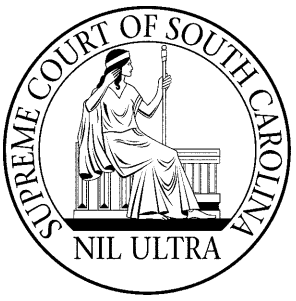

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 25
July 1, 2015
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Daniel J. Jenkins, Respondent.

Appellate Case No. 2012-212544

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Charleston County
Deadra L. Jefferson, Circuit Court Judge

Opinion No. 27537
Heard March 3, 2015 – Filed July 1, 2015

REVERSED

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Mark Reynolds Farthing, all of Columbia; and Solicitor Scarlett Anne Wilson, of Charleston, for Petitioner.

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

CHIEF JUSTICE TOAL: The State appeals the court of appeals' decision reversing the trial court's finding that a search warrant for samples of Daniel Jenkins's (Respondent) DNA was valid, and remanding for an evidentiary hearing regarding whether the State would have inevitably discovered Respondent's DNA during the course of its investigation.[1] *State v. Jenkins*, 398 S.C. 215, 727 S.E.2d 761 (Ct. App. 2012). We reverse, and reinstate Respondent's conviction for criminal sexual conduct in the first degree (CSC-First).

FACTS/PROCEDURAL BACKGROUND

In 2006, H.M. (the victim) lived by herself in downtown Charleston, South Carolina. At the time, she worked for a local bakery, to which she commuted by bicycle or bus. During her commute, the victim frequently passed Jabbers, a local grocery store, and casually greeted the people loitering outside, many of whom lived in the area and often gathered there. Although the victim did not know any of these people beyond exchanging a passing greeting, she came to learn that one of the people with whom she exchanged pleasantries was nicknamed "Black."

The victim testified that on April 5, 2006, she arrived home from work, consumed several alcoholic beverages, and fell asleep around 8 p.m. Approximately two hours later, the victim awoke to a knock at her door. She opened the door and saw Black, who asked the victim if she either wanted to go out and share a drink, or if she would lend him money to buy beer that he could then bring back to her apartment. When the victim declined, Black continued to pester her, asking her those same two questions repeatedly.

The victim stated she became uncomfortable, so she took a step back into her apartment to place some distance between herself and Black. However, Black stepped in "aggressively" behind her, and the two sat on the victim's sofa for a brief time while Black smoked a cigarette. Shortly thereafter, Black began making lewd sexual demands and threatening the victim, stating that if she did not comply with his demands, he would kill her.

The victim firmly told Black to leave because her boyfriend was coming

[1] *See Nix v. Williams*, 467 U.S. 431 (1984) (establishing and explaining the inevitable discovery doctrine).

over.[2] Thereafter, Black grasped a heavy glass candleholder and repeatedly struck the victim around the forehead, ears, and mouth.

A struggle ensued, during which Black pushed the victim's cordless telephone out of her reach. Ultimately, Black wrestled the victim's pants off of her, tore off her underwear, and forcibly engaged in sexual intercourse with the victim. Black then threatened to kill the victim if she told anyone about the encounter, and left the victim's apartment.

After the victim could not find her telephone, she ran outside for help. She unsuccessfully knocked on several neighbors' doors and attempted to stop three passing cars before encountering a woman on the street near Jabbers. The woman asked the victim what happened to her, but before the victim could speak, Black approached the women.

The victim stated that she became overwhelmed by Black's presence and started crying and asking to use a telephone. Black grabbed the victim's arm and "half-carried, half-guided" the victim to an alley across the street. He told her that he had her telephone and would return it if she washed the blood off of her face. Black then forcibly held the victim's head under a nearby faucet.

After Black returned the telephone, the victim ran back to her apartment and hid under a tarp on the side of the building while she called the police. She described her assault to the responding officers and told them that her attacker's nickname was Black.

The officers were familiar with a man from the neighborhood whose nickname was Black, but whose true identity was Respondent. They searched for and located Respondent within a matter of minutes in an abandoned building across the street from Jabbers, where he was sleeping nude. Other officers escorted the victim to Jabbers's parking lot, where she positively identified Respondent as her attacker.

After identifying Respondent, the victim underwent a rape examination. The nurse conducting the examination testified that the victim had a blackened eye, a bloody nose, a split lip, bleeding on the inside of her mouth, bruising on her arms

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[2] The victim did not have a boyfriend at the time, and was merely trying to induce Black into leaving her apartment.

and shoulders, abrasions and lacerations on her genitals, and defensive wounds on her hands. Further, the nurse found semen on vaginal and rectal swabs taken from the victim, as well as on various clothing and bodily swabs. The nurse stated that while the wounds and semen could be consistent with consensual sex, they were more likely the result of forcible sex.

In processing the alleged crime scene at the victim's apartment, police officers found blood stains on the victim's sofa, and her ripped underwear and a heavy glass candleholder lying on the floor. A fingerprint examiner testified that two of the three fingerprints recovered from the candleholder were Respondent's.

The following day, a police officer obtained a search warrant for Respondent's DNA to compare to the DNA recovered from the rape examination swabs. The affidavit necessary to establish probable cause for the warrant read:

> On 4/5/06 at approximately 22:30 hours while at [the victim's address], the subject, [Respondent] . . . , did enter the victim's residence and threatened to kill her if she did not comply with his demand to perform oral sex on her. The victim attempted to fight the subject, however he overpowered her by striking her in and about her face using a glass candle holder [sic].
>
> The subject then penetrated the victim's vagina with his tongue and penis. The DNA samples of blood, head hair and public hair will be retrieved from the suspect by [] trained medical personnel in a medical facility. The collection of these samples will be conducted in a noninvasive manner.[3]

A forensic DNA analyst developed a DNA profile from the rape examination swabs, and compared that profile to Respondent's DNA profile. The DNA profiles matched, with a 1 in 8.6 quintillion chance that the semen on the rape examination swabs came from an unrelated person.

Prior to the State introducing it at trial, Respondent moved to suppress the DNA evidence, arguing that the affidavit did not establish probable cause because it omitted: (1) the source of the officer's information regarding the assault, so that

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[3] The officer did not supplement the affidavit with oral testimony in front of the Magistrate who granted the warrant.

the Magistrate could judge the source's credibility; (2) how the officer came to suspect Respondent of the crime; (3) the victim's positive identification of Respondent as her attacker in Jabbers's parking lot; (4) photographs and physical evidence obtained of both the victim and the alleged scene of the crime; and (5) the results of the rape examination that the victim underwent, including the genital abrasions and lacerations, as well as the presence of semen. The trial court denied the motion to suppress.[4]

Ultimately, the jury convicted Respondent of CSC-First. Because of Respondent's two prior convictions for CSC-First and carjacking, both of which are "most serious offenses" under section 17-25-45(C)(1) of the South Carolina Code, the trial court imposed a mandatory sentence of life in prison without the possibility of parole. *See* S.C. Code Ann. § 17-25-45 (2014).

Respondent appealed, and the court of appeals remanded the case for an additional evidentiary hearing. *Jenkins*, 398 S.C. at 215, 727 S.E.2d at 761. Specifically, the court of appeals found the search warrant to obtain Respondent's DNA was invalid for two reasons. *Id.* at 221–25, 727 S.E.2d at 764–66. First, the court of appeals held that the affidavit in support of the warrant did not establish probable cause because it contained only conclusory statements; failed to set forth the source of the facts contained therein; and lacked any information allowing the Magistrate to make a credibility determination regarding the source of the information. *Id.* at 222–24, 727 S.E.2d at 764–66. Second, the court of appeals found that the affidavit was defective because it did not contain any indication that the police had obtained DNA evidence from the rape examination, and thus it did not establish that Respondent's DNA would have been relevant to the investigation. *Id.* at 224–25, 727 S.E.2d at 766. Moreover, the court of appeals found that admitting the DNA evidence was not harmless error because it bolstered the victim's credibility regarding two critical facts: that Respondent was her attacker, and that the sexual intercourse was not consensual. *Id.* at 225–27, 727 S.E.2d at 766–67.

Despite reversing the trial court's admission of the DNA evidence, the court of appeals did not order a new trial, but instead remanded the case for an

[4] As a result, Respondent's counsel changed strategies mid-trial from attempting to blame the assault on the victim's abusive ex-boyfriend to attempting to characterize the encounter as consensual sexual intercourse between Respondent and the victim.

evidentiary hearing. *See id.* at 227–30, 727 S.E.2d at 767–69. The court of appeals did so in response to the State's argument that Respondent's DNA would have been inevitably discovered regardless of the defective search warrant. *Id.* Specifically, the State asserted that Respondent's DNA was already on file in the State's DNA Identification Record Database due to his prior conviction for CSC-First. *See id.* at 228, 727 S.E.2d at 768; *see also* S.C. Code Ann. §§ 23-3-610, -620(A), -620(B), -640, -650(A) (2007 & Supp. 2014) (allowing the State to obtain, store, and use a criminal defendant's DNA sample as a result of prior convictions). However, because the trial court found the search warrant was not defective, the State contended it never had the opportunity to present this evidence. *Jenkins*, 398 S.C. at 228, 727 S.E.2d at 768. The court of appeals therefore remanded Respondent's case to the trial court to determine whether the inevitable discovery doctrine applied in this particular situation. *Id.* at 230, 727 S.E.2d at 769.

We granted the State's petition for a writ of certiorari to review the court of appeals' decision.

ISSUE

Whether admission of the DNA evidence obtained as a result of the defective search warrant constituted harmless error?

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. *State v. Black*, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012). The court is "bound by the trial court's factual findings unless they are clearly erroneous." *Id.*

ANALYSIS

The State has not challenged the court of appeals' finding that the affidavit did not establish probable cause, and that the search warrant to obtain Respondent's DNA was thus invalid. As such, we need only determine whether the trial court's error in admitting the DNA evidence was harmless beyond a reasonable doubt, and whether remand for an evidentiary hearing was the appropriate remedy.

The United States Supreme Court has distinguished between trial errors and structural defects in the trial mechanism itself. *State v. Mouzon*, 326 S.C. 199, 204, 485 S.E.2d 918, 921 (1997) (discussing *Arizona v. Fulminante*, 499 U.S. 279

(1991)). Structural defects "affect the entire conduct of the trial from beginning to end," whereas trial errors "occur during the presentation of the case to the jury, and may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." *Id.* (quoting *Fulminante*, 499 U.S. at 307–08, 309) (internal quotation marks omitted). Differentiating between structural and trial errors serves "to enforce procedural safeguards while ensuring that inconsequential, technical errors do not result in a new trial." *State v. Chavis*, 412 S.C. 101, 115, 771 S.E.2d 336, 343 (2015) (Hearn, J., dissenting). Most errors that occur during trial, including those that violate a defendant's constitutional rights, are trial errors that are subject to harmless error analysis. *State v. Rivera*, 402 S.C. 225, 246, 741 S.E.2d 694, 705 (2013).

Harmless error analyses are fact-intensive inquiries and are not governed by a definite set of rules. *State v. Byers*, 392 S.C. 438, 447–48, 710 S.E.2d 55, 60 (2011); *State v. Davis*, 371 S.C. 170, 181, 638 S.E.2d 57, 63 (2006). Rather, appellate courts must determine the materiality and prejudicial character of the error in relation to the entire case. *Byers*, 392 S.C. at 448, 710 S.E.2d at 60; *see also Black*, 400 S.C. at 27–28, 732 S.E.2d at 890 (stating that with respect to wrongly-admitted evidence impacting a witness's credibility, the Court should consider "the importance of the witness's testimony to the prosecution's case, whether the witness's testimony was cumulative, whether other evidence corroborates or contradicts the witness's testimony, the extent of cross-examination otherwise permitted, and the overall strength of the State's case"). An error is harmless if it did not reasonably affect the result of the trial. *State v. Bryant*, 369 S.C. 511, 518, 633 S.E.2d 152, 156 (2006); *see also State v. Tapp*, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012) ("Engaging in this harmless error analysis, we note that our jurisprudence requires us not to question whether the State proved its case beyond a reasonable doubt, but whether beyond a reasonable doubt the trial error did not contribute to the guilty verdict.").

Here, the court of appeals found that absent the DNA evidence, the case boiled down to a credibility contest between the victim—asserting that she was sexually assaulted by Respondent—and Respondent—alternatively asserting that the perpetrator of the assault was the victim's abusive ex-boyfriend, or that any sexual intercourse between the victim and Respondent was consensual. We find this conclusion to be incomplete based on our review of the totality of the evidence presented by the State.

Notwithstanding the DNA evidence, there was abundant, independent evidence in the record from which the jury could have found Respondent guilty. For example, the victim testified at length, giving a detailed account of the assault and the events that followed. Moreover, the State presented physical evidence regarding the results of the rape examination conducted on the victim, including the extensive nature of the victim's injuries, the defensive wounds on the victim's body, and the presence of semen. The State likewise presented testimony from the nurse who performed the rape examination that the victim's wounds were consistent with sexual assault. Other testimony revealed that the responding officers described the victim as "roughed up pretty good," and the rape examination nurse described the victim's face as "quite bruised." Additionally, the investigation of the alleged crime scene at the victim's apartment uncovered the victim's ripped underwear and blood and fingerprint evidence corroborating the victim's version of events. Finally, the responding police officers independently connected Respondent to the crime by his nickname "Black" due to their previous dealings with him. Further, after the officers searched for Respondent and found him naked and asleep a short distance away from the scene of the crime, the victim positively identified Respondent as her attacker within thirty minutes of the assault.

Accordingly, contrary to the court of appeals' assertion, this case was not dependent on the credibility of the victim and Respondent, with the DNA evidence serving as the only physical evidence that Respondent committed the assault. *Cf. State v. Jennings*, 394 S.C. 473, 480, 716 S.E.2d 91, 94–95 (2011) ("We further find the trial court's admission of the reports did not amount to harmless error. *There was no physical evidence presented in this case. The only evidence presented by the State was the children's accounts of what occurred* and other hearsay evidence of the children's accounts. Because the children's credibility was the most critical determination of the case, we find the admission of the written reports was not harmless." (emphasis added) (citation omitted)). Rather, there was other physical evidence that the victim was sexually assaulted, and that Respondent was the perpetrator.[5]

[5] Moreover, the DNA evidence only established that the victim and Respondent engaged in sexual intercourse, which Respondent's counsel conceded to the jury. However, the DNA evidence did *not* establish whether the encounter was consensual or non-consensual, which the rape examination nurse stated under

Further, while we agree that the DNA evidence was compelling, there is no jurisprudence in this State that DNA is either necessary or conclusive to establishing a defendant's guilt beyond a reasonable doubt. Rather, there are countless cases in which the State has not presented DNA evidence—either because it could not or chose not to do so—and a jury nonetheless properly convicts the defendant. DNA evidence is merely one way to establish that the accused is the perpetrator. However, the presence or absence of DNA evidence does not taint the remainder of the evidence in the record, nor does it overwhelm the jury's ability to make credibility determinations and decide whether a defendant is guilty. Like with fingerprinting and blood typing, both of which are similarly compelling types of evidence, DNA evidence can be disputed.

Accordingly, we find the admission of the DNA evidence in this case was harmless error, and we decline to adopt a per se rule that a new trial is mandatory any time DNA evidence is wrongly admitted.[6]

CONCLUSION

For the foregoing reasons, we reverse the portion the court of appeals' decision remanding the case for an evidentiary hearing regarding the applicability of the inevitable discovery doctrine. Instead, we reinstate Respondent's conviction for CSC-First because any error made by the trial court was harmless.

REVERSED.

BEATTY, KITTREDGE and HEARN, JJ., concur. PLEICONES, J., dissenting in a separate opinion.

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cross-examination by Respondent's counsel. Thus, the DNA evidence did not boost the victim's credibility that the intercourse was forced on her. Rather, the victim's claim that the intercourse was unwanted was supported by, *inter alia*, evidence of the injuries to her face and genitals, including the tears, abrasions, and defensive wounds.

[6] Because this issue is dispositive, we do not reach the State's second issue regarding whether it would have inevitably discovered Respondent's DNA during the course of its investigation. *See Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co.*, 382 S.C. 295, 307, 676 S.E.2d 700, 706 (2009).

JUSTICE PLEICONES: I respectfully dissent from the majority's decision to reverse the court of appeals as in my view, the erroneous admission of the DNA evidence—which the majority finds "compelling"—was not harmless. I would remand for a new trial.

The majority holds that notwithstanding the DNA evidence, there was abundant, independent evidence in the record from which the jury could have found Respondent guilty. In addition to the victim's testimony—which in my view is the only evidence *Respondent* sexually assaulted the victim—the majority relies on the results of the rape examination on the victim,[7] the testimony from the nurse who performed the rape examination that the victim's face was "quite bruised," the testimony from the responding officer that described the victim as "roughed up pretty good," and the presence of the victim's ripped underwear and "blood and fingerprint evidence"[8] at the scene. In my opinion, this evidence merely shows that the victim was likely sexually assaulted and that Respondent has been in the victim's home, not that Respondent was the perpetrator of the sexual assault. Accordingly, this case is indeed a battle of credibility between the victim and Respondent regarding Respondent's involvement in the sexual assault. In my view, the majority fails to point to the existence of overwhelming evidence of guilt as the victim's testimony was the only evidence that identified Respondent as the perpetrator of the sexual assault. *See State v. Chavis*, 412 S.C. 101, 109-10 & n.7, 771 S.E.2d 336, 340 (2015) (stating the materiality and prejudicial character of the error must be determined from its relationship to the entire case and the wrongful admission of evidence can be deemed harmless where there is other overwhelming evidence of guilt).[9]

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[7] The results of the rape examination were not conclusive that a sexual assault occurred. In fact, the nurse who performed the rape examination agreed that everything discovered in the pelvic examination could be consistent with consensual intercourse.

[8] Blood was found on the victim's couch and Respondent's fingerprints were recovered from a glass candleholder.

[9] In my view, the majority's reliance in footnote 5 on the concession by Respondent's counsel during argument that Respondent and the victim had consensual sex is improper because the concession was a necessary by-product of the lower court's erroneous decision to admit the DNA evidence. Respondent

Since I find the admission of the DNA evidence not harmless, I address the propriety of the court of appeals' decision to remand for an evidentiary hearing. In my view, remand for an evidentiary hearing to determine whether the inevitable discovery doctrine applies is improper. Here, inevitable discovery is advanced as an additional sustaining ground and it is well settled that the evidence forming the basis for an additional sustaining ground must appear in the record on appeal. There is no evidence in the record on appeal that Respondent's DNA is in the State DNA database. *See* Rule 220(c), SCACR; *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000). I would reverse respondent's conviction and remand for a new trial.

For the reasons given above, I would find the erroneous admission of DNA evidence not harmless, reverse respondent's conviction, and remand to the lower court for a new trial.

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should not be bound by this concession because his attorney unsuccessfully sought to ameliorate the prejudice from an erroneous evidentiary ruling.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State of South Carolina, Petitioner,

v.

Steven Louis Barnes, Respondent.

Appellate Case No. 2014-001966

IN THE ORIGINAL JURISDICTION

On Writ of Certiorari to Edgefield County
Diane S. Goodstein, Circuit Court Judge

Opinion No. 27538
Heard April 8, 2015 – Filed July 1, 2015

AFFIRMED

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka and Senior Assistant Attorney General Melody Jane Brown, all of Columbia; and Solicitor Donald V. Myers, of Lexington, for Petitioner.

Jeffrey P. Bloom; and Chief Attorney William Sean McGuire and Staff Attorney Emily Therese Kuchar, both

of Capital Trial Division of SC Commission on Indigent Defense, all of Columbia, for Respondent.

JUSTICE PLEICONES: We granted the State's request for a common law writ of certiorari to review a pretrial circuit court order in this capital retrial proceeding. We affirm the circuit court's order.

Respondent's first capital conviction and sentence were reversed on appeal because he was denied his constitutional right to represent himself at trial. *State v. Barnes*, 407 S.C. 27, 753 S.E.2d 545 (2014); *see Faretta v. California*, 422 U.S. 806 (1975). In *Barnes*, the Court declined to adopt the heightened competency standard for a defendant who seeks to represent himself which is permitted, but not required, by *Indiana v. Edwards*, 554 U.S. 164 (2008). Since the *Edwards* standard had been applied by the circuit judge, the Court held it was "constrained to reverse" respondent's conviction and sentence. *Id*. at 37, 753 S.E.2d at 550.

The State plans to retry respondent, and has indicated it will again seek the death penalty. Respondent sought the appointment of counsel to represent him in these new proceedings. At the appointment hearing, the State argued that in seeking representation for the retrial, respondent essentially conceded that his prior conviction was constitutionally obtained. The State contended that in light of this concession, respondent's original conviction and sentence should be reinstated and this Court should proceed to review the issues raised but not reached in the first appeal.[1] The circuit court denied the State's request.

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[1] The dissent does not address the State's argument, reasoning instead that "Respondent has waived his right to counsel in his second trial . . . ." From this waiver finding, the dissent concludes not that respondent must proceed *pro se* at this retrial, but rather that the waiver should result in the reinstatement of his first conviction. Thus, the dissent would not accord respondent a review of the non-*Faretta* issues raised in his first appeal, a review that even the State recognizes is appropriate. The dissent's position rests not upon any constitutional or procedural basis, but instead upon its characterization of respondent's motives as "an effort to manipulate the system and pollute the administration of justice." Even if we believe that a criminal defendant's exercise of his constitutional rights stem from impure motives, that motivation alone is not a basis to deny him these rights. Further, while it is unethical for an attorney to engage in conduct which tends to

ISSUE

Must this Court reconsider its decision in *State v. Barnes*, 407 S.C. 27, 753 S.E.2d 545 (2014), in light of respondent's request for counsel in his second trial?

ANALYSIS

The State argues that by requesting counsel at a pretrial hearing, respondent has conceded that there was no constitutional infirmity in his first trial. Before addressing the merits of his claim, we look first at the procedural hurdle which the State must clear.

In order to effect a review of respondent's first appeal, this Court would need to recall the remittitur from the circuit court. "In order to justify this court in exercising the unusual power of recalling the *remittitur* after it has been sent down, a very strong showing would be required that the *remittitur* was sent down through some mistake or inadvertence on the part of this court or its officer . . . ." *State v. Keels*, 39 S.C. 553, 17 S.E. 802 (1893). The State cites no authority, and we are aware of none, that permits the remittitur to be recalled, not because of an error or inadvertence on the part of the Supreme Court, but rather because of post-remittitur conduct by a party. Accordingly, we do not believe that even if we were to find merit to the State's position, that we would be empowered to grant the relief it seeks. *See also Earle v. City of Greenville*, 84 S.C. 193, 65 S.E. 1050 (1909).[2] As explained below, we find no authority supporting the State's position in this matter.[3]

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pollute the administration of justice (Rule 7(a)(5), Rule 413, SCACR), we are unaware that this principle applies to a criminal defendant.

[2] "[W]hen points arising in a case before this Court have been decided, they become *res judicata*, and, when the remittitur has been sent down, this Court loses jurisdiction, and cannot, therefore, in the further progress of the case, render a different decision upon the points decided, so as to affect the particular case in which the decision was rendered." *Id*. at 196, 65 S.E. at 1051.

[3] Even if we were to find merit to the State's position, the issue would not be ripe. Respondent's right to self-representation is a *trial right*, and one that he may seek to exercise under state law at any time up until that trial commences. *See State v.*

The State relies upon three decisions to support its contention that respondent's original conviction should be reinstated, and the appellate issues not reached in the appeal be considered now, if he persists in seeking counsel at his second proceeding: *United States v. Johnson*, 223 F.3d 665 (7th Cir. 2000); *Edwards v. Commonwealth*, 644 S.E.2d 396 (Va. Ct. App. 2007); and *People v. Carson*, 104 P.3d 837 (Cal. 2005). Read correctly, none of these decisions provide authority for the State's position.

In *Johnson*, the question on appeal was whether the defendant waived his right to represent himself at trial. The court held the defendant "acquiesced in the denial by judicial inaction of his motion and thereby deliberately relinquished his right of self-representation." *Johnson*, 223 F.3d at 669. Despite finding waiver, the opinion goes on in *obiter dictum*:

> We add that as he has made no representation that if we order a new trial he will persist in his desire to represent himself, his claim that his right of self-representation was infringed **may** be moot, as well as having no merit for the reasons just indicated. For if as we expect he would be represented by lawyers at any new trial, he would not have vindicated the right of self-representation upon which he premises his appeal from the denial of that right. **The point is not that at a subsequent trial he would be estopped to invoke his right to counsel, an argument rejected in the only cases to have considered the issue**. *United States v. McKinley*, 58 F.3d 1475, 1483 (10th Cir. 1995); *Johnstone v. Kelly*, 812 F.2d 821 (2d Cir. 1987) (per curiam). The point is rather that if he wants on remand exactly what he had in his first trial, namely representation by competent lawyers, it is difficult to understand what he lost by

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Winkler, 388 S.C. 574, 698 S.E.2d 596 (2010). *See McKaskle v. Wiggins*, 465 U.S. 168, 178 (1984) (The "core" of the right to self-representation is the defendant's right "to preserve actual control over the case he chooses to present to the jury."). That respondent seeks attorneys at this juncture, attorneys who have access to witnesses, investigators, discovery, law libraries, and other resources, does not mean that he will not choose to exercise his constitutional right to proceed *pro se* at the next trial.

> the denial of his motion: he had at the first trial what he wants at the second. (emphasis supplied).

Id.

While this dicta merely speculates about the consequences had the court found the defendant was entitled to a new trial, it also recognizes that precedent is squarely against the position now espoused by the State. *See United States v. McKinley, supra*; *Johnstone v. Kelly*, *supra*; *see also United States v. Kennard*, 799 F.2d 556, 557 (9th Cir. 1986) ("We reject the government's contention that, once a waiver of counsel has been given, a defendant is forever precluded from asking for an attorney in a later proceeding"); *Buhl v. Cooksey*, 233 F.3d 783, 807 fn.25 (3rd Cir. 2000); *State v. Figueroa*, 897 A.2d 1050, 1053 (N.J. 2006) (and cases cited therein). The State nowhere addresses *McKinley* or *Johnstone,* despite the fact that the dicta it relies upon in *Johnson* expressly acknowledges them.

The State's reliance on the Virginia Court of Appeals' decision in *Edwards v. Commonwealth, supra,* is also misplaced. The *Edwards* court **remanded** the case to the trial court for reconsideration of the defendant's *Faretta* request. The court indicated that if on remand the defendant withdrew his *Faretta* request, no retrial would be necessary. This is only logical since the trial court was being asked to make an initial *Faretta* determination. This decision cites the dicta from *Johnson*, *supra*, for the proposition that the defendant must persist in his *Faretta* request on *remand* or have his conviction reinstated. This Court, however, did not remand respondent's first appeal, but rather decided the merits of his *Faretta* issue, agreed with respondent, and reversed his conviction and sentence, leaving the State to decide whether to retry him. Finally, the issue in *People v. Carson, supra,* was whether the trial court erred in terminating the defendant's self-representation because of the defendant's pre-trial out-of-court conduct. *Carson* reversed the trial court's order, but instructed the trial court to hold another hearing to determine if the defendant's *Faretta* rights had been properly terminated. If they were found to have been, the judgment was to be reinstated, but if not, the State could retry him. In our view, *Carson* adds nothing to the State's contention that at a second trial respondent must proceed *pro se* or have his first appeal reinstated and the non-*Faretta* issues decided. If relevant at all, *Carson* holds that a *Faretta* violation mandates reversal of a criminal defendant's conviction.

The State relies on appellate decisions that **remanded** the question of the defendant's waiver of his right to counsel to the trial court for reconsideration. It is apparent to us that the State now regrets that in respondent's first appeal it chose to argue only that the trial court's adoption and application of the standard announced in *Edwards*, *supra*, was correct, rather than to ask in the alternative for a remand if the Court were not to adopt *Edwards*. The State did not seek this alternative relief, we decided the appeal on its merits, and properly returned the remittitur to the circuit court. Respondent is entitled to the new trial, with all its attendant constitutional rights, pursuant to our decision in his first appeal.

We also note with concern the implication of the State's argument. The State's position is that the erroneous denial of a defendant's sixth amendment right to self-representation at the first proceeding results in that defendant having a diminished sixth amendment right in a second trial. In other words, the State seeks to punish the defendant whose constitutional rights have been violated, a concept that is contrary to both justice and common sense. Finally, it appears that the State's argument is an attempt to introduce a prejudice component into what is admittedly a structural error. *See United States v. Gonzalez-Lopez*, 548 U.S. 140, 150-51 (2006) (prejudice is irrelevant when the constitutional right to self-representation is violated). As the Supreme Court explained "[s]ince the right of self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant, its denial is not amenable to 'harmless error' analysis. The right is either respected or denied; its deprivation cannot be harmless." *McKaskle*, 465 U.S. at 177, fn. 8. To the extent the State's argument can be characterized as "no harm, no foul," it conflicts with the United States Supreme Court's pronouncements on the sanctity of an individual's sixth amendment right to counsel/right to self-representation.

CONCLUSION

For the reasons given above, the circuit court's ruling is

AFFIRMED.

BEATTY and HEARN, JJ., concur. KITTREDGE, J., concurring in result only. TOAL, C.J., dissenting in a separate opinion.

CHIEF JUSTICE TOAL: I respectfully dissent. I would find that Respondent waived his right to insist on counsel by arguing and obtaining a ruling that he was deprived of his right to represent himself in his first trial. In my opinion, such waiver should be assessed on a case-by-case basis; however, the facts of this case warrant a finding of waiver.

Here, Respondent has already received a full and fair trial. However, in his initial trial, Respondent took the position that he desired to represent himself. Pursuant to *Indiana v. Edwards*,[4] the trial judge decided that Respondent was not capable of representing himself because of his lack of understanding of the complexities inherent in a death penalty case. We reversed on appeal, finding the judge erred in applying the *Edwards* competency standard to Respondent's request to waive his right of counsel and proceed pro se. *See State v. Barnes*, 407 S.C. 27, 37, 753 S.E.2d 545, 550 (2014).

Now that he has been granted a new trial on this basis, Respondent is requesting counsel. In my opinion, he cannot have it both ways. Therefore, I would find that Respondent has waived his right to counsel in his second trial because he already had a trial where he was represented by counsel. *See Barnes*, 407 S.C. at 35, 753 S.E.2d at 550 ("A South Carolina criminal defendant has the constitutional right to represent himself under both the federal and state constitutions. A capital defendant, like any other criminal defendant, may waive his right to counsel. So long as the defendant makes his request prior to trial, the only proper inquiry is that mandated by *Faretta* [*v. California*, 422 U.S. 806 (1975)]." (internal footnote omitted) (internal citations omitted)). Respondent's conduct here should be examined for what it is: an effort to manipulate the system and pollute the administration of justice.

For these reasons, I would reinstate Respondent's prior conviction.

[4] 554 U.S. 164 (2008).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Darren Scott, Petitioner.

Appellate Case No. 2013-002247

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Greenville County
G. Edward Welmaker, Circuit Court Judge

Opinion No. 27539
Heard April 22, 2015 – Filed July 1, 2015

CERTIORARI DISMISSED AS IMPROVIDENTLY GRANTED

Chief Appellate Defender Robert Michael Dudek and Appellate Defender David Alexander, both of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson and Assistant Attorney General Mark R. Farthing, both of Columbia, for Respondent.

PER CURIAM: We granted certiorari to review the court of appeals' opinion in *State v. Scott*, 405 S.C. 489, 748 S.E.2d 236 (Ct. App. 2013). We now dismiss the writ as improvidently granted.

DISMISSED AS IMPROVIDENTLY GRANTED.

TOAL, C.J., BEATTY, KITTREDGE and HEARN, JJ., concur.
PLEICONES, J., concurring in result only.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Tynaysha Horton, Petitioner,

v.

City of Columbia, Respondent.

Appellate Case No. 2014-001070

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Richland County
Alison Renee Lee, Circuit Court Judge

Opinion No. 27540
Heard June 17, 2015 – Filed July 1, 2015

CERTIORARI DISMISSED AS IMPROVIDENTLY GRANTED

John S. Nichols and Blake Alexander Hewitt, both of Bluestein Nichols Thompson & Delgado, LLC, James E. Smith, Jr. and Dylan W. Goff, both of James E. Smith, Jr., P.A., all of Columbia, for Petitioner.

Dana M. Thye, of Columbia, for Respondent.

PER CURIAM: We granted certiorari to review the court of appeals' opinion in *Horton v. City of Columbia*, 408 S.C. 27, 757 S.E.2d 537 (2014). We now dismiss the writ of certiorari as improvidently granted and further direct the court of appeals to depublish its opinion and assign the matter an unpublished opinion number. The above opinion shall no longer have any precedential effect.

DISMISSED AS IMPROVIDENTLY GRANTED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Gregg Gerald Henkel, Respondent.

Appellate Case No. 2013-001989

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Greenville County
G. Edward Welmaker, Circuit Court Judge

Opinion No. 27541
Heard June 22, 2015 – Filed July 1, 2015

REVERSED

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

C. Rauch Wise, of Greenwood, for Respondent.

JUSTICE PLEICONES: We granted the State's petition for a writ of certiorari to review the Court of Appeals' opinion that found the trial court should have dismissed respondent's DUI charge because the videotape did not comply with the

statutory requirements for videotaping respondent's conduct at the scene of his DUI arrest. *State v. Henkel*, 404 S.C. 626, 746 S.E.2d 347 (Ct. App. 2013); S.C. Code Ann. § 56–5–2953 (2006). We reverse.

FACTS

A witness observed a vehicle being driven erratically on I-385 and ultimately wrecking. Sergeant Hiott responded to the wreck and organized a search after learning from a witness that the driver had fled the scene. Officers were unable to locate the driver and cleared the scene.

Several hours later, Sergeant Hiott responded to a call indicating an individual had been found walking down I-385. When Sergeant Hiott arrived, he found respondent receiving medical care in an ambulance. Sergeant Hiott read respondent his *Miranda*[1] rights and conducted a horizontal gaze nystagmus (HGN) test while respondent was in the ambulance. Sergeant Hiott initiated his audio recording device by a switch on his belt during the HGN test.[2] After the HGN test, Sergeant Hiott learned respondent was not going to the hospital, so he led respondent from the ambulance to the side of his vehicle and asked him to recite the alphabet. Respondent failed both the HGN and ABC tests.[3] The ABC test and Sergeant Hiott's admonitions while administering the HGN test were captured by audio recording. Neither test was captured by video recording. Sergeant Hiott arrested respondent for DUI, placed respondent in his patrol vehicle, faced the in-car camera towards respondent, and read respondent his *Miranda* rights again.

Respondent sought dismissal of the charge alleging the videotape of his conduct at the scene failed to comply with the statutory videotaping requirements. Subsection 56–5–2953 (A) requires that an individual have his conduct recorded at the incident site, and that the recording must include that individual being advised of

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[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[2] This switch also activated patrol car's video recording camera. This forward facing camera only recorded the highway in front of Sergeant Hiott's vehicle. When Sergeant Hiott arrived at the scene, he pulled his patrol vehicle past all of the other emergency vehicles.

[3] No balancing tests were administered because respondent indicated he had an injured leg.

his *Miranda* rights prior to the administration of field sobriety tests.[4] Subsection (B) provides several exceptions to this videotaping requirement:

> [I]n circumstances including, but not limited to, road blocks, traffic accident investigations, and citizens' arrests, where an arrest has been made and the videotaping equipment has not been activated by blue lights, the failure by the arresting officer to produce the videotapes required by this section is not alone a ground for dismissal. However, as soon as videotaping is practicable in these circumstances, videotaping must begin and conform with the provisions of this section.

S.C. Code Ann. § 56–5–2953(B) (2006).

The trial court denied respondent's motion to dismiss. The trial court recognized this incident was not a typical DUI stop because Sergeant Hiott's investigation began hours after respondent's wreck. Accordingly, the trial court applied subsection (B), and found Sergeant Hiott activated the video and audio recording

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[4] Subsection (A) states:

> (A) A person who violates Section 56–5–2930, 56–5–2933, or 56–5–2945 must have his conduct at the incident site and the breath test site videotaped.
>
> (1) The videotaping at the incident site must:
>
> (a) begin not later than the activation of the officer's blue lights and conclude after the arrest of the person for a violation of Section 56–5–2930, 56–5–2933, or a probable cause determination that the person violated Section 56–5–2945; and
>
> (b) include the person being advised of his *Miranda* rights before any field sobriety tests are administered, if the tests are administered.

We note that § 56–5–2953 was amended effective February 10, 2009. *See* Act No. 201, 2008 S.C. Acts 1682-85. While subsection (A) was amended, the language of subsection (B) was essentially unchanged. Respondent's arrest occurred on January 19, 2008, so the amended statute is not applicable.

as soon as practicable.[5] The trial court found the videotape complied with the requirements of subsection (A) because it captured audio of the HGN and ABC tests.

The Court of Appeals reversed. The majority first looked to subsection (B) because the videotaping equipment was not activated by Sergeant Hiott's blue lights and Sergeant Hiott was conducting a traffic accident investigation. The majority applied the language of subsection (B) which provides two qualifying provisions: "[h]owever, as soon as videotaping is practicable in these circumstances, videotaping must begin and conform with the provisions of this section." S.C. Code Ann. § 56–5–2953(B). The majority found the language which requires "videotaping must begin and conform with the provisions of this section," necessitates compliance with subsection (A). That is, the majority held that once videotaping begins, it must include **all** the requirements of subsection (A). Subsection (A)(1)(b) requires the videotaping "include the person being advised of his *Miranda* rights before any field sobriety tests are administered." Here, the first *Miranda* warning was not captured by audio or video. Accordingly, the majority found dismissal of the charge was required because the videotape did not capture respondent being advised of his *Miranda* rights before the audio recording of the HGN and ABC tests.[6]

Judge Geathers dissented and reasoned that to require strict compliance with subsection (A)(1)(b) would effectively eviscerate the exception in subsection (B). Judge Geathers observed an officer is required to begin recording as soon as practicable, and the "begin and conform" provision in subsection (B) was intended to require compliance with subsection (A), *from that point forward*. Judge Geathers stated "the initiation of the videotaping and conformance must each begin as soon as is practicable," and here, it was not practicable to capture video evidence of respondent receiving his initial *Miranda* warnings or performing the HGN and ABC tests. Accordingly, Judge Geathers would have affirmed respondent's conviction and sentence.

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[5] The trial court's factual finding that videotaping began as soon as practicable is not challenged on appeal.

[6] This same issue will not arise under the amended version of the statute because while it requires both the field sobriety tests and the *Miranda* rights be recorded, it does not require *Miranda* rights be given **before** the field sobriety tests.

ISSUE

Did the videotape of respondent's conduct made at the scene of his traffic accident investigation comply with the videotaping requirements of S.C. Code Ann. § 56–5–2953, as it existed in January 2008?

ANALYSIS

The State contends the Court of Appeals misapplied the exception in subsection (B) because the phrase "as soon as videotaping is practicable" applies to both when the videotaping must "begin" and what it must show in order to "conform" to the requirements of subsection (A). The State argues the effect of the Court of Appeals' opinion requires, in situations such as this, the arresting officer to perform *Miranda* warnings and field sobriety tests anew, in order to capture them on videotape, if they were first performed prior to the moment where videotaping became practicable. We find the language of the exception in subsection (B) ambiguous, and construe the exception to require compliance with subsection (A) need only begin at the time videotaping becomes practicable, and continue until the arrest is complete.

"The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature." *Bryant v. State*, 384 S.C. 525, 529, 683 S.E.2d 280, 282 (2009). However, "[a]ll rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." *State v. Sweat*, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010).

If the statute is ambiguous, courts must construe the terms of the statute. *Lester v. S.C. Workers' Comp. Comm'n*, 334 S.C. 557, 561, 514 S.E.2d 751, 752 (1999). "A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers." *Sloan v. S.C. Bd. of Physical Therapy Exam'rs*, 370 S.C. 452, 468, 636 S.E.2d 598, 606-07 (2006). We have strictly construed § 56–5–2953. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 346, 713 S.E.2d 278, 285 (2011).

We find the language of the exception in subsection (B) ambiguous and construe the exception to require compliance with subsection (A) when it becomes

practicable to begin videotaping. Accordingly, we find Court of Appeals' majority erred, for two reasons, in finding once videotaping begins pursuant to an exception in subsection (B), that full compliance with subsection (A) is necessary. First, the majority opinion violates the legislative intent of the statute. Subsection (A) was intended to capture the interactions and field sobriety testing between the subject and the officer in a typical DUI traffic stop where there are no other witnesses. *Roberts*, 393 S.C. at 347, 713 S.E.2d at 285 (finding the purpose of § 56–5–2953 is to create direct evidence of a DUI arrest). During a traffic stop, the subject, his vehicle, and his interaction with the officer can be videotaped by the car-mounted camera that is initiated by the officer's blue lights. Requiring an officer to repeat *Miranda* and field sobriety tests on camera in a situation contemplated in subsection (B) is not consistent with the legislative intent of the DUI recording statute.

Here, the legislative concerns with videotaping one-on-one traffic stops to capture the interactions between an officer and the subject are not present. *See Sweat*, 386 S.C. at 350, 688 S.E.2d at 575 (holding "language must be construed in light of the intended purpose of the statute."). Numerous officers and emergency personnel observed respondent's conduct at the scene. Officer Hamilton testified he was the first responder that located respondent walking down I-385. Officer Hamilton testified respondent was unsteady on his feet, he was confused, and he was talking with a slurred voice. Officer Terry testified he also responded to the call reporting that respondent was walking down I-385 and he believed respondent was definitely intoxicated. He explained respondent was slurring his speech, his posture was slumped over, and he smelled like alcohol.

Second, the majority opinion fails to consider the statute as a whole. *Mid-State Auto Auction of Lexington, Inc. v. Altman*, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996) ("In ascertaining the intent of the legislature, a court should not focus on any single section or provision but should consider the language of the statute as a whole."). In effect, the majority opinion would render the exceptions for road blocks, traffic accident investigations, and citizens' arrests meaningless, if during an encounter it becomes practicable to begin videotaping. The majority requires an arresting officer to repeat *Miranda* warnings and field sobriety tests if it becomes practicable to begin videotaping; especially when, as occurred here, *Miranda* and a portion of a field sobriety test were conducted prior to the moment when videotaping became practicable. We hold the phrase "as soon as videotaping is practicable in these circumstances," applies to both when videotaping must "begin"

and when videotaping must "conform to the provisions of this section."

Accordingly, we hold when an individual's conduct is videotaped during a situation provided for in subsection (B), compliance with subsection (A) must begin at the time videotaping becomes practicable and continue until the arrest is complete. Subsection (A) of the statute as it existed at the time of respondent's arrest only required respondent's conduct be videotaped and *Miranda* warnings be given prior to field sobriety tests. We find the audio recording of respondent's field sobriety tests adequately captured his conduct at the scene of the traffic accident investigation. Additionally, because respondent was given *Miranda* warnings prior to the time videotaping became practicable, we hold the videotape complies with subsection (A) because the videotape need only begin complying with subsection (A) from the time videotaping became practicable. *See* footnote 5, *supra*.

We reverse the Court of Appeals and reinstate respondent's conviction because the videotape satisfied the requirements of § 56–5–2953 once videotaping became practicable.[7]

CONCLUSION

For the reasons given above, the opinion of the Court of Appeals is

REVERSED.

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

[7] Because we find the videotape complied with § 56–5–2953, we need not address whether the totality of the circumstances exception in subsection (B) applies.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Hazel Jeisel Rivera, Respondent,

v.

Warren Jared Newton, Newton's Farm, J&J Logging, Inc., and Edgar Rivera, Petitioners.

Appellate Case No. 2013-000674

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Georgetown County
Benjamin H. Culbertson, Circuit Court Judge

Opinion No. 27542
Heard April 7, 2015 – Filed July 1, 2015

CERTIORARI DISMISSED AS IMPROVIDENTLY GRANTED

Brandon A. Smith, of King, Love & Smith, LLC, of Greenwood, and John Dwight Hudson, of Hudson Law Offices, of Myrtle Beach, for Petitioners.

Lawrence Sidney Connor, IV, of Kelaher Connell & Connor, PC, of Surfside Beach, for Respondent.

PER CURIAM: We granted certiorari to review the court of appeals' opinion in *Rivera v. Newton*, 401 S.C. 402, 737 S.E.2d 193 (Ct. App. 2012). We now dismiss the writ of certiorari as improvidently granted and further direct the court of appeals to depublish its opinion and assign the matter an unpublished opinion number. The above opinion shall no longer have any precedential effect.

DISMISSED AS IMPROVIDENTLY GRANTED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of the Care and Treatment of Christopher Taft, Petitioner.

Appellate Case No. 2013-002246

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Richland County
Alison Renee Lee, Circuit Court Judge

Opinion No. 27543
Heard April 9, 2015 – Filed July 1, 2015

REVERSED

Appellate Defender LaNelle C. DuRant, of Columbia, for Petitioner.

Attorney General Alan M. Wilson and Senior Assistant Deputy Attorney General Deborah R.J. Shupe, of Columbia, for Respondent.

JUSTICE HEARN: In this civil commitment proceeding, Christopher Taft was found to be a sexually violent predator and was committed to the South Carolina Department of Mental Health. He now argues the trial court should have granted his motion for directed verdict because the State failed to present sufficient evidence under the Sexually Violent Predators Act (the SVP Act) that he was

presently likely to reoffend if not confined. We agree and reverse.

FACTUAL/PROCEDURAL HISTORY

The underlying facts of this case are tragic and disturbing. Taft grew up in a family rife with intergenerational incest. As a young child, he was sexually abused by his aunts, uncles, and a number of older cousins. As Taft went through puberty, he became an abuser himself of his younger siblings.

In June of 2006, at age fifteen, Taft pled guilty to three counts of assault and battery of a high and aggravated nature, stemming from the sexual assault of his sisters, then five and six, and his nine-year-old brother. Taft was committed to the Department of Juvenile Justice (DJJ) for six months, and the family court suspended his sentence upon placement in a sex offender treatment facility and probation after his release. He was admitted to Generations Group Home, a facility for juvenile sex offenders in November 2006. After he was discharged from Generations in June 2007, he was remanded to DJJ until his release in July 2008. Upon his release from DJJ, he was returned home to live with the same siblings he had previously assaulted.

In March of 2010, Taft, then nineteen, pled guilty to two counts of lewd act on a minor after being charged with two counts of CSC for fondling and engaging in intercourse with his eight and nine-year-old sisters. He received concurrent sentences of fifteen years' imprisonment on both charges, suspended to three years' incarceration and five years' probation.

The State brought a civil commitment proceeding pursuant to the SVP Act in July 2010. After an initial probable cause hearing, the court appointed Dr. Rebecca Jackson to evaluate whether Taft met the criteria for civil commitment. After examining Taft, Dr. Jackson issued a report on November 19, 2010, concluding he did not.

The State sought another expert and retained Dr. Gregg Dwyer to evaluate Taft. However, Dr. Dwyer was in the process of relocating from the University of South Carolina School of Medicine to the Medical University of South Carolina and had not yet finished setting up his new lab. Consequently, Dr. Dwyer was unable to complete the evaluation within the sixty-day time limit required by statute. On February 17, 2011, the final day before the time limit expired, the State filed a motion for a continuance, requesting more time to allow Dr. Dwyer to

complete his evaluation.

Taft objected to the request for a continuance, arguing the SVP Act required that a trial be conducted within ninety days of the court-appointed evaluation, and the State's claim that its expert did not have time to set up his new lab did not constitute good cause. Taft contended the State should have realized earlier that Dr. Dwyer could not meet the statutory deadline and obtained another expert. The trial court disagreed and granted the motion. The court directed the evaluation be completed by May 2, 2011, and set the trial for May 23, 2011.

Prior to commencement of the trial, Taft moved to exclude the State's second evaluation because even though it had been timely submitted pursuant to the trial court's latest order, it was authored by both Dr. Dwyer and a Dr. William Mulbry. Dr. Mulbry had been retained due to the continued difficulties with Dr. Dwyer's schedule. Taft argued the report should be excluded because the trial court's order granting the continuance specifically authorized only Dr. Dwyer to evaluate him. The court agreed, and excluded the report. The trial court also excluded any testimony regarding the second evaluation except from Dr. Dwyer, who the State acknowledged was not prepared to testify.

Taft subsequently moved for summary judgment, arguing that absent any evaluation or testimony from Dr. Dwyer, the State failed to provide any evidence that Taft was a sexually violent predator. He argued the only remaining evidence was the report and testimony of Dr. Jackson, who had concluded that Taft was not a sexually violent predator. In response, the State argued that it still had the reports of Drs. Geoffrey McKee and Jack Luadzers who had concluded Taft was a sexually violent predator in connection with his prior criminal investigation in 2009. Taft, however, asserted those two reports were outdated and inadmissible because they were not probative of whether he was *currently* a sexually violent predator. The trial court disagreed with Taft, finding the prior evaluations were admissible; it therefore denied the motion.

At trial, the State offered the testimony of Dr. McKee, who had examined Taft nearly two years earlier in June 2009. Dr. McKee discussed Taft's ability to accept and utilize the treatment he had received, and testified about the previous sexual abuse Taft had himself endured beginning at age five. Dr. McKee opined that based upon his previous evaluation of Taft, he concluded Taft suffered from

"pedophilia, sexually attracted to females and nonexclusive type,"[1] and that based on that prior evaluation, Taft met the statutory definition of a sexually violent predator. He testified that in reaching these conclusions he had conducted several risk assessment tests to measure Taft's likelihood of reoffending; based on Taft's score on these tests, McKee determined he had a moderate to high risk of sexual recidivism.

The court-appointed expert, Dr. Rebecca Jackson, also testified. Unlike Dr. McKee, Dr. Jackson's opinion was based on her evaluation of Taft in this civil commitment proceeding. Dr. Jackson opined Taft suffered from pedophilia, limited to incest, based on her finding that there was no evidence he was aroused by other females or other children. Dr. Jackson testified that she performed one risk assessment test which scored him as having a twenty-five percent chance of reoffending in five years and a thirty-three percent chance of reoffending over a ten-year period. However, she testified that in her professional opinion, Taft did not meet the criteria of the SVP Act, and other measures short of confinement could effectively prevent him from victimizing his sisters again.

At the close of the State's case, Taft moved for directed verdict, arguing the State failed to put forth any evidence that Taft *presently* suffered from a mental abnormality that made him likely to reoffend. The court denied the motion, concluding it was a jury issue. The jury ultimately found Taft was a sexually violent predator. Taft moved for judgment notwithstanding the verdict, again arguing lack of evidence, but the trial court denied the motion.

On appeal, Taft contended the trial court erred in failing to direct a verdict in his favor based on the lack of expert testimony that he was currently a sexually violent predator. The court of appeals affirmed in an unpublished opinion. *In re Taft*, Op. No. 2013-UP-334 (S.C. Ct. App. filed Aug. 7, 2013). This Court granted certiorari.

ISSUE PRESENTED

Did the court of appeals err in affirming the trial court's failure to direct a verdict in favor of Taft?

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[1] Dr. McKee's diagnosis indicated Taft is attracted to children under the age of thirteen, predominately female, and his attraction is nonexclusive so he is interested in children and adults.

LAW/ANALYSIS

Taft argues the court of appeals erred in affirming the trial court's denial of his motion for directed verdict. Specifically, Taft argues the State failed to put forth evidence he satisfied the definition of a sexually violent predator because neither expert testified that he had a present risk of reoffending. We agree.

On appeal from the denial of a defendant's directed verdict motion, the appellate court may only reverse the trial court if there is no evidence to support the trial court's ruling. *In re Matthews*, 345 S.C. 638, 646, 550 S.E.2d 311, 315 (2001). In considering a directed verdict motion, the trial court is concerned with the existence or nonexistence of evidence, not its weight. *State v. Cherry*, 361 S.C. 588, 593, 606 S.E.2d 475, 477–78 (2004). "A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged." *State v. McKnight*, 352 S.C. 635, 642, 576 S.E.2d 168, 171 (2003). Thus, a trial judge should grant a motion for directed verdict when the evidence presented merely raises a suspicion of guilt. *State v. Lollis*, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001). "'Suspicion' implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof." *Id.*

The State bears the burden of proving a person is a sexually violent predator. *In re Care & Treatment of Corley*, 353 S.C. 202, 206, 577 S.E.2d 451, 453 (2003). Pursuant to the SVP Act, a sexually violent predator is defined as a person who: "(a) has been convicted of a sexually violent offense; and (b) suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment." *In re Care & Treatment of Harvey*, 355 S.C. 53, 60, 584 S.E.2d 893, 896 (2003). A person is considered likely to engage in acts of sexual violence if "the person's propensity to commit acts of sexual violence is of such a degree as to pose a menace to the health and safety of others." S.C. Code Ann. § 44-48-30(9) (2002 and Supp. 2014).

It is undisputed Taft was convicted of a sexually violent offense and suffers from a mental abnormality; the sole question is whether the State produced evidence that his mental abnormality is such that he is *presently* likely to reoffend if not confined. The thrust of Taft's argument is that the State's expert testimony established only that he had a risk of reoffending in 2009 when he was evaluated in conjunction with the underlying criminal charges, and not that he had a risk of reoffending in 2011 in the context of this civil commitment proceeding. The State

contends the issue of present risk goes to the weight—not existence—of the evidence, and thus the trial court properly submitted the question to the jury.

We find the State's evidence devoid of proof Taft has a present risk to reoffend. Although the State's expert, Dr. McKee, stated that Taft met the definition of a sexually violent predator in 2009, he consistently refused to render a current diagnosis. Dr. McKee expressly testified that he "[did not] have the personal contact and the personal interview that [he] would need to do to form a current and active opinion" because "to be able to say whether [Taft] is a sexually violent predator now, [he] would have to be able to evaluate [him]." In fact, Dr. McKee admitted on cross-examination that "as of [that day] he could not give an opinion as to whether or not [Taft] is a sexually violent predator."

A civil proceeding to commit an individual, perhaps for life, following service of his criminal sentence, is an extraordinary remedy. Although this Court has repeatedly held the Act constitutional, we decline to construe it in a manner which would lessen the State's burden of proof. The General Assembly has carefully written our SVP Act to lay out exactly what is required to establish that someone is a sexually violent predator; the State must prove, beyond a reasonable doubt that the individual is *presently* a sexually violent predator. *See State v. Gaster*, 349 S.C. 545, 551, 564 S.E.2d 87, 90 (2002) (holding, in the context of an ex post facto challenge, that the SVP Act "permits involuntary confinement based upon the determination the person *currently* suffers from both a mental abnormality or personality disorder and is likely to engage in acts of sexual violence" (emphasis added)). Today, we give force to this requirement.

We decline to accept the State's argument that an expert's evaluation from a prior criminal proceeding is sufficient to prove an individual is a sexually violent predator. If this were so, it would obviate any possibility of rehabilitation during incarceration. Further, it would violate the legislature's statutory scheme, which clearly envisions a new civil commitment proceeding based upon current evidence that the individual suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment. In this case, Dr. Jackson opined that Taft did not meet the definition of a sexually violent predator under the SVP Act and Dr. McKee testified he could not say Taft was presently a sexually violent predator because he had not evaluated him since 2009. Accordingly, we find the State failed to present sufficient evidence that Taft had a current risk of

reoffending which would allow a jury to conclude he was a sexually violent predator.

CONCLUSION

Based on the foregoing, we find the trial court erred in denying Taft's motion for directed verdict. We therefore reverse.[2]

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

[2] Because our holding on this issue is dispositive, we decline to address Taft's additional argument that the court of appeals erred in affirming the trial court's grant of a continuance. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (noting an appellate court need not address remaining issues where one issue is dispositive).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Cynthia Hall and Ronald R. Ballentine, Respondents,

v.

Green Tree Servicing, LLC, f/k/a Green Tree Financial Servicing Corp., Appellant.

Appellate Case No. 2013-001528

Appeal From Richland County
Alison Renee Lee, Circuit Court Judge

Opinion No. 5323
Heard March 4, 2015 – Filed July 1, 2015

REVERSED

Val H. Stieglitz, III and Suzanne G. Grigg, of Columbia; and Stephen Peterson Groves, Sr., of Charleston; all of Nexsen Pruet, LLC, for Appellant.

Brian L. Boger and Phillip Anthony Curiale, of the Law Offices of Brian L. Boger, of Columbia, for Respondents.

WILLIAMS, J.: Green Tree Servicing, LLC (Green Tree) appeals the circuit court's order finding Cynthia Hall and Robert Ballentine's (Respondents) statutory claims against Green Tree for violations of claim and delivery proceedings and notification provisions were not subject to mandatory arbitration. We reverse.

FACTS/PROCEDURAL HISTORY

On March 12, 1999, Hall was granted title to property in Blythewood, South Carolina, by her father, Ballentine. On or around June 10, 1999, Hall completed a license application for a mobile home, listing herself and Ballentine as co-owners. On July 6, 1999, Respondents entered into a credit and sale contract (the Contract) with Green Tree through which the parties agreed Green Tree would finance Respondents' purchase of a mobile home. Under the terms of the Contract, Green Tree agreed to loan Respondents approximately $68,000 with an adjustable interest rate. Hall agreed to serve as the primary obligor with Ballentine as the secondary obligor.

The Contract contained the following arbitration clause:

> **ARBITRATION OF DISPUTES AND WAIVER OF JURY TRIAL**
>
> **a. Dispute Resolution.** Any controversy or claim between or among you and me or our assignees arising out of or relating to this Contract or any agreements or instruments relating to or delivered in connection with this Contract, including any claim based on or arising from an alleged tort, shall, if requested by either you or me, be determined by arbitration, reference, or trial by a judge as provided below.
>
> . . .
>
> **b. Arbitration**. Since this contract touches and concerns interstate commerce, an arbitration under this Contract shall be conducted in accordance with the [Federal Arbitration Act (FAA), 9 U.S.C. §§ 1–307 (2009 & Supp. 2014)], notwithstanding any choice of law provision in this Contract. The Commercial Rules of the American Arbitration Association ("AAA") also shall apply. The arbitrator(s) shall follow the law and shall give effect to statutes of limitation in determining any claim. Any controversy concerning

> whether an issue is arbitrable shall be determined by the arbitrator(s).

At some point after signing the Contract, Respondents defaulted on their monthly payments. On May 16, 2012, Green Tree repossessed the home. Green Tree sold the home on June 11, 2012.

On October 30, 2012, Respondents filed a complaint against Green Tree alleging breach of contract and unjust enrichment. Additionally, Respondents raised claims for violation of claim and delivery proceedings[1] and violation of notification provisions[2] (collectively "the statutory claims"). On November 29, 2012, Green Tree filed a motion to dismiss or, in the alternative, a motion to stay, pending mandatory arbitration.

On June 3, 2013, the circuit court issued an order granting Green Tree's motion to dismiss in part and denying the motion in part. The circuit court found it did not have subject matter jurisdiction over Respondents' claims for breach of contract and unjust enrichment because those claims were subject to mandatory arbitration pursuant to the arbitration clause in the Contract. However, the circuit court found the statutory claims were not subject to mandatory arbitration because the arbitration clause did not contain language indicating Respondents agreed to arbitrate statutory claims. Nevertheless, the circuit court found the arbitration clause was valid and enforceable because Respondents failed to present any evidence supporting their claim that it was unconscionable. This appeal followed.

ISSUE ON APPEAL

Did the circuit court err in finding the statutory claims were not subject to mandatory arbitration?

STANDARD OF REVIEW

"Arbitrability determinations are subject to de novo review." *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 379, 759 S.E.2d 727, 731 (2014) (emphasis omitted) (citing *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012)). The circuit court's determination of whether a claim

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[1] *See* S.C. Code Ann. §§ 15-69-10 through -210 (2005).

[2] *See* S.C. Code Ann. §§ 36-9-611 through -612 (2003).

is subject to arbitration will not be reversed by an appellate court if the finding is reasonably supported by the evidence. *York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 78, 749 S.E.2d 139, 144 (Ct. App. 2013). "[T]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." *Dean*, 408 S.C. at 379, 759 S.E.2d at 731(alteration in original) (quoting *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91 (2000)) (internal quotation marks omitted). "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 109, 739 S.E.2d 209, 213 (2013) (citation and internal quotation marks omitted).

LAW/ANALYSIS

Subject to Mandatory Arbitration

Green Tree argues the circuit court erred in finding the statutory claims are not subject to mandatory arbitration because (1) an arbitration clause does not need specific language stating it covers statutory claims, and (2) the statutory claims arise out of and are related to the Contract.

A. Specific Language for Statutory Claims

Green Tree argues the circuit court erred in finding an arbitration clause must include specific language stating it covers statutory claims. We agree.

In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625-28 (1985), the U.S. Supreme Court rejected the petitioner's argument that an "arbitration clause must specifically mention the statute giving rise to the claims that a party to the clause seeks to arbitrate." In addressing whether claims arising under the Sherman Antitrust Act[3] were subject to arbitration when the arbitration clause did not specifically include statutory claims, the Court found,

> Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue. Nothing, in the meantime, prevents a party from excluding statutory claims from the scope of an agreement to arbitrate.

[3] 15 U.S.C. §§ 1–7 (2009).

Id. at 628. Accordingly, the Court rejected the petitioner's proposed rule of arbitration clause construction and found specific language is not required for a statutory claim to be subject to an arbitration agreement. *Id.*

More recently in *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 673 (2012), the U.S. Supreme Court held a statutory claim arising out of the Credit Repair Organization Act (CROA)[4] was subject to arbitration under the parties' arbitration agreement. In *CompuCredit*, the contested arbitration clause stated, "Any claim, dispute or controversy (whether in contract, tort, or otherwise) at any time arising from or relating to your Account, any transferred balances or this Agreement . . . upon the election of you or us, will be resolved by binding arbitration." *Id.* at 668. The Court noted the FAA "requires courts to enforce agreements to arbitrate [federal statutory claims] according to their terms," "unless the FAA's mandate has been overridden by a contrary congressional command." *Id.* at 669 (citation and internal quotation marks omitted). The Court found the CROA did not contain an overriding congressional command and the language in the parties' arbitration agreement was sufficient to subject the plaintiff's statutory claim to mandatory arbitration. *See id.* at 673.

Likewise, in *Landers*, 402 S.C. at 114, 739 S.E.2d at 216, our supreme court held the plaintiff's statutory claim for illegal proxy solicitation under section 33-7-220(i) of the South Carolina Code (2006) was subject to mandatory arbitration pursuant to the parties' arbitration agreement. In *Landers*, the arbitration agreement stated that "any controversy or claim arising out of [or] relating to this contract, or the breach thereof, shall be settled by binding arbitration." *Id.* at 104, 739 S.E.2d at 211 (emphasis omitted). In determining whether the illegal proxy solicitation claim was subject to the arbitration agreement, our supreme court did not create an exception requiring specific language for an arbitration clause to cover a statutory claim. *Id.* at 113-14, 739 S.E.2d at 215-16. In fact, the court's discussion focused on whether the claim arose out of the agreement, not whether it was a common law or statutory claim. *Id.*

Based upon our review of the applicable precedent, we find no specific language is necessary for an arbitration clause to encompass statutory claims. Therefore, in the instant case, the circuit court erred in finding the statutory claims were not subject to mandatory arbitration because the arbitration clause did not specifically state Respondents agreed to arbitrate statutory claims. *See, e.g.*, *Mitsubishi*, 473 U.S. at

[4] 15 U.S.C. §§ 1679-79j (2009).

628 (holding no specific language was required for a statutory claim to be subject to an arbitration agreement); *CompuCredit*, 132 S. Ct. at 673 (finding an arbitration clause without express language stating it encompassed statutory claims covered the plaintiff's statutory claims); *Landers*, 402 S.C. at 113-14, 739 S.E.2d at 215-16 (failing to find the statutory nature of a claim was a distinguishing factor in determining whether a claim was subject to arbitration).

B. "Arising out of or Relating to" the Contract

Next, Green Tree argues the circuit court erred in concluding the statutory claims neither arose out of nor were related to the Contract. We agree.

"Generally, any arbitration agreement affecting interstate commerce . . . is subject to the FAA." *Landers*, 402 S.C. at 108, 739 S.E.2d at 213.

> [T]he first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute. The court is to make this determination by applying the federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the [FAA].

Mitsubishi, 473 U.S. at 626 (citation and internal quotation marks omitted). "[S]tatutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991).

"Whether a party has agreed to arbitrate an issue is a matter of contract interpretation[,] and [a] party cannot be required to submit to arbitration any dispute which he has not agreed . . . to submit." *Landers*, 402 S.C. at 108, 739 S.E.2d at 213 (alteration in original) (internal quotation marks and citation omitted). "There is a strong presumption in favor of the validity of arbitration agreements because of the strong policy favoring arbitration." *Cape Romain Contractors, Inc. v. Wando E., LLC*, 405 S.C. 115, 125, 747 S.E.2d 461, 466 (2013) (quoting *Bradley*, 398 S.C. at 455, 730 S.E.2d at 316) (internal quotation marks omitted).

In the instant case, the Contract's arbitration clause contains the following language:

> Any controversy or claim between or among you and me . . . arising out of or relating to this Contract or any agreements or instruments relating to or delivered in connection with this Contract, including any claim based on or arising from an alleged tort, shall, if requested by either you or me, be determined by arbitration, reference, or trial by a judge . . . .

First, we find Respondents' claim for violation of the claim and delivery proceedings statute is within the scope of the Contract's arbitration clause. In raising this claim, Respondents alleged Green Tree "failed to comply with the requisite formalities in undertaking an action in claim and delivery and, as such, [Respondents] were entitled to have remained in possession of the [home] until the appropriate procedures were followed." This claim is within the scope of the arbitration clause because Green Tree's actions to recover the property as a result of Respondents' default created a controversy arising out of the Contract. Additionally, as our supreme court has noted, any doubt as to whether this claim is subject to arbitration must be resolved in favor of arbitration. *See Landers*, 402 S.C. at 109, 739 S.E.2d at 213 ("It is the policy of this state and federal law to favor arbitration and any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." (citation and internal quotation marks omitted)). Accordingly, we find Respondents' claim for violation of claim and delivery proceedings is within the scope of the Contract's arbitration clause and is subject to mandatory arbitration.

Next, we find Respondents' claim for violation of the statutory notification provisions is subject to mandatory arbitration. With regard to this claim, Respondents assert Green Tree failed to provide them with the notice required by statute to properly retake possession of the property. We find this claim arises out of the Contract because Green Tree reclaimed the property due to Respondents' failure to comply with the terms of the Contract. Accordingly, Respondents' claim for violation of the statutory notification provisions is within the scope of the Contract's arbitration clause and subject to mandatory arbitration.[5]

[5] In response to Green Tree's arguments, Respondents argued in their brief that the arbitration clause was unconscionable; however, Respondents abandoned this issue during oral argument. Accordingly, we decline to address this issue. *See Folkens*

CONCLUSION

Based on the foregoing, we reverse the circuit court's finding that the statutory claims were not subject to mandatory arbitration.

REVERSED.

FEW, C.J., and HUFF, J., concur.

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v. Hunt, 290 S.C. 194, 205, 348 S.E.2d 839, 845 (Ct. App. 1986) (declining to address an issue that was abandoned during oral argument).