The Supreme Court of South Carolina

RE: Administrative Suspensions for Failure to Pay License Fees Required by Rule 410 of the South Carolina Appellate Court Rules (SCACR)

O R D E R

The South Carolina Bar has furnished the attached list of lawyers (including those holding a limited certificate to practice law) who have failed to pay their license fees for 2018. Pursuant to Rule 419(d)(1), SCACR, these lawyers are hereby suspended from the practice of law. They shall surrender their certificate of admission to practice law to the Clerk of this Court by March 28, 2018.

Any petition for reinstatement must be made in the manner specified by Rule 419(e), SCACR. Additionally, if they have not verified their information in the Attorney Information System, they shall do so prior to seeking reinstatement.

These lawyers are warned that any continuation of the practice of law in this State after being suspended by this order is the unauthorized practice of law, and will subject them to disciplinary action under Rule 413, SCACR, and could result in a finding of criminal or civil contempt by this Court. Further, any lawyer who is aware of any violation of this suspension shall report the matter to the Office of Disciplinary Counsel. Rule 8.3, Rules of Professional Conduct for Lawyers, Rule 407, SCACR.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina

February 26, 2018

Members Who Have Not Paid 2018 License Fees

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The Supreme Court of South Carolina

In the Matter of Charlotte Elizabeth Carpenter, Petitioner.

Appellate Case No. 2018-000205

ORDER

The records in the office of the Clerk of the Supreme Court show that on May 24, 2000, Petitioner was admitted and enrolled as a member of the Bar of this State. Currently, Petitioner is an inactive member of the Bar in good standing.

Petitioner has now submitted her resignation from the South Carolina Bar pursuant to Rule 409 of the South Carolina Appellate Court Rules. The resignation is accepted.

Within twenty (20) days of the date of this order, Petitioner shall surrender the certificate of admission to the Clerk of this Court. If Petitioner cannot locate this certificate, Petitioner shall provide the Clerk with an affidavit indicating this fact and indicating that the certificate will be immediately surrendered if it is subsequently located.

FOR THE COURT

BY s/ Daniel E. Shearouse
CLERK

Columbia, South Carolina

February 22, 2018

The Supreme Court of South Carolina

In the Matter James Conlan Lynch, Petitioner.

Appellate Case No. 2018-000248

ORDER

The records in the office of the Clerk of the Supreme Court show that on January 11, 2017, Petitioner was admitted and enrolled as a member of the Bar of this State. Currently, Petitioner is an inactive member of the Bar in good standing.

Petitioner has now submitted his resignation from the South Carolina Bar pursuant to Rule 409 of the South Carolina Appellate Court Rules. The resignation is accepted.

Within twenty (20) days of the date of this order, Petitioner shall surrender the certificate of admission to the Clerk of this Court. If Petitioner cannot locate this certificate, Petitioner shall provide the Clerk with an affidavit indicating this fact and indicating that the certificate will be immediately surrendered if it is subsequently located.

FOR THE COURT

BY s/ Daniel E. Shearouse
CLERK

Columbia, South Carolina

February 23, 2018

The Supreme Court of South Carolina

In the Matter of William Matthew Rogers, Petitioner

Appellate Case No. 2018-000247

ORDER

The records in the office of the Clerk of the Supreme Court show that on May 22, 2006, Petitioner was admitted and enrolled as a member of the Bar of this State. Currently, Petitioner is an inactive member of the Bar in good standing.

Petitioner has now submitted his resignation from the South Carolina Bar pursuant to Rule 409 of the South Carolina Appellate Court Rules. The resignation is accepted.

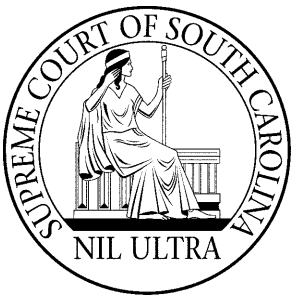
Within twenty (20) days of the date of this order, Petitioner shall surrender the certificate of admission to the Clerk of this Court. If Petitioner cannot locate this certificate, Petitioner shall provide the Clerk with an affidavit indicating this fact and indicating that the certificate will be immediately surrendered if it is subsequently located.

FOR THE COURT

BY s/ Daniel E. Shearouse
CLERK

Columbia, South Carolina

February 23, 2018



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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 9
February 28, 2018
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Betty Fisher, on behalf of the estate of Alice Shaw-Baker, Petitioner,

v.

Bessie Huckabee, Kay Passailaigue Slade, Sandra Byrd, and Peter Kouten, Respondents.

Appellate Case No. 2016-000320

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 27765
Heard October 19, 2017 – Filed February 28, 2018

AFFIRMED AS MODIFIED

John Hughes Cooper, of the John Hughes Cooper, P.C., of Mount Pleasant, Lisa Fisher, of the Law Offices of Lisa Fisher, of Long Beach, California, *pro hac vice*, both for Petitioner.

Evan Smith, of the Evan Smith Law Firm, LLC, of Charleston, and Warren W. Wills III, of the Law Office of W. Westbrook Wills III, of Folly Beach, both for Respondents.

JUSTICE FEW: The question we address in this appeal is who may bring a civil action on behalf of the estate of a deceased person when the personal representative

of the estate is also a potential defendant in the action. The answer is found in section 62-3-614 of our Probate Code, which provides, "A special administrator may be appointed . . . in circumstances where a general personal representative cannot or should not act."

I. Facts and Procedural History

Alice Shaw-Baker lived in Charleston and had no immediate family. She allegedly reached an agreement with Bessie Huckabee, Kay Passailaigue Slade, and Sandra Byrd that if they would care for her in her final years, she would leave them the assets of her estate. In her last will—executed in 2001—she left her entire estate to Huckabee, Slade, and Byrd, and named Huckabee the personal representative. Shaw-Baker died in February 2009 at the age of seventy-nine.

Betty Fisher is Shaw-Baker's niece and closest living relative. Shortly after Shaw-Baker's death, Fisher filed an action in probate court challenging the 2001 will and the appointment of Huckabee as personal representative. Fisher removed the probate action to circuit court. On May 14, 2009, Fisher filed what she called a "Motion for Temporary Injunction" in the probate action in which she requested to remove Huckabee as the personal representative. Fisher specifically alleged in the motion "Shaw-Baker's estate has a survival action against Huckabee" as one of the reasons Huckabee should be removed. As an alternative to the removal of Huckabee, Fisher requested that attorney Frank Barnwell be appointed special administrator pursuant to section 62-3-614 of the South Carolina Code (Supp. 2017). Fisher made no suggestion, however, that the special administrator might bring a survival action.

On February 24, 2012, purporting to act as Shaw-Baker's "real representative," Fisher brought this action in circuit court against Huckabee, Slade, and Byrd, and against Peter Kouten—a lawyer who represented the first three. Her primary allegation in this action is that Huckabee, Slade, and Byrd breached their duty to take suitable care of Shaw-Baker, causing Shaw-Baker to incur damages during her lifetime. Fisher brought the action under the survival statute—section 15-5-90 of the South Carolina Code (2005).

The defendants moved for summary judgment under Rule 56 of the South Carolina Rules of Civil Procedure, claiming Fisher did not have standing to bring the survival action. The record indicates the Motion for Temporary Injunction Fisher filed almost three years earlier was still pending in the probate action at the time the summary judgment motion was filed. However, Fisher never asked the circuit court—in the probate action or the survival action—to appoint a special

administrator for the purpose of bringing the survival action. The circuit court dismissed the action. The court of appeals affirmed. *Fisher v. Huckabee*, 415 S.C. 171, 781 S.E.2d 156 (Ct. App. 2015). We granted Fisher's petition for a writ of certiorari to review the dismissal of the action.

II. Analysis

The question of who may bring a civil action arises under Rule 17(a) of the South Carolina Rules of Civil Procedure, which provides, "Every action shall be prosecuted in the name of the real party in interest." As the court of appeals has recognized, the real party in interest is "'the party who, by the substantive law, has the right sought to be enforced.' It is ownership of the right sought to be enforced which qualifies one as a real party in interest." *Bank of Am., N.A. v. Draper*, 405 S.C. 214, 220, 746 S.E.2d 478, 481 (Ct. App. 2013). The substantive law governing the estates of deceased persons is the South Carolina Probate Code. *See generally* S.C. Code Ann. § 62-1-100(b)(1) (Supp. 2017) (providing "the [Probate] Code applies to any estates of decedents"); § 62-1-301 (Supp. 2017) (providing "this Code applies to (1) the affairs and estates of decedents . . . [and] (4) survivorship").

Under ordinary circumstances, the Probate Code grants the personal representative the exclusive authority to bring civil actions—including a survival action—on behalf of an estate. *See* § 62-3-715(20) (Supp. 2017) (stating a personal representative may "prosecute or defend claims . . . for the protection of the estate"); § 62-3-703(c) (Supp. 2017) (providing "a personal representative . . . has the same standing to sue and be sued . . . as his decedent had immediately prior to death"); § 62-3-715(24) (Supp. 2017) (stating a personal representative may "compromise and settle . . . all claims and actions based on causes of actions surviving, to personal representatives"); *see also Carson v. CSX Transp., Inc.*, 400 S.C. 221, 242, 734 S.E.2d 148, 159 (2012) (explaining "a survival claim may only be filed by the personal representative of the decedent's estate").

However, the Probate Code contemplates there will be "circumstances where a general personal representative cannot or should not act," in which case the Probate Code provides, "A special administrator may be appointed . . . ." § 62-3-614. The Reporter's Comment to section 62-3-614 explains, "Appointment of a special administrator would enable the estate to participate in a transaction which the general personal representative could not, or should not, handle because of conflict of interest."

The defendants' motion for summary judgment sought dismissal of the survival action on the premise Fisher did not meet the real party in interest requirement of Rule 17(a). The premise of the motion was correct because Fisher was neither the personal representative nor a special administrator. However, Rule 17(a) provides:

> No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed, after objection, for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

As the Reporter's Note to the rule states, this sentence "is intended to prevent forfeiture in those cases in which the determination of the proper party to sue is difficult or when there has been an honest mistake." *See also* 6A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1541 (3d ed. 2010) (this sentence of Rule 17(a) was added "to provide that the failure to join the real party in interest at the commencement of the action does not require dismissal").

Therefore, Rule 17(a) provided Fisher an opportunity to cure her failure to meet the real party in interest requirement. If she had asked, the circuit court would have been required to allow time for "ratification, joinder, or substitution" of the proper party under Rule 17(a) instead of immediately dismissing the action. However, Fisher did not ask for such time, and specifically, she never asked the circuit court to consider whether a special administrator should be appointed under section 62-3-614, nor did she mention her pending motion in the probate action to appoint one. Under this circumstance, Rule 17(a) permitted the dismissal of the action. *Cf. Patton v. Miller*, 420 S.C. 471, 488-89, 804 S.E.2d 252, 261 (2017) (holding "the circuit court . . . erred by dismissing Patton's claims . . . [because] she did specifically ask to take advantage of . . . 'ratification, joinder, [or] substitution'").

This case was litigated in confusion from the beginning. Fisher filed her complaint in what she claimed was her capacity "as Real Representative for Alice Shaw-Baker." The term "real representative" is found in the survival statute, which provides, "Causes of action for and in respect to any and all injuries and trespasses to and upon real estate and any and all injuries to the person or to personal property shall survive both to and against the personal or real representative, as the case may

be, of a deceased person . . . ." § 15-5-90. The circuit court, and later the court of appeals, analyzed the issue as whether Fisher qualified as Shaw-Baker's real representative. Neither court considered Rule 17(a). Although the result the courts reached was not erroneous, the analysis was misplaced.

The confusion and misplaced analysis arose from the fact that our statutes contain terms that no longer have the same significance under modern law they had when they were originally used. For example, section 15-51-20 of the Wrongful Death Act provides, "Every [wrongful death] action shall be brought by or in the name of the executor or administrator of such person." S.C. Code Ann. § 15-51-20 (2005). Prior to the enactment of our Probate Code, the terms "executor" and "administrator" had specific meaning, and an "action for wrongful death . . . [could] be brought only by the executor or administrator of such deceased person." *Glenn v. E. I. DuPont De Nemours & Co.*, 254 S.C. 128, 133, 174 S.E.2d 155, 157 (1970). Under the Probate Code, however, the terms "executor" and "administrator" do not have separate meaning, but are included within the defined term "personal representative." *See* S.C. Code Ann. § 62-1-201(33) (Supp. 2017) (defining "Personal representative" as "includes executor, administrator, . . ."). Therefore, wrongful death actions must be brought by the personal representative, despite the language "shall be brought by . . . the executor or administrator" that still appears in section 15-51-20. *Cf. Rutland v. S.C. Dep't of Transp.*, 390 S.C. 78, 81, 700 S.E.2d 451, 453 (Ct. App. 2010) (explaining the personal representative brought the wrongful death action), *aff'd as modified*, 400 S.C. 209, 734 S.E.2d 142 (2012).

Similarly, the term "real representative"—whatever the term meant when the survival statute was enacted in 1892[1]—is no longer a meaningful term. Rather, the substantive right to bring a survival action—like a wrongful death action—is determined by the Probate Code. As the court of appeals recognized, "The real representative . . . is mentioned nowhere in the modern Probate Code." 415 S.C. at 179, 781 S.E.2d at 160. Under the Probate Code, the right to bring a survival action belongs initially to the personal representative. *Carson*, 400 S.C. at 242, 734 S.E.2d at 159. However, "in circumstances where a general personal representative cannot or should not act," the right to bring a survival action belongs to a special administrator. § 62-3-614.

The dissent makes a tempting argument that we should reverse the circuit court and remand, so Fisher may now seek appointment as a special administrator for the

[1] *See* Act No. 15, 1892 S.C. Acts 18.

purpose of bringing this action. Interestingly, Fisher does not make this argument. The argument, however, raises the valid question of who bears the responsibility of determining the identity of the real party in interest. To some extent, all participants in the litigation—including the trial court—share this responsibility. Here, the circuit court engaged Fisher in a discussion over who has the authority to bring the action, and suggested that Fisher turn to the probate court for guidance. Fisher declined. Ultimately, the circuit court is not responsible for doing the plaintiff's work, and the burden of compliance with Rule 17(a) and its real party in interest requirement falls to the plaintiff.

When the defendants' motion challenged whether Fisher complied with this requirement, she responded by continuing to maintain her legally flawed position. In other words, Fisher insisted that the validity of her claimed status be litigated, and she never contemplated changing her status to comply with Rule 17(a). Fisher chose the question for the court, and eventually, the court must rule on the question put before it. Fisher put to the circuit court, the court of appeals, and now this Court, the question of whether there is even such thing as a "real representative" under modern law. The Probate Code provides the answer to her question—"No."

In *Patton*, by contrast, the plaintiff responded to the defendants' motion by "specifically ask[ing]" to change her status through "'ratification, joinder, [and] substitution'" so she could address the defendants' claim she was not the real party in interest. 420 S.C. at 489, 804 S.E.2d at 261 (quoting Rule 17(a)). When the circuit court in that case refused to permit her to do so, the court committed legal error. 420 S.C. at 488, 804 S.E.2d at 261. Thus, the distinction between *Patton* and this case is that the plaintiff in *Patton* placed before the circuit court the Rule 17(a) question of whether she should be permitted to ratify, join, or substitute, while Fisher held firmly to her flawed position that she was right in the first place.

III. Conclusion

The Probate Code defines who may act on behalf of the estate of a deceased person. The Probate Code, therefore, is the substantive law by which the identity of the "real party in interest" is determined for all civil actions brought on behalf of the estate of a deceased person. When the personal representative of the estate cannot or should not bring the lawsuit, a "special administrator" should be appointed pursuant to section 62-3-614. After the defendants challenged Fisher's status as the real party in interest, she did not ask for "a reasonable time . . . for ratification . . . or joinder or substitution." In that circumstance, Rule 17(a) provides for dismissal, and the circuit court did not err.

We **VACATE** that portion of the court of appeals' opinion discussing "real representative," and **AFFIRM** the court of appeals **AS MODIFIED**.

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

JUSTICE HEARN: Respectfully, I dissent as I believe the proper approach is to reverse and remand to the circuit court for consideration of whether a special administrator should be appointed to bring this action. While I agree with the majority's legal analysis of the terms "real representative" and "special administrator," and that Petitioner should have filed a motion to have a special administrator appointed, I part company with the majority's ultimate conclusion that dismissal is warranted because Petitioner failed to specifically request this relief.

The majority rightfully highlights the confusion that has plagued this case from the beginning. The particular posture of the parties and the fact that the term "real representative" still exists throughout our statutory framework contributed to the confusion and may explain, at least in part, why Petitioner failed to bring this action in the name of the real party in interest. However, holding this misapprehension fatal to Petitioner's case is a harsh result that is not required by our rules. Instead, I would hold that Rule 17(a), SCRCP, specifically allows the proper party to assume prosecution of this case. Rule 17(a), SCRCP ("No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed…."); *Patton v. Miller*, 420 S.C. 471, 487, 804 S.E.2d 252, 260 (2017) ("Under the Rules of Civil Procedure, however, it is improper to immediately dismiss a lawsuit simply because it was not brought in the name of the real party in interest."). Moreover, remanding this case to permit Petitioner to seek an appointment of a special administrator is in keeping with our general rules of construction. *See Russell v. City of Columbia*, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991) ("Our courts have held that pleadings in a case should be construed liberally so that substantial justice is done between the parties."). Although Petitioner did not specifically ask the circuit court to appoint a special administrator, the continued use of the term "real representative" in the survival statute appears to make this request unnecessary. Only today, with this opinion, does this Court clarify that the term "real representative" is no longer legally viable in actions like this.

Furthermore, there can be no question that Petitioner was seeking to pursue a survival action, thus warranting the appointment of a special administrator because the real party in interest—the personal representative—was the defendant. *Patton*, 420 S.C. at 489, 804 S.E.2d at 261 ("[T]he Rules were never intended to trap a party simply for not using the proper words or rule number to describe the applicable legal principal."). Because a remand has no effect on the merits of the underlying claim, any prejudice to the defendants would be minimal. *Id.* at 492, 804 S.E.2d at 263 ("While permitting the amendment would cause the defendants to face the merits of the amended claim, the defendants' opportunity to defend the claim on the merits

was no different than it would have been if [Petitioner] had originally brought the claim in [the proper] capacity.").

I believe that the clear import of Rule 17(a), SCRCP, together with our jurisprudence favoring the resolution of suits on their merits, point to a different result than that reached by the majority. *Id.* at 488, 804 S.E.2d at 261 ("The purpose of [Rule 17(a), SCRCP] is to avoid precisely what occurred here—the unnecessary procedural dismissal of a lawsuit the court should resolve on the merits. As the Reporter's Note to the rule indicates, this sentence 'is intended to prevent forfeiture in those cases in which the determination of the proper party to sue is difficult or where there has been an honest mistake.'"). To deny Petitioner the relief she seeks here, where there is no suggestion that her failure to use the correct nomenclature was anything other than an honest mistake, elevates form over substance and unnecessarily deprives her of her right to have this matter heard on its merits. Therefore, I would reverse and remand for the circuit court to consider whether a special administrator should be appointed.

BEATTY, C.J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

David Zackary Ledford, Respondent.

Appellate Case No. 2016-000791

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Greenwood County
Eugene C. Griffith Jr., Circuit Court Judge

Opinion No. 27766
Heard September 27, 2017 – Filed February 28, 2018

APPEAL DISMISSED

Attorney General Alan McCrory Wilson and Senior Assistant Deputy Attorney General John Benjamin Aplin, both of Columbia; and Solicitor David Matthew Stumbo, of Greenwood, for Petitioner.

Clarence Rauch Wise, of Greenwood, for Respondent.

JUSTICE JAMES: David Zackary Ledford was indicted for inflicting great bodily injury upon a child. The jury was sworn, and the case was tried up to the point of the charge conference between the trial court and the attorneys. During the charge conference, the State objected to the trial court's decision to give a jury charge proposed by Ledford. The trial court overruled the objection, and the State filed a notice of appeal. The court of appeals promptly dismissed the State's appeal, finding the issue raised was not immediately appealable. We affirm the court of appeals and dismiss the State's appeal.

FACTUAL AND PROCEDURAL HISTORY

David Zackary Ledford and Brianna Dickey (Mother) are the parents of a minor child (Child). In December 2013, Mother was not feeling well, and Ledford watched Child so Mother could go to the doctor. Shortly thereafter, Mother received a call from Ledford explaining Child was choking and not breathing. EMS transported Child to the hospital, and she remained hospitalized for approximately three weeks. At the time of the incident, Child was approximately three and a half months old. The State's theory was that Ledford violently shook and/or hit Child, causing great bodily injury. Ledford's theory was that he non-violently shook Child in an attempt to revive her after she made a "gurgling choking sound" and "went limp."

Ledford was indicted for inflicting great bodily injury upon a child—a violation of section 16-3-95 of the South Carolina Code (2015). The applicable portion of the statute does not set forth a specific level of intent the State must prove.[1] However, the indictment stated Ledford "willfully and unlawfully inflict[ed] great bodily injury upon a child."

On November 2, 2015, the case went to trial before a jury. The jury was empaneled and sworn, and following the conclusion of the presentation of evidence, Ledford submitted his requested jury charges to the trial court. One of Ledford's requested jury charges stated:

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[1] Section 16-3-95(A) provides: "It is unlawful to inflict great bodily injury upon a child." Section 16-3-95(C) defines "great bodily injury" as "bodily injury which creates a substantial risk of death or which causes serious or permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ."

> "It is unlawful to inflict great bodily injury upon a child." To violate this statute, the [S]tate is required to prove that [Ledford] acted wil[l]fully. To act wil[l]fully, the [S]tate is required to prove that [Ledford] knew his act would inflict great bodily injury upon a child. It is not sufficient that the [S]tate prove that he acted negligently, grossly negligent[ly] or reckless[ly] in his action. Such actions are not wil[l]ful as alleged in the indictment.

Ledford explained his requested jury charge included the term "willfully" because the indictment alleged he "willfully" inflicted great bodily injury upon a child. He asserted that because the State included this level of intent in the indictment, the State was required to prove to the jury he committed the crime "willfully." The State objected to the proposed jury charge, arguing the jury charge added an element to the offense that was not in the statute.

The trial court determined Ledford's requested jury charge—except for the last sentence—was appropriate. Before the trial court could charge the jury, the State filed its notice of appeal with the court of appeals. The court of appeals promptly dismissed the State's appeal, ruling the trial court's decision to give the disputed jury charge was not immediately appealable. We granted certiorari to review the court of appeals' order of dismissal.

DISCUSSION

The State argues the trial court's ruling was immediately appealable because the ruling was based upon legal error that heightened its burden of proof and materially impaired its ability to proceed after all of its evidence was presented. The State contends the trial court's ruling was patently erroneous and that the court of appeals failed to consider the unusual circumstances presented and the novel question of law presented in pursuit of this interlocutory appeal. We conclude the court of appeals correctly dismissed the appeal.

"The right of appeal arises from and is controlled by statutory law." *Hagood v. Sommerville*, 362 S.C. 191, 194, 607 S.E.2d 707, 708 (2005). Rule 201(a) of the South Carolina Appellate Court Rules provides in pertinent part, "Appeal may be taken, as provided by law, from any final judgment, *appealable order or decision*." Rule 201(a), SCACR (emphasis added). The determination of whether a party may appeal an order issued before or during trial is governed primarily by section 14-3-

330 of the South Carolina Code. *Hagood*, 362 S.C. at 195, 607 S.E.2d at 708. Section 14-3-330(2) permits an immediate appeal in a law case from:

> An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action[.]

S.C. Code Ann. § 14-3-330(2) (2017). "The provisions of section 14-3-330, including subsection (2), have been narrowly construed, and the immediate appeal of orders issued before or during trial generally has not been permitted." *State v. Wilson*, 387 S.C. 597, 601, 693 S.E.2d 923, 925 (2010). In *State v. McKnight*, 287 S.C. 167, 168, 337 S.E.2d 208, 209 (1985), we held that "[a] pre-trial order granting the suppression of evidence which significantly impairs the prosecution of a criminal case" is immediately appealable under section 14-3-330(2). We have never extended the right of appeal to an adverse mid-trial ruling.

In the instant case, we hold the State's issue is not immediately appealable. An immediate appeal from a mid-trial ruling on a proposed jury charge is a different animal from an immediate appeal from a pre-trial evidentiary ruling which materially hampers the State's prosecution of a case. Section 14-3-330(2) requires the State to show that the trial court's decision to charge "willfulness" to the jury "in effect determines the action." The State simply has not made that showing. The trial court's decision to give the disputed charge might make it more difficult for the State to prove its case; however, it does not foreclose the possibility that the jury could find Ledford acted willfully in inflicting great bodily injury upon Child. Therefore, the trial court's decision to give the disputed charge did not in effect determine the action.

We acknowledge that if the appeal is dismissed, the State will have no opportunity for appellate review of the propriety of the disputed jury charge. If the jury were to return a verdict of acquittal, the State would not be able to appeal the trial court's jury charge. *See State v. Tillinghast*, 375 S.C. 201, 203, 652 S.E.2d 400, 401 (2007) (providing the State may not appeal from an acquittal when raising a question of law). However, the State's argument stands true for any objection the State may have to any ruling made by the trial court during trial. There are countless situations in which a trial court's mid-trial ruling could make the State's prosecution

of its case more difficult, and the State would still be prohibited from appealing the trial court's decision if the jury returned a verdict of acquittal. If we were to adopt the State's reasoning, the State would conceivably be permitted to appeal any adverse mid-trial ruling on the ground the State would not be able to appeal the ruling following a verdict of acquittal. Section 14-3-330(2) cannot be interpreted to permit such appeals to go forward, as such an interpretation would result in the trial process becoming an unmanageable "stop-and-start" enterprise.

CONCLUSION

We hold the trial court's decision to charge a "willful" level of intent was not immediately appealable.[2] Therefore, we affirm the court of appeals and dismiss the State's appeal.

APPEAL DISMISSED.

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

[2] As we have affirmed the court of appeals' dismissal of the appeal, we do not decide: (1) the applicable level of intent the State must prove under section 16-3-95 of the South Carolina Code; (2) whether the trial judge was correct in ruling a charge on willfulness is appropriate in this instance; and (3) the logistical and other issues that may arise from the resumption of this trial.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Marshall Heath Collins, Respondent,

v.

State of South Carolina, Petitioner.

Appellate Case No. 2014-002397

ON WRIT OF CERTIORARI

Appeal From Pickens County
James R. Barber, III, Circuit Court Judge

Opinion No. 27767
Submitted May 15, 2017 – Filed February 28, 2018

REVERSED

Attorney General Alan M. Wilson and Assistant Attorney General Karen C. Ratigan, both of Columbia, for Petitioner.

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

CHIEF JUSTICE BEATTY: A jury convicted Marshall Collins of

trafficking methamphetamine (third offense), and possession of a weapon during the commission of a violent crime.[1] The trial judge sentenced Collins to an aggregate twenty-five years' imprisonment. The Court of Appeals affirmed. *State v. Collins*, Op. No. 2012-UP-356 (S.C. Ct. App. filed June 13, 2012). Subsequently, Collins filed a timely application for Post-Conviction Relief ("PCR"). After a hearing, the PCR judge issued an order granting Collins a new trial. This Court granted the State's petition for a writ of certiorari to review whether the PCR judge erred in finding trial counsel was ineffective in failing to request a continuance and failing to properly handle an expired plea offer. We reverse.

I. Factual/Procedural History

On October 2, 2009, at approximately 1:30 a.m., Officer Joshua Blair, from the Pickens Police Department, stopped Collins for driving a vehicle with a faulty tag light. According to Officer Blair, Collins claimed he did not have his license, but gave Officer Blair a false name and date of birth. As Officer Blair was checking the information, Collins fled on foot with a backpack. Officer Blair gave pursuit and eventually apprehended Collins.

When Officer Joseph Sapp arrived on the scene, he placed Collins in handcuffs without removing Collins' backpack. A search of the backpack revealed a handgun, methamphetamine, and numerous individual packages of Alprazolam and Oxycodone. Thereafter, Collins was charged with trafficking more than ten grams of methamphetamine, PWID Alprazolam, PWID Oxycodone, and possession of a weapon during the commission of a violent crime.

The trial proceedings began on December 1, 2010. Prior to the start of trial, Collins' trial counsel informed the trial judge that the solicitor had just served Collins with a copy of the November 23, 2010, indictment for the weapons charge. Counsel stated, "on a possession of a firearm during [the] commission of a violent crime, that indictment was just served on my client less than five minutes ago. So he's never been arraigned on that." Trial counsel admitted he received a copy of the indictment the week before trial, but maintained he was just the "mouthpiece" and that Collins' constitutional rights were at stake.

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[1] The jury could not reach a unanimous verdict on indictments for possession with intent to distribute (PWID) Alprazolam and Oxycodone.

In response, the solicitor produced an email he sent to trial counsel on November 12, 2010, explaining that he would submit the indictment for the weapons charge to the grand jury. The solicitor's email further stated, "[i]f the [g]rand [j]ury indicts, I will call the case, along with the pending drug charges at the 11/29/10 term. There is no additional discovery to be had as the information previously given over to you on the other cases contains the required information on the proposed weapons charge." According to the solicitor, he sent trial counsel a copy of the indictment returned by the grand jury on November 23, 2010, and had a signed receipt indicating counsel received the discovery materials. Additionally, the solicitor noted that the "purpose of the arraignment process . . . is to put the Defendant on notice." Further, the solicitor maintained he could have had Collins arrested, but noticed counsel instead.

Thereafter, the trial judge arraigned Collins on the offense of possession of a weapon during the commission of a violent crime. The judge asked trial counsel if he was ready to proceed on all charges, to which, trial counsel responded "[m]y focus in preparing for trial was not on this charge." The court then stood at recess so that trial counsel could speak with Collins about the weapons charge. After the break, the trial judge asked trial counsel, again, if he had spoken to Collins and was prepared to go forward on the weapons charge. Counsel responded, "[y]es, sir. And it was part of the discovery. It just [sic] - - I can try." Furthermore, counsel noted for the record that he objected to proceeding on the weapons charge because he did not think the "process" was proper.

Despite trial counsel's objection, the trial proceeded on all charges and the jury convicted Collins of trafficking more than ten grams of methamphetamine, and possession of a weapon during the commission of a violent crime. The trial judge sentenced Collins to an aggregate twenty-five years' imprisonment. The Court of Appeals affirmed. *State v. Collins*, Op. No. 2012-UP-356 (S.C. Ct. App. filed June 13, 2012). Subsequently, Collins filed a timely application for PCR.

At the PCR hearing, Collins alleged that trial counsel was ineffective because he failed to request a continuance and to properly handle an expired plea offer. In regards to the expired plea offer, Collins testified he was appointed Robert Newton, a public defender, in February of 2010. However, according to Collins, "Mr. Newton had relinquished his time with the public defender service[.]" Collins maintained he

reapplied for counsel in August of 2010 and was appointed trial counsel. Collins met with trial counsel for the first time on October 19, 2010, and a second time in early November 2010. During the second meeting, counsel went over discovery and showed Collins the expired plea offer, which was addressed to Newton.[2] Collins asserted he had never seen the offer before his second meeting with trial counsel. When asked if he ever told trial counsel that he wanted to plead guilty, Collins claimed he told counsel he wanted more information before he decided. Additionally, Collins acknowledged trial counsel indicated he would attempt to negotiate the trafficking charge.

In response, trial counsel confirmed that he was Collins' second attorney. Upon receiving Collins' file, counsel made the usual discovery motions and reviewed the discovery materials with Collins. Counsel admitted that he had received the plea offer, but explained the plea offer expired before he was appointed to represent Collins. Trial counsel testified the second page of the letter proposed an aggregate sentence of fifteen years' imprisonment "at eighty-five percent" in exchange for pleas to "trafficking, third offense; possession of meth, third offense; and unlawful neglect of a child." The letter stated that, if the offer was not accepted before June 21, 2010, any other offers would be withdrawn and the case would be placed on the trial calendar with no further negotiation. Trial counsel "fe[lt] certain" he not only talked to Collins about the expired plea offer, but also followed up with the solicitor. However, counsel could not recall the solicitor's response.

Next, Collins asserted trial counsel was ineffective in failing to request a continuance after Collins was served with the indictment for the weapons charge on the morning of trial. Collins argued that, prior to being served, he had no knowledge he would be going to trial for the weapons charge. When asked whether he ever

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[2] Only the first page of the letter was entered into evidence. The letter lists charges for (1) "Drugs / Trafficking in ice, crack or crack - 10 g or more, but less than 28 g - 1st offense," (2) "Children / Legal custodian, unlawful neglect of child or helpless person," and (3) "Drugs /Possession of less than one gram of meth or cocaine base, 3rd or sub." As part of the plea, the State agreed to dismiss charges under four different warrants for (1) forgery, (2) the manufacture or possession of Schedule IV drugs, except flunitrazepam, with the intent to distribute - 1st offense, (3) MDP narcotic drugs, LSD and cocaine, and (4) possession of other controlled substances in Schedule I to V - 2nd or subsequent offense.

instructed trial counsel to request a continuance, Collins maintained that counsel knew he "was not comfortable." Further, Collins made clear that trial counsel did "stress[] on the record [his objection] to having to try [the weapons charge]." Collins also acknowledged he went over all discovery with trial counsel and that he told counsel his version of what happened the night he was arrested.

In response, trial counsel confirmed that Collins was not served with the indictment for the weapons charge until the morning of trial. Counsel testified that he objected, but "in spite of or because of my objection, we moved forward on the charge." Although counsel admitted that he did not ask for a continuance, he noted that he "tried to keep it out." When asked if, in retrospect, he should have sought a continuance, counsel explained he did not think that he would have because, "although the firearm [charge] obviously carried a five-year penalty, it certainly was not the major problem we were facing." Counsel could not recall whether or not his discovery materials indicated a gun had been recovered. Nonetheless, trial counsel testified he and Collins reviewed the discovery materials, elements of the charges, and penalties. According to trial counsel, he had adequate time (two months) to prepare for trial, and noted, "it was not a complicated case."

Granting Collins' application, the PCR judge concluded trial counsel was ineffective for not requesting a continuance and Collins "[met] his burden of proving trial counsel did not properly handle the issue of the expired plea recommendation." The State appealed.

This Court granted the State's petition for a writ of certiorari to review whether the PCR judge erred in finding trial counsel was ineffective in failing to request a continuance and failing to properly handle an expired plea offer.

II. Standard of Review

"This Court gives great deference to the factual findings of the PCR court and will uphold them if there is any evidence of probative value to support them." *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). "Questions of law are reviewed *de novo*, and we will reverse the PCR court's decision when it is controlled by an error of law." *Id.*

III. Discussion

A. New Indictment

1. Arguments

The State asserts the PCR judge erred in finding trial counsel was ineffective when he failed to request a continuance after the indictment for the weapons charge was served upon Collins the morning of trial. The State maintains there is no probative evidence to support the finding that trial counsel was deficient. Furthermore, the State argues Collins failed to demonstrate he was prejudiced by the lack of a continuance. Specifically, the State contends Collins failed to provide any evidence of what trial counsel could have investigated or prepared with additional time to consider the weapons charge. We agree.

2. Analysis

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984); *Lomax v. State*, 379 S.C. 93, 665 S.E.2d 164 (2008). To overcome the presumption that counsel has rendered adequate assistance, the defendant must show: (1) counsel's performance was deficient, falling below an objective standard of reasonableness; and (2) counsel's deficient performance prejudiced the defendant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

a. *Deficient Performance*

Without making a finding on credibility, the PCR judge held Collins demonstrated trial counsel was deficient in failing to request a continuance. The PCR judge noted that, while Collins faced a significant amount of time in prison, trial counsel only represented Collins for six weeks and only met with Collins twice prior to trial. Consequently, the PCR judge determined "[n]either trial counsel nor [Collins] had sufficient time to prepare a defense for the new charge." As a result, the PCR judge concluded Collins suffered prejudice from the lack of a continuance.

Initially, we emphasize that "[t]he brevity of time spent in consultation with a

defendant alone is not indicative of inadequate trial preparation." *Harris v. State*, 377 S.C. 66, 75, 659 S.E.2d 140, 145 (2008). Here, counsel's performance was not deficient for several reasons. First, although counsel admitted he did not ask for a continuance, counsel did seek to keep the weapons charge out on the ground that Collins had not received proper notice. Second, trial counsel acknowledged he was aware of the solicitor's intentions to send the weapons charge to the grand jury as a direct presentment. Third, counsel believed he had enough time to consult with Collins and prepare for trial on the weapons charge adding, "it was not a complicated case." Finally, trial counsel maintained that, even in retrospect, he was unsure he would have requested a continuance given the weapons charge was not the major problem.

Ultimately, had counsel prevailed on his argument for trial not to proceed on the weapons charge, the result would have been a continuance. In other words, counsel made an argument for a continuance without formally requesting one. Therefore, we find trial counsel's performance did not fall below an objective standard of reasonableness and, as a result, the record does not contain any evidence of probative value sufficient to support the PCR judge's findings. *Sellner*, 416 S.C. at 610, 787 S.E.2d at 527.

b. *Prejudice*

However, even if counsel was deficient, we find Collins failed to prove he was prejudiced. According to the prejudice prong of the *Strickland* analysis, the PCR applicant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." *Id.*

As stated above, trial counsel testified he had adequate time to prepare for Collins' trial. More importantly, at the PCR hearing, neither Collins nor trial counsel suggested how additional preparation on Collins' behalf would have resulted in a different outcome. Collins presented no witnesses or any specific testimony establishing what, if any, evidence would have aided his defense if he had additional time to prepare for trial. *See Jackson v. State*, 329 S.C. 345, 353–54, 495 S.E.2d 768, 772 (1998) (holding that where PCR applicant failed to present any evidence of what counsel could have discovered or what other defenses he would have

requested counsel pursue had counsel more fully prepared for the trial, applicant failed to show his counsel's lack of preparation prejudiced him); *Skeen v. State*, 325 S.C. 210, 214–15, 481 S.E.2d 129, 132 (1997) (finding applicant was not entitled to PCR where there was no evidence presented at the PCR hearing to show how additional preparation would have had any possible effect on the result of the trial). Thus, not only was counsel on notice of the charge, but also, had the trial judge sustained his objection, the result would have been the same as a continuance—a delay in the trial proceedings. [3]

Based on the foregoing, we hold trial counsel's failure to request a continuance did not constitute deficient performance. Further, even if trial counsel was deficient, we find Collins failed to demonstrate any resulting prejudice. Because there is no evidence in the record to support a finding that counsel was ineffective, we reverse the PCR judge's decision on this issue.

B. Expired Plea Offer

1. Arguments

Next, the State contends the PCR judge erred in finding trial counsel was ineffective in his handling of the expired plea offer. The State maintains Collins failed to demonstrate trial counsel was deficient where the State made a plea offer while Collins was represented by his first attorney, and that plea offer expired three months before trial counsel was appointed to represent Collins. Furthermore, the State argues that, because plea bargaining is not a constitutional right, trial counsel was not under any obligation to have asked for reinstatement of the expired plea offer.

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[3] We note that had counsel requested a continuance formally, the trial judge's ruling likely would have remained the same due to the charge stemming from the same set of facts. After Collins' arraignment on the weapons charge, trial counsel, to no avail, moved to suppress the gun and the drugs which were all recovered from Collins' backpack. Collins testified at the PCR hearing that he did not have any issue with the suppression hearing. Further, counsel acknowledged that a suppression hearing was held, but that he could not think of anything he could have argued differently. Consequently, the PCR judge found Collins "failed to meet his burden of proving trial counsel did not properly argue his motion to suppress."

Even if trial counsel was deficient, the State contends Collins failed to prove he suffered any prejudice. The State maintains that, because Collins failed to demonstrate that he would have accepted the expired offer and that the State would not have rescinded it, Collins has failed to prove prejudice. We agree.

2. Analysis

The United States Supreme Court has held that "defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." *Missouri v. Frye*, 566 U.S. 133, 145 (2012). Generally, where defense counsel does not communicate such an offer to the defendant, counsel has rendered ineffective assistance. *Id.*

a. *Deficient Performance*

In granting Collins relief on this ground, the PCR judge found Collins "[met] his burden of proving trial counsel did not properly handle the issue of the expired plea recommendation." Specifically, the PCR judge noted that, although the plea offer expired before trial counsel represented Collins, "[Collins] said he was unsure about many of the charges contained in the offer and that he 'wanted more information' before he could have made an intelligent decision as to whether he should have accepted the offer." As a result, the PCR judge concluded Collins was prejudiced by trial counsel's representation.

As a threshold matter, Collins does not cite any authority that imposes a duty on trial counsel to revive an expired plea offer. Further, the decision whether to revive the expired plea offer rested exclusively with the solicitor. *See State v. Langford*, 400 S.C. 421, 436 n.6, 735 S.E.2d 471, 479 n.6 (2012) (stating "[u]ndoubtedly, the solicitor has discretion in choosing how to proceed with a case, including whether to prosecute in the first place and whether he brings it to trial or offers a plea bargain"); *see also Weatherford v. Bursey*, 429 U.S. 545, 561 (1977) (finding "there is no constitutional right to plea bargain; the prosecutor need not do so if he prefers to go to trial").

Here, Collins admitted that he first learned of the expired plea offer after trial counsel brought the offer to his attention. At that point, in regards to a plea offer

that has expired, trial counsel did all that he could. Even assuming trial counsel neglected to discuss the expired offer with the solicitor, the solicitor would have been under no obligation whatsoever to revive the expired offer. Thus, there is no evidence of probative value sufficient to support the PCR judge's finding that trial counsel was deficient in his handling of the expired plea offer.[4]

b. *Prejudice*

As previously mentioned, even if counsel was deficient, we find Collins failed to prove he was prejudiced. To show prejudice under *Strickland*, a defendant must demonstrate a reasonable probability that: (1) he "would have accepted the earlier plea offer had [he] been afforded effective assistance of counsel;" (2) "the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it;" and (3) "the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time." *Frye*, 566 U.S. at 147; *see Lafler v. Cooper*, 566 U.S. 156, 164 (2012) (stating "a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed").

Here, Collins proceeded to trial rather than plead guilty. At the PCR hearing, Collins testified only that after he became aware of the expired plea offer, he told trial counsel he wanted more information about the offer. Consequently, the record is void of any testimony that Collins expressed a desire to accept the expired offer. More importantly, even if Collins wanted to plead guilty, there is no evidence or testimony from the solicitor that the expired offer was still available before trial, nor is there any evidence or testimony that a new offer existed for Collins to accept. Thus, Collins failed to demonstrate a reasonable probability that he would have accepted any offer, new or expired. *See Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (holding the PCR applicant bears the burden of proving the allegations in their application). Therefore, we conclude the record does not support

[4] Frankly, we believe Collins' issue lies with his first attorney.

the PCR judge's finding that Collins suffered any prejudice from trial counsel's handling of the expired plea offer.

IV. Conclusion

Based on the foregoing, we find trial counsel was not deficient for failing to request a continuance, or in his handling of the expired plea offer. Additionally, we find Collins has failed to establish prejudice resulting from either alleged deficiency. Accordingly, we reverse the PCR judge's decision.

REVERSED.

KITTREDGE, HEARN and JAMES, JJ., concur. FEW, J., concurring in a separate opinion.

JUSTICE FEW: I concur in the majority opinion. I write separately to address the performance of Collins' first counsel. *See supra* note 4. Collins' PCR counsel did not mention first counsel's performance, and the PCR court did not make findings of fact as to first counsel. Thus, we cannot tell whether first counsel informed Collins of the plea offer in time for Collins to accept it before the offer expired. If first counsel did not inform Collins, however, he was clearly deficient. In any event, Collins could not prove prejudice arising from first counsel's performance because—as explained by the majority as to trial counsel—Collins failed to demonstrate he would have accepted the plea offer.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Lamont Antonio Samuel, Petitioner.

Appellate Case No. 2015-002401

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Orangeburg County
The Honorable Diane Schafer Goodstein, Circuit Court Judge

Opinion No. 27768
Heard March 1, 2017 – Filed February 28, 2018

REVERSED AND REMANDED

Appellate Defender Robert M. Pachak, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General J. Robert Bolchoz, Assistant Deputy Attorney General Donald J. Zelenka, Senior Assistant Attorney General W. Edgar Salter, III, all of Columbia,

and Solicitor David Michael Pascoe, Jr., of Orangeburg, for Respondent.

JUSTICE HEARN: In this case we clarify the proper scope of a circuit judge's inquiry under *Faretta*[1] when a criminal defendant knowingly, intelligently, and voluntarily waives his right to counsel and requests to proceed *pro se*. Prior to his trial for murder, Lamont Antonio Samuel moved to represent himself under *Faretta*. The circuit judge denied his motion, finding Samuel was lying about whether he had or would have access to legal coaching in preparation for trial. The court of appeals affirmed. *State v. Samuel*, 414 S.C. 206, 777 S.E.2d 398 (Ct. App. 2015). We now reverse.

FACTUAL/PROCEDURAL BACKGROUND

Samuel was indicted for the murder of his cousin, Taneris Hamilton. On the day his case was called to trial, Samuel indicated he was dissatisfied with defense counsel and made a *Faretta* motion to waive his right to counsel and proceed *pro se*. The circuit judge then properly initiated an *ex parte* hearing to discuss Samuel's *Faretta* motion with him.

Samuel informed the court that he was twenty-one years old and had graduated from high school with a 4.0 GPA in all honors classes with hopes of enlisting in the Navy as a diesel mechanic. Additionally, Samuel affirmed he understood he was charged with murder and was aware of the elements of the crime. He realized he could be sentenced to at least thirty years in prison, with a maximum possible sentence of life imprisonment without the possibility of parole. Samuel also indicated he had never been treated for drug or alcohol abuse, nor had he received assistance for mental or emotional health issues. Moreover, he had not taken any medication, drugs, or alcohol in the previous seventy-two hours. The judge noted she found Samuel to be "incredibly articulate" and "exceptionally bright;" nevertheless, she repeatedly told Samuel she had misgivings about his self-representation. Samuel thanked the judge for her advice, but reiterated his request to proceed *pro se*.

The circuit judge then inquired as to whether Samuel had any legal training.

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[1] 422 U.S. 806 (1975).

He responded that he had been studying trial procedures in the Criminal Law Handbook, which he had received in the mail while in prison. Samuel testified that his mother had sent him the book upon the advice of attorney Carl Grant. The circuit judge further questioned whether Samuel was familiar with the rules of evidence, motions *in limine*, and motions for directed verdict. Samuel affirmed that he was, based upon his study of the Criminal Law Handbook and coaching he had received from Grant. He also acknowledged he would be required to follow the rules of evidence if he were to represent himself, and that he had the right not to testify under the Fifth Amendment. Finally, the circuit judge asked Samuel if he was aware of any possible defenses he might have to the charge against him and, following some prompting questions by the judge, he acknowledged his intent to maintain his innocence based upon his co-defendant's alleged confession.

Rather than concluding the *Faretta* colloquy, the circuit judge continued to caution Samuel against representing himself, stating in her opinion Samuel would be far better defended by a trained lawyer, it would be unwise of him to waive his right to counsel, and she did not believe he was sufficiently familiar with the law, procedure, or rules of evidence to adequately represent himself. Despite the judge's warnings and in light of the potential penalties he faced, Samuel voluntarily reaffirmed his desire to dispense with the assistance of counsel and proceed *pro se*.

Nevertheless, the circuit judge continued her attempts to dissuade Samuel, asking "Do you know anything or anyone that I can have you speak with that might urge you to have a lawyer represent you?" Samuel responded,

> No, ma'am. . . . I mean, my mama, basically paid Mr. Grant a good bit amount [sic] of money. The reason why he couldn't represent me is because . . . his paralegal is related, you know, in some manner. So he had decided to just go over the steps with me day by day. I go through the trial, I got back to him. I talk to him, he'll tell me things or he won't -- he's not going to be in the courtroom, present. . . . I know he's not representing me, but he is coaching me on --.

The circuit judge then stated, "You're bright enough, educated enough. . . . You don't have a problem that I'm aware of that I can use, in all candor, to keep you from representing yourself." However, instead of ruling on Samuel's motion at that point, the circuit judge summoned Grant to question him on his relationship with Samuel. Nonetheless, prior to Grant's arrival, the judge stated on the record that her inclination was to allow Samuel to represent himself.

Upon his arrival, Grant testified as follows:

> I have no recollection of ever sharing with Ms. Betty Hickson, [Samuel's] mother, anything pertaining to any rules of evidence or rules in criminal procedure or anything like that. . . . The only discussion has been about the legal fees to represent this young man. . . . Also, I've not been retained. . . . I've not offered any assistance to anyone, Judge. I've not even given this young man any kind of copy of the rules of evidence or rules of criminal procedure or offered my assistance in any way. . . . [A]s far as my offering any assistance to him, Judge, number one, if he's representing himself I would not be available to provide any assistance to him in any capacity.

After hearing Grant's testimony, the circuit judge denied Samuel's request to proceed *pro se* citing Rule 3.3 of the Rules of Professional Conduct[2] and *Gardner v. State*, 351 S.C. 407, 412–13, 570 S.E.2d 184, 186–87 (2002) (including whether a defendant is attempting to delay or manipulate the proceedings as *one of ten* factors courts can consider when determining if a defendant "has a sufficient background to understand the dangers of self-representation"). Specifically, the circuit judge interpreted Samuel's and Grant's conflicting testimony to mean Samuel was lying to her and attempting to manipulate the proceedings.

Thereafter, Samuel proceeded to trial with his counsel and was found guilty and sentenced to fifty years imprisonment. He appealed his conviction, asserting the circuit judge erred in denying his right to self-representation, and the court of appeals affirmed. *Samuel*, 414 S.C. at 213, 777 S.E.2d at 402. This Court granted Samuel

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[2] Rule 3.3, Candor toward the Tribunal, reads in pertinent part:

(a) A *lawyer* shall not knowingly:
  (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

. . .

(d) In an *ex parte* proceeding, a *lawyer* shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Rule 3.3, RPC, Rule 407, SCACR (emphasis added).

a writ of certiorari to review the court of appeals' opinion.

STANDARD OF REVIEW

Whether a defendant has knowingly, intelligently, and voluntarily waived his right to counsel is a mixed question of law and fact which appellate courts review de novo. *United States v. Lopez-Osuna*, 242 F.3d 1191, 1198 (9th Cir. 2000). Specifically, we review a circuit judge's findings of historical fact for clear error; however, we review the denial of the right of self-representation based upon those findings of fact de novo. *United States v. Bush*, 404 F.3d 263, 270 (4th Cir. 2005). In doing so, this Court must consider the defendant's testimony, history, and the circumstances of his decision, as presented to the circuit judge at the time the defendant made his request. *United States v. Singleton*, 107 F.3d 1091, 1097 (4th Cir. 1997).

LAW/ANALYSIS

Through counsel, Samuel now argues the court of appeals erred in affirming the circuit judge's denial of his *Faretta* motion to proceed *pro se*. In particular, Samuel contends the circuit judge impermissibly exceeded the scope of the *Faretta* inquiry by considering Grant's testimony to conclude that Samuel was attempting to manipulate the proceedings, thereby precluding him from proceeding *pro se*. We agree.

In *Faretta*, the United States Supreme Court held that criminal defendants have a fundamental right to self-representation under the Sixth Amendment. 422 U.S. at 819–21. In order to effectively invoke this right of self-representation, the defendant must clearly and unequivocally assert his desire to proceed *pro se* and such request must be made knowingly, intelligently and voluntarily. *United States v. Frazier-El*, 204 F.3d 553, 558 (4th Cir. 2000). Where a defendant invokes his right of self-representation before trial, the only inquiry the circuit judge may undertake is that required by *Faretta*. *State v. Barnes*, 407 S.C. 27, 35, 753 S.E.2d 545, 550 (2014). Thus, the only basis upon which a circuit judge may deny a defendant's pre-trial motion to proceed *pro se* is if the court determines the defendant has not knowingly, intelligently, and voluntarily waived his right to counsel. *State v. Reed*, 332 S.C. 35, 41, 503 S.E.2d 747, 750 (1998). A circuit judge's denial of a defendant's knowing and voluntary request to proceed *pro se* is a structural error requiring automatic reversal and a new trial. *State v. Rivera*, 402 S.C. 225, 247, 741 S.E.2d 694, 705 (2013).

Whether a defendant has intelligently waived his right to counsel depends upon the particular facts and circumstances surrounding each case, including the background, experience, and conduct of the accused. *Singleton*, 107 F.3d at 1097. Moreover, as the United States Supreme Court has emphasized, "the competence that is required of a defendant seeking to waive his right to counsel is the competence to *waive the right*, not the competence to represent himself." *Godinez*, 509 U.S. at 399 (emphasis in original). In other words, whether a defendant is capable of effectively representing himself has no bearing upon his ability to elect self-representation. *Id.* at 400; *see also Faretta*, 422 U.S. at 836 (holding a defendant's "technical legal knowledge . . . [is] not relevant to an assessment of his knowing exercise of the right to defend himself"). Thus, this Court has held that

> [t]he ultimate test of whether a defendant has made a knowing and intelligent waiver of the right to counsel is not the trial judge's advice, but the defendant's understanding. A determination by the trial judge that the accused lacks the expertise or technical legal knowledge to proceed *pro se* does not justify a denial of the right to self-representation; the *only* relevant inquiry is whether the accused made a knowing and intelligent waiver of the right to counsel.

State v. Brewer, 328 S.C. 117, 119, 492 S.E.2d 97, 98 (1997) (internal citations omitted) (emphasis added).

Although a defendant's decision to proceed *pro se* may ultimately be to his detriment, such requests "must be honored out of that respect for the individual which is the lifeblood of the law." *Barnes*, 407 S.C. at 35–36, 753 S.E.2d at 550 (internal quotation omitted); *see also Frazier-El*, 204 F.3d at 558 (noting a defendant's right of self-representation generally must be honored, regardless of whether he would benefit from advice of counsel). Indeed, "[a] decision can be made intelligently, with an understanding of the consequences, without the decision itself being a wise one." *Reed*, 332 S.C. at 41, 503 S.E.2d at 750.

We agree with Samuel that the circuit judge erred in refusing to allow him to represent himself at trial. In this case, the circuit judge repeatedly noted how intelligent and articulate she found Samuel to be. Samuel also clearly expressed his understanding of the nature of the charge against him and the potential penalties he faced were he to be found guilty. He indicated he was making the request of his own volition and continuously asked to represent himself despite the circuit judge's persistent attempts to dissuade him. *See Reed*, 332 S.C. at 41, 503 S.E.2d at 750

(holding although it is the circuit judge's responsibility to inform the defendant of the dangers and disadvantages of self-representation, whether the judge believes the decision is prudent or wise is entirely irrelevant).

We acknowledge it was within the circuit judge's authority to summon Grant; however, her questioning of Grant should have been limited to discerning whether Samuel's request was knowingly and voluntarily made. Moreover, our standard of review requires us to consider de novo the circuit judge's application of Grant's testimony to Samuel's *Faretta* request. *Bush*, 404 F.3d at 270. We are unaware of any cases in which a circuit judge has relied on testimony from a third party witness, such as Grant, to determine whether a defendant has effectively invoked the right to proceed *pro se*. Moreover, whether Grant would be available to advise or coach Samuel throughout the trial[3] relates to his competence to represent himself which, as discussed *supra*, is entirely irrelevant to the issue of whether he effectively invoked his right of self-representation. *Godinez*, 509 U.S. at 399. Rather, it is clear the circuit judge, with the best of intentions, was so concerned with Samuel proceeding *pro se* that she went beyond the scope of the question at hand using Grant's testimony as the basis to prevent Samuel from invoking his constitutional right. We fully recognize the delicate balance a circuit judge must try to achieve in safeguarding a defendant's constitutional right to represent himself and the potential detrimental consequence of his self-representation. Nevertheless, because we find Grant's testimony irrelevant to the issue, the circuit judge erred in relying on it to deny Samuel's request to represent himself.[4]

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[3] We note both Samuel and Grant explicitly stated that Grant had not been hired as Samuel's attorney nor would he be representing Samuel at trial. Indeed, the only discrepancy between their recitations of the situation was regarding Grant's willingness and availability to provide advice and guidance to Samuel prior to and throughout the trial.

[4] Contrary to the dissent's charge, we do not strip trial judges of their authority and discretion to maintain the integrity of the proceedings before them. Rather, we simply view the initial *Faretta* request through a different lens than the dissent. As this Court has previously stated, at the time a defendant invokes his constitutional right to proceed *pro se* the only relevant inquiry is that outlined in *Faretta*—whether the defendant is knowingly, intelligently, and voluntarily waiving the right to counsel. *Brewer*, 328 S.C. at 119, 492 S.E.2d at 98. The sufficiency of such a request is a question of law for this Court to review de novo. *Bush*, 404 F.3d at

Moreover, we find the circuit judge's reliance on Rule 3.3 RPC and *Gardner* is misplaced. Not only has this Court never held that a criminal defendant acting *pro se* must comply with the rules of professional conduct, but we are unaware of any jurisdiction which has explicitly required criminal defendants to comply with ethical rules governing lawyers. Indeed, this Court has suggested, albeit in *dicta*, that the opposite may be true. *See State v. Barnes*, 413 S.C. 1, 3 n.1, 774 S.E.2d 454, 455 n.1 (2015) ("Even if we believe that a criminal defendant's exercise of his constitutional rights stem from impure motives, that motivation alone is not a basis to deny him these rights. Further, while it is unethical for an *attorney* to engage in conduct which tends to pollute the administration of justice (Rule 7(a)(5), Rule 413 SCACR), we are unaware that this principle applies to a criminal defendant." (emphasis added)).[5]

Finally, although *Gardner* permits a circuit judge to consider a defendant's

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270. However, once a defendant has been permitted to represent himself, the trial court has broad discretion to revoke that right for any of the reasons for which the dissent expresses concern. *West*, 877 F.2d at 285–86. Our holding does not require trial courts to suffer "mischief" or disruptive behavior in the courtroom with no recourse, but recognizes a defendant's constitutional right to self-representation may be lost when, in the trial court's discretion, he is disrupting or manipulating the trial of a case. Respectfully, however, that inquiry is separate from the issue we resolve today which focuses on the trial court's initial decision to permit a defendant to waive his right to counsel and proceed *pro se*.

[5] The Respondent suggests that our statement in *Barnes* may conflict with *United States v. West*, 877 F.2d 281 (4th Cir. 1989). We disagree. In *West*, the district court revoked the defendant's right of self-representation after the judge gave specific cautionary instructions immediately prior to the defendant's opening statement, which he promptly disregarded. *Id.* at 285–86. The Fourth Circuit Court of Appeals affirmed stating, "By asserting his right of self-representation, [the defendant] assumed the responsibility of acting in a manner befitting an officer of the court." 877 F.2d at 287. However, nothing in the *West* opinion suggests that criminal defendants should be bound by any specific rules applicable only to attorneys such that *Barnes* would conflict with its holding. Rather, in *West* the defendant blatantly disregarded the circuit judge's instructions, and it was due to his disregard for those rules that his right of self-representation was revoked. Therefore, we see no conflict between our position in *Barnes* and the Fourth Circuit's holding in *West*.

attempted manipulation of the proceedings, we discern no attempt by Samuel to disrupt or manipulate the process here. In most cases where a court has found a defendant to be manipulative, the defendant was clearly attempting to dispense with counsel in order to make impermissible arguments or raise invalid defenses at trial—in effect, to "beat the system"—rather than to waive the benefits of counsel. *See, e.g.*, *Frazier-El*, 204 F.3d at 560 (holding defendant's conduct manipulative where defendant repeatedly requested to replace his appointed counsel with another public defender, because his attorney would not present certain impermissible arguments, and it was clear his request to appear *pro se* was merely "a manipulative effort . . . to assert the defenses himself"). The only instance of manipulation the circuit judge cited was the disparate testimony from Samuel and Grant regarding their relationship. However, even if Samuel's testimony was misleading, this Court indicated in *Barnes* that a defendant's improper motive or unethical conduct is not enough to preclude him from exercising his right to self-representation. *See Barnes*, 413 S.C. at 3 n.1, 774 S.E.2d at 455 n.1. Therefore, we find Samuel made a knowing, intelligent, and voluntary request to proceed *pro se* as required by *Faretta*, and he should have been given the opportunity to represent himself.

CONCLUSION

For the foregoing reasons, we hold the circuit judge erred in denying Samuel's invocation of his right to self-representation under *Faretta*. Accordingly, we reverse the court of appeals' opinion and remand to the circuit judge for a new trial.

BEATTY, C.J. and Acting Justice J. Cordell Maddox, Jr., concur. KITTREDGE, J., dissenting in a separate opinion in which JAMES, J., concurs.

JUSTICE KITTREDGE: I respectfully dissent. The majority holds that "the only basis upon which a circuit judge may deny a defendant's pre-trial motion to proceed *pro se* is if the court determines the defendant has not knowingly, intelligently, and voluntarily waived his right to counsel." I certainly do not disagree in the abstract that an assertion of this right must be knowing, intelligent, and voluntary, and in the vast majority of cases, the majority's categorical approach will result in the proper outcome. But I construe the *Faretta*[6] framework more broadly to allow for a trial court's exercise of discretion where, as here, the knowingly, intelligently, and voluntarily asserted right of self-representation is accompanied by a circumstance that undermines the integrity of the proceedings and the orderly administration of justice. As a result, I would reject the majority's categorical rule that effectively precludes consideration of the trial court's exercise of discretion and places trial judges at the mercy of those who seek to exploit the right to self-representation for manipulative or disruptive ends.

In my judgment, this case illustrates the perplexing difficulties trial courts encounter when a defendant desires to proceed *pro se* and provides satisfactory, formulaic responses to the *Faretta* inquiry, yet the trial court perceives there is more at play. One of those difficulties occurs when a defendant's request to proceed *pro se* is motivated by a desire to manipulate the proceedings. According to the experienced trial judge, that is precisely what Petitioner was attempting to do. Review of such a fact-based determination necessarily involves consideration of the trial court's exercise of discretion and recognition that the trial judge was in a position to hear the accused and observe his demeanor. Because I am convinced there is evidence to support the trial court's finding, I would affirm.

More broadly, my concern is that the Court's categorical rule—that an absolute right to procced *pro se* automatically follows formulaic responses to *Faretta* inquiry—will invite mischief in the trial courts of this state while tying the hands of our trial court judges. Granted, in the vast majority of cases, requests to proceed *pro se* will be regularly and properly granted, but trial court discretion must always be present to address the particular circumstances of the case, such as where this right is asserted to serve manipulative, disruptive, or dilatory ends. Trial court discretion ensures the integrity of our justice system.

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[6] *Faretta v. California*, 422 U.S. 806 (1975).

I.

The record in this case reveals that in addition to being charged with murder, Petitioner was also charged with obstruction of justice for repeatedly giving false statements to police in which he identified an uninvolved person as the shooter; for snatching one of his written statements from an investigator's hand and ripping it up; and for lying to police when he claimed to have thrown a gun involved in the murder[7] into a nearby pond—a lie that caused three separate law enforcement agencies, including a dive team from Lexington County, to expend time and resources over several days searching the pond for a nonexistent gun.[8]

In asserting his right of self-representation, Petitioner expressed frustration with his appointed counsel because counsel refused to let Petitioner speak directly with the solicitor to provide what Petitioner believed to be exculpatory evidence—namely, letters from a codefendant which Petitioner believed constituted a written confession exonerating him. Petitioner explained that counsel's request to review the letters for incriminating statements before deciding whether they should be shared with the State was asinine because "Why would I give you something that incriminates me[?]" Petitioner further explained his belief that counsel's efforts to negotiate a guilty plea to a lesser included offense demonstrated counsel did not believe Petitioner was innocent and this caused Petitioner to question counsel's loyalty in defending him.

During a detailed *Faretta* inquiry, the trial court asked Petitioner whether he had ever studied the law. Petitioner responded that he had studied a criminal law handbook which he claimed was provided to his mother by a local attorney, Carl Grant. Shortly thereafter, Petitioner mentioned Mr. Grant again, explaining:

> [Petitioner]: I mean, my mama, basically paid Mr. Grant a good

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[7] Despite the majority's suggestion that Petitioner's co-defendant was the only "actual shooter," the record reveals that the victim was shot with three separate guns and that witnesses identified Petitioner and two other men as being responsible for the shooting.

[8] The obstruction of justice charge was nolle prossed following Petitioner's murder conviction.

bit of money. The reason why [Mr. Grant] couldn't represent me is because my family—I guess his paralegal is related, you know, in some manner. So he had decided to just go over the steps with me day by day. I go through the trial, I got back to him. I talk to him, he'll tell me things or he won't—he's not going to be in the courtroom, present.

The Court: Okay. And you know he's not representing you?

[Petitioner]: I know he's not representing me, but he is coaching me on—

The Court: I got you, but he's not representing you?

[Petitioner]: Oh, no, ma'am.

Following several further questions, the trial court appeared poised to grant Petitioner's motion. Then, Petitioner interrupted the trial court to make yet another reference to Mr. Grant:

The Court: Okay. Well, here's what I am going to do. You're bright enough, educated enough. You're not—you don't have a drug problem, you don't have an alcohol problem. You don't have a mental health problem. You don't have a problem that I'm aware of that I can use, in all candor, to keep you from representing yourself.

[Petitioner]: Ms. Goodstein—

The Court: You're bright enough.

[Petitioner]: I'd like to say something.

The Court: You understand your charges?

[Petitioner]: Yes, ma'am. I can say something to you?

The Court: Yeah.

[Petitioner]: I know, basically, you—what you're saying is that you're putting your neck on the line by you wouldn't want me to disappoint you. That's what's bringing me into this. My mama paying Carl Grant to come in and educate me, at the same time, just because he a lawyer, I mean, I went to school, I'm smart. I can catch onto the common sense—I won't put you down when we're going to trial . . . .

The Court: Here's what I'm going to do. I'm going to ask Mr. Grant to come over here.

[Petitioner]: Yes, ma'am.

The Court: Just because I want to—I just want to have a little bit of dialogue with him with you, also. . . . I want to understand a little bit about that relationship, okay.

[Petitioner]: Yes, ma'am.

The Court: So I'm going to go see if I can find him and have him come on over here and let's have a little bit of a dialogue, okay. . . . I'm inclined to allow you to represent yourself although there have been some communications between you and Carl Grant, and I have to understand what they are a little more fully, okay?

[Petitioner]: Yes, ma'am.

Neither defense counsel nor Petitioner contemporaneously objected to this procedure. After Mr. Grant arrived, the trial court explained, "I need for our record to reflect [] the relationship, the extent of it, and going forward for trial, what, if any, contact at all [Petitioner] can anticipate *because I think he needs to know that*—if you'll share with us." (emphasis added). In other words, the trial court's express purpose for asking Mr. Grant to appear and answer questions on the record was to establish that Petitioner's choice about whether to represent himself was "made with eyes open," *Faretta*, 422 U.S. at 835, specifically with regard to what

coaching or assistance, if any, Petitioner could expect Mr. Grant to provide him throughout the trial.

Mr. Grant informed the trial court that he had not been retained by Petitioner or Petitioner's mother and that he had not provided Petitioner any assistance whatsoever. Mr. Grant had quoted a retainer to fee to Petitioner's mother but never heard from Petitioner's mother again. Mr. Grant also stated that he would not provide any form of assistance to Petitioner during the trial. In short, Mr. Grant's testimony refuted Petitioner's statements to the trial court.

Thereafter, the trial court confirmed that Petitioner understood that Mr. Grant would not be providing him any form of assistance during trial:

> The Court: [Petitioner], do you have any questions of Mr. Grant that you want to ask him?
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> [Petitioner]: No, ma'am. But I will tell Mr. Grant . . . thank you for your information you provided me. I thank you for your advice and everything and I appreciate you addressing that to Ms. Goodstein.
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> . . .
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> The Court: And do you know what—tell me what advice and information you are speaking of specifically?
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> [Petitioner]: Everything he said.
>
> The Court: You're talking about today?
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> [Petitioner]: I'm just saying in general. Everything he said makes a whole lot of sense.
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> The Court: Okay . . . . Do you understand though that his—do you understand what the extent of his relationship has been?
>
> [Petitioner]: Yes, ma'am.

The Court: Okay. And that going forward that you cannot count on him being there?

[Petitioner]: Yes, ma'am.

The Court: Very well.

. . .

Mr. Grant: May I be dismissed, Your Honor[?]

The Court: Indeed, sir.

Mr. Grant: Thank you, Judge.

The Court: Thank you, kindly.

Mr. Grant: All right. See y'all.

The Court: All right.

[Petitioner]: Ms. Goodstein?

The Court: Yes? Yes, sir?

[Petitioner]: All right. What I was trying to say before Mr. Grant came . . . before Mr. Grant came, when he was talking to me and talking to my mother, the reason why he indicated he said what he said was because one of his paralegals is kin to me or something. That's why he could never take the case. But I'm sorry for having to go through that, but he already told my mother ahead of time that he had been through that in the previous past. So his reasons for not coming out and indicating the same is because his reputation was on the line . . . . [H]e already had told me and stated if it came down to him coming in front of a judge in front of the attorneys he was going to state that. I know if it was

somebody I was trying to do—handling some business for and be nice to them I would understand then because if my family member was kin to somebody else, I would do the same.

Following a short recess, the trial court made its ruling:

The Court: I am ready to rule and I want to put on the record why I am making the determination that I am making in this case. Now, first of all, here's what occurred this morning. . . . You went through [a] colloquy. You told me your educational background, which I think is very strong. I think you're very bright, I think you're very articulate, extremely articulate. Then we began to talk about the rules and your knowledge of the rules, and I think it was at that point you informed me that your mother had provided you with the rule book and that the title had been given to her by Carl Grant. And that you had been studying—

[Petitioner]: Yes, ma'am.

The Court: —the rules then you went on to tell me that Carl Grant had been coaching you, had been coaching you with regards to the process and that—that you believe that he would, likewise, be coaching you with regards to the process of a trial, throughout the trial.

[Petitioner]: Yes, ma'am.

The Court: I then, out of concern that whether Carl Grant had undertaken representation of you and whether or not he would be acting as stand-by counsel in some form or fashion if you were to be []representing yourself. That is why I had him come in here.

[Petitioner]: Yes, ma'am.

The Court: He has testified. What he has said is he did not provide the title and that he has not coached you, that he has not had any conversations with you with regards to the processes and that he

has not led you to believe that he would, likewise be doing so throughout the trial. Now,—

[Petitioner]: Ms. Goodstein, can I say something?

The Court: No, sir. I'm ruling. It's my turn to speak.

[Petitioner]: Okay.

The Court: Now, I have listened to you, I have listened to Carl Grant. I want you to understand I do not believe what you tell me about your relationship with Mr. Grant in terms of his having coached you and his willingness to coach you during the course of the trial. I simply do not believe that. I have to make a determination[,] and I do not believe what you are telling me is accurate. That brings me to one of our rules . . . . One of the elements that the Court has to consider is whether or not the defendant is attempting to delay or manipulate the proceedings. I do not believe that you are trying to delay the proceedings. *I am concerned that the proceedings are being manipulated*.

. . . [Y]ou're not allowed to attempt to manipulate the court in your attempts in representation and . . . I believe that there is authority for me to disallow your self-representation . . . . Unfortunately, it has been demonstrated to [m]e between this morning and this afternoon that you lack candor with the court. On that basis and the basis of the case law that I have already mentioned[,] I cannot allow you to self-represent. I must have counsel to represent you.

[Petitioner]: Ms. Goodstein?

The Court: Yes.

[Petitioner]: I ain't never said I want [counsel] to leave. I mean, they can be aside and stay by my side. I respect that, but when Carl Grant came in here and told you before this situation occurred that about his name being mentioned by his paralegals, he don't want

his reputation ruined. That's why Mr. Grant came and did—

The Court: I understand that. I don't believe you, because that's not what lawyers do. He simply would have a conflict and not be able to represent you. I don't believe you that he would be representing you and saying if it gets out[,] it will ruin my reputation. I find that very difficult to believe.

[Petitioner]: Due to the fact that Denise Hamilton is one of his paralegals—

The Court: I hear what you are saying.

[Petitioner]: —she's kin to me.

The Court: I hear what you are saying and I have ruled. There's another rule that says you don't argue with the court once it has ruled.

(emphasis added).

During both direct and cross-examination at trial, Petitioner was argumentative and nonresponsive, and he was admonished by the trial court numerous times. Ultimately, the jury returned a guilty verdict, and Petitioner was sentenced to prison.

II.
A.

I begin my discussion by acknowledging the obvious—an accused has the right to procced *pro se*. But no right is absolute.[9] Trial courts must have the authority to

[9] Indeed, various courts have recognized situations in which an assertion of the right of self-representation may properly be refused. *See Indiana v. Edwards*, 554 U.S. 164 (2008) (mental capacity); *McKaskle v. Wiggins*, 465 U.S. 168, 173 (1984) (unable or unwilling "to abide by rules of procedure and courtroom protocol"); *Savage v. Estelle*, 924 F.2d 1459, 1464 (9th Cir. 1990) (substantial speech

control the proceedings and to ensure orderly administration of justice. Courts are citadels of justice, and it is the trial judge who is charged with ensuring the integrity of the proceeding and protecting against the proceeding becoming infected with abusive and manipulative conduct. As the United States Supreme Court has explained:

> [O]ur courts, palladiums of liberty as they are, cannot be treated disrespectfully with impunity. . . . It would degrade our country and our judicial system to permit our courts to be bullied, insulted, and humiliated and their orderly progress thwarted and obstructed by defendants brought before them charged with crimes. As guardians of the public welfare, our state and federal judicial systems strive to administer equal justice to the rich and the poor, the good and the bad, the native and foreign born of every race, nationality, and religion. Being manned by humans, the courts are not perfect and are bound to make some errors. But, if our courts are to remain what the Founders intended, the citadels of justice, their proceedings cannot and must not be infected with the sort of scurrilous, abusive language and conduct paraded before the [] trial judge in this case.

Illinois v. Allen, 397 U.S. 337, 346–47 (1970).

I quote *Illinois v. Allen* "to acknowledge that constitutional rights must be asserted and exercised in a manner not inconsistent with the trial judge's control over the orderly administration of justice in [her] court." *Blankenship v. State*, 673 S.W.2d 578, 589 (Tx. App. 1984). Indeed, it is well-established that trial judges must strike "an appropriate balance between the questioned individual constitutional right and the necessity for orderly procedure in the courts of the land." *Id*. "A court should, of course, vigilantly protect a defendant's constitutional rights, but it was never intended that any of these rights be used as a ploy to frustrate the orderly procedures of a court in the administration of justice." *United States v. Lawrence*, 605 F.2d 1321, 1325 (4th Cir. 1979).

"Due to the very nature of the court as an institution, it must and does have an

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impediment); *Morris v. State*, 667 So. 2d 982, 987 (Fla. Dist. Ct. App. 1996) (poor physical health).

inherent power to impose order, respect, decorum, silence, and compliance with lawful mandates." *United States v. Shaffer Equip. Co.*, 11 F.3d 450, 461 (4th Cir. 1993). A trial court's inherent duty to preserve the integrity of the judicial process must be unwavering, and where a trial court believes a defendant asserts the right of self-representation for a manipulative purpose, "[i]t is not the accused's ignorance of the law which is critical, but rather his apparent willingness to be untruthful with the trial court to effect his own designs, which [] evince[s] an intent to abuse the judicial process." *Blankenship*, 673 S.W.2d at 591 n.13.

The majority finds fault with the trial court citing a rule of professional responsibility, Rule 3.3, RPC, Rule 407, SCACR. I agree that a defendant is not "bound" by the rules of professional conduct, but that misses the larger point. No one has the *right* to lie to the court and manipulate the proceeding. That, I believe, is the point being made by the trial court in referencing the rules of professional conduct. *Cf. United States v. Stewart*, 931 F. Supp. 2d 1199, 1201 (S.D. Fla. 2013) (observing that a criminal defendant has no right, constitutional or otherwise, to be untruthful with the court).

I am persuaded by the Fourth Circuit's holding that a defendant asserting the right of self-representation assumes the responsibility of acting in a manner befitting an officer of the court. *See United States v. West*, 877 F.2d 281, 287 (4th Cir. 1989). Even assuming the Court is nevertheless correct in refusing to apply the rules of professional conduct to Petitioner, the duty of candor to the tribunal set forth in Rule 3.3 "takes its shape from the larger object of preserving the integrity of the judicial system," and does not "displace[] the broader general duty of candor and good faith required to protect the integrity of the entire judicial process." *Shaffer Equip. Co.*, 11 F.3d at 458.

> [T]ampering with the administration of justice . . . involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud.

Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 246 (1944).

"[T]he right of self-representation, unlike the right to counsel, is not a critical aspect of a fair trial but instead affords protection to the defendant's interest in personal autonomy." *State v. Turner*, 37 A.3d 183, 192 (Conn. 2012) (internal quotations and citation omitted). "'At bottom, the *Faretta* right to self-representation is not absolute, and the 'government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer.'" *United States v. Bush*, 404 F.3d 263, 271 (4th Cir. 2005) (quoting *Frazier-El*, 204 F.3d 553, 560 (4th Cir. 2000)). "'A trial court *must* be permitted to distinguish between a manipulative effort to present particular arguments and a sincere desire to dispense with the benefits of counsel.'" *Id.* (emphasis added) (quoting *Frazier–El,* 204 F.3d at 560). And where a trial judge makes a finding on the record that a defendant's "real intent [i]s to exploit the right of self[-]representation to manipulative or disruptive ends," such a factual finding is entitled to deference from an appellate court. *Blankenship*, 673 S.W.2d at 590–91; *see United States v. Mackovich*, 209 F.3d 1227, 1237–38 (10th Cir. 2000) (a finding that an accused's assertion of the right of self-representation is manipulative in nature and thus an abuse of the judicial process is a factual finding).

Here, the trial court judged Petitioner's credibility and found Petitioner was untruthful about his relationship with Mr. Grant in terms of having received the criminal law handbook; the payment of a retainer on Petitioner's behalf; and that Petitioner would be receiving out-of-court coaching from Mr. Grant during the trial. The record also reveals that in thanking Mr. Grant, Petitioner attempted to insinuate Mr. Grant had been untruthful with the Court about assisting Petitioner; plus, immediately after Mr. Grant left the courtroom, Petitioner expressly claimed Mr. Grant had lied to the trial court about the purported arrangement with Petitioner. Thus, in light of the ample support the record, I believe the Court oversteps in disregarding the trial court's findings. Particularly since "[i]n ambiguous situations created by a defendant's vacillation or manipulation, we must ascribe a 'constitutional primacy' to the right to counsel because this right serves both the individual and collective good, as opposed to only the individual interests served by protecting the right of self-representation." *Frazier-El*, 204 F.3d at 559 (quoting *United States v. Singleton,* 107 F.3d 1091, 1102 (4th Cir. 1997)).

B.

As mentioned at the outset, the majority holds today that "the only basis upon which a circuit judge may deny a defendant's pre-trial motion to proceed *pro se* is if the court determines the defendant has not knowingly, intelligently, and voluntarily waived his right to counsel." This case illustrates a defendant's attempt to "knowingly, intelligently, and voluntarily" lie and manipulate the proceedings. And perhaps the result today reflects the success of Petitioner's efforts.

For example, the majority finds fault with the trial court's continuing admonition on the dangers of self-representation "[r]ather than concluding the *Faretta* colloquy." The majority further notes that "[n]evertheless, the circuit judge continued her attempts to dissuade" Petitioner. First, I observe the *Bench Book for United States District Judges* instructs "[t]he model [*Faretta*] inquiry is to be followed by a 'strong admonishment that the court recommends against the defendant trying to represent himself or herself.'" *United States v. Powell*, 847 F.3d 760, 774 (6th Cir. 2017) (quoting *United States v. Williams*, 641 F.3d 758, 767 (6th Cir. 2011)). Further, as a practical matter, it seems to me the Court is placing our trial court judges in a catch-22. On the one hand, it will be contended that a full warning on the dangers of self-representation is an encroachment of the right of self-representation, just as the Court today implies; conversely, a lesser warning will be portrayed as inadequate. Criminal court judges are regularly confronting and navigating this very minefield. "[T]he right to counsel and its counterpart the right to proceed *pro se* put the trial court in a difficult position." *Hsu v. United States*, 392 A.2d 972, 983 (D.C. 1978). "If a defendant asks for self-representation, the court risks reversal for denying the request or granting it." *Id*. (internal citations omitted).

The majority finds support for its reversal in "the circuit judge repeatedly not[ing] how intelligent and articulate she found [Petitioner] to be." I fail to see how Petitioner's intelligence provides a helping hand in reversing the trial court. I view Petitioner's intelligence as bolstering the trial court's finding of manipulation. In any event, Petitioner's intelligence in no manner demonstrates an abuse of discretion in the finding of manipulation.

I also strongly reject the majority's take on the trial court's consideration of

attorney Grant's testimony. The majority approaches the issue as follows: "[Petitioner] contends the circuit judge impermissibly exceeded the scope of the *Faretta* inquiry by considering Grant's testimony to conclude [Petitioner] was attempting to manipulate the proceedings, thereby precluding him from proceeding *pro se*. We agree." The majority makes this finding in the face of Petitioner's acknowledgement that the trial court had the authority to summon Grant. Rather than criticize the trial court judge, I commend her. Petitioner's testimony gave the trial court judge concern, and she should be commended for wanting to have Grant, a local attorney, confirm Petitioner's testimony. *See Faretta*, 422 U.S. at 852 (Blackmun, J., dissenting) (observing " the right to assistance of counsel and the right to self-representation are mutually exclusive"); *Hsu*, 392 A.2d at 983 ("The only way to avoid the risk [of improperly denying one of these mutually exclusive rights], therefore, is for the trial court to conduct *a searching inquiry* into 'the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.'" (emphasis added) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938))).

Further, the majority incorrectly identifies this inquiry as relating only to the issue of "[Petitioner's] competence to represent himself," which according to the majority, "is entirely irrelevant to the issue of whether he effectively invoked his right of self-representation." To the contrary, the requirement for a decision to proceed *pro se* to be knowing and voluntary "ensures the defendant 'actually *does* understand the significance and consequences of a particular decision and [that] the decision is uncoerced.'" *Edwards v. Com.*, 644 S.E.2d 396, 402 (Va. Ct. App. 2007) (quoting *Godinez v. Moran,* 509 U.S. 389, 401 n.12 (1993)). Indeed, this line of questioning by the trial court was wholly relevant and quite necessary to prevent Petitioner "from taking advantage of and manipulating the mutual exclusivity of the rights to counsel and self-representation," *Frazier-El*, 204 F.3d at 559, by later arguing his conviction should be reversed because his request to proceed *pro se* was unknowing and involuntary as it was premised upon Petitioner's belief that Mr. Grant would be providing him out-of-court assistance during his trial.

The majority's retort that the judge's "questioning of Grant should have been limited to discerning whether [Petitioner's] request was knowingly and voluntarily made" completely misses the mark, for no one has ever argued that Grant's testimony was primarily driven by his ability to assist the trial court in the narrow

issue of a voluntary waiver. Grant never met with Petitioner. This relates to my view, made at the outset of this opinion, that the *Faretta* framework is more than formulaic responses to questioning; I do not view *Faretta* in isolation or as an obstacle to a trial court's duty to ensure the integrity of the proceedings. *See People v. Lewis*, 140 P.3d 775, 803 (Cal. 2006) (observing criminal defendants sometimes assert the right of self-representation for the purpose of "plant[ing] reversible error in the record).

At this point in the proceeding, the able trial judge made it clear she was poised to grant Petitioner's request, but her concern led her to summon Grant. I view the trial court's handling of the situation as a quintessential example of an appropriate exercise of discretion, as she took a reasonable and measured step to protect a defendant's right of self-representation while also ensuring the integrity of the proceeding. Grant's testimony flatly contradicted Petitioner's. Grant met with Petitioner's mother, not Petitioner. The trial court determined Petitioner had lied in an effort to manipulate the proceedings, and this quite naturally led the trial court's ruling to deny Petitioner's request to proceed *pro se*.

The trial court's finding of manipulation is a factual determination that rests with the trial court, not this Court. Our standard of review on a trial court's factual finding is abuse of discretion, not de novo. The Court references "review[ing] a circuit judge's finding of historical fact for clear error," but ignores that deferential standard of review when the Court engages in its own fact-finding by noting "we discern no attempt by [Petitioner] to disrupt or manipulate the process here." To the contrary, Petitioner's complete lack of candor with the trial judge, his lies, and his distortions were a clear indication to the trial judge that a self-represented Petitioner would continue to be a disruptive force during the trial of the case. Such a conclusion is inescapably supported by facts in the record.[10]

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[10] The majority opinion claims it does "not strip trial judges of their authority and discretion to maintain the integrity of the proceedings before them." In my judgment, the Court's holding does just that—it strips trial judges of authority and discretion to fully vet a defendant's motion to proceed *pro se* and instead mandates the trial court accept at face value whatever a defendant says. The majority opinion further assures that trial courts have "recourse" to prevent mischief or disruptive behavior. The majority's reasoning is premised on the notion that the trial court's concern with Petitioner's manipulation of the proceedings was

The majority goes even further and states that a defendant's manipulation is "not enough" to deny a request to proceed *pro se*. The Court's support for this finding comes from a footnote in *State v. Barnes*, 413 S.C. 1, 774 S.E.2d 454 (2015), in which the *Barnes* majority responded to a statement by the *Barnes* dissent. Specifically, the *Barnes* majority's footnote observed there was no basis to deny a defendant's request for counsel simply because he had previously asserted (and obtained reversal of his conviction based on a violation of) his right to self-representation. *Id*. at 2 n.1, 774 S.E.2d at 455 n.1. The Court rejected the notion that "the erroneous denial of a defendant's sixth amendment right to self-representation at the first proceeding results in that defendant having a diminished sixth amendment right in a second trial." *Id*. at 7, 774 S.E.2d at 457. Here, we are not dealing with a request for counsel or multiple trials, so *Barnes* is procedurally and substantively inapposite. Further, in *Barnes*, the issue of manipulation by the defendant was introduced by the dissenting opinion of this Court; there was no factual finding of manipulative intent made by the trial court, as is the case here. In short, the Court simply disregards the applicable standard of review.

I wish to comment on what I believe is the majority's progression in its analysis that transforms the actual issue presented and reframes it to suit the majority's preference. I view this case as an appellate court reviewing a trial judge's effort to protect a defendant's right to proceed *pro se* in a manner consistent with a trial judge's authority to ensure the integrity and orderly administration of justice in her court. Because there is clearly evidence to support the trial judge's finding of manipulation, I would affirm. Conversely, the majority maintains its narrow and categorical *Faretta* approach and then cautions trial courts from overstepping in warning of the dangers of self-representation. Trial judges, we are told, must safeguard a defendant's "right to represent himself and the almost sure disaster that

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speculative, which is a false premise. This reasoning ignores the reality that mischief and manipulative behavior had *already* occurred. The testimony of Mr. Grant (to which Petitioner has never objected) decisively debunked every statement Petitioner made about their purported relationship. Under these circumstances, the trial judge had the discretion (and "recourse") to nip in the bud Petitioner's effort to manipulate the proceedings.

will result from his self-representation." No one contends otherwise[11] but that misses the point of this case and appeal. The trial judge was not seeking to protect Petitioner from himself; she was seeking to protect the justice system from manipulation.

Trial court judges have become accustomed navigating the efforts of some defendants to game the system. It is the trial judge who must ensure the integrity of the court and the proceedings. That is accomplished by the trial court's exercise of discretion. That discretionary authority is essential to the proper functioning of the justice system, but courtesy of today's opinion, that discretion has been removed. What is the result of today's opinion—trial court proceedings are now "at the mercy of those who seek to disrupt the very process designed to protect them." *Blankenship*, 673 S.E.2d at 591 (Clinton, J., concurring).

I dissent.

JAMES, J., concurs.

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[11] In his dissenting opinion in *Faretta*, Justice Blackmun observed, "If there is any truth to the old proverb that 'one who is his own lawyer has a fool for a client,' the Court by its opinion today now bestows a constitutional right on one to make a fool of himself." *Id*. at 852.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Gregg Taylor, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2015-001118

ON WRIT OF CERTIORARI

Appeal from Berkeley County
J. C. Nicholson, Jr., Post-Conviction Relief Judge

Opinion No. 27769
Submitted October 17, 2017 – Filed February 28, 2018

REVERSED

Mark J. Devine, of Charleston, for Petitioner.

Attorney General Alan M. Wilson and Assistant Attorney General Justin J. Hunter, both of Columbia, for Respondent.

JUSTICE KITTREDGE: This is a post-conviction relief (PCR) matter in which Petitioner Gregg Taylor, a Jamaican citizen, pled guilty to a drug offense. Petitioner resided in South Carolina for years with his wife and two children, all

three of whom are United States citizens. In plea negotiations, Petitioner's primary concern was whether he would be subject to deportation. Plea counsel viewed Petitioner's grave concern with the prospect of deportation as a "collateral" issue, yet provided general assurances to Petitioner that he would not be deported. As a result, Petitioner pled guilty. The drug offense resulted in Petitioner's deportation, and this PCR application followed. The PCR court denied relief. We granted a writ of certiorari and now reverse.

I.

Petitioner was indicted for possession with intent to distribute marijuana, which is punishable by up to five years in prison and a fine of $5,000. Petitioner retained counsel to represent him. It appeared the State's case against Petitioner was strong, which prompted counsel to pursue a plea bargain. Following plea negotiations, Petitioner pled guilty to the lesser included offense of possession of more than one ounce of marijuana, which is punishable by up to six months in prison and a $1,000 fine. Petitioner was sentenced to probation.

As a result of his conviction, Petitioner was deported and returned to Jamaica. The essence of the PCR application was counsel's alleged failure to properly advise Petitioner of the law concerning his risk of deportation. Because Petitioner had been deported, he appeared at the PCR hearing by way of an affidavit, wherein he stated counsel assured him that he would not be deported and that but for counsel's erroneous advice, he would not have pled guilty and would have insisted on going to trial.

A.

The PCR court denied relief. Petitioner argues the PCR judge erred in refusing to find plea counsel was ineffective in failing to advise Petitioner of the immigration and deportation consequences of pleading guilty. "[A]dvice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel." *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010). If the deportation consequences of a particular plea are unclear or uncertain, "a criminal defense attorney need do no more than advise a non-citizen client that pending criminal charges may carry a risk of adverse immigration consequences." *Id.* at 369. However, where the terms of the relevant immigration statute are "succinct, clear,

and explicit" in defining the removal consequence, counsel has an "equally clear" duty to give correct advice. *Id.* at 368–69.

Pursuant to federal law, an alien admitted to the United States who is convicted of a violation of "any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . . other than a single offense involving possession for one's own use of 30 grams or less of marijuana, *is deportable*." 8 U.S.C.A. § 1227(a)(2)(B)(i) (emphasis added).

In his PCR affidavit, Petitioner asserted that counsel misadvised him that his guilty plea would not have any adverse immigration consequences. Specifically, Petitioner stated counsel told him he had "nothing to worry about as to the immigration consequences of [his] plea . . . because [he] never had [his] lawful Permanent Resident Status as yet and accordingly [his] guilty plea would not have [any] consequences on [his] pending application . . . via [his] United States Citizen wife." Petitioner further stated counsel informed him that if he had his Green Card, he "would possibly have to deal with immigration, however because it was pending, *they could not use* [*his*] *guilty plea against* [*him*]." (emphasis added). Petitioner stated plea counsel told him, "I can promise you that you will walk out of that court room a free man in the US, the only thing that you may have to do is 6 months' probation." Finally, Petitioner stated that, had he known he would have faced deportation, he would not have entered a guilty plea, but would have insisted on going to trial.

The PCR court found Petitioner failed to meet his burden of proof. Specifically, the PCR court found plea counsel adequately complied with *Padilla*, and Petitioner "was fully advised that he could face deportation as a result of pleading guilty." Further, the PCR judge found any deficiency on the part of plea counsel was cured by the plea judge during his colloquy with Petitioner. Finally, the PCR judge found Petitioner failed to show that but for counsel's performance, Petitioner would not have pled guilty.

II.

This Court will uphold the findings of the PCR court when there is any evidence of probative value to support them. *Caprood v. State*, 338 S.C. 103, 109–10, 525 S.E.2d 514, 517 (2000). However, this Court will reverse the PCR court's decision when it is controlled by an error of law or unsupported by the evidence. *Edwards*

v. State, 392 S.C. 449, 455, 710 S.E.2d 60, 64 (2011).

A.

In *Padilla*, the Supreme Court found the terms of 8 U.S.C.A. § 1227(a)(2)(B)(i)—the same removal statute at issue in the instant case—are "succinct, clear, and explicit in defining the removal consequences for Padilla's conviction," and "counsel could have easily determined that [Padilla's] plea would make him eligible for deportation simply from reading the text of the statute, which addresses not some broad classification of crimes but specifically commands removal for all controlled substances convictions except for the most trivial of marijuana possession offenses." *Padilla*, 559 U.S. at 368–69 ("This is not a hard case in which to find deficiency: The consequences of Padilla's plea could have easily been determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel's advice was incorrect."). Similar to Padilla, Petitioner's drug charge was a categorically deportable offense.

Counsel's actual advice on the deportation issue was deficient as a matter of law. Counsel did inform Petitioner he *could* face deportation, but counsel failed to advise Petitioner that his deportation was presumptively mandatory. Pursuant to *Padilla*, counsel must do more than "discuss immigration" or advise Petitioner he *might* face adverse immigration consequences. Moreover, it is not clear if plea counsel even understood he had a duty to advise Petitioner of the actual immigration and deportation consequences of his guilty plea. When asked if he had read *Padilla*, counsel responded, "No sir, I don't recall reading that" and further stated:

> Sir, to be quite honest with you [the deportation consequences] wouldn't have mattered in reference to the defense of [Petitioner's] case. It's always going to go back to my protocol of whether the State can prove its case or not. *This is a collateral issue you are discussing*. I would not dwell -- I'll put it this way. Say that I determined hypothetically that he can be deported. Tell me how that assists me in whether or not he is guilty or not and how I can defend him? How does that change that?

(emphasis added).

In fact, the vast majority of plea counsel's PCR testimony shies away from unequivocal statements as to his advising Petitioner regarding the deportation consequences of his plea and, instead, focuses on counsel's "defense protocol" and the steps counsel typically takes in evaluating a client's criminal charges and formulating defenses. When asked if he read the federal deportation and removal statute prior to Petitioner's plea, plea counsel stated "it wouldn't have mattered in reference to the defense of this case" and any deportation or immigration consequences were "a collateral issue." When asked if, at any point during the decision to plead guilty, counsel talked with Petitioner about his immigration status, counsel responded, "To be honest with you[,] his immigration status is nil in reference to his freedom." When directly asked if he advised Petitioner that his guilty plea carried the possibility of deportation, plea counsel testified his main "concern was [defending] the P-W-I-D marijuana [charge]."

Plea counsel further testified immigration laws "really don't have no [sic] impact if it's not going to help me in defense of my client," and the fact that Petitioner would be subject to deportation as a result of his plea "would have been of small consequences to me in relationship to the fact of what [Petitioner] was charged with and my role as an attorney." In the following exchange, plea counsel asserted it was Petitioner's duty to know the deportation consequences of his plea:

> Q. So why did you not at least look at the removable statute to inform [Petitioner] by pleading guilty he would be subject to deportation?
>
> A. Sir, [Petitioner] had an obligation separate and apart from me to know his rights to come into this country just like every other citizen who is legally in this country is held to the responsibility to know their rights as an American citizen. . . . So if I failed in any manner to heighten the consequences to him[,] I think there was an equal burden on him to know what his rights were when they gave him that [G]reen [C]ard.

Plea counsel's testimony is contrary to *Padilla*. We are bound by *Padilla*, which under the circumstances presented here—the law explicitly defining the removal consequences for Petitioner's conviction—imposed a duty on legal counsel to

understand Petitioner's legal status and correctly advise him of the law concerning deportation. Counsel's testimony rejecting any duty to correctly advise a client in a *Padilla* context leaves only Petitioner's affidavit wherein he states, "I depended on my attorney to advise me and inform me properly as to the immigration consequences if accepting the plea deal. . . . If I had known that I would have faced deportation[,] I would have not entered a guilty plea, I would have gone to trial." Given that Petitioner's offense was manifestly one subjecting Petitioner to deportation, we are compelled to find that counsel's failure to correctly advise Petitioner was deficient as a matter of law.

B.

We turn now to the State's (and the PCR court's) reliance on the plea colloquy to remedy the deficiency. During the plea hearing, before accepting Petitioner's guilty plea, the plea court stated that a guilty plea could "subject [Petitioner] to being removed from this country" and "could affect [Petitioner's] right to remain here." Here, the colloquy was generic in that Petitioner was merely informed that his plea *could affect* his immigration status. In light of *Padilla* and its progeny, we are constrained to conclude that the plea court's general warning failed to cure counsel's deficient representation. We acknowledge that in many circumstances a plea court's standard colloquy will cover a multitude of deficiencies by counsel. *Pittman v. State*, 337 S.C. 597, 600, 524 S.E.2d 623, 625 (1999) ("A defendant's knowing and voluntary waiver of the constitutional rights which accompany a guilty plea 'may be accomplished by colloquy between the Court and the defendant, between the Court and defendant's counsel, or both.'") (quoting *State v. Ray*, 310 S.C. 431, 437, 247 S.E.2d 171, 174 (1993)). But under *Padilla*, special requirements have been added to counsel in the plea bargaining process when a non-citizen is involved. The meaning of *Padilla* would be negated if we allowed general comments from the plea court to satisfy the specific requirements imposed on counsel under the Sixth Amendment. The generic statement by the plea court was no better than counsel's general deportation advice, especially where Petitioner had made it crystal clear that his decision to plead guilty turned on the prospects of deportation.

In our research, we have found two cases, as well as a recent United States Supreme Court decision, which we find sufficiently mirror the case before us and compel the result we reach. The first case is *State v. Sandoval*, 249 P.3d 1015

(Wash. 2011). Sandoval was offered the opportunity to plead to a lesser rape charge that was still an aggravated felony making him subject to mandatory deportation. When Sandoval informed his attorney he did not want to plead guilty if the plea would result in his deportation, counsel told him he should accept the plea offer because he would not be immediately deported and would have sufficient time to retain proper immigration counsel to ameliorate any potential immigration consequences of his plea. *Id.*

Sandoval pled guilty and signed a plea statement containing the following warning: "If I am not a citizen of the United States, a plea of guilty to an offense punishable as a crime under state law is grounds for deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States." *Id.* The plea judge confirmed in a colloquy that Sandoval had reviewed the statement with his counsel and understood the warning. *Id.*

Noting the *Padilla* Court specifically stated "how critical it is for *counsel* to inform her noncitizen client that he faces a risk of deportation," the Washington Supreme Court found the guilty plea statement warning and the plea judge's review of the same with Sandoval during the colloquy could not "save the advice that counsel gave," which the court found "nullified the constitutionally required advice about the deportation consequences of pleading guilty" and "impermissibly left Sandoval [with] the impression that deportation was a remote possibility." *Sandoval*, 249 P.3d at 1020.

The second case is *United States v. Akinsade*, 686 F.3d 248 (4th Cir. 2012), wherein the Fourth Circuit Court of Appeals found a plea colloquy did not cure counsel's incorrect advice regarding the immigration and deportation consequences of the defendant's guilty plea. In *Akinsade*, the defendant, a Nigerian citizen who was a lawful permanent resident of the United States, was charged with embezzlement. Akinsade pled guilty after asking his attorney about the potential immigration consequences of a guilty plea and being incorrectly assured by counsel that he could not be deported based on the single conviction.

During Akinsade's plea hearing, the plea court reviewed the civil ramifications of Akinsade's plea, as follows:

> The Court: People who are found guilty of felonies, often lose their

right to vote, certain professional licenses may be denied them, may not be able to serve on a jury. And I know felons can't possess firearms. Certain jobs may be denied to you.

If you are on parole or probation with another system, that can be affected. *Or if you are not a citizen, you could be deported*. All of these things could be triggered by being found guilty of a felony. Do you understand that?

Akinsade: Yes, Your Honor.

The Court: Knowing that do you still wish to plead guilty?

Akinsade: Yes, Your Honor.

Id. (emphasis added).

On habeas review, the federal district court held that, while counsel was deficient under the first prong of *Strickland*[1] for rendering incorrect advice, Akinsade was not prejudiced because the plea court's "admonishment of the potential for deportation during the plea colloquy cured counsel's affirmative misrepresentations." *Id.* On appeal, the Fourth Circuit found the plea court's colloquy was inadequate and vacated the district court's order. Specifically, the Fourth Circuit found:

> This general and equivocal admonishment is insufficient to correct counsel's affirmative misadvice that Akinsade's crime was not categorically a deportable offense. More importantly, the admonishment did not "properly inform" Akinsade of the consequence he faced by pleading guilty: mandatory deportation. Thus, Akinsade could not have known that deportation was a legally mandated consequence of his plea.

[1] *Strickland v. Washington*, 466 U.S. 668 (1984).

Id. The Fourth Circuit emphasized their decision should not be interpreted to change the role of or impose new obligations on plea judges, or suggest a plea judge "needs to be 'clairvoyant' or must 'guess' about whether a defendant has been misinformed regarding a particular consequence of a plea." *Id.* Instead, the court explained:

> When, as here, the claim raised is that of ineffective assistance of *counsel*, the overall focus must be on the prejudice arising from *counsel's* deficient performance. If a district court's admonishment so happens to correct the deficient performance then there is no prejudice; however, if there is no correction, then our scrutiny is not directed toward the district court but appropriately to the constitutional offender.

Id. The court further held that, in order for a plea court's colloquy to be curative, "it should address the particular issue underlying the affirmative misadvice."

And finally, the Supreme Court's recent decision in *Lee v. United States*, with strikingly similar facts, further supports the granting of relief to Petitioner. 137 S.Ct. 1958 (2017). Lee, a non-United States citizen, was indicted on a drug charge. The evidence against Lee was overwhelming, perhaps like it may be against Petitioner. Because a conviction seemed an almost certainty, counsel sought to negotiate a plea agreement. Lee, however, was concerned with his immigration status and repeatedly asked counsel about the risk of deportation. Counsel assured Lee that he would not be deported as a result of pleading guilty. Lee was notified soon after the guilty plea that he would be deported, and in response, Lee filed a federal habeas claim, and he lost in the federal district court and the Court of Appeals for the Sixth Circuit. Lee prevailed in the Supreme Court, and the Court's analysis provides Petitioner strong support.

Lee adopted the familiar *Hill v. Lockhart*[2] framework in a *Padilla* context. In part, the *Lee* majority noted the following:

> Lee . . . argues he can establish prejudice under *Hill* because he never would have accepted a guilty plea had he known that he would be

[2] 474 U.S. 52 (1985).

> deported as a result. Lee insists he would have gambled on trial, risking more jail time for whatever small chance there might be of an acquittal that would let him remain in the United States. The Government responds that, since Lee had no viable defense at trial, he would almost certainly have lost and found himself still subject to deportation, with a lengthier prison sentence to boot. Lee, the Government contends, cannot show prejudice from accepting a plea where his only hope at trial was that something unexpected and unpredictable might occur that would lead to an acquittal.
>
> The Government asks that we, like the Court of Appeals below, adopt a *per se* rule that a defendant with no viable defense cannot show prejudice from the denial of his right to trial . . . . A defendant without any viable defense will be highly likely to lose at trial. And a defendant facing such long odds will rarely be able to show prejudice from accepting a guilty plea that offers him a better resolution than would be likely after trial. But that is not because the prejudice inquiry in this context looks to the probability of conviction for its own sake. It is instead because defendants obviously weigh their prospects at trial in deciding whether to accept a plea. . . .
>
> But common sense (not to mention our precedent) recognizes that there is more to consider than simply the likelihood of success at trial. . . . When those consequences are, from the defendant's perspective, similarly dire, even the smallest chance of success at trial may look attractive. For example, a defendant with no realistic defense to a charge carrying a 20-year sentence may nevertheless choose trial, if the prosecution's plea offer is 18 years. Here Lee alleges that avoiding deportation was the determinative factor for him; deportation after some time in prison was not meaningfully different from deportation after somewhat less time. He says he accordingly would have rejected any plea leading to deportation—even if it shaved off prison time—in favor of throwing a "Hail Mary" at trial.

Id. at 1966–67 (citations omitted). By focusing on Petitioner's decision-making, it is uncontested that he "would have rejected any plea leading to deportation." Because Petitioner's counsel provided deficient representation, we may not avoid a

finding of prejudice on the basis of the likelihood of a guilty verdict, even if Petitioner is throwing a "Hail Mary."

Just as in *Lee*, we are constrained to "conclude [Petitioner] has demonstrated a 'reasonable probability that, but for [his] counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Lee*, 137 S. Ct. at 1965 (quoting *Hill*, 474 U.S. at 59). The judgment of the PCR court is reversed.

REVERSED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Johnny Eades and Barbara Eades, Respondents,

v.

Palmetto Cardiovascular and Thoracic, PA; James M. Benner, MD; Mark J. Epler, MD; Trident Medical Center, LLC; Columbia/HCA Healthcare Corporation of South Carolina; HCA Healthcare-South Carolina; Trident Medical Center; Trident Health System; Palmetto Primary Care Physicians, LLC; Trident Emergency Physicians; LLC; Brian R. Whirreth, MD; Patricia Campbell, MD; Christine E. McNeal, MD; Matthew Wallen, MD; Charleston Radiologists, PA; Joseph M. Mullaney, MD; Tri-County Radiology Associates, PA; and Troy Marlon, MD, Defendants,

Of whom Palmetto Primary Care Physicians, LLC and Trident Emergency Physicians, LLC are Petitioners.

Appellate Case No. 2015-001967

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Charleston County
The Honorable Kristi Lea Harrington, Circuit Court Judge

Opinion No. 27770
Heard December 1, 2016 – Filed February 28, 2018

REVERSED

Thomas C. Salane and R. Hawthorne Barrett, both of Turner Padget Graham & Laney, PA, of Columbia, for Petitioner.

Gary Lane Cartee, of North Charleston, for Respondents.

JUSTICE HEARN: This case requires us to decide whether an expert witness affidavit submitted prior to the commencement of a medical malpractice action complied with section 15-36-100(A) of the South Carolina Code (Supp. 2016). The trial court found the affidavit insufficient based on the expert's practice area and dismissed the Notice of Intent to File Suit (NOI). We reverse, finding the statute permits the production of an affidavit from an expert who does not practice in the same area of medicine as the allegedly negligent doctor.

BACKGROUND

This medical malpractice action arose after Johnny Eades sought treatment from numerous healthcare providers, including Petitioners Palmetto Primary Care Physicians, LLC and Trident Emergency Physicians, LLC, for a blockage and aneurysm of the left iliac artery in July and August of 2009. Three years later, Mr. Eades and his wife filed an NOI to bring the medical malpractice action in Charleston County. Two days after filing the NOI, the Eades filed answers to interrogatories listing Dr. Paul A. Skudder as an expert witness, along with an affidavit from Skudder pursuant to section 15-79-125 of the South Carolina Code (Supp. 2016).

All defendants, including Petitioners, filed motions to dismiss the Eades' NOI. Following a hearing, the trial court granted the defendants' motions on two grounds, holding: (1) section 15-79-125 requires medical malpractice plaintiffs to file expert affidavits in compliance with section 15-36-100 contemporaneously with the NOI; and (2) the Eades' expert affidavit was defective because it did not conform to the requirements of section 15-36-100(A). Specifically, the trial court found the expert

affidavit was insufficient because it did not indicate that Skudder had "actual professional knowledge and experience" in the same practice areas as Dr. Campbell and Dr. Wallen.[1] The order further stated, "Dr. Skudder's affidavit fails to provide the proper qualifications, required by section 15-36-100, that would permit Dr. Skudder to present an expert opinion about Dr. Campbell and Dr. Wallen."

The court of appeals reversed in an unpublished opinion pursuant to this Court's decision in *Ranucci v. Crain*, 409 S.C. 493, 763 S.E.2d 189 (2014), which held that section 15-79-125 incorporates the safe harbor provision of 15-36-100(C)(1) and extends the time for filing the expert witness affidavit in medical malpractice actions where the statute of limitations is in danger of expiring.[2] In a footnote, the court of appeals summarily concluded the question of the sufficiency of the expert affidavit was not preserved for review and declined to address the issue. This Court granted certiorari to review the court of appeals' decision.

ISSUES PRESENTED

Did the court of appeals err in failing to affirm the dismissal as to Petitioners because the expert affidavit did not comply with section 15-36-100?

DISCUSSION

Finding the sufficiency of the Eades' expert affidavit is preserved for appellate review,[3] we turn to the merits of the issue. Petitioners argue the court of appeals

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[1] Campbell and Wallen were acting as employees of Palmetto Primary Care Physicians, LLC and Trident Emergency Physicians, LLC, respectively, when the alleged malpractice occurred.

[2] Petitioners do not challenge this holding.

[3] As an initial matter, we agree with Petitioners' argument that the issue is preserved for review. In order for an issue to be preserved for appellate review, the issue must have been timely raised by the appellant with sufficient specificity and ruled upon by the trial court. *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301-02, 641 S.E.2d 903, 907 (2007) (*citing* Jean Hoefer Toal et al., *Appellate Practice in South Carolina* 57 (2d ed. 2002)).

erred in failing to affirm the trial judge's dismissal on the grounds that the Eades' affidavit did not comport with the provisions of section 15-36-100(A). Specifically, Petitioners claim Skudder's affidavit was defective because it did not indicate that he practiced in the same area of medicine as Campbell and Wallen, in violation of the statutory requirements. We disagree.

"Questions of statutory interpretation are questions of law, which we are free to decide without any deference to the court below." *Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 535, 725 S.E.2d 693, 695 (2012). Statutes in derogation of the common law are to be strictly construed. *Epstein v. Coastal Timber Co.,* 393 S.C. 276, 285, 711 S.E.2d 912, 917 (2011). "Under this rule, a statute restricting the common law will 'not be extended beyond the clear intent of the legislature.'" *Grier*, 397 S.C. at 536, 725 S.E.2d at 696 (quoting *Crosby v. Glasscock Trucking Co.,* 340 S.C. 626, 628, 532 S.E.2d 856, 857 (2000)). Statutes limiting a claimant's right to bring suit are subject to this rule. *Id.* In *Grier*, this Court reviewed subsection (B) of 15-36-100 and found the statute restricted a plaintiff's common law right to bring a malpractice claim, requiring the Court to strictly construe the statute's

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In their motion to dismiss, Petitioners, together with their agents Campbell and Wallen, expressly raised the question of whether Skudder's affidavit complied with the requirements imposed by section 15-36-100. Specifically, Petitioners argued the affidavit was insufficient because it only stated Skudder was a board-certified vascular surgeon, but did not state that he practiced in the same areas as Campbell and Wallen.

The trial court stated in its order that although the expert affidavit did not comply with the grounds which were later held erroneous by *Ranucci*, "an additional ground for dismissal was raised by **Defendants**." (emphasis added). As the trial court was aware, Petitioners submitted a *joint* motion to dismiss with Campbell and Wallen raising the issue of the sufficiency of the affidavit. Thus, the trial court's order was not limited to Campbell and Wallen, but ruled on the issue as it applied to Petitioners as well. Furthermore, as the doctors' employers, Petitioners could only be liable vicariously through Campbell and Wallen. Accordingly, even if the trial court only addressed the sufficiency of the affidavit as it applied to Campbell and Wallen, it necessarily follows that the issue was raised and ruled upon as it pertained to Petitioners as well. Therefore, from the record it is clear that Petitioners raised the sufficiency of the expert affidavit in their motion, and the trial court ruled on the issue.

requirements. 397 S.C. at 538, 725 S.E.2d at 697.

Prior to initiating a medical malpractice action, section 15-79-125(A) requires a plaintiff to contemporaneously file a supporting affidavit from an expert witness in compliance with section 15-36-100. Section 15-36-100(A) defines an expert witness as an individual who is qualified as to the acceptable conduct of the professional whose conduct is at issue and who:

> (1) is licensed by an appropriate regulatory agency to practice his or her profession in the location in which the expert practices or teaches; and
>
> (2)(a) is board certified by a national or international association or academy which administers written and oral examinations for certification in the area of practice or specialty about which the opinion on the standard of care is offered; or
>
> (b) has actual professional knowledge and experience in the area of practice or specialty in which the opinion is to be given as the result of having been regularly engaged in:
>
> (i) the active practice of the area of specialty of his or her profession for at least three of the last five years immediately preceding the opinion;
>
> (ii) the teaching of the area of practice or specialty of his or her profession for at least half of his or her professional time as an employed member of the faculty of an educational institution which is accredited in the teaching of his or her profession for at least three of the last five years immediately preceding the opinion; or
>
> (iii) any combination of the active practice or the teaching of his or her profession in a manner which meets the requirements of subitems (i) and (ii) for at least three of the last five years immediately preceding the opinion;
>
> (3) is an individual not covered by subsections (A)(1) or (2), that has scientific, technical, or other specialized knowledge which may assist the trier of fact in understanding the evidence and determining a fact or issue in the case, by reason of the individual's study, experience, or

> both. However, an affidavit filed pursuant to subsection (B) by an expert qualified under this subsection must contain an explanation of the expert's credentials and why the expert is qualified to conduct the review required by subsection (B). The defendant is entitled to challenge the sufficiency of the expert's credentials pursuant to subsection (E).

On the merits, Petitioners contend Skudder's affidavit was insufficient under section 15-36-100(A) because it did not demonstrate he had "actual professional knowledge and experience" in the same specific practice areas as Campbell and Wallen.[4] Petitioners categorize Campbell and Wallen's areas of practice as emergency medicine and primary care, and attempt to disqualify Skudder based on his classification as a vascular and critical care surgeon. Thus, the crux of

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[4] In pertinent part, Skudder's affidavit read:

> 1. I, Paul Skudder, am a medical doctor licensed, without restriction and in good standing, in the states of Vermont, Massachusetts, and New York, and in the District of Columbia. I currently practice medicine, and I have been actively engaged in the practice of medicine for more than the past five years, and this practice has included the evaluation and treatment of patients with issues including occluded arteries, aneurysms, and related medical issues, which include issues similar to those of Johnny Eades in July and August, 2009. I have the following board certifications: 1986, American Board of Surgery (Recertified 2006); and ABS Surgical Critical Care (Recertified 2001).
>
> 2. I am familiar with the applicable medical standards for the evaluation and treatment of patients under the same or similar circumstances as Johnny Eades, including particularly, but not restricted to, occlusion of the left iliac artery, aneurysm of the same artery, and related issues. I am aware of the degree of care and skill ordinarily exercised by members of the medical profession under the same or similar circumstances as it relates to the care and treatment of patients such as Johnny Eades in July and August of 2009. This knowledge is based upon my education, training, and experience.

Petitioners' argument hinges on the interpretation of "area of practice or specialty" as contained in section 15-36-100(A)(2)(a) & (b).

Notwithstanding our disagreement with Petitioners' proposed application of subsection (A)(2), we need not reach that issue because we find Skudder's affidavit comports with section 15-36-100(A)(3). Subsection (A)(3) provides that an individual who is not otherwise qualified under subsections (A)(1) or (2) may still qualify as an expert if he has "scientific, technical, or other specialized knowledge which may assist the trier of fact in understanding the evidence and determining a fact or issue in the case, by reason of the individual's study, experience, or both." S.C. Code § 15-36-100(A)(3). To qualify under this provision, an affidavit filed by a proposed expert must contain an explanation of the expert's credentials and their relevance to the case. *Id.* Thus, this subsection contemplates the production of an expert affidavit from a doctor who is not certified in or does not practice in the same area of medicine as the defendant doctor, but otherwise possesses specialized knowledge to assist the trier of fact.

We find the information contained in Skudder's affidavit clearly sufficient to satisfy this provision. The affidavit lists Skudder's specialized, technical knowledge regarding the issue of Mr. Eades' treatment, explaining he is "aware of the degree of care and skill ordinarily exercised by members of the medical profession under the same or similar circumstances as it relates to the care and treatment of patients such as Johnny Eades. . . . This knowledge is based upon my education, training, and experience." Skudder further explained his active practice of medicine includes the evaluation and treatment of occluded arteries, aneurysms, and other issues similar to those for which Mr. Eades sought treatment. Thus, we find Skudder demonstrated he possesses the specialized knowledge and training that may assist the trier of fact in this case, and he explained why his credentials qualify him to identify a negligent act or omission committed by Petitioners. Accordingly, even if Skudder did not satisfy the requirements of subsection (A)(2) because he did not list the same practice areas as Campbell and Wallen, his affidavit comports with the more general requirements of subsection (A)(3).

CONCLUSION

For the foregoing reasons, the court of appeals erred in finding the sufficiency of the affidavit was unpreserved for review. Reaching the merits, we find the expert

affidavit produced by the Eades sufficient to comply with the statutory requirements of section 15-36-100(A)(3). Therefore, the opinion of the court of appeals is

REVERSED.

BEATTY, C.J., FEW, J., and Acting Justice James E. Moore, concur. Acting Justice Costa M. Pleicones, concurring in result only.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Jacklyn Donevant, Respondent,

v.

Town of Surfside Beach, Petitioner.

Appellate Case No. 2015-002533

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Horry County
Deadra L. Jefferson, Trial Court Judge

Opinion No. 27771
Heard October 18, 2017 – Filed February 28, 2018

AFFIRMED

Charles Franklin Thompson Jr., of Malone, Thompson, Summers & Ott, LLC, of Columbia, for Petitioner.

Henrietta U. Golding and James K. Gilliam, both of McNair Law Firm, of Myrtle Beach, for Respondent.

JUSTICE FEW: The court of appeals affirmed a jury verdict for Jacklyn Donevant in her wrongful termination action against the Town of Surfside Beach, finding her cause of action fit within the public policy exception to the at-will employment doctrine. *Donevant v. Town of Surfside Beach*, 414 S.C. 396, 778 S.E.2d 320 (Ct. App. 2015). The Town contends the court of appeals' decision "greatly expanded

the public policy exception." We find the Town has misinterpreted the court of appeals' opinion. We affirm.

The court of appeals set forth the facts of the case in detail. 414 S.C. at 399-404, 778 S.E.2d at 322-25. We summarize below those facts necessary to explain our interpretation of the court of appeals' opinion.

The South Carolina Building Codes Council[1] is responsible for adopting the building code that applies throughout the state. *See* S.C. Code Ann. §§ 6-9-40(A), 6-9-50(A) (Supp. 2017); 1 S.C. Code Ann. Regs. 8-236 (2011). The Council has adopted the International Building Code. *See* 1 S.C. Code Ann. Regs. 8-800 (Supp. 2017). Each municipality is responsible for enforcing this building code in its jurisdiction. *See* S.C. Code Ann. § 6-9-10(A) (Supp. 2017) (requiring all municipalities enforce the building code adopted by the South Carolina Building Code Council). Before she was fired, Donevant served as the Town's "building official," a position each municipality is required to fill. S.C. Code Ann. § 6-9-30(A) (Supp. 2017). The building official's responsibilities are defined in the State regulations. *See* 1 S.C. Code Ann. Regs. 8-105 (2011) (defining "building official" as "the officer designated by a local jurisdiction, who is charged with the administration and enforcement of Building Codes"). Chapter 1 of the building code provides, "The building official shall . . . enforce compliance with the provisions of this code" and "shall issue all necessary notices or orders to ensure compliance." Int'l Bldg. Code §§ 104.2, 104.3 (2006).[2]

The building code requires anyone "who intends to construct, enlarge, alter, [or] repair . . . a building . . . shall first . . . obtain the required permit." Int'l Bldg. Code § 105.1. The building code further provides, "It shall be unlawful for any person . . . to erect, construct, alter, . . . [or] repair . . . any building . . . in conflict with or in violation of any of the provisions of this code." Int'l Bldg. Code § 113.1. Donevant

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[1] The Council is an agency within the South Carolina Department of Labor, Licensing, and Regulation. S.C. Code Ann. § 1-30-65 (2005).

[2] Although municipalities are not required to adopt Chapter 1, *see* § 6-9-50(A), the Town chose to do so. *See* Surfside Beach, S.C., Ordinance No. 08-0641 (July 8, 2008) (adopting Chapters 1 through 35 of the 2006 Int'l Bldg. Code).

discovered unpermitted construction work she determined to be in violation of the building code, and she issued a stop work order.[3] She was fired a few days later.

Our Legislature established the general public policy of enforcing the building code in subsection 6-9-5(A) of the South Carolina Code (Supp. 2017), which provides, "The public policy of South Carolina is to maintain reasonable standards of construction in buildings and other structures in the State consistent with the public health, safety, and welfare of its citizens." The Legislature set forth the specific requirements of that policy by requiring every municipality to enforce the building code. § 6-9-10(A). As the Town's building official, Donevant was charged by State and local law to carry out this policy. *See supra*, discussion of S.C. Code Ann. § 6-9-30(A), 1 S.C. Code Ann. Regs. 8-105, and Int'l Bldg. Code §§ 104.2, 104.3. When she discovered construction work being done without a permit, which she correctly determined to be in violation of the building code, it became her mandatory responsibility to "ensure compliance."

As we read this record and the court of appeals' opinion, Donevant was fired because she carried out her mandatory responsibility under the law to enforce the provisions of the building code. The jury charge and the closing arguments are not in the record, which prevents us from determining the precise factual question the trial court put before the jury. However, during oral argument at the court of appeals, "the Town conceded that the reason Donevant was fired is not an issue on appeal." *Donevant*, 414 S.C. at 408, 778 S.E.2d at 327. Therefore, based on the record as it appears to us, the question on appeal is whether it is a violation of a clear mandate of public policy to fire a building official for enforcing the building code. *Ludwick v. This Minute of Carolina, Inc.*, 287 S.C. 219, 225, 337 S.E.2d 213, 216 (1985). As the court of appeals held, the answer is "yes." This case fits squarely within the long-established limits of the public policy exception to the at-will employment doctrine because firing Donevant for enforcing the building code violates a clear mandate of public policy. *See Barron v. Labor Finders of S.C.*, 393 S.C. 609, 614, 713 S.E.2d 634, 636-37 (2011) ("Under the 'public policy exception' to the at-will employment doctrine . . . an at-will employee has a cause of action in tort for wrongful termination where there is a retaliatory termination of the at-will employee in

[3] A stop work order is an official document signed by the building official that requires all construction at the site to cease. Int'l Bldg. Code §§ 114.1-114.3.

violation of a clear mandate of public policy." (citing *Ludwick*, 287 S.C. 219, 337 S.E.2d 213)).

The Town makes several arguments to support its contention the court of appeals' decision expands the public policy exception, each of which we find the court of appeals effectively refuted. We address in particular only one of those arguments—the argument Donevant's claim does not fit within the public policy exception because her decision to issue a stop work order was discretionary under *Antley v. Shepard*, 340 S.C 541, 532 S.E.2d 294 (Ct. App. 2000), *aff'd as modified*, 349 S.C. 600, 564 S.E.2d 116 (2002). In *Antley*, the court of appeals held the public policy exception does not apply when an employee is fired for taking action she is "permitted, but not required" by law, to take. 340 S.C. at 549, 532 S.E.2d at 298. The Town argues the court of appeals' decision is in conflict with *Antley* because she was fired for taking the discretionary action of issuing a stop work order.

We do not read the court of appeals' opinion to be in conflict with *Antley*. Distinguishing *Antley* from this case, the court of appeals explained that "unlike *Antley*, where the statutes 'permitted but did not require' the tax assessor to take action, the statutory and building code provisions at issue here *required* Donevant's actions of enforcing compliance with the building code." 414 S.C. at 413, 778 S.E.2d at 329 (quoting *Antley*, 340 S.C. at 549, 532 S.E.2d at 298) (emphasis in original). Thus, according to the court of appeals, *Antley* does not control this case because Donevant was not fired for taking the discretionary action of issuing the stop work order. Rather, she was fired for carrying out the building official's mandatory legal duty to "enforce compliance" with the building code. We agree with the court of appeals. While some statements in the court of appeals' opinion may suggest Donevant was fired for taking the discretionary action of issuing the stop work order,[4] the basis of the court's decision—with which we agree—is that the

[4] The court of appeals stated "to carry out her legal duty to 'enforce compliance' with the building code, Donevant issued a stop-work order as she was required to do by law," 414 S.C. at 413, 778 S.E.2d at 329, and, "By suspending Donevant and ultimately terminating her for issuing the stop-work order at the Pier Restaurant, Duckett effectively discharged Donevant for refusing to violate the law," 414 S.C. at 413, 778 S.E.2d at 330. We do not read these statements to say Donevant was fired because she chose to issue a stop work order as the means of enforcing the building code, but to merely explain the particular action she took in fulfilling her

public policy exception applies to her claim because she was fired for enforcing the building code. Under the circumstances of this case, firing Donevant for carrying out her mandatory responsibility to enforce the building code violates public policy.

The court of appeals' decision is **AFFIRMED**.

BEATTY, C.J., KITTREDGE, JAMES, JJ., and Acting Justice Donald Bruce Hocker, concur.

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mandatory duty. As the court of appeals also stated, "Donevant was enforcing the building code and therefore enforcing a clear mandate of public policy when she issued the stop-work order," 414 S.C. at 415, 778 S.E.2d at 331, and, "the law required Donevant to take action to enforce compliance with the building code when she saw unpermitted construction," 414 S.C. at 411, 778 S.E.2d at 328.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Kenneth Hilton, Petitioner,

v.

The State, Respondent.

Appellate Case No. 2015-002140

ON WRIT OF CERTIORARI

Appeal from Cherokee County
J. Derham Cole, Plea Court Judge
Roger L. Couch, Post-Conviction Relief Judge

Opinion No. 27772
Submitted February 15, 2018 – Filed February 28, 2018

AFFIRMED

Appellate Defender Robert M. Pachak, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson and Assistant Attorney General Valerie Garcia Giovanoli, both of Columbia, for Respondent.

JUSTICE FEW: Kenneth Lee Hilton appeals the denial of post-conviction relief (PCR) claiming the PCR court did not obtain a knowing and intelligent waiver of his right to counsel before allowing him to represent himself at his PCR trial. We find the PCR court obtained a valid waiver of counsel, and affirm.

I. Facts and Procedural History

Hilton lured a woman into his vehicle in Gastonia, North Carolina, on the pretense that he would drive her to a store so she could cash a check. When the victim realized Hilton was not driving to the store as he told her, she called 911 from her cell phone. Though she apparently did not speak to the 911 operator, she left the line open while Hilton drove her to a remote cemetery near Blacksburg, in Cherokee County, South Carolina. The 911 operator recorded the entire forty-five minute call. The recording contains the victim's statement, "Please pull over and let me out. I want to go home." Hilton responded, "If you don't calm down, I'm going to beat you so badly that the police won't recognize you." Hilton also told the victim he intended to sexually assault her. The victim stated Hilton repeatedly hit her in the face and throat as he drove. At the cemetery, Hilton forced the victim to remove her shorts and to perform oral sex on him. After he attempted to penetrate her with his penis, she was able to get away. Wearing only a shirt, the victim ran into the woods and hid until officers found her.

Hilton's DNA was matched through a national database. After he was arrested, he admitted he gave the victim a ride that day, though he initially denied he sexually assaulted her. He later pled guilty to kidnapping and assault with intent to commit criminal sexual conduct in the second degree. When asked at the PCR trial about the quality of the State's evidence, plea counsel explained, "We had the actual recording of what went on, and when you listen to it, there is no defense to these charges." The plea court sentenced him to forty-five years in prison. He did not appeal.

Hilton filed a PCR application alleging ineffective assistance of counsel. The State filed a return requesting a hearing, and the court appointed counsel to represent him. Hilton filed a written motion to "dismiss" his appointed attorney. A few weeks later, after learning his motion was set for a hearing, Hilton filed another motion, again seeking "dismissal of PCR Court Appointed Attorney." At the hearing on Hilton's motion, the PCR court informed him of his right to counsel but did not warn him of the dangers of proceeding without an attorney. After the hearing, the PCR court entered an order granting the motion to relieve counsel.

Almost a year later, Hilton appeared without an attorney before a second PCR court (Judge Couch) for his PCR trial. The PCR court began by inquiring into Hilton's waiver of his right to counsel. After the inquiry, discussed more fully below, the PCR court allowed Hilton to proceed without counsel. Both sides presented testimony. As a part of its presentation, the State informed the PCR court of Hilton's seven prior convictions for criminal sexual conduct. The PCR court took the case under advisement, and later issued a written order denying relief.

Hilton filed a petition for a writ of certiorari, arguing only that the PCR court erred in allowing him to represent himself without a valid wavier of his right to PCR counsel. We granted the petition.

II. Analysis

In *Whitehead v. State*, 310 S.C. 532, 426 S.E.2d 315 (1992), we recognized that Rule 71.1(d) of the South Carolina Rules of Civil Procedure "mandates the appointment of counsel for indigent PCR applicants whenever a PCR hearing is held to determine questions of law or fact." 310 S.C. at 535, 426 S.E.2d at 316. Rule 71.1(d) provides:

> If, after the State has filed its return, the application presents questions of law or fact which will require a hearing, the court shall promptly appoint counsel to assist the applicant if he is indigent. . . . Counsel shall insure that all available grounds for relief are included in the application and shall amend the application if necessary.

Rule 71.1(d), SCRCP. *See also* S.C. Code Ann. § 17-27-60 (2014) ("If the applicant is unable to pay court costs and expenses of representation . . . these costs and expenses shall be made available to the applicant . . . .").

We went on to hold in *Whitehead* that "when a PCR application is not dismissed *before* a hearing is held, the PCR judge must appoint counsel or obtain a knowing and intelligent waiver of that right by the applicant." 310 S.C. at 535, 426 S.E.2d at 316. As to what constitutes a valid waiver, we stated "the PCR applicant must be made aware of the right to counsel and the dangers of self-representation." 310 S.C. at 535, 426 S.E.2d at 316-17 (citing *Prince v. State*, 301 S.C. 422, 423-24, 392 S.E.2d 462, 463 (1990)).

Prince involved the petitioner's claim he did not make a valid waiver of his right to counsel at his guilty plea, not at a PCR trial. 301 S.C. at 423, 392 S.E.2d at 463. As we indicated in *Whitehead*, however, the *Prince* structure also applies in a PCR proceeding. 310 S.C. at 535, 426 S.E.2d at 316-17. Thus, there are two requirements the PCR court must meet before allowing a PCR applicant to proceed without an attorney. First, the court should make sure the applicant is aware of his right to counsel; second, the court should ensure the applicant understands the dangers and disadvantages of self-representation. *See Richardson v. State*, 377 S.C. 103, 105-06, 659 S.E.2d 493, 494-95 (2008) (discussing the two requirements for a valid

waiver of counsel in a PCR proceeding); *Whitehead*, 310 S.C. at 535, 426 S.E.2d at 316-17 (same); *Prince*, 301 S.C. at 423-24, 392 S.E.2d at 463 (same in a criminal proceeding).

As to the first requirement—the PCR court must advise the applicant of his right to counsel—Hilton specifically mentioned Rule 71.1(d) in his motion to "dismiss" counsel. He wrote in the motion that Rule 71.1(d) "provides . . . appointment of counsel . . . if there is a material issue requiring a hearing." In addition, the first PCR court informed Hilton at the initial hearing he had the right to counsel, explaining that "under the law you have a right to have court-appointed counsel to assist you in a post-conviction relief action." Hilton responded that he understood. Finally, before allowing Hilton to proceed without an attorney at the PCR trial, the second PCR court again informed Hilton he had the right to counsel,

> Court: Mr. Hilton . . . it appears that you are representing yourself in this matter. Is that true?
>
> Hilton: Yes.
>
> . . . .
>
> Court: And are you aware or have you been made aware that, should you wish to have an attorney, an attorney could be appointed for you . . . ?
>
> Hilton: I do not need an attorney, sir. . . . I chose to be pro se.

The PCR court satisfied the first requirement.

As to the second requirement—the PCR court must ensure the applicant understands the dangers and disadvantages of self-representation—Hilton addressed in his filings with the PCR court some of the things with which counsel could assist him. For example, in his first motion he wrote he was aware he bore the burden of proving his PCR claims, stating "after all, it is I who has the burden of establishing my entitlement to the relief I seek." He also wrote he was aware of his right to amend his PCR application, a right specifically mentioned in Rule 71.1(d). In his second motion, he asked for time in which "to file his own pro se Amendment to his

Application." Hilton's filings also indicate he was aware an attorney could help him with discovery, but that he chose to conduct discovery himself. Hilton also stated, "I fully understand my claims, and . . . I have the ability to prepare and represent my own claims before the Honorable Court." Finally, Hilton attached an "affidavit" to both motions in which he swore, "I make this waiver, to dismiss my Court appointed Attorney, with the full understanding of the dangers of self-representation and the consequences of proceeding pro se."

The second PCR court had the following discussion with Hilton before proceeding with the PCR trial,

> Court: Mr. Hilton, -- I want to be sure that you're aware of the kinds of things that an attorney might do to be of service to you in this matter.
>
> Hilton: Right.
>
> Court: Are you aware of those things?
>
> Hilton: Yes, I am.
>
> Court: Do I need to go over those with you at this time?
>
> Hilton: No, sir.

This dialogue is by no means a perfect effort at ensuring Hilton understood the dangers and disadvantages of self-representation, primarily because Hilton chose not to discuss the particular ways in which an attorney could be helpful. However, the nature of a PCR proceeding is such that a court's explanation of the dangers and disadvantages of self-representation is necessarily abbreviated when compared to such an explanation in a criminal case. In this PCR case, Hilton specifically stated in his affidavit he had a "full understanding of the dangers of self-representation and the consequences of proceeding pro se." At the PCR trial, the court offered to explain "the kinds of things that an attorney might do to be of service to you," and Hilton declined. While that unaccepted offer might not be sufficient in other circumstances, the record here is clear Hilton was already aware of several of the specific advantages of having an attorney. These include Hilton's knowledge that an attorney could assist him in conducting discovery, amending his application, and meeting his burden of proof.

If Hilton had been willing to allow the court to explain, the court would certainly have specifically discussed other advantages of having an attorney that can become important in PCR trials, such as an attorney's understanding of substantive law, and her skill at questioning witnesses to assist the applicant in meeting his burden of proof. Nevertheless, this record indicates—though does not clearly reveal—Hilton was aware of these advantages.[1] In addition, Hilton has not argued on appeal any one point as to which he contends the court's explanation was inadequate.

At the initial hearing, the PCR court clearly erred by failing to ensure Hilton understood the dangers and disadvantages of self-representation before granting the motion to relieve his appointed attorney. *Whitehead*, 310 S.C. at 535, 426 S.E.2d at 316-17; *see also Richardson*, 377 S.C. at 105-06, 659 S.E.2d at 494-95 (repeating our holding in *Whitehead* that "if a PCR application presents questions of law or fact requiring a hearing, . . . state law provides that counsel must be appointed or a knowing, intelligent waiver of the right to counsel must be obtained"). The precise question before us, however, is whether the second PCR court (Judge Couch) erred by going forward with the PCR trial with Hilton representing himself. After considering the entire record, we find Hilton's statements in his motions, combined with Judge Couch's rejected offer to explain the things an attorney could do to assist him, meet the second requirement of *Whitehead*—that the court should ensure the applicant understands the dangers and disadvantages of self-representation. *See Wroten v. State*, 301 S.C. 293, 294, 391 S.E.2d 575, 576 (1990) (holding, even in the context of a criminal case, "If the record demonstrates the defendant's decision to represent himself was made with an understanding of the risks of self-representation, the requirements of a voluntary waiver will be satisfied.").

III. Conclusion

[1] As to an attorney's ability to help him understand substantive law, Hilton wrote in his first motion, "I further hereby state that I fully understand my claims and issues that I intend to raise. Believe me I have been studying every day since trial. I have the ability to prepare and represent my own claims before the Honorable Court." As to an attorney's ability to question witnesses, the second PCR court offered at the beginning of the PCR trial to discuss reappointing counsel if Hilton changed his mind, and the court discussed a non-lawyer's difficulty questioning witnesses as Hilton began his cross-examination of plea counsel.

The PCR court obtained a valid waiver from Hilton of his right to counsel before allowing him to represent himself in a PCR trial. Therefore, the PCR court's decision to deny relief is **AFFIRMED**.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Wells Fargo Bank, N.A., successor-by-merger to Wachovia Bank, N.A., Respondent,

v.

Fallon Properties South Carolina, LLC, Timothy R. Fallon, Susan C. Fallon, Fallon Luminous Products Corporation, GE Business Capital Corporation, formerly Transamerica Business Capital Corporation, and FSD Repurchase Solutions, LLC, and South Carolina Department of Revenue, Defendants,

Of Whom Fallon Properties South Carolina, LLC, Timothy R. Fallon and Susan C. Fallon are the Petitioners.

Appellate Case No. 2015-002018

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Spartanburg County
Gordon G. Cooper, Master-in-Equity

Opinion No. 27773
Heard April 12, 2017 – Filed February 28, 2018

AFFIRMED AS MODIFIED

Alexander Hray, Jr., of Spartanburg, for Petitioners.

Robert L. Widener, of Columbia and Weyman C. Carter, of Greenville, both of McNair Law Firm, PA, for Respondent.

CHIEF JUSTICE BEATTY: We granted a writ of certiorari to review the Court of Appeals' decision in this case, which raises the novel issue of whether an email that provides written notice of entry of an order or judgment triggers the time for serving a notice of appeal for purposes of Rule 203(b)(1) of the South Carolina Appellate Court Rules ("SCACR"). As will be discussed, we hold that such an email, if sent from the court, an attorney of record, or a party, triggers the time to serve a notice of appeal. Because the email giving rise to this appeal was from a master-in-equity's administrative assistant and provided written notice of the entry of an order, we find the email triggered the time to appeal. Since the notice of appeal was not served until thirty-one days after the parties received the email, we agree with the Court of Appeals that the service of the notice of appeal was untimely. However, given the novelty of the issue, the frequency in which the issue is likely to arise, and the inconsistent case law interpreting Rule 203, SCACR, fairness dictates that our ruling on this issue be applied prospectively. Accordingly, we affirm as modified and remand to the Court of Appeals to allow the appeal to proceed on its merits.

I. Factual and Procedural History

On December 15, 2014, the master filed an order denying Fallon Properties South Carolina, LLC, Timothy R. Fallon, and Susan C. Fallon's ("Petitioners") petition for an order of appraisal. That same day, the master's administrative assistant emailed a signed and stamped copy of the order and Form 4 to both Petitioners and Wells Fargo Bank ("Respondent"). The email provided: "Please see attached copy of signed and clocked Form 4 and Order. I have also mailed a copy to all listed on the Form 4." Three days later, Petitioners received a copy of both documents in the mail.

Believing the time to appeal commenced on the day they received the copy of the order and Form 4 in the mail, Petitioners served their notice of appeal on January

15, 2015, which was thirty-one days after they received the email and twenty-eight days after they received the documents in the mail. Respondent subsequently filed a motion to dismiss, arguing the email triggered the time to appeal; therefore, Petitioners' notice of appeal was untimely served. The Court of Appeals agreed with Respondent and dismissed the appeal.

II. Discussion

Petitioners argue the Court of Appeals erred in determining the email triggered the time to serve their notice of appeal. We disagree.

Rule 203(b)(1), SCACR sets forth the procedures for appealing a decision of the court of common pleas and, by way of Rule 203(b)(4), SCACR,[1] a decision of a master-in-equity. This rule provides, in pertinent part: "A notice of appeal shall be served on all respondents within thirty (30) days after *receipt of written notice of entry of the order or judgment*." Rule 203(b)(1), SCACR (emphasis added). Thus, the time to serve the notice of appeal from a master's decision begins on the day the party receives written notice that an order or judgment has been entered.

To be clear, Petitioners do not dispute that the email constituted written notice of entry of the order or judgment. Rather, Petitioners take issue with the manner in which they *received* written notice. Petitioners contend the time to serve a notice of appeal is only triggered at the time the parties receive written notice of the entry of an order or judgment *by mail or hand delivery*. As a result, Petitioners posit the time to serve their notice of appeal did not commence until the day they received the copy of the order and Form 4 in the mail.

In support of their position, Petitioners erroneously rely on Rule 5 of the South Carolina Rules of Civil Procedure ("SCRCP"), which requires, *inter alia*, all written notices be served by mail or hand delivery. However, because we are concerned with an appellate procedure, that is, the service of a notice of appeal, the South Carolina Appellate Court Rules control; therefore, the South Carolina Rules of Civil Procedure are inapplicable to the outcome of this case. *See* Rule 101(a), SCACR

[1] *See* Rule 203(b)(4), SCACR ("The notice of appeal from an order or judgment issued by a master or special referee shall be served in the same manner as provided by Rule 203(b)(1).").

(mandating that the appellate court rules govern the practice and procedure in appeals before the Supreme Court or Court of Appeals); Rule 73, SCRCP (providing the procedure on appeal to the South Carolina Supreme Court or the South Carolina Court of Appeals must be in accordance with the appellate court rules); Rule 81, SCRCP (limiting the application of the rules of civil procedure to trial courts of civil jurisdiction as well as to magistrate's courts, probate courts, and family courts to the extent they are not inconsistent with the statutes and rules governing those courts). Accordingly, we will proceed to address the issue before us under the relevant appellate court rules.

Rule 203(b)(1), SCACR requires *the notice of appeal* be served within thirty days after receiving written notice of entry of the order or judgment. When determining whether the service of the notice of appeal is timely, which is the issue before us in this case, we look to the date the parties received written notice of entry of an order of judgment. Unlike the notice of appeal, there is no requirement that *the written notice of entry of an order or judgment* be served upon the parties. All that is required to trigger the time to appeal is that the parties *receive* such notice. Moreover, there is nothing in our appellate court rules suggesting that the manner in which a party may receive notice is limited to the methods used to effectuate service, that is, by mail or hand delivery. Thus, in determining the email did trigger the time to appeal, we find the Court of Appeals properly relied on *Canal Insurance Company v. Caldwell*, 338 S.C. 1, 524 S.E.2d 416 (Ct. App. 1999), wherein the court held that a fax from opposing counsel explaining judgment had been entered and providing the judgment roll number constituted receipt of written notice of entry of the judgment for purposes of Rule 203(b)(1), SCACR and triggered the time to appeal.

In *Canal*, the trial court granted summary judgment in favor of the respondent on March 17, 1997. *Canal*, 338 S.C. at 4, 524 S.E.2d at 417. Two days later, a form judgment was entered, indicating copies were mailed to all parties. *Id*. On June 24, 1997, appellants' counsel wrote opposing counsel inquiring about the status of the final order, which he allegedly did not receive. *Id*. On July 8, 1997, respondent's counsel faxed and mailed appellants' counsel informing him judgment was entered on March 19, 1997 and providing him with the judgment roll number. *Id*. One month later, appellants' counsel wrote the clerk's office requesting a copy of the judgment, which he received on August 12, 1997. *Id*. at 4-5, 524 S.E.2d at 417. Ten days after receiving the copy of the judgment, appellants' counsel filed a motion to reconsider. *Id*. at 5, 524 S.E.2d at 417. After determining the motion to reconsider

was timely, the trial court withdrew its original order and substituted a revised order from which appellants appealed to the Court of Appeals. *Id*. at 5, 524 S.E.2d at 417-18. Respondent contended the Court of Appeals lacked subject matter jurisdiction to hear the appeal because appellants' service of the notice of appeal was untimely.

In concluding it did not have subject matter jurisdiction over the case, the Court of Appeals determined: "[e]ven if [appellants'] counsel did not in fact receive the trial court's original form order, *there is no question that he received written notice of entry of the judgment . . . on July 8, 1997*," which was the day opposing counsel sent the fax. *Id*. at 5, 524 S.E.2d at 418 (emphasis added). According to the court, because counsel waited a month to request a copy of the order, his motion to reconsider was not timely and, thus, did not stay the time for appeal. *Id*. at 6, 524 S.E.2d at 418. As a result, the court found counsel should have served the notice of appeal on or before August 7, 1997. *Id*.

Similarly, we hold an email providing written notice of entry of an order or judgment for purposes of Rule 203(b)(1), SCACR triggers the time to appeal *as long as the email is received from the court, an attorney of record, or a party*. Here, it is undisputed the email Petitioners received came from the master's administrative assistant and provided written notice of the entry of the order. Consequently, we find Petitioners' receipt of the email triggered the time to appeal. Although Petitioners also received written notice by mail three days after receiving the email, the time to serve the notice of appeal commenced at the time the parties *first* received written notice of entry of the order. Accordingly, we find the Court of Appeals correctly determined the time to appeal was triggered on the day the parties received the email; therefore, the notice of appeal served thirty-one days thereafter was untimely.

Nevertheless, fairness dictates that our holding on this issue be applied prospectively given the novelty of the issue, the frequency in which the issue is likely to arise, and the inconsistency in the case law interpreting Rule 203, SCACR, which creates confusion as to whether receipt of electronic correspondence is sufficient to trigger the time to appeal. Specifically, we take issue with the Court of Appeals' decision in *White v. South Carolina Department of Health and Environmental Control*, 392 S.C. 247, 708 S.E.2d 812 (Ct. App. 2011), wherein the court determined an email received from opposing counsel containing a signed and filed copy of an order did not trigger the time to appeal under Rule 203(b)(6), SCACR.

By way of background, unlike this case and *Canal*, *White* concerned, *inter alia*, the timeliness of a notice of appeal from a decision of the Administrative Law Court ("ALC"). Because the appeal arose out of the ALC, Rule 203(b)(6), SCACR controlled, not Rule 203(b)(1), SCACR. Rule 203(b)(6) provides: "When a statute allows a decision of the administrative law court . . . to be appealed directly to the Supreme Court or the Court of Appeals, the notice of appeal shall be served on . . . the administrative law court . . . and all parties of record within thirty (30) days after *receipt of the decision*." Rule 203(b)(6), SCACR (emphasis added). Therefore, when determining whether the service of a notice of appeal from the ALC is timely, the court is concerned with the date the party actually receives the decision, not the date the party receives written notice that an order or judgment has been entered.

The ALC order that gave rise to the appeal in *White* was entered on January 28, 2009. *White*, 392 S.C. at 252, 708 S.E.2d at 814. On February 9, 2009, appellant's counsel received an email containing a signed and filed copy of the order from the counsel of appellant's co-defendant. *Id*. at 252, 708 S.E.2d at 814-15. Appellant subsequently served its notice of appeal on March 12, 2009. *Id*. at 252, 708 S.E.2d at 814. In arguing its notice of appeal was timely served, appellant contended the "receipt of the decision" requirement in Rule 203(b)(6), SCACR, necessitates service by mail or hand delivery; therefore, the time to file and serve the notice of appeal did not commence on the day it received the email containing the ALC's order. *Id*. at 253, 708 S.E.2d at 815.

The Court of Appeals agreed, finding "receipt of the decision" requires service and "there is nothing in the current applicable rules that authorizes service of a decision of the ALC by electronic mail." *White*, 392 S.C. at 253-54, 708 S.E.2d at 815. The court distinguished *White* from *Canal*, stating "Receipt of notice was the critical event in . . . *Canal*, whereas receipt of the order itself is the critical event under Rule 203(b)(6), SCACR, in the present case. Therefore, . . . *Canal* [is] not instructive in analyzing the 'receipt' of an ALJ's decision within the meaning of Rule 203(b)(6), SCACR."[2] *Id*. at 254-55, 708 S.E.2d at 816.

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[2] In this case, the Court of Appeals determined *White* did not apply because *White* concerned a different appellate court rule than the one at issue in this case.

The Court of Appeals was correct in acknowledging that Rule 203(b)(1) and Rule 203(b)(6) necessitate the receipt of different things in order to trigger the time to appeal. As discussed, Rule 203(b)(1) only requires the party receive written notice that an order or judgment has been entered, whereas Rule 203(b)(6) requires the party receive a copy of the decision in order to trigger the time to appeal. However, simply because the rules require the receipt of different things does not necessarily mean the manner in which a party receives those things must differ in order to trigger the time to appeal.[3]

In effect, the Court of Appeals interpreted the term "receipt" under Rule 203(b)(1) broadly, permitting the receipt of written notice of entry of an order or judgment by various methods, including fax, email, mail, or hand delivery. However, the court interpreted the term "receipt" under Rule 203(b)(6) narrowly, permitting the receipt of a decision only in a manner used to effectuate service, that is, by mail or hand delivery. In addition to being inconsistent, the court's interpretation of the term "receipt" in *White* is unsupported by the controlling appellate court rules. As discussed, "receipt" under Rule 203, SCACR is not synonymous with the requirements of service. Therefore, we overrule the court's decision in *White* to the extent it holds otherwise and interprets "receipt of the decision" to require receipt of the decision by mail or hand delivery in order to trigger the time to appeal under Rule 203(b)(6), SCACR.

III. Conclusion

In conclusion, we hold an email sent from the court, an attorney of record, or a party that provides written notice of entry of an order or judgment triggers the time for serving a notice of appeal for purposes of Rule 203(b)(1), SCACR. For the reasons stated, our holding shall be applied prospectively and Petitioners' appeal is remanded to the Court of Appeals to proceed on its merits.[4] Accordingly, the Court of Appeals' decision dismissing the appeal as untimely is

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[3] Nevertheless, we recognize that there may be some forms of communication used to receive written notice for purposes of Rule 203(b)(1) that could not practically be used to receive a decision for purposes of Rule 203(b)(6) due to technological limitations.

[4] It appears that the dissent fails to consider, or give much weight to, the fact electronic written notification was not contemplated by Rule 203(b), SCACR when it was promulgated by this Court in 1990. Email did not come into widespread use

AFFIRMED AS MODIFIED.

KITTREDGE, J., and Acting Justices James E. Moore and Howard P. King, concur. Acting Justice William P. Keesley, concurring in part and dissenting in part in a separate opinion.

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until the mid-nineties. The Court of Appeals' attempt to overlay Rule 203, SCACR to modern practice has resulted in justifiable confusion to the Bench and Bar. Rule 263(b), SCACR notwithstanding, the Supreme Court is the final arbiter of South Carolina law. The Court's jurisdiction and authority emanates from the South Carolina Constitution not from rules promulgated by the Court.

ACTING JUSTICE KEESLEY: I respectfully concur in part and dissent in part. I agree with much of the majority's well-reasoned decision. In particular, I believe the majority correctly found the thirty-day period in which to file and serve the notice of appeal began upon the receipt of the emailed copy of the ruling from the master's administrative assistant. *See* Rule 203(b)(1), SCACR ("A notice of appeal shall be served on all respondents within thirty (30) days after *receipt of written notice of entry of the order or judgment*." (emphasis added)).[5] Likewise, I agree with the majority that Rule 5 of the South Carolina Rules of Civil Procedure is not controlling in an appellate proceeding. *See* Rule 101(a), SCACR; Rule 73, SCRCP; Rule 81, SCRCP.

However, I part ways from the majority's argument, compelling and compassionate though it is, that we should only apply this "new" rule prospectively. South Carolina follows a bright-line rule: the timely service of the notice of appeal is a jurisdictional requirement, without which appellate courts lack the authority to hear and decide cases. *See, e.g.*, *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 14–15, 602 S.E.2d 772, 775 (2004). As this Court has previously explained:

> The notice of appeal in a case appealed from the Court of Common Pleas must be served on all respondents within thirty days after receipt of written notice of entry of the order or judgment. Rule 203(b)(1), SCACR. The requirement of service of the notice of appeal is jurisdictional, *i.e.*, if a party misses the deadline, *the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to "rescue" the delinquent party by extending or ignoring the deadline for service of the notice*. *Mears v. Mears*, 287 S.C. 168, 337 S.E.2d 206 (1985).

Id. (second emphasis added); *see also, e.g.*, Rule 205, SCACR ("*Upon* the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal." (emphasis added)); Rule 263(b), SCACR ("The time prescribed by the[South Carolina Appellate Court] Rules for performing any act *except the time for serving the notice of appeal under Rules 203 and 243* may be extended or shortened by the appellate court, or by any judge or justice thereof." (emphasis

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[5] Petitioners concede electronic communications such as email satisfy the written-notice requirement of Rule 203(b)(1).

added)); *Hill v. S.C. Dep't of Health & Envtl. Control*, 389 S.C. 1, 21, 698 S.E.2d 612, 623 (2010) ("The service of a notice of appeal is a jurisdictional requirement, and *the time for service may not be extended by this Court*." (emphasis added)); *Sadisco of Greenville, Inc. v. Greenville Cty. Bd. of Zoning Appeals*, 340 S.C. 57, 59, 530 S.E.2d 383, 384 (2000) (per curiam) ("This Court has consistently stated that service of the Notice of Appeal is a jurisdictional requirement, and this Court has *no authority* to extend or expand the time in which the Notice of Appeal must be served." (emphasis added)); Jean Hoefer Toal et al., *Appellate Practice in South Carolina* 122 (3d ed. 2016) ("If a party fails to [timely serve the notice of appeal], the appellate court has *no authority or discretion* to rescue the delinquent party by extending or ignoring the deadline because the appellate court lacks jurisdiction over the matter." (emphasis added) (collecting cases)). In other words, appellate courts do not obtain appellate jurisdiction over the matter until *after* timely service of the notice of appeal. *See* Rule 205, SCACR. Accordingly, appellate courts lack jurisdiction in cases where the notice of appeal was not timely served, and even this Court cannot rescue an appellant who has not met the service deadline, including in cases such as this one where missing the deadline is understandable. Indeed, other than making an appeal to fundamental fairness, the majority makes no attempt to cite any authority for its ability to do so.

I concede our current precedent creates some confusion as to what type of written notice triggers the thirty-day window for filing a notice of appeal under Rule 203(b). As the majority correctly notes, current case law permits a facsimile from opposing counsel to trigger the thirty-day window under Rule 203(b)(1), SCACR,[6] but prohibits an email from counsel from triggering the window under Rule 203(b)(6), SCACR.[7]

Nonetheless, even were I to agree with the majority that the court of appeals erred in portions of its ruling in *White* related to triggering the window in appeals from administrative law courts, I respectfully fail to see how that would give rise to an exception allowing this appeal to proceed. I simply cannot reconcile the majority's decision to apply its ruling prospectively with the extensive body of law

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[6] *Canal Ins. Co. v. Caldwell*, 338 S.C. 1, 524 S.E.2d 416 (Ct. App. 1999).
[7] *White v. S.C. Dep't of Health & Envtl. Control*, 392 S.C. 247, 708 S.E.2d 812 (Ct. App. 2011).

holding that appellate courts are not permitted to rescue a litigant from an untimely notice of appeal. Accordingly, I would affirm the dismissal by the court of appeals.

The Supreme Court of South Carolina

Re: Expansion of Electronic Filing Pilot Program - Court of Common Pleas

Appellate Case No. 2015-002439

ORDER

Pursuant to the provisions of Article V, Section 4 of the South Carolina Constitution,

IT IS ORDERED that the Pilot Program for the Electronic Filing (E-Filing) of documents in the Court of Common Pleas, which was established by Order dated December 1, 2015, is expanded to include Union County. Effective March 20, 2018, all filings in all common pleas cases commenced or pending in Union County must be E-Filed if the party is represented by an attorney, unless the type of case or the type of filing is excluded from the Pilot Program. The counties currently designated for mandatory E-Filing are as follows:

Aiken	Allendale	Anderson	Bamberg
Barnwell	Beaufort	Cherokee	Clarendon
Colleton	Edgefield	Georgetown	Greenville
Greenwood	Hampton	Horry	Jasper
Kershaw	Laurens	Lee	Lexington
McCormick	Newberry	Oconee	Pickens
Saluda	Spartanburg	Sumter	Williamsburg
York			

Richland - Reinstated Effective March 8, 2018
Union - Effective March 20, 2018

Attorneys should refer to the South Carolina Electronic Filing Policies and Guidelines, which were adopted by the Supreme Court on October 28, 2015, and the training materials available on the E-Filing Portal page at http://www.sccourts.org/efiling/ to determine whether any specific filings are exempted from the requirement that they be E-Filed. Attorneys who have cases pending in Pilot Counties are strongly encouraged to review, and to instruct their staff to review, the training materials available on the E-Filing Portal page.

s/Donald W. Beatty
Donald W. Beatty
Chief Justice of South Carolina

Columbia, South Carolina
February 28, 2018

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Gerald Rudell Williams, Appellant.

Appellate Case No. 2013-002304

Appeal From Saluda County
J. Michael Baxley, Circuit Court Judge

Opinion No. 5540
Heard March 14, 2017 – Filed February 28, 2018

AFFIRMED

Appellate Defender David Alexander, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Assistant Attorney General William Frederick Schumacher, IV, both of Columbia; and Assistant Solicitor Joshua L. Thomas, of Greenwood, for Respondent.

WILLIAMS, J.: In this criminal appeal, Gerald Rudell Williams appeals his convictions for attempted murder, arguing the circuit court erred in (1) refusing to charge the jury on the lesser included offense of first-degree assault and battery and (2) charging the jury on the doctrine of transferred intent. We affirm.

FACTS/PROCEDURAL HISTORY

This case arises out of an incident on April 13, 2012, in which a double-wide mobile home (the Residence) in Saluda, South Carolina, was shot several times. At the time, Al Jerome Young lived in the Residence, along with Ycedra Williams[1] and her husband, Joseph Wrighton. Prior to the incident, Young agreed to purchase drugs for OJ Charley in exchange for Charley paying Young $26,000 in cash. Young, however, stated he never planned on purchasing any drugs with the money; instead, Young intended to "rip [Charley] off." Following Young and Charley's meeting, Young received a call from Ycedra, who stated a van with five individuals[2] came to the Residence looking for Young, which prompted him to purchase a .40 caliber Smith & Wesson firearm from "a random dude on the street." Ycedra testified the Residence's other occupants[3] recognized something was "going on" with Young and left the Residence out of fear, leaving only Ycedra, Young, and Wrighton at the Residence.

On April 12, 2012, Investigator Robert Shorter, then-chief investigator for Saluda County's sheriff's office, received information from an individual in the Williston Police Department. The individual indicated Charley and others would be traveling from Barnwell County to Saluda County that night seeking to retaliate against some individuals as a result of something that occurred earlier that week. After receiving the tip, Investigator Shorter issued a "be-on-the-lookout" advisement to the night shift officers, warning them of armed and dangerous individuals, including Charley, who were potentially seeking to retaliate against

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[1] Ycedra and Williams were second cousins. However, Ycedra testified she had not had much contact with Williams since they were young, and furthermore, she had not spoken with him at all in the months prior to the April 2012 shooting incident.

[2] Ycedra testified Williams was not one of the individuals in the van.

[3] The following individuals also lived in the Residence with Young, Ycedra, and Wrighton: Young's sister, Felicia Barlow; her husband, Michael Barlow; the Barlow's three children; and Ycedra's stepbrother, Frank Gonzalez.

Young. Investigator Shorter further advised officers that Charley was likely heading to the Residence because Young might be hiding there.

Ycedra testified she and Wrighton were in the den of the Residence while Young was in his bedroom that night. Shortly after midnight, Ycedra heard a dog barking, went to look out the window, and saw two people in the driveway approaching the Residence. Ycedra yelled to Young that people were outside, and he told her to turn off the lights. At that point, Wrighton went to the door to check outside and the people began shooting at him. Wrighton ran back into the den, grabbed Ycedra, threw her down to the floor, and lay down with her. Thereafter, Young fired several shots back at the shooters through the door. Once the shooting stopped, Ycedra called the police.

Investigator Shorter testified his office informed him a shooting occurred at the Residence. Law enforcement arrested Williams and OJ Charley shortly after midnight. When Investigator Shorter arrived at the Residence, the scene was secure and officers had Williams and Charley in custody. Investigator Shorter observed multiple bullet holes in the walls and door of the Residence as well as shell casings in the yard and inside the Residence. He also noted the door "had bullet holes going both ways, bullets going in, bullets coming out."

On July 9, 2013, a grand jury indicted Williams for three counts of attempted murder. The case was called for a jury trial on October 14, 2013. At trial, Charley testified for the defense. Charley admitted he was involved in the shooting incident at the Residence. He testified that a few days before he participated in the shooting incident, he went to the Residence and met with Young. Charley stated he and Young drove to a laundromat, and once they arrived, Young pointed a gun at Charley and stole $32,000 from him. Charley testified he returned to the Residence the night of the shooting incident with Williams, whom he referred to as the driver. Charley stated he offered to pay Williams to drive and told Williams they were going to see some girls. According to Charley, Williams had no idea the shooting incident was about to take place. Charley stated Williams was also unaware another individual, Rico, was following them in another vehicle. Charley testified he left Williams in the van and met up with Rico, who had two handguns in his possession. Charley stated that as he and Rico approached the Residence, Young opened the front door and fired two shots in the air. Charley stated he then fired a shot in the air and then his gun jammed. He ran back to the van and was

soon arrested, but he believed Rico stayed and continued to fire shots toward the Residence.

On cross-examination, the State questioned Charley about the plea deal he received in exchange for testifying against Williams. Charley acknowledged he was double-crossing the State and had lied to the jury on direct examination to help Williams.[4] Charley subsequently testified Williams was entirely aware of Charley's intentions when they went to the Residence and eventually confessed to lying about Rico's involvement in the shooting incident. When asked whether he and Williams went to the Residence to kill Young, Charley stated, "No. I came back to get my money. If killing was in the process, I mean, I don't -- I can't say what would have happened, but I did come back to get my money." Additionally, Charley testified Williams had a handgun, participated in the shooting incident,

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[4] Charley's description of the shooting incident changed several times during cross-examination, and he admitted he was lying after the State informed Charley he could be charged with perjury. Specifically, the following occurred on recross-examination:

> [The State]: Are you trying now to hedge your bet and work yourself out some deal on the back side of this now and say you got some deal in hopes it'll get you a lighter sentence?
>
> [Charley]: No sir. I'm just -- I'm telling the truth. I mean, I tried to help -- tried to help him out. And this -- I mean, the right thing to do is just tell the truth.
>
> [The State]: And you tried to help your co-defendant by getting up here and lying, bald-faced lying, to 12 people, didn't you? More than 12, but 12 actual jurors?
>
> [Charley]: Yes, sir, I did. It's wrong. I'm wrong. I'm sorry. I mean, that's just -- it is what it is, a lie. I apologize and it's not right.

and agreed to help Charley because Charley offered to pay Williams a portion of the money they recovered from Young.

After the defense rested its case, Williams objected to several of the circuit court's jury charges, including an inferred malice charge and a transferred intent charge. Additionally, Williams objected to the circuit court's failure to give a charge on the lesser included offenses of assault and battery of a high and aggravated nature (ABHAN) and first-degree and second-degree assault and battery. The circuit court found all of the evidence in the case "goes to the alleged crime where [Williams] . . . shot up [the Residence] with the intent to kill an individual who was within the home and there happened to be two other individuals in there as well." The court found the evidence "devoid of any lesser included offense indicia" and declined to give the requested charges. At the conclusion of the three-day trial, the jury convicted Williams for the attempted murders of Young, Ycedra, and Wrighton. The circuit court sentenced Williams to concurrent terms of twenty years' imprisonment. This appeal followed.

ISSUES ON APPEAL

I. Did the circuit court err in refusing to charge the jury on the lesser included offense of first-degree assault and battery when it charged the jury on attempted murder?

II. Did the circuit court err in charging the jury on the doctrine of transferred intent?

STANDARD OF REVIEW

"In criminal cases, [the appellate court] sits to review errors of law only and is bound by the factual findings of the [circuit] court unless an abuse of discretion is shown." *State v. Laney*, 367 S.C. 639, 643, 627 S.E.2d 726, 729 (2006). "An abuse of discretion occurs when the conclusions of the [circuit] court either lack evidentiary support or are controlled by an error of law." *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006).

LAW/ANALYSIS

I. Lesser Included Offense Charge

Williams first argues the circuit court committed error by refusing to charge the jury on the lesser included offense of first-degree assault and battery when it charged the jury on attempted murder. We agree, but we find this error to be harmless.

"In reviewing jury charges for error, we must consider the [circuit] court's jury charge as a whole in light of the evidence and issues presented at trial." *State v. Adkins*, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct. App. 2003). The circuit "court is required to charge only the current and correct law of South Carolina." *State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011) (quoting *Sheppard v. State*, 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004)). "The [circuit court] is to charge the jury on a lesser included offense if there is any evidence from which the jury could infer that the lesser, rather than the greater, offense was committed." *State v. Watson*, 349 S.C. 372, 375, 563 S.E.2d 336, 337 (2002). "A [lesser included] offense is one whose elements are wholly contained within the crime charged." *State v. Dickerson*, 395 S.C. 101, 118, 716 S.E.2d 895, 904 (2011). However, even if the elements of the greater offense do not include all the elements of the lesser offense, we may still construe the lesser offense as a lesser included offense if it "has traditionally been considered a lesser included offense of the greater offense." *Watson*, 349 S.C. at 376, 563 S.E.2d at 338.

Section 16-3-29 of the South Carolina Code (2015) codifies attempted murder and states that "[a] person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder." Section 16-3-600 of the South Carolina Code (2015 & Supp. 2017) codifies the varying degrees of assault and battery, which—in descending order of severity—includes ABHAN and assault and battery in the first, second, and third degree. As relevant to this case, subsection 16-3-600(C)(1) provides:

> (1) A person commits the offense of assault and battery in the first degree if the person unlawfully:
>
> (a) injures another person, and the act:

(i) involves nonconsensual touching of the private parts of a person, either under or above clothing, with lewd and lascivious intent; or

(ii) occurred during the commission of a robbery, burglary, kidnapping, or theft; or

(b) offers or attempts to injure another person with the present ability to do so, and the act:

(i) is accomplished by means likely to produce death or great bodily injury;[5] or

(ii) occurred during the commission of a robbery, burglary, kidnapping, or theft.

Additionally, subsection 16-3-600(C)(3) provides, "[a]ssault and battery in the first degree is a lesser[]included offense of [ABHAN], as defined in subsection (B)(1), and attempted murder, as defined in [s]ection 16-3-29."

We find the facts of this case fit within the confines of subsection 16-3-600(C)(1)(b)(i). Accordingly, we hold the circuit court erred in refusing to charge the lesser included offense of assault and battery in the first degree. *See State v. Scott*, 414 S.C. 482, 486, 779 S.E.2d 529, 531 (2015) ("The refusal to grant a requested jury charge that states a sound principle of law applicable to the case at hand is an error of law." (quoting *State v. Pittman*, 373 S.C. 527, 570, 647 S.E.2d 144, 167 (2007))). Thus, the dispositive question is whether the circuit court's error affected the results of the trial.

"Errors, including erroneous jury instructions, are subject to harmless error analysis." *State v. Belcher*, 385 S.C. 597, 611, 685 S.E.2d 802, 809 (2009). The circumstances of a particular case dictate whether an error is harmless. *State v.*

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[5] "Great bodily injury" is defined as "bodily injury which causes a substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function of a bodily member or organ." S.C. Code Ann. § 16-3-600(A)(1).

Tapp, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012). "No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it could not reasonably have affected the result of the trial." *Id.* (internal quotation marks omitted) (quoting *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985)). "When considering whether an error with respect to a jury instruction [is] harmless, [the appellate court] must determine beyond a reasonable doubt that the error complained of did not contribute to the verdict." *State v. Middleton*, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014) (internal quotation marks omitted) (quoting *State v. Kerr*, 330 S.C. 132, 144–45, 498 S.E.2d 212, 218 (Ct. App. 1998)). Moreover, when considering harmless error, the appellate court's analysis is focused on whether the erroneous charge contributed to the verdict rendered, not what the verdict would have been had the circuit court correctly charged the jury. *Id.* "[W]e must review the facts the jury actually heard and weigh those facts against the erroneous jury charge to determine what effect, if any, it had on the verdict." *State v. Jefferies*, 316 S.C. 13, 22, 446 S.E.2d 427, 432 (1994).

Williams asserts the circuit court committed reversible error. Williams argues that, under the any evidence standard and when viewing facts in the light most favorable to Williams, the jury could have concluded Williams lacked malice because no one was injured and Charley testified Young shot first. Conversely, the State contends the error was harmless because the only conclusion established by the evidence was Williams possessed malice aforethought and intended to kill the victims.

We find our supreme court's analysis in *Middleton* to be instructive in resolving this issue. *See* 407 S.C. at 317–19, 755 S.E.2d at 435–36. In *Middleton*, the supreme court affirmed the appellant's convictions for two counts of attempted murder and one count of possession of a weapon during the commission of a violent crime. *See id.* at 314, 755 S.E.2d at 433. There, the appellant requested a jury charge on the lesser included offense of assault and battery in the first degree on both counts of attempted murder, but the circuit court only charged the jury on the lesser included offense as to the injured victim and refused to charge the lesser included offense as to the uninjured victim. *Id.* at 314–15, 755 S.E.2d at 434. Although the circuit court erred in refusing to charge the jury on the lesser included offense of assault and battery in the first degree, the supreme court found the error was harmless beyond a reasonable doubt. *Id.* at 319, 755 S.E.2d at 436. Specifically, the supreme court found the jury could only reach the conclusion that

the appellant attempted to murder the victims because the evidence presented at trial showed the appellant deliberately approached the passenger side of the car containing the victims and shot at least five times into the car, and the victim testified to escaping injuries because he jumped into the driver's seat and ran the appellant off the road. *Id.* Thus, in light of this evidence, the court noted the erroneous jury charge did not contribute to the verdict beyond a reasonable doubt. *Id.*

Similarly, in the instant case, we find the circuit court's error did not contribute to the verdict beyond a reasonable doubt because the evidence presented at trial yielded only the conclusion that Williams acted with malice aforethought and attempted to commit murder. Moreover, the circuit court instructed the jury on the charges of malice, malice aforethought, expressed malice, and inferred malice. Specifically, the court stated malice is "hatred or ill will or hostility towards another person" and is "the intentional doing of a wrongful act without just cause or excuse and with an intent to inflict an injury or under circumstances that the law will infer an evil intent." The court instructed malice aforethought "must exist in the mind of the defendant just before and at the time that the act is committed" and may be "expressed or inferred." The court stated malice may be inferred[6] "from conduct that shows a total disregard for human life" and may arise when the act is "performed with a deadly weapon."[7] Finally, the court stated "[i]f facts are proved beyond a reasonable doubt sufficient to raise an inference of malice to [the jury's] satisfaction, this inference would be simply an evidentiary fact to be considered by . . . the jury, along with the other evidence in the case" and informed the jury it was free to give the evidence the weight it deemed necessary.

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[6] Williams did not appeal the inferred malice jury charge. Thus, the circuit court's ruling on this issue is the law of the case and cannot be considered by this court. *See State v. Black*, 400 S.C. 10, 28, 732 S.E.2d 880, 890 (2012) (holding an unchallenged ruling, right or wrong, becomes the law of the case and will not be considered by the appellate court).

[7] The circuit court charged the jury that a firearm may be considered a deadly weapon.

In the instant case, with regard to the evidence, Charley testified Williams (1) was aware of the circumstances leading up to the shooting incident at the Residence; (2) had a handgun and participated in the shooting; and (3) agreed to help Charley in exchange for a portion of the money. Further, the victims testified to being shot at numerous times through the door and walls of the Residence. Last, evidence demonstrated Williams was present at the scene of the crime and possessed a firearm. This evidence supports the jury's findings that Williams had malice aforethought and intended to kill the victims.

In light of the charges and the facts presented at trial, the only conclusion the jury could draw from the evidence was that Williams acted with malice aforethought and was guilty of attempted murder of the victims. Therefore, we find the circuit court's error did not contribute to the verdict beyond a reasonable doubt.

II. Transferred Intent Charge[8]

Williams next argues the circuit court erred in charging the jury on transferred intent. We disagree.

"Criminal liability is normally based upon the concurrence of two factors, 'an evil-meaning mind [and] an evil-doing hand . . . .'" *United States v. Bailey*, 444 U.S. 394, 402 (1980) (alterations in original) (quoting *Morissette v. United States*, 342 U.S. 246, 251 (1952)). "A defendant may not be convicted of a criminal offense unless the State proves beyond a reasonable doubt that he acted with the criminal intent, or mental state, required for a particular offense." *State v. Fennell*, 340 S.C. 266, 271, 531 S.E.2d 512, 515 (2000). "In general, '[a]ttempt is a specific intent

[8] The circuit court gave a transferred intent charge to assist the jury with its deliberations regarding whether Williams was guilty of the attempted murders of Ycedra and Wrighton. Williams objected to this charge, and the circuit court responded by describing the case as "a situation where the defendant is accused of shooting into a house where individuals may have been, that he did not know were there, that is giving him the benefit of the facts of the case." The circuit court explained it gave the charge because it was "concerned that the jury may believe, after charging that intent is necessary, that [Williams] had no intent to harm those individuals."

crime.' . . . 'The act constituting the attempt must be done with the intent to commit that particular crime.'" *State v. Sutton*, 340 S.C. 393, 397, 532 S.E.2d 283, 285 (2000) (alteration in original) (quoting 21 AM. JUR. 2D *Criminal Law* § 176 (1998) (current version § 150)). As related to "attempt" crimes, specific intent means "the defendant consciously intended the completion of acts comprising the choate offense." *Id.*

In South Carolina, attempted murder requires proving the specific intent[9] to commit murder. *See State v. King*, Op. No. 27744 (S.C. Sup. Ct. filed Oct. 25, 2017) (Shearouse Adv. Sh. No. 40 at 27–28, 35) (finding the circuit court erred in charging the jury that attempted murder is a general intent crime and requiring proof of a specific intent to kill as an element of attempted murder). "The doctrine of transferred intent applies only in the situation of the same intended harm inflicted on an unintended victim." *State v. Bryant*, 316 S.C. 216, 219, 447 S.E.2d 852, 854 (1994).

In the instant case, Williams asserts that because attempted murder is a specific intent crime, any intent he had to kill Young could not be transferred to other victims. In response, the State contends Williams had specific intent when he committed the crime of attempted murder. Moreover, the State argues Williams' specific intent applied to all three victims "because specific intent does not exclude crimes to other victims." We find that charging the doctrine of transferred intent is proper to convict a defendant of attempted murder regardless of whether a victim, intended or unintended, suffers an injury.

Historically, South Carolina courts have applied the doctrine of transferred intent in finding a defendant guilty of manslaughter or murder, typically applying it when the defendant, acting with malice and an intention to kill one person, misses his intended target and mistakenly kills an unintended victim. In these cases, the defendant's criminal intent to kill the intended victim—his mental state of malice—transfers to an unintended victim. *See State v. Heyward*, 197 S.C. 371, 377, 15 S.E.2d 669, 672 (1941) (affirming murder conviction of a defendant who

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[9] "A specific intent to kill may be, and normally is, inferred from the surrounding circumstances, such as the character of the attack, the use of a deadly weapon, and the nature and extent of the victim's injuries." *Sutton*, 340 S.C. at 397 n.5, 532 S.E.2d at 285 n.5.

mistakenly shot and killed a police officer when the defendant believed the officer to be an assassin sent by a former employer); *id.* ("If there was malice in appellant's heart, he was guilty of the crime charged, it matters not whether he killed his intended victim or a third person through mistake."); *see also* WILLIAM SHEPARD MCANINCH ET AL., THE CRIMINAL LAW OF SOUTH CAROLINA 18–19 (6th ed. 2013) ("[A]ll that is required for murder is mental state of malice, provided here by the intent to kill a human being, coupled with an act which caused the death of a human being.").

In *Fennell*, our supreme court stated the term transferred intent was "somewhat misleading" and provided clarification for its meaning, explaining:

> The defendant's mental state, or *mens rea*, whatever it may be at the time he allegedly commits a criminal act, is contained within the defendant's brain when he commits the act. That mental state never leaves the defendant's brain; it is not "transferred" from the defendant's brain to another person or place. A more apt description might be that the mental state is like a spotlight emanating from its source—the defendant's mind—to its target—the intended victim.
>
> Nor is that mental state in limited supply. The mental state "spotlight" is not extinguished at the moment a bullet strikes and kills the intended victim, such that there is no mental state left upon which to convict an unintended victim who also is injured or killed.

340 S.C. at 271, 531 S.E.2d at 515. Applying this analogy, the court found that, unlike other jurisdictions, South Carolina law required applying the doctrine of transferred intent to convict a defendant of assault and battery with the intent to kill (ABIK) when the defendant killed his intended victim and merely injured an unintended victim.[10] *Id.* at 274, 276, 531 S.E.2d at 516, 517 ("A person who,

[10] In *Fennell*, the supreme court determined the required mental state for ABIK was the same as that for murder—malice aforethought—whereas for an ABHAN conviction, the State was not required to prove malice. 340 S.C. at 275, 531

acting with malice, unleashes a deadly force in an attempt to kill . . . an intended victim should anticipate that the law will require him to answer fully for his deeds when that force kills or injures an unintended victim.").

We are unaware of another South Carolina case that addresses a factual scenario similar to that of the instant case, in which the circuit court charged the jury with the doctrine of transferred intent when a defendant was charged with attempted murder of an intended and unintended victim but neither the intended nor unintended victims were injured. We apply the doctrine of transferred intent in this instance in accord with South Carolina jurisprudence. Other jurisdictions vary when deciding whether to apply the doctrine of transferred intent to attempted murder cases;[11] however, similar to *Fennell*, we recognize South Carolina's

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S.E.2d at 517. The court found that, although the record showed the appellant did not act with malice toward the unintended victim and was angry with the intended victim, a stray bullet happened to strike the unintended victim while the appellant killed the intended victim. *Id.* As a result, the court held the doctrine of transferred intent was the only way the State could show appellant acted with malice toward the unintended victim and obtain a conviction and sentence for ABIK rather than ABHAN. *Id.* at 275–76, 531 S.E.2d at 517.

[11] *Compare State v. Brady*, 745 So. 2d 954, 957 n.4, 958 (Fla. 1999) (finding "no need to resort to the doctrine of transferred intent" when the facts supported the conviction of attempted second-degree murder, but listing cases from several jurisdictions in which courts used transferred intent to affirm convictions when the crime required proof of an intent to kill), *id.* ("[S]o long as there is evidence of an intent to kill, it makes no difference that someone other than the intended victim was killed or injured."), *State v. Rodriguez-Gonzales*, 790 P.2d 287, 288 (Ariz. Ct. App. 1990) ("[T]ransferred intent addresses the circumstances surrounding an attempted crime as the actor believes them to be, i.e., where the actor's belief about some facts varies from the actual circumstances only insofar as there is a different victim or different harm. Intent to murder is transferable to each unintended victim once there is an attempt to kill someone."), *and State v. Gillette*, 699 P.2d 626, 636 (N.M. Ct. App. 1985) (affirming three convictions of attempted murder when a defendant sent a poisoned drink to an intended victim, and the intended victim and two others ingested the drink but were not injured; finding defendant's felonious intent to kill transferred to others who foreseeably would ingest the poison), *with*

criminal laws require the imposition of the doctrine of transferred intent. *See Fennell*, 340 S.C. at 273–74, 531 S.E.2d at 517. Furthermore, as long as the State has shown the specific intent to kill or commit a murder, the identity of the victim is irrelevant. *See Heyward*, 197 S.C. at 377, 15 S.E.2d at 672 ("If there was malice in appellant's heart, he was guilty of the crime charged, it matters not whether he killed his intended victim or a third person through mistake.").

Initially, we note South Carolina does not require a victim be injured to convict a defendant of attempted murder. *See* S.C. Code Ann. § 16-3-29 ("A person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder."); *Middleton*, 407 S.C. at 314–15, 755 S.E.2d at 433–34 (affirming the conviction of attempted murder against an uninjured victim). Moreover, we find Williams misconstrues the attempted murder statute to the extent he argues the statute requires the specific intent to murder specific victims. Williams specifically argues the transferred intent charge erroneously allowed the jury to find Williams guilty of attempted murder of Ycedra and Wrighton without requiring the State to prove (1) Williams knew they were in the Residence and (2) Williams specifically intended to kill Ycedra and Wrighton, in addition to Young. We disagree.

Section 16-3-29 does not require a specific victim; instead, it states a "person who, with the intent to kill, attempts to kill *another* person" is guilty of attempted murder. *See* S.C. Code Ann. § 16-3-29 (emphasis added). Furthermore, the requisite specific intent for attempted murder is the specific intent to commit

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Harrison v. State, 855 A.2d 1220, 1237 (Md. 2004) (listing cases from several jurisdictions that have rejected the doctrine of transferred intent in relation to the crime of attempted murder of an unintended victim), *id.* (holding "the theory of transferred intent applies only when a bystander has suffered a fatal injury" and finding this holding "comports with numerous other jurisdictions [that] have considered the issue [because it] avoids the numerous logical hurdles that arise when 'transferred intent' is applied to inchoate offenses"), *People v. Bland*, 48 P.3d 1107, 1117 (Cal. 2002) ("Someone who in truth does not intend to kill a person is not guilty of that person's attempted murder even if the crime would have been murder—due to transferred intent—if the person were killed."), *and id.* ("Someone who intends to kill only one person and attempts unsuccessfully to do so[] is guilty of attempted murder of the intended victim, but not the others.").

murder. *See King*, Op. No. 27744 (S.C. Sup. Ct. filed Oct. 25, 2017) (Shearouse Adv. Sh. No. 40 at 27–28, 35). Murder is defined as "the killing of any person with malice aforethought, either express or implied," and does not require a specific victim be killed. *See* S.C. Code Ann. § 16-3-10 (2015) (defining murder); *see also Fennell*, 340 S.C. at 276, 531 S.E.2d at 517 (finding the defendant's state of mind is more important than the identity of the victim in convicting a defendant of homicide); *Heyward*, 197 S.C. at 377, 15 S.E.2d at 672. Finally, the specific intent to kill can be inferred by the surrounding circumstances of the case, including the use of a deadly weapon and the character of the attack. *See Sutton*, 340 S.C. at 397 n.5, 532 S.E.2d at 285 n.5.

In the instant case, evidence supports the finding that Williams and Charley specifically intended to commit murder. In particular, testimony established Williams went to the Residence with a loaded weapon, intended to get Charley's money back from Young, and was fully aware of the reason for visiting the Residence. Additionally, testimony indicated Williams fired multiple shots into the walls and doors of the Residence after Ycedra informed Young of someone being outside the Residence and after Wrighton—albeit as a silhouetted figure—appeared at the door of the Residence. We find the evidence indicates Williams went with Charley to the Residence intending to kill Young to get Charley's money back, and Williams' actions of firing multiple shots at a dark figure standing in a door represented an attempt to kill another person with malice aforethought. *See* S.C. Code Ann. § 16-3-29 ("A person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder."); *see also Sutton*, 340 S.C. at 397, 532 S.E.2d at 285 ("In the context of an 'attempt' crime, specific intent means that the defendant consciously intended the completion of acts comprising the choate offense.").

The evidence also indicated Charley was aware Young did not live alone at the Residence. Thus, Williams' use of deadly force in attempting to kill Young would warrant the transferred intent charge as to Ycedra and Wrighton because it was foreseeable that Young would not be alone, especially when considering Young lived at the Residence with several other people. *See Fennell*, 340 S.C. at 276, 531 S.E.2d at 517 ("A person who, acting with malice, unleashes a deadly force in an attempt to kill . . . an intended victim should anticipate that the law will require him to answer fully for his deeds when that force kills or injures an unintended victim."); *id.* at 272, 531 S.E.2d at 515 (finding in a typical case of transferred

intent, "[a]lthough the defendant did not act with malice toward the unintended victim, the defendant's criminal intent to kill the intended victim . . . is transferred to the unintended victim").

Therefore, in light of the evidence and case law supporting transferred intent being charged to the jury, we find the circuit court did not err in charging transferred intent.

CONCLUSION

In conclusion, we find the circuit court committed harmless error in refusing to charge the jury on the lesser included offense of first-degree assault and battery. Moreover, we find the circuit court did not err in charging transferred intent to the jury. Thus, based on the foregoing analysis, Williams' convictions for attempted murder are

AFFIRMED.

KONDUROS, J., and LEE, A.J., concur.