# N O T I C E

## IN THE MATTER OF SIDNEY J. JONES, PETITIONER

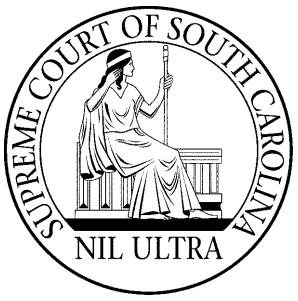
Petitioner was disbarred in September 2013. *In re Jones*, 405 S.C. 617, 749 S.E.2d 305 (2013). Petitioner has now filed a petition seeking to be reinstated.

Pursuant to Rule 33(e)(2) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413 of the South Carolina Appellate Court Rules, notice is hereby given that members of the bar and the public may file a notice of their opposition to or concurrence with the petition. Comments should be mailed to:

Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

These comments should be received within sixty (60) days of the date of this notice.

Columbia, South Carolina
April 13, 2022




# OPINIONS

## OF

# THE SUPREME COURT

## AND

# COURT OF APPEALS

## OF

# SOUTH CAROLINA

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**ADVANCE SHEET NO. 13**
**April 13, 2022**
**Patricia A. Howard, Clerk**
**Columbia, South Carolina**
**www.sccourts.org**

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

In the Matter of P. Michael DuPree, Respondent.

Appellate Case No. 2021-001483

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Opinion No. 28090
Submitted March 24, 2022 – Filed April 13, 2022

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**DEFINITE SUSPENSION**

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Disciplinary Counsel John S. Nichols and Assistant Disciplinary Counsel Julie K. Martino, both of Columbia, for the Office of Disciplinary Counsel.

O. Grady Query, of Query Sautter & Associates, LLC, of Charleston, for Respondent.

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**PER CURIAM:** In this attorney disciplinary matter, Respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, Respondent admits misconduct and consents to the imposition of a definite suspension ranging from six to nine months. We accept the Agreement and suspend Respondent from the practice of law in this state for nine months. The facts, as set forth in the Agreement, are as follows.

**I.**

On March 20, 2021, Respondent was arrested after a physical altercation with his girlfriend at a bowling alley. Respondent, who had been drinking, approached his girlfriend from behind, put his arms around her neck, pulled her backwards, and pulled her hair. A third party saw Respondent assault his girlfriend and intervened

by physically restraining and hitting Respondent. Respondent was charged with third-degree assault and battery. Respondent self-reported the criminal charge to ODC on March 29, 2021, and admitted himself into an inpatient treatment program in Florida for forty-five days. This Court subsequently placed Respondent on interim suspension. *In re DuPree*, 433 S.C. 240, 857 S.E.2d 792 (2021).

Following his release from inpatient treatment, Respondent contacted Lawyers Helping Lawyers and continued with outpatient treatment in Charleston three days per week. As part of his outpatient recovery program, Respondent voluntarily submitted to a breathalyzer test every morning and evening. He also attends Alcoholics Anonymous meetings.

The Attorney General's Office referred Respondent to the Dorchester County pretrial intervention program on July 12, 2021. On September 2, 2021, after completion of the program, the solicitor nolle prossed Respondent's criminal charge, and the circuit court subsequently entered an order for destruction of the related arrest records.

Respondent admits his conduct violated Rule 8.4(b), RPC, Rule 407, SCACR (prohibiting criminal acts that reflect adversely on a lawyer's fitness to practice law). Respondent further admits his conduct constitutes grounds for discipline under the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (prohibiting violations of the Rules of Professional Conduct), and Rule 7(a)(5) (prohibiting conduct demonstrating an unfitness to practice law). Respondent agrees to the imposition of a definite suspension of six to nine months and agrees to pay costs. Respondent also agrees that upon reinstatement, he will comply with a three-year monitoring contract with Lawyers Helping Lawyers and ensure, for a period of three years, that quarterly reports by his treating physician are submitted to the Commission on Lawyer Conduct addressing Respondent's diagnosis, treatment compliance, and prognosis.

## II.

We accept the Agreement and suspend Respondent from the practice of law in this state for a period of nine months, retroactive to April 16, 2021, the date he was placed on interim suspension. Within thirty days of the date of this opinion, Respondent shall pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission on Lawyer Conduct. Upon reinstatement,

should it be granted, Respondent shall enter into and comply with a three-year monitoring contract with Lawyers Helping Lawyers and ensure quarterly reports by Respondent's treating physician are filed with the Commission on Lawyer Conduct regarding Respondent's diagnosis, treatment compliance, and prognosis, for a period of three years.

**DEFINITE SUSPENSION.**

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

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

In the Matter of Robert S. Guyton, Respondent.

Appellate Case No. 2022-000252

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Opinion No. 28091
Submitted March 21, 2022 – Filed April 13, 2022

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## PUBLIC REPRIMAND

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Disciplinary Counsel John S. Nichols and Senior Assistant Disciplinary Counsel Ericka M. Williams, both of Columbia, for the Office of Disciplinary Counsel.

James Emerson Smith, Jr., of Columbia, for Respondent.

---

**PER CURIAM:** In this attorney disciplinary matter, Respondent and the Office of Disciplinary Counsel have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, Respondent admits misconduct and consents to the imposition of a public reprimand and a fine. We accept the Agreement, publicly reprimand Respondent, and impose a fine. The facts, as set forth in the Agreement, are as follows.

### I.

Respondent was reported to the South Carolina State Ethics Commission on January 22, 2010. On January 15, 2019, Respondent and the State Ethics Commission entered into a consent order in which Respondent admits that in 2009, he engaged in an effort to maximize financial support to certain favored political

candidates running for local and statewide election. In connection with this effort, on June 8, 2009, Respondent instructed his bookkeeper to order numerous cashier's checks that ostensibly derived from fourteen different limited liability companies (LLCs). After the cashier's checks were prepared by the bank, one of Respondent's employees delivered them to the Myrtle Beach Area Chamber of Commerce (MBAC) office. The checks were then distributed to the candidates by the MBAC chairman. In total, 148 cashier's checks were issued in amounts totaling $183,000.

Respondent admits he personally funded these political contributions, as most of the LLCs had little or no money of their own. Respondent further admits he had previously provided these candidates the maximum political campaign contribution allowed, and as such, the subsequent contributions were excessive as a matter of law. Respondent admits he violated section 8-13-1314 of the South Carolina Code by providing contributions to the candidates through fourteen LLCs in excess of statutory contribution limits.[1]

Respondent admits his conduct violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 8.4(a) (prohibiting misconduct); and Rule 8.4(d) (prohibiting conduct involving dishonesty, fraud, deceit, or misrepresentation). Respondent also admits his misconduct is grounds for discipline under Rule 7(a)(1), RLDE, Rule 413, SCACR (providing a violation of the Rules of Professional Conduct is a ground for discipline). In the Agreement, Respondent agrees to the imposition of a public reprimand. He further agrees to pay a fine of $5,000 and the costs of these proceedings. As a condition of discipline, Respondent agrees to complete the Legal Ethics and Practice Program Ethics School within nine months.

## II.

We find Respondent has committed misconduct and accept the Agreement. Accordingly, we publicly reprimand Respondent and impose a $5,000 fine. *See* Rule 7(b)(7), RLDE, Rule 413, SCACR (providing misconduct may be grounds for the assessment of a fine). Within thirty days, Respondent shall pay the $5,000 fine and all costs incurred in the investigation and prosecution of this matter by ODC

[1] For these violations, the State Ethics Commission issued a public reprimand and ordered Respondent to pay a civil penalty of $28,000 and an administrative fee of $5,000.

and the Commission on Lawyer Conduct. Within nine months, Respondent shall complete the Legal Ethics and Practice Program Ethics School.

**PUBLIC REPRIMAND.**

**BEATTY, C.J., KITTREDGE, FEW and JAMES, JJ., concur. HEARN, J., not participating.**

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

In the Matter of Ralph James Wilson, Jr., Respondent.

Appellate Case No. 2022-000253

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Opinion No. 28092
Submitted March 24, 2022 – Filed April 13, 2022

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## PUBLIC REPRIMAND

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Disciplinary Counsel John S. Nichols and Assistant Disciplinary Counsel Kelly B. Arnold, both of Columbia, for the Office of Disciplinary Counsel.

George M. Hearn, Jr., of Conway, for Respondent.

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**PER CURIAM:** In this attorney disciplinary matter, Respondent and the Office of Disciplinary Counsel have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, Respondent admits misconduct, consents to the imposition of a public reprimand or a definite suspension of up to nine months, and agrees to pay costs. We accept the Agreement and issue a public reprimand. The facts, as set forth in the Agreement, are as follows.

### I.

Respondent was charged with felony first-degree domestic violence on January 24, 2021, and subsequently placed on interim suspension. *In re Wilson*, 432 S.C. 491,

854 S.E.2d 614 (2021).[1] On December 6, 2021, Respondent entered a plea of no contest to one count of third-degree simple assault. The facts supporting the plea indicate that Respondent willfully and unlawfully engaged in an argument with his wife which escalated to the point that it was reasonable for his wife to fear imminent harm. Respondent was sentenced to thirty days in jail, suspended upon payment of a $500 fine plus costs. On December 7, 2021, Respondent paid $1,183.26, thereby successfully completing the court-ordered requirements of his sentence.

Respondent admits his conduct violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 8.4(b) (prohibiting criminal acts that reflect adversely on fitness as a lawyer); and Rule 8.4(e) (prohibiting conduct that is prejudicial to the administration of justice). Respondent also admits his misconduct is grounds for discipline under the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (providing a violation of the Rules of Professional Conduct is a ground for discipline); and Rule 7(a)(5) (providing conduct demonstrating an unfitness to practice law is a ground for discipline).

**II.**

We find Respondent's misconduct warrants a public reprimand. *See In re Laquiere*, 366 S.C. 559, 623 S.E.2d 651 (2005) (publicly reprimanding a lawyer who pled guilty to criminal domestic violence following an argument in which the lawyer struck his ex-girlfriend in the face). Accordingly, we accept the Agreement and publicly reprimand Respondent for his misconduct. Within thirty days, Respondent shall pay the costs incurred in the investigation and prosecution of this matter by the Office of Disciplinary Counsel and the Commission on Lawyer Conduct.

**PUBLIC REPRIMAND.**

**KITTREDGE, Acting Chief Justice, FEW and JAMES, JJ., concur.**
**BEATTY, C.J., and HEARN, J., not participating.**

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[1] This Court later issued an order lifting Respondent's interim suspension. *In re Wilson*, S.C. Sup. Ct. Order dated Feb. 7, 2022 (Howard Adv. Sh. No. 6 at 23).

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

PCS Nitrogen, Inc., Petitioner,

v.

Continental Casualty Company, Admiral Insurance Company, United States Fire Insurance Company, ACE Property & Casualty Insurance Company, Certain Underwriters at Lloyd's London, the Aviva Companies, the Winterthur Companies, Certain London Market Insurance Companies, Providence Washington Insurance Company (as Successor in Interest by way of Merger to Seaton Insurance Company, f/k/a Unigard Security Insurance, f/k/a Unigard Mutual Insurance Company), Berkshire Hathaway Specialty Insurance Company (f/k/a Stonewall Insurance Company), Lexington Insurance Company, Starr Indemnity & Liability Company (f/k/a Republic Insurance Company), First State Insurance Company, and Century Indemnity Company (f/k/a California Union Insurance Company and Insurance Company of North America), Defendants,

Of which Continental Casualty Company, Admiral Insurance Company, United States Fire Insurance Company, Certain Underwriters at Lloyd's London, the Aviva Companies, the Winterthur Companies, Certain London Market Insurance Companies, Providence Washington Insurance Company (as Successor in Interest by way of Merger to Seaton Insurance Company, f/k/a Unigard Security Insurance, f/k/a Unigard Mutual Insurance Company), Berkshire Hathaway Specialty Insurance Company (f/k/a Stonewall Insurance Company), Lexington Insurance Company, Starr Indemnity & Liability Company (f/k/a Republic

Insurance Company), and First State Insurance Company are the Respondents.

Appellate Case No. 2020-000445

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**ON WRIT OF CERTIORARI TO THE COURT OF APPEALS**

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Appeal from Charleston County
G. Thomas Cooper Jr., Circuit Court Judge

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Opinion No. 28093
Heard June 16, 2021 – Filed April 13, 2022

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**REVERSED AND REMANDED**

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William Howell Morrison, of Haynsworth Sinkler Boyd, PA, of Charleston; Sarah P. Spruill, of Haynsworth Sinkler Boyd, PA, of Greenville; and Michael H. Ginsberg and Matthew R. Divelbiss, of Pittsburgh, PA, for Petitioner.

Morgan S. Templeton, of Wall Templeton & Haldrup, PA, of Charleston, and Patrick F. Hofer, of Washington, D.C., for Respondent Continental Casualty Company; J.R. Murphy, Adam J. Neil, and Wesley B. Sawyer, of Murphy & Grantland, PA, of Columbia, for Respondent Admiral Insurance Company; Christian Stegmaier and R. Scott Wallinger Jr., of Collins & Lacy, PC, of Columbia, and John S. Favate, of Springfield, NJ, for Respondent United States Fire Insurance Company; Edward K. Pritchard III, of Pritchard Law Group, LLC, of Charleston, and Richard McDermott and Seth M. Jaffe, of Chicago, IL, for

Respondents Certain Underwriters at Lloyd's London, the Aviva Companies, the Winterthur Companies, Berkshire Hathaway Specialty Insurance Company (f/k/a Stonewall Insurance Company), and Starr Indemnity & Liability Company (f/k/a Republic Insurance Company); John T. Lay Jr. and Laura W. Jordan, of Gallivan, White & Boyd, PA, of Columbia, and Helen Franzese, of London, U.K., for Respondent Certain London Market Insurance Companies; Elizabeth J. Palmer, of Rosen Hagood, LLC, of Charleston, and Molly Poag and Harry Lee, of Washington, D.C., for Respondent Providence Washington Insurance Company (as Successor in Interest by way of Merger to Seaton Insurance Company, f/k/a Unigard Security Insurance, f/k/a Unigard Mutual Insurance Company); John C. Bonnie, of Weinberg Wheeler Hudgins Gunn & Dial, LLC, of Atlanta, GA, for Respondent Lexington Insurance Company; R. Michael Ethridge and Suzanne E. Chapman, of Ethridge Law Group, LLC, of Mt. Pleasant, and Wayne Karbal and Paul Parker, of Chicago, IL, for Respondent First State Insurance Company.

Matthew G. Gerrald, of Barnes Alford Stork & Johnson, LLP, of Columbia, and Laura A. Foggan, of Washington, D.C., for Amicus Curiae Complex Insurance Claims Litigation Association.

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**JUSTICE JAMES:** In this opinion, we review the application of the "post-loss exception"—a common law rule providing that insurer consent is not required for an assignment of insurance benefits made after a "loss" has occurred. PCS Nitrogen seeks insurance coverage for liability arising from contamination of a fertilizer manufacturing site in Charleston, claiming its right to coverage stems from an assignment of insurance benefits executed by Columbia Nitrogen Corporation in 1986. Respondents—the insurance carriers who issued the policies in question—claim they owe no coverage because Columbia Nitrogen Corporation executed the assignment without their consent. The circuit court granted summary judgment to Respondents, and the court of appeals affirmed. *PCS Nitrogen, Inc. v. Continental*

*Casualty Co.*, 429 S.C. 30, 837 S.E.2d 662 (Ct. App. 2019). We granted PCS's petition for a writ of certiorari. We reverse the court of appeals and remand for further proceedings.

## I. Background

### A. Corporate History and Insurance Coverage

In 1966, Columbia Nitrogen Corporation (Old CNC) began operating a fertilizer manufacturing site in Charleston (the Charleston Site). Respondents issued primary and excess liability insurance policies to Old CNC with policy periods ranging from 1966 to 1985. The policies provide, "The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of . . . property damage . . . to which this insurance applies, caused by an occurrence . . . ." The policies define "occurrence" as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured."

The policies contain two provisions pertinent to this appeal—a "consent-to-assignment" provision (sometimes referred to as an "anti-assignment" provision or a "no assignment" provision) and a "no action" provision. The consent-to-assignment provision states: "Assignment of interest under this policy shall not bind the company until its consent is endorsed hereon." The no action provision states:

> No action shall lie against the company, unless, as condition precedent thereto, there shall have been full compliance with all of the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company.

Old CNC ceased all fertilizer production at the Charleston Site in 1972 and sold the Charleston Site to a third party in 1985. In 1986, Old CNC sold assets related to its fertilizer production business in Augusta, Georgia, to CNC Corp. (New CNC). In that transaction, New CNC assumed some of Old CNC's liabilities, including those related to Old CNC's fertilizer production business.

The 1986 transaction also included the assignment at the root of this appeal. In that assignment, Old CNC transferred to New CNC its rights under expired

policies spanning from 1966 to 1985. Old CNC did not obtain Respondents' consent to the assignment.

Old CNC dissolved after closing the transaction with New CNC. In 1989, New CNC merged with Fertilizer Industries, Inc., which changed its name to Arcadian Corporation. In 1997, Arcadian Corporation merged with PCS Nitrogen.

### B. Federal Litigation

In 2005, Ashley II of Charleston, LLC, then-owner of the Charleston Site, filed a declaratory judgment action against PCS in federal court, alleging PCS was liable under CERCLA[1] for environmental remediation at the Charleston Site. Ashley II alleged Old CNC contaminated the Charleston Site and that PCS was liable for remediation because its predecessor, New CNC, acquired Old CNC's liabilities in the 1986 transaction. PCS argued it was not the corporate successor to Old CNC. PCS also filed a contribution counterclaim against Ashley II and third-party claims against several other entities with ties to the Charleston Site. Notably, PCS sought contribution from Old CNC's parent corporations, Koninklijke DSM N.V. and DSM Chemicals North America (collectively, the DSM Parties), arguing the DSM Parties were responsible for contamination caused by their "alter ego," Old CNC. PCS alleged Old CNC's "activities at the Charleston Site substantially contributed to the contamination of the Charleston Site property . . . ."

The district court found PCS liable under CERCLA and ruled there was no basis for imputing Old CNC's acts to the DSM Parties. *Ashley II of Charleston, LLC, v. PCS Nitrogen, Inc.*, 791 F. Supp. 2d 431, 440 (D.S.C. 2011). PCS appealed, and the Fourth Circuit affirmed. *PCS Nitrogen, Inc. v. Ashley II of Charleston, LLC*, 714 F.3d 161 (4th Cir. 2013).

### C. Current Litigation

Citing the assignment executed by Old CNC in 1986, PCS seeks a declaration that Respondents are obligated to provide coverage for its defense costs and environmental liabilities stemming from the CERCLA litigation. PCS contends Respondents' consent to the assignment was not required because the assignment took place after the loss occurred. PCS also argues it is the corporate successor to

[1] Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675.

Old CNC via de facto merger and therefore acquired all the rights under Old CNC's policies. Respondents argue PCS is not entitled to benefits under either theory and also claim coverage is barred under the "pollution exclusion" in the policies.

The circuit court granted summary judgment to Respondents, ruling the assignment is unenforceable as a matter of law because Old CNC did not secure Respondents' consent. The circuit court ruled the assignment is not a post-loss assignment because, at the time of the assignment, no judgment had been entered against Old CNC; the circuit court concluded "the loss in the third-party liability insurance context must be the event that fixes the insured contingency . . . a judgment against the insured." The circuit court also found Old CNC did not execute "an assignment of a chose in action for money payment, but an assignment of a contractual relationship—an attempt at a novation" that required insurer consent.

The circuit court also rejected PCS's argument that it is entitled to coverage as Old CNC's corporate successor under a de facto merger theory. Finally, the circuit court determined Respondents' motion for summary judgment with respect to the pollution exclusion was moot in light of its ruling that PCS is not entitled to coverage in the first instance. The court of appeals affirmed. *PCS Nitrogen, Inc. v. Continental Casualty Co.*, 429 S.C. 30, 837 S.E.2d 662 (Ct. App. 2019).

## II. Discussion

The question of whether the assignment is valid is a question of law. Accordingly, our standard of review on that issue is de novo. *See Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders FirstSource-Southeast Grp.*, 413 S.C. 630, 634-35, 776 S.E.2d 434, 437 (Ct. App. 2015) ("When the circuit court grants summary judgment on a question of law, we review the ruling de novo.").

### A.

We must first address two arguments Respondents contend PCS makes, which, in fact, PCS does not make. First, Respondents contend PCS claims Old CNC assigned insurance policies to New CNC, not merely rights under expired insurance policies. This is a drumbeat sounded throughout Respondents' brief; however, PCS has never made the argument that Old CNC assigned the insurance policies. PCS correctly notes assignment of the policies would have been impossible because the policy periods had expired; the only remaining things to be assigned

were policy rights or benefits with respect to occurrences that took place during the policy periods.

In a related argument, Respondents contend PCS did not appeal the circuit court's ruling that PCS was seeking—under a novation theory—to completely step into the shoes of Old CNC under the policies. Respondents claim PCS's failure to appeal that ruling makes it the law of the case and that, under the two-issue rule, we must affirm the circuit court's decision. *Buckner v. Preferred Mut. Ins. Co.*, 255 S.C. 159, 160-61, 177 S.E.2d 544, 544 (1970) (holding an appellant's failure to challenge a second ground of the trial court's decision required affirmance). We disagree. A "novation" involves the substitution of parties to the policy, not merely the assignment of policy rights. PCS has repeatedly argued it does not seek to succeed to the policies, but rather to Old CNC's policy rights. The trial court's ruling on the novation issue is part and parcel of the issue PCS has advanced throughout the appellate process—whether Old CNC validly assigned its policy rights without insurer consent. We reject Respondents' preservation argument.

Second, Respondents claim that because Old CNC obtained insurer consent to assign a liability policy that was active at the time of the assignment, Old CNC knew it was also required to obtain Respondents' consent to assign the expired policies at issue in this case. Respondents then claim PCS "urges the Court to adopt a theory of assignment 'by operation of law,' which no state has ever adopted." Respondents represent in their brief that PCS cites *Northern Insurance Co. v. Allied Mutual Insurance Co.*, 955 F.2d 1353 (9th Cir. 1992)—right down to a pincite at page 1357 of the opinion—for this proposition. However, PCS does not ask this Court to adopt the theory of assignment by operation of law and does not refer to page 1357 of the *Northern Insurance* opinion at all. PCS cites *Northern Insurance* only for the general propositions that the purpose of a consent-to-assignment provision is to protect insurers against heightened risk and that the prospect of heightened risk vanishes after the loss takes place. Since PCS does not argue the policies were assigned by operation of law, we will not address the merits of Respondents' counterargument. We now address issues relevant to this appeal.

**B.**

The consent-to-assignment provision of the policies issued by Respondents provides, "Assignment of interest under this policy shall not bind the company until its consent is endorsed hereon." However, as we noted in dictum in *Narruhn v. Alea London Ltd.*, the majority rule is that such a provision does not bar an assignment

made after a loss: "it is generally held that an assignment *after* a loss has already occurred does not require an insurer's consent." 404 S.C. 337, 344, 745 S.E.2d 90, 94 (2013).

Courts have recognized the post-loss exception because "[t]he purpose of a no assignment clause is to protect the insurer from increased liability, and after events giving rise to the insurer's liability have occurred, the insurer's risk cannot be increased by a change in the insured's identity." *Id.* Additionally, the post-loss exception recognizes that a consent-to-assignment clause cannot bar an insured from transferring the right to coverage that exists after a loss takes place. *See id.* at 344-45, 745 S.E.2d at 94 ("[A] clause restricting assignment [in an insurance policy] does not in any way limit the policyholder's power to make an assignment of the rights under the policy . . . ." (second alteration in original) (internal quotation marks omitted)).

Respondents cite decisions from Hawaii and Oregon holding that no assignments, even those made after a loss, are valid without insurer consent. *Del Monte Fresh Produce (Hawaii), Inc. v. Fireman's Fund Ins. Co.*, 183 P.3d 734, 747 (Haw. 2007); *Holloway v. Republic Indem. Co. of Am.*, 147 P.3d 329, 335 (Or. 2006). We decline to follow Hawaii and Oregon. We now adopt the post-loss exception and hold insurer consent is not required for an assignment of liability insurance coverage rights made after a loss.

## C.

### 1. The parties' arguments as to when the loss occurred

To answer the question of whether the 1986 assignment was executed pre-loss or post-loss, we must determine when the loss occurred. The policies do not define "loss." The policies define "occurrence" as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured." PCS argues the terms "loss" and "occurrence" are synonymous. PCS therefore contends the assignment is a post-loss assignment because it was executed after the occurrence—discharge of contaminants with resulting property damage.

For reasons not pertinent to this appeal, Respondents do not concede the discharge of contaminants with resulting property damage was an "occurrence" as defined in the policies—that is an issue left for resolution on remand. Respondents

argue that even if the discharge was an "occurrence," a "loss" would not occur until (1) an underlying suit results in a judgment against Old CNC for covered damages, or (2) a settlement is reached with the injured party with Respondents' consent. Specifically, Respondents contend "[t]he so-called 'post-loss' exception is really a 'chose in action' exception" and argue an assignment of insurance rights made without insurer consent is valid only when the insured possesses a "chose in action" under the policy. Respondents define "chose in action" as a "vested right to receive money" or a "debt" and contend their obligations under the policies would not mature into debts owing to the insured until judgment against Old CNC or settlement. Respondents claim the "no action" provision in the policies supports their position that Old CNC had no chose in action in 1986. The policies' no action provision states, in relevant part, "No action shall lie against the [insurer] . . . until the amount of the insured's obligation to pay shall have been finally determined by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company."

Respondents claim our decision in *Howard v. Allen*, 254 S.C. 455, 176 S.E.2d 127 (1970), requires us to hold a loss does not take place until judgment or settlement because only then would the insurer's obligation to pay the insured become fixed. We flatly disagree, as the pertinent issues in *Howard* bear no resemblance to the issues now before us. Howard was injured in South Carolina by an airplane propeller and sought to sue the plane's owner, a resident of Ohio. Howard could not serve the defendant in South Carolina, so she sought to issue a summons, complaint, and warrant of attachment directing the Spartanburg County Sheriff to attach and seize the liability limits and duty to defend contained in a policy of liability insurance issued to the defendant by a carrier that did business in South Carolina. Howard claimed service of these documents upon the defendant's insurer gave South Carolina courts personal jurisdiction over the defendant because the insurer's duty to defend and the applicable liability limits were "debts" owed by the insurer to the defendant. The trial court quashed the warrant, and Howard presented the following question to this Court on appeal: "Does the duty to defend and the limit of liability contained in a policy of liability insurance constitute a 'debt' owed the policyholder which is subject to attachment, thereby conferring jurisdiction [over the defendant] upon the Courts of this State?" *Id.* at 458, 176 S.E.2d at 128.

We held in *Howard* that neither the duty to indemnify nor the duty to defend was a debt subject to attachment. We noted the defendant's insurance policy likely contained a no action clause stipulating that no action could be brought against the

insurer until the liability of the insured was determined by final judgment or settlement. We explained that in light of the no action clause, "[i]t follows that insofar as the [duty to indemnify is] concerned, the insurer owes the insured nothing until the liability of the insured and the amount thereof has been determined." *Id.* at 460, 176 S.E.2d at 129. With respect to the insurer's duty to defend, we stated, "[t]here is no obligation to defend until an action is brought . . . ." *Id.* at 461, 176 S.E.2d at 129. We held that because the insurer had not failed to indemnify or defend the defendant at the time of the attachment, the insurer was not indebted to him: "At the time of the levy in the instant case the insurer had not failed to perform any obligation to the insured and was, therefore, we think, not indebted to him in any amount." *Id.* at 462, 176 S.E.2d at 130. Because the duties to indemnify and defend the defendant were not debts owed by the insurer, we held Howard could not attach them.

Respondents insist *Howard* requires us to hold that Old CNC did not have a chose in action under the policies in 1986. They claim *Howard* extends to the proposition that a loss occurs only when the insured possesses a debt or vested right to recover money. Therefore, according to Respondents, the assignment was a pre-loss assignment. We disagree. Our holding in *Howard* was much more straightforward than Respondents make it out to be. The narrow dynamic in *Howard* was an injured third party's effort to secure personal jurisdiction over a tortfeasor in South Carolina by attaching the insurer's contractual obligations to the tortfeasor. We simply held—in that setting—those obligations were not a debt subject to attachment by the injured third party. The term "chose in action" appears nowhere in *Howard*, and our holding in that case does not dictate the conclusion that an insured cannot assign policy rights to a corporate successor after a loss has occurred.

**2. Loss takes place at occurrence**

Though the insurer is not obligated to disburse proceeds until judgment or settlement, courts have long recognized that the insurer's coverage obligations and the insured's right to coverage arise well before that point. The Court of Appeals of Maryland explained this principle well over a century ago:

> It is not solely because the insured has actually paid damages that the liability of the insurer to him is fixed, but it is because an accident or casualty or occurrence has happened for which he is responsible, and against the loss arising from which he has been indemnified, that the obligation of the insurer to reimburse him arises, though the precise

> amount to be paid by the insurer may depend for its ascertainment upon events happening after the insolvency.

*Am. Cas. Ins. Co.'s Case*, 34 A. 778, 784 (Md. 1896). In 1939, the United States Court of Appeals for the Eighth Circuit held an assignment of insurance benefits made after the occurrence or underlying injury but before the insured's liability was fixed by judgment was enforceable as a post-loss assignment. *Ocean Accident & Guarantee Corp. v. Sw. Bell Tel. Co.*, 100 F.2d 441, 445-47 (8th Cir. 1939). The *Ocean Accident* court refused to equate loss with a judgment against the insured and held "under a liability policy such as the one under consideration, the liability, the loss and the cause of action arise simultaneously with the happening of the accidental injury . . . ." *Id.* at 446.

In the years since *Ocean Accident*, the overwhelming majority of jurisdictions have applied the post-loss exception to enforce assignments of insurance benefits made without insurer consent after an occurrence has taken place. *See Gopher Oil Co. v. Am. Hardware Mut. Ins. Co.*, 588 N.W.2d 756, 762-64 (Minn. Ct. App. 1999) (recognizing "when events giving rise to an insurer's liability have already occurred, the insurer's risk is not increased by a change in the insured's identity" and enforcing assignment of insurance interests made after environmental contamination took place); *Egger v. Gulf Ins. Co.*, 903 A.2d 1219, 1226 (Pa. 2006) (enforcing assignment made after underlying occurrence because "[t]he event that occasioned the liability of [the insurer], was the 'Occurrence' to which the policy applied"); *Pilkington N. Am., Inc. v. Travelers Cas. & Sur. Co.*, 861 N.E.2d 121, 126-29 (Ohio 2006) (rejecting an insurer's argument that a loss occurs upon a judgment against the insured because "the insurer's coverage obligation in an occurrence policy arises at the time of the occurrence" and "the lack of a specifically defined amount of recovery is not fatal to the determination that a chose exists"); *In re Ambassador Ins. Co., Inc.*, 965 A.2d 486, 490-92 (Vt. 2008) (holding consent-to-assignment clauses in insurance policies did not preclude enforcement of assignment and stating the "[insurer's] potential liability to insure [the insured] arose when parties were injured by [the insured's] products. Although the exact amount of [the insurer's] liability is not known because all of the suits against [the insured] have not been reduced to distinct monetary awards, [the insurer's] obligation to insure the risk has not been altered"); *Viking Pump, Inc. v. Century Indem. Co.*, 2 A.3d 76, 103-07 (Del. Ch. 2009) (noting consent-to-assignment clauses in policies could not bar assignment made after loss, observing courts "have treated the 'loss' as occurring when liability arose[,]" and rejecting insurer's argument that claims were too speculative to be

assigned); *Ill. Tool Works, Inc. v. Com. & Indus. Ins. Co.*, 962 N.E.2d 1042, 1049-50 (Ill. App. Ct. 2011) (rejecting an insurer's argument that the "loss" occurred upon judgment and stating "the loss was [the insured's] contamination of the [third party's] property, an occurrence for which [the insured] had bought defense and indemnification coverage").

The high courts of California and New Jersey recently applied the post-loss exception in factual scenarios similar to the one presented in this appeal. *Fluor Corp. v. Superior Ct.*, 354 P.3d 302 (Cal. 2015); *Givaudan Fragrances Corp. v. Aetna Cas. & Surety Co.*, 151 A.3d 576 (N.J. 2017). *Givaudan* is especially instructive. In both decisions, the courts examined the history of the post-loss exception and determined that under a third-party liability insurance policy, the loss arises at the time of the occurrence, not at the time judgment is entered against the insured. *Fluor Corp.*, 354 P.3d at 330 (holding that for purposes of the post-loss exception, loss "should be interpreted as referring to a loss sustained by a third party that is covered by the insured's policy, and for which the insured *may* be liable" (emphasis added)); *Givaudan*, 151 A.3d at 591 ("We begin by noting that the policies at issue are occurrence policies. They provide coverage based on liability for an occurrence to which the policy applies. As such, the relevant event giving rise to coverage is the loss event, not the entry of a judgment fixing the amount of damage for that loss." (citation omitted)). The reasoning in these decisions is sound, and we agree that under a third-party liability insurance policy, the loss takes place at the time of occurrence.[2]

During oral argument, counsel for Respondents noted that in *Henkel Corp. v. Hartford Accident & Indemnity Co.*, 62 P.3d 69 (Cal. 2003), the Supreme Court of California held claims under an insurance policy were not assignable without insurer consent until the claims were reduced to a claim for a sum of money due or to become due under the policy. However, the court overruled *Henkel* twelve years later in *Fluor*.

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[2] The *Fluor* decision centered upon the interpretation of a California statute tracing back to 1872 governing the assignment of claims "after a loss has happened." Cal. Ins. Code § 520 (West 2022). However, as the *Givaudan* court noted, "[w]hile the *Fluor* court necessarily applied the California statute in reaching its result, it also thoroughly reviewed the development of common law principles applicable to liability insurance and discussed the validity of anti-assignment clauses in light of those principles." 151 A.3d at 589.

Only one court has adopted the approach urged by Respondents in this case and held a loss under a third-party liability insurance policy does not necessarily take place at the time of the underlying occurrence. In *Travelers Casualty & Surety Co. v. U.S. Filter Corp.*, 895 N.E.2d 1172 (Ind. 2008), the Supreme Court of Indiana considered the claims of several companies that demanded liability coverage under policies issued to their predecessors by various insurers. The coverage dispute sprang from third-party bodily injury claims related to silica exposure from working near an industrial blast machine. The court noted other jurisdictions "widely recognize an exception to the enforcement of consent-to-assignment clauses for assignments made after a loss has occurred." *Id*. at 1178-79. However, the court distinguished "an instantly incurred loss, such as that resulting from windstorm or fire" from a loss that "occurred but went unreported, even unrealized, for years." *Id*. at 1179. The court decided that in order to qualify for assignment without insurer consent, "at a minimum . . . the loss must be identifiable with some precision" and "must be fixed, not speculative." *Id.* at 1180. The court concluded by holding that "[t]o the extent the . . . blast machine injuries had occurred but had not yet been reported at the time of the relevant transactions, they did not constitute an assignable chose in action." *Id*. at 1181.

We agree with the majority of jurisdictions and hold the "loss," in the context of the post-loss exception, is synonymous with the "occurrence." In this case, any loss occurred before Old CNC executed the assignment in 1986. We therefore reverse the court of appeals' holding that the loss does not take place until the insurer's obligation to pay is fixed by a judgment against the insured. *PCS Nitrogen, Inc.*, 429 S.C. at 42, 837 S.E.2d at 668. An insured's claim to coverage does not have to be reduced to a sum due or to become due under the policy for the claim to be assignable without insurer consent. After an occurrence, the insured possesses a contingent right to coverage, and it is a right that may be assigned without insurer consent.

**3. Was Respondents' risk increased by PCS's conduct during the CERCLA litigation?**

Respondents argue their risk was actually increased in this case because, during the CERCLA litigation (in which Ashley II, the current owner of the Charleston Site, sought environmental remediation costs from PCS), PCS sought to cast blame for the contamination upon Old CNC. Specifically, Respondents rely on a third-party complaint filed by PCS in the CERCLA litigation in which PCS alleged the DSM Parties, Old CNC's parent companies, should be held responsible for

contamination caused by their "alter ego," Old CNC. In the third-party complaint, PCS alleged: "Discovery recently taken in this case has revealed that Old [CNC's] activities at the Charleston Site substantially contributed to the contamination of the Charleston Site property and thus rendered Old [CNC] a 'covered person' within the meaning of . . . CERCLA."

PCS's allegations against the DSM Parties and its attempt to obtain contribution from the DSM Parties did nothing to change Respondents' risk, which became fixed at the time of the loss and was solely related to Old CNC's activities at the Charleston Site. The circuit court granted summary judgment on the sole issue of whether the assignment was a valid post-loss assignment. The separate issue of whether PCS engaged in post-loss conduct that would serve to void coverage under the policies is not before us but may be considered on remand.[3]

**D.**

We are also persuaded by PCS's public policy argument that relieving Respondents of their contractual duty to provide coverage would give Respondents a windfall. As PCS argues, the risks at issue were factored into the original underwriting of the policies, and the premiums paid by Old CNC were in exchange for coverage against the same risks. Quoting *In re Viking Pump*, PCS contends it seeks to have Respondents "cover[] the risk [they] originally contracted to insure." 148 A.3d at 651-52. If the assignment is voided under these circumstances, Respondents would receive the windfall of never having to insure occurrences they received premiums for covering.

## III. Conclusion

We reverse the court of appeals and hold Old CNC executed a valid post-loss assignment of insurance rights in 1986. PCS cannot be denied coverage on the basis that Respondents did not consent to the assignment. In light of our holding on that point, we need not address PCS's argument concerning de facto merger. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (providing that an appellate court need not address remaining issues when

[3] Respondents also maintain the discharge of contaminants was not an "occurrence" under the policies and that coverage is voided by a pollution exclusion. There may be other coverage issues of which we are not aware. We express no opinion on issues that may arise on remand.

resolution of a prior issue is dispositive). We remand to the circuit court for further proceedings on PCS's claim for coverage.

**REVERSED AND REMANDED.**

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

**JUSTICE FEW:** I concur in the majority opinion. I write only to express my dismay at Respondents' reliance on the meaningless phrase "chose in action" as a basis for its position. *See Arredondo v. SNH SE Ashley River Tenant, LLC*, 433 S.C. 69, 88, 856 S.E.2d 550, 560 (2021) (Few, J., concurring) ("If there was a time in our history when the phrase ['chose in action'] conveyed a precise meaning, the phrase has lost that meaning as the passage of time brought new usages. What is left of 'chose in action' is a descriptive phrase with no precise meaning, a phrase we should stop using because it is not only vague and meaningless but also obsolete. Today, if lawyers wish to write legal instruments . . . with precise meaning, they should use phrases that in current usage are defined precisely, and they should avoid phrases like 'chose in action' that mean nothing.").

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

The State, Respondent,

v.

Justin Jamal Warner, Petitioner.

Appellate Case No. 2020-000930

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**ON WRIT OF CERTIORARI TO THE COURT OF APPEALS**

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

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Opinion No. 28094
Heard November 8, 2021 – Filed April 13, 2022

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**AFFIRMED IN PART AND REMANDED**

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Chief Appellate Defender Robert Michael Dudek and Appellate Defender Adam Sinclair Ruffin, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson, Deputy Attorney General Donald J. Zelenka, Senior Assistant Deputy Attorney General Melody Jane Brown, and Senior Assistant Attorney General W. Edgar Salter III, of Columbia, for Respondent.

**JUSTICE FEW:** A jury convicted Justin Jamal Warner of murder, attempted armed robbery, and possession of a weapon during the commission of a violent crime. The court of appeals affirmed. We granted Warner's petition for a writ of certiorari to address: (1) whether the trial court was correct to deny Warner's motion to suppress cell-site location information (CSLI)[1] seized from his cell phone service provider; and (2) whether an out-of-court viewing by Warner's probation officer of a crime-scene video and the officer's identification of Warner as the man in the video required a hearing under *Neil v. Biggers*, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972). We find the trial court correctly ruled the identification made from the video did not require a *Biggers* hearing. As to the CSLI, we hold the warrant the trial court found invalid because the warrant sought information stored in another state is not—at least for that reason—invalid. We affirm the court of appeals as to the *Biggers* issue and remand to the trial court for further proceedings as to Warner's motion to suppress CSLI.

## I. Facts and History

On April 30, 2015, Warner entered the BP store at the intersection of I-85 and S.C. 153 in Anderson County. Warner showed his identification to the cashier for the purpose of purchasing cigars. The cashier—Mradulaben Patel—entered Warner's date of birth into the computerized cash register and opened it. Warner then pulled out a gun, pointed it at Patel, and attempted to reach into the cash drawer. When Patel resisted, Warner shot her. Warner then left the store without completing the robbery. Patel died several days after the shooting.

[1] "Most modern devices, such as smartphones, tap into the wireless network several times a minute whenever their signal is on, even if the owner is not using one of the phone's features. Each time the phone connects to a cell site, it generates a time-stamped record known as cell-site location information (CSLI). The precision of this information depends on the size of the geographic area covered by the cell site. The greater the concentration of cell sites, the smaller the coverage area." *Carpenter v. United States*, 585 U.S. ___, ___, 138 S. Ct. 2206, 2211, 201 L. Ed. 2d 507, 515 (2018).

Officers from the Anderson County Sheriff's Office obtained video of the incident from security cameras installed at the store. On May 4, 2015, officers received an anonymous Crimestoppers tip alleging Warner was the person who committed the crimes. After reviewing the tip, officers realized Warner's date of birth matched the date Patel entered into the register. A detective then contacted Nathan Goolsby—Warner's probation officer in Georgia—and sent him the crime-scene video. The detective asked Goolsby whether he could identify the person in the video as Warner. Goolsby then identified Warner as the person in the video.

Also on May 4, an Anderson County magistrate issued a warrant to "T-Mobile" authorizing the seizure of "subscriber information . . . from [Warner's cell number] starting on April 26, 2015 and continuing through May 4, 2015. Also tower locations to include physical addresses and or GPS coordinates." The warrant indicated it sought "records located at [an address in] New Jersey." A detective sent the warrant by facsimile to T-Mobile at the offices of its "Law Enforcement Relations Group" in New Jersey. Three days later, the Law Enforcement Relations Group responded—also by facsimile—stating, "This is in response to the Search Warrant, dated May 04, 2015, and served upon T-Mobile USA, Inc. on May 7, 2015." The facsimile response attached the requested records and indicated, "Original materials follow via US Mail."

An FBI expert testified the records showed Warner's cell phone communicating with cell towers near the location of the crime—indicating his presence near the BP store—at the general time the crime occurred.[2] The FBI expert's testimony was important to proving Warner committed the crimes because the State also proved Warner lived in a suburb of Atlanta, Georgia, over 130 miles from the BP store. The FBI expert's testimony indicated Warner drove along I-85 from the Atlanta area past S.C. 153 into Greenville County, and then returned to Anderson County in the general vicinity of the BP store at approximately the time of the crimes.

Warner moved to suppress the CSLI. During the suppression hearing, the State explained that cell phone providers like T-Mobile require a warrant to be sent to their offices in another state. The trial court summarily ruled the warrant was invalid

[2] The FBI expert was Special Agent David Church. The court of appeals extensively analyzed Special Agent Church's qualifications as an expert in CSLI as part of its analysis of the admissibility of his opinions. *State v. Warner*, 430 S.C. 76, 83-89, 842 S.E.2d 361, 364-67 (Ct. App. 2020).

because the requested records were stored in New Jersey, and it was "beyond the scope of authority of a [South Carolina] magistrate to obtain these records" in New Jersey. The trial court nevertheless denied the motion to suppress, finding the law at that time did not require a warrant. Warner also requested a *Biggers* hearing, contending Goolsby identified him in an unnecessarily suggestive identification procedure. The trial court ruled *Biggers* was not applicable because Goolsby was not an eyewitness and refused to conduct a hearing.

Warner's trial took place from May 22 to May 25, 2017. After the jury convicted him, the trial court sentenced Warner to life in prison for murder and concurrent prison terms of twenty years for attempted armed robbery and five years for possession of a weapon during the commission of a violent crime. Warner appealed, and the court of appeals affirmed the trial court on all issues. *State v. Warner*, 430 S.C. 76, 842 S.E.2d 361 (Ct. App. 2020). We granted Warner's petition for a writ of certiorari only on the two questions explained above.

## II. Motion to Suppress CSLI

Before 2014, courts generally did not even discuss whether the Fourth Amendment requires a warrant for digital information generated by or stored on a cell phone. *See generally United States v. Graham*, 824 F.3d 421, 428-29, 428-29 n.6, 429 n.7 (4th Cir. 2016) (en banc) (explaining the scant authority whether the Fourth Amendment protects CSLI, and citing federal and state cases nationwide); Eric Lode, Annotation, *Validity of Use of Cellular Telephone or Tower to Track Prospective, Real Time, or Historical Position of Possessor of Phone Under State Law*, 94 A.L.R. 6th 579 (2014). The Supreme Court's 2014 decision in *Riley v. California*, 573 U.S. 373, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014), made clear the Fourth Amendment does protect digital information stored on a cell phone. *See State v. Brown*, 423 S.C. 519, 523-24, 815 S.E.2d 761, 763-64 (2018) (discussing *Riley*). When Warner murdered Patel in 2015, however, no South Carolina court—nor any federal court whose precedent binds our courts—had addressed whether the Fourth Amendment protects digital information derived from a cell phone but not stored on it, such as CSLI. In 2016, the Fourth Circuit found that it does not. *Graham*, 824 F.3d at 427.[3]

[3] This opinion was issued by the Fourth Circuit sitting en banc. 824 F.3d at 424. In the panel decision—issued August 5, 2015—the Fourth Circuit held "the government conducts a search under the Fourth Amendment when it obtains and inspects a cell phone user's historical CSLI for an extended period of time." *United*

According to the Fourth Circuit, "This holding accords with that of every other federal appellate court that has considered the Fourth Amendment question before us. Not one has adopted the Defendants' theory." 824 F.3d at 428.

In 2017, therefore, at the time of Warner's trial, it appeared that a person had no reasonable expectation of privacy in their CSLI held by a cell phone service provider and the Fourth Amendment did not require a warrant for the seizure of CSLI. The trial court in this case relied on *Graham* in finding the Fourth Amendment did not apply, stating "the search warrant under the *Graham* case was not needed." Based on *Graham*, the trial court found Warner's voluntary use of his cell phone and the consequent provision of CSLI to the cell phone service provider resulted in the loss of any expectation of privacy Warner may have otherwise had in the information.

In 2018, however—after Warner's trial and while his appeal was pending at the court of appeals—the Supreme Court held CSLI is subject to the warrant requirement of the Fourth Amendment. *Carpenter*, 585 U.S. at ____, 138 S. Ct. at 2217, 201 L. Ed. 2d at 525. The State had not challenged the trial court's ruling that the warrant was invalid, *Warner*, 430 S.C. at 92, 842 S.E.2d at 369, which left for the court of appeals only the question of whether the exclusionary rule should be applied. The court of appeals found the exclusionary rule should not apply and affirmed. 430 S.C. at 94, 842 S.E.2d at 370.

At oral argument before this Court, Justices raised difficult questions as to how—if South Carolina courts do not have authority to issue warrants for the seizure of records kept in another state—law enforcement may reasonably carry out its investigative responsibilities in this modern digital age. The answers, though sincere and realistic, were unsatisfactory. Therefore, and in light of our concerns that the trial court mistakenly found the warrant invalid, we find it necessary to analyze the validity of the May 4, 2015 warrant. As our Rules acknowledge, and as this Court has held many times, we may affirm on any ground appearing in the record. *See* Rule 220(c), SCACR ("The appellate court may affirm any ruling . . . upon any

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*States v. Graham*, 796 F.3d 332, 344-45 (4th Cir. 2015). The court granted the government's petition for rehearing en banc on October 28, 2015, *United States v. Graham*, 624 F. App'x 75 (4th Cir. 2015), which vacated the panel decision, *Graham*, 824 F.3d at 424; *see also* 4th Cir. R. 35(c) (en banc proceedings) ("Granting of rehearing en banc vacates the previous panel judgment and opinion.").

ground[] appearing in the Record on Appeal."); *State v. King*, 422 S.C. 47, 64 n.5, 810 S.E.2d 18, 27 n.5 (2017) (same); *State v. Johnson*, 278 S.C. 668, 669-70, 301 S.E.2d 138, 139 (1983) (same).[4]

The primary focus of the dispute before the trial court over the validity of this warrant was whether an Anderson County magistrate had the authority to issue the warrant to an out-of-state entity for records that are not physically located in this State. The applicable statute, section 17-13-140 of the South Carolina Code (2014), provides,

> Any magistrate . . .[5] may issue a search warrant to search for and seize . . . property constituting evidence of crime or tending to show that a particular person committed a criminal offense . . . . The property described in this section, or any part thereof, may be seized from any place where such property may be located, or from the person,

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[4] Technically, we are not affirming the denial of the motion to suppress. However, we are deciding the trial court's ruling will not be reversed on the basis that the warrant sought information stored in another state. If no other basis for reversing the denial of the motion to suppress arises on remand, then the result of our analysis of the validity of the warrant in this respect will be that we affirm.

[5] The omitted text contains as many as three additional items in a series, followed by the limiting language ". . . having jurisdiction over the area where the property sought is located." § 17-13-140. We find the limiting language applies only to the last item in the series, not to "Any magistrate," which is the first item in the series. *See Comm'rs of Pub. Works of the City of Laurens v. City of Fountain Inn*, 428 S.C. 209, 219-20, 833 S.E.2d 834, 839 (2019) (Few, J., concurring) (explaining that under the last antecedent doctrine, the absence of a comma after the last item in a series indicates the modifying clause following the series applies only to the last item in the series). In addition, to read the limiting language as applying to all items in the series would contradict—and render superfluous—the language enabling the seizure of property within the "control of any person," because if all seizures are limited to property inside the jurisdiction of the individual judge, it would not have been necessary to alternately authorize the seizure of property was under a person's control.

> possession or control of any person who shall be found to have such property in his possession or under his control.

This warrant was issued to T-Mobile. While we assume for purposes of our analysis T-Mobile stores the applicable records in New Jersey,[6] the important fact is T-Mobile clearly does business in South Carolina, in particular, in Anderson County. T-Mobile, therefore, is subject to the jurisdiction of an Anderson County magistrate. The warrant sought records reflecting information generated in South Carolina through the interaction of Warner's cell phone and cell towers in Anderson County. While the T-Mobile office to which officers were told to send the warrant is located in New Jersey, section 17-13-140 specifically provides, "The property described in this section . . . may be seized . . . from the person, possession or control of any person who shall be found to have such property in his possession or under his control." T-Mobile is in possession and control of property that section 17-13-140 permits to be seized. T-Mobile is a "person" doing business in Anderson County. Thus, T-Mobile is subject to the jurisdiction of our courts, and we find it was not beyond the power of the magistrate to issue the warrant.

Our determination that the warrant was not invalid for the reason relied on by the trial court raises other questions. Warner argued in his suppression motion, for example, the affidavit supporting the warrant did not set forth probable cause. We agree. The affidavit states only, "Information was received through crime stoppers indicating that Justin Warner is a possible suspect. The informant's information was corroborated and a record search revealed that Warner has this listed number to him." While we have recognized—recently—that "[p]robable cause . . . is not a high bar," *State v. Jones*, 435 S.C. 138, 145, 866 S.E.2d 558, 562 (2021) (quoting *Kaley v. United States*, 571 U.S. 320, 338, 134 S. Ct. 1090, 1103, 188 L. Ed. 2d 46, 62

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[6] There is no evidence in the record to support this assumption other than the fact law enforcement officers were required to submit the warrant to the T-Mobile Law Enforcement Relations Group, which is located in New Jersey. In fact, the FBI Special Agent who testified as the State's expert on CSLI—when asked where the records were stored—did not testify where the records are stored. He stated only that the records are "generated" in New Jersey, "[New Jersey is] where T-Mobile's compliance people are, where they generate -- where all the requests go to and they generate those [records]. The actual records are pulled from the different switches, but [New Jersey is] where the record is generated from . . . ."

(2014)), it is by no means a toothless standard. *See Brinegar v. United States*, 338 U.S. 160, 175-76, 69 S. Ct. 1302, 1310-11, 93 L. Ed. 1879, 1890 (1949) (stating probable cause "has come to mean more than bare suspicion: Probable cause exists where 'the facts and circumstances within . . . [the officers'] knowledge, and of which they had reasonably trustworthy information, [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed"). The affidavit attached to this warrant provided the magistrate no facts or circumstances whatsoever; only the conclusory statement that some unnamed person considered Warner as a suspect based on unprovided information.[7] It is

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[7] The Supreme Court's statement in *Kaley*, which we quoted in *Jones*, was made to support the Supreme Court's continued refusal "to require the use of adversarial procedures to make probable cause determinations" in grand jury proceedings. *Kaley*, 571 U.S. at 338, 134 S. Ct. at 1103, 188 L. Ed. 2d at 62. The Supreme Court's statement in *Brinegar* was made in explaining probable cause existed to support a search incident to a warrantless arrest. *Brinegar*, 338 U.S. at 170-71, 69 S. Ct. at 1308, 93 L. Ed. at 1888. In *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983), even after abandoning the "two-pronged test" the Supreme Court previously applied, 62 U.S. at 238, 103 S. Ct. at 2332, 76 L. Ed. 2d at 548, the Court addressed a hypothetical basis for a search warrant much like the situation presented by the affidavit in this case:

> Our earlier cases illustrate the limits beyond which a magistrate may not venture in issuing a warrant. A sworn statement of an affiant that 'he has cause to suspect and does believe that' [a crime has been committed] will not do. An affidavit must provide the magistrate with a substantial basis for determining the existence of probable cause, and [a] wholly conclusory statement . . . fail[s] to meet this requirement. An officer's statement that 'affiants have received reliable information from a credible person and do believe' that heroin is stored in a home, is likewise inadequate. . . . [T]his is a mere conclusory statement that gives the magistrate virtually no basis at all for making a judgment regarding probable cause. Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others. In

inconceivable to us that the magistrate did not require the experienced detective to supplement the affidavit with sworn testimony, or if the magistrate did not require it, that the detective did not provide it on his own. It is unclear, however, whether the information in the affidavit was supplemented before the magistrate issued the warrant. Because the record on this issue—and perhaps other issues—was never fully developed during the suppression hearing, we remand to the trial court for a ruling on any unresolved issues related to Warner's motion to suppress. *See State v. Johnson*, 302 S.C. 243, 249, 395 S.E.2d 167, 170 (1990) (finding the affidavit attached to the search warrant lacked probable cause, but remanding to develop the record as to whether the affidavit was supplemented; explaining possible results on remand). If the trial court determines the affidavit was not supplemented, and thus the warrant lacked probable cause, the trial court should also consider whether the exclusionary rule should apply.

## III. *Neil v. Biggers* Hearing

Warner also argues the trial court erred by refusing to conduct a hearing to determine whether Goolsby's identification of Warner in the crime-scene video violated his due process rights under *Biggers*. Warner relies on a line of cases decided by the Supreme Court of the United States in which the Court held that unnecessarily suggestive police-arranged eyewitness identification procedures violate due process and, thus, are inadmissible, unless the trial court determines in a hearing that the identification was nevertheless so reliable that no substantial likelihood of misidentification exists. *See Perry v. New Hampshire*, 565 U.S. 228, 237-39, 132 S. Ct. 716, 723-25, 181 L. Ed. 2d 694, 706-07 (2012) (discussing the line of cases and explaining the Supreme Court "[s]ynthesiz[ed]" them into a two-part test in *Biggers*); *State v. Liverman*, 398 S.C. 130, 138, 727 S.E.2d 422, 426 (2012) (reciting *Biggers* test). Under *Biggers*, the trial court must first determine whether the police used an "'unnecessarily suggestive' . . . identification procedure[]," *State v. Wyatt*, 421 S.C. 306, 310, 806 S.E.2d 708, 710 (2017) (citing *Biggers*, 409 U.S. at 198-99,

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> order to ensure that such an abdication of the magistrate's duty does not occur, courts must continue to conscientiously review the sufficiency of affidavits on which warrants are issued.

62 U.S. at 239, 103 S. Ct. at 2332-33, 76 L. Ed. 2d at 548-49.

93 S. Ct. at 381-82, 34 L. Ed. 2d at 410-11), and second, if so, "whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed," 421 S.C. at 311, 806 S.E.2d at 710 (quoting *Liverman*, 398 S.C. at 138, 727 S.E.2d at 426).

The trial court in this case refused to conduct a *Biggers* hearing because Goolsby was not an eyewitness. The court stated, "I don't believe . . . this is a *Biggers* situation. You don't have an out-of-court identification [by] an eyewitness." We agree with the trial court. In every case decided by the Supreme Court or by this Court under *Biggers* and the line of cases that led to it, the witness who made the identification was an eyewitness to the crime itself, a witness who observed the crime take place in real time. The Supreme Court has given no reason to believe it would extend the *Biggers* analysis beyond eyewitnesses, nor has this Court. In *Perry*, the Supreme Court prefaced its discussion of the line of cases leading to *Biggers* by stating, "Only when evidence 'is so extremely unfair that its admission violates fundamental conceptions of justice,' have we imposed a constraint tied to the Due Process Clause." 565 U.S. at 237, 132 S. Ct. at 723, 181 L. Ed. 2d at 706 (citations omitted). The dangers of misidentification associated with eyewitness identification that threaten "fundamental conceptions of justice" are simply not present in a situation like the one in this case. While we agree with Warner the detective's question suggested to Goolsby that Warner is the man in the video, we nevertheless find Warner's due process rights do not require a hearing because Goolsby was not an eyewitness to the crime, and thus, *Biggers* does not apply.[8]

The trial court did not err in denying Warner a hearing as to Goolsby's identification.

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[8] Our court of appeals reached the same conclusion in *State v. McGee*, 408 S.C. 278, 758 S.E.2d 730 (Ct. App. 2014). There, the court found the identification was not subject to a *Biggers* analysis because the witness who made the identification "was not an eyewitness to the crime." 408 S.C. at 286, 758 S.E.2d at 735. In a recent decision by the Court of Appeals of Maryland on almost identical facts, the court held the "identification is not governed by the due process analysis in *Biggers*." *Greene v. State*, 229 A.3d 183, 193 (Md. 2020). Before reaching that conclusion, the Court of Appeals of Maryland conducted a thorough analysis of the same line of Supreme Court cases discussed above. 229 A.3d at 192-94. After our own thorough review of decisions on this point nationwide, we are aware of no court that has held the *Biggers* analysis extends to witnesses who are not "eyewitnesses."

## IV. Conclusion

We affirm the trial court's refusal to conduct a hearing under *Biggers* because Goolsby was not an eyewitness. As to Warner's motion to suppress CSLI, we find the warrant was not invalid for the reasons the trial court recited. We remand to the trial court for further proceedings.

**AFFIRMED IN PART AND REMANDED.**

**BEATTY, C.J., KITTREDGE and JAMES, JJ., concur. HEARN, J., dissenting in a separate opinion.**

**JUSTICE HEARN:** Because I agree with the decision and analysis of the court of appeals, I respectfully dissent. The court of appeals analyzed this pre-*Carpenter* Fourth Amendment violation under the standard set forth in *Davis* and concluded the exclusionary rule does not apply, which I believe was the correct approach. *See Davis v. United States*, 564 U.S. 229, 241 (2011) (holding searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule). I would end the matter there and not remand for a hearing. While I concede that probable cause was raised before the circuit court, the primary focus of the hearing was the privacy interests impacted by release of cell-site location data, and the circuit court denied the motion to suppress on that basis alone. I would not resurrect the probable cause issue now because the exclusionary rule would not serve any deterrent purpose and even assuming error in the denial of the motion to suppress, I would hold any error harmless.

The court of appeals found that the purposes of the exclusionary rule would not be honored in this case, and I agree completely with that determination. Here, the search warrant was issued under existing law that has since been changed. *Compare Carpenter v. United States*, 138 S. Ct. 2206, 2217 (2018) (holding that a person has an expectation of privacy in cell phone records held by a third party, thereby abrogating *Graham*'s extension of *Miller* to cell-site location information or "CSLI"), *with United States v Graham*, 824 F.3d 421, 427 (4th Cir. 2016) (finding no expectation of privacy in cell phone records held by a third party because of the third-party doctrine of *Miller*); *United States v. Miller*, 425 U.S. 435, 440 (1976) (holding bank depositor had no Fourth Amendment interest in bank records). While there is no dispute *Carpenter* applies retroactively, as the court of appeals correctly reasoned, applying the exclusionary rule is not called for when the behavior of the officers was made in either good faith or isolated simple negligence. Here, the officers were operating under the belief that Warner had no expectation of privacy in his cell phone records, and at the time, under the persuasive authority of *Graham* and the binding authority of *Miller*, that was true.

As an appellate court, we are required to balance the interests of the exclusionary rule with the "heavy toll on both the judicial system and society at large." *Davis v. United States*, 564 U.S. 229, 237 (2011). The rule was designed to serve as a last resort to deter officer misconduct and error. *Id* at 236 and *Elkins v. United States*, 364 U.S. 206, 217 (1960) (holding the exclusionary rule is "calculated to prevent, not to repair"). Here, there would be no deterrence of officer misconduct or error in excluding the evidence because, at the time of the search, officers acted in

compliance with current law. We can neither expect officers to predict future decisions of appellate courts nor take them to task for their failure to do so. Therefore, because the deterrent effect of the exclusionary rule would not be served here, I would not apply it. *See State v. Weston*, 329 S.C. 287, 293, 494 S.E.2d 801, 804 (1997) (stating "[s]uppression is appropriate in only a few situations"); *State v. Sachs*, 264 S.C. 541, 566, 216 S.E.2d 501, 514 (1975) (stating "[t]he exclusionary rule is harsh medicine," and "[e]xclusion should be applied only where [the purpose of] deterrence is clearly subserved").

Moreover, even assuming *arguendo* the circuit court erred in denying the motion to suppress, any error was harmless. When improper evidence is "merely cumulative" its admission is harmless beyond a reasonable doubt, and the conviction should not be reversed. *See State v. Haselden*, 353 S.C. 190, 197, 577 S.E.2d 445, 449 (2003) and *State v. Baccus*, 367 S.C. 41, 55-56, 625 S.E.2d 216, 224 (2006). Here, the CSLI data was clearly cumulative to a myriad of evidence which tied Warner to this crime: he was identified on the store's security footage by his probation officer, his birthday was entered into the store's computer during the fatal check-out, and his palm print matched one taken from the store's counter.[9] Further, the store's security video also captured the robber's vehicle at the scene, which closely resembled the same car Warner drove immediately before his arrest. Once investigators impounded Warner's vehicle, they found cigar wrappers similar to those purchased during the robbery and Warner's wallet, which resembled the one in the video of the robbery. In short, the use of his CSLI data was merely cumulative to other ample evidence, rendering any error harmless.

For the forgoing reasons, I respectfully dissent.

[9] The record reflects that the counter was cleaned approximately forty-five minutes before the crime. Seven individuals, including Warner, were in the store between the wiping of the counter and the robbery—five or six of whom approached the counter. However, it is clear no one besides Warner was involved in the robbery or murder.

# The Supreme Court of South Carolina

In the Matter of Craig L. Smith, Petitioner.

Appellate Case No. 2021-001205

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ORDER

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Petitioner was administratively suspended from the practice of law for failing to comply with annual continuing legal education requirements. *In re Admin. Suspensions for Failure to Comply with Continuing Legal Educ. Requirements*, S.C. Sup. Ct. Order dated April 20, 2017. He has now filed a petition for reinstatement pursuant to Rule 419 of the South Carolina Appellate Court Rules. Following a hearing, the Committee on Character and Fitness recommended the Court reinstate Petitioner to the practice of law.

The petition is granted, and Petitioner is hereby reinstated as a regular member of the South Carolina Bar.

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
April 5, 2022