



South Carolina Bar

Continuing Legal Education Division

28th Annual Criminal Practice in South Carolina

Friday, February 22, 2019

presented by
**The South Carolina Bar
Continuing Legal Education Division**

<http://www.scbar.org/CLE>

SC Supreme Court Commission on CLE Course No. 190837

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28th Annual Criminal Practice in South Carolina

Friday, February 22, 2019

This program qualifies for 6.0 MCLE; 1.0 LEPR
SC Supreme Commission on CLE Course #: 190837

8:30 a.m. Registration

8:55 a.m. Welcome and Program Overview

9:00 a.m. State Criminal Practice: Significant Developments in 2018

*Moderator: Honorable John C. Few, Justice
Supreme Court of South Carolina*

*Honorable Barry J. Barnette, Solicitor
Seventh Judicial Circuit*

*Robert M. Dudek, Chief Appellate Defender
South Carolina Commission on Indigent Defense*

*Honorable Ernest A. Finney III, Solicitor
Third Judicial Circuit*

*Jonathan Eric Fox, Chief Public Defender, Horry County
Fifteenth Judicial Circuit*

*Christopher D. Scalzo, Deputy Circuit Defender
Thirteenth Judicial Circuit*

*Donald J. Zelenka, Deputy Attorney General
Office of the Attorney General of South Carolina*

10:45 a.m. Break

11:00 a.m. Federal Criminal Practice: Significant Developments in 2018

*Moderator: Honorable J. Michelle Childs, Judge
U.S. District Court for the District of South Carolina*

*Robbie Carroll, Assistant Deputy Chief Probation Officer
United States Probation Office*

*Jessica Ann Salvini
Salvini & Bennett, LLC*

*Parks N. Small, Federal Public Defender
Federal Public Defender's Office*

*William K. Witherspoon, Assistant U.S. Attorney
United States Attorney's Office*

12:30 p.m. Lunch (on your own)

- 1:45 p.m.** **Legislative Review and Preview: Significant 2018 Legislation, Pre-Filed Bills for 2019, and Rule Changes**
Amie L. Clifford, Education Coordinator/Senior Staff Attorney
South Carolina Commission on Prosecution Coordination
- Tommy E. Pope, Elrod Pope Law Firm*
Speaker Pro Tempore, S.C. House of Representatives (Rep., Dist. 47)
- 2:15 p.m.** **Expungements Primer**
Adam Whitsett, General Counsel
South Carolina Law Enforcement Division
- 3:00 p.m.** **Break**
- 3:15 p.m.** **Developments and Issues in Juveniles Justice**
Laurel Eden Hendrick, Assistant Solicitor
Fifth Judicial Circuit Solicitor's Office
- 3:30 p.m.** **Keeping Up with Trends and Issues in Criminal Defense**
Christopher W. Adams
Adams & Bischoff, P.C.
- 3:45 p.m.** **PCR-Proofing Your Case**
Tara D. Shurling
Law Office of Tara Dawn Shurling, PA
- 4:00 p.m.** **Ethics Issues in Criminal Defense**
Susan Barber Hackett, Assistant Appellate Defender
Division of Appellate Defense, S.C. Commission on Appellate Defense
- 5:00 p.m.** **Adjourn**

28th Annual Criminal Practice in South Carolina

SPEAKER BIOGRAPHIES

(by order of presentation)

Amie L. Clifford

*South Carolina Commission on Prosecution Coordination
(course planner)*

Amie L. Clifford serves as General Counsel and Director of Education Services for the South Carolina Commission on Prosecution Coordination. Her responsibilities include advising the Commission and the Circuit Solicitors; monitoring legislation, case law, and rule changes; analyzing legislation; creating and managing educational programs for state and local prosecutors (including a trial advocacy and substantive law “bootcamp” program she created for new prosecutors); preparing educational materials; and special projects, including preparation of amicus briefs.

Prior to joining the Commission in November 2007, she was employed by the National District Attorneys Association (NDAA) as the Director of the National Center for Prosecution Ethics and as an Assistant Director of Programs for the National College of District Attorneys. She previously served as the Supreme Court Fellow at the U.S. Sentencing Commission (1999 – 2000), Assistant Solicitor in the Charleston County Solicitor’s Office (1991 – 1999), Assistant Attorney General in the Criminal Appeals Section of the South Carolina Attorney General’s Office (1984 – 1991), and Staff Attorney with Piedmont Legal Services, Inc. (1983 – 1984). As a volunteer, Amie served as a Special Assistant Attorney General (2006 – 2010; 2013 – 2018) and represented the State in criminal appeals in the South Carolina appellate courts.

Amie graduated from the University of South Carolina School of Law in May 1982 (at the age of 22) and was admitted to the South Carolina Bar in November 1982.

A former member and Chair of the South Carolina Bar’s CLE Committee, she has participated in CLE trainings since 1985. Amie has served as a contributing author for two publications of the South Carolina Bar, *South Carolina Jurisprudence* and *South Carolina Criminal Trial Techniques Handbook*. She has also contributed to publications of the American Bar Association (ABA) and NDAA, including *Doing Justice: A Prosecutor’s Guide to Ethics and Civil Liability* (2nd ed. 2007 NDAA) (for which she also served as editor), *Managing Prosecutors* (2007 NDAA), and *The Fourth Amendment Handbook: A Chronological Survey of Supreme Court Decisions* (2nd ed. 2002 ABA). She is currently working with the South Carolina Bar and NDAA on new editions of the criminal trial techniques and ethics books.

Amie currently serves the South Carolina Bar as a member of the House of Delegates, member of the Ethics Advisory and Professional Responsibility Committees, and Secretary of the Trial and Appellate Advocacy Section. She also currently serves as President of the South Carolina Women Lawyers Association. Her past Bar service includes service as President of the South Carolina Bar Young Lawyers Division, President of the South Carolina Chapter of the Federal Bar Association, member of the ABA Standing Committee on Ethics and Professional Responsibility, and Council member of the ABA Criminal Justice Section. She is also a Fellow of the National Institute for the Teaching of Ethics and Professionalism (Inaugural Group) (2005).

Honorable John C. Few

Supreme Court of South Carolina

John Cannon Few was born in Anderson and grew up in Greenwood. He attended Duke University, where he served as Duke's athletic mascot-the Blue Devil- before graduating in 1985 with a degree in English and Economics.

John attended the University of South Carolina School of Law, where he was a member of The Order of Wig and Robe and The Order of the Coif. He also served as Student Works Editor of the South Carolina Law Review. He received his Juris Doctor degree in 1988.

John began his legal career as law clerk to The Honorable G. Ross Anderson, Jr., United States District Judge. He practiced law in Greenville from 1989 until 2000, and is admitted to practice in South Carolina, the United States District Court for the District of South Carolina, the United States Court of Appeals for the Fourth Circuit, and the Supreme Court of the United States. John served as a trial judge on the Circuit Court of South Carolina from July 2000 until February 2010. He then became the Chief Judge of the South Carolina Court of Appeals, a position he held until February 2016. John was sworn in as a Justice on the Supreme Court of South Carolina on February 9, 2016.

John is a frequent public speaker on law and justice. He delivered commencement addresses at Charleston School of Law and Lander University, and he addresses bar associations and civic groups across the country. He began teaching law in 2005, and is currently an adjunct professor at the University of South Carolina School of Law. Among many other writings, John maintains a blog on the law and practice of Evidence. John has a long track record of community service, from reading to preschool children to serving on the board of Friends of the Reedy River to chairing the South Carolina Access to Justice Commission.

Honorable Barry J. Barnette

Solicitor Seventh Judicial Circuit

Mr. Barnette is the Solicitor for the Seventh Judicial Circuit Solicitor Office, which consists of Spartanburg and Cherokee County since February 2011. He was the Principal Deputy Solicitor for the Seventh Judicial Circuit from January 2001 to February 2001. He was also a member of the Commission of Judicial Conduct from December 1997 to January 2001. He was an Assistant Solicitor from January 1991 to July 1996. He was in private practice from June 1990 to January 1991 in Easley, South Carolina. He also taught Chemistry and Physical Science at Traveler's Rest High School from August 1988 to June 1990. He graduated from the West Virginia University College of Law in 1988 with a J.D. Degree. He graduated from Marshall University in 1985 and received a B.A. Degree in Education with specializations in Chemistry and General Science.

He received the 2006 Ernest F. Hollings Award for Excellence in state prosecution that is his profession's top honor in the State of South Carolina. He received an Outstanding Traffic Safety Prosecutor Award from the National Association of Prosecutor Coordinators in 2006. He received the 2007 Prosecutor of the Year award from the South Carolina Department of Public Safety. He received the 2010 Criminal Justice Award from the South Carolina Victim Assistance Network (SCVAN) for his work with crime victims and their families. He received the 2013 Solicitor of the Year Award from the South Carolina Victim Advocate Association (SCLEVA). He has taught numerous classes, seminars and presentations throughout South Carolina and the Southeast. He has taught Evidence Law and DUI law at the South Carolina Magistrate Court Orientation School and training seminars (1997-2011). He has done presentations at the Death Penalty sections and criminal law training (2004-2017) and Driving section (1991 - 2017) at the South Carolina Solicitor's Conferences and Training Sessions. He has made a presentation at Southeast Law Enforcement Training at Lawrenceburg, Tennessee in 2005. He received an award from MADD in 1996 for his traffic prosecution in the Seventh Judicial Circuit. He received the Spartanburg Optimist

Club Award for Outstanding Prosecution in 2002. He was a contributing author in *Handling Traffic Cases in South Carolina*, 4th Edition (2005) and 5th Edition (2012). He also produced the *Case Law on Driving Cases in South Carolina* booklet for several years for judges, attorneys, and law enforcement officers through South Carolina.

In his position of Spartanburg County Magistrate Judge, he heard over a hundred jury trials including civil and criminal matters. He also heard hundreds of non-jury trials including civil and criminal matters. He was on the Commission of Judicial Conduct for the State of South Carolina involving discipline matters involving judges of all levels from 1997 to 2001. In his position of Assistant Solicitor, Principal Deputy Solicitor, and Solicitor in the Seventh Judicial Circuit, he has prosecuted hundreds of cases and handled over one hundred trials over all types ranging from DUI to Death Penalty cases.

Robert M. Dudek

South Carolina Commission on Indigent Defense

Robert Dudek is the Chief Appellate Defender for the Division of Appellate Defense, the South Carolina Commission on Indigent Defense. He is a graduate of the University of South Carolina School of Journalism, and the University of South Carolina School of Law.

While an undergraduate Dudek was a sports writer for the Gamecock. He was a VISTA volunteer in Alaska in 1980. Dudek began his career as an appellate lawyer as an Assistant Appellate Defender in 1990. After a two-person Death Penalty Appellate Unit was formed, he was later promoted to Deputy Chief Appellate Defender for Capital Appeals. Dudek became the Chief Appellate Defender in 2010, and he presently leads an office of twelve Appellate Defenders. He often presents at CLE programs on the "Case Law Update" on criminal law opinions issued by the South Carolina Supreme Court and the Court of Appeals for that year.

Honorable Ernest A. Finney, III

South Carolina Commission on Indigent Defense

Ernest "Chip" Finney graduated from Wofford College with a B.A in Government (1977) then earned a Juris Doctor degree from the University of South Carolina School of Law (1980). Finney returned to practice in the firm founded by his father, in Sumter, South Carolina. Finney has been a member of the Sumter County Public Defender Corporation, President of the South Carolina Black Lawyers Association, President of the South Carolina Association of Criminal Defense Lawyers and member of the Chief Justice's Committee on Docket Management. From 2006 to 2010, Finney served as a Municipal Court Judge for the City of Columbia. He was elected Solicitor in November 2010 and has been re-elected, twice, to that office. In 2018 he was inducted into the Pee Dee Inn of Court Chapter, based in Florence, South Carolina.

Finney and his wife, Tammy have been blessed to raise and nurture four great children.

Jonathan Eric Fox

Horry County Fifteenth Judicial Circuit

Mr. Fox was born 1965 Chapel Hill, NC. He received his B.A. English, at The Ohio State University, 1987, Juris Doctor, University of South Carolina School of Law, 1990. He was Law Clerk for the Honorable James B. Stephen, Judge for the 7th Judicial Circuit. He was in private practice from 1991 – 2012 in Columbia and Conway. Mr. Fox served as Public Defender, Georgetown County, 1994 – 2012, Senior Trial Attorney, 15th Circuit Public Defender's Office, Horry County, 2012-2018, Chief Public Defender, Horry County, 2018 – present. He is married to Caroline Fishburne Fox, 27 years and counting. They have 2 children: Skottowe (24) and Maggie (18)

Christopher D. Scalzo

Thirteenth Judicial Circuit

Mr. Scalzo is the Circuit Public Defender for the 13th Judicial Circuit, which includes Greenville and Pickens Counties. Mr. Scalzo began as an assistant public defender in the Greenville County Public Defender Office in 2002 and was made Deputy Public Defender in 2008. He became the 13th Circuit Public Defender on February 1, 2018.

In August of 2011, Mr. Scalzo was appointed by the South Carolina Commission on Indigent Defense to act as Interim Circuit Defender for the 10th Judicial Circuit Public Defender Office, where he managed the Public Defender Offices in Anderson County and Oconee County.

Mr. Scalzo returned to the Greenville Public Defender Office as Deputy Public Defender in February of 2013.

Mr. Scalzo represents indigent clients charged with crimes. He has tried cases in Circuit, Family, and Magistrate court, and has argued before the South Carolina Court of Appeals and the South Carolina Supreme Court. He has represented clients in prosecutions for a wide variety of crimes from drug offenses and property crimes, to domestic violence, sexual assaults, and murder, including capital murder.

Mr. Scalzo was president of the South Carolina Public Defender Association from 2008 to 2014. During his tenure as president, he frequently represented the association's interests before the S.C. Legislature and as amicus curiae before the South Carolina Supreme Court.

Mr. Scalzo is a graduate of Rutgers College and Rutgers Law School and was admitted to the South Carolina Bar in 2002. He is a member of the Bar of the United States Supreme Court as well as the Greenville County Bar. Mr. Scalzo has been certified by the South Carolina Supreme Court to be Lead Counsel in Death Penalty Cases.

Donald J. Zelenka

Office of the Attorney General of South Carolina

Donald J. Zelenka is currently Deputy Attorney General of the Criminal Division. He was the former Chief of Capital and Collateral Litigation in the South Carolina Attorney General's Office in Columbia, South Carolina. He is a graduate of The Ohio State University (1974) with a B.A. in Economics and the University of South Carolina School Of Law (1977) with a J.D. degree. Mr. Zelenka has been with the Attorney General's Office since 1979. In 2006, he received the Association of Government Attorneys Award for "Excellence in Appellate Advocacy." In 2007, he received the Ernest F. Hollings Award for Excellence in State Prosecution. In 2011 Attorney General's Excellence Award, South Carolina Attorney General's Office. Mr. Zelenka is also a frequent lecturer on appellate practice in state and national courses.

He currently supervises the state's prosecution of all criminal appeals, state post-conviction relief proceedings, federal habeas corpus actions and capital litigation, as well as criminal prosecutions handled by the Attorney General's Office. Mr. Zelenka has personally orally argued six (6) cases before the United States Supreme Court, over one-hundred (100) cases in the United States Court of Appeals for the Fourth Circuit, including ten (10) en banc arguments, and numerous cases in the state appellate courts of South Carolina. He has also prosecuted murder and felony cases in the trial courts of his state.

He was a contributing chapter author of *The Appellate Prosecutor: A Practical and Inspirational Guide to Appellate Advocacy*, edited by Ronald H. Clark (2005 Trafford Press). He co-authored with Robert F. Daley, Jr., *Making the System Fair and Prompt: Recent Changes in Death Penalty Law, Post-Conviction Relief and Federal Habeas Corpus*, *South Carolina Lawyer*, July/August 1997. He also authored "Protecting the Record for Your Capital Case: Keeping the Eye on the Ball - It's Only The Beginning," *The Practical Prosecutor Magazine*, p. 30-39. (2006 - National College of District Attorneys). He was a co-author of *South Carolina Appellate Practice* (S.C. Bar 1985) (co-author).

TEACHING EXPERIENCE:

National District Attorneys Association National Advocacy Center, Columbia, S.C. - Faculty - Appellate Advocacy Course, Instructor and Featured Presenter; 1999-2007; Prosecutor's Bootcamp Course, Faculty - November 2001. Regularly at the South Carolina Solicitor's Association Annual Meetings. Numerous South Carolina Bar and Richland Bar Association C.L.E. programs on Criminal Law and Ethics. Adjunct Clinical Instructor - U.S.C. School of Law 1981-1983. Frequent presenter at Association of Government Lawyers in Capital Litigation Meetings. New York Prosecutors Training Institute, Featured Speaker - Capital Cases in the United States Supreme Court. February 2002. National Attorney Generals NAGTRI Appellate Advocacy - May 2016

PROFESSIONAL ACTIVITIES:

South Carolina Bar Association: Criminal Law Section (former Council Member); Association of Government Attorneys in Capital Litigation Board of Directors (1985-present). Virginia State Bar since 1979. American Bar Association; Government and Public Sector Lawyers Division; Criminal Justice Division, Prosecution Function Comm., Appellate and Habeas Practice Committee.

PERSONAL ACTIVITIES

Married - Leslie Zelenka (1975)
Union United Methodist Church
Rotary Club of St. Andrews-Columbia - President (2017-18)
The Ohio State University Alumni Band

Honorable J. Michelle Childs

U.S. District Court for the District of South Carolina

The Honorable J. Michelle Childs was appointed to the United States District Court for the District of South Carolina in August 2010. She holds a B.S. in Management from the University of South Florida Honors College, a J.D. from the University of South Carolina School of Law, a Masters in Personnel and Employment Relations from the University of South Carolina's Darla Moore School of Business, and a Masters of Judicial Studies from Duke University School of Law.

Prior to the federal court, she served as an At-Large Circuit Court Judge, including having responsibilities as the Chief Administrative Judge for General Sessions and Business Court for the Fifth Judicial Circuit of Richland and Kershaw Counties. Judge Childs also had the distinct honor of gubernatorial appointments as a Workers' Compensation Commissioner (2002-06) and as the Deputy Director for the South Carolina Department of Labor, Licensing and Regulation's Division of Labor (2000-02), overseeing programs for Wages and Child Labor, OSHA, OSHA Voluntary Programs, Elevators and Amusement Rides, Migrant Labor, and Labor-Management Mediation. Judge Childs was formerly a partner with the law firm of Nexsen Pruet Jacobs & Pollard, LLP, in Columbia, South Carolina, where she practiced in the areas of employment and labor law and general litigation. Judge Childs is very active in various local, state and national bar organizations, as well as community organizations. She is a member of the American Law Institute, the current Vice Chair of the American Bar Association's Judicial Division, the immediate past chair of the American Bar Association's National Conference of Federal Trial Judges, and she serves on the council of the American Bar Association's Section of Litigation.

As a practicing lawyer and judge, she has lectured and served frequently on panels for topics regarding litigation and trial techniques, courtroom practices and procedures, discovery and expert witness issues, evidence, and various topics for young lawyers.

Robbie Carroll

United States Probation Office

Mr. Carroll graduate Cum Laude with Honors from the University of South Carolina in 1993 with a Bachelor of Science Degree in Criminal Justice. He has a 24-year career in the community corrections field. He served 6 years as a probation and parole agent with the South Carolina Department of Probation, Parole and Pardon Services and 18 years with the United States Probation Office in the role of a presentence investigator, Sentencing Guideline Specialist, Supervising United States Probation Officer, and current role as Assistant Deputy Chief United States Probation Officer for the Columbia Division. He is a member of the Federal Probation and Pretrial Officer's Association and South Carolina Probation and Parole Association.

Jessica Ann Salvini

Salvini & Bennett, LLC

Ms. Salvini is an attorney licensed to practice law in the State of California and South Carolina. She was admitted to the California Bar in 2000 and the South Carolina Bar in 2001. In 2000, she practiced Federal Criminal law in San Francisco, California. In 2002, she opened her own law firm in South Carolina, along with her law partner. Ms. Salvini engages in the practice of both State and Federal Criminal law matters, Civil and Family law matters. In 2007, she was appointed to serve as a Municipal Judge for the City of Mauldin and she currently serves as the Chief Municipal Judge for the City of Mauldin. Ms. Salvini was recently elected to the Family Court Bench.

Parks Small

Federal Public Defenders Office

Mr. Small is the Federal Public Defender for the United States District Court for the District of South Carolina and has served in that position since January 1977. He serves by appointment of the U.S. Court of Appeals for the Fourth Circuit. The attorneys represent clients in the District Court, Court of Appeals and U.S. Supreme Court.

Prior to that Mr. Small was law clerk to Chief Judge Robert Martin, Jr. of the United States District Court for the District of South Carolina for three years.

Mr. Small has been on the national Defender Services Advisory Group and serves on the District Court Criminal Justice Act Panel Committee and the District Court Rules Committee.

Mr. Small is a graduate of the University of North Carolina and the South Carolina School of Law. Prior to law school he was employed by Aetna as a claim's adjuster.

William K. Witherspoon

United States Attorney's Office

Prior to being appointed Senior Litigation Counsel for the U.S. Attorney's Office, for the District of South Carolina in 2006, Mr. Witherspoon served as the First Assistant U.S. Attorney, Anti-Terrorism Coordinator, and Acting Violent Crimes Chief for the United States Attorney's Office. Prior to these positions, he prosecuted drug and violent crime cases in the Criminal Division of the U.S. Attorney's Office. Mr. Witherspoon is currently assigned to the Violent Crime Section of the United States Attorney's Office.

After being admitted to the South Carolina Bar in November 1991, Mr. Witherspoon clerked for the late Honorable Randall T. Bell of the South Carolina Court of Appeals, and afterwards, with the late Honorable Matthew J. Perry of the United States District Court. Following his tenure with the judges, he worked with the firm of Berry, Adams, Quackenbush & Stuart, P.A. of Columbia, South Carolina. Later, he was employed by the State of South Carolina Budget and Control Board, Office of General

Counsel. Mr. Witherspoon's practice of law has been very diverse, including civil, criminal and administrative matters.

Mr. Witherspoon received a Bachelor of Science degree in Biology with a minor in Chemistry from the University of South Carolina. Following graduation from college, Mr. Witherspoon was employed by Celion Carbon Fibers, a division of BSAF in Rock Hill, SC, as an analyst and was later promoted to Lead Analyst/Assistant Supervisor. Four years later, he left Celion for a position as a deputy sheriff with the Lancaster County Sheriff's Department. In 1988, he entered the University of South Carolina School of Law in 1988 where he served as President of the Student Body (the second African-American elected President) and where he earned many other honors. In 1999, Mr. Witherspoon was awarded the Compleat Lawyer Silver Medallion Award for his service both to the legal profession and the community at large. On May 18, 2016, Mr. Witherspoon was sworn in as President of the South Carolina Bar where he served for one year.

Tommy E. Pope

*Elrod Pope Law Firm Speaker
Pro Tempore, S.C. House of Representatives*

Tommy Pope is a managing partner of Elrod Pope Law Firm in Rock Hill, South Carolina bringing an extensive background of over 30 years of law enforcement and prosecution experience. From 1993-2006, Tommy served as Solicitor for the 16th Circuit (Union & York Counties, SC). Under his guidance, the 16th Circuit consistently led the State in caseload management, providing effective and timely prosecution of criminal cases. He is most often recognized for his 1995 prosecution of Susan Smith in Union County, South Carolina, who made national headlines for the drowning deaths of her two children. Today, he is frequently called upon by various national and international media outlets to provide legal commentary on cases involving parents who kill their children.

Tommy received a Bachelor of Science degree in Business Management from the University of South Carolina in 1984 and a Juris Doctorate from the School of Law in 1987. He also attended the South Carolina Criminal Justice Academy where he graduated with honors.

In 1999, Tommy Pope received the Silver Compleat Lawyer Award from the University of South Carolina Law School Alumni Association, recognizing competence, integrity, ethics and superior performance in his profession. In 2008, Tommy was awarded the Order of the Palmetto, our state's highest civilian honor for his dedication and service to the people of South Carolina.

Tommy volunteered as a mentor for the Supreme Court of South Carolina Lawyer Mentoring Program. He has also served as an instructor for the National College of District Attorneys at the National Advocacy Center in Columbia, South Carolina and has lectured to State Prosecutors' Associations across the country. Additionally, Tommy has been called upon by the South Carolina Chief Justice to serve on numerous committees regarding the administration of justice in our state.

Since 2010, Tommy has served as a member of the South Carolina House of Representatives for District 47. He was selected as Speaker Pro Tempore in December 2014. In August of 2016, he was named chair of the South Carolina House Tax committee. Previously, he was assigned to the Judiciary and Ethics Committees along with the Medical, Military, Public and Municipal Affairs committee from 2010-12. He also served on the House Republican Caucus Ethics Reform Study committee, as the House Republican Floor Leader.

Tommy was also selected to the South Carolina Super Lawyers list each year from 2013-2019. He is a Leadership South Carolina graduate (2016). The Sheriffs' Association named him the 2015-2016

Legislator of the Year. In 2014, Pope began serving as the SC Bar Lawyer Legislator Committee Chair.

Adam Whitsett

South Carolina Law Enforcement Division

EDUCATION:

B.A. (History) (with Honors), The Citadel, Charleston, South Carolina (2003).
J.D., University of South Carolina School of Law, Columbia, South Carolina (2006).

BAR ADMISSION:

South Carolina (2006)
United States District Court, District of South Carolina (2008)

PROFESSIONAL EXPERIENCE:

General Counsel, South Carolina Law Enforcement Division, Columbia, South Carolina (Present) (advises SLED on all matters, including NICS, Firearms Laws, Expungements, Sex Offender Registry, and FOIA)(also served as SLED's representative on several expungement legislative task forces); Assistant Attorney General, Civil Division, South Carolina Attorney General's Office, Columbia, South Carolina (represented the Office, other state agencies, and other entities on civil and regulatory litigation matters, including expungement litigation; and Litigator, The Finney Law Firm, Inc., Columbia, South Carolina (handled civil; criminal, domestic relations, workers compensation, probate cases, and appeals);

HONORS:

Recipient, Harry M. Lightsey, Sr. Scholarship

TEACHING EXPERIENCE:

Presented at numerous CLE programs across the state on the South Carolina Freedom of Information Act, South Carolina's expungement laws, state and federal firearms laws, the South Carolina Sex Offender Registry, video poker and gaming machine litigation, and special searches.

L. Eden Hendrick

Fifth Judicial Circuit Solicitor's Office

L. Eden Harvey Hendrick is originally from Columbia, South Carolina. She graduated from the University of Georgia in 2002 and the University of South Carolina School of Law in 2005. Immediately after law school, Mrs. Hendrick began working as a prosecutor in the Fifth Judicial Circuit as an Assistant Solicitor in both Family Court and General Sessions. In September 2010, Mrs. Hendrick became the staff attorney for the Foster Care Review Board Division with the Governor's Office of Executive Policy and Programs (now the Department of Administration). From March 2013 until January 2015, Mrs. Hendrick represented the Department of Social Services in abuse and neglect and termination of parental rights actions in Richland, Fairfield and Chester Counties. In January 2015, Mrs. Hendrick returned to the Fifth Circuit Solicitor's Office to manage the Richland County Family Court Division. Mrs. Hendrick is a member of the Richland County Bar Association.

Christopher W. Adams

Adams & Bischoff, P.C.

Christopher Adams is a criminal defense lawyer based in Charleston SC and is the Vice President of the NACDL.

Chris devotes half of his practice to defending men and women facing the death penalty in federal and state courts throughout the country. In 2013 Chris' client won a life sentence after a three-month federal death penalty trial in Puerto Rico (USA v. Casey, 3:05-cr-277). He has represented 75 men and women facing the death penalty at trial without a death verdict.

The other half of his practice is defending people facing allegations in federal and state courts of white-collar crimes, fraud, money laundering, drug offenses, sex crimes, computer crimes, violent felonies, etc.

Chris spent the first fifteen years of his career as a public defender and non-profit attorney. He teaches at the National Criminal Defense College and is a founder of the National College of Capital Voir Dire.

Tara D. Shurling

Law Office of Tara Dawn Shurling, PA

Ms. Tara Dawn Shurling received her undergraduate degree from the University of South Carolina in 1976. Subsequently, she received her J.D. Degree from the University of South Carolina in 1978. After graduating from law school, she joined the staff of the then newly created South Carolina Office of Appellate Defense in March 1979. While with that state agency, she represented indigents and handled approximately 2,000 criminal appeals including direct appeals and appeals from the denial of Post-Conviction Relief Applications. Attorneys with that agency function as appellate public defenders for those who are unable to hire legal counsel on appeal.

In June of 1994, Ms. Shurling left Appellate Defense and went into private practice. Her practice has four primary focal areas; general criminal defense in both state and federal court, direct criminal appeals to both the South Carolina Court of Appeals and the Supreme Court of South Carolina, Post-Conviction Relief cases, both in the circuit court and on appeal to the Supreme Court of South Carolina, and federal habeas actions in the U. S. District Court and on appeal to the Fourth Circuit Court of Appeals. She has handled nearly two thousand criminal appeals of various types since going into private practice. Ms. Shurling also enjoys an active criminal trial practice. In addition, her practice handles personal injury cases.

Ms. Shurling is admitted to practice in the United States District Court, the Fourth Circuit Court of Appeals and the United States Supreme Court, in addition to the South Carolina State Bar.

Ms. Shurling is a frequent speaker at various continuing legal education seminars. She is a past chairman of the Criminal Law Section of the South Carolina Bar and has been actively involved on many other bar committees. She is a past President of the South Carolina Chapter of the Federal Bar Association. She has served on the Board for the South Carolina Women Lawyer's Association for many years, and she is a Past President of that organization. Ms. Shurling is a Fellow in the American Academy of Appellate Lawyers. She joins only four other South Carolina lawyers to be admitted to the Academy. Ms. Shurling has been regularly recognized by South Carolina Super Lawyers. She is listed among the Best Lawyers in the Midlands by Columbia Metropolitan Magazine. From 2014-2017 her firm has been recognized by U.S. News and World Report as being among the best in the nation in her field of expertise and has recently been named for that distinction in 2018 as well. In 2017 she was recognized by Women in the Law, an organization which honors women lawyers nominated by their peers for excellence in their practices. She was recognized in 2017 by Columbia Living Magazine as one of the top attorneys in South Carolina. In 2018 she was honored to be named by Best Lawyers in America in the field of Appellate Practice. That organization is among the oldest and most respected peer review publications in the United States. She was also nominated by Lawyers of Distinction in 2017 in recognition of her special knowledge, skill, proficiency, as well as her professionalism and ethics in the practice of law. She has been named by CV Magazine for their 2018 list of the Legal Elite; their selection of the Lawyers of the Year. The publication, Finance Monthly, has named her as Lawyer of the Year in the United States in the category of Criminal Appellate practice.

Ms. Shurling has her office in Columbia, South Carolina, where she and her family have lived since she was a small child. She takes cases from anywhere in South Carolina and has regularly traveled throughout the State to represent clients in virtually every county.

Susan Barber Hackett

S.C. Commission on Appellate Defense

Susan Barber Hackett is an Appellate Defender with the Office of Appellate Defense. She represents individuals in their appeals following criminal convictions and in post-conviction relief matters. Previously, Ms. Hackett worked at the Office of Disciplinary Counsel where she investigated and prosecuted lawyers for violations of the Rules of Professional Responsibility. She also served as the Executive Director of the Center of Capital Litigation, a non-profit dedicated to the representation of individuals charged with capital crimes. While an associate at Blume, Weyble & Norris, LLC, she represented criminal defendants in state and federal courts. Upon graduating from law school, Ms. Hackett served as a judicial clerk to the Honorable Deadra L. Jefferson in the Ninth Circuit. Ms. Hackett also taught legal writing at the University of South Carolina School of Law as an adjunct professor for two years. She graduated from the University of South Carolina School of Law in 2003, and graduated from Winthrop University in 2000. Ms. Hackett is a regular presenter at Public Defense 101: Fundamentals of the Profession, an annual seminar sponsored by the South Carolina Commission on Indigent Defense. Ms. Hackett is an active member of the South Carolina Bar, serving on the Professional Responsibility Committee, the Law Related Education Committee, and the Fee Disputes Resolution Board.



South Carolina Bar

Continuing Legal Education Division

**28th Annual Criminal Practice in
South Carolina**

Friday, February 22, 2019

**State Criminal Practice: Significant
Developments in 2018**

**Significant Developments in State Criminal Practice:
Appellate Decisions and Rules Changes
(January 2018 through January 2019)**

CASE/RULE <i>with Topic(s) for which Chosen</i>	HOLDING
<p><i>State v. Harold Bennon</i> <i>Cartwright, III</i>, 425 S.C. 81, 819 S.E.2d 756 (2018) (Op. No. 27842 (S.C.S. Ct. September 26, 2018))</p> <p>Topics: Evidence (suicide attempt as evidence of guilt); Jury Instructions</p>	<p>In upholding the admission by the State of Cartwright’s attempted suicide as evidence of guilt, the Supreme Court established a procedure and test for determining the admissibility of such evidence, and provided that a trial court should not comment or instruct if such evidence is admitted.</p> <p style="padding-left: 40px;">[I]n future cases, we instruct trial courts to conduct a hearing outside of the presence of the jury. During this hearing, at which the State and the defendant shall be permitted to introduce evidence, the trial court shall determine whether the State has proven that: (1) a jury could reasonably find that a suicide attempt occurred; (2) the defendant was aware of the occurrence of the alleged crimes at the time of the suicide attempt; and (3) an unmistakable nexus exists by clear and convincing evidence linking the suicide attempt to a guilty conscience derivative of the offense for which the defendant is on trial. If the trial court concludes that the three factors have been established, the evidence is relevant and may be admitted, subject to a Rule 403, SCRE analysis. The suicide-attempt evidence may be admitted only when all three factors have been met, and the evidence survives a Rule 403 analysis. We recognize that in view of our rigorous framework, suicide-attempt evidence will rarely be admitted.</p> <p style="text-align: center;">* * *</p> <p>[T]he trial court shall not provide a limiting instruction or otherwise comment to the jury on this evidence. <i>See</i> S.C. Const. art. V, §21 (“Judges shall not charge juries in respect to matters of fact, but shall declare the law.”). The absence of a jury instruction shall in no manner foreclose the ability of the State and the defendant to make permissible jury arguments respecting the jury's consideration of the suicide-attempt evidence.</p> <p>(Footnote omitted.) <i>Id.</i>, 425 S.C. at 92-93, 819 S.E.2d at 761-762.</p>
<p><i>State v. Shannon Scott</i>, 424 S.C. 463, 819 S.E.2d 116</p>	<p>Scott’s underage daughter, Shade, went to a party with some friends; there she was assaulted by a girl, Teesha, with whom she had a history of problems. As Shade and her friends were leaving, Teesha followed them to the</p>

* The summaries are only intended to provide the CLE attendees with a basic understanding of the holding relevant to the “topic” (issue) identified by the panelists as the reason for the opinion’s significance. The summaries not intended to cover all issues or the Court’s complete analysis of the covered issue.

<p style="text-align: center;">CASE/RULE <i>with Topic(s) for which Chosen</i></p>	<p style="text-align: center;">HOLDING</p>
<p>(2018) (Op. No. 27834 (S.C.S. Ct. August 29, 2018))</p> <p>Topics: Protection of Persons and Property Act; Self-Defense</p>	<p>parking lot appearing, to Shade, ready to fight. Shade left with her friends in one car, and Teesha and her group followed them in a SUV. A third vehicle driven by Darrell followed the two vehicles. When Shade was stopped at a red light, someone from Teesha’s SUV approached them with a gun; Shade ran the light and Teesha pursued them. They tried to stop at a police station, but it was closed. One of the girls called Shade’s mother about Teesha chasing them and she told them to come to Scott’s house (where she was). When Shade reached the house, she pulled around to the back of the house; as everyone was either going in or in the house, a gunshot was heard. Shade’s mother called 911 and Scott retrieved his roommate’s gun and proceeded out onto the front stoop of the residence. Both pursuing vehicles had driven past the house and turned around so the driver’s door was facing the house. The lights on the SUV were turned off and the windows were rolled down; as it passed the house, shots were fired. Scott fired a warning shot into the air and yelled at them not to come closer. The SUV continued forward and Scott heard another shot. He shot again, maybe 2 or 3 times. Police arrived shortly thereafter and found Niles dead from a gunshot. Scott was indicted for murder. His motion for immunity under the Protection of Persons and Property Act (Section 16-11-440) was granted. The State appealed and the Court of Appeals affirmed. Both Scott and the State filed petitions for a writ of certiorari, which were granted by the Supreme Court.</p> <p>The Supreme Court first noted that the presumption of reasonable fear under Section 16-11-440(A) did not apply because there was no evidence that Niles or anyone else was in the process of unlawfully and forcefully entering Scott’s residence. The Court then looked to Section 16-11-440(C), which applies where a person, who is not engaged in unlawful activity, is attacked in a place other than a dwelling or residence. Such a person has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, if he reasonably believes such is necessary to prevent great bodily injury or death to himself or another. The Court reiterated that, consistent with the common law Castle Doctrine, which was extended by the Act to other places where a person has the right to be, immunity under 16-11-440(C) is predicated on the accused establishing the elements of self-defense by the preponderance of the evidence.</p> <p>The four elements that must be established to justify use of deadly force as self-defense are:</p> <p style="padding-left: 40px;">(1) The defendant was without fault in bringing on the difficulty; (2) The defendant... actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he</p>

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	<p>actually was in such imminent danger; (3) If the defense is based upon the defendant's actual belief of imminent danger, a reasonable prudent man of ordinary firmness and courage would have entertained the same belief...; and (4) The defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance.</p> <p><i>State v. Scott</i>, 424 S.C. at 469, 819 S.E.2d at 118. The Court found that while the trial court did not address these elements with precision, it could glean the necessary findings of fact to support the trial court's conclusion that Scott established each of the four elements by a preponderance of the evidence. The Court also found such to be supported by the record and upheld the grant of immunity.</p> <p>The Court rejected the State's argument that, even if Scott was entitled to use deadly force against the occupants of Teesha's SUV, he was not entitled to use deadly force against Niles. In doing so, it agreed with the trial court's determination that the evidence supported a finding that Scott reasonably believed Niles was engaged in an unlawful and forcible act against his home.</p>
<p><i>State v. Donte Samar Brown</i>, 424 S.C. 479, 818 S.E.2d 735 (2018) (Op. No. 27836 (S.C. Sup. Ct. August 29, 2018)).</p> <p><i>(Topic: Admissibility of Evidence)</i></p>	<p>This case arose from an armed robbery. Brown and Wilson were identified as the perpetrators, and police discovered that Wilson was wearing a GPS ankle monitor at the time. The GPS records from the South Carolina Department of Probation, Pardon, and Parole Services (PPP) placed Wilson at the crime scene just prior to and during the robbery.</p> <p>At trial, the prosecution offered the GPS records. Brown objected on the basis that the State was unable to authenticate the records or comply with the business records exception (Rules 803(6) and 901, SCRE). The PPP witness testified that, as a probation agent, he supervised offenders, including by the 24/7 monitoring of GPS monitoring systems by the general operations center for some offenders. He explained that field agents can log onto the computer and see in real-time where offenders are or look into the archived recordings to see where they have been. He explained that the recordings were made by a third party vendor. When asked by the prosecutor if the information gathered was accurate, the PPP agent said, "It is very accurate. We use it in court all the time." The trial court allowed the evidence in and Brown was convicted. On appeal, he challenged the admission of the GPS evidence on the ground the State had failed to authenticate it.</p>

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	<p>In addressing the issue, the Supreme Court acknowledged that neither the reliability nor operation of GPS technology in general is genuinely disputed and that the offering party does not need to make an elaborate showing of the accuracy of the recorded data. However, the Court provided that a party seeking to introduce GPS records must make a minimum showing that those particular records are accurate. The Court, emphasizing that the witness used to make this showing need not be an expert, proceeded to set out the following requirement for the authentication of GPS records.</p> <p style="padding-left: 40px;">...a witness should have experience with the electronic monitoring system used and provide testimony describing the monitoring system, the process of generating or obtaining the records, and how this process has produced accurate results for the particular device or data at issue.</p> <p><i>Id.</i>, at 11.</p> <p>While the admission was held to be improper in this case due to the failure to sufficiently authenticate the records, the error was determined to be harmless beyond a reasonable doubt due to the overwhelming evidence of guilt.</p>
<p><i>State v. Roy Lee Jones</i>, Op. No. 27822 (S.C. Sup. Ct. July 5, 2018)</p> <p>Topics: Evidence (delayed disclosure; behavior of non-offending caregiver); Experts and Expert Testimony</p>	<p>The State offered the testimony of an expert in child sexual abuse dynamics at Jones’ trial for CSC with a minor and lewd act on a minor. The trial court allowed her testimony on delayed reporting and behavior of nonoffending caregivers. On appeal from his convictions, Jones challenged the qualifications and testimony of the expert.</p> <p>The Supreme Court reiterated that a trial court determining whether to admit expert testimony must make three inquiries: (1) whether the evidence will assist the trier of fact; (2) whether the expert has acquired the requisite knowledge and skill to qualify as an expert in that particular subject matter, and (3) whether the substance of the testimony is reliable. The admission of an expert's testimony is left to the trial court's exercise of sound discretion, and its ruling will not be disturbed on appeal absent an abuse of discretion (<i>i.e.</i>, unsupported by the evidence or controlled by an error of law).</p> <p>The Court found that delayed disclosure by sexual abuse victims and the behavior of nonoffending caregivers</p>

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	<p>both deal with behavioral characteristics of sexual abuse victims and is an area of specialized knowledge where expert testimony may be utilized. In addressing Jones’ argument that there was no evidence that the expert’s testimony was accurate or reliable, the Court noted the expert testified that peer review journals and trade publications served as the basis for her opinions and that she had given numerous presentations on both behavioral characteristics. Justice Hearn noted that Jones “conflate[d] reliability with perfection.”</p> <p>The Court rejected Jones’ challenges to the qualification and testimony of the expert.</p>
<p><i>State v. Simmons</i>, 423 S.C. 552, 816 S.E.2d 566 (2018) (Op. No. 27819 (S.C. Sup. Ct. June 27, 2018)).</p> <p>(Topics: Hearsay)</p>	<p>At Simmons’ trial for the sexual assault of his twin sons when they were approximately nine years old, the State called the boys’ doctor to the stand. Dr. Simmons was qualified as an expert in pediatric medicine. The State asked Dr. Simmons to say what Minor 1 told him happened. The defense objected to anything other than the child’s disclosure date and time as inadmissible hearsay, and the State countered that it was admissible as statements for medical diagnosis. The trial court overruled the objection and the doctor testified that Minor 1 said that Simmons watched porn and made them “suck his penis” and promise not to tell anyone. There was no physical evidence of trauma or abuse. Simmons was convicted and appealed his convictions; the Court of Appeals affirmed and the Supreme Court granted a writ of certiorari.</p> <p>The Court reviewed the hearsay rule and medical diagnosis exception.</p> <p>The primary method of providing corroborating testimony regarding an alleged sexual assault is through the specific rule created for CSC cases – Rule 801(d)(1)(D), SCRE. <i>See id.</i>, Note (“Subsection (D), which is not contained in the federal rule, was added to make admissible in criminal sexual conduct cases evidence that the victim complained of the sexual assault, limited to the time and place of the assault.”). This rule “limits corroborating testimony ... to the time and place of the assault(s)” and considers it to be nonhearsay whereas “any other details or particulars, including the perpetrator's identity,” are generally considered hearsay and must be excluded unless they fall within an exception. <i>Thompson v. State</i>, 423 S.C. 814, 814 S.E.2d 487 (2018) (citation omitted).</p> <p>Thus, should the proponent desire more information beyond the permissible “time and place”</p>

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	<p>evidence, a rule or statute must allow for the admission of the additional evidence. Typically, as in this case, the additional evidence constitutes hearsay. Rule 801, SCRE. “Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Rule 801(c), SCRE. “Hearsay is inadmissible except as provided by the South Carolina Rules of Evidence, by other court rule, or by statute.” <i>State v. Jennings</i>, 394 S.C. 473, 478, 716 S.E.2d 91, 93 (2011) (citing Rule 802, SCRE). After an objection is raised, the proponent of hearsay testimony has the burden of showing it fits appropriately within a hearsay exception. At issue here is whether Dr. Simmons' testimony, which relayed statements far beyond the time and place of the alleged sexual assaults, falls within the hearsay exception regarding “[s]tatements made for purposes of medical diagnosis or treatment.” Rule 803(4), SCRE.</p> <p>This hearsay exception requires that the statements be provided for the purpose of and be reasonably pertinent to medical diagnosis or treatment. Rule 803(4), SCRE. Rule 803(4), SCRE, may well apply in a CSC case, but there must be a nexus between the information provided by the patient and the diagnosis or treatment of the patient. For example, after recent trauma, these type of statements can provide the doctor with specific areas to focus on or specific conditions to search for when performing the diagnostic physical exam and are reasonably pertinent to diagnosis or treatment. In this regard, “a statement that the victim had been raped or that the assailant had hurt the victim in a particular area would be pertinent to the diagnosis and treatment of the victim.” <i>State v. Burroughs</i>, 328 S.C. 489, 501, 492 S.E.2d 408, 414 (Ct. App. 1997). However, “[a] doctor's testimony as to history should include only those facts related to him by the victim upon which he relied in reaching his medical conclusions. The doctor's testimony should never be used as a tool to prove facts properly proved by other witnesses.” <i>State v. Brown</i>, 286 S.C. 445, 447, 334 S.E.2d 816, 817 (1985); <i>see also</i> Rule 803(4), SCRE, Note (stating a “physician's testimony should include only those statements related to him by the patient upon which the physician relied in reaching medical conclusions” (citing <i>State v. Camele</i>, 293 S.C. 302, 360 S.E.2d 307 (1987)).</p>

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	<p><i>Id.</i>, 423 S.C. at 564-565, 816 S.E.2d at 572-573. The Court found that Dr. Simmons testimony about the Minors’ identification of Simmons as their assailant and other details did not fall within the exception for statements made for the purpose of medical diagnosis.</p> <p style="padding-left: 40px;">This Court will not sanction the State's use of Dr. Simmons as a conduit for this glaringly inadmissible hearsay to be brought before the jury. If this tactic were permitted, the legitimate use of the Rule 803(4), SCRE, medical diagnosis and treatment exception would be undermined and the general approach of Rule 801(d)(1)(D), SCRE, would be thwarted. As aptly noted by Petitioner's appellate counsel during oral argument, Dr. Simmons' recounting of Minor 1's statements amounted to nothing more than “hearsay shrouded in a doctor's white coat.”</p> <p><i>Id.</i>, 423 S.C. at 565, 816 S.E.2d at 573. Because the only evidence presented by the State was the testimony of the children and other hearsay evidence of their accounts, the error was found to be prejudicial, the convictions reversed, and the case remanded for a new trial.</p>
<p><i>State v. Dill</i>, 423 S.C. 534, 816 S.E.2d 557 (2018) (Op. No. 27816 (S.C. Sup. Ct. June 20, 2018)).</p> <p><i>(Topics: Search & Seizure; Probable Cause)</i></p>	<p>The Sheriff’s Department requested a search warrant for Dill’s residence. The affidavit stated:</p> <p style="padding-left: 40px;">Laurens County Sheriff's Office has received information in the last 72 hours that at the above listed location an active methamphetamine lab is in operation. A confidential informant working in an undercover capacity with the Laurens County Sheriff's Office was at this location and did see numerous items that are used in the manufacturing of methamphetamine.</p> <p><i>Id.</i>, 423 S.C. at , 816 S.E.2d at . The officer who appeared before the magistrate supplemented the affidavit with oral testimony that the person who provided information to him was reliable and had been used in two other cases where arrests had been made.</p> <p>The affidavit also included the following items as the property sought to be recovered from the residence:</p> <p style="padding-left: 40px;">Any and all items of evidentiary value to include but not limited to ephedrine based medications, lithium strips and any and all parts of lithium batteries, bottles, tubing, hydrogen</p>

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	<p>peroxide, salt, cold packs and contents of such, toluene, liquid drain cleaner, and any currency, firearms, surveillance equipment electronic and otherwise, and any and all other items that could be used in the illegal manufacturing, distribution, or cultivation of illegal narcotics.</p> <p>Id., 423 S.C. at , 816 S.E.2d at . When executing the warrant, the officers seized some items that could be used to manufacture methamphetamine, but other items commonly used in the manufacturing process were not found. Dill was arrested for manufacturing methamphetamine. The trial court denied Dill’s motion to suppress the evidence seized because the warrant was not supported by probable cause, and because the State failed to reveal the identity of its informant. On appeal, the Court of Appeals upheld the trial court’s ruling.</p> <p>The Supreme Court granted a writ of certiorari to review the Court of Appeals’ decision. Noting the affidavit, as supplemented by the officer’s oral testimony, arguably gave the magistrate a sufficient basis to conclude the information attributed to the informant was likely true, the Court said that that was not the end of the inquiry. The magistrate must then determine, based on the information attributed to the informant, whether there was a substantial basis for concluding that probable cause existed for a search of the residence. Here, because the conclusory statement that an active lab was present in the residence was not attributable to the informant or any other particular source and there was no independent corroboration of this information, the affidavit was insufficient to support a finding of probable cause and the warrant was invalid.</p>
<p><i>State v. Lamar Sequan Brown</i>, 423 S.C. 519, 815 S.E.2d 761 (2018) (Op. No. 27814 (S.C. Sup. Ct. June 13, 2018))</p> <p>Topics: Search & Seizure (cell phone)</p>	<p>Brown left his cell phone behind when he committed a burglary. It was collected as evidence; after it sat in the evidence for six days, a detective retrieved it and, considering it to be abandoned property, guessed the screen code and opened the phone without a warrant. At trial, evidence of and from the phone was introduced over Brown’s Fourth Amendment challenge.</p> <p>Abandoned property has no protection under either the search or seizure provisions of the Fourth Amendment, and the unique character of cell phones (from <i>Riley v. California</i>, 134 S. Ct. 2473 (2014): cell phones hold the “privacies of life”; the data on and from a cell phone can reveal a person’s movements; and a search of a cell phone will typically expose far more than a search of a home) is one factor a trial court should consider when determining whether the owner has relinquished his expectation of privacy.” Here, the Court</p>

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	<p>found that Brown abandoned the phone – meaning no search warrant was necessary to access it – because he took no steps to continue to assert his privacy expectation in the phone or reclaim it. (He did not try to call or text his phone, have the service provider try to determine its whereabouts, went back to the scene or called the police to see if they had it; instead he cancelled his service to the phone.)</p>
<p><i>State v. Timothy Artez Pulley</i>, 423 S.C. 371, 815 S.E.2d 461 (2018) (Op. No. 27811 (S.C. Sup. Ct. June 6, 2018))</p> <p>Topics: Chain of Custody</p>	<p>At Pulley’s trial for trafficking in cocaine, the</p> <p>After picking up his girlfriend’s car from a paint shop, Pulley was stopped by two officers for speeding. When Pulley got out of the car Officer Craven recognized him and knew he was DUS. They attempted to arrest him, but he struggled. During the struggle, his pants came off; before returning them, they searched them and found marijuana. Deciding to impound the car, the officers inventoried it and found a grocery gad on the floor behind the driver’s seat that contained three separate plastic bags containing a total of 16.5 grams of cocaine. Pully was indicted and brought to trial for trafficking in cocaine.</p> <p>At trial, Officer Craven testified that after the drugs were discovered, they were placed in evidence inside the police department. Officer Brewer testified that he did not take the drugs from scene; while he could not remember how the drugs got from the scene to the department, he recollected that Craven took them. The evidence custodian testified that the drugs were not delivered to him in person even though the chain of custody form indicated they were; he said the form indicated Craven placed the drugs in the lockbox from which he retrieved them. He explained the form asked whether the custodian received the evidence in person or by mail, and it was standard procedure to write in person.</p> <p>The defense challenged the chain of custody. Brewer’s dash cam video revealed that Craven drove off while the drugs were still on the hood of Brewer’s car. Brewer was recalled and said that, after watching the video, he remembered that he had the drugs when he left the scene and turned them over to Craven, but he did not sign any paperwork to that effect and the dashcam did not show that.</p> <p>The Court found the chain of custody to be insufficient.</p> <p>“[T]his Court has long held that a party offering into evidence fungible items such as drugs or</p>

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	<p>blood samples must establish a complete chain of custody as far as practicable.”</p> <p>Where multiple people have handled the analyzed substance, “the identity of individuals who acquired the evidence and what was done with the evidence between the taking and the analysis must not be left to conjecture.” “Testimony from each custodian of fungible evidence, however, is not a prerequisite to establishing a chain of custody sufficient for admissibility.” “Where other evidence establishes the identity of those who have handled the evidence and reasonably demonstrates the manner of handling of the evidence, our courts have been willing to fill gaps in the chain of custody due to an absent witness.”</p> <p>“Proof of chain of custody need not negate all possibility of tampering so long as the chain of possession is complete.” “In applying this rule, we have found evidence inadmissible only where there is a missing link in the chain of possession <i>because the identity of those who handled the [substance] was not established at least as far as practicable.</i>”</p> <p>(Citations omitted; emphasis in original.) <i>Id.</i>, 423 S.C. at 377, 815 S.E.2d at 464.</p> <p>Although a perfect chain of custody is not required, a sufficient chain of custody requires more than the State presented in this case. Here, the express denial of handling the cocaine by Brewer, followed by a stipulation of a missing link by the State, the subsequent reversal by Brewer that he did in fact take the cocaine from the scene, coupled with the State's failure to produce testimony from Craven indicating how he obtained possession of the cocaine after the drugs were seen on the hood of Brewer's car, equates to conjecture. As a result, the chain of custody was not sufficiently established as far as practicable.</p> <p>(Citations omitted.) <i>Id.</i>, 423 S.C. at 378-379, 815 S.E.2d at 465. Pulley’s conviction was reversed.</p>
<p><i>State v. Venancio Diaz Perez</i>, 423 S.C. 491, 816 S.E.2d 550 (2018) (Op. No. 27810 (S.C. Sup. Ct. June 6, 2018))</p>	<p>The Supreme Court upheld the Court of Appeals’ ruling that the failure to allow the defense in a child sexual assault case to question the mother of the 404(B) witness (the mother of a second child sexually assaulted by Perez, but not the victim of the indicted CSC and lewd acts counts) about knowledge of and application for a U-visa constituted a violation of Perez’s Sixth Amendment confrontation rights by restricting his ability to</p>

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<p>Topics: Evidence (U visa as evidence going to credibility)</p>	<p>engage in appropriate cross-examination to show bias on the part of a witness. However, the Supreme Court disagreed with the Court of Appeals' determination that the error in the limitation of cross was harmless. Specifically noting the failure to admit evidence of a witness' U visa does not automatically equate to reversible error, the Court found the error in Perez's case to be particularly significant due to the lack of physical evidence and the victim's conflicting testimony.</p> <p><i>NOTE: The U nonimmigrant status (U visa) was created by Congress to strengthen the ability of federal, state, and local governments to investigate and prosecute certain designated crimes (including rape, sexual assault, and abusive sexual contact), to protect victims of those crimes who have suffered substantial mental or physical abuse as a result and who are willing to assist with the investigation and prosecution of the crimes; and to assist law enforcement agencies in better serving victims of crime. To apply for U nonimmigrant status, the required form must be submitted by the victim or someone petitioning on the victim's behalf. A valid petition must include the certification, of a federal, state or local government agency investigating or prosecuting a qualifying criminal activity, that the victim has been, is being, or will likely be helpful in the investigation or prosecution of the criminal activity of which he or she was a victim. A petition may also be submitted for eligible family members to obtain U nonimmigrant status. A U visa holder may be eligible to apply for a Green Card if he or she meets certain requirements, including being physically present in the United States for a continuous period of at least three years while in U nonimmigrant status and not having unreasonably refused to provide assistance to law enforcement since receiving the U visa. See https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status.</i></p>
<p><i>State v. Greene</i>, 423 S.C. 263, 814 S.E.2d 496 (2018) (Op. No. 27802 (S.C. Sup. Ct. May 23, 2018)).</p> <p>(Topics: Search & Seizure; Inventory Searches)</p>	<p>Greene's 46-day-old baby died as a result of respiratory insufficiency secondary to synergistic drug intoxication. Because the baby's body had no needle marks, the pathologist testified the only way the baby could have gotten the lethal level of morphine as was found was for it have been taken orally. Another expert talked about the passing of morphine and other drugs through breastmilk to a nursing baby, the danger posed by such drugs to nursing babies, and the inability of babies to metabolize drugs. Evidence was presented that Greene, a former nurse, was addicted to pain medications and took morphine and other pain medications while pregnant and after the baby's birth while breastfeeding her. Greene did not tell the doctors from whom she obtained the morphine and other prescriptions that she was pregnant and she did not tell her OB/GYN that she was taking the drugs. When Greene admitted to law enforcement that she had a drug addiction, she</p>

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	<p>said that she did not tell her doctors because she was afraid that they'd take her off the morphine. The prescription bottles found at her house contained warnings that the drugs should not be taken by pregnant or breastfeeding women because of danger of the drugs passing through the mother's milk to the baby. Greene was convicted and sentenced to 20 years for homicide by child abuse, a concurrent 5 years for involuntary manslaughter, and a concurrent 5 years for unlawful conduct toward a child. She appealed.</p> <p>The Court first rejected Greene's assertion that the trial court should have granted a directed verdict on all charges because the State failed to produce any evidence that the morphine found in the baby came from her breast milk. Finding the evidence sufficient, when viewed in the light most favorable to the State, to support the elements of the crimes with which Greene was charged, the Court upheld the denial of the directed verdict motions.</p> <p>Greene challenged her convictions for both homicide by child abuse and involuntary manslaughter for the single homicide could not stand. The Court found that there was no indication that the legislature, while manifestly authorizing multiple homicide charges for a single homicide, authorized multiple punishments for defendant who commits a single homicide. The Court held that it would follow the prevailing rule that "one homicide is limited to one homicide punishment per defendant." <i>Id.</i>, 423 S.C. at 280, 814 S.E.2d at 505. Rejecting the State's argument that Greene did not receive multiple punishments for the homicide because the sentence on the involuntary conviction was imposed concurrently, the Court held that the conviction itself is a punishment that must be vacated.</p> <p>The Court rejected a similar challenge to the unlawful conduct toward a child because it was an entirely separate offense that was complete before the baby's death.</p> <p>The convictions and sentences for homicide by child abuse and unlawful conduct toward a child were upheld, and the conviction and sentence for involuntary manslaughter was vacated.</p>
<p><i>State v. Miller</i>, 423 S.C. 95, 814 S.E.2d 166 (2018) (Op. No. 27798 (S.C. Sup. Ct.</p>	<p>Miller was stopped after parking on a private driveway, and arrested for driving with a suspended driver's license. The police department's procedures permitted its officers to tow vehicles when the driver is arrested away from his residence and there is no responsible party present at the scene. The department's written policy also required officers to conduct an inventory of the passenger compartment of any towed vehicle.</p>

CASE/RULE <i>with Topic(s) for which Chosen</i>	HOLDING
<p>May 9, 2018).</p> <p><i>(Topics: Search & Seizure; Inventory Searches)</i></p>	<p>Officers determined that the owner of the car did not live in the house belonging to the driveway on which Miller was stopped. Because Miller was arrested away from his residence and the owner of the car was not present at the scene, the officers requested a tow truck to tow the car. Before it, officers conducted an inventory search and found just under five grams of crack cocaine under the driver's seat. At his trial and on appeal, Miller argued the drugs, should have been suppressed because the police did not have authority to tow the car from a private driveway.</p> <p>In deciding the validity of an inventory search, the first determination should be whether the inventoried vehicle was in the validly seized. Here, the Supreme Court found the car was seized and towed pursuant to lawful authority, and that the officers acted in accordance with (and did not violate) written police department policy that had been adopted pursuant to a city ordinance.</p> <p>Further, the Court determined the inventory was not unreasonable as it served a legitimate purpose and was conducted pursuant to a valid standardized procedure.</p>
<p><i>State v. Melvin Vernon Beaty, Jr.</i>, 423 S.C. 26, 813 S.E.2d 502 (2018) (Op. No. 27693) (S.C. Sup. Ct. April 25, 2018))</p> <p>Topic: Jury Instructions</p>	<ul style="list-style-type: none"> • Jury Instruction on Role of Jury <p>“[A] trial judge should refrain from informing the jury, whether through comments or through a charge on the law, that its role is to search for the truth, or to find the true facts, or to render a just verdict. These phrases could be understood to place an obligation on the jury, independent of the burden of proof, to determine the circumstances surrounding the alleged crime and from those facts alone render the verdict the jury believes best serves its perception of justice. We instruct trial judges to avoid these terms and any others that may divert the jury from its obligation in a criminal case to determine whether the State has proven the defendant's guilt beyond a reasonable doubt.” (Footnote omitted.) <i>Id.</i>, 423 S.C. at 34, 813 S.E.2d at 506.</p> • Closing Argument <p>The Court reviewed the current common law rules governing closing argument in criminal cases.</p> <p style="text-align: center;">Our current closing argument rules consist of the following</p>

CASE/RULE <i>with Topic(s) for which Chosen</i>	HOLDING
	<p>patchwork: Pursuant to the common law rule pronounced in <i>Brisbane</i> and as clarified in <i>Garlington</i>, in cases in which no defendant introduces evidence, the defendant(s) have the right to open and close, but may waive the right to both or may waive opening and present full argument after the State's closing argument. Pursuant to the common law rule set forth in <i>Huckie</i>, if two or more defendants are jointly tried, if any one defendant introduces evidence, the State has the final closing argument. Pursuant to the common law rule as clarified in <i>Gellis</i>, in cases in which a defendant introduces evidence of any kind, even through a prosecution witness, the State has the final closing argument. However, in cases in which the State is entitled to the reply argument, there is no common law or codified rule as to whether the State must open in full on the law, or the facts, or both, or neither, and there is no rule governing the content of the State's reply argument.</p> <p><i>Id.</i>, 423 S.C. at 43, 813 S.E.2d at 511. The Court later, however, in its concluding paragraphs made the following statements.</p> <p>Currently, there is no rule governing the content and order of closing arguments in criminal cases in which a defendant introduces evidence, except for the "constitutional rule" that a defendant's right to due process cannot be violated at any stage of a trial. Consequently, trial judges must, on a case-by-case basis, ensure that a defendant's due process rights are not violated during the closing argument stage. Absent authority to formally adopt procedural rules, our authority — and the authority of the trial court — is but to address due process considerations as they arise. In cases in which a defendant introduces evidence, trial judges clearly have the authority</p>

<p style="text-align: center;">CASE/RULE <i>with Topic(s) for which Chosen</i></p>	<p style="text-align: center;">HOLDING</p>
	<p style="text-align: center;">to require the State to open in full on the facts and the law and have the authority to restrict the State's reply argument to matters raised by the defense in closing. This authority remains in keeping with the trial judge's authority to ensure that a defendant's due process rights are not violated during a criminal trial.</p> <p><i>Id.</i>, 423 S.C. at 46, 813 S.E.2d at 513-514.</p> <p>While acknowledging its inability to change or adopt a closing argument rule without first going through the constitutionally mandated legislative procedure, the Court stated that “clearly stated rules governing the content and order of closing argument are required.</p> <p><i>Please note that this is the opinion on rehearing (the original opinion no. 27693 was issued on December 29, 2016), and it is substantively different than the original on the closing argument issue.</i></p>
<p>Submitted Changes to Rule 13(a), SCRCrimP (S.C. Sup. Ct. Order dated January 31, 2018)</p>	<p>The Supreme Court submitted the following change to Rule 13(a), SCRCrimP (the subpoena rule) to the Senate and House Judiciary Committees on January 31.</p> <p>(a)(1) Issuance of Subpoenas. Upon the request of any party, the clerk of court shall issue subpoenas or subpoenas duces tecum for any person or persons to attend as witnesses in any cause or matter in the General Sessions Court. An attorney, as an officer of the court, may also issue and sign subpoenas or subpoenas duces tecum for any person or persons to attend as witnesses in any cause or matter in the General Sessions Court. The subpoena shall state the name of the court, the title of the action, and shall command each person to whom it is directed to attend and give testimony, or otherwise produce documentary evidence at a specified court proceeding. The subpoena shall also set forth the name of the party requesting the appearance of such witness and the name of counsel for the party, if any. The clerk of court or attorney issuing the subpoena shall utilize a court-approved</p>

CASE/RULE <i>with Topic(s) for which Chosen</i>	HOLDING
	<p>subpoena form.</p> <p>(2) Issuance of Subpoena for Personal or Confidential Information About a Victim. A subpoena requiring the production of personal or confidential information about a victim may be served on a third party only by court order. Before entering the order and unless there are exceptional circumstances, the court must require giving notice to the victim so that the victim can move to quash or modify the subpoena or otherwise object.</p> <p>In the Note accompanying the Rule, the Court provided the following explanation of/for the amendment.</p> <p>The 2019 amendment provides that an attorney is also authorized to issue and sign a subpoena on behalf of a court in which that attorney is licensed to practice. The amendment also makes clear that subpoenas may only be issued to summon a witness to appear or present documentary evidence at a court proceeding. The rule allowing an attorney to issue and sign a subpoena does not apply to any request for a subpoena for a witness located in another state, which is governed by the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings. See S.C. Code. Ann. §§ 19-9-10 et seq. (2014). New paragraph (a)(2) adopts a version of the federal rule intended to provide a protective mechanism when the defense subpoenas a third party to provide personal or confidential information about a victim. The amendment requires judicial approval before service of a subpoena seeking personal or confidential information about a victim from a third party.</p> <p>The amendments will become effective 90 calendar days after submission unless disapproved by concurrent resolution of the General Assembly, with the concurrence of three-fifths of the members of each House present and voting.</p>



South Carolina Bar

Continuing Legal Education Division

**28th Annual Criminal Practice in
South Carolina**

Friday, February 22, 2019

**Federal Criminal Practice: Significant
Developments in 2018**

Review of Significant Developments in Federal Criminal Law and Practice (January 2018 – January 2019)

The following 2018-2019 federal court opinions, legislative actions, federal rule changes (or proposals), sentencing guideline amendment (or proposed amendment), and/or agency policies are those the panel believe are the most significant developments in criminal law and practice issued during that period. Included is a summary of why the development is believed to be significant. During the panel discussion, the panel will address how these developments have impacted or will impact criminal practice in the federal courts in South Carolina. The summaries and discussion are intended to be neutral.

DEVELOPMENT (Legislation, Case, etc.)	WHY SIGNIFICANT	SUMMARY
LEGISLATION		
First Step Act of 2018, P.L. 115-391 (Dec. 21, 2018)	Sentencing Reform	Section 401. Reduce and restrict enhanced sentencing for prior drug offenses. Section 402. Broadening of existing safety valve Section 403. Clarification of section 924(c) of title 18 USC Section 404. Application of Fair Sentencing Act impacts 120 cases in the District of South Carolina, if not more. Reduced mandatory minimum terms for 841 convictions, redefined qualifying convictions under 851, expanded relief under the safety valve, retro-active application of the fair sentencing act
CASES		
ACCA PREDICATE CONVICTIONS		
<u>Stokeling v. United States</u> , 139 S. Ct. 544 (2019)	Defines “physical force” for ACCA’s scope	Physical force for the ACCA is the kind of force necessary to overcome resistance by a victim; it is different than the “slightest offensive touching” that would not qualify under <u>Johnson v. United States</u> , 559 U.S. 133 (2015). Robbery under Florida law, which requires only such force as is necessary to overcome the victim's resistance, qualifies as an

DEVELOPMENT (Legislation, Case, etc.)	WHY SIGNIFICANT	SUMMARY
		ACCA predicate under the force clause
<u>United States v. Stitt</u> , 139 S. Ct. 399 (2018)	Supreme Court decision impacting ACCA predicate convictions	Ruled that the generic definition of "burglary" includes vehicles or other "non-typical structures" such as watercraft that are adapted or commonly used for overnight lodging
<u>United States v. Fluker</u> , 891 F.3d 541 (4 th Cir. 2018).	Georgia robbery was not a crime of violence.	Prohibits a Georgia robbery from being a crime of violence to count as a predicate offense in a career offender designation.
<u>United States v. Marshall</u> , 747 Fed. Appx 139 (4 th Cir. 2018) <u>United States v. Sulton</u> , 740 Fed. Appx (4 th Cir 2018)	4 th Circuit decision impacting ACCA/guideline Predicate convictions	Ruled that the alternative language in S.C. Code §§ 44-53-445 and -370 creates a divisible offense, which is subject to the modified categorical approach. Although these statutes prohibit conduct -- purchasing -- that would not qualify as a federal sentencing predicate, the court may consult Shepard-approved documents to determine whether the defendant was convicted of other, qualifying offenses under these statutes. Identified SC Sentence Sheets as Sheppard-approved documents
<u>United States v. Furlow</u> , #18-4531, oral argument March, 2019	South Carolina Code §44-53-375(B)(1), as held by the district court was not an ACCA or Career Offender predicate.	Government appeal of the district court's statutory interpretation the offense was not an ACCA or Career Offender predicate because it encompassed mere purchasing of the drug and that the other ways of committing the offense were not divisible from mere purchasing.
<u>United States v Hodge</u> , 902 F.3d 420 (4 th Cir. 2018)	4 th Circuit decision impacting ACCA Predicate convictions	Ruled that when an ACCA sentence is vacated on appeal, the government may not propose previously unused predicates on remand.
<u>United States v. Simms</u> , 2019 WL 311906 (No. 15-4640) (4 th Cir. 1-24-2019)(<i>en banc</i>)	Holds 18 U.S.C. §924(c)(3)(B) unconstitutionally vague	Defendant was convicted of brandishing a firearm in connection with a crime of violence. Ruled that (1) the residual clause of 18 USC §924(c)(3)(B) is void for vagueness; (2) the categorical approach applies to §924(c); and (3) conspiracy to commit Hobbs Act robbery is not a crime of violence under§ 924(c)(3)(B)

DEVELOPMENT <i>(Legislation, Case, etc.)</i>	WHY SIGNIFICANT	SUMMARY
<u>US v. Davis</u> , U.S.S. Ct. No. 18-431 (Decision below: 903 F.3d 483 (5 th Cir. 2018))		The Supreme Court just granted certiorari on the exact same issue of <u>U.S. v. Simms</u> , on January 4, 2019. <u>US v. Davis</u> , No. 18-431. <u>Davis</u> involved a substantive Hobbs Act and a separate conspiracy with two § 924(c) counts. It was a remand to the Fifth Circuit for rehearing after <u>Dimaya</u> . On remand, the government argued for a case-specific approach, as in <u>Simms</u> . The Fifth Circuit found that the categorical approach, and <u>Dimaya</u> , applied, affirmed the substantive Hobbs Act § 924(c) under the force clause, but vacated the conspiracy § 924(c). <u>US v. Davis</u> , 903 F.3d 483 (5th Cir. 2018). The government appealed.
IMMIGRATION		
<u>Sessions v. Dimaya</u> , 138 S. Ct. 1204 (2018).	Residual clause of INA is impermissibly vague	The residual clause in the INA as it defines “crime of violence” defining aggravated felony was impermissibly vague and a violation of due process.
APPEALS - MOOTNESS		
<u>United States v. Ketter</u> , 908 F.3d 61 (4 th Cir. 2018).	Explains when an issue is moot on appeal	A sentence is not moot on appeal even if the custody part is complete if the appeal could alter the length or conditions of supervised release.
HABEAS CORPUS		
<u>United States v. Wheeler</u> , 8886 F.3d 415, 434 (4 th Cir. 2018).	New authority to obtain relief in 28 USC § 2241, habeas corpus.	When §2255 relief is not available, §2241 can be used to seek relief of an erroneously increased mandatory minimum sentence.
<u>Lester v. Flournoy</u> , 909 F.3d 708, 716 (4 th Cir. 2018).	New authority to obtain relief in 28 USC § 2241, habeas corpus.	Allows §2241 for misapplication of career offender guideline as a fundamental defect.
SEARCH & SEIZURE		
<u>Collins v. Virginia</u> , 138 S.	Curtilage search	Automobile exception to the Fourth Amendment’s warrant requirement

DEVELOPMENT (Legislation, Case, etc.)	WHY SIGNIFICANT	SUMMARY
Ct. 1663, 201 L. Ed. 2d 9 (2018)	protected by Fourth Amendment	for searches did not justify police officer's invasion of curtilage of home, for warrantless search of motorcycle covered by a tarp and parked in a partially enclosed top portion of driveway of home.
<u>Carpenter v. United States</u> , 138 S. Ct. 2206 (2018).	Fourth Amendment gives warrant protection before a wireless carrier can give CSLI information.	An individual maintains a legitimate expectation of privacy, for Fourth Amendment purposes, in the record of his physical movements as captured through CSLI.
SENTENCING GUIDELINES		
<u>Koons v. United States</u> , 138 S. Ct. 1783 (2018)	Retroactive guideline amendments	Defendant whose sentence has been reduced below a mandatory minimum based on substantial assistance is not entitled to further reductions if the guideline range is later amended retroactively.
<u>United States v McCollum</u> , 885 f.3d 300 (4 th C.ir 2018)	4 th Circuit decision impacting ACCA/guideline Predicate convictions	Ruled that generic conspiracy, as used in the Sentencing Guidelines, requires an overt act. Since conspiracy to commit murder in aid of racketeering does not require an overt act, the court concluded the conviction was not a crime of violence under the guidelines
<u>United States v Whitley</u> , 737 Fed. Appx 147 (4 th Cir 2018)	4 th Circuit decision impacting ACCA/guideline Predicate convictions	Ruled that drug conspiracies brought under 21 USC § 846 do not qualify as controlled substance offenses under the commentary to USSG § 4B1.2 citing <u>McCollum</u>
<u>Hughes v. United States</u> , 138 S. Ct. 1765 (2018)	Supreme Court decision impacting retroactive guideline amendments	Ruled that "a sentence imposed pursuant to a type-c agreement is 'based on' the defendant's guidelines range" for the purposes of § 3582(c)(2) "so long as that range was part of the framework the district court relied on in imposing the sentence or accepting the agreement," meaning that the agreement does not need to expressly incorporate the guidelines, as long as the range was "part of the framework" used to take the plea



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Legislative Review and Preview: Significant
2018 Legislation, Pre-Filed Bills for 2019, and
Rule Changes

Amie Clifford
Tommy Pope

2018 South Carolina Legislation of Interest to Criminal Practitioners

Act No.	Rat. No.	Bill No.	Summary	Signed	Veto Over. (if applicable)	Effective Date
160	171	S805	Creates and provides for the Department of Children's Advocacy by adding Article 22 to Chapter 11, Title 63. Purpose includes ensuring that children under the care of a state agency, "particularly children served by the child welfare or juvenile justice systems", receive timely, safe, and effective services and safeguarding the health, safety, and well-being of all children receiving service. The department's powers/duties include the investigation of complaints from/about and monitoring of services provided to children in care of a state agency.	5/3/2018		7/1/2019
162	R173	S1041	Creates the new crime of soliciting or obtaining – by deception, intimidation, undue influence, or false, misleading, or deceptive acts or practices – (1) the money or property of a vulnerable adult ; or (2) the personal identifying information of a vulnerable adult for the purposes of committing financial identity fraud or identity fraud.	5/3/2018		5/3/2018
182	R198	S131	Totally re-wrote the crime of " disturbing schools " and created a new crime of " student threats. " Separate summary sheet attached.	5/17/2018		5/17/2018
183	R199	S170	Provides that coroners shall schedule a local child fatality review team to review the death of a child under the age of 18; provides the purpose of and requires confidentiality (and exemption from FOIA of information and records) of the review team; and makes a violation of the mandated confidentiality misdemeanors punishable by a fine of not more than \$500 or imprisonment of not more than six months, or both. (Sections 17-15-140, 17-5-543, and 17-5-544). Also amends Section 17-5-130 to add additional duties for the Coroners Training Advisory Committee, including training, governing qualifications, and performance reviews of coroners and deputy coroners.	5/17/2018		5/17/2018

2018 South Carolina Legislation of Interest to Criminal Practitioners

Act No.	Rat. No.	Bill No.	Summary	Signed	Veto Over. (if applicable)	Effective Date
184	R200	S176	Makes it a crime (misdemeanor) for someone, subject to specified exceptions, to operate an unmanned aerial vehicle (drone) within a horizontal distance of 500 feet or a vertical distance of 250 feet from any local detention center or Department of Corrections facility without written consent from the Jail Administrator of the Detention Center or the Director of the Department of Corrections. A violation is punishable by a fine not to exceed \$500 or imprisonment for not more than 30 days, or both; also provides for forfeiture of the vehicle. (Sections 24-1-300 and 24-5-175).	5/17/2018		5/17/2018
191	R209	S810	Amends several statutes related to pawn brokers and transactions, including Section 40-39-145 that addresses law enforcement seizure of items from pawn brokers, return of seized items to innocent owners, and rights of and process by which pawn brokers can assert rights to seized items. Also amends Section 40-39-160 to provide that it is a misdemeanor (punishable by a fine not to exceed \$500 or imprisonment for not more than 30 days, or both) for a pawnbroker to knowingly and intentionally violates the provisions of Section 40-39-90 (pertaining to accessibility to records by law enforcement, court officials, and the Department of Consumer Affairs, and the confidentiality of loan records).	5/17/2018		90 days from 5/17/2018
204	R222	S959	Reduces the maximum term of imprisonment that may be imposed for a first offense violation of Section 16-11-770(B) (illegal graffiti vandalism) from 90 days to 30 days. NOTE: There is no savings clause in the Act, which means that persons charged with a first offense violation of 16-11-770(B) for conduct that occurred prior to May 17, 2018, should be sentenced under the new lower sentence.	5/17/2018		5/17/2018

2018 South Carolina Legislation of Interest to Criminal Practitioners

Act No.	Rat. No.	Bill No.	Summary	Signed	Veto Over. (if applicable)	Effective Date
214	R252	H4458	Amended litter statute (Section 16-11-700) to specifically cover cigarette butts and component litter, reduce the minimum fines, reduce maximum sentence, and provide some exceptions for discarding of dead fish, game, or wildlife.	5/18/2018		5/18/2018
238	R238	H3329	Made some changes to statutes dealing with human trafficking including definitions and the elements of the offense of trafficking in persons.	5/17/2018		5/17/2018
222	R264	H4705	This legislation added “clerical or nonclerical religious counselors who charge for services” to the list of mandated reporters of child abuse and neglect in Section 63-7-310(A); amended Section 63-7-310(C) and (D) to provide that the duty to report by a mandated reporter is not relieved by either reporting to a supervisor or person in charge of a school, institution, facility, or institution or by an internal investigation conducted by a school, institution, facility, or institution; and added Section 63-7-310(E) clarifying that a person under the age of 18 is not a mandatory reporter even if he or she falls into a mandated reporter category.	5/18/2018		5/18/2018
254	R237	H3209	In this Act, the General Assembly made numerous changes to expungements of criminal records, including the addition of 1 st offense simple possession or PWID as expungable offenses (see newly created Section 22-5-930), clarification that a CDV 1 st offense conviction is expungable under certain circumstances, clarification that out-of-state convictions can render a person’s conviction ineligible for expungement, and clarification the one expungement per person provision of Section 22-5-910. In addition, in Sections 22-5-910, 22-5-920, and 63-19-2050, the General Assembly provided for the expungement of multiple convictions provided that the person “received sentences at a single sentencing proceeding that are closely	n/a	6/27/2018	6 months from 6/27/2018

2018 South Carolina Legislation of Interest to Criminal Practitioners

Act No.	Rat. No.	Bill No.	Summary	Signed	Veto Over. (if applicable)	Effective Date
			<p>connected and arose out of the same incident may be considered as one offense and treated as one conviction for expungement purposes.”</p> <p>NOTE: There is no savings clause in the Act, which means that persons convicted of crimes before it was enacted will receive the benefit of it (in addition, language was added to Sections 17-22-910 and 22-5-910 that provides they apply retroactively).</p>			
262	292	3789	<p>Authorizes the expungement of a conviction falling under S.C. Code Sections 22-5-910, 22-5-920, 34-11-90(e), and 56-5-750(F)) for a person who has completed the South Carolina Youth Challenge Academy and the South Carolina Jobs Challenge Program administered by the South Carolina Army National Guard. The new statute, Section 17-22-1010, says, in Subsection (A) that the person may apply for expungement immediately upon graduation and successful completion of the South Carolina Youth Challenge Academy and the South Carolina Jobs Challenge Program, but in Subsection (B) it provides that the circuit court may issue an expungement order if the person has had no other conviction “during the approximately one-year period as provided in subsection (A).” Because subsection (A) does not mention any period of time when an expungement order may be issued is subject to different interpretations.</p>	7/2/18		7/2/18



SOUTH CAROLINA COMMISSION ON PROSECUTION COORDINATION

Review of 2018 Act No. 182 (R198, S131) Disturbing Schools by Nonstudents & Student Threats

2018 Act No. 182, which was effective May 17, 2018, made two changes to the South Carolina Code of Laws – it totally changed the crime of “disturbing schools” and it created a new crime of “student threats.”

TOTAL REVISION OF CRIME OF “DISTURBING SCHOOLS”

The Act amended **Section 16-17-420** to totally **REVISE THE CRIME OF DISTURBING SCHOOLS** so that it now only applies to nonstudents (see below for more information) and prohibits much more specific conduct than the previous statute.

Section 16-17-420.

(A) It is unlawful for a person who is not a student to wilfully interfere with, disrupt, or disturb the normal operations of a school or college in this State by:

- (1) entering upon school or college grounds or property without the permission of the principal or president in charge;
- (2) loitering upon or about school or college grounds or property, after notice is given to vacate the grounds or property and after having reasonable opportunity to vacate;
- (3) initiating a physical assault on, or fighting with, another person on school or college grounds or property;
- (4) being loud or boisterous on school or college grounds or property after instruction by school or college personnel to refrain from the conduct;
- (5) threatening physical harm to a student or a school or college employee while on school or college grounds or property; or
- (6) threatening the use of deadly force on school or college property or involving school or college grounds or property when the person has the present ability, or is reasonably believed to have the present ability, to carry out the threat.

(B) For the purpose of this section, ‘person who is not a student’ means a person who is not enrolled in, or who is suspended or expelled from, the school or college that the person interferes with, disrupts, or disturbs at the time the interference, disruption, or disturbance occurs.

(C) Any person who violates a provision of this section is guilty of a misdemeanor and, upon conviction, must be fined not more than two thousand dollars or imprisoned for not more than one year, or both.

As amended, the statute only applies to persons who are not students. The statute defines “person who is not a student” as someone who is not enrolled in or who is suspended/expelled from the school upon whose property the conduct occurs. The statute does not specify any minimum time for which the person must have been suspended or expelled.

NOTE: The Legislation includes a savings clause preserving existing liabilities and penalties (which means that it does not apply to conduct occurring before May 17, 2018, and that **the pre-amendment version of Section 16-17-420 applies to conduct occurring before May 17, 2018**).

NEW CRIME OF “STUDENT THREATS”

The Act also created a new statute, **Section 16-17-425**, creating the **NEW** crime of “**STUDENT THREATS.**”

Section 16-17-425.

(A) It is unlawful for a student of a school or college in this State to make threats to take the life of or to inflict bodily harm upon another by using any form of communication whatsoever.

(B) Nothing contained in this section may be construed to repeal, replace, or preclude application of any other criminal statute.

This new crime of “student threats” cannot apply to conduct occurring prior to the effective date of the Act.

Punishment and Jurisdiction for Section 16-17-425: Because the Legislature did not specify a penalty for Section 16-17-425, it is – under Section 17-25-30 and the case law interpreting it and its predecessor (*State v. Simms*, 412 S.C. 590, 774 S.E.2d 445 (2015); *State v. Hill*, 254 S.C. 321, 175 S.E.2d 227 (1970)) – punishable by up to 10 years imprisonment. As such, it is a General Sessions level offense for which an arrest warrant must be issued unless it is committed in the presence of a law enforcement officer.

The Supreme Court of South Carolina

Re: Amendments to Rule 13(a), South Carolina Rules of
Criminal Procedure

Appellate Case No. 2017-001233

ORDER

Pursuant to Article V, § 4 of the South Carolina Constitution, Rule 13(a) of the South Carolina Rules of Criminal Procedure is amended as set forth in the attachment to this order. This 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, 2019

Rule 13(a), South Carolina Rules of Criminal Procedure, is amended to provide as follows:

**RULE 13
SUBPOENAS**

(a)(1) Issuance of Subpoenas. Upon the request of any party, the clerk of court shall issue subpoenas or subpoenas duces tecum for any person or persons to attend as witnesses in any cause or matter in the General Sessions Court. An attorney, as an officer of the court, may also issue and sign subpoenas or subpoenas duces tecum for any person or persons to attend as witnesses in any cause or matter in the General Sessions Court. The subpoena shall state the name of the court, the title of the action, and shall command each person to whom it is directed to attend and give testimony, or otherwise produce documentary evidence at a specified court proceeding. The subpoena shall also set forth the name of the party requesting the appearance of such witness and the name of counsel for the party, if any. The clerk of court or attorney issuing the subpoena shall utilize a court-approved subpoena form.

(2) Issuance of Subpoena for Personal or Confidential Information About a Victim. A subpoena requiring the production of personal or confidential information about a victim may be served on a third party only by court order. Before entering the order and unless there are exceptional circumstances, the court must require giving notice to the victim so that the victim can move to quash or modify the subpoena or otherwise object.

Note to 2019 Amendment:

The 2019 amendment provides that an attorney is also authorized to issue and sign a subpoena on behalf of a court in which that attorney is licensed to practice. The amendment also makes clear that subpoenas may only be issued to summon a witness to appear or present documentary evidence at a court proceeding. The rule allowing an attorney to issue and sign a subpoena does not apply to any request for a subpoena for a witness located in another state, which is governed by the Uniform Act to Secure the Attendance of

Witnesses from Without a State in Criminal Proceedings. See S.C. Code. Ann. §§ 19-9-10 et seq. (2014). New paragraph (a)(2) adopts a version of the federal rule intended to provide a protective mechanism when the defense subpoenas a third party to provide personal or confidential information about a victim. The amendment requires judicial approval before service of a subpoena seeking personal or confidential information about a victim from a third party.

SUBMITTED TO GENERAL ASSEMBLY

2019-2020 Prefiled Bills

H.3046 *ILLEGALLY FACILITATING TERRORISM* Rep. Pope Establishes a criminal offense of furthering terrorism, defines the elements of this offense, and sets penalties. Also creates the offenses of material or financial support of an act of terrorism and concealment of the actions or plans of another to carry out an act of terrorism, and allows seizure and forfeiture of real and personal property used in connection with an offense contained in the article.

H.3047 *UNLAWFUL TRACKING DEVICES* Rep. Rutherford Creates and defines the offense of unlawful tracking.

H.3052 *NO JURY SERVICE ON ELECTION DAYS* Rep. Brown Prohibits courts from requiring a citizen to serve on a jury on the date of a primary or general election.

H.3053 *FELON FIREARM OR AMMUNITION ILLEGAL POSSESSION* Rep. Bryant Expands the parameters of the offense of unlawful possession of a firearm or ammunition by a person convicted of a violent crime to include persons convicted of a crime punishable by imprisonment of more than one year.

H.3056 *ILLEGAL HAZING* Rep. Clary Defines necessary terms and restructures all offenses and penalties associated with unlawful hazing.

H.3058 *FIREARM SALES BACKGROUND CHECKS* Rep. Cobb-Hunter A new code section, entitled "Firearms Criminal Background Checks" would require a national instant criminal background check to be completed before delivery of a firearm to a purchaser, or transferee.

H.3059 *INSTANT BACKGROUND CHECKS FOR FIREARM SALES* Rep. Cobb-Hunter Requires a national instant criminal background check before any sale, exchange, or transfer of any firearms, including gun shows. Exempts all records kept from disclosure as a public.

H.3060 *RIGHT TO COUNSEL IN MAGISTRATE COURT CASES* Rep. Cobb-Hunter All defendants in magistrate courts facing criminal charges with the possibility of imprisonment would have to be informed of their right to counsel under this proposed legislation.

H.3061 *FIREARMS ACCESS AS CHILD ENDANGERMENT* Rep. Dillard Creates the offenses of child endangerment with a firearm in the first and second degree when a child under the age of eighteen gains access to a loaded, operational firearm. To be guilty of this offense, a reasonable person would have to know a child is likely to gain access to the firearm under certain circumstances and subject to delineated exceptions. Retail firearms dealers would have to post notices of this law.

H.3063 *SEXUAL ORIENTATION AND HOMELESSNESS HATE CRIMES* Rep.

Gilliard Sets penalties for a person convicted of a crime committed with the intent to assault, intimidate, or threaten persons because of their race, religion, color, sex, age, national origin, sexual orientation, or homelessness. Also covers malicious injury to personal and real property by persons who maliciously injure personal or real property of another person with the intent to assault, intimidate, or threaten that person.

H.3064 *ILLEGALLY LURING A CHILD* Rep. Hewitt Creates the criminal offense of luring a child into a motor vehicle, dwelling, or structure. Sets out penalties as well as defenses to prosecution.

H.3065 *INCREASING MAGISTRATE COURT JURISDICTIONAL LIMITS* Rep.

Huggins Increases magistrates court civil jurisdiction from \$7,500 to \$15,000.

H.3066 *MISTAKEN IDENTITY ARREST RECORDS DESTRUCTION* Rep. King Directs the destruction of arrest records of persons arrested as a result of mistaken identity not later than 180 days after an investigation by a law enforcement or prosecution agency reveals that the person was arrested as a result of mistaken identity. Law enforcement or prosecution agencies cannot charge or collect a fee for the destruction of arrest records under these circumstances.

H.3067 *ILLEGAL DEFERRED PRESENTMENT BUSINESSES* Rep. King Creates the crime of engaging in the business of deferred presentment. Violations would be felonies. Repeals the South Carolina Deferred Presentment Services Act.

H.3068 *SEXUAL ORIENTATION HATE CRIMES* Rep. King People committing specific crimes with the intent to assault, intimidate, or threaten a person because of his race, religion, color, sex, age, national origin, or sexual orientation. Anyone who maliciously injures personal and real property with the intent to assault, intimidate, or threaten that person would be subject to additional criminal penalties under this legislation.

H.3069 *RECONFIGURING MEMBERSHIP ON THE JUDICIAL MERIT SELECTION*

COMMISSION Rep. Magnuson The Judicial Merit Selection Commission would consist of two members from each of the seven congressional districts and one member from the general public, appointed by the governor, with the advice and consent of the General Assembly. Sets out who will serve as the chairman of the commission. Members would be limited to two terms. Former General Assembly members could not serve on the commission until five years after leaving office.

H.3070 *APPOINTED JUDGES AND JUSTICES* Rep. Magnuson

All supreme court justices, judges on the court of appeals, and circuit court judges would be appointed by the governor with the advice and consent of the general assembly rather than being elected by the general assembly. Repeals the Judicial Merit Screening Commission.

H.3071 DEFENSE AGAINST PORCH PIRATES ACT Rep. McKnight Enacts the "Defense Against Porch Pirates Act." Makes it unlawful for any person to steal packages delivered to a porch, steps, or the vicinity of any entrance or exit of a residence. Declares violations to be the offense of felony of package theft. Penalties under this Act are in addition to any penalties for other offenses.

H.3072 ALCOHOL EDUCATION PROGRAM GRADUATION KEEPS PRETRIAL ELIGIBILITY INTACT Rep. Murphy Clarifies that anyone who previously participated in an alcohol education program is not prevented from subsequent participation in a pretrial intervention program.

H.3073 CONCEALED WEAPON CARRY BY CLERKS OF COURT Rep. B. Newton Includes clerks of court as persons allowed to carry a concealable weapon while on duty.

H.3074 ILLEGAL PROSTITUTION AND AFFIRMATIVE DEFENSES FOR HUMAN TRAFFICKING VICTIMS Rep. Norrell Increases penalties for solicitation of prostitution, establishing or keeping a brothel or house of prostitution, or causing or inducing another to participate in prostitution, including inducing individuals with mental disabilities. Creates as an affirmative defense for victims of human trafficking charged with a prostitution offense. Adds additional penalties for owners of business establishments who knowingly allow the business establishment to be used in violation of a prostitution offense. Courts are authorized to order a person to complete a program designed specifically for persons who solicit or procure a person for prostitution.

H.3075 TEEN DATING VIOLENCE PREVENTION ACT Rep. Norrell Enacts the "Teen Dating Violence Prevention Act" and defines necessary terms. Creates the offense of teen dating violence, provides penalties. Allows victims to seek orders of protection or restraining orders, and prohibits a person who violates the provisions of the section from participating in a pretrial intervention program. Requires the inclusion of teen dating violence education into our state comprehensive health education curriculum.

H.3078 ILLEGALLY INJURING LAW ENFORCEMENT, CORRECTIONAL, EMS, AND FIREFIGHTING OFFICIALS Rep. Pope Adds to instances of assault and battery of a high and aggravated nature when a person injures a federal, state, or local law enforcement officer or corrections officer, a firefighter, or an emergency medical services (EMS) worker in the discharge of, or because of, their official duties.

H.3079 NO TRESPASSING NOTICE POSTING BY USING PURPLE PAINT Rep. Pope Allows a different method of posting trespassing notices via clearly visible purple-painted property boundaries.

H.3134 CARRYING A PISTOL STATUTORY REVISIONS Rep. Pitts Prohibits anyone from carrying a handgun into certain places without permission of the owner or a person in control of the premises. Revises when a person may lawfully carry a handgun, including when a

person is on school grounds. Sets out additional circumstances when certain persons who carry a concealable weapon must leave or remove their weapon from the premises and to make a conforming change. This legislation would only apply to individuals who legally may purchase a firearm from a properly licensed and certified firearms dealer.

H.3162 GENERAL SESSIONS CASE TRANSFER ELIGIBILITY Rep.

Rutherford Criminal cases which do not carry sentences that exceed three years, rather than the current law of one year, could be transferred from general sessions court under this proposed legislation.

H.3171 RETIRED LAW ENFORCEMENT CONCEALED WEAPON CARRYING Rep.

Bryant Deletes that restricts retired law enforcement officers from carrying concealed weapons on certain premises.

H.3175 CONCEALABLE WEAPON PERMIT REVISIONS Reps. Loftis

Prohibitions from carrying concealed weapons would not apply to certain persons when visiting a residence or dwelling to inspect, appraise, sell, or lease the residence or dwelling place.

H.3176 MANDATORY DRIVER TESTING IN FELONY DUI INCIDENTS Rep.

Moore Any motorist involved in any wreck where anyone suffered great bodily injury or death must submit to tests to determine whether he or she is under the influence of alcohol or drugs.

H.3177 SEX OFFENDER REGISTRY CHANGE Rep. Pendarvis Sets out conditions that exempt a person who is convicted of, plead guilty to, entered a *nolo contendere* plea to, or has been adjudicated delinquent of criminal sexual conduct with minors, third degree, from being referred to as a sex offender.

H.3181 ILLEGAL SEX TRAFFICKING REVISIONS Rep. Fry

Revises the definition of "sex trafficking" to include certain sexual exploitation and prostitution offenses involving minors. Minor victims adjudicated delinquent for a violation of the article may have their records expunged. Sets out procedures for the interception of wire, oral, or electronic communications, in these case investigations. Also creates the offense of promoting travel for prostitution or sex trafficking and provide penalties.

H.3206 ILLEGAL ASSAULT WEAPONS AND HIGH-CAPACITY MAGAZINES Rep.

Brawley Defines the terms "assault weapon" and "high-capacity magazines" for inclusion in criminal statutes covering the unlawful transportation, storing, keeping, possessing, sale, rental, or giving away of machine guns, military firearms, sawed-off shotguns or rifles, Includes assault weapons and high-capacity magazines in the list of items banned by statute. Prohibits the possession, distribution, or manufacture of a device, part, component, attachment, or accessory intended to accelerate the rate of fire of a semiautomatic firearm, including a device commonly known as a bump stock or trigger crank.

H.3226 EXPEDITED RETURNS OF SEIZED PROPERTY Rep. Rutherford Requires the expedited return of certain property and monies seized when forfeiture proceedings have not been instituted and charges have not been filed within thirty days of seizure. The lawful owner would not be required to prove that the property or monies seized were legally acquired. Prohibits the seizing authority from requiring a lawful owner of property or monies to sign a release absolving the seizing authority from civil liability relating to any unlawful seizures before the property or monies are returned. Allows criminal charges to be brought at a later date if evidence warrants. Forfeiture proceedings can be held in the magistrate court if the value of the property seized does not exceed seven thousand five hundred dollars.

H.3227 ATTORNEY GENERAL PETITIONS FOR REDUCED SENTENCES Rep. Rutherford The attorney general would be authorized to file a motion for reduction of a sentence for substantial assistance to the state under this proposal.

H.3228 IMMUNITY FROM PROSECUTION ORDERS/APPEALS Rep. Rutherford Any order concerning immunity from prosecution pursuant to the protection of persons and property act would be immediately appealable. However, any defendant who does not appeal the order immediately may appeal any denial after conviction and sentencing.

H.3230 MINIMUM REQUIREMENTS FOR GRAND JURY TESTIMONY Rep. Weeks Requires the presentment to the county grand jury of material evidence. The county grand jury foreman must note all evidence considered by the county grand jury in the record. Requires a record of testimony and other proceedings of the county grand jury. The transcript, reporter's notes, record, and all other documents remain in the custody and control of the county clerk of court, and can be released under certain circumstances.

H.3232 TRANSFERABLE GENERAL SESSIONS CASES Rep. Stavrinakis Allows General Sessions Court criminal cases when the penalty does not exceed three years, rather than one year, to be transferred.

H.3237 PRIVATE INVESTIGATORS PROHIBITED FROM MULTI-PARTY REPRESENTATION Rep. Rutherford Prohibits a private investigation business from knowingly representing multiple parties with opposing interests in civil or criminal matters.

H.3240 NO SEMIAUTOMATIC WEAPONS REVISIONS Rep. Stavrinakis Prohibits possession, distribution, or manufacture of a device, part, component, attachment, or accessory intended to accelerate the rate of fire of a semiautomatic firearm, to provide a penalty for a violation of this section and to allow exceptions under certain circumstances.

H.3247 INTENTIONALLY IMPERSONATING ANOTHER PERSON ON THE INTERNET Rep. Rutherford Creates the offense of intentionally impersonating another person through the use of email, social media, or other internet website

H.3249 HUMAN TRAFFICKING AND CHILD EXPLOITATION PREVENTION ACT Rep.

Burns Adding article 5 to chapter 15, title 16 entitled the "Human Trafficking and Child Exploitation Prevention Act" so as to require a business, manufacturer, wholesaler, or individual that manufactures, distributes, or sells a product that makes content accessible on the internet to install and operate a digital blocking capability that renders obscenity inaccessible and to set minimum requirements for the blocking capability. Establishes a procedure for the consumer to deactivate the digital blocking capability; to allow a reporting system to unblock content that is not obscene, such as social media websites, and authorize a consumer to seek judicial relief if the filtered content is not unblocked within a reasonable time. Also contains criminal penalties for a business or individual that violates this article; to authorize the attorney general to seek injunctive relief against a business, manufacturer, wholesaler, or individual that manufactures, distributes, or sells any products in this state without a digital blocking capability. A consumer or the attorney general may file a suit against a party that is unresponsive to a report of obscene material breaching the filter and to prescribe damages for each violation.

H.3269 MARIJUANA TRAFFICKING SENTENCING REFORM Rep. Pendarvis Changes the penalty for first offense trafficking in marijuana of at least ten pounds but less than one hundred pounds of marijuana.

H.3270 SYNTHETIC OPIATE DERIVATIVE TRAFFICKING Rep. Pope Applies penalties for trafficking in morphine and other natural opiate derivatives to synthetic opiate derivatives.

H.3276 LEGAL SIMPLE POSSESSION OF MARIJUANA Rep. Thigpen Decriminalizes possessing twenty-eight grams, or one ounce, or less, of marijuana or ten grams or less of hashish and authorizes law enforcement to issue a civil citation for possession of that same quantity of marijuana or hashish. Decreases penalties for first offense possession of less than one gram of methamphetamine or cocaine base and requires completion of a drug treatment or rehabilitation program as part of any sentence. Requires courts to place persons on probation who are guilty of a first offense possession of certain controlled substances.

H.3277 TORTURE AS AN ELEMENT OF CHILD ABUSE Rep. Erickson Incorporates "torture" into the definition of "child abuse or neglect." SCDSS could forego family preservation and reunification in cases of torture. Adds torture, or conspiring to commit torture, as a ground for termination of parental rights. Homicide by child abuse will include incidents of torture, or conspiring to torture. In addition, torturing a child, or allowing another to torture a child, is a criminal offense.

H.3290 NO CELL TOWER SIMULATORS FOR LAW ENFORCEMENT Rep.

Rutherford Law enforcement agencies would be prohibited from purchasing cell-site simulator technology from a company that requires the purchaser of this equipment to enter into a nondisclosure agreement. Establishes a definition of "cell-site simulator technology."

H.3294 LEGALLY LEAVING BABIES BEHIND Rep. Crawford Placement of infants at designated locations without criminal liability would allow the placement of an infant not more than one-year-old at a safe haven. Revises the definition of "infant."

H.3296 CRIMINAL PROSTITUTION AND HUMAN TRAFFICKING REVISIONS Rep. Erickson Increases penalties for solicitation of prostitution, establishing or keeping a brothel or house of prostitution, or causing or inducing another to participate in prostitution. Establishes an affirmative defense when a victim of human trafficking is charged with a prostitution offense. Increases the penalties for soliciting, causing, or inducing another for or into prostitution when the prostitute has a mental disability.

H.3297 TRYING YOUTHS AS ADULTS Rep. Erickson Eliminates exceptions for children to be tried as an adult to be placed in the adult inmate population. Decreases the time a child may be held in a juvenile detention facility for committing a status offense or for violating a related court order. Requires children and their families to seek family counseling when the status offense is incorrigibility. Distinguishes between status and criminal offenses and changes the requirements for court orders. Modifies expungement of certain court records so that automatic expungement of a juvenile's records for status offenses are mandated, with exceptions.

H.3298 SAFE HARBOR FOR EXPLOITED MINORS ACT Rep. Erickson The "Safe Harbor for Exploited Minors Act" provides protection of the identity of minor victims of trafficking in persons, prostitution, and coerced involvement in these crimes, among other things.

H.3300 DRIVERS' LICENSE REVOCATION REFORMS Rep. Tallon Limits the permanent revocation of motorists' drivers licenses, to apply only to offenses occurring prior to October 1, 2014. In lieu of license suspension periods, motorists could instead participate in the installation of interlock ignition devices in their cars. To the extent they have these devices installed, the number of days the device is in place constitutes a credit against the suspension period. Related sections, including habitual offender findings and violation, would also be brought under this law after its effective date.

H.3301 ELECTROCUTION BY LAW; LETHAL INJECTION BY CHOICE Rep. Tallon Capital offense sentences to death will mean death by electrocution unless the convicted murderer elects for death lethal injection. However, this election is only available if necessary chemicals are all available at the time of election.

H.3303 WRONGFUL CONVICTION COMPENSATION Rep. Norrell Allows anyone who has been wrongfully convicted of, and imprisoned for, a crime may recover the monetary value of the loss sustained through the wrongful conviction and imprisonment.

H.3307 ELECTRONIC CASE TRACKING ACCESS Rep. Clemmons This bill requires SLED to establish and maintain a case tracking system and searchable website that includes certain information about property seized by law enforcement agencies and forfeited under state law or obtained under any agreement with the federal government.

H.3309 *SEXUAL ASSAULT KITS TRACKING SYSTEM* Rep. Cobb-Hunter Requires SLED to create and operate a statewide sexual assault kit tracking system.

H.3316 *LAW ENFORCEMENT PRECERTIFICATION MENTAL HEALTH EVALUATIONS* Rep. King If enacted, this bill would require all law enforcement officers to undergo a mental health evaluation before they can become certified or recertified. These evaluations must be conducted under the direction of the Law Enforcement Training Council.

H.3317 *LAW ENFORCEMENT CONTINUING EDUCATION* Rep. King Certified law enforcement officers would have to complete annual continuing law enforcement education credits in diversity training under this bill.

H.3318 *RELIEF FROM SEX OFFENDER REGISTRATION REQUIREMENTS* Rep. King Any person who is required to register as a sex offender may petition the court to terminate the registration requirement ten years from the date of initial registration under certain circumstances. For sex offenders required to register for life, the maximum period of registration is reduced to fifteen years.

H.3319 *NOTIFYING INMATES WHEN THEY WILL BE QUALIFIED TO REREGISTER TO VOTE* Rep. King This legislation requires the Department of Corrections and the Department of Probation, Parole and Pardon Services to inform a person who has been convicted of a felony or an offense against the election laws and has served the sentence imposed for these convictions, including probation and parole time, unless sooner pardoned, that he is eligible to register to vote.

H.3322 *COMPREHENSIVE CRIMINAL PROCESS AND CRIMINAL PENALTIES REFORM* Rep. Pitts This proposed legislation is lengthy and comprehensive. It, among many other things, would immediately parole inmates incarcerated for specified, nonviolent offenses. It would also require courts to take into account the financial resources of defendants before ordering restitution to be paid. Payment schedules would have to be developed for defendants. It also limits revocation of probation for mere technical noncompliance events by probationers. Parole would be made available to terminally ill, geriatric, or permanently disabled inmates. Inmates serving for 15 years could petition courts for sentence modification. The more comprehensive portion of this proposed legislation would remove the mandatory minimum sentences from over 275 criminal offenses that cover a vast spectrum of subjects-- including, but not limited to-- agriculture, alcohol, banking, business licensing and operation, contraband in detention facilities, drivers licenses, drugs, education, elections, environmental affairs, fire codes, fireworks, fishing, food safety, fraud, guns, hunting, inmates, larceny, juveniles, law enforcement, marriage, mining, motor vehicles, public funds, product labeling, professional licensing and practices, public officials, public service, riots, robbery, sex crimes, trains and railroad operations, utility operations, vandalism, and other areas of our existing criminal laws. Directs each circuit solicitor to establish a drug court program for adults and juveniles, to provide criteria for the eligibility of persons charged with nonviolent offenses, to allow each

circuit solicitor to establish an office of drug court program coordinator. Also directs the Commission on Prosecution Coordination to establish a state office of Drug Court Coordination, set fees for drug court program participation, and file annual reports detailing drug court program activities. Copies of this report would have to be given to the Sentencing Reform Oversight Committee. Sets out procedures for appointing and paying drug court judges.

H.3338 *NO CUSTODIAL ARRESTS FOR DRIVING UNDER SUSPENSION*

OFFENSES Rep. Rutherford Motorists could not be placed under custodial arrest when stopped for operating a motor vehicle with a suspended driver's license under certain circumstances. Also when a motorist appeals a conviction that requires the suspension of his driver's license, the driver's license suspension would be stayed while the case is being appealed. Finally, the Department of Motor Vehicles could not suspend a person's driver's license if it fails to receive notice of a conviction that requires the license to be suspended within 30 days of the conviction.

H.3354 *EXECUTION TEAM INFORMATION TO BE KEPT CONFIDENTIAL* Rep. Tallon

Under this legislation identifying information of an execution team or details regarding the procurement of items necessary to impose a death sentence will be confidential without exception. Exempts the purchase or acquisition of certain drugs or medical supplies necessary to execute a death sentence from the state procurement code and licensing processes as well as requirements of SCDHEC, and other departments or agencies of the state, or by the Board of Pharmacy.

H.3356 *NO 'CROWDING IN' ON LAW ENFORCEMENT OFFICERS* Rep. Thigpen

Bystanders would have to remain at least twelve feet away from a law enforcement officer when the officer is apprehending, arresting, searching, or consulting an individual, and when the bystander is recording the actions of the officer, under this proposal.

H.3360 *REGULATING VOLUNTEER WORK BY REGISTERED SEX OFFENDERS* Rep.

Yow It will be unlawful for a sex offender to work or perform volunteer service with, or around, minor children under certain circumstances unless approved by a circuit court order that requires the offender's employment or volunteer service be recorded in the offender's sex offender registry file. Any court costs and filing fees must be paid by the offender.

H.3362 *TRAFFIC TICKET NONPAYERS ARE NOT HABITUAL TRAFFIC OFFENDERS*

Rep. Pendarvis Under this bill, the term "habitual offender," would not include suspensions of a person's driver's license for failure to pay a traffic ticket and shall not be a conviction that would result in the person being considered a "habitual offender."

H.3363 *OPENLY CARRYING HANDGUNS* Rep. Pitts

Revises the definition of the term "concealable weapon" to allow a permit holder to carry a concealable weapon openly on his person.

H.3364 DRIVERS FOUND NOT GUILTY OF DRIVING WITH AN UNLAWFUL ALCOHOL CONCENTRATION ENTITLED TO RECORD EXPUNGEMENTS Rep.

Rutherford All evidence of the suspension of a person's driver's license for refusal to submit to testing for alcohol concentration and any entry in the driving record of a person that shows he was issued a temporary driver's license or that he was required to install an ignition interlock device on a vehicle he drives must be removed from his driving record if drivers are subsequently acquitted of driving with an unlawful alcohol concentration.

H.3366 LIMITING USE OF AUTOMATIC LICENSE TAG READERS Rep.

Rutherford Under this legislation, only certain entities could use an automatic license plate reader system. Limits where the system may be installed. Also limits how information obtained through the system may be used, and provides penalties for violations.

H.3367 EXCESSIVE RESTRAINT AND USE OF FORCE PROHIBITIONS Rep.

Rutherford Prohibits a law enforcement officer from using excessive restraint when detaining a person or unreasonable force while making an arrest and to provide penalties for an officer who uses excessive restraint or force. SLED would have exclusive jurisdiction and authority to conduct any investigation of all officer-involved uses of force that result, or could have resulted, in severe bodily injury or death. Establishes protocols for evidence collection and processing in certain circumstances. Grants an investigating officer the same authority as he would have in his home jurisdiction for the duration of any investigation. Establishes a procedure for forwarding evidence to the attorney general upon completion of any investigation. Establishes penalties for the failure to complete an independent investigation pursuant to the provisions of this section.

H.3368 NO CELL TOWER SIMULATORS FOR LAW ENFORCEMENT Rep. Rutherford

Prohibits a law enforcement agency from purchasing cell-site simulator technology or devices. Law enforcement agencies that currently possesses or uses cell-site simulator technology shall discontinue its use and discard the technology or devices. Defines the term "cell-site simulator technology."

H.3384 MAGISTRATES AS PRETRIAL INTERVENTION PROGRAM MONITORS Rep.

Pendarvis Authorizes circuit solicitors to designate a summary court judge to oversee a pretrial intervention program for offenses triable in summary court. Requires the solicitor and summary court judge to enter into a memorandum of understanding to ensure compliance with certain requirements.

H.3385 DEFERRED PROSECUTION PROGRAMS Rep. Pendarvis Grants each solicitor the authority to establish a deferred prosecution program for persons who commit summary court offenses. Establishes procedures for the operation of the program and the requirements for entry into the program. Allows disposition of the offense upon successful completion of the program. Authorizes a circuit solicitor to designate a summary court judge to oversee a deferred prosecution program.

H.3409 LEGALIZING GAMBLING Rep. Rutherford Would legalize gambling and gaming activities on which bets are made to include pari-mutuel betting on horse racing, sports betting on professional sports, casino activities, such as card and dice games where the skill of the player is involved in the outcome, and games of chance with the use of electronic devices or gaming tables. With this legalization, all of these activities would have to be strictly regulated and conducted in one location or in separate locations within the specified area subject to special laws, including criminal laws, enacted by the General Assembly. License fees and other costs to be authorized to operate these businesses would be directed to be used for highway, road, and bridge maintenance, construction, and repair. Also this proposed legislation deletes the state constitutional provision which makes it unlawful for a person holding an office of honor, trust, or profit to engage in gambling or betting on games of chance.

H.3424 INMATE FACE-TO-FACE ACCESS TO LEGAL COUNSEL Rep. Rutherford Any inmates confined in state, county, or municipal detention facilities could not be prohibited access to legal counsel when requested under certain circumstances. Defines the term "in-person meeting."

H.3425 SWORN TESTIMONY AND RIGHT TO CONFRONT WITNESSES AT PAROLE, PARDON, AND CLEMENCY HEARINGS Rep. Rutherford When convening parole, pardon, and clemency hearings, all testimony presented would have to be taken under oath. Potential parolees being considered for parole, or their legal counsel, would be given the right to confront any witness that appears before the board during these hearings.

H.3426 EXPUNGEMENT REQUESTS AT PAROLE AND PARDON HEARINGS Rep. Rutherford Any person who applies for a pardon for certain offenses would be given the opportunity, as part of this application, to request that the board of paroles and pardons recommend the expungement of criminal records related to the offenses. This legislation also sets out a procedure for criminal records to be expunged, and a nonpublic record maintained.

H.3429 NO RECORDING INMATE AND ATTORNEY MEETINGS Rep. Rutherford Prohibits state, county, or municipal detention facilities from intercepting, recording, monitoring, or divulging any communication between an inmate and his attorney.

H.3430 REMOVING JUVENILE OFFENDERS FROM THE SEX OFFENDER REGISTRY Rep. Rutherford Sets out a method for certain registered juvenile sex offenders' names to be removed from the sex offender registry. Also specifies a procedure to allow certain juveniles who have been adjudicated delinquent by the family court for committing certain offenses to be placed on the sex offender registry.

H.3450 REDEFINING THE AGE OF JUVENILES IN SOUTH CAROLINA Rep. Rutherford Proposes amending our state constitution, through appropriate procedures, for the separate confinement from older inmates, of juvenile offenders under the age of 18, instead of the current age of 17.

H.3451 SALES OF TOBACCO PRODUCTS AND ALTERNATIVE NICOTINE PRODUCTS TO MINORS Rep. Rutherford

Would prohibit the sale, furnishing, or provision of cigarettes or alternative nicotine products to a person under 21 years old. Current law applies only to anyone under 18 years of age. Also, anyone under 21 would be prohibited from purchasing, possessing, attempting to possess, or using any kind of fake ID to buy or possess tobacco products or alternative nicotine products. Prohibits distributing tobacco product or alternative nicotine product samples to anyone under 21.

H.3456 SOUTH CAROLINA CONSTITUTIONAL CARRY ACT OF 2019 Rep. Hill The "South Carolina Constitutional Carry Act of 2019" allows anyone not prohibited from possessing firearms under state law, to carry a handgun under certain circumstances. Revises the definition of the term "concealable weapon." Anyone lawfully carrying a concealable weapon could enter a business serving alcohol so long as they do not consume alcoholic liquor, beer, or wine while carrying their weapon on site. Valid out-of-state concealable weapon permits held by a resident of another state would be honored by South Carolina. Current law only applies to reciprocal state permit holders. A property owner's right to allow concealed weapons on their premises would extend both to persons who possess-- and persons who do not possess-- a concealable weapons permit.

H.3643 PROSECUTORIAL IMMUNITY FROM CIVIL LIABILITY Rep. Tallon Circuit solicitors--and authorized prosecutors--would be immune from civil liability for any legal counsel or advisory opinions requested by, or provided to, law enforcement under this proposed legislation.

H.3657 CRIMINALLY VICTIMIZING TRANSPORTATION WORKERS Rep. Pendarvis Enhances criminal penalties for perpetrators of violent crimes against public transportation employees and workers.

H.3658 NO ARREST ON SUBSEQUENT CHARGES FOR A SIMILAR, PREVIOUSLY-DISMISSED OFFENSE Rep. Rutherford Covers circumstances where charges have been dismissed--or *nolle prosequied*--after a preliminary hearing. If these defendants are subsequently indicted by local or state grand juries for the original or substantially similar charges, then only a courtesy summons could be issued.

H.3663 *HOMICIDE BY NARCOTICS* Rep. Pope Creates a criminal offense of homicide and great bodily injury by administering fentanyl, morphine, methamphetamine, or heroin. Sets out criminal penalties and defines necessary terms.

H.3664 *LAW ENFORCEMENT WORKERS COMPENSATION CLAIMS* Rep. Pope Allows law enforcement officers injured in the line of duty from stress, mental injury, or mental illness to seek workers' compensation benefits.

H.3683 *LIZZY'S LAW* Rep. R. Williams "Lizzy's Law" requires gun owners or gun possessors to report gun losses or thefts. Law enforcement agencies would be required to collect information about these lost or stolen guns. Sets penalties for failing to report lost or stolen guns.

H.3693 *LIMITED PARDON TO RESTORE HUNTING RIGHTS* Rep. Rutherford If enacted, a limited pardon could be granted to anyone convicted of a nonviolent felony offense to have a gun for hunting purposes.

H.3696 *SHERIFFS' DEPARTMENT AUTHORITY TO ENFORCE TITLE 61* Rep. Rose Allows sheriff departments to enforce the provisions of the Alcohol Beverage Control Act.

H.3702 *BARRING ANIMAL OWNERSHIP BY ANIMAL ABUSERS* Rep. Hill Prohibits anyone who is repeatedly convicted of animal cruelty from owning animals for up to five years.

H.3706 *DISTURBING SCHOOLS* Rep. Martin Restructures the criminal offense of disturbing schools.

H.3708 *MONITORING DOMESTIC VIOLENCE PERPETRATORS* Rep. Bailey In lieu of setting a bond, this proposal would allow courts to place a person charged with domestic violence under surveillance via an active electronic monitoring device. These devices would be required to have the capacity of keeping the victim notified at all times of the perpetrator's location. Sets out procedures for this monitoring, as well as penalties for tampering with an active electronic monitoring device.

H.3715 *SEXUAL BATTERY REPORTING REQUIREMENT EXCEPTIONS* Rep.

Norrell Revises the spousal sexual battery criminal law to delete provisions requiring the reporting of perpetrators of this crime to law enforcement within thirty days. Exempts anyone under a certain age from this law.

H.3723 *DIGITAL CURRENCY CAMPAIGN CONTRIBUTIONS* Rep. Clemmons Adds the ability for candidates and committees to accept digital currency as campaign contributions. Any increases in digital currency values would have to be reported as interest. Candidates or campaign committees selling digital currency would be required to deposit these sale proceeds into a campaign account before spending the funds. Amends the definition of "contribution" to include digital currencies.

H.3729 *MANDATORY REPORTING OF FETUS OR INFANT EXPOSURE TO ALCOHOL OR DRUGS* Rep. Fry Under this proposal, mandated reporters of suspected child abuse, or neglect, would include instances where an infant, or a fetus, is exposed to alcohol or controlled substances.

H.3730 *TRAFFICKING IN FENTANYL* Rep. Fry Creates the criminal offense of "trafficking in fentanyl."

H.3731 *LISTING SCHEDULE I CONTROLLED SUBSTANCES* Rep. Hewitt Authorizes the SCDHEC director to add illegal narcotic substances to the SC Code Schedule I illegal narcotics list when it is necessary to protect public health and safety.

H.3733 *COMMUNITY-LAW ENFORCEMENT PARTNERSHIP FOR DEFLECTION AND SUBSTANCE USE DISORDER TREATMENT ACT* Rep. Weeks Enacts the "Community-Law Enforcement Partnership for Deflection and Substance Use Disorder Treatment Act." This Act authorizes law enforcement agencies to partner with treatment facilities, and community organizations, to establish deflection programs. These programs facilitate substance use disorder treatment for users. They would be utilized in lieu of arrest and justice system involvement. Includes immunity from liability for anyone successfully completing a deflection program as well as for law enforcement agencies implementing deflection programs in good faith.

H.3734 *SYNTHETIC OPIATES AS ILLEGAL SYNTHETIC DRUGS* Rep. Fry Conforms provisions under trafficking in illegal drugs criminal laws, with the provisions covering possession and distribution of certain illegal drugs, to include synthetic opiates.

H.3735 *UNLAWFULLY SELLING CONTROLLED SUBSTANCES AS MANSLAUGHTER*

Rep. Fry Involuntary manslaughter would include the sale or delivery of controlled substances, their analogues, or other unlawful substances when they cause the death of the user.



South Carolina Bar

Continuing Legal Education Division

**28th Annual Criminal Practice in
South Carolina**

Friday, February 22, 2019

Expungements Primer

Adam Whitsett

Expungements - 2019

Adam Whitsett
SLED General Counsel

DISCLAIMER

Any and all opinions expressed in this presentation are solely those of the presenter and not of the South Carolina Law Enforcement Division, Chief Keel, the State of South Carolina, or any other agency of division thereof.

Current Expungement Statutes

- (1) Section 34-11-90(e), first offense misdemeanor fraudulent check;
- (2) Section 44-53-450(b), conditional discharge;
- (3) Section 22-5-910, first offense conviction in magistrates court;

Current Expungement Statutes

- (4) Section 22-5-920, YOA;
- (5) Section 22-5-930, first offense simple possession or possession with intent to distribute drug convictions;
- (6) Section 56-5-750(f), first offense failure to stop when signaled by a law enforcement vehicle;

Current Expungement Statutes

- (7) Section 17-22-150(a), PTI;
- (8) Section 17-1-40, criminal records destruction, except as provided in Section 17-22-950;
- (9) Section 63-19-2050, juvenile expungements;

Current Expungement Statutes

- (10) Section 17-22-530(A), AEP;
- (11) Section 17-22-330(A), TEP;
- (12) Section 17-22-1010, Youth Challenge Academy and Jobs Challenge Program; and
- (13) Any other statutory authorization

§ 17-22-910

(B) A person's eligibility for expungement ... must be **based on the offense that the person pled guilty to or was convicted of committing** and not on an offense for which the person may have been charged.

§ 17-22-910

In addition, if an offense for which a person was convicted is subsequently repealed and the elements of the offense are consistent with an existing similar offense which is currently eligible for expungement, a person's eligibility for expungement of an offense must be **based on the existing similar offense**.

§ 17-22-910

(C) The provisions of this section apply **retroactively** to allow expungement as provided by law for each offense delineated in subsection (A) by persons convicted prior to the enactment of this section or the addition of a specific item contained in subsection (A).

§ 17-1-40

General Sessions Non-convictions

- ALL NON-CONVICTIONS ARE ELIGIBLE (any number)
- FREE (unless part of a plea deal)

§ 17-22-950

Summary Court Non-convictions

- ALL NON-CONVICTIONS ARE ELIGIBLE (unless objection filed)(any number)
- All ARE FREE

§ 17-22-950

If Fingerprinted:

Summary Court shall issue the order to expunge unless dismissal at preliminary hearing or the accused person has charged pending in summary court and a court of general sessions and the charges arise out of the same court of events.

Timing of Order

“This expungement **must** occur no sooner than the appeal expiration date and no later than thirty days after the appeal expiration date.”

- Civil – 30 Days to File Appeal
- Criminal – 10 Days to File Appeal

Objections

- The prosecuting agency or appropriate law enforcement agency may file an objection to a summary court expungement.
- The reason for objecting must be that the accused person has other charges pending or the charges are not eligible for expungement.
- If an objection is filed, it must be heard by the judge of a general sessions court.

§ 17-22-950

- If NOT Fingerprinted:
 - No automatic expungement
 - However, person can apply *at the summary court* for an order with same restrictions above applicable.
 - (Form SCCA223E)

§ 17-22-950

(E) Criminal charges **must be** removed pursuant to this section from all Internet-based public records no later than **thirty days from the disposition date**, regardless of whether the accused person applies to the summary court for expungement pursuant to subsection (B). All other criminal records must be destroyed or retained pursuant to the provisions of Section 17-1-40.

§ 22-5-910(A)

Magistrate Conviction(s) - not DV

- **Conviction** for a crime carrying a penalty of not more than thirty days imprisonment or a fine of one thousand dollars, or both, including a conviction in magistrates or general sessions court.
- **Does not apply to an offense involving the operation of a motor vehicle (not all Title 56 offenses do).**

§ 22-5-910

Magistrate Conviction(s) – not DV

- **Must be three year conviction free (including out-of-state offenses, but excluding minor traffic violations not involving DUI)**
- **Must have no pending charge(s) (unless the pending charge(s) have been pending for more than five years).**

§ 22-5-910(B)

Domestic Violence

▫ a conviction for domestic violence in the third degree (Section 16-25-20(D)) or the old CDV first offense (Section 16-25-20(B)(1) as it existed before June 4, 2015), including a conviction in magistrates or general sessions court

§ 22-5-910(B)

Domestic Violence

Must be **five years** conviction free (including out-of-state convictions, but excluding minor traffic violations not involving DUI) with **no pending charges** (unless the pending charge(s) have been pending for more than five years).

§ 22-5-910(E)

For the purpose of this section, **any number** of offenses for crimes carrying a penalty of not more than thirty days imprisonment or a fine of one thousand dollars, or both, **for which the individual received sentences at a single sentencing proceeding that are closely connected and arose out of the same incident may be considered as one offense and treated as one conviction for expungement purposes.**

§ 22-5-910(F)

No person may have his records expunged under this section more than once (even if it occurred prior)

- Only one conviction or one qualifying “group”

§ 22-5-920

First Offense YOA Convictions Occurring After June 2, 2010

- a **first offense conviction as a youthful offender** for which a defendant is sentenced pursuant to the YOA.
- no other convictions (including out-of-state, but excluding minor traffic offenses) **during the sentence** or five years from the date of completion of the defendant’s sentence, including probation and parole

§ 22-5-920

First Offense YOA Convictions Occurring Prior to June 2, 2010

- a first offense **conviction occurring while the individual was a “youthful offender”** as defined in Section 24-19-10(d). (no sentencing requirement)
- no other convictions (including out-of-state, but excluding minor traffic offenses) **during the sentence** or **five years** from the date of completion of the defendant’s sentence, including probation and parole

§ 22-5-920

- Does **not** apply to:
 - (a) an offense involving the operation of a motor vehicle [not all Title 56 offenses];
 - (b) an offense classified as a violent crime in Section 16-1-60;
 - (c) an offense contained in Chapter 25, Title 16, except as otherwise provided in Section 16-25-30.
 - (d) an offense for which the individual is required to register in accordance with the South Carolina Sex Offender Registry Act

§ 22-5-920

For the purpose of this section, **any number** of offenses for crimes carrying a penalty of not more than thirty days imprisonment or a fine of one thousand dollars, or both, **for which the individual received sentences at a single sentencing proceeding that are closely connected and arose out of the same incident may be considered as one offense and treated as one conviction for expungement purposes.**

§ 22-5-930

Simple Possession

- **first offense conviction** for **simple possession**, including magistrate or general sessions
- No other **convictions** (including out-of-state but excluding minor traffic not involving DUI) within **three years from the date of the completion of the sentence, including probation and parole**, for this conviction and no pending charges

§ 22-5-930

PWID

- first offense conviction for **possession with intent to distribute** (not manufacturing, distribution, dispensing, delivering, purchasing, or anything else covered by criminal statute)
- No convictions (including out-of-state but excluding minor traffic not involving DUI) within **twenty years** from the date of the completion of any drug or any felony sentence, including probation and parole and **no pending charges**

§ 22-5-930(D)

Prior Conditional Discharges

No person may have the person's records expunged pursuant to this section if the person has had a **conditional discharge within the five years** prior to the date of arrest for the charge sought to be expunged if the charge sought to be expunged is **simple possession of marijuana**, or within the **ten years** prior to the date of arrest for the charge sought to be expunged if the charge sought to be expunged is for the simple possession of any other controlled substance

S.C. Code Ann. § 22-5-930(D)

A person may have the person's record expunged even though the conviction occurred before the effective date of this section; however, the expungement will not affect a subsequent enhanced conviction or sentence that occurred before the effective date of this section.

§ 22-5-930(F)

For the purpose of this section, **any number** of offenses for crimes carrying a penalty of not more than thirty days imprisonment or a fine of one thousand dollars, or both, **for which the individual received sentences at a single sentencing proceeding that are closely connected and arose out of the same incident may be considered as one offense and treated as one conviction for expungement purposes.**

§ 34-11-90(e)

First Offense Fraudulent Check Conviction

- **a first offense conviction** that is not a felony
- no other convictions during the one-year period following the conviction under this section (including out-of-state convictions)
- No person has any rights under this section more than one time.

§ 34-11-90(e)

- As used in this section the term “conviction” shall include the entering of a guilty plea, the entering of a plea of nolo contendere, or the forfeiting of bail. A conviction is classified as a felony if the instrument drawn or uttered in violation of this chapter exceeds the amount of five thousand dollars.
- Each instrument drawn or uttered in violation of this chapter constitutes a separate offense.

Diversionsary Dispositions

- § 44-53-450 – Conditional Discharge (Successful Completion)
- § 17-22-150 – PTI (Successful Completion)
- § 17-22-530 –AEP (Successful Completion)
- § 17-22-330 –TEP (Successful Completion)

Conditional Discharge

S.C. Code Ann. § 44-53-450

- Eligibility
 - No prior drug convictions of any kind.
 - Person pleads guilty to or is found guilty of **possession** of a controlled substance under Section 44-53-370(c) and (d), or Section 44-53-375(A)

Conditional Discharge - SPMJ

While conditional discharges for SPMJ and hashish are processed in the summary courts and do result in a dismissal upon successful completion, those criminal records must be expunged through the solicitor's office and signed by a circuit court judge as required by S.C. Code §17-22-910(2).

§ 56-5-750(f)

First Offense Failure to Stop for Blue Light Convictions

- **First offense conviction** pursuant to subsection (B)(1) [first offense where no great bodily injury or death resulted] that is not a felony
- No other convictions (excluding minor traffic offenses not involving DUI) during the **three-year** period following the completion of the terms and conditions of the sentence
- No person has any rights under this section more than one time.

§ 63-19-2050

Juvenile Expungements

- A person who has been taken into custody for, charged with, or adjudicated delinquent for having committed a status offense or a nonviolent crime, as defined in Section 16-1-70, may petition the court for an order expunging.
- A person may **not** petition the court if the person has a prior adjudication for an offense that would carry a maximum term of imprisonment of five years or more if committed by an adult.

§ 63-19-2050

Status Offenses

- If the person has been taken into custody for, charged with, or adjudicated delinquent for having committed a status offense, the court shall grant the expungement order. If the person has been taken into custody for, charged with, or adjudicated delinquent for having committed multiple status offenses, the court may grant an expungement order for the multiple status offenses.

§ 63-19-2050

- S.C. Code Ann. § 63-19-20(9)
 - “**Status offense**” means an offense which would not be a misdemeanor or felony if committed by an adult including, but not limited to,
 - incorrigibility or beyond the control of parents,
 - truancy,
 - running away,
 - playing or loitering in a billiard room,
 - playing a pinball machine, or
 - gaining admission to a theater by false identification.

§ 63-19-2050

Non-violent Offenses

- If the person has been taken into custody for, charged with, or adjudicated delinquent for having committed a nonviolent crime, as defined in Section 16-1-70, the court may grant the expungement order.
- An adjudication for a violent crime, as defined in Section 16-1-60, **must not be expunged.**

§ 63-19-2050

- The court **shall not** grant the expungement order unless the court finds that the person is
 - at least seventeen years of age,
 - has successfully completed any dispositional sentence imposed,
 - has not been subsequently adjudicated for or convicted of any criminal offense, and
 - does not have any criminal charges pending in family court or general sessions court.

§ 63-19-2050

Juvenile Non-convictions

- If the person was found **not guilty** in an adjudicatory hearing in the family court, the court **shall grant** the expungement order regardless of the person's age and
- the person **must not be charged a fee** for the expungement.

§ 63-19-2050

(C)(2) For the purpose of this section, **any number** of offenses for which the individual received youthful offender sentences at a single sentencing proceeding for offenses that are closely connected and arose out of the same incident may be considered as one offense and treated as one conviction for expungement purposes.

§17-22-1010

Youth Challenge Academy

- Must be eligible pursuant to Sections 22-5-910, 22-5-920, 34-11-90(e), and 56-5-750(F) and must successfully complete the South Carolina Youth Challenge Academy and the South Carolina Jobs Challenge Program administered by the South Carolina Army National Guard.
- Can have no other convictions during the approximately **one-year period** as provided in subsection (A), or immediately after graduation and successful completion
- No person may have his records expunged under this section more than once.

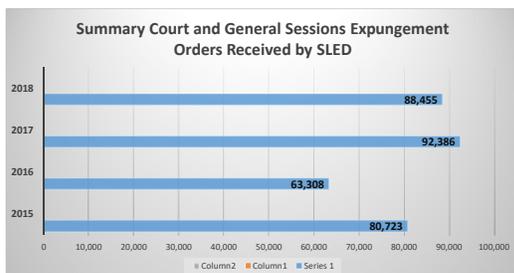
Minor Traffic-related Offenses

§ 17-22-940(E) - If the expungement is sought pursuant to Section 34-11-90(e), Section 22-5-910, Section 22-5-920, Section 63-19-2050, or Section 56-5-750(f), the conviction for **any minor traffic-related offense that is not related in any way to driving under the influence of alcohol or other drugs** will not be considered as a bar to expungement.

§ 17-22-940 - Role of SLED

(E) SLED shall verify and document that the criminal charges in **all cases**, except in cases when charges are sought to be expunged pursuant to Section 17-1-40, **Section 17-22-150(a), Section 17-22-530(A), Section 17-22-330(A), or Section 44-53-450(b)**, are appropriate for expungement before the solicitor or his designee, and then a circuit court judge, or a family court judge in the case of a juvenile, signs the application for expungement.

Expungement Orders Received by SLED



Forms - § 17-22-930

A person applying to expunge a criminal record shall obtain the appropriate blank expungement order form from the solicitor's office in the judicial circuit where the charge originated. **The use of this form is mandatory and to the exclusion of all other expungement forms.**

Use of One Order - § 17-22-940

(G) Each expungement order may contain only one charge sought to be expunged, except in those circumstances when expungement is sought for **multiple charges occurring out of a single incident and subject to expungement pursuant to Section 17-1-40 or 17-22-150(a).**

Fees - § 17-22-940

(A) In exchange for the expungement service that is provided by the solicitor's office, the applicant is responsible for payment to the solicitor's office of an **administrative fee in the amount of two hundred fifty dollars per individual order**, which must be retained by that office to defray the costs associated with the expungement process except as provided in items (1) and (2). The two hundred fifty dollar fee is **nonrefundable**, regardless of whether the offense is later determined to be statutorily ineligible for expungement or the solicitor or his designee does not consent to the expungement.

Fees - § 17-22-940(A)

(1) Any person who applies to the solicitor's office for an expungement of general session charges pursuant to Section 17-1-40 is exempt from paying the administrative fee, **unless the charge that is the subject of the expungement request was dismissed, discharged, or nolle prossed as part of the plea arrangement under which the defendant pled guilty and was sentenced to other charges.**

Fees - § 17-22-940(A)

(2) Each solicitor's office **shall** establish an account to collect **private donations** for the purpose of assisting in defraying the administrative fee of an expungement by up to fifty percent (50%). These funds shall be available on a first come, first serve basis to applicants. This item does not require the solicitor to request or solicit funds for this account.

SLED Fee - § 17-22-940

(E)(1) SLED shall receive a twenty-five dollar certified check or money order from the solicitor or his designee on behalf of the applicant made payable to SLED for each verification request, **except that no verification fee may be charged when an expungement is sought pursuant to Section 17-1-40, Section 17-22-530(A), Section 17-22-330(A), Section 17-22-150(a), or Section 44-53-450(b).**

Clerk of Court Fee - § 17-22-940

(F) The applicant also is responsible to the clerk of court for the filing fee per individual order as required by Section 8-21-310(21) [**\$35.00**], which must be forwarded to the clerk of court by the solicitor or his designee and deposited in the county general fund. If the charge is determined to be statutorily ineligible for expungement, this prepaid clerk of court filing fee must be refunded to the applicant by the solicitor or his designee.

Expungement = Sealing

§ 17-1-40(A) For purposes of this section, "under seal" means not subject to disclosure other than to a law enforcement or prosecution agency, and attorneys representing a law enforcement or prosecution agency, unless disclosure is allowed by court order.

§ 17-1-40

(B)(1)(a) Law enforcement and prosecution agencies **shall retain** the arrest and booking record, associated bench warrants, mug shots, and fingerprints of the person under seal for three years and one hundred twenty days....

The information must remain under seal. The information is not a public document and is exempt from disclosure, except by court order.

§ 17-1-40

(B)(1)(a) A law enforcement or prosecution agency **may retain the information indefinitely** for purposes of ongoing or future investigations and prosecution of the offense, administrative hearings, and to defend the agency and the agency's employees during litigation proceedings.

The information must remain under seal. The information is not a public document and is exempt from disclosure, except by court order.

§ 17-1-40(B)(4)

If a person pleads guilty to a lesser-included offense and the solicitor deems it appropriate, the solicitor shall notify the State Law Enforcement Division (SLED) and SLED shall request that the person's record contained in the National Crime Information Center (NCIC) database or other similar database reflects the lesser-included offense rather than the offense originally charged.

Employment Protection - § 17-22-960

Any employer that employs a worker who has had an expungement shall not, at any time, be subject to any administrative or legal claim or cause of action related to the worker's expunged offense. Except for criminal justice agencies, employers shall not use expunged information adversely against an employee.

§ 17-22-960

No information related to an expungement shall be used or introduced as evidence in any administrative or legal proceeding involving negligent hiring, negligent retention, or similar claims.

Solicitor Discretion

S.C. Code Ann. § 17-22-940(I) - “[n]othing in this article precludes an applicant from retaining counsel to apply to the solicitor’s office on his behalf or precludes retained counsel from initiating an action in circuit court seeking a judicial determination of eligibility **when the solicitor, in his discretion, does not consent to the expungement.**

Solicitor Discretion

S.C. Code Ann. § 17-22-940(A) - “[t]he two hundred fifty dollar fee is nonrefundable, regardless of whether the offense is later determined to be statutorily ineligible for expungement **or the solicitor or his designee does not consent to the expungement.**”

Non-Criminal Offenses

- 63-3-620 – Contempt of Court (Civil)
 - (Both CDR Codes 763 and 2442)
- 44-53-391 – Drug Paraphernalia
- 56-5-6520 – Seatbelt Violation
- 16-17-500(F)(1) – Cigarette Purchase By Minor
- 56-5-3425 – Bicycle Violations
- 6-9-80 – Building Code Violations

Non-Criminal Offenses

- 55-1-100(B) – Aircraft / Refusal of Breath Test
- 55-5-260(A) – Aircraft / USARA Violation
- 55-13-10 – Violation of Regulations Enacted by Counties Regarding Airports
- 56-5-3890(B) – Texting
- 58-23-1680(B) – Passenger / TNCA Violation

Contact Information

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Developments and Issues in Juveniles Justice

L. Eden Hendrick

Raise the Age
Senate Bill 916
Signed by Gov. Haley on June 6, 2016

Trend to Raise the Age Begins

- 2007 Connecticut
- 2010 Mississippi, Illinois
- 2013 Massachusetts
- 2014 New Hampshire

South Carolina Behind and Ahead of the Raise the Age Trend

- June 2016 **South Carolina**: effective July 2019
- June 2016 **Louisiana**: effective July 2018, July 2020
- April 2017 **New York**: effective October 2018, October 2019
- June 2017 **North Carolina**: effective December 2019
- June 2018 **Missouri**: effective January 2021

Current and Future Trends

- **Georgia, Texas, Michigan and Wisconsin** have juvenile age ending at 16
- May 2018 **Vermont** became the first State to raise the juvenile age to above 18 and by 2022, the juvenile system will include 18 year olds and some 19 year olds
- December 2018 Congress reauthorized **Juvenile Justice and Delinquency Prevention Act** for the first time since 2002

Terrible Teens

Multiple Statutory Definitions for “Minors,” “Juvenile” and “Child”

- Children's Code: 18 – unless otherwise defined
- Consent to Health Services: 16 and over
- Uniform Gift to Minors Act: 21 and over
- Juvenile Justice Code: under 16
- Class A-D Felonies: under 15
- Status Offense: under 17
- Contributing to Delinquency of a Minor: under 18
- Beer and Wine Purchase and Consumption: 21 and over; Sell Beer and Wine: 18 and over
- Marriage: 16 and over
- Missing Child: under 17, Missing Person: 17 and Over, Exploited Children: under 18
- Custodial Interference: under 16
- Piercing, Tattoos, Voluntary and Involuntary Commitments, Abortions, Lottery Tickets, Trusts and Estates, Workers Compensation

Definition of a Juvenile §63-19-20(1)

- Definition of a Juvenile for ALL Criminal or Status Offense
 - Current Law: 17th Birthday
 - New Law: 18th Birthday
- Person Charged with Criminal Offense that Carries 15 Years or More and Accompanying Offenses
 - Current Law: 16 years old
 - New Law: 17 years old

Family Court Jurisdiction §63-3-510

- Exclusive Original Jurisdiction
 - Current Law: Expires at 17
 - New Law: Expires at 18
- Once Acquired Jurisdiction Continues Until
 - Current Law: Expires at 21
 - New Law: Expires at 22

Waiver to General Sessions §63-19-1210

- Class E or F Felony or Misdemeanor
 - Current Law: 16
 - New Law: 17
- Class A, B, C, or D Felony
 - Current Law: 14 and 15
 - New Law: 14, 15 or 16
- Waiver for current offense that carries over 10 years and juvenile has 2 prior adjudications for 10 year offenses
 - Current Law: Automatic
 - New Law: After Full Investigation and Hearing

Probation §63-19-140

- Probation may expire before but not after the:
 - Current Law: 18th Birthday
 - New Law: 20th Birthday

Driver's License Suspension §63-19-1420

- Status Offense or Violation of Court Order for Status Offense
 - Current Law: 17th Birthday
 - New Law: 18th Birthday
- Criminal Offense or Violation of Court Order for Criminal Offense
 - Current Law: 18th Birthday
 - New Law: 20th Birthday

Commitment §63-19-1440

- Commitment for a criminal offense for an indeterminate sentence not to exceed
 - Current Law: 21st Birthday
 - New Law: 22nd Birthday
- Transfer for Violent Offenses from DJJ to SCDC
 - Current Law: 17th Birthday
 - New Law: 18th Birthday
- Transfer from DJJ to SCDC for all Offenses remains 19

Parole §63-19-1850

- Conditional Release may expire before but not after:
 - Current Law: 21st Birthday
 - New Law: 22nd Birthday

Expungement
§63-19-2050

- The Court shall not grant the expungement order unless the court finds that the person is at least
 - Current Law: 17 years old
 - New Law: 18 Years old
 - Not Guilty after a Trial remain expungable regardless of age

Data Collection
S. 916

- Court Administration consulted with various criminal justice agencies to collect data from July 1, 2016 through July 1, 2017 in order to help determine the fiscal and revenue impact of raising the juvenile age on various agencies
- Data Report Due to the General Assembly by September 1, 2017

Contingent on Funding
S.916

- “take effect on July 1, 2019, contingent on the Department of Juvenile Justice having received any funds that may be necessary for implementation.”
- DJJ to request such funds in fiscal year 2017-2018 and 2018-2019 budget requests.
- “Beginning on September 1, 2017, all state and local agencies and courts involved with the implementation of the provisions of this Act may begin undertaking and executing any and all applicable responsibilities so that the provisions of this Act may be fully implemented on July 1, 2019.”

What Happens Now

- SJR 46 and HJR 3450 to Amend Section 3, Article XII of the Constitution
 - “The General Assembly shall provide for the separate confinement of juvenile offenders under the age of ~~seventeen~~ eighteen from older confined persons.”
- As of February 8, 2018 – Still Up in the Air

S*916

Session 121 (2015-2016)

S*0916 (Rat #0227, Act #0268 of 2016) General Bill, By Malloy, Fair and

M.B. Matthews

AN ACT TO AMEND SECTION 63-3-510, CODE OF LAWS OF SOUTH CAROLINA, 1976,

RELATING TO THE JURISDICTION OF THE FAMILY COURT, SO AS TO **RAISE THE AGE** THAT A PERSON IS CONSIDERED A CHILD FOR PURPOSES OF DELINQUENCY MATTERS BEFORE THE FAMILY COURT; TO AMEND SECTION 63-19-20, RELATING TO THE DEFINITION OF "CHILD" OR "JUVENILE" , SO AS TO MEAN A PERSON UNDER THE AGE OF EIGHTEEN YEARS, WITH EXCEPTIONS; TO AMEND SECTIONS 63-19-1030, 63-19-1210, 63-19-1410, 63-19-1420, 63-19-1440, AS AMENDED, 63-19-1850, AS AMENDED, AND 63-19-2050, AS AMENDED, ALL RELATING TO JUVENILE DELINQUENCY PROCEEDINGS IN THE FAMILY COURT, SO AS TO RAISE AGE LIMITATIONS TO CONFORM WITH SECTIONS 63-3-510 AND 63-19-20; AND TO REQUIRE CERTAIN STATE AGENCIES TO COLLECT DATA AND SUBMIT A REPORT ADDRESSING THE FISCAL IMPACT OF RAISING THE AGE THAT A PERSON IS CONSIDERED A CHILD FOR PURPOSES OF DELINQUENCY MATTERS BEFORE THE FAMILY COURT. - ratified title

12/02/15 Senate Prefiled
12/02/15 Senate Referred to Committee on Judiciary
01/13/16 Senate Introduced and read first time (Senate Journal-page 30)
01/13/16 Senate Referred to Committee on Judiciary
(Senate Journal-page 30)
02/11/16 Senate Referred to Subcommittee: Malloy (ch), Campsen, Hembree
04/13/16 Senate Committee report: Favorable with amendment
Judiciary (Senate Journal-page 16)
04/14/16 Scrivener's error corrected
04/27/16 Senate Committee Amendment Amended and Adopted
(Senate Journal-page 46)
04/27/16 Senate Read second time (Senate Journal-page 46)
04/27/16 Senate Roll call Ayes-42 Nays-0 (Senate Journal-page 46)
04/28/16 Senate Read third time and sent to House
(Senate Journal-page 30)
04/28/16 Scrivener's error corrected
05/03/16 House Introduced and read first time (House Journal-page 11)
05/03/16 House Referred to Committee on Judiciary
(House Journal-page 11)
05/03/16 House Recalled from Committee on Judiciary
(House Journal-page 23)
05/04/16 House Amended (House Journal-page 14)
05/04/16 House Read second time (House Journal-page 14)
05/04/16 House Roll call Yeas-102 Nays-0 (House Journal-page 15)
05/04/16 Scrivener's error corrected
05/05/16 Scrivener's error corrected
05/05/16 House Read third time and returned to Senate with
amendments (House Journal-page 141)
05/24/16 Senate Concurred in House amendment and enrolled
(Senate Journal-page 110)
05/24/16 Senate Roll call Ayes-37 Nays-0 (Senate Journal-page 110)
06/02/16 Ratified R 227
06/06/16 Signed By Governor
06/16/16 Effective date See Act for Effective Date
06/17/16 Act No. 268

VERSIONS OF THIS BILL

12/2/2015
4/13/2016
4/14/2016
4/27/2016
4/28/2016
5/3/2016
5/4/2016
5/5/2016

S. 916

(A268, R227, S916)

AN ACT TO AMEND SECTION 63-3-510, CODE OF LAWS OF SOUTH CAROLINA, 1976, RELATING TO THE JURISDICTION OF THE FAMILY COURT, SO AS TO **RAISE THE AGE THAT A PERSON IS CONSIDERED A CHILD FOR PURPOSES OF DELINQUENCY MATTERS BEFORE THE FAMILY COURT; TO AMEND SECTION 63-19-20, RELATING TO THE DEFINITION OF "CHILD" OR "JUVENILE" , SO AS TO MEAN A PERSON UNDER THE AGE OF EIGHTEEN YEARS, WITH EXCEPTIONS; TO AMEND SECTIONS 63-19-1030, 63-19-1210, 63-19-1410, 63-19-1420, 63-19-1440, AS AMENDED, 63-19-1850, AS AMENDED, AND 63-19-2050, AS AMENDED, ALL RELATING TO JUVENILE DELINQUENCY PROCEEDINGS IN THE FAMILY COURT, SO AS TO RAISE AGE LIMITATIONS TO CONFORM WITH SECTIONS 63-3-510 AND 63-19-20; AND TO REQUIRE CERTAIN STATE AGENCIES TO COLLECT DATA AND SUBMIT A REPORT ADDRESSING THE FISCAL IMPACT OF RAISING THE AGE THAT A PERSON IS CONSIDERED A CHILD FOR PURPOSES OF DELINQUENCY MATTERS BEFORE THE FAMILY COURT.**

Be it enacted by the General Assembly of the State of South Carolina:

Jurisdiction of the family court, age limitations

SECTION 1. Section 63-3-510 of the 1976 Code is amended to read:

"Section 63-3-510. (A) Except as otherwise provided herein, the court shall have exclusive original jurisdiction and shall be the sole court for initiating action:

(1) Concerning any child living or found within the geographical limits of its jurisdiction:

(a) who is neglected as to proper or necessary support or education as required by law, or as to medical, psychiatric, psychological, or other care necessary to his well-being, or who is abandoned by his parent or other custodian;

(b) whose occupation, behavior, condition, environment, or associations are such as to injure or endanger his welfare or that of others;

(c) who is beyond the control of his parent or other custodian;

(d) who is alleged to have violated or attempted to violate any state or local law or municipal ordinance, regardless of where the violation occurred except as provided in Section 63-3-520;

(e) whose custody is the subject of controversy, except in those cases where the law now gives other courts concurrent jurisdiction. In the consideration of these cases, the court shall have concurrent jurisdiction to hear and determine the issue of custody and support.

(2) For the treatment or commitment to any mental institution of a mentally defective or mentally disordered or emotionally disturbed child. Provided, that nothing herein is intended to conflict with the authority of probate courts in dealing with mental cases.

(3) Concerning any person eighteen years of age or over, living or found within the geographical limits of the court's jurisdiction, alleged to have violated or attempted to violate any state or local law or municipal ordinance prior to having become eighteen years of age and such person shall be dealt with under the provisions of this title relating to children.

(4) For the detention of a juvenile in a juvenile detention facility who is charged with committing a criminal offense when detention in a secure facility is found to be necessary pursuant to the standards set forth in Section 63-19-820 and when the facility exists in, or is otherwise available to, the county in which the crime occurred.

(B) Whenever the court has acquired the jurisdiction of any child under eighteen years of age, jurisdiction continues so long as, in the judgment of the court, it may be necessary to retain jurisdiction for the correction or education of the child, but jurisdiction shall terminate when the child attains the age of twenty-two years. Any child who has been adjudicated delinquent and placed on probation by the court remains under the authority of the court only until the expiration of the specified term of his probation. This specified term of probation may expire before but not after the twentieth birthday of the child."

Juvenile justice code definitions

SECTION 2. Section 63-19-20(1) of the 1976 Code is amended to read:

"(1) 'Child' or 'juvenile' means a person less than eighteen years of age. 'Child' or 'juvenile' does not mean a person seventeen years of age or older who is charged with a Class A, B, C, or D felony as defined in Section 16-1-20 or a felony which provides for a maximum term of imprisonment of fifteen years or more. However, a person seventeen years of age who is charged with a Class A, B, C, or D felony as defined in Section 16-1-20 or a felony which provides for a maximum term of imprisonment of fifteen years or more may be remanded to the family court for disposition of the charge at the discretion of the solicitor. An additional or accompanying charge associated with the charges contained in this item must be heard by the court with jurisdiction over the offenses contained in this item."

Family court hearing requirements, age limitations for juveniles

SECTION 3. Section 63-19-1030(B) of the 1976 Code is amended to read:

"(B) The petition and all subsequent court documents must be entitled:

'In the Family Court of _____ County.

In the Interest of _____, a child under eighteen years of age.'

The petition must be verified and may be upon information and belief. It shall set forth plainly:

- (1) the facts which bring the child within the purview of this chapter;
- (2) the name, age, and residence of the child;
- (3) the names and residences of the child's parents;
- (4) the name and residence of a legal guardian, if there is one, of the person or persons having custody of or control of the child, or of the nearest known relative if no parent or guardian can be found. If any of these facts are not known by the petitioner, the petition shall state that."

Transfer of jurisdiction from family to circuit court, age limitations

SECTION 4. Section 63-19-1210 of the 1976 Code is amended to read:

"Section 63-19-1210. In accordance with the jurisdiction granted to the family court pursuant to Sections 63-3-510, 63-3-520, and 63-3-530, jurisdiction over a case involving a child must be transferred or retained as follows:

- (1) If, during the pendency of a criminal or quasi-criminal charge against a child in a circuit court of this State, it is ascertained that the child was under the age of eighteen years at the time of committing the alleged offense, it is the duty of the circuit court immediately to transfer the case, together with all the papers, documents, and testimony connected with it, to the family court of competent jurisdiction, except in those cases where the Constitution gives to the circuit court exclusive jurisdiction or in those cases where jurisdiction has properly been transferred to the circuit court by the family court under the provisions of this section. The court making the transfer shall order the child to be taken immediately to the place of detention designated by the court or to that court itself, or shall release the child to the custody of some suitable person to be brought before the court at a time designated. The court then shall proceed as provided in this chapter. The provisions of this section are applicable to all existing offenses and to offenses created in the future unless the General Assembly specifically directs otherwise.
- (2) Whenever a child is brought before a magistrate or city recorder and, in the opinion of the magistrate or city recorder, the child should be brought to the family court of competent jurisdiction under the provisions of this section, the magistrate or city recorder shall transfer the case to the family court and direct that the child involved be taken there.

(3) When an action is brought in a circuit court which, in the opinion of the judge, falls within the jurisdiction of the family court, he may transfer the action upon his own motion or the motion of any party.

(4) If a child seventeen years of age or older is charged with an offense which, if committed by an adult, would be a misdemeanor, a Class E or F felony as defined in Section 16-1-20, or a felony which provides for a maximum term of imprisonment of ten years or less, and if the court, after full investigation, considers it contrary to the best interest of the child or of the public to retain jurisdiction, the court, in its discretion, acting as committing magistrate, may bind over the child for proper criminal proceedings to a court which would have trial jurisdiction of the offense if committed by an adult.

(5) If a child fourteen, fifteen, or sixteen years of age is charged with an offense which, if committed by an adult, would be a Class A, B, C, or D felony as defined in Section 16-1-20 or a felony which provides for a maximum term of imprisonment of fifteen years or more, the court, after full investigation and hearing, may determine it contrary to the best interest of the child or of the public to retain jurisdiction. The court, acting as committing magistrate, may bind over the child for proper criminal proceedings to a court which would have trial jurisdiction of the offenses if committed by an adult.

(6) Within thirty days after the filing of a petition in the family court alleging the child has committed the offense of murder or criminal sexual conduct, the person executing the petition may request in writing that the case be transferred to the court of general sessions with a view to proceeding against the child as a criminal rather than as a child coming within the purview of this chapter. The judge of the family court is authorized to determine this request. If the request is denied, the petitioner may appeal within five days to the circuit court. Upon the hearing of the appeal, the judge of the circuit court is vested with the discretion of exercising and asserting the jurisdiction of the court of general sessions or of relinquishing jurisdiction to the family court. If the circuit judge elects to exercise the jurisdiction of the general sessions court for trial of the case, he shall issue an order to that effect, and then the family court has no further jurisdiction in the matter.

(7) Once the family court relinquishes its jurisdiction over the child and the child is bound over to be treated as an adult, Section 63-19-2020 dealing with the confidentiality of identity and fingerprints does not apply.

(8) When jurisdiction is relinquished by the family court in favor of another court, the court shall have full authority and power to grant bail, hold a preliminary hearing and any other powers as now provided by law for magistrates in such cases.

(9) If a child fourteen years of age or older is charged with a violation of Section 16-23-430, Section 16-23-20, or Section 44-53-445, the court, after full investigation and hearing, if it considers it contrary to the best interest of the child or the public to retain jurisdiction, acting as committing magistrate, may bind over the child for proper criminal proceedings to a court which would have trial jurisdiction of the offenses if committed by an adult.

(10) If a child fourteen years of age or older is charged with an offense which, if committed by an adult, provides for a term of imprisonment of ten years or more and the child previously has been adjudicated delinquent in family court or convicted in circuit court for two prior offenses which, if committed by an adult, provide for a term of imprisonment of ten years or more, the court, after full investigation and hearing, if it considers it contrary to the best interest of the child or the public to retain jurisdiction, acting as committing magistrate, may bind over the child for proper criminal proceedings to a court which would have trial jurisdiction of the offense if committed by an adult. For the purpose of this item, an adjudication or conviction is considered a second adjudication or conviction only if the date of the commission of the second offense occurred subsequent to the imposition of the sentence for the first offense."

Adjudication of juveniles in family court, age limitations

SECTION 5. Section 63-19-1410(A) of the 1976 Code is amended to read:

"(A) When a child is found by decree of the court to be subject to this chapter, the court shall in its decree make a finding of the facts upon which the court exercises its jurisdiction over the child. Following the decree, the court by order may:

- (1) cause a child concerning whom a petition has been filed to be examined or treated by a physician, psychiatrist, or psychologist and for that purpose place the child in a hospital or other suitable facility;
- (2) order care and treatment as it considers best, except as otherwise provided in this section and may designate a state agency as the lead agency to provide a family assessment to the court. The assessment shall include, but is not limited to, the strengths and weaknesses of the family, problems interfering with the functioning of the family and with the best interests of the child, and recommendations for a comprehensive service plan to strengthen the family and assist in resolving these issues.

The lead agency shall provide the family assessment to the court in a timely manner, and the court shall conduct a hearing to review the proposed plan and adopt a plan as part of its order that will best meet the needs and best interest of the child. In arriving at a comprehensive plan, the court shall consider:

- (a) additional testing or evaluation that may be needed;
- (b) economic services including, but not limited to, employment services, job training, food stamps, and aid to families with dependent children;
- (c) counseling services including, but not limited to, marital counseling, parenting skills, and alcohol and drug abuse counseling; and
- (d) any other programs or services appropriate to the child's and family's needs.

The lead agency is responsible for monitoring compliance with the court-ordered plan and shall report to the court as the court requires. In support of an order, the court may require the parents or other persons having custody of the child or any other person who has been found by the court

to be encouraging, causing, or contributing to the acts or conditions which bring the child within the purview of this chapter to do or omit to do acts required or forbidden by law, when the judge considers the requirement necessary for the welfare of the child. In case of failure to comply with the requirement, the court may proceed against those persons for contempt of court;

(3) place the child on probation or under supervision in the child's own home or in the custody of a suitable person elsewhere, upon conditions as the court may determine. A child placed on probation by the court remains under the authority of the court only until the expiration of the specified term of the child's probation. This specified term of probation may expire before but not after the twentieth birthday of the child. Probation means casework services during a continuance of the case. Probation must not be ordered or administered as punishment but as a measure for the protection, guidance, and well-being of the child and the child's family. Probation methods must be directed to the discovery and correction of the basic causes of maladjustment and to the development of the child's personality and character, with the aid of the social resources of the community. As a condition of probation, the court may order the child to participate in a community mentor program as provided for in Section 63-19-1430. The court may impose monetary restitution or participation in supervised work or community service, or both, as a condition of probation. The Department of Juvenile Justice, in coordination with local community agencies, shall develop and encourage employment of a constructive nature designed to make reparation and to promote the rehabilitation of the child. When considering the appropriate amount of monetary restitution to be ordered, the court shall establish the monetary loss suffered by the victim and then weigh and consider this amount against the number of individuals involved in causing the monetary loss, the child's particular role in causing this loss, and the child's ability to pay the amount over a reasonable period of time. The Department of Juvenile Justice shall develop a system for the transferring of court-ordered restitution from the child to the victim or owner of property injured, destroyed, or stolen. As a condition of probation the court may impose upon the child a fine not exceeding two hundred dollars when the offense is one in which a magistrate, municipal, or circuit court judge has the authority to impose a fine. A fine may be imposed when commitment is suspended but not in addition to commitment;

(4) order the child to participate in a community mentor program as provided in Section 63-19-1430;

(5) commit the child to the custody or to the guardianship of a public or private institution or agency authorized to care for children or to place them in family homes or under the guardianship of a suitable person. Commitment must be for an indeterminate period but in no event beyond the child's twenty-second birthday;

(6) require that a child under twelve years of age who is adjudicated delinquent for an offense listed in Section 23-3-430(C) be given appropriate psychiatric or psychological treatment to address the circumstances of the offense for which the child was adjudicated; and

(7) dismiss the petition or otherwise terminate its jurisdiction at any time on the motion of either party or on its own motion."

Driver's license restrictions for delinquent juveniles, age limitations

SECTION 6. Section 63-19-1420 of the 1976 Code is amended to read:

"Section 63-19-1420. (A) If a child is adjudicated delinquent for a status offense or is found in violation of a court order relating to a status offense, the court may suspend or restrict the child's driver's license until the child's eighteenth birthday.

(B) If a child is adjudicated delinquent for violation of a criminal offense or is found in violation of a court order relating to a criminal offense or is found in violation of a term or condition of probation, the court may suspend or restrict the child's driver's license until the child's twentieth birthday.

(C) If the court suspends the child's driver's license, the child must submit the license to the court, and the court shall forward the license to the Department of Motor Vehicles for license suspension. However, convictions not related to the operation of a motor vehicle shall not result in increased insurance premiums.

(D) If the court restricts the child's driver's license, the court may restrict the child's driving privileges to driving only to and from school or to and from work or as the court considers appropriate. Upon the court restricting a child's driver's license, the child must submit the license to the court and the court shall forward the license to the Department of Motor Vehicles for reissuance of the license with the restriction clearly noted.

(E) Notwithstanding the definition of a 'child' as provided for in Section 63-19-20, the court may suspend or restrict the driver's license of a child under the age of seventeen until the child's eighteenth birthday if subsection (B) applies.

(F) Upon suspending or restricting a child's driver's license under this section, the family court judge shall complete a form provided by and which must be remitted to the Department of Motor Vehicles."

Commitment of juveniles to the Department of Juvenile Justice, age limitations

SECTION 7. Section 63-19-1440 of the 1976 Code, as last amended by Act 227 of 2012, is further amended to read:

"Section 63-19-1440. (A) A child, after the child's twelfth birthday and before the eighteenth birthday or while under the jurisdiction of the family court for disposition of an offense that occurred prior to the child's eighteenth birthday, may be committed to the custody of the Department of Juvenile Justice which shall arrange for placement in a suitable corrective environment. Children under the age of twelve years may be committed only to the custody of the department which shall arrange for placement in a suitable corrective environment other than institutional confinement. No child under the age of eighteen years may be committed or sentenced to any other penal or correctional institution of this State.

(B) All commitments to the custody of the Department of Juvenile Justice for delinquency as opposed to the conviction of a specific crime may be made only for the reasons and in the manner prescribed in Sections 63-3-510, 63-3-520, 63-3-580, 63-3-600, 63-3-650, and this chapter, with evaluations made and proceedings conducted only by the judges authorized to

order commitments in this section. When a child is committed to the custody of the department, commitment must be for an indeterminate sentence, not extending beyond the twenty-second birthday of the child unless sooner released by the department, or for a determinate commitment sentence not to exceed ninety days.

(C) The court, before committing a child as a delinquent or as a part of a sentence including commitments for contempt, shall order a community evaluation or temporarily commit the child to the Department of Juvenile Justice for not more than forty-five days for evaluation. A community evaluation is equivalent to a residential evaluation, but it is not required to include all components of a residential evaluation. However, in either evaluation the department shall make a recommendation to the court on the appropriate disposition of the case and shall submit that recommendation to the court before final disposition. The department is authorized to allow any child adjudicated delinquent for a status offense, a misdemeanor offense, or violation of probation or contempt for any offense who is temporarily committed to the department's custody for a residential evaluation, to reside in that child's home or in his home community while undergoing a community evaluation, unless the committing judge finds and concludes in the order for evaluation, that a community evaluation of the child must not be conducted because the child presents an unreasonable flight or public safety risk to his home community. The court may waive in writing the evaluation of the child and proceed to issue final disposition in the case if the child:

- (1) has previously received a residential evaluation or a community evaluation and the evaluation is available to the court;
- (2) has been within the past year temporarily or finally discharged or conditionally released for parole from a correctional institution of the department, and the child's previous evaluation or other equivalent information is available to the court; or
- (3) receives a determinate commitment sentence not to exceed ninety days.

(D) When a juvenile is adjudicated delinquent or convicted of a crime or has entered a plea of guilty or nolo contendere in a court authorized to commit to the custody of the Department of Juvenile Justice, the juvenile may be committed for an indeterminate period until the juvenile has reached age twenty-two or until sooner released by the releasing entity or released by order of a judge of the Supreme Court or the circuit court of this State, rendered at chambers or otherwise, in a proceeding in the nature of an application for a writ of habeas corpus. A juvenile who has not been paroled or otherwise released from the custody of the department by the juvenile's nineteenth birthday must be transferred to the custody and authority of the Youthful Offender Division of the Department of Corrections. If not sooner released by the releasing entity, the juvenile must be released by age twenty-two according to the provisions of the juvenile's commitment; however, notwithstanding the above provision, any juvenile committed as an adult offender by order of the court of general sessions must be considered for parole or other release according to the laws pertaining to release of adult offenders.

(E) A juvenile committed to the Department of Juvenile Justice following an adjudication for a violent offense contained in Section 16-1-60 or for the offense of assault and battery of a high and aggravated nature, who has not been paroled or released from the custody of the department

by his eighteenth birthday must be transferred to the custody and authority of the Youthful Offender Division of the Department of Corrections. A juvenile who has not been paroled or released from the custody of the department by his nineteenth birthday must be transferred to the custody and authority of the Youthful Offender Division of the Department of Corrections at age nineteen. If not released sooner by the Board of Juvenile Parole, a juvenile transferred pursuant to this subsection must be released by his twenty-second birthday according to the provisions of his commitment. Notwithstanding the above provision, a juvenile committed as an adult offender by order of the court of general sessions must be considered for parole or other release according to the laws pertaining to release of adult offenders.

(F) Notwithstanding subsections (A) and (E), a child may be committed to the custody of the Department of Juvenile Justice or to a secure evaluation center operated by the department for a determinate period not to exceed ninety days when:

(1) the child has been adjudicated delinquent by a family court judge for a status offense, as defined in Section 63-19-20, excluding truancy, and the order acknowledges that the child has been afforded all due process rights guaranteed to a child offender;

(2) the child is in contempt of court for violation of a court order to attend school or an order issued as a result of the child's adjudication of delinquency for a status offense, as defined in Section 63-19-20; or

(3) the child is determined by the court to have violated the conditions of probation set forth by the court in an order issued as a result of the child's adjudication of delinquency for a status offense, as defined in Section 63-19-20 including truancy.

Orders issued pursuant to this subsection must acknowledge:

(a) that the child has been advised of all due process rights afforded to a child offender; and

(b) that the court has received information from the appropriate state or local agency or public entity that has reviewed the facts and circumstances causing the child to be before the court.

(G) A child committed under this section may not be confined with a child who has been determined by the department to be violent.

(H) After having served at least two-thirds of the time ordered by a court, a child committed to the Department of Juvenile Justice for a determinate period pursuant to this section may be released by the department prior to the expiration of the determinate period for 'good behavior' as determined by the department. The court, in its discretion, may state in the order that the child is not to be released prior to the expiration of the determinate period ordered by the court.

(I) Juveniles detained in any temporary holding facility or juvenile detention center or who are temporarily committed for evaluation to a Department of Juvenile Justice evaluation center for the offense for which they were subsequently committed by the family court to the custody of the Department of Juvenile Justice shall receive credit toward their parole guidelines, if indeterminately sentenced, or credit toward their date of release, if determinately sentenced, for

each day they are detained in or temporarily committed to any secure pre-dispositional facility, center, or program."

Conditional release of juveniles, age limitations

SECTION 8. Section 63-19-1850(A) of the 1976 Code, as last amended by Act 151 of 2010, is further amended to read:

"(A) A juvenile who shall have been conditionally released from a correctional facility shall remain under the authority of the releasing entity until the expiration of the specified term imposed in the juvenile's conditional aftercare release. The specified period of conditional release may expire before but not after the twenty-second birthday of the juvenile. Each juvenile conditionally released is subject to the conditions and restrictions of the release and may at any time on the order of the releasing entity be returned to the custody of a correctional institution for violation of aftercare rules or conditions of release. The conditions of release must include the requirement that the juvenile parolee must permit the search or seizure, without a search warrant, with or without cause, of the juvenile parolee's person, any vehicle the juvenile parolee owns or is driving, and any of the juvenile parolee's possessions by:

- (1) his aftercare counselor;
- (2) any probation agent employed by the Department of Probation, Parole and Pardon Services; or
- (3) any other law enforcement officer.

However, the conditions of release of a juvenile parolee who was adjudicated delinquent of a Class C misdemeanor or an unclassified misdemeanor that carries a term of imprisonment of not more than one year may not include the requirement that the juvenile parolee agree to be subject to search or seizure, without a search warrant, with or without cause, of the juvenile parolee's person, any vehicle the juvenile parolee owns or is driving, or any of the juvenile parolee's possessions.

By enacting this provision, the General Assembly intends to provide law enforcement with a means of reducing recidivism and does not authorize law enforcement officers to conduct searches for the sole purpose of harassment. Immediately before each search or seizure conducted pursuant to this subsection, the law enforcement officer seeking to conduct the search or seizure must verify with the Department of Probation, Parole and Pardon Services or by any other means available to the officer that the individual upon whom the search or seizure will be conducted is currently on parole or probation or that the individual is currently subject to the provisions of his conditional release. A law enforcement officer conducting a search or seizure without a warrant pursuant to this subsection shall report to the law enforcement agency that employs him all of these searches or seizures, which shall include the name, address, age, gender, and race or ethnicity of the person that is the subject of the search or seizure. The law enforcement agency shall submit this information at the end of each month to the Department of Probation, Parole and Pardon Services for review of abuse. A finding of abuse of the use of searches or seizures without a search warrant must be reported by the Department of Probation, Parole and Pardon Services to the State Law Enforcement Division for investigation. If the law

enforcement officer fails to report each search or seizure pursuant to this subsection, he is subject to discipline pursuant to the employing agency's policies and procedures."

Expungement orders in family court, age limitations

SECTION 9. Section 63-19-2050(C) of the 1976 Code, as last amended by Act 22 of 2015, is further amended to read:

"(C)(1) If the person has been taken into custody for, charged with, or adjudicated delinquent for having committed a status offense, the court shall grant the expungement order. If the person has been taken into custody for, charged with, or adjudicated delinquent for having committed multiple status offenses, the court may grant an expungement order for the multiple status offenses.

(2) If the person has been taken into custody for, charged with, or adjudicated delinquent for having committed a nonviolent crime, as defined in Section 16-1-70, the court may grant the expungement order.

(3) The court shall not grant the expungement order unless the court finds that the person is at least eighteen years of age, has successfully completed any dispositional sentence imposed, has not been subsequently adjudicated for or convicted of any criminal offense, and does not have any criminal charges pending in family court or general sessions court. If the person was found not guilty in an adjudicatory hearing in the family court, the court shall grant the expungement order regardless of the person's age and the person must not be charged a fee for the expungement. An adjudication for a violent crime, as defined in Section 16-1-60, must not be expunged."

Data collection and reporting requirements

SECTION 10. South Carolina Court Administration shall consult with the South Carolina Commission on Indigent Defense, South Carolina Commission on Prosecution Coordination, South Carolina Department of Corrections, South Carolina Department of Juvenile Justice, and South Carolina Department of Probation, Parole and Pardon Services to determine data and statistics that should be collected relevant to determining the fiscal and revenue impact of this act. All state and local agencies and courts shall collect the relevant data and statistics from July 1, 2016, through June 30, 2017, and transmit the data and statistics to court administration pursuant to court administration's instructions. Court administration shall collect the relevant data and statistics and make a report to the General Assembly by September 1, 2017.

Savings clause

SECTION 11. The repeal or amendment by this act of any law, whether temporary or permanent or civil or criminal, does not affect pending actions, rights, duties, or liabilities founded thereon, or alter, discharge, release or extinguish any penalty, forfeiture, or liability incurred under the repealed or amended law, unless the repealed or amended provision shall so expressly provide. After the effective date of this act, all laws repealed or amended by this act must be taken and treated as remaining in full force and effect for the purpose of sustaining any pending or vested right, civil action, special proceeding, criminal prosecution, or appeal existing

as of the effective date of this act, and for the enforcement of rights, duties, penalties, forfeitures, and liabilities as they stood under the repealed or amended laws.

Time effective

SECTION 12. Section 10 of this act takes effect upon approval by the Governor. Sections 1 through 9 and Section 11 of this act take effect on July 1, 2019, contingent upon the Department of Juvenile Justice having received any funds that may be necessary for implementation. If the report submitted to the General Assembly on September 1, 2017, reflects any additional funds needed by the Department of Juvenile Justice to ensure implementation will be possible on July 1, 2019, the department shall include these funds in its budget requests to the General Assembly as part of Fiscal Years 2017-2018 and 2018-2019. Beginning on September 1, 2017, all state and local agencies and courts involved with the implementation of the provisions of this act may begin undertaking and executing any and all applicable responsibilities so that the provisions of this act may be fully implemented on July 1, 2019.

Ratified the 2nd day of June, 2016.

Approved the 6th day of June, 2016.



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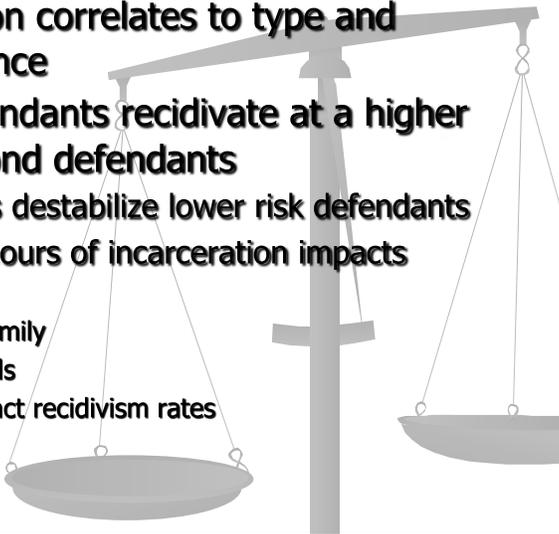
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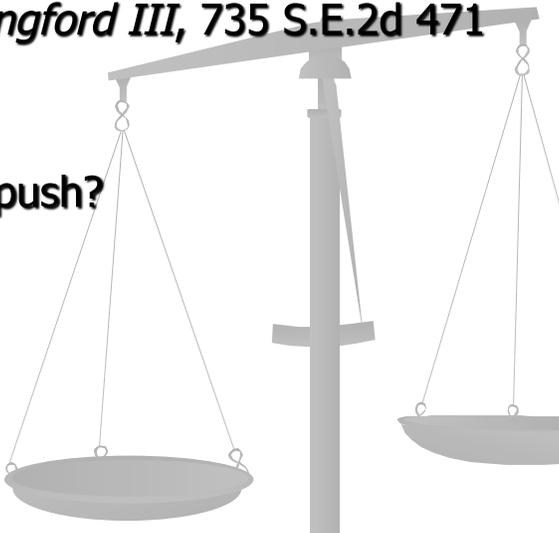
1. Bail Reform

- **The national trend**
 - California, New Jersey, Colorado
- **The Charleston experiment**
 - Significant reduction of inmates in pretrial detention
- **South Carolina?**

Impact of pretrial detention?

- Pretrial detention correlates to type and length of sentence
 - Cash bond defendants recidivate at a higher rate than PR bond defendants
 - Bond payments destabilize lower risk defendants
 - More than 24 hours of incarceration impacts
 - Job
 - Housing for family
 - Schools for kids
 - Which all impact recidivism rates
- 

2. Docket Reform

- *State v. K.C. Langford III*, 735 S.E.2d 471 (S.C. 2012)
 - 2013-2018?
 - New legislative push?
 - S. 444
- 

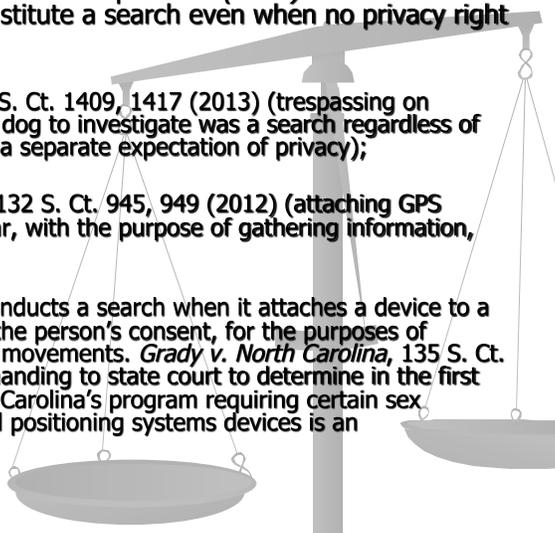
3. Privacy Reform

- Pendulum swinging to protect more liberty?



Suppression despite no REP

- The Supreme Court reaffirmed the pre-*Katz* (1967) rule that a physical trespass can constitute a search even when no privacy right is implicated.
 - *Florida v. Jardines*, 133 S. Ct. 1409, 1417 (2013) (trespassing on curtilage to allow police dog to investigate was a search regardless of whether defendant had a separate expectation of privacy);
 - *United States v. Jones*, 132 S. Ct. 945, 949 (2012) (attaching GPS device to defendant's car, with the purpose of gathering information, constitutes a search)
 - The government also conducts a search when it attaches a device to a person's body, without the person's consent, for the purposes of tracking the individual's movements. *Grady v. North Carolina*, 135 S. Ct. 1368, 1370 (2015) (remanding to state court to determine in the first instance whether North Carolina's program requiring certain sex offenders to wear global positioning systems devices is an "unreasonable" search).



Cell phones

- With respect to cellular telephones, the Supreme Court unanimously held that warrantless searches of the contents of cell phones seized incident to arrest violate the Fourth Amendment. *Riley v. California*, 134 S. Ct. 2473, 2495 (2014) (“Modern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse.”).

Cell tower data

- In *Carpenter v. United States*, the Supreme Court held that an individual maintains a legitimate expectation of privacy for the record of physical movements as captured through cell site location information (CSLI) and the government must generally obtain a search warrant supported by probable cause before acquiring CSLI from a wireless carrier. 138 S. Ct. 2206 (2018).
- *In re App. of U.S. for an Order Authorizing Disclosure of Location Information*, 849 F.Supp.2d 526, 539–42 (D. Md. 2011) (reasonable expectation of privacy in location and movements revealed by cell phone data)

Cell site simulators (Stingrays, etc.)

- The court suppressed evidence obtained through the warrantless use of a cell-site simulator because the use of such a device constitutes a Fourth Amendment search. *United States v. Lambis*, No. 15-cr-734, 2016 WL 3870940, at *5 (S.D.N.Y. July 12, 2016) (observing a warrant to obtain CSLI does not extend to use of the more precise cell-site simulator)
- District courts have suggested the use of cell-site simulators may be sufficiently intrusive to constitute a “search” for Fourth Amendment purposes. See, e.g., *In re Application of the U.S. for an Order Authorizing the Installation and Use of a Pen Register and Trap and Trace Device*, 890 F. Supp. 2d 747 (S.D. Texas June 2, 2012) (denying government’s application to authorize use of a Stingray device under the Pen/Trap Statute and suggesting a warrant would be necessary instead)

Terry stop limitations

- Observation of “nervous” behavior does not create RAS. *United States v. Bowman*, 884 F.3d 200, 214 (4th Cir. 2018) (nervousness, belongings, and inability to provide address from which he said he picked up passenger did not provide reasonable suspicion).

SC USDC suppressing warrantless searches

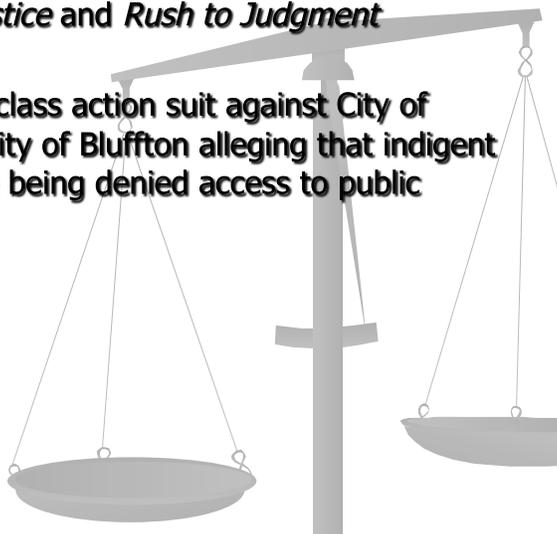
- *US v. Williams*, 4:18-cr-00086 (J. Coggins, ECF. 56)(surv. of Sea Mist hotel (red Cadillac, hand-to-hand transactions, social interactions, etc.) not sufficient for RAS)
- *US v. Holman*, 6:18-cr-00383 (J. Quattlebaum, ECF. 38) (investigative traffic stop based on high crime area, nervous behavior, and odd driving pattern is not RAS)
- *US v Diaz and Bozetti*, 2:16-cr-00055 (J. Norton, ECF. 105) (No RAS to prolong traffic detention for dog sniff, and dog is unreliable)

4. Decline of the Jury Trial?

- Significant decline in the number of jury trials nationally
 - The trial penalty?
 - Minimum mandatory sentencing?

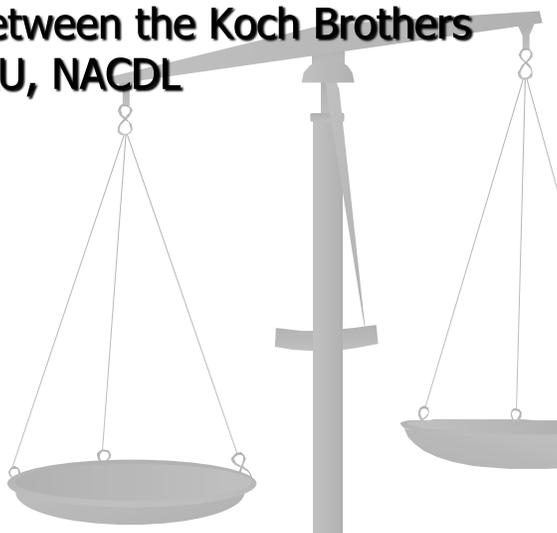
5. Due Process in the Summary Courts in SC

- *Summary Injustice and Rush to Judgment*
- Pending ACLU class action suit against City of Beaufort and City of Bluffton alleging that indigent defendants are being denied access to public defenders.



6. Sentencing Reform

- Collaboration between the Koch Brothers and FAMM, ACLU, NACDL
- First Step Act
- SC efforts?
 - H.3322
 - S.0048





South Carolina Bar

Continuing Legal Education Division

**28th Annual Criminal Practice in
South Carolina**

Friday, February 22, 2019

PCR-Proofing Your Case

Tara Shurling

THE PCR PROCESS

WHERE TO START

First things first, you need to find your client. The first question in the PCR application will tell you where the client was housed and *when he filed his application for Post-Conviction Relief*. In the last ten (10) years or so I have seen record levels of inmate movement in SCDC. It used to be that an inmate would be likely to serve out a five to ten year sentence in the same correctional institution. That is no longer the case. You should be able to locate your new client's SCDC inmate number on the Application for Post-Conviction Relief immediately to the right of his or her name. You can go on the SCDC website at www.doc.sc.gov and use your client's name and/or inmate number to ascertain their current institution assignment. I recommend that you immediately write your client and establish lines of communication.

There are several things that you need to emphasize with your PCR client up front:

- (A) That the inmate *must* notify you immediately if and when he is moved to a new correctional institutional assignment or even when he is moved within the population. A proper address should include a dorm assignment and a room number.
- (B) If your client maxes out his sentence or is released on parole or supervised release he must notify you and give you a new mailing address and phone number.
- (C) Advise your client that you will be coming to see him prior to his evidentiary hearing but that you may not be able to come and see him until sometime significantly closer to a hearing.
- (D) Tell your client that depending on the county in which their case is scheduled to be heard, there is an average wait of six months to as much as two years for a Post-Conviction Relief hearing.
- (E) Make sure your client understands that *you do not control the docket* inasmuch as the dockets are set by the Post-Conviction Relief Division of the Attorney General's Office.
- (F) Set some guidelines with your client for collect phone calls.
- (G) Tell your client that you do not have a copy of his plea or trial transcript and that you do not anticipate being provided one by the Attorney General's Office until the State prepares and files its Return to the Application for Post-Conviction Relief.

- (H) Give them an opportunity to set up *one contact person* outside SCDC. Get a name, address, phone numbers and an e-mail address (where possible) for the contact person.
- (I) Tell your client that you are letting SCDC know that you have been court appointed to represent him. Such notices need to be sent to the attention of

Ms. Debbie Castaldi
Office of Resource Information Management
South Carolina Department of Corrections
4444 Broad River Road
Columbia, SC 29221-1787

A form for notifying SCDC that you are legal counsel and that your phone transmissions should not be recorded is included at the back of these materials. Advise your client not to call you and tell you anything critical on the phone unless the recording at the beginning of the call acknowledges that it is a confidential call that will not be subject to recording and monitoring. As a practical matter, I don't trust the phone as a good way to communicate with any of my incarcerated clients, so I tell them not to convey sensitive information to me by phone.

THE NECESSARY DOCUMENTS

As previously noted, you will probably not be provided your client's General Sessions transcript right away. As a general practice, in cases involving guilty pleas the PCR Division of the Attorney General's Office orders the plea hearing transcript and sends a copy to PCR Counsel about the same time the Return is filed and served. If there was a trial but the conviction was not appealed, the AG has to order the trial transcript for the PCR case. If there was a direct appeal following a trial or a plea, the direct appeal division of the Attorney General's Office will already have the General Sessions record in their file and the PCR Division will be able to get the record below without ordering it. As a practice, it is always advisable to write the Attorney General's Office as soon as you are court appointed, to inform them of your representation, and to request that they send you any and all documentation necessary for the Post-Conviction Relief case *as quickly as possible*. If the PCR Application indicates that there was a direct appeal, you can make a specific request that they locate the record in their Direct Appeal Division's file and forward your copy to you as quickly as possible. If there was no

direct appeal, then be sure and ask that they send you a copy of the General Sessions record as soon as they receive it from the Court Reporter. Make note that you need to review the record before you go see your client for the last time and that the sooner they give it to you the better the chances are that you will not have to request a continuance.

In the normal course of events, the Attorney General's Office will provide you with a copy of the General Sessions record, a copy of the records of the Clerk of Court concerning the judgments and sentences addressed by the application, and a summary copy of the inmate's SCDC records. The Clerk of Court records and SCDC records are usually provided to you at the same time as the General Sessions transcript. When you receive the Clerk of Court records review them and make certain that you have been provided the *front and back* sides of two-sided documents. A common problem is the practice of providing you only copies of the outside cover of arrest warrants and/or indictments.

As soon as you can, review your client's Application for Post-Conviction Relief and determine whether he had a guilty plea or a jury trial. If he had a jury trial, ascertain whether the client had a direct appeal. If the application does not tell you, call the South Carolina Court of Appeals at 803-734-1890 and ask to speak with a docketing clerk. Give the docketing clerk give them your client's name, the date of his conviction, the county in which the judgment was entered, and ask them to check the Court's records to determine whether a direct appeal was perfected. If so, find out who the appellate lawyer was and whether that lawyer was a private practitioner or a staff attorney with the Appellate Division of the South Carolina Commission on Indigent Defense (formerly know as the South Carolina Office of Appellate Defense). If there was a direct appeal, you will need to contact the Attorney General's Office and request that you be provided copies of all the appellate materials including all briefs filed in the case, the opinion in the case, any petition for rehearing that may have been filed, and any petitions for writ of certiorari which may have followed.

There is no discovery process in Post-Conviction Relief cases. Unlike General Sessions Court where the Solicitors are required to respond to your discovery motions by providing you copies of certain materials, you will not be provided with discovery materials by the Attorney General's Office. One of the most beneficial things you can do to prepare a PCR case is to

arrange a time to sit down and review defense counsel's file. In some cases, the trial lawyer will allow you to do so simply by providing him a copy of the letter or order appointing you to the PCR case. Others will require a subpoena. Assuming they are not too voluminous, it is my practice to make a copy of the discovery materials that were sent to defense counsel by the Solicitor's Office. Most trial lawyers keep these materials segregated in their files. **DO NOT TAKE THE DEFENSE ATTORNEY'S FILE.** Even if the defense attorney offers it to you, it is a poor practice to take a defense lawyer's file. S.C. Code Ann. Section 17-27-130 actually dictates that trial counsel NOT turn over custody of his file to collateral counsel in capital cases. The logic behind this section is equally appropriate in non-capital matters as well. When the evidentiary hearing is set, you want defense counsel to be able to review his file in preparation for that proceeding and you want to be able to hold defense counsel accountable for what is and isn't in that file. If the file has been in your possession, defense counsel can readily explain the absence of any documentation by saying that the file has not been under his control since you took it.

In a case involving personal injury to a victim, be sure to make note of whether the discovery materials included medical records and/or autopsy reports. If the discovery materials provided to defense counsel did not include those items you should seriously consider issuing a subpoena for them. As the case develops, you may consider other documentation necessary. For example, if your client asserts that he had a viable alibi defense because he was at work during the commission of a particular crime, you will want to subpoena any records from his employer which might document that assertion and you may need to subpoena the employer and/or the client's supervisor.

With regard to any documentation you want to introduce at the Post-Conviction Relief hearing be mindful of the fact that you will need to have a witness present at the Post-Conviction Relief hearing to verify the authenticity of the document or business record *unless* you are able to get the Attorney General's Office to consent to the introduction of a copy in advance. I find that if I subpoena documents from a source and request that they are provided to me *along with a transmittal letter on letterhead referring to the specific documents attached*, the Attorney General's office will often consent to the introduction of these documents without dragging some

poor person to court to authenticate them. If not, you will have to subpoena someone in the position to authenticate the document in question.

MEETING THE CLIENT

For many of you this will be your very first experience dealing with the South Carolina Department of Corrections. Going to a correctional institution is not a pleasant experience but then again, it is not nearly as unpleasant as one might imagine. Most of the prisons in South Carolina are well run, are reasonably clean, and safe. There are some simple guidelines to go by. **NEVER GO SEE YOUR CLIENT WITHOUT CALLING THE MORNING OF YOUR APPOINTMENT TO VERIFY THAT YOUR CLIENT IS STILL THERE.** There is nothing more frustrating than traveling to a prison as far away as Evans Correctional Institution in Bennettsville, South Carolina only to find that your client was moved to another institution just the day before. If your client is older, or has a medical condition, it is advisable to check and make sure that he does not have an appointment for medical treatment away from the institution on the date of your appointment. Again, I have gone to visit an inmate only to discover he had an appointment with a cardiologist outside SCDC on the day of my appointment. The person who makes appointments for you will not be likely to know about such an appointment. Your best bet is to ask to speak with the institution's medical staff and check with them. You may have to fax them a copy of your order of appointment and your Bar card to get them to tell you if the client is scheduled to be away from the institution for medical treatment on a particular date.

Make appointments with your client's correctional institution *a minimum of twenty-four hours* in advance. When you call the institution, ask that they connect you with the employee responsible for setting up lawyer visits. Always find out what time that particular institution has *count times*. Most institutions do a total count of the inmate population at least three times a day. If that count does not balance there will be recounts and sometimes what are called *standing roll calls*. It is not in your best interest to schedule your visit near a *count time*. Find out when an institution's time count times are and what time they normally expect the count to have cleared. Plan your visit accordingly.

Always make note of the name of the individual who set up the appointment for you and request a fax number. Next, send a confirmation fax to that individual documenting your telephone conversation and the fact that an appointment has been set for a certain date and time. Give the institution the names of any staff members or experts who might be accompanying you. ***You cannot*** show up at a prison with a paralegal, or any other assistant or expert, that you have not given the institution advance notice would be coming with you. ***Take a copy of that fax transmission with you to the institution.*** I normally advise taking three copies. I give one copy to the person at the front security desk; keep one for my file, and have an extra handy to give to an SCDC employee inside the institution who may need to call your clients to the front for their attorney visit. Some institutions will call your clients up front in advance and have them in a holding cell waiting for you, while others will make you wait while they call them to the front. The latter process can take a long time so I recommend that you ask the institution if they will agree to have the inmate called up in advance of your arrival.

Find out in advance if your client is in lock-up or administrative segregation. If so, you will be going to an entirely different part of the prison from where the general population is housed. These sections have significantly enhanced security. If your client is in administrative segregation or lock-up I recommend finding out how long the individual is expected to remain there. If you are not under a time crunch, i.e., your hearing isn't the following week, I strongly recommend waiting until your client is returned to the general population to visit.

When you make your appointment ask if that particular institution has any specific dress codes. I was once kept waiting in the parking lot at Broad River Correctional Institution in 100 degree weather because my very dressy business suit had a wrap around skirt. Be mindful of contraband restrictions. Generally speaking, you cannot take in a cell phone, a beeper, or a PDA. You may be allowed to take in your laptop computer, but you will need to have that cleared by the individual prison at the time you make your appointment. In order to get a laptop approved, you will need to know the exact make and model of your laptop and provide that information to the individual scheduling your meeting. That individual is not likely to have the authority to approve the laptop for you, so be certain to arrange to have someone get back in touch with you and let you know whether or not you will be permitted to bring your laptop into the institution. Ladies, ***you will not be permitted to bring a handbag into SCDC.*** Gentlemen, ***wallets are no***

longer allowed. To get in the institution you will need to have your South Carolina driver's license, or official South Carolina identification card, as well as your South Carolina Bar card. You can take in a very small amount of cash; usually no more than \$10.00. I recommend that you take \$1.00 bills and, if possible, some quarters. Some institutions will arrange your attorney client meeting in the general visitation room. Those rooms are equipped with vending machines where you will be able to buy a soft drink or a cup of coffee. **YOU MAY NOT BUY YOUR CLIENT ANYTHING.** I used to routinely buy my client a soft drink to have during lengthy client interviews. I liked this practice because it not only put the client at ease but allowed me to enjoy my drink without feeling uncomfortable about the client not having one. SCDC has now cracked down on this practice and will not permit you to buy your client anything from the vending machines. I find this restriction unreasonable since the client's family and friends can buy them anything they want to from the vending machines during their visits in the same room.

It is a good idea to notify your client in advance that you are coming to their institution for a visit when possible. Be sure to instruct them to bring with them copies of any documentation that they want you to review in preparation for their evidentiary hearing. I always take a supply of 9 x 12 manila envelopes with me on prison visits so that I can keep materials given to me by clients separate from those already in my file. You will have a lot more luck getting your client to allow you to take materials from their possession if you can assure them that you are keeping their materials separate from the rest of your file and that you will copy them and mail the client a copy when you get back to your office. When you copy the materials and return a copy to the client, also be certain to do a transmittal letter documenting that you returned copies to him and reference exactly what documents you are sending.

If your client is not in custody at the time you are appointed you will obviously need to find him. If the client listed an SCDC location in his application but has been released since that time you may have a difficult time locating him. You can check with offender records at SCDC by calling (803) 896-1984. That office can let you know whether the client maxed out his sentence or whether he was released on some sort of supervised release or probation. If the client is on some sort of supervised release or probation, you can try calling the South Carolina Office of Pardon, Probation, Parole Services to ascertain who the client's supervising agent is. Frequently I am able to contact such an agent and ask him to have the client call me and notify

me of his current address when he next contacts that office or comes in for a regular appointment.

If the client has maxed out his sentence and is not under any type of supervision, try checking the Clerk of Court's records to see if the client wrote the Clerk of Court and provided a forwarding address upon his release from custody. If he did not, look at the front side of the arrest warrants in the case. This document should give you a current address for the client *at the time of his arrest*. Obviously, that address may or may not still be any good. The arrest warrant is also a good place to get your client's date of birth and social security number. This information can be helpful in having to locate the client. Another place to look is the sentencing order. In the top left hand corner you can also find personal information that can help you find your client. When all else fails, you can also try Google.

If your client is out of custody and you know his address, write him early on and ask that he call your office and set up an appointment to come in and meet with you to discuss his case. I recommend sending such letters *return receipt requested* so that you can verify that your client got your correspondence. At minimum, I would send any letter advising the client of the date and time of an evidentiary hearing *by registered mail, return receipt requested, and by regular U.S. Postal Service*. I send them *both ways* for one critical reason: most people think that a postal slip indicating the postman has attempted delivery of a registered letter means some kind of bad news. For that reason, clients often will not go to the post office and pick them up. That's why I send them both registered mail and regular mail. Registered mail so I can prove service to the court and regular mail just in case the client doesn't go pick up a registered letter. In the copy I send in the regular mail, I tell the client that they may have gotten notice that they have a registered letter that the post office and that the registered letter is nothing more than an additional copy of the letter they have in their hand. I ask them to pick the copy from the post-office so I can document that they got their copy. Once in a while, they even do it.

ADVISING THE CLIENT ABOUT THE RISKS OF PCR

Early on in the process you need to be certain that the client really wants to go through with his Post-Conviction Relief application. Understand that the majority of inmates file an

Application for Post-Conviction Relief because someone in the penitentiary told them they should. Many PCR applicants do not realize that if they prevail in a Post-Conviction Relief action, and win a remand of their case to the Court of General Sessions, they run the risk of ending up significantly worse off. Many inmates believe that they cannot get *more time* than they originally got if their case is remanded for a new trial. Many inmates believe that they can use the PCR procedure to simply seek a sentence reduction. Once they find out that the Court rarely has the authority to simply grant re-sentencing they are sometimes inclined to rethink the decision to go forward at all. As a general proposition, an Applicant cannot attack one judgment and sentence out of many that were pleaded to as part of a negotiated plea bargain. You also must cover with the client the possible implications of South Carolina Strike Law found at *S.C. Code Annotated Section 17-25-45*. **ALWAYS** find out if your client has a prior record. You also must know if he is serving multiple sentences from multiple jurisdictions. If one jurisdiction has run a sentence concurrent with a sentence being served in another, there is no guarantee that a judge at a new proceeding would follow suit. The client needs to understand that risk. If a client wins a new trial, the sentencing judge at a new trial, or plea, would not be bound by the sentence imposed in the original sentencing. *State vs. Louis Hilton*, 291 S.C. 276, 353 S.E.2d 282 (1987). In addition, the Solicitor's Office will not be under any obligation to negotiate a new plea bargain with an Applicant that has won remand of his case to the Court of General Sessions. There is absolutely no guarantee that a Solicitor's office will be willing to give the client any better deal than he was offered prior to the original trial or plea. As a practical matter, if a Solicitor has given the client a fair deal the first go around, there is always a risk that the Solicitor's Office will not be willing to negotiate any kind of plea bargain on remand. In reality, in the vast majority of cases, the clients *do not* receive more time after winning a PCR and having their cases remanded for further General Sessions prosecution. There has been talk for years, however, of encouraging Solicitors to actually get tougher on defendants following successful PCR applications in an effort to discourage the widespread practice of filing PCRs in almost every case. Your client needs to understand that there is no way to know whether the Solicitor assigned to his case on remand will be a proponent of that philosophy.

If, after consultation with you, your client wants to drop his application for Post-Conviction Relief there are two ways to do it:

(A) You can draft a written motion to withdraw the application for Post-Conviction Relief without a hearing and support it with an Affidavit from the client. In such Affidavits I include an acknowledgment by the client that he has been advised of numerous factors including:

- i. His right to a Post-Conviction Relief case.
- ii. The risk of proceeding with a Post-Conviction Relief case.
- iii. The dangers of proceeding with the Post-Conviction Relief case.
- iv. The fact that the voluntary withdrawal will result in an ***Order of Dismissal with Prejudice*** which will mean that the client is not likely to ever have the opportunity to address the same judgments and sentences in another Post-Conviction Relief Application.
- v. That the client has been advised that the failure to pursue Post-Conviction Relief in State court may hamper, if not totally eliminate, his ability to successfully pursue a Petition for Habeas Corpus in Federal Court.
- vi. That the client has been advised that he has an absolute right to be present at any hearings scheduled in connection with his Application for Post-Conviction Relief, that he has decided to waive that privilege and that he asks that the Court permit his counsel speak on his behalf.

(B). The client may wish to come to court even if he wants to withdraw his Application for Post-Conviction Relief. Often, they will forthrightly say they want to ***“go for the ride.”*** If the client wants to come to court, be prepared to advise the court that you have gone over all the factors discussed above with your client and that he has indicated that he wants to withdraw his application for Post-Conviction Relief. It is my practice then to invite the court to ask the Applicant any additional questions the Court might wish to include in the record.

In either case, whether the client is in court with you or not, I always come prepared to present the Court with a Proposed Order granting the withdrawal of the Application for Post-Conviction Relief. Set forth in the proposed order language which states that ***“the Court finds that the Applicant has been advised concerning all the factors discussed above and that the court finds that his decision to withdraw his Application for Post-Conviction Relief under the Uniform Post-Conviction Relief Procedure Act has been made knowingly, voluntarily, and without coercion from any source.”***

If you have a client who is no longer in SCDC custody, be certain to advise the client that his failure to appear at a Post-Conviction Relief hearing will no doubt result in a dismissal of his application with prejudice. When you go to court for a hearing with a client who is not in custody, be prepared for the State to make a Motion for Dismissal for Failure to Prosecute if your client does not show up. If you have a client who is not in custody and you have not been able to locate him, you need to be prepared to document for the court what reasonable steps you have taken to locate the client to provide him notice of the hearing. Generally, I try to provide the court with copies of my correspondence to the client and any supporting documentation concerning the manner in which it was mailed.

DEALING WITH CLIENT DEMANDS

You need to make it clear to your client from the outset that you have been court appointed to represent him *in a specific Post-Conviction Relief case*. Generally speaking, many inmates will operate under the mistaken impression that you are their attorney for *any legal problem they are having*. Some will expect you to file additional Post-Conviction Relief Applications for them in other counties as necessary, to represent them at parole hearings, and even defend them against the divorce their wife has filed against them. It saves time and hard feelings if you make clear to the client the parameters of your representation up front.

Most PCR clients will demand that you send them a copy of their transcript. As a general rule, if the client pleaded guilty, I normally send them a copy of that transcript when it is provided to me. If the client had a jury trial, *and a direct appeal that was handled by SCCID*, they will already have been provided a transcript by that state agency during the direct appeal process. I advise such clients that they were entitled to one free copy of their trial transcript and that SCCID will not reimburse me for the expense of providing them another one. If the client had a direct appeal, but was not represented by SCCID, I send them one copy of their trial transcript if it is not more than 500 pages or so long. If the record is much longer than that, I suggest you get court approval in advance for the expense of providing the client a copy of his transcript in order to ensure that you get reimbursed for the cost associated with doing so.

Often clients will demand that you send them a copy of their *“Motion for Discovery”*. Inmates universally refer to the discovery materials that were provided to their defense attorney by the Solicitor’s office as their *“Motion for Discovery”*. Be sure the client understands that you

are not being given a copy of those materials by the State during the Post-Conviction Relief process. Explain that you will be reviewing the defense attorney's file and making copies of any materials you feel you need in order to represent them competently, but that you may or may not be getting a complete copy of all of the discovery materials that were originally served on counsel.

Your PCR client may very well file a grievance against you if you do not meet with his demands. Unfortunately, it has become a common theory in SCDC that the way to get your lawyer's attention is to file a grievance against him. Do not get upset when you get a letter from the Disciplinary Counsel advising that the client has filed a grievance. Do file a response to the grievance letter in the time provided by the Office of the Disciplinary Counsel and explain clearly what actions you have taken in the case and where you and the client disagree. Remember that the attorney-client privilege is waived by the client filing his grievance against you. You are therefore free to speak openly concerning your communications with the client. Generally speaking, the Office of the Disciplinary Counsel is not interested in second guessing your preparation and handling of a PCR case. Assuming you have taken steps to be in reasonable communication with your client and that you have acted professionally, there is no reason to fear the Disciplinary Counsel will do anything other than dismiss the grievance. As previously noted, the wake of the *Richardson* decision the fact that the client has filed a grievance against you is not likely to provide a basis for you to be relieved as counsel in the PCR matter.

STATE MOTIONS FOR DISMISSAL WITHOUT A HEARING

The State is required to file a Return to every application for Post-Conviction Relief. Under the rules, the PCR division of the Attorney General's Office is supposed to file a Return in a case involving a guilty plea within sixty (60) days and with a case involving a trial within ninety (90) days. Rule 12 (a), SCRCP. Because of their case load, the Attorney General's Office seldom adheres to these time restrictions. I have seen many Applicants file motions for default judgment against the State for failure to comply with this rule. Such motions are universally denied.

In some cases, the State will file a Return and Motion to Dismiss. The most common reasons for the State to be seeking a dismissal without a hearing are as follows:

- (A) Failure of the inmate to comply with the PCR statute of limitations found at S.C. Code Annotated Section 17-27-45 (A), which provides that an Application for Post-Conviction Relief must be filed *within one year of either final judgment and sentencing or final ruling on a direct appeal.*
- (B) That the application in question is successive to earlier Applications for Post-Conviction Relief. The Uniform Post-Conviction Relief Procedure Act and the case law in South Carolina uniformly prohibit successive applications for Post-Conviction Relief unless you can demonstrate that the issue(s) raised could not have been raised in the original Application for Post-Conviction Relief.
- (C) The Application fails to state with specificity specific allegations of errors or admissions constituting the basis for a claim that the Applicant received ineffective assistance of counsel prior to or during his General Sessions proceeding or on direct appeal.

It is generally a good idea to file a Reply to a Return and Motion to Dismiss. In the case of both applications filed outside the statute of limitations and successive applications, you will need to ascertain from your client what, if any, legal justification they have for filing out of time or for filing successive application. If the client filed an Application for Post-Conviction Relief alleging simply that he is not guilty or that his lawyer “messed up”, you will need to file a Reply to the State’s Return and Motion to Dismiss asking that the matter not be summarily dismissed until you as court appointed counsel have had an opportunity to adequately review the file, visit with the client, and ascertain what specific allegations should be made in an amended application for relief.

When dealing with applications which were filed outside the statute of limitations, you need to interview the client and determine whether there was some new development in his case which prompted him to file an Application for Post-Conviction Relief after the statutory period had expired. For example, an inmate may have been told by his trial lawyer that he would be eligible for parole. When he arrived at SCDC his initial meeting with his classification officer and the documents provided to him may have actually shown a parole eligibility date. If, *at a later date*, those records are corrected and the client is informed after the one year filing period would ordinarily have expired that he is not eligible for parole, I have had some success in arguing that his one year for filing would begin from the date he was on notice of the problem. Remember, our state courts do not have a mail box rule like that found in the federal system. As

a result, our Supreme Court has found that having an Application in the mail by the deadline for filing is not sufficient. *Gary v. State*, 347 S.C. 627, 557 S.E.2d 662 (2001).

An inmate may have filed an Application for Post-Conviction Relief at an earlier date which was heard and ruled upon only to have some additional information come to his attention which necessitates a second application. ***If and only if*** you can prove that this information is not evidence that either he or his original PCR lawyer could have discovered at the time of the original application through the exercise of due diligence, you may be permitted to go forward. Although the South Carolina Supreme Court has not closed the door to the concept of equitable tolling of the Post-Conviction Relief statute of limitations, they have yet to cite an example of where and when it could properly be tolled. *Gary v. State*, 347 S.C. 627, 557 S.E.2d 662 (2001). It is an equally open question as to whether or not mental incompetency can serve to equitably toll the Post-Conviction Relief statute of limitations. *Norris v. State*, 335 S.C. 30, 515 S.E.2d 523 (1999).

If the State files a Return and Motion to Dismiss, the Circuit Court is likely to enter a Conditional Order of Dismissal. Such orders typically give the Applicant and his counsel twenty (20) days to provide the Court with an explanation of whatever reasons might exist why a Final Order of Dismissal should not be entered based on the grounds asserted in the State's Return and Motion to Dismiss. One of the reasons that it is so important that you contact your client and see what if any legal justification he has for a late application or a successive ***application as soon as you get the Return and Motion to Dismiss*** is the fact that you will not have much time to respond to a Conditional Order of Dismissal. If you do not file a responsive pleading to a Conditional Order of Dismissal, a Final Order of Dismissal will be issued. Under a recent decision, a Final Order of Dismissal following a Conditional Order of Dismissal which was not contested *is not an appealable order*. *Edith v. State*, 369 S.C. 408, 632 S.E.2d 844 (2006).

SUBJECT MATTER JURISDICTION ISSUES

In the last ten years one fertile area for consideration in Post-Conviction Relief matters was always a challenge to the lower court's subject matter jurisdiction. Both our Court of Appeals and our Supreme Court had reversed countless cases based on problems with indictments which arguably deprived the Circuit Court of subject matter jurisdiction. The vast majority of subject matter jurisdiction challenges are now useless in the wake of the

Supreme Court's decision in *Gentry v. State*, 363 S.C.93, 610 S.E. 494 (2005). In *Gentry*, the Supreme Court reversed more than forty prior cases and adopted the view that problems with indictments go to the sufficiency of the indictments themselves and do not impact the jurisdiction of the court. This means that if your client is raising a problem with his indictments which he thinks constitute a subject matter jurisdiction claim, the issue is more than likely now effectively controlled by the *Gentry* decision. In most cases you can modify the PCR Applicant's subject matter jurisdiction issue to make it a component of his claim of ineffective assistance of counsel. In other words, rather than saying that the Circuit Court lacked jurisdiction to try the client for a particular offense, you would now say that trial counsel was ineffective for failing to make a motion to quash an indictment that was infirm because of some particular deficiency.

CASES INVOLVING TRIALS

As most of you no doubt know, South Carolina strictly adheres to the contemporaneous objection rule for the preservation of errors on appeal. If your PCR case involves a jury trial, the *first thing* you need to do is ascertain whether or not there was a direct appeal. If there was, next review the opinion of the appellate court. Often an issue will have been raised on direct appeal that was not raised at all at trial or which was inadequately raised at trial to preserve the narrow issue argued on appeal for review. Appellate decisions frequently provide you with ammunition for a claim of ineffective assistance of trial counsel by noting the failure of trial counsel to preserve an issue for the Court's review by failing to make a contemporaneous objection or for failing to make an objection that is specific enough to support a more narrow ground pursued on direct appeal.

If there was not a direct appeal, you will need to talk to your client and find out why not. Under standing Supreme Court Order, *In Re Anonymous Member of the Bar*, 303 S.C. 306, 400 S.E.2d 486(1991) it is the obligation of any defense attorney to preserve his client's right to a direct appeal by filing a Notice of Appeal even if that attorney has not been appointed for or retained for purposes of appellate review. Defense attorneys can worry about getting off the appellate case *after* the Notice of Appeal is filed, but they have an obligation to preserve the right to appeal by filing, the Notice of Appeal *unless the client has expressly waived his right*

to direct review. If, for some reason, the trial attorney simply did not file a Notice of Appeal, or the appeal has been dismissed because the attorney failed to comply with court rules, the client has the opportunity to seek a belated direct appeal through the guidelines and procedures set forth by our Court in the cases of *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974) and *Davis v. State*, 288S.C. 290, 342 S.E.2d 60 (1986).

If you determine that your client had a jury trial, you will want to ask the Attorney General's Office to provide you the trial transcript **as soon as possible**. As previously noted, it is common not to get the trial transcript until approximately the same time as the State files their Return to your client's application. This can, unfortunately, be very close to the point in time when the case is scheduled for a hearing. In order to ensure that you have the maximum opportunity to read and review the trial transcript **before you see your client for the last time** you need to get the transcript as early as possible. If the client had a direct appeal that was handled by the Appellate Division of SCCID you can also request that they pull their file from archives and permit you to copy the trial transcript.

Read the trial transcript carefully, making note of any obvious problems which were not objected to by trial counsel. Remember that **Motions in Limine** do not preserve an issue for appellate review unless the trial attorney remembered to renew that objection at the time the evidence in question came in during the trial. A particular type of objectionable evidence must be objected to **each and every time the evidence comes in** through the same witness, or different witnesses, unless the presiding judge has specifically granted trial counsel permission to make a continuing objection. Inadmissible evidence must be objected to the first and every time it is mentioned at trial. If counsel did not object the first time inadmissible evidence came in, he will have waived his client's right to directly appeal the subsequent rulings of the trial court concerning the same evidence.

Look for problems in the comments of the prosecutor both in opening and closing arguments as well as throughout the trial. Review the jury instructions and see if the charge fully covered all the applicable law. At the same time you were looking for issues that may not have been preserved by defense counsel, you should also be looking for issues that were raised and ruled upon that were not presented on direct appeal. The later may provide a basis for a claim of

ineffective assistance of appellate counsel which is a cognizable claim on collateral review. *Evitts v. Lucey*, 469 U.S. 387, 105 S.Ct. 830 (1985). In a significant number of cases the appellate lawyer will have filed a brief pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396 (1967). In this hallmark case, the Supreme Court held that an attorney representing a court appointed client on appeal must file an appellate brief raising one or more issues ***notwithstanding counsel's opinion that the case lacks merit***. Such briefs are accompanied by petitions to be relieved as counsel. In the context of a Post-Conviction Relief action, the fact that an *Anders* Brief (or a *no merit* brief, as they are commonly referenced) was filed will effectively stop you from successfully raising a claim of ineffective assistance of appellate counsel. When an *Anders* Brief is filed, along with a Petition to be Relieved as Counsel, it shifts the burden from the appellant to the reviewing court. At that juncture, rather than simply reviewing the briefs and record relevant to the particular issues raised by the appellant, the reviewing court becomes obligated to review ***the entire record below*** from cover to cover. Before granting a Petition to be Relieved as Counsel, it is the obligation of the appellate court to issue an opinion concurring with counsel's view that there were no meritorious issues present for appeal. Therefore, where an opinion has been issued concurring with counsel's view that the case is meritless, and relieving counsel of further obligations in the case, you are not likely to get a Circuit Court judge to rule in your favor on a claim of ineffective assistance of appellate counsel. In order to rule in favor of your client on such a claim, the presiding PCR judge would have to find not only that appellate counsel missed a meritorious issue, but ***also that the reviewing appellate court missed it as well***. That obviously, is not likely to happen.

The decision as to whether to raise allegations of ineffective assistance of appellate counsel presents a potential conflict of interest for a PCR lawyer. Under the current system, if court appointed PCR counsel raises a claim of ineffective assistance of appellate counsel against one of the attorneys on the staff of the Appellate Division of SCCID ***it is likely to result in that State agency conflicting out of representation of the client in a PCR appeal from an Order of Dismissal***. When SCCID files a Conflict Petition alleging that they cannot represent the client in his PCR appeal because that action raises a claim that one of their staff attorneys was ineffective, it usually prompts an order from the Supreme Court appointing the lawyer who was appointed to handle the circuit court action to handle the PCR appeal. The author has always felt that this presents a serious problem. Clearly, if PCR counsel is cognizant of this dynamic, it could have a

chilling effect on PCR counsel's willingness to pursue claims of ineffective assistance of appellate counsel.

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS
TELEPHONE PRIVILEGE REQUEST
PLEASE PRINT

A copy of the first page of your most current telephone bill must be mailed with this form. All information requested on this form must be provided. After you have filled out the form, mail it to the address on the reverse side of this form. If you are the inmate's attorney, please see the reverse side of this form for additional instructions.

INMATE NAME: Donald Carter, #325307

INSTITUTION TO WHICH ASSIGNED: Lee Correctional Institution

I wish to be added to the telephone list of the above inmate so that I can receive collect phone calls from this inmate. My name, relationship to the inmate, telephone number, telephone service provider, physical address and mailing address are listed below. I understand that no toll-free numbers or cellular telephone numbers are allowed.

NAME OF REQUESTOR: SERVICE PRVDR.	RELATIONSHIP:	TELEPHONE	NUMBER
Tara Dawn Shurling Law Offices of Tara Dawn Shurling, PA Bellsouth	Attorney	803-738-8622	

Physical Address:

3614 Landmark Drive, Ste. D
Columbia, SC 29204

Mailing Address:

Same

By completing this form I am stating that I understand and agree to the following:

1. I am the party to whom the business telephone service is billed or an acceptable agent for that party.
2. I agree to pay all costs associated with accepting collect telephone calls from the above inmate.
3. I will always be quoted the rate prior to acceptance and charges do not begin until I accept the telephone call.
4. It is always my choice to accept or refuse a call.
5. Since inmate telephone privileges are a privilege not a right of the inmate, I understand that any fraudulent information that I provide in connection with this form or any efforts to defraud the phone company or to commit fraud using this phone system may result in loss of or restricted use of these privileges for the inmate.
6. I understand that all calls are subject to monitoring and recording with the exception of an inmate's attorney who has provided a request to the South Carolina Department of Corrections General Counsel. (Attorneys, please see reverse side for more information.)
7. In the event that the inmate has reached the maximum of twenty (20) allowed number on his/her phone list the responsibility to accept or deny this request will be the sole responsibility and decision of the inmate.

(SIGNATURE OF RESPONSIBLE PARTY)

(DATE)

Data Entry Performed by: _____ on _____

These cases will give you an idea of some of the types of claims that have succeeded and failed in application for Post-Conviction Relief. In addition to the above you need to consider whether trial counsel adequately represented his client in possible plea negotiation. You need to determine whether trial counsel was effective in the following areas.

- (A) Did counsel provide reasonable professional assistance of counsel in the plea negotiation process prior to the case going forward for a jury trial?
- (B) Did counsel meet with the client often enough and for long enough to effectively prepare the case for trial?
- (C) Did counsel ascertain from the client the names of witnesses the client felt might significantly contribute to his defense and did counsel interview those witnesses prior to trial?
- (D) Did counsel file discovery motions and did he review the discovery materials provided to him by the Solicitor with his client?
- (E) Did defense counsel investigate the factual allegations of the charges and where necessary hire an investigator to track down potential leads?
- (F) Did counsel explore the possibility of using expert witnesses at trial and would such experts been beneficial to the defense?
- (G) Did counsel make proper objections and motions concerning inadmissible evidence proffered by the State during trial?
- (H) Did defense counsel make proper motions for a mistrial following some development at trial which may have irreparably prejudiced the defendant's ability to receive a fair trial?
- (I) Did defense counsel make appropriate requests for jury instructions and did his failure to do so result in the lower court which failed to include instruction on all the law relevant to your client's charges?
- (J) Did defense counsel adequately impeach witnesses presented by the State?
- (K) Did defense counsel make a motion for a directed verdict and did he renew that motion at the close of the case and was his motion for directed verdict detailed and did it point out specific failures by the State to offer any evidence of elements of crimes charged?

- (L) Did defense counsel subpoena necessary witnesses?
- (M) Did defense counsel present a comprehensive and effective plea in mitigation of sentence?

GUILTY PLEA CASES

There are actually several types of guilty pleas. A defendant may plea straight up “as indicted” which means the defendant appears before the court and enters a plea of guilty without the benefit of any plea bargain with the State. He may plead to reduced charges as part of a plea bargain with the State. The defendant may plea guilty to only one or more of multiple charges with a plea bargain for remaining charges to be dismissed with prejudice. The State and the defendant may agree that the prosecution will make a recommendation as to sentence during a plea. In certain circumstances the defense and the State may reach a plea bargain for a negotiated sentence. In rare cases the State may agree for a defendant to enter what is known as an *Alford* Plea. In a plea entered pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970), the defendant is permitted to enter a plea and be sentenced without allocating guilt. When representing a client in a Post-Conviction Relief application in a case involving a guilty plea your job is to ascertain whether that plea was knowingly voluntarily and intelligently entered in the presence of reasonable professional assistance of counsel.

Some factors to be considered in determining whether a plea was knowingly, voluntarily, and intelligently entered are as follows:

- (A) Did the defendant yield and plead guilty because he was afraid to go to trial with an attorney who was clearly unprepared to represent him at trial?
- (B) Was the defendant promised a particular outcome as a result of a guilty plea that did not come to fruition?
- (C) Did the defendant enter a plea of guilty without having the opportunity to review the discovery materials in his case and without generally having a clear picture of the evidence the State would introduce against him if he went to trial?
- (D) Did defendant have an adequate understanding of the elements of the charges he was facing and the potential sentences he could receive for those offenses?

- (E) Did defense counsel adequately explain to his client the possible application of South Carolina's Strike Law and other relevant sentencing proceedings?
- (F) Did defense counsel threaten defendant with a harsher penalty than was actually possible taking into account the statutory law and the particular criminal history of the client in question?
- (G) Did defense counsel adequately explore with his client possible defenses to the crimes charged ?
- (H) Did defense counsel explain to his client the fact that by pleading guilty he would be waiving his right to contest any issue in his case with a limited exception of subject matter jurisdiction?
- (I) Did defense counsel explain to his client how a jury trial works and how his particular case would be presented at trial if the client elected to have his guilt or innocence determined in that forum?
- (J) Did defense counsel explain to his client the fact that he would have a right to a direct appeal following a jury trial versus the limited right to appeal from a guilty plea?

The docket for Post-Conviction Relief hearings is set by the PCR Division at the Attorney General's office. The telephone number for that section is **(803) 734-3737**. When you receive a docket for an up coming term of court you will be able to ascertain which assistant attorney general is scheduled to handle your specific PCR hearing. Usually that person will be the same individual who filed the Return to your client's application for Post-Conviction Relief. There is however a large turnover in this section of the Attorney General's office and they frequently switch around which attorneys are handling which circuits as well. If you have not had adequate time to prepare your client's case for a hearing and are considering asking for a continuance you will need to approach the chief administrative judge for the Court of Common Pleas if you intend to ask for the continuance sometime before the actual hearing date. If you wait until the date of the hearing you can of course put your motion to the presiding judge over that term of PCR hearings. In my experience, it is always advisable to try to get a continuance in advance however most judges are fairly receptive to a Motion for a Continuance if a Post-Conviction Relief case has not been continued in the past. Please bear in mind that the judge

will consider the actual age of the PCR application. This means that the presiding judge may not want to grant a continuance if the case has been delayed on several previous occasions even if you have not had any continuances since you were assigned to the case. In recent years the court appears to be tightening up on the delay in getting these matters heard and ruled upon. That is why I strongly suggest you go see your client early on in your representation to get a general idea of the allegations he wants to raise and any potential witnesses he might want to present at his hearing. I also suggest you go see your client a second time as soon as you get the docket scheduling the matter for hearing. In my experience the judge is a lot more likely to grant you a continuance if you genuinely need one where it is apparent that you have been diligent in your effort to be prepared.

Much to my regret I would note that I have on many occasions seen court appointed lawyers announced to the court that they were prepared to go forward with a Post-Conviction Relief hearing only subsequently announce that they had met with their client for the first time that morning in a holding cell at the courthouse. This practice is frankly unacceptable unless it is your intent to request a continuance, if the client wishes to go forward with his application for Post-Conviction Relief after this brief initial consultation. In my judgment, a lawyer cannot possibly be adequately prepared to do a competent job in representing a client on collateral review after such a brief consultation.

In preparing for a PCR hearing please bear in mind that you cannot say that a trial attorney was ineffective for failing to present evidence or witnesses unless you are prepared to present that evidence or those witnesses at the PCR hearing in order to demonstrate what their value would have been had they been produced during the original trial. It is absolutely pointless to assert for example that a trial counsel was ineffective for failing to present readily available evidence of an alibi if you have not prepared to present that alibi evidence to the PCR judge. For that end you may need to subpoena documents and witnesses for your Post-Conviction Relief hearing. That being the case, you obviously need to have met with your client and prepared his case for court well in advance of the hearing date. Your client will want to know whether he should testify at his Post-Conviction Relief hearing. Approach this question cautiously. If all of the issues you were raising address counsel's failure to deal with matters of law in the context of the jury trial then you may very well not need testimony from your client. In the context of a PCR hearing, as with any hearing, there are always inherited risks with putting your client on the stand. When you finish direct examination of your client the Attorney General's lawyer will

have their shot at him. If it isn't necessary to call your client it may very well be in his best interest not to testify. You need to discuss this fact with your client in advance so that he understands why you may not choose to call him as a witness. Otherwise he is likely to think that you are simply one more lawyer depriving him of his opportunity to "be heard". On the other hand, if your case involves a guilty plea and your client is alleging that his plea was not knowingly, voluntarily, and intelligently entered it will be imperative that you present your client as a witness. Under the *Hill vs. Lockhart* standard, it is necessary for you to demonstrate that but for the errors and omissions of counsel your client would not have waived his constitutional right to trial by jury by pleading guilty. The only way to effectively establish that is to put him on the stand and ask the appropriate questions.

PCR hearings are held in open court. This means that obviously any of your client's family members, loved ones, or friends are welcome to attend. As covered earlier, it is my practice to allow each client at their election to select one contact person outside SCDC. That person is sent courtesy copies of all scheduling notices. I advise the client from the beginning that would be his responsibility and the responsibility of his contact person to notify anyone they wish to attend their Post-Conviction Relief hearing. This does not relieve you of the responsibility to subpoena any family members or other individuals who might be valuable witnesses in your client's case. It is easy to fall prey to the assumption that a girlfriend, mother, grandmother, or close family friend will just be there because they have volunteered to be witness to some aspect of the client's case. Please remember that if they are under subpoena and do not show up for court you will have a leg to stand on when requesting a continuance because of their unavailability. If you have not subpoenaed them you will not. Another frequent problem arises when friends and family members request that you issue a subpoena for them so that they can come to court and be present for a Post-Conviction Relief proceeding at which you do not intend to call them as a witness. My obvious position is that I am not ethically able as an officer of the court to issue subpoenas for that purpose. For immediate family members I will write a short letter to an employer on occasion advising them that a hearing is taking place and that an individual has a strong interest in attending.

I always issue a subpoena for the attorney who represented the client in the Court of General Sessions. In that subpoena I also request that they produce for inspection on the date of the hearing their entire case file. I have gotten in this habit because at some point a few years ago the PCR Division of the Attorney General's Office apparently quit requesting that files be

brought to court by trial lawyers. It is my habit to try and get these subpoenas out as quickly as possible after the docket is served. Many lawyers are forced to store files away from their offices. If you want a lawyer to bring his file to court it is only reasonable that you give him as much notice as possible since he may have to retrieve that file from off site storage.

One question that frequently arises is whether you should be prepared to make legal arguments at the conclusion of a Post-Conviction Relief hearing. I would suggest that you always be prepared to summarize all your client's allegations and evidence in support of them at the conclusion of your case. If any of your client's issues are factually or legally complex I would suggest that you prepare a bench memo to present to the court at the time of the hearing. Where a hearing is lengthy and involves numerous complex issues I will frequently ask that the court allow me to submit a memorandum in support of the applicant's case in the form of a proposed order. I usually suggest that such proposed order be submitted in lieu of closing arguments. If your judge agrees to this procedure please note that you will need to file your proposed order with the Clerk of Court in order for those arguments to be preserved as part of the record. It is also a good idea to have a concise over view of the allegations you intend to pursue during the hearing prepared in advance. Many judges will ask that you state briefly for the record what your client's allegations are before the presentation of evidence and witnesses. If you have filed an amended application for Post-Conviction Relief it is a good idea to bring at least two or three extra clocked copies with you to court. In my experience the amended applications do not always make their way into the judge's packet prepared by the Attorney General's office. For that reason I always ask at the beginning of a hearing whether any amended application filed has been made part of the judge's packet.

No matter how well prepared you are for a Post-Conviction Relief hearing there is a high degree of likelihood that some issue will come up during the hearing that is not necessarily covered by the original application or your amended application. The Supreme Court's decision in *Simpson v. Moore*, 367 S.C. 587, 627 S.E.2d 701 (S.Ct. 2006), supports an Applicant being able to amend an application to include an allegation that was developed by the evidence and testimony presented during the hearing. If you find that testimony during the hearing has given rise to a new issue in your case do not forget to state for the record that you are amending your client's application to include this additional claim.

PREPARING YOUR CLIENT FOR THE PCR HEARING

Remember that your client is not a lawyer and does not understand the difference between collateral review and a trial or a guilty plea. Nine times out of ten a Post-Conviction Relief applicant will not understand the perimeters of what can and can't be raised in a Post-Conviction Relief proceeding. If you take the time to explain the dimensions of collateral review through Post-Conviction Relief to your client before you go to court you will be a lot less likely to have problems with him in court. As previously noted, you will need to discuss with your client the question of whether or not you are likely to want to present him as a witness. If you think you will want to present him as a witness, the client will probably want you to tell him exactly what questions you are going to ask him when you put him on the stand. Even more impossible, he will want you to tell him the questions the Attorney General's lawyer is going to ask him. You need to talk to your client and explain that there is no way you can tell him exactly what questions he will be asked if he takes the stand. One important thing to tell your client is that he needs to listen to your questions and answer them very specifically. Remind your client to answer your question and then stop speaking. One common problem in the setting of Post-Conviction Relief cases is that an inmate who has been dying to talk about his case, sometimes for years, will get on the stand and go off in tangents that completely distract the presiding judge from meritorious claims. Be sure your client how important it is for him to listen to your specific question and answer that question without volunteering additional information. I have seen many potentially winning cases sunk because a lawyer did not control his client on the stand. Make sure your client understands how important it is for him to speak up and speak clearly when on the witness stand. I always admonish my clients that their testimony will be worthless unless the presiding judge can hear it and understand it. While you are at it, a few lessons in basic courtroom etiquette never hurt. I always make sure that my PCR clients know to address the court formally, to answer questions yes sir or no sir, and to stand when they are being spoken to. Many of your clients will ask whether their family members can bring clothes for them to dress in for court. Sadly the answer to this question is no. The case law is fairly clear on this point. While your client has a right not to appear in prison garb in the presence of a jury, he does not have that same right in a PCR proceeding with a judge rather than a jury.

PROPOSED ORDERS

As previously noted, I often ask for permission to submit a bench brief in a form of a proposed order granting relief. Most judges like receiving proposed orders. A few judges seem to prefer you present your position in a traditional bench brief or memorandum format. I have experimented over the years with various formats for orders granting Post-Conviction Relief. As a practical matter the good ones all have the following qualities in common.

- (A) A good order should contain a procedural history. Most of what you need to draft the history portion of your proposed order, up to the date of the Post-Conviction Relief hearing, can usually be found in the State's Return. Check the information in the Return very carefully before you use it. The PCR Division of the Attorney General's Office is terribly over burdened and under staffed. As a foreseeable consequence, errors in the procedural histories cited in their Returns are not uncommon. You certainly do not want to repeat inaccurate information in your proposed order. An adequate procedural history should include when your client was indicted and by which court. It should list all of the charges your client was facing and how they were disposed of in the court below. The order should indicate whether or not an appeal was taken from the judgments or sentences issued in the Court of General Sessions. If there was an appeal you need to cite to any decisions entered by the reviewing court. You should also indicate whether a direct appeal was heard only by the Court of Appeals or whether the case was taken to the Supreme Court on Petition for Writ of Certiorari. The procedural history of the Post-Conviction Relief action should include the date the PCR application was filed, the date the State's Return was filed, and the dates any amended applications or returns were filed as well. In addition this portion of the order should acknowledge any previous Post-Conviction Relief applications that were filed by your client on the same charges and should indicate what disposition was had on those previous applications and should state whether an Order of Dismissal on a previous application was appealed on behalf of the applicant.
- (B) You need to list all of the allegations raised by your client in his initial application for Post-Conviction Relief and then separately state any that were raised by way of amended application. In addition you should set forth any allegations that were raised by oral amendment at the time of the PCR hearing. In this section of your order it is

also a good idea to indicate which if any allegations raised in the pleadings were expressly waived or abandoned at the evidentiary hearing.

- (C) Your order should contain a brief section which gives a factual overview of your client's case with specific reference to facts relevant to allegations raised by your client.
- (D) Discussion and applicable law. This section of your order should start out with an overview of the case law applicable to Post-Conviction Relief proceedings and standard overview applied therein. Take particular care to cite cases which deal with allegations of ineffective assistance of counsel in trial cases if your case involves a jury trial or those pertinent to guilty pleas if your case involves the challenge of a plea.
- (E) State which aspects of your client's case warrant the grant of relief. For example your proposed order might state " the applicant has asserted that defense counsel was ineffective for neglecting to adequately impeach the testimony of the victim at his jury trial with readily available evidence which would have cast doubt on the creditability of her testimony. Based on the testimony and evidence presented by the applicant in his Post-Conviction Relief hearing this court agrees."

You would then set forth all of the evidence that you introduced in the PCR hearing to support this claim and follow it up with an express finding by the Court that the applicant has met his burden of proof and the appropriate use of the testimony and evidence in question would likely have effected the outcome of his trial. Repeat this procedure for each specific allegation you genuinely believe warrants the grant of relief.

- (F) If you have a number of allegations which in and of themselves might not be strong enough to warrant a judge granting a new trial you may want to consider including a paragraph a finding that the collective impact of the cumulative errors and omissions of defense counsel were such that the court finds the client's right to a fair trial was violated.
- (G) In almost every case your client will have insisted that you raise some issues that you do not believe genuinely stand a chance of winning. Rather than to loop your

chances of the judge signing your proposed order by including those issues as grounds for relief I suggest you use a catch all paragraph like the following.

- (H) Conclusion. In most cases an order granting relief will need to state for all the forgoing reasons the court concludes that the applicant has met his burden of proof with regard to his allegation to his right to effective assistance of counsel as guaranteed by the 6th and 14th Amendments to the United States Constitution as well as Article I Section 13 of the South Carolina Constitution was violated in the lower court. Accordingly the applicant's judgments and sentences are reversed and his case is remanded to the Court of General Sessions for a new trial. In other cases, dealing with guilty pleas, your conclusion will be as follows. Having reviewed all of the testimony presented by this Applicant this Court concludes that his pleas of guilty were not knowingly, voluntarily, and intelligently entered inasmuch as they were the product of counsel's failure to provide him with reasonable professional assistance of counsel prior to and during to his guilty plea proceeding. Having found that the applicant's pleas were not knowingly, voluntarily, and intelligently entered the applicant's judgments are now vacated and remanded to the Court of General Sessions for a new trial. In rare cases the court will find that the relief warranted is a re-sentencing proceeding. In those cases the conclusion would be something of the following. Having reviewed the testimony and evidence presented by the applicant this court concludes that he has met his burden of proof in regard to his allegation that he did not receive effective assistance of counsel during his sentencing proceeding. Inasmuch as the applicant's right to reasonable professional assistance of counsel as guaranteed by the 6th and 14th Amendments to the United States Constitution as well as Article I Section 13 of the South Carolina Constitution was violated during his sentencing proceeding this court now vacates the sentences entered in his case and remands his charges to the Court of General Sessions for re-sentencing. There are of course many other permutations to these conclusions that may come up on the particular facts of your case. For example in rare cases your Post-Conviction Relief action may establish a Brady Violation in which the case the court will be granting a new trial based on that finding. In very rare cases the Court's finding may remand a

case to the Court of General Sessions for specific performance on a negotiated plea bargain.

Most judges will suggest that you forward your proposed order to them by email. It is my policy to follow-up such an email transmission with a hard copy by mail. Always remember to serve opposing counsel with a copy of your proposed order and any transmittal letter at the same time and by the same method by which you served the judge.

FOLLOW-UP AFTER THE HEARING

Sometimes a judge will rule on your client's application from the bench. More often or not he will announce that he is taking the matter under advisement and that he will notify the parties of his decision shortly. When the judge does not make a decision from the bench, you need to mark your calendar thirty, sixty, and ninety days out from the hearing for status checks. Generally, after thirty days I will send an email to the judge's law clerk and the Attorney General's office advising that my records indicate that the case has been taken under advisement and that no further action has been taken since the date of the hearing. I ask if there is anything further I can do to be of assistance to the court in reaching a decision. After sixty days I send a short letter noting that my files indicate that the above captioned Post-Conviction Relief case is still under advisement and inquiring as to whether there is anything I can do to assist the court in bringing the matter to a conclusion. In both cases I usually advise the court that I would be delighted to submit a proposed order if the court wishes. I send a similar letter after ninety days. One note of caution, occasionally the attorney representing the Attorney General's office will send a PCR judge a proposed order without the judge asking for one. The obvious danger is that the presiding judge inadvertently sign the order sent to them by the Attorney General without realizing that this was a matter under advisement. It's easy to understand how this could happen since judges will have dozen or more cases under advisement after a week long term of PCR hearings. Nevertheless if you receive a proposed order from a lawyer representing the Attorney General's office and your notes indicate that the case is under advisement you need to immediately write the judge. It is my practice to write the presiding judge and advise that I am in receipt of a proposed order that has been sent to him by the Attorney General's office. I tell the Court that my records indicate that the matter was under advisement and that the court had

not yet reached its decision concerning my client's application. I enclose a proposed order of my own if at all possible. It is better however to get a letter out to the judge without a proposed order than to delay responding to the State's unsolicited proposed order. Frequently, I will bring to the Court's attention that my records indicate that the court had not yet ruled on this case and will then ask that the court not sign the State's order until I have had the time to submit a proposed order presenting my client's position.

Often client's will pressure you to in turn pressure a judge to reach a decision in their case. I always tell them that it is not wise to push a man sitting on a fence. While polite reminders that a case is still outstanding are generally not harmful, I do not believe it is wise to pressure the court to reach its decision in a matter that is under advisement. Doing so may very well precipitate a decision you don't want. That being said, in rare cases where judges have taken six months or longer to reach a decision in a Post-Conviction Relief case, I have taken the unusual step of writing the judge and begging for a decision while informing the court that the client is eager to get on with the inevitable appellate process noting that if the client loses he will want to appeal His Honor's decision and if he wins the State in all probability will as well.

DRAFTING A RULE 59 MOTION

One of the most serious mistakes made by court appointed lawyers involves what they do for the client after the PCR hearing. In all my years at Appellate Defense I cannot tell you how many cases I saw where the lawyer did a fantastic job at a hearing but dropped the ball later. Specifically, our Supreme Court has specifically said that issues which are not addressed in the Order of Dismissal will not be entertained on appeal. When you as counsel are served with an Order of Dismissal it will in all likelihood have been drafted by the Assistant Attorney General who handled the case on behalf of the State. While I do not believe that any of their lawyers leave issues out of orders, they frequently do so inadvertently. If you as PCR counsel file a Notice of Appeal from an Order of Dismissal without reviewing the Order of Dismissal to determine whether it makes findings of fact and conclusions of law with regard to each and every one of your client's meritorious allegations you are doing your client a grave disservice. The client will not be able to appeal any issue that is not addressed by the judge in the order. For this reason, I suggest that you sit down immediately after your PCR hearing and make note of which issues you raised from the original application, any issues you raised from amended applications

and any issues that developed in the course of the hearing. When you receive an Order of Dismissal you only have ten (10) days to file a Motion to Alter or Amend Pursuant to Rule 59(e) SCRCP. In a Rule 59(e) motion you can politely advise the court that its order neglects to discuss certain issues raised by the Applicant in his case. At that juncture, the circuit court will either deny your 59(e) motion outright or issue an amended order addressing the issues you assert were omitted in the original order. Either way your client regains his ability to appeal the circuit court's ruling on all of his allegations.

When you file a Rule 59(e) Motion I suggest that you mark your calendar 30, 60 and 90 days out and take appropriate steps to check with the judge's law clerk on a regular basis to ascertain the status of your motion. Remember that pursuant to court rules you are required to not only file this motion with the Clerk of Court's Office but also to serve the presiding judge and opposing counsel.

When you receive a proposed order, it is very important that you review it closely and determine whether it covers all the issues raised by your client in his original Application, in any amended applications and those developed through testimony and evidence which came to light at during the PCR hearing. If you spot a problem quickly notify the Attorney General assigned to the file and the PCR Judge. Doing so at this stage may obviate the necessity for filing a Motion to Alter or Amend pursuant to Rule 59 (e), SCRCP, once an Order of Dismissal is filed. Do not forget to consider all the issues raised in the PCR even if the PCR Judge grants relief on one charge. If you win, and the Respondent appeals, you will need to file a cross-appeal on any other good issues developed in the PCR action. *See, Rule 203 (b)(c), SCACR.* The importance of making very sure your exact allegations are framed narrowed and that they are addressed in the Order of Dismissal, or an Order granting partial relief, has been highlighted recently by our Supreme Court. *See, Mangal v. State*, 421 S.C. 85, ___S.E.2d___ (S.Ct. Oct. 2017); *Robin Gray Reese v. State*, S.C.Sup.Ct. Order dated October 18, 2018. (App. Case No. 2017-001110)

PCR APPEALS

As noted in the previous section, when you receive an Order of Dismissal your next step should be to compare that Order with the list of issues you've raised during the Post-Conviction Relief hearing. Please do not file your Notice of Appeal until you have done so. If you find that the order is complete you have thirty (30) days from the date the order is filed with the Clerk of

Court's Office to file an appeal from the order in the Supreme Court of South Carolina. The Notice of Appeal should address the date of the Order, the ruling judge, the Common Pleas docket number and the County of origin. If you have filed a timely 59(e) Motion, your Notice of Appeal should not be filed until after you have obtained a ruling on that motion. If the presiding judge denies your 59(e), and does not issue an amended order, you will need to address both the original Order of Dismissal and your Order Denying 59(e) Motion in your Notice of Appeal. If the judge issues an Amended Order, you will need to ascertain whether that order is intended to replace the original order or whether it is an addition thereto. In some cases judges will issue superseding orders in which case you can file a Notice of Appeal from that order alone. More frequently, a judge will issue an order modifying or amending the original order, in which case your Notice of Appeal will need to address both orders. When you send a Notice of Appeal to the Supreme Court you must also send proof of service on opposing counsel. At that same time, I suggest that you serve your copy with a copy of your Notice and your transmittal letter so that he will be aware that an appeal has been filed on his behalf. I also suggest that you send a copy of your letter and the Notice of Appeal to the Appellate Division of the South Carolina Commission on Indigent Defense. That State agency is responsible for perfecting PCR appeals on behalf of indigent Applicants. If you were retained Counsel for the PCR, but your fee agreement with the party who hired you does not cover a PCR appeal, it is important that you make the client aware of his rights with regard to representation on appeal. Advise him of the steps necessary to apply for representation by the Appellate Division of SCCID and, of course, of his right to switch lawyers and hire someone else to handle the appeal if he chooses to do so. Once you have filed the Notice of Appeal it is your responsibility to notify that office that you have filed an appeal and that you were court appointed counsel. It is also incumbent upon you to provide that office with all the necessary documentation for the appeal. If you raised allegations of ineffective assistance of appellate counsel I suggest that you write that State agency and send them a copy of your Notice of Appeal and the Order of Dismissal. I generally do not send them the balance of the documentation in the case until they respond to an inquiry from me as to whether or not they intend to file a Petition to Conflict Out of representing the client on appeal. There is no purpose in sending them all of the documentation from their file if they are going to turn around and asked to be relieved as counsel. As previously noted earlier in these materials, if that office is relieved as counsel for the PCR appeal, the Supreme Court will more than likely appoint you to represent the client on appeal.

If you win a PCR the Attorney General's Office may file a 59(e) Motion to Alter or Amend because they feel the order granting relief needs some modification. If so, you may wish to specifically respond to points raised by them in a Reply to their motion. If they do not file a Rule 59(e) Motion, they too have thirty (30) days from the filing of the Order to file an appeal from the order granting relief. If you are served with a Notice of Appeal filed by the State it is incumbent upon you to notify the Appellate Division of SCCID that the State is appealing a favorable judgment from a PCR case in which you were court-appointed counsel. That office will then notify you if they need any documentation from your file.

CLOSING YOUR FILE AND ENDING THE ATTORNEY/CLIENT RELATIONSHIP

When the State send my office a copy of a proposed order that is being sent to a judge I always write the client and send them a copy immediately. My standard letter advises the client to review the State's proposed order and notify my office immediately if the client feels the order fails to address any of the issues that were presented at the PCR hearing. Often I will receive a signed Order of Dismissal from the Court faster than I have had time to get a response from the client concerning a proposed order of dismissal. Nevertheless, I immediately send the client a copy of the final Order of Dismissal along with the instruction that he notify me immediately if the client feels the order does not cover all of his issues. You need to make it perfectly clear that you know the client disagrees with the outcome ordered, but that the relevant inquiry is whether or not the order addresses all of the client's specific allegations. At the same time advise the client that you will be comparing the order against your own notes concerning what issues were preserved at the PCR hearing.

Once you make a decision about whether or not you are going to file a Rule 59(e) Motion you should notify the client of your next action. If you have not filed a Rule 59(e) Motion and proceed to file a Notice of Appeal be certain that the client is immediately advised. Be sure your client is advised that he needs to make a decision about representation on appeal quickly. He needs to advise you as soon when you have turned your file materials over to the Appellate Division of SCCID. At that point you should advise your client that your responsibilities under the terms of your court appointment have now been fulfilled and the Appellate Division of SCCID will now be responsible for representing him. Make sure the client understands that your

responsibilities with regards to your court appointment terminated once the appeal was filed and the case was turned over to SCCID.



South Carolina Bar

Continuing Legal Education Division

**28th Annual Criminal Practice in
South Carolina**

Friday, February 22, 2019

Ethics Issues in Criminal Defense

Susan Barber Hackett

ETHICAL ISSUES IN CRIMINAL DEFENSE

Susan Barber Hackett
Office of Appellate Defense
shackett@sccid.sc.gov

Most Common Complaints Against Lawyers

1. Neglect/Lack of Diligence
2. Inadequate Communication
3. Dishonesty/Deceit/Misrepresentation
4. Trust Account Misconduct
5. Lack of Competence
6. Conflict of Interest
7. Failure to Deliver Client File
8. Incivility
9. Advertising Misconduct
10. Discovery Abuse/Litigation Misconduct
11. Failure to Pay Third Party
12. Unauthorized Practice of Law
13. Improper Fees
14. Criminal Conduct (personal)

Source: CLC Annual Report 2016-2017

5 of the Most Common Complaints

Neglect/Lack of Diligence

- Rule 1.3, RPC, Rule 407, SCACR –

“A lawyer shall act with reasonable diligence and promptness in representing a client.”

- Rule 3.2, RPC, Rule 407, SCACR –

“A lawyer shall make reasonable efforts to expediate litigation consistent with the interests of the client.”

5 of the Most Common Complaints

Inadequate Communication

Rule 1.4, RPC, Rule 407, SCACR –

(a) A lawyer shall:

- (1) promptly inform;
- (2) reasonably consult with the client;
- (3) keep the client reasonably informed about the status of the matter;
- (4) promptly comply with reasonable requests for information; and
- (5) consult with the client about any relevant limitation on the lawyer’s conduct.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Document, document, document

Telsham Lex

7/28/16 - TC from [redacted] He got the new client letter and transcript. Wanted to know what he has to do. I explained he can help if he'd like and how. Not required. He is going to read it and get back to me. His next is [redacted] and he wants me to talk to her.

8/23/16 - TC from [redacted] I have not reviewed his case yet. [redacted] has called me. Things not in transcript.

8/23/16 - I received a voicemail from [redacted] She left two numbers [redacted] & [redacted] I called the both today. I left a voicemail on the second number.

8/25/16 - TC from [redacted] He does not want me to send his brief to him. Wants me to send it to his [redacted] I told him I need that in writing.

9/12/16 - TC from [redacted] I received his letter.

9/21/16 - TC from [redacted] [redacted] condition when he went into court - had hurt his back the week of trial or the week before. Had an appointment for him to go to the doctor the next day. Judge asked continuance request, could not take medications. Things not in the record. No answer, no bench. Their trial. Same doctor every day. Shock back put on him. She does not think this was in the transcript. No objection to the shock belt. Judge said he could have paid jail, but the jail would not allow. Delinquent in jail. The second day - requested continuance and avoid he had been in the emergency room seeking help.

12/29/16 - TC from [redacted] Status update.

1/17/17 - TC with Clark's office. No motions regarding expert witness in the file. She went through the file page by page. Rule 5, Reciprocal Rule 5, NOA, sentence sheet, verdict form, indictment, order for D to be in custody through the end of trial, trial exhibits (affidavits, photos, jury questions, interrogation), dismissal of malicious injury to property, jury strike sheet, order to attend bond, motion to attend bond, motion to reduce bond.

1/24/17 - TC with [redacted] She got the brief I sent. [redacted] as not received what I sent yet. He called her on Sunday morning. He was attacked. She called the prison and he was placed in protective custody. She wanted to know if I could "hurry up" the case. I told her I could not. I explained the state still has to file a brief.

3/13/17 - TC from [redacted] Status update. He is at Broad River. I updated the database.

6/30/17 - TC from [redacted] He got the state's brief. Wanted to know the next step. I explained we are waiting for the Court. He wanted to know how long that takes. I told him there is no time limit and the Court takes however long the Court takes.

8/29/17 - TC from [redacted] No update. Waiting for the court. He said he will call back in a few months for an update. He wanted to know about PCR so I explained the process. He said

his aunt said she looked online and the court requested medical records. He has been taken for an MRI as a result. I have looked everywhere online and I have no idea what he is talking about. He wants to know where "online" the case is.

12/1/17 - TC from [redacted] No update.

6/15/18 - VM from [redacted] Did not understand my letter.

6/21/18 - TC with [redacted] He wanted to know what is going on with his case. I went through everything that has happened and will happen. I am going to file a petition for writ of certiorari in the Supreme Court within the next 30 days.

3/13/17 - TC from [redacted]. Status update. He is at Broad River. I updated the database.

6/30/17 - TC from [redacted] He got the state's brief. Wanted to know the next step. I explained we are waiting for the Court. He wanted to know how long that takes. I told him there is no time limit and the Court takes however long the Court takes.



State of Tennessee
 Court of Appeals
 700 North Main Street
 Nashville, TN 37243
 Phone: 615-253-1200
 Fax: 615-253-1201
 Website: www.tnscad.com

April 18, 2018

McComick Commercial Interiors
 786 Buckingham Way
 McMinnville, TN 37095

Re: Your Case

Dear [redacted]

Please accept this letter as an update on the status of your case. As you know, I filed an Anders brief in your case in June of 2017. The Court of Appeals has not rendered a decision in your case. As soon as I hear from the Court, I will advise you immediately. This is a very long process, and you may not hear from me for several months if I have no update to provide. Nevertheless, if you have questions about your case, please feel free to contact me.

Sincerely,

 Susan D. Harlan
 Appellate Counsel

Please accept this letter as an update on the status of your case. As you know, I filed an Anders brief in your case in June of 2017. The Court of Appeals has not rendered a decision in your case. As soon as I hear from the Court, I will advise you immediately. This is a very long process, and you may not hear from me for several months if I have no update to provide. Nevertheless, if you have questions about your case, please feel free to contact me.

5 of the Most Common Complaints

Dishonesty/Deceit/Misrepresentation

- Rule 3.1, RPC, Rule 407, SCACR – “Meritorious Claims and Contentions”
- Rule 3.3, RPC, Rule 407, SCACR – “Candor Toward the Tribunal”
- Rule 4.1, RPC, Rule 407, SCACR – “Truthfulness in Statements to Others”
- Rule 8.4(e), RPC, Rule 407, SCACR – “It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation.”

5 of the Most Common Complaints

Failure to Deliver Client File

- Rule 1.4(a)(4), RPC, Rule 407, SCACR – “promptly comply with reasonable requests for information”
- Rule 1.15(i), RPC, Rule 407, SCACR – File retention rule

5 of the Most Common Complaints

Failure to Pay Third Party

- Pay the court reporter
- Pay the experts
- Pay any providers you've promised to protect
- Pay awards issued by the Fee Disputes Board

What to Do When You Receive a Complaint

Practice the 3 Rs:

1. Remain calm!
2. Read!
3. Respond!

The Disciplinary Process

1. An individual files a complaint.
2. ODC sends a Notice of Investigation
3. Lawyer Responds
4. ODC decides what to do next
5. Notice to Appear
6. Investigative Panel
7. Formal Charges
8. Answer
9. Hearing Panel
10. Report from Hearing Panel
11. Objections to Report
12. Supreme Court

The Disciplinary Process

- Rule 19(a) , RLDE, Rule 413, SCACR – Receipt of the complaint
 - Anybody can file a complaint
 - “If the information raises allegations that would constitute lawyer misconduct, incapacity, or the inability to participate in a disciplinary investigation or assist in the defense of formal proceedings if true, disciplinary counsel shall conduct an investigation.”

Complaint

S.D. Supreme Court of Disciplinary Cou
 Po. Box 12159
 Columbia, S.C. 29211

I'm filing a complaint against the above referenced
 Appellate Counsel; my Transcripts has been lost now
 for 3 years and she still hasn't ask them just
 to give me a New Trial, because my Trial
 Transcript is Lost, this is "Due Diligence" I'm suppose
 to use due diligence in Order for this issue to be diligently
 sought. I thank you for you time. [REDACTED]

RE: Formel Complaint Against /A
 Mrs. Suzan B. Hacket /S.C. Appellat

To whom it may concern,

I'm filing a complaint against the
 Appellate Counsel, my Transcripts ha
 for 3 years and she still hasn't ask them just
 to give me a New Trial, because my Trial
 Transcript is Lost, this is "Due Diligence" I'm suppose
 to use due diligence in Order for this issue to be diligently
 sought. I thank you for you time. [REDACTED]

The Disciplinary Process

- Rule 19 (b), RLDE, Rule 413, SCACR:
 - "Disciplinary counsel shall conduct all investigations. ... Disciplinary counsel shall issue a notice of investigation to the lawyer with a copy of the complaint or information received requesting that the lawyer file a response to the allegations in the notice."
 - "The lawyer shall file a written response within 15 days of notice to do so from disciplinary counsel."

Notice of Investigation



The Supreme Court of South Carolina
 OFFICE OF DISCIPLINARY COUNSEL
 Linda M. Craglin
 Disciplinary Counsel
 William C. Campbell
 Assistant Disciplinary Counsel

August 26, 2015

PERSONAL AND CONFIDENTIAL

Susan Barber Hackett, Esquire
 P.O. Box 11585
 Columbia, SC 29211

RE: NOTICE OF INVESTIGATION
 Complainant: ██████████
 Matter Number: 15-DE-L-1025



The grounds for discipline under RLDE relevant to this matter are found in Rule 7(a). The specific provisions of the Rules of Professional Conduct, Rule 407, SCACR, that we believe are relevant to our investigation at this time are Rules 1.3 and 1.4. We do not allege at this time that you violated any of the Rules, but, instead, list those Rules relevant to this investigation to afford you notice thereof. This investigation may be expanded, as provided in RLDE, if we deem appropriate.

Dear Ms. Hackett:

We have received information indicating possible proof of your part. A copy of the information received is enclosed. The provisions of the Rules for Lawyer Disciplinary Enforcement (RLDE) to investigate this matter.

You are hereby notified that the Office of Disciplinary Counsel is investigating the enclosed complaint.

The grounds for discipline under RLDE relevant to this matter are found in Rule 7(a). The specific provisions of the Rules of Professional Conduct that we believe are relevant to our investigation at this time are not alleged at this time that you violated any of the Rules, but, instead, list those Rules relevant to this investigation to afford you notice thereof. This investigation may be expanded, as provided in RLDE, if we deem appropriate.

You are required to file a written response with this office within fifteen days of the date of this letter. Your written response must address separately and with specificity whether any of the events mentioned occurred, whether you acknowledge violating the Rules of Professional Conduct, or other rules of this jurisdiction regarding professional conduct of lawyers, and, if so, which rules. Your response must also include your verification that it is complete and accurate to the best of your knowledge and belief. A form is enclosed for your convenience.

You are required to file a written response with this office within fifteen days of the date of this letter. Your written response must address separately and with specificity whether any of the events mentioned occurred, whether you acknowledge violating the Rules of Professional Conduct, or other rules of this jurisdiction regarding

Lawyer's response



South Carolina Commission on Access to Justice
 1306 Lady Street, Suite 402
 Columbia, South Carolina 29201-3302
 P.O. Box 12159
 Columbia, South Carolina 29211-1888
 Phone: 803.746.6000

William C. Campbell, Esquire
 Assistant Disciplinary Counsel
 Office of Disciplinary Counsel
 P.O. Box 12159
 Columbia, S.C. 29211

August

Re: ██████████ 15-DE-L-1025

Dear Mr. Campbell:

I received a notice of investigation from ██████████ on conviction under the name ██████████ as advised by your letter in your opinion and on all of our documentation. Pursuant to the Court, we are required to use the name on the notice of appeal and the same name which appears with conviction in order to perfect the appeal. However, for ease of reference, I will refer to him as ██████████ in this letter.

Your letter cites to Rules 1.3 and 1.4 as the rules being investigated. These rules concern diligence and communication. I will explain my efforts on behalf of ██████████ and my communications with ██████████ in the paragraphs that follow to demonstrate that I have worked diligently on his behalf and I have communicated with him to keep him reasonably informed about the status of his case.

"Last" transcript

██████████ alleges that his transcript has been lost for three years and that I have not requested a new trial on his behalf. While he is correct that I have not requested a new trial, I have not done so because there is no legal authority for doing so. Ideally, I will provide you with the history of my representation of ██████████. I was assigned to represent ██████████ on December 17, 2013. On that date, I sent ██████████ a copy of his trial transcript. He was tried on September 18-25, 2013. We have a complete copy of his trial transcript and he has been provided a copy of it.

On December 17, 2013, I noticed that on page 7 of the trial transcript there was a reference to a prior hearing. I immediately wrote a letter to trial counsel asking for information about the

Your letter cites to Rules 1.3 and 1.4 as the rules being investigated. These rules concern diligence and communication. I will explain my efforts on behalf of ██████████ and my communications with ██████████ in the paragraphs that follow to demonstrate that I have worked diligently on his behalf and I have communicated with him to keep him reasonably informed about the status of his case.

Lawyer's response

Not requesting a new trial

I have not requested a new trial on [REDACTED] behalf because there is no legal basis to do so. We have a complete copy of the trial transcript. We also have a copy of the transcript in which his trial counsel moved to be relieved. The only transcript that we are missing is one in which the prosecutor gave him a plea offer. In order to be entitled to a new trial based upon the lack of a transcript, we would have to show the Court that the record does not allow for meaningful appellate review. See State v. Ladson, 373 S.C. 320, 644 S.E.2d 271 (Ct. App. 2007). The current record permits meaningful appellate review because we have the complete trial transcript and the presentation of a plea offer would not provide any basis for a direct appeal issue.

Lawyer's response

In summary, I have corresponded with [REDACTED] by letter, either directly or by copying him, on December 17, 2013 (two letters), January 7, 2014, February 5, 2014, March 11, 2014, July 21, 2014, November 10, 2014, November 13, 2014, April 13, 2015, and April 22, 2015. I met with him on November 18, 2014 and December 10, 2014. Presently, the brief and designation of matter are due to be filed on September 16, 2015.

I hope this letter satisfies your office that I have not violated Rules 1.3 and 1.4 of the Rules of Professional Conduct. If you need additional information or require copies of any of the letters and/or requests listed in this letter, please do not hesitate to contact me.

The Disciplinary Process

- Investigation may include:
 - Just the complaint and response from the lawyer
 - Additional follow-up from the complainant and/or the lawyer
 - Assigning the case to an Attorney to Assist Disciplinary Counsel
 - Notice to Appear (Rule 19(c)(3), RLDE)

The Disciplinary Process

- Disposition after investigation (Rule 19(d), RLDE, Rule 413, SCACR)
 1. No Misconduct
 - a. Dismissal by ODC
 - b. Letter of caution by ODC
 2. Misconduct
 - a. Propose an agreement for discipline by consent
 - b. Recommend to an investigative panel that a letter of caution or confidential admonition be issued
 - c. Recommend to an investigative panel that formal charges be filed.

ODC's response


The Supreme Court of South Carolina
 OFFICE OF DISCIPLINARY COUNSEL
 Leahy M. Coppius
 Secretary-Counsel
 William C. Campbell
 Assistant Disciplinary Counsel

PERSONAL & CONFIDENTIAL
 [REDACTED]
 Post Office Box 205
 [REDACTED]
 Ridgeville, SC 29472

Re: Lawyer: Susan
 Case Number: 15-DI

Dear [REDACTED]

This office previously informed you of its intent to dismiss the complaint you filed in connection with the above-referenced matter. You were given thirty days to submit your written request for a review of that decision. No request was received from you. Accordingly, the complaint in this matter is dismissed pursuant to the provisions of Rule 19(d)(1) of RLDE. As required by these rules, a copy of this letter is being sent to Ms. Hackett as notice of the dismissal of this complaint.

Sincerely,


 William C. Campbell

WCC/

cc: Susan Barber Hackett, Esquire



Oct
 This office previously informed you of its intent to dismiss the complaint you filed in connection with the above-referenced matter. You were given thirty days to submit your written request for a review of that decision. No request was received from you. Accordingly, the complaint in this matter is dismissed pursuant to the provisions of Rule 19(d)(1) of RLDE. As required by these rules, a copy of this letter is being sent to Ms. Hackett as notice of the dismissal of this complaint.

The Disciplinary Process

- The Investigative Panel:
 1. Dismiss or issue letter of caution
 2. Accept AFDBC
 3. Execute a deferred discipline agreement
 4. Issue a confidential admonition (right to object)
 5. Direct ODC to file formal charges

The Disciplinary Process

- Formal Charges – file & serve
- Answer – Lawyer shall answer within 30 days (public)
 - Failure to answer is deemed an admission of the allegations; default
- Discovery
- Hearing before Hearing Panel
 - Failure to appear is deemed an admission of the factual allegations; default

The Disciplinary Process

- Hearing Panel issues a report
- ODC & Lawyer may file objections to the report with the Supreme Court
- Oral Argument at the Supreme Court

The Disciplinary Process
- Other forms of discipline not previously discussed

1. Disbarment
2. Definite suspension
3. Public reprimand
4. Admonition
5. Restitution
6. Assessment of the costs
7. Fine
8. Limitations on nature of lawyer's future practice
9. Debarment
10. Any other sanction

Q & A

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