The Supreme Court of South Carolina

Re: Amendments to South Carolina Appellate Court Rules

Appellate Case No. 2016-002561

ORDER

Pursuant to Article V, § 4, of the South Carolina Constitution, Rules 208, 215, 218, 221, 240, 245, 260, and 267 of the South Carolina Appellate Court Rules are hereby amended as provided in the attachment to this order. These amendments shall be submitted to the General Assembly as provided by Article V, § 4A of the South Carolina Constitution.

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
January 31, 2018

Rule 208(b), South Carolina Appellate Court Rules, is amended to provide:

(b) Content. The initial briefs under this Rule and the final briefs under Rule 211 shall contain:

(1) Brief of Appellant. The brief of appellant shall contain under appropriate headings and in the order here indicated:

(A) Table of Contents and Cases. A table of contents, with page references, and a table of cases (alphabetically arranged), statutes, and other authorities cited, with references to the pages of the brief where they are cited.

(B) Statement of Issues on Appeal. A statement of each of the issues presented for review. The statement shall be concise and direct as to each issue, and may be stated in question form. Broad general statements may be disregarded by the appellate court. Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal.

(C) Statement of the Case. The statement shall contain a concise history of the proceedings, insofar as necessary to an understanding of the appeal. The statement shall not contain contested matters and shall contain, as a minimum, the following information: the date of the commencement of the action or matter; the nature of the action or matter; the nature of the defense or of the response; the action of the court, jury, master, or administrative tribunal; the date(s) of trial or hearing; the mode of trial; the amount involved on appeal; the date and nature of the order, judgment or decision appealed from; the date of the service of the notice of appeal; the date of and description of such orders, judgments, decisions and proceedings of the lower court or administrative tribunal that may have affected the appeal, or may throw light upon the questions involved in the appeal; and any changes made in the parties by death,

substitution, or otherwise. Any matters stated or alleged in appellant's statement shall be binding on appellant.

(D) Standard of Review. If all the issues are governed by the same standard of appellate review, the Brief shall contain a section with the heading "Standard of Review," which shall concisely set forth the applicable standard of review with citations to relevant case law establishing the standard. If the same standard of review is not applicable to all of the issues, a separate section with a heading of "Standard of Review" shall be included at the start of the argument on each issue with citations to relevant case law establishing this standard of review.

(E) Argument. The brief shall be divided into as many parts as there are issues to be argued. At the head of each part, the particular issue to be addressed shall be set forth in distinctive type, followed by discussion and citations of authority. A party may also include a separate statement of facts relevant to the issues presented for review, with reference to the record on appeal, which may include contested matters and summarize the party's contentions.

(F) Conclusion. A short conclusion stating the precise relief requested.

(2) Brief of Respondent. The brief of respondent shall conform to the requirements of Rule 208(b)(1)(A)-(F), except that a statement of the issues, of the case, or of the standard of review need not be made unless the respondent is dissatisfied with the statement of the issues, of the case, or of the standard of review by appellant. If a respondent does not include his own statement of the case, he shall be bound by the matters stated or alleged in appellant's statement of the case. If a respondent does include his own statement of the case, he shall be bound by the matters stated or alleged in his statement of the case. Respondent's brief

may also contain argument asking the court to affirm for any ground appearing on the record as provided by Rule 220(c).

Rule 215, South Carolina Appellate Court Rules, is amended to provide:

RULE 215
SUBMISSION WITHOUT ORAL ARGUMENT

The appellate court may decide any case without oral argument if it determines that oral argument would not aid the court in resolving the issues.

Rule 218(a), South Carolina Appellate Court Rules, is amended to provide:

(a) Conduct of Argument. The appellant shall open and close the argument. Unless otherwise permitted by the court, counsel will not be permitted to read from books, briefs, records or authorities cited, although brief references therefrom may be read to illustrate points and argument.

Rule 221(a), South Carolina Appellate Court Rules, is amended to provide:

(a) Rehearing. Petitions for rehearing must be actually received by the appellate court no later than fifteen (15) days after the filing of the opinion, order, judgment, or decree of the court. A petition for rehearing shall be in accordance with Rule 240, and shall state with particularity the points supposed to have been overlooked or misapprehended by the court. No return to a petition for rehearing may be filed unless requested by the appellate court. Ordinarily, however, rehearing will not be granted in the absence of such a request. No petition for rehearing shall be allowed from an order denying a petition for a writ of certiorari under Rule 242, SCACR.

Rule 240(e), South Carolina Appellate Court Rules is amended to provide:

(e) Return to Motion. Any party opposing a motion or petition shall have ten (10) days from the date of service thereof to file an original and six (6) copies of his return with the clerk and serve on all parties a

copy of the return; provided, however, that a return to a petition for rehearing may only be filed if permitted under Rule 221(a). The court may in its discretion enlarge or limit the time for filing the return. The provisions of Rule 240(c) shall apply to a return. Failure of a party to timely file a return may be deemed a consent by that party to the relief sought in the motion or petition.

Rule 245(a), South Carolina Appellate Court Rules, is amended to provide:

(a) When Appropriate. The Supreme Court will not entertain matters in its original jurisdiction when the matter can be determined in a lower court in the first instance, without material prejudice to the rights of the parties. If the public interest is involved, or if special grounds of emergency or other good reasons exist why the original jurisdiction of the Supreme Court should be exercised, the facts showing the reasons must be stated in the petition.

Rule 260(b), South Carolina Appellate Court Rules, is amended to provide:

(b) Agreed Dismissal. If the parties to an appeal or other proceeding shall sign and file with the clerk of the appellate court an agreement that the proceeding be dismissed, the appellate court may enter an order of dismissal. The agreement may contain a provision altering the costs to be assessed under Rule 222 and/or other settlement terms subject to the provisions of Rule 261. An agreement that the proceeding be dismissed need not be in the form of a motion unless the parties request that the appellate court alter the costs assessed; approve a settlement agreement; modify the requirements of an Appellate Court Rule; or vacate a prior order, opinion, or judgment.

Rule 267(f), South Carolina Appellate Court Rules, is amended to provide as follows, and the current version of paragraph (f) is reordered as paragraph (g):

(f) Number of Copies. The number of copies required to be filed are specified in the applicable Appellate Court Rule. However, the number of copies required to be filed may be reduced by order of the Supreme Court.

The Supreme Court of South Carolina

Re: Amendments to Rule 8 of the South Carolina Court-Annexed Alternative Dispute Resolution Rules

Appellate Case No. 2017-002387

ORDER

Pursuant to Article V, § 4 of the South Carolina Constitution, Rule 8 of the South Carolina Court-Annexed Alternative Dispute Resolution Rules is amended as set forth in the attachment to this order. The amendment shall be submitted to the General Assembly as provided in Article V, § 4A of the South Carolina Constitution.

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
January 31, 2018

Rule 8 of the South Carolina Court-Annexed Alternative Dispute Resolution Rules is amended to provide:

Rule 8
Confidentiality

(a) Confidentiality. Any mediation communication disclosed during a mediation, including, but not limited to, oral, documentary, or electronic information, shall be confidential, and shall not be divulged by anyone in attendance at the mediation or participating in the mediation, except as permitted under this rule or by statute. Additionally, the parties, their attorneys and any other person present or participating in the mediation must execute an Agreement to Mediate that protects the confidentiality of the process. The parties and any other person present or participating shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial or other proceeding, any mediation communication disclosed in the course of a mediation, which shall include, but not be limited to:

(1) Views expressed or suggestions made by another party or any other person present with respect to a possible settlement of the dispute;

(2) Admissions made in the course of the mediation proceeding by another party or any other person present;

(3) Proposals made or views expressed by the mediator;

(4) The fact that another party had or had not indicated willingness to accept a proposal for settlement made by the mediator; and

(5) All records, reports or other documents created solely for use in the mediation or received by a mediator while serving as a mediator.

(b) Waiver of Confidentiality. Upon the signing by the parties of an agreement reached during mediation, confidentiality is waived as to the terms of the agreement, unless otherwise agreed to by the parties.

(c) Limited Exceptions to Confidentiality. There is no confidentiality attached to information that is disclosed during a mediation:

(1) for which the confidentiality against disclosure has been waived or stipulated to by all parties;

(2) that is used to plan a crime, commit or attempt to commit a crime, conceal ongoing criminal activity, or threaten violence;

(3) offered to report, prove, or disprove professional malpractice occurring during the mediation, solely for the purpose of the professional malpractice proceeding;

(4) offered for the limited purpose in judicial proceedings of establishing, refuting, approving, voiding, or reforming a settlement agreement reached during a mediation;

(5) offered to report, prove, or disprove professional misconduct occurring during the mediation; or

(6) in a report to or an inquiry from the Chief Judge for Administrative Purposes regarding a possible violation of these rules.

(d) Limited disclosures. A mediation communication disclosed under subsections (c)(3), (c)(4), (c)(5), or (c)(6) remains confidential and is not discoverable or admissible for any other purpose, unless otherwise permitted by this rule or by statute.

(e) Private Consultation/Confidentiality. The mediator may meet and consult individually with any party or parties or their counsel

during a mediation conference. The mediator without consent shall not divulge confidential information disclosed to a mediator in the course of a private consultation.

(f) No Waiver of Privilege. No communication by a party or attorney to the mediator in private session shall operate to waive any attorney-client privilege.

(g) Mediator Not to be Called as Witness. The mediator shall not be compelled by subpoena or otherwise to divulge any records or to testify in regard to the mediation in any adversary proceeding or judicial forum. All records, reports and other documents received by the mediator while serving in that capacity shall be confidential.

(h) Admissible information. Information that would be admissible or subject to discovery does not become inadmissible or protected from discovery by reason of its disclosure or use in a mediation.

The Supreme Court of South Carolina

Re: Amendments to Rules 207 and 607, South Carolina Appellate Court Rules

Appellate Case No. 2017-002059

ORDER

Pursuant to Article V, § 4 of the South Carolina Constitution, Rules 207 and 607 of the South Carolina Appellate Court Rules are amended as provided in the attachment to this order. These amendments shall be submitted to the General Assembly as provided by Article V, § 4A of the South Carolina Constitution.

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
January 31, 2018

Rule 207(a), South Carolina Appellate Court Rules, is amended to provide:

RULE 207
TRANSCRIPT OF PROCEEDING

(a) Appeals From a Lower Court.

(1) Ordering the Transcript. Where a transcript of the proceeding must be prepared by the court reporter, appellant shall, within the time provided for ordering the transcript, make satisfactory arrangements (including agreement regarding payment for the transcript), in writing with the court reporter for furnishing the transcript. In appeals from the court of common pleas, masters-in-equity, special referees or the family court in domestic actions, the transcript must be ordered within ten (10) days after the date of service of the notice of appeal. In appeals from the court of general sessions or the family court in juvenile actions, the transcript must be ordered within thirty (30) days of the date of service of the notice of appeal. Appellant shall contemporaneously furnish all parties, the Office of Court Administration, and the clerk of the appellate court with copies of all correspondence with the court reporter. The court reporter must acknowledge receipt of the request by responding to the appellant within five business days. Where required by paragraph (a)(7) and by Order of the Supreme Court, copies of all correspondence must also be provided by electronic means. Unless the parties otherwise agree in writing, appellant must order a transcript of the entire proceedings below. If a party to the appeal unjustifiably refuses to agree to ordering less than the entire transcript, appellant may move to be awarded costs for having unnecessary portions transcribed; this motion must be made no later than the time the final briefs are due under Rule 211.

(2) Delivery of Transcript. The court reporter shall transcribe and deliver the transcript to appellant no later than sixty (60) days after the date of the request. Records shall be transcribed by the court reporter in the order in which the requests for transcripts are made.

(3) Extension for Court Reporter. If a court reporter anticipates continuous engagement in the performance of other official duties which make it impossible to prepare a transcript in compliance with this Rule, the reporter shall promptly notify the Office of Court Administration by submitting a

Court-approved Notice of Request for Extension form. The Office of Court Administration may grant up to three (3) extensions for a total of up to ninety (90) days. An extension in excess of ninety (90) days shall not be allowed except by order of the Chief Justice.

(4) Notice of Extension. Upon the granting of any extension of time for delivery of the transcript, the Office of Court Administration shall notify all parties and the clerk of the appellate court.

(5) Failure to Receive Transcript. If appellant has not received the transcript within the allotted time nor received notification of an extension within ten (10) days after the allotted time, appellant shall notify the Office of Court Administration, the clerk of the appellate court, and the court reporter in writing.

(6) Failure to Comply. The willful failure of a court reporter to comply with the provisions of this Rule shall constitute contempt of court enforceable by order of the Chief Justice.

(7) Electronic Notification. In addition to providing notice as set forth above in paragraphs (a)(1) and (a)(5), where an appellant is represented by counsel, counsel shall provide copies of all correspondence with a court reporter via electronic means as specified by Order of the Supreme Court. Court reporters shall also provide copies of all correspondence and extension requests via electronic means as specified by Order of the Supreme Court.

. . . .

Rule 607, South Carolina Appellate Court Rules, is amended to provide:

RULE 607
COURT REPORTER TRANSCRIPTS AND TAPES

(a) Applicability. This rule is applicable to court reporter transcripts and tapes relating to proceedings before the family and circuit court, to include proceedings before masters-in-equity. A court reporter for such a proceeding, regardless whether the court reporter is a Judicial Department employee or a private court reporter, shall comply with the requirements of this rule.

(b) Ordering Transcripts. Transcripts of proceedings which are needed for an appeal or appellate review of a post-conviction relief action before the Supreme Court or Court of Appeals shall be ordered as provided by Rules 207(a) or 243(b), SCACR. In all other cases, the request for the transcript shall be made, in writing, to the court reporter, and a copy of the request shall be served as provided by Rule 262(b), SCACR, on all parties to the proceeding which is to be transcribed and, if the transcript is requested for use in another case, on all parties in that case. A copy of the request shall also be provided to the Office of Court Administration. If the request is made by an attorney, the attorney shall provide copies of all correspondence via electronic means as specified in Rule 207(a)(7) and by Order of the Supreme Court. The names and addresses of all persons who are to be served with a copy shall be included on the request for the transcript. The court reporter must acknowledge receipt of the request by responding to the person making the request within five business days, and provide a copy to the Office of Court Administration as specified in Rule 207(a)(7) and by Order of the Supreme Court.

(c) Preparation of Transcript. The transcript shall be prepared in the manner prescribed by the Court Reporters Manual published by the Office of Court Administration.

(d) Delivery of Transcripts. A court reporter shall transcribe and deliver the transcript no later than sixty (60) days after the date of the request. Records shall be transcribed by the court reporter in the order in which the requests for transcripts are made; provided, however, that requests to transcribe post-conviction relief proceedings challenging a sentence of death shall be given priority as provided by S.C. Code Ann. § 17-27-160(E).

(e) Extension of Time to Deliver. If a court reporter anticipates continuous engagement in the performance of other official duties which make it impossible to prepare a transcript within the time specified in (d) above, the reporter shall promptly notify the Office of Court Administration by submitting a Court-approved Notice of Request for Extension form. The Office of Court Administration may grant up to three extensions for a total of up to ninety (90) days. Extensions in excess of ninety days (90) days shall not be allowed except by order of the Chief Justice.

(f) Notice of Extension. Upon the granting of any extension of time for delivery of the transcript, the Office of Court Administration shall notify the parties and, if the transcript has been requested for an appeal or other proceeding before the Supreme Court or the Court of Appeals, the Clerk of that Court.

(g) Failure to Receive Transcript. If the requesting party has not received the transcript within the allotted time nor received notification of an extension within ten (10) days after the allotted time, the requesting party shall notify, in writing, the Office of Court Administration, the court reporter and, if the transcript has been requested for an appeal or other proceeding before the Supreme Court or the Court of Appeals, the Clerk of that Court. If the request was made by an attorney, the attorney shall also provide notice via electronic means as provided in Rule 207(a)(7) and by Order of the Supreme Court.

. . . .

The Supreme Court of South Carolina

In the Matter of Gary W. Patterson, Petitioner

Appellate Case No. 2018-000129

ORDER

The records in the office of the Clerk of the Supreme Court show that on May 21, 2012, Petitioner was admitted and enrolled as a member of the Bar of this State. Currently, Petitioner is a limited member of the Bar in good standing.

Petitioner has now submitted her resignation from the South Carolina Bar pursuant to Rule 409 of the South Carolina Appellate Court Rules. The resignation is accepted.

Within twenty (20) days of the date of this order, Petitioner shall surrender the certificate of admission to the Clerk of this Court. If Petitioner cannot locate this certificate, Petitioner shall provide the Clerk with an affidavit indicating this fact and indicating that the certificate will be immediately surrendered if it is subsequently located.

FOR THE COURT

BY s/ Daniel E. Shearouse
CLERK

Columbia, South Carolina

February 1, 2018

The Supreme Court of South Carolina

In the Matter of David C. Quast, Petitioner.

Appellate Case No. 2018-000135

ORDER

The records in the office of the Clerk of the Supreme Court show that on May 21, 2012, Petitioner was admitted and enrolled as a member of the Bar of this State. Currently, Petitioner is a limited member of the Bar in good standing.

Petitioner has now submitted her resignation from the South Carolina Bar pursuant to Rule 409 of the South Carolina Appellate Court Rules. The resignation is accepted.

Within twenty (20) days of the date of this order, Petitioner shall surrender the certificate of admission to the Clerk of this Court. If Petitioner cannot locate this certificate, Petitioner shall provide the Clerk with an affidavit indicating this fact and indicating that the certificate will be immediately surrendered if it is subsequently located.

FOR THE COURT

BY s/ Daniel E. Shearouse
CLERK

Columbia, South Carolina

February 1, 2018

The Supreme Court of South Carolina

In the Matter of Kevin Hayne Sitnik, Deceased.

Appellate Case No. 2018-000156

ORDER

Pursuant to Rule 31 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR), Disciplinary Counsel has filed a Petition for Appointment of Receiver in this matter. The petition is granted.

IT IS ORDERED that Peyre Thomas Lumpkin, Esquire, Receiver, is hereby appointed to assume responsibility for Mr. Sitnik's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) Mr. Sitnik maintained. Mr. Lumpkin shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of Mr. Sitnik's clients. Mr. Lumpkin may make disbursements from Mr. Sitnik's trust account(s), escrow account(s), operating account(s), and any other law office account(s) Mr. Sitnik maintained that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of Mr. Sitnik, shall serve as notice to the bank or other financial institution that the Receiver, Peyre Thomas Lumpkin, Esquire, has been duly appointed by this Court.

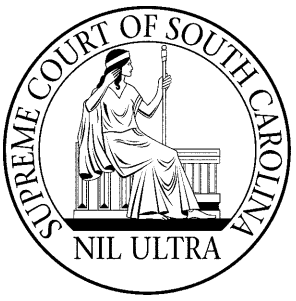
Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that the Receiver, Peyre Thomas Lumpkin, Esquire, has been duly appointed by this Court and has the authority to receive Mr. Sitnik's mail and the authority to direct that Mr. Sitnik's mail be delivered to Mr. Lumpkin's office.

Mr. Lumpkin's appointment shall be for a period of no longer than nine months unless an extension of the period of appointment is requested.

s/ Donald W. Beatty C.J.

Columbia, South Carolina

February 5, 2018



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 6
February 7, 2018
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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2017-UP-387-In the matter of Keith F. Burris	Pending
2017-UP-391-State v. Sean Robert Kelly	Pending
2017-UP-403-Preservation Society of Charleston v. SCDHEC	Pending
2017-UP-406-State v. Jerry McKnight, Sr.	Pending
2017-UP-412-United Auto Ins. v. Willie Freeman	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Michael Lee Robinson, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2015-001773

ON WRIT OF CERTIORARI

Appeal from Greenville County
Perry H. Gravely, Post-Conviction Relief Judge

Opinion No. 27762
Submitted November 15, 2017 – Filed February 7, 2018

REVERSED

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

Attorney General Alan Wilson and Assistant Attorney General DeShawn H. Mitchell, both of Columbia, for Respondent.

ACTING CHIEF JUSTICE KITTREDGE: This is a post-conviction relief (PCR) matter. Petitioner Michael Lee Robinson was indicted in 2013 on charges of first-degree criminal sexual conduct (CSC) with a minor. The alleged offenses

occurred between 1998 and 2000. However, between 2001 and 2012, the CSC statute was amended, increasing the sentencing range for this crime. The State offered "to let" Petitioner plead guilty under the prior sentencing law but insisted that Petitioner would be subject to the increased 2012 sentencing scheme if he rejected the offer and went to trial.[1] Plea counsel, apparently unaware of the inapplicability of the 2012 sentencing enhancement under any circumstances, recommended Petitioner accept the offer. Based on counsel's recommendation, Petitioner pled guilty.

The PCR court denied relief, and this Court granted a writ of certiorari to review that decision. Petitioner pled guilty on plea counsel's advice to accept the plea offer because Petitioner would otherwise be subject to an increased sentence based on a statute amended after the offense date. However, Petitioner was not subject to the increased sentence in the 2012 amended statute, for that would have violated the ex post facto clauses of the United States Constitution and South Carolina Constitution. Because the PCR court's decision is controlled by an error of law, we reverse.

I.

In February 2013, a Greenville County grand jury indicted Petitioner on several counts of first-degree CSC with a minor for alleged acts that occurred between July 1, 1998, and July 31, 2000. At the time the alleged acts occurred, the crime of first-degree CSC with a minor carried a sentencing range of zero to thirty years. S.C. Code Ann. §§ 16-3-655(A)(1) (1984) (defining the crime), 16-1-90(A) (1998) (listing the crime as a Class A felony), 16-1-20(A)(1) (1995) (providing the penalty for a Class A felony as zero to thirty years). However, in subsequent years, the sentencing range for first-degree CSC with a minor was increased to twenty-five years to life. S.C. Code Ann. § 16-3-655(D)(1) (2012). The State offered a plea deal for Petitioner to plead guilty to one count of first-degree CSC with a minor and, in exchange, the State would "agree to let" Petitioner "be sentenced under the

[1] This statute was amended prior to 2012; however, we refer to the 2012 amended statute as it was in effect at the time that Petitioner was indicted and both parties refer to it as the statute under which the State would have attempted to prosecute Petitioner. *See*, *e.g.*, 2006 Act No. 342, § 3 (codified at S.C. Code Ann. § 16-3-655(C)(1) (2006)); *see also* 2012 Act No. 255, § 1 (codified at S.C. Code Ann. § 16-3-655(D)(1) (2012)).

old version of the law" and the remaining charges would be dismissed. Plea counsel recommended that Petitioner accept the State's offer to avoid the harsher sentence under the 2012 amended statute. Plea counsel never informed Petitioner that under no circumstances could he be sentenced under the 2012 amended statute.

Petitioner maintains that plea counsel's deficient advice was not sufficiently cured during the guilty plea hearing. The plea judge initially referenced the sentencing range under the 2012 amended statute, as the following colloquy reveals:

> **The Court**: Okay. You're up here on this indictment. And it is 2013-674. It alleges that you did in Greenville County between July 1, 1998 and July 31 of 2000 commit a sexual battery on T.H., who was less than eleven years of age. CSC with a minor, first degree, twenty-five years to life.
>
> **[Plea Counsel]:** Judge, ---
>
> **The Court:** Do you understand that?
>
> **[Solicitor]:** *Your Honor, this was pre the law changes back in '98 and 2000. The sentence was zero to thirty years.*
>
> **The Court:** *Thirty years, okay.* Still considered a most serious offense.
>
> **[Solicitor]:** Yes, sir.
>
> **The Court:** If you get convictions for two or more most serious offenses you're eligible for life in prison without parole. It's a violent offense, which means you will basically do a minimum eighty-five percent of the sentence. You understand that?
>
> **[Petitioner]:** Yes, Your Honor.

> **The Court:** All right. Understanding the nature of the charge against you and the maximum possible punishment, how do you want to plead?
>
> **[Petitioner]:** Guilty, Your Honor.

(emphasis added). Pursuant to the plea deal, Petitioner pled guilty to one count of first-degree CSC with a minor. Petitioner was sentenced to twenty-five years imprisonment and the remaining charges were dismissed. No direct appeal was taken.

II.

Petitioner filed a PCR application contending that his plea counsel provided ineffective assistance and, as a result, his guilty plea was involuntary. At the PCR hearing, Petitioner testified that he had told plea counsel "nothing occurred" and he "wanted to go to trial." Petitioner further testified that he ultimately entered the guilty plea, based upon plea counsel's recommendation, to avoid a sentence under the 2012 amended statute of twenty-five years to life. Petitioner stated that he was scared about the potential life sentence under the amended law and decided to plead guilty to avoid a life sentence. Petitioner was adamant that counsel never informed him of the inapplicability of the 2012 amended statute enhancing the sentencing range, and it is undisputed that Petitioner, due to counsel's erroneous advice, believed he could face a life sentence under the new law.

Plea counsel acknowledged that Petitioner maintained his innocence and wanted a trial. Specifically, plea counsel stated, "Yeah . . . pretty much the entire time he said this had not happened and that he wanted a trial." As part of counsel's admission that he erroneously informed Petitioner that he would be subject to the 2012 increased sentencing scheme, counsel further admitted that he *did not* review the sentencing ranges on each of the charges with Petitioner.[2] Specifically, plea

[2] The order of the PCR court contains findings that are flatly contradicted by the record. One troubling example is the finding of the PCR court that plea counsel reviewed the sentencing ranges of each charge with Petitioner; plea counsel's testimony is to the contrary, as he admitted he did not review the sentencing ranges

counsel testified that he recommended Petitioner accept the plea offer because the State had agreed to let Petitioner "plea and be sentenced under the old version of the law" and the State had "indicated that if we were to go to trial they were going to pursue the new version of the law."

The PCR court dismissed Petitioner's application, finding Petitioner failed to prove both prongs of the *Strickland* test. *See Strickland v. Washington*, 466 U.S. 668 (1984) (requiring a defendant to prove ineffective assistance of counsel by showing counsel was deficient and such deficiency caused prejudice); *see also Sellner v. State*, 416 S.C. 606, 611, 787 S.E.2d 525, 527 (2016) (recognizing "[t]he two-part test also 'applies to challenges to guilty pleas based on ineffective assistance of counsel'" (quoting *Hill v. Lockhart*, 474 U.S. 52, 58 (1985)). In particular, the PCR court order inexplicably stated, "While [Petitioner] may have felt unsettled when plea counsel advised he was facing a life sentence, *this was an accurate statement of the law*." (emphasis added). This Court granted the petition for a writ of certiorari.

III.

A PCR court's findings of fact will be upheld if there is any evidence of probative value in the record to support them. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). However, we review questions of law de novo. *Id.* Moreover, "this Court will reverse the decision of the PCR court when it is controlled by an error of law." *Gonzales v. State*, 419 S.C. 2, 10, 795 S.E.2d 835, 839 (2017) (citing *Terry v. State*, 383 S.C. 361, 371, 680 S.E.2d 277, 282 (2009)).

"A defendant has the right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution." *Terry*, 383 S.C. at 370, 680 S.E.2d at 282 (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). "Where, as here, a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases.'" *Hill v. Lockhart*, 474 U.S. 52, 56 (1985) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970)). "[T]he defendant can show prejudice by

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with Petitioner. At the PCR hearing, the State inquired, "Did you review with [Petitioner] the sentence ranges on each of those charges?" Plea counsel replied, "No, I didn't."

demonstrating a 'reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" *Lee v. United States*, 137 S. Ct. 1958, 1965 (2017) (quoting *Hill*, 474 U.S. at 59).

Petitioner argues that plea counsel provided ineffective assistance of counsel because Petitioner based his decision to plead guilty on plea counsel's incorrect advice—that Petitioner should accept the guilty plea or he could be sentenced under the post-offense amended law with an increased sentencing range. Petitioner contends this ineffective assistance rendered his guilty plea involuntary. We agree. It is clear that Petitioner would not have pled guilty but for counsel's erroneous sentencing advice. Because the PCR court failed to recognize that plea counsel's advice was deficient—as an increased punishment under the amended law would have violated the ex post facto clauses of the United States Constitution and South Carolina Constitution—the PCR court's decision is controlled by an error of law and we reverse.

A.

With regard to the deficiency prong, plea counsel's advice was not "within the range of competence demanded of attorneys in criminal cases." *Hill v. Lockhart*, 474 U.S. 52, 56 (1985) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970)). His performance fell below reasonable professional norms as his advice that the State had the ability to prosecute Petitioner under the 2012 amended law was clearly incorrect.

It is well established that "[a] law which imposes additional punishment to that prescribed at the time the offense was committed is prohibited under the *ex post facto* clauses of the United States and South Carolina Constitutions." *State v. Dabney*, 301 S.C. 271, 273, 391 S.E.2d 563, 564 (1990). These clauses ensure "that individuals have fair warning of applicable laws." *Peugh v. United States*, 569 U.S. 530, 544 (2013). Thus, "[a]n ex post facto violation occurs when a change in the law retroactively . . . increases the punishment for a crime." *Jernigan v. State*, 340 S.C. 256, 261, 531 S.E.2d 507, 509 (2000); *see also Dorsey v. United States*, 567 U.S. 260, 275 (2012) (recognizing "the Constitution's *Ex Post Facto* Clause, Art. I, § 9, cl. 3, prohibits applying a new Act's higher penalties to pre-Act conduct").

Because the statutory revisions increased the punishment for the alleged prior crime, the State could not have sought to impose the enhanced sentencing scheme had Petitioner proceeded to trial instead of pleading guilty. The State could not "pursue the new version of the law" because it would violate the ex post facto clauses of the United States and South Carolina Constitutions. *See* U.S. Const. art. I, §§ 9, 10 (stating "[n]o Bill of Attainder or ex post facto Law shall be passed" and "[n]o state shall . . . pass any . . . ex post facto Law"); S.C. Const. art. I, § 4 (providing "[n]o . . . ex post facto law . . . shall be passed"). The PCR court erred in finding that plea counsel's advice was an accurate statement of the law. Plea counsel's failure to recognize that the ex post facto clauses prohibited the increased punishment for Petitioner's alleged offenses manifestly fell below objectively reasonable professional norms and constituted deficient performance. *See Goins v. State*, 397 S.C. 568, 574–75, 726 S.E.2d 1, 4 (2012) (finding plea counsel's incorrect advice regarding well-established law did "not reflect 'reasonable professional judgment'" and constituted deficient performance).

Although not directly conceding that plea counsel was deficient, the State acknowledges that Petitioner should have been sentenced under the prior law, regardless of the plea offer. Understandably, the State focuses most of its attention on the prejudice prong, claiming Petitioner was not prejudiced by counsel's representation. We turn to the prejudice analysis.

B.

"[W]hen a [petitioner] claims that his counsel's deficient performance deprived him of a trial by causing him to accept a plea, [he] can show prejudice by demonstrating a 'reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" *Lee v. United States*, 137 S. Ct. 1958, 1965 (2017) (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)).

The record is clear that Petitioner placed particular emphasis on his potential sentencing exposure in deciding whether to plead guilty. Indeed, Petitioner maintained his innocence and testified at the PCR hearing that he pled guilty *only* because he wanted to avoid the risk of receiving a life sentence under the amended law. As noted, even counsel admitted that Petitioner maintained his innocence and wanted to go "to trial." Petitioner has demonstrated a reasonable probability that he would have rejected the plea offer and proceeded to trial but for plea counsel's

incorrect advice. *See Hill*, 474 U.S. at 60 (explaining prejudice may be demonstrated by evidence that the accused "placed particular emphasis" on the specific incorrect advice by counsel in deciding to plead guilty).

C.

Finally, the State posits that "any inaccurate advice from counsel was cured by the plea court's colloquy." We acknowledge that, in some situations, a proper guilty plea colloquy may serve to cure the deficiency of plea counsel and remove any prejudice. The plea colloquy here cannot rescue this guilty plea.

At issue here is whether Petitioner truly understood the sentencing range and maximum penalty he faced for the charge. *See Pittman v. State*, 337 S.C. 597, 599, 524 S.E.2d 623, 624–25 (1999). The plea colloquy consisted of the plea judge stating the *incorrect* sentencing range (relying on the inapplicable 2012 amended statute) and the solicitor correcting the range. This portion of the colloquy was brief, and, more importantly, the plea court's vague retort—"Thirty years, okay"—did nothing to clarify the proper sentencing range. If anything, the colloquy likely served to confirm plea counsel's advice that the State would pursue the increased sentence if the case proceeded to trial. More to the point, it appeared as though the State was simply upholding its end of the plea bargain by allowing the plea to proceed under the older version of the statute, with a possible thirty-year sentence. For a plea hearing to cure deficient advice, the plea hearing must unambiguously address and resolve the incorrect advice—namely, that the Constitution forbade the State from proceeding to trial under the amended sentencing scheme. *See United States v. Akinsade*, 686 F.3d 248, 255 (4th Cir. 2012) (recognizing, "in order for a district court's admonishment to be curative, it should address the particular issue underlying the affirmative misadvice"). That did not occur here.

IV.

In summary, plea counsel was clearly deficient in failing to recognize and advise Petitioner that the ex post facto clauses of the United States Constitution and South Carolina Constitution prohibited an increased punishment under the post-offense amended sentencing scheme. In addition, the undisputed evidence in the record is clear: Petitioner would have insisted on going to trial and not pled guilty but for counsel's deficient advice. Thus, he has shown prejudice. Moreover, because the plea colloquy did not specifically address plea counsel's incorrect advice, the plea

hearing was insufficient to cure the deficient representation. We reverse the denial of PCR.

REVERSED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

State of South Carolina, Respondent,

v.

Elias James Walker, Appellant.

Appellate Case No. 2014-001462

Appeal from Charleston County
Roger M. Young Sr., Circuit Court Judge

Opinion No. 27763
Heard November 15, 2017 – Filed February 7, 2018

AFFIRMED

Chief Appellate Defender Robert Michael Dudek, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General William F. Schumacher, IV, both of Columbia, and Solicitor Scarlett Anne Wilson, of Charleston, for Respondent.

JUSTICE FEW: The question we address in this appeal is whether section 16-25-90 of the South Carolina Code (2015) violates the equal protection or due process rights of a defendant who commits an offense against his parent, because the definition of "household member" in subsection 16-25-10(3) of the South Carolina Code (Supp. 2017) does not include parents and children, and thus section 16-25-90 does not provide such a defendant any opportunity for early parole eligibility. We find no violation.

Elias James Walker killed his father by repeatedly stabbing him with a sword in a Mount Pleasant motel room where they were living. Walker was twenty-two years old. Pursuant to a plea agreement, Walker pled guilty but mentally ill to voluntary manslaughter and possession of a weapon during the commission of a violent crime. The circuit court imposed the negotiated sentence of thirty years in prison, suspended on the service of eighteen years with probation to follow. At the plea hearing, Walker presented evidence his father had physically and mentally abused him throughout his life. The circuit court found "there is ample evidence in the record of a history of criminal domestic violence against the defendant at the hands of his father." Based on this finding, Walker argued he was eligible for early parole under section 16-25-90. The circuit court found Walker was not eligible for early parole because his father was not his household member as defined in subsection 16-25-10(3). We certified Walker's appeal for our review pursuant to Rule 204(b) of the South Carolina Appellate Court Rules.

Under ordinary circumstances, a person sentenced to prison for a "no parole offense" such as voluntary manslaughter is not eligible for any form of early release "until the inmate has served at least eighty-five percent of the actual term of imprisonment imposed." S.C. Code Ann. § 24-13-150(A) (Supp. 2017); *see* S.C. Code Ann. § 24-13-100 (2007) (defining a "no parole offense" to include class A felonies); S.C. Code Ann. § 16-1-90(A) (Supp. 2017) (providing voluntary manslaughter is a class A felony). However, section 16-25-90 provides,

> [A]n inmate who was convicted of, or pled guilty . . . to, an offense against a household member is eligible for parole after serving one-fourth of his prison term when the inmate at the time he pled guilty . . . presented credible evidence of a history of criminal domestic violence . . . suffered at the hands of the household member.

Subsection 16-25-10(3) defines the term household member to include: "(a) a spouse; (b) a former spouse; (c) persons who have a child in common; or (d) a male and female who are cohabiting or formerly have cohabited." The definition does not include Walker or his father as a household member. Therefore, section 16-25-90 does not apply to Walker.

Walker argues excluding him from eligibility for early parole under section 16-25-90 violates his right to equal protection of the laws. *See* U.S. CONST. amend. XIV, § 1 ("No state shall . . . deny to any person . . . the equal protection of the laws."); S.C. CONST. art. I, § 3 ("nor shall any person be denied the equal protection of the

laws"). The initial inquiry in any equal protection analysis is whether the plaintiff made "a showing that similarly situated persons received disparate treatment." *Grant v. S.C. Coastal Council*, 319 S.C. 348, 354, 461 S.E.2d 388, 391 (1995); *see also Bodman v. State*, 403 S.C. 60, 74, 742 S.E.2d 363, 370 (2013) (stating the first step of an equal protection analysis is "whether the law treats 'similarly situated' entities differently"); *Town of Hollywood v. Floyd*, 403 S.C. 466, 480, 744 S.E.2d 161, 168 (2013) (stating "the equal protection clause does not prohibit different treatment of people in different circumstances").

Walker has not presented a valid equal protection claim because he is not similarly situated to the criminal domestic violence victims who commit offenses against a household member. The relationship between parents and their children is governed by the South Carolina Children's Code. *See* S.C. Code Ann. §§ 63-1-10 to -21-30 (2010 & Supp. 2017). The Children's Code is an extensive statutory scheme unlike anything governing the relationship between household members. *Cf.* S.C. Code Ann. §§ 16-25-10 to -750 (2015 & Supp. 2017) (Criminal Domestic Violence Act); S.C. Code Ann. §§ 20-4-10 to -160 (2014 & Supp. 2017) (Protection from Domestic Abuse Act). For example, the Children's Code establishes "[a] children's policy," which "appl[ies] to all children who have need of services including . . . those . . . neglected, abused or exploited and those who by their circumstance . . . are found to be in need of treatment or rehabilitation." S.C. Code Ann. § 63-1-20(A), (B) (2010). The Children's Code provides, "It shall be the policy of this State to concentrate on the prevention of children's problems as the most important strategy which can be planned and implemented on behalf of children and their families." S.C. Code Ann. § 63-1-20(C) (2010).

The Children's Code includes provisions to protect children against family violence, and provides penalties tailored to meet the specific needs of the parent-child relationship. *See, e.g.*, S.C. Code Ann. § 63-7-10(A)(1), (2) (2010) (recognizing the principles that "(1) Parents have the primary responsibility for and are the primary resource for their children," and "(2) Children should have the opportunity to grow up in a family unit if at all possible"); S.C. Code Ann. § 63-7-30 (2010) (allowing access to State services when "the problem presented involves child abuse or neglect"); S.C. Code Ann. § 63-5-70(A)(1) (2010) ("It is unlawful for . . . the parent or guardian of a child . . . to . . . place the child at unreasonable risk of harm affecting the child's life, physical or mental health, or safety."); § 63-5-70(A)(2) ("It is unlawful for . . . the parent or guardian of a child . . . to . . . do or cause to be done unlawfully or maliciously any bodily harm to the child so that the life or health of the child is endangered or likely to be endangered."). The Children's Code specifically contemplates the tension between a parent's right to discipline a child—

including physical discipline—and excessive corporal punishment. S.C. Code Ann. § 63-7-20(6)(a) (Supp. 2017).

Walker is not similarly situated to other domestic violence victims included in the definition of household member. Therefore, Walker has not presented a valid equal protection claim. He also argues his due process rights were violated. However, he cites no legal authority that supports his due process claim, and we have found none. The circuit court correctly denied his claim for early parole eligibility.

AFFIRMED.

HEARN, Acting Chief Justice, JAMES, J., and Acting Justices Jan B. Bromell Holmes and Arthur Eugene Morehead, III, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Stephen Smalls, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2016-001079

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Richland County
Henry F. Floyd, Trial Court Judge
J. Ernest Kinard Jr., Post-Conviction Relief Judge

Opinion No. 27764
Heard November 14, 2017 – Filed February 7, 2018

REVERSED

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

Attorney General Alan McCrory Wilson and Assistant Attorney General Jessica Elizabeth Kinard, both of Columbia, for Respondent.

JUSTICE FEW: In this post-conviction relief (PCR) case, we agree with the court of appeals' finding that trial counsel was deficient, but disagree that the State presented overwhelming evidence of guilt that precluded a finding of prejudice under the second prong of *Strickland v. Washington*. We find the evidence was not overwhelming, and reverse the court of appeals' finding that counsel's errors resulted in no prejudice.

I. Facts and Procedural History

At almost midnight on May 21, 2000, Jim Lightner and Eugene Green were closing the Bojangles restaurant on Elmwood Avenue in Columbia when a man charged in the door wielding a shotgun. The man forced Lightner to the back of the restaurant to open the safe. When they went to the back, Green escaped out the front door and ran across Elmwood to a gas station to call the police. While Green was on the phone with police, he saw the man walk out the side service door of the Bojangles carrying the shotgun in one hand and a white bag in the other. The man walked out of a wooden gate near the back of the parking lot just as a police cruiser pulled up to the front of the Bojangles. Green told the police to "make a left at the Lizard's Thicket," which would take the officer to where the man exited the wooden gate. When Green saw the cruiser make the left, he said "you got him." Although the officers were unable to find the suspect at that time, they did find a twelve-gauge pump-action shotgun and a white bag containing $1,900 just outside the gate.

Two fingerprint experts later examined the shotgun and determined that one of several prints on the gun belonged to Smalls. After securing a warrant for Smalls' arrest, Investigator Joe Gray drove to Smalls' house. When he saw Smalls walking down a nearby street carrying a child in his arms, Gray stepped out of his vehicle and asked Smalls about the robbery of the Bojangles. Gray testified Smalls "dropped the child" and "began running." Another officer found Smalls later that evening hiding in bushes a few blocks away.

Investigator Paul Mead prepared a photographic lineup that he presented to Lightner. Investigator Gray presented the same lineup to Green. Four days after the robbery, Green identified Smalls. Lightner, however, could not identify Smalls, but did narrow the suspects down to two people, one of whom was Smalls.

At trial in May of 2002, the State introduced Green's pretrial identification of Smalls. Green testified and identified Smalls in the courtroom. The State introduced the fact Lightner narrowed the suspects down to Smalls and one other person. Investigator Gray identified Smalls as the person who dropped the child and ran when he was asked about the robbery. Both fingerprint experts testified one of the fingerprints on the shotgun belonged to Smalls. The jury convicted Smalls of armed robbery, and the trial court sentenced him to twenty-five years in prison. The court of appeals dismissed his appeal in an unpublished opinion. *State v. Smalls*, Op. No. 2004-UP-315 (S.C. Ct. App. filed May 13, 2004).

Smalls filed an application for PCR alleging he received ineffective assistance of counsel. The PCR court first held a hearing in 2007. The court held the record open to allow PCR counsel time to investigate the circumstances under which the State dismissed a carjacking charge against Green on the morning of Smalls' trial. The hearing was not reconvened until 2012. The PCR court described the issue regarding the carjacking charge as not only one of ineffective assistance of counsel, but also whether "the State was deceptive" in representations made to the trial court and trial counsel.[1] The PCR court denied relief.

We transferred Smalls' petition for a writ of certiorari to the court of appeals pursuant to Rule 243(l) of the South Carolina Appellate Court Rules, and the court of appeals granted the petition. The court of appeals then found trial counsel's performance was deficient regarding the carjacking charge and in two other instances. *Smalls v. State*, 415 S.C. 490, 498-501, 783 S.E.2d 817, 820-22 (Ct. App. 2016). However, the court of appeals found "there was no prejudice resulting from trial counsel's deficient performance because the State presented overwhelming evidence of [Smalls'] guilt." 415 S.C. at 501, 783 S.E.2d at 822. Smalls filed a petition for a writ of certiorari, 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 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 review questions of law de novo, with no deference to trial courts.[2] *Sellner*, 416 S.C.

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[1] The PCR court did not make a ruling on the misrepresentation issue and neither party briefed the issue to the court of appeals or this Court.

[2] In numerous cases, this Court has incorrectly stated an appellate court "gives great deference to the PCR court's . . . conclusions of law." *See, e.g.*, *Porter v. State*, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). The court of appeals repeated our misstatement, quoting *Porter*. *Smalls*, 415 S.C. at 496, 783 S.E.2d at 820. We clarify that appellate courts review questions of law de novo, with no deference to trial courts. While we uphold the analysis and result of the following decisions, we now direct that none of these decisions should be read to suggest an appellate court gives any deference to a PCR court's conclusions of law: *Gonzales v. State*, 419 S.C. 2, 10, 795 S.E.2d 835, 839 (2017); *Gibbs v. State*, 416 S.C. 209, 218, 785 S.E.2d 455, 459 (2016); *McHam v. State*, 404 S.C. 465, 473, 746 S.E.2d 41, 45 (2013);

at 610, 787 S.E.2d at 527 (citing *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014)).

III. Deficient Performance

To prove trial counsel's performance was deficient, an applicant must show "counsel's representation fell below an objective standard of reasonableness." *Williams v. State*, 363 S.C. 341, 343, 611 S.E.2d 232, 233 (2005) (citing *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 2064, 80 L. E. 2d 674, 693 (1984)). The court of appeals held trial counsel's performance fell below this standard as to three separate instances. First, trial counsel did not effectively argue that the existence and dismissal of Green's carjacking charge was admissible as evidence of Green's bias. Second, trial counsel did not object to the State's question to Investigator Mead suggesting Smalls burglarized someone's home to obtain the shotgun. Third, trial counsel did not challenge the State's statement during opening that the police saw Smalls leaving the Bojangles.

Hyman v. State, 397 S.C. 35, 42, 723 S.E.2d 375, 378 (2012); *Holden v. State*, 393 S.C. 565, 573, 713 S.E.2d 611, 615 (2011); *Edwards v. State*, 392 S.C. 449, 455, 710 S.E.2d 60, 64 (2011); *Robinson v. State*, 387 S.C. 568, 574, 693 S.E.2d 402, 405 (2010); *Kolle v. State*, 386 S.C. 578, 589, 690 S.E.2d 73, 79 (2010); *Terry v. State*, 383 S.C. 361, 371, 680 S.E.2d 277, 282 (2009); *Jones v. State*, 382 S.C. 589, 595, 677 S.E.2d 20, 23 (2009); *Davie v. State*, 381 S.C. 601, 608, 675 S.E.2d 416, 420 (2009); *Miller v. State*, 379 S.C. 108, 115, 665 S.E.2d 596, 599 (2008); *Lomax v. State*, 379 S.C. 93, 100, 665 S.E.2d 164, 167 (2008); *Harris v. State*, 377 S.C. 66, 73, 659 S.E.2d 140, 144 (2008); *Lorenzen v. State*, 376 S.C. 521, 529, 657 S.E.2d 771, 776 (2008); *Smith v. State*, 375 S.C. 507, 515, 654 S.E.2d 523, 528 (2007); *Watson v. State*, 370 S.C. 68, 71, 634 S.E.2d 642, 643 (2006); *Porter*, 368 S.C. at 383, 629 S.E.2d at 356; *Simpson v. Moore*, 367 S.C. 587, 595, 627 S.E.2d 701, 705 (2006); *Bright v. State*, 365 S.C. 355, 358, 618 S.E.2d 296, 298 (2005); *Winns v. State*, 363 S.C. 414, 417, 611 S.E.2d 901, 903 (2005); *Dempsey v. State*, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005); *Sellers v. State*, 362 S.C. 182, 187, 607 S.E.2d 82, 84 (2005); *Magazine v. State*, 361 S.C. 610, 615, 606 S.E.2d 761, 763 (2004); *Huggler v. State*, 360 S.C. 627, 632, 602 S.E.2d 753, 756 (2004); *Green v. State*, 351 S.C. 184, 192, 569 S.E.2d 318, 322 (2002); *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000).

A. Dismissal of Green's Carjacking Charge

During a pretrial hearing on the morning of trial, the solicitor asked the trial court to make preliminary rulings on whether Green's prior convictions would be admissible to impeach him under Rule 609 of the South Carolina Rules of Evidence. The trial court ruled Green's convictions for distribution of crack cocaine, use of vehicle without owner's consent, and possession of a stolen motor vehicle were admissible. Trial counsel then asked about the pending carjacking charge, "He has a pending charge, Your Honor, but I don't know if I am allowed to go into that." The solicitor informed the trial court that Green's carjacking charge had been dismissed that morning. Apparently not recognizing that the dismissal of the charge was potentially stronger evidence of bias than the charge itself, trial counsel raised no further argument on the issue, and did not ask the trial court to make a ruling as to whether counsel would be permitted to use the carjacking charge or its dismissal to impeach Green.[3]

Evidence of a witness's bias can be compelling impeachment evidence, and for that reason "considerable latitude is allowed" to defense counsel in criminal cases "in the cross-examination of an adverse witness for the purpose of testing bias." *State v. Brown*, 303 S.C. 169, 171, 399 S.E.2d 593, 594 (1991). Our courts have followed the "general rule" that "'anything having a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity of a witness may be shown and considered in determining the credit to be accorded his testimony,'" so that "'on cross-examination, any fact may be elicited which tends to show interest, bias, or partiality' of the witness." *State v. Brewington*, 267 S.C. 97, 101, 226 S.E.2d 249, 250 (1976) (quoting 98 C.J.S. *Witnesses* §§ 460, 560a). "Rule 608(c) [of the South Carolina Rules of Evidence] 'preserves [this longstanding] South Carolina precedent.'" *State v. Sims*, 348 S.C. 16, 25, 558 S.E.2d 518, 523 (2002) (quoting *State v. Jones*, 343 S.C. 562, 570, 541 S.E.2d 813, 817 (2001) and citing *Brewington*, 267 S.C. at 101,

[3] At the PCR trial, trial counsel testified she argued to the trial court in chambers that she should be allowed to impeach Green with the fact the charge was dismissed, and the trial court ruled she could not. Such a conference is meaningless in this appeal. When a conference takes place off the record, it is trial counsel's duty to put the substance of the discussion and the trial court's ruling on the record. *See Foye v. State*, 335 S.C. 586, 590, 518 S.E.2d 265, 267 (1999) (finding trial counsel was deficient for failing to place his argument about the jury seeing his client in chains on the record, and thus failing to adequately preserve the issue for appeal).

226 S.E.2d at 250). *See* Rule 608(c), SCRE ("Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced.").

In *Sims*, decided three months before Smalls' trial, we discussed the use of pending charges as evidence of bias to impeach a State's witness. 348 S.C. at 23-26, 558 S.E.2d at 522-23. We stated, "There was the substantial possibility [the witness with pending charges] would give biased testimony in an effort to have the solicitor highlight to his future trial judge how he had cooperated . . . ." 348 S.C. at 25, 558 S.E.2d at 523. In this case, the fact Green faced charges for carjacking is evidence of his bias for the reasons we explained in *Sims*. In most circumstances, a trial court would admit evidence of the charge. *See State v. Dial*, 405 S.C. 247, 256, 746 S.E.2d 495, 499-500 (Ct. App. 2013) (recognizing trial courts have wide discretion in admitting evidence of bias). Smalls' counsel not only failed to attempt to cross-examine Green with evidence of these charges, but erroneously believed the State's dismissal of the charges eliminated the tendency of the evidence to show Green's bias. If the mere existence of the charge made it likely Green would give biased testimony, as we explained in *Sims*, the dismissal of the charge made the likelihood of bias manifest—because Green actually received the benefit he hoped the solicitor would provide in exchange for his cooperation.

The fact Green faced a carjacking charge that was dismissed on the morning of trial was strong evidence of Green's bias, and counsel's failure to cross-examine him on this point fell well below the "objective standard of reasonableness" by which we judge the performance of counsel. *Williams*, 363 S.C. at 343, 611 S.E.2d at 233. The magnitude of counsel's deficiency did not become clear, however, until the PCR trial was reconvened in 2012. Green testified he had been in jail awaiting trial on the carjacking charge in the weeks before Smalls' trial. Green explained that on two occasions the solicitor brought him to the courthouse and "asked [him] to be a cooperating witness and testify against Mr. Smalls." According to Green, he told the solicitor he did not want to cooperate because "I didn't want anything to do with it." Recalling his conversation with the solicitor, Green testified, "He was like if I didn't come . . . to participate in the trial that my charge wasn't going to go anywhere. . . . Like I still was going to be charged with the [carjacking]." Then, "a couple of days before" Smalls' trial, according to Green, he was released on a personal recognizance bond. The charge was dismissed the morning of trial, and Green testified against Smalls. PCR counsel asked Green at the 2012 hearing, "Would you have testified in the case against Stephen Smalls if you had not been told that your carjacking charge would not be dismissed if you didn't," and he responded, "No. Because I didn't want anything to do with it."

If trial counsel had attempted to cross-examine Green on the carjacking charge, she would have demonstrated that the State dismissed a charge that carried up to twenty years in prison[4] on the morning of trial in an apparent effort to secure Green's favorable testimony. If the trial court ruled against her, she was required to make a proffer. *See State v. Schmidt*, 288 S.C. 301, 303, 342 S.E.2d 401, 402-03 (1986) (stating "this Court will not review alleged error of the exclusion of testimony unless a proffer of testimony is properly made on the record"). In either circumstance, it is reasonably possible Green would have admitted—as he did at the PCR trial—the State made him a deal that handsomely rewarded him for his cooperation. Even if Green did not admit that, trial counsel should have forced the solicitor to disclose the terms of any deal he made with Green. *See State v. Hinson*, 293 S.C. 406, 408, 361 S.E.2d 120, 120 (1987) ("'When the reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of a promise of immunity made to that witness is a violation of due process." (quoting *Giglio v. United States*, 405 U.S. 150, 154, 92 S. Ct. 763, 766, 31 L. Ed. 2d 104, 108 (1972))). The court of appeals was correct to find trial counsel was deficient in handling the carjacking charge.

B. Prior Burglary

In an effort to show an innocent explanation for Smalls' fingerprint on the shotgun, trial counsel cross-examined Investigator Mead as follows,

> Q: Was the gun stolen? Had it been stolen?
>
> A: It was.
>
> . . . .
>
> Q: How long before had that gun been stolen?
>
> A: It was taken in a burglary of the individual's residence. The gun was reported stolen on August 28, 1999.
>
> . . . .

[4] S.C. Code Ann. § 16-3-1075(B)(1) (2015).

Q: So a little less than a year before this occurred?

A: Yes, ma'am.

Q: Do you know if that case was ever solved?

A: To my knowledge, no.

The State responded on redirect,

Q: Investigator Mead, first with regards to the shotgun, you were asked where it originally came from?

A: Yes, sir.

Q: To make it perfectly clear, [the shotgun] wasn't stolen from the defendant's house in 1999?

A: No, it was not.

Q: *He burglarized somebody else's house?*

A: *That's correct.*

Q: So is there any reason why his fingerprint would be on this weapon –

A: Not that I know of, sir.

Q: – other than he robbed the Bojangles?

A: That's correct.

The State's overall line of questioning on redirect appears to have been offered for the legitimate purpose of refuting defense counsel's suggestion of an innocent explanation for the fingerprint. However, the question, "He burglarized somebody else's house," and the answer "That's correct," did not serve any legitimate purpose. Rather, it was an improper effort to introduce evidence that Smalls committed another crime. *See* Rule 404(b), SCRE ("Evidence of other crimes, wrongs, or acts

is not admissible to prove the character of a person in order to show action in conformity therewith."). In addition, the State did not present clear and convincing evidence Smalls committed the prior burglary; in fact, Mead admitted the case was unsolved. *See State v. Smith*, 300 S.C. 216, 218, 387 S.E.2d 245, 247 (1989) (holding "proof of prior bad acts must be clear and convincing"). The court of appeals correctly ruled trial counsel was deficient in failing to object.

C. Opening Statement

In his opening statement, the assistant solicitor told the jury,

> Mr. Green ran out of the store when he was left alone up front, across the street, and called 911. The Columbia Police Department responded. Mr. Smalls ultimately took off out of the store with over $1,900 in a plastic bag with the shotgun. *The police saw him as he was leaving the store.* He ended up getting away that night, but he ended up leaving behind some very important pieces of evidence. He left behind that shotgun, he also left behind the money, in his quest to get away.

The court of appeals found trial counsel was deficient for failing to challenge the State's comment, "The police saw him as he was leaving the store." The court of appeals stated, "We hold trial counsel was deficient for failing to challenge the State's comments either by objecting or by pointing out during the closing arguments that the State failed to prove this assertion." 415 S.C. at 499, 783 S.E.2d at 821.

We certainly agree with the court of appeals that these are two of the options counsel has to deal with a misstatement by the State in opening. However, the simple fact trial counsel does not respond to an incorrect statement made during opening does not render trial counsel's performance deficient. Under certain circumstances, it may be reasonable for trial counsel to simply ignore the misstatement. Such a decision could be based on counsel's assessment the point is minor and inconsequential; perhaps it is debatable whether there is evidence to support the statement; or perhaps the circumstances of the trial—as perceived by trial counsel—unfold in such a way that pointing out the misstatement would no longer be beneficial.

Initially, we are not convinced there is no evidence in the record that supports the assistant solicitor's statement. When crime scene investigator Jim Potash was asked where he found the shotgun, he testified, "I was directed there by the officers, saying

that they were running behind or chasing – trying to chase a suspect from the business itself. They had indicated to me that they saw the person throw or dispose of on the right-hand side going through a fenced area a plastic bag." Green's testimony that he told the officers to intercept the suspect at Lizard's Thicket also appears to support the assistant solicitor's statement. In addition, the PCR court did not make any specific findings as to whether ignoring the misstatement was deficient. Rather, the PCR court appears to have denied relief on this point only on the basis of no prejudice. The court stated, "There is no merit to this claim, opening statements are not evidence, and the jury was told several times by the judge and the attorneys to base their verdict on the evidence only."

With no findings by the PCR court, and in light of the testimony of Potash and Green, we simply cannot say trial counsel was deficient for not addressing this remark in the State's opening that was never mentioned again. *See Stone v. State*, 419 S.C. 370, 380, 798 S.E.2d 561, 566 (2017) (stating "the law requires we presume counsel rendered adequate assistance and exercised reasonable professional judgment" and "the *Strickland* test . . . requires that [the applicant] prove" otherwise (citing *Strickland*, 466 U.S. at 690, 687, 104 S. Ct. at 2066, 2064, 80 L. Ed. 2d at 695, 693)).

We agree with the court of appeals' finding that Smalls proved trial counsel was deficient in two respects.

IV. Prejudice—Overwhelming Evidence of Guilt

We turn now to the second prong of *Strickland*—prejudice. The State argues Smalls failed to prove prejudice in this case because the State presented overwhelming evidence of Smalls' guilt. We disagree.

To satisfy the prejudice prong, an applicant must demonstrate "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citing *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693). As the Supreme Court of the United States explained in *Strickland*, "the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." 466 U.S. at 695, 104 S. Ct. at 2068-69, 80 L. Ed. 2d at 698. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." *Rutland v. State*, 415 S.C. 570, 577, 785 S.E.2d 350, 353 (2016) (citing *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698).

In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel's error had on the outcome of the trial. *See Strickland*, 466 U.S. at 695-96, 104 S. Ct. at 2069, 80 L. Ed. 2d at 698-99 (explaining that the court must analyze how individual errors of counsel affect the important factual findings in a particular case). In addition, the PCR court should consider the strength of the State's case in light of all the evidence presented to the jury. *See generally Jones v. State*, 332 S.C. 329, 333, 504 S.E.2d 822, 824 (1998) ("In deciding whether Jones was prejudiced, we must bear in mind the strength of the government's case . . . ," and "we must consider the totality of the evidence before the jury."). In general, the stronger the evidence presented by the State, the less likely the PCR court will find the applicant met his burden of proving prejudice. *See Strickland*, 466 U.S. at 696, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699 (stating "a verdict . . . only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support").

In this context, this Court has used the phrase "overwhelming evidence of guilt." In *Geter v. State*, 305 S.C. 365, 409 S.E.2d 344 (1991), for example, we held counsel was deficient for not objecting to repeated references to Geter's time previously spent in jail. 305 S.C. at 367, 409 S.E.2d at 345-46. We then examined the strength of the State's case as part of our consideration of prejudice. We found, "In light of the overwhelming evidence of petitioner's guilt . . . we find no reasonable probability the result of the trial would have been different had counsel's performance not been deficient in this regard." 305 S.C. at 367, 409 S.E.2d at 346. Similarly, in *Ford v. State*, 314 S.C. 245, 442 S.E.2d 604 (1994), we found counsel deficient for declining the trial court's offer to give the jury an alibi charge after Ford testified he was at a nightclub, not the place where the sexual assault occurred. 314 S.C. at 247-48, 442 S.E.2d at 605-06. However, we found "overwhelming evidence of Ford's guilt"—including DNA evidence showing Ford's semen on the victim's clothing—and thus "no reasonable probability that the result of the trial would have been different had counsel accepted the alibi charge." 314 S.C. at 248, 442 S.E.2d at 606. *See also Huggler v. State*, 360 S.C. 627, 634-35, 602 S.E.2d 753, 757 (2004) (finding counsel's deficient performance in not objecting to inadmissible prior consistent statements did not prejudice applicant "given that the witnesses' testimon[y] on direct provided overwhelming evidence that sexual abuse did in fact occur").

Ordinarily, the existence of "overwhelming evidence" does not automatically preclude a finding of prejudice. In *Simmons v. State*, 331 S.C. 333, 503 S.E.2d 164 (1998), for example, we found counsel was deficient for not objecting when the State in closing "improperly inject[ed] parole considerations into the jury's sentencing decision" and otherwise misstated the law regarding sentencing. 331 S.C. at 338-

39, 503 S.E.2d at 167. Despite finding the evidence of Simmons' guilt was "overwhelming," we balanced the impact of counsel's error against the strength of the State's case on the point in question, and found Simmons had proved prejudice. We explained,

> [B]ecause the issue is whether the solicitor's improper argument prevented the jury from fairly considering [its sentencing options], the overwhelming evidence of petitioner's guilt does not eliminate the reasonable probability that the result of the trial would have been different had trial counsel objected to portions of the solicitor's closing argument.

331 S.C. at 340, 503 S.E.2d at 167.

In *Smith v. State*, 375 S.C. 507, 523-24, 654 S.E.2d 523, 532 (2007), we first examined counsel's error—failure to object to improper closing argument—to assess its impact on the jury's determination of guilt, stating "the solicitor's comments were confined to facts established during trial" and "were limited and did not recur throughout his argument." 375 S.C. at 523, 654 S.E.2d at 532. We then considered the strength of the State's case and found "there was also overwhelming evidence of Petitioner's guilt." *Id.* We held, after balancing these and other considerations, "we do not believe there was a reasonable probability that the result of the trial would have been different." 375 S.C. at 524, 654 S.E.2d at 532.

Simmons and *Smith* illustrate the proper consideration of the strength of the State's case in the PCR court's analysis of prejudice: it is one significant factor the court must consider—along with the specific impact of counsel's error and other relevant considerations—in determining whether the applicant has met his burden of proving prejudice. In this case, however, neither the PCR court nor the court of appeals appears to have considered the specific impact of counsel's error. Rather, both courts used what they considered "overwhelming evidence of guilt" as a categorical bar that precluded a finding of prejudice, without the necessity of separately considering the impact of counsel's error.

In rare cases, using "overwhelming evidence" as a categorical bar to preclude a finding of prejudice is not error. We did it, for example, in *Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009). In *Rosemond*, we found trial counsel deficient for making inappropriate comments to the jury in the guilt phase of a capital trial. 383 S.C. at 325, 680 S.E.2d at 8. Without analyzing the specific impact of that error, we

held, "No prejudice occurred in the guilt phase as the State presented overwhelming evidence of guilt: Rosemond's confession and the murder weapon, which Rosemond helped the police locate. Further, in his confession, Rosemond admitted to planning the murder of his girlfriend." *Id.* We also did it in *Harris v. State*, 377 S.C. 66, 659 S.E.2d 140 (2008), in which we agreed "with the State's assertion" that "Harris was unable to show prejudice . . . due to the overwhelming evidence supporting Harris's guilt." 377 S.C. at 79, 659 S.E.2d at 147. We did not separately consider the specific impact of counsel's error. *See also Christenson v. Ault*, 598 F.3d 990, 997 (8th Cir. 2010) (stating, "When there is overwhelming evidence of guilt presented, it may be impossible to demonstrate prejudice," and, "Based on the trial record, demonstrating prejudice resulting from the alleged ineffective assistance would be impossible in this case.").

However, for the evidence to be "overwhelming" such that it categorically precludes a finding of prejudice—as we found it did in *Rosemond* and *Harris*—the evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the *Strickland* standard of "a reasonable probability . . . the factfinder would have had a reasonable doubt" cannot possibly be met. In *Franklin v. Catoe*, 346 S.C. 563, 552 S.E.2d 718 (2001), although we discussed the specific impact of counsel's error, we also discussed what is "overwhelming evidence." 346 S.C. at 574-75, 552 S.E.2d at 724-25. The error was that trial counsel did not advise Franklin of his right to make a personal closing argument during the guilt phase of his capital trial, and did not object to the trial court's failure to obtain a waiver of that right.[5] 346 S.C. at 571, 552 S.E.2d at 723. As to the prejudice prong, we described the "overwhelming" evidence in detail and stated, "Based on a review of the evidence presented, we can find no evidence whatsoever the jury would have rendered a different verdict had the error not been made." 346 S.C. at 574, 552 S.E.2d at 724. That evidence included Franklin's DNA on the victim's body, the victim's blood on Franklin's pants, Franklin's bloody palm print on the murder weapon, and the fact it was "impossible to believe a reasonable juror could find the violent brutality of this murder to be the result of consensual sex, as Franklin claimed." *Id.* The "overwhelming" nature of the evidence led us to conclude "there is no reasonable possibility Franklin's failure to make a personal closing argument

[5] *See* S.C. Code Ann. § 16-3-28 (2015) (requiring that "in any criminal trial where the maximum penalty is death . . . , the defendant and his counsel shall have the right to make the last argument").

to the jury during the guilt phase of his trial contributed in any way to his convictions." 346 S.C. at 574-75, 552 S.E.2d at 725.

In this case, the court of appeals relied on the following evidence in reaching its conclusion the evidence was overwhelming: (1) Green identified Smalls during a photographic lineup; (2) Lightner was able to narrow the suspects down to two—one of whom was Smalls—during a photographic lineup; (3) Smalls' fingerprint was on the shotgun; and (4) Smalls dropped a child and ran from Investigator Gray, who approached Smalls and told him he was the subject of an armed robbery investigation. 415 S.C. at 501-02, 783 S.E.2d at 822.

We begin our review of the evidence with Lightner, who testified he "spent a good bit of time with this person" and he "saw him pretty well." The fact Lightner could only narrow it down to two people in the photographic lineup undermines—not supports—the notion of overwhelming evidence. In addition, Investigator Mead testified that when he showed Lightner the lineup, Lightner "stated that if he had to pick a particular one, he would say [the other person]," not Smalls.

Next, Smalls dropped the child and fled from Investigator Gray. Evidence of flight is evidence of guilt, but we have been hesitant to assign it high probative value. In fact, in *State v. Grant*, 275 S.C. 404, 408, 272 S.E.2d 169, 171 (1980), we stated "evidence of flight tends to be only marginally probative." 275 S.C. at 408, 272 S.E.2d at 171 (quoting *State v. Jefferson*, 524 P.2d 248, 251 (Wash. App. 1974));[6]

[6] In *Jefferson*, the State of Washington court of appeals quoted *United States v. Robinson*, 475 F.2d 376, 384 (D.C. Cir. 1973), which cited *United States v. Telfaire*, 469 F.2d 552, 557-58 (D.C. Cir. 1972), which, in turn, this Court has cited on numerous occasions for the danger of mistaken eyewitness identification. *See, e.g.*, *Speaks v. State*, 377 S.C. 396, 399, 660 S.E.2d 512, 514 (2008) (stating the *Telfaire* jury charge "was designed to focus the attention of the jury on the identification issue and minimize the risk of conviction through false or mistaken identification" (quoting *State v. Jones*, 344 S.C. 48, 60, 543 S.E.2d 541, 547 (2001))); *State v. Simmons*, 308 S.C. 80, 84, 417 S.E.2d 92, 94 (1992) (citing *Telfaire* and "admonish[ing] the trial bench that in single witness identification cases the court should instruct the jury that the burden of proving the identity of the defendant rests with the state"); *State v. Motes*, 264 S.C. 317, 326, 215 S.E.2d 190, 194 (1975) (citing *Telfaire* and discussing the need to "focus[] the attention of the jury on the necessity for a finding that the testimony identified defendant as the offender beyond a reasonable doubt").

see also State v. Ballenger, 322 S.C. 196, 200, 470 S.E.2d 851, 854 (1996) (on review of the denial of a directed verdict motion, reversing the court of appeals' finding the State's evidence (including evidence of flight) merely raised a suspicion of guilt,[7] and stating flight is "at least *some* evidence") (emphasis added); *Ballenger*, 322 S.C. at 201, 470 S.E.2d at 855 (Finney, C.J., dissenting) (criticizing the majority because the fact "he ran when he saw the unmarked police car approaching" merely "raise[s] a *suspicion* of guilt" (emphasis in original)). Smalls' flight has little significance in the analysis of whether the State presented overwhelming evidence.

Smalls' fingerprint on the shotgun is the strongest evidence of Smalls' guilt. If the fingerprint experts correctly identified the fingerprint, it conclusively proves Smalls handled the shotgun at some point.

Finally, we turn to Green. In his closing argument, the solicitor stated, "The first piece of evidence I want to talk about is Eugene Green." The solicitor then argued two points to support Green's credibility. First, as to his trial testimony, the solicitor stated, "Eugene Green put his hand on this Bible, faced that man who shoved a shotgun in his chest, and told you under oath, no doubt about it, that's the man who robbed the Bojangles; no doubt about it whatsoever. That's proof beyond a reasonable doubt by itself."

Second, the solicitor belittled the significance of Green's prior convictions in assessing Green's credibility. "You don't think it took guts for Eugene Green to get up on this witness stand, and take an oath, and testify?" Then, referring specifically to Green's prior convictions for drug distribution and possession of a stolen motor vehicle, the solicitor argued,

> You think he was proud . . . ? But you heard about that because [Green] had the guts to take that witness stand and face the man that put a shotgun in his face. . . . And because he had a drug problem seven years ago and a possession of stolen vehicle, are we going to make it alright to shove a shotgun in his chest? . . . And how does that affect his credibility . . . ? Not at all, not at all. That's

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[7] *See State v. Ballenger*, 317 S.C. 364, 368, 454 S.E.2d 355, 357 (Ct. App. 1995), *rev'd*, 322 S.C. 196, 470 S.E.2d 851 (1996) (finding the State "presented evidence . . . which may raise a suspicion of . . . guilt, but . . . not . . . any direct or circumstantial evidence").

> proof beyond a reasonable doubt, Eugene Green's testimony.

As we have explained, the strength of the evidence must be considered along with the specific impact of counsel's errors. When potentially strong evidence such as the fingerprint and Green's identification is tainted by a significant error of counsel, it should not be considered as part of "overwhelming evidence" that precludes a finding of prejudice. Here, the importance we are willing to attribute to the fingerprint on the shotgun is affected by counsel's failure to object to the State's improper question and Investigator Mead's inadmissible answer. Although the existence of the fingerprint would have been admitted into evidence even without counsel's error, the State chose to respond to counsel's suggestion of an innocent explanation for the fingerprint by improperly introducing evidence Smalls committed an uncharged and unproven burglary, impugning his character in violation of Rule 404(b). Trial counsel's failure to object enabled the State to make this improper explanation.

As to Green, the State's emphasis on his identification of Smalls as its "first piece of evidence" must be balanced against counsel's failure to impeach Green with compelling evidence of bias. If trial counsel had cross-examined him on the carjacking charge, and Green testified as he did in the second PCR hearing, his credibility before the jury would have been severely damaged. We do not believe the jury could have heard about the dismissal of the charge without seriously questioning the credibility of everything Green said, including his pre-trial identification of Smalls as the man who committed the robbery.[8]

Eliminating Green's tainted testimony and identification from consideration, and considering the fingerprint in light of the solicitor's improper accusation that Smalls stole the shotgun, we are left with only Lightner's inability to identify Green, which undermines the notion of overwhelming evidence, and Smalls' flight, which is marginally probative and thus has little significance in our analysis. We find the

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[8] Also, eyewitness identification evidence is not conclusive. *See Perry v. New Hampshire*, 565 U.S. 228, 245, 132 S. Ct. 716, 728, 181 L. Ed. 2d 694, 711 (2012) (stating "we [have] observed that 'the annals of criminal law are rife with instances of mistaken identification'" (quoting *United States v. Wade*, 388 U.S. 218, 228, 87 S. Ct. 1926, 1933, 18 L. Ed. 2d 1149, 1158 (1967))); *State v. Liverman*, 398 S.C. 130, 140, 727 S.E.2d 422, 427 (2012) (citing *Perry* for the proposition that "eyewitness evidence is inherently imperfect"); *see also supra* note 4.

evidence that is not tainted by counsel's errors does not meet the standard for overwhelming evidence we described in *Franklin*—"no reasonable possibility [counsel's errors] contributed in any way to his convictions." 346 S.C. at 574-75, 552 S.E.2d at 725.

Because we find the evidence is not overwhelming, Smalls' individual claims of deficient performance must be analyzed separately to determine whether either of them gives rise to a reasonable probability the result of the trial would have been different without counsel's error. Although the PCR court found overwhelming evidence precluded a finding of prejudice, it did not make specific findings whether counsel's error as to the carjacking charge or prior burglary prejudiced Smalls. *See* Rule 52(a), SCRCP ("In all actions tried upon the facts without a jury . . . , the court shall find the facts specially and state separately its conclusions of law thereon . . . ."); *Hall v. Catoe*, 360 S.C. 353, 364-65, 601 S.E.2d 335, 341 (2004) (repeating our previous directive that PCR courts comply with Rule 52(a) (quoting *Pruitt v. State*, 310 S.C. 254, 256, 423 S.E.2d 127, 128 (1992))).

Ordinarily, the PCR court should make findings of fact on this issue, not us. *See Simmons v. State*, 416 S.C. 584, 593, 788 S.E.2d 220, 225 (2016) (remanding to the PCR court for findings, and stating, "We sit today in an appellate capacity and making findings of fact de novo would be contrary to this appellate setting"). In this case, however, we find it is not necessary to remand to the PCR court, and we have conducted the prejudice analysis ourselves. After balancing trial counsel's errors—failing to cross-examine Green on the dismissal of his carjacking charge and failing to object to evidence Smalls committed a burglary to obtain the shotgun—against our perception of the strength of the State's case, we find the errors significantly "undermine confidence in the outcome of the trial," *Rutland*, 415 S.C. at 577, 785 S.E.2d at 353, and leave "a reasonable probability that, but for counsel's errors, the result of the trial would have been different," *Ard*, 372 S.C. at 331, 642 S.E.2d at 596.

V. Conclusion

We agree with the court of appeals' finding that trial counsel was deficient in two instances. However, we **REVERSE** the court of appeals' finding that the evidence of guilt is overwhelming, and find counsel's errors prejudiced Smalls. We remand to the court of general sessions for a new trial.

KITTREDGE, Acting Chief Justice, HEARN, JAMES, JJ., and Acting Justice Arthur Eugene Morehead, III, concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Teresa Annette Davis, Appellant.

Appellate Case No. 2015-000981

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

Opinion No. 5534
Heard December 11, 2017 – Filed February 7, 2018

AFFIRMED

Christian Stegmaier and Kelsey Jan Brudvig, both of Collins & Lacy, PC, and Chief Appellate Defender Robert Michael Dudek, all of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Assistant Deputy Attorney General David A. Spencer, and Assistant Attorney General Mary Frances G. Jowers, all of Columbia, for Respondent.

SHORT, J.: Teresa Davis appeals her convictions of first-degree burglary and possession with intent to distribute (PWID) methamphetamine, second offense, for which the trial court sentenced her to a cumulative term of eighteen years' imprisonment. On appeal, Davis argues the trial court erred by (1) denying Davis's motion to sever her charges, (2) refusing to direct a verdict of acquittal when the

State failed to present evidence showing Davis had control over the drugs found in the vehicle, and (3) refusing to direct a verdict of acquittal because the State failed to introduce any direct or substantial circumstantial evidence that the home was occupied, for the purposes of qualifying as a dwelling, at the time of the alleged burglary. We affirm.

FACTS

As he was driving to work on February 10, 2014, Douglas Paul noticed a strange car in the driveway of his mother's home. Paul testified his mother suffered from Alzheimer's disease and had moved to a nursing home in the area about six months prior. His mother had given him a power of attorney, and he placed her home on the market but maintained and cared for the property, usually stopping by at least once a week. Not recognizing the car, Paul stopped at the house and looked around the property. After finding the car empty, Paul approached the house and found the front door was still locked. He walked to the garage door, which was still closed. Peering through the garage window, Paul noticed the door adjoining the house and garage was open. Suspecting an intruder, Paul called his wife and asked her to bring the key to the house as well as his handgun.[1] Once his wife arrived, Paul entered the home through the front door and noticed the glass sliding door at the back of the house was open. Hearing a noise upstairs, Paul shouted, "I know somebody is here. You know, whoever you are, you need to answer me." Paul also warned the intruder he was armed with a handgun. Paul exited the house and called the police because the noise from upstairs became clangorous, sounding as if "someone was tossing furniture." About eight to ten officers responded to the scene at various points throughout the day and most were in uniform. Officer George Mayer was the first to respond. Paul's wife informed Mayer she saw a man, who looked out of place, walking down the street. Mayer located the man and placed him in investigative detention in a squad car at the scene. Mayer identified the man as Ted Davis ("Brother"). Mayer searched Brother, finding a pair of work gloves in his boot as well as a white substance and glass pipe adjacent to his person.[2]

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[1] Paul testified he and his wife lived "under a quarter of a mile" from his mother's home.

[2] Mayer testified the white substance "appeared to be methamphetamine."

After a sweep of the scene, the police did not find anyone within the home or on the property. Paul walked through the home with the police, finding various doors, cabinets, and closets open throughout the home and garage, as well as an open window in the master bathroom located on the back part of the roof. Paul testified many of his mother's antiques and jewelry were collected in piles throughout the home. The police found a latex glove on the floor in the garage.

The police completed an inventory of the vehicle in the driveway, finding a purse and a small plaid bag next to each other in the driver's seat. Inside the purse, the police found Teresa Davis's South Carolina driver's license, lip balm, and some paperwork. The smaller plaid bag contained money, a digital scale, tissue paper, little baggies, a spoon, and a metal tin that contained two bags containing a crystal-like substance. The police also found mail in the back of the car behind the driver's seat. The mail was addressed to Davis, and the address matched the one on her driver's license. After running the license plate tag on the car, the police found it was registered to Lavina Davis.

After inventorying the vehicle, the police suspected another person may still be on the property. As some officers were walking along the back of the house, they spotted Teresa Davis crouching on the roof behind the chimney. As the police assisted Davis down from the chimney, a glass pipe rolled down the roof. The police placed Davis in investigative detention and read her *Miranda*[3] rights to her. After waiving her rights, Davis told police she was at the home because she was dropping off her friend Joe Mann. Davis further explained she hid on the roof because she was frightened. When asked why she remained on the roof for hours while the police were investigating, Davis did not respond.

When the police inquired about the drugs found in the car, Davis admitted the drugs were hers, stating, "That's mine. My brother doesn't do that." The police then placed Davis under arrest for PWID methamphetamine, after which Davis recanted her confession.[4] While conducting a search of Davis's person, the police found gloves and a flashlight in her jacket pocket. A grand jury indicted Davis for first-degree burglary and PWID methamphetamine, second offense.

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

[4] The trial court conducted a *Jackson v. Denno* hearing and found Davis's confession admissible. 378 U.S. 368 (1964).

At the beginning of trial, Davis moved to sever her charges, arguing the offenses were not closely related in kind or character. The trial court denied Davis's motion, finding both charges required the same witnesses.

During trial, Paul testified his mother lived in the home for thirty-seven years before moving to a nursing home in the area for medical reasons. Paul explained as his mother's attorney in fact, he placed the home on the market because the future was uncertain; however, it was the family's hope that she would be able to return to the home at some point. Paul testified either he or his wife checked on the home every "two to three days." Paul testified all of his mother's furniture, as well as some of her clothing, remained in the home. Paul also testified he and his wife stopped by the home a couple days before the incident, and they left the home with all the doors and windows closed and locked. Paul specified he kept "big, round wooden sticks" in the sliding glass doors that had to be removed from inside the house to open the doors. Paul testified the utilities were still on in the home. Paul testified he was "a hundred percent certain" he did not leave the bathroom window open, and for it to be opened, someone would have to open both the window and the outer storm window. Paul noted it was cold and the heat was on in the house, so neither he nor his wife would have left any doors or windows open. On cross-examination, Paul admitted the home was on the market at the time of the incident. Paul testified his mother had not returned to the residence since moving to the nursing home, and he did not stay at the home because he lived within walking distance.

The trial court recognized Meredith Landford as an expert in forensic chemistry. Landford testified that after testing the amounts found in the plaid bag, she ascertained the first bag contained 4.61 grams of methamphetamine and the second bag contained 2.63 grams of methamphetamine. Investigator William Freestate testified the items found within the plaid bag, such as the digital scale, spoon, and baggies, indicated the methamphetamine was for distribution rather than personal use. Additionally, Patrick Wagner, an evidence technician for the sheriff's office, testified he recovered one latent print from the home, and it did not match Davis's prints.

At the close of the State's case, the trial court instructed the jury the parties stipulated Davis had two prior burglary convictions. Davis moved for a directed verdict on the first-degree burglary charge, arguing the State failed to show there was an "occupant or inhabitant against whom the offense could have been

committed"; therefore, the home did not qualify as a dwelling for purposes of first-degree burglary. Specifically, Davis asserted the vacant house was on the market and neither the owner nor Paul resided therein. The State argued all of Paul's mother's furniture remained in the home, and she would have returned to the home had her condition improved. The State further noted the family only placed the home on the market as a precautionary measure. The trial court denied Davis's motion, finding it was a question for the jury whether the home constituted a dwelling as provided by statute.

Additionally, Davis moved for a directed verdict on the PWID charge, arguing the State failed to show she had control over the drugs found in the car because the police found her on the roof of the home. In response, the State contended it presented circumstantial evidence showing the drugs were in Davis's control because the police found the methamphetamine in a bag next to Davis's purse in a car that she admitted to driving. The trial court denied Davis's motion, finding it was a question for the jury whether Davis had control or possession of the drugs.

At the close of trial, the jury found Davis guilty of both charges as indicted. The trial court sentenced Davis to concurrent terms of eighteen years' imprisonment on each charge. This appeal followed.

STANDARD OF REVIEW

"In criminal cases, an appellate court sits to review errors of law only. Therefore, an appellate court is bound by the trial court's factual findings unless they are clearly erroneous." *State v. Banda*, 371 S.C. 245, 251, 639 S.E.2d 36, 39 (2006). Thus, "this [c]ourt is limited to determining whether the trial court abused its discretion." *State v. Edwards*, 384 S.C. 504, 508, 682 S.E.2d 820, 822 (2009). Accordingly, "[t]his [c]ourt does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial court's ruling is supported by any evidence." *Id.*

LAW/ANALYSIS

I. Severance of Charges

Davis argues the trial court abused its discretion in failing to sever the first-degree burglary and PWID methamphetamine charges. Davis maintains the

methamphetamine found in the car was unrelated to the burglary and the charges did not require proof by the same evidence. Davis contends her charges were not related in kind or character and she suffered prejudice from the joinder of these charges. We disagree.

"A motion for severance is addressed to the sound discretion of the trial court." *State v. Rice*, 368 S.C. 610, 613, 629 S.E.2d 393, 394 (Ct. App. 2006). "The trial court's ruling will not be disturbed on appeal absent an abuse of that discretion." *Id.* "An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law." *Id.* at 613, 629 S.E.2d at 395.

"The appellate court considers several factors when deciding whether the trial court's consolidation of charges was proper." *Id.* at 614, 629 S.E.2d at 395. "[J]oinder of offenses in one trial is 'proper if the offenses (1) are of the same general nature or character and spring from the same series of transactions, (2) are committed by the same offender, and (3) require the same or similar proof.'" *State v. Simmons*, 352 S.C. 342, 351, 573 S.E.2d 856, 861 (Ct. App. 2002) (quoting *State v. Carter*, 324 S.C. 383, 386, 478 S.E.2d 86, 88 (Ct. App. 1996)). "Offenses are considered to be of the same general nature where they are interconnected." *Id.* at 350, 573 S.E.2d at 860. "Where the offenses charged in separate indictments are of the same general nature involving connected transactions closely related in kind, place and character, the trial [court] has the power, in [its] discretion, to order the indictments tried together if the defendant's substantive rights would not be prejudiced." *Rice*, 368 S.C. at 614, 629 S.E.2d at 395. "[O]ffenses which are of the same nature, but which do not arise out of a single chain of circumstances and are not provable by the same evidence may not properly be tried together." *Id.*

In the instant case, the joinder of Davis's first-degree burglary and PWID methamphetamine offenses was proper. Although a grand jury issued two indictments against Davis, her arrest for PWID methamphetamine arose out of the police's inventory of the car at the scene of the burglary investigation. Therefore, Davis's offenses originated from the same chain of events and required the same witnesses. *See id.* ("Where the offenses charged in separate indictments are of the same general nature involving connected transactions closely related in kind, place and character, the trial [court] has the power, in [its] discretion, to order the indictments tried together if the defendant's substantive rights would not be prejudiced."); *Simmons*, 352 S.C. at 351, 573 S.E.2d at 861 (quoting *Carter*, 324 S.C. at 386, 478 S.E.2d at 88 ("[J]oinder of offenses in one trial is 'proper if the

offenses (1) are of the same general nature or character and spring from the same series of transactions, (2) are committed by the same offender, and (3) require the same or similar proof.'")). Accordingly, we find Davis suffered no prejudice and the trial court did not abuse its discretion in refusing to sever the indictments.

II. Directed Verdict

"When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight." *State v. Weston*, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). "A defendant is entitled to a directed verdict when the state fails to produce evidence of the offense charged." *Id.* "On appeal from the denial of a directed verdict in a criminal case, an appellate court must view the evidence in the light most favorable to the State." *State v. Stanley*, 365 S.C. 24, 41, 615 S.E.2d 455, 464 (Ct. App. 2005). "If there is any direct or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, we must find that the issues were properly submitted to the jury." *State v. Mollison*, 319 S.C. 41, 46, 459 S.E.2d 88, 91 (Ct. App. 1995). "Nevertheless, a[n appellate] court is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis." *State v. Bennett*, 415 S.C. 232, 236, 781 S.E.2d 352, 354 (2016). "[T]he lens through which a[n appellate] court considers circumstantial evidence when ruling on a directed verdict motion is distinct from the analysis performed by the jury." *Id.* "Accordingly, in ruling on a directed verdict motion where the State relies on circumstantial evidence, th[is] court must determine whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt." *Id.* at 237, 781 S.E.2d at 354.

A. PWID Methamphetamine

Davis argues the trial court erred in denying her motion for a directed verdict because the State failed to introduce any direct or substantial circumstantial evidence that she actually or constructively possessed the methamphetamine found in the vehicle at the scene of the burglary. We disagree.

In South Carolina, it is illegal for a person to "knowingly or intentionally" possess methamphetamine. *See* S.C. Code Ann. § 44-53-370(c) (2018). Subsection 44-53-375(B) of the South Carolina Code (2018) provides:

> A person who manufactures, distributes, dispenses, delivers, purchases, or otherwise aids, abets, attempts, or conspires to manufacture, distribute, dispense, deliver, or purchase, or possesses with intent to distribute, dispense, or deliver methamphetamine . . . is guilty of a felony . . . . Possession of one or more grams of methamphetamine . . . is prima facie evidence of a violation of this subsection.

"Possession of any amount of controlled substance coupled with sufficient indicia of intent to distribute will support a conviction for possession with intent to distribute." *State v. James*, 362 S.C. 557, 561-62, 608 S.E.2d 455, 457 (Ct. App. 2004). Possession may be actual or constructive. *See Mollison*, 319 S.C. at 45, 459 S.E.2d at 91. "Actual possession occurs when the drugs are found to be in the actual physical custody of the person charged with possession." *Stanley*, 365 S.C. at 42, 615 S.E.2d at 464. "Mere presence is insufficient to prove constructive possession." *State v. Heath*, 370 S.C. 326, 329, 635 S.E.2d 18, 19 (2006). "In order to prove constructive possession, the State must show the defendant had dominion and control, or the right to exercise dominion and control, over either the drugs or the premises upon which the drugs are found." *Stanley*, 365 S.C. at 42-43, 615 S.E.2d at 464. "Such possession can be established by circumstantial or direct evidence or a combination of the two." *Id.* at 43, 615 S.E.2d at 464-65.

Here, the police inventoried the vehicle as part of their investigation of the burglary of the Paul home. A purse and a smaller plaid bag sat on the driver's seat. Inside the purse, the police found Davis's South Carolina driver's license, lip balm, and some paperwork. The smaller plaid bag contained money, a digital scale, tissue paper, little baggies, a spoon, and a metal tin in which there were two bags containing a crystal-like substance. When the police located Davis on the roof, a glass pipe rolled down from where she was hiding. Further, after waiving her *Miranda* rights, Davis admitted the drugs were hers, stating, "That's mine. My brother doesn't do that." Davis also acknowledged she drove the car to the home to drop off her friend Joe Mann. *See Stanley*, 365 S.C. at 42-43, 615 S.E.2d at 464-65 ("In order to prove constructive possession, the State must show the defendant had dominion and control, or the right to exercise dominion and control, over either the drugs or the premises upon which the drugs are found. Such possession can be established by circumstantial or direct evidence or a combination of the two.").

At trial, a forensic chemist testified the plaid bag contained a bag holding 4.61 grams of methamphetamine and another with 2.63 grams of methamphetamine. Finally, an investigator testified the items found within the plaid bag, such as the digital scale, spoon, and baggies, indicated the methamphetamine was for distribution rather than personal use. *See James*, 362 S.C. at 561-62, 608 S.E.2d at 457 ("Possession of any amount of controlled substance coupled with sufficient indicia of intent to distribute will support a conviction for possession with intent to distribute."). Viewing the aforementioned evidence in the light most favorable to the State, we find a jury could reasonably deduce Davis's guilt. Accordingly, the trial court properly refused to direct a verdict in Davis's favor. *See Mollison*, 319 S.C. at 46, 459 S.E.2d at 91 ("If there is any direct or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, we must find that the issues were properly submitted to the jury.").

B. First-Degree Burglary

Davis argues the trial court abused its discretion in denying her motion for a directed verdict because the State failed to introduce any direct or substantial circumstantial evidence that the home was occupied, for the purposes of qualifying as a dwelling, at the time of the alleged burglary. Specifically, Davis contends the State failed to present direct or circumstantial evidence showing the homeowner left with the intention of returning. We disagree.

The pivotal question in the case at bar is whether the burglarized home was being utilized as a dwelling at the time of the alleged offense. As an initial matter, we find the trial court properly denied Davis's directed verdict motion. *See Weston*, 367 S.C. at 292, 625 S.E.2d at 648 ("When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight."). However, we recognize our jurisprudence does not speak directly to the facts of the case *sub judice*.

In South Carolina, "[a] person is guilty of burglary in the first degree if the person enters a dwelling without consent and with intent to commit a crime in the dwelling, and . . . the burglary is committed by a person with a prior record of two or more convictions for burglary." S.C. Code Ann. § 16-11-311(A)(2) (2015). In the context of burglary, a "dwelling" is defined as "any house, outhouse, apartment, building, erection, shed or box in which there sleeps a proprietor,

tenant, watchman, clerk, laborer or person who lodges there with a view to the protection of property." S.C. Code Ann. § 16-11-10 (2015).

"[B]urglary is a crime against possession and not against property." *State v. Clamp*, 225 S.C. 89, 102, 80 S.E.2d 918, 924 (1954). Therefore, "the test of whether a building is a dwelling house turns on whether the occupant has left with the intention to return." *State v. Glenn*, 297 S.C. 29, 32, 374 S.E.2d 671, 672 (1988). "Thus, the mere fact that a building is suitable for use as a dwelling is insufficient . . . ." *State v. Ferebee*, 273 S.C. 403, 405, 257 S.E.2d 154, 155 (1979). However, "the temporary absence of occupants will not prevent a residence from becoming the subject of a burglary." *Id.*

In considering whether an occupant had an intention to return, courts may consider circumstantial evidence depicting such an intent. *See State v. Evans*, 376 S.C. 421, 425, 656 S.E.2d 782, 784 (Ct. App. 2008). For example, in *Evans*, this court found that although the occupants were unable to frequently stay at their secondary home due to health concerns, the home was still a dwelling because the occupants maintained the habitability of the structure by leaving the utilities on and checking on the home periodically. 376 S.C. at 425-26, 656 S.E.2d at 784. Additionally, in *Glenn*, our supreme court found sufficient evidence of an intent to return existed when the occupant left $10,000 worth of possessions in the structure. 297 S.C. at 32, 374 S.E.2d at 672.

Although our appellate courts have not yet addressed a first-degree burglary case with the factual framework of the present case, other jurisdictions with similar cases have found the structure in question to be a dwelling. For instance, in *State v. Kautz*, the occupants lived in the burglarized home for many years but moved out six months prior to the burglary, leaving the home vacant. 39 P.3d 937, 939 (Or. Ct. App. 2002). The Oregon Court of Appeals found the home still constituted a dwelling, stating, "[The] defendant entered into the [occupants'] house during a short period of vacancy that followed a long period of overnight occupancy. The fortuity that [the] defendant burglarized the home during an interval when occupancy had ceased does not change the nature of his crime." *Id.* at 940. In *Mains v. State*, the occupant of the burglarized home had been living in a nursing home for two years but intended to return to the home once her health improved. 375 So. 2d 1299, 1300, 1302 (Ala. Crim. App. 1979). While in the nursing home, her grandson cared for and maintained the habitability of the home. *Id.* at 1301. The Alabama Court of Criminal Appeals held "the jury could

reasonably conclude from the testimony that, although she had been in a nursing home for some two years, the owner, . . . intended to return to her house and reside therein when her condition improved." *Id.* at 1302. In *People v. Marquez*, a California appellate court stated, "It is clear the issue in the instant case turns on whether a dwelling can be considered 'inhabited' where the resident has moved to a boarding home, has had a conservatorship appointed over her, the house is being maintained, and there is a doubt she will return." 192 Cal. Rptr. 193, 196 (Cal. Ct. App. 1983). Finding "[i]t is the intent and not the length of absence which controls," the court held the home was a dwelling within the context of burglary. *Id.* at 196.

Subsection 62-8-204(5)(A) of the South Carolina Code (Supp. 2017) provides that unless otherwise stipulated, "a power of attorney granting general authority with respect to real property authorizes the agent to . . . manage or conserve an interest in real property or a right incident to real property owned or claimed to be owned by the principal," including the right to "insur[e] against liability or casualty or other loss."

Here, Paul testified his mother lived in the home for thirty-seven years before moving to a nursing home for medical reasons. Paul explained as his mother's attorney in fact, he placed the home on the market because the future was uncertain; however, it was the family's hope that she would return to the home at some point. Although the record lacks direct evidence of the occupant's intent, Paul testified thirty-seven years' worth of his mother's furniture and possessions remained in the home. *See Evans*, 376 S.C. at 425, 656 S.E.2d at 784 (establishing when conducting an inquiry of whether an occupant had an intention to return, courts may consider circumstantial evidence depicting such an intent); *Glenn*, 297 S.C. at 32, 374 S.E.2d at 672 (holding sufficient circumstantial evidence of an intent to return existed when the occupant left $10,000 worth of possessions in the structure and had previously returned to gather some possessions). Further, Paul and his wife acted to protect and maintain the habitability of the home by leaving on the utilities and regularly checking on the home. Paul testified either he or his wife checked on the home every "two to three days," always leaving all the doors and windows locked.

Additionally, Paul's actions manifested an intent to return to the home. As his mother's attorney in fact, Paul was entitled to protect and enforce his mother's rights as to the home. *See* S.C. Code Ann. § 62-8-204(5)(A) (Supp. 2017)

(providing that unless otherwise stipulated, "a power of attorney granting general authority with respect to real property authorizes the agent to . . . manage or conserve an interest in real property or a right incident to real property owned or claimed to be owned by the principal," including the right to "insur[e] against liability or casualty or other loss").

Viewing the foregoing in the light most favorable to the State, we find sufficient circumstantial evidence existed to create a factual dispute as to what type of structure Davis entered. *See Stanley*, 365 S.C. at 41, 615 S.E.2d at 464 ("On appeal from the denial of a directed verdict in a criminal case, an appellate court must view the evidence in the light most favorable to the State."); *Bennett*, 415 S.C. at 237, 781 S.E.2d at 354 ("[I]n ruling on a directed verdict motion where the State relies on circumstantial evidence, th[is] court must determine whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt."). Accordingly, the trial court properly refused to direct a verdict in Davis's favor. *See Bennett*, 415 S.C. at 236, 781 S.E.2d at 354 ("[T]he lens through which a[n appellate] court considers circumstantial evidence when ruling on a directed verdict motion is distinct from the analysis performed by the jury."); *Mollison*, 319 S.C. at 46, 459 S.E.2d at 91 ("If there is any direct or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, we must find that the issues were properly submitted to the jury.").

CONCLUSION

Accordingly, the decision of the trial court is

AFFIRMED.

KONDUROS and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Clair Craver Johnson, Appellant,

v.

John Roberts, M.D., Respondent.

And

Clair Craver Johnson, Appellant,

v.

Medical University of South Carolina, Respondent.

Appellate Case No. 2015-001463

Appeal From Charleston County
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 5535
Heard September 20, 2017 – Filed February 7, 2018

REVERSED

Jonathan Blake Asbill, of Baker Ravenel & Bender, LLP and Bradley Lewis Lanford, of The Law Office of Kenneth E. Berger, LLC, both of Columbia for Appellant.

Donald Jay Davis, Jr., Stephen Lynwood Brown, James Edward Scott, IV, and Russell Grainger Hines, all of Young Clement Rivers of Charleston for Respondent John Roberts, M.D.

William Peele Early, of Pierce, Herns, Sloan & Wilson, LLC, of Charleston, for Respondent Medical University of South Carolina.

LOCKEMY, C.J.: In this action Clair Craver Johnson appeals the circuit court's entry of summary judgment in favor of John Roberts, M.D. and the Medical University of South Carolina (MUSC) (collectively Respondents). Johnson asserts the circuit court erred in finding her claims were time barred by the statute of repose applicable to medical malpractice claims. We reverse.

Johnson suffers from bi-polar disorder and depression. In 1997 she experienced severe mania, which required hospitalization. Dr. Roberts, a licensed psychiatrist, began treating Johnson at that time.

Johnson experienced several episodes of mania between 1997 until November 2003. On November 26, 2003, Johnson's doctors admitted her to MUSC, and on December 10, 2003, they began treating her with electroconvulsive therapy (ECT).[1] Between December 10, 2003 and June 26, 2008, Johnson's doctors treated her with ECT on eighty-six separate occasions. According to Johnson, she sustained serious permanent cognitive damage as a result of the ECT.

Johnson, proceeding pro se, filed a Notice of Intent to File Suit against MUSC on June 25, 2010. She alleged "due to having ECT . . . for an extended period of time between 2003 and 2008 [I] am now left with cognitive impairment and memory

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[1] "Electroconvulsive therapy is a procedure, done under general anesthesia, in which small electric currents are passed through the brain, intentionally triggering a brief seizure. ECT seems to cause changes in brain chemistry that can quickly reverse symptoms of certain mental illnesses." Mayo Clinic Staff, Electroconvulsive Therapy (ECT), Mayo Clinic (May 9, 2017), http://www.mayoclinic.org/tests-procedures/electroconvulsive-therapy/basics/definition/prc-20014161.

loss." Johnson also requested an extension to file an expert affidavit because "I am informed and have a good faith belief that the statute of limitation on my cause of action in this matter (absent a discovery exception) will expire within the next 10 days from the date my Notice of Intent to File Suit is filed." On August 20, 2010, Johnson filed a Stipulation of Dismissal without Prejudice of her Notice of Intent to Sue.

On November 16, 2011, Johnson filed a complaint against MUSC, asserting medical malpractice claims resulting from her ECT treatments. Johnson claimed, "[d]uring, after and a direct and proximate result of this extensive and involuntary ECT treatment, [she] lacked the mental capacity to understand and appreciate the detrimental effect the ECT had upon her until 2010 . . . ." Johnson also filed an affidavit from Harold J. Burstztajn, M.D., corroborating her claims that she was incapacitated as a result of the ECT until 2010. On May 16, 2012, Johnson filed an Amended Complaint against Dr. Roberts for damages resulting from the ECT treatments.

Following discovery, Respondents filed motions for summary judgment alleging Johnson's claims were barred by the statute of limitations and the statute of repose. Dr. Roberts contended the first act of negligence would have occurred between 2002 and 2003, meaning the statute of repose would bar any claims filed after 2009. MUSC also asserted, "Plaintiff's complaint against MUSC having arisen out of ECT treatment initiated in 2003 is time barred."

The circuit court held a hearing on Respondents' motions and later issued its order granting Respondents' summary judgment, finding Johnson's claims were time-barred by the statute of repose. Johnson filed a motion for reconsideration pursuant to Rule 59(e). The circuit court denied the motion. This appeal followed.

LAW

"An appellate court reviews a grant of summary judgment under the same standard applied by the [circuit] court pursuant to Rule 56, SCRCP." *Lanham v. Blue Cross & Blue Shield of S.C., Inc.*, 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002). A circuit court should grant a motion for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP.

South Carolina law requires claims for medical malpractice be filed within three years "from the date of the treatment, omission, or operation giving rise to the cause of action or three years from date of discovery or when it reasonably ought to have been discovered . . . ." S.C. Code Ann. § 15-3-545(A) (Supp. 2017). Section 15-3-545(A) creates a six-year statute of repose, beyond which a patient cannot sue their medical provider for malpractice. *Id*., *see also Kerr v. Richland Mem. Hosp.*, 383 S.C. 146, 148, 678 S.E.2d 809, 810 (2009) ("Accordingly, the statute of repose provision within section 15-35-545(A) applies as an absolute limit applicable in *any* medical malpractice action."). "A statute of repose creates a substantive right in those protected to be free from liability after a legislatively-determined period of time." *Langley v. Pierce*, 313 S.C. 401, 404, 438 S.E.2d 242, 243 (1993) (quoting *First United Methodist Church v. U.S. Gypsum Co.*, 882 F.2d 862, 866 (4th Cir.1989)).

ANALYSIS

Initially, we note Respondents assert the arguments Appellant presents to this court are different from the arguments presented to the circuit court and Appellant has not appealed the circuit court's ruling on the previous argument. We disagree.

During the circuit court's hearing on Respondents' motions for summary judgment, Appellant asserted she "received [ECT] eighty-six times over a several years period of time – 2003 to 2008. Each time she received that, it was a blow to her head, a tort." Appellant conceded the "continuous treatment rule" was unavailable to her, but she argued "each of these is an individual to[rt]." The circuit court found

> Plaintiff's medical records indicate ECT was commenced on December 20, 2003. For purposes of the statute of repose, such allegations constitute an occurrence beginning as early as the commencement of treatment in 2003. . . . Thus, Plaintiff was required to bring the instant action against MUSC no later than December 10, 2009, six years from the date of the onset of treatment. Plaintiff's untimely Complaint filed on November 16,

> 2011, is therefore barred as a matter of law pursuant to § 15-3-545.[2]

In her briefing to this court, Appellant's statement of issue on appeal was

> The lower court erred by concluding that the trigger date for computing the running of the six[-]year statute of repose and the three[-]year statute of limitation as December 10, 2003, the date of the first of eighty-six [ECT] treatments ending on June 26, 2008, the date of the eighty-sixth such treatment, the error being that [ECT] did not cause identifiable injury to appellant until no earlier than 2009-2010 thereby triggering a three-year period in which to initiate a claim pursuant to S.C. Code Ann. § 15-545(A).

Our supreme court has cautioned that issue preservation "is not a 'gotcha' game aimed at embarrassing attorneys or harming litigants." *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012). "While it may be good practice for us to reach the merits of an issue when error preservation is doubtful, we should follow our longstanding precedent and resolve the issue on preservation grounds when it *clearly* is unpreserved." *Id.* at 330, 730 S.E.2d at 285 (emphasis added). The factual theory Appellant presented to the circuit court is not identical to the factual theory she argues here. But Appellant's statement of issues on appeal is broad enough to encompass the argument she presents to this court, and the circuit court's ruling makes clear the judge's belief that the date of occurrence in this case was the first date of treatment. Appellant asserts in her brief she is "not [seeking] the application of [the continuous treatment] rule to her facts . . . . Johnson contends that *her claim arose . . . certainly [within] the six year statute of repose*."

It cannot be said that Appellant's arguments are clearly preserved. But in light of the foregoing, it also cannot be said that Johnson's arguments are clearly unpreserved. In these situations, "where the question of issue preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation." *Id.* at 333, 730 S.E.2d at 287 (Toal, C.J., concurring in result in part

[2] Judge Dennis made the same finding as to Dr. Roberts.

and dissenting in part). Therefore, we find Appellant has preserved her arguments to this court, and has adequately appealed the circuit court's order.

In *Marshall v. Dodds*, this court confronted the issue of whether the medical malpractice statute of repose bars subsequent acts of negligence in the course of a prolonged medical treatment. 417 S.C. 196, 789 S.E.2d 88 (Ct. App. 2016), *cert. granted*, August 23, 2017. Virginia Marshall was diagnosed with a rare form of blood cancer while she was under the care of two physicians. *Id*. at 199, 789 S.E.2d at 89. She initially began seeing the two doctors in 2000 and 2004, but neither noticed signs in her blood and urine tests which indicated the presence of cancer. *Id*. In 2011, after her diagnosis, she sued her doctors, alleging they committed malpractice by not discovering her cancer sooner. *Id*. at 200, 789 S.E.2d at 90. The circuit court found the claims were time barred "because the statute of repose began to run after the first alleged misdiagnoses . . . ." *Id*. at 202, 789 S.E.2d at 90. "[T]he court reasoned . . . [any] subsequent misdiagnoses were merely a continuation of the first misdiagnoses, not distinct acts of negligence that could serve as new trigger points for the statute of repose." *Id*.

This court reversed. The court found if a plaintiff alleges a "misdiagnosis or failure to diagnose a condition within the six-year period–which an expert witness opines to be a breach of the physician's duty of care–the statute of repose does not bar the cause of action merely because the physician previously misdiagnosed the condition outside the repose period." *Id*. at 205, 789 S.E.2d at 92. The court found the plaintiffs alleged specific dates and appointments within the statute of repose when Marshall's doctors failed to diagnose her with cancer. *Id*. at 205-06, 789 S.E.2d at 93-94. Accordingly, the court found Marshall's claims for medical malpractice for alleged negligent acts which occurred within the six-year statute of repose would not be time barred. *Id*. at 206, 789 S.E.2d at 93.

The *Marshall* court found this analysis to be consistent with our supreme court's decision in *Harrison v. Bevilacqua*, 354 S.C. 129, 580 S.E.2d 109 (2003). In *Harrison*, the court declined to adopt the continuous-treatment rule which would toll the statute of repose until the termination of a patient's treatment. *Id*. at 138, 580 S.E.2d at 114. The plaintiff in *Harrison* was a diagnosed schizophrenic that was involuntarily committed to the care and treatment of the Department of Mental Health (the Department) in 1982. *Id*. at 132, 580 S.E.2d at 111. He remained in the Department's care through 1995, when he was discharged. *Id.* He was appointed a guardian ad litem in 1994 that successfully petitioned for his release,

and subsequently filed a complaint alleging the Department should have discharged him as early as 1983. *Id*. The circuit court determined Harrison would only be allowed to present evidence of acts of negligence that occurred within the five-year statue of repose contained within the Tort Claims Act. *Id*. at 134, 580 S.E.2d at 111-12. A jury returned a verdict in favor of Harrison, but for only $1 in damages. *Id*. at 133, 580 S.E.2d at 111. Harrison then appealed the circuit court's decision, arguing the court should adopt the continuous treatment rule, meaning the statute of repose would have begun running after his discharge. *Id*. The *Harrison* court disagreed and found the continuous treatment rule would conflict with the General Assembly's objective to limit liability for medical malpractice cases. *Id*. at 138, 580 S.E.2d at 114.

Our court in *Marshall* noted, "[o]ur interpretation . . . is entirely consistent with *Harrison* because we are not suggesting the statute of repose is tolled until the termination of the physician's course of treatment." 417 S.C. at 208, 789 S.E.2d at 94. Rather, "we hold the statute begins to run at the time of a medical professional's alleged negligent act or omission for which the plaintiff seeks to impose liability without regard to when the course of treatment ended." *Id*.

The allegations in this case are indistinguishable from *Marshall*. Appellant asserts she has been harmed as a result of treatment she received within the six-year statute of repose. Because there is evidence that her injury occurred as a result of treatment within the six years prior to her lawsuit, the circuit court erred in finding as a matter of law her claim is barred by the statute of repose.

CONCLUSION

Accordingly, the circuit court's order is

REVERSED.

HUFF and HILL, JJ., concur.