# The Supreme Court of South Carolina

Re: Amendment to Rule 3 of the South Carolina Rules of Civil Procedure

Appellate Case No. 2022-001184

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ORDER

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Pursuant to Article V, § 4A of the South Carolina Constitution, Rule 3(b)(1) of the South Carolina Rules of Civil Procedure is amended as set forth in the attachment to this order. This amendment shall be submitted to the General Assembly as provided in Article V, § 4A of the South Carolina Constitution.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

s/ D. Garrison Hill J.

Columbia, South Carolina
January 31, 2024

**Rule 3 of the South Carolina Rules of Civil Procedure is amended to add the following language to paragraph (b)(1), and the following Note to the Rule.**

In determining whether the plaintiff is unable to pay the fee required to file the action, all factors concerning the plaintiff's financial condition should be considered including income, debts, assets, and family situation. A presumption that the plaintiff is unable to pay the fee required to file the action shall be created if the plaintiff's net household income is less than or equal to the Poverty Guidelines established and revised annually by the United States Department of Health and Human Services and published in the Federal Register. Net income shall mean gross income minus deductions allowed by law.

**Note to 2024 Amendment:**

This amendment added language to subsection (b) to provide guidance and create uniformity regarding who may proceed in forma pauperis. The language tracks that used for determining indigency in Rule 602, SCACR, and Rule 608, SCACR.

# The Supreme Court of South Carolina

Re: Amendments to South Carolina Appellate Court Rules

Appellate Case No. 2022-001647

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ORDER

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Pursuant to Article V, § 4A of the South Carolina Constitution, the South Carolina Appellate Court Rules are amended as set forth in the attachment to this order. These amendments shall be submitted to the General Assembly as provided in Article V, § 4A of the South Carolina Constitution.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

s/ D. Garrison Hill J.

Columbia, South Carolina
January 31, 2024

**1. Rule 203(e)(1)(B) and (e)(2)(B), SCACR, are amended to provide:**

**(e)(1)(B)** The docket number of the case in the lower court. If the appellant has knowledge of a related appeal, the docket number or appellate case number of any related appeals that are pending.

. . .

**(e)(2)(B)** The docket number of the case before the administrative law court, or if the appeal is from an agency, the docket number before the agency. If the appellant has knowledge of a related appeal, the docket number or appellate case number of any related appeals that are pending.

**2. Rule 209(c), SCACR, is amended to provide:**

**RULE 209**
**DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL**

. . .

**(c) Certification.** The Designation shall be signed. The signature constitutes a certificate that the Designation contains no matter which is irrelevant to the appeal.

**3. Rule 210(a), (b), (c), and (g), SCACR, are amended to provide:**

**RULE 210**
**RECORD ON APPEAL**

**(a) Time for Service.** Within thirty (30) days after service of the last brief, the appellant shall serve a copy of the Record on Appeal on each party who has served a brief. Proof of service of the Record shall be immediately filed with the clerk of the appellate court. Whenever a paper copy of the Record is served on another party, the Record shall

be bound as provided by Rule 267(d), unless this requirement is waived by the receiving party.

**(b) Time for Filing.** The appellant must file the Record on Appeal with the clerk of the appellate court no later than the date his brief(s) are due under Rule 211. As provided by Rule 267(d), one copy filed with the appellate court shall be filed unbound or filed by electronic means. The appellate court may require an appellant to file additional copies of the Record on Appeal.

**(c) Content.** The Record on Appeal shall include all matter designated to be included by any party under Rule 209 and shall comply with the requirements of Rule 267. The Record shall not, however, include matter which was not presented to the lower court or tribunal. Matter contained in the Record on Appeal shall be arranged in the following order: the title page, index, orders, judgments, decrees, decisions, pleadings, transcript, charges, and exhibits and other materials or documents. . . .

. . .

**(g) Certificate of Counsel.** The act of filing the Record on Appeal constitutes a certificate that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

**4. Rule 211(a), SCACR, is amended to provide:**

**RULE 211**
**FINAL BRIEFS**

**(a) Time to Serve and File.** Within twenty (20) days after the service of the Record on Appeal, each party shall serve a copy of the party's final brief(s) on every other party to the appeal, and file the final brief(s) with the clerk of the appellate court. As provided by Rule 267(d), one copy filed with the appellate court shall be filed unbound.

The final brief(s) shall be signed. The signature constitutes a certificate that the final brief(s) complies with Rule 211(b). The appellate court may require a party to file additional copies of its brief(s).

**5. Rule 212(c), SCACR, is amended to provide:**

**(c) Appendix.** Supplemental materials filed under Rule 212(b) shall be included in an Appendix to the Record on Appeal. Unless otherwise agreed by the parties or ordered by the Court, the Appendix shall be compiled, served and filed by the party initially proposing it. Whenever a paper copy of the Appendix to the Record on Appeal is served on another party, the Appendix shall be bound as provided by Rule 267(d), unless this requirement is waived by the receiving party.

**6. Rule 221(a), SCACR, is amended to provide:**

**RULE 221**
**REHEARING AND REMITTITUR**

**(a) Rehearing.** Petitions for rehearing must be actually received by the appellate court no later than fifteen (15) days after the filing of the opinion, order, judgment, or decree of the court. A petition for rehearing shall be in accordance with Rule 240, and shall state with particularity the points supposed to have been overlooked or misapprehended by the court. No return to a petition for rehearing may be filed unless requested by the appellate court. Ordinarily, however, rehearing will not be granted in the absence of such a request. No petition for rehearing shall be allowed from an order denying a petition for a writ of certiorari under Rule 242, SCACR, declining to entertain a matter under Rule 245, SCACR, or denying a motion to reinstate under Rule 260, SCACR. A petition for rehearing shall not exceed fifteen (15) pages.

**7. Rule 240(d), (e), and (f), SCACR, are amended to provide:**

**(d) Filing of Motions and Petitions.** The motion or petition shall be filed with the clerk of the appellate court, and a copy shall be served upon each party. The motion or petition filed with the appellate court shall be accompanied by the filing fee set by order of the Supreme Court. This filing fee shall not be required for motions or petitions in criminal appeals; petitions for writs of certiorari under Rules 242, 243, and 247; certified questions under Rule 244; petitions to invoke the original jurisdiction of the Supreme Court under Rule 245; or motions or petitions filed by the State of South Carolina or its departments or agencies. In extraordinary cases, the appellate court may relieve a party from paying the filing fee.

**(e) Return to Motion.** Any party opposing a motion or petition shall have ten (10) days from the date of service thereof to file a return with the clerk and serve on all parties a copy of the return; provided, however, that a return to a petition for rehearing may only be filed if permitted under Rule 221(a). The court may in its discretion enlarge or limit the time for filing the return. The provisions of Rule 240(c) shall apply to a return. Failure of a party to timely file a return may be deemed a consent by that party to the relief sought in the motion or petition.

**(f) Reply.** The moving party shall have five (5) days from the date of service of a return to file a reply with the clerk and serve on all parties a copy of the reply. The provisions of Rule 240(c) apply to a reply.

**8. Rule 241(d)(2) and (d)(5), SCACR, are amended to provide:**

**(d) Procedure for Obtaining Lift of Stay or Supersedeas.**

. . .

**(2)** After the lower court or administrative tribunal has ruled, any party may petition the appellate court where the appeal is pending for review of this order. An individual judge or justice may grant or deny the relief on a temporary basis, and refer the matter to the full appellate court to hear and determine the

matter, or he or she may issue a final order. Upon the issuance of a final order by an individual judge or justice, an aggrieved party may petition the full appellate court for review of that decision.

. . .

**(5)** The petition and accompanying documents shall be served on the opposing party(ies) and filed with the clerk of the appellate court together with proof of service.

**9. Rule 242(d), SCACR, is amended to delete current paragraph (d)(1) and renumber the remaining paragraphs accordingly.**

**10. Rule 242(c), (e), (f), (g), and (i), SCACR, are amended to provide:**

**RULE 242**
**CERTIORARI TO THE COURT OF APPEALS**

. . .

**(c) Time for Petitioning and Filing Fee.** A decision of the Court of Appeals is not final for the purpose of review by the Supreme Court until the petition for rehearing or reinstatement has been acted on by the Court of Appeals. A petition for writ of certiorari shall be served on opposing counsel and filed with proof of service with the Clerk of the Court of Appeals and the Clerk of the Supreme Court within thirty (30) days after the petition for rehearing or reinstatement is finally decided by the Court of Appeals. The petition filed with the Supreme Court shall be accompanied by the filing fee set by order of the Supreme Court. No filing fee shall be required in criminal cases or petitions filed by the State of South Carolina or its agencies or departments.

. . .

**(e) Appendix.** At the same time the petition is filed, the petitioner shall also file the Appendix with the Clerk of the Supreme Court. As provided by Rule 267(d), the Appendix filed with the Supreme Court shall be filed unbound or filed by electronic means. Whenever a paper copy of the Appendix is served on another party, the Appendix shall be bound as provided by Rule 267(d), unless this requirement is waived by the receiving party. The Appendix shall include the following:

. . .

**(f) Return to Petition.** Within thirty (30) days after service of the petition, respondent shall serve a copy of the return on opposing counsel, and shall file with the Clerk of the Supreme Court the return and proof of service showing that the return has been served. The return shall include an argument on each question and may include a counter-statement of the case and of the questions presented for review. The total length of a return shall not exceed twenty-five (25) pages. If review is being sought regarding a post-conviction relief case, the respondent need not file a return unless requested by the Supreme Court.

**(g) Reply.** The petitioner shall have ten (10) days from the date of service of the return to file with the Clerk of the Supreme Court a reply and proof of service showing that the reply has been served. The total length of the reply shall not exceed fifteen (15) pages.

. . .

**(i) Consideration by the Supreme Court**. The petition will be considered by the Supreme Court without oral argument. The petition may be granted or denied on any question presented. If the petition is granted, the Clerk shall notify each party or each party's attorney specifying the question or questions to be considered, and the parties shall prepare briefs addressing the question(s). Petitioner shall have thirty (30) days from the date the petition is granted to serve a copy of his brief and the Appendix on all parties to the appeal, and file the brief and the Appendix with the Clerk of the Supreme Court, along

with proof of service. Whenever a paper copy of the Appendix is served on another party, the Appendix shall be bound as provided by Rule 267(d), unless this requirement is waived by the receiving party. Within thirty (30) days after service of petitioner's brief, respondent shall serve a copy of his brief on all parties to the appeal, and file the brief with the Clerk of the Supreme Court, along with proof of service. Petitioner may file a reply brief. If a reply brief is prepared, petitioner shall, within ten (10) days after service of respondent's brief, serve a copy of the reply brief on all parties to the appeal and file the reply brief with the Clerk of the Supreme Court, along with proof of service. The briefs shall, to the extent possible, comply with the requirements of Rule 208(b). Oral argument shall not be permitted unless ordered by the Supreme Court.

. . . .

**11. Rule 243(d), (g), (h), and (j), SCACR, are amended to provide:**

**RULE 243**
**CERTIORARI TO REVIEW POST-CONVICTION RELIEF ACTIONS**

. . .

**(d) Service and Filing of Petition and Appendix.** Within thirty (30) days of receipt of the transcript, petitioner shall serve a copy of the Appendix and petition for writ of certiorari on opposing counsel and shall file the Appendix and petition and proof of service showing the Appendix and petition have been served with the Clerk of the Supreme. Whenever a paper copy of the Appendix is served on another party, the Appendix shall be bound as provided by Rule 267(d), unless this requirement is waived by the receiving party. As provided by Rule 267(d), the Appendix filed with the Supreme Court shall be filed unbound or filed by electronic means.

. . .

**(g) Return of Respondent.** Within thirty (30) days after service of the petition and Appendix, respondent shall serve a copy of his return on opposing counsel, and shall file the return and proof of service showing the return has been served with the Clerk of the Supreme Court. The return may rephrase the questions, offer additional sustaining grounds, and present a concise counter-statement. The total length of a return shall not exceed twenty-five (25) pages.

**(h) Reply.** The petitioner shall have ten (10) days from the date of service of the return to file a reply and proof of service showing the reply has been served with the Clerk of the Supreme Court. The total length of the reply shall not exceed fifteen (15) pages.

. . .

**(j) Procedure Upon Grant of Certiorari.** Upon the concurrence of any two justices, the petition may be granted on any question presented. The petition will be considered by the Supreme Court without oral argument. If the petition is granted, the Clerk shall notify each party or each party's attorney, specifying the question or questions to be considered, and the parties shall prepare briefs addressing the question(s). Petitioner shall have thirty (30) days from the date the petition is granted to serve a copy of his brief on all parties to the appeal, and file the brief and proof of service with the Clerk of the Supreme Court. Within thirty (30) days after service of petitioner's brief, respondent shall serve a copy of his brief on all parties to the appeal, and file the brief and proof of service with the Clerk of the Supreme Court. Petitioner may file a reply brief. If a reply brief is prepared, petitioner shall, within ten (10) days after service of respondent's brief, serve a copy of his reply brief on all parties to the appeal and file the reply brief and proof of service with the Clerk of the Supreme Court. The briefs shall, to the extent possible, comply with the requirements of Rule 208(b). Oral argument shall not be permitted unless ordered by the Supreme Court.

**12. Rule 245(c), SCACR, is amended to provide:**

**RULE 245**
**ORIGINAL JURISDICTION OF THE SUPREME COURT**

**(c) Actions.** A party seeking to have the Supreme Court entertain an action in its original jurisdiction (petitioner) shall serve on all other parties (respondents) a petition for original jurisdiction, a complaint setting forth the claim for relief in the manner specified by Rule 8, SCRCP, and a notice advising each respondent he has twenty (20) days from the date of service to serve and file a return to the petition. Service shall be in the same manner as required for summons and complaints in Rule 4, SCRCP. The petitioner shall file the petition, notice and complaint with the Clerk of the Supreme Court, along with proof of service on each respondent. Any party opposing the petition shall have twenty (20) days from the date of service to file a return with the Clerk of the Supreme Court and serve on all parties a copy of the return. Failure of a party to timely file a return may be deemed a consent by that party to the matter being heard in the original jurisdiction. Unless otherwise ordered by the Supreme Court, the petition shall be decided without oral argument. If the petition is granted, the respondent shall have thirty (30) days to serve and file an answer to the complaint. The Supreme Court may provide for discovery, fact finding and/or a briefing schedule as necessary.

**13. Rule 247(c), (f), (g), and (h), SCACR, are amended to provided:**

**RULE 247**
**CERTIORARI TO REVIEW DNA TESTING DECISIONS**

. . .

**(c) Service and Filing of Petition and Appendix.** Within thirty (30) days of receipt of the transcript, petitioner shall serve a copy of the Appendix and petition for a writ of certiorari on opposing counsel and shall file the Appendix and petition together with proof of service showing the Appendix and petition have been served with the Clerk of the appellate court in which the matter is pending. Whenever a paper copy of the Appendix is served on another party, the Appendix shall be bound as provided by Rule 267(d), unless this requirement is waived by the receiving party. As provided by Rule 267(d), one copy of the Appendix filed with the appellate court shall be filed unbound

or filed by electronic means.

. . .

**(f) Return of Respondent.** Within thirty (30) days after service of the petition and Appendix, respondent shall serve a copy of a return on opposing counsel, and shall file the return and proof of service showing the return has been served with the Clerk of the appellate court in which the matter is pending. The return may rephrase the questions, offer additional sustaining grounds, and present a concise counter-statement. The total length of a return shall not exceed twenty-five (25) pages.

**(g) Reply.** The petitioner shall have ten (10) days from the date of service of the return to file a reply and proof of service showing the reply has been served with the Clerk of the appellate court in which the matter is pending. The total length of the reply shall not exceed fifteen (15) pages.

**(h) Procedure Upon Grant of Certiorari.** Upon the concurrence of any two justices of the Supreme Court or one judge of a three-judge panel of the Court of Appeals, the petition may be granted on any question presented. The petition will be considered by the appellate court without oral argument. If the petition is granted, the Clerk shall notify each party or each party's attorney, specifying the question or questions to be considered, and the parties shall prepare briefs addressing the question(s). Petitioner shall have thirty (30) days from the date the petition is granted to serve a copy of a brief on all parties to the appeal, and file the brief and proof of service with the Clerk of the appellate court. Within thirty (30) days after service of petitioner's brief, respondent shall serve a copy of a brief on all parties to the appeal, and file the brief and proof of service with the Clerk of the appellate court. Petitioner may file a reply brief. If a reply brief is prepared, petitioner shall, within ten (10) days after service of respondent's brief, serve a copy of the reply brief on all parties to the appeal and file the reply brief and proof of service with the Clerk of the appellate court. The briefs shall, to the extent possible, comply with the requirements of Rule 208(b). Oral argument shall not be

permitted unless ordered by the appellate court.

**14. Rule 267(d) and (f), SCACR, are amended to provide:**

**RULE 267**
**FORM OF PAPERS**

. . .

**(d) Margins and Bindings.** Typewritten papers or reproductions must have a blank margin of one inch on all sides. If more than two sheets are used, they shall be securely fastened on the left margin. While petitions or motions need not be bound, Records on Appeal, Appendices in post-conviction relief matters and briefs must be bound in volumes not exceeding 250 sheets each. If staples or clasps are used to bind the volumes, the spines of the volumes shall be bound with heavy tape. One copy of every Final Brief, Record on Appeal, Supplemental Record, or Appendix filed with the appellate court shall be filed unbound or filed by electronic means pursuant to any order of the Supreme Court issued pursuant to Rule 262(a)(3).

. . .

**(f) Number of Copies.** Unless otherwise ordered or requested by the Appellate Court, a document filed with an Appellate Court need not be accompanied by any additional copies. However, the appellate courts may request additional copies from the lawyer or party submitting the document. Any additional requirements with respect to formatting and additional copies may be specified in an order of the Supreme Court.

# The Supreme Court of South Carolina

Re: Amendment to Rule 26, South Carolina Rules of Civil Procedure

Appellate Case No. 2023-001063

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ORDER

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Pursuant to Article V, § 4A of the South Carolina Constitution, Rule 26 of the South Carolina Rules of Civil Procedure is amended as set forth in the attachment to this order. This amendment shall be submitted to the General Assembly as provided in Article V, §4A of the South Carolina Constitution.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

s/ D. Garrison Hill J.

Columbia, South Carolina
January 31, 2024

**Rule 26(b)(4) of the South Carolina Rules of Civil Procedure is amended to provide:**

## RULE 26
## GENERAL PROVISIONS GOVERNING DISCOVERY

. . .

**(b)(4)(A) Trial Preparation: Experts.** Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained by any discovery method subject to subdivisions (b)(4)(B) and (C) of this rule, concerning fees and expenses, and subdivision (b)(4)(D).

**(B)** A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means. A party is not required to disclose nor produce an expert who was only consulted informally, or consulted and not retained or specially employed.

**(C)** Upon the request of the party seeking discovery, unless the court determines otherwise for good cause shown, or the parties agree otherwise, a party retaining an expert who is subject to deposition shall produce such expert in this state for the purpose of taking his deposition, and the party seeking discovery shall pay the expert a reasonable fee for time and expenses spent in travel and in responding to discovery and upon motion the court may require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

**(D) Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses.** Rule 26(b)(3) and Rule 26(b)(4)(A) protect communications between the party's attorney and any witness designated as an expert, regardless of the form of the communications, including draft reports, except to the extent that the communications:

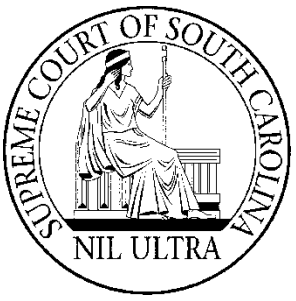
**(i)** relate to compensation for the expert's study or testimony;

**(ii)** identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

**(iii)** identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

**Note to 2024 Amendment:**

The amendment adding new paragraph (b)(4)(D) incorporates portions of the 2010 changes to Federal Rule 26(b)(4)(C), which provide additional protection for communications between lawyers and expert witnesses. The amendment will allow a freer exchange of information with an expert in the process of developing her thoughts and opinions and allow the consideration of the mental impressions of a lawyer without having to disclose those. These protections do not apply to the extent the lawyer and the expert communicate about matters that fall within the three exceptions in subdivisions (b)(4)(D)(i), (ii) and (iii).




# OPINIONS

## OF

# THE SUPREME COURT

## AND

# COURT OF APPEALS

## OF

# SOUTH CAROLINA

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**ADVANCE SHEET NO. 4**
**January 31, 2024**
**Patricia A. Howard, Clerk**
**Columbia, South Carolina**
**www.sccourts.org**

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2023-UP-263 – Rory M. Isaac v. Laura Kopchynski Pending

2023-UP-264 – Kathleen A. Grant v. Nationstar Mortgage, LLC Pending

2023-UP-272 – Estate of Barbara Owens v. Fundamental Clinical and

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| Operational Services, LLC | Pending |
| 2023-UP-274 – Terrence "Terry" Carroll v. Debra Mowery | Pending |
| 2023-UP-281 – Armando Acevedo v. Hunt Valley Holdings, LLC | Pending |
| 2023-UP-283 – Brigette Hemming v. Jeffrey Hemming | Pending |
| 2023-UP-289 – R-Anell Housing Group, LLC v. Homemax, LLC | Pending |
| 2023-UP-290 – Family Services Inc. v. Bridget D. Inman | Pending |
| 2023-UP-293 – NCP Pilgrim, LLC v. Mary Lou Cercopely | Pending |
| 2023-UP-295 – Mitchell L. Hinson v. State | Pending |
| 2023-UP-300 – SCDSS v. Kristie Taylor and George Cleveland, III (2) | Pending |
| 2023-UP-301 – Olivia M. Thompson v. College of Charleston | Pending |
| 2023-UP-311 – The State v. Joey C. Reid | Pending |
| 2023-UP-315 – Capital Bank, N.A. v. Rosewood Holdings, LLC | Pending |
| 2023-UP-321 – Gregory Pencille, #312332 v. SCDC (2) | Pending |
| 2023-UP-324 – Marvin Gipson v. Coffey & McKenzie, P.A. | Pending |
| 2023-UP-326 – SCDSS v. Joseph Green (2) | Pending |
| 2023-UP-343 – The State v. Jerome Smith | Pending |
| 2023-UP-352 – The State v. Michael T. Means | Pending |
| 2023-UP-365 – The State v. Levy L. Brown | Pending |
| 2023-UP-366 – Ray D. Fowler v. Pilot Travel Centers, LLC | Pending |
| 2023-UP-398 – The State v. Rashawn M. Little | Pending |

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

The State, Respondent,

v.

Lance Antonio Brewton, Petitioner.

Appellate Case No. 2022-001505

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**ON WRIT OF CERTIORARI TO THE COURT OF APPEALS**

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Appeal From Spartanburg County
J. Derham Cole, Circuit Court Judge

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Opinion No. 28191
Submitted May 23, 2023 – Filed January 31, 2024

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**AFFIRMED AS MODIFIED**

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Appellate Defender Kathrine Haggard Hudgins, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson and Senior Assistant Attorney General Mark Reynolds Farthing, both of Columbia; and Solicitor Barry Joe Barnette, of Spartanburg, for Respondent.

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**JUSTICE JAMES:** Lance Antonio Brewton was convicted by a jury of murdering Natalie Niematolo, Brewton's on-again, off-again girlfriend. He seeks a writ of certiorari to review the decision of the court of appeals in *State v. Brewton*, 437 S.C. 44, 876 S.E.2d 141 (Ct. App. 2022). We grant the petition on the sole issue of the trial court's admission of Brewton's 1999 strong-arm robbery conviction, dispense with further briefing, and affirm as modified the opinion of the court of appeals.

## I.

Brewton testified at trial, so his credibility as a witness was a jury issue. The State sought to introduce evidence that Brewton was convicted of strong-arm robbery (also known as common law robbery) in 1999 and 2008. After his 1999 conviction, Brewton was imprisoned and released from confinement in 2004. After his 2008 conviction, Brewton was released from confinement in 2011. Brewton testified in the instant case in August 2018, more than ten years after his 2004 release from confinement for the 1999 conviction.

Brewton did not object to the admissibility of the 2008 conviction. However, Brewton objected to the admissibility of the 1999 conviction on remoteness grounds, an obvious invocation of Rule 609(b) of the South Carolina Rules of Evidence. Rule 609 as a whole governs the admissibility of prior convictions for impeachment purposes, and Rule 609(b) provides:

> Evidence of a conviction under this rule is not admissible [for impeachment purposes] if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.

Rule 609(b) creates a presumption against the admissibility of a remote conviction for impeachment purposes. *State v. Black*, 400 S.C. 10, 18, 732 S.E.2d 880, 885 (2012). The proponent of the evidence must overcome this presumption by establishing, as the rule provides, that the probative value of the conviction substantially outweighs its prejudicial effect.

Before the trial court, Brewton argued evidence of his 1999 conviction was not admissible because he was released from confinement for that conviction in

2004, more than ten years before his 2018 trial testimony. The trial court noted the short period between Brewton's 2004 release and his 2008 conviction for his second robbery conviction, and the trial court noted the seven-year span between Brewton's 2011 release for the second robbery and his testimony in this case. In overruling Brewton's objection, the trial court ruled the probative value of both convictions substantially outweighed any danger of unfair prejudice[1] to Brewton. Brewton again objected to the admission of the 1999 conviction on the ground of remoteness and argued the probative value of that conviction was outweighed by the danger of unfair prejudice to Brewton. The trial court again overruled the objection.

Having lost the admissibility battle, Brewton asked the trial court if the two prior convictions would, in front of the jury, be generically referred to as "robberies" or "crimes of dishonesty." The State agreed to such a reference. The trial court stated it would not require such a generic reference but suggested that would be the better course. Brewton did not object further. He then testified on direct examination that he had been convicted of two crimes of dishonesty. During its closing argument, the State referred to the two prior convictions as crimes of dishonesty, arguing the convictions "could be used to weigh [Brewton's] credibility as a witness." The trial court charged the jury that some witnesses, "including the defendant, [have] a prior conviction or convictions for certain types of criminal offenses which have an element of dishonesty."[2] The trial court charged the jury that it could consider a witness's convictions only as to the credibility of the witness and for no other purpose. The court of appeals held Brewton waived his objection

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[1] Rule 609(b) uses the standard "prejudicial effect," not "danger of unfair prejudice." The latter standard is used in Rule 403 and applies to convictions of a witness other than the accused sought to be introduced under Rule 609(a)(1). The standard "prejudicial effect" applies to convictions of the accused sought to be introduced under Rule 609(a)(1) and to convictions of any witness sought to be introduced under Rule 609(b). Perhaps the drafters of the rules did not intend there to be any difference between the words "prejudicial effect" and "danger of unfair prejudice." But in most instances, a party seeks to introduce evidence that would have a "prejudicial effect" on the other side; however, the prejudicial effect might not be "unfair." Rule 609 of the Federal Rules of Evidence is largely the same as Rule 609, SCRE.

[2] The propriety of such a specific reference to the defendant is not before us.

to the admission of the 1999 conviction "because he acquiesced to referring to it as a crime of dishonesty." 437 S.C. at 61, 876 S.E.2d at 150.

## II.

### A. Waiver issue

We agree with Brewton that the court of appeals erred in holding he waived his objection to the admissibility of his 1999 conviction by agreeing the conviction could be referred to as "a crime of dishonesty." Rule 18(a) of the South Carolina Rules of Criminal Procedure provides "[c]ounsel shall not attempt to further argue any matter after he has been heard and the ruling of the court has been pronounced." Here, Brewton twice objected to the admissibility of his 1999 conviction on the ground of remoteness, and the trial court twice overruled the objection. Brewton's attempt to lessen the impact of the two prior convictions by requesting they be referred to as crimes of dishonesty was not a waiver of his objection. Finally, when the State argued during closing that the jury could consider the convictions when determining Brewton's credibility as a witness, Brewton had no further right to object. The trial court's ruling on the admissibility of the 1999 conviction was final, and the State confined its closing argument to the trial court's ruling. We will therefore consider the merits of Brewton's admissibility argument.

### B. Admissibility of the 1999 conviction

Rule 402, SCRE, provides,

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina. Evidence which is not relevant is not admissible.

Rule 401, SCRE, provides "'[r]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." When a witness testifies, the witness's credibility obviously becomes relevant, and a prior criminal conviction of a witness can be probative of that witness's credibility. Allowing the conviction into evidence certainly results in

prejudice to the party relying upon the witness's testimony. That prejudice obviously materializes when it is the testifying criminal defendant who has a prior conviction.

Rule 609 sets boundaries on the admissibility of the conviction by requiring the court to balance the probative value of the conviction against its prejudicial effect. The specific balancing test to be conducted depends upon the type of conviction, whether the witness is the accused in a criminal case, and whether the conviction is remote. As noted above, Rule 609(b) provides that a remote conviction is not admissible "unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect."

Brewton presents two basic arguments under Rule 609. First, Brewton argues strong-arm robbery is not a crime involving dishonesty and should not have been generically labeled as such during the trial court's jury instructions or by the State during its closing argument. "Crime of dishonesty or false statement" is a term of art used in Rule 609(a)(2), and, indeed, in *State v. Broadnax*,[3] this Court held "armed robbery is not a crime of dishonesty or false statement for purposes of impeachment under Rule 609(a)(2)." 414 S.C. 468, 476, 779 S.E.2d 789, 793 (2015). This logic necessarily extends to strong-arm robbery. However, Brewton did not argue at trial that strong-arm robbery is not a crime of dishonesty or false statement. In fact, it was Brewton who, after failing to convince the trial court that the 1999 conviction was too remote to be introduced, initially suggested labeling the strong-arm robbery convictions as crimes of dishonesty. While Brewton did not acquiesce to the threshold admissibility of the 1999 conviction, he did acquiesce to the labeling to which he now objects; thus, Brewton cannot now complain about that labeling.

Brewton next argues the trial court did not conduct the admissibility analysis required by *State v. Colf*, 337 S.C. 622, 525 S.E.2d 246 (2000). In *Colf*, this Court adopted the five-factor analysis employed by federal courts when weighing the probative value of a prior conviction against its prejudicial effect. 337 S.C. at 627, 525 S.E.2d at 248. These factors include:

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[3] Strong-arm robbery, also known as common law robbery, "is essentially the commission of larceny with force." *State v. Brown*, 274 S.C. 48, 49, 260 S.E.2d 719, 720 (1979). "Larceny involves the felonious taking and carrying away the goods of another." *Id.* (citations omitted).

(1) The impeachment value of the prior crime,

(2) The point in time of the conviction and the witness's subsequent history,

(3) The similarity between the past crime and the charged crime,

(4) The importance of the defendant's testimony, and

(5) The centrality of the credibility issue.

*Id*. We explained in *Colf*, "These factors are not exclusive; trial courts should exercise their discretion in light of the facts and circumstances of each particular case." *Id.*[4] We held in *Colf* that the evaluation of the five nonexclusive factors must be conducted by the trial court, not the appellate court, because "[i]t is difficult, if not impossible, for an appellate court to balance the interests at stake when the record does not contain the specific facts and circumstances necessary to a decision." *Id*. at 628-29, 525 S.E.2d at 249 (emphasis added). Thus, an appellate court may evaluate a *Colf* factor on its own only when the record clearly reflects the "specific facts and circumstances necessary" to evaluate that factor.

In this case, the trial court evaluated only two of the *Colf* factors. As for the first factor, the trial court obviously considered the impeachment value of a strong-arm robbery conviction, as it charged the jury that the defendant (and other witnesses) had prior convictions for crimes "which have an element of dishonesty." While we held in *Broadnax* that robbery is not a crime "involving dishonesty or false statement" as contemplated in Rule 609(a)(2), we have held a conviction for strong-arm robbery has some impeachment value. *State v. Robinson*, 426 S.C. 579, 600, 828 S.E.2d 203, 214 (2019). "Impeachment value refers to how strongly the nature of the conviction bears on the veracity, or credibility, of the witness." *Black*, 400 S.C. at 21-22, 732 S.E.2d at 887. Under Rule 609, evidence of a conviction of a

[4] The *Colf* factors (and any other relevant factors) must also be evaluated by the trial court under Rule 609(a)(1) when the State seeks to impeach the accused with a nonremote prior conviction of a crime carrying possible punishment in excess of one year. However, the State's burden is somewhat lessened, as it must establish "the probative value of admitting this evidence outweighs its prejudicial effect to the accused." Rule 609(a)(1), SCRE.

testifying witness may be introduced only to impeach the credibility of that witness. Therefore, under Rule 609, the impeachment value of a conviction is the only probative value of that conviction. The larceny component of a strong-arm robbery conviction enhances that probative value. The trial court's finding on this *Colf* factor is well-supported by the record and our case law.

The second *Colf* factor requires evaluation of "[t]he point in time of" Brewton's 1999 conviction, his 2004 release from confinement, and his subsequent history. 337 S.C. at 627, 525 S.E.2d at 248. Here, the trial court noted the relatively short time between Brewton's 2004 release from confinement after the 1999 conviction and Brewton's next robbery conviction in 2008. The trial court also considered the span of only seven years from Brewton's 2011 release from confinement for the second robbery conviction to the date he testified in this case. These circumstances enhance the probative value of the 1999 conviction. The trial court's finding on this *Colf* factor is amply supported by the record.

The trial court did not consider the third *Colf* factor, which requires evaluation of the similarities, if any, between the charged crime and the conviction sought to be introduced. The more similarities there are, the greater the prejudicial effect and the less likely the prior conviction should be admitted.[5] *See Colf*, 337 S.C. at 628, 525 S.E.2d at 249. In this case, the specific facts and circumstances in the record clearly establish Brewton's 1999 strong-arm robbery conviction bore no similarity to the facts surrounding Brewton's shooting of Ms. Niematolo. The State contends Brewton shot and killed Ms. Niematolo with malice aforethought after an argument. Brewton maintains he did not intentionally fire the gun. Strong-arm robbery is "the commission of larceny with force." *Brown*, 274 S.C. at 49, 260 S.E.2d at 720. Strong-arm robbery does not involve the use of a deadly weapon. There is no similarity between strong-arm robbery and the fact pattern surrounding the shooting in this case. The complete absence of similarities lessens the prejudicial effect of the 1999 conviction and, in this case, weighs only in favor of allowing the conviction into evidence. A remand of this issue to the trial court would serve no purpose.

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[5] If the prior conviction is not remote and was for a crime involving dishonesty or false statement, the conviction is admissible for impeachment purposes, regardless of the probative value or prejudicial effect of the evidence. *See Robinson*, 426 S.C. at 593, 828 S.E.2d at 210 (citing *State v. Bryant*, 369 S.C. 511, 517, 633 S.E.2d 152, 155 (2006)).

The trial court also did not address the fourth *Colf* factor, the importance of the defendant's testimony. The weight to be given to this factor is not clearly apparent from the record, so we will not undertake the analysis ourselves.

The trial court also did not address the fifth *Colf* factor, which requires evaluation of the "centrality of the credibility issue." It is patently apparent from the record that Brewton's credibility was central to the jury's determination of whether the shooting was unintentional or with malice aforethought. While the prejudicial effect of the conviction is apparent, Brewton was the only defense witness, and no State's witness supported his account that the shooting was unintentional. These facts and circumstances magnify the issue of Brewton's credibility and significantly heighten the probative value of the remote conviction. A remand of this issue to the trial court would serve no purpose.

The evidence in the record supports the trial court's determination that the probative value of the remote strong-arm robbery conviction substantially outweighed the prejudicial effect to Brewton.

## III.

We noted in *Colf* that the trial court must evaluate the *Colf* factors on its own and that a remand to the trial court for that undertaking will be necessary "when the record does not contain the specific facts and circumstances necessary to a decision." 337 S.C. at 628-29, 525 S.E.2d at 249 (emphasis added). While the trial court did not evaluate the third and fifth factors, the facts and circumstances pertinent to these two factors are clearly apparent from the record and support only the conclusion that these two factors significantly weighed in favor of admissibility of the 1999 conviction. A remand of these two issues is therefore not necessary. Because the first, second, third, and fifth *Colf* factors so clearly support the trial court's ruling, there is no need to consider the fourth factor in this case. We therefore affirm the court of appeals as modified.[6] However, we remind the trial bench and the bar of

[6] The State argues the lack of trial-court analysis of some *Colf* factors was harmless because the jury heard evidence Brewton was convicted of another crime which had "an element of dishonesty." The State contends evidence of the second conviction—to which Brewton did not object—removed any prejudicial taint of the remote conviction. We need not address this argument. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding the

the importance of an on-the-record evaluation of the weight to be given each *Colf* factor (and any other relevant factor). Such an evaluation allows the appellate court to fully consider the degree of discretion exercised by the trial judge in admitting, excluding, or limiting the evidence.

**AFFIRMED AS MODIFIED.**

**BEATTY, C.J., KITTREDGE, and FEW, JJ., concur. HILL, J., not participating.**

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appellate court need not address the remaining issues when disposition of a prior issue is dispositive).

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

Catherine Crosby Gandy, Respondent,

v.

John Wilson Gandy, Jr., Appellant.

Appellate Case No. 2022-001812

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Appeal From Horry County
FitzLee H. McEachin, Family Court Judge

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Opinion No. 6048
Heard September 12, 2023 – Filed January 24, 2024

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**AFFIRMED IN PART AND REVERSED IN PART**

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Carolyn R. Hills and Jennifer Darrow Hills, both of Hills & Hills, PC, of Myrtle Beach; and Rebecca Brown West, of Harling & West, LLC, of Lexington, all for Appellant.

George M. Hearn, Jr. and Kathleen Wrenn Hearn, both of Hearn & Hearn, PA, of Conway; and Marie-Louise Ramsdale, of Ramsdale Law Firm, of Mount Pleasant, all for Respondent.

Russell W. Hall, III, of The Law Office of Russell W. Hall III, of Myrtle Beach, as the Guardian ad Litem for Appellant.

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**WILLIAMS, C.J.:** In this domestic matter, John W. Gandy, Jr. (Father) appeals an order of the family court, arguing the family court erred in (1) awarding Catherine C. Gandy (Mother) primary custody of the parties' children and (2) awarding Mother alimony. We affirm in part and reverse in part.

## FACTS/PROCEDURAL HISTORY

Father and Mother married on June 12, 2010, in Horry County. During their marriage, the parties had four children together. The parties separated on October 20, 2020, and lived separate and apart since the date of separation.

On October 6, 2020, Mother filed an action seeking separate support and maintenance, sole custody, child support, and alimony, among other relief. Father answered and counterclaimed, seeking separate support and maintenance, joint custody, child support, and other various relief. Mother later amended her complaint, seeking a divorce on the ground of one year's continuous separation and the right to relocate with the children to New Orleans, Louisiana. Father answered and counterclaimed, also seeking a divorce on the ground of one year's continuous separation and sole custody of the children.

By consent of the parties, the family court issued a temporary order on April 15, 2021, granting joint custody in which Mother had primary physical and legal custody and Father had visitation every other weekend and overnight on Thursdays during the off weeks.[1] The temporary order also directed Father to pay Mother $6,000 per month in unallocated support. In November 2021, the parties consented to a custody evaluation.

The family court held a two-week hearing in July 2022. On September 26, 2022, the family court issued a final order and decree of divorce. Both parties subsequently filed motions pursuant to Rule 59(e), SCRCP. Following a hearing on the motions, the family court issued an amended final order and decree of divorce on December 19, 2022, granting, among other relief, a divorce on the ground of one year's continuous separation; awarding the parties joint custody of the children, with Mother having primary physical and legal custody; granting Mother's request to relocate to New Orleans, Louisiana; and awarding Mother

[1] Mother and the children were to reside in the marital home during litigation.

rehabilitative alimony, which Father was required to secure with a life insurance policy.[2] This appeal followed.

## ISSUES ON APPEAL

I. Did the family court err in awarding Mother primary custody of the children?

II. Did the family court err in awarding Mother rehabilitative alimony?

## STANDARD OF REVIEW

On appeal from the family court, this court reviews factual and legal issues de novo, with the exceptions of evidentiary and procedural rulings. *Stone v. Thompson*, 428 S.C. 79, 91, 833 S.E.2d 266, 272 (2019); *see also Stoney v. Stoney*, 422 S.C. 593, 596, 813 S.E.2d 486, 487 (2018) (per curiam). Therefore, this court may find facts in accordance with its own view of the preponderance of the evidence. *Posner v. Posner*, 383 S.C. 26, 31, 677 S.E.2d 616, 619 (Ct. App. 2009). However, this broad scope of review does not prevent this court from recognizing the family court's superior position to evaluate witness credibility and assign comparative weight to testimony. *Lewis v. Lewis*, 392 S.C. 381, 392, 709 S.E.2d 650, 655 (2011). Moreover, the appellant maintains the burden of convincing the appellate court that the family court's findings were made in error or were unsubstantiated by the evidence. *Posner*, 383 S.C. at 31, 677 S.E.2d at 619.

## LAW/ANALYSIS

## I. CUSTODY

### A. Award of Primary Custody to Mother

Father argues the family court erred in awarding primary custody of the children to Mother. Specifically, he contends the family court inaccurately assessed Mother's fitness and overvalued the primary caretaker factor because he contributed substantially to the children's care. Additionally, Father avers the family court

[2] The family court also issued two orders partially granting each party's post-trial motion.

assigned little weight to Mother's shortcomings as a parent and her attempts at alienating the two oldest children.

"The paramount and controlling factor in every custody dispute is the best interests of the children." *Brown v. Brown*, 362 S.C. 85, 90, 606 S.E.2d 785, 788 (Ct. App. 2004). "While numerous prior decisions set forth criteria that are helpful in such a determination, there exist no hard and fast rules and the totality of circumstances peculiar to each case constitutes the only scale upon which the ultimate decision can be weighed." *Klein v. Barrett*, 427 S.C. 74, 81, 828 S.E.2d 773, 776 (Ct. App. 2019) (quoting *Clark v. Clark*, 423 S.C. 596, 605, 815 S.E.2d 772, 777 (Ct. App. 2018)).

"In reaching a determination as to custody, the family court should consider how the custody decision will impact all areas of the child's life, including physical, psychological, spiritual, educational, familial, emotional, and recreational aspects." *Shirley v. Shirley*, 342 S.C. 324, 330, 536 S.E.2d 427, 430 (Ct. App. 2000). "Additionally, the court must assess each party's character, fitness, and attitude as they impact the child." *Id.* "The relative fitness of parents is an important issue in custody litigation . . . . Fitness decisions normally turn on either of two considerations; whether either parent has been the primary caretaker, or whether either parent has engaged in conduct which would affect the welfare of the child." *Brown*, 362 S.C. at 91, 606 S.E.2d at 788 (quoting Roy T. Stuckey, *Marital Litigation in South Carolina* 433 (3rd ed. 2001) (internal citations omitted)).

In its amended final order, the family court found that due to "Mother's role as primary caregiver, . . . it [was] appropriate for her to be designated as the primary custodial parent." In support of this finding, the family court stated, "Mother nor Father have shown any failures in their ability as parents[; however,] . . . Father's alcohol use is of some concern to the Court . . . ." The court noted:

> The Court is also concerned with Father's disciplinary style and issues with anger. The Court notes Father's disclosure to his counselor that he was seeking counseling for "anger issues." Jennifer Poindexter, the older two children's therapist, testified that a majority of the sessions with the two oldest children (which took place over the duration of this case) were spent addressing Father's disciplinary style used with them.

> Though Ms. Poindexter also pointed out that both children indicated that Father has gotten better about yelling at them. The younger two children's therapist also testified that Father placed the younger son outside as punishment, which caused distress to the child for some period of time thereafter. The evidence, including testimony from the children's therapists, reveals that Mother better adapts her disciplinary style to what each child needs, without being inappropriately permissive.

However, the final order also addressed concerns the family court had with Mother, particularly her "efforts to alienate Father" from the oldest daughter. Nonetheless, it stood by its decision to award Mother primary custody, finding it did "not believe the efforts of Mother were necessarily intended to destroy the relationship with Father and the children . . . ."

We hold the family court's grant of primary custody to Mother serves the best interest of the children. *See Stone*, 428 S.C. at 91–92, 833 S.E.2d at 272 (stating that on appeal from the family court, this court reviews factual and legal issues de novo with the exceptions of evidentiary and procedural rulings); *Brown*, 362 S.C. at 90, 606 S.E.2d at 788 ("The paramount and controlling factor in every custody dispute is the best interests of the children."). Father asserts the family court inaccurately assessed Mother's fitness and overvalued the primary caretaker factor; we disagree. Our review of the record indicates Mother is more attuned to the children's emotional needs and disciplines the children more effectively. *See Shirley*, 342 S.C. at 330, 536 S.E.2d at 430 ("In reaching a determination as to custody, the family court should consider how the custody decision will impact all areas of the child's life, including physical, psychological, spiritual, educational, familial, emotional, and recreational aspects."); *id.* ("Additionally, the court must assess each party's character, fitness, and attitude as they impact the child."); *Brown*, 362 S.C. at 91, 606 S.E.2d at 788 ("Fitness decisions normally turn on either of two considerations; whether either parent has been the primary caretaker, or whether either parent has engaged in conduct which would affect the welfare of the child." (quoting Roy T. Stuckey, Marital Litigation in South Carolina 433)). Dr. Poindexter, therapist for the oldest two children, and Dr. Henderson, the court- appointed custody evaluator, testified Mother disciplines the children more effectively by adapting her style to each child's needs. Additionally, they indicated Mother is more attuned to the emotional needs of each child and the children feel

more secure and comfortable confiding in her. To this same point, we agree with the concerns of the family court identified in the record about Father's style of discipline, including two particular incidents involving discipline that are concerning and a troubling history of alcohol use. The Guardian Ad Litem's report stated "the primary reason for the break-up of the marriage was Father's unhealthy relationship with alcohol. . . ." We agree this conduct negatively affects the welfare of the children, thus making Mother the better-suited party to have primary custody of the children.

Father's argument that the family court should have afforded more weight to Mother's attempts at alienating the children and Mother's own shortcomings as a parent fails to persuade us that Mother should not be afforded primary custody. Our review of the record indicates neither parent was perfect during the course of their separation and this litigation. Father places particular emphasis on Mother's attempts to align his oldest daughter against him and Mother's failure to alternate bringing the children to therapy sessions. Dr. Poindexter testified about Mother's alignment issues and expressed concern about the future of the oldest daughter's relationship with Father should it continue; however, she clarified that Mother was not consciously trying to create a "wedge" between the children and Father and that Mother eventually began alternating who took the children to therapy. Further, Father fails to acknowledge his own faults and conduct during the course of this case. Dr. Poindexter noted that both parents improperly attempted to influence and talk with the children about this case. She stated that Father called Mother a "despicable, controlling woman" in front of the children; repeatedly questioned the children about what occurred at Mother's house, which made them uncomfortable; and told the children he did not want them to move to New Orleans.

Accordingly, we affirm the family court's award of primary custody to Mother. *See Brown*, 362 S.C. at 90, 606 S.E.2d at 788 ("The paramount and controlling factor in every custody dispute is the best interests of the children."); *Shirley*, 342 S.C. at 330, 536 S.E.2d at 430 ("[T]he court must assess each party's character, fitness, and attitude as they impact the child.").

### B. Relocation to Louisiana

Father argues the family court's grant of Mother's request to relocate to Louisiana is not in the best interest of the children. We disagree.

"[A] parent cannot be refused custody simply because he/she intends to take the child to a distant state." *Marshall v. Marshall*, 282 S.C. 534, 541, 320 S.E.2d 44, 49 (Ct. App. 1984). "This is just another factor to be considered by the [family court]." *Id.*

> Cases involving the relocation of a custodial parent with a minor child bring into direct conflict a custodial parent's freedom to move to another state without permission from the court and the noncustodial parent's right to continue his or her relationship with the child as established before the custodial parent's relocation.

*Latimer v. Farmer*, 360 S.C. 375, 380, 602 S.E.2d 32, 34 (2004). "In all child custody cases, including relocation cases, the controlling considerations are the child's welfare and best interests." *Id.* at 381, 602 S.E.2d at 35. "The effect of relocation on the child's best interest is highly fact specific. It should not be assumed that merely relocating and potentially burdening the non-custodial parent's visitation rights always negatively affects the child's best interests." *Id.* at 382, 602 S.E.2d at 35. "Because '[f]orcing a person to live in a particular area encroaches upon the liberty of an individual to live in the place of his or her choice,' the court's authority to prohibit an out-of-state move 'should be exercised sparingly.'" *Rice v. Rice*, 335 S.C. 449, 453–54, 517 S.E.2d 220, 222 (Ct. App. 1999) (quoting *VanName v. VanName*, 308 S.C. 516, 519, 419 S.E.2d 373, 374 (Ct. App. 1992)). "While South Carolina has not delineated criteria for evaluating whether the best interests of the children are served in relocation cases, our Supreme Court has acknowledged, without endorsing or specifically approving, factors other states consider when making this determination." *Walrath v. Pope*, 384 S.C. 101, 106, 681 S.E.2d 602, 605 (Ct. App. 2009) (noting factors considered by New York and Pennsylvania courts).

In its final order, the family court found relocation to New Orleans to be in the children's best interest, stating "[a]ppellate jurisprudence on this issue shows a trend in favor of recognizing the benefits of relocation in a proper case." In making its determination, the court noted:

> [This court] is left with an exceptionally difficult decision to make. All of the experts in this case indicated

> that it would be better for the children to remain in Horry County with both parents. On the other hand, Mother, as the primary custodial parent, has clearly established that the *Latimer* factors weigh in favor of her being permitted to relocate with the children to New Orleans. As the Court of Appeals stated in *Rice v. Rice*, 335 S.C. 449[, 517 S.E.2d 220] (Ct. App. 1999), "forcing a person to live in a particular area encroaches upon the liberty of an individual to live in the place of his or her choice, the court's authority to prohibit an out-of-state move should be exercised sparingly." Unfortunately, this Court is unaware of any case law since *Latimer* where such a prohibition has been upheld.

The family court acknowledged that "while the children's relocation with Mother will undoubtedly come at the expense of less time with Father and their paternal grandparents, Mother's primary custody of the children is in their overall best interests." It further noted:

> Father will be able to maintain his relationship with the children through regular weekend and long weekend visits, the majority of school breaks and holidays, and through daily electronic visitation. Father clearly has the ability, with his parents' professed support, to afford air travel on a regular basis and Mother shall contribute to the travel costs . . . .

Based on our de novo review of the record, we hold the family court did not err in permitting Mother to relocate to New Orleans and that relocation served the best interest of the children. *See Latimer*, 360 S.C. at 382, 602 S.E.2d at 35 ("In all child custody cases, including relocation cases, the controlling considerations are the child's welfare and best interests."); *id.* at 381, 602 S.E.2d at 35 ("The effect of relocation on the child's best interest is highly fact specific. It should not be assumed that merely relocating and potentially burdening the non-custodial parent's visitation rights always negatively affects the child's best interests."); *Walrath*, 384 S.C. at 106, 681 S.E.2d at 605 (listing factors this court has acknowledged when determining whether to permit relocation). Mother testified she was offered a job in New Orleans with an annual salary of $60,000 and full

benefits. She further testified if permitted to relocate, she would live behind her parents in a house rent-free and would have support from family and close friends. According to Mother, her parents would be able to watch the children daily in New Orleans whereas Mother felt a lack of support from Father's family in Myrtle Beach. Additionally, she noted her son's pulmonologist in New Orleans would only be five minutes away instead of the current two-and-a-half-hour drive to Charleston from Myrtle Beach. Mother further testified the children would have to attend different schools in Myrtle Beach whereas they would be able to attend the same school in New Orleans. Mother estimated the children had already spent ten percent of their lives in New Orleans visiting family and noted all of the children's medical procedures were done there, making any potential transition for the children easier.

In contrast, if required to stay in Myrtle Beach, Mother was uncertain of what, if any, job prospects she would have; she alleged that Father had talked badly about her in the community and Father and his family had not offered any assistance to aid her in staying in Myrtle Beach. Moreover, Father confirmed he had done nothing to help Mother find a job. Ultimately, Mother has no ties to Myrtle Beach outside of her former relationship with Father and his family. *See Marshall*, 282 S.C. at 541–42, 320 S.E.2d at 49 (granting a mother's request to relocate to Louisiana after awarding her primary custody and finding she "ha[d] no ties to the state of South Carolina other than her now ex-husband's family[,] . . . [her] whole life was in Louisiana[, s]he ha[d] friends and family there who [would] provide the love, support, and attention to the children as would [her ex-husband's family, and t]he best interest of the children [would] be served by allowing [the] mother to relocate in a state where she [would] have the greatest opportunity to build her new life and care for the children"). Based on the foregoing, we find relocation serves the best interest of the children and affirm the family court's holding. *See Latimer*, 360 S.C. at 382, 602 S.E.2d at 35 ("In all child custody cases, including relocation cases, the controlling considerations are the child's welfare and best interests.").

## II. REHABILITATIVE ALIMONY

Father contends the family court erred in setting the amount of rehabilitative alimony and the length of the alimony term. We agree.

"Alimony is a substitute for the support normally incident to the marital relationship." *Hagood v. Hagood*, 427 S.C. 642, 657, 832 S.E.2d 609, 617 (Ct.

App. 2019). A family court may award alimony as a means of permanent support or for a temporary, rehabilitative term. *Johnson v. Johnson*, 296 S.C. 289, 300, 372 S.E.2d 107, 113 (Ct. App. 1988). "The purpose of rehabilitative alimony is to encourage a dependent spouse *to become self-supporting* after a divorce." *Jenkins v. Jenkins*, 345 S.C. 88, 95, 545 S.E.2d 531, 535 (Ct. App. 2001) (emphasis added). "It permits former spouses to develop their own lives free from obligations to each other." *Id.*

> Factors to be considered in making an alimony award include: (1) duration of the marriage; (2) physical and emotional health of the parties; (3) educational background of the parties; (4) employment history and earning potential of the parties; (5) standard of living established during the marriage; (6) current and reasonably anticipated earnings of the parties; (7) current and reasonably anticipated expenses of the parties; (8) marital and nonmarital properties of the parties; (9) custody of children; (10) marital misconduct or fault; (11) tax consequences; and (12) prior support obligations; as well as (13) other factors the court considers relevant.

*Hagood*, 427 S.C. at 658, 832 S.E.2d at 617 (quoting *Allen v. Allen*, 347 S.C. 177, 184, 554 S.E.2d 421, 424 (Ct. App. 2001)); *see also* S.C. Code Ann. § 20-3-130(C) (2014) (listing factors for the family court to consider when making an alimony determination). "No one of the above factors is dispositive." *Hagood*, 427 S.C. at 658, 832 S.E.2d at 617. "It is the duty of the family court to make an alimony award that is fit, equitable, and just if the claim is well founded." *Allen*, 347 S.C. at 184, 554 S.E.2d at 424.

Based on our de novo review, we find the family court erred in awarding Mother rehabilitative alimony. *See Stone*, 428 S.C. at 91, 833 S.E.2d at 272 (providing that on appeal from the family court, this court reviews factual and legal issues de novo). Here, the parties were married for ten years before their separation. Prior to the marriage, both parties attended Wofford College. Mother graduated with a bachelor's degree in business economics. During the marriage, Mother stayed home with the children while Father worked as an accountant for his family's

accounting firm in Myrtle Beach. At the time of trial, Mother was thirty-five years old and Father was thirty-seven years old.

At trial, the parties stipulated to the admission of a report by Mother's vocational rehabilitation expert, George Page. In his assessment, Page stated he conducted a one-hour telephone interview of Mother in April 2022 to determine her current employability and wage-earning capacity. His report stated:

> Ms. Gandy's work experience has been fairly short term. Her first job after Wofford College was with Coastal Direct Marketing Solutions, where she worked for less than one year. She was originally hired to assist in the organization process of mailings to retailers. She noted that she also called on businesses and solicited new business. She left because the job did not end up being what she expected.

Page also noted Mother worked part-time as a sales clerk for a retail shop in Myrtle Beach for approximately one year following her employment with the marketing firm but ceased working there before the birth of the parties' first child. For the next ten years, Mother stayed home with the children. After considering Mother's employment history, Page found Mother would be able to find work in the retail industry. He further opined:

> With Ms. Gandy's current education with a degree in Business Economics, she would also be able to enter entry-level employment in business and financial occupations. A sample of such jobs might include fundraiser, claims adjuster, market researcher and credit analyst.
>
> Additionally, it was indicated to me by Ms. Gandy that she is considering returning to school to get a registered nursing degree. She revealed her research identifies a minimum of three years to complete. If completed, Ms. Gandy would have an additional option as a registered nurse.

Page reported Mother could immediately qualify for the median wage in retail sales but she would likely start off between the tenth to twenty-fifth percentile range for other business and financial positions. He stated, "In my opinion, given Ms. Gandy's education, work experience and communication skills, she can currently earn a range of wages between . . . $11.28 to $22.62 per hour [for the New Orleans metro area]," which is approximately between $23,000 and $47,000 per year. Regarding pursuing a career in nursing, Page indicated Mother required "an additional three years of full-time course work" and that upon earning her nursing degree, Mother would likely earn approximately $29.11 per hour in the New Orleans metro area, which is around $60,500 annually.

However, Mother testified that in the time between her interview with Page and the trial, the children's hospital in New Orleans offered her a job. Mother explained she spoke with various employees at the children's hospital regarding the possibility of pursuing a nursing degree. Through those discussions and after reviewing Mother's resume, the hospital offered her a job in its fundraising and development department. Therefore, it was no longer her plan to start a nursing program. Mother further testified that if the court permitted her to relocate with the children to New Orleans, she would accept the job, which paid an annual salary of $60,000 with full benefits, including health, vision, and dental insurance for herself and the children. Mother testified that before staying home with the children, she made around $30,000 per year at her job with the marketing firm and approximately $15 an hour part time at the stationery store.

Mother also testified her parents purchased a house, which is located behind their home in New Orleans, for her to live in with the children. Mother would be responsible for utilities but would not have to pay rent. Mother testified the house was also conveniently located because it is only five minutes away from the children's hospital.

Mother's financial declaration indicated a total need of $11,054 per month in child support and alimony from Father. However, Mother acknowledged her declaration *did not account for her anticipated salary; rather, it accounted for no income*. Mother stated she felt her assessed need was reasonable based upon the lifestyle to which she and the children were accustomed to living. For alimony purposes, Father's stipulated monthly income was $12,008.67.

In her pleadings, Mother requested permanent alimony. In its initial final order and decree of divorce, the family court awarded Mother non-modifiable rehabilitative alimony of $2,000 per month for a period of eight years.[3] Father subsequently filed a Rule 59(e), SCRCP, motion requesting a reduction to the amount and time period, asserting the family court failed to specify its reasoning in making its rehabilitative determination. The family court held a hearing on the parties' post-trial motions. During the hearing, the family court stated:

> The Court did have an opportunity to go back and consider . . . the issue of alimony. And in reconsidering that, the Court did look over the totality of the case, the fact that mother had custody of the children, as well as the factors the Court should consider. And while I do find that the order is appropriate for rehabilitative alimony, I find that the eight years was to[o] long and I'm going to reduce that to seven years.

Thereafter, the family court issued an amended final order and decree of divorce, awarding Mother alimony of $2,000 per month for seven years.

Father contends the record contains "scant evidence" supporting the family court's finding that Mother should receive rehabilitative alimony for seven years. In conducting a de novo review of the record, we agree. Our precedent is clear that the purpose of rehabilitative alimony is to encourage a dependent spouse to become self-supporting. *See Jenkins*, 345 S.C. at 95, 545 S.E.2d at 535 ("The purpose of rehabilitative alimony is to encourage a dependent spouse to become self-supporting after a divorce."). Further, an alimony award should balance a spouse's reasonable needs to maintain her standard of living enjoyed during the marriage with her earning capacity. *See Johnson*, 296 S.C. at 303, 372 S.E.2d at 115 ("While based upon the reasonable needs of the wife to maintain her marital standard of living, the award should also take into account her own earning capacity."). The family court's award in the present case fails to do so. We can find no evidence in the record supporting the notion that Mother requires seven years to successfully transition back into the workforce. To the contrary, Mother successfully obtained employment, in an area in which she has experience, with

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[3] The family court also awarded Mother $5,000 a month in child support to be secured by Father's life insurance.

full benefits and a starting salary that was significantly higher than her vocational expert estimated. Moreover, Mother's living expenses in New Orleans are drastically reduced as she is only responsible for paying the utilities associated with the home. Although Mother initially discussed relying on familial support to go back to nursing school full-time for three years, she testified numerous times that she no longer planned to pursue that occupational path after receiving the job offer from the children's hospital.

Based on the foregoing, we reverse the family court's award of rehabilitative alimony to Mother, finding this matter involves the rare instance when the former dependent spouse, Mother, has already become sufficiently self-supporting prior to the end of the case. Thus, it would be inequitable to require Father to pay rehabilitative alimony. *See Allen*, 347 S.C. at 184, 554 S.E.2d at 424 ("It is the duty of the family court to make an alimony award that is fit, equitable, and just if the claim is well founded.").[4]

**CONCLUSION**

Based on the foregoing, the family court's holdings as to custody and relocation are **AFFIRMED** and the family court's award of rehabilitative alimony to Mother is **REVERSED.**

**HEWITT and VERDIN, JJ., concur.**

[4] Because our finding as to alimony is dispositive, we decline to address Father's remaining argument as to whether the family court erred in requiring him to secure his alimony obligation with life insurance. *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 review remaining issues when its determination of a prior issue is dispositive of the appeal).

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

John Upson, Respondent,

v.

State of South Carolina, Petitioner.

Appellate Case No. 2018-001674

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**ON WRIT OF CERTIORARI**

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Appeal from Aiken County
R. Scott Sprouse, Post-Conviction Relief Judge

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Opinion No. 6049
Heard December 7, 2023 – Filed January 31, 2024

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**REVERSED**

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Attorney General Alan Wilson and Senior Assistant Attorney General Mark Reynolds Farthing, both of Columbia, for Petitioner.

Tommy Arthur Thomas, of Irmo, for Respondent.

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**GEATHERS, J.:** The State of South Carolina (the State) appeals an order from the post-conviction relief (PCR) court granting John Upson's PCR application for ineffective assistance of counsel. The State argues the PCR court erred in finding that trial counsel was constitutionally ineffective by (1) failing to challenge or

otherwise determine the admissibility of eyewitness identification evidence, (2) failing to cross-examine a witness who testified that Upson had a "lazy eye," and (3) failing to challenge the State's testimony discrediting Upson's alibi with an expert witness of his own. We reverse.

## FACTS

John Upson was convicted in April 2014 of armed robbery and two counts of kidnapping and sentenced to twenty years' imprisonment for robbing a Captain D's restaurant.

Shortly after the restaurant had closed for the business day, Upson and another individual—both wearing black sweatpants, black hoodies, and bandanas covering their faces up to their eyes—entered and forced the employees into the freezer while they robbed the restaurant. Upson remained in the back of the restaurant near the freezer with the employees while the other individual, who was armed with a gun, took money from the front of the restaurant.

About a half-hour later, after the robbers left, the employees exited the freezer and called the police. When the police arrived, one of the employees, Jameshia Alston, gave a statement indicating that she recognized Upson's face—but did not know his name—because he had come into the restaurant two days prior, ordered a drink, and took a picture with one of her coworkers, William Keels.[1] Based on this recognition, Alston went home that night and scrolled through Keels's friends list on Facebook in the hopes of learning Upson's name.[2] Alston testified at trial that she conducted this Facebook search of her own volition and not at the behest of the police. Detective William Royster of the Aiken Department of Public Safety also testified at trial that he did not direct Alston to try to identify the robber on Facebook.

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[1] At his PCR hearing, Upson admitted to this, testifying, "I was in [Captain D's] on Monday before three—two [or] three days before this happened. Came in, we ordered some fish, and I used to date William Keels's sister. Hadn't seen [Keels] since he was a teenager. Long story short, he came out, we talked, [and] we left the restaurant."

[2] Explaining how a Facebook friends list works, Alston testified at trial, "[One] can scroll through a [Facebook] friend[s] list. And I saw [Upson's] picture and I clicked on his name. I didn't know his name at the time[,] but I clicked on it because I knew his face."

While scrolling through Keels's friends list, Alston came upon Upson's profile picture and recognized him as one of the robbers. She then clicked on his page and subsequently downloaded two pictures from Upson's Facebook page and emailed them and Upson's name to Detective Royster. This led to Upson's arrest.

At trial, Upson's counsel asked Alston about her Facebook investigation. When trial counsel asked Alston if she was ever shown a police lineup, she replied that she had been shown "[a] list of names." Trial counsel did not ask when the police provided the list or whether Upson's name appeared on it.[3] The PCR court later found that Alston "pulled a photograph from Facebook *before* speaking with law enforcement." (emphasis added).

Alston also testified at trial that she remembered Upson's "bald head" and his eyes because "[h]e has a lazy eye. It's kind of droopy, like that." Although trial counsel did not immediately challenge this characterization, he did hold up pictures of celebrities with their faces covered, except for their eyes and nose, throughout his closing argument and asked the jury if they could identify the celebrities to illustrate the difficulty Alston would have had identifying Upson.

Upson had relied on an alibi theory for his defense at trial—claiming that he was attending a comedy show and an after-party on the night the robbery occurred—and called three witnesses to support this theory. Even though each witness testified to seeing Upson either before or after the show, two of the witnesses did not specifically testify to seeing Upson *during* the show and the third witness specifically testified to *not* seeing him during the show.

To discredit Upson's alibi, the State utilized cell phone data to establish Upson's possible movement and call activity. One of the State's witnesses—though not qualified as an expert[4]—explained that the data showed Upson's cell phone had been used to make ten phone calls between 9:00 p.m. and 10:00 p.m. on the night of

[3] Trial counsel did not pursue the point, and it was never mentioned again.

[4] The witness was Desra Fraser, an intelligence research specialist for the Bureau of Alcohol, Tobacco, Firearms, and Explosives.

the robbery,[5] including three to Captain D's.[6] In its closing argument, the State pointed out that many of these calls would have been made from Upson's phone while Upson was purportedly attending the comedy show.

The State's witness also used raw data from Upson's phone carrier to generate a series of maps that were intended to show that Upson's phone could have been moving when the calls were made.[7] Importantly, the State did not claim that this data showed Upson was at Captain D's at the time of the crime, only that it showed he was placing phone calls and potentially on the move while the comedy show was taking place.

The jury found Upson guilty of armed robbery and kidnapping, and the trial judge sentenced him to concurrent, twenty-year sentences for each conviction. Upson appealed to this court, and his convictions were affirmed on June 1, 2016. *State v. Upson*, Op. No. 2016-UP-237 (S.C. Ct. App. filed June 1, 2016).

Upson then filed a PCR application in 2017. The PCR court heard the matter in August 2018 and granted Upson PCR on the grounds that trial counsel was ineffective for (1) "fail[ing] to challenge [Alston's Facebook identification] by either requesting a *Neil v. Biggers*[8] hearing or by objecting to its admission at trial," (2) failing to challenge Alston's "lazy eye" testimony,[9] and (3) failing to challenge the State's expert testimony and cell phone data discrediting Upson's alibi. The PCR

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[5] The robbery took place around 10:15 p.m.

[6] At least one of these calls was done by first dialing *67, which is a standard vertical service code (VSC) used to block caller ID when placing a phone call. *Vertical Service Codes*, North American Numbering Plan Administrator, https://nationalnanpa.com/number_resource_info/vsc_definitions.html.

[7] The maps were generated using software called Pen-Link and the "pie method," which involves drawing pie-shaped wedges to simulate the area in which a cell phone pinging off the tower could be located.

[8] 409 U.S. 188 (1972).

[9] The PCR court also noted that it "had the opportunity to personally study [Upson]'s facial features" at the evidentiary hearing and found that "[Upson] clearly did not have a 'lazy eye.'" It then indicated its concern "that this evidences a misidentification that led to [Upson]'s conviction."

court found that "trial counsel's deficient performance . . . prejudiced [Upson]." Trial counsel had moved out of state by the time the PCR hearing was held, and the PCR court sustained Upson's objection to allowing trial counsel to testify by telephone. The PCR court left the record open for thirty days to allow the State to add trial counsel's testimony, but the State did not elect to do so. The State petitioned for a writ of certiorari, and this court granted it in November 2021.

## ISSUES ON APPEAL

I. Did the PCR court err by finding that trial counsel was ineffective for failing to challenge or otherwise determine the admissibility of eyewitness identification evidence?

II. Did the PCR court err by finding that trial counsel was ineffective for failing to cross-examine a witness who testified that Upson had a lazy eye?

III. Did the PCR court err by finding that trial counsel was ineffective for failing to challenge the State's cell phone data evidence that was used to discredit Upson's alibi?

## STANDARD OF REVIEW

"Our standard of review in PCR cases depends on the specific issue before us. We defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them." *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). "However, [we] will reverse the [PCR] court's decision if it is controlled by an error of law." *Milledge v. State*, 422 S.C. 366, 374, 811 S.E.2d 796, 800 (2018). "We review questions of law de novo, with no deference to trial courts." *Smalls*, 422 S.C. at 180–81, 810 S.E.2d 836 at 839–40.

## LAW AND ANALYSIS

To establish an ineffective assistance of counsel claim, PCR applicants must show "(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). Deficiency "is measured by an objective standard of reasonableness." *Taylor v. State*, 404 S.C. 350, 359, 745 S.E.2d 97, 102 (2013). "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland v. Washington*, 466

U.S. 668, 690 (1984). To establish prejudice, a PCR applicant must "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

We reverse the PCR court's order. We will discuss each of the three grounds upon which the PCR court rested its ruling.

## I. Trial Counsel's Failure to Challenge Alston's Out-of-Court Identification of Upson

The State argues that the PCR court erred in finding that trial counsel was ineffective for his failure to request a *Neil v. Biggers* hearing or otherwise object to the admissibility of Alston's Facebook investigation. We hold that the PCR court erred on this ground. Trial counsel's failure to request a hearing or otherwise object could not have constituted deficient performance because a witness's independent identification process in which the state is not involved cannot be said to be unduly suggestive.

In-court identifications are inadmissible "if a suggestive[,] out-of-court identification procedure created a very substantial likelihood of irreparable misidentification." *State v. Traylor*, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004). There are two prongs that must be established to determine if an out of court identification is inadmissible: (1) whether the identification process was unduly suggestive, and (2) whether the identification was nevertheless so reliable that no substantial likelihood of misidentification existed. *State v. Moore*, 343 S.C. 282, 287, 540 S.E.2d 445, 447 (2000). "Only if [the procedure] was suggestive need the court consider the second question[.]" *Id.* (first alteration in original) (quoting *Jefferson v. State*, 425 S.E.2d 915, 918 (Ga. Ct. App. 1992)). "The fallibility of eyewitness evidence does not, *without the taint of improper state conduct*, warrant a due process rule requiring a trial court to screen such evidence for reliability before allowing the jury to assess its creditworthiness." *State v. Liverman*, 398 S.C. 130, 140, 727 S.E.2d 422, 427 (2012) (quoting *Perry v. New Hampshire*, 565 U.S. 228, 245 (2012)). Furthermore, "[a] primary aim" of a *Neil v. Biggers* hearing is "to deter law enforcement use of improper lineups, showups, and photo arrays in the first place." *Perry*, 565 U.S. at 241. The "due process concerns [*Neil v. Biggers* guards against] arise only when law enforcement officers use an identification procedure that is *both* suggestive and unnecessary." *Id.* at 238–39 (emphasis added); *see also State v. Tisdale*, 338 S.C. 607, 612, 527 S.E.2d 389, 392 (Ct. App. 2000) (per curiam) ("[T]he impetus behind the harsh remedy of exclusion is police

deterrence. . . . Thus, we hold that [a *Neil v. Biggers*] analysis is inapplicable where there is a nongovernmental identification source.").

The PCR court found that Alston "pulled a photograph from Facebook *before* speaking with law enforcement." (emphasis added). It further found that Alston was later presented with a list of names that included Upson's name, but that trial counsel failed to challenge this by either requesting a *Neil v. Biggers* hearing or by objecting to its admission at trial.

Alston's testimony establishes that she was looking through Keels's Facebook friends list because she recognized one of the men in the robbery as the same man who had been in Captain D's days prior and who had taken a photo with Keels. When Alston recognized Upson's profile picture on Keels's friends list, she took note of the corresponding profile name. Alston made clear in her testimony that she was searching for a *picture* she recognized, not a *name* she had been given beforehand. Specifically, Alston explained that "[one] can scroll through a [Facebook] friend[s] list. And I saw [Upson's] picture and I clicked on his name. I didn't know his name at the time[,] but I clicked on it because I knew his face."

Combining this with the PCR court's finding that any list of names given to Alston by the police appeared only *after* Alston's Facebook investigation, the appendix contains no evidence that law enforcement had anything to do with Alston's identification of Upson; rather, she testified this was something she "decided to take it to [her] own and do it [herself]." We hold the PCR court erred in finding that this failure to challenge the identification constituted deficient performance.

The first prong of *Neil v. Biggers* requires finding that the identification process was unduly suggestive in order to exclude an identification. Because law enforcement was not involved in the process Alston employed to identify Upson, the process could not have been unduly suggestive. *See Perry*, 565 U.S. at 248 ("[W]e hold that the Due Process Clause does not require a preliminary judicial inquiry into the reliability of an eyewitness identification when the identification was not procured under unnecessarily suggestive circumstances *arranged by law enforcement*." (emphasis added)). If the first prong fails, the court does not need to reach the second prong. *Id.* at 235 (upholding the trial court's conclusion that because the witness "spontaneously" and "without any inducement from the police" identified the defendant, the reliability of this identification was for the jury to consider); *State v. Dukes*, 404 S.C. 553, 557–58, 745 S.E.2d 137, 139 (Ct. App. 2013) ("If the court finds [an] identification did not result from impermissibly

suggestive police procedures, the inquiry [under *Neil v. Biggers*] ends there and the court does not need to consider the second prong."). Consequently, trial counsel's decision not to challenge Alston's identification cannot be said to have fallen below an objective standard of reasonableness.

## II. Trial Counsel's Failure to Cross-Examine Alston's Testimony that She Recognized Upson from His Lazy Eye

The State also argues that the PCR court erred in finding that counsel was ineffective for failing to cross-examine Alston on her testimony that she recognized Upson in part due to his lazy eye. We reverse the PCR court on this ground—trial counsel thoroughly tested the mettle of Alston's identification testimony throughout the trial, notwithstanding any failure to directly challenge her testimony on cross-examination. Consequently, trial counsel was not ineffective on this ground.

Alston testified that she recognized Upson because "[h]e has a lazy eye. It's kind of droopy, like that." While trial counsel did not immediately challenge Alston's claim that Upson had a lazy eye on cross-examination, trial counsel *did* challenge the reliability of Alston's identification. During cross-examination, trial counsel elicited testimony from Alston that revealed that much of Upson's face was covered by a bandana and a hoodie during the robbery.

Furthermore, during closing arguments, trial counsel utilized a tactic with the jury whereby he held up photos of three celebrities' faces with everything covered except their eyes and nose. Trial counsel used this tactic to demonstrate the difficulty that Alston would have had identifying Upson, whose features were covered and whom Alston had seen only once before. Because trial counsel thoroughly challenged the reliability of Alston's identification testimony, trial counsel's performance did not fall below an objective standard of reasonableness. *See Huggler v. State*, 360 S.C. 627, 635, 602 S.E.2d 753, 757 (2004) (holding that trial counsel was not ineffective for failing to cross-examine child witnesses on inconsistencies between direct testimonies and written statements when counsel instead chose to highlight the inconsistencies in closing), *abrogated on other grounds by Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018); *Ard v. Catoe*, 372 S.C. 318, 336, 642 S.E.2d 590, 599 (2007) (Toal, C.J., dissenting) ("[Defendant]'s trial counsel adequately investigated the issue of gunshot residue on the victim's hands[,] and their failure to cross-examine the State's gunshot residue expert was neither deficient nor prejudicial to [defendant].").

The PCR court also found that Upson did not have a lazy eye based on its "opportunity to personally study" Upson during the hearing. However, the jurors had the same opportunity to study Upson at trial and decide for themselves if they believed Alston's description of Upson was consistent with his appearance in the courtroom. Based on the jurors' decision to convict, they could have either agreed with Alston's characterization of Upson's eyelid as "droopy," or simply disregarded this portion of her testimony and decided to convict in light of her other bases for recognizing Upson. Specifically, Alston also identified Upson by "his bald head" and recognized the visible portions of his face from his interaction with Keels in the restaurant days prior. This means that the failure of Upson's trial counsel to cross-examine Alston on her lazy eye description could not have been prejudicial even if it was deficient—either way, the jurors would have made their own determinations in this regard and decided how that affected the overall reliability of Alston's identification. *Cf. State v. Odom*, 412 S.C. 253, 268, 772 S.E.2d 149, 156 (2015) ("It is uniformly the rule that a defendant's physical appearance may be considered by the jury in determining his or her age." (quoting *State v. Lauritsen*, 261 N.W.2d 755, 757 (Neb. 1978))); *Melton v. Williams*, 281 S.C. 182, 186, 314 S.E.2d 612, 614–15 (Ct. App. 1984) ("Assessment of the credibility of witnesses is a question for the jury, not the court, and it is the jury that decides the weight to be afforded the testimony."); *Goss v. State*, 425 S.C. 101, 108, 820 S.E.2d 373, 376 (2018) ("When a factfinder evaluates the credibility of witnesses, the mental process employed often requires the credibility evaluations to be based upon a consideration of all the evidence, not simply the parts the factfinder chooses to see and hear first-hand.").

## III. Trial Counsel's Failure to Challenge the State's Cell Phone Data Evidence Used to Discredit Upson's Alibi

Finally, the State challenges the PCR court's finding that trial counsel was ineffective for not calling an expert witness to testify on Upson's behalf to challenge the cell phone data the State relied on to discredit Upson's alibi. We reverse the PCR court on this ground because regardless of whether trial counsel's failure constituted deficient performance, Upson suffered no prejudice.

During the PCR hearing, Upson called Thomas Slovenski, a mobile phone forensics expert, as a witness. Slovenski criticized the cell phone maps presented by the State's witness at trial as confusing. Slovenski also noted that Pen-Link's accuracy as a software is "depend[e]nt a good bit . . . on the person who's actually using Pen-Link" and that another piece of software called TraX was better. Slovenski ran the raw cell phone data the State's witness used through TraX, instead

of Pen-Link, but conceded that "[o]n a couple of the maps[,] [it] look[s] like [the State] got it correct, but then . . . there's one that I can show you that it's an anomaly."

Further, Slovenski acknowledged that Pen-Link was the only available software at the time of Upson's trial and that Slovenski himself would have used Pen-Link for interpreting the data and the pie method for presenting it—just like the State's witness did. TraX—the software Slovenski said was better—did not exist until 2015, after Upson's trial.

To the extent Upson argues otherwise, trial counsel could not have been deficient for failing to enlist an expert to employ a technology that did not yet exist. *See Tillman v. State*, 244 S.C. 259, 264–65, 136 S.E.2d 300, 303 (1964) ("[Counsel] is not required . . . to do the impossible[] since the defendant is entitled to a fair trial and not a perfect one[.]"); *Smith v. State*, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) ("Counsel's performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel 'rendered adequate assistance and made all significant decisions in the exercise of reasonable[,] professional judgment.'" (quoting *Strickland*, 466 U.S. at 690)).

However, even if trial counsel was deficient in some other capacity by failing to call an expert witness, Upson was not prejudiced by this deficiency. Slovenski's testimony was largely consistent with the evidence introduced by the State during trial. The State relied on cell phone data as strong evidence that calls were placed via Upson's phone to Captain D's just before the restaurant was robbed, all while he was allegedly attending a comedy show. The State also used it to show that Upson may have been moving around town during this time. Slovenski's ultimate conclusion was that he could not "confirm any data that shows [Upson's cell phone] being used at or in the immediate area of Captain D's at the time of the incident." This is consistent with the State's presentation of the cell phone evidence at trial—the State never argued its maps showed Upson was actually at Captain D's when the robbery was committed.

Slovenski's testimony did not challenge the State's framing of the takeaways from the data. It established only that a more modern method could have resulted in a more accurate map. It did not discredit the call log tied to Upson's phone. Nor did Slovenski establish that he would have utilized a different method than the State's witness did—he admitted he would have used the same pie method that was employed at trial. We hold this does not create a level of doubt in the outcome of the trial sufficient enough to show prejudice from trial counsel's decision not to retain a cell phone data expert of his own. *See Strickland*, 466 U.S. at 694 ("The

[applicant] must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.").

## CONCLUSION

For the foregoing reasons, the PCR court's order is

**REVERSED.**

**THOMAS and KONDUROS, JJ., concur.**