# Judicial Merit Selection Commission





Post Office Box 142
Columbia, South Carolina 29202
(803) 212-6623

**M E D I A  R E L E A S E**

February 5, 2015

The Judicial Merit Selection Commission is accepting applications for the judicial offices listed below:

A vacancy will exist in the office currently held by the Honorable Jean H. Toal, Chief Justice of the Supreme Court, upon Chief Justice Toal's retirement on or before December 31, 2015. The successor will fill the unexpired term of that office, which will expire July 31, 2024.

The term of office currently held by the Honorable Roger E. Henderson, Judge of the Family Court, Fourth Judicial Circuit, Seat 1, upon Judge Henderson's election to the Circuit Court, Fourth Judicial Circuit, Seat 2, on February 4, 2015. The successor will fill the unexpired term of that office, which will expire June 30, 2016 and the subsequent full term, which will expire June 30, 2022.

In order to receive application materials, a prospective candidate must notify the Commission in writing of his or her intent to apply. Correspondence and questions may be directed to the Judicial Merit Selection Commission as follows:

Jane O. Shuler, Chief Counsel
Post Office Box 142
Columbia, South Carolina 29202
(803) 212-6629 (M-Th)

or

Jaynie Jordan, JMSC Administrative Assistant at (803) 212-6623.

**The Commission will not accept applications after 12:00 noon on Monday, March 9, 2015.**

For further information about the Judicial Merit Selection Commission and the judicial screening process, you may access the website at http://www.scstatehouse.gov/JudicialMeritPage/JMSCMainPage.php

# The Supreme Court of South Carolina

In the Matter of Myrielle Smith, Petitioner

Appellate Case No. 2015-000189

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ORDER

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The records in the office of the Clerk of the Supreme Court show that on November 8, 1978, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to Supreme Court of South Carolina, dated January 28, 2015, Petitioner submitted her resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court her certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of her resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that she has fully complied with the provisions of this order. The resignation of Myrielle Smith shall be effective upon full compliance with this order. Her name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

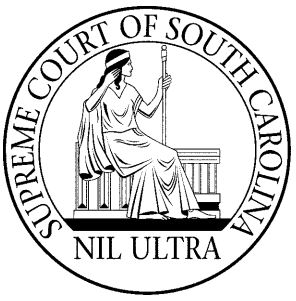
s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

February 4, 2015




# OPINIONS

## OF

# THE SUPREME COURT

## AND

# COURT OF APPEALS

## OF

# SOUTH CAROLINA

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**ADVANCE SHEET NO. 6**
**February 11, 2015**
**Daniel E. Shearouse, Clerk**
**Columbia, South Carolina**
**www.sccourts.org**

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

In the Matter of Joel Thomas Broome, Respondent.

Appellate Case No. 2014-002480

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Opinion No. 27492
Submitted February 3, 2015 – Filed February 11, 2015

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**DEFINITE SUSPENSION**

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Lesley M. Coggiola, Disciplinary Counsel, and Joseph P. Turner, Jr., Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Henry Morris Anderson, Jr., of Anderson Law Firm, PA, of Florence, for Respondent.

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**PER CURIAM:** In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to the imposition of a public reprimand or definite suspension up to one (1) year. Respondent requests that any suspension be imposed retroactively to October 9, 2013, the date of his interim suspension. In the Matter of Broome, 405 S.C. 621, 749 S.E.2d 114 (2013). We accept the Agreement and suspend respondent from the practice of law in this state for six (6) months, retroactive to the date of his interim suspension. The facts, as set forth in the Agreement, are as follows.

## Facts

On September 27, 2013, respondent was arrested and charged with Criminal Sexual Conduct - Third Degree. On October 9, 2013, the Court placed respondent on interim suspension. Id.

On March 17, 2014, respondent pled guilty to Assault and Battery - Third Degree. He was sentenced to thirty (30) days in jail, suspended upon service of six months of probation.[1] As part of his probation, an evaluation for substance abuse, anger, and sexual deviance was performed. After testing, the evaluator did not classify respondent with a substance abuse diagnosis and determined respondent did not need to participate in a substance abuse class or alcohol counseling. Regarding respondent's risk for sexual offense, the evaluator determined respondent has low risk indicators, suggesting respondent would not knowingly violate his own or another person's boundaries.

## Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 8.4(a) (it is professional misconduct for lawyer to violate Rules of Professional Conduct) and Rule 8.4(c) (it is professional misconduct for lawyer to commit criminal act involving moral turpitude).

Respondent also admits he has violated the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules for Professional Conduct).

## Conclusion

We accept the Agreement for Discipline by Consent and impose a six (6) month suspension, retroactive to the date of respondent's interim suspension. Id.

[1] Respondent has completed probation.

Within fifteen (15) days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR.

**DEFINITE SUSPENSION.**

**TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.**

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

In the Matter of Tammie Lynn Hoffman, Respondent.

Appellate Case No. 2014-002701

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Opinion No. 27493
Submitted February 3, 2015 – Filed February 11, 2015

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**DISBARRED**

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Lesley M. Coggiola, Disciplinary Counsel, and Julie K. Martino, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Tammie Lynn Hoffman, of Magnolia, Texas, pro se.

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**PER CURIAM:** In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to the imposition of a definite suspension of nine (9) months or more or disbarment. In addition, respondent agrees to pay the costs incurred in the investigation and prosecution of this matter within thirty (30) days of the date of the imposition of discipline. We accept the Agreement and disbar respondent from the practice of law in this state. Respondent shall pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission on Lawyer Conduct (the Commission) within thirty (30) days of the date of this opinion. The facts, as set forth in the Agreement, are as follows.

## Facts

On August 27, 2008, John Doe, a Nevada resident, wired $25,000.00 to respondent's trust account. Doe believed he was entering into an investment with Tom Roe, a third party ("Third Party"). Third Party told Doe via email that he would purchase a collateral mortgage obligation (CMO) on Doe's behalf and that Doe's funds would triple in three to five business days. Third Party also informed Doe that the investment was backed by real estate to match Doe's initial investment, but did not elaborate on this statement. Third Party assured Doe that the deal was solid because a law firm would type up and notarize the documents. Third Party instructed Doe to wire the money to respondent's trust account and Doe transferred the money as instructed.

Doe's money was apparently never invested and was never returned. On August 27, 2008, the same day Doe's $25,000.00 was wired into respondent's account, $24,750.00 was transferred out of the trust account. The recipient of these funds is unknown. On August 28, 2008, the remaining $250.00 was transferred to an unknown recipient.

On January 22, 2009, another $25,000.00 was transferred to respondent's trust account. The source of these funds is unknown.

Three checks from respondent's trust account bearing respondent's signature were written on January 22, 2009. These checks, #1002 for $8,500.00, #1003 for $8,500.00, and #1004 for $5,700.00, were made out to Third Party for a total of $22,700.00. Respondent denies writing these checks and denies any knowledge of Third Party or Doe.

Doe attempted to contact respondent to determine what happened to his money and to the property that allegedly secured the transaction. Respondent did not respond to Doe. She alleged she had no contact with Doe and that she had moved out of South Carolina by the time Doe filed the complaint against her.

Respondent informed ODC that a former paralegal used her trust account for these transactions without her knowledge or consent. Respondent stated that these funds were deposited into her trust account and disbursed without her knowledge.

Respondent failed to comply with a subpoena for her trust account records and for her paralegal's employment records. Respondent failed to provide bank statements, client ledgers, journals, reconciliations, cancelled checks, or deposit records, all of which were requested pursuant to a subpoena dated May 21, 2012. Respondent failed to provide any employment records pertaining to the paralegal respondent alleged used her account without her knowledge. Respondent did not provide a response to the subpoena.

Respondent failed to appear for interviews scheduled for February 28, 2013, and April 2, 2013, pursuant to Rule 19(c), RLDE.

## Law

Respondent admits that by her conduct she has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.15 (lawyer shall safeguard property of clients or third persons); Rule 5.3 (lawyer shall adequately supervise non-lawyer staff to ensure non-lawyer conduct compatible with professional obligations of lawyer); Rule 8.1(b) (lawyer shall not knowingly fail to respond to demand for information from disciplinary authority); and Rule 8.4(d) (it is misconduct for lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation).

Respondent also admits she has violated the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct); Rule 7(a)(3) (it shall be ground for discipline for lawyer to willfully fail to comply with subpoena issued under RLDE or knowingly fail to respond to lawful demand from disciplinary authority to appear pursuant to Rule 19, RLDE); Rule 7(a)(5) (it shall be ground for discipline for lawyer to engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law); and Rule 7(a)(6) (it shall be ground for discipline for lawyer to violate the oath of office taken to practice law in this state and contained in Rule 402(k), SCACR).

## Conclusion

We accept the Agreement for Discipline by Consent and disbar respondent from the practice of law in this state.[1] Within thirty (30) days from the date of this opinion, respondent shall pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission. Within fifteen (15) days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that she has complied with Rule 30 of Rule 413, SCACR, and shall also surrender her Certificate of Admission to the Practice of Law to the Clerk of Court.

**DISBARRED.**

**TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.**

[1] On August 8, 2011, the Court suspended respondent from the practice of law for two years. In the Matter of Hoffman, 393 S.C. 630, 714 S.E.2d 285 (2013). Respondent has not been reinstated.

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

In the Matter of Edward Earl Gilbert, Respondent.

Appellate Case No. 2014-002689

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Opinion No. 27494
Submitted February 3, 2015 – Filed February 11, 2015

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## PUBLIC REPRIMAND

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Lesley M. Coggiola, Disciplinary Counsel, and C. Tex Davis, Jr., Senior Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Edward Earl Gilbert, of Greenville, pro se.

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**PER CURIAM:** In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to the imposition of a confidential admonition or public reprimand. In addition, respondent agrees to pay the costs incurred in the investigation and prosecution of this matter within thirty (30) days of the imposition of discipline. He further agrees to submit a repayment plan to the Commission on Lawyer Conduct (the Commission) within thirty (30) days of the imposition of discipline agreeing to pay restitution in the amount of $28,594.00 to Jane Doe. Finally, respondent agrees to complete the South Carolina Bar's Trust Account School within twelve (12) months of the imposition of discipline. We accept the Agreement and issue a public reprimand with conditions as stated hereafter. The facts, as set forth in the Agreement, are as follows.

## Facts

Doe retained respondent to represent her in a bankruptcy matter. Respondent was retained to file a Chapter 11 reorganization. The case was filed in September 2003 and closed in June 2005.

In August 2005, respondent sent a copy of the Final Decree to Doe. In addition, respondent confirmed a discussion between the parties that respondent would continue to represent Doe in a foreclosure suit and an appeal to the United States District Court. In the letter, respondent stated that he knew Doe was unable to make payments at the time and, therefore, respondent agreed to defer billing to a later time.

Respondent contends Doe requested he appeal the Final Decree. Doe maintains that she refused to appeal the case to the United States District Court. There is no written confirmation signed by Doe.

The Final Decree required that an escrow account be established to cover the unpaid, allowed contingent and unliquidated Class 5 Unsecured claims. The balance in respondent's trust account for Doe's case after the payment of all known creditors was $32,434.00.

In June 2008, near the expiration of the statute of limitations, Doe requested the remaining funds in her account. Respondent replied that the funds were used to pay Doe's outstanding legal fees.

Doe sought relief from the South Carolina Resolution of Fee Disputes Board (the Board). Respondent was unable to provide financial records regarding Doe's case to the investigating attorney assigned to the matter by the Board. Respondent indicated the records had been misplaced.

The Board issued a Final Decision ruling that, out of the remaining $32,434.00 in the escrow account, respondent was entitled to $3,840.00 for legal fees after the Final Decree. On November 1, 2010, the Board issued a Certificate of Non-Compliance against respondent for failure to comply with a Final Decision. The Board entered a judgment in favor of Jane Doe against respondent in the amount of $28,594.00.

Doe filed a complaint with ODC. In order to complete its investigation, ODC had to obtain the financial records for Doe's case from financial institutions rather than from respondent. Respondent acknowledges that it is his responsibility to maintain a complete copy of all financial records pertaining to client matters and to retain them for a period of six (6) years after termination of the representation.

## Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.5(a) (lawyer shall not charge or collect unreasonable fee) and Rule 1.15(a) (lawyer shall hold property of client in connection with representation separate from lawyer's own property; lawyer shall maintain complete records of account funds and shall retain the complete records for six (6) years after termination of representation; lawyer shall comply with Rule 417, SCACR). Further, respondent admits he violated provisions of Rule 417, SCACR.

Respondent also admits he has violated the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct) and Rule 7(a)(10) (it shall be ground for discipline for lawyer to willfully fail to comply with a final decision of the Resolution of Fee Disputes Board).

## Conclusion

We find respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement and publicly reprimand respondent for his misconduct. Within thirty (30) days of the date of this opinion, respondent shall pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission and shall submit a repayment plan agreeing to pay $28,594.00 to Jane Doe. Within twelve (12) months of the date of this opinion, respondent shall complete the South Carolina Bar's Trust Account School and provide certification of completion to the Commission no later than ten (10) days after the conclusion of the course.

**PUBLIC REPRIMAND.**

**TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.**

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

In the Matter of John Brooks Reitzel, Jr., Respondent.

Appellate Case No. 2014-002700

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Opinion No. 27495
Submitted February 3, 2015 – Filed February 11, 2015

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**DISCIPLINE IMPOSED**

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Lesley M. Coggiola, Disciplinary Counsel, and Barbara M. Seymour, Deputy Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

John Brooks Reitzel, Jr., of High Point, North Carolina, pro se.

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**PER CURIAM:** In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to the imposition of a bar to admission of any kind in South Carolina for a definite or indefinite period of time to be determined by the Court. Further, respondent consents to the imposition of a bar to advertising and solicitation directed to South Carolina residents or entities and a bar to advertising and solicitation for any legal matters in South Carolina, both for a definite or indefinite period of time to be determined by the Court. We accept the Agreement and permanently debar respondent from seeking any form of admission to practice law in this state (including *pro hac vice* admission) without first obtaining an order from this Court allowing him to seek admission. Further, we prohibit respondent from any

advertising or solicitation in South Carolina whether in general or directed to residents or entities in South Carolina without first obtaining an order from this Court allowing him to advertise or solicit business in this state. The facts, as set forth in the Agreement, are as follows.

## Facts

Respondent is licensed to practice law and is in good standing in North Carolina. He is not, and has never been, licensed to practice law in South Carolina.

On August 10, 2011, respondent filed an answer on behalf of defendants in a foreclosure action pending in Charleston County, South Carolina, involving property located in South Carolina. Default was subsequently entered against the defendants in the matter. On November 1, 2011, respondent sent a letter opposing the default order to the presiding judge on behalf of the defendants.

At the time respondent filed the answer in the foreclosure matter, he had not applied for *pro hac vice* status in the matter, he was not admitted *pro hac vice* in the matter, and he was not otherwise permitted to make an appearance in court in South Carolina. Further, respondent's actions in representing the defendants in the foreclosure matter were not undertaken in association with an attorney admitted to practice law in South Carolina.

On November 3, 2011, counsel for the plaintiff wrote to respondent asking for verification that he was eligible to appear in court in South Carolina. Respondent responded with a letter dated November 8, 2011, acknowledging that he was not licensed to practice law in South Carolina, but stating that he "frequently practice[s] in South Carolina civil matters … involving foreclosure proceedings and deficiency claims." He further stated that, prior to counsel's letter, he had "received no objection from counsel for secured creditors or substitute trustees in such proceedings."

Respondent admits that, in the past, he has assisted other clients in preparing and filing responses in foreclosure and similar matters in South Carolina without association of local counsel and without seeking *pro hac vice* admission. Respondent represents that, in the future, he will comply with South Carolina rules and regulations regarding the practice of law.

## Law

Respondent admits the Commission on Lawyer Conduct (the Commission) and this Court have jurisdiction over all allegations that a lawyer has committed misconduct. The term "lawyer" includes "a lawyer not admitted in this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction…." Rule 2(q), RLDE.

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 5.5(b) (lawyer not admitted in this jurisdiction may not establish systematic and continuous presence in this jurisdiction for practice of law or hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction); Rule 5.5(c) (lawyer not admitted in this jurisdiction may not provide legal services on temporary basis unless practice complies with Rule 5.5(c), RPC); and Rule 8.4(e) (it is professional misconduct for lawyer to engage in conduct prejudicial to administration of justice).[1]

Respondent also admits he has violated the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct).

## Conclusion

We accept the Agreement and permanently debar respondent from seeking any form of admission to practice law in this state (including *pro hac vice* admission) without first obtaining an order from this Court allowing him to seek admission.[2]

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[1] The Rules of Professional Conduct, Rule 407, SCACR, are applicable as respondent's misconduct occurred in connection with matters pending before a tribunal in South Carolina. See Rule 8.5(b), RPC (addressing choice of law for disciplinary matters).

[2] The North Carolina State Bar's website, www.ncbar.gov, provides links to four orders imposing discipline upon respondent. According to these orders, respondent's disciplinary history in North Carolina includes a two year suspension stayed upon compliance with certain conditions issued in 1997, a reprimand issued

Further, we prohibit respondent from any advertising or solicitation in South Carolina whether in general or directed to residents or entities in South Carolina without first obtaining an order from this Court allowing him to advertise or solicit business in this state.

**DISCIPLINE IMPOSED.**

**TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.**

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in 1998, a three year suspension stayed upon compliance with certain conditions issued in 2000, and a reprimand issued in 2008.

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

Maria T. Curiel and Martin L. Curiel, Respondents,

v.

Hampton County E.M.S., Petitioner.

Appellate Case No. 2013-000391

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

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Appeal from Hampton County
Perry M. Buckner, Circuit Court Judge

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Opinion No. 27496
Heard January 15, 2015 – Filed February 11, 2015

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**DISMISSED AS IMPROVIDENTLY GRANTED**

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E. Mitchell Griffith and Mary E. Sharp, both of Griffith, Sadler & Sharp, P.A., of Beaufort, for Petitioner.

John S. Nichols, of Bluestein, Nichols, Thompson & Delgado, LLC, of Columbia, and H. Woodrow Gooding and Mark B. Tinsley, both of Gooding & Gooding, P.A., of Allendale, for Respondents.

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**PER CURIAM:** We granted certiorari to review the Court of Appeals' decision in *Curiel v. Hampton County E.M.S.*, 401 S.C. 646, 737 S.E.2d 854 (Ct. App. 2012). We now dismiss the writ as improvidently granted.

**DISMISSED AS IMPROVIDENTLY GRANTED.**

**TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.**

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

The State, Respondent,

v.

Mark Baker, Petitioner.

Appellate Case No. 2010-172951

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

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Appeal From Sumter County
The Honorable Howard P. King, Circuit Court Judge

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Opinion No. 27497
Heard November 15, 2012 – Filed February 11, 2015

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**REVERSED**

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

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General William M. Blitch, Jr., all of Columbia and Solicitor Ernest Adolphus Finney, III, of Sumter, for Respondent.

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**JUSTICE BEATTY:** Mark Baker was convicted of four counts of committing a lewd act upon a minor.[1] The Court of Appeals affirmed. *State v. Baker*, 390 S.C. 56, 700 S.E.2d 440 (Ct. App. 2010). Following the denial of his petition for rehearing, Baker petitioned this Court for a writ of certiorari to review the decision. We granted the petition to analyze whether: (1) the trial judge erred in refusing to quash the indictments, which alleged the offenses occurred over a six-year time frame; and (2) qualifying a witness as an expert in forensic interviewing. We reverse Baker's convictions as we hold the indictments were unconstitutionally overbroad.[2]

## I. Factual / Procedural History

In October 2004, Victim Two, Baker's youngest niece, informed her mother that "Uncle Mark was messing with" her older sister, Victim One. At that time, Victim Two denied that Baker had molested her.

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[1] *See* S.C. Code Ann. § 16-15-140 (2003) ("It is unlawful for a person over the age of fourteen years to wilfully and lewdly commit or attempt a lewd or lascivious act upon or with the body, or its parts, of a child under the age of sixteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of the person or of the child."). We cite to the code section in effect at the time of the alleged offenses. However, we note this code section was repealed on June 18, 2012.

[2] Based on our holding, it is unnecessary to address Baker's remaining issue regarding the qualification of the forensic interviewer as an expert witness. *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). However, we recently held that it is improper to qualify a forensic interviewer as an expert witness. *See State v. Kromah*, 401 S.C. 340, 357 n.5, 737 S.E.2d 490, 499 n.5 (2013) ("[W]e state today that we can envision no circumstance where [a forensic interviewer's] qualification as an expert at trial would be appropriate. . . . Such subjects, while undoubtedly important in the investigative process, are not appropriate in a court of law when they run afoul of evidentiary rules and a defendant's constitutional rights.").

On October 22, 2004, Baker was arrested on four counts of committing a lewd act upon a minor and one count of criminal sexual conduct with a minor in the second degree ("CSC"). At that time, the arrest warrants alleged the conduct involving Victim One occurred between: May 1, 2002 until September 1, 2002; May 1, 2003 until September 1, 2003; and June 1, 2004 until June 20, 2004. In January 2005, a Sumter County grand jury indicted Baker for the charges identified in the arrest warrants. In June 2006, as the case was coming up for trial, Victim Two came forward with a separate allegation that Baker abused her in 2002. In July 2006, Baker was indicted for committing a lewd act upon a minor for the claim made by Victim Two.

However, after Victim One and Victim Two viewed photographs of a visit to Sumter in their aunt's scrapbook, Victim One recalled that the abuse began before the birth of her youngest sister in October 1998. Victim Two also testified that Baker abused her in 1998 before the birth of her youngest sister. Subsequently, the State presented a second set of indictments to the grand jury that alleged the lewd acts involving Victim One occurred between June 1, 1998 and September 1, 2004. The timing of the CSC charge remained the same. Additionally, the indictment containing the allegation involving Victim Two was amended to state that she was molested between June 1, 1998 and September 1, 1998 instead of 2002. On October 26, 2006, the grand jury true billed the amended indictments.

On November 13, 2006, the case was called for trial. Prior to trial, Baker moved to quash the indictments on the ground they were unconstitutionally overbroad and vague. Baker explained that his ability to present a defense was hindered as the "broad brush [of the indictments] is not just summers of three years but really six and a half to seven years with no specificity." The trial judge denied the motion, finding the indictments were sufficient despite the lack of specific dates because the dates were not an essential element of the charges.

Ultimately, the jury convicted Baker of the four counts of committing a lewd act upon a minor involving Victim One, but acquitted him of the fifth count of committing a lewd act upon a minor and CSC. The judge sentenced Baker to an aggregate sentence of thirty years' imprisonment.

On appeal, the Court of Appeals affirmed Baker's convictions. *State v. Baker*, 390 S.C. 56, 700 S.E.2d 440 (Ct. App. 2010). In so ruling, the court found the indictments sufficient as time was not a material element of the charged offenses, the time period covered by the indictments occurred prior to the return of

the indictments by the grand jury, and the indictments clearly identified the elements of the offenses and substantially tracked the statutory language so that the nature of the charged offenses could be easily understood. *Id.* at 62-64, 700 S.E.2d at 442-44. This Court granted Baker's petition for a writ of certiorari pursuant to Rule 242(a) of the South Carolina Appellate Court Rules.

## II. Standard of Review

"In criminal cases, the appellate court sits to review errors of law only." *State v. Wilson*, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001) (citations omitted). "We are bound by the trial court's factual findings unless they are clearly erroneous." *Id.* at 6, 545 S.E.2d at 829.

## III. Discussion

Baker argues the Court of Appeals erred in affirming the circuit court judge's denial of his motion to quash the indictments. He contends the indictments were unconstitutionally overbroad and vague as the indictments alleged the offenses occurred at an unspecified time over a six-year period. As a result, Baker claims it was "virtually impossible to try and defend against accusations spanning such a vast period of time."[3]

An indictment is a critical document in criminal defense preparation that is grounded in constitutional and statutory principles. *See* S.C. Const. art. I, § 11 ("No person may be held to answer for any crime the jurisdiction over which is not within the magistrate's court, unless on a presentment or indictment of a grand jury of the county where the crime has been committed . . . ."); S.C. Code Ann. § 17-19-10 (2014) ("No person shall be held to answer in any court for an alleged crime or offense, unless upon indictment by a grand jury . . . ."). As we explained in *State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005):

> The indictment is the charge of the state against the defendant, the pleading by which he is informed of the fact, and the nature and scope of the accusation. When that indictment is presented, that accusation made, that pleading filed, the accused has two courses of

[3] Baker makes no assertion that the indictments failed to correctly identify the statutory elements of the offense. Accordingly, our analysis is confined to the narrow issue of whether the six-year time frame was unconstitutionally overbroad.

> procedure open to him. *He may question* the propriety of the accusation, *the manner in which it has been presented,* the source from which it proceeds, and have these matters promptly and properly determined; or, waiving them, he may put in issue the truth of the accusation, and demand the judgment of his peers on the merits of the charge. If he omits the former, and chooses the latter, he ought not, when defeated on the latter, --when found guilty of the crime charged, --to be permitted to go back to the former, and inquire as to the manner and means by which the charge was presented.

*Id.* at 102, 610 S.E.2d at 499-500 (citations omitted) (emphasis added).

If a defendant raises a timely challenge to the sufficiency of an indictment, the reviewing court is charged with:

> determining whether (1) *the offense is stated with sufficient certainty and particularity* to enable the court to know what judgment to pronounce, and *the defendant to know what he is called upon to answer* ***and*** *whether he may plead an acquittal* or conviction thereon; and (2) whether it apprises the defendant of the elements of the offense that is intended to be charged.

*Gentry*, 363 S.C. at 102-03, 610 S.E.2d at 500 (emphasis added). "In determining whether an indictment meets the sufficiency standard, the trial court must look at the indictment with a practical eye in view of all the surrounding circumstances." *State v. Tumbleston*, 376 S.C. 90, 97, 654 S.E.2d 849, 853 (Ct. App. 2007). In doing so, "one is to look at the 'surrounding circumstances' that existed pre-trial, in order to determine whether a given defendant has been 'prejudiced,' i.e., taken by surprise and hence unable to combat the charges against him." *State v. Wade*, 306 S.C. 79, 86, 409 S.E.2d 780, 784 (1991).

In reviewing Baker's appeal, we focus our attention on *Gentry* as it is the seminal case in analyzing the sufficiency of an indictment. Specifically, *Gentry* sets forth two requirements that are relevant and dispositive in the instant case. The first being a defendant's right to question the manner in which the accusation has been presented, which Baker has done. The second, and most important here, is the Court's determination as to whether the offense is stated with sufficient certainty and particularity to enable the defendant to know what he is called upon to answer and whether he may plead an acquittal.

Examining the indictments in the instant case in view of all the surrounding circumstances, we find Baker was prejudiced as he was undoubtedly taken by surprise and significantly limited in his ability to combat the charges against him. Simply stated, there was no way for Baker to know "whether he [could] plead an acquittal." *Gentry*, 363 S.C. at 103, 610 S.E.2d at 500.

Approximately two weeks before trial, the State presented Baker's counsel with new indictments notifying Baker that he was being charged with offenses that allegedly occurred between June 1, 1998 and September 1, 2004; however, no temporal limitation is identified in the indictments. Prior to that date, Baker had prepared a defense over the course of a year based on the original indictments that alleged the criminal offenses were committed during the summers of 2002, 2003, and 2004. Thus, as a result of the new indictments, Baker was required to research and defend against events that occurred over a continuous six-year period as opposed to three identifiable summers. Despite the significantly expanded time frame, the new indictments were no more specific than the original indictments.

Due to the State's belated presentation of the new indictments, Baker was given a mere two weeks to complete such an arduous task.[4] In addition to the time constraints, Baker's counsel noted the defense was hampered as Baker's employment records prior to July 2000 had been destroyed and, thus, he could not adequately establish Baker's whereabouts during the time frame identified in the

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[4] The dissent assigns error to our analysis regarding the requirements for a sufficient indictment. Specifically, the dissent claims that we erroneously conflate the "concepts of *notice* with *preparation*." Although we disagree with the dissent's assignment of error to our analysis, we acknowledge that we discuss the concepts of notice and preparation in tandem. We believe this is the correct treatment of these concepts as the notice function of an indictment necessarily includes an assessment of whether an accused has the opportunity to prepare a defense. More specifically, a sufficient indictment must do more than merely recite the elements of the offense charged. As previously stated, the indictment must also contain sufficient factual allegations to permit the accused to know whether he may plead an acquittal or conviction thereon. *Gentry*, 363 S.C. at 102-03, 610 S.E.2d at 500. Thus, we believe that notice and preparation are inextricably linked concepts as "[f]airness and due process require that a criminal defendant receive sufficient notice of the charges against him to enable him to prepare a defense." *In re Corey B.*, 291 S.C. 108, 109, 352 S.E.2d 470, 470 (1987).

indictments. Aside from this concrete example of prejudice, we are unable to discern how any defendant could effectively defend himself against a six-year time frame. More specifically, the only complete defense would be that of an alibi. As this Court has stated:

> The literal significance of the word 'alibi' is 'elsewhere'; as used in criminal law, it indicates that line of proof by which an accused undertakes to show that because he was not at the scene of the crime at the time of its commission, having been at another place at the time, he could not have committed the crime. In other words, by an alibi the accused attempts to prove that he was at a place so distant that his participation in the crime was impossible. *To be successful, his alibi must cover the entire time when his presence was required for accomplishment of the crime*. To establish an alibi, the accused must show that he was at another specified place at the time the crime was committed, thus making it impossible for him to have been at the scene of the crime. It is not enough for the accused to say that he was not at the scene and must therefore have been elsewhere. The latter statement does not constitute an alibi. And since an alibi derives its potency as a defense from the fact that it involves the physical impossibility of the accused's guilt, a purported alibi which leaves it possible for the accused to be the guilty person is no alibi at all.

*State v. Robbins*, 275 S.C. 373, 375, 271 S.E.2d 319, 320 (1980) (*quoting* 21 Am. Jur. 2d *Criminal Law* § 136 (emphasis added)). Although the solicitor indicated that Baker did not submit an alibi defense, it is understandable as it would have been impossible for him to produce evidence of an alibi that would cover a six-year period.

Given the expansive time frame and lack of specificity as to this time frame, we can only conclude Baker was prejudiced by the defects in the indictments. Although we recognize the difficulty the prosecution faces in identifying exact dates in child sexual abuse cases, the class of criminal case should not translate into an exception that operates to circumvent constitutional and statutory principles.

Accordingly, we hold the trial judge erred in refusing to quash the indictments as the non-specific, six-year period covered in the indictments was unconstitutionally overbroad because it lacked specificity as to when the alleged

acts occurred. It is axiomatic that an indictment must include more than the elements of the charged offense. Therefore, we reverse Baker's convictions.[5]

**REVERSED**.

**HEARN, J. concurs. PLEICONES, J., concurring in result only. TOAL, C.J., dissenting in a separate opinion in which KITTREDGE, J., concurs.**

[5] We emphasize that our decision does not preclude the State from re-indicting Baker for the four counts of committing lewd act upon a minor that he was convicted by using appropriate time limitations for the charged offenses. Had the indictments alleged that the conduct occurred during the summer months of the years 1998 through 2004, i.e., June 1 until September 1, we believe the indictments would have been sufficient.

**CHIEF JUSTICE TOAL:** I respectfully dissent. In my view, the court of appeals did not err in upholding the trial court's refusal to quash the indictment. Furthermore, I would find that the trial court did not err qualifying a police officer as an expert in forensic interviewing. Thus, I would affirm Petitioner's convictions for lewd act.

## I. Indictments

"The indictment is a notice document." *State v. Gentry*, 363 S.C. 93, 102–03, 610 S.E.2d 494, 500 (2005). As such,

> [T]he circuit court should judge the sufficiency of the indictment by determining whether (1) the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer and whether he may plead an acquittal or conviction thereon; and (2) whether it apprises the defendant of the elements of the offense that is intended to be charged.

*Id.* (citation omitted); *see also* S.C. Code Ann. § 17-19-20 (2003) ("Every indictment shall be deemed and judged sufficient and good in law which, in addition to allegations as to time and place, as required by law, charges the crime substantially in the language of the common law or of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood . . . ."). Thus, "an indictment passes legal muster when it charges the crime substantially in the language of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood." *State v. Tumbleston*, 376 S.C. 90, 98, 654 S.E.2d 849, 853 (Ct. App. 2007).

Generally, when an indictment is challenged based on an overly broad time period, our courts have considered whether time is a material element of the offense and whether the time period covered by the indictment occurred prior to the return of the indictment by the grand jury. *Id.* at 98–99, 654 S.E.2d at 853–54.

In *State v. Wade*, this Court unequivocally refused to adopt a per se rule of overbreadth for the mere fact that the time period covered in the indictment is lengthy. 306 S.C. 79, 85, 409 S.E.2d 780, 783 (1991). That case, like this case,

involved allegations of sexual abuse perpetrated upon a minor who could not remember the exact dates that her uncle molested her. *Id.* at 84, 409 S.E.2d at 783. Thus, the indictment included a time period spanning two years. *Id.* at 81, 409 S.E.2d at 781. To determine whether the petitioner was prejudiced by this lengthy time period, the Court declared it would examine the "'surrounding circumstances' that existed pre-trial, in order to determine whether a given defendant has been . . . taken by surprise and hence [is] unable to combat the charges against him," and *not* the mere fact that the indictment covers a longer time frame. *Id.* at 86, 409 S.E.2d at 784.

Thus, the coverage of six years in these indictments does not necessarily require a finding of overbreadth; accordingly, I analyze each of the factors explicated in our precedents in turn.

First, the language of the indictment substantially tracks the statutory language such that Petitioner was on notice of the charges he faced. Section 16-15-140 of the South Carolina Code, defining lewd act, provides:

> It is unlawful for a person over the age of fourteen years to willfully and lewdly commit or attempt a lewd or lascivious act upon or with the body, or its parts, of a child under the age of sixteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of the person or of the child.

S.C. Code Ann. § 16-15-140 (2003 & Supp. 2012). In comparison, the amended indictments for lewd act state:

> That [Petitioner], a person over the age of fourteen (14) years, did in Sumter County between the period of June 1, 1998 and September 1, 2004 violate Section 16-15-140 of the Code of Laws of South Carolina . . . in that . . . [Petitioner] did willfully and lewdly commit or attempt to commit a lewd and lascivious act upon or with the body, or any part or member thereof, of a child under the age of sixteen (16) years, to wit: [Victim 1] . . . , with the intent of arousing, appealing to, or gratifying the lust, passions or sexual desires of himself or of the said child.[6]

[6] The indictment for count five of lewd act involving Victim 2 is substantially

Likewise, section 16-3-655 of the South Carolina Code, defining CSC with a Minor - Second, provides:

> (B) A person is guilty of criminal sexual conduct with a minor in the second degree if: (1) the actor engages in sexual battery with a victim who is fourteen years of age or less but who is at least eleven years of age; or (2) the actor engages in sexual battery with a victim who is at least fourteen years of age but who is less than sixteen years of age and the actor is in a position of familial, custodial, or official authority to coerce the victim to submit or is older than the victim.

S.C. Code Ann. § 16-3-655 (Supp. 2007).[7] Petitioner's CSC with a Minor - Second indictment states:

> That [Petitioner] did in Sumter County between the period of June 1, 2004 and September 1, 2004, willfully and unlawfully commit criminal sexual conduct with a minor in the second degree by engaging in sexual battery with a minor who was at least fourteen (14) years of age but who was less than sixteen (16) years of age, to wit: [Victim 1] . . . and the actor was in a position of familial, custodial, or official authority to coerce the victim to submit or was older than the victim, to wit: vaginal digital intrusion and cunnilingus, in violation of Section 16-3-655(3) of the Code of Laws of South Carolina. . . .

Because time is not an element of the offenses, and because the time period covered by the indictments occurred prior to the return of the indictments by the grand jury, we must look to the surrounding circumstances leading to the enlargement of time in the indictments. *Tumbleston*, 376 S.C. 90, 101–02, 654 S.E.2d 849, 855 ("Indeed, indictments for a sex crime that allege offenses occurred during a specified time period are sufficient when the circumstances of the case warrant considering an extended time frame." (internal citations omitted)). To this end, the dates were extended in response to the child victims' collective

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similar, but Petitioner was acquitted of that charge.

[7] Because Appellant was indicted on July 20, 2006, we cite to the section and language effective at the time of the indictments. *Compare* S.C. Code Ann. § 16-3-655 (Supp. 2007), *with* S.C. Code Ann. § 16-3-655 (Supp. 2012).

recollection that the abuse began before the birth of their sister (in 1998) after viewing their aunt's scrapbook, but *after* the grand jury returned the initial indictments. Thus, these circumstances warranted broadening the time period to cover the years in which the abuse allegedly occurred (1998 until 2004), and under our existing framework, the indictments should be upheld.

However, the majority focuses on the date the amended indictments were returned by the grand jury on October 26, 2006, in relation to the date the case was called for trial on November 13, 2006, to support its finding that the indictments were insufficient. In so holding, the majority erroneously conflates the concepts of *notice* and *preparation*.

In my opinion, Petitioner's ability to prepare a more robust defense does not remotely figure into the notice paradigm. For this reason, the majority's focus on whether Petitioner had the opportunity to develop an alibi defense is completely inappropriate (and not just because Petitioner did not raise that argument himself). To me, such concerns are better addressed in a motion for trial continuance, which, incidentally, counsel for Petitioner filed for this exact reason in light of the enlarged scope of the indictments. For whatever reason, the motion was denied. Although Petitioner raised the propriety of the denial of this motion to the court of appeals (which affirmed), Petitioner has not raised the denial of the continuance to this Court. Thus, in my view, this was not a proper consideration on appeal.

More importantly, I think today's precedent will gravely restrict the State's ability to prosecute child sex abuse cases. Here, as in most cases of child sex abuse, the State was attempting to prosecute numerous, covert sexual encounters occurring over the course of many years. Our appellate courts have heretofore been careful to fashion a rule which takes the relative immaturity, lack of sophistication, and *trauma* suffered by child victims into account, and has sought to balance these considerations with the court's obligation to also protect the constitutional rights of the criminal defendant. *See, e.g.*, *Tumbleston*, 376 S.C. 102, 654 S.E.2d at 855 ("The stealth and repetitive nature of the alleged conduct compels identification of the broader time period. The victim is a young child, whom one cannot reasonably expect to recall the exact dates of the sexual abuse."). I fear that today's ruling will greatly hinder the State's ability to bring future perpetrators to justice, as it is often impossible for a child to recall the exact date(s)

he or she was abused. We have never required exacting specificity when upholding an indictment in this scenario before, and in my opinion, it is a mistake to add such a requirement now.

Without a doubt, these indictments put Petitioner on notice of what charges he was "called upon to answer" and apprised him of the elements of the offenses the State intended to charge. *Gentry*, 363 S.C. at 102–03, 610 S.E.2d at 500. This is all that the law required.

Accordingly, I would affirm the court of appeals' decision upholding the circuit court's denial of Petitioner's motion to quash the indictments.

## II. Expert Testimony

Furthermore, I would find that while the trial court erred in qualifying Herod, a victim's assistance officer, the admission of this testimony did not cause prejudice to Petitioner.

During trial, both girls testified against Petitioner. In addition, the State sought to qualify Gwen Herod as an expert in forensic interviewing and assessment of child abuse. The trial court conducted an *in camera* hearing to determine Herod's qualifications. Herod testified that she has been employed with the Sumter County Sheriff's Office since 1998 as a victim assistance officer. As part of her duties, Herod conducts forensic interviews of child victims of sexual abuse, usually at the behest of the investigating officer.

The circuit court allowed the State to proffer Herod's testimony to determine whether she was qualified as an expert in the field of forensic interviewing. Herod stated that she is a certified forensic interviewer due to her training, which involved taking two one-week courses sponsored by the American Prosecutors Research Institute (APRI). Herod testified she obtained certification in 2001 after passing a written examination and conducting a mock interview under observation. In 2003, Herod attended another advanced week-long APRI course. Herod further testified that she is certified on a state and national level as a victim assistance specialist, and is a member of APRI, the National Organization for Victim Assistance, the South Carolina Law Enforcement Victim Advocate Association, the National Sheriffs' Association Victim Advisory Board, and the South Carolina

Victim Assistance Network Advisory Board. Through the National Sheriffs' Association, she has trained other advocates across the nation. Under cross-examination, Herod acknowledged that she did not belong to an "association of forensic interviewers," she lacked a college degree, and her formal training was limited to the two APRI courses. Nevertheless, over Petitioner's objection, the circuit court qualified Herod as an expert in forensic interviewing.

Before the jury, Herod restated her background, and the circuit court again qualified her as an expert in forensic interviewing. Herod testified that since 2001, she has utilized the Rapport, Anatomy Identification, Touch Inquiry, Abuse Scenario, and Closure (RATAC) method to conduct forensic interviews of child victims of sexual abuse. Herod testified that in the "Rapport" stage, the interviewer "open[s] communication lines" with the child to "mak[e] the child feel at ease." Herod stated further that in this stage, the interviewer "also assess[es] the child, insuring that . . . that they're able to . . . to participate in the interview in a satisfactory way and . . . explain[s] to the child who [the interviewer is] and what [her] role is." In the "Anatomy Identification" stage, the interviewer shows pictures of the male and female anatomy to the child to ensure that she understands what body parts the child is describing, and explains to the child that he or she may use these pictures to circle and identify body parts throughout the interview. In the "Touch Inquiry" stage, Herod testified that the interviewer asks the child about the types of touching that the child deems acceptable, and the touches that make the child uncomfortable. In the "Abuse Scenario" stage, the child is asked to tell the interviewer about the circumstances of the abuse, and other information deemed necessary to the investigation. Finally, Herod testified that in the "Closure" stage, the interviewer ensures the child does not have any questions before ending the interview.

Herod testified that she conducted an interview with Victim 1 on October 21, 2004, using the RATAC method. During her testimony, Herod relayed that Victim 1 told her that the abuse occurred at her aunt and uncle's home in Sumter County during the summer months but that she could not recall the specific years of the abuse. Based on the interview, Herod recommended Victim 1 receive a medical exam. Herod also conducted a forensic interview with Victim 2 on the same date, and she denied being sexually abused by Petitioner at that time. During a follow-up meeting with the family, Victim 2 disclosed that Petitioner had abused

her also, which prompted Herod to again meet with Victim 2 on June 26, 2006, to discuss the allegations. At the time, Victim 2 was unable to give an exact date for the alleged abuse, but later identified a time frame.

Under cross-examination, defense counsel questioned Herod about the particular stages, and in regards to the Rapport stage, questioned Herod about her assessment of whether the child is telling the truth. In response, Herod stated that "we talk about [the importance of telling the truth] and I'm also assessing whether the child can even differentiate between the truth and a lie . . . . [b]ut we talk about the truth and the importance of it."

"The qualification of an expert witness and the admissibility of the expert's testimony are matters within the trial court's discretion." *Gooding v. St. Francis Xavier Hosp.*, 326 S.C. 248, 252, 487 S.E.2d 596, 598 (1997) (citation omitted). An appellate court will not disturb the trial judge's determination regarding a witness's qualifications to testify as an expert absent a showing of an abuse of discretion. *State v. Schumpert*, 312 S.C. 502, 505, 435 S.E.2d 859, 861 (1993) (citation omitted); *State v. Henry*, 329 S.C. 266, 273, 495 S.E.2d 463, 466 (Ct. App. 1997). "An abuse of discretion occurs when there is an error of law or a factual conclusion which is without evidentiary support." *Gooding*, 326 S.C. at 252, 487 S.E.2d at 598 (citation omitted).

Rule 702, SCRE, which governs the admission of expert testimony, provides:

> If scientific technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

To be competent to testify as an expert, "a witness must have acquired by reason of study or experience or both such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony." *Gooding*, 326 S.C. at 253, 487 S.E.2d at 598 (citation omitted). "Expert testimony differs from lay testimony in that an expert witness is permitted to state an opinion based on facts not within his firsthand knowledge or

may base his opinion on information made available before the hearing so long as it is the type of information that is reasonably relied upon in the field to make opinions." *Watson v. Ford Motor Co.*, 389 S.C. 434, 445–46, 699 S.E.2d 169, 175 (2010) (citing Rule 703, SCRE). Defects in an expert witness's education and experience go to the weight, rather than the admissibility, of the expert's testimony. *Gooding*, 326 S.C. at 253, 487 S.E.2d at 598 (citation omitted).

In *State v. Kromah*, we stated that we could "envision no circumstance where [a forensic interviewer's] qualification as an expert at trial would be appropriate." 401 S.C. 340, 357 n.5, 737 S.E.2d 490, 499 n.5 (2013); *cf. State v. Douglas*, 380 S.C. 499, 505, 671 S.E.2d 606, 609–10 (2009) (Pleicones, J., dissenting) ("[I]t was not only unnecessary but improper for the circuit court to qualify Herod as an expert witness" as "[t]his Court's jurisprudence and Rule 702 of the South Carolina Rules of Evidence emphasize the role of the trial court as the gatekeeper in determining, among other things, whether the expert's testimony consists of scientific, technical, or specialized knowledge that will assist the trier of fact." (citations omitted)).

Of course, the trial judge in the instant case did not have the benefit of the *Kromah* decision. While the majority did not address this issue in full, I take issue with its reliance on *Kromah*. *See Kromah*, 401 S.C. at 357 n.5, 737 S.E.2d at 499 n.5. The facts of *Kromah* were categorically different from the facts here, and I would hold that Herod's qualification as an expert was harmless beyond a reasonable doubt. *See id.*, 401 S.C. at 360, 737 S.E.2d at 501.

Here, Herod never testified on direct examination about the victims' credibility. The only time her testimony could be construed to touch on the victims' credibility occurred while under cross-examination by *Petitioner*'s counsel:

> Q: In regards to the . . . [R]apport stage, part of what you emphasize to them is the importance of telling the truth don't you?
>
> A: Yes, sir. We talk about that and I'm also assessing whether the child can even differentiate between the truth and a lie.
>
> Q: Okay.

A: But we talk about the truth and the importance of it.

Q: Right.

A: Yes, sir, I did.

Q: Okay. And you also did a forensic interview of [Victim 2] at that time, is that correct?

A: After [Victim 1].

Q: After [Victim 1].

A: The same day.

Q: Both of those occurred on October 21st, 2004, right?

A: That's correct.

Q: When you . . . when you did the forensic interview on [Victim 1] you emphasized to her in that standardized portion the importance of telling the truth, didn't you?

A: Yes, sir, I do in ever[y] interview.

Q: Okay. And you did it then . . . if you did it with every interview[,] you did it with [Victim 2].

A: I did.

In my opinion, the majority should not have relied on *Kromah*. If Herod in any way improperly bolstered the victims' credibility, it was because Petitioner raised the issue of Herod's assessment of the veracity of the child victim in her methodology. Therefore, he cannot now complain that it was error. *See State v. Robinson*, 305 S.C. 469, 474, 409 S.E.2d 404, 408 (1991) (finding where "petitioner opened the door to . . . evidence, he cannot complain of prejudice from its admission"). The focus in *Kromah* was on testimony that improperly bolstered

the child victim's testimony. To the extent the forensic interviewer's testimony does not touch on credibility, there is no reversible error.

In my opinion, while the circuit court should not have qualified Herod as an expert, any error resulting from the inclusion of her testimony was harmless beyond a reasonable doubt.

## III. Conclusion

For the foregoing reasons, I would affirm the court of appeals' decision upholding the circuit court's refusal to quash the indictments, and finding Petitioner suffered no prejudice despite Herod's qualification as an expert in forensic interviewing.

**KITTREDGE, J., concurs.**

# The Supreme Court of South Carolina

Amendment to Rule 2(r) of the Rules for Judicial Disciplinary Enforcement, Rule 502, SCACR

Appellate Case No. 2003-027155

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ORDER

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Pursuant to Article V, § 4, of the South Carolina Constitution, Rule 2(r) of the Rules for Judicial Disciplinary Enforcement (RJDE) contained in Rule 502 of the South Carolina Appellate Court Rules (SCACR) is amended to read as follows:

> **(r) Judge:** anyone, whether or not a lawyer, who is an officer of the unified judicial system, and who is eligible to perform judicial functions, including an officer such as a magistrate, master-in-equity or special referee, is a judge within the meaning of these rules. This term includes a retired judge who has elected to be eligible for appointment under S.C. Code Ann. § 9-8-120. For the limited purpose of disciplinary proceedings under S.C. Code Ann. § 1-23-560, this term shall also include judges of the Administrative Law Court. This term does not include arbitrators or mediators.

This amendment is effective immediately.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
February 11, 2015

# The Supreme Court of South Carolina

Re: Amendment to 413, South Carolina Appellate Court Rules

Appellate Case No. 2014-000434

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ORDER

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Rule 34 of the Rules for Lawyer Disciplinary Enforcement, which is contained in Rule 413, SCACR, is amended as set forth in the attachment to this Order. The amendments to Rule 34 permit a limited class of suspended lawyers to be employed by lawyers or law firms, with certain restrictions and supervisory requirements.

The amendments are effective immediately.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
February 11, 2015

## RULE 34

## EMPLOYMENT OF LAWYERS WHO ARE DISBARRED, SUSPENDED, TRANSFERRED TO INCAPACITY INACTIVE STATUS, OR PERMANENTLY RESIGNED IN LIEU OF DISCIPLINE

**(a) General Prohibition on Employment.** Except as provided in paragraph (b), below, a lawyer who is disbarred, suspended, transferred to incapacity inactive status, or permanently resigned in lieu of discipline shall not be employed directly or indirectly by a member of the South Carolina Bar as a paralegal, investigator, or in any other capacity connected with the practice of law, nor be employed directly or indirectly in the State of South Carolina as a paralegal, investigator, or in any capacity connected with the practice of law by a lawyer licensed in any other jurisdiction. Additionally, a lawyer who is disbarred, suspended, transferred to incapacity inactive status, or permanently resigned in lieu of discipline shall not serve as an arbitrator, mediator, or third party neutral in any Alternative Dispute Resolution proceeding in this state nor shall any member of the South Carolina Bar directly or indirectly employ a lawyer who has been disbarred, suspended, transferred to incapacity inactive status, or permanently resigned in lieu of discipline as an arbitrator, mediator, or third party neutral in any Alternative Dispute Resolution proceeding. Any member of the South Carolina Bar who, with knowledge that the person is disbarred, suspended, transferred to incapacity inactive status, or permanently resigned in lieu of discipline, employs such person in a manner prohibited by paragraph (a) of this rule shall be subject to discipline under these rules. A lawyer who is disbarred, suspended, transferred to incapacity inactive status, or permanently resigned in lieu of discipline who violates paragraph (a) of this rule shall be deemed in contempt of the Supreme Court and may be punished accordingly.

**(b) Employment of Lawyers Suspended for Less than Nine Months.**

> **(1)** A lawyer who has been suspended from the practice of law for a definite period of less than nine months may engage in the following activities during the period of his or her suspension:
>
> > **(A)** clerical legal research and writing, including document drafting, library or online database research, and searching titles, including obtaining information at the recording office; and

**(B)** non law-related office tasks, including but not limited to, building and grounds maintenance, personal errands for employees, computer and network maintenance, and marketing or design support.

**(2)** A lawyer who has been suspended from the practice of law for a definite period of less than nine months and is employed in any capacity connected with the practice of law pursuant to this rule is forbidden from engaging in the following activities:

**(A)** practicing law in any form;

**(B)** having contact or interaction in person, by telephone, by electronic means, or otherwise with clients, former clients, or potential clients of a lawyer, law firm, or any other entity engaged in the provision of legal services in any capacity;

**(C)** soliciting prospective clients in any form to engage the suspended lawyer in legal services at a future time when the suspended lawyer is reinstated to the practice of law;

**(D)** handling client funds or operating any trust or financial account belonging to a lawyer, law firm, or other entity;

**(E)** appearing as a lawyer before any court, judge, justice, board, commission, or other public body or authority;

**(F)** holding himself or herself out as a lawyer by any means; or

**(G)** continuing employment with the lawyer, law firm, or any other entity where the misconduct resulting in suspension occurred.

**(3)** If a suspended lawyer is employed in a law-related position during the period of suspension, the suspended lawyer must be adequately supervised.

**(A)** If a suspended lawyer is employed by another lawyer, law firm, or any other entity providing legal services during the period of suspension pursuant to paragraph (b)(1), the suspended lawyer must be supervised by a regular member of the South Carolina Bar who is in good standing (supervising lawyer). The suspended lawyer and supervising lawyer must submit a written plan to the Commission on Lawyer Conduct that outlines the scope of the suspended lawyer's

employment, anticipated assignments on which the suspended lawyer will render assistance, and appropriate procedural safeguards in place to ensure a violation of this rule or further misconduct does not occur.

**(B)** The supervising lawyer shall be solely responsible for the supervision of the suspended lawyer. If the suspended lawyer violates this or any other rule while under the supervision of the supervising lawyer, the supervising lawyer shall be subject to discipline under these rules and may be punished accordingly.

**(4)** A suspended lawyer who violates paragraph (b) of this rule shall be subject to discipline under these rules, shall be deemed in contempt of the Supreme Court, and may be punished accordingly.

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

Edward Freiburger, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2010-177147

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**ON WRIT OF CERTIORARI**

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Appeal From Richland County
Henry F. Floyd, Trial Court Judge
G. Thomas Cooper, Jr., Post-Conviction Relief Judge

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Opinion No. 5295
Heard October 16, 2014 – Filed February 11, 2015

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**REVERSED AND REMANDED**

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John H. Blume, III, Blume Norris & Franklin-Best, LLC, and Lindsey Sterling Vann, both of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson and Assistant Attorney General Megan E. Harrigan, both of Columbia, for Respondent.

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**FEW, C.J.:** In 2001, the State indicted Edward Freiburger for a murder that occurred in 1961. Following his conviction and the denial of his direct appeal, Freiburger filed an application for post-conviction relief (PCR), claiming ineffective assistance of counsel. We find the PCR court correctly denied PCR as to all issues except one—Freiburger's claim that trial counsel was ineffective for failing to introduce a letter written in 1961 by the Chief of SLED, J.P. Strom, to the director of the FBI, J. Edgar Hoover. We find the letter would have deeply undermined the foundation of the State's case—its ballistics evidence. We reverse the denial of PCR as to this issue and remand to the court of general sessions for a new trial.

## I. Facts and Procedural History

John Orner was a taxi driver in Columbia who regularly transported soldiers to and from the local U.S. Army base—Fort Jackson. On the evening of February 28, 1961, Orner did not return home after being dispatched to pick up a passenger at the base. Police found Orner's blood-stained taxi the next morning on the 1200 block of Assembly Street, near its intersection with Gervais Street. Two days later, police discovered Orner's body by the side of U.S. Highway 601 in lower Richland County. He died from a gunshot wound to the head. Forensic examinations of three bullet fragments removed from Orner's head indicated the bullet was fired from a .32 caliber Harrington and Richardson (H&R) revolver.

In March of 1961, Freiburger was arrested in Tennessee for hitchhiking, and police seized a .32 caliber H&R revolver he was carrying (the "Freiburger gun"). This gun was later given to Richland County authorities in connection with their investigation of Orner's murder. Ballistics experts examined bullets test-fired through the Freiburger gun, as well as another .32 caliber H&R revolver seized from the home of a local resident, Alonzo Dreher (the "Dreher gun"). These ballistics tests yielded inconclusive results, and no charges were brought at that time.

In 2000, the Richland County Sheriff's Department reopened the murder investigation. Lieutenant Ira Parnell, supervisor of the South Carolina Law Enforcement Division's (SLED) Firearms Identification Laboratory, reexamined the three bullet fragments and compared them to the test bullets fired by the Freiburger and Dreher guns. Lt. Parnell also fired his own test bullets with the Freiburger gun. He later issued a report stating the results "were inconclusive" and

the bullet fragments "could have been fired by [the Dreher gun], [the Freiburger gun], or by another similarly rifled firearm of the same caliber." Also in 2000, four other SLED ballistics experts compared the test bullets with the three bullet fragments and reached the same inconclusive results. However, John Cayton, a private ballistics expert hired by the Sheriff's department, concluded striations on one of the bullet fragments matched markings on test bullets from the Freiburger gun, and not the Dreher gun or any similar caliber H&R gun. On the basis of Cayton's opinion, the State indicted Freiburger for the murder of Orner.

At trial, Freiburger was represented by John Delgado and Kathrine Hudgins. Cayton and Lt. Parnell testified as experts for the State. The jury found Freiburger guilty of murder, and the trial court sentenced him to life in prison. The supreme court affirmed his conviction. *State v. Freiburger*, 366 S.C. 125, 620 S.E.2d 737 (2005).

Freiburger filed a PCR application, claiming trial counsel was ineffective for several reasons, including not introducing into evidence Chief Strom's 1961 letter to Hoover (the "Hoover letter"). According to the Hoover letter, Lieutenant Millard Cate—the head of SLED's Firearms Identification Laboratory in 1961—performed comparative ballistics tests on the three bullet fragments and test bullets fired through the Freiburger and Dreher guns. In the letter, Chief Strom stated "Lt. Cate is of the opinion that [the Dreher] weapon killed the taxi driver."[1] The letter further stated that although Lt. Cate noted some similarities between the test bullets from the Freiburger gun and the bullet fragments, he was "unable to establish an identification of any kind." According to the letter, the "Army Firearms Examiner" also reached inconclusive results as to the Freiburger gun.

The PCR court initially found trial counsel was not deficient for failing to introduce the letter. In its order denying Freiburger's Rule 59(e), SCRCP, motion, however, the court stated, "It may have been error to not try to use the letter in

[1] While the record does not reveal how police came to suspect the Dreher gun was involved in the murder, the Hoover letter provides the following information: "[The Dreher gun] was recovered in a house where it is possible that any number of persons could have carried it out. However, the owner Alonzo Dreher, who is an old man, says that he does not believe that anyone had his gun. A number of known thieves and robbers, including members of his own family, have been in this house from time to time."

some manner or for some purpose." Notwithstanding this, the court denied PCR because it found Freiburger did not prove he was prejudiced by trial counsel's error. This court granted Freiburger's petition for a writ of certiorari.

## II. Ineffective Assistance of Counsel

Under the two-pronged test from *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), a PCR applicant alleging ineffective assistance of counsel must show: (1) trial counsel "failed to render reasonably effective assistance under prevailing professional norms," *Porter v. State*, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006); and (2) "there is a reasonable probability, but for counsel's unprofessional errors, the result of the proceeding would have been different," *Suber v. State*, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). As to the first prong, Freiburger must prove trial counsel's performance was deficient, "meaning that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Edwards v. State*, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (citation and quotation marks omitted). If the State contends the alleged deficiency resulted from a strategic decision made at trial, counsel "must articulate a valid reason for employing a certain strategy." *Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) (emphasis removed). As to the second prong, Freiburger must show there is a "reasonable probability" that, absent trial counsel's error, "the jury would have had a reasonable doubt as to [his] guilt." *Edwards*, 392 S.C. at 459, 710 S.E.2d at 66; *see also Lounds v. State*, 380 S.C. 454, 459, 670 S.E.2d 646, 649 (2008) ("[W]hen a defendant's conviction is challenged, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt." (citation and internal quotations marks omitted)).

Freiburger argues trial counsel was ineffective for failing to introduce the Hoover letter at trial. He correctly points out the letter was the only evidence establishing the Dreher gun as the murder weapon—a scenario under which Freiburger could not be the person who killed Orner. He argues the letter should have been used to contradict Cayton's opinion that the Freiburger gun was the murder weapon, refute a SLED examiners' testimony that he and Lt. Cate "exclude[d]" the Dreher gun, and corroborate the inconclusive results reached by multiple SLED examiners as to the Freiburger gun.

### A. Deficiency—The First Prong of *Strickland*

We begin our analysis of whether Freiburger met the first prong of *Strickland* with the State's concession that the letter would have been admissible at trial. When questioned at oral argument regarding the admissibility of the letter, the State responded, "I think it would have been admissible at trial."

The PCR court's statement in its Rule 59(e) order—"[i]t may have been error to not try to use the letter in some manner or for some purpose"—appears to be a finding of deficiency. There is ample evidence in the record to support this finding. *See Moore v. State*, 399 S.C. 641, 646, 732 S.E.2d 871, 873 (2012) (providing an "any evidence" standard for reviewing a PCR court's ruling). However, to the extent the PCR court did not find Freiburger proved the first prong of *Strickland*, we hold the court's decision is not supported by the evidence. *See Lorenzen v. State*, 376 S.C. 521, 529, 657 S.E.2d 771, 776 (2008) ("A PCR court's findings will be upheld on appeal if there is 'any evidence of probative value sufficient to support them.'" (citation omitted)).

The letter would have been highly beneficial to Freiburger for multiple reasons. First, the letter stated Lt. Cate was "of the opinion" the Dreher gun was the murder weapon, which would have been the only evidence that directly contradicted Cayton's positive identification of the Freiburger gun. Lt. Cate's "opinion" stands out because the State successfully presented the other experts' "inconclusive" ballistics results as not being inconsistent with Cayton's opinion, but different only by a matter of degree. For example, Lt. Parnell testified:

> My opinion was that it was an inconclusive result, and there are degrees of inconclusive . . . , from no similarities noted, to a lot of similarities noted, to not quite enough. In the case of . . . the bullet fragment from Mr. Orner's head . . . and [the Freiburger gun], I found a remarkable similarity . . . . It was just not quite enough for me to conclude that it was fired out of that revolver and no other gun ever made.

The State ended its direct examination of Lt. Parnell by asking, "And the other examiners at SLED, . . . Lt. Defreese, Mr. Collins, Mr. Whittler, Mr. Paavel, their opinion agrees with yours?" Lt. Parnell responded, "That's correct."

Second, Lt. Cate's opinion regarding the Dreher gun would have discredited Lt. Parnell's testimony that "[he] saw no similarity between" the bullet fragments and test bullets fired through the Dreher gun. The letter indicates Lt. Cate saw enough similarities that he reached "the opinion that [the Dreher] weapon" did it. Third, the letter could have been used to undermine the inconclusive results reached by the other SLED examiners as to the Dreher gun because the letter indicates the results of Lt. Cate's ballistics tests were not inconclusive. Fourth, Lt. Cate's opinion as to the Freiburger gun matched the inconclusive results reached by other SLED examiners. The letter states Lt. Cate observed "some similarities," but he "was unable to establish an identification of any kind."

Finally, the letter contradicted the testimony of another expert for the State, Carl Stokes, who worked for SLED from 1954 until 1981. It would have been particularly important to impeach Stokes with the letter because the State framed his testimony in terms of his relationship with Lt. Cate. Specifically, Stokes testified, "I was [Lt. Cate's] first understudy," and he described all the work he did in this case in terms of his collaboration with Lt. Cate. Stokes explained how "Mr. Cate and I went to the Dunbar Funeral Home" because "the body of John Orner was there . . . and we were there to assist in the recovery of the bullet." Stokes then testified, referring to Lt. Cate and himself, "We recovered three fragments of a bullet," which "remained in our custody," and "Mr. M.M. Cate's initials are on the vial" containing the fragments. Stokes repeatedly identified Lt. Cate's initials on various containers, and then described the work he and Lt. Cate did and the results they reached. He testified "we were able to determine that the fragments were fired from an H&R .32 revolver," "we concluded it was from one bullet," and "we were able to measure the groove of the bullet and determine that it was the same width as a Harrington & Richardson weapon."

Stokes then testified to the conclusions he and Lt. Cate reached regarding the Dreher and Freiburger guns, specifically that "*we* were able to exclude the [Dreher gun]." (emphasis added). The State asked Stokes to elaborate:

> Q: And when you say "excluded," explain what that means to us, Mr. Stokes?
>
> A: In comparing the test bullet with the known specimen, you're looking for identifying

characteristics, those characteristics that have been imparted on the bullet from the barrel, . . . the individual scratch marks as it passes through the barrel. We look for those identifying characteristics to match together, and we did that in this particular case.

Q: And the [Dreher gun] was excluded?

A: *We* excluded it, yes, sir.

Q: It did not fire that bullet?

A: It did not fire the fragments that we had.

(emphasis added). Stokes later testified as to Lt. Cate, "I don't ever recall any results coming out of the lab that we didn't agree on," and as to the particular results in this case, "Mr. Cate [and I] came to the same opinion."

Stokes' claim that he and Lt. Cate "were able to exclude" the Dreher gun cannot be reconciled with Chief Strom's statement in the Hoover letter—"Lt. Cate is of the opinion that [the Dreher gun] killed the taxi driver." The letter demonstrates Stokes testified incorrectly when he stated, "We were able to exclude [the Dreher gun]" and Lt. Cate concluded "[i]t did not fire the fragments that we had."

This discussion demonstrates the multiple ways trial counsel could have effectively used the letter to benefit the defense. In the face of these benefits, the record contains no basis for a decision not to introduce the letter into evidence. Hudgins testified she knew of no reason why the Hoover letter was not introduced. The PCR court found Delgado saw the letter and "specifically list[ed]" it on an index he created of discovery materials provided by the State. When Delgado was asked at the PCR hearing, "[D]id [you] have a strategic reason not to use this letter?" he responded, "No, sir." Delgado further stated in an affidavit submitted to the PCR court, "I do not presently remember why I did not use the letter at trial and I cannot

think of any strategic reason why I would have decided not to use it." In the same affidavit, Delgado stated the letter "would have been powerful evidence."[2]

We therefore find trial counsel's failure to introduce the Hoover letter requires a finding of deficiency. The letter contains evidence that would have been favorable to Freiburger in several important ways. Trial counsel has not articulated any reason for not introducing it, nor has the State argued there could be such a reason. Thus, counsel's failure to introduce the letter into evidence was so serious an error that it rendered counsel's performance deficient under the first prong of *Strickland*. *See Edwards*, 392 S.C. at 456, 710 S.E.2d at 64.

### B. Prejudice—The Second Prong of *Strickland*

We find Freiburger also met his burden of proof as to the second prong of *Strickland* because there is a reasonable probability the jury would have had a reasonable doubt as to whether he was guilty of murder if trial counsel had introduced the letter at trial. *See* 392 S.C. at 459, 710 S.E.2d at 66.

To frame our discussion of prejudice, we point out the evidence against Freiburger was purely circumstantial, and—other than ballistics—weak. The supreme court discussed the extent of the evidence in affirming the denial of Freiburger's directed verdict motion:

> The evidence adduced at trial which tended to implicate Freiburger was as follows: 1) he was a soldier stationed at Fort Jackson on February 28, 1961, 2) he had a habit

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[2] We hesitate to embrace Delgado's testimony. The PCR court stated Delgado "was evasive in his testimony" and gave examples to illustrate Delgado's evasiveness. The PCR court noted significant inconsistencies between Delgado's affidavit and his live testimony and found, "this court does not believe [Delgado's] affidavit testimony." We agree with the PCR court. Delgado made no attempt to defend his actions as trial counsel, but attempted to cast those actions as deficient. He so clearly continued in the PCR proceedings to act as an advocate for Freiburger that the PCR court allowed the State to treat him as a hostile witness. *See* Rule 611(c), SCRE ("When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.").

> of pawning his personal property at downtown Columbia pawn shops, 3) he purchased a .32 caliber H & R revolver, serial number W9948, and bullets from the Capital Loan and Pawn shop on February 28, 1961, 4) the victim was shot on February 28, 1961 with a .32 caliber H & R revolver, 5) two days after the victim's cab was found, Freiburger stayed at a downtown motel in close proximity to where Victim's bloody cab was found, 6) Freiburger was arrested in Tennessee on March 29, 1961 carrying a .32 caliber H & R revolver, 7) [ballistics], and 8) Freiburger was evasive when talking to Richland County police investigators in Indiana in September 2000, claiming he did not recall having been in the army, or having been stationed at Fort Jackson.

*Freiburger*, 366 S.C. at 137, 620 S.E.2d at 743. In fact, the State did not indict Freiburger for forty years following Orner's death. Instead, the State brought charges only after it obtained ballistics evidence directly tying Freiburger's gun to the murder—Cayton's expert opinion.

It is also important to note the manner in which the State portrayed Lt. Cate during trial. In addition to the testimony recited above, Stokes testified Lt. Cate was "one of the building blocks" of SLED's firearms identification division who always tried "to avoid an inconclusive" ballistics result. Stokes testified Lt. Cate "did everything possible . . . to identify any weapon that we got. . . . [Lt. Cate] lived by not messing with [the] in between, and we had very few inconclusives." The State began its questions to Lt. Parnell by asking whether he knew and worked for Lt. Cate, and specifically pointed out "you worked with and knew [Lt. Cate] before 1973," but after that "you were under his supervision." In its closing argument, the State emphasized Lt. Cate's positive character, stating, "Mr. Cate must have been a heck of a man, a heck of a man, and he didn't want [anything] in between, no sir, no ma'am. He excluded everything."

The weakness of the State's non-ballistics evidence and the State's efforts to use the expertise of Lt. Cate to its advantage at trial frame our analysis of the importance of the Hoover letter to Freiburger's defense. With this in mind, we find the Hoover letter would have undermined the State's ballistics evidence in three particular ways.

First, it would have negatively impacted the certainty of Cayton's opinion that the Freiburger gun was the murder weapon. The State relied heavily on Cayton's ballistics analysis to convict Freiburger. As Delgado testified at the PCR hearing, "Without John Cayton, the solicitor did not have a case." In fact, Cayton's opinion that the Freiburger gun killed Orner is the only additional evidence the State added since 1961, when it decided not to prosecute Freiburger. Because the State built its case around Cayton's positive identification of the Freiburger gun, Lt. Cate's contrary opinion that the Dreher gun fired the fatal bullet—the only evidence available to *contradict* Cayton's opinion—would have been a great benefit to Freiburger's defense. *See McKnight v. State*, 378 S.C. 33, 55, 661 S.E.2d 354, 365 (2008) (finding counsel's failure to introduce evidence prejudiced defendant because it would have undermined the conclusion of the only expert who testified that the defendant's actions caused the victim's death).

Second, introduction of the letter would have disrupted the apparent unanimity of the State's experts. Cayton's positive identification of the Freiburger gun gained strength from the corroborative effect of Stokes' and Lt. Parnell's trial testimony, and Lt. Parnell's statement that the other SLED experts—none of whom testified at trial—agreed with him. Specifically, Stokes and Lt. Parnell testified they were able to exclude the Dreher gun, but reached inconclusive results regarding the Freiburger gun. Their exclusion of the Dreher gun made the inconclusive results as to the Freiburger gun logically consistent with Cayton's opinion. However, Lt. Cate's opinion that the Dreher gun was the murder weapon would have prevented this corroborative effect. Specifically, Lt. Cate's opinion that the Dreher gun was the murder weapon necessarily excluded the Freiburger gun—because only one gun could be the murder weapon. Thus, introduction of the letter would have transformed an apparent consensus among firearms examiners into a conflict among experts regarding which gun fired the fatal bullet. *See Ard v. Catoe*, 372 S.C. 318, 330, 642 S.E.2d 590, 596 (2007) (affirming finding of prejudice because "the extent to which the jurors credited [expert]'s testimony . . . was critical to the outcome of the case" and "counsel's failure to refute . . . evidence transformed an arguable case into a clear case" (internal quotation marks omitted)).

Finally, the letter was important for impeachment purposes, as it contradicted Stokes' testimony regarding the results of the ballistics tests he and Lt. Cate performed in 1961. Because trial counsel did not use the letter, the jury was left

with the belief that Lt. Cate excluded the Dreher gun—the direct opposite of what Chief Strom wrote in the Hoover letter.

To support its finding of no prejudice, the PCR court relied on Lt. Parnell's testimony at the PCR hearing. Specifically, Lt. Parnell was asked if he was familiar with a letter written by Lt. Cate in 1961, to which he responded, "Well, Mr. Cate didn't write it." He was then asked if the letter indicated that Lt. Cate believed the Dreher gun killed Orner. Lt. Parnell responded, "I see that in the letter. But I also know that Mr. Cate didn't write a formal report indicating one way or the other. But . . . that is what [the letter] says." Based on this testimony, the court found the presentation of the letter was "not useful to [Freiburger] and would have probably been detrimental if done at trial."

While Lt. Parnell's testimony at the PCR hearing was dismissive of Lt. Cate's opinion in the Hoover letter, his testimony does not support a finding of no prejudice. The PCR court also concluded no prejudice resulted based on "Mr. Delgado's explanation that he . . . did not ascribe great importance to [the letter]." There is no evidence whatsoever to support this finding. In fact, all statements in Delgado's affidavit and live testimony—such as that the letter "would have been helpful" and constituted "powerful evidence" for the defense—directly contradict the court's finding.

The State discounts the importance of the letter, arguing Chief Strom sent the letter to request additional ballistics testing by the FBI, which demonstrates Lt. Cate was unsure of his conclusion. The State contends this decreases any prejudicial effect of trial counsel's failure to introduce the letter at trial. We believe the State's argument overlooks the importance of the letter to Freiburger's case. It is true Chief Strom requested additional ballistics testing from the FBI. However, the letter demonstrates one of the reasons for the State's request—Lt. Cate believed the Dreher gun was the murder weapon, and thus the State had nobody to prosecute. While we acknowledge Lt. Cate may not have been certain, Chief Strom chose to write "Lt. Cate is of the opinion that [the Dreher] weapon killed the taxi driver," and these are the words the jury would have heard if counsel had introduced the letter. Lt. Cate's uncertainty makes his "opinion" only marginally less significant.

The State best illustrated the importance of the Hoover letter in its own closing argument, in which the solicitor stated,

> Who excludes this gun? If it's excluded, find him not guilty. If one person put their hand on this Bible, swore to tell the truth and said, "This is not the gun that murdered John Orner," find him not guilty . . . .

By the State's own challenge to the jury during closing argument, the existence of an "opinion" that the Dreher gun killed Orner reasonably could have changed the outcome of trial.

We find no evidence to support the PCR court's determination that Freiburger failed to prove prejudice. Rather, we find the admission of the Hoover letter would have deeply undermined the State's case. Counsel's failure to introduce the letter leaves us without confidence in the outcome of the trial. *See Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698 (stating as to the second prong, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome"). Accordingly, we hold the court erred in denying PCR.

## III. Conclusion

The order of the PCR court is **REVERSED** and the case is **REMANDED** to the court of general sessions for a new trial.

**LOCKEMY, J., concurs.**

**THOMAS, J. (concurring in part and dissenting in part):** I agree with the majority that the PCR court correctly denied Freiburger relief on the issues he raised concerning alleged violations of *Brady v. Maryland*[3] and *Crawford v. Washington*.[4] I also agree with the majority's decision to affirm the PCR court's refusal to grant relief due to trial counsel's alleged failure to use the Parnell Report when cross-examining Lt. Parnell. As the Hoover letter, I do not dispute that Freiburger's trial counsel had been informed of its existence and that we should not address whether the evidence would have been admissible in view of the State's concession during oral argument. I write separately, however, because I would

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[3] *Brady v. Maryland*, 373 U.S. 83 (1963).

[4] *Crawford v. Washington*, 541 U.S. 36 (2004).

affirm the PCR court's findings that Freiburger's trial counsel was not ineffective for failing to introduce the letter and that this failure was not prejudicial to Freiburger.

"The burden is on the applicant in a post-conviction proceeding to prove the allegations in his application." *Brannon v. State*, 345 S.C. 437, 439, 548 S.E.2d 866, 867 (2001) (citation omitted). Although "[a]n appellate court must affirm the PCR court's decision when its findings are supported by any evidence of probative value, . . . an appellate court will not affirm the decision when it is not supported by any probative evidence." *Id.* (citations omitted).

"To establish the requisite prejudice necessary to prove a claim of ineffective assistance of counsel, [a PCR applicant] must demonstrate that his attorney's errors had an effect on the judgment against him." *Edwards v. State*, 392 S.C. 449, 458-59, 710 S.E.2d 60, 65 (2011). To accomplish this, 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). "[W]hen a defendant's conviction is challenged, 'the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt.'" *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (quoting *Strickland*, 466 U.S. at 695).

The PCR court found Freiburger failed to satisfy his burden to demonstrate with any credible probative evidence that use of the Hoover letter would have made the outcome of the trial any different. To support this finding, the court noted that at the PCR hearing, firearms expert Lt. Parnell was cross-examined regarding the letter and the results of the cross-examination were not useful to Freiburger. The court further found Parnell's testimony would probably have been detrimental to Freiburger had the cross-examination been conducted during his trial. I agree with the PCR court's assessment of Parnell's testimony and would hold this is evidence that would support the PCR court's finding that use of the Hoover letter at trial would most likely not have benefited Freiburger.

During the PCR hearing, Parnell acknowledged that he was familiar with the letter and knew it stated that Lt. Cate was of the opinion the Dreher weapon was used to kill the victim. However, Parnell also mentioned that the letter revealed that Cate,

though his opinion was based on bullet comparisons, "withheld a formal report because of the condition of the bullet." Furthermore, the letter was addressed to the attention of the Firearms Laboratory of the Federal Bureau of Investigation, and as Parnell acknowledged on cross-examination, "was written for the purpose of obtaining, attempting to obtain assistance from the FBI in doing an additional examination of the bullet." Parnell also testified that the bullet was in three fragments and showed signs of twisting and distortion that could have complicated the identification procedure. Furthermore, as Parnell testified, the letter mentioned that Cate did not document his opinion in a formal report and suggested he was reluctant to do this because the condition of the bullet undermined his confidence in his identification of the murder weapon. Therefore, although I agree with the majority that Cate's opinion, as stated in the Hoover letter, did not support Cayton's positive identification of the Freiburger gun, I would hold the letter, when considered in its entirety, presented only a differing but still tentative conclusion that another weapon was involved. At best, then, the Hoover letter would only emphasize the difficulty law enforcement had in determining in 1961 who owned the .32 caliber Harrington and Richardson revolver that killed the victim, an uncertainty that should have been readily apparent in view of the other evidence presented at trial and the fact that many years passed before anyone was charged in the case. To the extent the letter presented a different opinion about the murder weapon, it also suggested that the individual to whom the opinion was attributed had valid concerns about the reliability of his identification and the condition of the physical evidence upon which this identification was based.

The majority also finds introduction of the Hoover letter would have been beneficial to Freiburger as a means to impeach Carl Stokes. The PCR court did not rule on this issue, and Freiburger, though he moved to alter or amend the judgment, did not request specific findings of fact or conclusions of law on whether the letter would have discredited Stokes's testimony; therefore, I would not hold Freiburger is entitled to PCR based on this rationale. *See Pruitt v. State*, 310 S.C. 254, 255, 423 S.E.2d 127, 128 (1992) ("[W]e are not abandoning the general rule that issues must be raised to, and ruled on by, the post-conviction judge to be preserved for appellate review.") (*quoted in Marlar v. State*, 375 S.C. 407, 410, 653 S.E.2d 266, 267 (2007)).

For the foregoing reasons, I would affirm the denial of PCR.

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

The State, Respondent,

v.

Mitchell Rivers, Appellant.

Appellate Case No. 2011-186026

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Appeal From Chesterfield County
Paul M. Burch, Circuit Court Judge

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Opinion No. 5296
Heard January 8, 2015 – Filed February 11, 2015

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**AFFIRMED**

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Chief Appellate Defender Robert Michael Dudek, and Appellate Defenders Breen Richard Stevens and Benjamin John Tripp, all of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Jennifer Ellis Roberts, all of Columbia; and Solicitor William Benjamin Rogers, Jr., of Bennettsville, for Respondent.

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**LOCKEMY, J.:** Mitchell Rivers was convicted of homicide by child abuse following the death of his four-month-old adopted son (the victim). Rivers appeals

his conviction, arguing the trial court erred in admitting evidence of injuries the victim sustained at an earlier time because no evidence connected Rivers to the injuries. We affirm.

**FACTS**

The State alleged the victim died of asphyxiation while in Rivers's custody. Rivers claimed the victim's death was an accident and "did not occur under circumstances that manifest extreme indifference to human life."

Before trial, Rivers filed a motion to exclude "certain aspects of the collateral evidence that was observed during the [victim's] autopsy." In a memorandum filed with the court, Rivers explained he was seeking to exclude "evidence of any extraneous injuries to the [victim] . . . that occurred prior to the [victim]'s death." He asserted "[t]here [wa]s no nexus between these extraneous injuries and the causes of death of the [victim]" and that "[e]vidence of alleged prior child abuse is inadmissible where there is no evidence that the [d]efendant inflicted the previous injuries." The State filed a memorandum supporting admission of the evidence, arguing "the constellation of injuries is evidence of child abuse and neglect, directly relevant pursuant to [Rule 404(b), SCRE,] to counter [Rivers's] argument of mistake or accident" and to establish motive.

During a pretrial hearing on Rivers's motion, the trial court stated it would admit the parties' memoranda as court exhibits and noted both parties "clearly stated [their] positions." The trial court denied Rivers's motion, stating, "These child cases are getting a little different treatment than what we normally are use[d] to involving adult cases and other type criminal cases." The trial court concluded its ruling by informing Rivers, "You're protected on the record on that."

Following his trial, the jury convicted Rivers of homicide by child abuse, and the trial court sentenced him to life imprisonment. This appeal followed.[1]

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[1] Rivers's appellate counsel initially filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), asking to be relieved as counsel. This court denied the petition to be relieved as counsel and directed the parties to address the following issue and any other issues of arguable merit: "Did the trial court err in admitting evidence of collateral injuries indicative of prior child abuse?" *State v. Mitchell Rivers*, S.C. Ct. App. Order dated Sept. 5, 2013.

**LAW/ANALYSIS**

Rivers argues the trial court erred in admitting evidence of the victim's other injuries because no evidence connected Rivers to the injuries. We find this issue is unpreserved.

"In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court]. Issues not raised and ruled upon in the trial court will not be considered on appeal." *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003). "A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground." *Id.* at 142, 587 S.E.2d at 694.

Initially, we note that prior to trial, the trial court never ruled on the current issue on appeal—whether evidence of the victim's other injuries was inadmissible because no evidence connected Rivers to the injuries. Rather, in denying Rivers's motion to exclude evidence of the victim's other injuries, the trial court stated, "These child cases are getting a little different treatment than what we normally are use[d] to involving adult cases and other type criminal cases." Although Rivers argued in his pre-trial memoranda that "[e]vidence of alleged prior child abuse is inadmissible where there is no evidence that the [d]efendant inflicted the previous injuries," the trial court's ruling that "child cases are getting a little different treatment" does not indicate it considered whether there was any evidence connecting Rivers to these injuries. Moreover, Rivers never objected or requested clarification from the trial court regarding its ruling. We further note that at the time of the pre-trial hearing, there had been no evidence presented as to who was responsible for the victim's other injuries. The parties had not proffered any testimony on this issue, and they had not submitted any affidavits indicating the evidence they intended to present at trial. Thus, the trial court could not have made a pre-trial ruling as to whether there was any evidence connecting Rivers to the victim's other injuries.

In addition, we find this issue unpreserved because Rivers never raised the issue at trial for the trial court to make a final ruling. *See State v. Atieh*, 397 S.C. 641, 646, 725 S.E.2d 730, 733 (Ct. App. 2012) ("A ruling in limine is not final; unless an objection is made at the time the evidence is offered and a final ruling procured, the issue is not preserved for review."). The State presented evidence of the victim's other injuries through the testimony of Dr. Janice Ross, a forensic

pathologist who performed the victim's autopsy. Dr. Ross described several rib fractures found on the victim's body that were in the process of healing at the time of the victim's death. Dr. Ross explained the rib fractures revealed "no significant recent bleeding" and opined that some of the fractures were probably "at least seven to fourteen days old." Although Rivers objected during portions of Dr. Ross's testimony, arguing her testimony was speculative and cumulative, Rivers did not raise his current argument on appeal that there was no evidence connecting him to these prior injuries. *See Dunbar*, 356 S.C. at 142, 587 S.E.2d at 694 ("A party may not argue one ground at trial and an alternate ground on appeal."). Rivers likewise did not object on this ground during the testimony of paramedic Ron Martin and forensic pathologist Dr. Clay Nichols, who both testified regarding the victim's other injuries. Consequently, the trial court never ruled on whether evidence of the victim's other injuries was inadmissible because there was no evidence connecting Rivers to these injuries.

We further find no exception exists that would have relieved Rivers of his requirement to obtain a final ruling when the evidence was offered at trial. *See Atieh*, 397 S.C. at 646-47, 725 S.E.2d at 733 ("A ruling in limine is not final; unless an objection is made at the time the evidence is offered and a final ruling procured, the issue is not preserved for review."); *id.* at 646-47, 725 S.E.2d at 733 (noting exceptions to this rule include (1) "when the motion in limine is made immediately prior to the introduction of the evidence in question" and (2) when the "trial court clearly indicates its ruling is final"). Following the pre-trial hearing, the State presented multiple witnesses before Dr. Ross first testified about the victim's other injuries; therefore, evidence of the other injuries did not immediately follow River's pre-trial motion to exclude the evidence. Likewise, even assuming the trial court ruled on this issue pre-trial, the trial court's cursory remark that Rivers "[was] protected on the record on that" was not a clear indication that its ruling on the admissibility of this evidence was final. Accordingly, because the trial court did not rule on whether there was evidence connecting Rivers to the victim's other injuries, we find the issue is unpreserved.[2]

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[2] During oral argument, the State admitted its strongest argument was the issue presented is unpreserved. We remind the bar that our appellate courts have "consistently refused to apply the plain error rule" and "it is the responsibility of counsel to preserve issues for appellate review." *State v. Passmore*, 363 S.C. 568, 583, 611 S.E.2d 273, 281 (Ct. App. 2005); *see also Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004).

## CONCLUSION

We hold the issue presented on appeal is unpreserved because it was not raised to and ruled upon by the trial court. Accordingly, the trial court is

**AFFIRMED.**

**FEW, C.J., and THOMAS, J., concur.**