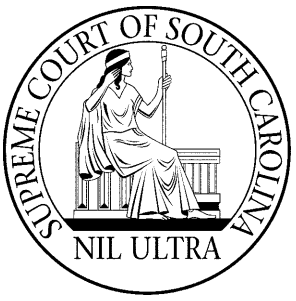

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 27
July 19, 2017
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

PETITIONS - UNITED STATES SUPREME COURT

EXTENSION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI IN THE UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

27720 - Paula Fullbright, et al. v. Spinnaker Resorts, Inc.
and
Paul Chenard v. Hilton Head Island Development Pending

The South Carolina Court of Appeals

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

PETITIONS FOR REHEARING

5488-Linda Gibson v. Ameris Bank	Pending
5489-State v. Eric T. Spears	Pending
5490-Anderson Cty. v. Joey Preston	Pending
5491-Jenna Foran v. Murphy USA	Pending
5492-State v. Demario Monte Thompson	Pending
2017-UP-158-State v. Rion M. Rutledge	Denied 07/12/17
2017-UP-192-David Johnson v. Mark Keel	Denied 07/12/17
2017-UP-193-John Gregory v. Mark Keel	Denied 07/12/17
2017-UP-194-Mansy McNeil v. Mark Keel	Denied 07/12/17
2017-UP-195-Edward Green v. Mark Keel	Denied 07/12/17
2017-UP-196-SCDSS v. Carol Barzilay	Denied 07/12/17
2017-UP-201-State v. Jarret Graddick	Pending
2017-UP-208-Estate of Willie Weekley v. L. C. Weekley	Pending
2017-UP-215-Sandy Chamblee v. Anderson Cty. Fire Dep't	Pending
2017-UP-217-Clarence B. Jenkins, Jr. v. SCDEW	Pending
2017-UP-225-State v. Joseph T. Rowland	Pending
2017-UP-227-Arrowpoint Capital Corp. v. SC Second Injury Fund (3)	Pending
2017-UP-228-Arrowpoint Capital Corp. v. SC Second Injury Fund (2)	Pending
2017-UP-229-Arrowpoint Capital Corp. v. SC Second Injury Fund	Pending
2017-UP-234-Suntrust v. Mark Ostendorff	Pending
2017-UP-233-Martha Perez v. Alice Manufacturing	Pending
2017-UP-236-State v. Dennis E. Hoover	Pending

2017-UP-237-State v. Shane Adam Burdette	Pending
2017-UP-241-Robert Lester, Jr. v. Marco and Timea Sanchez	Pending
2017-UP-243-Clifford Holley v. Dan-Sa	Pending
2017-UP-245-State v. Dameon L. Thompson	Pending
2017-UP-249-Charles Taylor v. Stop "N" Save	Pending
2017-UP-258-State v. Dennis Cervantes-Pavon	Pending
2017-UP-261-Bank of America v. Shawn Bethea	Pending
2017-UP-262-In the matter of Carl M. Asquith	Pending
2017-UP-264-Jerry Hogan v. Corder and Sons, Inc.	Pending
2017-UP-265-Genesie Fulton v. L. William Goldstein	Pending

PETITIONS-SOUTH CAROLINA SUPREME COURT

5253-Sierra Club v. Chem-Nuclear	Pending
5326-Denise Wright v. PRG	Pending
5328-Matthew McAlhaney v. Richard McElveen	Pending
5355-State v. Lamar Sequan Brown	Pending
5368-SCDOT v. David Powell	Pending
5374-David M. Repko v. County of Georgetown	Pending
5382-State v. Marc A. Palmer	Pending
5387-Richard Wilson v. Laura B. Willis	Pending
5388-Vivian Atkins v. James R. Wilson, Jr.	Pending
5391-Paggy D. Conits v. Spiro E. Conits	Pending

5393-SC Ins. Reserve Fund v. East Richland	Pending
5398-Claude W. Graham v. Town of Latta	Pending
5403-Virginia Marshall v. Kenneth Dodds	Pending
5406-Charles Gary v. Hattie M. Askew	Pending
5411-John Doe v. City of Duncan	Pending
5414-In the matter of the estate of Marion M. Kay	Pending
5415-Timothy McMahan v. SC Department of Education	Pending
5416-Allen Patterson v. Herb Witter	Pending
5417-Meredith Huffman v. Sunshine Recycling	Pending
5418-Gary G. Harris v. Tietex International, Ltd.	Pending
5419-Arkay, LLC v. City of Charleston	Pending
5420-Darryl Frierson v. State	Pending
5421-Coastal Federal Credit v. Angel Latoria Brown	Pending
5424-Janette Buchanan v. S.C. Property and Casualty Ins.	Pending
5428-State v. Roy L. Jones	Pending
5430-Wilfred Allen Woods v. Etta Catherine Woods	Pending
5431-Lori Stoney v. Richard Stoney	Pending
5432-Daniel Dorn v. Paul Cohen	Pending
5433-The Winthrop University Trustees v. Pickens Roofing	Pending
5434-The Callawassie Island v. Ronnie Dennis	Pending
5435-State v. Joshua W. Porch	Pending
5436-Lynne Vicary v. Town of Awendaw	Pending

5438-The Gates at Williams-Brice v. DDC Construction Inc.	Pending
5441-State v. David A. Land	Pending
5442-Otha Delaney v. First Financial	Pending
5443-State v. Steven Hoss Walters, Jr.	Pending
5444-Rose Electric v. Cooler Erectors of Atlanta	Pending
5446-State v. Rickey Mazique	Pending
5447-Rent-A-Center v. SCDOR	Pending
5448-Shanna Kranchick v. State	Pending
5449-A. Marion Stone III v. Susan B. Thompson	Pending
5450-Tzvetelina Miteva v. Nicholas Robinson	Pending
5451-Pee Dee Health v. Estate of Hugh Thompson, III (3)	Pending
5452-Frank Gordon, Jr. v. Donald W. Lancaster	Pending
5453-Karen Forman v. SCDLLLR (3)	Pending
5454-Todd Olds v. City of Goose Creek	Pending
5455-William Montgomery v. Spartanburg County	Pending
5456-State v. Devin Johnson	Pending
5458-William Turner v. SAIIA Construction	Pending
5460-Frank Mead, III, v. Beaufort Cty. Assessor	Pending
5462-In the matter of the Estate of Eris Singletary Smith	Pending
5464-Anna D. Wilson v. SCDMV	Pending
5467-Belle Hall Plantation v. John Murray (David Keys)	Pending

5469-First Citizens Bank v. Park at Durbin Creek	Pending
5471-Joshua Fay v. Total Quality Logistics	Pending
5473-State v. Alexander Carmichael Huckabee, III	Pending
5475-Sara Y. Wilson v. Charleston Co. School District	Pending
2015-UP-330-Bigford Enterprises v. D. C. Development	Pending
2015-UP-466-State v. Harold Cartwright, III	Pending
2015-UP-547-Evalena Catoe v. The City of Columbia	Pending
2016-UP-052-Randall Green v. Wayne Bauerle	Pending
2016-UP-056-Gwendolyn Sellers v. Cleveland Sellers, Jr.	Pending
2016-UP-068-State v. Marcus Bailey	Pending
2016-UP-109-Brook Waddle v. SCDHHS	Pending
2016-UP-132-Willis Weary v. State	Pending
2016-UP-135-State v. Ernest M. Allen	Pending
2016-UP-137-Glenda R. Couram v. Christopher Hooker	Pending
2016-UP-138-McGuinn Construction v. Saul Espino	Pending
2016-UP-139-Hector Fragosa v. Kade Construction	Pending
2016-UP-141-Plantation Federal v. J. Charles Gray	Pending
2016-UP-158-Raymond Carter v. Donnie Myers	Pending
2016-UP-184-D&C Builders v. Richard Buckley	Pending
2016-UP-199-Ryan Powell v. Amy Boheler	Pending
2016-UP-206-State v. Devatee Tymar Clinton	Pending
2016-UP-261-Samuel T. Brick v. Richland Cty. Planning Comm'n	Pending

2016-UP-274-Bayview Loan Servicing v. Scott Schledwitz	Pending
2016-UP-276-Hubert Bethune v. Waffle House	Pending
2016-UP-280-Juan Ramirez v. Progressive Northern	Pending
2016-UP-315-State v. Marco S. Sanders	Pending
2016-UP-320-State v. Emmanual M. Rodriguez	Pending
2016-UP-325-National Bank of SC v. Thaddeus F. Segars	Pending
2016-UP-330-State v. William T. Calvert	Pending
2016-UP-338-HHH Ltd. of Greenville v. Randall S. Hiller	Pending
2016-UP-340-State v. James Richard Bartee, Jr.	Pending
2016-UP-351-Tipperary Sales v. S.C. Dep't of Transp.	Pending
2016-UP-366-In Re: Estate of Valerie D'Agostino	Pending
2016-UP-367-State v. Christopher D. Campbell	Pending
2016-UP-368-Overland, Inc. v. Lara Nance	Pending
2016-UP-382-Darrell L. Goss v. State	Pending
2016-UP-392-Joshua Cramer v. SCDC (2)	Pending
2016-UP-395-Darrell Efird v. The State	Pending
2016-UP-402-Coves Darden v. Francisco Ibanez	Pending
2016-UP-403-State v. Arthur Moseley	Pending
2016-UP-404-George Glassmeyer v. City of Columbia (2)	Pending
2016-UP-406-State v. Darryl Wayne Moran	Pending
2016-UP-408-Rebecca Jackson v. OSI Restaurant Partners	Pending

2016-UP-411-State v. Jimmy Turner	Pending
2016-UP-413-SCDSS v. Salisha Hemphill	Pending
2016-UP-421-Mark Ostendorff v. School District of Pickens	Pending
2016-UP-424-State v. Daniel Martinez Herrera	Pending
2016-UP-430-State v. Thomas James	Pending
2016-UP-431-Benjamin Henderson v. Patricia Greer	Pending
2016-UP-436-State v. Keith D. Tate	Pending
2016-UP-447-State v. Donte S. Brown	Pending
2016-UP-448-State v. Corey J. Williams	Pending
2016-UP-452-Paula Rose v. Charles Homer Rose, II	Pending
2016-UP-454-Gene Gibbs v. Jill R. Gibbs	Pending
2016-UP-461-Melvin T. Roberts v. Mark Keel	Pending
2016-UP-473-State v. James K. Bethel, Jr.	Pending
2016-UP-475-Melissa Spalt v. SCDMV	Pending
2016-UP-479-State v. Abdul Furquan	Pending
2016-UP-485-Johnson Koola v. Cambridge Two (2)	Pending
2016-UP-486-State v. Kathy Revan	Pending
2016-UP-487-Mare Baracco v. Beaufort Cty.	Pending
2016-UP-489-State v. Johnny J. Boyd	Pending
2016-UP-515-Tommy S. Adams v. The State	Pending
2016-UP-519-Live Oak Village HOA v. Thomas Morris	Pending
2016-UP-527-Grange S. Lucas v. Karen A. Sickinger	Pending

2016-UP-528-Betty Fisher v. Bessie Huckabee and Lisa Fisher v. Betty Huckabee — Pending

2016-UP-529-Kimberly Walker v. Sunbelt — Pending

2017-UP-002-Woodruff Road v. SC Greenville Hwy. 146 — Pending

2017-UP-009-In the matter of Daryl Snow — Pending

2017-UP-013-Amisub of South Carolina, Inc. v. SCDHEC — Pending

2017-UP-015-State v. Jalann Williams — Pending

2017-UP-017-State v. Quartis Hemingway — Pending

2017-UP-021-State v. Wayne Polite — Pending

2017-UP-022-Kenneth W. Signor v. Mark Keel — Pending

2017-UP-025-State v. David Glover — Pending

2017-UP-026-State v. Michael E. Williams — Pending

2017-UP-028-State v. Demetrice R. James — Pending

2017-UP-029-State v. Robert D. Hughes — Pending

2017-UP-031-FV-I, Inc. v. Bryon J. Dolan — Pending

2017-UP-037-State v. Curtis Brent Gorny — Pending

2017-UP-040-Jeffrey Kennedy v. Richland Sch. Dist. Two — Pending

2017-UP-043-Ex parte: Mickey Ray Carter, Jr. and Nila Collean Carter — Pending

2017-UP-046-Wells Fargo v. Delores Prescott — Pending

2017-UP-054-Bernard McFadden v. SCDC — Pending

2017-UP-059-Gernaris Hamilton v. Henry Scott — Pending

2017-UP-065-State v. Stephon Robinson	Pending
2017-UP-068-rick Still v. SCDHEC	Pending
2017-UP-070-State v. Calvert Myers	Pending
2017-UP-071-State v. Ralph Martin	Pending
2017-UP-082-Kenneth Green v. SCDPPPS	Pending
2017-UP-096-Robert Wilkes v. Town of Pawleys Island	Pending
2017-UP-103-State v. Jujuan A. Habersham	Pending
2017-UP-108-State v. Michael Gentile	Pending
2017-UP-117-Suzanne Hackett v. Alejandra Hurdle Harless	Pending
2017-UP-118-Skydive Myrtle Beach, Inc. v. Horry County	Pending
2017-UP-124-Rudy Almazan v. Henson & Associates	Pending
2017-UP-137-In the matter of Calvin J. Miller	Pending
2017-UP-139-State v. Jeffrey Lynn Chronister	Pending
2017-UP-145-Cory McMillan v. UCI Medical Affiliates	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Kareem Harry, Petitioner.

Appellate Case No. 2015-002161

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Horry County
Steven H. John, Circuit Court Judge

Opinion No. 27724
Heard November 30, 2016 – Filed July 19, 2017

AFFIRMED

Meliah Bowers Jefferson, of Wyche, P.A., of Greenville, and Chief Appellate Defender Robert Michael Dudek, of Columbia, for Petitioner.

Attorney General Alan M. Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General J. Anthony Mabry, all of

Columbia; and Solicitor Jimmy A. Richardson, II, of Conway, for Respondent.

JUSTICE KITTREDGE: Petitioner Kareem Harry was convicted of murder, under the theory that the "hand of one is the hand of all," for his role in a failed attempt to recover a television. The court of appeals affirmed, holding the trial court properly denied Petitioner's motion for a directed verdict. *State v. Harry*, 413 S.C. 534, 776 S.E.2d 387 (Ct. App. 2015). We issued a writ of certiorari to review the court of appeals' decision and now affirm.

I.

This tragic story culminates with an attempt by Petitioner and his enlisted cohorts to retrieve Petitioner's forty-seven-inch plasma-screen television from Kevin Bowens (Victim). Victim was shot and killed on his property by one of Petitioner's accomplices during the confrontation. The State contends the evidence demonstrates that Petitioner intended to retrieve his television by any means necessary, including the use of force. According to the State, Victim's death was therefore a natural and foreseeable consequence of Petitioner's plan to retrieve his television and, under the theory of accomplice liability that says the hand of one is the hand of all, Petitioner is guilty of murder. Petitioner counters that he only wanted to peacefully reclaim his television, he had no idea his accomplice was armed, and he actually tried to be a calming influence when the situation became tense. In light of the differing inferences that may be drawn from the evidence, we emphasize that because we are reviewing a directed verdict motion, we are required to "'view[] the evidence and all reasonable inferences in the light most favorable to the State.'" *State v. Bennett*, 415 S.C. 232, 235, 781 S.E.2d 352, 353 (2016) (quoting *State v. Butler*, 407 S.C. 376, 381, 755 S.E.2d 457, 460 (2014)).

A.

The chain of events leading to Victim's death began about nine months before the murder. During this time, Petitioner had an abusive, on-again, off-again romantic relationship with Ashley Bledsoe, with whom he temporarily resided in Surfside Beach. The weekend before the shooting, police responded to Bledsoe's residence to investigate allegations that Petitioner had assaulted Bledsoe during an argument. Petitioner fled through a bedroom window, leaving behind a coat in which the police found cocaine. Petitioner also left behind personal belongings, including his

television.

The day after her argument with Petitioner, Bledsoe met Victim, a drug dealer who lived in Murrells Inlet, and the two spent the night together at Bledsoe's apartment. The following morning, Bledsoe agreed to give Petitioner's television to Victim in exchange for $400. Before leaving Bledsoe's apartment, Victim loaded the television into the backseat of his car, promising to return shortly with the cash. Victim did not return and never paid Bledsoe for the television.

By all accounts the television was lightweight. Victim was able to lift it, load it into the backseat of his sedan, and unload it at his home without any assistance. Victim's girlfriend also testified that the television was not heavy, it did not require more than one person to lift, and she had been able to move it by herself. As for how Victim had obtained the television, he explained to his girlfriend that "he had bought it off of somebody. . . . [H]e had given them a little bit of money for it and that he had bought an ounce of weed at a really good price to make up the difference and that he still owed a little bit of money on it . . . ."

At some point, Bledsoe's landlord learned police had found drugs in Bledsoe's apartment and terminated the lease. Bledsoe was required to vacate the premises and remove all belongings. Bledsoe relayed the fact of the lease termination to Petitioner, who had personal property in the apartment. Petitioner asked Sage McPhail, a drug customer of his who owned a pickup truck, to help move Petitioner's belongings from Bledsoe's apartment.[1] The day before the shooting, Bledsoe met McPhail at her apartment and gave McPhail all of Petitioner's belongings—except, of course, for Petitioner's television, which she had sold to Victim.[2]

When Petitioner discovered his television was not among the items recovered from Bledsoe's apartment, he contacted Bledsoe and demanded that she return the television or pay him for it. Frightened that Petitioner might become violent toward her if he learned of her romantic encounter with Victim, Bledsoe lied and told Petitioner she had sold the television to a female friend for $400. Petitioner

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[1] McPhail occasionally performed odd jobs for Petitioner in exchange for cocaine or marijuana.

[2] There was also evidence Victim took drugs from Bledsoe's apartment that belonged to Petitioner.

reiterated his demand that Bledsoe return the television or give him the $400.

The following day, Petitioner called and texted Bledsoe on ten separate occasions to inquire about the television, but Bledsoe never answered or responded. Petitioner thereafter sent Bledsoe a text message stating, "I'm going to call the police if you don't give me my TV." Desperate to appease Petitioner, Bledsoe texted Victim numerous times asking for the money and explaining that the television belonged to a friend, who was demanding payment and threatening to call the police. At some point, Victim texted Bledsoe, "Stop letting that police shit scare you," but eventually Victim stopped responding to Bledsoe's text messages and telephone calls. Unable to get any response from Victim, Bledsoe told Petitioner the truth about the person to whom she sold the television and provided Petitioner with Victim's telephone number.

Around 7:00 p.m. on the evening of the shooting, Bledsoe was running errands with her roommate in Murrells Inlet when she received a call from Petitioner, who demanded that she pull over immediately so he could pick her up and she could show Petitioner where Victim lived. Petitioner's plan, as noted, was to retrieve either the television or the $400 Victim promised to pay for it.[3] Bledsoe's roommate, who was driving, pulled over in the parking lot of Waccamaw Hospital, located just 2.9 miles from Victim's home, and a few moments later, Petitioner, who was driving McPhail's truck, picked up Bledsoe.[4] Instead of proceeding directly to Victim's nearby home, Petitioner instead drove 16.3 miles to the Myrtle Beach home of his friends, and fellow drug dealers, Tommy Byrne and Saire Castro.

Upon arriving at Byrne and Castro's apartment, Petitioner went inside while Bledsoe waited in the car. When Petitioner entered the home, Byrne and Castro were at the kitchen table, while Byrne's father was cooking dinner. Petitioner summoned Castro into the living room and the two had a five- to eight-minute conversation, which Byrne could not overhear because he remained seated at the

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[3] Petitioner apparently had a probation meeting the following morning and was in need of funds to pay probation-related fees.

[4] Earlier in the day, McPhail agreed to perform some minor automotive repairs on Petitioner's SUV in exchange for cocaine; since McPhail had to take the SUV to his uncle's shop in Loris (forty-five minutes away) to perform the work, McPhail left his truck for Petitioner to drive in the meantime.

kitchen table.[5] Castro was told that, along with Petitioner's television, Victim had also stolen some drugs belonging to Petitioner that Petitioner had stored in Bledsoe's apartment (of which it appears Bledsoe was unaware). Immediately following the conversation with Petitioner, Castro returned to the kitchen, asked Byrne if he wanted to "take a ride," and retrieved his (Castro's) handgun from above a kitchen cabinet. Although there is no direct evidence that Petitioner or Byrne saw Castro retrieve his handgun, they both saw him go into the kitchen, and the evidence established it was well-known that Castro carried a gun.[6]

Petitioner then returned to the pickup truck where Bledsoe was waiting, and Byrne and Castro got into Castro's sedan, with Castro behind the wheel. With Petitioner leading the way in the pickup, the two vehicles caravanned 11.6 miles to Victim's home in the Burgess area of Murrells Inlet. During the car ride, Castro informed Byrne the purpose of the ride was "to go collect a TV."

At some point prior to arriving at Victim's home, Petitioner sent Victim a text message stating, "Meet me in Burgess." Several minutes later, Petitioner called Victim's cell phone and the two had a brief conversation during which Petitioner made clear his intention to retrieve the television. According to Victim's girlfriend, after receiving Petitioner's telephone call Victim became agitated and was unable to finish eating dinner. Instead, Victim got up from the dinner table and went into the master bedroom.

A few minutes later, Victim's girlfriend looked out the window and saw Petitioner's caravan arriving at the couple's home. She immediately rushed to the master bedroom to tell Victim that two vehicles had pulled into the yard. Victim tucked a handgun in the front of his pants and told his girlfriend he "would take care of it." Victim walked out into the driveway, leaned up against the side of his parked car, and stood with his arms crossed and the gun visible in his waistband.

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[5] Byrne also testified that earlier that evening he had taken several Xanax pills (for which he did not have a prescription), and on a scale of one to ten, he was "about a seven" in terms of his level of intoxication.

[6] Several weeks prior to the shooting, Castro was arrested and charged with unlawful conduct toward a child when police found two semi-automatic guns and drugs in the car in which he was traveling with his child. Petitioner admitted he was aware that Castro sold drugs and that just a few weeks prior to the shooting Castro had been arrested with guns and drugs.

Although Victim was visibly armed, Petitioner and his cohorts exited their vehicles and formed a semi-circle around Victim. Witnesses could not make out precisely what was said, but the ensuing conversation was loud and confrontational.

By all accounts, Petitioner inquired several times about the television, and Victim stated he had neither the television nor any money to give Petitioner. At some point, Bledsoe got out of the truck and confronted Victim about "stealing" the television. After it became obvious that Petitioner was not going to obtain either his television or any money, Petitioner instructed Bledsoe to get back into the truck and "gave [Victim a] head nod." Castro then pulled out his gun and shot Victim three times.

Immediately after the shooting, Petitioner jumped into the passenger side of the truck, pushed Bledsoe into the driver's seat, and instructed her to drive away. Approximately one mile from the scene of the shooting, police spotted the fleeing caravan, and after a brief chase, Bledsoe pulled over and surrendered. However, before she could fully stop, Petitioner exited the vehicle through the passenger door and fled on foot to the home of a friend who lived nearby. Petitioner used the friend's telephone to call his brother for a ride to Petitioner's ex-girlfriend's house in Socastee.

Meanwhile, McPhail had completed the repairs to Petitioner's SUV and had driven to Petitioner's ex-girlfriend's home to return the SUV and retrieve his pickup. When he got there, his truck was gone and no one was home, so he leaned the seat back and fell asleep while waiting for Petitioner to arrive with the pickup. McPhail awoke to the sound of Petitioner knocking on the SUV's window, and Petitioner informed McPhail that "the cops got your truck." Petitioner instructed his brother to drop McPhail off at Byrne and Castro's apartment so McPhail could give Castro a ride out of town. Before leaving, Petitioner instructed McPhail that "you ain't seen me."

B.

It is undisputed that Castro shot Victim, but because Petitioner was the only one who had any motive to confront Victim, the State theorized that he was the mastermind behind the incident. Thus, Petitioner, Castro, Byrne, and Bledsoe were all charged with murder under the theory that the hand of one is the hand of all.[7] Castro pled guilty to voluntary manslaughter and was sentenced to thirty

[7] McPhail was charged with accessory after the fact to murder.

years in prison, and Byrne and Bledsoe agreed to testify on behalf of the State at Petitioner's trial.

At the close of the State's case, Petitioner moved for a directed verdict, arguing the State produced no evidence of a common design to undertake any illegal purpose. After the trial court denied Petitioner's motion, Castro and Petitioner both testified in Petitioner's defense; however, their accounts of the incident differed from each other and from the other witnesses in numerous key aspects. Petitioner was convicted by the jury and sentenced to thirty-one years in prison. The court of appeals affirmed. *Harry*, 413 S.C. at 542–43, 776 S.E.2d at 392.

II.

Petitioner contends the court of appeals erred in affirming the denial of his directed verdict motion, arguing that the State failed to produce substantial circumstantial evidence that Petitioner planned to confront or assault Victim, or otherwise intended any unlawful action that would foreseeably result in a violent confrontation. We disagree.

A.

In reviewing the denial of a motion for a directed verdict, the Court must view the evidence in a light most favorable to the State. *E.g.*, *Bennett*, 415 S.C. at 235, 781 S.E.2d at 353 (citation omitted). "The Court's review is limited to considering the existence or nonexistence of evidence, not its weight." *Id.* "When the evidence submitted raises a mere suspicion that the accused is guilty, a directed verdict should be granted because suspicion implies a belief of guilt based on facts or circumstances which do not amount to proof." *Id*. at 236, 781 S.E.2d at 353. "Nevertheless," in reviewing the denial of a directed verdict motion, we are "not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis." *Id.* at 236, 781 S.E.2d at 354.

Indeed, this Court emphasized in *Bennett* that "the lens through which a court considers circumstantial evidence when ruling on a directed verdict motion is distinct from the analysis performed by the jury." *Id.* (citing *State v. Littlejohn*, 228 S.C. 324, 89 S.E.2d 924 (1955)). "Within the jury's inquiry, 'it is necessary that every circumstance relied upon by the state be proven beyond a reasonable doubt . . . .'" *Id.* (quoting *Littlejohn*, 228 S.C. at 328, 89 S.E.2d at 926).

> However, when ruling on a directed verdict motion, the trial court views the evidence in the light most favorable to the State and must

> submit the case to the jury if there is "any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced."

Id. at 236–37, 781 S.E.2d at 354 (quoting *Littlejohn*, 228 S.C. at 329, 89 S.E.2d at 926). "Therefore, although the *jury* must consider alternative hypotheses, the *court* must concern itself solely with the existence or non-existence of evidence from which a jury could reasonably infer guilt." *Id.* at 237, 781 S.E.2d at 354.

B.

"'Under the hand of one is the hand of all theory [of accomplice liability], one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose.'" *State v. Thompson*, 374 S.C. 257, 261–62, 647 S.E.2d 702, 704–05 (Ct. App. 2007) (alteration in original) (quoting *State v. Condrey*, 349 S.C. 184, 194, 562 S.E.2d 320, 324 (Ct. App. 2002)) (internal quotation marks omitted). "Mere presence and prior knowledge that a crime was going to be committed, without more, is insufficient to constitute guilt." *Id.* at 262, 647 S.E.2d at 705. "However, 'presence at the scene of a crime by pre-arrangement to aid, encourage, or abet in the perpetration of the crime constitutes guilt as a [principal].'" *Id.* (alteration in original) (quoting *State v. Hill*, 268 S.C. 390, 395–96, 234 S.E.2d 219, 221 (1977)).

III.

Therefore, to withstand Petitioner's directed verdict motion in the trial of this case, the State was required to produce evidence of Petitioner's presence at the scene of the shooting as a result of a prior arranged plan to undertake an illegal act, if necessary, to retrieve the television. We agree with the court of appeals that the State presented sufficient evidence to survive the directed verdict motion. The excellent opinion of the court of appeals analyzed the evidence appropriately in light of the applicable standard of review. The dissent cites the proper standard of review, but rejects it in application, preferring instead to recast the evidence in a light favorable to Petitioner.

The State presented evidence that Petitioner had a history of violence and that Victim—who, like Petitioner, was a drug dealer—had not only slept with Petitioner's on-again, off-again girlfriend, but had also taken a television and drugs belonging to Petitioner without paying for them. The State further produced

evidence that just before the shooting, instead of proceeding the 2.9 miles to Victim's house immediately upon picking up Bledsoe, Petitioner instead traveled 16.3 miles to recruit Castro, who was known to carry a gun, and Byrne to accompany him as backup when he confronted Victim,[8] despite the fact that the television was not so large or heavy that it required more than one person to carry.

After Petitioner showed up unannounced at Byrne and Castro's home and conferred with Castro, Castro immediately armed himself and asked Byrne to join them. Petitioner then led the caravan to Victim's house. Prior to arriving at Victim's home, Petitioner texted and called Victim to the point that Victim was too upset to finish eating dinner. Once the caravan arrived at Victim's home, Petitioner, Castro, and Byrne continued with Petitioner's mission, notwithstanding the fact they could tell Victim was armed. Further, even though Petitioner knew both sides of this confrontation were armed, his tone toward Victim was loud and heated, and according to Castro's own testimony, Petitioner "gave . . . [a] head nod" just prior to Castro firing the fatal shots. Moreover, Castro and Petitioner left their vehicles running as they confronted Victim. Following the shooting, Petitioner shoved Bledsoe into the driver's seat and forced her to drive the getaway vehicle, from which Petitioner fled on foot after it was stopped by the police.

Even without considering Petitioner's flight,[9] the evidence yielded a reasonable series of inferences consistent with the State's theory—that Petitioner devised a plan to retrieve, by force if necessary, his television from Victim, a known drug dealer whom Petitioner and his accomplices knew was armed before exiting their vehicles. The State therefore presented sufficient evidence that Petitioner was engaged in a scheme to commit an illegal act, the result of which was Victim's shooting death, and the trial court properly denied Petitioner's motion for a directed verdict.

IV.

Because the court of appeals properly determined that the State presented sufficient evidence to withstand Petitioner's motion for a directed verdict, we affirm the court

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[8] Petitioner then had to backtrack 11.6 miles to get from Byrne and Castro's apartment to Victim's home.

[9] "Evidence of flight has been held to constitute evidence of guilty knowledge and intent." *State v. Beckham*, 334 S.C. 302, 315, 513 S.E.2d 606, 612 (1999) (citing *State v. Thompson*, 278 S.C. 1, 10–11, 292 S.E.2d 581, 587 (1982)).

of appeals' decision.

AFFIRMED.

FEW, J., and Acting Justice Costa M. Pleicones, concur. HEARN, J., dissenting in a separate opinion in which BEATTY, C.J., concurs.

JUSTICE HEARN: I respectfully dissent. Because the record contains no evidence of an illegal plan or purpose, I do not believe Appellant Harry's conviction under the theory of "hand of one is the hand of all" can stand. Therefore, I would reverse the trial court's denial of Harry's motion for directed verdict.

Harry contends the court of appeals erred in affirming the denial of his directed verdict motion, arguing that the State failed to produce substantial circumstantial evidence that he planned to confront or assault the Victim or otherwise intended any unlawful action that would foreseeably result in a homicide. I agree.

A defendant is entitled to a directed verdict when the State fails to produce evidence tending to prove *every* element of the offense charged. *State v. Brannon*, 388 S.C. 498, 501, 697 S.E.2d 593, 595 (2010). In reviewing the denial of a directed verdict, "[t]he Court's review is limited to considering the existence or nonexistence of evidence, not its weight." *State v. Bennett*, 415 S.C. 232, 235–36, 781 S.E.2d 352, 353–54 (2016) (citing *State v. Cherry*, 361 S.C. 588, 593, 606 S.E.2d 475, 478–79 (2004)). "When the evidence submitted raises a mere suspicion that the accused is guilty, a directed verdict should be granted because suspicion implies a belief of guilt based on facts or circumstances which do not amount to proof." *Id*. at 236, 781 S.E.2d at 353–54 (citing *State v. Hepburn*, 406 S.C. 416, 429, 753 S.E.2d 402, 409 (2013)). Moreover, when co-defendants are not tried jointly and both the appellant and his co-defendant testify in his defense, an appellate court must consider all the evidence in the record to determine whether the trial judge erred in denying the appellant's motion for a directed verdict. *State v. Phillips*, 416 S.C. 184, 195–97, 785 S.E.2d 448, 453–54 (2016) (explaining the waiver rule adopted in *Hepburn*).

Harry was charged with and convicted of murder based on the accomplice theory, commonly referred to as "hand of one is the hand of all." Under this theory, "'one who joins with another to accomplish an *illegal purpose* is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose.'" *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010) (quoting *State v. Condrey*, 349 S.C. 184, 194, 562 S.E.2d 320, 324 (Ct. App. 2002)) (emphasis added). In order to be guilty under this theory a defendant must "be present at the scene of the crime and intentionally, or through a common design, aid abet, or assist in the commission of that crime through some overt act." *Id.* (quoting *State v. Langley*, 334 S.C. 643, 648–49, 515 S.E.2d 98, 101 (1999)) (internal quotations omitted). Additionally, a defendant "'must be chargeable with knowledge of the principal's criminal conduct.'" *Id.* at 480, 697 S.E.2d at 584 (quoting *State v. Leonard*, 292 S.C. 133, 137, 355 S.E.2d 270, 272 (1987)); *see also State v. Reid*, 408 S.C. 461, 473, 758 S.E.2d 904, 910 (2014) ("[P]roof of mere

presence is insufficient, and the State must present evidence the participant knew of the principal's criminal conduct."). This Court has explained that in order for a defendant to have the requisite knowledge:

> "the alleged accomplice must have acted with the intention of encouraging and abetting the commission of the homicide, or, at least that the commission of the murder by the principal must have been a *reasonably foreseeable consequence* of the defendant's actions."

Mattison, 388 S.C. at 484, 697 S.E.2d at 586 (quoting 40 Am. Jur. 2d *Homicide* § 26 (2010)) (emphasis added).

I am troubled by the State's application of the "hand of one is the hand of all" theory to this case. This theory of accomplice liability is most frequently utilized in the context of burglary or robbery cases in which there is typically strong circumstantial evidence of a plan to perpetrate an illegal act. *See, e.g.*, *Barber v. State*, 393 S.C. 232, 234–36, 712 S.E.2d 436, 437–38 (2011) (Barber was convicted of criminal conspiracy, murder, and possession of a firearm during commission of a violent crime *inter alia* for planning and perpetrating a burglary with three other men, although there were only two weapons and it was uncertain which two of the defendants were actually armed and which one shot and killed the victim.); *Rivera v. State*, 382 S.C. 606, 608, 677 S.E.2d 596, 597 (2009) (Rivera was charged with murder and armed robbery under the "hand of one is the hand of all" theory where Rivera did not actively participate in the robbery and murder, but "accompanied the active participants to the scene with knowledge that they intended to commit the robbery."). After an extensive review of the cases involving accomplice theory, I am unaware of any case in which a defendant was convicted under similar circumstances to those present in this case, *i.e.*, in the course of retrieving property which was rightfully his.

Furthermore, I believe the facts in *People v. Miller*—an unpublished opinion from the California Fourth District Court of Appeal—are distinguishable and the court of appeals' reliance on that case misplaced. *See State v. Harry*, 413 S.C. 534, 541–42, 776 S.E.2d 387, 391–92 (Ct. App. 2015) (citing *Miller*, No. E040249, 2008 WL 1899560 (Cal. Ct. App. April 30, 2008)). The defendant in *Miller* admitted his purpose in going to the victim's home was to confront the victim, fully anticipating there would be an altercation. There, the defendant Miller was angry with the victim for refusing to give Miller's sister a quote on a new air conditioner. When Miller went to the victim's house to confront him, the two argued loudly, cursing at one another, and eventually began fighting. During the altercation, Miller's friend, Baillie, pulled his gun and fired seven shots, killing the victim and seriously injuring another bystander. A few days later, Miller turned himself in and gave a videotaped

statement to the police. In his statement, Miller admitted that his purpose in going to the victim's house was to confront the victim and he anticipated there would be an altercation. Additionally, Miller acknowledged he brought Baillie because he knew that Baillie and the victim were not on good terms and "Baillie would back him up if he needed help fighting [the victim]." *Miller*, 2008 WL 1899560 at *1–2.

By contrast, Harry never admitted to having an illegal purpose in going to see the victim, but instead consistently maintained that his sole intent was to retrieve his television. *See, e.g.*, *Holliday v. Poston*, 60 S.C. 103, ---, 38 S.E. 449, 450 (1901) (Gary, J., concurring) (stating the longstanding equitable principle "that if a stranger in possession of my property undertakes to sell it, and delivers it accordingly, it is at my option either to pursue the property in the hands of the holder" or to bring an action to recover the proceeds of the sale). Moreover, none of Harry's alleged accomplices—including Bledsoe and Byrne who were witnesses for the State—testified that Harry expressed or indicated any plan other than to lawfully recover his television.

Viewing the record in the light most favorable the State, I find the evidence at most establishes the following: (1) while he was only a few miles from the victim's home, Harry learned Bledsoe had sold the television to the victim; (2) rather than driving there immediately, Harry drove out of his way to pick up his friend Castro from Byrne's house;[10] (3) Harry and Castro spoke for about 5 minutes in Byrne's house; (4) as Harry was exiting the house, Castro invited Byrne to come along for a ride; (5) Castro retrieved his gun, unseen by either Harry or Byrne; (6) when they arrived at the victim's house, Harry asked for the television and the victim refused to give him the television or any money; (7) Bledsoe began yelling at the victim, accusing him of stealing the television and lying; and (8) Harry attempted to calm Bledsoe and began walking her back to the truck when Castro shot the victim. While the testimony evidenced a plan between Harry and Castro, there is nothing illegal in requesting that a friend accompany you to recover your own property. Indeed, when pressed by the members of this Court at oral argument, the State was unable to articulate what illegal purpose Harry might have had. Instead, the State repeatedly asserted that it is illegal to recover personal property when doing so will result in a

[10] The State repeatedly asserted the fact that Harry drove so far out of his way to pick up Castro and Byrne before going to see the victim is evidence Harry anticipated there would be an altercation with the victim and wanted to bring Castro and Byrne as back-up. However, the only testimony regarding why Harry drove all the way to Myrtle Beach first was from Harry himself, in which he testified he was in no rush to pick up the television and he wanted to buy some marijuana from Byrne or Castro, both drug dealers, to smoke with Bledsoe later that evening.

breach of the peace. However, this argument assumes, again without any evidentiary basis, that Harry intended or knew a breach of the peace would occur during his interaction with the victim. Moreover, even if Harry *knew* Castro carried a gun, that fact would still not be sufficient circumstantial evidence in my view to establish an illegal purpose.

Based on the record, I find no evidence Harry intended anything more than to retrieve his television nor is there any evidence he was aware of any illegal intent on Castro's part in accompanying him. Therefore, I respectfully dissent because I conclude Harry was entitled to a directed verdict.

BEATTY, C.J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

James Jefferson Jowers Sr., Andrew J. Anastos, Ben Williamson, Melanie Ruhlman, and Anthony Ruhlman, Appellants,

v.

South Carolina Department of Health and Environmental Control, Respondent.

Appellate Case No. 2016-000428

Appeal from Barnwell County
R. Markley Dennis Jr., Circuit Court Judge

Opinion No. 27725
Heard December 1, 2016 – Filed July 19, 2017

AFFIRMED

Amy E. Armstrong, Amelia A. Thompson, and Jessie A. White, all of South Carolina Environmental Law Project, of Pawleys Island, for Appellants.

Attorney General Alan Wilson, Solicitor General Robert D. Cook, Deputy Solicitor General J. Emory Smith Jr., Senior Assistant Attorney General T. Parkin C. Hunter, Assistant General Counsel Michael S. Traynham, all of Columbia and Lisa A. Reynolds, of Anderson Reynolds & Stephens, LLC, of Charleston, for Respondent.

M. McMullen Taylor, of Mullen Taylor, LLC, of Columbia and John D. Echeverria, of Vermont School of Law, South Royalton, Vermont, for Amicus Curiae, Congaree Riverkeeper, Inc.

JUSTICE FEW: This is a challenge to the registration provisions in the Surface Water Withdrawal Act. The plaintiffs claim those provisions are an unconstitutional taking, a violation of due process, and a violation of the public trust doctrine. The circuit court granted summary judgment against the plaintiffs on the grounds the case does not present a justiciable controversy, both because the plaintiffs lack standing and the dispute is not ripe for judicial determination. We affirm.

I. The Surface Water Withdrawal Act

The Surface Water Withdrawal, Permitting, Use, and Reporting Act regulates surface water withdrawals in South Carolina. S.C. Code Ann. §§ 49-4-10 to -180 (Supp. 2016). Surface water is defined as "all water that is wholly or partially within the State . . . or within its jurisdiction, which is open to the atmosphere and subject to surface runoff, including, but not limited to, lakes, streams, ponds, rivers, creeks, runs, springs, and reservoirs . . . ." § 49-4-20(27). The Department of Health and Environmental Control is charged with the implementation and enforcement of the Act. § 49-4-170. The Act establishes two mechanisms to regulate surface water withdrawals—a permitting system and a registration system.

A. Permitting System

The Act requires most "surface water withdrawers" to obtain a permit before withdrawing surface water. § 49-4-25. A "surface water withdrawer" is defined as "a person withdrawing surface water in excess of three million gallons during any one month . . . ." § 49-4-20(28). A permit applicant must provide detailed information to DHEC about the proposed surface water withdrawal. § 49-4-80(A). DHEC must provide the public with notice of a permit application within thirty days, and if residents of the affected area request a hearing, DHEC must conduct one. § 49-4-80(K)(1). If DHEC determines the proposed use is reasonable, DHEC must issue a permit to the applicant. §§ 49-4-25, -80(J). In making its determination of reasonableness, DHEC is required to consider a number of criteria. § 49-4-80(B).[1] Permits are issued for a term of no less than twenty years

[1] Subsection 49-4-80(B) sets forth the criteria for determining reasonableness: (1) minimum instream flow or minimum water level and the safe yield; (2) anticipated effect of the proposed use on existing users; (3) reasonably foreseeable future need

and no more than fifty years. § 49-4-100(B). After a permit is issued, surface water withdrawals made pursuant to the terms and conditions of the permit are presumed to be reasonable. § 49-4-110(B).

B. Registration System

Agricultural users are treated differently under the Act. "[A] person who makes surface water withdrawals for agricultural uses[2] at an agricultural facility[3]" is classified as a "Registered surface water withdrawer," § 49-4-20(23), and is not required to obtain a permit, § 49-4-35(A).[4] Instead, agricultural users simply register their surface water use with DHEC and are permitted to withdraw surface water up to the registered amount. § 49-4-35(A). Because agricultural users are exempt from the permit requirement, their surface water use is not subject to the subsection 49-4-80(B) reasonableness factors.

The Act establishes two ways for agricultural users to register their water use with DHEC—one for users who were already reporting their use to DHEC when the Act was rewritten in 2010,[5] and one for users who were not yet reporting their use. For

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for surface water; (4) reasonably foreseeable detrimental impact on navigation, fish and wildlife habitat, or recreation; (5) applicant's reasonably foreseeable future water needs; (6) beneficial impact on the State; (7) impact of applicable industry standards on the efficient use of water; (8) anticipated effect of the proposed use on: (a) interstate and intrastate water use; (b) public health and welfare; (c) economic development and the economy of the State; and (d) federal laws and interstate agreements and compacts; and (9) any other reasonable criteria DHEC promulgates by regulation. § 49-4-80.

[2] "Agricultural use" is defined broadly to include the preparation, production, and sale of crops, flowers, trees, turf, and animals. § 49-4-20(3).

[3] "Agricultural facility" is also defined broadly. § 49-4-20(2).

[4] As section 49-4-25 indicates, there are other exceptions to the permit requirement "provided in Sections 49-4-30, 49-4-35, 49-4-40, and 49-4-45." The exception for agricultural users is provided in section 49-4-35.

[5] The Water Use Reporting and Coordination Act was originally enacted in 1982, Act No. 282, 1982 S.C. Acts 1980. It was completely rewritten in 2010 and renamed the Surface Water Withdrawal, Permitting, Use, and Reporting Act, Act

those already reporting, the Act allows the user to "maintain its withdrawals at its highest reported level or at the design capacity of the intake structure" and the user is deemed registered. § 49-4-35(B). For users who were not yet reporting their use, the Act requires the user to report its anticipated withdrawal amount to DHEC for DHEC to determine whether the use is within the "safe yield" of the water source. § 49-4-35(C). Safe yield is defined as,

> [T]he amount of water available for withdrawal from a particular surface water source in excess of the minimum instream flow or minimum water level for that surface water source. Safe yield is determined by comparing the natural and artificial replenishment of the surface water to the existing or planned consumptive and nonconsumptive uses.

§ 49-4-20(25). After DHEC determines whether the anticipated withdrawal amount is within the safe yield, it "must send a detailed description of its determination to the proposed registered surface water withdrawer." § 49-4-35(C).

The Act grants DHEC oversight over registered withdrawals. Subsection 49-4-35(E) provides,

> The department may modify the amount an existing registered surface water withdrawer may withdraw, or suspend or revoke a registered surface water withdrawer's authority to withdraw water, if the registered surface water withdrawer withdraws substantially more surface water than he is registered for or anticipates withdrawing, as the case may be, and the withdrawals result in detrimental effects to the environment or human health.

§ 49-4-35(E).

Registration has three effects important to the plaintiffs' claims in this case. First, unlike permits, which are issued for a term of years, registrations have no time limits. *Compare* § 49-4-35(C) (allowing registered users to continue making withdrawals "during subsequent years" with no reference to time limits), *with* § 49-

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No. 247, 2010 S.C. Acts 1824-49. The 1982 Act provided for a regulatory "reporting system for agricultural users." 1982 S.C. Acts at 1982.

4-100(B) (establishing time limits for permits). Second, the Act presumes all registered amounts are reasonable. § 49-4-110(B). Third, the Act changes the standard of proof for private causes of action for damages by requiring plaintiffs to show a registered user is violating its registration. *Id.*

II. Procedural History

The plaintiffs own property along rivers or streams in Bamberg, Darlington, and Greenville counties. In September 2014, they jointly filed this action against DHEC in Barnwell County, challenging the Act's registration system for agricultural users in three ways. First, they claim the registration system is an unconstitutional taking of private property for private use. *See* S.C. CONST. art. I, § 13(A) ("private property shall not be taken for private use"). Second, they claim the Act violates their due process rights by depriving them of their property without notice or an opportunity to be heard. *See* U.S. CONST. amend. XIV, § 1 ("No state shall . . . deprive any person of . . . property, without due process of law . . . ."); S.C. CONST. art. I, § 3 ("nor shall any person be deprived of . . . property without due process of law"). Finally, they claim the Act violates the public trust doctrine by disposing of assets the State holds in trust. *See* S.C. CONST. art. XIV, § 4 ("All navigable waters shall forever remain public highways free to the citizens of the State . . . ."); *Sierra Club v. Kiawah Resort Assocs.*, 318 S.C. 119, 128, 456 S.E.2d 397, 402 (1995) (stating "the state owns the property below . . . a navigable stream . . . [as] part of the Public Trust").

The plaintiffs and DHEC filed motions for summary judgment. The circuit court granted summary judgment in favor of DHEC after finding the plaintiffs did not have standing and the case was not ripe. The circuit court also addressed the merits of the plaintiffs' claims. The court ruled the Act's registration process was not an unconstitutional taking because the plaintiffs were not deprived of any rights. Likewise, the circuit court held that without a deprivation of rights, there could be no violation of due process. The circuit court held the public trust doctrine was not violated because the plaintiffs had not lost their right to use the waterways or been injured by any withdrawals. The circuit court did not rule on DHEC's contention the claims were barred by the statute of limitations or that venue was improper.

The plaintiffs appealed to the court of appeals and moved to certify the case to this Court pursuant to Rule 204(b) of the South Carolina Appellate Court Rules. We granted the motion to certify.

III. Justiciability

Our courts will not address the merits of any case unless it presents a justiciable controversy. *Byrd v. Irmo High Sch.*, 321 S.C. 426, 430-31, 468 S.E.2d 861, 864 (1996). In *Byrd*, we stated, "Before any action can be maintained, there must exist a justiciable controversy," and, "This Court will not . . . make an adjudication where there remains no actual controversy." *Id.*; *see also Peoples Fed. Sav. & Loan Ass'n v. Res. Planning Corp.*, 358 S.C. 460, 477, 596 S.E.2d 51, 60 (2004) ("A threshold inquiry for any court is a determination of justiciability, i.e., whether the litigation presents an active case or controversy."). "Justiciability encompasses . . . ripeness . . . and standing." *James v. Anne's Inc.*, 390 S.C. 188, 193, 701 S.E.2d 730, 732 (2010). Standing is "a personal stake in the subject matter of the lawsuit." *Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S.C. Dep't of Nat. Res.*, 345 S.C. 594, 600, 550 S.E.2d 287, 291 (2001). A plaintiff has standing to challenge legislation when he sustained, or is in immediate danger of sustaining, actual prejudice or injury from the legislative action. 345 S.C. at 600-01, 550 S.E.2d at 291. To meet the "stringent" test for standing, "the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not 'conjectural' or 'hypothetical.'" 345 S.C. at 601, 550 S.E.2d at 291 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351, 364 (1992)).[6] We have explained ripeness by defining what is not ripe, stating "an issue that is contingent, hypothetical, or abstract is not ripe for judicial review." *Colleton Cty. Taxpayers Ass'n v. Sch. Dist. of Colleton Cty.*, 371 S.C. 224, 242, 638 S.E.2d 685, 694 (2006).

Before we may determine whether the plaintiffs have presented a justiciable controversy, we must first understand their theory of how the Act has caused them injury. Because their theory depends on their interpretation of the Act, we must then interpret the Act to determine whether they have properly alleged an "injury in fact" under it, *Sea Pines*, 345 S.C. at 601, 550 S.E.2d at 291, such that this case presents an "actual controversy" as opposed to one that is "contingent, hypothetical, or abstract," *Byrd*, 321 S.C. at 431, 468 S.E.2d at 864; *Colleton Cty.*, 371 S.C. at 242, 638 S.E.2d at 694.

We review de novo the circuit court's ruling that there is no justiciable controversy. *See Ex parte State ex rel. Wilson*, 391 S.C. 565, 570, 707 S.E.2d 402, 405 (2011) (affirming the circuit court's order granting summary judgment on the basis of

[6] A plaintiff must show two additional elements not at issue in this case: causation and likelihood the injury can be redressed by the court's decision. *Id.*

justiciability where the ruling depended on statutory interpretation, and stating, "The construction of a statute is a question of law, which this Court may resolve without deference to the circuit court.").

IV. The Plaintiffs' Theory of Injury

The plaintiffs' claims of unconstitutional taking and violation of due process are based on their allegation the Act has deprived them of "riparian" rights. The public trust claim, on the other hand, is based on the allegation the Act disposes of assets the State holds in trust for our citizens.

A. Riparian Rights

The property rights the plaintiffs allege have been taken from them under the registration provisions of the Act are known under the common law as riparian rights. The word riparian means "pertaining to or situated on the bank of a river, or a stream." 78 Am. Jur. 2d *Waters* § 33 (2013). *See also Riparian*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("Of, relating to, or located on the bank of a river or stream").[7] Under the common law, riparian property owners—those owning land adjacent to rivers or streams—hold special rights allowing them to make "reasonable use" of the water adjacent to their property. *White's Mill Colony Inc. v. Williams*, 363 S.C. 117, 129, 609 S.E.2d 811, 817 (Ct. App. 2005) (citing *Lowe v. Ottaray Mills*, 93 S.C. 420, 423, 77 S.E. 135, 136 (1913)). We have described "reasonable use" as follows,

> All that the law requires of the party, by or over whose land a stream passes, is, that he should use the water in a reasonable manner, and so as not to destroy, or render

[7] The current editions *American Jurisprudence* and *Black's Law Dictionary* recognize that some states include lakes and tidal waters within the definition of riparian. That is not true in South Carolina. In *Lowcountry Open Land Trust v. State*, 347 S.C. 96, 552 S.E.2d 778 (Ct. App. 2001), our court of appeals held "interests attached to property abutting an ocean, sea or lake are termed 'littoral.'" 347 S.C. at 108, 552 S.E.2d at 785 (citing *Littoral*, BLACK'S LAW DICTIONARY (6th ed. 1990)); *see also White's Mill Colony Inc. v. Williams*, 363 S.C. 117, 129, 609 S.E.2d 811, 817-18 (Ct. App. 2005) (stating "there is a distinction in classification that our courts have indicated a desire to strictly observe: owners of land along rivers and streams are said to hold 'riparian' rights, while owners of land abutting oceans, seas, or lakes, are said to hold 'littoral' rights").

> useless, or materially diminish, or affect, the application of the water by the proprietor below on the stream . . . .

White v. Whitney Mfg. Co., 60 S.C. 254, 266, 38 S.E. 456, 460 (1901); *see also Mason v. Apalache Mills*, 81 S.C. 554, 559, 62 S.E. 399, 401 (1908) ("The different owners of land through which a stream flows are each entitled to the reasonable use of the water, and for an injury to one owner, incidental to the reasonable use of the stream by another, there is no right of redress.").

Thus, the right of reasonable use is "subject to the limitation that the use may not interfere with the like rights of those above, below, or on the opposite shore." *White's Mill Colony Inc.*, 363 S.C. at 129, 609 S.E.2d at 817 (citing *Mason*, 81 S.C. at 559, 62 S.E. at 401). Under the common law, if a riparian owner unreasonably interferes with another riparian owner's right of reasonable use, the injured owner's remedy is to bring an action for damages, or for an injunction, or both. *See McMahan v. Walhalla Light & Power Co.*, 102 S.C. 57, 59-61, 86 S.E. 194, 194-95 (1915) (approving a jury charge on the right of reasonable use in a case where a downstream riparian owner sued an upstream riparian owner for damages); *Mason*, 81 S.C. at 557, 62 S.E. at 400 (describing the downstream riparian owner's claim for an injunction against the upstream operator of a dam based on "the unreasonable use of the stream"); *see also* 78 Am. Jur. 2d *Waters* § 53 (2013) ("Interference with riparian rights is an actionable tort. Any interference with a vested right to the use of water . . . would entitle the party injured to damages, and an injunction would issue perpetually restraining any such interference.").

B. Public Trust Assets

The Constitution of South Carolina provides, "All navigable waters shall forever remain public highways free to the citizens of the State and the United States." S.C. CONST. art. XIV, § 4. Consistent with this provision, the State owns all property below the high water mark of any navigable stream. *Sierra Club*, 318 S.C. at 128, 456 S.E.2d at 402; *see also McCullough v. Wall*, 38 S.C.L. (4 Rich.) 68, 87 (1850) (stating "in this State all rivers navigable for boats are *juris publici*[8]"). Courts have long recognized this ownership as a trust. In 1884, this Court held:

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[8] *See Juris Publici*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("Of public right; relating to common or public use").

> The state had in the beds of these tidal channels not only title as property, . . . but something more, the *jus publicum*,[9] consisting of the rights, powers, and privileges . . . which she held in a fiduciary capacity for general and public use; in trust for the benefit of all the citizens of the state, and in respect to which she had trust duties to perform.

State v. Pac. Guano Co., 22 S.C. 50, 83–84 (1884); *see also Illinois Cent. R. Co. v. State of Illinois*, 146 U.S. 387, 452-53, 13 S. Ct. 110, 118, 36 L. Ed. 1018, 1042 (1892) (recognizing this ownership as a "trust which requires the government of the state to preserve such waters for the use of the public").

We now call this the "public trust doctrine." *See Sierra Club*, 318 S.C. at 127-28, 456 S.E.2d at 402 (discussing "the Public Trust Doctrine"). Under the public trust doctrine, the State "cannot permit activity that substantially impairs the public interest in marine life, water quality, or public access." *McQueen v. S.C. Coastal Council*, 354 S.C. 142, 149, 580 S.E.2d 116, 119-20 (2003). The plaintiffs argue the Act violates the public trust doctrine by disposing of the State's water to agricultural users. According to the plaintiffs, "the State has lost complete control of registered amounts of water in perpetuity."

V. The Nature of the Plaintiffs' Claims

Having explained the plaintiffs' theory of injury, we turn now to the registration provisions of the Act to determine whether its terms support the plaintiffs' allegation of an injury in fact such that this case presents an actual controversy.

A. The Takings and Due Process Claims

The plaintiffs' takings and due process claims are based on their allegation that they have lost their riparian right to bring a challenge to another riparian owner's future unreasonable use. Significantly, the plaintiffs do not allege they have sustained any injury resulting from any withdrawal of surface water that has

[9] *See Jus Publicum*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("The right, title, or dominion of public ownership; esp., the government's right to own real property in trust for the public benefit").

already been made by an agricultural user.[10] The allegation the plaintiffs do make is based on two provisions of the Act: (1) subsection 49-4-110(B), which states registered withdrawals are presumed to be reasonable and changes the standard of proof for private causes of action for damages, and (2) subsection 49-4-100(B), which requires permits must be issued for a specific term, but is silent as to time limits for registered uses. The plaintiffs argue these provisions allow registered users to withdraw a fixed amount of water that will forever be deemed reasonable, which in turn prevents them from ever successfully challenging a registered agricultural use, regardless of how conditions may change in the future. Based on this argument, the plaintiffs allege their "rights were fundamentally altered" the moment these provisions were signed into law,[11] and thus they have suffered an "injury in fact" sufficient to establish standing, and have presented an actual controversy that is ripe for judicial determination.

We find the Act does not support the plaintiffs' allegations of injury. First, we find nothing in the Act preventing the plaintiffs from seeking an injunction against a riparian owner for unreasonable use. Prior to the Act, a riparian owner could bring an action challenging another riparian owner's unreasonable use and seeking an injunction. *See Mason*, 81 S.C. at 563, 558, 62 S.E. at 402, 400 (affirming the circuit court's order granting an injunction, as modified, against the upstream operator of a dam based on "the unreasonable use of the stream"). After the Act, a riparian owner may still challenge another riparian owner's use as unreasonable—including a registered agricultural user. If such a plaintiff can prove a registered agricultural use is unreasonably interfering with his right of reasonable use, and otherwise establish the elements for an injunction, then the plaintiff may be entitled to injunctive relief.

Second, we find nothing in the Act preventing a riparian owner from filing a declaratory judgment action to protect his right of reasonable use. Under section 15-53-20 of the South Carolina Code (2005), courts have the "power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." A riparian owner may file a declaratory judgment action against registered agricultural users, and request the court declare their use unreasonable. While such a declaration may be of little value without an injunction, there is

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[10] In response to a discovery request, the plaintiffs admitted "[their] property and [their] use thereof have not been injured due to any withdrawal of water for agricultural purposes occurring on a river or stream flowing past property that [they] own."

[11] The rewritten Act became effective on January 1, 2011. 2010 S.C. Acts at 1848.

nothing in the Act preventing the plaintiff from including DHEC as a defendant. This, in turn, could trigger DHEC's right to modify the registration under subsection 49-4-35(E).

Third, we find nothing in the Act prohibiting private causes of action for damages against registered agricultural users. In fact, the Act specifically contemplates such actions. Subsection 49-4-110(B) states, "No private cause of action for damages arising directly from a surface water withdrawal by a permitted or registered surface water withdrawer may be maintained *unless* the plaintiff can show a violation of a valid permit or registration." § 49-4-110(B) (emphasis added). While this provision changes the standard of proof a plaintiff must meet in an action for damages, the right of action clearly still exists. We are aware of no authority—and the plaintiffs cite none—for a finding that a change to the standard of proof in an action for damages deprives a future plaintiff of property rights under the takings or due process clauses.

Finally, we find no support in the Act for the plaintiffs' argument that the presumption of reasonableness will prevent future plaintiffs from proving a registered use is unreasonable. Under the common law, the plaintiff has the burden of proving—by a preponderance of the evidence—a defendant's use is unreasonable. The Act, however, provides, "Surface water withdrawals made by permitted or registered surface water withdrawers shall be presumed to be reasonable." § 49-4-110(B). The Act is unclear whether the presumption is rebuttable or conclusive.[12] Employing the rules of statutory construction, we find the presumption is rebuttable.[13] Therefore, under the Act, a plaintiff may still meet

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[12] A rebuttable presumption is defined as an "inference drawn from certain facts that establish a prima facie case, which may be overcome by the introduction of contrary evidence." *Rebuttable Presumption*, BLACK'S LAW DICTIONARY (10th ed. 2014). A conclusive presumption is defined as a "presumption that cannot be overcome by any additional evidence or argument because it is accepted as irrefutable proof that establishes a fact beyond dispute." *Conclusive Presumption*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[13] The presumption of reasonableness is found in the first sentence of subsection 49-4-110(B). The next sentence specifically contemplates a right of action for damages, "No private cause of action for damages . . . from a surface water withdrawal . . . may be maintained *unless* the plaintiff can show a violation of a valid permit or registration." § 49-4-110(B) (emphasis added). If we interpreted the presumption in the first sentence as conclusive, it would prevent any right of

his burden by proving—by a preponderance of the evidence—the defendant's use is unreasonable.

In summary, the plaintiffs' allegations that the Act has deprived them of their common law riparian rights are not supported by the terms of the Act. The plaintiffs may still challenge an agricultural use as unreasonable, they are still entitled to injunctive relief when they prove the required elements, and they may still recover damages when they satisfy the applicable standard of proof. Because the Act has not deprived the plaintiffs of their riparian rights, they have no standing, and their claim for future injury is not ripe for our determination.

The plaintiffs also argue they have standing under the public importance exception. "[S]tanding is not inflexible and standing may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance." *ATC S., Inc. v. Charleston Cty.*, 380 S.C. 191, 198, 669 S.E.2d 337, 341 (2008). However, we "must be cautious with this exception, lest it swallow the rule." *S.C. Pub. Interest Found. v. S.C. Transp. Infrastructure Bank*, 403 S.C. 640, 646, 744 S.E.2d 521, 524 (2013). We find the public importance exception does not apply in this case because there is no need for "future guidance."

B. The Public Trust Claim

The plaintiffs argue the Act violates the public trust doctrine because its provisions "effectively dispose of substantial, permanent rights in South Carolina's navigable waterways to agricultural users." They allege the state has "lost complete control of registered amounts of water in perpetuity" and the "registered owner has complete control over whether or not the state can ever alter the registered amount."

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action for damages, and thus the first sentence would be in conflict with the second sentence. "[S]tatutes must be read as a whole and sections which are part of the same general statutory scheme must be construed together and each given effect, if it can be done by any reasonable construction." *Hudson ex rel. Hudson v. Lancaster Convalescent Ctr.*, 407 S.C. 112, 124–25, 754 S.E.2d 486, 492–93 (2014). "It is the duty of this Court to give all parts and provisions of a legislative enactment effect and reconcile conflicts if reasonably and logically possible." *Adams v. Clarendon Cty. Sch. Dist. No. 2*, 270 S.C. 266, 272, 241 S.E.2d 897, 900 (1978). Reading the presumption as rebuttable leaves no conflict.

We begin our discussion of the public trust claim by observing that, to resolve this appeal, it is not necessary that we determine whether the public trust doctrine even applies in this case. South Carolina has recognized the public trust doctrine for at least 132 years, *see Pac. Guano Co.*, 22 S.C. at 83-84, yet all of the appellate court decisions we have found applying the doctrine indicate it protects the waterway itself and the land below the high water mark. *See, e.g., Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 29, 766 S.E.2d 707, 715 (2014) (stating public trust doctrine applies to "lands below the high water line"); *Wilson*, 391 S.C. at 572, 707 S.E.2d at 406 (stating the "State holds presumptive title to all land below the high water mark"); *Sierra Club*, 318 S.C. at 128, 456 S.E.2d at 402 (stating the issue before the Court was "whether the docks substantially impair the public interest in the public trust lands and waters" and finding no violation of the public trust doctrine because "the docks would not substantially impair marine life, water quality, or public access to the area");[14] *Pac. Guano Co.*, 22 S.C. at 87 (finding "the defendants mined in the beds of [navigable] streams running through their lands under an honest but mistaken belief of their right to do so"); *Grant v. State*, 395 S.C. 225, 229, 717 S.E.2d 96, 98 (Ct. App. 2011) ("Title to land between the high and low water marks remains in the State and is held in trust for the benefit of the public."). We have never held the public trust doctrine prohibits the State from allowing riparian landowners to use the water in the waterway.

Nevertheless, the non-justiciability of the claim that the Surface Water Withdrawal Act violates the public trust doctrine is apparent on the face of the Act itself. The basic premise of the doctrine is the State does not have the power to convey to private owners assets the State holds in trust for its people. The Supreme Court of the United States explained this in *Illinois Central Railroad Company*:

> A grant of all the lands under the navigable waters of a state has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to

[14] In *Sierra Club*, to explain the general nature of the public trust doctrine, we quoted an expansive statement from an article in the Tulane Environmental Law Journal as to the scope of the doctrine. 318 S.C. at 127-28, 456 S.E.2d at 402. However, the permit applicant in that case never intended to consume the water itself, and we therefore confined our actual ruling to the permit's impact on the waterway: "marine life, water quality, or public access." 318 S.C. at 128, 456 S.E.2d at 402.

> revocation. The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them . . . than it can abdicate its police powers . . . .

146 U.S. at 453, 13 S. Ct. at 118, 36 L. Ed. at 1043.

The State does have the power, however, to take legislative action "promoting the interests of the public." *Id.*; *see also Pac. Guano Co.*, 22 S.C. at 84 (stating "the state as such trustee has the power to dispose of these beds as she may think best for her citizens"). The issue in *Illinois Central Railroad Company* was "whether the railroad corporation can hold the lands and control the waters by the grant, against any future exercise of power over them by the State." 146 U.S. at 452, 13 S. Ct. at 118, 36 L. Ed. at 1042. Explaining the applicability of the public trust doctrine to that question, the Supreme Court differentiated between grants by the state that improve the interests of the people and grants that interfere with those interests:

> The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks, and piers therein, for which purpose the state may grant parcels of the submerged lands; and, so long as their disposition is made for such purpose, no valid objections can be made to the grants. It is grants of parcels of lands under navigable waters that may afford foundation for wharves, piers, docks, and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the state. But that is a very different doctrine from the one which would sanction the abdication of the general control of the state over lands under the navigable waters of an entire harbor or bay, or of a sea or lake. Such abdication is not consistent with the exercise of that trust which requires the government of the state to preserve such waters for the use of the public.

146 U.S. at 452-53, 13 S. Ct. at 118, 36 L. Ed. at 1042.

By its terms, the Surface Water Withdrawal Act is designed to allow use of surface waters to promote the interests of the people, while protecting against any use of surface water that is contrary to those interests. First, the Act allows DHEC to grant a permit only if it "determines that the applicant's proposed use is reasonable," § 49-4-25, and requires DHEC, before allowing registration, to make a "determination as to whether [the anticipated withdrawal] quantity is within the safe yield for that water source," § 49-4-35(C). Second, the Act grants DHEC the power to subsequently restrict permitted and registered surface water usage when necessary to protect the public interest. Under subsection 49-4-120(A), DHEC "may modify, suspend, or revoke a permit under [listed] conditions." Similarly, subsection 49-4-35(E) enables DHEC to "modify the amount an existing registered surface water withdrawer may withdraw, or suspend or revoke a registered surface water withdrawer's authority to withdraw water."[15]

The plaintiffs' public trust doctrine claims are based exclusively on their belief that future surface water withdrawals may endanger assets held in trust by the State, and their argument that the Surface Water Withdrawal Act prohibits the State from protecting those assets. As we have explained, however, the Act provides several mechanisms for DHEC to protect against the loss of trust assets. On its face, therefore, the Act is entirely consistent with the State's obligations under the public trust doctrine. Until a plaintiff alleges the State is failing to utilize its power under the Act or otherwise failing to protect public trust assets, any claim based on the public trust doctrine does not present a justiciable controversy.

In *Sloan v. Sanford*, 357 S.C. 431, 434, 593 S.E.2d 470, 472 (2004), we explained that the decision of whether to utilize the public importance exception to standing requires balancing two competing interests:

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[15] In addition, the Drought Response Act protects the State's interest in the water in navigable streams. S.C. Code Ann. §§ 49-23-10 to -100 (2008 & Supp. 2016). Under the Drought Response Act, the Department of Natural Resources has the duty to "formulate, coordinate, and execute a drought mitigation plan," § 49-23-30, and has broad powers to protect the water in navigable streams against excessive consumption by surface water withdrawers, *e.g.*, § 49-23-50. These powers include the authority to prevent most registered agricultural users from withdrawing unreasonable amounts of water during periods of drought. § 49-23-70(C).

> An appropriate balance between the competing policy concerns underlying the issue of standing must be realized. Citizens must be afforded access to the judicial process to address alleged injustices. On the other hand, standing cannot be granted to every individual who has a grievance against a public official. Otherwise, public officials would be subject to numerous lawsuits at the expense of both judicial economy and the freedom from frivolous lawsuits.

357 S.C. at 434, 593 S.E.2d at 472.

The "alleged injustice" the plaintiffs seek to address in this case is that at some point in the future the State may fail to protect against currently nonexistent unreasonable uses of surface water, which in turn could become so severe that the State's inaction amounts to a violation of its responsibilities to protect the public trust. However, neither the plaintiffs nor this Court can predict whether the State will attempt the necessary future action to protect against these hypothetical future unreasonable uses, and thus the "Citizens must be afforded access to the judicial process" side of the *Sloan* balance carries very little weight. After weighing that factor against the other competing interests we described in *Sloan*, we find the public importance exception should not apply to the plaintiffs' public trust claim. As we have stated before, courts "must be cautious with this exception, lest it swallow the rule." *S.C. Pub. Interest Found.*, 403 S.C. at 646, 744 S.E.2d at 524.

VI. Conclusion

We find the plaintiffs do not have standing and have not made any claim that is ripe for judicial determination. Therefore, the circuit court correctly determined there is no justiciable controversy. Accordingly, the circuit court's decision to grant summary judgment in favor of DHEC is **AFFIRMED**.

Acting Justices Costa M. Pleicones and James E. Moore, concur. HEARN, J., concurring in part and dissenting in part in a separate opinion in which BEATTY, C.J., concurs.

JUSTICE HEARN: I concur with the majority's analysis of Appellants' takings and due process claims, but I respectfully dissent on the issue of the public trust doctrine. Because of the Surface Water Withdrawal Act's inherent connection to the public waterways of South Carolina, I would find that Appellants' public trust claim comes within the public importance exception to standing. Cognizant of the fact that the public importance exception is used sparingly by this Court, I believe if there is ever a time when the doctrine should be applied, this is it.

DISCUSSION

I. STANDING

The public importance exception provides standing to a plaintiff where an issue is of such public importance that its resolution is required for future guidance. *Sloan v. Dep't of Transp.*, 365 S.C. 299, 304, 618 S.E.2d 876, 878 (2005). Thus, the doctrine affords citizens access to the judicial process to address alleged injustices where standing otherwise would not be available. *See Sloan v. Sanford*, 357 S.C. 431, 434, 593 S.E.2d 470, 472 (2004). We have applied the doctrine in a wide range of cases where we determined an underlying societal interest required resolution. *See, e.g.*, *S.C. Pub. Interest Found. v. S.C. Transp. Infrastructure Bank*, 403 S.C. 640, 645, 744 S.E.2d 521, 524 (2013) (issue of whether statute governing composition of board of directors of state infrastructure bank was unconstitutional fell within public interest exception); *Davis v. Richland County Council*, 372 S.C. 497, 500, 642 S.E.2d 740, 742 (2007) (finding public importance standing to bring action challenging constitutionality of act altering method for electing members of county commission); *Baird v. Charleston County*, 333 S.C. 519, 531, 511 S.E.2d 69, 75 (1999) (doctors had standing to seek injunction against county issuing tax exempt bonds for purchase of medical facility).

The circuit judge based his decision to deny public importance standing to Appellants in part on the lack of previous challenges to the Act. This was error. A history of previous challenges to legislation is not a prerequisite to achieving standing under the public importance exception; if indeed it were, no party could ever raise a novel issue without meeting traditional standing requirements, and the public importance exception would be rendered meaningless. Rather, the touchstone of the doctrine is whether the matter is "inextricably connected to the public need for court resolution for future guidance." *ATC South, Inc. v. Charleston County*, 380 S.C. 191, 199, 669 S.E.2d 337, 341 (2008). Given Appellants' allegations regarding violations of the public trust, I believe the claim implicates significant societal interests deserving of a definitive disposition.

Accordingly, I would reverse the circuit judge's grant of summary judgment as to the public trust claim. Rather than address the merits of Appellants' claim at this stage without the benefit of a fully developed record, I would simply reverse summary judgment and remand to the circuit court. However, because the majority has expressed its views on the merits of Appellants' claim, I feel compelled to do so as well.

II. PUBLIC TRUST DOCTRINE

The public trust doctrine protects the public's "inalienable right to breathe clean air; to drink safe water; to fish and sail, and recreate upon the high seas, territorial seas and navigable waters; as well as to land on the seashores and riverbanks." *Sierra Club v. Kiawah Resort Associates*, 318 S.C. 119, 127–28, 456 S.E.2d 397, 402 (1995). With this in mind, I turn to the particular aspects of the Act which I believe impede the State's ability to manage the public trust.

Section 49-4-35(E) of the Act grants DHEC authority only to modify a registered user's withdrawal if the amount of water being withdrawn is "substantially more" than his registered amount and the withdrawals have detrimental effects on the environment or human health. S.C. Code Ann. § 49-4-35(E) (Supp. 2016). Whereas under the common law the right to withdraw was correlative, and reasonableness was ever dependent upon the dynamic conditions of the waterway, the Act now allows a registered user to lock in a presumed reasonable volume of withdrawable water in perpetuity. Problematically, section 49-4-35(E) grants DHEC no authority to modify withdrawals unless the user exceeds his registered amount. In other words, the Act has established fixed withdrawals which do not fluctuate according to in-stream conditions. While withdrawing four million gallons per month may have no harmful effects at the present, changing conditions in ten years may render that amount detrimental to a waterway. Under this new regulatory scheme, a user may continue to withdraw the registered amount even if it is harmful to the health of the waterway, and DHEC has no authority to curtail those withdrawals so long as the user remains within his registered amount. The common law system which once allowed for flexibility has been replaced by a more rigid framework that does not on its face provide sufficient authority for DHEC to protect the public's interest in South Carolina's waterways. Though I believe a water permitting regime can be implemented without jeopardizing the public trust, I find the Act flawed in that it does not grant DHEC the inherent authority to modify a registered user's withdrawals as conditions may require.

The majority cites to the Drought Response Act to further support its position that the State has not abrogated its duties to protect and manage public waterways. Specifically, the majority suggests that section 49-23-70(C) of the South Carolina Code (Supp. 2016) grants the State authority to limit withdrawals made by registered users in times of drought. I will not delve into a lengthy analysis of the statute because it is not at issue in this case; however, a plain reading of this subsection indicates that it grants the State authority to curtail only nonessential uses, carving out exceptions for essential uses, including agricultural operations for food production—precisely one of the industries that would qualify as a registered user under the Act. In short, neither the Act nor the Drought Response Act creates any mechanism for the State to lower the registered amount if it becomes harmful to the waterway unless the user exceeds his registered amount.

By crafting the Act in such a way that DHEC is limited in its ability to modify registered withdrawals, I believe the State has compromised its duty to prevent "activity that substantially impairs the public interest in marine life, water quality, or public access." *McQueen v. S.C. Coastal Council*, 354 S.C. 142, 149, 580 S.E.2d 116, 119-20 (2003). Therefore, I do not join the majority in holding the Act is entirely consistent with the State's obligations under the public trust doctrine.

CONCLUSION

For the foregoing reasons, I believe the circuit judge erred in granting summary judgment on Appellants' public trust doctrine claim, and I would reverse and remand to the circuit court for further proceedings.

BEATTY, C.J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Farid A. Mangal, Respondent,

v.

State of South Carolina, Petitioner.

Appellate Case No. 2016-000610

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Spartanburg County
J. Mark Hayes II, Trial Judge
J. Derham Cole, Post-Conviction Relief Judge

Opinion No. 27726
Heard December 14, 2016 – Filed July 19, 2017

REVERSED

Attorney General Alan Wilson and Assistant Attorney General Alicia A. Olive, both of Columbia, for Petitioner.

John R. Ferguson, of Cox Ferguson & Wham, LLC, of Laurens, and C. Rauch Wise, of Greenwood, for Respondent.

Solicitor J. Strom Thurmond, Solicitor Barry J. Barnette and Amie Clifford, all of Columbia, for Amicus Curiae Solicitors' Association of South Carolina, Inc.

Suzanne B. Cole, of Spartanburg and Candice A. Lively, of Chester, for Amicus Curiae South Carolina Network

of Children's Advocacy Centers and University of South Carolina Children Law Center.

JUSTICE FEW: Farid A. Mangal was convicted of criminal sexual conduct with a minor, lewd act upon a child, and incest. After his convictions were affirmed, Mangal filed this action for post-conviction relief (PCR). He argues trial counsel was ineffective for not objecting to improper bolstering testimony. The PCR court refused to rule on the improper bolstering issue because the court found Mangal did not raise it in his PCR application or at the PCR hearing. The court of appeals reversed, finding the improper bolstering issue was raised to the PCR court. The court of appeals then proceeded to grant PCR on the merits of the issue before it was considered by the PCR court. We reverse the court of appeals and reinstate the PCR court's order.

I. Facts and Procedural History

The facts surrounding Mangal's sex crimes are set forth in detail in the court of appeals' opinion. *Mangal v. State*, 415 S.C. 310, 781 S.E.2d 732 (Ct. App. 2015). Focusing on those facts relevant to the specific issues in this appeal, the victim—Mangal's nineteen-year-old daughter—testified Mangal had been sexually assaulting her since she was ten years old. She described where, when, and how it happened. On cross-examination, trial counsel questioned the victim about inconsistencies in her testimony and suggested she had a motive to lie about the sexual abuse—to gain freedom from Mangal's strict parenting. Mangal testified in his defense and claimed the victim and her mother fabricated the allegations.

Mangal's improper bolstering claim is based on the testimony of the State's witness Nancy Henderson, M.D., a pediatrician the trial court qualified as an expert "in the examination, diagnosis, and treatment of child sex abuse." Dr. Henderson testified she conducted a physical examination of the victim and discovered her "hymen tissue looked very, very normal" except for a "marked narrowing" at one spot.[1] Dr. Henderson concluded this was "a sign of some type of penetration." She then testified the victim had been "sexually abused," and that her opinion was "based on the history [the victim] shared with me and based on my examination." Trial counsel cross-examined Dr. Henderson in part by emphasizing her reliance on the

[1] Dr. Henderson explained the hymen "is a type of flexible tissue in the adolescent population that partially covers the vaginal opening."

victim's history—as opposed to the physical examination—in forming her opinion that the hymen injury resulted from sexual abuse.

The jury convicted Mangal of criminal sexual conduct with a minor in the first degree, criminal sexual conduct with a minor in the second degree (two counts), lewd act upon a child,[2] and incest. The trial court sentenced Mangal to thirty years in prison, and the court of appeals affirmed his convictions. *State v. Mangal*, Op. No. 2009-UP-113 (S.C. Ct. App. filed March 4, 2009).

Mangal filed his PCR application without the assistance of counsel.[3] As required by section 17-27-50 of the South Carolina Code (2014) and Rule 71.1(b) of the South Carolina Rules of Civil Procedure, he made the application on the form prescribed by this Court. *See* Form 5, SCRCP Appendix of Forms. In the blank requiring the applicant to "State concisely the grounds on which you base your allegation that you are being held in custody unlawfully," Mangal handwrote, (a) "ineffective assistance of counsel trial," (b) "prejudiceness," (c) "ineffective assistance of appellate counsel." In the blank requiring the applicant to "State concisely and in the same order the facts which support each of the grounds set out [above]," Mangal handwrote (a) "failure to preserve direct appeal issue," (b) "failed to investigate documentary evidence and witnesses," and (c) "fail to make an additional object[ion] to the sufficiency of the curative charge or moved for a mistrial." He also wrote "will amend pursuant to SCRCP, Rule 71.1" to include "new grounds upon appt. of PCR counsel," in apparent recognition that Rule 71.1(d) requires, "Counsel shall insure that all available grounds for relief are included in the application and shall amend the application if necessary."

Mangal was subsequently appointed counsel, but no written amendment to Mangal's original application was filed. Mangal's counsel began the PCR hearing by calling witnesses, giving no indication to the PCR court he intended to raise any

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[2] This offense is now classified as criminal sexual conduct with a minor in the third degree under subsection 16-3-655(C) of the South Carolina Code (2015).

[3] There is no provision of law for the appointment of counsel in a PCR proceeding unless the application raises questions of law or fact which the court determines require a hearing. *See* Rule 71.1(d), SCRCP ("If, after the State has filed its return, the application presents questions of law or fact which will require a hearing, the court shall promptly appoint counsel to assist the applicant if he is indigent."); *see also Whitehead v. State*, 310 S.C. 532, 535, 426 S.E.2d 315, 316 (1992) ("Rule 71.1(d) mandates the appointment of counsel for indigent PCR applicants whenever a PCR hearing is held to determine questions of law or fact.").

issues not set forth in the original application. During his presentation of evidence, PCR counsel asked trial counsel why he did not object to "improper bolstering" testimony given by Dr. Henderson, and the State briefly cross-examined him on the same subject. However, PCR counsel did not mention any intent to make an ineffective assistance claim based on a failure to object to improper bolstering testimony until the end of the hearing. At that point, he argued trial counsel was ineffective in several respects not mentioned in the original application, including for not objecting to the alleged improper bolstering testimony of Dr. Henderson.

The PCR court denied relief in a written order without addressing the improper bolstering issue. Mangal made a motion under Rule 59(e) of the South Carolina Rules of Civil Procedure to alter or amend the judgment, arguing the PCR court should have addressed the improper bolstering issue. The PCR court denied the motion and held the improper bolstering issue was "not presented to the court in the application or in an amendment, and no testimonial evidence from the applicant was presented in support of these allegations."

Mangal filed a petition for a writ of certiorari seeking review of the denial of PCR, which we transferred to the court of appeals pursuant to Rule 243(l) of the South Carolina Appellate Court Rules. Mangal argued trial counsel was ineffective for not objecting to Dr. Henderson's testimony and the PCR court erred by not ruling on the issue. The court of appeals agreed the PCR court erred in not ruling on the improper bolstering issue. *Mangal*, 415 S.C. at 317-18, 781 S.E.2d at 735-36. The court of appeals then addressed the merits of the issue, finding Dr. Henderson's testimony was improper bolstering and counsel was ineffective for not objecting to it. 415 S.C. at 319-20, 781 S.E.2d at 736-37. The court of appeals remanded to the court of general sessions for a new trial. 415 S.C. at 319-20, 781 S.E.2d at 737. The State filed a petition for a writ of certiorari for review of the court of appeals' decision, which we granted.

II. Standard of Review

Our standard of review in PCR cases depends on the specific issue before us. We defer to a PCR court's findings of fact and will uphold them if there is any evidence in the record to support them. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (citing *Jordan v. State*, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). We do not defer to a PCR court's rulings on questions of law.[4]

[4] The court of appeals incorrectly stated "an appellate court 'gives great deference to the PCR court's . . . conclusions of law,'" quoting our own incorrect statement in

"Questions of law are reviewed de novo, and we will reverse the PCR court's decision when it is controlled by an error of law." *Sellner*, 416 S.C. at 610, 787 S.E.2d at 527 (citing *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014)). On review of a PCR court's resolution of procedural questions arising under the Post-Conviction Procedure Act or the South Carolina Rules of Civil Procedure, we apply an abuse of discretion standard. *See Winkler v. State*, 418 S.C. 643, 663, 795 S.E.2d 686, 697 (2016) (applying an abuse of discretion standard to the trial court's decision on a motion for a continuance); *Sweet v. State*, 255 S.C. 293, 296, 178 S.E.2d 657, 658 (1971) (same).

III. Presentation of the Improper Bolstering Issue

We first address the court of appeals' ruling that the improper bolstering issue was presented to the PCR court, and thus the PCR court erred in not ruling on it. We find the PCR court acted within its discretion in refusing to address the issue. First, the written application makes no mention of a claim based on improper bolstering, and no amendment to the written application was ever made. Second, PCR counsel began the hearing without mentioning there would be any additional claims for ineffective counsel beyond those listed in the original application. Third, even when PCR counsel questioned trial counsel on why he did not object to Dr. Henderson's testimony, he did not inform the PCR court he would make a claim for ineffectiveness based on the failure to make an objection.

Fourth, when PCR counsel did finally mention an ineffectiveness claim based on the testimony of Dr. Henderson, he did not make the claim with specificity. In what was essentially a closing argument, PCR counsel argued for relief on several unrelated grounds, and then stated,

> We also brought up the issue of Dr. Henderson. I believe in this case we have no case law specifically on allowing an expert to say in her opinion abuse occurred. She wasn't asked that question. She gave that answer. It did not receive an objection which we believe it should have. It was improper vouching.

Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). *Mangal*, 415 S.C. at 316, 781 S.E.2d at 734. We clarify that appellate courts review questions of law de novo, with no deference to trial courts.

There was no further discussion of any claim for ineffectiveness based on trial counsel not objecting to Dr. Henderson's testimony.

To the extent PCR counsel's brief statement constitutes a claim for ineffective assistance of counsel, we find a PCR judge would have difficulty recognizing it. The entire evidentiary presentation at the PCR hearing regarding trial counsel's decision not to object to Dr. Henderson's testimony consisted of three points. First, the PCR court was informed that the State asked Dr. Henderson, "Do you have an opinion within a reasonable degree of medical certainty based on your education, training, and experience, and based on your findings on examination of the victim, whether those findings are consistent with a penetrating injury?" Second, PCR counsel immediately commented, "Which was an appropriate question under our law, I would think." Third, the PCR court was informed Dr. Henderson stated she "believed [the victim] had been abused." Thus, the only evidentiary basis PCR counsel presented to support the premise that Dr. Henderson's testimony was improper bolstering was the fact Dr. Henderson testified she believed the victim had been abused.

In its opinion concluding Dr. Henderson's testimony was improper bolstering, the court of appeals relied on several additional portions of Dr. Henderson's testimony that were not revealed to the PCR court at any point during the PCR hearing. First, the court of appeals relied on the fact Dr. Henderson testified she considered "the history that [Victim] gave [her]" in reaching her opinion the victim had been abused. 415 S.C. at 319, 781 S.E.2d at 736. However, the PCR hearing transcript contains no mention of any such testimony. Second, most of the testimony the court of appeals relied on to support its conclusion Dr. Henderson's testimony was improper bolstering was actually elicited by trial counsel on cross-examination. There was no reference to any of that testimony during the PCR hearing, and PCR counsel never directed the PCR court to the trial transcript.

Finally with regard to the PCR court's exercise of discretion in refusing to address the improper bolstering issue, Mangal filed a Rule 59(e) motion asking the PCR court to consider the claim. The PCR court denied the motion, finding "no testimonial evidence . . . was presented in support of these allegations." We agree with the PCR court. The most generous interpretation of the improper bolstering claim—as counsel described it to the PCR court in closing argument and in the Rule 59(e) motion[5]—limits the claim to the failure to object to Dr. Henderson's

[5] Mangal's current PCR appellate counsel did not represent him at the PCR hearing or in filing the Rule 59(e) motion.

direct examination opinion testimony that the narrowing of the victim's hymen indicated a penetrating injury due to sexual abuse. Even if the PCR court had independently consulted the trial transcript of the direct examination of Dr. Henderson, the court would have discovered no further support for the claim other than Dr. Henderson considered the victim's history in reaching her opinion. Notably, the PCR court would also have discovered Dr. Henderson did not repeat to the jury what the victim told her in that history.

From a procedural standpoint, the court of appeals relied on *Simpson v. Moore*, 367 S.C. 587, 627 S.E.2d 701 (2006), which it found "similar" to this case, to support its conclusion the PCR court erred by not ruling on the improper bolstering issue. *Mangal*, 415 S.C. at 317, 781 S.E.2d at 735. *Simpson* is similar to this case in that the PCR court refused to rule on a PCR claim "because Simpson did not specifically raise it in his PCR application." 367 S.C. at 599, 627 S.E.2d at 707. Also similar to this case, Simpson filed a Rule 59(e) motion challenging the PCR court's refusal to rule on the issue. 367 S.C. at 600 n.3, 627 S.E.2d at 708 n.3. We held "Simpson should have been permitted to amend his PCR application to conform to the evidence presented." 367 S.C. at 599, 627 S.E.2d at 708.

However, there are significant dissimilarities between *Simpson* and this case. First, *Simpson* was an appeal from a three and one-half day PCR hearing, and PCR counsel's intention to pursue the disputed issue was made clear *during* the PCR hearing. The issue concerned an alleged *Brady*[6] violation involving a bag of money, which trial counsel testified he learned of "two hours before testifying" at the PCR trial,[7] and the State knew about it in time to present a witness "whom the State called for the specific purpose of addressing the . . . issue." 367 S.C. at 599, 627 S.E.2d at 707. The PCR court also left the record open in *Simpson* for the State to submit additional evidence. 367 S.C. at 608, 627 S.E.2d at 712. Here, on the other hand, the State had no notice Mangal intended to pursue the claim until the end of the hearing, after all the evidence had been presented. Though the State

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[6] *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

[7] In *Simpson*, we stated, "Simpson's defense counsel . . . testified that he learned about the bag of money *only* two hours before testifying." 367 S.C. at 599, 627 S.E.2d at 707. We used the word "only" to emphasize the merit of the *Brady* claim—that trial counsel was never informed of exculpatory information. We did not mention it in relation to the late indication of an intent to pursue the PCR claim. The important fact here is that the applicant's intent to pursue the claim was clear *during* the PCR hearing.

did conduct a brief cross-examination of trial counsel on his decision not to object to Dr. Henderson's testimony, the State had little reason to suspect her testimony would form part of the basis of a PCR claim yet to be made.

Second, the PCR court in *Simpson* made a specific finding as to the merits of the *Brady* claim, stating "the contents of the bag could have been exculpatory," and "this evidence should have been preserved and, thus, been subject to discovery." 367 S.C. at 599, 627 S.E.2d at 707. We observed, "Despite this finding, the [PCR] court ruled that the issue about the bag of money was not preserved for review because Simpson did not specifically raise it in his PCR application." *Id.* Here, the PCR court made no such finding on the merits of the improper bolstering issue.

Finally, we specifically relied in *Simpson* on Rule 15(b) of the South Carolina Rules of Civil Procedure, under which—we stated—"pleadings may be amended, even after judgment, to conform to issues tried by express or implied consent but not raised in the original pleadings." 367 S.C. at 599, 627 S.E.2d at 708 (citing Rule 15(b), SCRCP). The focus of a Rule 15(b) analysis is prejudice to the opposing party. *See Harvey v. Strickland*, 350 S.C. 303, 313, 566 S.E.2d 529, 535 (2002) (holding Rule 15(b) "[a]mendments to conform to the proof should be liberally allowed when no prejudice to the opposing party will result."). We analyzed prejudice in *Simpson*, holding "the State would not be prejudiced by such an amendment given that the State cross-examined Simpson's defense counsel on the issue and was permitted to present its own witness . . . to contest the issue's relevance." *Simpson*, 367 S.C. at 599, 627 S.E.2d at 708. The court of appeals did not mention any prejudice analysis in this case before relying on *Simpson* to find error in the PCR court's refusal to allow an amendment.

IV. Excusing Procedural Default in PCR Proceedings

There have been rare cases in which we have excused PCR applicants from procedural failures such as occurred in this case. In *Simmons v. State*, 416 S.C. 584, 788 S.E.2d 220 (2016), for example, the PCR applicant properly amended his application to assert "a claim that the State violated his due process rights by presenting false evidence to the jury" with its presentation of DNA evidence. 416 S.C. at 589, 788 S.E.2d at 223. The PCR court granted relief on another issue, as a result of which the applicant's death sentence was vacated. 416 S.C. at 586, 788 S.E.2d at 222. The PCR court "summarily denied the remaining claims, including Simmons's challenge to the DNA evidence, 'as without merit.'" 416 S.C. at 591, 788 S.E.2d at 224. As to the summary denial of those claims, "Simmons failed to file a Rule 59, SCRCP motion, as our issue-preservation rules require." *Id.*; *see*

Marlar v. State, 375 S.C. 407, 410, 653 S.E.2d 266, 267 (2007) (holding that when a PCR court fails to make specific findings as to an issue, a Rule 59(e) motion is necessary to preserve the issue for appeal). We held that although the State was "technically correct" to argue Simmons' DNA claim was procedurally barred, "dismissing the writ of certiorari would be fundamentally contrary to the interests of justice." *Simmons*, 416 S.C. at 591, 788 S.E.2d at 224. We remanded the case to the PCR court for a new trial on the DNA claim. 416 S.C. at 593-94, 788 S.E.2d at 225.

Our ruling in *Simmons* was based on the State's presentation—though innocent—of false evidence underlying the State's analysis of DNA. 416 S.C. at 591, 788 S.E.2d at 224. We relied on precedent from the Supreme Court of the United States and this Court to support the need for the "extraordinary action" we took under that circumstance to excuse the procedural bar. 416 S.C. at 591-92, 788 S.E.2d at 224 (citing *Napue v. Illinois*, 360 U.S. 264, 269, 79 S. Ct. 1173, 1177, 3 L. Ed. 2d 1217, 1221 (1959) and *Riddle v. Ozmint*, 369 S.C. 39, 47-48, 631 S.E.2d 70, 75 (2006)).

In most PCR cases, however, we have refused to excuse the pleading and issue-preservation requirements that apply in all civil cases. In *Aice v. State*, 305 S.C. 448, 409 S.E.2d 392 (1991), for example, we refused to relax procedural requirements simply "on the ground that his first . . . PCR application was insufficient due to ineffective PCR counsel." 305 S.C. at 448, 409 S.E.2d at 393. In *Plyler v. State*, 309 S.C. 408, 424 S.E.2d 477 (1992), the applicant attempted to raise on appeal for the first time a burden-shifting claim based on trial counsel's failure to object to the trial court's malice charge. 309 S.C. at 409, 424 S.E.2d at 478. As to the merits of the claim, we found "the malice charge . . . is so diseased with burden-shifting presumptions that it violates *Sandstrom v. Montana*, 442 U.S. 510, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979)." *Plyler*, 309 S.C. at 410-11, 424 S.E.2d at 478. Nevertheless, we affirmed the denial of PCR, stating, "Since this issue was neither raised at the PCR hearing nor ruled upon by the PCR court, it is procedurally barred." 309 S.C. at 409, 424 S.E.2d at 478. In *Marlar*, we reversed the court of appeals for addressing an issue not specifically addressed in a PCR order when the applicant did not make a motion to alter or amend pursuant to Rule 59(e). 375 S.C. at 410, 653 S.E.2d at 267. We stated, "Because respondent did not make a Rule 59(e) motion . . . , the issues were not preserved for appellate review, and the Court of Appeals erred in addressing the merits of the issues . . . ." *Id.*; *see also Humbert v. State*, 345 S.C. 332, 337, 548 S.E.2d 862, 865 (2001) (stating the failure to file a Rule 59(e) motion as to an issue not addressed by the PCR court leaves the issue unpreserved).

We have often considered the tension between the rights at stake in PCR proceedings and the application of traditional procedural requirements for the presentation and preservation of issues. *See, e.g.*, *Robertson v. State*, 418 S.C. 505, 795 S.E.2d 29 (2016); *Odom v. State*, 337 S.C. 256, 523 S.E.2d 753 (1999). The Supreme Court of the United States recently addressed this tension in *Martinez v. Ryan*, 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012). The issue in *Martinez* was "whether a federal habeas court may excuse a procedural default of an ineffective-assistance claim when the claim was not properly presented in state court due to an attorney's errors in an initial-review collateral proceeding." 566 U.S. at 5, 132 S. Ct. at 1313, 182 L. Ed. 2d at 280. After Martinez was convicted in the state court of Arizona of two counts of criminal sexual conduct with a minor, the state appointed new counsel for the direct appeal. 566 U.S. at 5-6, 132 S. Ct. at 1313-14, 182 L. Ed. 2d at 280. While the direct appeal was pending, Martinez's newly-appointed counsel initiated a state PCR proceeding. 566 U.S. at 6, 132 S. Ct. at 1314, 182 L. Ed. 2d at 280. However, counsel made no claim of ineffective assistance of trial counsel, and later filed a statement asserting there were "no colorable claims at all." 566 U.S. at 6, 132 S. Ct. at 1314, 182 L. Ed. 2d at 280-81. The state court dismissed the PCR action. 566 U.S. at 6, 132 S. Ct. at 1314, 182 L. Ed. 2d at 281.

Later, Martinez filed a second PCR action in state court with new counsel, this time asserting trial counsel provided ineffective assistance. 566 U.S. at 6-7, 132 S. Ct. at 1314, 182 L. Ed. 2d at 281. The state court dismissed this PCR action, finding Martinez was procedurally barred from pursuing ineffective assistance claims that should have been asserted in his first PCR action. 566 U.S. at 7, 132 S. Ct. at 1314, 182 L. Ed. 2d at 281. Martinez subsequently filed a writ of habeas corpus in federal court, again raising the ineffective assistance of counsel claims. *Id.* The district court refused to address the claims on the ground they were barred by procedural default in state court, and "Martinez had not shown cause to excuse the procedural default." 566 U.S. at 7-8, 132 S. Ct. at 1315, 182 L. Ed. 2d at 281. After the Ninth Circuit affirmed, the Supreme Court granted certiorari. 566 U.S. at 8, 132 S. Ct. at 1315, 182 L. Ed. 2d at 282.

The Supreme Court held "a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." 566 U.S. at 17, 132 S. Ct. at 1320, 182 L. Ed. 2d at 288. In doing so, the Court recognized the right to the effective assistance of trial counsel is a "bedrock principle in our justice system," and acknowledged applicants

"confined to prison" and "unlearned in the law" often have difficulty complying with procedural rules in a PCR case. 566 U.S. at 12, 132 S. Ct. at 1317, 182 L. Ed. 2d at 284. The Court then stated,

> Allowing a federal habeas court to hear a claim of ineffective assistance of trial counsel when an attorney's errors (or the absence of an attorney) caused a procedural default in an initial-review collateral proceeding acknowledges, as an equitable matter, that the initial-review collateral proceeding, if undertaken without counsel or with ineffective counsel, may not have been sufficient to ensure that proper consideration was given to a substantial claim.

566 U.S. at 14, 132 S. Ct. at 1318, 182 L. Ed. 2d at 285-86.

We first considered *Martinez* in *Kelly v. State*, 404 S.C. 365, 745 S.E.2d 377 (2013). We held *Martinez* "is limited to federal habeas corpus review and is not applicable to state post-conviction relief actions." 404 S.C. at 365, 745 S.E.2d at 377. We considered *Martinez* again in *Robertson*. Reaffirming *Kelly*, we held "*Martinez* does not afford Petitioner a right to file a successive PCR application by merely alleging ineffective assistance of prior PCR counsel." 418 S.C. at 516, 795 S.E.2d at 34. In *Robertson*, however, we permitted the PCR applicant to pursue a successive application the PCR court found was procedurally barred. 418 S.C. at 516, 795 S.E.2d at 34.

The Supreme Court's decision in *Martinez* reminds us that the Sixth Amendment guarantee of effective assistance of counsel is a "bedrock principle in our justice system." *Simmons* and *Martinez* counsel us that there are situations where the interests of justice require PCR courts to be flexible with procedural requirements *before* PCR applicants suffer procedural default on substantial claims. Such flexibility is consistent with the purpose and spirit of our Rules of Civil Procedure.[8] These considerations should guide PCR courts when struggling to

[8] *See* 4 Charles Alan Wright, Arthur R. Miller & Adam N. Steinman, *Federal Practice and Procedure* § 1029 (4th ed. 2015) ("The federal rules are designed to discourage battles over mere form and to sweep away needless procedural controversies that either delay a trial on the merits or deny a party his day in court because of technical deficiencies."); *Maybank v. BB&T Corp.*, 416 S.C. 541, 565, 787 S.E.2d 498, 510 (2016) ("In construing the South Carolina Rules of Civil

balance procedural requirements against the importance of the issues at stake in PCR proceedings. We encourage trial courts in PCR cases to use the discretion we grant them on procedural matters to find reasonable ways—within the flexibility of our Rules—to reach the merits of substantial issues.

As we stated in *Odom* and repeated in *Robertson*,

> "All applicants are entitled to a full and fair opportunity to present claims in one PCR application."

Robertson, 418 S.C. at 513, 795 S.E.2d at 33; *Odom*, 337 S.C. at 261, 523 S.E.2d at 755.

V. The Procedural Default in This Case

This is not an appropriate case in which to excuse Mangal from his procedural default. As we explained, the PCR court acted within its discretion to refuse to address any claim based on Dr. Henderson's direct examination testimony. In addition to that testimony, however, the court of appeals relied on Dr. Henderson's cross-examination testimony to support its conclusion of improper bolstering. This testimony does not convince us to excuse the procedural default.

First, none of it was presented to the PCR court at the hearing. In addition, the State makes a convincing argument that trial counsel elicited this testimony intentionally pursuant to a valid trial strategy. *See Watson v. State*, 370 S.C. 68, 72-73, 634 S.E.2d 642, 644 (2006) (finding counsel's performance was not deficient in making the decision not to object to "inadmissible" testimony because his strategy—that doing so "might lead to the more damaging introduction" of other evidence—was valid).

Trial counsel testified this was "not the first time I've been with Dr. Henderson." When asked if he expected Dr. Henderson to give an opinion on whether the victim had been sexually abused, trial counsel answered, "Not only did I expect it, but if she had answered any other way I would have been shocked, because Dr.

Procedure, our Court looks for guidance to cases interpreting the federal rules."); 3 *Cyclopedia of Federal Procedure* § 8.2 (3d ed., rev. 2017) ("The spirit of the Rules is to settle controversies upon their merits rather than to dismiss actions on technical grounds, to permit amendments liberally, and to avoid, if possible, depriving a litigant of a chance to bring a case to trial.").

Henderson's testimony is canned testimony. And she'll testify the same way in every trial." The State argues trial counsel, knowing Dr. Henderson would give an opinion the victim had been sexually abused, attempted to undermine her opinion by demonstrating to the jury that Dr. Henderson's opinion was not based on the objective results of her physical examination, but rather on the victim's fabricated statements. The State argues trial counsel then intentionally invited Dr. Henderson to admit she based her opinion on the truth of what the victim told her. According to the State, this allowed trial counsel to impeach Dr. Henderson's opinion with the weaknesses he had previously shown in the victim's credibility. Otherwise, the State argues, trial counsel was left with an expert opinion based only on objective physical findings—a far more difficult opinion to impeach. We need not decide whether this was a valid trial strategy.[9] We simply find this evidence does not support the extraordinary action of excusing Mangal's procedural default.

VI. Conclusion

We **REVERSE** the court of appeals' finding that the PCR court erred in refusing to address the improper bolstering issue, and **REINSTATE** the PCR court's order denying PCR.

KITTREDGE, J., concurs. BEATTY, C.J., HEARN, J., and Acting Justice Costa M. Pleicones concur in result only.

[9] If we were to excuse the procedural default for failing to present this claim to the PCR court, it would be necessary to remand to the PCR court for a hearing because the PCR court was not given the opportunity to make factual findings as to the reasonableness of this strategy, and if found not to be a reasonable strategy, whether the applicant suffered prejudice. *See Simmons*, 416 S.C. at 593, 788 S.E.2d at 225 ("We sit today in an appellate capacity and making findings of fact de novo would be contrary to this appellate setting.").

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Vance L. Boone, Thelma Boone, Travis G. Messex, Theresa S. Messex, Brian Johnson, and Kelli Johnson, on behalf of themselves and all others similarly situated, Petitioners,

v.

Quicken Loans, Inc. and Title Source, Inc., Respondents.

Appellate Case No. 2013-002288

IN THE ORIGINAL JURISDICTION OF THE SUPREME COURT

Opinion No. 27727
Heard October 19, 2016 – Filed July 19, 2017

DECLARATORY JUDGMENT ISSUED

Charles L. Dibble, of Dibble Law Offices, of Columbia, Steven W. Hamm, of Richardson Plowden & Robinson, P.A., of Columbia; C. Bradley Hutto, of Williams & Williams, of Orangeburg and Daniel Webster Williams, of Bedingfield & Williams, of Barnwell, for Petitioners/Respondents.

Benjamin Rush Smith, III, Allen Mattison Bogan, and Carmen Harper Thomas, all of Nelson Mullins Riley & Scarborough LLP, of Columbia, and Jeffrey B. Morganroth, of Morganroth & Morganroth, PLLC, of

Birmingham, MI, *pro hac vice*, for
Respondents/Petitioners.

JUSTICE KITTREDGE: We accepted this declaratory judgment matter in our original jurisdiction to determine if Respondents/Petitioners Quicken Loans, Inc. (Quicken Loans) and Title Source, Inc. (Title Source) have engaged in the unauthorized practice of law (UPL).[1] In their complaint, Petitioners/Respondents Vance L. and Thelma Boone, Travis G. and Theresa S. Messex, and Brian and Kelli Johnson (collectively "Homeowners"), alleged the residential mortgage refinancing model implemented by Quicken Loans and Title Source in refinancing the Homeowners' mortgage loans constitutes UPL. In addition to seeking declaratory relief, Homeowners' complaint also sought class certification and requested class relief.[2]

We referred this matter to a Special Referee to take evidence and issue a report containing proposed findings of fact and recommendations to the Court regarding the UPL issue, as well as on the issues of class certification and class relief. Following an evidentiary proceeding during which the parties submitted extensive testimony and documentary evidence, the Special Referee issued a report proposing various factual findings and recommending this Court declare that Quicken Loans and Title Source engaged in UPL but opining that neither class certification nor class relief were appropriate under the circumstances. Quicken Loans and Title Source took exception to the Special Referee's proposed findings of fact and UPL recommendation. Homeowners took exception to Special Referee's recommendation that class certification and class relief were unwarranted under the circumstances.

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[1] *In re Unauthorized Practice of Law Rules Proposed by the South Carolina Bar*, 309 S.C. 304, 422 S.E.2d 123 (1992).

[2] Specifically, Homeowners requested that certain class members' mortgage liens filed after August 8, 2011, (the date this Court refiled its decision in *Matrix Financial Services Corp. v. Frazer*, 394 S.C. 134, 714 S.E.2d 532 (2011)), be declared void and that Quicken and Title Source be required to disgorge all fees collected during the refinancing process, together with prejudgment interest.

We find the record in this case shows licensed South Carolina attorneys were involved at every critical step of these refinancing transactions, as required by our precedents. We also find that requiring more attorney involvement would not effectively further our stated goal of protecting the public from the dangers of UPL. We therefore respectfully reject the Special Referee's conclusion that Quicken Loans and Title Source committed UPL. Because we reject the finding of UPL, we need not address the parties' remaining exceptions, including Homeowners' request that we declare their mortgages void and certify this case as a class action.

I.

Quicken Loans is a nationwide online mortgage lender that provides, among other things, residential mortgage loan refinances. Prior to expanding into the South Carolina market, Quicken Loans engaged South Carolina attorneys—with expertise in real estate transactions and knowledgeable of our UPL jurisprudence—to review the Quicken Loans refinance procedure. After reviewing the procedure, the attorneys opined that the procedure would not constitute UPL, as evidenced by the sufficient involvement of a South Carolina lawyer at each critical step. Buoyed by the supporting opinions of South Carolina lawyers, Quicken Loans moved forward with offering residential mortgage loan refinance services to South Carolina borrowers.

Under the Quicken Loans refinance procedure, the borrowers have already purchased the property and are simply seeking a new mortgage loan (presumably with more favorable terms) to replace the existing loan. The process begins with a potential borrower completing a loan application, which is typically done online. Thereafter, the borrower speaks on the telephone with a licensed mortgage banker employed by Quicken Loans. Each borrower is informed that he or she has the right to select legal counsel to represent him or her in the transaction and asked whether he or she has a preference as to a specific attorney.[3] If the borrower does not desire to use a particular attorney during the loan transaction, Quicken Loans engages Title Source, a nationwide provider of settlement services and title

[3] *See* S.C. Code Ann. § 37-10-102 (2015) (requiring mortgage lenders to ascertain a borrower's preference as to the legal counsel they wish to employ to represent them in connection with closing the loan transaction).

insurance, to provide the necessary settlement services. Title Source, in turn, subcontracts with various individuals and entities (including licensed South Carolina attorneys) to perform those various services in compliance with South Carolina law.

For the transactions at issue in this case, Title Source turned to a non-attorney abstractor (Abstractor) to perform a title search and prepare a title abstract. In each of these transactions, Title Source initiated the title search by ordering a title abstract from Abstractor via email for each particular parcel of property to be refinanced. The scope of each title search was directed by Title Source in the email ordering the search; for loan refinances, no transfer of ownership takes place, so the title search includes two years back from the relevant vesting deed. Upon receiving a title abstract order from Title Source, Abstractor determined the county in which the property is located, then traveled to the relevant county land records office to locate and photocopy the pertinent documents on record, such as deeds, mortgages, mortgage assignments, loan modifications, tax documents, and personal judgments against the borrower(s). Thereafter, Abstractor prepared an "abstract" or index of the documents pulled from the public records, scanned and uploaded the abstract sheet along with the documents themselves, and electronically transmitted both the abstract and supporting documents back to Title Source through a web portal.[4]

After Abstractor's reports were transmitted to Title Source through the web portal, Title Source subsequently digitally transmitted those reports to David Aylor, a South Carolina attorney, who personally reviewed the title abstract and accompanying documents. If appropriate, based on his review of the documents, Aylor used an electronic template to generate and digitally sign title review certificates, verifying that he had reviewed the title documents and that the property owners held fee simple title to the property they were seeking to refinance.[5] Following receipt of the title certification, Title Source produced a title

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[4] Abstractor testified that occasionally, she would receive follow-up inquiries seeking clarification or requests for additional documents, and in those cases, she would revisit the county courthouse to clarify or to obtain the requested document(s) and upload those through the Title Source web portal.

[5] Aylor testified that in reviewing the documents in title abstracts, he would sometimes encounter a problem which required him to contact the abstractor with

commitment, which it submitted to Quicken Loans.

Thereafter, Title Source and Quicken Loans coordinated to schedule the loan closings and prepare the closing package, including the HUD-1 settlement statement, note, mortgage, and closing instructions, which were reviewed by the closing attorney prior to closing. In reviewing the closing package documents, the closing attorney confirmed that the title work was certified by a South Carolina lawyer and that the closing documents were accurate and complied with the law, and if necessary, made corrections or refused to proceed with the closing until the discrepancies were resolved.

Thereafter, the closing attorneys met with the borrowers in person, explained the legal effect of the loan documents, answered any questions the borrowers had, and supervised the borrowers' execution of the legal instruments.

Once the closing was finished, the attorney returned the executed documents to Title Source, along with detailed instructions on recording certain documents and disbursing loan proceeds. Upon the disbursement of funds, Title Source provided each closing attorney with a closing ledger, which the closing attorney used to confirm that disbursement of the funds was done in accordance with the HUD-1 settlement statement. Following recordation in the proper county land records office, a certified copy of each recorded document is mailed to the closing lawyer for their review.

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follow-up questions and occasionally, when the issue could not be resolved quickly, required him to notify Title Source that there would be a delay in issuing the title certificate. Aylor explained that sometimes the issue was as simple as poor copy quality of a particular document, but other times, it was "more serious than that." Aylor understood as the South Carolina attorney rendering an opinion as to the title of the property, he was responsible for reviewing the abstractor's report and vouching for its legal sufficiency. *See Ex parte Watson*, 356 S.C. 432, 436, 589 S.E.2d 760, 762 (2003) ("[W]e hold that when nonlawyer title abstractors examine public records and then render an opinion as to the content of those records, they are engaged in the unauthorized practice of law. But if a licensed attorney reviews the title abstractor's report and vouches for its legal sufficiency by signing the report, title abstractors would not be engaged in the unauthorized practice of law.").

Notably, each of the attorneys involved throughout these challenged transactions testified that they maintained their independence and were not controlled by Quicken Loans or Title Source in the exercise of their professional judgments. Moreover, at the hearing before the Special Referee, William Higgins, an expert in ethical and professional responsibility issues associated with real estate transactions in South Carolina, opined that Quicken Loans and Title Source had developed an "efficient, automated, consumer-friendly method" and "they've done so in a way that includes direct and appropriate involvement of South Carolina licensed lawyers, and they've done it in a way that [] allows those lawyers to act independently that does not impinge on their professional responsibilities or their professional independence."

Nevertheless, at the conclusion of the evidentiary hearing, the Special Referee issued a report recommending this Court declare Respondents' conduct to be UPL and issue an injunction against Respondents conducting real estate refinance transactions in South Carolina. In so finding, the Special Referee focused on the proper issue, that is, whether the supervision by the South Carolina attorneys was sufficient and "meaningful."

Quicken Loans and Title Source take exception to the Special Referee's recommendation that the Court find they engaged in UPL and contend the Report and Recommendation misconstrued this Court's UPL precedents and omitted and ignored material facts demonstrating Respondents' compliance with the law and protection of South Carolina consumers. Conversely, the Homeowners urge this Court to adopt the Special Referee's finding that Quicken Loans and Title Source engaged in UPL; the Homeowners further contend they are also entitled to additional relief beyond the injunction recommended by the Special Referee.

II.

The South Carolina Constitution assigns to this Court the duty to regulate the practice of law. S.C. Const. art. V, § 4. "South Carolina, like other jurisdictions, limits the practice of law to licensed attorneys." *Brown v. Coe*, 365 S.C. 137, 139, 616 S.E.2d 705, 706 (2005) (citation omitted). "[T]he policy of prohibiting laymen from practicing law is not for the purpose of creating a monopoly in the legal profession, nor for its protection, but to assure *the public* adequate protection in the pursuit of justice, by preventing the intrusion of incompetent and unlearned persons in the practice of law." *State ex rel. Daniel v. Wells*, 191 S.C. 468, 5

S.E.2d 181, 186 (1939) (emphasis added).

"The generally understood definition of the practice of law embraces the preparation of pleadings, and other papers incident to actions and special proceedings, and the management of such actions and proceedings on behalf of clients before judges and courts." *Crawford v. Cent. Mortg. Co.*, 404 S.C. 39, 45, 744 S.E.2d 538, 541 (2013) (quoting *State v. Despain*, 319 S.C. 317, 319, 460 S.E.2d 576, 577 (1995)) (internal quotation marks omitted). Further, this Court has recognized that "[t]he practice of law is not confined to litigation, but extends to activities in other fields which entail specialized legal knowledge and ability." *State v. Buyers Serv. Co.*, 292 S.C. 426, 430, 357 S.E.2d 15, 17 (1987). This includes the preparation of legal documents "when such preparation involves the giving of advice, consultation, explanation, or recommendations on matters of law." *Franklin v. Chavis*, 371 S.C. 527, 531–32, 640 S.E.2d 873, 876 (2007). However, "[o]ther than these general statements, there is no comprehensive definition of the practice of law." *Roberts v. LaConey*, 375 S.C. 97, 103, 650 S.E.2d 474, 477 (2007) (citing *Linder v. Insurance Claims Consultants, Inc.,* 348 S.C. 477, 487, 560 S.E.2d 612, 617–18 (2002)).

The absence of a precise definition is deliberate. This Court has resisted attempts to establish a bright-line definition of what constitutes the practice of law, [6]

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[6] Likewise, other states have also eschewed a rigid definition of what constitutes the practice of law in favor of a case-by-case approach. As the Massachusetts Supreme Judicial Court has explained:

> We believe it is impossible to frame any comprehensive and satisfactory definition of what constitutes the practice of law. To a large extent each case must be decided upon its own particular facts. But at least it may be said that in general the practice of directing and managing the enforcement of legal claims and the establishment of the legal rights of others, where it is necessary to form and to act upon opinions as to what those rights are and as to the legal methods which must be adopted to enforce them, the practice of giving or furnishing legal advice as to such rights and methods and the practice, as an occupation, of drafting documents by which such rights are created, modified, surrendered[,] or secured are all aspects of the practice of law.

explaining "what constitutes the practice of law must be decided on the facts and in the context of each individual case." *Id.* Indeed, in 1992, we declined to adopt a set of rules proposed by the South Carolina Bar which were designed to define and delineate those activities which constitute the practice of law because we determined "it is neither practicable nor wise to attempt a comprehensive definition by way of a set of rules." *In re Unauthorized Practice of Law Rules*, 309 S.C. 304, 305–07, 422 S.E.2d 123, 124–25 (1992). Instead, we determined "the better course is to decide what is and what is not the unauthorized practice of law in the context of an actual case or controversy" rather than through an abstract set of guidelines. *Id.* However, in making our determination, we also urged "any interested individual who becomes aware of conduct" that might constitute UPL "to bring a declaratory judgment action in this Court's original jurisdiction to determine the validity of the conduct." *Id.* at 307, 422 S.E.2d at 125. And it is pursuant to that directive that Homeowners filed this action asking the Court to examine the residential mortgage-refinance business model implemented by Quicken Loans and Title Source.

During the last three decades, this Court has explored many times what activities constitute the practice of law in the context of a residential real estate transaction. Almost thirty years ago, in the seminal case of *Buyers Service*, we first identified four steps in a residential real estate purchase transaction that constitute the practice of law and, therefore, must be performed or supervised by a South Carolina-licensed attorney: (1) the preparation of "deeds, notes[,] and other instruments related to mortgage loans and transfers of real property";[7] (2) title examination and the "preparation of title abstracts for persons other than attorneys";[8] (3) overseeing "real estate and mortgage loan closings" and "instructing clients in the manner in which to execute legal documents";[9] (4) and

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In re Shoe Mfrs. Protective Ass'n, 3 N.E.2d 746, 748 (Mass. 1936) (reaffirmed by *Real Estate Bar Ass'n for Massachusetts, Inc. v. Nat'l Real Estate Info. Servs.*, 459 Mass. 512, 517–18, 946 N.E.2d 665, 674 (2011)).

[7] *Buyers Serv.*, 292 S.C. at 430, 357 S.E.2d at 17.

[8] *Id.* at 432, 357 S.E.2d at 18.

[9] *Id.* at 433, 357 S.E.2d at 19.

giving "instructions to the Clerk of Court or Register of Mesne Conveyances as to the manner of recording" documents.[10] *Buyers Serv.*, 292 S.C. at 430–34, 357 S.E.2d at 17–19 (citations omitted). Thereafter, we recognized a fifth step that must be supervised by an attorney—the disbursement of funds. *Doe Law Firm v. Richardson*, 371 S.C. 14, 18, 636 S.E.2d 866, 868 (2006). Although we acknowledged that the "disbursement of loan proceeds [does not] in and of itself 'entail[] specialized legal knowledge and ability' such that it constitutes the practice of law," we nevertheless explained that "disbursement of funds in the context of a residential real estate loan closing cannot and should not be separated from the process as a whole." *Id*. (quoting *Buyers Serv.*, 292 S.C. at 430, 357 S.E.2d at 17)).

The common thread running through our decisions is the desire to protect the public. We determined that UPL claims should be analyzed on a case-by-case basis "to strike a proper balance between the legal profession and other professionals which will ensure the public's protection from the harms caused by the unauthorized practice of law." *In re Unauthorized Practice of Law Rules*, 309 S.C. at 307, 422 S.E.2d at 125. As the Supreme Court of Georgia has observed regarding that state's similar requirement that an attorney oversee real estate transactions, "[i]f the attorney fails in his or her responsibility in the closing, the attorney may be held accountable through a malpractice or [] disciplinary action. In contrast, the public has little or no recourse if a non-lawyer fails to close the transaction properly." *In re UPL Advisory Opinion 2003-2*, 588 S.E.2d 741, 742 (Ga. 2003).

Indeed, the goal of consumer protection was at the heart of this Court's reasoning

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[10] *Id.* at 434, 357 S.E.2d at 19. Specifically, as to the fourth step, we explained,

> We do not consider the physical transportation or mailing of documents to the courthouse to be the practice of law. However, when this step takes place as part of a real estate transfer, it falls under the definition of the practice of law as formulated by this court . . . It is an aspect of conveyancing and affects legal rights. The appropriate sequence of recording is critical in order to protect a purchaser's title to property.

Id.

in *Buyers Service*, no more so than when the Court stated, "The reason preparation of instruments by lay persons must be held to constitute the unauthorized practice of law is . . . for the protection of the public from the potentially severe economic and emotional consequences which may flow from erroneous advice given by persons untrained in the law." 292 S.C. at 431, 357 S.E.2d at 18.[11] We further observed that requiring the closing to be performed by a licensed attorney would help ensure the involvement of at least one professional "possessed of the requisite skill, competence and ethics," and would provide true accountability by allowing meaningful recourse to members of the public. *Id*.

Indeed, the complete lack of attorney involvement was what prompted this Court to find UPL had occurred in *Buyers Service* and in *Matrix Financial Services Corp. v. Frazer*, 394 S.C. 134, 714 S.E.2d 532 (2011). Buyers Service was a commercial title company that, along with a lender, performed entire real estate transactions with no attorney oversight. *See Buyers Serv.*, 292 S.C. at 428–29, 357 S.E.2d at 16–17. The Court determined Buyers Service had committed UPL by settling the transactions—including ordering and filling out legal instruments relating to the transfer of real property, such as mortgages and deeds; performing title searches and creating abstracts to determine ownership of property; giving legal advice, including as to how purchasers could acquire fee simple title; conducting closings; depositing loan proceeds into its escrow account and

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[11] Consistent with our approach, many other states also recognize the primacy of consumer protection in residential real estate conveyances and employ a similar analysis in determining the appropriate level of attorney involvement in mortgage transactions. *See, e.g.*, *In re First Escrow, Inc.*, 840 S.W.2d 839, 843–44 (Mo. 1992) (recognizing "the need to balance the protection of the public against a desire to avoid unnecessary inconvenience and expense" and "the duty to strike a workable balance between the public's protection and the public's convenience"); *Bennion, Van Camp, Hagen & Ruhl v. Kassler Escrow, Inc.*, 635 P.2d 730, 733 (Wash. 1981) (holding lay persons performing tasks relating to real estate transactions were engaged in the unauthorized practice of law and explaining "[i]t is the duty of the court to protect the public from the activity of those who, because of lack of professional skills, may cause injury whether they are members of the bar or persons never qualified for or admitted to the bar." (quotation marks and citation omitted)).

disbursing funds; and transferring documents to the land records office for recording—without any lawyer input or supervision.[12] *Id.* Similarly, in *Matrix*, we found the lender engaged in UPL by hiring a non-lawyer "to perform the title search, prepare the documents, and close the refinance loan—all admittedly without the supervision of a licensed attorney." 394 S.C. at 139, 714 S.E.2d at 534. We explained, that because the presence of attorneys in real estate closings is required for the protection of the public, "[l]enders cannot ignore established laws of this state and yet expect this Court to overlook their unlawful disregard." *Id*. at 140, 714 S.E.2d at 535.

As protection of the public is, and has always been, the lodestar of our context-dependent approach to determining whether an activity constitutes the practice of law, this Court has refused to require attorney involvement it did not find necessary to protect the public. For instance, even though the Court has determined that, in the context of a real estate transaction, the disbursement of loan proceeds must be supervised by an attorney, the Court nevertheless refused to "specify the form that supervision must take." *Richardson*, 371 S.C. at 18, 636 S.E.2d at 868. Rather than requiring loan proceeds to pass through a closing attorney's trust account, we instead left it up to the supervising attorneys to decide how best to satisfy their obligations to their clients. *Id.* Additionally, we have held that attorney supervision over loan modifications is not required because the cost to consumers would be greater than any benefit, given the "the existence of a robust regulatory regime and competent non-attorney professionals" involved in the loan-modification process. *Crawford*, 404 S.C. at 47, 744 S.E.2d at 542.

Likewise, in *Doe v. McMaster*, we found a lawyer's association with a lender and title company did not violate "the proscription against the unauthorized practice of law." 355 S.C. 306, 316, 585 S.E.2d 773, 778 (2003). *McMaster* was a declaratory judgment action brought by a lawyer seeking a determination of whether his association with a lender and title company was proper under our UPL rules. *Id.* at 309, 585 S.E.2d at 774. We held a lawyer may associate with a lender or title company to perform real estate transactions so long as (1) the lawyer

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[12] The Court noted that after the proceedings against Buyers Service began, the company started using an attorney to review the closing documents. *Buyers Serv.*, 292 S.C. at 429, 357 S.E.2d at 16. However, the attorney answered only to Buyers Service and never met with the purchaser. *Id.* at 429, 357 S.E.2d at 17.

"ensure[s] the title search and preparation of loan documents [were] supervised by an attorney";[13] (2) the lawyer is independent from the lender and "reviews and corrects, if needed, the [loan] documents [prepared by the lender] to ensure their compliance with law";[14] (3) the lawyer "supervise[s] the loan's closing and provide[s] legal advice to the buyer";[15] and (4) the lawyer supervises the recording of the mortgage and other documents.[16] *Id.* at 312–16, 585 S.E.2d at 776–78. Regarding this last step, the Court held it was sufficient that the lawyer "forward[ed] properly executed loan documents to [the title company] with specific instructions regarding how, when[,] and where to satisfy the existing first mortgage and to record the new mortgage and any assignments, if applicable."[17] *See id.* at 316, 585 S.E.2d at 778. Thus, a refinance process does not constitute UPL as long as a licensed South Carolina attorney is involved at each critical stage and exercises independent professional judgment, including making corrections if necessary, at the key points throughout the transaction. To be clear, the lawyer's involvement and supervisory role remain vital and necessary; however, this Court has never found that, as a matter of consumer protection, attorneys are required to personally conduct the myriad clerical tasks required to prepare for a transaction closing.

As a result, in evaluating whether challenged conduct constitutes the unauthorized practice of law, this Court carefully considers the specific constellation of facts presented and legal rights implicated to determine whether the degree of attorney involvement appropriately protects the public from potential legal pitfalls without unduly burdening consumer choice or needlessly increasing consumer costs. It is through this lens we must evaluate the procedures employed by Quicken Loans and Title Source to determine whether either or both of those entities have engaged in UPL in the residential real estate transactions at issue.

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[13] *McMaster*, 355 S.C. at 313, 585 S.E.2d at 776.

[14] *Id.* at 314, 585 S.E.2d at 777.

[15] *Id.* at 315, 585 S.E.2d at 777.

[16] *Id.* at 315–16, 585 S.E.2d at 778.

[17] *Id.* at 310, 585 S.E.2d at 775. According to the stipulated facts the lawyer also authorized the lender to disburse funds. *See id.*

A. Title Search and Certification

First, for every transaction challenged in this lawsuit, a South Carolina attorney issued a title review certificate saying he had carefully reviewed the records for the subject property and made a determination as to the ownership of that property. The express purpose of issuing the certificate was "to affirm that the residential title work and search were conducted under the supervision of a South Carolina attorney." *Id.* We do not believe the effectiveness of the title certificates is altered by the fact that a non-lawyer created the abstract reviewed by the attorney, for we have held that "if a licensed attorney reviews the title abstractor's report and vouches for its legal sufficiency by signing the report, title abstractors would not be engaged in the unauthorized practice of law." *Ex parte Watson*, 356 S.C. 432, 436, 589 S.E.2d 760, 762 (2003). Moreover, Aylor, the attorney who issued the title certificates in this case, testified that he always personally reviewed the abstractor's report and only issued a title certificate if he was confident of its legal sufficiency. Aylor said he took steps to ensure he complied with all applicable laws, including South Carolina's rules on UPL.[18] We believe Aylor's conduct satisfies the requirement of *Buyers Service* that examination of title and preparation of abstracts only be performed by, or under the supervision of, a licensed attorney. *See Buyers Service*, 292 S.C. at 432–33, 357 S.E.2d at 18–19.

B. Preparation of Instruments

Next, although Quicken Loans and Title Source were primarily responsible for preparing the loan documents utilized in these refinance transactions, we find the legal instruments were adequately reviewed (and corrected if necessary) by licensed attorneys prior to the closings. Although Respondents prepared the forms, there is nothing improper about that "as long as an independent attorney reviews and corrects, if needed, the documents." *McMaster*, 355 S.C. at 314, 585 S.E.2d at 777. Here, the closing attorneys all stated that they reviewed the documents for accuracy and compliance with the law prior to closing.

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[18] Aylor's contract with Title Source also states that Aylor would be responsible for complying with South Carolina's rules regarding UPL, specifically mentioning this Court's rulings in *Buyers Service* and *McMaster*.

C. Closing the Transaction

As to the closings, we find the record shows all of the loans were closed with appropriate attorney supervision. *See Buyers Service*, 292 S.C. at 433–34, 357 S.E.2d at 19 (stating that real estate closings must be supervised by an attorney). Each closing attorney signed a Closing Attorney's Statement, indicating he or she had reviewed all of the relevant closing documents including the HUD-1 settlement statement, note, mortgage, and legal description prior to closing. Each attorney also stated that he or she reviewed and explained the documents to the borrowers, answered any questions the borrowers asked, and supervised the borrowers' execution of the documents. Because a licensed attorney who had previously reviewed the closing documents for accuracy and legal sufficiency was physically present at each closing to answer questions and to instruct borrowers in the manner in which to execute the closing documents, there is no basis for a finding of UPL with respect to this step of the challenged transactions. *Id.*; *In re Lester*, 353 S.C. 246, 247, 578 S.E.2d 7, 7 (2003).

D. Recording and Disbursement

Finally, we find the record shows lawyers authorized and supervised the recording of all necessary documents and the disbursement of funds. *See Richardson*, 371 S.C. at 18, 636 S.E.2d at 868; *Buyers Service*, 292 S.C. at 434, 357 S.E.2d at 19. Each closing attorney testified he or she monitored the disbursement and recordation process to ensure the refinance transaction was properly completed in compliance with South Carolina law. Further, the evidence shows that in each loan transaction here, the closing attorney authorized Respondents to record documents and disburse proceeds with specific instructions for Respondents to return proof of recordation and disbursement to the closing lawyer upon completion. Specifically, the closing lawyers insisted on receiving a detailed disbursement ledger showing how the loan proceeds were applied, which the lawyers reviewed to confirm loan proceeds were disbursed properly. The closing lawyers also required Respondents to provide the recording date and the book and page numbers of the recorded loan documents, which the lawyers then used to obtain copies of the recorded loan documents to confirm all necessary documents were properly recorded. Indeed, in each of the transactions at issue, the closing attorney's file contained a copy of the recorded mortgage. Because the attorneys were required to verify the proper disbursement of the loan proceeds and that all of the necessary documents were recorded properly in the correct county, there is no basis for finding Respondents

committed UPL in this step of the closing process.[19]

III.

Given the extensive evidence of attorney involvement summarized above, we declare Respondents' conduct not does not constitute UPL. It appears Quicken Loans, Title Source, and those acting on their behalf took appropriate steps to ensure their actions complied with our state's UPL rules, including soliciting opinions from other South Carolina attorneys as to what lawyers must do during real estate transactions to avoid violating South Carolina's UPL rules. The record further reveals Title Source expected the South Carolina attorneys it engaged to take the steps needed to comply with South Carolina law. We do not suggest that such expectations are dispositive. Rather, these expectations must translate into actual compliance with the law. Here, we are firmly persuaded that, in each of the transactions at issue, the residential mortgage refinance practice utilized by Quicken Loans and Title Source, which includes direct and independent attorney supervision at each critical step, complies with the law. Because we find Quicken Loans and Title Source have honored this Court's precedents requiring attorney involvement and allowed those South Carolina attorneys the opportunity to independently exercise their professional judgment, we find the process utilized in these transactions does not constitute UPL.

Likewise, other courts have declined to require more robust attorney involvement under almost identical facts. For example, the Supreme Judicial Court of Massachusetts held that a title insurance company which contracted with lenders to coordinate settlement services in residential mortgage refinance transactions did not engage in UPL by ordering title examinations and abstracts from non-attorney third parties or by preparing HUD-1 and other settlement-related documents. *Real Estate Bar Association for Massachusetts, Inc. v. National Real Estate Information*

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[19] To the extent this Court's decision in *In re Breckenridge*, 416 S.C. 466, 787 S.E.2d 466 (2016), may be read to require the closing attorney utilize his or her own trust account to control the disbursement of loan proceeds, we hereby modify that decision. In doing so, we reaffirm our holding in *Richardson* that, in the context of a residential real estate loan closing, the disbursement of loan proceeds constitutes the practice of law and must be supervised by an attorney. *Richardson*, 371 S.C. at 18, 636 S.E.2d at 868. The attorney supervision required under Respondents' refinance model satisfies the *Richardson* standard.

Services, 946 N.E.2d 665, 677–79 (2011). In so finding, the court emphasized that both the title examination and the closing documents were reviewed by licensed Massachusetts attorneys prior to closing and that neither the title company nor the lender directed "the attorneys how to conduct the closing or fulfil their legal, professional, and ethical obligations." *Id*. at 682. So long as a licensed attorney interpreted the legal status of title, reviewed the settlement documents prior to closing, and remained free to exercise independent judgment in fulfilling their professional and ethical obligations, the title insurance company's involvement in coordinating the refinance process did not constitute UPL. As to the issue of whether the title insurance company's activities in contracting with licensed Massachusetts attorneys to attend real estate closings constituted UPL, the court noted that "[w]hen a third party interposes itself between an attorney and a client, the key question is who exercises and retains control over the attorney." *Id*. at 682–83. The court acknowledged that a third party "may facilitate the creation of a relationship between an attorney and client, and also may pay the legal bills of the client. . . . However, there must be a genuine attorney-client relationship, and direction and control over the attorney's actions cannot rest with that third party." *Id*. at 683–84 (explaining "[t]he degree of interposition and the facts of each individual case play a role in determining whether an inappropriate intermediary relationship exists—that is, one in which the intermediary, because of the degree of its control over the attorney, is itself deemed to be engaged in the unauthorized practice of law"). Here, because each attorney involved at every critical point in these challenged transactions remained free to exercise his or her independent professional judgment, the presence of a third party intermediary (such as Title Source) does not transform the practice into UPL.

Moreover, under the residential mortgage refinance process presented here, we believe a finding that Respondents' conduct constituted UPL would mark an unwise and unnecessary intrusion into the marketplace. We believe this is especially so, as the attorney involvement and supervision serve the goal of protecting the public. Once it is determined that sufficient attorney involvement is present and further that the interest of the public is protected, this Court should stay its hand and let the marketplace control. Indeed, there is no allegation here of fault in connection with any title search, closing, disbursement or otherwise—Homeowners do not allege they were harmed in any way by the Quicken Loans model. To the contrary, one homeowner testified she and her husband had no problems with their loan from Quicken Loans and they would refinance with Quicken Loans again if Quicken Loans were able to offer them a better interest

rate.

Simply put, we believe requiring more attorney involvement in cases such as this would belie the Court's oft-stated assertion that UPL rules exist to protect the public, not lawyers. *See, e.g.*, *Crawford*, 404 S.C. at 45, 744 S.E.2d at 541 ("The unauthorized practice of law jurisprudence in South Carolina is driven by the public policy of protecting consumers."). In this context, where there is already "a robust regulatory regime[20] and competent non-attorney professionals," *id.* at 47, 744 S.E.2d at 542, we do not believe requiring more attorney involvement would appreciably benefit the public or justify the concomitant increase in costs and reduction in consumer choice or access to affordable legal services. *Cf. In re Unauthorized Practice of Law Rules*, 309 S.C. at 306, 422 S.E.2d at 124–25 (recognizing the strict licensing requirements for becoming a Certified Public Accountant (CPA) and holding "that allowing CPAs to practice in their areas of expertise, subject to their own professional regulation, will best serve to both protect and promote the public interest").

DECLARATORY JUDGMENT ISSUED.

BEATTY, C.J., HEARN, FEW, JJ., and Acting Justice Costa M. Pleicones, concur.

[20] Quicken is subject to regulation by, among other things, the Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd–Frank), the Truth in Lending Act (TILA), and the Real Estate Settlement Procedures Act (RESPA).

The Gates at Williams-Brice Condominium Association and Katharine Swinson, individually, and on behalf of all others similarly situated, Petitioners,

v.

DDC Construction, Inc.; Kapasi Glass Mart, Inc.; DMC Consolidated, Inc.; DMC Builders, Co., Inc., individually and d/b/a The Dinerstein Companies, DC Developers - Columbia Condos, Inc.; Columbia Condos, LP; DMC Developers I, Ltd.; 31-W Insulation Company, Inc.; Associated Concrete Contractors, Inc.; Bailey Electric Company, LLC; C&B Utilities, LP; Carolina Floor Systems, Inc.; Century Fire Protection, LLC; Cherokee Inc.; Coronado Stucco, LP; Cross Plains Custom Tile, Inc.; Lowry Construction & Framing Inc.; LTB Construction, Inc.; Martin Morales Jr. Painting & Drywall, LLC; Metal Construction Materials, Inc.; Southwest Ironworks, Inc.; The Clerkley/Watkins Group, LP; Tindall Corporation; Triad Pest Control, Inc.; Wyman Acoustics LLC; Alenco Holding Corporation, Alenco Window GA, LLC, New AlencoWindow, Ltd.; AWC Holding Company; Crosby Window, Inc., f/k/a/ Action WinDoor Technology, Inc.; Geo-Systems Design & Testing, Inc.; HGE Consulting, Inc.; Maintenance Builders Supply, Ltd.; SCA Engineers, Inc.; Sinclair & Associates, Inc.; Faultless Hardware, individually and d/b/a Pamex Inc.; T & M Concrete, Inc.; Loveless Commercial Contracting, Inc.; Economy Waterproofing, Inc.; BMC West Corporation; Highway One Construction, Inc.; J.I. Windows LLC; Dietrich Industries, Inc., a/k/a Dietrich Metal Framing, Inc. n/k/a Clarkwestern Dietrich Building Systems LLC; Best Masonry and its successor in interest, OldCastle APG; Headwaters, Inc. d/b/a Best Masonry; and John Doe #1-10, Defendants,

Of Whom DDC Construction, Inc. and Columbia

Condos, LP, are the Respondents.

Appellate Case No. 2016-002440
Lower Court Case No. 2012-CP-40-08512

ORDER

Petitioners have filed a motion seeking dismissal of their petition for a writ of certiorari to the Court of Appeals, indicating they have entered into a final settlement agreement with respondents, and they additionally ask the Court to vacate the opinion of the Court of Appeals in *The Gates at Williams-Brice Condominium Association v. DDC Construction, Inc.*, 418 S.C. 282, 792 S.E.2d 240 (Ct. App. 2016). Respondents indicate they are not opposed to the requests. In response to this Court's inquiry pursuant to Rule 261(d), SCACR, the Court of Appeals has recommended that the request to vacate the opinion be granted. We hereby grant the motion, dismiss the petition for a writ of certiorari, and vacate the opinion of the Court of Appeals.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina

June 16, 2017

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Jo Pradubsri, Appellant.

Appellate Case No. 2015-000208

Appeal From Lexington County
Clifton Newman, Circuit Court Judge

Opinion No. 5499
Heard November 9, 2016 – Filed July 19, 2017

AFFIRMED

Appellate Defender John Harrison Strom, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General William M. Blitch, Jr., both of Columbia; and Solicitor Samuel R. Hubbard, III, of Lexington, for Respondent.

MCDONALD, J.: Jo Pradubsri appeals his convictions for trafficking in crack cocaine, possession with intent to distribute crack cocaine within the proximity of a school (the proximity charge), and unlawful carrying of a pistol. Pradubsri argues the circuit court erred when it (1) refused to reveal an informant's identity, (2)

found reasonable suspicion existed to justify his traffic stop, (3) gave an erroneous jury instruction on reasonable doubt, (4) refused to grant a directed verdict on the proximity charge, and (5) allowed testimony from a former codefendant that Pradubsri manufactured crack cocaine in his residence and participated in a drug sale immediately before the traffic stop. We affirm.

Factual Background

Around 3:00 a.m. on November 9, 2008, Sergeant John Finch of the Lexington County Sheriff's Department stopped Pradubsri's vehicle on St. Andrews Road in Irmo based on an informant's tip that the vehicle would likely contain crack cocaine and weapons. Finch conducted the stop as Pradubsri's vehicle exited a Kroger parking lot less than half a mile from an elementary school. Pradubsri was driving with his then-girlfriend, Melissa Martin, sitting in the passenger's seat. When Finch approached the vehicle, he saw furtive or shuffling movements and observed a black 9mm semi-automatic pistol on Pradubsri's side of the car. As Finch removed Pradubsri and Martin from the car, another officer saw that Martin had a small baggie in her clinched fist, a baggie in her waistband, and an unnatural bulge in her pants. In total, police found four baggies of crack weighing approximately seventy-five grams on Martin. Police also found a smaller .25-caliber semi-automatic pistol in a purse under a seat.

Law and Analysis

I. Reasonable Suspicion

Pradubsri argues police lacked reasonable suspicion to justify the traffic stop because the informant's information was neither sufficiently particularized nor corroborated. We disagree.

Before trial,[1] the State proffered testimony about the informant, whom Sergeant Finch had arrested for drugs and prostitution in the past. Finch testified he had used the informant multiple times before Pradubsri's arrest, he always found her

[1] Pradubsri was initially tried in 2010, but his convictions were reversed after this court found the trial court erroneously restricted Martin's cross-examination. *See State v. Pradubsri*, 403 S.C. 270, 743 S.E.2d 98 (Ct. App. 2013). A 2014 retrial ended in a mistrial.

information to be reliable, and she had assisted with several cases involving individuals on the "Midland's Most Wanted" list.

In Pradubsri's case, the informant participated informally by making "ten to twenty" phone calls to police over a three-month period. Through these calls, she relayed information about Pradubsri's and Martin's vehicle, their travel plans, their nicknames, and the locations where they sold drugs. Specifically, the informant told police the pair mostly sold drugs in hotels and motels and "were moving up and down Bush River [Road] down to St. Andrews [Road] and then back into the Irmo area." The informant also reported where Pradubsri and Martin lived, how much cocaine they bought per week, and where it was cooked into crack.

According to the informant, if Pradubsri was driving at night with Martin as his passenger, the vehicle would likely contain crack and weapons. The informant also identified the weapons: Pradubsri carried a black 9mm Hi-Point semi-automatic pistol, and Martin had a small silver .25-caliber semi-automatic.

On the night of the traffic stop, Finch spotted the silver 2001 Chevy Monte Carlo with a dent on the front right panel on St. Andrew's Road. Pradubsri was driving and Martin was his passenger. Finch had previously dealt with both Pradubsri and Martin but testified he knew Martin "a little more extensively from the prostitution and drugs and on the street." After Finch and another deputy approached Pradubsri's vehicle, Finch saw the handle of a pistol protruding from the gap between the driver's seat and the car's center console.[2] At this point, Finch ordered Pradubsri and Miller to step out of the vehicle, and the deputies found the drugs and second weapon.

Pradubsri moved to suppress the evidence seized during the traffic stop, arguing police did not have reasonable suspicion of criminal activity necessary to justify the stop. The trial court found the stop proper based upon the reliable information provided by the informant that Pradubsri and Martin were in engaged in criminal activity.

"Our review in Fourth Amendment search and seizure cases is limited to determining whether any evidence supports the trial court's finding." *State v.*

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[2] Finch's investigation revealed Pradubsri was a felon who could not legally possess a firearm.

Willard, 374 S.C. 129, 133, 647 S.E.2d 252, 255 (Ct. App. 2007). "A traffic stop is not unreasonable if conducted with probable cause to believe a traffic violation has occurred, or when the officer has a reasonable suspicion the occupants are involved in criminal activity." *State v. Vinson*, 400 S.C. 347, 352, 734 S.E.2d 182, 184 (Ct. App. 2012). "'Reasonable suspicion' requires a 'particularized and objective basis that would lead one to suspect another of criminal activity.'" *State v. Khingratsaiphon*, 352 S.C. 62, 69, 572 S.E.2d 456, 459 (2002) (quoting *United States v. Cortez*, 449 U.S. 411, 418 (1981)). "In determining whether reasonable suspicion exists, the court must consider the totality of the circumstances." *Willard*, 374 S.C. at 134, 647 S.E.2d at 255. "Reasonable suspicion is more than a general hunch but less than what is required for probable cause." *Id.* "Reasonable suspicion, like probable cause, is dependent upon both the content of information possessed by police and its degree of reliability." *Alabama v. White*, 496 U.S. 325, 330 (1990).

In *White*, police received an anonymous telephone tip that Vanessa White would leave a certain apartment complex at a specific time in a brown Plymouth station wagon with a broken taillight. 496 U.S. at 327. The tipster further stated White would travel to a particular motel and would have about an ounce of cocaine in a brown attaché case. *Id.* Police discovered White's vehicle at the apartment complex, followed it as it drove the most direct route to the motel, and initiated a stop shortly before it reached the motel. *Id.* A consensual search revealed marijuana in a brown attaché case and cocaine in White's purse. *Id.* The United States Supreme Court held that at the time of the stop "the anonymous tip had been sufficiently corroborated to furnish reasonable suspicion that [White] was engaged in criminal activity." *Id.* at 331. While acknowledging that not every detail mentioned by the tipster was verified, the Supreme Court placed particular importance on the tipster's ability to predict White's future behavior "because it demonstrated inside information—a special familiarity with [White's] affairs." *Id.* at 331–32. Ultimately, the Supreme Court concluded "[w]hen significant aspects of the caller's predictions were verified, there was reason to believe not only that the caller was honest but also that he was well informed, at least well enough to justify the stop." *Id.* at 332.

However, in *State v. Green*, this court held an anonymous caller who gave police a tip that Green was carrying a large sum of money and narcotics along with Green's name, a description of his car, and the location he would be departing did not "supply sufficient indicia of reliability to establish reasonable suspicion to justify

an investigatory stop." 341 S.C. 214, 218, 532 S.E.2d 896, 897 (Ct. App. 2000). This court noted the caller's information was readily observable and provided no predictive information, especially when the location from which the defendant departed had only two possible exits and the officer had no reason, aside from the tip, to suspect criminal activity. *Id.* at 218, 532 S.E.2d at 897–98. Significantly, this court stated, "Since the telephone call was anonymous, the caller did not place his credibility at risk and could lie with impunity. Therefore, [the court] cannot judge the credibility of the caller, and the risk of fabrication becomes unacceptable." *Id.* at 218, 532 S.E.2d at 898.

Conversely, in *State v. Rogers*, an officer received information from a known informant concerning the location of a planned robbery, the individuals involved, and the vehicle they would be driving. 368 S.C. 529, 532, 629 S.E.2d 679, 681 (Ct. App. 2006). The officer later received a dispatch about the robbery and found and stopped the car described by the informant. *Id.* at 531–32, 629 S.E.2d at 681. On appeal from the denial of Rogers's motion to suppress, this court found *Green* "clearly distinguishable" because it involved an investigatory stop based on an anonymous tip, as opposed to information from a known and reliable informant whom police had used in the past. *Id.* at 535, 629 S.E.2d at 682. Specifically, the court stated the officer "received the information from a known, accountable informant whose reputation could be assessed and who explained how he knew about the planned robbery, thereby supplying a basis, outside of his already proven reliability, for [the officer] to believe the confidential informant had inside information on the matter." *Id.*

More recently, in *State v. Pope*, an informant facing a drug charge arranged a drug sale with the defendant in exchange for a bond reduction. 410 S.C. 214, 219–20, 763 S.E.2d 814, 817 (Ct. App. 2014). The informant described the make, model, and color of Pope's vehicle, as well as the highway and direction in which Pope would be traveling with more than one person. *Id.* at 220, 763 S.E.2d at 817. The informant also called Pope while he was in route to the sale and relayed his specific location to police. *Id.* When police stopped the vehicle and conducted warrantless searches of the vehicle and its occupants, they discovered drug residue, scales, and cash. Later, upon searching the car that transported two of Pope's companions to the detention center, a deputy discovered a yellow bag containing a little more than eleven grams of crack cocaine. *Id.* at 220–21, 763 S.E.2d at 817–

18.[3] On appeal, this court found reasonable suspicion existed for the traffic stop because police were able to corroborate the informant's description of the vehicle, the highway and direction of the vehicle, the location of the vehicle at a specific time, and the fact that more than one person would be in the vehicle. *Id.* at 225, 763 S.E.2d at 820.

Likewise, the evidence here supports the circuit court's finding that police had reasonable suspicion to stop the Pradubsri vehicle. *Willard*, 374 S.C. at 133, 647 S.E.2d at 255. Finch's in camera testimony revealed the informant provided police with the following information: Pradubsri's and Martin's nicknames were JoJo and Magic, they drove a silver 2001 Chevy Monte Carlo with a dent on the front right panel, they sold drugs "moving up and down Bush River [Road] down to St. Andrews [Road] and then back into the Irmo area," they lived off of Lord Howe Road, they cooked the cocaine into crack at their home, and they were more likely to be dealing drugs at night when Pradubsri was driving and Martin was in the passenger seat. The informant also specified the vehicle would contain crack, a black 9mm pistol, and a silver .25-caliber semi-automatic weapon.

Given these facts, evidence supports the circuit court's decision that under the totality of the circumstances, the police had reasonable suspicion for the traffic stop. *See Willard*, 374 S.C. at 134, 647 S.E.2d at 255. This case is somewhat unique because the informant here did not give as much predictive information as the tipster in *White* and because the informant provided her information to law enforcement over some three months before Pradubsri's vehicle was located and stopped. However, given that the informant's identity was known to law enforcement and she had a history of providing reliable information, Finch was justified in making the stop once he saw Pradubsri driving a vehicle matching the informant's description in the small, identified area at a time when the informant had reported drugs and two specified weapons would very likely be in the vehicle. *See Adams v. Williams*, 407 U.S. 143, 146–47 (1972) (stating an unverified tip from a known informant may not have been sufficient to establish probable cause but carried enough indicia of reliability to justify a forcible stop and frisk); *Rogers*, 368 S.C. at 535, 629 S.E.2d at 682 (holding reasonable suspicion existed when a police officer stopped a vehicle after receiving information from a known and accountable informant whose reputation could be assessed); *Florida v. J.L.*, 529

[3] The court of appeals further upheld the warrantless searches of the vehicle and found a complete chain of custody was established for the cocaine.

U.S. 266, 276 (2000) ("If an informant places his anonymity at risk, a court can consider this factor in weighing the reliability of the tip."). Accordingly, we affirm the circuit court's denial of Pradubsri's motion to suppress the evidence seized during the traffic stop.

II. Reasonable Doubt Charge

Pradubsri argues the circuit court erred in instructing the jury that reasonable doubt "is doubt which makes an honest, sincere, conscientious juror in search of the truth hesitate to act." He further challenges the circuit court's language instructing the jury to "to evaluate the evidence and determine that evidence which convinces you of its truth" and that "it is your duty to determine the effect, the value, weight, and the truth of the evidence presented during trial." We find no reversible error.

During the charge conference, Pradubsri moved to exclude any jury charge language referencing a "search for the truth," arguing it improperly shifted the State's burden of proof as forbidden by *State v. Daniels*.[4] After a colloquy, the circuit court agreed to remove this line from the charge. Nevertheless, the circuit court charged the jury, "A reasonable doubt is doubt which makes an honest, sincere, conscientious juror in search of the truth to hesitate to act." Pradubsri objected, but the circuit court overruled the objection and denied a subsequent motion for a mistrial.

"The standard for review of an ambiguous jury instruction is whether there is a reasonable likelihood that the jury applied the challenged instruction in a way that violates the Constitution." *State v. Aleksey*, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000). "In reviewing jury charges for error, this [c]ourt must consider the [trial] court's jury charge as a whole in light of the evidence and issues presented at trial." *State v. Simmons*, 384 S.C. 145, 178, 682 S.E.2d 19, 36 (Ct. App. 2009). "If, as a whole, the charges are reasonably free from error, isolated portions which might be misleading do not constitute reversible error." *Id.* "A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and

[4] 401 S.C. 251, 256, 737 S.E.2d 473, 475 (2012) (instructing a trial judge to remove language from his charge that told the jury to reach a verdict that would represent truth and justice for all parties because such language could alter the jury's perception of the burden of proof).

adequately covers the law." *Id.* "To warrant reversal, a [trial] court's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." *Id.*

Recently, in *State v. Beaty*, a circuit court used "truth seeking" language in its preliminary jury remarks. Op. No. 27693 (S.C. Sup. Ct. filed Dec. 29, 2016) (Shearouse Adv. Sh. No. 1 at 13–14), *reh'g granted* Mar. 24, 2017. On appeal, our supreme court explained,

> [A] trial court should refrain from informing the jury, whether through comments or through its charge, that its role is to search for the truth, or to find the true facts, or to render a just verdict. These phrases may be understood to place an obligation on the jury, independent of the burden of proof, to determine the circumstances surrounding the alleged crime and from those facts alone render the verdict it believes best serves the jury's perception of justice. We caution trial judges to avoid these terms and any other that may divert the jury from its obligation in a criminal case to determine, based solely on the evidence presented, whether the State has proven the defendant's guilt beyond a reasonable doubt.

Id. at 15–16. Nevertheless, the supreme court held the defendant was unable to show prejudice from the comments sufficient to warrant reversal. *Id.* at 16.

Beaty echoes the supreme court's previous admonition against such language in *State v. Needs*, 333 S.C. 134, 508 S.E.2d 857 (1998). *Needs* addressed a circumstantial evidence charge and the following reasonable doubt charge:

> [A] reasonable doubt is a doubt which makes an honest, sincere, conscientious juror *in search of the truth* in the case hesitate to act. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that a reasonable person would not hesitate to rely and to act upon it in the most important of his or her own affairs.

Id. at 152, 508 S.E.2d at 866.

Needs urged trial courts to avoid using such language but ultimately upheld the conviction because the circuit court reiterated the "beyond a reasonable doubt" standard twenty-six times and the rest of the charge did not contain other disfavored language—particularly the "moral certainly" and "real reason" language found in *State v. Manning*.[5] *See Needs*, 333 S.C. at 154–55, 508 S.E.2d at 867–68.

In Pradubsri's case, the circuit court used truth-seeking language almost identical to that challenged in *Needs*. However, the circuit court referenced the "beyond a reasonable doubt" standard at least twenty times during its instructions. Further, the instructions did not contain *Manning*'s disfavored language. *See Needs*, 333 S.C. at 155, 508 S.E.2d at 867 (holding a charge was harmless partly because "it did not contain . . . troubling language identified in *Manning*"); *see also State v. Kirkpatrick*, 320 S.C. 38, 46, 462 S.E.2d 884, 889 (Ct. App. 1995) (noting a charge was not defective partly because it lacked "language found objectionable in the *Manning* case").

In considering Pradubsri's argument that the challenged language improperly shifted the State's burden of proof, we note the circuit court stated, "The Defendant is not required to prove his innocence. The burden of proof remains on the State to prove guilt beyond a reasonable doubt." Additionally, the circuit court instructed, "The presumption of innocence is like a robe of righteousness placed about the shoulders of the Defendant[,] which remains with the Defendant until it has been stripped from the Defendant by evidence satisfying you of the Defendant's guilt beyond a reasonable doubt." Thus, our review of the record and the entire charge reveals no prejudice sufficient to warrant reversal. *See Beaty*, No. 1 at 16 (reviewing the trial court's comments and the entire trial record and concluding there was no prejudice from the trial court's error sufficient to warrant reversal); *Simmons*, 384 S.C. at 178, 682 S.E.2d at 36 (holding appellate courts must consider the trial court's jury charge as a whole); *id.* ("If, as a whole, the charges

[5] 305 S.C. 413, 409 S.E.2d 372 (1991).

are reasonably free from error, isolated portions which might be misleading do not constitute reversible error.").[6]

III. Remaining Issues

As to the remaining issues, we affirm pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to Pradubsri's argument that the circuit court erred in refusing to reveal the informant's identity, we find the circuit court acted within its discretion. *See State v. Humphries*, 354 S.C. 87, 90, 579 S.E.2d 613, 615 (2003) ("[I]f the informant is an active participant in the criminal transaction and/or a material witness on the issue of guilt or innocence, disclosure of his identity may be required depending upon the facts and circumstances. On the other hand, an informant's identity need not be disclosed where he possesses only a peripheral knowledge of the crime or is a mere 'tipster' who supplies a lead to law enforcement."); *id.* at 90, 579 S.E.2d at 614–15 ("The burden is upon the defendant to show the facts and circumstances entitling him to the disclosure."); *id.* at 90, 579 S.E.2d at 615 (holding a trial court did not abuse its discretion by failing to require disclosure of an informant's name).

2. As to Pradubsri's argument that the circuit court erred in refusing to grant a directed verdict on the proximity charge, we find the charge was correctly submitted to the jury. *See State v. Cherry*, 361 S.C. 588, 593, 606 S.E.2d 475, 477–78 (2004) ("When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight."); *id.* at 593–94, 606 S.E.2d at 478 ("If there is any direct evidence or any substantial

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[6] We find unpreserved Pradubsri's arguments that the circuit court erred in instructing the jury to determine "the effect, the value, weight and the truth of the evidence presented" and that it was the jury's duty to "determine that evidence which convinces you of its truth" because Pradubsri's trial objection related only to the "search for the truth" language. However, even if the other "truth" references are considered, the instructions as a whole adequately covered the law and do not warrant reversal. *See Simmons*, 384 S.C. at 178, 682 S.E.2d at 36.

circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury.").[7]

3. As to Pradubsri's argument that the circuit court erred in allowing Martin to testify about Pradubsri's prior bad acts, we find the circuit court did not abuse its discretion in allowing the testimony. *See State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006) ("The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion."); *State v. Sweat*, 362 S.C. 117, 127, 606 S.E.2d 508, 513 (Ct. App. 2004) ("Evidence is admissible if 'logically relevant' to establish a material fact or element of the crime; it need not be 'necessary' to the State's case in order to be admitted.").

Conclusion

For the foregoing reasons, Pradubsri's convictions are

AFFIRMED.

LOCKEMY, C.J., and KONDUROS, J., concur.

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[7] Further, we note the version of the statute that governed the proximity charge at the time of Pradubsri's arrest did not contain a knowledge requirement and made it a crime to "unlawfully possess with intent to distribute, a controlled substance while in, on, or within a one-half mile radius of the grounds of a[n] . . . elementary . . . school . . . ." S.C. Code Ann. § 44-53-445 (2002). The statute was rewritten in 2010 and now requires that a person "have knowledge that he is in, on, or within a one-half mile radius of the grounds of a public or private elementary . . . school . . . ." S.C. Code Ann. § 44-53-445(B)(1) (Supp. 2016). However, this new requirement has no bearing on Pradubsri's case. *See State v. Henkel*, 413 S.C. 9, 11 n.4, 774 S.E.2d 458, 460 n.4 (2015) (stating a statute that was amended in 2009 was not applicable when the defendant's arrest occurred in 2008).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

William Huck and Dianne Huck, Respondents,

v.

Oakland Wings, LLC d/b/a Wild Wing Café, Civil Site Environmental, Inc., Oakland Properties, LLC, Chandler Construction Services, Inc., Avtex Commercial Properties, Inc., Defendants,

Of Whom Avtex Commercial Properties, Inc. is the Appellant.

Appellate Case No. 2015-002025

Appeal From Charleston County
Brian M. Gibbons, Circuit Court Judge

Opinion No. 5500
Heard May 2, 2017 – Filed July 19, 2017

REVERSED AND REMANDED

Kenneth Michael Barfield and Diane Summers Clarke, II, both of Barnwell Whaley Patterson & Helms, LLC, of Charleston, for Appellant.

Edward K. Pritchard, III, and Elizabeth Fraysure Fulton, both of Pritchard Law Group, LLC, of Charleston, for Respondents.

LEE, A.J.: In this appeal arising from a premises liability lawsuit, Avtex Commercial Properties, Inc. (Avtex) argues the trial court erred in denying its motion to disclose settlement and motion for setoff. We reverse and remand.

FACTS

William Huck slipped and fell while walking into Wild Wing Café in Mount Pleasant. Huck and his wife, Dianne Huck, filed a complaint against Wild Wing Café and Avtex, as the building's owner, among other parties. Huck alleged he suffered bodily injury, causing him to have surgery and incur medical costs. Huck asserted causes of action for negligence and loss of consortium. Dianne also asserted a cause of action for loss of consortium. Prior to trial, a settlement was entered into with defendants Civil Site Environmental, Inc. and Chandler Construction Services, Inc. The terms of the settlement, including the amounts, were not disclosed to the trial court. At the close of the Hucks' case, the court granted the remaining defendants' motions for directed verdict on Dianne's loss of consortium claim.

The jury returned a verdict in favor of Huck against Avtex only in the amount of $97,640, but the jury found Huck was fifty percent negligent in bringing about his own injuries. Accordingly, the court reduced the verdict by fifty percent to $48,820 and entered judgment against Avtex in that amount. Avtex filed a motion for judgment notwithstanding the verdict pursuant to Rule 50(b), SCRCP. It also filed a motion for disclosure of settlement and setoff, or in the alternative, to determine if the settlement was made in good faith. The trial court denied both motions. Avtex made a motion to alter or amend judgment pursuant to Rule 59(e), SCRCP, which the trial court denied. This appeal followed.

STANDARD OF REVIEW

"In an action at law, on appeal of a case tried by a jury, the jurisdiction of this Court extends merely to the correction of errors of law." *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 85, 221 S.E.2d 773, 775 (1976). "[A] factual finding of the jury will not be disturbed unless a review of the record discloses that there is no evidence which reasonably supports the jury's findings." *Id.*

LAW/ANALYSIS

I. Motion to Disclose Settlement

Avtex argues the trial court erred in denying its motion to disclose settlement. We agree.

"In interpreting the language of a court rule, we apply the same rules of construction used in interpreting statutes." *Green ex rel. Green v. Lewis Truck Lines, Inc.*, 314 S.C. 303, 304, 443 S.E.2d 906, 907 (1994). "In construing a statute, its words must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation." *City of Camden v. Brassell*, 326 S.C. 556, 561, 486 S.E.2d 492, 495 (Ct. App. 1997). "When the language of a court rule is clear and unambiguous, the court is obligated to follow its plain and ordinary meaning." *Stark Truss Co. v. Superior Constr. Corp.*, 360 S.C. 503, 508, 602 S.E.2d 99, 102 (Ct. App. 2004).

Rule 8 of the South Carolina Alternative Dispute Resolution Rules provides:

> Communications *during a mediation settlement conference* shall be confidential. Additionally, the parties, their attorneys and any other person present must execute an Agreement to Mediate that protects the confidentiality of the process. To that end, the parties and any other person present shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial or other proceeding, any oral or written communications *having occurred in a mediation proceeding* . . . .

Rule 8(a), SCADR (emphases added).

This court must give the words of Rule 8 their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the rule. *See Green*, 314

S.C. at 304, 443 S.E.2d at 907; *Stark Truss Co.*, 360 S.C. at 508, 602 S.E.2d at 102.

Avtex argues the trial court erred in concluding the South Carolina rules governing alternative dispute resolution prevented it from compelling disclosure of the terms of the settlements between the Hucks and Civil Site Environmental, Inc. and Chandler Construction Services, Inc. The Hucks argue the settlement agreement is protected because it was a part of the mediation process.

We find the trial court erred in denying Avtex's motion to disclose settlement. The documents referred to in Rule 8 are designed to protect any documents prepared for use by the mediator and the parties to the mediation itself. Once the parties reach a settlement, documents prepared in conjunction with the settlement and release are not for the purpose of, or in the course of, mediation. Rather, they are documents prepared in connection with the litigation and to bring the litigation to a close. Rule 8 is designed to protect the communications made during the mediation itself and to protect the process. The parties' mediation agreement reinforces the rule and simply incorporates the same language. The request for production of the settlement documents does not disclose confidential information from the mediation (i.e., it does not disclose or discuss information the parties utilized to reach the settlement). Further, any confidential matters the parties do not want disclosed can be protected through court proceedings including confidentiality provisions. Accordingly, we reverse the trial court on this issue.

II. Motion for Setoff

Avtex argues the trial court erred in denying its motion for setoff. We agree.

"A nonsettling defendant is entitled to credit for the amount paid by another defendant who settles." *Welch v. Epstein*, 342 S.C. 279, 312, 536 S.E.2d 408, 425 (Ct. App. 2000) (citing *Powers v. Temple*, 250 S.C. 149, 155, 156 S.E.2d 759, 761 (1967) ("[T]he rule is almost universally followed that one [tortfeasor] is entitled to credit for the amount paid by another [tortfeasor] for a covenant not to sue.")). "The reason for allowing such a credit is to prevent an injured person from obtaining a second recovery of that part of the amount of damages sustained which has already been paid to him." *Truesdale v. S.C. Highway Dep't*, 264 S.C. 221, 235, 213 S.E.2d 740, 746 (1975), *overruled on other grounds by McCall ex rel.*

Andrews, 285 S.C. 243, 329 S.E.2d 741 (1985), *superseded by statute*. "In other words, there can be only one satisfaction for an injury or wrong." *Welch*, 342 S.C. at 312, 536 S.E.2d at 425. "However, the reduction in the judgment must be from a settlement for the same cause of action." *Id.*

Section 15-38-50 of the South Carolina Code (2005) provides:

> When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:
>
> (1) it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and
>
> (2) it discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

"Section 15-38-50 grants the court no discretion in determining the equities involved in applying a [setoff] once a release has been executed in good faith between a plaintiff and one of several joint tortfeasors." *Vortex Sports & Entm't, Inc. v. Ware*, 378 S.C. 197, 210, 662 S.E.2d 444, 451 (Ct. App. 2008) (quoting *Ellis v. Oliver*, 335 S.C. 106, 113, 515 S.E.2d 268, 272 (Ct. App. 1999)). When the settlement is for the same injury as a matter of law, "the right to setoff arises as an operation of law, and the circuit court must award a setoff." *Smith v. Widener*, 397 S.C. 468, 474, 724 S.E.2d 188, 191 (Ct. App. 2012).

Avtex argues it is entitled to a setoff to account for the amounts Civil Site Environmental, Inc. and Chandler Construction Services, Inc. each paid the Hucks to settle the claims against them. Avtex asserts the Hucks allocated a substantial percentage of the settlement with Civil Site Environmental, Inc. and Chandler Construction Services, Inc. to Dianne's loss of consortium claim in an effort to deprive Avtex of a setoff. Therefore, Avtex argues the trial court erred in finding it

"has no jurisdiction to evaluate the 'fairness' or 'reasonableness' of such settlement agreements or to reallocate the settlements, assuming there is anything to reallocate," and "[n]othing in the law or at equity permits this court to conduct such an inquiry." The Hucks argue the trial court did not have any authority to reapportion the settlement proceeds.

Pursuant to section 15-38-50, we agree Avtex is entitled to a setoff. It was the trial court's function to determine the amount of the setoff. To determine if the nonsettling tortfeasor is entitled to a setoff as a preliminary matter, the documents must be reviewed to determine if their terms shield the settling tortfeasor from the requirements of section 15-38-50(2). Therefore, the court must review the documents to determine the amount of the settlement and its terms. Under section 15-38-50, the court also must determine if the release or covenant was "given in good faith." Because the trial court did not conduct such a review, we remand the case for the trial court to look at the settlement agreement and determine if Avtex is entitled to a setoff.

CONCLUSION

Accordingly, the trial court's order is

REVERSED AND REMANDED.

WILLIAMS and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Lorenzo Bernard Young, Appellant.

Appellate Case No. 2014-002548

Appeal From Richland County
Robert E. Hood, Circuit Court Judge

Opinion No. Op. 5501
Heard April 17, 2017 – Filed July 19, 2017

AFFIRMED

Appellate Defender David Alexander, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Deputy Attorney General Donald J. Zelenka, Assistant Attorney General Susannah Rawl Cole, and Solicitor Daniel Edward Johnson, all of Columbia, for Respondent.

HILL, J.: After a joint trial, Lorenzo Young and Trenton Barnes were convicted by a jury of murder, kidnapping, second-degree burglary, and attempted armed robbery. On appeal, Young argues the trial court abused its discretion in (1) admitting a letter written by Barnes as a statement against penal interest, Rule 804(b)(3), SCRE; and (2) failing to grant his motion for mistrial. We find the letter was admitted in error, and the error was not cured by the trial court's instruction to disregard the letter. We

conclude, however, that the error in admitting the letter and any error in failing to grant a mistrial was harmless. We therefore affirm Young's convictions and sentences.

I.

Kelly Hunnewell worked for Carolina Cafe in Columbia as a baker and cook. Hunnewell's shift started early in the morning, and she baked at a remote kitchen located at 93 Tommy Circle. The kitchen was next door to the Ale House Lounge, and both buildings were equipped with video surveillance.

According to the surveillance video and other evidence, Hunnewell arrived at the kitchen at 3:00 a.m. on July 1, 2013. It was raining hard outside, and she left the door to the kitchen propped open. At 3:40 a.m., while Hunnewell was stirring potatoes, a man wearing a red-hooded sweatshirt entered the open door, followed closely by a man wearing a gray-hooded sweatshirt. Both men had their sweatshirts pulled tightly around their faces. Each held a gun in what appeared to be a gloved hand. At the same time, a third man, wearing a dark-hooded sweatshirt, appeared at the door. The man in the red sweatshirt immediately ran up behind Hunnewell and placed his gun to her head. The man in the gray sweatshirt ran to the other side of Hunnewell, blocking any means for her escape. A brief struggle ensued, and Hunnewell attempted to fend off her assailants with a large spoon. During the struggle, both men fired their weapons. Hunnewell fell to the ground, and at 3:41 a.m., the men fled.

A neighbor who heard the gunshots and Hunnewell's screams called the police. Officer Jonathan Brayboy received the call from dispatch at 3:44 a.m., and arrived promptly to find Hunnewell lying on the floor. It was later determined she had died almost instantly from a .40 caliber gunshot wound to her chest and neck. Police officers discovered six bullet casings at the scene—four .45 caliber GAP casings and two Smith & Wesson .40 caliber casings. Police swabbed for DNA, canvassed the neighborhood for information related to the crime, and released portions of the surveillance video to the media.

Tips began to trickle in. Mary Brown, a resident of the neighborhood where Barnes and Young lived, called the police tip line after seeing the surveillance video on the news. Brown testified that on the afternoon before the shooting, she was at a cookout also attended by two young men: one was wearing a gray-hooded jacket or hoodie,

the other a red one. At the time, she did not know who the men were but later identified them to police.[1]

Donald Moore, who knew Young "from the street" and described Barnes and Troy Stevenson, Barnes' brother, as his friends, approached the police on July 2nd. In his statement, Moore informed the police that a few days before the shooting, he was present when Troy and Young were discussing a plan to rob the Ale House. He stated Young had acquired a Glock 40 and was showing it on the street. Moore stated Young wore the red-hooded sweatshirt seen on the video, and Troy often wore the gray one. Finally, Moore stated that after viewing the surveillance video, he believed Troy and Young were the shooters. At trial, Moore recanted his entire statement, testifying he had lied to police.

On July 5th, Investigators executed a search warrant at Young's house and recovered five gloves from Young's closet that later tested positive for gunshot residue, two unfired .45 caliber GAP rounds of ammunition, an empty Glock magazine, and a .40 caliber Smith & Wesson unfired round. Police searched Barnes' home pursuant to warrant the same day, recovering a "soaking wet" dark hoodie. Barnes, who was sixteen at the time, was arrested at his home, which was within walking distance of the scene. Young was arrested later that evening, found hiding in an upstairs closet of his cousin's home.

Latoya Barnes, Barnes' mother, testified she was home the night of the shooting and her two sons, Barnes and Troy, were there as well. According to Latoya, around 11:00 p.m. or midnight, Barnes and Young left the house together, while Troy had departed earlier with another group of friends. Latoya testified Young was wearing a red sweatshirt, Troy was wearing a dark sweatshirt, and Barnes was wearing a gray one. Troy eventually returned home with his friends, but Barnes and Young had still not returned at 2:00 or 3:00 a.m. Around that time, Latoya stated Young called and asked to speak with one of Troy's friends who was present at Latoya's home; she gave the friend the phone. Later, Latoya received another call from Young, asking for that same friend. Latoya testified she asked Young, "Where is [Barnes]?" Young replied Barnes was with him "right down the street." Latoya asked Young to tell Barnes to come home. When Barnes did not immediately return home, Latoya told Troy to go "get your brother." Troy then left the house and Latoya went to bed. Latoya testified that when she awoke at 6:00 or 7:00 in the morning, Barnes, Young,

[1] Due to a sustained objection, Brown was not permitted to testify to the actual identities of the men, just that she was able to identify them to the police.

and Troy were all at her home. Shortly thereafter, someone came by and picked Young up.

At trial, the State questioned Latoya about a statement she gave to police after her sons were arrested, identifying Barnes as the person in the video wearing the gray hoodie. Latoya denied identifying Barnes. Later in the trial, the State played a portion of Latoya's recorded statement to police in which she identified Barnes as the person in the video, stating, "Yeah, I mean it was [Barnes] with the gray on. Like I said, I know my kids' build. I know them from their fingers to their toes. I know my kids."

Additionally, Latoya testified she received a letter from Barnes dated March 31, 2014, while he was in the detention center. Over Young's objection that it was inadmissible hearsay and violated *Bruton v. United States*,[2] the letter was entered into evidence. In the letter, Barnes admitted his role in the shooting and implicated Young. A handwriting expert testified the letter was written by Barnes. After an overnight recess, the trial court instructed the jury the letter could not be used as evidence against Young. Young objected to the instruction and moved for a mistrial.

Young's girlfriend, Rolanda Coleman, testified that at the time of the shooting, she and Young were living together with their infant daughter. Speaking with police a week after the shooting, Coleman stated Young had acquired a gun a month or two before the incident. Coleman testified that on the night of the shooting, she was at her home and Young was at Latoya's home. According to her statement, Coleman received a call from Young the next morning asking for a ride home. Young's mother picked him up from Barnes' home, and when he returned, Young had a gun that he wrapped in a shirt and placed in the baby's crib.[3] Young described the gun to Coleman as a "45." Coleman and Young then went to work; when they returned home, the gun was gone. After Young and his mother saw the surveillance video of the shooting on the news, Coleman overheard Young's mother tell him to get rid of the gun. Coleman also testified Barnes often wore a gray-hooded sweatshirt, and she had previously seen Barnes with a gun. Upon seeing the video of the shooting, Coleman identified Barnes as the person wearing the gray sweatshirt. She testified she could not identify the person in the red sweatshirt. Coleman admitted that at the

[2] 391 U.S. 123 (1968).

[3] Coleman testified the baby was staying with her grandmother at the time.

time of trial, she had pending charges for burglary in the first degree but claimed the State had made no promises to her in exchange for her testimony.[4]

Evidence from Young's cell phone was also admitted. The call log corroborated Latoya's and Coleman's testimony regarding calls made by Young on the evening and morning of the shooting. The phone also contained several cached photographs from internet searches beginning the day of the shooting, including portions of the video and still pictures of the man in the red sweatshirt from the police media release. Investigators also discovered a video on the cell phone recorded five days before the shooting. This video, which was published for the jury, depicted Young in a gray sweatshirt displaying a gun—which he called a "Glock 4-5"—for the camera.

Next, the State presented the testimony of three jailhouse informants. Alfred Dominique Wright testified Young approached him in the jail's law library asking for help with his case. According to Wright, Young told him what happened the night of the shooting, implicating both himself and two brothers nicknamed "Trigg and Trap." Wright testified he later learned Trigg and Trap were Troy and Barnes.

Michael Peterson testified that while he and Young were housed in the same unit of the detention center, Young approached him to talk about his case. Peterson testified Young described the shooting incident, implicating himself and another person Young called "his little homey." Peterson further testified that later, while in the shower, he overheard a nervous-sounding Young "hollering back and forth" with Troy about evidence collected in the case, explaining that all the police had recovered were shell casings.

Michael Schaefer testified he knew Young because they were housed in the same dorm in jail. Schaefer testified Young told him about the shooting, implicating himself and "Trap and Trigg." According to Schaefer, on one occasion, Young told him, "I shouldn't have shot that bitch."

Finally, the State presented testimony from a firearms and tool marks examination expert and a DNA expert. The firearms expert testified GAP .45 bullets, like the ones found at the scene and at Young's house, were typically used by law enforcement rather than civilians and could only be fired by a Glock-manufactured gun. The DNA expert testified she could not exclude either Barnes or Young from a DNA sample recovered from the spoon Hunnewell used to hit her assailants.

[4] Young and Coleman were codefendants for the burglary charges, but the trial court did not permit reference about Young being charged.

However, on cross-examination, the expert admitted one-third of the world population could not be excluded as contributors. Neither the guns nor the red and gray hoodies were ever found.

Neither Barnes nor Young presented evidence, and instead challenged the State's proof. At the close of trial, the trial court charged "hand of one, hand of all" liability in addition to murder, kidnapping, second-degree burglary, and attempted armed robbery. After deliberating around three hours, the jury found Barnes and Young guilty of all counts. Young received consecutive sentences of life without the possibility of parole for murder, twenty years for attempted armed robbery, and fifteen years for burglary. Barnes was sentenced consecutively to fifty years for murder, twenty years for attempted armed robbery, and fifteen years for burglary.

II.

Young argues the trial court erred in admitting Barnes' letter to his mother as a statement against penal interest pursuant to Rule 804(b)(3), SCRE, which provides:

> (b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> . . . .
>
> (3) *Statement Against Interest.* A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Williamson v. United States, 512 U.S. 594 (1994), is the starting point for considering admissibility of statements against penal interest. The case involved lengthy statements made by Williamson's accomplice, Harris, which had been admitted as evidence against Williamson in his separate trial. *Id.* at 596-98. The

Court began by holding that the term "statement" as used in the text of Federal Rule of Evidence 804(b)(3) refers to a "single declaration or remark." *Id.* at 599–600. Rejecting the broader construction that a "statement" can encompass a narrative or extended declaration, the Court reasoned:

> Rule 804(b)(3) is founded on the commonsense notion that reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true. This notion simply does not extend to the broader definition of "statement." The fact that a person is making a broadly self-inculpatory confession does not make more credible the confession's non-self-inculpatory parts. One of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature.

Id. *Williamson* recognized that Rule 804(b)(3) is an attempt to reconcile two creeds of witness reliability courts have long sustained. The first is the principle upon which the rule was founded: that people do not often falsely accuse themselves or say things that harm their interests, so such statements are naturally credible. The second is the belief that an accomplice's statement that accuses another is inherently unreliable. *See, e.g.*, *Lee v. Illinois*, 476 U.S. 530 (1986). *Williamson* confronts the issue of what courts should do when the same person makes both types of statements. Wigmore believed that because the declarant was speaking while in a trustworthy state of mind indicating his "sincerity and accuracy," then whatever a declarant says when "under that influence" should be admitted. 5 J. Wigmore, *Evidence* § 1465, p. 339 (J. Chadbourn rev. 1974). *Williamson* avoided Wigmore's hypnosis-like view, which seems designed more for a circus tent than a tribunal, and crafted an approach that more realistically accounts for human nature: that when speaking of their criminal activity, people often speak out of both sides of their mouth. *Williamson* instructs how to apply Rule 804(b)(3) when a remark considered so reliable as to be naturally credible (i.e., no one would say it unless it was true) is coupled with one long held to be conspicuously unreliable (i.e., no one who says that can be trusted):

> In our view, the most faithful reading of Rule 804(b)(3) is that it does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory. The district court may not just assume for purposes of Rule 804(b)(3)

> that a statement is self-inculpatory because it is part of a fuller confession, and this is especially true when the statement implicates someone else.

512 U.S. at 600–01.

Our supreme court adopted the *Williamson* approach in *State v. Fuller*, 337 S.C. 236, 244–45, 523 S.E.2d 168, 172 (1999). We interpret the rule allowing statements against penal interest stringently. *Fuller* emphasized the "strict requirements" of the rule. *Id.* at 245, 523 S.E.2d at 172. *State v. Holmes* reaffirmed *Fuller* and stressed the rule is to be applied "very narrowly to only those portions of a hearsay statement which are plainly self-inculpatory." 342 S.C. 113, 117, 536 S.E.2d 671, 673 (2000).

Rule 804(b)(3), SCRE, requires the trial judge to view the disputed evidence in light of the surrounding circumstances and discern whether each particular remark is plainly self-inculpatory. This entails a searching examination of both content and context.

Viewing Barnes' letter through this lens, we conclude it is replete with statements that do not directly incriminate him, but instead seek to curry favor with his mother or shift blame to Young. Barnes assures his mother at least four times that his brother Troy's involvement was minimal (e.g., "Troy [] had nothing to do with it. I should of told them that Troy really came down there to get me . . . . [Troy] said hell no don't go with [that] man . . . . I looked back and seen Troy waving his hand telling me to come back."). Even the State in its closing acknowledged Barnes' underlying motivations in writing the letter, conceding he was "maybe trying [to] protect his brother" and "minimizing his own role." The focus on downplaying Troy's role is significant, for in an earlier recorded statement that the trial court excluded, Barnes had told police that he—and not Troy—had been the "lookout" for the two others who had gone inside the bakery. This underscores the notorious unreliability common to statements implicating accomplices and why they by definition almost always fall outside the tight boundaries of Rule 804(b)(3).

Barnes also paints himself in the letter as a reluctant participant manipulated by Young into the robbery and murder. He repeatedly describes Young as the organizer and instigator, offering a "mere presence" defense for himself. Once a declarant begins shifting blame to another, there is a corresponding shift away from the admissibility requirements of the rule. *See Williamson*, 512 U.S. at 603; *McCormick on Evidence*, § 319 at 534 (7th ed. 2013). Like the declarant in *Holmes*, Barnes "repeatedly depicts himself as [being] caught up in the crime." 342 S.C. at 117 n.3,

536 S.E.2d at 673 n.3. Barnes wrote he was planning on spending the evening with his girlfriend, until bowing to Young's relentless pressure to accompany him on his planned robbery of the Ale House. When they found the Ale House closed, Barnes wrote "so I said come on let's go back to my house then [Young] said you see that lady over there . . . ." Barnes describes the fatal moment as orchestrated entirely by Young: "I got scared ma I didn't want to do it . . . I should never listen to [Young]." These blame-spreading remarks should have not been presented to the jury. *Id.* ("'Confessions' which shift blame to co-conspirators cannot reasonably be viewed as self-inculpatory."); *see State v. Dinkins*, 339 S.C. 597, 602, 529 S.E.2d 557, 559 (Ct. App. 2000) (attempts to absolve blame and other self-serving statements do not qualify as statements against penal interest).

Placing Barnes' statements in context does not translate into admitting the entire narrative to demonstrate the backdrop. There is no *res gestae* rider to Rule 804(b)(3). Nor can we accept the State's position that the entire letter, except the references to Troy, is against Barnes' penal interest. To be sure, "a statement is not *per se* inadmissible simply because the declarant names another person." *Fuller*, 337 S.C. at 245, 523 S.E.2d at 172. Nevertheless, we have never found a statement in which a declarant implicates—rather than merely names—another admissible under Rule 804(b)(3). The rule only grants admission of statements against the declarant's penal interest. Statements that are against the penal interest of an accomplice do not qualify for the simple fact that the accomplice is not the declarant. To explain proper application of the rule, the *Williamson* Court furnished an illuminating example:

> [O]ther parts of his confession, especially the parts that implicated Williamson, did little to subject Harris himself to criminal liability. A reasonable person in Harris' position might even think that implicating someone else would decrease his practical exposure to criminal liability, at least so far as sentencing goes. Small fish in a big conspiracy often get shorter sentences than people who are running the whole show, especially if the small fish are willing to help the authorities catch the big ones.

512 U.S. at 604 (citations omitted). The Court dismissed the position that "an entire narrative, including non-self-inculpatory parts (but excluding the clearly self-serving parts . . .), may be admissible if it is in the aggregate self-inculpatory." *Id.* at 601. *See generally Weinstein's Federal Evidence*, § 804.06 (4)(d) (2d ed. 2017) ("[A] statement which shifts a greater share of the blame to another person (self-serving)

or which simply adds the name of a partner in the crime (neutral) should be excluded even when closely connected to a statement that assigns criminality to the declarant.").

The State also mischaracterizes *Williamson* as drawing a distinction between statements made by Harris regarding the same criminal activity undertaken by both Harris and Williamson and statements by Harris about Williamson's "separate criminal activity." *Williamson* does not say this. In his narrative confessions, Harris implicated both himself and Williamson in the same drug conspiracy; the opinion depicts no unilateral "separate" criminal conduct by Williamson. *Williamson*, 512 U.S. at 596–97. The fact that Williamson's exposure to criminal prosecution was "separate" from Harris' is precisely what removed declarant Harris' statements implicating his accomplice Williamson from the rule: he had made a statement not against his own penal interest, but against the interest of Williamson. *Id.* at 604. As *Williamson* noted:

> The question under Rule 804(b)(3) is always whether the statement was sufficiently against the declarant's penal interest "that a reasonable person in the declarant's position would not have made the statement unless believing it to be true," and this question can only be answered in light of all the surrounding circumstances.

*Id.*at 603–04; *see also McCormick on Evidence*, § 319 at 533 ("The result is that only the specific parts of the narrative that inculpate qualify.").

Nor are we persuaded by the State's reliance on *United States v. Dargan*, 738 F.3d 643 (4th Cir. 2013). Dargan was tried separately for a robbery committed with two others. *Id.* at 645–46. The Fourth Circuit affirmed admission of a statement one of Dargan's co-defendants, Harvey, had made to a cellmate confessing to the crime and mentioning his two accomplices without identifying them other than to say they were incarcerated in the same facility. *Id.* at 649–50. The court found the statements were against the declarant's penal interest and satisfied Rule 804(b)(3) because they demonstrated an insider's knowledge of the crime and exposed him to conspiracy liability. *Id.*

We are not convinced *Dargan* is compatible with *Williamson*. There is no "insider's knowledge" exception to the hearsay rule. *Dargan* and other courts that see such a mirage, *see, e.g.*, *United States v. Volpendesto*, 746 F.3d 273, 288 (7th Cir. 2014), may be misreading *Williamson*'s reference to how *otherwise neutral* statements may,

depending on context, be self-inculpatory if they "give the police significant details about the crime." *Williamson*, 512 U.S. at 603. But this does not mean, as Justice Scalia's solo concurrence implies, that statements revealing inside knowledge of a crime are automatically admissible even if they implicate others besides the declarant. *Id.* at 605–07.

We also find it difficult to see how any of Harvey's remarks in *Dargan*, other than the admission of his own involvement, were individually self-inculpatory. One who says "I killed X and did it with Y" would certainly be subject to conspiracy liability, and the statement would also be admissible against the declarant in his separate trial as a statement of a party-opponent. But almost *any* remark implicating both the declarant and an accomplice in a joint crime also incriminates the declarant in a conspiracy, and to use such logic to meet 804(b)(3) would be an end run around *Williamson* as well as render that decision unintelligible, as many of the statements the Court described as non-self-inculpatory to Harris surely connected him to a conspiracy with Williamson.[5]

Significantly, Federal Rule of Evidence 804(b)(3) was amended in 2010 to require that a statement against penal interest be "supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability." Our Rule 804(b)(3) only requires corroboration when the statement is offered to exculpate the accused. Because this protective layer of corroboration is not extended to statements offered by the State to inculpate the accused, the need to rigorously restrict admission to plainly self-inculpatory remarks in such circumstances is even more urgent. Confining the statement against interest exception to such declarations is consistent with the text of the rule and the wariness with which our courts have treated this strand of hearsay, which was altogether barred from admission in criminal trials until *State v. Doctor*, 306 S.C. 527, 529–30, 413 S.E.2d 36, 38 (1992), and the adoption of the South Carolina Rules of Evidence in 1995. Before that, the common law only tolerated it

[5] Rule 801(d)(2)(E), SCRE, classifies "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy" as not hearsay. But remarks made by a co-conspirator once the conspiracy has ended or that do not advance the conspiracy's aims do not enjoy the same aura of reliability. Consequently, they are treated like any other hearsay, mirroring the treatment Rule 804(b)(3) accords the non-self-inculpatory statements of accomplices. *See State v. Sims*, 387 S.C. 557, 566, 694 S.E.2d 9, 14 (2010) (finding co-conspirator statements that do not further the conspiracy but simply "spill the beans" inadmissible).

in civil cases, and then only if the declarant was dead. *See, e.g.*, *Gilchrist v. Martin*, 8 S.C. Eq. 492 (1831).

We find the trial court erred in admitting Barnes' letter without conducting the careful examination required by Rule 804(b)(3). The portions of the letter that did not plainly inculpate Barnes were rank hearsay inadmissible against Young.

III.

We next consider whether the trial court cured the error by instructing the jury the next morning to not consider the letter against Young. We start by presuming the cure worked, for we also presume juries follow their instructions. *See State v. Grovenstein*, 335 S.C. 347, 353, 517 S.E.2d 216, 219 (1999); *see also Richardson v. Marsh*, 481 U.S. 200, 206 (1987) (noting "the almost invariable assumption of the law that jurors follow their instructions"). This presumption has long been assailed, most famously by Justice Jackson's disdainful appraisal of "[t]he naive assumption that prejudicial effects can be overcome by instructions to the jury, [which] all practicing lawyers know to be unmitigated fiction." *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring) (citation omitted). Others have defended jurors' ability to perform their duties conscientiously. *See United States v. Mazzone*, 782 F.2d 757, 764 (7th Cir. 1986) ("We are not quite so naive as to believe that telling jurors not to think about something will cause them to forget it, but we trust juries to behave responsibly and to put aside as considerations bearing on their judgment matters that the judge tells them to put aside."); *see also* Sklansky, *Evidentiary Instructions and the Jury as Other*, 65 Stan. L. Rev. 407, 424-28 (2013) (reviewing thirty-three empirical studies of the effect of limiting instructions on mock juries and contending instructions can be effective if prudently delivered).

Limiting instructions are deemed to cure error unless "it is probable that, notwithstanding the instruction, the accused was prejudiced." *State v. Smith*, 290 S.C. 393, 395, 350 S.E.2d 923, 924 (1986). The instruction given here was well-crafted, as far as limiting instructions go, which is not far amidst the dense gravity of a *Bruton*-like error.[6] *Bruton* held the admission, in a joint trial, of a nontestifying

[6] We leave for another day the issue of what impact, if any, *Crawford v. Washington*, 541 U.S. 36 (2004) has on *Bruton*. Many federal circuits have found that because *Crawford* limited the reach of the Confrontation Clause to testimonial statements, *Bruton* no longer applies to the admission of non-testimonial statements in a joint trial. *See Dargan*, *supra*; *United States v. Vasquez*, 766 F.3d 373, 378–79 (5th Cir.

defendant's confession implicating a co-defendant violated the Confrontation Clause. 391 U.S. at 126. The Court then took the remarkable step of adopting a *per se* rule that the violation could not be cured by a limiting instruction. *Id.* at 135–36. The Court found:

> [T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial.

Id. (citations omitted).

Relying on this same language, our supreme court recently reaffirmed that a limiting instruction cannot fix a *Bruton* violation. *State v. McDonald*, 412 S.C. 133, 142, 771 S.E.2d 840, 844 (2015). We perceive no practical difference between *Bruton*, *McDonald*, and the wrongful admission of Barnes' letter against Young that would justify a different result. We do not believe the limiting instruction given here in a joint trial magically gains potency by labeling the error it was designed to target as inadmissible hearsay rather than lack of confrontation. The concepts are close cousins. *Dutton v. Evans*, 400 U.S. 74, 86 (1970) ("[T]he Sixth Amendment's Confrontation Clause and the evidentiary hearsay rule stem from the same roots."). Nor can we sensibly say the magnitude of prejudice varies with whether the tainted confession was testimonial or not. It was an out-of-court statement that came in as evidence against the accused without the benefit of cross-examination, and the limiting instruction could not take it out.

IV.

Having decided the error in admitting Barnes' hearsay statements was not cured, we must address whether it was nevertheless harmless. The improper admission of

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2014). Our focus is solely whether, on the record before us, the presumption that curative instructions work can, in a joint trial, withstand the admission of an out-of-court statement by a nontestifying co-defendant that violates the hearsay rule. Rules 801–805, SCRE.

hearsay is harmless when it could not have reasonably affected the result of the trial. *State v. Brewer*, 411 S.C. 401, 408–09, 768 S.E.2d 656, 660 (2015). "No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case." *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985). For example, "[i]mproperly admitted hearsay which is merely cumulative to other evidence may be viewed as harmless." *State v. Jennings*, 394 S.C. 473, 478, 716 S.E.2d 91, 93–94 (2011) (citing *State v. Blackburn*, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978)). If it appears beyond a reasonable doubt that the error did not contribute to the verdict, then the error may be deemed harmless. *State v. Tapp*, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012).

While we have not based the error here on *Bruton* or other constitutional grounds, the analysis for ascertaining the harmfulness of a *Bruton* error remains useful, and is not functionally different from the test for trial errors outlined above. The violation of the Sixth Amendment right to confrontation is not *per se* reversible error. In *McDonald* and *State v. Henson*, 407 S.C. 154, 167, 754 S.E.2d 508, 515 (2014), our supreme court quoted *Schneble v. Florida*, 405 U.S. 427, 430 (1972): "In some cases the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the codefendant's admission is so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper use of the admission was harmless error." Whether a *Bruton* error is harmless depends upon numerous factors including "the importance of the witness's testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and of course, the overall strength of the prosecution's case." *State v. Jenkins*, 322 S.C. 360, 364–65, 474 S.E.2d 812, 815 (Ct. App. 1996).

We recognize it may seem counter-intuitive to find the hearsay error so prejudiced Young that no curative instruction could save it, yet also find the error harmless beyond a reasonable doubt. We are also mindful that a confession (sometimes called "the Queen of proofs") is among the most explosive and incriminating of evidence, and often profoundly impacts the jury. But it must be remembered that the jury also had before it three separate confessions made by Young himself rather than his accomplice. Although these statements were recounted by fellow prisoners facing serious pending charges, and whose motives and recall were questioned extensively, it was up to the jury to gauge credibility. It is probable the collective impact of this testimony was more damaging to Young than Barnes' letter, which after all was written by a minor in lockup to his mother. *See Harrington v. California*, 395 U.S.

250, 254 (1969) (finding admission of two co-defendants' confessions in violation of *Bruton* harmless when Harrington also confessed and evidence of his guilt was overwhelming; "Our judgment must be based on our own reading of the record and on what seems to us to have been the probable impact of the two confessions on the minds of an average jury."). The statements attributed to Young by his fellow inmates were largely consistent with each other, and corroborated other key pieces of the State's case. *See Schneble*, 405 U.S. at 431 (finding a *Bruton* violation to be harmless error when the "details of petitioner's [confession] were internally consistent, were corroborated by other objective evidence, and were not contradicted by any other evidence in the case"); *accord McDonald*, 412 S.C. at 143–44, 771 S.E.2d at 845. We note *McDonald* found a limiting instruction wanting in light of *Bruton*, yet still found the *Bruton* error harmless.[7] 412 S.C. at 142–44, 771 S.E.2d at 844–45.

Although the decision dealt with a defendant's confession improperly admitted against him in his separate trial, Justice Kennedy's concurrence in *Arizona v. Fulminante*, 499 U.S. 279, 313 (1991), emphasized that a court

> conducting a harmless-error inquiry must appreciate the indelible impact a full confession may have on the trier of fact . . . . If the jury believes that a defendant has admitted the crime, it doubtless will be tempted to rest its decision on that evidence alone, without careful consideration of the other evidence in the case. Apart, perhaps, from a videotape of the crime, one would have difficulty finding evidence more damaging to a criminal defendant's plea of innocence.

We have such a videotape here. Three witnesses, including his mother, identified Barnes as one of the people on the video shooting at Hunnewell. Numerous witnesses placed Young together with Barnes at Barnes' mother's house shortly before and after the crime occurred, wearing a red sweatshirt like that seen on the video. This house was within walking distance of the scene. Donald Moore stated that Young had discussed his planned robbery of the Ale House and that Young had

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[7] We understand that in *Henson* our supreme court found a *Bruton* error not to be harmless. *See Henson*, 407 S.C. at 167, 754 S.E.2d at 515. There, however, the evidence of guilt was not overwhelming. Unlike the situation here, there was no physical evidence linking the defendant to the crime and he had not confessed to third parties. *See id.*

a Glock .40. Three witnesses related confessions by Young that corroborated details from the video. Portions of the video were found on his cell phone, along with a depiction of him brandishing what he described as a Glock .45. Shell casings from the scene matched the make and type as those found at Young's home. The gloves recovered from Young's home bore gunshot residue. Young's girlfriend observed him hiding a gun he described as a .45 when he arrived home a few hours after the murder, and she also heard his mother later warn him to get rid of the gun.

We therefore find it clear beyond a reasonable doubt that a rational jury would have found Young guilty absent the error.[8] *Neder v. United States*, 527 U.S. 1, 18 (1999). To be sure, there are instances when the improper hearsay heard by the jury is so prominent that "[t]he reverberating clang of those accusatory words would drown all weaker sounds." *Shepard v. United States*, 290 U.S. 96, 104 (1933) (Cardozo, J.). But here there was a deafening drumbeat of substantial testimonial and physical evidence far more resonant than Barnes' letter.

We do not make this finding lightly, but in keeping with the view that "[t]he harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986) (citation omitted); *cf.* Murray, *A Contextual Approach to Harmless Error Review*, 130 Harv. L. Rev. 1791 (2017) (noting "some degree of procedural error is virtually inevitable in all but the most straightforward of criminal trials," but advocating reform of harmless error doctrine to account more for the nature of the right infringed by the trial error rather than its effect on result).

We remain concerned—not to mention perplexed—by the State's use of evidence the Supreme Court forbade a generation ago in *Williamson*, and in a manner condemned a generation before that in *Bruton*. We echo Justice Kittredge's reminder of the "cautionary warning from almost three decades ago" that the State should seek the expediency of joint trials only after considering the often insoluble evidentiary

[8] In light of this disposition, we find that if any error occurred in denying Young's motion for a mistrial, it was also harmless. *See State v. Howard*, 296 S.C. 481, 485, 374 S.E.2d 284, 286 (1988).

problems they pose. *McDonald*, 412 S.C. at 144 n.4, 771 S.E.2d at 845 n.4. These problems, as common as they are elementary, appear to have escaped the State's attention here. Although we have found Young's trial fundamentally fair, the State's decision to jointly try him with Barnes needlessly jeopardized that fairness.

V.

Because any error in his trial was harmless beyond a reasonable doubt, Young's convictions are affirmed.

AFFIRMED.

GEATHERS and MCDONALD, JJ., concur.