The Supreme Court of South Carolina

REQUEST FOR WRITTEN COMMENTS AND NOTICE OF PUBLIC HEARING

The Supreme Court of South Carolina is considering adding a rule to the South Carolina Rules of Criminal Procedure to govern closing arguments in non-capital criminal cases. A draft of this proposed rule is attached to this notice.

Persons or entities desiring to submit written comments regarding this proposed rule may do so by filing an original and seven (7) copies of their written comments with the Supreme Court. The written comments must be sent to the following address:

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, South Carolina 29211

The Supreme Court must receive any written comments by Wednesday, July 1, 2015. Additionally, the Court requests that an electronic version of the comments in Microsoft Word or WordPerfect be e-mailed to Rule21@sccourts.org by that same date.

The Court will hold a public hearing regarding this matter on Wednesday, September 23, 2015, at 3:00 p.m. in the Supreme Court Courtroom in Columbia, South Carolina. Those desiring to be heard shall notify the Clerk of the Supreme Court no later than Tuesday, September 8, 2015.

Columbia, South Carolina
April 29, 2015

RULE 21
CLOSING ARGUMENTS

Closing arguments in all non-capital cases shall proceed in the following order:

(a) the prosecution shall open the argument in full;

(b) the defense shall be permitted to reply; and

(c) the prosecution shall then be permitted to reply in rebuttal.

If the matter involves multiple defendants, the court shall determine their relative order in presentation of closing argument.

Note:

Rule 21 replaces the common law rule, which permitted a defendant to retain the final closing argument if the defendant presented no evidence during the trial, and is substantially similar to the Federal Rule. The rule requires that the prosecution open in full and may make a rebuttal argument, which must be limited to a direct response to the defendant's closing argument.

The Supreme Court of South Carolina

RE: Administrative Suspensions for Failure to Comply with Continuing Legal Education Requirements

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O R D E R

The South Carolina Commission on Continuing Legal Education and Specialization has furnished the attached list of lawyers who have failed to file reports showing compliance with continuing legal education requirements, or who have failed to pay the filing fee or any penalty required for the report of compliance, for the reporting year ending in February 2015. Pursuant to Rule 419(d)(2), SCACR, these lawyers are hereby suspended from the practice of law. They shall surrender their certificates to practice law in this State to the Clerk of this Court by May 22, 2015.

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

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

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
April 23, 2015

LAWYERS NON-COMPLIANT
WITH THE MCLE REQUIREMENTS
FOR THE 2014-2015 REPORTING YEAR
AS OF APRIL 16, 2015

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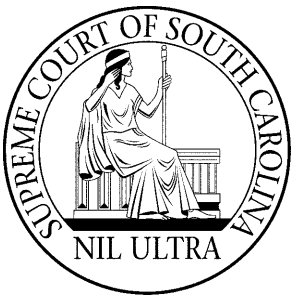

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 17
April 29, 2015
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Anthony Clark Odom, Appellant.

Appellate Case No. 2012-206186

Appeal from Oconee County
R. Lawton McIntosh, Circuit Court Judge

Opinion No. 27517
Heard May 21, 2014 – Filed April 22, 2015

AFFIRMED

Brian D. McDaniel, of Beaufort, for Appellant.

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

JUSTICE KITTREDGE: Anthony Clark Odom (Appellant) appeals his conviction for criminal solicitation of a minor. We affirm.

I.

Appellant's conviction for criminal solicitation of a minor[1] followed a series of internet chat sessions with an undercover Westminster, South Carolina, city police officer[2] posing as a fourteen-year-old girl. The internet exchanges occurred from May 4–6, 2006, in Oconee County, South Carolina. A jury found Appellant guilty of one count of criminal solicitation of a minor, based on the internet chats that occurred from May 4–5, 2006. Appellant was acquitted of the count involving a chat room conversation that allegedly occurred on May 6, 2006. The trial court sentenced Appellant to seven years' imprisonment, suspended upon the service of five years' probation, along with conditions including registering as a sex offender. Appellant appealed his conviction, and the Court certified the case from the court of appeals pursuant to Rule 204(b), SCACR.

II.

"In criminal cases, the appellate court sits to review errors of law only." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Therefore, this Court is bound by the trial court's factual findings unless the appellant can demonstrate that the trial court's conclusions either lack evidentiary support or are controlled by an error of law. *State v. Laney*, 367 S.C. 639, 644, 627 S.E.2d 726, 729 (2006).

A.

Appellant argues that the officer posing as a fourteen-year-old girl must have a bond to be acting in his official capacity and therefore the trial court erred in refusing to instruct the jury on the law of bonding.[3] We find no error.

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[1] *See* S.C. Code Ann. § 16-15-342 (Supp. 2013) (defining the crime of criminal solicitation of a minor and requiring that the defendant be "eighteen years of age or older).

[2] The case was prosecuted by the Attorney General's (AG) Office because the officer was participating in the AG's Internet Crimes Against Children (ICAC) Task Force.

[3] *See* S.C. Code Ann. § 16-15-342(D) ("It is not a defense to a prosecution pursuant to this section, on the basis of consent or otherwise, that the person

First, there is no evidence that the undercover officer, Officer Patterson, was not bonded. Moreover, Officer Patterson was a municipal police officer with the Westminster City Police Department. State law does not mandate a bond requirement for full-time sworn (non-reserve) municipal police officers. *Compare* S.C. Code Ann. § 5-7-110 (Supp. 2013) (containing no bond requirement for municipal police officers), *with* § 23-7-30 (Supp. 2013) (requiring special state constables to file a bond before discharging his or her duties), *and* § 23-13-20 (Supp. 2013) (requiring county deputy sheriffs to file a bond before discharging his or her duties), *and* § 23-27-70 (Supp. 2013) (requiring deputy sheriffs of unincorporated areas to provide a bond before discharging his or her duties), *and* § 23-28-20 (requiring reserve police officers to provide a bond before discharging his or her duties). Therefore, had the trial judge instructed the jury on a bonding requirement, it would have been an erroneous instruction. We affirm on this issue.

B.

Appellant next assigns error to the trial court's refusal to dismiss the indictments due to vindictive prosecution. We find no error.

Initially, the State sought to indict Appellant for his conversations with an undercover officer in Spartanburg County.[4] It was not the State's original intent to indict Appellant for his conversations with Officer Patterson in Oconee County that are the subject of this appeal. Rather, the AG's strategy was to try Appellant in Spartanburg County on other similar charges, and use the evidence gathered in the Oconee investigation as "prior bad acts" evidence[5] in the Spartanburg trial.

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reasonably believed to be under the age of eighteen is a law enforcement agent or officer *acting in an official capacity*." (emphasis added)).

[4] Appellant was indicted in Spartanburg County on one count of criminal solicitation of a minor for engaging in seventeen separate conversations in an online chat room with an undercover agent posing as a thirteen-year-old girl. These conversations allegedly occurred from March 12–May 4, 2006. The Spartanburg trial resulted in a mistrial because of a hung jury on March 2, 2010.

[5] *See* Rule 404(b), SCRE (stating that "[e]vidence of other crimes, wrongs, or acts" may "be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent"); *State v. Lyle*, 125 S.C. 406,

Appellant was indicted in Spartanburg County on June 22, 2006. During pre-trial motions, the court suppressed all of the evidence obtained by the ICAC Task Force pursuant to 18 U.S.C. §§ 2703(d) (stating requirements for court orders to procure stored electronic communications) and 3127(2)(B) (2006) (permitting state criminal courts to "enter orders authorizing the use of a pen register or a trap and trace device").[6] The State appealed this ruling, and on March 30, 2009, this Court reversed. *See State v. Odom*, 382 S.C. 144, 676 S.E.2d 124 (2009).[7] The State planned to proceed with the Spartanburg trial in August 2009.[8]

In June 2009, Officer Patterson, lead investigator in the Oconee County case, was dismissed from the police department. Officer Patterson was arrested in connection with a dispute with his ex-wife, a charge that was ultimately dismissed. Because the State planned to use evidence from the Oconee investigation in the Spartanburg trial, Appellant's defense counsel in that trial, James Huff, attempted to subpoena Patterson's personnel records, including his arrest records.

Before the Spartanburg trial began, the State notified Appellant that it planned to seek separate indictments in Oconee County. The Spartanburg trial began on February 22, 2010, and resulted in a mistrial due to a hung jury on March 2, 2010.

On April 12, 2010, a grand jury true billed the indictments in Oconee County. Appellant asserted that the State chose to prosecute him on the Oconee County

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118 S.E. 803 (1923) (explaining the permissible uses of evidence of prior bad acts).

[6] The bulk of the electronic evidence implicating Appellant in the Oconee charges was obtained using these orders during the Spartanburg investigation.

[7] While the Spartanburg case was under appellate review, the ICAC Task Force underwent a change in leadership, and Megan Wines replaced David Stumbo as lead prosecutor. We make note of this in view of the trial court's reference to the change in leadership. As the trial court found, there was no evidence of misconduct against either lead prosecutor.

[8] The trial did not actually start on this date because Appellant obtained a continuance after he hired new trial counsel.

charges in retaliation for counsel Huff's attempts to obtain the Patterson records in the Spartanburg trial.

The trial court held a pre-trial hearing on Appellant's vindictive prosecution motion. At the hearing, Huff stated that on February 16, 2010, he spoke to lead prosecutor Megan Wines on the telephone regarding the Patterson arrest records, during which Wines told Huff that she had instructed Patterson's criminal defense attorney to refuse to relinquish the records to Huff because she did not believe that Huff had the authority to subpoena the information. Wines also indicated that she was frustrated by Huff's pursuit of these records.

Huff further stated that he again discussed the matter of the records with Wines two days later. Huff stated that Wines again indicated that she was unhappy with him for pursuing the Patterson arrest records because she felt they were irrelevant to the Spartanburg charges. Huff related that, as a consequence of his pursuit of the records, Wines told him, "Fine. We'll just indict [Appellant] in Oconee." Thus, Huff believed that the AG belatedly chose to indict Appellant in Oconee because Huff subpoenaed Patterson's records in the Spartanburg trial. According to Huff, from the time of Appellant's arrest until the second conversation with Wines, he received no indication from the AG's office that the AG planned to prosecute Appellant in Oconee County.

In contrast, Wines stated that she initially thought to use the Oconee charges as *Lyle* evidence in the Spartanburg trial in furtherance of the trial strategy devised by her predecessor, Solicitor Stumbo. However, prior to the call of the case in Spartanburg, she changed her mind because she felt that using the charges in such a way was complicating matters in the Spartanburg trial, and that Patterson's arrest was "too collateral an issue" to deal with in the Spartanburg case. She was also worried that the subpoena issue would further delay the start of the Spartanburg trial, which had already been delayed numerous times, including for the appeal of the pre-trial evidentiary ruling. Therefore, Wines claimed she decided to pursue indictments in Oconee County, where Patterson led the investigation, and where his arrest records would be more directly relevant. She further testified that another change in strategy was to seek separate indictments for each conversation due to the mistrial in Spartanburg where a single indictment for all of the conversations resulted in confusion for the jury.

While Wines admitted that she was irritated with Huff for serving subpoenas that she did not believe he had the authority to pursue, Wines testified that her decision to seek the indictments in Oconee County ultimately came down to a change in trial strategy:

> And I was frustrated that the matter had come to Judge Hayes ordering that we would have a hearing on attorney/client privilege with regard to Mark Patterson's records which were not instrumental to the Spartanburg trial . . . . There was gonna [sic] be potential *Lyle* evidence, and I don't know that we would have ever gotten it in.
>
> So it made sense to me at that point that I believe separate crimes had been committed, it made sense to change trial strategy and to go ahead and have those sent to the Oconee County Grand Jury, which was done in May.

The trial court denied Appellant's motion, stating:

> I don't find that there was established any actual malice or evidence that would rise to an implied malice or vindictiveness. I think under the circumstances the explanation given by the State was reasonable, and given the wide discretion given to prosecutors, the evidence doesn't amount to the level that would give rise to the draconian remedy of dismissing the warrants.

"It is a due process violation to punish a person for exercising a protected statutory or constitutional right." *State v. Fletcher*, 322 S.C. 256, 259–60, 471 S.E.2d 702, 704 (Ct. App. 1996) (citing *United States v. Goodwin*, 457 U.S. 368, 372 (1982)); *see also United States v. Wilson*, 262 F.3d 305, 314 (4th Cir. 2001) (stating if a prosecutor "responds to a defendant's successful exercise of his right to appeal by bringing a more serious charge against him, he acts unconstitutionally"); *United States v. Lanoue*, 137 F.3d 656, 664–65 (1st Cir. 1998) (stating that such retaliatory conduct amounts to vindictive prosecution and "violates a defendant's Fifth Amendment right to due process"). On a claim of vindictive prosecution, courts generally "review the [trial court's] legal conclusions *de novo* and its findings of fact for clear error." *United States v. Jarrett*, 447 F.3d 520, 524 (7th Cir. 2006) (citing *United States v. Falcon*, 347 F.3d 1000, 1004 (7th Cir. 2003)).

"A claim of prosecutorial vindictiveness turns on the facts of each case." *People v. Hall*, 726 N.E.2d 213, 220 (Ill. App. Ct. 2000).

Courts will "reverse a conviction that is the result of a vindictive prosecution where the facts show an actual vindictiveness or a sufficient likelihood of vindictiveness to warrant . . . a presumption [of vindictiveness]." *Barrett v. Virginia*, 585 S.E.2d 355, 365 (Va. Ct. App. 2003) (citations omitted), *aff'd*, 597 S.E.2d 104 (Va. 2004).

"To demonstrate actual vindictiveness, a defendant must show that the government harbored 'vindictive animus' and that the superseding indictment was brought '*solely* to punish' him." *United States v. Bell*, 523 F. App'x 956, 959 (4th Cir. 2013) (quoting *Wilson*, 262 F.3d at 316). In other words, to prove a claim of actual vindictiveness, "a defendant must show, through objective evidence, that (1) the prosecutor acted with genuine animus toward the defendant and (2) the defendant would not have been prosecuted but for that animus." *Wilson*, 262 F.3d at 314 (citations omitted); *see also United States v. Sanders*, 211 F.3d 711, 716–17 (2d Cir. 2000) ("To establish an actual vindictive motive, a defendant must prove objectively that the prosecutor's charging decision or the resultant indictments were a direct and unjustifiable penalty, that resulted solely from the defendant's exercise of a protected legal right." (internal citations and quotation marks omitted)).

> Accordingly, while the prosecutor's charging decision is presumptively lawful, and the prosecutor is not required to sustain any burden of justification for an increase in charges, the defendant is free to tender evidence to the court to support a claim that enhanced charges are a direct and unjustifiable penalty for the exercise of a procedural right. Of course, only in a rare case would a defendant be able to overcome the presumptive validity of the prosecutor's actions through such a demonstration.

Goodwin, 457 U.S. at 384 n.19 (internal quotation marks omitted).

Likewise, a presumption of vindictiveness may arise if a criminal defendant establishes that "circumstances surrounding the initiation of the prosecution . . . 'pose[d] a realistic likelihood of vindictiveness.'" *Wilson*, 262 F.3d at 317 (quoting *Blackledge v. Perry*, 417 U.S. 21, 27 (1974)). "If the defendant creates a

presumption of vindictiveness the burden shifts to the government to show that legitimate reasons exist for the prosecution." *Barrett*, 585 S.E.2d at 365 (citations omitted). When determining if a presumption of vindictiveness is warranted,

> the appropriate inquiry is whether . . . for example, where, after the defendant's prior exercise of a procedural or substantive legal right, or his having succeeded in reversing a conviction on appeal, the prosecution acts arguably to punish the exercise of such rights, by increasing the measure of jeopardy by bringing additional or more severe charges, or where the judge assesses a larger penalty upon subsequent conviction for the same offense following an earlier reversal.

United States v. Ward, 757 F.2d 616, 619–20 (5th Cir. 1985).

Despite the prosecutor's candid admission that she was irritated with Huff, we find Appellant has fallen far short of presenting evidence tending to show that vindictiveness played any role in the decision to prosecute the Oconee County charges. We join the able trial judge in rejecting the claim of vindictiveness under these circumstances. In so holding, we note that a defendant asserting prosecutorial misconduct carries a "heavy burden of proving that the . . . prosecution 'could not be justified as a proper exercise of prosecutorial discretion.'" *Wilson*, 262 F.3d at 316 (quoting *Goodwin*, 457 U.S. at 380 n.12); *see State v. Dawkins*, 297 S.C. 386, 389, 377 S.E.2d 298, 300 (1989) ("[A]n initial decision by the prosecutor should not freeze future conduct, because the initial charges filed by a prosecutor may not reflect the extent to which an individual is legitimately subject to prosecution."); *see also Goodwin*, 457 U.S. at 382 ("A prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution."); *United States v. Esposito*, 968 F.2d 300, 306 (3d Cir. 1992) ("We will not apply a presumption of vindictiveness to a subsequent criminal case where the basis for that case is justified by the evidence and does not put the defendant twice in jeopardy. Such a presumption is tantamount to making an acquittal a waiver of criminal liability for conduct that arose from the operative facts of the first prosecution. It fashions a new constitutional rule that requires prosecutors to bring all possible charges in an indictment or forever hold their peace . . . . We reject such a proposition for it undermines lawful exercise of discretion as well as plain practicality."); *cf. State v. Langford*, 400 S.C. 421, 435 n.6, 735 S.E.2d 471, 479 n.6 (2012) (stating a

prosecutor "has discretion in choosing how to proceed with a case, including whether to prosecute in the first place and whether he brings it to trial or offers a plea bargain.").

C.

Appellant argues that the trial court erred by taking judicial notice of an element of the offense, Appellant's age. We agree but find the error harmless.

The State requested the trial court take judicial notice under Rule 201(b), SCRE, of Appellant's date of birth based on certified copies of records from the Department of Motor Vehicles (DMV). Further, the State asserted that because the document was a certified record of the DMV, the trial judge did not have discretion to "question it." The trial court accepted the State's argument and ruled that it would take judicial notice of Appellant's date of birth, June 22, 1973, based on section 19-5-30 (concerning certification of governmental records), Rule 901(7), SCRE (concerning authentication of records), and also Rule 201(b)(2) and (g), SCRE (concerning judicial notice).

Thereafter, the trial judge instructed the jury:

> [L]adies and gentlemen of the jury, I have taken judicial notice of a fact. That means that you are not allowed to debate whether or not it's true or accurate. I charge you that you must find as conclusive the fact that [Appellant's] date of birth is June 22nd, 1973. That's June 22nd, 1973, and you shall not and you are not allowed to debate that. You must accept that as a conclusive fact.

Appellant contends that the trial court erred in instructing the jury to take judicial notice of Appellant's date of birth because his age was an element of the crime charged. We agree. To withstand a constitutional challenge, Rule 201 cannot be construed as a license to conclusively establish a fact that is an element of the offense charged.

Rule 201, SCRE, governing judicial notice, provides:

> **(a) Scope of Rule.** This rule governs only judicial notice of adjudicative facts.

> **(b) Kinds of Facts.** A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.
>
> **(c) When Discretionary.** A court may take judicial notice, whether requested or not.
>
> **(d) When Mandatory.** A court shall take judicial notice if requested by a party and supplied with the necessary information.
>
> **(e) Opportunity to Be Heard.** A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.
>
> **(f) Time of Taking Notice.** Judicial notice may be taken at any stage of the proceeding.
>
> **(g) Instructing Jury.** The court shall instruct the jury to accept as conclusive any fact judicially noticed.

The State correctly points out that "'Courts will take judicial notice of subjects and facts of general knowledge, and also of facts in the field of any particular science which are capable of demonstration by resort to readily accessible sources of indisputable accuracy, and judges may inform themselves as to such facts by reference to standard works on the subject.'" *In re Harry C.*, 280 S.C. 308, 309–10, 313 S.E.2d 287, 288 (1984) (quoting *State v. Newton*, 204 S.E.2d 724, 725 (N.C. Ct. App. 1974)). But the State overlooks the mandatory nature of a judicially noticed fact under our version of Rule 201 juxtaposed to the constitutionally imposed burden that the State prove each element of the offense.

In all criminal prosecutions, "[t]he government must prove beyond a reasonable doubt every element of a charged offense." *Victor v. Nebraska*, 511 U.S. 1, 5 (1994) (citing *In re Winship*, 397 U.S. 358, 364 (1970)); *see Dervin v. State*, 386

S.C. 164, 168, 687 S.E.2d 712, 713 (2009) ("Due process requires the State to prove every element of a criminal offense beyond a reasonable doubt." (citing *State v. Brown*, 360 S.C. 581, 595, 602 S.E.2d 392, 400 (2004))). Here, the jury was instructed to accept as conclusively determined that Appellant was born on June 22, 1973, which established Appellant as eighteen years or older at the time of the offense. The taking of judicial notice of Appellant's date of birth was tantamount to a directed verdict on the element of the accused's age, a practice which is clearly forbidden. *See United Bhd. of Carpenters & Joiners of Am. v. United States*, 330 U.S. 395, 408 (1947) ("[A] judge may not direct a verdict of guilty no matter how conclusive the evidence.").

The jury was instructed, "you are not allowed to debate whether or not it's true or accurate . . . you shall not and you are not allowed to debate that. You must accept that as a conclusive fact." This was error. The federal courts largely avoid this problem, for Federal Rule of Evidence 201(f) is permissive and states that the jury "may or may not accept the noticed fact as conclusive." Thus, federal courts have typically rejected challenges similar to Appellant's when the jury was properly instructed that it was free to accept or reject the noticed fact. *See, e.g., United States v. Bello*, 194 F.3d 18, 25 (1st Cir. 1999) ("[T]here is widespread agreement that [Federal Rule of Evidence 201(f)], which makes judicial notice non-conclusive in criminal cases, adequately safeguards the criminal defendant's [constitutional rights]."); *United States v. Chapel*, 41 F.3d 1338, 1342 (9th Cir. 1994) (holding that a court does not "usurp the jury's fact-finding role by taking judicial notice" when the jury is instructed that it is not required to accept the noticed fact as conclusive).

Although we hold that the trial court erred in taking judicial notice of Appellant's age in this case, "most constitutional errors can be harmless." *Arizona v. Fulminante*, 499 U.S. 279, 306 (1991) (citations omitted). Indeed, the United States Supreme Court "has applied harmless-error review in cases where the jury did not render a 'complete verdict' on every element of the offense." *Neder v. United States*, 527 U.S. 1, 13 (1999). This harmless error standard "serve[s] a very useful purpose insofar as [it] block[s] setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial." *Chapman v. California*, 386 U.S. 18, 22 (1967).

We find the error in this case to be harmless beyond a reasonable doubt in light of the properly admitted evidence that Appellant was eighteen years or older at the time of the underlying offense. Specifically, Appellant repeatedly acknowledged

in the Internet chats (with a person he believed to be a minor) that he was over the age of eighteen. In fact, Appellant claimed to be forty years old and emphasized the vast age difference between himself and the purported minor, describing himself as "alot [sic] older" than the minor. This evidence together with the jury's ability to view Appellant's appearance in the courtroom provides a proper basis on which to find the error in this case harmless beyond a reasonable doubt. *See State v. Lauritsen*, 261 N.W.2d 755, 757 (Neb. 1978) ("It is uniformly the rule that a defendant's physical appearance may be considered by the jury in determining his or her age. It has been held, however, that the jury may not fix the age of the defendant by merely observing him during the trial; and that there must be *some other evidence* in conjunction with the appearance of the defendant." (emphasis added) (citations omitted)).

D.

Appellant finally contends that section 16-15-342 of the South Carolina Code violates his rights to equal protection and free speech and is unconstitutional. We disagree and affirm pursuant to Rule 220(b)(1), SCACR, and the following authorities: *State v. Gaster*, 349 S.C. 545, 549–50, 564 S.E.2d 87, 89–90 (2002) ("When the issue is the constitutionality of a statute, every presumption will be made in favor of its validity and no statute will be declared unconstitutional unless its invalidity appears so clearly as to leave no doubt that it conflicts with the constitution."); *see Bodman v. State*, 403 S.C. 60, 69, 742 S.E.2d 363, 367 (2013) ("A classification will survive rational basis review when it bears a reasonable relation to the legislative purpose sought to be achieved, members of the class are treated alike under similar circumstances, and the classification rests on a rational basis." (citation omitted)); *State v. Green*, 397 S.C. 268, 277–78, 724 S.E.2d 664, 668 (2012) (rejecting a First Amendment challenge to section 16-15-342 and noting that "[c]ourts have recognized that speech used to further the sexual exploitation of children does not enjoy constitutional protection." (quotation omitted)).

III.

Appellant's conviction and sentence are affirmed.

AFFIRMED.

PLEICONES, BEATTY and HEARN, JJ., concur. TOAL, C.J., concurring in a separate opinion.

CHIEF JUSTICE TOAL: While I concur in the result reached by the majority, I write separately because I disagree that the trial judge's decision to take judicial notice of Appellant's birthdate was an error of law.

At trial, the State provided the judge with certified DMV records indicating Appellant's date of birth, but did not formally seek to enter the DMV records into evidence. The trial judge then instructed the jury:

> [L]adies and gentlemen of the jury, I have taken judicial notice of a fact. That means that you are not allowed to debate whether or not it's true or accurate. I charge you that you must find as conclusive the fact that [Appellant's] date of birth is June 22, 1973. That's June 22, 1973, and you shall not and you are not allowed to debate that. You must accept that as a conclusive fact.

Rule 201, SCRE, governing judicial notice, provides:

> **(a) Scope of Rule.** This rule governs only judicial notice of adjudicative facts.
>
> **(b) Kinds of Facts.** A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.
>
> **(c) When Discretionary.** A court may take judicial notice, whether requested or not.
>
> **(d) When Mandatory.** A court shall take judicial notice if requested by a party and supplied with the necessary information.
>
> **(e) Opportunity to Be Heard.** A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

> **(f) Time of Taking Notice.** Judicial notice may be taken at any stage of the proceeding.
>
> **(g) Instructing Jury.** The court shall instruct the jury to accept as conclusive any fact judicially noticed.

"'A trial court may take judicial notice of a fact only if sufficient notoriety attaches to the fact involved as to make it proper to assume its existence without proof.'" *Bowers v. Bowers*, 349 S.C. 85, 94, 561 S.E.2d 610, 615 (Ct. App. 2002) (quoting *Eadie v. H.A. Sack Co.*, 322 S.C. 164, 171–72, 470 S.E.2d 397, 401 (Ct. App. 1996)); *see also Moss v. Aetna Life Ins. Co.*, 267 S.C. 370, 377, 228 S.E.2d 108, 112 (1976) ("'Judicial notice' takes the place of proof. It simply means that the court will admit into evidence and consider, without proof of the facts, matters of common and general knowledge."). This is because "'courts are not required to be ignorant of a fact which is generally and reliably established merely because evidence of the fact is not offered.'" *In re Harry C.*, 280 S.C. 308, 309–10, 313 S.E.2d 287, 288 (1984) (quoting *State v. Newton*, 204 S.E.2d 724, 725 (N.C. Ct. App. 1974)). Rather, courts "'will take judicial notice of subjects and facts of general knowledge, and also of facts in the field of any particular science which are capable of demonstration by resort to readily accessible sources of indisputable accuracy, and judges may inform themselves as to such facts by reference to standard works on the subject.'" *Id.* (quoting *Newton*, 204 S.E.2d at 725).

> The offense of criminal solicitation of a minor occurs where:
>
> A person eighteen years of age or older . . . knowingly contacts or communicates with, or attempts to contact or communicate with, a person who is under the age of eighteen, or a person reasonably believed to be under the age of eighteen, for the purpose of or with the intent of persuading, inducing, enticing, or coercing the person to engage or participate in a sexual activity as defined in Section 16-15-375(5) or a violent crime as defined in Section 16-1-60, or with the intent to perform a sexual activity in the presence of the person under the age of eighteen, or person reasonably believed to be under the age of eighteen.

S.C. Code Ann. § 16-15-342(A) (Supp. 2013). Thus, the element of the crime related to age is whether the accused is eighteen years of age or older. *See id.*

Because the trial judge took judicial notice of Appellant's date of birth, I disagree with the majority's characterization of the trial judge's action in this case as taking judicial notice of an "element" of the offense. While I concede that the taking of judicial notice of Appellant's birth date likely resulted in the foregone conclusion that Appellant was over the age of eighteen, the fact that the trial judge did not directly instruct the jury to find Appellant "over the age of eighteen" is a notable, albeit technical, distinction. As stated previously, a fact properly judicially noticed is any fact "not subject to reasonable dispute in that it is either . . . generally known within the territorial jurisdiction of the trial court or . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Rule 201(b), SCRE. In my opinion, the DMV records containing Appellant's date of birth fall within this definition. *Cf. Martin v. Bay*, 400 S.C. 140, 153, 732 S.E.2d 667, 674 (Ct. App. 2012) (finding the Master erred in taking judicial notice of a fact based on his "personal knowledge" because the fact was not "one of common knowledge accepted by the general public without qualification or contention").

Moreover, even though the *result* of the taking of judicial notice of Appellant's birth date is that Appellant's age was almost conclusively established, by providing the jury with Appellant's birth date, the jury still had to take the additional step of applying this fact to establish the *element* of the crime. In this respect, taking judicial notice of Appellant's date of birth is no different from taking judicial notice of the time of sunset in a burglary case, in which one of the elements of the crime is that the robbery must occur at nighttime.[9] In either case, the jury is provided with an indisputable fact—Appellant's birthdate, or the time of sunset—which it must then use to determine whether the State has established an element of the crime—whether Appellant was over eighteen when engaging in sexually explicit conversations with a minor, or whether the robbery occurred at

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[9] *See, e.g., James v. State*, 546 S.W.2d 306, 310 (Tex. Crim. App. 1977) (recognizing that a court may "take judicial notice of the time the sun rose and set on the day of a burglary for purposes of determining if such burglary was committed in the 'daytime'" (citation omitted)); *cf. Toole v. Salter*, 249 S.C. 354, 362, 154 S.E.2d 434, 437 (1967) (finding that where the relevant statute provided that a parked vehicle must display lights one-half hour after sunset, the trial court committed prejudicial error in failing to take judicial notice of the time of sunset on the day of the collision).

night. These examples illustrate the critical distinction—ignored by the majority—between taking judicial notice of an adjudicative fact, and taking judicial notice of an element of the crime. In my opinion, the majority's reasoning will lead to unnecessary challenges whenever a judge takes judicial notice, because the fact noticed almost always corroborates an element of the offense.

Accordingly, I would affirm the trial judge's decision to take judicial notice of Appellant's date of birth.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of William Joseph Cutchin, Respondent.

Appellate Case No. 2014-002498

Opinion No. 27518
Heard March 5, 2015 – Filed April 22, 2015

DISBARRED

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

William Joseph Cutchin, of Tallahassee, Florida, *pro se*.

PER CURIAM: William Joseph Cutchin (Respondent) engaged in a course of conduct where he undertook representation of clients but failed to perform the services promised, accepted fees for work not completed, and comingled and misappropriated client funds. Additionally, Respondent closed his law practice and moved out of state without notifying clients or providing any forwarding information. We disbar Respondent, order him to pay the costs of this proceeding, make restitution, and to complete the Legal Ethics and Practice Program, Ethics School, and Trust Account School prior to seeking readmission to the South Carolina Bar.

PROCEDURAL/FACTUAL BACKGROUND

Formal charges were filed against Respondent by the Office of Disciplinary Counsel (ODC) on November 8, 2013. Respondent filed an answer on December 12, 2013. The panel of the Commission on Lawyer Conduct served Respondent

with an order to appear before the panel on June 12, 2014, and the panel convened on August 12, 2014. Respondent did not appear. As a result of his failure to appear, Respondent is deemed to have admitted the factual allegations in the formal charges pursuant to Rule 24(b), RLDE, Rule 413, SCACR. The factual allegations are as follows:

Matter A

Respondent was retained to prepare a will and trust for a client. Respondent prepared the documents, and they were signed by the client. After client's death, complainants, the trustees in this matter, asked for assistance in paying medical and funeral expenses and probating client's estate. Respondent agreed and charged complainants $1,000.00.

Respondent suggested complainants sign several blank counter checks on the trust account so he could pay bills as they came due. The complainants agreed, and left several signed, blank checks in Respondent's possession. He then wrote checks on the trust account that totaled $12,500.00, only $1,000.00 of which was authorized as payment to him. Of the $11,500.00 fraudulently deposited into his Respondent's operating account, only $2,381.24 was used on behalf of the trust; $9,118.76 was misappropriated.

After repeated attempts to receive records requested regarding this matter, ODC issued a subpoena requiring Respondent to appear for an interview with the records. Respondent failed to appear. Instead, Respondent wrote a letter to ODC stating he had closed his practice, never intended to practice law again, and was moving out of the state.

Matter B

Respondent was retained by client to probate the will of client's late wife, and took possession of the will and death certificate. When the client attempted to contact Respondent about receiving funds from his wife's life insurance policy, he discovered Respondent's office was empty and his telephone disconnected. The client's e-mails were returned as undeliverable. Respondent did not inform client that he was closing his office, provide contact information to client, or advise him to find another attorney.

Matter C

A client retained Respondent for assistance in estate planning, and paid him $3,900.00. The client also provided his and his wife's wills as well as the title to their home. After Respondent drafted the estate planning documents, client discovered an error and asked that it be corrected. The client spoke to Respondent's paralegal, who answered him she would correct the problem.

When client returned to Respondent's office to retrieve the corrected documents, he discovered it was vacant. There was no notice on the door saying where Respondent had gone or what happened to the firm. When client attempted to call, the telephone had been disconnected, and his e-mails were returned as undeliverable. None of client's original documents were ever returned.

The client filed a complaint against Respondent with the Resolution of Fee Disputes Board. The board found in favor of client in the amount of $2,000.00.

Matter D

Respondent was retained by client to draft a simple trust. The client initially paid $1,000.00, and later paid an additional $500.00. The client never heard from Respondent again. He attempted to call but the office telephone service was disconnected, and all e-mails to Respondent were returned as undeliverable.

Matter E

Respondent was retained by client to handle his deceased father's estate. When complainant, client's mother, took over the estate after client's death, it had been ongoing for six years with little progress. Respondent asked for extensions to file documents in the probate court on May 14, 2007, December 3, 2007, January 6, 2010, December 29, 2010, and October 21, 2011. On August 6, 2012, Respondent asked for another extension and falsely represented he needed the extension because he had just recently gotten the case and needed time to put everything together. When complainant attempted to contact Respondent, she discovered he had abandoned his office. Respondent's telephone was disconnected and Respondent made no effort to inform her that he was closing his practice. Although client paid Respondent $3,000.00 and complainant paid an additional $2,500.00, Respondent never did the work he was hired to complete.

Matter F

Respondent was hired by client to assist him with estate planning. After Respondent retitled deeds to client's property but filed them incorrectly, client obtained paperwork to correct the problems and took it to Respondent. The client later attempted to contact Respondent to ensure the corrections had been made and discovered the telephone had been disconnected. The client drove to Respondent's office, but it was closed and no forwarding information was available. Respondent never returned documents to client.

Matter G

Husband and wife clients paid $400.00 for Respondent's "Estate Planning Updating" service. Although clients had questions about the estate planning process, Respondent was not available. The clients made an appointment to meet with Respondent, but Respondent did not show up; his paralegal did.

Respondent's paralegal took possession of clients' car title, which was never returned. Later, Respondent sent clients a letter telling them he was resigning as their attorney because of an undisclosed conflict. The clients were unable to obtain any of their original documents from Respondent.

Matter H

Respondent was retained by a client to create a living trust. After client's death, the trustee paid $4,500.00 for representation of the estate and trust. Respondent mismanaged the trust to the detriment of the trustee and his family.

Complainant, the trustee, paid an additional $3,895.00 to Respondent for preparation of a personal trust. Respondent did nothing with regard to the personal trust except provide a trust/estate planning notebook. Complainant also submitted banking records and property deeds to Respondent, which were never returned.

Matter I

Respondent attempted to sell his practice to another attorney. Respondent did not give written notice to his clients or publish a notice of the sale in a newspaper of general circulation in his geographic area, as required by the rules.

Matter J

Respondent has failed to cooperate with the Attorney to Protect Client Interests (ATP), who needed to use an Internet-based service to find Respondent because he abandoned his office and left no forwarding information. After the ATP found Respondent, he told the ATP he was moving to Florida but did not provide a forwarding address or any contact information whatsoever. Respondent left the state and has had very limited communication with the ATP.

LAW/ANALYSIS

This Court reserves the sole authority to discipline attorneys and determine appropriate sanctions. *In the Matter of Thompson*, 343 S.C. 1, 10, 539 S.E.2d 396, 401 (2000). Although the Court may draw its own conclusions and make its own findings of fact, the unanimous findings and conclusions of the panel are entitled to significant respect and consideration. *Id.* at 11, 539 S.E.2d at 401.

We find based on the foregoing facts that Respondent has violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (competent representation); Rule 1.2 (scope of representation); Rule 1.3 (diligence and promptness in representing client); Rule 1.4 (communicating with clients); Rule 1.5 (unreasonable fees and expenses); Rule 1.15 (misappropriation of client funds); Rule 1.16 (protecting client interests when terminating representation); Rule 1.17 (lawyer's responsibilities for sale of law practice), Rule 2.1 (rendering candid advice); Rule 3.2 (expediting litigation); Rule 5.3 (lawyer's responsibilities regarding nonlawyer assistants); Rule 8.1(b) (failure to disclose facts in connection with a disciplinary matter); Rule 8.4(b) (committing a criminal act that reflects adversely on honesty, trustworthiness, or fitness as a lawyer); Rule 8.4 (d) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation); and Rule 8.4(e) (conduct that is prejudicial to the administration of justice). We find Respondent has also violated Rule 402(k)(3) (lawyer's oath) and Rule 417 (financial recordkeeping), SCACR.

The panel recommended disbarment. While disbarment is an extraordinary sanction, "the primary purpose of disbarment . . . is the removal of an unfit person from the profession for the protection of the courts and the public, not punishment of the offending attorney." *In the Matter of Pennington*, 393 S.C. 300, 304, 713

S.E.2d 261, 263 (2011) (quoting *In the Matter of Burr*, 267 S.C. 419, 423, 228 S.E.2d 678, 680 (1976)). We have found disbarment is an appropriate sanction in similar cases. *See, e.g., In the Matter of Trexler*, 350 S.C. 483, 487, 567 S.E.2d 470, 472 (2002) (disbarring attorney for multiple acts of misconduct, including misappropriation of client funds); *In the Matter of Craig*, 344 S.C. 646, 651, 545 S.E.2d 823, 826 (2001) (disbarment is appropriate sanction where attorney commits multiple acts of misconduct, including misappropriation of client funds).

It is significant that Respondent has failed to meaningfully participate in these disciplinary proceedings. In addition to failing to appear at the panel hearing, Respondent did not appear during oral argument before the Court. As this Court has stated:

> An attorney usually does not abandon a license to practice law without a fight. Those who do must understand that "neglecting to participate [in a disciplinary proceeding] is entitled to substantial weight in determining the sanction." An attorney's failure to answer charges or appear to defend or explain alleged misconduct indicates an obvious disinterest in the practice of law. Such an attorney is likely to face the most severe sanctions . . . .

In the Matter of Hall, 333 S.C. 247, 251, 509 S.E.2d 266, 268 (1998) (quoting *In the Matter of Sifly*, 279 S.C. 113, 115, 302 S.E.2d 858, 859 (1983)).

Respondent fraudulently deposited client funds into his operating account, and misappropriated client funds. Further, Respondent failed to provide representation he had promised, abandoned his practice without proper closure, has not cooperated with the ATP, and failed to engage in these disciplinary proceedings. Respondent's actions have shown a clear disinterest in continuing the practice of law in South Carolina. We therefore agree that disbarment is the appropriate sanction.

CONCLUSION

We disbar Respondent and order him to pay the costs of these proceedings in the amount of $1,161.75. We also order him to make restitution in the amount of $9,118.76 to the complainants in Matter A; $2,000.00 to the client in Matter C; $1,500.00 to the client in Matter D; $5,500.00 to the complainant in Matter E; $400.00 to the clients in Matter G; and $8,395.00 to the complainant in Matter H.

Respondent shall enter into a restitution payment plan with ODC within forty-five days of the filing of this opinion. We also order Respondent to complete the Legal Ethics and Practice Program, Ethics School, and Trust Account School as conditions of readmission.

Within fifteen days of the date of this opinion, Respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR, and shall also surrender his certificate of admission to the practice of law in South Carolina to the Clerk of Court.

DISBARRED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Gregory A. Collins (Deceased), Employee, Claimant, Respondent,

v.

Seko Charlotte and Nationwide Mutual Ins. Co., Petitioners,

v.

West Expedited & Delivery Service, Inc., Defendant,

v.

Seko Worldwide and Federal Ins. Co., Defendants,

v.

Uninsured Employers Fund, Respondent.

Appellate Case No. 2012-213425

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From the South Carolina Workers' Compensation Commission Appellate Panel

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Opinion No. 27519
Heard March 5, 2015 – Filed April 29, 2015

AFFIRMED

Weston Adams, III, of McAngus Goudelock & Courie, LLC, of Columbia, and Helen Faith Hiser, of McAngus Goudelock & Courie, LLC, of Mt. Pleasant, both for Petitioner.

Linda Byars McKenzie, of Bowen McKenzie & Bowen, LLP, of Greenville, and Timothy Blair Killen, of Willson Jones Carter & Baxley, P.A., of Columbia, for Respondents.

JUSTICE BEATTY: This matter is before the Court on a writ of certiorari to the Court of Appeals to review the decision in *Collins v. Charlotte*, 400 S.C. 50, 732 S.E.2d 630 (Ct. App. 2012). The Court of Appeals reversed the Workers' Compensation Commission's (Commission) decision which found that Gregory Collins was not a statutory employee of Seko Charlotte at the time of his death. We affirm.

I. Facts

Collins worked for West Expedited & Delivery Service, Incorporated (West Expedited) and was killed in an automobile collision while returning to South Carolina after making a delivery in Wisconsin for Seko Charlotte. West Expedited, as a subcontractor, contracted with Seko Charlotte to make an interstate delivery of parts. Seko Charlotte, like West Expedited, is in the cargo delivery business.

Collins made deliveries to Wauwatosa and Menomonee Falls, Wisconsin. Although there is no written contract, Seko Charlotte engaged in business with West Expedited roughly two to three times per month. In this case, as was customary, Seko Charlotte paid West Expedited for mileage one way, however, West Expedited included the cost of the return trip in the mileage rate charged Seko Charlotte.

As a result of Collins' work-related death, Collins' dependents filed a workers' compensation claim against West Expedited[1], Seko Worldwide, Federal Insurance Company, Seko Charlotte[2], and Nationwide Mutual Insurance Company (Nationwide).[3] The case was heard by a single commissioner of the Workers' Compensation Commission. The single commissioner applied the three tests from *Voss v. Ramco, Inc.*, 325 S.C. 560, 482 S.E.2d 582 (Ct. App. 1997)[4] and determined that Collins was Seko Charlotte's statutory employee at the time of his fatal accident pursuant to section 42-1-410 of the South Carolina Code.[5]

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[1] The Uninsured Employers Fund was brought into the case because West Expedited did not carry workers' compensation insurance at the time of Collins' fatal accident.

[2] Seko Charlotte and Nationwide Mutual Insurance Company were brought into the case after Seko Worldwide, LLC filed a motion to add them as parties.

[3] Nationwide is Seko Charlotte's workers' compensation insurance carrier.

[4] *Voss* states:

> To determine whether the work performed by a subcontractor is a part of the owner's business, this Court *must* consider whether (1) the activity of the subcontractor is an *important* part of the owner's trade or business; (2) the activity performed by the subcontractor is a *necessary, essential, and integral* part of the owner's business; or (3) the *identical activity* performed by the subcontractor has been performed by employees of the owner.

Voss, 325 S.C. at 568, 482 S.E.2d at 586 (emphasis added).

[5] Section 42-1-410 reads:

> When any person . . . referred to as "contractor," contracts . . . with any other person . . . for the execution or performance by or under the subcontractor of the whole or any of the work undertaken by such contractor, the contractor shall be Liable to pay to any workman employed in the work any compensation under this Title which he would have been liable to pay if that workman had been immediately employed by him.

Additionally, Collins was determined to be a traveling employee.[6] Therefore, Seko Charlotte, and its insurance company, Nationwide, were liable.

Seko Charlotte and Nationwide timely appealed the single commissioner's order. The appeal was heard by the Appellate Panel of the Commission. Applying the four factors of the employee/independent contractor test, the Appellate Panel of the Commission concluded Collins was not an employee of Seko Charlotte on the return trip because West Expedited had "the exclusive right of control over [Collins]" after the deliveries were made in Wisconsin. The Appellate Panel of the Commission reversed the single commissioner.

The Uninsured Employers Fund (Fund) appealed to the Court of Appeals. *Collins*, 400 S.C. at 50, 732 S.E.2d at 630. The court found that the Commission committed an error of law when it applied the employee/independent contractor test instead of the statutory employee test. *Id.* at 57, 732 S.E.2d at 634. Applying the statutory employee test, the Court of Appeals concluded that Collins was Seko Charlotte's statutory employee, reversed the Commission's decision, and reinstated the single commissioner's order. *Id.* at 58, 732 S.E.2d at 634. This Court granted Seko Charlotte and Nationwide's petition for a writ of certiorari to review the decision of the Court of Appeals.

II. Standard of Review

"[Appellate] review is limited to deciding whether the Commission's decision is unsupported by substantial evidence or is controlled by some error of law." *Hargrove v. Titan Textile Co.*, 360 S.C. 276, 289, 599 S.E.2d 604, 611 (Ct. App. 2004). "The determination of whether a worker is a statutory employee is jurisdictional and, therefore, the question on appeal is one of law." *Fortner v. Thomas M. Evans Constr. & Dev., L.L.C.*, 402 S.C. 421, 429, 741 S.E.2d 538, 543 (Ct. App. 2013). "As a result, this court has the power and duty to review the

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S.C. Code Ann. § 42-1-410 (1985).

[6] "It is well settled that 'traveling employees are generally within the course of their employment from the time they leave home on a business trip until they return, for the self-evident reason that traveling itself is a large part of the job.'" *Hall v. Desert Aire, Inc.*, 376 S.C. 338, 357, 656 S.E.2d 753, 762 (Ct. App. 2007) (quoting Arthur Larson, *Larson's Workers' Compensation Law*, § 14.01 (Lexis-Nexis 2004)).

entire record and decide the jurisdictional facts in accord with its view of the preponderance of the evidence." *Id.* "It is South Carolina's policy to resolve jurisdictional doubts in favor of the inclusion of employers and employees under the [Workers' Compensation Act]." *Id.* at 429-30, 741 S.E.2d at 543.

III. Discussion

The issue on appeal is whether the Court of Appeals erred in holding that Collins was a statutory employee of Seko Charlotte at the time of his fatal accident? The statutory employment section of the Workers' Compensation Act ("WCA") provides:

> When any person, in this section . . . referred to as "owner," undertakes to perform or execute any work which is part of his trade, business or occupation and contracts with any other person (in this section . . . referred to as "subcontractor") for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any workman employed in the work any compensation under this title which he would have been liable to pay if the workman had been immediately employed by him.

S.C. Code Ann. § 42-1-400 (1985). "The terms owner and contractor can be used interchangeably." *Fortner*, 402 S.C. at 431, 741 S.E.2d at 544. "Thus, depending on the **nature of the work** performed by the subcontractor, an employee of a subcontractor may be considered a statutory employee of the owner or upstream employer." *Voss*, 325 S.C. at 565, 482 S.E.2d at 585 (emphasis added). There are three tests to determine whether a statutory employment relationship exists:

> To determine whether the work performed by a subcontractor is a part of the owner's business, this Court *must* consider whether (1) the activity of the subcontractor is an *important* part of the owner's trade or business; (2) the activity performed by the subcontractor is a *necessary, essential, and integral* part of the owner's business; or (3) the *identical activity* performed by the subcontractor has been performed by employees of the owner.

Id. at 568, 482 S.E.2d at 586 (emphasis added). "If any of these tests is satisfied, the injured worker is considered the statutory employee of the owner." *Id.*

"The concept of statutory employment provides an exception to the general rule that coverage under the WCA requires the existence of an employer-employee relationship." *Fortner*, 402 S.C. at 432, 741 S.E.2d at 544 (citing S.C. Code Ann. § 42-1-410). "The statutory employee doctrine converts conceded non-employees into employees for purposes of the [WCA]." *Id.* at 432, 741 S.E.2d at 544.

Seko Charlotte and Nationwide, (collectively Petitioners) argue the Court of Appeals erred in holding that Collins was Seko Charlotte's statutory employee at the time of this fatal accident because the contractual relationship between West Expedited and Seko Charlotte had terminated. Petitioners argue their contract terminated once the deliveries were made and Collins began his return trip to South Carolina. Petitioners, therefore, submit that without a contractual relationship, no statutory employment relationship may be found to exist between Collins and Seko Charlotte.

Conversely, the Fund argues that Collins was Seko Charlotte's statutory employee because the return trip was "necessarily incidental to [Collins'] statutory employment with Seko." The Fund represents that each of the three tests for creating a statutory employment relationship were met here. Further, the Fund submits that Collins' injuries arose out of his employment relationship as he was a "traveling employee" and Collins does not meet the exception to the rule because he "did not deviate from the most direct route to return him to South Carolina."

This case is fact-driven and under these facts, Collins qualifies as a statutory employee. The circumstances here involve a delivery of goods on a round-trip to Wisconsin and back to South Carolina. Seko Charlotte concedes that Collins was a statutory employee on the trip to Wisconsin. At issue is whether Collins' status ever changed.

The Court of Appeals was correct in concluding that the Commission erred in applying the employee/independent contractor test when it should have applied the statutory employee test. The statutory employee status is an exception to the normal employee/employer relationship. In the statutory employment analysis, active control of the worker is not the focal point. It is evident that Seko Charlotte understands this because Seko Charlotte had no more control over Collins on the trip to Wisconsin than it did on the return trip to South Carolina, yet it concedes that Collins was its statutory employee on the trip to Wisconsin.

Seko Charlotte contends that it was the parties' understanding that the delivery of the cargo to Wisconsin terminated their contract. Assuming this to be so, Seko Charlotte's and West Expedited's understanding of when their obligation to each other terminated is not dispositive of our inquiry. This is so because the contract only provides the necessary foundation for the creation of the statutory employee relationship. Once the statutory employee status attaches, the extent of the status is determined by the nature of the work contracted to be performed. We must view this issue from the perspective of when was the employee's contracted work for the statutory employer completed. Our focus thus becomes the nature of the work itself.

Collins was engaged in an "express hot delivery" from South Carolina to Wisconsin for Seko Charlotte. In this instance, an "express hot delivery" is understood in the trade to mean an immediate and direct trip to Wisconsin. It is also understood that it is unlikely that the driver will have cargo on the return trip. Moreover, Morris West, owner of West Expedited, testified that it was unusual to carry cargo on a return trip of an "express hot delivery," and when West Expedited did have a load it was for the same primary contractor.

Seko Charlotte frequently used West Expedited's services and knew that the trip was being made especially for them and that, more than likely, the return trip would be without cargo for another West Expedited customer. Indeed, Collins did not pick up any cargo for the return trip to South Carolina. Therefore, the nature of the work required immediate travel to Wisconsin and an expected return trip to South Carolina. As the Court of Appeals stated in *Hall*, the traveling itself is a large part of the job. *Hall v. Desert Aire, Inc.*, 376 S.C. 338, 357, 656 S.E.2d 753, 762 (Ct. App. 2007). Viewed from this perspective, it is reasonable to conclude that, under the facts of this case, the work for Seko Charlotte ended when Collins returned to South Carolina.

This conclusion is buttressed by the fact that Seko Charlotte concedes that: (1) it is in the cargo delivery business; (2) interstate deliveries are a necessary and integral part of its business; and (3) its drivers make similar deliveries as Collins did if it is within 100 miles of Charlotte. The nature of the work for Seko Charlotte's direct employees is the same as the work performed by Collins. This fits squarely within the requirements of *Voss*.

Further, the language of section 42-1- 400 states, "the owner shall be liable to pay to any workman employed in the work any compensation under this title

which he would have been liable to pay if the workman had been immediately employed by him." As such, this section does not allow for partial or conditional statutory employees. Seko Charlotte concedes that its drivers are covered on their return trips. Collins was entitled to the same coverage as Seko Charlotte's direct employees.

IV. Conclusion

The Court of Appeals properly reversed the Commission's decision and reinstated the single commissioner's order. We, therefore, affirm the Court of Appeals.

AFFIRMED.

PLEICONES, Acting Chief Justice, KITTREDGE, HEARN, JJ., and Acting Justice James E. Moore, concur.