The Supreme Court of South Carolina

RE: Operation of the Trial Courts During the Coronavirus Emergency
(As Amended June 15, 2021)

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 coronavirus (COVID-19) emergency.

This is the fourth time this order has been amended.[1] In this fourth amendment to the order, the discussion in section (a) has been significantly revised.

The expiration date of the order in section (i) has been extended to August 2, 2021, and the title of section (i) has been revised to reflect this section contains an expiration date. This relatively short extension is being made as a more complete and through revision of this order is being considered by the Court.

[1] This order was initially filed on April 3, 2020, and has been amended on three prior occasions. On April 14, 2020, changes were made to sections (c)(5) and (c)(8). On April 22, 2020, section (c)(17) was added. On December 16, 2020, the Court amended sections (c)(1), (c)(2) (c)(3), (c)(4), (c)(6), (c)(8), (c)(9), (d)(2), (d)(3), (f)(1)(C), (h)(1), (h)(2), (h)(3), and (i), and added new sections (c)(11)(D), (c)(18), (f)(4) and (i)(3). The third amendment revised section (i) to extend the order for an additional 90 days.

Finally, new footnotes 2 and 13 have been added, and the remaining footnotes have been renumbered based on these additions. No other substantive changes have been made.

The risk posed by COVID-19 has reduced significantly, and is projected to decrease even further.[2] As anticipated by the language in section (c) and footnote 4 of this order, the Chief Justice has issued guidance allowing in-person hearings and trials to procced. Further, grand juries are again being convened. This Court wholeheartedly supports these actions taken by the Chief Justice, and nothing in this order should be construed as limiting the ability of the Chief Justice to further reduce restrictions as may be appropriate, including the masking and social distancing requirements in this order.

This amended order is being issued pursuant to Rule 611 of the South Carolina Appellate Court Rules (SCACR). 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. As required by Rule 611, SCACR, a copy of this order shall be provided to the Chairs of the House and Senate Judiciary Committees.

Finally, Rule 612, SCACR, recently became effective. This order serves as the current guidance for use of remote communication technology under that rule.

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[2] At the end of 2020 and the start of 2021, the Institute for Health Metrics and Evaluation estimated that around 12,300 persons were being infected with the coronavirus each day in South Carolina. Currently, the estimated number of new infections is around 625 per day, and this is projected to decrease to around 240 new infections per day by September 1, 2021. See https://covid19.healthdata.org/united-states-of-america/south-carolina?view=infections-testing&tab=trend&test=infections.

(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. If done in accordance with a plan approved by the Chief Justice,[3] jury selections and jury trials may be conducted. These plans should adhere to the guidance contained in section (c)(3) below.

(2) Non-Jury Trials and Hearings. Subject to the guidance provided in section (c)(3) below, non-jury trials and hearings may be conducted.

(3) General Guidance Regarding Trials and Hearings.

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[3] To obtain approval of a plan, the plan should be submitted to the Office of Court Administration. Since the plan will have to address courtroom and other facility specific information, a separate plan will need to be submitted for the circuit court in each county. Further, a separate plan will need to be submitted by each magistrate, municipal and probate court. Court Administration should be contacted to obtain additional advice and assistance regarding the content and requirements that should be addressed in any plan.

(A) Remote Non-Jury Trials and Hearings. Except as may be restricted by any constitutional provision, statutory provision or other provision of this order, a non-jury trial or a hearing on a motion or other matter, including a first appearance in a criminal case, may be conducted using remote communication technology to avoid the need for a physical appearance by any party, witness or counsel.

(B) In-Person Trials and Hearings.[4] An in-person trial or hearing may be conducted if a judge determines (1) it is appropriate to conduct an in-person trial or hearing and (2) the trial or hearing can be safely be conducted. If an in-person trial or hearing is held, the following will apply:

(i) Start and end times for trials and hearings must be staggered to minimize the number of persons who will be present at the same time in the courtroom or hearing room, and the waiting rooms, hallways or other common areas which support the courtroom or hearing room.

(ii) Unless the judge authorizes another person to attend, attendance at the trial or hearing shall be limited to the attorneys or parties in the matter, necessary witnesses and necessary court staff. In the event the matter has numerous counsel or parties, the judge may further limit attendance as may be necessary to safely conduct the hearing.

(iii) Except as restricted by constitutional or statutory provision, a judge may allow a party to appear or a witness to testify using remote communication technology. As an

[4] The guidance in this order is, of course, subject to such additional orders and directions as the Chief Justice may prescribe as the administrative head of the unified judicial system under Article V, §4, of the South Carolina Constitution. As it relates to live hearings or trials, the ability to safely conduct live proceedings will undoubtedly vary significantly over time, and we are confident the Chief Justice will provide the trial courts with additional guidance and instructions as may be necessary to either expand or restrict live proceedings as this pandemic progresses.

example, allowing a person who is at a heightened risk from COVID-19 due to age or serious underlying medical condition to appear or testify remotely might be an appropriate accommodation if requested by that person.

(iv) Except when necessary for the proceeding (such as handing an exhibit to the judge or opposing counsel, or counsel consulting with their client), all persons in the courtroom or hearing room must maintain at least six feet of distance from other persons in the room. Masks must be worn by all persons as specified by order of the Chief Justice dated July 30, 2020.[5] To ensure social distancing can be maintained, it is recommended the maximum number of persons not exceed one person per 113 square feet of space in the courtroom or hearing room. This area may be reduced if plexiglass shields are being used, but the six foot distancing set forth above should be maintained.

(v) Efforts should be made to sanitize the witness stand and/or podium between witnesses and presentation by counsel. Further, before a subsequent trial or hearing is held, the courtroom or hearing room surfaces which may have been touched by participants in the prior matter, including door handles, should be sanitized.

(4) Minimizing Hearings on Motions. While the practice has been to conduct hearings on virtually all motions, this may 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

[5] This order is available at https://www.sccourts.org/whatsnew/displaywhatsnew.cfm?indexID=2523.

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 or a written statement with the certification provided by section (c)(16) below setting forth the facts on which the warrantless arrest was made within eight (8) hours of the arrest. The judge shall consider this affidavit or written statement with the certification and, if appropriate, may have the officer or others supplement the affidavit or written statement with the certification 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. Preliminary hearings may be conducted in-person or by remote communication technology subject to the requirements specified by section (c)(3) above. However, a preliminary hearing conducted by remote communication technology will not be conducted over the objection of the defendant. In the event a defendant objects to a preliminary hearing being conducted using remote communication technology, and the judge determines that an in-person

hearing cannot safely be conducted, the preliminary hearing may be continued until such time as the judge determines an in-person hearing can be safely conducted.[6]

(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.

(A) Scheduling Orders Issued Prior to April 3, 2020. Under a prior version of this order, all deadlines under scheduling orders issued prior to April 3, 2020, were stayed, retroactive to March 13, 2020. Forty-five (45) days following the date on which the Governor lifts or rescinds the emergency orders relating to the coronavirus emergency, this stay shall end.

(**B) Scheduling Orders Issued On or After April 3, 2020.** A new or amended scheduling order issued on or after April 3, 2020, will not be subject to any stay under this order. Both the decision to issue such an order and the terms of that order must consider the impact the emergency has on the ability of the parties and counsel to proceed. Judges are encouraged to seek input from the parties and counsel before issuing a new or amended scheduling order.

[6] If a preliminary hearing is not held before the defendant is indicted by the grand jury, a preliminary hearing will not be held. Rule 2(b) of the South Carolina Rules of Criminal Procedure.

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

(A) Extensions of Time. Due to the increased need for extensions at the start of this emergency, the filing fees for a motion for an extension of time were waived, and the due dates for trial court filings due on or after April 3, 2020 were automatically extended for thirty (30) days. That need has now decreased.[7] Accordingly, the filing fee waiver shall not apply to any motions for extensions filed on or after January 16, 2021. Further, the automatic extension shall not apply to any action or event due on or after January 16, 2021.

(B) Forgiveness of Procedural Defaults Since March 13, 2020, to April 3, 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 was forgiven, and the required action was required to be taken by May 4, 2020. If a dismissal or other adverse action has been taken, that adverse action was to 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.

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[7] As explained by the order of April 3, 2020, the automatic extension was intended to give "lawyers and self-represented litigants appearing before the trial courts … time to take actions to protect themselves and their families." Since sufficient time has been provided for this to occur, and most lawyers and litigants have been able to adjust to working remotely, this automatic extension is no longer warranted.

(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.[8] 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.

(D) Entrance Screening and Protective Masks. All persons entering a courthouse shall be screened for fever and shall wear a protective mask while in the courthouse as required by the order of the Chief Justice dated July 30, 2020.[9]

(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

[8] 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.

[9] This order is available at https://www.sccourts.org/whatsnew/displaywhatsnew.cfm?indexID=2523.

the Attorney Information System (AIS).[10] 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 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.

[10] 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.

(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."

(17) Arrest and Search Warrants. Due to this emergency, it may not be possible for an officer seeking an arrest warrant or a search warrant to appear before the judge to be sworn and sign the warrant. Therefore, a judge may use the procedures provided in section (c)(7) above to remotely

administer the oath to the officer and, if appropriate, the judge may take sworn testimony using remote communication technology to supplement the allegations in the warrant. The judge shall make a notation on the warrant indicating the oath was administered remotely and the officer was not available to sign the warrant in the presence of the judge. If probable cause is found, the judge shall sign the warrant and return the warrant to the officer for execution. While the officer may sign the warrant when it is returned, the failure to do so shall not affect the validity of the warrant. The warrant may be transmitted to the judge and returned to the officer by e-mail, fax or other electronic means. For the purpose of this section, the term "search warrant" shall also include applications under South Carolina Homeland Security Act, S.C. Code Ann. §§ 17-30-10 to -145.

(18) Discovery. Depositions and other discovery matters may be conducted using remote communication technology.

(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. 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. County grand juries may convene in-person so long as the Chief Judge for Administrative Purposes determines grand jurors can be safely distanced and equipped with protective gear, and meeting rooms and courtrooms sanitized. To help ensure appropriate social distancing can be maintained, a minimum of 113 square feet of space per person should be available during any grand jury proceedings, including deliberations.

(3) Guilty Pleas. Guilty pleas may be conducted as specified by section (c)(3) above. However, a guilty plea by remote communication technology will not be conducted unless both the defendant and prosecutor consent. 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.

(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 or waived by the parties.

(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.

(4) Execution of Bench Warrants. While the Chief Justice temporarily suspended the execution of bench warrants for non-payment of child support and alimony,[11] that suspension has expired. Therefore, bench warrants issued by the family court shall be promptly executed by appropriate law enforcement personnel.

(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

[11] See Orders of the Chief Justice dated May 7, 2020 and June 5, 2020 (available at https://www.sccourts.org/whatsnew/displaywhatsnew.cfm?indexID=2510 and https://www.sccourts.org/whatsnew/displaywhatsnew.cfm?indexID=2497).

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 shall be conducted in the manner specified by section (c)(3) above. The frequency of these bond hearings shall be specified by the Chief Justice.[12] 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. If the defendant is incarcerated at the South Carolina Department of Corrections, the judge shall also transmit a copy of the

[12] Currently, the Chief Justice has directed bond hearings be held twice a day. See Memorandum of the Chief Justice dated September 25, 2020 (available at https://www.sccourts.org/whatsnew/displaywhatsnew.cfm?indexID=2530).

annotated warrant to the Office of General Counsel at the South Carolina Department of Corrections.[13]

(3) Guilty Pleas. For offenses within the jurisdiction of the summary court (including those cases transferred to the summary court pursuant to S.C. Code Ann. § 22-3-545), guilty pleas may be conducted as specified by section (c)(3) above. However, a guilty plea by remote communication technology will not be conducted unless both the defendant and prosecutor consent. 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. A defendant charged with criminal offenses, traffic violations, ordinance violations, and administrative violations within the jurisdiction of the summary courts may plead guilty by affidavit or certification. This procedure may only be utilized by persons represented by an attorney and desiring to plead guilty where the charge does not carry imprisonment as a possible punishment or where the prosecutor or prosecuting law enforcement officer and defense attorney have agreed that the recommended sentence will not result in jail time. If applicable, the prosecutor or prosecuting law enforcement officer must comply with the Victims' Bill of Rights under Article I, Section 24 of the South Carolina Constitution.[14]

(i) Effective Date; Expiration Date; and Revocation of Prior Orders and Memoranda. This order is effective immediately. Unless extended, this order will expire on August 2, 2021. This order replaces the following orders and memoranda previously issued.

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[13] Rule 3, SCRCrimP, was recently amended to include this language.

[14] This language regarding pleas by affidavit or certification incorporates language from a May 7, 2020, order of the Chief Justice (available at https://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2020-05-07-01).

(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."

(3) Order dated May 29, 2020, entitled "County Grand Juries."

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
As Amended June 15, 2021

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499

N O T I C E

IN THE MATTER OF JAMES MARSHALL BIDDLE, PETITIONER

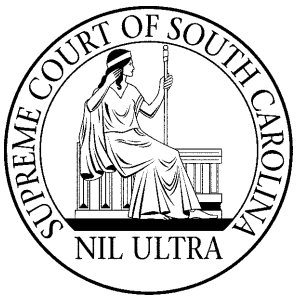
Petitioner was definitely suspended from the practice of law for three (3) years. *In re Biddle*, 412 S.C. 630, 773 S.E.2d 590 (2015). Petitioner has now filed a petition seeking to be reinstated.

Pursuant to Rule 33(e)(2) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413 of the South Carolina Appellate Court Rules, notice is hereby given that members of the bar and the public may file a notice of their opposition to or concurrence with the petition. Comments should be mailed to:

Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

These comments should be received within sixty (60) days of the date of this notice.

Columbia, South Carolina
June 16, 2021



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 20
June 16, 2021
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ashley Reeves, as Personal Representative for the Estate of Albert Carl "Bert" Reeves, Petitioner,

v.

South Carolina Municipal Insurance and Risk Financing Fund, Respondent.

Appellate Case No. 2019-001756

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Colleton County
Perry M. Buckner III, Circuit Court Judge

Opinion No. 28034
Heard November 18, 2020 – Filed June 16, 2021

REVERSED IN PART, VACATED IN PART

William Mullins McLeod Jr. and Colin Ram, McLeod Law Group, LLC, of Charleston for Petitioner.

C. Mitchell Brown and Brian Patrick Crotty, Nelson Mullins Riley & Scarborough, LLP, of Columbia for Respondent.

JUSTICE FEW: A Town of Cottageville police officer shot and killed the former town Mayor Bert Reeves. A federal jury awarded Reeves' estate $97,500,000 in damages. The South Carolina Municipal Insurance and Risk Financing Fund, which insured the town, paid $10,000,000 to settle the federal lawsuit and two other lawsuits. The Settlement Agreement provided for two questions to be submitted to the state courts. The first question is whether the amount of indemnity coverage available under the policy is more than $1,000,000. The second question is whether the South Carolina Tort Claims Act applies to a bad faith action against the Fund. We answer the first question "yes"; we decline to answer the second question.

I. Facts and Procedural History

Randall Price—a police officer for the Town of Cottageville in Colleton County—shot and killed former Cottageville Mayor Albert Carl "Bert" Reeves on May 16, 2011. Ashley Reeves—the personal representative of Bert Reeves' estate—filed a wrongful death and survival lawsuit in state court against Price, the Cottageville police department, and the Town of Cottageville for negligence, assault, battery, and civil rights violations under 42 U.S.C.A. § 1983 (2012). Ashley alleged that while Price was on duty, he drove onto a dirt road to confront Reeves, blocked him in, started a fight with him, and shot and killed him. She claimed the police department and the town were liable for Price's actions because he was their employee. Ashley also alleged the police department and the town were negligent in hiring, retaining, and supervising Price, and those actions violated Reeves' civil rights under section 1983. The defendants removed the lawsuit to federal court. The parties refer to this as the Cottageville lawsuit.

Ashley filed a separate federal lawsuit against Cottageville Police Chief John Craddock. She alleged Craddock—a licensed paramedic—was present when Price shot Reeves. She claimed Craddock was liable for civil rights violations under section 1983 for failing to supervise Price, failing to intervene to stop Price, and failing to give medical care after Price shot Reeves.

The South Carolina Municipal Insurance and Risk Financing Fund provided liability insurance to Cottageville, and administered claims against it, pursuant to an insurance policy labeled the Coverage Contract. This "Fund," as we will call it, is a self-insurance liability fund established pursuant to subsection 15-78-140(A) of the

South Carolina Code (Supp. 2020).[1] Ashley filed a declaratory judgment action in state circuit court against the Fund requesting the court declare the extent of indemnity coverage provided in the Coverage Contract. The Fund argued then and argues now that coverage provided by the Coverage Contract is limited to $1,000,000.

The Cottageville lawsuit was the only case to go to trial. The federal jury found Price was negligent, his negligence proximately caused Reeves' death, and Price violated Reeves' constitutional rights by using excessive force and unlawfully seizing Reeves. The jury found Cottageville negligently hired, retained, and supervised Price, and violated Reeves' constitutional rights. The jury awarded Reeves' estate $7,500,000 in actual damages and $90,000,000 in punitive damages—$30,000,000 against Price and $60,000,000 against Cottageville.

Ashley and the Fund agreed to settle all three lawsuits for $10,000,000. The Settlement Agreement provided Ashley may seek declaratory judgment asking the courts to resolve the two questions.[2] The Fund agreed to pay Reeves' estate an additional $1,000,000 for each question resolved in Ashley's favor. The federal court approved the Settlement Agreement.

The Fund filed a petition with this Court asking us to decide the questions in our original jurisdiction. We declined. Ashley then filed this declaratory judgment claim by amending her pending complaint in circuit court. On the first question, the circuit court ruled in favor of Ashley, finding there was more than $1,000,000 in coverage available under the policy. On the second question, the circuit court ruled in favor of the Fund, finding the Fund is a political subdivision, and therefore, a bad faith claim against it would be subject to the Tort Claims Act.

---

[1] Subsection 15-78-140(A) provides that "political subdivisions of this State . . . shall procure insurance to cover [tort and other liability] risks for which immunity has been waived" under the Tort Claims Act by one of several methods, including "(4) establishing pooled self-insurance liability funds, by intergovernmental agreement."

[2] The two questions as fully stated by the parties in the Settlement Agreement are set forth in the court of appeals' opinion. *Reeves v. S.C. Mun. Ins. & Risk Fin. Fund*, 427 S.C. 613, 620-21, 832 S.E.2d 312, 316 (Ct. App. 2019).

The court of appeals reversed the circuit court's ruling regarding the amount of coverage available but affirmed the ruling the Fund is a political subdivision. *Reeves v. S.C. Mun. Ins. & Risk Fin. Fund*, 427 S.C. 613, 635, 640, 832 S.E.2d 312, 324, 326 (Ct. App. 2019). We granted a writ of certiorari to review the court of appeals' decision.

II. Indemnity Coverage Available

The Coverage Contract provided indemnity coverage for the town in areas such as general liability, business auto liability, and law enforcement liability. The coverage at issue in this case is law enforcement liability under Section IV of the Coverage Contract. The general provisions in Section I apply.

A. Insuring Language

We begin with the law enforcement liability insuring language in Section IV. We highlighted the operative language in bold for clarity,

> **[The Fund] agrees**, subject to the limitations, terms, and conditions hereunder mentioned **to pay** on behalf of the Member or Covered Person(s) **for sums which the Member or Covered Person(s) shall be obligated to pay** exclusively **as Money Damages because of a Wrongful Act by a Member**, **a Law Enforcement Employee**, or other Covered Person(s) while acting in conjunction with Law Enforcement Employees, which is **committed while acting in both the course and the scope of his or her official duties**, as provided under the "South Carolina Tort Claims Act" where a South Carolina state law is involved, or while acting in both the course and scope of a mutual aid agreement between governmental entities for the temporary sharing of Law Enforcement Employees or other Covered Person(s) under the terms and circumstances specified therein, and **which results in**:
>
> a. Property Damage or **Bodily Injury** which is first caused and first becomes manifest during the Coverage

> Period, **provided the Wrongful Act amounts to an Occurrence**; **or**
>
> b. **Personal Injury** or Advertising Injury which is first caused and first becomes manifest during the Coverage Period.

Under this insuring language, the Fund agreed to pay when a Member (Cottageville) or a Law Enforcement Employee (Price or Craddock) committed a Wrongful Act in the course and scope of his official duties, and the Wrongful Act resulted in Bodily Injury or Personal Injury. The parties agree Price and Craddock were acting within the scope of their official duties when Price killed Reeves. The federal jury determined Cottageville and Price committed numerous Wrongful Acts.

The next question is whether the Wrongful Acts resulted in Bodily Injury. Bodily Injury is defined in the Coverage Contract. We highlighted the operative language in bold for clarity,

> **"Bodily Injury" means physical injury to any person (including death)** and any mental anguish or mental suffering associated with or arising from such physical injury. However, for purposes of this Section IV, Bodily Injury does not include such injuries if they result directly and immediately from the infliction of Personal Injury, including without limitation assault and battery; any such resulting injuries shall be deemed to be part of the Personal Injury.

Reeves is dead; that is a Bodily Injury. Therefore, as the parties agree, the insuring language provides coverage in this case.

We turn then to the policy limits for law enforcement liability indemnity coverage. The Contract Declaration page for Section IV of the Coverage Contract provides the "Liability Limit" is "$1,000,000" "Per Occurrence."

The term "Occurrence" is one we commonly use. In that common usage, the death of Bert Reeves was one tragic occurrence. However, we are not permitted to use our intuitive definition of a term defined in an insurance policy. The Fund wrote the

definition of "Occurrence" applicable here, which is found in Section I, the General Provisions section of the Coverage Contract. Again, we put the operative language in bold for clarity,

> **"Occurrence" means an accident which results in Bodily Injury** or Property Damage, the original cause of which and the initial damage from **which happened during the Contract Period** set forth in the Declarations. Without limitation, all references to any type of injury arising out of or from an Occurrence or being caused by an Occurrence employ the foregoing meaning. Subject to the foregoing, "Occurrence" includes continuing exposure to the same harmful conditions. All such continuing exposure, damage, or injury shall be treated as one Occurrence.
>
> Only when used **to describe coverage limits on a per "Occurrence" basis** or when otherwise describing whether an event or series of events constitutes one loss for coverage purposes or more than one loss, **the word "Occurrence" means a covered event of the sort expressly described in the Insuring Agreement of the relevant Coverage Section** pertaining to the loss or claim, whether an Occurrence (as defined in the opening paragraph of this General Definition or as defined in the separate definition, if any, appearing in the Definitions part of the relevant Coverage Section), a **Wrongful Act**, a Loss, or an Offense causing Personal Injury or Advertising Injury, as those terms are defined in the relevant Coverage Section.

This is not a simple and straightforward definition. In effect, it is three definitions, one for each context in which the Fund used the term Occurrence in the Coverage Contract. The first sentence of the definition provides its central meaning—an "'Occurrence' is an accident which results in Bodily Injury." The definition continues by explaining the three specific contexts in which the Fund used the term in the policy. The first context is set forth in the second sentence of the definition, which further explains the central meaning by reiterating the definition applies when

an injury "arises out of" or is "caused by" an Occurrence. The first context applies when the Occurrence is an act or failure to act that causes injury. Under the terms of the Coverage Contract, therefore, an Occurrence is some act or failure to act that causes an injury.

The second context is addressed in the next two sentences of the definition, which are the last two sentences of the first paragraph. These two sentences explain that when "continuing exposure to the same harmful conditions" results in damage or injury, there is only one Occurrence. This case is not a "continuing exposure" situation, and thus, this second context for the definition of Occurrence is not applicable here.

The third context overlaps with the first context and is applicable here. It is found in the second paragraph, which applies when Occurrence is "used to describe limits on a per 'Occurrence' basis or when otherwise describing whether an event or series of events constitutes one loss . . . ." In that context—this context—"the word 'Occurrence' means a covered event of the sort expressly described in the Insuring Agreement of the relevant Coverage Section."

This takes us back to the insuring language quoted above. The "covered event . . . expressly described" in the insuring language is a Wrongful Act. This portion of the definition of Occurrence specifically equates Occurrence with Wrongful Act.[3] The term Wrongful Act is defined as "any actual or alleged error in the performance or failure to perform an official duty . . . or any omission or neglect in performing an official duty; or any breach of an official duty . . . ."

The meaning of the term Occurrence is central to understanding the Liability Limit for law enforcement liability coverage in Section IV. The Coverage Contract does not define Occurrence the way we commonly use it, in which some act or failure to act results in a tragic occurrence.[4] Rather, under the Fund's definition, the tragic

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[3] The definition provides, "'Occurrence' means a covered event of the sort expressly described in the Insuring Agreement . . . , whether an Occurrence . . . , a Wrongful Act, a Loss, or an Offense."

[4] Our analysis is narrow and relates only to the term "Occurrence" as it is defined in this Coverage Contract. Our analysis is irrelevant, for example, to the term "Occurrence" as it is used in the South Carolina Tort Claims Act. *See* S.C. Code

death of Bert Reeves was the result of an Occurrence. The Coverage Contract defines Occurrence as a Wrongful Act that results in Bodily Injury. Ashley argues Reeves' death was the result of at least four Wrongful Acts. She argues Cottageville's negligent hiring, retention, and supervision of Price, and Price's use of deadly force, are four different Wrongful Acts. The federal jury found in Ashley's favor for each Wrongful Act, which demonstrates she is correct that four Wrongful Acts occurred. The four Wrongful Acts are four Occurrences under the terms of the Coverage Contract.

Our conclusion there was more than one Occurrence is supported by considering just two of the several Wrongful Acts Ashley contends "occurred." Even under the Fund's interpretation of the Coverage Contract, these two acts are separate Occurrences. First, Price shot Reeves. Though the gunshot left Reeves in danger for his life, and caused him eventually to die, he was still alive immediately afterwards. Second, Craddock allegedly refused to render medical care to Reeves, despite Craddock's training as a paramedic. The Craddock case was never tried, but considering the allegations against him, it is not possible to view (1) Price shooting Reeves and his eventually resulting death, and (2) Craddock standing by refusing to render medical care while Reeves suffered through the last few minutes of life, as the same Occurrence. So, even if we were to find all of the Wrongful Acts by Price, Craddock, the police department, and the town were not separate Occurrences, we cannot escape the reality that the two acts used in this illustration are two separate Occurrences resulting in separate claims for separate damages.

Returning to the applicable insuring language, however, we do find Cottageville and Price committed at least four Wrongful Acts while acting in the course and scope of their official duties: Cottageville's negligent hiring, retaining, and supervising Price, and Price's use of deadly force in shooting Reeves. If the jury in the Craddock case agreed Chief Craddock violated Reeves' civil rights by failing to render medical care, that would be another Wrongful Act and a fifth Occurrence. Section IV provides coverage for each of the four Occurrences the jury found occurred. The Liability Limit is the number of Occurrences/Wrongful Acts times $1,000,000. Unless some

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Ann. § 15-78-30(g) (2005) (providing, "'Occurrence' means an unfolding sequence of events which proximately flow from a single act of negligence").

other limitation in the Coverage Contract applies, the four Occurrences require the Fund to pay more than $1,000,000 in indemnity coverage.[5]

B. Limitations

The Fund argues there are three applicable limitations in the Coverage Contract: (1) the No Duplication clause in Section I; and two clauses in the "Limit of Liability" portion of Section IV—(2) the "Limit of Liability" clause; and (3) "[the Fund]'s Limit of Liability" clause. We find none of the limitations apply.

The No Duplication clause contains two prohibitions. First, it limits recovery for any claim that invokes liability coverage from more than one section of the Coverage Contract. Ashley's claims involve only law enforcement liability, and thus, invoke liability coverage only under Section IV. Next, the No Duplication clause provides, "A single Coverage Limit applies to all claims or suits involving substantially the same injury or damage, or a progressive injury or damage." "Coverage Limit" is not defined in the Coverage Contract. The Fund would have us assume "Coverage Limit" means "$1,000,000," but there is no support for this position in the language of the policy. As the term "Coverage Limit" is not defined, we will not read it as limiting coverage more than the defined term "Liability Limit." *See Walde v. Ass'n Ins. Co.*, 401 S.C. 431, 439, 737 S.E.2d 631, 635 (Ct. App. 2012) ("Policies are construed in favor of coverage, and exclusions in an insurance policy are construed against the insurer." (quoting *M & M Corp. of S.C. v. Auto–Owners Ins. Co.*, 390 S.C. 255, 259, 701 S.E.2d 33, 35 (2010))). We find the undefined term Coverage Limit is synonymous with "Liability Limit," which is defined as "$1,000,000" "Per Occurrence."

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[5] The circuit court ruled in favor of Ashley on the first question for the additional reason that there were multiple categories of damages caused by the defendants' Wrongful Acts, including damages for wrongful death and damages that survived Reeves' death. The circuit court found the multiple categories of damages rendered the policy limit to be in excess of $1,000,000. *See Reeves*, 427 S.C. at 631, 832 S.E.2d at 321-22 (explaining the circuit court's alternative basis for its ruling). Because our decision is based on the number of Occurrences, we need not address this alternative point. *See Whiteside v. Cherokee Cty. Sch. Dist. No. One*, 311 S.C. 335, 340, 428 S.E.2d 886, 889 (1993) ("In view of our disposition of this issue, we need not address appellants' remaining exceptions." (citations omitted)).

The second limitation the Fund claims applies is in the "Limit of Liability" portion of Section IV of the Coverage Contract. The limitation provides, "Only a single limit or Annual Aggregate . . . will apply, regardless of the number of persons or organizations injured or making claims, or the number of Covered Persons who allegedly caused them, or whether the damage or injuries at issue were continuing or repeated over the course of more than one Coverage Period." This language does not limit Ashley's claims because Section IV does not contain an "Annual Aggregate," and to the extent there is a "single limit"—another undefined term—the Coverage Contract provides it is the Liability Limit: "$1,000,000" "Per Occurrence."

The third limitation the Fund claims applies is also in the "Limit of Liability" portion of Section IV. The limitation provides the Fund's "liability for any one occurrence/wrongful act will be limited to $1,000,000 per Member regardless of the number of Covered Persons, number of claimants or claims made . . . ." The Fund focuses on "limited to $1,000,000 per Member" to argue it does not have to provide coverage from different wrongful acts committed by Cottageville and its officers. However, the Fund overlooks the key language in the limitation—that liability is limited to $1,000,000 per Member "for any one occurrence/wrongful act." There were multiple occurrences/wrongful acts. Therefore, this provision does not limit Ashley's claims.

To summarize, the insuring language of the Coverage Contract provides $1,000,000 in coverage for each Occurrence, which is a Wrongful Act resulting in Bodily Injury. Cottageville's negligent acts of hiring, retaining, and supervising Price, and Price's use of deadly force, are separate Occurrences under the terms of the Coverage Contract. No limitation applies. Therefore, there is more than $1,000,000 in indemnity coverage available.

C. Court of Appeals' Analysis

The structure of the court of appeals' opinion differs considerably from ours, which this Court should explain. We acknowledge the Coverage Contract is a complicated insurance policy which must be analyzed in a complicated factual scenario with at least four defendants and numerous Wrongful Acts. Respectfully, however, we find the court of appeals erred primarily because it did not complete its analysis of the insuring language of the Coverage Contract before considering whether the limiting language affected the insuring language. Under the proper structure for analyzing any insurance policy, the analysis begins with the insuring language. The court

should complete that analysis, and then determine whether there is any other provision in the policy that limits or excludes what is insured.

The court of appeals followed that structure through what it called its first and second steps of analysis. *Reeves*, 427 S.C. at 627-29, 832 S.E.2d at 319-20. In its third step, however, the court of appeals considered whether the law enforcement liability coverage for Bodily Injury was limited by the definition of Personal Injury. 427 S.C. at 629-30, 832 S.E.2d at 320-21. The court of appeals relied on the following sentence in the Coverage Contract, as set forth in the definition we quoted above, "Bodily Injury does not include such injuries if they result directly and immediately from the infliction of Personal Injury."

The court of appeals erred in relying on this sentence for several reasons. First, this sentence from the Coverage Contract is confusing, if not indecipherable. The court of appeals read the phrase "such injuries" to refer all the way back in the definition of Bodily Injury to "physical injury to any person (including death)." Under the court of appeals' reading, the sentence provides "Bodily Injury" does not include "physical injury" or "death." However, the policy definition of the term states, "'Bodily Injury' means physical injury . . . (including death)." Bodily Injury cannot be defined to "mean" physical injury including death and then suddenly not mean physical injury *or* death. The more logical way is to read the phrase "such injuries" as referring back in the definition of Bodily Injury only to "any mental anguish or mental suffering associated with or arising from such physical injury." Under this reading—which still is confusing—when an insured commits an Offense that results in Personal Injury, the Coverage Contract does not provide coverage for "mental anguish or mental suffering," but for only the physical injury itself. As our courts have repeatedly stated, confusing and ambiguous language in insurance policy limitations must be construed against the insurer that drafted the policy. *See, e.g.*, *Walde*, 401 S.C. at 439, 737 S.E.2d at 635.[6]

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[6] The circuit court found the term Occurrence to be ambiguous, 427 S.C. at 633-34, 832 S.E.2d at 323, but the court of appeals apparently found the entire Coverage Contract to be clear and unambiguous, 427 S.C. at 634-35, 832 S.E.2d at 323-24. As we explained, we find the insuring language applicable to this case, including the Liability Limit on the Contract Declarations page, to be unambiguous. We also find there is no clear limitation in the policy that would reduce the available coverage to $1,000,000. To the extent it may be argued that such a limitation exists, the argument ignores numerous ambiguities in the limiting language. When those

Second, the court of appeals' reading limits coverage only when the sentence is considered in conjunction with the definition of Offense. The court stated "to recover under Personal Injury, the Wrongful Act that caused the Personal Injury must amount to a covered Offense." 427 S.C. at 629, 832 S.E.2d at 320. Thus, the Personal Injury limitation applied by the court of appeals operates by incorporating the language "Offense is subject to a single Coverage Limit of $1,000,000" into the analysis. *See* 427 S.C. at 633, 832 S.E.2d at 323 (stating "the Offense is subject to a single Coverage Limit of $1,000,000"). As we explained, however, the term "Coverage Limit" is undefined, and we will not read it to limit coverage under the policy to $1,000,000.

Third, the term Personal Injury does not include all of the Wrongful Acts the jury found to have occurred in this case. The Coverage Contract defines Personal Injury to "mean[] only the following Offenses," and then lists "assault and battery," "violation of civil rights," and others not applicable here. The definition does not list negligence, such as the jury found Price committed, or negligent hiring, retention, or supervision, such as the jury found the town committed. Each of these were Wrongful Acts that resulted in the death of Reeves, but they are not Personal Injury as that term is defined in the policy. Thus, even to the extent Reeves' death did result directly from Offenses as included in the definition of Personal Injury, Reeves' death also resulted directly from Wrongful Acts that meet only the definition of Bodily Injury.

Finally, the court of appeals was not correct to conclude "the coverage issue [must be analyzed] exclusively under the Coverage Contract's provisions for Personal Injury." 427 S.C. at 622, 832 S.E.2d at 317; *see also* 427 S.C. at 630, 832 S.E.2d at 321 (stating "the Bodily Injury is deemed part of the Personal Injury for coverage purposes"); 427 S.C. at 634, 832 S.E.2d at 323 (holding "coverage for *Offense* is at issue, not coverage for *Occurrence*"). A straightforward analysis of the insuring language of the Coverage Contract reveals clear and unambiguous indemnity coverage for liability incurred when a Member (Cottageville) or Law Enforcement Employee (Price or Craddock) commits Wrongful Acts that result in Bodily Injury "(including death)."

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ambiguous provisions are construed against the insurer, the insuring language is limited only by the Limit of Liability provision, "$1,000,000" "Per Occurrence."

III. Bad Faith Tort Claim

The second question the Settlement Agreement calls on us to answer is whether a bad faith claim against the Fund is subject to the South Carolina Tort Claims Act. For two reasons, we decline to answer the question. We vacate the answer given by the court of appeals. *See Reeves*, 427 S.C. at 635-40, 832 S.E.2d at 324-26.

The first reason we decline to answer the question is we cannot be sure the claim is assignable. The claim did not initially belong to Ashley, but instead, to the parties insured by the Fund: Cottageville, Price, and Craddock. According to the full text of the second question, "[The Fund] was informed that any bad faith claims that exist in favor of Cottageville would be assigned to [Ashley]." 427 S.C. at 620-21, 832 S.E.2d at 316. The declaratory judgment claim Ashley filed pursuant to the Settlement Agreement also states, "Cottageville informed [the Fund] it intended to assign any bad faith claims in its favor that may exist against [the Fund] to [Ashley]."[7] This Court has never recognized the validity of any assignment of a bad faith claim; certainly we have not done so in the circumstances of this case.[8]

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[7] The record before us does not contain the actual assignment.

[8] While we have no concern regarding any improper conduct in this case, the practice of assigning bad faith claims to leverage insurance companies to pay more than policy limits has apparently become fashionable in recent years. In *Fowler v. State Farm Mutual Automobile Insurance Co.*, 300 F. Supp. 3d 751 (D.S.C. 2017), for example, the plaintiff's attorney sent a demand letter to State Farm insisting the insurer pay its policy limits within a week, "at noon." 300 F. Supp. 3d at 753. Despite State Farm's apparent acceptance of the demand, the plaintiff's attorney deemed the response a counteroffer and rejection, filed suit against the insured, negotiated with the insured—now its adverse party in a lawsuit—for a "confession of judgment of $7 million" without State Farm's involvement, took a purported assignment of the insured's bad faith claim, and sued State Farm for bad faith. *Id.* After State Farm removed the case, the district court granted summary judgment, in part because, "Defendant's response to the offer could not constitute bad faith as a matter of law." 300 F. Supp. 3d at 753-54. The Fourth Circuit affirmed. 759 F. App'x 160 (4th Cir. 2019). While the *Fowler* case suggests "bad faith" of another form that we stress is not present here, it illustrates reasons it may not be appropriate to permit assignment of bad faith claims under all circumstances. *But see* Constance

In other factual situations, South Carolina's federal courts have held a bad faith claim is assignable. In *Schneider v. Allstate Insurance Co.*, 487 F. Supp. 239 (D.S.C. 1980), for example, the injured plaintiff sued the at-fault driver insured by Allstate with liability limits of $10,000. 487 F. Supp. at 240. Before trial, the plaintiff offered to settle within policy limits. The jury awarded a total of $68,000. Allstate paid its liability limits but no more, leaving its insured with an excess judgment of $58,000. The at-fault driver then assigned his bad faith claim against Allstate to the plaintiff, presumably in exchange for a covenant not to execute on the judgment. *Id.* In the plaintiff's suit against Allstate on the assigned claim, the district court held the bad faith claim was assignable. 487 F. Supp. at 245.

The assignment in *Schneider*, however, appears considerably different from the assignment in this case. The party making the assignment was an individual, not a town. 487 F. Supp. at 240. To reach its conclusion the bad faith claim was assignable, the district court in *Schneider* relied exclusively on the applicability of the South Carolina survival statute. 487 F. Supp. at 241 (citing S.C. Code Ann. § 15-5-90 (1976) (survival statute); *Doremus v. Atl. Coast Line R.R. Co.*, 242 S.C. 123, 142, 130 S.E.2d 370, 379 (1963) (holding a personal injury claim is assignable because it survives the death of the real party in interest)). In this case, the party making the assignment is a town, to which the survival statute does not apply. *See* S.C. Code Ann. § 15-5-90 (2005) (providing this statute—the survival statute—applies to "a deceased person and . . . an insolvent person or a defunct or insolvent corporation"). In *Schneider*, the plaintiff made an offer to settle within policy limits. 487 F. Supp. at 240. In this case, the parties never were able to agree on the policy limits. In *Schneider*, the judgment against the insured appears to have become final. In this case, the verdict against the insured remained subject to the district court's ruling on post-trial motions and an appeal to the Fourth Circuit.

The most significant difference between *Schneider* and this case, however, is that in *Schneider* the insurance company did not satisfy the judgment, but left the insured exposed beyond the policy limits. Here, the Fund satisfied the judgment. The insured paid nothing.

A. Anastopoulo, *A New Twist on Remedies: Judicial Assignment of Bad Faith Claims*, 50 Ind. L. Rev. 727 (2017) (arguing bad faith claims should be assignable).

The question of whether a bad faith claim is assignable under the circumstances present in this case, to our knowledge, has never been presented to this Court. While it seems to us that allowing assignment under the circumstances present in *Schneider* would be appropriate, we also recognize there are other considerations that may warrant refusing to allow assignment of bad faith claims in all situations. *See generally Fowler v. Hunter*, 388 S.C. 355, 362, 697 S.E.2d 531, 535 (2010) (permitting the assignment of a professional negligence claim against the insurer as a part of a settlement with an at-fault driver, "provided the risk of collusion is minimized").[9] Until we decide whether such a claim may be assigned in the first place, we are hesitant to answer the question posed by the parties in this case.

The second reason we decline to answer the question relates to the validity of any bad faith claim Cottageville may have had against the Fund. On this point, we do not address whether the Fund acted in bad faith. There is simply no evidence in the record either way, so we have no way of knowing. Rather, we address the nature of the Fund's duty to its insureds.

This Court has recognized in numerous opinions that an insurer must act reasonably and in good faith in defending its insured. *See, e.g.*, *Miles v. State Farm Mut. Auto. Ins. Co.*, 238 S.C. 374, 380, 120 S.E.2d 217, 220 (1961) ("In the defense of an action against its insured, an insurer is bound not only to act in good faith but also to exercise reasonable care." (citing *Tiger River*[10] *Pine Co. v. Maryland Cas. Co.*, 163 S.C. 229, 234-35, 161 S.E. 491, 493-94 (1931))). This duty includes the insurer's obligation to settle a lawsuit against its insured within policy limits if it is unreasonable to refuse to do so. *See Nichols v. State Farm Mut. Auto. Ins. Co.*, 279 S.C. 336, 339, 306 S.E.2d 616, 618 (1983) (stating "an insurer's unreasonable refusal to settle within policy limits subjects the insurer to tort liability" (citing *Tyger River Pine Co. v. Maryland Cas. Co.,* 170 S.C. 286, 290-91, 170 S.E. 346, 348 (1933))).

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[9] The assigned claim in *Fowler* was a professional negligence claim against the insurer; it was not a bad faith claim. 388 S.C. at 360, 697 S.E.2d at 533. However, our analysis in *Fowler* of the danger of collusion as a predicate to permitting the assignment of claims pursuant to a settlement is relevant to whether assignment of bad faith claims should be permitted in all situations.

[10] The River and the former eponymous "Pine Company" are correctly spelled "Tyger." *See Sentry Select Ins. Co. v. Maybank L. Firm, LLC*, 426 S.C. 154, 158 n.3, 826 S.E.2d 270, 272 n.3 (2019).

We also recognized an insurer may be liable for consequential damages in addition to the amount of the excess judgment if the insurer acts in bad faith to the insured in some respect other than protecting the insured from an excess judgment. *See Tadlock Painting Co. v. Maryland Cas. Co.*, 322 S.C. 498, 501, 473 S.E.2d 52, 53 (1996) ("[I]mplicit in the holding [of *Nichols*] is the extension of a duty of good faith and fair dealing in the performance of *all* obligations undertaken by the insurer for the insured." (quoting *Carolina Bank & Tr. Co. v. St. Paul Fire & Marine Co.*, 279 S.C. 576, 580, 310 S.E.2d 163, 165 (Ct. App. 1983))); 322 S.C. at 504, 473 S.E.2d at 55 (permitting the recovery of consequential damages).

As we stated, we do not have before us any facts regarding what conduct by the Fund may form the basis of a bad faith claim. Nevertheless, none of the cases we previously decided in which we recognized a right of action for bad faith against an insurer appear to bear any relationship to this case. Here, the Fund argued the extent of its limit for liability was $1,000,000. Although we disagree, we find the Fund's position reasonable. The Coverage Contract gave the Fund the exclusive right—"subject to the Limits of Liability"—to "conduct negotiations and enter into such settlement of any claim or suit as [the Fund] deems expedient." The liability issues at the trial of the Cottageville lawsuit were hotly contested, and there is no indication of any certainty the plaintiff would prevail before the jury. We are aware of no conduct by the Fund which might subject it to liability other than asserting its insureds right to a trial by jury. *See In re Mt. Hawley Ins. Co.*, 427 S.C. 159, 170, 829 S.E.2d 707, 714 (2019) ("Of course, . . . '[i]f there is a reasonable ground for contesting a claim, there is no bad faith.'" (alteration in original) (quoting *Crossley v. State Farm Mut. Auto. Ins. Co.*, 307 S.C. 354, 360, 415 S.E.2d 393, 397 (1992))). When the verdict far exceeded any view of policy limits, the Fund settled the case, leaving its insureds insulated from any excess judgment. While it is conceivable an insurer may subject itself to liability for consequential damages for bad faith conduct in some other respect, we do not condone the idea an insurer may incur bad faith liability for simply taking a case to the jury, when the insurer satisfied the judgment after trial without exposing the insured to excess liability.

For these two reasons, we decline to answer the second question.

IV. Conclusion

We reverse the court of appeals' determination regarding the amount of indemnity coverage available. We vacate the court of appeals' determination that a bad faith claim against the Fund is barred by the South Carolina Tort Claims Act.

BEATTY, C.J., HEARN and JAMES, JJ., concur. KITTREDGE, J., concurring in result in a separate opinion.

JUSTICE KITTREDGE: I concur in result. I write separately because I respectfully disagree with the majority's approach in determining the number of occurrences. I would hold the two lawsuits filed by the Estate of Albert "Bert" Reeves involved two occurrences.

The South Carolina Municipal Insurance and Risk Financing Fund (the Fund) provided liability coverage to the Town of Cottageville and its police officers. The question presented by the parties is:

> (1) Do the claims made and the verdict rendered against the Town of Cottageville and Randall Price, relating to the hiring, retention, supervision, and shooting death of Bert Reeves result in there being more than $1,000,000.00 in indemnity coverage available under the terms of the [Fund's] Coverage Contract with the Town of Cottageville with respect to all such claims including the claims made against John Craddock in the separately styled action referenced above? Reeves asserts there is more than one occurrence based on the facts and claims and the jury's verdict relating to the hiring, retention, supervision, and shooting death of Bert Reeves, and, thus, there is more than $1,000,000.00 in indemnity coverage available under the Coverage Contract. [The Fund] asserts the Coverage Contract is limited to a total of $1,000,000.00 in indemnity coverage.

Reeves v. S.C. Mun. Ins. & Risk Fin. Fund, 427 S.C. 613, 620, 832 S.E.2d 312, 316 (Ct. App. 2019) (internal alteration marks omitted).

The facts are fully set forth in the majority opinion as well as the court of appeals' opinion. Cottageville Police Officer Randall Price shot former Cottageville Mayor Bert Reeves. Cottageville Police Chief John Craddock was present when Price shot Reeves. Craddock, a trained paramedic, refused to provide medical assistance to Reeves as he lay dying from the gunshot wound. In the action against Officer Price and the Town of Cottageville, a jury awarded Reeves's estate $97.5 million, consisting mainly of punitive damages. Reeves's estate and the Fund settled both cases, which included the claim against Craddock.

The parties agreed that Reeves's estate would receive—in addition to a guaranteed $10,000,000 settlement—an additional $1,000,000 payment for each of two possible questions answered in favor of Reeves's estate.[11]

Reeves's estate argued there were four "occurrences" under the terms of the Fund's insurance policy with Cottageville; the Fund argued there was only one occurrence. Once we determine there was more than one occurrence, we have resolved the appeal—under the terms of the question presented by the parties, it matters only whether there was more than one occurrence (as asserted by Reeves's estate), not precisely how many occurrences there were. The majority, however, holds there were exactly four occurrences. I do not agree. If we must decide the number of occurrences, in my judgment, the policy provides there were only two occurrences.

As I construe the majority opinion, it seems the majority equates each "wrongful act" with a covered "occurrence" under the policy, irrespective of the presence or absence of a resulting injury. In construing the insuring language portion of the policy, the majority opinion states, "[t]his portion of the definition of Occurrence specifically equates Occurrence with Wrongful Act." I agree with the majority insofar as a single wrongful act or multiple wrongful acts resulting in an injury is an occurrence. I respectfully disagree that a wrongful act, by itself with no resulting injury, "equates [to an] Occurrence."

The policy defines "wrongful act" as

> any actual or alleged error in the performance or failure to perform an official duty; or any misstatement, misleading statement, or misleading act made or done in the course of official duty and upon which a claimant or plaintiff has relied to his, her, or its detriment; or any omission or neglect in performing an official duty; or any breach of an official duty, including misfeasance, malfeasance and nonfeasance; but only, with respect to any or all of the foregoing, when committed by a Member or by a Covered Person(s) while acting within both the course and the scope of his or her official duties, as provided under the "South Carolina Tort Claims Act."

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[11] The majority and I answer only the first of the two questions presented by the parties.

The policy defines "occurrence" as the term is commonly understood—"an accident which results in Bodily Injury." "Bodily Injury" is further defined as "physical injury to any person (including death)." The policy language requires the Fund to only pay covered claims for "a Wrongful Act . . . *which results in* . . . *bodily injury* . . . provided the Wrongful Act amounts to an Occurrence." (Emphasis added.) Thus, as I read the policy's language, the Fund is not required to cover a wrongful act that does *not* result in bodily injury.

I do agree with the majority that the policy language does allow for coverage for more than a single occurrence. That, however, does not negate what I view as a clear requirement that a wrongful act result in an injury. What links a wrongful act to an occurrence is the resulting injury. Absent a resulting injury, there is no occurrence, regardless of the number of wrongful acts.

I acknowledge a host of wrongful acts committed by Officer Price and the Town of Cottageville.[12] But under the terms of the policy, a wrongful act *by itself* is not an occurrence and does not trigger coverage. My review of the policy persuades me that coverage is activated only when the wrongful act or wrongful acts result in the injury—that is the occurrence. I would hold the parties to the unambiguous definition of occurrence, which expressly requires a resulting injury. Here, there were two occurrences, one which resulted from the wrongful acts of Officer Price and the Town of Cottageville, and the second stemming from Chief Craddock's willful failure to render aid to Reeves. Concerning the second occurrence—the claim against Chief Craddock—the record stipulates that Reeves was still alive after being shot by Officer Price, yet Chief Craddock (a trained paramedic) decided to watch Reeves die rather than attempt to save his life or promptly summon medical assistance.

Therefore, as far as determining there was more than one occurrence, I concur in result. I do fully concur in the balance of the majority opinion.

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[12] The majority agrees with Reeves's estate that "Cottageville's negligent hiring, retention, and supervision of Price, and Price's use of deadly force, are four different Wrongful Acts." I take no issue with the majority in this regard. I part company with the majority in equating a wrongful act with a covered occurrence.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Ahshaad Mykiel Owens, Petitioner.

Appellate Case No. 2019-001601

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Charleston County
R. Markley Dennis Jr., Circuit Court Judge

Opinion No. 28035
Heard November 17, 2020 – Filed June 16, 2021

AFFIRMED

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

Attorney General Alan McCrory Wilson, Deputy Attorney General Donald J. Zelenka, Senior Assistant Deputy Attorney General Melody Jane Brown, and Susannah Rawl Cole, all of Columbia; Solicitor Scarlett Anne Wilson, of Charleston, all for Respondent.

PER CURIAM: Ahshaad Owens shot and killed Jarrod Howard during a drug deal. Owens claimed he shot Howard by accident, but the jury convicted him of murder. Owens claims the trial court erred in charging the jury that unlawful activity on his part could foreclose his accident defense. In particular, Owens argues the trial court failed to explain to the jury that his unlawful actions (the drug deal) must have proximately caused the killing to defeat his claim of accident. The court of appeals found no error in the charge, affirmed, and provided a "recommended charge for future cases." *State v. Owens*, 427 S.C. 325, 831 S.E.2d 126 (Ct. App. 2019). We granted Owens' petition for a writ of certiorari to review the court of appeals' decision.

We agree with the court of appeals the trial court's charge adequately instructed the jury on proximate cause. *See Owens*, 427 S.C. at 328, 332, 831 S.E.2d at 127, 129. Therefore, we affirm the court of appeals.

Neither party raised the correctness of the court of appeals' recommended jury charge. *See Owens*, 427 S.C. at 333-34, 831 S.E.2d at 130. After careful study of it, we elect not to address it directly in this case. We note, however, that any plea of accident in a murder case does not change the State's burden of proof as to its case in chief. To prove murder, as we have held many times, the State must prove a voluntary and intentional act with malice. *See, e.g.*, *State v. Belcher*, 385 S.C. 597, 609 n.5, 685 S.E.2d 802, 808 n.5 (2009) ("The term malice indicates a formed purpose and design to do a wrongful act . . . ." (quoting *State v. Fennell*, 340 S.C. 266, 275 n.2, 531 S.E.2d 512, 517 n.2 (2000))); *State v. Reese*, 370 S.C. 31, 39, 633 S.E.2d 898, 902 (2006) (defining malice as "the doing of a wrongful act intentionally . . ." (citation omitted)); *State v. Judge*, 208 S.C. 497, 505, 38 S.E.2d 715, 719 (1946) (stating malice "is a performed purpose to do a wrongful act, without sufficient legal provocation" (quoting *State v. Heyward*, 197 S.C. 371, 375, 15 S.E.2d 669, 671 (1941))); 208 S.C. at 506, 38 S.E.2d at 720 (defining malice "as consisting of the intentional doing of a wrongful act toward another . . ."); *State v. Byrd*, 72 S.C. 104, 110, 51 S.E. 542, 544 (1905) ("Malice is the intentional killing of a person, knowing it to be wrong, intending to do it, knowing it to be wrong, without just legal excuse."); *see also State v. Ferguson*, 91 S.C. 235, 244, 74 S.E. 502, 505-06 (1912) ("The plea of accidental homicide, if indeed it can properly be called a plea, is certainly not an affirmative defense . . . because the state cannot ask for a conviction unless it proves that the killing was done with criminal intent." (citing *State v. McDaniel*, 68 S.C. 304, 316, 47 S.E. 384, 388 (1904))).

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Faye P. Croft, Personally and as Trustee of the James A. Croft Trust; James A. Croft Trust; William A. Harbeson; Heyward G. Hutson; James Stephen Greene, Jr.; South Carolina Public Interest Foundation; Summerville Preservation Society; and Dorchester County Taxpayers Association, individually, and on behalf of all others similarly situated, Petitioners,

v.

Town of Summerville and Town of Summerville Board of Architectural Review, Respondents.

Appellate Case No. 2020-000334

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Dorchester County
Edgar W. Dickson, Circuit Court Judge

Opinion No. 28036
Heard March 3, 2021 – Filed June 16, 2021

VACATED

Michael T. Rose, of Mike Rose Law Firm, PC, of Summerville, and W. Andrew Gowder Jr., of Austen & Gowder, LLC, of Charleston, for Petitioners.

G. Waring Parker, of G. Waring Parker Law Firm, LLC, of Summerville, and Timothy Alan Domin, of Clawson & Staubes, LLC, of Charleston, for Respondents.

Jay Bender, of Baker, Ravenel and Bender, LLP, of Columbia, for Amicus Curiae South Carolina Press Association.

JUSTICE JAMES: In this appeal, several Summerville residents and public interest groups (Petitioners) ask the Court to invalidate approval granted by the Town of Summerville Board of Architectural Review (the Board) for construction of a proposed development project (the Project). Petitioners contend the Board violated the Freedom of Information Act (FOIA)[1] and various Summerville ordinances. At some point during Petitioners' appeal of the Board's decision, Applegate & Co. (the Developer) decided not to go forward with the Project. Since there remains no actual controversy for this Court to decide, we vacate the court of appeals' decision and dismiss Petitioners' appeal as moot.

Background

On July 9, 2014, the Town of Summerville (the Town) and Town of Summerville Redevelopment Corporation entered into an agreement with the Developer to construct the Project. The Project, to be called "The Dorchester," included plans for a conference center, hotel, condominiums, and parking garage. The Developer subsequently sought design approval from the Board.

The Board is a seven-member public body charged with reviewing applications for construction, modification, and demolition within Summerville's historic district. Summerville, S.C., Code of Ordinances § 32-175(b), (f). As a public body, the Board must comply with the record disclosure and open meeting requirements of FOIA and Summerville's ordinances. *See* S.C. Code Ann. §§ 30-4-30, -60; Summerville, S.C., Code of Ordinances §§ 32-176(d)-(e), -182(b). Pertinent provisions of both are discussed below.

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[1] S.C. Code Ann. §§ 30-4-10 to -165 (2007 & Supp. 2020).

On July 21, 23, and 29, 2014, six Board members[2] met on separate occasions with the Mayor of Summerville and the Developer in groups of two. Prior to those gatherings, the Board Secretary wrote in an email to Board members:

> The Mayor would like to get your input and thoughts on this project while still in the very early stages of design. His thought is to meet you at his home . . . in a casual setting, two board members at a time for approximately 30 minutes (no possibility of it looking like a quorum).

The gatherings at the Mayor's house were not open to the public, and the Board did not keep minutes of the gatherings.

On October 6 and November 3, 2014, the Board held publicly-noticed meetings and discussed the Project. Minutes were kept, and the Board took public comment during the meetings. The Board did not vote on the Project at either meeting.

On December 12, 2014, six Board members met with the Developer in pre-arranged groups of three on two separate occasions. The Board Secretary wrote in an email to Board members:

> To avoid any possibility of a quorum (as this is not a public meeting), please stay within your agreed time frame. Please remember this is a workshop to give you an opportunity to review plans and discuss concerns from prior meetings.

These two gatherings were not open to the public, and the Board did not keep minutes of the gatherings.

On January 5, 2015, the Board held a publicly-noticed meeting and discussed the Project. Minutes were kept. The meeting was held in the Town Hall Annex training room, while the other public meetings about the Project were held in the Town Hall Annex council chambers. According to a letter written by an attendee of the meeting, "there were far too few seats to accommodate the number of people crowded into the [training room]." The Board Chairman opened the meeting by stating "we usually choose to allow others to express comments that might help

[2] One Board member recused himself from all Board discussion of the Project due to a conflict of interest. Accordingly, only six Board members considered, and ultimately voted on, the Project.

influence our decision making," and asked the attendees to limit their comments to three minutes. However, the Board did not take public comment during the meeting. The Board granted the Project "conceptual and preliminary approval" during the meeting. The Board also approved demolition of a gas station, contingent upon the Project receiving final approval.

On January 12, 2015, the Board held a publicly-noticed meeting to discuss the Project's demolition needs. Minutes were kept. The Board did not take public comment during the meeting. The Board voted to allow demolition of several buildings, contingent upon the Project receiving final approval.

On April 6 and May 11, 2015, the Board held publicly-noticed meetings and discussed the Project. Minutes were kept, and the Board took public comment during both meetings. During the April 6 meeting, the Board granted the Project "conditional final approval." During the May 11 meeting, the Board granted the Project final approval.

Petitioners timely appealed the Board's April 6 and May 11 decisions to the circuit court, seeking a reversal of the Board's approval of the Project.[3] Petitioners claimed the Board violated FOIA and applicable Summerville ordinances throughout its review of the Project. Petitioners did not seek to enjoin the Developer from constructing the Project while Petitioners' appeal was pending. By order dated September 24, 2015, the circuit court affirmed the Board's approval of the Project. Petitioners timely appealed to the court of appeals. The court of appeals affirmed the circuit court and upheld the Board's approval of the Project. *Croft v. Town of Summerville*, 428 S.C. 576, 837 S.E.2d 219 (Ct. App. 2019). This Court granted Petitioners a writ of certiorari to review the court of appeals' decision.

Discussion

Petitioners ask this Court to reverse the court of appeals and invalidate the Board's approval of the Project. Petitioners allege the Board violated several FOIA provisions and Summerville's ordinances during the Board's review of the Project. For example, Petitioners contend the gatherings of small groups of Board members with the Developer in July and December 2014 were "meetings" of "committees" of the Board required to be open to the public. *See* S.C. Code Ann. §§ 30-4-20(a), (d), (e), -60. Petitioners claim the Board also violated FOIA by holding the January 5,

[3] The appeals were consolidated by consent of the parties.

2015 meeting in a room that was too small to allow public participation. Petitioners also argue the Board violated a Summerville ordinance by failing to give the public the opportunity to comment during the January 5 and January 12, 2015 public meetings during which the Board considered the Developer's application to demolish structures. *See* Summerville, S.C., Code of Ordinances § 32-182(b).

Again, Petitioners contend the only appropriate remedy for these alleged violations is invalidation of the Board's approval of the Project. Granting such relief would prohibit the Developer from moving forward with the Project and would require the Developer to obtain new Board approval before any construction could begin.

A. Mootness

During oral argument, members of the Court asked counsel for Petitioners and Respondents about the current status of the Project. Petitioners' counsel responded, "my understanding is that the Project is not going forward," and explained he believed the Developer made the "economic decision" to abandon the Project. Respondents' counsel provided the same information to the Court. Counsel explained the Developer abandoned the Project when the Town committed what the Developer thought was an insufficient amount of funding for the public improvement portion of the Project. During oral argument, counsel for both Petitioners and Respondents acknowledged the Developer's abandonment of the Project likely rendered Petitioners' appeal moot.

"Generally, this Court only considers cases presenting a justiciable controversy." *Sloan v. Friends of the Hunley, Inc.*, 369 S.C. 20, 25, 630 S.E.2d 474, 477 (2006). "An appellate court will not pass on moot and academic questions or make an adjudication where there remains no actual controversy." *Curtis v. State*, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001). "A moot case exists where a judgment rendered by the court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the reviewing court." *Sloan*, 369 S.C. at 26, 630 S.E.2d at 477.

Counsel for Petitioners and Respondents are correct this appeal is now moot. In their brief, Petitioners ask the Court "to invalidate the [Board] approvals of the Project and . . . require the [Developer] to obtain new approvals following lawful procedures." Respondents ask the Court to affirm the Board's approval of the Project. At its core, the fight in this case is over whether the Developer can build

the Project as currently approved by the Board, or whether the Developer must return to the Board and obtain new approval before building the Project. This controversy ended when the Developer decided not to build the Project. A decision rendered for either party would not provide any practical relief and would be a purely academic exercise by this Court.

B. Exceptions to Mootness

Petitioners request the Court to consider two exceptions to the mootness doctrine. First, they urge the Court to decide the merits of the appeal because the issues at play are capable of repetition, yet evade review. This Court has recognized this exception to the mootness doctrine. *See, e.g.*, *Byrd v. Irmo High School*, 321 S.C. 426, 431-32, 468 S.E.2d 861, 864 (1996). However, for the exception to apply, "the action must be one which will truly evade review." *Sloan*, 369 S.C. at 27, 630 S.E.2d at 478. The exception is most applicable in situations where the prejudice suffered by the complaining party is temporary and has ended by the time of appellate review. *See Byrd*, 321 S.C. at 432, 468 S.E.2d at 864 (finding short-term student suspensions evade review because they are, "by their very nature, completed long before an appellate court can review the issues they implicate"). Even if the issues related to alleged FOIA and ordinance violations by the Board are capable of repetition, they do not evade review. Here, Petitioners' appeal became moot because the Developer decided to abandon the Project, not because Petitioners had insufficient time to challenge the Board's approval before the controversy ended.

Petitioners also ask this Court to decide the merits of the appeal under the public interest exception to the mootness doctrine. An appellate court may address an issue despite its mootness "when the question considers matters of important public interest." *Sloan*, 369 S.C. at 26-27, 630 S.E.2d at 478. For this exception to apply, "the issue must present a question of imperative and manifest urgency requiring the establishment of a rule for future guidance in 'matters of important public interest.'" *Id.* at 27, 630 S.E.2d at 478 (quoting *Sloan v. Greenville Cty.*, 361 S.C. 568, 570, 606 S.E.2d 464, 465-66 (2004)). We agree it is "important" that citizens have the ability to stay informed of the activities of public bodies. *See* S.C. Code Ann. § 30-4-15 ("The General Assembly finds that it is vital in a democratic society that public business be performed in an open and public manner so that citizens shall be advised of the performance of public officials and of the decisions that are reached in public activity and in the formulation of public policy."). However, we hold the public importance exception does not apply in this case because there exists no imperative or manifest urgency requiring this Court to issue

an opinion on the application of FOIA and Summerville's ordinances to the Board's activity. We therefore refuse to apply the public importance exception.

Conclusion

For the foregoing reasons, we vacate the court of appeals' decision and dismiss this appeal as moot.

VACATED.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Robert Lee Miller, III, Appellant.

Appellate Case No. 2017-001347

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

Opinion No. 5824
Heard November 3, 2020 – Filed June 16, 2021

AFFIRMED

Appellate Defender Susan Barber Hackett, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General W. Jeffery Young, Deputy Attorney General Donald J. Zelenka, Senior Assistant Deputy Attorney General Melody Jane Brown, Assistant Attorney General Sherrie Butterbaugh, and Assistant Attorney General Mark Reynolds Farthing, all of Columbia; and Solicitor Isaac McDuffie Stone, III, of Bluffton; all for Respondent.

WILLIAMS, J.: Robert Lee Miller, III, a juvenile offender, appeals his sentence of fifty-five years' imprisonment for the murder of Willie Johnson (Victim). Miller argues the trial court erred by imposing what amounted to a de facto life sentence, which he asserts requires a finding of irreparable corruption under *Aiken v. Byars*.[1] Miller also argues the trial court erred in admitting statements he made to officers during a custodial interrogation, contending he did not voluntarily and knowingly waive his *Miranda*[2] rights. We affirm.

FACTS/PROCEDURAL HISTORY

On June 17, 2014, fifteen-year-old Miller, Miller's older brother, and his brother's friend, Gabriel, broke into Victim's home in Allendale. After asking Victim if he had any sugar, Miller and his accomplices forced their way into his home. The boys knocked Victim to the ground, bound his hands behind his back, robbed him, and ransacked his home. Victim was beaten so badly that his dentures were scattered about the room. Then a plastic bag was placed over his head so he could not look at them. Victim later died in his home with his hands bound and the bag over his head. An expert who conducted Victim's autopsy testified his cause of death was asphyxia from the plastic bag wrapped around his head and stated blunt force trauma was a contributing factor.

On June 24, 2014, Chief Marvin Williams, of the Fairfax Police Department, questioned Miller as a suspect in an unrelated crime that occurred in Fairfax. Before questioning Miller, Chief Williams presented him with a *Miranda* rights acknowledgment and waiver form and asked Miller to read the form to him line-by-line. Chief Williams asked Miller if he understood each right after Miller read them aloud. Miller initialed after each individual right and signed his name at the bottom of the form. Soon after Chief Williams began questioning Miller, Miller stated he did not commit the Fairfax crime, and he thought Chief Williams wanted to question him about Victim's murder. According to Chief Williams, he asked Miller what he was talking about and Miller described his and his accomplices' participation in Victim's murder. Chief Williams and Miller were the only two people in the room during the confession, and Chief Williams did not write a report or summary of the confession, have Miller make a written statement, or record the confession in any manner. Chief Williams testified he did not offer

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[1] 410 S.C. 534, 765 S.E.2d 572 (2014).
[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

Miller leniency during the interview, did not threaten him, and did not coerce him to confess.

After Chief Williams concluded his interview with Miller, Agents Richard Johnson and Natasha Merrell, both of the South Carolina State Law Enforcement Division (SLED), interrogated Miller about Victim's murder. The two agents recorded the interview on Agent Merrell's SLED cell phone. Neither of the agents re-Mirandized Miller before questioning him, and during the first portion of his interview, Miller was accompanied by Tiffany Sabb. Initially, Agent Johnson explained SLED's role as a state investigative agency and asked Miller about his relationship with Sabb. Miller stated Sabb was "like a mother to [him]."[3] Agent Johnson also asked Miller where his mother was, and Miller replied she was at home but he was comfortable speaking to SLED without her. Agent Johnson clarified Miller was in the eighth grade and that he could read and write by asking Miller to read a certificate that was in the room. Miller read the first few sentences but could not read the word "contributions" or the cursive portions on the certificate. Agent Johnson then asked Sabb to leave the room, and when she left, Miller expressed apprehension about talking with Agent Johnson, stating he was more comfortable speaking to Agent Merrell instead. Agent Johnson replied, "You don't like males? I intimidate you," and he exited the room after confirming that Miller was willing to talk to Agent Merrell and that Miller understood it was his decision to speak with her. Miller confirmed that he would talk to Agent Merrell.

When questioned by Agent Merrell, Miller denied any involvement in the murder, stating he was in Fairfax the entire week of the murder until Friday when a bus dropped him off in Allendale. Miller claimed his neighbor, the school bus driver, could confirm his alibi. Agent Merrell stated she was there to help Miller and asked him to be honest with her. She asked Miller if he got a ride from Allendale to Fairfax on the evening of the murder, and Miller explained that he did and that he was in Allendale that day for a school hearing. When asked how he got back to Fairfax that night, Miller did not answer the question.

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[3] Sabb is the mother of Johnathan Capers, one of Miller's friends from Allendale. Miller spent a great amount of time with Capers and Sabb, often living with them for weeks at a time. Both Capers and Sabb gave incriminating statements against Miller before he was interrogated, and both testified at Miller's trial that he confessed to them he murdered Victim.

Miller then told Agent Merrell how the situation was "crazy" and how acquaintances told him that they heard he kicked Victim's door in and that he held Victim while the other boys beat him. Agent Merrell asked which story was true, and Miller again denied involvement in Victim's murder. Agent Merrell asked again about Miller's transportation from Allendale to Fairfax on the day of the murder and whether he could remember what he did between the school hearing and Wednesday morning. Again, Miller failed to answer the question. Agent Merrell then asked Miller about an encounter he had with Allendale police regarding Gabriel, his accomplice. Miller denied knowing Gabriel, but explained the police wanted to talk to his brother about Gabriel. Agent Merrell then existed the room and returned with Agent Johnson.

Agent Johnson immediately explained that he and Agent Merrell were trying to help Miller but also told Miller he was going to jail. Miller asked if he was going to jail that day, and Agent Johnson replied, "Yea, and there ain't nothing we can do to stop it." Miller replied, "I know." The colloquy that proceeded is as follows:

> Agent Johnson: Here's what we want to do is to try and help you on the far end. Why? When you're young . . . truth, you're the very first one we're talking to and that's why you getting that break. Cause in South Carolina, the hands of one is the hands of all. It doesn't matter which one of you did what, you were there. That makes you equal. [Boy], if we charge you with assault and battery, everybody else is going to get charged with assault and battery.
>
> Miller: Yes, sir. . . . If they charge me with murder . . . everybody is going to get charged with murder.
>
> . . . .
>
> Agent Johnson: I'm lazy. I'm ready to go home. Alright? There's this thing that you don't know. That while you were here, we already got what we need. . . .
>
> Miller: Can I ask you something?

Agent Johnson: Yes, sir.

Miller: How many years I got?

Agent Johnson: I don't know. I don't know. You know what an a** is? You know what an a** of time is? That's a lot of time. You ever hear the prosecutor say an a** of time?

Miller: So what can I do to get me out of this situation?

Agent Johnson: You ain't getting out of this, but what you can do is minimize the kind of time. Look at it this way, alright, I don't know what kind of time you'll get. I can't tell you that. I'm not the judge or the lawyer. But here's what I'm getting at, I'm just throwing some hypothetical numbers out. Let's say if you were looking at 30 years and because you talked, let's say you tell the truth and come clean. . . . You come clean and you lay it out on the table, and you cooperate? What we do is, is let the prosecutor know.

. . . .

Miller: Alright, alright. I'll tell you. I'll be honest with you. I ain't really wanting to do this. I ain't really wanting to do it. Tell you the truth, I was sitting on the porch . . . and he came by me. He came at me and told me, he told me about the situation.

Agent Johnson: Who's he?

Miller: Gabriel! The one, the one, the one it's the, it's the main boy! The main one. He's the main one.

Agent Johnson: Okay.

Miller: I ain't want to do none of this man. All I wanted to do was go to Fairfax cause I ain't want to stay in Allendale.

Agent Johnson: Okay.

Miller: I knocked on the door and I opened it and . . . after that and tied him down. . . .

. . . .

Agent Johnson: Alright, so you say Gabriel tie[d] him down?

Miller: I say . . .

Agent Johnson: No, no that's the wrong, that's the wrong answer, wrong.

Miller: No . . .

Agent Johnson: Rob, look at me [boy], look at me, look at me Rob . . . s*** happens. . . . You said you didn't wanna be there and from what we was told it wasn't supposed to go down like that. Y'all was just doing a lick.[4] S*** happens. Now, the thing to do is let's see how we can minimize it. I told you . . .

Miller: I don 't . . .

Agent Johnson: I told you up front . . .

Miller: I don't . . . but listen . . .

[4] To "hit a lick" or "do a lick" means to get a lot of money quickly, usually by illegal means such as robbing someone.

Agent Johnson: (talking over each other) going to jail. . . .

Miller: I don't really care . . . minimize or not. I'm still getting locked up. Ain't nothing changed about that.

Agent Johnson: Yes, it is.

Miller: No, I'm still getting locked up[,] ain't nothing going to change about that. What's changed about it, tell me one thing that's changed about it?

Agent Johnson: The length of time that you going to be looking at.

Miller: It still don't mean nothing, I'm still going to be doing the time. I'm still doing the time man it's . . . just please stop, just please stop with me. Please, just please.

Agent Johnson: Well [boy], like I told you from the beginning . . .

Miller: I said . . . I been honest with you.

Agent Johnson: Listen, it's like I told you from the beginning, it's up to you to talk to us. You don't have to talk to us. If you wanna stop at any time we can stop. It's up to you. What do you wanna do?

Miller: I just wanna go home man.

Agent Johnson: Huh?

Miller: I just wanna go home man.

Agent Johnson: Well you ain't going home, but what you wanna do?

Miller: I'm being honest with y'all. I told you.

Agent Johnson: I understand that man.

Miller: I told you what I do . . .

Agent Johnson: No, the only thing you told us was that you didn't want to be there and Gabriel planned . . . Gabriel did this, Gabriel did that . . . and . . . but you didn't tell us details.

Miller: I was just . . . told you. . . . I knocked on the door, I went in and I hit him. And I hold him down. . . . Well he, he (inaudible) wanted to go searching the house. I know he (inaudible) . . . . He was the main thing searching. (inaudible) I was just posted up the whole time.

Agent Johnson: Yep. That's right. . . . That's right. You stayed in the living room with him, with, with the old man.

Miller: Watching him.

Agent Johnson: Watching him, that's right.

Miller: They kept coming back.

Agent Johnson: Who put the bag over his head?

Miller: I did.

Agent Johnson: Thank you. You did. Alright, who took the wallet out of his, umm, pocket?

Miller: I did.

> Agent Johnson: And you know your prints and stuff will be on that wallet.[5]
>
> . . . .
>
> Agent Johnson: Alright, so . . . . All we, all we need is a clear picture from you, so when I talk with the Solicitor, "this is what Robert told us. He's hurt. I can tell he is hurt about it. Whatever you can do to help him, you help him." But like I told you from the beginning, ain't nothing we can do about stopping jail time.
>
> Miller: No[,] that's what I said, just lock me up. I, I only got two choices in my life right now, either go to jail or die. . . . I just wanna, I just wanna go, I just wanna leave here. I'm done talking. Whenever y'all ready to lock me up, I'm ready. Let's go, please. I'm ready.
>
> Agent Johnson: Okay, alright. You, you through talking with us?
>
> Miller: I already told you. I told y'all the details of what happened. I admitted I did it.
>
> Agent Johnson: I just wanted to make sure, I (inaudible) . . . you ain't wanna talk no more.
>
> Miller: I ain't wanna talk no more. I say what I have to say, I [am] just ready to go man.

The family court waived jurisdiction to try Miller as a minor pursuant to *Kent v. United States*,[6] finding Miller could not be rehabilitated in the state's juvenile justice system. An Allendale County grand jury indicted Miller for murder, and

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[5] During cross-examination, Agent Merrell admitted Agent Johnson lied to Miller regarding his finger-prints and none of Miller's fingerprints were found on the Victim's wallet.

[6] 383 U.S. 541 (1966).

the case proceeded to trial. The trial court held a pretrial *Jackson v. Denno*[7] hearing to determine the admissibility of Miller's confession based upon its voluntariness. During the hearing, Chief Williams and Agents Johnson and Merrell testified for the State. Kimberly Jordan, a Fourteenth Circuit juvenile public defender, testified regarding Miller's pre-waiver evaluation[8] and his ability to understand his *Miranda* rights. According to Jordan, Miller did not understand the right to remain silent or how an attorney would be helpful to him.

After reviewing the interrogation transcript, the trial court determined based upon the totality of the circumstances that Miller's statements were voluntary and his confession was admissible at trial. The trial court relied upon the following facts in making its decision: (1) Miller received *Miranda* warnings before the interrogations, and the length and location of the interrogations was reasonable; (2) although Miller likely had limited learning abilities, he was street smart and attempted to create an alibi; (3) Miller was in good physical condition with no record of mental health issues, and his criminal record was fairly limited; (4) neither Chief Williams nor the SLED agents made misrepresentations, promises of leniency, or threats of violence against Miller; and (5) Miller's isolation from a parent or friend was minor, considering Agent Johnson asked Miller if he was willing to talk to them after Sabb left the room and he responded "yes."

The jury unanimously found Miller guilty of murder, and the trial court held an individualized sentencing hearing as required by *Byars*. During the sentencing hearing, Miller argued that *Miller v. Alabama*,[9] established a presumption that all juveniles are not irreparably corrupt. Miller contended the State must prove he was irreparably corrupt, and the court must find him irreparably corrupt before moving into the *Byars* factors. The trial court ruled *Byars* does not require a finding of irreparable corruption before sentencing a juvenile to life without the possibility of parole (LWOP) and then proceeded to consider the *Byars* factors. The court considered Miller's age at the time of the murder and the peer pressure from his brother and Gabriel. The court also considered Miller's poor home environment and minimal parental guidance in his life. The court also gave weight to the brutality of the crime, particularly Victim's dentures being scattered about

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[7] 378 U.S. 368 (1964).
[8] The family court conducts a pre-waiver evaluation when determining if it will waive its jurisdiction to try a juvenile for his or her crimes.
[9] 567 U.S. 460 (2012).

the room, the plastic bag placed over Victim's head, and the evidence showing Miller watched Victim's breath move the plastic bag as he left the house. In listing these particular facts, the trial court noted even someone of Miller's relatively low mental capacity should appreciate the severity of his actions.[10] The court concluded its analysis by allowing Miller to address his possibility for rehabilitation. Based on its findings, the trial court sentenced Miller to fifty-five years' imprisonment. This appeal followed.

ISSUES ON APPEAL

I. Is Miller's fifty-five-year prison sentence a de facto life sentence, and if so, must a trial court find Miller irreparably corrupt before imposing such a sentence?

II. Did the trial court err in finding Miller voluntarily waived his *Miranda* rights and in admitting Miller's confessions?

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006); *see also State v. Finley*, 427 S.C. 419, 423, 831 S.E.2d 158, 160 (Ct. App. 2019) ("When considering whether a sentence violates the Eighth Amendment's prohibition on cruel and unusual punishments, the appellate court's standard of review extends only to the correction of errors of law."). Thus, the trial court's factual findings are binding on the appellate court unless clearly erroneous or controlled by an error of law. *See State v. Winkler*, 388 S.C. 574, 582–83, 698 S.E.2d 596, 601 (2010). On appeal, "the reviewing court does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial [court's] ruling is supported by any evidence." *State v. Parker*, 391 S.C. 606, 611–12, 707 S.E.2d 799, 801 (2011) (quoting *State v. Wilson*, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001)). This court will not disturb the trial 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

[10] At the time of the hearing, Miller was eighteen years old, and the last time his I.Q. was tested, he was in the fifth grade, and he scored a seventy-six. A seventy-six is classified as "very low" or "well below average."

from an error of law or a factual conclusion that is without evidentiary support." *Id.*

LAW/ANALYSIS

I. De Facto Life Sentence

Miller argues his sentence of fifty-five years' imprisonment is a de facto life sentence and that a trial court must first find he was irreparably corrupt before sentencing him to life in prison. We disagree.

The Eighth Amendment to the United States Constitution states "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The prohibition against cruel and unusual punishment safeguards an individual's rights against excessive and disproportionate criminal sanctions, "highlighting the essential principle that courts must consider 'the human attributes even of those who have committed serious crimes.'" *Finley*, 427 S.C. at 424, 831 S.C. at 161 (quoting *Graham v. Florida*, 560 U.S. 48, 59 (2010)). "In this vein, sentences that are grossly out of proportion to the severity of the crime are unconstitutional." *Id.*

In *Roper v. Simmons*, the Supreme Court categorically banned all death sentences for juvenile offenders who were under the age of eighteen at the time they committed their offense. 543 U.S. 551, 568 (2005). In *Graham*, the Supreme Court held the Eighth Amendment banned the "imposition of a life without parole sentence on a juvenile offender who did not commit homicide." 560 U.S. at 82. The Court noted, however, that states are "not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What [states] must do . . . is give [juveniles] some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at 75. Finally, in *Miller*, the Supreme Court held "that mandatory life without parole for those under the age of [eighteen] at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" 567 U.S. at 465. The Court explained its rationale by relying on *Graham* and *Roper*, stating "[those decisions] make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty" on a juvenile. *Id.* at 489. The Court reasoned that an individualized sentencing hearing, in which it considered the defendant's age, maturity, family life, circumstances surrounding

the homicide offense, the offender's ability to aid in his defense, and the possibility of rehabilitation was required to sentence a juvenile to life in prison without the possibility of parole. *Id.* at 477–78.

Our supreme court interpreted *Miller* as creating a categorical ban on juvenile LWOP sentences "absent individualized considerations of youth" and establishing a duty for courts to "fully explore the impact of the defendant's juvenility on the sentence rendered." *Byars* at 540–41, 543, 765 S.E.2d at 575, 577. Therefore, pursuant to *Byars*, trial courts must hold individualized sentencing hearings and consider the mitigating factors of youth discussed in *Miller* before imposing an LWOP sentence on a juvenile. *See id.* at 544, 765 S.E.2d at 577.

In *State v. Slocumb*, our supreme court held "[n]either *Graham* nor the Eighth Amendment, as interpreted by the [United States] Supreme Court currently prohibits the imposition of aggregate sentences for multiple offenses amounting to a [de facto] life sentence on a juvenile nonhomicide offender." 426 S.C. 297, 314–15, 827 S.E.2d 148, 157. The court reasoned it was not appropriate, "as an inferior court, to extend federal constitutional protections under the Eighth Amendment beyond the boundaries the Supreme Court set in *Graham*." *Id.* at 306–07, 827 S.E.2d at 153.

Based on the aforementioned precedent, we find the trial court's term-of-years sentence does not violate the Eighth Amendment. As the court noted in *Slocumb*, we are bound by the constitutional protections implemented by the Supreme Court, which has thus far declined to extend the holding of *Graham* and its progeny to term-of-year sentences.

As to Miller's argument that a trial court must specifically find a juvenile is "irreparably corrupt" before sentencing him or her to a life sentence, pursuant to *Jones v. Mississippi*, such a finding is not required under the Eighth Amendment. *See* 141 S. Ct. 1307, 1318–19 (2021) ("[T]he Court has unequivocally stated that a separate factual finding of [irreparable corruption] is not required before a [trial court] imposes a life-without-parole sentence on a murderer under 18."). Further, in a case involving a juvenile who commits homicide, "a [s]tate's discretionary sentencing system is both constitutionally necessary and constitutionally sufficient." *Id.* at 1313. In South Carolina, *Byars* mandates only that trial courts hold an individualized sentencing hearing in which all the "mitigating hallmark features of youth are fully explored." 410 S.C. at 545, 765 S.E.2d at 578; *see also*

Miller, 567 U.S. at 480 ("Although we do not foreclose a [trial court's] ability to [impose a sentence of life without parole] in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.").

We find the trial court did not err in its sentencing procedure. The record shows the trial court held an individualized sentencing hearing in which both the State and Miller were able to present arguments regarding Miller's juvenility. The trial court stated if Miller was an adult, it would impose a de jure sentence of life in prison; however, the trial court considered each factor listed in *Byars* and then sentenced Miller to a term-of-years prison sentence under South Carolina's discretionary sentencing scheme. Because neither the Eighth Amendment nor *Byars* requires the trial court to find Miller "irreparably corrupt" and the court considered the "mitigating hallmark features" of Miller's youth in an individualized sentencing hearing, we find it did not err in sentencing Miller. Accordingly, we affirm the trial court on this issue.

II. Admission of Incriminating Statements

Miller argues the trial court erred in admitting confessions he made during custodial interrogation. Specifically, Miller argues that due to his age, his low intellectual functioning, and the coercive pressure applied during the interrogation, his confessions were not given pursuant to a voluntary, knowing, and intelligent waiver of his *Miranda* rights. We disagree.

In *Jackson v. Denno*, the United States Supreme Court held, "It is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession." 378 U.S. at 376. "A statement obtained as a result of custodial interrogation is inadmissible unless the suspect was advised of and voluntarily waived his [constitutional] rights." *State v. Miller*, 375 S.C. 370, 379, 652 S.E.2d 444, 449 (Ct. App. 2007). "If [an] interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." *Miranda*, 384 U.S. at 475. Whether an individual voluntarily waived his *Miranda* rights requires a two-step inquiry:

> (1) the waiver must be "voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception" and (2) the waiver must be "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it."

State v. Moses, 390 S.C. 502, 513, 702 S.E. 395, 401 (Ct. App. 2010) (quoting *Berghuis v. Thompkins*, 560 U.S. 370, 382–83 (2010)).

"In South Carolina, the test for determining whether a defendant's confession was given freely, knowingly, and voluntarily focuses upon whether the defendant's will was overborne by the totality of the circumstances surrounding the confession." *Id.*

> [T]he totality of the circumstances includes "the youth of the accused, his lack of education or his low intelligence, the lack of any advice to the accused of his constitutional rights, the length of detention, the repeated and prolonged nature of the questioning, and the use of physical punishment such as the deprivation of food or sleep."

State v. Pittman, 373 S.C. 527, 566, 647 S.E.2d 144, 164 (2007) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973) (citations omitted)). Regarding juveniles, our courts have also weighed (1) the juvenile's background, experience, conduct, maturity, physical condition, mental health, and isolation from a parent and (2) any misrepresentations, threats of violence, exertion of improper influence, or promises made by law enforcement. *Moses*, 390 S.C. at 513–14, 702 S.E.2d at 401. "No one factor is determinative; each case requires careful scrutiny of all the surrounding circumstances." *In re Tracy B.*, 391 S.C. 51, 66, 704 S.E.2d 71, 79 (Ct. App. 2010).

We find the trial court did not err in finding Miller voluntarily waived his *Miranda* rights based on the totality of the circumstances. First, although Miller was fifteen years old when he murdered Victim and when he confessed, youth alone is insufficient to prove the involuntariness of a defendant's confession. *See Pittman*, 373 S.C. at 569, 647 S.E.2d at 166 (stating that when only evidence of a

defendant's youth is presented, that alone is not probative of coercion); *accord Williams v. Peyton*, 404 F.2d 528, 530 (4th Cir. 1968) ("Youth by itself is not a ground for holding a confession inadmissible."). Further, our precedent clearly establishes that a juvenile is capable of voluntarily waiving his *Miranda* rights before incriminating himself. *See e.g.*, *Pittman*, 373 S.C. at 569–70, 647 S.E.2d at 166 (holding a twelve-year-old who was questioned alone by two officers voluntarily waived his rights before confessing to a double homicide); *State v. Boys*, 302 S.C. 545, 548, 397 S.E.2d 529, 531 (1990) (finding a seventeen-year-old voluntarily waived his rights after his mother told him he needed an attorney and to not speak to officers); *Moses*, 390 S.C. at 514–15, 702 S.E.2d at 401–02 (finding a seventeen-year-old special education student who could read and write on a third grade level voluntarily waived his rights); *In re Christopher W.*, 285 S.C. 329, 329–31, 329 S.E.2d 769, 769–70 (Ct. App. 1985) (holding an eleven-year-old voluntarily waived his rights even after the trial court expressed extreme displeasure with the coercive nature of his interrogation because the juvenile was "intelligent, quick, and articulate").

Second, although Miller had a low I.Q., the record indicates that he was streetwise and knew how to conduct himself in front of police officers. *See In re Williams*, 265 S.C. 295, 301, 217 S.E.2d 719, 722 (1975) ("Mental deficiency alone is not sufficient to render a confession involuntary but . . . it is a factor to be considered along with all of the other attendant facts and circumstances in determining the voluntariness of the confession."). The trial court relied on the fact that Miller gave an alibi several times when talking to Agent Merrell, and he knew several officers that he came into contact with during the investigation. The record also showed Miller was only one year behind in school. Chief Williams testified he Mirandized Miller before interrogating him, and Miller read him each right individually from a standard waiver form. Chief Williams stated he asked Miller if he understood his rights, and Miller responded affirmatively and initialed beside each right. Miller also signed the written waiver form. *See State v. Smith*, 268 S.C. 349, 352–54, 234 S.E.2d 19, 20–21 (1977) ("The decisions are voluminous that the signing of a written waiver is usually sufficient [to constitute a voluntary waiver]."); *see also Moses*, 390 S.C. at 514–15, 702 S.E.2d at 401–02 (holding a juvenile who could read and write on a third grade level voluntarily and knowingly waived his rights because the officer read the juvenile's rights verbatim from a waiver of rights form and asked if he understood the rights).

Third, although Miller was questioned twice by three different officers and was not re-Mirandized before his second interrogation, the length of both interrogations was not prolonged, and the amount of time between the first and second interrogation was minimal. *In re Tracy B.*, 391 S.C. at 67–68, 704 S.E.2d at 79 (finding that even though a juvenile did not receive fresh *Miranda* rights before interrogation recommenced, he voluntarily waived those rights because the interrogating officer asked him if he had already received *Miranda* warnings, the juvenile responded that he had, and less than two hours had passed since the juvenile was initially Mirandized). The record shows that Miller arrived at the police station at approximately 4:00 P.M., and Agents Johnson and Merrell concluded their interrogation around 7:00 P.M. Miller received *Miranda* warnings before his initial interrogation by Chief Williams, and even though Agents Johnson and Merrell did not re-Mirandize Miller before interrogating him, Agent Johnson repeatedly advised him that it was his choice to speak with them and that he could end the interrogation at any time.

Fourth, the interrogation tactics Agents Johnson and Merrell used against Miller were not forceful enough to overbear Miller's will in light of the surrounding circumstances. *See State v. Register*, 323 S.C. 471, 479, 476 S.E.2d 153, 158 (1996) ("[A] defendant's will is not overborne merely because he is led to believe that the government's knowledge of his guilt is greater than it actually is."); *id.* at 478, 476 S.E.2d at 158 (holding that a defendant's waiver of rights was voluntary even though officers isolated him and deceived him by telling him someone saw him with the victim the night of the murder, his shoes and car tires matched impressions found at the murder scene, and that the officers had irrefutable DNA evidence establishing his guilt). Agent Johnson's statements that Miller's fingerprints would be on Victim's wallet and that the State had enough evidence against Miller to prosecute him, when combined with all the other facts, were insufficient to overbear Miller's will. Agent Johnson's interrogation of Miller after Miller expressed an apprehension about talking to him nor his statements about minimizing Miller's prison sentence were sufficient to overbear Miller's will. The agents did not coerce Miller or threaten him with adverse consequences or physical punishment if he did not cooperate during his interrogation, and they did not make him any specific promises of leniency. *See Pittman*, 373 S.C. at 568, 647 S.E.2d at 165 ("Although courts have given confessions by juveniles special scrutiny, courts generally do not find a juvenile's confession involuntary whe[n] there is no evidence of extended, intimidating questioning or some other form of coercion.").

Finally, we find the officers interrogating Miller without a parent present was not sufficient to render his waiver of rights involuntary. *See In re Christopher W.*, 285 S.C. at 330, 329 S.E.2d at 770 ("The South Carolina Supreme Court has rejected the position a minor's inculpatory statement obtained in the absence of counsel, *parent*, or other friendly adult is [per se] inadmissible." (emphasis added)); *see also Moses*, 390 S.C. at 515, 702 S.E.2d at 402 (finding a juvenile's mother's request to be present during her child's interrogation was not dispositive of the juvenile's waiver). Miller stated during his interrogation that he was comfortable talking to agent Merrell without both his mother and Sabb present.

Based on the foregoing, we find the trial court did not abuse its discretion in finding Miller voluntarily waived his rights. *See Adkins*, 353 S.C. at 326, 577 S.E.2d at 468 (stating that appellate courts do not disturb a trial court's admissibility determinations absent a finding of prejudicial abuse of discretion).

CONCLUSION

Accordingly, Miller's sentence and conviction is

AFFIRMED.

HUFF and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

William Howard Heath, Appellant.

Appellate Case No. 2018-000938

Appeal From Lexington County
R. Knox McMahon, Circuit Court Judge

Opinion No. 5825
Heard December 8, 2020 – Filed June 16, 2021

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Appellate Defender David Alexander, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General William Frederick Schumacher, IV, both of Columbia; and Solicitor Samuel R. Hubbard, III, of Lexington, for Respondent.

LOCKEMY, C.J.: William Howard Heath appeals his convictions for first-degree criminal sexual conduct (CSC) with a minor, second-degree CSC with a minor, and two counts of third-degree CSC, as well as his sentence of life imprisonment. On appeal, Heath argues the trial court abused its discretion by (1) admitting three

unfairly prejudicial photographs, (2) admitting the victim's hearsay statements to law enforcement after the assault, and (3) sentencing him to life imprisonment after the legislature amended the sentencing statute within the indictment date range. We affirm in part but vacate Heath's life sentence and remand for resentencing on the conviction for first-degree CSC with a minor.

FACTS/PROCEDURAL HISTORY

A Lexington County grand jury indicted Heath for first-degree CSC with a minor for offenses occurring from September 14, 2004, to September 15, 2007; second-degree CSC with a minor with a date range of September 17, 2011, to September 15, 2013; and two counts of third-degree CSC with a date range of December 1, 2014, and April 26, 2015.

At trial, Heath's biological daughter (Victim) testified he sexually abused her multiple times when she was six or seven and threatened to kill her or her mother if she told anyone.[1] She explained she would often resist, but if she did, he would hit her, pull her hair, or force himself upon her. Victim testified about a long history of sexual abuse. Specifically, she recalled one instance that occurred around his birthday. She stated Heath often watched pornography on his iPad while he assaulted her.

Victim explained the most recent incident occurred on April 26, 2015. Victim stated that after she resisted his sexual advances, he forced her to clean the house. He continued to make sexual advances and commanded her to his bedroom. She recalled Heath took off her clothes and rubbed his genitals against her buttocks while watching pornography on his iPad. She testified State's Exhibit 22 was a screenshot from the video Heath watched while he assaulted her. Victim explained she ran out of Heath's bedroom and sent a text message explaining what happened to her aunt. Her aunt contacted Victim's mother, who called the police.

Sergeant Caleb Black testified he responded to Heath's home and spoke with Victim. He explained Victim's eyes were red from crying and she was visibly upset. The State asked Sergeant Black what Victim told him had occurred, and Heath objected, arguing her statements were inadmissible hearsay. The State

[1] Based on Victim's age at trial, the range for those accusations spanned between 2004 and 2007.

argued Victim's statements were an excited utterance. Heath asserted the statement was not made "in the heat of the moment" because too much time had passed. The trial court sustained the objection. Sergeant Black explained that when he talked to Victim, she was on her bed, crying into her pillow. Deputies secured Heath's iPad from his bedroom.

After Victim testified, Sergeant Black was recalled as a witness. He explained that when he arrived on the scene, Victim was crying, her eyes were red, and she was visibly upset. Heath objected to Sergeant Black's testimony, arguing Victim's statements were hearsay. The trial court held Sergeant Black's testimony fell under three hearsay exceptions: (1) excited utterance, (2) res gestae, and (3) present sense impression. As to the excited utterance exception, the trial court held the exception applied because evidence was presented Victim had red eyes, was crying, and was upset when she spoke with Sergeant Black. Sergeant Black testified Victim told him Heath had sexually abused her and about his history of abusing her. He remained with her as she continued to cry until other officers arrived.

A rape kit was performed on Victim, and a hair was collected from her pubic hair combing and another from her rectal swab; both hairs matched Heath's DNA. The inside of Victim's underwear tested positive for saliva, which also matched Heath's DNA.

The State offered a compact disc that contained photographs of pornography from Heath's iPad, including exhibits marked State's Exhibits 22, 36, and 38 into evidence. Heath objected based on relevance and Rule 403 of the South Carolina Rules of Evidence. Specifically, Heath argued because the jury would hear testimony from Detective Michael Phipps that the pornography was present on the iPad and in Heath's web history, showing the jury the pornographic images would unfairly prejudice him. The trial court overruled the objection and admitted the exhibits, finding that the images corroborated Victim's testimony Heath watched pornography while he assaulted her. The trial court found the photographs on the iPad were from April 26, 2015, and December 2, 2014, and these dates corresponded with the days Victim stated Heath assaulted her. The trial court weighed the probative nature of the evidence against the danger of unfair prejudice and found it was highly probative and while it prejudiced Heath, it was not unfairly prejudicial.

Detective Phipps, an expert in forensic examination of digital devices, testified he extracted Exhibit 38—an image—from Heath's iPad and that someone viewed the pornographic video on December 2, 2014. Exhibit 38 was a screenshot from a pornographic video with the watermark "incesttv.com" on the bottom of the image. Detective Phipps explained incesttv.com was a website that included adult roleplaying and involved incest, including father-daughter role-play. Exhibits 22 and 36 were admitted subject to Heath's prior objections. Exhibit 22 was a screenshot of a pornographic video, which contained the watermark "DaughterDestruction.com." Exhibit 36 contained a screenshot from a pornographic video and contained no watermark. Detective Phipps testified Exhibits 22 and 36 were accessed on Heath's iPad on April 26, 2015. He explained "daughterdestruction.com" was a website for "hardcore" pornography. Heath did not object to any of Detective Phipps's testimony regarding the watermarks.

The jury found Heath guilty on all four indictments. During sentencing, the State asserted that the legislature amended the first-degree CSC with a minor statute on July 1, 2006, which changed the prior sentencing range of zero to thirty years' imprisonment to twenty-five years' to life imprisonment. The State argued Heath was convicted of an ongoing activity from before the statute was amended until after its 2006 amendment and the trial court should therefore sentence him according to the new sentencing range. Heath argued the sentence should be determined based on the statute before the 2006 amendment because Victim's testimony indicated the conduct giving rise to the first-degree CSC with a minor charges occurred before July 1, 2006. The trial court sentenced Heath to life imprisonment for first-degree CSC with a minor, twenty years' imprisonment for second-degree CSC with a minor, and two sentences of ten years' imprisonment for third-degree CSC, all to run consecutively.

ISSUES ON APPEAL

1. Did the trial court err by admitting photographs of pornography found on Heath's iPad?

2. Did the trial court err by admitting hearsay evidence of Victim's interview with law enforcement?

3. Did the trial court err by sentencing Heath to life imprisonment when the legislature amended the sentencing statute during the time of the alleged conduct found within the indictment date range?

STANDARD OF REVIEW

The admission of evidence is left to the trial court's sound discretion, and its decision will not be reversed absent an abuse of discretion. *State v. Byers*, 392 S.C. 438, 444, 710 S.E.2d 55, 57-58 (2011). "An abuse of discretion occurs when the trial court's ruling is based on an error of law." *Id.* at 444, 710 S.E.2d 58 (quoting *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000)). "To warrant reversal based on the wrongful admission of evidence, the complaining party must prove resulting prejudice." *Id.* "Prejudice occurs when there is a reasonable probability the wrongly admitted evidence influenced the jury's verdict." *Id.*

"A trial [court] is allowed broad discretion in sentencing within statutory limits." *Brooks v. State*, 325 S.C. 269, 271, 481 S.E.2d 712, 713 (1997). "A sentence will not be overturned absent an abuse of discretion when the ruling is based on an error of law or a factual conclusion without evidentiary support." *In re M.B.H.*, 387 S.C. 323, 326, 692 S.E.2d 541, 542 (2010).

LAW/ANALYSIS

I. Rule 403, SCRE

Heath argues the trial court erred by admitting screenshots of pornography found on his iPad. He asserts these images and their watermarks were unfairly prejudicial, and therefore, inadmissible under Rule 403, SCRE. We disagree.

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." Rule 403, SCRE. "Unfair prejudice means an undue tendency to suggest decision on an improper basis." *State v. Wiles*, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009). "[T]he determination of prejudice must be based on the entire record, and the result will generally turn on the facts of each case." *State v. Stokes*, 381 S.C. 390, 404, 673 S.E.2d 434, 441 (2009).

"Courts must often grapple with disturbing and unpleasant cases, but that does not justify preventing essential evidence from being considered by the jury, which is charged with the solemn duty of acting as the fact-finder." *State v. Collins*, 409 S.C. 524, 535, 763 S.E.2d 22, 28 (2014). "A trial [court] is not required to exclude relevant evidence merely because it is unpleasant or offensive." *State v. Martucci*, 380 S.C. 232, 250, 669 S.E.2d 598, 607 (Ct. App. 2008). "[T]he standard is not simply whether the evidence is prejudicial; rather, the standard under Rule 403, SCRE is whether there is a danger of *unfair* prejudice that *substantially* outweighs the probative value of the evidence." *Collins*, 409 S.C. at 536, 763 S.E.2d at 28.

As to the watermarks on the images, Heath failed to preserve this issue for appellate review. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) ("Issues not raised and ruled upon in the trial court will not be considered on appeal."). Heath never objected to Detective Phipps's testimony regarding the watermarks. Rather, Heath's objections at trial were to the displaying of pornography to the jury, he did not mention the watermarks or their unfair prejudice to the trial court. Thus, without raising the issue or drawing the trial court's attention to the watermarks' prejudicial nature, Heath failed to preserve this argument for appellate review.

We find the trial court did not abuse its discretion in admitting these photographs because the court weighed the photographs' probative value against the danger of unfair prejudice. Victim testified that on April 26, 2016, Heath watched pornography on his iPad while he sexually assaulted her. Exhibit 22 and 36 were accessed on Heath's iPad on that date, and Victim identified Exhibit 22 as the pornography Heath watched during that assault. Detective Phipps testified Exhibit 38 was accessed on Heath's iPad on December 2, 2014, and Victim testified Heath sexually assaulted her around his birthday, which was December 1. Since these exhibits corroborate Victim's testimony about the circumstances surrounding how Heath sexually assaulted her, evidence supports the trial court's finding that these photographs were highly probative. *See Collins*, 409 S.C. at 534, 763 S.E.2d at 27 ("If the offered photograph serves to corroborate testimony, it is not an abuse of discretion to admit it." (quoting *State v. Nance*, 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996))); *State v. Hawes*, 423 S.C. 118, 130, 813 S.E.2d 513, 519 (Ct. App. 2018) (holding the trial court did not abuse its discretion in admitting crime scene photographs that established the circumstances of the crime and corroborated the testimony of a State's witness).

The corroboration of Victim's testimony of the events regarding her abuse was extremely probative. While the photographs do not paint Heath in a positive light, because they were part of the circumstances surrounding the crime, they were not unfairly prejudicial. *See Collins*, 409 S.C. at 536, 763 S.E.2d at 28 ("[T]he standard is not simply whether the evidence is prejudicial; rather, the standard under Rule 403, SCRE is whether there is a danger of *unfair* prejudice that *substantially* outweighs the probative value of the evidence."). We therefore conclude the trial court did not abuse its discretion in admitting Exhibits 22, 36, and 38.

II. Hearsay

Heath argues the trial court erred in admitting Victim's responses to law enforcement after the alleged assault. He asserts no evidence was presented to establish Victim was "excited" during the interview with Sergeant Black. We disagree.

An excited utterance is an exception to the rule against hearsay evidence. Rule 803(2), SCRE. An excited utterance is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." *Id.* "The rationale for the [excited utterance] exception lies in the special reliability accorded to a statement uttered in spontaneous excitement which suspends the declarant's powers of reflection and fabrication." *State v. Burdette*, 335 S.C. 34, 42, 515 S.E.2d 525, 529 (1999) (alteration in original) (quoting *State v. Blackburn*, 271 S.C. 324, 327, 247 S.E.2d 334, 336 (1978)).

"A court must consider the totality of the circumstances when determining whether a statement falls within the excited utterance exception." *State v. Davis*, 371 S.C. 170, 178, 638 S.E.2d 57, 62 (2006). Our supreme court "has generally allowed as excited utterances statements made by the victim to the police immediately following a physical attack." *Burdette*, 335 S.C. at 43, 515 S.E.2d at 530.

"The passage of time between the startling event and the statement is one factor to consider, but it is not the dispositive factor." *State v. Stahlnecker*, 386 S.C. 609, 623, 690 S.E.2d 565, 573 (2010). Although there is no hard and fast rule as to the time period when an excited utterance ends, our courts have admitted a victim's statement to law enforcement as an excited utterance when the statement was made

shortly after an alleged sexual assault. *See State v. Harrison*, 298 S.C. 333, 337, 380 S.E.2d 818, 820 (1989) (allowing under the *res gestae* exception, the statements of an alleged rape victim to an officer at the hospital upon the first opportunity to tell what had occurred); *State v. Quillien*, 263 S.C. 87, 96-97, 207 S.E.2d 814, 819 (1974) (concluding a rape victim's statements to police after she arrived at the emergency room were admissible under the *res gestae* exception).

A. Merits

Here, Sergeant Black testified that when he arrived at the home, Victim was crying, her eyes were red, and she was visibly upset. Further, he stated she continued to cry into her pillow after he interviewed her. Only thirty minutes had passed since she was sexually assaulted by her father and Victim would have been under significant stress and emotional strain after having finally reported years of abuse by her father. The passage of time is but one factor to consider, and we do not believe the lapse of thirty minutes between the assault and Victim's statements to Sergeant Black precluded their admission under the excited utterance exception. *See Burdette*, 335 S.C. at 43, 515 S.E.2d at 530 (admitting Victim's statement to a law enforcement officer as an excited utterance when no more than one hour passed between the attack and the victim's statement); *cf. State v. Burroughs*, 328 S.C. 489, 498, 492 S.E.2d 408, 412 (Ct. App. 1997) (explaining that the former *res gestae* exception had the same temporal requirement as the excited utterance exception). We find these facts support the trial court's conclusion that Victim's statements to Sergeant Black fell under the excited utterance exception.

Further, Heath's argument the excited utterance exception does not apply because the Victim was not "excited" is meritless. Our courts have ruled on multiple occasions that the excited utterance exception applies to a victim who was visibly upset and crying. *See Stahlnecker*, 386 S.C. at 623, 690 S.E.2d at 573 (holding a victim who "was upset and crying when she told her mother about the [sexual] abuse" was under the stress of excitement; thus, her statements were admissible as excited utterances). Rule 803(2), SCRE, requires that the declarant be under "the stress of excitement," not that the victim be excited. *See State v. Sims*, 348 S.C. 16, 22, 558 S.E.2d 518, 522 (2002) (holding declarant's statements were admissible under the excited utterance exception when declarant was "not crying or acting 'excited' in the sense of being animated when he made the statement" but whose demeanor was "characteristic of someone who [wa]s under the 'stress of excitement'"). The record reflects Victim was under the "stress of excitement."

Based on the foregoing, we hold the trial court did not abuse its discretion by admitting Victim's statements to Sergeant Black.

B. Harmless Error

Moreover, any alleged error in admitting Victim's statements or Exhibits 22, 36, and 38 was harmless because the physical evidence against Heath was overwhelming. *See Collins*, 409 S.C. at 537, 763 S.E.2d at 29 ("The harmless error rule generally provides that an error is harmless beyond a reasonable doubt if it did not contribute to the verdict obtained."). Victim testified Heath performed oral sex on her on April 26, 2016, and saliva matching Heath's DNA was found on the inside of Victim's underwear immediately following the assault. Further, hairs from Victim's rectal swab and pubic hair combing matched Heath's DNA. *See Collins*, 409 S.C. at 538, 763 S.E.2d at 29-30 ("Another description frequently cited is that error 'is harmless where a defendant's guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached.'" (quoting *State v. Bryant*, 369 S.C. 511, 518, 633 S.E.2d 152, 156 (2006))). We find there was overwhelming physical evidence of Heath's guilt and therefore any alleged error was harmless.

III. Sentencing

Heath argues the first-degree CSC with a minor statute was amended to increase the maximum penalty from thirty years' imprisonment to life imprisonment in the middle of the date range alleged in the indictment and the trial court therefore erred in sentencing him to life imprisonment. We agree.

"In the absence of a controlling statute, the common law requires that a convicted criminal receive the punishment in effect at the time he is sentenced, unless it is greater than the punishment provided for when the offense was committed." *State v. Varner*, 310 S.C. 264, 265, 423 S.E.2d 133, 133 (1992). The legislature amended the first-degree CSC statute in 2006; prior to this amendment, the maximum sentence for first-degree CSC was thirty years' imprisonment. *See* S.C. Code Ann. § 16-3-655 (Supp. 2005), *amended by* S.C. Code Ann. § 16-3-655 (2015). The legislature amended the statute to provide that a person convicted of first-degree CSC be imprisoned for "twenty-five years, no part of which may be suspended or probation granted, or must be imprisoned for life." S.C. Code Ann. § 16-3-655 (Supp. 2006), *amended by* S.C. Code Ann. § 16-3-655 (2015).

The indictment alleged Heath committed first-degree CSC with a date range of September 16, 2004, to September 15, 2007. Victim testified she was first sexually assaulted when she was six or seven years old, and based on Victim's age at the time of trial, such assaults would have occurred between 2004 and 2006. Although the date range of the indictment fell under both the pre-amendment and post-amendment statutes, the majority of Victim's testimony regarding when Heath assaulted addressed conduct that occurred prior to the statutory amendment at issue. Without a factual finding as to when the abuse occurred, the trial court should have sentenced Heath within the pre-amendment maximum of thirty years' imprisonment. Accordingly, we vacate Heath's life sentence.

CONCLUSION

Based on the foregoing, we affirm the trial court's admission of Exhibits 22, 36, and 38 and the testimony regarding Victim's statements to law enforcement. However, we vacate Heath's sentence for first-degree CSC with a minor and remand for resentencing in accordance with this opinion.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

KONDUROS and MCDONALD, JJ., concur.