidence demonstrating that the individual expert is able to draw reliable results from the procedures of which he or she consistently applies.").

In this sense of requiring proof of accuracy, Rule 702 echoes Rule 901(b)(9), SCRE, which requires that before a process or system can be authenticated, it must be shown the process or system "produces an accurate result." This burden is not met by a witness who claims a report produced by the system is accurate because "we use it in court all the time." *State v. Brown*, 424 S.C. 479, 487–88, 818 S.E.2d 735, 739–40 (2018) (holding such testimony insufficient to authenticate GPS records). Church went much further than the hapless witness in *Brown*. Church explained how CSLI enjoyed universal acceptance in the cellular industry as well as the law enforcement community. *See State v. Harvey*, 932 N.W.2d 792, 808 (Minn. 2019) (finding CSLI reliable based in part on industry providers' "vested interest in maintaining accurate records" for billing and for 911 purposes).

We therefore affirm the trial court's admission of Church's CSLI testimony, and join the many other jurisdictions that have deemed CSLI reliable enough to pass the Rule 702 gate. *See, e.g.*, *United States v. Hill*, 818 F.3d 289, 298 (7th Cir. 2016) ("Historical cell-site analysis can show with sufficient reliability that a phone was in a general area, especially in a well-populated one. The technique requires specialized training, which Agent Raschke has and has employed successfully on hundreds of occasions." (citation omitted)); *United States v. Medley*, 312 F. Supp.

3d 493, 502 (D. Md. 2018) (concluding government met burden of showing CSLI evidence was "accurate enough and well accepted enough within the appropriate fields of science, technology and specialized knowledge to allow admissibility"); *Holbrook v. Commonwealth*, 525 S.W.3d 73, 80–82 (Ky. 2017) (accord). These three decisions offer the best analysis of CSLI, and they all conditioned their approval of its admissibility on the witnesses' caveat that his opinion as to location relied upon the assumption that the cell phone has connected with the closest tower. Church made the same concession. We find no error.

III.

A. Identification Testimony of Non-Eyewitness

Warner next claims his due process right to a fair trial was violated when the State asked Goolsby to view the video and then used him as an identification witness at trial. Due process prevents the State from using evidence so unreliable that it offends fundamental conceptions of justice and ordered liberty. *Perry v. New Hampshire*, 565 U.S. 228, 237 (2012). When the police arrange a pretrial, out-of-court identification procedure where an eyewitness to the crime identifies the defendant, due process concerns are triggered only when the procedure is both suggestive and unnecessary. *Id*. at 238–39; *Neil v. Biggers*, 409 U.S. 188, 196–201 (1972). Accordingly, when a defendant challenges a pretrial identification, the first matter the trial court must decide is whether the identification was the result of a police procedure that was both unnecessary and suggestive. If it was not, the inquiry ends. *State v. Wyatt*, 421 S.C. 306, 310, 806 S.E.2d 708, 710 (2017). But, if the procedure was unnecessary and suggestive, due process requires suppression of the eyewitness identification if the procedure created a "substantial likelihood of irreparable misidentification." *Biggers*, 409 U.S. at 198 (quoting *Simmons v. United States*, 390 U.S. 377, 384 (1968)). The trial court must therefore determine whether, despite the unnecessary and suggestive police conduct, the eyewitness identification is nevertheless reliable.

Whether an eyewitness identification is reliable enough to be admitted is a mixed question of law and fact within the trial court's discretion, but where the evidence admits of a single reasonable inference, the question is one of law for this court. *State v. Moore*, 343 S.C. 282, 288, 540 S.E.2d 445, 448 (2000). In *Perry*, the United States Supreme Court clarified that due process does not require pretrial screening of all eyewitness identifications, only those procured by needlessly suggestive state

action. 565 U.S. at 232–33 (holding due process not implicated when eyewitness identified defendant on scene without police suggestion). Our supreme court has interpreted *Perry* as requiring a preliminary judicial inquiry (and generally a hearing) "once it is contended that an identification is obtained under unnecessarily suggestive circumstances arranged by state action, regardless of the witness's prior knowledge of the accused." *State v. Liverman*, 398 S.C. 130, 140, 727 S.E.2d 422, 427 (2012) (due process required pretrial identification hearing where out of court identification procedure consisted of suggestive show-up, even though eyewitness had long known accused).

Like the eyewitness in *Liverman*, Goolsby knew the defendant before the crime. Unlike the witness in *Liverman*, Goolsby was not an eyewitness to the crime. This court has held the *Neil v. Biggers* due process inquiry does not apply to a non-eyewitness. *State v. McGee*, 408 S.C. 278, 286–87, 758 S.E.2d 730, 734–35 (Ct. App. 2014). Further, even if delivery of the surveillance video here amounted to "state action," we disagree it was unnecessary. The State did not create the video. The State's use of it was necessary under the circumstances. At the time of their contact with Goolsby, the police had just received the Crimestoppers' tip, and the investigation was at a critical point. The armed perpetrator of a violent crime was still on the run and had already traveled between at least two states. It would have been impractical for the police to produce an array of videos recreating the crime scene, casting different actors as the perpetrator, before sending them to Goolsby. *See Wyatt*, 421 S.C. at 314–15, 806 S.E.2d at 712 (questioning whether less suggestive procedures were realistic alternatives, as under the circumstances "a lineup would be unworkable"); *see also Simmons v. United States*, 390 U.S. 377, 384–85 (1968) (police display of photos of bank robbery suspects to bank employee victims day after robbery necessary; it was "essential for the FBI agents swiftly to determine whether they were on the right track, so that they could properly deploy their forces in Chicago and, if necessary, alert officials in other cities"); *United States v. Sanders*, 708 F.3d 976, 987 (7th Cir. 2013) (holding single photographic "show-up" was necessary when armed felon at large as police "could not have produced a significantly less suggestive procedure without sacrificing critical time"); *see generally* LaFave, et al., *Criminal Procedure* § 7.4(b) (4th ed. 2003).

Even if sending the video to Goolsby was unnecessarily suggestive, we are confident Goolsby's identification was reliable. *See Manson v. Brathwaite*, 432 U.S. 98, 114 (1977) ("[R]eliability is the linchpin" of the due process inquiry). Without disclosing he was Warner's probation officer, Goolsby told the jury he had spent time with

Warner every month over the past nine or so months, usually for fifteen to thirty minutes each time. He testified he was sure of his identification because he was familiar with Warner's gait, the way he carried himself, and the way he held his hands and shoulders, and Warner had the same height and build as the person on the video. *See, e.g.*, *State v. Hall*, 940 A.2d 645, 650, 653–54 (R.I. 2008) (single photo of suspect shown to police officer who identified defendant as suspect was neither suggestive nor unnecessary; suspect was object of ongoing manhunt, and experienced officer was less likely to be affected by a "suggestive procedure"). As *Liverman* noted, a witness's prior knowledge of the accused "remains a significant factor in determining reliability" and mitigates even the extreme suggestiveness of a show-up. 398 S.C. at 135, 141–42, 727 S.E.2d at 424, 427–28 (concluding eyewitness's in-court identification had origins independent of suggestive taint of police orchestrated show-up, as eyewitness was acquaintance and former neighbor of defendant and had known him since elementary school). We affirm.

IV.

A. Application of Exclusionary Rule to pre-*Carpenter* Warrantless Search of Cell Phone Records

Warner next contends the trial court erred in denying his motion to suppress the cell records the State obtained from T-Mobile. At trial, Warner maintained the search warrant issued by the magistrate was invalid because the records were housed in New Jersey, and the magistrate's jurisdiction stopped at the Anderson County border. S.C. Code Ann. § 17-13-140 (2014). The trial court agreed and found the warrant invalid. The State did not challenge this ruling. However, the trial court still denied Warner's motion to suppress, ruling Warner had no expectation of privacy in the T-Mobile records based on the third party doctrine. *See United States v. Miller*, 425 U.S. 435, 443 (1976). As the trial court noted, the Fourth Circuit had recently used the third party doctrine to uphold the warrantless collection of cell phone records. *See United States v. Graham*, 824 F.3d 421, 437–38 (4th Cir. 2016).

While this appeal was pending, the United States Supreme Court decided *Carpenter v. United States*, 138 S. Ct. 2206, 2217 (2018), which held a person has a legitimate expectation of privacy in his cell phone records held by a third party. The court therefore held *Miller* did not apply to cell phone records, and the government could only obtain them by complying with the Fourth Amendment. We do not doubt

Carpenter applies retroactively to Warner's appeal. *See Griffith v. Kentucky*, 479 U.S. 314, 328 (1987).

Warner bases his claim solely on the Fourth Amendment, so the question becomes what remedy *Carpenter* provides him. The United States Supreme Court separates the retroactivity of a decision from the issue of the remedy. *Davis v. United States*, 564 U.S. 229, 243–44 (2011) ("[T]he retroactive application of a new rule of substantive Fourth Amendment law raises the question whether a suppression remedy applies; it does not answer that question."). In *Davis*, the Court faced the issue of whether the remedy of suppression should be applied where the search of the defendant was authorized at the time it was performed under the automobile exception to the Fourth Amendment recognized by *New York v. Belton*, 453 U.S. 454 (1981), but became unconstitutional after *Arizona v. Gant*, 556 U.S. 332 (2009). The search of Mr. Davis occurred two years before *Gant* but while Gant's direct appeal was pending. In a 7-2 decision, the Court refused to apply the exclusionary rule to the retroactive Fourth Amendment violation. The Court noted the single purpose of the exclusionary rule is to "deter future Fourth Amendment violations." *Id.* at 236–37. When the officer's actions are taken in objective good faith or involve only isolated simple negligence, the benefit of deterrence is dwarfed by the "heavy toll" the exclusionary system costs the justice system and society. *Id.* at 237–39. The Court noted there is no deterrent effect when the Fourth Amendment error is made by judges rather than police, as the rule was designed only to redress the officer's misconduct. To apply the *Gant* rule to the search of Mr. Davis that was authorized by *Belton* when it was performed, the Court reasoned, would penalize police for the Fourth Amendment misreadings of appellate courts. The South Carolina Supreme Court has followed *Davis*. *See State v. Brown*, 401 S.C. 82, 96, 736 S.E.2d 263, 270 (2012). Although *Davis* has taken on withering criticism, mainly for what some perceive as its sabotage of retroactivity, *see* LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 1.3(h) (5th ed. 2012), we are obligated to follow it.

Although the officers exceeded the Fourth Amendment when they obtained Warner's cell phone records without a valid warrant, in light of *Miller*'s validity at the time of the search, their conduct was not a deliberate or reckless transgression. Like the search in *Davis*, the search of Warner's records was not wrongful at the time it was made, and no deterrent value accrues from suppressing the evidence under these specific circumstances. Our conclusion is in accord with many state and federal courts that have confronted the retroactivity of *Carpenter* and whether CSLI records

obtained without a valid warrant before *Carpenter* should be subject to the exclusionary rule. *See United States v. Chavez*, 894 F.3d 593, 608 (4th Cir. 2018); *United States v. Goldstein*, 914 F.3d 200, 203–07 (3d Cir. 2019); *Reed v. Commonwealth*, 834 S.E.2d 505, 510–12 (Va. Ct. App. 2019). We therefore affirm the denial of Warner's motion to suppress.

V.

A. Admissibility of Rule 1006, SCRE Summary

Shortly after Church testified about the path of travel of Warner's cell phone, the State sought admission of five maps from his report. Four of the maps showed the location of the cell towers pinged by Warner's phone along I-85 between Atlanta and the Anderson/Greenville area, included the time of access, an arrow pointing the direction of travel, and an explanation that the "arrow indicates direction of travel." The fifth map depicted the location and angle of two tower "wedges" Warner's phone had accessed near the crime scene. The trial court overruled Warner's objection to the maps and admitted them as evidence. Warner claims foul, arguing the maps unduly highlighted Church's testimony and allowed the State to introduce independent evidence that went beyond the underlying source documents.

Rule 1006, SCRE, provides in part that the "contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation, provided the underlying data are admissible into evidence." The party seeking to admit a summary must demonstrate (1) the contents of the documents upon which the summary is based are so voluminous it would be inconvenient to examine them in court; (2) the underlying documents are admissible in evidence; (3) the summary is a faithful rendering of the underlying data, and any inferences it contains are supported by the contents and are neutral and non-argumentative; and (4) the originals or duplicates of the underlying documents have been made reasonably available to the other parties. Rule 1006 should be interpreted in light of its intended purpose as an exception to the best evidence rule of Rule 1002, SCRE. This does not mean a summary may not include anything not in the contents of the underlying documents; it may contain fair inferences and conclusions supported by the documents. 2 *McCormick on Evidence* § 241 (8th ed. 2020). But the more inferences a summary chart contains, the less likely it will be admissible under Rule 1006, the more likely it will draw an objection based on other grounds (including Rule 403, SCRE), and the more likely the trial

court will decide not to admit the summary as an exhibit but restrict it to being a demonstrative aid.

The evidence underlying the maps came from Warner's phone records and the T-Mobile tower list, both of which had been admitted. The phone records comprise seventy-five pages of data, displayed in a format so technical that they appear as near gibberish to the untrained eye. The most a non-expert could glean from them would be the date, time, and duration of the calls (provided one has a familiarity with Coordinated Universal Time and how to translate it to Eastern Standard Time, taking into account Daylight Savings Time). The address of the tower locations had to be established by cross-referencing the T-Mobile tower list. *See Crowley v. Spivey*, 285 S.C. 397, 412, 329 S.E.2d 774, 783 (Ct. App. 1985) (affirming admission of summary of thirty-one pages of telephone records where trial court concluded summary chart "would save the jury from having to decipher for themselves the long and somewhat confusing" records) (pre-SCRE case); *United States. v. Yousef*, 327 F.3d 56, 157–58 (2d Cir. 2003) (affirming admissibility of summary of telephone calls made by suspects in 1993 World Trade Center bombing).

The maps accurately summarized these already admitted records. Warner's real beef seems to be with the arrow that alleged the direction of travel of Warner's phone. But, as we have said, a summary chart is not inadmissible just because it carries an inference supported by the underlying evidence. *United States v. Spalding*, 894 F.3d 173, 184–86 (5th Cir. 2018). The text of Rule 1006 authorizes admissibility of not just a "summary" of underlying admissible data but also a "chart" or "calculation." A calculation is an inference based on underlying data, and Church's placement of the locations of the towers Warner's phone pinged along I-85 is his calculation of the movement of Warner's phone in time and space. He took raw data already in evidence—the phone and tower records—and superimposed it on a Google Earth map that included a directional arrow, a format the jury could better understand. *See* 6 *Weinstein's Evidence* § 1006.03 (2d ed. 2019) ("Calculations are admissible to distill quantitative information from a large quantity of material."); *see also United States v. Clements*, 588 F.2d 1030, 1039 (1979) (affirming admissibility of summary calculating gross revenue of gambling operation gleaned from 3,000 phone calls). We recognize charts, powerpoints, and other visual depictions of evidence can be powerful; even when they have not been admitted, jurors often ask (in vain) to see them during deliberations. A trial court must therefore be vigilant in ensuring a Rule 1006 summary is an accurate portrayal of the underlying evidence, and that any inferences and conclusions are faithful to that evidence and are not mere placards of

argument. 2 *McCormick on Evidence*, § 241 (8th ed. 2020); Mueller & Kirkpatrick, *Federal Evidence* 1107 (3d ed. 2003) (summary "must fairly condense the underlying material and cannot embellish with information not contained in the originals. It cannot be a jury argument in disguise . . . ." (footnotes omitted)). We conclude the maps were accurate and unembellished portrayals containing fair inferences well anchored to the underlying, admitted documents. The trial court exercised sound discretion over the maps, requiring the State to remove certain captions and conclusions from them before allowing them into evidence.

It would have likewise been within the trial courts vast discretion to have not admitted the maps, but only allowed them as demonstrative aids, and instructing the jury of their limited purpose. Some courts call such aids "pedagogical devices," but we won't. *See United States v. Bray*, 139 F.3d 1104, 1111–12 (6th Cir. 1998); *United States v. Janati*, 374 F.3d 263, 273 (4th Cir. 2004). Rule 611(a), SCRE, arms the trial court with the power to ensure evidence is presented in a manner "effective for the ascertainment of truth" and avoids wasting time. The trial court—so better attuned to the rhythms of the trial than we are—has wide discretion over the choice of whether a summary should be admitted, excluded, or allowed only as a demonstrative aid. At any rate, Warner suffered no prejudice; the maps were cumulative to records already in evidence and Church's testimony. We affirm.

AFFIRMED.

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