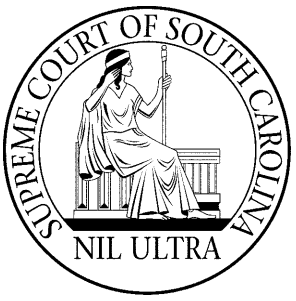

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 31
July 31, 2019
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

None

PETITIONS - UNITED STATES SUPREME COURT

EXTENSION OF TIME TO FILE PETITION TO THE UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

27897 - Clair Johnson v. John Roberts (MUSC)	Pending
2019-MO-030 - State v. Jake Lake	Pending

The South Carolina Court of Appeals

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

PETITIONS FOR REHEARING

5660-Otis Nero v. SCDOT	Pending
5661-Palmetto Construction Group, LLC v. Restoration Specialists (2)	Pending
5662-Christy Byrd v. McLeod Physician Associates II	Pending
5663-State v. Ahshaad Mykiel Owens	Pending
2018-UP-432-Thomas Torrence v. SCDC	Pending
2019-UP-099-John Doe v. Board of Zoning Appeals	Pending
2019-UP-133-State v. George Holmes	Pending
2019-UP-140-John McDaniel v. Career Employment	Pending
2019-UP-165-Cyril Okadigwe v. SCDLLR	Pending
2019-UP-169-State v. Jermaine Antonio Hodge	Pending
2019-UP-209-State v. Terrance Stewart	Pending
2019-UP-213-Timothy Hannah v. MJV	Pending
2019-UP-214-State v. Jose Reyes Reyes	Pending
2019-UP-216-Paula Higgins v. Christopher Higgins	Pending
2019-UP-219-Adele Pope v. Alan Wilson (James Brown Legacy Trust)	Pending
2019-UP-232-Lindsey Stewart v. Green Apple, LLC	Pending
2019-UP-233-State v. Aaron Young, Sr.	Pending
2019-UP-238-Federal National Mortgage v. John D. Dalen	Pending

PETITIONS-SOUTH CAROLINA SUPREME COURT

5583-Leisel Paradis v. Charleston County	Pending
5590-State v. Michael L. Mealor	Pending

5592-State v. Aaron S. Young, Jr.	Pending
5600-Stoneledge v. IMK Dev. (Marick/Thoennes)	Pending
5601-Stoneledge v. IMK Dev. (Bostic Brothers)	Pending
5602-John McIntyre v. Securities Commissioner of SC	Pending
5606-George Clark v. Patricia Clark	Pending
5611-State v. James Bubba Patterson	Pending
5615-Rent-A-Center v. SCDOR	Pending
5617-Maria Allwin v. Russ Cooper Associates, Inc.	Pending
5618-Jean Derrick v. Lisa Moore	Pending
5621-Gary Nestler v. Joseph Fields	Pending
5624-State v. Trey C. Brown	Pending
5625-Angie Keene v. CNA Holdings	Pending
5627-Georgetown Cty. v. Davis & Floyd, Inc.	Pending
5630-State v. John Kenneth Massey, Jr.	Pending
5637-Lee Moore v. Debra Moore	Pendiing
5631-State v. Heather E. Sims	Pending
5642-State v. Dean Alton Holcomb	Pending
5644-Hilda Stott v. White Oak Manor, Inc.	Pending
5646-Grays Hill Baptist Church v. Beaufort County	Pending
5650-State v. Felix Kotowski	Pending
2017-UP-338-Clarence Winfrey v. Archway Services, Inc. (3)	Pending

2018-UP-249-Century Capital v. Midtown Development	Pending
2018-UP-470-William R. Cook, III, v. Benny R. Phillips	Pending
2019-UP-047-Michael Landry v. Angela Landry	Pending
2019-UP-052-State v. Michael Fulwiley	Pending
2019-UP-067-Lorrie Dibernardo v. Carolina Cardiology	Pending
2019-UP-083-State v. Melvin Durant	Pending
2019-UP-100-State v. Rhajon Sanders	Pending
2019-UP-104-Uuno Baum v. SCDC	Pending
2019-UP-110-Kenji Kilgore v. Estate of Samuel Joe Dixon	Pending
2019-UP-128-Wilson Garner, Jr. v. Nell Gaines	Pending
2019-UP-146-State v. Justin Antonio Butler	Pending
2019-UP-172-Robert Gillmann v. Beth Gillman	Pending
2019-UP-178-Arthur Eleazer v. Leslie Hughey	Pending
2019-UP-179-Paula Rose v. Charles Rose, III	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Shane Adam Burdette, Petitioner.

Appellate Case No. 2017-001990

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Oconee County
J. Cordell Maddox Jr., Circuit Court Judge

Opinion No. 27910
Heard February 21, 2019 – Filed July 31, 2019

REVERSED AND REMANDED

Appellate Defender Susan Barber Hackett, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson, Deputy Attorney General Donald J. Zelenka, Senior Assistant Deputy Attorney General Melody Jane Brown, Senior Assistant Attorney General William M. Blitch Jr., and Assistant Attorney General Susannah Rawl Cole, all of Columbia;

and Solicitor David Rhys Wagner Jr., of Anderson, all for Respondent.

JUSTICE JAMES: Shane Adam Burdette was indicted and tried for murder and possession of a weapon during the commission of a violent crime. Over Burdette's objection, the trial court charged the jury that it could infer the element of malice from the use of a deadly weapon. The jury convicted Burdette of the lesser-included offense of voluntary manslaughter and possession of a weapon during the commission of a violent crime. The court of appeals affirmed Burdette's conviction, holding that although the trial court erred in giving the inferred malice jury instruction, Burdette suffered no prejudice. *State v. Burdette*, Op. No. 2017-UP-237 (S.C. Ct. App. filed June 7, 2017). We granted Burdette's petition for a writ of certiorari to review the court of appeals' decision. We hold the trial court's erroneous jury instruction was not harmless beyond a reasonable doubt. We therefore reverse and remand for a new trial on the offenses of voluntary manslaughter and possession of a weapon during the commission of a violent crime. We also hold, regardless of the evidence presented at trial, a trial court shall no longer instruct a jury that malice may be inferred from the use of a deadly weapon.

I. FACTUAL AND PROCEDURAL HISTORY

Burdette shot and killed Evan Tyner (Victim). Victim died from a single shotgun pellet wound to the back of his neck. After the shooting, Burdette gave several inconsistent statements to law enforcement. The State's theory of the case and Burdette's theory of the case were substantially different. The State claimed murder; Burdette claimed accident. Burdette was indicted for murder and possession of a weapon during the commission of a violent crime.

At trial, evidence was presented in support of both the State's and Burdette's theories of the case. Following the close of the presentation of evidence, the trial court informed the parties it intended to charge the jury on the law of murder, voluntary manslaughter, involuntary manslaughter, and accident. The trial court gave the parties a copy of its proposed jury charge for review. Burdette objected to the trial court's proposed instruction that inferred malice could arise when a deadly weapon is used. Citing *State v. Belcher*,[1] Burdette argued the instruction was

---

[1] 385 S.C. 597, 612, 685 S.E.2d 802, 810 (2009).

inappropriate because there was evidence presented that could reduce, excuse, justify, or mitigate the homicide. The trial court gave the charge over Burdette's objection.

The trial court charged the law of murder, voluntary manslaughter, involuntary manslaughter, and accident. When charging the law of murder, the trial court defined murder as a killing with malice aforethought and stated to the jury, "Inferred malice may also arise when the deed is done with a deadly weapon." When charging the law of voluntary manslaughter, the trial court did not specifically inform the jury that malice is not an element of that offense. However, when charging the law of involuntary manslaughter, the trial court specifically informed the jury that malice is not an element of that offense. Of course, malice is not an element of either voluntary or involuntary manslaughter.

After deliberating for about one hour, the jury requested additional instruction from the trial court on the law of murder, voluntary manslaughter, and involuntary manslaughter to provide the jury with "a better understanding" of the different charges. The trial court essentially repeated its previous instruction and again included in the murder instruction that the jury could infer the element of malice from the use of a deadly weapon. The trial court again did not inform the jury that malice is not an element of voluntary manslaughter but did inform the jury that malice is not an element of involuntary manslaughter.

The jury found Burdette not guilty of murder but guilty of voluntary manslaughter and possession of a weapon during the commission of a violent crime. The trial court sentenced Burdette to twenty-five years in prison, suspended upon the service of fifteen years and five years' probation for voluntary manslaughter. The trial court also sentenced Burdette to a consecutive prison term of five years for the weapon possession charge.

Burdette appealed, arguing the trial court erroneously instructed the jury that malice may be inferred from the use of a deadly weapon because evidence was presented tending to reduce, mitigate, excuse, or justify the homicide. The court of appeals affirmed in an unpublished opinion. *State v. Burdette*, Op. No. 2017-UP-237 (S.C. Ct. App. filed June 7, 2017). Although the court of appeals agreed the inferred malice jury instruction was erroneous, it held Burdette "suffered no prejudice" from the erroneous instruction. *Id.* The court of appeals reasoned Burdette was convicted of voluntary manslaughter—not murder—and because malice is not an element of voluntary manslaughter, the inferred malice instruction

could not have contributed to the verdict. *Id.* This Court granted certiorari to review the court of appeals' decision.

II. ISSUES PRESENTED

1. Did the trial court err in giving the inferred malice instruction?

2. If error, was the error harmless beyond a reasonable doubt?

3. Does the inferred malice instruction continue to have validity?

III. DISCUSSION

A. The Inferred Malice Jury Instruction

1. Was the Jury Instruction Erroneous?

There was evidence presented at trial that tended to reduce, mitigate, excuse, or justify Burdette's killing of Victim—making the trial court's inferred malice instruction inappropriate. *See State v. Stanko*, 402 S.C. 252, 260, 741 S.E.2d 708, 712 (2013) ("A jury charge instructing that malice may be inferred from the use of a deadly weapon is no longer good law in South Carolina where evidence is presented that would reduce, mitigate, excuse, or justify the homicide." (citing *State v. Belcher*, 385 S.C. 597, 600, 685 S.E.2d 802, 803-04 (2009))). The State rightly concedes this point. The court of appeals therefore correctly held the giving of the instruction in this case was error.

2. Was the Trial Court's Error Harmless?

An erroneous instruction alone is insufficient to warrant this Court's reversal. "Errors, including erroneous jury instructions, are subject to harmless error analysis." *Belcher*, 385 S.C. at 611, 685 S.E.2d at 809. "When considering whether an error with respect to a jury instruction was harmless, we must 'determine beyond a reasonable doubt that the error complained of did not contribute to the verdict.'" *State v. Middleton*, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014) (quoting *State v. Kerr*, 330 S.C. 132, 144-45, 498 S.E.2d 212, 218 (Ct. App. 1998)). "In making a harmless error analysis, our inquiry is not what the verdict would have been had the jury been given the correct charge, but whether the erroneous charge contributed to the verdict rendered." *Id.* (quoting *Kerr*, 330 S.C. at 145, 498 S.E.2d at 218).

The State maintains, and the court of appeals held, Burdette was not prejudiced by the trial court's erroneous inferred malice instruction (1) because Burdette was convicted of voluntary manslaughter, and (2) since malice is not an element of voluntary manslaughter, the inclusion of the inferred malice instruction in the jury instruction on murder could not have contributed to the verdict. Burdette argues a reading of the jury charge as a whole compels the conclusion that the trial court's error was not harmless. We agree with Burdette.

The trial court's charge to the jury of the elements of murder, voluntary manslaughter, and involuntary manslaughter take up a mere six pages of the overall trial transcript. Absent a self-defense instruction, that is the typical length of this portion of the jury instruction. As is customary, the trial court first instructed the jury on the offense of murder, then the lesser-included offense of voluntary manslaughter, and then the lesser-included offense of involuntary manslaughter.

In many instances, a lesser-included offense is deemed to exist because the lesser offense is "one whose elements are wholly contained within the crime charged." *State v. Dickerson*, 395 S.C. 101, 118, 716 S.E.2d 895, 904 (2011) (citing *State v. Northcutt*, 372 S.C. 207, 215, 641 S.E.2d 873, 877 (2007)). This is known as the "elements test." *See Northcutt*, 372 S.C. at 215, 641 S.E.2d at 877. In those cases, the trial court simply explains to the jury that the lesser offense includes all of the elements of the greater offense except for one or more elements, and the trial court then lists those elements that are not included in the lesser offense. In those cases, the trial court is able to explain the distinction between the greater and lesser offense in an orderly and very understandable fashion. For example, possession of cocaine is a lesser-included offense of possession of cocaine with intent to distribute (PWID) because possession of cocaine contains all the elements of PWID except for the intent to distribute.

In other instances, such as in the case at bar, one offense may be considered a lesser offense of another not by virtue of the elements test, but rather because it "has traditionally been considered a lesser included offense of the greater offense charged." *Northcutt*, 372 S.C. at 216, 641 S.E.2d at 877-78. In those instances, the elements of the lesser offense are not "wholly contained" within the greater offense, and the trial court cannot simply list for the jury those elements not included in the lesser offense. Therefore, there is greater potential for jury confusion when the lesser offense has traditionally been considered a lesser offense of the greater offense. Because there is greater potential for jury confusion, there is a great need for clarity when the trial court explains the greater and lesser offenses to the jury.

Voluntary manslaughter is a lesser offense of murder not by virtue of the elements test, but because it has traditionally been considered a lesser offense of murder. Therefore, a trial court must allow the jury to consider the lesser offense of voluntary manslaughter if there is evidence from which it could be inferred that a defendant committed voluntary manslaughter rather than the greater offense of murder. "Voluntary and involuntary manslaughter are both lesser-included offenses of murder." *State v. Sams*, 410 S.C. 303, 309, 764 S.E.2d 511, 514 (2014). Obviously, neither of these offenses are considered lesser offenses of murder by virtue of the elements tests, as the elements of neither offense are "wholly contained" in the elements of murder.

In *State v. Scott*, we repeated the general rule that involuntary manslaughter is "the unintentional killing of another without malice while engaged in either (1) the commission of some unlawful act not amounting to a felony and not naturally tending to cause death or great bodily harm, or (2) the doing of a lawful act with a reckless disregard for the safety of others." 414 S.C. 482, 487, 779 S.E.2d 529, 531 (2015) (quoting *Sams*, 410 S.C. at 309, 764 S.E.2d at 514). Involuntary manslaughter mandates a showing of criminal negligence, defined as "the reckless disregard of the safety of others." S.C. Code Ann. § 16-3-60 (2015). "Recklessness is a state of mind in which the actor is aware of his or her conduct, yet consciously disregards a risk which his or her conduct is creating." *State v. Pittman*, 373 S.C. 527, 571, 647 S.E.2d 144, 167 (2007).

When considering whether an incorrect jury instruction constitutes harmless error, we are required to review the trial court's charge to the jury in its entirety. *See Stanko*, 402 S.C. at 264, 741 S.E.2d at 714 ("Jury instructions should be considered as a whole, and if as a whole, they are free from error, any isolated portions which may be misleading do not constitute reversible error."). We will therefore review the trial court's instructions on the offenses of murder, voluntary manslaughter, and involuntary manslaughter. Because voluntary and involuntary manslaughter are lesser offenses of murder under the more cumbersome "traditional" test, it was particularly important for the trial court to clearly explain the elements of all three offenses in this case.

As to the count of murder, the trial court charged the following points to the jury: the State must prove the defendant killed another person with malice aforethought; malice is hatred, ill will, or hostility towards another person; malice is the intentional doing of a wrongful act without just cause or excuse and with an intent to inflict an injury or under circumstances that the law will infer an evil intent;

malice need not exist for any particular time before the act is committed, but malice must exist in the mind of the defendant just before and at the time the act is committed; therefore, there must be a combination of the previous evil intent and the act; malice aforethought may be expressed or inferred, but the terms "expressed" or "inferred" do not mean different kinds of malice, but instead mean the manner in which the malice can be proven to have existed, and that is by direct or circumstantial evidence; "expressed malice" is shown when a person speaks words which express ill will or hatred for another, or when the person prepared beforehand to do the act which was later accomplished, with the examples being given of a person "lying in wait" for a person or other acts of preparation going to show that the deed was in the defendant's mind ahead of time; malice may be inferred from conduct showing a total disregard for human life; "inferred malice" may arise when the deed is done with a deadly weapon; the trial court defined "deadly weapon" and gave examples of deadly weapons.

The trial court then instructed the jury that if it found the State failed to prove beyond a reasonable doubt that the defendant committed murder, it must consider whether the State proved beyond a reasonable doubt that the defendant committed the lesser-included offense of voluntary manslaughter. The trial court charged the following: the State must prove beyond a reasonable doubt that the defendant took the life of another person in the sudden heat of passion based on sufficient legal provocation; both heat of passion and sufficient legal provocation must be present at the time of the killing; sudden heat of passion may, for a time, affect a person's self-control and temporarily disturb a person's reason; this sudden heat of passion must be the type that would make an ordinary person unable to coolly reflect on his actions and would produce an uncontrollable influence or impulse to do violence; sufficient legal provocation must be the type that would make a person of ordinary reason and caution become enraged and lose control temporarily; such provocation necessary for voluntary manslaughter must come from some act by the victim or related to the victim; words alone are insufficient to support legal provocation; where death is caused by the use of a deadly weapon, the words must be accompanied by some overt threatening act which could have produced the heat of passion; exercising a legal right, no matter how offensive it may be to another, is never sufficient legal provocation to support voluntary manslaughter; if the heat of passion cools or if there was enough time between the provocation and the killing for the passion of a reasonable person to cool, the killing would not be voluntary manslaughter; when considering whether a reasonable person would have had enough time to cool down or cool off, all of the circumstances surrounding the killing must be considered; it

is permissible to consider the nature of the provocation, if any, the defendant's mental and physical state, and the circumstances and relationship between the parties.

Importantly however, the trial court did not explain to the jury that malice is not an element of voluntary manslaughter, despite section 16-3-50 of the South Carolina Code (2015) referring to "manslaughter" as "the unlawful killing of another without malice, express or implied."

After concluding the voluntary manslaughter instruction, the trial court instructed the jury that if it found the State failed to prove beyond a reasonable doubt that the defendant committed murder or voluntary manslaughter, it must consider whether the State proved beyond a reasonable doubt that the defendant committed the lesser-included offense of involuntary manslaughter. Specifically, the trial court instructed the jury: the State must prove beyond a reasonable doubt that the defendant unintentionally killed the victim "without malice" but while engaged in an unlawful activity not naturally tending to cause death or great bodily harm, or that the defendant unintentionally killed the victim without malice while engaged in a lawful activity with reckless disregard for the safety of others; "unintentional" means the defendant did not intend for anyone to be killed or seriously injured; "reckless disregard for the safety of others" requires more than mere negligence or carelessness; "mere negligence" or "carelessness" is the failure to use the care that a person of ordinary reason would use under the same or similar circumstances; "recklessness" is a conscious failure to use ordinary care; exercising "reckless disregard for the safety of others" means that one is not interested in the consequences of his acts or the rights and safety of others; if a person who knows or should know that ordinary care requires certain precautions to be taken for the safety of others when using a dangerous instrumentality such as a gun or car, but that person fails to use those precautions without concern, the person's actions are considered reckless; the State must prove beyond a reasonable doubt that the defendant's act was the proximate cause of death; "proximate cause" is direct, immediate, and efficient cause; "proximate cause" is the cause without which the death of the person would not have resulted; there must be a chain of causation from the time of the injury inflicted by the defendant until the time of the victim's death; proximate cause does not necessarily mean that it occurred immediately prior to the victim's death.

The trial court twice instructed the jury on voluntary manslaughter but did not include the fact that it is a killing without malice. The trial court twice instructed the jury that involuntary manslaughter is the unintentional killing of another *without*

malice. Burdette contends that while the trial court correctly charged the law of involuntary manslaughter, the trial court should have similarly instructed the jury that malice is not an element of voluntary manslaughter. Burdette claims the charge as a whole likely led the jury to incorrectly believe that malice is an element of voluntary manslaughter. Consequently, Burdette argues, the jury was left with the impression that it could use the inference of malice deriving from the use of a deadly weapon as a basis for convicting him of voluntary manslaughter.

After consideration of the jury instructions as a whole, we are compelled to agree with Burdette. When the trial court instructed the jury that malice was not an element of involuntary manslaughter, but did not instruct the jury that malice was not an element of voluntary manslaughter, the jury was left with the incorrect impression that malice is an element of voluntary manslaughter, which allowed the jury to use the improperly charged inference of malice from the use of a deadly weapon to find Burdette guilty of voluntary manslaughter. The prejudice stemming from the erroneous and confusing instructions was compounded when, during deliberations, the jury requested the trial court to provide a "better understanding" of the charges of murder, voluntary manslaughter, and involuntary manslaughter, and the trial court repeated its original instructions which (1) included the erroneous inferred malice instruction and (2) did not include an instruction that malice is not an element of voluntary manslaughter. The charge as a whole necessarily resulted in confusion that contributed to the verdict that Burdette was guilty of voluntary manslaughter. Therefore, we cannot conclude the trial court's erroneous instruction was harmless beyond a reasonable doubt.

B. Continuing Validity of the Inferred Malice Instruction in South Carolina

In *Belcher*, we held the trial court could no longer give the inferred malice from the use of a deadly weapon charge in cases in which evidence was presented that would reduce, mitigate, excuse, or justify a homicide or an assault and battery with the intent to kill. 385 S.C. at 612, 685 S.E.2d at 810. We now consider whether the permissive inference charge may be given in *any setting*, even those in which no evidence is presented that would reduce, mitigate, excuse, or justify the commission of an offense containing the element of malice. We have held in other settings that it is improper to give examples of conduct the jury may consider when determining whether the State has proven an element of a crime or when determining whether certain other facts have been proven or disproven. *See, e.g.*, *State v. Grant*, 275 S.C. 404, 407-08, 272 S.E.2d 169, 171 (1980) (holding it was improper for the trial judge

to charge the jury that the defendant's flight may be considered as evidence of guilt); *State v. Hughey*, 339 S.C. 439, 452, 529 S.E.2d 721, 728 (2000) (holding, in a voluntary manslaughter case, the trial court correctly refused the defendant's request to charge the jury specific examples of conduct that might be considered as evidence of legal provocation, as the giving of such examples would be an impermissible charge on the facts), *overruled on other grounds by Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009); *State v. Cheeks*, 401 S.C. 322, 328-29, 737 S.E.2d 480, 484 (2013) (holding, in a drug trafficking case, that the trial court must not charge the jury that actual knowledge of the presence of a drug is strong evidence of a defendant's intent to control its disposition or use).

In *Cheeks*, we noted, "Simply because certain facts may be considered by the jury as evidence of guilt in a given case where the circumstances warrant, it does not follow that [the jury] should be charged that these facts are probative of guilt. It is always for the jury to determine the facts, and the inferences that are to be drawn from these facts." 401 S.C. at 328, 737 S.E.2d at 484. When the trial court tells the jury it may use evidence of the use of a deadly weapon to establish the existence of malice, a critical element of the charge of murder, the trial court has directly commented upon facts in evidence, elevated those facts, and emphasized them to the jury. Even telling the jury that it is to give evidence of the use of a deadly weapon only the weight the jury determines it should be given does not remove the taint of the trial court's injection of its commentary upon that evidence. Such an instruction is no different than an instruction that the jury may use evidence of flight as evidence of guilt. A jury instruction that malice may be inferred from the use of a deadly weapon is an improper court-sponsored emphasis of a fact in evidence—that the deed was done with a deadly weapon—and it should no longer be permitted.

We decide this issue solely under the common law; pursuant to our policy-making role under the common law, we hold, regardless of the evidence presented at trial, a trial court shall not instruct the jury that it may infer the existence of malice when the deed was done with a deadly weapon. Of course, whether the deed was done with a deadly weapon or not, the State and the defendant are free to argue the existence or nonexistence of malice based on the evidence in the record. For example, if evidence is introduced that the deed was done with a deadly weapon, the State is free to argue to the jury that it should infer the existence of malice based on that fact and any other facts that would naturally and logically allow a jury to

conclude the defendant acted with malice aforethought.[2] Similarly, if the deed was not done with a deadly weapon, a defendant is free to argue the absence of malice based on that fact and any other facts that would naturally and logically allow a jury to conclude the State failed to prove beyond a reasonable doubt that the defendant acted without malice aforethought. "It is axiomatic that some matters appropriate for jury argument are not proper for charging. 'Do jurors need the court's permission to infer something? The answer is, of course not.'" *Belcher*, 385 S.C. at 612 n.9, 685 S.E.2d at 810 n.9 (quoting Bruce A. Antkowiak, *The Art of Malice*, 60 RUTGERS L. REV. 435, 476 (2008)).

Of course, our ruling does not prohibit a trial court from citing outside the presence of the jury the proposition that malice may be inferred from the use of a deadly weapon. For example, when ruling on a defendant's motion for directed verdict on the ground the State failed to prove the element of malice, a trial court may take into account the fact that the deed was done with a deadly weapon.

IV. CONCLUSION

We hold the trial court's erroneous inferred malice instruction was not harmless beyond a reasonable doubt. We reverse Burdette's convictions and remand for a new trial on the charges of voluntary manslaughter and possession of a weapon during the commission of a violent crime. Because Burdette was acquitted of murder, he cannot be retried for murder. *See State v. Parker*, 391 S.C. 606, 612, 707 S.E.2d 799, 801 (2011) (providing that pursuant to the law of double jeopardy, a defendant may not be prosecuted for the same offense after an acquittal).

We further overrule our precedent to the extent it permits a jury instruction that malice may be inferred from the defendant's use of a deadly weapon.[3]

---

[2] However, we repeat our comment in *State v. Cartwright*: "We do not suggest there are no limits to a party's jury argument, for the law provides limits, as enhanced by Due Process protections." 425 S.C. 81, 93 n.3, 819 S.E.2d 756, 762 n.3 (2018).

[3] Our decision today overrules in part a considerable amount of South Carolina case law. We overrule those cases insofar as it can be construed that we have approved a trial court's charge that a jury may infer the existence of malice from the defendant's use of a deadly weapon. The following represents a non-exhaustive list of such cases: *Gibson v. State*, 416 S.C. 260, 786 S.E.2d 121 (2016); *State v. Stanko*, 402 S.C. 252, 741 S.E.2d 708 (2013); *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802

Regardless of the evidence presented at trial, trial courts shall not instruct a jury that the element of malice may be inferred when the deed is done with a deadly weapon. Our ruling today is effective in this case and in those cases which are pending on direct review or are not yet final, so long as the issue is preserved. *See Griffith v. Kentucky*, 479 U.S. 314, 328 (1987) (holding "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases . . . pending on direct review or not yet final"). However, today's ruling will not apply to convictions challenged on post-conviction relief. *See Belcher*, 385 S.C. at 613, 685 S.E.2d at 810 (citing *Teague v. Lane*, 489 U.S. 288 (1989)).

REVERSED AND REMANDED.

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

(2009); *Sheppard v. State*, 357 S.C. 646, 594 S.E.2d 462 (2004); *Gibson v. State*, 355 S.C. 429, 586 S.E.2d 119 (2003); *Tate v. State*, 351 S.C. 418, 570 S.E.2d 522 (2002); *State v. Harvin*, 345 S.C. 190, 547 S.E.2d 497 (2001); *State v. Von Dohlen*, 322 S.C. 234, 471 S.E.2d 689 (1996); *Plyler v. State*, 309 S.C. 408, 424 S.E.2d 477 (1992); *Carter v. State*, 301 S.C. 396, 392 S.E.2d 184 (1990); *State v. Smith*, 288 S.C. 329, 342 S.E.2d 600 (1986); *State v. Peterson*, 287 S.C. 244, 335 S.E.2d 800 (1985); *State v. Lucas*, 285 S.C. 37, 328 S.E.2d 63 (1985); *State v. Campbell*, 287 S.C. 377, 339 S.E.2d 109 (1985); *State v. Woods*, 282 S.C. 18, 316 S.E.2d 673 (1984); *State v. Jennings*, 280 S.C. 62, 309 S.E.2d 759 (1983); *State v. Elmore*, 279 S.C. 417, 308 S.E.2d 781 (1983); *State v. Koon*, 278 S.C. 528, 298 S.E.2d 769 (1982); *State v. Friend*, 276 S.C. 552, 281 S.E.2d 106 (1981); *State v. Hyman*, 276 S.C. 559, 281 S.E.2d 209 (1981); *State v. Crocker*, 272 S.C. 344, 251 S.E.2d 764 (1979); *State v. Robinson*, 149 S.C. 439, 147 S.E. 441 (1929); *State v. Portee*, 122 S.C. 298, 115 S.E. 238 (1922); *State v. Jackson*, 36 S.C. 487, 15 S.E. 559 (1892); *State v. Levelle*, 34 S.C. 120, 13 S.E. 319 (1891); *State v. King*, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015); *State v. Frazier*, 401 S.C. 224, 736 S.E.2d 301 (Ct. App. 2013); *State v. Price*, 400 S.C. 110, 732 S.E.2d 652 (Ct. App. 2012); *State v. Kinard*, 373 S.C. 500, 646 S.E.2d 168 (Ct. App. 2007); *State v. Franklin*, 310 S.C. 122, 425 S.E.2d 758 (Ct. App. 1992); *State v. Merriman*, 287 S.C. 74, 337 S.E.2d 218 (Ct. App. 1985). We have not included the cases that were previously overruled by *Belcher*.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Derrick Fishburne, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2016-002385

ON WRIT OF CERTIORARI

Appeal from Colleton County
Edgar W. Dickson, Circuit Court Judge

Opinion No. 27911
Submitted June 17, 2019 – Filed July 31, 2019

REMANDED

Tristan Michael Shaffer, of Tristan M. Shaffer Attorney at Law, of Chapin, for Petitioner.

Attorney General Alan McCrory Wilson and Assistant Attorney General Benjamin Hunter Limbaugh, both of Columbia, for Respondent.

JUSTICE JAMES: This case stems from the post-conviction relief (PCR) court's denial of relief to Derrick Fishburne. Because the PCR court's order contains no findings of fact as to one of Fishburne's primary PCR claims, we remand this matter

to the PCR court for the PCR court to issue an order setting forth adequate findings of fact and conclusions of law regarding Fishburne's unaddressed PCR claim. In doing so, we again stress that PCR orders must be prepared in compliance with section 17-27-80 of the South Carolina Code (2014) and Rule 52(a) of the South Carolina Rules of Civil Procedure.

FACTUAL AND PROCEDURAL BACKGROUND

During the early morning hours of April 10, 2009, law enforcement responded to a 911 call reporting a shooting at Spirits Lounge in Walterboro. A patrol officer arrived on scene and observed a man (Victim) lying in a pool of blood on the pavement outside the front of the club. Victim was transported to the hospital, but he did not survive. An autopsy determined Victim's cause of death was six gunshot wounds.

During law enforcement's investigation, two eyewitnesses identified Fishburne as the shooter. These eyewitnesses first identified Fishburne by name and subsequently identified him in a lineup. Law enforcement arrested Fishburne when he appeared at the local courthouse for roll call in an unrelated matter. Fishburne gave law enforcement a statement in which he denied being at the club on the night of the murder, claiming to have stayed the night at his girlfriend's house. This was not the truth. Fishburne's girlfriend told law enforcement he left her house around 12:45 a.m. (before the shooting occurred) and did not return until approximately 3:00 a.m. (after the shooting occurred). Another witness, Jarrod Frazier, testified he saw Fishburne at the club and thought Fishburne might have left before the shooting, but was not sure. In his written statement to law enforcement, Frazier stated he saw Fishburne leaving the club's parking lot in an SUV about 10-15 minutes before the shooting occurred. Frazier admitted on cross-examination he gave the exculpatory written statement to law enforcement so Fishburne "could get a bond."

Fishburne was indicted for murder and possession of a weapon during the commission of a violent crime. At trial, Fishburne's trial counsel said the following during his opening statement to the jury—all relevant to one of Fishburne's underlying PCR claims:

> I think the evidence will show that [law enforcement] made a decision that before the morning was out, once they had the name Derrick Fishburne, once they had that name, they had their guy. I think the evidence will show they picked him up from roll call on Friday, the

> next day. He was already in court. He might qualify as a usual suspect. He was an easy guy for them to get, because he was in court anyway. They picked him up from roll call on April the 10th, and they took him back to the Sheriff's Office Annex and they interviewed him. Now, because he had involvement with them before, I think the evidence will show he said, "I wasn't there." I think the evidence will show that there's a long video tape and you will have a chance to look at that.
>
> He said, "I'm not saying anything," pretty much. "I wasn't there. I don't know what you're talking about." And at the end of the interview, they arrested him. One of the things he told me was, "I was at my girlfriend's house all night. I was at Lorinda Williams' -- Penny Williams' house," and I think the evidence will show that they went and checked with Penny, that he was not there. That he had, in fact, left the house at some time during a time when he could have been at the club, and I think the evidence will show from different witnesses, I think the State will be able to prove that he was, in fact, at the club. But they arrested him before they checked that out. I think the evidence will show that he was arrested at the end of that interview and they didn't check out Penny's story until later. It didn't check out. He told a lie.

Further, during closing arguments, Fishburne's trial counsel argued:

> [Fishburne] was rounded up and the testimony of Detective Williams was that they picked him up from roll call. He is one of the usual suspects. He had been at roll call, so he already had some trouble. They knew him. They took him from here and took him down to the station and Detective Williams told you, he was already under arrest at that time. He was under arrest for murder and it really didn't matter what he said.
>
> One of the things also, what Detective Johnson said in the tape that you got to see is that [Fishburne's] brother is in prison. This is not a pretty fact, but it's the truth of the matter. The Fishburnes had trouble; it's a fact. So what does that mean to [Fishburne]? What does that mean to anybody being rounded up and taken down to the Sheriff's Office to get a statement? Do you think you're going to get a fair trial? He was already under arrest and it -- yeah, they checked out his story and it didn't check out, but if he was already under arrest, it didn't matter.

The jury convicted Fishburne as indicted. The trial court sentenced Fishburne to concurrent prison terms of forty years for murder and five years for possession of a weapon during the commission of a violent crime. The court of appeals dismissed Fishburne's direct appeal following *Anders*[1] briefing. *State v. Fishburne*, Op. No. 2012-UP-363 (S.C. Ct. App. filed June 20, 2012).

Fishburne filed an application for PCR, and his hearing was held on October 27, 2014. Prior to the commencement of the hearing, Fishburne specified his alleged grounds for relief: (1) ineffective assistance of counsel for trial counsel's failure to properly investigate potential alibi witnesses and (2) ineffective assistance of counsel for trial counsel introducing other bad act evidence into the trial and characterizing him as one of the "usual suspects." The State objected to the amendment because Fishburne did not "enumerate these allegations with specificity in his application." After Fishburne explained he had alerted the State to these specific allegations over a year ago via email, the PCR court permitted the amendment.

Trial counsel testified Fishburne's statement to law enforcement that he was not at the club was problematic because the State had several witnesses who would testify Fishburne was indeed at the club. Trial counsel testified Fishburne explained law enforcement had harassed him in the past and that he did not think law enforcement would believe his side of the story anyway. Trial counsel explained his decision to refer to Fishburne as a "usual suspect" as follows:

> **Trial Counsel:** Well, I had to -- I tried to find a way to explain why he lied to the police. You know, you've got somebody that has you leaving the scene before this happens, so why would you deny that you're there? And you know, you don't need to do that; and it's a lie, and it's an unnecessary lie. And so, how do you explain that? You've got to give the jury -- in my -- my strategy, you've got to give the -- you can't -- juries don't like lies, whether the police tell them or the defendants tell them or whether witnesses tell them, and you've got to explain it, somehow. And that was my way to explain why he would lie about being in the club.

[1] *See Anders v. California*, 386 U.S. 738 (1967).

PCR Counsel: Okay. It's safe to say that that's sort of a double-edged sword. Is that --

Trial Counsel: Yes, it's a risk.

PCR Counsel: Okay.

Trial Counsel: There's no doubt. I mean, you -- you want to present some evidence that, you know, somebody doesn't trust the police, then you have to show prior involvement with the police, which, normally, you work to try not to do. But, yeah, it's a risk. But I don't know how -- but you've got to explain a lie.

Trial counsel admitted he did not pursue additional alibi witnesses that could have testified to Fishburne leaving the club before the shooting. Trial counsel testified he strategically decided to not present additional alibi witnesses to say Fishburne left the club over an hour before the shooting because he already had a witness he believed would testify that Fishburne left shortly before the shooting.

Other than trial counsel, Fishburne was the only witness at the PCR hearing. He testified he was at the club that evening but left prior to the shooting. He testified he gave trial counsel the names of multiple alibi witnesses and that trial counsel failed to contact them. None of these purported alibi witnesses were present at the PCR hearing.

The PCR court denied Fishburne relief in a written order. After setting forth the procedural history of Fishburne's case and reciting the *Strickland*[2] standard, the PCR court set forth findings of fact and conclusions of law on Fishburne's claim trial counsel failed to call alibi witnesses. However, there is no discussion at all of Fishburne's claim arising from trial counsel's mention of Fishburne being at roll call for another criminal charge and trial counsel's characterization of Fishburne as a "usual suspect." Fishburne did not file a Rule 59(e), SCRCP motion asking the PCR court to rule on this issue. We granted Fishburne's petition for a writ of certiorari to

[2] *See Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984) (providing a PCR applicant claiming ineffective assistance of counsel must show (1) counsel's performance was deficient and (2) counsel's deficiency prejudiced the applicant to the extent "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different").

address whether his case should be remanded to the PCR court to make sufficient findings of fact as mandated by statute.

DISCUSSION

In ruling on a PCR application, "[t]he [PCR] court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented." S.C. Code Ann. § 17-27-80 (2014). The South Carolina Rules of Civil Procedure apply to PCR matters. *See id.*; Rule 71.1(a), SCRCP. Rule 52(a) provides in pertinent part, "In all actions tried upon the facts without a jury . . . , the court shall find the facts specially and state separately its conclusions of law thereon." Rule 52(a), SCRCP. "The PCR court's general denial of all claims not specifically addressed in the PCR court's order 'does not constitute a sufficient ruling on any issues since it does not set forth specific findings of fact and conclusions of law.'" *Simmons v. State*, 416 S.C. 584, 592, 788 S.E.2d 220, 225 (2016) (quoting *Marlar v. State*, 375 S.C. 407, 409, 653 S.E.2d 266, 266 (2007)).

We agree with Fishburne that the PCR court erred by not making any findings of fact or conclusions of law regarding his ineffective assistance of counsel claim for trial counsel's reference to him being at roll call to answer to another criminal charge and his characterization of Fishburne as a "usual suspect." Over the years, we have issued numerous opinions addressing a PCR court's failure to make adequate findings of fact and conclusions of law regarding duly raised issues. In *McCray v. State*, the PCR court dismissed the applicant's claims of ineffective assistance of counsel without making any findings of fact on the specific allegations raised. 305 S.C. 329, 330, 408 S.E.2d 241, 241 (1991). We reversed and remanded, holding: "The PCR court's conclusions regarding ineffective assistance are insufficient for appellate review and fail to meet the standard set forth in [section 17-27-80]." *Id.*

In *Pruitt v. State*, the applicant raised several claims for relief in his PCR application and presented evidence regarding those claims during the PCR hearing. 310 S.C. 254, 255, 423 S.E.2d 127, 127-28 (1992). The PCR court's order did not address the applicant's claims. We vacated the PCR court's order denying relief and remanded the matter to the PCR court to hold a new hearing. We noted, "[W]e are not abandoning the general rule that issues must be raised to, and ruled on by, the post-conviction judge to be preserved for appellate review. The extraordinary action we take today is necessary only because our opinion in *McCray* is not being followed." *Id.* at 255 n.2, 423 S.E.2d at 128 n.2. We further explained:

> We take this opportunity to express our concern with the increasing number of orders in PCR proceedings that fail to address the merits of the issues raised by the applicant. Not only does this deprive the parties of rulings on the issues raised, but it makes review by the appellate court more difficult and ultimately increases the work load of all involved where, as in this case, a new hearing is required to secure the rulings which should have been made initially. Counsel preparing proposed orders should be meticulous in doing so, opposing counsel should call any omissions to the attention of the PCR judge prior to issuance of the order, and the PCR judge should carefully review the order prior to signing it. Even after an order is filed, counsel has an obligation to review the order and file a Rule 59(e), SCRCP, motion to alter or amend if the order fails to set forth the findings and the reasons for those findings as required by § 17-27-80 and Rule 52(a), SCRCP.

Id. at 255-56, 423 S.E.2d at 128; *see also McCullough v. State*, 320 S.C. 270, 272, 464 S.E.2d 340, 341 (1995) ("Although the error was not raised to and ruled on by the PCR judge, we find it necessary to vacate the order and remand this matter to the circuit court to issue an order addressing its decision to dismiss [the applicant's] second application as successive."); *Bryson v. State*, 328 S.C. 236, 236-37, 493 S.E.2d 500, 500 (1997) (vacating the order of dismissal and remanding to the PCR court to make specific findings of fact and conclusions of law for each issue properly raised by the applicant).

In *Humbert v. State*, the applicant argued he received ineffective assistance of counsel when trial counsel allowed him to appear at trial while wearing a jail uniform, shackles, and an identification bracelet bearing his mug shot. 345 S.C. 332, 334, 548 S.E.2d 862, 863 (2001). The PCR court did not rule specifically as to whether trial counsel was ineffective for proceeding to trial while the applicant was wearing shackles and the identification bracelet. *Id.* at 337, 548 S.E.2d at 865. Because the applicant did not file a Rule 59(e) motion requesting a ruling on these issues, we held the issues were not preserved for review. *Id.*

In *Marlar v. State*, the applicant raised several issues to the PCR court, and the PCR court's order failed to specifically address any of the issues raised by the applicant. 375 S.C. 407, 408, 653 S.E.2d 266, 266 (2007). The applicant did not file a Rule 59(e) motion but petitioned for a writ of certiorari, arguing the PCR court's order was inadequate and that his case should be remanded for specific findings of fact. The court of appeals vacated the PCR court's order and remanded

the matter for a new hearing, stressing the need for the PCR court to make specific findings of fact and conclusions of law as to each issue raised in the PCR application. In doing so, the court of appeals rejected the State's argument that none of the applicant's allegations were preserved because of the applicant's failure to make a Rule 59(e) motion to alter or amend the judgment to include specific findings of fact and conclusions of law. The court of appeals reasoned that this Court, in the past, had remanded PCR actions to the PCR court for specific rulings, despite the fact there were no Rule 59(e) motions filed.

We reversed the court of appeals' decision, explaining:

> The cases this Court remanded for specific findings were unique cases in which the Court attempted to remind circuit court judges and parties that: (1) specific findings of fact and conclusions of law were required; and (2) a Rule 59(e) motion must be filed if issues are not adequately addressed in order to preserve the issues for appellate review. Although the cases apparently have not accomplished the Court's goal, they do not change the general rule that issues which are not properly preserved will not be addressed on appeal.

Id. at 410, 653 S.E.2d at 267. We held that because the applicant failed to make a Rule 59(e) motion asking the PCR court to make specific findings of fact and conclusions of law on his allegations, the issues were unpreserved, and the court of appeals erred by addressing the merits of the issues and remanding the case to the PCR court. *Id.*

In *Simmons v. State*, the PCR court vacated the applicant's death sentence but summarily denied all of his remaining claims, including a challenge to DNA evidence, finding the claims to be "without merit." 416 S.C. 584, 591, 788 S.E.2d 220, 224 (2016). Although the applicant failed to file a Rule 59(e) motion to request a ruling on the summarily denied issues, we noted "that although the State is technically correct [(in arguing the applicant's claims were not preserved)], we also believe dismissing the writ of certiorari would be fundamentally contrary to the interests of justice. . . . [O]ur jurisprudence permits a remand under such extraordinary circumstances." *Id.* We emphasized remands should be granted "sparingly" and should be "reserved for the rarest of cases." *Id.* at 593, 788 S.E.2d at 225. We remanded the matter to the PCR court for a new hearing on the DNA claim. *Id.* at 593-94, 788 S.E.2d at 225.

Last year, we issued an order holding the PCR court erred by signing an inadequate PCR order and by denying the applicant's Rule 59(e) motion. *See Reese v. State*, 425 S.C. 108, 111, 820 S.E.2d 376, 378 (2018). Citing numerous cases, we noted, "This is not the first time this Court has raised concerns over orders . . . that do not comply with section 17-27-80 and Rule 52(a)." *Id.* at 109-11, 820 S.E.2d at 377-78. We vacated both PCR orders and remanded the case to the PCR court for the entry of "a new PCR order that complies with the law." *Id.* at 111, 820 S.E.2d at 378.

The State argues Fishburne's failure to file a Rule 59(e) motion precludes appellate review. *See Marlar*, 375 S.C. at 410, 653 S.E.2d at 267 (providing "a Rule 59(e) motion must be filed if issues are not adequately addressed" in the PCR order). We acknowledge the validity of the State's preservation argument, and we acknowledge our prior decisions have been somewhat inconsistent as to whether a Rule 59(e) motion is required to preserve an applicant's request to remand to the PCR court for the consideration of particular issues in which the PCR court failed to make sufficient findings of fact and conclusions of law. If this were a generic civil action, we would likely be quick to accept the State's preservation argument. However, because the United States Constitution's Sixth Amendment guarantee to a defendant's right to effective assistance of counsel is engrained in PCR cases, we cannot continue to permit a party's procedural shortcoming—such as the failure to file a Rule 59(e) motion—to prevent this Court from remanding claims of ineffective assistance of counsel when the PCR court's order does not comply with section 17-27-80.

We do not place the blame on a single party below for an insufficient PCR order. The preparation and finalization of a PCR order is often a collaborative effort. We recognize the prevailing party often prepares a proposed order for the PCR court. *See Hall v. Catoe*, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004) ("[I]t is common practice for judges to ask a party to draft a proposed order for the sake of efficiency."). When counsel for either side prepares the proposed order, the order must include findings of fact and conclusions of law as to all issues raised by an applicant. A copy of the proposed order should be transmitted to opposing counsel. Opposing counsel should promptly review the proposed order and alert preparing counsel and the PCR court as to any deficiencies in the proposed order. Because the PCR judge will ultimately be signing the order, the PCR judge must carefully review the proposed order to ensure it includes appropriate findings of fact and conclusions of law as to all issues raised. Once a proposed order is finalized, signed by the PCR

judge, filed, and served upon the parties, the parties should thoroughly review the final order to make sure all issues raised were adequately addressed as required by section 17-27-80 and Rule 52(a); if they were not, a timely Rule 59(e) motion should be filed, requesting the PCR court to address the appropriate issues. When these steps are ignored on the front end, we find ourselves having to remand a case, as we do today.

In remanding to the PCR court, we do not dictate the conclusions the PCR court should reach. We simply require the PCR court to set forth appropriate findings of fact and conclusions of law, whatever they may be. As we stated almost thirty years ago in *Pruitt*, "We are confident that in the future all those involved in post-conviction matters will do everything in their power to ensure that remands such as the one we order today will no longer be necessary." 310 S.C. at 256, 423 S.E.2d at 128.

CONCLUSION

We remand to the PCR court for the issuance of a supplemental order setting forth findings of fact and conclusions of law on the PCR ground that was not addressed in the original order. The supplemental PCR order shall be entered within forty-five days of this Court's mailing of the remittitur. Following the issuance of the supplemental PCR order (and a ruling on any post-hearing motions that may thereafter be filed), the aggrieved party may serve and file a new notice of appeal.

REMANDED.

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

JUSTICE HEARN: I concur but write separately to emphasize the importance of filing a Rule 59(e) motion to preserve an issue for appellate review. I caution the bench and the bar not to read our decision as relaxing this requirement in the PCR context. Our rules do not expressly carve out any such exception, and therefore, appellate courts should avoid selectively applying them in PCR. Although we have overlooked the lack of a Rule 59(e) motion in the past, as the majority discusses, those decisions clearly represent extraordinary circumstances. Our issue preservation requirements are well-settled and serve to enable both parties to raise issues and allow courts an opportunity to rule on them. *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011). Fairness dictates that we apply these rules in a consistent manner, departing from this approach only in exceptional circumstances—lest the exception swallow the general rule. While the wisdom of foregoing the need to file a Rule 59(e) motion to preserve an issue in PCR is not before us, if there is a sentiment to abandon this procedural requirement, then the appropriate course is to submit a proposed rule change to the General Assembly for its approval.

I agree that PCR implicates the Sixth Amendment, as it is the avenue for challenging such alleged constitutional violations that occurred at trial. However, I do not believe this fact alone requires us to address an issue that is clearly unpreserved. PCR is a creature of statute and governed by the Uniform Post-Conviction Procedure Act. *See Robertson v. State*, 418 S.C. 505, 513, 795 S.E.2d 29, 33 (2016) ("The South Carolina Legislature enacted the Uniform Post-Conviction Procedure Act to govern all aspects of PCR . . . ."). It is this statutory scheme that affords the right to counsel in PCR, not the constitution. *See Turner v. State*, 384 S.C. 451, 456 n.5, 682 S.E.2d 792, 794 n.5 (2009) ("[T]he right to PCR counsel arises from Rule 71.1, SCRCP, and not from the constitution."). While we certainly apply Sixth Amendment principles in PCR,[3] because the statute affords this right, I do not believe it is inherently unfair to follow our issue preservation rules uniformly. Accordingly, in most instances where a party fails to file a Rule 59(e) motion when required to do so, we will find the issue unpreserved and decline to address the merits. Nonetheless, I join the majority because it is necessary once again

[3] *See, e.g.*, *Hilton v. State*, 422 S.C. 204, 208, 810 S.E.2d 852, 854 (2018) (noting the *Prince* and *Faretta* framework apply in a PCR setting where the applicant sought to waive his statutory right to counsel).

to remind the State, opposing counsel, and the circuit court of the need for orders that contain specific findings of fact and conclusions of law.

JAMES, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

South Carolina Lottery Commission, Respondent,

v.

George S. Glassmeyer, Appellant.

Appellate Case No. 2016-001112

Appeal From Richland County
L. Casey Manning, Circuit Court Judge

Opinion No. 5671
Submitted September 19, 2018 – Filed July 31, 2019

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Andrew Sims Radeker and Taylor Meriwether Smith, IV, of Harrison, Radeker & Smith, P.A., of Columbia, both for Appellant.

Karl Smith Bowers, Jr., of Columbia, for Respondent.

THOMAS, J.: George Glassmeyer appeals the circuit court's order granting declaratory and injunctive relief in this Freedom of Information Act (FOIA) case. On appeal, Glassmeyer argues the circuit court erred by (1) failing to address his counterclaims, (2) entering judgment on the pleadings, (3) finding the South

Carolina Lottery Commission (SCLC) had standing to bring the action, and (4) failing to grant his motion to dismiss. We affirm in part, reverse in part, and remand.

On March 31, 2014, Glassmeyer submitted a FOIA request to SCLC for information related to any claims for any South Carolina lottery prize equal to or greater than one million dollars in gross proceeds from March 1, 2013, to March 20, 2014. Specifically, Glassmeyer requested (1) the claimants' full names, (2) the claimants' complete addresses, (3) the claimants' telephone numbers, (4) the gross dollar amount of the claims, (5) the dates of the claims, and (6) a copy of any form of identification SCLC obtained from the claimants. On April 1, 2014, SCLC mailed letters to the claimants who were affected by the FOIA request. Many of the claimants objected to the release of their personal information and filed complaints against SCLC. On April 4, 2014, one of the claimants, "John Doe," requested the circuit court to grant a permanent injunction enjoining SCLC from disclosing Doe's name, address, telephone number, amount of claim, date of claim, and any forms of identification obtained for the claim.[1]

SCLC then responded to Glassmeyer's request on April 16, 2014. In sum, SCLC informed Glassmeyer that (1) the request for the claimants' full names, complete addresses, telephone numbers, and forms of identification were exempted from disclosure by section 30-2-310 (A)(1)(e) of the South Carolina Code (Supp. 2018)[2] and, therefore, were exempted from disclosure under section 30-4-40(a)(4) of the South Carolina Code (2007)[3]; (2) the request for copies of the claimants' forms of identification, such as their driver's licenses, were not public records under FOIA; and (3) SCLC could not disclose an individual's personal identifying information

---

[1] The record only includes the full disposition of Doe's case, *John Doe v. South Carolina Lottery Commission*, Civil Action No. 2014-CP-40-2446. The record does not contain information regarding the outcomes of the other cases involving the claimants who filed complaints against SCLC.

[2] Section 30-2-310(A)(1)(e) provides, in pertinent part, that a public body may not "intentionally communicate or otherwise make available to the general public an individual's social security number or a portion of it containing six digits or more or other personal identifying information."

[3] Section 30-4-40(a)(4) provides, "A public body may but is not required to exempt from disclosure . . . [m]atters specifically exempted from disclosure by statute or law."

because it would be an invasion of privacy. However, SCLC did disclose the following information to Glassmeyer: the gross dollar amount of the claims, dates of the claims, the hometowns and states of the claimants, and the games associated with the prizes won.

Glassmeyer submitted two more FOIA requests in letters dated April 16 and April 17, 2014. Glassmeyer stated that the response he received from SCLC on April 16 "**did not** satisfy my request." (emphasis in original). Again, Glassmeyer requested that SCLC provide him with the "claimants' full names."

Meanwhile, Doe's action against SCLC proceeded forward in the circuit court. The circuit court found that

> [Doe] therefore is entitled to a declaratory judgment that the release of all or any part of [Doe's] personal identifying information, such as [claimant's] name, would result in an unreasonable invasion of [Doe's] personal privacy in accordance with Section 30-4-40(a)(2).[4]

Thus, on April 25, 2014, the court granted a permanent injunction and ordered that SCLC be "permanently restrained and enjoined from releasing any and all

---

[4] Section 30-4-40(a)(2) of the South Carolina Code (Supp. 2018) provides, "A public body may but is not required to exempt from disclosure . . . [i]nformation of a personal nature where the public disclosure thereof would constitute unreasonable invasion of personal privacy. Information of a personal nature shall include, but not be limited to, information as to gross receipts contained in applications for business licenses, information relating to public records which include the name, address, and telephone number or other such information of an individual or individuals who are handicapped or disabled when the information is requested for person-to-person commercial solicitation of handicapped persons solely by virtue of their handicap, and any audio recording of the final statements of a dying victim in a call to 911 emergency services. Any audio of the victim's statements must be redacted prior to the release of the recording unless the privacy interest is waived by the victim's next of kin. This provision must not be interpreted to restrict access by the public and press to information contained in public records."

information regarding [Doe] in response to the FOIA request of Mr. George Glassmeyer and any other FOIA request."[5]

Thereafter, in a letter dated May 7, 2014, SCLC responded to Glassmeyer's April 16 and April 17 requests. SCLC granted Glassmeyer's request pertaining to information that it determined was disclosable, but informed Glassmeyer that his request for the claimants' full names would constitute an unreasonable invasion of personal privacy and this information was exempt under section 30-4-40(a)(2). On that same day, SCLC filed a summons and complaint against Glassmeyer requesting the court grant declaratory judgment and injunctive relief "with respect to the release of personal information regarding claimants of lottery winnings," which resulted in the present appeal.

STANDARD OF REVIEW

"A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." *Felts v. Richland Cty.*, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991). "In equitable actions, the appellate court may find facts in accordance with its own view of the preponderance of the evidence." *Id.* "In law actions, the lower court must be affirmed where there is 'any evidence' to support its findings." *Id.* "An issue [that is] essentially one at law will not be transformed into one in equity simply because declaratory relief is sought." *Id.* "A declaratory judgment action under the FOIA to determine whether certain information should be disclosed is an action at law." *Burton v. York Cty. Sheriff's Dep't*, 358 S.C. 339, 346, 594 S.E.2d 888, 892 (Ct. App. 2004). The appellate court reviews questions of law de novo. *See Glassmeyer v. City of Columbia*, 414 S.C. 213, 218, 777 S.E.2d 835, 838 (Ct. App. 2015).

STANDING

Glassmeyer argues SCLC did not have standing under FOIA to file this action because the statute indicates only citizens may apply to the circuit court for a declaratory judgment or injunction. We disagree.

---

[5] This order only addressed Doe's rights and how releasing his personal information would affect him.

"To have standing, one must have a personal stake in the subject matter of the lawsuit. In other words, one must be a real party in interest." *Sea Pines Ass'n for the Prot. of Wildlife, Inc. v. S.C. Dep't of Nat. Res.*, 345 S.C. 594, 600, 550 S.E.2d 287, 291 (2001). "Standing may be acquired: (1) by statute; (2) through the rubric of 'constitutional standing;' or (3) under the 'public importance' exception." *ATC S., Inc. v. Charleston Cty.*, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008). The FOIA statute specifically "contains a civil enforcement provision granting standing to a South Carolina citizen to seek injunctive relief against a violation of any FOIA provision." *Cricket Cove Ventures, LLC v. Gilland*, 390 S.C. 312, 327, 701 S.E.2d 39, 47 (Ct. App. 2010). Specifically, section 30-4-100(A) of the South Carolina Code (Supp. 2018) states:

> A citizen of the State may apply to the circuit court for a declaratory judgment, injunctive relief, or both, to enforce the provisions of this chapter in appropriate cases if the application is made no later than one year after the date of the alleged violation or one year after a public vote in public session, whichever comes later.

Although Glassmeyer argues SCLC is not a "citizen" and therefore lacked standing under section 30-4-100(A) to file for a declaratory judgment, SCLC did not bring an action under section 30-4-100(A). Instead, SCLC brought an action under the Declaratory Judgments Act seeking confirmation that the release of the information Glassmeyer requested would constitute an unreasonable invasion of the lottery winners' personal privacy in accordance with section 30-4-40(a)(2) and therefore may be withheld from disclosure. *See* S.C. Code Ann. §§ 15-53-10 to -140 (2005). The Declaratory Judgments Act provides that "[c]ourts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed." S.C. Code Ann. § 15-53-20 (2005). As such,

> [a]ny person . . . whose rights, status or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status or other legal relations . . . .

S.C. Code Ann. § 15-53-30 (2005). The purpose of the Declaratory Judgments Act "is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations." S.C. Code Ann. § 15-53-130 (2005); *see also Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 423, 593 S.E.2d 462, 466 (2004) ("The basic purpose of the [Declaratory Judgments] Act is to provide for declaratory judgments without awaiting a breach of existing rights."). Further, "[t]he Declaratory Judgments Act is a proper vehicle in which to bring a controversy before the court when there is an existing controversy or at least the ripening seeds of a controversy." *Sunset Cay, LLC*, 357 S.C. at 423, 593 S.E.2d at 466. Moreover, the Act "is to be liberally construed and administered." § 15-53-130.

"To fall within the intended purpose and scope of the Declaratory Judgments Act, the parties must seek adjudication of a justiciable controversy." *Tourism Expenditure Review Comm. v. City of Myrtle Beach*, 403 S.C. 76, 81, 742 S.E.2d 371, 373–74 (2013) (footnote omitted). "Questions of statutory interpretation, by themselves, do not rise to the level of actual controversy." *Id*. at 81, 742 S.E.2d at 374 (internal citations omitted). An adjudication that would not settle the legal rights of the parties would be "only advisory and, therefore, beyond the intended purpose and scope of a declaratory judgement." *Power v. McNair*, 255 S.C. 150, 154–55, 177 S.E.2d 551, 553 (1970) (holding action for declaratory judgment to determine whether simultaneous holding of office of city policeman and commission as state constable without compensation would constitute dual office holding prohibited by the South Carolina Constitution presented no justiciable controversy); *see also City of Columbia v. Sanders*, 231 S.C. 61, 68, 97 S.E.2d 210, 213 (1957) ("The Uniform Declaratory Judgment[s] Act . . . 'does not require the court to give a purely advisory opinion which the parties might, so to speak, put on ice to be used if and when the occasion might arise,' or 'license litigants to fish in judicial ponds for legal advice.'" (citations omitted)). Thus,

> [w]here a concrete issue is present, and there is a definite assertion of legal rights and a positive legal duty with respect thereto, which are denied by the adverse party, there is a justiciable controversy calling for the invocation of declaratory judgment action.

Power, 255 S.C. at 153–54, 177 S.E.2d at 553 (quoting *Dantzler v. Callison*, 227 S.C. 317, 321, 88 S.E.2d 64, 66 (1955)).

Here, there was an on-going controversy affecting the duties and obligations of SCLC and the rights of Glassmeyer and all the claimants who were affected by his FOIA requests. The permanent injunction that was granted for Doe only resolved the matter as to that particular claimant, and it only prohibited the release of Doe's personal identifying information. Moreover, SCLC had already informed Glassmeyer that the personal identifying information he sought was exempted under FOIA. Glassmeyer made it clear that SCLC's reasoning for not disclosing the requested information "**did not**" satisfy his request, and he made another request for the exact same information. Consequently, as reflected in the minutes of the "Executive Committee of the South Carolina Education Lottery Board of Commissioners," SCLC experienced

> an unusually strong negative reaction after the winners were notified [about Glassmeyer's request]. The number of calls and the concerns expressed over privacy and safety were greater than the last time similar information was requested. Several attorneys called to inquire about filing a lawsuit and to express concern over their client[s] bearing the costs associated with filing. Other winners asked if they could be put on "a list" as wishing to not have their information disclosed.

Thus, under these circumstances, it is understandable that SCLC would utilize the Declaratory Judgments Act to remove any uncertainty and insecurity with respect to its duties and obligations regarding disclosure under FOIA that would affect the rights of the remaining claimants and Glassmeyer. *See* § 15-53-130 ("[The Declaratory Judgments Act's] purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations."); *see also Sunset Cay, LLC*, 357 S.C. at 423, 593 S.E.2d at 466 ("The basic purpose of the [Declaratory Judgments] Act is to provide for declaratory judgments without awaiting a breach of existing rights."); *id*. ("The Declaratory Judgments Act is a proper vehicle in which to bring a controversy before the court when there is an existing controversy or at least the ripening seeds of a controversy."). Thus, we find SCLC was not constrained from seeking a declaratory judgment in the instant matter.

Additionally, it is important to note that the legislature amended section 30-4-110 of the FOIA statute in 2017. S.C. Code § 30-4-110 (Supp. 2018).[6] Section 30-4-110 is now entitled, "Hearings regarding disclosure; appropriate relief; civil fine for violation." *Id*. Section 30-4-110(A) provides,

> A public body may file a request for hearing with the circuit court to seek relief from unduly burdensome, overly broad, vague, repetitive, or otherwise improper requests, or where it has received a request but it is unable to make a good faith determination as to whether the information is exempt from disclosure.

Section 30-4-110(C) further provides that "[i]f a person or entity seeking relief under this section prevails, the court may order[] equitable relief as [it] considers appropriate[.]" *Id*. The FOIA statute now explicitly provides an avenue for agencies like SCLC to seek relief if presented with a similar factual scenario as the case at bar. However, SCLC did not have the benefit of this provision in 2014. Thus, the Declaratory Judgments Act was a viable means for SCLC to seek relief and to terminate the on-going controversy. *See City of Myrtle Beach,* 403 S.C. at 82, 742 S.E.2d at 374 ("The Declaratory Judgments Act may not be invoked to avoid or circumvent the legislature's exclusive method for challenging [a provision within an act]."). Moreover, given the gravity of the interests at stake—i.e., the potential invasion of personal privacy for the claimants, the risk of unlimited legal exposure for SCLC, the potential to diminish the number of lottery players because of fear of their identity being exposed, and balancing the equities of Glassmeyer's right to request information—prudence dictated the agency's decision to have the circuit court declare its obligations and to remove any doubt it may have had. *See Power*, 255 S.C. at 154–55, 177 S.E.2d at 553 ("Where a concrete issue is present, and there is a definite assertion of legal rights and a positive legal duty with respect thereto, which are denied by the adverse party, there is a justiciable controversy calling for the invocation of declaratory judgment action." (quoting *Dantzler*, 227

---

[6] The legislative act adopting this amendment provided, "To amend section 30-4-110, relating to penalties for violations of the Freedom of Information Act, so as to remove criminal penalties, and *to provide rights and remedies of public bodies from whom requests are made and persons with specific interests in exempt information for which disclosure is sought*, among other things[.]" Act No. 67, 2017 S.C. Acts 3352 (emphases added).

S.C. at 321, 88 S.E.2d at 66)). Accordingly, we find SCLC had standing to file for a declaratory judgment.

DECLARATORY JUDGMENT

Glassmeyer argues the circuit court erred in issuing the declaratory judgment for SCLC because the balancing of the individual's privacy against the public's need to know weighs in his favor. Further, Glassmeyer contends the circuit court considered evidence outside of the pleadings and construed the pleadings in the light most favorable to SCLC. We disagree.

"FOIA is remedial in nature and should be liberally construed to carry out its purpose." *Evening Post Publ'g Co. v. Berkeley Cty. Sch. Dist.*, 392 S.C. 76, 82, 708 S.E.2d 745, 748 (2011). As the General Assembly stated,

> [I]t is vital in a democratic society that public business be performed in an open and public manner so that citizens shall be advised of the performance of public officials and of the decisions that are reached in public activity and in the formulation of public policy. Toward this end, provisions of this chapter must be construed so as to make it possible for citizens, or their representatives, to learn and report fully the activities of their public officials at a minimum cost or delay to the persons seeking access to public documents or meetings.

S.C. Code Ann. § 30-4-15 (2007).

"FOIA's basic premise is [that] 'any person has a right to inspect or copy any public record of a public body.'" *Evening Post Publ'g Co.*, 392 S.C. at 82, 708 S.E.2d at 748 (quoting § 30-4-30(a)). However, this right is not absolute. "Information of a personal nature where the public disclosure thereof would constitute [an] unreasonable invasion of personal privacy" is exempt from disclosure under FOIA. § 30-4-40(a)(2). The exemption provision gives the public body the discretion to disclose such information, stating the public body "may but is not required to" disclose the information. § 30-4-40(a). "The determination of whether documents or portions thereof are exempt from FOIA must be made on a case-by-case basis, and the exempt and non-exempt material shall be separated and the non[-]exempt

material disclosed." *Evening Post Publ'g Co.*, 392 S.C. at 82, 708 S.E.2d at 748.

> Section 30-4-40(a)(2) does not specifically list or define the types of records, reports, or other information that should be classified as personal or private information exempt from disclosure. We must, therefore, resort to general privacy principles, which examination involves a balancing of conflicting interests—the interest of the individual in privacy on the one hand against the interest of the public's need to know on the other.

Burton, 358 S.C. at 352, 594 S.E.2d at 895. "Our [s]upreme [c]ourt has defined the 'right to privacy' as the right of an individual to be let alone and to live a life free from unwarranted publicity." *Id.* A plaintiff must establish three elements in order to receive an injunction: "(1) he will suffer immediate, irreparable harm without the injunction; (2) he has a likelihood of success on the merits; and (3) he has no adequate remedy at law." *Compton v. S.C. Dep't of Corr.*, 392 S.C. 361, 366, 709 S.E.2d 639, 642 (2011).

In *Glassmeyer v. City of Columbia*, Glassmeyer sent a FOIA request to the City of Columbia, requesting all the application materials for the final three applicants for city manager. 414 S.C. at 216–17, 777 S.E.2d at 837. The city provided the applicants' information but redacted the street name and number of the applicants' home addresses, some of their telephone numbers, their job references, their driver's license numbers, their driver's license restrictions, and some of the applicants' reasons for leaving their previous employment. *Id.* at 217, 777 S.E.2d at 837. Glassmeyer filed a declaratory judgment and injunction action against the city. *Id.* Prior to the circuit court issuing an order, Glassmeyer conceded that the driver's license information was exempt under state law. *Id.* at 217, 777 S.E.2d at 838. The circuit court granted Glassmeyer's request for summary judgment. *Id.* at 218, 777 S.E.2d at 838. This court reversed the circuit court, holding disclosure of the applicants' home addresses, telephone numbers, and personal email addresses would constitute an unreasonable invasion of personal privacy. *Id.* at 223, 777 S.E.2d at 840–41. This court applied the balancing test, considering what information the city provided and noted it "fail[ed] to see how disclosure of the limited information . . . would serve to establish the veracity of the applicants more than the information [the city] already provided." *Id.* at 223, 777 S.E.2d at 841.

We find the instant case is similar to *Glassmeyer v. City of Columbia*. Here, SCLC provided Glassmeyer with the amount of the lottery winnings, the lottery game, and the claimants' home towns and states. Although Glassmeyer argues the test of balancing the individual's privacy against the public's need to know is in his favor, we disagree. Glassmeyer has not provided any reason that the public needs to know the information he requested or any reason as to why the information SCLC provided was not adequate. *See Burton*, 358 S.C. at 352, 594 S.E.2d at 895 ("We must, therefore, resort to general privacy principles, which examination involves a balancing of conflicting interests—the interest of the individual in privacy on the one hand against the interest of the public's need to know on the other."). When asked to explain why he needed the information, Glassmeyer indicated it had the potential for exposing government corruption. However, without more, we are unable to fathom how disclosure of the rest of the information would benefit the public more than what was already provided. We agree with the circuit court's determination that it would be an unreasonable invasion of privacy for SCLC to release the requested information. *See Burton*, 358 S.C. at 352, 594 S.E.2d at 895 ("Our [s]upreme [c]ourt has defined the 'right to privacy' as the right of an individual to be let alone and to live a life free from unwarranted publicity."). The lottery claimants' names are not public knowledge and the release of such information could lead to the discovery of other personal information. Thus, we find the balancing test weighs in favor of preventing the disclosure of the information in order to safeguard the claimants' personal privacy.

We disagree with Glassmeyer's argument that *Glassmeyer v. City of Columbia* is not controlling because the lottery claimants in the instant case filled out a claim form which stated the information may be subject to disclosure under FOIA. The claimants did not waive their right to privacy just by executing the form. The form merely indicated that *some* of the information included in the form *may* be subject to disclosure under FOIA. However, this warning does not mean the claimants waived any right they had to the privacy of the information on the form, such as their social security numbers. In fact, SCLC did disclose some of the information included on the form—the claimants' home towns and states. Just as *Glassmeyer v. City of Columbia* found "[a]n individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form," we find this same interest does not dissolve just because the claimants were warned that some of the

information may be subject to disclosure. 414 S.C. at 222, 777 S.E.2d at 840 (quoting *U.S. Dep't of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 500 (1994)).

As to Glassmeyer's argument that the circuit court considered evidence outside of the pleadings and construed the pleadings in a light more favorable to SCLC, we disagree. The question of whether the information Glassmeyer requested was exempt under FOIA is a question of law and does not require looking at any facts other than Glassmeyer's request. Although the circuit court cited to news articles that were included in SCLC's complaint as examples of harm that befell lottery winners around the country, we believe these citations were not necessary to the circuit court's order. Furthermore, Rule 12(c) of the South Carolina Rules of Civil Procedure indicates a motion for judgment on the pleadings can be construed as a motion for summary judgment if the circuit court considers facts outside of the pleadings, and therefore, granting the motion would be proper if there was no genuine issue of material fact. *See* Rule 12(c) ("If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the [c]ourt, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56[, SCRCP] . . . ."); *Fay v. Total Quality Logistics, LLC*, 419 S.C. 622, 628, 799 S.E.2d 318, 322 (Ct. App. 2017) ("The circuit court should grant a motion for summary judgment when the evidence shows 'there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" (quoting Rule 56(c))). Thus, we find the circuit court did not err in issuing the declaratory judgment.

COUNTERCLAIM

Glassmeyer argues the circuit court erred in not addressing his counterclaim for willful abuse of process.[7] We agree. The circuit court's order did not address Glassmeyer's counterclaim but indicated it "conclude[d] the . . . matter." After the circuit court issued its order, Glassmeyer filed a motion for reconsideration and asked the circuit court to rule on his counterclaim. However, the circuit court did not mention the counterclaim in its order denying Glassmeyer's motion for

[7] Glassmeyer also argues the circuit court erred in not addressing his counterclaim for a declaratory judgment. However, we find the circuit court implicitly resolved Glassmeyer's counterclaim for declaratory judgment and affirm the circuit court's declaratory judgment.

reconsideration. Thus, we remand to the circuit court to address Glassmeyer's willful abuse of process counterclaim.

CONCLUSION

We find SCLC had standing under the Declaratory Judgments Act to bring this declaratory judgment and injunction action. Thus, we affirm the circuit court's grant of injunctive relief. We affirm the circuit court's declaratory judgment that the information Glassmeyer requested was exempt from FOIA. We remand to the circuit court to address Glassmeyer's counterclaim for willful abuse of process.[8]

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.[9]

LOCKEMY, C.J., and GEATHERS, J., concur.

---

[8] Glassmeyer also appealed the circuit court's denial of his motion to dismiss. We decline to address this issue because it is not appealable. *See Levi v. N. Anderson Cty. EMS*, 409 S.C. 374, 382, 762 S.E.2d 44, 48 (Ct. App. 2014) ("[T]he denial of a motion to dismiss does not establish the law of the case and the issue raised by the motion can be raised again at a later stage of the proceedings. Therefore, the denial of a motion to dismiss is not directly appealable . . . ." (quoting *McLendon v. S.C. Dep't of Highways & Pub. Transp.*, 313 S.C. 525, 526 n.2, 443 S.E.2d 539, 540 n.2 (1994))).

[9] We decide this case without oral argument pursuant to Rule 215, SCACR.