Public Defense 101

Fundamentals of the Profession

PARTICIPANT MANUAL

Solomon Blatt Building, Room 112
1105 Pendleton Street
Columbia, South Carolina

November 20-21, 2017

SCCID
SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Representing The Poor: *Where We Came From; Where We Are Going*

Public Defense 101
Fundamentals of the Profession
November 20-21, 2017

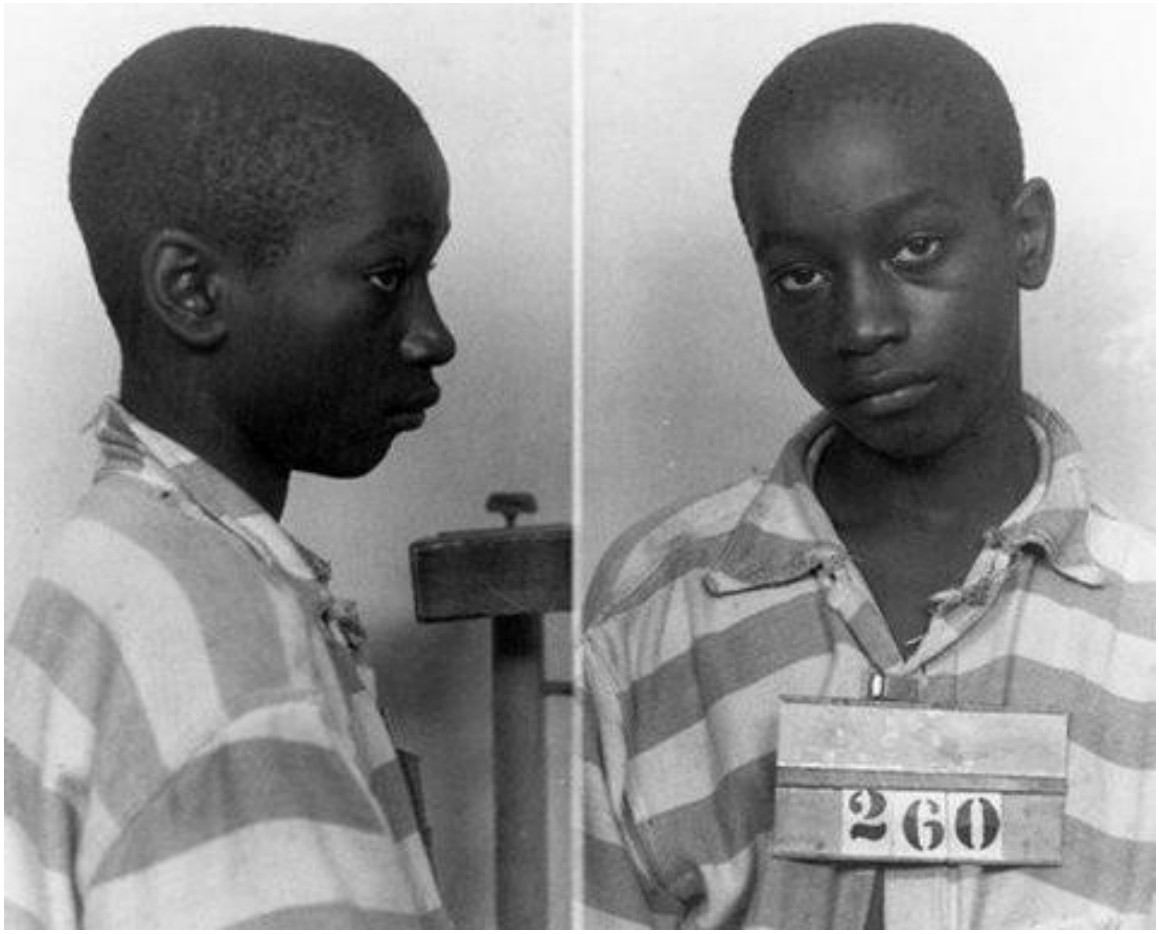
Harry Dest
Circuit Public Defender, 16th Circuit

SCCID
South Carolina Commission on Indigent Defense

"The arc of the moral universe is long, but it bends toward justice."

– Martin Luther King, Jr.

State v. George Stinney



George Stinney

The youngest person executed in the United States in the 20th Century.
(14 years old)

State v. George Stinney
March 23, 1944
11 year old Betty Binnicker
8 year old Mary Thames
"MAYPOPS"
George and sister Katherine
last people to see the girls

Next morning bodies were found in a muddy ditch
Severe head wounds

Green Mission Baptist Church

George Stinney held 5 days
No Miranda
No lawyer
No family

2 police officers said he confessed – NO WRITTEN RECORD of statement
Railroad spike
No physical evidence at trial, spike, bloody clothes of defendant

Trial
Attorney Charles Plowden – tax commissioner
Entire case lasted 2 hours
Plowden never asked a question on cross
Presented no evidence

All white jury deliberated for 10 minutes
State Senator John Grier Binkins assisted in the prosecution
Plowden did not file an appeal

Execution June 16, 1944

5’1” 90 pounds
Arrest – Execution: 81 days

2014 New Trial

Gov. Olin Johnston

June 10, 1944.

Mr. W. Wallace Fridy, Pastor
Lyman Methodist Church
Lyman, S. C.

Dear Reverend:

I have your letter concerning George Stinney, Jr. As you know, I had nothing to do with this matter. It was entirely in the hands of the judge, the jury, and the solicitor.

I understand that, although this boy was about 14 years of age, he brutally murdered two little girls, ages 11 and 8. I would suggest that you contact the solicitor, the judge, and the jury in regards to this matter.

I have just talked with the officer who made the arrest in this case. It may be interesting for you to know that Stinney killed the smaller girl to rape the larger one. Then he killed the larger girl and raped her dead body. Twenty minutes later he returned and attempted to rape her again but her body was too cold. All of this he admitted himself.

One other thing, the colored people of Alcolu would have lynched this boy themselves had it not been for the protection of the officers.

Sincerely yours,

Olin D. Johnston
Governor.

ODJ:LB W

Expert testimony

Alibi witnesses
Amie Stinney Ruffner
Katherine Stinney Robinson

The New York Times

- South Carolina Judge Vacates Conviction of George Stinney in 1944 Execution
- Great and Fundamental Injustice
- "The all-white jury could not be considered a jury of the teenager's peers, Judge Mullen ruled, and his court-appointed attorney did "little to nothing" to defend him. His confession was most likely coerced and unreliable, she added, "due to the power differential between his position as a 14-year-old black male apprehended and questioned by white, uniformed law enforcement in a small, segregated mill town in South Carolina."

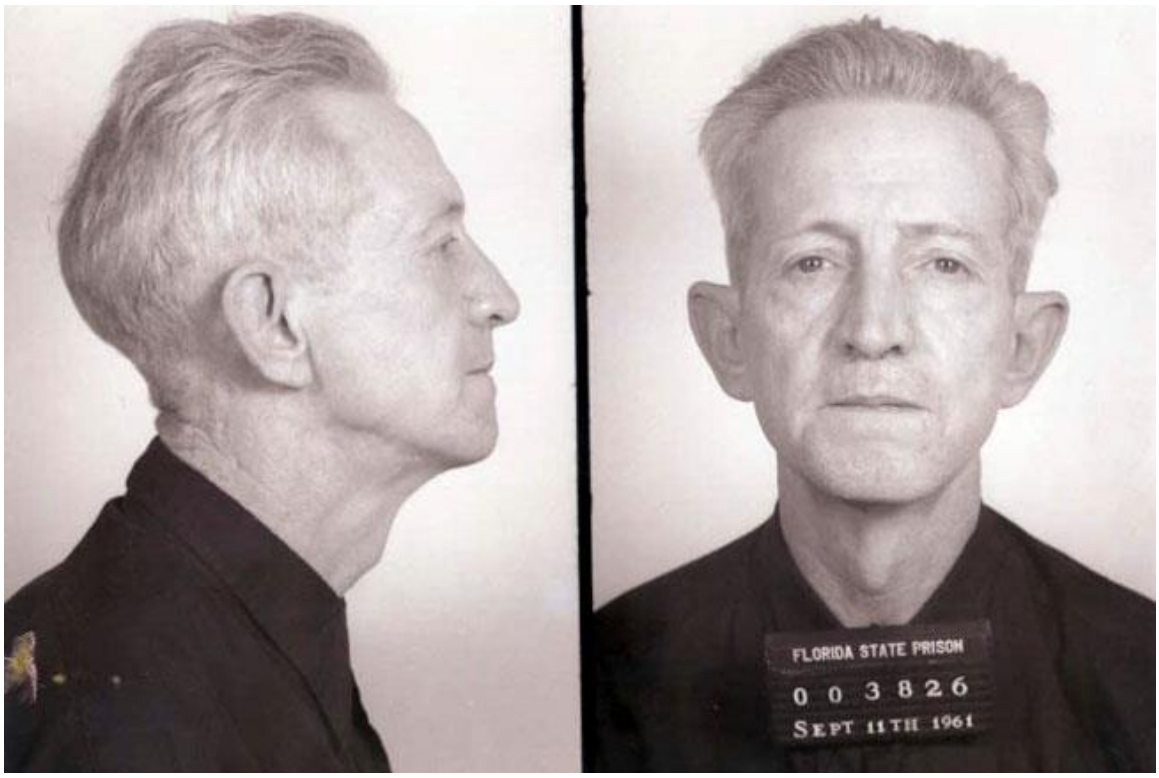
"I am not aware of any case where someone who was convicted has had the trial conviction and sentence vacated after they'd been executed, " said Miller W. Shealy Jr., a professor at the Charleston School of Law and one of the lawyers who worked on behalf of the Stinney family to have the conviction thrown out.

Betts v. Brady, 316 U.S. 455 (1942)

The right to counsel is not essential to a fair trial.
The states are required to provide counsel to indigent defendants only if the case involves special circumstances . . .

illiteracy
mentally retardation
incapable of defending self
or capital cases.

Gideon



Clarence Earl Gideon

- June 3 1961, between midnight and 8 am, a burglary – Bay Harbor Pool Hall.
- Intruder gained entry by breaking into front door
- Smashed a cigarette machine, record player, and stole large sum of coins.

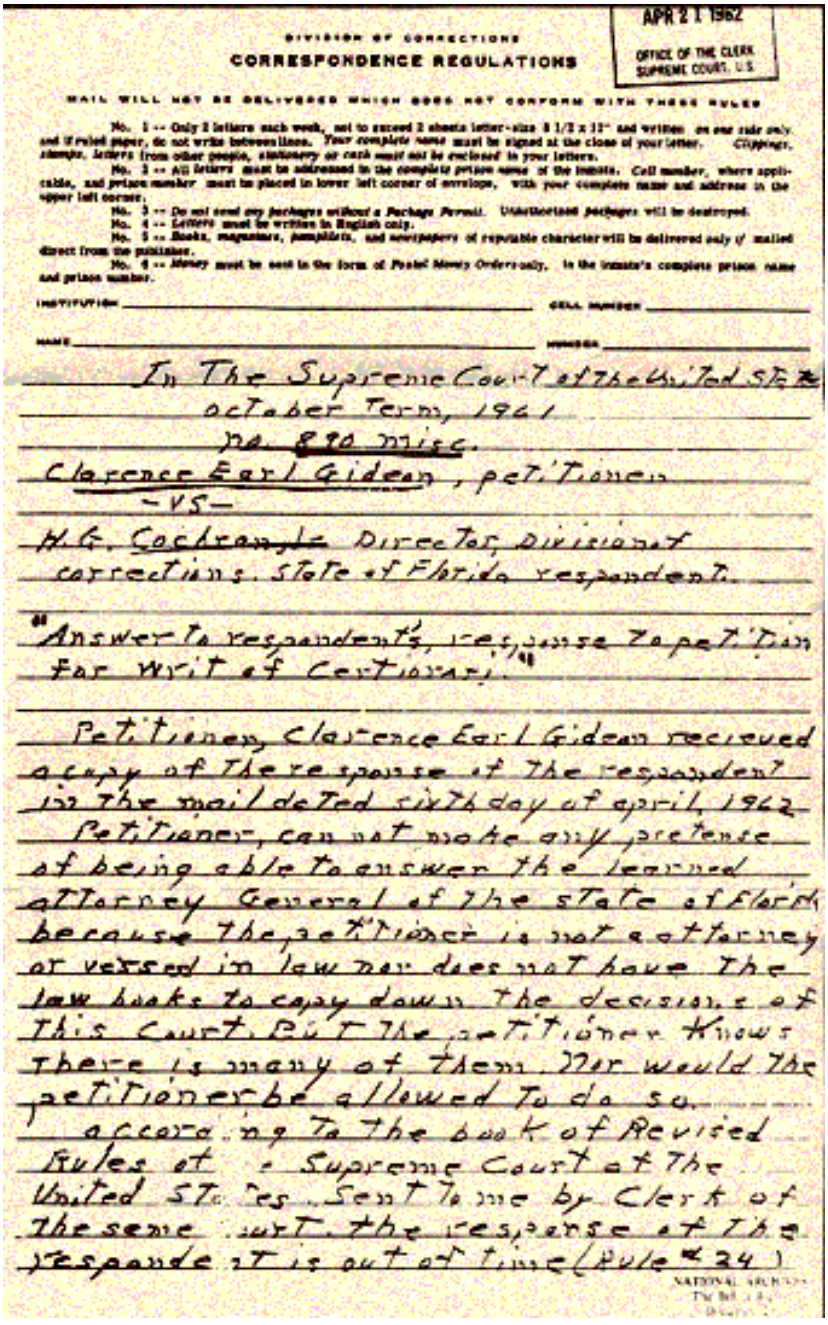
- Henry Cook
- 5:30 a.m. – Clarence Gideon
  large sum of coins in pockets and bottles of wine.

- Judge Robert McCrary

(Transcript)

- District Attorney
  - William Harris
- Witnesses
  - Henry Cook
  - Preston Grey (Cab Driver)

- Jury deliberated less than ten minutes.
- Sentenced Gideon to 5 years in prison.



APR 21 1962

OFFICE OF THE CLERK
SUPREME COURT, U.S.

DIVISION OF CORRECTIONS

CORRESPONDENCE REGULATIONS

MAIL WILL NOT BE DELIVERED WHICH DOES NOT CONFORM WITH THESE RULES

No. 1 -- Only 2 letters each week, not to exceed 2 sheets letter-size 8 1/2 x 11" and written on one side only and if ruled paper, do not write between lines. *Your complete name* must be signed at the close of your letter. Clippings, stamps, letters from other people, stationery or cash must not be enclosed in your letters.

No. 2 -- All letters must be addressed to the *complete prison name* of the inmate. Cell number, where applicable, and prison number must be placed in lower left corner of envelope, with your complete name and address in the upper left corner.

No. 3 -- Do not send any packages *without a Package Permit.* Unauthorized packages will be destroyed.

No. 4 -- Letters must be written in English only.

No. 5 -- Books, magazines, pamphlets, and newspapers of reputable character will be delivered only if mailed direct from the publisher.

No. 6 -- Money must be sent in the form of *Postal Money Orders* only. In the inmate's complete prison name and prison number.

INSTITUTION _____ CELL NUMBER _____

NAME _____ NUMBER _____

In The Supreme Court of the United States
october Term, 1961
no. 890 misc.
Clarence Earl Gideon, petitioner
-vs-
H.G. Cochran Jr. Director, Division of
corrections. State of Florida respondent.

"Answer to respondent's, response to petition
for writ of certiorari."

Petitioner, Clarence Earl Gideon recieved
a copy of the response of the respondent
in the mail dated sixth day of april, 1962
Petitioner, can not make any pretense
of being able to answer the learned
attorney General of the state of Florida
because the petitioner is not a attorney
or versed in law nor does not have the
law books to copy down the decisions of
this Court. But the petitioner knows
there is many of them. Nor would the
petitioner be allowed To do so.
according To the book of Revised
Rules of Supreme Court of the
United States. Sent To me by Clerk of
the same court. the response of the
respondent it is out of time (Rule # 24)

NATIONAL ARCHIVES

In Johnson v. Zerbst (1938) the Federal Government was already required to appoint counsel for indigent defense in all felony cases. (6th Amendment)

"the assistance of counsel is essential to a fair trial and required by due process of law."

1963: States without appointed counsel in felony cases.

"In our adversary system of criminal justice, any person hailed into court, who is too poor to hire a lawyer could not be assured a fair trial, unless counsel is provided for him. Lawyers in criminal courts are a necessity not a luxury. This is the obvious truth."

Justice Hugo Black

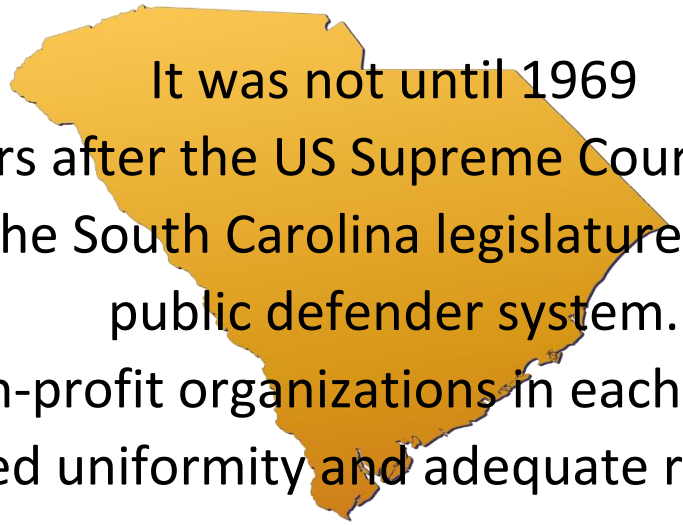
Gideon:

- Retrial
  - Attorney – Fred Turner
  - Henry Cook – look out for others

- Preston Gray
- Didn't see Gideon carrying wine, money or coins of any sort.

(transcript).

I



It was not until 1969
(6 years after the US Supreme Court decision)
that the South Carolina legislature created a public defender system.
Non-profit organizations in each county.
Lacked uniformity and adequate resources.

2003

ABA report
"The lack of funding and resources raises serious doubts whether defendants are receiving adequate representation. This crisis shakes the foundation of our criminal justice system."

"No Constitutional right is celebrated so much in the abstract, and observed so little in reality as the right to counsel." – Steven Bright
Former Director – Southern Poverty Law Center

2007 Indigent Defense Act

Whereas, the General Assembly believes it is necessary to establish parity in benefits and salaries between prosecution and defense systems; and

2006

12.6 million dollars
129 Public Defenders
50% had healthcare and retirement benefits

2014

Over 30 million dollars
230 public defenders
100% have healthcare and retirement benefits

Mass Incarceration

2.3 million Incarcerated in US
More than half of state prisoners are serving time for non-violent offenses.

1 in every 9 prisoners are serving life sentences.
African Americans and Hispanics comprise 58% of prisoners, even though they only make up a quarter of the population.

Rank	Country/entity	Prisoners per 100,000 population
1	United States of America	743
2	Rwanda	595
3	Georgia	539
4	Virgin Islands (USA)	539
5	Russian Federation	534
6	Seychelles	507
7	St. Kitts and Nevis	495
7	Cuba	487[2]
8	Anguilla (United Kingdom)	480
9	Belize	439
9	British Virgin Islands (United Kingdom)	439

Now What?
Analyzing and Managing Your Cases

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Greenville, SC
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SCCID
SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

What we're going to cover?

Managing your clients & <u>their</u> files

Analyzing your <u>client's</u> cases

But…Before We Do That

Let's talk about some general ideas about

- **handling your cases**
- **being a Public Defender**

Some Ideas That Apply to Handling Your Cases (and in general to being a PD)

Be Yourself

Be Neat

Be Organized

Be Consistent

Some Ideas That Apply to Handling Your Cases
(and in general to being a PD)

Be yourself…

unless no one likes you!

Then you

should definitely

be someone else!!

Don't put on an ACT…this ain't Broadway!

- **You're only convincing being yourself**
- **Not as you playing someone else**

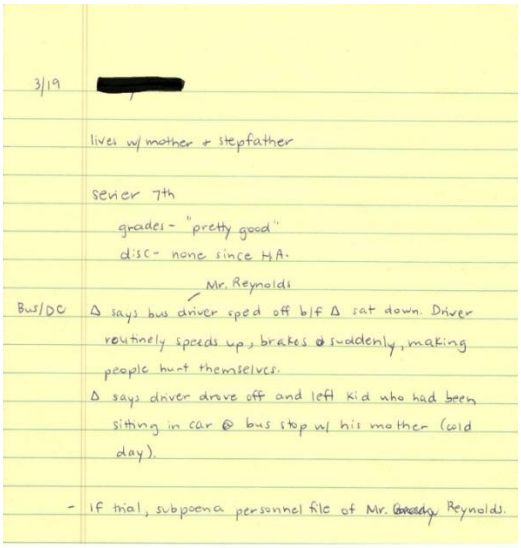
Be yourself… And steal as much s#@t as you can!

Seriously, it's fun!

Steal as many tricks of the trade as you can…

- **But <u>only</u> use what works for you**
- **And…when you use it, make it your own**

Be neat…well, at least mostly legible



3/19 [redacted]

lives w/ mother + stepfather

senior 7th

grades - "pretty good"

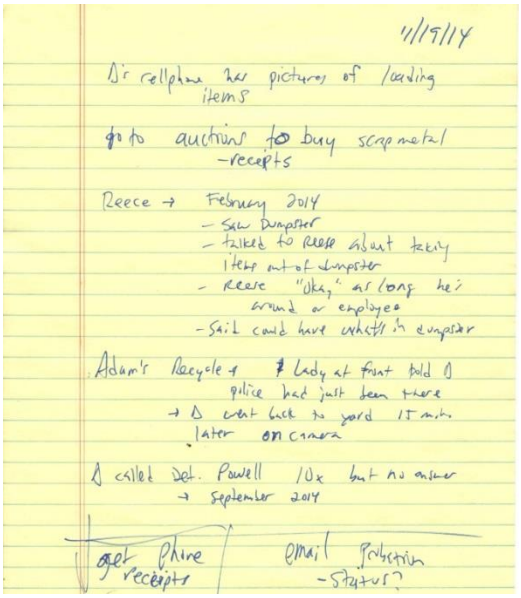
disc - none since HA.

Mr. Reynolds

Bus/DC Δ says bus driver sped off b/f Δ sat down. Driver routinely speeds up, brakes suddenly, making people hurt themselves.

Δ says driver drove off and left kid who had been sitting in car @ bus stop w/ his mother (cold day).

- if trial, subpoena personnel file of Mr. ~~Greedy~~ Reynolds.



1/19/14

Dr cellphone has pictures of loading items

go to auctions to buy scrap metal
-receipts

Reece → February 2014
- saw dumpster
- talked to Reece about taking items out of dumpster
- Reece "okay," as long he's around as employee
- said could have whatever in dumpster

Adam's Recycle + ? Lady at front told Δ police had just been there
→ Δ went back to yard 15 min. later on camera

Δ called Det. Powell 10x but no answer
→ September 2014

get phone records | email Protection -Status?

Be organized…follow a pattern

Why?

1) **Make sure I don't forget something**
2) **Client control—especially with talkers**

Be organized…Example #2: talking to your client

Have a plan… or come up with one

- **Share it with your client**
- **People (including you) feel better when there's a plan**

Be consistent…

Nomar Garciaparra:

14 years in MLB

6,116 Plate Appearances

Be consistent…it helps with

- **Making sure you cover everything**
- **Controlling the situation**
- **Maintaining consistency because your memory isn't reliable**

Managing Your Cases

Time Management…

- **Know yourself**
  - **You know what you suck at!**
  - **You know what you're good at!**
- **Just be honest with yourself**
- **Use a calendar—Nuff said!**
- **Work with your assistant**
  - **Come up with some way of staying on top of your deadlines, to-do's, etc.**

Should you spend an equal amount of time on all your cases?

NO!!

Triage your cases…PEOPLE! … TRIAGE!!

- **You know the cases you can move quickly**
  - **Move 'em**
  - **Bring the deal to the prosecutor**
  - **Don't let the client delay for the sake of delaying**
    - **Explain the pitfalls of delaying**
      - **Loss of control—only 2 things client controls whether to plead or go to trial (not the results!)**
      - **Probation/jail—start later means get out later**

Managing Your Client

Stop trying to CONTROL them

It's THEIR case

- **Let it be their case**
  - **Are you going to jail?**
  - **Will you be testifying ?**
- **You're smarter then them**
  - **So what?**
  - **Do you want a medal?**
- **Your job is to represent them…do that!**

Your job is to represent them…

Do that!

- **Do they want to risk LWOP?**
  - **Let 'em**
- **Do they want a trial?**
  - **Let 'em have one**
- **Do they want a PR bond on their murder charge?**
  - **Ask for it**

BUT…only after you've done your job!

What is doing your job?

- **It's counseling**

- **It's advising**
- **It's giving them an objective, realistic view of what they're facing…**
  - **At trial**
  - **With plea option 1**
  - **With Plea option 2**
  - **With whatever option <u>YOU</u> see for them**
  - **With whatever option <u>THEY</u> want to consider**

And after you've…

- **Counseled**
- **Advised**
- **Given them an objective, realistic view of what they're facing…**
  - **You've done YOUR job**
  - **And they get to do THEIR job—which is decide**

Ahh…but you say: "I ain't stand-by counsel!"

- **You're right—you aren't**
- **You're not required to stand-by**
- **You're required to participate**
- **Just don't**
  - **Substitute your ideas for theirs**
  - **Try to control their choice**

Don’t rush to judgment about your client

- **If you haven’t already, you will develop a good sense for evaluating people’s personalities**
  - **You will be able to spot liars**
  - **You will be able to see around corners and know when the difficult client is coming**
- **Allow that development**
  - **But control it**

Don’t rush to judgment about your client

The ability to quickly identify various personality types is a super-power

- **Use it responsibly**
- **Use it for good—not evil**
- **Use it to better represent your clients—not avoid them or manipulate them**

Analyzing Your Client's Cases

When?

- **Not too quickly**
- **Not before you have to**
- **Not simply because the client wants an answer**

How Much Info Do You Need?

- **There is no scientific answer**
- **The more you do it, the better you get at it**
- **Maintain control**
  - **Don't let your client rush you**
  - **Don't let your own anxiety, ego, or whatever rush you**

When Do You Tell Your Client?

- **When he has to know**
  - **Not sooner**
  - **Not later**

Do You Spend Enough Time With Your Client?

We all fall into both of these categories:

- **Not enough**
- **Too Much**

Are You Counseling Your Clients or Reinforcing Your Own PD Philosophy?

Public Defender Philosophy

1) **The State can do <u>no</u> right**
    - ❖ **Cops & prosecutors always cheat**
2) **The Client is Guilty**
    - ❖ **They're All Guilty**

You've Spotted A Great Issue…What Do You Do?

Don't tell your client…at least not yet

1) **The issue maybe great, but litigating it may not be so great…for your client**
    - *o* **Your client may not want it**
    - *o* **It may not be the best thing for your client**
2) **The client is who your represent, not his legal issue**

Let's Talk Examples

1. Client wants to take Polygraph because that'll prove he didn't do it
2. Client wants to reject the offer because he's supposed to get another offer (at least 3 offers!)
3. Client says let's go to trial (he thinks the prosecutor will cave and give him a better deal at trial; he might tell you that or not)
4. Client has a list of "motions" he wants you to file
5. Client says "you ain't doing anything for me!"
6. Client wants to fire you
7. The prosecutor is a lying, cheating no good…
8. The prosecutor is trying to bully you
9. The judge won't let you talk
10. The judge has ruled against you…and it's ridiculous!

The pile doesn't go down…

So, go home at 5!

Initial Client Issues

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Grant Gibbons
Circuit Public Defender
Second Judicial Circuit

1. KEEPING GOOD CLIENT RELATIONSHIPS

a. RETURN PHONE CALLS

b. KEEP INFORMATION FLOWING

c. HONESTY

Don’t promise what you can’t deliver

Qualify advice that depends solely on client’s story

If you say you will do something, DO IT!

d. FAMILY DYNAMICS

Mothers, wives, and children can wield amazing power with a client

e. PROFESSIONAL DISTANCE AND RESPECT

Avoid first names for both client and yourself

f. GOING THE EXTRA MILE

AFTER-HOURS VISITS

WEEKEND VISITS

MEETINGS WITH FAMILIES

PRELIMINARY ISSUES

1ST MEETING

GET TO KNOW A LITTLE ABOUT YOUR CLIENT BEFORE JUMPING INTO THE CASE

WORK HISTORY

MILITARY HISTORY

EDUCATION LEVEL

BIGGEST CONCERN ASSOCIATED WITH THE CHARGE

FAMILY

TIME

JOB

COLLATERAL CONSEQUENCES

PRIOR TO HEARING HIS/HER STORY, EXPLAIN DANGERS OF CHANGING THE STORY LATER

GENERAL VERSUS SPECIFIC DISCUSSIONS

EXPLAIN USUAL TIMING OF EVENTS – DISCOVERY DELAYS, ETC.

GO OVER CHARGES AND POTENTIAL SENTENCES

REVIEW POSSIBLE LESSER INCLUDED CHARGES

WARN ABOUT ANY POSSIBLE ENHANCEMENTS

EXPLAIN THE POSSIBILITY OF THE “TRIAL PENALTY.”

LISTENING – PAY GENUINE ATTENTION – BUILD SOME RESPECT

FAMILY COMMUNICATIONS – Who can I speak with?

ROLES OF ATTORNEY/CLIENT

Let the client know up front which decisions are completely his/hers.

You can't be a therapist or a cheerleader.

PRELIMINARY HEARING –

EXPLAIN WHAT PRELIMINARY HEARINGS ARE, AS WELL AS WHAT THEY ARE NOT.

IS IT IN CLIENT'S BEST INTEREST TO HAVE ONE?

PUBLICITY

DISCLOSE DEFENSES

WEAKNESSES OF STATE'S CASE BECOME APPARENT

BOND ISSUES

WHAT IS THE BOND AMOUNT?

WHAT ARE THE CHANCES YOU CAN POST IT?

IF NOT, WHAT COULD YOU ARRANGE TO POST?

ARE THERE OTHER CONDITIONS?

JAIL ISSUES

EXPLAIN THE DANGER OF COMMUNICATING OVER THE PHONE OR CONFIDING IN CELLMATES.

EXPLAIN THE PERILS OF JAILHOUSE LEGAL ADVICE

COPIES OF DISCOVERY MATERIAL

EXPLAIN THAT HAVING THIS IN DETENTION IS DANGEROUS

Jailhouse snitches with facts

MENTAL HEALTH ISSUES

PRIOR HOSPITALIZATIONS

PRIOR DIAGNOSIS

MENTALLY ILL VERSUS INCOMPETENT

MITIGATION

DEFENSE

STATE EVALUATION VERSUS PRIVATE

CONFLICTS

ARE THERE CODEFENDANTS?

DO YOU HAVE A CONFLICT?

WHO ARE KNOWN VICTIMS/WITNESSES?

DO THEY CONSTITUTE A CONFLICT?

INVESTIGATION

CLIENT

CLIENT'S FAMILY

TIMING

SPEEDY TRIAL MOTION

EXPLAIN WHEN IT IS APPROPRIATE ALONG WITH CONSEQUENSES

IRRECONCILABLE DIFFERENCES

COMPLAINTS TO SUPERVISORS

GRIEVANCES

DOCUMENTATION, DOCUMENTATION, DOCUMENTATION

RE-ASSIGN?

REQUESTS FOR NEW COUNSEL

MADE TO YOU

MADE TO SUPERVISOR

MADE TO THE COURT

Holistic Defense

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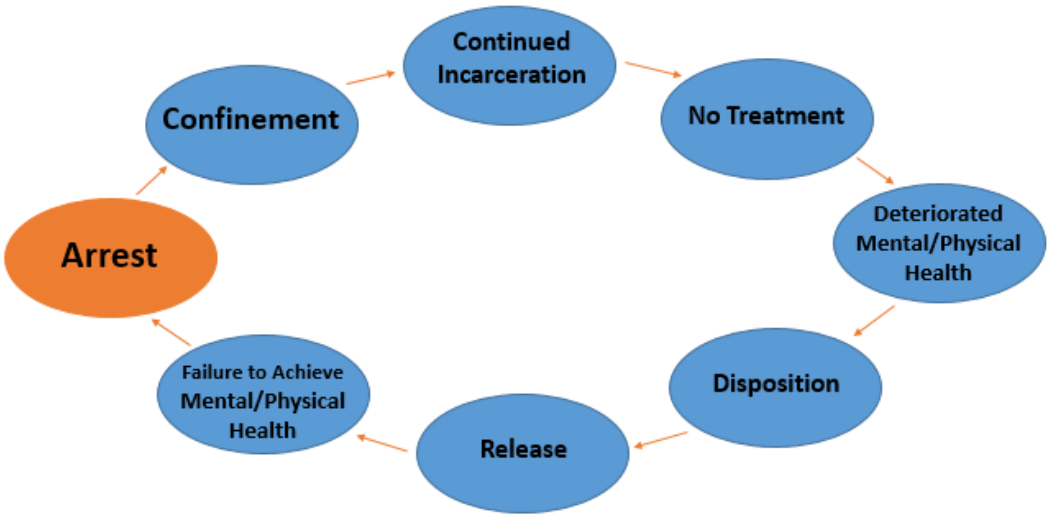
Grant Gibbons
Circuit Public Defender
Second Judicial Circuit

Traditional model of Representation

of criminally charged individuals



Changes to the Traditional Model

- During the last decade there has been a notable shift of attitudes and approaches to representation within the criminal defense community across the country.

There are different approaches being implemented today:

1. Client- Centered Defense.
    a. Advocating for the client's wishes, not assuming the lawyer knows what is best.
    b. Having client actively participate in defense.
    c. Focus on client being informed and comfortable.

2. Community – Oriented Defense

a. Fosters strong ties with community groups and organizations.

b. Engage in policy initiatives that will help the community.

c. Works with schools, churches, etc.

d. Work toward long-term policy changes.

Why Change?

Proponents of holistic representation believe that it can translate into greater stability and less contact with the criminal justice system.

- Public defenders have a unique chance to not only address a client's specific criminal charges but to use the trauma of a criminal arrest for positive gain by addressing specific life-issues that may have led to the alleged criminal activity.

WHAT EXACTLY IS HOLISTIC DEFENSE?

Generally, Holistic defense is more of a paradigm shift than a regimented procedure.

It is a view of representation that attempts to address clients' legal issues along with any underlying life situations that may have driven them into the criminal justice system, or that may bring them back into the system.

CORE PRINCIPLES OR PILLARS OF HOLISTIC DEFENSE

1. SEAMLESS ACCESS TO LEGAL AND NON-LEGAL SERVICES.
2. DYNAMIC, INTERDISCIPLINARY COMMUNICATION.
3. ADVOCATES WITH AN INTERDISCIPLINARY SKILL SET.
4. A ROBUST UNDERSTANDING OF, AND A CONNECTION TO, THE COMMUNITY BEING SERVED.

Life-issues that may lead clients to offend:

- Substance abuse
- Public housing
- Immigration
- Lack of Education/Job skills
- Mental Health/Behavioral
- Financial
- Domestic situations

Some of the issues Holistic Defense can address:

- Provide better life outcomes
- Prevent recidivism
- Reduce crime and enhance public safety
- Achieve these goals in a cost-effective fashion

Principles for Holistic Defense

- Meet Clients' Needs
- Partner with the Community
- Fix Systemic Problems
- Educate the Public
- Collaborate
- Address Civil Legal Needs
- Pursue a Multidisciplinary Approach
- Seek Necessary Support

HOW CAN WE DO THIS?

The Bronx Defenders model:

- **<u>In-house</u>** teams comprised of:
  - Criminal Attorneys
  - Civil Attorneys
  - Family Court Attorneys
  - Social Workers
  - Immigration specialists

For most offices, this approach is cost prohibitive.

That just means we have to be a little more creative.

WAYS TO START IMPLEMENTING A HOLISTIC APPROACH IN SMALLER OFFICES:

- Create resident specialists within your existing staff, divide the focus areas.
- Approach local law schools about intern programs.
- Approach local colleges/universities about social worker intern programs.
- Community volunteers, churches, civic organizations, etc.
- Become personally familiar with local service providers.
- Become trained in spotting non-legal issues.
- Network with service and public benefit organizations.
- Seek local attorneys with appropriate skill sets. Ask about pro bono work.
- Foster a relationship with civil legal aid providers.
- Provide community service. Be in the community you serve. Make relationships.

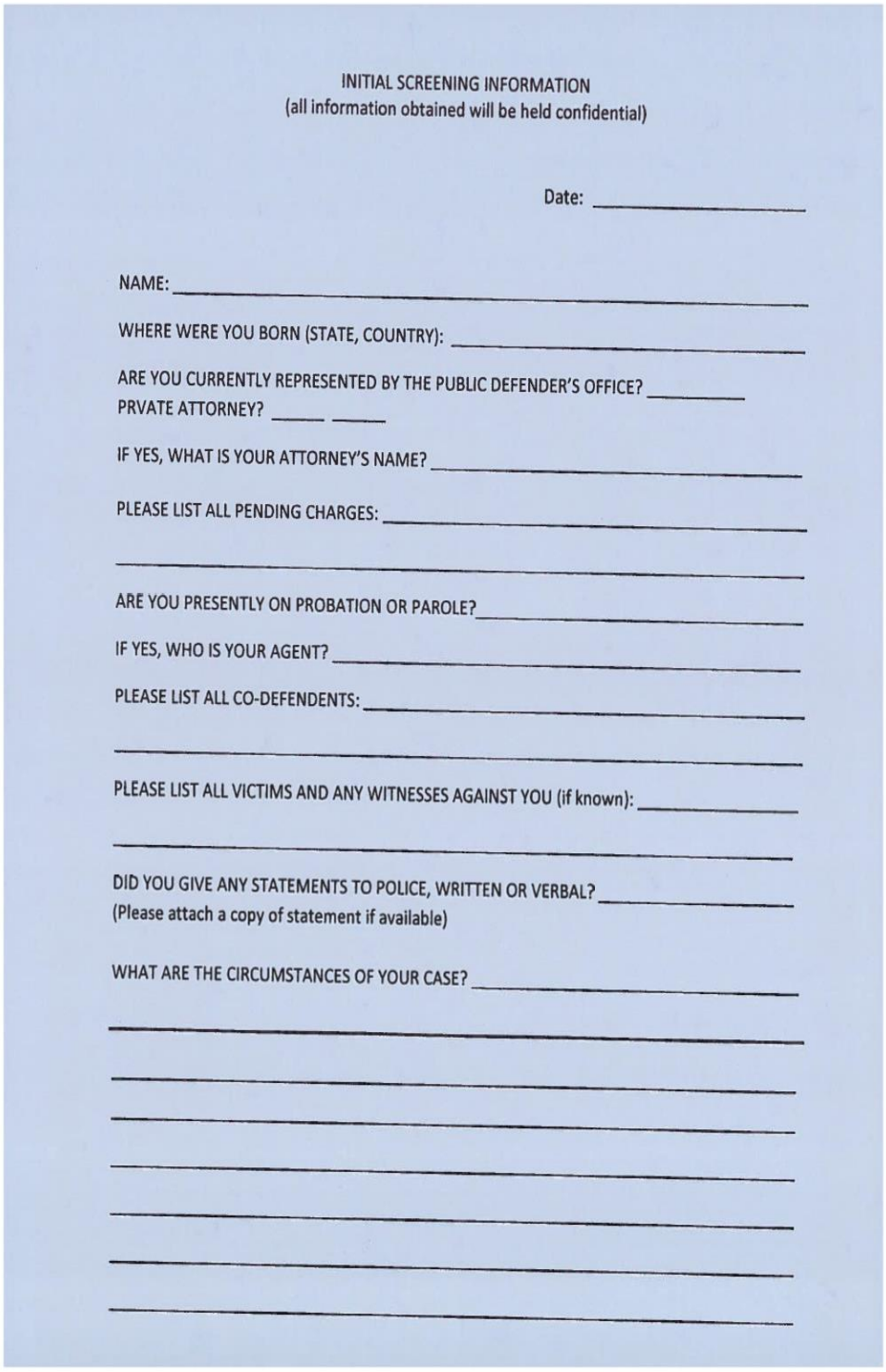
SEAMLESS ACCESS TO SERVICES

One of the **most effective** steps towards a holistic practice is to help clients and service providers get connected.

Many clients are going without needed services, because they either don't know services are available, or do not know how or where to get them.

Informing them about services is great. What if we could make them an appointment with the provider while they are in our office? What if we could go over requirements with them in one place? Provide maps? Provide phone numbers?

“JUST THE FACTS MA’AM” APPROACH



INITIAL SCREENING INFORMATION
(all information obtained will be held confidential)

Date: _____

NAME: _____

WHERE WERE YOU BORN (STATE, COUNTRY): _____

ARE YOU CURRENTLY REPRESENTED BY THE PUBLIC DEFENDER'S OFFICE? _____
PRVATE ATTORNEY? _____ _____

IF YES, WHAT IS YOUR ATTORNEY'S NAME? _____

PLEASE LIST ALL PENDING CHARGES: _____

_____

ARE YOU PRESENTLY ON PROBATION OR PAROLE? _____

IF YES, WHO IS YOUR AGENT? _____

PLEASE LIST ALL CO-DEFENDENTS: _____

_____

PLEASE LIST ALL VICTIMS AND ANY WITNESSES AGAINST YOU (if known): _____

_____

DID YOU GIVE ANY STATEMENTS TO POLICE, WRITTEN OR VERBAL? _____
(Please attach a copy of statement if available)

WHAT ARE THE CIRCUMSTANCES OF YOUR CASE? _____

_____

_____

_____

_____

_____

_____

_____

Sample Intake Form

Gender (circle one): Male Female

Age: _____

Primary Language (circle one): English Spanish French German Other

Marital status (circle one): Married Single Divorced Separated Cohabitating

Highest Level of Education (circle one): Less than high school High school

Some college Bachelor's Degree Master's Degree Doctoral Degree Other

Ethnicity (circle one): White Black Latino/Hispanic Asian/Pacific Islander

Biracial Multiracial

Are you employed? Yes No

Are you a veteran of the United States military? Yes No

Are you a student? Full-time or Part-time Yes No

Sample Intake Form

How many children do you have living at home under the age of 18?

Do you have any needs that you DO NOT have access to? Yes No

If yes (circle as many as needed): Shelter Food Clothing Medication

Medical Housing Employment Skills Training

Who is your support system (family, friends, spouse, children, church)?

Are you in need of immigration representation? Yes No

Have you been diagnosed or suffer from any Mental/Emotional Illness?

Yes No

If Yes, please explain:

Are you taking any medications? Yes No

If yes, please explain:

Describe your overall health?

Case #1: Client A

Charge: Shoplifting 2nd Offense

- Appointed when client has been in jail for 10 days.
- Client stole canned meat.
- Client says he was in the Navy.
- No address

Case #2: Client B

Charge: Unlawful Conduct Towards a Child

- Client is undocumented alien.
- Child had been turned over to ex-husband.
- DSS is involved.
- Client has prior mental health diagnosis.
- Client has been given eviction notice at the jail.

Case #3: Client C

Charge: Unlawful Possession of a Pistol

- Client is on SSI for a mental issue.
- Client has alienated all relatives.
- Client lives in subsidized public housing.
- Client also is on food stamps.
- Client has been off medication for several months.
- Client waived representation, and stayed in the jail for 4 months.
- Prosecution is offering a time served sentence.
- Client is very unstable and borders on incompetency.

Challenging Identification Evidence

Public Defense 101
Fundamentals of the Profession
November 20-21, 2017

Kathryn (Kat) Haggard Hudgins
Appellate Defender

Eyewitness Identification – Getting it Right

https://youtu.be/DZsckuKiH94

Does the identification meet the requirements of Due Process?

Neil v. Biggers,
409 U.S. 188, 195, 93 S. Ct. 375, 380, 34 L. Ed. 2d 401 (1972).

Two Prong Test:

1. Unduly Suggestive Police ID Procedure?

If yes:

2. Is it **reliable** despite the suggestive procedure - no substantial likelihood of misidentification? Totality of the circumstances

What is an unduly suggestive police ID procedure?

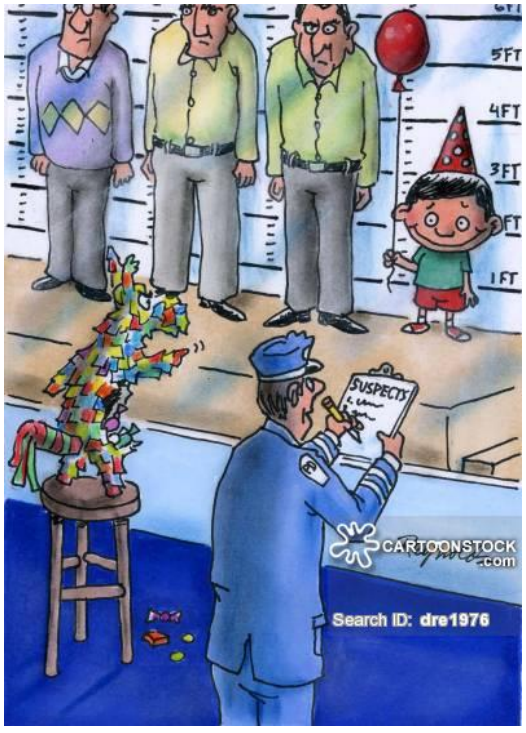
1. Show Up IDs are inherently suggestive

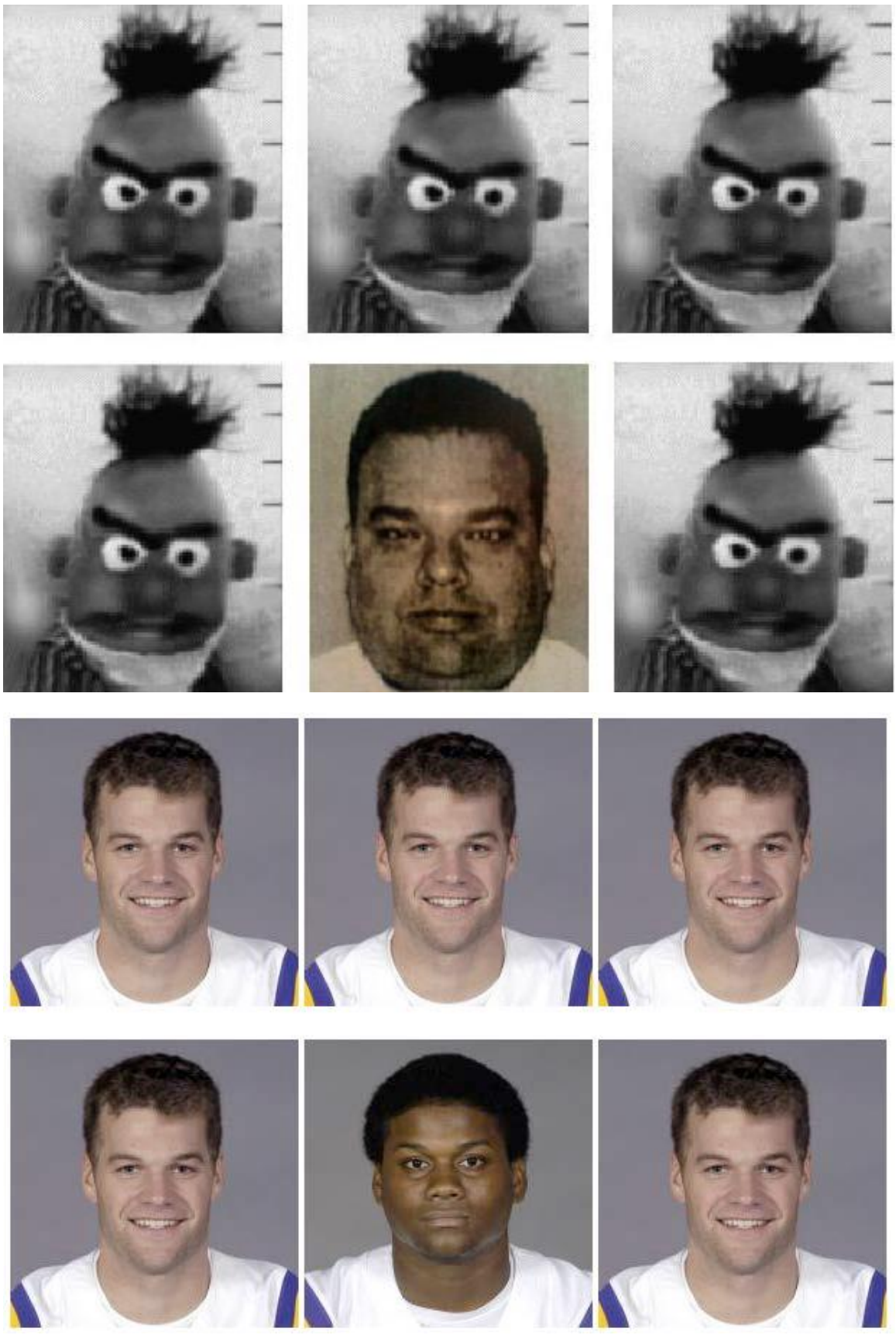
- Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d. 1199 (1967) (practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned).
- State v. Johnson, 311 S.C. 132, 134, 427 S.E.2d 718, 719 (Ct.App.1993) (single person show-ups are particularly disfavored in the law).

Other Unduly Suggestive Police ID Procedures

1. Physical Characteristics – height, weight, age, hairstyle, race, clothing etc
2. Lighting
3. Shadows


6'6"
6'
5'6"
5'
4'6"
4'
3'6"
3'


5FT
4FT
3FT
2FT
1FT
SUSPECTS
CARTOONSTOCK
.com
Search ID: dre1976



Unduly Suggestive Police ID Procedure = Move for Hearing

1. Identification Hearing
2. Neil v. Biggers Hearing
3. Biggers Hearing

Pre-Trial

Outside the presence of the jury – in camera

Rule 104(c) SCRE

The Hearing

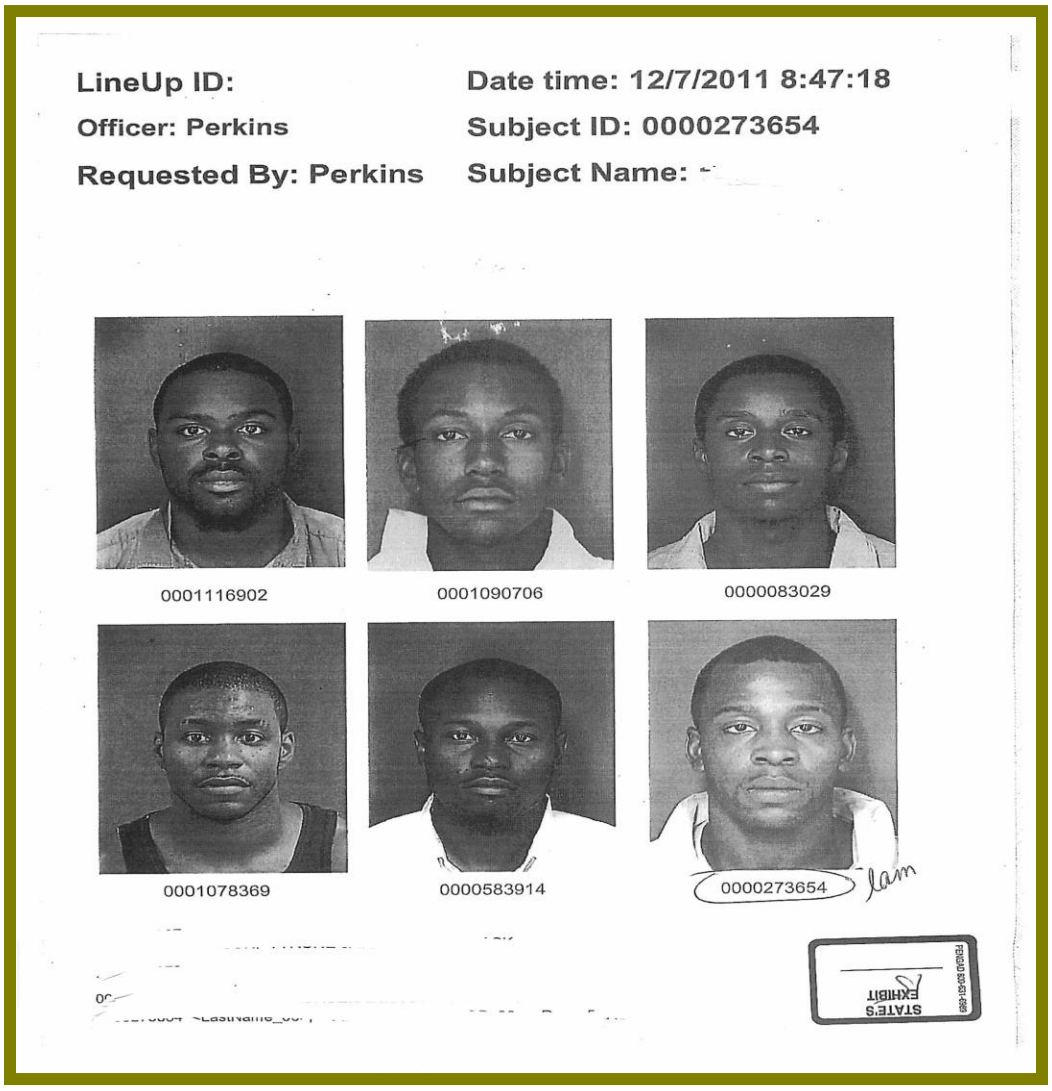
Witnesses:

- Investigating Officer
- Officer who compiled lineup
- Officer who showed lineup
- Identifying witness

Exhibits

- The 6 pack lineup
- The Report

6-Pack Lineup

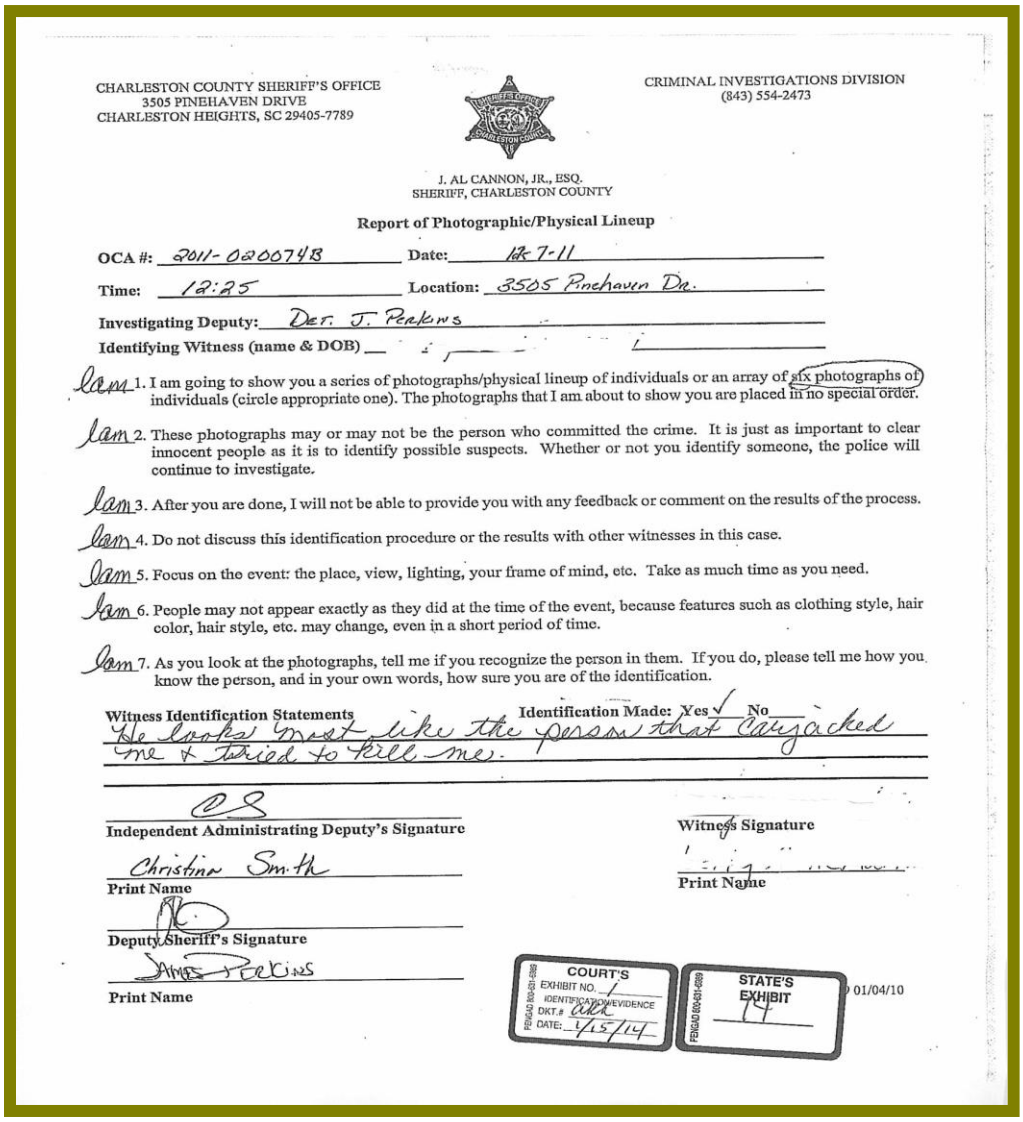


LineUp ID:
Date time: 12/7/2011 8:47:18
Officer: Perkins
Subject ID: 0000273654
Requested By: Perkins
Subject Name:

0001116902
0001090706
0000083029
0001078369
0000583914
0000273654

STATE'S EXHIBIT

REPORT



CHARLESTON COUNTY SHERIFF'S OFFICE
3505 PINEHAVEN DRIVE
CHARLESTON HEIGHTS, SC 29405-7789

CRIMINAL INVESTIGATIONS DIVISION
(843) 554-2473

J. AL CANNON, JR., ESQ.
SHERIFF, CHARLESTON COUNTY

Report of Photographic/Physical Lineup

OCA #: 2011-0200748 **Date:** 12-7-11

Time: 12:25 **Location:** 3505 Pinehaven Dr.

Investigating Deputy: DET. J. PERKINS

Identifying Witness (name & DOB) [illegible]

I am 1. I am going to show you a series of photographs/physical lineup of individuals or an array of six photographs of individuals (circle appropriate one). The photographs that I am about to show you are placed in no special order.

I am 2. These photographs may or may not be the person who committed the crime. It is just as important to clear innocent people as it is to identify possible suspects. Whether or not you identify someone, the police will continue to investigate.

I am 3. After you are done, I will not be able to provide you with any feedback or comment on the results of the process.

I am 4. Do not discuss this identification procedure or the results with other witnesses in this case.

I am 5. Focus on the event: the place, view, lighting, your frame of mind, etc. Take as much time as you need.

I am 6. People may not appear exactly as they did at the time of the event, because features such as clothing style, hair color, hair style, etc. may change, even in a short period of time.

I am 7. As you look at the photographs, tell me if you recognize the person in them. If you do, please tell me how you know the person, and in your own words, how sure you are of the identification.

Witness Identification Statements **Identification Made: Yes** ✓ **No** ___

He looks most like the person that carjacked me & tried to kill me.

CS

Independent Administrating Deputy's Signature

Christina Smith

Print Name

Witness Signature

Print Name

Deputy Sheriff's Signature

JAMES PERKINS

Print Name

COURT'S EXHIBIT NO. 1 IDENTIFICATION/EVIDENCE DKT.# CCR DATE: 4/15/14

STATE'S EXHIBIT 14

01/04/10

Prong 2 - 5 Factors of Reliability

(1) the witness's opportunity to view the perpetrator at the time of the crime

(2) the witness's degree of attention

(3) the accuracy of the witness's prior description of the perpetrator

(4) the level of certainty demonstrated by the witness at the confrontation

(5) the length of time between the crime and the confrontation.

1. Witness Opportunity to view Perpetrator at time of crime

- ☐ Lighting – it was dark
- ☐ Perpetrator wearing a mask
- ☐ The crime took place very quickly

2. Degree of Attention

- ☐ Your eyes were closed during the rape
- ☐ You were distracted – trying to get the attention of others or worried about your children in next room

3. Accuracy of Prior Description

- ☐ Broad general descriptions
- ☐ Discrepancies in the description

4. Level of certainty

- ☐ Confidence statements – “He looked most like the person who carjacked me and tried to kill me.” Not very confident!
- ☐ If no confidence statement – Argue State failed to prove witness was certain.

5. Length of time between crime and ID

- ☐ Were there intervening lineups shown to the witness?

Cross Examine the Officers

- ☐ Double-Blind Administration
- ☐ Proper Lineup Composition – how was it done?
- ☐ Instructions to the witness
- ☐ Confidence Statements
- ☐ Record the ID procedure
- ☐ Sequential Presentation

Consider Hiring an Expert

- ☐ Memory fallibility/ Cross Racial ID
- ☐ Educate the judge

Motion to Suppress

☐ Argue that, in addition to the 5 reliability factors, the failure to follow proper procedures resulted in an inherently unreliable ID conducive to irreparable mistaken identification.

1. Move to Suppress Out of Court ID Procedure and Testimony

AND

2. Move to Suppress any In court ID as being tainted by the suggestive and unreliable ID procedure

Motion Denied

ID in at Trial – What do I do?

1. Challenge the witnesses with the reliability factors:

- ☐ Opportunity
- ☐ Degree of Attention
- ☐ Accuracy of Prior Description
- ☐ Level of Certainty
- ☐ Length of time

2. Challenge the procedure

- ☐ Double Blind Administration
- ☐ Proper Lineup Composition – how was it done?
- ☐ Instructions to the witness
- ☐ Confidence Statements
- ☐ Record the ID procedure
- ☐ Sequential Presentation

2. Use your expert to educate the JURY

4. Convince the jury that the ID is unreliable and the procedure used resulted in the misidentification of your client

Just in case you don't convince the jury

5. Preserve the ID issue for Appellate Review

- ☐ Object to all **out of court** ID testimony and evidence from all witnesses at the time they testify – Contemporaneous Objection
- ☐ Object to any **in court** Identification of your client


7
6
5
4
3
2

Life after Padilla v. Kentucky Strategies on Representing Non-Citizen Clients

Public Defense 101
Fundamentals of the Profession
November 20-21, 2017

Charles A. Phipps
803-233-8374
cp@charlesaphipps.com

SCCID
SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Padilla v. Kentucky

> 130 S. Ct. 1473 (2010): "When the [immigration] law is not succinct and straightforward . . . a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear."

Defendant was a Lawful Permanent Resident

He was driving a tractor trailer with a large amount of marijuana

Attorney told him that he "did not have to worry about immigration status since he had been in the country so long"

Major Federal Entities

- DHS (U.S. Department of Homeland Security)
- USCIS (U.S. Citizenship and Immigration Services)
- ICE (Immigration and Customs Enforcement)
- CBP (Customs and Border Protection)
- EOIR (Executive Office for Immigration Review)

Types of Foreign Nationals (aka Aliens)

- Lawful Permanent Residents (lawfully in the United States with the intent to remain permanently)
    - This person is not a U.S. citizen
    - This person can be deported
- A person lawfully in the U.S. temporarily
    - Tourists
    - Students
    - Temporary work visas
- A person not in the U.S. lawfully
    - The person entered lawfully on a temporary visa but did not leave
    - The person entered unlawfully

A brief aside:

- Unlawful presence and the 10 year penalty

- Immigration Hold/Detainer

DEPARTMENT OF HOMELAND SECURITY
U.S. Immigration and Customs Enforcement

IMMIGRATION DETAINER - NOTICE OF ACTION

File No: Date:

TO: (Name and Title of Institution - OR Any Subsequent Law Enforcement Agency)

FROM: (Department of Homeland Security Office Address)

MAINTAIN CUSTODY OF ALIEN FOR A PERIOD NOT TO EXCEED 48 HOURS

Name of Alien: _____

Date of Birth: _____ Nationality: _____ Sex: _____

THE U.S. DEPARTMENT OF HOMELAND SECURITY (DHS) HAS TAKEN THE FOLLOWING ACTION RELATED TO THE PERSON IDENTIFIED ABOVE, CURRENTLY IN YOUR CUSTODY:

☐ Initiated an investigation to determine whether this person is subject to removal from the United States.

☐ Initiated removal proceedings and served a Notice to Appear or other charging document. A copy of the charging document is attached and was served on _____ .
(Date)

☐ Served a warrant of arrest for removal proceedings. A copy of the warrant is attached and was served on _____ .
(Date)

☐ Obtained an order of deportation or removal from the United States for this person.

(This action does not limit your discretion to make decisions related to this person's custody classification, work and quarter assignments, or other matters.)

IT IS REQUESTED THAT YOU:

☐ Maintain custody of the subject for a period **NOT TO EXCEED 48 HOURS**, excluding Saturdays, Sundays, and holidays, beyond the time when the subject would have otherwise been released from your custody to allow DHS to take custody of the subject. This request flows from federal regulation 8 C.F.R. § 287.7, which provides that a law enforcement agency "shall maintain custody of an alien" once a detainer has been issued by DHS. **You are not authorized to hold the subject beyond these 48 hours.** As early as possible prior to the time you otherwise would release the subject, please notify the Department by calling _____ during business hours or _____ after hours or in an emergency. If you cannot reach a Department Official at these numbers, please contact the Immigration and Customs Enforcement (ICE) Law Enforcement Support Center in Burlington, Vermont at: (802) 872-6020.

☐ Provide a copy to the subject of this detainer.

☐ Notify this office of the time of release at least 30 days prior to release or as far in advance as possible.

☐ Notify this office in the event of the inmate's death, hospitalization or transfer to another institution.

☐ Consider this request for a detainer operative only upon the subject's conviction.

☐ Cancel the detainer previously placed by this Office on _____ .
(Date)

_____ _____
(Name and title of Immigration Officer) (Signature of Immigration Officer)

TO BE COMPLETED BY THE LAW ENFORCEMENT AGENCY CURRENTLY HOLDING THE SUBJECT OF THIS NOTICE:

Please provide the information below, sign, and return to the Department using the envelope enclosed for your convenience or by faxing a copy to _____ . You should maintain a copy for your own records so you may track the case and not hold the subject beyond the 48-hour period.

Local Booking or Inmate # _____ Date of latest criminal charge/conviction: _____

Last criminal charge/conviction: _____

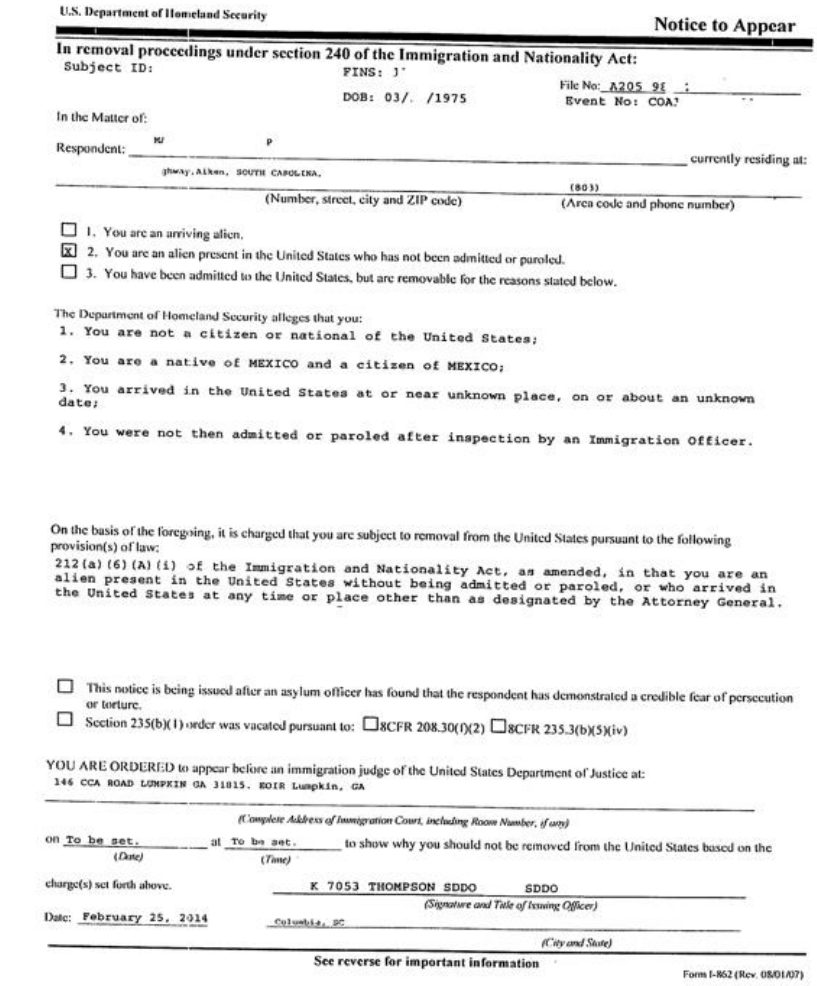
Estimated release date: _____

Notice: Once in our custody, the subject of this detainer may be removed from the United States. If the individual may be the victim of a crime, or if you want this individual to remain in the United States for prosecution or other law enforcement purposes, including acting as a witness, please notify the ICE Law Enforcement Support Center at (802) 872-6020.

_____ _____
(Name and title of officer) (Signature of Officer)

The Detention and Removal Process

- Immigration Hold/Detainer
- Notice to Appear (NTA)
- Immigration Bond Process
- Immigration Court Process
- Airport Detention/NTA for LPRs



U.S. Department of Homeland Security

Notice to Appear

In removal proceedings under section 240 of the Immigration and Nationality Act:

Subject ID: FINS:]' File No: A205 9[:

DOB: 03/. /1975 Event No: COA?

In the Matter of:

Respondent: MJ P currently residing at:

ghway, Aiken, SOUTH CAROLINA,

(Number, street, city and ZIP code) (803) (Area code and phone number)

☐ 1. You are an arriving alien.

☒ 2. You are an alien present in the United States who has not been admitted or paroled.

☐ 3. You have been admitted to the United States, but are removable for the reasons stated below.

The Department of Homeland Security alleges that you:

1. You are not a citizen or national of the United States;

2. You are a native of MEXICO and a citizen of MEXICO;

3. You arrived in the United States at or near unknown place, on or about an unknown date;

4. You were not then admitted or paroled after inspection by an Immigration Officer.

On the basis of the foregoing, it is charged that you are subject to removal from the United States pursuant to the following provision(s) of law:

212(a)(6)(A)(i) of the Immigration and Nationality Act, as amended, in that you are an alien present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General.

☐ This notice is being issued after an asylum officer has found that the respondent has demonstrated a credible fear of persecution or torture.

☐ Section 235(b)(1) order was vacated pursuant to: ☐8CFR 208.30(f)(2) ☐8CFR 235.3(b)(5)(iv)

YOU ARE ORDERED to appear before an immigration judge of the United States Department of Justice at:

146 CCA ROAD LUMPKIN GA 31815. EOIR Lumpkin, GA

(Complete Address of Immigration Court, including Room Number, if any)

on To be set. *(Date)* at To be set. *(Time)* to show why you should not be removed from the United States based on the charge(s) set forth above.

K 7053 THOMPSON SDDO SDDO

(Signature and Title of Issuing Officer)

Date: February 25, 2014 Columbia, SC

(City and State)

See reverse for important information

Form I-862 (Rev. 08/01/07)

HERE CASE

U.S. Department of Homeland Security

Notice of Custody Determination

Event No: COA14
File No: A205 9
Date: 02/25/2014
FIN:

5 Highway
SOUTH CAROLINA,

Pursuant to the authority contained in section 236 of the Immigration and Nationality Act and part 236 of title 8, Code of Federal Regulations, I have determined that pending a final determination by the immigration judge in your case, and in the event you are ordered removed from the United States, until you are taken into custody for removal, you shall be:

- ☐ detained in the custody of the Department of Homeland Security.
- ☒ released under bond in the amount of $ 5,000.00
- ☐ released on your own recognizance.

☒ You may request a review of this determination by an immigration judge.

☐ You may not request a review of this determination by an immigration judge because the Immigration and Nationality Act prohibits your release from custody.

K 7053 THOMPSON SDDO
(Signature of authorized officer)

SDDO
(Title of authorized officer)

Columbia, SC
(Office location)

☐ I do ☐ do not request a redetermination of this custody decision by an immigration judge.

☒ I acknowledge receipt of this notification.

(Signature of respondent) (Date)

RESULT OF CUSTODY REDETERMINATION

On _____, custody status/conditions for release were reconsidered by:

☐ Immigration Judge ☐ DHS Official ☐ Board of Immigration Appeals

The results of the redetermination/reconsiderationare:

- ☐ No change - Original determination upheld.
- ☐ Detain in custody of this Service.
- ☐ Bond amount reset to _____
- ☐ Release - Order of Recognizance
- ☐ Release - Personal Recognizance
- ☐ Other: _____

(Signature of officer)

Form I-286 (Rev. 08/01/07)

Crimes making a person inadmissible

- CIMTs: “any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of: (I) a crime involving moral turpitude . . . is inadmissible” INA § 212(a)(2)(A)(i)
    - Certain exceptions if committed under 18
    - Exception if the maximum penalty did not exceed imprisonment for one year (and, if convicted, the person not sentenced to a term more than 6 months)

- What is a CIMT? “conduct which is inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general . . .” *Matter of Franklin*, 20 I & N Dec. 867 (BIA 1994)
    - No cases examine specific SC crimes

Crimes making a person deportable

- A similar, but not identical, list identifies crimes making a person deportable. In addition to the previous crimes:
    - Domestic violence and crimes against children
    - Aggravated felonies

Aggravated Felonies

- A crime of violence “for which the term of imprisonment is at least 1 year.” INA § 101(a)(43)(F).
- A theft offense or burglary offense “for which the term of imprisonment is at least 1 year.” INA § 101(a)(43)(G).

- Murder, rape, or sexual abuse of a minor, trafficking in a controlled substance, trafficking in firearms, child pornography, espionage, alien smuggling, counterfeiting passports, perjury, and many others.

Consequences of AF

- Ineligible for almost all forms of relief in immigration court
- Additional penalties if the person is removed and attempts to re-enter the U.S. unlawfully

Plea Negotiations, Collateral Consequences, and an Overview of Diversion Programs

Public Defense 101
Fundamentals of the Profession
November 20-21, 2017

Mike Lifsey
Circuit Public Defender
Sixth Judicial Circuit

COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS

DISMANTLING BARRIERS TO OPPORTUNITY

SOUTH CAROLINA APPLESEED LEGAL JUSTICE CENTER

2013

Forward

A criminal conviction can have far reaching and lifelong consequences that extend beyond the payment of a fine, a term of probation, or time in prison. A criminal record could follow someone for the rest of his or her life, hindering every opportunity or lack of opportunity available.

This manual provides a necessary background and context for issues facing individuals with criminal records. Criminal defense attorneys should use this manual to better inform and advise their clients of the consequences of having a criminal record. For others working in the criminal justice system, it could assist in sentencing and plea bargaining, as well as hopefully provide incentive to consider alternatives to incarceration and conviction (such as PTI, conditional discharges, or another diversion program). Third, this manual can be used to provide information to elected officials, non-profit groups, advocates, and the general public.

While this manual has attempted to cover a wide array of topics, it is not exhaustive. Each person's situation is different and must be approached individually. However, this is a good starting point, and this manual provides links to additional resources for your convenience. The laws, policies, and practices reflected in this manual tend to change rapidly, and for that reason it may be helpful to conduct further research. Nothing contained in this publication should be considered legal advice.

TABLE OF CONTENTS

Introduction

Approximately 1 in 4 adults in the United States has a criminal record.[1] Each year, around 700,000 people are released from federal and state prisons.[2] More than 1.7 million children aged 18 or younger in the United States have an incarcerated parent.[3] Unfortunately, these numbers have increased drastically over the past 30 years.

In South Carolina, the percentage of South Carolinians with a criminal record is just over 30% of the total population.[4] Although African-Americans constitute only 30% of the South Carolina population, they represent 50% of persons arrested, 55% of those on probation, and 70% of persons incarcerated.[5] This reflects a nation-wide trend reflecting a higher arrest rate for African-Americans.[6]

After incarceration, thousands of people attempt to reenter society. Thousands more are never incarcerated but still have the burden of a criminal conviction, or even an arrest, that impacts many of their opportunities. These individuals face nearly insurmountable barriers to basic needs such as housing and employment as well as other barriers to their personal advancement.

The day-to-day discrimination facing people with criminal records may be found in our code of laws, or simply a function of personal bias. For purposes of this guide, the discussion has been limited to laws and policies which create collateral consequences to the criminal justice system.

What is a Collateral Consequence?

"A collateral consequence is defined as a collateral sanction or a disqualification" that arises as a result of a criminal record.[7] Collateral consequences should be distinguished from direct consequences of a criminal charge. A direct consequence is the sentence—whether prison, probation or time served—and any associated fines.[8] The collateral consequences, on the other hand, are "penalty[ies], disability[ies], or disadvantage[s], however denominated, that [are] imposed by law as a result of an individual's conviction for a felony, misdemeanor, or other offense, but not as part of the judgment of the court."[9] Examples of collateral consequences include: the requirement to register as a sex offender, deportation, employment consequences, eligibility for public benefits, and eligibility for student loans.

South Carolina and the National Landscape

Some barriers facing individuals with criminal records are based on federal exclusions, and others are a result of local law and policy. This manual will review some issues that stem from federal law, as well as those laws and policies that are exclusive to South Carolina.

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[1] Michelle N. Rodriguez & Maurice Emsellem, *65 Million "Need Not Apply": The Case for Reforming Criminal Background Checks for Employment*, NAT'L EMP. L. PROJECT (Mar. 2011), *available at* http://nelp.3cdn.net/e9231d3aee1d058c9e_55im6wopc.pdf.

[2] E. Ann Carson & William J. Sabol, *Prisoners in 2011*, U.S. DEP'T OF JUST (Dec. 17, 2012), *available at* http://bjs.gov/index.cfm?ty=pbdetail&iid=4559.

[3] *Incarcerated Parents and Their Children: Trends 1991-2007*, THE SENT'G PROJECT, Feb. 2009, at 1, *available at* www.sentencingproject.org/doc/publications/publications/inc_incarceratedparents.pdf.

[4] Bureau of Just. Stat., *Survey of State Criminal History Information Systems, 2008*, U.S. DEP'T OF JUST. (Oct. 2009), at Table 1, *available at* www.ncjrs.gov/pdffiles1/bjs/grants/228661.pdf.

[5] S.C. Budget & Control Bd., *South Carolina Young Adults Count State Report: Section 6: Crime*, *available at* www.scyoungadults.org/sc_crime.asp.

[6] Fed. Bureau of Investigation, *Crime in the United States, 2009*, U.S. DEPT. OF JUST., *available at* www2.fbi.gov/ucr/cius2009/index.html.

[7] Court Security Improvement Act of 2007, Pub. L. 110-177, § 510(d), 121 Stat. 2534 (2008).

[8] *Id.*

[9] *Id.*

With bipartisan support, South Carolina recently signed into law the Omnibus Crime Reduction and Sentencing Reform Act of 2010.[10] This Act is a comprehensive package of sentencing and institutional reform. The Act is projected to save South Carolina up to $175 million in construction costs and more than $66 million in operating costs over the following 5 years.[11] While these sentencing reforms are designed to slow the growth of South Carolina's prison population over the next 5 years, they do very little to reduce barriers that individuals face after their release from the criminal justice system. The majority of individuals in the criminal justice system will one day leave prison and complete supervision, and these individuals will face a myriad of barriers to reentry.

The Obama Administration has expressed support for reentry reform. In 2008, the Second Chance Act[12] was signed into law. The Second Chance Act is designed to improve outcomes for people returning to communities from prisons and jails. In 2011, Attorney General Eric Holder announced the creation of a cabinet level Reentry Council whose goal is to bring various agencies together to work towards this goal.[13] Conservative groups have also been in support of these reforms, especially because these reform could save states money and reduce crime.[14]

Barriers to reentry do not only affect formerly incarcerated individuals, but also they impact their families, communities, and the general public. Rather than creating barriers to reentry, supportive policies directed at those with criminal justice involvement will instead improve reentry outcomes. Successful reentry reduces taxpayer expense, increases public safety, reduces homelessness, and creates stronger communities.

Underlying the discussion of collateral consequences is how they affect recidivism rates. Recidivism occurs when an individual with a criminal conviction is rearrested, reconvicted, or returned to custody. Recidivism traditionally occurs in one of two ways: [15]

1) The ex-offender commits a new crime that results in a new conviction, or
2) The offender commits a technical violation of supervision (probation or parole), such as failing to report to their probation or parole officer, failing a drug test, or violating another term of their supervision.

Reducing recidivism rates lowers crime and prison costs, while also increasing public safely. In a Pew Center study that analyzed state recidivism rates of two different time periods (1999-2002 and 2004-2007), South Carolina's recidivism rates have increased by 19% during each of those two time periods.[16]

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[10] 2010 S.C. Acts 273.

[11] *South Carolina's Public Safety Reform: Legislation Enacts Research-based Strategies to Cut Prison Growth and Costs*, PEW CENTER ON THE STATES (June 2010), a*vailable at* www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing_and_corrections/PSPP_South_Carolina_brief.pdf.

[12] Pub. L. 110-199, 122 Stat. 657 (2008).

[13] The Nat'l Reentry Res. Ctr., *Federal Interagency Reentry Council*, JUST. CENTER, www.nationalreentryresourcecenter.org/reentry-council (last visited Apr. 5, 2013).

[14] Newt Gingrich & Pat Nolen, *Prison Reform: A Smart way for States to Save Money and Lives*, WASH. POST, Jan. 7, 2011, *available at* www.washingtonpost.com/wp-dyn/content/article/2011/01/06/AR2011010604386.html; *see also* the *Right on Crime*, www.rightoncrime.com/ (Conservative Case for Reform).

[15] S.C. Dep't of Prob., Parole, & Pardon Serv., *Standard Conditions of Supervision*, *available at*: www.dppps.sc.gov/what_we_do_supervision.html (last visited Apr. 5, 2013).

[16] Pub. Safety Performance Project, *State of Recidivism: The Revolving Door of America's Prisons*, PEW CENTER ON THE STATES, at 15, Exhibit 3 (Apr. 2011), a*vailable at* www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing_and_corrections/State_Recidivism_Revolving_Door_America_Prisons%20.pdf.

While evaluating the direct cause of this increased rate of recidivism is beyond the scope of this guide, collateral consequences and lack of opportunity have an impact on recidivism.

Barriers to opportunity have both an immediate and a long-term effect, not only to the individual with a criminal record, but to society as a whole. Bringing these barriers to light will hopefully inform those working with the population facing reentry issues so that they may be mitigated as much as possible and ultimately be eliminated when possible.

Housing

Introduction

Individuals leaving jail or prison face a number of obstacles. Finding adequate and affordable housing is often both the most immediate concern and the most challenging. Finding employment, maintaining sobriety, and positively engaging in society are all extremely difficult without stable and affordable housing.[17] Formerly incarcerated individuals often have multiple underlying issues, such as a history of drug abuse, mental illness, disabilities, and/or educational shortfalls (including illiteracy), and many individuals have more than one of these background factors. Additionally, formerly incarcerated individuals often have a poor work history or a lack of job skills that make finding adequate employment to afford housing especially difficult. The practical barriers to reentry are quite significant.

Federally funded public housing was established to provide decent and safe rental housing for eligible low-income families, the elderly, and persons with disabilities. Individuals with criminal records are in need of affordable housing, but local policies often put federally subsidized housing outside their reach, especially for those with a history of drug convictions.

The U.S. Department of Housing and Urban Development (HUD) administers federal aid to local public housing authorities (PHAs), which manage the housing programs in their jurisdictions. HUD has given local PHAs broad discretion in crafting admissions and eviction policies relating to criminal activity and criminal records. Each individual PHA creates a unique policy regarding how that PHA will treat criminal activity and criminal records in its admissions and evictions. There are currently 43 different housing authorities in South Carolina, each with its own unique policies.

Individuals returning to the community after incarceration or release to parole or probation will often turn to family members for housing and support.[18] Because of a PHA's termination policies relating to criminal records, it could prove difficult for these individuals to rejoin their families living in public or subsidized housing. Without housing options, people recently released from incarceration will likely face the prospect of being homeless.

Federally Assisted Housing and Previously Incarcerated Individuals

For reference purposes, a brief discussion of income limits shows the financial realities facing families who seek housing assistance. Income limits to qualify for housing assistance are based on a percentage of the area median income (AMI) for a particular area or jurisdiction. These income levels are readjusted ever year, and HUD publishes yearly income limits for all jurisdictions.[19]

For example, in Richland County, a family of four's 2011 income levels were as follows:[20]

Area Median Income is $60,400
Low Income (80% of AMI) is $49,050
Very Low Income (50% of AMI) is $30,650
Extremely Low Income (30% of AMI) is $18,400

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[17] Jocelyn Fontaine & Jennifer Biess, *Housing as a Platform for Formerly Incarcerated Persons*, THE URBAN INST. (Apr. 2012), *available at* www.aecf.org/KnowledgeCenter/Publications.aspx?pubguid=%7BCE90236E-564D-424F-8386-B3A1E2ED4407%7D.

[18] Studies have shown that between 48-62% of prisoners sleep at a relatives' house on their first night out of prison. *See Id.*

[19] More information can be found at: www.huduser.org/portal/datasets/il/il12/index_il2012.html.

[20] *Richland County FY 2013 Income Limits Summary*, DEP'T OF HOUSING & URB. DEV., *available at* www.huduser.org/portal/datasets/il/il2013/2013summary.odn (last visited Apr. 5, 2013).

Accessing Subsidized Housing: People with criminal records may wish to apply for housing on their own, or they may wish to join an existing household (such as with their children or other family members).

Application for Housing Assistance: Federal law requires PHAs to perform criminal background checks for all adult (age 18 or older) household members who apply for housing assistance. The PHA must obtain signed, written authorization to obtain an applicant's criminal history.[21] If a PHA determines during the screening process that there is criminal history that bars an applicant from admission, the PHA must notify the individual of the proposed action, and the PHA must provide the individual with a copy of the information and an opportunity to dispute the accuracy or relevance of the criminal history prior to any adverse action by the PHA.[22] Any policy regarding admission and screening must be in writing and available to applicants.

Denial of application: The PHA must provide written notice to the applicant stating the reasons for the rejection. If the notice states that an applicant is not eligible for housing based on their *criminal record*, the notice should specify why assistance is being denied. The notice should also set forth the procedure for contesting an adverse determination, and the applicant should be given the opportunity to dispute the accuracy or relevance of the record.

Public Housing: The local PHA is generally both the owner of the housing unit as well as the landlord.

Section 8 Housing Choice Voucher: The tenant applies for a voucher with the local PHA. A tenant is responsible for finding a landlord who will take the Section 8 Voucher. The tenant pays a share of the rent, and the PHA pays the landlord the difference.

Applying for Assistance: Subsidized housing is in high demand. Many PHAs in South Carolina have a waiting list, and due to limited availability, some have temporarily discontinued taking applications. Check with the local PHA to find out more about the process and/or waiting periods that may exist. Waiting lists are usually longer for Housing Choice Vouchers.

Criminal Records and Criminal Activity: Pursuant to federal law, PHAs must reject applicants with two specific criminal backgrounds. Otherwise, PHAs have broad discretion to accept or deny applicants who have engaged in other types of criminal activity.

There are two mandatory and permanent lifetime bans based on criminal records. Per federal law, PHAs must establish a lifetime ban on admission to applicants with the following convictions:[23]

1) Individuals who have been convicted of methamphetamine production on the premises of federally-funded assisted housing; and
2) Individuals who are subject to a lifetime sex offender registration requirement under state law. Under South Carolina law, all individuals required to register as a sex offender in South Carolina are required to register for life.

Permissive Denials. Other than the two mandatory denials listed above, PHAs have broad discretion. PHAs are allowed the flexibility to set local admission policies and criteria for individuals with certain

[21] 42 U.S.C. §1437d(s) (2006).
[22] 24 C.F.R. 5.903(f) (2012).
[23] § 960.204.

histories of criminal activity and the use of illegal substances or alcohol abuse. It is important to note that a conviction is not always required before a PHA can take action.

Under federal law, a PHA may create a policy that would deny an applicant based on the following:

Drug Related Criminal Activity:[24]

- A household member who has been evicted from federally assisted housing within the past three years because of drug-related criminal activity. This includes individuals and households evicted under HUDs "one strike" policy. PHAs are authorized to extend the ban beyond three years.
- A household member currently engaging in illegal drug use; or
- The PHA has reasonable cause to believe that a household member's illegal drug use or pattern of illegal drug use may threaten the health, safety, or right to peaceful enjoyment of the premises by other residents.

Current Alcohol Abuse:[25] A household member currently abusing alcohol in a manner that interferes with the health, safety, or right to peaceful enjoyment of other residents. The standards here require that the PHA must establish a nexus between the alcohol abuse and the threat to the health, safety or right to peaceful enjoyment of other residents.

Other criminal activity:[26] A local PHA may establish policies that deny admission if it determines that any household member is currently engaged in, or has engaged in during a *reasonable time* before the admission decision any:

- Drug-related criminal activity;
- Violent criminal activity;
- Other criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other residents; or
- Other criminal activity that threatens the health or safety of the PHA or owner or any employee, contractor, subcontractor or agent of the PHA or owner who is involved in the housing operations.

For a denial based on a previous eviction for drug related criminal activity, the PHA may establish a policy to admit the household or household member if the evicted member has successfully completed treatment at an approved drug rehabilitation facility or the circumstances leading to the eviction no longer exist (for example, the criminal household member has died or is imprisoned).[27] However, a PHA is not required to take such circumstances into consideration if it is not part of its established policy to do so.

HUD has determined that it would be too rigid to define a "reasonable time" period to cover every circumstance nationally, so HUD has left that issue to local PHAs to determine in their admissions policies. Thus, local PHAs have the sole discretion to define a "reasonable time" period.

A PHA may have a policy that shortens the period of time an individual or household is restricted from admission, and that policy can also consider other factors such as the severity of the crime and/or completion of a rehabilitation program. Federal law allows a PHA to reconsider an applicant it previously denied based on criminal activity, but a PHA is not required to make such considerations. Other

[24] § 960.204(a).
[25] § 960.204(b).
[26] § 960.203(c).
[27] § 960.203(c).

considerations the PHA may make are the time, nature, and extent of an applicant's previous criminal conduct, including the seriousness of the offense.

The bottom line: If an individual is denied public/assisted housing under the provision that he or she had previously been evicted from public housing for drug-related criminal activity, it is important to check the specific policies and procedures for that particular housing authority. The applicant may be able to gain admission upon showing the PHA that he or she has completed a supervised drug rehabilitation program that has been approved by the PHA, or an applicant may be eligible if the PHA admits individuals on a case-by-case basis.

Eviction from Public Housing or Terminating Tenancy:

Federal One Strike Policy:[28] This policy permits the eviction of an entire household when one member, a guest of the tenant, or another person under the tenant's control engages in drug activity or other types of criminal conduct on or near the premises. A tenant can be subject to eviction regardless of his or her knowledge of the misconduct and regardless of whether he or she had any control over the person who engaged in the unlawful conduct. The PHA may terminate assistance regardless of whether the household member has been arrested or convicted of any criminal activity.

The "one-strike" policy makes all tenants, even the elderly, disabled, and children, vulnerable to eviction. The Supreme Court has stated that the eviction of an entire family is permissible, though not mandatory, under this provision.[29] PHAs must take into considerations real-world factors that may make such a policy counterproductive. Such considerations could include the actual crime-reducing benefits measured against the considerable human costs of displacement, homelessness, and family division that might occur with such a policy.

Section 8 Housing Choice Voucher - PHA termination of voucher

Permissive terminations of a Section 8 Housing Choice Voucher by the local PHA:
A PHA may terminate Section 8 vouchers if:[30]

- Any family member has committed fraud, bribery, or any other corrupt or criminal act in connection with any federal housing program;
- Any family member has engaged in or threatened abusive or violent behavior towards PHA personnel;
- Any family member is currently engaged in illegal drug use;
- A pattern of illegal drug use by any household member interferes with the health, safety, or right to peaceful enjoyment of the premises by other residents.

PHA discretion to consider circumstances:
In deciding whether to terminate a tenants voucher, the PHA may consider all relevant circumstances such as: the seriousness of the case, the extent of participation or culpability of individual family members, mitigating circumstances related to the disability of a family member, and the effects of denial or termination of assistance on other family members who were not involved in the action or failure.[31]

When terminating assistance for illegal use of drugs or alcohol abuse where the person no longer engages in such behavior, the local PHA may consider whether that household member has successfully

[28] § 966.4(l)(5)(i)(B).
[29] Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S.125 (2002).
[30] § 982.553.
[31] § 982.552(c)(2).

completed a drug or alcohol rehabilitation program or can consider other evidence of rehabilitation, and can require the household member to submit evidence of his or her rehabilitation.[32]

The PHA may impose, as a condition of continued assistance for other family members, a requirement that the culpable family members will not reside in the unit. The PHA may then permit the other members of a participant family to continue receiving assistance.[33] This is a reasonable adjustment to the federal "one strike" allowance so that an entire family is not evicted due to the activities of one household member.

Informal Hearing: The PHA must have procedures for an informal hearing based on the PHAs determination to terminate assistance for certain criminal acts.

Landlord Eviction for a tenant with a Section 8 (Housing Choice) Voucher[34]

These evictions are usually based on violations of the lease agreement between the landlord and the Section 8 Voucher holder. The landlord may only evict a tenant by instituting a court action.[35] If the landlord seeks an eviction, he or she is required to provide the PHA with a copy of the owner eviction notice as provided to the tenant. The tenant is also required to inform the PHA of the eviction and provide the PHA with a copy of the eviction notice. The PHA may terminate assistance if the cause for eviction was also a basis for termination of assistance in the local PHAs plan.

The landlord may base an eviction for criminal activity if the owner determines that the covered person has engaged in the activity. There is no requirement that the covered person be arrested or convicted for such activity, and the landlord does not have to satisfy criminal conviction standards (beyond a reasonable doubt) to seek an eviction. The following list contains permissive grounds for an eviction by an owner/landlord:

Landlord grounds for eviction of a Section 8 Housing Voucher Tenant as it relates to criminal activity:[36]

- Any drug related criminal activity engaged *in, on, or near* the premises by any tenant, household member, or guest, or such activity engaged in on the premises by any other person under the tenant's control;
- When the owner determines that any household member is illegally using a drug or when the owner determines that a pattern of illegal use of a drug interferes with the health, safety, or right to peaceful enjoyment of the premises by other residents;
- Activity by a covered person that is a threat to other residents:
    a. Any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other residents or persons residing in the immediate vicinity of the premises; or
    b. Any *violent* criminal activity *on or near* the premises by a tenant, household member, or guest; or
    c. Any violent criminal activity on the premises by any person under the tenant's control;
- If a tenant is a fugitive felon;
- If a tenant is violating a condition of probation or parole imposed under federal or state law.

[32] § 982.552(c)(2)(iii).
[33] § 982.552(c)(2)(ii).
[34] § 982.310.
[35] § 982.553(b).
[36] § 982.310(c)(2)(i).

Discretion of landlord: The landlord could make a condition that the culpable household member(s) leave the unit for the continued household tenancy. The landlord can also take into consideration evidence of drug or alcohol treatment.

Summary
The below chart summarizes the federal drug and crime related restrictions for public housing: [37]

Summary of Federal Drug- and Other Crime-Related Restrictions in Federal Housing Assistance Programs

(denial=denial of admission to applications; termination=termination of assistance and/or tenancy)

Activity	Public Housing	Section 8 Vouchers	Project-Based Section 8
Drug-related criminal activity	Grounds for denial; grounds for termination	Grounds for denial; grounds for termination	Grounds for denial; grounds for termination
Violent criminal activity	Grounds for denial	Grounds for denial; grounds for termination	Grounds for denial
Criminal activity that interferes with health, safety, peaceful enjoyment of other residents	Grounds for denial; grounds for termination	Grounds for denial; grounds for termination	Grounds for denial; grounds for termination
Determined to be currently using illegal drugs	Mandatory denial; grounds for termination	Mandatory denial; grounds for termination	Mandatory denial; grounds for termination
Abuse of drugs or alcohol that interferes with health, safety, peaceful enjoyment of other residents	Grounds for denial; grounds for termination	Grounds for denial; grounds for termination	Grounds for denial; grounds for termination
Subject to lifetime registration on a state sex-offender registry	Mandatory denial	Mandatory denial	Mandatory denial
Convicted of producing methamphetamines on federally assisted property	Mandatory denial; mandatory termination	Mandatory denial; mandatory termination	No provision
Fugitive felon	Grounds for termination	Grounds for termination	Grounds for termination
Drug testing	No provision	No provision	No provision

Source: Table prepared by CRS.

Note: This table summarizes only federal policies. While there may be no federal policies in a given category, local administrators may have adopted a policy in that category using their discretionary authority.

Miscellaneous Provisions:

Sex Offenders: Federal law bans sex offenders who are subject to lifetime registration requirements from admission into federally assisted housing. On June 11, 2012 HUD issued guidance stating that if a PHA discovers that it erroneously admitted a household member who was subject to a lifetime registration requirement at the time of admission and was admitted after June 25, 2001, the PHA must immediate pursue eviction or termination.[38] The PHA must offer the household the option of removing the ineligible family member.[39] The guidance also clarifies that there is currently no statutory or regulatory basis to evict or terminate assistance of the

[37] Maggie McCarty et al., CONG. RESEARCH SERV., R42394, DRUG TESTING AND CRIME-RELATED RESTRICTIONS IN TANF, SNAP, AND HOUSING ASSISTANCE 19 (2012).
[38] U.S. Dep't of Hous. & Urb. Dev., Notice PIH 2012-28 (June 11, 2012).
[39] *Id.*

household based solely on the household member's sex offender registration status if he or she was admitted to public housing prior to June 25, 2001.[40]

Portability: Portability is a key feature of the voucher program. Portability allows tenants with a voucher to move from one PHAs jurisdiction to another PHAs jurisdiction.[41] Thus, it gives Section 8 voucher holders the freedom to relocate to another area.

Criminal history can affect portability. Under current law, a family moving into another jurisdiction must satisfy the receiving PHAs screening criteria. This policy could cause problems for a family if the receiving PHAs screening criteria is more stringent than the initial PHAs screening criteria. A household member who has a criminal record that was acceptable under the initial PHAs screening policy may be ineligible based on the receiving jurisdiction's PHA screening policy. This type of policy could result in loss of mobility, employment, housing uncertainty, and other practical problems.

To reduce the problems associated with criminal records and portability, a PHA could adopt screening criteria that are less stringent when it comes to criminal records. In the alternative, PHA's could adopt the screening criteria used by the issuing PHA when evaluating ported vouchers. Voucher holders with criminal records should always check the eligibility requirements of the receiving jurisdiction or seek to move to a jurisdiction with less rigid eligibility requirements.

Veterans Affairs Supportive Housing (VASH):

VASH combines housing choice vouchers with case management and clinical services provided by the Veterans Administration. This program is designed to reduce homelessness among veterans. Under this program veterans are specifically excluded from the criminal record screening criteria for the regular housing choice voucher program, except for veterans who must register as a sex offender.[42]

There is currently a very limited number of VASH voucher available across the state. South Carolina received 200 VASH vouchers in fiscal year 2012, bringing the South Carolina total number of vouchers to 595.[43]

Discussion: Strategies to reduce barriers to subsidized and affordable housing

Advocates should attempt to identify and quantify the housing needs in their area for individuals with criminal records. The South Carolina Department of Corrections or local jails may have relevant information relating to the number of individuals released from incarceration. Local homeless organizations and shelters may be able to shed light on the criminal history background of their client population.

Local PHAs may keep records of the number of people that are excluded from admission annually based on criminal history screening. A local PHA may have data relating to current tenants with criminal

[40] *Id.*
[41] 24 C.F.R. § 982.353 (2012).
[42] Section 8 Housing Choice Vouchers: Revised Implementation of the HUD-VA Supportive Housing Program, 77 Fed. Reg. 17086 (March 23, 2012), *available at* www.gpo.gov/fdsys/pkg/FR-2012-03-23/pdf/2012-7081.pdf.
[43] An excel spreadsheet can be downloaded at: http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/hcv/vash.

histories and the proportion of that population to the public housing population in general, as well as how many households include members with criminal histories.

If possible, advocates should determine the extent to which individuals with criminal records are dissuaded from applying for assistance or are under the belief that any criminal history is a permanent ban from public housing assistance. In South Carolina, African Americans are disproportionately represented in the criminal justice system. A PHA policy that excludes or limits an individual with a criminal record from access to housing could have a disproportionate impact on people of color, which could have serious fair housing implications. PHAs could face fair housing complaints if their policies disproportionately impact a protected class.[44]

A person's inability to find stable housing could be a contributing factor to whether that person recidivates or ends up homeless and living on the streets. The lack of stable and affordable housing available to the reentry population can have a severe negative effect to public safety, as well as additional costs to the general public. A local policy to exclude people from public housing could also mean that individual is unable to join his or her families and his or her children, which impacts their access to a support system.

HUD Secretary Shaun Donovan has encouraged public housing authorities to allow ex-offenders to rejoin their families living in public housing when it is appropriate to do so.[45] HUD understands that blanket prohibitions do not allow local PHAs to consider important factors when creating their policies. HUD gives PHAs broad discretion so that the housing authorities are able to consider factors such as disability, age, evidence of rehabilitation, time since offense, and any number of other factors. Mandating termination, instead of providing the PHA with discretion, strips a PHA with the ability to consider factors specific to its region and circumstances.

Advocates should work with local PHAs to encourage them to use discretion to make their policies and leases as non-punitive as possible, while still protecting the public. Housing authorities should be urged to eliminate or reduce barriers to affordable housing. Both PHAs and private landlords accepting vouchers should adopt policies that individually assess each applicant based on a relevant and individualized assessment of the risk.

The American Bar Association's Criminal Justice Section issued a resolution urging the federal government to encourage public housing authorities to reevaluate their current rules regarding admission, termination, and additions to household to ensure that those rules do not unfairly punish people with criminal records.[46] According to the ABA resolution, "many barriers to housing that come from local PHA rules and policies are overly broad and unfairly discriminate against the reentering population."[47] Advocates should work with local PHAs to ensure that their policies do no unreasonably restrict access to affordable housing.

Admission policies may touch on various factors that ultimately lead to a housing provider using a person's criminal record to deny access to housing for low-income people. PHAs should take a look at their admission policies and identify those policies which may lead to overbroad denials for people with criminal records.

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[44] *See* Roriguez & Emsellem, *supra* note 1, at 5 (discussing how disproportionally impacting a protected group can run afoul of Title VII).

[45] The letter is available at: http://nationalreentryresourcecenter.org/announcements/hud-director-encourages-public-housing-authorities-to-grant-access-to-people-with-criminal-records.

[46] Criminal Justice Section, *Reentry Housing Resolution*, A.B.A. (Oct. 2011).

[47] *Id.*

Suggested PHA Admission Policies:

- A policy to make individualized reviews for each applicant.
- Limit a review of an applicant's criminal history to a set "look-back" period.
- Ensure that admissions policies are clear.
- Require consideration of mitigating circumstances or evidence of rehabilitation.
- Create specific time periods of ineligibility based on the nature and seriousness of the crime, while also allowing for individualized circumstances or mitigating evidence to overcome ineligibility.
- Clear policies on whether the prohibition period begins at the time of arrest, conviction, or release from jail/prison/parole/probation.

A PHA should be encouraged to establish policies that take individual circumstances into consideration, as well as mitigating circumstances. For instance, a PHA could establish specific waiting periods or bans based on categories of offenses (6 months for misdemeanors, 1 year for non-violent felonies, etc.), or accept individuals who have completed drug rehabilitation. PHAs should establish a list of charges with a related waiting period based on the nature of the threat, and clarify if the waiting period starts at the date of conviction or another date. It makes little sense to treat a prior possession of marijuana charge the same as a robbery charge or trafficking charge. Additionally, PHAs should also limit their criminal history "look-back" period to a fixed period of time prior to application.

Problematic PHA Admissions Policies:

- Admissions policies that exceed the required federal bans.
- Blanket prohibitions that don't relate to the seriousness of the offense.
- The use of arrests without convictions as proof of criminal activity.
- Vague, inappropriate, or misleading definitions of criminal activity.
- Policies that do not allow an applicant to present circumstances or other mitigating factors.
- Policies that do not consider drug/alcohol treatment or rehabilitation.
- Unreasonably long prohibition periods that do not relate to a present threat to the health, safety, or right to peaceful enjoyment by other tenants.
- Unreasonably long look back periods.

For More Information:

- HUD website: http://portal.hud.gov/hudportal/HUD?src=/topics/rental_assistance/phprog
- Affordable Housing Coalition of SC: www.affordablehousingsc.org/
- SC State Housing Finance & Development Authority: www.schousing.com/
- 24 C.F.R. 960.204 for Public Housing
- 24 C.F.R. 982.553 for the Housing Choice Voucher Program

Employment

Introduction

Studies have shown that employment is a fundamental component of the reentry process, and that ex-offenders who are able to find stable employment are much more likely to succeed in their rehabilitation than those who cannot find work.[48] Ex-offenders must contend with a number of barriers to finding stable employment, much less finding employment that provides a living wage. Some of these barriers relate to various characteristics that may hinder an ex-offender, including a lack of education, job skills, or a work history. Other factors may have more to do with societal or personal feelings about ex-offenders. Taken together, these factors rarely qualify an individual with a criminal history for jobs that pay much above minimum wage.

Increasing employment opportunities for individuals with criminal records has various benefits. Increased employment of ex-offenders reduces recidivism rates, which ultimately increases public safety. Studies have shown that strict across the board employment bans for individuals with criminal records are not based on the actual risk posed by such employees.[49] Reducing barriers to employment will have an effect on crime rates, unemployment rates, homelessness, and will reduce dependence on public benefits such as housing assistance and TANF/SNAP. As the chart below will show, unemployment rates in South Carolina have been consistently higher than national unemployment rates over the last ten years:[50]

Year	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
National	5.8	6.0	5.5	5.1	4.6	4.6	5.8	9.3	9.6	8.9
SC	6.0	6.7	6.8	6.7	6.4	5.6	6.9	11.3	11.2	10.3

Reducing barriers to employment for individuals with criminal records could have a widespread positive impact that could benefit all South Carolinians, both economically and in terms of public safety.

Because a discussion on the costs to society and the unemployment rate could be extensive, this guide will focus on the few employer incentives that exist on the federal level, as well as a discussion on how employers who screen for criminal history may run afoul of anti-discrimination laws.

Employer Incentives:

- **Work Opportunity Tax Credit**: The Work Opportunity Tax Credit (WOTC) is a federal tax credit used to reduce the federal tax liability of private-for-profit employers. Employers can save money on their federal income taxes in the form of a tax credit incentive through the Work Opportunity Tax Credit (WOTC) program by hiring ex-felons (in addition to other populations that are traditionally difficult to employ). Under WOTC, an ex-felon is an individual who has been convicted of a felony under any statute of the United States or any State, and has a hiring date which is within one year from the date of conviction or release from prison. For each new ex-felon hired, the credit is 25% of qualified first-year wages for those employed at least 120 hours, or $1500; and 40% for those employed 400 hours or more, or $2400. WTOC does not limit to the number of ex-felons an employer can hire to benefit from these tax savings. Employer should fill out IRS Form 5884 to take advantage of the Work Opportunity Credit.

[48] Nathan James, CONG. RESEARCH SERV., RL34287, *Offender Reentry: Correctional Statistics, Reintegration into the Community, and Recidivism* 1 (2011).
[49] Rodriguez & Emsellem, *supra* note 1, at 6.
[50] Bureau of Labor Statistics, www.bls.gov.

According to the SC Department of Employment and Workforce, in program year 2011, South Carolina employers were issued 18,684 certifications adding up to $77,310,600 in potential tax savings, with 497 tax credit certifications used specifically for hiring ex-felons.

- **Federal Bonding Program**: The Federal Bonding Program (FBP) is a federally funded incentive directed towards encouraging employers to hire at-risk and hard to place job applicants, including ex-offenders. The bond insures the employer for any type of theft, forgery, larceny or embezzlement by an employee for a six-month period. This service is provided at no cost to either the employer or the employee. The bonds are available to any individual who is qualified for the employment in question, not commercially bondable, and has a firm job offer. Bonding requests should be made by the job applicant at any of the South Carolina Workforce Centers. A directory of Workforce Centers is available at: www.scworks.org/directory.asp.

Discrimination Based on Criminal Record

South Carolina does not have a state law that limits employer inquiry into a job applicant's prior arrests or convictions. Federal law does not bar employers from examining a job applicant's criminal record. However, an employer's use of an individual's criminal history in making employment decisions may, in some instances, violate the prohibition against employment discrimination under Title VII of the Civil Rights Act of 1964.The Equal Employment Opportunity Commission (EEOC) enforces Title VII.[51]

Title VII does not prohibit an employer from requiring applicants to provide information about arrests, convictions, or incarceration, nor are individuals with criminal records specifically protected under Title VII as a protected class. Title VII of the Civil Rights Act of 1964 makes it unlawful to discriminate in employment based on race, color, national origin, religion, or sex.[52] A violation of Title VII occurs when an employer's practice of using criminal records in employment decisions leads to either disparate treatment or disparate impact of a protected class, such as race.

On April 25, 2012 the EEOC updated its policy statement relating to Title VII and the use of criminal records in employment decisions.[53] This guide will summarize some of the significant aspects of the guidance.

Who Does Title VII Apply To?

- Private Employers and federal, state, and local government;
- Federal Security Clearances should be acceptable under Title VII;
- *State and local laws are pre-empted by Title VII*. If the employer has an exclusionary policy or practice and it is not job related and consistent with business necessity, the fact that it was adopted to comply with state or local law will not shield the employer from Title VII liability.[54]

Disparate Treatment:

An employer may be liable under a disparate treatment theory if the applicant can show the employer treated him differently because of his race, national origin, or on another protected basis.[55] For example,

[51] 42 U.S.C. § 2000e-5(a) (2006).
[52] § 2000e-2.
[53] EEOC Enforcement Guidance, *Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N (Apr. 25, 2012), *available at* http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.
[54] § 2000e-7.
[55] *See* § 2000e-2(a).

an employer's use of criminal records could trigger Title VII liability under a disparate treatment theory if the employer rejects an African American applicant based on his criminal record but hires a similarly situated white applicant with a comparable criminal record. Evidence of disparate treatment might include an employers biased statements, inconsistent hiring practices, statistical evidence, or comparisons between similarly situated applicants from different protected classes might suggest that an employer may be discriminating based on race or another protected characteristic.[56]

Disparate Impact:
It may be more likely that claims of employment discrimination based on a criminal record would fall under disparate impact. An employer may be liable under a disparate impact claim if an applicant can show that the employer's *neutral* policy or practice has the effect of disproportionately screening out a Title VII protected group, and the employer fails to demonstrate that the policy or practice is job related for the position in question and consistent with business necessity.[57]

Nationally, African Americans are arrested in numbers disproportionate to their representation in the general population.[58] This is also true in South Carolina where African Americans constitute around 30% of the population, but 50% of those arrested and 70% of those incarcerated.[59] This information suggests that a blanket criminal record exclusion would have a disparate impact based on race.

There are two main parts to Title VII that should be reviewed when establishing a disparate impact claim. They are as follows:

Part I – A covered employer is liable for violating Title VII when the plaintiff/potential employee demonstrates that the employer's neutral policy or practice has the effect of disproportionately screening out a protected group *and* the employer fails to demonstrate that the policy or practice is job related for the position in question and consistent with business necessity
In *Green v. Missouri Pacific Railroad*, the Eighth Circuit identified the following three factors (known as the "Green factors") used to assess whether an exclusion based upon a criminal record is job related for the position in question and consistent with business necessity:[60]

- The nature and gravity of the offense or conduct;
- The time that has passed since the offense or conduct and/or completion of the sentence; and
- The nature of the job held or sought.

Part II – Even if an employer demonstrates that its policy or practice is consistent with job related business necessity, the potential employee may still prevail by demonstrating that there is a less discriminatory "alternative employment practice" that serves the employer's goals (other than criminal record exclusion).[61]

[56] *See supra* note 53.
[57] § 2000e-2(k)(1)(A)(i). If an employer successfully demonstrates that its policy or practice is job related for the position in question and consistent with business necessity, a Title VII plaintiff may still prevail by demonstrating that there is a less discriminatory "alternative employment practice" that serves the employer's legitimate goals as effectively as the challenged practice but that the employer refused to adopt. *Id.* § 2000e-2(k)(1)(A)(ii).
[58] *See supra* note 53.
[59] *See supra* note 6 and accompanying text.
[60] Green v. Mo. Pac. R.R., 549 F.2d 1158 (8th Cir. 1977). *See also* El v. Se. Pa. Transp. Auth., 479 F.3d 232 (3d Cir. 2007) for an in-depth statutory analysis.
[61] § 2000e-2(k)(1)(A)(ii), (C). *See also* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 998 (1988).

The EEOC has specified two circumstances in which employers will consistently meet the "job related and consistent with business necessity" defense:[62]

1) The criminal conduct screen is done pursuant to the Uniform Guidelines on Employee Selection Procedures (Uniform Guidelines);[63]
2) The employer has developed a targeted criminal conduct screen that takes into consideration the *Green* factors, and also provides an opportunity for an individualized assessment to determine whether the policy as applied is job related and consistent with business necessity.

Employers should read the EEOC guidance so that they do not run afoul of federal law. Employees and job seekers with criminal records also should be aware that there are laws that might protect them from employment discrimination. If a job seeker feels they may have been discriminated against, he or she must file a charge of employment discrimination within 180 days of the unlawful employment practice.[64]

There are a number of policies and practices that can be changed or modified to give individuals with criminal records a better chance of obtaining employment. Some of these changes may include:

- Encourage employers in South Carolina to adopt the *EEOC Employer Best Practices*.[65]
- Encourage employers to refrain from asking about arrests or convictions on job applications and instead wait until the hiring process has narrowed down applicants based on who is best qualified for the position.
- Pass a law in South Carolina that requires employers to wait until later the selection process to ask about arrests and convictions.[66] An employer is more likely to objectively assess the relevance of a potential employee's conviction if it becomes known after the employer is already aware of the applicant's qualifications and experience.

Fair Credit Reporting ACT:

The Fair Credit Reporting Act (FCRA) is a law that protects the privacy and accuracy of information in a person's credit report; it is enforced by the Federal Trade Commission (FTC).[67] The FCRA also covers certain background checks conducted when an employer uses a third party entity to conduct a background check.

FCRA states that arrests (also called an adverse item of information) must be removed from third party criminal background reports after 7 years.[68] Note that this requirement applies to arrests only, not convictions. Additionally, consumer reporting agencies are required to verify the accuracy of public records of arrests, indictments, and convictions.[69]

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[62] *See* EEOC Enforcement Guidance for more detail: www.eeoc.gov/laws/guidance/arrest_conviction.cfm#sdendnote1sym.
[63] *See* 29 C.F.R. § 1607.5 (2012) (describing the general standards for validity studies).
[64] 42 U.S.C. § 2000e-5(e)(1).
[65] *See* EEOC Enforcement Guidance, *Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N (Apr. 25, 2012), *available at* http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.
[66] The Legal Action Center has summarized a description of 14 states that have laws prohibiting employment discrimination based on criminal records. This list is helpful when crafting policies or proposed legislation in South Carolina. The overview is available at: http://lac.org/toolkits/standards/Fourteen_State_Laws.pdf.
[67] Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq.
[68] The reporting periods have been lengthened for certain adverse information pertaining to U.S. Government insured or guaranteed student loans, or pertaining to national direct student loans. See sections 430A(f) and 463(c)(3) of the Higher Education Act of 1965, 20 U.S.C. 1080a(f) and 20 U.S.C. 1087cc(c)(3), respectively.
[69] 15 U.S.C. §1681(d); *see also* §1681k.

FCRA imposes a number of requirements on employers who use criminal background checks to screen job applicants or employees. The requirements include:

- Employers must get permission, usually in writing, before obtaining a report about an applicant or employee.
- If adverse action is taken (no job offer, no promotion, termination, etc.) based on the report, the employer must provide the applicant or employee with a copy of the report as well as inform the applicant or employee of their rights under the FCRA.
- An applicant/employee has the right to dispute inaccurate or incomplete information on their report.[70]

There are legal consequences for employers who do not comply with the FCRA, whether they fail to get an applicant's written permission before getting a copy of their credit or other background report, fail to provide the appropriate disclosures in a timely way, or fail to provide adverse action notices to unsuccessful job applicants.

For More Information:

- Work Opportunity Tax Credit:
  - Department of Labor: www.doleta.gov/wotc
  - IRS Website: www.irs.gov
  - South Carolina Department of Employment and Workforce: www.dew.sc.gov/
- Federal Bonding Program:
  - Department of Labor Federal Bonding Website: www.bonds4jobs.com/
  - South Carolina Department of Employment and Workforce: www.dew.sc.gov
  - SC Works (for a map of workforce centers across the state: www.scworks.org/directory.asp
- EEOC Enforcement Guidance, *Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N (Apr. 25, 2012), *available at* http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm
- About the Fair Credit Reporting Act (FCRA): www.ftc.gov/credit or call 1-877-382-4357

[70] See the Federal Trade Commission website for more information: www.ftc.gov/bcp/index.shtml.

Education– Student Loans and Grants

Federal Student Aid:

Federal student aid may include grants, school loans, or federal work study. Starting in 2000, students with drug convictions lost access to federal financial aid as a result of an amendment to the Higher Education Act.[71] The Souder Amendment added the Aid Elimination Penalty which affected the eligibility of many students with drug convictions.[72] This penalty was in effect until Congress scaled back the law in 2006, and again in 2008. Students who were previously denied access to federal aid may now be eligible.

Current Status: A student who is receiving federal student aid and is convicted for the possession or sale of illegal drugs while receiving federal student aid will have his or her aid suspended. Student loan eligibility may be suspended for an amount of time depending on the nature of the conviction.[73] Suspension from aid will be as follows:

	POSSESSION OF ILLEGAL DRUGS	**SALE OF ILLEGAL DRUGS**
FIRST OFFENSE	One Year	Two Years
SECOND OFFENSE	Two Years	Indefinite
THIRD (+) OFFENSES	Indefinite	

If a student is disqualified due to such a drug conviction, there are three methods for a student to regain eligibility:[74]

1) If the conviction is reversed or set aside;
2) If the student successfully passes two unannounced drug tests; or
3) If the student successfully completes a drug rehabilitation program that includes two unannounced drug tests.

Pell Grant:[75]

In 1965, Congress passed Title IV of the Higher Education Act, which permitted incarcerated persons to apply for Pell Grants to finance their education. In 1994, Congress eliminated Pell Grant eligibility for incarcerated persons pursuant to the Violent Crimes Control and Law Enforcement Act, signed into law by President Clinton.[76] Once released from incarceration, individuals will regain Pell Grant eligibility subject to the drug conviction ban and time limits listed in the above chart.

In addition to the above criteria relating to drug convictions, students subject to an involuntary civil commitment (Sexual Violent Predator) after completing a period of incarceration for forcible or non-forcible sexual offense are ineligible to receive a Federal Pell Grant.[77]

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[71] Students for Sensible Drug Policy, The Higher Education Act, available at: http://ssdp.org/campaigns/the-higher-education-act/.
[72] *See* Higher Education Amendments of 1998, Pub. L. No. 105-244, 112 Stat. 1581 (2008).
[73] 20 U.S.C. § 1091(r)(1) (2006).
[74] § 1091(r)(2).
[75] 34 C.F.R. §§ 690.1 & 690.83 (2012).
[76] § 1070a(b)(6).
[77] *Id.*

Students who may be ineligible for the above grants or loans are still encouraged to fill out a FAFSA as there may be non-federally based aid available for which they qualify.

State Based Student Aid:

To qualify for South Carolina specific grants and financial aid, a student must never have been convicted of any felonies and must never have been convicted of any second or subsequent alcohol/drug-related misdemeanor offenses within the past academic year.

South Carolina offers a variety of student aid. The below list summarizes specific exclusions based on criminal record:

LIFE Scholarship: Any felony convictions, or second or subsequent alcohol or other drug related misdemeanor conviction within the past academic year.[78]
SC Hope Scholarship: Any felony conviction, or a second alcohol or drug related misdemeanor within the past academic year.[79]
Palmetto Fellows: Any felony conviction or juvenile adjudication, or any second or subsequent alcohol or other drug-related misdemeanor offense within the past academic year.[80]
Lottery Tuition: The regulations do not specifically enumerate eligibility requirement relating to criminal records, though students must first determine eligibility for federal student aid.[81]
SC National Guard College Assistance Program: No specific mention of criminal record eligibility requirements, though applicant must be in good standing with the National Guard.[82]
Free Tuition for Residents Sixty Years of Age: No enumerated eligibility requirements relating to criminal records.[83]

Discussion:

For many students from low or middle income families, student aid is the only way to pay for a college education. Students convicted on drug charges while in school may be forced to drop out of school solely because of their financial dependence on financial aid. Therefore, this penalty has a greater impact on lower income students, who are often dependent on financial aid. Individuals with drug convictions who can independently afford college will be able to complete their degrees. Furthermore, because of the discriminatory enforcement of drug laws, these penalties will have a greater impact on minority students.

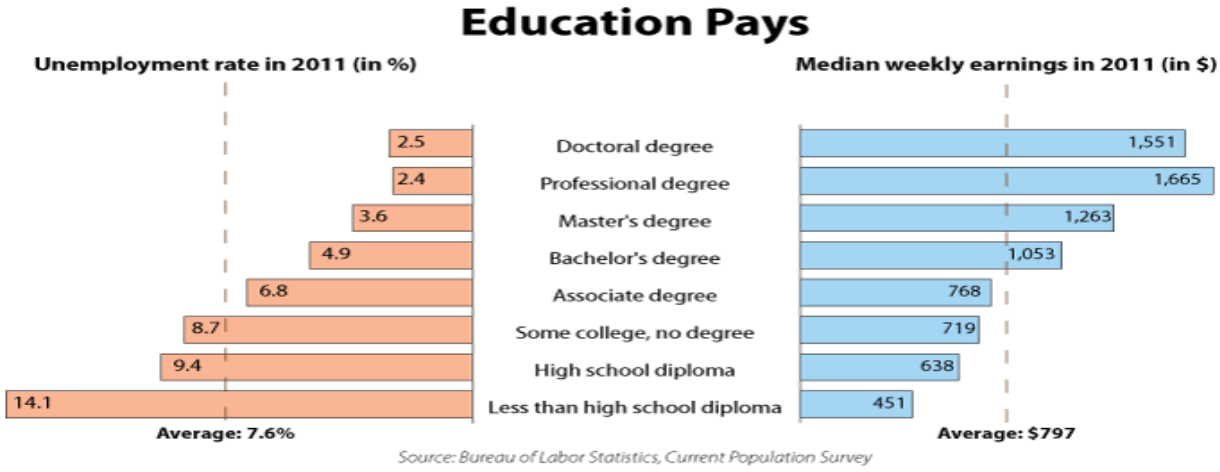
Because students receiving federal aid must already meet academic standards and minimum GPA requirements, this policy will impact good students who are academically qualified for student aid. Even a temporary suspension of student aid may deter a student from finishing their education.

Higher education and incarceration rates are also linked. Studies show that the more education a person completes, the more likely he or she avoids incarceration or abuse drugs. In 2002, according to the Bureau

[78] S.C. Code Ann. Regs. § 62-1200.10(A)(7) (2011). *See also* S.C. Comm'n on Higher Educ., *LIFE Scholarship FAQ, available at* www.che.sc.gov/StudentServices/LIFE/Frequently_Asked_Questions_for_LIFE.pdf.
[79] § 62-900.95(A)(5). *See also* S.C. Comm'n on Higher Educ., *S.C. HOPE Scholarship FAQ, available at* www.che.sc.gov/StudentServices/HOPE/Q&A_HOPE.pdf.
[80] § 62-315(A)(6). *See also* S.C. Comm'n on Higher Educ., *Palmetto Fellows Scholarship FAQ, available at* www.che.sc.gov/StudentServices/PalmettoFellows/files/Q&A_PFS_2010-11.pdf.
[81] § 62-900.165. *See also* S.C. Comm'n on Higher Educ., *General Eligibility Requirements, available at* www.che.sc.gov/StudentServices/LTAP/LTAGenEligReq.htm.
[82] § 62-253.
[83] § 62-1110.

of Justice Statistics, individuals with college degrees made up less than 3% of the jail population, whereas individuals with either a GED or high school diploma made up more than 40% of the jail population.[84]

Education and income potential are also linked. By denying lower-income students who otherwise maintain good grades the financial assistance that would provide them the opportunity to finish their degree, the policy acts to curtail their future income potential. This could have far reaching lifelong implications for these students. In South Carolina, the lifetime income of a person with a bachelor's degree averages around $2.5 million dollars, compared to $1.3 million dollars for the same person who is a high school graduate. [85] The following chart shows income potential on a national level for individuals age 25 and older: [86]



Discussion

A number of policy goals are achieved with greater access to higher education. These include:

- **Poverty Reduction**: Access to higher education has a direct impact on potential future earnings. Increasing access to higher education will increase earning potential. Individuals with criminal records could obtain higher paying/living-wage jobs if given the opportunity to seek higher education. Furthermore, children of parents who have postsecondary education are more likely to go to college, which will allow future generations the ability to climb out of and stay out of poverty.
- **Reduce Recidivism**: Many people who leave prison are unskilled and under-educated. These factors correlate to recidivism rates as less educated inmates are more likely than educated inmates to be recidivists. Increased educational opportunities will decrease recidivism rates and in turn increase public safety, which will save taxpayer dollars.

For More Information:

- Federal Student Aid: www.studentaid.ed.gov

[84] Bureau of Justice Statistics, *Profile of Jail Inmates, 2002*, U.S. DEP'T OF JUST. (Oct. 12, 2004), *available at* www.bjs.gov/content/pub/pdf/pji02.pdf.
[85] South Carolina Commission on Higher Education: www.che.sc.gov/.
[86] Bureau of Labor Statistics, *available at*: www.bls.gov/emp/ep_chart_001.htm.

- For details on specific drug convictions, refer to the "FAFSA Question 23 Student Aid Eligibility Worksheet" at www.studentaid.ed.gov/pubs.
- South Carolina Commission on Higher Education: http://www.che.sc.gov/.
- The South Carolina Commission on Higher Education also maintains a student/parent friendly website at: http://www.sccango.org/index.php.

SNAP/TANF

SNAP: Supplemental Nutrition Assistance Program (Food Stamps):

In October 2008, the name of the federal food stamp program was changed to the Supplemental Nutrition Assistance Program (SNAP). Federal and state laws and regulations govern the SNAP Program, and the Department of Social Services (DSS) administers the SNAP program in South Carolina. SNAP applicants must meet both the state and federal guidelines for the program. SNAP benefits are provided to supplement the food purchasing power of low-income recipients via the use of an EBT card (a debit card).

While the majority of rules regarding the program are the same in every state federal law allows state agencies some discretion to determine how to administer SNAP in their respective states. Federal law bans individuals convicted of a drug-related felony after August 22, 1996 from receiving SNAP benefits unless the state chooses to opt-out or modify the ban.[87] If a family member is a convicted drug-felon, his or her income shall be considered the income of the family, but he or she will not be considered a member of the family when determining benefits.[88]

The majority of states have either opted-out of or modified the drug felon ban for SNAP benefits.[89] South Carolina is one of fifteen states that have the full ban in place.[90] Nineteen states allow SNAP benefits to individuals with felony drug conviction. The remaining states have either modified or limited the ban. Examples of these modified approaches are: [91]

- Limiting the circumstances in which the permanent disqualification applies (such as only when convictions involve the sale of drugs);
- Requiring the person convicted to submit to drug testing;
- Requiring participation in a drug treatment program; and/or
- Imposing a temporary disqualification period.

H.R. 377: Food Assistance to Improve Reintegration Act of 2011 is federal legislation introduced January 2011 to repeal the SNAP felony drug ban. Similar legislation was introduced in 2009 but did not make it out of committee.

TANF: Temporary Assistance for Needy Families

TANF (formerly AFDC- Aid to Families with Dependent Children) is the federal welfare program that provides cash assistance to needy families. TANF applicants must meet both the state and federal guidelines for the program. TANF eligibility mirrors SNAP eligibility requirements for individuals with

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[87] 21 U.S.C. § 862a (2006). *See also* 7 C.F.R. 273.11(m) (2012) ("**Individuals convicted of drug-related felonies.** An individual convicted (under Federal or State law) of any offense which is classified as a felony by the law of the jurisdiction involved and which has as an element the possession, use, or distribution of a controlled substance (as defined in section 102(6) of the Controlled Substance Act, 21 U.S.C. 802(6)) shall not be considered an eligible household member unless the State legislature of the State where the individual is domiciled has enacted legislation exempting individuals domiciled in the State from the above exclusion.").

[88] § 862a(b)(2).

[89] Maggie McCarty et. al, *supra* note 37, at 11–12.

[90] *Id.*

[91] Food & Nutrition Serv., *Supplemental Nutrition Assistance Program: State Options Report*, U.S. DEP'T OF AGRIC. (Nov. 2010), *available at* www.fns.usda.gov/SNAP/rules/Memo/Support/State_Options/9-State_Options.pdf.

drug-related felonies.[92] The amount of assistance under TANF is reduced if a family member has been convicted of a drug-related felony.[93] TANF recipients may be required to submit to drug tests.

Similar to the SNAP program, states can choose to opt-out or modify the federal ban.[94] The majority of states have either opted-out of or modified the drug felon ban for TANF cash assistance.[95] South Carolina is one of twelve states with the full ban in place.[96]

Ban modifications vary from state to state. Modifications include allowing an applicant to receive TANF benefits if he or she is in compliance with court orders (such as probation, etc), have completed treatment or had a negative drug screen and two states where the ban ends a certain time after completion of sentence.

In addition to the felony drug ban, TANF includes a 10-year prohibition of assistance to those who have been convicted in state or federal court of committing welfare fraud by applying for benefits in more than one state.[97]

H.R. 3573: RISE Act of 2011 is federal legislation introduced December 2011 in part to eliminate the ban for individual convicted of drug felonies.

Discussion

Food assistance is a critical element for a successful reentry into society for many ex-offenders. These bans *only* apply to individuals with drug convictions. Individuals convicted of other crimes, including violent crimes like murder or rape, are still eligible for SNAP and TANF benefits. The felony drug ban targets a narrow category of ex-offenders who are typically non-violent offenders. They may be battling drug addiction on top of trying to find or hold down a job, maintain housing, and reconnect with family and society. A lifetime ban aimed at a specific group of ex-offenders impacts them for the rest of their lives, regardless of whether they are ever again involved with drugs. Lack of access to food will likely have the biggest impact when individuals are most in need and have a higher risk for re-offending, such as when they are released from incarceration.

The ban also has unintended consequences for the families of those convicted of a felony drug charge. A reduction in benefits impacts an entire family, not just the individual with the felony drug conviction. SNAP benefits are determined, in part, by household size and income. Even if an individual is banned from receiving benefits, his or her income is counted towards the entire household income, thereby reducing benefits for the rest of the household. The entire household will simply have to get by on less.

The SNAP ban could separate family members from living with one another. For example, a father with a felony drug conviction has an incentive to live away from his family so that his conviction does not reduce SNAP benefits for the rest of the family members, including his children.

South Carolina has the option to opt-out of the federal ban completely. South Carolina could also choose to put limitations or conditions on eligibility, such as:

[92] *See* 42 U.S.C. § 862a(b)(1) (2006).
[93] *Id.*
[94] § 862a(1).
[95] Maggie McCarty et. al, *supra* note 37, at 9.
[96] *Id*.
[97] § 608(a)(8).

- Condition eligibility for SNAP/TANF on participation in a drug and alcohol treatment program.
- Condition benefits for those with drug conviction on passing a drug test.
- Condition eligibility for SNAP/TANF on successful completion of his or her sentence or compliance with the terms and conditions of parole or probation.
- Limit eligibility to those individuals convicted of drug possession.
- Limited ineligibility for specific time frames, such as one year from the date of conviction.
- Exempt individuals with disabilities, dependents, etc. from the ban.
- Provide SNAP benefits without limitation while limiting TANF benefits.[98]

For More Information:

- SNAP: http://www.fns.usda.gov/SNAP/rules/Memo/Support/State_Options/9-State_Options.pdf
- List of States with TANF eligibility criteria: http://www.lac.org/doc_library/lac/publications/HIRE_Network_State_TANF_Options_Drug_Felony_Ban.pdf
- The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104-193, 110 Stat. 2105 (1996).

[98]The Legal Action Center has an Advocate's Toolkit with many additional suggestions. The entire Toolkit is available online at: www.lac.org/toolkits/Introduction.htm.

Social Security and Disability Benefits[99]

Social Security

Social Security benefits are not payable to an individual who is convicted of a criminal offense and confined for more than 30 days. Benefits to a spouse or children will continue as long as they remain eligible. There are a few specific federal offenses which would disqualify an individual from benefits.[100] These are: espionage, sabotage, treason, sedition, or subversive activities.[101]

There is a prerelease procedure to ensure that an individual's benefits will resume upon release, usually within 30 days. The inmate should check with his or her institution to begin processing the inmate's paper work. Alternatively, the inmate could write his or her local Social Security Office about setting up a pre-release agreement. Social Security and/or Supplemental Security Income (SSI) benefits are suspended when individuals are in jail or prison.

When individuals leave prison or jail it is important that they have funds to cover living expenses. If benefits have merely been suspended, they can be restarted without much delay. If benefits have been terminated, it could take a few months before benefits will resume.

A pre-release agreement is important for an individual's successful reentry into society after incarceration and could serve to lessen financial hardship and could also deter recidivism. Once an inmate knows his anticipated release date, he should ask the institution where he is housed whether they have a prerelease agreement with the local Social Security Office, or if not, he should contact the Social Security Office to tell them your scheduled release date.

Veterans Benefits

Veterans with criminal histories may be at increased risk for homelessness. The VA has acknowledged this issue and has several programs in place to reduce incidences of homelessness for all Veterans and for those with criminal records. Every VA medical center has a Veterans Justice Outreach Specialist who is the VA liaison with the local criminal justice system. The Healthcare for Re-Entry Veterans (HCRV) is another program specifically designed for incarcerated Veterans. The HCRV program includes:

- Outreach and pre-release assessments services for Veterans in prison;
- Referrals and linkages to medical, psychiatric, and social services, including employment services upon release;
- Short term case management assistance upon release.ashley
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The VA may pay certain benefits to incarcerated Veterans depending on the type of benefit, the length of incarceration, and the nature of the charge.

An eligible Veteran who is not currently incarcerated can use VA medical care regardless of any criminal history. The only time an eligible Veteran is unable to use VA medical care is during periods of incarceration or if the Veteran is in fugitive felon status.

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[99] This information is a general overview as in relates to currently incarcerated individuals. *See* Soc. Sec. Admin., Publ'n No. 05-10133, *What Prisoners Need To Know* (May 2010), *available at* www.ssa.gov/pubs/10133.html#a0=2.

[100] 20 C.F.R. § 404.466 (2012).

[101] § 404.465.

Disability Compensation

VA disability compensation payments are *reduced* if a veteran is convicted of a felony and imprisoned for more than 60 days. The monthly payment will be reduced beginning with the 61st day of imprisonment. If the payment before incarceration was greater than 10%, the reduced payment will be the 10% rate. If the payment before incarceration was the 10% rate, the reduced payment will be half the 10% rate. Payments are not reduced for recipients participating in work release programs, residing in halfway houses (also known as "residential re-entry centers"), or under community control.

Disability Pension

Veterans in receipt of VA pension will have payments *terminated* effective the 61st day after imprisonment in a federal, state, or local penal institution for conviction of a *felony or misdemeanor*. Payments may be resumed upon release from prison if the veteran meets VA eligibility requirements.

Reinstating Benefits after Incarceration

Compensation or pension benefits can be resumed the date of release from incarceration if the Department of Veteran's Affairs received notice of release, such as proposed date of release as determined by the Department of Corrections. Once a veteran is released from prison, compensation payments may be reinstated based upon the severity of the service connected disability(ies) at that time.

The VA may apportion benefits that are not received by the incarcerated individual to the incarcerated individual's spouse or dependents. The VA regional office can provide more detail on how to apply.

For More Information:

- For Social Security information, visit www.ssa.gov. See also: Soc. Sec. Admin., Publ'n No. 05-10504, *Entering The Community After Incarceration—How We Can Help* (Oct. 2008), *available at* www.ssa.gov/pubs/10504.html; See also: Soc. Sec. Admin., Publ'n No. 05-10133, *What Prisoners Need To Know* (May 2010), *available at* www.ssa.gov/pubs/10133.html#a0=2.For Veteran's Benefits information, visit www.va.gov.
- The Veteran's Administration publishes a guidebook for incarcerated Veterans. The guidebook can be found online at: http://www.va.gov/HOMELESS/docs/Reentry/09_sc.pdf.

Clearing a Criminal Record

Inaccuracies on SLED or NCIC Checks

SLED
South Carolina Law Enforcement Division (SLED) is the agency responsible for maintaining criminal records in South Carolina. SLED reports contain criminal history record information that will include: all unsealed conviction data, non-conviction data and non-disposition data as well as findings of not guilty, nolle prosequi, dismissals, and similar dispositions which show any final disposition of an arrest.[102] The local Clerk of Court keeps the General Sessions records for cases heard in that county, and anyone can request his or her General Sessions records at the appropriate Clerk of Courts office.

Correcting a mistake on SLED report -
SC law provides a method for individuals to challenge the information on their criminal records if there is a mistake on a SLED report.[103] The steps to formally challenge information on a SLED report are as follows:

1. Contact SLED and request a "Challenge of Criminal History Record" packet.
2. Complete the application, provide picture ID, and submit a copy of the criminal record in question or a $25 money order to obtain a copy of the criminal record.
3. Get fingerprinted by a law enforcement agency and submit fingerprints to SLED.
4. SLED will accept or deny the challenge through an administrative review.
5. If SLED find errors, omissions, or cannot verify the accuracy of the record, SLED must accept the challenge and modify the record.
6. The individual challenging a record may seek an appeal of the decision of the administrative review by requesting one within 30 days of the denial of the finding by petitioning the Criminal History Administrative Appeal Board. A hearing will be conducted within 60 days and the individual seeking review may present evidence concerning the record. If the appeal is denied, the individual seeking review must be notified in writing of the reason for the denial.

NCIC
The National Crime Information Center (NCIC) is the federal repository for criminal justice information and is maintained by the FBI. The records relating to individuals are often referred to as a person's "Rap" (record of arrests and prosecutions) sheet. NCIC maintains information from various federal, state, local, and tribal criminal justice users. Information ranges from stolen vehicles to missing persons, as well as individuals who are fugitives. This information is generally not open to the public. Since NCIC is a criminal justice repository, the information pertaining to an individual is only as accurate as the information submitted by the local law enforcement agency (such as SLED).

Correcting a mistake on NCIC/Rap sheet -
If a recipient of a record believes the information on his or her RAP sheet is incorrect, he or she should contact the agency that submitted the erroneous information. [104] An individual could also direct his or her challenge to the FBI at the below address, and the FBI will forward the challenge to the appropriate agency. You may request a copy of your RAP sheet by submitting a written request which includes the following information:

[102] S.C. Code Ann. Regs. § 73-23 (1990).
[103] § 73-24.
[104] *See* 28 C.F.R. § 16.30 et seq. (2012).

- Proof of Identify: name, date of birth, and a set of rolled fingerprints obtained by a law enforcement agency.
- Certified check or money order for $18 made out to the Treasury of the United States. If indigent, an individual may submit evidence of indigence and request a waiver of the fee. Requests should be mailed to the following address:

  FBI, Criminal Justice Information Services Division
  ATTN: SCU, MOD. D-2
  1000 Custer Hollow Road
  Clarksburg, WV 23606

Pardons and Expungements

Pardons

What is a Pardon? A pardon means that an individual is fully forgiven from all the legal consequences of his crime and of his conviction, direct and collateral, including the punishment, whether of imprisonment, pecuniary penalty or whatever else the law has provided. Pardons should FULLY restore all civil rights lost as a result of a conviction, including the right to:

- Register to Vote
- Vote
  - It is important to know that a person's right to vote is automatically restored once his or her sentence is fully satisfied.
  - SC Code §7-5-120(B)3) provides that a person is disqualified from being registered or voting if he is convicted of a felony or offenses against the election laws, unless the disqualification has been removed by service of the sentence, including probation and parole time unless sooner pardoned.
- Serve on a jury
- Hold public office, except as provided in SC Code §16-13-210
- Testify without having the conviction introduced for impeachment purposes to the extent provided by Rule 609 of the SC Rules of Evidence[105]
- Not have his testimony excluded in a legal proceeding if convicted of perjury, and
- Be licensed for any occupation requiring a license

Who is eligible for a pardon? The Board of Paroles and Pardons shall make eligibility determinations based on a number of criteria as follows:

> Probationers: May be considered for a pardon any time after discharge from supervision provided all restitution and collection fees have been paid in full
> Parolees: Any time after successful completion of five years under supervision, or any time after the successful completion of the maximum parole period if less than five years. Restitution and collection fees must be paid in full.
> Inmates: The Board will consider pardons based upon the application and findings of extraordinary circumstances. Restitution and collection fees must be paid in full.
> Inmates with Terminal Illness: If an inmate has a life expectancy of one year or less. All restitution and collection fees must be paid in full. Two separate doctors' statements documenting life expectancy must be attached to the application.

The Pardon Process: A person seeking a pardon must fill out a pardon application.[106] All restitution and collect fees for the charge(s) in question must be paid in full before applying for a pardon. A Pardon Application consists of the following:

- Three written letters of reference;

[105] Rule 609 states: **Effect of Pardon, Annulment, or Certificate of Rehabilitation or Other Equivalent Procedure.** Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence. S.C. R. EVID. 609.

[106] Pardon applications are available on the SCDPPPS website at: www.dppps.sc.gov/apply_for_a_pardon.html.

(i) Must list name, address, and telephone numbers for each reference
(ii) Each letter must specifically state support for your pardon
(iii) People related by blood or marriage do not qualify to write a letter of reference

- Application form, available online at http://www.dppps.sc.gov/ or you can request one by writing to:

  Department of Probation, Parole and Pardon Services
  Attn: Legal Services, Pardon Application Processing
  2221 Devine Street, Suite 600
  P.O. Box 50666 Columbia, SC 29250

- Application Fee: Applicant must submit a $100.00 non-refundable money order or cashier's check with their application.

Once received, the pardon application is then submitted to an investigator. The investigation takes about 90 days. For an expedited investigation, an applicant may request an expedited investigation on the application form under "Reason for Requesting a Pardon." If an applicant is requesting an expedited investigation, the applicant must attach a statement describing the extraordinary circumstances for the request. There is no right to an expedited hearing, which is at the discretion of the Department of Probation, Parole and Pardon.

After the investigation in complete, the pardon application will be scheduled for a hearing. The time frame for scheduling a hearing is between 7-9 months after submitting the application. Pardons for out of state residents made by may take longer.

Victims will be notified 30 days prior to the hearing date. Victims have the right to attend the hearing and present testimony to the Paroles and Pardons Board. Additionally, victims may choose to attend the hearing by videoconferencing at the Charleston or Spartanburg Remote Videoconferencing Site. Victims may also voice their opposition to a pardon by submitting letters or petitions.

The Parole board shall permit appearances by counsel or other persons during a parole hearing. An order of pardon must be signed by at least two-thirds of the members of the board. If a pardon application is denied, the individual requesting the pardon must wait one year from the date of denial before filing another pardon application and fee.

Expungement of Record after Receiving a Pardon: A pardon alone does not remove the conviction from a person's criminal history or RAP sheet. Only an expungement can do that. In June 2012, Governor Haley vetoed a bill that would allow a person who is applying for a pardon to request that the Board recommend the expungement of the record relating to the offense.

Some general information about pardons:

- In 2011, there were 496 pardons applied for. Of the 496 pardon applications, 301 were granted.
- A pardon does not relieve an individual from the requirements to register as a sex offender.
- A pardon DOES NOT expunge a criminal record. An individual's criminal history will still reflect an arrest and conviction. When asked about criminal history as part of a job application or interview, the applicant must still list the conviction but can indicate that the conviction was pardoned.

Expungements[107]

What is an Expungement? An expungement is the destruction of a person's arrest or criminal conviction. When a person has his or her records expunged, it is as though the related proceedings never occurred. South Carolina law provides for limited circumstances for when a person is eligible to have their records expunged.[108]

Who is eligible for an Expungement? Certain offenses are eligible for expungement if certain criteria are met. Below is a list of enumerated offenses for which an individual might be eligible for an expungement.

> **(1)** Nolle Prossed, dismissal, finding of not guilty. Any person who applies for an expungement on these grounds is exempt from paying the administrative fee associated with the expungement process, unless the criminal charge that is the subject of the expungement was dismissed as part of a plea arrangement under which the defendant pled guilty and was sentenced on other charges;[109]
> **(2)** First Offense misdemeanor fraudulent check;[110]
> **(3)** Conditional discharge for simple possession of marijuana or hashish;[111]
> **(4)** First offense conviction in magistrates court;[112]
> **(5)** Youthful offender act;[113]
> **(6)** First Offense failure to stop for a blue light;[114]
> **(7)** Successful completion of Pretrial Intervention (PTI);[115]
> **(8)** Juvenile Records;[116]
> **(9)** Alcohol Education Program.[117]

The Expungement Process: The applicant should contact the appropriate individual or department in the Solicitor's office in the circuit in which the offense was committed and prosecuted.[118] The applicant is

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[107] Information taken in large part from the South Carolina Judicial Department website, available at: www.judicial.state.sc.us/expungementInfo/expAppProcessGS.cfm and the South Carolina Bar website, available at www.scbar.org/PublicServices/ExpungementandPardons.aspx. The Uniform Expungement of Criminal Records Act is codified at S.C. Code Ann. § 17-22-910 et seq. (1976).

[108] *See* S.C. Code § 17-22-9190 et seq. for the full text of the Uniform Expungement of Criminal Records Act.

[109] § 17-1-40.

[110] § 34-11-90(e).

[111] § 44-53-450(b).

[112] § 22-5-910. Expungements are generally allowed under this provision for crimes carrying a penalty of not more than 30 days imprisonment or a fine of $500, or both. Certain motor vehicle offenses are excluded. The waiting period for expungements of a criminal domestic violence offense is five years, as opposed to three years for other offenses.

[113] § 22-5-920. There are certain exclusions that apply to expungements pursuant to this provision. *See Id.* The defendant must not have had any conviction in five years since completing his or her sentence, including probation and parole.

[114] § 56-5-750(f).

[115] § 17-22-150(a).

[116] § 20-7-8525. Juvenile adjudications are ineligible for expungements if the individual 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. The person seeking the expungement must be at least 18 years old, have completed his/her sentence, and have had no subsequent charges.

[117] § 17-22-530.

[118] A list of the appropriate contact for expungements in each circuit is available at: www.scbar.org/LinkClick.aspx?fileticket=FVxtsmf8jIk%3d&tabid=1034.

required to pay administrative and other costs associated with the expungement process. The applicant must pay the following amounts to the solicitor in the form of separate certified checks or money orders:

- A non-refundable administrative fee of $250.00 made payable to the solicitor;
- A non-refundable SLED verification fee of $25.00 made payable to SLED;
- A filing fee of $35.00 made payable to the county clerk of court.
- **EXEMPTION**: Any person who applies for an expungement pursuant to Section 17-2-40 (dismissed charges or finding of not guilty) is exempt from paying the administrative fee, SLED fee, and filing fee.[119]

The Solicitor's Office will send the expungement application to SLED to verify that the offense is eligible for expungement. SLED will return the application to the Solicitor and indicate on the application form if the offense(s) is eligible for expungement. If SLED determines that the offense(s) is eligible for expungement, the solicitor will obtain all necessary signatures, including the signature of the PTI director, AEP director, summary court judge, and the circuit court judge (as needed). Once the order is signed by the judge, the solicitor will file the order with the clerk of court. The solicitor will provide copies of the expungement order to all pertinent government agencies as well as the applicant.

For More Information:

- SLED - www.sled.sc.gov
  803-737-9000
- NCIC - www.fbi.gov/about-us/cjis/ncic/
- Department of Probation, Parole, and Pardon Services - http://www.dppps.sc.gov/
  2221 Devine Street, Suite 600
  P.O. Box 50666 Columbia, SC 29250
  (803)734-9220
- Expungement Directory - www.scbar.org/LinkClick.aspx?fileticket=FVxtsmf8jIk%3d&tabid=1034
- South Carolina Statutes -
  Pardons: S.C. Code §24-21-5 et seq.
  Uniform Expungement of Criminal Records Act: S.C. Code Ann. § 17-22-910 et seq

[119] See S.C. Code Ann. §§ 17-22-940(B) (Administrative fee exemption), 940(F)(1) (SLED fee exemption) , and 940(I) (filing fee exemption).

Military

Each branch of the military has different regulations relating to treatment of criminal records. The military requires individuals to disclose all arrests, charges, convictions, juvenile adjudications, traffic violations, probation, dismissed charges, expunged and pardoned offenses. Conduct waivers may be available for certain charges. Waiver availability and waiting periods change based on the needs of the military, so it is necessary to check with local recruiting offices to get the most current information.

Army – 1-888-550-ARMY or contact the local recruitment office.

Navy – 1-800-USA-NAVY or contact the local recruitment office.

Air Force – 1-800-423-8723 or contact the local recruitment office.

Air National Guard – 1-803-806-4221 or contact the local recruitment office.

U.S. Coast Guard – 1-800-438-8724 or contact the local recruitment office.

Immigration

Any person who is not a citizen of the United States can be deported from the country, or denied the opportunity to obtain, or even change, his or her legal status in the United States. This includes, but is not limited to, those who are undocumented, those who have Visas, and those who are lawful permanent residents.

An undocumented immigrant who entered the U.S. without inspection is removable regardless of the outcome of any criminal case. If she's been here for more than 6 months, she is also subject to at least a 3-year bar to reentry. Whether at the end of that period she could apply for a Visa depends on whether she would be "admissible."

An immigrant who enters legally must still be concerned with deportability and the effect the criminal justice system could have on his ability to become a U.S. Citizen.

Criminal defense attorneys should keep in mind the 2010 Supreme Court case *Padilla v. Kentucky*.[120] *Padilla* held that criminal defense attorneys must advise non-citizen clients of the potential deportation risks of a guilty plea.[121] While criminal defense attorneys are not expected to become experts in immigration law, they are required to inform their clients of potentially adverse collateral consequences of their criminal charge, at least in terms of immigration issues. Criminal defense attorneys may want to look into this issue further as it may better inform plea negotiations that will eliminate deportation risk. It is also important to note that this case, though it deals solely with immigration issues, may provide important insight for challenges to other collateral consequences.

While this guide is not intended to list every possible crime that carries an adverse risk, it can provide a general outline. In general terms, there are certain crimes and convictions that can place a non-citizen at risk for deportation and can also make one inadmissible.

Aggravated felonies – will result in deportation and inadmissibility

- The crime must carry a punishment of one year or more (thus many misdemeanors can fall under this category);
- The person does not have to be confined in prison to be able to be deported or be inadmissible;
- The person in this situation could receive a suspended sentence of one year or more and be deported or deemed inadmissible;

The list of aggravated felonies is detailed in the Immigration and Nationality Act.[122] Keep in mind, though, that the list may not contain all crimes that would be considered aggravated felonies for deportation purposes. One would also have to look at the South Carolina Code and determine what a "felony" is for purposes of deportation or inadmissibility. Certain juvenile adjudications or diversion programs may reduce exposure to deportation.

Crimes involving moral turpitude (CIMT) – could make someone either deportable or inadmissible

- No statutory definition for CIMT;
- Crimes typically involve base or vile acts;
- The crime must be punishable with a sentence of one year or more;

[120] Padilla v. Kentucky, 559 U.S. 356 (2010).
[121] *Id.*
[122] 8 U.S.C. § 1101 et seq. (2006).

- One must examine the crime as it is defined by the elements in the criminal statute - not the person's actual conduct.

Examples are:

- Crimes that involve intent to defraud or steal;
- Crimes that involve intentional or reckless infliction of harm to a person or property;
- Crimes involving malice or lewdness.

It should be noted that there is no requirement that a person actually serve time for a CIMT. The person could be deemed deportable or inadmissible even if he or she received a fine or probation. A person may become inadmissible without even a conviction, simply by admitting that he or she committed a crime.

Controlled substances – can make someone deportable or inadmissible

- A onetime exception for possession of marijuana for personal use of 30 grams or less (only for those who are deportable) (**be aware of the distinction in SC where the inference weight for PWID is >28.6**)[123];
- Non-citizens who are drug users or addicts are inadmissible;
- May be deportable or inadmissible even without a conviction;
- Conviction of a felony drug offense in South Carolina also makes non-citizens deportable as an aggravated felony conviction.

In South Carolina, the personal use of 30 grams would not necessarily be an exception. This is because in South Carolina anything over 28.6 grams is generally inferred to be possession with intent to distribute.[124]

In cases involving controlled substances, a conviction is not always necessary to make a person deportable or inadmissible. If a person makes a formal, knowing admission of a drug offense to a Department of State or a Department of Homeland Security official then they are at risk. For a knowing admission, the person must voluntarily admit to the elements of the offense after the official explains the offense in plain terms. A non-citizen can also be at risk, and become permanently barred, if a Department of State or a Department of Homeland Security official has "reason to believe" that the non-citizen is or was a drug trafficker.

Domestic violence – can make someone deportable, as can the following:

- Stalking; or
- Child abuse; or
- Violations of orders of protection

Firearms charges – can make someone deportable

Naturalization: A non-citizen trying to become naturalized can also be affected by crimes and convictions. Anyone who wants to become naturalized has to meet several requirements, one of which is good moral character. Conviction of an aggravated felony is a permanent bar to proving good moral character.

Examples of crimes that might show a lack of good moral character:

- Any crime against a person with intent to harm;

[123] *See* S.C. Code Ann. § 44-53-370 (2012).
[124] *Id.*

- Any crime against property or the Government that involves "fraud" or evil intent;
- Violating any controlled substance law;
- Habitual drunkenness or drunk driving;
- Illegal gambling;
- Prostitution;
- Polygamy;
- Confinement in jail, prison, or similar institution for which the total confinement was 180 days or more;
- Failing to complete any probation, parole, or suspended sentence; or
- Criminal domestic violence (above).

The list of crimes contained here are the most common types of crimes that are considered when a non-citizen is trying to get some type of status in the United States, or become naturalized. There are many others. It is best to look to the Immigration and Nationality Act if there are any concerns, or in the alternative, contact an immigration attorney.

For More Information:

- Katherine Brady & Dan Kesselbrenner, *Grounds of Deportability and Inadmissibility Related to Crimes*, MULTI-TRACK FED. CRIM. DEF. TRAINING (Sept. 2008), *available at* http://www.fd.org/pdf_lib/MT08/MT08_GroundsDeportabilityInadmissibilityCrimes.pdf.
- Immigration and Nationality Act, 8 U.S.C. Section 1101 (2003).
- S.C. CODE ANN. 16-1-10 (1976).
- S.C. CODE ANN. 44-53-370 (1976).

PRETRIAL INTERVENTION (PTI)
REQUIREMENTS

All potential participants must call to make an appointment to apply to the program.

Contact: Terrie P. Frost, PTI Director
Sixth Circuit Solicitor's Office
Chester County Courthouse, 4th Floor
140 Main Street
Chester, SC 29706
803-377-1141

At time of application: Applicant must bring with them:
Warrant/Ticket
Driver's License or Picture ID from Highway Dept.
Social Security Card
Applicant must pay the $100.00 application fee at that time
(Cash or money order **ONLY)**

Once accepted into the PTI Program MINIMUM requirements are as follows:

Applicant will pay the program participation fee in the amount of $250.00 at the time of orientation. (Cash, money order ONLY)

Applicant will be responsible for **a minimum of 30 (or more) hours of community service** at a non-profit organization and/or agency.

Applicant will attend and complete a **16 hour group counseling session** and will be responsible to pay a $75.00 group fee. ***A drug screen is included in this fee.***

Other potential requirements include but are not limited to Narcotics Anonymous meetings, General Sessions Court observation, and restitution. Applicant will also be required to complete any other terms and/or conditions of the PTI Contract.

Once the applicant has completed all requirements of the PTI contract, the charge will be dismissed. The applicant then has the opportunity to have the charge expunged from their record. **The expungement fee is $285.00.**

Total fees for the program: (This does not include any amounts for potential restitution.)

Application fee:	$100.00
Program Fee:	$250.00
Counseling fee:	$ 75.00
Expungement fee:	$285.00
	$710.00

ALL FEES ARE NON-REFUNDABLE

ALCOHOL EDUCATION PROGRAM
REQUIREMENTS

All potential participants must call to make an appointment to apply to the program.

Contact: Terrie P. Frost, AEP Director
Sixth Circuit Solicitor's Office
Chester County Courthouse, 4th Floor
140 Main Street
Chester, SC 29706
803-377-1141

At time of application: Applicant must bring with them:
Warrant/Ticket
Picture ID
Social Security Card
Applicant must pay the $250.00 program fee at time of application.
(Cash, money order
or certified bank check **ONLY**)

Once accepted into the AEP Program:

Applicant will be responsible for **15 hours of community service** at a non-profit organization and/or agency.

Applicant must also attend and pay for:

Alive @ 25 - $35.00 (defensive driving class through the National Safety Council which is held in Irmo, South Carolina, or York, South Carolina)

8 hour alcohol education class - $100.00. This class is scheduled by Hazel Pittman Center of Chester.

Once the applicant has completed these requirements of the AEP Program, the charge will be dismissed. The applicant then has the opportunity to have the charge expunged from their record. **The expungement fee is $285.00**.

Total fees for the program:

Program fee:	$250.00
Alive @ 25	35.00
8 hr. alcohol education	100.00
Expungement fee	285.00
	$670.00

ALL FEES ARE NON-REFUNDABLE

OFFICE OF THE SOLICITOR
SIXTH JUDICIAL CIRCUIT
DOUGLAS A. BARFIELD, JR., SOLICITOR

TRAFFIC EDUCATION PROGRAM

The Progam

The Sixth Circuit Solicitor's Office Traffic Education Program is a diversion program which allows a driver who has been issued a traffic ticket to receive education on safe driving practices and to perform community service rather than requiring him or her to appear in court for disposition of the ticket. Successful completion of the program results in dismissal of the ticket and preservation of the driver's good driving record.

Eligibility

A person who is charged with a traffic related offense punishable only by a fine and the loss of four points or less and which did not result in death or serious bodily injury to another person is eligible. The applicant must not have any points on his or her driving record at the time application is made. A person may participate in the program only once. If the participant violates the conditions of the program, his or her participation will be terminated and the traffic related offense will be prosecuted in court. If the participant receives a subsequent traffic violation during the six months following the date of the issuance of the ticket for which he or she has entered the program, his or her participation will be terminated and the traffic related offense will be prosecuted in court.

Requirements

Each participant must complete a four-hour Traffic Education Program course conducted by York County 9-1-1 Driving School. The school's website is www.911DrivingSchool.com and its locations are

2000 Highway 160 West, Suite 106
Fort Mill, South Carolina 29708
803-802-9001

1348 Ebenezer Road, Suite 102
Rock Hill, South Carolina 29732
803-339-9110

Each participant must also complete four hours of community service at a nonprofit agency. The Sixth Circuit Solicitor's Office will provide participants with referrals to appropriate agencies for community service.

Costs

The total cost to complete the Sixth Circuit Solicitor's Office Traffic Education Program is $280.00, which included a $140.00 application fee and a $140.00 participation fee. Both fees are payable at the time application is made and are nonrefundable. Payment must be made in two separate money orders of $140.00 each made payable to "Traffic Education Program." A separate fee of $35.00 will be charged by York County 9-1-1 Driving School and will be collected from the participant by the school when the participant enrolls in the course.

Enrollment

To apply for the Sixth Circuit Solicitor's Office Traffic Education Program applicants should contact this office to schedule an appointment. Applicants who were written tickets in Chester and Fairfield Counties should contact Terrie Frost at

Sixth Circuit Solicitor's Office
Chester County Courthouse
140 Main Street
Chester, South Carolina
803-377-1141

Applicants who were written tickets in Lancaster County should contact Julie Small at

Sixth Circuit Solicitor's Office
Lancaster County Courthouse
104 North Main Street
Lancaster, South Carolina
803-416-9367

Applicants must provide the above fees, a copy of the traffic ticket, photographic identification card, and a social security card or some other official document bearing the applicant's name and social security number such as a paycheck stub at the time application is made. The application will not be accepted if the applicant does not provide each of these items. Application arrangements can be made for the applicants who reside in counties other than Chester, Fairfield, and Lancaster. Participants must contact York County 9-1-1 Driving School directly to enroll in the course.

Completion

When an applicant successfully completes all requirements of the Sixth Circuit Solicitor's Office Traffic Education Program, the office will notify the court of the completion and direct the court to dismiss the traffic related offense.

SECTION 44-53-450. Conditional discharge; eligibility for expungement.

(A) Whenever any person who has not previously been convicted of any offense under this article or any offense under any state or federal statute relating to marijuana, or stimulant, depressant, or hallucinogenic drugs, 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), the court, without entering a judgment of guilt and with the consent of the accused, may defer further proceedings and place him on probation upon terms and conditions as it requires, including the requirement that such person cooperate in a treatment and rehabilitation program of a state-supported facility or a facility approved by the commission, if available. Upon violation of a term or condition, the court may enter an adjudication of guilt and proceed as otherwise provided. Upon fulfillment of the terms and conditions, the court shall discharge the person and dismiss the proceedings against him. Discharge and dismissal under this section shall be without court adjudication of guilt and is not a conviction for purposes of this section or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime, including the additional penalties imposed for second or subsequent convictions. However, a nonpublic record shall be forwarded to and retained by the Department of Narcotic and Dangerous Drugs under the South Carolina Law Enforcement Division solely for the purpose of use by the courts in determining whether or not a person has committed a subsequent offense under this article. Discharge and dismissal under this section may occur only once with respect to any person.

(B) Upon the dismissal of the person and discharge of the proceedings against him pursuant to subsection (A), the person may apply to the court for an order to expunge from all official records (other than the nonpublic records to be retained as provided in subsection (A)) all recordation relating to his arrest, indictment or information, trial, finding of guilty, and dismissal and discharge pursuant to this section. If the court determines, after hearing, that the person was dismissed and the proceedings against him discharged, it shall enter the order. The effect of the order is to restore the person, in the contemplation of the law, to the status he occupied before the arrest or indictment or information. No person as to whom the order has been entered may be held pursuant to another provision of law to be guilty of perjury or otherwise giving a false statement by reason of his failure to recite or acknowledge the arrest, or indictment or information, or trial in response to an inquiry made of him for any purpose.

(C) Before a person may be discharged and the proceedings dismissed pursuant to this section, the person must pay a fee of three hundred fifty dollars if the person is in a general sessions court and one hundred fifty dollars if the person is in a summary court. No portion of the fee may be waived, reduced, or suspended, except in cases of indigency. If the court determines that a person is indigent, the court may partially or totally waive, reduce, or suspend the fee. The revenue collected pursuant to this subsection must be retained by the jurisdiction that heard or processed the case and paid to the State Treasurer within thirty days of receipt. The State

Treasurer shall transmit these funds to the Prosecution Coordination Commission which shall then apportion these funds among the sixteen judicial circuits on a per capita basis equal to the population in that circuit compared to the population of the State as a whole based on the most recent official United States census. The funds must be used for drug treatment court programs only. The amounts generated by this subsection are in addition to any amounts presently being provided for drug treatment court programs and may not be used to supplant funding already allocated for these services. The State Treasurer may request the State Auditor to examine the financial records of a jurisdiction which he believes is not timely transmitting the funds required to be paid to the State Treasurer pursuant to this subsection. The State Auditor is further authorized to conduct these examinations and the local jurisdiction is required to participate in and cooperate fully with the examination.

HISTORY: 1962 Code Section 32-1510.57; 1971 (57) 800; 1974 (58) 2284; 2009 Act No. 36, Section 7, eff June 2, 2009; 2010 Act No. 273, Section 40, eff June 2, 2010.

ARTICLE 3.

TRAFFIC EDUCATION PROGRAM

SECTION 17-22-300. Citation of article.

This article may be cited as the "Traffic Education Program Act".

HISTORY: 2008 Act No. 176, Section 2, eff 90 days after Governor's approval (approved February 4, 2008).

SECTION 17-22-310. Prosecutorial discretion of Circuit Solicitor to establish traffic education program; administration.

(A) Each circuit solicitor has the prosecutorial discretion as defined in this chapter and shall as a matter of prosecutorial discretion establish a traffic education program in the respective circuits for persons who commit traffic-related offenses that are punishable only by a fine and loss of four points or less. A person may not participate in a traffic education program if the person's traffic-related offense resulted in death or serious bodily injury to another person.

(B) The circuit solicitors are specifically endowed with and retain all discretionary powers pursuant to the common law.

(C) A traffic education program must be under the direct supervision and control of the circuit solicitor; however, the solicitor may contract for services with a county or municipality in the circuit.

(D) The South Carolina Commission on Prosecution Coordination shall oversee administrative procedures for the traffic education programs.

(E) A traffic education program must include both a community service and an educational component.

HISTORY: 2008 Act No. 176, Section 2, eff 90 days after Governor's approval (approved February 4, 2008).

SECTION 17-22-320. Eligibility.

(A) A person may be considered for a traffic education program if he has no significant history of traffic violations. A person may not participate in a traffic education program more than once.

(B) A person's participation in a traffic education program does not prevent his participation in a pretrial intervention program pursuant to the provisions and conditions of Article 1.

HISTORY: 2008 Act No. 176, Section 2, eff 90 days after Governor's approval (approved February 4, 2008); 2011 Act No. 55, Section 1, eff June 14, 2011.

SECTION 17-22-330. Disposition of traffic-related offense on completion of program; subsequent violation.

(A) When a person successfully completes a traffic education program, the governmental agency administering the program shall effect a noncriminal disposition, as defined in this chapter, of the traffic-related offense, and there must be no record maintained of the traffic-related offense except by the appropriate traffic education program in order to ensure that a person does not benefit from the provisions of this article more than once.

(B) If applicable, the person may apply to the court for an order to destroy all official records relating to his arrest.

(C) If a person violates the conditions of a traffic education program, then the person may be terminated from the program and the traffic-related offense reinstated by the governmental agency administering the program in the appropriate municipality or county.

(D) If a person receives a subsequent traffic violation during the six months following the issuance of the ticket for which he has entered the traffic education program, he must be terminated from the program and the traffic-related offense must be reinstated by the governmental agency administering the program in the appropriate municipality or county.

HISTORY: 2008 Act No. 176, Section 2, eff 90 days after Governor's approval (approved February 4, 2008).

SECTION 17-22-340. Office of Traffic Education Program Coordinator.

Each circuit solicitor may establish an Office of Traffic Education Program Coordinator whose responsibility is to assist in the establishment and maintenance of the traffic education program.

HISTORY: 2008 Act No. 176, Section 2, eff 90 days after Governor's approval (approved February 4, 2008).

SECTION 17-22-350. Fees; waiver; distribution of fee proceeds.

(A) A person shall pay a nonrefundable one hundred forty-dollar fee to apply for a traffic education program that cannot be reduced or suspended. Additionally, a person shall pay a nonrefundable fee, not to exceed one hundred forty dollars, to participate in a traffic education program. Participation in a traffic education program may not be denied due to a person's inability to pay. If a person is deemed unable to pay, both the application fee and the participation fee must be waived.

(B) For offenses that would have been otherwise tried in magistrates court, the governmental agency administering the program shall retain the participation fee to support the traffic education program. The application fees must be remitted to the county treasurer. The county treasurer shall remit 9.17 percent of the revenue from the application fees to the county to be used for the purposes set forth in Section 14-1-207(D) and remit the balance of the revenue from the application fees to the Office of the State Treasurer on a monthly basis, by the fifteenth day of each month, and make reports on a form and in a manner prescribed by the State Treasurer. Fees paid in installments must be remitted as received. The State Treasurer shall deposit the amounts received as follows:

(1) 23.62 percent to the Department of Probation, Parole and Pardon Services;

(2) 15.12 percent to the South Carolina Criminal Justice Academy;

(3) .44 percent to the Department of Public Safety's South Carolina Law Enforcement Officers Hall of Fame;

(4) 13.73 percent to the State Office of Victim Assistance;

(5) 6.01 percent to the General Fund;

(6) 10.97 percent to the Commission on Indigent Defense;

(7) 1.34 percent to the Attorney General's Office;

(8) .90 percent to the Department of Juvenile Justice Arbitration Program;

(9) .81 percent to the Department of Juvenile Justice Marine Institutes;

(10) .90 percent to the Department of Juvenile Justice Regional Status Offender Program;

(11) 3.95 percent to the Department of Juvenile Justice Coastal Evaluation Center;

(12) 6.74 percent to the Circuit Solicitors;

(13) 2.68 percent to the State Law Enforcement Division;

(14) 2.68 percent to the Department of Corrections;

(15) .67 percent to the Judicial Department;

(16) .28 percent to the Department of Natural Resources; and

(17) .02 percent to the Forestry Commission.

(C) For offenses that would have been otherwise tried in municipal court, the governmental agency administering the program shall retain the participation fees to support the traffic education program. The application fees must be remitted to the city treasurer. The city treasurer shall remit 9.17 percent of the revenue from the application fees to the municipality to be used for the purposes set forth in Section 14-1-208(D) and remit the balance of the revenues from the application fees to the Office of the State Treasurer on a monthly basis, by the fifteenth day of each month, and make reports on a form and in a manner prescribed by the State Treasurer. Fees paid in installments must be remitted as received. The State Treasurer must deposit the amounts received as follows:

(1) 10.25 percent to the Department of Probation, Parole and Pardon Services;

(2) 10.13 percent to the South Carolina Criminal Justice Academy;

(3) .26 percent to the Department of Public Safety's South Carolina Law Enforcement Officer's Hall of Fame;

(4) 7.57 percent to the State Office of Victim Assistance;

(5) 2.77 percent to the General Fund;

(6) 11.02 percent to the Commission on Indigent Defense;

(7) 1.07 percent to the Attorney General's Office;

(8) .65 percent to the Department of Mental Health;

(9) 7.64 percent for the programs established pursuant to Section 56-5-2953(E);

(10) 9.93 percent to the Governor's Task Force on Litter;

(11) 9.93 percent to the Department of Juvenile Justice;

(12) .90 percent to the Department of Juvenile Justice Arbitration Program;

(13) .81 percent to the Department of Juvenile Justice Marine Institutes;

(14) .90 percent to the Department of Juvenile Justice Regional Status Offender Program;

(15) 3.95 percent to the Department of Juvenile Justice Coastal Evaluation Center;

(16) 6.74 percent to the Circuit Solicitors;

(17) 2.68 percent to the State Law Enforcement Division;

(18) 2.68 percent to the Department of Corrections;

(19) .67 percent to the Judicial Department;

(20) .28 percent to the Department of Natural Resources; and

(21) .02 percent to the Forestry Commission.

HISTORY: 2008 Act No. 176, Section 2, eff 90 days after Governor's approval (approved February 4, 2008).

SECTION 17-22-360. Annual report.

Each governmental agency that administers a traffic education program shall submit a traffic education program annual report, by the first day of August, to the Commission on Prosecution Coordination providing the total number of participants by original traffic-related offenses, the total number of participants that successfully completed the traffic education program, the total amount of fees collected, and the total revenue remitted to the municipalities, counties, and Office of the State Treasurer for the state's fiscal year. The Commission on Prosecution Coordination may establish additional guidelines for the annual reports. The annual reports must be made available for public inspection.

HISTORY: 2008 Act No. 176, Section 2, eff 90 days after Governor's approval (approved

February 4, 2008).

SECTION 17-22-370. Submission of information necessary for creation and maintenance of list of participants.

Each governmental agency that administers a traffic education program shall submit to the Commission on Prosecution Coordination necessary identifying information on each participant for the creation and maintenance of a list of participants in traffic education programs. This list is to be used by the commission for the sole purpose of complying with Section 17-22-320(A). The information collected by the commission only may be released to a governmental agency administering the program for the purpose of determining eligibility for a traffic education program.

HISTORY: 2008 Act No. 176, Section 2, eff 90 days after Governor's approval (approved February 4, 2008).

Title 17 - Criminal Procedures

CHAPTER 22.

INTERVENTION PROGRAMS

ARTICLE 1.

PRETRIAL INTERVENTION

SECTION 17-22-10. Short title.

This article may be cited as the "Pretrial Intervention Act."

HISTORY: 1980 Act No. 360, Section 2.

SECTION 17-22-20. Definitions.

When used in this chapter:

(1) The term "prosecutorial discretion" shall mean the power of the circuit solicitor to consider all circumstances of criminal proceedings and to determine whether any legal action is to be taken and, if so taken, of what kind and degree and to what conclusion.

(2) The term "noncriminal disposition" shall mean the dismissal of a criminal charge without prejudice to the State to reinstate criminal proceedings on motion of the solicitor.

HISTORY: 1980 Act No. 360, Section 3.

SECTION 17-22-30. Circuit solicitors to establish pretrial intervention programs; oversight of administrative procedures.

(A) Each circuit solicitor shall have the prosecutorial discretion as defined herein and shall as a matter of such prosecutorial discretion establish a pretrial intervention program in the respective circuits.

(B) The circuit solicitors are specifically endowed with and shall retain all discretionary powers under the common law.

(C) A pretrial intervention program shall be under the direct supervision and control of the circuit solicitor; however, he may contract for services with any agency desired.

(D) The South Carolina Commission on Prosecution Coordination shall oversee administrative procedures for the Circuit Solicitors' Pretrial Intervention Programs.

HISTORY: 1980 Act No. 360, Section 4; 1992 Act No. 453, Section 1; 1992 Act No. 499, Section 1.

SECTION 17-22-40. Pretrial intervention coordinator; staff; funding.

There is established the office of Pretrial Intervention Coordinator whose responsibility is to assist the solicitor in each judicial circuit in establishing and maintaining a pretrial intervention program. The office of Pretrial Intervention Coordinator must be within the South Carolina Commission on Prosecution Coordination. The coordinator and such staff as is necessary to assist in the implementation of the provisions of this article must be employed by the South Carolina Commission on Prosecution Coordination. The office of the coordinator must be funded by an appropriation to the Commission on Prosecution Coordination in the state general appropriation act.

HISTORY: 1980 Act No. 360, Section 5; 1982 Act No. 421, Section 7; 1992 Act No. 453, Section 2; 1992 Act No. 499, Section 2.

SECTION 17-22-50. Persons not to be considered for intervention.

(A) A person must not be considered for intervention if:

(1) he previously has been accepted into an intervention program; or

(2) the person is charged with:

(a) blackmail;

(b) driving under the influence or driving with an unlawful alcohol concentration;

(c) a traffic-related offense which is punishable only by fine or loss of points;

(d) a fish, game, wildlife, or commercial fishery-related offense which is punishable by a loss of eighteen points as provided in Section 50-9-1020;

(e) a crime of violence as defined in Section 16-1-60; or

(f) an offense contained in Chapter 25 of Title 16 if the offender has been convicted previously

of a violation of that chapter or a similar offense in another jurisdiction.

(B) However, this section does not apply if the solicitor determines the elements of the crime do not fit the charge.

HISTORY: 1980 Act No. 360, Section 6; 1982 Act No. 421, Section 1; 1985 Act No. 106, Section 1; 1992 Act No. 453, Section 3; 1992 Act No. 499, Section 3; 2003 Act No. 92, Section 4, eff January 1, 2004; 2008 Act No. 201, Section 17, eff at 12:00 p.m. on February 10, 2009.

SECTION 17-22-55. Additional conditions for admission to pretrial intervention of person charged with fish, game, wildlife, or commercial fishery-related offense.

As a condition of admission to the pretrial intervention program of a person charged with a fish, game, wildlife, or commercial fishery-related offense which does not disqualify him for intervention, this person shall pay an additional administrative charge equal to the maximum monetary fine, not to exceed five hundred dollars, which could be imposed for the offense. The administrative charge must be deposited in the game and fish fund of the county where the offense was committed. Also, if any property was seized and confiscated at the time of the arrest for the offense, as a condition of admission to the pretrial intervention program, the offender must agree to the retention and sale of that property as provided by law by the law enforcement agency making the seizure. The proceeds from the sale also must be deposited in the game and fish fund of the county wherein the offense was committed.

HISTORY: 1992 Act No. 499, Section 4.

SECTION 17-22-60. Standards of eligibility for intervention program.

Intervention is appropriate only where:

(1) there is substantial likelihood that justice will be served if the offender is placed in an intervention program;

(2) it is determined that the needs of the offender and the State can better be met outside the traditional criminal justice process;

(3) it is apparent that the offender poses no threat to the community;

(4) it appears that the offender is unlikely to be involved in further criminal activity;

(5) the offender, in those cases where it is required, is likely to respond quickly to rehabilitative

treatment;

(6) the offender has no significant history of prior delinquency or criminal activity;

(7) the offender has not previously been accepted in a pretrial intervention program.

HISTORY: 1980 Act No. 360, Section 7; 1992 Act No. 453, Section 4; 1992 Act No. 499, Section 5; 1995 Act No. 7, Part I Section 22.

SECTION 17-22-70. Information which may be required by solicitor.

Prior to admittance of an offender into an intervention program, the solicitor or judge, if application is made to the court pursuant to Section 17-22-100, may require the offender to furnish information concerning the offender's past criminal record, education and work record, family history, medical or psychiatric treatment or care received, psychological tests taken and other information which, in the solicitor's or judge's opinion, has bearing on the decision as to whether the offender should be admitted. Solicitor's office records under this section shall adhere to and abide by Federal Confidentiality Regulation 42 CFR Part 2 and any other applicable federal, state, or local regulations.

HISTORY: 1980 Act No. 360, Section 8; 1982 Act No. 421, Section 2; 1992 Act No. 453, Section 5; 1992 Act No. 499, Section 6.

SECTION 17-22-80. Recommendations of victim and law enforcement agency.

Prior to any person being admitted to a pretrial intervention program the victim, if any, of the crime for which the applicant is charged and the law enforcement agency employing the arresting officer shall be asked to comment in writing as to whether or not the applicant should be allowed to enter an intervention program. In each case involving admission to an intervention program, the solicitor or judge, if application is made to the court pursuant to Section 17-22-100, shall consider the recommendations of the law enforcement agency and the victim, if any, in making a decision.

HISTORY: 1980 Act No. 360, Section 9; 1992 Act No. 453, Section 6; 1992 Act No. 499, Section 7.

SECTION 17-22-90. Agreements required of offender in program.

An offender who enters an intervention program shall:

(1) waive, in writing and contingent upon his successful completion of the program, his right to a speedy trial;

(2) agree, in writing, to the tolling while in the program of all periods of limitation established by statutes or rules of court;

(3) agree, in writing, to the conditions of the intervention program established by the solicitor;

(4) in the event there is a victim of the crime, agree, in writing, to make restitution to the victim within a specified period of time and in an amount to be determined by the solicitor;

(5) agree, in writing, that records relating to participation in pretrial intervention or information obtained through pretrial intervention is not admissible as evidence in subsequent proceedings, criminal or civil, and communication between pretrial intervention counselors and defendants shall remain as privileged communication unless a court of competent jurisdiction determines that there is a compelling public interest that the communication be revealed. A written admission of guilt may not be required of a defendant before acceptance or completion of the pretrial intervention program;

(6) if the offense is criminal sexual conduct with a minor in the third degree pursuant to Section 16-3-655(C), agree in the agreement between the solicitor's office and the offender as provided in Section 17-22-120 to allow information about the offense to be made available to day care centers, group day care homes, family day care homes, church or religious day care centers, and other facilities providing care to children and related agencies by the State Law Enforcement Division pursuant to regulations which the State Law Enforcement Division shall promulgate; and

(7) if the offense is first offense criminal domestic violence pursuant to Section 16-25-20, agree in writing to successful completion of a batterer's treatment program approved by the Department of Social Services.

HISTORY: 1980 Act No. 360, Section 10; 1982 Act No. 421, Section 3; 1996 Act No. 444, Section 3; 2005 Act No. 166, Section 6, eff January 1, 2006; 2012 Act No. 255, Section 3, eff June 18, 2012.

SECTION 17-22-100. Time for application to intervention program.

An offender must make application to an intervention program or to the chief administrative judge of the court of general sessions no later than seventy-five days after service of the warrant or within ten days following appointment of counsel for the charge for which he makes the

application. However, in the discretion of the solicitor or the chief administrative judge of the court of general sessions, if application is made directly to the judge, the provisions of this section may be waived. Applications received by the chief administrative judge of the court of general sessions under this section may be preliminarily approved by the judge pending a determination by the pretrial office that the offender is eligible to participate in a pretrial program pursuant to Sections 17-22-50 and 17-22-60. Applications received by the chief administrative judge of the court of general sessions and information obtained pursuant to Section 17-22-70 must be forwarded to the pretrial office.

HISTORY: 1980 Act No. 360, Section 11; 1992 Act No. 453, Section 7; 1992 Act No. 499, Section 8.

SECTION 17-22-110. Fees for application and participation; waiver.

An applicant to an intervention program or an offender who applies to the chief administrative judge of the court of general sessions for admission to a program pursuant to Section 17-22-100 shall pay a nonrefundable application fee of one hundred dollars and, if accepted into the program, a nonrefundable participation fee of two hundred fifty dollars prior to admission. All fees paid must be deposited into a special circuit solicitor's fund for operation of the pretrial intervention program. All fees or costs of supervision may be waived partially or totally by the solicitor in cases of indigency. The solicitor may also, if he determines necessary, in situations other than indigency allow scheduling of payments in lieu of lump sum payment. In no case shall aggregate fees for application and participation in an intervention program exceed three hundred fifty dollars. However, in cases where the solicitor determines that referral to another agency or program is needed to achieve rehabilitation for a problem directly related to the charge, the defendant may be required to pay his participation in that special program, except that no services may be denied due to inability to pay.

HISTORY: 1980 Act No. 360, Section 12; 1982 Act No. 421, Section 4; 1987 Act No. 57 Section 1; 1992 Act No. 453, Section 8; 1992 Act No. 499, Section 9; 1997 Act No. 59, Section 1.

SECTION 17-22-120. Individual agreement between offender and solicitor; alcohol and drug abuse services.

In any case in which an offender agrees to an intervention program, a specific agreement must be made between the solicitor and the offender. This agreement shall include the terms of the intervention program, the length of the program and a section stating the period of time after which the prosecutor will either dismiss the charge or seek a conviction based upon that charge. The agreement must be signed by the offender and his or her counsel, if represented by counsel,

and filed in the solicitor's office. The Commission on Alcohol and Drug Abuse shall provide training if requested on the recognition of alcohol and drug abuse to counselor employees of local pretrial intervention programs and the local agency authorized by Section 61-12-20 shall provide services to alcohol and drug abusers if referred by pretrial intervention programs. However, no services may be denied due to an offender's inability to pay.

HISTORY: 1980 Act No. 360, Section 13; 1992 Act No. 453, Section 9; 1992 Act No. 499, Section 10.

SECTION 17-22-130. Reports and identification as to offenders accepted for intervention program.

Notwithstanding the provisions of Section 17-1-40, in all cases where an offender is accepted for intervention a report must be made and retained on file in the solicitor's office, regardless of whether or not the offender successfully completes the intervention program. All reports must be retained on file in the solicitor's office for a period of two years after successful completion, two years after rejection, or two years after unsuccessful completion of the program. After the retention of these reports for two years, they may be destroyed. The circuit solicitor shall furnish to the South Carolina Law Enforcement Division personal identification information on each person who applies for intervention, is subsequently accepted or rejected and successfully or unsuccessfully completes the program. This information may only be used by the division and the State Coordinator's Office in those cases where a circuit solicitor inquires as to whether a person has previously been accepted in an intervention program. However, that information may be confidentially released to the State Coordinator's Office to assist in compiling annual reports. The identification information on any defendant must not be under any circumstances released as public knowledge.

HISTORY: 1980 Act No. 360, Section 14; 1982 Act No. 421, Section 5; 1992 Act No. 453, Section 10; 1992 Act No. 499, Section 11.

SECTION 17-22-140. Restitution to victim.

Prior to the completion of the pretrial intervention program the offender shall make restitution, as determined by the solicitor, to the victim, if any.

HISTORY: 1980 Act No. 360, Section 15.

SECTION 17-22-150. Disposition of charges against offenders accepted for intervention program.

(a) In the event an offender successfully completes a pretrial intervention program, the solicitor shall effect a noncriminal disposition of the charge or charges pending against the offender. Upon such disposition, the offender may apply to the court for an order to destroy all official records relating to his arrest and no evidence of the records pertaining to the charge may be retained by any municipal, county, or state entity or any individual, except as otherwise provided in Section 17-22-130. The effect of the order is to restore the person, in the contemplation of the law, to the status he occupied before the arrest. No person as to whom the order has been entered may be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of his failure to recite or acknowledge the arrest in response to any inquiry made of him for any purpose.

(b) In the event the offender violates the conditions of the program agreement: (1) the solicitor may terminate the offender's participation in the program, (2) the waiver executed pursuant to Section 17-22-90 shall be void on the date the offender is removed from the program for the violation and (3) the prosecution of pending criminal charges against the offender shall be resumed by the solicitor.

HISTORY: 1980 Act No. 360, Section 16; 1982 Act No. 421, Section 6; 1992 Act No. 453, Section 11; 1992 Act No. 499, Section 12.

SECTION 17-22-170. Unlawful retention or release of information regarding participation in intervention program; penalty.

Any municipal, county, or state entity or any individual who unlawfully retains or releases information on an offender's participation in a pretrial intervention program is guilty of a misdemeanor and, upon conviction, must be punished by a fine not exceeding two thousand dollars or by imprisonment not to exceed one year.

The provisions of this section do not apply to circuit solicitors or their staff in the performance of their official duties.

HISTORY: 1992 Act No. 453, Section 12; 1992 Act No. 499, Section 13.

STATE OF SOUTH CAROLINA)
)
COUNTY OF _____)
STATE)
V.)
_____)
)
AKA: _____)
)
RACE: _____ SEX: _____ AGE: _____)
)
DOB: _____ SSN: _____)
)
ADDRESS: _____)
)
CITY, STATE, ZIP: _____)
)
DL: _____ SID# _____)

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE # _____-GS-_____-_____

A/W# _____

Date of Offense: _____

S.C. Code §: _____

CDR Code #:_____

CONDITIONAL DISCHARGE

(§44-53-450, SC Code)

☐ Defendant Represented by PD/Appointed Counsel ☐ Defendant paid the $500 PD fee ☐ Defendant paid the $350.00 CD Fee
The charge is: ☐ As Indicted, ☐ Defendant Waives Presentment to Grand Jury_____ (defendant's initials)

OFFENSE: _____**,** as set forth in § (check applicable statute) ☐ 44-53-0370(c) ☐ 44-53-0370(d)(1) ☐ 44-53-0370(d)(2) ☐ 44-53-0370(d)(3) ☐ 44-53-0370(d)(4) ☐ 44-53-375(A) of the South Carolina Code of Laws, bearing CDR Code # _____. This Court finds that this offense qualifies for a conditional discharge because: (1) the Defendant has not previously been convicted of any offense under this article or any offense under any State or Federal statute relating to marijuana or stimulant, depressant or hallucinogenic drugs, and (2) the current offense is possession of a controlled substance under either Sections 44-53-370(c) and (d), or Section 44-53-375 (A), SC Code.

WHEREFORE, the Court, without entering a judgment of guilt and with the consent of the Defendant, hereby defers further proceedings and places the Defendant on probation upon the terms and conditions hereinafter required. Upon fulfillment of the terms and conditions, and payment of the $350 fee described in Section 44-53-450(C), the Court shall discharge the Defendant and dismiss the proceedings against him. Upon violation of a term or condition, the Court may enter an adjudication of guilt and proceed as otherwise provided by law.

The Defendant is hereby placed on probation for a period of _____ days/months/years, under the supervision of the South Carolina Department of Probation, Parole and Pardon Services and its Agents, subject to the provisions of the laws of South Carolina, and subject to the Department's standard conditions of probation, which are incorporated by reference, and any other conditions set forth below.

ADDITIONAL CONDITIONS: _____

_____

The conditions of probation begin today. The Sheriff or other law enforcement officer who has custody of the Defendant is hereby ordered to deliver said Defendant to the Probation Office of this County, or if the Defendant is under bond, then such bond shall remain in full force until the Defendant reports to the Probation Office. It is further ordered that the Clerk of Court file this Order in his or her office and forthwith provide a copy to the county office of the Department.

_____ **PRESIDING JUDGE:** _____
Clerk of Court/Deputy Clerk

Judge Code: _____

Court Reporter: _____ **Proceeding Date:** _____

The defendant is advised that upon violation of a term or condition of this probation, the Court may enter an adjudication of guilt and proceed as otherwise provided by law. The Defendant shall be subject to arrest upon the order of the Court, or upon a warrant issued by the probation agent pursuant to § 24-21-450, SC Code, or alternatively may be served with a citation issued by the probation agent pursuant to § 24-21-300, SC Code.

By signing below, the Defendant certifies that he has read, or had read to him, this Conditional Discharge Order and the conditions set out herein. He further agrees to comply with each condition during the period of probation, and consents to a Conditional Discharge under § 44-53-450, SC Code.

Solicitor	SC Bar #	Defendant	Attorney for Defendant	SC Bar #

ARTICLE 5.

ALCOHOL EDUCATION PROGRAM

SECTION 17-22-500. Citation of article.

This article may be cited as the "Alcohol Education Program Act".

HISTORY: 2007 Act No. 35, Section 2, eff June 6, 2007.

SECTION 17-22-510. Prosecutorial discretion of Circuit Solicitor to establish alcohol education program; administration.

(A) Each circuit solicitor has the prosecutorial discretion as defined in this chapter and shall as a matter of prosecutorial discretion establish an alcohol education program in the respective circuits for persons who commit certain alcohol-related offenses.

(B) The circuit solicitors are specifically endowed with and retain all discretionary powers pursuant to the common law.

(C) An alcohol education program must be under the direct supervision and control of the circuit solicitor; however, the solicitor may contract for education and supervision services.

(D) The South Carolina Commission on Prosecution Coordination shall oversee administrative procedures for the alcohol education programs. The commission shall consult with the Department of Alcohol and Other Drug Abuse Services before the approval of these administrative procedures.

(E) An alcohol education program must include an educational and community service component.

HISTORY: 2007 Act No. 35, Section 2, eff June 6, 2007.

SECTION 17-22-520. Eligibility requirements for consideration for program.

(A) A person may be considered for an alcohol education program if he:

(1) is at least seventeen years of age but less than twenty-one years of age at the time of arrest;

(2) has no prior alcohol-related offenses; and

(3) has no significant history of prior delinquency or criminal activity on his record.

(B) A person may not participate in an alcohol education program more than once.

(C) A person may be considered for an alcohol education program if he is charged with a violation of the following offenses:

(1) purchase or possession of beer or wine by a person under the age of twenty-one pursuant to Section 63-19-2440;

(2) purchase or possession of alcoholic liquors by a person under the age of twenty-one pursuant to Section 63-19-2450;

(3) open container in a motor vehicle pursuant to Section 61-4-110;

(4) public disorderly conduct pursuant to Section 16-17-530;

(5) littering pursuant to Section 16-11-700;

(6) providing false information concerning age to purchase beer or wine pursuant to Section 61-4-60;

(7) unlawful purchase of beer or wine for a person who cannot legally buy for consumption on the premises pursuant to Section 61-4-80;

(8) transfer of beer or wine for underage person's consumption pursuant to Section 61-4-90;

(9) transfer of alcoholic liquors for underage person's consumption pursuant to Section 61-6-4070;

(10) possession of an altered driver's license or other false documentation pursuant to Section 56-1-515; and

(11) another offense similar in nature and severity to the above-described offenses, as determined by the circuit solicitor. However, the provisions of this item may not be construed to include an offense enumerated in Section 56-5-2930 or Section 56-5-2933.

(D) A person's participation in an alcohol education program does not prevent his participation in a pretrial intervention program pursuant to the provisions and conditions of Article 1.

HISTORY: 2007 Act No. 35, Section 2, eff June 6, 2007.

SECTION 17-22-530. Disposition of alcohol-related offense on completion of program.

(A) When a person successfully completes an alcohol education program, the circuit solicitor shall effect a noncriminal disposition, as defined in this chapter, of the alcohol-related offense, and there must be no record maintained of the alcohol-related offense except by the Commission on Prosecution Coordination in order to ensure that a person does not benefit from the provisions of this article more than once.

(B) If applicable, the person may apply to the court for an order to destroy all official records relating to his arrest.

(C) If a person violates the conditions of an alcohol education program, the person may be terminated from the program and the alcohol-related offense reinstated by the circuit solicitor in the appropriate municipality or county.

HISTORY: 2007 Act No. 35, Section 2, eff June 6, 2007.

SECTION 17-22-540. Office of Alcohol Education Program Coordinator.

Each circuit solicitor may establish an Office of Alcohol Education Program Coordinator whose responsibility is to assist in the establishment and maintenance of the alcohol education program.

HISTORY: 2007 Act No. 35, Section 2, eff June 6, 2007.

SECTION 17-22-550. Fees; waiver.

A person shall pay a two-hundred-fifty-dollar fee to enroll in an alcohol education program. All fees must be deposited into a special circuit solicitor's fund for operation of the alcohol education program. In cases when the solicitor contracts with education and supervision providers, the person also may be subject to additional fees payable to the provider of these services. However, participation in an alcohol education program may not be denied due to a person's inability to pay these fees. If a person is deemed unable to pay, the fees for enrollment, education, and supervision services may be waived or reduced at the discretion of each solicitor.

HISTORY: 2007 Act No. 35, Section 2, eff June 6, 2007.

SECTION 17-22-560. Records.

Each circuit solicitor shall submit to the Commission on Prosecution Coordination necessary identifying information on each enrollee for the creation and maintenance of a list of enrollees in alcohol education programs. This list is to be used by the commission for the sole purpose of complying with Section 17-22-520(A) and (B). The information maintained by the commission may be released only to a circuit solicitor for the purpose of determining eligibility for an alcohol education program.

HISTORY: 2007 Act No. 35, Section 2, eff June 6, 2007.

Jackson v. Denno
And
Suppression of Statements

Public Defense 101
Fundamentals of the Profession
November 20-21, 2017

Susan Hackett
Appellate Defender
SCCID Office of Appellate Defense

SCCID
SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Fifth Amendment

- "No person … shall be compelled in any criminal case to be a witness against himself."
- Applicable to the states through the Fourteenth Amendment. Malloy v. Hogan, 378 U.S. 1, 8 (1964).

- The Fifth Amendment privilege is violated by **officially coerced self-accusation**.

United States v. Washington, 431 U.S. 181, 187 (1977).

- The Fifth Amendment's protections extend to statements or acts that are (1) **compelled**; (2) **testimonial**; and (3) **incriminating** of the person in a criminal proceeding.

United States v. Hubbell, 530 U.S. 27, 34 (2000).

Jackson v. Denno, 378 U.S. 368 (1964)

- "[A] defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an **involuntary confession**, without regard for the truth or falsity of the confession."
- A defendant has a constitutional right to "have a fair **hearing** and a reliable determination on the issue of **voluntariness**."

Rule 104, SCRE

- Rule 104(A): "Preliminary questions concerning … the existence of a privilege … shall be determined by the court."
- Rule 104(C): "Hearings on the admissibility of confessions or statements by an accused … shall in all cases be conducted out of the hearing of the jury."
- Rule 104(D): "The accused does **not**, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case."

Voluntariness of the Statement

- The test is whether, considering the totality of the circumstances, the free will of the witness was overborne.

Rogers v. Richmond, 365 U.S. 534, 544 (1961).

Remember: The defendant **can** challenge the voluntariness of a statement **outside** the context of an in-custody interrogation.

- Incriminating statements made during the course of the court-ordered psychiatric examination violated the Fifth Amendment.

Estelle v. Smith, 451 U.S. 454, 468-469 (1981).

- Use of information given by a defendant to obtain counsel creates a conflict between the defendant's Fifth and Sixth amendment rights.

United States v. Pavelko, 992 F.2d 32, 34 (3rd Cir. 1993); United States v. Aguirre, 605 F.3d 351, 358 (6th Cir. 2010); United States v. Hardwell, 80 F.3d 1471, 1484 (10th Cir. 1996).

- Probationer's statements to his probation agent that he had been using cocaine the night of an automobile accident were inadmissible where the probationer was not warned that his statements may be used against him in a matter unrelated to his probation.

State v. Hook, 348 S.C. 401, 412-414, 559 S.E.2d 856, 861-862 (Ct. App. 2002); see also, Minnesota v. Murphy, 465 U.S. 420, 427 (1984).

Voluntariness of the Statement

Totality of the circumstances analysis:

- **Characteristics of the defendant:**

    a) background;
    b) experience;
    c) conduct of the accused;
    d) age; maturity;
    e) physical condition and
    f) mental health;
    g) lack of education or low intelligence;

- **Circumstances of the interrogation:**

    a) length of custody or detention;
    b) police misrepresentations;
    c) isolation of a minor from his or her parent;
    d) the lack of any advice to the accused of his constitutional rights;
    e) threats of violence; direct or indirect promises;
    f) repeated and prolonged nature of the questioning; exertion of improper influence;
    g) the use of physical punishment, such as the deprivation of food or sleep.

Voluntariness of the Statement – Making the Record

- What questions do you ask?
- What witnesses do you call?
- Do you have any exhibits?
- What's your argument?

- Concern by the Court that the circumstances surrounding in-custody interrogation can operate to overbear the will of a suspect.

- Custodial interrogation is "inherently coercive."

- Due to the Court's concerns about in-custody interrogation resulting in involuntary confessions, the Court requires a suspect to be warned of his rights prior to interrogation. This is Miranda.

Miranda v. Arizona, 384 U.S. 436 (1966)

- "**Prior** to **any** questioning, the person must be warned (1) that he has the right to remain silent, (2) that any statement he does make may be used as evidence against him, and (3) that he has the right to the presence of an attorney, either retained or (4) appointed."

Custodial Interrogation

- What questions do you ask?
- What witnesses do you call?
- Do you have any exhibits?
- What's your argument?

Miranda – Who is the Interrogator?

- Estelle v. Smith, 451 U.S. 454, 466-467 (1981): Miranda applies even when the interrogator is not LE, but is acting as an **agent** of the state

- State v. Lynch, 375 S.C. 628, 634, 654 S.E.2d 292, 296 (2007) television reporter was not acting as an agent of the state when he questioned the accused about a prison riot because he was on the scene in his capacity as a news reporter.

- **Role** of the interrogator & **Purpose** of the questions

- State v. Kirton, 381 S.C. 7, 671 S.E.2d 107 (Ct. App. 2008): D was not subject to custodial interrogation when he was asked a single question by a magistrate presiding over his bond hearing. The question was "innocuous" and related solely to the setting of bond. It was not intended to elicit an incriminating response.

Notes:

- Magistrate testified that he read D his Miranda rights. Court also found D voluntarily waived his rights.
- Question asked was "Would you like to address the court?" The response was "I need help." When the Magistrate asked what kind of help, D said "I need mental help."
- State sought to admit the statement during the cross-examination of D.

Miranda – Who is the Interrogator? Making the Record

- What questions do you ask?
- What witnesses do you call?
- Do you have any exhibits?
- What's your argument?

Miranda Warnings

- After establishing a custodial interrogation took place, did LE advise your client of his rights?

- Four specific warnings: "(1) the right to remain silent; (2) that anything he says can be used against him in a court of law; (3) that he has the right to the presence of an attorney, and (4) that if he cannot afford an attorney one will be appointed for him prior to any questioning if he wants."

- **Test:** Do the warnings **reasonably** convey to a suspect his rights as required by Miranda?

- California v. Prysock, 453 U.S. 355 (1981) – warnings do not have to follow the "rigid" formula of Miranda.

- Also see, Duckworth v. Eagan, 492 U.S. 195 (1989)("We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court.")

- Florida v. Powell, 559 U.S. 50 (2010) – Advised suspect that he had "the right to talk to a lawyer before answering any of [LEO's] questions" and that he can invoke this right "at any time … during the interview" satisfied Miranda's requirement that an individual be informed that he has the right to consult with a lawyer and have the lawyer with him during interrogation.

Miranda Warnings- Making the Record

- What questions do you ask?
- What witnesses do you call?
- Do you have any exhibits?
- What's your argument?

Miranda Waiver

- The waiver has two distinct dimensions: It must be "voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception," and it must be "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." Moran v. Burbine, 475 U.S. 412, 421 (1986).

- It is not enough that the interrogator advised the suspect of his rights and the suspect made an un-coerced statement. The prosecution must show that the accused **understood** the rights.

Berghuis v. Thompkins, 560 U.S. 370 (2010) (citing Colorado v. Spring, 479 U.S. 564, 573-575 (1987); Connecticut v. Barrett, 479 U.S. 523, 530 (1987)).

- **TEST:** Did the **totality of the circumstances** surrounding the custodial statement defeat the defendant's will?

State v. Moses, 390 S.C. 502, 513, 702 S.E.2d 395, 401 (Ct. App. 2010)

- "[W]aivers can be established even absent formal or express statements of waiver."
- "[W]aiver … may be implied through 'the defendant's silence coupled with an understanding of his rights and a course of conduct indicating waiver."

Berghuis v. Thompkins, 560 U.S. 370 (2010)

- "Where the prosecution shows that a Miranda warning was given and that it was understood by the accused, an accused's uncoerced statement establishes an **implied waiver** of the right to remain silent."
- "The law can presume that an individual who, with a full understanding of his or her rights, **acts** in a manner **inconsistent** with their exercise has made a deliberate choice to relinquish the protection those rights afford."

Berghuis v. Thompkins, 560 U.S. 370 (2010)

- "In sum, a suspect who has **received** and **understood** the Miranda warnings, and has **not invoked** his Miranda rights, waives the right to remain silent **by making** an uncoerced statement to the police."

Berghuis v. Thompkins, 560 U.S. 370 (2010)

- "Once a voluntary waiver of the Miranda rights is made, that waiver **continues** until the individual being questioned indicates that he wants to revoke the waiver and remain silent or circumstances exist which establish that his 'will has been overborne and his capacity for self-determination critically impaired.'"

State v. Rochester, 301 S.C. 196, 391 S.E.2d 244 (1990).

Miranda Waiver – Making the Record

- What questions do you ask?
- What witnesses do you call?
- Do you have any exhibits?
- What's your argument?

Miranda – Timing

- **Question First Technique**

- Missouri v. Seibert, 542 U.S. 600 (2004): Officers transported D to the police station. Officers questioned D for 30-40 minutes without advising her of Miranda. During the discussion, officers obtained a confession. Then, D took a twenty minute break. After, the break, the officer turned on the recorder and advised D of Miranda. D waived Miranda. The officer resumed questioning and got a second confession from D.

- Missouri v. Seibert, 542 U.S. 600 (2004): "The object of question-first is to render Miranda warnings ineffective by waiting for a particularly opportune time to give them, after the suspect has already confessed."

- The "threshold issue when interrogators question first and warn later is thus whether it would be reasonable to find that in these circumstances the warnings could function 'effectively' as Miranda requires."

- "[W]hen Miranda warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and 'deprive a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them.'"

- Missouri v. Seibert, 542 U.S. 600 (2004):"these circumstances must be seen as challenging the comprehensibility and efficacy of the Miranda warnings to the point that a reasonable person in the suspect's shoes would not have understood them to convey a message that she retained a choice about continuing to talk."

- State v. Navy, 386 S.C. 294, 688 S.E.2d 838 (2010): Four factors –
- (1) the completeness and detail of the questions and answers in the first interrogation;
- (2) the timing and setting of the first and second interrogations;
- (3) the continuity of police personnel; and
- (4) the degree to which the interrogator's questions treated the second round as continuous with the first.

Miranda – Timing - Making the Record

- What questions do you ask?
- What witnesses do you call?
- Do you have any exhibits?
- What's your argument?

Miranda – Invocation of Right to Silence

- A suspect invokes his right to silence by clearly articulating his desire to end the interrogation and must do so "unambiguously."
- **The suspect must clearly articulate his desire to end the interrogation**.

Berghuis v. Thompkins, 560 U.S. 370 (2010); Davis v. United States, 512 U.S. 452, 459 (1994)(addressing right to counsel); State v. Reed, 332 S.C. 35, 42, 503 S.E.2d 747, 750 (1998).

- Aleksey's statement of "'That's all I've got to say'" at the conclusion of an interrogation with LE was not an **unequivocal invocation** of his

right to discontinue questioning. The Court found the statement **ambiguous** in its context because it indicated either a desire to discontinue questioning or simply the end of his story.

State v. Aleksey, 343 S.C. 20, 31, 538 S.E.2d 248, 253-254 (2000)

- The fact that D was silent for the first 2 hours and 45 minutes of the 3 hour interrogation was insufficient to invoke his right to remain silent.

Berghuis v. Thompkins, 560 U.S. 370 (2010)

Invocation of Right to Silence - Making the Record

- What questions do you ask?
- What witnesses do you call?
- Do you have any exhibits?
- What's your argument?

Invocation of Right to Silence – How long does it last?

- If a suspect invokes his right to silence, the interrogators must **scrupulously honor** the invocation.

Michigan v. Mosley, 423 U.S. 96, 103 (1975); State v. Benjamin, 345 S.C. 470, 476, 549 S.E.2d 258, 261 (2001).

- However, "the admissibility of statements obtained after the person in custody has decided to remain silent depends under Miranda on whether his 'right to cut off questioning' was 'scrupulously honored.'"

Michigan v. Mosley, 423 U.S. 96, 104 (1975).

Invocation of Right to Silence – How long does it last?

How to determine if invocation was "scrupulously honored":

1. Whether the police warned the defendant of his Miranda rights at the first interrogation.

2. Whether the police immediately stopped the interrogation when the defendant indicated he did not want to answer questions.

3. Whether the police resumed questioning only after passage of a significant period of time.

4. Whether the police provided a second set of Miranda warnings prior to the second interrogation.

5. Whether the second interrogation was restricted to a crime that had not been the subject of the earlier interrogation.

Invocation of Right to Silence – How long does it last?

- When the suspect re-initiates communication after invoking his right to silence, the police may resume interrogation.

Edwards v. Arizona, 451 U.S. 477, 485 (1981)

- What counts as re-initiating? "What is going to happen to me now?" is a question that re-initiates. "[A] bare inquiry" is not. Examples include asking for water or to use the phone.

Oregon v. Bradshaw, 462 U.S. 1039 (1983).

How long does it last? Making your record

- What questions do you ask?
- What witnesses do you call?
- Do you have any exhibits?
- What's your argument?

Miranda Waiver – Burden of Proof

- To introduce a statement produced during custodial interrogation, the **prosecution** must prove by a **preponderance** of the evidence that the statement was made freely and voluntarily, and taken in compliance with Miranda v. Arizona, 384 U.S. 426 (1966).

State v. Goodwin, 384 S.C. 588, 601, 683 S.E.2d 500, 507 (Ct. App. 2009).

Practice Points

1. Stop calling the interrogation an "interview."

2. Call the cops "interrogators."

3. Challenge "Voluntary" being written on the statement and waiver forms.

4. What's good for the goose is good for the gander.

The Plea Hearing:

Sentencing Basics and Mitigation

Violations of Probation

Public Defense 101
Fundamentals of the Profession
November 20-21, 2017

Hervery Young
Deputy Director and General Counsel
SCCID

SCCID
SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Housekeeping . . .

- This presentation focuses on General Sessions level cases
- This presentation assumes you have assessed the case and negotiated a plea deal for your client
- This presentation will not cover anything but will offer you best practices and CYA pointers
- This presentation is guaranteed NOT to provide any case law citations and summaries

Guilty Plea Basics

- 3 Types of Guilty Pleas
    - Plea of Guilt
    - Nolo Contendere
    - *Alford* plea

BP: Be familiar with the judge

Guilty Plea - Essential Elements

- Knowing, voluntary & intelligent
- Factual Basis
- Plea Agreement/Terms

BP: Get written plea agreement; discuss with judge terms if sensitive issues

Guilty Plea - Prep Work

- Element/Penalty Sheet
- Consequences of Plea
- Plea Colloquy Sheet
- Mitigation Witnesses
- Sentencing Sheet(s)
- Prep Client

Guilty Plea - In the Courtroom

- Sign Client Up
- Entering the Plea
    - BP: *If there are any issues with factual basis, discuss it with solicitor BEFORE signing the plea*
    - *BP: Try to interview victim during investigation.*
- Sentencing

Mitigation

"Investigations into mitigating evidence should comprise efforts to discover all reasonable available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor."
Retired Justice Sandra Day O'Connor
US Supreme Court

Goal of Sentencing

Present a narrative about the client that explains

1. how and why he arrived at the point in his life where he committed his crime,
2. how he will avoid wrongdoing in the future
3. Why the judge should feel confident that your proposed punishment will address protecting society, rehab and deterrence.

Sentencing – Prep Work

- Develop Client's Social History
- Address Behavior Issues
- Documentation
- Determine who will be witnesses & PREP them
- Solicitor's Position
- Know the Judge

Sentencing – Tools

- Live Witnesses
- Letters & Documentation
- Sentencing Memorandum
- Mitigation Video

Probation Violation

- **Goal**
    - Show that “violation” is not willful
    - Show that judge can address “violation” is a way that minimize or avoid jail time

- **Supervision Levels**
    - Low
    - Standard
    - High
    - Community Supervision

- Arrest Warrant
- Citation
- Administrative Hearing
- **Compliance**
    - No Reporting
    - Not paying Money
    - Dirty screens
- New Conviction

- **Types of Hearings**
    - Admission
    - Evidentiary

Probation Violation (Cont'd)

- **Documents to Review**
    - Original Sentencing Sheet (Transcripts ???)
    - Form 1106
    - Affidavits of Community Complaints
    - Probation Ledger Report
- **Take time to investigate**
    - Talk to people
    - Go look for yourself
- **Determine consequences and exposure**
- **Not Reporting**
- **Financial**
    - must be wilful
    - Financial Declaration
- **Dirty Screens**
    - Rehab options
- **New Charges Pending**
    - Continue until charges resolved
- **Community Supervision**
-
    - CS and Probation
    - Violation results in starting all over

Administrative Monitoring

- **Community Supervision**
    - CS and Probation
    - Violation results in starting all over

Preserving the Record For Appellate Review

Public Defense 101
Fundamentals of the Profession
November 20-21, 2017

Robert Dudek
Chief Appellate Defender
SCCID

SCCID
SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Preserving the Record for Appellate Review

- Specific Coherent-on-the-Record Objection
- *Voir Dire*
- Opening and Closing Statements
- Jury Instructions – Requests to Charge
- Proffer
- Motion in Limine
- Co-defendant's Objections and Motions
- Secure a ruling from trial court
- Stating specific grounds and case law in support of an objection or motion
- Indictments

Specific Coherent On-the-Record Objection

- The appellate court looks for **a specific understandable objection or motion accompanied by a coherent on-the-record argument by the trial counsel to the trial court.**

- **"OBJECTION"** is **NOT** a Legal Objection. **State specific grounds and case law in support of an objection or motion**

Counsel Must Secure a Ruling for Appellate Court

- Counsel must assure that he receives a specific ruling on each objection and issue he raises. A ruling of "objection noted," **or the judge ignoring or never ruling upon the objection** will not preserve the issue.

- In an unpublished opinion of the Court of Appeals held an incoherent ruling, "sustained in part, overruled in part," will not preserve the issue for appellate review where the **Court cannot clearly understand the ruling.**

- There are times when counsel will respectfully have to say, “I have to have a ruling Your Honor,” to assure an issue is preserved for appellate review.

- There will also be times when counsel must be sure the record clearly reflects the nature of the judge’s ruling.

- Counsel must be careful to assure that all bench conference arguments, rulings, and rulings in chamber *are put on the record to preserve an issue for review*.

Where conduct in court becomes an issue counsel must continue to put the objectionable conduct on the record.

- State v. Paige, 375 S.C. 643, 654 S.E.2d 300 (2007), photographic buttons of victim.
- State v. Hill, 331 S.C. 94, 501 S.E.2d 122 (1998) police officers in the courtroom.

Counsel Must Secure a Ruling for Appellate Court

- In State v. Childers 358 S.C 614, 595 S.E.2d 872 (2004), reversed in part on other grounds 373 S.C. 367, 645 S.E. 2d 233 (2007), defense counsel brought to the court's attention the fact that he had prosecuted Childers as a solicitor in the past. Counsel **also raised to the trial judge a conflict of interest issue since he had also represented the dead victim's brother in a prior civil suit.**

  The client vigorously objected to counsel representing him.

- The judge would not relieve the defense attorney as counsel based upon him having prosecuted Childers in the past.

- However, the trial judge did **not** rule on the conflict issue as it related to counsel having **represented** the victim's brother in the past. The Court of Appeals held that **an issue must be both raised to and ruled upon by the trial judge** to be preserved for appellate review.

- Counsel must assure that he receives a specific ruling on each objection and issue he raises. A ruling of "objection noted," **or the judge ignoring or never ruling upon the objection** will not preserve the issue.

Indictments

- **DEFECT IN INDICTMENT MUST BE OBJECTED TO BEFORE TRIAL**

  - State v. Gentry, forever changes the law on objections to defects in the indictment being able to be raised for the first time on appeal.

  - In State v. Gentry the Supreme Court held that an indictment is mainly **a notice document** and the failure to make an objection prior to trial to a defect in the indictment or the indictment process forever waives that objection.

  - If the defendant does not make a **proper motion** or motions, **he is assumed to understand the charges against him.** The appellate courts will no longer consider defects in the indictment or process as matters of subject-matter jurisdiction that can be raised for the first time on appeal.

  - State v. Means, 367 S.C. 374, 626 S.E.2d 348 (2006) sets forth the proper procedure after Gentry for raising defects in the indictment or indictment process. As with any other trial objection, counsel must now raise to the trial judge all alleged defects in the indictment or indictment process, **and obtain a ruling from the trial court**.

Voir Dire

- Requests for *voir dire* must be made a court's exhibit.

  - There must be an argument on why the voir dire is necessary given the specific facts of the case.

Motions *in Limine*

Objections to matters ruled on adversely to counsel in limine MUST BE RENEWED at trial with each new piece of evidence or testimony that touches upon the issue in dispute.

A Motion *in limine* is a pre-trial ruling on the admissibility of evidence. It is a **preliminary ruling** and is **subject to change based on developments during the trial.**

- A motion *in limine* may touch upon a broad class of evidence such as other bad acts evidence or bad character evidence.

- Since a ruling in *limine* is not final, **an objection must be made at the time the evidence is offered at trial and a final trial ruling procured at that time**. Otherwise, the issue heard in *limine* is not preserved for appeal.

- The trial judge is often making an *in limine* ruling based on the condensed version of the objectionable or proposed testimony, **or even just representations by counsel** as to what the evidence would show when it is later offered before the jury.

- Consequently, after the trial begins and other evidence is offered **the trial judge may come to appreciate the undue prejudice** from the evidence or why it is improper for the jury to consider it.

- Further, the trial judge may simply change his mind between the time of ruling the evidence admissible or inadmissible *in limine* and the time it is finally offered at trial.

- When the trial judge rules upon testimony or disputed evidence immediately before the jury considers it, that is not considered an *in limine* ruling **because there is no intervening time for developments to change the judge's mind**.

- The Court, on appeal, will consider an issue where the testimony or disputed evidence is heard outside the presence of the jury, and ruled upon by a trial judge <u>immediately</u> before the jury considers it.

Proffers

- **The appellate courts will not guess** or give counsel the benefit of the doubt as to what excluded evidence or other matters would have been or what they would have shown. **There must be a proffer.**

- Any excluded testimony, exhibits, *voir dire*, and refused jury instructions **must be made a court's exhibit**.

- **The proffer must include an on-the-record argument by counsel as to why the proffered item is admissible evidence.**

TESTIMONY

- If **part of a witness' testimony is excluded**, the portion that counsel wants into evidence must be fully proffered outside the presence of the jury together with an argument as to why the evidence is admissible.

- If the trial court **refuses to allow counsel to proffer the testimony of a witness**, counsel *must orally state* on the record what the proffered testimony from the witness or witnesses would have been had the court heard it outside the presence of the jury.

DOCUMENT

- If a **written document is excluded** from evidence, it must be made **a court's exhibit** so that it can be reviewed by the appellate court.

Opening Statement

State v. John Ward, 374 S.C. 606, 649 S.E.2d 145 (2007)

- In his opening statement the solicitor told the jury the victim was "not a drinker, was not a drug user. . ."
- Conversely, the defendants were drinkers who "were beating their chests and they had something to prove that night."
- The defendant complained on appeal that this contrast made the defendants look like they were "drinking and gang banging at the club" that night.
- The Court held a mistrial was later properly denied noting, "Ward made no objection to solicitor's opening argument" and later references were made until he [finally] objected."

Co-Defendant Objections and Motions

- An objection to evidence by counsel *for a co-defendant* **does not preserve the issue for the other attorney** unless he or she joins in the co-defendant's objection.

- If counsel has *additional reasons* for objecting to the evidence originally objected to by the co-defendant's attorney, **those additional reasons must be argued to the trial court** to preserve the issue for appeal.

- In short, counsel **cannot "ride" a co-defendant's objection** to gain review by the appellate court.

- The same is true **for the failure to join in a co-defendant's motion** or his objections to opening or closing argument.

The appellate court will not give counsel for a co-defendant the benefit of the doubt that he also finds the offered evidence or argument objectionable, **or assume that he joins in a co-defendant's motion**.

- Counsel for one defendant can obviously **have a much different strategy** on what he wants the jury to consider, and even how he or she wishes to conduct themselves in the presence of the jury.

CURATIVE INSTRUCTIONS

- **Curative instructions and motions to strike can also be problem areas on appeal.**

  - If the trial judge sustains an objection, and offers to give a curative instruction, that curative instruction will likely cure the prejudice unless a mistrial motion is made.

  - The refusal to accept a curative instruction **will likely waive the issue on appeal** since the trial court offered to attempt cure the prejudice, and that relief was refused by trial counsel.

  - The issue is often best preserved by arguing, when true, that counsel **does not believe the prejudice can be cured** by a curative instruction, **but** accepting the curative instruction **and then object to the curative instruction.**

  - Not objecting is acceptance of what the judge has done to try and cure the problem. **If you do not object to the curative instruction you have accepted it, and you have no issue on appeal to complain about.**

  - This is particularly true when counsel still moves for a mistrial despite a curative instruction. Further, when a witness "blurts" out an answer before the trial court is able to sustain an objection, counsel **should move to strike the answer or he or she has received all the relief requested**, and there is not any issue preserved for appeal.

MOTION FOR DIRECTED VERDICT

- **A MOST COMMON ERROR – DON'T FORGET TO RENEW MOTION FOR DIRECTED VERDICT AT THE CLOSE OF ALL OF THE EVIDENCE**:

- A motion for a directed verdict **must be renewed at the close of the evidence**.

- Further, "The standard or usual motions" is insufficient to preserve a directed verdict argument.

  See Court Rule 19 of the Criminal Rules on the trial judge reviewing the sufficiency of the evidence on his own without a proper motion. That rule should not be of any comfort to the moving party when the matter is addressed on the appeal.

JURY INSTRUCTIONS – REQUESTS TO CHARGE

Counsel Must Secure a Ruling for Appellate Court

- Counsel must specifically raise to the trial judge the specific jury instructions he wants the judge to charge, and obtain an **on the record ruling** from the judge on whether he will charge the requested instruction. (Specificity is important – not "numbers 2,5 and 6 I will not charge").

- Refused jury instructions must be made **a court's exhibit** if in writing. The jury charges must contain correct citations of law.

- It must also be remembered that if **any part** of the requested jury instruction is not a correct statement of law the appellate court will undoubtedly hold the trial judge did not abuse his discretion by refusing to give the whole jury instruction because part of it was an incorrect statement of law.

CHARGES ON THE FACTS

In addition, be careful that your proposed jury instructions are not **"charges on the facts."**

If the instructions are **very specific, and appear tailored to your facts you are in danger.**

However, the judge has a duty under State v. Fuller, 297 S.C. 440, 377 S.E. 2d 328 (1988) to "craft the instructions to the facts," such as self-defense – and "the right to act on appearances," or not allow the other to "get the drop on him."

CLOSING ARGUMENTS

State v. Willie Reese, 370 S.C. 31, 633 S.E.2d 898 (2006).

- In closing the solicitor asked: "Who speaks for Teresa Reese? In this system of justice that we have in this type of case, who speaks for Teresa Reese?"

- Defense counsel objected, and the judge overruled the objection telling counsel he would hear from him on his motion later. When the solicitor continued with this theme defense counsel objected again.

- Court held: This was an impermissible "Golden Rule" argument asking the jurors "to view the evidence" from the alleged victim's standpoint.

State v. Carmen Rice, 375 S.C. 302, 652 S.E.2d 409 (Ct. App. 2007)

- The decedent was a married man out with two other women when he was robbed and shot.

- The decedent's wife was in the courtroom during the trial and his "womanizing" became an issue as to the identity of the second woman involved that night.

- The one admitted woman killer who testified against Rice apologized to the widow for being a "coward and not coming forward earlier."

- The solicitor addressed the widow personally in his closing and asked the jury to give her peace and justice.

- Court held the issue preserved where the bench conference was put on the record and the objection at the time was agreed on, but ruled the argument did not deprive the defendant of a fair trial.

Pretrial Release:
Law and Practice Tips

Public Defense 101
Fundamentals of the Profession
November 20-21, 2017

Breen Stevens
Assistant Public Defender
First Judicial Circuit

Pretrial Release: Law and Practice Tips

Public Defense 101 Training Seminar

Presentation by Breen R. Stevens
Assistant Public Defender
First Judicial Circuit

"If it suffices to accuse, what will become of the innocent?"

Coffin v. United States, 156 U.S. 432, 455, 15 S.Ct. 394, 403 (1895) (quoting Ammianus Marcellinus, Rerum Gestarum Libri Qui Supersunt, L. XVIII, c. 1, A. D. 359).

"Unless th[e] right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning."

Stack v. Boyle, 342 U.S. 1, 4, 72 S. Ct. 1, 3 (1951) (superceded in part by statute, recognized by *United States v. Salerno,* 481 U.S. 739, 107 S. Ct. 2095 (1987)).

I. Constitutional Authorities for Bond:

A. Eighth Amendment of the United States Constitution provides, among other things, that "[e]xcessive bail shall not be required."

B. Article I Section 15 of the South Carolina Constitution grants all persons the right to a bond before trial but allows the denial of bond in certain exceptional cases. *E.g.*, Capital cases or offenses punishable by life in prison (Murder, Burglary First Degree). The bond set is also required to be reasonable, which means sufficient to assure the attendance of Defendant at future Court dates.

II. South Carolina Code Section §17-15-10: bonds for non-capital offenses.

A. All persons *are entitled* to **a personal recognizance bond without a surety in any amount for any charge**, unless:

1. A personal recognizance bond will not reasonably assure Defendant's attendance at Court on the charges; and/or

2. An **unreasonable** danger to the community would result without a surety.

III. Conditions of release. §17-15-10(1)—(4)

A. Amount of surety necessary to guarantee the appearance of the Defendant.

B. Whether to place Defendant with a person or organization to supervise Defendant while on bond.

C. Restrictions on travel or association or residence while on bond.

D. Any other conditions necessary to guarantee appearance.

NOTE (per §17-15-20), every person on a bond is required to:

1. Appear for Court;

2. Not leave the State;

3. Be of good behavior while on bond.

IV. Surety/Cash bond amounts.

A. Amount of a bond is **only** calculated to assure appearances at Court and/or to protect the public.

B. Bond amounts on Magistrate offenses *cannot exceed the maximum fine* for that offense. See §22-5-530, which allows any person to be released from custody on the payment of the full amount of a fine for a particular offense.

C. Once a bond has been set on a General Sessions offense, it can only be reconsidered by the Magistrate Court until it is transmitted to Circuit Court. Once transmitted, the Magistrate Court has no jurisdiction.

V. Alternatives to surety bonds.

A. Defendant or his or her agent may place the entire bond amount with the Court. §§17-15-190 and 22-5-530.

B. Court may allow Defendant to post 10% of the bond amount in cash with the Court in lieu of a surety bond. §17-15-15.

VI. Matters to be considered in setting bond and conditions.

A. The nature and circumstances of the offense.

B. Defendant's ties to the community.

C. Employment.

D. Financial resources.

E. Character and mental condition.

F. Length of residence in community.

G. Prior record.

H. Whether the Defendant is an illegal alien.

I. Failure to appear or other history regarding prior charges. §17-15-30.

NOTE: The rules of evidence do not apply at bond hearings. § 17-15-60.

VII. Victim's rights regarding bonds.

A. Victims are entitled to notice concerning bond hearings (so be ready).

B. Victims are defined in S.C. Const. Art. I § 24(C)(2), and §16-13-1510.

C. The Bond Judge will check with law enforcement about notification of victims before the bond hearing. Notification procedures are set forth in §16-3-1525.

1. The efforts to notify are to be reasonable calculated to give all victims sufficient notice of the bond hearing and to inform victim of the right to be present.

2. If victim is not there, the judge will inquire about efforts to notify.

3. If notice is not given in a timely manner the bond hearing will likely be delayed for a reasonable time to allow proper notice.

4. Bonds will likely contemplate protections for victims.

VIII. Reconsideration of bond set by summary court. §17-15-55(A)(1).

A. Know Your Client:

1. Family in the area?

2. How long has he lived in the area?

3. Employed?

4. Resources (Trust-fund baby, or empty as a pocket)?

5. Character & mental condition?

Remember, it costs more $ for the county to house a person with special needs.

6. Prior convictions?

7. Any other pending charges?

8. Has he run before?

9. Is he here in the U.S. legally?

B. Practice Tips:

1. Contact family/friends of Client before reconsideration hearing. Even better if they can also attend.

NOTE: Get Client's permission first. Rules of Ethics still apply!

2. Determine:

- Where Client will stay
- Who is also at that location
- Whether Client will be employed
- Where Client will work
- Approximate bond amount Client might be able to make
- *Possible* special conditions Client:
  - Curfew?
  - House arrest?
  - GPS monitoring?

C. Circuit courts have discretion to review and reconsider bond set by summary court judges on GS charges.

1. File the motion to reconsider bond with clerk of court.

2. "Hearings on these motions must be scheduled." §17-15-55(A)(1)

3. Be prepared to argue U.S. Const. Amend. VIII, S.C. Const. Art. I § 15, as well as factors listed in §§17-15-10 and 17-15-30.

IX. Further Defense motions for reconsideration after circuit court heard and ruled on prior motion. §17-15-55(A)(2).

A. Motion to reconsider must make *prima facie showing* of a *material change in circumstances* relating to the factors in § 17-15-30. The facts must have arisen after the prior motion for reconsideration.

B. After 6 months, the length of time that the Defendant has been held in pretrial incarceration constitutes a statutorily recognized basis to reconsider (*i.e.* a aterial change of circumstances).

C. The chief judge *shall* schedule a hearing if a *prima facie* showing of a material change of circumstances is present in the motion.

X. Revocation or Modification of summary court bond. §17-15-55(B)(1).

A. State must make a written motion to revoke or modify bond stating:

1. The particular grounds for revocation or modification;

2. The relief or order sought.

B. State must file the motion with the clerk of court.

C. State must serve a copy of the motion on:

1. The chief judge;

2. Defense counsel of record;

3. Bondsman (if any).

D. A full hearing must be conducted. If Defendant is found to have violated the terms of his bond it can be revoked or modified.

E. If the bond is revoked the Defendant is entitled to another bond setting on the charge as no person may be held without bond. Section 15, Article I South Carolina Constitution. *See State v. Boatwright,* 424 S.E. 2d 139 (1992).

XI. Further State motions for reconsideration after circuit court heard and ruled on prior motion. §17-15-55(B)(2)

A. Further motions to reconsider must make *prima facie showing* of a *material change in circumstances*. The facts must have arisen after the prior motion for reconsideration.

B. The chief judge shall schedule a hearing *if* a *prima facie* showing of a material change of circumstances is present in the written motion.

XII. Emergency bond revocation hearings. § 17-15-55(B)(3).

A. State's motion to revoke or modify bond must contain *prima facie* showing of:

1. imminent danger to the community;

2. imminent danger to the Defendant; or

3. flight by the Defendant.

B. Chief judge or presiding judge shall conduct, or order an emergency bond hearing to be conducted by the circuit court within 48 hours of receiving service of the State's motion (or as soon as practicable)

C. Notice of the hearing *must* be given to defense counsel of record, and bond surety

D. Defense counsel and bond surety *shall* make reasonable efforts to notify the Defendant.

E. Court may go forward with the revocation hearing without the Defendant or bond surety.

F. If hearing is conducted without presence of Defendant, then defense may have a hearing to reconsider revocation after filing a motion with the clerk of court, and serving it on the solicitor and bond surety.

** All Statutes cited with § are sections from the South Carolina Code of Laws (1976) as amended*

The Discovery Process: Rule 5/Brady Preliminary Hearings Subpoenas

Public Defense 101
Fundamentals of the Profession
November 20-21, 2017

Mark Leiendecker
Circuit Public Defender
First Judicial Circuit

SCCID
South Carolina Commission on Indigent Defense

What are we trying to Discover and why?

The two prongs of the 6th Amendment

- **Confrontation Clause**
- **Compulsory Process Clause**

Guess what were not as backward as we think!!!!!!!

- **Art I Sec 14 S.C. Const**
- ***" …any person charged with an offense shall enjoy the RIGHT to….be confronted with THE witnesses against him; to have COMPULSORY PROCESS for obtaining witnesses in his FAVOR, and to be FULLY HEARD in his defense…"***

Rule 5 is limiting and at best a starting point.

Cross means a meaningful cross

- **This means the discovery to prepare**
- **This means timely disclosure**

Helpful cases

- **Kyles v. Whitley should be on everyone's best seller list.**

    - **What it tells us the Govt has to do**
    - **What it tells us we get to do.**
    - **What it tells us about excuses**
      (*yes it is your job Solicitor) and it is your obligation to enforce it your Honor.*
    - **It is not about exculpatory but FAVORABLE evidence.**

Don't fall for the Materiality trap.

It's not just Yankee Law

- **Gibson v. State, 514 SE2d 320 (1999)**
- **State v. Jo Pradubsri : yup, no kidding, it is still the law.**

Gee we get to say something too?

- **The right to present a defense**

Let's think about this a minute

- **What do I want?**
- **Why do I want it?**
- **When do I need it?**
- **In what form can I get it?**
- **In what form should I be able to get it?**
- **What do I give up if I ask for it?**

Motions to Sever
And
The Bruton Doctrine

Public Defense 101
Fundamentals of the Profession
November 20-21, 2017

Wanda Carter
Deputy Chief Appellate Defender
Office of Appellate Defense
SCCID

SCCID
SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Bruton v. United States
391 U.S. 123 (1968)

A non-testifying defendant's confession that implicates his co-defendant is not admissible at trial.

Richardson v. Marsh
481 U.S. 200 (1987)

The non-testifying defendant's confession that implicates his non-confessing co-defendant **is** admissible if it eliminates the existence of the non-confessing defendant.

Remedy: Severance

- Defense Arguments
  - Antagonistic Defenses
  - Specific Right of a Co-Defendant is Violated with a Joint Trial

Remedy: Redaction

- Blank Space Substitutions

EXAMPLES OF OBVIOUS BLANK SPACE SUBSTITUTION ERRORS

- **"DELETION"** *GRAY v. MARYLAND*, 523 U.S. 185 (1998)(STUCK DOWN)
- **"SHE"** *STATE v. HOLDER*, 676 S.E.2d 690 (2009)(STRUCK DOWN)
- **"MISTER X"** *STATE v. LaBARGE*, 268, S.E.2d 278(1980)(STRUCK DOWN)

EXAMPLES OF LESS OBVIOUS BLANK SPACE SUBSTITUTION ERRORS

"knock"---not bad, but police admitted that "knock" was arrested after co-defendant's statement was made…dead giveaway as to ID of "knock" *STATE v. JOHNSON*, 703 S.E.2d 217 (2010) (STRUCK DOWN)

"the guy"—not bad but "the guy" was always referenced in connection to "the gun" and the solicitor told the jury that Henson (a co-defendant)was the shooter. Dead giveaway as to ID of the co-defendant who was the shooter…..*STATE V. HENSON*, 754 S.E.2d 508 (2014)(STRUCK DOWN)

"Another/other….seems ok, but the "another/other" was referenced in connection with Little Debbie cakes which was an unique fact associated with the perpetrator, i.e. the co-defendant….dead giveaway….*STATE V. JACKSON*, Opinion No. 578 (S.C.Ct. App., Nov. 5, 2014)(STRUCK DOWN)

State v. McDonald, affirmed 400 S.C.272, 734 S.E.2d 167 (Ct. App.2012), cert. granted
affirmed as modified, 412 S.C. 133, 771 S.E.2d 840 (2015).

3 co-defendants were tried jointly in this case (McDonald, Whitehead, & Cannon). Cannon gave a statement implicating McDonald & Whitehead, and the phrase "**another person**" was used to refer to them. The Court of Appeals approved of the redaction.
However, the **S.C. Supreme Court disapproved of the redaction** and held that it was clear who Cannon was referring to in his statement, but affirmed nonetheless due to overwhelming state's evidence.

Search and Seizure

Public Defense 101
Fundamentals of the Profession
November 20-21, 2017

Breen Stevens
Assistant Public Defender
First Judicial Circuit

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South Carolina Commission on Indigent Defense

Search & Seizure

General Overview

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

- U.S. Constitution, Amendment IV.

Divided into Two Parts:

- ⊡ "Reasonableness Clause"
  - what it seeks to prohibit
- ⊡ "Warrant Clause"
  - all about warrants
  - with "particularity requirement"

Reasonableness Clause:

- ⊡ *Who* is covered?
  - "the people"
  - *What* is covered?
  - "persons, houses, papers, and effects"
- ⊡ Nature of the protection?
  - "against *unreasonable* searches and seizures"

Sub-issues of Reasonableness Clause

- ⊡ Who are "the people" whose rights are covered under 4th A?
  - See, e.g., U.S. v. Verdugo-Uriquidez, 494 U.S. 259 (1990) ("a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.").
- ⊡ Is there anything that is *not* a "person, house, paper, or effect" falling outside 4th A?
- ⊡ What is a "search" and/or "seizure" under 4th A?
  - See Terry v. Ohio, 328 U.S. 1 (1968), and U.S. v. Mendenhall, 446 U.S. 544 (1980).
- ⊡ What makes a search and/or seizure "unreasonable"?

Warrant Clause:

- ⊡ What is required for issuance of a warrant?
  - "probable cause, supported by oath or affirmation"
- ⊡ Form/content of a warrant?
  - "and particularly describing the place to be searched, and the persons or things to be seized"
    - A.k.a. the "Particularity Requirement"
- ⊡ What is required for issuance of a warrant?
  - "probable cause, supported by oath or affirmation"
- ⊡ Form/content of a warrant?
  - "and particularly describing the place to be searched, and the persons or things to be seized"
    - A.k.a. the "Particularity Requirement"

Sub-issues of Warrant Clause

- ⊡ What constitutes "Probable Cause"?
  - "[P]robable cause exists where the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the **[p176]** belief that an offense has been or is being committed."

    - Bringar v. U.S., 338 U.S. 160, 175-76 (1949).

- ⊡ How particular does a warrant have to state the "place to be searched" and "persons or things to be seized"?

- ⊡ Was the warrant executed properly?
  - When was it executed? (staleness)
  - How did police execute it? (knock & announce)
  - Scope of the search?

Other Matters to Consider

- ⊡ Standing to raise 4th Amendment claim?
  - 4th Amendment rights are personal

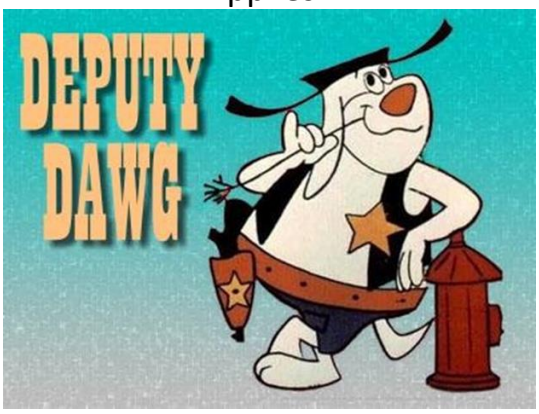
- ⊡ Who did the searching and/or seizing?
  - 4th Amendment limits governmental actions, agents, and actors
  - E.g.- applies to Deputy Dawg, but NOT Nosey Neighbor

- ⊡ When to raise 4th Amendment issues?
  - Pretrial

- ⊡ What is the remedy?
  - Exclusion

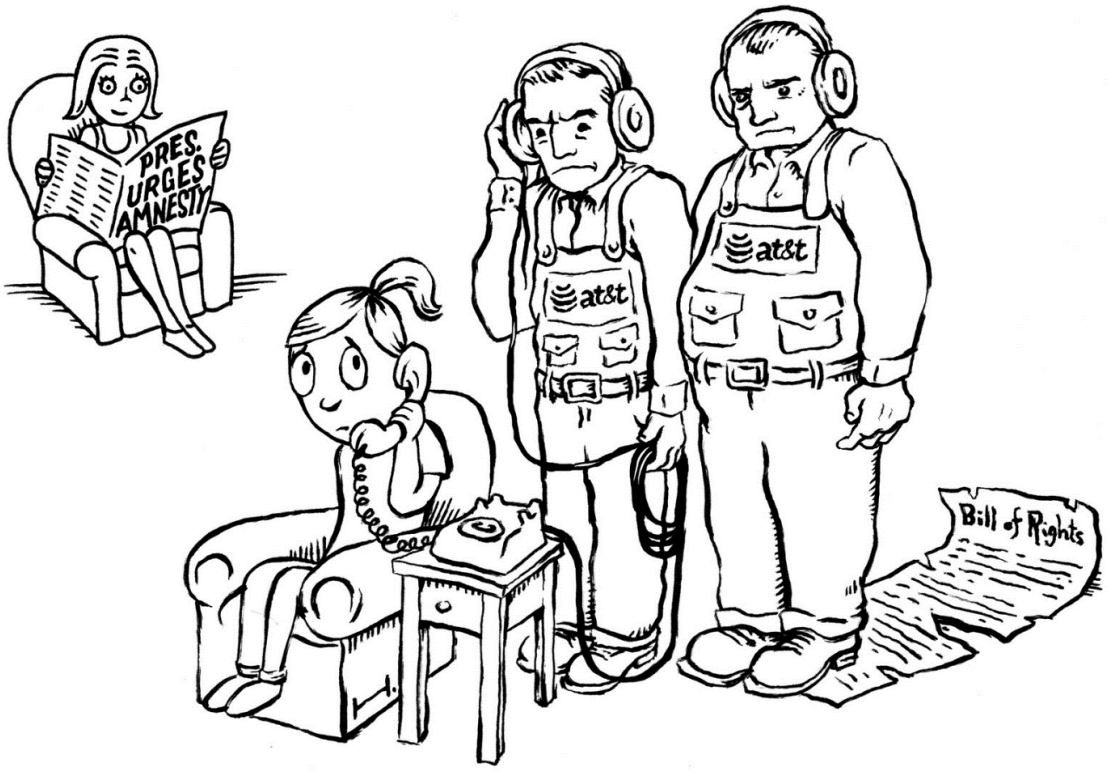
Limited to Government actors you say?

Applies



Does not apply

Are you sure?



"It's okay honey, Congress says they're heroes."

Checklist Please

(1) **Does Client have Standing to raise 4th Amendment challenge to the specific evidence in question?**

(2) **Is Client among "the people" protected?**

(3) **Did the police activity implicate a "person, house, paper, or effect"?**

(4) **Did the police activity constitute a search/seizure?**

(5) **Was the search/seizure reasonable?**

- Did the police have adequate grounds to conduct the search/seizure?
  - Probable Cause?
  - Reasonable Articulable Suspicion?
- Did the police act on basis of a search/arrest warrant?
  - No? Did they have a valid reason **(lots of exceptions)**
  - Yes, BUT:

    Did they get the warrant in a proper manner?

    Was it from a "neutral and detached magistrate"?

    Does the warrant satisfy the "Particularity Requirement"?

    Did the police properly execute the warrant?

(6) **Exclusionary rule?**

- Objective "good faith" reliance on bad warrant?
- Evidence is causally linked to the initial illegality? Then it's *probably* out. . . BUT
  - Inevitable discovery doctrine?
  - Attenuated-connection doctrine?

Exceptions to the Warrant Requirement?

Yes, Exceptions to the Warrant Requirement

- ⊡ Exigent circumstances
  - Destruction of evidence
  - Avoidance of capture (hot pursuit)
- ⊡ Search incident to lawful arrest (SIA)
- ⊡ Automobile exception
- ⊡ Plain view
- ⊡ Inventory search
- ⊡ Consent

We have a State Constitution Too?

YES

Article I, Section 10

"The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures *and unreasonable invasions of privacy shall not be violated*, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, the person or thing to be seized, and the information to be obtained."

- S.C. Const. Art. I, Sec. 10.

Why Should I Raise Both State AND Federal Constitutional Arguments?

"The relationship between the two constitutions is significant because '[s]tate courts may afford more expansive rights under state constitutional provisions than the rights which are conferred by the Federal Constitution.'"

- State v. Forrester, 342 S.C. 637, 643, 541 S.E.2d 837, 840 (2011).

In Other Words

"The South Carolina Constitution, with an express right to privacy provision included in the article prohibiting unreasonable searches and seizures, favors an interpretation offering a higher level of privacy protection than the Fourth Amendment."

- State v. Forrester, 342 S.C. 637, 645, 541 S.E.2d 837, 841 (2011).

AND

- ⊡ A party may NOT argue one ground at trial and then an alternative ground on appeal.
  - See, e.g., State v. Harris, 351 S.C. 643, 572 S.E.2d 267 (2002).

So, if possible, include both Federal AND State grounds for every motion, objection, and argument.

Because the right against unreasonable invasions of privacy is important

Relatively Recent Fourth Amendment Case Law and Issues to Consider When Moving to Suppress Evidence Based on a Fourth Amendment Violation

State v. Jomar Antavis Robinson
(S.C. Sup. Ct. Nov. 12, 2014)

- ⊡ Held defendant's Fourth Amendment rights were not violated by police officers' warrantless entry onto porch of apartment for which defendant failed to prove reasonable expectation of privacy, even if entry by officers involved trespass

- ⊡ Reminder that Fourth Amendment does not apply in the absence of an expectation of privacy (i.e.- Be Sure to **Establish Standing**)

State v. Jomar Antavis Robinson
(S.C. Sup. Ct. Nov. 12, 2014)

- ⊡ To claim protection of the Fourth Amendment, a defendant must demonstrate an actual and reasonable expectation of privacy in the place searched.

- ⊡ The proponent of the motion to suppress has the burden to establish that he had an expectation of privacy in the area illegally searched.

- ⊡ Opinion suggests mere presence with the consent of homeowner is not enough to establish a reasonable expectation of privacy in the home of another

- ⊡ Factors the Court suggested that should be considered:
    a. whether the defendant owned the home or had property rights to it;
    b. whether he was an overnight guest at the home;
    c. whether he kept a change of clothes at the home;
    d. whether he had a key to the home;
    e. whether he had dominion and control over the home and could exclude others;
    f. how long he had known the owner of the home;
    g. how long he had been at the home;
    h. whether he attempted to keep his activities in the home private;
    i. whether he engaged in typical domestic activities at the home, or whether he treated it as a commercial establishment;
    j. whether he alleged a proprietary or possessory interest in the premises and property seized (even if only at a motion to suppress, where that admission cannot be used against him to determine his guilt); and
    k. whether he paid rent at the home.

State v. Alex Robinson,
408 S.C. 268, 758 S.E.2d 725 (Ct. App. 2014)

- ⊡ Addresses the reliability of confidential informants

- ⊡ Search warrant obtained based on officer's affidavit that a confidential informant working for the police department had made continuous purchases of drugs from home

- ⊡ Court of Appeals held that officer's failure to include in his affidavit any evidence of the informant's reliability rendered the warrant invalid and the evidence seized pursuant to the warrant had to be suppressed.

- ⊡ Officers must give the issuing judge information to assess the reliability of the information contained in the affidavit supporting the warrant.

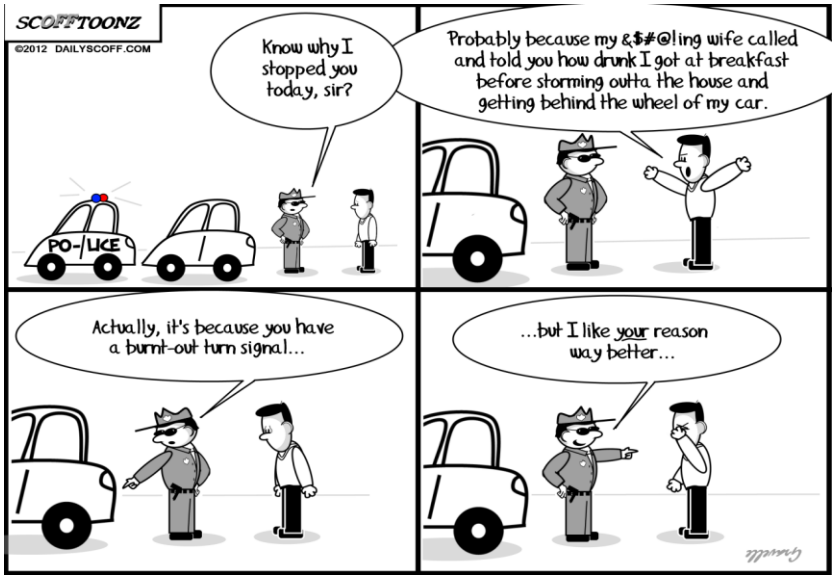
Controlled Drug Buys:

- ⊡ State will often alleged a controlled drug buy establishes probable cause to support a search warrant

- ⊡ But does the affidavit indicate:
  - That the informant was searched prior to and after meeting with the defendant?
  - That an officer observed the meeting or even observed the informant leaving to meet with the defendant?

Traffic Stops:

Violation of motor vehicle codes provide officer with reasonable suspicion to initiate traffic stop



State v. Erick Eton Hewins,
409 S.C. 93, 760 S.E.2d 814 (2014)

- ⊡ But officer cannot exceed scope of stop unless he has reasonable suspicion of criminal activity to extend duration of the stop and conduct a search

- ⊡ Following factors were not sufficient to extend stop and conduct search after officer decided to issue warning:
  - Defendant had been seen in known drug area earlier
  - Defendant remained very nervous despite being given a warning
  - When asked, Defendant quickly responded he had no drugs

- ⊡ Once traffic stop has been concluded, the deployment of a drug-detection dog is at that point illegal

Terry Stop and Frisk Checklist

- ⊡ Is there reasonable suspicion supported by articulable facts the person is involved in criminal activity to stop the person?

- ⊡ Is there a reasonable belief the person is armed and dangerous and can the officer specify the particular facts on which he or she based his or her belief the suspect was armed and dangerous? A mere general concern for officer safety is not sufficient.

- ⊡ Did the officer exceed the scope of a proper pat-down?

- ⊡ Officer is confined to patting the outer clothing of the suspect for concealed objects which might be used as instruments of assault. Sibron v. New York, 392 U.S. 40 (1968)

- ⊡ Officer cannot forcefully reach into pockets and the like under Sibron

- ⊡ During pat-down, was incriminating nature of object immediately apparent or did officer have to manipulate the object through a further search to determine whether it was contraband? Minnesota v. Dickerson, 508 U.S. 366 (1993)

Knock & Talks
State v. Rushan Counts

What's a "Knock & Talk"
(The Ugly)

"Knock and Talk" Technique:

In the context of Fourth Amendment analysis, scholars have explained: One police tactic that courts have increasingly subjected to reasonableness review is the procedure known as "knock and talk." The "knock and talk" procedure is a common and seemingly innocuous procedure that police use proactively, making the procedure vulnerable to potential abuse. The "knock and talk" appears innocuous because courts do not generally consider its use a search and seizure, but rather an investigative tactic….

US Supreme Court's View

(The Bad)

Despite the potential for abuse and the heightened expectation of privacy in one's home, the United States Supreme Court has recently reaffirmed the "knock and talk" technique as constitutionally permissible. *See Florida v. Jardines, 133 S. Ct. 1409, 1415-16, 185 L. Ed. 2d 495 (2013)* ("We have accordingly recognized that 'the knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers and peddlers of all kinds. . . . Thus, a police officer not armed with a warrant may approach a home and knock, precisely because that is 'no more than any private citizen might do.'" (citations omitted)).

State v. Rushan Counts

(The Good)

"Our state constitution's provision protecting unreasonable invasions of privacy *necessarily requires* some analysis of the privacy interests involved when a warrantless seizure is made on private property." *Weaver, 374 S.C. at 326, 649 S.E.2d at 485* (Pleicones, J., concurring) (emphasis added). Because the privacy interests in one's home are the most sacrosanct, we believe there must be some threshold evidentiary basis for law enforcement to approach a private residence. **Otherwise, we foresee the potential for abuse if law enforcement targets a neighborhood and indiscriminately knocks on doors with the hope of discovering contraband without a search warrant**. Although the State maintains these encounters are entirely consensual, we cannot ignore the nature of the "knock and talk" procedure. In contrast to a routine sales call, **the "knock and talk" technique is inherently coercive as it is conducted by law enforcement and not a private citizen.**

State v. Counts (holding)

[W]e hold that **law enforcement must have reasonable suspicion of illegal activity at a targeted residence prior to approaching the residence and knocking on the door.** As with our previous right-to-privacy decisions, we find this rule safeguards the express constitutional right against unreasonable invasions of privacy and does not hamper law enforcement in their investigative efforts. **State v. Counts, 413 S.C. 153, 776 S.E.2d 59 (2015).**

Cell Phones & Cell Towers?

- **Riley v. California**, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014) (Cell phones; get a warrant):
- Our holding, of course, is not that the information on a cell phone is immune from search; it is instead that **a warrant is generally required before such a search, even when a cell phone is seized incident to arrest.**
- **United States v. Graham**, 824 F.3d 421 (4th Cir. 2016) (En Banc) (Historical cell tower data; No Privacy Interest… so says the 4th Cir).

What About GPS?

Cars: Get A Warrant!

- United States v. Jones, 132 S. Ct. 945, 181 L. Ed. 2d 911 (2012) (GPS on car; get a warrant)
- State v. Adams, 409 S.C. 641, 763 S.E.2d 341 (2014) (GPS on car; get a warrant)

People: Get A Warrant!

- Grady v. North Carolina, 135 S. Ct. 1368, 191 L. Ed. 2d 459 (2015)

Is My Curtilage Protected?

- State v. Bash, 419 S.C. 263 (2017)
  - Backyard cookout . . . of crack
  - Police go on anonymous tip
  - Bust crack cookout without warrant
  - Drugs should have been suppressed

What About Trails & Paths?

- ⊡ State v. Anderson, 415 S.C. 441 (2016)
  - Warrant for busting drug house in known drug area
  - Footpath by house known to be used to move drugs
    - Footpath NOT included in warrant
  - Defendant was on footpath
  - Cops stop & frisk sans Warrant
  - Should Have Suppressed

What About Bus Stations?

- ⊡ State v. Spears, 420 S.C. 363 (Ct. App. 2017)

  - DEA tip
  - Getting off bus used by criminals
  - With 4 bags
  - Stopped and demanded ID
  - High crime area NOT carte blanche to stop someone
  - Not reasonable suspicion of a crime

DUI Battle Royal:
Breath vs. Blood

- ⊡ Birchfield v. North Dakota, 136 S. Ct. 2160 (2017)
  - DUI arrests
  - Blood tests, get warrant
  - Breath test . . . ok as Search Incident to Arrest

More Traffic Stop Cases…

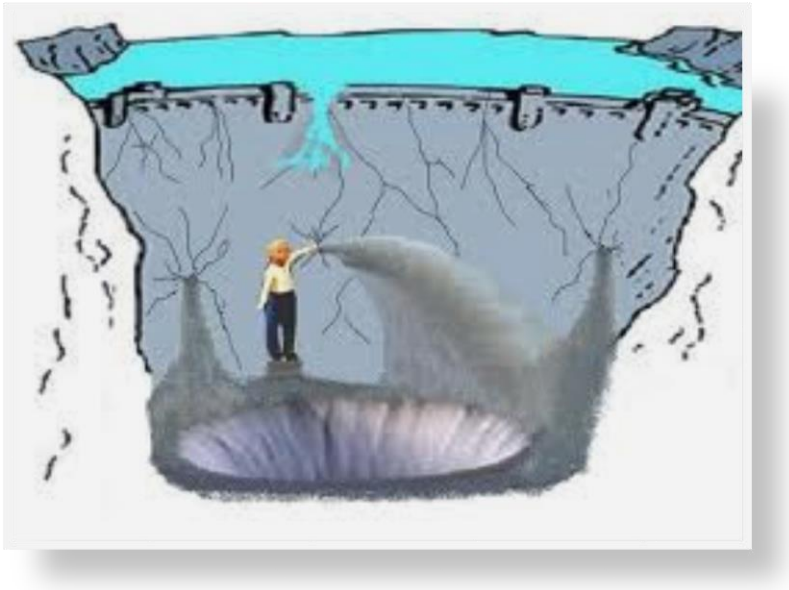
- ⊡ Utah v. Strieff, 136 S. Ct. 2056 (2016) (Illegal traffic stop, BUT active A/W on Defendant is sufficient intervening cause. Drugs are in).

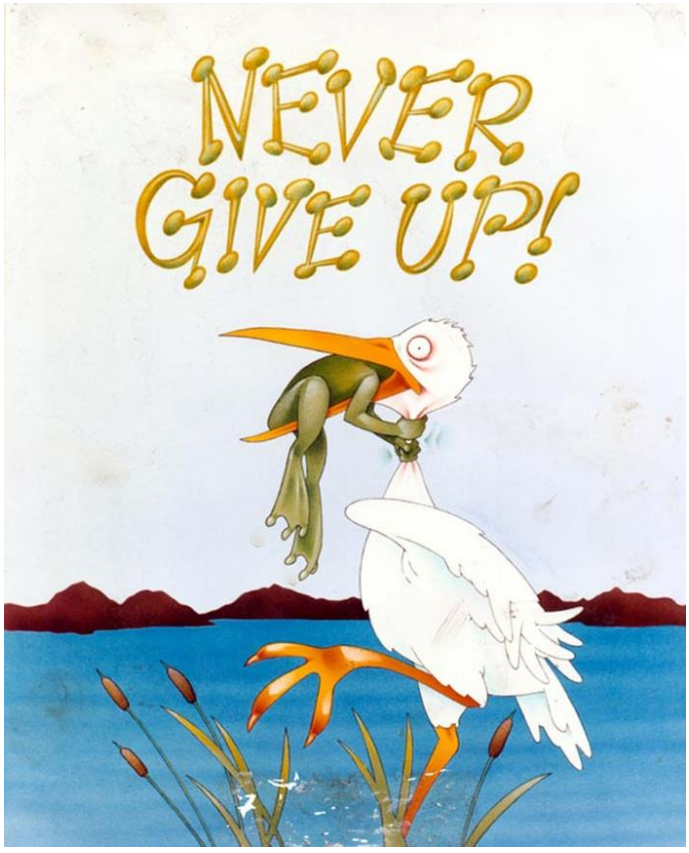
- ⊡ State v. Moore, 415 S.C. 245 (2016) (Factors for RAS on traffic stop. Bad case, but good language re: overreliance on "nervousness" by cops).

- ⊡ State v. Pradubsri, 803 S.E.2d 724 (Ct. App. 2017) (Traffic stop off informant's tip).

Search & Seizure Law

Yes, there are many, Many Exceptions





Jury Selection, Voir Dire And Batson Challenges

Public Defense 101
Fundamentals of the Profession
November 20-21, 2017

Ashley Pennington
Circuit Public Defender
Ninth Judicial Circuit

ATTACHMENTS

- SC Code § 14-7-1020 Voir Dire statute
- SC Code § 14-7-1110 Peremptory Challenges statute
- Voir Dire template
- Voir Dire on juror honesty
- Jury Voir Dire sexual assault jury questions
- Voir Dire – DUI current 4-2006
- Jury selection requiring criminal histories
- Jury Selection form
- Jury Selection notes
- Jury Selection Form 7-21-08

RELEVANT CASE LAW

- Cochran 631 SE2nd 294 (2006)
- Rogers 450 S.C. 520 (Ct App 2013)

Peremptory Challenges – How Many

Primary Jurors
SC Code §14-7-1110

- Murder, Manslaughter, Burglary, Arson, CSC, Armed Robbery, Grand Larceny, Breach of Trust, Perjury, Forgery = 10
- Other offenses = 5
- State = 5

- Multiple defendants split 20

  State = 10
- Misdemeanor Multi-Defendants split 10

  State =5

Alternate Jurors
SC Code §14-7-1120

- For each alternate juror called:
  - Defense = 2
  - State = 1

Batson v. Kentucky, 476 U.S. 79 (1986)

The Basics: *Batson* held that the Equal Protection Clause prohibits use of peremptory strikes in a discriminatory manner. Neither party may use preemptory strikes on the basis of race or gender.

Batson Challenge 3-Step Procedure

Step One: Request Batson Hearing – Before the jury is sworn, if either party thinks that strikes were exercised in a discriminatory manner on specific jurors, the challenging party can ask the court to order

You're a racist!!!

Step Two: Facially-Neutral Reason – The proponent of the strike must then give a facially neutral explanation for the strike. "Step two of this process does not demand an explanation that is persuasive or even plausible." *State v. Rogers*, 405 S.C. 520 (Ct. App. 2013)(stereotypes). However, "[t]he proponent of the challenge must provide an objectively discernible basis for the challenge that permits the opponent of the challenge and the trial court to evaluate it. *State v. Giles*, 407 S.C. 14, 22 (2014)(don't want you).

No, I'm not!!!

Step Three: Mere Pretext/Disparate Treatment – If a race-neutral explanation is tendered, the trial court must then decide whether the opponent of the strike has proved purposeful racial discrimination. "At step three, the opponent of the strike must show the reason offered, though facially race-neutral, was actually mere pretext to engage in purposeful racial discrimination." *State v. Cochran*, 369 S.C. 308, 315 (Ct. App. 2006). "The burden of persuading the court that a *Batson* violation has occurred remains

at all times on the opponent of the strike." *State v. Haigler*, 334 S.C. 623, 629 (1999). "This burden is generally established by showing similarly situated members of another race were seated on the jury." *Cochran*, 369 S.C. at 315. "Under some circumstances, the race-neutral explanation given by the proponent may be so fundamentally implausible that the judge may determine, at the third step of the analysis, that the explanation was mere pretext even without a showing of disparate treatment." *Payton v. Kearse*, 329 S.C. 51, 55 (1998). The trial court's finding will largely turn on an evaluation of credibility. *Miller-El v. Cockrell*, 537 U.S. 322, 339 (2003).

Yes, you are…

■ Remedy

- "When the opponent of the strike proves the proponent of the strike practiced purposeful racial discrimination, the trial court must quash the entire jury panel and initiate another jury selection de novo." *Cochran*, 369 S.C. at 315. If an improperly struck juror is called by the clerk, the party that previously struck the juror must seat the juror.
- *Cf. State v. Heyward*, 357 S.C.577 (Ct. App. 2004)(affirming trial ordering the last juror of the 12-person jury to the first alternate juror's position; restored defendant's peremptory strike)

■ Remedy on Appeal (Insurance)

- Object to State's strikes: If your objection is denied and found valid on appeal: NEW TRIAL
- Your Valid Strikes: If judge disallows your valid strike AND the juror is re-selected and serves on the trial jury: NEW TRIAL

- **STRIKES**
  - Dual-Motivation Doctrine
    - "The Court rejects the dual motivation doctrine and holds that once a discriminatory reason, either inherent or pretextual, has been found the entire jury selection process has been tainted." *Payton v. Kearse*, 495 S.E.2d 205 (1998)(redneck).

Valid Reasons for Strikes

- Demeanor, tone, or facial expression*: *Matthews v. Evatt*, 105 F.3d 907 (4th Cir. 1997); *State v. Wilder*, 306 S.C. 535 (1991)(late); *State v. Wright*, 304 S.C. 529 (1991); *State v. Smalls*, 336 S.C. 301, 309 (Ct. App. 1999).
- Appearance: *State v. Blotcher*, 142 F.3d 728 (4th Cir. 1998)(nice glasses/conservative); *State v. Rogers*, 405 S.C. 520 (Ct. App. 2013)(crew cut/conservative); *cf. McCrea v. Gheraibeh*, 380 S.C. 183 (2008)("dreadlocks retain their roots as a religious and social symbol of historically black cultures").
- The potential juror was a recipient of a prior strike: *Sumpter v. State*, 312 S.C. 221 (1994)
- Prior jury service: *State v. Casey*, 325 S.C. 447 (Ct. App. 1997).
- Prior criminal conviction: *Casey*, 325 S.C. at 453 n.2; see also *Sumpter*, 312 S.C. at 223-24
- Possible criminal conviction: *State v. Martinez*, 294 S.C. 72 (1987); *State v. Ford*, 334 S.C. 59 (1999)
- Prior prosecution by that particular Solicitor's office: *State v. Dyar*, 317 S.C. 77 (1994).
- Acquaintance with the trial judge: *State v. Adams*, 322 S.C. 114 (1996)
- Relationship with attorney: *State v. Ford*, 334 S.C. 59 (1999)
- Relationship with law enforcement or pro-law enforcement attitude: *Ford*, 334 S.C. at 65; cf. *State v. Richburg*, 304 S.C. 162 (1991); *State v. Stewart*, 413 S.C. 308 (Ct. App. 2015).
- Knowledge of or personal association with defendant: *State v. Johnson*, 302 S.C. 243 (1990).
- Acquaintance with the trial judge: *State v. Adams*, 322 S.C. 114 (1996)
- Relationship with attorney: *State v. Ford*, 334 S.C. 59 (1999)
- Relationship with law enforcement or pro-law enforcement attitude: *Ford*, 334 S.C. at 65; cf. *State v. Richburg*, 304 S.C. 162 (1991); *State v. Stewart*, 413 S.C. 308 (Ct. App. 2015).

- Knowledge of or personal association with defendant: *State v. Johnson*, 302 S.C. 243 (1990).
- Unemployment: *State v. Green*, 306 S.C. 94 (1991)
- Place or type of employment: *State v. Inman*, 409 S.C. 19 (2014)(farmer); *State v. Scott*, 406 S.C. 108 (Ct. App. 2013)(teacher vs. warehouse manager; need not be identical); *State v. Williams*, 379 S.C. 399 (Ct. App. 2008)(spouse's employment)
- Education: *State v. Guess*, 318 S.C. 269 (Ct. App. 1995); *State v. Richburg*, 304 S.C. 162 (1991)(college-tolerate to drugs)
- Age: State v. Easler; *State v. Chapman*, 317 S.C. 302 (1995); *State v. Geddis*, 313 S.C. 37 (1993); *State v. Grate*, 310 S.C. 240 (1992)
- "General instability": *State v. Robinson*, 305 S.C. 469 (1991)

Invalid Reasons for Strikes

- Desire to seat other potential jurors who have not yet been presented: *State v. Hicks*, 330 S.C. 207, 210 (1998); *State v. Grandy*, 306 S.C. 224 (1991).
- Generalization about an entire group/Political Affiliation: *Payton v. Kearse*, 329 S.C. 51 (1998)(redneck); *Foster v. Spartanburg Hospital Systems*, 314 S.C. 282 (Ct. App. 1999)(democrat).
- Racial Stereotypes/Potential juror who "shucked and jived" to the microphone: *State v. Tomlin*, 299 S.C. 294, 299 (1989); cf. *State v. Rogers*, 405 S.C. 520 (Ct. App. 2013)(okay to stereotype, but not racially)
- Vague objection that the jurors "were not right for the jury": *State v. Giles*, 407 S.C. 14 (2015)
- Third Party Told You To Strike: *State v. Marble*, 311 S.C. 23 (1992)(Investigator)

Voir Dire Statute

SECTION 14-7-1020. Jurors may be examined by court; if juror is not indifferent, he must be set aside.

The court shall, on motion of either party in the suit, examine on oath any person who is called as a juror to know whether he is related to either party, has any interest in the cause, has expressed or formed any opinion, or is sensible of any bias or prejudice therein, and the party objecting to the juror may introduce any other competent evidence in support of the objection. If it appears to the court that the juror is not indifferent in the cause, he must be placed aside as to the trial of that cause and another must be called.

HISTORY: 1962 Code Section 38-202; 1952 Code Section 38-202; 1942 Code Section 637; 1932 Code Section 637; Civ. P. '22 Section 577; Civ. C. '12 Section 4045; Civ. C. '02 Section 2944; G. S. 2261; R. S. 2403; 1797 (5) 358; 1986 Act No. 340, Section 3, eff March 10, 1986.

SECTION 14-7-1030. Time for making objections to jurors.

All objections to jurors called to try prosecutions, actions, issues, or questions arising out of actions or special proceedings in the various courts of this State, if not made before the juror is impaneled for or charged with the trial of the prosecution, action, issue, or question arising out of an action or special proceeding, is waived, and if made thereafter is of no effect.

HISTORY: 1962 Code Section 38-203; 1952 Code Section 38-203; 1942 Code Section 639; 1932 Code Section 639; Civ. P. '22 Section 579; Civ. C. '12 Section 4047; Civ. C. '02 Section 2946; G. S. 2265; R. S. 2406; 1871 (14) 693; 1899 (23) 39; 1986 Act No. 340, Section 3, eff March 10, 1986.

SECTION 14-7-1110. Peremptory challenges in criminal cases.

Any person who is arraigned for the crime of murder, manslaughter, burglary, arson, criminal sexual conduct, armed robbery, grand larceny, or breach of trust when it is punishable as for grand larceny, perjury, or forgery is entitled to peremptory challenges not exceeding ten, and the State in these cases is entitled to peremptory challenges not exceeding five. Any person who is indicted for any crime or offense other than those enumerated above has the right to peremptory challenges not exceeding five, and the State in these cases is entitled to peremptory challenges not exceeding five. No right to stand aside jurors is allowed to the State in any case whatsoever. In no case where there is more than one defendant jointly tried are more than twenty peremptory challenges allowed in all to the defendants, and in misdemeanors when there is more than one defendant jointly tried no more than ten peremptory challenges are allowed in all to the defendants. In felonies when there is more than one defendant jointly tried the State has ten challenges.

HISTORY: 1962 Code Section 38-211; 1952 Code Section 38-211; 1942 Code Section 1002; 1932 Code Section 1002; Cr. P. '22 Section 88; Cr. C. '12 Section 82; Cr. C. '02 Section 55; R. S. 54; 33 Ed. 1; 1712 (2) 549; 1841 (11) 154; 1887 (19) 830; 1892 (21) 94; 1927 (35) 180; 1928 (35) 1161; 1930 (36) 1268; 1932 (27) 1145; 1943 (43) 285; 1986 Act No. 340, Section 3, eff March 10, 1986; 1987 Act No. 10, Section 1, eff March 16, 1987.

SECTION 14-7-1120. Challenges and strikes of alternate jurors.

In criminal cases the prosecution is entitled to one and the defendant to two peremptory challenges for each alternate juror called under the provisions of Section 14-7-320 and in civil cases, each party shall have one strike for each alternate juror.

HISTORY: 1962 Code Section 38-212; 1952 Code Section 38-212; 1942 Code Section 626-2; 1937 (40) 300; 1986 Act No. 340, Section 3, eff March 10, 1986.

VOIR DIRE TEMPLATE

The Defendant, _____, through his attorney requests pursuant to South Carolina Code of Laws § 14-7-1020 that the **jury panel be *sworn*** prior to voir dire in this case. Counsel believes that there are matters of knowledge and prejudice which could taint the service of individual jurors in this case. Therefore, counsel requests that the following questions be asked of the entire jury panel. The Court asks that jurors respond by standing. Counsel requests that they be identified by name and juror number by the Clerk. Counsel then requests that the Court inquire as to the specific responses of the individual on the record at the bench.

1. Are you a former member of law enforcement or any department of corrections in any capacity?

2. Are any members of your family or close personal friends employed by such law enforcement agencies? If so, please stand.

3. Are you or any members of your immediate family affiliated with a victim's rights organization or organizations which promote law enforcement? If so, please stand.

4. A) Have you been the victim of a violent crime? If so, please stand.
   B) Have any of your close friends or relatives been a victim of violent crime? If so, please stand.

5. Have you seen any publicity regarding this case? This case involves._____ If so, please stand.

6. A) Do you know or have any connection to any of the following witnesses:
   B).Do you know or have any connection with the defendant in this case.

7. Do you know anything about the facts of this case?

8. Do you know or any of your family or close friends know the victim, _____or any of her family members or close friends?

9. The victim lives at _____. Do you live in this subdivision or have family or close friends that live in this subdivision?

10. Has the media coverage in this case led you to think that the defendant going to trial in this case is guilty or probably guilty of the _____?

Respectfully submitted,

Sexual Assault

JUROR QUESTIONNAIRE

Juror #:_____

1. **Full Name:**_____ **Age:**_____
2. **Where in Dallas County do you live?** _____
3. **Where do you work and what is your job (if unemployed/retired, what and where was your last job)?**_____
4. **How long have (did) you worked there?** _____
5. **What are/were your duties or responsibilities?** _____
6. **What jobs have you held in the past?** _____
7. **Have you ever been responsible for supervising, hiring or firing employees?** ❑ **YES** ❑ **NO**
8. **What is your current marital status?** _____
9. **If you are married or living with someone, for how many years?**_____
10. **How many times have you been married?** _____
11. **How far did you go in school [if college, name school(s) and any degree(s) you received]?**

    _____

12. **Where does your spouse or partner work and what is this person's job (if unemployed/retired, what and where was this person's last job)?** _____

    _____

13. **Please list the sex, age and occupation for each of your children and step-children:**

    _____

    _____

14. **Please check (✔) any of the following in which you have received training or education:**

    ❑ **Child development** ❑ **Criminal justice** ❑ **Counseling** ❑ **Criminology** ❑ **Human sexuality**
    ❑ **Law enforcement** ❑ **Psychology** ❑ **Law** ❑ **Medicine** ❑ **Sociology**

15. **Have you or anyone you know ever worked for, or volunteered time or money to, any organization that helps children [i.e., YMCA, crisis center, social agency, etc.]?** ❑ **YES** ❑ **NO**
    If YES, who, what organization(s), and what was the association with that organization(s)?

    _____

    _____

16. **Have you or anyone you know ever volunteered time or held a job that involved contact with children (i.e., teacher's aide, scout leader, coach, Sunday school teacher, etc.)?** ❑ **YES** ❑ **NO**
    If YES, who and what type of work did this person do? _____

    _____

17. **Have you ever worked, or volunteered, at a crisis hotline, shelter for abused children, etc.?**
    ❑ **YES** ❑ **NO** **If YES, please tell us why you decided to work or volunteer and when and where you did this:** _____

    _____

18. **Have you or any family members ever been associated with any organization(s) dedicated to helping victims of crime? ❑ YES ❑ NO If YES, who and to which organizations(s)?**_____

_____

19. **Have you or any family members ever been associated with or worked with any program(s) dedicated to rehabilitating persons convicted of crime? ❑ YES ❑ NO If YES, who and which program(s)?** _____

_____

20. **Have you, any family members or friends ever applied for work with or worked for any law enforcement agency(ies) [i.e., Texas Rangers, police, sheriff, prison, jails, etc.]? ❑ YES ❑ NO If YES, who and for which agency(ies)?**_____

_____

21. **Have you or anyone you know ever applied for work with or worked for any attorney(s) or law firm(s)? ❑ YES ❑ NO If YES, who and for what attorney(s) or law firm(s):** _____

_____

22. **Do you know any judges, prosecuting attorneys or criminal defense attorneys on a personal, professional or casual basis? ❑ YES ❑ NO If YES, whom do you know and how do you know this person?**_____

_____

23. **How many times have you served on a:**

❑ Criminal Jury _____ time(s) ❑ Civil Jury _____ time(s) ❑ Never served

a. **What types of criminal case(s)?** _____

b. **What was the verdict(s)?** _____

c. **Were you ever the foreperson? ❑ YES ❑ NO**

24. **Have you ever appeared before or served on a Grand Jury ? ❑ YES ❑ NO If YES, please explain:**_____

_____

25. **Have you or any family members ever been a victim of a crime? ❑ YES ❑ NO If YES:**

a. **What happened?** _____

b. **Who was the victim?** _____

c. **Was anyone arrested? ❑ YES ❑ NO**

d. **What was the outcome?** _____

e. **How did you feel about the outcome?** _____

_____

26. **Please check (✔) the box below that best describes how comfortable you feel talking about sex: ❑ Very uncomfortable ❑ Uncomfortable ❑ Comfortable ❑ Very comfortable**

27. **In general, what are your feelings or opinions about young children viewing** Playboy **magazine or other sexually explicit materials?** _____

_____

28. **WITHOUT MENTIONING ANY NAMES, have you or anyone you know ever experienced any unwanted physical or sexual contact? ❑ YES ❑ NO If YES, please explain:**

_____

_____

29. **There have been a number of cases lately in which young girls have accused adults of sexual misconduct. What have you heard, read or seen about these stories?** _____

_____

30. **What was your reaction to what you heard, read or saw?** _____

_____

31. **In general, what are your feelings or opinions about cases in which children accuse adults of inappropriate touching?** _____

_____

32. **In your opinion, what are some reasons why a child would** falsely **accuse an adultof inappropriate touching?** _____

_____

33. **How likely is it that a child would falsely accuse an adult of inappropriate touching?**
❑ Very Likely ❑ Likely ❑ Somewhat Likely ❑ Unlikely ❑ Very Unlikely
WHY? _____

_____

34. **If a child told his/her parent that another adult had touching him/her inappropriately, how long do you believe the parent would wait before contacting the police?** _____
PLEASE TELL US WHY YOU FEEL THIS WAY: _____

_____

35. **When an adult is accused of indecency with a child do you believe the accusation is [please check [✔] only one box]: ❑ Definitely True ❑ Probably True ❑ Might Be True ❑ Definitely Not True ❑ Probably Not True ❑ Not True**
WHY DO YOU FEEL THIS WAY? _____

_____

36. **In a case in which an adult is charged with indecency with a child, whom would you start out favoring, even if slightly: ❑ the Prosecution ❑ the Adult ❑ Neither**
WHY? _____

_____

37. What comes to mind when you think of a:

a. District Attorney: _____

b. Criminal defense attorney: _____

38. Please list the newspapers, professional journals, magazines, or other periodicals you subscribe to or regularly read: _____

_____

39. Please list any unions or civic, political, social, professional, or religious organizations to which you now belong or have belonged: _____

_____

40. How many hours a week do you spend watching television? _____

41. What law-related shows do you watch on television [i.e., Judge Judy, Court TV, Law and Order, The Practice, etc.]? _____

_____

42. Please list your 3 favorite television shows: (1) _____

(2) _____ **(3)** _____

43. Please list 3 people you admire the most: (1) _____

(2) _____ **(3)** _____

44. Please list 3 people you admire the least: (1) _____

(2) _____ **(3)** _____

45. Please list the one person you feel most influenced your life and tell us why:

_____

_____

46. Which of the following would you use to describe yourself? [Check (✔) all that apply.]

❑ Analytical	❑ Assertive	❑ Careful	❑ Cautious	❑ Child advocate
❑ Compassionate	❑ Creative	❑ Decisive	❑ Detailed	❑ Emotional
❑ Feminist	❑ Generous	❑ Impulsive	❑ Judgmental	❑ Kind
❑ Leader	❑ Logical	❑ Naive	❑ Old-fashioned	❑ Open-minded
❑ Opinionated	❑ Outspoken	❑ Practical	❑ Private	❑ Quiet
❑ Self-conscious	❑ Sensitive	❑ Shy	❑ Skeptical	❑ Snap-decision
❑ Smart	❑ Strict	❑ Thoughtful	❑ Trusting	❑ Other_____

47. Are you: ❑ Very Conservative ❑ Conservative ❑ Moderate ❑ Liberal ❑ Very Liberal

48. What do you enjoy doing in your spare time? _____

_____

49. Is there anything else you feel is important for you to tell the Judge and the attorneys?

_____

DUI VOIR DIRE

Court's Introduction To The Jury

We are about to begin the trial of the State/City versus _____has been accused of driving under the influence. In a criminal trial the prosecuting agency is called "The State/ The City" and the person charged is called "The Defendant". Our law says that a person has violated this law if he or she drives a motor vehicle after they have consumed alcohol to such an extent that it has materially and appreciably impaired their mental and physical faculties to such an extent that they are unable to operate a vehicle safely on the roadways of our state. §56-5-2930

Under both the United States and South Carolina Constitutions (S.C. Art. I, Sec. 14) the Defendant is entitled to a trial by fair and impartial jurors. Now, to that end, I am going to ask you some questions as a group. Our state Supreme Court has said,

> **"It is fundamental that a defendant is entitled to a trial by an impartial jury. The trial judge has the duty to assure himself that every juror is unbiased, fair and impartial." *State v. Gulledge,* 277 S.C. 368 (1982).**

How you were raised and your life experiences have helped shape your beliefs, feelings or opinions on various topics. These beliefs or feelings help make us who you are. They are not easily acquired and not easily set aside. This Court neither condones nor condemns any beliefs you might have. However, this Court has a duty to ask you questions regarding your beliefs or feelings on issues that might be involved in this case. This is called *voir dire.*

The purpose of *voir dire* is to detect any belief, feeling or experience that might unfairly influence your deliberation. You see it would be a violation of your oath if you were to serve on a jury and had any pre-existing belief or opinion which would improperly influence your deliberation or tend to make you biased for or against either side. In order to serve on this jury, I need to know whether you can completely assure this Court that your feelings about alcohol or drinking and driving will absolutely play no part in your deliberations of this case.

I encourage you to be completely honest in answering these questions and disclose any matters whatsoever which might make it difficult for you to serve on this jury. Even though the questions are being asked to you as a whole, consider these questions as being asked to you individually. If you do not understand the questions, raise your hand and I will repeat it or ask it in another way. Do not be shy or hold back your answers; as I ask the questions, raise your hand if your answer is "yes" so that we can see who you are and give you a chance to explain if you need to.

Relationships/Associations

1. Have you, a relative, or **close** friend, now or in the past, ever been a member of a law enforcement agency (federal, state, county, city, or military police department)?

2. Are you related by blood or marriage to, or are you **close** personal friends with, or had any contact with any of the prosecutors or employees in the Solicitor's office/City attorney office or employees?

3. Have any of the attorneys in this case ever represented you or the opposing party in a legal matter?

4. Are you related by blood or marriage, or **close** friends with anyone employed by the Attorney General, or any other Solicitor's office?

5. MADD: (A) Are you a member of MADD (Mothers Against Drunk Drivers), SADD (Students Against Drunk Driving), ALAnon (Alcoholics Anonymous), a church, or any other similar organization that is opposed to the consumption of alcohol?

   (B) Other than to a church, have you made a financial contribution to any of those groups,?

6. Are you a member of, or a financial contributor to, any group which has as its primary concern the promotion of law enforcement or victim's rights? Some of these groups would include but not be limited to CAVE (Citizens Against Violence), CADRE (Citizens Advocating a Return to Ethics), or any similar groups or organizations.

7. Is there any juror who is a supporter of a police booster organization, honorary

law enforcement organization or any similar group? These may include the South Carolina Troopers Association, SCLEOA (South Carolina Law Enforcement Officers Association), the County Sheriff's Association, FOP (Fraternal Order of Police).

Prior Court Experience

8. Have you served on a criminal jury before? What was the charge and the verdict?

9. Was there anything about your previous jury experience that would cause you to feel some allegiance in favor of or against either the Prosecution or the Defense?

10. Has anyone ever appeared as a witness for the prosecution of defense at any trial?

Alcohol Experience

11. Who has **never** consumed a beer, a mixed drink, or a glass of wine?

12. Who drank at one time but does not drink anymore?

13. Have you **ever** consumed an alcoholic drink and then driven a car within a "reasonably" short time period after drinking?

14. Do you believe you can tell when **you've** had too much to drink to drive safely?

15. Do you feel a person could drive a car safely after drinking alcohol, **depending** on the particular circumstances of that case?

16. (a) Have you had any family or personal experience with someone who had an alcohol problem?

    (b) Would that experience affect your ability in giving the Prosecution or the accused a fair and impartial trial?

Opinions Regarding Alcohol

17. Do you believe that the consumption of alcohol is **morally wrong** or **a sin** under your religious or moral beliefs?

18. Do you believe that a person can drink one (1) alcoholic beverage and **not** be materially and appreciably impaired?

19. Do you prohibit the storage or use of alcoholic beverages in your home?

20. Do you have so strong a belief against the use of alcohol, that you could not

completely **"flush"** that belief out of your mind during your deliberations?

Opinion Regarding Driving After Drinking

21. Do you believe it **should** be crime to drive a car if the driver has consumed **any** amount of an alcoholic beverage?

22. Do you believe that a person who drinks **any** amount of alcohol and then drives a motor vehicle should be **automatically** guilty of DUI?

23. Do you feel that you could not find a person charged with DUI innocent under any circumstances?

24. Do you feel that if someone admits to drinking some alcohol and then driving a car, that **this alone** would be enough for you to find them guilty of DUI?

25. Have you now or in the past had a red ribbon, a bumper sticker or other symbol on your car to show a position against drinking and driving?

Datamaster Testimony

STATEMENT BY COURT:

> **"In some cases where a person is charged with Driving Under the Influence a breath test is given. The machine used to be called a Breathalyzer. The machine now in use is called a Datamaster."**

26. Do you believe a breath test result is always accurate?

27. If there was a breath test in this case, would you base your verdict solely on the results of the breath test?

Miscellaneous

28. Are you inclined to think that a person is guilty of a crime simply because he was arrested?

29. Who has **never** been stopped by a police officer?

30. If you have been stopped by a police officer, did being stopped make you nervous?

31. Would you be inclined to believe a Police Officer's testimony over that of a private citizen **merely** because he is a Police Officer?

32. Have you, a **close** friend or relative ever been in a traffic accident where the **other driver** was alleged to have been drinking alcohol?
(PLEASE HAVE THE JUROR APPROACH THE BENCH, OUTSIDE OF THE HEARING OF THE OTHER JURORS TO EXPLAIN THEIR SITUATION).

Court Statements

33. Do you understand that if there is **any** uncertainty as to whether reasonable doubt exists, **that** uncertainty must be given to the Defendant and he must be acquitted?

34. If the evidence on the whole raises a reasonable doubt in your mind, would you hesitate to vote not guilty?

35. If you come to the conclusion that the prosecution has not proven the guilt of the Defendant beyond a reasonable doubt and a majority of the jurors believe that the Defendant is guilty, would you change your verdict because you were in the minority?

36. Do you agree and understand that an acquittal serves the interest of justice as well as a conviction?

37. Is there anyone who has heard about this case before coming to court today? **If so the Defendant requests individual sequestered voir dire of that person so that the entire panel will not be prejudiced.**

Cage v. Louisiana, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed. 339 (1990)
State v. Manning, 409 S.E.2d 372 (1991)
State v. Britt, 117 S.E.2d 378 (1960)
State v. Brown, 126 S.E.2d 1 (1962)
State v. Sheppard, 1509 S.E.2d 918 (1988)
Statutes: 14-7-810
14-7-820

James B. Huff
Attorney for Defendant
Post Office Box 6488
North Augusta, SC 29841
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STATE OF SOUTH CAROLINA	**)**	**IN GENERAL SESSIONS COURT**
	)	**FOR THE SIXTH CIRCUIT**
COUNTY OF CHESTER	**)**	**Case Numbers: 05-GS-12-162 to171**

THE STATE OF SOUTH CAROLINA,)
)
Vs.)
)
ARTHUR PARKER, SR., and MARY E .)
LUTHER,)
Defendants.)
_____)

NOTICE OF MOTION AND MOTION *IN LIMINE*
FOR CRIMINAL HISTORY OF THE JURY *VENIRE*

To: Henry McMaster, South Carolina Attorney General, by and through his appointed designee, William Frick:

NOW COMES THE DEFENDANTS, above-named, who are hereby requesting that this Honorable Court require the State to provide to the Defense any and all criminal histories of the potential jurors on the *venire,* as well as any witnesses which the State plans to call.

The grounds for this motion will be more fully set forth in the hearing and will be based upon the record in this case, evidence presented at the hearing, the arguments of counsel and the Statutory and Common Law of the State of South Carolina.

HAMILTON, DELLENEY,
AND HEMLEPP, P.A.

BY: _____

W. MICHAEL HEMLEPP, JR.
128 Center Street
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Chester, South Carolina 29706
803-581-2211
803-581-2209 (fax)
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Chester, South Carolina
August 16, 2005

JURY SELECTION: *State vs.* ________________

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JURY SELECTION NOTES

DATE __________ CASE____________________________________

JUDGE______________________ CT REPORTER________________________

Juror #	*Juror Name*	*State Strike*	*Def Strike*	*Seated?*	*Cause?*	*Batson-Cause-Description Notes*

JURY SELECTION NOTES Date _____ Case_____

Judge_____ Court_____ Reporter_____

Juror #	***Juror Name***	***State Strike***	***Def Strike***	***Seated?***	***Cause?***	***Batson-Cause-Description Notes***

Motions Practice
And
Filing Appeals

Public Defense 101
Fundamentals of the Profession
November 20-21, 2017

Janna A. Nelson
Circuit Public Defender
Eighth Judicial Circuit

Topics Covered

- I. Pre-Trial Motions
- II. Directed Verdict
- III. Motions for Mistrial
- IV. Post-Trial Motions
- V. A Couple More Post-Trial Motions
- VI. Notice of Appeal – General Sessions Court and Summary Court

Pre-Trial/Trial Motions

- Strategic, Fact-Specific Decisions
    - Timing?
    - Limitations?
    - What are we NOT covering in this presentation?
        - Motions made during the course of representation prior to trial, e.g. bond motions, funding motions, etc.
        - Every possible pre-trial/trial motion
        - Standards for granting/denying motions

Pre-Trial/Trial Motions

- **Motion to Suppress**

    - 4th Amendment guarantees that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV

- **Motion to Suppress Client's Statement(s)**

- ***Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964)**

    - Judge uses preponderance of the evidence standard to determine if statement is freely and voluntarily given
    - Jury must find voluntariness beyond a reasonable doubt
    - Can use as pre-trial discovery

- **Motion to Suppress In-Court Identification of Client**

- ***Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972)**

    - Was the identification procedure so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification? *State v. Gambrell*, 274 S.C. 487, 590, 266 S.E.2d 78, 80 (1980).
    - Does not apply when there was no pre-trial identification procedure.

- **Motion to Quash the Indictment**

    - ***State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005)**

    - requires the motion to be made before the jury is sworn.
    - Indictment is merely a notice document

More Motions

- Requested *voir dire* questions
- Attorney-conducted *voir dire*
- Individual *voir dire*
- Excuse juror for cause
- *Batson* motion
- Sequestration of witnesses or jury
- Confirm number of peremptory strikes
- If client is testifying, settle what, if any, of his record can be used for impeachment

- **Motions on non-evidentiary issues**

    - Joinder/severance
    - Dismiss due to lack of speedy trial
    - Dismiss due to double jeopardy
    - Motion to enforce plea agreement
    - Dismiss due to lack of personal or subject matter jurisdiction
    - Client's competency to stand trial

- **Motions dealing with conduct of the trial**

    - Change of venue
    - Recuse solicitor or judge
    - Continuance
    - Cuffing/shackling client
    - Excluding press
    - Allowing client to remain on bond
    - Motion to disallow reference to complaining witness as a "victim"

- **Motions in limine**
    - Third-party guilt
    - Rape shield testimony
    - *Bruton* motion
    - *Crawford* motion
    - *Lyle*/Rule 404(b) motion
    - Expert testimony
    - Castle doctrine/Protection of Persons and Property Act
    - Competency of Witness to testify

Directed Verdict

- What is it?

  Motion that Court should direct a verdict of not guilty because there is a failure of competent evidence tending to prove the charge.

- When do you make the motion?

  1) At end of State's case
  2) At close of all evidence (defense case/reply)
  3) Even if you don't put up a case, be safe and renew your motion for Directed Verdict when you rest.

- **What is the standard?**

  - Court views evidence and all reasonable inferences in the light most favorable to the state
  - Court is concerned with the existence or non-existence of evidence, not the weight
  - Evidence raising a suspicion isn't enough
  - If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury
  - *State v. Asbury* talks about substantial circumstantial evidence.
  - Also *State v. Pearson* from July 2014 (cert has been granted in this case)

  - Issues not raised in support of the motion are not preserved for appeal

- **What are some things to argue?**

  - Is evidence missing on any element of the offense(s) charged?
  - Circumstantial evidence isn't substantial?
  - Is there evidence of a lesser-included offense only?
  - Did the state establish venue?
  - If a defense was presented, is there evidence to refute it?

Motion for Mistrial

- What is it?
- When do you make it?
- How can you get one? (It ain't easy.)

- Proper when dictated by "manifest necessity" or "the ends of public justice" (e.g., the public's interest in a fair trial designed to end in a just judgment).
- Discretionary
- Fact-specific inquiry
- Defendant must show error and resulting prejudice

- **Curative Instructions**

    - These things are a Catch-22
    - If you reject it or refuse to prepare one, you've abandoned your argument
    - If you consent to it without objection, you've abandoned your argument
    - Renew motion for mistrial after instruction given
    - Move to strike the offending testimony or your motion may not be preserved

- **Double Jeopardy Clause**

    - Doesn't apply when the defendant moves for mistrial, with one exception
    - If defendant can show he was goaded into moving for mistrial through misconduct of prosecutor, defendant can raise double jeopardy if the case is called again
    - Retrial also barred when mistrial is improvidently granted

- **Some reasons to move for mistrial**

    - Improper argument, e.g., implying jury has a duty to community to convict, overly inflammatory argument, violation of the Golden Rule
    - Excessive display of emotion in front of the jury
    - Jury hearing improper evidence (will be considered to be without prejudice if curative instruction given)
    - Juror misconduct

Post-Trial Motions

- What motions can you file?

- What's the purpose?

1. **MOTION FOR NEW TRIAL**

   Motion for new trial to address the sufficiency of evidence or for a ruling on matters previously raised but not ruled upon

   A motion for new trial is the only post-verdict fact-based remedy available in criminal cases

   - Motion for JNOV is improper

   - Can't use to raise new issues
     - Exception: Toyota of Florence, Inc. v. Lynch

   Rule 29, SCRCrimP

   i. Must be made within 10 days of sentence
   ii. Stays time for appeal until receipt of written order

2. **MOTION FOR RECONSIDERATION OF SENTENCE**

   - **What are some reasons for reconsideration?**

     - Is the sentence disproportionate to co-defendant sentences or sentences for similarly-situated defendants convicted of same offense(s)?
     - Was defendant punished for going to trial, in violation of Davis v. State
     - Is there additional mitigation not presented at sentencing hearing?

- Rule 29, SCRCrimP
    - Motion for reconsideration of sentence must be made within 10 days of sentencing.
    - Stays time for appeal until receipt of written order. (Motion must be ruled upon before notice of appeal can be filed)
- Either party can request
- Defendant has no constitutional right to be present

3. **MOTION FOR NEW TRIAL BASED ON AFTER-DISCOVERED EVIDENCE**

- Motion for new trial based on after-discovered evidence
    - Have to show:
        - Evidence is such that it will probably change the result if a new trial is granted
        - Evidence has been discovered since the trial
        - Evidence couldn't have been discovered before trial through due diligence
        - Evidence is material
        - Not merely cumulative or impeaching

- Rule 29, SCRCrimP
    - Motions based on after-discovered evidence must be made within 1 year of actual discovery of the evidence or when it could have been obtained through due diligence—can't be made while case on appeal without leave of appellate court

- **Motion to poll jury**—ensures that verdict is that of each juror

- **Motion for appeal bond**
    - S.C. Code Ann. Sec. 18-1-90
    - If defendant appeals and the sentence is less than 10 years, the Circuit Court may set an appeal bond

APPEAL

NOTICE OF APPEAL FROM GENERAL SESSIONS COURT

- **WHEN and WHOM to SERVE -** Rule 203(b)(2), SCACR
    - Serve notice of appeal within 10 days after sentencing on all respondents
    - NOTE: A timely post-trial motion stays the time to appeal, which then runs from receipt of the written notice of order granting/denying
- **WHEN and WHERE to FILE -** Rule 203(d)(1), SCACR
    - If death sentence or a constitutional question, file Notice with clerk of lower court and Clerk of Supreme Court
    - Otherwise, file with clerk of lower court and Clerk of Court of Appeals
    - Must be filed within 10 days of service, along with proof of service and copy of order(s)/judgment(s) appealed
- Form 4 in the Appendix to the SCACR is a go-by for a Notice of Appeal
- Send a copy to Appellate Defense so they'll know, and give them a heads-up on any issues you think are important
- If you have questions about the process, the folks at Appellate Defense almost certainly know the answers—don't hesitate to call them

NOTICE OF APPEAL FROM MAGISTRATE/MUNICIPAL COURT

- **Appeals from Magistrate/Municipal Court convictions go to the Court of Common Pleas and have their own procedures.**

APPEALS FROM MAGISTRATE COURT

Any person convicted of any offense by a magistrate may appeal the sentence to the Court of Common Pleas for that county. (§18-3-10).

- **REQUIREMENTS FOR NOTICE OF APPEAL – Magistrate Court**

  - Within 10 days after sentence
  - In writing
  - States grounds for appeal
  - File with clerk of circuit court
  - Serve on
    - Magistrate who tried case
      AND
    - Designated agent for prosecuting agency or attorney who prosecuted charge

  - Payment of the fine for the offense does not waive the right to appeal
  - NOTE: If a defendant makes a motion for a new trial within ten (10) days as provided in § 22-3-1000, and the motion is denied the time for appeal is extended to thirty days.

For more information refer to:

The applicable statutes

Court Rules
http://www.sccourts.org/courtReg/index.cfm

Summary Court Judge' Bench Book
http://www.sccourts.org/summaryCourtBenchBook/

APPEALS FROM MUNICIPAL COURT

Any person convicted of any offense by a municipal court may appeal the sentence to the Court of Common Pleas. (§14-25-95).

- **REQUIREMENTS FOR NOTICE OF APPEAL – Municipal Court**

  - Within 10 days after sentence has been passed or judgment rendered
  - In writing
  - Set forth grounds for appeal
  - Serve on municipal judge or the clerk of municipal court

  - The party appealing shall enter into a bond, payable to the municipality, to appear and defend the appeal at the next term of the Court of Common Pleas or shall pay the fine assessed.

  - NOTE: If a defendant makes a motion for a new trial within ten (10) days as provided in § 22-3-1000, and the motion is denied the time for appeal is extended to thirty days.

For more information refer to:

The applicable statutes

Court Rules
http://www.sccourts.org/courtReg/index.cfm

Summary Court Judge' Bench Book
http://www.sccourts.org/summaryCourtBenchBook/

Post-Conviction Relief

Public Defense 101
Fundamentals of the Profession
November 20-21, 2017

Rob Madsen
Circuit Public Defender
Eleventh Judicial Circuit

What a Post Conviction Relief Hearing is not

A substitute for direct appeal
Collateral attack that the evidence was insufficient to support conviction
A hearing challenging the conditions of confinement
Alter defendant's sentence

What a Post Conviction Relief Hearing is

- In South Carolina, a post-conviction relief (PCR) proceeding is a collateral attack on a criminal conviction. At this stage, the convicted person seeks to prove that his original trial lawyer was incompetent in handling his case or that there were other errors that prove his trial was unfair.

- A hearing where your client tells the judge and the rest of the world that you learned nothing in law school, nothing here the last two days, and but for your incompetence he would not be in jail!

- A hearing where your client talks about what a great job you did!

Post Conviction Relief is a hearing requesting relief from a conviction

There are six enumerated grounds for relief

1. Violation of State or Federal Constitution
2. Court was without jurisdiction to impose sentence
3. Sentence exceeds the maximum authorized by law
4. Evidence of material facts, not previously heard
5. The sentence has expired; probation, parole, or conditional release unlawfully revoked; or otherwise unlawfully held
6. Collateral attack upon any ground available under common law, statutory, writ, motion, etc.

Time limits

Must be filed within one year of either the date the sentence was imposed or the date the appeal was completed.
§17-27-45

No PCR during appeal

A PCR cannot be filed while the appellate court is still considering the appeal.

No subsequent PCR

All ground for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application
§17-27-90

Waives Attorney/Client Privilege

§17-27-130

BURDEN OF PROOF

The burden of proof is on the Applicant in post-conviction proceedings to prove the allegations in his application *Griffin v. Martin* 278 S.C. 620, 300 S.E.2d 482 (1983).

PRESUMPTION

- Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.
- The proper measure of counsel's performance remains whether he has provided representation within the range of competence required of attorneys in criminal cases.

Ineffective assistance of counsel

- Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985)
  - The determination of ineffective assistance of counsel requires the two prong test in *Strickland.*
    - First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment.
    - Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.
    - If counsel's ineffectiveness was so pervasive an applicant may be exempted from proving actual prejudice

Trial mistakes

Failure to raise objections
Failure to present evidence or call witnesses
Failure to request or object to jury instructions
Failure of trial strategy
Failure to perfect appeal of conviction

Failure invalidating guilty plea

Counsel's advice was incompetent.

But for counsel's errors, a resonable probability exists that the defendant would not have pleaded guilty

Examples

- **Alexander v. State, grossly misleading sentencing advice**
- **Dupree v. State, failing to pursue at the suppression hearing**
- **Mitchell v. State, character of the defendant, i.e. a mafia member, as well as evidence of "devil worship."**
- **Dawkins v. State, hearsay evidence which improperly corroborated**
- **Ard v. Catoe, further investigated and more thoroughly challenged the gunshot residue evidence.**
- **Roseboro v. State, failing to request an alibi instruction**
- **Martinez v. State, failing to subpoena an alibi witness**
- **Nance v. Ozmint, `I did not ask [to represent the Petitioner], I was simply appointed. [defense counsel], as the public defender, did not ask for this case either.**
- **High v. State, failing to object to a mandatory presumption of intent**
- **Davenport v. State, failed to adequately apprise her of the M'Naghten defense**
- **Jordan v. State, constituted an actual conflict of interest**
- **Nichols v. State, not putting forth a defense at a probation revocation hearing**

PRACTICE TIPS

- Have a System
- Maintain Communications
    - Jail visits (2 visit testimony)
    - Phone calls
- Convey Plea Offers
    - CYA letters
- Independently Investigate Case
    - Use available resources
- Document, Document, Document file
- Advise of Appeal At End Of Trial
- Create a PCR Cheat Sheet

POST-CONVICTION RELIEF

Post-conviction relief actions are governed by South Carolina's Uniform Post-Conviction Procedure Act, §17-27-10, et al. South Carolina Code of Laws, which became effective in 1969.

A post-conviction petitioner may not raise collateral attacks on the conviction based on the ground that the evidence was insufficient to support the conviction.

They are not substitutes for direct appeals.

A PCR application must be filed within one year of either the date the sentence was imposed or the date the appeal is completed

A PCR cannot be filed while the appellate court is still considering the appeal.

No post-conviction relief is available for an applicant challenging the conditions of confinement

According to §17-27-20 there are six enumerated grounds for relief under the Post-Conviction Procedure Act:

(A) Any person who has been convicted of, or sentenced for, a crime and who claims:

(1) That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;

e.g., all claims of ineffective assistance of counsel

In Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985) South Carolina adopted a two-prong test.

1) Counsel's performance was deficient.

2) Counsel's deficient performance prejudiced him so as to deprive him of a fair trial and there is a reasonable probability that the result would have been different.
(If counsel's ineffectiveness was so pervasive an applicant may be exempted from proving actual prejudice.)

Grounds

Failure to advise properly
-defenses
-sentence
-lesser included offense

Failure invalidating guilty plea
-counsel's advice was incompetent
-but for counsel's errors, a reasonable probability exists that the defendant would not have pleaded guilty.

Failure to raise objections
-Counsel does not object to improper evidence.

Failure to present evidence or call witnesses

Failure to request or object to specific jury instructions

Failure of trial strategy
-valid reason

Failure to perfect appeal of conviction

Defendant is entitled to effective assistance of appellate counsel

(**2) That the court was without jurisdiction to impose sentence;**

Slocumb v. State, 337 S.C. 46, 522 S.E.2d 809 (1999) General Sessions Court without jurisdiction over criminal sexual conduct charge committed by juvenile under 14 years of age.

(3) That the sentence exceeds the maximum authorized by law;

Owens v. State, 331 S.C. 582, 503 S.E.2d 462 (1998) Court vacates sentence for kidnapping pursuant to § 16-3-910 because applicant was sentenced for murder.

(4) That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;

In Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993) the Supreme Court states that to obtain a new trial based on after discovered evidence, a party must show that the evidence

1) would probably change the result in a new trial;
2) has been discovered since the trial;
3) could not have been discovered before trial;
4) is material to the issue of guilt or innocence; and
5) is not merely cumulative or impeaching

(5) That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or

Hayes v. State, 413 S.C. 553, 777 S.E.2d 6 (2015) the Supreme Court reversed defendant's probation revocation. The revocation exceeded the maximum authorized by law because sentencing credit for time served was not properly applied by the Department of Corrections.

(6) That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy; may institute, without paying a filing fee, a proceeding under this chapter to secure relief. Provided, however, that this section shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction.

PRACTICE TIPS

Maintain communication
jail visits
phone calls

Convey plea offers

CYA letters

Utilize available resources

Investigate case

Ask questions

Document, document, document file

Advise of appeal at end of trial

Create a PCR cheat sheet at the close of the case

§ **17**-**27**-**20**. Persons who may institute proceeding; exclusiveness of remedy.

(A) Any person who has been convicted of, or sentenced for, a crime and who claims:
(1) That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
(2) That the court was without jurisdiction to impose sentence;
(3) That the sentence exceeds the maximum authorized by law;
(4) That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
(5) That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
(6) That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy; may institute, without paying a filing fee, a proceeding under this chapter to secure relief. Provided, however, that this section shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction.
(B) This remedy is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction. Except as otherwise provided in this chapter, it comprehends and takes the place of all other common law, statutory or other remedies heretofore available for challenging the validity of the conviction or sentence. It shall be used exclusively in place of them.

Credits

HISTORY: 1962 Code § 17-601; 1969 (56) 158.

§ 17-27-45. Filing procedures for post-conviction relief applications.

(A) An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.
(B) When a court whose decisions are binding upon the Supreme Court of this State or the Supreme Court of this State holds that the Constitution of the United States or the Constitution of South Carolina, or both, impose upon state criminal proceedings a substantive standard not previously recognized or a right not in existence at the time of the state court trial, and if the standard or right is intended to be applied retroactively, an application under this chapter may be filed not later than one year after the date on which the standard or right was determined to exist.
(C) If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence.

§ **17**-**27**-**130**. Waiver of attorney-client privilege by allegation of ineffective prior counsel; access to files.

Where a defendant alleges ineffective assistance of prior trial counsel or appellate counsel as a ground for post-conviction relief or collateral relief under any procedure, the applicant shall be deemed to have waived the attorney-client privilege with respect to both oral and written communications between counsel and the defendant, and between retained or appointed experts and the defendant, to the extent necessary for prior counsel to respond to the allegation. This waiver of the attorney-client privilege shall be deemed automatic upon the filing of the allegation alleging ineffective assistance of prior counsel and the court need not enter an order waiving the privilege. Thereafter, counsel alleged to have been ineffective is free to discuss and disclose any aspect of the representation with representatives of the State for purposes of defending against the allegations of ineffectiveness, to the extent necessary for prior counsel to respond to the allegation.

In the case of a defendant who has been convicted of a capital offense and sentenced to death, the defendant's prior trial counsel or appellate counsel shall make available to the capital defendant's collateral counsel the complete files of the defendant's trial or appellate counsel. The capital defendant's collateral counsel may inspect and photocopy the files, but the defendant's prior trial or appellate counsel shall maintain custody of their respective files, except as to the material which is admitted into evidence in any trial proceeding.

Post-Conviction Relief Cases

Public Defense 101
Fundamentals of the Profession
November 20-21, 2017

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SCCID
SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Ruben Ramirez v. State, Op. No. 27696 (filed January 5, 2017)

- The issue before us is **whether a severely mentally retarded individual should be afforded post-conviction relief (PCR) where his plea counsel failed to request an independent competency evaluation prior to his guilty plea**.
- Supreme Court held that counsel was deficient, and that Ramirez was prejudiced. Counsel was "on notice" that the client suffered from severe mental retardation in this ABIK, kidnapping, and CSC case.
- The guilty plea was vacated, and a new trial was ordered.

Anthony Neil Briggs v. State, Op. No. 27745 (filed October 25, 2017)

- Briggs' primary claim of ineffective assistance of counsel relates to the testimony of Michele Arroyo-Staggs, who conducted *the two forensic interviews* of the victim. At trial, the State called Arroyo-Staggs to testify about those interviews, and moved to qualify her **as an expert witness in child abuse assessment**.
- The PCR court found trial counsel was deficient **in three respects** as to the testimony of Arroyo-Staggs. First, **Singleton failed to object to the qualification of Arroyo-Staggs as an expert** witness. (However, the Supreme Court ruled: In light of this history of permitting forensic interviewers to testify as experts, we simply cannot say it was unreasonable for Singleton to not object to the qualification of Arroyo-Staggs as an expert in child abuse assessment in **the August 2010 trial**).
- Second, Singleton **did not object to her direct examination testimony that improperly bolstered** the credibility of the victim.
- Third, Singleton's counsel intentionally elicited additional improper bolstering testimony from Arroyo-Staggs on cross-examination **in which she explained the reasons she "believed" the victim's accusations against Briggs.**
- Arroyo-Staggs' testimony **that the victim had not been coached—the second point as to which the PCR court ruled Singleton should have objected**—is similar to the "no reason not to be truthful" testimony we found improper in State v. Smith, *386 S.C. 562, 689 S.E.2d 629 (2010). Opinion that child's testimony was "**believable.**" – SIX MONTHS BEFORE THIS TRIAL.*
- The PCR court found Singleton's performance **did not meet the objective standard of reasonableness** by which we judge the performance of counsel under the first prong of Strickland v. Washington, 466 U.S. 668 (1984).
- Conclusion: **Briggs's trial counsel was deficient for not objecting to, and eliciting, testimony from the forensic interviewer which improperly bolstered** *the credibility of the victim*. NEW TRIAL GRANTED.

Fred R. Rutland v. The State
415 U.S. 570, 785 S.E.2d 350 (March 30, 2016)

- Rutland was having an affair with the victim's estranged wife, Sally Peele, and both said the victim was abusive and violent.
- Rutland and Peele went to the Bow Wow Boutique to inquire about buying a car from an employee, Kimberly.
- The victim subsequently arrived, and he was shot and killed by Rutland.
- Kimberly gave a statement to the police in which she said **the victim reached in his back pocket and pulled out a gun**.
- She then heard two shots and the victim fell.
- The victim subsequently arrived, and he was shot and killed by Rutland.
- Kimberly gave a statement to the police in which she said **the victim reached in his back pocket and pulled out a gun**.
- She then heard two shots and the victim fell.
- She also told a newspaper reporter that *the victim pulled out a gun*.
- At trial Kimberly told a much different story.
- She said the only thing she saw **in the victim's hand was a pack of cigarettes**.
- Defense counsel failed to question Kimberly on cross-examination **about her highly inconsistent statements**.
- At the PCR hearing, PCR counsel said trial counsel was ineffective for failing to cross-examine Kimberly about her prior inconsistent statement.
- Trial counsel agreed Kimberly's testimony was very important since she was the only objective witness to the shooting.
- The PCR judge found that trial counsel was deficient in failing to cross-examine Kimberly, but that Rutland had failed to prove prejudice.
- The Supreme Court disagreed. **It found the failure to cross-examine Kimberly about her prior inconsistent statements regarding the victim being armed was prejudicial and that counsel was ineffective.**

Susan Tappeiner v. State,
416 S.C. 239, 785 S.E.2d 471 (May 4, 2016)

- Solicitor improperly argues the witnesses vouched for the "victim."
- During closing arguments, trial counsel asserted "[t]here's no scientific evidence here. There's no semen. There's no DNA."
- Citing repeatedly to Tappeiner's husband's testimony, trial counsel discussed the discrepancies between the version of events offered by Victim and the husband.
- Solicitor argued the "**Victim looked [them] in the eye**" . . . the solicitor reminded the jury . . . the school resource **said he believed the victim**.
- The solicitor then asserted the rape crisis counselor likewise interviewed Victim "**face to face, eye to eye**," **and she believed his version of events as well.**
- The solicitor stated, "I think **the expert** told you that she has done **over 200 forensic interviews**. Folks, these are people who can detect when someone is making something up or if there is nothing there."
- The solicitor then reminded the jury that *the police interviewed* Tappeiner "**face to face, eye to eye," and that she was charged the same day** with CSC with a minor, second degree.
- HELD:
- **Improper closing argument**, and also that the solicitor's remarks regarding whether the jurors would want Tappeiner babysitting their children or relatives **improperly appealed to the jurors' emotions, rather than the evidence in the record.**

Freiburger v. State,
413 S.C. 243, 775 S.E. 2d 391 (Ct. App. 2015)

Counsel had available a letter from Chief Strom of SLED to J. Edgar Hoover identifying **a third party's pistol as the murder weapon**. Counsel did not introduce the letter, which **the State agreed was admissible**. The State's circumstantial case was centered on updated scientific evidence demonstrating Defendant's pistol was the murder weapon. **Counsel was ineffective for failure to introduce the letter**.

1.) It would have negatively impacted the certainty of State's expert **that Freiburger's pistol was the murder weapon**;

2.) **It would have disrupted the apparent unanimity of the State's experts** in a prosecution 40 years after the incident;

3. **The letter was impeachment evidence**-without it the jury was left with the impression State's expert had excluded the third party pistol as the murder weapon.

Nelson H. Castro v. State,
___S.C.___, 789 S.E.2d 44 (July 20, 2016)

After a trial, petitioner was convicted of trafficking cocaine between twenty-eight and one hundred grams and was sentenced **to fifteen years' imprisonment.**

Prior to trial, the judge told Castro: " I have pre-tried this with your attorney, **and I will tell you I am inclined to sentence on a plea [to] seven years.** I would not be so inclined in the event of trial."

SENTENCING:

"[Petitioner], this is, as I said, an extremely serious offense. **The State has had to take you to trial on a case where there was overwhelming evidence of your guilt.…**

The jury has found you guilty, and I sentence you to incarceration in the State Department of Corrections for a period of **fifteen years**. [7 YEARS BEFORE TRIAL]."

HELD:

"We hold the statements made by the trial judge clearly reveal **he improperly considered petitioner's decision to exercise his right to a jury trial in sentencing petitioner**….

Wigington v. State,
413 S.C. 578, 776 S.E. 2d 407 (Ct. App. 2015)

Counsel was ineffective for failure to preserve a request for jury instruction and potential verdict of **involuntary manslaughter** in a murder case. Evidence showed the Applicant may have been armed **in self-defense and recklessly handled a loaded gun** at time of victim's death.

Counsel only argued that he would be entitled to a charge of involuntary manslaughter **if the trial judge determined "it was appropriate" to charge self-defense**. (WRONG). Counsel never argued that the evidence from the trial entitled Applicant to a charge of involuntary manslaughter. This was deficient and prejudicial.

Wilds v. State,
407 S.C. 432, 756 S.E.2d 387 (Ct. App. 2014)

Appellate counsel held ineffective and a new trial ordered. The evidence showed the Applicant was either the shooter in a murder/armed robbery case, or not involved , i.e. there was no evidence that he was liable as an accomplice to another person actually shooting.

The trial judge erroneously submitted this basis (accomplice liability) to find Applicant guilty to the jury. Appellate counsel was deficient for not raising this issue on direct appeal and the Applicant was prejudiced as the error was reversible.

It is worthy of note that the charge (**hand of one is the hand of all) was not given in the original charge, but in response to a jury question:** [I]f we say [Wilds is] guilty of murder are we saying he of the three [alone] actually pulled the trigger?

Sanders v. State,
412 S.C. 611, 773 S.E.2d 580 (2015)

As part of a plea bargain, the Applicant waived the right to direct appeal, PCR, and federal habeas corpus. He applied for PCR, contending that he was still entitled to challenge **the advice he received** in agreeing to the waiver of all of his appeals as constitutionally defective advice. REVERSED.

Reeves v. State,
2015 WL 700 8531 (Ct. App Nov. 12, 2015)

In a CSC and lewd act case, Counsel found prejudicially ineffective by Court of Appeals, unanimously reversing the PCR trial judge. Counsel was ineffective in failing to **investigate and present the testimony of a gynecological expert witness**.

Trial counsel had not retained a medical expert because counsel thought the Applicant did not have the money to do so. This was not a legitimate trial strategy.

Expert at PCR provided additional **non-culpable ways** injury to proportioned sexual abuse victim could have occurred, **including self infliction or accident**. State's expert had observed what "appeared to be a healing scar" on victim's hymen. Solicitor had argued in closing there was "**no other explanation other than she was penetrated [sexually]**."

Bagwell v. State, 410 S.C. 259, 763 S.E.2d 650 (Ct. App. 2014)
Bagwell was convicted of first degree burglary. Witnesses at trial had testified to seeing a trail of blood on his face at the scene, and the prosecution suggested to the jury **that he cut himself on the glass patio door at the scene**.

Bagwell testified he was asleep in his apartment at the time of the offense. At PCR, PCR counsel **introduced DNA test results** indicating blood found in three pieces of glass recovered from victims' glass patio door did not match Bagwell.

On appeal, trial counsel was held ineffective for failure to have the DNA testing accomplished before the trial. Trial counsel's only explanation **was thinking the State would have it tested**.

Mincey v. State,
314 S.C. 355, 444 S.E.2d 510 (1994)

The failure to object to **the solicitor's closing argument that two witnesses gave false testimony due to intimidation or threats by the defendant**, where there was no evidence the defendant intimidated any of the witnesses, constituted ineffective assistance of counsel.

Mitchell v. State, 298 S.C. 186, 379 S.E.2d 123 (1989)

In a criminal case, **the state cannot attack the character of the defendant unless he or she first places it at issue.** *Defense counsel was ineffective for failing to object to evidence that Mitchell was a mafia member, as well as evidence of "devil worship."*

Alexander v. State, 303 S.C. 539, 402 S.E.2d 484 (1991)

Counsel was ineffective for giving grossly misleading sentencing advice where a proper review of the indictments would have prevented such bad advice.

Jordan v. State, 406 S.C. 443, 752 S.E.2d 538 (2013)

Joint representation of boyfriend and girlfriend in a trafficking in meth case constituted an actual conflict of interest. The defendant was therefore entitled to a new trial.

Dupree v. State, 305 S.C. 285, 408 S.E.2d 215 (1991)

Counsel was ineffective **for failing to pursue at the suppression hearing the issue of whether his client's statements were involuntary as the result of alleged threats where it was undisputed counsel knew of the alleged threats.**