



OPINIONS
OF
THE SUPREME COURT
AND
COURT OF APPEALS
OF
SOUTH CAROLINA

ADVANCE SHEET NO. 12
March 29, 2023
Patricia A. Howard, Clerk
Columbia, South Carolina
www.sccourts.org

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

USAA Casualty Insurance Company, Plaintiff,

v.

Vincent J. Rafferty Jr., as personal representative of the
Estate of Megan Walters Jenkins, Defendant.

Appellate Case No. 2021-001390

**ON CERTIFICATION FROM THE UNITED
STATES DISTRICT COURT FOR THE DISTRICT
OF SOUTH CAROLINA**

Opinion No. 28143
Heard October 26, 2022 – Filed March 29, 2023

CERTIFIED QUESTION ANSWERED

John Robert Murphy, Wesley Brian Sawyer, and Megan
Noelle Walker, all of Murphy & Grantland, P.A., of
Columbia, for Plaintiff.

Bert Glenn Utsey III, of Clawson Fagnoli Utsey, LLC,
and Mark Joseph Bringardner, of Bringardner Injury Law
Firm, LLC, all of Charleston, for Defendant.

JUSTICE JAMES: Pursuant to Rule 244, SCACR, the United States District Court
for the District of South Carolina certified the following question to this Court:

Under South Carolina law, may an auto insurer validly limit underinsured motorist property damage coverage to property damage to vehicles defined in the policy as "covered autos"?

In their briefs and during oral argument, the parties did not directly address the question as framed by the district court. Instead, the parties briefed and argued the broader question of whether an automobile insurer's offer of underinsured motorist (UIM) coverage must include property damage coverage. Because the answer to the broader question yields the answer to the certified question, we will follow the parties' lead. Plaintiff USAA Casualty Insurance Company (USAA) rightly concedes that if we hold an insurer is required to offer UIM property damage coverage, we must answer the certified question "no." We hold insurers are required to offer UIM property damage coverage and therefore answer the certified question "no."

Background

In 2019, USAA issued a personal automobile policy to Megan Jenkins. The policy listed a Toyota Corolla as the insured vehicle and provided \$100,000 in UIM coverage for property damage to "your covered auto." The policy defined "your covered auto" as any vehicle shown on the policy's declaration, any newly acquired vehicle, and any trailer owned by the insured.

While riding her bicycle, Jenkins was struck and killed by an underinsured motorist. Defendant Vincent Rafferty—Jenkins' personal representative—made a claim under Jenkins' policy for UIM property damage arising from damage to the bicycle. USAA denied the claim and commenced this action in federal court, asserting Jenkins' bicycle did not fall within the definition of "your covered auto." Whether USAA prevails depends upon whether automobile insurers are required to offer UIM property damage coverage at all. If insurers are not required to offer UIM property damage coverage, they are free to restrict such coverage to an insured's "covered auto."

Discussion

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "Where the statute's language is plain and unambiguous[] and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and

the court has no right to impose another meaning." *Id.* "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." *Id.*; see *McClanahan v. Richland Cnty. Council*, 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002) ("All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute."). The automobile insurance statutes we will discuss fall within a comprehensive statutory scheme, so they must be read as a whole, not in isolation. See *Higgins v. State*, 307 S.C. 446, 449, 415 S.E.2d 799, 801 (1992).

The court of appeals has unequivocally held South Carolina Code section 38-77-160 (2015) requires an insurer to offer UIM property damage coverage.¹ Though this Court has held section 38-77-160 requires an insurer to offer UIM coverage,²

¹ See *Mathis v. State Farm Mut. Auto. Ins. Co.*, 315 S.C. 71, 75, 431 S.E.2d 619, 621-22 (Ct. App. 1993) ("On its face, [section 38-77-160] requires an offer of UIM insurance up to the limits of the insured's liability coverage to provide coverage 'in the event that damages are sustained [in excess of the liability limits carried by the at-fault motorist].' The common understanding of the term 'damages' includes property damage. . . . We hold that a liberal construction of section 38-77-160 requires that offers of UIM insurance include coverage for both bodily injury and property damage up to the limits of the insured's liability policy."); *Russo v. Nationwide Mut. Ins. Co.*, 334 S.C. 455, 459, 513 S.E.2d 127, 129 (Ct. App. 1999) ("Despite section 38-77-160's omission of the term 'bodily injury,' the repeated references to liability coverage and liability limits convince us the term 'damages' must be construed in accordance with the basic liability coverage statute, section 38-77-140, which focuses on bodily injury damages. We must read these statutes together. The term 'damages' in section 38-77-160 means bodily injury or property damage because it references liability coverage, which in turn explicitly limits coverage to bodily injury. Such a construction accords with the statute's declared purpose." (citation omitted)).

² See *Bardsley v. Gov't Emps. Ins. Co.*, 405 S.C. 68, 77, 747 S.E.2d 436, 441 (2013) ("UIM property damage coverage is not statutorily mandated[.]"); *Carter v. Standard Fire Ins. Co.*, 406 S.C. 609, 621-22, 753 S.E.2d, 515, 521-22 (2013) ("While true, as Standard Fire suggests, we have stated that UIM is not mandatory coverage in the sense that an insured chooses to purchase excess UIM coverage on

we have yet to address the specific question of whether the offer must include UIM property damage coverage. We address that question today.

Our analysis necessarily begins with section 38-77-160, which states in pertinent part:

[Automobile insurance] carriers shall . . . offer, at the option of the insured, underinsured motorist coverage up to the limits of the insured[']s liability coverage to provide coverage in the event that damages are sustained in excess of the liability limits carried by an at-fault insured or underinsured motorist or in excess of any damages cap or limitation imposed by statute.

S.C. Code Ann. § 38-77-160.

USAA presents two statutory comparisons in support of its position that insurers are not required to offer UIM property damage coverage. First, USAA compares section 38-77-160 and section 38-77-150 (2015). USAA notes that while section 38-77-160 broadly states an insurer must offer UIM coverage "up to the limits of the insured[']s liability coverage[,]" section 38-77-150 mandates uninsured motorist (UM) coverage be provided "within limits which may be no less than the requirements of [liability coverage]" plus an additional \$25,000 limit for "injury to or destruction of the property of the insured in any one accident" USAA claims the specific reference to property damage coverage in section 38-77-150 and the

a vehicle and a specified amount is not required by statute, we have held it is a statutorily required coverage in the sense it is required to be offered." (footnote omitted)); *Nationwide Ins. Co. of Am. v. Knight*, 433 S.C. 371, 380-81, 858 S.E.2d 633, 638 (2021) ("UIM coverage is statutorily required coverage because it must be offered. However, UIM coverage is not mandatory because an insured can choose whether or not to purchase it." (footnote omitted)). During oral argument, the parties devoted substantial time to discussing *Bardsley*. Reading *Bardsley* in light of *Carter* and *Knight*, it is clear all three cases stand for the proposition that UIM coverage is statutorily "required" (i.e., the insurer must offer UIM coverage) but not statutorily "mandated" (i.e., the insured need not purchase UIM coverage). In this case, we determine whether the required offer of UIM coverage must include property damage coverage.

absence of such a reference in section 38-77-160 establish the General Assembly's intent not to require an offer of UIM property damage coverage.

Second, USAA compares the definitions of "underinsured motor vehicle" in subsection 38-77-30(15) and "uninsured motor vehicle" in subsection 38-77-30(14) (2015 & Supp. 2022). USAA notes the definition of "underinsured motor vehicle" references only "bodily injury liability insurance[,]" while the definition of "uninsured motor vehicle" specifically references both "bodily injury liability insurance and property damage liability insurance" S.C. Code Ann. § 38-77-30(14)-(15) (emphasis added).

We disagree with USAA's analysis. Section 38-77-160 plainly requires an automobile insurer to offer UIM coverage "up to the limits of the insured[']s liability coverage to provide coverage in the event that damages are sustained" in excess of the liability limits carried by an underinsured motorist. (emphasis added). This language brings into play section 38-77-140 (2015). Section 38-77-140 requires an insured to carry liability coverage in the minimum amount of \$25,000 per person per accident for bodily injury; the minimum amount of \$50,000 for bodily injury for all persons injured in an accident; and the minimum amount of \$25,000 for property damage per accident. Because an insurer is required to offer UIM coverage "up to the limits of the insured[']s liability coverage" (section 38-77-160) and because the insured's liability coverage must include property damage coverage (section 38-77-140), the UIM offer must include UIM property damage coverage. It would be absurd to conclude otherwise.

Also, the word "damages" as it is used in section 38-77-160 must be read in conjunction with subsection 38-77-30(4). Subsection 38-77-30(4) plainly states the term "damages," as used in the automobile insurance statutes, "includes both actual and punitive damages." USAA does not dispute that the term "actual damages" includes property damage.

USAA's analysis also fails under a plain reading of section 38-73-470 (2015 & Supp. 2022). In 1997, the General Assembly amended section 38-73-470 to include the following provision: "There is no requirement for an insurer or an agent to offer underinsured motorist coverage at limits less than the statutorily required bodily injury or property damage limits." Act No. 154 § 3, 1997 S.C. Acts 931, 951. As Rafferty argues, there would have been no need for the General Assembly to enact this provision if an insurer was not required to offer UIM property damage coverage.

Finally, if we were to conclude section 38-77-160 is ambiguous, any ambiguity must be construed in favor of coverage. *See Auto Owners Ins. Co. v. Rollison*, 378 S.C. 600, 609, 663 S.E.2d 484, 488 ("All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." (quoting *Broadhurst v. City of Myrtle Beach Election Comm'n*, 342 S.C. 373, 380, 537 S.E.2d 543, 546 (2000))); *Williams v. Gov't Emps. Ins. Co. (GEICO)*, 409 S.C. 586, 599, 762 S.E.2d 705, 712 (2014) ("The purpose of the Motor Vehicle Financial Responsibility Act (MVFRA), contained in Title 56 of the South Carolina Code, is to give greater protection to those injured through the negligent operation of automobiles. . . . Similarly, the stated purpose of the chapter on automobile insurance in Title 38 was to implement a complete reform of automobile insurance in order to, among other things, make sure every risk meeting certain criteria was entitled to automobile insurance and prevent the evasion of coverage provided for by that chapter."); *Lincoln Gen. Ins. Co. v. Progressive N. Ins. Co.*, 406 S.C. 534, 539, 753 S.E.2d 437, 440 (Ct. App. 2013) ("The purpose of the MVFRA is to give greater protection to those injured through the negligent operation of automobiles."); *Floyd v. Nationwide Mut. Ins. Co.*, 367 S.C. 253, 260, 626 S.E.2d 6, 10 (2005) ("The central purpose of [section 38-77-160] is to provide coverage when the injured party's damages exceed the liability limits of the at-fault motorist. The UIM and UM statutes are remedial in nature and enacted for the benefit of injured persons; therefore, they should be construed liberally to effect the purpose intended by the Legislature." (citation omitted)).

Having held section 38-77-160 requires an insurer to offer UIM property damage coverage, we turn to the certified question; that is, can an insurer limit UIM property damage coverage to the insured's "covered auto"? USAA conceded during oral argument that if an insurer is required to offer UIM property damage coverage, such coverage cannot be limited to the insured's "covered auto." We agree. The statutory definition of "damages" includes "actual damages." S.C. Code Ann. § 38-77-30(4). "Actual damages" include property damage. Section 38-77-160 does not distinguish between damage to a covered automobile and damage to other types of property owned by the insured. Therefore, "damages" include damage to all property owned by the insured. *See In re Decker*, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995) ("A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage[] or superfluous . . .").

Conclusion

Section 38-77-160 requires an insurer to offer UIM property damage coverage. An insurer cannot limit that coverage to vehicles defined in the policy as "covered autos." Therefore, we answer the certified question "no."

CERTIFIED QUESTION ANSWERED.

BEATTY, C.J., KITTREDGE, FEW, JJ., and Acting Justice John D. Geathers, concur.

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

Nationwide Affinity Insurance Company of America,
Appellant,

v.

Andrew Green, Respondent.

Appellate Case No. 2021-000243

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

Opinion No. 28144
Heard October 26, 2022 – Filed March 29, 2023

AFFIRMED

John Robert Murphy and Wesley Brian Sawyer, both of
Murphy & Grantland, P.A., of Columbia, for Appellant.

Roy T. Willey IV, Matthew Thomas Foss, Alexis
Wimberly McCumber, Eric Marc Poulin, and Angeline M.
Larrivee, all of Poulin | Willey | Anastopoulo, LLC, of
Charleston, for Respondent.

JUSTICE JAMES: In *USAA Casualty Insurance Co. v. Rafferty*, we held South Carolina Code section 38-77-160 (2015) requires automobile insurers to offer underinsured motorist (UIM) property damage coverage, and that coverage cannot be limited to an insured's "covered auto." Op. No. 28143 (S.C. Sup. Ct. filed Mar.

29, 2023) (Howard Adv. Sh. No. 12 at 18). This appeal is resolved by our holding in *Rafferty*.

Background

In 2018, Appellant Nationwide Affinity Insurance Company of America (Nationwide) issued a personal automobile insurance policy to Shameika Clark, Respondent Andrew Green's mother. The policy included \$25,000 in UIM property damage coverage for Clark and her family members. The general definition section broadly defined "property damage" as "physical injury to, destruction of[,] or loss of use of tangible property." The UIM endorsement, however, more narrowly defined "property damage" as "injury to or destruction of 'your covered auto.'"

On October 19, 2018, Green was hit by a motor vehicle while walking home from school. Green alleged the driver, Harold Carraway, negligently and recklessly crossed the center line, ran off the road, and struck him. Green claimed he sustained bodily injury and property damage as a result of Carraway's conduct. After Carraway's insurer tendered its liability limits, Green pursued a claim against Nationwide for UIM bodily injury and property damage. Nationwide tendered its UIM bodily injury limits but refused to pay UIM property damage because the accident did not result in damage to a "covered auto."

Nationwide commenced this declaratory judgment action and requested a declaration that Green is not entitled to UIM property damage. Green conceded a "covered auto" was not damaged in the accident but claimed the UIM endorsement impermissibly limits property damage coverage to "injury to or destruction of 'your covered auto.'" Green alleged section 38-77-160 "mandate[s]" the endorsement be reformed to include broader property damage coverage.

Nationwide thereafter moved for judgment on the pleadings. Nationwide relied on Green's concession that a "covered auto" was not damaged in the accident. Citing *Bardsley v. Government Employees Insurance Co.*, 405 S.C. 68, 747 S.E.2d 436 (2013), Nationwide argued section 38-77-160 requires insurers to offer bodily injury coverage but not property damage coverage. Conversely, Green argued section 38-77-160 requires UIM coverage to mirror liability coverage as explained in *Glasscock, Inc. v. U.S. Fidelity & Guaranty Co.*, 348 S.C. 76, 557 S.E.2d 689 (Ct. App. 2001).

The circuit court found *Glasscock* controlling and, therefore, reformed the UIM endorsement to cover "damage to or loss of any tangible property." Nationwide

appealed, and we certified the appeal because the same issue was presented by the certified question in *Rafferty*, Op. No. 28143 (Howard Adv. Sh. No. 12 at 18).

Discussion

"A suit for declaratory judgment is neither legal nor equitable[] but is determined by the nature of the underlying issue." *Felts v. Richland Cnty.*, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991). "Whether a particular provision in an insurance policy violates the public policy of the state is a question of law that is reviewed *de novo* by an appellate court." *Williams v. Gov't Emps. Ins. Co. (GEICO)*, 409 S.C. 586, 599, 762 S.E.2d 705, 712 (2014).

Nationwide argues that because the definition of "underinsured motor vehicle" in subsection 38-77-30(15) (2015 & Supp. 2022) refers only to bodily injury coverage, insurers need not offer UIM property damage coverage. Nationwide mistakenly claims we "addressed this very statutory question in *Bardsley*." Nationwide goes on to incorrectly state what it claims is the holding in *Bardsley*—that section 38-77-160 does not require an offer of property damage coverage. Following this premise, Nationwide claims it can limit "purely voluntary" coverage to the insured's "covered auto." We rejected this argument in *Rafferty*, Op. No. 28143 (Howard Adv. Sh. No. 12 at 18).

Nationwide next argues the circuit court improperly relied on *Glasscock*. In *Glasscock*, the court of appeals ruled the portion of section 38-77-160 stating that an insurer must offer UIM coverage "up to the limits of the insured[s] liability coverage" requires the insurer to provide the same type of UIM coverage as liability coverage. *See* 348 S.C. at 83-84, 557 S.E.2d at 692-93. Nationwide argues the court of appeals in *Glasscock* "relied on an interpretation of [section] 38-77-160 that included UIM property damage as part of the statutory language." Nationwide asserts this Court in *Bardsley*, however, "interpreted the language of [section] 38-77-160 to only be applicable to UIM bodily injury coverage" Therefore, Nationwide argues *Bardsley* "effectively overruled" *Glasscock*. We disagree.

Just as USAA did in *Rafferty*, Op. No. 28143 (Howard Adv. Sh. No. 12 at 14-15 n.2), Nationwide extends *Bardsley* beyond its scope and conflates the terms "statutorily mandated" and "statutorily required." Nationwide also misconstrues the facts and holding in *Glasscock*. There, the court of appeals acknowledged that by covering loss of use damages, the liability provision of the policy at issue "provide[d] greater coverage than the minimum required by statute." 348 S.C. at 83, 557 S.E.2d

at 692. The court of appeals therefore had to determine whether UIM coverage "up to the limits of the insured[s] liability coverage" includes coverage for loss of use. As such, *Glasscock* dealt exclusively with an insurer's obligations once UIM coverage is purchased; it did not speak to whether section 38-77-160 "requires" or "mandates" property damage coverage in the first instance.

Moving to the merits of this case, we affirm the circuit court in accordance with our decision in *Rafferty*, Op. No. 28143 (Howard Adv. Sh. No. 12 at 18). See *Williams*, 409 S.C. at 598, 762 S.E.2d at 712 ("Statutes governing an insurance contract are part of the contract as a matter of law, and to the extent a policy provision conflicts with an applicable statute, the provision is invalid."); *Glasscock*, 348 S.C. at 84, 557 S.E.2d at 693 (indicating reformation is proper when a policy provision conflicts with section 38-77-160); *State Farm Mut. Auto. Ins. Co. v. Bookert*, 330 S.C. 221, 228-29, 499 S.E.2d 480, 483-84 (Ct. App. 1997) (same), *rev'd on other grounds*, 337 S.C. 291, 523 S.E.2d 181 (1999).

Conclusion

Section 38-77-160 requires insurers to offer UIM property damage coverage, and insurers may not limit that coverage to vehicles defined in a policy as "covered autos." *Rafferty*, Op. No. 28143 (Howard Adv. Sh. No. 12 at 18). The circuit court's order reforming Nationwide's UIM endorsement is therefore affirmed.

AFFIRMED.

BEATTY, C.J., KITTREDGE, FEW, JJ., and Acting Justice John D. Geathers, concur.

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

The State, Respondent,

v.

Timothy Ray Jones Jr., Appellant.

Appellate Case No. 2019-001008

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

Opinion No. 28145
Heard November 9, 2021 – Filed March 29, 2023

AFFIRMED

Chief Appellate Defender Robert Michael Dudek, Appellate Defender Susan Barber Hackett, Appellate Defender David Alexander, Appellate Defender Lara Mary Caudy, and Appellate Defender Taylor Davis Gilliam, all of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Deputy Attorney General Donald J. Zelenka, Senior Assistant Deputy Attorney General Melody Jane Brown, and Assistant Attorney General Tommy Evans Jr., all of Columbia, and Solicitor Samuel R. Hubbard III, of Lexington, for Respondent.

JUSTICE JAMES: Appellant Timothy Ray Jones Jr. admitted to killing his five young children and was indicted for five counts of murder. He was convicted by jury and sentenced to death. In this direct appeal, Jones raises eight issues centering on three points: juror qualification, requested voir dire and a related jury instruction, and evidentiary rulings made during the guilt and sentencing phases. We affirm the juror qualification, voir dire, and jury instruction rulings. We hold the trial court erred in certain evidentiary rulings; however, we hold the errors were harmless and affirm Jones's conviction and death sentence.

Background

This background summarizes the details surrounding the murders and Jones's actions in the succeeding days.

Jones and his wife were divorced and had five children. They had an informal joint custody agreement, with Jones being the children's primary caretaker. Throughout the day of August 28, 2014, Jones smoked spice—a form of synthetic marijuana—at work to cope with the stress of an impending project. Jones left work in the late afternoon and went to his home in Lexington County. He smoked more spice before leaving home to pick up his children. Abigail (age 1) and Gabriel (age 2) were staying at a neighbor's house, and Nahtahn (age 6), Elias (age 7), and Merah (age 8) were participating in an after-school program. Jones retrieved the children and purchased takeout from a local restaurant.

After Jones and the children returned home with their supper, Jones discovered an electrical outlet in the house was not working. He accused Nahtahn of tampering with the outlet because Nahtahn had an unusual interest in electricity. To get Nahtahn to admit he played with the outlet, Jones forced Nahtahn to do one hundred pushups, one hundred situps, and two hundred squats, all in sets of ten.

Nahtahn never admitted to playing with the outlet, but Jones later heard Nahtahn telling his mother over the phone, "It was an accident, Mommy." Enraged, Jones sent Nahtahn to bed. Later that night, Jones went to check on Nahtahn. He shook Nahtahn by the shoulders and again demanded to know what happened to the outlet. Nahtahn collapsed to the floor. Jones told Elias and Merah he thought Nahtahn was dead, and Merah confirmed Nahtahn was not breathing.

Jones then searched the internet for a violent male-on-male rape scene from the movie *American History X* and began to fear the things he would endure in prison

as a "baby killer." At approximately 2:00 a.m., Jones took Merah with him to purchase ten packs of cigarettes at a nearby convenience store. Jones claimed that on the way home, he heard voices in his head telling him to kill his other four children because they would be better off in Heaven than without parents.

When Jones and Merah returned home, Merah went to bed. Jones smoked two bowls of spice and walked to the living room where Elias and Merah were sleeping. Jones wrapped his hands around Elias' neck and strangled him to death while Elias begged, "Dad, take me with you." Jones then turned toward Merah, who pleaded, "Daddy, I love you," and strangled her to death. Jones proceeded to strangle Abigail and Gabriel to death using a belt because his hands were too big to wrap around their tiny necks.

Jones next tried to kill himself by smoking seven or eight more bowls of spice. He woke up the following day and became paranoid. Thinking it was a matter of time before he was arrested, Jones decided he would go to Las Vegas. He wrapped each of the five bodies in bedsheets and stacked them in the back seat of his Cadillac Escalade. For the next eight days, Jones kept the bodies in his vehicle and drove back and forth through South Carolina, Georgia, Alabama, and Mississippi. At various points along the way, Jones purchased spice, trash bags, chemicals, goggles, a dust mask, and a jab saw.¹ During the trip, he searched online for applicable extradition laws and local dumpsites, landfills, and campgrounds.

On September 6—eight days after the murders—Jones placed his children's bodies in trash bags and dumped them in a rural area near Pine Apple, Alabama. Later that day, Jones was stopped at a safety checkpoint in Smith County, Mississippi. Officer Charles Johnson testified that as Jones approached the checkpoint, he smelled a strong odor of burnt marijuana and garbage coming from the vehicle. Officer Johnson noticed Jones's eyes were red and glassy and his speech was slurred. Officer Johnson asked Jones to pull to the side of the road. Jones consented to a search of his vehicle, which revealed bleach stains on the floorboard; synthetic marijuana; drug paraphernalia; bleach; muriatic acid; charcoal fluid; and a scribbled note reading in part, "Head to campground," "Melt bodies," "Sand to dust or small pieces," and "Day 1: Burn up bodies. Day 2: Sand down bones. Day 3: Mexican Border ☺, dissolve, and discard." Jones was arrested for driving under the influence, possession of a controlled substance, and possession of drug paraphernalia. A dispatcher advised the officers of a hit on Jones's vehicle for five

¹ A jab saw is a long, narrow saw typically used to cut building material.

missing children. Jones confessed to the murders soon after his arrest, and on September 9—eleven days after the murders—Jones led law enforcement to his children's bodies. The bodies were still in trash bags, and the children were unrecognizable due to severe decomposition and animal activity.

Jones was extradited from Mississippi to South Carolina, where he was indicted for five counts of murder. The State sought the death penalty, claiming the following aggravating circumstances applied: (1) the murder of two or more persons by one act or pursuant to one scheme or course of conduct and (2) the murder of a child eleven years of age or under. S.C. Code Ann. § 16-3-20(C)(a)(9)-(10) (2015). Jones entered a plea of not guilty by reason of insanity (NGRI) pursuant to South Carolina Code subsection 17-24-10(A) (2014).² The jury rejected the insanity defense, returned five guilty verdicts, and recommended a death sentence. The trial court adopted the jury's recommendation and sentenced Jones to death. Jones raises the following issues in this direct appeal:

- (1) Did the trial court err in qualifying Juror #156?
- (2) Did the trial court err in disqualifying Juror #338?
- (3) Did the trial court err in denying Jones's request for voir dire and a jury instruction detailing the consequences of an NGRI verdict?
- (4) Did the trial court err in denying Jones's motion to suppress evidence obtained as a result of the safety checkpoint?
- (5) Did the trial court err in excluding Dr. Adriana Flores' expert testimony during the sentencing phase?

² Subsection 17-24-10(A) sets forth the affirmative defense of insanity:

It is an affirmative defense to a prosecution for a crime that, at the time of the commission of the act constituting the offense, the defendant, as a result of mental disease or defect, lacked the capacity to distinguish moral or legal right from moral or legal wrong or to recognize the particular act charged as morally or legally wrong.

A defendant has the burden of proving insanity by a preponderance of the evidence. S.C. Code Ann. § 17-24-10(B).

- (6) Did the trial court err in limiting testimony pertaining to Jones's future dangerousness, remorse, and social history during the sentencing phase?
- (7) Did the trial court err in excluding Cynthia Turner's pre-recorded testimony during the sentencing phase?
- (8) Did the trial court err in admitting autopsy photographs of the child victims during the sentencing phase?

Discussion

A. Guilt Phase

1. Qualification of Juror #156

The determination of whether a prospective juror is qualified to serve on a capital trial jury is "within the sole discretion of the trial judge and is not reversible on appeal unless wholly unsupported by the evidence." *State v. Evins*, 373 S.C. 404, 418, 645 S.E.2d 904, 911 (2007). When reviewing an alleged error in the qualification of a juror, we conduct a three-step analysis, giving particular deference to the trial judge who sees and hears the juror. *State v. Green*, 301 S.C. 347, 352, 392 S.E.2d 157, 159-60 (1990); *Evins*, 373 S.C. at 418, 645 S.E.2d at 911. First, we must find the appellant exhausted all of his peremptory challenges. Second, we must determine the disputed juror was erroneously qualified. Third, we must conclude the erroneous qualification deprived the appellant of a fair trial.

We have repeatedly held that to determine whether a juror was erroneously qualified, the challenged juror's responses must be examined "in light of the entire *voir dire*." *Evins*, 373 S.C. at 418, 645 S.E.2d at 911; *Green*, 301 S.C. at 354, 392 S.E.2d at 161; *State v. Woods*, 382 S.C. 153, 159, 676 S.E.2d 128, 131 (2009). A juror is erroneously qualified when "his or her views on capital punishment would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Woods*, 382 S.C. at 159, 676 S.E.2d at 131; *see Wainwright v. Witt*, 469 U.S. 412, 424 (1985); S.C. Code Ann. § 16-3-20(E). "The ultimate consideration is that the juror be unbiased, impartial, and able to carry out the law as explained to him." *State v. Sapp*, 366 S.C. 283, 291, 621 S.E.2d 883, 887 (2005).

Jones exhausted all ten of his peremptory challenges before Juror #156 was seated, thus satisfying step one of our analysis. Step two—whether the trial court

erroneously qualified Juror #156—is the crux of Jones's challenge. Jones argues Juror #156 was erroneously qualified because (1) he was unwilling to consider social history evidence that did not involve the facts or circumstances surrounding the murders and (2) he could not consider voting for a life sentence on the basis of mercy. We disagree.

During voir dire, the trial judge questioned whether Juror #156 could consider the facts of Jones's case in an unbiased manner. Juror #156 told the trial judge, "I believe that all the evidence and the facts should be presented and taken into consideration when you are talking about somebody's life[,] especially what this case deals with."

Moments later, the trial judge asked Juror #156 to identify himself as one of three types of capital jurors: Type 1 jurors, who believe the death penalty is appropriate when a defendant is convicted beyond a reasonable doubt of aggravated murder; Type 2 jurors, who believe life without parole is appropriate when a defendant is convicted beyond a reasonable doubt of aggravated murder; and Type 3 jurors, who believe the death penalty or life without parole may be appropriate when a defendant is convicted beyond a reasonable doubt of aggravated murder. Juror #156 replied, "I find myself torn between, I see myself as type three but depending on the facts I can quickly bring myself to type one, depending on the facts and evidence." Throughout his testimony, Juror #156 continually emphasized he could meaningfully consider the testimony and evidence presented in light of the trial court's instructions and the four verdict forms, all while being fair and impartial to both sides.

When the trial judge questioned Juror #156 about the sentencing phase of trial, Juror #156 said he understood the death penalty is not automatic and reiterated, "I believe you have to take [into] consideration all evidence when you are talking about somebody's life." Juror #156 continued, "If the evidence . . . calls for the death penalty then I feel like as human beings we have to determine whether . . . to take . . . that person's choice to live or not." Finally, Juror #156 told the trial judge he could recommend either the death penalty or life without parole depending on the facts presented.

During the State's examination, the solicitor asked Juror #156,

So if you were to sit on a jury . . . and [reach] with your colleagues, your co-jurors, the decision he is guilty of murder, . . . [w]ould you

already have your mind made up coming in that second phase or would you want to hear additional stuff of the good and the bad, the aggravating and the mitigating, before you made that big decision?

Again, Juror #156 reiterated:

Every ounce of information, evidence, facts, mitigation, everything, needs to be taken into consideration before the final decision If the evidence at the end of all of this, mitigation, aggravation, all of that, if it constitutes for the death penalty then what is right is right, what is wrong is wrong.

At the conclusion of the State's examination, Juror #156 told the solicitor he had not made up his mind; instead, he wanted to hear all of the facts before making a final decision.

During defense counsel's examination, Juror #156 explained he wanted to hear everything—the defendant's good, bad, past, and future—before coming to a sentencing decision. Juror #156 stated he understood and respected that jurors have the right to decline imposing the death penalty solely based on mercy, but he also expressed his belief that based on the facts presented, jurors should be able to explain why they made a particular sentencing decision. Defense counsel then asked, "Somebody might say, I can't explain it to you, this is what I feel is right. . . . Can you respect a juror's right to say, I don't have a reason, this is my moral judgment, this is what is right for me, I have got to do it?" Juror #156 replied, "It might sound harsh when I say this. But if they say that after being presented the facts, I don't believe they should be here." Soon after, Juror #156 stated,

I think after you are presented the evidence and the facts, you have a reason of the way you feel and . . . the decision you make. . . . I don't see how you can be here and be fair to both parties if some[one] says, well, I feel merciful. What is right is right and what is wrong is wrong.

During the State's final examination, the solicitor questioned whether Juror #156 could consider mitigating factors before recommending a sentence. Juror #156 responded,

I am thinking, it needs to be within a reason timetable But when we are here for . . . the murders of these kids, [it] needs to be involved around this. . . . The mitigating factors that have something to do with

the case. But also, I mean, when you are talking about somebody's life, . . . there is nothing wrong to me with getting all the facts, all the evidence.

The solicitor then asked whether Juror #156 could consider mitigation evidence presented by the defense that went "way back." Juror #156, again emphasizing the facts, stated,

Yes, I don't see why it could do any wrong. But, like I said, for me personally, you know, what happened twenty years ago when you are in elementary school doesn't have anything to do with your decision making now. . . . But like I said, I will be willing to, I mean when you are talking about somebody's life, like I said, if the Defense wants to give up their facts, the Prosecutors want[] to give their facts, I am willing to listen to both before making an ultimate decision.

Finally, the solicitor asked whether the ultimate sentence Juror #156 recommended "would depend on facts or just feelings." Juror #156 responded, "Facts."

After Juror #156 left the courtroom, Jones moved to excuse him as being "substantially impaired in his ability to follow the law." Essentially, Jones argued Juror #156 was (1) mitigation-impaired in that he could only consider mitigation evidence within a recent timetable and (2) unable to respect the rights of other jurors to decline imposing the death penalty based on mercy alone. The State responded that Juror #156 was a "facts guy" who was willing to listen to all mitigation evidence even though he had a difficult time understanding how distant evidence could relate to a present crime. Based on the totality of Juror #156's testimony, including him stating "repeatedly he wanted to hear all the facts . . . before mak[ing] a huge decision of taking someone's life," the trial court qualified Juror #156. Jones objected under the Sixth and Fourteenth Amendments, again claiming Juror #156 was mitigation-impaired and unable to consider mercy. We agree with the trial court's qualification.

Juror #156 repeatedly stressed throughout voir dire the importance of facts. He never indicated he would automatically impose the death penalty and instead stated his sentencing recommendation would be wholly determined by the evidence set forth at trial. When asked questions regarding preconceived notions about the death penalty, Juror #156 reiterated, "I go back to the evidence." Although Juror #156 initially expressed doubt about how mitigation evidence from a defendant's

childhood could affect the defendant's present decision-making, he completed his response with, "but like I said, . . . I am willing to listen to both [sides] before making an ultimate decision."

Juror #156 never rejected the possibility of a "mercy sentence." Rather, Juror #156 stated his belief that even if a mercy sentence was imposed, a juror should be able to articulate why he or she chose mercy. Jones improperly isolates Juror #156's statement, "I don't see how you can be here and be fair to both parties if some[one] says, well, I feel merciful." That statement must be considered in light of Juror #156's entire voir dire, including his preceding statement, "I think after you are presented the evidence and the facts, you have a reason of the way you feel and . . . the decision you make." Together, these responses reflect Juror #156's desire for jurors to specify the reason for their decisions, but they do not insinuate Juror #156 was unable to impose a life sentence based on mercy alone. For these reasons, we affirm the trial court's qualification of Juror #156.

2. Disqualification of Juror #338

"On review, the trial court's disqualification of a prospective juror will not be disturbed where there is a reasonable basis from which the trial court could have concluded that the juror would not have been able to faithfully discharge his responsibilities as a juror under the law." *Green*, 301 S.C. at 355, 392 S.E.2d at 161; *see State v. Wise*, 359 S.C. 14, 23-24, 569 S.E.2d 475, 479 (2004). We must be particularly deferential to the trial judge who sees and hears the juror, keeping in mind that in certain situations, the trial judge may disqualify a juror based on a "definite impression" that he or she would be unable to return a verdict according to law. *Evins*, 373 S.C. at 418, 645 S.E.2d at 911; *see* S.C. Code Ann. § 16-3-20(E).

When defense counsel examined Juror #338, he questioned whether Juror #338 could fairly consider an NGRI verdict. Particularly, defense counsel inquired, "If in your mind you thought [expert witnesses] present[ed] enough information to support that verdict, is that a verdict you could really consider or would you still have some hesitation because it would kind of be letting someone off still?" Juror #338 responded, "It would depend on the information provided and the plan of action after that. So obviously you, claimed insanity, you wouldn't just become part of society again. What would then be that plan[?]? So you have been declared insane and then what, now what, essentially." Around this time, the State objected and Juror #338 was briefly excused from the courtroom.

After discussing this line of questioning, the trial judge ruled defense counsel could ask Juror #338, "Not knowing what would happen, would that cause you to perhaps not consider [an NGRI] verdict?" Juror #338 answered, "I would need to know what happened to consider that verdict." Soon after, the State objected again. The trial judge clarified, "The end result plan is not allowed to be given in a trial. Okay. It is not. So he is asking you, if that were the case then would that affect your ability to consider [an NGRI verdict]." The following exchange took place:

Juror #338: Can I ask a question?

The Court: You may.

Juror #338: So in the case of the death penalty, you know death is the result.

The Court: That is the result.

Juror #338: And if you know the life sentence without parole, you know that is a result.

The Court: Correct.

Juror #338: But in the case of not guilty by insanity, you don't know the result.

The Court: Don't know the result.

Juror #338: I don't understand.

The Court: That is just the Court rules. So the result of that you would always be in the dark with regard to the result of a not guilty by reason of insanity verdict. Knowing you would always be in the dark about that, not knowing what would happen, would that cause you to maybe not consider that verdict as a true verdict. Would you vote for it not knowing what would happen?

Juror #338: I have no words honestly because without knowing what the result is how can you choose that option.

The Court: So it sounds like you do have some reservations about choosing that option, not knowing the result.

Juror #338: It is just not knowing the result. You know the result of the other options but you don't know the result of that option.

The Court: Okay. She has answered that sufficiently. Move on.

(emphasis added).

At the conclusion of voir dire, the State argued Juror #338 was unqualified because she would have unanswered questions about the consequences of an NGRI verdict. In response, defense counsel contended that although Juror #338 expressed concern and confusion about not knowing the consequences of an NGRI verdict, she did not express a complete inability to consider that verdict. Ultimately, the trial judge excused Juror #338, noting: "Since I can't answer your question and that is a big concern of you being able to go forward and make a decision I am going to excuse you from jury service" Defense counsel objected, asserting that "just having concerns doesn't disqualify somebody." We agree with the trial court's ruling.

Jones argues Juror #338 should have been qualified because her responses indicated she could meaningfully consider an NGRI verdict. In Jones's view, Juror #338 was simply "concern[ed] about not knowing the outcome of such a verdict" and "confus[ed] as to why jurors were told the outcome of the two potential verdicts during the penalty phase . . . but not the outcome of a[n] NGRI verdict." Jones alleges Juror #338 "never indicated she would be unwilling to return a verdict of not guilty by reason of insanity"

Much like the juror's responses in *Sapp*, 366 S.C. at 291-92, 621 S.E.2d at 887, Juror #338's responses reflected her complete inability to render a verdict according to law. When asked if she could consider an NGRI verdict without knowing its consequences, Juror #338 unequivocally stated, "I would need to know what happened to consider that verdict." Thereafter, she expressed confusion as to why the jury was informed of the consequences of a guilty verdict (i.e., life without parole or death) but not informed of the consequences of an NGRI verdict. The trial judge explained he was bound by court rules, which do not permit such an instruction, and then asked Juror #338 whether she could consider an NGRI verdict knowing she would be in the dark as to its consequences. Juror #338 again stated she could not.

As we discuss immediately below, South Carolina law does not permit a juror to know the consequences of an NGRI verdict. To discharge her responsibilities as a juror, Juror #338 must have been able to fully consider each of the verdicts before her and decide upon a verdict in accordance with the law. Because Juror #338 unambiguously stated she could not consider an NGRI verdict unless she was informed of its consequences and because the trial court is forbidden from informing the jury of those consequences, we affirm the disqualification of Juror #338.

3. Denial of Jones's Request for Voir Dire and a Jury Instruction Detailing the Consequences of an NGRI Verdict

The trial court denied Jones's request for voir dire and a jury instruction detailing the consequences of an NGRI verdict. We affirm the trial court's ruling on this issue.

In *State v. Poindexter*, the defendant was charged with murder. 314 S.C. 490, 491, 431 S.E.2d 254, 254 (1993). Potential verdicts in the case were guilty, not guilty, NGRI, and guilty but mentally ill. The jury found the defendant guilty but mentally ill. The defendant appealed, arguing the trial court erred in refusing to inform the jury of the consequences of each verdict either during voir dire, opening statements, closing arguments, or special instructions. We affirmed the trial court's ruling, noting:

[V]oir dire is not to be used as a means of pre-educating or indoctrinating a jury or as a means of impaneling a jury with particular predispositions. In our view, the discovery and elimination of biased or prejudiced jurors during *voir dire* does not require that they first be informed of the consequences of each potential verdict.

Id. at 492 n.2, 431 S.E.2d at 255 n.2 (citation omitted).

With respect to jury instructions after a jury is seated and sworn, the trial judge shall instruct the jury on the "current and correct law." *State v. Taylor*, 356 S.C. 227, 231, 589 S.E.2d 1, 3 (2003). "To warrant reversal, a trial judge's charge must be both erroneous and prejudicial." *Id.*

On several occasions, we have considered whether trial courts should instruct jurors on the consequences of an NGRI verdict. We have held that in noncapital trials, absent agreement by the parties, a consequences instruction is improper unless it would be curative under the facts of a particular trial or it is required to clarify a

misstatement of law and would not prejudice either party. *See State v. Huiett*, 271 S.C. 205, 208, 246 S.E.2d 862, 864 (1978). The justification for this rule is that in a noncapital trial, the jury has no sentencing responsibility and sentencing is irrelevant to the determination of guilt. *Poindexter*, 314 S.C. at 492, 431 S.E.2d at 255; *see State v. Pulley*, 216 S.C. 552, 555, 59 S.E.2d 155, 157 (1950); *State v. Valenti*, 265 S.C. 380, 388, 218 S.E.2d 726, 729 (1975); *State v. McGee*, 268 S.C. 618, 620-21, 235 S.E.2d 715, 716 (1977). In a capital trial, which is uniquely bifurcated, the same rule applies but for different reasons: (1) NGRI is a verdict during the guilt phase, not the sentencing phase, and (2) if an NGRI verdict is rendered, the jury has no sentencing responsibilities. *See State v. Bell*, 293 S.C. 391, 399, 360 S.E.2d 706, 710 (1987).

We granted Jones's motion to argue against the foregoing precedent. Although we acknowledge there is a trend toward requiring a consequences instruction,³ we decline to join that trend. Therefore, we hold the trial court did not

³ Some states require the instruction notwithstanding objection or request. *See* Alaska Stat. Ann. § 12.47.040(c) (West 2022); *People v. Tally*, 7 P.3d 172, 184 (Colo. App. 1999); *Roberts v. State*, 335 So. 2d 285, 288-89 (Fla. 1976); Ga. Code Ann. § 17-7-131(b)(3)(A) (West 2022); Kan. Stat. Ann. § 22-3428(f) (West 2022); *Kuk v. State*, 392 P.2d 630, 634-35 (Nev. 1964); *State v. Blair*, 732 A.2d 448, 451 (N.H. 1999); *State v. Krol*, 344 A.2d 289, 304-05 (N.J. 1975); N.Y. Crim. Proc. Law § 300.10(3) (McKinney 2023); *Commonwealth v. Mulgrew*, 380 A.2d 349, 351 (Pa. 1977); Tenn. Code Ann. § 33-7-303(e) (West 2023); *State v. Nuckolls*, 273 S.E.2d 87, 90 (W. Va. 1980). One state requires the instruction "unless the defendant affirmatively objects[.]" Conn. Gen. Stat. Ann. § 54-89a (West 2023). Other states require the instruction only upon request. Haw. Rev. Stat. Ann. § 704-402(2) (West 2022) (required when requested by the defendant); *Georgopoulos v. State*, 735 N.E.2d 1138, 1143 (Ind. 2000) (same); *Commonwealth v. Chappell*, 40 N.E.3d 1031, 1042-43 (Mass. 2015) (same); *Erdman v. State*, 553 A.2d 244, 249-50 (Md. 1989) (same); Mo. Ann. Stat. § 552.030(6) (West 2022) (same); *State v. Hammonds*, 224 S.E.2d 595, 604 (N.C. 1976) (same); *State v. Shickles*, 760 P.2d 291, 297-98 (Utah 1988) (same), *abrogated on other grounds by State v. Doporto*, 935 P.2d 484 (Utah 1997); *People v. Dennis*, 215 Cal. Rptr. 750, 753 (Cal. Ct. App. 1985) (requiring an instruction when requested by the jury or the defendant); *State v. Leeming*, 612 So. 2d 308, 315 (La. Ct. App. 1992) (same); Ky. RCr 9.55 (requiring an instruction when requested by either party).

err in denying Jones's request for voir dire and a jury instruction detailing the consequences of an NGRI verdict.

4. Denial of Jones's Motion to Suppress

Quite by chance, on the same day Jones disposed of the children's bodies, he was apprehended at a safety checkpoint in Smith County, Mississippi. Deputy Charles Johnson, one of the two officers conducting the checkpoint, testified that "because things were quiet" on the night of September 6, 2014, he and Deputy Robert Thompson asked Smith County Under-Sheriff Marty Patterson for permission to conduct a safety checkpoint. Sheriff Charlie Crumpton testified safety checkpoints were intended to check for driver's licenses, seatbelt violations, proper child restraints, and proof of insurance. Sheriff Crumpton estimated approximately ten percent of drivers are ticketed or arrested at safety checkpoints. He also testified the department's verbal policy required that checkpoints be approved by a supervisor and conducted at a safe location by two or more officers who wear reflective vests and stop all vehicles. Deputy Johnson testified he and Deputy Thompson followed the department's policy. Deputy Johnson further testified he was normally equipped with a portable device to conduct breathalyzer tests on suspected drunk drivers.

Jones moved to suppress all evidence stemming from the Smith County checkpoint, arguing the checkpoint violated the Fourth Amendment because its primary purpose was general crime prevention. The trial court denied Jones's motion, and he contends the denial was improper. We disagree.

"[A]ppellate review of a motion to suppress based on the Fourth Amendment involves a two-step analysis. This dual inquiry means we review the trial court's factual findings for any evidentiary support, but the ultimate legal conclusion . . . is a question of law subject to de novo review." *State v. Frasier*, 437 S.C. 625, 633-34, 879 S.E.2d 762, 766 (2022).

The United States Supreme Court has considered the constitutionality of checkpoints on several occasions. The Supreme Court has unequivocally held checkpoints constitute Fourth Amendment seizures, even though their purpose is limited and the time of detention is brief. *United States v. Martinez-Fuerte*, 428 U.S. 543, 556 (1976).

In *Delaware v. Prouse*, the Supreme Court considered the constitutionality of random spot checks designed to verify driver's licenses and vehicle registration. 440

U.S. 648, 650 (1979). The issue in *Prouse* arose when an officer on routine patrol decided to randomly stop a vehicle despite observing no traffic or equipment violations. The officer was not acting under law enforcement guidelines or procedures pertaining to spot checks. The Supreme Court noted there was no empirical data suggesting spot checks produced anything more than a marginal contribution to highway safety. Balancing "the State's interest in discretionary spot checks" and the "resulting intrusion on the privacy and security of the persons detained[,]" the Supreme Court held the "incremental contribution to highway safety" ensured by a random spot check is insufficient to justify a warrantless seizure under the Fourth Amendment. *Id.* at 655, 659. The Supreme Court clarified, however, that its holding did not prohibit states "from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion." *Id.* at 663. Critically, the Supreme Court suggested "[q]uestioning of all oncoming traffic at roadblock-type stops is one possible alternative." *Id.*

In *Michigan Department of State Police v. Sitz*, the Supreme Court considered the constitutionality of highway sobriety checkpoints. 496 U.S. 444, 447 (1990). The law enforcement policy in *Sitz* required all vehicles to be stopped at sobriety checkpoints; if an officer suspected intoxication, he was required to direct the driver to pull over and produce a driver's license and vehicle registration. Data showed that during the challenged checkpoint, two out of 126 drivers (1.6%) were arrested for drunken driving. The Supreme Court distinguished *Prouse*, noting that "[u]nlike *Prouse*, this case involves neither a complete absence of empirical data nor a challenge to random highway stops." *Id.* at 454. Balancing "the State's interest in preventing drunken driving, the extent to which this system can reasonably be said to advance that interest, and the degree of intrusion upon individual motorists who are briefly stopped," the *Sitz* Court held mandatory sobriety checkpoints survive Fourth Amendment scrutiny. *Id.* at 455.

In *City of Indianapolis v. Edmond*, the Supreme Court addressed "the constitutionality of a highway checkpoint program whose primary purpose [wa]s the discovery and interdiction of illegal narcotics." 531 U.S. 32, 34 (2000). The Supreme Court observed the stops in *Sitz* and *Prouse* were concerned with highway safety, which is a significant Fourth Amendment interest. However, because the primary purpose of the *Edmond* program was not to ensure highway safety but instead "to uncover evidence of ordinary criminal wrongdoing," the Supreme Court held the program violated the Fourth Amendment. *Id.* at 41-42. Importantly, the Supreme Court repeated the suggestion it made in *Prouse* that "a similar type of

roadblock with the purpose of verifying drivers' licenses and vehicle registrations would be permissible." *Id.* at 37-38.

Here, the checkpoint was precisely the type of checkpoint suggested by the Supreme Court in *Prouse* and *Edmond*. The State presented evidence sufficient to prove the primary purpose of the Smith County checkpoint was highway safety, not general crime prevention. Four officers testified the checkpoint was intended to check for driver's licenses, vehicle registrations, and proof of insurance. At no point did any witness suggest a contrary purpose. As in *Sitz*, the Smith County Sheriff's Department had a policy requiring that all vehicles passing through checkpoints be stopped in a safe, structured manner. Officers did not have unbridled discretion as was the case in *Prouse*; instead, stops were brief and minimally intrusive. For these reasons, we hold the trial court did not err in denying Jones's motion to suppress.

B. Sentencing Phase

1. Exclusion of Dr. Adriana Flores' Expert Testimony

The South Carolina Code provides jurors must consider several mitigating circumstances in a capital trial, including whether "[t]he murder was committed while the defendant was under the influence of mental or emotional disturbance"; whether "[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired"; and "[t]he age or mentality of the defendant at the time of the crime." S.C. Code Ann. § 16-3-20(C)(b)(2), (6)-(7). Additionally, the Eighth Amendment, which applies to the states through the Fourteenth Amendment, "requires that the jury [in a capital case] be able to consider and give effect to all relevant mitigating evidence offered by [the defendant]." *Boyde v. California*, 494 U.S. 370, 377-78 (1990); *see Lockett v. Ohio*, 438 U.S. 586, 604 (1978). This is particularly due to the "qualitative difference" between ordinary criminal trials and capital trials—where there is a "corresponding difference in the need for reliability" *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

"Generally, the admission of expert testimony is a matter within the sound discretion of the trial court." *State v. Whaley*, 305 S.C. 138, 143, 406 S.E.2d 369, 372 (1991). We will not reverse the trial court's exclusion of expert testimony unless the exclusion resulted from a prejudicial abuse of discretion. *State v. Cope*, 405 S.C. 317, 343-44, 748 S.E.2d 194, 208 (2013). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an

error of law." *State v. Kromah*, 401 S.C. 340, 349, 737 S.E.2d 490, 495 (2013) (quoting *State v. Douglas*, 369 S.C. 424, 429-30, 632 S.E.2d 845, 848 (2006)).

During the guilt phase of trial, Jones presented testimony from several experts in an attempt to establish his NGRI defense. Their testimony is summarized below. In reply, the State called neuropsychologist⁴ Dr. Kimberly Kruse. Because the testimony from Jones's insanity witnesses and Dr. Kruse was also relevant to the foregoing statutory mitigation circumstances, it was incorporated into the sentencing phase.

Dr. Kruse testified she was asked by Dr. Richard Frierson, the court-appointed evaluator, to evaluate Jones. Dr. Kruse interviewed Jones on February 19, 2019, approximately two months before trial. Dr. Kruse testified about several tests she administered during the evaluation and explained how she scored the raw data. The tests included the M-FAST, SIMS, SIRS, MMPI, and PAI.⁵ Dr. Kruse testified her scoring of the raw data led her to conclude Jones was malingering symptoms of mental illness. She testified malingering is voluntary, conscious, and self-directed behavior aimed at exaggerating symptoms or creating symptoms that do not exist.

As noted above, Dr. Kruse's testimony was incorporated into the sentencing phase. During that phase, Jones provided the State with an affidavit from forensic psychologist Dr. Adriana Flores. Dr. Flores was new to the case and was prepared to testify "regarding errors and incorrect conclusions" on the part of Dr. Kruse, specifically with regard to Dr. Kruse's scoring of the raw data that led her to conclude Jones was malingering. In her affidavit, Dr. Flores stated she was obligated under the American Psychological Association's ethical principles to confront Dr. Kruse about her concerns.

The solicitor lodged three basic objections to Dr. Flores' testimony. First, he argued Dr. Flores' affidavit and purported testimony were "an attack on Dr. Kruse."

⁴ Neuropsychology focuses on understanding the relationship between one's brain and behavior.

⁵ These acronyms stand for the Miller Forensic Assessment of Symptoms Test, the Structured Inventory of Malingered Symptomology, the Structured Interview of Reported Symptoms, the Minnesota Multiphasic Personality Inventory, and the Personality Assessment Inventory, respectively.

The solicitor argued that allowing Dr. Flores to testify would "permanently stain . . . [Dr. Kruse's] personal and professional integrity" and intimidate Dr. Kruse to the point that she would be afraid to testify in response to Dr. Flores' allegations. Second, the solicitor argued Dr. Flores would improperly pit her testimony against that of Dr. Kruse. Third, the solicitor argued the State would suffer unfair prejudice if Dr. Flores were allowed to testify without any notice to the State.

The trial judge noted trial had been underway for six weeks, Dr. Flores was not on the witness list, and numerous expert witnesses had already testified for both parties. Defense counsel informed the trial judge that he discovered Dr. Flores' concerns the preceding weekend when defense witness Dr. Julie Dorney asked Dr. Flores to review Dr. Kruse's testing methodology and conclusions. Defense counsel stated that as soon as he became aware of Dr. Flores' interest in testifying, he informed the State. The trial judge considered these arguments and ruled, "I've got to draw the line somewhere We're too far in the game to call new players. I presume you'll have to proffer her, but I don't think she should be allowed to testify." The record is not clear on this point, but apparently, the defense had Dr. Kruse's report and raw data in advance of trial yet did not secure its own expert to review them.

During her proffer, Dr. Flores testified she was concerned Dr. Kruse had "omitted a validity section" from one of the tests she conducted, and in turn, Dr. Flores "had the feeling that something was being hidden from [Dr. Kruse's] report." The trial judge noted what he termed "improper pitting of witnesses" and warned defense counsel, "Just be careful not to pit the witnesses. . . . If [Dr. Flores] took the raw data and scored it herself, that's rescoring the data. But if she's going to testify to the mistakes Dr. Kruse made, that's pitting witnesses. So characterize your question properly." Dr. Flores explained in detail several tests that Dr. Kruse performed on Jones. Dr. Flores explained the M-FAST and SIMS were screening tests for malingering, and if the scores on those tests are above a certain level, the SIRS should be administered. Dr. Flores testified she reviewed the raw data and determined Jones's scores on the M-FAST and SIMS were below the cut-off levels for malingering; therefore, in Dr. Flores' opinion, Dr. Kruse should not have administered the SIRS. Dr. Flores testified as to her own scoring of the raw data and concluded, "Just looking at the data, I don't think there's enough information there to say that [Jones] was malingering."

In its brief, the State argues the trial court properly excluded Dr. Flores' testimony. The State repeats its grounds for exclusion as witness intimidation;

"improper pitting of witnesses"; and Rule 403, SCRE (i.e., the probative value of Dr. Flores' testimony was substantially outweighed by the danger of unfair prejudice to the State). The State also presents an additional argument that Dr. Flores' testimony would have amounted to needless presentation of cumulative evidence under Rule 403.

First, we reject the State's argument Dr. Kruse would have been so intimidated by Dr. Flores' accusations that she would have been afraid to testify in reply. As the State notes in its brief, at the time of trial, Dr. Kruse had served as Chief Neuropsychologist at Prisma Health for eleven years and had been qualified as an expert in the field of neuropsychology over seventy-five times. There is no evidence Dr. Kruse would have been afraid to return to the courtroom and testify in reply. Even if she had been, we question how this would be germane to the admissibility of Dr. Flores' testimony.

Second, as the trial court concluded and as the proffer transcript bears out, Dr. Flores' testimony could have been tailored to avoid any purported "improper pitting of witnesses." The trial court had a firm grasp of the issue and could have resolved all related objections. We therefore reject the State's argument on this ground.

Citing Rule 403, the State claims Dr. Flores' testimony would have been needlessly cumulative in light of the testimony of eight defense experts. Rule 403 provides in part that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . or by considerations of . . . needless presentation of cumulative evidence." The State did not argue Dr. Flores' testimony was needlessly cumulative at trial, and the trial court did not consider this ground when excluding Dr. Flores' testimony. We review evidentiary rulings for an abuse of discretion, and on this particular ground, we cannot review a nonexistent ruling.

The State did, however, raise unfair prejudice at trial. The State claims the trial court properly excluded the testimony because under Rule 403, the probative value of Dr. Flores' testimony was substantially outweighed by the danger of unfair prejudice to the State. Of course, the "unfair prejudice" cited by the State is the surprise arising from Jones's late disclosure of Dr. Flores. The State claims this surprise left the State unable to appropriately prepare for and respond to Dr. Flores' testimony. Jones argues he should have been able to use Dr. Flores' testimony to argue before the jury that Dr. Kruse's scoring was faulty and perhaps misleading. Jones, as the proponent of Dr. Flores' testimony, had to establish its probative value;

if the evidence had probative value, the State, as the opponent of the evidence, had to establish its probative value was substantially outweighed by the danger of unfair prejudice. We agree with Jones that Dr. Flores' testimony had probative value because it included her rescoring of Dr. Kruse's raw data in a way that purported to rebut Dr. Kruse's conclusions of malingering.

Having determined the evidence had probative value, we next review the trial court's ruling on three fronts. First, was the State prejudiced by the evidence? Here, the prejudice cited by the State was "surprise." There is no question Dr. Flores' testimony was prejudicial to the State; after all, most evidence offered by one party is prejudicial to the other. Second, was this prejudice to the State unfair? Probably so because Jones obtained Dr. Kruse's report before trial and could have secured a qualified individual to review the raw data before Dr. Kruse entered the fray in the eleventh hour. Third, was the probative value of Dr. Flores' testimony substantially outweighed by the danger of unfair prejudice to the State? This is always a difficult question. We recognize trial courts necessarily process and rule upon objections in a rapid-fire setting, and we applaud the trial judge's immediate grasp of the State's objections to Dr. Flores' testimony. The trial judge quickly moved to the most pertinent objection: whether Jones presented Dr. Flores' testimony too late in the game. Implicit in the trial judge's exclusion of Dr. Flores' testimony is that the probative value of that testimony was substantially outweighed by the danger of unfair prejudice to the State. It is on this point we conclude the trial court erred.

In *State v. Mercer*, we considered a similar challenge to the trial court's exclusion of expert testimony about a capital defendant's brain scan. 381 S.C. 149, 160, 672 S.E.2d 556, 561 (2009). Although a prior witness testified the scan showed a "questionable abnormality[,]" defense expert Dr. John Steedman planned to "render a stronger finding of an abnormality." *Id.* at 160, 672 S.E.2d at 562. The trial court excluded Dr. Steedman's testimony during the sentencing phase, finding he was a surprise witness and his testimony was unduly prejudicial. On appeal, we concluded, "The probative value of Dr. Steedman's excluded testimony was, as a matter of law, not substantially outweighed by its potential for prejudice, as a result of the purported late disclosure or otherwise." *Id.* at 161, 672 S.E.2d at 562. Our conclusion rested on two grounds. First, the trial court never issued a formal discovery order. Second, both Dr. Steedman and the substance of his testimony were disclosed to the State before he was set to testify. Although we found the exclusion of Dr. Steedman's testimony error, we held the error was harmless beyond a reasonable doubt because the brain scan was admitted into evidence; another expert

testified as to its abnormality; and Dr. Steedman was allowed to testify "at length" about the defendant's "cognitive deficiencies" and "learning disorder." *Id.* at 161-62, 672 S.E.2d at 562-63.

We emphasize that our holding in *Mercer* does not stand for the black-letter proposition that in every criminal or civil case, a trial court's exclusion of tardy evidence is error under Rule 403. However, in this case, we hold as a matter of law that the probative value of Dr. Flores' testimony was not substantially outweighed by the danger of unfair prejudice to the State. The trial court should have allowed Dr. Flores to testify about her rescoring of Dr. Kruse's raw data.

i. Harmless Error

Having determined the exclusion of Dr. Flores' testimony was error, we must determine whether the error was harmless. We hold it was harmless. During the guilt phase, Jones presented seven expert witnesses to testify in support of his NGRI defense. This testimony was incorporated into the sentencing phase and was before the jury as mitigation evidence. Additionally, Jones called Dr. Donna Schwartz-Maddox as a mitigation witness during the sentencing phase. A summary of these witnesses' testimony is important, and this summary reveals that each defense witness who gave an opinion as to whether Jones was malingering stated quite unequivocally he was not.

Richard Frierson, M.D., is a general and forensic psychiatrist and a professor of psychiatry at the University of South Carolina School of Medicine. The medical school has a contract with the South Carolina Department of Mental Health (DMH), so Dr. Frierson regularly performs forensic evaluations at DMH's request. Dr. Frierson testified he interviewed Jones six times for a total of nineteen hours and reviewed information from 295 sources. Dr. Frierson opined that at the time of the murders, Jones was sane, or criminally responsible (i.e., Jones could distinguish moral right from moral wrong and could recognize his actions as legally and morally wrong). Dr. Frierson testified that at the time of the murders, Jones had substance-induced psychotic disorder from smoking spice. Jones knew he had a family history of schizophrenia and was convinced the drug-induced "anxious thoughts" he was having were, in fact, schizophrenia. Dr. Frierson testified he has practiced forensic psychiatry for thirty years; he has examined individuals who were malingering and was rather surprised the tests he conducted did not indicate Jones was malingering. Dr. Frierson testified Jones "was trying to convince himself he had schizophrenia so he could live with what he did."

Julie Dorney, M.D., testified for the defense as an expert in forensic psychiatry. Dr. Dorney provided exceedingly detailed testimony on the issue of insanity. She met with Jones eight times before trial—the first time being on the three-year anniversary of the murders. Dr. Dorney testified that at the time of the murders, Jones "suffered from psychotic symptoms, specifically delusional thinking and hallucinations." She testified this was "a major mental illness," and Jones was insane because he did not recognize the legal wrongfulness of his conduct and did not have the capacity to distinguish moral right from moral wrong. She further testified that after Jones killed Nahtahn, he felt the other four children would be better off in Heaven than without parents.

Dr. Dorney testified she always looks for signs of malingering and saw none in Jones. She testified that although a staff member from the South Carolina Department of Corrections (SCDC) questioned whether Jones was malingering, the hundreds of pages she reviewed did not support a finding of malingering. During cross-examination, the State questioned Dr. Dorney about Dr. Kruse's testing. Dr. Dorney stated Jones was not displaying symptoms of schizophrenia at the time of Dr. Kruse's evaluation, so she questioned why anyone would conduct malingering tests at that time. Dr. Dorney stated the malingering tests conducted by Dr. Kruse "are tools that you use if someone is actively reporting symptoms. At the time [Jones] saw [Dr. Kruse], he didn't have any symptoms." Dr. Dorney characterized Dr. Kruse's employment of the tests as "a misuse of the tests." Again, she testified nothing would support the conclusion that Jones was malingering.

April Hames, Ph.D., Jones's marriage therapist, testified for the defense as an expert in marriage and family therapy. Jones's therapy sessions with Dr. Hames took place three to four years before the murders. Dr. Hames testified that during Jones's first session, Jones said he had a "monster" inside of him. Jones repeatedly referenced the monster in subsequent sessions. Dr. Hames testified Jones came to her for help with anxiety, depression, and feelings of inferiority. She diagnosed Jones with recurrent major depressive disorder and unspecified nonpsychotic mental disorder.

Bhushan Agharkar, M.D., testified for the defense as an expert in adult and forensic psychiatry. Dr. Agharkar testified Jones suffered from schizophrenia and minor neurocognitive disorder, the latter of which is commonly referred to as "brain damage." Dr. Agharkar was very informative and detailed how schizophrenia manifests itself in those stricken with the disorder. He noted Jones's mother is schizophrenic, which creates in Jones a "significant genetic loading" for the disorder.

Dr. Agharkar testified he always considered the prospect of malingering but determined Jones was not malingering based on his history, brain damage, symptom presentation, and response to medications. Dr. Agharkar also testified that he requested neuropsychologist Erin Bigler, Ph.D., to review Jones's brain imaging studies.

Dr. Bigler testified for the defense as an expert in neuropsychology. Dr. Bigler testified he had particular expertise "in looking at brain imaging methods and how to use those findings to relate to the behavior of the individual." Evidence introduced at trial established that Jones was involved in a car accident at age fifteen. The accident left Jones with a brain injury and visible indentation on his forehead. After reviewing Jones's brain imaging studies, Dr. Bigler testified he could immediately tell Jones had "a significant traumatic brain injury and . . . skull defect." Dr. Bigler testified there is a connection between traumatic brain injury and schizophrenia. Ultimately, Dr. Bigler recommended Jones's brain imaging studies be reviewed by a neuroradiologist.

Travis Snyder, M.D., testified for the defense as an expert in neuroradiology. Dr. Snyder examined MRI scans of Jones's brain and found a large left frontal depressed skull fracture, indicating Jones sustained a severe traumatic brain injury at some point in his life. Among other abnormalities, Dr. Snyder found thinning of the cortex and corpus collosum, which he testified are associated with schizophrenia and schizoaffective disorder. Dr. Snyder testified frontal lobe injuries—such as the one Jones sustained—often result in cognitive problems, personality changes, risk taking, disinhibition, and behavior spontaneity.

Donna Schwartz-Maddox, M.D., testified for the defense as an expert in forensic psychiatry. Her testimony was very detailed on the subject of schizophrenia and its causes and treatment. Dr. Schwartz-Maddox testified she first saw Jones in an SCDC hospital on September 13, 2014, just fifteen days after the murders. She testified "there was no question in [her] mind" Jones "was clearly psychotic" that day. She testified Jones "me[t] the diagnostic criteria for schizophrenia." On the issue of whether Jones's condition was substance induced—in his case, whether it was caused by smoking spice—Dr. Schwartz-Maddox testified most instances of substance-induced psychosis resolve within a month when the patient is hospitalized and properly medicated. She testified Jones remained in the hospital until trial and was properly medicated but still had symptoms of psychosis. Dr. Schwartz-Maddox testified that before trial began, Jones was housed at SCDC and was prescribed a very high dose of Geodon, an antipsychotic drug. However, when trial began, Jones

was moved to the Lexington County Detention Center, and his Geodon dosage was reduced to a much lower level. According to Dr. Schwartz-Maddox, this caused Jones's psychotic symptoms to worsen, which lent legitimacy to her conclusion that he was not malingering. Dr. Schwartz-Maddox testified she had "not seen [Jones] intentionally fake his symptoms," and if anything, Jones underreported his symptoms.

Beverly Wood, M.D., Chief of Psychiatry at SCDC, testified for the defense as an expert in psychiatry. Dr. Wood diagnosed Jones with schizoaffective disorder and prescribed a medication regimen that included the aforementioned Geodon. Dr. Wood testified as to Jones's family history of schizophrenia. Jones told Dr. Wood he had been hearing voices since he was twelve years old. Dr. Wood noted Jones displayed "flight of ideas," "pressured speech," and disregard for personal hygiene, all of which indicate mental illness. Dr. Wood testified that in the SCDC setting, a number of inmates fake mental illness for various reasons, but nothing led her to believe Jones was malingering.

Jones admits in his brief that he "presented significant evidence to prove he was not sane at the time he killed his children." According to Jones, Dr. Frierson, Dr. Dorney, Dr. Hames, Dr. Agharkar, Dr. Schwartz-Maddox, and Dr. Wood "presented significant evidence" that he was mentally ill and not malingering. Additionally, the detailed explanations of Jones's brain damage given by Dr. Bigler and Dr. Snyder were front and center for the jury as mitigation evidence. In light of the extensive testimony that Jones was not malingering, we hold any error in the trial court's exclusion of Dr. Flores' testimony was harmless. In fact, the only witness who suggested Jones was malingering was Dr. Kruse. Dr. Dorney directly challenged the propriety of Dr. Kruse administering malingering tests because Jones was not displaying symptoms of schizophrenia at the time. While only Dr. Flores rescored Dr. Kruse's data, we hold the issue of malingering was exhaustively and fully addressed.

Although Dr. Flores' testimony would have purportedly cast doubt on Dr. Kruse's scoring and allegedly flawed approach to concluding Jones was malingering, Jones presented a wealth of evidence that he had brain damage, was schizophrenic, and was not malingering. We hold it is not reasonably likely Dr. Flores' testimony would have affected the jury's decision to impose a death sentence. *See Skipper v. South Carolina*, 476 U.S. 1, 8 (1986) (stating that in the sentencing phase of a capital trial, an error is not harmless if "it appears reasonably likely that the exclusion of evidence . . . may have affected the jury's decision to impose the death sentence");

Chaffee v. State, 294 S.C. 88, 91, 362 S.E.2d 875, 877 (1987); *State v. Key*, 256 S.C. 90, 93-94, 180 S.E.2d 888, 890 (1971). Therefore, the trial court's exclusion of Dr. Flores' testimony was harmless.

2. Limitation of Testimony Pertaining to Jones's Future Dangerousness, Remorse, and Social History

As noted above, the admission of evidence is left to the sound discretion of the trial court, and generally, evidentiary rulings will not be reversed on appeal absent a prejudicial abuse of discretion. *Whaley*, 305 S.C. at 143, 406 S.E.2d at 372; *Cope*, 405 S.C. at 343-44, 748 S.E.2d at 208.

Although the Eighth Amendment recognizes a capital defendant's right to present mitigation evidence, that right is limited by general evidentiary principles. *See Jurek v. Texas*, 428 U.S. 262, 271 (1976); *Mercer*, 381 S.C. at 161, 672 S.E.2d at 562. Specifically, to be admissible, mitigation evidence must be relevant. *Lockett*, 438 U.S. at 604 n.12; *Payne v. Tennessee*, 501 U.S. 808, 822 (1991); *see State v. Northcutt*, 372 S.C. 207, 221, 641 S.E.2d 873, 880 (2007); *State v. Dickerson*, 395 S.C. 101, 116, 716 S.E.2d 895, 903 (2011). "The meaning of relevance is no different in the context of mitigating evidence introduced in a capital sentencing proceeding" than it is in any other trial. *McKoy v. North Carolina*, 494 U.S. 433, 440 (1990). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. Evidence that is not relevant should be excluded. *See* Rule 402, SCRE. In the context of capital sentencing, "if the sentencer could reasonably find that [mitigation evidence] warrants a sentence less than death, . . . the Eighth Amendment requires that the jury be able to consider and give effect to that evidence." *Tennard v. Dretke*, 542 U.S. 274, 285 (2004) (cleaned up) (first quoting *McKoy*, 494 U.S. at 441; and then quoting *Boyde*, 494 U.S. at 377-78).

i. Future Dangerousness

During the sentencing phase, defense counsel proffered the testimony of Sergeant Barry Sowards. Sergeant Sowards testified about an encounter he had with Jones while transporting Jones from Mississippi to South Carolina. According to Sergeant Sowards, when he and the extradition team stopped at a rest stop, the other team members went inside, and he remained in the vehicle with an automatic weapon on his lap. Noticing the weapon, Jones told Sergeant Sowards, "You guys don't need

automatic weapons for me. I'm not going to hurt you." Sergeant Sowards replied, "These weapons are not for you, in particular, [they're] for everyone trying to kill you."

Defense counsel sought to introduce Sergeant Sowards' response as mitigating evidence that Jones did not present a risk of future dangerousness. After hearing Sergeant Sowards' proffered testimony, the trial judge ruled, "You can get Tim's response in, but Detective Sowards' response, to me, is his personal opinion and not relevant to Mr. Jones character in any way. I think it goes to Mr. Sowards' training as an officer, that's his job to protect him, it is Mr. Sowards' character."

We affirm the trial court's ruling that Sergeant Sowards' proffered testimony was not relevant to Jones's future dangerousness. The testimony reflected Sergeant Sowards' speculative opinion about how the public perceives Jones. It was not based on Sergeant Sowards' own perception and had nothing to do with Jones's actual dangerousness.

ii. Remorse

Before the jury, Sergeant Sowards testified he had been with Jones throughout the entire trial. Defense counsel classified Sergeant Sowards as Jones's "handler" and then asked whether he witnessed Jones crying during trial. Sergeant Sowards replied, "Yes," upon which the following exchange took place:

Defense Counsel: Do you believe that those are crocodile tears?

Deputy Solicitor: Objection, Your Honor, speculation.

The Court: I sustain the objection.

Defense Counsel: When you've seen him crying, do you believe that his remorse is real?

Deputy Solicitor: Objection, speculation.

The Court: Sustained.

Defense counsel argued Sergeant Sowards' testimony demonstrated Jones's remorse. At no point, however, did defense counsel proffer Sergeant Sowards' responses to these questions.

Even assuming Sergeant Sowards would have testified that he thought Jones's tears were real and Jones's remorse was genuine, we hold any error in excluding this testimony is harmless. A fleeting mention of Jones's remorse, if admitted, would not have affected the jury's decision to impose a death sentence. *See Skipper*, 476 U.S. at 8; *Chaffee*, 294 S.C. at 91, 362 S.E.2d at 877; *Key*, 256 S.C. at 93-94, 180 S.E.2d at 890.

iii. Social History

When Roberta Thornsberry—Jones's paternal grandmother—testified during the sentencing phase, defense counsel inquired about her life before Jones was born. The State objected, upon which the trial court excused the jury. Noting that he consistently "directed the [d]efense to only ask questions from [Jones's] birth forward" in the guilt phase, the trial judge asked defense counsel why his ruling should differ in the sentencing phase. Defense counsel responded by requesting to proffer Thornsberry's testimony. The trial judge allowed the proffer. Thornsberry's testimony detailed a family history full of abandonment, incest, abuse, and exploitation.

Although the trial judge recognized that evidence of Thornsberry's horrific childhood certainly "impacted [Jones] to some degree," he ruled such evidence would be irrelevant to Jones's character and would, therefore, confuse the jury. Defense counsel objected to the ruling, and the trial judge clarified Thornsberry would be allowed to testify generally about her "childhood from a broken home and traumatic history" but would not be allowed to testify about intimate details that were irrelevant to Jones's character.

Anticipating the trial court's ruling would equally apply to the testimony of Jones's father Timothy Ray Jones Sr. (Senior), defense counsel proffered Senior's testimony. Senior explained how his childhood was marked by fear, violence, trauma, mental illness, physical abuse, and substance abuse. At the end of the proffer, defense counsel again requested the jury be permitted to hear testimony about events occurring before Jones's birth. The trial court did not allow this testimony.

Defense counsel also proffered the testimony of Deborah Grey, a social historian. The disputed portion of Grey's proffer began with Thornsberry's childhood and continued until Jones's birth; it largely tracked Thornsberry's and

Senior's proffers, albeit with more expansive details. At the conclusion of Grey's proffer, the trial judge made the following statement:

I want to think of a way and I suggest you all come up with a way for this lady to say, this lady's summary of Ms. Thornsberry's mental history, Ms. [Turner] -- Cynthia [Turner's] history . . . -- without going through every single minute detail. . . . All of the social psychologists and psychiatrists said the Jones family . . . had a huge bunch of illnesses, medical, suicides, physical abuse, sexual abuse. I think she can say things like that without saying the grandma was sexually abused 18 times by the time she was six

The trial judge later instructed defense counsel to "use a broader brush rather than a detailed brush" and to "present some mitigating facts without becoming the Dr. Phil show." The trial judge continually advised defense counsel to give the facts but to avoid the details of each fact: "Put up some rails on the alley where you don't go in the gutter. . . . If you get too detailed, I'm going to say move on."

Before the jury, Grey was permitted to testify extensively about Jones's family history. She testified that both the paternal and maternal sides of Jones's family were littered with attachment and protection issues. She recounted the rape, torture, abandonment, trafficking, substance abuse, domestic violence, and mental illness Jones's caretakers endured and opined this was the family dynamic into which Jones was born. Nonetheless, Jones argues the trial court erred in forcing him to deliver a "condensed and sanitized" social history and in repeatedly instructing Grey to "move on" when her testimony became too detailed. We disagree and, therefore, affirm the trial court's limitations.

Although events occurring to Thornsberry and Senior before Jones's birth undoubtedly shaped their parenting methods and family environment, these events were irrelevant to Jones's character. In our view, Jones disregards the requirement that evidence of a defendant's social history be relevant and concerned with the defendant's character or record. *See Lockett*, 438 U.S. at 604-05, 604 n.12; *Eddings v. Oklahoma*, 455 U.S. 104, 113-15 (1982); *United States v. Tsarnaev*, 142 S. Ct. 1024, 1038 (2022) ("[W]e have expressly held that 'the Eighth Amendment does not deprive' a sovereign 'of its authority to set reasonable limits upon the evidence a [capital] defendant can submit, and control the manner in which it is submitted.'" (alteration in original) (quoting *Oregon v. Guzek*, 546 U.S. 517, 526 (2006))). It would be far too remote to conclude external events impacting Jones's family

members before his birth directly affected Jones's own character. If anything, these events affected the character of Jones's family members—an issue that was not before the jury during sentencing.

Even assuming the trial court erred by limiting the testimony of Thornsberry and Senior, any error is harmless. Grey was permitted to testify considerably about Jones's family history, including all relevant details. For these reasons, we affirm the trial court's limitations.

3. Exclusion of Cynthia Turner's Pre-Recorded Testimony

During the sentencing phase, defense counsel sought to publish the pre-recorded testimony of Jones's mother—Cynthia Turner—as mitigation evidence of Jones's state of mind and mental illness. In the recording, Turner was unable to recall basic facts about her personal history and appeared detached from reality. When asked about her father, mother, and siblings, Turner said she did not know them well despite spending the majority of her childhood with them. Turner also claimed she did not know Senior, even though she dated and was married to him for five years. Turner was unsure why Senior was awarded primary custody of Jones after their divorce, and she did not remember giving birth to one of her other children. When asked how she felt about Jones, Turner replied, "He's a nice kid, but I don't understand how he did that about his kids."

Noting numerous experts had already testified about Turner's mental illness, the trial judge questioned the relevance of her testimony. Defense counsel responded, "It's his mother, his mother who is diagnosed with schizophrenia, in which a number of other people have diagnosed Tim with, and what condition Tim could end up in. . . . It's his future." The solicitor countered that Turner's testimony was prejudicial because it was unclear whether her exhibited symptoms were signs of schizophrenia, manifestations of another disorder, or medicinal side effects. The following exchange then took place:

Defense Counsel: Mitigation is any reason not to give death. The fact that his own mother couldn't come to his trial is likely a reason for a Juror not to give death.

The Court: How are you prevented from arguing that right now?

Defense Counsel: I'm not.

....

The Court: All right. I'm not letting it in then. You talked me in to it.

Defense Counsel: We object under *State v. Mercer* and that relevant mitigation should be admitted and 403 shouldn't be used to exclude mitigation evidence.

The Court: It's a broader 403. That video was done late, it was done during jury selection. There's too many things that are unknown with her medical condition. And the State has not challenged whatsoever that she has severe mental challenges, issues, is institutionalized. All that's free game for you to argue that she couldn't come for those reasons. She was not allowed to come. So you are certainly welcome to argue that. I think it's inflammatory and I don't think that it's a proper video to be introduced in this phase of the case. So I'm not going to allow it.

We affirm the trial court's ruling that Turner's testimony had no probative value and risked confusing the issue to be decided—Jones's mental state—with the issue that was demonstrated by the testimony—Turner's own mental state. Jones claims *Weik v. State*, 409 S.C. 214, 761 S.E.2d 757 (2014), supports the recording's admission because Turner's "bizarre behavior . . . would have corroborated the defense mental health experts' description of schizophrenia." However, Jones's reliance on *Weik* is misplaced. In *Weik*, defense counsel conducted numerous pre-trial interviews with the defendant's family members, coworkers, and acquaintances, all of whom "revealed [his] childhood was traumatic, filled with emotional and physical abuse at the hands of his psychotic father[.]" *Id.* at 217, 761 S.E.2d at 758. Despite abundant evidence, defense counsel presented only one mitigation witness—the defendant's sister—who provided "extremely limited testimony, which was general, vague, and offered no detail or insight into the degree of abuse [the defendant] suffered as a child." *Id.* at 235, 761 S.E.2d at 768. We remanded the case for a new sentencing trial because the evidence presented by defense counsel failed to sufficiently reveal the defendant's "abusive and dysfunctional childhood" as well as his "genetic predisposition to schizophrenia" and hallucinogenic symptoms at the time of the crime. *Id.* at 238-39, 761 S.E.2d at 769-70.

Unlike in *Weik*, where defense counsel presented minimal testimony about the defendant's abusive family background, Jones's extensive social history was elicited

through the testimony of Thornsberry, Senior, and Grey. While the social history testimony in *Weik* spanned merely three pages of the trial transcript, the testimony here was set forth in more than one hundred pages in the sentencing phase alone. Jones argues that at the very least, Turner's testimony bore on mitigating factors related to his mental state; however, Turner's testimony was relevant to her mental state, not Jones's. Neither Turner's diagnosis nor the hereditary nature of schizophrenia was disputed. We therefore affirm the trial court's exclusion.

4. Admission of Autopsy Photographs

During the sentencing phase, the trial court admitted—over Jones's objection—ten autopsy photographs (two per child). The issue before us is whether the probative value, if any, of the photographs was substantially outweighed by the danger of unfair prejudice under Rule 403, SCRE.

Jones argued at trial that the photographs were inadmissible under Rules 401 and 403, SCRE, because the State had already proved the existence of statutory aggravating circumstances and the "absolutely horrific" and "nightmarish" photographs would do nothing more than "arise sympathy or prejudice." The solicitor responded that the photographs "show[] [Jones's] character, the work of his hands" because they "depict the bodies of the victims in the same condition he left them in -- or condition he left them to become in." The solicitor argued the photographs were relevant to show how Jones bagged up his children's bodies, drove them around for more than a week, and deliberately left them in the hot sun to accelerate decomposition.

After reviewing cases cited by both parties, the trial judge allowed the State to admit two autopsy photographs per child, citing several cases along with Rules 401, 402, and 403, SCRE. The trial judge determined the photographs, "even though very unpleasant," were probative of Jones's "conduct of packing the children in the bags and contorting the bodies in different fashions, putting them out there in the woods." Over Jones's objection, the photographs were admitted during the testimony of expert witness Dr. Janice Ross—the forensic pathologist who performed the autopsies and took the disputed photographs. Dr. Ross testified during the guilt phase and was recalled by the State during the sentencing phase for the purpose of having the photographs admitted into evidence.

Although Dr. Ross described what was depicted in each photograph, the solicitor did not publish the photographs in open court—out of what the solicitor

stated was his "respect for the jury." Dr. Ross testified Elias' cause of death was asphyxia due to strangulation; Gabriel's cause of death was homicidal violence with probable strangulation; and Merah's, Abigail's, and Nahtahn's causes of death were homicidal violence. Dr. Ross testified there was a wound to Nahtahn's knee—which was depicted in a photograph published during the guilt phase—that appeared to be caused by a sharp instrument "like a saw or a knife."

After Dr. Ross's testimony, defense counsel noted, "[The State] needed the photographs to show Dr. Ross in testimony and they were not used for that purpose, which enhances the fact that they're just being used to create an emotional impact." Defense counsel then moved to have the photographs kept in the courtroom during jury deliberations so that a record could be made of any emotional impact the photographs evoked if a juror asked to see them. The trial court denied this request, and the photographs went into the jury room along with other trial exhibits.

"The determination of the relevancy and materiality of a photograph is left to the sound discretion of the trial judge" whose "rulings will not be disturbed absent a showing of probable prejudice." *State v. Kornahrens*, 290 S.C. 281, 288, 350 S.E.2d 180, 185 (1986); *see Evins*, 373 S.C. at 421, 645 S.E.2d at 912. In the sentencing phase of a capital trial, photographs may be offered as extenuating, mitigating, or aggravating evidence to "direct the jury's attention to the specific circumstances of the crime and the characteristics of the offender." *State v. Haselden*, 353 S.C. 190, 199, 577 S.E.2d 445, 450 (2003) (quoting *State v. Matthews*, 296 S.C. 379, 390, 373 S.E.2d 587, 594 (1988)).

"[I]t is well-established that photographs calculated to arouse the sympathies and prejudices of the jury are to be excluded if they are irrelevant or unnecessary to the issues at trial." *State v. Middleton*, 288 S.C. 21, 24, 339 S.E.2d 692, 693 (1986); *see* Rule 401, SCRE; Rule 403, SCRE. Photographs are relevant if they "depict the bodies of the murder victims in substantially the same condition in which the defendant left them." *Kornahrens*, 290 S.C. at 289, 350 S.E.2d at 185. Even if relevant, photographs are unfairly prejudicial if they "create a 'tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.'" *State v. Franklin*, 318 S.C. 47, 55, 456 S.E.2d 357, 361 (1995) (quoting *State v. Alexander*, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991)); *see* S.C. Code Ann. § 16-3-25(C)(1) (2015).

In several capital trials, we have considered the admissibility of autopsy photographs.⁶ We explained in *Franklin*, "The criteria is not . . . that photographs become inadmissible because they graphically depict a gruesome scene. Rather, the question is whether the photographs are unfairly prejudicial so as to outweigh the probative value." 318 S.C. at 55, 456 S.E.2d at 361. We noted the autopsy photographs in that case were highly relevant to the issue of physical torture delivered upon the victim by the defendant. In *Middleton*, we considered a challenge to the trial court's admission of photographs showing the victim's scalp pulled away from her skull and her surgically opened vaginal cavity filled with semen. 288 S.C. at 24, 339 S.E.2d at 693. Because it was clear the facts were not in dispute and because the testimony of a forensic pathologist "negated any arguable evidentiary value of the photographs[,]" we held the "prejudice created by the photographs clearly outweighed *any* evidentiary value." *Id.* at 23-24, 339 S.E.2d at 693.

Nine months after deciding *Middleton*, we decided *Kornahrens*, 290 S.C. at 281, 350 S.E.2d at 180. In *Kornahrens*, the trial court admitted several photographs during sentencing that depicted the autopsies of two murder victims. Photographs of one victim showed her lying on an autopsy table in the same condition her body was found, and photographs of the other victim showed knife wounds to his chest, back, and thigh. We concluded the photographs were properly admitted because "while not pleasant to look at, they showed what the defendant himself did to the

⁶ Notable cases outside of those discussed in this subsection include *State v. Patrick*, 289 S.C. 301, 308-09, 345 S.E.2d 481, 485 (1986) (holding an autopsy photograph was "not substantially necessary" and was "highly prejudicial" because it showed the victim lying on an autopsy table with a "considerable amount of blood" and without any depiction of the crime scene or post-mortem abuse), *overruled on other grounds by Brightman v. State*, 336 S.C. 348, 520 S.E.2d 614 (1999); *State v. Rosemond*, 335 S.C. 593, 597, 518 S.E.2d 588, 590 (1999) (holding the probative value of crime scene and autopsy photographs outweighed any prejudicial effect because they "served to corroborate the pathologist's testimony describing the position of the victims as they were dying and the wounds each received"); and *State v. Johnson*, 338 S.C. 114, 129-30, 525 S.E.2d 519, 526-27 (2000) (holding autopsy photographs that depicted the victim's nearly severed shoulder and her head wound were admissible because although "difficult to look at, they nevertheless revealed the true nature of the attack and would have permitted the jury to comprehend the precise damage inflicted by the [murder weapon]").

bodies," and the bodies were not "altered by decomposition or by any other outside force." *Id.* at 289, 350 S.E.2d at 186 (cleaned up).

More recently, we considered a challenge to the trial court's admission of several autopsy photographs during sentencing, each "graphically depict[ing] the injuries of the victim[.]" *State v. Torres*, 390 S.C. 618, 624, 703 S.E.2d 226, 229 (2010). We acknowledged "some of the photographs were close-ups of the victims' injuries and were graphic in nature," but we concluded the "purpose of the close-ups was to help identify the nature of the particular injury" and "show what the defendant did to the victims, which goes straight to circumstances of the crime." *Id.* (cleaned up). We upheld the trial court's admission because although the crime was "particularly horrific[,] . . . the admission of the photographs did not unduly prejudice the jury." *Id.* Despite affirming the trial court's admission, we explained the photographs were "at the outer limits of what our law permits a jury to consider." *Id.* In light of our growing concern in the admission of autopsy photographs, we "strongly encourage[d] all solicitors to refrain from pushing the envelope on admissibility in order to gain a victory which, in all likelihood, was already assured because of other substantial evidence in the case." *Id.*

After *Torres*, we again considered the admissibility of horrendous autopsy photographs, albeit in a noncapital trial. See *State v. Collins*, 409 S.C. 524, 531-34, 763 S.E.2d 22, 26-28 (2014). In *Collins*, the defendant was indicted for several crimes arising from a ten-year-old boy being mauled to death by the defendant's unrestrained dogs. At trial, the State offered into evidence a group of pre-autopsy photographs taken by a forensic pathologist that demonstrated "the dangerous propensities of the dogs, the manner and extent of the attack, and [the defendant's] criminal negligence[.]" *Id.* at 532, 763 S.E.2d at 27. The "nature and extent" of the victim's injuries were in dispute, and the photographs "show[ed] the boy's exposed jawbone and upper arm bone[] and the areas where his chest and face had been partially eaten during the dog attack." *Id.* at 532, 533 n.3, 763 S.E.2d at 27 & n.3. The trial court admitted the photographs, and the court of appeals reversed, holding the probative value of the "disturbing" and "gruesome" photographs was substantially outweighed by the danger of unfair prejudice. *State v. Collins*, 398 S.C. 197, 202, 208-10, 727 S.E.2d 751, 754, 757-58 (Ct. App. 2012).

In *Collins*, we acknowledged the photographs were graphic, but we concluded they were "highly probative, corroborative, and material in establishing the elements of the offenses charged; their probative value outweighed their potential prejudice; and the court of appeals should not have invaded the trial court's discretion in

admitting this crucial evidence based on its emotional reaction to the subject matter presented." 409 S.C. at 535, 763 S.E.2d at 28 (cleaned up). We observed photographs should not be excluded just because they are gruesome. *Id.* at 535-36, 763 S.E.2d at 28.

As we noted in *Kornahrens*, "The purpose of the bifurcated proceeding in a capital case is to permit the introduction of evidence in the sentencing proceeding which ordinarily would be inadmissible in the guilt phase." 290 S.C. at 289, 350 S.E.2d at 185. With respect to photographs, we stated, "In determining whether to recommend a sentence of death, the jury may be permitted to see photographs which depict the bodies of the murder victims in substantially the same condition in which the defendant left them." *Id.* We also noted that even though the trial court must balance the probative value of evidence against the danger of unfair prejudice, the scope of the probative value of evidence in the sentencing phase is "much broader" than in the guilt phase. *Id.* at 289, 350 S.E.2d at 186. An obvious takeaway from *Kornahrens* is that the evidence must still have at least some probative value for it to enjoy that "much broader" scope.

Unlike the photographs admitted in *Kornahrens*, *Torres*, and *Collins*, the autopsy photographs in this case were of no probative value. The photographs here do not depict the children's bodies in substantially the same condition in which Jones left them. The photographs depict the children's bodies in the advanced stages of decomposition occurring in the three days between the time Jones dumped the bodies to the time law enforcement discovered them. The bodies were so severely decomposed that with the exception of one photograph, neither strangulation nor ligature marks were visible to corroborate Dr. Ross's testimony. The State does not claim Jones altered his children's faces or limbs, yet several photographs showed extensive tissue loss appearing as though an animal had eaten their faces and limbs.

Even assuming the photographs had some probative value because they purport to show Jones's character through the method and manner in which he bagged and disposed of the bodies, we hold as a matter of law that under Rule 403, such probative value—even in its "much broader" form as noted in *Kornahrens*—was substantially outweighed by the danger of unfair prejudice to Jones. The photographs show the children's bodies in a state of complete discoloration; they were engulfed in maggots and contorted beyond recognition. Some of the children's faces were missing, a number of their limbs had been eaten by animals, and one child's head had decomposed to skeletal remains.

The solicitor's statement that he was not going to publish the ten admitted photographs in open court "out of respect for the jury" is telling on the issue of whether any probative value was substantially outweighed by the danger of unfair prejudice. Also, when Jones offered the photographs into evidence during the guilt phase, the solicitor, after first objecting on relevance grounds, argued the photographs should be excluded under Rule 403:

The photographs are far more prejudicial than probative. I think what Jones is trying to do is basically use shock value to diminish the shock should there be a second half of this case. In the second phase of this case, we get to show the characteristics of the crime, the defendant, how the victims were found. The photographs become probative at that point, relevant at that point. Right now, they're not.

(emphasis added) (cleaned up). The solicitor's words "to diminish the shock" are even more indicative that the probative value of the photographs was substantially outweighed by the danger of unfair prejudice. We observed in *Torres* that "[p]hotographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or not necessary to substantiate material facts or conditions." 390 S.C. at 623, 703 S.E.2d at 228.

Based on the record before us, we hold the photographs had no probative value. We hold that even if the photographs had probative value, the broader probative value implicated by *Kornahrens* was substantially outweighed by the danger of unfair prejudice to Jones.

i. Harmless Error

Having determined the autopsy photographs were admitted in error, we must determine whether the error was harmless. There is no question that the murders perpetrated by Jones were horrific—perhaps the most horrific imaginable. After running six-year-old Nahtahn to death, Jones strangled seven-year-old Elias to death while Elias begged Jones not to kill him. Jones strangled eight-year-old Merah to death while she pleaded, "Daddy, I love you." Jones strangled one-year-old Abigail and two-year-old Gabriel to death with a belt because their necks were too small for Jones to strangle with his bare hands. Jones then packed his children's bodies in plastic bags, stacked them in the back seat of his vehicle, and drove across several states, all while trying to decide what to do. As he drove, Jones bought spice, trash bags, chemicals, goggles, a dust mask, and a jab saw. He searched the internet for

applicable extradition laws and local dumpsites, landfills, and campgrounds. He wrote a note reading in part, "Melt bodies," "Sand to dust or small pieces," and "Day 1: Burn up bodies. Day 2: Sand down bones. Day 3: Mexican Border ☺, dissolve, and discard." His expression of happiness about escaping to Mexico is particularly compelling. While the autopsy photographs should not have been admitted, we properly take note of Jones's calculated efforts to dispose of his children's bodies in a remote area to evade responsibility for what he had done.

Were the autopsy photographs horrific? Absolutely. Were they inadmissible under Rule 403? Yes, for the reasons we have explained. However, after weighing the horrific facts of this case against the improper admission of the photographs, we hold the photographs did not contribute to the jury's sentence of death. *See Skipper*, 476 U.S. at 8; *Chaffee*, 294 S.C. at 91, 362 S.E.2d at 877; *Key*, 256 S.C. at 93-94, 180 S.E.2d at 890.

C. Proportionality Review

Pursuant to South Carolina Code section 16-3-25, we must conduct a proportionality review of Jones's death sentence. We find the sentence was not the result of passion, prejudice, or any other arbitrary factor and was instead supported by the aggravating factors alleged by the State, as set forth in subsections 16-3-20(C)(a)(9) (murder of two or more persons by one act or pursuant to one scheme or course of conduct) and (10) (murder of a child eleven years of age or younger). With the possible exception of *State v. Wilson*, 306 S.C. 498, 413 S.E.2d 19 (1992) in which the defendant was sentenced to death for murdering two eight-year-old girls on an elementary school campus, there is not a comparable case to the one before us. Frankly, the horrific murders perpetrated by Jones are incapable of comparison in this state. *Cf. Kornahrens*, 290 S.C. at 283-84, 290-91, 350 S.E.2d at 182-83, 186-87; *Moore v. Stirling*, 436 S.C. 207, 229, 871 S.E.2d 423, 435 (2022); *State v. Bell*, 302 S.C. 18, 21-22, 39-40, 393 S.E.2d 364, 366-67, 376 (1990); *State v. Passaro*, 350 S.C. 499, 501-02, 508-10, 567 S.E.2d 862-64, 867-68 (2002). Therefore, Jones's death sentence is neither excessive nor disproportionate.

Conclusion

For the foregoing reasons, we affirm Jones's convictions and death sentence.

AFFIRMED.

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

JUSTICE FEW: I concur in the majority opinion in all respects except as to subsection B.4. I would hold the trial court acted within its discretion to admit two autopsy photographs of the badly decomposed body of each child, and thus, the admission of the photographs was not error under Rule 403 of the South Carolina Rules of Evidence. The majority is correct the photographs are gruesome, and were certain to cause a forceful, emotional reaction from the jury. Like the other Justices, I have seen—and sat with—these photographs. It is not possible to describe them. They are literally unbearable. A death penalty trial, however—like a man's heinous murder of his own children—is itself a gruesome business, and even without photographs such as these, evidence of what this man did to his children certainly caused a forceful, emotional reaction from the jury. There is hardly anything "unfair" in allowing the jury to see—not just hear—what this man did to the bodies of his children. It is simply not possible to sanitize the murder of these five innocent children, nor for that matter the trial of the man who did it, nor certainly the evidence on which the State seeks to convince the jury to kill that man through the death penalty. Timothy Ray Jones Jr. took a long series of planned and deliberate actions, first to murder his own children, then to conceal his vicious crimes, and finally to leave the bodies of *his own children* for the purpose of having them deteriorate to the condition shown in the photographs. His crimes were unspeakable; his efforts to get away with his crimes were unconscionable; he is despicable. The photographs show all that, and thus, the photographs have probative value. In my view, the trial court's determination that the probative value of the photographs was not substantially outweighed by the danger of unfair prejudice was a reasonable decision and within the trial court's discretion. I would find no error.

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

Anthony Denson, as personal representative of the estate
of Garland Denson, Plaintiff,

v.

National Casualty Company, Defendant.

Appellate Case No. 2021-001389

CERTIFIED QUESTION

ON CERTIFICATION FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF SOUTH CAROLINA
David C. Norton, United States District Judge

Opinion No. 28146
Heard September 13, 2022 – Filed March 29, 2023

CERTIFIED QUESTION ANSWERED

Johnny F. Driggers, of Goose Creek; and Andrew S.
Radeker and Sarah M. Larabee, both of Harrison,
Radeker & Smith, P.A., of Columbia, all for Plaintiff.

Robert Mills Kennedy Jr., of Phelps Dunbar LLP, of
North Carolina, for Defendant.

JUSTICE KITTREDGE: This Court accepted the following certified question from the United States District Court for the District of South Carolina:

May a person entitled to bring a dram-shop action against a business maintain a negligence action against the business's insurer where the insurer failed to notify the South Carolina Department of Revenue of the business's lapse in or termination of liquor liability coverage in violation of S.C. Code Ann. § 61-2-145(C) [(2022),] and the business did not have liquor liability coverage at the time of the underlying accident?

We answer the certified question "no" and conclude section 61-2-145(C) does not create a private right of action in favor of an injured party against the business's insurer.

I.

We discern the following facts from the limited record before us and offer them merely in an effort to provide context.¹

Garland Denson (the decedent) was killed in an automobile accident allegedly caused by a drunk driver. The complaint alleged the at-fault driver was overserved at Royal Lanes, a bar insured by Defendant National Casualty Company (National Casualty) under a general liability policy with no liquor liability endorsement. During probate of the decedent's estate, his personal representative, Plaintiff Anthony Denson (Denson), discovered Royal Lanes did not have the required liquor liability insurance. Specifically, Denson learned National Casualty previously provided liquor liability coverage to Royal Lanes, but at the time of the accident, the business had failed to renew the liquor liability coverage, leaving only a general liability policy.² Liquor liability coverage is statutorily mandated

¹ A certified question does not require this Court to make findings of fact; we answer only the narrow legal question presented by the federal court. *See Poly-Med, Inc. v. Novus Sci. Pte. Ltd.*, 437 S.C. 343, 346–47, 878 S.E.2d 896, 897–98 (2022) (recognizing this Court's role on certification is to answer questions of law, not questions of fact, and noting we must answer those questions narrowly to ensure disputed facts do not impact the analysis or alter the conclusion).

² Although this fact is not found in the certification order, counsel for National

for certain establishments that sell alcoholic beverages, and the failure to maintain this coverage constitutes a violation of South Carolina law. *See* S.C. Code Ann. § 61-2-145(A) (requiring certain businesses to maintain liquor liability insurance coverage of at least \$1,000,000).

As a result of this discovery, Denson filed a direct negligence action against National Casualty, rather than Royal Lanes. Denson claimed National Casualty was directly liable to the decedent's estate for failing to notify the South Carolina Department of Revenue (the department) about Royal Lanes' lapse or termination of liquor liability coverage as required by statute. In support, Denson cited section 61-2-145(C), which provides:

Each insurer writing liquor liability insurance policies or general liability insurance policies with a liquor liability endorsement to a person licensed or permitted to sell alcoholic beverages for on-premises consumption, in which the person so licensed or permitted remains open to sell alcoholic beverages for on-premises consumption after five o'clock p.m., must notify the department in a manner prescribed by department regulation of the lapse or termination of the liquor liability insurance policy or the general liability insurance policy with a liquor liability endorsement.

(Emphasis added.)³

National Casualty filed a motion to dismiss, arguing section 61-2-145 did not grant the decedent's estate (or any similarly injured party) the right to bring a cause of action against the insurer. In opposing the motion, Denson relied on the concept of negligence per se. Denson specifically argued that National Casualty's violation of its statutory duty constituted negligence per se, which in turn gave rise to a private right of action against the insurance company. The district court certified the above question to resolve National Casualty's motion to dismiss. We accepted the question pursuant to Rule 244, SCACR.

Casualty conceded during oral argument that Royal Lanes previously maintained a policy with National Casualty that provided liquor liability coverage.

³ It is undisputed that National Casualty did not notify the department of Royal Lanes' lapse or termination of liquor liability coverage prior to the accident.

II.

This certified question requires that we interpret section 61-2-145. We are guided by our precedents, and we apply standard rules of statutory construction to determine legislative intent. *See generally Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) ("The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." (cleaned up)).

III.

Denson's argument leads with general principles of negligence per se. Armed with the insurer's statutory reporting duty under section 61-2-145(C), Denson concludes he is entitled to forgo an action against the alleged tortfeasor and sue the insurer directly. We reject this argument. To establish a claim for negligence per se based on a violation of the statute's reporting duty, Denson must first demonstrate either that National Casualty owed him a common-law duty of care, or that the legislature created a private right of action in section 61-2-145. As we will explain, no such common-law duty exists, and section 61-2-145 does not create a private right of action against the insurer. In essence, Denson's emphasis of the import of negligence per se puts the cart before the horse. The fact that a statute imposes a duty is not dispositive of a tortfeasor's liability under a negligence claim, for all statutes impose commands to do or refrain from doing something.

Our jurisprudence has at times merged the analysis for a private right of action and negligence per se because both address the question of whether the legislature intended the statute be used to impose civil liability. *See* 1 Dan B. Dobbs et al., *The Law of Torts* § 146 & n.13 (2d ed. 2011) (identifying this Court as seemingly treating the negligence per se doctrine as identical to a private cause of action (citing *Doe v. Marion*, 373 S.C. 390, 645 S.E.2d 245 (2007))); *see also, e.g., Whitlaw v. Kroger Co.*, 306 S.C. 51, 52, 410 S.E.2d 251, 252 (1991) (per curiam) (analyzing whether a private cause of action for damages may be instituted under two statutes, and concluding these statutes give rise to liability only where used to establish negligence per se); *Rayfield v. S.C. Dep't of Corr.*, 297 S.C. 95, 103–04,

374 S.E.2d 910, 914–15 (Ct. App. 1988) (using a negligence per se analysis to determine whether a statute "afford[s] a right of action for injury from the violation of a statute" (citation omitted)).

A distinction must be made, however, between (1) cases in which liability is based upon the violation of a statutory duty when there is also an underlying common-law cause of action; and (2) cases in which liability is based upon the violation of a statutory duty when there is no underlying common-law cause of action. *See Dobbs, supra*, § 158 (noting the confusion between private right of action and negligence per se, but stating the distinctions "are fundamental to a coherent understanding of statutes in tort law"). As Judge Posner explained:

Ordinarily the scope of the tort duty of care . . . is given by the common law. And although the legislature can and sometimes does create a duty of care to a new class of injured persons, *the mere fact that a statute defines due care does not in and of itself create a duty enforceable by tort law*. The distinction is well explained in *Marquay v. Eno*, [662 A.2d 272, 277 (N.H. 1995)]: "whether or not the common law recognizes a cause of action, the plaintiff may maintain an action under an applicable statute where the legislature intended violation of that statute to give rise to civil liability. The doctrine of negligence per se, on the other hand, provides that where a cause of action does exist at common law, the standard of conduct to which a defendant will be held may be defined as that required by statute, rather than as the usual reasonable person standard." *Otherwise every statute that specified a standard of care would be automatically enforceable by tort suits for damages—every statute in effect would create an implied private right of action—which clearly is not the law*.

Cuyler v. United States, 362 F.3d 949, 952 (7th Cir. 2004) (cleaned up) (emphasis added).

In any negligence cause of action, it is of course essential the plaintiff establish that a legal duty of care was owed *to the plaintiff* by the defendant. *See Bass v. Gopal, Inc.*, 395 S.C. 129, 134, 716 S.E.2d 910, 913 (2011) ("In any negligence action, the threshold issue is whether the defendant owed a duty to the plaintiff."); *Bishop v. S.C. Dep't of Mental Health*, 331 S.C. 79, 86, 502 S.E.2d 78, 81 (1998) ("An essential element in a cause of action for negligence is the existence of a legal duty of care owed by the defendant to the plaintiff. Without a duty, there is no

actionable negligence." (citing *Rogers v. S.C. Dep't of Parole & Cmty. Corr.*, 320 S.C. 253, 464 S.E.2d 330 (1995))). That duty may arise from the common law or a statute. *Steinke v. S.C. Dep't of Lab., Licensing & Regul.*, 336 S.C. 373, 388, 520 S.E.2d 142, 149 (1999) (quoting *Jensen v. Anderson Cnty. Dep't of Soc. Servs.*, 304 S.C. 195, 199, 403 S.E.2d 615, 617 (1991)).

Here, Denson's counsel conceded at oral argument that the threshold inquiry is whether section 61-2-145 gives rise to a private right of action.⁴ We take this to mean he admits the insurance company owes no common-law duty to an injured third-party under these facts—an unremarkable position with which all readily agree. Thus, negligence per se only applies in this case if we find the statute creates a private right of action, for it is axiomatic in cases where no common-law cause of action exists, negligence per se only comes into play when a statute grants the plaintiff a right to sue the chosen defendant. *Cf.* 57A Am. Jur. 2d *Negligence* § 683 (2022) ("[T]he negligence per se doctrine *does not create a duty of care* but merely sets a standard of care by which the defendant may be judged in the common-law action, and therefore, *the absence of an underlying common-law duty renders the presence of a statutory standard of care irrelevant*. A statutory duty or standard may establish an essential element for a negligence action; however, *it does not provide the cause of action*, but rather the duty or standard of care, statutory or otherwise, is merely an element of proof that comes into play *after* an action has been rightfully commenced *pursuant to the preexisting common-law*

⁴ Justice Few questioned Denson's counsel on the matter at oral argument, stating, "The question here is whether there is a duty that extends to your client—in other words, whether there is a private right of action under this statute. If the answer is no, then negligence per se never comes into the equation. If the answer is yes, then maybe negligence per se comes into the question if there is a violation." Counsel responded, "That's correct, Your Honor." The dissent suggests we are using counsel's statements at argument in a "gotcha" game. We disagree. We have not treated counsel's concession as dispositive; rather we merely note Denson's counsel's acknowledgement of the obvious—the threshold question is whether the legislature intended the statute to create a private right of action. The dissent makes the same error Denson does, that is, equating principles of negligence per se as proof that the legislature intended to create a private right of action. Acceptance of Denson's position would eviscerate our public duty rule by transforming virtually all statutes to private causes of action.

cause of action. On the other hand, when a statute creates a duty of care and sets the standard by which a breach is measured, the statute no longer gives rise to a negligence per se claim but rather creates a right of action." (emphasis added) (footnotes omitted)).⁵

If the Court determines the General Assembly did not intend the statute create a private right of action, and there is no underlying common-law duty owed by the defendant to the plaintiff, then the Court need not undertake further analysis. This is so because the presence of a duty in a statute—the basis of the doctrine of negligence per se—may not be construed as automatically creating a private right of action. *See Doe ex rel. Doe v. Wal-Mart Stores, Inc.*, 393 S.C. 240, 246–48, 711 S.E.2d 908, 911–12 (2011) (concluding a statute did not impose a duty on the defendant where the defendant's "duty to report under the [statute] cannot give rise to civil liability"); *see also* 57A Am. Jur. 2d *Negligence* § 705 (2022) ("A statute creates no liability to the person injured unless it discloses an intention, express or implied, that from disregard of the statutory command, a liability for resultant damage arises, *which would not exist but for the statute.*" (emphasis added)).

A.

Denson asks us to recognize a duty of care *based on the statute alone* running from National Casualty to himself to ensure his ability to be compensated for injuries caused by a drunk-driving accident. Because there exists no common-law right of

⁵ In applying South Carolina law, the district court has acknowledged that, "Generally, a statute must permit a private cause of action in order for plaintiffs to maintain a civil suit for negligence per se." *In re Blackbaud, Inc., Customer Data Breach Litig.*, 567 F. Supp. 3d 667, 683 (D.S.C. 2021) (cleaned up); *see, e.g., Williams v. Hill Mfg. Co.*, 489 F. Supp. 20, 21–22 (D.S.C. 1980) ("In South Carolina, the violation of an applicable statute is 'negligence per se.' And it is clear that with regard to this rule, South Carolina has adopted the statutory purpose doctrine and has used the[se] three tests[—(1) whether the legislature intended to create a private liability, as distinguished from one of a public character; (2) whether the person injured is a person or a member of a class for whose benefit or protection the law is enacted; and (3) whether the injury complained of was such as the enactment was intended to prevent—in applying it." (internal citation omitted)).

action against National Casualty in this case,⁶ we turn first to whether the statute gives rise to a private cause of action.⁷

The main factor in determining whether a statute gives rise to a private cause of action is legislative intent, which is determined primarily from the language of the statute. *Kubic v. MERSCORP Holdings, Inc.*, 416 S.C. 161, 168, 785 S.E.2d 595, 599 (2016); *Georgetown Cnty. League of Women Voters v. Smith Land Co.*, 393 S.C. 350, 353, 713 S.E.2d 287, 289 (2011) (quoting *Marion*, 373 S.C. at 396, 645

⁶ See *Major v. Nat'l Indem. Co.*, 267 S.C. 517, 520, 229 S.E.2d 849, 850 (1976) (stating that absent privity of contract between the plaintiff and the insured, the plaintiff has no common-law right to maintain suit directly against the insurer).

⁷ In an attempt to shore up its argument, the dissent cites to a case from the Kansas Supreme Court, *Shirley v. Glass*, 308 P.3d 1 (Kan. 2013). In *Shirley*, however, the Kansas Supreme Court did not have to consider whether the statute gave the plaintiff a private right of action because the plaintiff had a common-law cause of action against the defendant. *Id.* at 5–6. *Shirley* therefore has no applicability here. See *Kudlacik v. Johnny's Shawnee, Inc.*, 440 P.3d 576, 582–83 (Kan. 2019) (distinguishing *Shirley* from a dram shop case in which "a duty of care [was] based on the statutes alone," and noting that in Kansas, "negligence per se requires proof [the] defendant violated [the] statute, that [the] violation caused [the] plaintiff's damages, and that [the] Legislature intended [an] individual right of action for [the] injury arising out of [that] violation" (emphasis added) (citation omitted)). *Shirley* and Kansas law support this majority opinion, not the dissenting opinion. More to the point, the approach taken by the dissent has been explicitly and repeatedly *rejected* by the Kansas Supreme Court. *Id.* (noting a common-law or statutory duty (i.e., cause of action) must exist *prior* to any application of negligence per se); *Pullen v. West*, 92 P.3d 584, 593–94, 597 (Kan. 2004) (concluding negligence per se was inapplicable where the legislature did not intend to establish a private cause of action for violations of the statute); *Kan. State Bank & Tr. Co. v. Specialized Transp. Servs., Inc.*, 819 P.2d 587, 603 (Kan. 1991) ("Violation of a statute alone does not establish negligence per se. The plaintiff must also establish that an individual right of action for injury arising out of the violation was intended by the legislature."). Perhaps the reason for this is that, as noted above, the dissent's approach would allow every statute imposing a duty to in effect create an implied private right of action—the exact outcome Judge Posner warned against in *Cuyler*. See 362 F.3d at 952.

S.E.2d at 248). Generally, when a statute does not expressly create civil liability, a duty will not be implied unless the statute was enacted for the special benefit of a private party. *Marion*, 373 S.C. at 397, 645 S.E.2d at 248; *see also 16 Jade St., L.L.C. v. R. Design Constr. Co.*, 405 S.C. 384, 389–90, 747 S.E.2d 770, 773 (2013) (applying the rules for establishing a private cause of action in the context of determining whether a statute imposes a legal duty); *Citizens for Lee Cnty., Inc. v. Lee Cnty.*, 308 S.C. 23, 28, 416 S.E.2d 641, 645 (1992) ("The threshold consideration here is whether or not [plaintiffs] . . . have an implied cause of action under the statute, since no private right of action is expressly provided. . . . [T]his Court held that assuring that legislation was enacted for the special benefit of the private party is a test for determining whether a right of private action is created by implication." (citation omitted)). "In this respect, the general rule is that a statute which does not purport to establish a civil liability, but merely makes provision to secure the safety or welfare of the public as an entity is not subject to a construction establishing a civil liability." *Whitworth v. Fast Fare Mkts. of S.C., Inc.*, 289 S.C. 418, 420, 338 S.E.2d 155, 156 (1985) (quoting 73 Am. Jur. 2d. *Statutes* § 432 (1974)); *see also Rayfield*, 297 S.C. at 103, 374 S.E.2d at 914 ("In order to show that the defendant owes him a duty of care arising from a statute, the plaintiff must show two things: (1) that the essential purpose of the statute is to protect from the kind of harm the plaintiff has suffered; and (2) that he is a member of the class of persons the statute is intended to protect.").

B.

Applying the above principles, we turn to Denson's claim that the decedent's estate may maintain a private cause of action against National Casualty pursuant to section 61-2-145. Subsection (A) provides that businesses "licensed or permitted to sell alcoholic beverages for on-premises consumption . . . [are] required to maintain a liquor liability insurance policy or a general liability insurance policy with a liquor liability endorsement for a total coverage of at least one million dollars." S.C. Code Ann. § 61-2-145(A). Additionally, "Failure to maintain this coverage constitutes grounds for suspension or revocation of the [business's liquor] permit or license." *Id.* As for insurers that provide businesses with this requisite liquor liability coverage, subsection (C) provides an insurer "must notify the department . . . of the lapse or termination" of its insured's liquor liability coverage. *Id.* § 61-2-145(C).

Based on this language, Denson asserts the subsection (C) duty on the insurer creates a private right of action. We disagree and hold the legislature did not

intend to create a private right of action.⁸ First, a statutory right to maintain an action against the insurer here would contravene common law. In *Major ex rel. Major v. National Indemnity Co.*, this Court explained, "At common law, no right to maintain suit directly against the insurer existed absent privity of contract between the claimant and the insured. *Because direct actions against the insurer contravene[] common law, such a right must be expressly sanctioned by the legislature and not [be] merely inferentially deduced.*" 267 S.C. 517, 520, 229 S.E.2d 849, 850 (1976) (emphasis added) (citation omitted). Moreover, "legislation in derogation of common law must be strictly construed under settled principles enunciated by this Court." *Id.*; see also *Doe v. Marion*, 361 S.C. 463, 473, 605 S.E.2d 556, 561 (Ct. App. 2004) ("A rule of statutory construction is that any legislation which is in derogation of common law must be strictly construed and not extended in application beyond clear legislative intent. Therefore, a statute is not to be construed in derogation of common law rights if another interpretation is reasonable." (citation omitted)), *aff'd*, 373 S.C. 390, 645 S.E.2d 245.

We thus conclude section 61-2-145 does not create a private cause of action against an insurer for its failure to report an insured's lapse or termination of liquor liability coverage. Standing alone, the lack of an express sanction for a direct right of action leads us to conclude there is no statutory right to maintain an action against the insurer here. *Major*, 267 S.C. at 520, 229 S.E.2d at 850.

C.

Nonetheless, we go further and conclude subsection (C) likewise does not support a claim for negligence per se because the essential purpose of subsection (C) is not to protect against the type of harm suffered by the decedent. Subsection (C) does not satisfy the first element of the two-part *Rayfield* test. See *Rayfield*, 297 S.C. at 103, 374 S.E.2d at 914 (providing the plaintiff must show "that the essential purpose of the statute is to protect from the kind of harm the plaintiff has suffered"). As evidenced by the language of the statute, subsection (C) is part of a larger regulatory scheme intended to ensure that certain businesses maintain liquor liability insurance. This scheme is clearly intended to primarily promote the public safety and welfare, not to benefit a private party. *Kubic*, 416 S.C. at 169, 785 S.E.2d at 599 ("Our rules of construction allow this Court to infer a cause of action

⁸ If our effort to discern legislative intent is not correct, the legislature may, of course, amend the statute to clearly provide for a private right of action.

'only if the legislation was enacted for the special benefit of a private party.'" (quoting *Marion*, 373 S.C. at 397, 645 S.E.2d at 248)); *see also* 57A Am. Jur. 2d *Negligence* § 668 (2022) ("Where a statutory provision does not define a standard of care but merely imposes an administrative requirement, such as the requirement to obtain a license or to *file a report to support a regulatory scheme*, violation of such requirement *will not support a negligence per se claim.*" (emphasis added)). Of course, we acknowledge that the insurance requirement will ultimately benefit private parties, but the same can be said of all statutes mandating insurance coverage. A finding that the legislature intended to create a private right of action requires more than simply demonstrating a plaintiff may potentially benefit.

Moreover, when read as a whole, section 61-2-145 is primarily aimed at regulating the insured's actions and secondarily aimed at imposing a reporting requirement on the insurer. This is evidenced by the statute's failure to provide any consequence for the insurer. Conversely, the statute clearly provides for penalties against the insured-business should it fail to maintain the requisite liquor liability coverage. *See* S.C. Code Ann. § 61-2-145(A) ("Failure to maintain this coverage constitutes grounds for suspension or revocation of the permit or license."). The fact that the legislature delineated consequences for insureds but did not do the same for insurers further supports our conclusion that the statute does not create an implied private right of action against insurers. *See Kubic*, 416 S.C. at 170, 785 S.E.2d at 600 ("When the legislature delineated who would be able to bring a suit pursuant to [the statute in question], it chose not to afford that right to [the plaintiffs]. We decline to imply [legislative intent from] deliberate silence because to do so would be to rewrite the statute."). Accordingly, the enforcement mechanism of the statute is the department's authority to suspend or revoke a business's liquor license, not civil liability on behalf of the business's insurer. *See Dema v. Tenet Physician Servs.-Hilton Head, Inc.*, 383 S.C. 115, 122, 678 S.E.2d 430, 434 (2009) (concluding the provided enforcement mechanism of a statute indicated the legislature did not intend to create civil liability as another means of enforcement).

We do not suggest that there are no consequences for an insurer's failure to notify the department of the lapse or termination of liquor liability coverage. The department has the authority to sanction an insurer for violating section 61-2-145. *See, e.g.*, S.C. Code Ann. § 38-2-10(A) (Supp. 2022) ("[T]he following administrative penalties apply for each violation of the insurance laws of this State . . . subject to enforcement by the Department of Insurance: (1) If the violator is an insurer, . . . the [department's] director or his designee shall fine the [insurer]

in an amount not to exceed fifteen thousand dollars, suspend or revoke the [insurer's] authority to do business in this State, or both. If the violation is [willful], the director or his designee shall fine the [insurer] in an amount not to exceed thirty thousand dollars, suspend or revoke the [insurer's] authority to do business in this State, or both.").

IV.

We conclude section 61-2-145 does not give rise to a private right of action. We answer the certified question "no" and hold a person entitled to bring a dram-shop action against a business may not maintain a negligence action against the business's insurer based on the insurer's violation of section 61-2-145(C).

CERTIFIED QUESTION ANSWERED.

FEW and JAMES, JJ., concur. Acting Justice Kaye G. Hearn dissenting in a separate opinion in which BEATTY, C.J., concurs.

Acting Justice Hearn: Today, I dissent because the majority conflates two independent, well-recognized legal concepts—the doctrine of negligence *per se* and implied private rights of action. I begin with stating the question actually asked by the federal court, not the one answered by the majority. The federal court asks whether Denson can maintain a *negligence action* against National Casualty for its failure to comply with South Carolina law. I would answer that question "yes."

The certified question presupposes Denson's ability to bring a dram shop action against the business insured by National Casualty. Unlike many states, South Carolina does not have specific dram shop statute.⁹ Elsewhere, private rights of action have been recognized where the legislature has explicitly *created* a cause of action due to public policy concerns; however, a court can also find private rights of action if it determines the statute implies that result.¹⁰ This is the path that has heretofore been followed in South

⁹ *See generally*, N.C. Gen. Stat. Ann. § 18B-121 ("An aggrieved party has a claim for relief for damages against a permittee or local Alcoholic Beverage Control Board if . . ."); Ga. Code Ann. § 51-1-40 ("[A] person who willfully, knowingly, and unlawfully sells, furnishes, or serves alcoholic beverages to a person who is not of lawful drinking age, knowing that such person will soon be driving a motor vehicle, or who knowingly sells, furnishes, or serves alcoholic beverages to a person who is in a state of noticeable intoxication, knowing that such person will soon be driving a motor vehicle, may become liable for injury or damage caused by or resulting from the intoxication of such minor or person when the sale, furnishing, or serving is the proximate cause of such injury or damage."); and Tenn. Code Ann. § 57-10-102 (stating liability may be imposed if a jury determines that the defendant either sold to a minor or "[s]old the alcoholic beverage or beer to a visibly intoxicated person and such person caused the personal injury or death as the direct result of the consumption of the alcoholic beverage or beer so sold").

¹⁰ *See* S.C. Jur. Action § 14 ("In determining whether a private remedy is implicit in a statute not expressly providing one, the court has considered as relevant factors whether the plaintiff is one of the class for whose special benefit the statute was enacted, whether there is any indication of legislative intent, explicit or implied, either to create or deny such a remedy, and whether it is consistent with

Carolina. For example, in 1990, the court of appeals decided *Daley v. Ward*, wherein an injured motorist had been awarded a verdict in a suit against a bar and its allegedly overserved patron. Although the South Carolina statute proscribing the sale of beer or wine to any person while in an intoxicated condition did not specifically create a private right of action, the court determined the General Assembly had intended to do so. *Daley v. Ward*, 303 S.C. 81, 84, 399 S.E.2d 13, 15 (Ct. App. 1990) ("[W]e [previously] noted that the purpose of the statute is to protect not only the individual served in violation of the statute, but also the public at large, from the possible adverse consequences."). That analysis requires specific findings and accordingly is appropriately rare.

Conversely, negligence actions are among the most common brought by plaintiffs across the country. Negligence *per se* is a doctrine, used in tandem with a negligence claim, to establish two of the elements of negligence—duty and breach. In order to use a statute for this purpose, plaintiffs must establish a duty owed through proving two recognized criteria: "(1) that the essential purpose of the statute is to protect from the kind of harm the plaintiff has suffered; and (2) that he is a member of the class of persons the statute intended to protect." *Rayfield v. S.C. Dep't of Corr.*, 297 S.C. 95, 103, 374 S.E.2d 910, 914 (Ct. App. 1988). Those two elements ensure that the statute proposed as a basis of duty and breach is being used properly. Both elements are designed to limit negligence *per se*'s use to actions where the plaintiff is owed a duty arising from the statute. See S.C. Jur. Negligence § 12 ("To show that the defendant *owes him a duty of care arising from a statute*, the plaintiff must show two things: (1) that the essential purpose of the statute is to protect from the kind of harm the plaintiff has suffered; and (2) that he is a member of the class of persons the statute is intended to protect." (emphasis added)).

In South Carolina, negligence *per se* has been used to establish duty and breach within the context of automobile accidents for 100 years. See *Cirosky v. Smathers*, 128 S.C. 358, 359, 122 S.E. 864, 865 (1924) ("[The city

the underlying purpose of the legislative scheme to imply such a remedy for the plaintiff.")

ordinance] in effect prohibits operation by an unlicensed person and by one under 16 years of age. In this case the operator was both unlicensed and under 16. His operation was therefore unlawful and negligence *per se*."). *Cirosky* represents the classic example of negligence *per se* within the automobile collision context: a driver breaking a law and therefore breaching his duty to members of the public at large. *Id.* at 358, 122 S.E. at 864.

In 1933, this example was expanded upon in *Lawrence v. Southern Railway – Carolina Division*, 169 S.C. 1, 2, 167 S.E. 839, 840 (1933). There, the Court held that a railroad car's failure to comply with a signaling statute constituted negligence *per se* even though the car was at a complete stop. *Id.* at 2, 167 S.E. at 840. In *Lawrence*, the plaintiff recovered damages as a result of running into an unlit railroad car while it was parked on Charleston's King Street after midnight. *Id.* at 5, 167 S.E. at 844. To determine whether the statute could be used as evidence of negligence *per se*, the Court considered not only legislative intent but whether the plaintiff was one of the intended beneficiaries: "[t]he purpose of the signal statute was to warn the unwary. It was designed to arouse the traveler upon the highway approaching a railroad crossing who might be momentarily abstracted or inadvertent." *Id.* at 12, 167 S.E. at 843. The *Lawrence* Court allowed the plaintiff to recover, even though he was the driver and may have been negligent himself in driving into the parked railcar,¹¹ because the statute was intended to protect the public from unseen railcars as hazards on the roadway.

In *Norton v. Opening Break of Aiken, Inc.*, the use of negligence *per se* was expanded even further. 319 S.C. 469, 470, 462 S.E.2d 861, 862 (1995). In *Norton*, the bar's breach of an underage drinking statute was used as evidence of duty and breach in a negligence action. *Id.* at 469, 462 S.E.2d at

¹¹ The Court's *Lawrence* decision was before South Carolina's adoption of comparative negligence in 1991 and therefore part of this discussion was centered around whether the plaintiff could overcome the defense of contributory negligence. *See generally, Nelson v. Concrete Supply*, 303 S.C. 243, 399 S.E.2d 783 (1991) (adopting comparative negligence in South Carolina, which was later codified). Regardless, the negligence *per se* analysis is instructive.

862. Opening Break owned a bar in Aiken and allowed one of its employees to host a party on its premises after hours. *Id.* The party included numerous minors drinking alcohol, one of whom drove home intoxicated, killing Jerry Norton, whose estate sued in negligence. *Id.* at 469, 462 S.E.2d at 862.

Though Opening Break did not provide the alcohol to minors, the Court still ruled that the bar breached 23 S.C. Code Ann. Reg. 7-31 (Supp. 1994) which "prohibits ABC licensees from knowingly allowing persons under age 21 to drink alcohol on the licensed premises." *Id.* at 470, 462 S.E.2d at 862. The court of appeals provided this negligence *per se* analysis of the regulation in question:

Although the law does not imply an automatic duty to the public at large whenever a statute is violated, a rule forbidding a licensee of the Alcoholic Beverage Control Commission to facilitate consumption of alcohol by a minor is designed to protect both the minor who consumes the alcohol and those members of the public likely to be harmed by the minor's consumption of that alcohol. It follows that a third party harmed by the minor's consumption has an action against the licensee who violated the statute.

Norton v. Opening Break of Aiken, 313 S.C. 508, 512, 443 S.E.2d 406, 408 (Ct. App. 1994) (citations omitted). This Court subsequently affirmed the court of appeals' decision and adopted its reasoning. *Norton* at 470, 462 S.E.2d at 862 (citing *Tant v. Dan River, Inc.*, 289 S.C. 325, 345 S.E.2d 495 (1986) (regulations have the force of law; violation of a regulation may constitute negligence *per se*); *Whitlaw v. Kroger Co.*, 306 S.C. 51, 410 S.E.2d 251 (1991) (setting forth two-pronged test for determining when a duty created by statute or regulation will support an action for negligence)). Because the underage drinking regulation was intended to protect against the kind of harm the plaintiff suffered, the plaintiff was permitted to use it as the basis of a negligence *per se* analysis. This is exactly what Denson should be permitted to do here.

In *Whitlaw v. Kroger Co.*, the Court transformed a certified question asking if a statute created a private cause of action into an opportunity to address whether

negligence *per se* could be used in conjunction with the statute at issue.¹² 306 S.C. 51, 52, 410 S.E.2d 251, 252 (1991). The defendant sold beer to a minor and that minor ultimately wrecked a car while intoxicated, killing his passenger. The passenger's father sued the defendant seller, seeking to use South Carolina statutory law as a basis for the negligence action. *Id.* at 53, 410 S.E.2d at 252. The pertinent statute in *Whitlaw* related to the sale of alcohol to minors, and the Court, rather than create a cause of action stemming from the breach of that statute, ruled that negligence *per se* was the appropriate avenue for recovery. The factors utilized were the same put forth in *Rayfield*: "(1) that the essential purpose of the statute is to protect from the kind of harm the plaintiff has suffered; and (2) that he is a member of the class of persons the statute is intended to protect." *Id.* at 53, 410 S.E.2d at 252 (quoting *Rayfield v. S.C. Dep't of Corr.*, 297 S.C. 95, 103, 374 S.E.2d 910, 915 (Ct. App. 1988)).

Compare those decisions with a pair of cases from the court of appeals denying the use of negligence *per se*. In *Hurst v. Sandy*, a statute requiring the licensure of engineers could not be used in construction litigation to show negligence. 329 S.C. 471, 479, 494 S.E.2d 847, 851 (Ct. App. 1997) (holding that plaintiffs failed to demonstrate that the essential purpose of the licensing statute at issue was to protect against the harm suffered and therefore no duty was breached by its violation). The court noted the purpose of the statute was

¹² The majority points out that counsel at oral argument conceded that finding a private right of action is a threshold inquiry. However, mere moments after the colloquy the majority cites as evidence of this concession, in an attempt to clarify his position, Denson's counsel was questioned as to whether he liked the template of *Whitlaw v. Kroger*, to which he responded, "I do Your Honor, I do like that template. And that template is part of this state's law." *Whitlaw* did not pose a threshold private right of action inquiry as the majority does today and instead used the longstanding negligence *per se* analysis of *Rayfield* in answering whether the plaintiff was owed a duty under the statute. *See* 306 S.C. 51, 410 S.E.2d 251 (1991). Just as error preservation should not be used to trap lawyers in a "gotcha" game, an off-the-cuff response during the heat of oral argument—short of an unequivocal concession—should not be used against the lawyer, particularly when that response is later clarified. *State v. Jones*, 435 S.C. 138, 145, 866 S.E.2d 558, 561 (2021) (stating courts should disfavor using preservation as a "gotcha" game against litigants).

to, "regulate the practice of engineering by requiring persons who want to engage in this profession be licensed and registered" and not "impose civil liability on private individuals[.]" Accordingly, the court of appeals ruled that the plaintiff's negligence *per se* argument failed "the first prong of the *Rayfield* test." *Id.* at 479, 494 S.E.2d at 851.

Similarly, in *Wogan v. Kunze*, it was determined that a physician's failure to comply with the reporting requirements of the Medicare Act did not constitute negligence *per se*. 366 S.C. 583, 602, 623 S.E.2d 107, 118 (2006), *modified on other grounds*, 379 S.C. 581, 588, 666 S.E.2d 901, 905 (2008).¹³ In *Wogan*, the court of appeals found that the Medicare Act was "not designed to protect from harm" and instead was merely, "to maintain the orderly operation and handling of the program." *Id.* at 603, 623 S.E.2d at 118. Because the statute's essential purpose was *not* to address the kind of harm suffered and the plaintiff was not a member of the class the statute was designed to protect, the court of appeals dismissed the claim and this Court affirmed that holding. *Wogan*, 379 S.C. at 588, 666 S.E.2d at 905. However, today's majority opinion discards our long-standing negligence *per se* framework, focusing only on whether the statute in question creates a private right of action.¹⁴

¹³ Notably, the court of appeals in *Wogan*, which was subsequently affirmed by this Court, treated the plaintiff's claims for an implied private right of action and negligence *per se* distinctly, engaging in a thoughtful discussion on the limitations of leaving it to courts to find private rights of actions where the legislature does not explicitly do so. *Compare Wogan* at 595, 623 S.E.2d at 114 *with Wogan* at 602, 623 S.E.2d at 117-18. In my view, *Wogan's* treating of the two claims as distinct is the correct approach given our state's jurisprudence.

¹⁴ I am not alone in arguing these two concepts ought to remain distinct. For example, in *Shirley v. Glass*, the Kansas Supreme Court held, "[w]hether these statutes give rise to an independent private cause of action is irrelevant in the present case, however, because [the plaintiff] did not plead a statutory violation as the grounds for her suit. She instead presented a case based on simple negligence." 297 Kan. 888, 894, 308 P.3d 1, 5 (Kan. 2013). Here, the same is true. As recognized by the federal court, Denson brought a negligence action against

Here, S.C. Code Ann. § 61-2-145(C) is part of the Title 61, which governs the sale and consumption of alcohol in South Carolina. *See generally*, S.C. Code Ann. §§ 61-2-10 to 61-10-290. Subsection (A) of the same section reads:

(A) In addition to all other requirements, a person licensed or permitted to sell alcoholic beverages for on-premises consumption, which remains open after five o'clock p.m. to sell alcoholic beverages for on-premises consumption, *is required to maintain a liquor liability insurance policy or a general liability insurance policy with a liquor liability endorsement for a total coverage of at least one million dollars during the period of the biennial permit or license. Failure to maintain this coverage constitutes grounds for suspension or revocation of the permit or license.*

S.C. Code Ann. § 61-2-145(A) (emphasis added).

Together, subsections (A) and (C) create a regulatory scheme that compels certain, high-risk, alcohol-selling establishments to possess \$1 million in liquor liability coverage for the benefit of the general populace. If they do not, they will not be granted a liquor license and, if their coverage lapses at any point, their insurer is required to notify the Department so that disciplinary action (likely licensure revocation) can induce the restoration of liquor liability insurance. This scheme is clearly intended to benefit the public at large, specifically those likely to encounter inebriated bar patrons on the roadway.

Garland Denson was one of those intended beneficiaries when he was struck and killed by an overserved patron of Royal Lanes bar. In my view, the requirements imposed upon National Casualty to notify the Department of any lapses in liquor liability coverage were intended to protect against the

National Casualty. The question then becomes *not* whether the statute creates an alternative avenue for recovery, but whether the statute can be used within the context of a negligence action to show two of the four requisite elements.

exact harm that Garland Denson and his estate suffered. Plaintiff has clearly shown duty and breach through the appropriate use of negligence *per se*.¹⁵

Instead of answering the question asked—whether Denson can pursue an action in negligence—the majority answers a different question: whether the statute at issue—section 61-2-145(C)—created an implied private right of action. It does so by imposing that as a prerequisite to a plaintiff maintaining a simple negligence action. For decades, our courts have utilized the two-pronged negligence *per se* test to answer the question of duty rather than the limitations judicially imposed on the creation of a private right of action, but today, the majority conflates them to preclude any recovery by Denson. That conflation is a stark departure from the law with which I strongly disagree. I would first and foremost answer the question actually posed, and I would do so using the longstanding two-pronged test. Because I would answer the question "yes," I dissent.

BEATTY, C.J., concurs.

¹⁵ I note that regardless of whether Denson is able to prove causation, that issue is a factual question for the jury and not before the Court. *See Ballou v. Sigma Nu Gen. Fraternity*, 291 S.C. 140, 147, 352 S.E.2d 488, 493 (Ct. App. 1986) ("The question of proximate causation is ordinarily a question of fact for determination by the jury. ").