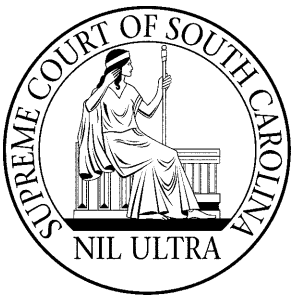

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 24
June 13, 2018
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of David R. DuBose, Respondent.

Appellate Case No. 2018-000013

Opinion No. 27812
Submitted June 1, 2018 – Filed June 13, 2018

DEFINITE SUSPENSION

John S. Nichols, Disciplinary Counsel, and C. Tex Davis, Jr., Senior Assistant Disciplinary Counsel, of Columbia, for Office of Disciplinary Counsel.

David R. DuBose, of Richmond, Virginia, *pro se*.

PER CURIAM: This attorney disciplinary matter is before the Court pursuant to the reciprocal disciplinary provisions of Rule 29 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules.

Respondent was admitted to practice law in the Commonwealth of Virginia in June 2002 and in South Carolina in November 2007. On June 9, 2015, Respondent was suspended from the practice of law by the Virginia State Bar Disciplinary Board for fifteen (15) days with certain terms imposed on his suspension. Respondent was discipline because of misconduct involving several instances of failing to act with reasonable diligence and promptness in representing clients, failing to keep clients reasonably informed, and withdrawing from the representation of a client without informing the client. *In re DuBose*, VSB Docket No. 15-032-101878, 2015 WL 3945399 (Va.St.Disp. June 9, 2015). Respondent complied with the terms of his suspension, and the matter was concluded.

Respondent did not notify the Commission on Lawyer Conduct within fifteen (15) days of his suspension as required by Rule 29(a), RLDE. Respondent notified the Office of Disciplinary Counsel (ODC) of his suspension on December 15, 2017, and ODC notified the Court of Respondent's suspension on January 4, 2018.

As required by the provisions of Rule 29(b), the Clerk of Court provided Respondent thirty (30) days in which to assert a reason that identical discipline should not be imposed in this state. Respondent filed a return stating he would not claim that identical discipline was unwarranted.

The Court finds that reciprocal discipline is appropriate and hereby suspends Respondent from the practice of law in South Carolina for fifteen (15) days from the date of this opinion.

Within fifteen days of the date of this opinion, Respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE.

DEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Samuel R. Drose, Former Magistrate for Marion County, Respondent.

Appellate Case No. 2018-000563

Opinion No. 27813
Submitted May 25, 2018 – Filed June 13, 2018

PUBLIC REPRIMAND

John S. Nichols, Disciplinary Counsel, and Joseph P. Turner, Senior Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Samuel R. Drose, of Marion, *pro se*.

PER CURIAM: In this judicial disciplinary matter, Respondent and the Office of Disciplinary Counsel have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Judicial Disciplinary Enforcement (RJDE) contained in Rule 502 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, Respondent admits misconduct and consents to the imposition of a public reprimand pursuant to Rule 7(b), RJDE, Rule 502, SCACR. We accept the Agreement and issue a public reprimand. The facts, as set forth in the Agreement, are as follows.

Facts

Respondent was arrested on May 14, 2014, after he took possession of a substance which he believed was oxycodone, a Schedule II controlled substance. Respondent resigned his position as a part-time Magistrate on the same day.

Law

Respondent admits that by his conduct he has violated Canon 1A (a judge should maintain high standards of conduct) and Cannon 2A (a judge shall respect and comply with the law and shall act at all times to promote public confidence in the integrity of the judiciary) of the Code of Judicial Conduct found in Rule 501, SCACR.

Respondent also admits that by violating the Code of Judicial Conduct, he has also violated Rule 7(a)(1), RJDE, Rule 502, SCACR.

Conclusion

We find Respondent's misconduct warrants a public reprimand.[1] Accordingly, we accept the Agreement and publicly reprimand Respondent for his misconduct.

PUBLIC REPRIMAND.

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

[1] A public reprimand is the most severe sanction the Court can impose when a judge no longer holds judicial office. *See In re Gravely*, 321 S.C. 235, 467 S.E.2d 924 (1996).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Lamar Sequan Brown, Petitioner.

Appellate Case No. 2015-002360

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Charleston County
J. C. Nicholson Jr., Circuit Court Judge

Opinion No. 27814
Heard March 28, 2018 – Filed June 13, 2018

AFFIRMED

Appellate Defender David Alexander, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson, Assistant Attorney General William M. Blitch Jr., both of Columbia; and Solicitor Scarlett Anne Wilson, of Charleston; all for Respondent.

JUSTICE FEW: In this appeal we address whether the digital information stored on a cell phone may be abandoned such that its privacy is no longer protected by the Fourth Amendment. The trial court determined the information on the cell phone in

this case had been abandoned, and admitted it into evidence. A divided panel of the court of appeals affirmed. *State v. Brown*, 414 S.C. 14, 776 S.E.2d 917 (Ct. App. 2015). We affirm the court of appeals.

I. Facts and Procedural History

On December 22, 2011, one of the victims and his girlfriend returned from dinner to his condominium on James Island in the city of Charleston. The victim testified they went straight to the living room because "I had arranged all of her Christmas presents . . . on the center coffee table." While she was opening the presents, he heard a phone ringing down the hall toward the bedrooms. Initially, he assumed the phone belonged to his roommate or her boyfriend. After the phone rang a few times, he saw a light and feared it might be someone with a flashlight. He testified, "I got a little nervous so I got up and told my girlfriend to stay in the living room and I walked down the hall and [saw] the ringing phone . . . on my bedroom floor." When he turned on his bedroom light, he realized his home had been burglarized. His "window had been broken out" and there was "glass everywhere." The burglar stole his television, his laptop computer, two of his roommate's laptops, and some of her jewelry.

The victim called the police. The first officer on the scene took the cell phone to the police station and secured it in a locker in the evidence room. Six days later, Detective Jordan Lester retrieved the cell phone and was able to observe "a background picture of a black male with dreadlocks." Considering the phone to be "abandoned property," he guessed the code to unlock the screen—1-2-3-4—and opened the phone without a warrant. Detective Lester looked through the "contacts" stored on the phone and found a person listed as "Grandma." He entered "Grandma's" phone number into a database called Accurint and identified a list of her relatives, which included a man matching the age of the person pictured on the background screen of the cell phone—Lamar Brown. Detective Lester then entered Brown's name into the South Carolina Department of Motor Vehicles database and looked at Brown's driver's license photograph. After comparing the photographs, Detective Lester determined Brown was the man pictured on the screen of the cell phone.

Detective Lester sent other officers to Brown's home to question him. The officers showed Brown the cell phone and informed him it was found at the scene of a burglary. Brown admitted the phone belonged to him, but claimed he lost it on December 23rd—one day after the burglary occurred. Brown also admitted that no

one else could have had his cell phone on December 22nd. After questioning Brown, the police charged him with burglary in the first degree.

At trial, Brown's counsel moved to suppress all evidence obtained from the cell phone on the ground Detective Lester conducted an unreasonable search of the phone in violation of Brown's Fourth Amendment rights. The trial court found Brown had no reasonable expectation of privacy in the information stored on the phone because he abandoned it. The jury convicted Brown of first-degree burglary, and the trial court sentenced him to eighteen years in prison. We granted Brown's petition for a writ of certiorari to review the court of appeals' opinion affirming his conviction.

II. Analysis

The Fourth Amendment guarantees us the right to be free from unreasonable searches and seizures. U.S. CONST. amend. IV; *see also* S.C. CONST. art. I, § 10. "Abandoned property," however, "has no protection from either the search or seizure provisions of the Fourth Amendment." *State v. Dupree*, 319 S.C. 454, 457, 462 S.E.2d 279, 281 (1995) (citing *California v. Greenwood*, 486 U.S. 35, 40-41, 108 S. Ct. 1625, 1628-29, 100 L. Ed. 2d 30, 36-37 (1988)). Under a standard abandonment analysis, "the question is whether the defendant has, in discarding the property, relinquished his reasonable expectation of privacy." *Dupree*, 319 S.C. at 457, 462 S.E.2d at 281 (quoting *City of St. Paul v. Vaughn*, 237 N.W.2d 365, 371 (Minn. 1975)). As the Fourth Circuit has described it, "When a person voluntarily abandons his privacy interest in property, his subjective expectation of privacy becomes unreasonable . . . ." *United States v. Stevenson*, 396 F.3d 538, 546 (4th Cir. 2005); *see also id.* ("'[T]he proper test for abandonment is . . . whether the complaining party retains a reasonable expectation of privacy in the [property] alleged to be abandoned.'" (quoting *United States v. Haynie*, 637 F.2d 227, 237 (4th Cir. 1980))). In any Fourth Amendment challenge, "defendants must show that they have a legitimate expectation of privacy in the place searched." *State v. Missouri*, 361 S.C. 107, 112, 603 S.E.2d 594, 596 (2004) (citing *Rakas v. Illinois*, 439 U.S. 128, 143, 99 S. Ct. 421, 430, 58 L. Ed. 2d 387, 401 (1978)). When the reasonable expectation of privacy is relinquished through abandonment, the property is no longer protected by the Fourth Amendment. *Dupree*, 319 S.C. at 457, 462 S.E.2d at 281.

Brown contends, however, the reasoning of the Supreme Court of the United States in *Riley v. California*, 573 U.S. ___, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014), fundamentally alters the abandonment analysis when the property in question is the

digital information stored on a cell phone. In *Riley*, the Supreme Court described in extensive detail the manner in which "[c]ell phones differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person." 573 U.S. at ___, 134 S. Ct. at 2489, 189 L. Ed. 2d at 446. Among the many observations the Court made to explain these differences, the Court stated, "many of the more than 90% of American adults who own a cell phone keep on their person a digital record of nearly every aspect of their lives—from the mundane to the intimate," 573 U.S. at ___, 134 S. Ct. at 2490, 189 L. Ed. 2d at 447, "Data on a cell phone can also reveal where a person has been[,] . . . and can reconstruct someone's specific movements down to the minute, . . . within a particular building," 573 U.S. at ___, 134 S. Ct. at 2490, 189 L. Ed. 2d at 448, and "a cell phone search would typically expose to the government far *more* than the most exhaustive search of a house," 573 U.S. at ___, 134 S. Ct. at 2491, 189 L. Ed. 2d at 448. The Court concluded, "Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans 'the privacies of life.'" 573 U.S. at ___, 134 S. Ct. at 2494-95, 189 L. Ed. 2d at 452 (quoting *Boyd v. United States*, 116 U.S. 616, 630, 6 S. Ct. 524, 532, 29 L. Ed. 746, 751 (1886)).

We certainly agree with Brown that the reasoning of *Riley* is important to the Fourth Amendment analysis any time the police conduct a warrantless search of the digital information on a cell phone. We find, however, that *Riley* does not alter the standard abandonment analysis.[1] Rather, the unique character of cell phones described in *Riley* is one factor a trial court should consider when determining whether the owner has relinquished his expectation of privacy.

Turning to the abandonment analysis the trial court conducted in this case, we review the trial court's decision for clear error. *State v. Moore*, 415 S.C. 245, 251, 781

[1] Other courts have considered whether the digital information stored on a cell phone may be abandoned for purposes of the Fourth Amendment and found that it had been abandoned. *See United States v. Crumble*, 878 F.3d 656, 659-60 (8th Cir. 2018) (holding the warrantless search of a cell phone did not violate the Fourth Amendment because the defendant abandoned it); *United States v. Sparks*, 806 F.3d 1323, 1347 (11th Cir. 2015) (same); *State v. Samalia*, 375 P.3d 1082, 1089 (Wash. 2016) (same); *but see State v. K.C.*, 207 So. 3d 951, 956 (Fla. Dist. Ct. App. 2016) (holding that "a categorical rule permitting warrantless searches of abandoned cell phones, the contents of which are password protected, is . . . unconstitutional" (relying on *Brown*, 414 S.C. at 32, 776 S.E.2d at 927 (Konduros, J., dissenting))).

S.E.2d 897, 900 (2016). This means we "must affirm if there is any evidence to support the trial court's [factual] ruling," 415 S.C. at 251, 781 S.E.2d at 900, but we "review[] questions of law de novo," *State v. Adams*, 409 S.C. 641, 647, 763 S.E.2d 341, 344 (2014).

We begin our review of the trial court's finding that Brown abandoned his phone with the factual premise of *Riley*, that cell phones hold "the privacies of life." 573 U.S. at ___, 134 S. Ct. at 2494-95, 189 L. Ed. 2d at 452. Brown's expectation that this privacy would be honored—at least initially—is supported by the fact he put a lock on the screen of the phone. As the court of appeals in this case stated, "the act of locking the container . . . demonstrates to a law enforcement officer that the owner of the container *started out* with an expectation of privacy in the container's contents." 414 S.C. at 27, 776 S.E.2d at 924. At least until the time of the burglary, therefore, Brown enjoyed Fourth Amendment protection for the digital information stored on his phone.

Additionally, we can presume Brown did not intentionally leave his cell phone at the scene of the crime, for he must have known that doing so would lead to the discovery that he was the burglar. Thus, it is unlikely a police officer would believe the mere act of leaving the phone at the scene of the crime was an intentional relinquishment of his privacy. For at least a short period of time after the crime, therefore, the phone might not yet have been abandoned. However, when a person loses something of value—whether valuable because it is worth money or because it holds privacies—the person who lost it will normally begin to look for the item. In this case, the phone sat in the evidence locker at the police station for six days. The record contains no evidence Brown did anything during this time to try to recover his phone. While Brown might have taken action to protect his privacy before he left it at the victim's condominium, there is no evidence he did anything after that to retain the privacy he previously had in the phone's digital contents. There is no evidence he tried to call the phone to see if someone would answer. There is no evidence he attempted to text the phone in hopes the text would show on the screen, perhaps with an alternate number where Brown could be reached, or perhaps even with a message that he did not relinquish his privacy in the contents of the phone.[2] There is no evidence he attempted to contact the service provider for information on the whereabouts of the phone. Instead, he contacted his service provider and canceled

[2] Brown's phone received numerous calls and texts after Brown left it at the scene of the burglary. However, there is no evidence Brown made or initiated any of those calls or texts.

his cellular service to the phone. And there is certainly no evidence he went back to the scene of the crime to look for it, or that he attempted to call the police to see if they had it.

We would expect that a person who lost a cell phone that has value because of the privacies it holds would look for the phone in one or more of the ways described above. On the other hand, the reason a burglar would not look too hard to find a phone he lost during a burglary is obvious. Brown put himself in the difficult position of having to balance the risk that finding the phone would incriminate him against the benefit of retrieving the private digital information stored in it. Looking at these facts objectively, any police officer would assume after six days of no efforts by the owner to recover this phone—especially under the circumstance that the owner left the phone at the scene of a burglary—that the owner had decided it was too risky to try to recover it. Brown's decision not to attempt to recover the phone equates to the abandonment of the phone.

"A legitimate expectation of privacy is both subjective and objective in nature: the defendant must show (1) he had a subjective expectation of not being discovered, and (2) the expectation is one that society recognizes as reasonable." *Missouri*, 361 S.C. at 112, 603 S.E.2d at 596 (citing *Oliver v. United States*, 466 U.S. 170, 177, 104 S. Ct. 1735, 1741, 80 L. Ed. 2d 214, 223 (1984)). As to the first point, Brown's decision to forego looking for his phone demonstrates he did not expect to maintain his privacy in the information stored on his phone. In addition—although it is not clear Detective Lester knew this when he opened the phone—Brown told the officer who first interviewed him that he canceled cellular service to the phone when he realized "someone has [my] phone."[3] Considering these facts, Brown clearly had no "subjective expectation" that his privacy in the digital information on the phone would be preserved.

Brown even more clearly fails on the second point. Here, we pause to consider the reasoning of Judge Konduros—the dissenting judge at the court of appeals. Judge Konduros correctly points out that *Riley* "recognized the unique nature of modern cell phones, their capacity for storage of vast amounts of personal information on devices easily carried, and the resulting privacy concerns triggered," and "the decision provides guidance on the protection of privacy interests under the Fourth Amendment given substantial advancements in technology." 414 S.C. at 30, 776

[3] Brown's statement is inconsistent with the records of his cell phone provider, which indicate the service was not officially canceled until later.

S.E.2d at 926 (Konduros, J., dissenting). With this reasoning, Judge Konduros properly brings our focus back to the factual premise of *Riley*—cell phones hold "the privacies of life." 573 U.S. at ___, 134 S. Ct. at 2494-95, 189 L. Ed. 2d at 452. From this premise, Judge Konduros correctly concludes "the Court's language indicates law enforcement must obtain warrants to search cell phones, even in cases when a person's expectation of privacy is diminished." 414 S.C. at 32, 776 S.E.2d at 927 (Konduros, J., dissenting).

In our abandonment analysis, however, the question is not whether Brown's expectation of privacy was "diminished." Rather, the question before us is whether Brown could reasonably expect to maintain any privacy interest in his phone after he chose to cancel cellular service and stop looking for it. More specifically, the question on this second point from *Missouri* is whether society will recognize as reasonable that a burglar who leaves his cell phone in a home he just robbed, and thereafter cancels service to the phone and makes no effort to recover it, nevertheless maintains a privacy interest under the Fourth Amendment in the digital information stored on the phone. Viewing the question in this posture, even considering the valid reasoning of Judge Konduros, the answer to the question is clearly, "No." The idea that a burglar may leave his cell phone at the scene of his crime, do nothing to recover the phone for six days, cancel cellular service to the phone, and then expect that law enforcement officers will not attempt to access the contents of the phone to determine who committed the burglary is not an idea that society will accept as reasonable.

To summarize, we turn to the majority opinion from the court of appeals, which we believe correctly concludes the abandonment analysis,

> When Detective Lester made the decision to unlock the phone several days later, he was aware of these circumstances, all of which, when considered together, provided sufficient objective facts to support his belief that any expectation of privacy in the phone and its data had been abandoned.

414 S.C. at 26, 776 S.E.2d at 924.

III. Conclusion

Modern cell phones are not just another item of property, and the extent to which they "differ in both a quantitative and a qualitative sense from other objects" is an

important factor to be considered in any abandonment analysis. Nevertheless, the standard abandonment analysis applies to cell phones. There is evidence in the record to support the trial court's finding that Brown abandoned his cell phone. The decision of the court of appeals is **AFFIRMED**.

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

CHIEF JUSTICE BEATTY: I respectfully dissent. I would reverse the decision of the Court of Appeals and find, as did Judge Konduros in her well-reasoned dissent, Brown did not abandon his expectation of privacy in the contents of his cell phone. Accordingly, I would conclude that law enforcement's warrantless search of Brown's cell phone violated the Fourth Amendment.

The Fourth Amendment to the United States Constitution protects a person's right to be free from unreasonable searches and seizures. U.S. Const. amend. IV. "Warrantless searches and seizures are unreasonable absent a recognized exception to the warrant requirement." *State v. Brown*, 401 S.C. 82, 89, 736 S.E.2d 263, 266 (2012) (citation omitted). The State bears the burden of establishing "the existence of circumstances constituting an exception to the general prohibition against warrantless searches and seizures." *State v. Gamble*, 405 S.C. 409, 416, 747 S.E.2d 784, 787 (2013).

We have recognized the doctrine of abandonment as an exception to the Fourth Amendment warrant requirement. *State v. Dupree*, 319 S.C. 454, 457, 462 S.E.2d 279, 281 (1995). In determining whether the defendant abandoned property for Fourth Amendment search and seizure purposes,

> the question is whether the defendant has, in discarding the property, relinquished his reasonable expectation of privacy so that its seizure and search is reasonable within the limits of the Fourth Amendment. In essence, what is abandoned is not necessarily the defendant's property, but his reasonable expectation of privacy therein.

Id. (citation omitted). To answer this question, a court "must determine from an objective viewpoint whether property has been abandoned." 79 C.J.S. *Searches* § 43, at 70 (2017). "[A]bandonment is a question of intent and exists only if property has been voluntarily discarded under circumstances indicating no future expectation of privacy with regard to it." 68 Am. Jur. 2d *Searches and Seizures* § 23, at 135 (2010). Intent in this context is "inferred from words, acts, and other objective facts." 79 C.J.S. *Searches* § 43, at 70 (2017).

In my view, this case presents the Court with an opportunity to consider the continued validity of the doctrine of abandonment with respect to passcode-protected digital information in a post-*Riley* era. In *Riley*, the Supreme Court of the United States consolidated two cases to determine "whether the police may, without

a warrant, search digital information on a cell phone seized from an individual who has been arrested." *Riley v. California*, 134 S. Ct. 2473, 2480 (2014). In a unanimous decision authored by Chief Justice Roberts, the Court answered this question in the negative. *Id*. at 2485. More specifically, the Court concluded "[o]ur answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—*get a warrant*." *Id*. at 2495 (emphasis added).

In reaching this conclusion, the Court prefaced its analysis by stating:

> Absent more precise guidance from the founding era, we generally determine whether to exempt a given type of search from the warrant requirement "by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Wyoming v. Houghton*, 526 U.S. 295, 300, 119 S. Ct. 1297, 143 L. Ed. 2d 408 (1999).

Id. at 2484. Using this analytical framework, the Court reasoned that:

> while *Robinson*'s[4] categorical rule strikes the appropriate balance in the context of physical objects, neither of its rationales has much force with respect to digital content on cell phones. On the government interest side, *Robinson* concluded that the two risks identified in *Chimel*[5]—harm to officers and destruction of evidence—are present

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4 *United States v. Robinson*, 414 U.S. 218 (1973) (concluding that, following a custodial arrest, the warrantless search of defendant's person, the inspection of a crumpled cigarette package found on defendant's person, and the seizure of heroin capsules found in the package were permissible under the Fourth Amendment).

5 *Chimel v. California*, 395 U.S. 752, 763 (1969) (holding that a search incident to an arrest may only include "the arrestee's person and the area 'within his immediate control'–construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence"), *abrogated by Arizona v. Gant*, 556 U.S. 332 (2009) (concluding search of defendant's vehicle, while defendant was handcuffed and locked in the back of a patrol car following an arrest for driving with a suspended license, did not fall within the search incident to arrest exception to the Fourth Amendment's warrant requirement as the safety and evidentiary justifications underlying *Chimel*'s reaching-distance rule were not present).

> in all custodial arrests. There are no comparable risks when the search is of digital data. In addition, *Robinson* regarded any privacy interests retained by an individual after arrest as significantly diminished by the fact of the arrest itself. Cell phones, however, place vast quantities of personal information literally in the hands of individuals. A search of the information on a cell phone bears little resemblance to the type of brief physical search considered in *Robinson*.
>
> We therefore decline to extend *Robinson* to searches of data on cell phones, and *hold instead that officers must generally secure a warrant before conducting such a search*.

Id. at 2484–85 (emphasis added).

Although the Court issued this categorical rule, it noted that "other case-specific exceptions," primarily the exigent circumstances exception, "may still justify a warrantless search of a particular phone." *Id*. at 2494. The Court explained, "[t]he critical point is that, unlike the search incident to arrest exception, the exigent circumstances exception requires a court to examine whether an emergency justified a warrantless search in each particular case." *Id*.

In my view, the majority fails to appreciate the full import of the *Riley* decision. While the majority discusses *Riley*, it concludes that "*Riley* does not alter the standard abandonment analysis." By narrowly construing the holding, the majority finds "the unique character of cell phones described in *Riley* is one factor a trial court should consider when determining whether the owner has relinquished his expectation of privacy."

In contrast to the majority, I believe *Riley* creates a categorical rule that, absent exigent circumstances, law enforcement must procure a search warrant before searching the data contents of a cell phone. Even though the decision in *Riley* arose out of a search incident to an arrest, I discern no reason why the Supreme Court's rationale is not equally applicable with respect to the abandonment exception to the Fourth Amendment. I believe the defendant's expectation of privacy in the digital contents of a cell phone remains the same in either context.

As one legal scholar explained:

> the logic behind the Supreme Court's need to protect cell phones during arrests applies just as convincingly to cell phones left behind by their

> users. Categorically, the Supreme Court clearly identified that cell phones "implicate privacy concerns far beyond those implicated by the search" of any other nondigital physical item or container because of cell phones' immense storage capacity and variety of detailed information. The same invasion of privacy occurs during a warrantless search of a cell phone, regardless of whether that phone is found during an arrest or left behind by its owner. In light of the modern developments of personal technological devices and the Court's analysis in *Riley*, courts should develop a carve-out for cell phones from the abandonment exception to the Fourth Amendment and require police officers to obtain a search warrant before searching cell phones left behind by their owners.

Abigail Hoverman, Note, *Riley and Abandonment: Expanding Fourth Amendment Protection of Cell Phones*, 111 Nw. U. L. Rev. 517, 543 (2017) (footnote omitted).

I agree with this assessment and believe that any interpretation limiting the holding in *Riley* effectively negates its precedential value. *See State v. K.C.*, 207 So. 3d 951, 956 (Fla. Dist. Ct. App. 2016) (analyzing *Riley* and holding that "a categorical rule permitting warrantless searches of abandoned cell phones, the contents of which are password protected, is . . . unconstitutional (relying on *Brown*, 414 S.C. at 32, 776 S.E.2d at 927 (Konduros, J., dissenting) and *State v. Samalia*, 375 P.3d 1082, 1091-96 (Wash. 2016) (*en banc*) (Yu, J., dissenting))).

However, even accepting the majority's narrow interpretation of *Riley*, I would find the State failed to establish the abandonment exception to the Fourth Amendment warrant requirement.

As the majority recognizes, Brown did not voluntarily discard his cell phone. Brown also placed a passcode on his cell phone to protect his personal information from unauthorized access. *See K.C.*, 207 So. 3d at 955 (concluding that contents of defendant's cell phone, which was left in a stolen vehicle, were still protected by a password given "the password protection that most cell phone users place on their devices is designed specifically to prevent unauthorized access to the vast store of personal information which a cell phone can hold when the phone is out of the owner's possession"). Brown never relinquished this passcode.

Further, unlike the majority, I believe there is evidence that Brown attempted to locate his phone. Notably, the victim was drawn to the bedroom by the sound of the ringing cell phone. During his testimony, the victim stated that the phone rang

"over and over and over." The cell phone records reflect that these calls and text messages were initiated by individuals known to Brown as they were identified in the contact list stored on his cell phone. The cell phone records also reflect that the phone received calls and text messages from the evening of December 22, 2011, until at least January 3, 2012. Without evidence to the contrary, one can only infer that Brown initiated these contacts in order to find his cell phone. Additionally, on January 22, 2012, Brown contacted the cell phone service provider to discontinue service on the cell phone. By discontinuing cell phone service, Brown deactivated the lost cell phone to prevent the use of and access to the phone. Also, when questioned by law enforcement, Brown never disclaimed ownership of the cell phone.

In my view, these objective facts demonstrate Brown's intent to retain his expectation of privacy in the contents of his cell phone. *See* 79 C.J.S. *Searches* § 43, at 70 (2017) (noting that a court, when determining whether property has been abandoned in the context of search and seizure analysis, must look at the "totality of the circumstances, paying particular attention to explicit denials of ownership and to any physical relinquishment of the property"). Because there were no exigent circumstances presented, I would find law enforcement was required to obtain a warrant prior to the search of Brown's cell phone.

This decision in no way limits the ability of law enforcement to access the data contents of a cell phone that is unintentionally discarded near or at the scene of a crime. Rather, as explained by Chief Justice Roberts in *Riley*, it "is not that the information on a cell phone is immune from search; it is instead that a warrant is generally required before such a search, even when a cell phone is seized incident to arrest." *Riley*, 134 S. Ct. at 2493.

Finally, I believe my conclusion effectuates the intent of *Riley*, but, even more importantly, ensures the heightened level of protection afforded by the express right to privacy found in the South Carolina Constitution. *See* S.C. Const. art. I, § 10 ("The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated . . . ."); *State v. Weaver*, 374 S.C. 313, 322, 649 S.E.2d 479, 483 (2007) ("By articulating a specific prohibition against 'unreasonable invasions of privacy,' the people of South Carolina have indicated that searches and seizures that do not offend the federal Constitution may still offend the South Carolina Constitution. Accordingly, the South Carolina Constitution favors an interpretation offering a higher level of privacy protection than the Fourth Amendment." (citation omitted)).

Based on the foregoing, I would find the trial court erred in denying Brown's motion to suppress as law enforcement's warrantless search violated the Fourth Amendment. Accordingly, I would reverse the decision of the Court of Appeals.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

David Wilkins Ross, Appellant.

Appellate Case No. 2016-000738

Appeal from Greenville County
Robin B. Stilwell, Circuit Court Judge

Opinion No. 27815
Heard March 6, 2018 – Filed June 13, 2018

REVERSED AND REMANDED

Appellate Defender LaNelle Cantey DuRant, of Columbia, for Appellant.

Matthew C. Buchanan, South Carolina Department of Probation, Parole and Pardon Services, of Columbia, for Respondent.

JUSTICE FEW: David Wilkins Ross pled guilty in 1979 to lewd act upon a child. Thirty-two years later, he was convicted in magistrate's court of misdemeanor failure to register as a sex offender. Ross argues the automatic imposition of lifetime electronic monitoring required by subsection 23-3-540(E) of the South Carolina Code (Supp. 2017) as a result of his failure to register is an unreasonable search under the Fourth Amendment. Addressing only this particular subsection of 23-3-540, we agree. We reverse the circuit court's order automatically imposing electronic monitoring, and remand for an individualized inquiry into whether the

imposition of monitoring in Ross's circumstances is reasonable under the Fourth Amendment.

I. Facts and Procedural History

When Ross pled guilty to lewd act upon a child in 1979, the trial court—the late Honorable Frank Eppes—sentenced Ross to six years in prison, but suspended all of the active prison time upon Ross's successful service of five years of probation. Less than two years later, Judge Eppes revoked Ross's probation for being convicted of alcohol-related offenses in municipal court. His conviction for lewd act—which is now reclassified as criminal sexual conduct (CSC) with a minor in the third degree[1]—is the only sexual offense of which Ross has been convicted.

In 1994, our General Assembly enacted the Sex Offender Registry Act. *See* S.C. Code Ann. §§ 23-3-400 to -555 (2007 & Supp. 2017). Subsection 23-3-430(A) (2007) provides, "Any person, regardless of age, residing in the State of South Carolina who in this State . . . pled guilty . . . to an offense described below, . . . shall be required to register" as a sex offender. Subsection 23-3-430(C)(6) includes "criminal sexual conduct with minors, third degree" as an offense requiring registration. "A person required to register pursuant to this article is required to register biannually for life." § 23-3-460(A) (Supp. 2017).

Ross was convicted in 2011 in magistrate court for failing to register. *See* § 23-3-470(A) (Supp. 2017) ("If an offender fails to register . . . , he must be punished as provided in subsection (B)."); § 23-3-470(B)(1) ("A person convicted for a first offense is guilty of a misdemeanor . . . ."). The details of Ross's failure to comply with subsection 23-3-470(A) are not in the record.

Under subsection 23-3-540(E), the automatic, mandatory consequence of Ross's failure to register is lifetime electronic monitoring. In particular, subsection 23-3-540(E) provides,

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[1] In 1979, the crime of lewd act upon a child was codified in section 16-15-140 of the South Carolina Code (1976) (repealed 2012). CSC with a minor in the third degree is codified in subsection 16-3-655(C) of the South Carolina Code (2015).

> A person who is required to register pursuant to this article for committing . . . criminal sexual conduct with a minor in the third degree, . . . and who violates a provision of this article, must be ordered by the court to be monitored by the Department of Probation, Parole and Pardon Services with an active electronic monitoring device.

To enforce this requirement, the Department brought an action in circuit court seeking an order to place Ross on electronic monitoring. At the hearing before the circuit court, Ross argued automatic, mandatory electronic monitoring pursuant to subsection 23-3-540(E) is an unconstitutional search under the Fourth Amendment. Ross argued the "must be ordered" language in subsection 23-3-540(E) prohibits the court from considering his unique circumstances, which in turn renders the required electronic monitoring unreasonable. *See Samson v. California*, 547 U.S. 843, 848, 126 S. Ct. 2193, 2197, 165 L. Ed. 2d 250, 256 (2006) (stating the Fourth Amendment requires courts to "'examin[e] the totality of the circumstances' to determine whether a search is reasonable" (alteration in original) (quoting *United States v. Knights*, 534 U.S. 112, 118, 122 S. Ct. 587, 591, 151 L. Ed. 2d 497, 505 (2001))). To support his argument, Ross presented expert testimony from Dr. William Burke, whom the circuit court qualified as an expert in "psychosexual evaluation and treatment." Dr. Burke testified he evaluated Ross and determined he is in the "lowest category of risk" of reoffending.

The circuit court disagreed with Ross and found that an order placing Ross on electronic monitoring was automatic and mandatory under subsection 23-3-540(E). Ross appealed to the court of appeals. We certified the case for our review pursuant to Rule 204(b) of the South Carolina Appellate Court Rules.

II. Fourth Amendment

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST. amend. IV; *see also* S.C. CONST. art. I, § 10. In *Grady v. North Carolina*, 575 U.S. ___, 135 S. Ct. 1368, 191 L. Ed. 2d 459 (2015), the Supreme Court of the United States clarified that electronic monitoring of sex offenders is a "search" under the Fourth Amendment. 575 U.S. at ___, 135 S. Ct. at 1370, 191 L. Ed. 2d at 461-62. The Court held "a State . . . conducts a search when it attaches a device to a

person's body, without consent, for the purpose of tracking that individual's movements." 575 U.S. at ___, 135 S. Ct. at 1370, 191 L. Ed. 2d at 461-62. For any search, "The ultimate standard set forth in the Fourth Amendment is reasonableness." *Cady v. Dombrowski*, 413 U.S. 433, 439, 93 S. Ct. 2523, 2527, 37 L. Ed. 2d 706, 713 (1973). As the Court stated in *Grady*, "The Fourth Amendment prohibits only *unreasonable* searches. The reasonableness of a search depends on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations." 575 U.S. at ___, 135 S. Ct. at 1371, 191 L. Ed. 2d at 462.

A. Electronic Monitoring under the Sex Offender Registry

Section 23-3-400 (Supp. 2017) sets forth the purpose of the sex offender registry: "to provide for the public health, welfare, and safety of its citizens" and "provide law enforcement with the tools needed in investigating criminal offenses." As part of the sex offender registry, the General Assembly created a comprehensive scheme for electronic monitoring of certain sex offenders through the use of "an active electronic monitoring device." There are three different categories of events that trigger the electronic monitoring requirement. Persons newly convicted of sex offenses are governed by subsections 23-3-540(A) and (B);[2] persons who violate probation, parole, or community supervision are governed by subsections 23-3-540(C) and (D);[3] and persons who violate the provisions of the registry itself are governed by subsections 23-3-540(E) and (F). When the underlying crime is CSC with a minor in the first or third degree, the electronic monitoring requirement is automatic and mandatory. § 23-3-540(A), (C), and (E). For all other offenses,[4] the

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[2] *See, e.g.*, *In Interest of Justin B.*, 419 S.C. 575, 580, 799 S.E.2d 675, 677 (2017) (observing that upon conviction for CSC with a minor in the first degree, the defendant "must . . . wear an electronic monitoring device" pursuant to subsection 23-3-540(A)).

[3] *See, e.g.*, *State v. Nation*, 408 S.C. 474, 478, 759 S.E.2d 428, 430 (2014) (defendant who violated probation for CSC with a minor in the third degree placed on electronic monitoring pursuant to subsection 23-3-540(C)).

[4] The other sexual offenses are listed in subsection 23-3-540(G).

court "may" impose the electronic monitoring requirement. § 23-3-540(B), (D), and (F). The "active electronic monitoring device" required by section 23-3-540 uses "a web-based computer system that actively monitors and records a person's location at least once every minute twenty-four hours a day and that timely records and reports the person's presence near or within a prohibited area or the person's departure from a specified geographic location." § 23-3-540(P).

B. The Reasonableness of the Search

The State argues the automatic, mandatory requirement of electronic monitoring—triggered by Ross's failure to register in 2011—is reasonable under the Fourth Amendment, and "the trial court in this case did not need to conduct an individual assessment of reasonableness to order [Ross] to be electronically monitored." The State relies primarily on this Court's decision in *State v. Dykes*, 403 S.C. 499, 744 S.E.2d 505 (2013), in which we considered a Fourth Amendment challenge to automatic, mandatory electronic monitoring triggered pursuant to a different subsection—23-3-540(C)—by the offender's violation of her probation. 403 S.C. at 510 n.9, 744 S.E.2d at 511 n.9. While we upheld the requirement of electronic monitoring in *Dykes*, the situation we faced there was vastly different from the situation here. First, the primary legal challenge to electronic monitoring in *Dykes* was based on due process. 403 S.C. at 505, 744 S.E.2d at 508. We addressed the Fourth Amendment challenge only in a footnote, and only in the nature of a "memorandum" opinion pursuant to Rule 220 of the South Carolina Appellate Court Rules. 403 S.C. at 510 n.9, 744 S.E.2d at 511 n.9. Rule 220(a) specifically provides "memorandum opinions . . . shall be of no precedential value."[5]

[5] In fairness to the circuit court here, we have previously indicated *Dykes* is precedential. *See Nation*, 408 S.C. at 479, 759 S.E.2d at 430-31 (addressing a similar challenge based on "the Fourth Amendment's prohibition on unreasonable searches and seizures" and stating we "explicitly rejected" the argument in *Dykes*, and affirming imposition of automatic, mandatory electronic monitoring pursuant to subsection 23-3-540(C)). We now clarify that rulings by our appellate courts in the nature of a memorandum opinion pursuant to Rule 220(b)(1), even when made within the body of a published opinion that is otherwise binding precedent, "shall be of no precedential value."

Second—and more importantly—the factual and legal context of our decision in *Dykes* was completely different. After the defendant pled guilty to lewd act upon a child, the court sentenced her to fifteen years in prison, but partially suspended the fifteen year term upon the service of three years of active prison time followed by five years of probation. 403 S.C. at 503, 744 S.E.2d at 507. The question of automatic, mandatory electronic monitoring arose after the defendant served the active portion of her prison sentence, and then "violated her probation in multiple respects," which triggered electronic monitoring under subsection 23-3-540(C). *Id.* The fact the defendant was on probation when the court imposed electronic monitoring is important. Probation is considered "an act of grace" given to a person who is still serving the sentence of the court, and "the revocation of this privilege of probation is more in the nature of an extension of the original proceedings." *State v. Franks*, 276 S.C. 636, 638, 281 S.E.2d 227, 228 (1981). In addition, section 24-21-410 of the South Carolina Code (Supp. 2017) provides, "Probation is a form of clemency," and, "Before a defendant may be placed on probation, he must agree in writing to be subject to a search or seizure, without a search warrant, based on reasonable suspicions, of the defendant's person." In *Knights*, the Supreme Court of the United States found a similar condition of probation "salient" in reaching its conclusion that a warrantless search of a probationer was reasonable. 534 U.S. at 118, 122 S. Ct. at 591, 151 L. Ed. 2d at 505; *see also Samson*, 547 U.S. at 857, 126 S. Ct. at 2202, 165 L. Ed. 2d at 262 (finding "the Fourth Amendment does not prohibit a police officer from conducting a suspicionless search of a parolee").

Ross, on the other hand, was not on probation, and thus no longer under the jurisdiction of the sentencing court when he was ordered to be placed on electronic monitoring for his failure to register. In fact, Ross was ordered to be placed on electronic monitoring thirty-six years after his conviction, and at least twenty-nine years after he completed serving his punishment for that crime.[6] Also, Ross has not been convicted of any sexual offense since 1979.

The situation in *Dykes* is also different because of the consistent circumstances the court will face under subsection 23-3-540(C) compared to the widely varying

[6] Ross was sentenced to probation in 1979 and began serving a six-year probation revocation sentence in late 1980. The circuit court entered its order requiring lifetime electronic monitoring on November 23, 2015.

circumstances it will face under subsection 23-3-540(E). In every case in which electronic monitoring is imposed pursuant to subsection 23-3-540(C), the defendant will have been on conditional release from the original sentence through probation, parole, or community supervision. However, the circumstances leading up to the imposition of electronic monitoring pursuant to subsection 23-3-540(E) will vary widely on a case-by-case basis.

To illustrate the likelihood that a relatively innocent technical failure to register may lead to automatic, mandatory electronic monitoring pursuant to subsection 23-3-540(E), we will analyze what the law specifically requires for the registration itself. The analysis actually begins with the federal Sex Offender Registration and Notification Act (SORNA). *See* 34 U.S.C.S. §§ 20901 to 20991 (LexisNexis 2018).[7] Pursuant to subsection 20912(a), "Each jurisdiction shall maintain a jurisdiction-wide sex offender registry conforming to the requirements of this subchapter." South Carolina enacted the Sex Offender Registry Act. Pursuant to section 23-3-420, the State Law Enforcement Division (SLED) has "promulgate[d] regulations to implement the provisions" of the federal and state registration requirements, and pursuant to section 23-3-530, SLED has developed a "protocol manual" for registration. *See* S.C. Code Ann. Regs. 73-200 to -270 (2012).

SORNA, our Sex Offender Registry Act, and SLED regulations together impose appropriately technical requirements an offender must meet in completing his registration to accomplish the purposes of the registry. For example, subsection 20913(c) of SORNA requires,

> A sex offender shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction involved pursuant to subsection (a) and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry.

[7] SORNA was previously codified in 42 U.S.C. §§ 16901 to 16991 (2012 & Supp. 2016), but was re-codified in Title 34 in September 2017.

Similarly, section 23-3-460 of the Sex Offender Registry Act requires an offender to notify his local sheriff of any such changes "within three business days." *See* § 23-3-460(C) (offender who moves residences within the same county must notify sheriff of the change of address within three business days); *id.* (offender who acquires real property, accepts employment, or becomes affiliated with any school must register within three business days); § 23-3-460(D) (offender who moves to a new county must register within three business days); § 23-3-460(E) (offender who is affiliated with any school must notify sheriff of a change of status within three business days); § 23-3-460(F) (offender who moves outside of South Carolina must notify sheriff of the change of address within three business days); § 23-3-460(G) (offender who moves to South Carolina and establishes a residence, acquires real property, accepts employment, or becomes affiliated with any school must register within three business days).

Section 23-3-450 requires "the offender must provide information as prescribed by SLED," and SLED regulation 73-260 requires twenty-three separate items of information. We can readily imagine a scenario in which an offender commits a purely technical violation of section 23-3-450 or section 23-3-460. Such a violation would nevertheless subject him to conviction under subsection 23-3-470(A), and if he is convicted, require electronic monitoring under subsection 23-3-540(E). Such a scenario[8] would appear to be a significantly different indicator of the likelihood of reoffending than a non-technical failure, such as an intentional refusal to register by an offender who moves to a neighborhood heavily populated by children. *See Dykes*, 403 S.C. at 507, 744 S.E.2d at 510 (stating "a likelihood of re-offending lies at the core" of our sex offender registry).

We believe this discussion of the widely varying circumstances that may lead to automatic, mandatory electronic monitoring imposed for failure to register demands an individualized inquiry into the reasonableness of the search in every case. The

[8] For example, the term "business days" in subsection 20913(c) and section 23-3-460 is not defined, and neither addresses whether a change of "employment" occurs on the date of hire or the date work begins. While we are hopeful and confident that local registration officials endeavor to avoid catching an offender in a purely technical violation, an offender's innocent miscalculation of either of these variables could potentially lead to automatic, mandatory electronic monitoring.

State argues, however, that the statute itself reflects an individualized analysis in the General Assembly's decision to separate out the various triggering events and different underlying crimes in the subsections of 23-3-540. This is a compelling argument, as the Supreme Court in *Grady* specifically referred to "the ultimate question of the *program's* constitutionality" and noted, "The North Carolina courts did not examine whether the State's monitoring *program* is reasonable." 575 U.S. at ___, 135 S. Ct. at 1371, 191 L. Ed. 2d at 463 (emphasis added). At first glance, the Court's focus on the "program"—rather than the circumstances of the individual search—seems to support the State's argument. However, the *Grady* Court also stated, "The reasonableness of a search depends on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations." 575 U.S. at ___, 135 S. Ct. at 1371, 191 L. Ed. 2d at 462.

This statement draws us to the differences between subsection 23-3-540(E) and the North Carolina law under which Grady was subjected to electronic monitoring. Grady was classified as a "recidivist," *see* 575 U.S. at ___, 135 S. Ct. at 1369, 191 L. Ed. 2d at 460, a classification that does not specifically exist in South Carolina, but closely resembles our subsections 23-3-540(A) and (C). There is no provision under the North Carolina law for automatically imposing mandatory electronic monitoring under the circumstances for which subsection 23-3-540(E) requires it. *See* N.C. Gen. Stat. Ann. § 14-208.11 (2017) (providing a person who "willfully" fails to register is guilty of a felony); *see also* N.C. Gen. Stat. Ann. § 14-208.40 (2017) (listing three categories of persons who are subject to electronic monitoring, none of which includes persons who fail to register). Given the wide variety of circumstances that may lead to the requirement of electronic monitoring under subsection 23-3-540(E), we find a review of only the program itself is not an adequate review for reasonableness under the Fourth Amendment.

Turning to Ross's arguments, he contends the mandatory language in subsection 23-3-540(E)—"must be ordered by the court"—renders the subsection itself unconstitutional, thus prohibiting even the individualized consideration of reasonableness in his case. We disagree. Such an interpretation would be contrary to the General Assembly's expression of intent section 23-3-400 that "these provisions are not intended to violate the guaranteed constitutional rights of those who have violated our nation's laws." In light of this clear statement of intent, we find it necessary to overlay the protections of the Fourth Amendment onto the

provisions of subsection 23-3-540(E). *See Joytime Distributors & Amusement Co. v. State*, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999) ("All statutes are presumed constitutional and will, if possible, be construed so as to render them valid.").

Therefore, we find electronic monitoring under subsection 23-3-540(E) "must be ordered by the court" only after the court finds electronic monitoring would not be an unreasonable search based on the totality of the circumstances presented in an individual case. Further guidance on what is and is not reasonable must necessarily wait until we are presented with a full factual record.

III. Conclusion

We emphasize that our decision in this case is precedential only in cases in which the State requests the imposition of electronic monitoring pursuant to subsection 23-3-540(E). The circuit court's order imposing electronic monitoring on Ross is **REVERSED** and the case is **REMANDED** to the circuit court for further proceedings consistent with this opinion.

KITTREDGE, HEARN and JAMES, JJ., concur. BEATTY, C.J., concurring in result only.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center, d/b/a Fort Mill Medical Center, Respondent,

v.

South Carolina Department of Health and Environmental Control and The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center-Fort Mill, Respondents,

Of whom The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center-Fort Mill, is the Appellant.

Appellate Case No. 2015-000056

ON REMAND FROM THE SUPREME COURT

Appeal From The Administrative Law Court
S. Phillip Lenski, Administrative Law Judge

Opinion No. 5568
Submitted May 14, 2018 – Filed June 6, 2018

AFFIRMED

Douglas M. Muller, Trudy Hartzog Robertson, and E. Brandon Gaskins, of Moore & Van Allen PLLC, of Charleston, for Appellant.

Stuart M. Andrews, Jr. and Daniel J. Westbrook, of Nelson Mullins Riley & Scarborough LLP, of Columbia, for Respondent Amisub of South Carolina.

Ashley Caroline Biggers and Vito Michael Wicevic, of Columbia, for Respondent South Carolina Department of Health and Environmental Control.

GEATHERS, J.: Appellant Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center-Fort Mill (Carolinas), challenges a decision of the South Carolina Administrative Law Court (ALC) ordering Respondent South Carolina Department of Health and Environmental Control (DHEC) to issue a Certificate of Need (CON) to Respondent Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center, d/b/a Fort Mill Medical Center (Piedmont). Carolinas argues the purpose and effect of the ALC's application of the CON Act, the Project Review Criteria, and the 2004-2005 State Health Plan is to protect Piedmont from out-of-state competition, and, therefore, such an application violates the Dormant Commerce Clause.[1] We affirm.

FACTS/PROCEDURAL HISTORY

Piedmont Medical Center in Rock Hill is the sole hospital in York County. It provides standard community hospital services as well as specialized services such as open heart surgery, neurosurgery, neonatal intensive care, and behavioral health. Amisub of South Carolina, Inc., which is a subsidiary of Tenet Healthcare

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[1] This court's previous opinion in this appeal addressed Carolinas' challenge to the ALC's approval of Piedmont's proposal to transfer beds from its existing hospital in Rock Hill to its proposed hospital in Fort Mill and Carolinas' argument that ALC's application of certain Project Review Criteria was arbitrary and capricious. *Amisub of South Carolina, Inc. v. S.C. Dep't of Health & Envtl. Control*, Op. No. 2017-UP-013 (S.C. Ct. App. filed January 11, 2017). Carolinas did not challenge our disposition of those two issues in its Petition for Writ of Certiorari to the South Carolina Supreme Court. Rather, Carolinas challenged our conclusion that its Dormant Commerce Clause argument was unpreserved for review. The supreme court agreed with Carolinas, reversed our conclusion, and remanded the case to this court for a ruling on the merits of the issue. *Amisub of South Carolina, Inc. v. S.C. Dep't of Health & Envtl. Control*, Op. No. 27792 (S.C. Sup. Ct. filed April 25, 2018) (Shearouse Adv. Sh. No. 17 at 33).

Corporation, operates Piedmont Medical Center. Tenet Healthcare Corporation is headquartered in Dallas, Texas, and owns forty-nine hospitals in ten states.

Carolinas, which is headquartered in Charlotte, North Carolina, owns multiple hospitals in North Carolina with a large network of employed physicians, the Carolinas Physician Network (CPN), many of whom have practices in York County. As of the date of the final contested case hearing, Carolinas employed between seventy and ninety York County physicians. Additionally, Carolinas owns and operates Roper Hospital in downtown Charleston.

In 2005, Piedmont, Carolinas, Presbyterian Healthcare System (Presbyterian), and Hospital Partners of America, Inc. submitted applications to DHEC for a CON to build a sixty-four-bed hospital near Fort Mill based on the 2004-2005 State Health Plan's identification of a need for sixty-four additional acute care hospital beds in York County. Subsequently, Piedmont withdrew its application and submitted a new application for a one-hundred-bed hospital, which would include thirty-six beds transferred from Piedmont's Rock Hill facility to its proposed Fort Mill facility. In 2006, DHEC approved Piedmont's new application and denied the other three applications. Carolinas and Presbyterian filed separate requests for a contested case hearing before the ALC, which took place in September 2009.

The ALC concluded DHEC misinterpreted the 2004-2005 State Health Plan to allow only existing providers to obtain a CON. The ALC remanded the case to DHEC for a determination of which applicant most fully complied with the CON Act, the State Health Plan, Project Review Criteria,[2] and applicable DHEC

[2] There are thirty-three criteria for DHEC's review of a project under the CON program. S.C. Code Ann. Regs. 61-15 § 802 (2011) (amended 2012). Throughout this opinion, we cite to the version of a statute or regulation that was in effect when the parties submitted their respective CON applications.

regulations.[3] By October 2010,[4] the three remaining applicants submitted to DHEC additional information to supplement their respective applications.

In September 2011, DHEC granted Carolinas' application and denied the applications of Piedmont and Presbyterian. Piedmont and Presbyterian submitted their respective requests for a contested case hearing before the ALC, and the ALC consolidated the cases. Presbyterian later withdrew its request, and the ALC dismissed Presbyterian as a party. The ALC ultimately ordered DHEC to award the CON to Piedmont. Carolinas filed a motion for reconsideration pursuant to Rule 59(e), SCRCP, and the ALC issued an Amended Final Order denying the motion. This appeal followed.

STANDARD OF REVIEW

The Administrative Procedures Act governs the standard of review on appeal from a decision of the ALC, allowing this court to

> reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) affected by other error of law; (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

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[3] When DHEC is considering competing applications, it must award a CON on the basis of which applicant most fully complies with the CON Act, the State Health Plan, Project Review Criteria, and applicable DHEC regulations. S.C. Code Ann. § 44-7-210(C) (2002) (amended 2010). However, if neither application complies with these requirements, DHEC may not issue a CON. *Id.* Further, DHEC may refuse to issue a CON based on identified project review criteria and other regulations even if an application complies with the State Health Plan. *Id.*

[4] The remaining three applicants appealed the ALC's remand order; however, our supreme court dismissed the appeal because the remand order was interlocutory. *Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Envtl. Control*, 387 S.C. 265, 267, 692 S.E.2d 894, 895 (2010).

S.C. Code Ann. § 1-23-380(5) (Supp. 2017).

LAW/ANALYSIS

Carolinas does not challenge the constitutionality of the CON Act itself. Further, Carolinas does not challenge the constitutionality of the 2004-2005 State Health Plan or the Project Review Criteria. Rather, Carolinas argues the purpose and effect of the ALC's application of the CON Act, the 2004-2005 State Health Plan, and the Project Review Criteria is to protect Piedmont from out-of-state competition, and, therefore, such an application violates the Dormant Commerce Clause. Carolinas essentially challenges the ALC's conclusions of law concerning adverse impact and outmigration.

On this record,[5] we hold the ALC properly applied the provisions of the CON Act, the 2004-2005 State Health Plan, and the Project Review Criteria in considering the needs of residents in *all* areas of York County and, therefore, did not violate the Dormant Commerce Clause. The ALC placed appropriate significance on adverse impact, as required by the Project Review Criteria, and outmigration, as we explain herein.

We will address each criterion Carolinas references in turn. But first, we will provide a primer on the general principles surrounding the Dormant Commerce Clause and the general provisions of South Carolina's CON law.

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[5] Carolinas has not challenged any of the ALC's findings of fact as not being supported by substantial evidence. *See Spartanburg Reg'l Med. Ctr. v. Oncology & Hematology Assocs. of S.C., LLC*, 387 S.C. 79, 89, 690 S.E.2d 783, 788 (2010) ("On appeal from a contested CON case, the reviewing court 'may not substitute its judgment for the judgment of the [finder of fact] as to the weight of the evidence on questions of fact.'" (quoting § 1-23-380(5))); *id.* ("The ALC presides over the hearing of a contested case from DHEC's decision on a CON application and serves as the finder of fact."); *Bursey v. S.C. Dep't of Health & Envtl. Control*, 360 S.C. 135, 144, 600 S.E.2d 80, 85 (Ct. App. 2004) (holding that under the "'substantial evidence' standard of review, the factual findings of the [administrative] agency are presumed correct and will be set aside only if unsupported by substantial evidence"); *id.* ("Substantial evidence is not a mere scintilla of evidence, nor evidence viewed blindly from one side, but is evidence [that], when considering the record as a whole, would allow reasonable minds to reach the conclusion that the agency reached in order to justify its action.").

Dormant Commerce Clause

The Commerce Clause of the United States Constitution, U.S. Const. art. I, § 8, cl. 3, grants Congress the power to regulate commerce among the several states. "However, 'the Commerce Clause is more than an affirmative grant of power; it has a negative sweep as well.'" *Travelscape, LLC v. S.C. Dep't of Revenue*, 391 S.C. 89, 103–04, 705 S.E.2d 28, 36 (2011) (quoting *Quill Corp. v. North Dakota*, 504 U.S. 298, 309 (1992)). "Even in the absence of Congressional regulation, the negative implications of the Commerce Clause, often referred to as the Dormant Commerce Clause, prohibit state action that unduly burdens interstate commerce." *Id.* at 104, 705 S.E.2d at 36 (citing *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 287 (1997)). "The 'common thread' among those cases in which the [United States Supreme] Court has found a [D]ormant Commerce Clause violation is that 'the State interfered with the natural functioning of the interstate market either through prohibition or through burdensome regulation.'" *McBurney v. Young*, 569 U.S. 221, 235 (2013) (quoting *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 806 (1976)). Nonetheless, the Commerce Clause

> does not elevate free trade above all other values. As long as a State does not *needlessly* obstruct interstate trade or attempt to "place itself in a position of economic isolation," it retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources.

Maine v. Taylor, 477 U.S. 131, 151 (1986) (emphasis added) (citation omitted) (quoting *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935)).

> We apply a two-tiered analysis to state actions allegedly violating the [D]ormant Commerce Clause. The first tier, "a virtually *per se* rule of invalidity," applies [when] a state law discriminates facially, in its practical effect, or in its purpose. *Wyoming v. Oklahoma*, 502 U.S. 437, 454–55 . . . (1992) (quoting *Philadelphia* [*v. New Jersey*], 437 U.S. [617,] 624 [(1978)]). In order for a law to survive such scrutiny, the state must prove that the discriminatory law "is demonstrably justified by a valid factor unrelated to economic protectionism," *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 274 . . . (1988), and that there are

> no "nondiscriminatory alternatives adequate to preserve the local interests at stake," [*Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 342 (1992)] (quoting *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 353 . . . (1977)). . . .
>
> The second tier applies if a statute regulates evenhandedly and only indirectly affects interstate commerce. In that case, the law is valid unless the burdens on commerce are "clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 . . . (1970).

Envtl. Tech. Council v. Sierra Club, 98 F.3d 774, 785 (4th Cir. 1996).

The first tier of analysis is also referred to as "strict scrutiny analysis[.]" *Colon Health Ctrs. of Am., LLC v. Hazel*, 733 F.3d 535, 543 (4th Cir. 2013) (quoting *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 334 (4th Cir. 2001)). "[A] 'less strict scrutiny' applies under the undue burden tier." *Id.* at 545 (quoting *Yamaha Motor Corp. v. Jim's Motorcycle, Inc.*, 401 F.3d 560, 567 (4th Cir. 2005)). "The putative benefits of a challenged law are evaluated under the rational basis test, . . . though 'speculative' benefits will not pass muster[.]" *Id.* (quoting *Medigen of Ky., Inc. v. Pub. Serv. Comm'n*, 985 F.2d 164, 167 (4th Cir. 1993)).

"[A] state or local law discriminates by restricting market participation or curtailing the movement of articles of interstate commerce based on whether a market participant or article of commerce is in-state versus out-of-state, or local versus non-local." *Florida Transp. Servs., Inc. v. Miami-Dade Cty.*, 703 F.3d 1230, 1244 (11th Cir. 2012). Further, "[i]n conducting the discrimination inquiry, a court should focus on discrimination against *interstate commerce*—not merely discrimination against the specific parties before it." *Colon Health*, 733 F.3d at 543.

> Focusing exclusively on discrimination against individual firms . . . improperly narrows the scope of the judicial inquiry and has the baneful effect of precluding certain meritorious claims. For while the burden on a single firm may have but a negligible impact on interstate commerce, the effect of the law as a whole and in the aggregate may be substantial.

Id.

In any event, "[t]he Supreme Court has consistently held that a state's power to regulate commerce is at its zenith in areas traditionally of local concern." *Kleenwell Biohazard Waste & Gen. Ecology Consultants, Inc. v. Nelson*, 48 F.3d 391, 398 (9th Cir. 1995) (citing *Hunt*, 432 U.S. at 350). "In addition, regulations that touch on safety are those that the Court has been most reluctant to invalidate." *Id.* (citing *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 443 (1978)). While "a bald assertion that laws are directed toward legitimate health and safety concerns is not enough to withstand a [D]ormant Commerce Clause challenge, . . . [courts] must give some deference to states' decisions regarding health and safety." *Nat'l Ass'n of Optometrists & Opticians LensCrafters, Inc. v. Brown*, 567 F.3d 521, 526 (9th Cir. 2009) (citing *Gen. Motors Corp.*, 519 U.S. at 307). In fact, those asserting a Dormant Commerce Clause violation "'bear[ ] the burden of proving that the burdens placed on interstate commerce outweigh' [a law's] local benefits." *Colon Health*, 813 F.3d 145, 157 (4th Cir. 2016) (quoting *LensCrafters, Inc. v. Robinson*, 403 F.3d 798, 805 (6th Cir. 2005)).

South Carolina CON Law

The purpose of the CON Act is to "promote cost containment, prevent unnecessary duplication of health care facilities and services, guide the establishment of health facilities and services [that] will best serve public needs, and ensure that high quality services are provided in health facilities in this [s]tate." S.C. Code Ann. § 44-7-120 (2002). To achieve these purposes, the CON Act requires (1) the issuance of a CON before undertaking a project prescribed by the CON Act, (2) the adoption of procedures and criteria for submitting a CON application and for review before issuing a CON, (3) the preparation and publication of a State Health Plan, and (4) the licensing of health care facilities. *Id.* DHEC is designated the sole state agency for control and administration of the CON program and licensing of health facilities. S.C. Code Ann. § 44-7-140 (2002). A person or health care facility must obtain a CON before, among other things, establishing a new health care facility or changing the existing bed complement of a health care facility. S.C. Code Ann. § 44-7-160 (2002) (amended 2010).

With the advice of a health planning committee, of which most of the members are appointed by the Governor, DHEC must prepare a State Health Plan for use in administering the CON program. S.C. Code Ann. § 44-7-180(A), (B) (2002) (amended 2010). The State Health Plan has designated four regions of the state for the purpose of keeping an inventory of health facilities and services.

Chapter II.A, 2004-2005 State Health Plan. Each region is further divided into service areas. *Id.* In the 2004-2005 State Health Plan, most service areas consist of individual counties, such as York County.

DHEC may not issue a CON unless an application complies with the State Health Plan, Project Review Criteria, and other regulations. S.C. Code Ann. § 44-7-210(C) (2002) (amended 2010); *see also* S.C. Code Ann. Regs. 61-15 § 801.3 (2011) (amended 2012) ("[N]o project may be approved unless it is consistent with the State Health Plan."); S.C. Code Ann. Regs. 61-15 § 802.1 (2011) (amended 2012) ("The proposal shall not be approved unless it is in compliance with the State Health Plan."). Further, there are thirty-three criteria for DHEC's review of a project. S.C. Code Ann. Regs. 61-15 § 802 (2011) (amended 2012). The criteria are grouped under the following categories:

Need for the Proposed Project (Section 802.1 through 802.4)
Economic Consideration (Section 802.5 through 802.19)
Health System Resources (Section 802.20 through 802.25)
Site Suitability (Section 802.26 through 802.30)
Special Consideration (Section 802.31 through 802.33)

S.C. Code Ann. Regs. 61-15 § 801.1 (2011). Each section of Chapter II of the State Health Plan designates the most important project review criteria for the particular type of facility or service addressed in that section. Chapter I.I, 2004-2005 State Health Plan. "The relative importance assigned to each specific criterion is established by [DHEC] depending upon the importance of the criterion applied to the specific project." § 801.2 (2011). Further, "[t]he relative importance must be consistent for competing projects." *Id.*

In the present case, DHEC established the relative importance of the Project Review Criteria for the competing CON applications, "listing the most important criteria first, as follows:

Rank 1	Compliance with the State Plan (1)
Rank 2	Community Need Documentation (2a-2e)
	Distribution (Accessibility) (3a-3g)
	Distribution (22)
Rank 3	Projected Revenues (6a, 6b)
	Projected Expenses (7)
	Net Income (9)
	Financial Feasibility (15)

	Cost Containment (16a-16c)
	Efficiency (17)
Rank 4	Record of the Applicant (13a, 13b, 13d)
	Acceptability (4a-4c)
	Adverse Effects on Other Facilities (23a, 23b)

The ALC's Application of Project Review Criteria

1. Adverse Impact

Carolinas first challenges the ALC's application of criteria 16(c), 22, and 23(a).[6] With regard to these criteria, Carolinas argues the ALC's adverse impact analysis was one-sided and, thus, discriminatory. In other words, the ALC assessed whether awarding a CON to Carolinas would have an adverse impact on Piedmont without assessing whether awarding the CON to Piedmont would have an adverse impact on Carolinas. Carolinas maintains the purpose underlying the ALC's analysis was to protect Piedmont from non-local competition and to reduce the number of South Carolinians seeking healthcare in North Carolina.

a. Criterion 16(c)

Criterion 16 is entitled "Cost Containment (Minimizing Costs)" and is grouped under the general category "Economic Consideration." §§ 801.1, 802.16. Criterion 16(c) states, "The impact of the project upon the applicant's cost to provide services and the applicant's patient charges should be reasonable. The impact of the project upon the cost and charges of *other* providers of similar services should be considered if the data are available." § 802.16 (emphasis added). Carolinas asserts (1) the ALC incorrectly included Criterion 16(c) in its adverse impact analysis and (2) the intent and effect of the ALC's application of this criterion was "to protect the local hospital's profitability from being harmed by a new market entrant."

In its conclusions of law regarding adverse impact, the ALC stated, "The most heavily disputed application of the Project Review Criteria relates to DHEC's analysis of the Project Review Criteria on adverse impact." The ALC identified Criterion 16(c) as being included in the adverse impact criteria, and explained its conclusion that Piedmont best met Criterion 16(c) as follows:

[6] §§ 802.16(c), .22, .23(a) (2011).

> The effect on Piedmont of the loss of over one thousand (1000) patients and millions of dollars a year will make it more difficult for the hospital to recoup its fixed costs. Its associated per unit cost per unit of services associated would increase. As a result, the operation of [Carolinas' proposed facility] would have an adverse effect on existing providers.

Carolinas is correct in its observation that Criterion 16(c) is not grouped together with the criteria entitled "Adverse Effects on Other Facilities," which falls under the general category of "Health System Resources." *See* S.C. Code Ann. Regs. 61-15 §§ 801.1, 802.23. However, the ALC was obviously aware of this when it recounted DHEC's establishment of the relative importance of the Project Review Criteria, which includes "Cost Containment (16a-16c)" in the group of the third-most-important criteria and "Adverse Effects on Other Facilities (23a, 23b)" in the group of the fourth-most-important criteria. Yet, when presented with the task of choosing "which applicant most fully complies with"[7] Criterion 16(c), the ALC focused on the second part of this criterion, which requires consideration of "the impact of the project upon the cost and charges of other providers of similar services." § 802.16. Here, the ALC determined Carolinas' proposed facility would have an adverse impact on the cost and charges of Piedmont's existing facility. Therefore, it was logical for the ALC to include its application of Criterion 16(c) within its discussion of adverse impact generally. Further, the protection of *existing* providers' patients from increased costs is an obvious objective of Criterion 16(c), which Carolinas does not challenge.

b. Criterion 22

Criterion 22 states, "The existing distribution of the health service(s) should be identified and the effect of the proposed project upon that distribution should be carefully considered to functionally balance the distribution to the target population." § 802.22. This criterion falls under the general category of Health System Resources. §§ 801.1, 802.22. Carolinas maintains the ALC concluded Piedmont best met Criterion 22 "because increased competition from [Carolinas' proposed facility] would negatively impact Piedmont's ability to retain its staff physicians and receive their referrals." Carolinas argues the ALC applied Criterion 22 for the purpose of "protecting an existing local hospital from competition from a non-local hospital."

[7] § 44-7-210(C).

The ALC explained its conclusion that Piedmont best met Criterion 22 as follows:

> [T]he operation of [Carolinas' proposed facility] would have an adverse effect on the distribution of services provided by existing healthcare providers to the residents of York County. Section 802.22 calls for an evaluation of the effect of the proposed facility or service not only on Piedmont but also on other healthcare providers. Letters from over forty (40) physicians to DHEC during its staff review as well as the testimony of . . . three physicians is compelling evidence that the ability of existing York County healthcare providers to serve residents of the county would be jeopardized by the operation of [Carolinas' proposed facility].

Carolinas states that despite the ALC's reference to the adverse effects on physicians, the ALC's findings of fact "demonstrate that the ALC's primary concern was the extent to which changes in the physician market arising from the establishment of [Carolinas' proposed facility] would affect Piedmont."

First, an adverse effect on Piedmont's existing facility alone would be sufficient to warrant the conclusion that Piedmont, rather than Carolinas, better meets Criterion 22 because of the specialized services the existing facility offers. In its findings of fact, the ALC stated, "In addition to standard community hospital services, Piedmont Medical Center provides specialized services not usually offered by a hospital its size, including open heart surgery, neurosurgery, cardiac catheterization, vascular surgery, neonatal intensive care, specialized women's and pediatric services, and behavioral health." Notably, Carolinas has not challenged any of the ALC's findings of fact as not being supported by substantial evidence.

Further, the ALC's findings discussing the adverse impact on Piedmont that would result from physicians shifting their patient referrals from Piedmont's existing facility to Carolinas also referenced the likely adverse impact on physicians themselves. The ALC highlighted the testimony of a cardiology physician concerning the effect of awarding the CON to Carolinas:

> Dr. Singhi recognized the challenges that would exist if [Carolinas' proposed facility] was approved that would not

> permit his practice to maintain its present status (e.g.[,] *being able to refer and admit patients to any facility* [*of*] *his choosing at which he has privileges*). . . . If the Carolina Cardiology Physicians become employed by [Carolinas], Dr. Singhi acknowledged that [Carolinas] would expect his group to comply with the CPN physician network referral policy and transfer patients from Piedmont to [Carolinas'] facilities.

(emphasis added). The ALC also discussed the testimony of a pulmonologist illustrating the impact Carolinas' proposed facility would have on not only Piedmont's existing specialty services but also specialty physicians' ability to maintain their proficiency as to certain skills due to the decline in the demand for those skills. The ALC found that the "[l]oss or paring of Piedmont's specialty programs would be detrimental to York County citizens, *especially those living in the western, more rural part of the county farther away from [Carolinas'] specialty facilities in North Carolina*." (emphasis added). Again, Carolinas has not challenged any of the ALC's findings of fact as not being supported by substantial evidence.

The ALC properly identified the "existing distribution of the health service(s)," as required by Criterion 22, by referencing Piedmont and physician providers in York County. Further, the ALC properly considered the impact Carolinas' proposed facility would have on that distribution in order "to functionally balance the distribution to the target population." The ALC implicitly recognized that, in balancing the distribution of health system resources, DHEC may not ignore the needs of citizens in the western part of York County now being served by Piedmont and physicians practicing in that area.

c. Criterion 23(a)

Criterion 23 is entitled "Adverse Effects on Other Facilities" and falls under the general category of Health System Resources. §§ 801.1, 802.23. Criterion 23(a) states, "The impact on the current and projected occupancy rates or use rates of existing facilities and services should be weighed against the increased accessibility offered by the proposed services."

Carolinas argues the ALC focused solely on the adverse financial impact that Carolinas' proposed facility would have on Piedmont's existing facility, and the "sole purpose and practical effect of the ALC's ruling in this regard was to protect

Piedmont's market share from competition." While the ALC did not address the increased accessibility offered by Carolinas' proposed facility in its conclusions of law concerning Criterion 23(a), the ALC recognized the increased accessibility offered by *both* Carolinas' and Piedmont's respective proposed facilities in its findings of fact. Nevertheless, the ALC found Piedmont's proposed 100-bed facility would provide superior accessibility to meet the rapid population growth in northern York County. The ALC further found Carolinas would provide inferior accessibility to medically underserved patients due to the restrictions York County physicians in the CPN had placed on accepting these patients.[8] Therefore, the Amended Final Order as a whole reflects the ALC's proper balancing of the impact of Carolinas' proposed facility on the occupancy rates of Piedmont's existing facility against the increased accessibility offered by Carolinas' proposed facility as required by Criterion 23(a).

Based on the foregoing, the ALC properly applied Project Review Criteria 16(c), 22, and 23(a) without any discriminatory purpose. We acknowledge that the proper application of these criteria may have the effect of protecting competing providers who already have a presence in the service area, regardless of whether these providers represent in-state or out-of-state interests. However, this serves the purposes of the CON Act to ensure the quality of care in health facilities, "guide the establishment of health facilities and services [that] will best serve public needs," and promote cost containment. § 44-7-120. "As long as a State does not *needlessly* obstruct interstate trade or attempt to 'place itself in a position of economic isolation,' it retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources." *Taylor*, 477 U.S. at 151 (emphasis added)

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[8] The ALC highlighted the evidence showing that those CPN primary care practices representing eighty percent of the York County patient referrals to Carolinas' facilities were either "not accepting new uninsured, Medicaid, or Medicare patients" or were "not accepting new uninsured patients unless the patient paid in advance [seventy] percent of a new patient charge" ranging from $290 to $800. Approximately nineteen months later, these practices were "still not scheduling appointments for new Medicaid or Medicare patients." Further, Carolinas' records showed "relatively low percentages of Medicaid and uninsured care by" York County CPN physicians. Recognizing that the CPN primary care physicians "would function as the gatekeepers for" Carolinas' proposed Fort Mill facility, the ALC stated, "If the flow of medically underserved patients into [the CPN] primary care offices is restricted, the referrals and ultimate admissions of those individuals into [Carolinas' proposed Fort Mill facility] would be restricted as well." Carolinas has not challenged these findings of fact.

(citation omitted) (quoting *Baldwin*, 294 U.S. at 527); *cf. Colon Health*, 813 F.3d at 154 (rejecting the appellants' argument that Virginia's CON requirement "discriminates in favor of incumbent health care providers at the expense of new, predominantly out-of-state firms" because "incumbency bias in this context is not a surrogate for the 'negative[ ] impact [on] interstate commerce' with which the [D]ormant Commerce Clause is concerned" (alterations in original) (quoting *Colon Health*, 733 F.3d at 543)). Therefore, we find no Dormant Commerce Clause violation in the application of these criteria.

2. Need

Carolinas next challenges the ALC's application of criteria 2(a), 2(b), 2(c), and 2(e).[9] With regard to these criteria, Carolinas argues (1) the ALC applied these criteria to reduce patient outmigration to North Carolina, which discriminates against, and burdens, interstate commerce; (2) the ALC's application of these criteria "seeks to limit out-of-state and out-of-county interests from accessing the local market;" and (3) the ALC provided Piedmont with an advantage over Carolinas by considering Piedmont's transfer of beds from its Rock Hill facility and Piedmont's resulting superior ability to accommodate population growth—Carolinas contends that it could not lawfully transfer beds from its North Carolina facilities pursuant to the Bed Transfer Provision of the 2004-2005 State Health Plan—and this advantage discriminates against out-of-state hospital systems. We will address these arguments in turn. But first, we will set forth the pertinent provisions in Criterion 2.

Criterion 2 is entitled "Community Need Documentation" and falls under the general category of "Need for the Proposed Project." §§ 801.1, 802.2. Criterion 2 states, in pertinent part,

> a. The target population should be clearly identified as to the size, location, distribution, and socioeconomic status (if applicable).
>
> b. Projections of anticipated population changes should be reasonable and based upon accepted demographic or statistical methodologies, with assumptions and methodologies clearly presented in the application. The

[9] §§ 802.2(a), (b), (c), (e) (2011). Subpart (d) of Criterion 2, which addresses the reduction, relocation, or elimination of a facility or service, does not apply to either CON application in the present case. *See* § 802.2(d) (2011).

> applicant must use population statistics consistent with those generated by the state demographer, State Budget and Control Board.
>
> c. The proposed project should provide services that meet an identified (documented) need of the target population. The assumptions and methods used to determine the level of need should be specified in the application and based on a reasonable approach as judged by the reviewing body. Any deviation from the population projection used in the South Carolina Health Plan should be explained.
>
> . . . .
>
> e. Current and/or projected utilization should be sufficient to justify the expansion or implementation of the proposed service.

§§ 802.2.

As to the ALC's application of these criteria, Carolinas first argues the goal of reducing patient outmigration to North Carolina discriminates against and burdens interstate commerce. We disagree.

Patient outmigration data is typically used in the CON application process to demonstrate the need for an additional provider or service in a particular service area, and the outmigration from one service area to another usually occurs intrastate. In other words, need can be shown by evidence of residents traveling to a provider located outside the service area. *See Marlboro Park Hosp. v. S.C. Dep't of Health & Envtl. Control*, 358 S.C. 573, 578, 595 S.E.2d 851, 853 (Ct. App. 2004) (stating evidence considered by the ALC "undisputedly related to core issues addressed during [DHEC's staff review] hearing"); *id.* at 578 n.2, 595 S.E.2d at 853 n.2 (identifying two core issues in DHEC's staff review hearing as the need for the proposed outpatient surgical center and the project's adverse impact on existing providers and listing 1997 outmigration data compiled by the Budget and Control Board as among the evidence that "dealt squarely with the issues before the [ALC]"). While some of these residents may live in close proximity to a provider outside the service area, many would experience a significant reduction in travel time by the addition of a service or provider within the service area.

Therefore, the goal of reducing outmigration reflects a legitimate concern regarding patient travel time, which obviously can affect health outcomes in an emergency. Even if the reduction of outmigration negatively affects interstate trade when the service area happens to border another state, this reduction can hardly be characterized as needless for Dormant Commerce Clause purposes. *See Taylor*, 477 U.S. at 151 ("As long as a State does not *needlessly* obstruct interstate trade or attempt to 'place itself in a position of economic isolation,' it retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources." (emphasis added) (citation omitted) (quoting *Baldwin*, 294 U.S. at 527).

Presumably, either Piedmont's proposed facility or Carolinas' proposed facility would meet the need for sixty-four more general hospital beds in York County. However, the ALC's analysis of which proposal would best meet community need as set forth in criteria 2(a), 2(b), 2(c), and 2(e) was more complex:

> In addition to meeting the need for new hospital services, Piedmont's application was specifically intended to strengthen the York County healthcare system by reducing outmigration from York County. While patients have sought medical services outside of York County for years, primarily in the Charlotte area, the outmigration accelerated from 2005 to 2011. The effects of the outmigration, which are detailed in the relevant Findings of Fact and are incorporated herein, reduced the ability of Piedmont and many of the independent physicians on Piedmont's medical staff to meet the healthcare needs of York County residents. Piedmont demonstrated by a preponderance of the evidence that the establishment of [its proposed facility] would strengthen the capacity of existing York County providers to meet those needs. For these reasons, Piedmont best meets § 802.2(a, b, c, e).

The ALC also concluded,

> One of the principal differences between the applicants is that the approval of [Carolinas' proposed facility] would have the effect of causing the erosion of quality of care at Piedmont and among specialists practicing there as a result of the diminution in the volume of patients and the

> degradation of the payor mix of the patients who would continue to be seen at Piedmont. Consequently, there would be no hospital in York County providing many of the high quality and tertiary services that Piedmont has added. Alternatively, the establishment of [Piedmont's proposed facility] will ensure that high quality services continue to be provided and added within York County.

The ALC's unchallenged findings of fact support these conclusions. The ALC found outmigration would continue if Carolinas' proposed facility was built in Fort Mill because Carolinas would refer its Fort Mill patients needing specialty care to one of Carolinas' North Carolina facilities providing these types of services rather than to Piedmont's existing facility in Rock Hill.[10] The ALC also found that if Carolinas' proposed facility was built in Fort Mill, Carolinas would further reduce Piedmont's market share, thereby reducing the volume necessary for Piedmont's continued provision of its specialty services to residents of Rock Hill and western York County.[11] Piedmont had already lost a significant volume of complex cases

[10] Carolinas' proposed Fort Mill facility would provide only primary and secondary care. One of Piedmont's experts, Joel Grice, testified that even if the competing CON applicant had been a provider's hospital offering specialty services and located within South Carolina but outside of York County, outmigration from York County would still be a concern.

[11] In its reply brief, Carolinas argues, "The ALC's ruling fails to demonstrate that [the] purpose [of maintaining needed healthcare services in York County] is supported by sufficient evidence under the strict scrutiny analysis." Carolinas also alleges "Piedmont presented no concrete evidence that Piedmont will discontinue specialized or complex services if Carolinas is granted the Fort Mill CON." Because Carolinas did not raise these arguments in its main appellate brief, we need not consider them. *See Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 692 (Ct. App. 2001) ("[A]n argument made in a reply brief cannot present an issue to the appellate court if it was not addressed in the initial brief.").

Further, Carolinas' allegations are simply unfounded. Piedmont presented the testimony of Arun Adlakha, M.D., who had requested Piedmont to acquire an instrument that would allow him to perform navigational bronchoscopies. Piedmont acquired the instrument, which was the first of its kind in the greater Charlotte area. When it was first placed in operation, Dr. Adlakha performed enough procedures to maintain his proficiency. However, after the patient volume for this service

from 2005 to 2011, forcing one of its physicians to terminate use of a new invasive technology acquired by Piedmont in 2009, due to the referral patterns of physicians aligned with Carolinas. In contrast, Piedmont's proposed facility in Fort Mill would strengthen Piedmont's ability to serve residents "throughout York County by increasing the number of patients treated at Piedmont's Rock Hill facility."

While Carolinas would have the court believe the ALC was simply looking out for Piedmont's bottom line, the ALC was looking at the big picture for all of York County, i.e., how to preserve the quality of care and the larger complement of services Piedmont's existing facility provides to York County residents who do not live in the more affluent northern part of the county. These objectives are consistent with the Project Review Criteria, which Carolinas has not challenged.

As to Carolinas' argument that the ALC's application of the community need criteria "seeks to limit out-of-state and out-of-county interests from accessing the local market," we disagree. Carolinas' characterization of Piedmont as an "in-state" or local interest is disingenuous. Both parties own multiple hospitals in multiple states, including South Carolina.[12]

Carolinas next argues the ALC provided Piedmont with an advantage over Carolinas by considering Piedmont's transfer of beds from its Rock Hill facility when Carolinas could not lawfully transfer beds from its North Carolina facilities and this advantage discriminates against "out-of-state hospital systems." However, even if Piedmont had not proposed to transfer beds from its Rock Hill facility, the ALC's findings support its conclusion that Piedmont best meets criteria 2(a, b, c, e)—these findings indicate Piedmont's proposed facility would better preserve the quality of care and the larger complement of services that Piedmont's Rock Hill facility

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significantly declined, Dr. Adlakha decided "to terminate the use of the instrument as he found it 'very difficult to maintain [his] proficiency and justify keeping it for so long.'" Dr. Adlakha attributed the decrease in patient volume to CPN's referral practices.

[12] As previously stated, Piedmont's ultimate owner, Tenet Healthcare Corporation, is headquartered in Dallas, Texas and owns forty-nine hospitals in ten states. Carolinas, which is headquartered in Charlotte, North Carolina, owns multiple hospitals in North Carolina as well as a large network of employed physicians, the CPN, many of whom have practices in York County, South Carolina. Further, Carolinas owns and manages at least one hospital in South Carolina, i.e., Roper Hospital in Charleston.

provides to York County residents who live in Rock Hill or the western, rural part of the county. Therefore, the ALC's approval of Piedmont's proposed bed transfer does not constitute reversible error. *See Judy v. Judy*, 384 S.C. 634, 646, 682 S.E.2d 836, 842 (Ct. App. 2009) ("Generally, appellate courts will not set aside judgments due to insubstantial errors not affecting the result.").

Further, the ALC also took into account the capacity to expand, i.e., "shell space," that each respective proposed facility would possess in order to accommodate population growth. The ALC concluded Piedmont had the superior capacity to expand, and Carolinas has not presented any authorities or evidence indicating it was unfairly prevented from competing with Piedmont on this basis.

Based on the foregoing, the ALC properly applied Project Review Criteria 2(a), 2(b), 2(c), and 2(e) without any discriminatory purpose. To the extent that the proper application of these criteria may have a discriminatory effect, Carolinas has failed to carry its burden of "'proving that the burdens placed on interstate commerce outweigh' the . . . local benefits" of these criteria. *Colon Health*, 813 F.3d at 157 (quoting *LensCrafters*, 403 F.3d at 805). Therefore, we find no Dormant Commerce Clause violation in the application of these criteria.

3. Efficiency

Criterion 17 is entitled "Efficiency" and falls under the general category of "Economic Consideration." §§ 801.1, 802.17. Criterion 17 states, "The proposed project should improve efficiency by avoiding duplication of services, promoting shared services[,] and fostering economies of scale or size." § 802.17. The ALC concluded, "Piedmont better satisfies this criterion because its proposal fosters economies of scale by spreading costs over a greater number of beds. Not only will [Piedmont's proposed facility's] 100 beds better accommodate future growth, [Piedmont's proposed facility] is better designed for expansion than is [Carolinas' proposed facility]."

As with criteria 2(a, b, c, e), Carolinas argues the ALC's application of Criterion 17 provided Piedmont with an unfair advantage over Carolinas by considering Piedmont's transfer of beds from its Rock Hill facility. However, Piedmont's bed transfer proposal was not the sole reason for the ALC's determination that Piedmont best met Criterion 17. The ALC also concluded Piedmont's proposed facility was better designed for expansion than Carolinas' proposed facility, and this factor alone allows Piedmont to best meet Criterion 17.

Again, Carolinas does not challenge the constitutionality of any of the Project Review Criteria or the purposes of the CON Act served by these criteria. We find no discriminatory purpose behind the ALC's thoughtful and correct application of these criteria to the complex facts of this case.[13] To the extent that the proper application of the Project Review Criteria may have a discriminatory effect, "[c]ourts are afforded some latitude to determine for themselves the practical impact of a state law, but in doing so they must not cripple the States' 'authority under their general police powers to regulate matters of legitimate local concern.'" *Colon Health*, 813 F.3d at 152 (quoting *Taylor*, 477 U.S. at 138).

Based on the foregoing, we find no Dormant Commerce Clause violation.

CONCLUSION

Accordingly, we affirm the ALC's Amended Final Order.

AFFIRMED.

WILLIAMS and THOMAS, JJ., concur.

[13] Carolinas also argues the ALC erred in failing to conduct the proper Dormant Commerce Clause analysis because the ALC stated, "The same plan, criteri[a,] and analysis would have been utilized regardless of whether competing applicants were out-of-state or in-state providers." Carolinas asserts that this is the incorrect standard for a Dormant Commerce Clause analysis. Because the ALC properly applied the provisions of the CON Act, the 2004-2005 State Health Plan, and the Project Review Criteria without any discriminatory purpose, we find no reversible error. *See Judy*, 384 S.C. at 646, 682 S.E.2d at 842 ("Generally, appellate courts will not set aside judgments due to insubstantial errors not affecting the result.").

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Preston Shands, Jr., Appellant.

Appellate Case No. 2015-001199

Appeal From Laurens County
Edward W. Miller, Circuit Court Judge

Opinion No. 5569
Heard November 8, 2017 – Filed June 13, 2018

AFFIRMED IN PART AND REVERSED IN PART

E. Charles Grose, Jr., of Grose Law Firm, of Greenwood, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Deputy Attorney General David A. Spencer, both of Columbia; and Solicitor David Matthew Stumbo, of Greenwood, all for Respondent.

THOMAS, J.: Preston Shands, Jr., appeals his convictions for first-degree burglary, kidnapping, attempted murder, first-degree assault and battery, and possession of a weapon during the commission of a violent crime. On appeal,

Shands argues the trial court erred by (1) improperly applying the *Batson*[1] comparative juror analysis; (2) refusing to quash the indictments; (3) allowing the State to impeach him with a prior conviction; (4) refusing to charge the jury on involuntary intoxication; (5) denying his motion to strike the State's improper comments during closing argument; (6) instructing the jurors they could infer malice from the use of a deadly weapon; (7) failing to require the State to open fully on the law and facts during its initial closing argument; and (8) denying his motion for directed verdict on the kidnapping charge. We affirm in part and reverse in part.

FACTS AND PROCEDURAL HISTORY

In October 2014, a Laurens County grand jury indicted Shands for attempted murder, kidnapping, burglary, possession of a weapon during the commission of a violent crime, and two counts of assault and battery arising out of a domestic incident on July 20, 2014. On the day of the incident, Sharon Shands (Sharon) tried to leave the house after Shands began arguing with her. Shands prevented her from leaving by pulling her back into the house by her hair; he then stabbed her multiple times with a barbecue fork. Sharon was able to escape to the neighbor's house, but Shands followed her and broke into the neighbor's house. The assault ended when police arrived.

Shands testified in his defense and admitted he was responsible for what happened to Sharon. However, he claimed he did not have any memory of the incident because he drank homemade moonshine earlier in the day that must have been laced with a drug. Shands testified he bought the moonshine from someone at work and did not know who made the moonshine or what was in it. Shands believed there "was something more strong and powerful in there . . . other than alcohol" because it "had some effect on [him] that took [him] slap clean out of [his] mind." The jury found Shands guilty of attempted murder, possession of a weapon during the commission of a violent crime, assault and battery, burglary, and kidnapping. The trial court sentenced Shands to life imprisonment without the possibility of parole for first-degree burglary, kidnapping, and attempted murder;

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[1] *Batson v. Kentucky*, 476 U.S. 79, 96–98 (1986) (adopting a three-step inquiry for evaluating whether a party used a peremptory challenge to strike a juror in a manner that violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution).

ten years' imprisonment for first-degree assault and battery; and five years' imprisonment for possession of a weapon during the commission of a violent crime. This appeal followed.

STANDARD OF REVIEW

In criminal cases, this court sits to review errors of law only, and is bound by the trial court's factual findings unless those findings are clearly erroneous. *State v. Edwards*, 384 S.C. 504, 508, 682 S.E.2d 820, 822 (2009). Thus, on review, this court is limited to determining whether the trial court abused its discretion. *Id.*

I. *BATSON* CHALLENGE

Shands argues the trial court did not properly apply the third step of the *Batson* comparative juror analysis. Shands asserts he proved the State impermissibly struck two jurors on the basis of gender by showing there was a similarly situated female juror on the panel. He contends the trial court "was confused because the initial motion was based on [the State] striking men, and . . . Shands then pointed to . . . a female[,]" and therefore, the trial court "operated under the mistaken belief [it] could not consider a similarly situated female juror." We affirm.

Generally, "[t]he trial court's findings regarding purposeful discrimination are accorded great deference and will be set aside on appeal only if clearly erroneous." *State v. Haigler*, 334 S.C. 623, 630, 515 S.E.2d 88, 91 (1999). However, "[w]he[n] the assignment of error is the failure to follow the *Batson* hearing procedure, [the appellate court] must answer a question of law. When a question of law is presented, [the] standard of review is plenary." *State v. Stewart*, 413 S.C. 308, 316, 775 S.E.2d 416, 420 (Ct. App. 2015) (quoting *State v. Cochran*, 369 S.C. 308, 312–13, 631 S.E.2d 294, 297 (Ct. App. 2006)).

> [T]he Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States prohibits the striking of a potential juror based on race or gender. When one party strikes a member of a cognizable racial group or gender, the trial court must hold a *Batson* hearing if the opposing party requests one.

Id. at 313–14, 775 S.E.2d at 419 (internal citation omitted). "The United States Supreme Court has set forth a three-step inquiry for evaluating whether a party

executed a peremptory challenge in a manner which violated the Equal Protection Clause." *State v. Inman*, 409 S.C. 19, 25, 760 S.E.2d 105, 108 (2014).

> First, the opponent of the peremptory challenge must make a prima facie showing that the challenge was based on race [or gender]. If a sufficient showing is made, the trial court will move to the second step in the process, which requires the proponent of the challenge to provide a . . . neutral explanation for the challenge. If the trial court finds that burden has been met, the process will proceed to the third step, at which point the trial court must determine whether the opponent of the challenge has proved purposeful discrimination.

State v. Giles, 407 S.C. 14, 18, 754 S.E.2d 261, 263 (2014) (internal citations omitted). In order to prove purposeful discrimination, "[t]he opponent of the strike must show the race or gender[]neutral explanation was mere pretext, which generally is established by showing the party did not strike a similarly[]situated member of another race or gender." *Stewart*, 413 S.C. at 314, 775 S.E.2d at 419. "The burden of persuading the court that a *Batson* violation has occurred remains at all times on the opponent of the strike." *State v. Evins*, 373 S.C. 404, 415, 645 S.E.2d 904, 909 (2007). "Whether a *Batson* violation has occurred must be determined by examining the totality of the facts and circumstances in the record." *State v. Shuler*, 344 S.C. 604, 615, 545 S.E.2d 805, 810 (2001).

During jury selection, the State used four of its five peremptory strikes on three men and one woman. The impaneled jury was composed of nine women and three men. Shands objected based on the State striking male jurors, and the court properly held a *Batson* hearing. In response to Shands's *Batson* motion, the State indicated it struck two of the potential jurors because they had convictions for criminal domestic violence (CDV) and the other potential juror because he had four convictions for violating the lottery law. The State's explanation for striking the three male potential jurors satisfied the second step of the *Batson* analysis because "a prior criminal conviction is a neutral reason to strike" a potential juror. *See State v. Casey*, 325 S.C. 447, 453 n.2, 481 S.E.2d 169, 172 n.2 (Ct. App. 1997). To meet the third step of the *Batson* analysis, Shands argued the State sat a similarly situated female juror who had a fraudulent check conviction, indicating the State's gender neutral reason for striking the male potential jurors was pretext.

When Shands argued the third step of the *Batson* analysis, the trial court believed that Shands previously based his objection on male jurors being struck but altered his objection because the State sat a female juror. Shands's counsel reiterated his assertion that the female juror was similarly situated to the males who were struck, which met the third prong of *Batson*. However, the trial court denied the objection, finding the strikes were gender neutral.

Based on the exchange between Shands and the trial court in the record, we find the trial court misapplied the third step of the *Batson* analysis by not properly considering whether the female juror was similarly situated to the potential male jurors. Therefore, this issue presents a question of law for this court because the trial court failed to follow the proper *Batson* hearing procedure. *See Stewart*, 413 S.C. at 316, 775 S.E.2d at 420 ("[When] the assignment of error is the failure to follow the *Batson* hearing procedure, [the appellate court] must answer a question of law. When a question of law is presented, [the] standard of review is plenary." (quoting *Cochran*, 369 S.C. at 312–13, 631 S.E.2d at 297)).

However, we find Shands did not meet his burden to show the State's strikes were based on purposeful discrimination. *See Evins*, 373 S.C. at 415, 645 S.E.2d at 909 ("The burden of persuading the court that a *Batson* violation has occurred remains at all times on the opponent of the strike."). The female juror was not similarly situated to the two potential male jurors who had convictions for CDV. It is understandable that the State would want to strike potential jurors who had convictions for CDV because Shands was being tried for attempting to kill his wife. Further, the female juror was not similarly situated to the third potential male juror who had convictions for violating the lottery law. We agree with the State that having multiple convictions is different than having only one conviction that is over a decade old. Considering the totality of facts in the record, we find Shands did not meet his burden of showing the State's use of its peremptory strikes was impermissible. *See Shuler*, 344 S.C. at 615, 545 S.E.2d at 810 ("Whether a *Batson* violation has occurred must be determined by examining the totality of the facts and circumstances in the record.").

II. GRAND JURY PROCESS

Shands argues the trial court erred in refusing to quash the indictments because the Laurens County grand jury process is unconstitutional. Shands contends the officer who testified at his grand jury hearing was not listed on his indictments and had no personal knowledge of his case, in violation of section 14-7-1550 of the

South Carolina Code (2017).[2] Shands urges this court to correct "a fundamental inequality within the grand jury process in South Carolina: defendants indicted under the statewide grand jury system are afforded different procedures under the law than defendants who are indicted under the county grand jury system[,]" namely that "statewide grand jury proceedings must be recorded."

We affirm the trial court's denial of Shands's motion to quash because Shands did not present clear evidence that there was an abuse of the grand jury proceedings in his case. "When a defendant timely moves to quash an indictment . . ., the [trial] court must determine whether the defendant[']s constitutional right to have the criminal allegations against him weighed by a properly constituted grand jury has been violated." *Evans v. State*, 363 S.C. 495, 510, 611 S.E.2d 510, 518 (2005). "Proceedings before the grand jury are presumed to be regular unless there is clear evidence to the contrary." *State v. Thompson*, 305 S.C. 496, 501, 409 S.E.2d 420, 424 (Ct. App. 1991). "Speculation about 'potential' abuse of grand jury proceedings cannot substitute for evidence of *actual* abuse as grounds for quashing an otherwise lawful indictment." *Id.* at 502, 409 S.E.2d at 424.

When making his motion to quash the indictments, Shands admitted he may "need to call some witnesses" if the State did not stipulate to the grand jury process because the testimony presented to the grand jury was not recorded. The State explained the Laurens County grand jury process:

> Essentially, Your Honor, since Solicitor Stumbo has come into office, each individual assistant will, as he is assigned cases, there is a template for the indictment that is electronically produced and put in our electronic record system. We will go in, we will tailor the indictment to the facts that we have and then those are presented out, each individual assistant or deputy will then sign the indictments. But, essentially, yes, the individual agencies are notified the [g]rand [j]ury is coming, they will send a representative and one

[2] Section 14-7-1550 states: "The foreman of the grand jury . . . may swear the witnesses whose names shall appear on the bill of indictment in the grand jury room. No witnesses shall be sworn except those who have been bound over or subpoenaed in the manner provided by law."

> representative from each department will present all indictments from that individual department. That has been pretty much standard since I started in 1982.

However, the State indicated it "could not tell" whether either of the two officers listed on Shands's indictments testified in front of the grand jury because it did not have a record of who testified. We are unable to say there was a violation in Shands's case from the record presented. Without any clear evidence, Shands's argument that there was a grand jury abuse in his case is pure speculation. Furthermore, we disagree with Shands's argument regarding the nature of the county grand jury system because of "the view long held uniformly by courts nationwide that secrecy of grand jury proceedings is desirable and necessary." *See Evans*, 363 S.C. at 505, 611 S.E.2d at 515; *see also State v. Moses*, 390 S.C. 502, 521, 702 S.E.2d 395, 405 (Ct. App. 2010) (affirming the trial court's denial of the defendant's motion to quash the indictments even though direct evidence "is difficult to provide due to the secretive nature of the grand jury proceedings"). Therefore, we find the trial court did not abuse its discretion in refusing to quash Shands's indictments.

III. PRIOR CONVICTION

Shands argues the trial court erred in allowing the State to impeach him with his 1976 murder conviction. Shands contends the conviction had no probative value and was highly prejudicial because it was similar to his charge of attempted murder. Shands asserts allowing the State to refer to the conviction as a violent felony did not lessen the prejudice because he was on trial for several violent felonies. Shands also argues he was released from confinement more than ten years prior to trial so the conviction was not admissible. Shands contends he did not open the door to the evidence because his conviction was not contrary to the evidence "that he had never acted in this manner around his wife and the children."

We agree that Shands's conviction was not admissible under Rule 609, SCRE. Rule 609(a)(1), SCRE, allows "evidence that an accused has been convicted of . . . a crime [to] be admitted [for the purpose of attacking the credibility of the accused] if the [trial] court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused." Rule 609(b), SCRE, then limits the admissible convictions to those when no more than "a period of . . . ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction." However, convictions that are

over ten years old can be admitted "in the interests of justice" if the trial court determines "that the probative value of the conviction . . . *substantially* outweighs its prejudicial effect." Rule 609(b) (emphasis added). The trial court should consider the following factors in determining whether the probative value of a prior conviction outweighs its prejudicial effect: (1) the impeachment value of the prior crime; (2) the point in time of the conviction and the witness's subsequent history; (3) the similarity between the past crime and the charged crime; (4) the importance of the defendant's testimony; and (5) the centrality of the credibility issue. *Green v. State*, 338 S.C. 428, 433–34, 527 S.E.2d 98, 101 (2000).

This case presents the novel issue in South Carolina of whether parole following a prison term constitutes "confinement" for the purposes of the ten-year time limit under Rule 609(b). The trial court found Shands's prior conviction for murder could be used to impeach him because he was still on parole for the conviction when he committed the crimes charged. In *State v. Scott*, this court held a defendant's 1977 robbery conviction was not too remote to be used to impeach her because, although she received parole in 1980, her sentence was still in effect until 1986. 326 S.C. 448, 451–52, 484 S.E.2d 110, 112 (Ct. App. 1997). However, the trial in *Scott* was prior to the adoption of the South Carolina Rules of Evidence. Therefore, the *Scott* court relied on common law to find the defendant's conviction was not too remote and did not interpret the confinement language from Rule 609(b). *See id.* at 450, 484 S.E.2d at 111. Under the common law rule, "[t]here [wa]s no fixed time in [South Carolina] after which a conviction bec[ame] too remote." *State v. Sarvis*, 317 S.C. 102, 105, 450 S.E.2d 606, 608 (Ct. App. 1994). For those reasons, we disagree with the State and find *Scott* is not controlling in the instant case. We note the majority of jurisdictions[3] considering this issue have held that probation and parole do not count as confinement for the purposes of rules and statutes similar to our Rule 609(b). *See United States v. Rogers*, 542 F.3d 197, 198 (7th Cir. 2008) ("[P]robation does not constitute 'confinement' within the meaning of Rule 609(b)."); *Bizmark, Inc. v. Kroger Co.*, 994 F. Supp. 726, 728 (W.D. Va. 1998) ("'[R]elease from confinement,' for 609(b) purposes means release from actual imprisonment, and therefore, [] neither parole nor probation constitutes confinement under the rule."); *Allen v. State*, 687 S.E.2d 799, 803 (Ga. 2010) ("The legislature's distinction of 'confinement' from release on parole and suspended and probated sentences, when coupled with the construction of identical statutory

[3] Because Rule 609(b) "is identical to the federal rule, federal cases may be persuasive." *See State v. Colf*, 337 S.C. 622, 626, 525 S.E.2d 246, 248 (2000).

language by the federal courts and our sister states, leads us to conclude that probation does not qualify as confinement . . . ."); *Commonwealth v. Treadwell*, 911 A.2d 987, 991 (Pa. Super. Ct. 2006) ("After reviewing the relevant statutory language and the rationale relied upon in other jurisdictions, we agree with the federal courts and our sister states, and conclude that probation does not qualify as confinement . . . .").

We follow the majority of jurisdictions in holding that probation and parole do not constitute "confinement" for the purposes of Rule 609(b); confinement ends when a defendant is released from actual imprisonment. Although Rule 609(b) does not define the term confinement, Black's Law Dictionary defines the term as "[t]he act of imprisoning or restraining someone; the quality, state, or condition of being imprisoned or restrained." *Confinement,* BLACK'S LAW DICTIONARY (10th ed. 2014). Conversely, "[t]he term parole means a conditional release from imprisonment." *State v. Ellis*, 397 S.C. 576, 579–80, 726 S.E.2d 5, 7 (2012). Although Shands was not technically a "free citizen" while he was on parole, we find he was no longer confined because he was not actually imprisoned. *See id.* at 581, 726 S.E.2d at 7 (recognizing a defendant on parole "was not a free citizen" and had "[a]ll the consequences of the judgement [still] upon him, except that he had leave of absence from prison" (quoting *Crooks v. Sanders, Superintendent of State Penitentiary*, 123 S.C. 28, 36–37, 115 S.E. 760, 763 (1922))). Therefore, Shands's confinement for his 1976 conviction ended in 2003 when he was released on parole, making his conviction over ten years old and presumptively inadmissible under Rule 609(b). *See Colf*, 337 S.C. at 626, 525 S.E.2d at 248 ("Rule 609(b) establishes a presumption against admissibility of remote convictions . . . .").

Furthermore, the State did not present sufficient evidence to show the probative value of Shands's conviction *substantially* outweighed its prejudicial effect. *See id.* at 626–27, 525 S.E.2d at 248 ("[T]he State bears the burden of establishing facts and circumstances sufficient to substantially overcome that presumption."); Rule 609(b) (explaining a stale conviction is not admissible unless "in the interests of justice" the trial court determines "the probative value of the conviction[,] supported by specific facts and circumstances[,] substantially outweighs its prejudicial effect"). Because Shands was convicted over forty years ago and was released from prison over ten years ago, we believe his conviction had little probative value. *See State v. Black*, 400 S.C. 10, 26, 732 S.E.2d 880, 889 (2012) ("The genesis of the rule's ten-year provision was the belief that after ten years,

the probative value of the conviction with respect to a person's credibility has diminished to the point where it should no longer be admissible."). Moreover, the prejudicial effect was high because of the nature of his charges. Thus, the trial court erred by finding the prior conviction admissible under Rule 609(b).

However, we find the trial court did not err in admitting Shands's prior conviction because Shands opened the door to such evidence. "[O]therwise inadmissible evidence may be properly admitted when opposing counsel opens the door to that evidence." *State v. Page*, 378 S.C. 476, 482, 663 S.E.2d 357, 360 (Ct. App. 2008). "A party cannot complain of prejudice from evidence to which he opened the door." *State v. Culbreath*, 377 S.C. 326, 333, 659 S.E.2d 268, 272 (Ct. App. 2008). At trial, Shands elicited testimony during the cross-examination of numerous witnesses to show that he had never reacted violently before. For example, Shands's counsel asked Sharon if this was the first time "he ha[d] ever done something like this." Shands's counsel also elicited testimony from Shands's two sons about whether they had ever seen Shands act in a similar manner. Furthermore, Shands's counsel asked the neighbor if Shands's behavior on the night of the incident was "entirely out of character." Because Shands opened the door about his past non-violent actions, the State was entitled to rebut his assertions with evidence of his prior conviction for a violent felony. *See State v. Taylor*, 333 S.C. 159, 175, 508 S.E.2d 870, 878 (1998) ("[B]ecause appellant 'opened the door' about his relationship with his wife, the solicitor was entitled to cross-examine him regarding the relationship, even if the responses brought out appellant's prior criminal domestic violence conviction."). Therefore, the trial court did not err in admitting Shands's prior conviction. *See State v. Robinson,* 305 S.C. 469, 474, 409 S.E.2d 404, 408 (1991) (explaining one who opens the door to evidence cannot complain of its admission).

IV. VOLUNTARY INTOXICATION

After resting his case, Shands requested that the trial court charge the jury on involuntary intoxication. The trial court denied Shands's request but granted the State's request to charge that voluntary intoxication was not a defense to a crime. On appeal, Shands argues the trial court erred in refusing to charge the jury on involuntary intoxication because his testimony indicated that the moonshine he drank was unknowingly "spiked with something other than alcohol." Shands contends the trial court improperly commented on the facts when it charged

voluntary intoxication without also charging involuntary intoxication. We disagree.

At trial, "[t]he law to be charged is determined from the facts presented." *State v. Lewis*, 328 S.C. 273, 278, 494 S.E.2d 115, 117 (1997).

> Involuntary intoxication may result from innocently consuming an intoxicant, through being tricked into it by another, or being forced to take it, or perhaps through unanticipated side effects of a prescription drug taken on orders of a physician. If [a jury] find[s] the defendant was given drugs or alcoholic beverages without his knowledge, and as a result, he lost his ability to exercise independent judgment and volition while committing the crimes alleged against him, then it would be [the jury's duty] to find the defendant not guilty.

RALPH KING ANDERSON, JR., SOUTH CAROLINA REQUESTS TO CHARGE - CRIMINAL § 6-4 (2012). However, "voluntary intoxication or use of drugs does not constitute a defense to a crime." *State v. Hartfield*, 300 S.C. 469, 473, 388 S.E.2d 802, 804 (1990).

We find the trial court did not err in refusing to charge involuntary intoxication because Shands voluntarily consumed an illegal intoxicant. *See* S.C. Code Ann. § 61-6-4010(A) (2009) (making it illegal for a person to "manufacture, store, keep, receive, have in possession, transport, ship, buy, sell, barter, exchange, or deliver alcoholic liquors, except liquors acquired in a lawful manner" or "accept, receive, or have in possession alcoholic liquors for unlawful use"). Shands admitted he voluntarily drank the "homemade moonshine" and did not know who made it. He knew the moonshine was stronger than a typical alcoholic beverage because his coworkers told him the moonshine was "the grand[d]addy of all, the cremator of all whiskey" and he could not "say [he] drunk anything" until he "tasted the grand[d]addy." Moreover, Shands admitted he "had no idea what was in [the moonshine] and [he] had no idea how [he] was going to react to it," but he decided to drink it anyway.

We agree with the reasoning of the California Court of Appeals when it considered whether a defendant was entitled to an involuntary intoxication charge when he voluntarily smoked a marijuana cigarette given to him by others that was

unknowingly laced with phencyclidine (PCP). *See People v. Velez*, 221 Cal. Rptr. 631, 632 (Cal. Ct. App. 1985). The California Court of Appeals affirmed the trial court's denial of an involuntary intoxication charge, reasoning

> [The defendant's] defense depends on the validity of [the] defendant's assumptions that the cigarette did not contain PCP and would produce a predictable intoxicating effect. However, . . . these assumptions are tested not by [the] defendant's subjective belief but rather by the standard of a reasonable person. In this regard, it is common knowledge that unlawful street drugs do not come with warranties of purity or quality associated with lawfully acquired drugs such as alcohol. Thus, . . . unlawful street drugs are frequently not the substance they purport to be . . . .

Id. at 637. Similarly, in the instant case, Shands knowingly consumed an illegal, unregulated liquor and had no right to assume the moonshine would cause a predictable intoxicating effect. Further, because there was no evidence to support a charge for involuntary intoxication, the trial court did not err in charging voluntary intoxication without an accompanying charge on involuntary intoxication. *See Lewis*, 328 S.C. at 278, 494 S.E.2d at 117 ("The law to be charged is determined from the facts presented at trial."). Therefore, we find the trial court did not err.

V. COMMENTS DURING THE STATE'S CLOSING ARGUMENT

Shands argues the trial court erred by not striking the State's improper comments during closing argument and not instructing the jurors to disregard the comments. Shands asserts the State's comment: "This is a jealous, controlling husband who was not going to let his property leave that house," was "highly inflammatory and not based on the evidence." We disagree.

In its reply closing argument, the State described its view of the case and evidence:

> And what happens, he is an almost 60-year-old man with a 38-year-old wife and she is beautiful and she is a good woman and she was taking care of him but it wasn't good enough for him. He starts getting controlling. [The

> neighbor] told y'all, [Shands] could be jealous if you tried to talk to [Sharon] in the neighborhood. He starts getting jealous and controlling. And it gets worse and it gets worse and he is arguing and he is fussing and he is drinking and Sharon said we were on pins and needles. So this, he may not have put his hands on her before but this is a relationship that is going downhill fast. And what happens on July 20, 2014, she finally says, you know what, I am leaving, I am going. Come on kids, get in the car. And that is when he snaps. He is not, his wife and his kids that he provides for and he works for that are his property, she is not leaving him, she is not taking those kids, no, no, no, no. Grabs her by the hair, grabs the first thing he can get his hands on and starts going at her. This isn't about he was drinking something that day, this is a jealous, controlling husband who was not going to let his property leave that house.

Shands objected and moved to strike, and the trial court instructed the State to continue.

We find the trial court did not abuse its discretion in denying Shands's motion to strike because the State's comments were not outside of the evidence. *See State v. Penland*, 275 S.C. 537, 539, 273 S.E.2d 765, 766 (1981) ("The control of argument is normally within the discretion of the trial [court], and we will not disturb [its] ruling whe[n] there is no abuse of discretion."). In its closing argument, the State "may argue [its] version of the testimony presented, and furthermore may comment on the weight to be accorded such testimony." *State v. New*, 338 S.C. 313, 319, 526 S.E.2d 237, 240 (Ct. App. 1999). In the instant case, Shands responded affirmatively when the State asked if he "got pretty jealous and kind of controlling" and if "things . . . started falling apart." Sharon testified Shands was "controlling" in the months leading up to the incident, and she "walked on pins and needles every day [because she] didn't know what to expect" from him. The neighbor recalled Shands got "a little jealous at times" if someone tried to talk to Sharon, and Shands "would say something to . . . get her attention." The evidence further showed Shands did not allow Sharon to leave the house when she tried to leave with the children, pulling her by the hair to get her to stay. Furthermore, Shands was not prejudiced by the comments in light of the overwhelming evidence of his

guilt, including his testimony that he committed the acts in question and his lack of a viable defense. *See Humphries v. State*, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002) ("Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument."). Therefore, we find the trial court did not err in refusing to strike the State's comments during its closing argument.

VI. INFERRED MALICE JURY INSTRUCTION

Shands argues the trial court erred in instructing the jury that malice could be inferred from the use of a deadly weapon and giving the example of a knife as a deadly weapon. Shands contends the instruction was contrary to *State v. Belcher*[4] because the attempted murder charge could have been reduced or mitigated by the lesser-included offense of assault and battery of a high and aggravated nature (ABHAN) or Shands's defense that he lacked criminal intent. We agree that the trial court erred in instructing the jury that malice could be inferred from the use of a deadly weapon.

"The implication of malice may arise from the use of a deadly weapon." *State v. Campbell*, 287 S.C. 377, 379, 339 S.E.2d 109, 109 (1985) (per curiam). However, "the 'use of a deadly weapon' implied malice instruction has no place in a murder (or assault and battery with intent to kill[5] [(ABWIK)]) prosecution whe[n] evidence is presented that would reduce, mitigate, excuse[,] or justify the killing (or the alleged [ABWIK])." *Belcher*, 385 S.C. at 610, 685 S.E.2d at 809(footnote omitted). "A deadly weapon is generally defined as 'any article, instrument[,] or substance [that] is likely to produce death or great bodily harm.'" *Campbell*, 287 S.C. at 379, 339 S.E.2d at 109 (quoting *State v. Sturdivant*, 283 S.E.2d 719, 725 (N.C. 1981)).

"A person who, with intent to kill, attempts to kill another person with malice

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[4] 385 S.C. 597, 685 S.E.2d 802 (2009).

[5] According to the Omnibus Crime Reduction and Sentencing Reform Act, the Legislature abolished the offense of ABWIK and replaced it with attempted murder. *See* Act No. 273, 2010 S.C. Acts 1949–50. ABWIK was "an unlawful act of violent nature to the person of another with malice aforethought, either express or implied." *State v. Hinson*, 253 S.C. 607, 611, 172 S.E.2d 548, 550 (1970).

aforethought, either expressed or implied, commits the offense of attempted murder." S.C. Code Ann. § 16-3-29 (2015). In *State v. King*, our supreme court considered the requisite *mens rea* required for attempted murder. *See State v. King*, 422 S.C. 47, 54, 810 S.E.2d 18, 22 (2017). The majority opinion, written by Chief Justice Beatty, held attempted murder requires the specific intent to commit murder, which is a higher level of *mens rea* than is required for murder.[6] *Id.* at 54–64, 810 S.E.2d at 22–27. The court discussed the fact that attempt crimes require the highest level of mens rea because "it is logically impossible to attempt an unintended result." . at 56, 810 S.E.2d at 23 (quoting 22 C.J.S. *Criminal Law: Substantive Principles* § 156, at 221–22 (2016)). The court explained attempted murder was not a mere codification of ABWIK, a general intent crime, because the General Assembly "purposefully add[ed] the language 'with intent to kill' to 'malice aforethought, either express or implied.'"[7] *King*, 422 S.C. at 61, 810 S.E.2d at 25. After considering the legislative history of the attempted murder statute, the court held a "specific intent to kill" is an element of attempted murder, and the trial court erred in instructing the jury that it was not. *Id.* at 61–64, 810 S.E.2d at 25–27. Although the majority opinion in *King* did not directly address the issue of whether an inferred malice charge was warranted in an attempted murder case, the court

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[6] Acting Justices Benjamin and Hayes concurred in the majority opinion. Acting Justice Pleicones concurred in result only and did not write a separate opinion.

[7] Justice Kittredge wrote a concurrence to express his belief that the General Assembly intended to codify ABWIK when it enacted the attempted murder statute. *King*, 422 S.C. at 71, 810 S.E.2d at 30 (Kittredge, J., concurring). Justice Kittredge noted the statutory offense of attempted murder had an ambiguity because the language "with intent to kill" was included with the "seemingly contradictory" language of "with malice aforethought, either expressed or implied." *Id.* at 73, 810 S.E.2d at 32 (Kittredge, J., concurring). However, Justice Kittredge believed a specific intent to kill was not required because ABWIK, a general intent crime, included "with intent to kill" in the name of the common law crime. *Id.* at 73–74, 810 S.E.2d at 32 (Kittredge, J., concurring). Justice Kittredge further pointed to "the legislature's use of the verbatim definition of ABWIK in the section 16-3-29 offense of attempted murder." *Id.* at 73, 810 S.E.2d at 32 (Kittredge, J., concurring). Therefore, Justice Kittredge would have affirmed the trial court's instruction that specific intent to kill was not an element of attempted murder. *Id.* at 73–74, 810 S.E.2d at 32 (Kittredge, J., concurring).

indicated its belief in a footnote that malice can never be implied in an attempted murder case. *See id.* at 64 n.5, 810 S.E.2d at 27 n.5. The court stated:

> While we find it unnecessary to address King's additional sustaining ground [that the trial court erred in instructing the jury that malice could be inferred from the use of a deadly weapon], we would respectfully suggest to the General Assembly to re-evaluate the language following "malice aforethought" as the inclusion of the word "implied" in section 16-3-29 is arguably inconsistent with a specific[]intent crime. *See* [*Keys v. State*, 766 P.2d 270, 273 (Nev. 1988)] (stating, "[o]ne cannot *attempt* to kill another with implied malice because there is no such criminal offense as an attempt to achieve an unintended result" (citation and internal quotation marks omitted)). Moreover, if there is no evidence that one charged with attempted murder had express malice and a specific intent to kill, we believe the crime would involve a lower level of intent[, and] thus, would fall within the lesser degrees of the assault and battery offenses codified in section 16-3-600. *See* S.C. Code Ann. § 16-3-600 (2015 & Supp. 2016) (identifying levels and degrees of assault and battery offenses).

Id.

"[S]pecific intent means that the defendant consciously intended the completion of acts comprising the [completed] offense." *State v. Nesbitt*, 346 S.C. 226, 231, 550 S.E.2d 864, 866 (Ct. App. 2001) (quoting *State v. Sutton*, 340 S.C. 393, 397, 532 S.E.2d 283, 285 (2000)). "ABHAN is a lesser-included offense of attempted murder." *State v. Middleton*, 407 S.C. 312, 315, 755 S.E.2d 432, 434 (2014). "An ABHAN charge is appropriate when the evidence demonstrates the defendant lacked the requisite intent to kill." *State v. Dennis*, 402 S.C. 627, 638, 742 S.E.2d 21, 27 (Ct. App. 2013) (per curiam) (quoting *State v. Coleman*, 342 S.C. 172, 176, 536 S.E.2d 387, 389 (Ct. App. 2000)).

> [ABHAN] is the unlawful act of violent injury to another accompanied by circumstances of aggravation. Circumstances of aggravation include the infliction of

> serious bodily injury, great disparity in the ages or physical conditions of the parties, a difference in sexes, the purposeful infliction of shame and disgrace, taking indecent liberties or familiarities with a female, and resistance to lawful authority.[8]

State v. Green, 327 S.C. 581, 585, 491 S.E.2d 263, 264–65 (Ct. App. 1997) (internal citations omitted).

In light of our supreme court's discussion in *King*, we find the State needed to prove Shands acted with express malice *and* the specific intent to kill in order to be found guilty of attempted murder. *See King*, 422 S.C. at 54–64, 810 S.E.2d at 22–27. Therefore, we question whether an implied malice instruction is proper in any attempted murder trial. However, even if an implied malice instruction was appropriate in an attempted murder case, we do not believe it was appropriate in Shands's case. As Shands and the State recognized at trial, if the jury did not believe Shands had the specific intent to kill, he would have been guilty of the lesser-included offense of ABHAN. Despite the number of times Shands stabbed Sharon and the nature of the attack, a jury could have found Shands only had a general intent to kill instead of the higher *mens rea* of specific intent to kill. *See State v. Kinard*, 373 S.C. 500, 504, 646 S.E.2d 168, 169 (Ct. App. 2007) ("'General intent' is defined as 'the state of mind required for the commission of certain common law crimes not requiring specific intent' and it 'usually takes the form of recklessness . . . or negligence.'" (quoting BLACK'S LAW DICTIONARY (7th ed. 1999))); *Nesbitt*, 346 S.C. at 231, 550 S.E.2d at 866 ("[S]pecific intent means that the defendant consciously intended the completion of acts comprising the [completed] offense." (quoting *Sutton*, 340 S.C. at 397, 532 S.E.2d at 285)). Therefore, because there was evidence to reduce Shands's charge, the trial court erred in instructing the jury that malice could be inferred from the use of a deadly weapon. *See Belcher*, 385 S.C. at 610, 685 S.E.2d at 809 (holding the use of a

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[8] The legislature codified ABHAN in section 16-3-600(B)(1) of the South Carolina Code (2015). However, the codified version's effective date was after the dates of the alleged offenses in this case. Thus, the pre-codified version of ABHAN applies to Shands's case. *See Pierce v. State*, 338 S.C. 139, 145, 526 S.E.2d 222, 225 (2000) ("The application of a new or amended criminal statute may prompt a defendant to allege a violation of the Ex Post Facto Clause, arguing the court may not apply a statute enacted or amended after the date of an offense in his case.").

deadly weapon inferred malice instruction is not proper when there was evidence to reduce the crime).

This error requires reversal of Shands's conviction for attempted murder.[9] However, we find the trial court's error caused Shands no prejudice as to his convictions for first-degree burglary, kidnapping, first-degree assault and battery, and possession of a weapon during the commission of a violent crime, and we affirm those convictions.

VII. CLOSING ARGUMENT PROCEDURE

Shands argues the trial court violated his due process rights[10] by refusing to require the State to open fully on the law and the facts in its initial closing argument so he would have the opportunity to respond to the State's entire argument in his closing argument. Shands argues the State "revealed to the jurors for the first time [its] theory about the kidnapping charge" in its reply closing argument. Shands also states he would have liked to respond to

> what [he] considered to be somewhat an emotional attack on [him] both in some of how it was delivered but in particular[] the language that was used. [He] would have responded about what [the State] said about kidnapping, [he] would have responded to what [it] said about placing the police on trial, that was not [his] purpose. And [he] would have responded to . . . the argument made about Sharon leaving that day as well as a number of things that [he thought it] said that exceeded the bounds of what the evidence really was . . . .

Shands contends even if some of the evidence fairly arose from the evidence at the

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[9] Because Shands's argument regarding the propriety of the inferred malice instruction is dispositive, we do not consider Shands's argument that giving the example of a knife as a deadly weapon was a comment on the facts of the case. *See State v. Henson*, 407 S.C. 154, 167 n.4, 754 S.E.2d 508, 515 n.4 (2014) (declining to reach an additional argument where the resolution of the first issue was dispositive).

[10] Due process requires that no person shall be deprived of life, liberty, or property without due process of law. U.S. CONST. amend. XIV § 1; S.C. CONST. art. 1, § 3.

trial, "there was [no] guarantee the [State] would make those same arguments during [its] closing argument" and it was "fundamentally unfair to require [him] to predict the prosecutor's closing argument."

In *State v. Beaty*, our supreme court declined to create a rule specifying "the content and order of closing arguments in criminal cases in which a defendant introduces evidence," noting it did not have the authority "to promulgate a procedural rule for future cases by simply issuing an opinion." *State v. Beaty*, Op. No. 27693 (S.C. Sup. Ct. filed April 25, 2018) (Shearouse Adv. Sh. No. 17 at 12, 19, 22, 28). The supreme court extensively discussed the history of South Carolina's rules and practices surrounding the procedure of closing arguments in criminal cases. *Id.* at 19–25. The court explained the existing procedure applicable to Shands's case as follows:

> [I]n cases in which a defendant introduces evidence of any kind, even through a prosecution witness, the State has the final closing argument. However, in cases in which the State is entitled to the reply argument, there is no common law or codified rule as to whether the State must open in full on the law, or the facts, or both, or neither, and there is no rule governing the content of the State's reply argument.

Id. at 25. The court, instead, noted it "retain[ed] the authority to determine—on a case-by-case basis—whether a defendant's due process rights have been violated by procedural methods employed during a trial." *Id.* In *Beaty*, the supreme court found the State's closing arguments did not violate the defendant's procedural due process rights because the State's theories were (1) "arguably a proper response" to the defendant's closing argument, (2) "largely inconsequential to the question" of whether the defendant murdered the victim, (3) supported by evidence in the record, and (4) not prejudicial to the defendant. *Id.* at 26–28.

Therefore, we must determine whether Shands's due process rights were violated in this instance. "[P]rocedural due process contemplates a fair trial." *Id.* at 26. "A denial of due process occurs when a defendant in a criminal trial is denied the fundamental fairness essential to the concept of justice." *Id.* (quoting *State v. Hornsby*, 326 S.C. 121, 129, 484 S.E.2d 869, 873 (1991)). Our "case law focuses upon allegedly inflammatory or unsupported content of the State's closing argument, not upon whether the State must open in full on the facts and not upon

reply arguments which have a basis in the record but to which a defendant is not allowed to respond." *Id.* "Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument." *Humphries*, 351 S.C. at 373, 570 S.E.2d at 166. "The relevant question is whether the [State]'s comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.*

Although Shands argues he did not get a chance to reply to the State's version of the facts, we find he was aware of the State's arguments and could have used his closing argument to respond to them. Shands was aware of the State's theory of the kidnapping charge because the State explained what facts it believed supported the charge in response to Shands's directed verdict motion. The State indicated the kidnapping charge was appropriate because Shands grabbed Sharon by the hair to pull her back into the house and would not let her leave through the garage. The State indicated in its initial closing argument that the kidnapping in Shands's case was not "the traditional kidnapping" a person usually thinks about when "there is [an] Amber alert and somebody's child is missing." The State explained: "Kidnapping is confining someone against their will and it doesn't have to be for a long time, there is no set amount of time that you have to confine somebody." Although the jury had not yet heard the State's full theory for kidnapping, Shands was aware of its theory and knew from the State's initial closing argument that the State was focusing on a brief confinement to support the kidnapping charge. Furthermore, the State's comments in its closing argument regarding kidnapping were arguably in reply to Shands's closing argument comment that he "had no idea how [the State] would explain kidnapping to [the jury] under this evidence."

Regarding Shands's argument that the State "emotional[ly] attack[ed]" him in its reply closing argument, we believe this matter was inconsequential to the issue of Shands's guilt, and as discussed in Section V, these comments were not prejudicial. Shands further argued he would have responded to the State's comments about him "placing the police on trial." We believe the State's comments during its reply closing argument were arguably in response to Shands's closing argument highlighting the fact that the police officers never asked him what his side of the story was and stating the lack of information in the case was "the fault of the police officers." Furthermore, these comments were insignificant to the issues before the jury.

Accordingly, while the State did "not restrict its reply argument to matters raised by" Shands and the trial court did not allow him to respond to the foregoing points, we hold Shands did not suffer prejudice as a result because he was not denied "the fundamental fairness essential to the concept of justice." *See Beaty*, Op. No. 27795 (Shearouse Adv. Sh. No. 17 at 27) (quoting *Hornsby*, 326 S.C. at 129, 484 S.E.2d at 873).

VIII. DIRECTED VERDICT

Shands argues the trial court erred in denying his motion for a directed verdict on the kidnapping charge because the evidence did not show that Shands "actually restrained" Sharon. Shands further argues the kidnapping statute is unconstitutionally vague and overbroad because the facts of his case did not put him on notice that his conduct could constitute kidnapping. We disagree.

"When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight." *State v. Hernandez*, 382 S.C. 620, 624, 677 S.E.2d 603, 605 (2009). If the State fails to produce evidence of the charged offense, then the defendant is entitled to a directed verdict. *Id.* "In an appeal from the denial of a directed verdict motion, the appellate court must view the evidence in the light most favorable to the State." *State v. Cope*, 405 S.C. 317, 348, 748 S.E.2d 194, 210 (2013). "If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the [c]ourt must find the case was properly submitted to the jury." *Id.* (quoting *State v. Curtis*, 356 S.C. 622, 633–34, 591 S.E.2d 600, 605 (2004)).

Kidnapping occurs when one "unlawfully seize[s], confine[s], inveigle[s], decoy[s], kidnap[s], abduct[s,] or carr[ies] away" another person. S.C. Code Ann. § 16-3-910 (2015). "A kidnapping commences when [a victim] is [lawfully] deprived of his [or her] freedom and continues until freedom is restored." *State v. Kornahrens*, 290 S.C. 281, 287, 350 S.E.2d 180, 184 (1986). "[T]he crime of kidnapping in South Carolina is broad in scope" and "encompass[es] restraint regardless of duration." *Lozada v. S.C. Law Enf't Div.*, 395 S.C. 509, 513, 719 S.E.2d 258, 260 (2011).

We find Shands's argument regarding the constitutionality of the kidnapping statute is without merit because our supreme court has already held the kidnapping statute is not unconstitutionally vague and overbroad. *See State v. Smith*, 275 S.C. 164, 166, 268 S.E.2d 276, 277 (1980) ("The terms of th[e] statute are clear and

unambiguous. It proscribes the forceful seizure, confinement[,] or carrying away of another against his will without authority of law. We hold it is not unconstitutionally vague . . . .").[11] Further, we hold the trial court did not err in denying Shands's motion for a directed verdict because, viewing the evidence in the light most favorable to the State, there was evidence to support the kidnapping charge. Sharon testified she tried to leave the house, but Shands kept closing the garage door so she could not escape. Sharon also testified Shands pulled her by the hair and tried to drag her into the house so she could not leave. The sons both recalled Shands grabbing Sharon by the hair as well. We find this evidence supported the kidnapping charge. Shands appears to argue that because his attempts to close the garage door and pull Sharon inside the house by her hair were not ultimately successful in preventing Sharon from leaving the house, his actions were only *attempts* to restrain, rather than actual restraints. We disagree. The kidnapping statute does not prescribe a duration, and therefore, by preventing Sharon from leaving the house, Shands restrained and confined her for the purposes of the statute. *See Lozada*, 395 S.C. at 513, 719 S.E.2d at 260 (stating that kidnapping "encompass[es] restraint regardless of duration"). Therefore, we affirm the trial court's denial of Shands's motion for a directed verdict on the kidnapping charge.

CONCLUSION

For the foregoing reasons, we affirm Shands's convictions for first-degree burglary, kidnapping, first-degree assault and battery, and possession of a weapon during the commission of a violent crime, and we reverse his conviction for attempted murder.

AFFIRMED IN PART AND REVERSED IN PART.

WILLIAMS and MCDONALD, JJ., concur.

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[11] Other than an amendment to the maximum sentence, the kidnapping statute in 1980 was identical to the kidnapping statute in effect at the time of Shands's case. *See Smith*, 275 S.C. at 166, 268 S.E.2d at 277 ("Whoever shall unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away any other person by any means whatsoever without authority of law, . . ., shall be guilty of a felony and, upon conviction, shall suffer the punishment of life imprisonment . . ." (quoting S.C. Code Ann. § 16-3-910 (Supp. 1979)).