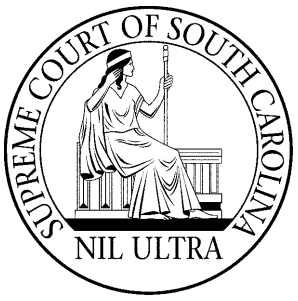

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 24
June 21, 2023
Patricia A. Howard, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of the Care and Treatment of Francis Arthur Oxner, Petitioner.

Appellate Case No. 2020-001278

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Lexington County
Diane Schafer Goodstein, Circuit Court Judge

Opinion No. 28160
Heard March 15, 2022 – Filed June 21, 2023

AFFIRMED

Blake Terence Williams and Allen Mattison Bogan, of Nelson Mullins Riley & Scarborough, LLP; Chief Appellate Defender Robert Michael Dudek and Appellate Defender David Alexander, all of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson and Senior Assistant Deputy Attorney General Deborah R.J. Shupe, both of Columbia, for Respondent.

JUSTICE FEW: For the first time, this Court considers a Sexually Violent Predator Act[1] case arising under subsection 44-48-100(B) of the South Carolina Code (2018). In all our prior sexually violent predator cases, the person the State sought to have committed had been convicted in criminal court of a sexually violent crime as a predicate to commencement of civil commitment proceedings under the Act. Subsection 44-48-100(B) applies when a person cannot be convicted in a criminal court because he is not competent to stand trial. The subsection requires that before the State may proceed to a trial to commit such person as a sexually violent predator, "the [circuit] court first shall hear evidence and determine whether the person committed the act or acts with which he is charged." § 44-48-100(B). If the circuit court determines after such a hearing the person did commit the charged acts, then the State may take the civil commitment proceedings to trial. *Id.* The circuit court in this case found Francis Arthur Oxner committed the acts with which he was charged. On appeal, Oxner claims a lengthy delay before his subsection 44-48-100(B) hearing violated his right to a speedy trial, the fact he was never convicted precludes proceedings under the Act, and conducting the subsection 44-48-100(B) hearing while he was incompetent violated his due process rights. We affirm.

I. Facts and Procedural History

In 2005, the State indicted Oxner for first degree criminal sexual conduct with a minor, assault with intent to commit first degree criminal sexual conduct (two counts), buggery, and exposure of private parts in a lewd and lascivious manner. The State's forensic psychiatrist found Oxner incompetent to stand trial, so the State dismissed the indictments without prejudice.[2] From 2005 until 2011, pursuant to several probate court orders, Oxner was hospitalized at the South Carolina Department of Mental Health for treatment of his mental illnesses, which included Schizophrenia (Paranoid Type) and Schizotypal Personality traits.

In May 2011, the Department recommended Oxner be transferred to a residential care facility. As required by subsection 44-48-40(A)(1) of the South Carolina Code

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[1] S.C. Code Ann. §§ 44-48-10 to -170 (2018).

[2] To accomplish this, the assistant solicitor wrote "DNP with leave to re-indict if Δ becomes competent" on the original of each indictment—presumably meaning "do not prosecute . . ." or "dismiss/nolle prosse . . ."—and signed her name.

(2018), the Department notified the multidisciplinary team and the Attorney General of the recommended transfer. The State filed a petition in circuit court on July 11, 2011, requesting the court make a probable cause determination as to whether Oxner qualifies as a sexually violent predator under the Act. On August 16, 2011, the circuit court issued an order finding probable cause to believe Oxner qualifies as a sexually violent predator. The circuit court ordered a hearing pursuant to subsection 44-48-100(B).[3]

The circuit court did not conduct the subsection 44-48-100(B) hearing until April 21, 2016. The court found Oxner "committed the act for which he was charged," "remains incompetent to stand trial," and "probable cause exists to have [him] evaluated under the Act to determine whether or not he suffers from a mental abnormality or personality disorder that makes him likely to engage in acts of sexual violence if not confined." Oxner immediately appealed the May 18, 2016 final order pursuant to subsection 44-48-100(B),[4] and the court of appeals affirmed. *In re Care & Treatment of Oxner*, 430 S.C. 555, 846 S.E.2d 365 (Ct. App. 2020). We granted Oxner's petition for a writ of certiorari to review the court of appeals' opinion. We affirm the court of appeals.

II. Delay of the Subsection 44-48-100(B) Hearing

Oxner argues he was denied the right to a speedy trial because there was "an unexplained, four-year delay" between the initiation of sexually violent predator proceedings in 2011 and the subsection 44-48-100(B) hearing in 2016. The court of appeals declined to address this issue, holding the issue was unpreserved. 430 S.C. at 565-66, 846 S.E.2d at 371. While we are troubled by this unexplained and clearly unnecessary delay, we agree with the court of appeals. Oxner did not raise the timeliness issue until the end of the subsection 44-48-100(B) hearing in April 2016.

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[3] In 2014, the State re-indicted Oxner for assault with the intent to commit first degree criminal sexual conduct with a minor, and in 2015, the State re-indicted Oxner for first degree criminal sexual conduct with a minor under the age of eleven.

[4] "If, after the conclusion of the hearing on this issue, the court finds beyond a reasonable doubt that the person committed the act or acts with which he is charged, the court must enter a final order, appealable by the person, on that issue . . . ." § 44-48-100(B).

The circuit court did not address the issue at that point and did not rule on the issue in its final order. Oxner did not file a Rule 59(e) motion asking the court to address the issue. Therefore, whether Oxner was denied the right to a speedy trial because of the delay is not preserved for our review. *See In re Michael H.*, 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004) ("In order to preserve an issue for appeal, it must be raised to *and* ruled upon by the trial court." (emphasis added) (citing *Wilder Corp. v. Wilke*, 330 S.C. 71, 497 S.E.2d 731 (1998))).

III. "Convicted of a sexually violent offense"

Oxner contends he could not be subject to proceedings under the Act because he did not meet the Act's definition of a sexually violent predator. The Act defines a "sexually violent predator" as a person who "(a) has been convicted of a sexually violent offense; and (b) suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment." § 44-48-30(1). Oxner argues he has never been "convicted of a sexually violent offense."

The phrase "convicted of a sexually violent offense," however, is a defined term under the Act. The definition includes, of course, persons who have been criminally convicted of their crimes. § 44-48-30(6)(a)-(b). The definition also includes a person who "has . . . been charged but determined to be incompetent to stand trial for a sexually violent offense." § 44-48-30(6)(c). We have acknowledged this definition before, stating, "The use of the word 'conviction' is somewhat misleading . . . since under the Act it includes persons charged but found incompetent to stand trial, those found not guilty by reason of insanity, and those found guilty but mentally ill." *In re Care & Treatment of Matthews*, 345 S.C. 638, 649-50, 550 S.E.2d 311, 316 (2001). While Oxner does not meet the colloquial meaning of "convicted of a sexually violent offense," he meets the statutory definition. Therefore, we agree with the court of appeals that he was subject to sexually violent predator proceedings.

The fact Oxner's charges were dismissed in 2005 makes no difference to this conclusion.[5] For purposes of the "convicted of a sexually violent offense"

[5] Oxner argues he did not meet the subsection 44-48-30(6)(c) requirement of "has . . . been charged" because the 2005 charges were "nolle prossed." He wrote in his brief, "For legal purposes, at that juncture it was the same as if Oxner had never been

requirement, it is sufficient that Oxner had been charged in 2005, found incompetent to stand trial, and re-indicted in 2014 and 2015 before the subsection 44-48-100(B) hearing in 2016.

IV. Due Process Challenge

Finally, Oxner argues the subsection 44-48-100(B) hearing violated his due process rights because he was unable to assist counsel in representing him due to severe incompetence. He challenges "whether the constitutional guarantees to due process and the effective assistance of counsel can be sufficiently afforded in a proceeding under § 44-48-100(B) where the accused is incompetent and unable to assist counsel." The court of appeals rejected this argument and held the Act "includes significant procedural safeguards that protect an incompetent person from the risk of an erroneous deprivation of his personal liberty interests, while addressing the State's compelling interests in providing treatment for sexually violent predators and protecting the public." 430 S.C. at 569, 846 S.E.2d at 373. We agree.

'charged' since the *nolle prosequi* had extinguished the legal effect of the charges." Oxner relies on *Mackey v. State*, 357 S.C. 666, 595 S.E.2d 241 (2004). In that case, we vacated the petitioner's convictions and sentences because his indictments had been dismissed and the State did not re-indict him before his criminal trial. 357 S.C. at 668, 595 S.E.2d at 242-43. In the course of explaining that the State may not proceed to a criminal trial after the dismissal of an indictment unless the defendant is re-indicted, we stated, "We adopt a specific, bright-line rule that . . . treats charges *nol prossed* as if they never existed . . . ." 357 S.C. at 669, 595 S.E.2d at 243. Oxner argues the words we used in *Mackey* require us to find he "has [not] been charged" under subsection 44-48-30(6)(c). We disagree. First, "nolle prosequi" is not a term of art; it is simply an archaic way to describe a dismissal without prejudice. *See Fortune v. State*, 428 S.C. 545, 551 n.1, 837 S.E.2d 37, 40 n.1 (2019) ("'Nolle prosse' is a shortened version of the archaic Latin term 'nolle prosequi.' In plain, modern English, the term means 'to have (a case) dismissed.'" (quoting *Nolle prosequi*, BLACK'S LAW DICTIONARY (11th ed. 2019))). Under *Mackey*, the dismissal of the 2005 indictments meant the State could not proceed to a criminal trial without re-indicting Oxner. There is nothing in *Mackey*, however, or in subsection 44-48-30(6)(c), that prevented the State from seeking a subsection 44-48-100(B) determination that Oxner "committed the act or acts with which he is charged" because—"at that juncture"—he "ha[d] been charged."

"The United States Supreme Court 'repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.'" *In re Care & Treatment of Chapman*, 419 S.C. 172, 179, 796 S.E.2d 843, 846 (2017) (quoting *Addington v. Texas*, 441 U.S. 418, 425, 99 S. Ct. 1804, 1809, 60 L. Ed. 2d 323, 330-31 (1979)). However, "Due Process is not a technical concept with fixed parameters unrelated to time, place, and circumstances; rather, it is a flexible concept that calls for such procedural protections as the situation demands." *State v. Legg*, 416 S.C. 9, 13, 785 S.E.2d 369, 371 (2016) (citing *Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S. Ct. 893, 902, 47 L. Ed. 2d 18, 33 (1976)).

When a person charged with a sexually violent crime is incompetent, the person cannot be tried in a court of general sessions. Nevertheless, the State has a significant interest in protecting the public from sexually violent people who threaten the health and welfare of the public, especially children. *See, e.g.*, *Addington*, 441 U.S. at 426, 99 S. Ct. at 1809, 60 L. Ed. 2d at 331 (noting "the state also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill"). Because the State's right and obligation to protect the public is hindered by the inability to criminally try an incompetent person, the State's only option is to proceed under the Act and seek involuntary civil commitment of the person. This is precisely the reason the General Assembly excluded "the right not to be tried while incompetent" from the constitutional rights available to persons under the Act but granted every other right available to criminal defendants. S.C. Code Ann. § 44-48-100(B) (providing "all constitutional rights available to defendants at criminal trials, other than the right not to be tried while incompetent, apply" in a subsection 44-48-100(B) hearing). Without the exclusion of this right, the State is unable to protect the public from some dangerous sexually violent persons.

While Oxner certainly has the right to due process during his subsection 44-48-100(B) hearing, his due process rights are satisfied by the safeguards articulated in the Act.[6] While these procedural safeguards may not be perfect, any potential

[6] For instance, subsection 44-48-100(B) requires compliance with the rules of evidence, provides all constitutional rights available at criminal trials (except the competency requirement), requires various findings the circuit court must make before determining whether the person committed the acts, allows the right to appeal

defects are reasonable in light of the circumstance that Oxner is not competent to stand a criminal trial. Under the very specific procedures outlined in the statute, the risk of an *erroneous* deprivation of Oxner's—any incompetent person's—liberty interest by involuntary civil commitment is significantly reduced if not completely eliminated. *See United States v. White*, 927 F.3d 257, 265 (4th Cir. 2019) (considering a due process challenge to the federal SVP commitment scheme and concluding "that the risk of an erroneous deprivation of [the person's] liberty interest is substantially and adequately mitigated by the broad array of procedures required" by the statute).

V. Conclusion

We find the circuit court did not err in finding Oxner "committed the act or acts with which he is charged" under subsection 44-48-100(B). We remand the case to the circuit court for "a trial to determine whether [Oxner] is a sexually violent predator" as required by subsection 44-48-90(A) of the South Carolina Code (2018).

AFFIRMED.

BEATTY, C.J., KITTREDGE, JAMES, JJ., and Acting Justice Kaye G. Hearn, concur.

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those findings before being tried, and requires the application of the highest burden of proof. S.C. Code Ann. § 44-48-100(B). In addition, section 44-48-90 of the South Carolina Code (2018) grants the right to a jury trial on the ultimate question of whether the person is a sexually violent predator, permits additional expert witnesses paid for by the State if the circuit court finds it necessary, and guarantees experts have access to the individual and his records. Finally, if the person is tried and subsequently committed as a sexually violent predator, the person has the ability to petition the circuit court for release from commitment at any time. S.C. Code Ann. § 44-48-110 (2018).

THE STATE OF SOUTH CAROLINA

In The Supreme Court

The State, Respondent,

v.

Jon Smart, Petitioner.

Appellate Case No. 2021-000987

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Clarendon County
D. Craig Brown, Circuit Court Judge

Opinion No. 28161
Heard November 16, 2022 – Filed June 21, 2023

AFFIRMED

Appellate Defender Joanna Katherine Delany, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson, Chief Deputy W. Jeffrey Young, Deputy Attorney General Donald J. Zelenka, Senior Assistant Deputy Attorney General Melody Jane Brown, Assistant Attorney General Tommy Evans Jr., of Columbia; Solicitor Ernest Adolphus Finney III, of Sumter, all for Respondent.

JUSTICE FEW: Today we address whether a juvenile sentenced to life in prison bears any burden of proof or persuasion when seeking resentencing under *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014). We hold there is no such burden—on either party—and the resentencing court did not impose such a burden. We affirm the decision of the resentencing court imposing a life sentence.

I. Facts and Procedural History

Smart and his co-defendant, Stephen Hutto, were in custody at a Department of Juvenile Justice detention facility near Rimini in Clarendon County in August 1999 when they brutally murdered a citizen volunteer who graciously allowed the boys to work on his family farm under his supervision as a part of their rehabilitation. Smart and Hutto then stole the man's truck and drove it on a violent crime spree starting in Rimini, to the town of Bamberg, and continuing to Myrtle Beach. After Horry County Police officers stopped them for a traffic violation and discovered the truck was stolen, Smart and Hutto led officers on a thirty-mile high-speed chase during which Smart fired shots at pursuing law enforcement vehicles. Smart was sixteen years old. For a more complete presentation of the facts, see *State v. Smart* (*Smart II*), 433 S.C. 651, 655-57, 861 S.E.2d 383, 385-86 (Ct. App. 2021); *State v. Hutto*, 356 S.C. 384, 386-87, 589 S.E.2d 202, 203 (Ct. App. 2003).

Smart pled guilty in 2001 to murder, armed robbery, grand larceny, criminal conspiracy, and escape. The plea court sentenced him to life in prison for the murder. Under subsection 16-3-20(A) of the South Carolina Code (Supp. 1999), Smart was not eligible for parole. In 2016, Smart sought resentencing pursuant to *Aiken*. *Smart v. State*, 416 S.C. 583, 583, 787 S.E.2d 845, 845 (2016). A different circuit court again sentenced him to life without parole. Smart appealed the sentence on multiple grounds, including his claim the resentencing court erred by requiring him to show life without parole was inappropriate. The court of appeals affirmed. *Smart II*, 433 S.C. at 666, 861 S.E.2d at 391. We granted Smart's petition for a writ of certiorari to address his arguments the resentencing court improperly placed on him a burden of proof or persuasion and should have placed the burden on the State.

II. *Aiken v. Byars*

In 2012, the Supreme Court of the United States held the Eighth Amendment prohibits mandatory life without parole sentences for homicides committed by a person under the age of eighteen. *Miller v. Alabama*, 567 U.S. 460, 489, 132 S. Ct. 2455, 2475, 183 L. Ed. 2d 407, 430 (2012). In *Aiken*, this Court applied the reasoning of *Miller* retroactively and extended it to South Carolina's discretionary

life without parole sentences. *See* 410 S.C. at 540-44, 765 S.E.2d at 575-77 (lead opinion); 410 S.C. at 545-46, 765 S.E.2d at 578 (Pleicones, J., concurring) ("While . . . the majority exceeds the scope of current Eighth Amendment jurisprudence in ordering relief under *Miller*, I would reach the same result under S.C. Const. art. I, § 15."). The Court emphasized the constitutional significance of youth, noting "*Miller* requires the sentencing authority 'take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.'" 410 S.C. at 544, 765 S.E.2d at 577 (quoting *Miller*, 567 U.S. at 480, 132 S. Ct. at 2469, 183 L. Ed. 2d at 424). We identified five factors from *Miller* that a circuit court must consider before sentencing a juvenile to life without parole. *Id.* (quoting *Miller*, 567 U.S. at 477-78, 132 S. Ct. at 2468, 183 L. Ed. 2d at 423).

III. Resentencing Procedure

In *Aiken*, we effectively granted every motion for resentencing for any juvenile sentenced to life without parole prior to *Miller* and *Aiken*. We addressed the "Appropriate Procedure" in *Aiken* itself, 410 S.C. at 544, 765 S.E.2d at 577, and required "the following procedures shall be followed" in a subsequent administrative order, *In re Admin. Ord.*, 415 S.C. 460, 460-61, 783 S.E.2d 534, 534 (2016). We now clarify that in an *Aiken* resentencing hearing—as with almost any other sentencing proceeding[1]—there is no burden of proof or persuasion placed on either party and there is no presumption for or against any sentence. Instead, both the State and the defendant have a mutual burden *of production* to provide the resentencing court with any evidence and arguments they believe bear on the *Aiken* factors or otherwise relate to what should be the appropriate sentence. The sentence to be imposed is within the discretion of the resentencing court. *See State v. Bolin*, 209 S.C. 108, 111, 39 S.E.2d 197, 198 (1946) ("The length of the prison sentence rests in the sound discretion of the trial Court . . . ." (quoting *State v. Johnson*, 159 S.C. 165, 170, 156 S.E. 353, 354 (1930))). In exercising this discretion, the resentencing court may give no deference to the prior sentencing court's decision to impose life without parole. The resentencing court must consider all the evidence and

[1] *But see* S.C. Code Ann. § 16-3-20 (B) (2015) (providing that "a statutory aggravating circumstance" must be found beyond a reasonable doubt before imposing the death penalty); *State v. Grooms*, 343 S.C. 248, 253-55, 540 S.E.2d 99, 101-02 (2000) (discussing a burden of persuasion in certain domestic violence cases under section 16-25-90 of the South Carolina Code (2015)).

arguments presented at the resentencing hearing and impose an appropriate sentence without any regard to the prior sentencing court's thought process or decision.

Smart argues the resentencing court should have placed a burden of proof or persuasion on the State. In *Miller*, the Supreme Court suggested it should be the "rare juvenile" who is sentenced to life without parole. *Miller*, 567 U.S. at 479-80, 132 S. Ct. at 2469, 183 L. Ed. 2d at 424 (quoting *Roper v. Simmons*, 543 U.S. 551, 573, 125 S. Ct. 1183, 1197, 161 L. Ed. 2d 1, 24 (2005); *Graham v. Florida*, 560 U.S. 48, 68, 130 S. Ct. 2011, 2026, 176 L. Ed. 2d 825, 841 (2010)). In *Aiken*—quoting the same discussion from *Miller*—this Court stated "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." 410 S.C. at 539, 765 S.E.2d at 575 (quoting 567 U.S. at 479, 132 S. Ct. at 2469, 183 L. Ed. 2d at 424). Smart relies on these statements and others to argue the State should bear the burden of demonstrating that a life without parole sentence is proper. We disagree. The *Miller* discussion related to "the great difficulty" sentencing courts face in "distinguishing" between those juveniles who do not deserve such a sentence and those who do. *Miller*, 567 U.S. at 479-80, 132 S. Ct. at 2469, 183 L. Ed. 2d at 424. The statements were not meant to suggest a presumption against life without parole or that any burden must be placed on the State.[2] Today we stand by what was essentially a prediction by this Court that when sentencing courts consider the *Aiken* factors and all the evidence that relates to those factors, because of "children's diminished culpability and heightened capacity for change[,] . . . appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Aiken*, 410 S.C. at 539, 765 S.E.2d at 575 (quoting *Miller*, 567 U.S. at 479, 132 S. Ct. at 2469, 183 L. Ed. 2d at 424). The decision belongs to the resentencing court, and this Court will not recognize any presumption nor impose any burden of proof or persuasion. We trust our circuit judges are well-equipped to make the right decision in each case.

[2] *See Jones v. Mississippi*, 593 U.S. ___, ___, 141 S. Ct. 1307, 1318-19, 209 L. Ed. 2d 390, 404 (2021) (holding "a separate factual finding of permanent incorrigibility is not required before a sentencer imposes a life-without-parole sentence on a murderer under 18").

IV. Smart's Resentencing

We acknowledge there is language in the resentencing court's oral ruling that could be understood to support Smart's claim the court placed an improper burden on him.[3] After a careful review of the entire record, however, we are convinced the resentencing court thoroughly considered Smart's background and history in light of the *Aiken* factors. As *Aiken* requires, "the mitigating hallmark features of youth [were] fully explored," 410 S.C. at 545, 765 S.E.2d at 578, and the resentencing court imposed its life sentence de novo without any burden of proof or persuasion on Smart or any deference to the sentence previously imposed.

While we do not review the substance of the resentencing court's decision to impose a life sentence, to explain our ruling the court followed the proper procedure under *Aiken*, we summarize the thought process the court went through in making its decision. We begin with a statement the resentencing court made at the conclusion of the hearing, "I have methodically gone through each bit of information that's been provided to me [and] made what I believe to be, not easy, not easy on my part, but made what I believe to be the right decision in this case." The record supports the court's statement. First, the court considered the transcript from and other evidence surrounding the original guilty plea to murder. The court heard extensive testimony from an expert psychologist who interviewed Smart several times and reviewed thousands of pages of his records. The court also heard testimony from four other witnesses the State and Smart presented regarding the circumstances of the crime and Smart's personal background and history.

The court then heard arguments from the attorneys on both sides and analyzed the *Aiken* factors in light of those arguments. As an example of this analysis, the court compared Smart's sister's claim at the resentencing hearing that her parents ignored the children and exposed them to drugs with Smart's father's testimony at a family court juvenile delinquency proceeding before Smart was sent to Rimini. In light of the father's testimony—particularly his efforts to get Smart drug treatment—the sentencing court discounted the sister's testimony. Also, the court carefully considered whether Smart and Hutto planned the murder in advance or acted suddenly and impulsively. The State argued a map of their escape route

[3] For example, the circuit court concluded its ruling by saying, "It is with no pleasure at all that I affirm so to speak, or deny your client's motion and impose a life sentence." Based on the circuit court's in-depth consideration of the *Miller* factors, we believe this was simply a misstatement by the court.

demonstrated the murder was planned in advance, but the court discounted the map because—the court appears to have concluded—it just as easily could have been made as part of their plans for after their eventual release. Ultimately, based on testimony from other juveniles to whom Smart and Hutto spoke about planning the murder, the court was convinced the boys planned the murder and escape in advance; it was not a sudden or impulsive action. The court also found Smart appreciated the consequences of his actions because he and Hutto hid the victim's body and attempted to wash the blood away from the scene. The court considered Smart's multiple statements to law enforcement officers, his interactions with solicitors, and his conduct during the guilty plea, all as indicative Smart was competent to assist counsel in his defense. After viewing autopsy photographs, the court noted the sheer brutality of the murder. The resentencing court noted the plea court entered a "negotiated sentence" of life in prison, as a result of which the plea court had no choice but to accept the negotiation or reject the plea, but stated that on resentencing the court was considering everything presented in the hearing in order to make its own choice.

Finally, the resentencing court stated,

> I have taken all these factors into consideration, and I still believe it's the right decision. Will I lose sleep over it [?] . . . Probably so. . . . These decisions aren't easy. Certainly, I have tried. And I have told you all, I typed my own 30-page transcript in my review of all this stuff. I have tried to hit on each of these points in coming to this conclusion. Again that's not – it wasn't easy.

In sum, it is clear from the record the resentencing court carefully considered all of the evidence presented at the resentencing hearing by both the State and Smart and correctly treated the proceeding as a de novo sentencing hearing, with no burden of proof or persuasion on Smart.

V. Conclusion

This Court's decision in *Aiken* requires juveniles "receive an individualized hearing where the mitigating hallmark features of youth are fully explored" before being sentenced to life without parole. 410 S.C. at 545, 765 S.E.2d at 578. The resentencing court in this case gave Smart just such an individualized hearing and soundly exercised its sentencing discretion without placing any burden of proof or persuasion on Smart nor giving any deference to the previously imposed sentence.

AFFIRMED.

BEATTY, C.J., KITTREDGE, JAMES, JJ., and Acting Justice Kaye G. Hearn, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Richard Passio Jr., Petitioner.

Appellate Case No. 2021-001007

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Jasper County
Carmen T. Mullen, Circuit Court Judge

Opinion No. 28162
Heard March 8, 2023 – Filed June 21, 2023

AFFIRMED AS MODIFIED

Elizabeth Anne Franklin-Best, of Elizabeth Franklin-Best, P.C., of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson, Deputy Attorney General Donald J. Zelenka, Senior Assistant Deputy Attorney General Melody Jane Brown, and Assistant Attorney General William Joseph Maye, all of Columbia; and Solicitor Isaac McDuffie Stone, of Bluffton, all for Respondent.

JUSTICE KITTREDGE: Petitioner Richard Passio Jr. was convicted of murdering his wife and sentenced to thirty years' imprisonment. Passio appealed, arguing the trial court erred in (1) denying his motion for a directed verdict and (2) admitting a screenshot of his Facebook page. Finding no error by the trial court on either issue, the court of appeals affirmed. *State v. Passio*, 433 S.C. 666, 861 S.E.2d 785 (Ct. App. 2021). We granted a writ of certiorari to review the court of appeals' decision.

Having carefully examined Passio's challenges, we affirm the court of appeals in upholding the trial court's denial of Passio's motion for a directed verdict. We conclude, however, that the admission of Passio's Facebook page was error, albeit harmless. We therefore affirm the court of appeals' decision as modified.

I.

As more fully set forth in the court of appeals' opinion, the State presented substantial circumstantial evidence of Passio's guilt. We readily agree with the court of appeals that the evidence presented at trial—viewed collectively and in the light most favorable to the State—provided a sufficient basis on which a reasonable juror could readily find Passio guilty beyond a reasonable doubt. *See State v. Frazier*, 386 S.C. 526, 531, 689 S.E.2d 610, 613 (2010) ("When reviewing a denial of a directed verdict, an appellate court views the evidence and all reasonable inferences in the light most favorable to the State."); *State v. Bennett*, 415 S.C. 232, 237, 781 S.E.2d 352, 354 (2016) ("[I]n ruling on a directed verdict motion where the State relies on circumstantial evidence, the court must determine whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt."). Therefore, the court of appeals properly affirmed the trial court's denial of Passio's motion for a directed verdict.

We further note that Passio now relies on his directed verdict motion to challenge the admission of certain evidence. We reject Passio's attempt to rely on his directed verdict motion as a backdoor means to contest evidentiary rulings that were not objected to at trial and not raised as separate issues on appeal.

II.

With respect to Passio's Facebook profile picture and accompanying caption,[1] the State introduced the Facebook screenshot evidence (over Passio's objection) during the testimony of Passio's father. The State argued the Facebook caption evidence was necessary to impeach the father's testimony that he knew his son well. The father denied any knowledge of or familiarity with the Facebook caption. The admission of this evidence was error: a witness may not be impeached by extrinsic evidence of a collateral matter. 98 C.J.S. *Witnesses* § 856 (2013) ("A witness cannot be contradicted, for the purpose of impeachment, as to collateral, irrelevant, or immaterial matters. Evidence introduced for the sole purpose of impeaching a witness is not otherwise relevant or material. Where the subject of the extrinsic evidence is collateral to the substantive issues at trial, then normally the defendant's answer with regard to his or her knowledge or denial of the questioned conduct is binding on the questioner and precludes further inquiry or extrinsic proof. The effect of this rule is that it prevents irrelevant evidence from being introduced under the guise of impeachment." (footnotes omitted)).[2] It was error for the court of appeals to affirm the admission of the Facebook caption.

Nevertheless, the erroneous admission of Passio's Facebook caption was an insubstantial error not affecting the result of the trial. *See State v. Pagan*, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006) ("Generally, appellate courts will not set aside

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[1] The caption read, "I know who I am. I'm a dude, playing a dude, disguised as another dude." Although not revealed at trial, Passio's caption was a quote from the 2008 film *Tropic Thunder*.

[2] After improperly seeking admission of the collateral Facebook caption, the State compounded its error by misuing the caption to attack Passio's character during closing argument. Specifically, the solicitor concluded her closing argument as follows:

> I'm going to leave you with [Passio's] quote: "I know who I am, I'm a dude playing a dude, disguised as another dude." Well, he does know who he is, and he does know what he did. He knows the monster inside that he has tried to disguise. Don't be fooled by that disguise. I'm asking you to return a verdict of guilty on murder, and speak the truth that [the victim] can no longer speak.

convictions due to insubstantial errors not affecting the result."). The evidence of Passio's guilt was substantial, and there is no good-faith argument that the admission of the Facebook caption affected the outcome of the trial. The error in admitting the Facebook caption was harmless. *See State v. Langley*, 334 S.C. 643, 647–48, 515 S.E.2d 98, 100 (1999) ("Even if the evidence was not relevant and thus wrongly admitted by the trial judge, its admission may constitute harmless error if the irrelevant evidence did not affect the outcome of the trial."). We therefore modify the court of appeals' opinion.

III.

We affirm the court of appeals' decision to uphold the trial court's denial of Passio's motion for directed verdict. However, we modify the court of appeals' opinion by holding it was error—albeit harmless—for the trial court to admit Passio's Facebook caption. The decision of the court of appeals is

AFFIRMED AS MODIFIED.

BEATTY, C.J., FEW, JAMES, and HILL, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Lucinda Ruh, Plaintiff,

v.

Metal Recycling Services, LLC, Defendant.

Appellate Case No. 2022-000094

CERTIFIED QUESTION

ON CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Opinion No. 28163
Heard September 13, 2022 – Filed June 21, 2023

CERTIFIED QUESTION ANSWERED

James David George Jr., Graham L. Newman, and Mark D. Chappell, of Chappell, Smith & Arden, of Columbia, for Plaintiff.

Christopher A. Ogiba of Moore & Van Allen PLLC, of Charleston, and Scott M. Tyler of Moore & Van Allen PLLC, of Charlotte, NC, both for Defendant.

Robert Daniel Moseley Jr. and Robert Charles Rogers of Mosely Marcinak Law Group LLP, of Taylors, for Amici

Curiae South Carolina Chamber of Commerce and the South Carolina Trucking Association, Inc.

Whitney B. Harrison, of McGowan, Hood, Felder, & Phillips, LLC, of Columbia, for Amicus Curiae South Carolina Association for Justice.

JUSTICE FEW: The United States Court of Appeals for the Fourth Circuit certified the following question to this Court pursuant to Rule 244 of the South Carolina Appellate Court Rules:

> Under South Carolina law, can an employer be subject to liability for harm caused by the negligent selection of an independent contractor?

We answer the certified question:

> Yes, the principal[1] in an independent contractor relationship may be subject to liability for physical harm proximately caused by the principal's own negligence in selecting the independent contractor.

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[1] The term "employer" suggests an employer-employee relationship. In such a relationship, the employer—even if not itself negligent—may be vicariously liable for the negligence of its employee. *James v. Kelly Trucking Co.*, 377 S.C. 628, 631, 661 S.E.2d 329, 330 (2008) (citing *Sams v. Arthur*, 135 S.C. 123, 128-131, 133 S.E. 205, 207-08 (1926)). As we explain, one who retains an independent contractor is not vicariously liable for the contractor's negligence. This Court in previous opinions, the Fourth Circuit in the certified question, and the American Law Institute in Section 411 of the Restatement (Second) of Torts have all used the term "employer" to describe one who hires an independent contractor. To avoid any confusion between these different relationships and whether they give rise to vicarious liability, we believe the better term for an "employer" in an independent contractor relationship is "principal."

I. Background

Metal Recycling Services, LLC, hired an independent contractor—Norris Trucking1, LLC—to transport scrap metal. A truck driver employed by Norris Trucking hit the car Lucinda Ruh was driving and injured her. Ruh sued Metal Recycling Services and its parent company, Nucor Corporation, in state court. The defendants removed the case to the United States District Court for the District of South Carolina. The district court granted the defendants' motion to dismiss, finding Ruh did not allege an employer-employee relationship between the defendants and Norris Trucking or its driver, nor did she otherwise allege any basis on which the defendants could be liable for the negligence of their independent contractor. *Ruh v. Metal Recycling Servs., LLC*, 436 F. Supp. 3d 844, 852 (D.S.C. 2020). The district court delayed entry of judgment to allow Ruh to seek leave to amend her complaint. *Id.* Ruh then filed a motion to amend her complaint to add a claim that Metal Recycling Services itself was negligent in selecting Norris Trucking to transport the scrap metal. The district court denied the motion to amend and dismissed the complaint. *Ruh v. Metal Recycling Servs., LLC*, No. 0:19-CV-03229-CMC, 2020 WL 1303136, at *2-3 (D.S.C. Mar. 19, 2020). Ruh appealed to the United States Court of Appeals for the Fourth Circuit, which certified the question to this Court.

II. Analysis

We begin by affirming the "general rule" that a principal "is not vicariously liable for the negligent acts of an independent contractor." *Rock Hill Tel. Co. v. Globe Commc'ns, Inc.*, 363 S.C. 385, 390, 611 S.E.2d 235, 238 (2005); *see also Duane v. Presley Const. Co.*, 270 S.C. 682, 683, 244 S.E.2d 509, 510 (1978) (stating "an employer is not liable for the torts of an independent contractor committed in the performance of contracted work" (citing *Conlin v. City Council of Charleston*, 49 S.C.L. (15 Rich.) 201, 211 (1868))); *Caldwell v. Carroll*, 139 S.C. 163, 187, 137 S.E. 444, 452 (1927) (Cothran, J., dissenting from dismissal of petition for rehearing) ("In every clime, under every judicial sky, it has been the settled law that the proprietor of any kind of property to be constructed or improved is not liable in damages for the negligent act of an independent contractor . . . ."). Ruh's claim in her proposed Amended Complaint, however, is not based on the allegation that Norris Trucking—the contractor—was negligent. Rather, her claim is based on the allegation that Metal Recycling Services—the principal—was negligent in selecting Norris Trucking to perform the work. Thus, nothing we say in this opinion affects

the general rule that a principal is not liable for the negligence of its independent contractor.

On this issue—the negligence of the independent contractor—there is one point we must make clear. In most of these cases, the plaintiff contends the independent contractor has committed a negligent act, and thus, will also be a defendant. In this case, for example, Ruh brought a separate claim against Norris Trucking and its driver for the driver's negligence in causing her injuries. In most cases in which the plaintiff sues the contractor *and* the principal—this case included—the plaintiff's theory is the contractor's negligence was one proximate cause of the injury, but also, the principal's negligent failure to select a competent and careful contractor was another proximate cause of the injury. *See generally J.T. Baggerly v. CSX Transp., Inc.*, 370 S.C. 362, 369, 635 S.E.2d 97, 101 (2006) (recognizing there may be more than one proximate cause of any injury); *Culbertson v. Johnson Motor Lines, Inc.*, 226 S.C. 13, 23, 83 S.E.2d 338, 342-43 (1954) (same). To be clear, however, proving the negligence of the independent contractor will not result in the liability of the principal. Under our decision today, there can be no recovery against the principal unless the plaintiff separately proves the negligence *of the principal* in selecting that particular independent contractor and that the principal's negligence was a proximate cause of the alleged injuries.

The question of whether the principal in an independent-contractor relationship can be held liable for its *own negligence* in selecting a particular contractor has never been squarely before this Court. We view our "yes" answer to the question, however, as a straightforward application of the defining principles of tort law in this State, and we believe our answer should come as no surprise to even a casual student of the law. *See Fitzer v. Greater Greenville S.C. Young Men's Christian Ass'n*, 277 S.C. 1, 3, 282 S.E.2d 230, 231 (1981) ("lay[ing] this anachronism [of charitable immunity] to rest" and stating, "There is no tenet more fundamental in our law than liability follows the tortious wrongdoer."), *superseded in part by statute*, Act. No. 461, 1994 S.C. Acts 4963.[2] In fact, our predecessor Court—the Court of Appeals

[2] *See also Langley v. Boyter*, 284 S.C. 162, 183, 325 S.E.2d 550, 562 (Ct. App. 1984) (discussing "the basic premise of our fault system" is that a defendant "who is at fault in causing an accident" should not be allowed "to escape bearing any of its cost"), *opinion quashed*, 286 S.C. 85, 332 S.E.2d 100 (1985), *reasoning later adopted in*, *Nelson v. Concrete Supply Co.*, 303 S.C. 243, 399 S.E.2d 783 (1991); Ralph C. McCullough II & Gerald M. Finkel, *A Guide to South Carolina Torts IV* 2

for the Courts of Law and Equity[3]—anticipated today's ruling over 150 years ago. *See Conlin*, 49 S.C.L. at 211 (predicting that "under suitable allegations the owner might be made responsible for the misconduct or negligence of a contractor known to be unworthy of trust").[4] As the Fourth Circuit noted in its certification order to this Court, "every other state in the Fourth Circuit has . . . recognized a duty to hire a competent independent contractor." *Ruh v. Metal Recycling Servs., LLC*, No. 20-1440, 2022 WL 203744, at *2 (4th Cir. Jan. 24, 2022) (citing cases). As Ruh points out in her brief, "thirty-seven states have [held a principal] owes a duty [of

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(1st ed. 1995) ("The central theme underlying the whole of tort law is the idea that the tortfeasor . . . is usually held responsible . . . because he has departed from a reasonable standard of care.").

[3] The Supreme Court of South Carolina was not created until the adoption of the 1868 Constitution. *See* S.C. Const. of 1868 art. IV, §§ 1-5. From 1859 to 1868, appeals from trial courts were heard by the Court of Appeals for the Courts of Law and Equity, created by statute. *See* Act No. 4438, 12 Statutes of S.C. 647 (1859) ("*Be it enacted* by the Senate and House of Representatives, now met and sitting in General Assembly, . . . That a Court of Appeals for the Courts of Law and Equity shall be, and the same is hereby, established."). *Conlin*—decided in January 1868—was one of the last decisions the court of appeals made before the new Justices of the Supreme Court were elected in July. *See* Barry Edmond Hambright, The South Carolina Supreme Court 37-50 (1981) (Ph.D. dissertation, University of South Carolina) (on file with the Supreme Court of South Carolina Library) (discussing the creation of the 1859 Court of Appeals and the 1868 Supreme Court).

[4] *See also Caldwell*, 139 S.C. at 172, 137 S.E. at 446 (majority allowing negligence action against principal to proceed); 139 S.C. at 184-85, 137 S.E. at 451 (Cothran, J., dissenting) (stating in response to majority, "Where the relation of an independent contractor exists, *and due diligence has been exercised in selecting a competent contractor*, . . . the contractor is not liable" (emphasis added) (quoting 39 *Corpus Juris* § 1530, 1324 and citing *Conlin*, 49 S.C.L. at 211); *Shockley v. Hoechst Celanese Corp.*, 793 F. Supp. 670, 674-75 (D.S.C. 1992) (imposing liability on the principal for its own negligence in using a contractor to dispose of hazardous waste), *aff'd on this ground, rev'd in part on other grounds*, 996 F.2d 1212 (4th Cir. 1993) (unpublished table decision).

reasonable care] in the selection of an independent contractor."[5] As our own research reveals, no state has held that a principal is insulated from the consequences of its own negligence simply because its contractor was also negligent in causing the injury.

Nevertheless, Metal Recycling Services argues that to answer the question "yes" would "open the floodgates," and "expand . . . the scope of liability . . . to any [principal] who does not turn every stone to investigate and analyze the independent contractor's background, resources, and qualifications." Similarly, friends of the Court—South Carolina Chamber of Commerce and The South Carolina Trucking Association, Inc.—argue answering "yes" will create "unlimited liability upon any shipper who transports goods to or through the State of South Carolina" and "has the potential to drastically, and detrimentally, impact the business environment within the State of South Carolina." Because we are obligated to take these arguments seriously, we address how we anticipate our decision will play out in this and future cases, explain the limited impact we believe our decision will have, and hopefully assure those potentially affected by our decision that, in fact, the sky is not falling.

We turn, therefore, to section 411 of the Restatement (Second) of Torts, which provides:

> An employer is subject to liability for physical harm to third persons caused by his failure to exercise reasonable care to employ a competent and careful contractor
>
> (a) to do work which will involve a risk of physical harm unless it is skillfully and carefully done, or
>
> (b) to perform any duty which the employer owes to third persons.

Restatement (Second) of Torts § 411 (Am. L. Inst. 1965).

Ruh asks us to adopt section 411. While we find the text of and comments to subsection 411(a) will be useful in future cases as our circuit and appellate courts

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[5] Metal Recycling Services concedes "it is true that a majority of states have recognized such claims," but contends the majority comprises thirty-four states, not thirty-seven.

determine the parameters of this theory of liability, we deem it unnecessary to go so far as to "adopt" section 411. We will briefly explore four key features of subsection 411(a).[6] First—as in any negligence action—the plaintiff must prove the defendant—in these cases the principal—did not exercise reasonable care. Second, the standard for reasonable care will vary depending on the degree to which the work involves a risk of physical harm unless done "skillfully and carefully." Third, the question of reasonable care relates only to selecting a "competent and careful contractor." Finally, the plaintiff must establish the negligence of the principal was a proximate cause of the physical harm. Each of these features—and others not anticipated here—should be analyzed in future cases to develop a standard that allows an injured plaintiff to recover from an at-fault principal when such a recovery is warranted by the facts and the law, while avoiding unwarranted liability for principals who act reasonably in hiring independent contractors.

a. Reasonable Care

The standard for the liability of the principal is reasonable care, or, "that [care] which a reasonable [principal] would exercise under the circumstances." Restatement (Second) of Torts § 411 cmt. c. During oral argument, we explored what the reasonable care standard may require of principals. Following up here on that discussion, first, reasonable care under subsection 411(a) is a matter of proof. The plaintiff must establish by proof a standard of care for selecting a contractor for the particular work and that the principal breached that standard. Second, most participants in the modern economy already act reasonably in selecting contractors. *See* Restatement (Second) of Torts § 411 cmt. c (recognizing "one who employs" a contractor to perform relatively simple and safe work within the contractor's field "is entitled to assume that [a contractor] of good reputation is competent to do such work safely"); *id.* (explaining the sophistication of the principal "is to be taken into account" in determining the standard of care, using an example of hiring a contractor

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[6] This case involves potential liability only as set forth in subsection 411(a). We do not address liability under subsection 411(b). *Cf. Mentzer v. Ognibene*, 597 A.2d 604, 609 (Pa. Super. Ct. 1991) ("We agree that the scope of section 411 is properly limited to claims by third persons other than employees of the negligent independent contractor itself."); *Chapman v. Black*, 741 P.2d 998, 1005 (Wash. App. 1987) ("[T]he liability extends not to the employee of the independent contractor, but to innocent passersby.").

to build a house); *Sievers v. McClure*, 746 P.2d 885, 891 (Alaska 1987) ("[Section 411] is not unduly burdensome, as in most cases it requires *no additional effort* from an employer who must act reasonably in the selection process . . . ." (emphasis added)). We do not foresee that our decision today will place any significant additional burden on the vast majority of principals to investigate a potential independent contractor.

b. Risk of Harm

Subsection 411(a) contemplates liability of the principal only when the work of the contractor involves a "risk of physical harm unless it is skillfully and carefully done." Thus, the principal should make reasonable inquiry into the extent to which the work the contractor is being hired to complete involves danger—a foreseeable risk of physical harm—to third parties. *See* Restatement (Second) of Torts § 411 cmt. c (reciting "the general principle that the amount of care which should be used is proportionate to the danger involved in failing to use it"). The American Law Institute explains that "if the work is such as will be highly dangerous unless properly done and is of a sort which requires peculiar competence and skill for its successful accomplishment," the principal "may well be required to go to considerable pains to investigate the reputation of the contractor . . . and ascertain the contractor's actual competence." *Id.* Thus, a more risky job generally requires a higher level of competence and care. A contractor hauling toxic chemicals on public highways, for example, needs expertise and equipment, and must act with a level of care, that would not be required for a contractor hauling paper products.

On the other hand, the American Law Institute explains, if the work is of a character that is within the competence of an average person—not requiring special skill and training—there will be a lower standard of care. *See* Restatement (Second) of Torts § 411 cmt. c (stating "whether the work lies within the competence of the average [contractor] or is work which can be properly done only by persons possessing *special skill and training*" is an "important" factor in "determining [the] amount of care required" (emphasis added)). Continuing with the trucking example, competence for hauling paper products may be nothing more than a commercial driver's license and a commercially sound vehicle, and carefulness may be indicated simply by not having a reputation for careless driving. Thus, hiring a trucking company to haul paper products may require no more than a surface level assessment of competence. *See, e.g.*, *Lutz v. Cybularz*, 607 A.2d 1089, 1093 (Pa. Super. Ct. 1992) (holding section 411 required "only a minimal degree of care" from the

principal in that case, and stating, "First, the foreseeable danger resulting from improperly delivered newspapers is significantly less than, for example, that of an improperly constructed building or machinery. The risk associated with delivering newspapers is unlikely to result in serious physical harm or property damage.").

c. Competent and Careful

Subsection 411(a) requires a principal to exercise reasonable care in selecting "a competent and careful" contractor. Whether a particular contractor is sufficiently competent and careful to perform the work safely will depend on the difficulty and danger associated with the particular work. "The words 'competent and careful contractor' denote a contractor who possesses the knowledge, skill, experience, and available equipment which a reasonable [principal] would realize that a contractor must have in order to do the work . . . without creating unreasonable risk of injury to others, and who also possesses the personal characteristics which are equally necessary." Restatement (Second) of Torts § 411 cmt. a. The American Law Institute explains, as an example of what is not meant by competent and careful, "The rule stated in this Section . . . has no application where the contractor, although competent and careful, is financially irresponsible." Restatement (Second) of Torts § 411 cmt. g.

As stated above, the standard for the competence and carefulness required for particular work is a matter of proof. Of course, a principal's actual knowledge that a contractor has demonstrated—or failed to demonstrate—competence and carefulness in prior work will always be relevant to whether the principal breached the standard of care.

d. Proximate Cause

As with any other theory of liability, the plaintiff must establish proximate cause. The American Law Institute addressed proximate cause in comment b to section 411, stating "it is . . . necessary that harm shall result from some quality in the contractor which made it negligent for the employer to entrust the work to him." Restatement (Second) of Torts § 411 cmt. b. Sticking with the trucking example to illustrate the point, if a principal hires a contractor unqualified to handle emergencies that may arise while hauling toxic chemicals, the principal is negligent in hiring the contractor. But if the contractor causes an accident by negligently failing to yield the right of way, and the dangerous quality of his cargo plays no part in the accident

or injury, then the plaintiff will be unable to establish cause-in-fact and thus unable to establish proximate cause. *See Wickersham v. Ford Motor Co.*, 432 S.C. 384, 390, 853 S.E.2d 329, 332 (2020) ("Proximate cause requires proof of cause-in-fact and legal cause."). In this example, the principal may be liable for his negligence in selecting the contractor only when the contractor's lack of qualifications to handle an emergency involving toxic chemicals is the cause-in-fact of the plaintiff's injury. *See, e.g.*, *Hixon v. Sherwin-Williams Co.*, 671 F.2d 1005, 1010 (7th Cir. 1982) (explaining that even if the defendant/principal was negligent in hiring a contractor "because he had no experience with this particular type of job," the accident resulted from a completely different error: the contractor's "unaccountable failure to read or pay attention to the warnings on the can of glue," and thus the plaintiff could not establish probable cause because the "accident was no more probable because [the contractor] was inexperienced").

III. Conclusion

We answer the certified question "yes." The potential liability we recognize today is consistent with fundamental principles of tort law. It is based solely on a principal's own negligence in hiring or selecting an independent contractor. It is not a form of vicarious liability nor is it an exception to the general rule that a principal is not liable for the negligence of an independent contractor.

CERTIFIED QUESTION ANSWERED.

BEATTY, C.J., KITTREDGE, JAMES, JJ., and Acting Justice Kaye G. Hearn, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Anthony Allan Jones, II, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2020-000188

ON WRIT OF CERTIORARI

Appeal from Charleston County
Robert E. Hood, Circuit Court Judge

Opinion No. 28164
Submitted May 16, 2022 – Filed June 21, 2023

AFFIRMED IN PART AND REVERSED IN PART

Elizabeth Anne Franklin-Best, of Elizabeth Franklin-Best, P.C., of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson and Senior Assistant Deputy Attorney General William M. Blitch, Jr., both of Columbia, for Respondent.

Allison Krause Elder and Katherine Weaver Patterson, both of Greenville, for Amici Curiae Root & Rebound, SC Commission on Indigent Defense, Dr. Kate Kleinfelter, Justice 360, and Cornell Law School Juvenile Justice

Clinic; Hannah Lyon Freedman, of Columbia, for Amicus Curiae Justice 360; Dr. Aleksandra Boguslawa Chauhan, of Columbia, for Amicus Curiae SC Commission on Indigent Defense; and John H. Blume, III, of Ithaca, NY, for Amicus Curiae Juvenile Justice Clinic and Cornell Law School.

CHIEF JUSTICE BEATTY: Petitioner Anthony Jones pleaded guilty on December 12, 2016 to first-degree burglary and armed robbery, crimes he committed at the ages of sixteen and seventeen, respectively. Pursuant to subsection 63-19-20(1),[1] the definitional statute of chapter nineteen in the Juvenile Justice Code, the circuit court had jurisdiction over Jones's charges, rather than the family court.[2] The

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[1] At the time of Jones's crimes and his plea, the subsection provided as follows:

> "Child" or "juvenile" means a person less than *seventeen* years of age. "Child" or "juvenile" does not mean a person *sixteen* years of age or older who is charged with a Class A, B, C, or D felony as defined in Section 16-1-20 or a felony which provides for a maximum term of imprisonment of fifteen years or more. However, a person *sixteen* years of age who is charged with a Class A, B, C, or D felony as defined in Section 16-1-20 or a felony which provides for a maximum term of imprisonment of fifteen years or more may be remanded to the family court for disposition of the charge at the discretion of the solicitor. An additional or accompanying charge associated with the charges contained in this item must be heard by the court with jurisdiction over the offenses contained in this item.

S.C. Code Ann. § 63-19-20(1) (2010) (emphasis added).

[2] The General Assembly amended the provision, effective in 2019:

> "Child" or "juvenile" means a person less than *eighteen* years of age. "Child" or "juvenile" does not mean a person *seventeen* years of age or older who is charged with a Class A, B, C, or D felony as defined in Section 16-1-20 or a felony which provides for a maximum term of imprisonment of fifteen years or more. However, a person *seventeen* years of age who is charged with a Class A, B, C, or D felony as defined

circuit court judge sentenced Jones to ten years in prison for armed robbery and fifteen years for first-degree burglary, with the sentences to run concurrently. Jones did not file a direct appeal. Instead, he filed an application for post-conviction relief ("PCR") on several grounds, including a challenge to the constitutionality of subsection 63-19-20(1). After a hearing, the PCR court dismissed the application, finding the constitutional challenge was not a cognizable PCR claim and, even if it were, the statute was constitutional. We granted Jones's petition for a writ of certiorari to consider whether the PCR court erred.

We conclude Jones properly brought this challenge in his PCR application and subsection 63-19-20(1) is constitutional. However, in keeping with our prior decisions regarding sentencing juveniles, circuit court judges must consider the mitigating factors of youth as identified in *Aiken v. Byars*[3] when sentencing. Consideration of these factors can be done at sentencing; therefore, a separate *Aiken* hearing is not required. Accordingly, we affirm in part and reverse in part.

I. FACTS & PROCEDURAL HISTORY

On June 7, 2015, Jones entered a home in Dorchester County through an unlocked door. The victim had left her patio door unlocked for neighbors to return furniture. When the victim returned home, she noticed her firearm was missing from her nightstand and her cat was outside. Investigators found fingerprints inside the victim's residence that matched Jones's fingerprints.

Jones used the stolen firearm in an armed robbery in Charleston County on June 28, 2015. Jones contacted the robbery victim regarding a Craigslist advertisement for a laptop. He and a co-defendant met the victim for the purported

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> in Section 16-1-20 or a felony which provides for a maximum term of imprisonment of fifteen years or more may be remanded to the family court for disposition of the charge at the discretion of the solicitor. An additional or accompanying charge associated with the charges contained in this item must be heard by the court with jurisdiction over the offenses contained in this item.

S.C. Code Ann. § 63-19-20(1) (Supp. 2021) (emphasis added).

[3] 410 S.C. 534, 765 S.E.2d 572 (2014).

sale. The co-defendant opened the victim's car door, grabbed the laptop, and pointed a revolver at the victim. Jones and the co-defendant fled with the laptop.

After police identified the vehicle from the victim's description, a high-speed chase ensued. The vehicle crashed into a tree, and Jones and the co-defendant fled. Police eventually arrested Jones and the co-defendant, and they found the laptop in the vehicle and the revolver in a nearby yard. Police also discovered the vehicle belonged to Jones's father. Later, the co-defendant gave a statement implicating Jones as the person who planned the robbery and provided the weapon.

The State indicted Jones for first-degree burglary in Dorchester County on October 1, 2015, and for armed robbery in Charleston County on October 20, 2015. Jones appeared before the circuit court because armed robbery (subsection 16-11-330(A)) is defined as a Class A felony.[4] S.C. Code Ann. § 16-1-90(A) (2015 & Supp. 2021); *id*. § 63-19-20(1) (2010) (excluding a person sixteen years of age who committed a Class A, B, C, or D felony from the definition of "child" or "juvenile").[5]

Jones agreed to plead guilty to both charges during the plea hearing held in Charleston County on December 12, 2016. After negotiations, the Dorchester County Solicitor recommended to the court that Jones receive the statutory minimum sentence of fifteen years in prison for the first-degree burglary charge. The Charleston County Solicitor did not make a sentencing recommendation.

At the time of his plea and sentencing, Jones was eighteen years old and had previously been adjudicated delinquent as a juvenile for second-degree burglary, a weapons charge, and shoplifting. The plea court sentenced him to fifteen years in

[4] First-degree burglary is exempt from the classification system. S.C. Code Ann. § 16-1-10(D) (2015 & Supp. 2021).

[5] In both the 2010 and 2021 version, the subsection allows for remand to the family court at the discretion of the solicitor.

prison for first-degree burglary[6] and ten years for armed robbery,[7] to run concurrently.

Following his sentencing, Jones did not pursue a direct appeal. However, on April 14, 2017, Jones simultaneously filed identical applications for PCR in Dorchester County and Charleston County. In these applications, Jones sought to vacate his pleas. By order dated June 22, 2017, a circuit court judge granted Jones's motion to merge the applications into one action for PCR.

Jones raised two arguments in his PCR application. First, Jones alleged his plea counsel was constitutionally ineffective according to *Strickland v. Washington*, 46 U.S. 668 (1984) because counsel did not properly investigate the mitigating circumstances of Jones's youth and failed to engage in meaningful plea negotiations. Second, Jones contended subsection 63-19-20(1),[8] which transferred him from family court to circuit court as an adult, was unconstitutional. Specifically, Jones asserted the statutory provision is unconstitutional because it does not allow discretion in sentencing for a defendant who was a juvenile at the time of the crime, which deprived him of due process. Further, Jones claimed his sentence is also cruel and unusual in violation of the Eighth Amendment to the United States Constitution and article I, sections 3 and 15, of the South Carolina Constitution.

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[6] *See* S.C. Code Ann. § 16-11-311(B) (2015) ("Burglary in the first degree is a felony punishable by life imprisonment. For purposes of this section, 'life' means until death. The court, in its discretion, may sentence the defendant to *a term of not less than fifteen years*." (emphasis added)).

[7] *See* S.C. Code Ann. § 16-11-330(A) (2015) ("A person who commits robbery while armed . . . is guilty of a felony and, upon conviction, *must be imprisoned for a mandatory minimum term of not less than ten years* or more than thirty years, no part of which may be suspended or probation granted." (emphasis added)).

[8] The parties and the lower courts refer to the provision as the "automatic waiver provision." This, however, is a misnomer. As we will explain, we construe subsection 63-19-20(1) as a definitional statute. We refer to it here exclusively as "subsection 63-19-20(1)."

The PCR court conducted the hearing on November 18, 2019 and subsequently dismissed Jones's application in an order dated January 29, 2020. The court relied on two principal reasons in dismissing the application.

First, the court ruled that Jones did not meet his burden under *Strickland* in alleging constitutional ineffectiveness for failing to investigate mitigating circumstances of youth because Jones was sentenced to the mandatory minimum for both crimes. In support of this, the PCR court found that plea counsel noted Jones's youth and the plea court considered Jones's age. Jones did not appeal the *Strickland* ruling to this Court.

Second, the PCR court ruled counsel was not deficient in failing to challenge the constitutionality of subsection 63-19-20(1) because "[a]t the time of [Jones's] plea, and to date, South Carolina's automatic waiver provision and [Jones's] mandatory minimum sentence are considered constitutional." The court found, even if the court interpreted Jones's claim as a *Strickland* challenge, "[i]t is a long-standing rule that an attorney is not required to be clairvoyant and anticipate or discover changes in the law which were not in existence at the time of trial." Further, the court noted that "[a]ny allegation that the waiver provision was unconstitutional or that [Jones's] sentence was unconstitutional could and should have been raised either in a direct appeal or through the Federal Habeas procedures."

Jones appealed the dismissal of his PCR application for the sole purpose of challenging the constitutionality of subsection 63-19-20(1). *See* Rule 243(a), SCACR; Rule 243(l), SCACR. This Court granted the petition because it involves a challenge to the constitutionality of a statute. *See* Rule 203(d)(1)(A)(ii), SCACR.

II. STANDARD OF REVIEW

In an appeal from a PCR court, "[q]uestions of law are reviewed *de novo*, and we will reverse the PCR court's decision when it is controlled by an error of law." *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016).

"This Court has a limited scope of review in cases involving a constitutional challenge to a statute because all statutes are presumed constitutional and, if possible, will be construed to render them valid." *Curtis v. State*, 345 S.C. 557, 569, 549 S.E.2d 591, 597 (2001). "Further, a legislative act will not be declared unconstitutional unless its repugnance to the Constitution is clear and beyond a reasonable doubt." *Id*. at 570, 549 S.E.2d at 597.

III. DISCUSSION

Jones argues subsection 63-19-20(1) is unconstitutional. In support, Jones contends the provision restricts a judge's ability to consider the mitigating factors of youth as articulated in *Miller v. Alabama*, 567 U.S. 460 (2012) because a family court is in a better position to adjudicate juveniles. In Jones's view, the provision prevents judges from exploring the full impact of a defendant's youth on the record before a juvenile is "automatically waived" to the circuit court. Jones maintains that "adult court" delivers more severe sentences to defendants.

Conversely, the State argues that the provision is constitutional and, therefore, the PCR court did not commit an error of law dismissing Jones's PCR application. The State contends that Jones has no constitutional right to have his case adjudicated in family court. Additionally, the State asserts that any right a person may have to be in the family court's jurisdiction is statutorily created.

Because Jones appeals the PCR court's order of dismissal, we must consider whether Jones brings a cognizable PCR claim in his application and whether subsection 63-19-20(1) is constitutional.

A. Cognizable PCR Claim

The PCR court characterized Jones's constitutional claim as a trial court error, not cognizable for PCR. We conclude the PCR court erred in this holding.

A person who has been convicted of a crime can initiate a PCR proceeding when he alleges his conviction or sentence violated either the United States Constitution or South Carolina Constitution. S.C. Code Ann. § 17-27-20(A)(1) (2014) ("Persons who may institute proceeding; exclusiveness of remedy. (A) Any person who has been convicted of, or sentenced for, a crime and who claims: (1) That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State.").

In *Simmons v. State*, this Court indirectly distinguished constitutional PCR claims and claims that the parties could have addressed before trial, during trial, or on direct appeal. 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975) ("Errors in a petitioner's trial which could have been reviewed on appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings." (citations omitted)).

However, "[a] violation found to be unconstitutional after the time for appeal lapses is not a direct appeal issue and is not barred from PCR consideration." *Gibson v. State*, 329 S.C. 37, 41, 495 S.E.2d 426, 428 (1998). "In a PCR proceeding, a defendant collaterally attacks his conviction and may raise any claims of constitutional violations relating to his conviction." *Williams v. Ozmint*, 380 S.C. 473, 477, 671 S.E.2d 600, 601 (2008).

Turning to the instant case, we find Jones properly challenged the constitutionality of subsection 63-19-20(1) and his resulting sentences in his PCR application. Initially, we note that Jones was precluded from raising this issue during the plea proceeding because conditional guilty pleas are not permitted. *See State v. Truesdale*, 278 S.C. 368, 370, 296 S.E.2d 528, 529 (1982) ("[A]ppellant here entered a conditional plea which is a practice not recognized in South Carolina and a practice which we expressly disapprove. . . . [A] guilty plea constitutes waiver of all prior claims of constitutional rights or deprivations thereof."). Further, pursuant to subsection 17-27-20(A)(1), the PCR court had jurisdiction over this claim, which is distinct from an ineffective assistance of counsel claim under *Strickland*.

Having found Jones presented a cognizable PCR claim, we now address the merits of his constitutional challenge.

B. Constitutionality of subsection 63-19-20(1)[9]

For reasons that will be discussed, we hold that subsection 63-19-20(1) is constitutional. However, we are mindful that juveniles are entitled to careful sentencing under the Eighth Amendment, and we direct circuit court judges to consider the mitigating factors of youth articulated in *Aiken v. Byars*, 410 S.C. 534, 544, 765 S.E.2d 572, 577 (2014). While consideration of the factors enumerated in *Aiken* provides sufficient attention to actual juvenility, circuit court judges are not required to do so in a separate *Aiken* hearing when sentencing pursuant to this subsection. *See In re Administrative Order*, 415 S.C. 460, 783 S.E.2d 534 (2016)

[9] Before the PCR court, Jones argued the provision violated his rights under both the United States and South Carolina Constitutions. However, before this Court, Jones does not argue subsection 63-19-20(1) violates his rights under the South Carolina Constitution. Accordingly, we limit our analysis to Jones's challenge under the United States Constitution.

(establishing procedures for the management and disposition of motions for resentencing filed pursuant to *Aiken*).

We begin by examining the jurisdiction of the family court and the operational effect of subsection 63-19-20(1). The family court has exclusive jurisdiction over a child "who is alleged to have violated or attempted to violate any state or local law." S.C. Code Ann. § 63-3-510(A)(1)(d) (2010). In general, a "child" or "juvenile" is defined as "a person less than seventeen years of age," according to the provision at the time of Jones's sentencing. S.C. Code Ann. § 63-19-20(1) (2010). However, the General Assembly expressly excluded from this definition "a person *sixteen* years of age or older who is charged with a Class A, B, C, or D felony as defined in Section 16-1-20 or a felony which provides for a maximum term of imprisonment of fifteen years or more." *Id*. (emphasis added). Because Jones did not meet the definition of a "child" or "juvenile," he was subject to the jurisdiction of the circuit court rather than the family court.

Further, in our view, subsection 63-19-20(1) operates as a definitional statute, in both its 2010 form and its 2021 form. The General Assembly created the family court as a statutory court and determines its jurisdiction through legislation. Because the subsection exempts Jones from falling within the family court's jurisdiction, in operation with subsection 63-3-510(A)(1)(d), it cannot "transfer" or "waive" him to the circuit court. Therefore, we decline to characterize subsection 63-29-20(1) as an "automatic waiver provision" and view the subsection as definitional in effect.

Turning to the basis of Jones's challenge, the Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.[10] "[T]he Eighth Amendment guarantees individuals the right not to be subjected to excessive sanctions." *Roper v. Simmons*, 543 U.S. 551, 560 (2005).

The United States Supreme Court sequentially has interpreted the protections of the Eighth Amendment to hold that juveniles are entitled to different treatment in sentencing when the death penalty or a life-without-parole sentence is imposed. *See Thompson v. Oklahoma*, 487 U.S. 815 (1988) (holding the execution of an offender under the age of sixteen at the time of the crime violates the United States

[10] "The provision is applicable to the States through the Fourteenth Amendment." *Roper v. Simmons*, 543 U.S. 551, 560 (2005).

Constitution); *Roper*, 543 U.S. at 551 (ruling the imposition of the death penalty for offenders under the age of eighteen at the time of the crime violates the Eighth and Fourteenth Amendments); *Graham v. Florida*, 560 U.S. 48 (2010) (holding the Eighth and Fourteenth Amendments prohibit the imposition of a life-without-parole sentence on a juvenile offender who did not commit homicide); *Miller v. Alabama*, 567 U.S. 460 (2012) (ruling that *mandatory* life-without-parole sentences for individuals under the age of eighteen violates the Eighth Amendment and stating the judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty).[11]

Most recently, the United States Supreme Court again limited its interpretation of the amendment in the *Roper-Graham-Miller* line of cases. *See Jones v. Mississippi*, 141 S. Ct. 1307 (2021) (holding, under *Miller*, a sentencing court need not make a finding of permanent incorrigibility before imposing a life-without-parole sentence).

We have followed United States Supreme Court precedent in interpreting the Eighth Amendment as applied to South Carolina law. *See Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014) (holding inmates sentenced to life without parole as juveniles before *Miller* were entitled to resentencing because their sentences violated the Eighth Amendment);[12] *State v. Slocumb*, 426 S.C. 297, 827 S.E.2d 148 (2019) (declining to extend *Graham*'s holding to de facto life-without-parole sentences); *State v. Smith*, 428 S.C. 417, 836 S.E.2d 348 (2019) (holding mandatory minimum sentence on those convicted of murder, whether a juvenile or adult, does not violate the Eighth Amendment as interpreted by *Miller*).

In *Aiken*, we held life-without-parole sentences for juvenile offenders only satisfied the constitutional requirements articulated in *Miller* when the sentencing court conducted an individualized hearing on mitigating factors of youth. 410 S.C. at 545, 765 S.E.2d at 578. We later limited *Aiken*'s holding by declining to extend the reasoning to de facto life sentences: "[W]e believe the proper course is to respect the Supreme Court's admonition that lower courts must refrain from extending federal constitutional protections beyond the line drawn by the Supreme Court."

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[11] The United States Supreme Court held the *Miller* rule applies to the states retroactively on collateral review. *Montgomery v. Louisiana*, 577 U.S. 190 (2016).

[12] This Court's decision in *Aiken* came before the United States Supreme Court's decision in *Montgomery*.

Slocumb, 426 S.C. at 314–15, 827 S.E.2d at 157. Again, in *Smith*, we declined to extend *Aiken* and held a mandatory minimum sentence was constitutional as applied to juveniles. 428 S.C. at 418, 836 S.E.2d at 348. Further, we noted that "[w]e are again being asked to ignore the confines of the holdings of the Supreme Court and instead extend the rationale underlying the holdings." *Id*. at 420, 836 S.E.2d at 349–50.

In this case, we find *Smith* is dispositive. Appellant Smith was convicted of murder and attempted murder, which he committed just before his eighteenth birthday. *Id*. at 418, 836 S.E.2d at 348. South Carolina law provided for a mandatory minimum sentence of thirty years for murder, whether an adult or a juvenile. *Id*. (citing S.C. Code Ann. § 16-3-20(A) (2015)). The circuit court gave Smith an individualized sentencing hearing pursuant to *Aiken*. *Id*. at 419, 836 S.E.2d at 349. Following the narrow trend of precedent, we declined to extend the reasoning behind the interpretation of the Eighth Amendment and held the mandatory minimum sentence was constitutional as applied to juveniles. *Id*. at 420–21, 836 S.E.2d at 349–50. Because mandatory minimums do not violate juveniles' rights under the Eighth Amendment, juveniles can be subject to those mandatory minimums under the operation of subsection 63-19-20(1).

Considering the confines of these precedents, we again decline to extend the *Roper-Graham-Miller* line,[13] and Jones cannot rely on their reasonings to support

[13] *See State v. B.T.D.*, 296 So. 3d 343, 354–55 (Ala. Crim. App. 2019) ("Accordingly, in Alabama, juveniles who have attained the age of [sixteen] years and who are charged with an offense enumerated in [the similar provision] have neither a constitutionally nor statutorily protected liberty interest in juvenile-court adjudication that would entitle them to procedural due process before they can be subjected to the jurisdiction of the 'adult court.'"); *see also United States v. Bland*, 472 F.2d 1329, 1337 (D.C. Cir. 1972) ("[J]udicial consideration of the legitimate scope of prosecutorial discretion clearly encompasses the exercise of such discretion where it has the effect of determining whether a person will be charged as a juvenile or as an adult. . . . [T]he exercise of discretion by the United States Attorney in the case at bar involves no violation of due process or equal protection of the law."), *cert. denied*, 412 U.S. 909 (1973).

his contention that subsection 63-19-20(1) violates the Eighth Amendment.[14] Therefore, we hold that subsection 63-19-20(1) does not violate the Constitution.

Despite our conclusion that subsection 63-19-20(1) is consistent with the Eighth Amendment, the United States Supreme Court's precedent, and our precedent, we direct circuit courts to consider the mitigating factors of youth in sentencing juveniles falling under the ambit of subsection 63-19-20(1).

In *Aiken*, we enumerated five factors that a court must consider when life without parole is a possible sentence for a juvenile:

> (1) the chronological age of the offender and the hallmark features of youth, including "immaturity, impetuosity, and failure to appreciate the risks and consequence"; (2) the "family and home environment" that surrounded the offender; (3) the circumstances of the homicide offense, including the extent of the offender's participation in the conduct and how familial and peer pressures may have affected him; (4) the "incompetencies associated with youth—for example, [the offender's] inability to deal with police officers or prosecutors (including on a plea agreement) or [the offender's] incapacity to assist his own attorneys"; and (5) the "possibility of rehabilitation."

410 S.C. at 544, 765 S.E.2d at 577 (quoting *Miller*, 567 U.S. at 477–78). Courts have applied these "mitigating factors of youth" to consider the fundamental differences between juvenile and adult offenders. *See supra* Section III(B).

Turning to the specific issue presented, the important distinction between family court and circuit court pertains to sentencing discretion. The family court has broad discretion as to adjudication, which is expressly not a conviction. S.C. Code

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[14] We note that some state courts have identified different challenges—either a claim based on a liberty interest in being "tried as a juvenile" or a right to be "sentenced as a juvenile." *Compare State v. Orozco*, 483 P.3d 331, 339 (Idaho 2021) ("[W]e decline to create a protected liberty interest where the legislature itself has expressly preempted one."), *with State v. Crooks*, 911 N.W.2d 153, 170 (Iowa 2018) ("We conclude the Iowa youthful offender statutes provide the discretionary, posttrial sentencing that *Miller* requires."). In theory, the former arises from the Due Process Clause of the Fourteenth Amendment, and the latter from the Eighth Amendment. However, it appears that the parties here base their claims on the latter.

Ann. § 63-19-1410 (2010 & Supp. 2021). In contrast, a circuit court's discretion in sentencing is limited to statutorily created parameters. In the instant case, armed robbery carries a mandatory minimum sentence of ten years, and first-degree burglary carries a mandatory minimum of fifteen years. *Id*. § 16-11-330(A) (2015); *id*. § 16-11-311(B).

Jones contends that his transfer to circuit court restricts the court's ability to consider the *Miller* factors before a juvenile is automatically waived to adult court where the sentences are much more severe. We disagree. Although the General Assembly has bound the circuit court's sentencing discretion by creating statutory minimums, the circuit court had a range of years in which to appropriately sentence Jones. Jones does not adequately explain why a family court must consider these factors over the general sessions court.

Here, the plea court sufficiently considered the applicable mitigating factors of youth before imposing Jones's sentences. At the hearing, the circuit court inquired into Jones's background and characteristics of youth as to the first factor. Jones achieved his GED. He worked in landscaping, was not married, and did not have any children. Jones, at the time, was not under the influence of any drugs or alcohol, and he did not have any mental, physical, emotional, or nervous disabilities.[15] The court also inquired into Jones's understanding of his relationship with his attorney.

As to the second factor, the court heard from Jones's mother, father, and grandmother before imposing the sentence.

As to the fourth factor, the court made certain that Jones understood the severity of his charges and the minimum and maximum penalties. The court also heard a detailed recitation of the facts underlying the charges and admonished Jones to "listen carefully to the facts." Further, the court cautioned Jones about the risks in waiving a jury trial. In our calculation, the court asked Jones if he certainly pleaded guilty no less than eight times.

Therefore, the plea court properly considered the mitigating factors of youth and thoroughly explored Jones's juvenility on the record. We discern no difference between a circuit court's and a family court's ability to investigate Jones's

[15] Two years before the hearing, when he was sixteen, Jones was treated for his marijuana use.

background on the record.[16] Additionally, after thorough questioning, the plea court sentenced Jones to the statutory minimum for each charge. Consequently, accepting Jones's plea and sentencing him accordingly did not result in a constitutional infirmity based on the United States Supreme Court's and this Court's interpretations of the Eighth Amendment.

IV. CONCLUSION

Because Jones properly brought a cognizable PCR claim in challenging his sentences and subsection 63-19-20(1), we conclude the PCR court erred in dismissing his application on this ground. As to the merits of Jones's constitutional claim, we hold that subsection 63-19-20(1) does not violate the Eighth Amendment beyond a reasonable doubt. However, we direct circuit courts to consider the *Aiken* factors of youth when sentencing juveniles subject to this subsection.[17] In the instant case, given that the circuit court judge sufficiently considered these factors, we affirm Jones's sentences.

AFFIRMED IN PART AND REVERSED IN PART.

KITTREDGE and JAMES, J.J., concur. Acting Justice Kaye G. Hearn concurring in a separate opinion in which FEW, J., concurs.

[16] We note these factors are fact-specific and may weigh differently on a case-by-case basis in the discretion of the circuit court.

[17] We reiterate our holding does not require a separate *Aiken* hearing established by *In re Administrative Order*, 415 S.C. 460, 783 S.E.2d 534 (2016).

Acting Justice Kaye G. Hearn: I concur with the majority's opinion except for its conclusion that the hearing before the circuit court fully complied with *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014). While the circuit court judge obviously could not have been aware that our decision in *Aiken* would apply to these facts, the hearing that occurred in no way satisfies what *Aiken* requires.

In *Aiken*, we noted,

> While we do not go so far as some commentators who suggest that the sentencing of a juvenile offender subject to a life without parole sentence should mirror the penalty phase of a capital case, we are mindful that the *Miller* Court specifically linked the individualized sentencing requirements of capital sentencing to juvenile life without parole sentences.

Id. at 544, 765 S.E.2d at 577. Thus, it is apparent that an *Aiken* hearing is more than what transpires during typical sentencing. Indeed, we recently heard a challenge following a resentencing hearing where the primary issue concerned whether the trial court had imposed a burden on the defendant to prove why the original sentence violated *Aiken*. In determining that no such burden of proof or persuasion exists, we upheld the sentence imposed after recounting the thorough inquiry that occurred. *State v. Smart*, Op. No. 28161 (S.C. Sup. Ct. filed June 21, 2023) (Howard Adv. Sh. No. 24 at 17). The trial court in *Smart* conducted a textbook example of what a proper *Aiken* hearing affords—listening to testimony from an expert psychologist who examined Smart several times and reviewed "thousands of pages of his records," and receiving testimony from a number of witnesses regarding the circumstances of the crime and the defendant's background. The trial court weighed the evidenced, considered counsel's arguments, and analyzed the *Aiken* factors before imposing a sentence.

Conversely, the hearing in this matter involved a guilty plea that included the same boilerplate questions asked during any plea, regardless of the defendant's age. For example, the court asked about the defendant's age, his criminal record, his employment history, any drugs or medication he may have been on, his satisfaction with his lawyer, and whether he understood the consequences of pleading guilty. I believe *Aiken* requires more because these general questions simply do not equate to the more in-depth and detailed questions that should be asked and answered in order

to analyze the "hallmark features of youth" that *Aiken* mandates. In my view, it would be nearly impossible for any hearing where the judge does all the questioning to comply with *Aiken*. Nonetheless, I concur in the balance of the majority's opinion because the circuit court sentenced the defendant to the statutory minimum sentence for both charges and ran them concurrently; thus, a more thorough hearing in this case could not have led to a lesser sentence.

FEW, J., concurs.

The Supreme Court of South Carolina

In the Matter of Jane M. Randall, Respondent.

Appellate Case No. 2023-000665

ORDER

On May 31, 2023, this Court issued an order placing Respondent on interim suspension and appointing Peyre T. Lumpkin as Receiver to protect the interests of Respondent's clients. *In re Randall*, S.C. Sup. Ct. Order dated May 31, 2023 (Howard Adv. Sh. No. 22 at 18). On June 2, 2023, Respondent filed a petition for rehearing requesting that the Court reconsider the appointment of the Receiver as there is now an experienced lawyer associated with her firm, Carol Nash N. Hare, Esquire, who is willing and capable of acting as a responsible party under Rule 31(c), RLDE, Rule 413, SCACR, thereby obviating the need for appointment of the Receiver.

The Court finds Ms. Hare is capable of and shall be responsible for the protection of Respondent's clients, and thus, appointment of the Receiver is unnecessary in this matter. Accordingly, the Receiver's appointment is hereby terminated. The Receiver shall transfer possession and control of Respondent's client files and law office accounts and, if necessary, notify the United States Postmaster to redirect Respondent's mail to Ms. Hare's address. Ms. Hare shall ensure Respondent's clients are notified that she is now the firm's responsible party.

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

Columbia, South Carolina
June 8, 2023

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Wilton Q. Greene, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2018-000339

ON WRIT OF CERTIORARI

Appeal From Berkeley County
Michael G. Nettles, Circuit Court Judge

Opinion No. 5991
Heard October 12, 2021 – Filed June 21, 2023

REVERSED AND REMANDED

Appellate Defender Joanna Katherine Delany, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson, Senior Assistant Deputy Attorney General William M. Blitch, Jr., Assistant Attorney General Joshua Abraham Edwards, and Assistant Attorney General William Harold Ray, all of Columbia, for Respondent.

MCDONALD, J.: Wilton Q. Greene (Petitioner) argues the post-conviction relief (PCR) court erred in finding he received effective assistance of counsel despite trial counsel's failure to object to the admission of his prior robbery conviction or request a limiting instruction at his trial for armed robbery and kidnapping. We reverse and remand.

Facts and Procedural History

Petitioner went to the Big Lots in Moncks Corner one morning and purchased three grams of crack cocaine. After unsuccessfully trying to resell the drugs, he saw the victim, Bing Ho Zhang, as he was leaving the Big Lots parking lot. According to Petitioner, "I met with Mr. Bing before. I did business with Mr. Bing. . . . [H]e asked me did I have drugs on me. I told him yes. So I asked him could he give me a ride."[1]

Petitioner testified Zhang was initially confused about whether they were going to Bojangles or McDonald's.[2] He claimed Zhang wanted to buy sixty dollars' worth of cocaine but did not have enough money, so Petitioner agreed to hold Zhang's wallet, which contained Zhang's green card, as collateral until he could pay. According to Petitioner, the two men had previously engaged in a similar transaction, and he used a knife to cut pieces of the crack cocaine. Petitioner explained, "I gave it to Mr. Bing. He hit it and then we started driving." He asked Zhang to take him to the bank since Zhang did not seem to know where Bojangles was, but Zhang did not understand and responded: "[O]h I get it[,] you want all the money. You want all the money."

At that point, Zhang "started acting a little funny." Petitioner "kept telling him to go to the bank. He would keep saying I don't got [sic] no money." Although Zhang tried to give him some small bills, Petitioner declined. Instead, Petitioner

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[1] It is undisputed that Zhang agreed to give Petitioner a ride, and the two men drove away in agreement that Zhang would drop him off at a fast food restaurant.

[2] Zhang, who is originally from China, primarily speaks Mandarin. During Zhang's testimony, the trial court stopped the proceedings and asked the State to find an interpreter, stating: "I don't think he understands what anybody is even asking him, okay."

agreed to hold on to Zhang's wallet until he could pay in full. While they were driving, Zhang saw a police car and swerved towards it. Petitioner stated, "And as soon as he stopped I ran to get the drugs off me; [so] that I could throw the drugs off me." When Petitioner saw the police car, he "was thinking about just getting away from the police because [he] had drugs on [him]." Petitioner admitted he was able to toss the drugs before the police arrested him.

While Zhang testified he agreed to give Petitioner a ride to McDonald's, he claimed that on the way, Petitioner pulled a knife, instructed him to go to a bank, and took his wallet. Zhang then began looking for a police car and when he saw one, he swerved toward it, honking his horn and yelling that he was being robbed. According to Zhang, Petitioner "saw the police and just said shit, the bad word, and then opened the door and [ran] away."

Officer Anthony Judy of the Moncks Corner Police Department was on patrol when Zhang's car came at him "head on" through the median. Officer Judy testified he "locked up the brakes" and jumped out of his car because he feared he was being ambushed. The car stopped about five feet in front of Officer Judy's patrol car, and the driver, who "had a very wild look in his face," then "bailed out yelling he robbed me, he robbed me." A black male passenger exited the car and started running toward the Huddle House. After he saw "how frantic the driver was[, Officer Judy] realized there definitely was a problem and the black male was exiting and leaving the area." So, he returned to his patrol car and began chasing Petitioner. Officer Judy was able to cut Petitioner off in a parking lot and a brief foot chase ensued until Petitioner fell and dropped a knife. When Officer Judy took Petitioner into custody, he found Zhang's wallet and twenty-two dollars in Petitioner's pocket. At that point, Petitioner stated, "[T]his is bull. I asked him to take me to Bojangles and drop me off by the bank beside it." Petitioner told him he was just a "victim of circumstances." The Berkeley County Grand Jury subsequently indicted Petitioner for armed robbery and kidnapping.

At trial, Petitioner observed, "it's my word against his word," and told his trial counsel he wanted to testify.[3] However, trial counsel noted for the record that

[3] At the PCR hearing, trial counsel agreed the case was a "swearing match" between Petitioner and Zhang.

Petitioner was going to testify "against [his] advice."[4] After questioning Petitioner, the trial court found he "freely, voluntarily, and intelligently" chose to testify.

In response to the trial court's inquiry about Petitioner's prior record, trial counsel reported Petitioner had a prior conviction from 2011 for "strong arm robbery."[5] Neither the State nor trial counsel made any argument regarding the admissibility (or inadmissibility) of Petitioner's prior conviction. Nevertheless, the trial court and trial counsel agreed strong arm robbery "would be an impeachable offense." Without further argument or discussion, the trial court advised Petitioner that the State could ask him about his prior conviction if he testified.

Trial counsel testified he attempted to minimize the prejudicial effect of the prior conviction by questioning Petitioner about it on direct. At the very end of Petitioner's direct examination, trial counsel inquired:

> Q. And you have a conviction?
>
> A. Yes, sir.
>
> Q. What's the conviction for?
>
> A. I pled to strong armed robbery.
>
> Q. No further questions.

Prior to the court's jury charge, the parties had a "very informal charge conference." There was no limiting instruction addressing Petitioner's prior similar conviction, nor was one requested. Before submitting the case to the jury, the trial

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[4] Trial counsel further testified Petitioner initially told him the incident arose from a drug deal gone bad; however, when he later met with Petitioner to relay a plea offer, Petitioner's account differed.

[5] "Common law robbery and 'strong arm' robbery are synonymous terms for a common law offense whose penalty is provided for by statute." *State v. Rosemond*, 348 S.C. 621, 628, 560 S.E.2d 636, 640 (Ct. App. 2002), *aff'd as modified*, 356 S.C. 426, 589 S.E.2d 757 (2003).

court asked the parties if they had any exceptions to the charge as given. Trial counsel responded, "No, Your Honor."

The jury deliberated for five and a half hours before sending a note asking, "Is there a possibility of a lesser included charge?" After receiving an answer in the negative, the jury sent another note requesting to rehear (or be provided a copy of) Petitioner and Zhang's testimonies, which were replayed for the jury. The jury then sent a third note stating, "We would like to see the police report of the incident and transcript." The trial court replied that because neither the transcript nor the police report was admitted into evidence, it could not provide them.

Finally, the trial court alerted counsel, "[t]he jury sent in a note saying they're decided on one charge, deadlocked on another. They [have] voted three times; some are unwavering." The court accepted and sealed the verdict on one charge and gave an *Allen* charge[6] as to the second. The jury then deliberated another hour before finding Petitioner guilty as indicted. At sentencing, Petitioner maintained the incident was "a misunderstanding." The trial court sentenced him concurrently to twenty years' imprisonment for armed robbery and twenty years for kidnapping.

Petitioner timely appealed his convictions and sentences, which this court affirmed by unpublished opinion in *State v. Greene*, Op. No. 2015-UP-086 (S.C. Ct. App. filed February 25, 2015). Petitioner then filed this action for post-conviction relief.

The PCR court heard testimony from Petitioner and trial counsel, who explained his strategy was to "minimize the selling of drugs." Trial counsel did not know why he failed to argue the inadmissibility of Petitioner's prior robbery conviction or seek to limit its similarity to the offense for which Petitioner was being tried. Trial counsel admitted he has argued in other cases "to change it to just a felony" when a defendant's prior convictions are similar to the crime charged. He noted, "I know I have done that on other cases. I don't know why I didn't do it on this one."

PCR counsel agreed trial counsel had control over strategy decisions but noted Petitioner's testimony that this was a drug deal gone bad, "flew in the face of [trial counsel's] preferred strategy." PCR counsel argued trial counsel was ineffective because he failed to object to the admission of Petitioner's prior conviction; failed

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[6] *Allen v. United States*, 164 U.S. 492 (1896).

to request that the trial court articulate its basis for finding the prior conviction admissible under Rule 609(a)(1), SCRE; and did not request a limiting instruction addressing the purpose for which the jury could consider the prior conviction.

The PCR court denied relief and issued an order of dismissal, finding meritless Petitioner's allegation that trial counsel was ineffective in failing to object to the admission of the prior robbery conviction. The court noted Petitioner's "prior conviction was within the ten-year period allowed under the rules of evidence, and its introduction at trial was not objectionable in any manner other than its potential prejudice as a similar offense with little probative value." Finding trial counsel was not deficient, the PCR court stated "there can be no resulting prejudice from any alleged deficiency based on the overwhelming evidence against [Petitioner]." The order further stated:

> Although the trial judge in the case at hand did not explicitly place this balancing test on the record at trial, [Petitioner] has not met his burden of showing that the trial judge failed to conduct the balancing test. It is possible that the trial judge conducted the balancing test but did not specifically explain each factor of the test for the record. Trial Counsel credibly testified he saw no reason to object to the admission of the prior conviction at the time of trial. Although he was unsure at the evidentiary hearing why he did not make that argument, he did not believe at the time of trial that an objection was necessary. "[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough v. Gentry*, 540 U.S. 1, 6 (2003). This Court finds Trial Counsel's failure to object [or] to request [a] curative instruction was not deficient.

Standard of Review

"Our standard of review in PCR cases depends on the specific issue before us." *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). "We defer to a PCR court's findings of fact and will uphold them if there is evidence in the record

to support them." *Id.* "We review questions of law de novo, with no deference to trial courts." *Id.* at 180–81, 810 S.E.2d at 839. "The admission of evidence concerning past convictions for impeachment purposes remains within the trial [court's] discretion, provided the [trial court] conducts the analysis mandated by the evidence rules and case law." *State v. Robinson*, 426 S.C. 579, 591, 828 S.E.2d 203, 209 (2019) (alteration in original) (quoting *State v. Dunlap*, 346 S.C. 312, 324, 550 S.E.2d 889, 896 (Ct. App. 2001)).

Law and Analysis

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984). "In order to establish a claim for ineffective assistance of counsel, the applicant must show that: (1) counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) counsel's deficient performance prejudiced the applicant's case." *Speaks v. State*, 377 S.C. 396, 399, 660 S.E.2d 512, 514 (2008). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Id.* at 700.

I. Deficiency and Rule 609(a)(1)

Petitioner argues the PCR court erred in finding trial counsel provided effective assistance despite his failure to object to the admission of Petitioner's prior conviction for strong arm robbery because trial counsel testified he did not know why he failed to object to the admission of the prior similar conviction.[7] We agree.

[7] Armed robbery occurs when one commits robbery "while armed with a pistol, dirk, slingshot, metal knuckles, razor, or other deadly weapon, or while alleging, either by action or words, he was armed while using a representation of a deadly weapon or any object which a person present . . . reasonably believed to be a deadly weapon." S.C. Code Ann. § 16-11-330. Strong arm robbery is a common law crime, which is defined as "the 'felonious or unlawful taking of money, goods, or other personal property of any value from the person of another or in his presence by violence or by putting such person in fear.'" *State v. Gourdine*, 322 S.C. 396, 398, 472 S.E.2d 241, 241 (1996) (quoting *State v. Drayton*, 293 S.C. 417, 361 S.E.2d 329, 335 (1987)).

"Rule 609 of the South Carolina Rules of Evidence governs the admissibility of a witness's prior convictions for purposes of impeachment." *Robinson*, 426 S.C. at 592, 828 S.E.2d at 209. It provides, in pertinent part:

> (a) General Rule. For the purpose of attacking the credibility of a witness,
>
> (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; . . .

SCRE 609(a)(1). Regarding this rule, our supreme court has explained:

> [U]nder Rule 609(a)(1), when the accused chooses to testify during his trial, if the State seeks to introduce impeachment evidence that the accused has been convicted of a crime punishable by imprisonment for more than one year, the evidence is admissible if the State establishes the probative value of admitting the evidence outweighs its prejudicial effect upon the accused.

Robinson, 426 S.C. at 593, 828 S.E.2d at 210.

In *State v. Colf*, our supreme court adopted a five-factor test for trial courts to use when weighing whether the probative value of evidence of a defendant's prior convictions 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.
>
> 5. The centrality of the credibility issue.

337 S.C. 622, 627, 525 S.E.2d 246, 248 (2000). "These factors are not exclusive; trial courts should exercise their discretion in light of the facts and circumstances of each particular case." *Id.*

"The starting point in the analysis is the degree to which the prior convictions have probative value, meaning the tendency to prove the issue at hand—the witness's propensity for truthfulness, or credibility." *Robinson*, 426 S.C. at 597–98, 828 S.E.2d at 212 (quoting *State v. Black*, 400 S.C. 10, 21, 732 S.E.2d 880, 886 (2012)). "The purpose of the impeachment is not to show the witness is a bad person but rather to show background facts which impact the witness's credibility." *Id.* at 598, 828 S.E.2d at 213.

In *Robinson*, the supreme court ultimately concluded the trial court did not abuse its discretion in weighing the impeachment value of the defendant's prior convictions:

> Even though Robinson's convictions for strong arm robbery and breaking and entering automobiles are not crimes involving dishonesty or false statement within the meaning of Rule 609(a)(2), that does not rule out the existence of impeachment value in each one of these prior offenses. The trial court observed, "Simply put, convictions for breaking into motor vehicles and strong-arm robbery don't imply that the accused was an armed burglar, as was alleged in this case, but they do imply that the accused is not someone to be trusted—that he might not be credible." It was within the trial court's discretion to conclude that because Robinson has prior

> convictions for such offenses, he legitimately might not be considered credible.

Id. at 599–600, 828 S.E.2d at 213–14.

In Petitioner's case, the PCR court explained:

> [Petitioner]'s allegation that Trial Counsel was ineffective for failing to request a Rule 609(A), SCRE, balancing test for his prior conviction for his prior conviction for strong armed robbery is meritless. [Petitioner]'s prior conviction was within the ten year period allowed under the rules of evidence, and its introduction at trial was not objectionable in any manner other than its potential prejudice as a similar offense with little probative value. However this Court finds Trial Counsel was not deficient and there can be no resulting prejudice from any alleged deficiency based on the overwhelming evidence against [Petitioner].

The PCR court recognized the trial court did not specifically articulate the basis for its conclusion that Petitioner's prior conviction was admissible, stating, "It is possible that the trial judge conducted the balancing test but did not specifically explain each factor of the test for the record." We are unable to find support in the record for the conclusion that the required balancing occurred because when the trial court suggested Petitioner's 2011 strong armed robbery conviction was an impeachable offense, trial counsel simply agreed and made no attempt to challenge admissibility. Thus, the trial court did not conduct an on-the-record balancing, presumably because trial counsel acquiesced to the admission of the prior similar conviction. Although trial counsel later testified at the PCR hearing that he generally would challenge the admissibility of such a conviction, he could not explain why he failed to do so in Petitioner's case, which he admitted was a swearing contest. *Contra Smith v. State*, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) ("[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.").

"The current state of the law does not mandate the trial court make an on-the-record specific finding 'as long as the record reveals that the trial judge did

engage in a meaningful balancing of the probative value and the prejudicial effect before admitting a non-609(a)(2) prior conviction under 609(a)(1).'" *State v. Elmore*, 368 S.C. 230, 238–39, 628 S.E.2d 271, 275 (Ct. App. 2006) (quoting *State v. Scriven*, 339 S.C. 333, 341, 529 S.E.2d 71, 75 (Ct. App. 2000)). However, "[a]n on-the-record analysis is especially needed when undertaking a balancing that involves a prior similar offense under Rule 609(a)(1)." *Id.* at 239, 628 S.E.2d at 275. "This is because the 'the danger of unfair prejudice to the defendant from impeachment by that prior offense weighs against its admission.'" *Id.* (quoting *State v. Dunlap*, 353 S.C. 539, 542, 579 S.E.2d 318, 320 (2003)); *see also, Green v. State*, 338 S.C. 428, 434, 527 S.E.2d 98, 101 (2000) (finding trial counsel's failure to argue the prejudicial effect of the convictions outweighed their probative value constituted ineffective assistance of counsel and prejudiced the defendant). "Indeed, the similarity of a prior crime to the crime charged heightens the prejudicial value of the crime." *Elmore*, 368 S.C. at 239, 628 S.E.2d at 275.

Petitioner argues trial counsel provided ineffective assistance when he failed to object to the prior conviction's admissibility because the conviction should have been excluded under Rule 609 and *Colf*. The language of *Elmore* and *Green*, *supra*, supports Petitioner's argument. While trial counsel may have believed the court was inclined to admit Petitioner's strong arm robbery conviction for impeachment purposes, this alone does not render his representation effective. Without any objection—or even a request that the trial court perform the required Rule 609(a) balancing—we cannot know whether the trial court would have admitted the evidence for impeachment purposes. *See, e.g.*, *Robinson*, 426 S.C. at 607, 828 S.E.2d at 217 ("In any given case involving the same indicted charges, two different trial courts could examine the same prior conviction(s), evaluate the same five *Colf* factors, and perhaps reach opposite conclusions as to the admissibility of the prior convictions. In such an instance, it is conceivable that under our standard of review, both trial courts would be affirmed. This is the nature of our standard of review in Rule 609(a)(1) cases when a trial court weighs the probative value of a prior conviction against its prejudicial effect."). In sum, we find no evidence in the record to support the PCR court's finding that trial counsel rendered reasonably effective assistance in merely acquiescing to the admission of Petitioner's prior strong arm robbery conviction. If trial counsel had objected or requested that the trial court perform the balancing test on the record, this may have made a difference to the trial court's decision. Accordingly, the PCR court erred in finding trial counsel's failure to object (or request a balancing analysis) was not deficient performance.

II. Limiting Instruction

Petitioner next argues the PCR court erred in finding trial counsel provided effective assistance where counsel failed to request a limiting instruction so the trial court could inform the jury of the limited purpose for which a prior conviction may be considered. In Petitioner's view, the lack of such instruction permitted the jury to improperly consider the prior conviction as propensity evidence. We agree.

"Under our system of justice, a conviction must be based upon evidence of the offense for which the accused is on trial rather than prior criminal or immoral acts." *State v. Gore*, 283 S.C. 118, 120, 322 S.E.2d 12, 13 (1984). In *State v. Smalls*, our supreme court explained, "where the evidence of other crimes is admissible only to impeach an accused when he testifies, the court, particularly on request, should instruct the jury that such evidence shall be considered by the jury only on the question of the credibility of the accused, and not to show his guilt." 260 S.C. 44, 47, 194 S.E.2d 188, 189 (1973). There, the supreme court found the trial judge's refusal of "a request to instruct the jury that evidence of [the defendant's] prior criminal record could only be considered on the issue of his credibility as a witness and not upon the question of his guilt" was prejudicial error requiring a new trial. *Id*. at 46, 194 S.E.2d at 189. "Since the jurors were not so instructed, they were free to consider the prior convictions for any purpose, including the probability that [the defendant] committed the crime because he had demonstrated a prior criminal tendency. This was highly prejudicial." *Id.* at 47–48, 194 S.E.2d at 189–90.

In *State v. Bryant*, the trial court committed reversible error when it declined to give a limiting instruction regarding Bryant's prior convictions for housebreaking, conspiracy to commit burglary, and strong arm robbery, which were admitted for impeachment purposes in his trial for distribution of crack cocaine. 307 S.C. 458, 459–61, 415 S.E.2d 806, 807–08 (1992). In reversing the conviction, the supreme court noted a prior conviction does not need to be similar to the crime charged for a defendant to be entitled to a limiting instruction but recognized "prejudice is even more egregious in such cases." *Id.* at 461, 415 S.E.2d at 808.

Here, the jury heard Petitioner's testimony regarding his prior robbery conviction not once but twice: during Petitioner's case-in-chief and again during deliberations after the jury asked to rehear the testimonies of Petitioner and Zhang. In between,

the trial court charged the jury on kidnapping and armed robbery.[8] At no point did the trial court provide—because trial counsel did not request—a limiting instruction regarding the prior conviction. The similarity between Petitioner's prior conviction for strong arm robbery and the armed robbery charge for which he was on trial was highly prejudicial, particularly in the absence of a limiting instruction addressing impeachment versus propensity. Thus, when we consider trial counsel's failure to request a limiting instruction coupled with his failure to object to the admissibility of the prior similar conviction in the first instance, we find the PCR erred in finding trial counsel's performance was not deficient.

III. Overwhelming Evidence and Prejudice

Relying on *Smalls v. State*,[9] Petitioner argues the PCR court erred in finding overwhelming evidence of guilt where the jury deliberated for over five hours and asked to rehear the testimony of Petitioner and Zhang; the jury said it was deadlocked on one of the two charges, resulting in an *Allen* instruction; and trial counsel admitted the case was a swearing match between Petitioner and Zhang. We agree.

In *Smalls*, the State introduced eyewitness testimony identifying Smalls—who was on trial for armed robbery—as the perpetrator, testimony from a police officer reporting Smalls fled the scene of the crime, and fingerprint evidence establishing Smalls handled the weapon used during the robbery. *Id.* at 179–80, 810 S.E.2d at 838–39. However, our supreme court held the eyewitness testimony and fingerprint evidence were tainted by trial counsel's errors. *Id.* at 194–95, 810 S.E.2d at 847. The court explained, "the strength of the [State's] evidence must be considered along with the specific impact of counsel's errors." *Id.* at 194, 810 S.E.2d at 846. In light of its finding that "Smalls's flight, which is marginally

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[8] We acknowledge Petitioner's own testimony—that this was a drug deal gone bad—illustrated for the jury that he was engaging in illegal activity.

[9] 422 S.C. at 191, 810 S.E.2d at 845 (holding overwhelming evidence of guilt precludes a finding of prejudice only where the evidence provides "something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the *Strickland* standard of 'a reasonable probability . . . the factfinder would have had a reasonable doubt' cannot possibly be met.").

probative and thus has little significance in our analysis[,]" the court determined "the evidence that is not tainted by counsel's errors does not meet the standard for overwhelming evidence we described in *Franklin*—'no reasonable possibility [counsel's errors] contributed in any way to his convictions.'" *Id.* at 195, 810 S.E.2d at 847 (quoting *Franklin v. Catoe*, 346 S.C. 563, 574–75, 552 S.E.2d 718, 725 (2001)).

As to overwhelming evidence, the PCR court here summarized:

> At trial, the victim testified about the entire encounter. The police officer, who met the victim and [Petitioner] at the scene of the crime while it was happening and chased [Petitioner] down the street until he tackled and arrested him, also testified. The State introduced the knife, which [Petitioner] threw away from him as he was being chased, right before he was apprehended. Finally, the victim's wallet with his identification card was found in [Petitioner]'s front pocket as he was arrested and was introduced at trial. Accordingly, this Court finds any error in admitting this prior conviction had no prejudicial effect on the outcome of the trial and [Petitioner] cannot meet the second prong of the *Strickland* test.

In this case, the jury faced competing stories from Zhang and Petitioner—both of whom provided at least arguable explanations for the actions of the parties and the physical evidence Officer Judy retrieved at the scene. Zhang's testimony pointed to an armed robbery and kidnapping, while Petitioner testified the encounter was a drug deal gone bad complicated by a language barrier. Although Officer Judy witnessed Petitioner exit Zhang's vehicle and flee after Zhang drove toward his patrol car with a "very wild look on his face," Zhang and Petitioner were the only witnesses able to testify as to what may have happened inside the car.

We are not convinced that the probative evidence in the record supports the PCR court's finding of overwhelming evidence under the circumstances in this case. Because Petitioner and Zhang were the only witnesses to their encounter in the vehicle, we cannot say there "is no reasonable possibility [counsel's errors] contributed in any way to [Petitioner's] convictions." *Martin v. State*, 427 S.C. 450, 456, 832 S.E.2d 277, 280 (2019) (quoting *Smalls*, 422 S.C. at 191, 810 S.E.2d

at 845). As evidenced by its request to rehear the testimonies of Zhang and Petitioner, its initial deadlock on one count and need for an *Allen* charge, and its inquiry about the possibility of a lesser included offense, the jury clearly struggled with the evidence and with who was telling the truth. *See, e.g.*, *Martin*, 427 S.C. at 457, 832 S.E.2d at 280 (noting that in *Lounds v. State*, 380 S.C. 454, 458–59, 463, 670 S.E.2d 646, 648, 651 (2008), the court found "a jury's questions during deliberations—asking to rehear testimony and jury charges—indicated they were struggling with several aspects of witnesses' accounts"). For these reasons, we find erroneous the PCR court's overwhelming evidence and prejudice findings.

Conclusion

Accordingly, we reverse the PCR court's finding that trial counsel provided effective assistance and remand this matter for a new trial.

REVERSED AND REMANDED.

WILLIAMS, C.J., and, LOCKEMY, A.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Rufus Rivers and Merle Rivers, Appellants,

v.

James Smith, Jr., Respondent.

Appellate Case No. 2020-000451

Appeal From Orangeburg County
Edgar W. Dickson, Circuit Court Judge

Opinion No. 5992
Submitted March 1, 2023 – Filed June 21, 2023

REVERSED

Rufus Rivers, of Cordova, pro se.

Merle Rivers, of Cordova, pro se.

Kathleen McColl McDaniel and Sarah Jean Michaelis Cox, both of Burnette Shutt & McDaniel, PA, of Columbia, both for Respondent.

HEWITT, J.: Rufus and Merle Rivers appeal a circuit court order affirming a magistrate's order of eviction. They contend the case falls within a statute prohibiting magistrates from exercising jurisdiction when title to the property is at issue. Based on that, they argue the magistrate erred in finding a landlord-tenant relationship existed between them and James Smith, Jr., and in ordering them to pay

rent into the magistrate's registry to secure a stay while they appealed the eviction. We agree and reverse.

FACTS

This case concerns property once owned by James Smith's deceased mother, Jessie Mae Smith (Jessie Mae). The Rivers have lived on the property since 2009. There is no record of a written lease agreement between the Rivers and either Jessie Mae or James.

In July 2013, Jessie Mae executed a power of attorney designating James as her authorized agent and granting him authority to spend her finances, sell or dispose of her property, and make her healthcare decisions. In September 2014, James transferred the property to himself, on Jessie Mae's behalf, via a quitclaim deed. This deed was recorded the following month. James presented evidence to the magistrate that the Orangeburg County Tax Assessor's Office has identified him as the owner of record since September 2014. Jessie Mae died in 2016.

In July 2018, roughly two years after Jessie Mae died, James sent the Rivers a letter demanding they vacate the property within thirty days. The Rivers refused. They asked James to cease and desist any effort to displace them, claimed James held an invalid power of attorney, and alleged he had breached fiduciary duties. Competing lawsuits followed.

The Rivers sued James in the Orangeburg County Court of Common Pleas. The suit challenged James's ownership of the property and alleged constructive fraud, unjust enrichment, and other causes of action. The Rivers filed an amended complaint a few days later alleging that James used an invalid power of attorney from Jessie Mae and that Jessie Mae had orally given or promised the property to them.

Around the same time, James filed this case against the Rivers in magistrate court seeking to evict them from the property. The magistrate conducted a hearing not long after the case was filed.

The Rivers made various arguments to the magistrate in opposing the eviction, but there is no disputing that the arguments involved an alleged promise by Jessie Mae to give them the property. The record suggests the Rivers alerted the magistrate to

their circuit court lawsuit against James. The Rivers asked the magistrate to dismiss the eviction action and allow James to add his claims to the circuit court case.

According to the magistrate's return, James's main argument was that the Rivers' circuit court case and their claim to own the property lacked any conceivable merit because the alleged gift from Jessie Mae would have occurred more than three years before any lawsuits were filed. James argued the Rivers' ownership claims would therefore be barred by the applicable statute of limitations.

After the testimony and arguments concluded, the magistrate orally ruled that James was the current and lawful owner of the property, that the Rivers were tenants, and that the Rivers unlawfully occupied the property.

The Rivers filed a motion for reconsideration. Among other things, they argued the magistrate lacked jurisdiction, that they had informed the magistrate both orally and in writing of their circuit court case, and that James was using the eviction process to circumvent the circuit court case.

The magistrate held a hearing on the motion for reconsideration, at which the Rivers presented a court record reflecting that their case against Smith had been referred to the master-in-equity. The magistrate denied the motion based on its previous finding that Smith owned the property. The magistrate determined the case did not involve a question in title and that she had jurisdiction to hear the dispute.

The Rivers appealed the magistrate's decision to circuit court. The case was continued after a first hearing based on the Rivers' contention that their circuit court suit against James involved a challenge to his claim of title, but after that—and after the master-in-equity dismissed the Rivers' suit against James for failing to state a claim upon which relief could be granted—the circuit court affirmed the magistrate's decision and ordered a writ of ejectment to be issued. The circuit court found the Rivers' jurisdictional issue to be moot. The court stated that Smith owned the property and that although "the Rivers attempted to challenge Smith's title to the [p]roperty, this challenge was dismissed by the [master] for failure to state a claim upon which relief could be granted." This appeal followed.[1]

[1] The Rivers recently filed a "motion to vacate" with this court. The motion primarily discusses events outside of the record. After careful review, the motion is denied.

ISSUE

Whether section 22-3-20(2) of the South Carolina Code (2007)—which bars a magistrate from hearing a case when title to real property is in question—prohibited the magistrate from considering this case.

STANDARD OF REVIEW

We are bound by the factual findings under review as long as they are supported by any evidence. *See Vacation Time of Hilton Head Island, Inc. v. Kiwi Corp.*, 280 S.C. 232, 233, 312 S.E.2d 20, 21 (Ct. App. 1984). Even so, "[d]etermining the proper interpretation of a statute is a question of law, and [the appellate court] reviews questions of law de novo." *Palmetto Co. v. McMahon*, 395 S.C. 1, 3, 716 S.E.2d 329, 330 (Ct. App. 2011) (quoting *Town of Summerville v. City of North Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008)).

JURISDICTION OVER THE EVICTION

The legislature has provided that "[n]o magistrate shall have cognizance of a civil action . . . when the title to real property shall come into question, except as provided in Article 11 of this chapter." S.C. Code Ann. § 22-3-20(2). A series of statutes—sections 22-3-1110 to -1180—govern the procedure in cases where title is challenged.

The reason for this rule appears to be that summary proceedings in magistrate court are only appropriate when the conventional landlord-tenant relationship is established. *See Stewart-Jones Co. v. Shehan*, 127 S.C. 451, 455-56, 121 S.E. 374, 376 (1924) (discussing a constitutional provision that has since been substantially codified in section 22-3-20). As one might guess from the date in the citation, there do not appear to be many cases interpreting this rule; certainly not any modern ones. An even older case explains that while the ejectment statute was designed to establish an efficient means for ejecting trespassers, it was not intended to give someone an advantage when there is a dispute over rightful possession. *Richland Drug Co. v. Moorman*, 71 S.C. 236, 239, 50 S.E. 792, 793 (1905).

Precedent explains the magistrate retains jurisdiction if the defendant does not comply with the statutory procedure for raising a question as to title or offer any evidence drawing title into question. In *Bamberg Banking Co. v. Matthews*, for

example, our supreme court upheld the magistrate's jurisdiction in spite of the defendant's claim that she owned the property and the lease she signed with the bank was procured through fraud and duress. 132 S.C. 130, 132-33, 128 S.E. 718, 719 (1925). The court noted the defendant did not follow proper procedure, did not deny the lease at the hearing, and offered no evidence of fraud or duress. *Id*. *Barnes v. Charleston & Western Carolina Railway Co.* follows the same reasoning. 106 S.C. 227, 230, 90 S.E. 1017, 1018 (1916) (noting the defendant denied the plaintiff's allegations but did not comply with the statutory procedure and did not offer any testimony at the foreclosure hearing).

This case is not like *Bamberg Banking Co.* and *Barnes*. This is not a situation where a defendant feigns a challenge to title but has no actual arguments to muster. This case also differs from those cases in that the Rivers complied with the statutory procedures. A statute allowed them to raise questionable title as a defense in their answer to the foreclosure suit, and they provided the magistrate and Smith with their signed answer raising that defense at the hearing. *See* S.C. Code Ann. § 22-3-1110 (2007). A different statute required them to file an undertaking as assurance that the defendant will promptly file an action in circuit court over title to the property, *see* S.C. Code Ann. § 22-3-1120 (2007), but the Rivers cleared this bar with room to spare—they filed their circuit court suit before Smith filed his case to evict them. They gave the magistrate and Smith copies of the summons and complaint at the hearing.

If this was all there was to the case, we think there would be no question as to the outcome. Smith certainly has defenses to the Rivers' claims, and those defenses may be good ones, but our reading of precedent convinces us the magistrate's jurisdiction ends as soon as it becomes clear that there is a challenge to title and the traditional landlord-tenant relationship does not exist. But, as we noted in the background, the master-in-equity dismissed the Rivers' case against James while the Rivers' appeal of the magistrate's decision was pending. The Rivers did not appeal the master's decision. Absent an appeal or a proper motion under Rule 60, SCRCP, the master's order is binding. The circuit court found this rendered any jurisdictional defect moot.

We cannot agree. If the magistrate did not have jurisdiction over the eviction case, it lacked jurisdiction to enter the eviction order and that order is a nullity. *See, e.g.*, *Leviner v. Sonoco Prods. Co.*, 339 S.C. 492, 494, 530 S.E.2d 127, 128 (2000) (stating an order issued without jurisdiction was a nullity). We are not presented with any authority that subsequent events like the master-in-equity's order here can

reach back in time and ratify an order that was issued by a court that lacked jurisdiction to do so. This case may well end in a second but successful eviction, but we cannot say that outcome is certain.

CONCLUSION

Our holding controls the related issues regarding a landlord-tenant relationship and the rent funds in escrow. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address remaining issues on appeal when its determination of a prior issue is dispositive). Based on the foregoing, the magistrate's order of eviction is

REVERSED.[2]

THOMAS and MCDONALD, JJ., concur.

[2] We decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Sylvia Lockaby, Appellant,

v.

City of Simpsonville, Janice Curtis, and Adam Randolph, Respondents.

Appellate Case No. 2019-001449

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

Opinion No. 5993
Heard September 13, 2022 – Filed June 21, 2023

AFFIRMED

Andrew Sims Radeker and Taylor Meriwether Smith, IV, both of Harrison, Radeker & Smith, P.A., of Columbia, for Appellant.

Boyd Benjamin Nicholson, Jr. and Sarah P. Spruill, both of Haynsworth Sinkler Boyd, PA, of Greenville; and Daniel Roper Hughes, of Duggan & Hughes, LLC, of Greer, all for Respondents.

GEATHERS, J.: In this civil rights action, former Simpsonville City Councilmember Sylvia Lockaby (Lockaby) challenges a grant of summary judgment to the City of Simpsonville (the City), former Mayor Janice Curtis (Curtis), and Sgt. Adam Randolph (Sgt. Randolph) (collectively, Respondents). Lockaby alleges the circuit court erred in (1) finding that she should have pursued "internal remedies" before bringing suit; (2) concluding that her claims were barred by legislative immunity; and (3) finding there were no genuine issues of material fact. We affirm.

FACTS/PROCEDURAL HISTORY

On February 9, 2016, the Simpsonville City Council began its regular business meeting. After the call to order, pledge of allegiance, and a few other agenda items, the conversation eventually turned to the matter of a proposed curb replacement in the town. During discussion of the topic, Lockaby began asking the city administrator questions. What happened next is revealed in a transcript provided in the meeting minutes. We quote at length because of the centrality of the events to the issues before us:

> Councilmember Lockaby: Are we opening a can of worms? Cause if we fix this . . .
>
> Mayor Curtis: Who are you talking to?
>
> Councilmember Lockaby: I'm looking at Mr. [Dyrhaug].[1]
>
> Mayor Curtis: Well you didn't identify anyone . . . excuse me.
>
> Councilmember Lockaby: Mr. [Dyrhaug], I'm looking straight at you. Are we opening a can of worms when we do this? I'm just asking the question.
>
> Mr. Dyrhaug: I don't have an answer for that, but I . . .
>
> Councilmember Lockaby: Well.

[1] The city administrator's name is rendered two different ways in the minutes. We are not certain which is correct but have chosen the one used to designate him while he was speaking.

Mr. Dyrhaug: The issue is that[,] so when this road was resurfaced[,] that the reveal on the curb was diminished and that's caused an issue of storm water coming from the road onto private properties.

Councilmember Lockaby: And we have storm water issues all over the city.

Mayor Curtis: [Not intelligible]

Councilmember Lockaby: I'm still speaking, please.

Mayor Curtis: Yes, but you're arguing the point and this isn't a time for argument. You can ask questions, but this isn't argument.

Councilmember Lockaby: I'm not arguing. I'm, I'm stating a fact that we have storm water issues all over the city. Is this opening a can of worms?

Mayor Curtis: Well, ask our attorney.

Councilmember Lockaby: I was asking Mr. [Dyrhaug;] I haven't even gotten to the attorney yet.

Mayor Curtis: Well, okay, that's fine. Mr. Holmes,[2] could you . . .

Councilmember Lockaby: I'm not finished.

Mayor Curtis: You are now. [Gavels] Thank you. Mr. Holmes . . .

Councilmember Lockaby: I am not.

Mayor Curtis: Yes, you are. Mr. Holmes, could you . . .

[2] This appears to be a reference to the city attorney.

Councilmember Lockaby: [talks over, not intelligible] . . . we had to do . . .

Mayor Curtis: [Gavels 3 times] Order. Order. Order.

Councilmember Lockaby: You going to throw me out?[3]

Mayor Curtis: [Gavels] Order.

Councilmember Lockaby: You going to threaten to throw me out?

Mayor Curtis: Keep it up and you'll find out.

Councilmember Lockaby: I guess I will.

Mayor Curtis: Okay.

Councilmember Lockaby: I'm keeping it up.

Mayor Curtis: [Gavels] Mr. Holmes[,] will you please answer her question? Thank you.

Councilmember Lockaby: I know if you want to answer her question[;] I haven't asked one.

Mayor Curtis: Can I get the police officer from the back to enter the front, please?

Officer: Need her out?

Mayor Curtis: I need her out.

Officer: Councilmember Lockaby, will you come with me, please?

[3] Apparently, Mayor Curtis had threatened to throw out another member of the council earlier in the meeting. Mayor Curtis had taken office about a month earlier. She testified in a deposition that restoring civility to the council was one of her goals.

Mayor Curtis: We'll take a five[-]minute recess. [Gavels.]

Accounts differ as to precisely what happened next. According to Lockaby, she did not believe she said anything as the recess got underway. Instead, she "gathered [her] stuff and . . . walked out." Sgt. Randolph, who was serving as sergeant-at-arms, made sure she left the building. In her deposition, Lockaby testified, "I'm sure if I had not gone willingly, then I would have been physically escorted out." Lockaby also testified that during the exchange at the city council meeting, she never raised her voice.

Others remember Lockaby's exit from the meeting slightly differently. In an affidavit, Sgt. Randolph recalled that "Councilmember Lockaby said something to the effect of[,] 'That's fine. I was leaving anyway.'" The city clerk remembered a similar statement.

At the time, the Simpsonville Code of Ordinances provided, relevant to this action:

> The mayor shall be recognized as the head of the city government for all ceremonial purposes and by the governor for purposes of military law. He or she shall preside over the meetings of the city council, but shall have no regular administrative duties. The mayor shall provide the city council with information, guidance[,] and leadership in matters of policy determination.

The ordinances additionally stated: "Except as otherwise required by state law or ordinance, all proceedings of council shall be governed by the latest edition of 'Robert's Rules of Order, Newly Revised,' and the city attorney shall act as parliamentarian."

Finally, Rule 2-67 stated:

> (a) Any person who speaks at a city council meeting shall conduct himself or herself in a manner appropriate to the decorum of the meeting and shall not use any profane, abusive or obscene language nor any fighting [words] or otherwise engage in disorderly conduct. Any person who makes such remarks or otherwise engages in disorderly conduct which disrupts or otherwise impedes the orderly

> conduct of a city council meeting shall, at the discretion of the presiding officer, be barred from further audience before city council during that meeting and may be removed from the building.
>
> (b) Any law enforcement officer who is serving as sergeant-at-arms of city council shall carry out all orders and instructions given by the presiding officer for the purpose of maintaining order and decorum at the city council meeting. Upon instruction of the presiding officer, it shall be the duty of such law enforcement officer to remove from the city council meeting any person who is disturbing the proceedings of the city council.

In February 2018, Lockaby filed an action against the City, Mayor Curtis, and Sgt. Randolph. In her suit, Lockaby brought three claims: (1) violation of her civil rights under 42 U.S.C. § 1983, specifically with regard to her First Amendment and Fourth Amendment rights; (2) gross negligence; and (3) false imprisonment.

In February 2019, Respondents filed a motion for summary judgment.[4] The circuit court conducted a hearing on April 25, 2019, and took the matter under advisement for 15 days to allow for more discovery. On July 1, 2019, the court granted summary judgment, finding that (1) Lockaby failed to exhaust her administrative remedies by not appealing Curtis's decision to the full council; and (2) her claims were "barred by legislative immunity." Subsequently, the circuit court denied Lockaby's motion for reconsideration. This appeal followed.

STANDARD OF REVIEW

"The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder." *Englert, Inc. v. LeafGuard USA, Inc.*, 377 S.C. 129, 134, 659 S.E.2d 496, 498 (2008) (quoting *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001)). "When reviewing a grant of summary judgment, the appellate court applies the same standard applied by the [circuit] court . . . ." *Id.* at 133–34, 659 S.E.2d at 498. "Summary judgment is appropriate when 'the pleadings, depositions, answers to interrogatories, and admissions on file,

[4] At some point, the circuit court found there were "no claims under the [South Carolina Tort Claims] Act against the individual defendants." The order to this effect does not appear in the record.

together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Id.* at 134, 659 S.E.2d at 498 (quoting Rule 56(c), SCRCP). "When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." *Id.*

"[I]n cases requiring a heightened burden of proof or in cases applying federal law . . . the non-moving party must submit more than a mere scintilla of evidence to withstand a motion for summary judgment." *Hancock v. Mid-S. Mgmt. Co.*, 381 S.C. 326, 330–31, 673 S.E.2d 801, 803 (2009) (footnote omitted). Even in cases in which the non-moving party faces the lower burden of proof involved in state claims, our courts have noted that "a scintilla is a perceptible amount. There still must be a verifiable spark, not something conjured by shadows." *Gibson v. Epting*, 426 S.C. 346, 352, 827 S.E.2d 178, 181 (Ct. App. 2019).

Any disagreements over evidence or its meaning must be material, in addition to being both genuine and concerning an issue of fact. *See id.* ("Only disputes over facts that might affect the outcome of the suit . . . will properly preclude the entry of summary judgment." (alteration in original) (quoting, in parenthetical, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986))).

LAW/ANALYSIS

Lockaby argues the circuit court erred in finding that her action was barred by legislative immunity because the decision to eject her from the council meeting was not legislative in nature. We disagree.

For nearly 25 years, the legislative immunity of local lawmakers in civil rights actions has been openly acknowledged by the U.S. Supreme Court. *See Bogan v. Scott-Harris*, 523 U.S. 44, 53–54 (1998) ("[W]e now make explicit what was implicit in our precedents: Local legislators are entitled to absolute immunity from § 1983 liability for their legislative activities."). Similarly, our Tort Claims Act and our state supreme court recognize the doctrine of legislative immunity. *See* S.C. Code Ann. § 15-78-60(1) (2005) (providing that a "governmental entity is not liable for a loss resulting from . . . legislative, judicial, or quasi-judicial action or inaction"); *Richardson v. McGill*, 273 S.C. 142, 146, 255 S.E.2d 341, 343 (1979).

In those contexts, our state and federal courts have occasionally wrestled with what constitutes a "legislative act." For example, in a case dealing with the

constitutional immunity of Congress,[5] the U.S. Supreme Court discussed at some length the boundaries of the immunity. *See generally Gravel v. United States*, 408 U.S. 606 (1972). Both parties cite *Gravel* in their briefs, and we find some portions of the decision instructive:

> Legislative acts are not all-encompassing. The heart of the [Speech and Debate] Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be *an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings* with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House. As the Court of Appeals put it, the courts have extended the privilege to matters beyond pure speech or debate in either House, but "only when necessary to prevent indirect impairment of such deliberations."

Id. at 625 (emphasis added) (quoting *United States v. Doe*, 455 F.2d 753, 760 (1st Cir. 1972)). *See also Forrester v. White*, 484 U.S. 219, 224 (1988) ("[W]e examine the nature of the functions with which a particular official or class of officials has been lawfully entrusted, and we seek to evaluate the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions.").

We have little trouble concluding that disciplinary actions targeted at a council member for the sake of keeping order during a meeting is a legislative function. While other jurisdictions are split on this question, we consider our conclusion as the better view. *See Whitener v. McWatters*, 112 F.3d 740, 744 (4th Cir. 1997) ("[B]ecause citizens may not sue legislators for their legislative acts, legislative bodies are left to police their own members. Absent truly exceptional circumstances, it would be strange to hold that such self-policing is itself actionable in a court."); *id.* ("This history and long practice confirm that the disciplinary action taken by the Loudoun County Board of Supervisors against one of its members was legislative in

[5] *See* U.S. Const. art. I, § 6 (providing that members of Congress "shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place." (emphasis added)).

nature. . . . As legislative speech and voting is protected by absolute immunity, the exercise of self-disciplinary power is likewise protected."); *see also Shields v. Charter Twp. of Comstock*, 617 F. Supp. 2d 606, 618 (W.D. Mich. 2009).

Nor do we think the fact that the action was taken by Mayor Curtis alone, rather than the council as a whole, removes it from the realm of legislative action. The *Bogan* court and other federal authority repeatedly stress that legislative immunity does not depend on who carries out the act—or even why—but on what act they carry out. *See Bogan*, 523 U.S. at 54 ("Whether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it."); *see also Chase v. Senate of Virginia*, 539 F. Supp. 3d 562, 571 (E.D. Va. 2021) ("Because legislators generally cannot perform their legislative roles without the assistance of aides, legislative immunity extends to the agents of legislators. Lower [federal] courts have extended that premise to find that even legislative employees in administrative roles can be entitled to legislative immunity." (citation omitted)); *cf. Butz v. Economou*, 438 U.S. 478, 511 (1978) (holding, in a case concerning federal administrative judges: "Judges have absolute immunity not because of their particular location within the Government but because of the special nature of their responsibilities.").

In sum, the decision to eject Lockaby from the council meeting was a legislative act. Whether we believe the decision was rash and ill-advised is immaterial. Therefore, we uphold the circuit court's ruling that Lockaby's suit is barred by legislative immunity. Because our resolution of this issue is dispositive, we decline to address Lockaby's remaining issues. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (recognizing that an appellate court need not address the remaining issues when resolution of a prior issue is dispositive).

CONCLUSION

Accordingly, we affirm the circuit court's order.

AFFIRMED.

MCDONALD, J., and HILL, A.J., concur.