CHAPTER 3

Offenses Against the Person

ARTICLE 1

Homicide

**SECTION 16‑3‑5.** Person causing injury which results in death at least three years later not to be prosecuted for homicide.

A person who causes bodily injury which results in the death of the victim is not criminally responsible for the victim’s death and must not be prosecuted for a homicide offense if at least three years intervene between the injury and the death of the victim.

HISTORY: 2001 Act No. 97, Section 1.

Library References

Homicide 508.

Westlaw Topic No. 203.

C.J.S. Homicide Section 4.

LAW REVIEW AND JOURNAL COMMENTARIES

Don’t forget to wear your hunter orange (or flack jacket): A critique on the lack of criminal prosecution of hunting “accidents.” 56 S.C. L. Rev. 135, Autumn 2004.

**SECTION 16‑3‑10.** “Murder” defined.

“Murder” is the killing of any person with malice aforethought, either express or implied.

HISTORY: 1962 Code Section 16‑51; 1952 Code Section 16‑51; 1942 Code Section 1101; 1932 Code Section 1101; Cr. C. ‘22 Section 1; Cr. C. ‘12 Section 135; Cr. C. ‘02 Section 108; G. S. 2453; R. S. 108; 1712 (2) 418.

CROSS REFERENCES

Allegations sufficient for indictment for murder, see Section 17‑19‑30.

Commission of this crime within specified radius of child day care center as separate offense, see Section 63‑13‑200.

Denial of registration as an operator of a child day care or group day care home where the applicant, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑820.

Denial of renewal for child day care or group day care home where the person applying for approval, the operator of the facility, or an employee or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑630.

Fingerprint review of any person applying to operate or seek employment at a child day care or group day care home to determine prior conviction of the crime referred to in this section, see Section 63‑13‑620.

Foster care placement with certain persons prohibited, see Section 63‑7‑2350.

Homicide by operation of boat, see Section 50‑21‑115.

No license or registration will be issued to any religious establishment to operate a child day care or group day care home where the operator, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑1010.

No person may be employed by the Department of Social Services in its day care licensing or child protective services divisions who has been convicted of the crime referred to in this section, see Section 63‑13‑190.

Offenses specified in this section as exempt from classification of felonies and misdemeanors, see Section 16‑1‑10.

Past conviction check prior to initial employment of teachers, see Section 59‑26‑40.

Persons convicted of Title 16, Chapter 3 crimes prohibited from appointment as guardian ad litem for child in abuse or neglect proceeding, see Section 63‑11‑520.

Post‑conviction DNA procedures, see Section 17‑28‑10 et seq.

Preservation of DNA evidence, see Section 17‑28‑310 et seq.

Provisions of South Carolina Probate Code relative to effect of homicide on intestate succession, wills, joint assets, life insurance, and beneficiary designations, see Section 62‑2‑803.

Sentencing, see Section 17‑25‑20 et seq.

Violent crimes defined, see Section 16‑1‑60.

Library References

Homicide 525.

Westlaw Topic No. 203.

C.J.S. Homicide Sections 36 to 37.

RESEARCH REFERENCES

ALR Library

70 ALR 5th 461 , Prosecution of Mother for Prenatal Substance Abuse Based on Endangerment of or Delivery of Controlled Substance to Child.

64 ALR 5th 671 , Homicide Based on Killing of Unborn Child.

Encyclopedias

S.C. Jur. Burglary Section 9, Punishment.

S.C. Jur. Children and Families Section 108, Adjudicatory Hearing.

S.C. Jur. Children and Families Section 111, Appeal and Post‑Conviction Review.

S.C. Jur. Homicide Section 3, Excusable Homicides.

S.C. Jur. Homicide Section 4, Criminal Homicides.

S.C. Jur. Homicide Section 10, Time of Victim’s Death.

S.C. Jur. Homicide Section 13, Absence of Degrees.

S.C. Jur. Homicide Section 14, Definition of Murder.

S.C. Jur. Homicide Section 15, Malice‑ Generally.

S.C. Jur. Homicide Section 16, Malice Defined.

S.C. Jur. Homicide Section 20, Use of a Deadly Weapon.

S.C. Jur. Homicide Section 21, Malignant/Depraved Heart Murder.

LAW REVIEW AND JOURNAL COMMENTARIES

Don’t forget to wear your hunter orange (or flack jacket): A critique on the lack of criminal prosecution of hunting “accidents.” 56 S.C. L. Rev. 135, (Autumn 2004).

Photograph of nude homicide victim not unduly prejudicial. 39 S.C. L. Rev. 93, (Autumn 1987).

A year in the life of death: Murders and capital sentences in South Carolina, 1998. 53 S.C. L. Rev. 249, (Winter 2002).

United States Supreme Court Annotations

Mental capacity, Presenting evidence from court‑ordered mental examination, to rebut murder defendant’s voluntary intoxication defense, did not violate Fifth Amendment, see Kansas v. Cheever, 2013, 134 S.Ct. 596, 187 L.Ed.2d 519, on remand 304 Kan. 866, 375 P.3d 979. Criminal Law 393(1), 490

Attorney General’s Opinions

South Carolina’s mandatory death penalty for murder in specified circumstances is unconstitutional in light of recent Supreme Court decisions. 1975‑76 Op.Atty.Gen., No 4388, p 224 (1976 WL 23006).

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1. In general

This section [Code 1962 Section 16‑51] does not make murder a statutory offense; it is still a common‑law crime. State v Coleman (1876) 8 SC 237. State v Bowers (1903) 65 SC 207, 43 SE 656. State v Wilson (1915) 104 SC 351, 89 SE 301.

In a murder case, the corpus delicti consists of two elements: the death of a human being, and the criminal act of another in causing that death. State v. Weston (S.C. 2006) 367 S.C. 279, 625 S.E.2d 641, habeas corpus dismissed 2011 WL 1543343, appeal dismissed 461 Fed.Appx. 264, 2012 WL 90154, certiorari denied 132 S.Ct. 2413, 182 L.Ed.2d 1048. Homicide 511

Definition of murder in no wise affects the ingredients which are necessary to constitute murder, but leaves them exactly and in every particular as they stood at common law. State v. Judge (S.C. 1946) 208 S.C. 497, 38 S.E.2d 715. Homicide 525

2. Constitutional issues

State court’s decision that petitioner was not denied his Sixth Amendment right to impeach and confront witnesses against him when he was denied access to potential impeachment material on state’s witnesses was not contrary to clearly established federal law, or unreasonable determination of facts in light of evidence presented in state court, or as would warrant federal habeas relief, where personnel files of county jail employees was not materially favorable to petitioner, and, thus, failure to disclose it to defendant did not violate Brady. Bennett v. Stirling, 2016, 170 F.Supp.3d 851, affirmed 842 F.3d 319. Sentencing And Punishment 313

State court’s decision that seating of racially biased juror did not deprive petitioner of his right to impartial jury at sentencing phase of capital murder trial, because juror was not actually racially biased against petitioner, was unreasonable determination of facts in light of evidence presented in state court proceeding for postconviction relief, warranting federal habeas relief, where juror unambiguously admitted to racial bias at time of petitioner’s sentencing proceeding, juror’s statement that he thought petitioner was guilty “because he was just a dumb nigger” established that he was actually biased, and record contradicted juror’s later denial of his own bias, given his testimony that he regretted his admission because it jeopardized petitioner’s death sentence. Bennett v. Stirling, 2016, 170 F.Supp.3d 851, affirmed 842 F.3d 319. Criminal Law 1171.1(2.1)

Prosecutor’s injection of race into sentencing phase of capital murder trial was both improper and prejudicial, and thus deprived defendant of due process, where there was no evidentiary basis for racially charged evidence that prosecutor elicited, and only purpose of references to interracial sexual relations, a crime victim being chased by black savages, and fictional large ape who took white woman into captivity before engaging in murderous rampage was to employ all‑white jury’s racial prejudice against black defendant. Bennett v. Stirling, 2016, 170 F.Supp.3d 851, affirmed 842 F.3d 319. Constitutional Law 4745; Sentencing and Punishment 1780(2)

Murder defendant was not deprived of fair trial, in violation of due process clause, as result of potentially exculpatory evidence lost by police in investigation of his case; while record was replete with indications that police investigation was deeply flawed, there was no indication that flaws were product of more than mere negligence, and to extent defendant was disadvantaged by state’s loss of evidence, defendant’s attorney was allowed to forcefully cross‑examine police officers on deficiencies in investigation, with trial court additionally instructing jury that it could infer that evidence which was lost or destroyed by a party would have been adverse to such party. State v. Reaves (S.C. 2015) 414 S.C. 118, 777 S.E.2d 213, certiorari denied 136 S.Ct. 855, 193 L.Ed.2d 754. Constitutional Law 4594(8); Criminal Law 2010; Criminal Law 2012

Trial court did not abuse its discretion in denying murder defendant’s motion to dismiss case based on claimed speedy trial violation arising from nearly 39‑month delay between arrest and trial; while state’s reason for delay, which was heavy backlog of cases and complexities involved in case, was factor weighing against state, defendant did not assert right until over three years after arrest, with case being called for trial later that same month and additional three‑month delay being due to trial judge’s granting of defendant’s mistrial motion, and defendant was not caused any particularized prejudice result of delay, even though there was missing evidence, in that there was no indication that lost evidence would have helped defendant’s case rather than hurt it. State v. Reaves (S.C. 2015) 414 S.C. 118, 777 S.E.2d 213, certiorari denied 136 S.Ct. 855, 193 L.Ed.2d 754. Criminal Law 577.10(10); Criminal Law 577.15(3); Criminal Law 577.16(4)

Murder victim’s 911 call shortly after a violent fight with defendant, who was victim’s wife, was not testimonial, and thus admission of the call during murder trial did not violate defendant’s right of confrontation; the fight victim described during the call had occurred just prior the call, victim explained that he was worried defendant was going to enter his trailer at any moment to attack him, victim was frantic, and victim’s further statements, after he had been assured that defendant was at the police station, merely repeated his prior statements made when he still feared that defendant would enter the trailer. State v. Bratschi (S.C.App. 2015) 413 S.C. 97, 775 S.E.2d 39. Criminal Law 662.40

Evidence of witnesses’ prior convictions relating to dishonesty was not “material,” for Brady purposes, in murder prosecution, and thus prosecution’s failure to disclose such information to defense prior to initial cross‑examination of witnesses did not violate due process; prosecution produced testimony from multiple witnesses corroborating testimony of witnesses at issue, such that proceeding would not have been different had the evidence been disclosed sooner. State v. McCray (S.C.App. 2015) 413 S.C. 76, 773 S.E.2d 914. Constitutional Law 4594(4); Criminal Law 1999

Police officers, who were performing a welfare check for murder victim, acted within the scope of defendant’s consent to enter his home when they removed car keys found on a table and used them to open trunk of victim’s car, which was parked outside the home and in which victim’s body was discovered, and thus seizure of the keys fell within consent exception to warrant and probable cause requirements; defendant was aware that the officers were seeking to determine victim’s whereabouts when they requested entry into his home, it was undisputed that defendant allowed the officers into his home, and defendant did not object when one of the officers picked up the car keys, but simply accompanied the officers to the car. State v. Bruce (S.C. 2015) 412 S.C. 504, 772 S.E.2d 753, certiorari denied 136 S.Ct. 281, 193 L.Ed.2d 204. Searches and Seizures 186

Admission of nontestifying co‑defendant’s statement using the phrase “another person” to refer to two other male crime participants violated murder defendant’s rights under the Confrontation Clause; there were three male defendants in the trial, and jury was left with the inescapable conclusion that the confession referred to the co‑defendants, who were seated at counsel table. State v. McDonald (S.C. 2015) 412 S.C. 133, 771 S.E.2d 840. Criminal Law 662.10

Mere presence of limiting instruction was not curative of Confrontation Clause violation from admission of nontestifying co‑defendant’s statement that indirectly inculpated murder defendant; there were some contexts in which the risk that the jury would not, or could not, follow instructions was so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system could not be ignored. State v. McDonald (S.C. 2015) 412 S.C. 133, 771 S.E.2d 840. Criminal Law 662.10; Criminal Law 673(4)

Items seized by border patrol agent while murder and larceny defendant was detained at border while attempting to enter Canada were lawfully seized under border exception to the Fourth Amendment. State v. Lynch (S.C.App. 2015) 412 S.C. 156, 771 S.E.2d 346, rehearing denied, certiorari denied. Customs Duties 126(1)

Omission of information from arrest warrant affidavit, including information that car that murder and larceny defendant was driving belonged to his live‑in girlfriend, did not warrant Franks hearing to challenge veracity of warrant affidavit, where police detective did not intentionally or recklessly omit the allegedly exculpatory information, in that he could not have informed the magistrate of the omitted information at time affidavit was made. State v. Lynch (S.C.App. 2015) 412 S.C. 156, 771 S.E.2d 346, rehearing denied, certiorari denied. Searches and Seizures 199

Defendant did not have legitimate expectation of privacy in his historical cell phone cite location records which would be protected under the Fourth Amendment; defendant voluntarily contracted with cellular provider, thereby conveying his cell site location data to provider, who created records in ordinary course of business. State v. Drayton (S.C.App. 2015) 411 S.C. 533, 769 S.E.2d 254, certiorari granted in part, vacated in part 415 S.C. 43, 780 S.E.2d 902. Searches and Seizures 26; Telecommunications 1475

Discovery of victim’s body during first trial for murder constituted manifest necessity to declare a mistrial in murder prosecution, and thus retrial for murder offense was not barred by double jeopardy clause; discovery of a body was an extremely important piece of evidence that had the potential to exonerate or inculpate defendant. State v. Baum (S.C.App. 2003) 355 S.C. 209, 584 S.E.2d 419, rehearing denied, certiorari denied, certiorari denied 125 S.Ct. 2251, 544 U.S. 1035, 161 L.Ed.2d 1063, habeas corpus dismissed 2007 WL 2903923, affirmed 572 F.3d 198, certiorari denied 130 S.Ct. 1704, 559 U.S. 979, 176 L.Ed.2d 193, leave to file for rehearing denied 130 S.Ct. 3382, 176 L.Ed.2d 1266. Double Jeopardy 99

The prosecution of a defendant for murder, after his conviction for kidnapping the murder victim, would not be barred on double jeopardy grounds, even though a body was never found and thus the state relied primarily on evidence of the kidnapping offense, since kidnapping is not an essential element of murder; the mere overlapping of proof does not establish a double jeopardy violation. State v. Owens (S.C. 1992) 309 S.C. 402, 424 S.E.2d 473, certiorari denied 113 S.Ct. 1861, 507 U.S. 1036, 123 L.Ed.2d 482, denial of post‑conviction relief reversed 331 S.C. 582, 503 S.E.2d 462.

3. What constitutes murder

It constitutes murder to kill one in commission of other offense. State v Levelle (1891) 34 SC 120, 13 SE 319. State v Kennedy (1918) 109 SC 141, 95 SE 350.

Intent to commit assault resulting in death may constitute murder. State v Alexander (1889) 30 SC 74, 8 SE 440. See also, State v Emerson (1907) 78 SC 83, 58 SE 974.

All persons present aiding and abetting a murder are regarded as principals and equally guilty. State v Davis (1911) 88 SC 204, 70 SE 417. State v Cannon (1897) 49 SC 550, 27 SE 526. State v Gaylord (1905) 70 SC 415, 50 SE 20. State v Kennedy (1918) 109 SC 141, 95 SE 350. State v Fley (1809) 4 SCL 338. State v Crank (1831) 18 SCL 66. State v Anthony (1821) 12 SCL 285. State v Arden (1795) 1 SCL 487. State v Carson, (1892) 36 SC 524, 15 SE 588.

In a murder case, the corpus delicti consists of two elements: (1) the death of a human being, and (2) the criminal act of another in causing that death. State v. Blakely (S.C.App. 2013) 402 S.C. 650, 742 S.E.2d 29. Homicide 511

Any person who is present at a homicide, aiding and abetting, is guilty of the homicide as a principal, even though another does the killing. State v. Zeigler (S.C.App. 2005) 364 S.C. 94, 610 S.E.2d 859, rehearing denied, certiorari denied, habeas corpus dismissed 2015 WL 5604154, appeal dismissed 643 Fed.Appx. 257, 2016 WL 1274728. Homicide 571

The enactment of Section 56‑5‑2945, creating the offense of felony driving under the influence (DUI), did not repeal by implication the offense of murder caused by the operation of a motor vehicle. Felony DUI requires proof that the vehicle was operated by a person who was under the influence; malice is not an element of felony DUI. Murder, on the other hand, requires a showing of malice. While evidence of intoxication may be used to establish malice, murder arising out of the operation of a motor vehicle does not require proof that the driver was under the influence. Since these offenses require different elements, they are distinct offenses and, therefore, felony DUI does not supplant the offense of murder caused by the use of a motor vehicle. State v. Webb (S.C. 1990) 301 S.C. 66, 389 S.E.2d 664. Automobiles 316

Murder is the unlawful killing of another with malice of forethought, express or implied. State v. Johnson (S.C. 1987) 291 S.C. 127, 352 S.E.2d 480.

Murder is the killing of any person with malice aforethought, either express or implied. State v. Kornahrens (S.C. 1986) 290 S.C. 281, 350 S.E.2d 180, certiorari denied 107 S.Ct. 1592, 480 U.S. 940, 94 L.Ed.2d 781, denial of habeas corpus affirmed 66 F.3d 1350, certiorari denied 116 S.Ct. 1575, 517 U.S. 1171, 134 L.Ed.2d 673, rehearing denied 116 S.Ct. 2541, 518 U.S. 1013, 135 L.Ed.2d 1063.

The offense of killing by stabbing or thrusting under Section SC/16‑3‑40 requires proof of an element not required to prove the crime of murder, i.e., use of a knife or similar weapon to cause death, and the offense of killing by stabbing or thrusting is not supported by an indictment for murder. State v. Kornahrens (S.C. 1986) 290 S.C. 281, 350 S.E.2d 180, certiorari denied 107 S.Ct. 1592, 480 U.S. 940, 94 L.Ed.2d 781, denial of habeas corpus affirmed 66 F.3d 1350, certiorari denied 116 S.Ct. 1575, 517 U.S. 1171, 134 L.Ed.2d 673, rehearing denied 116 S.Ct. 2541, 518 U.S. 1013, 135 L.Ed.2d 1063. Indictment And Information 191(4)

He who is present at a homicide, aiding and abetting, is guilty of the homicide as a principal, even though another does the killing. State v. Crowe (S.C. 1972) 258 S.C. 258, 188 S.E.2d 379, certiorari denied 93 S.Ct. 691, 409 U.S. 1077, 34 L.Ed.2d 666.

Malice is an essential ingredient of murder. State v. Harvey (S.C. 1951) 220 S.C. 506, 68 S.E.2d 409. Homicide 530

Inciter to suicide is murderer if causal connection between incitement and death established. State v. Jones (S.C. 1910) 86 S.C. 17, 67 S.E. 160. Homicide 566

A killing in sudden heat and passion because of a slight physical aggression against one’s person, or member of his family, or property in his presence is manslaughter, but a killing under such circumstances because of previous malice is murder. State v. Gallman (S.C. 1908) 79 S.C. 229, 60 S.E. 682. Homicide 1457

Motive is not an essential element of crime and need not be shown, although the presence or absence of evidence of a motive may be considered in determining whether there was criminal intent, which is an essential element of any common‑law crime. State v. Thrailkill (S.C. 1906) 73 S.C. 314, 53 S.E. 482.

If the killing was done under circumstances which showed that the previous criminal intention existed to bring about a fight in order to get to kill the assailant, that is murder. State v. Summer (S.C. 1899) 55 S.C. 32, 32 S.E. 771, 74 Am.St.Rep. 707.

When a man kills another with malice under a previously formed intention to do so, he is not excused by the provocation given to him at the time of the homicide. State v. Sullivan (S.C. 1895) 43 S.C. 205, 21 S.E. 4.

If a man meets another and kills him with a previously formed intention of killing him, that is murder. State v. Sullivan (S.C. 1895) 43 S.C. 205, 21 S.E. 4.

No provocation, however grievous, will excuse from the crime of murder, where, from the weapons used or the manner of assault, an intention to kill or do some bodily harm, is manifest. State v. Way (S.C. 1893) 38 S.C. 333, 17 S.E. 39. Homicide 684

One who, in attempting to commit suicide, accidentally kills another who is trying to prevent it, is guilty of murder. State v. Levelle (S.C. 1891) 34 S.C. 120, 13 S.E. 319, 27 Am.St.Rep. 799. Homicide 504

4. Person

If state may not legislate for protection and preservation of life of nonviable fetus, it surely cannot make surgical severance of fetus from womb murder under state law. Floyd v. Anders (D.C.S.C. 1977) 440 F.Supp. 535, vacated 99 S.Ct. 1200, 440 U.S. 445, 59 L.Ed.2d 442, rehearing denied 99 S.Ct. 2043, 441 U.S. 928, 60 L.Ed.2d 403.

An unborn child is a “person” within the definition of murder found in Section 16‑3‑10. State v. Horne (S.C. 1984) 282 S.C. 444, 319 S.E.2d 703.

5. Duty to retreat

The duty to retreat need not be shown in a murder case in which a defendant seeks immunity from prosecution under the Protection of Persons and Property Act. State v. Douglas (S.C.App. 2014) 411 S.C. 307, 768 S.E.2d 232, certiorari dismissed as improvidently granted 416 S.C. 627, 788 S.E.2d 686. Homicide 799

The rule that a lawful guest attacked in the home of another person has no duty to retreat when attacked by an intruder is inapplicable where the attacker is the homeowner; thus, the guest would have a duty to retreat if possible, before he could assert a self‑defense claim. State v. Chambers (S.C.App. 1992) 310 S.C. 43, 425 S.E.2d 45. Homicide 803

6. Felony murder

When two or more combine together to commit a robbery and, during the robbery, a homicide is committed as a natural and probable consequence, all present and participating in the robbery are as guilty of the killing as the one committing the homicide. State v. Avery (S.C. 1998) 333 S.C. 284, 509 S.E.2d 476, rehearing denied. Homicide 612

If two or more combine together to commit an unlawful act, such as robbery, and, in the execution of that criminal act, a homicide is committed by one of the actors, as a probable or natural consequence of the acts done in pursuance of the common design, all present participating in the unlawful undertaking are as guilty as the one who committed the fatal act. State v. Crowe (S.C. 1972) 258 S.C. 258, 188 S.E.2d 379, certiorari denied 93 S.Ct. 691, 409 U.S. 1077, 34 L.Ed.2d 666. Homicide 615

The common purpose may not have been to kill and murder, but if it was unlawful, as, for instance, to break in and steal, and in the execution of this common purpose a homicide is committed by one, as a probable or natural consequence of the acts done in pursuance of the common design, then all present participating in the unlawful common design, are as guilty as the slayer. State v. Crowe (S.C. 1972) 258 S.C. 258, 188 S.E.2d 379, certiorari denied 93 S.Ct. 691, 409 U.S. 1077, 34 L.Ed.2d 666. Homicide 615

7. Murder distinguished from manslaughter

Words are not sufficient provocation to reduce a homicide from murder to manslaughter. State v Ellison (1913) 95 SC 127, 78 SE 704. State v Bethune (1910) 86 SC 143, 67 SE 466, later app 93 SC 195, 75 SE 281. State v Harvey (1951) 220 SC 506, 68 SE2d 409.

The distinguishing element between murder and manslaughter is that of malice. Malice must be shown to convict one of murder. It does not have to be shown to convict one of manslaughter. But both murder and manslaughter are felonies. State v King (1930) 158 SC 251, 155 SE 409. State v Ferguson (1835) 20 SCL 619. State v Adams (1904) 68 SC 421, 47 SE 676. State v Reeder (1905) 72 SC 223, 51 SE 702. State v Driggers (1910) 84 SC 526, 66 SE 1042. State v Chastain (1910) 85 SC 64, 67 SE 6.

Even if sufficient legal provocation has aroused a defendant’s passion, if at the time of the killing those passions had cooled or a sufficiently reasonable time had elapsed so that the passions of the ordinary reasonable person would have cooled, the killing would be murder and not manslaughter. State v. Smith (S.C.App. 2005) 363 S.C. 111, 609 S.E.2d 528. Homicide 669

Shooting victim’s attempt to resist or defend herself by threatening defendant with a pair of scissors, after defendant entered motel office in which victim was working, pulled out a gun and demanded that victim give him money, did not satisfy the sufficient legal provocation element of voluntary manslaughter. Tate v. State (S.C. 2002) 351 S.C. 418, 570 S.E.2d 522. Homicide 673

Fact that victim’s mother threw a cigarette case at defendant immediately before defendant shot victim did not reduce killing to manslaughter; defendant had already grabbed gun to shoot victim, case was not thrown by victim, and throwing a cigarette case would not naturally render the mind of an ordinary person incapable of cool reflection and produce uncontrollable impulse to do violence. State v. Locklair (S.C. 2000) 341 S.C. 352, 535 S.E.2d 420, rehearing denied, certiorari denied 121 S.Ct. 817, 531 U.S. 1093, 148 L.Ed.2d 701. Homicide 673

To warrant a court’s eliminating the offense of manslaughter in a murder prosecution, it should very clearly appear that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter. State v. Cole (S.C. 2000) 338 S.C. 97, 525 S.E.2d 511. Homicide 1452

The sudden heat of passion, upon sufficient legal provocation, which mitigates a felonious killing to manslaughter, while it need not dethrone reason entirely, or shut out knowledge and volition, must be such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence. State v. Cole (S.C. 2000) 338 S.C. 97, 525 S.E.2d 511. Homicide 668

Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation; heat of passion alone will not suffice to reduce murder to voluntary manslaughter. State v. Kornahrens (S.C. 1986) 290 S.C. 281, 350 S.E.2d 180, certiorari denied 107 S.Ct. 1592, 480 U.S. 940, 94 L.Ed.2d 781, denial of habeas corpus affirmed 66 F.3d 1350, certiorari denied 116 S.Ct. 1575, 517 U.S. 1171, 134 L.Ed.2d 673, rehearing denied 116 S.Ct. 2541, 518 U.S. 1013, 135 L.Ed.2d 1063. Homicide 667

Heat of passion alone will not suffice to reduce murder to voluntary manslaughter. State v. Plemmons (S.C. 1985) 286 S.C. 78, 332 S.E.2d 765, vacated 106 S.Ct. 1943, 476 U.S. 1102, 90 L.Ed.2d 353. Homicide 668

A conviction may be had for involuntary manslaughter under an indictment for murder in the usual form. State v. White (S.C. 1969) 253 S.C. 475, 171 S.E.2d 712, certiorari denied 90 S.Ct. 482, 396 U.S. 987, 24 L.Ed.2d 451. Indictment And Information 189(8)

The law does not reduce from murder to manslaughter every homicide committed in the heat of passion. State v. Norris (S.C. 1969) 253 S.C. 31, 168 S.E.2d 564. Homicide 673

The killing of a human being, even in the heat of passion, is murder if the slayer have no just cause for his anger. State v. Norris (S.C. 1969) 253 S.C. 31, 168 S.E.2d 564. Homicide 667

It must be passion justly excited by legal provocation. State v. Norris (S.C. 1969) 253 S.C. 31, 168 S.E.2d 564.

If an adequate legal provocation does not exist, the killing, even in the heat of passion, is murder and not manslaughter. State v. Norris (S.C. 1969) 253 S.C. 31, 168 S.E.2d 564. Homicide 672

The sudden heat and passion, upon sufficient legal provocation, which mitigates a felonious killing to manslaughter, while it need not dethrone reason entirely, or shut out knowledge and volition, must be such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence. State v. Norris (S.C. 1969) 253 S.C. 31, 168 S.E.2d 564.

In determining whether the act which caused death was impelled by heat of passion or by malice, all the surrounding circumstances and conditions are to be taken into consideration, including previous relations and conditions connected with the tragedy, as well as those existing at the time of the killing. State v. Norris (S.C. 1969) 253 S.C. 31, 168 S.E.2d 564. Homicide 668

On a trial for murder growing out of the use of a deadly weapon, it is unnecessary to charge the law relating to manslaughter where the testimony fails to suggest any theory upon which a verdict of manslaughter could rest. State v. Norris (S.C. 1969) 253 S.C. 31, 168 S.E.2d 564. Homicide 1452

To warrant the court in eliminating the offense of manslaughter, it should very clearly appear that there is no evidence whatever tending to reduce the crime from murder to manslaughter. State v. Norris (S.C. 1969) 253 S.C. 31, 168 S.E.2d 564. Homicide 1452

It is gross and culpable negligence for a drunken person to attempt to guide and operate an automobile upon a public highway, and one so doing, and occasioning injuries to another, causing death, may be guilty of murder or manslaughter, as the facts may determine. State v. Mouzon (S.C. 1957) 231 S.C. 655, 99 S.E.2d 672.

But words plus hostile acts may reduce or excuse killing. Words accompanied by hostile acts may, according to circumstances, not only reduce a killing from murder to manslaughter, but may establish the plea of self‑defense. State v. Harvey (S.C. 1951) 220 S.C. 506, 68 S.E.2d 409. Homicide 675; Homicide 766

“Voluntary manslaughter” is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation; heat of passion alone will not suffice to reduce murder to voluntary manslaughter, as both heat of passion and sufficient legal provocation must be present at the time of the killing. State v. Grubbs (S.C.App. 2003) 353 S.C. 374, 577 S.E.2d 493, rehearing denied, certiorari denied. Homicide 658

The sudden heat of passion, upon sufficient legal provocation, which mitigates a felonious killing to manslaughter, while it need not dethrone reason entirely, or shut out knowledge and volition, must be such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence. State v. Grubbs (S.C.App. 2003) 353 S.C. 374, 577 S.E.2d 493, rehearing denied, certiorari denied. Homicide 668

8. Malice

Malice is a term importing wickedness and excluding a just cause or excuse. State v Doig (1845) 31 SCL 179. State v Harvey (1951) 220 SC 506, 68 SE2d 409. State v Fuller (1956) 229 SC 439, 93 SE2d 463.

“Aforethought” refers to time evil intent is conceived. While there may be and probably is some distinction between “malice” and “malice aforethought,” the latter conveying more the idea of premeditation and design, and being, therefore, more intense in respect to the wickedness of heart involved than is the word “malice” alone, still the word “aforethought” is usually understood to refer rather to the time when the evil intent is conceived. State v Judge (1946) 208 SC 497, 38 SE2d 715. State v Harvey (1951) 220 SC 506, 68 SE2d 409.

Malice is a wilful or intentional doing of a wrongful act, without just cause or excuse. State v Ferguson (1912) 91 SC 235, 74 SE 502. State v Harvey (1951) 220 SC 506, 68 SE2d 409.

“Malice,” within meaning of South Carolina murder statute, is the wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong. Young v. Catoe (C.A.4 (S.C.) 2000) 205 F.3d 750, certiorari denied 121 S.Ct. 164, 531 U.S. 868, 148 L.Ed.2d 111. Homicide 530

In the context of murder, malice does not require ill‑will toward the individual injured, but rather it signifies a general malignant recklessness of the lives and safety of others, or a condition of the mind which shows a heart regardless of social duty and fatally bent on mischief. In re Tracy B. (S.C.App. 2010) 391 S.C. 51, 704 S.E.2d 71, rehearing denied, certiorari granted, certiorari dismissed as improvidently granted 400 S.C. 502, 735 S.E.2d 504. Homicide 530

Where evidence is presented that would reduce, mitigate, excuse or justify a homicide (or assault and battery with intent to kill) caused by the use of a deadly weapon, juries shall not be charged that malice may be inferred from the use of a deadly weapon; the permissive inference charge concerning the use of a deadly weapon remains a correct statement of the law where the only issue presented to the jury is whether the defendant has committed murder (or assault and battery with intent to kill). State v. Belcher (S.C. 2009) 385 S.C. 597, 685 S.E.2d 802. Criminal Law 778(6); Homicide 1392

The “use of a deadly weapon” implied malice instruction has no place in a murder (or assault and battery with intent to kill) prosecution where evidence is presented that would reduce, mitigate, excuse or justify the killing (or the alleged assault and battery with intent to kill). State v. Belcher (S.C. 2009) 385 S.C. 597, 685 S.E.2d 802. Criminal Law 778(6); Homicide 1392

“Malice,” in the context of murder prosecution, is the wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong; it is the doing of a wrongful act intentionally and without just cause or excuse. State v. Reese (S.C. 2006) 370 S.C. 31, 633 S.E.2d 898, rehearing denied. Homicide 530

“Malice” is the wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong. State v. Douglas (S.C.App. 2004) 359 S.C. 187, 597 S.E.2d 1, certiorari granted, affirmed in part, reversed in part 369 S.C. 424, 632 S.E.2d 845, rehearing denied. Homicide 530

A pistol is a “deadly weapon,” for purposes of inferring the malice element of homicide. Sheppard v. State (S.C. 2004) 357 S.C. 646, 594 S.E.2d 462. Homicide 909

“Malice,” for purposes of offenses of murder and assault and battery with intent to kill (ABIK), is the wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong; it is the doing of a wrongful act intentionally and without just cause or excuse. Tate v. State (S.C. 2002) 351 S.C. 418, 570 S.E.2d 522. Homicide 530; Homicide 728

For purposes of murder charge, which requires either express or implied malice, extreme recklessness can lead to an inference of malice, even though malice and recklessness are not equivalent. State v. Watson (S.C. 2002) 349 S.C. 372, 563 S.E.2d 336. Homicide 909

Malice aforethought is an element of the offense of murder. State v. Owens (S.C. 2001) 346 S.C. 637, 552 S.E.2d 745, rehearing denied, appeal after new sentencing hearing 362 S.C. 175, 607 S.E.2d 78, appeal after new sentencing hearing 378 S.C. 636, 664 S.E.2d 80, certiorari denied, certiorari denied 129 S.Ct. 1004, 173 L.Ed.2d 300, habeas corpus dismissed 2010 WL 146164. Homicide 530

“Malice,” for purposes of a murder prosecution, is the wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong. State v. Kelsey (S.C. 1998) 331 S.C. 50, 502 S.E.2d 63, rehearing denied. Homicide 530

Malice may be implied in a murder prosecution from the defendant’s use of a deadly weapon. State v. Kelsey (S.C. 1998) 331 S.C. 50, 502 S.E.2d 63, rehearing denied. Homicide 909

Malice is the wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong. State v. Johnson (S.C. 1987) 291 S.C. 127, 352 S.E.2d 480.

The implication of malice may arise from the use of a deadly weapon, and gasoline may be considered a deadly weapon. State v. Campbell (S.C. 1985) 287 S.C. 377, 339 S.E.2d 109, grant of habeas corpus reversed 888 F.2d 1385, certiorari denied 110 S.Ct. 1528, 494 U.S. 1058, 108 L.Ed.2d 768, habeas corpus denied 920 F.2d 926. Homicide 909

Malice does not necessarily mean an actual intent to take human life. It may be inferential or implied, instead of positive, as when an act which imports danger to another is done so recklessly or wantonly as to manifest depravity of mind and disregard of human life. State v. Mouzon (S.C. 1957) 231 S.C. 655, 99 S.E.2d 672.

The term malice indicates a formed purpose and design to do a wrongful act under the circumstances that exclude any legal right to do it. State v. Fuller (S.C. 1956) 229 S.C. 439, 93 S.E.2d 463.

Malice is defined as being hatred or ill will. Malice is wrongful intent to injure another person. It indicates a wicked or depraved spirit intent on doing wrong. State v. Fuller (S.C. 1956) 229 S.C. 439, 93 S.E.2d 463.

Express malice is where a person kills another with a sedate, deliberate mind and formed design, such formed design being evidenced by external circumstances disclosing the inward intention. State v. Fuller (S.C. 1956) 229 S.C. 439, 93 S.E.2d 463.

Implied malice is presumed from the use of a deadly weapon, or from the wilful, deliberate and intentional doing of an unlawful act without just cause or excuse. State v. Fuller (S.C. 1956) 229 S.C. 439, 93 S.E.2d 463.

The law does not require that the malice must exist for any appreciable length of time before the commission of the act. State v. Fuller (S.C. 1956) 229 S.C. 439, 93 S.E.2d 463.

Malice need not exist for any particular length of time prior to the killing. State v. Harvey (S.C. 1951) 220 S.C. 506, 68 S.E.2d 409.

When there is no evidence which would have warranted a finding of fact that the accused shot in sudden heat of passion, upon sufficient legal provocation, or that he shot in self‑defense, as claimed, then a finding that the killing was accompanied by malice aforethought is justified. State v. Judge (S.C. 1946) 208 S.C. 497, 38 S.E.2d 715.

Malice is a wicked purpose. It is a performed purpose to do a wrongful act, without sufficient legal provocation; and it would be an indication to do a wrongful act which resulted in the death of a man, without sufficient legal provocation, or just excuse, or legal excuse. State v. Judge (S.C. 1946) 208 S.C. 497, 38 S.E.2d 715. Homicide 530

If the lives of two men had been threatened, each by the other, and one man went where he knew the other was going to be, and he went there with the intent and purpose in his heart to do harm or injury to the other, then there would be express malice in his very act of going there. State v. Jones (S.C. 1919) 113 S.C. 134, 101 S.E. 647. Homicide 531

Malice is a wrongful act done intentionally without just cause or excuse. State v. Foster (S.C. 1903) 66 S.C. 469, 45 S.E. 1.

9. Provocation

An exercise of a legal right by the victim is never deemed a provocation sufficient to justify or to mitigate an act of violence against the victim. Sheppard v. State (S.C. 2004) 357 S.C. 646, 594 S.E.2d 462. Homicide 672

10. Immunity

Defendant was not entitled to immunity under provision of Protection of Persons and Property Act allowing presumption of having reasonable fear of imminent peril or death or great bodily injury when person against whom deadly force was used removed or was attempting to remove another person against his will from occupied vehicle in prosecution for voluntary manslaughter and possession of weapon during commission of violent crime; while defendant alleged that victim was forcing him from his truck at gunpoint, there were at least three other witnesses who stated that argument between two men had subsided and that everyone was calm when defendant shot victim, and, since court found defendant’s version of events incredible, failure to address last phrase of provision did not constitute reversible error. State v. Oates (S.C.App. 2017) 421 S.C. 1, 803 S.E.2d 911. Criminal Law 286

Defendant was not entitled to immunity under provision of Protection of Persons and Property Act stating that person who was attacked in place where he had right to be had no duty to retreat and had right to meet attacker with deadly force if he reasonably believed it was necessary to prevent death or great bodily injury to himself, in prosecution for voluntary manslaughter and possession of weapon during commission of violent crime; while defendant was in place that he was allowed to be, his use of deadly force against victim was not necessary to prevent his own death or injury or commission of violent crime, and, assuming that there was attack by victim previously, there was no such event at time of shooting and, thus, there was no force to meet, as victim was walking away from defendant when he was shot. State v. Oates (S.C.App. 2017) 421 S.C. 1, 803 S.E.2d 911. Criminal Law 286

Immunity finding pursuant to provision in Persons and Property Act providing that a person “who is attacked in another place where he has a right to be, including, but not limited to, his place of business,” could have been made even if location of homicide was defendant’s residence; General Assembly’s intent was to provide protections of Act to persons within their own home facing not only unwelcome intruders but also attackers, including those who were initially invited into home and later placed homeowner in reasonable fear of death or great bodily injury. State v. Douglas (S.C.App. 2014) 411 S.C. 307, 768 S.E.2d 232, certiorari dismissed as improvidently granted 416 S.C. 627, 788 S.E.2d 686. Homicide 770

Trial court did not abuse its discretion by failing to assess defendant’s intoxication, in determining whether defendant was entitled to immunity from murder prosecution under the Protection of Persons and Property Act; court implicitly found that a reasonable, sober person facing defendant’s circumstances would have believed shooting victim was necessary to prevent great bodily harm to himself, and court noted that law enforcement did not obtain defendant’s specific blood‑alcohol level despite fact that he was in custody. State v. Douglas (S.C.App. 2014) 411 S.C. 307, 768 S.E.2d 232, certiorari dismissed as improvidently granted 416 S.C. 627, 788 S.E.2d 686. Homicide 795

11. Mutual combat

Mutual combat bars a claim of self‑defense because it negates the element of not being at fault. Jackson v. State (S.C. 2003) 355 S.C. 568, 586 S.E.2d 562, rehearing denied. Homicide 784

For purposes of a claim of self‑defense, “mutual combat” exists when there is mutual intent and willingness to fight. Jackson v. State (S.C. 2003) 355 S.C. 568, 586 S.E.2d 562, rehearing denied. Homicide 784

For the purpose of the doctrine of mutual combat, mutual intent is manifested by the acts and conduct of the parties and the circumstances attending and leading up to the combat. State v. Taylor (S.C. 2003) 356 S.C. 227, 589 S.E.2d 1, rehearing granted. Homicide 784

If the defendant is engaged in mutual combat, self‑defense is unavailable unless the defendant withdraws from the conflict before the killing occurs. State v. Taylor (S.C. 2003) 356 S.C. 227, 589 S.E.2d 1, rehearing granted. Homicide 784

A finding that a defendant was engaged in mutual combat does not preclude the jury from convicting the defendant of manslaughter as opposed to murder. State v. Taylor (S.C. 2003) 356 S.C. 227, 589 S.E.2d 1, rehearing granted. Homicide 690

Where two persons mutually engage in combat, and one kills another, and at the time of the killing it be maliciously done, it is murder; if it be done in sudden heat and passion upon sufficient provocation without premeditation or malice, it would be manslaughter. State v. Taylor (S.C. 2003) 356 S.C. 227, 589 S.E.2d 1, rehearing granted. Homicide 690

The mutual combat doctrine is triggered when both parties contribute to the resulting fight. State v. Taylor (S.C. 2003) 356 S.C. 227, 589 S.E.2d 1, rehearing granted. Homicide 784

12. Duress

Duress is not a defense to murder. State v. Kelsey (S.C. 1998) 331 S.C. 50, 502 S.E.2d 63, rehearing denied. Homicide 763

13. Accident

Homicide will be excusable on the ground of accident when: (1) the killing was unintentional; (2) the defendant was acting lawfully; and (3) due care was exercised in the handling of the weapon. State v. Chatman (S.C. 1999) 336 S.C. 149, 519 S.E.2d 100. Homicide 762

Homicide is not excusable on the ground of accident unless it appears that the defendant was acting lawfully. State v. Chatman (S.C. 1999) 336 S.C. 149, 519 S.E.2d 100. Homicide 762

14. Attempted murder

Defendant who shot and wounded victim in altercation outside of night club could not be convicted of attempted murder, but could only be convicted of assault and battery with intent to kill; victim did not die within a year and a day after the wounds were inflicted, so there was a conclusive presumption that the wounds from the shooting did not cause the death. State v. Sutton (S.C.App. 1998) 333 S.C. 192, 508 S.E.2d 41, rehearing denied, certiorari granted, affirmed as modified 340 S.C. 393, 532 S.E.2d 283. Assault And Battery 57; Homicide 557; Homicide 566; Homicide 914

15. Self‑defense

Four elements required by law to establish a case of self‑defense are: (1) defendant must have been without fault in bringing on the difficulty; (2) defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger; (3) if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief, but if defendant actually was in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life; and (4) defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance. State v. Douglas (S.C.App. 2014) 411 S.C. 307, 768 S.E.2d 232, certiorari dismissed as improvidently granted 416 S.C. 627, 788 S.E.2d 686. Homicide 766

In a murder case in which a defendant claims immunity from prosecution under the Protection of Persons and Property Act, a valid case of self‑defense must exist, and the trial court must necessarily consider the elements of self‑defense in determining a defendant’s entitlement to immunity. State v. Douglas (S.C.App. 2014) 411 S.C. 307, 768 S.E.2d 232, certiorari dismissed as improvidently granted 416 S.C. 627, 788 S.E.2d 686. Homicide 766

Although juvenile’s unlawful possession of a pistol on evening in question did not automatically bar a self‑defense charge in murder case arising from his shooting at occupied vehicle, it was evidence of an unlawful activity which could preclude the assertion of self‑defense. In re Tracy B. (S.C.App. 2010) 391 S.C. 51, 704 S.E.2d 71, rehearing denied, certiorari granted, certiorari dismissed as improvidently granted 400 S.C. 502, 735 S.E.2d 504. Infants 2470

Juvenile had other means of avoiding the danger, and therefore could not establish self‑defense in murder prosecution arising from his firing gun in the direction of occupied vehicle; other teenagers sitting on front porch ran into house when first shots were fired from the vehicle, and juvenile was the only one sitting on the front porch that evening who ran towards the departing car and fired a gun in its direction. In re Tracy B. (S.C.App. 2010) 391 S.C. 51, 704 S.E.2d 71, rehearing denied, certiorari granted, certiorari dismissed as improvidently granted 400 S.C. 502, 735 S.E.2d 504. Infants 2470

Juvenile was not without fault in bringing on the difficulty, as necessary to establish self‑defense in murder prosecution arising from juvenile’s firing of a gun in direction of occupied vehicle; initial difficulty that began when vehicle occupant fired shots had passed, as vehicle was two houses beyond porch where juvenile had been seated when juvenile ran toward vehicle in the street and fired his gun. In re Tracy B. (S.C.App. 2010) 391 S.C. 51, 704 S.E.2d 71, rehearing denied, certiorari granted, certiorari dismissed as improvidently granted 400 S.C. 502, 735 S.E.2d 504. Infants 2470

Defendant is entitled to a self‑defense charge if there is evidence establishing: (1) he was without fault in bringing on the difficulty; (2) he believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) he had no means of avoiding the danger; and (4) that a reasonably prudent person of ordinary firmness and courage would have entertained the same belief about the danger. Jackson v. State (S.C. 2003) 355 S.C. 568, 586 S.E.2d 562, rehearing denied. Homicide 1472

To establish self‑defense in murder prosecution, four elements must be present: (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must have been in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) if his defense is based upon his belief of imminent danger, defendant must show that a reasonably prudent person of ordinary firmness and courage would have entertained the belief that he was actually in imminent danger and that the circumstances were such as would warrant a person of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm or the loss of his life; and (4) the defendant had no other probable means of avoiding the danger. State v. Day (S.C. 2000) 341 S.C. 410, 535 S.E.2d 431. Homicide 766

Murder defendant who brought on initial difficulty by breaking into victim’s vehicle could not assert self‑defense, despite his claim that he withdrew from conflict and communicated his intent to do so by throwing down his knife; even if defendant subjectively meant to withdraw from conflict, he failed to communicate this intent to victim, as defendant admitted that victim did not see defendant drop knife, and defendant did not tell victim that defendant was leaving and did not want to fight. State v. Bryant (S.C. 1999) 336 S.C. 340, 520 S.E.2d 319. Homicide 783

To establish self‑defense, four elements must be present: (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must have been in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief—if the defendant was actually in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life; and (4) the defendant had no other probable means of avoiding the danger. State v. Bryant (S.C. 1999) 336 S.C. 340, 520 S.E.2d 319. Homicide 766

Any act of the accused in violation of law and reasonably calculated to produce the occasion amounts to bringing on the difficulty and bars his right to assert self‑defense as a justification or excuse for a homicide. State v. Bryant (S.C. 1999) 336 S.C. 340, 520 S.E.2d 319. Homicide 774

To establish self‑defense, there must be evidence that: (1) defendant was without fault in bringing on the difficulty; (2) he actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) a reasonably prudent person of ordinary firmness and courage would have entertained the same belief; and (4) he had no other probable means of avoiding the danger. State v. Chatman (S.C. 1999) 336 S.C. 149, 519 S.E.2d 100. Homicide 766

A jury charge which requires a defendant to establish self‑defense by a preponderance of the evidence is erroneous. A defendant must merely produce evidence which causes the jury to have a reasonable doubt regarding his or her guilt. Dandy v. State (S.C. 1990) 301 S.C. 303, 391 S.E.2d 581.

In order to claim self‑defense, the defendant must be without fault in bringing on the difficulty. State v. Taylor (S.C. 2003) 356 S.C. 227, 589 S.E.2d 1, rehearing granted. Homicide 774

16. Venue

Evidence was sufficient to establish venue in Horry County where facts indicated that victim was last seen at his residence in that county, there were signs of struggle, and ransom money was demanded and delivered in that county; venue in criminal case need not be affirmatively proven if there is sufficient evidence from which it can be inferred. State v. Owens (S.C. 1987) 293 S.C. 161, 359 S.E.2d 275, certiorari denied 108 S.Ct. 496, 484 U.S. 982, 98 L.Ed.2d 495. Criminal Law 564(1)

17. Discovery

Solicitor’s failure to disclose second statement by co‑defendant to police given five days before trial, which statement was substantially inconsistent with initial statement to police regarding the events and timeline surrounding victim’s murder, together with failure to disclose that, after second statement, several police officers took co‑defendant by automobile to victim’s home and from there retraced route he and defendant had allegedly taken after murder, constituted Brady violation, in prosecution for capital murder and robbery, for which defendant was entitled to post‑conviction relief; co‑defendant was young man of limited mental abilities and was only eyewitness to crime, knowledge of officer’s trip with co‑defendant after he gave second, inconsistent statement would have bolstered defendant’s contention that co‑defendant was unreliable witness who had to be coached, there was no physical evidence connecting defendant to murder, and prosecution’s case rested largely on co‑defendant’s recounting of murder. Riddle v. Ozmint (S.C. 2006) 369 S.C. 39, 631 S.E.2d 70. Criminal Law 1998; Criminal Law 1999; Criminal Law 2001

State did not violate Brady v. Maryland in capital murder prosecution by failing to inform defendant before retrial that accomplice, who testified at first trial that defendant committed both murder for which he was on trial and another murder, had recanted and blamed other murder on another person; such evidence was not material, as defendant admitted his guilt of other murder when he pled guilty in prior prosecution arising therefrom, and jury in instant case was aware that witness had changed her story on several previous occasions. Johnson v. Catoe (S.C. 1999) 336 S.C. 354, 520 S.E.2d 617. Criminal Law 1997

18. Indictment

Defendant had adequate notice of charge for assault and battery of highly aggravated nature, although he was not indicted for such offense, and thus, trial court did not lack subject matter jurisdiction to enter plea, where defendant signed sentencing sheet in which he waived presentment of indictment to grand jury and pleaded guilty to charge, and sentencing sheet referenced indictment for second degree lynching. State v. Smalls (S.C. 2005) 364 S.C. 343, 613 S.E.2d 754. Indictment And Information 5

An indictment for murder is sufficient if the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, the defendant to know what he is called upon to answer, and if an acquittal or a conviction thereon may be pleaded as a bar to any subsequent prosecution. Joseph v. State (S.C. 2002) 351 S.C. 551, 571 S.E.2d 280. Homicide 832

Murder indictment was sufficient to confer subject matter jurisdiction on court that accepted defendant’s guilty plea, even though indictment omitted the words “willfully” and “feloniously,” as the term “feloniously” was encompassed in “murder” and the term “willfully” was encompassed in “malice.” Joseph v. State (S.C. 2002) 351 S.C. 551, 571 S.E.2d 280. Homicide 832

In a criminal case the trial court’s subject matter jurisdiction is limited to those crimes charged in the indictment and all lesser included offenses. State v. Watson (S.C. 2002) 349 S.C. 372, 563 S.E.2d 336. Criminal Law 93

Indictment was sufficient to inform capital murder defendant of the elements of murder, including malice aforethought, although indictment did not specifically state defendant killed victim with malice aforethought, where indictment referred to murder statute which defendant allegedly violated, and statute defined murder as “the killing of any person with malice aforethought.” State v. Owens (S.C. 2001) 346 S.C. 637, 552 S.E.2d 745, rehearing denied, appeal after new sentencing hearing 362 S.C. 175, 607 S.E.2d 78, appeal after new sentencing hearing 378 S.C. 636, 664 S.E.2d 80, certiorari denied, certiorari denied 129 S.Ct. 1004, 173 L.Ed.2d 300, habeas corpus dismissed 2010 WL 146164. Homicide 835

A defendant may not be found guilty as an accessory when indicted solely as a principal. State v. Fuller (S.C. 2001) 346 S.C. 477, 552 S.E.2d 282, habeas corpus dismissed 2010 WL 2710506. Indictment And Information 174

Indictment for murder is sufficient if offense is stated with sufficient certainty and particularity to enable court to know what judgment to pronounce, defendant to know what he is called upon to answer, and if acquittal or conviction thereon may be pleaded as bar to any subsequent prosecution; allegations may state in alternative manner instrumentality of death, or may state that death was caused by means or instrumentality unknown. State v. Owens (S.C. 1987) 293 S.C. 161, 359 S.E.2d 275, certiorari denied 108 S.Ct. 496, 484 U.S. 982, 98 L.Ed.2d 495.

19. Competency to stand trial

Opinions of State’s experts, and trial court’s own observations of defendant, established that defendant was competent to stand trial for capital murder. State v. Weik (S.C. 2002) 356 S.C. 76, 587 S.E.2d 683, rehearing granted, adhered to on rehearing 354 S.C. 382, 581 S.E.2d 834, certiorari denied 123 S.Ct. 2580, 539 U.S. 930, 156 L.Ed.2d 609. Criminal Law 625.15

20. Included offenses

Involuntary manslaughter is a lesser‑included offense of murder and is defined as the unintentional killing of another without malice while engaged in either (1) the commission of some unlawful act not amounting to a felony and not naturally tending to cause death or great bodily harm, or (2) the doing of a lawful act with a reckless disregard for the safety of others. State v. Scott (S.C. 2015) 414 S.C. 482, 779 S.E.2d 529, rehearing denied. Homicide 620; Homicide 659; Indictment and Information 189(8)

Voluntary and involuntary manslaughter are both lesser‑included offenses of murder. State v. Sams (S.C. 2014) 410 S.C. 303, 764 S.E.2d 511, rehearing denied. Indictment And Information 189(8)

Involuntary manslaughter is a lesser included offense of murder only if there is evidence the killing was unintentional. State v. Battle (S.C.App. 2014) 408 S.C. 109, 757 S.E.2d 737, rehearing denied, certiorari denied. Indictment and Information 189(8)

In determining whether voluntary manslaughter should be charged as a lesser offense of murder, the court must view the evidence in the light most favorable to the defendant; the charge need not be given where it clearly appears that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter. State v. Cottrell (S.C. 2008) 376 S.C. 260, 657 S.E.2d 451. Homicide 1452

Evidence during prosecution in which defendant was charged with the murder of a police officer warranted a charge on the lesser offense of voluntary manslaughter; although it was permissible to infer, as did the trial judge, that the victim acted as he did because he observed a gun in defendant’s possession, an alternative and reasonable inference was that the victim reacted in an impermissibly aggressive manner, physically assaulting and then shooting defendant when he exercised his constitutional right to walk away. State v. Cottrell (S.C. 2008) 376 S.C. 260, 657 S.E.2d 451. Homicide 1458

A lesser offense is included in the greater only if each of its elements is always a necessary element of the greater offense. State v. Northcutt (S.C. 2007) 372 S.C. 207, 641 S.E.2d 873, rehearing denied. Indictment And Information 191(.5)

Homicide by child abuse is not a lesser‑included offense of murder; an element of homicide by child abuse, the death of a child under age eleven, is not an element of murder. State v. Northcutt (S.C. 2007) 372 S.C. 207, 641 S.E.2d 873, rehearing denied. Indictment And Information 191(4)

Even assuming that allegation by defendant’s daughter that victim had molested her as child was sufficient legal provocation, instruction for voluntary manslaughter as lesser offense of murder was not warranted, nor was verdict for manslaughter supported by evidence, where defendant heard allegation early in morning, went to work and did numerous activities throughout day, and did not go to victim’s house to shoot him until evening. State v. Smith (S.C.App. 2005) 363 S.C. 111, 609 S.E.2d 528. Homicide 669

To warrant a court’s eliminating the offense of manslaughter as lesser included offense of murder, it should very clearly appear that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter. State v. Childers (S.C.App. 2004) 358 S.C. 614, 595 S.E.2d 872, rehearing denied, certiorari granted, affirmed in part, reversed in part 373 S.C. 367, 645 S.E.2d 233, certiorari denied, certiorari denied 128 S.Ct. 618, 552 U.S. 1025, 169 L.Ed.2d 399. Homicide 1452

Assault and battery with intent to kill (ABIK) comprises all elements of murder except death of victim. State v. Wilds (S.C.App. 2003) 355 S.C. 269, 584 S.E.2d 138. Homicide 725

To be convicted of assault and battery with intent to kill (ABIK), jury must be satisfied beyond reasonable doubt that if victim had died, defendant would have been guilty of murder. State v. Wilds (S.C.App. 2003) 355 S.C. 269, 584 S.E.2d 138. Homicide 725

Involuntary manslaughter is a lesser included offense of murder. State v. Watson (S.C. 2002) 349 S.C. 372, 563 S.E.2d 336. Indictment And Information 191(4)

Reckless homicide was not a lesser included offense of murder, because elements of murder did not include all elements of reckless homicide, as murder did not require the operation of an automobile, nor was reckless homicide an offense that had traditionally been considered a lesser included offense of murder; overruling, State v. Reid, 324 S.C. 74, 476 S.E.2d 695. State v. Watson (S.C. 2002) 349 S.C. 372, 563 S.E.2d 336. Indictment And Information 191(4)

The determination of whether a particular offense is a lesser included offense of the offense charged does not end with an application of the elements test; where an offense has traditionally been considered a lesser included offense of the greater offense charged, court will continue to construe it as a lesser included offense, despite failure to strictly satisfy the elements test. State v. Watson (S.C. 2002) 349 S.C. 372, 563 S.E.2d 336. Indictment And Information 189(1); Indictment And Information 191(.5)

Murder defendant was not entitled to jury instruction on accessory after the fact to murder, as defendant had not been indicted for accessory after the fact, accessory after the fact was not a lesser‑included offense to murder, and evidence did not eliminate defendant as a principal first; defendant admitted being present during the stabbing but claimed he had no knowledge of co‑defendants’ plan to kill victim and that he was asleep when victim was attacked. State v. Fuller (S.C. 2001) 346 S.C. 477, 552 S.E.2d 282, habeas corpus dismissed 2010 WL 2710506. Homicide 1468

Evidence that defendant armed himself in self‑defense at time of fatal shooting and that gun went off by accident warranted giving requested charge on involuntary manslaughter, in murder prosecution. State v. Burriss (S.C. 1999) 334 S.C. 256, 513 S.E.2d 104. Homicide 1458

Involuntary manslaughter is defined as either: (1) the killing of another without malice and unintentionally, but while one is engaged in the commission of some unlawful act not amounting to a felony and not naturally tending to cause death or great bodily harm, or (2) the killing of another without malice and unintentionally, but while one is acting lawfully with reckless disregard of the safety of others. State v. Burriss (S.C. 1999) 334 S.C. 256, 513 S.E.2d 104. Homicide 659

The offense of assault and battery with intent to kill embraces the whole of attempted murder. State v. Sutton (S.C.App. 1998) 333 S.C. 192, 508 S.E.2d 41, rehearing denied, certiorari granted, affirmed as modified 340 S.C. 393, 532 S.E.2d 283. Indictment And Information 191(.5)

Although words alone may not constitute sufficient legal provocation to warrant jury charge on voluntary manslaughter, words accompanied by some overt, threatening act may be sufficient. State v. Johnson (S.C. 1998) 333 S.C. 62, 508 S.E.2d 29, appeal after new trial 363 S.C. 53, 609 S.E.2d 520. Homicide 1380

Defendant charged with murder was entitled to jury charge on voluntary manslaughter, where evidence indicated that defendant and victim had “had words” and were engaged in fight at time shooting occurred. State v. Johnson (S.C. 1998) 333 S.C. 62, 508 S.E.2d 29, appeal after new trial 363 S.C. 53, 609 S.E.2d 520. Homicide 1458

It was not error to refuse to charge lesser included offense of involuntary manslaughter, where defendant was convicted of murder, where victim was hit with single shot from substantial distance, most of shot missed her, and pellets which did hit her struck upper portion of her head; defendant contended this evidence could have been basis for jury to reasonably have found that fatal shot was fired recklessly at wall of victim’s bedroom, but argument was rejected where additional evidence established that victim had shotgun wounds to right hand, which demonstrated that she was most likely attempting to protect herself when shot was fired, and single shot to head was fired with shotgun at distance of only 5 to 15 feet; lesser included offense instruction is required by due process only when evidence warrants such instruction. State v. Atkins (S.C. 1987) 293 S.C. 294, 360 S.E.2d 302.

21. Guilty pleas

Plea of guilty but mentally ill to offenses of murder, assault and battery with intent to kill, and illegal carrying of firearm was entered with understanding by capital defendant and his counsel of full consequences that defendant was facing at time plea was entered, and thus was knowing, voluntary, and intelligent, when trial court repeatedly informed defendant of both procedural and substantive consequences of plea, court informed defendant that death penalty was possibility at least five times and defendant answered each time that he understood, and the record disclosed that defendant was aware that trial court, rather than jury, would make decision as to whether he would be sentenced to death and that such decision would be made by weighing aggravating and mitigating evidence presented during case. Wilson v. Ozmint (C.A.4 (S.C.) 2003) 352 F.3d 847, opinion amended on denial of rehearing 357 F.3d 461, certiorari denied 124 S.Ct. 2879, 542 U.S. 923, 159 L.Ed.2d 783. Criminal Law 273.1(1); Criminal Law 273.1(4)

22. Joint trial

Defendant was not entitled to severance of murder trial from that of co‑defendant based on his defense that co‑defendant shot victim, where neither defendant nor co‑defendant pointed to any specific trial right that would be prejudiced by joint trial and trial court gave cautionary instruction before testimony began and in closing instructions. State v. Dennis (S.C. 1999) 337 S.C. 275, 523 S.E.2d 173. Criminal Law 622.7(6)

The general rule allowing joint trials applies with equal force when a defendant’s severance motion is based upon the likelihood he and a codefendant will present mutually antagonistic defenses. State v. Dennis (S.C. 1999) 337 S.C. 275, 523 S.E.2d 173. Criminal Law 622.7(6)

The trial judge must act cautiously in allowing a joint trial; the judge must carefully consider problems that may arise from a joint trial, such as redacted statements, and must assure protection of each defendant’s constitutional right to confront witnesses against him. State v. Dennis (S.C. 1999) 337 S.C. 275, 523 S.E.2d 173. Criminal Law 622.7(1); Criminal Law 622.8(7)

A proper cautionary instruction may help protect the individual rights of each defendant and ensure that no prejudice results from a joint trial. State v. Dennis (S.C. 1999) 337 S.C. 275, 523 S.E.2d 173. Criminal Law 793

23. Substitution of counsel

Defendant was not entitled to substitution of counsel, in trial for murder and other crimes, based on counsel’s prosecution of him ten years prior when counsel was assistant solicitor, absent any showing of actual conflict of interest or competing loyalties, or that defendant was prejudiced by counsel’s representation. State v. Childers (S.C.App. 2004) 358 S.C. 614, 595 S.E.2d 872, rehearing denied, certiorari granted, affirmed in part, reversed in part 373 S.C. 367, 645 S.E.2d 233, certiorari denied, certiorari denied 128 S.Ct. 618, 552 U.S. 1025, 169 L.Ed.2d 399. Criminal Law 1780; Criminal Law 1788; Criminal Law 1828(1)

24. Arguments of counsel

Whether defendant had the required malice aforethought for murder was a question for the jury, and therefore, the evidence of defendant’s guilt was not overwhelming, and the solicitor’s improper Golden Rule closing argument, asking jurors to abandon their impartiality and view the evidence from victim’s viewpoint, deprived defendant of a fair trial. State v. Reese (S.C. 2006) 370 S.C. 31, 633 S.E.2d 898, rehearing denied. Criminal Law 1171.1(6); Criminal Law 2151

Solicitor’s comments during closing argument of murder prosecution, in which solicitor told jury that they spoke on behalf of victim, constituted “golden rule argument” that impermissibly asked jurors to become advocates of victim, and thus reversal of conviction was required. State v. Reese (S.C.App. 2004) 359 S.C. 260, 597 S.E.2d 169, rehearing denied, certiorari granted, affirmed in part, reversed in part 370 S.C. 31, 633 S.E.2d 898. Criminal Law 1171.1(6); Criminal Law 2151

A solicitor has a right, during closing arguments, to state his version of the testimony and to comment on the weight to be given such testimony. Humphries v. State (S.C. 2002) 351 S.C. 362, 570 S.E.2d 160, rehearing denied. Criminal Law 2073

Evidence of defendant’s nickname of “outlaw” and of his related tattoo were prejudicial, in murder prosecution; state did not use evidence for any purpose other than to attack defendant’s character, where prosecutor repeatedly referred to defendant as an outlaw in her closing argument, in order to paint a picture of defendant as someone who was proud of his status and who felt he was above the law. State v. Day (S.C. 2000) 341 S.C. 410, 535 S.E.2d 431. Criminal Law 338(7); Criminal Law 345

Evidence supported solicitor’s statement during closing arguments in murder prosecution that defendant stood over victim after stabbing him; some blood found on victim’s body matched defendant’s blood, and police officer testified that he found “uniform drops of blood that were consistent when falling at a 90 degree angle straight to the abdomen area of the victim in three specific areas.” State v. Cooper (S.C. 1999) 334 S.C. 540, 514 S.E.2d 584. Criminal Law 2117

25. Presumption and burden of proof

The law presumes malice from the mere fact of homicide, but there are also cases as made by the proof, to which the rule is inapplicable. When all the circumstances of the case are fully proved, there is no room for presumptions. The question becomes one of fact for the jury, under the general principle that he who affirms must prove, and that every man is presumed innocent until the contrary appears. State v Hopkins (1881) 15 SC 153. State v Jones (1889) 29 SC 201, 7 SE 296. State v Ariel (1893) 38 SC 221, 16 SE 779. State v Rochester (1905) 72 SC 194, 51 SE 685.

In the absence of any rebutting testimony, malice may be and is inferred from the use of a deadly weapon. State v Levelle (1891) 34 SC 120, 13 SE 319. State v Jackson (1892) 36 SC 487, 15 SE 559.

The State must prove malice. State v Coleman (1875) 6 SC 185. State v Hopkins (1881) 15 SC 153.

To establish the existence of a conspiracy, proof of an express agreement is not necessary, and direct evidence is not essential, but the conspiracy may be sufficiently shown by circumstantial evidence and the conduct of the parties. State v. Kelsey (S.C. 1998) 331 S.C. 50, 502 S.E.2d 63, rehearing denied. Conspiracy 47(2)

There was no material variance between indictment and proof where state did not prove specific means of accomplishing murder, because state did produce evidence tending to show that victim could have been killed by any one of means alleged in indictment. State v. Owens (S.C. 1987) 293 S.C. 161, 359 S.E.2d 275, certiorari denied 108 S.Ct. 496, 484 U.S. 982, 98 L.Ed.2d 495.

From the use of a deadly weapon, malice may be inferred. State v. Merriman (S.C.App. 1985) 287 S.C. 74, 337 S.E.2d 218. Homicide 909

Malice is to be presumed from the use of a deadly weapon in the commission of a homicide. State v. Arnold (S.C. 1976) 266 S.C. 153, 221 S.E.2d 867. Homicide 909

If facts are proved sufficient to raise a presumption of malice, such a presumption would be rebuttable, and it is always for the jury to determine from all of the evidence in the case whether or not malice has been proved beyond a reasonable doubt. State v. Fuller (S.C. 1956) 229 S.C. 439, 93 S.E.2d 463.

If the fact of a voluntary homicide is shown unaccompanied by circumstances of excuse, malice is presumed. State v. Henderson (S.C. 1906) 74 S.C. 477, 55 S.E. 117.

Charge not error which stated, “The use of a deadly weapon presumes malice, but the presumption may be rebutted; so, after all, it is left for the jury to say, from all the facts and circumstances, whether the killing was done with malice or not.” State v. Byrd (S.C. 1905) 72 S.C. 104, 51 S.E. 542.

If the act of a person which produces the death of another, be attended with such circumstances as are the ordinary symptoms of a wicked, depraved and malignant spirit, the law, from the circumstances will imply malice, without reference to what was passing in the person’s mind at the time he committed the act. State v. Smith, 1847, 47 Am.Dec. 589, 1847 WL 2220, Unreported.

26. Admissibility of evidence—In general

Witness’s statement that he had taken a polygraph test, in response to prosecutor’s question, had no prejudicial impact on defendant in murder prosecution, and therefore, was not grounds for mistrial, despite defendant’s contention that jury could infer that witness was no longer a suspect because he passed polygraph and that defendant did not take polygraph because he could not pass; results of test were not indicated, there was no evidence that defendant was offered or took a polygraph test, and reference to witness taking a polygraph test was an isolated comment. State v. Palmer (S.C.App. 2016) 415 S.C. 502, 783 S.E.2d 823, rehearing denied. Criminal Law 867.12(1)

Probative value of toxicology report relating to victim, and indicating that victim had a blend of different drugs in her system, was outweighed by danger of unfair prejudice or jury confusion, and thus was inadmissible in murder prosecution premised on victim’s death by strangulation and severing of jugular vein. State v. Drayton (S.C.App. 2015) 411 S.C. 533, 769 S.E.2d 254, certiorari granted in part, vacated in part 415 S.C. 43, 780 S.E.2d 902. Criminal Law 338(7)

Whether a specific instance of conduct by the deceased is closely connected in point of time or occasion to the homicide so as to be admissible, in murder prosecution of one pleading self‑defense against an attack by the deceased, is in the trial court’s discretion and will not be disturbed on appeal absent an abuse of discretion resulting in prejudice to the accused. State v. Douglas (S.C.App. 2014) 411 S.C. 307, 768 S.E.2d 232, certiorari dismissed as improvidently granted 416 S.C. 627, 788 S.E.2d 686. Criminal Law 1153.3; Homicide 1054

The trial court’s admission of co‑defendant’s redacted statements during joint murder trial violated defendant’s right of confrontation; co‑defendant’s multiple statements to police indicated the “other person” bought a snack cake at grocery store before the murder and robbery, surveillance from the grocery store, which was shown to the jury, depicted defendant as the person who purchased the snack cake, co‑defendant’s statements also indicated the “other person” shot and killed the victim, which statements incriminated defendant. State v. Jackson (S.C.App. 2014) 410 S.C. 584, 765 S.E.2d 841. Criminal Law 662.10

Evidence in murder trial that victim’s roommate had been evicted was not relevant to show third party guilt, and thus was properly excluded; there was no evidence tying roommate to the murder, evidence that police generally begin looking for murder suspects within the victim’s close friends and family would merely cast a bare suspicion upon roommate, and the evidence did not show roommate’s guilt nor was it inconsistent with defendant’s culpability. State v. Al‑Amin (S.C.App. 2003) 353 S.C. 405, 578 S.E.2d 32, rehearing denied, certiorari denied, habeas corpus dismissed 2011 WL 3439531, appeal dismissed 458 Fed.Appx. 290, 2011 WL 6358013, certiorari denied 132 S.Ct. 1931, 182 L.Ed.2d 791. Homicide 1034

Defendant’s ex‑wife’s testimony that defendant had tendency to golf, fish, or go to his mother’s house was not evidence that tended to prove that defendant had a tendency toward abusing and murdering his two‑year‑old son, and thus was admissible in capital murder prosecution. State v. Haselden (S.C. 2003) 353 S.C. 190, 577 S.E.2d 445. Homicide 996

Destruction of murder weapon before defense team could examine it did not require suppression of testimony regarding weapon or dismissal of indictments, where there was no bad faith in destruction of gun, bullets and documentation of microscopic comparison of bullets were still available to defense, and defendant was not prejudiced because gun was incriminating rather than exculpatory. State v. Cheeseboro (S.C. 2001) 346 S.C. 526, 552 S.E.2d 300, rehearing denied, certiorari denied, certiorari denied 122 S.Ct. 1310, 535 U.S. 933, 152 L.Ed.2d 219, post‑conviction relief denied 2006 WL 2598750, habeas corpus dismissed 2009 WL 890649, appeal dismissed 360 Fed.Appx. 450, 2010 WL 107332. Criminal Law 2011

Probative value of murder victim’s pregnancy outweighed its prejudicial effect, where State’s theory of case was that defendant planned his crimes, and because he knew victim was pregnant and particularly vulnerable, jury could infer that defendant had consciously selected a “perfect victim,” making it less probable that he committed voluntary manslaughter. State v. Kelly (S.C. 2001) 343 S.C. 350, 540 S.E.2d 851, certiorari granted 121 S.Ct. 2548, 533 U.S. 928, 150 L.Ed.2d 716, reversed and remanded 122 S.Ct. 726, 534 U.S. 246, 151 L.Ed.2d 670. Homicide 998

Derogatory letter that inmate who testified for state wrote to another inmate was not relevant to any issue in capital murder trial, including issue of inmate’s credibility; while defendant claimed that letter was relevant to contradicting inmate’s characterization of himself as rational, calm person, inmate did not so characterize himself, but rather, admitted he was “far from being an angel” and could get “frustrated, overly excited and emotional,” and jury was aware of inmate’s lengthy criminal record. State v. Johnson (S.C. 2000) 338 S.C. 114, 525 S.E.2d 519, rehearing denied, certiorari denied 121 S.Ct. 104, 531 U.S. 840, 148 L.Ed.2d 62. Criminal Law 433

Evidence that defendant was given drugs and told to stand on corner and sell them was relevant in capital murder prosecution to rebut testimony by defendant’s girlfriend repeating defendant’s statement that he had bandaged hand because of fight with someone who had given drugs to girlfriend; clear inference from girlfriend’s testimony was that defendant was opposed to drugs, and witness’ reply implying that defendant was not as adamantly opposed to drugs as claimed by girlfriend was permissible. State v. Bennett (S.C. 1997) 328 S.C. 251, 493 S.E.2d 845, appeal after new sentencing hearing 369 S.C. 219, 632 S.E.2d 281, certiorari denied, certiorari denied 127 S.Ct. 681, 166 L.Ed.2d 530. Criminal Law 368.28

Testimony concerning appliances and severed electrical cords seized at defendant’s home was relevant, as homicide victim’s hands and feet were bound with cut electrical cord, and moreover, probative value of testimony was not outweighed by danger of unfair prejudice to defendant. State v. Asbury (S.C. 1997) 328 S.C. 187, 493 S.E.2d 349. Homicide 963

Permitting murder victim’s mother to testify that victim attended high school and participated in several high school sports did not rise to the level of abuse of discretion; mother testified in a very brief manner regarding the nature of the victim’s activities. State v. Adkins (S.C.App. 2003) 353 S.C. 312, 577 S.E.2d 460, rehearing denied, certiorari denied. Homicide 997

27. —— Motive and intent, admissibility of evidence

Probative value of evidence concerning charges pending against cooperating witness in murder prosecution at time of his agreement to cooperate did not justify making solicitor take the stand to testify about his reasons for dismissing such charges, possibly requiring substitution of counsel for the state, where only link between dismissal of charges and witness’s decision to cooperate was temporal, and defendant was allowed to impeach witness with other felony charges still pending as well as certain prior convictions, thus enabling him to attack witness’s credibility and emphasize his motive to testify untruthfully. State v. Taylor (S.C.App. 2013) 404 S.C. 506, 745 S.E.2d 124. Witnesses 374(1)

Evidence of previous threats made by the defendant to his former girlfriend was admissible to show malice and to show intent, in prosecution of defendant for assault and battery with intent to kill (ABIK), as to former girlfriend, and murder, as to former girlfriend’s male friend. Blakely v. State (S.C. 2004) 360 S.C. 636, 602 S.E.2d 758, rehearing denied. Criminal Law 371.40; Homicide 989(1)

Murder of cab driver and murder in barbershop were sufficiently similar to warrant admission of evidence of cab driver murder in prosecution for barbershop murder to show motive, common scheme or plan, and identity, where same gun was used in both shootings, and defendant himself linked barbershop and cab driver murders in his letters to former cellmate. State v. Cheeseboro (S.C. 2001) 346 S.C. 526, 552 S.E.2d 300, rehearing denied, certiorari denied, certiorari denied 122 S.Ct. 1310, 535 U.S. 933, 152 L.Ed.2d 219, post‑conviction relief denied 2006 WL 2598750, habeas corpus dismissed 2009 WL 890649, appeal dismissed 360 Fed.Appx. 450, 2010 WL 107332. Criminal Law 371.13; Criminal Law 372.40; Criminal Law 373.12; Criminal Law 373.15

Although the State is not required to prove motive in a homicide prosecution, the State may introduce evidence that a defendant carried an insurance policy on a victim’s life, where the policy named the defendant as the beneficiary, to establish motive. State v. Needs (S.C. 1998) 333 S.C. 134, 508 S.E.2d 857, rehearing denied. Homicide 1011

The State may introduce evidence that a murder defendant carried an insurance policy on the victim’s life when there is some showing that the defendant would derive some benefit from the proceeds of the policy. State v. Needs (S.C. 1998) 333 S.C. 134, 508 S.E.2d 857, rehearing denied. Homicide 1011

Evidence that defendant obtained insurance on life of father, for whose murder he was charged, provided the insuror with the necessary information and made his wife beneficiary under the policy was admissible to establish motive for the murder; it was not necessary to show that the defendant was the beneficiary so long as there was some showing that the defendant would derive some benefits from the proceeds of the policy. State v. Vermillion (S.C. 1978) 271 S.C. 99, 245 S.E.2d 128.

28. —— Identification, admissibility of evidence

Trial court did not err in admitting witness’s testimony, in defendant’s trial on charges of murder and burglary, that about a year before victim was attacked in his home witness had twice seen defendant at a building in which victim held church services and Bible studies, even though witness initially identified defendant only after police officers showed her a single picture of defendant and asked whether she recognized him; witness was not an eyewitness to any crime and her trial testimony showed only that defendant knew victim, defendant only challenged admission of witness’s testimony as unduly suggestive and inherently unreliable, defendant admitted to going to the building in a statement that was admitted into evidence at trial, and defendant also admitted to knowing victim. State v. McGee (S.C.App. 2014) 408 S.C. 278, 758 S.E.2d 730, rehearing denied, certiorari denied. Criminal Law 341

Trial court abused its discretion in refusing to admit videographer’s testimony in murder trial, which was profered to question reliability of witnesses’ identification of defendant as man they saw near crime scene, where main issue was identity of perpetrator, sole evidence of identity was eyewitness identification, and identification was not substantially corroborated by evidence giving it independent reliability. State v. Frazier (S.C. 2004) 357 S.C. 161, 592 S.E.2d 621, rehearing denied, appeal after new trial 375 S.C. 575, 654 S.E.2d 280, certiorari granted, affirmed in part, reversed in part 386 S.C. 526, 689 S.E.2d 610. Criminal Law 450

Witness’s testimony that defendant ran from police while out on bond for murder charge, and that defendant commented to witness following flight that police wanted him for “killing some girl,” because of what particular individual had said, was admissible to establish defendant’s identity in murder prosecution; witness’s testimony put defendant’s flight into context, as it proved defendant was attempting to flee from police because he was charged with murdering victim, and that he blamed particular individual, who was State’s key witness, for his situation. State v. Pagan (S.C.App. 2004) 357 S.C. 132, 591 S.E.2d 646, rehearing denied, certiorari granted, affirmed as modified 369 S.C. 201, 631 S.E.2d 262. Criminal Law 372.40; Homicide 1021

29. —— Corroboration, admissibility of evidence

Probative value of murder victim’s 911 call shortly after a violent fight with defendant, who was victim’s wife, was not outweighed by unfair prejudice in murder trial; the recording assisted in demonstrating why victim feared for his life and corroborated testimony concerning the extent of victim’s injuries after the fight and how he got the injuries. State v. Bratschi (S.C.App. 2015) 413 S.C. 97, 775 S.E.2d 39. Criminal Law 338(7)

Witness’s testimony about defendant’s alleged failure to stop for a blue light and his subsequent statement was inadmissible in murder trial as evidence corroborating testimony of eyewitness to murder; witness’s testimony did not establish that eyewitness was an eyewitness to crime or that defendant had threatened eyewitness but, rather, simply revealed that defendant knew that he had been charged with murder and that he knew name of a witness. State v. Pagan (S.C. 2006) 369 S.C. 201, 631 S.E.2d 262, rehearing denied. Witnesses 414(1)

Witness’s testimony that defendant ran from police while out on bond for murder charge, and that defendant commented to witness following flight that police wanted him for “killing some girl,” because of what particular individual had said, was admissible in murder prosecution as corroboration evidence; witness’s testimony corroborated testimony of particular individual, who was State’s key witness, that individual was an eyewitness to the murder and that defendant knew her identity. State v. Pagan (S.C.App. 2004) 357 S.C. 132, 591 S.E.2d 646, rehearing denied, certiorari granted, affirmed as modified 369 S.C. 201, 631 S.E.2d 262. Homicide 1021

30. —— State of mind, admissibility of evidence

In the murder prosecution of one pleading self‑defense against an attack by the deceased, evidence of other specific instances of violence on the part of the deceased are not admissible unless they were directed against the defendant or, if directed against others, were so closely connected at point of time or occasion with the homicide as reasonably to indicate the state of mind of the deceased at the time of the homicide, or to produce reasonable apprehension of great bodily harm. State v. Douglas (S.C.App. 2014) 411 S.C. 307, 768 S.E.2d 232, certiorari dismissed as improvidently granted 416 S.C. 627, 788 S.E.2d 686. Homicide 1054

Trial court did not abuse its discretion in finding that evidence suggesting gang associations of murder victim and witnesses was not relevant to show defendant’s state of mind and fear of being killed by mob, which allegedly surrounded his car, at time defendant fired his gun, since defendant never testified that mob was part of gang, or that fact that mob was allegedly part of gang made him more fearful. State v. Sobers (S.C.App. 2013) 404 S.C. 263, 744 S.E.2d 588. Homicide 995; Homicide 997

Evidence that defendant was aware of victim’s prior act of violence against victim’s wife and her property was admissible in murder trial to show victim’s state of mind at time of shooting and to prove that defendant had a reasonable apprehension of great bodily harm from victim, as required for defendant’s claims of self‑defense and defense of others, where prior act of violence occurred less than three months before victim’s death. State v. Mekler (S.C.App. 2005) 368 S.C. 1, 626 S.E.2d 890, certiorari granted, affirmed 379 S.C. 12, 664 S.E.2d 477. Homicide 1054

31. —— Prior bad acts, admissibility of evidence

Trial court failed to properly conduct required analysis prior to admitting prior bad acts evidence in trial for murder, possession of a weapon during the commission of a violent crime, and assault and battery in the third degree; trial court failed to consider relevancy of evidence, whether evidence fell within exception to rule prohibiting admission of prior bad acts evidence to prove character of defendant, and whether, if evidence fell within exception, whether evidence was clear and convincing and whether probative value of evidence outweighed prejudice to defendant. State v. King (S.C.App. 2016) 416 S.C. 92, 784 S.E.2d 252, rehearing denied, certiorari granted. Criminal Law 368.41; Criminal Law 374.22

Testimony of murder victim’s father regarding victim’s ability to play football was not evidence of victim’s good character that opened the door to admission of additional prior bad acts evidence, but was instead an explanation of victim’s physical limitations arising from previous automobile accident, which was relevant in light of defendant’s testimony regarding victim’s movement during altercation. State v. McCray (S.C.App. 2015) 413 S.C. 76, 773 S.E.2d 914. Criminal Law 396(1)

Evidence of murder victim’s previous violent acts, in form of prior burglary and safecracking incidents, as well as prior arrest for driving under suspension, failure to stop for a blue light, and unlawful carrying of a pistol, were situation‑specific and unrelated to victim’s state of mind at time of homicide, and thus testimony regarding such prior instances of violence was inadmissible. State v. McCray (S.C.App. 2015) 413 S.C. 76, 773 S.E.2d 914. Homicide 1054

Evidence that victim fired gun the night before murder incident was not so closely connected to homicide to allow for its admission into evidence where, at time of homicide, no gun was found and no evidence was produced to show that defendant was aware of victim’s behavior the night before. State v. McCray (S.C.App. 2015) 413 S.C. 76, 773 S.E.2d 914. Homicide 1054

Danger of unfair prejudice did not substantially outweigh probative value of evidence of defendant’s theft of a tractor‑trailer truck, and thus trial court did not abuse its discretion in admitting such evidence as part of the res gestae in defendant’s trial on charges of murder and burglary; truck was stolen on the night before burglary of victim’s home and fatal attack on victim, truck was found the following day about a mile from victim’s home, truck’s owner testified that it would have contained a winch rod in its tool box, a winch rod with victim’s blood on it was found across the street from victim’s home, and pry marks on victim’s door were consistent with the winch rod. State v. McGee (S.C.App. 2014) 408 S.C. 278, 758 S.E.2d 730, rehearing denied, certiorari denied. Criminal Law 368.13

Trial court failed to conduct requisite on‑the‑record balancing test, in murder prosecution, to determine whether probative value of testimony concerning prior shooting was substantially outweighed by danger of unfair prejudice; other than finding there was clear and convincing evidence of prior shooting and that testimony of victim’s sister concerning victim’s account of prior incident was admissible, trial court made no specific findings on record as to why testimony had probative value, nature of unfair prejudice, or whether probative value of testimony was substantially outweighed by danger of unfair prejudice, and consideration of applicable rule could not be implied from record. State v. Spears (S.C.App. 2013) 403 S.C. 247, 742 S.E.2d 878, certiorari denied. Criminal Law 374.24

Evidence regarding two prior armed robberies was properly admissible in defendant’s capital murder trial under the res gestae theory, assuming defendant preserved the issue for appeal; prior robberies were committed by various combinations of the same four individuals within hours of third robbery, in which store clerk was murdered, evidence of the robberies was necessary to place third robbery in context and was critical for the jury to understand the nature and environment of the third robbery and murder, and testimony indicated success of prior robberies encouraged defendant to commit third robbery. State v. Owens (S.C. 2001) 346 S.C. 637, 552 S.E.2d 745, rehearing denied, appeal after new sentencing hearing 362 S.C. 175, 607 S.E.2d 78, appeal after new sentencing hearing 378 S.C. 636, 664 S.E.2d 80, certiorari denied, certiorari denied 129 S.Ct. 1004, 173 L.Ed.2d 300, habeas corpus dismissed 2010 WL 146164. Criminal Law 368.85

The res gestae theory recognizes evidence of other bad acts may be an integral part of the crime with which the defendant is charged or may be needed to aid the fact finder in understanding the context in which the crime occurred. State v. Owens (S.C. 2001) 346 S.C. 637, 552 S.E.2d 745, rehearing denied, appeal after new sentencing hearing 362 S.C. 175, 607 S.E.2d 78, appeal after new sentencing hearing 378 S.C. 636, 664 S.E.2d 80, certiorari denied, certiorari denied 129 S.Ct. 1004, 173 L.Ed.2d 300, habeas corpus dismissed 2010 WL 146164. Criminal Law 368.71

Evidence of other crimes is admissible when it furnishes part of the context of the crime or is necessary to a full presentation of the case, or is so intimately connected with the crime charged and is so much a part of the case setting and environment that its proof is appropriate in order to complete the story of the crime on trial by proving its immediate context or res gestae or the uncharged offense is so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other and is thus part of the res gestae of the crime charged. State v. Owens (S.C. 2001) 346 S.C. 637, 552 S.E.2d 745, rehearing denied, appeal after new sentencing hearing 362 S.C. 175, 607 S.E.2d 78, appeal after new sentencing hearing 378 S.C. 636, 664 S.E.2d 80, certiorari denied, certiorari denied 129 S.Ct. 1004, 173 L.Ed.2d 300, habeas corpus dismissed 2010 WL 146164. Criminal Law 368.72; Criminal Law 372.55

Evidence of prior murder was properly admitted to show identity and motive in prosecution for murder and armed robbery, where same weapon was used in both murders, and both murders involved robbery. State v. Cheeseboro (S.C. 2001) 346 S.C. 526, 552 S.E.2d 300, rehearing denied, certiorari denied, certiorari denied 122 S.Ct. 1310, 535 U.S. 933, 152 L.Ed.2d 219, post‑conviction relief denied 2006 WL 2598750, habeas corpus dismissed 2009 WL 890649, appeal dismissed 360 Fed.Appx. 450, 2010 WL 107332. Criminal Law 372.40; Criminal Law 373.12; Criminal Law 373.15

Evidence of prior act of violence by victim directed toward witness was admissible in murder prosecution as relevant to an essential element of defendant’s self‑defense claim, to prove defendant had a reasonable apprehension of violence from victim, where four months prior to victim’s death, victim held a double‑barreled shotgun to witness’s head for eighteen hours as he drove around the county accusing her of being involved in a drug trafficking scheme in his residence. State v. Day (S.C. 2000) 341 S.C. 410, 535 S.E.2d 431. Homicide 1054

Although evidence that murder victim hit defendant on head with beer bottle on prior occasion was admissible to support defendant’s claim that victim was aggressor in altercation that led to victim’s death, specific details of that prior incident were properly excluded. State v. Taylor (S.C. 1998) 333 S.C. 159, 508 S.E.2d 870, rehearing denied. Homicide 1052

In homicide cases, evidence that accused and decedent had previous difficulty is admissible to show animus of parties and to aid jury in deciding who was probable aggressor; general details of that difficulty, however, are inadmissible. State v. Taylor (S.C. 1998) 333 S.C. 159, 508 S.E.2d 870, rehearing denied. Homicide 988(1); Homicide 988(2)

32. —— Experts, admissibility of evidence

Crime scene analyst’s testimony exceeded scope of proper reply testimony, as it was not limited to refuting murder defendant’s testimony but rather explained the crime scene; while defendant denied carving “rapist” in victim’s back and covering victim with a blanket, and claimed he merely saw a dildo on the bed by his co‑defendant’s feet, analyst opined there were two distinct offenders and testified in detail about staging and undoing, why someone would carve rapist in a victim’s back, and about the level of anger associated with superficial cutting, and opined the offenders used the dildo for shock value to show what type of rapist the victim was and the blanket to symbolically erase what had occurred at the scene. State v. Prather (S.C.App. 2017) 2017 WL 3880781. Criminal Law 683(1)

Prosecution’s failure to produce fingerprint expert’s file, which documented identification of victim’s fingerprints from severed hands, to defense prior to murder trial did not unfairly prejudice defendant, and thus striking expert’s testimony or granting mistrial was not warranted, even though failure to produce file allegedly violated rule of criminal procedure; for four years prior to trial, defense team was aware that fingerprints from severed hands had been run through Automated Fingerprint Identification System (AFIS) and that there could be AFIS‑related documents, there was no evidence that defense counsel attempted to interview expert or review any AFIS‑related documents prior to trial, and defendant did not contest victim’s identity. State v. Jenkins (S.C.App. 2014) 408 S.C. 560, 759 S.E.2d 759, rehearing denied. Criminal Law 627.8(6)

Fact that prosecution in murder trial did not produce to defense prior to trial the file of the fingerprint expert, who identified victim’s fingerprints from severed hands, did not entitle defendant to long recess or short continuance to obtain assistance of an expert qualified to review documents in expert’s file; defense team was aware of expert’s fingerprint analysis and the possible existence of documents related to Automated Fingerprint Identification System (AFIS) for four years prior to trial. State v. Jenkins (S.C.App. 2014) 408 S.C. 560, 759 S.E.2d 759, rehearing denied. Criminal Law 590(2)

Trial court could exclude testimony of defendant’s false‑confession expert about the specifics of two cases involving false confessions as more prejudicial than probative at a trial for murder and criminal sexual conduct (CSC); presenting the jury with details of historical cases of people who were imprisoned based on false confessions would distract the jury’s attention from the facts of defendant’s case and potentially confuse the issues. State v. Cope (S.C. 2013) 405 S.C. 317, 748 S.E.2d 194, motion for relief from judgment denied 135 S.Ct. 400, 190 L.Ed.2d 289. Criminal Law 474.3(1)

Defendant was not prejudiced at a trial for murder and criminal sexual conduct (CSC) by any error in trial court’s exclusion of testimony of defendant’s false‑confession expert about the specifics of two cases involving false confessions on the ground that the testimony would be more prejudicial than probative; expert presented extensive testimony about the nature of coerced internalized false confessions and the factors that often accompanied such false confessions, and expert noted that such confessions did in fact occur and indicated generally that there were a number of cases where people gave detailed confessions that later turned out to be completely false. State v. Cope (S.C. 2013) 405 S.C. 317, 748 S.E.2d 194, motion for relief from judgment denied 135 S.Ct. 400, 190 L.Ed.2d 289. Criminal Law 1169.9

Admission of firearms expert’s written reports in murder prosecution did not constitute improper bolstering of her testimony identifying gun as murder weapon, as reports were relevant to her own testimony, not that of any other witness, and did not vouch for her credibility, but rather constituted written representation of findings on which her opinions and testimony were based. State v. Taylor (S.C.App. 2013) 404 S.C. 506, 745 S.E.2d 124. Criminal Law 489

Trial court exclusion of testimony from expert in social psychology regarding specific case studies of false confessions was not an abuse of discretion, during prosecution for murder and arson; expert testified about specific cases of false confession, he testified that sometimes people can give very detailed false confessions, and defendant failed to show that he was prejudiced by the exclusion of more specific case studies. State v. Myers (S.C. 2004) 359 S.C. 40, 596 S.E.2d 488, rehearing denied, certiorari denied 125 S.Ct. 485, 543 U.S. 980, 160 L.Ed.2d 359. Criminal Law 1170(1)

Defendant’s expert’s testimony regarding battered wife syndrome should have been admitted, in prosecution for murder, although trial court refused to allow testimony because it conflicted with defendant’s own testimony that she did not know her attacker/victim at time she fired gun, where defendant’s defense at trial was self‑defense, defendant testified to pattern of past abuse perpetrated by victim, and court charged jury on self defense; precisely because defendant’s testimony conflicted with her own defense, and proffered expert testimony was relevant to explain this conflict, jury was entitled to consider testimony. State v. Grubbs (S.C.App. 2003) 353 S.C. 374, 577 S.E.2d 493, rehearing denied, certiorari denied. Criminal Law 474.4(3)

33. —— DNA, admissibility of evidence

Evidence showing that another individual had been tried and convicted of the same murders before defendant’s DNA was linked to the crimes was irrelevant and thus inadmissible, in murder prosecution; although defendant was entitled to introduce evidence of third‑party guilt and perhaps would have been able to introduce evidence that solicitors had successfully obtained indictments for the other individual, the jury’s verdict in the other individual’s case was not relevant to defendant’s guilt. State v. Hill (S.C. 2014) 409 S.C. 50, 760 S.E.2d 802. Homicide 1034

Law Enforcement Division’s (SLED) letter to local police department, in which references were made to the DNA Index System (CODIS) and, by implication, defendant’s criminal record, was inadmissible, in prosecution for murder. State v. Hill (S.C. 2014) 409 S.C. 50, 760 S.E.2d 802. Criminal Law 368.28; Criminal Law 436(6)

Evidence that DNA testing had eliminated murder defendant as a source of DNA obtained from a sperm fraction that had been taken from the victim was not relevant and thus was properly excluded; there was no assertion that victim was sexually assaulted by defendant, and the evidence was not inconsistent with defendant’s guilt nor did it raise a reasonable inference or presumption as to defendant’s innocence. State v. Al‑Amin (S.C.App. 2003) 353 S.C. 405, 578 S.E.2d 32, rehearing denied, certiorari denied, habeas corpus dismissed 2011 WL 3439531, appeal dismissed 458 Fed.Appx. 290, 2011 WL 6358013, certiorari denied 132 S.Ct. 1931, 182 L.Ed.2d 791. Criminal Law 388.2

34. —— Photographs and videos, admissibility of evidence

The probative value of three autopsy photographs that showed the murder victim’s exposed skull and brain was not outweighed by the danger of unfair prejudice; the photographs identified the location of the victim’s external and internal injuries, they corroborated pathologist’s findings concerning the extent and location of the victim’s head injuries, as well as the cause of death, they rebutted the anticipated testimony from defendant’s pathologist as to the cause of the victim’s injuries, and they aided the State in proving that defendant caused the fatal brain injury. State v. Gray (S.C.App. 2014) 408 S.C. 601, 759 S.E.2d 160. Criminal Law 438(6); Criminal Law 438(7)

Trial court erred in excluding the videotape made by videographer which attempted to show lighting conditions of crime scene and was profered to question reliability of witnesses’ identification of defendant as man they saw near the scene, though trial judge ruled he did not believe the lighting conditions in effect on night of the crime were capable of recreation, given that videographer’s testimony demonstrated a sufficient degree of similarity between lighting conditions in effect on night of the crime and in effect when videotape was taken as to render the videotape admissible. State v. Frazier (S.C. 2004) 357 S.C. 161, 592 S.E.2d 621, rehearing denied, appeal after new trial 375 S.C. 575, 654 S.E.2d 280, certiorari granted, affirmed in part, reversed in part 386 S.C. 526, 689 S.E.2d 610. Criminal Law 438(8)

Photographs depicting left and right side of two‑year‑old victim’s head and abdominal area were necessary to corroborate pathologist’s testimony, to understand true nature of attack on victim, and were relevant to demonstrate aggravating circumstances of physical torture, and thus were admissible in sentencing phase of capital murder prosecution; pathologist testified that he had to dissect from ear to ear to be able to see large areas of bruising which could not be seen from outside, photographs of abdominal area showed bruising under the skin in abdominal muscles and blood inside abdomen, and pathologist testified that all of the blood inside abdomen contributed to victim’s death. State v. Haselden (S.C. 2003) 353 S.C. 190, 577 S.E.2d 445. Sentencing And Punishment 1767

Victim’s identification of defendant in armed robbery and murder prosecution was not tainted by hypnosis, and thus defendant was not deprived of his right to confrontation, where there was no evidence that hypnosis rendered identification process unduly suggestive, victim was not shown any photographs during hypnosis session, and composite drawing based on victim’s pre‑hypnosis description and one drawn during hypnosis session were similar. State v. Cheeseboro (S.C. 2001) 346 S.C. 526, 552 S.E.2d 300, rehearing denied, certiorari denied, certiorari denied 122 S.Ct. 1310, 535 U.S. 933, 152 L.Ed.2d 219, post‑conviction relief denied 2006 WL 2598750, habeas corpus dismissed 2009 WL 890649, appeal dismissed 360 Fed.Appx. 450, 2010 WL 107332. Criminal Law 662.65

Crime scene photograph depicting contents of purse, including enlarged version of photograph of victim’s children that was damaged when purse was set on fire, was admissible in capital murder prosecution, despite claim that enlarged version was prejudicial to defendant and unnecessary since original photograph was available to jury; trial judge ruled that original photograph was too fragile for jury to handle, photograph of children was relevant in proving that purse belonged to victim, and establishing victim as owner of purse served to corroborate defendant’s accomplice’s testimony that defendant murdered victim and then burned her purse. State v. Johnson (S.C. 2000) 338 S.C. 114, 525 S.E.2d 519, rehearing denied, certiorari denied 121 S.Ct. 104, 531 U.S. 840, 148 L.Ed.2d 62. Criminal Law 438(8)

Prosecution was entitled to introduce crime scene photograph depicting damaged contents of purse that had been set on fire, including enlarged version of photograph of murder victim’s children, even though defendant offered to stipulate that purse belonged to victim; photograph of children was relevant in proving that purse belonged to victim, and establishing victim as owner of purse served to corroborate defendant’s accomplice’s testimony that defendant murdered victim and then burned her purse. State v. Johnson (S.C. 2000) 338 S.C. 114, 525 S.E.2d 519, rehearing denied, certiorari denied 121 S.Ct. 104, 531 U.S. 840, 148 L.Ed.2d 62. Criminal Law 438(8)

Danger of unfair prejudice did not substantially outweigh probative value as to admission of six color photographs of victim’s body taken at crime scene, and six color autopsy photographs, at penalty phase of capital murder trial; one of the alleged aggravating circumstances at sentencing was physical torture, and the photographs illustrated defendant’s testimony regarding the location and the severity of the shotgun wounds. State v. Weik (S.C. 2002) 356 S.C. 76, 587 S.E.2d 683, rehearing granted, adhered to on rehearing 354 S.C. 382, 581 S.E.2d 834, certiorari denied 123 S.Ct. 2580, 539 U.S. 930, 156 L.Ed.2d 609. Sentencing And Punishment 1767

35. —— Hearsay, admissibility of evidence

Present sense impression hearsay exception did not apply to testimony by two witnesses that, on the evening before his murder, victim told them that defendant “had given [victim] $200 to buy beer because he wanted to have sex with him,” where neither witness gave any indication as to the amount of time that elapsed between defendant’s alleged sexual solicitation of victim and witnesses’ subsequent conversation with victim, and State simply explained that it was an “ongoing chain of events.” State v. Parvin (S.C.App. 2015) 413 S.C. 497, 777 S.E.2d 1, rehearing denied. Criminal Law 419(2.15)

Trial court’s error in admitting defendant’s unredacted audiotaped interrogation by the police, which contained interrogators’ hearsay statements, was not harmless as it related to murder charge, given the presence of at least two shooters in the parking lot of club and the lack of direct evidence pointing conclusively to defendant as the one who fired the fatal shot. State v. Brewer (S.C. 2015) 411 S.C. 401, 768 S.E.2d 656, rehearing denied. Criminal Law 1169.1(9); Criminal Law 1169.1(10)

Trial court erred in excluding defendant’s statement to witness that he and victim had been tussling over gun when it went off; defendant testified in his own defense, and thus, did not render himself unavailable as witness. State v. Golson (S.C.App. 2002) 349 S.C. 421, 562 S.E.2d 663, rehearing denied, certiorari denied, habeas corpus dismissed 2012 WL 909787. Criminal Law 410.71

Erroneous admission of hearsay testimony indicating that victim was afraid of defendant required reversal of murder conviction, as such testimony directly refuted defendant’s accident defense. State v. Garcia (S.C. 1999) 334 S.C. 71, 512 S.E.2d 507. Criminal Law 419(1.5); Criminal Law 1169.1(9)

The defendant was entitled to the reversal of his conviction for murder on the ground that the trial judge erroneously excluded a hearsay statement of his codefendant where the crux of the case was that each defendant swore that the other had committed the crime, and the excluded statement consisted of the codefendant’s admission that, at the time of the murder, the defendant was outside the camper where the murder took place, and that he and another man were inside. State v. Good (S.C.App. 1992) 308 S.C. 313, 417 S.E.2d 643, rehearing denied, certiorari denied.

36. —— Flight, admissibility of evidence

Witness’s testimony that defendant ran from police while out on bond for murder charge, and that defendant commented to witness following flight that police wanted him for “killing some girl,” because of what particular individual had said, was admissible in murder prosecution for the purpose of proving defendant’s flight and “guilty knowledge”; testimony established that defendant was attempting to avoid capture and violate his bond provisions for the murder charge and that defendant could identify the particular individual, who was the State’s key witness in murder case. State v. Pagan (S.C.App. 2004) 357 S.C. 132, 591 S.E.2d 646, rehearing denied, certiorari granted, affirmed as modified 369 S.C. 201, 631 S.E.2d 262. Homicide 1021

Evidence that defendant and his family had left for a vacation to Florida early on morning that arrest warrant issued for defendant, that they checked into a hotel room in Florida for one hour, and then checked out and drove all night to Kentucky was admissible in murder prosecution as evidence of flight, even though defendant claimed he was going to eventually return. State v. Beckham (S.C. 1999) 334 S.C. 302, 513 S.E.2d 606. Homicide 1021

37. Statements by defendant

District court’s exclusion of portions of defendant’s confessions during guilt phase of trial, because those portions inculpated codefendant and defendant was not subject to cross‑examination by codefendant, did not violate defendant’s right not to testify, because excluded statements were not exculpatory as to defendant and their exclusion did not materially alter meaning of confessions; even if excluded statements suggested that defendant did not have intent to kill, defendant could still be held responsible for murder as participant in crime. Howard v. Moore (C.A.4 (S.C.) 1997) 131 F.3d 399, certiorari denied 119 S.Ct. 108, 525 U.S. 843, 142 L.Ed.2d 86. Criminal Law 413.86

At pretrial hearing to determine admissibility of defendant’s recorded statement in prosecution for murder and armed robbery, trial court was required to make factual finding as to whether defendant waived his Miranda rights prior to answering investigators’ questions; there was conflicting evidence given that investigators stressed that they did not elicit any information from defendant prior to defendant’s signing of Miranda rights waiver form, and defendant’s testimony indicated that forbidden “question‑first, give Miranda warnings later” tactic was employed in his interrogation. State v. White (S.C.App. 2014) 410 S.C. 56, 762 S.E.2d 726, rehearing denied, certiorari denied. Criminal Law 413.63

Evidence was sufficient to support finding that defendant’s confession to murder and arson was voluntary; there was no evidence to support defendant’s allegation that the confession was involuntary or was the product of police trickery, defendant was advised of his rights three different times, none of the interrogations lasted more than a few hours, defendant was offered food and was told that he was free to leave the police station, and police made sure that defendant was fresh and rested before they interrogated him. State v. Myers (S.C. 2004) 359 S.C. 40, 596 S.E.2d 488, rehearing denied, certiorari denied 125 S.Ct. 485, 543 U.S. 980, 160 L.Ed.2d 359. Criminal Law 413.51

Defendant did not open door to prosecutor’s questions regarding defendant’s failure to give police exculpatory statement after his arrest, for purposes of impeaching defendant’s alleged testimony that he cooperated with police, in trial for murder and other crimes; defendant never testified that he had cooperated with police, but only that he had explained to police his travels between his home in New York and South Carolina during time of murder, and that he knew nothing of the crimes, before demanding his right to counsel. State v. McIntosh (S.C. 2004) 358 S.C. 432, 595 S.E.2d 484. Criminal Law 396(1)

Co‑worker’s testimony, to the effect that he overheard defendant tell victim’s wife during a telephone conversation that “somebody should kill that son‑of‑a‑bitch,” was too speculative to be admitted in murder prosecution, where co‑worker did not know when the statement was made, he did not know to whom defendant was speaking, and he could not recall the exact content of the statement he attributed to defendant. State v. Frazier (S.C. 2004) 357 S.C. 161, 592 S.E.2d 621, rehearing denied, appeal after new trial 375 S.C. 575, 654 S.E.2d 280, certiorari granted, affirmed in part, reversed in part 386 S.C. 526, 689 S.E.2d 610. Criminal Law 410.8

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 is critically impaired. State v. Crawley (S.C.App. 2002) 349 S.C. 459, 562 S.E.2d 683, rehearing denied, certiorari denied, habeas corpus dismissed 2009 WL 580440, appeal dismissed 332 Fed.Appx. 31, 2009 WL 2843563. Criminal Law 411.99

Failure of law enforcement officials to tell defendant that particular murder was subject of questioning before she waived her Miranda rights did not affect voluntariness of her subsequent confessions to the murder. State v. Crawley (S.C.App. 2002) 349 S.C. 459, 562 S.E.2d 683, rehearing denied, certiorari denied, habeas corpus dismissed 2009 WL 580440, appeal dismissed 332 Fed.Appx. 31, 2009 WL 2843563. Criminal Law 411.60

To introduce statement made by defendant after he has been advised of his Miranda rights, state must prove by preponderance of the evidence that defendant voluntarily waived those rights. State v. Crawley (S.C.App. 2002) 349 S.C. 459, 562 S.E.2d 683, rehearing denied, certiorari denied, habeas corpus dismissed 2009 WL 580440, appeal dismissed 332 Fed.Appx. 31, 2009 WL 2843563. Criminal Law 413.48

Evidence was sufficient to show that defendant’s confessions to murder were knowingly, intelligently, and voluntarily given, despite defendant’s allegations that she was adversely affected by withdrawal symptoms from alcohol and drugs when she made confessions; police officer testified that he had known defendant in his capacity as officer for 17 years, that he was aware of her addiction, and that she did not act any different on day of interrogation, and officer disputed defendant’s allegation that she asked to be left alone or that she cried during interrogation. State v. Crawley (S.C.App. 2002) 349 S.C. 459, 562 S.E.2d 683, rehearing denied, certiorari denied, habeas corpus dismissed 2009 WL 580440, appeal dismissed 332 Fed.Appx. 31, 2009 WL 2843563. Criminal Law 413.51

Capital murder defendant did not assert right to counsel in matter at trial, for purposes of determining whether subsequent interrogation regarding other murder violated defendant’s constitutional rights; there was no evidence defendant declined to speak with police without the presence of counsel in original matter, and evidence offered at guilt phase of trial indicated defendant voluntarily waived his right to counsel and spoke to the sheriff’s department about the original incident. State v. Owens (S.C. 2001) 346 S.C. 637, 552 S.E.2d 745, rehearing denied, appeal after new sentencing hearing 362 S.C. 175, 607 S.E.2d 78, appeal after new sentencing hearing 378 S.C. 636, 664 S.E.2d 80, certiorari denied, certiorari denied 129 S.Ct. 1004, 173 L.Ed.2d 300, habeas corpus dismissed 2010 WL 146164. Criminal Law 411.98

After a suspect has requested counsel, if the police reinitiate questioning in the absence of counsel, the suspect’s statements are presumed involuntary and, therefore, inadmissible. State v. Owens (S.C. 2001) 346 S.C. 637, 552 S.E.2d 745, rehearing denied, appeal after new sentencing hearing 362 S.C. 175, 607 S.E.2d 78, appeal after new sentencing hearing 378 S.C. 636, 664 S.E.2d 80, certiorari denied, certiorari denied 129 S.Ct. 1004, 173 L.Ed.2d 300, habeas corpus dismissed 2010 WL 146164. Criminal Law 413.32

A statement induced by a promise of leniency is involuntary only if so connected with the inducement as to be a consequence of the promise. State v. Owens (S.C. 2001) 346 S.C. 637, 552 S.E.2d 745, rehearing denied, appeal after new sentencing hearing 362 S.C. 175, 607 S.E.2d 78, appeal after new sentencing hearing 378 S.C. 636, 664 S.E.2d 80, certiorari denied, certiorari denied 129 S.Ct. 1004, 173 L.Ed.2d 300, habeas corpus dismissed 2010 WL 146164. Criminal Law 411.54(1)

Statements elicited during custodial interrogation are admissible if the prosecution establishes that the suspect knowingly and intelligently waived his privilege against self‑incrimination and his right to retained or appointed counsel. State v. Owens (S.C. 2001) 346 S.C. 637, 552 S.E.2d 745, rehearing denied, appeal after new sentencing hearing 362 S.C. 175, 607 S.E.2d 78, appeal after new sentencing hearing 378 S.C. 636, 664 S.E.2d 80, certiorari denied, certiorari denied 129 S.Ct. 1004, 173 L.Ed.2d 300, habeas corpus dismissed 2010 WL 146164. Criminal Law 411.93; Criminal Law 411.94

The statement of a defendant was properly admitted in evidence in a murder trial where the defendant refused to discuss the case with officers, was read his rights and refused to waive them, asked the departing officers what would happen to him and was told that he was wanted in California for the murder of a delivery boy, and then he blurted out “I had to kill that boy” and “I didn’t want him to identify me”; the defendant clearly initiated the further conversation after waiving his rights. State v. Sims (S.C. 1991) 304 S.C. 409, 405 S.E.2d 377, certiorari denied 112 S.Ct. 1193, 502 U.S. 1103, 117 L.Ed.2d 434.

38. Questions for jury

Issue of whether defendant acted in self‑defense was question for jury in prosecution for voluntary manslaughter and possession of weapon during commission of violent crime; there was evidence from which jury could have inferred degree of recklessness that rose to level of malice and unreasonableness of defendant’s stated belief that he was in imminent danger of losing his life or sustaining serious bodily injury, as, when defendant told victim to put his gun away, victim placed gun into his waistband and never pulled it back out, most of six shots fired by defendant hit victim in his back, and exit wound from victim’s chest was shored, indicating that he was pressed against hard object when bullet exited body, which was consistent with testimony that defendant kept shooting victim even after he fell onto street. State v. Oates (S.C.App. 2017) 421 S.C. 1, 803 S.E.2d 911. Homicide 1345

Whether defendant was guilty of murder under the hand of one is the hand of all theory of accomplice liability was a question for the jury in murder prosecution, even though the State did not present any direct evidence that defendant acted in concert with alleged accomplice who admitted to shooting the victim; the evidence yielded a reasonable series of inferences consistent with the State’s theory, that defendant devised a plan to retrieve, by force if necessary, his television from victim, a known drug dealer whom defendant and his accomplices knew was armed before exiting their vehicles, and thus, the State presented sufficient evidence that defendant was engaged in a scheme to commit an illegal act, the result of which was victim’s shooting death. State v. Harry (S.C. 2017) 420 S.C. 290, 803 S.E.2d 272. Homicide 1332

Whether defendant was guilty of murder under the hand of one is the hand of all theory of accomplice liability was a question for the jury in murder prosecution, even though the State did not present any direct evidence that defendant acted in concert with alleged accomplice who admitted to shooting the victim; substantial circumstantial evidence showed that defendant and accomplice planned to confront victim over television that defendant’s girlfriend had previously given to victim in exchange, she alleged, for payment at a later date, and which defendant believed belonged to him, jury could infer defendant planned to assault victim or otherwise take the television by force when defendant and his girlfriend went out of their way to pick up accomplice, who was known to carry a gun, and defendant and accomplice had lengthy, private discussion after which defendant led accomplice to victim’s residence. State v. Harry (S.C.App. 2015) 413 S.C. 534, 776 S.E.2d 387, rehearing denied, certiorari granted, affirmed 2017 WL 3045894. Homicide 1332

Issue as to whether principal was guilty of murder was for jury, in prosecution of defendant as accessory before the fact of murder; there was evidence that principal shot and killed victim with gun provided by defendant, and, because principal had used deadly weapon to murder victim, malice could be inferred. Sellers v. State (S.C. 2005) 362 S.C. 182, 607 S.E.2d 82, rehearing denied. Homicide 1332

39. Instructions—In general

Trial judge’s preliminary remarks to the jury in murder prosecution, stating that jury’s role was to “search for the truth,” determine “true facts,” and render a “just verdict,” had potential effect of lessening state’s burden to prove offense beyond a reasonable doubt, and, therefore, were improper. State v. Beaty (S.C. 2016) 2016 WL 7474479, rehearing granted. Criminal Law 789(4)

Denial of murder and larceny defendant’s requested circumstantial evidence charge, based on “reasonable hypothesis” language found in Edwards, and stating, inter alia, that “[c]ircumstantial evidence has to be complete,” was not reversible error, since state Supreme Court held in Logan that Edwards language was unnecessary. State v. Lynch (S.C.App. 2015) 412 S.C. 156, 771 S.E.2d 346, rehearing denied, certiorari denied. Criminal Law 784(7)

Any error in trial court’s circumstantial evidence jury instruction was harmless, in murder trial, even though instruction omitted “reasonable hypothesis” language; trial court’s instructions properly conveyed applicable law as to state’s burden of proof and reasonable doubt, circumstantial evidence instruction immediately followed reasonable doubt instruction, and instructions as whole conveyed applicable law. State v. Drayton (S.C.App. 2015) 411 S.C. 533, 769 S.E.2d 254, certiorari granted in part, vacated in part 415 S.C. 43, 780 S.E.2d 902. Criminal Law 1172.2

Defendant was not entitled to proposed jury instruction regarding circumstantial evidence in murder trial, which stated that the jury could not convict him unless all of the circumstances pointed conclusively to his guilt “to the exclusion of every other reasonable hypothesis”; Supreme Court had excluded the “reasonable hypothesis” language from the circumstantial evidence instruction. State v. Jenkins (S.C.App. 2014) 408 S.C. 560, 759 S.E.2d 759, rehearing denied. Criminal Law 784(7)

Removal of beating victim from life support was not independent intervening cause capable of breaking chain of causation triggered by defendant’s wrongful actions, and thus, defendant was not entitled to instruction on proximate cause in murder prosecution; State’s evidence clearly established that victim died from severe traumatic blows to head, fact that victim lived for period of time after beating had no effect as to cause of her death and was considered due to medical treatment she received at hospital, and in fact, physician opined that victim would have died within minutes of injury without medical attention. State v. Patterson (S.C.App. 2006) 367 S.C. 219, 625 S.E.2d 239, rehearing denied, certiorari denied. Homicide 566; Homicide 1400

Trial court’s denial of parole eligibility charge in capital murder trial did not constitute a violation of fundamental fairness shocking to the universal sense of justice, as would justify grant of writ of habeas corpus to defendant convicted of murder and sentenced to death, given that there is no constitutional requirement that a parole eligible defendant receive a parole eligibility instruction. McWee v. State (S.C. 2004) 357 S.C. 403, 593 S.E.2d 456, rehearing denied, certiorari denied 124 S.Ct. 1904, 541 U.S. 984, 158 L.Ed.2d 487. Habeas Corpus 508

Trial judge is to charge jury on lesser included offense if there is any evidence from which jury could infer that lesser, rather than greater, offense was committed. State v. Watson (S.C. 2002) 349 S.C. 372, 563 S.E.2d 336. Criminal Law 795(2.10)

When the defendant has not been indicted as an accessory, it is proper to charge the jury on the difference between accessory and principal where the evidence points to an exclusionary offense which dictates that different proof is required as to each defendant. State v. Fuller (S.C. 2001) 346 S.C. 477, 552 S.E.2d 282, habeas corpus dismissed 2010 WL 2710506. Criminal Law 792(2)

Capital murder defendant was prejudiced by appellate counsel’s ineffectiveness in failing to raise and brief issue of trial court’s refusal to instruct jury that terms “life” and “death” are to be understood in their plain and ordinary meaning; had counsel raised issue on direct appeal, defendant would have been entitled to reversal of sentencing phase of his conviction. Southerland v. State (S.C. 1999) 337 S.C. 610, 524 S.E.2d 833. Criminal Law 1969

The trial court did not err in denying the jury charge requested by a defendant on trial for murder that if the jury determined that the defendant had no motive to murder the victim the jury should “duly consider” the absence of a motive in “weighing” the question of guilt; such an instruction would have been an impermissible charge on the facts. State v. Hartley (S.C.App. 1992) 307 S.C. 239, 414 S.E.2d 182, certiorari denied.

The trial court did not err in denying the jury charge requested by a defendant on trial for murder that the transcript taken as a whole indicated he had said that he had never touched the victim where the jury inquired during its deliberations into what he had testified to and requested to hear replayed only the solicitor’s cross‑examination of him; such an instruction would be impermissible as a charge on the facts. State v. Hartley (S.C.App. 1992) 307 S.C. 239, 414 S.E.2d 182, certiorari denied.

There was no error in trial judge’s refusal to give jury instruction on duress, where defendant was found guilty of murder by accomplice liability, because record was devoid of evidence of coercion to degree of eminent threat of death or serious bodily injury. State v. Robinson (S.C. 1987) 294 S.C. 120, 363 S.E.2d 104. Criminal Law 814(8)

It is not error for trial judge to instruct jury that it must not be governed by sympathy in reaching its sentencing decision. State v. Owens (S.C. 1987) 293 S.C. 161, 359 S.E.2d 275, certiorari denied 108 S.Ct. 496, 484 U.S. 982, 98 L.Ed.2d 495. Criminal Law 798(.5)

During the penalty phase of death penalty cases which involve conspiracy liability, the trial judge should charge that the death penalty can not be imposed on an individual who aids and abets in a crime in the course of which a murder is committed by others, but who did not himself kill, attempt to kill, or intend that a killing take place or that lethal force be used. State v. Peterson (S.C. 1985) 287 S.C. 244, 335 S.E.2d 800. Sentencing And Punishment 1780(3)

Trial judge in defining murder and manslaughter is not limited to the definition given in statute, but may use the common‑law definition. State v. Stukes (S.C. 1906) 73 S.C. 386, 53 S.E. 643.

Evidence was insufficient to warrant the jury charge on mutual combat, and thus defendant was entitled to a new trial, in prosecution for murder; there was no evidence that victim was willing to engage in an armed encounter with defendant, there was no evidence victim knew that defendant was armed with a knife, and there was no pre‑existing ill‑will or dispute between the parties. State v. Taylor (S.C. 2003) 356 S.C. 227, 589 S.E.2d 1, rehearing granted. Criminal Law 814(8); Criminal Law 922(1); Homicide 1482

In general, the trial judge is required to charge only the current and correct law of South Carolina, and the law to be charged to the jury is determined by the evidence at trial. State v. Taylor (S.C. 2003) 356 S.C. 227, 589 S.E.2d 1, rehearing granted. Criminal Law 769; Criminal Law 814(1)

Error resulting from portion of trial court’s jury charge, which used the term “failure to testify” to refer to defendant’s choice to exercise his right to remain silent, did not warrant reversal; when viewed as a whole, trial court adequately charged the law regarding defendant’s right to remain silent and not to testify during his criminal trial, and defendant’s attorney was the one who requested the charge using the language “failure to testify.” State v. Adkins (S.C.App. 2003) 353 S.C. 312, 577 S.E.2d 460, rehearing denied, certiorari denied. Criminal Law 822(15); Criminal Law 1137(3)

40. —— Reasonable doubt

No reasonable likelihood existed that jurors in murder prosecution applied trial court’s instructions on reasonable doubt and circumstantial evidence in manner violating defendant’s constitutional right to due process, despite fact that one such instruction equated “reasonable doubt” with “moral certainty,” where jury instructions as a whole adequately communicated high burden of proof required to be established by the state. Todd v. State (S.C. 2003) 355 S.C. 396, 585 S.E.2d 305, rehearing denied. Constitutional Law 4639; Criminal Law 822(16)

The defendant was not entitled to a jury instruction that if there was a reasonable doubt as to whether he was guilty of murder or manslaughter in the shooting of his father, the jury was required to find him guilty of manslaughter, even though psychiatrists testified that he had shot his father to keep his father from interfering with his primary objective of killing his stepmother, where there was ample evidence of deliberation and premeditation, including hiding his shotgun, loading it, and lying in wait for his father. State v. Franklin (S.C.App. 1992) 310 S.C. 122, 425 S.E.2d 758, rehearing denied, certiorari denied.

A defendant charged with murder was entitled to have the jury instructed that if they had any reasonable doubt as to whether he was guilty of murder or voluntary manslaughter they should resolve their doubt in favor of the lesser offense where the defendant and his fiancee, the victim, had left a bar around closing time, had gotten into an argument which continued until they returned to their apartment, had gone to bed where they continued to quarrel and she continued to hit him, and he then reached under the bed, grabbed a buck knife and killed her. State v. Robinson (S.C. 1992) 307 S.C. 169, 414 S.E.2d 142.

A trial judge erred when he refused to charge the jury that if they had a reasonable doubt between murder and manslaughter, they had to resolve it in favor of the lesser offense. State v. Jackson (S.C. 1990) 301 S.C. 41, 389 S.E.2d 650. Criminal Law 798(.6)

Error resulting from portion of trial court’s jury charge, which stated that “should you have a reasonable doubt as to whether or not the defendant has made out his defense,” did not warrant reversal; when charge was examined in its entirety, judge adequately explained that State had burden of proving every element of charged offense and the defendant was not required to prove his innocence. State v. Adkins (S.C.App. 2003) 353 S.C. 312, 577 S.E.2d 460, rehearing denied, certiorari denied. Criminal Law 822(16)

41. —— Malice

Complete omission of permissive inference language in jury instruction stating that malice could be inferred from use of deadly weapon was not a “slight deviation” permissible under State v. Elmore, and thus charge was improper. Gibson v. State (S.C. 2016) 416 S.C. 260, 786 S.E.2d 121, rehearing denied. Homicide 1392

A jury charge instructing that malice may be inferred from the use of a deadly weapon is no longer good law in South Carolina where evidence is presented that would reduce, mitigate, excuse or justify the homicide; overruling State v. Reese, 370 S.C. 31, 633 S.E.2d 898; State v. Norris, 285 S.C. 86, 328 S.E.2d 339; State v. Griffin, 277 S.C. 193, 285 S.E.2d 631; State v. Mattison, 276 S.C. 235, 277 S.E.2d 598; State v. Arnold, 266 S.C. 153, 221 S.E.2d 867; State v. Alford, 264 S.C. 26, 212 S.E.2d 252; State v. Maxey, 262 S.C. 504, 205 S.E.2d 841; State v. Martin, 216 S.C. 129, 57 S.E.2d 55; State v. Deas, 202 S.C. 9, 23 S.E.2d 820; State v. Martin, 149 S.C. 464, 147 S.E. 606; State v. Cleland, 148 S.C. 86, 145 S.E. 628; State v. Strickland, 147 S.C. 514, 145 S.E. 404; State v. Wilson, 115 S.C. 248, 105 S.E. 341; State v. Hardin, 114 S.C. 280, 103 S.E. 557; State v. Hollis, 108 S.C. 442, 95 S.E. 74; State v. Jones, 101 S.C. 111, 85 S.E. 239; State v. Crosby, 88 S.C. 98, 70 S.E. 440; State v. Owens, 79 S.C. 125, 60 S.E. 305; State v. Byrd, 72 S.C. 104, 51 S.E. 542; State v. Foster, 66 S.C. 469, 45 S.E. 1; State v. Taylor, 56 S.C. 360, 34 S.E. 939; State v. Petsch, 43 S.C. 132, 20 S.E. 993; State v. Symmes, 40 S.C. 383, 19 S.E. 16; State v. Mcintosh, 40 S.C. 349, 18 S.E. 1033; State v. Ballington, 346 S.C. 262, 551 S.E.2d 280; State v. McLemore, 310 S.C. 91, 425 S.E.2d 752. State v. Belcher (S.C. 2009) 385 S.C. 597, 685 S.E.2d 802. Homicide 1392

In prosecution for murder relating to killing of officer during attempt to arrest defendant, instruction on the malice element of murder, that jury could find express malice if, by the use of words, there was manifested a deliberate intention to violently and unlawfully take the life of another, was not an improper comment by the court on the facts of the case, relating to defendant’s prior threats to kill a police officer if an officer attempted to arrest him; jury was instructed malice must accompany the physical act of killing and that past malice was not sufficient. Sheppard v. State (S.C. 2004) 357 S.C. 646, 594 S.E.2d 462. Homicide 1391

Sandstrom holding that malice instruction allowing jury to presume malice from a defendant’s use of deadly weapon impermissibly lowered State’s burden of proving that element of murder beyond reasonable doubt and shifted burden of proof to defendant to rebut presumption did not apply retroactively to similar instruction given in defendants’ murder trial, where instruction did not seriously diminish accuracy of conviction, in light of overwhelming evidence of guilt. Gibson v. State (S.C. 2003) 355 S.C. 429, 586 S.E.2d 119, certiorari denied, certiorari denied 124 S.Ct. 1439, 540 U.S. 1191, 158 L.Ed.2d 102. Courts 100(1)

Malice instruction allowing jury to presume malice from defendants’ intentional acts and from use of deadly weapon lowered State’s burden of proving element of malice beyond reasonable doubt, and impermissibly shifted burden to defendant to rebut presumption. Gibson v. State (S.C. 2003) 355 S.C. 429, 586 S.E.2d 119, certiorari denied, certiorari denied 124 S.Ct. 1439, 540 U.S. 1191, 158 L.Ed.2d 102. Criminal Law 778(5)

Jury instructions that unconstitutionally shifted burden of proof by stating that malice was presumed from use of deadly weapon did not contribute to verdict finding defendant guilty of murder, and thus trial counsel’s failure to object to the instructions did not prejudice defendant as required for ineffective assistance of counsel claim, although jury was also instructed on voluntary manslaughter, and defendant indicated regret over killing victim; defendant acted without just cause or excuse in shooting victim when she refused to give him money and threatened him with a pair of scissors, and all of evidence showed that defendant acted with malice. Tate v. State (S.C. 2002) 351 S.C. 418, 570 S.E.2d 522. Criminal Law 1948

There was reasonable likelihood that jury instructions that unconstitutionally shifted burden of proof, by stating that malice was presumed from use of deadly weapon, contributed to verdict finding defendant guilty of assault and battery with intent to kill (ABIK), rather than lesser included offense of assault and battery of a high and aggravated nature (ABHAN), and thus trial counsel’s failure to object to the instructions constituted ineffective assistance, although jury was instructed that state had burden of proving guilt beyond a reasonable doubt and that inference of malice was question for jury; evidence of malice with respect to assault charge was not overwhelming. Tate v. State (S.C. 2002) 351 S.C. 418, 570 S.E.2d 522. Criminal Law 1948

Trial judge’s instruction that inference of malice was question for the jury, in prosecution for assault and battery with intent to kill (ABIK), did not cure error resulting from jury instruction that unconstitutionally shifted burden of proof by stating that malice was presumed from use of deadly weapon, where instruction was not given immediately after the malice instructions and was only given once, while the erroneous presumption of malice instruction was repeated three times. Tate v. State (S.C. 2002) 351 S.C. 418, 570 S.E.2d 522. Criminal Law 823(9)

The jury charge in a murder prosecution did not improperly instruct the jury to presume malice from the defendant’s use of a shotgun where the charge used the word “implication” rather than “presumption,” and the charge clearly instructed the jury that the use of a deadly weapon was simply an evidentiary fact to be taken into consideration along with all the other evidence in the case. State v. Franklin (S.C.App. 1992) 310 S.C. 122, 425 S.E.2d 758, rehearing denied, certiorari denied. Homicide 1392

The trial court in a prosecution for murder properly instructed the jury that an implication of malice could arise from the use of brutal force, even absent the use of a deadly weapon, where the cause of death was head injuries which were consistent with a severe beating administered with fists. State v. McLemore (S.C.App. 1992) 310 S.C. 91, 425 S.E.2d 752, rehearing denied, certiorari denied.

A defendant, charged with murder, was not entitled to a jury instruction on the lesser included offense of voluntary manslaughter where, after loading his pistol and firing one bullet to test it, he followed the victim (with whom he had been quarrelling) into a store, shot the victim through the heart, and then, while using vile language indicative of malice, shot the victim again in the back of the head. State v. Lowry (S.C.App. 1992) 309 S.C. 533, 424 S.E.2d 549, rehearing denied, certiorari granted, reversed 315 S.C. 396, 434 S.E.2d 272.

The trial court did not err in denying a defendant’s request for a jury charge on the crime of manslaughter as a lesser‑included offense of the crime of murder where, even though the evidence from the defendant showed that he didn’t harbor ill‑feelings toward the victim, there was no evidence showing that he killed the victim without malice; it is not error to refuse to submit a lesser included offense unless there is evidence tending to show that the defendant is only guilty of the lesser offense. State v. Hartley (S.C.App. 1992) 307 S.C. 239, 414 S.E.2d 182, certiorari denied.

Trial court’s use of the term “rebuttable” in charge on implied malice did not unconstitutionally shift a burden of proof to the defendant, where, in the two instances complained of, the term “rebuttable” was used in conjunction with the term “inference” rather than “presumption”, and was followed immediately by the instruction that the state bore the burden of proving malice beyond a reasonable doubt and that it was for the jury to determine from all the evidence whether or not malice had been proven. State v. Patrick (S.C. 1986) 289 S.C. 301, 345 S.E.2d 481. Criminal Law 778(5)

There was no error in failing to give an instruction on manslaughter, in a prosecution for murder, where the defendant, at best, might argue mutual combat, but the record clearly reflected that the killing was intentional and maliciously perpetrated. State v. Merriman (S.C.App. 1985) 287 S.C. 74, 337 S.E.2d 218.

A malice charge in a murder case which used the terms “presumption,” “rebuttable,” and “implied and presumed” at least nine times was clearly erroneous. Every judge in South Carolina should delete from his malice charges all phrases denoting a presumption or a rebuttable presumption. These constitutionally infirm phrases should be replaced with terms such as “might infer” or “may be presumed” which denote a permissive inference. The judge should make it clear to the jury that it is free to accept or reject these permissive inferences depending on its view of the evidence. State v. Peterson (S.C. 1985) 287 S.C. 244, 335 S.E.2d 800.

The charge “that from brutal conduct on the part of the person committing the crime of murder, malice could be inferred” and not limiting the brutal conduct to the time of the commission of the offense, but brutal conduct generally, was held without error. State v. Jones (S.C. 1910) 86 S.C. 17, 67 S.E. 160.

An exception to a charge, “malice has been defined to be a term of art imparting wickedness and excluding just cause or excuse. It is something that springs from wickedness, from depravity, from a depraved spirit, from a spirit at the time bent on mischief, and not then having a regard for the social obligations, or the obligations which rest upon mankind,” for the reason that the instruction had a tendency to make the jury believe that mere wickedness in a defendant is equivalent to malice, held without merit. State v. Miller (S.C. 1906) 73 S.C. 277, 53 S.E. 426, 114 Am.St.Rep. 82.

Charge that “malice is the intentional killing of a person, knowing it to be wrong, without just legal excuse,” is not error. State v. Byrd (S.C. 1905) 72 S.C. 104, 51 S.E. 542.

Charge that if defendant intentionally and wrongfully killed the deceased without any justification or excuse, then he killed him with malice, and that would constitute murder, held without error. State v. McDaniel (S.C. 1904) 68 S.C. 304, 47 S.E. 384, 102 Am.St.Rep. 661. Criminal Law 763(10)

It is not error to give an instruction to the jury as to implied malice even though all facts and circumstances attending the homicide have been developed in the testimony. State v. Davis (S.C. 1897) 50 S.C. 405, 27 S.E. 905, 62 Am.St.Rep. 837.

There was no error in charging malice is the deliberate and well‑informed purpose to do an unlawful act; in this case, to take life without justification or excuse. State v. McIntosh (S.C. 1893) 39 S.C. 97, 17 S.E. 446. Criminal Law 763(10)

There was no error where the jury was instructed that if the act which produced death be attended with such circumstances as indicate a wicked, depraved and malignant spirit, the law will imply malice, without reference to what was passing in the prisoner’s mind. State v. Levelle (S.C. 1891) 34 S.C. 120, 13 S.E. 319, 27 Am.St.Rep. 799.

42. —— Self‑defense

In prosecution for murder, instructions regarding burden of proof were so inherently contradictory and confusing as to rise to level of constitutional infirmity, where court in one breath instructed jury that accused had burden of proving self‑defense by preponderance of evidence, yet in other that prosecution had to prove beyond reasonable doubt that killing had been felonious (and therefore unlawful) and with malice. Thomas v. Leeke (C.A.4 (S.C.) 1984) 725 F.2d 246, certiorari denied 105 S.Ct. 218, 469 U.S. 870, 83 L.Ed.2d 148. Criminal Law 810

Instructions charging jury that defendant had to prove self‑defense by preponderance of evidence unconstitutionally relieved state of its burden to prove beyond reasonable doubt all elements of crime of murder; placing burden on defendant in murder case to prove that he acted in self‑defense invariably places burden on defendant to prove his innocence and to disprove that he acted with malice, essential element of crime of murder. Smart v. Leeke, 1987, 677 F.Supp. 414, affirmed 856 F.2d 609, rehearing granted, opinion vacated on rehearing 873 F.2d 1558, certiorari denied 110 S.Ct. 189, 493 U.S. 867, 107 L.Ed.2d 144.

Evidence did not warrant instruction for self‑defense; codefendant, who did not witness shooting, testified that victim knocked on door of residence from which defendant was selling drugs, that defendant opened door while holding gun, that victim said “you got these dudes running your house like that” or “you got these young boys in your house now,” and that defendant told him that victim appeared to reach for his abdomen, there was no evidence that victim verbally threatened defendant or that defendant actually saw gun on victim’s person before defendant shot him, and victim suffered ten gunshot wounds, including three in back. State v. Wright (S.C.App. 2016) 416 S.C. 353, 785 S.E.2d 479. Homicide 1478

Proffered instruction on self‑defense that, if defendant justified in firing first shot, he was justified in continuing to shoot until it was apparent that danger to his life and body had ceased was adequately covered by entire charge on self‑defense, in trial for murder, including instruction that person could use such force as was reasonably necessary, even to point of taking human life, where such was reasonable. State v. Marin (S.C. 2016) 415 S.C. 475, 783 S.E.2d 808. Criminal Law 829(5)

Jury instruction regarding lack of duty to retreat when attacked in a place where a person had a right to be was not warranted as part of self‑defense instruction, despite murder defendant’s assertion that he was heir to property at which incident occurred, such that he did not have duty to retreat, where defendant arrived at or near area in question, exited his vehicle, yelled something at victim, and then fired his shotgun at victim, after which he approached victim, kicked him, and yelled “die motherfucker, die.” State v. McCray (S.C.App. 2015) 413 S.C. 76, 773 S.E.2d 914. Homicide 1485

Where homicide defendant contended that he shot the victim in self‑defense, trial court was not required to give defendant’s requested jury instruction that a defendant may continue to shoot as long as he reasonably believes it is necessary to continue to use deadly force, where jury was otherwise properly instructed that use of deadly force is justified if reasonably necessary to prevent death or serious bodily injury, and trial counsel was permitted to argue that defendant’s second shot was reasonably necessary under the circumstances. State v. Marin (S.C.App. 2013) 404 S.C. 615, 745 S.E.2d 148, certiorari granted, affirmed as modified 415 S.C. 475, 783 S.E.2d 808. Criminal Law 829(5); Homicide 1487

Trial court was not required to charge jury on law of self‑defense in murder prosecution; defendant stated that victim, his brother, ran and that he was 50 feet away when the fatal shot was fired, and thus, defendant was no longer in danger when he fired the shot. State v. Lockamy (S.C.App. 2006) 369 S.C. 378, 631 S.E.2d 555, rehearing denied, certiorari denied. Homicide 788

Evidence did not warrant instruction, in murder prosecution, that a person assaulted in a club of which he a member is not required to retreat, in order to invoke the doctrine of self‑defense; the club at which shooting occurred was a dance club that charged five dollars for admission, and such evidence did not establish that defendant was a “member” of a club. Gilchrist v. State (S.C. 2005) 364 S.C. 173, 612 S.E.2d 702. Homicide 1485

Evidence that murder defendant was not at fault in bringing on difficulty culminating in murder and that reasonably prudent person would have believed he was in danger of losing his life or sustaining seriously bodily injury entitled defendant to self‑defense instruction; according to defendant’s testimony, victim physically attacked him after he told her he intended to change jobs and wanted his family to have opportunity to see their baby more often, attempted to strangle and beat him, and shot at him. Jackson v. State (S.C. 2003) 355 S.C. 568, 586 S.E.2d 562, rehearing denied. Homicide 1482; Homicide 1484

If there is any evidence in the record to support self‑defense, the issue should be submitted to the jury. State v. Burkhart (S.C. 2002) 350 S.C. 252, 565 S.E.2d 298, appeal after new trial 371 S.C. 482, 640 S.E.2d 450. Homicide 1476

Defendant was entitled, in murder prosecution, to instruction applicable to his theory of self‑defense, rather than standard instruction provided after jury inquired during deliberations about the law on self‑defense; jury instruction should have included a charge indicating that defendant had a right to judge the conduct of victim more harshly than otherwise because of victim’s drug consumption, and that the jury could consider prior instances of violence or unprovoked aggression by victim in determining whether defendant had a reasonable belief of imminent danger. State v. Day (S.C. 2000) 341 S.C. 410, 535 S.E.2d 431. Criminal Law 863(2)

Evidence that defendant armed himself in self‑defense at time of fatal shooting and that gun went off by accident warranted giving requested charge on law of accident, in murder prosecution; defendant testified that victim and another man were smoking crack cocaine laced with marijuana when he arrived at their house, their eyes were big like they were “getting crazy or something,” they threatened to rob defendant and defendant drew his gun after being physically attacked and thrown to the ground by them, at which time victim went into house to get something, which defendant believed to be a gun, and victim instructed other man to “get that punk,” after which defendant’s gun went off accidentally because his hand was shaking as other man approached him. State v. Burriss (S.C. 1999) 334 S.C. 256, 513 S.E.2d 104. Homicide 1492

Trial judge did not err in denying motion to reduce charge of murder to charge of manslaughter where there was ample evidence to submit the case to the jury on the charge of murder, and where trial judge instructed the jury as to the law of manslaughter and self‑defense, as well as murder; it was for the jury to decide which, if any, measure of homicide the accused had committed. State v. Arnold (S.C. 1976) 266 S.C. 153, 221 S.E.2d 867.

43. —— Provocation

Evidence did not show sufficient legal provocation to warrant jury instruction on voluntary manslaughter in trial for capital murder, even though defendant argued that victim, who was law enforcement officer, conducted aggressive stop by angling patrol car such that moped driven by defendant had no other direction to go than to hit patrol car, curb, or bushes and that, therefore, defendant could reasonably have feared for his safety before he shot officer though driver’s side window; there was no evidence that officer acted in unlawful manner in discharging his duties, that he bumped moped, or that he fired upon defendant before defendant shot him multiple times. State v. Wood (S.C. 2004) 362 S.C. 135, 607 S.E.2d 57, rehearing denied, certiorari denied 125 S.Ct. 2942, 545 U.S. 1132, 162 L.Ed.2d 873, application for writ of habeas corpus held in abeyance 2013 WL 5744779. Homicide 1458

To warrant a jury instruction on voluntary manslaughter in a murder prosecution, both heat of passion and sufficient legal provocation must be present at the time of the killing. State v. Cole (S.C. 2000) 338 S.C. 97, 525 S.E.2d 511. Homicide 1458

There was no evidence of “sufficient legal provocation” that would warrant jury instruction on voluntary manslaughter in murder prosecution; evidence showed merely that victim’s companion assaulted defendant’s friend and stole his jewelry, that defendant twice fought briefly with victim’s companion and was pulled off by victim, that victim’s companion pushed over defendant’s stereo, and that victim and his companion then left. State v. Cole (S.C. 2000) 338 S.C. 97, 525 S.E.2d 511. Homicide 1458

A defendant on trial for the murder of his stepmother was not entitled to a jury instruction on manslaughter, even though numerous psychiatrists testified that his stepmother subjected him to physical and emotional abuse throughout his childhood, where the stepmother was in the kitchen down the hallway from the defendant immediately before he shot and beat her to death, and there was no evidence of legal provocation. State v. Franklin (S.C.App. 1992) 310 S.C. 122, 425 S.E.2d 758, rehearing denied, certiorari denied. Homicide 1457

Fighting is sufficient legal provocation to warrant giving a voluntary manslaughter charge. State v. Grubbs (S.C.App. 2003) 353 S.C. 374, 577 S.E.2d 493, rehearing denied, certiorari denied. Homicide 1458

44. —— Involuntary manslaughter

Defendant, who claimed to have unintentionally killed victim while executing a martial arts move, did not act with reckless disregard for the safety of others, and thus he was not entitled to an involuntary manslaughter jury instruction in murder trial, where defendant executed move allegedly in response to victim charging him with a shiny silver object, which pushed victim’s elbow up and caused her to stab herself in the throat, and defendant’s father had a black belt in martial arts and trained defendant. State v. Scott (S.C. 2015) 414 S.C. 482, 779 S.E.2d 529, rehearing denied. Homicide 709; Homicide 1458

Defendant’s argument that his actions were not of a type naturally tending to cause great bodily harm or death, and thus, trial court should have issued jury instruction on involuntary manslaughter, was not properly preserved, as defendant never expressly asserted argument to the circuit court. State v. Sams (S.C. 2014) 410 S.C. 303, 764 S.E.2d 511, rehearing denied. Criminal Law 1038.2

There was no evidence that the victim’s death from strangulation was unintentional, as would support jury charge of involuntary manslaughter in murder prosecution, despite defendant’s assertions that he meant no harm to the victim, and only acted in self‑defense when he chocked the victim to point of unconsciousness and then death; rather, defendant’s prolonged and continued hold on victim’s neck, until a responding officer repeatedly ordered him to release his hold, was intentional and type of conduct that was highly likely to result in serious injury or death. State v. Sams (S.C. 2014) 410 S.C. 303, 764 S.E.2d 511, rehearing denied. Homicide 1458

Murder defendant’s testimony that he struggled with victim over murder weapon and that his hand might have touched trigger of weapon during struggle was sufficient evidence to support jury instruction on involuntary manslaughter, as testimony that gun discovered at crime scene next to victim’s body was fully loaded did not constitute overwhelming evidence that defendant intentionally killed victim, especially given that no test was performed to confirm whether gun recovered was fired on night of shooting, no bullet fragments or projectiles were recovered during investigation, and no eyewitnesses saw gun fire. State v. Battle (S.C.App. 2014) 408 S.C. 109, 757 S.E.2d 737, rehearing denied, certiorari denied. Homicide 1458

Evidence of a struggle over the murder weapon supports submission of an involuntary manslaughter charge to the jury. State v. Battle (S.C.App. 2014) 408 S.C. 109, 757 S.E.2d 737, rehearing denied, certiorari denied. Homicide 1458

Evidence of a struggle between the defendant and the victim over a weapon supports submission of an involuntary manslaughter charge. State v. Battle (S.C.App. 2014) 408 S.C. 109, 757 S.E.2d 737, rehearing denied, certiorari denied. Homicide 1458

Murder defendant was not entitled to jury charge on involuntary manslaughter, even if jury could reasonably conclude that initial two shots that hit the wall were unintentionally fired, since defendant stated to police that, after gun fell from his waistband during struggle with victim, he “pulled the gun” on victim, put gun to victim’s chest, and shot him, and there was no evidence that victim knew defendant had gun, or that struggle with victim was for control of gun. State v. Murray (S.C.App. 2013) 404 S.C. 300, 744 S.E.2d 607. Homicide 1458

Defendant was entitled in murder trial to jury instruction on lesser‑included offense of involuntary manslaughter, even though defendant testified on cross examination that she cocked shotgun and “meant for [victim] to stop”; there was also evidence from which jury could have inferred that defendant did not intentionally discharge shotgun, including defendant’s testimony that she did not remember pulling trigger and that her finger must have slipped “and got on the trigger” and that she did not remember pulling trigger. State v. Mekler (S.C.App. 2005) 368 S.C. 1, 626 S.E.2d 890, certiorari granted, affirmed 379 S.C. 12, 664 S.E.2d 477. Homicide 1458

Evidence warranted giving requested charge on involuntary manslaughter in murder prosecution, where defendant, in his statement to police, indicated that he pulled out a gun, that he stated he was going to kill himself, that gun went off while he was moving gun back and forth, that defendant did not know how the gun went off, and that defendant did not mean to shoot victim. State v. Reese (S.C.App. 2004) 359 S.C. 260, 597 S.E.2d 169, rehearing denied, certiorari granted, affirmed in part, reversed in part 370 S.C. 31, 633 S.E.2d 898. Homicide 1458

It was not error to refuse to charge lesser included offense of involuntary manslaughter, where defendant was convicted of murder, where victim was hit with single shot from substantial distance, most of shot missed her, and pellets which did hit her struck upper portion of her head; defendant contended this evidence could have been basis for jury to reasonably have found that fatal shot was fired recklessly at wall of victim’s bedroom, but argument was rejected where additional evidence established that victim had shotgun wounds to right hand, which demonstrated that she was most likely attempting to protect herself when shot was fired, and single shot to head was fired with shotgun at distance of only 5 to 15 feet; lesser included offense instruction is required by due process only when evidence warrants such instruction. State v. Atkins (S.C. 1987) 293 S.C. 294, 360 S.E.2d 302.

Defendant was entitled to involuntary manslaughter instruction, in prosecution for murder, although defendant gave statements inconsistent with manslaughter theory, where one of her statements asserted facts entitling her to the instruction; defendant alleged that victim/common law spouse pushed her and punched her in the eye at time of incident, and that there was long term abuse of defendant by victim. State v. Grubbs (S.C.App. 2003) 353 S.C. 374, 577 S.E.2d 493, rehearing denied, certiorari denied. Homicide 1458

45. —— Voluntary manslaughter

Instruction on voluntary manslaughter, as lesser‑included offense of murder, was warranted; jury could have reasonably inferred that defendant was incapable of cool reflection and was acting under uncontrollable impulse to do violence when he shot victim six times, as victim’s brother testified that defendant was very nervous even before victim ratcheted his gun, brother testified that immediately after shooting victim, defendant was waving his pistol around saying that he would kill whoever came near him, and witness testified that when she tried to get near victim’s body, defendant told her not to move or he would shoot. State v. Oates (S.C.App. 2017) 421 S.C. 1, 803 S.E.2d 911. Homicide 1458

Evidence did not warrant instruction on voluntary manslaughter, in trial for murder, trafficking in cocaine, and other crimes; codefendant, who did not witness shooting, testified that victim knocked on door of residence from which defendant was selling drugs, that defendant opened door while holding gun, that victim said “you got these dudes running your house like that” or “you got these young boys in your house now,” and that defendant had told him that victim then reached by his abdomen—indicating he had gun—and that defendant shot victim because he feared victim was reaching for gun, codefendant admitted that if victim looked like he was reaching for gun, victim would not yet have had gun in his hand, and pathologist who performed autopsy testified victim sustained ten gunshot wounds, three of which were in his back. State v. Wright (S.C.App. 2016) 416 S.C. 353, 785 S.E.2d 479. Homicide 1458

Evidence did not show that defendant acted within a sudden heat of passion upon sufficient legal provocation, and thus, murder defendant was not entitled to instruction on the lesser‑included offense of voluntary manslaughter; defendant testified that he did not want to hurt victim, that he shot with his eyes closed, and that he was merely attempting to stop victim from shooting, and thus, defendant’s own testimony did not establish that he was overtaken by sudden heat of passion such that he had an uncontrollable impulse to do violence, and the scheme to rob the victim, coupled with defendant’s decision to arrive at the scene armed with a deadly weapon, discounted any claim that defendant in any way act in a sudden heat of passion. State v. Niles (S.C. 2015) 412 S.C. 515, 772 S.E.2d 877. Homicide 1458

It is proper for a trial judge to refuse to charge voluntary manslaughter in a murder case where it very clearly appears there is no evidence whatsoever tending to reduce the crime from murder to manslaughter. State v. Locklair (S.C. 2000) 341 S.C. 352, 535 S.E.2d 420, rehearing denied, certiorari denied 121 S.Ct. 817, 531 U.S. 1093, 148 L.Ed.2d 701. Homicide 1452

There was no evidence of “sudden heat of passion” that would warrant jury instruction on voluntary manslaughter in murder prosecution; by defendant’s own testimony, he shot at victim and his companion to scare them away, and they left defendant’s apartment three to five minutes before he fired fatal shot. State v. Cole (S.C. 2000) 338 S.C. 97, 525 S.E.2d 511. Homicide 1458

46. Sufficiency of evidence

There was sufficient independent evidence corroborating defendant’s extrajudicial confessions about having murdered victims, as required to support murder convictions; victim and defendant sold drugs in a sophisticated drug organization and defendant was responsible to organization for victim’s shortcomings, there was evidence that defendant paged victim, that victim hurriedly grabbed a large sum of money and left his home to go to a “liquor house,” which was owned by second victim and used by organization, that defendant was in close proximity to liquor house at the time the crimes occurred, and that, around that time frame, defendant ran into his home and was sweating and out of breath, changed clothes, and asked his child’s mother to throw away a black trash bag for him. Hill v. State (S.C.App. 2016) 415 S.C. 421, 782 S.E.2d 414. Criminal Law 413.94(13)

Murder conviction was supported by substantial circumstantial evidence; defendant, who was victim’s wife, violently fought with victim several weeks before victim’s disappearance, resulting in victim’s admission to hospital, assault and battery charges were filed against defendant, victim obtained a restraining order against defendant, defendant confronted victim and others about victim’s dating another individual, victim’s vehicle was found away from his home after his disappearance, defendant’s blood was found on the steering wheel and was, at most, one week old, defendant got a ride from a stranger near where the vehicle was found around the time victim disappeared, and a grave‑like hole was dug on the property of defendant’s family. State v. Bratschi (S.C.App. 2015) 413 S.C. 97, 775 S.E.2d 39. Homicide 1184

Conviction for murder was supported by substantial circumstantial evidence, including evidence that defendant was last person seen with two victims at place where state alleged murders occurred, defendant admitted to police that he saw one of the victims on day before state alleged murder occurred, and that he did not know anyone that wanted to harm the victims, he was stopped for speeding while driving victim’s car in Texas two days after victims were last seen, and he abandoned the car in Seattle, removing the license plate and all identification. State v. Lynch (S.C.App. 2015) 412 S.C. 156, 771 S.E.2d 346, rehearing denied, certiorari denied. Homicide 1184; Homicide 1186

Sufficient evidence existed that defendant reasonably believed shooting victim was necessary to prevent great bodily harm and that he acted in self‑defense, as required for immunity from murder prosecution under the Protection of Persons and Property Act, even though defendant condoned and participated in drinking binge at his home with victim; several photographs of defendant showed severe bruising on his upper arms, a black eye, a scraped knee, and several marks on his legs and chest, defendant’s testimony indicated that victim’s violent behavior was an unreasonable reaction to defendant’s reasonable demand for victim to return defendant’s medicine, objective forensic evidence was consistent with defendant’s testimony, and victim previously choked defendant and had to be pulled off of him. State v. Douglas (S.C.App. 2014) 411 S.C. 307, 768 S.E.2d 232, certiorari dismissed as improvidently granted 416 S.C. 627, 788 S.E.2d 686. Homicide 1198

Conviction for murder was supported by substantial circumstantial evidence, including evidence that defendant had ongoing affair with victim’s wife at time of murder, that wife and defendant conspired to kill victim, that neighbor saw truck matching description of defendant’s truck near crime scene, and that cell phone records placed defendant in vicinity of crime scene. State v. Rogers (S.C.App. 2013) 405 S.C. 554, 748 S.E.2d 265. Homicide 1184

Evidence was sufficient to support defendant’s conviction for murder in regard to shooting of victim, where eyewitness identified defendant as shooter, another witness testified that he saw defendant “peeping” around building in which victim was shot, heard a gunshot, and observed defendant running past building, and other witness testified that defendant had previously made threat in reference to victim. Clark v. State (S.C.App. 2011) 396 S.C. 164, 719 S.E.2d 708. Homicide 1181; Homicide 1184

State presented insufficient evidence to submit murder charge to the jury, and therefore trial court should have granted a directed verdict of acquittal, where no direct evidence linked defendant to the crime scene or items from the victim’s house found in a burn pile on defendant’s mother’s property, there was no testimony tending to establish that defendant had control over the burn pile, blood found on defendant’s pants could not be matched to victim’s DNA, weapon used to beat victim was never introduced into evidence, and no evidence was presented concerning defendant’s knowledge that victim may have had money in a briefcase in her house. State v. Bostick (S.C. 2011) 392 S.C. 134, 708 S.E.2d 774, rehearing denied. Homicide 1331

Evidence that juvenile saw an arm come out of passenger side of a passing vehicle and start shooting, and that juvenile immediately thereafter ran towards the vehicle in the street and fired a single shot in the direction of the vehicle, was sufficient evidence of reckless conduct and wanton disregard for human life from which the family court could infer malice on murder charge arising from death of vehicle occupant from gunshot wound. In re Tracy B. (S.C.App. 2010) 391 S.C. 51, 704 S.E.2d 71, rehearing denied, certiorari granted, certiorari dismissed as improvidently granted 400 S.C. 502, 735 S.E.2d 504. Infants 2640(6)

Evidence of malice aforethought was sufficient to survive juvenile’s motion for directed verdict on murder charge; there was evidence juvenile retrieved a deadly weapon from his brother’s closet, walked to another room, opened a window, and pointed the gun near victim outside, and record indicated it required six pounds of pressure to fire the gun and the recoil on the specific firearm in question was “negligible,” which indicated that accidental discharge of second shot was unlikely. In re Walter M. (S.C.App. 2009) 386 S.C. 387, 688 S.E.2d 133, rehearing denied, certiorari denied. Infants 2568; Infants 2640(6)

State presented sufficient evidence to establish corpus delicti of murder to warrant submission of case to jury, even though victim’s body was never found; prior to defendant moving in with victim, his mother, victim had active social life, victim became very upset and was afraid of defendant after he moved in with her, victim disappeared two days after telling witness she intended to ask defendant to leave, witness noticed trunk of victim’s car lined with plastic on day she disappeared, police saw that linoleum floor in kitchen had been torn up and was missing, and victim’s blood was found on floor underneath linoleum. State v. Weston (S.C. 2006) 367 S.C. 279, 625 S.E.2d 641, habeas corpus dismissed 2011 WL 1543343, appeal dismissed 461 Fed.Appx. 264, 2012 WL 90154, certiorari denied 132 S.Ct. 2413, 182 L.Ed.2d 1048. Homicide 1128; Homicide 1129

Circumstantial evidence was sufficient to support conviction for cab driver’s nearly 40‑year‑old murder; there was evidence defendant was a soldier stationed at fort, that he had a habit of pawning his personal property at downtown area pawn shops, that he purchased revolver and bullets from pawn shop, that victim was shot on same day with same caliber and model revolver, that two days after the murder defendant stayed at downtown motel in close proximately to where driver’s cab was found, that defendant was arrested carrying the revolver, that ballistics test indicated that revolver seized from defendant was the same weapon which fired the shot killing the victim, and that defendant was evasive when talking to police investigators and claimed he did not recall having been in the army or having been stationed at fort. State v. Freiburger (S.C. 2005) 366 S.C. 125, 620 S.E.2d 737, rehearing denied, certiorari denied, certiorari denied 126 S.Ct. 2287, 547 U.S. 1147, 164 L.Ed.2d 813, denial of post‑conviction relief reversed 413 S.C. 243, 775 S.E.2d 391. Homicide 1184

Evidence was sufficient to support conviction for murder; defendant and victim got into argument, defendant threw beer bottle at victim and allegedly punched victim, when victim ran away from trailer, defendant and others pursued, 10 to 15 minutes later, victim’s body was seen lying motionless facedown on road, pathologist confirmed victim suffered severe beating, defendant and codefendant were seen walking on road to back to trailer, defendant and codefendant were gone during window of time victim died, and later that night, codefendant stated that he had kicked victim to death, defendant then stated that victim deserved it, and codefendant was limping and possibly had swollen toe. State v. Zeigler (S.C.App. 2005) 364 S.C. 94, 610 S.E.2d 859, rehearing denied, certiorari denied, habeas corpus dismissed 2015 WL 5604154, appeal dismissed 643 Fed.Appx. 257, 2016 WL 1274728. Homicide 1179; Homicide 1181; Homicide 1184

Substantial circumstantial evidence supported submission of murder case to the jury; witness observed defendant dragging something out of apartment that was “consistent with being a [human] body” and wrapped in a pink blanket, witness found the same pink blanket containing victim’s body in the dumpster closest to defendant’s apartment later that day, police discovered a construction bolt with victim’s blood on it in defendant’s apartment closet, victim’s blood was found on shower curtain and carpet inside defendant’s apartment, and defendant fled from scene. State v. Al‑Amin (S.C.App. 2003) 353 S.C. 405, 578 S.E.2d 32, rehearing denied, certiorari denied, habeas corpus dismissed 2011 WL 3439531, appeal dismissed 458 Fed.Appx. 290, 2011 WL 6358013, certiorari denied 132 S.Ct. 1931, 182 L.Ed.2d 791. Homicide 1321

Evidence was sufficient to show that defendant’s confessions to murder were knowingly, intelligently, and voluntarily given, despite defendant’s allegations that she was adversely affected by withdrawal symptoms from alcohol and drugs when she made confessions; police officer testified that he had known defendant in his capacity as officer for 17 years, that he was aware of her addiction, and that she did not act any different on day of interrogation, and officer disputed defendant’s allegation that she asked to be left alone or that she cried during interrogation. State v. Crawley (S.C.App. 2002) 349 S.C. 459, 562 S.E.2d 683, rehearing denied, certiorari denied, habeas corpus dismissed 2009 WL 580440, appeal dismissed 332 Fed.Appx. 31, 2009 WL 2843563. Criminal Law 413.51

Evidence supported submission of defendant’s murder charge to the jury; defendant told others at his place of employment that he wanted “that bitch” out of his trailer, defendant told co‑defendants that they needed to do something with victim or they were all “going to be in trouble,” and defendant informed co‑defendant while transporting victim to creek to dispose of her body that he didn’t have to worry about victim being bothersome because she was already dead. State v. Stuckey (S.C.App. 2001) 347 S.C. 484, 556 S.E.2d 403, rehearing denied, certiorari denied. Homicide 1321; Homicide 1371

Evidence was sufficient to support finding that defendant killed his wife with malice, as required to support murder conviction, where number and location of injuries indicated that wife was severely beaten and strangled for extended period of time, and evidence that defendant attempted to cover up how his wife died suggested that he killed her with wicked or depraved spirit. State v. Ballington (S.C.App. 2001) 346 S.C. 262, 551 S.E.2d 280, rehearing denied, certiorari denied. Homicide 1136

Evidence was sufficient to establish that defendant believed he was in imminent danger, as element required to support charge on self‑defense in murder prosecution, where defendant testified he shot victim because he thought victim, who hired defendant to kill his ex‑girlfriend, was going to pull a gun on him when it was discovered that defendant did not proceed with the plan. State v. Day (S.C. 2000) 341 S.C. 410, 535 S.E.2d 431. Homicide 1484

Evidence did not support finding that defendant was acting in self‑defense, and since he was not acting in self‑defense, then he could not have been acting lawfully, and thus, defendant, who was convicted of voluntary manslaughter, was not entitled to accident charge; defendant was not in imminent danger when he grabbed victim, defendant could have left and avoided any danger, he was at fault in bringing on the difficulty, and a reasonably prudent person would not have thought he was in imminent danger. State v. Chatman (S.C. 1999) 336 S.C. 149, 519 S.E.2d 100. Homicide 1195; Homicide 1197; Homicide 1199; Homicide 1492

Evidence supported murder conviction; there was testimony that defendant told police that he had fight with victim on night of murder and slashed victim two or three times with knife, there was evidence that defendant cut his hands on knife as result of stabbing victim, and there was expert testimony that defendant’s blood matched blood found on victim’s body. State v. Cooper (S.C. 1999) 334 S.C. 540, 514 S.E.2d 584. Homicide 1184

Evidence in murder prosecution was sufficient to submit issue of malice to jury; evidence showed that defendant planned and participated in armed robbery of store, that he obtained guns for robbery, carried one gun, wore mask, pointed gun at store owner, and demanded money from cash register, that co‑defendant fatally shot owner’s father even though owner complied with defendant’s instructions to give him money, and that defendant acted “normally” after shooting. State v. Avery (S.C. 1998) 333 S.C. 284, 509 S.E.2d 476, rehearing denied. Homicide 1326

Evidence was sufficient to submit murder charge to jury; evidence indicted that defendant essentially masterminded his and his coconspirators’ construction of pipe bombs day before murder, one coconspirator testified that he believed victim was definitely alive, but unconscious, when he, codefendant, and defendant took her from car into woods, that he left defendant and codefendant with victim, and that defendant and codefendant were running out of woods away from victim when pipe bomb exploded, and defendant admitted that he put pipe bomb in victim’s mouth, after which codefendant lit bomb. State v. Kelsey (S.C. 1998) 331 S.C. 50, 502 S.E.2d 63, rehearing denied. Homicide 1332

There was sufficient evidence of defendant’s guilt on charges of murder and kidnapping to present jury question; defendant’s fingerprints were found at victim’s residence, there was testimony that electrical cords which bound victim’s hands and ankles had been cut by pair of scissors found in defendant’s home, and there was evidence that same severed electrical cords had at one time been attached to electric blanket found in defendant’s home. State v. Asbury (S.C. 1997) 328 S.C. 187, 493 S.E.2d 349. Homicide 1321; Kidnapping 40

In a prosecution for murder, the defendant was not denied effective assistance by his counsel’s failure to present evidence that the defendant and victim had known each other and been romantically involved, in order to rebut the charge of kidnapping, where he never informed his counsel of the witnesses whose testimony he claimed corroborated his story; moreover, since the PCR judge found the witnesses’ testimony to be incredible, there was no evidence that the allegedly deficient performance would have prejudiced his defense. Drayton v. Evatt (S.C. 1993) 312 S.C. 4, 430 S.E.2d 517, rehearing denied, certiorari denied 114 S.Ct. 607, 510 U.S. 1014, 126 L.Ed.2d 572, rehearing denied 114 S.Ct. 1142, 510 U.S. 1159, 127 L.Ed.2d 451.

In a prosecution for murder and assault and battery of a high and aggravated nature, the defendant was not prejudiced by the introduction into evidence of a crack pipe found during the search of his home, even though such evidence was neither connected to the crimes with which the defendant was charged nor had any bearing on the identity of the perpetrator, where the defendant admitted at trial that he was “good and high” after consuming beer and smoking crack cocaine on the night of the crimes. State v. Wells (S.C.App. 1992) 336 S.C. 223, 426 S.E.2d 814.

Substantial evidence supported a conviction for murder where the defendant (1) owned the murder weapon, (2) told a co‑worker 2 hours before the murder that she and the victim, her husband, were “going to have it out,” (3) was spotted leaving the house by a neighbor, who then went into the house and found the victim’s body, (4) drove by the victim’s father’s house at the time the victim was supposed to meet his father there, and (5) denied knowing that the victim had been killed when she returned to the house. State v. Jeffcoat (S.C.App. 1991) 305 S.C. 339, 408 S.E.2d 247, certiorari denied.

Murder case was properly submitted to jury where defendant’s inculpatory statements were not the only proof of corpus delicti of murder, which may be proven by circumstantial evidence; circumstances surrounding sudden disappearance of victim, considered with unlikelihood of his voluntary departure, as shown by his personal habits and relationships, was sufficient to establish corpus delicti of murder or that victim was dead by criminal act of another. State v. Owens (S.C. 1987) 293 S.C. 161, 359 S.E.2d 275, certiorari denied 108 S.Ct. 496, 484 U.S. 982, 98 L.Ed.2d 495.

Evidence and testimony are more than sufficient to support conviction of murder where State presented evidence that accused had placed loaded revolver in his girlfriend’s purse the day of the shooting, that he took his girlfriend with the gun in the purse to a ballgame which was attended by victim, after which game the accused walked across the softball field, grabbed the gun from the purse, and shot the victim at point blank range; and this was sufficient despite argument that testimony of defense witnesses, if believed, showed that actions of accused were done by accident and not as a rule of design or intent on the part of the accused. State v. Arnold (S.C. 1976) 266 S.C. 153, 221 S.E.2d 867.

Evidence was sufficient to sustain verdict of murder by automobile driver who, while intoxicated, drove at speed of 70 to 80 miles per hour through village having 35‑mile zone and struck and killed pedestrian crossing highway, and then did not stop; conduct of driver was such as to imperil human life, and even though there was no actual intent to kill, there was evidence of such recklessness and wantonness as to indicate a depravity of mind and disregard of human life, from which the jury could infer malice. State v. Mouzon (S.C. 1957) 231 S.C. 655, 99 S.E.2d 672.

47. Sentence and punishment

Florida’s rule, as interpreted by that State’s Supreme Court, foreclosing further exploration of a capital defendant’s intellectual disability if his IQ score was more than 70, created unacceptable risk that persons with intellectual disability would be executed, in violation of Eighth Amendment; rule disregarded established medical practice by taking IQ score as final and conclusive evidence of a defendant’s intellectual capacity and by refusing to recognize that score was, on its own terms, imprecise, and vast majority of states had rejected the strict 70 cutoff; abrogating Cherry v. State, 959 So. Hall v. Florida, U.S.Fla.2014, 134 S.Ct. 1986, 188 L.Ed.2d 1007. Sentencing and Punishment 1642

Five‑year consecutive sentence for possession of a weapon during the commission of a violent crime was inapplicable to defendant also sentenced to life without parole for murder. State v. Palmer (S.C.App. 2016) 415 S.C. 502, 783 S.E.2d 823, rehearing denied. Sentencing and Punishment 620

Solicitor’s closing argument, at penalty phase of capital murder trial, was a proper use of victim impact evidence to compare the uniqueness of defendant and victim based on evidence already in the record, rather than an improper argument that the victim was “worthy” and that defendant was “unworthy”; defendant had introduced evidence of his own uniqueness through testimony of 13 mitigation witnesses regarding his difficult childhood and background, and solicitor’s argument compared how victim had dealt with victim’s childhood poverty and adversity in a different way than defendant. Humphries v. State (S.C. 2002) 351 S.C. 362, 570 S.E.2d 160, rehearing denied. Sentencing And Punishment 1763; Sentencing And Punishment 1780(2)

Because the state had proven the existence of at least one aggravating circumstance beyond a reasonable doubt it was not necessary to address the other aggravating circumstances on circumstances‑of‑aggravation review in death penalty case. State v. Passaro (S.C. 2002) 350 S.C. 499, 567 S.E.2d 862. Sentencing And Punishment 1788(5)

The United States Constitution requires the death penalty to be imposed only if the sentence is neither excessive nor disproportionate in light of the crime and the defendant. State v. Passaro (S.C. 2002) 350 S.C. 499, 567 S.E.2d 862. Sentencing And Punishment 1657

Death penalty was not disproportionate for defendant’s murder of his two‑year‑old child by arson; although defendant did not have a substantial history of violent criminal conduct and he suffered slight mental or emotional disturbance at the time of the murder, defendant knowingly and intentionally started fire, jumped from the van, and failed to inform rescuers that his child was still strapped to a safety seat in the vehicle, and victim was alive during the fire, succumbing to death only after intense heat caused her severe pain and suffering. State v. Passaro (S.C. 2002) 350 S.C. 499, 567 S.E.2d 862. Sentencing And Punishment 1684; Sentencing And Punishment 1708; Sentencing And Punishment 1710

Death sentence for murder committed during course of kidnapping and robbery was not excessive or disproportionate to sentences imposed in other cases, where defendant escaped from prison, forced victim at gunpoint to get keys to his vehicle, drove victim to another town, and shot victim after victim begged defendant not to hurt him and defendant assured victim that he would not be hurt. State v. Ivey (S.C. 1998) 331 S.C. 118, 502 S.E.2d 92, rehearing denied, certiorari denied 119 S.Ct. 812, 525 U.S. 1075, 142 L.Ed.2d 671, habeas corpus dismissed 2008 WL 1787481. Sentencing And Punishment 1661; Sentencing And Punishment 1681; Sentencing And Punishment 1705

Death sentence in capital murder case was proportionate to that in similar cases and was neither excessive nor disproportionate to crime; defendant, then 16 years old, broke into home of 68‑year‑old victim and his wife in early morning hours, he went to their bedroom where he stabbed victim ten times in chest, shoulder and arm, victim bled to death, his wife was beaten in face and chest and suffered broken collar bone and six fractured ribs, and defendant stole several dollars in small change from their home. State v. Powers (S.C. 1998) 331 S.C. 37, 501 S.E.2d 116, rehearing denied, certiorari denied 119 S.Ct. 597, 525 U.S. 1043, 142 L.Ed.2d 539. Sentencing And Punishment 1681

The imposition of a life sentence for a kidnapping conviction was properly vacated where the defendant forced a 72‑year‑old man into the trunk of his car, drove to an isolated place, removed the man from the trunk and took his money, then forced the man back into the trunk and left him there, where he was found dead of a heart attack several days later, and the defendant received a life sentence on these same facts under the murder statute. State v. McCall (S.C.App. 1991) 304 S.C. 465, 405 S.E.2d 414, certiorari denied.

48. Review

Defendant failed to preserve for review on direct appeal claim that he should have been allowed to cross‑examine codefendant with prior inconsistent statement in letter codefendant wrote in which he exonerated defendant and implicated another individual in murder, where he failed to proffer codefendant’s testimony whether he wrote letter and failed to produce letter when State made objection to it. State v. Wright (S.C.App. 2016) 416 S.C. 353, 785 S.E.2d 479. Criminal Law 1036.1(9)

Defendant failed to preserve for review on direct appeal claim that trial court erred in instructing jury to disregard codefendant’s testimony concerning letter he allegedly wrote exonerating defendant of victim’s murder, where defendant acquiesced in trial court’s ruling and failed to object to instruction. State v. Wright (S.C.App. 2016) 416 S.C. 353, 785 S.E.2d 479. Criminal Law 1038.1(5); Criminal Law 1137(3)

Defendant preserved argument for review that trial court failed to conduct required analysis prior to admitting prior bad acts evidence in trial for murder, possession of a weapon during the commission of a violent crime, and assault and battery in the third degree, since argument was sufficiently specific, apparent from context, and clear; parties discussed state’s motion to introduce prior bad acts evidence in chambers, defense counsel moved on several occasions to exclude or redact portions of state’s exhibits, arguing inadmissibility under rule governing prior bad acts evidence, and circuit court stated defense counsel’s objections were protected for the record. State v. King (S.C.App. 2016) 416 S.C. 92, 784 S.E.2d 252, rehearing denied, certiorari granted. Criminal Law 1043(2)

Defendant failed to preserve argument for review that trial court failed to consider factors for granting mistrial in denying defendant’s motion for mistrial when state witness referenced defendant’s prior armed robbery charge shortly after court cautioned that any reference to charge would result in mistrial in prosecution for murder, possession of a weapon during the commission of a violent crime, and assault and battery in the third degree; defendant withdrew his motion for mistrial regarding witness’s testimony, and defendant did not make argument that court failed to consider factors for granting mistrial before trial judge. State v. King (S.C.App. 2016) 416 S.C. 92, 784 S.E.2d 252, rehearing denied, certiorari granted. Criminal Law 1039; Criminal Law 1044.1(1)

Murder defendant’s challenge to trial court’s denial of his request to admit evidence of victim’s prior drug use, on basis that testimony of medical examiner about victim’s toxicology report, which indicated that victim had marijuana metabolites in his system at time of his death, opened the door for admission of such evidence, was rendered unpreserved for appellate review by defendant’s failure to raise such claim at trial. State v. McCray (S.C.App. 2015) 413 S.C. 76, 773 S.E.2d 914. Criminal Law 1036.1(3.1)

It was improper for the Court of Appeals to instruct the trial court to consider on remand whether it was error, in murder prosecution, to admit evidence relating to the discovery of victim’s body and whether the error was harmless; trial court could not perform a harmless error analysis of its own evidentiary ruling. State v. Bruce (S.C. 2015) 412 S.C. 504, 772 S.E.2d 753, certiorari denied 136 S.Ct. 281, 193 L.Ed.2d 204. Criminal Law 1192

Defendant failed to preserve for appeal to the Supreme Court his argument that the search of murder victim’s car trunk, in which victim was found, was an unreasonable search, where defendant only argued before the Court of Appeals that the seizure of car keys used to open the trunk was unreasonable. State v. Bruce (S.C. 2015) 412 S.C. 504, 772 S.E.2d 753, certiorari denied 136 S.Ct. 281, 193 L.Ed.2d 204. Criminal Law 1043(3)

Defendant failed to preserve issue of whether border patrol’s seizure of items from his possession while he was detained at United States/Canada border was unlawful, in murder and grand larceny prosecution, where defendant conceded, at bench trial, that the initial search of his bags by the border patrol was valid. State v. Lynch (S.C.App. 2015) 412 S.C. 156, 771 S.E.2d 346, rehearing denied, certiorari denied. Criminal Law 260.4

Trial court’s pretrial order excluding statement homicide defendant made to law enforcement in connection with a polygraph examination was not an immediately appealable interlocutory order; defendant’s statements made subsequent to the excluded statement were admitted by the trial court and supplied essentially the same information and confession as the excluded statement, such that the exclusion did not significantly impair the prosecution’s ability to try the case. State v. Samuel (S.C. 2015) 411 S.C. 602, 769 S.E.2d 662. Criminal Law 1024(1)

State did not fail to preserve appellate review of whether trial court abused its discretion in admitting police officers’ testimony concerning specific instances of victim’s violent conduct, in determining whether defendant was entitled to immunity from murder prosecution under the Protection of Persons and Property Act; court was sufficiently apprised of State’s continuing objections such that it had an opportunity to consider and rule on them before issuing its order granting immunity, and State’s objections at trial adequately covered both relevance and improper character evidence to the extent evidence went beyond what defendant had already referenced in his own testimony. State v. Douglas (S.C.App. 2014) 411 S.C. 307, 768 S.E.2d 232, certiorari dismissed as improvidently granted 416 S.C. 627, 788 S.E.2d 686. Criminal Law 1043(1)

Defendant waived his appellate Confrontation Clause argument that alleged police sergeant effectively told the jury that co‑defendant’s unredacted confession named defendant when he stated that warrants were issued for defendant’s arrest after co‑defendant provided a statement to investigator, where defendant failed to make his argument in the trial court. State v. Jackson (S.C.App. 2014) 410 S.C. 584, 765 S.E.2d 841. Criminal Law 1035(10)

Defendant waived his appellate argument that alleged the trial court’s failure to instruct the jury not to consider co‑defendant’s statements in determining defendant’s guilt violated the Confrontation Clause, where defendant failed to raise the issue in the trial court. State v. Jackson (S.C.App. 2014) 410 S.C. 584, 765 S.E.2d 841. Criminal Law 1035(10)

Murder defendant failed to preserve for appellate review his contention that trial court erred in instructing jury that it could consider evidence of flight in determining his guilt, where defendant failed to object to such instruction at trial; rather, state objected to such instruction, and defendant argued that instruction was proper. State v. Battle (S.C.App. 2014) 408 S.C. 109, 757 S.E.2d 737, rehearing denied, certiorari denied. Criminal Law 1038.1(3.1)

Defendant’s statement, “It’s done,” was circumstantial rather than direct evidence that defendant murdered victim, for purposes of determining standard for reviewing denial of directed verdict, because jury would have to infer what defendant meant by both “it” and “done” before it could determine if the statement was a confession to murder. State v. Rogers (S.C.App. 2013) 405 S.C. 554, 748 S.E.2d 265. Criminal Law 1134.70

Defendant’s statement, “I put the gun to the back of [victim]’s head and pulled the trigger,” was circumstantial rather than direct evidence that defendant murdered victim, for purposes of determining standard for reviewing denial of directed verdict, because forensic evidence proved victim died of strangulation rather than gunshot, and jury would have to infer that defendant meant to say that he strangled victim to death in order to find defendant guilty of murder based solely on this statement. State v. Rogers (S.C.App. 2013) 405 S.C. 554, 748 S.E.2d 265. Criminal Law 1134.70

Co‑conspirator’s testimony that defendant said he was cleaning blood off his hands and clothes was circumstantial rather than direct evidence that defendant murdered victim, for purposes of determining standard for reviewing denial of directed verdict, because it was unclear from testimony whether defendant actually said he was cleaning up from murder, or whether that was just what co‑conspirator inferred. State v. Rogers (S.C.App. 2013) 405 S.C. 554, 748 S.E.2d 265. Criminal Law 1134.70

Juvenile failed to preserve for review on appeal argument that state to prove beyond a reasonable doubt he killed victim with malice aforethought, where juvenile made no objection to the final verdict of the family court and made no motion for new trial. In re Walter M. (S.C.App. 2009) 386 S.C. 387, 688 S.E.2d 133, rehearing denied, certiorari denied. Infants 2882

Supreme Court’s ruling that the “use of a deadly weapon” implied malice instruction had no place in a murder (or assault and battery with intent to kill) prosecution when evidence was presented that would reduce, mitigate, excuse or justify the killing (or the alleged assault and battery with intent to kill) represented a clear break from modern precedent, and thus, the Court’s ruling would be effective for all cases which were pending on direct review or not yet final where the issue was preserved; however, Court’s ruling would not apply to convictions challenged on post‑conviction relief. State v. Belcher (S.C. 2009) 385 S.C. 597, 685 S.E.2d 802. Courts 100(1); Criminal Law 1181(2)

Defendant failed to preserve for review on direct appeal claim that counsel should have been relieved based on his past representation of murder victim’s brother, where defendant’s only basis for request to substitute counsel was counsel’s prosecution of defendant ten years earlier when he was assistant solicitor. State v. Childers (S.C.App. 2004) 358 S.C. 614, 595 S.E.2d 872, rehearing denied, certiorari granted, affirmed in part, reversed in part 373 S.C. 367, 645 S.E.2d 233, certiorari denied, certiorari denied 128 S.Ct. 618, 552 U.S. 1025, 169 L.Ed.2d 399. Criminal Law 1035(7)

Defendant did not waive Doyle challenge on direct appeal by failing to object after State improperly questioned defendant regarding his failure to give exculpatory statement to police following his arrest, in trial for murder and other crimes, where counsel raised Doyle objection after second improper question. State v. McIntosh (S.C. 2004) 358 S.C. 432, 595 S.E.2d 484. Criminal Law 1036.10

Improper comments during closing arguments do not automatically require reversal if they are not prejudicial to the defendant. Humphries v. State (S.C. 2002) 351 S.C. 362, 570 S.E.2d 160, rehearing denied. Criminal Law 1171.1(2.1)

Capital murder defendant was competent to waive appeal, as evidence established that defendant suffered from no major mental illness, that he understood nature of appellate proceedings, and that he knew why he was tried and why he received a death sentence, forensic psychiatric expert noted that defendant was aware of finality of death penalty and was able to discuss in detail his reason for waiving appeal, and appellate court questioned defendant during oral arguments and had no doubt as to his competency. State v. Passaro (S.C. 2002) 350 S.C. 499, 567 S.E.2d 862. Sentencing And Punishment 1791

Trial judge acted within his discretion, during murder trial, in denying mistrial after witness testified that defendant had called victim “from the jailhouse,” where witness’s statement was vague and provided no particulars regarding defendant’s connection, if any to the “jailhouse,” and it was not apparent from the statement whether defendant herself was incarcerated or was visiting someone else at the jail. State v. Crawley (S.C.App. 2002) 349 S.C. 459, 562 S.E.2d 683, rehearing denied, certiorari denied, habeas corpus dismissed 2009 WL 580440, appeal dismissed 332 Fed.Appx. 31, 2009 WL 2843563. Criminal Law 867.12(9)

Capital murder defendant failed to object to the solicitor’s questions concerning his involvement in armed robberies which took place shortly before armed robbery in which store clerk was killed, and thus failed to preserve the issue for consideration on appeal. State v. Owens (S.C. 2001) 346 S.C. 637, 552 S.E.2d 745, rehearing denied, appeal after new sentencing hearing 362 S.C. 175, 607 S.E.2d 78, appeal after new sentencing hearing 378 S.C. 636, 664 S.E.2d 80, certiorari denied, certiorari denied 129 S.Ct. 1004, 173 L.Ed.2d 300, habeas corpus dismissed 2010 WL 146164. Criminal Law 1037.1(2)

On appeal, the Supreme Court does not re‑evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial judge’s ruling is supported by any evidence; the conclusion of the trial judge on issues of fact as to the voluntariness of a confession will not be disturbed unless so manifestly erroneous as to show an abuse of discretion. State v. Owens (S.C. 2001) 346 S.C. 637, 552 S.E.2d 745, rehearing denied, appeal after new sentencing hearing 362 S.C. 175, 607 S.E.2d 78, appeal after new sentencing hearing 378 S.C. 636, 664 S.E.2d 80, certiorari denied, certiorari denied 129 S.Ct. 1004, 173 L.Ed.2d 300, habeas corpus dismissed 2010 WL 146164. Criminal Law 1158.13

To warrant reversal, a trial judge’s jury charge must be both erroneous and prejudicial. State v. Taylor (S.C. 2003) 356 S.C. 227, 589 S.E.2d 1, rehearing granted. Criminal Law 1172.1(1)

Defendant did not preserve appellate review as to trial court’s refusal to accept defendant’s guilty plea before individual voir dire, nor as to trial court’s conduct in informing jurors, before opening statements, that defendant was pleading “not guilty” rather than guilty but mentally ill (GBMI), where defendant did not object in the trial court, in the prosecution for capital murder. State v. Weik (S.C. 2002) 356 S.C. 76, 587 S.E.2d 683, rehearing granted, adhered to on rehearing 354 S.C. 382, 581 S.E.2d 834, certiorari denied 123 S.Ct. 2580, 539 U.S. 930, 156 L.Ed.2d 609. Criminal Law 1031(4); Criminal Law 1035(8.1)

Defendant did not preserve appellate review of trial court’s failure to submit guilty but mentally ill (GBMI) as possible form of verdict at guilt phase of capital murder trial, where defendant had not requested such charge in the trial court nor had he called its omission to the attention of the trial court. State v. Weik (S.C. 2002) 356 S.C. 76, 587 S.E.2d 683, rehearing granted, adhered to on rehearing 354 S.C. 382, 581 S.E.2d 834, certiorari denied 123 S.Ct. 2580, 539 U.S. 930, 156 L.Ed.2d 609. Criminal Law 1040

49. Harmless error

Due process violation which occurred in defendant’s trial could not be said to be harmless beyond reasonable doubt, nor could predominantly circumstantial evidence establish defendant’s guilt beyond reasonable doubt, where reasonable juror could find that defendant had killed victims in self‑defense, and therefore, writ of habeas corpus should be issued. Smart v. Leeke, 1987, 677 F.Supp. 414, affirmed 856 F.2d 609, rehearing granted, opinion vacated on rehearing 873 F.2d 1558, certiorari denied 110 S.Ct. 189, 493 U.S. 867, 107 L.Ed.2d 144.

Improper admission of coroner’s lay opinion testimony, that victim’s death was homicide, could reasonably have affected result of defendant’s murder conviction, and thus was not harmless error; main issue during trial was whether defendant intentionally or accidentally hit victim with his vehicle, coroner testified that any death presented five options, natural, accident, homicide, suicide, and undetermined, coroner defined homicide as “the intentional act of you taking the life of another[,]” and coroner opined that victim’s death was homicide, which expressly ruled out accident as potential manner of death, and thus expert’s testimony went directly to main issue and heart of defendant’s defense that incident was accident. State v. Westmoreland (S.C.App. 2017) 2017 WL 2961161. Criminal Law 1169.9

Any error in issuance of warrants for search of murder defendant’s historical cell site location data was harmless, where defendant’s guilt was conclusively established by other competent evidence at trial. State v. Drayton (S.C. 2015) 415 S.C. 43, 780 S.E.2d 902. Criminal Law 1166(1)

Defendant was not prejudiced by trial court’s erroneous application of present sense impression hearsay exception to testimony by two witnesses that, on the evening before his murder, victim told them that defendant “had given [victim] $200 to buy beer because he wanted to have sex with him,” and thus the error was harmless, where later in trial police detectives testified that one of the two witnesses stated that victim told him that defendant give victim $200 to have sex, and defendant did not object to detectives’ hearsay testimony. State v. Parvin (S.C.App. 2015) 413 S.C. 497, 777 S.E.2d 1, rehearing denied. Criminal Law 1169.2(6)

Trial court’s error in admitting DNA analysis expert who peer reviewed another DNA expert’s report, in violation of murder defendant’s confrontation clause rights, was harmless; witness’s testimony that victim’s DNA matched DNA recovered from scene merely proved that victim, whom defendant admittedly shot and kicked, was bleeding, and although witness’s testimony was contradicted by defendant’s testimony that victim was not bleeding after being shot and kicked, such contradiction was insignificant given overwhelming evidence of defendant’s guilt. State v. McCray (S.C.App. 2015) 413 S.C. 76, 773 S.E.2d 914. Criminal Law 1168(2)

Violation of murder defendant’s Confrontation Clause rights, through admission of nontestifying co‑defendant’s indirectly inculpatory statement, was harmless beyond a reasonable doubt; there was overwhelming evidence of defendant’s guilt, including his confession. State v. McDonald (S.C. 2015) 412 S.C. 133, 771 S.E.2d 840. Criminal Law 1168(2)

Any error in exclusion of toxicology report relating to victim, and indicating that victim had a blend of different drugs in her system, was harmless, in murder prosecution premised on victim’s death by strangulation and severing of jugular vein, where such evidence was cumulative to numerous other references regarding victim’s illegal drug use. State v. Drayton (S.C.App. 2015) 411 S.C. 533, 769 S.E.2d 254, certiorari granted in part, vacated in part 415 S.C. 43, 780 S.E.2d 902. Criminal Law 1170(1)

Any inaccuracy in trial court’s characterization of toxicologist’s testimony that victim’s blood‑alcohol level would have “most probably” lead to victim’s aggressive and violent behavior was harmless, in determining whether defendant was entitled to immunity from murder prosecution under the Protection of Persons and Property Act; toxicologist’s testimony that blood‑alcohol level “can” cause severe aggression, emotional instability, and violence for an experienced drinker provided support for court’s recognition of testimony as relevant to victim’s aggressive behavior prior to shooting, and defendant recounted his knowledge of victim’s history of burglary, armed robbery, assaulting a woman and two police officers, in addition to incident in which he choked defendant. State v. Douglas (S.C.App. 2014) 411 S.C. 307, 768 S.E.2d 232, certiorari dismissed as improvidently granted 416 S.C. 627, 788 S.E.2d 686. Criminal Law 1166(1)

Any error in admission of police officers’ testimony concerning specific instances of victim’s violent conduct was harmless, in determining whether defendant was entitled to immunity from murder prosecution under the Protection of Persons and Property Act, where fact that victim had a history of violent behavior was well‑established, without objection from the State, prior to admission of officers’ testimony. State v. Douglas (S.C.App. 2014) 411 S.C. 307, 768 S.E.2d 232, certiorari dismissed as improvidently granted 416 S.C. 627, 788 S.E.2d 686. Criminal Law 1169.1(7)

The trial court’s admission of co‑defendant’s statement to police, in violation of the Confrontation Clause during the joint murder trial, was not harmless error; the statements were the only direct evidence that defendant planned the robbery, called to order pizza, and then shot the pizza delivery person, the State emphasized co‑defendant’s statement at trial, and the trial court failed to provide the jury with a limiting instruction that it could consider co‑defendant’s statements only against co‑defendant. State v. Jackson (S.C.App. 2014) 410 S.C. 584, 765 S.E.2d 841. Criminal Law 1168(2)

Any error that trial court committed in admitting defendant’s recorded statement, which purportedly contained comments that defendant made before Miranda rights were waived, was harmless in prosecution for murder and armed robbery; cell phone evidence clearly placed victim and defendant together at time and place of murder, and testimony presented at trial placed defendant at crime scene and overwhelmingly established defendant’s guilt. State v. White (S.C.App. 2014) 410 S.C. 56, 762 S.E.2d 726, rehearing denied, certiorari denied. Criminal Law 1169.12

Admission of Law Enforcement Division’s (SLED) letter to local police department, in which references were made to the DNA Index System (CODIS) and, by implication, defendant’s criminal record, was not reversible error, in murder prosecution; evidence contained in letter was merely cumulative to other evidence of defendant’s DNA being in the CODIS database, State never tried to introduce evidence why defendant’s DNA was in the database, and there was no reference to nor indication of any previous crime defendant committed. State v. Hill (S.C. 2014) 409 S.C. 50, 760 S.E.2d 802. Criminal Law 1169.2(3); Criminal Law 1169.11

Any error in trial court’s circumstantial evidence jury instruction in murder trial was harmless, even though instruction omitted language that all of the circumstances had to be consistent with each other and, when taken together, point conclusively to defendant’s guilt beyond a reasonable doubt; trial court’s instructions properly conveyed the applicable law as to the State’s burden of proof and reasonable doubt, the circumstantial evidence instruction immediately followed the reasonable doubt instruction, and the instructions as a whole conveyed the applicable law. State v. Jenkins (S.C.App. 2014) 408 S.C. 560, 759 S.E.2d 759, rehearing denied. Criminal Law 1172.2

Trial court’s erroneous refusal to instruct jury on involuntary manslaughter in murder prosecution was not harmless beyond reasonable doubt, where there was conflicting evidence as to whether victim was shot during struggle over murder weapon; two witnesses testified that gun discovered next to victim’s body was fully loaded and, consequently, was not murder weapon, but no bullet fragments or projectiles were recovered and no witnesses actually saw gun that was fired, and defendant testified he was unarmed on night of shooting, that victim initiated altercation, and that when victim drew his gun, struggle ensued, resulting in victim being shot by his own weapon. State v. Battle (S.C.App. 2014) 408 S.C. 109, 757 S.E.2d 737, rehearing denied, certiorari denied. Criminal Law 1173.2(4)

Trial court’s error in charging jury that malice could be inferred by the use of a deadly weapon could not be considered harmless in murder prosecution; evidence of self‑defense was presented, thereby highlighting the prejudice resulting from the charge, and it was entirely conceivable that the only evidence of malice was defendant’s use of a handgun. State v. Belcher (S.C. 2009) 385 S.C. 597, 685 S.E.2d 802. Criminal Law 1172.2

Error in trial court’s admission of evidence that defendant inquired about life insurance on victim approximately two months before murder was harmless; victim told defendant on night of murder that he wanted a divorce from her, defendant told her boyfriend that she was worried about her business if divorce occurred, murder weapon and victim’s wallet were found in creek behind defendant’s house, two bullets fired into victim originated from same source or same melt of lead as several bullets found in defendant’s closet, and the state sought to show motive through proper admission of two other life‑insurance policies and victim’s retirement benefits, from which defendant would benefit. State v. Douglas (S.C. 2006) 369 S.C. 424, 632 S.E.2d 845, rehearing denied, grant of post‑conviction relief affirmed 2016 WL 3511894. Criminal Law 1169.1(3)

Trial court’s error in admitting evidence of defendant’s drug use and drug dealing as part of the res gestae of the crimes of murder and possession of firearm during the commission of a violent crime when, in fact, drug evidence was not inextricably intertwined with the crimes charged was harmless; witness testified that defendant threatened to kill victim shortly before murder, another witness testified that he saw victim get into vehicle with defendant several hours before shooting, DNA from blood in the car was a positive match to the victim, and drug evidence was cumulative to other unobjected to testimony. State v. Broaddus (S.C.App. 2004) 361 S.C. 534, 605 S.E.2d 579, rehearing denied, certiorari denied, habeas corpus dismissed 2011 WL 4344120, appeal dismissed 469 Fed.Appx. 225, 2012 WL 924383. Criminal Law 1169.1(9); Criminal Law 1169.2(6)

Trial court error in admitting into evidence an anger management questionnaire completed by defendant was harmless, in prosecution for murder and arson; defendant voluntarily confessed to the murder and arson. State v. Myers (S.C. 2004) 359 S.C. 40, 596 S.E.2d 488, rehearing denied, certiorari denied 125 S.Ct. 485, 543 U.S. 980, 160 L.Ed.2d 359. Criminal Law 1169.12

Error in allowing solicitor to comment on defendant’s failure to give exculpatory post‑arrest, post‑Miranda statement to police was not harmless, in trial for murder and other crimes; solicitor asked defendant at least ten questions aimed at showing defendant never presented alibi defense to police, solicitor tied defendant’s silence directly to alibi defense, defendant had documentary proof to support claim that he left South Carolina before crimes occurred, State’s two key witnesses were unable to recall whether they saw defendant at crime scene or just staying with co‑defendant in weeks following crimes, and there was no physical or trace evidence connecting defendant to crimes. State v. McIntosh (S.C. 2004) 358 S.C. 432, 595 S.E.2d 484. Criminal Law 1171.3

In order for a Doyle error to be harmless, the record must establish the reference to the defendant’s right to silence was a single reference, which was not repeated or alluded to; the solicitor did not tie the defendant’s silence directly to his exculpatory story; the exculpatory story was totally implausible; and the evidence of guilt was overwhelming. State v. McIntosh (S.C. 2004) 358 S.C. 432, 595 S.E.2d 484. Criminal Law 1171.3

Even if trial court erred in admitting witness’s testimony that defendant ran from police while out on bond for murder charge, and that defendant commented to witness following flight that police wanted him for “killing some girl,” because of what particular individual had said, such error was harmless; witness’s testimony was cumulative to evidence presented at trial. State v. Pagan (S.C.App. 2004) 357 S.C. 132, 591 S.E.2d 646, rehearing denied, certiorari granted, affirmed as modified 369 S.C. 201, 631 S.E.2d 262. Criminal Law 1169.2(3)

Assuming that defendant’s ex‑wife’s testimony that defendant had tendency to golf, fish, or go to his mother’s house was objectionable as impermissible character evidence, any error in admitting evidence in capital murder prosecution was harmless, where defendant’s girlfriend was questioned as to how she began dating defendant and she explained that she had been a babysitter for his children, and when asked where defendant would be when she was babysitting, girlfriend responded that he would be either be playing golf or working, and defendant admitted on cross‑examination that he played a lot of golf. State v. Haselden (S.C. 2003) 353 S.C. 190, 577 S.E.2d 445. Criminal Law 1169.1(6)

An unconstitutional burden‑shifting instruction is not reversible error if the error was harmless beyond a reasonable doubt. Tate v. State (S.C. 2002) 351 S.C. 418, 570 S.E.2d 522. Criminal Law 1172.2

Any error in the admission of hearsay testimony by victim’s daughter that she was told by victim that victim was dating defendant and that defendant was going to come and stay with victim, was harmless in murder trial, where defendant admitted her close relationship to victim in her statement to police, and police officer testified without objection that defendant stayed with victim for two to three day periods, using victim’s residence as a safe house when defendant’s husband beat her. State v. Crawley (S.C.App. 2002) 349 S.C. 459, 562 S.E.2d 683, rehearing denied, certiorari denied, habeas corpus dismissed 2009 WL 580440, appeal dismissed 332 Fed.Appx. 31, 2009 WL 2843563. Criminal Law 1169.1(9)

Trial court’s error in excluding defendant’s statement to witness that shooting was accidental was harmless, where admission of statement would have been cumulative, and there was overwhelming evidence of defendant’s guilt. State v. Golson (S.C.App. 2002) 349 S.C. 421, 562 S.E.2d 663, rehearing denied, certiorari denied, habeas corpus dismissed 2012 WL 909787. Criminal Law 1170(2)

The trial court erred in instructing the jury that the crime of involuntary manslaughter was applicable to a case where the defendant forced a 72‑year‑old man into the trunk of his car, drove to an isolated place, removed the man from the trunk and took his money, then forced the man back into the trunk and left him there, where he was found dead of a heart attack several days later; but this error was harmless to the defendant’s subsequent conviction for murder on these facts. State v. McCall (S.C.App. 1991) 304 S.C. 465, 405 S.E.2d 414, certiorari denied.

The trial court erred by failing to charge the jury that, if they had a reasonable doubt as to whether the defendant was guilty of murder or of a lesser offense, the doubt must be resolved in favor of the lesser offense after the jury had asked for a “clarification of the specific definitions and differences between involuntary manslaughter and murder”; but this error was harmless where no evidence supported the lesser charge. State v. McCall (S.C.App. 1991) 304 S.C. 465, 405 S.E.2d 414, certiorari denied. Criminal Law 1173.2(4)

In a prosecution for murder, the defendant was deprived of the effective assistance of counsel where the defense counsel failed to object to a mandatory presumption of malice charge to the jury; although such a charge is subject to a harmless error analysis, such an analysis is inappropriate where there is evidence from which the jury could find the defendant guilty of the lesser offense of voluntary manslaughter, since a charge creating a mandatory presumption of malice precludes manslaughter. The defense counsel was also ineffective in failing to request a charge instructing the jury that “if they had a reasonable doubt as to whether the appellant was guilty of murder or manslaughter, it was their duty to resolve that doubt in his favor, and find him guilty of the lesser offense,” where the offenses of murder and manslaughter were submitted to the jury. Carter v. State (S.C. 1990) 301 S.C. 396, 392 S.E.2d 184.

In a prosecution for murder on the theory of accomplice liability, the trial judge’s charge on implied malice, which constituted an improper mandatory presumption, was harmless error where it was beyond a reasonable doubt that the jury would have found it unnecessary to rely on the erroneous mandatory presumption in concluding that the defendant’s accomplice had acted with malice in killing when he lunged at the victim with a knife upon her entry into a store in which the defendant and his accomplice were committing a robbery. Yates v. Aiken (S.C. 1989) 301 S.C. 214, 391 S.E.2d 530, certiorari granted 111 S.Ct. 41, 498 U.S. 809, 112 L.Ed.2d 18, reversed 111 S.Ct. 1884, 500 U.S. 391, 114 L.Ed.2d 432. Criminal Law 778(6); Criminal Law 1172.2

50. Prejudicial error

Error in allowing, as reply testimony, crime scene analyst’s general testimony as to the circumstances of the crime was prejudicial at murder trial; defendant and co‑defendant had presented different versions of what had happened, analyst testified two people were present at the crime scene and manipulated the crime scene to present a particular version of events to authorities, which supported state’s theory that defendant and co‑defendant had acted in concert, and prior trial had resulted in hung jury. State v. Prather (S.C.App. 2017) 2017 WL 3880781. Criminal Law 1168(2)

Trial court’s decision to give jury instruction on “the hand of one is the hand of all” after confirming to defense counsel that it would not give the instruction rendered murder trial fundamentally unfair, even though the trial court offered to allow the defense to present additional closing arguments after the jury had already begun deliberating in order to cure defective jury instruction; the decision to give the instruction after the jury began deliberating was prejudicial because defendant crafted his closing argument in reliance on the trial court’s adamancy that it would not instruct on “the hand of one is the hand of all” during the charge conference because, at that time, the court believed the evidence did not support the instruction, and to reargue his closing would have required the defense to shift theories because during closing, he had argued that defendant was not at the scene, and after the additional instruction, he would have been required to argue defendant was merely present. State v. Johnson (S.C.App. 2016) 418 S.C. 587, 795 S.E.2d 171, rehearing denied. Criminal Law 846; Criminal Law 863(2)

A jury instruction misstating the law of self‑defense amounts to an error of constitutional magnitude and is presumed prejudicial. State v. Burkhart (S.C. 2002) 350 S.C. 252, 565 S.E.2d 298, appeal after new trial 371 S.C. 482, 640 S.E.2d 450. Criminal Law 1163(4)

51. Reversible error

Trial judge’s preliminary remarks to the jury in murder prosecution, stating that jury’s role was to “search for the truth,” determine “true facts,” and render a “just verdict,” were not sufficiently prejudicial to warrant reversal of conviction, even if they had potential effect of lessening state’s burden of proof, in light of the entirety of judge’s opening comments and trial record. State v. Beaty (S.C. 2016) 2016 WL 7474479, rehearing granted. Criminal Law 1172.2

Erroneous admission of prior bad act testimony in murder prosecution, without conducting requisite balancing test, was not harmless; defendant was tried for shooting and killing victim, prior bad act testimony involved defendant shooting victim a month before murder, and based upon similarities, jury could have determined defendant was guilty on improper basis, by relying on prior bad act testimony as propensity evidence. State v. Spears (S.C.App. 2013) 403 S.C. 247, 742 S.E.2d 878, certiorari denied. Criminal Law 1169.11

When there is no actual conflict of interest, the defendant must demonstrate he was prejudiced by the attorney’s representation of him, in order for a trial court’s refusal to substitute counsel to constitute reversible error. State v. Childers (S.C.App. 2004) 358 S.C. 614, 595 S.E.2d 872, rehearing denied, certiorari granted, affirmed in part, reversed in part 373 S.C. 367, 645 S.E.2d 233, certiorari denied, certiorari denied 128 S.Ct. 618, 552 U.S. 1025, 169 L.Ed.2d 399. Criminal Law 1166.10(3)

Error in excluding testimony and videotape of expert witness, and portion of college professor’s videotaped deposition which discussed a “photo lineup study,” was not harmless in prosecution for murder, conspiracy to commit murder, and armed robbery, where reliability in eyewitness identification of defendant was essential to defense of murder case. State v. Frazier (S.C. 2004) 357 S.C. 161, 592 S.E.2d 621, rehearing denied, appeal after new trial 375 S.C. 575, 654 S.E.2d 280, certiorari granted, affirmed in part, reversed in part 386 S.C. 526, 689 S.E.2d 610. Criminal Law 1170(1)

Error in admitting testimony of defendant’s co‑worker, who stated, in effect, that he overheard defendant tell victim’s wife during a telephone conversation that “somebody should kill that son‑of‑a‑bitch,” was not harmless, where there was little direct evidence linking defendant to the crime, and the trial court erroneously limited defendant’s attempts to impeach the only direct evidence against him, i.e., the eyewitness identification of two passersby. State v. Frazier (S.C. 2004) 357 S.C. 161, 592 S.E.2d 621, rehearing denied, appeal after new trial 375 S.C. 575, 654 S.E.2d 280, certiorari granted, affirmed in part, reversed in part 386 S.C. 526, 689 S.E.2d 610. Criminal Law 1169.12

Trial court’s failure in capital murder trial to give requested instruction that State had burden of disproving self‑defense by proof beyond a reasonable doubt was reversible error, where defendant admitted to killing his victims and relied entirely on self‑defense at trial, and thus, defendant’s credibility and relative burdens of proof surrounding sole issue of self‑defense versus murder were central to case. State v. Burkhart (S.C. 2002) 350 S.C. 252, 565 S.E.2d 298, appeal after new trial 371 S.C. 482, 640 S.E.2d 450. Criminal Law 1173.2(3)

If there is any evidence in the record from which it could reasonably be inferred that the defendant acted in self‑defense, the defendant is entitled to instructions on the defense, and the trial judge’s refusal to do so is reversible error. State v. Day (S.C. 2000) 341 S.C. 410, 535 S.E.2d 431. Criminal Law 1173.2(3); Homicide 1476

Regardless of a capital defendant’s parole eligibility, he or she is entitled upon request to have the jury instructed that the terms “life” and “death” are to be understood in their plain and ordinary meaning, and the refusal to give such a request is reversible error. Southerland v. State (S.C. 1999) 337 S.C. 610, 524 S.E.2d 833. Criminal Law 824(1); Criminal Law 1173.2(4)

In a prosecution for murder, the trial court’s instruction that, if the jury had a reasonable doubt as to whether the defendant was guilty of murder, it should acquit him of murder and then consider the issue of manslaughter, was reversible error where the defendant requested and was entitled to a charge instructing the jury that it was their duty to resolve any doubt as to whether he was guilty of murder or manslaughter in favor of the lesser offense of manslaughter. State v. Gorum (S.C. 1993) 311 S.C. 332, 428 S.E.2d 884, rehearing denied. Criminal Law 798(.6); Criminal Law 1172.1(4.1)

52. New trial

Improper manner in which trial court arrived at its ruling finding that defendant had violated Batson by using peremptory strike on white juror, having inappropriately left the burden of persuasion on defendant as the party opposing State’s Batson motion to show that his peremptory strike of a white juror was not racially discriminatory, necessitated reversal of conviction for murder and other offenses and remand for new trial, as erroneous Batson ruling served to taint the jury giving rise to presumed prejudice, as there was no way to determine with any degree of certainty whether defendant’s right to a fair trial by an impartial jury was abridged. State v. Inman (S.C. 2014) 409 S.C. 19, 760 S.E.2d 105, rehearing denied. Jury 121

Witness’s mention of a polygraph exam during her testimony in defendant’s murder trial warranted a new trial, even though trial court gave jury a curative instruction; due to the fact that witness was the first witness called to the stand, the jury could have inferred that the other witnesses took polygraph tests and the results of those tests affected their testimony, and given that the evidence against defendant consisted of the testimony of three witnesses, the credibility of the witnesses was a vital element in the State’s case. State v. Johnson (S.C.App. 2005) 363 S.C. 184, 610 S.E.2d 305, rehearing denied, certiorari granted, vacated 376 S.C. 8, 654 S.E.2d 835. Criminal Law 921

A defendant convicted of murder was not entitled to a new trial based on the discovery that he had a brain tumor at the time of the offense where his expert testified only that the tumor “may have” had an effect on his commission of the crime, and thus he failed to prove that the tumor had rendered the defendant legally insane. State v. South (S.C. 1993) 310 S.C. 504, 427 S.E.2d 666. Criminal Law 945(2)

A defendant on trial for murder was not entitled to either a directed verdict of not guilty or a new trial based on insufficiency of the evidence where the evidence showed that (1) the victim was the grandmother of the defendant’s wife, who had left him, (2) prior to the murder he left work early and asked a co‑worker to falsify his time record, (3) he mentioned the victim’s death 3 hours before it was discovered, (4) a car like his was seen near the wife’s paramour’s car, wherein the murder weapon was found, (5) the defendant called the police and attempted to anonymously implicate the paramour and the wife in the crime, and (5) he identified the method of death before the information was released by the police. State v. Smith (S.C.App. 1992) 307 S.C. 376, 415 S.E.2d 409, rehearing denied, certiorari granted, certiorari dismissed as improvidently granted.

53. Habeas corpus

Writ of habeas corpus must issue because instructions to jury that burden of proof was upon state to prove malice beyond reasonable doubt, but that defendant must prove self‑defense by preponderance of evidence, were conflicting and confusing. Challenged instructions likely caused jurors actual confusion where judge, upon written request from jury, had been required to provide written copy of murder, manslaughter, and self‑defense instructions to jury; jury being advised “defendant is entitled to any reasonable doubt arising in the whole case or in any defenses” was insufficient to cure constitutional infirmities. Smart v. Leeke, 1987, 677 F.Supp. 414, affirmed 856 F.2d 609, rehearing granted, opinion vacated on rehearing 873 F.2d 1558, certiorari denied 110 S.Ct. 189, 493 U.S. 867, 107 L.Ed.2d 144.

54. Effective assistance of counsel

Capital murder defendant was required to show reasonable possibility that insanity defense would have succeeded at trial to prevail on ineffective assistance of counsel claim based on trial counsel’s alleged failure to inform defendant, before he entered plea of guilty but mentally ill, that psychiatrist had come to new conclusion that defendant was legally insane on date of underlying shootings. Wilson v. Ozmint (C.A.4 (S.C.) 2003) 352 F.3d 847, opinion amended on denial of rehearing 357 F.3d 461, certiorari denied 124 S.Ct. 2879, 542 U.S. 923, 159 L.Ed.2d 783. Criminal Law 1912

Appellate counsel’s failure to argue on direct appeal that evidence of capital murder defendant’s assault of other people, which was unrelated to murder for which he was being sentenced, as irrelevant and prejudicial evidence without any probative value, did not prejudice defendant, and thus was not ineffective assistance of counsel, where there was no evidence that, but for appellate counsel’s failure, defendant would have prevailed on his appeal. Bennett v. Stirling, 2016, 170 F.Supp.3d 851, affirmed 842 F.3d 319. Habeas Corpus 486(5)

State court’s determination that trial counsel was not ineffective for failing to object to trial court’s instruction to jury at sentencing phase of capital murder trial, which specifically instructed jurors that they could consider evidence of petitioner’s character in context of aggravating evidence, but allegedly failed to instruct jury it could also consider character in mitigation, was not contrary to clearly established federal law, as would warrant federal habeas relief, where trial court’s instructions informed jury that it had to consider any evidence in mitigation, which included character evidence and more. Bennett v. Stirling, 2016, 170 F.Supp.3d 851, affirmed 842 F.3d 319. Criminal Law 1962

State court’s determination that trial counsel was not ineffective for failing to object to trial court’s statements to jury at sentencing phase of capital murder trial, which allegedly implied existence of appellate review of jury’s verdict, was not contrary to clearly established federal law, as would warrant federal habeas relief, where trial court’s statements referencing future review were only directed to its instructions on the law, and there was no reason for counsel to object to trial court’s instructions. Bennett v. Stirling, 2016, 170 F.Supp.3d 851, affirmed 842 F.3d 319. Habeas Corpus 486(2); Habeas Corpus 709

Trial counsel’s alleged failure to object to prosecutor’s improper injection of race into sentencing phase of capital murder trial was not deficient performance and did not prejudice defendant, and, thus, did not amount to ineffective assistance of counsel, where counsel did object that prosecutor’s injection of race rendered proceedings fundamentally unfair, trial court ruled on merits of defendants’ claim that injection of race deprived him of fair trial, and additional objections to prosecutor’s improper injection of race would not have resulted in different outcome. Bennett v. Stirling, 2016, 170 F.Supp.3d 851, affirmed 842 F.3d 319. Habeas Corpus 486(2)

Trial counsel’s decision to forego voir dire on racial attitudes was not deficient performance, as element of ineffective assistance of counsel claim, where counsel made deliberate decision to avoid offending potential jurors or injecting race into capital murder trial, and doubted that questioning in voir dire would reveal potential jurors’ racial biases, if such biases existed. Bennett v. Stirling, 2016, 170 F.Supp.3d 851, affirmed 842 F.3d 319. Criminal Law 868

Improper jury instruction stating that malice could be inferred from use of a deadly weapon, but omitting permissive inference language, was prejudicial to defendant in murder trial, and thus counsel’s failure to object was ineffective assistance, where only evidence of malice was defendant’s use of a gun. Gibson v. State (S.C. 2016) 416 S.C. 260, 786 S.E.2d 121, rehearing denied. Criminal Law 1948

Trial counsel’s failure to cross‑examine State’s witness regarding prior inconsistent statements that victim was armed prejudiced murder defendant; credibility of witness, who was only independent witness to events, would have suffered if confronted with prior statements that supported defendant’s claim of self‑defense, solicitor relied on and emphasized witness’s testimony during closing arguments, and jury asked question about whose fingerprints were on gun that defendant claimed victim used and solicitor suggested could have been planted, indicating jury focused on whether victim was armed. Rutland v. State (S.C. 2016) 415 S.C. 570, 785 S.E.2d 350, rehearing denied. Criminal Law 1935

Appellate counsel’s failure to raise issue that denial of directed verdict motion for lack of independent evidence corroborating defendant’s extra‑judicial confessions was erroneous on appeal of defendant’s murder conviction was not deficient, as required for ineffective assistance claim; counsel did not testify as to his reasons for declining to raise issue on appeal, and testimony from postconviction hearing did not show how issue was promising or had any more merit than the issues that counsel chose to raise on appeal. Hill v. State (S.C.App. 2016) 415 S.C. 421, 782 S.E.2d 414. Criminal Law 1969

Defense counsel’s failure to argue that evidence at trial entitled defendant to involuntary manslaughter instruction was deficient performance, in murder prosecution, as required to establish claim of ineffective assistance; evidence indicated defendant may have been armed in self‑defense at time of shooting and may have been recklessly handing loaded gun at time of son’s death, and counsel erroneously argued to trial court that defendant would have been entitled to an instruction on involuntary manslaughter only if court determined a self‑defense charge was appropriate. Wigington v. State (S.C.App. 2015) 413 S.C. 578, 776 S.E.2d 407. Criminal Law 1950

Defense counsel’s failure to argue at trial that defendant was entitled to involuntary manslaughter instruction prejudiced defendant, in murder prosecution, and thus amounted to ineffective assistance; had defense counsel properly raised the issue to the trial court, defendant would have been entitled to involuntary manslaughter instruction. Wigington v. State (S.C.App. 2015) 413 S.C. 578, 776 S.E.2d 407. Criminal Law 1950

Trial counsel’s deficient performance in failing to introduce letter identifying a third party’s firearm as murder weapon prejudiced defendant and thus was ineffective assistance of counsel, where state’s evidence other than ballistics evidence was purely circumstantial and weak, state only indicted defendant after it obtained ballistics evidence directly tying defendant’s firearm to murder 40 years after murder, letter would have negatively impacted certainty of expert’s testimony that defendant’s firearm was murder weapon, letter would have disrupted apparent unanimity of state’s experts regarding murder weapon, and letter would have impeached state’s witness. Freiburger v. State (S.C.App. 2015) 413 S.C. 243, 775 S.E.2d 391, rehearing denied. Criminal Law 1933

Trial counsel’s failure to introduce letter written at time of original murder investigation stating that head of state firearms identification laboratory was of opinion that firearm owned by a third party killed the victim was deficient performance, as element of ineffective assistance, where letter would have been admissible at trial, letter would have been only evidence that directly contradicted private ballistics expert’s positive identification of defendant’s firearm as the murder weapon, letter would have supported other experts whose results were inconclusive regarding which firearm was murder weapon, and letter would have impeached state’s witness. Freiburger v. State (S.C.App. 2015) 413 S.C. 243, 775 S.E.2d 391, rehearing denied. Criminal Law 1933

Trial counsel’s failure to present readily available social history mitigation evidence concerning defendant’s chaotic upbringing and dysfunctional family, during the sentencing hearing in capital murder prosecution, amounted to deficient performance, as element of ineffective assistance claim, in murder prosecution in which State sought death penalty; although counsel introduced psychological testimony regarding defendant’s mental illness, counsel failed to present even a skeletal version of defendant’s social history even though there was abundant social history evidence available to them. Weik v. State (S.C. 2014) 409 S.C. 214, 761 S.E.2d 757. Criminal Law 1961

Defendant suffered prejudice as result of trial counsel’s deficient performance in failing to present readily available social history mitigation evidence concerning defendant’s chaotic upbringing and dysfunctional family, during the sentencing hearing in capital murder prosecution, thus constituting ineffective assistance warranting reversal of death sentence and remand for resentencing; evidence would have showed that defendant was predisposed to mental illness and that he was paranoid and extremely delusional at the time of the killing. Weik v. State (S.C. 2014) 409 S.C. 214, 761 S.E.2d 757. Criminal Law 1961

Trial counsel’s failure to object to the trial court’s supplemental jury instruction on malice murder, which impermissibly shifted the burden of proof for malice from the State to defendant, constituted ineffective assistance of counsel; instruction violated defendant’s due process rights by creating a mandatory presumption that required the jury to find malice if the State proved defendant’s participation on the armed robbery, and the evidence of defendant’s guilt was not overwhelming. Lowry v. State (S.C. 2008) 376 S.C. 499, 657 S.E.2d 760. Constitutional Law 4638; Criminal Law 778(5); Criminal Law 1948

Record did not support judge’s finding, in postconviction relief proceeding involving claim of ineffective assistance of trial counsel in murder trial, that trial counsel had noted a continuing objection to jury instruction on malice on ground that the instruction unconstitutionally shifted burden of proof, although trial counsel had indicated after the erroneous instruction was given a second time that an objection had been made; only objection made by trial counsel prior to the instruction being given was one of “undue emphasis,” and counsel never objected to instruction on ground it shifted burden of proof. Tate v. State (S.C. 2002) 351 S.C. 418, 570 S.E.2d 522. Criminal Law 1519(12)

To prove that counsel was ineffective, the applicant must show that counsel’s performance was deficient and that there is a reasonable probability that, but for counsel’s errors, the result of the trial would have been different; a “reasonable probability” is a probability sufficient to undermine confidence in the outcome of the trial. Tate v. State (S.C. 2002) 351 S.C. 418, 570 S.E.2d 522. Criminal Law 1881

For purposes of establishing ineffective assistance of counsel claim, defendant’s trial counsel was deficient, in prosecution for murder and assault and battery with intent to kill (ABIK), in failing to object to jury instructions that unconstitutionally shifted the burden of proof by stating that malice was presumed from use of a deadly weapon; counsel only objected to instructions on ground of “undue emphasis,” and did not object on ground that instructions shifted the burden of proof. Tate v. State (S.C. 2002) 351 S.C. 418, 570 S.E.2d 522. Criminal Law 1948

Jury instructions that unconstitutionally shifted burden of proof by stating that malice was presumed from use of deadly weapon did not contribute to verdict finding defendant guilty of murder, and thus trial counsel’s failure to object to the instructions did not prejudice defendant as required for ineffective assistance of counsel claim, although jury was also instructed on voluntary manslaughter, and defendant indicated regret over killing victim; defendant acted without just cause or excuse in shooting victim when she refused to give him money and threatened him with a pair of scissors, and all of evidence showed that defendant acted with malice. Tate v. State (S.C. 2002) 351 S.C. 418, 570 S.E.2d 522. Criminal Law 1948

There was reasonable likelihood that jury instructions that unconstitutionally shifted burden of proof, by stating that malice was presumed from use of deadly weapon, contributed to verdict finding defendant guilty of assault and battery with intent to kill (ABIK), rather than lesser included offense of assault and battery of a high and aggravated nature (ABHAN), and thus trial counsel’s failure to object to the instructions constituted ineffective assistance, although jury was instructed that state had burden of proving guilt beyond a reasonable doubt and that inference of malice was question for jury; evidence of malice with respect to assault charge was not overwhelming. Tate v. State (S.C. 2002) 351 S.C. 418, 570 S.E.2d 522. Criminal Law 1948

Trial counsels’ failure to object to trial judge’s response to jury’s question concerning result if jury failed to reach verdict on murder charges was deficient performance, for purposes of establishing ineffective assistance of trial counsel, where trial counsel could have anticipated that jury’s failure to reach verdict on any count in indictment would necessitate new trial only on particular count, not new trial of entire case, without objection from counsel, trial judge instructed jury that failure to reach verdict on murder charges would require new trial of entire case, and trial counsel offered no explanation why they failed to object, which precluded finding that lack of objection was trial strategy. Pauling v. State (S.C. 2002) 350 S.C. 278, 565 S.E.2d 769. Criminal Law 1951

There was reasonable probability that outcome of trial would have been different, but for trial counsels’ failure to object to improper jury instruction, that if jury did not reach verdict on murder charges, all murder and non‑murder charges would have to be retried, which established prejudice necessary to establish ineffective assistance of trial counsel, and which mandated retrial on murder charge, where jury may have convicted defendant of one count of murder and acquitted him of other count to avoid retrial of non‑murder charges as trial judge had instructed, and nothing distinguished defendant’s involvement, particularly intent, in murder for which he was convicted from murder for which he was acquitted. Pauling v. State (S.C. 2002) 350 S.C. 278, 565 S.E.2d 769. Criminal Law 1948

The defendant was not denied effective assistance by her counsel’s failure to present evidence of the complex psychological phenomenon known as “battered woman’s syndrome” in her trial for the murder of her husband while he slept, since the Supreme Court did not recognize the syndrome as relevant to a claim of self‑defense until 6 years after her trial. Robinson v. State (S.C. 1992) 308 S.C. 74, 417 S.E.2d 88, rehearing denied. Criminal Law 1922

Trial counsel’s failure to move for a directed verdict, on the ground that the evidence did not establish the corpus delicti of murder independent of the defendant’s extra‑judicial confession, did not constitute ineffective assistance of counsel where the decapitated body of the victim was found in a wooded area, the head was found 10 to 15 feet from the body with the lower jaw and neck area missing, and the forensic pathologist (1) could not determine a cause of death, (2) found no evidence of foul play, but (3) could not rule out strangulation; thus, the corpus delicti of murder was sufficiently established by circumstantial evidence. Brown v. State (S.C. 1992) 307 S.C. 465, 415 S.E.2d 811.

A defendant’s counsel was ineffective in advising the defendant to plead “guilty but mentally ill” to murder where counsel was fully aware that the State’s own psychiatrist had diagnosed the defendant as legally insane at the time of the crime, and failed to adequately apprise the defendant of the M’Naghten defense which, if established, would have relieved her of criminal responsibility. Davenport v. State (S.C. 1990) 301 S.C. 39, 389 S.E.2d 649. Criminal Law 1912

**SECTION 16‑3‑20.** Punishment for murder; separate sentencing proceeding when death penalty sought.

(A) A person who is convicted of or pleads guilty to murder must be punished by death, or by a mandatory minimum term of imprisonment for thirty years to life. If the State seeks the death penalty and a statutory aggravating circumstance is found beyond a reasonable doubt pursuant to subsections (B) and (C), and a recommendation of death is not made, the trial judge must impose a sentence of life imprisonment. For purposes of this section, “life” or “life imprisonment” means until death of the offender without the possibility of parole, and when requested by the State or the defendant, the judge must charge the jury in his instructions that life imprisonment means until the death of the defendant without the possibility of parole. In cases where the defendant is eligible for parole, the judge must charge the applicable parole eligibility statute. No person sentenced to life imprisonment pursuant to this section is eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory life imprisonment required by this section. No person sentenced to a mandatory minimum term of imprisonment for thirty years to life pursuant to this section is eligible for parole or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory minimum term of imprisonment for thirty years to life required by this section. Under no circumstances may a female who is pregnant be executed so long as she is pregnant or for a period of at least nine months after she is no longer pregnant. When the Governor commutes a sentence of death to life imprisonment under the provisions of Section 14, Article IV of the Constitution of South Carolina, 1895, the commutee is not eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, good conduct credits, education credits, or any other credits that would reduce the mandatory imprisonment required by this subsection.

(B) When the State seeks the death penalty, upon conviction or adjudication of guilt of a defendant of murder, the court shall conduct a separate sentencing proceeding. In the proceeding, if a statutory aggravating circumstance is found, the defendant must be sentenced to either death or life imprisonment. If no statutory aggravating circumstance is found, the defendant must be sentenced to either life imprisonment or a mandatory minimum term of imprisonment for thirty years to life. The proceeding must be conducted by the trial judge before the trial jury as soon as practicable after the lapse of twenty‑four hours unless waived by the defendant. If trial by jury has been waived by the defendant and the State, or if the defendant pleaded guilty, the sentencing proceeding must be conducted before the judge. In the sentencing proceeding, the jury or judge shall hear additional evidence in extenuation, mitigation, or aggravation of the punishment. Only such evidence in aggravation as the State has informed the defendant in writing before the trial is admissible. This section must not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the State of South Carolina or the applicable laws of either. The State, the defendant, and his counsel are permitted to present arguments for or against the sentence to be imposed. The defendant and his counsel shall have the closing argument regarding the sentence to be imposed.

(C) The judge shall consider, or he shall include in his instructions to the jury for it to consider, mitigating circumstances otherwise authorized or allowed by law and the following statutory aggravating and mitigating circumstances which may be supported by the evidence:

(a) Statutory aggravating circumstances:

(1) The murder was committed while in the commission of the following crimes or acts:

(a) criminal sexual conduct in any degree;

(b) kidnapping;

(c) trafficking in persons;

(d) burglary in any degree;

(e) robbery while armed with a deadly weapon;

(f) larceny with use of a deadly weapon;

(g) killing by poison;

(h) drug trafficking as defined in Section 44‑53‑370(e), 44‑53‑375(B), 44‑53‑440, or 44‑53‑445;

(i) physical torture;

(j) dismemberment of a person; or

(k) arson in the first degree as defined in Section 16‑11‑110(A).

(2) The murder was committed by a person with a prior conviction for murder.

(3) The offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person.

(4) The offender committed the murder for himself or another for the purpose of receiving money or a thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, solicitor, former solicitor, or other officer of the court during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The murder of a federal, state, or local law enforcement officer or former federal, state, or local law enforcement officer, peace officer or former peace officer, corrections officer or former corrections officer, including a county or municipal corrections officer or a former county or municipal corrections officer, a county or municipal detention facility employee or former county or municipal detention facility employee, or fireman or former fireman during or because of the performance of his official duties.

(8) The murder of a family member of an official listed in subitems (5) and (7) above with the intent to impede or retaliate against the official. “Family member” means a spouse, parent, brother, sister, child, or person to whom the official stands in the place of a parent or a person living in the official’s household and related to him by blood or marriage.

(9) Two or more persons were murdered by the defendant by one act or pursuant to one scheme or course of conduct.

(10) The murder of a child eleven years of age or under.

(11) The murder of a witness or potential witness committed at any time during the criminal process for the purpose of impeding or deterring prosecution of any crime.

(12) The murder was committed by a person deemed a sexually violent predator pursuant to the provisions of Chapter 48, Title 44, or a person deemed a sexually violent predator who is released pursuant to Section 44‑48‑120.

(b) Mitigating circumstances:

(1) The defendant has no significant history of prior criminal conviction involving the use of violence against another person.

(2) The murder was committed while the defendant was under the influence of mental or emotional disturbance.

(3) The victim was a participant in the defendant’s conduct or consented to the act.

(4) The defendant was an accomplice in the murder committed by another person and his participation was relatively minor.

(5) The defendant acted under duress or under the domination of another person.

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(7) The age or mentality of the defendant at the time of the crime.

(8) The defendant was provoked by the victim into committing the murder.

(9) The defendant was below the age of eighteen at the time of the crime.

(10) The defendant had mental retardation at the time of the crime. “Mental retardation” means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.

The statutory instructions as to statutory aggravating and mitigating circumstances must be given in charge and in writing to the jury for its deliberation. The jury, if its verdict is a recommendation of death, shall designate in writing, and signed by all members of the jury, the statutory aggravating circumstance or circumstances which it found beyond a reasonable doubt. The jury, if it does not recommend death, after finding a statutory aggravating circumstance or circumstances beyond a reasonable doubt, shall designate in writing, and signed by all members of the jury, the statutory aggravating circumstance or circumstances it found beyond a reasonable doubt. In nonjury cases the judge shall make the designation of the statutory aggravating circumstance or circumstances. Unless at least one of the statutory aggravating circumstances enumerated in this section is found, the death penalty must not be imposed.

Where a statutory aggravating circumstance is found and a recommendation of death is made, the trial judge shall sentence the defendant to death. The trial judge, before imposing the death penalty, shall find as an affirmative fact that the death penalty was warranted under the evidence of the case and was not a result of prejudice, passion, or any other arbitrary factor. Where a statutory aggravating circumstance is found and a sentence of death is not recommended by the jury, the trial judge shall sentence the defendant to life imprisonment as provided in subsection (A). Before dismissing the jury, the trial judge shall question the jury as to whether or not it found a statutory aggravating circumstance or circumstances beyond a reasonable doubt. If the jury does not unanimously find any statutory aggravating circumstances or circumstances beyond a reasonable doubt, it shall not make a sentencing recommendation. Where a statutory aggravating circumstance is not found, the trial judge shall sentence the defendant to either life imprisonment or a mandatory minimum term of imprisonment for thirty years. No person sentenced to life imprisonment or a mandatory minimum term of imprisonment for thirty years under this section is eligible for parole or to receive any work credits, good conduct credits, education credits, or any other credits that would reduce the sentence required by this section. If the jury has found a statutory aggravating circumstance or circumstances beyond a reasonable doubt, the jury shall designate this finding, in writing, signed by all the members of the jury. The jury shall not recommend the death penalty if the vote for such penalty is not unanimous as provided. If members of the jury after a reasonable deliberation cannot agree on a recommendation as to whether or not the death sentence should be imposed on a defendant found guilty of murder, the trial judge shall dismiss such jury and shall sentence the defendant to life imprisonment as provided in subsection (A).

(D) Notwithstanding the provisions of Section 14‑7‑1020, in cases involving capital punishment a person called as a juror must be examined by the attorney for the defense.

(E) In a criminal action in which a defendant is charged with a crime which may be punishable by death, a person may not be disqualified, excused, or excluded from service as a juror by reason of his beliefs or attitudes against capital punishment unless such beliefs or attitudes would render him unable to return a verdict according to law.

HISTORY: 1962 Code Section 16‑52; 1952 Code Section 16‑52; 1942 Code Section 1102; 1932 Code Section 1102; Cr. C. ‘22 Section 2; Cr. C. ‘12 Section 136; Cr. C. ‘02 Section 109; G. S. 2454; R. S. 109; 1868 (14) 175; 1894 (21) 785; 1974 (58) 2361; 1977 Act No. 177 Section 1; 1978 Act No. 555 Section 1; 1985 Act No. 104, Section 1; 1986 Act No. 462, Section 27; 1990 Act No. 604, Section 15; 1992 Act No. 488, Section 1; 1995 Act No. 83, Section 10; 1996 Act No. 317, Section 1; 2002 Act No. 224, Section 1, eff May 1, 2002 (applicable to offenses committed on or after that date); 2002 Act No. 278, Section 1, eff May 28, 2002; 2006 Act No. 342, Section 2, eff July 1, 2006; 2007 Act No. 101, Section 1, eff June 18, 2007; 2010 Act No. 273, Section 21, eff June 2, 2010; 2010 Act No. 289, Section 4, eff June 11, 2010.

Editor’s Note

2006 Act No. 342, Section 1, provides as follows:

“This act may be cited as the ‘Sex Offender Accountability and Protection of Minors Act of 2006’.”

2006 Act No. 342, Section 12, provides as follows:

“It is the intent of the General Assembly that one of the purposes of this act is to provide for the death penalty for a subsequent offense of first degree criminal sexual conduct with a minor who is less than eleven years of age and that this act does not alter or amend and is separate and distinct from the provisions of Section 16‑3‑20, providing for the imposition of the death penalty for murder.”

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Experts, Alabama court’s ruling that capital defendant received sufficient assistance of mental health expert was contrary to, or involved unreasonable application of, Ake, see McWilliams v. Dunn, 2017, 137 S.Ct. 1790, 198 L.Ed.2d 341. Costs 302.4

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Sentencing, mandatory sentence of life without parole for juvenile convicted of homicide violates Eighth Amendment, see Miller v. Alabama, 2012, 132 S.Ct. 2455, 567 U.S. 460, 183 L.Ed.2d 407, on remand 2013 Ark. 175, 426 S.W.3d 906, on remand 148 So.3d 78. Homicide 1572; Sentencing and Punishment 1607

Attorney General’s Opinions

A defendant convicted of or pleading guilty to murder who has a previous murder conviction must be punished by death or by imprisonment for life pursuant to the provisions of Section 16‑3‑20 on the date the offense was committed, and such defendant would be ineligible for parole consideration on the new murder conviction because of the previous murder conviction. S.C. Op.Atty.Gen. (May 24, 2011) 2011 WL 2214058.

The dismemberment aggravating factor, where the dismemberment took place more than a month after the victim was killed and buried, and the purpose of the murder was not for the dismemberment of the body. SC Op.Atty.Gen. (Feb. 3, 2006) 2006 WL 422562.

Death penalty may be sought where it is alleged that two high‑school students were murdered by firing of automatic weapon and pistol into van carrying several young people; pursuant to and dependent on facts presented, three different statutory aggravating circumstances may be available which would allow death penalty to be sought. 1990 Op.Atty.Gen. No 90‑16 (1990 WL 482404).

Under the 1986 Omnibus Criminal Justice Improvements Act, individuals convicted of murder are not entitled to reductions in time prior to parole eligibility through the use of earned work credits. Prisoners convicted of any violent crimes, as defined in Section 16‑1‑60, for a criminal event that occurred after June 3, 1986, and who have a prior conviction at any time before or after June 3, 1986, for one of the specified crimes, would not be eligible for parole consideration on the recent conviction and must complete service of their entire sentences. Under the provisions of Sections 24‑21‑645 and 24‑21‑650, the review in two years upon rejection, of prisoners in confinement for a violent crime, is applicable to the entire violent offender population. Under the provisions of Section 24‑21‑610, all burglary in the second degree convictions would not be eligible for parole until they have served at least one‑third of their sentence. Any and all offenses of burglary in the first degree and burglary in the second degree under Section 16‑11‑312(B) carry all consequences of a “violent crime” regardless of the statutory aggravating circumstances shown. 1986 Op.Atty.Gen., No 86‑102, p 309 (1986 WL 192060).

South Carolina’s mandatory death penalty for murder in specified circumstances is unconstitutional in light of recent Supreme Court decisions. 1975‑76 Op.Atty.Gen., No 4388, p 224 (1976 WL 23006).

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1. In general

This section, which prescribes the penalty for murder, lawfully expresses the public policy of this State, and the wisdom of this policy is a legislative question, not a judicial one. State v Atkinson (1970) 253 SC 531, 172 SE2d 111. State v Crowe (1972) 258 SC 258, 188 SE2d 379, cert den 409 US 1077, 34 L Ed 2d 666, 93 S Ct 691.

In order to justify imposition of the death penalty upon a conviction of murder, the defendant need not have been the triggerman; it is sufficient that the defendant set out on a course of criminal conduct, and at a minimum, contemplated that life would be taken. Roach v. Martin (C.A.4 (S.C.) 1985) 757 F.2d 1463, certiorari denied 106 S.Ct. 185, 474 U.S. 865, 88 L.Ed.2d 154, rehearing denied 106 S.Ct. 549, 474 U.S. 1014, 88 L.Ed.2d 477. Sentencing And Punishment 1669

A possible sentence of death applies only when one is convicted of or has pled guilty to the crime of murder. State v. Bixby (S.C. 2007) 373 S.C. 74, 644 S.E.2d 54. Sentencing And Punishment 1668

Defendant charged with accessory before the fact of murder was not eligible for death penalty; rather, death penalty was limited to those convicted of murder. State v. Bixby (S.C. 2007) 373 S.C. 74, 644 S.E.2d 54. Sentencing And Punishment 1669

Under the capital penalty scheme, the factfinder retains absolute discretion to impose a life sentence, notwithstanding the presence of an aggravating circumstance. State v. Simmons (S.C. 2004) 360 S.C. 33, 599 S.E.2d 448, rehearing denied, certiorari denied 125 S.Ct. 1068, 543 U.S. 1124, 160 L.Ed.2d 1074. Sentencing And Punishment 1658

During the sentencing phase, the trial judge may permit the introduction of additional evidence of aggravation in order to aid the jury in determining whether to recommend a death sentence. State v. Shuler (S.C. 2003) 353 S.C. 176, 577 S.E.2d 438. Sentencing And Punishment 1756

The bifurcated structure of a capital proceeding should be used to prevent guilt phase evidence from being considered in the penalty phase; consequently, evidence properly admitted during the guilt phase may also be entered during the penalty phase. State v. Tucker (S.C. 1995) 319 S.C. 425, 462 S.E.2d 263, rehearing denied, certiorari denied 116 S.Ct. 789, 516 U.S. 1080, 133 L.Ed.2d 739, habeas corpus dismissed 56 F.Supp.2d 611, affirmed 221 F.3d 600, certiorari denied 121 S.Ct. 661, 531 U.S. 1054, 148 L.Ed.2d 563, habeas corpus granted 346 S.C. 483, 552 S.E.2d 712.

The death penalty may be imposed when the defendant pleads guilty without explicitly admitting his guilt pursuant to an Alford plea, since the primary concern is whether the plea was entered into freely and voluntarily. State v. Ray (S.C. 1993) 310 S.C. 431, 427 S.E.2d 171.

In a prosecution for murder, kidnapping and first‑degree criminal sexual conduct, the sentencing phase of a capital proceeding was improperly tried to a jury under Section 16‑3‑20(B). State v. Truesdale (S.C. 1982) 278 S.C. 368, 296 S.E.2d 528.

2. Purpose

Purpose of the sentencing phase in a capital trial is to direct the jury’s attention to the specific circumstances of the crime and the characteristics of the offender. State v. Haselden (S.C. 2003) 353 S.C. 190, 577 S.E.2d 445. Sentencing And Punishment 1776

The purpose of the sentencing phase in a capital trial is to direct the jury’s attention to the specific circumstances of the crime and the characteristics of the offender. State v. Owens (S.C. 2001) 346 S.C. 637, 552 S.E.2d 745, rehearing denied, appeal after new sentencing hearing 362 S.C. 175, 607 S.E.2d 78, appeal after new sentencing hearing 378 S.C. 636, 664 S.E.2d 80, certiorari denied, certiorari denied 129 S.Ct. 1004, 173 L.Ed.2d 300, habeas corpus dismissed 2010 WL 146164. Sentencing And Punishment 1667; Sentencing And Punishment 1702

The purpose of statute regarding additional evidence at hearing to decide whether to impose death penalty is to ensure a capital defendant is given a fair and complete opportunity to respond to each factual allegation used by the state as a justification for a sentence of death. State v. Owens (S.C. 2001) 346 S.C. 637, 552 S.E.2d 745, rehearing denied, appeal after new sentencing hearing 362 S.C. 175, 607 S.E.2d 78, appeal after new sentencing hearing 378 S.C. 636, 664 S.E.2d 80, certiorari denied, certiorari denied 129 S.Ct. 1004, 173 L.Ed.2d 300, habeas corpus dismissed 2010 WL 146164. Sentencing And Punishment 1756

The purpose of the bifurcated proceeding in a capital case is to permit the introduction of the evidence in the sentencing proceeding which ordinarily would be inadmissible in the guilt phase, and, in the sentencing proceeding, the trial court may permit the introduction of additional evidence in extenuation, mitigation or aggravation. State v. Kornahrens (S.C. 1986) 290 S.C. 281, 350 S.E.2d 180, certiorari denied 107 S.Ct. 1592, 480 U.S. 940, 94 L.Ed.2d 781, denial of habeas corpus affirmed 66 F.3d 1350, certiorari denied 116 S.Ct. 1575, 517 U.S. 1171, 134 L.Ed.2d 673, rehearing denied 116 S.Ct. 2541, 518 U.S. 1013, 135 L.Ed.2d 1063.

3. Construction and application

Murder sentence of life imprisonment was appropriate under version of sentencing statute in effect at the time of the offense; amendment to that statute that was in effect at time of sentencing that allowed a minimum sentence of 30 years imprisonment did not apply, because the legislature expressly stated that the amendment applied prospectively to crimes committed after amendment’s effective date. State v. Gay (S.C. 2001) 343 S.C. 543, 541 S.E.2d 541, habeas corpus dismissed 2009 WL 2151784. Homicide 1572

A defendant who pled guilty but mentally ill pursuant to Section 17‑24‑20 to 2 counts of murder, 9 counts of assault and battery with intent to kill, and one count of illegally carrying a firearm, could be sentenced to death since, although the legislature did not give special guidance or a specific procedure to be used in cases involving the death sentence, Section 17‑24‑70 states that a defendant found guilty but mentally ill “must be sentenced as provided by law for a defendant found guilty,” and the penalty for one found guilty of murder may include the death penalty. State v. Wilson (S.C. 1992) 306 S.C. 498, 413 S.E.2d 19, certiorari denied 113 S.Ct. 137, 506 U.S. 846, 121 L.Ed.2d 90.

The trial court properly granted a defendant’s motion for an order prohibiting the State from seeking the death penalty where the maximum punishment for murder in South Carolina had been life imprisonment when the alleged crime was committed and an operative death penalty had not been reinstated until approximately nine months later. State v. Logan (S.C. 1982) 277 S.C. 252, 286 S.E.2d 125.

Death penalty cannot be applied to defendants who were tried before June 8, 1977, since intent of Capital Punishment Act effective on that date was that no one suffer death penalty unless and until bifurcated trial was conducted at both stages consistent with Act. State v. Rodgers (S.C. 1978) 270 S.C. 285, 242 S.E.2d 215.

4. Constitutional issues—In general

Constitutionality of former provisions of this section. See State v Gibson (1972) 259 SC 459, 192 SE2d 720. State v Bellue (1972) 259 SC 487, 193 SE2d 121. State v Speights (1974) 263 SC 127, 208 SE2d 43.

Florida’s capital sentencing scheme, under which an advisory jury makes a recommendation to a judge, and the judge makes the critical findings needed for imposition of a death sentence, violates the Sixth Amendment right to jury trial; overruling Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340, and Hildwin v. Florida, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728, and abrogating Bottoson v. Moore, 833 So.2d 693,Tedder v. State, 322 So.2d 908,Blackwelder v. State, 851 So.2d 650, and State v. Steele, 921 So.2d 538. Hurst v. Florida, U.S.Fla.2016, 136 S.Ct. 616, 193 L.Ed.2d 504, on remand 202 So.3d 40. Jury 31.1; Sentencing and Punishment 1626

Where defendant was convicted of capital murder and, in sentencing phase, court instructed jury on statutory aggravating factors, including factor that murder was “especially heinous, atrocious, or cruel, but no further definition was offered, and jury found all three aggravating factors present and sentenced defendant to death, accused was entitled to rely on decisions in Maynard v Cartwright (1988) 486 US 356, 100 L Ed 2d 372, 108 S Ct 1853, and Clemons v Mississippi (1990) 494 US 738, 108 L Ed 2d 725, 110 S Ct 1441, on remand, remanded (Miss) 593 So 2d 1004, which, in essence, invalidated death sentence because of vagueness of statutory aggravating factor phrased similarly to Mississippi’s and Maynard and Clemons did not announce “new rule;” fact that Mississippi is a “weighing” state gave emphasis to requirement that aggravating factors be defined with some degree of precision; at time defendant’s sentence became final, US Supreme Court precedents did not permit state appellate courts to apply rule of automatic affirmance to any death sentence supported by multiple aggravating factors when one of such factors was invalid; Clemons decision did not announce “new rule” in applying requirement of precise definition of aggravating factors to Mississippi capital sentencing system; and, view expressed by Court of Appeals prior to Clemons decision that decision in Godfrey v Georgia (1980) 446 US 420, 64 L Ed 2d 398, 100 S Ct 1759, did not apply to Mississippi, was relevant but not dispositive of new rule inquiry, had not been adopted by Supreme Court of Mississippi, and was erroneous. Stringer v. Black (U.S.Miss. 1992) 112 S.Ct. 1130, 503 U.S. 222, 117 L.Ed.2d 367.

Introduction, at capital sentencing procedure, of evidence as to defendants membership in white racist prison gang, violated First Amendment of U.S. Constitution where evidence had no relevance to proceeding, in which defendant, who was white, was being sentenced for murder of white person. Dawson v. Delaware, 1992, 112 S.Ct. 1093, 503 U.S. 159, 117 L.Ed.2d 309.

Following an individual’s conviction of a capital offense, the Eighth and Fourteenth Amendments require that the sentencer not be precluded from considering, as a mitigating factor, any aspect of the defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence of less than death. Eddings v. Oklahoma, U.S.Okla.1982, 102 S.Ct. 869, 455 U.S. 104, 71 L.Ed.2d 1.

The imposition of a sentence of death on a 16‑year‑old individual convicted of first‑degree murder is done without the type of individualized consideration of mitigating factors required by the Eighth and Fourteenth Amendments in capital cases, where the trial judge considers the defendant’s youth as a mitigating circumstance, but refuses to consider in mitigation, as a matter of law, evidence of a turbulent family history, of beating by a harsh father, and of severe emotional disturbance. Eddings v. Oklahoma, U.S.Okla.1982, 102 S.Ct. 869, 455 U.S. 104, 71 L.Ed.2d 1.

Mandatory death penalty for first degree murder of police officer, without consideration of mitigating circumstances, is unconstitutional. Roberts v. Louisiana, U.S.La.1977, 97 S.Ct. 1993, 431 U.S. 633, 52 L.Ed.2d 637, 5 O.O.3d 252.

Section 16‑3‑20, which provides that where a defendant pleads guilty to murder, the trial court, rather than a jury, will determine if statutory aggravating circumstances exist and the ultimate appropriateness of imposition of the death penalty, does not violate the Sixth, Eighth, or Fourteenth Amendment to the United States Constitution, as the federal Constitution does not give state criminal defendants the right to sentencing by a jury. Roach v. Martin (C.A.4 (S.C.) 1985) 757 F.2d 1463, certiorari denied 106 S.Ct. 185, 474 U.S. 865, 88 L.Ed.2d 154, rehearing denied 106 S.Ct. 549, 474 U.S. 1014, 88 L.Ed.2d 477.

Statute, which eliminated the possibility of sentencing by a jury when a defendant pled guilty in a capital case, was not unconstitutional; judge could sentence a capital defendant only after the defendant knowingly and voluntarily waived his right to a jury trial. State v. Crisp (S.C. 2005) 362 S.C. 412, 608 S.E.2d 429. Jury 31.1; Sentencing And Punishment 1626

The construction and application of an aggravating circumstance is unconstitutionally broad or vague if it does not channel or limit the jury’s discretion in imposing the death penalty. State v. Smith (S.C. 1989) 298 S.C. 482, 381 S.E.2d 724, certiorari denied 110 S.Ct. 1536, 494 U.S. 1060, 108 L.Ed.2d 775, rehearing denied 110 S.Ct. 2221, 495 U.S. 953, 109 L.Ed.2d 546. Sentencing And Punishment 1652

In a murder prosecution, the trial judge properly denied the defendant’s request to waive any protection afforded by the ex post facto clause of the United States Constitution in order that the jury might consider, as mitigating evidence, the increased time prior to parole eligibility under the 30‑year parole eligibility provision of the Omnibus Criminal Justice Improvements Act, which was enacted subsequent to the murders in question. State v. Smith (S.C. 1989) 298 S.C. 482, 381 S.E.2d 724, certiorari denied 110 S.Ct. 1536, 494 U.S. 1060, 108 L.Ed.2d 775, rehearing denied 110 S.Ct. 2221, 495 U.S. 953, 109 L.Ed.2d 546. Criminal Law 790; Pardon And Parole 42.1

Section 15‑3‑40(3), which provides for tolling of the applicable statute of limitations for an inmate serving less than a life sentence at the time the cause of action accrued, did not deny equal protection to a defendant who had been sentenced to life for murder under Section 16‑3‑20(A), despite his contention that he would be eligible for parole after 20 years and therefore stood in the same position as one convicted for a term less than life, since an award of parole is discretionary with the parole board even after a defendant becomes eligible and, therefore, the defendant’s status was not the same as that of an inmate serving a definite term of 20 years. Merriman v. Minter (S.C. 1989) 298 S.C. 110, 378 S.E.2d 441.

The provision of Section 16‑3‑20(a) which was in effect at the time the defendant committed murder (stating that a life sentence required 20 years service before parole eligibility), rather than the amended version of the statute (stating that a life sentence requires 30 years before parole eligibility), applied to the defendant’s crimes since application of the new statute to the defendant’s crimes would violate the constitutional prohibition against ex post facto laws. State v. Matthews (S.C. 1988) 296 S.C. 379, 373 S.E.2d 587, certiorari denied 109 S.Ct. 1559, 489 U.S. 1091, 103 L.Ed.2d 861, denial of habeas corpus affirmed 105 F.3d 907, certiorari denied 118 S.Ct. 102, 139 L.Ed.2d 57.

A solicitor’s comment, during the sentencing phase of a capital murder trial, regarding letters written by the defendant in which the defendant stated that he was glad that the victim had died, and that the solicitor didn’t know whether the defendant had changed his mind, did not constitute an impermissible indirect comment on the defendant’s right to remain silent. State v. Matthews (S.C. 1988) 296 S.C. 379, 373 S.E.2d 587, certiorari denied 109 S.Ct. 1559, 489 U.S. 1091, 103 L.Ed.2d 861, denial of habeas corpus affirmed 105 F.3d 907, certiorari denied 118 S.Ct. 102, 139 L.Ed.2d 57. Sentencing And Punishment 1780(2)

The constitutionality of the Death Penalty Act is well settled. State v. South (S.C. 1985) 285 S.C. 529, 331 S.E.2d 775, certiorari denied 106 S.Ct. 209, 474 U.S. 888, 88 L.Ed.2d 178, denial of post‑conviction relief affirmed 310 S.C. 504, 427 S.E.2d 666.

Procedures for imposing death penalty are constitutional; procedures focus sentencing authorities’ attention on particularized nature of crime and particularized characteristics of individual defendant; guidance provided by sentencing procedures reduces likelihood that sentencing authority will impose sentence capriciously; additionally, requirement that sentencing authority specify factors it relied upon in reaching its decision ensures meaningful appellate review; unbridled discretion of Solicitor to extend mercy to any capital defendant does not render statutory complex facially invalid; neither is statutory complex unconstitutional because it does not assign numerical values to aggravating and mitigating circumstances so that sentencing authority can determine when mitigating circumstances outweigh aggravating circumstances; list of aggravating circumstances under which death penalty can be imposed is not arbitrary on its face. State v. Shaw (S.C. 1979) 273 S.C. 194, 255 S.E.2d 799, certiorari denied 100 S.Ct. 437, 444 U.S. 957, 62 L.Ed.2d 329, rehearing denied 100 S.Ct. 694, 444 U.S. 1027, 62 L.Ed.2d 662, certiorari denied 100 S.Ct. 690, 444 U.S. 1026, 62 L.Ed.2d 660, rehearing denied 100 S.Ct. 1073, 444 U.S. 1104, 62 L.Ed.2d 791. Sentencing And Punishment 1626; Sentencing And Punishment 1627

1962 Code Section 16‑52 [1976 Code Section 16‑3‑20] is not unconstitutional. State v. Allen (S.C. 1976) 266 S.C. 468, 224 S.E.2d 881.

Challenge to constitutionality of 1962 Code Section 16‑52 as amended [1976 Code Section 16‑3‑20] are without merit. State v. Ingram (S.C. 1976) 266 S.C. 462, 224 S.E.2d 711.

5. —— Cruel and unusual punishment, constitutional issues

State postconviction court’s determination that death‑row inmate’s IQ score of 75 demonstrated that he could not possess subaverage intelligence reflected an unreasonable determination of the facts, as required for federal habeas review of his claim that his execution would violate the Eighth Amendment prohibition of cruel and unusual punishment; accounting for the margin of error, inmate’s reported test result was squarely in the range of potential intellectual disability, and there was no evidence of any higher IQ test score that could render the state court’s determination reasonable. Brumfield v. Cain, 2015, 135 S.Ct. 2269, 192 L.Ed.2d 356, on remand 808 F.3d 1041. Habeas Corpus 477; Habeas Corpus 508

State postconviction court’s determination that record failed to raise any question as to death‑row inmate’s impairment in adaptive skills, as defined by Louisiana law, was unreasonable, as required for federal habeas review of his claim that his execution would violate the Eighth Amendment prohibition of cruel and unusual punishment; evidence that inmate had been placed in special education classes at an early age, was suspected of having a learning disability, and could barely read at a fourth‑grade level indicated that he was deficient in both “understanding and use of language” and “learning,” while evidence of his commitment to mental health facilities at a young age and of officials’ administration of antipsychotic and sedative drugs to him indicated deficits in other areas. Brumfield v. Cain, 2015, 135 S.Ct. 2269, 192 L.Ed.2d 356, on remand 808 F.3d 1041. Habeas Corpus 477; Habeas Corpus 508

Evidence in state postconviction proceeding was sufficient to create a reasonable doubt as to whether death‑row inmate’s intellectual disability manifested before adulthood, as required for hearing on his claim that his execution would violate the Eighth Amendment prohibition of cruel and unusual punishment; both a social worker and a clinical neuropsychologist testified length about inmate’s intellectual shortcomings as a child and their possible connection to his low birth weight. Brumfield v. Cain, 2015, 135 S.Ct. 2269, 192 L.Ed.2d 356, on remand 808 F.3d 1041. Criminal Law 1655(1)

Execution of mentally retarded criminal is unconstitutionally “cruel and unusual punishment.” Atkins v. Virginia, 2002, 122 S.Ct. 2242, 536 U.S. 304, 153 L.Ed.2d 335, on remand 266 Va. 73, 581 S.E.2d 514. Sentencing And Punishment 1642

Trial court’s limiting instruction defining “especially heinous, atrocious, or cruel” aggravating factor in state death penalty statute, was not constitutionally sufficient. Shell v. Mississippi (U.S.Miss. 1990) 111 S.Ct. 313, 498 U.S. 1, 112 L.Ed.2d 1.

State capital sentencing instructions which prevent sentencing jury from considering any mitigating factor that jury does not unanimously find, violated Eighth Amendment by preventing sentencer from considering all mitigating evidence, as it prevents jurors from getting effect to evidence which they believe calls for a sentence less than death, even if all jurors agree that some mitigating circumstance exists, unless jurors unanimously find existence of the same mitigating circumstance. McKoy v. North Carolina, 1990, 110 S.Ct. 1227, 494 U.S. 433, 108 L.Ed.2d 369.

Imposition of death penalty for crimes committed at age 16 or 17 is not mode or act of punishment that was considered cruel and unusual at time Bill of Rights was adopted, and there is no modern national consensus forbidding imposition of death penalty for crimes committed at those ages. Stanford v. Kentucky, 1989, 109 S.Ct. 2969, 492 U.S. 361, 106 L.Ed.2d 306. Sentencing And Punishment 1643

Application of state death penalty statute to homicide defendant who was 15‑years‑old at time of offense, following trial as adult which resulted in conviction of first‑degree murder, violates cruel and unusual punishment clause of Eighth Amendment, according to plurality of U.S. Supreme Court. Thompson v. Oklahoma, U.S.Okla.1988, 108 S.Ct. 2687, 487 U.S. 815, 101 L.Ed.2d 702.

Felony‑murder death penalty for persons who do not kill or intend to kill victims, but who have major personal involvement in felony and show reckless indifference to human life, does not violate Eighth Amendment. Tison v. Arizona, U.S.Ariz.1987, 107 S.Ct. 1676, 481 U.S. 137, 95 L.Ed.2d 127.

State is prohibited by Eighth Amendment from inflicting death penalty on prisoner who is insane. Ford v. Wainwright, U.S.Fla.1986, 106 S.Ct. 2595, 477 U.S. 399, 91 L.Ed.2d 335. Sentencing And Punishment 1641

State court’s exclusion from death penalty sentencing hearing of testimony as to defendant’s good behavior in jail is violative of cruel and unusual punishment clause of Eighth Amendment. Skipper v. South Carolina (U.S.S.C. 1986) 106 S.Ct. 1669, 476 U.S. 1, 90 L.Ed.2d 1.

Evidence that defendant in capital case would not pose danger if spared, but incarcerated, must be considered potentially mitigating, and under cruel and unusual punishment clause of Eighth Amendment such evidence may not be excluded from sentencer’s consideration. Skipper v. South Carolina (U.S.S.C. 1986) 106 S.Ct. 1669, 476 U.S. 1, 90 L.Ed.2d 1.

Aggravating factor included in state’s capital sentencing scheme does not genuinely narrow the class of persons eligible for death penalty, so as to conform with Eighth and Fourteenth Amendments, if sentencer fairly could conclude that it applies to every defendant. Smith v. Moore (C.A.4 (S.C.) 1998) 137 F.3d 808, certiorari denied 119 S.Ct. 199, 525 U.S. 886, 142 L.Ed.2d 163. Constitutional Law 4745; Sentencing And Punishment 1618

“Physical torture” aggravating factor included in South Carolina’s capital sentencing scheme narrowed the class of persons eligible for death penalty, and thus conformed to Eighth and Fourteenth Amendments; aggravating factor required intent to torture separate and distinct from intent to kill. Smith v. Moore (C.A.4 (S.C.) 1998) 137 F.3d 808, certiorari denied 119 S.Ct. 199, 525 U.S. 886, 142 L.Ed.2d 163. Constitutional Law 4745; Sentencing And Punishment 1625

The trial judge did not violate the defendant’s Eighth Amendment rights by refusing to instruct the jury that he would be ineligible for parole if sentenced to life where the solicitor informed the jury of the defendant’s parole ineligibility. State v. Southerland (S.C. 1994) 316 S.C. 377, 447 S.E.2d 862, rehearing denied, certiorari denied 115 S.Ct. 1136, 513 U.S. 1166, 130 L.Ed.2d 1096, denial of post‑conviction relief affirmed in part, reversed in part 337 S.C. 610, 524 S.E.2d 833. Sentencing And Punishment 1780(3)

Imposition of the death penalty does not constitute cruel and unusual punishment under the Federal and State Constitutions. State v. McDowell (S.C. 1976) 266 S.C. 508, 224 S.E.2d 889.

1962 Code Section 16‑52 [1976 Code Section 16‑3‑20] is not unconstitutional under the United States Supreme Court’s decision in Furman v Georgia, 408 US 238, 33 L Ed 2d 346, 92 S Ct 2726, reh den 409 US 902, 34 L Ed 2d 163, 93 S Ct 89 and on remand 229 Ga 731, 194 SE2d 410; capital punishment does not violate the prohibition against cruel and unusual punishment under the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution; nor is capital punishment unconstitutional under the South Carolina Constitution, Article 1, Section 15. State v. Allen (S.C. 1976) 266 S.C. 175, 222 S.E.2d 287, vacated 97 S.Ct. 2944, 432 U.S. 902, 53 L.Ed.2d 1074.

6. —— Due process, constitutional issues

Future dangerousness of capital defendant who faced either life in prison without parole or death was put “at issue” during sentencing phase, and thus Due Process Clause entitled defendant to inform jury of his parole ineligibility if sentenced to life, where prosecutor presented to jury evidence that defendant had participated in attempts to escape from prison, including plan to take female guard hostage, and had been caught carrying a shank in prison; evidence raised strong implication of generalized future dangerousness, and prosecutor accentuated implication by expressing hope to jurors that they would “never in [their] lives again have to experience ... [b]eing some 30 feet away from such a person.” Kelly v. South Carolina, 2002, 122 S.Ct. 726, 534 U.S. 246, 151 L.Ed.2d 670. Constitutional Law 4745; Sentencing And Punishment 1780(2); Sentencing And Punishment 1780(3)

Capital defendant’s due process right to inform jury during sentencing phase that he would be ineligible for parole if sentenced to life in prison rather than death, triggered by combination of state’s no‑parole statute and prosecution’s raising of issue of future dangerousness, did not depend on whether jurors inquired as to possibility of parole or indicated any confusion on issue. Kelly v. South Carolina, 2002, 122 S.Ct. 726, 534 U.S. 246, 151 L.Ed.2d 670. Constitutional Law 4745; Sentencing And Punishment 1780(2); Sentencing And Punishment 1780(3)

When capital defendant’s future dangerousness is at issue, and only sentencing alternative to death available to jury is life imprisonment without possibility of parole, due process entitles defendant to inform jury of his parole ineligibility, either by jury instruction or in arguments by counsel. Kelly v. South Carolina, 2002, 122 S.Ct. 726, 534 U.S. 246, 151 L.Ed.2d 670. Constitutional Law 4745; Sentencing And Punishment 1780(2); Sentencing And Punishment 1780(3)

Whenever future dangerousness is at issue in capital sentencing proceeding under South Carolina’s amended sentencing scheme, pursuant to which jury, on finding presence of statutory aggravator, has no choice other than to recommend sentence either of death or of life imprisonment, due process requires that jury must be informed that life sentence carries no possibility of parole. Shafer v. South Carolina (U.S.S.C. 2001) 121 S.Ct. 1263, 532 U.S. 36, 149 L.Ed.2d 178, on remand 352 S.C. 191, 573 S.E.2d 796. Constitutional Law 4745

Prosecutor’s closing argument at capital sentence hearing, which compared the respective worth of the life of murder victim to that of petitioner, rendered trial fundamentally unfair in violation of Due Process Clause; side‑by‑side comparison of the relative value of the two lives was calculatedly incendiary and rendered the sentencing fundamentally infirm. Humphries v. Ozmint (C.A.4 (S.C.) 2004) 366 F.3d 266, rehearing an banc granted, on rehearing 397 F.3d 206, certiorari denied 126 S.Ct. 128, 546 U.S. 856, 163 L.Ed.2d 133. Constitutional Law 4745; Sentencing And Punishment 1780(2)

State was not required to notify petitioner of its intended use of victim impact evidence during capital sentencing proceeding, and even if notice was required, petitioner received adequate written notice that the State, which listed the victim impact witnesses on its witness lists and had clear discussions with the defense about presenting victim impact evidence only during the sentencing phase of the trial, intended to introduce certain facts in evidence including “all circumstances surrounding the commission of these crimes”; while notice could have been more explicit concerning the planned introduction of victim impact evidence, State was not obligated under either South Carolina statute or the Due Process Clause to detail the victim impact evidence with greater specificity. Humphries v. Ozmint (C.A.4 (S.C.) 2004) 366 F.3d 266, rehearing an banc granted, on rehearing 397 F.3d 206, certiorari denied 126 S.Ct. 128, 546 U.S. 856, 163 L.Ed.2d 133. Constitutional Law 4744(2); Sentencing And Punishment 1745

Denial of an instruction in capital murder case regarding the statutory mitigating circumstance that the murder was committed while defendant was under the influence of mental or emotional disturbance, based on psychologist’s testimony regarding defendant’s mental retardation and possible brain damage, was consistent with South Carolina law and therefore could not have violated any due process right possessed by defendant, since the South Carolina Supreme Court has consistently held that the “mental or emotional disturbance” mitigator is not appropriate when the claimed disturbance is a chronic condition rather than an acute one. Jones v. Catoe (C.A.4 (S.C.) 2001) 9 Fed.Appx. 245, 2001 WL 574630, Unreported, certiorari denied 122 S.Ct. 630, 534 U.S. 1047, 151 L.Ed.2d 550. Constitutional Law 4745; Sentencing And Punishment 1780(3)

Statute requiring that a capital sentencing proceeding must be conducted before a judge when a defendant pleads guilty does not deprive a defendant of due process or result in cruel and unusual punishment; at such a proceeding, the judge is required to consider any mitigating circumstances allowed by law, to consider the enumerated statutory aggravating and mitigating circumstances, to receive evidence in extenuation, mitigation, and aggravation of punishment, and to find the existence of statutory aggravating circumstances beyond a reasonable doubt before imposing a death sentence. State v. Allen (S.C. 2009) 386 S.C. 93, 687 S.E.2d 21, rehearing denied, certiorari denied, certiorari denied 130 S.Ct. 3329, 560 U.S. 929, 176 L.Ed.2d 1229. Constitutional Law 4753; Jury 34(9); Sentencing And Punishment 1626

Defendant’s right to reasonable notice of any aggravating circumstances to be alleged at his trial for murder, at which trial defendant was sentenced to death, did not mandate that such notice be given through the indictment, and therefore, reversal of defendant’s murder convictions was not required; defendant did not assert that state’s notice of evidence of aggravation failed to comport with state code requirements, or that he was denied due process because the notice was not given in sufficient advance of the trial. State v. Sigmon (S.C. 2005) 366 S.C. 552, 623 S.E.2d 648, rehearing denied, certiorari denied 126 S.Ct. 2932, 548 U.S. 909, 165 L.Ed.2d 959, dismissal of post‑conviction relief affirmed 403 S.C. 120, 742 S.E.2d 394, certiorari denied 134 S.Ct. 646, 187 L.Ed.2d 428. Indictment And Information 113; Sentencing And Punishment 1745

A capital defendant’s right to voir dire, while grounded in statutory law, also is rooted in the due process clause, and to be constitutionally compelled, it is not enough that a question may be helpful; rather, the trial court’s failure to ask or allow a question must render the defendant’s trial fundamentally unfair. State v. Wise (S.C. 2004) 359 S.C. 14, 596 S.E.2d 475, rehearing denied, certiorari denied, certiorari denied 125 S.Ct. 355, 543 U.S. 948, 160 L.Ed.2d 263. Constitutional Law 4760; Jury 131(1)

Future dangerousness of defendant was put at issue during sentencing phase of capital murder trial, and thus, due process required that jury be instructed of defendant’s parole ineligibility if sentenced to life imprisonment, where although State did not directly argue defendant’s future dangerousness, solicitor argued that he hoped jury would never be 30 feet away from a baby‑killer, and during guilt phase, State elicited testimony from defendant’s girlfriend that immediately after victim’s death, defendant had threatened her babies and had told her he had ways of eliminating people. State v. Haselden (S.C. 2003) 353 S.C. 190, 577 S.E.2d 445. Constitutional Law 4745; Sentencing And Punishment 1780(3)

Solicitor’s general deterrence argument to jury in closing argument of penalty phase of murder prosecution, that by jury’s imposing death penalty on defendant an innocent life might be spared, did not inject an arbitrary factor into the jury’s consideration, such as would violate due process. State v. Shuler (S.C. 2003) 353 S.C. 176, 577 S.E.2d 438. Constitutional Law 4745; Sentencing And Punishment 1780(2)

Solicitor’s use of tape recording of murder victim’s 911 telephone call, revealing victim’s physical pain and suffering after being shot by defendant, did not deny defendant due process in penalty phase of murder prosecution; during the three day proceeding, the prosecution played an excerpt from the 911 tape for identification purposes and the entire tape during the presentation of its evidence, and then during closing argument, the solicitor again played a portion of the 911 tape and the entire tape. State v. Shuler (S.C. 2003) 353 S.C. 176, 577 S.E.2d 438. Constitutional Law 4708; Sentencing And Punishment 1767

The relevant question regarding an allegedly improper closing argument is whether the solicitor’s comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. Humphries v. State (S.C. 2002) 351 S.C. 362, 570 S.E.2d 160, rehearing denied. Constitutional Law 4629

Capital murder defendant’s due process rights were not violated when trial judge refused to instruct jury that defendant was parole ineligible, where mandatory minimum 30‑year sentence was a legally available sentence. State v. Starnes (S.C. 2000) 340 S.C. 312, 531 S.E.2d 907, appeal after new trial 388 S.C. 590, 698 S.E.2d 604, rehearing denied. Sentencing And Punishment 368.5

Due process did not entitle murder defendant to instruction on parole ineligibility, where possible sentences were death, life without possibility of parole, and mandatory minimum thirty‑year sentence. State v. Shafer (S.C. 2000) 340 S.C. 291, 531 S.E.2d 524, certiorari granted in part 121 S.Ct. 30, 530 U.S. 1306, 147 L.Ed.2d 1053, reversed 121 S.Ct. 1263, 532 U.S. 36, 149 L.Ed.2d 178, on remand 352 S.C. 191, 573 S.E.2d 796. Constitutional Law 4745; Criminal Law 790

Capital murder defendant was not entitled to statutory notice of prosecution’s intent to introduce victim impact testimony as aggravating circumstance, and failure to give defendant such notice did not violate due process or Eighth Amendment. State v. Humphries (S.C. 1996) 325 S.C. 28, 479 S.E.2d 52, rehearing denied, certiorari denied 117 S.Ct. 2441, 520 U.S. 1268, 138 L.Ed.2d 201, denial of post‑conviction relief affirmed 351 S.C. 362, 570 S.E.2d 160, dismissal of habeas corpus affirmed in part, vacated in part 366 F.3d 266, rehearing an banc granted, on rehearing 397 F.3d 206, certiorari denied 126 S.Ct. 128, 163 L.Ed.2d 133. Constitutional Law 4744(2); Sentencing And Punishment 1745

The due process clause of the Fourteenth Amendment prohibits use of victim impact evidence which is so unduly prejudicial that it renders the trial fundamentally unfair. State v. Southerland (S.C. 1994) 316 S.C. 377, 447 S.E.2d 862, rehearing denied, certiorari denied 115 S.Ct. 1136, 513 U.S. 1166, 130 L.Ed.2d 1096, denial of post‑conviction relief affirmed in part, reversed in part 337 S.C. 610, 524 S.E.2d 833. Sentencing And Punishment 1763; Sentencing And Punishment 1782

The trial judge did not violate the defendant’s due process rights by refusing to instruct the jury that the defendant would be ineligible for parole if sentenced to life under Section 24‑21‑640 where the solicitor did not argue the defendant’s future dangerousness and the defense counsel informed the jury throughout closing argument that life imprisonment for the defendant meant that he would never be released from prison. State v. Southerland (S.C. 1994) 316 S.C. 377, 447 S.E.2d 862, rehearing denied, certiorari denied 115 S.Ct. 1136, 513 U.S. 1166, 130 L.Ed.2d 1096, denial of post‑conviction relief affirmed in part, reversed in part 337 S.C. 610, 524 S.E.2d 833. Constitutional Law 4745; Sentencing And Punishment 1780(3)

The trial judge in the penalty phase of a murder trial unconstitutionally shifted the burden of proof to the defendant in violation of due process where he instructed the jury that (1) “malice may be implied or presumed from the willful, deliberate and intentional doing of an unlawful act without just cause or excuse,” and (2) malice would be presumed or implied “if one uses a deadly weapon or employs a deadly weapon deliberately, intentionally, and without just cause or excuse.” Arnold v. State (S.C. 1992) 309 S.C. 157, 420 S.E.2d 834, rehearing granted, certiorari denied 113 S.Ct. 1302, 507 U.S. 927, 122 L.Ed.2d 691. Constitutional Law 4638; Criminal Law 778(6)

7. —— Self‑representation, constitutional issues

Trial court did not abuse its discretion in denying defendant’s request to represent himself at the sentencing phase of capital murder prosecution, where trial court was concerned that defendant’s medication would affect his ability to properly and fully function as his own counsel, that allowing defendant to represent himself during sentencing phase would require some delay for defendant to fully prepare, and that the jury might be confused to have the first half of the case tried by counsel and the second half tried without counsel, especially if the jury could see counsel at defendant’s counsel table. State v. Winkler (S.C. 2010) 388 S.C. 574, 698 S.E.2d 596, rehearing denied, certiorari denied, certiorari denied 131 S.Ct. 2155, 563 U.S. 963, 179 L.Ed.2d 940, grant of post‑conviction relief reversed 418 S.C. 643, 795 S.E.2d 686. Sentencing and Punishment 1737

8. —— Proportionality and excessiveness, constitutional issues

Sentence of death was appropriate punishment for capital murder; trial court findings of three statutory aggravating circumstances for the murder was supported by the evidence, and review of prior cases established that the death sentence was proportionate to that in similar cases and was neither excessive nor disproportionate to the crime. State v. Inman (S.C. 2011) 395 S.C. 539, 720 S.E.2d 31, rehearing denied, certiorari denied 133 S.Ct. 219, 568 U.S. 863, 184 L.Ed.2d 112. Sentencing And Punishment 1657; Sentencing And Punishment 1668

Defendant’s death sentence was neither excessive nor disproportionate; defendant’s sentence was not the result of passion, prejudice, or any other arbitrary factor, and defendant had a prior conviction for murder. State v. Justus (S.C. 2011) 392 S.C. 416, 709 S.E.2d 668, certiorari denied 132 S.Ct. 1095, 565 U.S. 1160, 181 L.Ed.2d 984. Sentencing and Punishment 1705

Death sentence was not the result of passion, prejudice, or any other arbitrary factor, and was neither excessive nor disproportionate, as imposed in murder prosecution in which jury found statutory aggravating circumstance of the murder of a witness to impede or deter prosecution of a crime. State v. Winkler (S.C. 2010) 388 S.C. 574, 698 S.E.2d 596, rehearing denied, certiorari denied, certiorari denied 131 S.Ct. 2155, 563 U.S. 963, 179 L.Ed.2d 940, grant of post‑conviction relief reversed 418 S.C. 643, 795 S.E.2d 686. Sentencing and Punishment 1682

Death sentence for murder was not the result of passion, prejudice, or any other arbitrary factor, and defendant’s sentence was neither excessive nor disproportionate; trial court found two aggravating circumstances, namely murder in the commission of a burglary and in the commission of larceny involving the use of a deadly weapon, and court gave no significant weight to non‑statutory mitigating circumstance that defendant pled guilty. Mahdi v. State (S.C. 2009) 383 S.C. 135, 678 S.E.2d 807. Sentencing And Punishment 1645; Sentencing And Punishment 1681

Sentence of death for murder was not excessive. State v. Binney (S.C. 2005) 362 S.C. 353, 608 S.E.2d 418, rehearing denied, certiorari denied 126 S.Ct. 115, 546 U.S. 852, 163 L.Ed.2d 125, denial of post‑conviction relief affirmed 384 S.C. 539, 683 S.E.2d 478. Sentencing And Punishment 1612

Death penalty was not disproportionate for defendant’s murder of his two‑year‑old child by arson; although defendant did not have a substantial history of violent criminal conduct and he suffered slight mental or emotional disturbance at the time of the murder, defendant knowingly and intentionally started fire, jumped from the van, and failed to inform rescuers that his child was still strapped to a safety seat in the vehicle, and victim was alive during the fire, succumbing to death only after intense heat caused her severe pain and suffering. State v. Passaro (S.C. 2002) 350 S.C. 499, 567 S.E.2d 862. Sentencing And Punishment 1684; Sentencing And Punishment 1708; Sentencing And Punishment 1710

The United States Constitution requires the death penalty to be imposed only if the sentence is neither excessive nor disproportionate in light of the crime and the defendant. State v. Passaro (S.C. 2002) 350 S.C. 499, 567 S.E.2d 862. Sentencing And Punishment 1657

Death sentence was proportionate in capital murder prosecution in which jury found aggravating circumstances of robbery while armed with deadly weapon, kidnaping, larceny while armed with deadly weapon, and physical torture. State v. Johnson (S.C. 2000) 338 S.C. 114, 525 S.E.2d 519, rehearing denied, certiorari denied 121 S.Ct. 104, 531 U.S. 840, 148 L.Ed.2d 62. Sentencing And Punishment 1681; Sentencing And Punishment 1684

Death sentence in murder case was neither excessive nor disproportionate to that imposed in similar cases; 73‑year‑old victim’s arms and legs were bound, he was stabbed over 34 times in neck, chest, and abdomen, and beaten in head with flashlight, and jury found statutory aggravating circumstances of murder while in commission of kidnaping and while in commission of robbery while armed with deadly weapon. State v. Hicks (S.C. 1998) 330 S.C. 207, 499 S.E.2d 209, rehearing denied, certiorari denied 119 S.Ct. 552, 525 U.S. 1022, 142 L.Ed.2d 459. Sentencing And Punishment 1681

The imposition of the death penalty was not disproportionate or excessive where the defendant had pled guilty but mentally ill to 2 counts of murder, 9 counts of assault and battery with intent to kill, and one count of illegally carrying a firearm arising from an incident in which he had stolen a gun from his grandmother, bought and loaded it with hollow‑point long rifle ammunition, drove to an elementary school, and randomly shot both children and adults there, and where the mitigating factors of (1) influence of mental or emotional disturbance, (2) capacity to appreciate the criminality of the crime, and (3) the defendant’s age were all considered and rejected. State v. Wilson (S.C. 1992) 306 S.C. 498, 413 S.E.2d 19, certiorari denied 113 S.Ct. 137, 506 U.S. 846, 121 L.Ed.2d 90.

The evidence supported the jury’s finding of an aggravating circumstance, despite the defendant’s suggestion that the case be viewed as merely “a mugging gone awry,” where the facts indicated that the defendant, unprovoked, murdered a man by shooting him in the head at point‑blank range in the course of robbing his wife of her purse, and the death sentence was not arbitrarily imposed and was proportionate to the penalty in similar cases. State v. Patterson (S.C. 1989) 299 S.C. 280, 384 S.E.2d 699, vacated 110 S.Ct. 709, 493 U.S. 1013, 107 L.Ed.2d 730, on remand 302 S.C. 384, 396 S.E.2d 366.

9. Aggravating circumstances—In general

State sentencing statute providing for finding of aggravating and mitigating circumstances by trial court instead of by jury was valid; “heinous, cruel or depraved” aggravating circumstance does not fail to channel sentencer’s discretion in violation of Eighth and Fourteenth Amendments because State Supreme Court has sought to give substance to operative terms of statute and its construction meets constitutional requirements; and contention that “heinous, cruel or depraved” circumstance was applied arbitrarily and, as applied, did not distinguish accused’s case from others in which death sentence was not imposed, was in effect challenge to proportionality review of state’s Supreme Court and would be rejected. Walton v. Arizona, U.S.Ariz.1990, 110 S.Ct. 3047, 497 U.S. 639, 111 L.Ed.2d 511.

Evidence in death penalty case supported submission to jury of the statutory aggravating circumstance of the murder of a witness to impede or deter prosecution of a crime; murder victim was also the alleged victim in an ongoing criminal process against defendant for criminal sexual conduct and other charged offenses from five months earlier and was clearly a potential witness at trial on those charges, victim’s son testified that defendant stated, “You thought I was going to prison,” when he broke into condominium and shot victim, and a person who was on the phone with victim’s son heard a voice say, “I’m not going to jail you stupid bitch.” State v. Winkler (S.C. 2010) 388 S.C. 574, 698 S.E.2d 596, rehearing denied, certiorari denied, certiorari denied 131 S.Ct. 2155, 563 U.S. 963, 179 L.Ed.2d 940, grant of post‑conviction relief reversed 418 S.C. 643, 795 S.E.2d 686. Sentencing and Punishment 1777

The trial judge should submit a statutory aggravator to the jury in death penalty case if there is any evidence, direct or circumstantial, to support it. State v. Winkler (S.C. 2010) 388 S.C. 574, 698 S.E.2d 596, rehearing denied, certiorari denied, certiorari denied 131 S.Ct. 2155, 563 U.S. 963, 179 L.Ed.2d 940, grant of post‑conviction relief reversed 418 S.C. 643, 795 S.E.2d 686. Sentencing and Punishment 1777

Viable but unborn fetus is both “person” and “child” as used in statutory aggravating circumstances that provide for death penalty eligibility where two or more persons were murdered by defendant by one act or pursuant to one scheme or course of conduct, or where murder victim was child 11 years of age or under. State v. Ard (S.C. 1998) 332 S.C. 370, 505 S.E.2d 328, rehearing denied. Sentencing And Punishment 1683; Sentencing And Punishment 1727

“While in the commission of,” as used in statutory aggravating circumstance allowing imposition of death penalty for any murder carried out while in commission of robbery while armed with deadly weapon, does not require that robbery be completed, but rather, it includes attempted armed robbery as well. State v. Humphries (S.C. 1996) 325 S.C. 28, 479 S.E.2d 52, rehearing denied, certiorari denied 117 S.Ct. 2441, 520 U.S. 1268, 138 L.Ed.2d 201, denial of post‑conviction relief affirmed 351 S.C. 362, 570 S.E.2d 160, dismissal of habeas corpus affirmed in part, vacated in part 366 F.3d 266, rehearing an banc granted, on rehearing 397 F.3d 206, certiorari denied 126 S.Ct. 128, 163 L.Ed.2d 133. Sentencing And Punishment 1681

The death penalty may be imposed only upon a finding by the sentencing authority beyond a reasonable doubt of at least one statutory aggravating circumstance. This requirement applies to those trials in which the same jury determines guilt in phase I, then imposes sentence in phase II. However, it applies with equal force when a new jury is impaneled for purposes of resentencing only. Aggravating circumstances serve to guide and limit the sentencing authority’s discretion so as to reduce the likelihood that the sentence will be imposed in an arbitrary or capricious manner. This discretion must not be affected by “state‑induced suggestions that the sentencing jury may shift its responsibility” for determining whether death is the appropriate punishment in a particular case. State v. Riddle (S.C. 1990) 301 S.C. 68, 389 S.E.2d 665.

The definition of “agent” under Section 16‑3‑20(C)(a)(6) is not limited to those hired or paid to murder. State v. Cain (S.C. 1988) 297 S.C. 497, 377 S.E.2d 556, certiorari denied 110 S.Ct. 3254, 497 U.S. 1010, 111 L.Ed.2d 764, rehearing denied 111 S.Ct. 14, 497 U.S. 1050, 111 L.Ed.2d 828.

A trial judge did not err in submitting the statutory aggravating circumstance of first degree criminal sexual conduct because at the time the offense was committed, Section 16‑3‑20(c)(a)(1) provided for an aggravating circumstance of “rape” which is interchangeable with “criminal sexual conduct.” State v. Middleton (S.C. 1988) 295 S.C. 318, 368 S.E.2d 457, certiorari denied 109 S.Ct. 189, 488 U.S. 872, 102 L.Ed.2d 158, rehearing denied 109 S.Ct. 406, 488 U.S. 961, 102 L.Ed.2d 393, habeas corpus dismissed 855 F.Supp. 837, affirmed 77 F.3d 469, certiorari denied 117 S.Ct. 199, 136 L.Ed.2d 135, rehearing denied 117 S.Ct. 449, 136 L.Ed.2d 345.

Trial judge properly refused to quash the aggravating circumstances of kidnapping and burglary, where the evidence was sufficient to submit the 2 aggravating circumstances to the jury. State v. Kornahrens (S.C. 1986) 290 S.C. 281, 350 S.E.2d 180, certiorari denied 107 S.Ct. 1592, 480 U.S. 940, 94 L.Ed.2d 781, denial of habeas corpus affirmed 66 F.3d 1350, certiorari denied 116 S.Ct. 1575, 517 U.S. 1171, 134 L.Ed.2d 673, rehearing denied 116 S.Ct. 2541, 518 U.S. 1013, 135 L.Ed.2d 1063.

Fact that crimes of kidnapping and criminal sexual conduct were committed after murder and upon person other than murder victim does not invalidate them as aggravating circumstances upon which death sentence may be faced where crimes were consummated in continuous series of acts with murder, were committed in same place and were not separated by any substantial lapse of time. State v. Jones (S.C. 1985) 288 S.C. 1, 340 S.E.2d 782, vacated 106 S.Ct. 1943, 476 U.S. 1102, 90 L.Ed.2d 353, dismissal of post‑conviction relief affirmed. Sentencing And Punishment 1681

It is sufficient to support the death penalty that one aggravating circumstance be proved. State v. Chaffee (S.C. 1984) 285 S.C. 21, 328 S.E.2d 464, certiorari denied 105 S.Ct. 1878, 471 U.S. 1009, 85 L.Ed.2d 170, rehearing denied 105 S.Ct. 2370, 471 U.S. 1120, 86 L.Ed.2d 268, rehearing denied 105 S.Ct. 2369, 471 U.S. 1120, 86 L.Ed.2d 268. Sentencing And Punishment 1652

Since South Carolina adheres to the common law rule of murder, and makes no distinction between murder and felony murder, the aggravating circumstance of murder in a death penalty case, pursuant to Section 16‑3‑20(C)(a)(1)(e), remains as such regardless of whether the crime charged is murder or felony murder. State v. Yates (S.C. 1982) 280 S.C. 29, 310 S.E.2d 805, certiorari denied 103 S.Ct. 3098, 462 U.S. 1124, 77 L.Ed.2d 1356, denial of habeas corpus vacated 106 S.Ct. 218, 474 U.S. 896, 88 L.Ed.2d 218, on remand 290 S.C. 231, 349 S.E.2d 84. Sentencing And Punishment 1668

A conviction of criminal sexual conduct under Section 16‑3‑651 constitutes the offense of rape, and thus may be considered an aggravating circumstance under Section 16‑3‑20(C)(a), where the facts on which the conviction was based are sufficient to support a conviction under the previous statutory or common law offense of rape. State v. Elmore (S.C. 1983) 279 S.C. 417, 308 S.E.2d 781. Sex Offenses 13

Where the state proved the elements of burglary, it properly relied on that crime as an aggravating circumstance under Section 16‑3‑20(C)(a)(1)(d). State v. Spann (S.C. 1983) 279 S.C. 399, 308 S.E.2d 518, appeal dismissed, certiorari denied 104 S.Ct. 2146, 466 U.S. 947, 80 L.Ed.2d 533, dismissal of habeas corpus reversed 963 F.2d 663. Sentencing And Punishment 1681

In a prosecution for murder, the trial court did not err in submitting three aggravating circumstances to the sentencing jury where the second and third were included in the first since all three circumstances charged were included in Section 16‑3‑20(C) and thus were proper as determined by the General Assembly. State v. Woomer (S.C. 1981) 277 S.C. 170, 284 S.E.2d 357. Sentencing And Punishment 1660

10. —— Weight of evidence, aggravating circumstances

In nonweighing state, in which jury that has found defendant guilty of capital murder and found at least one statutory aggravating factor is not required to weigh such factors against the mitigating evidence, jury’s reliance on invalid aggravating factor may not infect the formal process of deciding whether death is appropriate penalty if jury also finds at least one valid aggravating factor. Smith v. Moore (C.A.4 (S.C.) 1998) 137 F.3d 808, certiorari denied 119 S.Ct. 199, 525 U.S. 886, 142 L.Ed.2d 163. Sentencing And Punishment 1788(10)

Where one valid aggravating factor supports death sentence and jury need not weigh it against mitigating factors, sentence need not be set aside simply because jury also found invalid aggravating factor. Adams v. Aiken (C.A.4 (S.C.) 1992) 965 F.2d 1306, certiorari denied 113 S.Ct. 2966, 508 U.S. 974, 125 L.Ed.2d 666, vacated on rehearing 114 S.Ct. 1365, 511 U.S. 1001, 128 L.Ed.2d 42, on remand 41 F.3d 175. Sentencing And Punishment 1659

In determining whether to submit an aggravating circumstance to the jury, the trial court is concerned only with the existence of evidence, not its weight; the aggravating circumstance is properly submitted if supported by any direct or circumstantial evidence. State v. Smith (S.C. 1989) 298 S.C. 482, 381 S.E.2d 724, certiorari denied 110 S.Ct. 1536, 494 U.S. 1060, 108 L.Ed.2d 775, rehearing denied 110 S.Ct. 2221, 495 U.S. 953, 109 L.Ed.2d 546. Sentencing And Punishment 368.5

Jury should not be instructed to “weigh” aggravating circumstances against mitigating circumstances, and jury should be instructed to “consider” any mitigating circumstances as well as any aggravating circumstances. State v. Bellamy (S.C. 1987) 293 S.C. 103, 359 S.E.2d 63. Sentencing And Punishment 368.5

In a prosecution for murder, the application of the Death Penalty Statute was proper, even though defendant asserted that Section 16‑3‑20(C) provided no guidelines for the weighing of aggravating and mitigating circumstances. State v. Thompson (S.C. 1982) 278 S.C. 1, 292 S.E.2d 581, certiorari denied 102 S.Ct. 1996, 456 U.S. 938, 72 L.Ed.2d 458, rehearing denied 102 S.Ct. 2917, 457 U.S. 1112, 73 L.Ed.2d 1323. Sentencing And Punishment 1625; Sentencing And Punishment 1627

11. —— Physical torture, aggravating circumstances

“Physical torture” exists under South Carolina’s capital sentencing scheme when victim is intentionally subjected to serious physical abuse prior to death. Smith v. Moore (C.A.4 (S.C.) 1998) 137 F.3d 808, certiorari denied 119 S.Ct. 199, 525 U.S. 886, 142 L.Ed.2d 163. Sentencing And Punishment 1684

Finding that defendant inflicted “physical torture” within meaning of aggravating factor included in South Carolina’s capital sentencing scheme was supported by sufficient evidence, including autopsies indicating that victims were stabbed 27 and 17 times, and that both had defensive wounds. Smith v. Moore (C.A.4 (S.C.) 1998) 137 F.3d 808, certiorari denied 119 S.Ct. 199, 525 U.S. 886, 142 L.Ed.2d 163. Sentencing And Punishment 1684

The statutory aggravating circumstance of physical torture occurs (1) when the victim is subjected to serious physical abuse before death or (2) when the victim is subjected to an aggravated battery before death. State v. Shuler (S.C. 2003) 353 S.C. 176, 577 S.E.2d 438. Sentencing And Punishment 1684

Tape recording of murder victim’s 911 telephone call, revealing victim’s physical pain and suffering after being shot by defendant, was relevant in penalty phase of murder prosecution to prove the aggravating circumstance of physical torture. State v. Shuler (S.C. 2003) 353 S.C. 176, 577 S.E.2d 438. Sentencing And Punishment 1767

Evidence in sentencing phase of capital murder prosecution warranted submission of aggravating circumstance of physical torture to jury; victim suffered massive blows from machete before finally bleeding to death, expert pathologist testified that victim died as result of blood loss, that it took approximately ten minutes for her to die, and that blows would have been painful if she were in fact conscious, and law enforcement agent testified that blood stain patterns indicated that victim had fallen in one spot and then rolled to her final resting place several feet away, and that in his opinion, victim had rolled on her own after initial blow. State v. Johnson (S.C. 2000) 338 S.C. 114, 525 S.E.2d 519, rehearing denied, certiorari denied 121 S.Ct. 104, 531 U.S. 840, 148 L.Ed.2d 62. Sentencing And Punishment 1780(3)

The aggravating circumstance of physical torture is properly submitted to the jury in the sentencing phase of a capital murder prosecution (1) when the victim is subjected to serious physical abuse before death; or (2) when the victim is subjected to an aggravated battery before death. State v. Johnson (S.C. 2000) 338 S.C. 114, 525 S.E.2d 519, rehearing denied, certiorari denied 121 S.Ct. 104, 531 U.S. 840, 148 L.Ed.2d 62. Sentencing And Punishment 1780(3)

For purposes of determining whether to submit aggravating circumstance of physical torture to jury in sentencing phase of capital murder prosecution, although conscious awareness of pain may buttress conclusion that victim was subjected to serious physical abuse before death, its absence does not foreclose finding of physical torture; abusive and depraved nature of homicidal assault is not erased solely because victim mercifully may have been rendered unconscious at outset of attack. State v. Johnson (S.C. 2000) 338 S.C. 114, 525 S.E.2d 519, rehearing denied, certiorari denied 121 S.Ct. 104, 531 U.S. 840, 148 L.Ed.2d 62. Sentencing And Punishment 1780(3)

Evidence in capital murder case supported submission to jury of aggravating circumstance of physical torture; there was graphic testimony that victim was subjected to repeated sexual assaults, including defendant’s attempts to sodomize her. State v. Gardner (S.C. 1998) 332 S.C. 389, 505 S.E.2d 338, rehearing denied, certiorari denied 119 S.Ct. 1260, 526 U.S. 1022, 143 L.Ed.2d 356, denial of habeas corpus affirmed 511 F.3d 420, certiorari denied 2008 WL 2328355. Sentencing And Punishment 1777

Stabbing victim with screwdriver approximately 70 to 75 times in head, back, and neck could be found to be aggravating circumstance of “torture” in capital murder prosecution, even though state’s pathologist testified this was not “typical” case of torture; defensive wounds tended to indicate victim was conscious at least through portion of attack, and there was testimony that most wounds were inflicted before death. State v. Bennett (S.C. 1997) 328 S.C. 251, 493 S.E.2d 845, appeal after new sentencing hearing 369 S.C. 219, 632 S.E.2d 281, certiorari denied, certiorari denied 127 S.Ct. 681, 166 L.Ed.2d 530. Sentencing And Punishment 1684

The evidence supported the finding that the defendant possessed an intent to torture his victim, separate from an intent to murder her, where (1) her forehead was battered against the rough surface of a wall with enough force to peel the skin and soft tissue away from her skull and to cause the orbital plate encasing her eyes to hemorrhage, (2) her nose was broken so that the bone protruded, (3) she had an extensive number of hemorrhaged blood vessels in her eyes indicating at least 10 minutes of struggle during strangulation, and (4) the defendant confessed that her “stomach was still moving” when he dragged her body, face‑down, into a goldfish pond. State v. Davis (S.C. 1992) 309 S.C. 326, 422 S.E.2d 133, rehearing denied, certiorari denied 113 S.Ct. 2355, 508 U.S. 915, 124 L.Ed.2d 263. Sentencing And Punishment 1684

The aggravating circumstance of physical torture occurs when the victim is intentionally subjected to serious physical abuse prior to death. State v. Smith (S.C. 1989) 298 S.C. 482, 381 S.E.2d 724, certiorari denied 110 S.Ct. 1536, 494 U.S. 1060, 108 L.Ed.2d 775, rehearing denied 110 S.Ct. 2221, 495 U.S. 953, 109 L.Ed.2d 546. Sentencing And Punishment 1684

12. —— Notice, aggravating circumstances

Even assuming that South Carolina statute required state to notify petitioner of its intended use of victim impact evidence during capital sentencing proceeding, petitioner received adequate written notice, where state listed victim impact witnesses on its witness lists, had clear discussions with defense counsel about presenting victim impact evidence, and provided written pre‑trial notice that it intended to introduce “all circumstances surrounding the commission of these crimes”; while notice could have been more explicit concerning the planned introduction of victim impact evidence, state was not obligated to detail victim impact evidence with greater specificity. Humphries v. Ozmint (C.A.4 (S.C.) 2005) 397 F.3d 206, certiorari denied 126 S.Ct. 128, 546 U.S. 856, 163 L.Ed.2d 133. Sentencing And Punishment 1745

South Carolina statute requiring state to give written pre‑trial notice if it intends to introduce evidence of certain statutory aggravating factors at sentencing did not require state to notify petitioner of its intended use of victim impact evidence during capital sentencing proceeding, where victim impact evidence was not listed in statute as aggravating factor. Humphries v. Ozmint (C.A.4 (S.C.) 2005) 397 F.3d 206, certiorari denied 126 S.Ct. 128, 546 U.S. 856, 163 L.Ed.2d 133. Sentencing And Punishment 1745

Portion of evidence of defendant’s prior conviction for assault and battery of a high and aggravated nature (ABHAN) comprising hospital photographs of ABHAN victims did not constitute victim‑impact evidence in death‑penalty phase of murder trial, even though photographs were certain to elicit an emotional response from jury; photographs were introduced to describe extent of injuries suffered by ABHAN victims and were highly probative of nature of defendant’s prior crime, in that they provided the clearest picture of aggravated nature of assault and battery. State v. Bennett (S.C. 2006) 369 S.C. 219, 632 S.E.2d 281, certiorari denied, certiorari denied 127 S.Ct. 681, 549 U.S. 1061, 166 L.Ed.2d 530, habeas corpus granted 170 F.Supp.3d 851, affirmed 842 F.3d 319. Sentencing And Punishment 1763; Sentencing And Punishment 1767

The State was not required to identify in the indictment any aggravating factors that exposed capital defendant to the death penalty; the aggravating factors were sentencing factors and were not elements of murder, and State complied with statutes by timely notifying defendant of its intent to seek the death penalty and by identifying the aggravating circumstances and the evidence that the State intended to rely on at trial. State v. Crisp (S.C. 2005) 362 S.C. 412, 608 S.E.2d 429. Sentencing And Punishment 1744

State gave capital murder defendant notice of evidence of aggravating factors it introduced at sentencing hearing, although those factors did not occur until after defendant was convicted of murder, where more than one month before trial state notified defense counsel in writing it intended to introduce characteristics of the defendant before, during, and after the crime as aggravation evidence, and trial judge admitted statement as evidence of his character the day before the hearing started. State v. Owens (S.C. 2001) 346 S.C. 637, 552 S.E.2d 745, rehearing denied, appeal after new sentencing hearing 362 S.C. 175, 607 S.E.2d 78, appeal after new sentencing hearing 378 S.C. 636, 664 S.E.2d 80, certiorari denied, certiorari denied 129 S.Ct. 1004, 173 L.Ed.2d 300, habeas corpus dismissed 2010 WL 146164. Sentencing And Punishment 1745

Statutory notice requirement regarding additional evidence at hearing to decide whether to impose death penalty is not limited to evidence of statutory aggravating factors; instead, under limited circumstances, the notice requirement applies to evidence not specifically enumerated in the statute and introduced by the prosecution during the sentencing phase. State v. Owens (S.C. 2001) 346 S.C. 637, 552 S.E.2d 745, rehearing denied, appeal after new sentencing hearing 362 S.C. 175, 607 S.E.2d 78, appeal after new sentencing hearing 378 S.C. 636, 664 S.E.2d 80, certiorari denied, certiorari denied 129 S.Ct. 1004, 173 L.Ed.2d 300, habeas corpus dismissed 2010 WL 146164. Sentencing And Punishment 1745

Solicitor gave capital murder defendant adequate notice of victim impact evidence it intended to introduce during penalty phase of prosecution, even though state was not required to provide notice of victim impact testimony, where notice informed defendant that state would introduce evidence of victim’s personal characteristics and impact of her death on her family and students. State v. Byram (S.C. 1997) 326 S.C. 107, 485 S.E.2d 360, rehearing denied, dismissal of habeas corpus affirmed 339 F.3d 203, certiorari denied 124 S.Ct. 1680, 541 U.S. 947, 158 L.Ed.2d 374. Sentencing And Punishment 1745

State was not required to provide capital murder defendant with notice that it intended to introduce victim impact testimony during penalty phase of prosecution. State v. Byram (S.C. 1997) 326 S.C. 107, 485 S.E.2d 360, rehearing denied, dismissal of habeas corpus affirmed 339 F.3d 203, certiorari denied 124 S.Ct. 1680, 541 U.S. 947, 158 L.Ed.2d 374. Sentencing And Punishment 1745

The trial judge must submit to the jury those aggravating circumstances with which the state has noticed the defendant, if the aggravating circumstances are supported by the evidence. State v. Kornahrens (S.C. 1986) 290 S.C. 281, 350 S.E.2d 180, certiorari denied 107 S.Ct. 1592, 480 U.S. 940, 94 L.Ed.2d 781, denial of habeas corpus affirmed 66 F.3d 1350, certiorari denied 116 S.Ct. 1575, 517 U.S. 1171, 134 L.Ed.2d 673, rehearing denied 116 S.Ct. 2541, 518 U.S. 1013, 135 L.Ed.2d 1063.

In a prosecution for murder, the trial court properly refused to strike language in the murder indictment referring to armed robbery as the aggravating circumstance where, although defendant alleged that the crime stated in the indictment (murder committed while in the commission of robbery while armed with a deadly weapon) was no longer a crime in South Carolina because the 1974 version of Section 16‑3‑20 was declared unconstitutional, it was not prejudicial to inform the defendant of the aggravating circumstances; stating the aggravating circumstance in the indictment merely alleged the circumstances making the murder subject to capital punishment. State v. Thompson (S.C. 1982) 278 S.C. 1, 292 S.E.2d 581, certiorari denied 102 S.Ct. 1996, 456 U.S. 938, 72 L.Ed.2d 458, rehearing denied 102 S.Ct. 2917, 457 U.S. 1112, 73 L.Ed.2d 1323. Indictment And Information 137(1)

13. —— Prior convictions, aggravating circumstances

In capital murder prosecution, for judge to instruct jury on aggravating circumstance that murder was committed by person with prior record of conviction of murder, prior murder conviction must have occurred by time of sentencing proceeding in second murder trial. State v. Locklair (S.C. 2000) 341 S.C. 352, 535 S.E.2d 420, rehearing denied, certiorari denied 121 S.Ct. 817, 531 U.S. 1093, 148 L.Ed.2d 701. Sentencing And Punishment 1707

Second degree murder in Virginia does not equate with murder in South Carolina, and a defendant’s prior conviction in Virginia for second degree murder did not qualify as an aggravating circumstance under Section 16‑3‑20(C)(a)(2). State v. Norris (S.C. 1985) 285 S.C. 86, 328 S.E.2d 339. Sentencing And Punishment 1705

14. —— Great risk of danger, aggravating circumstances

Evidence supported submission of “great risk of danger” aggravator to jury in capital murder trial; defendant shot victim while she sat in a vehicle in a public place, gun was a weapon hazardous to more than one person, and defendant knew there were other occupants in the vehicle with victim when he shot multiple times into the confined space of the vehicle’s interior. State v. Lindsey (S.C. 2007) 372 S.C. 185, 642 S.E.2d 557, rehearing denied, certiorari denied 128 S.Ct. 274, 552 U.S. 917, 169 L.Ed.2d 200. Sentencing And Punishment 1777

In capital murder prosecution, a firearm may be used to support “great risk of danger” aggravator. State v. Locklair (S.C. 2000) 341 S.C. 352, 535 S.E.2d 420, rehearing denied, certiorari denied 121 S.Ct. 817, 531 U.S. 1093, 148 L.Ed.2d 701. Sentencing And Punishment 1679

15. Mitigating circumstances—In general

The trial judge must make an initial determination of which statutory mitigating circumstances have evidentiary support at the penalty phase of a capital murder trial and then allow the defendant to request any additional statutory mitigating circumstances supported in the record. State v. Bowman (S.C. 2005) 366 S.C. 485, 623 S.E.2d 378, rehearing denied, certiorari denied 126 S.Ct. 2867, 547 U.S. 1195, 165 L.Ed.2d 900. Sentencing And Punishment 1780(3)

The trial judge must make an initial determination of which statutory mitigating circumstances have evidentiary support at the penalty phase of the capital murder trial and then allow the defendant to request any additional statutory mitigating circumstances supported in the record. State v. Vazsquez (S.C. 2005) 364 S.C. 293, 613 S.E.2d 359, rehearing denied, denial of post‑conviction relief reversed 388 S.C. 447, 698 S.E.2d 561. Sentencing And Punishment 1780(3)

An exercise of a legal right by the victim is never deemed a provocation sufficient to justify or to mitigate an act of violence against the victim. Sheppard v. State (S.C. 2004) 357 S.C. 646, 594 S.E.2d 462. Homicide 672

Although a codefendant’s participation might be relevant to the circumstances of the offense and, therefore, a mitigating circumstance to be considered at sentencing, the fact that codefendants received lesser sentences could no more be considered mitigating than could the fact that a codefendant received the death penalty be aggravating. State v. Charping (S.C. 1998) 333 S.C. 124, 508 S.E.2d 851, rehearing denied, certiorari denied 119 S.Ct. 2345, 527 U.S. 1007, 144 L.Ed.2d 241. Sentencing And Punishment 56; Sentencing And Punishment 89

There is no mandate that the jury must reconsider residual doubts as to guilt at the sentencing phase; residual doubts are not a mitigating factor in sentencing. State v. Southerland (S.C. 1994) 316 S.C. 377, 447 S.E.2d 862, rehearing denied, certiorari denied 115 S.Ct. 1136, 513 U.S. 1166, 130 L.Ed.2d 1096, denial of post‑conviction relief affirmed in part, reversed in part 337 S.C. 610, 524 S.E.2d 833. Sentencing And Punishment 1685

Pursuant to Section 16‑3‑20(C), the trial judge must submit for the jury’s consideration, in the penalty phase of a capital case, any statutory mitigating circumstances supported by the evidence. Once the trial judge has made an initial determination of which statutory mitigating circumstances are supported by the evidence, the defendant shall be given an opportunity on the record (1) to waive the submission of those he or she does not wish considered by the jury; and (2) to request any additional mitigating statutory circumstances supported by the evidence that he or she wishes submitted to the jury. State v. Victor (S.C. 1989) 300 S.C. 220, 387 S.E.2d 248. Sentencing And Punishment 1780(3)

Evidence that a defendant’s case was inadequately investigated by counsel did not constitute mitigation evidence. The defendant did not seek to re‑present guilt phase evidence, but rather, his claim fell within that of ineffective assistance of counsel, which must be reserved for post‑conviction relief. State v. Elmore (S.C. 1989) 300 S.C. 130, 386 S.E.2d 769, certiorari denied 110 S.Ct. 2633, 496 U.S. 931, 110 L.Ed.2d 652, rehearing denied 111 S.Ct. 9, 497 U.S. 1047, 111 L.Ed.2d 824.

It was error for trial judge to refuse to find as matter of law that at time defendant committed crime of statutory rape, it was not crime involving use of violence against another person where issue arose during presentence hearing after defendant’s conviction for murder where defendant sought to argue to jury in mitigation of punishment that he had no prior record of crimes involving use of violence against another person; error required reversal of death sentence. State v. Gill (S.C. 1979) 273 S.C. 190, 255 S.E.2d 455. Sentencing And Punishment 1789(9); Sentencing And Punishment 1789(10)

16. —— Mental impairment, mitigating circumstances

Death sentence for mentally retarded accused was not categorically prohibited by Eighth Amendment, but accused is entitled to instruction as to mitigating effect of mental retardation and childhood abuse. Penry v. Lynaugh, U.S.Tex.1989, 109 S.Ct. 2934, 492 U.S. 302, 106 L.Ed.2d 256.

The fact that a trial judge made specific findings that a defendant who pled guilty to murder was a border line mental retardate, acted under the influence of extreme emotional or mental disturbance at the time of the offense, acted under duress or the domination of another person, and whose capacity to conform his conduct to the requirements of law was substantially impaired, does not foreclose imposition of the death penalty under Section 16‑3‑20, where the balance of aggravating and mitigating circumstances warranted imposition of the death sentence, and the defendant was not hallucinating at the time of the offense; nor does the possibility that the defendant carries a gene for Huntington’s disease, a progressively debilitating mental disease, preclude imposition of the death sentence, where there is no evidence that the defendant in fact carries the gene; nor would a positive diagnosis that the defendant carries the gene preclude imposition of the death penalty. Roach v. Martin (C.A.4 (S.C.) 1985) 757 F.2d 1463, certiorari denied 106 S.Ct. 185, 474 U.S. 865, 88 L.Ed.2d 154, rehearing denied 106 S.Ct. 549, 474 U.S. 1014, 88 L.Ed.2d 477.

Capital defendant was not prejudiced by the absence of the statutory mitigating factor relating to the age or mentality of the defendant at the time of the crime; defendant’s mental condition was the focus of the guilt phase and was also a main issue in the penalty phase, the jury heard extensive expert testimony regarding defendant’s alleged mental disorders, and trial court charged the jury on two other mitigating factors through which they could consider defendant’s mental condition. State v. Stanko (S.C. 2008) 376 S.C. 571, 658 S.E.2d 94, rehearing denied, certiorari denied, certiorari denied 129 S.Ct. 182, 555 U.S. 875, 172 L.Ed.2d 129. Sentencing And Punishment 1789(9)

If the judge finds defendant in a capital case to be mentally retarded by a preponderance of the evidence in the pre‑trial hearing, the defendant will not be eligible for the death penalty; if, however, the judge finds the defendant is not mentally retarded and the jury finds the defendant guilty of the capital charge, the defendant may still present mitigating evidence that he or she had mental retardation at the time of the crime, and, if the jury finds this mitigating circumstance, then a death sentence will not be imposed. Franklin v. Maynard (S.C. 2003) 356 S.C. 276, 588 S.E.2d 604, rehearing denied. Sentencing And Punishment 1713; Sentencing And Punishment 1793

In making the mental retardation determination in death penalty cases, the trial judge shall make the determination in a pre‑trial hearing, if so requested by the defendant or the prosecution, after hearing evidence, including expert testimony, from both the defendant and the State. Franklin v. Maynard (S.C. 2003) 356 S.C. 276, 588 S.E.2d 604, rehearing denied. Sentencing And Punishment 1794

Supreme Court would not create a definition of mental retardation, for purposes of making a mental retardation determination in death penalty cases, that was different from the one already established by the legislature in statute providing for mental retardation as a mitigating circumstance in such cases. Franklin v. Maynard (S.C. 2003) 356 S.C. 276, 588 S.E.2d 604, rehearing denied. Sentencing And Punishment 1642

17. —— Intoxication, mitigating circumstances

When there is evidence the defendant was intoxicated at the time of the crime, the trial court is required to submit the mitigating circumstances, at penalty phase of capital murder trial, that murder was committed while defendant was under influence of mental or emotional disturbance, that capacity of defendant to appreciate the criminality of his conduct or to conform his conduct to requirements of law was substantially impaired, and that jury could consider the mentality of defendant at time of the crime. State v. Bowman (S.C. 2005) 366 S.C. 485, 623 S.E.2d 378, rehearing denied, certiorari denied 126 S.Ct. 2867, 547 U.S. 1195, 165 L.Ed.2d 900. Sentencing And Punishment 1780(3)

Mere evidence that defendant had been drinking before the murder was not sufficient evidence of intoxication to warrant instruction on mitigating circumstance, at penalty phase of capital murder trial, that capacity of defendant to appreciate the criminality of his conduct or to conform his conduct to requirements of law was substantially impaired. State v. Bowman (S.C. 2005) 366 S.C. 485, 623 S.E.2d 378, rehearing denied, certiorari denied 126 S.Ct. 2867, 547 U.S. 1195, 165 L.Ed.2d 900. Sentencing And Punishment 1780(3)

Mere evidence that defendant had drinks before the murders was not sufficient evidence of intoxication to warrant instructions on mitigating circumstances, at penalty phase of capital murder trial, that murder was committed while defendant was under influence of mental or emotional disturbance, that capacity of defendant to appreciate criminality of his conduct or to conform his conduct to requirements of law was substantially impaired, and that jury could consider the mentality of defendant at the time of the crime. State v. Vazsquez (S.C. 2005) 364 S.C. 293, 613 S.E.2d 359, rehearing denied, denial of post‑conviction relief reversed 388 S.C. 447, 698 S.E.2d 561. Sentencing And Punishment 1780(3)

When there is evidence that defendant was intoxicated at the time of the crime, trial judge is required to submit mitigating circumstances, at penalty phase of capital murder trial, that murder was committed while defendant was under influence of mental or emotional disturbance, that capacity of defendant to appreciate criminality of his conduct or to conform his conduct to requirements of law was substantially impaired, and that jury could consider the mentality of defendant at the time of the crime. State v. Vazsquez (S.C. 2005) 364 S.C. 293, 613 S.E.2d 359, rehearing denied, denial of post‑conviction relief reversed 388 S.C. 447, 698 S.E.2d 561. Sentencing And Punishment 1780(3)

Evidence that defendant was voluntarily intoxicated when the murder occurred warranted instructions, at penalty phase of capital murder trial, on mitigating circumstances regarding substantial impairment of defendant’s capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law, and the age or mentality of defendant at the time of the crime. State v. Stone (S.C. 2002) 350 S.C. 442, 567 S.E.2d 244, appeal after new sentencing hearing 376 S.C. 32, 655 S.E.2d 487, rehearing denied. Sentencing And Punishment 1780(3)

The statutory mitigating circumstances set forth in Section 16‑3‑20(C)(b)(2), (6) and (7) are required to be submitted to the jury when there is evidence of intoxication only in the absence of a specific charge regarding intoxication as a mitigating circumstance. State v. Plemmons (S.C. 1988) 296 S.C. 76, 370 S.E.2d 871.

Trial judge did not err in failing to charge mitigating circumstances in Section 16‑3‑20(C)(b)(2), (6) and (7), where defendant’s confession stated that he drank alcohol on evening before murder and drank beer at gas station where victim worked, because there was no evidence defendant was intoxicated at time crime was committed. State v. Drayton (S.C. 1987) 293 S.C. 417, 361 S.E.2d 329, certiorari denied 108 S.Ct. 1060, 484 U.S. 1079, 98 L.Ed.2d 1021, dismissal of post‑conviction relief affirmed 312 S.C. 4, 430 S.E.2d 517, rehearing denied, certiorari denied 114 S.Ct. 607, 510 U.S. 1014, 126 L.Ed.2d 572, rehearing denied 114 S.Ct. 1142, 510 U.S. 1159, 127 L.Ed.2d 451. Homicide 1506

Evidence of voluntary intoxication is a proper matter for consideration by the jury in mitigation of punishment. State v. Pierce (S.C. 1986) 289 S.C. 430, 346 S.E.2d 707. Sentencing And Punishment 106

18. Practice and procedure

The trial court erred in proceeding directly from the defendant’s plea of guilty to the offense of murder to his sentencing, without waiting at least 24 hours as required by Section 16‑3‑20, since the plain and ordinary meaning of the statute mandates a distinct, bifurcated proceeding in murder cases, whether conviction was by a jury or before a judge without a jury; moreover, defense counsel’s assent to an immediate sentencing proceeding did not constitute a waiver of the waiting period. State v. Ray (S.C. 1993) 310 S.C. 431, 427 S.E.2d 171.

A trial judge did not err in asking the defendant, in the presence of the jury, whether he desired to exercise his right to the statutory waiting period between the guilt phase and the sentencing phase of his bifurcated trial, in spite of the defendant’s argument that he was prejudiced because the jury was told that it would have to be sequestered for an additional 2 days solely due to his decision to rely on his statutory right, in that the verdict was rendered on a Friday and therefore the trial did not commence again until Monday, where the judge explained during the voir dire that the trial would be lengthy, and the judge clearly articulated that the right to a 24 hour waiting period was statutorily mandated and was the defendant’s right. State v. Bell (S.C. 1990) 302 S.C. 18, 393 S.E.2d 364, certiorari denied 111 S.Ct. 227, 498 U.S. 881, 112 L.Ed.2d 182.

A capital defendant was not prejudiced by the trial judge conducting the sentencing proceeding past midnight on the night before the jury rendered its verdict where the record indicated that the jury elected to continue the proceeding when asked by the trial judge. State v. Howard (S.C. 1988) 295 S.C. 462, 369 S.E.2d 132, certiorari denied 109 S.Ct. 3174, 490 U.S. 1113, 104 L.Ed.2d 1036, rehearing denied 110 S.Ct. 13, 492 U.S. 932, 106 L.Ed.2d 628, denial of habeas corpus affirmed 131 F.3d 399. Criminal Law 865(2)

A second examination of defendant’s competence to stand trial was not warranted, after the defense had rested at guilt phase of capital murder trial; trial court found that defendant’s conduct had remained consistent throughout the proceedings and that defendant had not decompensated in the manner that his experts had predicted. State v. Weik (S.C. 2002) 356 S.C. 76, 587 S.E.2d 683, rehearing granted, adhered to on rehearing 354 S.C. 382, 581 S.E.2d 834, certiorari denied 123 S.Ct. 2580, 539 U.S. 930, 156 L.Ed.2d 609. Mental Health 434

19. Jury—In general

Trial court’s decision not to inform parties that note sent by jury during sentencing deliberations indicated specific numerical split in jury’s vote did not violate capital murder defendant’s right to assistance of counsel, fair jury trial, or non‑arbitrary verdict; court notified parties of note’s contents, withholding only numerical split, note did not state that jury was hopelessly deadlocked, court determined that jury, which had only been deliberating for two hours, had not yet reached deadlock after “reasonable deliberation,” under statute which required imposition of life sentence if jury could not reach recommendation after reasonable deliberation, and court advised jury not to notify court of specific vote counts in future notes. State v. Cottrell (S.C. 2017) 2017 WL 6503904. Criminal Law 1852; Jury 31.3(1); Sentencing and Punishment 1779(3)

Defendant’s guilty plea to murder and other felony offenses was not rendered conditional by the fact that, before entering plea, defendant questioned validity of statute that foreclosed his right to have a jury decide his sentence upon entry of plea in capital case; defendant was permitted to appeal the issue, any decision as to the issue did not affect the entry or validity of the plea, even if defendant had preserved his challenge to the statute, he specifically abandoned it issue on appeal as he correctly recognized that the issue had been decided against his position, and defendant’s plea was entered knowingly and voluntarily. State v. Inman (S.C. 2011) 395 S.C. 539, 720 S.E.2d 31, rehearing denied, certiorari denied 133 S.Ct. 219, 568 U.S. 863, 184 L.Ed.2d 112. Criminal Law 273(4.1)

The determination whether a juror is qualified to serve in a capital case is within the sole discretion of the trial judge and is not reversible on appeal unless wholly unsupported by the evidence. State v. Lindsey (S.C. 2007) 372 S.C. 185, 642 S.E.2d 557, rehearing denied, certiorari denied 128 S.Ct. 274, 552 U.S. 917, 169 L.Ed.2d 200. Criminal Law 1152.2(2)

The ultimate consideration in determining whether a juror is qualified to serve on a death penalty case is that the juror be unbiased, impartial, and able to carry out the law as explained to him. State v. Sapp (S.C. 2005) 366 S.C. 283, 621 S.E.2d 883, rehearing denied, certiorari denied 126 S.Ct. 2025, 547 U.S. 1133, 164 L.Ed.2d 787. Jury 97(1)

Trial court impermissibly injected its personal opinion into defendant’s decision to waive jury for retrial of sentencing phase of capital murder trial, and thus, new sentencing proceeding was required, where trial court told defendant it was “not uncommon” for people opposed to the death penalty to lie about their views so they could get on a jury and then refuse to impose the death penalty. State v. Owens (S.C. 2004) 362 S.C. 175, 607 S.E.2d 78, appeal after new sentencing hearing 378 S.C. 636, 664 S.E.2d 80, rehearing denied, certiorari denied, certiorari denied 129 S.Ct. 1004, 555 U.S. 1141, 173 L.Ed.2d 300, habeas corpus dismissed 2010 WL 146164. Jury 29(6)

Capital defendant who pled guilty was not deprived of right to jury trial on sentencing for murder; defendant was informed that by pleading guilty he waived his right to jury trial on both guilt and sentencing, but he chose to do so, and defendant did not argue that his waiver was made involuntarily, unknowingly, or unintelligently. State v. Downs (S.C. 2004) 361 S.C. 141, 604 S.E.2d 377, rehearing denied. Jury 29(4); Jury 29(6)

Trial judge did not abuse his discretion in capital murder trial by excusing prospective juror for cause during individual voir dire after juror stated that she could not under any circumstances find defendant guilty, even though court did not first permit defense counsel to examine juror;juror’s belief she should not sit in judgment of another rendered her incapable of fulfilling her basic responsibilities as a juror and would have prevented or substantially impaired the performance of her duties as a juror. State v. Wise (S.C. 2004) 359 S.C. 14, 596 S.E.2d 475, rehearing denied, certiorari denied, certiorari denied 125 S.Ct. 355, 543 U.S. 948, 160 L.Ed.2d 263. Jury 104.1

A trial judge’s explanation to all perspective jurors that “the ultimate punishment of the defendant will be in your hands if you as a member of the trial jury have found the defendant guilty” was sufficient to satisfy the requirement that the trial judge convey to the jury the idea that its sentencing recommendations during the sentencing phase of a capital proceeding will be followed. State v. Middleton (S.C. 1988) 295 S.C. 318, 368 S.E.2d 457, certiorari denied 109 S.Ct. 189, 488 U.S. 872, 102 L.Ed.2d 158, rehearing denied 109 S.Ct. 406, 488 U.S. 961, 102 L.Ed.2d 393, habeas corpus dismissed 855 F.Supp. 837, affirmed 77 F.3d 469, certiorari denied 117 S.Ct. 199, 136 L.Ed.2d 135, rehearing denied 117 S.Ct. 449, 136 L.Ed.2d 345. Sentencing And Punishment 1780(3)

There was no abuse of discretion in refusing to change venue where trial judge has screened jurors to ensure defendant fair trial; trial judge interviewed each juror to determine whether he or she could be impartial and received satisfactory reply; it is defendant’s burden to demonstrate actual juror prejudice as result of news accounts of defendant’s case and mere assertion that jurors could have been subconsciously affected by media exposure is insufficient to show prejudice where of jurors actually selected to serve, one indicated he had seen one or 2 headlines, another had read one article, and 2 others vaguely recalled hearing something about case. State v. Owens (S.C. 1987) 293 S.C. 161, 359 S.E.2d 275, certiorari denied 108 S.Ct. 496, 484 U.S. 982, 98 L.Ed.2d 495.

In a prosecution for armed robbery and murder in which the defendant was sentenced to death, the guilty plea and sentence would be vacated where a significant inducement for entering the plea was the condition that the jury determine punishment, an impermissible condition under the statutory mandate that the trial judge alone determines punishment when a defendant pleads guilty to murder. State v. Patterson (S.C. 1982) 278 S.C. 319, 295 S.E.2d 264. Criminal Law 1187

20. —— Examination, jury

In capital murder case, juror’s responses during voir dire did not demonstrate that she was unable to render verdict according to the law, and thus juror was not erroneously qualified; juror repeatedly acknowledged that state always had burden of proof in criminal case, and although juror expressed concern that “something needs to be done” about repeat offenders, she recognized finality of sentence of life imprisonment without possibility of parole and that it could be an appropriate punishment. State v. Blackwell (S.C. 2017) 420 S.C. 127, 801 S.E.2d 713. Jury 107; Jury 108

Trial court did not abuse its discretion in disqualifying prospective juror in death penalty case, where upon examination by solicitor, juror strongly indicated that she would always give the death penalty to anyone who intentionally kills another, and upon further examination explained that she would give life only to someone who unintentionally kills another, like self‑defense. State v. Evins (S.C. 2007) 373 S.C. 404, 645 S.E.2d 904, rehearing denied, certiorari denied, certiorari denied 128 S.Ct. 662, 552 U.S. 1046, 169 L.Ed.2d 521. Jury 108

Trial court’s refusal to allow defendant to ask prospective jurors whether they would “stick with their vote or go with the majority” did not deprive him of a fair and impartial jury in death‑penalty phase of murder trial; trial court extensively questioned each juror regarding ability to be fair and impartial, and nothing indicated that any juror failed in those capacities. State v. Bennett (S.C. 2006) 369 S.C. 219, 632 S.E.2d 281, certiorari denied, certiorari denied 127 S.Ct. 681, 549 U.S. 1061, 166 L.Ed.2d 530, habeas corpus granted 170 F.Supp.3d 851, affirmed 842 F.3d 319. Jury 131(8)

Statutes regarding scope of voir dire and granting capital defendant right to examine jurors governed selection of jurors and did not apply to situation where court was informed of a matter which might have justified discharge of seated juror. State v. Ivey (S.C. 1998) 331 S.C. 118, 502 S.E.2d 92, rehearing denied, certiorari denied 119 S.Ct. 812, 525 U.S. 1075, 142 L.Ed.2d 671, habeas corpus dismissed 2008 WL 1787481. Jury 131(1); Jury 131(4)

Murder defendant was not entitled to ask jurors on voir dire whether they would consider that he did not have significant prior criminal history of violence; trial judge stated that he would allow defendant to ask whether juror would consider mitigating circumstances as presented by defense and as instructed by court, and this general question covered whether juror would refuse to consider mitigating circumstances and did not render trial unfair. State v. Hill (S.C. 1998) 331 S.C. 94, 501 S.E.2d 122, rehearing denied, certiorari denied 119 S.Ct. 597, 525 U.S. 1043, 142 L.Ed.2d 539, denial of habeas corpus affirmed 339 F.3d 187. Jury 131(8)

Although a capital defendant has the statutory right during voir dire to examine jurors through counsel, this does not enlarge the scope of voir dire otherwise permitted. State v. Hill (S.C. 1998) 331 S.C. 94, 501 S.E.2d 122, rehearing denied, certiorari denied 119 S.Ct. 597, 525 U.S. 1043, 142 L.Ed.2d 539, denial of habeas corpus affirmed 339 F.3d 187. Jury 131(4)

Manner in which a capital defendant examines jurors through counsel during voir dire, and the scope of any additional voir dire, are matters of trial court discretion. State v. Hill (S.C. 1998) 331 S.C. 94, 501 S.E.2d 122, rehearing denied, certiorari denied 119 S.Ct. 597, 525 U.S. 1043, 142 L.Ed.2d 539, denial of habeas corpus affirmed 339 F.3d 187. Jury 131(4); Jury 131(13)

The defendant was not deprived of the opportunity to select a fair and impartial jury by the trial judge’s preclusion of queries into any bias by the prospective jurors in favor of testimony presented by police officers, since a juror should not, prior to trial, be required to identify which witnesses he will believe, but rather he must determine the credibility of witnesses only after he has heard all of the testimony. State v. Davis (S.C. 1992) 309 S.C. 326, 422 S.E.2d 133, rehearing denied, certiorari denied 113 S.Ct. 2355, 508 U.S. 915, 124 L.Ed.2d 263.

In order to protect a capital defendant’s right to an impartial jury, he or she is entitled to have prospective jurors informed of the race of the defendant and questioned on their racial biases. If a juror is shown through voir dire to exhibit bias, the trial judge must exercise his or her discretion by disqualifying such a juror. A juror must be excused if his or her opinions would prevent or substantially impair the performance of his or her duties as a juror in accordance with the oath and instructions. State v. Green (S.C. 1990) 301 S.C. 347, 392 S.E.2d 157, certiorari denied 111 S.Ct. 229, 498 U.S. 881, 112 L.Ed.2d 183, rehearing denied 111 S.Ct. 548, 498 U.S. 995, 112 L.Ed.2d 556, denial of habeas corpus affirmed 220 F.3d 220.

A trial judge in a capital case did not abuse his discretion in limiting the number and form of questions during voir dire on the issue of racial bias where the judge allowed extensive questioning on racial bias. State v. Patterson (S.C. 1989) 299 S.C. 280, 384 S.E.2d 699, vacated 110 S.Ct. 709, 493 U.S. 1013, 107 L.Ed.2d 730, on remand 302 S.C. 384, 396 S.E.2d 366.

A trial judge in a capital case did not abuse his discretion in refusing to allow the defendant to ask prospective jurors on voir dire “what a life sentence meant to them,” in order to determine whether any jurors had “misconceptions” about the parole eligibility of a murderer sentenced to life imprisonment, where the trial judge’s final jury instructions properly conveyed the meaning of “life sentence” and imprisonment for the duration of the defendant’s life. State v. Matthews (S.C. 1988) 296 S.C. 379, 373 S.E.2d 587, certiorari denied 109 S.Ct. 1559, 489 U.S. 1091, 103 L.Ed.2d 861, denial of habeas corpus affirmed 105 F.3d 907, certiorari denied 118 S.Ct. 102, 139 L.Ed.2d 57. Jury 131(8)

SC Code Ann Section 16‑3‑20(D) grants capital defendant right to examine jurors through counsel but does not enlarge scope of voir dire permitted under Section 14‑7‑1020, and trial judge properly exercised his discretion to limit scope of voir dire to inquiry into jurors bias or prejudice. State v. Owens (S.C. 1987) 293 S.C. 161, 359 S.E.2d 275, certiorari denied 108 S.Ct. 496, 484 U.S. 982, 98 L.Ed.2d 495.

While Section 16‑3‑20(D) grants a capital defendant the right to examine jurors through counsel, that section does not enlarge the scope of voir dire delineated in Section 14‑7‑1020, which permits inquiry into bias or prejudice. State v. Patterson (S.C. 1986) 290 S.C. 523, 351 S.E.2d 853, certiorari dismissed 107 S.Ct. 2490, 482 U.S. 902, 96 L.Ed.2d 382.

The defendant’s right to examine jurors under Section 16‑3‑20(D) may be waived. State v. Norris (S.C. 1985) 285 S.C. 86, 328 S.E.2d 339.

Questioning of a prospective juror as to whether he would believe a police officer’s testimony before that of a private citizen was improper voir dire examination under Section 16‑3‑20(D), since it called upon the juror to make a determination in his own mind as to whether one class of persons was more credible than another, and invaded the province of the jury to determine individual credibility in the context of the entire case. State v. Adams (S.C. 1983) 279 S.C. 228, 306 S.E.2d 208, certiorari denied 104 S.Ct. 558, 464 U.S. 1023, 78 L.Ed.2d 730, denial of habeas corpus affirmed 965 F.2d 1306, certiorari denied 113 S.Ct. 2966, 508 U.S. 974, 125 L.Ed.2d 666, vacated on rehearing 114 S.Ct. 1365, 511 U.S. 1001, 128 L.Ed.2d 42, on remand 41 F.3d 175.

In a prosecution for murder, in which direct voir dire by defense counsel was guaranteed, pursuant to Section 16‑3‑20(D), defendant was not prejudiced by his counsel’s absence during the simple drawing of names for the impaneling of the jury where defendant did not exercise his full entitlement of peremptory challenges, from which it could be concluded that the jury panel was seated with his approval. State v. Smart (S.C. 1982) 278 S.C. 515, 299 S.E.2d 686, certiorari denied 103 S.Ct. 1784, 460 U.S. 1088, 76 L.Ed.2d 353, habeas corpus granted 677 F.Supp. 414, affirmed 856 F.2d 609, rehearing granted, opinion vacated on rehearing 873 F.2d 1558, certiorari denied 110 S.Ct. 189, 493 U.S. 867, 107 L.Ed.2d 144.

In a prosecution for murder, the court properly limited defense counsel’s voir dire questioning to the determination of specific and real bias or interest in the jurors and not to the development of personality profiles since neither Section 16‑3‑20(D) nor Section 14‑7‑1020 requires the trial judge to permit counsel to engage in lengthy interviews of prospective jurors. State v. Smart (S.C. 1982) 278 S.C. 515, 299 S.E.2d 686, certiorari denied 103 S.Ct. 1784, 460 U.S. 1088, 76 L.Ed.2d 353, habeas corpus granted 677 F.Supp. 414, affirmed 856 F.2d 609, rehearing granted, opinion vacated on rehearing 873 F.2d 1558, certiorari denied 110 S.Ct. 189, 493 U.S. 867, 107 L.Ed.2d 144.

In a prosecution for murder, the court properly ruled that Section 14‑7‑1020 limited defendant’s attorneys on voir dire where, although defendant alleged that Section 16‑3‑20(D), which allows defense counsel to examine the potential jurors, allowed his counsel unlimited voir dire in a capital murder case, the method and scope of voir dire was within the trial court’s discretion. State v. Thompson (S.C. 1982) 278 S.C. 1, 292 S.E.2d 581, certiorari denied 102 S.Ct. 1996, 456 U.S. 938, 72 L.Ed.2d 458, rehearing denied 102 S.Ct. 2917, 457 U.S. 1112, 73 L.Ed.2d 1323.

Right of State to conduct voir dire examination is discretionary with trial judge. State v. Goolsby (S.C. 1980) 275 S.C. 110, 268 S.E.2d 31, certiorari denied 101 S.Ct. 616, 449 U.S. 1037, 66 L.Ed.2d 500.

Prohibiting State as a matter of law from conducting voir dire examination of jurors in death case is error, since this section is merely a limitation upon, but does not repeal, the discretion of the court in voir dire examinations authorized under Code Section 14‑7‑1020. State v. Smart (S.C. 1980) 274 S.C. 303, 262 S.E.2d 911. Jury 131(1)

21. —— Opinion as to death penalty, jury

A prospective juror may be excluded for cause when his or her views on capital punishment would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. State v. Blackwell (S.C. 2017) 420 S.C. 127, 801 S.E.2d 713. Jury 108

Trial court did not abuse its discretion in disqualifying prospective juror in capital murder case, where when questioned by solicitor during voir dire, juror vacillated between being opposed to the death penalty and appearing to believe it would be appropriate for most murders, and juror ultimately stated that she would always pick life in prison over death. State v. Evins (S.C. 2007) 373 S.C. 404, 645 S.E.2d 904, rehearing denied, certiorari denied, certiorari denied 128 S.Ct. 662, 552 U.S. 1046, 169 L.Ed.2d 521. Jury 108

Trial court did not abuse its discretion in disqualifying prospective juror in capital murder case, where juror testified that he was not in favor of the death penalty and that he “really would have to be persuaded” to give the death penalty, described himself as a juror who would not give the death penalty, and stated that he has always been against the death penalty. State v. Evins (S.C. 2007) 373 S.C. 404, 645 S.E.2d 904, rehearing denied, certiorari denied, certiorari denied 128 S.Ct. 662, 552 U.S. 1046, 169 L.Ed.2d 521. Jury 108

A prospective juror may be excluded for cause in capital case when his or her views on capital punishment would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. State v. Lindsey (S.C. 2007) 372 S.C. 185, 642 S.E.2d 557, rehearing denied, certiorari denied 128 S.Ct. 274, 552 U.S. 917, 169 L.Ed.2d 200. Jury 108

Trial court properly excused prospective juror for cause in capital murder case, where prospective juror was uncertain whether he could impose death penalty and stated that he believed that life in prison was worse than death no matter what the facts of the case were. State v. Lindsey (S.C. 2007) 372 S.C. 185, 642 S.E.2d 557, rehearing denied, certiorari denied 128 S.Ct. 274, 552 U.S. 917, 169 L.Ed.2d 200. Jury 108

Trial court properly excused prospective juror for cause in death penalty case, where prospective juror unequivocally stated, at the outset of voir dire, that she could not consider the law regarding imposing the death penalty because of her religious beliefs, and even though after further questioning prospective juror stated she could put aside her religion, prospective juror subsequently broke down in tears when questioned as to whether the teaching of her Methodist religion that “Thou shalt not kill” would affect her ability to deliberate on the jury, and was unable to answer the question. State v. Sapp (S.C. 2005) 366 S.C. 283, 621 S.E.2d 883, rehearing denied, certiorari denied 126 S.Ct. 2025, 547 U.S. 1133, 164 L.Ed.2d 787. Jury 108

Trial court did not err in excluding, for cause, juror who was initially death penalty qualified, but later had change of heart and was not sure that he could give case fair and impartial consideration, where juror firmly stated three times upon subsequent questioning that he could not impose death penalty because of religious beliefs. State v. Simpson (S.C. 1996) 325 S.C. 37, 479 S.E.2d 57, rehearing denied, certiorari denied 117 S.Ct. 2460, 520 U.S. 1277, 138 L.Ed.2d 217, denial of post‑conviction relief affirmed in part, reversed in part 367 S.C. 587, 627 S.E.2d 701. Jury 108

In a capital murder case, the record supported disqualification of a juror who stated that she would find it “very difficult” to impose the death penalty on a young person and that she could not vote for death in the defendant’s case, since age was no bar to the death penalty in the defendant’s case, and thus the juror could not consider imposition of a penalty allowed by law. State v. Longworth (S.C. 1993) 313 S.C. 360, 438 S.E.2d 219, rehearing denied, certiorari denied 115 S.Ct. 105, 513 U.S. 831, 130 L.Ed.2d 53.

The trial court properly disqualified a prospective juror where, during voir dire, the juror stated that she would never impose the death penalty on a mentally retarded defendant, no matter how egregious the crime or how slight the mental retardation, and the defendant on trial was mildly retarded. State v. Davis (S.C. 1992) 309 S.C. 326, 422 S.E.2d 133, rehearing denied, certiorari denied 113 S.Ct. 2355, 508 U.S. 915, 124 L.Ed.2d 263.

Two jurors who admitted reading a newspaper article revealing the defendant’s prior death sentence, were properly qualified where both jurors stated that they would be guided by the law, the evidence, and no other consideration. Four jurors who were allegedly predisposed to impose the death penalty were properly qualified where the voir dire of the questioned jurors revealed that all could, depending upon the evidence presented, recommend a life sentence. State v. Atkins (S.C. 1990) 303 S.C. 214, 399 S.E.2d 760, certiorari denied 111 S.Ct. 2913, 501 U.S. 1259, 115 L.Ed.2d 1076, denial of habeas corpus affirmed 139 F.3d 887, certiorari denied 119 S.Ct. 191, 525 U.S. 882, 142 L.Ed.2d 156.

In a prosecution for murder and kidnapping, the trial judge did not err in qualifying 9 jurors who knew that the defendant had previously been sentenced to death for the murder and kidnapping of another victim, where each of the 9 jurors expressed the belief that he or she could set aside any prejudice, passion or bias and render a verdict based on evidence presented in the courtroom. Additionally, the trial judge did not abuse his discretion in not striking 3 jurors who purportedly equivocated concerning their views on the death penalty where all 3 jurors indicated that they would be able to give a sentence of life or death depending on the facts and circumstances. State v. Bell (S.C. 1990) 302 S.C. 18, 393 S.E.2d 364, certiorari denied 111 S.Ct. 227, 498 U.S. 881, 112 L.Ed.2d 182.

A trial judge did not err in disqualifying a juror for cause, based upon her statements during voir dire that she could not sign her name to a verdict that the defendant be sentenced to death, since a prospective juror may be excluded for cause if his or her views on capital punishment would prevent or substantially impair the performance of his or her duties as a juror. State v. Elmore (S.C. 1989) 300 S.C. 130, 386 S.E.2d 769, certiorari denied 110 S.Ct. 2633, 496 U.S. 931, 110 L.Ed.2d 652, rehearing denied 111 S.Ct. 9, 497 U.S. 1047, 111 L.Ed.2d 824.

A trial judge in a murder prosecution properly excused a prospective juror based upon her views regarding capital punishment where the prospective juror stated during voir dire examination that she could not vote for the death penalty if she “had not seen the act,” regardless of the evidence. State v. Cain (S.C. 1988) 297 S.C. 497, 377 S.E.2d 556, certiorari denied 110 S.Ct. 3254, 497 U.S. 1010, 111 L.Ed.2d 764, rehearing denied 111 S.Ct. 14, 497 U.S. 1050, 111 L.Ed.2d 828.

A judge in a capital murder case did not abuse his discretion in refusing to submit to voir dire examination of his personal views on the death penalty. State v. Matthews (S.C. 1988) 296 S.C. 379, 373 S.E.2d 587, certiorari denied 109 S.Ct. 1559, 489 U.S. 1091, 103 L.Ed.2d 861, denial of habeas corpus affirmed 105 F.3d 907, certiorari denied 118 S.Ct. 102, 139 L.Ed.2d 57.

Sentencing phase of trial in which defendant had received death penalty for 2 counts of murder was reversed where, in several instances, once judge determined that prospective juror was opposed to death penalty, judge excused him without allowing either side opportunity to question him; while it is clear that scope and duration of such examination is within discretion of trial judge, that discretion does not extend so far as to authorize trial judge to refuse counsel right to conduct any examination at all in capital case. State v. Atkins (S.C. 1987) 293 S.C. 294, 360 S.E.2d 302.

The Federal Constitution does not prohibit the removal for cause of prospective jurors whose opposition to the death penalty is so strong that it would prevent or substantially impair the performance of their duties at the sentencing phase of the trial. State v. Patterson (S.C. 1986) 290 S.C. 523, 351 S.E.2d 853, certiorari dismissed 107 S.Ct. 2490, 482 U.S. 902, 96 L.Ed.2d 382. Jury 108

The trial judge had the authority, as well as the duty, to disallow capital defendant’s counsel from asking hypothetical questions of potential jurors on voir dire in an attempt to discover hidden biases or prejudices concerning the death penalty. State v. Patterson (S.C. 1986) 290 S.C. 523, 351 S.E.2d 853, certiorari dismissed 107 S.Ct. 2490, 482 U.S. 902, 96 L.Ed.2d 382. Jury 131(17)

The action of the trial judge in excusing a juror because of her views relating to capital punishment was consistent with the mandate of Section 16‑3‑20(E) where there was a reasonable basis for the judge to conclude that the juror was unable to faithfully discharge her responsibility under the law. State v. Chaffee (S.C. 1984) 285 S.C. 21, 328 S.E.2d 464, certiorari denied 105 S.Ct. 1878, 471 U.S. 1009, 85 L.Ed.2d 170, rehearing denied 105 S.Ct. 2370, 471 U.S. 1120, 86 L.Ed.2d 268, rehearing denied 105 S.Ct. 2369, 471 U.S. 1120, 86 L.Ed.2d 268.

A juror who cannot impose the death penalty cannot render a verdict of guilty pursuant to Section 16‑3‑20; accordingly, in a prosecution for murder, the trial judge properly disqualified two jurors who expressed the belief that defendant was guilty but indicated that they would be opposed to the death penalty despite their opinion of his guilt. State v. Gaskins (S.C. 1985) 284 S.C. 105, 326 S.E.2d 132, certiorari denied 105 S.Ct. 2368, 471 U.S. 1120, 86 L.Ed.2d 266, habeas corpus dismissed 916 F.2d 941, rehearing denied, certiorari denied 111 S.Ct. 2277, 500 U.S. 961, 114 L.Ed.2d 728, rehearing denied 112 S.Ct. 14, 501 U.S. 1269, 115 L.Ed.2d 1098, habeas corpus denied 943 F.2d 49, certiorari denied 112 S.Ct. 18, 501 U.S. 1272, 115 L.Ed.2d 1102.

During the sentencing phase of a murder prosecution, three potential jurors who stated that they could not or would not vote for the death penalty were properly excused under Section 14‑7‑1020, and this worked no prejudice on defendants, who had been granted leave to examine over 100 prospective jurors, far above and beyond any constitutional and statutory entitlements, since the test of a juror’s qualification is the ability to reach a verdict of either guilt or innocence, and, if necessary, to vote for a sentence of death; moreover, the ability merely to consider these possibilities is not sufficient, under Section 16‑3‑20(E), to qualify a prospective juror. State v. Plath (S.C. 1984) 281 S.C. 1, 313 S.E.2d 619, certiorari denied 104 S.Ct. 3560, 467 U.S. 1265, 82 L.Ed.2d 862, rehearing denied 105 S.Ct. 27, 468 U.S. 1226, 82 L.Ed.2d 920, rehearing denied 105 S.Ct. 28, 468 U.S. 1226, 82 L.Ed.2d 920, denial of habeas corpus affirmed 113 F.3d 1352, certiorari denied 118 S.Ct. 715, 139 L.Ed.2d 655, denial of habeas corpus affirmed 130 F.3d 595, certiorari denied 118 S.Ct. 1854, 140 L.Ed.2d 1102. Jury 108

Voir dire examination upon the issue of capital punishment is essential to accomplish the legitimate aim of Section 16‑3‑20(E), which is to assure a jury capable of performing its duty under the law. State v. Truesdale (S.C. 1982) 278 S.C. 368, 296 S.E.2d 528.

In a prosecution for murder, the court properly excused four jurors for cause, who were unalterably opposed to capital punishment since, under Section 16‑3‑20(E), the trial judge had a reasonable basis to conclude that the potential jurors could not faithfully carry out their duties under the law. State v. Thompson (S.C. 1982) 278 S.C. 1, 292 S.E.2d 581, certiorari denied 102 S.Ct. 1996, 456 U.S. 938, 72 L.Ed.2d 458, rehearing denied 102 S.Ct. 2917, 457 U.S. 1112, 73 L.Ed.2d 1323. Jury 108

Although it was error to prevent the defense from examining two prospective jurors who were disqualified by the court when they indicated opposition to the death penalty, the exceptions under the statute were moot where the defendant was sentenced to life imprisonment. State v. Owens (S.C. 1981) 277 S.C. 189, 284 S.E.2d 584. Criminal Law 1166.16; Jury 131(1)

Trial judge may disqualify prospective jurors from service on jury panel under S.C. Code Section 16‑3‑30(e) who are absolutely opposed to capital punishment under any circumstance. State v. Linder (S.C. 1981) 276 S.C. 304, 278 S.E.2d 335.

22. —— Reasonable deliberation, jury

Provision of statute requiring trial judge to sentence defendant to life imprisonment if capital sentencing jury cannot agree on death sentence recommendation after a “reasonable deliberation” did not mandate a sentence of life imprisonment; jury only deliberated about a lengthy capital murder trial for approximately five and a half before sending note to judge, and jury did not indicate it was deadlocked, but rather requested additional instructions to resolve their impasse. State v. Williams (S.C. 2010) 386 S.C. 503, 690 S.E.2d 62, rehearing denied, certiorari denied, certiorari denied 131 S.Ct. 230, 562 U.S. 899, 178 L.Ed.2d 153. Sentencing And Punishment 1779(1)

Whether a particular capital sentencing jury could not agree on a death sentence recommendation after a “reasonable deliberation,” so as to require trial judge to direct a life sentence, is not simply an elapsed‑time dependent determination, but rather is an issue committed to the trial judge’s discretion. State v. Williams (S.C. 2010) 386 S.C. 503, 690 S.E.2d 62, rehearing denied, certiorari denied, certiorari denied 131 S.Ct. 230, 562 U.S. 899, 178 L.Ed.2d 153. Sentencing And Punishment 1779(1)

Capital sentencing jury did not, as a matter of law, engage in a “reasonable deliberation” before being unable to agree on a death sentence recommendation, and thus, defendant was not entitled to a directed life sentence, where jury began deliberations at 1:33 p.m. and informed the judge that it as hopelessly deadlocked at 10:44 a.m. the next day. Tucker v. Catoe (S.C. 2001) 346 S.C. 483, 552 S.E.2d 712. Sentencing And Punishment 1779(1)

23. Closing arguments

Solicitor’s reference to “the blond lady” when cross examining a witness about a former prison guard who had engaged in a sexual relationship with defendant was not made to inflame passions or prejudices of jury in death‑penalty phase of murder trial, even though reference could have racial connotations; reference was made while cross examining a defense witness, whereas if the state had sought to make race of defendant’s former lover an issue in case, it would have elicited evidence to that effect while examining a state’s witness who testified extensively about the affair. State v. Bennett (S.C. 2006) 369 S.C. 219, 632 S.E.2d 281, certiorari denied, certiorari denied 127 S.Ct. 681, 549 U.S. 1061, 166 L.Ed.2d 530, habeas corpus granted 170 F.Supp.3d 851, affirmed 842 F.3d 319. Sentencing And Punishment 1780(2)

Solicitor’s comparison of defendant’s size and violent acts to those of “King Kong” during closing argument was not an appeal to passions or prejudices of jury in death‑penalty phase of murder trial, even though term “King Kong” could have racial connotations; defendant’s size and strength were probative of aggravating circumstance of physical torture, which was charged to jury, and, in that respect, solicitor’s use of “King Kong” was not suggestive of a giant black gorilla who abducts a white woman but, rather, was descriptive of defendant’s size and strength as they related to his past crimes. State v. Bennett (S.C. 2006) 369 S.C. 219, 632 S.E.2d 281, certiorari denied, certiorari denied 127 S.Ct. 681, 549 U.S. 1061, 166 L.Ed.2d 530, habeas corpus granted 170 F.Supp.3d 851, affirmed 842 F.3d 319. Sentencing And Punishment 1780(2)

Solicitor’s comparison to defendant’s size and violent acts to those of a “Caveman” during closing argument was not inflammatory in death‑penalty phase of murder trial; comment was merely descriptive of two of defendant’s past violent incidents in which he dragged victims by the hair. State v. Bennett (S.C. 2006) 369 S.C. 219, 632 S.E.2d 281, certiorari denied, certiorari denied 127 S.Ct. 681, 549 U.S. 1061, 166 L.Ed.2d 530, habeas corpus granted 170 F.Supp.3d 851, affirmed 842 F.3d 319. Sentencing And Punishment 1780(2)

Solicitor’s statement in penalty phase of murder prosecution, that there was no mitigation evidence that defendant had ever done a good deed or had a decent thought, was not an improper comment on defendant’s failure to testify. State v. Shuler (S.C. 2003) 353 S.C. 176, 577 S.E.2d 438. Sentencing And Punishment 1780(2)

State presented evidence of defendant’s future dangerousness during sentencing phase of capital murder prosecution to entitle defendant to instruction on parole ineligibility; State presented evidence that defendant became enraged and verbally abusive to a staff member of the detention center when she turned off the telephones, State introduced evidence that defendant was incapable of following rules by showing he had violated his probation in the past and had been charged for possession of contraband in the jail, State showed that defendant was a repeat criminal offender, and State’s language during closing argument that “they might come back,” implied that defendant might come back and commit future crimes if he was not executed. State v. Shafer (S.C. 2002) 352 S.C. 191, 573 S.E.2d 796. Sentencing And Punishment 1780(3)

A solicitor has a right, during closing arguments, to state his version of the testimony and to comment on the weight to be given such testimony. Humphries v. State (S.C. 2002) 351 S.C. 362, 570 S.E.2d 160, rehearing denied. Criminal Law 2073

Solicitor’s closing argument, at penalty phase of capital murder trial, was a proper use of victim impact evidence to compare the uniqueness of defendant and victim based on evidence already in the record, rather than an improper argument that the victim was “worthy” and that defendant was “unworthy”; defendant had introduced evidence of his own uniqueness through testimony of 13 mitigation witnesses regarding his difficult childhood and background, and solicitor’s argument compared how victim had dealt with victim’s childhood poverty and adversity in a different way than defendant. Humphries v. State (S.C. 2002) 351 S.C. 362, 570 S.E.2d 160, rehearing denied. Sentencing And Punishment 1763; Sentencing And Punishment 1780(2)

Although the plain language of Section 16‑3‑20 gives a defendant the right to a closing argument during sentencing, it does not give the defendant the right to an opening statement in the sentencing phase. State v. Southerland (S.C. 1994) 316 S.C. 377, 447 S.E.2d 862, rehearing denied, certiorari denied 115 S.Ct. 1136, 513 U.S. 1166, 130 L.Ed.2d 1096, denial of post‑conviction relief affirmed in part, reversed in part 337 S.C. 610, 524 S.E.2d 833.

A solicitor’s closing argument was not improper where the solicitor commented that the case warranted the death penalty, referred to the defendant’s parole eligibility in 20 years if sentenced to life, and remarked that the defendant’s evidence of post traumatic stress syndrome should not mitigate the crimes. State v. Atkins (S.C. 1990) 303 S.C. 214, 399 S.E.2d 760, certiorari denied 111 S.Ct. 2913, 501 U.S. 1259, 115 L.Ed.2d 1076, denial of habeas corpus affirmed 139 F.3d 887, certiorari denied 119 S.Ct. 191, 525 U.S. 882, 142 L.Ed.2d 156. Sentencing And Punishment 1780(2)

A solicitor’s closing argument in the sentencing phase of a capital murder prosecution, imploring the jury “to do what’s right” and stating that if the death penalty “was not right in this case, it was never right,” did not impermissibly inject the solicitor’s personal opinion concerning the death penalty into the proceeding; since the solicitor’s comments did not diminish the role of the jury to decide the defendant’s fate, the argument was proper. The solicitor’s argument suggesting to the jury that the imposition of a light sentence would be a “cop out” was not improper where the solicitor did not attack the courage or lack thereof of the jury to impose the death sentence. Additionally, the solicitor’s comment that his voice would be the last one heard on behalf of the State and the victim, and his suggestion to the jury that imposing a sentence less than the death penalty would be a “blight on the memory” of the victim, were not improper. State v. Bell (S.C. 1990) 302 S.C. 18, 393 S.E.2d 364, certiorari denied 111 S.Ct. 227, 498 U.S. 881, 112 L.Ed.2d 182.

A solicitor’s reference to the deterrent effect of capital punishment during closing argument was not improper since a deterrence argument is proper in the sentencing phase of a capital trial. Additionally, the solicitor’s argument emphasizing that the defendant’s crimes were uncharacteristic and unpredictable and that the defendant was therefore “more frightening” than “career criminals,” did not compare the relative merits of the defendant’s prosecution with other prosecutions, and was therefore not impermissible. State v. Truesdale (S.C. 1990) 301 S.C. 546, 393 S.E.2d 168, certiorari denied 111 S.Ct. 800, 498 U.S. 1074, 112 L.Ed.2d 861, rehearing denied 111 S.Ct. 1341, 499 U.S. 932, 113 L.Ed.2d 272.

A solicitor’s closing argument during the sentencing phase of a capital case did not improperly appeal to the jury’s passion and prejudice by employing such phrases as “cop‑out” and “guilt trip” in exhorting the jury to return a sentence of death, and did not deprive the defendant of a fair trial where, in context, the solicitor’s comments urged a fearless administration of the law in the face of the defense counsel’s emotional appeal for mercy. State v. Patterson (S.C. 1989) 299 S.C. 280, 384 S.E.2d 699, vacated 110 S.Ct. 709, 493 U.S. 1013, 107 L.Ed.2d 730, on remand 302 S.C. 384, 396 S.E.2d 366.

A solicitor’s jury argument during the sentencing phase of a capital case that prison inmates can come and go as they please, can come out for visits, and have to report back to their cells for the evening meals did not improperly trivialize life imprisonment where the thrust of the solicitor’s comment was to distinguish life on death row, where the defendant had been residing, from life in the general prison population where the defendant would be placed if given a life sentence, and the solicitor was directly quoting the defendant’s own witness and was within the record as required. Additionally, the solicitor’s argument did not undermine the requirement that life imprisonment be understood in its plain and ordinary meaning, or that the defendant be allowed to present evidence in mitigation of death. State v. Patterson (S.C. 1989) 299 S.C. 280, 384 S.E.2d 699, vacated 110 S.Ct. 709, 493 U.S. 1013, 107 L.Ed.2d 730, on remand 302 S.C. 384, 396 S.E.2d 366. Sentencing And Punishment 1780(2)

A solicitor’s closing argument at the sentencing phase of a capital case violated the defendant’s Eighth Amendment rights, requiring reversal of the death sentence, where the solicitor’s extensive comments regarding the victim’s character were unnecessary to an understanding of the circumstances of the crime, and the remarks conveyed the suggestion that the defendant deserved a death sentence because the victim was a religious man and a registered voter. State v. Gathers (S.C. 1988) 295 S.C. 476, 369 S.E.2d 140, certiorari granted 109 S.Ct. 218, 488 U.S. 888, 102 L.Ed.2d 209, dismissal denied 109 S.Ct. 778, 488 U.S. 1002, 102 L.Ed.2d 771, affirmed 109 S.Ct. 2207, 490 U.S. 805, 104 L.Ed.2d 876, rehearing denied 110 S.Ct. 24, 492 U.S. 938, 106 L.Ed.2d 636.

A solicitor’s statement during closing argument in the sentencing phase of a capital proceeding that to sentence the defendant other than to death would be a mockery of the memory of the victim did not improperly appeal to the passion and sympathy of the jury. State v. Middleton (S.C. 1988) 295 S.C. 318, 368 S.E.2d 457, certiorari denied 109 S.Ct. 189, 488 U.S. 872, 102 L.Ed.2d 158, rehearing denied 109 S.Ct. 406, 488 U.S. 961, 102 L.Ed.2d 393, habeas corpus dismissed 855 F.Supp. 837, affirmed 77 F.3d 469, certiorari denied 117 S.Ct. 199, 136 L.Ed.2d 135, rehearing denied 117 S.Ct. 449, 136 L.Ed.2d 345. Sentencing And Punishment 1780(2)

Final argument of solicitor in penalty phase of capital trial must be carefully tailored so as not to appeal to personal bias of jurors, nor be calculated to arouse passion or prejudice; argument must be confined to record and its reasonable inferences and focus on characteristics of defendant and nature of crime. State v. Reed (S.C. 1987) 293 S.C. 515, 362 S.E.2d 13. Sentencing And Punishment 1780(2)

The Fifth Amendment privilege against compelled self‑incrimination applies in both the guilt and penalty phase of a capital trial, and a defendant was unfairly prejudiced by the solicitor’s comment in closing argument calling attention to defendant’s failure to testify. State v. Arther (S.C. 1986) 290 S.C. 291, 350 S.E.2d 187.

Nothing in Section 16‑3‑20(B) can be interpreted as denying to a capital defendant the right to testify in the event he chooses to also make a closing statement. The defendant is entitled to both testify and make a closing statement. State v. Norris (S.C. 1985) 285 S.C. 86, 328 S.E.2d 339.

In a prosecution for murder and first degree criminal sexual assault, the solicitor’s closing argument in the sentencing phase was improper and violated Section 16‑3‑20(B) where the solicitor urged the jury to consider the defendant’s plea of not guilty as evidence that defendant lacked remorse. State v. Sloan (S.C. 1982) 278 S.C. 435, 298 S.E.2d 92. Sentencing And Punishment 1780(2)

24. Jurisdiction

Trial court had subject matter jurisdiction to sentence defendant convicted of murder to death; although defendant argued court lacked subject matter jurisdiction to sentence him to death since indictments for murder did not allege any aggravating circumstance which exposed him to death penalty, aggravating circumstances were sentencing factors and were not elements of murder, and state, as required by statute, timely notified defendant of its intention to seek death penalty and identified aggravating circumstances and related evidence state intended to use at trial. State v. Laney (S.C. 2006) 367 S.C. 639, 627 S.E.2d 726, rehearing denied. Indictment And Information 113; Sentencing And Punishment 1742; Sentencing And Punishment 1744

25. Presumptions and burden of proof

A defendant in a capital case shall have the burden of proving he or she is mentally retarded by a preponderance of the evidence. Franklin v. Maynard (S.C. 2003) 356 S.C. 276, 588 S.E.2d 604, rehearing denied. Sentencing And Punishment 1793

Probative value of recording of murder victim’s 911 telephone call, revealing victim’s physical pain and suffering after being shot by defendant, was not outweighed by risk of prejudice in penalty phase of murder prosecution; recording described crime scene immediately after victim and her family were shot, and tape was relevant to establish aggravating circumstance of physical torture. State v. Shuler (S.C. 2003) 353 S.C. 176, 577 S.E.2d 438. Sentencing And Punishment 1767

Adverse inference was not warranted at sentencing hearing by state’s unexplained failure to call codefendant at defendant’s murder trial, where codefendant was accessible to both the state and the defense, and one witness who was with defendant and codefendant during the torture and murder of victim and another witness who returned to crime scene with defendant to bury victim testified at defendant’s murder trial. State v. Charping (S.C. 1998) 333 S.C. 124, 508 S.E.2d 851, rehearing denied, certiorari denied 119 S.Ct. 2345, 527 U.S. 1007, 144 L.Ed.2d 241. Sentencing And Punishment 1753

Reasonable juror would have understood from penalty phase instructions in capital murder prosecution that burden of proof was upon defendant to establish that he should not be sentenced to death once state established statutory aggravating circumstance or that mitigating circumstance must be established before life sentence could be imposed; instructions specified that state had overall burden of proof, that jury could impose life sentence even if it found statutory aggravating circumstance, and that jury was authorized to impose life sentence even if it did not find any mitigating circumstances. State v. Hicks (S.C. 1998) 330 S.C. 207, 499 S.E.2d 209, rehearing denied, certiorari denied 119 S.Ct. 552, 525 U.S. 1022, 142 L.Ed.2d 459. Criminal Law 778(2)

The defendant may rebut victim impact evidence offered by the state. State v. Southerland (S.C. 1994) 316 S.C. 377, 447 S.E.2d 862, rehearing denied, certiorari denied 115 S.Ct. 1136, 513 U.S. 1166, 130 L.Ed.2d 1096, denial of post‑conviction relief affirmed in part, reversed in part 337 S.C. 610, 524 S.E.2d 833.

Trial court erred in instructing jury that accused is required to establish plea of self‑defense by preponderance or greater weight of evidence, because defendant must merely produce evidence which causes jury to have reasonable doubt regarding his guilt. State v. Bellamy (S.C. 1987) 293 S.C. 103, 359 S.E.2d 63. Homicide 1194

Since under state law no articulated burden is placed on a capital defendant to prove his statutory mitigating circumstances, the trial court erred in charging that the jury could consider a statutory mitigating circumstance only if it were supported by the evidence beyond a reasonable doubt. State v. Patrick (S.C. 1986) 289 S.C. 301, 345 S.E.2d 481.

There was no error in instructing the jury that the defendant in a murder case had the burden to prove mitigation. State v. South (S.C. 1985) 285 S.C. 529, 331 S.E.2d 775, certiorari denied 106 S.Ct. 209, 474 U.S. 888, 88 L.Ed.2d 178, denial of post‑conviction relief affirmed 310 S.C. 504, 427 S.E.2d 666.

26. Admissibility of evidence—In general

Court’s exclusion from death penalty sentencing hearing of testimony of jailors and visitor to jail as to defendant’s good behavior in jail between his arrest and trial denied defendant his right to place before sentencing jury all relevant evidence in mitigation of punishment, thus violating cruel and unusual punishment clause of Eighth Amendment. Skipper v. South Carolina (U.S.S.C. 1986) 106 S.Ct. 1669, 476 U.S. 1, 90 L.Ed.2d 1. Sentencing And Punishment 1757

Trial court acted within its discretion in refusing to recuse Solicitor’s Office as advocates and declining defendant’s request to question Solicitor for purposes of asserting prosecutorial misconduct claim at sentencing in capital murder trial; determination of prosecutorial misconduct was not necessarily dependent upon intent of the prosecutor, as such testimony was neither relevant nor material to the defendant’s claim, and any testimony from the Solicitor or members of his staff would have been cumulative as defense counsel had submitted significant testimonial and documentary evidence regarding the Solicitor’s use of the challenged tactic in previous trials. State v. Inman (S.C. 2011) 395 S.C. 539, 720 S.E.2d 31, rehearing denied, certiorari denied 133 S.Ct. 219, 568 U.S. 863, 184 L.Ed.2d 112. Criminal Law 1693; Criminal Law 1986

Although a capital defendant may present witnesses at sentencing who know and care for him and are willing on that basis to ask for mercy on his behalf, he may not present witnesses to testify merely to their religious and philosophical attitudes about the death penalty; nor is he entitled to present the opinion of a witness about what verdict the jury “ought” to reach. State v. Johnson (S.C. 2000) 338 S.C. 114, 525 S.E.2d 519, rehearing denied, certiorari denied 121 S.Ct. 104, 531 U.S. 840, 148 L.Ed.2d 62. Sentencing And Punishment 1758(1); Sentencing And Punishment 1768

State was not required to reintroduce the guilt phase evidence at beginning of sentencing phase of capital murder trial. State v. Huggins (S.C. 1999) 336 S.C. 200, 519 S.E.2d 574, rehearing denied, certiorari denied 120 S.Ct. 1199, 528 U.S. 1172, 145 L.Ed.2d 1103. Sentencing And Punishment 1660

In a murder prosecution, the trial judge erred in failing to secure an on‑the‑record waiver of the defendant’s right to testify at the sentencing phase proceeding, even though he had waived his right to testify or offer a statement during his guilty plea, where it was not shown that the defendant was even aware that he could testify at the sentencing. State v. Ray (S.C. 1993) 310 S.C. 431, 427 S.E.2d 171.

The trial court erred in instructing a defendant, who was giving a jury statement pursuant to Section 16‑3‑20, that he was not to “talk about any of the facts that surround the incident” since, although the trial judge may prohibit unsworn testimony, the defendant may present argument regarding facts that are in evidence. State v. Davis (S.C. 1991) 306 S.C. 246, 411 S.E.2d 220.

The mother of a defendant convicted of murder should have been allowed to answer the question “Do you have a basis for asking this jury to spare your son’s life?” during the penalty phase of his trial since her answer would have constituted a general plea for mercy rather than testimony about what verdict the witness thought should be imposed; however, this error was not prejudicial where the mother later stated “That’s my son. I don’t want him to die.” State v. Torrence (S.C. 1991) 305 S.C. 45, 406 S.E.2d 315. Sentencing And Punishment 1757

A trial court did not err in refusing the defendant’s request to strike the death penalty due to prosecutorial misconduct, based upon the allegation that the solicitor obtained a medical report in violation of the attorney‑client privilege, where the trial court precluded the State’s use of the report as well as any testimony of the examining physician, and, therefore, the defendant suffered no prejudice. State v. Atkins (S.C. 1990) 303 S.C. 214, 399 S.E.2d 760, certiorari denied 111 S.Ct. 2913, 501 U.S. 1259, 115 L.Ed.2d 1076, denial of habeas corpus affirmed 139 F.3d 887, certiorari denied 119 S.Ct. 191, 525 U.S. 882, 142 L.Ed.2d 156. Criminal Law 1171.1(1); Sentencing And Punishment 1789(9)

A trial court in a capital murder case properly exercised its discretion in prohibiting the defendant’s counsel from eliciting the opinions of the defendant’s family members concerning the appropriate punishment since the prohibited line of questioning went to the ultimate issue to be decided by the jury ‑ life imprisonment versus death penalty ‑ and was properly reserved for jury determination. State v. Matthews (S.C. 1988) 296 S.C. 379, 373 S.E.2d 587, certiorari denied 109 S.Ct. 1559, 489 U.S. 1091, 103 L.Ed.2d 861, denial of habeas corpus affirmed 105 F.3d 907, certiorari denied 118 S.Ct. 102, 139 L.Ed.2d 57.

A defendant was prejudiced by the exclusion of his complete confession at the penalty phase where the confession contained evidence that the defendant may have acted under the co‑defendant’s domination to support the statutory mitigating circumstance that the defendant “acted under duress or under the domination of another person” as set forth in Section 16‑3‑20(C)(b)(5). State v. Howard (S.C. 1988) 295 S.C. 462, 369 S.E.2d 132, certiorari denied 109 S.Ct. 3174, 490 U.S. 1113, 104 L.Ed.2d 1036, rehearing denied 110 S.Ct. 13, 492 U.S. 932, 106 L.Ed.2d 628, denial of habeas corpus affirmed 131 F.3d 399.

Evidence that co‑defendant had told mitigation witness several months before murder that she was angry with victim because of argument the two had at store was relevant to one of mitigating circumstances charged and should have been admitted into evidence. State v. Reed (S.C. 1987) 293 S.C. 515, 362 S.E.2d 13.

In a trial for the murder of a police officer, the badge and credentials of the officer were admissible as proof of an aggravating circumstance under Section 16‑3‑20(C)(a)(7). State v. South (S.C. 1985) 285 S.C. 529, 331 S.E.2d 775, certiorari denied 106 S.Ct. 209, 474 U.S. 888, 88 L.Ed.2d 178, denial of post‑conviction relief affirmed 310 S.C. 504, 427 S.E.2d 666. Sentencing And Punishment 1731

In the sentencing phase of a capital case it is essential that the jury have for consideration all pertinent information about the defendant on trial for his life. State v. Skipper (S.C. 1985) 285 S.C. 42, 328 S.E.2d 58, certiorari granted in part 106 S.Ct. 270, 474 U.S. 900, 88 L.Ed.2d 225, reversed 106 S.Ct. 1669, 476 U.S. 1, 90 L.Ed.2d 1. Sentencing And Punishment 1756

Before a death sentence under Section 16‑3‑20 may be imposed, the attention of a jury or a judge must be directed to the specific circumstances of the crime and the characteristics of the person who committed the crime. State v. Stewart (S.C. 1984) 283 S.C. 104, 320 S.E.2d 447. Sentencing And Punishment 1665; Sentencing And Punishment 1700

In a prosecution for murder, the court properly quashed defendant’s subpoena duces tecum issued for the Director of the South Carolina Department of Corrections, directing him to bring the electric chair to the courtroom based on defendant’s allegation that the process of electrocution is evidence in mitigation of the punishment and should have been presented to the jury under Section 16‑3‑20(B); the legislature has determined that capital punishment shall be imposed by electrocution, under Section 24‑3‑530, and the manner or nature of capital punishment has been removed from consideration of juries. State v. Thompson (S.C. 1982) 278 S.C. 1, 292 S.E.2d 581, certiorari denied 102 S.Ct. 1996, 456 U.S. 938, 72 L.Ed.2d 458, rehearing denied 102 S.Ct. 2917, 457 U.S. 1112, 73 L.Ed.2d 1323. Sentencing And Punishment 1758(4)

27. —— Victim information, admissibility of evidence

Victim impact evidence is admissible in South Carolina at the sentencing phase of a capital murder trial, and the State is permitted to make closing arguments regarding that evidence during the sentencing phase. Humphries v. State (S.C. 2002) 351 S.C. 362, 570 S.E.2d 160, rehearing denied. Sentencing And Punishment 1763; Sentencing And Punishment 1780(2)

The trial court did not err in refusing to allow the defendant to introduce evidence of the victim’s bad character in mitigation of his sentence where the state did not introduce any victim impact evidence. State v. Southerland (S.C. 1994) 316 S.C. 377, 447 S.E.2d 862, rehearing denied, certiorari denied 115 S.Ct. 1136, 513 U.S. 1166, 130 L.Ed.2d 1096, denial of post‑conviction relief affirmed in part, reversed in part 337 S.C. 610, 524 S.E.2d 833.

The impact of a crime on the victim and the victim’s family is not per se inadmissible in a capital sentencing proceeding; thus, a court may admit evidence of the specific harm done by a defendant so that a jury may meaningfully consider the defendant’s blameworthiness at the sentencing phase at trial. State v. Southerland (S.C. 1994) 316 S.C. 377, 447 S.E.2d 862, rehearing denied, certiorari denied 115 S.Ct. 1136, 513 U.S. 1166, 130 L.Ed.2d 1096, denial of post‑conviction relief affirmed in part, reversed in part 337 S.C. 610, 524 S.E.2d 833.

The trial court properly admitted testimony by the parents of 2 murder victims regarding their reliance on the victims, as well as the victims’ dreams and aspirations, in the sentencing phase of a capital murder trial since the evidence was relevant to the victims’ uniqueness as individual human beings. State v. Rocheville (S.C. 1993) 310 S.C. 20, 425 S.E.2d 32, rehearing denied, certiorari denied 113 S.Ct. 2978, 508 U.S. 978, 125 L.Ed.2d 675, rehearing denied 114 S.Ct. 21, 509 U.S. 942, 125 L.Ed.2d 772, appeal from denial of habeas corpus 175 F.3d 1015, certiorari denied 120 S.Ct. 377, 528 U.S. 953, 145 L.Ed.2d 294.

In the sentencing phase of a capital murder trial, the court did not err in admitting the testimony of the victim’s mother regarding the victim’s decision to attend the college at which she was murdered, even though some of her comments possessed little probative value, where the fact that the victim was a hard‑working college student with strong aspirations to higher education was already known to the jury, and thus the testimony did not improperly convey to them that the defendant was more deserving of the death penalty for his crime. State v. Davis (S.C. 1992) 309 S.C. 326, 422 S.E.2d 133, rehearing denied, certiorari denied 113 S.Ct. 2355, 508 U.S. 915, 124 L.Ed.2d 263.

28. —— Experts, admissibility of evidence

Manner in which State conducted voir dire of defense expert concerning her licensure status, questioning trial court whether the witness was subject to civil and criminal penalties for practicing social work without a license, unequivocally constituted witness intimidation and prosecutorial misconduct, during sentencing in capital murder prosecution. State v. Inman (S.C. 2011) 395 S.C. 539, 720 S.E.2d 31, rehearing denied, certiorari denied 133 S.Ct. 219, 568 U.S. 863, 184 L.Ed.2d 112. Sentencing And Punishment 1780(2)

Two experts did not improperly testify as to the existence of statutory mitigating circumstances where the solicitor asked both experts whether they had any opinion as to the defendant’s state of mind on the day of the crimes, and whether he lacked substantial capacity to conform his conduct to the requirements of the law on that day. The question did not go to the existence of statutory mitigating circumstances but, rather, to the experts’ knowledge of the defendant’s state of mind on the day of the crimes; since the defendant’s state of mind was relevant, admission of the testimony was proper. State v. Atkins (S.C. 1990) 303 S.C. 214, 399 S.E.2d 760, certiorari denied 111 S.Ct. 2913, 501 U.S. 1259, 115 L.Ed.2d 1076, denial of habeas corpus affirmed 139 F.3d 887, certiorari denied 119 S.Ct. 191, 525 U.S. 882, 142 L.Ed.2d 156. Criminal Law 470(2)

Trial judge committed error in refusing to allow in evidence, at the sentencing phase of a capital murder trial, of expert opinion testimony of a clinical psychologist that the defendant very likely could adjust to prison life. State v. Riddle (S.C. 1987) 291 S.C. 232, 353 S.E.2d 138.

29. —— Photographs, admissibility of evidence

If a photograph offered for admission during sentencing phase of a capital murder trial serves to corroborate testimony, there is no abuse of discretion in admitting the photograph. State v. Evins (S.C. 2007) 373 S.C. 404, 645 S.E.2d 904, rehearing denied, certiorari denied, certiorari denied 128 S.Ct. 662, 552 U.S. 1046, 169 L.Ed.2d 521. Sentencing And Punishment 1767

Trial court did not abuse its discretion in admitting during sentencing phase of capital murder trial seven photographs of the victim, two of which revealed that the victim had defecated on herself; photographs showed that victim was substantially in the same condition as defendant left her, photographs showing defecation corroborated testimony that had been given, and the photographs were not unnecessarily gruesome or disturbing. State v. Evins (S.C. 2007) 373 S.C. 404, 645 S.E.2d 904, rehearing denied, certiorari denied, certiorari denied 128 S.Ct. 662, 552 U.S. 1046, 169 L.Ed.2d 521. Sentencing And Punishment 1767

Photographs depicting left and right side of two‑year‑old victim’s head and abdominal area were necessary to corroborate pathologist’s testimony, to understand true nature of attack on victim, and were relevant to demonstrate aggravating circumstances of physical torture, and thus were admissible in sentencing phase of capital murder prosecution; pathologist testified that he had to dissect from ear to ear to be able to see large areas of bruising which could not be seen from outside, photographs of abdominal area showed bruising under the skin in abdominal muscles and blood inside abdomen, and pathologist testified that all of the blood inside abdomen contributed to victim’s death. State v. Haselden (S.C. 2003) 353 S.C. 190, 577 S.E.2d 445. Sentencing And Punishment 1767

Photograph depicting two‑year‑old victim’s dilated anus was not relevant to sentencing phase of capital murder prosecution, but rather served only to inflame jury, and thus was inadmissible; during sentencing phase, pathologist only reiterated his guilt phase testimony that there was no trauma to anus and that rectal dilation was not unusual after death, and photograph did not go to circumstances of crime, characteristics of defendant, nor to existence of aggravating circumstances, but sole purpose of photo was to insinuate that perhaps there was sexual abuse when there was no evidence of such an assault. State v. Haselden (S.C. 2003) 353 S.C. 190, 577 S.E.2d 445. Sentencing And Punishment 1767

In sentencing proceedings, the trial court may admit photographs which depict the bodies of the murder victims in substantially the same condition in which the defendant left them in order to show the circumstances of the crime and the character of the defendant; they are also admissible when material and relevant to an aggravating circumstance. State v. Johnson (S.C. 2000) 338 S.C. 114, 525 S.E.2d 519, rehearing denied, certiorari denied 121 S.Ct. 104, 531 U.S. 840, 148 L.Ed.2d 62. Sentencing And Punishment 1767

Crime scene photographs showing murder victim’s entire body as discovered by police, close‑up view of her left hand and forearm, and close‑up shots of her head and chest, were admissible in sentencing phase of capital murder prosecution; expert used them to show that victim had rolled more than six feet after initial blow, which was relevant to physical torture aggravating circumstance, and photographs of head and hand showed brutality of crime and nature of physical abuse, which was not only pertinent to showing circumstances of crime and character of the defendant, but to establish aggravating circumstance of physical torture. State v. Johnson (S.C. 2000) 338 S.C. 114, 525 S.E.2d 519, rehearing denied, certiorari denied 121 S.Ct. 104, 531 U.S. 840, 148 L.Ed.2d 62. Sentencing And Punishment 1767

Autopsy photographs showing victim’s nearly severed shoulder and her head wounds were admissible in sentencing phase of capital murder prosecution; they revealed true nature of attack and would have permitted jury to comprehend precise damage inflicted by machete, which, in turn, would have allowed jury to determine existence of physical torture by assessing seriousness of physical abuse inflicted upon victim’s body before her death. State v. Johnson (S.C. 2000) 338 S.C. 114, 525 S.E.2d 519, rehearing denied, certiorari denied 121 S.Ct. 104, 531 U.S. 840, 148 L.Ed.2d 62. Sentencing And Punishment 1767

In determining whether to recommend a sentence of death, the jury may be permitted to see photographs which depict the bodies of the murder victims in substantially the same condition in which the defendant left them; while trial judge is still required to balance the prejudicial effect of the photographs against their probative value, the scope of the probative value is much broader in the sentencing phase of capital case. State v. Rosemond (S.C. 1999) 335 S.C. 593, 518 S.E.2d 588, denial of post‑conviction relief affirmed in part, reversed in part 383 S.C. 320, 680 S.E.2d 5, rehearing denied. Sentencing And Punishment 1767

Evidence of other crimes, including “gory photos” of victim of separate murder committed by defendant, was admissible at sentencing phase of capital murder trial. State v. Tucker (S.C. 1999) 334 S.C. 1, 512 S.E.2d 99, certiorari denied 119 S.Ct. 2407, 527 U.S. 1042, 144 L.Ed.2d 805. Sentencing And Punishment 1762; Sentencing And Punishment 1767

Photographs of victim’s body were admissible in sentencing phase of capital murder trial to show circumstances of crime and defendant’s character. State v. Tucker (S.C. 1999) 334 S.C. 1, 512 S.E.2d 99, certiorari denied 119 S.Ct. 2407, 527 U.S. 1042, 144 L.Ed.2d 805. Sentencing And Punishment 1767

Close‑up color photograph of victim’s face was admissible in sentencing phase of capital murder trial to show circumstances of crime and defendant’s character; photo accurately depicted victim’s condition after defendant left her, having shot her in lower part of her face five times. State v. Gardner (S.C. 1998) 332 S.C. 389, 505 S.E.2d 338, rehearing denied, certiorari denied 119 S.Ct. 1260, 526 U.S. 1022, 143 L.Ed.2d 356, denial of habeas corpus affirmed 511 F.3d 420, certiorari denied 2008 WL 2328355. Sentencing And Punishment 1767

Photographs of viable but unborn fetus were admissible in sentencing phase of prosecution for murder of both mother and fetus, who died of asphyxiation after defendant shot and killed mother; photographs supported statutory aggravating circumstances that defendant murdered two persons during one course of conduct, and that one victim was child under age of eleven. State v. Ard (S.C. 1998) 332 S.C. 370, 505 S.E.2d 328, rehearing denied. Sentencing And Punishment 318

Viability of unborn child of whose murder defendant was convicted was not at issue during sentencing phase of capital trial, for purposes of determining admissibility of photographs of victim; during guilt phase instructions, trial judge specifically charged jury it must find unborn child was viable, and having found defendant guilty of unborn child’s murder, jury had already concluded unborn child was viable. State v. Ard (S.C. 1998) 332 S.C. 370, 505 S.E.2d 328, rehearing denied. Sentencing And Punishment 1767

Photographs of viable but unborn fetus dressed in clothes his mother intended for him to wear home from hospital were admissible in sentencing phase of prosecution for murder of both mother and fetus, who died of asphyxiation after defendant shot and killed mother; photos revealed mother’s aspirations about birth of her child and were relevant to sentence for her murder. State v. Ard (S.C. 1998) 332 S.C. 370, 505 S.E.2d 328, rehearing denied. Sentencing And Punishment 318

Five color photos of defendant’s assault victim and eleven color autopsy photos of defendant’s murder victim were admissible in sentencing phase of capital murder prosecution; autopsy photos depicted victim’s body in “cleaned‑up state” and allowed pathologist to illustrate his testimony regarding victim’s pre‑ and peri‑mortem wounds, and, while photos of assault victim were gory, there was neither assertion, nor any evidence, that they improperly influenced judge. Ray v. State (S.C. 1998) 330 S.C. 184, 498 S.E.2d 640, rehearing denied, certiorari denied 119 S.Ct. 240, 525 U.S. 905, 142 L.Ed.2d 197. Sentencing And Punishment 1767

Photographs of the interior of the defendant’s home should have been admitted into evidence at the sentencing phase of the capital murder trial, as a mitigating circumstance, especially since, on the morning of the murder, the defendant had conferred with his landlord, the victim, concerning the dilapidated condition of the house and the need for repairs. State v. Cooper (S.C. 1986) 291 S.C. 332, 353 S.E.2d 441. Sentencing And Punishment 1767

In determining whether to recommend a sentence of death, the jury may be permitted to see photographs which depict the bodies of the murder victims in substantially the same condition in which the defendant left them. State v. Kornahrens (S.C. 1986) 290 S.C. 281, 350 S.E.2d 180, certiorari denied 107 S.Ct. 1592, 480 U.S. 940, 94 L.Ed.2d 781, denial of habeas corpus affirmed 66 F.3d 1350, certiorari denied 116 S.Ct. 1575, 517 U.S. 1171, 134 L.Ed.2d 673, rehearing denied 116 S.Ct. 2541, 518 U.S. 1013, 135 L.Ed.2d 1063.

At sentencing proceeding, evidence establishing circumstances of aggravation was admissible although defendant pled guilty and thus established circumstances of aggravation of kidnapping, rape and armed robbery beyond reasonable doubt, since diversity of circumstances under which murder can be committed requires that sentencing authority be given as much information as possible about circumstances of particular crime; photographs depicting post‑mortem abuse to victim’s body were properly admitted into evidence and considered by sentencing authority, not as additional evidence in aggravation of punishment, but as evidence of circumstances of crime and characteristics of individual defendant. State v. Shaw (S.C. 1979) 273 S.C. 194, 255 S.E.2d 799, certiorari denied 100 S.Ct. 437, 444 U.S. 957, 62 L.Ed.2d 329, rehearing denied 100 S.Ct. 694, 444 U.S. 1027, 62 L.Ed.2d 662, certiorari denied 100 S.Ct. 690, 444 U.S. 1026, 62 L.Ed.2d 660, rehearing denied 100 S.Ct. 1073, 444 U.S. 1104, 62 L.Ed.2d 791. Sentencing And Punishment 1762

Danger of unfair prejudice did not substantially outweigh probative value as to admission of six color photographs of victim’s body taken at crime scene, and six color autopsy photographs, at penalty phase of capital murder trial; one of the alleged aggravating circumstances at sentencing was physical torture, and the photographs illustrated defendant’s testimony regarding the location and the severity of the shotgun wounds. State v. Weik (S.C. 2002) 356 S.C. 76, 587 S.E.2d 683, rehearing granted, adhered to on rehearing 354 S.C. 382, 581 S.E.2d 834, certiorari denied 123 S.Ct. 2580, 539 U.S. 930, 156 L.Ed.2d 609. Sentencing And Punishment 1767

30. —— Prior acts, admissibility of evidence

In the penalty phase of a capital murder trial, the admission of evidence the defendant committed a similar crime is proper as it indicates his individual characteristics. State v. Owens (S.C. 2001) 346 S.C. 637, 552 S.E.2d 745, rehearing denied, appeal after new sentencing hearing 362 S.C. 175, 607 S.E.2d 78, appeal after new sentencing hearing 378 S.C. 636, 664 S.E.2d 80, certiorari denied, certiorari denied 129 S.Ct. 1004, 173 L.Ed.2d 300, habeas corpus dismissed 2010 WL 146164. Sentencing And Punishment 1762

Evidence that defendant had received domestic violence conviction three months prior to fatal shooting of infant daughter as she was being held by defendant’s wife was admissible, in prosecution for murder and assault and battery with intent to kill, to prove intent to kill and the absence of mistake or accident. State v. Smith (S.C. 1999) 337 S.C. 27, 522 S.E.2d 598. Criminal Law 371.41; Criminal Law 372.15

Witness’ testimony that, two days prior to robbery and murder of victim, defendant’s accomplice had fired gun at witness in dispute over food stamps was not relevant to circumstances of victim’s death and, thus, was properly excluded from evidence in penalty phase of capital murder trial, especially in light of defendant’s admission that he and accomplice had conspired to rob victim. State v. Huggins (S.C. 1999) 336 S.C. 200, 519 S.E.2d 574, rehearing denied, certiorari denied 120 S.Ct. 1199, 528 U.S. 1172, 145 L.Ed.2d 1103. Sentencing And Punishment 1759

Witness’ testimony that, three or four years before robbery and murder of victim, defendant’s accomplice had shot witness over a trivial incident was properly excluded from evidence in penalty phase of capital murder trial, as there was no evidence that defendant was a minor participant in crime and testimony was not probative of any fact in issue. State v. Huggins (S.C. 1999) 336 S.C. 200, 519 S.E.2d 574, rehearing denied, certiorari denied 120 S.Ct. 1199, 528 U.S. 1172, 145 L.Ed.2d 1103. Sentencing And Punishment 1756

Details of capital murder defendant’s prior murder convictions, including photographs of prior murder victims, were properly allowed into evidence in sentencing phase. State v. Tucker (S.C. 1999) 334 S.C. 1, 512 S.E.2d 99, certiorari denied 119 S.Ct. 2407, 527 U.S. 1042, 144 L.Ed.2d 805. Sentencing And Punishment 1762; Sentencing And Punishment 1767

Codefendant’s convictions and receipt of a life sentence for victim’s murder were irrelevant to establish defendant’s character nor did they demonstrate mitigating circumstances of the crime, and thus they was excludable at sentencing hearing. State v. Charping (S.C. 1998) 333 S.C. 124, 508 S.E.2d 851, rehearing denied, certiorari denied 119 S.Ct. 2345, 527 U.S. 1007, 144 L.Ed.2d 241. Sentencing And Punishment 1757

Evidence of the defendant’s prior attacks on 3 elderly women was properly admitted to show intent for purposes of the first degree burglary charge in a murder prosecution involving the beating death of an elderly woman, even though the 3 prior attacks involved sexual assaults, where each attack was accompanied by terrific physical violence far beyond that needed to accomplish the assault itself, and theft was not the overwhelming motivation; moreover, the probative value of the evidence outweighed its prejudicial effect since the issue of intent was a contested one. State v. Simmons (S.C. 1993) 310 S.C. 439, 427 S.E.2d 175, rehearing denied, certiorari granted 114 S.Ct. 57, 510 U.S. 811, 126 L.Ed.2d 27, reversed 114 S.Ct. 2187, 512 U.S. 154, 129 L.Ed.2d 133.

The trial court properly excluded, from a trial for murder and armed robbery, evidence of a co‑defendant’s previous conviction for assault and battery with intent to kill which was offered to show the statutory mitigating circumstances set forth in Section 16‑3‑20, where no evidence established its logical relevance to the circumstances of the crime charged and it was not probative on the issue of the defendant’s, rather than the co‑defendant’s, moral culpability. State v. Bell (S.C. 1991) 305 S.C. 11, 406 S.E.2d 165, certiorari denied 112 S.Ct. 888, 502 U.S. 1038, 116 L.Ed.2d 791. Sentencing And Punishment 1762

In a capital sentencing trial, the jury’s function is to determine the appropriate punishment based upon the circumstances of the crime and the characteristics of the defendant. Thus, testimony regarding prior difficulties between the defendant, who was white, and the victim’s family which was black, including an incident involving the defendant’s flying of the confederate flag on Independence Day, did not improperly imply that the defendant was racially prejudiced, and was properly admitted since the defendant’s prior disputes with the family were relevant to motive. State v. Atkins (S.C. 1990) 303 S.C. 214, 399 S.E.2d 760, certiorari denied 111 S.Ct. 2913, 501 U.S. 1259, 115 L.Ed.2d 1076, denial of habeas corpus affirmed 139 F.3d 887, certiorari denied 119 S.Ct. 191, 525 U.S. 882, 142 L.Ed.2d 156.

A defendant failed to show prejudice, and therefore could not complain that the solicitor’s testimony concerning the details of prior offenses constituted inadmissible hearsay, where the defendant’s trial strategy was apparently one which sought to draw the jury’s attention to his bizarre sexually deviant behavior in order to support his contention in mitigation that he was mentally ill, and the defendant presented numerous witnesses in mitigation who testified generally about his propensity to assault women and specifically about the assault the solicitor recounted. State v. Bell (S.C. 1990) 302 S.C. 18, 393 S.E.2d 364, certiorari denied 111 S.Ct. 227, 498 U.S. 881, 112 L.Ed.2d 182.

In the penalty phase of a capital case, the admission of testimony that a defendant has attempted a similar crime or crimes to that for which the defendant is on trial is proper because such testimony indicates a defendant’s individual characteristics and predisposition to commit similar crimes. These crimes may not be used to prove statutory aggravating circumstances, and the judge must properly limit the jury’s consideration of these offenses to evidence of the defendant’s characteristics as they may bear logical relevance to the crime. Although the commission of crimes being used to support an aggravating circumstance must be proved beyond a reasonable doubt, this high standard of proof is not necessary where crimes are introduced merely to demonstrate the defendant’s character. Thus, in a prosecution for murder and armed robbery, arising from the robbery and shooting of the victim in the parking lot of a shopping mall, evidence of other crimes involving the robbery and shooting of victims in shopping mall parking lots was properly admitted, and the judge’s charge to the jury that these crimes “should not be considered as substantive evidence of aggravating circumstances; but if you are convinced that the defendant committed those crimes, or any of them, you may consider them as evidence of his character, his characteristics,” was proper. State v. Green (S.C. 1990) 301 S.C. 347, 392 S.E.2d 157, certiorari denied 111 S.Ct. 229, 498 U.S. 881, 112 L.Ed.2d 183, rehearing denied 111 S.Ct. 548, 498 U.S. 995, 112 L.Ed.2d 556, denial of habeas corpus affirmed 220 F.3d 220.

Admission of defendant’s juvenile delinquency adjudications in evidence, at the sentencing phase of a capital murder trial, to show aggravating circumstance was error, where the state had failed to provide notice of intention to offer such evidence, and had failed to furnish the defendant with a copy of his criminal record in response to his discovery request under Criminal Practice Rule 8. State v. Riddle (S.C. 1987) 291 S.C. 232, 353 S.E.2d 138.

A capital murder defendant was unduly prejudiced by the introduction in evidence, at the sentencing phase, of an affidavit showing that the defendant had earlier been charged with murder, when the earlier murder charge had been dismissed, especially in light of the solicitor’s exploitation of the affidavit in closing argument by referring to the case at hand as defendant’s second murder. State v. Arther (S.C. 1986) 290 S.C. 291, 350 S.E.2d 187.

In a murder prosecution, the failure of the State to provide defendant with confessions to prior murders and photographs of prior murder victims prior to the commencement of his trial did not preclude admission of these items at the sentencing phase of his trial where the confession was given to defendant as soon as it was obtained and where defendant was advised that the state would rely upon his prior conviction as an aggravating circumstance. State v. Gaskins (S.C. 1985) 284 S.C. 105, 326 S.E.2d 132, certiorari denied 105 S.Ct. 2368, 471 U.S. 1120, 86 L.Ed.2d 266, habeas corpus dismissed 916 F.2d 941, rehearing denied, certiorari denied 111 S.Ct. 2277, 500 U.S. 961, 114 L.Ed.2d 728, rehearing denied 112 S.Ct. 14, 501 U.S. 1269, 115 L.Ed.2d 1098, habeas corpus denied 943 F.2d 49, certiorari denied 112 S.Ct. 18, 501 U.S. 1272, 115 L.Ed.2d 1102. Criminal Law 2007

31. Instructions—In general

Instructing jury during sentencing phase of capital murder trial that state had the burden to prove beyond a reasonable doubt that there were one or more aggravating circumstances that were not outweighed by any mitigating circumstances “found to exist” did not impermissibly cause jury to speculate that mitigating circumstances had to be proved beyond a reasonable doubt; instructions as a whole clearly distinguished between aggravating and mitigating circumstances, and did not once state that the defense bore the burden of proving facts constituting a mitigating circumstance beyond a reasonable doubt. Kansas v. Carr, 2016, 136 S.Ct. 633, 193 L.Ed.2d 535, on remand 305 Kan. 794, 388 P.3d 101. Sentencing and Punishment 1780(3)

Jury instruction on nonstatutory mitigating circumstances did not narrow evidence that the jury in a death‑penalty case could consider in mitigation to factors relating specifically to defendant’s murders of two persons, such that the instruction did not preclude the jury’s consideration of, e.g., defendant’s remorse or adaptability to prison life; in another instruction, trial court clearly indicated the jury’s power to consider any circumstance in mitigation, and a reasonable juror would have known that he or she could consider any reason in deciding whether to sentence defendant to death. Sigmon v. State (S.C. 2013) 403 S.C. 120, 742 S.E.2d 394, certiorari denied 134 S.Ct. 646, 187 L.Ed.2d 428. Sentencing and Punishment 1780(3)

Trial court’s Allen charge was not coercive in sentencing phase of capital murder proceeding; charge was not directed at minority jurors, charge evenly addressed both majority and minority jurors and urged them to consider each other’s views, there was no inquiry into jury’s numerical division, and jury deliberated for approximately three hours and 45 minutes after being given charge. State v. Williams (S.C. 2010) 386 S.C. 503, 690 S.E.2d 62, rehearing denied, certiorari denied, certiorari denied 131 S.Ct. 230, 562 U.S. 899, 178 L.Ed.2d 153. Criminal Law 865(1.5)

It is proper to instruct a jury in sentencing phase of a capital murder prosecution that it may recommend a life sentence for any reason or no reason at all, including as an act of mercy. Rosemond v. Catoe (S.C. 2009) 383 S.C. 320, 680 S.E.2d 5, rehearing denied. Sentencing And Punishment 1780(3)

Trial court could not instruct jury, in sentencing phase of capital murder prosecution, “You may recommend a sentence of life imprisonment for any reason or for no reason at all other than as an act of mercy”; testimony of two family friends who asked jury for mercy was admitted, and jury should have been allowed to consider such pleas for mercy; overruling State v. Hughey, 339 S.C. 439, 529 S.E.2d 721. Rosemond v. Catoe (S.C. 2009) 383 S.C. 320, 680 S.E.2d 5, rehearing denied. Sentencing And Punishment 1780(3)

The trial judge must submit for the jury’s consideration, at the penalty phase of a capital murder trial, any statutory mitigating circumstances supported by the evidence. State v. Vazsquez (S.C. 2005) 364 S.C. 293, 613 S.E.2d 359, rehearing denied, denial of post‑conviction relief reversed 388 S.C. 447, 698 S.E.2d 561. Sentencing And Punishment 1780(3)

Evidence did not warrant instruction, in murder prosecution, that a person assaulted in a club of which he a member is not required to retreat, in order to invoke the doctrine of self‑defense; the club at which shooting occurred was a dance club that charged five dollars for admission, and such evidence did not establish that defendant was a “member” of a club. Gilchrist v. State (S.C. 2005) 364 S.C. 173, 612 S.E.2d 702. Homicide 1485

Trial judge was not required to instruct jury during the penalty phase of capital murder trial that it could impose life sentence “for any reason or no reason at all”; jury was informed that it could consider any mitigating circumstance authorized by law and could impose life sentence even if aggravating circumstances were found. State v. Hicks (S.C. 1998) 330 S.C. 207, 499 S.E.2d 209, rehearing denied, certiorari denied 119 S.Ct. 552, 525 U.S. 1022, 142 L.Ed.2d 459. Sentencing And Punishment 1780(3)

The jury must be charged at the close of the penalty phase that it must find that the defendant’s confessions were voluntarily given and accompanied by a waiver of his constitutional rights, where a capital defendant’s disputed statement was introduced initially in the penalty phase; no confession may be considered by the jury unless it has been found beyond a reasonable doubt to have been given freely and voluntarily. State v. Torrence (S.C. 1991) 305 S.C. 45, 406 S.E.2d 315.

The jury instructions given by a trial court during the penalty phase of a capital murder prosecution were proper and did not impermissibly restrict the jury’s ability to consider all mitigating evidence by suggesting that only statutory mitigating circumstances were relevant, where the trial court instructed the jury that they could give a life sentence for any reason or for no reason at all and the court stated that the jurors could consider any mitigating circumstances otherwise authorized or allowed by law. Additionally, an instruction stating that the jury should not allow themselves “to be governed by sympathy, by prejudice, by passion, or by public opinion,” did not impermissibly imply that the jury could not consider “sympathy” in mitigation, where the instruction was given at the end of the penalty phase after the defendant had finished putting forth all of his evidence in mitigation, and a reasonable juror would simply not isolate the word “sympathy,” disregard all of the defendant’s evidence and all of the judge’s previous instructions, and refuse to consider mitigating evidence. State v. Bell (S.C. 1990) 302 S.C. 18, 393 S.E.2d 364, certiorari denied 111 S.Ct. 227, 498 U.S. 881, 112 L.Ed.2d 182.

It was not error for a court, during the sentencing phase of a capital murder trial, to refuse to charge the jury not to consider the deterrent effect of the death penalty. State v. Matthews (S.C. 1988) 296 S.C. 379, 373 S.E.2d 587, certiorari denied 109 S.Ct. 1559, 489 U.S. 1091, 103 L.Ed.2d 861, denial of habeas corpus affirmed 105 F.3d 907, certiorari denied 118 S.Ct. 102, 139 L.Ed.2d 57.

It is not error for trial judge to instruct jury that it must not be governed by sympathy in reaching its sentencing decision. State v. Owens (S.C. 1987) 293 S.C. 161, 359 S.E.2d 275, certiorari denied 108 S.Ct. 496, 484 U.S. 982, 98 L.Ed.2d 495. Criminal Law 798(.5)

Trial judge’s supplemental instruction properly informed jury that each one of 3 capital murder charges was separate and was not dependent on or affected by a verdict on the other charge. State v. Kornahrens (S.C. 1986) 290 S.C. 281, 350 S.E.2d 180, certiorari denied 107 S.Ct. 1592, 480 U.S. 940, 94 L.Ed.2d 781, denial of habeas corpus affirmed 66 F.3d 1350, certiorari denied 116 S.Ct. 1575, 517 U.S. 1171, 134 L.Ed.2d 673, rehearing denied 116 S.Ct. 2541, 518 U.S. 1013, 135 L.Ed.2d 1063. Criminal Law 878(3)

Since record was replete with evidence that the defendant was extremely intoxicated, smoking marijuana, and injecting drugs intravenously during the commission of the crimes, the trial judge was required by law to instruct the jury on statutory mitigating circumstances 2, 6, and 7. State v. Pierce (S.C. 1986) 289 S.C. 430, 346 S.E.2d 707.

In a murder trial, the trial judge properly charged the jury to consider the mitigating circumstances alleged by the defendant, and only the enumerated aggravating circumstances which the state proved beyond a reasonable doubt. State v. Smith (S.C. 1985) 286 S.C. 406, 334 S.E.2d 277, certiorari denied 106 S.Ct. 1239, 475 U.S. 1031, 89 L.Ed.2d 347, rehearing denied 106 S.Ct. 1665, 475 U.S. 1132, 90 L.Ed.2d 207, denial of habeas corpus affirmed 137 F.3d 808.

With no evidence in the record to support a reasonable inference that the defendant’s participation in a murder was relatively minor, there was no error in refusing to charge on mitigating circumstances in accordance with Section 16‑3‑20(C)(b)(4). State v. Patterson (S.C. 1984) 285 S.C. 5, 327 S.E.2d 650, certiorari denied 105 S.Ct. 2056, 471 U.S. 1036, 85 L.Ed.2d 329.

To instruct jury that it will recommend what sentence convicted murderer will be given is not improper and does not mask true nature of jurors’ responsibility at sentencing phase of bifurcated trial. State v. Linder (S.C. 1981) 276 S.C. 304, 278 S.E.2d 335.

Sentence of death must be vacated where judge failed to instruct jury that it could impose life imprisonment instead of death even if it found one or more statutory aggravating circumstances and where state improperly suggested to jury that its recommendation would not necessarily be followed. State v. Woomer (S.C. 1981) 276 S.C. 258, 277 S.E.2d 696, habeas corpus denied 905 F.2d 1533. Sentencing And Punishment 1789(10)

In prosecution for murder punishable by death, trial court properly denied instruction on involuntary manslaughter where defendant claimed that although he intentionally fired his shotgun, he meant to shoot over the victim’s head. State v. Craig (S.C. 1976) 267 S.C. 262, 227 S.E.2d 306. Homicide 1458

32. —— Unanimity, instructions

In the sentencing phase of a capital case, the trial judge’s failure to specify that a finding of a mitigating circumstance need not be unanimous was not improper on the ground that it could have led jurors to erroneously conclude that such a finding must be unanimous, where the trial judge clearly charged the jury that it could consider any mitigating factor and could recommend a life sentence for no reason at all, and nothing in the charge insinuated that a life sentence could be given only upon a unanimous finding of a mitigating circumstance. State v. Patterson (S.C. 1989) 299 S.C. 280, 384 S.E.2d 699, vacated 110 S.Ct. 709, 493 U.S. 1013, 107 L.Ed.2d 730, on remand 302 S.C. 384, 396 S.E.2d 366.

In a prosecution for armed robbery, kidnapping, and murder, the court properly denied defendant’s request to instruct the jury of the actual effect of failure to reach unanimous agreement as to punishments, and the court did not err in instructing the jury that unanimity would be required before a life sentence could be imposed since, under the language of Section 16‑3‑20(C), which provides that when a sentence of death is not recommended by the jury a life sentence must be given, that portion of the statute addressing the legal effect given to the existence of an unalterably divided jury is addressed to the trial judge only and need not be divulged to the jury. Furthermore, the court’s charge on written statutory instructions concerning mitigating circumstances was sufficient to alert the jurors that they could consider mitigating circumstances other than the nine statutory mitigating circumstances. State v. Copeland (S.C. 1982) 278 S.C. 572, 300 S.E.2d 63, certiorari denied 103 S.Ct. 1802, 460 U.S. 1103, 76 L.Ed.2d 367, rehearing denied 103 S.Ct. 3099, 462 U.S. 1124, 77 L.Ed.2d 1357, certiorari denied 103 S.Ct. 3553, 463 U.S. 1214, 77 L.Ed.2d 1399, rehearing denied 104 S.Ct. 39, 463 U.S. 1249, 77 L.Ed.2d 1457, appeal from denial of post‑conviction relief dismissed 134 F.3d 364.

Portion of statute which states that where sentence of death is not recommended by jury, life sentence must be given, addresses legal effect given to existence of unalterably divided jury, and is addressed to trial judge only and need not be divulged to jury. State v. Adams (S.C. 1981) 277 S.C. 115, 283 S.E.2d 582.

33. —— Weight of evidence, instructions

State death penalty statute mandating death sentence if jury finds at least one aggravating circumstance and no mitigating circumstances satisfies requirements of the Eighth Amendment and does not violate Amendment’s requirement of individualized sentencing, because presence of aggravating circumstances serves purpose of limiting class of death‑eligible defendants, and Amendment does not require that aggravating circumstances be further refined or weighed by jury, rather, requirement of individualized sentencing in capital cases is satisfied by allowing jury to consider all relevant mitigating evidence. Blystone v. Pennsylvania, U.S.Pa.1990, 110 S.Ct. 1078, 494 U.S. 299, 108 L.Ed.2d 255.

In determining whether to submit an aggravating circumstance to the jury in support of sentence of death, the trial court is concerned with the existence of the evidence, not its weight. State v. Locklair (S.C. 2000) 341 S.C. 352, 535 S.E.2d 420, rehearing denied, certiorari denied 121 S.Ct. 817, 531 U.S. 1093, 148 L.Ed.2d 701. Sentencing And Punishment 1777

The sentencing jury in a capital case should not be instructed to “weigh” the aggravating circumstances against the mitigating circumstances. Jones v. State (S.C. 1998) 332 S.C. 329, 504 S.E.2d 822, rehearing denied, certiorari denied 119 S.Ct. 1259, 526 U.S. 1021, 143 L.Ed.2d 355, rehearing denied 119 S.Ct. 1788, 526 U.S. 1128, 143 L.Ed.2d 815. Sentencing And Punishment 1780(3)

Judge has duty to review all statutory mitigating circumstances and instruct jury as to any which may be supported by evidence and not merely those which are requested by defendant, and in deciding which statutory mitigating circumstances may be supported, judge is concerned only with existence of evidence and not its weight; jury should not be instructed to “weigh” aggravating circumstances against mitigating circumstances, and jury should be instructed to “consider” any mitigating circumstances as well as any aggravating circumstances. State v. Bellamy (S.C. 1987) 293 S.C. 103, 359 S.E.2d 63.

Jury should not be instructed to “weigh” aggravating circumstances against mitigating circumstances, but should be instructed to consider any mitigating circumstances as well as any aggravating circumstances. State v. Bellamy (S.C. 1987) 293 S.C. 103, 359 S.E.2d 63. Sentencing And Punishment 368.5

In the sentencing phase of a capital trial, the trial judge must instruct the jury as to those statutory mitigating circumstances as may be supported by the evidence and, in this regard, the trial judge is not concerned with the weight of the evidence, but only with the existence of evidence. State v. Pierce (S.C. 1986) 289 S.C. 430, 346 S.E.2d 707. Sentencing And Punishment 368.5

34. —— Capacity to appreciate criminality, instructions

Neuropsychologist’s testimony during capital sentencing proceeding that defendant’s organic brain dysfunction would affect his ability “to cope and deal with stress and life itself” did not warrant jury instruction on statutory mitigating circumstance of defendant’s capacity to appreciate criminality of his conduct, or his ability to conform his conduct to requirements of law; such testimony implied that defendant could not deal with stress, not that he would be unable to appreciate criminality of his conduct or to conform his conduct to law. State v. Hughey (S.C. 2000) 339 S.C. 439, 529 S.E.2d 721, rehearing denied, certiorari denied 121 S.Ct. 345, 531 U.S. 946, 148 L.Ed.2d 277. Sentencing And Punishment 1780(3)

Capital murder defendant’s abuse as child, several head traumas, car accident, and death of his mother did not warranting sentencing phase jury instruction on statutory mitigating circumstance of defendant’s capacity to appreciate criminality of his conduct, or his ability to conform his conduct to requirements of law; trial judge adequately submitted issue of defendant’s mental well‑being by instructing jury to consider as non‑statutory mitigation, “his level of intellectual function whether as a natural consequence of his birth or as a result of physical and/or emotional trauma suffered as a child or as an adult.” State v. Hughey (S.C. 2000) 339 S.C. 439, 529 S.E.2d 721, rehearing denied, certiorari denied 121 S.Ct. 345, 531 U.S. 946, 148 L.Ed.2d 277. Sentencing And Punishment 1780(3)

Refusal to charge jury on mitigating circumstances in prosecution for murder was not error, even though accused was a borderline mental retardate, where testimony indicated he was able to appreciate the criminality of his conduct and to conform to the requirements of law, and one expert testified that he could communicate on a college level. State v. Tyner (S.C. 1979) 273 S.C. 646, 258 S.E.2d 559.

35. —— Mental or emotional disturbance, instructions

The trial court erred in failing to charge the jury, in a trial where the defendant was charged with murder and the death penalty was sought, on the mitigating circumstance in Section 16‑3‑20(C)(b)(2) that applies when “the murder was committed while the defendant was under the influence of mental or emotional disturbance” where there was evidence that the defendant had been drinking heavily on the night of the murder; it was insufficient to charge only Sections 16‑3‑20(C)(b)(6) and (7) pertaining to impairment of the defendant’s capacity or his age and mentality. State v. Young (S.C. 1991) 305 S.C. 380, 409 S.E.2d 352, denial of habeas corpus affirmed 205 F.3d 750, certiorari denied 121 S.Ct. 164, 531 U.S. 868, 148 L.Ed.2d 111.

A trial judge erred in failing to instruct the jury as to the statutory mitigating circumstances found in Section 16‑3‑20(C)(b)(2), (6), and (7) where the defense psychiatrist testified that the defendant had an antisocial personality which is synonymous with a psychopathic personality, that the defendant could kill again if given the opportunity, that such a disorder begins early in life, and that the defendant had not outgrown the illness as of the date of the trial, since this evidence raised the inference that the defendant was suffering from a mental disorder at the time the murder was committed. State v. Caldwell (S.C. 1990) 300 S.C. 494, 388 S.E.2d 816.

36. —— Parole eligibility, instructions

Neither trial court’s instruction, to effect that sentence of life imprisonment meant until death of defendant, nor defense counsel’s closing argument, to effect that, if capital murder defendant’s life was spared, then he would die in prison, was sufficient to inform jurors of defendant’s parole ineligibility, and to satisfy court’s obligation, to extent that future dangerousness was at issue, to instruct on defendant’s parole ineligibility, given confusion exhibited by jurors, in post‑deliberative question to court, as to whether there was some remote possibility of parole. Shafer v. South Carolina (U.S.S.C. 2001) 121 S.Ct. 1263, 532 U.S. 36, 149 L.Ed.2d 178, on remand 352 S.C. 191, 573 S.E.2d 796. Sentencing And Punishment 1780(2); Sentencing And Punishment 1780(3)

Possible juror confusion about the meaning of “life imprisonment” did not warrant instruction at capital sentencing phase to inform jury that, if jury sentenced petitioner to life imprisonment in lieu of imposing a sentence of death, he would not be parole eligible for 30 years, since any juror confusion on this issue was obviated by trial court’s instruction that the terms “life imprisonment” and “death sentence” should be understood in their ordinary and plain meaning; by instructing jury that life imprisonment means “life imprisonment,” court effectively gave petitioner more than he asked for. Young v. Catoe (C.A.4 (S.C.) 2000) 205 F.3d 750, certiorari denied 121 S.Ct. 164, 531 U.S. 868, 148 L.Ed.2d 111. Criminal Law 790

Curative instruction removed any prejudice caused when prosecutor, during penalty phase of capital murder trial, asked a correctional consultant testifying on behalf of defendant, about the possibility of escape; curative instruction made it clear that the question asked by the prosecutor was improper and asked the jury to disavow that question from their minds, and the curative instruction, without mentioning the contents of the escape question again, emphasized that the jury was to be concerned with only two sentences: death and life without the possibility of parole, and that life without parole meant “until the death of the defendant.” State v. Bowman (S.C. 2005) 366 S.C. 485, 623 S.E.2d 378, rehearing denied, certiorari denied 126 S.Ct. 2867, 547 U.S. 1195, 165 L.Ed.2d 900. Sentencing And Punishment 1780(2)

Trial court’s denial of parole eligibility charge in capital murder trial did not constitute a violation of fundamental fairness shocking to the universal sense of justice, as would justify grant of writ of habeas corpus to defendant convicted of murder and sentenced to death, given that there is no constitutional requirement that a parole eligible defendant receive a parole eligibility instruction. McWee v. State (S.C. 2004) 357 S.C. 403, 593 S.E.2d 456, rehearing denied, certiorari denied 124 S.Ct. 1904, 541 U.S. 984, 158 L.Ed.2d 487. Habeas Corpus 508

When requested by the State or the defendant, a judge in a capital murder case must charge the jury in his instructions that life imprisonment means until the death of the defendant without the possibility of parole, and in cases where the defendant is eligible for parole, the judge must charge the applicable parole eligibility statute. State v. Shafer (S.C. 2002) 352 S.C. 191, 573 S.E.2d 796. Sentencing And Punishment 1780(3)

During penalty phase of capital murder trial, in response to jury’s question regarding parole eligibility, defendant was not entitled to have read to jury the portion of sentencing statute discussing parole eligibility. State v. Shafer (S.C. 2000) 340 S.C. 291, 531 S.E.2d 524, certiorari granted in part 121 S.Ct. 30, 530 U.S. 1306, 147 L.Ed.2d 1053, reversed 121 S.Ct. 1263, 532 U.S. 36, 149 L.Ed.2d 178, on remand 352 S.C. 191, 573 S.E.2d 796. Sentencing And Punishment 1779(3)

When the issue of parole is raised by the jury, the court should instruct the jury that it shall not consider parole eligibility in reaching its decision, and that the terms “life imprisonment” and “death sentence” should be understood in their ordinary and plain meaning. State v. Ard (S.C. 1998) 332 S.C. 370, 505 S.E.2d 328, rehearing denied. Criminal Law 863(2)

Capital murder defendant was not entitled to charge on parole eligibility since defendant was eligible for parole if life sentence was imposed. State v. Byram (S.C. 1997) 326 S.C. 107, 485 S.E.2d 360, rehearing denied, dismissal of habeas corpus affirmed 339 F.3d 203, certiorari denied 124 S.Ct. 1680, 541 U.S. 947, 158 L.Ed.2d 374. Criminal Law 790

The trial judge in a murder prosecution cured his erroneous denial of the defendant’s request for a “plain meaning” charge where he later properly answered the jury’s question regarding the possibility of parole by giving the “plain meaning” charge, from which a reasonable juror would have understood that life imprisonment meant life without parole. State v. Simmons (S.C. 1993) 310 S.C. 439, 427 S.E.2d 175, rehearing denied, certiorari granted 114 S.Ct. 57, 510 U.S. 811, 126 L.Ed.2d 27, reversed 114 S.Ct. 2187, 512 U.S. 154, 129 L.Ed.2d 133. Criminal Law 823(1)

The trial court committed prejudicial error in denying a defendant’s request during the penalty phase of a capital murder trial to charge the jury, pursuant to Section 24‑21‑640, that because he was already serving a life sentence for a previous, unrelated, violent crime conviction, the imposition of a life sentence in a murder case would require service of both offenses without the possibility of parole, and the judge erroneously charged the jury as to parole eligibility under Section 16‑3‑20 instead; such error was a violation of the 8th and 14th amendments of the US Constitution, and Art V, Section 21 of the SC Constitution. State v. Torrence (S.C. 1991) 305 S.C. 45, 406 S.E.2d 315. Sentencing And Punishment 1780(3); Sentencing And Punishment 1789(9)

A defendant who was tried and convicted prior to enactment of the Omnibus Criminal Justice Improvements Act was not entitled to a requested charge that if the defendant was sentenced to life imprisonment, he would not be eligible for parole for 20 years. The trial judge’s refusal to give the requested charge was not an exclusion of mitigating evidence since information regarding requirements for parole eligibility is not mitigating evidence and is irrelevant to a defendant’s adaptability to prison life, and whether a jury is given information regarding reduction of a death sentence by commutation, pardon, or parole is a matter of state law. State v. Patterson (S.C. 1989) 299 S.C. 280, 384 S.E.2d 699, vacated 110 S.Ct. 709, 493 U.S. 1013, 107 L.Ed.2d 730, on remand 302 S.C. 384, 396 S.E.2d 366.

A trial judge’s response to a jury’s parole eligibility question which did not specifically instruct the jury “not to consider parole,” but instructed that “life imprisonment is to be understood in its ordinary and plain meaning,” adequately instructed that parole was not a sentencing consideration. A “life imprisonment in its ordinary and plain meaning” charge necessarily precludes jury consideration of parole eligibility since being imprisoned for life and being paroled are mutually exclusive propositions. State v. Smith (S.C. 1989) 298 S.C. 482, 381 S.E.2d 724, certiorari denied 110 S.Ct. 1536, 494 U.S. 1060, 108 L.Ed.2d 775, rehearing denied 110 S.Ct. 2221, 495 U.S. 953, 109 L.Ed.2d 546. Criminal Law 863(2)

In response to a question posed by the jury regarding the defendant’s parole eligibility, a trial judge erred in instructing the jury only that it was not to concern itself with parole, and in failing to instruct the jury that the terms “life” and “death” are to be understood in their ordinary and plain meaning. State v. Plemmons (S.C. 1988) 296 S.C. 76, 370 S.E.2d 871. Criminal Law 863(2); Criminal Law 1174(1)

When the issue is raised, the court should instruct the jury that it shall not consider parole eligibility in reaching its decision, and that the terms “life imprisonment” and “death sentence” should be understood in their ordinary and plain meaning. State v. Norris (S.C. 1985) 285 S.C. 86, 328 S.E.2d 339. Sentencing And Punishment 1780(3)

37. —— Prior convictions, instructions

Criminal sexual conduct with minor was “violent crime,” and thus, capital murder defendant’s prior convictions for that offense precluded jury instruction on mitigating circumstance of “no significant history of prior criminal conviction involving the use of violence against another person,” even if his sexual conduct with minor was consensual. State v. Rogers (S.C. 2000) 338 S.C. 435, 527 S.E.2d 101. Sentencing And Punishment 1780(3)

A defendant convicted of murder and sentenced to the death penalty was entitled to a limiting instruction on the jury’s consideration of his prior convictions where the state chose to establish the aggravating circumstance of armed robbery at the sentencing phase only, and the defendant’s prior convictions included assault and battery, underage possession of alcoholic beverages, public disorderly conduct, an adjudication of delinquency, and assault and battery of a high and aggravated nature. State v. Young (S.C. 1991) 305 S.C. 380, 409 S.E.2d 352, denial of habeas corpus affirmed 205 F.3d 750, certiorari denied 121 S.Ct. 164, 531 U.S. 868, 148 L.Ed.2d 111.

A defendant was not entitled to a jury instruction that he had no “significant history of prior criminal conviction involving the use of violence against another person” pursuant to Section 16‑3‑20 where at the time he committed 2 murders in South Carolina, he had not yet committed a murder in California, but at the time of the South Carolina trial he had already been convicted of the murder in California; “prior” refers to the time of trial, not to the time of the commission of the crime. State v. Sims (S.C. 1991) 304 S.C. 409, 405 S.E.2d 377, certiorari denied 112 S.Ct. 1193, 502 U.S. 1103, 117 L.Ed.2d 434. Sentencing And Punishment 368.5

A jury charge adequately apprised the jury of the State’s burden to establish the existence of the statutory aggravating circumstance and the jury’s duty to consider, in mitigation, the defendant’s evidence regarding his prior murder conviction, where the court stated that the defendant “was permitted, without restriction, to offer in mitigation, evidence and details concerning the conviction,” that it was for the jury to determine “whether or not the 1970 murder conviction would be used as an aggravating circumstance in this case,” and that the jury was required to “make a unanimous finding that the State has proven beyond every reasonable doubt that the murder was committed by a person with a prior record of conviction for murder.” State v. Atkins (S.C. 1990) 303 S.C. 214, 399 S.E.2d 760, certiorari denied 111 S.Ct. 2913, 501 U.S. 1259, 115 L.Ed.2d 1076, denial of habeas corpus affirmed 139 F.3d 887, certiorari denied 119 S.Ct. 191, 525 U.S. 882, 142 L.Ed.2d 156.

It was not error for trial court to fail to give limiting instruction where solicitor had referred to parole violations, because solicitor mentioned parole only in context of defendant’s prior convictions, at no time stating or implying that defendant could be put on parole if he were given life sentence. State v. Drayton (S.C. 1987) 293 S.C. 417, 361 S.E.2d 329, certiorari denied 108 S.Ct. 1060, 484 U.S. 1079, 98 L.Ed.2d 1021, dismissal of post‑conviction relief affirmed 312 S.C. 4, 430 S.E.2d 517, rehearing denied, certiorari denied 114 S.Ct. 607, 510 U.S. 1014, 126 L.Ed.2d 572, rehearing denied 114 S.Ct. 1142, 510 U.S. 1159, 127 L.Ed.2d 451. Criminal Law 790; Sentencing And Punishment 1780(3)

In a trial for murder and armed robbery, there was no error in the trial judge’s failure to instruct the jury that the defendant’s prior convictions could be considered only as to his character and not as proof of the statutory aggravating circumstance. Where a statutory aggravating circumstance has been proved beyond a reasonable doubt at the guilt phase, no instruction limiting consideration to a defendant’s characteristics is necessary. State v. Plemmons (S.C. 1985) 286 S.C. 78, 332 S.E.2d 765, vacated 106 S.Ct. 1943, 476 U.S. 1102, 90 L.Ed.2d 353.

38. —— Physical torture, instructions

Trial court’s jury instruction concerning “physical torture” aggravating factor included in South Carolina’s capital sentencing scheme adequately instructed jury that it had to find intent to torture, by stating, inter alia, that physical torture was intentional infliction of abuse upon body of another before death. Smith v. Moore (C.A.4 (S.C.) 1998) 137 F.3d 808, certiorari denied 119 S.Ct. 199, 525 U.S. 886, 142 L.Ed.2d 163. Sentencing And Punishment 1780(3)

The trial judge did not improperly charge the jury, in the sentencing phase of a death penalty trial, regarding the statutory aggravating circumstance of “physical torture” when he stated that “torture occurs when the victim is subjected to serious physical abuse before death. Torture occurs when the victim is subjected to aggravated battery.” State v. Davis (S.C. 1992) 309 S.C. 326, 422 S.E.2d 133, rehearing denied, certiorari denied 113 S.Ct. 2355, 508 U.S. 915, 124 L.Ed.2d 263. Sentencing And Punishment 1780(3)

The statutory aggravating circumstance of physical torture, as defined in a trial judge’s charge, was not so broad as to violate the Eighth Amendment where the court’s charge defined physical torture as follows: “physical torture is the intentional infliction of serious, violent, horrible, or inhuman abuse upon the body of another before death. The instantaneous death of the victim does not constitute torture. Physical torture may include the malicious infliction of bodily harm to another by depriving him or her of a member of his or her body or by rendering a member of his or her body useless, or by seriously disfiguring his or her body or a member of his or her body, or the intentional and unmerciful prolonging of severe pain and abuse to the body of another, or the intentional unmerciful infliction of serious and extensive physical pain and abuse to the body of another.” State v. Smith (S.C. 1989) 298 S.C. 482, 381 S.E.2d 724, certiorari denied 110 S.Ct. 1536, 494 U.S. 1060, 108 L.Ed.2d 775, rehearing denied 110 S.Ct. 2221, 495 U.S. 953, 109 L.Ed.2d 546.

39. —— Future dangerousness, instructions

State presented evidence of defendant’s future dangerousness during sentencing phase of capital murder prosecution to entitle defendant to instruction on parole ineligibility; State presented evidence that defendant became enraged and verbally abusive to a staff member of the detention center when she turned off the telephones, State introduced evidence that defendant was incapable of following rules by showing he had violated his probation in the past and had been charged for possession of contraband in the jail, State showed that defendant was a repeat criminal offender, and State’s language during closing argument that “they might come back,” implied that defendant might come back and commit future crimes if he was not executed. State v. Shafer (S.C. 2002) 352 S.C. 191, 573 S.E.2d 796. Sentencing And Punishment 1780(3)

For a defendant to be entitled to a parole ineligibility instruction during penalty phase of murder prosecution, two prongs must be met: (1) State must put the defendant’s future dangerousness in issue, and (2) the only available alternative sentence to death is life imprisonment without possibility of parole. State v. Kelly (S.C. 2001) 343 S.C. 350, 540 S.E.2d 851, certiorari granted 121 S.Ct. 2548, 533 U.S. 928, 150 L.Ed.2d 716, reversed and remanded 122 S.Ct. 726, 534 U.S. 246, 151 L.Ed.2d 670. Sentencing And Punishment 1780(3)

In penalty phase of capital murder prosecution, trial court was warranted in denying defendant’s request for absence of dangerousness instruction, where State would not argue that defendant was danger to public at large, but rather that defendant presented future danger to others in prison. State v. Kelly (S.C. 2001) 343 S.C. 350, 540 S.E.2d 851, certiorari granted 121 S.Ct. 2548, 533 U.S. 928, 150 L.Ed.2d 716, reversed and remanded 122 S.Ct. 726, 534 U.S. 246, 151 L.Ed.2d 670. Sentencing And Punishment 1780(3)

“Great risk of danger” aggravator was properly submitted to jury in capital murder trial; there was evidence that defendant attempted to fire gun several times, that defendant shot at home with children inside after he shot victim outside, that people had to struggle with defendant to retrieve gun, and that shots were fired in different directions during struggle. State v. Locklair (S.C. 2000) 341 S.C. 352, 535 S.E.2d 420, rehearing denied, certiorari denied 121 S.Ct. 817, 531 U.S. 1093, 148 L.Ed.2d 701. Sentencing And Punishment 1777

In death penalty cases in which future dangerousness is at issue under Simmons, and state law prohibits the defendant’s release on parole, the following charge must be given if the sentencing jury inquires about the meaning of “life imprisonment,” or counsel requests a jury charge concerning parole eligibility: “If you sentence the defendant to death you must assume that the sentence will be carried out. If a recommendation of death is not made the defendant shall be sentenced to life imprisonment without the possibility of parole.” State v. Southerland (S.C. 1994) 316 S.C. 377, 447 S.E.2d 862, rehearing denied, certiorari denied 115 S.Ct. 1136, 513 U.S. 1166, 130 L.Ed.2d 1096, denial of post‑conviction relief affirmed in part, reversed in part 337 S.C. 610, 524 S.E.2d 833. Sentencing And Punishment 1780(3)

40. Sufficiency of evidence

The fact that a trial judge made specific findings that a defendant who pled guilty to murder was a border line mental retardate, acted under the influence of extreme emotional or mental disturbance at the time of the offense, acted under duress or the domination of another person, and whose capacity to conform his conduct to the requirements of law was substantially impaired, does not foreclose imposition of the death penalty under Section 16‑3‑20, where the balance of aggravating and mitigating circumstances warranted imposition of the death sentence, and the defendant was not hallucinating at the time of the offense; nor does the possibility that the defendant carries a gene for Huntington’s disease, a progressively debilitating mental disease, preclude imposition of the death sentence, where there is no evidence that the defendant in fact carries the gene; nor would a positive diagnosis that the defendant carries the gene preclude imposition of the death penalty. Roach v. Martin (C.A.4 (S.C.) 1985) 757 F.2d 1463, certiorari denied 106 S.Ct. 185, 474 U.S. 865, 88 L.Ed.2d 154, rehearing denied 106 S.Ct. 549, 474 U.S. 1014, 88 L.Ed.2d 477.

Trial court’s pre‑trial finding that murder defendant was not mentally retarded, and thus not exempt from death penalty pursuant to Eighth Amendment, was supported by the evidence and not against its preponderance; defendant was able to successfully obtain commercial driver’s license and be employed as truck driver, defendant scored between 68 and 87 on standard school I.Q. tests prior to age of 18, defendant made reasonably sufficient grades during his school career, defendant’s lower I.Q. scores later in life could have been caused by accidents or diseases, defendant raised two children during his 26‑year marriage, and defendant was never diagnosed with mental retardation. State v. Blackwell (S.C. 2017) 420 S.C. 127, 801 S.E.2d 713. Sentencing and Punishment 1793

Evidence supported postconviction court’s finding that defendant was not intoxicated when he murdered two persons, so as to support a conclusion that defendant was not entitled, in a death‑penalty case, to a jury instruction on the statutory mitigating circumstance of defendant’s age or mentality, even though defendant presented testimonies of companion and doctor that defendant smoked crack cocaine and consumed alcohol during the night before the murders, and doctor testified that the effect of those substances could persist for as long as 28 days; doctor’s testimony did not pertain to whether defendant was intoxicated during the murders, companion testified that he and defendant ran out of crack cocaine at some point in the evening and that defendant went to sleep, and trial counsel stated that he did not attribute defendant’s behavior to intoxication. Sigmon v. State (S.C. 2013) 403 S.C. 120, 742 S.E.2d 394, certiorari denied 134 S.Ct. 646, 187 L.Ed.2d 428. Criminal Law 1618(13); Sentencing and Punishment 1780(3)

Imposition of a death sentence for two murders was not the result of any arbitrary factor, even though trial court stated at sentencing that it hoped that a death sentence would serve as a deterrent to abusive parents; in light of the entirety of trial court’s colloquy, it was clear that the death sentence was premised primarily on retribution to defendant in particular and the fact that the murders were deliberate, premeditated, and cruel, given trial court’s comments on, inter alia, the way defendant put a shotgun to one victim’s mouth and pulled the trigger. State v. Allen (S.C. 2009) 386 S.C. 93, 687 S.E.2d 21, rehearing denied, certiorari denied, certiorari denied 130 S.Ct. 3329, 560 U.S. 929, 176 L.Ed.2d 1229. Sentencing And Punishment 1676; Sentencing And Punishment 1684; Sentencing And Punishment 1780(2)

Trial court’s error, in failing to give instruction on robbery as a lesser‑included offense of armed robbery, did not warrant reversal of death sentence for first degree murder conviction that was supported by armed robbery aggravating factor; sentence of death was supported by other valid aggravators, as jury affirmatively found independent aggravators of criminal sexual conduct, kidnapping, burglary, and physical torture. State v. Simmons (S.C. 2004) 360 S.C. 33, 599 S.E.2d 448, rehearing denied, certiorari denied 125 S.Ct. 1068, 543 U.S. 1124, 160 L.Ed.2d 1074. Criminal Law 1173.2(4)

Death penalty was warranted for defendant convicted of the murders of his former live‑in lover, his lover’s thirteen year‑old daughter, and his lover’s mother; aggravating circumstances included that two or more persons were murdered pursuant to one scheme or course of conduct, that murder was committed while in the commission of burglary, and that murder was committed while in the commission of physical torture. State v. Shuler (S.C. 2003) 353 S.C. 176, 577 S.E.2d 438. Sentencing And Punishment 1681; Sentencing And Punishment 1683; Sentencing And Punishment 1684

In the appeal of a matter finding the defendant guilty of murder and larceny wherein the jury found the aggravating circumstances of murder of a law enforcement officer and murder committed while in the commission of larceny with a deadly weapon, the sentence was not a result of passion, prejudice, or other arbitrary factors and the evidence supported the jury’s finding of the aggravating circumstances where, while driving in a stolen truck, the defendant was stopped by a police officer for a traffic violation, and then shot the police officer in the head. State v. Hudgins (S.C. 1995) 319 S.C. 233, 460 S.E.2d 388, rehearing denied, certiorari denied 116 S.Ct. 821, 516 U.S. 1096, 133 L.Ed.2d 764, denial of post‑conviction relief reversed 337 S.C. 333, 524 S.E.2d 105.

In a prosecution for murder, the evidence supported a determination that the defendant committed the murder during the commission of a kidnapping where (1) the victim, who had been shot, was conscious when she left the site of the shooting to go with the defendant to the hospital, (2) she resisted the ensuing abduction, and (3) she was strangled and stabbed while in the process of being deprived of her freedom. State v. Ray (S.C. 1993) 310 S.C. 431, 427 S.E.2d 171. Sentencing And Punishment 1681

In a trial for capital murder, the evidence was insufficient to establish that the defendant was under duress when he shot the victim, despite his testimony that his accomplice handed him a gun and said “its either you or [the victim],” where there was no evidence indicating that the accomplice had any other weapon readily available, and thus when the defendant held the gun in his own hand, the necessary imminent nature of the duress was removed. State v. Rocheville (S.C. 1993) 310 S.C. 20, 425 S.E.2d 32, rehearing denied, certiorari denied 113 S.Ct. 2978, 508 U.S. 978, 125 L.Ed.2d 675, rehearing denied 114 S.Ct. 21, 509 U.S. 942, 125 L.Ed.2d 772, appeal from denial of habeas corpus 175 F.3d 1015, certiorari denied 120 S.Ct. 377, 528 U.S. 953, 145 L.Ed.2d 294.

In a prosecution for murder and armed robbery, there was sufficient evidence to deny the defendant’s motion for a directed verdict for the crime of armed robbery and to sustain the aggravating circumstance of robbery while armed with a deadly weapon, in spite of the defendant’s argument that the State failed to establish that money was taken from the person or presence of the victim, where approximately $1,056.60 was missing from the Hess station where the victim was murdered and the defendant had approximately $946.37 on his person. State v. Childs (S.C. 1989) 299 S.C. 471, 385 S.E.2d 839.

Twenty‑two‑year‑old defendant convicted of murder who committed murder for purpose of pecuniary gain, who terrorized wife of murder victim by means of rape and forced confinement and who admits on witness stand that he feels no remorse for crimes is properly punished by sentence of death. State v. Jones (S.C. 1985) 288 S.C. 1, 340 S.E.2d 782, vacated 106 S.Ct. 1943, 476 U.S. 1102, 90 L.Ed.2d 353, dismissal of post‑conviction relief affirmed. Sentencing And Punishment 1673; Sentencing And Punishment 1718

Death sentence was warranted in capital murder prosecution; defendant physically tortured the victim, as aggravating circumstance, the breaking down of the screen door of the victim’s trailer while defendant was armed with a shotgun was more than a “technical” burglary, so that burglary was an aggravating circumstance, and jury could have concluded that defendant, despite his mental disorder, had planned to confront the victim and kill her. State v. Weik (S.C. 2002) 356 S.C. 76, 587 S.E.2d 683, rehearing granted, adhered to on rehearing 354 S.C. 382, 581 S.E.2d 834, certiorari denied 123 S.Ct. 2580, 539 U.S. 930, 156 L.Ed.2d 609. Sentencing And Punishment 1676; Sentencing And Punishment 1681; Sentencing And Punishment 1684

41. New Trial

If defendant was convicted again on retrial, after a successful appeal of his capital murder conviction, the death penalty could not be validly imposed, where the jury at the original trial had found the presence of the only statutory aggravating circumstance which had been alleged, but had failed to recommend death. Sheppard v. State (S.C. 2004) 357 S.C. 646, 594 S.E.2d 462. Double Jeopardy 115

Although a verdict of guilty of the separate offenses of murder and of armed robbery but not guilty of murder while in the commission of a robbery while armed with a deadly weapon was inconsistent, a new trial would not be granted where the inconsistency did not prejudice the rights of the defendant. State v. Hall (S.C. 1977) 268 S.C. 524, 235 S.E.2d 112. Criminal Law 1178

42. Mistrial

State’s prosecutorial misconduct in intimidating a defense witness concerning her social work licensure status did not necessitate declaration of mistrial, in capital murder prosecution; misconduct occurred during bench trial sentencing hearing, any testimony that was potentially excluded was arguably cumulative to that of defendant’s other expert witness who testified in detail regarding defendant’s childhood, his family, his mental health disorders, and his criminal history, and trial court thoroughly considered all mitigating evidence. State v. Inman (S.C. 2011) 395 S.C. 539, 720 S.E.2d 31, rehearing denied, certiorari denied 133 S.Ct. 219, 568 U.S. 863, 184 L.Ed.2d 112. Sentencing And Punishment 1780(2)

Trial judge committed no error in capital murder proceeding in not declaring a mistrial and giving an Allen charge after jury revealed it was divided nine to three in favor of death sentence; jury voluntarily disclosed its numerical division and requested further instructions on how to proceed, judge then promptly informed attorneys of jurors’ numerical division and indicated that he could give Allen charge, and judge did not inquire about specifics of jury’s impasse. State v. Williams (S.C. 2010) 386 S.C. 503, 690 S.E.2d 62, rehearing denied, certiorari denied, certiorari denied 131 S.Ct. 230, 562 U.S. 899, 178 L.Ed.2d 153. Criminal Law 865(1.5)

Defendant was not entitled to mistrial based on lay witness’s testimony in sentencing phase of capital murder proceeding; witness, a doctor, was introduced to give fact testimony regarding her observation of defendant’s mental state within hours of victim’s murder, witness’s testimony was reasonably limited to her factual observations over course of interview, and to the extent there was any confusion among jurors regarding witness’s role as a lay witness, such confusion was effectively cured by court’s instruction to jury. State v. Williams (S.C. 2010) 386 S.C. 503, 690 S.E.2d 62, rehearing denied, certiorari denied, certiorari denied 131 S.Ct. 230, 562 U.S. 899, 178 L.Ed.2d 153. Sentencing And Punishment 1779(1)

Prosecutor’s remark during voir dire that “I’m not here to give this defendant a Baby Ruth, I’m here to put him in the electric chair” was not so prejudicial as to require a mistrial where defendant would indeed have been sentenced to the electric chair if he had been convicted as charged under Code 1962 Section 16‑52(5) [Code 1976 Section 16‑3‑20(5)]. State v. Craig (S.C. 1976) 267 S.C. 262, 227 S.E.2d 306.

43. Resentencing

In a resentencing hearing, each side has the right to put into evidence anything that is properly put into evidence during the guilt or sentencing phase of the previous trial. State v. Tucker (S.C. 1999) 334 S.C. 1, 512 S.E.2d 99, certiorari denied 119 S.Ct. 2407, 527 U.S. 1042, 144 L.Ed.2d 805. Sentencing And Punishment 2298(1)

During voir dire upon remand for resentencing, capital murder defendant was not entitled to question jury venire about their knowledge of his trial in another county for different murder, of imposition of death penalty in that case, or of his prior trial for instant murder. State v. Tucker (S.C. 1999) 334 S.C. 1, 512 S.E.2d 99, certiorari denied 119 S.Ct. 2407, 527 U.S. 1042, 144 L.Ed.2d 805. Jury 131(7)

Even if capital murder defendant’s attorneys failed to thoroughly investigate and present at resentencing mitigating evidence regarding his mental impairments, he was not thereby prejudiced; extensive evidence was presented at resentencing hearing about defendant’s family and social background and bizarre behavior through his teacher, mother, two aunts, and uncle, jurors were aware through clinical psychologist’s testimony that defendant was mentally retarded and had brain damage, they were given several mitigating factors through which to consider defendant’s mental condition, and they were also presented with overwhelming evidence of his guilt and callous and heinous way in which he calculated and executed murder. Jones v. State (S.C. 1998) 332 S.C. 329, 504 S.E.2d 822, rehearing denied, certiorari denied 119 S.Ct. 1259, 526 U.S. 1021, 143 L.Ed.2d 355, rehearing denied 119 S.Ct. 1788, 526 U.S. 1128, 143 L.Ed.2d 815. Criminal Law 1960; Criminal Law 1961

Inmate’s passing references to capital murder defendant being on death row did not prejudice defendant on resentencing; jury may have construed such comments as meaning that defendant was under death sentence for previous crime, and defendant did not establish how such comments misled jury regarding its role in sentencing process or diminished its sense of responsibility. Jones v. State (S.C. 1998) 332 S.C. 329, 504 S.E.2d 822, rehearing denied, certiorari denied 119 S.Ct. 1259, 526 U.S. 1021, 143 L.Ed.2d 355, rehearing denied 119 S.Ct. 1788, 526 U.S. 1128, 143 L.Ed.2d 815. Sentencing And Punishment 1789(9)

A defendant convicted of murder and sentenced to death was not entitled to be resentenced based on the discovery that he had a brain tumor at the time of the offense where the trial judge found only that there was a “significant possibility” that the outcome of the sentencing “could have” been different; the proper standard was whether the newly discovered evidence probably would have changed the result. State v. South (S.C. 1993) 310 S.C. 504, 427 S.E.2d 666. Sentencing And Punishment 2265

A defendant, who pled guilty but mentally ill to 2 counts of murder, 9 counts of assault and battery with intent to kill, and one count of illegally carrying a firearm, and was sentenced to the death penalty by the trial judge without a jury, was not entitled to resentencing where the judge stated in the sentencing order that he had considered and found the existence of 2 statutory aggravating circumstances and 4 mitigating circumstances, and that he had considered any other possible mitigating circumstances and found none; although the mitigating circumstance of cooperation with law enforcement was not a named mitigating circumstance, the order stated that the judge had “considered the evidence offered in aggravation, extenuation, and mitigation “ and in form clearly was listing only the statutory circumstances. State v. Wilson (S.C. 1992) 306 S.C. 498, 413 S.E.2d 19, certiorari denied 113 S.Ct. 137, 506 U.S. 846, 121 L.Ed.2d 90.

In a capital murder resentencing proceeding, the court properly denied the defendant’s request to attack the validity of his prior murder conviction, which was the State’s sole aggravating circumstance, on the ground that the conviction was invalid due to ineffective assistance of counsel, where the murder conviction had not been reversed or set aside; the resentencing trial was not the proper forum for collateral attack upon that conviction. State v. Atkins (S.C. 1990) 303 S.C. 214, 399 S.E.2d 760, certiorari denied 111 S.Ct. 2913, 501 U.S. 1259, 115 L.Ed.2d 1076, denial of habeas corpus affirmed 139 F.3d 887, certiorari denied 119 S.Ct. 191, 525 U.S. 882, 142 L.Ed.2d 156.

In capital murder resentencing proceeding, it was error for the State to be permitted to prove statutory aggravating circumstances by introducing from the first trial the defendant’s convictions for burglary and armed robbery. Although the State or the accused may offer, at a resentencing trial, evidence previously presented at either the guilt or sentencing phase of the original trial, convictions for aggravating crimes which accompany the murder do not constitute such evidence. State v. Riddle (S.C. 1990) 301 S.C. 68, 389 S.E.2d 665.

43.5. Effective assistance of counsel

Defense counsel’s failure to object to trial court’s decision not to answer jury’s questions regarding what would happen to capital defendant if it failed to reach unanimous decision on sentencing was not deficient performance, and thus did not amount to ineffective assistance; there was no legal support on which counsel could have relied to make objection when court refused to instruct jury as to consequences of not reaching verdict, and counsel’s understanding that court could not tell jury that defendant would receive life sentence was legally supported. Winkler v. State (S.C. 2016) 418 S.C. 643, 795 S.E.2d 686, rehearing denied. Criminal Law 1963

44. Review

State appellate court may uphold death sentence based in part on invalid aggravating circumstance, either by reweighing of aggravating and mitigating circumstances or by conducting harmless error review; decision in instant case was vacated and remanded as it was not clear whether state Supreme Court’s decision had correctly employed either of above methods for upholding death sentence. Clemons v. Mississippi (U.S.Miss. 1990) 110 S.Ct. 1441, 494 U.S. 738, 108 L.Ed.2d 725.

The determination of whether a jury has engaged in a “reasonable deliberation,” for purposes of the rule requiring a trial court to impose a life sentence if a capital sentencing jury cannot reach a recommendation after a reasonable deliberation, is a matter committed to the trial court’s discretion. State v. Cottrell (S.C. 2017) 2017 WL 6503904. Sentencing and Punishment 1779(1)

Death sentence imposed on defendant who murdered police officer was proportional, and thus death sentence would be affirmed, where sentence was not imposed as result of passion, prejudice, or any other arbitrary factor, evidence clearly supported jury’s finding of statutory aggravating circumstances, and death penalty had been imposed in similar cases in which aggravating circumstances involved death of a police officer. State v. Cottrell (S.C. 2017) 2017 WL 6503904. Sentencing and Punishment 1731

Capital defendant failed to preserve for appellate review claim that trial court erred by failing to instruct the jury on the statutory mitigating circumstance relating to the age or mentality of the defendant at the time of the crime; after the trial court informed the parties that it would charge two other mitigating factors, defendant stated that he had no objection to the decision and did not request that the court charge any additional statutory mitigating factors, and, after charging the jury, defendant indicated he had no objection to the charge. State v. Stanko (S.C. 2008) 376 S.C. 571, 658 S.E.2d 94, rehearing denied, certiorari denied, certiorari denied 129 S.Ct. 182, 555 U.S. 875, 172 L.Ed.2d 129. Sentencing And Punishment 1789(3)

Capital murder defendant failed to preserve for appellate review issue of whether he was entitled to new sentencing hearing on basis of trial court’s failure to sua sponte charge jury on statutory mitigating factor of whether capacity of defendant to appreciate criminality of his conduct or conform his conduct to requirements of law was substantially impaired, as defendant failed to make contemporaneous objection during sentencing proceeding, nor did he request that jury be charged on this mitigator; abrogating, State v. Bowman, 366 S.C. 485, 623 S.E.2d 378, State v. Vazquez, 364 S.C. 293, 613 S.E.2d 359. State v. Evans (S.C. 2006) 371 S.C. 27, 637 S.E.2d 313. Sentencing And Punishment 1789(3)

Absent a request by counsel to charge the mitigating circumstances at the penalty phase of the capital murder trial, the issue is not preserved for review. State v. Vazsquez (S.C. 2005) 364 S.C. 293, 613 S.E.2d 359, rehearing denied, denial of post‑conviction relief reversed 388 S.C. 447, 698 S.E.2d 561. Sentencing And Punishment 1789(3)

The general rule in capital punishment cases, known as the “clean slate rule,” is that when a defendant’s conviction is reversed on appeal, the original conviction is nullified and the slate is wiped clean, so that if the defendant is convicted again on retrial, the death penalty may be validly imposed. Sheppard v. State (S.C. 2004) 357 S.C. 646, 594 S.E.2d 462. Double Jeopardy 115

Defendant failed to preserve for appeal issue of whether solicitor improperly commented on defendant’s failure to testify in penalty phase of murder prosecution, where defendant objected to solicitor’s comment only on the ground that it improperly shifted the burden of proof. State v. Shuler (S.C. 2003) 353 S.C. 176, 577 S.E.2d 438. Sentencing And Punishment 1789(3)

Because the state had proven the existence of at least one aggravating circumstance beyond a reasonable doubt it was not necessary to address the other aggravating circumstances on circumstances‑of‑aggravation review in death penalty case. State v. Passaro (S.C. 2002) 350 S.C. 499, 567 S.E.2d 862. Sentencing And Punishment 1788(5)

On appeal, the defendant could not contend that Section 16‑3‑20 was unconstitutional because it authorized the imposition of the death penalty on a juvenile where the defendant did not raise this issue below. State v. Hudgins (S.C. 1995) 319 S.C. 233, 460 S.E.2d 388, rehearing denied, certiorari denied 116 S.Ct. 821, 516 U.S. 1096, 133 L.Ed.2d 764, denial of post‑conviction relief reversed 337 S.C. 333, 524 S.E.2d 105. Sentencing And Punishment 1788(3)

Whether it was error to exclude from evidence in a capital murder trial of murder victim’s medical records compiled by the hospital, on the grounds that such records contained the physician’s subjective opinions, not merely factual observations, could not be determined on appeal where the defendant failed to include such records in the transcript but, in any event, any error and their exclusion was harmless, since the testimony of the victim’s wife as to the victim being beaten prior to being shot was refuted by testimony of a pathologist who performed the autopsy on the victim, and, thus, the evidence in the records was merely cumulative. State v. Patterson (S.C. 1986) 290 S.C. 523, 351 S.E.2d 853, certiorari dismissed 107 S.Ct. 2490, 482 U.S. 902, 96 L.Ed.2d 382.

Although a specific request for statutory mitigating circumstances charges were not made at trial, the Supreme Court reviews the error in failing to charge in favorem vitae. State v. Pierce (S.C. 1986) 289 S.C. 430, 346 S.E.2d 707.

45. Harmless error

Even if “physical torture” aggravating factor included in South Carolina’s capital sentencing scheme were invalid, jury’s reliance on it did not infect the formal process of deciding whether death was appropriate penalty, and any error was harmless; jury found second aggravating circumstance clearly supported by record, jury did not hear any evidence relevant only to “physical torture” factor, prosecutor’s closing argument focused on all aggravating factors presented, and jury deliberated for only two hours. Smith v. Moore (C.A.4 (S.C.) 1998) 137 F.3d 808, certiorari denied 119 S.Ct. 199, 525 U.S. 886, 142 L.Ed.2d 163. Sentencing And Punishment 1788(10)

Trial court’s error, if any, in not informing parties of specific contents of note sent by jury during sentencing deliberations in capital murder trial, namely that note gave numerical split in jury’s vote, was harmless; because trial court concluded jury had not yet reached deadlock after “reasonable deliberation,” under statute which required imposition of life sentence if jury could not reach recommendation after reasonable deliberation, even if defendant had been notified of numerical split, there was nothing further for him to do at the time to protect his rights. State v. Cottrell (S.C. 2017) 2017 WL 6503904. Sentencing and Punishment 1789(9)

Where there is evidence the defendant was extremely intoxicated during the commission of the crime, the failure to instruct the jury on statutory mitigating circumstances at penalty phase of capital murder trial that murder was committed while defendant was under influence of mental or emotional disturbance, that capacity of defendant to appreciate the criminality of his conduct or to conform his conduct to requirements of law was substantially impaired, and that jury could consider the mentality of defendant at time of the crime, is not harmless error. State v. Bowman (S.C. 2005) 366 S.C. 485, 623 S.E.2d 378, rehearing denied, certiorari denied 126 S.Ct. 2867, 547 U.S. 1195, 165 L.Ed.2d 900. Sentencing And Punishment 1780(3); Sentencing And Punishment 1789(9)

Even if solicitor’s comment in penalty phase of murder prosecution, that there was no mitigation evidence that defendant had ever done a good deed or had a decent thought, was improper comment on defendant’s failure to testify, such error was harmless, given that jury was instructed that it could not consider defendant’s failure to testify in any way and could not use it against him. State v. Shuler (S.C. 2003) 353 S.C. 176, 577 S.E.2d 438. Sentencing And Punishment 1789(9)

Any error in refusing to admit into evidence, in sentencing phase of capital murder trial, notice of intent to seek death penalty and related documents, which had been served on defendant before he had briefly been released on bond and were offered by defendant to show his good character in not fleeing during that period, was harmless, where defendant was permitted to introduce evidence that he was briefly bonded out of jail, jail record keeper testified to dates of defendant’s release, and defendant’s bail bondsman testified that he had no trouble contacting defendant while he was out on bond and no trouble picking him up when bond was revoked. State v. Huggins (S.C. 1999) 336 S.C. 200, 519 S.E.2d 574, rehearing denied, certiorari denied 120 S.Ct. 1199, 528 U.S. 1172, 145 L.Ed.2d 1103. Sentencing And Punishment 1789(9)

Instruction stating that jury was not to consider parole eligibility in reaching sentencing decision in capital murder prosecution was error, as defendant did not specifically request such instruction and jury did not inquire about parole eligibility; however, since trial judge instructed jury not to consider parole eligibility, it was presumed that jury did not in fact consider parole, and thus, error was harmless. State v. Ard (S.C. 1998) 332 S.C. 370, 505 S.E.2d 328, rehearing denied. Criminal Law 790

Any error in submitting statutory aggravating circumstance that two or more persons were murdered by defendant by one actor pursuant to one scheme or course of conduct was harmless during sentencing phase of capital murder case, where jury found three statutory aggravating circumstances, and did not find challenged circumstance. State v. Tucker (S.C. 1996) 324 S.C. 155, 478 S.E.2d 260, rehearing denied, certiorari denied 117 S.Ct. 1561, 520 U.S. 1200, 137 L.Ed.2d 708, denial of habeas corpus affirmed 350 F.3d 433, certiorari denied 124 S.Ct. 2100, 541 U.S. 1032, 158 L.Ed.2d 715. Sentencing And Punishment 1789(9)

The trial judge’s error in unconstitutionally instructing the jury in the penalty phase of a murder trial that malice could be presumed from the use of a deadly weapon or the intentional doing of an unlawful act was harmless where the testimony of 2 eyewitnesses and one defendant overwhelmingly established the intentional and malicious torture and murder of the victim, and thus there was no reasonable possibility that the presumptions might have contributed to the conviction. Arnold v. State (S.C. 1992) 309 S.C. 157, 420 S.E.2d 834, rehearing granted, certiorari denied 113 S.Ct. 1302, 507 U.S. 927, 122 L.Ed.2d 691.

Any error in a trial court’s jury instruction on the statutory mitigating circumstance of duress was harmless beyond a reasonable doubt in light of the “utter implausibility” of the defendant’s claim of duress. Additionally, the trial court’s failure to instruct the jury that a confession may not be considered unless found beyond a reasonable doubt to have been given freely and voluntarily, was harmless since the only reasonable inference from the evidence was that the statement was voluntary. State v. Truesdale (S.C. 1990) 301 S.C. 546, 393 S.E.2d 168, certiorari denied 111 S.Ct. 800, 498 U.S. 1074, 112 L.Ed.2d 861, rehearing denied 111 S.Ct. 1341, 499 U.S. 932, 113 L.Ed.2d 272.

Error which occurred in denying defendant right to conduct examination of prospective jurors may be harmless when accused is sentenced to life imprisonment, but not when he is sentenced to death. State v. Atkins (S.C. 1987) 293 S.C. 294, 360 S.E.2d 302.

46. Reversible error

Limitation of scope of capital murder defendant’s allocution to preclude him from referring to his having prayed for God’s forgiveness did not prejudice defendant and was not reversible error, where defendant in fact asserted before the jury that he had “prayed and prayed and prayed” and had asked God to forgive him. State v. Stokes (S.C. 2001) 345 S.C. 368, 548 S.E.2d 202, rehearing denied. Criminal Law 1177.3(2)

Regardless of a capital defendant’s parole eligibility, he or she is entitled upon request to have the jury instructed that the terms “life” and “death” are to be understood in their plain and ordinary meaning, and the refusal to give such a request is reversible error. Southerland v. State (S.C. 1999) 337 S.C. 610, 524 S.E.2d 833. Criminal Law 824(1); Criminal Law 1173.2(4)

A solicitor’s comments on the defendant’s lack of remorse during the sentencing phase of a capital murder prosecution constituted reversible error because they violated the accused’s Fifth, Eighth and Fourteenth Amendment rights. State v. Diddlemeyer (S.C. 1988) 296 S.C. 235, 371 S.E.2d 793. Criminal Law 1171.6; Sentencing And Punishment 1780(2)

Reversible error resulted, during the sentencing phase of a capital murder trial, from the exclusion of testimony of a clinical psychologist as to the defendant’s future adaptability to prison life, since such testimony was evidence of a mitigating circumstance. State v. Matthews (S.C. 1986) 291 S.C. 339, 353 S.E.2d 444.

Trial judge committed reversible error in refusing to permit a clinical psychologist to testify, during the trial’s sentencing phase, as to her evaluation of capital murder defendant’s adaptability to prison life, since the expert’s testimony as to future adaptability to prison life was required to be admitted as a relevant mitigating evidence of the defendant’s character. State v. Patterson (S.C. 1986) 290 S.C. 523, 351 S.E.2d 853, certiorari dismissed 107 S.Ct. 2490, 482 U.S. 902, 96 L.Ed.2d 382.

Solicitor who confined his argument to a legitimate recommendation concerning the punishment to be imposed, in his argument that the jury should return the death penalty, did not commit reversible error warranting a new trial. State v. Allen (S.C. 1976) 266 S.C. 468, 224 S.E.2d 881. Criminal Law 2163; Sentencing And Punishment 1780(2)

47. Habeas corpus

A defendant who has been convicted of murder and sentenced to death will not be granted habeas corpus relief where the sentencing judge would not allow the defendant to introduce statistical evidence to show that Section 16‑3‑20 has been disproportionately applied to individuals who have committed aggravated murder of white victims, where such evidence does not show a discriminatory intent on the part of state prosecutors. Roach v. Martin (C.A.4 (S.C.) 1985) 757 F.2d 1463, certiorari denied 106 S.Ct. 185, 474 U.S. 865, 88 L.Ed.2d 154, rehearing denied 106 S.Ct. 549, 474 U.S. 1014, 88 L.Ed.2d 477.

**SECTION 16‑3‑21.** Jury instruction as to discussion of verdict.

(A) In all cases in which an individual is sentenced to death, the trial judge shall, before the dismissal of the jury, verbally instruct the jury concerning the discussion of its verdict. A standard written instruction shall be promulgated by the Supreme Court for use in all capital cases.

(B) The verbal instruction shall include:

(1) the right of the juror to refuse to discuss the verdict;

(2) the right of the juror to discuss the verdict to the extent that the juror so chooses;

(3) the right of the juror to terminate any discussion pertaining to the verdict at any time the juror so chooses;

(4) the right of the juror to report any person who continues to pursue a discussion of the verdict or who continues to harass the juror after the juror has refused to discuss the verdict or communicated a desire to terminate discussion of the verdict; and

(5) the name, address, and phone number of the person or persons to whom the juror should report any harassment concerning the refusal to discuss the verdict or the juror’s decision to terminate discussion of the verdict.

(C) In addition to the verbal instruction of the trial judge, each juror, upon dismissal from jury service, shall receive a copy of the written jury instruction set forth in subsection (A).

HISTORY: 1996 Act No. 448, Section 2.

Editor’s Note

1996 Act No. 448, Section 1, eff June 18, 1996, provides as follows:

“SECTION 1. This act [consisting of Sections 16‑3‑21, 17‑25‑380, 17‑27‑130, 17‑27‑150, and 17‑27‑160] is known and may be cited as the ‘South Carolina Effective Death Penalty Act of 1996’.”

Library References

Sentencing and Punishment 1780(3).

Westlaw Topic No. 350H.

C.J.S. Criminal Law Sections 1835, 2133 to 2137, 2218.

United States Supreme Court Annotations

Habeas corpus, death sentence, notice, see Magwood v. Patterson, 2010, 130 S.Ct. 2788, 561 U.S. 320, 177 L.Ed.2d 592, on remand 664 F.3d 1340.

**SECTION 16‑3‑25.** Punishment for murder; review by Supreme Court of imposition of death penalty.

(A) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of South Carolina. The clerk of the trial court, within ten days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court of South Carolina together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Supreme Court of South Carolina.

(B) The Supreme Court of South Carolina shall consider the punishment as well as any errors by way of appeal.

(C) With regard to the sentence, the court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and

(2) Whether the evidence supports the jury’s or judge’s finding of a statutory aggravating circumstance as enumerated in Section 16‑3‑20, and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(D) Both the defendant and the State shall have the right to submit briefs within the time provided by the court and to present oral arguments to the court.

(E) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

(1) Affirm the sentence of death; or

(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the Supreme Court of South Carolina in its decision, and the extracts prepared as hereinafter provided for, shall be provided to the resentencing judge for his consideration. If the court finds error prejudicial to the defendant in the sentencing proceeding conducted by the trial judge before the trial jury as outlined under Item (B) of Section 16‑3‑20, the court may set the sentence aside and remand the case for a resentencing proceeding to be conducted by the same or a different trial judge and by a new jury impaneled for such purpose. In the resentencing proceeding, the new jury, if the defendant does not waive the right of a trial jury for the resentencing proceeding, shall hear evidence in extenuation, mitigation or aggravation of the punishment in addition to any evidence admitted in the defendant’s first trial relating to guilt for the particular crime for which the defendant has been found guilty.

(F) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on all legal errors, the factual substantiation of the verdict, and the validity of the sentence.

HISTORY: 1962 Code Section 16‑52.1; 1977 Act No. 177 Section 2.

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NOTES OF DECISIONS

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1. In general

Mental retardation is not a bar to the imposition of the death penalty in the sentencing phase of a capital case. State v. Jones (S.C. 1989) 298 S.C. 118, 378 S.E.2d 594, certiorari denied 110 S.Ct. 1534, 494 U.S. 1060, 108 L.Ed.2d 773, rehearing denied 110 S.Ct. 2221, 495 U.S. 953, 109 L.Ed.2d 546.

The purpose of the bifurcated trial procedure is to protect the accused by forcing the state not to admit certain evidence relative to the determination of the proper punishment until the guilt or innocence issue has been decided. State v. Stewart (S.C. 1986) 288 S.C. 232, 341 S.E.2d 789. Sentencing And Punishment 334

In a prosecution for murder, Section 16‑3‑25 did not provide defendant with the right to access to the cases with which the Supreme Court compares each death sentence. State v. Thompson (S.C. 1982) 278 S.C. 1, 292 S.E.2d 581, certiorari denied 102 S.Ct. 1996, 456 U.S. 938, 72 L.Ed.2d 458, rehearing denied 102 S.Ct. 2917, 457 U.S. 1112, 73 L.Ed.2d 1323. Sentencing And Punishment 1788(6)

2. Constitutional issues

In conducting a proportionality review of a death sentence, Supreme Court searches for similar cases in which the death sentence has been upheld. State v. Bryant (S.C. 2007) 372 S.C. 305, 642 S.E.2d 582, rehearing denied, certiorari denied 128 S.Ct. 245, 552 U.S. 899, 169 L.Ed.2d 169; State v. Bennett (S.C. 2006) 369 S.C. 219, 632 S.E.2d 281, certiorari denied, certiorari denied 127 S.Ct. 681, 549 U.S. 1061, 166 L.Ed.2d 530; State v. Vazsquez (S.C. 2005) 364 S.C. 293, 613 S.E.2d 359, rehearing denied, denial of post‑conviction relief reversed 388 S.C. 447, 698 S.E.2d 561; State v. Wise (S.C. 2004) 359 S.C. 14, 596 S.E.2d 475, rehearing denied, certiorari denied, certiorari denied 125 S.Ct. 355, 543 U.S. 948, 160 L.Ed.2d 263.

A sentence of capital punishment imposed on a defendant convicted of murder will not be reversed because the South Carolina Supreme Court was unable to compare the defendant’s sentence with those imposed in similar South Carolina cases because the defendant’s case was the first to be tried under Section 16‑3‑20; the state Supreme Court need not have abstained from finding the defendant’s sentence proportionate until a sufficient number of comparative cases arose; while Section 16‑3‑25(C)(3) requires the South Carolina Supreme Court to determine whether a sentence of death is excessive or disproportionate to the penalty imposed in similar South Carolina cases, such comparative review is not constitutionally mandated. Roach v. Martin (C.A.4 (S.C.) 1985) 757 F.2d 1463, certiorari denied 106 S.Ct. 185, 474 U.S. 865, 88 L.Ed.2d 154, rehearing denied 106 S.Ct. 549, 474 U.S. 1014, 88 L.Ed.2d 477.

Defendant did not have a federal or state constitutional right to proceed pro se on appeal of death sentence; request to proceed pro se was not made in a timely fashion, appellate counsel had no duty to raise every non‑frivolous issue presented by record, but instead had discretion to exercise reasonable professional judgment, defendant was represented by two very experienced capital appeals litigators, and any mistake appellate counsel may have made in determining viable issues for briefing could have been resolved on postconviction relief. State v. Roberts (S.C. 2005) 364 S.C. 583, 614 S.E.2d 626. Sentencing And Punishment 1788(4)

The United States Constitution requires the death penalty to be imposed only if the sentence is neither excessive nor disproportionate in light of the crime and the defendant. State v. Passaro (S.C. 2002) 350 S.C. 499, 567 S.E.2d 862. Sentencing And Punishment 1657

A solicitor’s comments on the defendant’s lack of remorse during the sentencing phase of a capital murder prosecution constituted reversible error because they violated the accused’s Fifth, Eighth and Fourteenth Amendment rights. State v. Diddlemeyer (S.C. 1988) 296 S.C. 235, 371 S.E.2d 793. Criminal Law 1171.6; Sentencing And Punishment 1780(2)

A solicitor’s closing argument at the sentencing phase of a capital case violated the defendant’s Eighth Amendment rights, requiring reversal of the death sentence, where the solicitor’s extensive comments regarding the victim’s character were unnecessary to an understanding of the circumstances of the crime, and the remarks conveyed the suggestion that the defendant deserved a death sentence because the victim was a religious man and a registered voter. State v. Gathers (S.C. 1988) 295 S.C. 476, 369 S.E.2d 140, certiorari granted 109 S.Ct. 218, 488 U.S. 888, 102 L.Ed.2d 209, dismissal denied 109 S.Ct. 778, 488 U.S. 1002, 102 L.Ed.2d 771, affirmed 109 S.Ct. 2207, 490 U.S. 805, 104 L.Ed.2d 876, rehearing denied 110 S.Ct. 24, 492 U.S. 938, 106 L.Ed.2d 636.

A solicitor’s comments during summation in the penalty phase of a capital case were impermissible comments on the defendant’s right to remain silent where the solicitor instructed the jury to “look at [defendant], does he look sorry to you?” and later asked the jury “Have you seen any remorse?” Additionally, the solicitor impermissibly appealed to the jury’s passion, stating that the defendant was “going to do everything he can, through his attorneys, to take advantage of your caring, and your softness, and that softness which creates an inability to do something difficult like, you should be sentenced to death . . . he depends on your soft underbelly, your lack of courage, your lack of commitment to get out of what he’s into . . . “. State v. Cockerham (S.C. 1988) 294 S.C. 380, 365 S.E.2d 22.

Ineffectiveness of counsel at the trial level is an issue which may be asserted only in proceedings under the Post‑Conviction Procedure Act, and the issue is inappropriate for review on direct appeal from a sentence imposing the death penalty. State v. Kornahrens (S.C. 1986) 290 S.C. 281, 350 S.E.2d 180, certiorari denied 107 S.Ct. 1592, 480 U.S. 940, 94 L.Ed.2d 781, denial of habeas corpus affirmed 66 F.3d 1350, certiorari denied 116 S.Ct. 1575, 517 U.S. 1171, 134 L.Ed.2d 673, rehearing denied 116 S.Ct. 2541, 518 U.S. 1013, 135 L.Ed.2d 1063. Criminal Law 1134.47(3); Criminal Law 1440(2)

The Eighth Amendment bars any sentencing procedure creating a risk of the death penalty being imposed where there may be factors that call for a less severe penalty. State v. Stewart (S.C. 1986) 288 S.C. 232, 341 S.E.2d 789. Sentencing And Punishment 1614

On appeal from a sentencing retrial in which the defendants were given death sentences for armed robbery and murder, the jury having found that “robbery while armed with a deadly weapon” and “larceny with the use of a deadly weapon” existed as aggravating circumstances beyond a reasonable doubt, the trial court did not violate the prohibition against double jeopardy by submitting both aggravating circumstances to the jury where, at the first trial, the two aggravating circumstances had been submitted to the sentencing jury but they had only found “robbery while armed with a deadly weapon” as an aggravating circumstance, no finding having been made on the other circumstance. The imposition of the death penalty would be upheld where it was found that the penalty was proportionate to a crime of this nature and to the crime and the defendants in this case. State v. Gilbert (S.C. 1981) 277 S.C. 53, 283 S.E.2d 179, certiorari denied 102 S.Ct. 2258, 456 U.S. 984, 72 L.Ed.2d 863, grant of habeas corpus affirmed 121 F.3d 144, rehearing granted, opinion vacated, on rehearing 134 F.3d 642.

3. In favorem vitae doctrine

The doctrine of “in favorem vitae,” permitting the review of a defendant’s entire record, would not be applied to the appeal of a capital murder trial in which the defendant was indicted before, but tried after, the filing of the Supreme Court’s decision abolishing the doctrine. State v. Rocheville (S.C. 1993) 310 S.C. 20, 425 S.E.2d 32, rehearing denied, certiorari denied 113 S.Ct. 2978, 508 U.S. 978, 125 L.Ed.2d 675, rehearing denied 114 S.Ct. 21, 509 U.S. 942, 125 L.Ed.2d 772, appeal from denial of habeas corpus 175 F.3d 1015, certiorari denied 120 S.Ct. 377, 528 U.S. 953, 145 L.Ed.2d 294. Courts 100(1)

Upon review of a death sentence, the Supreme Court, under the doctrine of in favorem vitae, has a duty to search the record for prejudicial error committed by the trial court, but the court is not required to review the strategic decisions of defense counsel. State v. Riddle (S.C. 1987) 291 S.C. 232, 353 S.E.2d 138. Criminal Law 1028; Sentencing And Punishment 1788(3)

4. Competency to waive rights

In deciding the issue of a capital defendant’s competency to waive his appellate and postconviction rights, the Supreme Court carefully and thoroughly reviews the defendant’s history of mental competency; the existence and present status of mental illness or disease suffered by the defendant, if any, as shown in the record of previous proceedings and in the competency hearing; the testimony and opinions of mental health experts who have examined the defendant; the findings of the circuit court which conducted a competency hearing; the arguments of counsel; and the defendant’s demeanor and personal responses to any questions at oral argument regarding the waiver of appellate and postconviction rights. State v. Downs (S.C. 2006) 369 S.C. 55, 631 S.E.2d 79. Criminal Law 1026.10(1); Criminal Law 1572; Sentencing And Punishment 1788(2)

Murder defendant who had been sentenced to death was not mentally competent to waive his right to pursue post‑conviction relief; while defendant apparently understood what he was tried for and reason for his punishment, it was clear he did not understand nature of the post‑conviction relief proceeding, as he was not able to describe, in a reasonably coherent fashion using layman’s terms, basic purposes or procedures available to him in post‑conviction proceeding, and Supreme Court was not persuaded that defendant possessed sufficient capacity or ability to rationally communicate with counsel, given opinions of mental health experts who examined defendant, and cited his inability to communicate adequately with counsel as a primary reason for their conclusion he was not mentally competent. Hughes v. State (S.C. 2006) 367 S.C. 389, 626 S.E.2d 805. Criminal Law 1572

When considering the competency of a request by a defendant who has been sentenced to death to waive the right to appeal or pursue post‑conviction relief, and to be executed forthwith, the Supreme Court carefully and thoroughly reviews defendant’s history of mental competency, existence and present status of mental illness or disease suffered by defendant, if any, as shown in record of previous proceedings and in competency hearing, testimony and opinions of mental health experts who have examined defendant, findings of trial court which conducted competency hearing, arguments of counsel, and defendant’s demeanor and personal responses to Court’s questions at oral argument regarding waiver of appellate and post‑conviction rights. Hughes v. State (S.C. 2006) 367 S.C. 389, 626 S.E.2d 805. Criminal Law 1026.10(1); Criminal Law 1572; Sentencing And Punishment 1788(2)

5. Execution notice

Supreme Court is charged with the responsibility of issuing a notice authorizing the execution of a person who has been duly convicted in a court of law and sentenced to death. Reed v. Ozmint (S.C. 2007) 374 S.C. 19, 647 S.E.2d 209. Sentencing And Punishment 1795

The Supreme Court is charged with the responsibility of issuing a notice authorizing the execution of a person who has been duly convicted in a court of law and sentenced to death, and the Court will issue an execution notice after that person either has exhausted all appeals and other avenues of post‑conviction relief in state and federal courts, or after that person, who is determined by the Court to be mentally competent, knowingly and voluntarily waives such appeals. Hughes v. State (S.C. 2006) 367 S.C. 389, 626 S.E.2d 805. Sentencing And Punishment 1795

6. Mitigation

Evidence of mental impairments such as brain damage or low intellectual functioning has powerful mitigating effect during sentencing phase of capital case. Stone v. State (S.C. 2017) 419 S.C. 370, 798 S.E.2d 561. Sentencing and Punishment 1713

Portion of closing argument in which solicitor appeared to be asking jurors, in a capital case, to accord some weight to his determination of the appropriateness of a death sentence did not, in context, diminish the jury’s role in rendering a death sentence, which could have meant that the resulting death sentence was not free from the influence of any arbitrary factor; solicitor did not go so far as to compare his undertaking in requesting the death penalty to the jury’s decision to ultimately impose a death sentence, and solicitor, during closing argument, often emphasized the important role of the jury in determining the appropriate sentence. Sigmon v. State (S.C. 2013) 403 S.C. 120, 742 S.E.2d 394, certiorari denied 134 S.Ct. 646, 187 L.Ed.2d 428. Sentencing and Punishment 1780(2)

Exercise of a legal right, no matter how offensive to another, is never in law deemed a provocation sufficient to justify or mitigate an act of violence. State v. Wood (S.C. 2004) 362 S.C. 135, 607 S.E.2d 57, rehearing denied, certiorari denied 125 S.Ct. 2942, 545 U.S. 1132, 162 L.Ed.2d 873, application for writ of habeas corpus held in abeyance 2013 WL 5744779. Criminal Law 38

7. Arbitrary factor

When the jury is invited to speculate about irrelevant matters upon which a death sentence may be based, the statute prohibiting the jury from imposing a death sentence under the influence of any arbitrary factor is violated. (Per opinion of Moore, J., with one justice concurring and one justice concurring separately.) State v. Burkhart (S.C. 2007) 371 S.C. 482, 640 S.E.2d 450. Sentencing And Punishment 1647

8. Practice and procedure

A capital defendant was not prejudiced by the trial judge conducting the sentencing proceeding past midnight on the night before the jury rendered its verdict where the record indicated that the jury elected to continue the proceeding when asked by the trial judge. State v. Howard (S.C. 1988) 295 S.C. 462, 369 S.E.2d 132, certiorari denied 109 S.Ct. 3174, 490 U.S. 1113, 104 L.Ed.2d 1036, rehearing denied 110 S.Ct. 13, 492 U.S. 932, 106 L.Ed.2d 628, denial of habeas corpus affirmed 131 F.3d 399. Criminal Law 865(2)

9. Juror feelings toward death penalty

Record supported trial court’s disqualification of black prospective juror in prosecution for capital murder, where juror was initially adamant that she could not vote for death penalty in any situation, changed her mind after questioning from defense counsel and stated that she could consider death penalty, and stated to trial court that she had no idea what changed her mind but then, when asked by the state whether defense counsel’s appeal to her to serve on jury to make it demographically and racially balanced led her to change her statement so that she could impose death penalty, answered yes. State v. Wood (S.C. 2004) 362 S.C. 135, 607 S.E.2d 57, rehearing denied, certiorari denied 125 S.Ct. 2942, 545 U.S. 1132, 162 L.Ed.2d 873, application for writ of habeas corpus held in abeyance 2013 WL 5744779. Jury 108

A juror should not be excused for cause merely because he or she expresses moral scruples against the death penalty, unless such beliefs would substantially impair performance of his or her duties as a juror. However, this rule has not been extended to apply to peremptory challenges. A prosecutor may exercise his or her peremptory challenges for any non‑racially discriminatory reason. Accordingly, where a prosecutor perceives that a juror will have a problem imposing the death penalty, he or she may exercise a peremptory challenge against such a juror. State v. Green (S.C. 1990) 301 S.C. 347, 392 S.E.2d 157, certiorari denied 111 S.Ct. 229, 498 U.S. 881, 112 L.Ed.2d 183, rehearing denied 111 S.Ct. 548, 498 U.S. 995, 112 L.Ed.2d 556, denial of habeas corpus affirmed 220 F.3d 220.

10. Voir dire

Trial judge’s refusal to ask questions on voir dire about contents of news reports concerning accused, who was convicted of murder and sentenced to death, did not violate Sixth or Fourteenth Amendments, where eight of twelve venire persons who were sworn as jurors had answered on voir dire that they had read or heard something about case, but none of eight indicated he or she had formed opinion or would be biased; previous Supreme Court cases had stressed wide discretion of to trial court in conducting voir dire regarding pretrial publicity; since trial judge sat in locale where pretrial publicity was said to have effect, his perception of depth and extent of news stories should be of assistance in deciding how detailed an inquiry to make; voir dire in instant case was not perfunctory and covered subject of possible bias from pretrial publicity. Mu’Min v. Virginia, 1991, 111 S.Ct. 1899, 500 U.S. 415, 114 L.Ed.2d 493.

A trial judge did not err in disqualifying a juror for cause, based upon her statements during voir dire that she could not sign her name to a verdict that the defendant be sentenced to death, since a prospective juror may be excluded for cause if his or her views on capital punishment would prevent or substantially impair the performance of his or her duties as a juror. State v. Elmore (S.C. 1989) 300 S.C. 130, 386 S.E.2d 769, certiorari denied 110 S.Ct. 2633, 496 U.S. 931, 110 L.Ed.2d 652, rehearing denied 111 S.Ct. 9, 497 U.S. 1047, 111 L.Ed.2d 824.

A trial judge in a murder prosecution properly excused a prospective juror based upon her views regarding capital punishment where the prospective juror stated during voir dire examination that she could not vote for the death penalty if she “had not seen the act,” regardless of the evidence. State v. Cain (S.C. 1988) 297 S.C. 497, 377 S.E.2d 556, certiorari denied 110 S.Ct. 3254, 497 U.S. 1010, 111 L.Ed.2d 764, rehearing denied 111 S.Ct. 14, 497 U.S. 1050, 111 L.Ed.2d 828.

A judge in a capital murder case did not abuse his discretion in refusing to submit to voir dire examination of his personal views on the death penalty. State v. Matthews (S.C. 1988) 296 S.C. 379, 373 S.E.2d 587, certiorari denied 109 S.Ct. 1559, 489 U.S. 1091, 103 L.Ed.2d 861, denial of habeas corpus affirmed 105 F.3d 907, certiorari denied 118 S.Ct. 102, 139 L.Ed.2d 57.

A trial judge in a capital case did not abuse his discretion in refusing to allow the defendant to ask prospective jurors on voir dire “what a life sentence meant to them,” in order to determine whether any jurors had “misconceptions” about the parole eligibility of a murderer sentenced to life imprisonment, where the trial judge’s final jury instructions properly conveyed the meaning of “life sentence” and imprisonment for the duration of the defendant’s life. State v. Matthews (S.C. 1988) 296 S.C. 379, 373 S.E.2d 587, certiorari denied 109 S.Ct. 1559, 489 U.S. 1091, 103 L.Ed.2d 861, denial of habeas corpus affirmed 105 F.3d 907, certiorari denied 118 S.Ct. 102, 139 L.Ed.2d 57. Jury 131(8)

11. Resentencing

In a capital murder resentencing proceeding, the court properly denied the defendant’s request to attack the validity of his prior murder conviction, which was the State’s sole aggravating circumstance, on the ground that the conviction was invalid due to ineffective assistance of counsel, where the murder conviction had not been reversed or set aside; the resentencing trial was not the proper forum for collateral attack upon that conviction. State v. Atkins (S.C. 1990) 303 S.C. 214, 399 S.E.2d 760, certiorari denied 111 S.Ct. 2913, 501 U.S. 1259, 115 L.Ed.2d 1076, denial of habeas corpus affirmed 139 F.3d 887, certiorari denied 119 S.Ct. 191, 525 U.S. 882, 142 L.Ed.2d 156.

12. Admissibility of evidence

Probative value far outweighed any prejudice stemming from video recording, admitted at sentencing phase of capital murder prosecution, that showed defendant repeatedly refusing to accede to prison guards’ numerous requests to submit to a pat‑down; while prior testimony had already established defendant’s prior convictions and his problems with maintaining parole conditions, the video recording presented the jury with competent evidence to showcase defendant’s character and adaptability to prison life by illustrating defendant in an actual routine prison situation. State v. Torres (S.C. 2010) 390 S.C. 618, 703 S.E.2d 226. Sentencing and Punishment 1767

As admitted at sentencing phase of capital murder trial, video recording showing defendant’s behavior in a routine prison situation where he repeatedly refused to accede to prison guards’ numerous requests to submit to a pat‑down did not introduce an arbitrary factor into jury’s determination; video recording was probative on the issue of defendant’s adaptability to prison life, which is a legitimate concern in the sentencing phase. State v. Torres (S.C. 2010) 390 S.C. 618, 703 S.E.2d 226. Sentencing and Punishment 1767

Testimony by state’s witness regarding the privileges available to an inmate who receives a sentence of life without parole, which included access to the yard, work, education, meals, canteen, phone, library, recreation, mail, television, and outside visitors, injected an arbitrary factor into the jury’s sentencing considerations at capital murder trial and required reversal of defendant’s death sentence. (Per opinion of Moore, J., with one justice concurring and one justice concurring separately.) State v. Burkhart (S.C. 2007) 371 S.C. 482, 640 S.E.2d 450. Sentencing And Punishment 1654

A statement which was introduced at the guilt phase of the defendant’s trial after its voluntariness was established at an in camera hearing was admissible at the defendant’s resentencing proceeding pursuant to Section 16‑3‑25(E)(2). State v. Truesdale (S.C. 1990) 301 S.C. 546, 393 S.E.2d 168, certiorari denied 111 S.Ct. 800, 498 U.S. 1074, 112 L.Ed.2d 861, rehearing denied 111 S.Ct. 1341, 499 U.S. 932, 113 L.Ed.2d 272. Sentencing And Punishment 2298(2)

In a capital murder resentencing proceeding, it was error for the State to be permitted to prove statutory aggravating circumstances by introducing from the first trial the defendant’s convictions for burglary and armed robbery. Although the State or the accused may offer, at a resentencing trial, evidence previously presented at either the guilt or sentencing phase of the original trial, convictions for aggravating crimes which accompany the murder do not constitute such evidence. State v. Riddle (S.C. 1990) 301 S.C. 68, 389 S.E.2d 665.

Evidence of the retroactive application of a stricter parole eligibility provision was not admissible as mitigating evidence in the sentencing phase of a capital case. State v. Jones (S.C. 1989) 298 S.C. 118, 378 S.E.2d 594, certiorari denied 110 S.Ct. 1534, 494 U.S. 1060, 108 L.Ed.2d 773, rehearing denied 110 S.Ct. 2221, 495 U.S. 953, 109 L.Ed.2d 546. Sentencing And Punishment 1757

A trial court in a capital murder case properly exercised its discretion in prohibiting the defendant’s counsel from eliciting the opinions of the defendant’s family members concerning the appropriate punishment since the prohibited line of questioning went to the ultimate issue to be decided by the jury ‑ life imprisonment versus death penalty ‑ and was properly reserved for jury determination. State v. Matthews (S.C. 1988) 296 S.C. 379, 373 S.E.2d 587, certiorari denied 109 S.Ct. 1559, 489 U.S. 1091, 103 L.Ed.2d 861, denial of habeas corpus affirmed 105 F.3d 907, certiorari denied 118 S.Ct. 102, 139 L.Ed.2d 57.

A defendant was prejudiced by the exclusion of his complete confession at the penalty phase where the confession contained evidence that the defendant may have acted under the co‑defendant’s domination to support the statutory mitigating circumstance that the defendant “acted under duress or under the domination of another person” as set forth in Section 16‑3‑20(C)(b)(5). State v. Howard (S.C. 1988) 295 S.C. 462, 369 S.E.2d 132, certiorari denied 109 S.Ct. 3174, 490 U.S. 1113, 104 L.Ed.2d 1036, rehearing denied 110 S.Ct. 13, 492 U.S. 932, 106 L.Ed.2d 628, denial of habeas corpus affirmed 131 F.3d 399.

In a resentencing hearing where the guilt phase had been upheld on appeal, defendant was entitled to reintroduce alibi evidence which he had presented at the guilt phase of his first trial. State v. Stewart (S.C. 1986) 288 S.C. 232, 341 S.E.2d 789.

In a resentencing hearing, each side has the right to put into evidence anything that it properly put into evidence during the guilt or sentencing phase of the previous trial. State v. Stewart (S.C. 1986) 288 S.C. 232, 341 S.E.2d 789. Sentencing And Punishment 2292

Information concerning prior criminal convictions is admissible as additional evidence during the sentencing or resentencing phase of a capital trial under Section 16‑3‑25(E); accordingly, where a defendant charged with murder took the witness stand during the guilt phase of his trial and, on direct examination, revealed his own prior criminal record, he would not be heard to complain when that information, exactly as he had volunteered it, was placed before the jury during the sentencing trial. State v. Plath (S.C. 1984) 281 S.C. 1, 313 S.E.2d 619, certiorari denied 104 S.Ct. 3560, 467 U.S. 1265, 82 L.Ed.2d 862, rehearing denied 105 S.Ct. 27, 468 U.S. 1226, 82 L.Ed.2d 920, rehearing denied 105 S.Ct. 28, 468 U.S. 1226, 82 L.Ed.2d 920, denial of habeas corpus affirmed 113 F.3d 1352, certiorari denied 118 S.Ct. 715, 139 L.Ed.2d 655, denial of habeas corpus affirmed 130 F.3d 595, certiorari denied 118 S.Ct. 1854, 140 L.Ed.2d 1102. Sentencing And Punishment 1762

13. Closing argument

When a solicitor’s personal opinion is explicitly injected into the jury’s deliberations as though it were in itself evidence justifying a sentence of death, the resulting death sentence may not be free from the influence of any arbitrary factor. Sigmon v. State (S.C. 2013) 403 S.C. 120, 742 S.E.2d 394, certiorari denied 134 S.Ct. 646, 187 L.Ed.2d 428. Sentencing and Punishment 1780(2)

Improper comments during closing arguments do not automatically require reversal if they are not prejudicial to the defendant. Humphries v. State (S.C. 2002) 351 S.C. 362, 570 S.E.2d 160, rehearing denied. Criminal Law 1171.1(2.1)

A solicitor’s closing argument in the sentencing phase of a capital murder prosecution, imploring the jury “to do what’s right” and stating that if the death penalty “was not right in this case, it was never right,” did not impermissibly inject the solicitor’s personal opinion concerning the death penalty into the proceeding; since the solicitor’s comments did not diminish the role of the jury to decide the defendant’s fate, the argument was proper. The solicitor’s argument suggesting to the jury that the imposition of a light sentence would be a “cop out” was not improper where the solicitor did not attack the courage or lack thereof of the jury to impose the death sentence. Additionally, the solicitor’s comment that his voice would be the last one heard on behalf of the State and the victim, and his suggestion to the jury that imposing a sentence less than the death penalty would be a “blight on the memory” of the victim, were not improper. State v. Bell (S.C. 1990) 302 S.C. 18, 393 S.E.2d 364, certiorari denied 111 S.Ct. 227, 498 U.S. 881, 112 L.Ed.2d 182.

A solicitor’s reference to the deterrent effect of capital punishment during closing argument was not improper since a deterrence argument is proper in the sentencing phase of a capital trial. Additionally, the solicitor’s argument emphasizing that the defendant’s crimes were uncharacteristic and unpredictable and that the defendant was therefore “more frightening” than “career criminals,” did not compare the relative merits of the defendant’s prosecution with other prosecutions, and was therefore not impermissible. State v. Truesdale (S.C. 1990) 301 S.C. 546, 393 S.E.2d 168, certiorari denied 111 S.Ct. 800, 498 U.S. 1074, 112 L.Ed.2d 861, rehearing denied 111 S.Ct. 1341, 499 U.S. 932, 113 L.Ed.2d 272.

A solicitor’s closing argument during the sentencing phase of a capital case did not improperly appeal to the jury’s passion and prejudice by employing such phrases as “cop‑out” and “guilt trip” in exhorting the jury to return a sentence of death, and did not deprive the defendant of a fair trial where, in context, the solicitor’s comments urged a fearless administration of the law in the face of the defense counsel’s emotional appeal for mercy. State v. Patterson (S.C. 1989) 299 S.C. 280, 384 S.E.2d 699, vacated 110 S.Ct. 709, 493 U.S. 1013, 107 L.Ed.2d 730, on remand 302 S.C. 384, 396 S.E.2d 366.

A solicitor’s statement during closing argument in the sentencing phase of a capital proceeding that to sentence the defendant other than to death would be a mockery of the memory of the victim did not improperly appeal to the passion and sympathy of the jury. State v. Middleton (S.C. 1988) 295 S.C. 318, 368 S.E.2d 457, certiorari denied 109 S.Ct. 189, 488 U.S. 872, 102 L.Ed.2d 158, rehearing denied 109 S.Ct. 406, 488 U.S. 961, 102 L.Ed.2d 393, habeas corpus dismissed 855 F.Supp. 837, affirmed 77 F.3d 469, certiorari denied 117 S.Ct. 199, 136 L.Ed.2d 135, rehearing denied 117 S.Ct. 449, 136 L.Ed.2d 345. Sentencing And Punishment 1780(2)

In a prosecution for murder and first degree criminal sexual assault, in which the defendant was sentenced to death, the solicitor’s argument during the guilt phase that if the defendant was not convicted, the murder would forever remain unsolved, constituted an arbitrary factor affecting defendant’s guilt, in violation of Section 16‑3‑25(C)(1) and the Eighth Amendment, in that the remark invited the jury to speculate about a matter irrelevant to defendant’s guilt and diverted the jury from its duty to decide guilt or innocence solely on the evidence presented. State v. Sloan (S.C. 1982) 278 S.C. 435, 298 S.E.2d 92. Criminal Law 2155

When solicitor’s personal opinion is explicitly injected into jury’s determinations as though it were in itself evidence justifying sentence of death, resulting death sentence may not be free from influence of any arbitrary factor. State v. Butler (S.C. 1982) 277 S.C. 543, 290 S.E.2d 420. Sentencing And Punishment 1780(2)

When solicitor’s personal opinion is explicitly injected into jury’s deliberations as though it were itself evidence justifying sentence of death, resulting death sentence may not be free from influence of any arbitrary factor as required by South Carolina Code Section 16‑3‑25(c)(1), and by the Eighth Amendment of the United States Constitution. State v. Woomer (S.C. 1981) 277 S.C. 170, 284 S.E.2d 357. Sentencing And Punishment 1780(2)

Death sentences would be set aside and the case remanded for resentencing where the solicitor, during his closing argument, had stated that he would never ask for the death penalty again if the jury did not return with a recommendation that it be imposed in this case and had commented upon the court’s power to ignore the jury’s recommendation. State v. Plath (S.C. 1981) 277 S.C. 126, 284 S.E.2d 221. Criminal Law 1171.1(6); Criminal Law 2163; Sentencing And Punishment 1780(2)

14. Instructions

The trial judge did not improperly charge the jury, in the sentencing phase of a death penalty trial, regarding the statutory aggravating circumstance of “physical torture” when he stated that “torture occurs when the victim is subjected to serious physical abuse before death. Torture occurs when the victim is subjected to aggravated battery.” State v. Davis (S.C. 1992) 309 S.C. 326, 422 S.E.2d 133, rehearing denied, certiorari denied 113 S.Ct. 2355, 508 U.S. 915, 124 L.Ed.2d 263. Sentencing And Punishment 1780(3)

A jury charge adequately apprised the jury of the State’s burden to establish the existence of the statutory aggravating circumstance and the jury’s duty to consider, in mitigation, the defendant’s evidence regarding his prior murder conviction, where the court stated that the defendant “was permitted, without restriction, to offer in mitigation, evidence and details concerning the conviction,” that it was for the jury to determine “whether or not the 1970 murder conviction would be used as an aggravating circumstance in this case,” and that the jury was required to “make a unanimous finding that the State has proven beyond every reasonable doubt that the murder was committed by a person with a prior record of conviction for murder.” State v. Atkins (S.C. 1990) 303 S.C. 214, 399 S.E.2d 760, certiorari denied 111 S.Ct. 2913, 501 U.S. 1259, 115 L.Ed.2d 1076, denial of habeas corpus affirmed 139 F.3d 887, certiorari denied 119 S.Ct. 191, 525 U.S. 882, 142 L.Ed.2d 156.

The jury instructions given by a trial court during the penalty phase of a capital murder prosecution were proper and did not impermissibly restrict the jury’s ability to consider all mitigating evidence by suggesting that only statutory mitigating circumstances were relevant, where the trial court instructed the jury that they could give a life sentence for any reason or for no reason at all and the court stated that the jurors could consider any mitigating circumstances otherwise authorized or allowed by law. Additionally, an instruction stating that the jury should not allow themselves “to be governed by sympathy, by prejudice, by passion, or by public opinion,” did not impermissibly imply that the jury could not consider “sympathy” in mitigation, where the instruction was given at the end of the penalty phase after the defendant had finished putting forth all of his evidence in mitigation, and a reasonable juror would simply not isolate the word “sympathy,” disregard all of the defendant’s evidence and all of the judge’s previous instructions, and refuse to consider mitigating evidence. State v. Bell (S.C. 1990) 302 S.C. 18, 393 S.E.2d 364, certiorari denied 111 S.Ct. 227, 498 U.S. 881, 112 L.Ed.2d 182.

A trial judge erred in failing to instruct the jury as to the statutory mitigating circumstances found in Section 16‑3‑20(C)(b)(2), (6), and (7) where the defense psychiatrist testified that the defendant had an antisocial personality which is synonymous with a psychopathic personality, that the defendant could kill again if given the opportunity, that such a disorder begins early in life, and that the defendant had not outgrown the illness as of the date of the trial, since this evidence raised the inference that the defendant was suffering from a mental disorder at the time the murder was committed. State v. Caldwell (S.C. 1990) 300 S.C. 494, 388 S.E.2d 816.

In the sentencing phase of a capital case, the trial judge’s failure to specify that a finding of a mitigating circumstance need not be unanimous was not improper on the ground that it could have led jurors to erroneously conclude that such a finding must be unanimous, where the trial judge clearly charged the jury that it could consider any mitigating factor and could recommend a life sentence for no reason at all, and nothing in the charge insinuated that a life sentence could be given only upon a unanimous finding of a mitigating circumstance. State v. Patterson (S.C. 1989) 299 S.C. 280, 384 S.E.2d 699, vacated 110 S.Ct. 709, 493 U.S. 1013, 107 L.Ed.2d 730, on remand 302 S.C. 384, 396 S.E.2d 366.

A trial judge’s response to a jury’s parole eligibility question which did not specifically instruct the jury “not to consider parole,” but instructed that “life imprisonment is to be understood in its ordinary and plain meaning,” adequately instructed that parole was not a sentencing consideration. A “life imprisonment in its ordinary and plain meaning” charge necessarily precludes jury consideration of parole eligibility since being imprisoned for life and being paroled are mutually exclusive propositions. State v. Smith (S.C. 1989) 298 S.C. 482, 381 S.E.2d 724, certiorari denied 110 S.Ct. 1536, 494 U.S. 1060, 108 L.Ed.2d 775, rehearing denied 110 S.Ct. 2221, 495 U.S. 953, 109 L.Ed.2d 546. Criminal Law 863(2)

It was not error for a court, during the sentencing phase of a capital murder trial, to refuse to charge the jury not to consider the deterrent effect of the death penalty. State v. Matthews (S.C. 1988) 296 S.C. 379, 373 S.E.2d 587, certiorari denied 109 S.Ct. 1559, 489 U.S. 1091, 103 L.Ed.2d 861, denial of habeas corpus affirmed 105 F.3d 907, certiorari denied 118 S.Ct. 102, 139 L.Ed.2d 57.

In response to a question posed by the jury regarding the defendant’s parole eligibility, a trial judge erred in instructing the jury only that it was not to concern itself with parole, and in failing to instruct the jury that the terms “life” and “death” are to be understood in their ordinary and plain meaning. State v. Plemmons (S.C. 1988) 296 S.C. 76, 370 S.E.2d 871. Criminal Law 863(2); Criminal Law 1174(1)

A trial judge’s explanation to all perspective jurors that “the ultimate punishment of the defendant will be in your hands if you as a member of the trial jury have found the defendant guilty” was sufficient to satisfy the requirement that the trial judge convey to the jury the idea that its sentencing recommendations during the sentencing phase of a capital proceeding will be followed. State v. Middleton (S.C. 1988) 295 S.C. 318, 368 S.E.2d 457, certiorari denied 109 S.Ct. 189, 488 U.S. 872, 102 L.Ed.2d 158, rehearing denied 109 S.Ct. 406, 488 U.S. 961, 102 L.Ed.2d 393, habeas corpus dismissed 855 F.Supp. 837, affirmed 77 F.3d 469, certiorari denied 117 S.Ct. 199, 136 L.Ed.2d 135, rehearing denied 117 S.Ct. 449, 136 L.Ed.2d 345. Sentencing And Punishment 1780(3)

At a resentencing hearing, the trial judge should carefully instruct the jury that evidence of other crimes could be considered only as evidence of the defendant’s general character and not as proof of any statutory aggravating circumstances. State v. Stewart (S.C. 1986) 288 S.C. 232, 341 S.E.2d 789. Sentencing And Punishment 2298(1)

Omission of instruction that jury may recommend life imprisonment rather than death even if it finds existence of one or more statutory aggravating circumstances beyond reasonable doubt is error requiring death penalty to be vacated and case to be remanded for resentencing proceeding in accordance with Section 16‑3‑25. State v. Goolsby (S.C. 1980) 275 S.C. 110, 268 S.E.2d 31, certiorari denied 101 S.Ct. 616, 449 U.S. 1037, 66 L.Ed.2d 500. Sentencing And Punishment 1780(3); Sentencing And Punishment 1789(9)

15. Sufficiency of evidence

Evidence supported jury’s findings during penalty phase of capital murder prosecution of the aggravating factors of criminal sexual conduct, kidnapping, and torture; record readily demonstrated that defendant kidnapped victim, committed criminal sexual conduct on him, and tortured him. State v. Dickerson (S.C. 2011) 395 S.C. 101, 716 S.E.2d 895, rehearing denied, certiorari denied 132 S.Ct. 1972, 182 L.Ed.2d 823. Sentencing and Punishment 1772

Death sentence for murder was not the result of passion, prejudice, or any other arbitrary factor, and defendant’s sentence was neither excessive nor disproportionate; trial court found two aggravating circumstances, namely murder in the commission of a burglary and in the commission of larceny involving the use of a deadly weapon, and court gave no significant weight to non‑statutory mitigating circumstance that defendant pled guilty. Mahdi v. State (S.C. 2009) 383 S.C. 135, 678 S.E.2d 807. Sentencing And Punishment 1645; Sentencing And Punishment 1681

Evidence at sentencing phase of capital murder prosecution supported finding of aggravating circumstance that murder was committed in course of kidnapping; victim was inveigled into getting in truck under pretense she was being taken to hospital, and defendant’s intent not to take her to hospital was evidenced by fact that when they departed in truck he took rope with which he subsequently strangled her. Ray v. State (S.C. 1998) 330 S.C. 184, 498 S.E.2d 640, rehearing denied, certiorari denied 119 S.Ct. 240, 525 U.S. 905, 142 L.Ed.2d 197. Sentencing And Punishment 1681

The evidence supported the jury’s finding of the aggravating circumstance of first degree burglary, and that the death sentence was not arbitrarily imposed, where the defendant, who had previously violently assaulted 3 other elderly woman, entered the 79‑year‑old victim’s home, beat her to death with the commode lid, and took a nightgown from her bedroom before he fled. State v. Simmons (S.C. 1993) 310 S.C. 439, 427 S.E.2d 175, rehearing denied, certiorari granted 114 S.Ct. 57, 510 U.S. 811, 126 L.Ed.2d 27, reversed 114 S.Ct. 2187, 512 U.S. 154, 129 L.Ed.2d 133.

Sufficient evidence supported the jury’s finding of an aggravating circumstance, and thus the death sentence was not arbitrarily imposed, where the victim was found dead with a shot in the back of the head and a shot in the back, the defendant’s fingerprints were found on the victim’s car nearby, 2 witnesses placed the defendant with 2 others in the area 2‑3 hours before the victim was discovered, and the defendant gave a number of conflicting statements to the police, including confessions to attempting to steal the victim’s car stereo and to shooting the victim. State v. Bell (S.C. 1991) 305 S.C. 11, 406 S.E.2d 165, certiorari denied 112 S.Ct. 888, 502 U.S. 1038, 116 L.Ed.2d 791.

The evidence supported the jury’s finding of an aggravating circumstance, despite the defendant’s suggestion that the case be viewed as merely “a mugging gone awry,” where the facts indicated that the defendant, unprovoked, murdered a man by shooting him in the head at point‑blank range in the course of robbing his wife of her purse, and the death sentence was not arbitrarily imposed and was proportionate to the penalty in similar cases. State v. Patterson (S.C. 1989) 299 S.C. 280, 384 S.E.2d 699, vacated 110 S.Ct. 709, 493 U.S. 1013, 107 L.Ed.2d 730, on remand 302 S.C. 384, 396 S.E.2d 366.

In a murder prosecution, the totality of the record abundantly supported the trial judge’s finding that the death penalty was warranted and that its imposition was not the result of passion, prejudice, or any other arbitrary factor, within the meaning of Section 16‑3‑25(C). State v. Yates (S.C. 1982) 280 S.C. 29, 310 S.E.2d 805, certiorari denied 103 S.Ct. 3098, 462 U.S. 1124, 77 L.Ed.2d 1356, denial of habeas corpus vacated 106 S.Ct. 218, 474 U.S. 896, 88 L.Ed.2d 218, on remand 290 S.C. 231, 349 S.E.2d 84. Sentencing And Punishment 1668

In a prosecution for armed robbery, kidnapping, and murder, the evidence was clearly sufficient to justify the death penalty where, although defendant was not the triggerman in two murders, he was present the entire time the crimes were committed, defendant held a gun on at least one of the two victims and forced him to lay on the ground whereupon both victims were shot to death, and where defendant could not seriously contend that he did not intend or contemplate that life would be taken. Imposition of the death penalty for the crime of murder while in the commission of kidnapping does not violate the Eighth Amendment prohibition against arbitrary infliction of the death penalty since the statutory definition of kidnapping is not overbroad and ambiguous. State v. Copeland (S.C. 1982) 278 S.C. 572, 300 S.E.2d 63, certiorari denied 103 S.Ct. 1802, 460 U.S. 1103, 76 L.Ed.2d 367, rehearing denied 103 S.Ct. 3099, 462 U.S. 1124, 77 L.Ed.2d 1357, certiorari denied 103 S.Ct. 3553, 463 U.S. 1214, 77 L.Ed.2d 1399, rehearing denied 104 S.Ct. 39, 463 U.S. 1249, 77 L.Ed.2d 1457, appeal from denial of post‑conviction relief dismissed 134 F.3d 364. Sentencing And Punishment 1669

16. Sentence of death affirmed

Death sentence imposed on defendant who murdered police officer was proportional, and thus death sentence would be affirmed, where sentence was not imposed as result of passion, prejudice, or any other arbitrary factor, evidence clearly supported jury’s finding of statutory aggravating circumstances, and death penalty had been imposed in similar cases in which aggravating circumstances involved death of a police officer. State v. Cottrell (S.C. 2017) 2017 WL 6503904. Sentencing and Punishment 1731

Imposition of death penalty for murder conviction was neither excessive nor disproportionate in light of crime and defendant; murder involved child under age of 11 and was committed while in commission of kidnapping, and death sentence was imposed in similar cases. State v. Blackwell (S.C. 2017) 420 S.C. 127, 801 S.E.2d 713. Sentencing and Punishment 1681; Sentencing and Punishment 1727

Death sentence imposed on murder defendant on findings of aggravating circumstances of kidnapping, criminal sexual conduct, and torture was neither excessive nor disproportionate in light of the results of similar cases; in other capital cases where the state proceeded on the aggravating circumstances of kidnapping, criminal sexual conduct, torture, or any combination thereof, the Supreme Court had routinely affirmed the sentence of death. State v. Dickerson (S.C. 2011) 395 S.C. 101, 716 S.E.2d 895, rehearing denied, certiorari denied 132 S.Ct. 1972, 182 L.Ed.2d 823. Sentencing and Punishment 1657; Sentencing and Punishment 1681; Sentencing and Punishment 1684

Death sentence imposed on defendant who was convicted of first‑degree murder, kidnapping, and criminal sexual assault was not the result of passion, prejudice, or other arbitrary factor; the gruesome nature of defendant’s acts fits squarely within the aggravating circumstances for which the jury recommended the death penalty, and there was no indication that the proceedings were tainted in any way or that the sentence was anything other than a rational response to the evidence presented. State v. Dickerson (S.C. 2011) 395 S.C. 101, 716 S.E.2d 895, rehearing denied, certiorari denied 132 S.Ct. 1972, 182 L.Ed.2d 823. Sentencing and Punishment 1681; Sentencing and Punishment 1684

Death penalty for murder was not disproportionate, capricious, or imposed as result of passion, prejudice or other arbitrary factor, although defendant was unquestionably deeply troubled, institutionalized at age 11, and showed low intelligence; defendant went on eight‑day‑crime‑spree in which he cased isolated rural homes looking for vulnerable victims, committed three murders, two burglaries in the first degree, armed robbery, burglary in the second degree, assault and battery with intent to kill (ABIK), arson in the second degree, possession of a stolen handgun, and threatened the life of a public employee. State v. Bryant (S.C. 2011) 390 S.C. 638, 704 S.E.2d 344, rehearing denied. Sentencing And Punishment 1681; Sentencing And Punishment 1713; Sentencing And Punishment 1716

Death sentence was not excessive or disproportionate in case involving double murder, armed robbery, burglary of a dwelling, attempt to burn, and criminal sexual conduct. State v. Torres (S.C. 2010) 390 S.C. 618, 703 S.E.2d 226. Sentencing and Punishment 1681; Sentencing and Punishment 1683

Imposition of a death sentence for two murders was not the result of any arbitrary factor, even though trial court stated at sentencing that it hoped that a death sentence would serve as a deterrent to abusive parents; in light of the entirety of trial court’s colloquy, it was clear that the death sentence was premised primarily on retribution to defendant in particular and the fact that the murders were deliberate, premeditated, and cruel, given trial court’s comments on, inter alia, the way defendant put a shotgun to one victim’s mouth and pulled the trigger. State v. Allen (S.C. 2009) 386 S.C. 93, 687 S.E.2d 21, rehearing denied, certiorari denied, certiorari denied 130 S.Ct. 3329, 560 U.S. 929, 176 L.Ed.2d 1229. Sentencing And Punishment 1676; Sentencing And Punishment 1684; Sentencing And Punishment 1780(2)

Death sentence imposed upon defendant convicted of murder, assault and battery with intent to kill, criminal sexual conduct, two counts of kidnapping, and armed robbery was not the result of passion, prejudice, or any other arbitrary factor. State v. Stanko (S.C. 2008) 376 S.C. 571, 658 S.E.2d 94, rehearing denied, certiorari denied, certiorari denied 129 S.Ct. 182, 555 U.S. 875, 172 L.Ed.2d 129. Sentencing And Punishment 1681

Imposition of death penalty upon defendant convicted of murder, kidnapping, first degree criminal sexual conduct (CSC), and grand larceny, was not result of passion, prejudice, or any other arbitrary factor, and death sentence was not excessive or disproportionate to penalty imposed in similar cases. State v. Evins (S.C. 2007) 373 S.C. 404, 645 S.E.2d 904, rehearing denied, certiorari denied, certiorari denied 128 S.Ct. 662, 552 U.S. 1046, 169 L.Ed.2d 521. Sentencing And Punishment 1647; Sentencing And Punishment 1657

Death sentence imposed on defendant for murder of police officer who was attempting to arrest defendant was neither excessive or disproportionate in light of the crime and the defendant. State v. Bryant (S.C. 2007) 372 S.C. 305, 642 S.E.2d 582, rehearing denied, certiorari denied 128 S.Ct. 245, 552 U.S. 899, 169 L.Ed.2d 169. Sentencing And Punishment 1682

Death sentence imposed upon defendant upon his two murder convictions was not result of passion, prejudice, or any other arbitrary factor, nor was sentence excessive or disproportionate to his crime. State v. Evans (S.C. 2006) 371 S.C. 27, 637 S.E.2d 313. Sentencing And Punishment 1788(6)

Death sentence for murder in which victim was stabbed approximately 70 times with a screwdriver was not excessive or disproportionate in light of crime and defendant. State v. Bennett (S.C. 2006) 369 S.C. 219, 632 S.E.2d 281, certiorari denied, certiorari denied 127 S.Ct. 681, 549 U.S. 1061, 166 L.Ed.2d 530, habeas corpus granted 170 F.Supp.3d 851, affirmed 842 F.3d 319. Sentencing And Punishment 1657; Sentencing And Punishment 1686

Defendant’s death sentence was not disproportionate to the crime defendant was convicted of, which involved murder of two persons while committing burglary and while committing physical torture; the death sentence was not the result of passion, prejudice, or any other arbitrary factor, the evidence supported the jury’s findings of aggravation, and, in comparison with similar cases, defendant’s sentence was neither excessive nor disproportionate to his crime. State v. Sigmon (S.C. 2005) 366 S.C. 552, 623 S.E.2d 648, rehearing denied, certiorari denied 126 S.Ct. 2932, 548 U.S. 909, 165 L.Ed.2d 959, dismissal of post‑conviction relief affirmed 403 S.C. 120, 742 S.E.2d 394, certiorari denied 134 S.Ct. 646, 187 L.Ed.2d 428. Sentencing And Punishment 1681; Sentencing And Punishment 1683; Sentencing And Punishment 1684

Death sentence imposed on defendant convicted of murder was not disproportionate to penalty imposed in similar cases. State v. Bowman (S.C. 2005) 366 S.C. 485, 623 S.E.2d 378, rehearing denied, certiorari denied 126 S.Ct. 2867, 547 U.S. 1195, 165 L.Ed.2d 900. Sentencing And Punishment 1657

Death sentence was not disproportionate in capital murder prosecution in which aggravating factors were that defendant had created a great risk of death to more than one person, and that victim was a police officer. State v. Sapp (S.C. 2005) 366 S.C. 283, 621 S.E.2d 883, rehearing denied, certiorari denied 126 S.Ct. 2025, 547 U.S. 1133, 164 L.Ed.2d 787. Sentencing And Punishment 1679; Sentencing And Punishment 1731

Death sentence was proportional punishment for defendant who returned to fast food restaurant after he had been fired and killed two of his co‑workers. State v. Vazsquez (S.C. 2005) 364 S.C. 293, 613 S.E.2d 359, rehearing denied, denial of post‑conviction relief reversed 388 S.C. 447, 698 S.E.2d 561. Sentencing And Punishment 1788(6)

Sentence of death for murder was not disproportionate; death sentences were imposed in similar cases, sentence was not result of passion, prejudice, or any other arbitrary factor, and jury’s finding of statutory aggravating circumstance was supported by evidence. State v. Wood (S.C. 2004) 362 S.C. 135, 607 S.E.2d 57, rehearing denied, certiorari denied 125 S.Ct. 2942, 545 U.S. 1132, 162 L.Ed.2d 873, application for writ of habeas corpus held in abeyance 2013 WL 5744779. Sentencing And Punishment 1788(6)

Sentence of death was not disproportionate for offense involving murder, kidnapping, and first‑degree criminal sexual conduct with a minor. State v. Downs (S.C. 2004) 361 S.C. 141, 604 S.E.2d 377, rehearing denied. Sentencing And Punishment 1657

Sentence of death imposed on defendant for each of his four convictions for murder was neither excessive nor disproportionate in light of crime and defendant. State v. Wise (S.C. 2004) 359 S.C. 14, 596 S.E.2d 475, rehearing denied, certiorari denied, certiorari denied 125 S.Ct. 355, 543 U.S. 948, 160 L.Ed.2d 263. Sentencing And Punishment 1683

Death sentence for defendant who broke into house and shot and killed victim was proportionate to that in similar cases and was neither excessive nor disproportionate to the crime. State v. Tench (S.C. 2003) 353 S.C. 531, 579 S.E.2d 314. Sentencing And Punishment 1681

Death penalty was not disproportionate for defendant’s murder of his two‑year‑old child by arson; although defendant did not have a substantial history of violent criminal conduct and he suffered slight mental or emotional disturbance at the time of the murder, defendant knowingly and intentionally started fire, jumped from the van, and failed to inform rescuers that his child was still strapped to a safety seat in the vehicle, and victim was alive during the fire, succumbing to death only after intense heat caused her severe pain and suffering. State v. Passaro (S.C. 2002) 350 S.C. 499, 567 S.E.2d 862. Sentencing And Punishment 1684; Sentencing And Punishment 1708; Sentencing And Punishment 1710

Imposition of death penalty upon defendant convicted of murder, kidnapping, first degree criminal sexual conduct (CSC), and criminal conspiracy, was not result of passion, prejudice, or any other arbitrary factor, evidence supported aggravating circumstances, and death sentence was not excessive or disproportionate to penalty imposed in similar cases. State v. Stokes (S.C. 2001) 345 S.C. 368, 548 S.E.2d 202, rehearing denied. Sentencing And Punishment 1681

Death sentence based on single aggravating circumstance of the death of a police officer was not the result of passion, prejudice, or other arbitrary factors, and was not excessive or disproportionate to the penalty imposed in similar cases. State v. Aleksey (S.C. 2000) 343 S.C. 20, 538 S.E.2d 248, rehearing denied, certiorari denied 121 S.Ct. 1974, 532 U.S. 1027, 149 L.Ed.2d 766. Sentencing And Punishment 1731

Death sentence imposed on defendant who sexually assaulted 72‑year‑old widow, forced her to drink poisonous cleaning fluids, wrapped her head with duct tape, and allowed her to die from asphyxiation was neither excessive nor disproportionate to penalties imposed in similar cases. State v. Council (S.C. 1999) 335 S.C. 1, 515 S.E.2d 508, rehearing denied, certiorari denied 120 S.Ct. 588, 528 U.S. 1050, 145 L.Ed.2d 489, grant of post‑conviction relief reversed in part 380 S.C. 159, 670 S.E.2d 356, certiorari denied 129 S.Ct. 2770, 174 L.Ed.2d 284. Sentencing And Punishment 1681; Sentencing And Punishment 1684; Sentencing And Punishment 1727

Death sentence imposed on defendant who sexually assaulted 72‑year‑old widow, forced her to drink poisonous cleaning fluids, wrapped her head with duct tape, and allowed her to die from asphyxiation, was not result of passion, prejudice, or any other arbitrary factor, and jury’s finding of statutory aggravating circumstances was supported by the evidence. State v. Council (S.C. 1999) 335 S.C. 1, 515 S.E.2d 508, rehearing denied, certiorari denied 120 S.Ct. 588, 528 U.S. 1050, 145 L.Ed.2d 489, grant of post‑conviction relief reversed in part 380 S.C. 159, 670 S.E.2d 356, certiorari denied 129 S.Ct. 2770, 174 L.Ed.2d 284. Sentencing And Punishment 1681; Sentencing And Punishment 1684; Sentencing And Punishment 1727

Death sentence was appropriate for defendant convicted of murder of his girlfriend and their viable but unborn fetus, who died of asphyxiation after defendant shot and killed girlfriend. State v. Ard (S.C. 1998) 332 S.C. 370, 505 S.E.2d 328, rehearing denied. Sentencing And Punishment 1683

Death penalty was neither excessive nor disproportionate for defendant convicted of murdering his estranged wife and her daughter’s fiancé, and of assault and battery with intent to kill his wife’s daughter. State v. Kelly (S.C. 1998) 331 S.C. 132, 502 S.E.2d 99, rehearing denied, certiorari denied 119 S.Ct. 816, 525 U.S. 1077, 142 L.Ed.2d 675. Sentencing And Punishment 1681; Sentencing And Punishment 1683

Death sentence in capital murder case was proportionate to that in similar cases and was neither excessive nor disproportionate to crime; defendant, then 16 years old, broke into home of 68‑year‑old victim and his wife in early morning hours, he went to their bedroom where he stabbed victim ten times in chest, shoulder and arm, victim bled to death, his wife was beaten in face and chest and suffered broken collar bone and six fractured ribs, and defendant stole several dollars in small change from their home. State v. Powers (S.C. 1998) 331 S.C. 37, 501 S.E.2d 116, rehearing denied, certiorari denied 119 S.Ct. 597, 525 U.S. 1043, 142 L.Ed.2d 539. Sentencing And Punishment 1681

Death sentence imposed upon conviction for capital murder was warranted; evidence supported statutory aggravating circumstance of kidnapping, and sentence was proportional to that imposed in other cases. Ray v. State (S.C. 1998) 330 S.C. 184, 498 S.E.2d 640, rehearing denied, certiorari denied 119 S.Ct. 240, 525 U.S. 905, 142 L.Ed.2d 197. Sentencing And Punishment 1681

Death sentence for murder of twenty‑year‑old casino employee during armed robbery was proportionate to that in similar cases and was neither excessive nor disproportionate to the crime. State v. Hughes (S.C. 1997) 328 S.C. 146, 493 S.E.2d 821, certiorari denied 118 S.Ct. 1674, 523 U.S. 1097, 140 L.Ed.2d 798. Sentencing And Punishment 1681

Death sentence imposed on defendant who beat one child to death and beat another child severely, after raping and severely beating their mother, was not excessive or disproportionate to penalty imposed in similar cases. State v. Conyers (S.C. 1997) 326 S.C. 263, 487 S.E.2d 181, rehearing denied. Sentencing And Punishment 1681; Sentencing And Punishment 1727

Death penalty imposed on defendant convicted of murder was neither excessive nor disproportionate to that imposed in similar cases, where defendant broke into victim’s home, stole victim’s handbag and van, and stabbed victim to death with her own butcher knife. State v. Byram (S.C. 1997) 326 S.C. 107, 485 S.E.2d 360, rehearing denied, dismissal of habeas corpus affirmed 339 F.3d 203, certiorari denied 124 S.Ct. 1680, 541 U.S. 947, 158 L.Ed.2d 374. Sentencing And Punishment 1681

Death sentence imposed on defendant who fatally shot victim during robbery was proportionate to sentences imposed in similar cases and was not arbitrary, excessive or disproportionate to crime. State v. Tucker (S.C. 1996) 324 S.C. 155, 478 S.E.2d 260, rehearing denied, certiorari denied 117 S.Ct. 1561, 520 U.S. 1200, 137 L.Ed.2d 708, denial of habeas corpus affirmed 350 F.3d 433, certiorari denied 124 S.Ct. 2100, 541 U.S. 1032, 158 L.Ed.2d 715. Sentencing And Punishment 1681

Death penalty was warranted in capital murder prosecution, as sentence was not result of passion, prejudice, or any arbitrary factor, jury’s finding of aggravating circumstances was supported by evidence, and death penalty was not excessive or disproportionate to penalty imposed in similar capital cases. State v. McWee (S.C. 1996) 322 S.C. 387, 472 S.E.2d 235, rehearing denied, certiorari denied 117 S.Ct. 695, 519 U.S. 1061, 136 L.Ed.2d 618, appeal from denial of habeas corpus 283 F.3d 179, certiorari denied 123 S.Ct. 162, 537 U.S. 893, 154 L.Ed.2d 158, habeas corpus denied 357 S.C. 403, 593 S.E.2d 456, certiorari denied 124 S.Ct. 1904, 541 U.S. 984, 158 L.Ed.2d 487. Sentencing And Punishment 1668

In the sentencing of a defendant convicted of homicide, a sentence of death was not disproportionate to that in similar cases neither was it excessive nor disproportionate to the crime in the case where the defendant shot the victim because she “smarted off” at him and acted like a “bitch” in that she refused to give him change. State v. Von Dohlen (S.C. 1996) 322 S.C. 234, 471 S.E.2d 689, rehearing denied, certiorari denied 117 S.Ct. 402, 519 U.S. 972, 136 L.Ed.2d 316, denial of post‑conviction relief affirmed in part, reversed in part 360 S.C. 598, 602 S.E.2d 738, certiorari denied 125 S.Ct. 1645, 544 U.S. 943, 161 L.Ed.2d 511. Sentencing And Punishment 1681

A penalty of death was not the result of passion, prejudice or other arbitrary factor, nor was the sentence excessive or disproportionate, where the defendant was convicted of raping, beating and strangling a 79‑year‑old woman in her home. State v. Tucker (S.C. 1995) 319 S.C. 425, 462 S.E.2d 263, rehearing denied, certiorari denied 116 S.Ct. 789, 516 U.S. 1080, 133 L.Ed.2d 739, habeas corpus dismissed 56 F.Supp.2d 611, affirmed 221 F.3d 600, certiorari denied 121 S.Ct. 661, 531 U.S. 1054, 148 L.Ed.2d 563, habeas corpus granted 346 S.C. 483, 552 S.E.2d 712. Sentencing And Punishment 1727

A death sentence was not the result of passion, prejudice, or any other arbitrary factor, nor was it disproportionate to that imposed in similar cases, where the defendant was convicted of committing a murder during an armed robbery. State v. Young (S.C. 1995) 319 S.C. 33, 459 S.E.2d 84, rehearing denied, certiorari denied 116 S.Ct. 718, 516 U.S. 1051, 133 L.Ed.2d 671. Sentencing And Punishment 1668

On review under Section 16‑3‑25, the court would conclude that a defendant’s sentence was not excessive or disproportionate to the penalty imposed in similar cases (the death sentence for murder, 30 years each for kidnapping and first degree criminal sexual conduct, 25 years for armed robbery, and 10 years for resisting arrest). State v. Hall (S.C. 1994) 312 S.C. 95, 439 S.E.2d 278, rehearing denied, certiorari denied 114 S.Ct. 2770, 512 U.S. 1246, 129 L.Ed.2d 883, denial of post‑conviction relief affirmed in part, reversed in part 2004 WL 1773859.

Imposition of the death penalty was proper where the defendant had kidnapped the assistant manager of a movie theater in order to steal the nightly deposit, and then shot the manager in the back of the head as he knelt in a ditch by the side of a road several miles away from the theater, with his hands clasped. State v. Rocheville (S.C. 1993) 310 S.C. 20, 425 S.E.2d 32, rehearing denied, certiorari denied 113 S.Ct. 2978, 508 U.S. 978, 125 L.Ed.2d 675, rehearing denied 114 S.Ct. 21, 509 U.S. 942, 125 L.Ed.2d 772, appeal from denial of habeas corpus 175 F.3d 1015, certiorari denied 120 S.Ct. 377, 528 U.S. 953, 145 L.Ed.2d 294.

The imposition of the death penalty was not disproportionate or excessive where the defendant had pled guilty but mentally ill to 2 counts of murder, 9 counts of assault and battery with intent to kill, and one count of illegally carrying a firearm arising from an incident in which he had stolen a gun from his grandmother, bought and loaded it with hollow‑point long rifle ammunition, drove to an elementary school, and randomly shot both children and adults there, and where the mitigating factors of (1) influence of mental or emotional disturbance, (2) capacity to appreciate the criminality of the crime, and (3) the defendant’s age were all considered and rejected. State v. Wilson (S.C. 1992) 306 S.C. 498, 413 S.E.2d 19, certiorari denied 113 S.Ct. 137, 506 U.S. 846, 121 L.Ed.2d 90.

Death sentence was not result of passion, prejudice, or other arbitrary factor, and evidence supported finding of jury of aggravating circumstance of kidnapping, and therefore under sentence review required by Section 16‑3‑25, death sentence was found to be neither excessive nor inappropriate in light of circumstances of crime and character of appellant. State v. Owens (S.C. 1987) 293 S.C. 161, 359 S.E.2d 275, certiorari denied 108 S.Ct. 496, 484 U.S. 982, 98 L.Ed.2d 495.

Imposition of the death sentence on a defendant was not disproportionate to the penalty imposed in similar cases under evidence showing that the defendant, without provocation, surprised and brutally stabbed his ex‑wife, her elderly father and a 10 year old boy, loaded their bodies onto a pickup truck and transported them to their gravesite, where the bodies were buried, one atop the other, in a common grave. State v. Kornahrens (S.C. 1986) 290 S.C. 281, 350 S.E.2d 180, certiorari denied 107 S.Ct. 1592, 480 U.S. 940, 94 L.Ed.2d 781, denial of habeas corpus affirmed 66 F.3d 1350, certiorari denied 116 S.Ct. 1575, 517 U.S. 1171, 134 L.Ed.2d 673, rehearing denied 116 S.Ct. 2541, 518 U.S. 1013, 135 L.Ed.2d 1063.

A jury’s recommendation of the death penalty was justified where the defendant had entered the home of a couple, both in their eighties, and asked to borrow a car, and when refused, stabbed the husband twenty‑seven times and then stabbed the wife seventeen times. State v. Smith (S.C. 1985) 286 S.C. 406, 334 S.E.2d 277, certiorari denied 106 S.Ct. 1239, 475 U.S. 1031, 89 L.Ed.2d 347, rehearing denied 106 S.Ct. 1665, 475 U.S. 1132, 90 L.Ed.2d 207, denial of habeas corpus affirmed 137 F.3d 808.

The character of one convicted of murder and armed robbery, and the crimes for which he had been convicted, justified the jury’s recommendation of death. State v. Plemmons (S.C. 1985) 286 S.C. 78, 332 S.E.2d 765, vacated 106 S.Ct. 1943, 476 U.S. 1102, 90 L.Ed.2d 353.

A death sentence of one convicted of murder, burglary and criminal sexual conduct was not disproportionate where the victim was savagely attacked and brutally raped and had multiple pre‑mortem injuries all over her body, and it was evident that she suffered intense pain prior to death. State v. Elmore (S.C. 1985) 286 S.C. 70, 332 S.E.2d 762, vacated 106 S.Ct. 1942, 476 U.S. 1101, 90 L.Ed.2d 353. Sentencing And Punishment 1681; Sentencing And Punishment 1686

A death sentence for the murder of a policeman was appropriate, especially in light of the complete absence of provocation on the part of the victim. State v. South (S.C. 1985) 285 S.C. 529, 331 S.E.2d 775, certiorari denied 106 S.Ct. 209, 474 U.S. 888, 88 L.Ed.2d 178, denial of post‑conviction relief affirmed 310 S.C. 504, 427 S.E.2d 666. Sentencing And Punishment 1731

A death penalty was neither excessive nor inappropriate in light of the circumstances of the crime and the character of the defendant where the defendant abducted a young woman, drove her to a secluded area and strangled her, despite the facts that he had no prior criminal record, that he had “an intermittent explosive disorder,” that he was very remorseful, and that he “behaved well 99% of the time.” State v. Koon (S.C. 1984) 285 S.C. 1, 328 S.E.2d 625, certiorari denied 105 S.Ct. 2056, 471 U.S. 1036, 85 L.Ed.2d 329. Sentencing And Punishment 1661

The imposition of the death penalty was justified on the conviction of a series of crimes “about as savage as any known to the law,” where there was no semblence of an excuse, nor did the record reveal any facts relative to the accused persons themselves that would warrant leniency. State v. Chaffee (S.C. 1984) 285 S.C. 21, 328 S.E.2d 464, certiorari denied 105 S.Ct. 1878, 471 U.S. 1009, 85 L.Ed.2d 170, rehearing denied 105 S.Ct. 2370, 471 U.S. 1120, 86 L.Ed.2d 268, rehearing denied 105 S.Ct. 2369, 471 U.S. 1120, 86 L.Ed.2d 268.

The imposition of the death penalty was proper where the defendant was found guilty of two murders while committing burglary, armed robbery and grand larceny. State v. Lucas (S.C. 1985) 285 S.C. 37, 328 S.E.2d 63, certiorari denied 105 S.Ct. 2714, 472 U.S. 1012, 86 L.Ed.2d 729, rehearing denied 106 S.Ct. 15, 473 U.S. 925, 87 L.Ed.2d 694, denial of post‑conviction relief affirmed 308 S.C. 31, 416 S.E.2d 646. Sentencing And Punishment 1681; Sentencing And Punishment 1683

The death penalty was fully justified where the defendant was convicted of murder and first degree criminal sexual conduct (rape). State v. Skipper (S.C. 1985) 285 S.C. 42, 328 S.E.2d 58, certiorari granted in part 106 S.Ct. 270, 474 U.S. 900, 88 L.Ed.2d 225, reversed 106 S.Ct. 1669, 476 U.S. 1, 90 L.Ed.2d 1. Sentencing And Punishment 1681

The imposition of the death penalty was fully justified by a brutal homicide, accompanied by rape. State v. Truesdale (S.C. 1984) 285 S.C. 13, 328 S.E.2d 53, certiorari denied 105 S.Ct. 1878, 471 U.S. 1009, 85 L.Ed.2d 170, rehearing denied 105 S.Ct. 2370, 471 U.S. 1120, 86 L.Ed.2d 268, rehearing denied 289 S.C. 488, 347 S.E.2d 101, certiorari granted, reversed 107 S.Ct. 1394, 480 U.S. 527, 94 L.Ed.2d 539, rehearing denied 107 S.Ct. 2204, 481 U.S. 1060, 95 L.Ed.2d 859, denial of post‑conviction relief affirmed 142 F.3d 749. Sentencing And Punishment 1681

Imposition of the death penalty was proper where the defendant shot the victim in cold blood for pecuniary gain and the victim’s autopsy revealed a shotgun wound one inch by two inches in the back of his skull and 30 to 40 pellet wounds to the head. State v. Patterson (S.C. 1984) 285 S.C. 5, 327 S.E.2d 650, certiorari denied 105 S.Ct. 2056, 471 U.S. 1036, 85 L.Ed.2d 329. Sentencing And Punishment 1668; Sentencing And Punishment 1686

In a murder prosecution, imposition of the death penalty was proper where defendant’s conversations on the telephone and his carrying out of the murder plan, as well as his efforts after the victim’s death to lure the state’s witness into helping to exonerate him, involved a scheme which was about as wicked as it was conceivable. State v. Gaskins (S.C. 1985) 284 S.C. 105, 326 S.E.2d 132, certiorari denied 105 S.Ct. 2368, 471 U.S. 1120, 86 L.Ed.2d 266, habeas corpus dismissed 916 F.2d 941, rehearing denied, certiorari denied 111 S.Ct. 2277, 500 U.S. 961, 114 L.Ed.2d 728, rehearing denied 112 S.Ct. 14, 501 U.S. 1269, 115 L.Ed.2d 1098, habeas corpus denied 943 F.2d 49, certiorari denied 112 S.Ct. 18, 501 U.S. 1272, 115 L.Ed.2d 1102.

Where defendant broke into an elderly woman’s home, stole money and jewelry, assaulted her sexually, and strangled her, the death penalty was fully justified, and was proportional to that imposed in similar cases, under Section 16‑3‑25(C)(3). State v. Spann (S.C. 1983) 279 S.C. 399, 308 S.E.2d 518, appeal dismissed, certiorari denied 104 S.Ct. 2146, 466 U.S. 947, 80 L.Ed.2d 533, dismissal of habeas corpus reversed 963 F.2d 663. Sentencing And Punishment 1681; Sentencing And Punishment 1727

In a prosecution for capital murder, the sentence of death was neither excessive nor disproportionate to the penalty imposed in similar cases, under Section 16‑3‑25(C)(3), where defendant was a twenty‑three year old man whose participation in his trial indicated intelligence beyond question, where the evidence indicated that he broke into the residence of his victim by force, lay in wait for his victim’s arrival, took him from his home, strangled him to death, and hid his body under brush, all for the purpose of attempting to extort money from the victim’s parents, and where the jury found no mitigating circumstances to offset the aggravating circumstances. State v. Adams (S.C. 1983) 279 S.C. 228, 306 S.E.2d 208, certiorari denied 104 S.Ct. 558, 464 U.S. 1023, 78 L.Ed.2d 730, denial of habeas corpus affirmed 965 F.2d 1306, certiorari denied 113 S.Ct. 2966, 508 U.S. 974, 125 L.Ed.2d 666, vacated on rehearing 114 S.Ct. 1365, 511 U.S. 1001, 128 L.Ed.2d 42, on remand 41 F.3d 175.

Where the evidence showed defendants robbed a service station at night and kidnapped two attendants taking them to a secluded spot where they were shot to death, and then defendants robbed another service station attendant on the same night and took him to another secluded spot where he was similarly shot to death, the sentence of death imposed on defendants was appropriate and neither excessive nor disproportionate in light of their crimes and their respective characters. State v. Copeland (S.C. 1982) 278 S.C. 572, 300 S.E.2d 63, certiorari denied 103 S.Ct. 1802, 460 U.S. 1103, 76 L.Ed.2d 367, rehearing denied 103 S.Ct. 3099, 462 U.S. 1124, 77 L.Ed.2d 1357, certiorari denied 103 S.Ct. 3553, 463 U.S. 1214, 77 L.Ed.2d 1399, rehearing denied 104 S.Ct. 39, 463 U.S. 1249, 77 L.Ed.2d 1457, appeal from denial of post‑conviction relief dismissed 134 F.3d 364.

In a prosecution for murder, assault and battery with intent to kill, criminal sexual conduct in the first degree, and kidnapping, defendant was properly sentenced to death and the court’s construction of Section 16‑3‑25(C)(3) did not violate the Eighth Amendment requirement that capital punishment be imposed fairly and with reasonable consistency where the sentence of death was neither excessive nor disproportionate in that the defendant, along with an accomplice, robbed, kidnapped, raped and murdered in circumstances that starkly revealed a thoroughly malignant spirit in which those awesome acts were committed and where the trial court found insufficient the mitigating evidence of possible voluntary inebriation and testimony by defendant’s witnesses that they found the behavior proven at trial to be uncharacteristic of defendant. State v. Woomer (S.C. 1982) 278 S.C. 468, 299 S.E.2d 317, certiorari denied 103 S.Ct. 3572, 463 U.S. 1229, 77 L.Ed.2d 1413.

A death sentence was neither excessive nor disproportionate to the penalty imposed in similar cases where the record clearly reflected that the defendant had maliciously and purposefully committed a brutal murder accompanied by rape. State v. Butler (S.C. 1982) 277 S.C. 452, 290 S.E.2d 1, certiorari denied 103 S.Ct. 242, 459 U.S. 932, 74 L.Ed.2d 191, habeas corpus granted 302 S.C. 466, 397 S.E.2d 87, certiorari denied 111 S.Ct. 442, 498 U.S. 972, 112 L.Ed.2d 425.

Supreme Court would uphold imposition of death penalty where it was satisfied that sentences were not influenced by passion, prejudice or any other arbitrary factor but were products of sound and careful deliberation based on evidence, sentencing judge imposed sentences of death after finding beyond reasonable doubt that murder was committed while in commission of rape, while in commission of kidnapping and while in commission of armed robbery, defendants pled guilty to murder, rape, kidnapping, and armed robbery, and evidence supported their pleas as well as finding of sentencing authority that murders were committed while in commission of other crimes to which defendants pled guilty; fact that Supreme Court could not find similar case with which to compare defendants’ does not require that defendants’ sentences be set aside, since any system of review that requires comparison of each case with all similar prior cases must have beginning. State v. Shaw (S.C. 1979) 273 S.C. 194, 255 S.E.2d 799, certiorari denied 100 S.Ct. 437, 444 U.S. 957, 62 L.Ed.2d 329, rehearing denied 100 S.Ct. 694, 444 U.S. 1027, 62 L.Ed.2d 662, certiorari denied 100 S.Ct. 690, 444 U.S. 1026, 62 L.Ed.2d 660, rehearing denied 100 S.Ct. 1073, 444 U.S. 1104, 62 L.Ed.2d 791.

Death penalty in defendant’s case, relating to defendant’s murder of the mother of his child, was proportionate to other cases where the murder resulted from domestic problems. State v. Weik (S.C. 2002) 356 S.C. 76, 587 S.E.2d 683, rehearing granted, adhered to on rehearing 354 S.C. 382, 581 S.E.2d 834, certiorari denied 123 S.Ct. 2580, 539 U.S. 930, 156 L.Ed.2d 609. Sentencing And Punishment 1657

17. Harmless error

Even if solicitor’s comment in penalty phase of murder prosecution, that there was no mitigation evidence that defendant had ever done a good deed or had a decent thought, was improper comment on defendant’s failure to testify, such error was harmless, given that jury was instructed that it could not consider defendant’s failure to testify in any way and could not use it against him. State v. Shuler (S.C. 2003) 353 S.C. 176, 577 S.E.2d 438. Sentencing And Punishment 1789(9)

Any error in a trial court’s jury instruction on the statutory mitigating circumstance of duress was harmless beyond a reasonable doubt in light of the “utter implausibility” of the defendant’s claim of duress. Additionally, the trial court’s failure to instruct the jury that a confession may not be considered unless found beyond a reasonable doubt to have been given freely and voluntarily, was harmless since the only reasonable inference from the evidence was that the statement was voluntary. State v. Truesdale (S.C. 1990) 301 S.C. 546, 393 S.E.2d 168, certiorari denied 111 S.Ct. 800, 498 U.S. 1074, 112 L.Ed.2d 861, rehearing denied 111 S.Ct. 1341, 499 U.S. 932, 113 L.Ed.2d 272.

18. Reversible error

Solicitor’s comments regarding judicial review of death penalty suggested to jury that its responsibility for deciding fate of accused was lessened and constituted reversible error. State v Tyner (1979) 273 SC 646, 258 SE2d 559. State v Gilbert (1979) 273 SC 690, 258 SE2d 890, later app 277 SC 53, 283 SE2d 179, cert den 456 US 984, 72 L Ed 2d 863, 102 S Ct 2258, application den 456 US 1004, 73 L Ed 2d 1299, 102 S Ct 2294.

Solicitor’s improper comments and action during closing argument of sentencing phase of capital murder trial involving infant victim, which consisted of solicitor declaring an “open season on babies in Lexington County” if the death penalty was not returned, repeatedly telling jury he “expects” the death penalty, and producing a large black shroud and draping it over victim’s crib and wheeling the crib from the courtroom in a staged funeral procession, constituted reversible error; solicitor was overly zealous in his argument and such resulted in death sentence being imposed under the influence and passion and prejudice. State v. Northcutt (S.C. 2007) 372 S.C. 207, 641 S.E.2d 873, rehearing denied. Sentencing And Punishment 1789(9)

19. Waiver of review

Evidence supported finding that convicted capital defendant was competent to waive his right to direct appeal and that waiver was made knowingly and voluntarily, in capital murder prosecution arising out of defendant’s murder of his prison cellmate, despite defendant’s lifelong mental health issues; expert examiners found defendant understood that a jury had convicted him for death of his cellmate and that a judge had sentenced him to death, experts found that defendant verbalized a basic understanding of the appellate process and post‑conviction relief, physician found that waiver was not a product of depression or that it constituted a desire to commit suicide, defendant was able to articulate understanding of conviction and death sentence in response to questions from court, and defendant stated that he deserved death penalty and did not want to remain incarcerated for next 30 to 40 years. State v. Motts (S.C. 2011) 391 S.C. 635, 707 S.E.2d 804. Criminal Law 1026.10(1); Sentencing and Punishment 1788(2)

Although a convicted capital defendant is entitled to waive his personal right to a direct appeal, he cannot waive Supreme Court’s statutorily‑imposed duty to review his capital sentence; abrogating State v. Torrence, 322 S.C. 475, 473 S.E.2d 703. State v. Motts (S.C. 2011) 391 S.C. 635, 707 S.E.2d 804. Sentencing and Punishment 1788(2)

Death sentence based on single aggravating circumstance and single victim was not disproportionate to penalty imposed in other death penalty cases; fact that the victim was defendant’s wife did not lessen defendant’s culpability, as there was no evidence of any immediate dispute leading up to the murder, much less any provocation on victim’s part, and evidence supported submission of aggravating circumstance. State v. Lindsey (S.C. 2007) 372 S.C. 185, 642 S.E.2d 557, rehearing denied, certiorari denied 128 S.Ct. 274, 552 U.S. 917, 169 L.Ed.2d 200. Sentencing And Punishment 1657; Sentencing And Punishment 1675; Sentencing And Punishment 1735

Defendant convicted of capital murder and sentenced to death was mentally competent to waive appeal and postconviction rights; psychiatric experts for both State and defendant testified that he understood appeals process and consequences of waiver, and that defendant was able to communicate clearly and to discuss his desires with attorney who would not frustrate his desire to be executed, diagnosis of mild depression did not effect defendant’s ability to communicate effectively or assist counsel, and anti‑depressant medication did not alter defendant’s desire to proceed with execution. State v. Downs (S.C. 2006) 369 S.C. 55, 631 S.E.2d 79. Criminal Law 1026.10(1); Criminal Law 1572; Sentencing And Punishment 1788(2)

A capital defendant may waive the right to general appellate review, but this right is limited to competent individuals whose decision is knowing and voluntary. State v. Passaro (S.C. 2002) 350 S.C. 499, 567 S.E.2d 862. Sentencing And Punishment 1788(2); Sentencing And Punishment 1791

Defendant, who pled guilty to capital murder and then waived mitigation at the penalty phase, could waive appellate review, where there was no suggestion that defendant was not guilty or that his guilty plea was defective. State v. Passaro (S.C. 2002) 350 S.C. 499, 567 S.E.2d 862. Sentencing And Punishment 1788(2)

Capital murder defendant was competent to waive appeal, as evidence established that defendant suffered from no major mental illness, that he understood nature of appellate proceedings, and that he knew why he was tried and why he received a death sentence, forensic psychiatric expert noted that defendant was aware of finality of death penalty and was able to discuss in detail his reason for waiving appeal, and appellate court questioned defendant during oral arguments and had no doubt as to his competency. State v. Passaro (S.C. 2002) 350 S.C. 499, 567 S.E.2d 862. Sentencing And Punishment 1791

Capital murder defendant’s waiver of his right to appellate review was knowing and voluntary; forensic psychiatric expert noted defendant understood the consequences of his action, and no evidence suggested defendant was being coerced into waiving his appeal. State v. Passaro (S.C. 2002) 350 S.C. 499, 567 S.E.2d 862. Sentencing And Punishment 1788(2)

Statutory review provisions for death penalty may be waived. State v. Torrence (S.C. 1996) 322 S.C. 475, 473 S.E.2d 703, rehearing denied. Criminal Law 1026.10(1)

20. Post‑conviction relief

Evidence that a defendant’s case was inadequately investigated by counsel did not constitute mitigation evidence. The defendant did not seek to re‑present guilt phase evidence, but rather, his claim fell within that of ineffective assistance of counsel, which must be reserved for post‑conviction relief. State v. Elmore (S.C. 1989) 300 S.C. 130, 386 S.E.2d 769, certiorari denied 110 S.Ct. 2633, 496 U.S. 931, 110 L.Ed.2d 652, rehearing denied 111 S.Ct. 9, 497 U.S. 1047, 111 L.Ed.2d 824.

21. Review

Death penalty was not disproportionate sentence for capital murder conviction arising out of defendant’s killing of his prison cellmate; defendant violently murdered victim, strangling him to death despite his pleas for his life, defendant appeared to be unaffected by his actions and smoked cigarettes, ate breakfast, and watched television after he killed victim, and defendant then callously displayed victim’s body in prison common area in order to send message to other inmates. State v. Motts (S.C. 2011) 391 S.C. 635, 707 S.E.2d 804. Sentencing and Punishment 1680

Absent a request by counsel to charge the mitigating circumstances at penalty phase of a capital murder trial, the issue is not preserved for review. State v. Bowman (S.C. 2005) 366 S.C. 485, 623 S.E.2d 378, rehearing denied, certiorari denied 126 S.Ct. 2867, 547 U.S. 1195, 165 L.Ed.2d 900. Sentencing And Punishment 1789(3)

**SECTION 16‑3‑26.** Punishment for murder; notice to defense attorney of solicitor’s intention to seek death penalty; appointment of attorneys for indigent; investigative, expert or other services.

(A) Whenever the solicitor seeks the death penalty he shall notify the defense attorney of his intention to seek such penalty at least thirty days prior to the trial of the case. At the request of the defense attorney, the defense attorney shall be excused from all other trial duties ten days prior to the term of court in which the trial is to be held.

(B)(1) Whenever any person is charged with murder and the death penalty is sought, the court, upon determining that such person is unable financially to retain adequate legal counsel, shall appoint two attorneys to defend such person in the trial of the action. One of the attorneys so appointed shall have at least five years’ experience as a licensed attorney and at least three years’ experience in the actual trial of felony cases, and only one of the attorneys so appointed shall be the Public Defender or a member of his staff. In all cases where no conflict exists, the public defender or member of his staff shall be appointed if qualified. If a conflict exists, the court shall then turn first to the contract public defender attorneys, if qualified, before turning to the Office of Indigent Defense.

(2) Notwithstanding any other provision of law, the court shall order payment of all fees and costs from funds available to the Office of Indigent Defense for the defense of indigent. Any attorney appointed shall be compensated at a rate not to exceed fifty dollars per hour for time expended out of court and seventy‑five dollars per hour for time expended in court. Compensation shall not exceed twenty‑five thousand dollars and shall be paid from funds available to the Office of Indigent Defense for the defense of indigent represented by court‑appointed, private counsel.

(C)(1) Upon a finding in ex parte proceedings that investigative, expert, or other services are reasonably necessary for the representation of the defendant whether in connection with issues relating to guilt or sentence, the court shall authorize the defendant’s attorneys to obtain such services on behalf of the defendant and shall order the payment, from funds available to the Office of Indigent Defense, of fees and expenses not to exceed twenty thousand dollars as the court shall deem appropriate. Payment of such fees and expenses may be ordered in cases where the defendant is an indigent represented by either court‑appointed, private counsel or the public defender.

(2) Court‑appointed counsel seeking payment for fees and expenses shall request these payments from the Office of Indigent Defense within thirty days after the completion of the case. For the purposes of this statute, exhaustion of the funds shall occur if the funds administered by the Office of Indigent Defense and reserved for death penalty fees and expenses have been reduced to zero. If either the Death Penalty Trial Fund or the Conflict Fund has been exhausted in a month and the other fund contains money not scheduled to be disbursed in that month, then the Indigent Defense Commission must transfer a sufficient amount from the fund with the positive fund balance to the fund with no balance and pay the obligation to the extent possible.

(D) Payment in excess of the hourly rates and limit in subsection (B) or (C) is authorized only if the court certifies, in a written order with specific findings of fact, that payment in excess of the rates is necessary to provide compensation adequate to ensure effective assistance of counsel and payment in excess of the limit is appropriate because the services provided were reasonably and necessarily incurred. Upon a finding that timely procurement of such services cannot await prior authorization, the court may authorize the provision of and payment for such services nunc pro tunc.

(E) After completion of the trial, the court shall conduct a hearing to review and validate the fees, costs, and other expenditures on behalf of the defendant.

(F) The Supreme Court shall promulgate guidelines on the expertise and qualifications necessary for attorneys to be certified as competent to handle death penalty cases.

(G) The Office of Indigent Defense shall maintain a list of death penalty qualified attorneys who have applied for and received certification by the Supreme Court as provided for herein. In the event the court appointed counsel notifies the chief administrative judge in writing that he or she does not wish to provide representation in a death penalty case the chief administrative judge shall advise the Office of Indigent Defense which shall forward a name or names to the chief administrative judge for consideration. The appointment power is vested in the chief administrative judge. The Office of Indigent Defense shall establish guidelines as are necessary to ensure that attorneys’ names are presented to the judges on a fair and equitable basis taking into account geography and previous assignments from the list. Efforts shall be made to present an attorney from the area or region where the action is initiated.

(H) The payment schedule set forth herein, as amended by Act 164 of 1993, shall apply to any case for which trial occurs on or after July 1, 1993.

(I) Notwithstanding another provision of law, only attorneys who are licensed to practice in this State and residents of this State may be appointed by the Court and compensated with funds appropriated to the Death Penalty Trial Fund in the Office of Indigent Defense. This proviso shall not pertain to any case in which council has been appointed on the effective date of this Act.

(J) The Judicial Department biennially shall develop and make available to the public a list of standard fees and expenses associated with the defense of an indigent person in a death penalty case.

HISTORY: 1962 Code Section 16‑52.2; 1977 Act No. 177 Section 3; 1978 Act No. 555 Section 2; 1986 Act No. 462, Section 26; 1993 Act No. 164, Part II, Section 45D; 1994 Act No. 497, Part I, E23‑Section 14; 1995 Act No; 145, Part I, Section 14; 1996 Act No. 458, Part II, Section 26A.

CROSS REFERENCES

Office of Indigent Defense to perform functions provided for in this section, see Section 17‑3‑330.

Library References

Costs 302.3, 302.4.

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83 ALR 5th 541 , Right of Indigent Defendant in State Criminal Prosecution to Ex Parte in Camera Hearing on Request for State‑Funded Expert Witness.

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LAW REVIEW AND JOURNAL COMMENTARIES

The administration of the death penalty in South Carolina: experiences over the first few years. 39 S.C. L. Rev. 245 (Winter 1988).

Annual Survey of South Carolina Law: Criminal Law and Procedure: The Death Penalty. 29 S.C. L. Rev. 86.

Annual Survey of South Carolina Law: The Death Penalty. 31 S.C. L. Rev. 49.

Execution of the mentally retarded: a punishment without justification. 40 S.C. L. Rev. 419 (Winter 1989).

Indigent defense services for post‑conviction relief in South Carolina: current problems and potential remedies. 42 S.C. L. Rev. 417 (Winter 1991).

A “Meaningful” Basis for the Death Penalty: The Practice, Constitutionality, and Justice of Capital Punishment in South Carolina. 34 S.C. L. Rev. 391 (December 1982).

1982 Survey: Capital punishment; validity of statutory limits on recovery of fees by expert witnesses and court‑appointed attorneys. 35 S.C. L. Rev. 58 (Autumn 1983).

Attorney General’s Opinions

The cost of transcripts (1) are not payable under Section 16‑3‑26(C); (2) cannot be paid under subsection 16‑3‑26(b); (3) may be paid out of the Capital Defense Fund (Section 17‑3‑80) pursuant to Rule 7(3) of the Rules of the Supreme Court. 1981 Op.Atty.Gen., No 81‑11, p 16 (1981 WL 96538).

As Act No. 177 of 1977 is in conflict with the earlier Code provision establishing a maximum compensation for appointed counsel, Act No. 177 controls the amount and method of compensation and costs to be paid. 1976‑77 Op.Atty.Gen., No 77‑217, p 168 (1977 WL 24559).

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1. In general

A trial court’s failure to follow the mandates of Section 16‑3‑26(B),which sets forth the requirements for attorneys representing individuals in capital cases, denied the defendant a fair trial where the record was replete with instances of improper testimony and unpreserved exceptions. State v. Diddlemeyer (S.C. 1988) 296 S.C. 235, 371 S.E.2d 793.

Section 17‑23‑70 has been superseded by Section 16‑3‑26(B), a more recent statute, which by its terms is more specific than Section 17‑23‑70. State v. Brown (S.C. 1986) 289 S.C. 581, 347 S.E.2d 882.

Section 16‑3‑26(B) provides the exclusive procedure for appointment of counsel for indigent defendants charged with capital murder. State v. Brown (S.C. 1986) 289 S.C. 581, 347 S.E.2d 882.

The punishment for a crime is not and never has been considered a part of the pleading charging a crime. Thus, in a prosecution for murder in which the aggravating circumstance of rape resulted in the imposition of the death penalty, the indictment for murder was not defective for failure to specify the aggravating circumstance. State v. Butler (S.C. 1982) 277 S.C. 452, 290 S.E.2d 1, certiorari denied 103 S.Ct. 242, 459 U.S. 932, 74 L.Ed.2d 191, habeas corpus granted 302 S.C. 466, 397 S.E.2d 87, certiorari denied 111 S.Ct. 442, 498 U.S. 972, 112 L.Ed.2d 425.

The mere fact that an accused was represented at his arraignment by counsel of less than five years’ experience did not deprive him of any right afforded under this section [Code 1962 Section 17‑507], in the absence of prejudice therefrom, and where the record contains no such showing of prejudice. State v. Marshall (S.C. 1973) 260 S.C. 323, 195 S.E.2d 709. Criminal Law 1876

The appointment of three attorneys to represent defendant was not illegal and did not create the impression upon the jury that the trial judge regarded the offense as unusually grave and serious. State v. Sharpe (S.C. 1961) 239 S.C. 258, 122 S.E.2d 622.

The accused was not prejudiced in his trial by the appointment of three attorneys to defend him under the provisions of this section [Code 1962 Section 17‑507]. State v. Cooper (S.C. 1948) 212 S.C. 61, 46 S.E.2d 545.

This section [Code 1962 Section 17‑507] is in conformity with SC Const, Art 1, Section 18 (now Art 1 Section 14). State v. Grant (S.C. 1941) 199 S.C. 412, 19 S.E.2d 638, certiorari denied 62 S.Ct. 942, 316 U.S. 662, 86 L.Ed. 1739.

2. Constitutional issues

The landmark case of Betts v Brady (1942) 316 US 455, 86 L Ed 1595, 62 S Ct 1252, holding that the due process clause of the Fourteenth Amendment does not confer on an indigent person charged with crime in a state court an absolute right, independent of the circumstances, to have counsel appointed for him, was overruled in Gideon v Wainwright, 372 US 335, 9 L Ed 2d 799, 83 S Ct 792, 23 Ohio Ops 2d 258, 93 ALR2d 733, on remand (Fla) 153 So 2d 299, holding that the Fourteenth Amendment makes obligatory on the states the provision of the Sixth Amendment that in all criminal prosecutions the accused shall enjoy the right to have the assistance of counsel for his defense. The now recognized constitutional requirement that counsel be appointed for indigent criminal defendants in state cases applies in noncapital cases as well as in capital cases. Pitt v MacDougall (1964) 245 SC 98, 138 SE2d 840. Shelton v State (1962) 239 SC 535, 123 SE2d 867. Pitt v State (1962) 240 SC 557, 126 SE2d 579. State v Hollman (1958) 232 SC 489, 102 SE2d 873.

Taking of evidence on accused’s future dangerousness in pretrial psychiatric examinations, without notice on such issue, violated accused’s Sixth Amendment right to assistance of counsel in death penalty case. Powell v. Texas, U.S.Tex.1989, 109 S.Ct. 3146, 492 U.S. 680, 106 L.Ed.2d 551.

Neither Eighth Amendment nor Fourteenth Amendment due process clause requires states to appoint counsel for indigent death row inmates seeking state postconviction relief; considerations such as those listed by District Court in instant case should not be treated as factual findings since such treatment could permit different constitutional rules to apply in different states; and District Court would be able on remand to remedy any alleged denial to death row inmates of adequate and timely access to prison library. Murray v. Giarratano, 1989, 109 S.Ct. 2765, 492 U.S. 1, 106 L.Ed.2d 1.

Spending limit mandated by SC Code Section 16‑3‑26(C) is construed to apply equally to noncapital cases, thus, Section 16‑3‑26(C) is not unconstitutional as denial of equal protection. State v. Goolsby (S.C. 1982) 278 S.C. 52, 292 S.E.2d 180.

Effective assistance of counsel found, under either farce‑and‑mockery‑of‑justice standard or normal‑competency test, where public defender, although under heavy case load and without assistance of an investigator, demonstrated normal and customary degree of skill possessed by attorneys reasonably knowledgeable of criminal law, and there was nothing in record to indicate conviction resulted from any deficiency on part of appellant’s attorney. State v. Pendergrass (S.C. 1977) 270 S.C. 1, 239 S.E.2d 750. Criminal Law 1974

An accused in a State prosecution may waive his right under the Fourteenth Amendment to be represented by counsel, provided such waiver is intelligently and understandingly made. Pitt v. MacDougall (S.C. 1964) 245 S.C. 98, 138 S.E.2d 840. Criminal Law 1751

An accused’s failure to request the assistance of counsel is not a waiver of his constitutional right to the assistance of counsel and it may not be presumed from a silent reocrd that he intelligently and understandingly waived his constitutional right to the assistance of counsel. Pitt v. MacDougall (S.C. 1964) 245 S.C. 98, 138 S.E.2d 840. Criminal Law 1766; Criminal Law 1771

Where the denial of the constitutional right to the assistance of counsel is asserted, it becomes the duty of the court to make a careful examination of the record to determine whether a person charged with crime did, in fact, intelligently, understandingly and effectively waive his right to the assistance of court‑appointed counsel. Pitt v. MacDougall (S.C. 1964) 245 S.C. 98, 138 S.E.2d 840. Criminal Law 1770

The right to counsel may be waived by a defendant, if intelligently and understandingly done. Pitt v. State (S.C. 1962) 240 S.C. 557, 126 S.E.2d 579. Criminal Law 1751

3. Notice of intent

Imposition of death penalty after notice that state would not recommend it violated Fourteenth Amendment due process clause because of insufficient notice that penalty might be imposed; lack of adequate notice created impermissible risk that adversary process might have malfunctioned in case. Lankford v. Idaho, 1991, 111 S.Ct. 1723, 500 U.S. 110, 114 L.Ed.2d 173.

State was not estopped from seeking death penalty, even if it failed to serve defendant with “Notice of Intent To Seek The Death Penalty” for more than three years after his indictment; only notice requirement for state to seek death penalty was that defendant be given 30 days notice prior to trial. State v. Powers (S.C. 1998) 331 S.C. 37, 501 S.E.2d 116, rehearing denied, certiorari denied 119 S.Ct. 597, 525 U.S. 1043, 142 L.Ed.2d 539. Sentencing And Punishment 1743

State was not precluded from seeking death penalty by failing to give 30 days’ notice of intention to do so where, for months prior to calling of indictment for trial, defendant’s attorneys had actual notice that state was seeking death penalty; actual notice was all that statute required. State v. McWee (S.C. 1996) 322 S.C. 387, 472 S.E.2d 235, rehearing denied, certiorari denied 117 S.Ct. 695, 519 U.S. 1061, 136 L.Ed.2d 618, appeal from denial of habeas corpus 283 F.3d 179, certiorari denied 123 S.Ct. 162, 537 U.S. 893, 154 L.Ed.2d 158, habeas corpus denied 357 S.C. 403, 593 S.E.2d 456, certiorari denied 124 S.Ct. 1904, 541 U.S. 984, 158 L.Ed.2d 487. Sentencing And Punishment 1747

Section 16‑3‑26, requiring a solicitor seeking the death penalty to notify the defendant, does not require written notice. State v. Young (S.C. 1995) 319 S.C. 33, 459 S.E.2d 84, rehearing denied, certiorari denied 116 S.Ct. 718, 516 U.S. 1051, 133 L.Ed.2d 671.

The State is not required to serve a second Notice of Intent to Seek the Death Penalty at resentencing; thus, in an action reversed and remanded for resentencing, the solicitor was not required, prior to the defendant’s resentencing, to serve a notice of intent to seek the death penalty where the solicitor had served such notice prior to the first sentencing. State v. Young (S.C. 1995) 319 S.C. 33, 459 S.E.2d 84, rehearing denied, certiorari denied 116 S.Ct. 718, 516 U.S. 1051, 133 L.Ed.2d 671.

A defendant indicted for murder was not entitled to a copy of the indictment at least three days prior to her trial as provided in Section 17‑19‑80 for capital cases where the prosecution had not given the defense 30 days notice of its intention to seek the death penalty as required by Section 16‑3‑26, thus foregoing the right to seek that penalty under Section 16‑3‑20 and rendering Section 17‑19‑80 inapplicable. State v. Rackley (S.C. 1980) 275 S.C. 402, 272 S.E.2d 33. Criminal Law 627(2)

4. Appointment of counsel

Since, by clear implication, nonindigent defendants have no right to court appointed counsel under Section 16‑3‑26(B), which provides exclusive procedure for appointment of counsel for indigent defendants charged with capital murder, there was no merit to capital defendant’s contention that he was entitled to free court appointed counsel, whether an indigent or not, and further that, since he had not been informed of this right, his waiver of counsel had not been knowingly and intelligently made. State v. Brown (S.C. 1986) 289 S.C. 581, 347 S.E.2d 882.

Section 16‑3‑26(B) provides the exclusive procedure for appointment of counsel for indigent defendants charged with capital murder. State v. Brown (S.C. 1986) 289 S.C. 581, 347 S.E.2d 882.

Defendant cannot waive his right to counsel unless he has been advised by the trial court of his right to court‑appointed counsel. Pitt v. MacDougall (S.C. 1964) 245 S.C. 98, 138 S.E.2d 840.

5. Expert or other services

Defendant convicted of murder and sentenced to death was not entitled to post‑trial funding to test his accomplice’s gloves for gunshot residue (GSR), where defendant had retained GSR expert for trial, but elected not to test accomplice’s gloves for strategic trial purposes. State v. Mercer (S.C. 2009) 381 S.C. 149, 672 S.E.2d 556, rehearing denied, certiorari denied, certiorari denied 130 S.Ct. 104, 558 U.S. 843, 175 L.Ed.2d 70, habeas corpus dismissed 2015 WL 1280618. Costs 302.3

The matter of authorizing funds to capital defendants lies within the sound discretion of the trial court. State v. Mercer (S.C. 2009) 381 S.C. 149, 672 S.E.2d 556, rehearing denied, certiorari denied, certiorari denied 130 S.Ct. 104, 558 U.S. 843, 175 L.Ed.2d 70, habeas corpus dismissed 2015 WL 1280618. Costs 302

Postconviction relief judge properly conducted hearing on petitioner’s motion for payment of expert witness fees at which counsel for state was allowed to fully participate, rather than holding ex parte hearing. Thames v. State (S.C. 1996) 325 S.C. 9, 478 S.E.2d 682. Costs 302.2(2)

When defendant requests expert services for criminal trial, request is determined by judge in ex parte proceedings. Thames v. State (S.C. 1996) 325 S.C. 9, 478 S.E.2d 682. Costs 302.2(2)

A county does not have standing to participate in an ex parte hearing under Section 16‑3‑26(C) to determine the necessity and reasonableness of investigative and expert services required for representation of an indigent capital murder defendant. Ex parte Lexington County (S.C. 1994) 314 S.C. 220, 442 S.E.2d 589. Costs 302.2(2); Costs 302.3

Section 16‑3‑26 does not require that an ex parte proceeding to determine the necessity and reasonableness of investigative and expert services required for representation of an indigent capital murder defendant be held in camera. Ex parte Lexington County (S.C. 1994) 314 S.C. 220, 442 S.E.2d 589. Costs 302.2(2); Costs 302.3

Trial court’s ruling that the defense team could spend up to the then $2,000 limit pursuant to Section 16‑3‑26(C) for the procurement of expert witnesses, which ruling also reserved to the defense team the right to petition for an expansion of that amount, did not prejudice the defendant, especially where the record established that not only did the state provide defendant with the services of a published medical expert on “brain death,” but also that defense counsel exhaustively cross‑examined the state’s expert witnesses on the defendant’s behalf. State v. Matthews (S.C. 1986) 291 S.C. 339, 353 S.E.2d 444.

The trial court in a murder prosecution properly denied defendant’s motion, pursuant to Section 16‑3‑26(C), for funds to pay a jury selection expert, where the expert stated that he would provide his expertise regardless of whether or not the court ordered the payment of his fee. State v. Yates (S.C. 1982) 280 S.C. 29, 310 S.E.2d 805, certiorari denied 103 S.Ct. 3098, 462 U.S. 1124, 77 L.Ed.2d 1356, denial of habeas corpus vacated 106 S.Ct. 218, 474 U.S. 896, 88 L.Ed.2d 218, on remand 290 S.C. 231, 349 S.E.2d 84. Costs 302.2(2)

The refusal of the trial court, based upon the conclusion of the Court Administrator that the defendant was not indigent, to enforce its order directing the judicial department to advance funds to defense counsel to procure expert witnesses did not result in prejudice to the defendant where, after the request for defense expenses had been denied, the defendant’s attorney nevertheless replied that he was “ready, willing, and able to go forward representing him at trial.” State v. Owens (S.C. 1981) 277 S.C. 189, 284 S.E.2d 584. Criminal Law 1177.6

6. Review

Capital murder defendant’s failure to raise speedy trial motion precluded appellate review of his claim that State was estopped from seeking death penalty on ground that State failed to serve defendant with “Notice of Intent To Seek The Death Penalty” for more than three years after his indictment. State v. Powers (S.C. 1998) 331 S.C. 37, 501 S.E.2d 116, rehearing denied, certiorari denied 119 S.Ct. 597, 525 U.S. 1043, 142 L.Ed.2d 539. Criminal Law 1044.1(1)

**SECTION 16‑3‑28.** Punishment for murder; right of defendant to make last argument.

Notwithstanding any other provision of law, in any criminal trial where the maximum penalty is death or in a separate sentencing proceeding following such trial, the defendant and his counsel shall have the right to make the last argument.

HISTORY: 1977 Act No. 177 Section 5; 1986 Act No. 462, Section 43.

Library References

Criminal Law 2064.

Sentencing and Punishment 1780(2).

Westlaw Topic Nos. 110, 350H.

C.J.S. Criminal Law Sections 1686, 1713, 2128 to 2130, 2217.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Appeal and Error Section 81, Matters Related to the Jury.

S.C. Jur. Witnesses Section 3, Capital Defendant’s Right to Testify; Waiver.

LAW REVIEW AND JOURNAL COMMENTARIES

Annual Survey of South Carolina Law: Criminal Law and Procedure: The Death Penalty. 29 S.C. L. Rev. 86.

NOTES OF DECISIONS

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1. In general

Capital murder defendant was not entitled to argue, during his act of addressing jury during guilt phase of capital murder prosecution, that he was on trial for his life and that his life was in jeopardy; jury was specifically instructed that it was not to consider punishment at the guilt phase of trial and defendant’s argument would have misled jury to believe it could have considered punishment during guilt phase. State v. Moore (S.C. 2004) 357 S.C. 458, 593 S.E.2d 608. Criminal Law 2160

Capital defendant had the right to personally address the jury in the guilt phase of his capital trial regarding all charges, including non‑capital charges. Cooper v. Moore (S.C. 2002) 351 S.C. 207, 569 S.E.2d 330, appeal after new trial 386 S.C. 210, 687 S.E.2d 62, rehearing denied, certiorari granted. Criminal Law 645

Statute giving defendant in death penalty case the right to make the last argument does not require the defendant’s decision to personally address the jury be made after the solicitor’s closing. State v. Charping (S.C. 1998) 333 S.C. 124, 508 S.E.2d 851, rehearing denied, certiorari denied 119 S.Ct. 2345, 527 U.S. 1007, 144 L.Ed.2d 241. Sentencing And Punishment 358

It is within the trial court’s discretion to require that defendant in a death penalty case make a decision regarding whether he or she will exercise right to make last argument after the presentation of evidence, but prior to the state’s closing argument. State v. Charping (S.C. 1998) 333 S.C. 124, 508 S.E.2d 851, rehearing denied, certiorari denied 119 S.Ct. 2345, 527 U.S. 1007, 144 L.Ed.2d 241. Criminal Law 668

In prosecution for murder and kidnapping, trial court did not abuse its discretion in denying defendants’ motions for severance, despite defendants’ argument that failure to sever denied one of them statutory right to last argument and despite defendant’s argument that defense could have seated juror opposed to death penalty if separate trials had been granted. Code 1976, Sections 16‑3‑20(B), 16‑3‑28. State v. Plath (S.C. 1981) 277 S.C. 126, 284 S.E.2d 221. Criminal Law 622.7(1)

2. Constitutional issues

Capital defendant claiming he was denied effective assistance of counsel as to all charges, including non‑capital charges, when he was not advised of his statutory right to make a guilt phase closing argument had to show prejudice. Cooper v. Moore (S.C. 2002) 351 S.C. 207, 569 S.E.2d 330, appeal after new trial 386 S.C. 210, 687 S.E.2d 62, rehearing denied, certiorari granted. Criminal Law 1942

Counsel were deficient for failing to inform capital defendant of his statutory right to make a closing statement to the jury during the guilt phase of his trial. Cooper v. Moore (S.C. 2002) 351 S.C. 207, 569 S.E.2d 330, appeal after new trial 386 S.C. 210, 687 S.E.2d 62, rehearing denied, certiorari granted. Criminal Law 1942

Defendant was prejudiced as to non‑capital charges by counsel’s deficient performance in failing to inform defendant of his statutory right to make a closing statement to the jury during the guilt phase of his trial, as defendant did not testify before the jury such that the jury did not have the opportunity to hear him argue for his innocence or to hear and consider his side of the story, and evidence against defendant was mostly circumstantial and not overwhelming. Cooper v. Moore (S.C. 2002) 351 S.C. 207, 569 S.E.2d 330, appeal after new trial 386 S.C. 210, 687 S.E.2d 62, rehearing denied, certiorari granted. Criminal Law 1942

Capital murder defendant moving for post conviction relief (PCR) on ground that trial counsel were ineffective for failing to advise him of his statutory right to make personal closing statement during guilt phase was required to show that he was prejudiced by lack of such waiver; overruling State v. Reed, 293 S.C. 515, 362 S.E.2d 13, State v. Orr, 304 S.C. 185, 403 S.E.2d 623, State v. Charping, 313 S.C. 147, 437 S.E.2d 88, and State v. Cooper, 312 S.C. 90, 439 S.E.2d 276. Franklin v. Catoe (S.C. 2001) 346 S.C. 563, 552 S.E.2d 718, rehearing denied, certiorari denied, certiorari denied 122 S.Ct. 2332, 535 U.S. 1114, 153 L.Ed.2d 162. Criminal Law 1519(3)

3. Reversible error

The defendant’s murder conviction would be reversed and remanded for a new trial where the defendant did not waive his right to make the last argument; Section 16‑3‑28 clearly indicates that the legislature intended for capital defendants to have a personal right to make the last argument in both phases of their trials. State v. Charping (S.C. 1993) 313 S.C. 147, 437 S.E.2d 88, rehearing denied, appeal after new trial 333 S.C. 124, 508 S.E.2d 851, certiorari denied 119 S.Ct. 2345, 527 U.S. 1007, 144 L.Ed.2d 241.

The denial of a defendant’s right to make a final argument is reversible error absent a knowing and voluntary waiver of the right on the record. State v. Charping (S.C. 1993) 313 S.C. 147, 437 S.E.2d 88, rehearing denied, appeal after new trial 333 S.C. 124, 508 S.E.2d 851, certiorari denied 119 S.Ct. 2345, 527 U.S. 1007, 144 L.Ed.2d 241.

4. Waiver

Record supported finding that defendant did not knowingly and intelligently waive his statutory right to make personal closing statement during guilt phase of his capital murder trial; there was no on‑the‑record waiver, and testimony given at post conviction relief (PCR) hearing by defense counsel, solicitor, and defendant himself indicated that no waiver occurred. Franklin v. Catoe (S.C. 2001) 346 S.C. 563, 552 S.E.2d 718, rehearing denied, certiorari denied, certiorari denied 122 S.Ct. 2332, 535 U.S. 1114, 153 L.Ed.2d 162. Criminal Law 645

A post conviction relief (PCR) hearing is the appropriate forum for addressing the issue of whether a defendant knowingly and intelligently waived his statutory right to make a personal closing statement during the guilt phase of his capital trial. Franklin v. Catoe (S.C. 2001) 346 S.C. 563, 552 S.E.2d 718, rehearing denied, certiorari denied, certiorari denied 122 S.Ct. 2332, 535 U.S. 1114, 153 L.Ed.2d 162. Criminal Law 1655(8)

Capital murder defendant moving for post conviction relief (PCR) on ground that trial counsel were ineffective for failing to advise him of his statutory right to make personal closing statement during guilt phase failed to show that he was prejudiced by lack of such waiver; error occurred during guilt phase, where jury was confined to determining whether defendant committed crime, not whether he deserved death penalty, and evidence of guilt was overwhelming. Franklin v. Catoe (S.C. 2001) 346 S.C. 563, 552 S.E.2d 718, rehearing denied, certiorari denied, certiorari denied 122 S.Ct. 2332, 535 U.S. 1114, 153 L.Ed.2d 162. Criminal Law 1519(3)

A petitioner for post conviction relief (PCR) may no longer rely solely on the trial record to demonstrate that he did not knowingly and intelligently waive his statutory right to make a personal closing statement during the guilt phase of his capital trial; rather, the PCR court should analyze all the facts surrounding the trial to determine if the petitioner knowingly and intelligently waived his rights. Franklin v. Catoe (S.C. 2001) 346 S.C. 563, 552 S.E.2d 718, rehearing denied, certiorari denied, certiorari denied 122 S.Ct. 2332, 535 U.S. 1114, 153 L.Ed.2d 162. Criminal Law 1614

Waiver of defendant’s right to make last argument in death penalty case was knowing and voluntary, even though he was asked whether he wished to exercise right to make last argument prior to the solicitor’s closing argument at sentencing hearing, where record demonstrated that defendant was well aware of his right to personally address the jury and that he waived that right, and there was no evidence that defendant did not understand his right, or that decision to waive right was not knowing and voluntary. State v. Charping (S.C. 1998) 333 S.C. 124, 508 S.E.2d 851, rehearing denied, certiorari denied 119 S.Ct. 2345, 527 U.S. 1007, 144 L.Ed.2d 241. Sentencing And Punishment 360

The record revealed that the defendant chose not to exercise his right to make a final argument to the jury during the guilt phase of the trial, and thus the defendant waived his right to make a final argument, where the defendant’s trial counsel stated that he had informed the defendant of his right to make a final argument and the defense made a strategic decision not to have the defendant make the last argument. Cartrette v. State (S.C. 1994) 323 S.C. 15, 448 S.E.2d 553.

A knowing and voluntary waiver of the right to last argument must be satisfied by a full record. State v. Charping (S.C. 1993) 313 S.C. 147, 437 S.E.2d 88, rehearing denied, appeal after new trial 333 S.C. 124, 508 S.E.2d 851, certiorari denied 119 S.Ct. 2345, 527 U.S. 1007, 144 L.Ed.2d 241. Criminal Law 1086.11

The colloquy between the trial judge and the defense counsel in the sentencing phase of a death penalty trial was sufficient to demonstrate that the defendant, who was mildly retarded, was cognizant of his right to testify, and that he knowingly and intelligently waived that right, where his trial counsel reported in depth their discussions with him regarding his waiver, they stated that he consistently maintained that he didn’t want to say anything, and they concluded, based on their year‑long relationship with him, that he understood his right to testify and that it was his decision not to testify. State v. Davis (S.C. 1992) 309 S.C. 326, 422 S.E.2d 133, rehearing denied, certiorari denied 113 S.Ct. 2355, 508 U.S. 915, 124 L.Ed.2d 263. Sentencing And Punishment 1774

The trial court’s record did not show that a defendant’s waiver of his rights to testify and to personally address the jury was knowing and voluntary where the defendant had an I.Q. between 53 and 59 (mild to moderate mental retardation), defense counsel maintained that the defendant was not competent to stand trial, and counsel stated that they had explained his rights to the defendant “the best we can and he has... given us the indication that he doesn’t want to say anything.” State v. Orr (S.C. 1991) 304 S.C. 185, 403 S.E.2d 623.

Trial judge erred in allowing state to have closing argument in guilt phase in capital case where record was devoid of evidence defendant made knowing and intelligent waiver of this right; speculation as to whether defendant was prejudiced by being denied right to final argument was inappropriate in this situation. State v. Reed (S.C. 1987) 293 S.C. 515, 362 S.E.2d 13.

5. Review

Capital murder defendant’s claim that his waiver of his right to make a closing argument to jury during sentencing phase was rendered involuntary due to the trial court’s admonition to him that the statement he made would have to be confined to the evidence that has been presented and to the issues concerning the sentence imposed, was more appropriately addressed in post conviction relief action, where present record did not allow for a determination of what trial court meant by admonition or what defendant understood such admonition to mean. State v. Moore (S.C. 2004) 357 S.C. 458, 593 S.E.2d 608. Criminal Law 1119(1)

**SECTION 16‑3‑29.** Attempted murder.

A person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder. A person who violates this section is guilty of a felony, and, upon conviction, must be imprisoned for not more than thirty years. A sentence imposed pursuant to this section may not be suspended nor may probation be granted.

HISTORY: 2010 Act No. 273, Section 6.A, eff June 2, 2010.

Editor’s Note

2010 Act No. 273, Section 7.C, provides:

“Wherever in the 1976 Code of Laws reference is made to the common law offense of assault and battery of a high and aggravated nature, it means assault and battery with intent to kill, as contained in repealed Section 16‑3‑620, and, except for references in Section 16‑1‑60 and Section 17‑25‑45, wherever in the 1976 Code reference is made to assault and battery with intent to kill, it means attempted murder as defined in Section 16‑3‑29.”

CROSS REFERENCES

Life sentence for person convicted for certain crimes, see Section 17‑25‑45.

Violent crimes defined, see Section 16‑1‑60.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Assault and Battery Section 10, Degrees.

S.C. Jur. Assault and Battery Section 19, Sentence for Assault and Battery With Intent to Kill.

S.C. Jur. Burglary Section 9, Punishment.

S.C. Jur. Homicide Section 22.50, Attempted Murder.

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1. In general

Specific intent to commit murder is an element of attempted murder. State v. King (S.C.App. 2015) 412 S.C. 403, 772 S.E.2d 189, rehearing denied. Homicide 558

First‑degree assault and battery based on attempt to injure another person in manner likely to produce death or great bodily injury was lesser included offense of attempted murder with respect to one of two victims who suffered no injury. State v. Middleton (S.C. 2014) 407 S.C. 312, 755 S.E.2d 432, rehearing denied, certiorari denied 135 S.Ct. 196, 190 L.Ed.2d 152. Indictment and Information 191(4)

Assault and battery with intent to kill (ABWIK) is an unlawful act of a violent nature to the person of another with malice aforethought, either express or implied, and comprises all the elements of murder except the death of the victim. State v. Dennis (S.C.App. 2013) 402 S.C. 627, 742 S.E.2d 21. Homicide 728

2. Instructions

Trial court’s error in refusing to instruct on first‑degree assault and battery as lesser included offense of attempted murder as to victim who did not suffer any injury was harmless beyond reasonable doubt, in view of evidence that defendant drove his moped up to vehicle occupied by driver and passenger, pulled out gun, began shooting through passenger window, and fired his weapon at least five times, and passenger’s testimony that only reason he was not killed was because he had wherewithal to jump into driver’s seat and drive defendant off road. State v. Middleton (S.C. 2014) 407 S.C. 312, 755 S.E.2d 432, rehearing denied, certiorari denied 135 S.Ct. 196, 190 L.Ed.2d 152. Criminal Law 1173.2(4)

Defendant’s testimony that he only intended to scare shooting victim did not mitigate evidence of general intent to kill, so as to warrant jury instruction on assault and battery of a high and aggravated nature (ABHAN) as lesser included offense of assault and battery with intent to kill (ABWIK), especially where evidence established that defendant pointed gun at victim, who had run 40 to 45 feet away, no evidence suggested victim drew his gun before defendant shot him, all accounts of shooting confirmed that defendant pointed his gun at victim, not in the air, and defendant fired five shots, wounding victim in arm, leg, and back. State v. Dennis (S.C.App. 2013) 402 S.C. 627, 742 S.E.2d 21. Criminal Law 795(2.50)

3. Admissibility of evidence

Police officer’s testimony as to number of gunshots fired was hearsay in prosecution for attempted murder, where testimony was based exclusively on statements made to officer by witnesses and thus necessarily revealed content of out‑of‑court statements, and state offered testimony to prove truth of witnesses’ statements. State v. King (S.C.App. 2015) 412 S.C. 403, 772 S.E.2d 189, rehearing denied. Criminal Law 419(1.5)

4. Harmless error

Trial court’s errors of charging jury that attempted murder was general intent crime rather than specific intent crime and by admitting police officer’s hearsay testimony regarding number of gunshots fired prejudiced defendant as to charge of attempted murder and thus were not harmless beyond a reasonable doubt; that only one shell casing was found at scene could have led jury to find defendant fired only one gunshot, and testimony that more than one shot was fired presented a stronger case for attempted murder charge. State v. King (S.C.App. 2015) 412 S.C. 403, 772 S.E.2d 189, rehearing denied. Criminal Law 1169.1(9); Criminal Law 1172.1(3)

Trial court’s errors of charging jury that attempted murder was general intent crime rather than specific intent crime and by admitting police officer’s hearsay testimony regarding number of gunshots fired did not prejudice defendant as to charges of armed robbery and possession of a firearm during the commission of a violent crime and thus were harmless beyond a reasonable doubt as to those two charges; defendant failed to demonstrate that jury charge on attempted murder or admission of officer’s testimony had any effect on armed robbery charge or firearm charge. State v. King (S.C.App. 2015) 412 S.C. 403, 772 S.E.2d 189, rehearing denied. Criminal Law 1169.1(9); Criminal Law 1172.1(3)

5. Review

Because the crime of attempted murder was defined by statute, appellate court would first look to the language of the statute to determine what the Legislature intended the elements of the crime to be, including the level of intent required. State v. King (S.C.App. 2015) 412 S.C. 403, 772 S.E.2d 189, rehearing denied. Homicide 557; Homicide 558

**SECTION 16‑3‑50.** Manslaughter.

A person convicted of manslaughter, or the unlawful killing of another without malice, express or implied, must be imprisoned not more than thirty years or less than two years.

HISTORY: 1962 Code Section 16‑55; 1952 Code Section 16‑55; 1942 Code Section 1107; 1932 Code Section 1107; Cr. C. ‘22 Section 10; Cr. C. ‘12 Section 148; Cr. C. ‘02 Section 120; G. S. 2465; R. S. 120; 1869 (14) 175; 1931 (38) 332; 1934 (38) 1463; 1993 Act No. 184, Section 159.

CROSS REFERENCES

Additional punishment for possession of firearm or knife during commission of, or attempt to commit, violent crime, see Section 16‑23‑490.

Commission of this crime within specified radius of child day care center as separate offense, see Section 63‑13‑200.

Custody of convicted persons, designation of place of confinement, participation in work release and training program, see Section 24‑3‑20.

Denial of registration as an operator of a child day care or group day care home where the applicant, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑820.

Denial of renewal for child day care or group day care home where the person applying for approval, the operator of the facility, or an employee or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑630.

Eligibility for work release, see Section 24‑13‑125.

Fingerprint review of any person applying to operate or seek employment at a child day care or group day care home to determine prior conviction of the crime referred to in this section, see Section 63‑13‑620.

Foster care placement with certain persons prohibited, see Section 63‑7‑2350.

Homicide by operation of boat, see Section 50‑21‑115.

No license or registration will be issued to any religious establishment to operate a child day care or group day care home where the operator, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑1010.

No person may be employed by the Department of Social Services in its day care licensing or child protective services divisions who has been convicted of the crime referred to in this section, see Section 63‑13‑190.

Past conviction check prior to initial employment of teachers, see Section 59‑26‑40.

Persons convicted of Title 16, Chapter 3 crimes prohibited from appointment as guardian ad litem for child in abuse or neglect proceeding, see Section 63‑11‑520.

Post‑conviction DNA procedures, see Section 17‑28‑10 et seq.

Preservation of DNA evidence, see Section 17‑28‑310 et seq.

Prohibition against release of offender into community in which he committed violent crime, see Section 24‑13‑650.

Provisions of South Carolina Probate Code relative to effect of homicide on intestate succession, wills, joint assets, life insurance, and beneficiary designations, see Section 62‑2‑803.

Reckless homicide in traffic accidents, see Section 56‑5‑2910.

Revoking driver’s license of person convicted of manslaughter from operation of a motor vehicle, see Section 56‑1‑280.

Sentencing, see Section 17‑25‑20 et seq.

Violent crimes defined, see Section 16‑1‑60.

Library References

Homicide 1568.

Westlaw Topic No. 203.

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S.C. Jur. Assault and Battery Section 5, Intent is a Necessary Element.

S.C. Jur. Homicide Section 10, Time of Victim’s Death.

S.C. Jur. Homicide Section 15, Malice‑ Generally.

LAW REVIEW AND JOURNAL COMMENTARIES

Don’t forget to wear your hunter orange (or flack jacket): A critique on the lack of criminal prosecution of hunting “accidents.” 56 S.C. L. Rev. 135 (Autumn 2004).

Attorney General’s Opinions

A conviction of voluntary or involuntary manslaughter pursuant to the provisions of Sections 16‑3‑50 and 16‑3‑60 requires suspension of driver’s license privileges pursuant to Section 56‑1‑280 of the Code of Laws, 1976. 1982 Op.Atty.Gen., No 82‑16, p 22 (1982 WL 154986).

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1. In general

Manslaughter is taking the life of another in sudden heat and passion, under reasonable provocation, without premeditation or malice. State v Ferguson (1835) 20 SCL 619. State v Smith (1857) 44 SCL 341. State v Jacobs (1888) 28 SC 29, 4 SE 799.

Voluntary manslaughter is the unlawful killing of a human being in the sudden heat of passion upon sufficient legal provocation. State v. Smith (S.C.App. 2005) 363 S.C. 111, 609 S.E.2d 528; State v. Knoten (S.C. 2001) 347 S.C. 296, 555 S.E.2d 391, rehearing denied; State v. Cole (S.C. 2000) 338 S.C. 97, 525 S.E.2d 511; State v. Damon (S.C. 1985) 285 S.C. 125, 328 S.E.2d 628, certiorari denied 106 S.Ct. 187, 474 U.S. 865, 88 L.Ed.2d 156, rehearing denied 106 S.Ct. 551, 474 U.S. 1015, 88 L.Ed.2d 479.

A conviction for voluntary manslaughter was a prerequisite for a conviction for possession of a weapon during the commission of a violent crime. Cook v. State (S.C. 2015) 415 S.C. 551, 784 S.E.2d 665, rehearing denied. Weapons 194(2)

“Voluntary manslaughter” is the unlawful killing of a human being in sudden heat of passion upon a sufficient legal provocation. State v. Wood (S.C. 2004) 362 S.C. 135, 607 S.E.2d 57, rehearing denied, certiorari denied 125 S.Ct. 2942, 545 U.S. 1132, 162 L.Ed.2d 873, application for writ of habeas corpus held in abeyance 2013 WL 5744779. Homicide 658

The sudden heat of passion, upon sufficient legal provocation, which mitigates a felonious killing to manslaughter, while it need not dethrone reason entirely or shut out knowledge and volition, must be such as would naturally disturb the sway of reason, render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence. State v. Knoten (S.C. 2001) 347 S.C. 296, 555 S.E.2d 391, rehearing denied. Homicide 668

“Involuntary manslaughter” is either (1) the killing of another without malice and unintentionally, but while one is engaged in the commission of some unlawful act not amounting to a felony and not naturally tending to cause death or great bodily harm or (2) the killing of another without malice and unintentionally, but while one is acting lawfully, with reckless disregard for the safety of others. State v. Knoten (S.C. 2001) 347 S.C. 296, 555 S.E.2d 391, rehearing denied. Homicide 620; Homicide 659

Sudden heat of passion upon sufficient legal provocation that mitigates a felonious killing to manslaughter must be such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence. State v. Locklair (S.C. 2000) 341 S.C. 352, 535 S.E.2d 420, rehearing denied, certiorari denied 121 S.Ct. 817, 531 U.S. 1093, 148 L.Ed.2d 701. Homicide 668

To warrant a court’s eliminating the offense of manslaughter in a murder prosecution, it should very clearly appear that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter. State v. Cole (S.C. 2000) 338 S.C. 97, 525 S.E.2d 511. Homicide 1452

Manslaughter is the unlawful killing of a human being in sudden heat of passion on a sufficient legal provocation. State v. Plemmons (S.C. 1985) 286 S.C. 78, 332 S.E.2d 765, vacated 106 S.Ct. 1943, 476 U.S. 1102, 90 L.Ed.2d 353. Homicide 668

A conviction may be had for involuntary manslaughter under an indictment for murder in the usual form. State v. White (S.C. 1969) 253 S.C. 475, 171 S.E.2d 712, certiorari denied 90 S.Ct. 482, 396 U.S. 987, 24 L.Ed.2d 451. Indictment And Information 189(8)

Voluntary manslaughter is usually defined as the unlawful killing of a human being in sudden heat of passion upon a sufficient legal provocation. State v Harvey (1951) 220 SC 506, 68 SE2d 409. State v. Norris (S.C. 1969) 253 S.C. 31, 168 S.E.2d 564. Homicide 667

To warrant the court in eliminating the offense of manslaughter it should very clearly appear that there is no evidence whatever tending to reduce the crime from murder to manslaughter. State v. Norris (S.C. 1969) 253 S.C. 31, 168 S.E.2d 564. Homicide 1452

The general statutory definition in this section [Code 1962 Section 16‑55] includes both voluntary and involuntary manslaughter. State v. Barnett (S.C. 1951) 218 S.C. 415, 63 S.E.2d 57.

The legislature of this State has never undertaken to define involuntary manslaughter. Thus the courts necessarily follow the common‑law definition. State v. Barnett (S.C. 1951) 218 S.C. 415, 63 S.E.2d 57.

If an act done is a violation of a statute intended and designed to prevent injury to the person, and is in itself dangerous, and death ensues, the person violating the statute is guilty of manslaughter. State v. Brown (S.C. 1945) 205 S.C. 514, 32 S.E.2d 825. Homicide 628

2. Constitutional issues

A defendant who pled guilty to a charge of voluntary manslaughter did not receive ineffective assistance of counsel, based on his counsel’s failure to advise him of the defense of accident, where the defendant (1) had entered the home of his victim armed with a weapon he intended to use to scare the victim, (2) shot into the wall to scare the victim, who was sleeping, and (3) shot the victim, who had awakened and grabbed for the gun, which went off during the struggle. Arnette v. State (S.C. 1992) 306 S.C. 556, 413 S.E.2d 803.

The failure of defense counsel to request self‑defense charges on ‘appearances’ and ‘retreat’ during a trial for voluntary manslaughter constituted ineffective assistance where the defendant had visited with the victim and both drank until intoxicated, the victim pulled out a gun during a dispute about the defendant’s son and threw the gun down pointing at the son, the defendant gave the gun back to the victim and started to leave, the defendant heard a gun shot, turned back, told his son to run, and tried to take the gun from the victim, whereupon the gun fired and the victim was shot. Battle v. State (S.C. 1991) 305 S.C. 460, 409 S.E.2d 400.

In a prosecution for murder, the defendant was deprived of the effective assistance of counsel where the defense counsel failed to object to a mandatory presumption of malice charge to the jury; although such a charge is subject to a harmless error analysis, such an analysis is inappropriate where there is evidence from which the jury could find the defendant guilty of the lesser offense of voluntary manslaughter, since a charge creating a mandatory presumption of malice precludes manslaughter. The defense counsel was also ineffective in failing to request a charge instructing the jury that “if they had a reasonable doubt as to whether the appellant was guilty of murder or manslaughter, it was their duty to resolve that doubt in his favor, and find him guilty of the lesser offense,” where the offenses of murder and manslaughter were submitted to the jury. Carter v. State (S.C. 1990) 301 S.C. 396, 392 S.E.2d 184.

In a manslaughter prosecution, the defense counsel’s failure to object to the trial judge’s jury charge regarding a mandatory presumption of intent from the doing of an unlawful act, which was clearly erroneous as a burden‑shifting instruction on an element of the crime, constituted ineffective assistance of counsel where the critical dispute at trial was whether the defendant had the requisite intent to kill someone when he pulled a gun from his pocket, such that he should be convicted of voluntary rather than involuntary manslaughter. High v. State (S.C. 1989) 300 S.C. 88, 386 S.E.2d 463.

3. Elements of offense

In proving corpus delicti, the law demands the best proof which in the nature of the case is attainable. Direct and positive evidence is not essential. It is now well established that the elements constituting the corpus delicti in a homicide ‑ the death of the person whose life is alleged to have been taken feloniously, and the criminal agency of another in taking the life of such person ‑ may be sufficiently proved by presumptive or circumstantial evidence, where that is the best evidence obtainable. State v. Watts (S.C. 1967) 249 S.C. 80, 152 S.E.2d 684.

The corpus delicti consists of two elements: (1) The death of the person killed; (2) its causation by the criminal act of another. These elements may be sufficiently proven by circumstantial evidence where as is often the case that is the best evidence obtainable. State v. McIver (S.C. 1961) 238 S.C. 401, 120 S.E.2d 393. Homicide 511; Homicide 1128

4. Legal provocation

No mere words, however insulting, can excuse the killing and reduce the offense to manslaughter. State v Levelle (1891) 34 SC 120, 13 SE 319. State v Davis (1897) 50 SC 405, 27 SE 905. State v Gilliam (1903) 66 SC 419, 45 SE 6. State v Harvey (1951) 220 SC 506, 68 SE2d 409.

Even if sufficient legal provocation has aroused a defendant’s passion, if at the time of the killing those passions had cooled or a sufficiently reasonable time had elapsed so that the passions of the ordinary reasonable person would have cooled, the killing would be murder and not manslaughter. State v. Smith (S.C.App. 2005) 363 S.C. 111, 609 S.E.2d 528. Homicide 669

In order to support a charge for voluntary manslaughter, the provocation must be such as to render the mind of an ordinary person incapable of cool reflection and produce an uncontrollable impulse to do violence. State v. Smith (S.C.App. 2005) 363 S.C. 111, 609 S.E.2d 528. Homicide 673

Even when a person’s passion has been sufficiently aroused by a legally adequate provocation, if at the time of the killing those passions had cooled or a sufficiently reasonable time had elapsed so that the passions of the ordinary reasonable person would have cooled, the killing is murder and not manslaughter. State v. Knoten (S.C. 2001) 347 S.C. 296, 555 S.E.2d 391, rehearing denied. Homicide 669

Where death is caused by use of a deadly weapon, words alone, however opprobrious, are not sufficient to constitute a legal provocation to mitigate a killing to voluntary manslaughter; rather, when death is caused by the use of a deadly weapon, the opprobrious words must be accompanied by the appearance of an assault—by some overt, threatening act—which could have produced the heat of passion. State v. Locklair (S.C. 2000) 341 S.C. 352, 535 S.E.2d 420, rehearing denied, certiorari denied 121 S.Ct. 817, 531 U.S. 1093, 148 L.Ed.2d 701. Homicide 674

A defendant on trial for the murder of his stepmother was not entitled to a jury instruction on manslaughter, even though numerous psychiatrists testified that his stepmother subjected him to physical and emotional abuse throughout his childhood, where the stepmother was in the kitchen down the hallway from the defendant immediately before he shot and beat her to death, and there was no evidence of legal provocation. State v. Franklin (S.C.App. 1992) 310 S.C. 122, 425 S.E.2d 758, rehearing denied, certiorari denied. Homicide 1457

The exercise of a legal right, no matter how offensive to another, is never in law deemed a provocation sufficient to justify or mitigate an act of violence. State v. Norris (S.C. 1969) 253 S.C. 31, 168 S.E.2d 564. Assault And Battery 66

That which is perfectly justifiable on the part of the deceased cannot be any legal provocation to the slayer. State v. Norris (S.C. 1969) 253 S.C. 31, 168 S.E.2d 564.

If an adequate legal provocation does not exist, the killing, even in the heat of passion is murder and not manslaughter. State v. Norris (S.C. 1969) 253 S.C. 31, 168 S.E.2d 564. Homicide 672

It must be passion justly excited by legal provocation. State v. Norris (S.C. 1969) 253 S.C. 31, 168 S.E.2d 564.

5. Heat of passion

Both heat of passion and sufficient legal provocation must be present at the time of the killing to support a charge for voluntary manslaughter. State v. Smith (S.C.App. 2005) 363 S.C. 111, 609 S.E.2d 528. Homicide 668; Homicide 671

Heat of passion alone will not suffice to reduce murder to voluntary manslaughter. State v. Wood (S.C. 2004) 362 S.C. 135, 607 S.E.2d 57, rehearing denied, certiorari denied 125 S.Ct. 2942, 545 U.S. 1132, 162 L.Ed.2d 873, application for writ of habeas corpus held in abeyance 2013 WL 5744779. Homicide 668

Heat of passion alone will not suffice to reduce murder to voluntary manslaughter; both heat of passion and sufficient legal provocation must be present at the time of the killing. State v. Knoten (S.C. 2001) 347 S.C. 296, 555 S.E.2d 391, rehearing denied. Homicide 668; Homicide 673

The sudden heat of passion, upon sufficient legal provocation, which mitigates a felonious killing to manslaughter, while it need not dethrone reason entirely, or shut out knowledge and volition, must be such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence. State v. Cole (S.C. 2000) 338 S.C. 97, 525 S.E.2d 511. Homicide 668

Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation; heat of passion alone will not suffice to reduce murder to voluntary manslaughter. State v. Kornahrens (S.C. 1986) 290 S.C. 281, 350 S.E.2d 180, certiorari denied 107 S.Ct. 1592, 480 U.S. 940, 94 L.Ed.2d 781, denial of habeas corpus affirmed 66 F.3d 1350, certiorari denied 116 S.Ct. 1575, 517 U.S. 1171, 134 L.Ed.2d 673, rehearing denied 116 S.Ct. 2541, 518 U.S. 1013, 135 L.Ed.2d 1063. Homicide 667

Heat of passion alone will not suffice to reduce murder to voluntary manslaughter. State v. Plemmons (S.C. 1985) 286 S.C. 78, 332 S.E.2d 765, vacated 106 S.Ct. 1943, 476 U.S. 1102, 90 L.Ed.2d 353. Homicide 668

Determining whether act causing death was impelled by heat of passion or by malice. In determining whether the act which caused death was impelled by heat of passion or by malice, all the surrounding circumstances and conditions are to be taken into consideration, including previous relations and conditions connected with the tragedy, as well as those existing at the time of the killing. State v. Norris (S.C. 1969) 253 S.C. 31, 168 S.E.2d 564. Homicide 668

The killing of a human being, even in the heat of passion, is murder if the slayer have no just cause for his anger. State v. Norris (S.C. 1969) 253 S.C. 31, 168 S.E.2d 564. Homicide 667

The sudden heat and passion, upon sufficient legal provocation, which mitigates a felonious killing to manslaughter, while it need not dethrone reason entirely, or shut out knowledge and volition, must be such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence. State v. Norris (S.C. 1969) 253 S.C. 31, 168 S.E.2d 564.

The law does not reduce from murder to manslaughter every homicide committed in the heat of passion. State v. Norris (S.C. 1969) 253 S.C. 31, 168 S.E.2d 564. Homicide 673

A father killing a man who he detects in his home in illicit intercourse with daughter, a member of his family, would be guilty of manslaughter. State v. Emerson (S.C. 1907) 78 S.C. 83, 58 S.E. 974.

6. Dangerous instrumentalities

And killing by negligent use of deadly weapon is manslaughter. State v Gilliam (1903) 66 SC 419, 45 SE 6. State v Tucker (1910) 86 SC 211, 68 SE 523. State v Revels (1910) 86 SC 213, 68 SE 523.

When death is caused by a deadly weapon, words alone are insufficient to constitute a legal provocation. State v. Plemmons (S.C. 1985) 286 S.C. 78, 332 S.E.2d 765, vacated 106 S.Ct. 1943, 476 U.S. 1102, 90 L.Ed.2d 353. Homicide 674

The negligent handling of a loaded gun causing death will support a verdict for involuntary manslaughter. State v. White (S.C. 1969) 253 S.C. 475, 171 S.E.2d 712, certiorari denied 90 S.Ct. 482, 396 U.S. 987, 24 L.Ed.2d 451. Homicide 708

The fact that a mortal wound is inflicted by a pistol, a deadly weapon, creates a rebuttable presumption of the malicious use of a firearm. State v. Watts (S.C. 1967) 249 S.C. 80, 152 S.E.2d 684. Homicide 909

In State v Dixon (1936) 181 SC 1, 186 SE 531, 532, which was an automobile accident case, it was said: “There can be no question that it is the established rule in this jurisdiction that one who causes the death of another by the negligent use of a deadly weapon or instrumentality may be convicted of involuntary manslaughter.” Several decisions of the Supreme Court have sustained verdicts in which it was implicit that an automobile is a dangerous instrumentality and within the foregoing rule. State v. Caldwell (S.C. 1957) 231 S.C. 184, 98 S.E.2d 259.

In respect to the degree of negligence necessary to establish involuntary manslaughter at common law, motor vehicles are classified as dangerous instrumentalities, and the “deadly weapon” rule, which requires only simple negligence, applies. State v. Caldwell (S.C. 1957) 231 S.C. 184, 98 S.E.2d 259.

Where the instrument involved is not inherently dangerous, more than ordinary negligence is required to support a conviction for involuntary manslaughter, but simple negligence causing the death of another is sufficient if the instrumentality is of such character that its negligent use under the surrounding circumstances is necessarily dangerous to human life or limb. Firearms and motor vehicles fall within the latter category. State v. Barnett (S.C. 1951) 218 S.C. 415, 63 S.E.2d 57. Homicide 708

And simple negligence in the operation of an automobile is sufficient to support a conviction of involuntary manslaughter. State v. Barnett (S.C. 1951) 218 S.C. 415, 63 S.E.2d 57. Automobiles 344

The reckless homicide statute, Code 1962 Section 46‑341, did not repeal the common‑law offense of involuntary manslaughter where death resulted from the operation of an automobile, but, on the contrary, the legislature desired to preserve that offense as defined by the Supreme Court. State v. Barnett (S.C. 1951) 218 S.C. 415, 63 S.E.2d 57. Automobiles 344

An officer shooting a person charged with a misdemeanor and fleeing to avoid arrest is guilty of manslaughter. State v. Sudduth (S.C. 1906) 74 S.C. 498, 54 S.E. 1013.

7. Distinguished from murder

Defendant did not restore a three‑year‑old child’s freedom and end a kidnapping by leaving her in pajamas a few feet from the edge of a river in a temperature of twenty‑four degrees Fahrenheit; thus, the child’s drowning death was murder, not involuntary manslaughter. State v. Knoten (S.C. 2001) 347 S.C. 296, 555 S.E.2d 391, rehearing denied. Homicide 604

Probative value of murder victim’s pregnancy outweighed its prejudicial effect, where State’s theory of case was that defendant planned his crimes, and because he knew victim was pregnant and particularly vulnerable, jury could infer that defendant had consciously selected a “perfect victim,” making it less probable that he committed voluntary manslaughter. State v. Kelly (S.C. 2001) 343 S.C. 350, 540 S.E.2d 851, certiorari granted 121 S.Ct. 2548, 533 U.S. 928, 150 L.Ed.2d 716, reversed and remanded 122 S.Ct. 726, 534 U.S. 246, 151 L.Ed.2d 670. Homicide 998

As to distinction between murder and manslaughter, see State v. Summer (S.C. 1899) 55 S.C. 32, 32 S.E. 771, 74 Am.St.Rep. 707.

8. Aiding and abetting

Persons aiding and abetting in the commission of manslaughter are guilty of the crime. State v. Putman (S.C. 1882) 18 S.C. 175, 44 Am.Rep. 569. Homicide 718

9. Defenses

Words accompanied by hostile acts may, however, reduce a killing to manslaughter, or establish the plea of self‑defense. State v Harvey (1951) 220 SC 506, 68 SE2d 409, quoting State v Mason (1920) 115 SC 214, 105 SE 286.

The issue of whether defendant acted in self‑defense when she stabbed the victim was for the jury, in voluntary manslaughter prosecution. State v. Butler (S.C. 2014) 407 S.C. 376, 755 S.E.2d 457. Homicide 1345

Whether defendant who brought a gun to a transaction in which he planned to sell illegal drugs, and who shot and killed drug purchaser during transaction after purchaser’s acquaintance pointed a gun at defendant, was at fault in “bringing on the difficulty,” so as to bar claim of self‑defense, was question for the jury in prosecution for voluntary manslaughter. State v. Smith (S.C.App. 2013) 406 S.C. 547, 752 S.E.2d 795, rehearing denied. Homicide 1347

Defendant did not show that a reasonable person would have feared serious bodily harm or loss of life from victim’s words and actions and, thus, was not entitled at trial for murder to a jury instruction on self‑defense, even though there was evidence that defendant, who was victim’s father, had been subjected to criminal domestic violence at victim’s hands in the past, and victim, during verbal disagreement, stood from his seated position and told defendant that he would kill him if defendant touched him again; victim did not advance toward defendant, strike at defendant, or present any weapon before defendant exited house, retrieved a gun, returned to house, and shot victim. State v. Wigington (S.C.App. 2007) 375 S.C. 25, 649 S.E.2d 185. Homicide 1484

To satisfy the legal defense of accident in homicide case, it must be shown that the defendant used due care in the handling of the weapon. State v. Crosby (S.C. 2003) 355 S.C. 47, 584 S.E.2d 110. Homicide 762

Under the theory of “defense of others,” one is not guilty of taking the life of an assailant who assaults a friend, relative, or bystander if that friend, relative, or bystander would likewise have the right to take the life of the assailant in self‑defense. Douglas v. State (S.C. 1998) 332 S.C. 67, 504 S.E.2d 307. Homicide 1489

Contributory negligence of decedent is not a defense to prosecution for involuntary manslaughter. State v. Caldwell (S.C. 1957) 231 S.C. 184, 98 S.E.2d 259. Homicide 750

9.5. Pleas

State’s recommendation of the maximum sentence was breach of plea agreement with defendant, which included State’s promise to remain silent during sentencing, that warranted invalidation of plea agreement in manslaughter prosecution. Smith v. State (S.C. 2015) 413 S.C. 194, 775 S.E.2d 696. Criminal Law 273.1(2)

10. Admissibility of evidence

Erroneous admission of statement of defendant’s friend, that defendant was fixing to shoot victim, was harmless, where witness testified that defendant told her that if he did not kill victim that night, victim would be on his list, defendant did not object to witness’s testimony, and both statements were evidence of defendant’s preexisting intent to kill victim. State v. Gilchrist (S.C. 2000) 342 S.C. 369, 536 S.E.2d 868, rehearing denied, habeas corpus dismissed 2005 WL 3747428, denial of post‑conviction relief affirmed 364 S.C. 173, 612 S.E.2d 702, habeas corpus denied 2007 WL 951749, appeal dismissed 250 Fed.Appx. 573, 2007 WL 2974033. Criminal Law 1169.7

A conviction for voluntary manslaughter would be reversed and remanded for a new trial where the trial court erroneously refused to qualify the defendant’s expert in the field of blood spatter patterns and their interpretation; the jury was deprived of this expert information and was instead bombarded with the solicitor’s nonexpert views and interpretations of the blood spatters, which was sufficiently prejudicial to make the trial court’s ruling reversible. State v. Myers (S.C. 1990) 301 S.C. 251, 391 S.E.2d 551.

11. Instructions—In general

As to charge properly defining manslaughter, see State v Lee (1908) 79 SC 223, 60 SE 524. State v Bowers (1903) 65 SC 207, 43 SE 656. State v Hunter (1909) 82 SC 153, 63 SE 685, error dismd 219 US 582, 55 L Ed 345, 31 S Ct 470.

Where defendant is convicted of manslaughter, error in charging as to murder is eliminated. State v Richardson (1896) 47 SC 18, 24 SE 1028. State v Robertson (1899) 54 SC 147, 31 SE 868. State v Stuckey (1900) 56 SC 576, 35 SE 263. State v Perry (1907) 78 SC 184, 59 SE 851. State v Owens (1908) 79 SC 125, 60 SE 305. State v Henderson (1908) 80 SC 165, 60 SE 314.

Existence of any evidence that a shooting giving rise to homicide prosecution was intentional does not negate all evidence from which any other inference may be drawn. State v. Crosby (S.C. 2003) 355 S.C. 47, 584 S.E.2d 110. Homicide 908

Jury instructions in voluntary manslaughter prosecution, stating that defendant does not have to wait until deceased gets drop on him or deceased begins to shoot him, were sufficient to inform jury that defendant had right to use as much force as required for his complete protection from loss of life or serious bodily harm, and could not be limited to degree or quantity of attacking opposing force. Douglas v. State (S.C. 1998) 332 S.C. 67, 504 S.E.2d 307. Homicide 1487

The defendant was not entitled to a jury instruction that if there was a reasonable doubt as to whether he was guilty of murder or manslaughter in the shooting of his father, the jury was required to find him guilty of manslaughter, even though psychiatrists testified that he had shot his father to keep his father from interfering with his primary objective of killing his stepmother, where there was ample evidence of deliberation and premeditation, including hiding his shotgun, loading it, and lying in wait for his father. State v. Franklin (S.C.App. 1992) 310 S.C. 122, 425 S.E.2d 758, rehearing denied, certiorari denied.

The trial court did not err in denying a defendant’s request for a jury charge on the crime of manslaughter as a lesser‑included offense of the crime of murder where, even though the evidence from the defendant showed that he didn’t harbor ill‑feelings toward the victim, there was no evidence showing that he killed the victim without malice; it is not error to refuse to submit a lesser included offense unless there is evidence tending to show that the defendant is only guilty of the lesser offense. State v. Hartley (S.C.App. 1992) 307 S.C. 239, 414 S.E.2d 182, certiorari denied.

A trial judge erred when he refused to charge the jury that if they had a reasonable doubt between murder and manslaughter, they had to resolve it in favor of the lesser offense. State v. Jackson (S.C. 1990) 301 S.C. 41, 389 S.E.2d 650. Criminal Law 798(.6)

Where a defendant claims that he or she armed himself or herself in self‑defense, while also claiming that the actual shooting was accidental, this combination of events can “place the shooting in the context of self‑defense.” Thus, a trial judge erred in failing to charge that the defendant had a right to possess a weapon in her home, where the defendant claimed that she armed herself in self‑defense in case deadly force was necessary but that the lethal charge was fired accidentally, the defendant had been slapped by the victim and shoved by the victim’s ex‑husband immediately before she got the gun from the bedroom, and the victim had great animosity towards the defendant and had previously attacked her. The trial judge also erred in failing to charge that if the defendant lawfully armed herself in self‑defense because of a threat to her safety created by the victim and the gun accidentally discharged, then the jury would have to find her not guilty. The trial judge’s traditional self‑defense charge which focused only on the right to use the weapon in self‑defense was inadequate. State v. McCaskill (S.C. 1990) 300 S.C. 256, 387 S.E.2d 268.

Voluntary manslaughter involves intent on the part of the perpetrator but not malice so that trial judge’s instructions that jury would have to find that defendant did not intend to kill deceased in order for them to return a verdict of manslaughter rather than murder was error. State v. Blassingame (S.C. 1978) 271 S.C. 44, 244 S.E.2d 528. Criminal Law 863(2); Criminal Law 1174(1)

On a trial for murder growing out of the use of a deadly weapon, it is unnecessary to charge the law relating to manslaughter where the testimony fails to suggest any theory upon which a verdict of manslaughter could rest. State v. Norris (S.C. 1969) 253 S.C. 31, 168 S.E.2d 564. Homicide 1452

Instruction that manslaughter was “not the felonious, but the unlawful taking of human life \* \* \* upon \* \* \* sufficient legal provocations,” was erroneous since manslaughter is a felony. State v. King (S.C. 1930) 158 S.C. 251, 155 S.E. 409. Homicide 1372

Where the testimony indicates either murder or self‑defense, and there is no testimony to show manslaughter, it is not error to omit to charge the law as to manslaughter. State v. Adams (S.C. 1904) 68 S.C. 421, 47 S.E. 676.

If it is error to charge that defendants could not under certain circumstances be convicted of manslaughter only, it is not material when verdict was for manslaughter. State v. Jenkins (S.C. 1884) 21 S.C. 595.

12. —— Voluntary manslaughter, instructions

Where there are no actions by a victim to constitute legal provocation, a jury instruction on voluntary manslaughter is not required. State v. Wood (S.C. 2004) 362 S.C. 135, 607 S.E.2d 57, rehearing denied, certiorari denied 125 S.Ct. 2942, 545 U.S. 1132, 162 L.Ed.2d 873, application for writ of habeas corpus held in abeyance 2013 WL 5744779. Homicide 1452

Defendant was not entitled to instruction on voluntary manslaughter, and thus, defense counsel was not deficient in failing to request such instruction, where sufficient provocation necessary to justify instruction had to come from victim, and defendant presented no evidence that homicide victim provoked him, but instead, that victim whom he also shot, but did not kill, engaged in provocative acts. Harris v. State (S.C. 2003) 354 S.C. 382, 581 S.E.2d 154. Homicide 1458

A voluntary manslaughter instruction in a murder prosecution was required by evidence that the victim chased a naked defendant outside and cut him with a knife, the defendant retrieved a bar from his car and returned to the victim’s apartment, and the victim cut him again before he killed her; the attack by a knife‑wielding victim as the defendant reentered the apartment for his clothes was sufficient legal provocation, and his purpose in returning to the apartment was a jury question. State v. Knoten (S.C. 2001) 347 S.C. 296, 555 S.E.2d 391, rehearing denied. Homicide 679; Homicide 1323; Homicide 1380; Homicide 1458

The fact that the defendant recanted his confession did not preclude an instruction on voluntary manslaughter in a murder prosecution; the state introduced the confession, and it supported a voluntary manslaughter charge. State v. Knoten (S.C. 2001) 347 S.C. 296, 555 S.E.2d 391, rehearing denied. Homicide 1458

It is proper for a trial judge to refuse to charge voluntary manslaughter in a murder case where it very clearly appears there is no evidence whatsoever tending to reduce the crime from murder to manslaughter. State v. Locklair (S.C. 2000) 341 S.C. 352, 535 S.E.2d 420, rehearing denied, certiorari denied 121 S.Ct. 817, 531 U.S. 1093, 148 L.Ed.2d 701. Homicide 1452

To warrant a jury instruction on voluntary manslaughter in a murder prosecution, both heat of passion and sufficient legal provocation must be present at the time of the killing. State v. Cole (S.C. 2000) 338 S.C. 97, 525 S.E.2d 511. Homicide 1458

There was no evidence of “sufficient legal provocation” that would warrant jury instruction on voluntary manslaughter in murder prosecution; evidence showed merely that victim’s companion assaulted defendant’s friend and stole his jewelry, that defendant twice fought briefly with victim’s companion and was pulled off by victim, that victim’s companion pushed over defendant’s stereo, and that victim and his companion then left. State v. Cole (S.C. 2000) 338 S.C. 97, 525 S.E.2d 511. Homicide 1458

There was no evidence of “sudden heat of passion” that would warrant jury instruction on voluntary manslaughter in murder prosecution; by defendant’s own testimony, he shot at victim and his companion to scare them away, and they left defendant’s apartment three to five minutes before he fired fatal shot. State v. Cole (S.C. 2000) 338 S.C. 97, 525 S.E.2d 511. Homicide 1458

Jury instructions in voluntary manslaughter prosecution, stating that defendant does not have to wait until deceased gets drop on him or deceased begins to shoot him, were sufficient to inform jury that defendant had right to use as much force as required for his complete protection from loss of life or serious bodily harm, and could not be limited to degree or quantity of attacking opposing force. Douglas v. State (S.C. 1998) 332 S.C. 67, 504 S.E.2d 307. Homicide 1487

Evidence did not support defendant’s request for jury instruction on “defense of others” in voluntary manslaughter, which arose from defendant and codefendant shooting into crowd that rushed them after argument erupted. Douglas v. State (S.C. 1998) 332 S.C. 67, 504 S.E.2d 307. Homicide 1489

A defendant, charged with murder, was not entitled to a jury instruction on the lesser included offense of voluntary manslaughter where, after loading his pistol and firing one bullet to test it, he followed the victim (with whom he had been quarrelling) into a store, shot the victim through the heart, and then, while using vile language indicative of malice, shot the victim again in the back of the head. State v. Lowry (S.C.App. 1992) 309 S.C. 533, 424 S.E.2d 549, rehearing denied, certiorari granted, reversed 315 S.C. 396, 434 S.E.2d 272.

A defendant charged with murder was entitled to have the jury instructed that if they had any reasonable doubt as to whether he was guilty of murder or voluntary manslaughter they should resolve their doubt in favor of the lesser offense where the defendant and his fiancee, the victim, had left a bar around closing time, had gotten into an argument which continued until they returned to their apartment, had gone to bed where they continued to quarrel and she continued to hit him, and he then reached under the bed, grabbed a buck knife and killed her. State v. Robinson (S.C. 1992) 307 S.C. 169, 414 S.E.2d 142.

The trial court’s error in improperly instructing a jury on the applicability of provocation by assault on another to a charge of voluntary manslaughter was not harmless, even though (1) the defendant testified that he shot the victim accidentally rather than in circumstances which would justify a manslaughter charge; and (2) the jury eventually came back with a finding of murder, which assumes a finding of malice. State v. Smith (S.C.App. 1991) 304 S.C. 129, 403 S.E.2d 162, certiorari denied.

A charge of voluntary manslaughter was proper where there was circumstantial evidence which may uphold the charge. State v. Kahan (S.C. 1977) 268 S.C. 240, 233 S.E.2d 293.

13. —— Involuntary manslaughter, instructions

Defendant in homicide prosecution did not, by waiving a jury instruction on accident, likewise waive any entitlement to a charge on involuntary manslaughter. State v. Crosby (S.C. 2003) 355 S.C. 47, 584 S.E.2d 110. Criminal Law 846

Defendant, who was convicted of voluntary manslaughter, was entitled to charge on involuntary manslaughter; while defendant and victim were facing one another on the ground, defendant had his shoulder pressed into victim’s neck, defendant was not attempting to strangle victim by placing his hands around victim’s neck, and defendant’s battery was not such that naturally tended to cause death or great bodily harm. State v. Chatman (S.C. 1999) 336 S.C. 149, 519 S.E.2d 100. Homicide 1458

Voluntary manslaughter defendant was not entitled to jury instruction on involuntary manslaughter; defendant armed himself with gun and intentionally fired it into crowd. Douglas v. State (S.C. 1998) 332 S.C. 67, 504 S.E.2d 307. Homicide 1458

The trial court did not err in refusing to charge the jury on involuntary manslaughter where the evidence showed that the defendant went to the victim’s house, got into an argument with the victim, was struck in the head by the victim, told the victim he was leaving, and then shot the victim with a .22 caliber pistol after the victim turned and began to walk away, even though evidence showed that (1) the defendant had sustained frontal brain lobe damage as a child, (2) a person with such damage might respond with greater emotion than a normal person, and (3) the defendant told an officer he “just exploded” and got angry because his head was hurting. Ex parte Rice (S.C. 1992) 307 S.C. 469, 415 S.E.2d 819.

The trial Court erred by responding to a jury’s question of “With voluntary manslaughter, to have legal provocation, does a person need to be struck himself, or is it enough to see someone else being assaulted for there to be enough cause to act?” by restating its previous charge on involuntary manslaughter and offering 2 examples of provocation by assault on the individual charged, since this response failed to answer the jury’s question and might have led them to believe that sufficient provocation could only arise out of an assault on the defendant himself. State v. Smith (S.C.App. 1991) 304 S.C. 129, 403 S.E.2d 162, certiorari denied. Criminal Law 863(2); Criminal Law 1174(1)

Under Section 16‑3‑50, manslaughter is the unlawful killing of another without express or implied malice; accordingly, in a prosecution for murder, the trial court properly refused a charge of involuntary manslaughter where defendant’s intent to shoot the victim negated any claim of involuntary manslaughter. State v. Gandy (S.C. 1984) 283 S.C. 571, 324 S.E.2d 65.

Instruction on involuntary manslaughter was not warranted where defendant conceded at trial that shooting was intentional. State v. Mickle (S.C. 1979) 273 S.C. 71, 254 S.E.2d 295.

Under South Carolina law, voluntary manslaughter defendant was not entitled to charge on lesser offense of involuntary manslaughter, where defendant was drinking on day of murder, he spoke to two people about having killed victim, victim’s hands were raised in defensive posture, and victim had been stabbed 39 times. Ford v. Stevenson (C.A.4 (S.C.) 2013) 523 Fed.Appx. 206, 2013 WL 1320503, Unreported, certiorari denied 134 S.Ct. 449, 187 L.Ed.2d 300. Homicide 1458

14. Sufficiency of evidence

Insufficient evidence existed that defendant, prosecuted for murder, shot victim in the sudden heat of passion, as required to support voluntary manslaughter conviction, even if defendant was in fear and stated “before I knew it, I fired a shot”; defendant stated that he tried to walk away from victim but victim kept cutting him off, a witness testified that defendant and victim were talking softly just before the shooting and that he could hardly tell they were arguing, and defendant did not indicate he lacked control over his actions. Cook v. State (S.C. 2015) 415 S.C. 551, 784 S.E.2d 665, rehearing denied. Homicide 1458

Where death is caused by the use of a deadly weapon, words alone, however opprobrious, are not sufficient to constitute a legal provocation for purposes of voluntary manslaughter. State v. Wharton (S.C.App. 2005) 367 S.C. 71, 624 S.E.2d 654, certiorari granted, affirmed in part, vacated in part 381 S.C. 209, 672 S.E.2d 786. Homicide 674

Where the evidence as a whole supported a jury finding that the defendant unlawfully killed the victim in sudden heat of passion and not in self‑defense, a conviction of voluntary manslaughter would be affirmed. State v. Sumpter (S.C.App. 1985) 286 S.C. 150, 332 S.E.2d 774, certiorari granted in part 287 S.C. 258, 335 S.E.2d 808, reversed in part 288 S.C. 574, 344 S.E.2d 148. Homicide 1152

Evidence was sufficient that victim’s death resulted from criminal agency of wife where defendant and her husband had been arguing earlier that day, following incident, she drove to friend’s house and stated she shot her husband, and chemist testified that lack of gun powder residue on victim’s shirt negated possibility of suicide. State v. Mickle (S.C. 1979) 273 S.C. 71, 254 S.E.2d 295.

Conviction of voluntary manslaughter reversed where there were bad feelings between the defendant and the deceased, the deceased had consumed a large amount of alcohol, had earlier threatened the defendant and came on to the defendant’s property with a gun, the facts establishing that the defendant acted in self‑defense. State v. Hendrix (S.C. 1978) 270 S.C. 653, 244 S.E.2d 503.

15. Presumptions and burden of proof

Where circumstantial evidence is relied upon by the State there must be positive proof of facts and circumstances which taken together warrant inference of guilt to a moral certainty to the exclusion of any other reasonable hypothesis. State v. McIver (S.C. 1961) 238 S.C. 401, 120 S.E.2d 393. Criminal Law 552(3)

All elements of manslaughter may be proved by circumstantial evidence. State v. Gillis (S.C. 1906) 73 S.C. 318, 53 S.E. 487, 114 Am.St.Rep. 95.

16. Sentence and punishment

Assuming that the sentence of life imprisonment in cases involving a wrongful killing with a motor vehicle is rare, this does not render the application of the sentencing statute, in an automobile killing case, as cruel and unusual punishment in violation of the Eighth Amendment. Simmons v. State (S.C. 1975) 264 S.C. 417, 215 S.E.2d 883.

With the view of fixing the sentence to be imposed upon a defendant convicted of manslaughter, it is proper for the trial judge, in open court, in the presence of the defendant, to inquire into any relevant facts in aggravation or mitigation of punishment. State v. Green (S.C. 1951) 220 S.C. 315, 67 S.E.2d 509.

In a prosecution for manslaughter it was error for the trial judge, following the rendition of the verdict of guilty, to request the jury to return to the jury room and make a recommendation as to the quantum of punishment, and to impose sentence in accordance with the jury’s recommendation. State v. Green (S.C. 1951) 220 S.C. 315, 67 S.E.2d 509. Criminal Law 889

This section [Code 1962 Section 16‑55] implies that the trial judge is to exercise a discretion in imposing sentences. Therefore any reasonable means by which his mind can be enlightened should not be prohibited to him. State v. Reeder (S.C. 1908) 79 S.C. 139, 60 S.E. 434, 14 Am.Ann.Cas. 968.

And can therefore hear affidavits in aggravation or mitigation of sentence. Where the punishment is within the discretion of the trial judge, as in cases of manslaughter, it is not error for him to hear, after conviction, affidavits in aggravation or mitigation of sentence. State v. Reeder (S.C. 1908) 79 S.C. 139, 60 S.E. 434, 14 Am.Ann.Cas. 968.

The solicitor is properly permitted to read affidavits in aggravation of the manslaughter for which defendant was convicted, on his being called for sentence, it being a reasonable means to enable the court to exercise the discretion vested in it by this section [Code 1962 Section 16‑55]. State v. Reeder (S.C. 1908) 79 S.C. 139, 60 S.E. 434, 14 Am.Ann.Cas. 968. Sentencing And Punishment 318

**SECTION 16‑3‑60.** Involuntary manslaughter; “criminal negligence” defined.

With regard to the crime of involuntary manslaughter, criminal negligence is defined as the reckless disregard of the safety of others. A person charged with the crime of involuntary manslaughter may be convicted only upon a showing of criminal negligence as defined in this section. A person convicted of involuntary manslaughter must be imprisoned not more than five years.

HISTORY: 1962 Code Section 16‑55.1; 1968 (55) 2626; 1993 Act No. 184, Section 160.

CROSS REFERENCES

Commission of this crime within specified radius of child day care center as separate offense, see Section 63‑13‑200.

Denial of registration as an operator of a child day care or group day care home where the applicant, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑820.

Denial of renewal for child day care or group day care home where the person applying for approval, the operator of the facility, or an employee or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑630.

Fingerprint review of any person applying to operate or seek employment at a child day care or group day care home to determine prior conviction of the crime referred to in this section, see Section 63‑13‑620.

Foster care placement with certain persons prohibited, see Section 63‑7‑2350.

No license or registration will be issued to any religious establishment to operate a child day care or group day care home where the operator, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑1010.

No person may be employed by the Department of Social Services in its day care licensing or child protective services divisions who has been convicted of the crime referred to in this section, see Section 63‑13‑190.

Past conviction check prior to initial employment of teachers, see Section 59‑26‑40.

Persons convicted of Title 16, Chapter 3 crimes prohibited from appointment as guardian ad litem for child in abuse or neglect proceeding, see Section 63‑11‑520.

Provisions of South Carolina Probate Code relative to effect of homicide on intestate succession, wills, joint assets, life insurance, and beneficiary designations, see Section 62‑2‑803.

Library References

Homicide 659, 708.

Westlaw Topic No. 203.

C.J.S. Homicide Sections 127, 129, 131, 133 to 136, 138 to 142.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Assault and Battery Section 5, Intent is a Necessary Element.

S.C. Jur. Homicide Section 16, Malice Defined.

LAW REVIEW AND JOURNAL COMMENTARIES

Don’t forget to wear your hunter orange (or flack jacket): A critique on the lack of criminal prosecution of hunting “accidents.” 56 S.C. L. Rev. 135, Autumn 2004.

Attorney General’s Opinions

A conviction of voluntary or involuntary manslaughter pursuant to the provisions of Sections 16‑3‑50 and 16‑3‑60 requires suspension of driver’s license privileges pursuant to Section 56‑1‑280 of the Code of Laws, 1976. 1982 Op.Atty.Gen., No 82‑16, p 22 (1982 WL 154986).

NOTES OF DECISIONS

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1. In general

Causative violation of an applicable statute constitutes actionable negligence and is evidence of recklessness and willfulness. Adams v. Hunter (D.C.S.C. 1972) 343 F.Supp. 1284, affirmed 471 F.2d 648.

A person charged with involuntary manslaughter may be convicted only upon a showing of criminal negligence. State v. Knoten (S.C. 2001) 347 S.C. 296, 555 S.E.2d 391, rehearing denied.

Unintentional killing resulting from an unlawful assault and battery, not of a character of itself to cause death, is involuntary manslaughter. State v. Chatman (S.C. 1999) 336 S.C. 149, 519 S.E.2d 100. Homicide 637

Although jury can return verdict of armed robbery and involuntary manslaughter, defendant cannot be convicted of both offenses; involuntary manslaughter requires that accompanying unlawful act be one that does not amount to felony and does not naturally tend to cause death or great bodily harm. State v. Avery (S.C. 1998) 333 S.C. 284, 509 S.E.2d 476, rehearing denied. Criminal Law 29(14)

Recklessness implies the doing of a negligent act knowingly. DeLee v. Knight (S.C. 1975) 266 S.C. 103, 221 S.E.2d 844, certiorari denied 96 S.Ct. 2658, 426 U.S. 939, 49 L.Ed.2d 392.

Mere negligence does not support the conviction; the State had to prove heedlessness or willfulness. DeLee v. Knight (S.C. 1975) 266 S.C. 103, 221 S.E.2d 844, certiorari denied 96 S.Ct. 2658, 426 U.S. 939, 49 L.Ed.2d 392. Homicide 708; Homicide 930

The question of what constitutes criminal negligence depends on the facts and circumstances of each case. DeLee v. Knight (S.C. 1975) 266 S.C. 103, 221 S.E.2d 844, certiorari denied 96 S.Ct. 2658, 426 U.S. 939, 49 L.Ed.2d 392. Criminal Law 23

In determining whether one has acted negligently or with criminal negligence all of the facts and circumstances must be considered. State v. Addis (S.C. 1972) 257 S.C. 482, 186 S.E.2d 415. Criminal Law 23; Negligence 200

The fact that the defendant had been drinking beer must be considered in determining whether he had acted with criminal negligence. State v. Addis (S.C. 1972) 257 S.C. 482, 186 S.E.2d 415.

2. Constitutional issues

Defendant was not entitled to a jury instruction on involuntary manslaughter at his trial on charge of voluntary manslaughter, and thus, trial counsel’s failure to request that trial court include language explaining that a person can be acting lawfully if he is entitled to arm himself in self‑defense at time of shooting as part of its jury instruction on involuntary manslaughter did not prejudice defendant, and therefore did not amount to ineffective assistance of counsel; although defendant fired gun three times in a downward direction in an attempt to scare victim, rather than in an attempt to harm victim, defendant intentionally fired the gun, thus precluding an instruction on involuntary manslaughter. Sullivan v. State (S.C.App. 2014) 407 S.C. 241, 754 S.E.2d 885, rehearing denied. Homicide 1458

In a manslaughter prosecution, the defense counsel’s failure to object to the trial judge’s jury charge regarding a mandatory presumption of intent from the doing of an unlawful act, which was clearly erroneous as a burden‑shifting instruction on an element of the crime, constituted ineffective assistance of counsel where the critical dispute at trial was whether the defendant had the requisite intent to kill someone when he pulled a gun from his pocket, such that he should be convicted of voluntary rather than involuntary manslaughter. High v. State (S.C. 1989) 300 S.C. 88, 386 S.E.2d 463.

3. Construction and application

The rule of statutory construction, that repeal by implication is not favored and will not be indulged in if there is any other reasonable construction, is applicable to statutes relating to crimes; thus, the specific crime codified in Section 56‑5‑2910 has not been repealed by the general provisions of the involuntary manslaughter statute, Section 16‑3‑60. Neither the fact that the solicitor may arbitrarily choose the section under which to prosecute nor the fact that the punishment for involuntary manslaughter is two years and the punishment under Section 56‑5‑2910, for the indistinguishable offense of reckless homicide by means of an automobile, is five years renders the statutory scheme constitutionally defective. Strickland v. State (S.C. 1981) 276 S.C. 17, 274 S.E.2d 430.

4. Elements of offense

“Recklessness,” for purposes of involuntary manslaughter, is a state of mind in which the actor is aware of his or her conduct, yet consciously disregards a risk which his or her conduct is creating. State v. Scott (S.C. 2015) 414 S.C. 482, 779 S.E.2d 529, rehearing denied. Homicide 709

To establish involuntary manslaughter, the State must show the defendant killed another person without malice and unintentionally while the defendant was engaged in either (1) an unlawful activity not amounting to a felony and not naturally tending to cause death or great bodily harm, or (2) a lawful activity with a reckless disregard of the safety of others. State v. Collins (S.C. 2014) 409 S.C. 524, 763 S.E.2d 22, rehearing denied. Homicide 659

Involuntary manslaughter is defined as: (1) the unintentional killing of another without malice but while engaged in an unlawful activity not naturally tending to cause death or great bodily harm; or (2) the unintentional killing of another without malice but while engaged in a lawful activity with reckless disregard for the safety of others. State v. Battle (S.C.App. 2014) 408 S.C. 109, 757 S.E.2d 737, rehearing denied, certiorari denied. Homicide 659

“Involuntary manslaughter” is defined as the unintentional killing of another without malice while engaged in (1) an unlawful activity not naturally tending to cause death or great bodily harm or (2) a lawful activity with reckless disregard for the safety of others. Sullivan v. State (S.C.App. 2014) 407 S.C. 241, 754 S.E.2d 885, rehearing denied. Homicide 659

Involuntary manslaughter is (1) the unintentional killing of another without malice, but while engaged in an unlawful activity not naturally tending to cause death or great bodily harm; or (2) the unintentional killing of another without malice, while engaged in a lawful activity with reckless disregard for the safety of others. State v. Crosby (S.C. 2003) 355 S.C. 47, 584 S.E.2d 110. Homicide 659

“Involuntary manslaughter” is: (1) the unintentional killing of another without malice, but while engaged in an unlawful activity not naturally tending to cause death or great bodily harm, or (2) the unintentional killing of another without malice, while engaged in a lawful activity with reckless disregard for the safety of others. State v. Tyler (S.C. 2002) 348 S.C. 526, 560 S.E.2d 888, habeas corpus dismissed 2009 WL 5216892. Homicide 620; Homicide 659

“Involuntary manslaughter” is: (1) the unintentional killing of another without malice, but while engaged in an unlawful activity not naturally tending to cause death or great bodily harm; or (2) the unintentional killing of another without malice, while engaged in a lawful activity with reckless disregard for the safety of others. State v. Chatman (S.C. 1999) 336 S.C. 149, 519 S.E.2d 100. Homicide 659

Involuntary manslaughter is defined as either: (1) the killing of another without malice and unintentionally, but while one is engaged in the commission of some unlawful act not amounting to a felony and not naturally tending to cause death or great bodily harm, or (2) the killing of another without malice and unintentionally, but while one is acting lawfully with reckless disregard of the safety of others. State v. Burriss (S.C. 1999) 334 S.C. 256, 513 S.E.2d 104. Homicide 659

To constitute voluntary manslaughter, there must be a finding of criminal negligence, statutorily defined as reckless disregard of the safety of others. State v. Smith (S.C. 1994) 315 S.C. 547, 446 S.E.2d 411. Homicide 708

Involuntary manslaughter, as defined by Section 16‑3‑60, is found upon a showing of criminal negligence. State v. Gandy (S.C. 1984) 283 S.C. 571, 324 S.E.2d 65.

5. Included offenses

Involuntary manslaughter is a lesser‑included offense of murder and is defined as the unintentional killing of another without malice while engaged in either (1) the commission of some unlawful act not amounting to a felony and not naturally tending to cause death or great bodily harm, or (2) the doing of a lawful act with a reckless disregard for the safety of others. State v. Scott (S.C. 2015) 414 S.C. 482, 779 S.E.2d 529, rehearing denied. Homicide 620; Homicide 659; Indictment and Information 189(8)

Involuntary manslaughter is a lesser included offense of murder only if there is evidence the killing was unintentional. State v. Battle (S.C.App. 2014) 408 S.C. 109, 757 S.E.2d 737, rehearing denied, certiorari denied. Indictment and Information 189(8)

Involuntary manslaughter is a lesser included offense of murder. State v. Watson (S.C. 2002) 349 S.C. 372, 563 S.E.2d 336. Indictment And Information 191(4)

Reckless homicide and involuntary manslaughter are not lesser included offenses of felony driving under the influence (DUI) since recklessness is not required to support a conviction for felony DUI, thus overruling prior case law to the contrary. State v. Cribb (S.C. 1992) 310 S.C. 518, 426 S.E.2d 306. Indictment And Information 191(.5)

6. Admissibility of evidence

The trial court’s admission of pre‑autopsy photographs of the victim, who had been mauled by dogs, was not an abuse of discretion, in prosecution for involuntary manslaughter and three counts of owning a dangerous animal; the probative value of the evidence outweighed its prejudicial effect as the photographs assisted in establishing the elements of the offenses charged, they showed the extent of the victim’s injuries, and the victim’s dog bites were not the type of bites that an ordinary juror may have been familiar with. State v. Collins (S.C. 2014) 409 S.C. 524, 763 S.E.2d 22, rehearing denied. Criminal Law 438(5.1); Criminal Law 438(7)

The trial court properly admitted in evidence, in a prosecution for involuntary manslaughter arising out of the automobile death of an underage student to whom the defendant had sold alcohol, an undercover tape of the defendant admitting that he knew that he sold alcohol to underage teens, that they would get drunk and drive, and that he could be held responsible, since such information was relevant and probative, and not so prejudicial as to be excludable. State v. Hambright (S.C.App. 1992) 310 S.C. 382, 426 S.E.2d 806.

In a prosecution for involuntary manslaughter arising out of the automobile death of an underage student to whom the defendant had sold alcohol, the trial court properly admitted in evidence photographs of the victim’s car, even though the car was in an altered condition from having been moved and having its top removed in order to extricate the back seat passengers, where the defendant had a full opportunity to cross‑examine the witnesses concerning the changes in the car’s appearance, and thus the jury was not misled. State v. Hambright (S.C.App. 1992) 310 S.C. 382, 426 S.E.2d 806.

7. Instructions

Defendant, who claimed to have unintentionally killed victim while executing a martial arts move, did not act with reckless disregard for the safety of others, and thus he was not entitled to an involuntary manslaughter jury instruction in murder trial, where defendant executed move allegedly in response to victim charging him with a shiny silver object, which pushed victim’s elbow up and caused her to stab herself in the throat, and defendant’s father had a black belt in martial arts and trained defendant. State v. Scott (S.C. 2015) 414 S.C. 482, 779 S.E.2d 529, rehearing denied. Homicide 709; Homicide 1458

When determining whether a charge on involuntary manslaughter is proper, the trial court must look to the presence of evidence, not its weight. State v. Battle (S.C.App. 2014) 408 S.C. 109, 757 S.E.2d 737, rehearing denied, certiorari denied. Homicide 1458

Evidence of a struggle over the murder weapon supports submission of an involuntary manslaughter charge to the jury. State v. Battle (S.C.App. 2014) 408 S.C. 109, 757 S.E.2d 737, rehearing denied, certiorari denied. Homicide 1458

Evidence of a struggle between the defendant and the victim over a weapon supports submission of an involuntary manslaughter charge. State v. Battle (S.C.App. 2014) 408 S.C. 109, 757 S.E.2d 737, rehearing denied, certiorari denied. Homicide 1458

Murder defendant’s testimony that he struggled with victim over murder weapon and that his hand might have touched trigger of weapon during struggle was sufficient evidence to support jury instruction on involuntary manslaughter, as testimony that gun discovered at crime scene next to victim’s body was fully loaded did not constitute overwhelming evidence that defendant intentionally killed victim, especially given that no test was performed to confirm whether gun recovered was fired on night of shooting, no bullet fragments or projectiles were recovered during investigation, and no eyewitnesses saw gun fire. State v. Battle (S.C.App. 2014) 408 S.C. 109, 757 S.E.2d 737, rehearing denied, certiorari denied. Homicide 1458

Evidence did not support jury instruction on involuntary manslaughter, in murder prosecution arising out of victim’s death from stab wound, despite defendant’s theory that he, in allegedly seeing victim pull a knife from her pocket and allegedly performing a martial arts move which caused victim to stab herself, unintentionally caused victim’s death while engaged in the lawful activity of self‑defense with reckless disregard for victim’s safety; the circumstances defendant relied on to argue he recklessly exceeded justifiable force, namely victim’s alleged possession of a knife, actually justified the use of more force. State v. Scott (S.C.App. 2014) 408 S.C. 21, 757 S.E.2d 533, rehearing denied, certiorari granted, affirmed 414 S.C. 482, 779 S.E.2d 529. Homicide 1458

When the victim was killed by a gunshot, and no evidence is presented showing the defendant fired the gun unintentionally, the defendant is not entitled to a jury instruction on involuntary manslaughter. Sullivan v. State (S.C.App. 2014) 407 S.C. 241, 754 S.E.2d 885, rehearing denied. Homicide 1458

To warrant a jury instruction on involuntary manslaughter, there must be some evidence that the killing was unintentional. Sullivan v. State (S.C.App. 2014) 407 S.C. 241, 754 S.E.2d 885, rehearing denied. Homicide 1458

Murder defendant was not entitled to jury charge on involuntary manslaughter, even if jury could reasonably conclude that initial two shots that hit the wall were unintentionally fired, since defendant stated to police that, after gun fell from his waistband during struggle with victim, he “pulled the gun” on victim, put gun to victim’s chest, and shot him, and there was no evidence that victim knew defendant had gun, or that struggle with victim was for control of gun. State v. Murray (S.C.App. 2013) 404 S.C. 300, 744 S.E.2d 607. Homicide 1458

Defendant was not entitled to a jury charge on involuntary manslaughter based on the unintentional killing of another without malice while engaged in a lawful activity with reckless disregard for the safety of others; defendant entered trailer to sell crack cocaine to victim, defendant was armed, defendant brandished the gun and used it to pistol‑whip victim, the victim was unarmed, the door to the trailer was unlocked, and there was no evidence that defendant was unable to retreat from the dangerous situation that he had created. State v. Smith (S.C. 2011) 391 S.C. 408, 706 S.E.2d 12. Homicide 1458

Evidence during murder prosecution did not warrant charge of voluntary manslaughter; defendant testified he was provoked by the victim’s former brother‑in‑law and he fired his gun in response to being first shot at by the ex‑brother‑in‑law, and thus, defendant’s testimony did not support the contention that the killing was in the sudden heat of passion upon sufficient legal provocation by the victim. (Per Burnett, J., with one Justice concurring and one Justice concurring in result only). State v. Childers (S.C. 2007) 373 S.C. 367, 645 S.E.2d 233, rehearing denied, certiorari denied, certiorari denied 128 S.Ct. 618, 552 U.S. 1025, 169 L.Ed.2d 399. Homicide 1458

A defendant is entitled to a jury charge on involuntary manslaughter where the evidence shows a reckless disregard of the safety of others. State v. Crosby (S.C. 2003) 355 S.C. 47, 584 S.E.2d 110. Homicide 1380

Involuntary manslaughter instruction was warranted in homicide prosecution, despite defendant’s statement to police immediately after shooting that “I closed my eyes and pulled the trigger,” where defendant immediately added that he did not even know he had pulled the trigger, three witnesses testified that defendant told them immediately after shooting that it had been an accident, and defendant testified that victim was charging at him with his hand behind his back, that defendant reached in his pocket, and that defendant “turned around and boom.” State v. Crosby (S.C. 2003) 355 S.C. 47, 584 S.E.2d 110. Homicide 1458

Trial judge is to charge jury on lesser included offense if there is any evidence from which jury could infer that lesser, rather than greater, offense was committed. State v. Watson (S.C. 2002) 349 S.C. 372, 563 S.E.2d 336. Criminal Law 795(2.10)

Defendant’s conduct did not fit within definition of “involuntary manslaughter,” so as to entitle her to jury charge on involuntary manslaughter in murder trial, where it was patent that conduct in pouring gasoline on husband’s head and igniting him was not lawful activity, and it was likewise patent that conduct would naturally tend to cause death or great bodily injury. State v. Tyler (S.C. 2002) 348 S.C. 526, 560 S.E.2d 888, habeas corpus dismissed 2009 WL 5216892. Homicide 1457

In murder trial, jury instruction on lesser‑included offense of assault and battery of a high and aggravated nature (ABHAN), which improperly analogized ABHAN and voluntary manslaughter, was error, given that to extent that jury instruction equated ABHAN with manslaughter, it precluded jury from finding ABHAN if found that defendant acted with malice. State v. Tyler (S.C. 2002) 348 S.C. 526, 560 S.E.2d 888, habeas corpus dismissed 2009 WL 5216892. Criminal Law 795(2.50)

Defendant, who was convicted of voluntary manslaughter, was entitled to charge on involuntary manslaughter; while defendant and victim were facing one another on the ground, defendant had his shoulder pressed into victim’s neck, defendant was not attempting to strangle victim by placing his hands around victim’s neck, and defendant’s battery was not such that naturally tended to cause death or great bodily harm. State v. Chatman (S.C. 1999) 336 S.C. 149, 519 S.E.2d 100. Homicide 1458

Evidence that defendant armed himself in self‑defense at time of fatal shooting and that gun went off by accident warranted giving requested charge on involuntary manslaughter, in murder prosecution. State v. Burriss (S.C. 1999) 334 S.C. 256, 513 S.E.2d 104. Homicide 1458

The defendant was not entitled to a charge of involuntary manslaughter, since no legal provocation was shown, where he awoke the victim’s housemate in the middle of the night to demand alcohol, he attacked her when she refused to give him alcohol and in turn demanded the repayment of some money, and while attempting to aid the housemate, the victim fell to the ground and the defendant stabbed him 18 times. State v. Wells (S.C.App. 1992) 336 S.C. 223, 426 S.E.2d 814.

The defendant was not entitled to a directed verdict on the charge of involuntary manslaughter in connection with the death of a high school student to whom he had sold alcohol where the defendant had sold 4 pints of vodka and whiskey to the student and his friends, and later that evening the student, who had a blood alcohol which would “significantly impair” his ability to drive a car, drove his vehicle into a telephone pole with extreme force. State v. Hambright (S.C.App. 1992) 310 S.C. 382, 426 S.E.2d 806.

The trial court erred in refusing to charge the jury with the law of involuntary manslaughter where the testimony of the only witness, the defendant’s sister, was that the victim threatened to “cut” the defendant, the victim approached the defendant’s car, the defendant exited the car with a shotgun, there was a scuffle over the gun between the defendant and a passenger in the car, and the witness heard a shotgun blast while headed back to her house and saw that the victim had been shot. Casey v. State (S.C. 1991) 305 S.C. 445, 409 S.E.2d 391. Homicide 1380

In a trial for reckless homicide and involuntary manslaughter, the trial court did not commit error in refusing to give jury charges requested by the defendant which correctly stated the law defining recklessness where the judge in his charge (1) used language referring to an “ordinary, reasonable, prudent person” only in reference to whether such a person would know he was engaged in wrongdoing, (2) never instructed the jury to judge the defendant’s action by a standard of ordinary care, and (3) gave a supplemental charge specifically distinguishing negligence and recklessness. Matter of Alexander (S.C. 1991) 305 S.C. 187, 407 S.E.2d 907.

8. Sufficiency of evidence

Evidence was insufficient to support finding of involuntary manslaughter; defendant stated he had no contact with victim, except for prior spanking, and he simply found her unconscious on floor. State v. Mitchell (S.C.App. 2005) 362 S.C. 289, 608 S.E.2d 140, rehearing denied, certiorari denied. Homicide 1150

When the State introduces a statement or confession, that statement or confession may support an involuntary manslaughter charge. State v. Reese (S.C.App. 2004) 359 S.C. 260, 597 S.E.2d 169, rehearing denied, certiorari granted, affirmed in part, reversed in part 370 S.C. 31, 633 S.E.2d 898. Homicide 1186

The negligent handling of a loaded gun causing death will support a finding for involuntary manslaughter. State v. Reese (S.C.App. 2004) 359 S.C. 260, 597 S.E.2d 169, rehearing denied, certiorari granted, affirmed in part, reversed in part 370 S.C. 31, 633 S.E.2d 898. Homicide 708

Evidence of persistent speed, lack of control, which resulted in an unexplained departure from the road, and a pattern of careless weaving from one side of the road to the other, while operating a bus overcrowded with young children, supports a finding of criminal negligence. DeLee v. Knight (S.C. 1975) 266 S.C. 103, 221 S.E.2d 844, certiorari denied 96 S.Ct. 2658, 426 U.S. 939, 49 L.Ed.2d 392. Automobiles 355(4); Automobiles 355(13)

Testimony of two witnesses as to speed and careless operation of motor vehicle moments before accident tended to prove conscious indifference to the safety of the occupants of the vehicle by showing a continuity of speed and hazardous inattentive operation of the vehicle leading up to the accident and was not so remote as to lead to conjecture or speculation. DeLee v. Knight (S.C. 1975) 266 S.C. 103, 221 S.E.2d 844, certiorari denied 96 S.Ct. 2658, 426 U.S. 939, 49 L.Ed.2d 392.

9. Harmless error

Any alleged error by the trial court in admitting pre‑autopsy photographs of dog mauling victim was harmless, during prosecution for involuntary manslaughter and three counts of owning a dangerous animal; undisputed evidence established that defendant’s dogs were unrestrained, that the dogs attacked the ten year old victim, killing the victim, and partially ate the victim, and defendant’s dogs had previously exhibited overt acts of aggression against other people while defendant was present. (Per Beatty, J., with one judge concurring and two judges concurring in the result.) State v. Collins (S.C. 2014) 409 S.C. 524, 763 S.E.2d 22, rehearing denied. Criminal Law 1169.1(10)

Trial court’s erroneous refusal to instruct the jury on involuntary manslaughter is subject to a harmless error analysis. State v. Battle (S.C.App. 2014) 408 S.C. 109, 757 S.E.2d 737, rehearing denied, certiorari denied. Criminal Law 1173.2(4)

Trial court’s erroneous refusal to instruct jury on involuntary manslaughter in murder prosecution was not harmless beyond reasonable doubt, where there was conflicting evidence as to whether victim was shot during struggle over murder weapon; two witnesses testified that gun discovered next to victim’s body was fully loaded and, consequently, was not murder weapon, but no bullet fragments or projectiles were recovered and no witnesses actually saw gun that was fired, and defendant testified he was unarmed on night of shooting, that victim initiated altercation, and that when victim drew his gun, struggle ensued, resulting in victim being shot by his own weapon. State v. Battle (S.C.App. 2014) 408 S.C. 109, 757 S.E.2d 737, rehearing denied, certiorari denied. Criminal Law 1173.2(4)

Error in jury instruction on assault and battery of a high and aggravated nature (ABHAN), which improperly analogized ABHAN and voluntary manslaughter, was harmless, where immediately prior to charging jury on ABHAN and assault and battery with intent to kill (ABIK), trial court instructed jury that if causal link between defendant’s act and victim’s death was broken so that she could not be convicted of murder or voluntary manslaughter, then defendant could still be convicted of ABIK or ABHAN, and guilty verdicts on ABHAN or ABIK charges were possible if, and only if, jury concluded that defendant’s actions had not proximately caused her husband’s death, and jury did not find such break in causal chain, but rather convicted her of murder. State v. Tyler (S.C. 2002) 348 S.C. 526, 560 S.E.2d 888, habeas corpus dismissed 2009 WL 5216892. Criminal Law 1172.8

The trial court erred in instructing the jury that the crime of involuntary manslaughter was applicable to a case where the defendant forced a 72‑year‑old man into the trunk of his car, drove to an isolated place, removed the man from the trunk and took his money, then forced the man back into the trunk and left him there, where he was found dead of a heart attack several days later; but this error was harmless to the defendant’s subsequent conviction for murder on these facts. State v. McCall (S.C.App. 1991) 304 S.C. 465, 405 S.E.2d 414, certiorari denied.

**SECTION 16‑3‑70.** Administering or attempting to administer poison.

(A) It is unlawful for a person to:

(1) maliciously administer to, attempt to administer to, aid or assist in administering to, or cause to be taken by, another person a poison or other destructive thing, with intent to kill that person; or

(2) counsel, aid, or abet a person under item (1) of this subsection.

(B) A person who violates the provisions of this section is guilty of a felony and, upon conviction, must be imprisoned not more than twenty years.

HISTORY: 1962 Code Section 16‑56; 1952 Code Section 16‑56; 1942 Code Section 1108; 1932 Code Section 1108; Cr. C. ‘22 Section 11; Cr. C. ‘12 Section 149; Cr. C. ‘02 Section 121; G. S. 2466; R. S. 121; 1859 (12) 832; 1898 (22) 812; 1993 Act No. 184, Section 161.

CROSS REFERENCES

Accessories before the fact, generally, see Sections 16‑1‑40, 16‑1‑50.

Commission of this crime within specified radius of child day care center as separate offense, see Section 63‑13‑200.

Denial of registration as an operator of a child day care or group day care home where the applicant, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑820.

Denial of renewal for child day care or group day care home where the person applying for approval, the operator of the facility, or an employee or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑630.

Fingerprint review of any person applying to operate or seek employment at a child day care or group day care home to determine prior conviction of the crime referred to in this section, see Section 63‑13‑620.

Foster care placement with certain persons prohibited, see Section 63‑7‑2350.

No license or registration will be issued to any religious establishment to operate a child day care or group day care home where the operator, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑1010.

No person may be employed by the Department of Social Services in its day care licensing or child protective services divisions who has been convicted of the crime referred to in this section, see Section 63‑13‑190.

Past conviction check prior to initial employment of teachers, see Section 59‑26‑40.

Persons convicted of Title 16, Chapter 3 crimes prohibited from appointment as guardian ad litem for child in abuse or neglect proceeding, see Section 63‑11‑520.

Library References

Environmental Law 747, 761.

Westlaw Topic No. 149E.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Homicide Section 29, Other Offenses Involving Killing.

S.C. Jur. Poisons Section 10, Criminal Liability.

LAW REVIEW AND JOURNAL COMMENTARIES

Capital Punishment in South Carolina: The End of an Era. 24 S.C. L. Rev. 762.

NOTES OF DECISIONS

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1. In general

It was necessary, in order to convict the accused, for the State to prove ingestion of arsenic by the victim and the criminal agency of the accused in administering such to him. State v. James (S.C. 1971) 255 S.C. 365, 179 S.E.2d 41. Environmental Law 747

Intent manifested in attempt being the gravamen of the offense, under this section [Code 1962 Section 16‑56], it is immaterial that enough concentrated lye was not put in a well to cause death or serious sickness from the water. State v. Ready (S.C. 1918) 110 S.C. 177, 96 S.E. 287. Homicide 557; Homicide 558

Relative to offenses under this section [Code 1962 Section 16‑56], evidence of color and effect of water of well is prima facie proof such water was sufficiently strong from concentrated lye to be poisonous or injuries to health. State v. Ready (S.C. 1918) 110 S.C. 177, 96 S.E. 287. Homicide 1168

When a person, with intent to kill, administers to a little child a drug which he believes to be poisonous and of sufficient quantity to destroy life, the common‑law offense is complete, even though the dose is insufficient for the purpose intended. State v Glover (1888) 27 SC 602, 4 SE 564. State v. Ready (S.C. 1918) 110 S.C. 177, 96 S.E. 287.

The common‑law offense of assault with intent to kill, by administering a drug believed to be deadly in character, is not superseded by the provisions of this section [Code 1962 Section 16‑56], providing a punishment for administering poison. State v. Glover (S.C. 1888) 27 S.C. 602, 4 S.E. 564. Homicide 726

The administering of a drug which a defendant has been informed will produce death, whether such drug in fact is so poisonous or not, constitutes assault with intent to kill. State v. Glover (S.C. 1888) 27 S.C. 602, 4 S.E. 564. Homicide 732

**SECTION 16‑3‑75.** Tampering with human drug product or food item; penalty.

It is unlawful for a person to maliciously tamper with a human drug product or food item with the intent to do bodily harm to a person.

A person who violates the provisions of this section is guilty of a felony and, upon conviction, must be imprisoned not more than twenty years.

HISTORY: 1984 Act No. 477, Section 1; 1993 Act No. 184, Section 162.

CROSS REFERENCES

Commission of this crime within specified radius of child day care center as separate offense, see Section 63‑13‑200.

Denial of registration as an operator of a child day care or group day care home where the applicant, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑820.

Denial of renewal for child day care or group day care home where the person applying for approval, the operator of the facility, or an employee or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑630.

Fingerprint review of any person applying to operate or seek employment at a child day care or group day care home to determine prior conviction of the crime referred to in this section, see Section 63‑13‑620.

Foster care placement with certain persons prohibited, see Section 63‑7‑2340.

No license or registration will be issued to any religious establishment to operate a child day care or group day care home where the operator, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑1010.

No person may be employed by the Department of Social Services in its day care licensing or child protective services divisions who has been convicted of the crime referred to in this section, see Section 63‑13‑190.

Past conviction check prior to initial employment of teachers, see Section 59‑26‑40.

Persons convicted of Title 16, Chapter 3 crimes prohibited from appointment as guardian ad litem for child in abuse or neglect proceeding, see Section 63‑11‑520.

Library References

Food 12, 23.

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C.J.S. Adulteration Section 7.

C.J.S. Drugs and Narcotics Sections 188 to 206.

C.J.S. Food Sections 41 to 45, 47 to 48, 52, 60.

C.J.S. Health and Environment Section 87.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Homicide Section 29, Other Offenses Involving Killing.

S.C. Jur. Poisons Section 10, Criminal Liability.

**SECTION 16‑3‑85.** Homicide by child abuse; definitions; penalty; sentencing.

(A) A person is guilty of homicide by child abuse if the person:

(1) causes the death of a child under the age of eleven while committing child abuse or neglect, and the death occurs under circumstances manifesting an extreme indifference to human life; or

(2) knowingly aids and abets another person to commit child abuse or neglect, and the child abuse or neglect results in the death of a child under the age of eleven.

(B) For purposes of this section, the following definitions apply:

(1) “child abuse or neglect” means an act or omission by any person which causes harm to the child’s physical health or welfare;

(2) “harm” to a child’s health or welfare occurs when a person:

(a) inflicts or allows to be inflicted upon the child physical injury, including injuries sustained as a result of excessive corporal punishment;

(b) fails to supply the child with adequate food, clothing, shelter, or health care, and the failure to do so causes a physical injury or condition resulting in death; or

(c) abandons the child resulting in the child’s death.

(C) Homicide by child abuse is a felony and a person who is convicted of or pleads guilty to homicide by child abuse:

(1) under subsection (A)(1) may be imprisoned for life but not less than a term of twenty years; or

(2) under subsection (A)(2) must be imprisoned for a term not exceeding twenty years nor less than ten years.

(D) In sentencing a person under this section, the judge must consider any aggravating circumstances including, but not limited to, a defendant’s past pattern of child abuse or neglect of a child under the age of eleven, and any mitigating circumstances; however, a child’s crying does not constitute provocation so as to be considered a mitigating circumstance.

HISTORY: 1992 Act No. 412, Section 1; 2000 Act No. 261, Section 1.

CROSS REFERENCES

Commission of this crime within specified radius of child day care center as separate offense, see Section 63‑13‑200.

Denial of registration as an operator of a child day care or group day care home where the applicant, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑820.

Denial of renewal for child day care or group day care home where the person applying for approval, the operator of the facility, or an employee or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑630.

Fingerprint review of any person applying to operate or seek employment at a child day care or group day care home to determine prior conviction of the crime referred to in this section, see Section 63‑13‑620.

Foster care placement with certain persons prohibited, see Section 63‑7‑2350.

No license or registration will be issued to any religious establishment to operate a child day care or group day care home where the operator, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑1010.

No person may be employed by the Department of Social Services in its day care licensing or child protective services divisions who has been convicted of the crime referred to in this section, see Section 63‑13‑190.

Offenses specified in subdivision (C)(1) of this section as exempt from classification of felonies and misdemeanors, see Section 16‑1‑10.

Past conviction check prior to initial employment of teachers, see Section 59‑26‑40.

Persons convicted of Title 16, Chapter 3 crimes prohibited from appointment as guardian ad litem for child in abuse or neglect proceeding, see Section 63‑11‑520.

Post‑conviction DNA procedures, see Section 17‑28‑10 et seq.

Preservation of DNA evidence, see Section 17‑28‑310 et seq.

Sentencing, see Section 17‑25‑20 et seq.

Violent crimes defined, see Section 16‑1‑60.

Library References

Homicide 597, 1565.

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C.J.S. Homicide Sections 61, 539 to 541.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Burglary Section 9, Punishment.

S.C. Jur. Constitutional Law Section 80, Criminal Proceedings.

S.C. Jur. Homicide Section 29, Other Offenses Involving Killing.

LAW REVIEW AND JOURNAL COMMENTARIES

Protecting our children: A reformation of South Carolina’s homicide by child abuse laws. Brigid Benincasa, 65 S.C. L. Rev. 735 (Summer 2014).

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1. In general

A deliberate act in the face of knowledge that it would create a risk of death to a child is a reckless disregard of the risk, and thus demonstrates an extreme indifference to the child’s life, as an element of homicide by child abuse. State v. Phillips (S.C.App. 2014) 411 S.C. 124, 767 S.E.2d 444, rehearing denied, certiorari granted, affirmed as modified 416 S.C. 184, 785 S.E.2d 448. Homicide 603

Homicide by child abuse statute does not require the State to prove a defendant acted with the intent to harm in order to prove that the death occurred under circumstances manifesting an extreme indifference to human life; instead, the State must prove the defendant performed a deliberate act that he or she knew would create a risk of death to the child. State v. Phillips (S.C.App. 2014) 411 S.C. 124, 767 S.E.2d 444, rehearing denied, certiorari granted, affirmed as modified 416 S.C. 184, 785 S.E.2d 448. Homicide 603

State’s alleged violation of agreement with co‑defendant in trial for homicide by child abuse would not provide co‑defendant with relief, since agreement was not proffer agreement intended to protect co‑defendant against the use of his statements, and defendant failed to show how enforcement of agreement would have affected him. State v. Palmer (S.C.App. 2014) 408 S.C. 218, 758 S.E.2d 195, rehearing denied, certiorari granted, affirmed in part, reversed in part 413 S.C. 410, 776 S.E.2d 558. Criminal Law 42.5(1)

Assuming that defendant had prior knowledge that co‑defendant was going to commit a crime, such prior knowledge was insufficient to constitute guilt of aiding and abetting homicide by child abuse. State v. Lewis (S.C.App. 2013) 403 S.C. 345, 743 S.E.2d 124, rehearing denied, certiorari granted, certiorari dismissed as improvidently granted 411 S.C. 647, 770 S.E.2d 398. Homicide 614

Evidence that defendant failed to act to stop further abuse of victim did not constitute evidence of aiding and abetting homicide by child abuse, as aiding and abetting required overt act. State v. Lewis (S.C.App. 2013) 403 S.C. 345, 743 S.E.2d 124, rehearing denied, certiorari granted, certiorari dismissed as improvidently granted 411 S.C. 647, 770 S.E.2d 398. Homicide 614

Overt act is required to be held liable for aiding and abetting, which necessarily excludes the possibility of being held criminally liable for a failure to act. State v. Lewis (S.C.App. 2013) 403 S.C. 345, 743 S.E.2d 124, rehearing denied, certiorari granted, certiorari dismissed as improvidently granted 411 S.C. 647, 770 S.E.2d 398. Criminal Law 59(5)

In a prosecution for homicide by child abuse, “extreme indifference” is in the nature of a culpable mental state and therefore is akin to intent. State v. Martucci (S.C.App. 2008) 380 S.C. 232, 669 S.E.2d 598, rehearing denied. Homicide 603

The homicide by child abuse statute applied to stillbirth of fetus caused by ingestion of cocaine. State v. McKnight (S.C. 2003) 352 S.C. 635, 576 S.E.2d 168, certiorari denied, certiorari denied 124 S.Ct. 101, 540 U.S. 819, 157 L.Ed.2d 36, denial of post‑conviction relief reversed 378 S.C. 33, 661 S.E.2d 354. Homicide 503

In the context of homicide by abuse statutes,” extreme indifference” is a mental state akin to intent characterized by a deliberate act culminating in death. State v. Jarrell (S.C.App. 2002) 350 S.C. 90, 564 S.E.2d 362, rehearing denied, certiorari denied, habeas corpus dismissed 2011 WL 1526816. Homicide 597

2. Constitutional issues

Defense counsel’s deficient performance, in prosecution for homicide by child abuse, in failing to object to supplemental jury instructions which erroneously enlarged indictment, prejudiced defendant, and thus, was ineffective assistance. Bailey v. State (S.C. 2011) 392 S.C. 422, 709 S.E.2d 671. Criminal Law 1948

The disparity between the sentences for criminal abortion and homicide by child abuse did not violates the Equal Protection Clause; defendant was not similarly situated to individuals prosecuted under the criminal abortion statute, as she never argued that she intended to cause an abortion through her cocaine use, the imposition of different sentences upon the individuals who obtained illegal abortions and the individuals who committed homicide as a result of child abuse was reasonable, and there was a legitimate legislative purpose for imposing different sentences for the offenses. McKnight v. State (S.C. 2008) 378 S.C. 33, 661 S.E.2d 354. Constitutional Law 3809; Homicide 1563

Trial counsel rendered ineffective assistance when she failed to object to the jury charge on the measure of criminal intent required for conviction under the Homicide by Child Abuse (HCA) statute, in prosecution for homicide by child abuse; the jury questioned the court on the definition of criminal intent, the court replied by reciting the general criminal intent charge to the jury, and the general charge referred to negligence and did not clarify the mental state required for a conviction of homicide by child abuse. McKnight v. State (S.C. 2008) 378 S.C. 33, 661 S.E.2d 354. Criminal Law 1948

Prosecuting defendant for crime of homicide by child abuse for causing stillbirth of her viable fetus by using cocaine did not violate defendant’s right to privacy. State v. McKnight (S.C. 2003) 352 S.C. 635, 576 S.E.2d 168, certiorari denied, certiorari denied 124 S.Ct. 101, 540 U.S. 819, 157 L.Ed.2d 36, denial of post‑conviction relief reversed 378 S.C. 33, 661 S.E.2d 354. Constitutional Law 1238; Homicide 603

Sentencing defendant to 20 years in prison, suspended upon service of 12 years, for crime of homicide by child abuse for causing stillbirth of her viable fetus by using cocaine was not cruel and unusual punishment, even though no other state defined a viable fetus as a child for purposes of criminal prosecution of a mother, considering that homicide was a severe offense, penalty was no harsher than that imposed upon any other individual charged with murder, and other states imposed severe sentences on those found guilty of murder or neglect of a child. State v. McKnight (S.C. 2003) 352 S.C. 635, 576 S.E.2d 168, certiorari denied, certiorari denied 124 S.Ct. 101, 540 U.S. 819, 157 L.Ed.2d 36, denial of post‑conviction relief reversed 378 S.C. 33, 661 S.E.2d 354. Homicide 1567; Sentencing And Punishment 1495

Defendant was on notice that her conduct in ingesting cocaine while pregnant was proscribed, and thus, prosecution for homicide by child abuse did not violate due process, in light of ample authority in state that a viable fetus was a “person.” State v. McKnight (S.C. 2003) 352 S.C. 635, 576 S.E.2d 168, certiorari denied, certiorari denied 124 S.Ct. 101, 540 U.S. 819, 157 L.Ed.2d 36, denial of post‑conviction relief reversed 378 S.C. 33, 661 S.E.2d 354. Constitutional Law 4509(14); Homicide 503; Homicide 603

3. Justiciability

Defendant who was prosecuted for statutory crime of homicide by child abuse for causing stillbirth of her viable fetus by using cocaine had no standing to assert the privacy rights of other pregnant women in challenging validity of statute. State v. McKnight (S.C. 2003) 352 S.C. 635, 576 S.E.2d 168, certiorari denied, certiorari denied 124 S.Ct. 101, 540 U.S. 819, 157 L.Ed.2d 36, denial of post‑conviction relief reversed 378 S.C. 33, 661 S.E.2d 354. Constitutional Law 727

4. Lesser included offenses

Common‑law principles of accomplice liability do not apply in the context of the statute setting forth the offense of homicide by child abuse. State v. Smith (S.C. 2013) 406 S.C. 215, 750 S.E.2d 612, rehearing denied. Homicide 614

Indictment alleging that defendant violated the statutory provision on homicide by child abuse as a principal did not provide notice of homicide by child abuse by aiding and abetting, and thus defendant could not be convicted of homicide by child abuse by aiding and abetting, given that homicide by child abuse by aiding and abetting was not a lesser‑included offense of homicide by child abuse as a principal. State v. Smith (S.C. 2013) 406 S.C. 215, 750 S.E.2d 612, rehearing denied. Homicide 854

Because homicide by child abuse by aiding and abetting is not a lesser‑included offense of homicide by child abuse as a principal, an indictment expressly charging only homicide by child abuse as a principal does not provide notice of homicide by child abuse by aiding and abetting. State v. Smith (S.C. 2013) 406 S.C. 215, 750 S.E.2d 612, rehearing denied. Homicide 854; Indictment and Information 191(4)

Defendant was not entitled to a jury instruction on involuntary manslaughter as a lesser included offense of homicide by child abuse; an element of involuntary manslaughter was the unintentional killing of another without malice, but while engaged in an unlawful activity not naturally tending to cause death or great bodily harm, and child abuse could never be defined as an unlawful activity “not tending to cause death of great bodily harm”; abrogating State v. Mitchell, 362 S.C. 289, 608 S.E.2d 140. McKnight v. State (S.C. 2008) 378 S.C. 33, 661 S.E.2d 354. Homicide 1458

Homicide by child abuse is not a lesser‑included offense of murder; an element of homicide by child abuse, the death of a child under age eleven, is not an element of murder. State v. Northcutt (S.C. 2007) 372 S.C. 207, 641 S.E.2d 873, rehearing denied. Indictment And Information 191(4)

Involuntary manslaughter was not lesser included offense of homicide by child abuse; crime of homicide by child abuse only applied in cases where victim was under age of 11 whereas application of involuntary manslaughter was not affected by age of victim, homicide by child abuse involved child abuse or neglect, involuntary manslaughter existed based on larger number of factual predicates, and homicide by child abuse did not include all elements of involuntary manslaughter. State v. Mitchell (S.C.App. 2005) 362 S.C. 289, 608 S.E.2d 140, rehearing denied, certiorari denied. Indictment And Information 191(4)

5. Admissibility of evidence

Erroneous admission of law‑enforcement agent’s criminal‑profile testimony was harmless as to defendant’s conviction for unlawful conduct toward a child, where there was other overwhelming evidence of defendant’s guilt, including testimony of physician that victim’s urinary tract infection eventually made its way into her blood, that blood clots cut off blood supply to victim’s brain, and that it would have become obvious that victim was very sick based on progression of symptoms, and defendant’s testimony showed he assisted in victim’s care during two months she lived with him before she died, that he should have done something to help victim, and that he did not know victim was as sick as she was, which necessarily implied that he knew victim was sick to some degree. State v. Huckabee (S.C.App. 2017) 419 S.C. 414, 798 S.E.2d 584, rehearing denied. Criminal Law 1169.9

Erroneous admission of law‑enforcement agent’s criminal‑profile testimony was not harmless as to defendant’s convictions for homicide by child abuse, inflicting great bodily injury upon a child, and criminal sexual conduct with a minor, where agent testified that overwhelming majority of sexual offenders were male and that profile of individual who would inflict cigarette burns on child was an adult male approximately 25 to 40 years of age, defendant matched profile, and testimony excluded victim’s mother as likely perpetrator and made it easy for jury to view mother as generally more credible than defendant, and thus agent’s testimony went to heart of defendant’s defense, which was that mother inflicted abuse and that her testimony against defendant was not credible. State v. Huckabee (S.C.App. 2017) 419 S.C. 414, 798 S.E.2d 584, rehearing denied. Criminal Law 1169.9

Trial court’s findings, in determining that defendant voluntarily gave statements related to alleged homicide by child abuse, were supported by the record, such that statements were admissible at trial. State v. Palmer (S.C.App. 2014) 408 S.C. 218, 758 S.E.2d 195, rehearing denied, certiorari granted, affirmed in part, reversed in part 413 S.C. 410, 776 S.E.2d 558. Criminal Law 413.51

Defendant’s Mirandarights were not violated during interrogation process related to defendant’s alleged homicide by child abuse, and thus defendant’s statements given after she waived her Mirandarights were not tainted by alleged violation, since police did not interrogate defendant before giving her Mirandarights. S.C.Code Ann. State v. Palmer (S.C.App. 2014) 408 S.C. 218, 758 S.E.2d 195, rehearing denied, certiorari granted, affirmed in part, reversed in part 413 S.C. 410, 776 S.E.2d 558. Criminal Law 411.96

Probative value of three autopsy photographs of five‑month‑old victim’s head injuries was not outweighed by danger of unfair prejudice in prosecution for homicide by child abuse; defendant claimed that he tripped and fell within victim in his arms, and, thus, that victim’s injuries were accidental, photographs were introduced to corroborate testimony of forensic pathologist who performed autopsy that victim’s various injuries were inconsistent with an accidental injury, and they were highly probative of whether victim was abused and whether abuse was cause of his death, as integral elements of charged offense. State v. Dial (S.C.App. 2013) 405 S.C. 247, 746 S.E.2d 495, certiorari dismissed as improvidently granted 412 S.C. 121, 770 S.E.2d 767. Criminal Law 438(7)

Any error was harmless, in prosecution for homicide by child abuse, in excluding copies of forensic pathologist’s allegedly conflicting death certificate reports, the earlier one containing statement that “head hit object” and the later one containing blank space where that statement had been; while defendant argued that earlier determination supported his theory that victim’s injuries were sustained by a fall onto coffee table, pathologist testified to the exact changes made to the documents and thoroughly explained reason for changes, and defendant had opportunity to fully cross‑examine her. State v. Dial (S.C.App. 2013) 405 S.C. 247, 746 S.E.2d 495, certiorari dismissed as improvidently granted 412 S.C. 121, 770 S.E.2d 767. Criminal Law 1170(1)

Alleged bias of county’s major crimes investigator, based on a romantic relationship between himself and assistant solicitor who was initially assigned to prosecute defendant for homicide by child abuse, was speculative, such that trial court did not abuse its discretion in not allowing cross‑examination of investigator concerning that relationship; timeline of relationship was not definitively established, assistant solicitor was removed from case when relationship was discovered and Attorney General had taken over case, and assistant solicitor had no involvement with the prosecution at time of trial. State v. Dial (S.C.App. 2013) 405 S.C. 247, 746 S.E.2d 495, certiorari dismissed as improvidently granted 412 S.C. 121, 770 S.E.2d 767. Witnesses 372(2)

There was clear and convincing evidence that defendant committed child abuse in connection with infant victim’s broken leg, thus satisfying one requirement for admission of that “other acts” evidence in prosecution for homicide by child abuse arising from victim’s death three months later; defendant was the only person with victim when injury occurred, he admitted to victim’s mother and to pediatrician that injury occurred while he held the child in his hands, three treating physicians and pathologist testified that victim’s spiral fracture was result of child abuse, and there was evidence that defendant lied about how child’s injury occurred in order to conceal his involvement. State v. Smith (S.C.App. 2011) 391 S.C. 353, 705 S.E.2d 491, rehearing denied, reversed 406 S.C. 215, 750 S.E.2d 612. Criminal Law 374.20(3)

Trial court admission of two photographs of child victim taken approximately one month before his death was not an abuse of discretion, in prosecution for homicide by child abuse; the photographs were taken by a neighbor to depict the bruising on child’s back and arm, defendant was present when the photographs were taken, the photographs established that defendant was aware of the abuse of child, which was relevant to whether defendant’s acts or omissions resulted in child’s death, and the photographs established a pattern of abuse and neglect. State v. Holder (S.C. 2009) 382 S.C. 278, 676 S.E.2d 690, habeas corpus denied 2016 WL 462435. Criminal Law 438(5.1)

Trial court admission of testimony from defendant’s coworker, who testified that defendant began dressing differently and talked less about her child once her relationship began with codefendant, did not constitute the impermissible admission of character evidence, in prosecution for homicide by child abuse; coworker merely recounted her version of events leading up to child’s death, as well as her impression of defendant during that time, and the purpose of the testimony was to show that defendant manifested an extreme indifference to the well‑being of her child by trying to please codefendant instead of protecting the welfare of child. State v. Holder (S.C. 2009) 382 S.C. 278, 676 S.E.2d 690, habeas corpus denied 2016 WL 462435. Homicide 996

Autopsy photographs of child’s internal organs and other injuries were admissible in prosecution for homicide by child abuse; photographs were introduced to corroborate testimony of doctor who performed autopsy regarding various injuries inflicted on child, various stages of healing or freshness, and the internal trauma which caused child’s death, photographs were relevant to prove that child was abused and abuse caused his death, that abuse manifested an extreme indifference to human life, and that severity of bruises and resulting trauma were inconsistent with accidental injury or play, and photographs were not introduced with the intent to inflame, elicit sympathy of, or prejudice the jury. State v. Martucci (S.C.App. 2008) 380 S.C. 232, 669 S.E.2d 598, rehearing denied. Criminal Law 438(6)

Even assuming that defendant’s urine specimen was illegally obtained in hospital following delivery of her stillborn child, admission of the drug screening results was harmless, in prosecution for homicide by child abuse; defendant’s caseworker testified that defendant knew she was pregnant and used crack cocaine when she could get it, defense expert testified that cocaine was in the unborn child at some point, and state’s experts testified that presence of benzoylecgonine in infant’s system indicated that defendant used cocaine. State v. McKnight (S.C. 2003) 352 S.C. 635, 576 S.E.2d 168, certiorari denied, certiorari denied 124 S.Ct. 101, 540 U.S. 819, 157 L.Ed.2d 36, denial of post‑conviction relief reversed 378 S.C. 33, 661 S.E.2d 354. Criminal Law 1169.1(8)

Forensic psychologist’s expert testimony that defendant did not fit the diagnostic qualifications of a pedophile was irrelevant and, thus, inadmissible in defendant’s trial for homicide by child abuse and other charges; defendant was allegedly involved in incest, and there were significant differences in identification and diagnosis of incest abusers and pedophiles. State v. Jarrell (S.C.App. 2002) 350 S.C. 90, 564 S.E.2d 362, rehearing denied, certiorari denied, habeas corpus dismissed 2011 WL 1526816. Criminal Law 474.4(5)

Investigation of state’s witness for an uncharged armed robbery did not create reasonable probability that outcome of the proceeding would have been different had the information been disclosed, and thus state’s failure to disclose this information was not a Brady violation in defendant’s trial for homicide by child abuse and other charges; witness’s alleged involvement in uncharged offense had no bearing on defendant’s guilt, and uncharged offense was not probative of witness’s truthfulness and, thus, could not be used for impeachment purposes. State v. Jarrell (S.C.App. 2002) 350 S.C. 90, 564 S.E.2d 362, rehearing denied, certiorari denied, habeas corpus dismissed 2011 WL 1526816. Criminal Law 1999

Forensic psychiatrist’s expert testimony that defendant’s husband lacked the capacity to conform his behavior to the requirements of the law and that he acted impulsively at the actual time he allegedly murdered victim was irrelevant and, thus, inadmissible in defendant’s prosecution for homicide by child abuse, accessory before and after the fact, and other charges; expert did not exclude possibility that husband could have planned victim’s death with defendant prior to the event, and husband’s state of mind when he murdered victim had no probative bearing on his capacity to plan. State v. Jarrell (S.C.App. 2002) 350 S.C. 90, 564 S.E.2d 362, rehearing denied, certiorari denied, habeas corpus dismissed 2011 WL 1526816. Criminal Law 474

Trial court acted within its discretion in admitting autopsy photographs in defendant’s trial for homicide by child abuse and other charges, although photographs were graphic and defendant claimed they were unnecessary given pathologist’s testimony about the cause of death and sexual abuse of victim, where trial court did not admit all photographs, and admitted photographs corroborated testimony about condition of victim and time of death, supported charge against defendant of accessory after the fact, and helped jury understand pathologist’s testimony. State v. Jarrell (S.C.App. 2002) 350 S.C. 90, 564 S.E.2d 362, rehearing denied, certiorari denied, habeas corpus dismissed 2011 WL 1526816. Criminal Law 438(6)

6. Questions for jury

Issue of whether defendant acted with extreme indifference to human life in administering her medication to child resulting in death of child due to overdose was for jury in trial for homicide by child abuse; evidence indicated child was in her care and custody at time of lethal dose, multiple doses of medication were administered, and concentration of medication in child’s blood was at least two‑and‑a‑half times therapeutic amount. State v. Phillips (S.C. 2016) 416 S.C. 184, 785 S.E.2d 448. Homicide 1322

Issue of whether defendant, child victim’s grandmother, caused victim’s fatal injuries was for the jury in prosecution for homicide by child abuse; there was evidence that defendant was alone with victim at the time that medical evidence indicated the fatal injury was sustained, defendant admitted mistreating the victim by shaking, spanking and overdosing him, and numerous witnesses testified to defendant’s unusual affect and statements following victim’s injury. State v. Palmer (S.C. 2015) 413 S.C. 410, 776 S.E.2d 558, rehearing denied. Homicide 1331; Infants 1632(2)

Evidence of defendant’s flight and suicide attempt was insufficient to withstand motion for directed verdict in prosecution for aiding and abetting homicide by child abuse, absent any evidence of overt act or requisite state of mind for aiding and abetting. State v. Lewis (S.C.App. 2013) 403 S.C. 345, 743 S.E.2d 124, rehearing denied, certiorari granted, certiorari dismissed as improvidently granted 411 S.C. 647, 770 S.E.2d 398. Homicide 1332

Evidence of requisite mental state of knowledge was insufficient to create jury question in prosecution for aiding and abetting homicide by child abuse; defendant and co‑defendant both claimed they were apart when victim was injured, and defendant testified that as soon as he found victim’s condition to be odd, he brought her to co‑defendant and medical personnel were immediately called., that it was only after he was told about implications of victim’s injuries did he realize victim’s sounds made earlier that night could have been result of someone shaking her, and that he initially thought victim had suffered seizure. State v. Lewis (S.C.App. 2013) 403 S.C. 345, 743 S.E.2d 124, rehearing denied, certiorari granted, certiorari dismissed as improvidently granted 411 S.C. 647, 770 S.E.2d 398. Homicide 1332

Evidence that defendant instigated, abetted, and witnessed spanking of victim’s older brother by his co‑defendant was insufficient to create jury question as to guilty knowledge, in prosecution for aiding and abetting homicide by child abuse, absent any evidence that defendant witnessed co‑defendant’s subsequent actions with respect to victim; mere knowledge of co‑defendant’s intent to commit crime was insufficient to constitute guilt of aiding and abetting. State v. Lewis (S.C.App. 2013) 403 S.C. 345, 743 S.E.2d 124, rehearing denied, certiorari granted, certiorari dismissed as improvidently granted 411 S.C. 647, 770 S.E.2d 398. Homicide 1332

Even if jury found the state failed in prosecution for homicide by child abuse to prove beyond a reasonable doubt that defendant inflicted fatal chest injuries, or personally administered pseudoephedrine overdose, jury could nevertheless find him guilty of aiding and abetting if it found the state proved beyond a reasonable doubt that he knew about the injuries or about the pseudoephedrine but failed to seek medical care for victim. State v. Smith (S.C.App. 2011) 391 S.C. 353, 705 S.E.2d 491, rehearing denied, reversed 406 S.C. 215, 750 S.E.2d 612. Homicide 614; Homicide 1207

Issue of whether cocaine caused the stillbirth of defendant’s child was for the jury, in prosecution for homicide by child abuse, where State presented expert testimony that cause of death was intrauterine cocaine exposure and ruled out other indications of cause death, physician who performed autopsy ruled death a homicide, and defense expert testified that cocaine had been in baby’s system at one point and ruled out other suggested infections or abnormalities as cause of death. State v. McKnight (S.C. 2003) 352 S.C. 635, 576 S.E.2d 168, certiorari denied, certiorari denied 124 S.Ct. 101, 540 U.S. 819, 157 L.Ed.2d 36, denial of post‑conviction relief reversed 378 S.C. 33, 661 S.E.2d 354. Homicide 1330

Issue of whether defendant had requisite criminal intent to commit homicide by child abuse, that is, whether she acted with extreme indifference to her unborn child’s life, was for the jury, where it was public knowledge that maternal use of cocaine during pregnancy could cause serious harm to viable unborn child, and there was evidence that defendant took cocaine knowing she was pregnant. State v. McKnight (S.C. 2003) 352 S.C. 635, 576 S.E.2d 168, certiorari denied, certiorari denied 124 S.Ct. 101, 540 U.S. 819, 157 L.Ed.2d 36, denial of post‑conviction relief reversed 378 S.C. 33, 661 S.E.2d 354. Homicide 1327

Evidence that mother left her home on the day of the murder of her child knowing that child would be killed in her absence raised fact issue for jury as to whether mother had the mental state of extreme indifference to human life necessary to sustain conviction for homicide by child abuse. State v. Jarrell (S.C.App. 2002) 350 S.C. 90, 564 S.E.2d 362, rehearing denied, certiorari denied, habeas corpus dismissed 2011 WL 1526816. Homicide 1327

7. Instructions

Any alleged error or prejudice arising when victim’s mother approached witness stand with urn containing victim’s ashes was cured, in prosecution for homicide by child abuse, by curative instruction to jury to base any decision on facts presented at trial, not on emotional response of improper conduct, and, therefore, no mistrial was required; defendant did not establish that any juror saw the item in mother’s hands and could not show that the item would have been recognizable as victim’s urn if in fact a juror had seen it. State v. Dial (S.C.App. 2013) 405 S.C. 247, 746 S.E.2d 495, certiorari dismissed as improvidently granted 412 S.C. 121, 770 S.E.2d 767. Criminal Law 1174(5)

In prosecution for homicide by child abuse, supplemental instructions that allowed jury to find defendant guilty if it found act of “abuse or neglect” impermissibly enlarged indictment, which alleged that defendant inflicted injuries resulting in victim’s death, and not that victim’s death was result of omission on defendant’s part. Bailey v. State (S.C. 2011) 392 S.C. 422, 709 S.E.2d 671. Criminal Law 814(5)

8. Sufficiency of evidence

There was sufficient evidence of defendants’ guilt to justify trial court’s denial of their motions for directed verdict with respect to homicide by child abuse charges; physicians’ testimony indicated that victim, the defendants’ son, was exhibiting pain and other obvious symptoms of repeated physical abuse one to two weeks prior to his death and could have been saved had he received medical treatment, severity of victim’s symptoms and history of defendants’ animosity toward victim raised inference that their failure to seek medical treatment was a deliberate act, and evidence of victim’s last beating indicated that both defendants were present for the beating and were aware of the grave trauma being inflicted on victim. State v. Thompson (S.C.App. 2017) 420 S.C. 192, 802 S.E.2d 623. Homicide 1322

Evidence was insufficient to support defendants’ convictions for aiding and abetting homicide by child abuse in joint trial; there was no evidence other than rank speculation that either defendant abused the child in the presence of the other who then failed to seek medical help, and there was no evidence that more prompt treatment would have mitigated the victim’s injuries. State v. Palmer (S.C. 2015) 413 S.C. 410, 776 S.E.2d 558, rehearing denied. Homicide 1207; Infants 1706

Evidence was insufficient to support finding that defendant, the companion of child victim’s grandmother, caused victim’s injuries, and thus would not support conviction for homicide by child abuse; defendant was not alone with child victim until after victim sustained injuries and fell asleep, and the only evidence was that the sleeping victim’s injuries would not have been immediately apparent. State v. Palmer (S.C. 2015) 413 S.C. 410, 776 S.E.2d 558, rehearing denied. Homicide 1184; Infants 1705(4)

Witness’s testimony, in prosecution for homicide by child abuse in which it was alleged that defendant gave child prescription cough syrup that was prescribed to defendant, that witness heard defendant state that she had given the child some cough medicine over the weekend and “surely to God that’s not what is wrong” was direct evidence of child abuse, rather than circumstantial evidence; if jury believed witness’s testimony, the evidence would immediately establish the main fact to be proved, i.e., that defendant gave the child cough medicine. State v. Phillips (S.C.App. 2014) 411 S.C. 124, 767 S.E.2d 444, rehearing denied, certiorari granted, affirmed as modified 416 S.C. 184, 785 S.E.2d 448. Criminal Law 549; Homicide 1165; Infants 1705(2)

Evidence was sufficient to establish that defendant intended to give child prescription cough syrup with the knowledge that doing so would create a risk to the child’s life, so as to support conviction for homicide by child abuse; evidence was presented that defendant knew that giving prescription medication to child when it was not prescribed to him would put the child’s health at risk, health risks associated with giving children medications prescribed to adults were a matter of common knowledge, and evidence was presented that defendant, knowing the safety risks, gave child multiple doses of the medication, resulting in a toxic blood level, and that defendant tried to cover up her actions and shift the blame from herself. State v. Phillips (S.C.App. 2014) 411 S.C. 124, 767 S.E.2d 444, rehearing denied, certiorari granted, affirmed as modified 416 S.C. 184, 785 S.E.2d 448. Homicide 1164

Evidence was sufficient to establish that defendant, who was child’s grandmother, caused child’s death while committing child abuse or neglect, so as to support conviction for homicide by child abuse; witness testified that she heard defendant state that she had given the child some cough medicine, and medical testimony was presented that the cough medicine had to be prescription cough syrup prescribed to defendant and that child died from receiving multiple doses of it. State v. Phillips (S.C.App. 2014) 411 S.C. 124, 767 S.E.2d 444, rehearing denied, certiorari granted, affirmed as modified 416 S.C. 184, 785 S.E.2d 448. Homicide 1174

Evidence was sufficient to support jury’s determination, in finding defendant guilty in joint trial for homicide by child abuse, that defendant inflicted at least one of her grandchild’s injuries that were conclusively established to be result of child abuse while in co‑defendant’s and defendant’s exclusive control; circumstantial evidence indicated defendant was often frustrated with and disliked child, defendant stated that child was exhibiting normal behaviors when she returned from work, during which time child had been in co‑defendant’s care, and defendant called police to report child’s symptoms only after she had entered his room later that evening. State v. Palmer (S.C.App. 2014) 408 S.C. 218, 758 S.E.2d 195, rehearing denied, certiorari granted, affirmed in part, reversed in part 413 S.C. 410, 776 S.E.2d 558. Homicide 1184

Evidence was insufficient to support defendants’ convictions for aiding and abetting homicide by child abuse in joint trial, even though state’s evidence conclusively proved child died from child abuse, absent direct evidence that defendants knowingly undertook any action to aid or abet that abuse. State v. Palmer (S.C.App. 2014) 408 S.C. 218, 758 S.E.2d 195, rehearing denied, certiorari granted, affirmed in part, reversed in part 413 S.C. 410, 776 S.E.2d 558. Homicide 1207

Evidence was sufficient to support jury’s determination, in finding defendant guilty in joint trial for homicide by child abuse, that co‑defendant inflicted at least one of child’s injuries, conclusively established to be result of child abuse while in co‑defendant’s and defendant’s exclusive control; co‑defendant had child in his care entire day in which injuries were inflicted while defendant was at work and grocery store, and even though defendant stated that child was sleeping “and breathing fine” when she returned from work, physician testified that person may be unable to differentiate a sleeping child from one who is unconscious, and defendant did not check on child when she returned from store. State v. Palmer (S.C.App. 2014) 408 S.C. 218, 758 S.E.2d 195, rehearing denied, certiorari granted, affirmed in part, reversed in part 413 S.C. 410, 776 S.E.2d 558. Homicide 1184

State failed to present substantial circumstantial evidence to support charge of homicide by child abuse arising from death of defendant’s 16‑month‑old child; every piece of state’s evidence established that defendant was asleep at the time child sustained her injuries, that defendant was only awoken after jointly tried codefendant retrieved unresponsive child from her crib, and that the victim appeared to be acting normally until after defendant put the victim to sleep and went to sleep herself, and only evidence in support of defendant’s guilt was codefendant’s interested testimony that he heard defendant shaking child before he found child unresponsive in crib. State v. Hepburn (S.C. 2013) 406 S.C. 416, 753 S.E.2d 402, rehearing denied. Homicide 1165

Evidence was sufficient to establish act or omission by defendant wherein he inflicted or allowed physical harm to be inflicted on victim resulting in victim’s death so as to support conviction for homicide by child abuse and aiding and abetting homicide by child abuse; victim sustained injury during time when defendant and codefendant were only two persons who could have caused injury, victim had two skull fracture sites, injury caused immediate neurological problems which would have been obvious to defendant, injuries were result of severe beating with intentional force to back of victim’s head, and physician testified that injuries were unquestionably result of child abuse. State v. Smith (S.C.App. 2004) 359 S.C. 481, 597 S.E.2d 888. Homicide 1165; Homicide 1207

9. Sentence and punishment

Trial court has no power to suspend a sentence imposed on a person convicted of homicide by child abuse; although the homicide by child abuse statute does not specifically prohibit suspension of a sentence, it falls within the exception provided in statute, stating that court’s power to suspend sentence does not apply to any offense punishable by death or life imprisonment, because the crime of homicide by child abuse is punishable by life imprisonment. Richardson v. State (S.C.App. 2014) 407 S.C. 482, 756 S.E.2d 404. Sentencing and Punishment 1837; Sentencing and Punishment 1853

10. Review

Defendant, on appeal of affirmance of denial of her motion for directed verdict, waived her right to have Supreme Court review sufficiency of state’s case based solely on its case‑in‑chief when she chose to testify in her own defense, since exception to waiver rule for testimony given by a defendant in response to testimony implicating defendant given by a co‑defendant did not apply, in that defendant’s testimony was given prior to co‑defendant’s defense, and not as response to co‑defendant’s defense. State v. Phillips (S.C. 2016) 416 S.C. 184, 785 S.E.2d 448. Criminal Law 901

Defendant preserved for appeal her argument that court should have applied State v. Hepburn exception, to rule that defendant who presented evidence in his own defense waived right to have appellate court review denial of directed verdict based solely on evidence presented in state’s case‑in‑chief, under which exception an appellate court, when reviewing denial of directed verdict, could not consider testimony of co‑defendant or testimony offered by co‑defendant, even though defendant did not expressly articulate relevance of Hepburn, where she consistently argued denial of motion for directed verdict was error, and cited to Hepburn on appeal. State v. Phillips (S.C. 2016) 416 S.C. 184, 785 S.E.2d 448. Criminal Law 1036.8

Defendant failed to preserve appellate review of argument that trial court erred in admitting evidence of victim’s extraneous injuries prior to his death on the ground that no evidence connected defendant to injuries, in prosecution for homicide by child abuse; court’s ruling on defendant’s pretrial motion to exclude such evidence did not indicate that it considered whether there was evidence connecting defendant to injuries and defendant did not request clarification of ruling, defendant never raised issue at trial for court to make a final ruling on it, evidence of injuries did not immediately follow motion, and court’s cursory remark that defendant was “protected on the record on that” was not a clear indication that its ruling was final. State v. Rivers (S.C.App. 2015) 411 S.C. 551, 769 S.E.2d 263. Criminal Law 1036.1(3.1); Criminal Law 1045

Defendant did not preserve her argument for review that any statements she gave before being advised of her constitutional rights were inadmissible, since defendant did not allege violation before or during trial for homicide by child abuse. State v. Palmer (S.C.App. 2014) 408 S.C. 218, 758 S.E.2d 195, rehearing denied, certiorari granted, affirmed in part, reversed in part 413 S.C. 410, 776 S.E.2d 558. Criminal Law 1036.1(5)

Defendant did not, by testifying in prosecution for homicide by child abuse, waive appellate consideration of the evidence as it stood at the time of defendant’s mid‑trial motion for directed verdict, where defendant did not dispute state’s contention that victim died from child abuse inflicted by defendant or jointly tried codefendant, and defendant’s testimony merely rebutted codefendant’s testimony implicating her in victim’s death. State v. Hepburn (S.C. 2013) 406 S.C. 416, 753 S.E.2d 402, rehearing denied. Criminal Law 901

Argument that trial court committed reversible error in imposing maximum sentence of life imprisonment for homicide by child abuse by purportedly failing to properly consider aggravating and mitigating circumstances was not preserved for review, where defendant did not raise an objection on that basis during or after sentencing. State v. Dial (S.C.App. 2013) 405 S.C. 247, 746 S.E.2d 495, certiorari dismissed as improvidently granted 412 S.C. 121, 770 S.E.2d 767. Criminal Law 1042.3(1)

Defendant’s contention that the criminal abortion statute was the more specific statute and that it, rather than the homicide by child abuse statute, controlled her prosecution was not raised in the trial court, and thus, issue was not preserved for appellate review, even though defendant argued generally in the trial court that the homicide by child abuse statute was inapplicable. State v. McKnight (S.C. 2003) 352 S.C. 635, 576 S.E.2d 168, certiorari denied, certiorari denied 124 S.Ct. 101, 540 U.S. 819, 157 L.Ed.2d 36, denial of post‑conviction relief reversed 378 S.C. 33, 661 S.E.2d 354. Criminal Law 1030(3)

Defendant failed to preserve for appellate review her claim that a dildo found in her mother’s room in shared trailer was improperly admitted into evidence in defendant’s trial for homicide by child abuse, accessory before the fact, and other charges, although defendant objected at trial to admission of dildo on relevance grounds, where, on appeal, defendant argued that prejudicial impact of admission of dildo outweighed its probative value, and that admission of dildo impugned the character and credibility of her mother’s testimony. State v. Jarrell (S.C.App. 2002) 350 S.C. 90, 564 S.E.2d 362, rehearing denied, certiorari denied, habeas corpus dismissed 2011 WL 1526816. Criminal Law 1043(3)

**SECTION 16‑3‑95.** Infliction or allowing infliction of great bodily injury upon a child; penalty; definition; corporal punishment and traffic accident exceptions.

(A) It is unlawful to inflict great bodily injury upon a child. A person who violates this subsection is guilty of a felony and, upon conviction, must be imprisoned not more than twenty years.

(B) It is unlawful for a child’s parent or guardian, person with whom the child’s parent or guardian is cohabitating, or any other person responsible for a child’s welfare as defined in Section 63‑7‑20 knowingly to allow another person to inflict great bodily injury upon a child. A person who violates this subsection is guilty of a felony and, upon conviction, must be imprisoned not more than five years.

(C) For purposes of this section, “great bodily injury” means bodily injury which creates a substantial risk of death or which causes serious or permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

(D) This section may not be construed to prohibit corporal punishment or physical discipline which is administered by a parent or person in loco parentis in a manner which does not cause great bodily injury upon a child.

(E) This section does not apply to traffic accidents unless the accident was caused by the driver’s reckless disregard for the safety of others.

HISTORY: 2000 Act No. 261, Section 2.

CROSS REFERENCES

Commission of this crime within specified radius of child day care center as separate offense, see Section 63‑13‑200.

Denial of registration as an operator of a child day care or group day care home where the applicant, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑820.

Denial of renewal for child day care or group day care home where the person applying for approval, the operator of the facility, or an employee or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑630.

Fingerprint review of any person applying to operate or seek employment at a child day care or group day care home to determine prior conviction of the crime referred to in this section, see Section 63‑13‑620.

Foster care placement with certain persons prohibited, see Section 63‑7‑2350.

No license or registration will be issued to any religious establishment to operate a child day care or group day care home where the operator, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑1010.

No person may be employed by the Department of Social Services in its day care licensing or child protective services divisions who has been convicted of the crime referred to in this section, see Section 63‑13‑190.

Past conviction check prior to initial employment of teachers, see Section 59‑26‑40.

Persons convicted of Title 16, Chapter 3 crimes prohibited from appointment as guardian ad litem for child in abuse or neglect proceeding, see Section 63‑11‑520.

Violent crimes defined, see Section 16‑1‑60.

Library References

Infants 1559 to 1561.

Westlaw Topic No. 211.

C.J.S. Infants Section 195.

ARTICLE 3

Lynching

**SECTION 16‑3‑210.** Assault and battery by mob; investigation and apprehension; civil liability.

(A) For purposes of this section, a “mob” is defined as the assemblage of two or more persons, without color or authority of law, for the premeditated purpose and with the premeditated intent of committing an act of violence upon the person of another.

(B) Any act of violence inflicted by a mob upon the body of another person, which results in the death of the person, shall constitute the felony crime of assault and battery by mob in the first degree and, upon conviction, an offender shall be punished by imprisonment for not less than thirty years.

(C) Any act of violence inflicted by a mob upon the body of another person, which results in serious bodily injury to the person, shall constitute the felony crime of assault and battery by mob in the second degree and, upon conviction, an offender shall be punished by imprisonment for not less than three years nor more than twenty‑five years.

(D) Any act of violence inflicted by a mob upon the body of another person, which results in bodily injury to the person, shall constitute the misdemeanor crime of assault and battery by mob in the third degree and, upon conviction, an offender shall be punished by imprisonment for not more than one year.

(E) When any mob commits an act of violence, the sheriff of the county where the crime occurs and the solicitor of the circuit where the county is located shall act as speedily as possible to apprehend and identify the members of the mob and bring them to trial.

(F) The solicitor of any circuit has summary power to conduct any investigation deemed necessary by him in order to apprehend the members of a mob and may subpoena witnesses and take testimony under oath.

(G) This article shall not be construed to relieve a member of any such mob from civil liability.

HISTORY: 1962 Code Section 16‑57; 1952 Code Section 16‑57; 1951 (47) 233; 2010 Act No. 273, Section 4, eff June 2, 2010.

CROSS REFERENCES

Commission of this crime within specified radius of child day care center as separate offense, see Section 63‑13‑200.

Denial of registration as an operator of a child day care or group day care home where the applicant, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑820.

Denial of renewal for child day care or group day care home where the person applying for approval, the operator of the facility, or an employee or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑630.

Fingerprint review of any person applying to operate or seek employment at a child day care or group day care home to determine prior conviction of the crime referred to in this section, see Section 63‑13‑620.

Foster care placement with certain persons prohibited, see Section 63‑7‑2350.

Liability of county for lynching, see Section 15‑51‑210.

No license or registration will be issued to any religious establishment to operate a child day care or group day care home where the operator, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑1010.

No person may be employed by the Department of Social Services in its day care licensing or child protective services divisions who has been convicted of the crime referred to in this section, see Section 63‑13‑190.

Offenses specified in this section as exempt from classification of felonies and misdemeanors, see Section 16‑1‑10.

Past conviction check prior to initial employment of teachers, see Section 59‑26‑40.

Persons convicted of Title 16, Chapter 3 crimes prohibited from appointment as guardian ad litem for child in abuse or neglect proceeding, see Section 63‑11‑520.

Post‑conviction DNA procedures, see Section 17‑28‑10 et seq.

Preservation of DNA evidence, see Section 17‑28‑310 et seq.

Sentencing, see Section 17‑25‑20 et seq.

Violent crimes defined, see Section 16‑1‑60.

Library References

Riot 1.

Westlaw Topic No. 341.

C.J.S. Affray Section 2.

C.J.S. Riot; Insurrection Sections 1 to 13.

RESEARCH REFERENCES

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S.C. Jur. Assault and Battery Section 22.50, Assault and Battery by Mob (Lynching).

S.C. Jur. Homicide Section 30, Lynching.

LAW REVIEW AND JOURNAL COMMENTARIES

The administration of the death penalty in South Carolina: experiences over the first few years. 39 S.C. L. Rev. 245 (Winter 1988).

Annual Survey of South Carolina Law: The Death Penalty. 31 S.C. L. Rev. 49.

Execution of the mentally retarded: a punishment without justification. 40 S.C. L. Rev. 419 (Winter 1989).

NOTES OF DECISIONS

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1. In general

State may demonstrate the intent element in a lynching case through positive testimonial evidence or circumstantial inferences. State v. Smith (S.C.App. 2002) 352 S.C. 133, 572 S.E.2d 473. Riot 6

Although the common intent to do violence element of lynching may be formed before or during the assemblage, the state must produce at least some evidence of premeditation in order to sustain a conviction. State v. Smith (S.C.App. 2002) 352 S.C. 133, 572 S.E.2d 473. Riot 1

To constitute a mob as defined by Section 16‑3‑230 for purposes of first degree lynching, Section 16‑3‑210, an assemblage need not have formed with the premeditated purpose and intent of committing an act of violence on the person of another, but may form the requisite purpose and intent after the participants are assembled. State v. Barksdale (S.C.App. 1993) 311 S.C. 210, 428 S.E.2d 498, rehearing denied.

2. Constitutional issues

Imposition of consecutive sentences on three counts of second‑degree lynching, based upon conduct of accused in firing his gun at least three times into vehicle and injuring three occupants, did not violate double jeopardy clause, for accused committed three separate violations of South Carolina lynching statute. S.C.Code 1976, Section 16‑3‑220; U.S.C.A. Const.Amend. 5. Notaro v. Evatt, 1993, 831 F.Supp. 518. Double Jeopardy 182

3. Included offenses

Circuit Court lacked subject matter jurisdiction to accept guilty plea to offense of assault and battery of high and aggravated nature (ABHAN), where indictment charged defendant with offense of second‑degree lynching; ABHAN was not lesser‑included offense of second degree lynching and, because no indictment charging defendant with ABHAN was prepared, no valid waiver of presentment of charge to grand jury could occur, which was prerequisite to valid guilty plea. State v. Smalls (S.C.App. 2003) 354 S.C. 498, 581 S.E.2d 850, rehearing denied, certiorari granted, reversed 364 S.C. 343, 613 S.E.2d 754. Criminal Law 273(4.1)

4. Instructions

The trial court in a prosecution for first degree lynching was not required to instruct the jury that the assemblage required by Section 16‑3‑210 had to be for the premeditated purpose and with the premeditated intent of committing an act of violence on the person of another where the court had properly instructed the jury on the definition of a “mob” under Section 16‑3‑230. State v. Barksdale (S.C.App. 1993) 311 S.C. 210, 428 S.E.2d 498, rehearing denied.

The trial court in a prosecution for first degree lynching was not required to reinstruct the jury on the definition of a mob where, after the jury requested a recharge on lynching and self‑defense, the court asked the jury if it needed to be recharged on the statutory definition of a mob, to which the jury responded that it did not. State v. Barksdale (S.C.App. 1993) 311 S.C. 210, 428 S.E.2d 498, rehearing denied.

5. Sufficiency of evidence

Evidence was insufficient to support conviction for second degree lynching, as it did not establish that defendant and codefendants constituted a “mob” by acting with premeditated purpose and intent; testimony indicated that victim approached defendant in his truck and that defendant became upset at something victim said and jumped out of the truck and hit him, it was undisputed that one codefendant came from across the street and hit victim in the back of the head, and the other codefendant, who was defendant’s girlfriend, subsequently exited the truck and cut victim with an unknown weapon. State v. Smith (S.C.App. 2002) 352 S.C. 133, 572 S.E.2d 473. Riot 6

In a prosecution for first degree lynching, Section 16‑3‑210, the defendants were not entitled to a directed verdict based on the state’s failure to show that they had assembled as part of a mob for the purpose and with the intent of committing an act of violence, even though one of the state’s key witnesses testified that “it was just a fight,” where the defendants returned to the victim after their initial confrontation with the intent of fighting. State v. Barksdale (S.C.App. 1993) 311 S.C. 210, 428 S.E.2d 498, rehearing denied.

ARTICLE 5

Dueling

**SECTION 16‑3‑410.** Sending or accepting challenge to fight.

It is unlawful for a person to challenge another to fight with a sword, pistol, rapier, or any other deadly weapon or to accept a challenge.

A person who violates the provisions of this section is guilty of a misdemeanor and, upon conviction, must be imprisoned not more than two years. A person convicted under this section is deprived of the right of suffrage, and is disabled from holding any office of honor or trust in this State.

HISTORY: 1962 Code Section 16‑61; 1952 Code Section 16‑61; 1942 Code Section 1117; 1932 Code Section 1117; Cr. C. ‘22 Section 15; Cr. C. ‘12 Section 153; Cr. C. ‘02 Section 125; G. S. 2468; R. S. 125; 1880 (17) 501; 1993 Act No. 184, Section 88.

CROSS REFERENCES

Being deprived of holding office for dueling, see SC Const. Art. XVII, Section 1B.

Commission of this crime within specified radius of child day care center as separate offense, see Section 63‑13‑200.

Denial of registration as an operator of a child day care or group day care home where the applicant, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑820.

Denial of renewal for child day care or group day care home where the person applying for approval, the operator of the facility, or an employee or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑630.

Fingerprint review of any person applying to operate or seek employment at a child day care or group day care home to determine prior conviction of the crime referred to in this section, see Section 63‑13‑620.

Foster care placement with certain persons prohibited, see Section 63‑7‑2350.

No license or registration will be issued to any religious establishment to operate a child day care or group day care home where the operator, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑1010.

No person may be employed by the Department of Social Services in its day care licensing or child protective services divisions who has been convicted of the crime referred to in this section, see Section 63‑13‑190.

Past conviction check prior to initial employment of teachers, see Section 59‑26‑40.

Persons convicted of Title 16, Chapter 3 crimes prohibited from appointment as guardian ad litem for child in abuse or neglect proceeding, see Section 63‑11‑520.

Library References

Criminal Law 45.30.

Westlaw Topic No. 110.

C.J.S. Affray Section 2.

NOTES OF DECISIONS

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1. In general

Or against principal who sends challenge or fights. State v Strickland (1819) 11 SCL 181. State v Dupont (1823) 13 SCL 334.

Indictment will lie in this State for challenge to fight duel in Georgia. State v Taylor (1812) 5 SCL 243. State v Cunningham (1843) 29 SCL 246.

Or for any agreement to fight with loaded pistols and actually fighting. Herriott ads. State (S.C. 1841). Criminal Law 45.30

Disability to hold office imposed by this section [Code 1962 Section 16‑61], does not constitute a part of the sentence. State v. Dupont (S.C. 1823).

Or for verbal challenge. State v. Strickland (S.C. 1819).

**SECTION 16‑3‑420.** Carrying or delivering challenge; serving as second.

Whoever shall (a) willingly or knowingly carry or deliver any such challenge in writing or verbally deliver any message intended as, or purporting to be, such a challenge, (b) be present at the fighting of any duel as a second or (c) aid or give countenance thereto shall, for every such offense, on conviction thereof, be forever disabled from holding any office of honor or trust in this State and shall be imprisoned in the Penitentiary for a term not exceeding two years, at the discretion of the court, and shall be fined in a sum not less than five hundred dollars nor more than one thousand dollars.

HISTORY: 1962 Code Section 16‑62; 1952 Code Section 16‑62; 1942 Code Section 1118; 1932 Code Section 1118; Cr. C. ‘22 Section 16; Cr. C. ‘12 Section 154; Cr. C. ‘02 Section 126; G. S. 2469; R. S. 126; 1880 (17) 502.

CROSS REFERENCES

Being deprived of holding office for dueling, see SC Const. Art. XVII, Section 1B.

Commission of this crime within specified radius of child day care center as separate offense, see Section 63‑13‑200.

Denial of registration as an operator of a child day care or group day care home where the applicant, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑820.

Denial of renewal for child day care or group day care home where the person applying for approval, the operator of the facility, or an employee or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑630.

Fingerprint review of any person applying to operate or seek employment at a child day care or group day care home to determine prior conviction of the crime referred to in this section, see Section 63‑13‑620.

Foster care placement with certain persons prohibited, see Section 63‑7‑2350.

No license or registration will be issued to any religious establishment to operate a child day care or group day care home where the operator, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑1010.

No person may be employed by the Department of Social Services in its day care licensing or child protective services divisions who has been convicted of the crime referred to in this section, see Section 63‑13‑190.

Past conviction check prior to initial employment of teachers, see Section 59‑26‑40.

Persons convicted of Title 16, Chapter 3 crimes prohibited from appointment as guardian ad litem for child in abuse or neglect proceeding, see Section 63‑11‑520.

Library References

Criminal Law 45.30.

Officers and Public Employees 31.

Westlaw Topic Nos. 110, 283.

C.J.S. Affray Section 2.

C.J.S. Officers and Public Employees Sections 28 to 30.

**SECTION 16‑3‑440.** Principal or second compelled to give testimony.

Upon the trial of all indictments for dueling any person concerned therein, either as principal or second or as counseling, aiding and abetting in such duel, shall be compelled to give evidence against the person actually indicted, without incriminating himself or subjecting or making himself liable to any prosecution, penalty, forfeiture or punishment on account of his agency in such duel.

HISTORY: 1962 Code Section 16‑64; 1952 Code Section 16‑64; 1942 Code Section 1014; 1932 Code Section 1014; Cr. P. ‘22 Section 100; Cr. C. ‘12 Section 155; Cr. C. ‘02 Section 127; G. S. 2470; R. S. 127; 1823 (6) 208.

Library References

Criminal Law 42.

Westlaw Topic No. 110.

C.J.S. Criminal Law Sections 65, 97 to 112.

**SECTION 16‑3‑450.** Persons concerned in duel as witnesses.

When two or more persons shall be charged in any indictment for fighting a duel or being concerned therein either of such persons may be used as a witness in behalf of the State by having his name stricken out of the indictment, or otherwise, at the discretion of the Attorney General or solicitor or other attorney acting for the State conducting such prosecution, of which an entry shall immediately be made on the minutes of the court.

HISTORY: 1962 Code Section 16‑65; 1952 Code Section 16‑65; 1942 Code Section 1015; 1932 Code Section 1015; Cr. P. ‘22 Section 101; Cr. C. ‘12 Section 156; Cr. C. ‘02 Section 128; G. S. 2471; R. S. 128; 1823 (6) 208.

Library References

District and Prosecuting Attorneys 8(6).

Westlaw Topic No. 131.

C.J.S. District and Prosecuting Attorneys Sections 26, 28, 47 to 50, 54, 63.

**SECTION 16‑3‑460.** Pleading in bar by State’s witness to subsequent indictment.

In case any such person so used as a witness in behalf of the State in any prosecution for fighting a duel or for being concerned therein shall afterwards be indicted for the same offense, the fact of his having been used as a witness in the former prosecution for the same offense may be pleaded in bar to such subsequent indictment and, on proof thereof by competent evidence, such person shall be thereof acquitted and discharged.

HISTORY: 1962 Code Section 16‑66; 1952 Code Section 16‑66; 1942 Code Section 1015; 1932 Code Section 1015; Cr. P. ‘22 Section 101; Cr. C. ‘12 Section 156; Cr. C. ‘02 Section 128; G. S. 2471; R. S. 128; 1823 (6) 208.

Library References

Criminal Law 286, 287.

Westlaw Topic No. 110.

C.J.S. Criminal Law Sections 496, 501.

ARTICLE 6

Hazing

**SECTION 16‑3‑510.** Hazing unlawful; definitions.

It is unlawful for a person to intentionally or recklessly engage in acts which have a foreseeable potential for causing physical harm to a person for the purpose of initiation or admission into or affiliation with a chartered or nonchartered student, fraternal, or sororal organization. Fraternity, sorority, or other organization for purposes of this section means those chartered and nonchartered fraternities, sororities, or other organizations operating in connection with a school, college, or university. This section does not include customary athletic events or similar contests or competitions, or military training whether state, federal, or educational.

HISTORY: 1987 Act No. 73 Section 1; 2002 Act No. 310, Section 4, eff June 5, 2002.

CROSS REFERENCES

Commission of this crime within specified radius of child day care center as separate offense, see Section 63‑13‑200.

Denial of registration as an operator of a child day care or group day care home where the applicant, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑820.

Denial of renewal for child day care or group day care home where the person applying for approval, the operator of the facility, or an employee or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑630.

Fingerprint review of any person applying to operate or seek employment at a child day care or group day care home to determine prior conviction of the crime referred to in this section, see Section 63‑13‑620.

Foster care placement with certain persons prohibited, see Section 63‑7‑2350.

No license or registration will be issued to any religious establishment to operate a child day care or group day care home where the operator, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑1010.

No person may be employed by the Department of Social Services in its day care licensing or child protective services divisions who has been convicted of the crime referred to in this section, see Section 63‑13‑190.

Past conviction check prior to initial employment of teachers, see Section 59‑26‑40.

Persons convicted of Title 16, Chapter 3 crimes prohibited from appointment as guardian ad litem for child in abuse or neglect proceeding, see Section 63‑11‑520.

Prohibition of hazing at all state supported universities, colleges, and public institutions of higher learning, see Section 59‑101‑200.

Prohibition of student hazing, see Section 59‑63‑275.

Library References

Education 1195, 1198.

Westlaw Topic No. 141E.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Colleges and Universities Section 22, Discipline Matters.

**SECTION 16‑3‑520.** Unlawful to assist in or fail to report hazing.

It is unlawful for any person to knowingly permit or assist any person in committing acts made unlawful by Section 16‑3‑510 or to fail to report promptly any information within his knowledge of acts made unlawful by Section 16‑3‑510 to the chief executive officer of the appropriate school, college, or university.

HISTORY: 1987 Act No. 73 Section 2.

CROSS REFERENCES

Commission of this crime within specified radius of child day care center as separate offense, see Section 63‑13‑200.

Denial of registration as an operator of a child day care or group day care home where the applicant, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑820.

Denial of renewal for child day care or group day care home where the person applying for approval, the operator of the facility, or an employee or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑630.

Fingerprint review of any person applying to operate or seek employment at a child day care or group day care home to determine prior conviction of the crime referred to in this section, see Section 63‑13‑620.

Foster care placement with certain persons prohibited, see Section 63‑7‑2350.

No license or registration will be issued to any religious establishment to operate a child day care or group day care home where the operator, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑1010.

No person may be employed by the Department of Social Services in its day care licensing or child protective services divisions who has been convicted of the crime referred to in this section, see Section 63‑13‑190.

Past conviction check prior to initial employment of teachers, see Section 59‑26‑40.

Persons convicted of Title 16, Chapter 3 crimes prohibited from appointment as guardian ad litem for child in abuse or neglect proceeding, see Section 63‑11‑520.

Prohibition of hazing at all state supported universities, colleges, and public institutions of higher learning, see Section 59‑101‑200.

Library References

Education 1195, 1198.

Westlaw Topic No. 141E.

**SECTION 16‑3‑530.** Penalties.

Any person who violates the provisions of Sections 16‑3‑510 or 16‑3‑520 is guilty of a misdemeanor and, upon conviction, must be punished by a fine not to exceed five hundred dollars or by imprisonment for a term not to exceed twelve months, or both.

HISTORY: 1987 Act No. 73 Section 3.

CROSS REFERENCES

Prohibition of hazing at all state supported universities, colleges, and public institutions of higher learning, see Section 59‑101‑200.

Library References

Education 1195, 1198.

Westlaw Topic No. 141E.

**SECTION 16‑3‑540.** Consent not a defense.

The implied or express consent of a person to acts which violate Section 16‑3‑510 does not constitute a defense to violations of Sections 16‑3‑510 or 16‑3‑520.

HISTORY: 1987 Act No. 73 Section 4.

CROSS REFERENCES

Commission of this crime within specified radius of child day care center as separate offense, see Section 63‑13‑200.

Prohibition of hazing at all state supported universities, colleges, and public institutions of higher learning, see Section 59‑101‑200.

Library References

Criminal Law 39.

Education 1195, 1198.

Westlaw Topic Nos. 110, 141E.

C.J.S. Criminal Law Section 126.

ARTICLE 7

Assault and Criminal Sexual Conduct

CROSS REFERENCES

Termination of parental rights, grounds, see Section 63‑7‑2570.

**SECTION 16‑3‑600.** Assault and battery; definitions; degrees of offenses.

(A) For purposes of this section:

(1) “Great bodily injury” means bodily injury which causes a substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function of a bodily member or organ.

(2) “Moderate bodily injury” means physical injury that involves prolonged loss of consciousness, or that causes temporary or moderate disfigurement or temporary loss of the function of a bodily member or organ, or injury that requires medical treatment when the treatment requires the use of regional or general anesthesia or injury that results in a fracture or dislocation. Moderate bodily injury does not include one‑time treatment and subsequent observation of scratches, cuts, abrasions, bruises, burns, splinters, or any other minor injuries that do not ordinarily require extensive medical care.

(3) “Private parts” means the genital area or buttocks of a male or female or the breasts of a female.

(B)(1) A person commits the offense of assault and battery of a high and aggravated nature if the person unlawfully injures another person, and:

(a) great bodily injury to another person results; or

(b) the act is accomplished by means likely to produce death or great bodily injury.

(2) A person who violates this subsection is guilty of a felony, and, upon conviction, must be imprisoned for not more than twenty years.

(3) Assault and battery of a high and aggravated nature is a lesser‑included offense of attempted murder, as defined in Section 16‑3‑29.

(C)(1) A person commits the offense of assault and battery in the first degree if the person unlawfully:

(a) injures another person, and the act:

(i) involves nonconsensual touching of the private parts of a person, either under or above clothing, with lewd and lascivious intent; or

(ii) occurred during the commission of a robbery, burglary, kidnapping, or theft; or

(b) offers or attempts to injure another person with the present ability to do so, and the act:

(i) is accomplished by means likely to produce death or great bodily injury; or

(ii) occurred during the commission of a robbery, burglary, kidnapping, or theft.

(2) A person who violates this subsection is guilty of a felony, and, upon conviction, must be imprisoned for not more than ten years.

(3) Assault and battery in the first degree is a lesser‑included offense of assault and battery of a high and aggravated nature, as defined in subsection (B)(1), and attempted murder, as defined in Section 16‑3‑29.

(D)(1) A person commits the offense of assault and battery in the second degree if the person unlawfully injures another person, or offers or attempts to injure another person with the present ability to do so, and:

(a) moderate bodily injury to another person results or moderate bodily injury to another person could have resulted; or

(b) the act involves the nonconsensual touching of the private parts of a person, either under or above clothing.

(2) A person who violates this subsection is guilty of a misdemeanor, and, upon conviction, must be fined not more than two thousand five hundred dollars, or imprisoned for not more than three years, or both.

(3) Assault and battery in the second degree is a lesser‑included offense of assault and battery in the first degree, as defined in subsection (C)(1), assault and battery of a high and aggravated nature, as defined in subsection (B)(1), and attempted murder, as defined in Section 16‑3‑29.

(E)(1) A person commits the offense of assault and battery in the third degree if the person unlawfully injures another person, or offers or attempts to injure another person with the present ability to do so.

(2) A person who violates this subsection is guilty of a misdemeanor, and, upon conviction, must be fined not more than five hundred dollars, or imprisoned for not more than thirty days, or both.

(3) Assault and battery in the third degree is a lesser‑included offense of assault and battery in the second degree, as defined in subsection (D)(1), assault and battery in the first degree, as defined in subsection (C)(1), assault and battery of a high and aggravated nature, as defined in subsection (B)(1), and attempted murder, as defined in Section 16‑3‑29.

HISTORY: 2010 Act No. 273, Section 6.B, eff June 2, 2010; 2011 Act No. 39, Sections 1, 2, eff June 7, 2011; 2015 Act No. 58 (S.3), Pt II, Section 3, eff June 4, 2015.

Effect of Amendment

2015 Act No. 58, Section 3, rewrote (A)(2).

CROSS REFERENCES

Domestic violence, acts prohibited, penalties, see Section 16‑25‑20.

Life sentence for person convicted for certain crimes, see Section 17‑25‑45.

Violent crimes defined, see Section 16‑1‑60.

Library References

Assault and Battery 47, 54, 59, 60, 100.

Westlaw Topic No. 37.

C.J.S. Assault Sections 1 to 3, 73 to 74, 78 to 88, 95 to 96, 98.

C.J.S. Robbery Section 108.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Assault and Battery Section 9, Sentence for Simple Assault and Battery.

S.C. Jur. Assault and Battery Section 16, Sentence for ABHAN.

NOTES OF DECISIONS

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1. In general

First‑degree assault and battery based on attempt to injure another person in manner likely to produce death or great bodily injury was lesser included offense of attempted murder with respect to one of two victims who suffered no injury. State v. Middleton (S.C. 2014) 407 S.C. 312, 755 S.E.2d 432, rehearing denied, certiorari denied 135 S.Ct. 196, 190 L.Ed.2d 152. Indictment and Information 191(4)

Circumstances that give rise to assault and battery of a high and aggravated nature (ABHAN) may also give rise to an inference of malice, and a defendant may thus be convicted of ABHAN regardless of whether malice is present. State v. Dennis (S.C.App. 2013) 402 S.C. 627, 742 S.E.2d 21. Assault and Battery 54

Element that distinguishes assault and battery with intent to kill (ABWIK) from assault and battery of a high and aggravated nature (ABHAN) is not malice but an intent to kill. State v. Dennis (S.C.App. 2013) 402 S.C. 627, 742 S.E.2d 21. Assault and Battery 54; Homicide 727; Homicide 728

Assault and battery with intent to kill (ABWIK) is an unlawful act of a violent nature to the person of another with malice aforethought, either express or implied, and comprises all the elements of murder except the death of the victim. State v. Dennis (S.C.App. 2013) 402 S.C. 627, 742 S.E.2d 21. Homicide 728

Under the common law, assault and battery of a high and aggravated nature (ABHAN) requires an unlawful act of violent injury accompanied by circumstances of aggravation, which may include the use of a deadly weapon, the infliction of serious bodily injury, or the intent to commit a felony. State v. Dennis (S.C.App. 2013) 402 S.C. 627, 742 S.E.2d 21. Assault and Battery 54

2. Constitutional issues

Counsel rendered deficient performance, as element of ineffective assistance claim, when counsel failed to obtain an independent competency evaluation of defendant prior to allowing defendant to plead guilty but mentally ill to charges that included assault and battery with intent to kill, kidnapping, and first‑degree sexual assault, although one evaluation of defendant stated he was competent to stand trial; plea counsel was aware that a more thorough evaluation and school board assessment stated defendant was cognitively limited, his IQ placed him in the category of severe mental retardation, and his intellectual functioning was similar to that of a four to seven‑year‑old child, and plea counsel’s strategy of pursuing the plea instead of obtaining competency evaluation was not objectively reasonable because if defendant was found incompetent at time of pleas, he could not have been convicted of the crimes. Ramirez v. State (S.C.App. 2015) 413 S.C. 351, 776 S.E.2d 101, rehearing denied, affirmed in part, reversed in part 419 S.C. 14, 795 S.E.2d 841. Criminal Law 1900; Criminal Law 1920

Evidence of probative value supported postconviction relief court’s finding that applicant did not prove, as element of ineffective assistance claim, that he was prejudiced by plea counsel’s failure to request mental examination prior to entry of applicant’s plea of guilty but mentally ill to assault and battery with intent to kill, kidnapping, and first‑degree sexual assault, although one doctor’s evaluation, based on five meetings with applicant lasting three to four hours each, found applicant incompetent; another doctor, who met with applicant for a total of approximately 90 minutes, filed a report stating applicant was competent to stand trial, and postconviction relief counsel failed to introduce an independent competency evaluation at the postconviction relief hearing. Ramirez v. State (S.C.App. 2015) 413 S.C. 351, 776 S.E.2d 101, rehearing denied, affirmed in part, reversed in part 419 S.C. 14, 795 S.E.2d 841. Criminal Law 1618(10)

Defendant was prejudiced by trial counsel’s deficient performance in failing to object to unconstitutionally coercive Allen charge, which was given after jurors indicated that they could not reach a unanimous decision, in prosecution for assault and battery, and armed robbery, among other charges. Workman v. State (S.C. 2015) 412 S.C. 128, 771 S.E.2d 636. Criminal Law 1948

Under South Carolina law, police officers had objectively reasonable belief that arrestee had committed assault by unlawfully injuring or attempting to injure another person, and thus had probable cause justifying arrest; officers alleged that arrestee ignored and walked around an officer who warned him not to cause a problem after arrestee’s car was damaged by another race car driver and instructed arrestee to go back to his pit area, arrestee instead walked towards driver’s car, shrugging off officer who attempted to grab arrestee to prevent him from approaching driver’s car, and arrestee approached driver’s car and appeared to grab driver’s helmet and shake it. Smith v. Murphy (C.A.4 (S.C.) 2015) 634 Fed.Appx. 914, 2015 WL 7351758. Arrest 63.4(15)

Defendant was not prejudiced by counsel’s failure to adequately investigate or present evidence regarding defendant’s mental health issues at trial on charges of assault and battery with intent to kill and assault and battery of a high and aggravated nature, as required to support a claim of ineffective assistance of counsel, where such evidence was inadmissible under South Carolina law. Goins v. Warden, Perry Correctional Inst. (C.A.4 (S.C.) 2014) 576 Fed.Appx. 167, 2014 WL 2748471. Criminal Law 1891; Criminal Law 1922

3. Collateral consequences

South Carolina offense of common law assault and battery of a high and aggravated nature did not pose the serious potential risk of physical injury required to come within the residual clause of the Armed Career Criminal Act (ACCA), and thus was not categorically an ACCA “violent felony”; first element of the offense, a violent injury, could be satisfied in absence of actual bodily harm, and second element, the presence of aggravating circumstances, could be satisfied simply by showing, for example, a disparity in age. U.S. v. Hemingway (C.A.4 (S.C.) 2013) 734 F.3d 323. Sentencing and Punishment 1285

Under South Carolina law, defendant’s prior conviction for assault and battery of a high and aggravated nature (ABHAN) qualified as a crime of violence under the modified categorical approach of the sentencing guidelines, and he was therefore a career offender for purposes of sentencing following his conviction for conspiracy to possess with intent to distribute and distribute heroin, and possession with intent to distribute and distribution of heroin. U.S. v. Johnson (C.A.4 (S.C.) 2013) 508 Fed.Appx. 277, 2013 WL 440999, Unreported. Sentencing and Punishment 1263

4. Admissibility of evidence

Trial court failed to properly conduct required analysis prior to admitting prior bad acts evidence in trial for murder, possession of a weapon during the commission of a violent crime, and assault and battery in the third degree; trial court failed to consider relevancy of evidence, whether evidence fell within exception to rule prohibiting admission of prior bad acts evidence to prove character of defendant, and whether, if evidence fell within exception, whether evidence was clear and convincing and whether probative value of evidence outweighed prejudice to defendant. State v. King (S.C.App. 2016) 416 S.C. 92, 784 S.E.2d 252, rehearing denied, certiorari granted. Criminal Law 368.41; Criminal Law 374.22

Trial court’s error in admitting defendant’s unredacted audiotaped interrogation by the police, which contained interrogators’ hearsay statements, was harmless as it related to the assault and battery with intent to kill and weapon charges; State introduced a photograph showing the gun in defendant’s waistband, corroboration was found in the testimony of the many witnesses who were inside the nightclub, photographer saw defendant draw his weapon and point it at victim and immediately thereafter, photographer heard gunshots, and several witnesses saw defendant shooting inside the club. State v. Brewer (S.C. 2015) 411 S.C. 401, 768 S.E.2d 656, rehearing denied. Criminal Law 1169.1(9); Criminal Law 1169.1(10)

Defendant waived his right to counsel following arraignment, at which he requested appointment of counsel, by signing Miranda waiver prior to giving statement during police‑initiated interview, such that interview did not violate defendant’s right to counsel and statement was admissible at trial for assault and battery of a high and aggravated nature, armed robbery, possessing a firearm during the commission of a violent crime, and criminal conspiracy, absent allegations that defendant requested that his counsel be present or that his waiver was otherwise not knowing and voluntary. State v. Reid (S.C. 2014) 408 S.C. 461, 758 S.E.2d 904, rehearing denied. Criminal Law 1752

5. Instructions

Allen charge that was given to jurors after they indicated that they could not reach a unanimous decision in prosecution for assault and battery, and armed robbery, among other charges, was unconstitutionally coercive, where the trial judge did not charge the majority jurors to consider the positions of the minority jurors, and the jury reached a verdict two hours after receiving the Allen charge. Workman v. State (S.C. 2015) 412 S.C. 128, 771 S.E.2d 636. Criminal Law 865(1.5)

Trial court’s error in refusing to instruct on first‑degree assault and battery as lesser included offense of attempted murder as to victim who did not suffer any injury was harmless beyond reasonable doubt, in view of evidence that defendant drove his moped up to vehicle occupied by driver and passenger, pulled out gun, began shooting through passenger window, and fired his weapon at least five times, and passenger’s testimony that only reason he was not killed was because he had wherewithal to jump into driver’s seat and drive defendant off road. State v. Middleton (S.C. 2014) 407 S.C. 312, 755 S.E.2d 432, rehearing denied, certiorari denied 135 S.Ct. 196, 190 L.Ed.2d 152. Criminal Law 1173.2(4)

6. Sentence and punishment

The rule of lenity, under which a defendant is sentenced to the lesser of two offenses for which he was found guilty, did not apply to defendant convicted of simple assault of victim one, and assault of a high and aggravated nature of victim two, where the trial court was not construing a penal statute in sentencing defendant. State v. Samuels (S.C. 2013) 403 S.C. 551, 743 S.E.2d 773. Sentencing and Punishment 11

7. Review

Defendant preserved argument for review that trial court failed to conduct required analysis prior to admitting prior bad acts evidence in trial for murder, possession of a weapon during the commission of a violent crime, and assault and battery in the third degree, since argument was sufficiently specific, apparent from context, and clear; parties discussed state’s motion to introduce prior bad acts evidence in chambers, defense counsel moved on several occasions to exclude or redact portions of state’s exhibits, arguing inadmissibility under rule governing prior bad acts evidence, and circuit court stated defense counsel’s objections were protected for the record. State v. King (S.C.App. 2016) 416 S.C. 92, 784 S.E.2d 252, rehearing denied, certiorari granted. Criminal Law 1043(2)

Defendant failed to preserve argument for review that trial court failed to consider factors for granting mistrial in denying defendant’s motion for mistrial when state witness referenced defendant’s prior armed robbery charge shortly after court cautioned that any reference to charge would result in mistrial in prosecution for murder, possession of a weapon during the commission of a violent crime, and assault and battery in the third degree; defendant withdrew his motion for mistrial regarding witness’s testimony, and defendant did not make argument that court failed to consider factors for granting mistrial before trial judge. State v. King (S.C.App. 2016) 416 S.C. 92, 784 S.E.2d 252, rehearing denied, certiorari granted. Criminal Law 1039; Criminal Law 1044.1(1)

**SECTION 16‑3‑610.** Certain offenses committed with a carried or concealed deadly weapon.

If a person is convicted of an offense pursuant to Section 16‑3‑29, 16‑3‑600, or manslaughter, and the offense is committed with a deadly weapon of the character as specified in Section 16‑23‑460 carried or concealed upon the person of the defendant, the judge shall, in addition to the punishment provided by law for such offense, sentence the person to imprisonment for the misdemeanor offense for not less than three months nor more than twelve months, or a fine of not less than two hundred dollars, or both.

HISTORY: 1962 Code Section 16‑93; 1952 Code Section 16‑93; 1942 Code Section 1258; 1932 Code Section 1258; Cr. C. ‘22 Section 153; Cr. C. ‘12 Section 160; Cr. C. ‘02 Section 132; 1897 (22) 427; 2010 Act No. 273, Section 6.C, eff June 2, 2010.

Editor’s Note

2010 Act No. 273, Section 7.C, provides:

“Wherever in the 1976 Code of Laws reference is made to the common law offense of assault and battery of a high and aggravated nature, it means assault and battery with intent to kill, as contained in repealed Section 16‑3‑620, and, except for references in Section 16‑1‑60 and Section 17‑25‑45, wherever in the 1976 Code reference is made to assault and battery with intent to kill, it means attempted murder as defined in Section 16‑3‑29.”

CROSS REFERENCES

Additional penalty for person convicted of assault and battery when in possession of firearm, see Section 16‑23‑490.

Commission of this crime within specified radius of child day care center as separate offense, see Section 63‑13‑200.

Denial of registration as an operator of a child day care or group day care home where the applicant, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑820.

Denial of renewal for child day care or group day care home where the person applying for approval, the operator of the facility, or an employee or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑630.

Fingerprint review of any person applying to operate or seek employment at a child day care or group day care home to determine prior conviction of the crime referred to in this section, see Section 63‑13‑620.

Foster care placement with certain persons prohibited, see Section 63‑7‑2350.

No license or registration will be issued to any religious establishment to operate a child day care or group day care home where the operator, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑1010.

No person may be employed by the Department of Social Services in its day care licensing or child protective services divisions who has been convicted of the crime referred to in this section, see Section 63‑13‑190.

Past conviction check prior to initial employment of teachers, see Section 59‑26‑40.

Persons convicted of Title 16, Chapter 3 crimes prohibited from appointment as guardian ad litem for child in abuse or neglect proceeding, see Section 63‑11‑520.

Special count in indictment for crimes committed with concealed weapons, and jurisdiction as to such count, see Section 17‑19‑40.

Library References

Assault and Battery 56, 60, 100.

Sentencing and Punishment 79.

Westlaw Topic Nos. 37, 350H.

C.J.S. Assault Sections 74, 91 to 94.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Assault and Battery Section 9, Sentence for Simple Assault and Battery.

NOTES OF DECISIONS

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1. In general

“Simple assault and battery “is an unlawful act of violent injury to another, unaccompanied by any circumstances of aggravation. State v. White (S.C. 2004) 361 S.C. 407, 605 S.E.2d 540. Assault And Battery 48

Neither serious bodily harm nor use of deadly weapon is essential element of offense of aggravated assault and battery. State v. Brown (S.C. 1977) 269 S.C. 491, 238 S.E.2d 174. Assault And Battery 54

Violent injury under circumstances of aggravation shown where assailant reached into women’s car, grabbed her by left arm and thrust pistol into her ribs, even though actual bodily harm was not established. State v. Foxworth (S.C. 1977) 269 S.C. 496, 238 S.E.2d 172.

This section [Code 1962 Section 16‑93] must be construed with Code 1962 Section 17‑404. State v. Johnson (S.C. 1905) 70 S.C. 384, 50 S.E. 8.

The bill of indictment must include count for carrying concealed weapons, and there must be a finding of guilty thereon before any punishment therefor can be imposed. State v. Johnson (S.C. 1905) 70 S.C. 384, 50 S.E. 8.

Under indictment for assault with pistol with intent to kill, where jury found a verdict of “guilty of an aggravated assault and battery,” and words “and battery” were stricken out as surplusage and the verdict was held good. State v. Robinson (S.C. 1889) 31 S.C. 453, 10 S.E. 101. Homicide 1558

**SECTION 16‑3‑615.** Spousal sexual battery.

(A) Sexual battery, as defined in Section 16‑3‑651(h), when accomplished through use of aggravated force, defined as the use or the threat of use of a weapon or the use or threat of use of physical force or physical violence of a high and aggravated nature, by one spouse against the other spouse if they are living together, constitutes the felony of spousal sexual battery and, upon conviction, a person must be imprisoned not more than ten years.

(B) The offending spouse’s conduct must be reported to appropriate law enforcement authorities within thirty days in order for that spouse to be prosecuted for this offense.

(C) The provisions of Section 16‑3‑659.1 apply to any trial brought under this section.

(D) This section is not applicable to a purported marriage entered into by a male under the age of sixteen or a female under the age of fourteen.

HISTORY: 1991 Act No. 139, Section 1; 1994 Act No. 295, Sections 1, 3; 1997 Act No. 95, Section 2.

CROSS REFERENCES

Commission of this crime within specified radius of child day care center as separate offense, see Section 63‑13‑200.

Denial of registration as an operator of a child day care or group day care home where the applicant, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑820.

Denial of renewal for child day care or group day care home where the person applying for approval, the operator of the facility, or an employee or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑630.

Evidence of victim’s sexual conduct not admissible in prosecutions under this section, see Section 16‑3‑659.1.

Fingerprint review of any person applying to operate or seek employment at a child day care or group day care home to determine prior conviction of the crime referred to in this section, see Section 63‑13‑620.

Foster care placement with certain persons prohibited, see Section 63‑7‑2350.

No license or registration will be issued to any religious establishment to operate a child day care or group day care home where the operator, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑1010.

No person may be employed by the Department of Social Services in its day care licensing or child protective services divisions who has been convicted of the crime referred to in this section, see Section 63‑13‑190.

Past conviction check prior to initial employment of teachers, see Section 59‑26‑40.

Persons convicted of Title 16, Chapter 3 crimes prohibited from appointment as guardian ad litem for child in abuse or neglect proceeding, see Section 63‑11‑520.

Persons convicted under this section must register for sex offender registry, see Section 23‑3‑430.

Post‑conviction DNA procedures, see Section 17‑28‑10 et seq.

Preservation of DNA evidence, see Section 17‑28‑310 et seq.

Prohibited acts A, narcotics, penalties, see Section 44‑53‑370.

Violent crimes defined, see Section 16‑1‑60.

Library References

Assault and Battery 48, 59, 100.

Rape 4, 17, 64.

Westlaw Topic Nos. 37, 321.

C.J.S. Assault Sections 1 to 3, 73, 78 to 80, 98.

C.J.S. Rape Sections 12, 14, 31 to 35, 42, 49, 121 to 122.

C.J.S. Robbery Section 108.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Criminal Domestic Violence Section 6, Sexual.

S.C. Jur. Criminal Domestic Violence Section 9, State‑Wide Statistics.

S.C. Jur. Criminal Sexual Conduct Section 3, Involving Married Persons.

S.C. Jur. Criminal Sexual Conduct Section 44, Rape Shield Statute.

Attorney General’s Opinions

The following would be classified as Tier III sexual offenses pursuant to the Sex Offender Registration and Notification Act requirements: spousal sexual battery; criminal sexual conduct, where the victim is a spouse; incest, where the victim is under 16 years of age; and sexual misconduct with an inmate, patient, or offender, depending on the sexual misconduct involved and the age of the victim. S.C. Op.Atty.Gen. (July 7, 2011) 2011 WL 3346429.

The crime of assault and battery of a high and aggravated nature is a crime of moral turpitude. 1994 Op.Atty.Gen., No 94‑26, p 64 (1994 WL 199758).

**SECTION 16‑3‑625.** Resisting arrest with deadly weapon; sentencing; “deadly weapon” defined; application of section.

A person who resists the lawful efforts of a law enforcement officer to arrest him or another person with the use or threat of use of a deadly weapon against the officer, and the person is in possession or claims to be in possession of a deadly weapon, is guilty of a felony and, upon conviction, must be punished by imprisonment for not more than ten nor less than two years. No sentence imposed hereunder for a first offense shall be suspended to less than six months nor shall the persons so sentenced be eligible for parole until after service of six months. No person sentenced under this section for a second or subsequent offense shall have the sentence suspended to less than two years nor shall the person be eligible for parole until after service of two years.

As used in this section “deadly weapon” means any instrument which can be used to inflict deadly force.

This section does not affect or replace the common law crime of assault and battery with intent to kill nor does it apply if the sentencing judge, in his discretion, elects to sentence an eligible defendant under the provisions of the “Youthful Offenders Act”.

HISTORY: 1980 Act No. 511, Section 1; 1995 Act No. 83, Section 11.

CROSS REFERENCES

Arrests, generally, see Section 17‑13‑10 et seq.

Commission of this crime within specified radius of child day care center as separate offense, see Section 63‑13‑200.

Denial of registration as an operator of a child day care or group day care home where the applicant, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑820.

Denial of renewal for child day care or group day care home where the person applying for approval, the operator of the facility, or an employee or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑630.

Fingerprint review of any person applying to operate or seek employment at a child day care or group day care home to determine prior conviction of the crime referred to in this section, see Section 63‑13‑620.

Foster care placement with certain persons prohibited, see Section 63‑7‑2350.

No license or registration will be issued to any religious establishment to operate a child day care or group day care home where the operator, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑1010.

No person may be employed by the Department of Social Services in its day care licensing or child protective services divisions who has been convicted of the crime referred to in this section, see Section 63‑13‑190.

Past conviction check prior to initial employment of teachers, see Section 59‑26‑40.

Persons convicted of Title 16, Chapter 3 crimes prohibited from appointment as guardian ad litem for child in abuse or neglect proceeding, see Section 63‑11‑520.

Library References

Obstructing Justice 126, 179.

Sentencing and Punishment 76.

Westlaw Topic Nos. 282, 350H.

C.J.S. Obstructing Justice or Governmental Administration Sections 86 to 89.

RESEARCH REFERENCES

ALR Library

119 ALR, Federal 319 , What Constitutes “Violent Felony” for Purpose of Sentence Enhancement Under Armed Career Criminal Act (18 U.S.C.A. Section 924(E)(1)).

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1. Deadly weapon

A hand or fist may be a deadly weapon or object pursuant to Section 16‑3‑625, depending on the manner and means of its use, the wounds inflicted, and other relevant facts, since there is no reason to distinguish injuries caused by an instrumentality from similar injuries inflicted by a hand or fist. State v. Davis (S.C. 1992) 309 S.C. 326, 422 S.E.2d 133, rehearing denied, certiorari denied 113 S.Ct. 2355, 508 U.S. 915, 124 L.Ed.2d 263. Assault And Battery 56

2. Admissibility of evidence

Evidence that defendant killed state trooper was admissible as part of res gestae of later crimes for which defendant was on trial; killing provided context and motivation for later crimes and was relevant to show complete, whole, unfragmented story regarding defendant’s crimes, killing explained why police pursued defendant and reason defendant shot at, harmed, and threatened officers who attempted to apprehend him, crimes were temporally related, killing took place only two hours before later crimes, and two crimes comprised part of same episode. State v. Wood (S.C.App. 2004) 362 S.C. 520, 608 S.E.2d 435, rehearing denied, certiorari denied. Criminal Law 368.98

3. Questions for jury

In prosecution for resisting arrest with a deadly weapon, a jury question was presented as to whether underlying arrest for disorderly conduct was lawful on ground defendant was conducting himself in a grossly intoxicated and disorderly manner in a public place, in light of evidence that defendant was acting in a loud and boisterous manner and cursing at police, that his language was loud enough to disturb the neighborhood, and that at some point during the incident, there was a car load of teenagers on the cul‑de‑sac across the street. State v. McGowan (S.C. 2001) 347 S.C. 618, 557 S.E.2d 657, habeas corpus dismissed 2007 WL 914295. Obstructing Justice 173

**SECTION 16‑3‑651.** Criminal sexual conduct; definitions.

For the purposes of Sections 16‑3‑651 to 16‑3‑659.1:

(a) “Actor” means a person accused of criminal sexual conduct.

(b) “Aggravated coercion” means that the actor threatens to use force or violence of a high and aggravated nature to overcome the victim or another person, if the victim reasonably believes that the actor has the present ability to carry out the threat, or threatens to retaliate in the future by the infliction of physical harm, kidnapping or extortion, under circumstances of aggravation, against the victim or any other person.

(c) “Aggravated force” means that the actor uses physical force or physical violence of a high and aggravated nature to overcome the victim or includes the threat of the use of a deadly weapon.

(d) “Intimate parts” includes the primary genital area, anus, groin, inner thighs, or buttocks of a male or female human being and the breasts of a female human being.

(e) “Mentally defective” means that a person suffers from a mental disease or defect which renders the person temporarily or permanently incapable of appraising the nature of his or her conduct.

(f) “Mentally incapacitated” means that a person is rendered temporarily incapable of appraising or controlling his or her conduct whether this condition is produced by illness, defect, the influence of a substance or from some other cause.

(g) “Physically helpless” means that a person is unconscious, asleep, or for any other reason physically unable to communicate unwillingness to an act.

(h) “Sexual battery” means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person’s body or of any object into the genital or anal openings of another person’s body, except when such intrusion is accomplished for medically recognized treatment or diagnostic purposes.

(i) “Victim” means the person alleging to have been subjected to criminal sexual conduct.

HISTORY: 1977 Act No. 157 Section 1.

CROSS REFERENCES

No child may be placed in foster care with person convicted of, or who has pled guilty or nolo contendere to, offense against the person under this chapter, see Section 63‑7‑2340.

Requirement that persons convicted of crimes involving sexual battery as defined in this section, and their victims, be tested for Human Immunodeficiency Virus, see Section 16‑3‑740.

Sexual misconduct with an inmate, patient or offender, see Section 44‑23‑1150.

Trafficking in persons, definitions, see Section 16‑3‑2010.

RESEARCH REFERENCES

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S.C. Jur. Assault and Battery Section 12, With Indecent Liberties to a Female.

S.C. Jur. Assault and Battery Section 26, Cases Illustrating Right to Jury Charge.

S.C. Jur. Criminal Sexual Conduct Section 3, Involving Married Persons.

S.C. Jur. Criminal Sexual Conduct Section 12, Actor.

S.C. Jur. Criminal Sexual Conduct Section 13, Aggravated Coercion.

S.C. Jur. Criminal Sexual Conduct Section 14, Aggravated Force.

S.C. Jur. Criminal Sexual Conduct Section 15, Intimate Parts.

S.C. Jur. Criminal Sexual Conduct Section 16, Mentally Defective.

S.C. Jur. Criminal Sexual Conduct Section 17, Mentally Incapacitated.

S.C. Jur. Criminal Sexual Conduct Section 18, Physically Helpless.

S.C. Jur. Criminal Sexual Conduct Section 19, Sexual Battery.

S.C. Jur. Criminal Sexual Conduct Section 20, Victim.

S.C. Jur. Criminal Sexual Conduct Section 54, Aids Testing of Convicted Sex Offenders.

LAW REVIEW AND JOURNAL COMMENTARIES

Annual Survey of South Carolina Law: Criminal Law: Rape Reform in South Carolina. 30 S.C. L. Rev. 45.

Victim Testimony in Sex Crime Prosecutions: An analysis of the Rape Shield Provision and the Use of Deposition Testimony Under the Criminal Sexual Conduct Statute. 34 S.C. L. Rev. 583.

United States Supreme Court Annotations

Habeas corpus, Excluding extrinsic evidence impeaching complaining witness’ prior rape allegations did not violate clearly established law, see Nevada v. Jackson, 2013, 133 S.Ct. 1990, 186 L.Ed.2d 62, on remand 723 F.3d 1114. Habeas Corpus 492

Habeas corpus, State procedural default will not bar federal habeas review of claim of trial counsel’s ineffectiveness where there was no meaningful opportunity to raise claim on direct appeal, see Trevino v. Thaler, 2013, 133 S.Ct. 1911, 185 L.Ed.2d 1044, on remand 740 F.3d 378. Habeas Corpus 405.1, 406

Attorney General’s Opinions

State law is coextensive with federal definition of sexual exploitation set forth in 45 CFR Section 1340.2(d)(2). 1985 Op.Atty.Gen., No 85‑22, p 75 (1985 WL 165992).

A conviction of criminal sexual conduct in any degree constitutes the offense of rape where the facts on which the conviction was based are sufficient to support a conviction under the previous statutory or common law offense of rape. 1979 Op.Atty.Gen., No 79‑12, p 22 (1979 WL 29018).

(1) An allegation of criminal sexual conduct in the first, second or third degree without further clarification is not sufficient for the transfer of a juvenile under Article III, Section 1(B), of Act No. 690, 1976 Statutes at Large 1859. Section 14‑21‑540 allows for the transfer of juveniles over 16 years of age for any offense, misdemeanor or felony. Transfer can be made under this statutory provision upon a simple charge of criminal sexual conduct in any degree; (2) The legislative intent in using the word “rape” in Article III, Section 1(B) of Act No. 690 was to include within its meaning the offense of rape as set forth in the old statutes (Sections 16‑71, 16‑72, 16‑80 of 1962) and at common law. While the offense of rape is included in the Criminal Sexual Conduct Act, a charge of criminal sexual conduct in any one of three degrees may be for an act other than rape. Therefore, in order for a person executing a petition in family court to request that the case be transferred, he must allege more than a charge of criminal sexual conduct in the first, second or third degree, he must allege a description of facts sufficient to constitute rape if brought under the old statutes or at common law. However, he may allege, without reference to the new Criminal Sexual Conduct Act, the offense of common law rape. It should be taken into consideration that where a common law felony is committed and no provision for punishment is available, Section 17‑25‑20 (1976) requires a sentence of not less than three months and not more than ten years, at the discretion of the Court. 1976‑77 Op.Atty.Gen., No 77‑366, p 289 (1977 WL 24704).

NOTES OF DECISIONS

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1. In general

Applied in (Decided under former statute.) State v McNeal (1916) 103 SC 197, 87 SE 1004. State v Gatlin (1946) 208 SC 414, 38 SE2d 238. State v Daniels (1957) 231 SC 176, 97 SE2d 902. State v Johnson (1960) 236 SC 207, 113 SE2d 540. State v Outen (1961) 237 SC 514, 118 SE2d 175, cert den 366 US 977, 6 L Ed 2d 1266, 81 S Ct 1948. State v Robinson (1961) 238 SC 140, 119 SE2d 671. Moorer v South Carolina (1964, DC SC) 240 F Supp 529. State v Gamble (1966) 247 SC 214, 146 SE2d 709, later app 249 SC 605, 155 SE2d 916, cert den 390 US 927, 19 L Ed 2d 988, 88 S Ct 862. State v Quillien (1974) 263 SC 87, 207 SE2d 814. State v Callahan (1974) 263 SC 35, 208 SE2d 284, cert den 420 US 981, 43 L Ed 2d 663, 95 S Ct 1411.

Stated in (Decided under former law.) State v Dalby (1910) 86 SC 367, 68 SE 633. State v Chasteen (1957) 231 SC 141, 97 SE2d 517. State v Gamble (1966) 247 SC 214, 146 SE2d 709, later app 249 SC 605, 155 SE2d 916, cert den 390 US 927, 19 L Ed 2d 988, 88 S Ct 862. Thompson v State (1968) 251 SC 593, 164 SE2d 760. State v Singleton (1972) 258 SC 125, 187 SE2d 518. Moorer v South Carolina (1964, DC SC) 240 F Supp 529. Quillien v Leeke (1969, DC SC) 303 F Supp 698.

Cited in (Decided under former statute.) State v Gatlin (1946) 208 SC 414, 38 SE2d 238. State v Horton (1946) 209 SC 151, 39 SE2d 222. State v Brooks (1959) 235 SC 344, 111 SE2d 686, cert den 365 US 300, 5 L Ed 2d 689, 81 S Ct 707. Ross v State (1967) 250 SC 442, 158 SE2d 647. Wilson v State (1968) 250 SC 550, 159 SE2d 282. State v Cannon (1972) 257 SC 425, 186 SE2d 413. Moorer v South Carolina (1965, DC SC) 239 F Supp 180. Phillips v Oconee County (1969, DC SC) 314 F Supp 1376.

Quoted in (Decided under former statute.) Moorer v. State of S. C., 1965, 240 F.Supp. 531.

Although most attempted sexual batteries will involve a touching, a person may be convicted of assault with intent to commit criminal sexual conduct (ACSC) by proof of an assault with or without a battery. State v. Elliott (S.C. 2001) 346 S.C. 603, 552 S.E.2d 727. Sex Offenses 98

While essential to show force and penetration upon charge of rape, Supreme Court unwilling to promulgate rule of law requiring unoffending female to lay bare the facts of her ravishment to extent of showing accomplishment in all its sordid details. (Decided under former statute.) State v. Moorer (S.C. 1963) 241 S.C. 487, 129 S.E.2d 330.

The meaning of this section cannot be fairly and adequately imparted by merely reading it. Essential to its understanding is its interpretation by the Supreme Court. (Decided under former statute.) State v. Worthy (S.C. 1962) 239 S.C. 449, 123 S.E.2d 835.

And it was within the discretion of the trial judge to reopen the case and permit the State to prove nonmarriage of the prosecutrix. (Decided under former statute.) State v. Harrison (S.C. 1960) 236 S.C. 246, 113 S.E.2d 783. Criminal Law 686(1)

For relationship between rape, assault with intent to commit rape and assault and battery of a high and aggravated nature, (Decided under former statute.) see State v. Collins (S.C. 1956) 228 S.C. 537, 91 S.E.2d 259.

History of section. (Decided under former statute.) State v. Whitener (S.C. 1955) 228 S.C. 244, 89 S.E.2d 701, certiorari denied 76 S.Ct. 101, 350 U.S. 861, 100 L.Ed. 764.

2. Construction with other laws

When SC Const, Art 3, Section 33, and Code 1962 Section 16‑71 and this section [Code 1962 Section 16‑80] are construed together, it is apparent that Code 1962 Section 16‑71 has reference to rape at common law, and that this section [Code 1962 Section 16‑80] refers to carnal knowledge of an unmarried woman was has not attained the age of fourteen years (now sixteen years), and who, by reason of her tender years, cannot legally consent to sexual intercourse. (Decided under former statute.) State v Gilchrist (1899) 54 SC 159, 31 SE 866. State v Ward (1944) 204 SC 210, 28 SE2d 785.

When SC Const, Art 3, Section 33, and this section [Code 1962 Section 16‑71] and Code 1962 Section 16‑80 are construed together, it is apparent that this section [Code 1962 Section 16‑71] has reference to rape at common law, and that Code 1962 Section 16‑80 refers to carnal knowledge of an unmarried woman who has not attained the age of 14 (now 16) years, and who, by reason of her tender years, cannot legally consent to sexual intercourse. (Decided under former statute.) State v Gilchrist (1899) 54 SC 159, 31 SE 866. State v Ward (1944) 204 SC 210, 28 SE2d 785.

A conviction of criminal sexual conduct under Section 16‑3‑651 constitutes the offense of rape, and thus may be considered an aggravating circumstance under Section 16‑3‑20(C)(a), where the facts on which the conviction was based are sufficient to support a conviction under the previous statutory or common law offense of rape. State v. Elmore (S.C. 1983) 279 S.C. 417, 308 S.E.2d 781. Sex Offenses 13

This section and Sections 16‑71, 16‑72 and 16‑80 are subservient to the age of consent provisions of SC Const, Art 3, Section 33. (Decided under former statute.) State v. Whitener (S.C. 1955) 228 S.C. 244, 89 S.E.2d 701, certiorari denied 76 S.Ct. 101, 350 U.S. 861, 100 L.Ed. 764.

This section [Code 1962 Section 16‑71] and Code 1962 Sections 16‑72 and 16‑80 are subservient to the age of consent provisions of SC Const, Art 3, Section 33. (Decided under former statute.) State v. Whitener (S.C. 1955) 228 S.C. 244, 89 S.E.2d 701, certiorari denied 76 S.Ct. 101, 350 U.S. 861, 100 L.Ed. 764.

3. Constitutional issues

The effective assistance of counsel in a prosecution for rape is a necessary requisite of due process of law, and the denial of such constitutes valid ground for the issuance of the writ of habeas corpus. (Decided under former statute.) Crosby v State (1962) 241 SC 40, 126 SE2d 843. Ross v State (1967) 250 SC 442, 158 SE2d 647.

State supreme court reasonably applied federal law when it determined that petitioner was not denied a right to present a complete defense in a rape prosecution when he was barred from presenting extrinsic evidence of victim’s prior accusations of sexual assault, due to his failure to file written notice of his intent to present such evidence; court determined that the proffered evidence had little impeachment value because at most it showed simply that the victim’s reports could not be corroborated. Nevada v. Jackson, 2013, 133 S.Ct. 1990, 186 L.Ed.2d 62, on remand 723 F.3d 1114. Habeas Corpus 492

Trial counsel’s failure to accurately define sexual battery to defendant before the guilty plea hearing did not prejudice defendant, where the judge, during the plea hearing, read the indictments, which identified the elements of the offenses, defendant indicated that he understood the charges, and defendant admitted his guilt. Terry v. State (S.C. 2009) 383 S.C. 361, 680 S.E.2d 277. Criminal Law 1920

Trial counsel’s failure to accurately define sexual battery to defendant before the guilty plea hearing constituted deficient performance. Terry v. State (S.C. 2009) 383 S.C. 361, 680 S.E.2d 277. Criminal Law 1920

A defendant charged with criminal sexual conduct was deprived of the effective assistance of counsel where his counsel failed to subpoena a witness who would have testified that he saw the defendant leaving a lounge 15 minutes prior to the conclusion of the victim’s rape, counsel admitted that he would have called this witness if the witness had been present in the courtroom on the day of trial, and further admitted that “one more piece of evidence” might have made a difference in the verdict; thus, counsel’s representation fell below the objective standard of reasonableness. Martinez v. State (S.C. 1991) 304 S.C. 39, 403 S.E.2d 113. Criminal Law 1923

Criminal sexual conduct statute, Sections 16‑3‑651 to 16‑3‑654, is not unconstitutionally vague and violative of due process; penal statute which is arguably unconstitutional in some of its applications will not be overturned where it is clearly applicable to accused. State v. Gambrell (S.C. 1980) 274 S.C. 587, 266 S.E.2d 78. Constitutional Law 699

In asking the jury to determine the issue of mercy by relating the circumstances of the case to their loved ones, the solicitor injected into the case considerations foreign to the record and calculated to take from the trial the necessary element of impartiality. (Decided under former statute.) State v. White (S.C. 1965) 246 S.C. 502, 144 S.E.2d 481.

This section [Code 1962 Section 16‑71] clearly defines the offense in language which apprises a violator of the prohibited conduct and is not unconstitutionally vague, indefinite and uncertain. (Decided under former statute.) Moorer v. MacDougall (S.C. 1965) 245 S.C. 633, 142 S.E.2d 46. Sex Offenses 5(1)

This section [Code 1962 Section 16‑71] is constitutional. (Decided under former statute.) State v. Glover (S.C. 1912) 91 S.C. 562, 75 S.E. 218.

This section is constitutional. (Decided under former statute.) State v. Butler (S.C. 1910) 85 S.C. 45, 66 S.E. 1041.

4. Rape

Carnal knowledge, completed by penetration, however slight, is material element which must be proved beyond reasonable doubt by the State. (Decided under former statute.) State v Moorer (1963) 241 SC 487, 129 SE2d 330. State v Thomas (1966) 248 SC 573, 151 SE2d 855.

The words “rape” and “ravish” are synonymous terms of wide usage and plain English which have a well defined meaning. (Decided under former statute.) State v. Thomas (S.C. 1966) 248 S.C. 573, 151 S.E.2d 855.

“Ravish” is uniformly defined as the carnal knowledge of a woman by force and against her consent. (Decided under former statute.) Moorer v. MacDougall (S.C. 1965) 245 S.C. 633, 142 S.E.2d 46.

“Rape” is defined as the ravishing of a woman without her consent. (Decided under former statute.) Moorer v. MacDougall (S.C. 1965) 245 S.C. 633, 142 S.E.2d 46.

“Rape” and “ravish” are synonymous terms. (Decided under former statute.) State v. Moorer (S.C. 1963) 241 S.C. 487, 129 S.E.2d 330. Sex Offenses 13

It is not necessary for the State to prove emission. (Decided under former statute.) State v. Worthy (S.C. 1962) 239 S.C. 449, 123 S.E.2d 835. Sex Offenses 22

Both common‑law and statutory rape may be joined in the same indictment. (Decided under former statute.) State v. Harrison (S.C. 1960) 236 S.C. 246, 113 S.E.2d 783. Indictment And Information 130

The fact that the prosecutrix complained of a rape may be shown in corroboration of her testimony. (Decided under former statute.) State v. Harrison (S.C. 1960) 236 S.C. 246, 113 S.E.2d 783. Sex Offenses 247

Where the conviction is for rape, under this section [Code 1962 Section 16‑71], or the common‑law indictment, Code 1962 Section 16‑80 does not apply, though the woman child is under 14 years of age, since the two offenses are separate and distinct. (Decided under former statute.) State v. Haddon (S.C. 1897) 49 S.C. 308, 27 S.E. 194. Infants 1597; Sex Offenses 5(7)

5. Statutory rape

Applied in (Decided under former statute.) State v Wagstaff (1943) 202 SC 443, 25 SE2d 484. Sweet v State (1971) 255 SC 293, 178 SE2d 657.

This is a statutory offense, distinct from rape. (Decided under former statute.) State v Haddon (1897) 49 SC 308, 27 SE 194. State v Coleman (1899) 54 SC 162, 31 SE 866.

But both common‑law and statutory rape may be joined in the same indictment. (Decided under former statute.) State v. Harrison (S.C. 1960) 236 S.C. 246, 113 S.E.2d 783. Indictment And Information 130

Where the female is under the age of 14 and unmarried, the only other element necessary to be proven in order to establish the crime of rape is the fact that the defendant had sexual intercourse with her. (Decided under former statute.) State v. Whitener (S.C. 1955) 228 S.C. 244, 89 S.E.2d 701, certiorari denied 76 S.Ct. 101, 350 U.S. 861, 100 L.Ed. 764. Infants 1597; Sex Offenses 21(1)

Where the female is under the age of 16, the only other element necessary to be proven in order to establish the crime of carnal knowledge under this section [Code 1962 Section 16‑80] is the fact that the defendant had intercourse with her. (Decided under former statute.) State v. Whitener (S.C. 1955) 228 S.C. 244, 89 S.E.2d 701, certiorari denied 76 S.Ct. 101, 350 U.S. 861, 100 L.Ed. 764. Infants 1597; Sex Offenses 21(1)

History of section. (Decided under former statute.) State v. Whitener (S.C. 1955) 228 S.C. 244, 89 S.E.2d 701, certiorari denied 76 S.Ct. 101, 350 U.S. 861, 100 L.Ed. 764.

This section [Code 1962 Section 16‑80] and Code 1962 Sections 16‑71 and 16‑72 are subservient to the age of consent provisions of SC Const, Art 3, Section 33. (Decided under former statute.) State v. Whitener (S.C. 1955) 228 S.C. 244, 89 S.E.2d 701, certiorari denied 76 S.Ct. 101, 350 U.S. 861, 100 L.Ed. 764.

Where indictment did not allege any offense occurring prior to the prosecutrix’ becoming 14 years of age, evidence as to intercourse occurring prior to such time was inadmissible, and the trial judge erred when he charged the jury only on item (1) of this section [Code 1962 Section 16‑80] without any reference to item (2). (Decided under former statute.) State v. Bailey (S.C. 1955) 226 S.C. 612, 86 S.E.2d 472.

While force is not a necessary ingredient of this offense, the fact that the act was accompanied by force will not prevent a conviction of statutory rape as charged in the indictment. (Decided under former statute.) State v. Horton (S.C. 1946) 209 S.C. 151, 39 S.E.2d 222. Infants 1597; Sex Offenses 15; Sex Offenses 66

A defendant charged with violating the provisions of this section [Code 1962 Section 16‑80] is not prejudiced because the word “rape” is endorsed upon the back of the indictment, for this offense is known as “statutory rape.” (Decided under former statute.) State v. Horton (S.C. 1946) 209 S.C. 151, 39 S.E.2d 222.

This statutory provision, making the age of consent sixteen years, is not in violation of SC Const, Art 3, Section 33. (Decided under former statute.) State v. Smith (S.C. 1936) 181 S.C. 485, 188 S.E. 132.

Quoted in (Decided under former statute.) State v. Wilson (S.C. 1931) 162 S.C. 413, 161 S.E. 104, 81 A.L.R. 580.

Conviction under this section [Code 1962 Section 16‑80] does not disqualify person as witness. (Decided under former statute.) State v. Jeffcoat (S.C. 1928) 148 S.C. 322, 146 S.E. 95.

Boy between 7 and 14 years of age may be convicted, if the physical capacity be shown. (Decided under former statute.) State v. Coleman (S.C. 1899) 54 S.C. 162, 31 S.E. 866.

Where the conviction is for rape, under Code 1962 Section 16‑71 or the common‑law indictment, this section [Code 1962 Section 16‑80] does not apply, though the woman child is under 14 years of age, since the two offenses are separate and distinct. (Decided under former statute.) State v. Haddon (S.C. 1897) 49 S.C. 308, 27 S.E. 194. Infants 1597; Sex Offenses 5(7)

6. Assault with intent to commit rape

Where defendant has made an assault with intent to commit rape and the woman, after resistance, yields voluntarily, the crime of rape is not committed, but the offense of assault with intent to commit rape remains since the ultimate consent of the woman has no retroactive effect by relation and does not operate as a condonation of a crime which had become complete. (Decided under former statute.) State v. Collins (S.C. 1956) 228 S.C. 537, 91 S.E.2d 259.

7. Sexual battery

“Sexual battery” does not mean any battery of a sexual nature, but, rather, is statutorily defined to include only certain specific acts, which can be loosely described as involving penetration of some sort. State v. Elliott (S.C. 2001) 346 S.C. 603, 552 S.E.2d 727. Sex Offenses 21(1)

8. Aggravated coercion

It is clear from definition in Section 16‑3‑651 that language “aggravated coercion” as used in Section 16‑3‑653 means that sexual battery occurs under circumstances where victim’s consent is lacking. State v. Cox (S.C. 1980) 274 S.C. 624, 266 S.E.2d 784.

9. Aiding and abetting

Although intercourse was absent, still the fact that accused was present, aiding and abetting in the commission of the crime, made him guilty as a principal. (Decided under former statute.) Breland v. State (S.C. 1969) 253 S.C. 187, 169 S.E.2d 604.

10. Intent

Under Section 16‑3‑651, the aggravating circumstances of rape and assault with intent to ravish do not require, as an essential element, the intent to accomplish penetration by the male genital organ. State v. Stewart (S.C. 1984) 283 S.C. 104, 320 S.E.2d 447. Sentencing And Punishment 1681

11. Intrusion

The term “intrusion” in Section 16‑3‑651(h) includes any intrusion by one person into another person’s body, not only penetration or intrusion of victim’s body. Smith v. State of S.C. (C.A.4 (S.C.) 1989) 882 F.2d 895, certiorari denied 110 S.Ct. 843, 493 U.S. 1046, 107 L.Ed.2d 838.

Intrusion into the victim’s vagina is not necessary when a defendant performs cunnilingus, in order for a defendant to be guilty of a sexual battery with a victim who is less than eleven years of age; the sexual offense of cunnilingus is complete when the cunnilinguist licks or kisses the female genitalia, and penetration is not necessary or required. State v. Morgan (S.C.App. 2002) 352 S.C. 359, 574 S.E.2d 203. Sex Offenses 21(2)

Evidence that defendant licked six‑year‑old victim’s vagina was sufficient to establish that defendant performed cunnilingus, a separate and distinct act of battery, for purposes of defendant’s prosecution for the offense of criminal sexual contact with a minor. State v. Morgan (S.C.App. 2002) 352 S.C. 359, 574 S.E.2d 203. Infants 1750; Sex Offenses 259

Evidence in prosecution for criminal sexual conduct (CSC) with minor was insufficient to create jury issue on “penetration,” despite victim’s testimony that defendant fondled her while she sat on his lap in recliner chair in the living room, that defendant touched her “lu‑lu,” and such touching made victim “feel bad”; such testimony did not show “intrusion,” victim’s physical examination revealed no signs of sexual battery, and other victims testified that, although defendant fondled them in living room, he attempted penetration only in bedroom. State v. Johnson (S.C. 1999) 334 S.C. 78, 512 S.E.2d 795. Infants 1665(6); Sex Offenses 339

Testimony of 6 year old prosecutrix that defendant touched her with his penis, that she could not remember if he put it inside her body, and that, when asked if it hurt, she replied that it had, is sufficient evidence of “intrusion, however slight,” as is required to create jury issue. State v. Mathis (S.C. 1986) 287 S.C. 589, 340 S.E.2d 538.

Proof of penetration need not be in any particular form of words. (Decided under former statute.) State v. Thomas (S.C. 1966) 248 S.C. 573, 151 S.E.2d 855.

Use of the term “raped” or “ravished” in testimony given by the prosecutrix is sufficient to warrant a finding of penetration. (Decided under former statute.) State v. Thomas (S.C. 1966) 248 S.C. 573, 151 S.E.2d 855.

In order to constitute the crime of rape, there must be some degree of penetration of the female genital organ by the male genital organ, but any penetration however slight, is all that is necessary. (Decided under former statute.) State v. Worthy (S.C. 1962) 239 S.C. 449, 123 S.E.2d 835. Sex Offenses 21(1)

12. Force and resistance

One of the elements of rape is the use of force. (Decided under former statute.) State v. Thorne (S.C. 1961) 239 S.C. 164, 121 S.E.2d 623, certiorari denied 82 S.Ct. 485, 368 U.S. 979, 7 L.Ed.2d 440.

In general, force on the part of the male and resistance on the part of the female are necessary ingredients of the crime, as indicative of nonconsent. (Decided under former statute.) State v. Whitener (S.C. 1955) 228 S.C. 244, 89 S.E.2d 701, certiorari denied 76 S.Ct. 101, 350 U.S. 861, 100 L.Ed. 764. Sex Offenses 66; Sex Offenses 72

Sexual intercourse with a woman who is unconscious or insane is rape, and neither force nor resistance is necessary to constitute the offense. (Decided under former statute.) State v. Whitener (S.C. 1955) 228 S.C. 244, 89 S.E.2d 701, certiorari denied 76 S.Ct. 101, 350 U.S. 861, 100 L.Ed. 764.

The force may be actual or constructive, and the degree of force and of resistance required to characterize the act as rape must, of necessity vary with the circumstances of the particular case. (Decided under former statute.) State v. Whitener (S.C. 1955) 228 S.C. 244, 89 S.E.2d 701, certiorari denied 76 S.Ct. 101, 350 U.S. 861, 100 L.Ed. 764. Sex Offenses 66; Sex Offenses 73

Where the female is under the age of consent, force and resistance are immaterial and not necessary to constitute the offense. (Decided under former statute.) State v. Whitener (S.C. 1955) 228 S.C. 244, 89 S.E.2d 701, certiorari denied 76 S.Ct. 101, 350 U.S. 861, 100 L.Ed. 764. Infants 1597; Sex Offenses 62(3)

13. Consent

The age of consent is fixed by SC Const, Art 3, Section 33. (Decided under former statute.) Moorer v. MacDougall (S.C. 1965) 245 S.C. 633, 142 S.E.2d 46.

Consent on the part of the female being fundamentally inconsistent with the concept of rape, it is ordinarily an essential element of the crime that the act be committed without the consent of the female, or, as it is otherwise expressed, against her will. (Decided under former statute.) State v. Whitener (S.C. 1955) 228 S.C. 244, 89 S.E.2d 701, certiorari denied 76 S.Ct. 101, 350 U.S. 861, 100 L.Ed. 764. Sex Offenses 55

Since, under this section [Code 1962 Section 16‑71] there may be an indictment for rape without alleging the woman’s age, or that she is unmarried, under such indictment the State may prove that the woman is unmarried and under fourteen years of age, in order to establish that the sexual intercourse was without consent, within SC Const, Art 3, Section 33, or such proof may be offered by the State in reply to defendant’s defense that the woman actually consented. (Decided under former statute.) State v. Haddon (S.C. 1897) 49 S.C. 308, 27 S.E. 194. Infants 1734; Sex Offenses 210

14. Defenses

Voluntary intoxication is not a defense to a crime of specific intent such as assault with the intent to ravish. (Decided under former statute.) State v. Vaughn (S.C. 1977) 268 S.C. 119, 232 S.E.2d 328.

The test in this State, where defendant asserts insanity as a defense in a prosecution under this section [Code 1962 Section 16‑71] is the mental capacity or the want of it, sufficient to distinguish moral or legal right from moral or legal wrong and to recognize the particular act charged as morally or legally wrong. (Decided under former statute.) State v. Thorne (S.C. 1961) 239 S.C. 164, 121 S.E.2d 623, certiorari denied 82 S.Ct. 485, 368 U.S. 979, 7 L.Ed.2d 440. Criminal Law 48

15. Confessions

Voluntariness of confession. (Decided under former statute.) State v. Cannon (S.C. 1966) 248 S.C. 506, 151 S.E.2d 752.

16. Lesser included offenses

Assault and battery of a high and aggravated nature (ABHAN) is a lesser included offense of assault with intent to commit criminal sexual conduct (ACSC), despite fact that the elements of ABHAN and ACSC do not meet the elements test; since battery is not a necessary element of ACSC, it follows that ABHAN, which requires battery as an element, does not satisfy the elements test, but this situation presents an anomaly in the law. State v. Elliott (S.C. 2001) 346 S.C. 603, 552 S.E.2d 727. Indictment And Information 191(.5)

17. Indictment

There was no variance between defendant’s indictment for crime of rape under former Section 16‑71 and proof at trial where, even though indictment did not charge that victim was unmarried, there is nothing in record to indicate that her marital status was at issue, and where prosecution introduced evidence tending powerfully to establish that she was unmarried, including her testimony that she was 13 years old at time of incident and that she lived with her mother, stepfather, stepbrothers, and stepsister. (Decided under former statute.) Griffin v. Aiken (C.A.4 (S.C.) 1985) 775 F.2d 1226, certiorari denied 106 S.Ct. 3301, 478 U.S. 1007, 92 L.Ed.2d 715. Sex Offenses 165

There is no variance between indictment and proof at trial where defendant is charged with rape and convicted of statutory rape. Griffin v. Aiken (C.A.4 (S.C.) 1985) 775 F.2d 1226, certiorari denied 106 S.Ct. 3301, 478 U.S. 1007, 92 L.Ed.2d 715.

18. Presumptions and burden of proof

Admitting connection while denying the rape is not affirmative defense, but leaves the burden of proof on the State. (Decided under former law.) State v. Taylor (S.C. 1900) 57 S.C. 483, 35 S.E. 729, 76 Am.St.Rep. 575.

19. Admissibility of evidence

Evidence of other crimes is competent to prove the specific crime charged under this section [Code 1962 Section 16‑71] when it tends to establish, (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; (5) the identity of the person charged with the commission of the crime on trial. (Decided under former statute.) State v Sharpe (1961) 239 SC 258, 122 SE2d 622. State v Thomas (1966) 248 SC 573, 151 SE2d 855.

If the prosecutrix does not testify, evidence that she complained of a rape is inadmissible. (Decided under former statute.) State v Harrison (1960) 236 SC 246, 113 SE2d 783. State v Sharpe (1961) 239 SC 258, 122 SE2d 622.

The particulars or details are not admissible, but so much of the complaint as identifies “the time and place with that of the one charged” may be shown. (Decided under former statute.) State v Harrison (1960) 236 SC 246, 113 SE2d 783. State v Sharpe (1961) 239 SC 258, 122 SE2d 622.

Trial court could exclude testimony of defendant’s false‑confession expert about the specifics of two cases involving false confessions as more prejudicial than probative at a trial for murder and criminal sexual conduct (CSC); presenting the jury with details of historical cases of people who were imprisoned based on false confessions would distract the jury’s attention from the facts of defendant’s case and potentially confuse the issues. State v. Cope (S.C. 2013) 405 S.C. 317, 748 S.E.2d 194, motion for relief from judgment denied 135 S.Ct. 400, 190 L.Ed.2d 289. Criminal Law 474.3(1)

Defendant was not prejudiced at a trial for murder and criminal sexual conduct (CSC) by any error in trial court’s exclusion of testimony of defendant’s false‑confession expert about the specifics of two cases involving false confessions on the ground that the testimony would be more prejudicial than probative; expert presented extensive testimony about the nature of coerced internalized false confessions and the factors that often accompanied such false confessions, and expert noted that such confessions did in fact occur and indicated generally that there were a number of cases where people gave detailed confessions that later turned out to be completely false. State v. Cope (S.C. 2013) 405 S.C. 317, 748 S.E.2d 194, motion for relief from judgment denied 135 S.Ct. 400, 190 L.Ed.2d 289. Criminal Law 1169.9

The joinder of the charges against defendant’s stepson and defendant’s stepdaughter was proper, during prosecution for criminal sexual conduct and lewd act upon a child; defendant embarked upon a series of actions aimed at the sexual abuse of his two prepubescent stepchildren over the course of an eight month period, defendant was not prejudiced by the joinder because evidence regarding his sexual abuse of each of the stepchildren would have been admissible in separate trials to show a common scheme or plan, and there were similarities between the acts as both victims were the stepchildren of defendant, both were prepubescents, and the abuse of both victims started with inappropriate touching. State v. Beekman (S.C.App. 2013) 405 S.C. 225, 746 S.E.2d 483, affirmed 415 S.C. 632, 785 S.E.2d 202. Criminal Law 620(1)

Testimony of one stepdaughter that she was molested by defendant at least once a week for eight years was admissible, in prosecution for sexual abuse of other stepdaughter, to establish common plan or scheme, where defendant used his relationship as stepfather to control both stepdaughters, and defendant engaged in similar conduct as to each stepdaughter. State v. Adams (S.C.App. 1998) 332 S.C. 139, 504 S.E.2d 124. Criminal Law 370.25; Criminal Law 373.10; Criminal Law 373.13

Evidence of a rape victim’s emotional trauma which allegedly resulted from the attack is relevant to prove the elements of criminal sexual conduct, including lack of consent, since evidence of behavioral and personality changes tends to establish or make more or less probable that the offense occurred. However, such evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. State v. Alexander (S.C. 1991) 303 S.C. 377, 401 S.E.2d 146. Sex Offenses 209

In a prosecution for criminal sexual conduct, testimony of the child victim’s guardian ad litem regarding conversations she had had with the victim about the alleged assault, was improperly admitted into evidence where the guardian ad litem supplied the only testimony regarding the identity of the perpetrator and the details of the incident, since this was not corroborative testimony. The mere fact that the victim testified did not cure the error in admitting the guardian ad litem’s hearsay testimony since the victim refused to accuse the defendant and in effect declined to admit the out‑of‑court statements attributed to her by the guardian ad litem. Simpkins v. State (S.C. 1991) 303 S.C. 364, 401 S.E.2d 142.

In determining the admissibility of evidence of a victim’s prior accusation, the trial judge should first determine whether the accusation was false. If the prior allegation was false, the next consideration becomes remoteness in time. Finally, the trial court should consider the factual similarity between prior and present allegations to determine relevancy. Thus, a trial court did not abuse its discretion in refusing to allow defense counsel to cross‑examine the victim ‑ the defendant’s 17‑year‑old stepdaughter ‑ about her prior allegation of sexual abuse by her biological father when she was 8 years old, based on the determination that the bare accusation of an 8 year old made 9 years earlier was too remote to be of sufficient probative value, where the previous accusation had not been investigated and the defense presented no evidence to establish its falsity. State v. Boiter (S.C. 1990) 302 S.C. 381, 396 S.E.2d 364.

In a prosecution for criminal sexual conduct upon the defendant’s 11‑year‑old stepdaughter, the testimony of a social worker constituted impermissible “bolstering” of the victim’s testimony, warranting reversal of the conviction, where the social worker testified prior to the victim’s testifying and therefore the victim’s credibility was not subject to impeachment inasmuch as she had not taken the stand, the social worker testified extensively to details of the sexual abuse reported by the victim, and the State relied solely upon the victim’s testimony to establish the details of the crime and the identity of the perpetrator. State v. Barrett (S.C. 1989) 299 S.C. 485, 386 S.E.2d 242.

Although evidence of prior consistent statements is ordinarily inadmissible when a witness has not been impeached, an exception to this rule exists in criminal sexual conduct cases. When the victim testifies, evidence from other witnesses that the victim complained of the sexual assault is admissible as corroboration of the incident. However, the evidence must be limited to the time and place of the assault, and may not include particulars or details. State v. Barrett (S.C. 1989) 299 S.C. 485, 386 S.E.2d 242.

In a rape case, where intercourse is admitted, identity is not in question, and the only issue is consent, evidence of other independent offenses is not admissible. (Decided under former statute.) State v. Davis (S.C. 1961) 239 S.C. 280, 122 S.E.2d 633. Criminal Law 368.37

The general rule is that evidence that the accused has committed another crime independent of and unconnected with the one on trial is inadmissible. (Decided under former statute.) State v. Sharpe (S.C. 1961) 239 S.C. 258, 122 S.E.2d 622.

Statements in the presence of the accused by a third person are admissible as evidence in a prosecution under this section [Code 1962 Section 16‑71] when such accused remains silent and does not deny such statements. (Decided under former statute.) State v. Sharpe (S.C. 1961) 239 S.C. 258, 122 S.E.2d 622.

It is not improper to show the circumstances under and through which the act of rape was accomplished. (Decided under former statute.) State v. Thorne (S.C. 1961) 239 S.C. 164, 121 S.E.2d 623, certiorari denied 82 S.Ct. 485, 368 U.S. 979, 7 L.Ed.2d 440.

In a prosecution under this section [Code 1962 Section 16‑71], the determination of the relevancy and the materiality of a photograph is left to the sound discretion of the trial judge. If such photographs are calculated to arouse the sympathy or prejudice of the jury or if they are entirely irrelevant or not necessary to substantiate facts, they should be excluded. (Decided under former statute.) State v. Thorne (S.C. 1961) 239 S.C. 164, 121 S.E.2d 623, certiorari denied 82 S.Ct. 485, 368 U.S. 979, 7 L.Ed.2d 440.

Where it forms part of the res gestae, evidence is admissible to show that the defendant ravished or attempted to ravish another female on the occasion of the alleged rape of the prosecutrix. (Decided under former statute.) State v. Brooks (S.C. 1959) 235 S.C. 344, 111 S.E.2d 686, appeal dismissed, certiorari denied 81 S.Ct. 707, 365 U.S. 300, 5 L.Ed.2d 689. Criminal Law 368.94

20. Sufficiency of evidence

State presented sufficient evidence to present jury question as to whether juvenile was guilty of criminal sexual conduct with a minor; victim testified that it was painful when juvenile put his private part inside her and that, before he did this, he put something on that looked like a rubber band, but was not, other children in the home at the time of the incident testified that they saw juvenile on top of victim and that juvenile and victim had their pants down, and treating physician testified that he observed a perianal tear on the victim, which was red and swollen. In Interest of Cisco K. (S.C.App. 1998) 332 S.C. 649, 506 S.E.2d 536. Infants 2568

The evidence supported a verdict of second degree assault with intent to commit criminal sexual conduct, even though the defendant did not verbally threaten the victim, where, after pulling her from the balcony railing over which she was trying to escape, the defendant grabbed her breasts with both hands and began fumbling with the clothing that covered her stomach; thus, the defendant’s actions supported an inference that he threatened to use high and aggravated force on the victim to commit a sexual battery. State v. Fulp (S.C.App. 1992) 310 S.C. 278, 423 S.E.2d 149.

Evidence sufficient to establish essential element of penetration. (Decided under former statute.) State v. Thomas (S.C. 1966) 248 S.C. 573, 151 S.E.2d 855. Sex Offenses 259

In order to sustain a conviction in a prosecution for rape the evidence must be sufficient to establish the fact of penetration beyond a reasonable doubt. (Decided under former statute.) State v. Thomas (S.C. 1966) 248 S.C. 573, 151 S.E.2d 855.

21. Questions for jury

Jury question was presented in prosecution for criminal sexual conduct (CSC) with minor as to whether “intrusion” occurred; victim testified that defendant touched her and that it hurt, and physical examination of victim showed she had suffered injury inside her vagina which was consistent with sexual abuse. State v. Johnson (S.C. 1999) 334 S.C. 78, 512 S.E.2d 795. Infants 1665(5); Sex Offenses 339

In order to constitute the crime of rape, there must be some degree of penetration of the female genital organ by the male genital organ, but any penetration, however slight, is all that is necessary, and it is not necessary to prove emission. It is a question of fact for the jury to determine as to whether this took place without the consent of the prosecutrix and against her will. (Decided under former statute.) State v. Fleming (S.C. 1970) 254 S.C. 415, 175 S.E.2d 624. Sex Offenses 389

22. Instructions

Defendant, in prosecution for criminal sexual conduct (CSC) in the first degree, was not entitled to jury instruction on the lesser included offense of assault and battery of a high and aggravated nature (ABHAN); while defense counsel suggested in opening remarks that the sex was consensual, no evidence was presented at trial to support such assertion, and victim’s uncontradicted testimony was that defendant physically forced her into an abandoned house, threw her into a door, pulled her upstairs, pushed her into a room and down on the ground, and forced her to perform sexual acts with him. State v. Fields (S.C.App. 2003) 356 S.C. 517, 589 S.E.2d 792. Criminal Law 795(2.80)

There was no evidence to support instruction on charge of assault and battery of a high and aggravated nature (ABHAN) as lesser‑included offense of criminal sexual conduct with a minor (CSCM); as defendant’s defense was that he did not penetrate victim, and that she was injured when she fell out of a bunk bed while medical testimony indicated victim’s internal injury could have been caused only by penetration, defendant was guilty of sexual battery or no battery at all. Moultrie v. State (S.C. 2003) 354 S.C. 646, 583 S.E.2d 436. Criminal Law 795(2.80)

Trial judge properly refused to instruct jury with regard to penalty for rape since jury had nothing to do with determination of punishment for this crime. (Decided under former statute.) State v. McGee (S.C. 1977) 268 S.C. 618, 235 S.E.2d 715. Criminal Law 796

Instruction that “without her consent does not mean that consent is obtained or gained when force is used to gain or obtain the consent of the woman. Forcibly and without consent are used together and if the consent is gained by force, although there is consent but nevertheless against her will and desire, brought about by violence, force or threats of violence, then the sexual act is without the consent of the female,” was proper. (Decided under former statute.) State v. Brooks (S.C. 1959) 235 S.C. 344, 111 S.E.2d 686, appeal dismissed, certiorari denied 81 S.Ct. 707, 365 U.S. 300, 5 L.Ed.2d 689.

Instruction that “forcibly does not mean that actual force has to be used at the time; but constructive force may be used in the sense of fear of violence, or impending danger, or threats of violence whereby the consent of the woman was obtained by use of threats or fear of violence” was proper. (Decided under former statute.) State v. Brooks (S.C. 1959) 235 S.C. 344, 111 S.E.2d 686, appeal dismissed, certiorari denied 81 S.Ct. 707, 365 U.S. 300, 5 L.Ed.2d 689.

It was not error not to charge the law applicable to statutory rape and incest where the indictment charged the defendant with common‑law rape and with attempted criminal assault. (Decided under former statute.) State v. Phillips (S.C. 1952) 222 S.C. 338, 72 S.E.2d 910.

Where accused did not move to require the State to elect under which of two sections of the Code it would proceed, some of the allegations of the indictment applying to one and some to the other, and did not object to the indictment for this defect by demurrer or motion to quash before jury sworn, he cannot complain, after conviction, of the court’s charge, which was good as to one section, since the charge would be considered with reference to that section which would support a conviction. (Decided under former statute.) State v. Gilchrist (S.C. 1899) 54 S.C. 159, 31 S.E. 866. Criminal Law 814(1)

An instruction that “if there was force on the part of the defendant, and that consent was not given by the female, that would be rape,” sufficiently defines the crime. (Decided under former statute.) State v. Sudduth (S.C. 1898) 52 S.C. 488, 30 S.E. 408.

An indictment which charges that defendant upon a person named “did make an assault, and her, the said P. W., then and there violently, against her will, feloniously did ravish and carnally know,” is an indictment under this section [Code 1962 Section 16‑71], and it is not necessary to allege the woman’s age, or whether she is married or not. (Decided under former statute.) State v. Haddon (S.C. 1897) 49 S.C. 308, 27 S.E. 194. Infants 1658; Sex Offenses 154

23. Sentence and punishment

Alternative of sentencing juvenile for a definite term pursuant to 1962 Code Section 16‑72 [1976 Code Section 16‑3‑640] is still available to trial judge despite fact that 1962 Code Section 55‑50.30 [1976 Code Section 24‑15‑510] removes authority of the Circuit Court under this section to sentence a juvenile to the State Penitentiary and requires that such sentence be served in the custody of the Board of Youth Services; and Board had no power to conditionally release juvenile, pursuant to 1962 Code Section 55‑50.25 [1976 Code Section 24‑15‑360] who had been sentenced to definite term of 21 years pursuant to this section. (Decided under former statute.) Golden v. State Bd. of Juvenile Placement and Aftercare (S.C. 1976) 266 S.C. 427, 223 S.E.2d 777.

Sentence imposed on defendant convicted of assault with intent to ravish, with recommendation to mercy, to serve fifteen years’ imprisonment was authorized. (Decided under former statute.) State v. Wilson (S.C. 1931) 162 S.C. 413, 161 S.E. 104, 81 A.L.R. 580. Sex Offenses 438

24. Habeas corpus

No evidentiary hearing is necessary on issue that this section [Code 1962 Section 16‑71] is, upon its face and as construed and applied to habeas corpus petitioner, vague, indefinite and uncertain. (Decided under former statute.) Moorer v. State of S. C., 1965, 244 F.Supp. 531. Habeas Corpus 745.1

**SECTION 16‑3‑652.** Criminal sexual conduct in the first degree.

(1) A person is guilty of criminal sexual conduct in the first degree if the actor engages in sexual battery with the victim and if any one or more of the following circumstances are proven:

(a) The actor uses aggravated force to accomplish sexual battery.

(b) The victim submits to sexual battery by the actor under circumstances where the victim is also the victim of forcible confinement, kidnapping, trafficking in persons, robbery, extortion, burglary, housebreaking, or any other similar offense or act.

(c) The actor causes the victim, without the victim’s consent, to become mentally incapacitated or physically helpless by administering, distributing, dispensing, delivering, or causing to be administered, distributed, dispensed, or delivered a controlled substance, a controlled substance analogue, or any intoxicating substance.

(2) Criminal sexual conduct in the first degree is a felony punishable by imprisonment for not more than thirty years, according to the discretion of the court.

HISTORY: 1977 Act No. 157 Section 2; 1998 Act No. 372, Section 4; 2000 Act No. 355, Section 1; 2010 Act No. 289, Section 5, eff June 11, 2010.

CROSS REFERENCES

Commission of this crime within specified radius of child day care center as separate offense, see Section 63‑13‑200.

Denial of registration as an operator of a child day care or group day care home where the applicant, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑820.

Denial of renewal for child day care or group day care home where the person applying for approval, the operator of the facility, or an employee or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑630.

Fingerprint review of any person applying to operate or seek employment at a child day care or group day care home to determine prior conviction of the crime referred to in this section, see Section 63‑13‑620.

Foster care placement with certain persons prohibited, see Section 63‑7‑2350.

No license or registration will be issued to any religious establishment to operate a child day care or group day care home where the operator, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑1010.

No person may be employed by the Department of Social Services in its day care licensing or child protective services divisions who has been convicted of the crime referred to in this section, see Section 63‑13‑190.

Offender registry information available to public, see Section 23‑3‑490.

Past conviction check prior to initial employment of teachers, see Section 59‑26‑40.

Persons convicted of Title 16, Chapter 3 crimes prohibited from appointment as guardian ad litem for child in abuse or neglect proceeding, see Section 63‑11‑520.

Persons convicted under this section must provide a sample from which DNA may be obtained for inclusion in the State DNA Database, see Section 23‑3‑620.

Persons convicted under this section must register for sex offender registry, see Section 23‑3‑430.

Placement of minor sex offenders, see Section 63‑7‑2360.

Post‑conviction DNA procedures, see Section 17‑28‑10 et seq.

Preservation of DNA evidence, see Section 17‑28‑310 et seq.

Prohibited acts A, narcotics, penalties, see Section 44‑53‑370.

Sentencing, see Section 17‑25‑20 et seq.

Trafficking in persons, definitions, see Section 16‑3‑2010.

Library References

Assault and Battery 59, 100.

Rape 1 to 14, 64.

Sodomy 1, 8.

Westlaw Topic Nos. 37, 321, 357.

C.J.S. Rape Sections 1 to 12, 14 to 31, 33, 121 to 122.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Assault and Battery Section 26, Cases Illustrating Right to Jury Charge.

S.C. Jur. Burglary Section 9, Punishment.

S.C. Jur. Criminal Sexual Conduct Section 2, All Degrees.

S.C. Jur. Criminal Sexual Conduct Section 3, Involving Married Persons.

S.C. Jur. Criminal Sexual Conduct Section 4, Assault With Intent to Commit Criminal Sexual Conduct.

S.C. Jur. Criminal Sexual Conduct Section 14, Aggravated Force.

Attorney General’s Opinions

Offenses categorized by the Attorney General as tier 3 offenders as defined by the Federal Sex Offender Registration and Notification Act. SC Op.Atty.Gen. (May 30, 2008) 2008 WL 2324820.

Among State code provisions which are included in term “sexual offense” are Sections 16‑3‑652 et seq., 16‑15‑130, 16‑15‑140[repealed], and 16‑15‑20. 1985 Op.Atty.Gen., No 85‑22, p 75 (1985 WL 165992).

NOTES OF DECISIONS

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1. In general

Intrusion into the victim’s vagina is not necessary when a defendant performs cunnilingus, in order for a defendant to be guilty of a sexual battery with a victim who is less than eleven years of age; the sexual offense of cunnilingus is complete when the cunnilinguist licks or kisses the female genitalia, and penetration is not necessary or required. State v. Morgan (S.C.App. 2002) 352 S.C. 359, 574 S.E.2d 203. Sex Offenses 21(2)

Elementally, the offense of assault with intent to commit first‑degree criminal sexual conduct is analyzed as: (1) an assault, and (2) criminal intent to commit criminal sexual conduct in the first degree. State v. Ervin (S.C.App. 1998) 333 S.C. 351, 510 S.E.2d 220. Sex Offenses 98; Sex Offenses 99

Verdicts finding the defendant guilty of first‑degree criminal sexual conduct but not guilty of common‑law burglary were not inconsistent since the elements of burglary did not have to be established in order to prove the defendant guilty of criminal sexual conduct. State v. Lynn (S.C. 1981) 277 S.C. 222, 284 S.E.2d 786. Criminal Law 878(4)

2. Constitutional issues

Counsel rendered deficient performance, as element of ineffective assistance claim, when counsel failed to obtain an independent competency evaluation of defendant prior to allowing defendant to plead guilty but mentally ill to charges that included assault and battery with intent to kill, kidnapping, and first‑degree sexual assault, although one evaluation of defendant stated he was competent to stand trial; plea counsel was aware that a more thorough evaluation and school board assessment stated defendant was cognitively limited, his IQ placed him in the category of severe mental retardation, and his intellectual functioning was similar to that of a four to seven‑year‑old child, and plea counsel’s strategy of pursuing the plea instead of obtaining competency evaluation was not objectively reasonable because if defendant was found incompetent at time of pleas, he could not have been convicted of the crimes. Ramirez v. State (S.C.App. 2015) 413 S.C. 351, 776 S.E.2d 101, rehearing denied, affirmed in part, reversed in part 419 S.C. 14, 795 S.E.2d 841. Criminal Law 1900; Criminal Law 1920

Evidence of probative value supported postconviction relief court’s finding that applicant did not prove, as element of ineffective assistance claim, that he was prejudiced by plea counsel’s failure to request mental examination prior to entry of applicant’s plea of guilty but mentally ill to assault and battery with intent to kill, kidnapping, and first‑degree sexual assault, although one doctor’s evaluation, based on five meetings with applicant lasting three to four hours each, found applicant incompetent; another doctor, who met with applicant for a total of approximately 90 minutes, filed a report stating applicant was competent to stand trial, and postconviction relief counsel failed to introduce an independent competency evaluation at the postconviction relief hearing. Ramirez v. State (S.C.App. 2015) 413 S.C. 351, 776 S.E.2d 101, rehearing denied, affirmed in part, reversed in part 419 S.C. 14, 795 S.E.2d 841. Criminal Law 1618(10)

Although assault and battery of a high and aggravated nature (ABHAN) is a lesser included offense of criminal sexual conduct in the first degree, the 2 offenses constituted 2 separate acts where the assault with intent to commit criminal sexual conduct occurred when the defendant grabbed the victim, forced her into the woods and ripped her clothes in an effort to commit a sexual battery, and ABHAN occurred when the defendant subsequently put his knee on the victim’s chest, put one hand around her neck and told her that he was going to kill her. Under the facts of the case, it could be inferred that the defendant abandoned his attempt to rape the victim, and then assaulted her in an attempt to silence her because she could identify him, so that the threat to kill the victim and the ensuing assault were not in furtherance of the attempted criminal sexual conduct. Thus, the defendant’s convictions for assault with intent to commit criminal sexual conduct and ABHAN were for different acts constituting separate offenses and did not violate the constitutional prohibition against double jeopardy. State v. Frazier (S.C. 1990) 302 S.C. 500, 397 S.E.2d 93.

Criminal sexual conduct statute, Sections 16‑3‑651 to 16‑3‑654, is not unconstitutionally vague and violative of due process; penal statute which is arguably unconstitutional in some of its applications will not be overturned where it is clearly applicable to accused. State v. Gambrell (S.C. 1980) 274 S.C. 587, 266 S.E.2d 78. Constitutional Law 699

2.5. Construction with other laws

Under South Carolina law, common law crime of assault with intent to ravish was not same as statutory offenses of first or second degree assault with intent to commit criminal sexual conduct, for purpose of determining whether common law offense qualified as most serious offense, under two‑strike mandatory sentencing law; the common law crime was broader than the statutory offenses, as both statutory offenses required intent to commit a sexual battery or the use of aggravated force. Bowers v. McFadden, 2015, 153 F.Supp.3d 875. Sentencing and Punishment 1273

3. Lesser included offenses

Assault and battery of a high and aggravated nature is a lesser‑included offense of criminal sexual conduct. Magazine v. State (S.C. 2004) 361 S.C. 610, 606 S.E.2d 761. Indictment And Information 191(.5)

Even though, under the traditional “elements test,” assault and battery of a high and aggravated nature (ABHAN) would not be a lesser included offense of first degree criminal sexual conduct (CSC), because the “circumstances of aggravation” element of ABHAN was not an element of first degree CSC and because some potential circumstances of aggravation were not elements of first degree CSC, the Supreme Court, to maintain a uniform approach to CSC and ABHAN offenses, would continue its repeated holding that ABHAN was a lesser included offense of first degree CSC. State v. Primus (S.C. 2002) 349 S.C. 576, 564 S.E.2d 103, habeas corpus denied 555 F.Supp.2d 596, appeal dismissed 298 Fed.Appx. 236, 2008 WL 4790104, certiorari denied 129 S.Ct. 1621, 173 L.Ed.2d 1004. Indictment And Information 191(.5)

Assault and battery of a high and aggravated nature (ABHAN) is a lesser included offense of assault with intent to commit criminal sexual conduct (ACSC), despite fact that the elements of ABHAN and ACSC do not meet the elements test; since battery is not a necessary element of ACSC, it follows that ABHAN, which requires battery as an element, does not satisfy the elements test, but this situation presents an anomaly in the law. State v. Elliott (S.C. 2001) 346 S.C. 603, 552 S.E.2d 727. Indictment And Information 191(.5)

Third degree criminal sexual conduct was not lesser included offense of first degree criminal sexual conduct, as charged offense of first degree criminal sexual conduct did not contain elements requiring that victim be mentally defective, and that offender knew, or had reason to know, that victim was mentally defective, and thus trial court lacked subject matter jurisdiction to convict defendant, who allegedly sexually assaulted mentally retarded victim, of third degree criminal sexual conduct; overruling State v. Summers 276 S.C. 11, 274 S.E.2d 427 and State v. Burgess, 278 S.C. 497, 299 S.E.2d 328. State v. McFadden (S.C. 2000) 342 S.C. 629, 539 S.E.2d 387. Indictment And Information 189(10)

Offense of assault and battery of high and aggravating nature is lessor ‑ included offense of criminal sexual conduct in first degree. State v. Pressley (S.C. 1987) 292 S.C. 9, 354 S.E.2d 777.

4. Juvenile offenders

Sexual offense committed by petitioner when he was under 14 years of age could not be transferred to general sessions court; intervening statute providing that any person under age of 14 should be tried as juvenile for sexual offenses was unaffected by later repeal and simultaneous reenactment of provision limiting transfer of sexual offenses to those committed by juveniles fourteen years of age and over. Slocumb v. State (S.C. 1999) 337 S.C. 46, 522 S.E.2d 809. Infants 2971

5. Aggravated force

Assault and battery of high and aggravated nature is a lesser included offense of assault with intent to commit sexual conduct, notwithstanding that technically assault with intent to commit sexual conduct does not contain all of the elements of assault and battery of high and aggravated nature. State v. Geiger (S.C.App. 2006) 370 S.C. 600, 635 S.E.2d 669, habeas corpus dismissed in part 2013 WL 841752, appeal dismissed 539 Fed.Appx. 117, 2013 WL 4713388. Indictment And Information 189(5)

Circumstances of aggravation for purposes of assault and battery of a high and aggravated nature (ABHAN) include the use of a deadly weapon, intent to commit a felony, infliction of serious bodily injury, great disparity in the ages or physical conditions of the parties, a difference in gender, the purposeful infliction of shame and disgrace, taking indecent liberties of familiarities with a female, and resistance to lawful authority. Dempsey v. State (S.C. 2005) 363 S.C. 365, 610 S.E.2d 812. Assault And Battery 54

A difference in gender, like any other aggravating circumstance, is a factor for the court to consider in determining if the evidence warrants a jury charge on simple assault, as a simple assault may occur between a man and a woman depending on the degree of violence and the circumstances attending the attack. State v. White (S.C. 2004) 361 S.C. 407, 605 S.E.2d 540. Assault And Battery 96(1)

Evidence that defendant had, at various times, physically beaten his daughters for disobedience, refusing to have sex with him, or revealing or attempting to reveal the sexual abuse did not establish that defendant actually used aggravated force on or about the time of sexual assaults, as element of first‑degree criminal sexual conduct (CSC). State v. Brown (S.C. 2004) 360 S.C. 581, 602 S.E.2d 392. Infants 1750; Sex Offenses 275

A sexual battery constitutes first‑degree criminal sexual conduct (CSC) only if it was accomplished through the use of force and the force constitutes aggravated force. State v. Brown (S.C. 2004) 360 S.C. 581, 602 S.E.2d 392. Sex Offenses 68

The presence of an aggravating circumstance necessary to sustain a prosecution for assault and battery of a high and aggravated nature (ABHAN), e.g., infliction of serious bodily injury, great disparity in ages or physical conditions of parties, difference in the sexes, purposeful infliction of shame and disgrace, taking indecent liberties or familiarities with a female, and resistance to lawful authority, is not sufficient to establish actual use of aggravated force, as element of first‑degree criminal sexual conduct (CSC). State v. Brown (S.C. 2004) 360 S.C. 581, 602 S.E.2d 392. Sex Offenses 68

To convict a defendant of first‑degree criminal sexual conduct (CSC), the State must present evidence the defendant committed a sexual battery and actually used aggravated force at the time of the assault, i.e., the defendant overcame the victim through the use of physical force, physical violence of a high and aggravated nature, or the threat of the use of a deadly weapon; the evidence must show the actual use of aggravated force occurred near in time and place to the assault, such that the effect of the aggravated force caused the victim to submit to the assault. State v. Brown (S.C. 2004) 360 S.C. 581, 602 S.E.2d 392. Sex Offenses 68; Sex Offenses 69

Second‑degree criminal sexual conduct (CSC) is a lesser included offense of first‑degree criminal sexual conduct. State v. Brown (S.C. 2004) 360 S.C. 581, 602 S.E.2d 392. Indictment And Information 191(8)

Mere presence of assault and battery of high and aggravated nature (ABHAN) aggravating circumstance is insufficient to satisfy aggravated force element of first degree criminal sexual conduct (CSC). State v. Green (S.C.App. 1997) 327 S.C. 581, 491 S.E.2d 263. Sex Offenses 66

“Aggravation” necessary for first degree criminal sexual conduct (CSC) conviction must be associated with degree of force used. State v. Green (S.C.App. 1997) 327 S.C. 581, 491 S.E.2d 263. Sex Offenses 66

State presented no evidence that defendant used aggravated force when committing sexual batteries, and thus, trial court should have granted defendant’s directed verdict motion on first degree criminal sexual conduct (CSC) charges, where fact that battery may have painful did not support inference that battery was accomplished through use of force, record was devoid of evidence that defendant used any force in connection with shaving her pubic hairs, and while victim testified that defendant had his hands on her shoulders during attacks, she did not testify that he held her down or otherwise used any force. State v. Green (S.C.App. 1997) 327 S.C. 581, 491 S.E.2d 263. Sex Offenses 275

6. Indictment

Evidence that a physical fight ‑ instead of rape ‑ occurred warrants a charge of assault and battery of high and aggravated nature as a lesser‑included offense of criminal sexual conduct. Magazine v. State (S.C. 2004) 361 S.C. 610, 606 S.E.2d 761. Criminal Law 795(2.80)

Indictments sufficiently charged a defendant with the offenses of first degree sexual conduct and contributing to the delinquency of a minor where the indictments, dated December 5, 1988, charged that the conduct occurred between July 4, 1988 and August 25, 1988; time is not an essential element of either offense, and thus the indictment need not have specifically charged the time, but rather must have apprised the defendant of what he should have been prepared to meet and shown that the offense was committed prior to the finding of the indictment. State v. Wingo (S.C.App. 1991) 304 S.C. 173, 403 S.E.2d 322.

An amendment of an indictment at the close of evidence at trial, which increased the lesser charge of assault with intent to commit third degree criminal sexual conduct to the greater charge of assault with intent to commit first degree criminal sexual conduct, was improper as it exceeded the terms of Section 17‑19‑100, which permits amendment of an indictment provided that the nature of the offense charged is not changed. State v. Riddle (S.C. 1990) 301 S.C. 211, 391 S.E.2d 253, post‑conviction relief granted 308 S.C. 361, 418 S.E.2d 308, rehearing denied. Indictment And Information 159(2)

6.5. Joinder

Offenses of first‑degree criminal sexual conduct, arising from defendant’s conduct with respect to stepson, and lewd act upon a child, arising from defendant’s conduct with respect to stepdaughter, arose from single chain of events, as required for joinder of charges, even though incidents underlying charges occurred at different times; victims were siblings, molestation occurred at same place and over same eight‑month period of time, and with same modus operandi, in that defendant took advantage of victims’ habit of watching television with him. State v. Beekman (S.C. 2016) 415 S.C. 632, 785 S.E.2d 202. Criminal Law 620(1)

Offenses of first‑degree criminal sexual conduct, arising from defendant’s conduct with respect to stepson, and lewd act upon a child, arising from defendant’s conduct with respect to stepdaughter, were supported by same evidence, as required for joinder of charges, even though each offense was a distinct crime and was not proven by completely identical evidence; there were glaring similarities in defendant molesting both of his stepchildren in the same place, over the same time period, and in a similar manner, and testimony from many of the same witnesses would be used to prove both charges. State v. Beekman (S.C. 2016) 415 S.C. 632, 785 S.E.2d 202. Criminal Law 620(1)

7. Competency to stand trial

Evidence supported finding that defendant was competent to stand trial for rape and burglary, even though defendant suffered brain damage and short term memory deficits; forensic psychologists testified that defendant understood the charges against him and the nature of the proceedings, and that defendant was able to consult with his attorneys. State v. Proctor (S.C.App. 2001) 348 S.C. 322, 559 S.E.2d 318, rehearing denied, reversed 358 S.C. 424, 595 S.E.2d 480. Criminal Law 625.15

8. Presumptions and burden of proof

Attempted criminal sexual misconduct offense could be proven by circumstantial evidence, the law making no distinction between the weight or value to be given to either direct or circumstantial evidence; however, to the extent the State relied on circumstantial evidence, all of the circumstances had to be consistent with each other and, when taken together, point conclusively to defendant’s guilt beyond a reasonable doubt. State v. Logan (S.C. 2013) 405 S.C. 83, 747 S.E.2d 444. Sex Offenses 282

In order to prove assault with intent to commit first‑degree criminal sexual conduct, the state is not required to prove conduct showing criminal sexual conduct in the first degree; however, the state must prove the intent to commit criminal sexual conduct in the first degree. State v. Ervin (S.C.App. 1998) 333 S.C. 351, 510 S.E.2d 220. Sex Offenses 98; Sex Offenses 99

8.5. Witnesses

Affirmative response from pediatric medical expert to state’s question whether expert’s findings from exam of victim were consistent with victim having experienced sexual abuse did not constitute improper bolstering of victim’s testimony in prosecution for first‑degree criminal sexual conduct (CSC) and second‑degree CSC, although state’s question was inartfully worded, and although expert mentioned that she considered victim’s history; expert explained that victim’s exam was normal and no specific findings linked to allegations of abuse, but that normal results were common in instances where there was a delayed disclosure, expert did not comment on truthfulness of victim’s history or repeat to jury details of what victim told her, and expert did not comment on victim’s veracity. State v. Perry (S.C.App. 2017) 420 S.C. 643, 803 S.E.2d 899. Criminal Law 474.3(3)

9. Admissibility of evidence

Trial court did not abuse its discretion in permitting victim to refresh his recollection by reviewing transcript from previous trial during pretrial hearing in prosecution for criminal sexual conduct with a minor, where court permitted defendant great latitude on cross‑examination, and defendant impeached victim by cross‑examining him regarding his need to refresh his recollection at the hearing. State v. Smith (S.C.App. 2014) 411 S.C. 161, 767 S.E.2d 212, certiorari denied. Witnesses 255(9)

Expert’s testimony regarding relationship between length of delay of child victim’s disclosure of sexual abuse and credibility of disclosure did not improperly bolster victim’s testimony, despite fact that expert stated “no, it really doesn’t” in response to State’s inappropriate question asking whether length of delay eroded credibility of disclosure; expert explained that a lengthy delay was consistent with if not necessitated by trauma victim suffered and gave appropriately general explanation of medical or scientific reasons a child might not immediately disclose sexual trauma, expert qualified his response to question by stressing that credibility and delayed reporting were unrelated, and expert never gave an opinion regarding whether victim was telling the truth. State v. Smith (S.C.App. 2014) 411 S.C. 161, 767 S.E.2d 212, certiorari denied. Criminal Law 474.3(3)

Error in allowing forensic interviewer’s testimony identifying perpetrator of criminal sexual conduct by testifying that victim reported he was about six or seven years old when his dad started to perform sexual acts on him was harmless, where criminal investigator testified without objection that victim’s aunt and victim reported to him that victim had been sexually assaulted by his father. State v. Smith (S.C.App. 2014) 411 S.C. 161, 767 S.E.2d 212, certiorari denied. Criminal Law 1169.9

Allowing forensic interviewer’s testimony identifying perpetrator of criminal sexual conduct by testifying that victim reported he was about six or seven years old when his dad started to perform sexual acts on him was error, since testimony went beyond time and place of alleged assault. State v. Smith (S.C.App. 2014) 411 S.C. 161, 767 S.E.2d 212, certiorari denied. Criminal Law 474.3(3)

Defendant waived any objection to trial court’s curative instruction following forensic interviewer’s testimony that victim reported he had to suck his dad’s penis, where defendant did not object to instruction. State v. Smith (S.C.App. 2014) 411 S.C. 161, 767 S.E.2d 212, certiorari denied. Criminal Law 1038.1(5)

Rule of evidence that sexual assault victim’s prior consistent out‑of‑court statements limited to time and place of alleged incident are not hearsay, if victim testifies at trial and is subject to cross‑examination, does not allow a witness to testify as to identity of alleged perpetrator. State v. Smith (S.C.App. 2014) 411 S.C. 161, 767 S.E.2d 212, certiorari denied. Sex Offenses 245; Witnesses 414(2)

Corroborative testimony of a witness regarding a sexual assault victim’s prior consistent out‑of‑court statement, if victim testifies at trial and is subject to cross‑examination, is not hearsay and is limited to the time and place of the alleged assault and cannot include details regarding the assault. State v. Smith (S.C.App. 2014) 411 S.C. 161, 767 S.E.2d 212, certiorari denied. Sex Offenses 245; Sex Offenses 247; Witnesses 414(2)

Exceptional circumstances did not exist that would warrant reversal of the trial court’s finding that the prejudicial value of evidence that stepbrother had previously sexually abused child victim substantially outweighed its probative value, during prosecution for criminal sexual conduct involving child’s sibling; the evidence did not provide an alternate explanation as to how sibling was familiar with the sexual conduct she alleged defendant committed. State v. Williams (S.C.App. 2014) 409 S.C. 455, 761 S.E.2d 770. Criminal Law 1134.49(1)

The trial court’s exclusion of evidence of stepbrother’s abuse of child victim, which the defense sought to admit to impeach mother’s testimony that she answered all the questions on an intake form truthfully, was not an abuse of discretion, during prosecution for criminal sexual conduct; the testimony pertained to a collateral matter. State v. Williams (S.C.App. 2014) 409 S.C. 455, 761 S.E.2d 770. Witnesses 344(5)

Victim’s statements to her mother that defendant, whom victim had been dating off‑and‑on over period of years, beat her, raped her, and sodomized her, which statements mother repeated to 911 operator, came within excited utterance exception to rule against hearsay, in trial for criminal sexual conduct and kidnapping, where mother testified that victim was shaking, crying, and distraught when victim called mother to tell her what happened, and that victim “lost it” when she arrived at mother’s house. State v. Hendricks (S.C.App. 2014) 408 S.C. 525, 759 S.E.2d 434, rehearing denied. Criminal Law 366(6)

Statements by victim’s mother to 911 operator that victim’s “boyfriend just broke into [victim’s] house, and beat her up and raped her,” and that “[h]e sodomized her,” were hearsay, in trial for criminal sexual conduct and kidnapping, even if statement was offered to explain why police went to hospital to meet with victim, where reason for police arriving at hospital was not significant issue at trial, and probative value of mother’s statement was truth of statements, i.e., that defendant had broken into victim’s home and raped and sodomized her. State v. Hendricks (S.C.App. 2014) 408 S.C. 525, 759 S.E.2d 434, rehearing denied. Criminal Law 419(3)

Statements by victim’s mother to 911 operator that victim’s “boyfriend just broke into [victim’s] house, and beat her up and raped her,” and that “[h]e sodomized her,” did not come within present sense impression exception to rule against hearsay, in trial for criminal sexual conduct and kidnapping, where mother was not perceiving rape and sodomy while making statements. State v. Hendricks (S.C.App. 2014) 408 S.C. 525, 759 S.E.2d 434, rehearing denied. Criminal Law 419(2.15)

Statements by victim’s mother to 911 operator that victim’s “boyfriend just broke into [victim’s] house, and beat her up and raped her,” that “[h]e sodomized her,” identifying defendant by name, and requesting that operator have police meet them at hospital did not come within excited utterance exception to rule against hearsay, in trial for criminal sexual conduct and kidnapping; although mother may have been stressed when victim initially called her to tell her what happened, there was no evidence that mother was still under significant stress of excitement when she later made statement to operator while driving victim to hospital, after victim arrived at mother’s home with her children and after mother put victim’s children to bed, and mother was not speaking spontaneously when making statements to operator, but instead, statements indicated reflection and purpose to initiate criminal investigation against defendant. State v. Hendricks (S.C.App. 2014) 408 S.C. 525, 759 S.E.2d 434, rehearing denied. Criminal Law 368(3)

Trial court’s errors in qualifying forensic interviewer as expert, and in allowing interviewer’s testimony as to child’s credibility and truthfulness, were harmless in prosecution of defendant for first‑degree criminal sexual conduct, where jury’s determination of defendant’s guilt was based upon physical evidence of defendant’s abuse of victim and the corroborating testimony of victim’s aunt who victim went to immediately after the abuse. State v. Portillo (S.C.App. 2014) 408 S.C. 66, 757 S.E.2d 721, rehearing denied, affirmed in part, vacated in part 2015 WL 790299. Criminal Law 1169.9

Forensic interviewer’s testimony in prosecution of defendant for first‑degree criminal sexual conduct, that nine‑year‑old victim was not coached for the interview, that victim used child‑like hand gestures, and that the victim exhibited signs of post traumatic stress disorder violated rules prohibiting an expert from commenting on a witness’ credibility, and from opining that a witness’ behavior indicated that the witness was telling the truth. State v. Portillo (S.C.App. 2014) 408 S.C. 66, 757 S.E.2d 721, rehearing denied, affirmed in part, vacated in part 2015 WL 790299. Criminal Law 474.3(3)

Forensic interviewer who conducted interview of nine‑year‑old girl who was victim of sexual abuse by her uncle was not qualified to be an expert in prosecution of uncle for first‑degree criminal sexual conduct; interviewer’s only purpose as expert would be to comment on credibility of interviewee. State v. Portillo (S.C.App. 2014) 408 S.C. 66, 757 S.E.2d 721, rehearing denied, affirmed in part, vacated in part 2015 WL 790299. Criminal Law 478(1)

Trial court did not abuse its discretion by admitting victim’s testimony regarding two statements defendant made to her as he was preparing to rape her, specifically “[i]f I was like I was, Bitch, I would have killed you. You would be a dead Bitch,” and “I’ve killed one, and I’ll kill again,” in prosecution for first‑degree criminal sexual conduct (CSC); trial court admitted the statements as part of the crime, and court also concluded that the statements were not offered for the prohibited purpose of proving defendant’s character “in order to show action in conformity therewith,” but rather were offered to prove intent. State v. Gilmore (S.C.App. 2011) 396 S.C. 72, 719 S.E.2d 688, habeas corpus dismissed 2015 WL 4771869, remanded 639 Fed.Appx. 954, 2016 WL 2894009, appeal dismissed 681 Fed.Appx. 278, 2017 WL 1040447. Criminal Law 368.5; Criminal Law 368.94; Criminal Law 371.49

Probative value of rape trauma evidence from State’s expert witness outweighed its prejudicial impact, and thus, testimony was admissible in prosecution for criminal sexual conduct (CSC); expert’s testimony was consistent with the probative purpose of admitting rape trauma evidence, i.e., to refute the defendant’s contention that the sex was consensual and to prove that a sexual offense occurred. State v. White (S.C. 2004) 361 S.C. 407, 605 S.E.2d 540. Criminal Law 474.4(2)

Victim’s in court identification testimony was admissible, even though victim chose not to make selection from the one photographic lineup she was shown, where she described the scene as well‑lit, victim testified that she had heightened degree of attention during incident, which she described in great detail, and victim was with perpetrator for some fifteen minutes. State v. McCord (S.C.App. 2002) 349 S.C. 477, 562 S.E.2d 689. Criminal Law 339.9(3)

Although evidence of prior consistent statements is ordinarily inadmissible when a witness has not been impeached, an exception to this rule exists in criminal sexual conduct cases. When the victim testifies, evidence from other witnesses that the victim complained of the sexual assault is admissible as corroboration of the incident. However, the evidence must be limited to the time and place of the assault, and may not include particulars or details. State v. Barrett (S.C. 1989) 299 S.C. 485, 386 S.E.2d 242.

10. Questions for jury

There was sufficient evidence of aggravated force to submit charge of first degree criminal sexual conduct (CSC) to jury; there was evidence that after confining victim in automobile, defendant grabbed her hands, got on top of her and was holding her down with his body and hands, and victim testified that he would not get off of her, and that she was kicking, pushing, fighting and hitting to get him off of her. State v. Lindsey (S.C. 2003) 355 S.C. 15, 583 S.E.2d 740. Sex Offenses 275

11. Instructions

Evidence must support the existence of two conditions before the trial judge is required to charge the jury on the lesser‑included offense of assault and battery of a high and aggravated nature (ABHAN) in a prosecution for first‑degree criminal sexual conduct (CSC), in a case in which there is evidence the defendant committed a nonsexual ABHAN contemporaneous with CSC, but there is evidence that instead of CSC the two had consensual sex; first, the nonsexual ABHAN must have occurred “contemporaneously” with the alleged CSC, and, second, there must be evidence that the victim consented to have sex. State v. Gilmore (S.C.App. 2011) 396 S.C. 72, 719 S.E.2d 688, habeas corpus dismissed 2015 WL 4771869, remanded 639 Fed.Appx. 954, 2016 WL 2894009, appeal dismissed 681 Fed.Appx. 278, 2017 WL 1040447. Criminal Law 795(2.80)

Evidence in prosecution for first‑degree criminal sexual conduct (CSC) did not warrant charge on assault and battery of a high and aggravated nature (ABHAN) as a lesser‑included offense; there was not sufficient evidence of consensual sex to permit the jury to reasonably conclude that defendant was guilty only of ABHAN, as defendant did not testify in the case, and the only other eyewitness to the alleged CSC was the victim, who testified the sex was not consensual. State v. Gilmore (S.C.App. 2011) 396 S.C. 72, 719 S.E.2d 688, habeas corpus dismissed 2015 WL 4771869, remanded 639 Fed.Appx. 954, 2016 WL 2894009, appeal dismissed 681 Fed.Appx. 278, 2017 WL 1040447. Criminal Law 795(2.80)

Evidence did not warrant instruction on assault and battery of high and aggravated nature as lesser included offense of assault with intent to commit sexual conduct, in light of victim’s undisputed testimony that defendant put gun to her head, put his penis in her mouth, and attempted to force her legs apart to engage in sexual intercourse. State v. Geiger (S.C.App. 2006) 370 S.C. 600, 635 S.E.2d 669, habeas corpus dismissed in part 2013 WL 841752, appeal dismissed 539 Fed.Appx. 117, 2013 WL 4713388. Criminal Law 795(2.80)

Defendant was not entitled to instruction on assault and battery of high and aggravated nature as lesser‑included offense of criminal sexual conduct, and thus, counsel was not ineffective for failing to request instruction, where, at bond hearing, defendant denied that he was with victim, and defendant presented no evidence at trial to refute victim’s testimony or to suggest anything other than rape occurred. Magazine v. State (S.C. 2004) 361 S.C. 610, 606 S.E.2d 761. Criminal Law 1950

Defendant, who was convicted of first degree criminal sexual conduct (CSC), was entitled to jury charge on lesser‑included offense of assault and battery of a high and aggravated nature (ABHAN); there was evidence from which the jury could have believed that the sexual intercourse was consensual and that no battery occurred until after the parties engaged in intercourse. State v. White (S.C. 2004) 361 S.C. 407, 605 S.E.2d 540. Criminal Law 795(2.80)

Trial judge erred in prosecution for assault with intent to commit first degree criminal sexual conduct (ACSC) by giving jury charge defining lesser included offense of assault and battery of high and aggravated nature (ABHAN) as including element of sudden heat and passion upon sufficient legal provocation. State v. Heyward (S.C.App. 2002) 350 S.C. 153, 564 S.E.2d 379, rehearing denied, certiorari denied. Criminal Law 795(2.30)

Trial judge committed reversible error in prosecution for assault with intent to commit first degree criminal sexual conduct (ACSC) when judge gave jury charge defining lesser included offense of assault and battery of high and aggravated nature (ABHAN) as including element of sudden heat and passion upon sufficient legal provocation; ABHAN charge was required given evidence presented in case. State v. Heyward (S.C.App. 2002) 350 S.C. 153, 564 S.E.2d 379, rehearing denied, certiorari denied. Criminal Law 1172.1(4.1)

Pursuant to Section 16‑3‑657, the testimony of the victim need not be corroborated in prosecutions under Sections 16‑3‑652 through 16‑3‑658; consequently, the trial judge, in the prosecution of an action for criminal sexual conduct with a minor, properly charged the jury that it could believe any single witness over several, it was the sole judge of the facts, he had no opinion about those facts, and the state had the burden of proving the offense charged beyond a reasonable doubt. State v. Schumpert (S.C. 1993) 312 S.C. 502, 435 S.E.2d 859, rehearing denied. Infants 1666(5); Sex Offenses 421

After having charged the jury regarding both first degree criminal sexual conduct and the lesser offense of second degree criminal sexual conduct, the trial court did not err in failing to instruct them that it should resolve any reasonable doubt in favor of the lesser charge where there was no evidence to support a finding that the defendant was only guilty of the lesser charge. State v. Davis (S.C. 1992) 309 S.C. 326, 422 S.E.2d 133, rehearing denied, certiorari denied 113 S.Ct. 2355, 508 U.S. 915, 124 L.Ed.2d 263.

Defendant charged with criminal sexual conduct in first degree, who is convicted of kidnapping, is not entitled to have jury charged on second degree and third degree criminal sexual conduct but is entitled to have jury charged on assault and battery of high and aggravated nature. State v. Drafts (S.C. 1986) 288 S.C. 30, 340 S.E.2d 784.

12. Sufficiency of evidence

Evidence that defendant had, at various times, physically beaten his daughters for disobedience, refusing to have sex with him, or revealing or attempting to reveal the sexual abuse did not establish that defendant actually used aggravated force on or about the time of sexual assaults, as element of first‑degree criminal sexual conduct (CSC). State v. Brown (S.C. 2004) 360 S.C. 581, 602 S.E.2d 392. Infants 1750; Sex Offenses 275

In prosecution for first degree criminal sexual conduct, kidnapping, and carjacking, any possible error that resulted from the introduction of police officers’ alleged hearsay testimony regarding statements made by bystander and in the introduction of officer’s single reference to warrants that existed against defendant was harmless, considering the overwhelming evidence of defendant’s guilt; defendant confessed to raping and abducting victim, as well as taking her car, victim’s car was found near defendant’s home after offenses were committed, and defendant’s DNA matched the DNA obtained from vaginal swabs taken from victim and victim’s clothing. State v. Thompson (S.C.App. 2003) 352 S.C. 552, 575 S.E.2d 77. Criminal Law 1169.1(9); Criminal Law 1169.11

Evidence that defendant licked six‑year‑old victim’s vagina was sufficient to establish that defendant performed cunnilingus, a separate and distinct act of battery, for purposes of defendant’s prosecution for the offense of criminal sexual contact with a minor. State v. Morgan (S.C.App. 2002) 352 S.C. 359, 574 S.E.2d 203. Infants 1750; Sex Offenses 259

Evidence supported finding that defendant engaged in first degree criminal sexual conduct; inmate testified that defendant admitted that he had watched co‑defendant sexually assault victim while she was kidnapped, and defendant orchestrated or permitted victim to be held at his trailer while others engaged in sexual acts with kidnapped victim. State v. Stuckey (S.C.App. 2001) 347 S.C. 484, 556 S.E.2d 403, rehearing denied, certiorari denied. Sex Offenses 294

The State presented sufficient evidence that the defendant used aggravated force in raping his victim where, in the living room, he initially threatened her with a knife, and although he may not have brought the knife into the bedroom with them, he continued to threaten to use the knife. Anonymous (M‑156‑90) v. State Bd. of Medical Examiners (S.C.App. 1996) 321 S.C. 133, 467 S.E.2d 258.

Evidence was sufficient to identify defendant as perpetrator of first degree burglary and first degree criminal sexual conduct, where evidence showed that defendant’s wallet was found at scene, victim said her assailant looked similar to person pictured on defendant’s driver’s license, and defendant’s appearance was consistent with description given by victim, including scratch on back of neck. State v. Martinez (S.C. 1987) 294 S.C. 72, 362 S.E.2d 641, post‑conviction relief granted 304 S.C. 39, 403 S.E.2d 113. Burglary 41(6); Sex Offenses 261

A defendant indicted for criminal sexual conduct in the first degree was properly convicted of criminal sexual conduct in the second degree under the evidence presented at trial since the offense of criminal sexual conduct in the second and third degrees are lesser included offenses in the charge of criminal sexual conduct in the first degree and, if the facts warrant, the lesser degrees of the offense may be submitted to the jury under a charge of the first degree. State v. Summers (S.C. 1981) 276 S.C. 11, 274 S.E.2d 427.

13. Sentencing

Defendant’s prior rape conviction did not necessarily contain all elements of most serious criminal sexual conduct (CSC) offenses, and thus defendant could not be sentenced to life imprisonment without parole (LWOP) for subsequent first‑degree CSC conviction; there was no evidence in record concerning earlier conviction, and thus conviction may have fallen into category of third‑degree CSC, which did not involve aggravating circumstances and which was not “most serious offense” for which LWOP could be imposed. State v. Lindsey (S.C. 2003) 355 S.C. 15, 583 S.E.2d 740. Sentencing And Punishment 1258

Judges are allowed a wide, not unlimited, discretion in imposing conditions of suspension or probation and they cannot impose conditions which are illegal and void as against public policy; accordingly, castration as a condition to suspension of defendants’ sentence and probation was void as against public policy in that it inflicted cruel and unusual punishment. State v. Brown (S.C. 1985) 284 S.C. 407, 326 S.E.2d 410. Sentencing And Punishment 1962; Sentencing And Punishment 1963

14. Review

Defendant’s challenge to admission of 911 call made by victim’s mother as hearsay was adequately preserved for appellate review, even if defendant did not state his objection with specificity, in trial for criminal sexual conduct and kidnapping, where objection based on hearsay was apparent from record, in that State immediately responded to objection by citing to case dealing with “excited utterance” and “present sense impression” exceptions to hearsay rule. State v. Hendricks (S.C.App. 2014) 408 S.C. 525, 759 S.E.2d 434, rehearing denied. Criminal Law 1036.5

Court committed prejudicial error in admitting testimony by defendant’s wife as to defendant’s alleged performance of bizarre sexual acts upon her to prove identity of defendant in trial for kidnapping and criminal sexual conduct where only common element in described activities were sexual frustration and violence. State v. Rivers (S.C. 1979) 273 S.C. 75, 254 S.E.2d 299.

15. Harmless error

Trial court’s error in admitting DNA evidence that was collected pursuant to an invalid warrant was harmless since there was abundant, independent evidence in the record from which the jury could have found defendant guilty of first degree criminal sexual conduct; victim testified at length, giving a detailed account of the assault and the events that followed, State presented physical evidence regarding the results of the rape examination conducted on victim, including the extensive nature of the victim’s injuries, the defensive wounds on the victim’s body, and the presence of semen, and State presented testimony from the nurse who performed the rape examination that the victim’s wounds were consistent with sexual assault, and presence or absence of DNA evidence did not taint the remainder of the evidence in the record, nor did it overwhelm the jury’s ability to make credibility determinations and decide whether defendant was guilty. State v. Jenkins (S.C. 2015) 412 S.C. 643, 773 S.E.2d 906. Criminal Law 1169.1(8)

Error in admission of hearsay evidence in form of statements by victim’s mother to 911 operator that defendant had raped and sodomized victim, identifying defendant by name, and requesting that police officer be sent to hospital to meet with victim, was harmless, in trial for criminal sexual conduct and kidnapping, where it was merely cumulative of mother’s testimony regarding victim’s statements to her in initial telephone call, which came within excited utterance exception to hearsay rule, and 911 recording. State v. Hendricks (S.C.App. 2014) 408 S.C. 525, 759 S.E.2d 434, rehearing denied. Criminal Law 1169.2(6)

16. Reversible error

The introduction of the testimony of a 9‑year‑old victim’s 12‑year‑old cousin, that the defendant in an action for first degree sexual conduct and contributing to the delinquency of a minor had also sexually assaulted the victim’s 12‑year‑old sister, was not reversible error where the manner of the assault was identical and the victim’s sister testified without objection to the same events; not only was this testimony cumulative, but it tended to show a common scheme or plan, and thus its probative value outweighed its prejudicial effect. State v. Wingo (S.C.App. 1991) 304 S.C. 173, 403 S.E.2d 322.

**SECTION 16‑3‑653.** Criminal sexual conduct in the second degree.

(1) A person is guilty of criminal sexual conduct in the second degree if the actor uses aggravated coercion to accomplish sexual battery.

(2) Criminal sexual conduct in the second degree is a felony punishable by imprisonment for not more than twenty years according to the discretion of the court.

HISTORY: 1977 Act No. 157 Section 3.

CROSS REFERENCES

Commission of this crime within specified radius of child day care center as separate offense, see Section 63‑13‑200.

Denial of registration as an operator of a child day care or group day care home where the applicant, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑820.

Denial of renewal for child day care or group day care home where the person applying for approval, the operator of the facility, or an employee or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑630.

Fingerprint review of any person applying to operate or seek employment at a child day care or group day care home to determine prior conviction of the crime referred to in this section, see Section 63‑13‑620.

Foster care placement with certain persons prohibited, see Section 63‑7‑2350.

No license or registration will be issued to any religious establishment to operate a child day care or group day care home where the operator, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑1010.

No person may be employed by the Department of Social Services in its day care licensing or child protective services divisions who has been convicted of the crime referred to in this section, see Section 63‑13‑190.

Offender registry information available to public, see Section 23‑3‑490.

Past conviction check prior to initial employment of teachers, see Section 59‑26‑40.

Penalty under this section for engaging child for sexual performance, see Section 16‑3‑810.

Persons convicted of Title 16, Chapter 3 crimes prohibited from appointment as guardian ad litem for child in abuse or neglect proceeding, see Section 63‑11‑520.

Persons convicted under this section must provide a sample from which DNA may be obtained for inclusion in the State DNA Database, see Section 23‑3‑620.

Persons convicted under this section must register for sex offender registry, see Section 23‑3‑430.

Placement of minor sex offenders, see Section 63‑7‑2360.

Post‑conviction DNA procedures, see Section 17‑28‑10 et seq.

Preservation of DNA evidence, see Section 17‑28‑310 et seq.

Prohibited acts A, narcotics, penalties, see Section 44‑53‑370.

Sentencing, see Section 17‑25‑20 et seq.

Trafficking in persons, definitions, see Section 16‑3‑2010.

Library References

Assault and Battery 59, 100.

Rape 6, 64.

Sodomy 1, 8.

Westlaw Topic Nos. 37, 321, 357.

C.J.S. Rape Sections 1, 3, 24, 121 to 122.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Burglary Section 9, Punishment.

S.C. Jur. Criminal Sexual Conduct Section 2, All Degrees.

S.C. Jur. Criminal Sexual Conduct Section 3, Involving Married Persons.

Attorney General’s Opinions

Offenses categorized by the Attorney General as tier 3 offenders as defined by the Federal Sex Offender Registration and Notification Act. SC Op.Atty.Gen. (May 30, 2008) 2008 WL 2324820.

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1. Constitutional issues

Participation in a community supervision program was a collateral consequence of sentencing, and thus counsel was not ineffective in failing to inform defendant about the program when advising him to plead guilty to second degree criminal sexual conduct. Jackson v. State (S.C. 2002) 349 S.C. 62, 562 S.E.2d 475. Criminal Law 1920

Criminal sexual conduct statute, Sections 16‑3‑651 to 16‑3‑654, is not unconstitutionally vague and violative of due process; penal statute which is arguably unconstitutional in some of its applications will not be overturned where it is clearly applicable to accused. State v. Gambrell (S.C. 1980) 274 S.C. 587, 266 S.E.2d 78. Constitutional Law 699

2. Aggravated coercion

It is clear from definition in Section 16‑3‑651 that language “aggravated coercion” as used in Section 16‑3‑653 means that sexual battery occurs under circumstances where victim’s consent is lacking. State v. Cox (S.C. 1980) 274 S.C. 624, 266 S.E.2d 784.

3. Defenses

The exception contained in Section 16‑3‑658,which provides that a person cannot be guilty of criminal sexual conduct if the victim is his legal spouse unless the couple is living apart by reason of a court order, is not a part of the description of the offense of criminal sexual conduct, but is a matter of defense, and therefore it need not be negatived in the indictment. State v. Bermudez (S.C. 1989) 297 S.C. 230, 376 S.E.2d 258.

4. Lesser included offenses

SC Code Ann Section 16‑3‑655(3) is not lesser included offense of Section 16‑3‑653, since Section 16‑3‑655(3) includes additional element of age requirement, such that where defendant was indicted under Section 16‑3‑653 and trial judge charged jury only under Section 16‑3‑655(3), defendants conviction under Section 16‑3‑653 must be reversed and remanded, as defendant in criminal case is entitled to be tried only on charges set forth in indictment, even though defendant did not object about this matter at trial, as trial court lacked subject matter jurisdiction to convict defendant for offense when there was no indictment charging him with that offense when jury is sworn. State v. Munn (S.C. 1987) 292 S.C. 497, 357 S.E.2d 461.

5. Indictment

Second‑degree criminal sexual conduct (CSC) is a lesser included offense of first‑degree criminal sexual conduct. State v. Brown (S.C. 2004) 360 S.C. 581, 602 S.E.2d 392. Indictment And Information 191(8)

Because second‑degree criminal sexual conduct (CSC) with a minor requires the victim be between the ages of 11 and 14, it is not a lesser‑included offense of first‑degree CSC, which contains no element regarding the victim’s age. State v. Ellison (S.C.App. 2003) 356 S.C. 33, 586 S.E.2d 596. Indictment And Information 189(1)

Indictment was insufficient to confer subject matter jurisdiction on trial court to convict defendant of second‑degree criminal sexual conduct (CSC) with a minor, even though body of indictment alleged that defendant committed sexual battery on a 13‑year‑old, which constitutes second‑degree CSC with a minor, where caption of indictment and title to indictment’s body stated that alleged crime was first‑degree CSC with a minor, which involves victim younger than 11, and statutory reference in indictment was changed at beginning of trial from statute prohibiting CSC with minors to statute prohibiting first‑degree CSC, which involves aggravated force but has no age element. State v. Ellison (S.C.App. 2003) 356 S.C. 33, 586 S.E.2d 596. Indictment And Information 48

6. Admissibility of evidence

Trial court did not abuse its discretion in admitting victim’s forensic interview and allowing jurors to use transcript of audio portion of interview, even though victim’s statement in video was not clearly audible, in prosecution for lewd act upon a child; court demonstrated that it understood the purpose of statute governing admission of out‑of‑court statements of children when it explained to jurors that they needed to “listen and watch” and “decide what was said and done on the video, not what the transcript is.” State v. White (S.C.App. 2016) 416 S.C. 135, 784 S.E.2d 695. Criminal Law 438(8); Criminal Law 858(1)

Although evidence of prior consistent statements is ordinarily inadmissible when a witness has not been impeached, an exception to this rule exists in criminal sexual conduct cases. When the victim testifies, evidence from other witnesses that the victim complained of the sexual assault is admissible as corroboration of the incident. However, the evidence must be limited to the time and place of the assault, and may not include particulars or details. State v. Barrett (S.C. 1989) 299 S.C. 485, 386 S.E.2d 242.

7. Instructions

Pursuant to Section 16‑3‑657, the testimony of the victim need not be corroborated in prosecutions under Sections 16‑3‑652 through 16‑3‑658; consequently, the trial judge, in the prosecution of an action for criminal sexual conduct with a minor, properly charged the jury that it could believe any single witness over several, it was the sole judge of the facts, he had no opinion about those facts, and the state had the burden of proving the offense charged beyond a reasonable doubt. State v. Schumpert (S.C. 1993) 312 S.C. 502, 435 S.E.2d 859, rehearing denied. Infants 1666(5); Sex Offenses 421

After having charged the jury regarding both first degree criminal sexual conduct and the lesser offense of second degree criminal sexual conduct, the trial court did not err in failing to instruct them that it should resolve any reasonable doubt in favor of the lesser charge where there was no evidence to support a finding that the defendant was only guilty of the lesser charge. State v. Davis (S.C. 1992) 309 S.C. 326, 422 S.E.2d 133, rehearing denied, certiorari denied 113 S.Ct. 2355, 508 U.S. 915, 124 L.Ed.2d 263.

The trial court erred in charging the jury that it could find the offense of attempted criminal sexual conduct occurred “on or about February 14th” where, although the indictment had used this language, after jury selection the state had moved to amend the indictment and orally confirmed that it would seek to prove the offense occurred on February 14th but did not physically alter the indictment to reflect this amendment, and during trial the defendant had presented evidence that on this day he had been engaged in church activities from 7:00 a.m. until 10:00 p.m.; although the state need not prove the exact date set forth in the indictment unless time is an essential element of the charge, the defendant is entitled to be sufficiently apprised of the offense charged. State v. Rallo (S.C. 1991) 304 S.C. 258, 403 S.E.2d 653.

Defendant charged with criminal sexual conduct in first degree, who is convicted of kidnapping, is not entitled to have jury charged on second degree and third degree criminal sexual conduct but is entitled to have jury charged on assault and battery of high and aggravated nature. State v. Drafts (S.C. 1986) 288 S.C. 30, 340 S.E.2d 784.

A defendant indicted for criminal sexual conduct in the first degree was properly convicted of criminal sexual conduct in the second degree under the evidence presented at trial since the offense of criminal sexual conduct in the second and third degrees are lesser included offenses in the charge of criminal sexual conduct in the first degree and, if the facts warrant, the lesser degrees of the offense may be submitted to the jury under a charge of the first degree. State v. Summers (S.C. 1981) 276 S.C. 11, 274 S.E.2d 427.

8. Sufficiency of evidence

Evidence was sufficient to support conviction for second‑degree criminal sexual conduct; victim testified defendant performed oral sex on him throughout summer at frequency of two to three times per week at time he was under age of 16, victim was younger than defendant and had been student in defendant’s class, which would have placed defendant in position of familial, custodial, or official authority to coerce victim to submit. State v. Nicholson (S.C.App. 2005) 366 S.C. 568, 623 S.E.2d 100, rehearing denied, certiorari denied, certiorari denied 128 S.Ct. 87, 552 U.S. 815, 169 L.Ed.2d 20. Infants 1750; Sex Offenses 258

The evidence supported a verdict of second degree assault with intent to commit criminal sexual conduct, even though the defendant did not verbally threaten the victim, where, after pulling her from the balcony railing over which she was trying to escape, the defendant grabbed her breasts with both hands and began fumbling with the clothing that covered her stomach; thus, the defendant’s actions supported an inference that he threatened to use high and aggravated force on the victim to commit a sexual battery. State v. Fulp (S.C.App. 1992) 310 S.C. 278, 423 S.E.2d 149.

There was no evidence to support a finding of second degree criminal sexual conduct where (1) the defendant admitted that he struck the victim several times with his fist after she had refused his advances, and that he continued to hit or shove her until they reached the site of the sexual assault, and (2) the state’s evidence indicated that the victim was severely physically abused before, and during, the sexual assault. State v. Davis (S.C. 1992) 309 S.C. 326, 422 S.E.2d 133, rehearing denied, certiorari denied 113 S.Ct. 2355, 508 U.S. 915, 124 L.Ed.2d 263.

9. Sentence and punishment

The trial court did not err in sentencing a defendant,who was convicted of second degree criminal sexual conduct.with a minor under Section 16‑3‑655 (which does not specify a maximum penalty),.to 20 years imprisonment even though Section 17‑25‑20 provides a maximum penalty of 10 years for a felony for which the legislature has failed to provide another sentence, since Section 16‑3‑653 provides that second degree criminal sexual conduct is punishable by imprisonment for up to 20 years, and the clear intent of the legislature was to read Sections 16‑3‑655 and 16‑3‑653, statutes within the same act, in conjunction. State v. Outlaw (S.C.App. 1991) 304 S.C. 347, 404 S.E.2d 516, reversed 307 S.C. 177, 414 S.E.2d 147.

**SECTION 16‑3‑654.** Criminal sexual conduct in the third degree.

(1) A person is guilty of criminal sexual conduct in the third degree if the actor engages in sexual battery with the victim and if any one or more of the following circumstances are proven:

(a) The actor uses force or coercion to accomplish the sexual battery in the absence of aggravating circumstances.

(b) The actor knows or has reason to know that the victim is mentally defective, mentally incapacitated, or physically helpless and aggravated force or aggravated coercion was not used to accomplish sexual battery.

(2) Criminal sexual conduct in the third degree is a felony punishable by imprisonment for not more than ten years, according to the discretion of the court.

HISTORY: 1977 Act No. 157 Section 4.

CROSS REFERENCES

Commission of this crime within specified radius of child day care center as separate offense, see Section 63‑13‑200.

Denial of registration as an operator of a child day care or group day care home where the applicant, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑820.

Denial of renewal for child day care or group day care home where the person applying for approval, the operator of the facility, or an employee or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑630.

Fingerprint review of any person applying to operate or seek employment at a child day care or group day care home to determine prior conviction of the crime referred to in this section, see Section 63‑13‑620.

Foster care placement with certain persons prohibited, see Section 63‑7‑2350.

Implementation of supervised furlough program, search and seizure, fee, guidelines, eligibility criteria, see Section 24‑13‑710.

No license or registration will be issued to any religious establishment to operate a child day care or group day care home where the operator, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑1010.

No person may be employed by the Department of Social Services in its day care licensing or child protective services divisions who has been convicted of the crime referred to in this section, see Section 63‑13‑190.

Offender registry information available to public, see Section 23‑3‑490.

Past conviction check prior to initial employment of teachers, see Section 59‑26‑40.

Penalty under this section for producing, directing or promoting sexual performance by child, see Section 16‑3‑820.

Persons convicted of Title 16, Chapter 3 crimes prohibited from appointment as guardian ad litem for child in abuse or neglect proceeding, see Section 63‑11‑520.

Persons convicted under this section must register for sex offender registry, see Section 23‑3‑430.

Placement of minor sex offenders, see Section 63‑7‑2360.

Post‑conviction DNA procedures, see Section 17‑28‑10 et seq.

Preservation of DNA evidence, see Section 17‑28‑310 et seq.

Prohibited acts A, narcotics, penalties, see Section 44‑53‑370.

Trafficking in persons, definitions, see Section 16‑3‑2010.

Library References

Assault and Battery 59, 100.

Rape 6, 12, 64.

Sodomy 1, 8.

Westlaw Topic Nos. 37, 321, 357.

C.J.S. Rape Sections 1, 3, 24, 28 to 30, 121 to 122.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Assault and Battery Section 26, Cases Illustrating Right to Jury Charge.

S.C. Jur. Attorney and Client Section 11, Conviction of a Crime.

S.C. Jur. Criminal Sexual Conduct Section 2, All Degrees.

Attorney General’s Opinions

Offenses categorized by the Attorney General as tier 3 offenders as defined by the Federal Sex Offender Registration and Notification Act. SC Op.Atty.Gen. (May 30, 2008) 2008 WL 2324820.

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1. In general

Deputy solicitor’s convictions for acceptance of bribe and criminal sexual conduct warranted Supreme Court’s acceptance of agreement providing for disbarment. Matter of Roberts (S.C. 1998) 331 S.C. 325, 503 S.E.2d 160. Attorney And Client 59.14(4)

Acceptance of a bribe and criminal sexual conduct are serious crimes, for purposes of attorney disciplinary proceedings, since the circumstances of the commission of those crimes adversely reflect on an attorney’s honesty, trustworthiness, and fitness as a lawyer. Matter of Roberts (S.C. 1998) 331 S.C. 325, 503 S.E.2d 160. Attorney And Client 39

The commission of criminal sexual conduct in any degree is a crime of moral turpitude, for purposes of attorney disciplinary proceedings. Matter of Roberts (S.C. 1998) 331 S.C. 325, 503 S.E.2d 160. Attorney And Client 39

Acceptance of a bribe and criminal sexual conduct are conduct involving dishonesty, fraud, deceit, or misrepresentation. Matter of Roberts (S.C. 1998) 331 S.C. 325, 503 S.E.2d 160. Attorney And Client 39

Section 16‑3‑654 does not overrule Section 44‑23‑1150 by implication. State v. Kirkland (S.C. 1984) 282 S.C. 14, 317 S.E.2d 444.

2. Constitutional issues

Fact that “force” and “coercion” are not defined in S.C. Code Section 16‑3‑654 does not render statute vague or ambiguous as they are words of common ordinary meaning and are sufficiently specific and fundamental to proscribe conduct. State v. Hamilton (S.C. 1981) 276 S.C. 173, 276 S.E.2d 784. Sex Offenses 5(1)

3. Lesser included offenses

Third degree criminal sexual conduct (CSC) was not a lesser included offense of first degree CSC with a minor, as third degree CSC contained element not found in first degree CSC with a minor, that the actor knew or had reason to know that the victim was physically helpless. State v. Green (S.C.App. 2000) 343 S.C. 207, 539 S.E.2d 419. Indictment And Information 191(.5)

Third degree criminal sexual conduct was not lesser included offense of first degree criminal sexual conduct, as charged offense of first degree criminal sexual conduct did not contain elements requiring that victim be mentally defective, and that offender knew, or had reason to know, that victim was mentally defective, and thus trial court lacked subject matter jurisdiction to convict defendant, who allegedly sexually assaulted mentally retarded victim, of third degree criminal sexual conduct; overruling State v. Summers 276 S.C. 11, 274 S.E.2d 427 and State v. Burgess, 278 S.C. 497, 299 S.E.2d 328. State v. McFadden (S.C. 2000) 342 S.C. 629, 539 S.E.2d 387. Indictment And Information 189(10)

4. Indictment

An amendment of an indictment at the close of evidence at trial, which increased the lesser charge of assault with intent to commit third degree criminal sexual conduct to the greater charge of assault with intent to commit first degree criminal sexual conduct, was improper as it exceeded the terms of Section 17‑19‑100, which permits amendment of an indictment provided that the nature of the offense charged is not changed. State v. Riddle (S.C. 1990) 301 S.C. 211, 391 S.E.2d 253, post‑conviction relief granted 308 S.C. 361, 418 S.E.2d 308, rehearing denied. Indictment And Information 159(2)

5. Admissibility of evidence

Testimony regarding history and work of foundation that defendant allegedly established was not substantive evidence constituting prior bad act in criminal sexual conduct prosecution; solicitor’s questions did not elicit or establish that defendant had propensity to commit criminal sexual conduct. State v. Richardson (S.C.App. 2004) 358 S.C. 586, 595 S.E.2d 858, rehearing denied. Criminal Law 373.4

Evidence regarding history and work of foundation that defendant allegedly established that was supposed to assist victims’ family and church was relevant to issue of defendant’s alleged coercion of two female victims in criminal sexual conduct prosecution; victims testified that defendant threatened to withhold from their church assistance of foundation if they did not comply with defendant’s sexual demands, so it was relevant as to why they in fact complied, evidence established basis of defendant’s authority over victims, and testimony was relevant to defendant’s credibility given he denied ever sexually assaulting either victim. State v. Richardson (S.C.App. 2004) 358 S.C. 586, 595 S.E.2d 858, rehearing denied. Sex Offenses 213

Officer’s testimony regarding his conversation with defendant, wherein defendant acknowledged that he had a problem with his sexual desires, was properly admitted as a confession to the charged crime of criminal sexual conduct; defendant’s statement was not introduced to show his bad character, but, rather, his statement was intended to convey to the officer that he had committed the sexual assault on the victim and that he would return the next morning to give the complete details of the incident. State v. Tufts (S.C.App. 2003) 355 S.C. 493, 585 S.E.2d 523, rehearing denied, certiorari denied. Criminal Law 410.8

Although evidence of prior consistent statements is ordinarily inadmissible when a witness has not been impeached, an exception to this rule exists in criminal sexual conduct cases. When the victim testifies, evidence from other witnesses that the victim complained of the sexual assault is admissible as corroboration of the incident. However, the evidence must be limited to the time and place of the assault, and may not include particulars or details. State v. Barrett (S.C. 1989) 299 S.C. 485, 386 S.E.2d 242.

6. Instructions

Defendant was not entitled to instruction on assault and battery of high and aggravated nature (ABHAN) as lesser‑included offense of assault with intent to commit criminal sexual conduct (ACSC) in the third degree; only evidence that could have supported an ABHAN instruction allegedly occurred after the sexual assault took place, that is, when defendant heard victim’s grandnephew come into the home and defendant held the victim to the bed, however ACSC charge related only to those acts committed by defendant that preceded the grandnephew’s coming into the home, acts that defendant claimed were consensual in nature and victim claimed were not. State v. Whitten (S.C.App. 2007) 375 S.C. 43, 649 S.E.2d 505, rehearing denied, certiorari denied. Criminal Law 795(2.80)

Where victim testified that defendant had sex with her despite her repeated refusals and that she was in fear for her life, this testimony alone was sufficient to send charge of third‑degree criminal sexual conduct to the jury, even though defendant testified that encounter was consensual; defendant’s testimony did not entitle him to directed verdict but, rather, created credibility issue to be resolved by jury. State v. Burroughs (S.C.App. 1997) 328 S.C. 489, 492 S.E.2d 408. Sex Offenses 348; Sex Offenses 351

Pursuant to Section 16‑3‑657, the testimony of the victim need not be corroborated in prosecutions under Sections 16‑3‑652 through 16‑3‑658; consequently, the trial judge, in the prosecution of an action for criminal sexual conduct with a minor, properly charged the jury that it could believe any single witness over several, it was the sole judge of the facts, he had no opinion about those facts, and the state had the burden of proving the offense charged beyond a reasonable doubt. State v. Schumpert (S.C. 1993) 312 S.C. 502, 435 S.E.2d 859, rehearing denied. Infants 1666(5); Sex Offenses 421

Defendant charged with criminal sexual conduct in first degree, who is convicted of kidnapping, is not entitled to have jury charged on second degree and third degree criminal sexual conduct but is entitled to have jury charged on assault and battery of high and aggravated nature. State v. Drafts (S.C. 1986) 288 S.C. 30, 340 S.E.2d 784.

7. Sufficiency of evidence

Evidence of intent to engage in sexual battery was insufficient to support conviction of assault with intent to commit third‑degree criminal sexual conduct (CSC), where victim testified only that defendant put his hand just inside waistline of her pants and then withdrew it. State v. Atieh (S.C.App. 2012) 397 S.C. 641, 725 S.E.2d 730, rehearing denied. Sex Offenses 288

Evidence was sufficient to establish use of force or coercion as required to support conviction for sexual battery; defendant said he would provide financial assistance to victim’s family and church, victim had been raised in the church and taught to respect her elders and authority figures, she feared she would be punished if she did not do as defendant asked, defendant had sexual intercourse with victim despite her refusals, defendant supported his actions by quoting scriptures, victim was concerned that her family and church would be deprived of defendant’s assistance if she failed to comply with his requests, and victim was not willing participant. State v. Richardson (S.C.App. 2004) 358 S.C. 586, 595 S.E.2d 858, rehearing denied. Infants 1750; Sex Offenses 256; Sex Offenses 276

A defendant indicted for criminal sexual conduct in the first degree was properly convicted of criminal sexual conduct in the second degree under the evidence presented at trial since the offense of criminal sexual conduct in the second and third degrees are lesser included offenses in the charge of criminal sexual conduct in the first degree and, if the facts warrant, the lesser degrees of the offense may be submitted to the jury under a charge of the first degree. State v. Summers (S.C. 1981) 276 S.C. 11, 274 S.E.2d 427.

8. Review

Defendant failed to preserve for appellate review his claim that solicitor’s allegedly improper questions concerning whether he considered himself a man of God placed his character at issue, where defendant objected to question at trial on ground of relevancy. State v. Richardson (S.C.App. 2004) 358 S.C. 586, 595 S.E.2d 858, rehearing denied. Criminal Law 1043(3)

In prosecution of defendant for criminal sexual conduct, trial judge’s decision that officer could testify regarding his conversation with defendant, wherein defendant acknowledged that he had a problem with his sexual desires, was a final ruling since this decision was reached after in camera testimony from both officer and defendant, lengthy discussion with counsel, and an overnight recess, and thus, defendant’s objections prior to trial judge’s ruling preserved for appeal his claim that officer’s testimony constituted improper character evidence against him; immediately after trial judge ruled, the State called officer to the stand, and he testified in front of jury, and there was no opportunity for the trial judge to change his ruling. State v. Tufts (S.C.App. 2003) 355 S.C. 493, 585 S.E.2d 523, rehearing denied, certiorari denied. Criminal Law 1045

**SECTION 16‑3‑655.** Criminal sexual conduct with a minor; aggravating and mitigating circumstances; penalties; repeat offenders.

(A) A person is guilty of criminal sexual conduct with a minor in the first degree if:

(1) the actor engages in sexual battery with a victim who is less than eleven years of age; or

(2) the actor engages in sexual battery with a victim who is less than sixteen years of age and the actor has previously been convicted of, pled guilty or nolo contendere to, or adjudicated delinquent for an offense listed in Section 23‑3‑430(C) or has been ordered to be included in the sex offender registry pursuant to Section 23‑3‑430(D).

(B) A person is guilty of criminal sexual conduct with a minor in the second degree if:

(1) the actor engages in sexual battery with a victim who is fourteen years of age or less but who is at least eleven years of age; or

(2) the actor engages in sexual battery with a victim who is at least fourteen years of age but who is less than sixteen years of age and the actor is in a position of familial, custodial, or official authority to coerce the victim to submit or is older than the victim. However, a person may not be convicted of a violation of the provisions of this item if he is eighteen years of age or less when he engages in consensual sexual conduct with another person who is at least fourteen years of age.

(C) A person is guilty of criminal sexual conduct with a minor in the third degree if the actor is over fourteen years of age and the actor wilfully and lewdly commits or attempts to commit a lewd or lascivious act upon or with the body, or its parts, of a child under sixteen years of age, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of the actor or the child. However, a person may not be convicted of a violation of the provisions of this subsection if the person is eighteen years of age or less when the person engages in consensual lewd or lascivious conduct with another person who is at least fourteen years of age.

(D)(1) A person convicted of a violation of subsection (A)(1) is guilty of a felony and, upon conviction, must be imprisoned for a mandatory minimum of twenty‑five years, no part of which may be suspended nor probation granted, or must be imprisoned for life. In the case of a person pleading guilty or nolo contendere to a violation of subsection (A)(1), the judge must make a specific finding on the record regarding whether the type of conduct that constituted the sexual battery involved sexual or anal intercourse by a person or intrusion by an object. In the case of a person convicted at trial for a violation of subsection (A)(1), the judge or jury, whichever is applicable, must designate as part of the verdict whether the conduct that constituted the sexual battery involved sexual or anal intercourse by a person or intrusion by an object. If the person has previously been convicted of, pled guilty or nolo contendere to, or adjudicated delinquent for first degree criminal sexual conduct with a minor who is less than eleven years of age or a federal or out‑of‑state offense that would constitute first degree criminal sexual conduct with a minor who is less than eleven years of age, he must be punished by death or by imprisonment for life, as provided in this section. For the purpose of determining a prior conviction under this subsection, the person must have been convicted of, pled guilty or nolo contendere to, or adjudicated delinquent on a separate occasion, prior to the instant adjudication, for first degree criminal sexual conduct with a minor who is less than eleven years of age or a federal or out‑of‑state offense that would constitute first degree criminal sexual conduct with a minor who is less than eleven years of age. In order to be eligible for the death penalty pursuant to this section, the sexual battery constituting the current offense and any prior offense must have involved sexual or anal intercourse by a person or intrusion by an object. If any prior offense that would make a person eligible for the death penalty pursuant to this section occurred prior to the effective date of this act and no specific finding was made regarding the nature of the conduct or is an out‑of‑state or federal conviction, the determination of whether the sexual battery constituting the prior offense involved sexual or anal intercourse by a person or intrusion by an object must be made in the separate sentencing proceeding provided in this section and proven beyond a reasonable doubt and designated in writing by the judge or jury, whichever is applicable. If the judge or jury, whichever is applicable, does not find that the prior offense involved sexual or anal intercourse by a person or intrusion by an object, then the person must be sentenced to imprisonment for life. For purposes of this subsection, imprisonment for life means imprisonment until death.

(2) A person convicted of a violation of subsection (A)(2) is guilty of a felony and, upon conviction, must be imprisoned for not less than ten years nor more than thirty years, no part of which may be suspended nor probation granted.

(3) A person convicted of a violation of subsection (B) is guilty of a felony and, upon conviction, must be imprisoned for not more than twenty years in the discretion of the court.

(4) A person convicted of a violation of subsection (C) is guilty of a felony and, upon conviction, must be fined in the discretion of the court or imprisoned not more than fifteen years, or both.

(E) If the State seeks the death penalty, upon conviction or adjudication of guilt of a defendant pursuant to this section, a statutory aggravating circumstance is found beyond a reasonable doubt pursuant to items (1) and (2), and a recommendation of death is not made, the trial judge must impose a sentence of life imprisonment. For purposes of this section, “life imprisonment” means until death of the offender without the possibility of parole, and when requested by the State or the defendant, the judge must charge the jury in his instructions that life imprisonment means until the death of the defendant without the possibility of parole. No person sentenced to life imprisonment, pursuant to this subsection, is eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory life imprisonment required by this section. Under no circumstances may a female who is pregnant be executed, so long as she is pregnant or for a period of at least nine months after she is no longer pregnant. When the Governor commutes a sentence of death imposed pursuant to this section to life imprisonment pursuant to the provisions of Section 14, Article IV of the Constitution of South Carolina, 1895, the commutee is not eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, good conduct credits, education credits, or any other credits that would reduce the mandatory imprisonment required by this subsection.

(1) When the State seeks the death penalty, upon conviction or adjudication of guilt of a defendant pursuant to this section, the court shall conduct a separate sentencing proceeding. In the proceeding, if a statutory aggravating circumstance is found, the defendant must be sentenced to either death or life imprisonment. The proceeding must be conducted by the trial judge before the trial jury as soon as practicable after the lapse of twenty‑four hours unless waived by the defendant. If trial by jury has been waived by the defendant and the State, or if the defendant pled guilty, the sentencing proceeding must be conducted before the judge. In the sentencing proceeding, the jury or judge shall hear additional evidence in extenuation, mitigation, or aggravation of the punishment. Only evidence in aggravation as the State has informed the defendant in writing before the trial is admissible. This section must not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States, or the State of South Carolina, or the applicable laws of either. The State, the defendant, and his counsel are permitted to present arguments for or against the sentence to be imposed. The defendant and his counsel shall have the closing argument regarding the sentence to be imposed.

(2) In sentencing a person, upon conviction or adjudication of guilt of a defendant pursuant to this section, the judge shall consider, or he shall include in his instructions to the jury for it to consider, mitigating circumstances otherwise authorized or allowed by law and the following statutory aggravating and mitigating circumstances which may be supported by the evidence:

(a) Statutory aggravating circumstances:

(i) The victim’s resistance was overcome by force.

(ii) The victim was prevented from resisting the act because the actor was armed with a dangerous weapon.

(iii) The victim was prevented from resisting the act by threats of great and immediate bodily harm, accompanied by an apparent power to inflict bodily harm.

(iv) The victim is prevented from resisting the act because the victim suffers from a physical or mental infirmity preventing his resistance.

(v) The crime was committed by a person with a prior conviction for murder.

(vi) The offender committed the crime for himself or another for the purpose of receiving money or a thing of monetary value.

(vii) The offender caused or directed another to commit the crime or committed the crime as an agent or employee of another person.

(viii) The crime was committed against two or more persons by the defendant by one act, or pursuant to one scheme, or course of conduct.

(ix) The crime was committed during the commission of burglary in any degree, kidnapping, or trafficking in persons.

(b) Mitigating circumstances:

(i) The defendant has no significant history of prior criminal convictions involving the use of violence against another person.

(ii) The crime was committed while the defendant was under the influence of mental or emotional disturbance.

(iii) The defendant was an accomplice in the crime committed by another person and his participation was relatively minor.

(iv) The defendant acted under duress or under the domination of another person.

(v) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(vi) The age or mentality of the defendant at the time of the crime.

(vii) The defendant was below the age of eighteen at the time of the crime.

The statutory instructions as to statutory aggravating and mitigating circumstances must be given in charge and in writing to the jury for its deliberation. The jury, if its verdict is a recommendation of death, shall designate in writing, and signed by all members of the jury, the statutory aggravating circumstance or circumstances, which it found beyond a reasonable doubt. The jury, if it does not recommend death, after finding a statutory aggravating circumstance or circumstances beyond a reasonable doubt, shall designate in writing, and signed by all members of the jury, the statutory aggravating circumstance or circumstances it found beyond a reasonable doubt. In nonjury cases, the judge shall make the designation of the statutory aggravating circumstance or circumstances. Unless at least one of the statutory aggravating circumstances enumerated in this section is found, the death penalty must not be imposed.

When a statutory aggravating circumstance is found and a recommendation of death is made, the trial judge shall sentence the defendant to death. The trial judge, before imposing the death penalty, shall find as an affirmative fact that the death penalty was warranted under the evidence of the case and was not a result of prejudice, passion, or any other arbitrary factor. When a statutory aggravating circumstance is found and a sentence of death is not recommended by the jury, the trial judge shall sentence the defendant to life imprisonment as provided in this subsection. Before dismissing the jury, the trial judge shall question the jury as to whether or not it found a statutory aggravating circumstance or circumstances beyond a reasonable doubt. If the jury does not unanimously find any statutory aggravating circumstances or circumstances beyond a reasonable doubt, it shall not make a sentencing recommendation. When a statutory aggravating circumstance is not found, the trial judge shall sentence the defendant to life imprisonment. No person sentenced to life imprisonment pursuant to this section is eligible for parole or to receive any work credits, good conduct credits, education credits, or any other credits that would reduce the sentence required by this section. If the jury has found a statutory aggravating circumstance or circumstances beyond a reasonable doubt, the jury shall designate this finding, in writing, signed by all the members of the jury. The jury shall not recommend the death penalty if the vote for the death penalty is not unanimous as provided. If members of the jury after a reasonable deliberation cannot agree on a recommendation as to whether or not the death sentence should be imposed on a defendant upon conviction or adjudication of guilt of a defendant pursuant to this section, the trial judge shall dismiss the jury and shall sentence the defendant to life imprisonment, as provided in this subsection.

(3) Notwithstanding the provisions of Section 14‑7‑1020, in cases involving capital punishment a person called as a juror must be examined by the attorney for the defense.

(4) In a criminal action pursuant to this section, which may be punishable by death, a person may not be disqualified, excused, or excluded from service as a juror by reason of his beliefs or attitudes against capital punishment unless those beliefs or attitudes would render him unable to return a verdict according to law.

(F)(1) In all cases in which an individual is sentenced to death pursuant to this section, the trial judge, before the dismissal of the jury, shall verbally instruct the jury concerning the discussion of its verdict. A standard written instruction must be promulgated by the Supreme Court for use in capital cases brought pursuant to this section.

(2) The verbal instruction must include:

(a) the right of the juror to refuse to discuss the verdict;

(b) the right of the juror to discuss the verdict to the extent that the juror so chooses;

(c) the right of the juror to terminate any discussion pertaining to the verdict at any time the juror so chooses;

(d) the right of the juror to report any person who continues to pursue a discussion of the verdict or who continues to harass the juror after the juror has refused to discuss the verdict or communicated a desire to terminate discussion of the verdict; and

(e) the name, address, and phone number of the person or persons to whom the juror should report any harassment concerning the refusal to discuss the verdict or the juror’s decision to terminate discussion of the verdict.

(3) In addition to the verbal instruction of the trial judge, each juror, upon dismissal from jury service, shall receive a copy of the written jury instruction as provided in item (1).

(G)(1) Whenever the death penalty is imposed pursuant to this section, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of South Carolina. The clerk of the trial court, within ten days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court of South Carolina together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Supreme Court of South Carolina.

(2) The Supreme Court of South Carolina shall consider the punishment as well as any errors by way of appeal.

(3) With regard to the sentence, the court shall determine whether the:

(a) sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;

(b) evidence supports the jury’s or judge’s finding of a statutory aggravating circumstance as enumerated in subsection (E)(2)(a); and

(c) sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(4) Both the defendant and the State shall have the right to submit briefs within the time provided by the court and to present oral arguments to the court.

(5) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, is authorized to:

(a) affirm the sentence of death; or

(b) set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the Supreme Court of South Carolina in its decision, and the extracts prepared as provided for, must be provided to the resentencing judge for his consideration. If the court finds error prejudicial to the defendant in the sentencing proceeding conducted by the trial judge before the trial jury as outlined in subsection (E)(1), the court may set the sentence aside and remand the case for a resentencing proceeding to be conducted by the same or a different trial judge and by a new jury impaneled for this purpose. In the resentencing proceeding, the new jury, if the defendant does not waive the right of a trial jury for the resentencing proceeding, shall hear evidence in extenuation, mitigation, or aggravation of the punishment in addition to any evidence admitted in the defendant’s first trial relating to guilt for the particular crime for which the defendant has been found guilty.

(6) The sentence review is in addition to direct appeal, if taken, and the review and appeal must be consolidated for consideration. The court shall render its decision on all legal errors, the factual substantiation of the verdict, and the validity of the sentence.

(H)(1) Whenever the solicitor seeks the death penalty pursuant to this section, he shall notify the defense attorney of his intention to seek the death penalty at least thirty days prior to the trial of the case. At the request of the defense attorney, the defense attorney must be excused from all other trial duties ten days prior to the term of court in which the trial is to be held.

(2)(a) Whenever any person is charged with first degree criminal sexual conduct with a minor who is less than eleven years and the death penalty is sought, the court, upon determining that the person is unable financially to retain adequate legal counsel, shall appoint two attorneys to defend the person in the trial of the action. One of the attorneys so appointed shall have at least five years’ experience as a licensed attorney and at least three years’ experience in the actual trial of felony cases, and only one of the attorneys so appointed may be the public defender or a member of his staff. In all cases when no conflict exists, the public defender or member of his staff must be appointed if qualified. If a conflict exists, the court then shall turn first to the contract public defender attorneys, if qualified, before turning to the Office of Indigent Defense.

(b) Notwithstanding another provision of law, the court shall order payment of all fees and costs from funds available to the Office of Indigent Defense for the defense of the indigent. Any attorney appointed must be compensated at a rate not to exceed fifty dollars per hour for time expended out of court and seventy‑five dollars per hour for time expended in court. Compensation may not exceed twenty‑five thousand dollars and must be paid from funds available to the Office of Indigent Defense for the defense of indigent represented by court‑appointed, private counsel.

(3)(a) Upon a finding in ex parte proceedings that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or sentence, the court shall authorize the defendant’s attorneys to obtain services on behalf of the defendant and shall order the payment, from funds available to the Office of Indigent Defense, of fees and expenses not to exceed twenty thousand dollars as the court deems appropriate. Payment of these fees and expenses may be ordered in cases where the defendant is an indigent represented by either court‑appointed, private counsel, or the public defender.

(b) Court‑appointed counsel seeking payment for fees and expenses shall request these payments from the Office of Indigent Defense within thirty days after the completion of the case. For the purposes of this statute, exhaustion of the funds shall occur if the funds administered by the Office of Indigent Defense and reserved for death penalty fees and expenses have been reduced to zero. If either the Death Penalty Trial Fund or the Conflict Fund has been exhausted in a month and the other fund contains money not scheduled to be disbursed in that month, then the Indigent Defense Commission must transfer a sufficient amount from the fund with the positive fund balance to the fund with no balance and pay the obligation to the extent possible.

(4) Payment in excess of the hourly rates and limit in item (2) or (3) is authorized only if the court certifies, in a written order with specific findings of fact, that payment in excess of the rates is necessary to provide compensation adequate to ensure effective assistance of counsel and payment in excess of the limit is appropriate because the services provided were reasonably and necessarily incurred. Upon a finding that timely procurement of services cannot await prior authorization, the court may authorize the provision of and payment for services nunc pro tunc.

(5) After completion of the trial, the court shall conduct a hearing to review and validate the fees, costs, and other expenditures on behalf of the defendant.

(6) The Supreme Court shall promulgate guidelines on the expertise and qualifications necessary for attorneys to be certified as competent to handle death penalty cases brought pursuant to this section.

(7) The Office of Indigent Defense shall maintain a list of death penalty qualified attorneys who have applied for and received certification by the Supreme Court as provided for in this subsection. In the event the court‑appointed counsel notifies the chief administrative judge in writing that he or she does not wish to provide representation in a death penalty case, the chief administrative judge shall advise the Office of Indigent Defense which shall forward a name or names to the chief administrative judge for consideration. The appointment power is vested in the chief administrative judge. The Office of Indigent Defense shall establish guidelines as are necessary to ensure that attorneys’ names are presented to the judges on a fair and equitable basis, taking into account geography and previous assignments from the list. Efforts must be made to present an attorney from the area or region where the action is initiated.

(8) The payment schedule provided in this subsection, as amended by Act 164 of 1993, shall apply to any case for which trial occurs on or after July 1, 1993.

(9) Notwithstanding another provision of law, only attorneys who are licensed to practice in this State and residents of this State may be appointed by the court and compensated with funds appropriated to the Death Penalty Trial Fund in the Office of Indigent Defense. This item shall not pertain to any case in which counsel has been appointed on the effective date of this act.

(10) The judicial department biennially shall develop and make available to the public a list of standard fees and expenses associated with the defense of an indigent person in a death penalty case.

(I) Notwithstanding another provision of law, in any trial pursuant to this section when the maximum penalty is death or in a separate sentencing proceeding following the trial, the defendant and his counsel shall have the right to make the last argument.

HISTORY: 1977 Act No. 157 Section 5; 1978 Act No. 639 Section 1; 1984 Act No. 509; 2005 Act No. 94, Section 1, eff June 1, 2005; 2006 Act No. 342, Section 3, eff July 1, 2006; 2006 Act No. 346, Section 1, eff July 1, 2006; 2008 Act No. 335, Section 18, eff June 16, 2008; 2010 Act No. 289, Section 6, eff June 11, 2010; 2012 Act No. 255, Section 1, eff June 18, 2012.

Editor’s Note

2006 Act No. 342, Section 1, provides as follows:

“This act may be cited as the ‘Sex Offender Accountability and Protection of Minors Act of 2006’.”

2006 Act No. 342, Section 12, provides as follows:

“It is the intent of the General Assembly that one of the purposes of this act is to provide for the death penalty for a subsequent offense of first degree criminal sexual conduct with a minor who is less than eleven years of age and that this act does not alter or amend and is separate and distinct from the provisions of Section 16‑3‑20, providing for the imposition of the death penalty for murder.”

2006 Act No. 346, Section 5, provides as follows:

“Expenses incurred relating to the defense of a constitutional challenge to the application of the provisions of Section 16‑3‑655, relating to the imposition of the death penalty, must be borne in their entirety by the Office of the Attorney General. The Office of the Attorney General is solely responsible for the defense of these actions and the Prosecution Coordination Commission and the offices of the individual circuit solicitors in the State must be held harmless.”

2006 Act No. 346, Section 6, provides as follows:

“The General Assembly is aware that this act amends sections of the South Carolina Code of Laws that are also amended in S.1267 of 2006 [Act 342], and it is the intent of the General Assembly that the provisions of this act control in their entirety as to those code sections.”

CROSS REFERENCES

Agreements required of offender in program, see Section 17‑22‑90.

Commission of this crime within specified radius of child day care center as separate offense, see Section 63‑13‑200.

Correction and treatment of youthful offenders, definitions, see Section 24‑19‑10.

Denial of registration as an operator of a child day care or group day care home where the applicant, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑820.

Denial of renewal for child day care or group day care home where the person applying for approval, the operator of the facility, or an employee or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑630.

Electronic monitoring, reporting damage to or removing monitoring device, penalty, see Section 23‑3‑540.

Fingerprint review of any person applying to operate or seek employment at a child day care or group day care home to determine prior conviction of the crime referred to in this section, see Section 63‑13‑620.

Foster care placement with certain persons prohibited, see Section 63‑7‑2350.

Implementation of supervised furlough program, search and seizure, fee, guidelines, eligibility criteria, see Section 24‑13‑710.

No license or registration will be issued to any religious establishment to operate a child day care or group day care home where the operator, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑1010.

No person may be employed by the Department of Social Services in its day care licensing or child protective services divisions who has been convicted of the crime referred to in this section, see Section 63‑13‑190.

Persons convicted of Title 16, Chapter 3 crimes prohibited from appointment as guardian ad litem for child in abuse or neglect proceeding, see Section 63‑11‑520.

Persons convicted under this section must provide a sample from which DNA may be obtained for inclusion in the State DNA Database, see Section 23‑3‑620.

Placement of minor sex offenders, see Section 63‑7‑2360.

Post‑conviction DNA procedures, see Section 17‑28‑10 et seq.

Preservation of DNA evidence, see Section 17‑28‑310 et seq.

Prohibited acts A, narcotics, penalties, see Section 44‑53‑370.

Sentencing, see Section 17‑25‑20 et seq.

Sexually Violent Predator Act, definitions, see Section 44‑48‑30.

Trafficking in persons, definitions, see Section 16‑3‑2010.

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Rape 13, 64.

Sodomy 1, 8.

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C.J.S. Evidence Section 380.

C.J.S. Infants Sections 193, 200 to 202.

C.J.S. Rape Sections 3, 6, 20 to 21, 24, 26, 121 to 122.

C.J.S. Sodomy Sections 1 to 5, 13 to 14.

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24 Am. Jur. Proof of Facts 3d 1, Action by Crime Victim Against School Arising Out of Assault or Criminal Act.

S.C. Jur. Assault and Battery Section 26, Cases Illustrating Right to Jury Charge.

S.C. Jur. Assault and Battery Section 33, Consent.

S.C. Jur. Assault and Battery Section 50, Consent.

S.C. Jur. Burglary Section 9, Punishment.

S.C. Jur. Criminal Sexual Conduct Section 2, All Degrees.

S.C. Jur. Criminal Sexual Conduct Section 4, Assault With Intent to Commit Criminal Sexual Conduct.

S.C. Jur. Criminal Sexual Conduct Section 5, Committing or Attempting a Lewd Act Upon a Child Under Fourteen.

S.C. Jur. Criminal Sexual Conduct Section 37, Outcry Evidence.

S.C. Jur. Probation, Parole, and Pardon Section 30, The Order of Pardon and Its Effect.

LAW REVIEW AND JOURNAL COMMENTARIES

Annual Survey of South Carolina Law: Criminal Law. 38 S.C. L. Rev. 75 (Autumn 1986).

South Carolina’s Evolving Standards of Decency: Capital Child Rape Statute Provides a Reminder that Societal Progression Continues Through Action, Not Idleness. 58 S.C. L. Rev. 509 (Spring 2007).

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Cruel and unusual punishment, death penalty, rape of a child, see Kennedy v. Louisiana, 2008, 128 S.Ct. 2641, 554 U.S. 407, 171 L.Ed.2d 525, as modified, modified on denial of rehearing 129 S.Ct. 1, 554 U.S. 945, 171 L.Ed.2d 932, on remand 994 So.2d 1287, 2005‑1981 (La. 11/21/08).

Attorney General’s Opinions

Offenses categorized by the Attorney General as tier 3 offenders as defined by the Federal Sex Offender Registration and Notification Act. SC Op.Atty.Gen. (May 30, 2008) 2008 WL 2324820.

Discussion of whether Jessica’s Law has retroactive effect. SC Op.Atty.Gen. (Sept. 6, 2006) 2006 WL 2849799.

The “Romeo” clause pursuant to Jessica’s Law. SC Op.Atty.Gen. (July 14, 2006) 2006 WL 2382448.

Discussion of the retroactive effect of the 1999 amendment to the Sex Offender Registry laws and the effect of the amendment on certain offenders convicted of second degree criminal sexual conduct with minors. SC Op.Atty.Gen. (Sept. 20, 2000) 2000 WL 1478804.

Crime of criminal sexual conduct with a minor under Section 16‑3‑655 is included within the term “violent” crimes for purposes of Section 16‑1‑60. 1991 Op.Atty.Gen. No 91‑46, p 118 (1991 WL 474776).

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1. In general

Statute allowing law enforcement to request victim of alleged criminal sexual conduct offense to submit to polygraph examination did not apply, where there was no evidence challenging credibility of victim. State v. McBride (S.C.App. 2016) 416 S.C. 379, 786 S.E.2d 435, certiorari denied. Criminal Law 388.5(1)

To establish the requisite elements of accessory before the fact to criminal sexual conduct, the State must prove: (1) the accused advised and agreed, urged, or in some way aided some other person to commit the offense; (2) the accused was not present when the offense was committed; and (3) some principal committed the offense. State v. Claypoole (S.C.App. 2006) 371 S.C. 473, 639 S.E.2d 466, rehearing denied, certiorari granted, certiorari dismissed as improvidently granted 382 S.C. 614, 677 S.E.2d 600. Sex Offenses 135

Rule that victim under the age of 16 is legally incapable of consenting to sexual battery committed by older person applies in both criminal and civil context. Doe ex rel. Roe v. Orangeburg County School Dist. No. 2 (S.C. 1999) 335 S.C. 556, 518 S.E.2d 259, rehearing denied. Assault And Battery 11; Infants 1594; Sex Offenses 62(3)

The elements of first‑degree assault with intent to commit criminal sexual conduct on a minor are: (1) an assault, (2) with the intent to commit a sexual battery, (3) against a minor under the age of eleven. State v. Brock (S.C.App. 1999) 335 S.C. 267, 516 S.E.2d 212. Infants 1594; Sex Offenses 16

Elements of second‑degree criminal sexual conduct with a minor are as follows: (1) the actor engages in sexual battery, (2) with a victim who is at least 14 years of age, but who is less than 16 years of age, and (3) the actor is in a position of familial, custodial, or official authority to coerce the victim to submit or is older than the victim. State v. Warren (S.C.App. 1998) 330 S.C. 584, 500 S.E.2d 128, rehearing denied, certiorari granted, reversed 341 S.C. 349, 534 S.E.2d 687. Infants 1611

Female can statutorily rape male child under gender‑neutral statute governing criminal sexual conduct with minors. Doe v. Brown (S.C. 1997) 331 S.C. 491, 489 S.E.2d 917. Infants 1596; Sex Offenses 26

As a matter of public policy, the General Assembly has determined that a minor under the age of sixteen is not capable of voluntarily consenting to a sexual battery committed by an older person; such is the law of the state whether it is applied in a criminal or civil context. Doe by Doe v. Greenville Hosp. System (S.C.App. 1994) 323 S.C. 33, 448 S.E.2d 564, rehearing denied, certiorari granted, certiorari dismissed as improvidently granted 320 S.C. 235, 464 S.E.2d 124.

To be in violation of Section 16‑3‑655, the actor must engage in a “sexual battery” with the victim. South Carolina Dept. of Social Services v. Forrester (S.C.App. 1984) 282 S.C. 512, 320 S.E.2d 39. Infants 1594; Sex Offenses 18

2. Constitutional issues

Sex offense defendant’s due process rights were not violated by police losing shirt worn by minor victim that victim’s mother had left with police after she took it to victim’s forensic and medical examination; defendant did not show bad faith by State in losing shirt, and it was speculative at best that shirt contained exculpatory value. State v. McBride (S.C.App. 2016) 416 S.C. 379, 786 S.E.2d 435, certiorari denied. Constitutional Law 4594(8); Criminal Law 2011

Jury instruction stating that testimony of criminal sexual conduct victim need not be corroborated violated state constitution’s section prohibiting courts from commenting to the jury on the facts of a case. State v. McBride (S.C.App. 2016) 416 S.C. 379, 786 S.E.2d 435, certiorari denied. Criminal Law 763(18)

Defendant was prejudiced by trial counsel’s failure to object to solicitor’s improper comments during closing argument in which solicitor vouched for victim’s credibility, misrepresented evidence adduced at trial, and appealed to juror’s emotions, as required to support claim of ineffective assistance of counsel, in trial for criminal sexual conduct (CSC) with minor; case was entirely dependent on credibility determination between State’s witnesses and defense’s witness, there was no direct evidence beyond victim’s assertions, and thus, evidence of defendant’s guilt was not overwhelming, and it was likely that solicitor’s emotional plea asking jurors if any of them would want defendant babysitting their child, particularly in conjunction with the solicitor’s improper vouching for Victim’s credibility, swayed jurors’ view of facts and resolution of contradictions in witnesses’ testimonies. Tappeiner v. State (S.C. 2016) 416 S.C. 239, 785 S.E.2d 471. Criminal Law 1944

Defendant was prejudiced by his trial counsel’s deficiency in failing to call medical expert to challenge the State’s medical evidence in prosecution of defendant for criminal sexual conduct with a minor; there were additional ways minor’s injury could have occurred, including self‑infliction or by accident, and these additional theories were not presented during trial. Reeves v. State (S.C.App. 2015) 415 S.C. 366, 782 S.E.2d 747, rehearing denied, certiorari denied. Criminal Law 1931

Defendant’s trial counsel was deficient for failing to call a medical expert to challenge the State’s medical evidence presented at trial of defendant for criminal sexual conduct with a minor; counsel did not consult with an expert prior to trial, even though he knew the State would attempt to admit evidence of a physical trauma, and counsel did not provide a legitimate trial strategy for failing to consult with an expert before trial or call a medical expert witness to testify at trial. Reeves v. State (S.C.App. 2015) 415 S.C. 366, 782 S.E.2d 747, rehearing denied, certiorari denied. Criminal Law 1931

Trial counsel’s failure to object to pediatrician’s testimony, that she believed victim was abused as improper bolstering, constituted deficient performance in trial for criminal sexual conduct (CSC) with a minor, lewd act upon a minor, and incest; although it was proper for pediatrician to opine that based on her examination, victim’s injuries were consistent with sexual abuse, testimony that pediatrician believed victim was abused implied that she found victim credible. Mangal v. State (S.C.App. 2015) 415 S.C. 310, 781 S.E.2d 732, rehearing denied, reversed 2017 WL 3045812. Criminal Law 1931

Trial counsel’s failure to object to pediatrician’s testimony, that she believed victim was abused as improper bolstering, was prejudicial to defendant in trial for criminal sexual conduct (CSC) with a minor, lewd act upon a minor, and incest; case lacked physical evidence and hinged on credibility, and pediatrician’s testimony was critical on that issue. Mangal v. State (S.C.App. 2015) 415 S.C. 310, 781 S.E.2d 732, rehearing denied, reversed 2017 WL 3045812. Criminal Law 1931

Statutory provision that permitted the admission of child’s videotaped forensic interview at defendant’s trial on the charge of first degree criminal sexual conduct with a minor did not violate the Sixth Amendment’s Confrontation Clause, even though defendant did not have the opportunity for contemporaneous cross‑examination of the child, and would have had to recall the child as an adverse witness in order to examine her about the videotaped statement; the child testified in open court and defendant’s right to the opportunity for effective cross‑examination was satisfied during the child’s actual trial testimony. State v. Anderson (S.C. 2015) 413 S.C. 212, 776 S.E.2d 76, rehearing denied. Criminal Law 662.40

New indictments that notified defendant that alleged offenses of criminal sexual conduct with a minor and committing a lewd act upon a minor occurred at an unspecified time over a six‑year period, rather over three summers, as alleged in the original indictments, were unconstitutionally overbroad and vague, in violation of defendant’s due process rights, because they lacked specificity as to when the alleged acts occurred; defendant was taken by surprise and significantly limited in his ability to combat the charges against him, as there was no way for defendant to know whether he could plead an acquittal, and due to the state’s belated presentation of the new indictments, defendant was given a mere two weeks to complete the task of researching events that occurred over a continuous six‑year period. State v. Baker (S.C. 2015) 411 S.C. 583, 769 S.E.2d 860, rehearing denied. Constitutional Law 4583; Indictment and Information 87(7)

Trial counsel’s failure to object when the solicitor impermissibly asked the jury to “speak up” for three‑year‑old child victim during its closing arguments did not prejudice defendant, and therefore did not constitute ineffective assistance of counsel, in prosecution for criminal sexual conduct with a minor; defendant failed to establish that but for counsel’s deficient performance the result at trial court have been different, given that the remark was limited in duration, and there was overwhelming evidence of defendant’s guilt, including testimony from four eyewitnesses, defendant’s admission of “accidental” penetration of victim, and evidence that child had exhibited symptoms indicative of sexual abuse and had been diagnosed with gonorrhea. Brown v. State (S.C. 2009) 383 S.C. 506, 680 S.E.2d 909. Criminal Law 1944

Trial counsel’s failure to accurately define sexual battery to defendant before the guilty plea hearing did not prejudice defendant, where the judge, during the plea hearing, read the indictments, which identified the elements of the offenses, defendant indicated that he understood the charges, and defendant admitted his guilt. Terry v. State (S.C. 2009) 383 S.C. 361, 680 S.E.2d 277. Criminal Law 1920

Trial counsel’s failure to accurately define sexual battery to defendant before the guilty plea hearing constituted deficient performance. Terry v. State (S.C. 2009) 383 S.C. 361, 680 S.E.2d 277. Criminal Law 1920

Defendant did not receive ineffective assistance of counsel when his attorney failed to object to amendment of indictment to change offense from second degree criminal sexual conduct to first degree; first‑degree offense applied when victim was under eleven years of age and victim in present case was seven. Wilson v. State (S.C. 1997) 327 S.C. 45, 488 S.E.2d 322. Criminal Law 1895

Double jeopardy did not bar the Family Court’s prosecution of a mother’s live‑in boyfriend, in an action by the county Department of Social Services seeking intervention for the protection of a child allegedly sexually abused by the boyfriend, even though he had been indicted for criminal sexual conduct with a minor and his trial in general sessions court was pending, since the Family Court action was totally independent of the criminal charge and any finding in Family Court would have no effect on the criminal action. Beaufort County Dept. of Social Services v. Strahan (S.C.App. 1992) 310 S.C. 553, 426 S.E.2d 331.

A defendant on trial for committing a lewd act upon a minor was not denied effective assistance by his counsel’s failure to call an examining doctor who failed to find any physical evidence of sexual abuse on the child victim where another doctor, who did find such evidence, was extensively questioned about the inconsistencies between the 2 findings. Underwood v. State (S.C. 1992) 309 S.C. 560, 425 S.E.2d 20.

A defendant on trial for committing a lewd act upon a minor was not denied effective assistance by his counsel’s failure to object to a doctor’s testimony of a “common profile” of people who sexually abuse children where the doctor had testified about the relatively minor physical injuries found on the child victim, and the testimony was offered to explain the type and degree of the injuries as being consistent with a certain type of sexual abuse. Underwood v. State (S.C. 1992) 309 S.C. 560, 425 S.E.2d 20.

The defendant failed to prove that his guilty plea to charges of sexual conduct with a minor (his step‑niece) was unlawfully induced by his counsel’s statement that if he did not plead guilty, his mother, wife and sister‑in‑law would go to jail where there were numerous inter‑related charges and potential charges against him and the other adult members of his family arising from instances of criminal sexual conduct with several minor family members, and he entered the guilty plea with an awareness of the plea negotiations concerning the other cases involved. Wade v. State (S.C. 1992) 308 S.C. 552, 419 S.E.2d 781.

The right to confrontation was not violated by the exclusion of a defendant charged with first‑degree criminal sexual conduct from a hearing to determine the necessity of using videotape for the testimony of the child‑victim where the defendant’s attorney was present at the hearing and the only issue was how, not if, the child would testify; the hearing was not a “crucial phase” and her absence did not hinder her effective cross‑examination at trial. Starnes v. State (S.C. 1991) 307 S.C. 247, 414 S.E.2d 582, rehearing denied.

A defendant’s right to confrontation was not violated by the use at her trial for first‑degree criminal sexual conduct of a videotape of the child‑victim’s testimony in place of the child where at the videotaping (1) her trial attorney was present, (2) she was able to view the proceeding by way of a closed circuit monitor, and (3) she was in constant contact with her attorney through the use of headphones; protecting a child‑victim from further trauma is an important state interest warranting the use of videotape testimony. Starnes v. State (S.C. 1991) 307 S.C. 247, 414 S.E.2d 582, rehearing denied.

The crime of first degree criminal sexual conduct with a minor under Section 16‑3‑655(1) requires that sexual battery be committed and that the victim be less than eleven years of age, whereas the crime of committing a lewd act on a minor under Section 16‑15‑140 [repealed] does not require a sexual battery and refers to victims under the age of fourteen; accordingly, a defendant could be reindicted for the offense of committing a lewd act on a child following a directed verdict of acquittal in his trial for first degree criminal sexual conduct with a minor without violating the doctrine of former jeopardy under the Fifth Amendment. State v. Norton (S.C. 1985) 286 S.C. 95, 332 S.E.2d 531.

3. Lesser included offenses

Defendant committed an overt act toward commission of the crime beyond acts of preparation, for purposes of attempt element of second‑degree attempted criminal sexual conduct (CSC) with a minor; defendant, in preparation, arranged a time and meeting location with a person he thought to be a minor, he described the type of car he would be driving and he confirmed the description of the putative minor’s clothing, and he left the location at which he was communicating with putative minor through Internet chat room and committed an act beyond mere preparation by driving to and physically arriving at prearranged location within 15 minutes of agreed upon time. State v. Reid (S.C.App. 2009) 383 S.C. 285, 679 S.E.2d 194, rehearing denied, certiorari granted, affirmed 393 S.C. 325, 713 S.E.2d 274. Infants 1591; Telecommunications 1350

There was no evidence to support instruction on charge of assault and battery of a high and aggravated nature (ABHAN) as lesser‑included offense of criminal sexual conduct with a minor (CSCM); as defendant’s defense was that he did not penetrate victim, and that she was injured when she fell out of a bunk bed while medical testimony indicated victim’s internal injury could have been caused only by penetration, defendant was guilty of sexual battery or no battery at all. Moultrie v. State (S.C. 2003) 354 S.C. 646, 583 S.E.2d 436. Criminal Law 795(2.80)

Second degree criminal sexual conduct (CSC) with a minor is not a lesser‑included offense of the first degree charge because it includes an age requirement element that is different from the age requirement element in the crime of first degree CSC with a minor; the first degree charge requires proof the victim is “less than eleven years old,” while the second degree charge requires proof the victim is “fourteen years of age or less but at least eleven years of age.” Cohen v. State (S.C. 2003) 354 S.C. 563, 582 S.E.2d 403. Indictment And Information 189(10)

Third degree criminal sexual conduct (CSC) was not a lesser included offense of first degree CSC with a minor, as third degree CSC contained element not found in first degree CSC with a minor, that the actor knew or had reason to know that the victim was physically helpless. State v. Green (S.C.App. 2000) 343 S.C. 207, 539 S.E.2d 419. Indictment And Information 191(.5)

Committing a lewd act on a minor is not a lesser‑included offense of first‑degree criminal sexual conduct on a minor. Campbell v. State (S.C. 2000) 342 S.C. 100, 535 S.E.2d 928. Indictment And Information 191(.5)

Committing a lewd act upon a minor was not a lesser included offense of first‑degree assault with intent to commit criminal sexual conduct on a minor. State v. Brock (S.C.App. 1999) 335 S.C. 267, 516 S.E.2d 212. Indictment And Information 191(.5)

In determining whether one crime is a lesser included offense of another, the test is whether the greater of the two offenses includes all of the elements of the lesser offense; if the lesser offense includes an element which is not included in the greater offense, then the lesser offense is not included in the greater offense. State v. Brock (S.C.App. 1999) 335 S.C. 267, 516 S.E.2d 212. Indictment And Information 189(1); Indictment And Information 191(.5)

Assault and battery of a high and aggravated nature is a lesser included offense of first‑degree criminal sexual conduct. State v. Murphy (S.C.App. 1996) 322 S.C. 321, 471 S.E.2d 739, rehearing denied. Indictment And Information 191(8)

SC Code Ann Section 16‑3‑655(3) is not lesser included offense of Section 16‑3‑653, since Section 16‑3‑655(3) includes additional element of age requirement, such that where defendant was indicted under Section 16‑3‑653 and trial judge charged jury only under Section 16‑3‑655(3), defendants conviction under Section 16‑3‑653 must be reversed and remanded, as defendant in criminal case is entitled to be tried only on charges set forth in indictment, even though defendant did not object about this matter at trial, as trial court lacked subject matter jurisdiction to convict defendant for offense when there was no indictment charging him with that offense when jury is sworn. State v. Munn (S.C. 1987) 292 S.C. 497, 357 S.E.2d 461.

Assault and battery of high and aggravated nature is lesser included offense under Section 16‑3‑655(1) and, at request of defendant, should be submitted to jury if there is evidence from which it can be inferred that defendant committed assault and battery of high and aggravated nature, rather than greater offense of criminal sexual conduct in first degree. State v. Mathis (S.C. 1986) 287 S.C. 589, 340 S.E.2d 538. Criminal Law 795(2.80); Criminal Law 1173.2(4)

4. Indictment

Indictments charging defendant with committing a lewd act upon a minor and criminal sexual conduct with a minor were sufficient, in that the indictments clearly identified the elements of lewd act and criminal sexual conduct and substantially tracked the statutory language so plainly that the nature of the charged offense could be easily understood. State v. Baker (S.C.App. 2010) 390 S.C. 56, 700 S.E.2d 440, rehearing denied, certiorari granted, reversed 411 S.C. 583, 769 S.E.2d 860. Indictment And Information 71.4(12)

Plea court did not have subject matter jurisdiction to accept defendant’s guilty plea to second degree criminal sexual conduct (CSC) with a minor, given that indictment improperly indicated defendant was charged with first degree CSC with a minor, and that second degree CSC with a minor was not a lesser‑included offense of first degree CSC with a minor. Cohen v. State (S.C. 2003) 354 S.C. 563, 582 S.E.2d 403. Criminal Law 273(4.1)

Amendments to indictment for second‑degree criminal sexual conduct with a minor, changing name of offense within body of indictment, and age of victim, did not change substantive nature of offense, where, like original indictment, amended indictment set forth all of statutory elements of offense, and amendment to victim’s age from 15 to 14 years old did not alter victim’s status as minor. State v. Warren (S.C.App. 1998) 330 S.C. 584, 500 S.E.2d 128, rehearing denied, certiorari granted, reversed 341 S.C. 349, 534 S.E.2d 687. Indictment And Information 159(2)

A charging indictment for first degree sexual conduct with a minor was sufficient where (1) it contained allegations of the necessary elements of the crime and alleged that these acts occurred at divers times during 1984 and 1985, and (2) the defendant’s defense of denial and factual impossibility were not prejudiced by the broad time range alleged. State v. Wade (S.C. 1991) 306 S.C. 79, 409 S.E.2d 780.

An indictment sufficiently alleged both the time and place of the alleged offense of first degree criminal sexual conduct where, although it did not state the exact location the offense occurred, it did contain the name of the county in which the offense was committed and stated that the offense occurred on several occasions, but that the occurrence which was the subject of the charge occurred “on or about December 9, 1988.” State v. Thompson (S.C.App. 1991) 305 S.C. 496, 409 S.E.2d 420.

5. Physical or psychological examination

In determining whether defendant has a compelling need or reason for additional physical or psychological examinations of child sexual assault victim, judge should consider (1) nature of examination requested and intrusiveness inherent in that examination, (2) victim’s age, (3) resulting physical and/or emotional effects of examination on victim, (4) probative value of examination to issue before court, (5) remoteness in time of examination to alleged criminal act, and (6) evidence already available for defendant’s use. In re Michael H. (S.C. 2004) 360 S.C. 540, 602 S.E.2d 729, rehearing denied, certiorari denied 125 S.Ct. 1644, 544 U.S. 943, 161 L.Ed.2d 511. Criminal Law 627.5(1)

Trial court could order child who alleged he was sexually assaulted to submit to independent psychological examination, in light of child’s admission of hearing voices in his head that told him to say and do mean things to his friends, child’s very young age, fact that child was undergoing counseling and spoke freely of incident, indicating he would not be further traumatized by another examination, and fact that child’s counselor testified child was hearing voices during year when child alleged assault occurred. In re Michael H. (S.C. 2004) 360 S.C. 540, 602 S.E.2d 729, rehearing denied, certiorari denied 125 S.Ct. 1644, 544 U.S. 943, 161 L.Ed.2d 511. Infants 2567

6. Joinder

Offenses of first‑degree criminal sexual conduct, arising from defendant’s conduct with respect to stepson, and lewd act upon a child, arising from defendant’s conduct with respect to stepdaughter, arose from single chain of events, as required for joinder of charges, even though incidents underlying charges occurred at different times; victims were siblings, molestation occurred at same place and over same eight‑month period of time, and with same modus operandi, in that defendant took advantage of victims’ habit of watching television with him. State v. Beekman (S.C. 2016) 415 S.C. 632, 785 S.E.2d 202. Criminal Law 620(1)

Offenses of first‑degree criminal sexual conduct, arising from defendant’s conduct with respect to stepson, and lewd act upon a child, arising from defendant’s conduct with respect to stepdaughter, were supported by same evidence, as required for joinder of charges, even though each offense was a distinct crime and was not proven by completely identical evidence; there were glaring similarities in defendant molesting both of his stepchildren in the same place, over the same time period, and in a similar manner, and testimony from many of the same witnesses would be used to prove both charges. State v. Beekman (S.C. 2016) 415 S.C. 632, 785 S.E.2d 202. Criminal Law 620(1)

For purposes of joinder analysis, two counts of criminal sexual conduct with a minor and two counts of lewd act upon a child, involving two victims, arose from same chain of circumstances, where molestation of each child during same time period and in same location, accomplished through same access to them; victims were sisters, defendant lived in victims’ house and had access to them with permission of their grandmother, defendant used this access on multiple occasions to take each child from her bed to play room in which he molested them, one victim was eight years old and other victim was seven years old at time abuse ended, and time periods of abuse overlapped almost precisely. State v. McGaha (S.C.App. 2013) 404 S.C. 289, 744 S.E.2d 602. Criminal Law 620(1)

Trial court acted within its discretion in joining for trial two counts of first‑degree criminal sexual conduct with a minor and two counts of lewd act upon a child, involving two victims, where charges arose from same chain of circumstances, would be proven by same evidence through same witnesses, and were of same general nature, and joinder did not prejudice defendant’s substantial rights. State v. McGaha (S.C.App. 2013) 404 S.C. 289, 744 S.E.2d 602. Criminal Law 620(1)

For purposes of joinder analysis, two counts of criminal sexual conduct with a minor and two counts of lewd act upon a child, involving two victims, would be proven by same evidence through same witnesses; victims’ grandmother testified concerning her custody of both victims, who were sisters, and her relationship with defendant, who resided with her and victims, another relative testified about her relationship with victims and its role in their disclosing sexual abuse to her, as well as victims’ mental disabilities, and forensic interviewer gave foundational testimony relevant to interviews of both victims. State v. McGaha (S.C.App. 2013) 404 S.C. 289, 744 S.E.2d 602. Criminal Law 620(1)

For purposes of joinder analysis, two counts of criminal sexual conduct with a minor and two counts of lewd act upon a child, involving two victims, were of same general nature. State v. McGaha (S.C.App. 2013) 404 S.C. 289, 744 S.E.2d 602. Criminal Law 620(1)

7. Selection of jury

Defendant’s exercise of peremptory strike against male prospective juror was not discriminatory based on gender, in trial for criminal sexual conduct with minor and other crimes; defendant’s reason for striking juror, that he appeared conservative and was retired, was gender‑neutral, defendant struck only one out of ten male jurors, and nine male jurors served on jury. State v. Rayfield (S.C. 2006) 369 S.C. 106, 631 S.E.2d 244, rehearing denied. Jury 33(5.15)

8. Arguments and conduct of counsel

Solicitor improperly vouched for credibility of child victim in trial for criminal sexual conduct with minor, when, during closing argument, solicitor stated that victim “looked [them] in the eye,” that rape crisis counselor interviewed victim “face to face, eye to eye,” and believed victim’s version of events, and that victim made consistent statements throughout his “eye to eye, face to face discussions” with various witnesses, and that the jury should “think about the eye to eye, face to face interviews that victim had with law enforcement and expert”. Tappeiner v. State (S.C. 2016) 416 S.C. 239, 785 S.E.2d 471. Criminal Law 2098(3)

Trial counsel’s closing argument in which counsel highlighted inconsistencies in witnesses testimony about what occurred when child victim and siblings spent night at defendant’s home did not invite solicitor’s improper comments vouching for victim’s credibility, misstating evidence presented at trial, and impermissibly appealing to jurors’ emotions by asking jurors if any of them would want defendant babysitting their children, in trial for criminal sexual conduct with minor. Tappeiner v. State (S.C. 2016) 416 S.C. 239, 785 S.E.2d 471. Criminal Law 2165

Solicitor’s comments during closing argument that rape crisis counselor personally interviewed child victim, and that she is someone “who can detect when someone is making something up or if there is nothing there,” misstated rape counselor’s testimony at trial for criminal sexual conduct with minor, where counselor never testified that she interviewed victim, but rather, she only answered solicitor’s hypothetical questions about why child victim might delay reporting sexual abuse. Tappeiner v. State (S.C. 2016) 416 S.C. 239, 785 S.E.2d 471. Criminal Law 2089

Solicitor’s query to jury during closing argument, asking if jurors would want defendant babysitting their children or relatives, was improper appeal to jurors’ emotions, rather than on evidence admitted at trial on charge for criminal sexual conduct with minor. Tappeiner v. State (S.C. 2016) 416 S.C. 239, 785 S.E.2d 471. Criminal Law 2146

The solicitor’s closing argument remarks, which asked the jury to “speak up” for three‑year‑old child victim, constituted impermissible argument, in prosecution for criminal sexual conduct with a minor. Brown v. State (S.C. 2009) 383 S.C. 506, 680 S.E.2d 909. Criminal Law 2151

8.5. Ineffective assistance of counsel

Counsel’s failure to object to testimony by forensic interviewer that child victim had not been coached, as improper bolstering, was not deficient performance and, thus, was not ineffective assistance of counsel in prosecution for first degree criminal sexual conduct with minor and lewd act upon child; while counsel told jury in his opening statement that victim’s mother was telling anybody that would listen and that father was putting all of this in her head, and, thus, counsel made question of whether someone coached child to make false accusation issue in case, State claimed that it offered testimony that victim had not been coached to respond to counsel’s statement, not for purpose of bolstering. Briggs v. State (S.C. 2017) 421 S.C. 316, 806 S.E.2d 713. Criminal Law 1931

Counsel’s failure to object to testimony by forensic interviewer, that her role was to determine whether child victim knew difference between truth and lie and that her purpose was finding out if something happened, as improper bolstering was deficient performance under first prong of ineffective assistance of counsel in prosecution for first degree criminal sexual conduct with minor and lewd act upon child; by informing jury that she conducted forensic interviews for purpose of finding out whether sexual abuse happened, interviewer went far beyond her role as person who collected facts for jury to use in determining whether victim was telling truth, as she invaded province of jury and directly conveyed to jury she believed victim, and testimony that interviewer made determination that victim understood difference between truth and lie was not part of evidentiary role but indirectly revealed that she believed disclosure in interview was truth. Briggs v. State (S.C. 2017) 421 S.C. 316, 806 S.E.2d 713. Criminal Law 1931

Counsel’s cross‑examination question to forensic interviewer, which asked how she could as expert determine if child victim was telling truth, elicited improper bolstering testimony and was deficient performance under first prong of ineffective assistance of counsel in prosecution for first degree criminal sexual conduct with minor and lewd act upon child; question was open‑ended and sure to solicit answer that directly bolstered victim’s credibility, interviewer’s answer placed squarely before jury her opinion that victim was telling truth, and there was no defensible purpose for question, as counsel stated his strategy was to say that crimes did not occur, because no one believed that they happened. Briggs v. State (S.C. 2017) 421 S.C. 316, 806 S.E.2d 713. Criminal Law 1931

Counsel’s failure to object to forensic interviewer being qualified as expert in child abuse assessment was not deficient performance and, thus, was not ineffective assistance of counsel in prosecution for first degree criminal sexual conduct with minor and lewd act upon child; there was history of permitting forensic interviewers to testify as experts. Briggs v. State (S.C. 2017) 421 S.C. 316, 806 S.E.2d 713. Criminal Law 1931

Defendant was prejudiced by counsel’s failure to object to testimony by forensic interviewer, that her role was to determine whether child victim knew difference between truth and lie and that her purpose was finding out if something happened, and cross‑examination question to interviewer, which asked how she could determine if victim was telling truth, that elicited improper bolstering and, thus, he was denied effective assistance of counsel in prosecution for first degree criminal sexual conduct with minor and lewd act upon child; there was no physical evidence any sexual abuse occurred, and, thus, victim’s credibility was very important, and there was reasonable probability that result would have been different if interviewer had not been allowed to improperly bolster victim. Briggs v. State (S.C. 2017) 421 S.C. 316, 806 S.E.2d 713. Criminal Law 1931

9. Admissibility of evidence

State did not violate disclosure rules in producing dark and illegible photographs prior to trial and producing legible, color photographs at defendant’s trial for sexual conduct with minor, and therefore trial court did not err in denying defendant’s motion to suppress; solicitor notified defendant that there were pictures and disk available for inspection. S.C. R. Crim. P. 5(a)(1)(C). State v. McBride (S.C.App. 2016) 416 S.C. 379, 786 S.E.2d 435, certiorari denied. Criminal Law 1148

State did not violate disclosure rules in producing dark and illegible photographs prior to trial and producing legible, color photographs at defendant’s trial for sexual conduct with minor, and therefore trial court did not err in denying defendant’s motion to suppress; solicitor notified defendant that there were pictures and disk available for inspection. State v. McBride (S.C.App. 2016) 416 S.C. 379, 786 S.E.2d 435, certiorari denied. Criminal Law 1148

Although more prudent practice would have been to call an independent mental health professional, trial court committed no error in qualifying victim’s forensic interviewer as an expert mental health professional in area of child sexual abuse characteristics, before allowing her to testify during defendant’s prosecution for criminal sexual contact with a minor and a lewd act upon a minor; testimony she offered regarding general behavioral characteristics of sexually abused children was relevant and admissible, and she did not improperly vouch for the victim’s credibility. State v. Barrett (S.C.App. 2016) 416 S.C. 124, 785 S.E.2d 387, rehearing denied, certiorari granted. Criminal Law 474.4(4); Criminal Law 479

Defendant was on notice that his trial, on charges of criminal sexual conduct (CSC) with a minor and a lewd act upon a minor, might include testimony regarding general behavioral characteristics of sexually abused minors, therefore, the trial court did not abuse its discretion in declining to grant a continuance for him to obtain an expert to dispute state’s expert’s testimony. State v. Barrett (S.C.App. 2016) 416 S.C. 124, 785 S.E.2d 387, rehearing denied, certiorari granted. Criminal Law 594(1)

Testimony of expert psychotherapist and social worker regarding behaviors observed in victim and symptoms of post‑traumatic stress disorder (PTSD) was admissible, in prosecution for second degree criminal sexual conduct with a minor, which stemmed from allegations that defendant placed his finger and penis inside victim’s vagina and that he attempted to sodomize her; testimony explained common behaviors and characteristics of child sexual trauma victim, testimony regarding behaviors expert observed in victim was based on her personal observations, and testimony did not constitute impermissible vouching or bolstering of victim’s testimony, as expert testified about behaviors she observed in victim but did not indicate whether she believed victim was telling truth regarding sexual abuse. State v. Berry (S.C.App. 2015) 413 S.C. 118, 775 S.E.2d 51, rehearing denied, certiorari granted, affirmed as modified 418 S.C. 500, 795 S.E.2d 26. Criminal Law 474.4(4)

Victim’s testimony regarding defendant’s subsequent bad acts, i.e., act of sexual abuse committed by defendant after victim turned 16, was admissible in prosecution for second degree criminal sexual conduct with a minor, which stemmed from allegations that defendant placed his finger and penis inside victim’s vagina and that he attempted to sodomize her; evidence was relevant, as victim testified defendant digitally penetrated her without her consent after she turned 16, and, thus, acts were criminal, testimony constituted evidence of common scheme or plan, as it established incidents of abuse that occurred in same manner and same locations as conduct that formed basis of charge of criminal sexual conduct with a minor, and, since testimony regarding continuous and similar illegal conduct was probative to establish the charge, its probative value was not substantially outweighed by any prejudicial effect. State v. Berry (S.C.App. 2015) 413 S.C. 118, 775 S.E.2d 51, rehearing denied, certiorari granted, affirmed as modified 418 S.C. 500, 795 S.E.2d 26. Criminal Law 368.37; Criminal Law 373.10; Criminal Law 373.22

State failed to show individual reliability of witness sufficient to allow her to testify as child abuse assessment expert in prosecution for crimes involving unlawful sexual conduct with a minor; while witness was trained in rapport, anatomy, touch, abuse scenario, and closure (RATAC) protocol and used the protocol during her interviews, there was no evidence that her conclusions or impressions taken from those interviews were accurate, given that her only peer review involved one other interviewer reviewing her work to ensure she was using RATAC protocol.(Per Beatty, J., with one judge concurring and two judges concurring in part and dissenting in part.) State v. Chavis (S.C. 2015) 412 S.C. 101, 771 S.E.2d 336, rehearing denied. Criminal Law 479

Testimony of expert witness regarding her recommendation that victim “not be around defendant for any reason” improperly bolstered credibility of victim and, thus, was inadmissible in prosecution for crimes involving unlawful sexual conduct with a minor, since that recommendation could only be interpreted as witness believing victim’s claim that defendant sexually abused her.(Per Beatty, J., with one judge concurring and two judges concurring in part and dissenting in part.) State v. Chavis (S.C. 2015) 412 S.C. 101, 771 S.E.2d 336, rehearing denied. Criminal Law 474.3(3)

Trial court’s errors in qualifying witness as expert, and in permitting improper testimony of that witness and a second witness who improperly bolstered victim, were harmless, in prosecution for crimes involving unlawful sexual conduct with a minor; testimony at issue was that victim’s stepsister disclosed abuse to an evaluator years earlier and that witness recommended that defendant not be around victim for any reason, but multiple witnesses confirmed that stepsister had previously made a disclosure of sexual abuse, as did stepsister in her testimony, and all of defendant’s crimes were established independent of both that witness and victim, through use of physical evidence and witness corroboration.(Per Beatty, J., with one judge concurring and two judges concurring in part and dissenting in part.) State v. Chavis (S.C. 2015) 412 S.C. 101, 771 S.E.2d 336, rehearing denied. Criminal Law 1169.9

Testimony of state’s expert on child abuse dynamics and delayed disclosures regarding general behavioral characteristics of child sex abuse victims was not inadmissible as being within ordinary knowledge of jury, in child sex abuse trial; expert’s specialized knowledge of behavioral characteristics of child sex abuse victims was relevant and crucial in assisting jury’s understanding of why children might delay disclosing sexual abuse, and why recollections may have become clearer each time they discussed instances of abuse. State v. Brown (S.C.App. 2015) 411 S.C. 332, 768 S.E.2d 246, certiorari denied. Criminal Law 474.4(4)

The unique and often perplexing behavior exhibited by child sex abuse victims does not fall within the ordinary knowledge of a juror with no prior experience, either directly or indirectly, with sexual abuse, and therefore, the general behavioral characteristics of child sex abuse victims are more appropriate for an expert qualified in the field to explain to the jury, so long as the expert does not improperly bolster the victims’ testimony. State v. Brown (S.C.App. 2015) 411 S.C. 332, 768 S.E.2d 246, certiorari denied. Criminal Law 474.4(4)

Testimony of state’s expert on child abuse dynamics and delayed disclosure regarding general behavioral characteristics of alleged child sex abuse victims did not improperly bolster testimony of alleged victims in child sex abuse trial, where expert testified in broad terms regarding various reasons sex abuse victims may delay disclosure and how the disclosure process progresses, and expert did not testify as forensic interviewer, never interviewed alleged victims, did not prepare report for her testimony, did not express opinion or belief regarding credibility of alleged victims’ allegations, and did not express opinion regarding credibility of victims. State v. Brown (S.C.App. 2015) 411 S.C. 332, 768 S.E.2d 246, certiorari denied. Criminal Law 474.4(4)

Testimony of state’s expert on child abuse dynamics and delayed disclosures regarding general behavioral characteristics of child sex abuse victims did not improperly corroborate testimony of, and therefore was not cumulative of, alleged victims’ testimony in child sex abuse trial, for purposes of rule governing exclusion of relevant evidence, where expert did not interview victims prior to testifying at trial, expert’s knowledge of case was limited to discussions with solicitor, and expert did not express opinion on credibility of alleged victims. State v. Brown (S.C.App. 2015) 411 S.C. 332, 768 S.E.2d 246, certiorari denied. Criminal Law 474.4(4)

Probative value of testimony of state’s expert on child abuse dynamics and delayed disclosures regarding general behavioral characteristics of child sex abuse victims outweighed any prejudicial effect on defendant in child sex abuse trial, since expert was not qualified as forensic interviewer and thus concerns that jury would give undue weight to tesimony of forensic interviewer who interviewed victim and expressed opinion as to alleged victims’ credibility was not present, testimony was relevant to help jury understand various aspects of alleged victims’ behavior and provided insight into often strange demeanors of sexually abused children, testimony assisted in explaining psychological effects of sexual abuse on child victims’ behavior, and testimony was crucial in explaining to jury why child sex abuse victims are often unable to effectively relay incidents of criminal sexual abuse. State v. Brown (S.C.App. 2015) 411 S.C. 332, 768 S.E.2d 246, certiorari denied. Criminal Law 474.4(4)

Testimony regarding prior sexual conduct between victim and defendant constituted common scheme or plan for purposes of admissibility in prosecution for criminal sexual conduct with a minor; defendant’s prior acts occurred over approximately 10 month span with same victim and always when victim’s mother was at work, conduct began with inappropriate touching, removal of victim’s clothes, and finally escalated to sexual intercourse, defendant also told victim to “keep this a secret between me and you” and that he would “buy her things” to keep her quiet, and these acts constituted continued illicit intercourse between same parties. State v. Edwards (S.C.App. 2007) 373 S.C. 230, 644 S.E.2d 66, rehearing denied, certiorari granted, affirmed as modified 383 S.C. 66, 678 S.E.2d 405. Criminal Law 373.10; Criminal Law 373.14; Criminal Law 373.15

Testimony of expert witness in forensic interviewing of child sexual assault victims did not impermissibly bolster victim’s testimony; expert testified only about time period in which alleged events occurred and opined that victim needed medical evaluation, although jury could have inferred expert thought victim told her the truth about being molested, expert offered no testimony as to alleged perpetrator or particulars of sexual abuse and did not express her opinion as to whether or not victim told her truth during interview, and testimony was not presented to bolster victim’s credibility, but as measure to prevent a defense or argument that victim’s testimony was result of police suggestiveness. State v. Douglas (S.C.App. 2006) 367 S.C. 498, 626 S.E.2d 59, rehearing denied, certiorari granted, affirmed in part, reversed in part 380 S.C. 499, 671 S.E.2d 606. Witnesses 318

Defendant’s wife did not make clear and unequivocal admission that her prior statement to detective was inconsistent with trial testimony, and thus, extrinsic evidence of wife’s prior inconsistent statement to detective was properly admitted in prosecution for criminal sexual conduct with a minor; although wife admitted to portion of statement quoted, she said that it was incomplete, that she did not say she saw her husband’s hand on victim’s backside, but that she saw his hand on back side of victim’s leg, and she equivocated as to whether statement was her own words, and that she may have been unclear or that detective may have paraphrased what she said. State v. Blalock (S.C.App. 2003) 357 S.C. 74, 591 S.E.2d 632, rehearing denied, certiorari granted. Witnesses 389

Rule of evidence that sexual assault victim’s prior consistent statements limited to time and place of alleged incident are not hearsay, if victim testifies at trial and is subject to cross‑examination, expressly allows other witnesses to testify that victim complained of assault, but only as to time and place; it specifically circumscribes such testimony by excluding details or particulars. State v. Jeffcoat (S.C.App. 2002) 350 S.C. 392, 565 S.E.2d 321. Criminal Law 419(1.10)

Testimony of victim’s mother and post‑trauma therapist encompassed detailed aspects of victim’s statements, including naming defendant as her abuser, and thus, such testimony was not admissible under rule of evidence that sexual assault victim’s prior consistent statements limited to time and place of alleged incident are not hearsay, if victim testifies at trial and is subject to cross‑examination. State v. Jeffcoat (S.C.App. 2002) 350 S.C. 392, 565 S.E.2d 321. Criminal Law 419(1.10)

Testimony of child victim’s mother and post‑trauma therapist regarding victim’s words and actions following alleged commission of crimes was offered to rebut an implied charge of improper influence on victim’s testimony in defendant’s prosecution for criminal sexual conduct and committing a lewd act on a minor, despite contention that defense counsel merely conducted normal cross‑examination, where defense counsel raised issue of improper influence at trial asking victim whether she practiced before testifying and whether anyone, and specifically mother or lawyer, had told her what to say. State v. Jeffcoat (S.C.App. 2002) 350 S.C. 392, 565 S.E.2d 321. Criminal Law 396(1)

Mother’s hearsay testimony that child victim told her that defendant “put his weenie on her toodie,” and post‑trauma therapist’s hearsay testimony that victim told her that defendant “hurt her hiney with his weenie” and “put his weenie in her mouth,” was admissible to rebut defense counsel’s claim of improper influence on victim, where victim’s statements to mother were made prior to any contact with judicial system and thus could not have been the result of any alleged coaching of victim’s court testimony, and family only became involved with solicitor’s office and subsequent prosecution after victim stopped seeing therapist. State v. Jeffcoat (S.C.App. 2002) 350 S.C. 392, 565 S.E.2d 321. Criminal Law 396(1)

Officer’s testimony that defendant “showed no concern towards his child,” when told that child named defendant as the perpetrator of sexual assault on child, did not rise to the level of being a comment on defendant’s lack of remorse, and thus was not inadmissible for that reason. Legge v. State (S.C. 2002) 349 S.C. 222, 562 S.E.2d 618, rehearing denied. Criminal Law 351(1)

Defendant convicted of committing lewd act on child was not prejudiced by solicitor’s improper attempt on cross‑examination to pit defendant’s testimony, that he phoned victim’s aunt several times but did not speak with her, against testimony of victim’s aunt, that defendant told her over phone, “You know how little girls are... She came in the room and got in the bed with me”; testimony dealt with collateral matter that was of no real importance to question of defendant’s guilt, and in any event, defendant never answered solicitor’s question, which inquired as to whether victim’s aunt was lying. State v. Benning (S.C.App. 1999) 338 S.C. 59, 524 S.E.2d 852. Criminal Law 1171.8(2)

Allegations in search warrant affidavit concerning existence of pornographic materials in defendant’s home, and testimony concerning various items seized pursuant to execution of search warrant, including several pornographic videotapes, condoms, handcuffs, vibrator, and numerous photographs, were irrelevant in prosecution for first degree criminal sexual conduct (CSC) with minor, as allegations in affidavit were not corroborated by other competent testimony, and victims did not claim that defendant photographed them, viewed pornographic material with them, or used those sexual aids with them. State v. Johnson (S.C. 1999) 334 S.C. 78, 512 S.E.2d 795. Criminal Law 368.37

The Family Court had jurisdiction over a mother’s live‑in boyfriend in an action by the county Department of Social Services seeking intervention for the protection of a child allegedly sexually abused by the boyfriend, even though he had been indicted for criminal sexual conduct with a minor and his trial in general sessions court was pending, since the Family Court action was a civil action aimed at child protection, rather than a criminal action geared toward punishing the defendant. Beaufort County Dept. of Social Services v. Strahan (S.C.App. 1992) 310 S.C. 553, 426 S.E.2d 331.

Evidence of an uncharged sexual assault on a second child victim was not admissible against the defendant in a prosecution for criminal sexual conduct against a minor, even though both children put together similar composites, where forensic evidence showed that semen found on the second victim’s bed was not that of the defendant, the defendant was not identified by the second victim in a photographic lineup, and the defendant’s statement that “I did it, I don’t know why I did it, I need help” could have referred to either the first or second victim; evidence of other bad acts to establish a common scheme or plan is not admissible unless the evidence that the defendant is guilty of the act is clear and convincing. State v. Atkins (S.C.App. 1992) 309 S.C. 542, 424 S.E.2d 554.

In a prosecution for criminal sexual conduct against a minor, the defendant was entitled to a new trial based on the admission of his confession in a prior prosecution for committing a lewd act on a minor, since such evidence was inadmissible to show a criminal propensity to sexually abuse children, and since it was introduced without reference to its time frame, thus allowing the jury to believe that the statement related to the present crime. State v. Atkins (S.C.App. 1992) 309 S.C. 542, 424 S.E.2d 554.

Although evidence of prior consistent statements is ordinarily inadmissible when a witness has not been impeached, an exception to this rule exists in criminal sexual conduct cases. When the victim testifies, evidence from other witnesses that the victim complained of the sexual assault is admissible as corroboration of the incident. However, the evidence must be limited to the time and place of the assault, and may not include particulars or details. State v. Barrett (S.C. 1989) 299 S.C. 485, 386 S.E.2d 242.

In a prosecution for criminal sexual conduct upon the defendant’s 11‑year‑old stepdaughter, the testimony of a social worker constituted impermissible “bolstering” of the victim’s testimony, warranting reversal of the conviction, where the social worker testified prior to the victim’s testifying and therefore the victim’s credibility was not subject to impeachment inasmuch as she had not taken the stand, the social worker testified extensively to details of the sexual abuse reported by the victim, and the State relied solely upon the victim’s testimony to establish the details of the crime and the identity of the perpetrator. State v. Barrett (S.C. 1989) 299 S.C. 485, 386 S.E.2d 242.

In a prosecution in which the victim was a foster child in the defendant’s home, evidence of prior incidents of sexual abuse of other children by the defendant was admissible where the prior abuse occurred while each of the children was a foster child to the defendant and of similar age to the victim, the defendant took advantage of this relationship for his sexual gratification in each instance, and although the extent of abuse against the victim was even more reprehensible than that against the previous foster children, it commenced in exactly the same manner under similar circumstances. State v. Hallman (S.C. 1989) 298 S.C. 172, 379 S.E.2d 115.

10. Questions for jury

Whether defendant penetrated victim’s mouth was issue for jury in trial for criminal sexual conduct with a minor. State v. McBride (S.C.App. 2016) 416 S.C. 379, 786 S.E.2d 435, certiorari denied. Criminal Law 753.2(3.1)

Jury question was presented in prosecution for criminal sexual conduct (CSC) with minor as to whether “intrusion” occurred; victim testified that defendant touched her and that it hurt, and physical examination of victim showed she had suffered injury inside her vagina which was consistent with sexual abuse. State v. Johnson (S.C. 1999) 334 S.C. 78, 512 S.E.2d 795. Infants 1665(5); Sex Offenses 339

11. Instructions

Use of the term “statutory rape” by the trial judge at one point in his instructions and by the jury upon rendition of its verdict did not establish that the defendant had been improperly tried and convicted under former Section 16‑3‑650 where the trial judge specifically mentioned that a new statute had recently been enacted, the instructions to the jury were based upon the new statute, and the verdict of “statutory rape” as returned by the jury conformed to the language of the new statute as set forth in Section 16‑3‑655(3). Carver v. Martin (C.A.4 (S.C.) 1981) 664 F.2d 932.

Defendant was not entitled to adverse inference jury charge based on police losing shirt worn by minor sex offense victim that victim’s mother had left with police after she took it to victim’s forensic and medical examination; adverse inference charges were rarely permitted in criminal cases. State v. McBride (S.C.App. 2016) 416 S.C. 379, 786 S.E.2d 435, certiorari denied. Criminal Law 778(10)

Jury instructions on the lesser‑included offense of assault and battery of a high and aggravated nature (ABHAN) to criminal sexual conduct (CSC) with a minor were not warranted; while there was evidence of conduct that could have been construed as ABHAN during the period of the sexual batteries, such as testimony that defendant on one occasion picked up victim and yelled obscenities at him, no such incident was alleged to have occurred instead of the sexual batteries. Dempsey v. State (S.C. 2005) 363 S.C. 365, 610 S.E.2d 812. Criminal Law 795(2.80)

There was no evidence to support instruction on charge of assault and battery of a high and aggravated nature (ABHAN) as lesser‑included offense of criminal sexual conduct with a minor (CSCM); as defendant’s defense was that he did not penetrate victim, and that she was injured when she fell out of a bunk bed while medical testimony indicated victim’s internal injury could have been caused only by penetration, defendant was guilty of sexual battery or no battery at all. Moultrie v. State (S.C. 2003) 354 S.C. 646, 583 S.E.2d 436. Criminal Law 795(2.80)

In the prosecution of a charge of first‑degree criminal sexual conduct (CSC), the trial court erred in failing to give jury instructions on the charge of assault of a high and aggravated nature since it is a lesser included offense of CSC. State v. Murphy (S.C.App. 1996) 322 S.C. 321, 471 S.E.2d 739, rehearing denied. Indictment And Information 191(8)

Pursuant to Section 16‑3‑657, the testimony of the victim need not be corroborated in prosecutions under Sections 16‑3‑652 through 16‑3‑658; consequently, the trial judge, in the prosecution of an action for criminal sexual conduct with a minor, properly charged the jury that it could believe any single witness over several, it was the sole judge of the facts, he had no opinion about those facts, and the state had the burden of proving the offense charged beyond a reasonable doubt. State v. Schumpert (S.C. 1993) 312 S.C. 502, 435 S.E.2d 859, rehearing denied. Infants 1666(5); Sex Offenses 421

12. Sufficiency of evidence

An agreement to meet a fictitious minor at a designated place and time, coupled with traveling to that location, may constitute evidence of an overt act, beyond mere preparation, in furtherance of the crime of attempted criminal sexual conduct (CSC) with a minor. State v. Reid (S.C. 2011) 393 S.C. 325, 713 S.E.2d 274. Infants 1591

There was sufficient evidence that defendant had the specific intent to commit criminal sexual conduct (CSC) with a minor, and that he committed an overt act toward commission of CSC with a minor beyond acts of preparation, as necessary to support conviction for attempted second‑degree CSC with a minor; defendant, while in an Internet chat room, clearly indicated to alleged minor victim, who was actually an undercover police officer, that he desired to have a sexual encounter with alleged victim, whom he believed was 14 years old, defendant designated a vacant parking lot as the clandestine meeting place, he proposed meeting alleged victim in the middle of the night, and he drove to that location. State v. Reid (S.C. 2011) 393 S.C. 325, 713 S.E.2d 274. Infants 1591

Defendant committed an overt act toward commission of the crime beyond acts of preparation, for purposes of attempt element of second‑degree attempted criminal sexual conduct (CSC) with a minor; defendant, in preparation, arranged a time and meeting location with a person he thought to be a minor, he described the type of car he would be driving and he confirmed the description of the putative minor’s clothing, and he left the location at which he was communicating with putative minor through Internet chat room and committed an act beyond mere preparation by driving to and physically arriving at prearranged location within 15 minutes of agreed upon time. State v. Reid (S.C.App. 2009) 383 S.C. 285, 679 S.E.2d 194, rehearing denied, certiorari granted, affirmed 393 S.C. 325, 713 S.E.2d 274. Infants 1591; Telecommunications 1350

Evidence established defendant’s specific intent to accomplish criminal sexual conduct (CSC) with a minor, in prosecution for second‑degree attempted CSC with a minor; in an Internet chat room, defendant asked a person he thought was a 14‑year‑old girl if she would meet him within the hour in order to “make love ... snuggle, kiss, whatever,” and the last question he asked was, “you wanna have sex, honestly?” State v. Reid (S.C.App. 2009) 383 S.C. 285, 679 S.E.2d 194, rehearing denied, certiorari granted, affirmed 393 S.C. 325, 713 S.E.2d 274. Infants 1591; Telecommunications 1350

Evidence was sufficient to support conviction for accessory before the fact to criminal sexual conduct with a minor; defendant mother knew about domestic partner’s sexual relationship with her victim daughter, she allowed partner to reside in same house with girls, she was aware of court order prohibited any contact between partner and girls, she continued to aid partner by failing to stop him from having sex with victim, and she told her neighbor that she did not understand why everyone was so concerned with partner and victim having sex, because she stated that permitting older men to have sex with young girls was a good way to teach them about sex. State v. Claypoole (S.C.App. 2006) 371 S.C. 473, 639 S.E.2d 466, rehearing denied, certiorari granted, certiorari dismissed as improvidently granted 382 S.C. 614, 677 S.E.2d 600. Infants 1750; Sex Offenses 256; Sex Offenses 268

Evidence in prosecution for criminal sexual conduct (CSC) with minor was insufficient to create jury issue on “penetration,” despite victim’s testimony that defendant fondled her while she sat on his lap in recliner chair in the living room, that defendant touched her “lu‑lu,” and such touching made victim “feel bad”; such testimony did not show “intrusion,” victim’s physical examination revealed no signs of sexual battery, and other victims testified that, although defendant fondled them in living room, he attempted penetration only in bedroom. State v. Johnson (S.C. 1999) 334 S.C. 78, 512 S.E.2d 795. Infants 1665(6); Sex Offenses 339

State presented sufficient evidence to present jury question as to whether juvenile was guilty of criminal sexual conduct with a minor; victim testified that it was painful when juvenile put his private part inside her and that, before he did this, he put something on that looked like a rubber band, but was not, other children in the home at the time of the incident testified that they saw juvenile on top of victim and that juvenile and victim had their pants down, and treating physician testified that he observed a perianal tear on the victim, which was red and swollen. In Interest of Cisco K. (S.C.App. 1998) 332 S.C. 649, 506 S.E.2d 536. Infants 2568

Testimony of 6 year old prosecutrix that defendant touched her with his penis, that she could not remember if he put it inside her body, and that, when asked if it hurt, she replied that it had, is sufficient evidence of “intrusion, however slight,” as is required to create jury issue. State v. Mathis (S.C. 1986) 287 S.C. 589, 340 S.E.2d 538.

13. Sentencing

First degree assault with intent to commit criminal sexual conduct with minor was a “most serious offense” for purposes of sentencing defendant to life without possibility of parole under “two strikes” statute; assault with intent to commit criminal sexual conduct with minor in first degree was more aptly designated as “attempt” to commit criminal sexual conduct with minor, and legislature intended offense to be considered “most serious” offense. State v. Sosbee (S.C.App. 2006) 371 S.C. 104, 637 S.E.2d 571. Sentencing And Punishment 1236

Maximum sentence for committing lewd act on child was properly based on evidence presented at trial, even though trial judge, prior to imposing sentence, stated that he would also have found defendant guilty of criminal sexual conduct (CSC) charge of which jury acquitted him; trial judge heard evidence and observed witnesses during trial, and substantial evidence in record supported conviction on lewd act charge. State v. Benning (S.C.App. 1999) 338 S.C. 59, 524 S.E.2d 852. Sentencing And Punishment 362

The trial court did not err in sentencing a defendant, who was convicted of second degree criminal sexual conduct with a minor under Section 16‑3‑655 (which does not specify a maximum penalty), to 20 years imprisonment even though Section 17‑25‑20 provides a maximum penalty of 10 years for a felony for which the legislature has failed to provide another sentence, since Section 16‑3‑653 provides that second degree criminal sexual conduct is punishable by imprisonment for up to 20 years, and the clear intent of the legislature was to read Sections 16‑3‑655 and 16‑3‑653, statutes within the same act, in conjunction. State v. Outlaw (S.C.App. 1991) 304 S.C. 347, 404 S.E.2d 516, reversed 307 S.C. 177, 414 S.E.2d 147.

14. Review

Defendant, who was 16 years old at time of alleged sexual conduct with minor, did not preserve for appeal issue of whether circuit court lacked jurisdiction to hear case and should have transferred case to court of general sessions; issue was not raised to trial court, and issue was not one of subject matter jurisdiction, as circuit court had power to hear criminal cases. State v. McBride (S.C.App. 2016) 416 S.C. 379, 786 S.E.2d 435, certiorari denied. Criminal Law 1033.1

Sex offense defendant did not preserve for appeal issue of whether his due process rights were violated by limitation of cross‑examination of police witness regarding lost evidence, where, after State’s objection to defendant’s questioning was sustained on ground of irrelevancy, defendant made no further attempt to cross‑examine witness regarding lost evidence, and defendant did not raise due process argument later raised on appeal. State v. McBride (S.C.App. 2016) 416 S.C. 379, 786 S.E.2d 435, certiorari denied. Criminal Law 1036.10

Sex offense defendant failed to preserve for appeal issue regarding whether trial court erred in suppressing only portion of his statement to police, where defendant had only moved to strike that portion of statement. State v. McBride (S.C.App. 2016) 416 S.C. 379, 786 S.E.2d 435, certiorari denied. Criminal Law 1036.1(5)

Defendant preserved for appellate review claim that trial court erred in admitting testimony from State’s expert psychotherapist and social worker regarding behaviors observed in victim and symptoms of post‑traumatic stress disorder (PTSD), in prosecution for second degree criminal sexual conduct with a minor, which stemmed from allegations that defendant placed his finger and penis inside victim’s vagina and that he attempted to sodomize her; during expert’s testimony, defendant’s objections to State’s questions regarding symptoms of trauma seen in sexual abuse victims and symptoms of PTSD were overruled, and, in response to State’s questions, expert testified about specific trauma symptoms children would have tended to show following sexual assault and her observations as to specific symptoms of trauma suffered by victim. State v. Berry (S.C.App. 2015) 413 S.C. 118, 775 S.E.2d 51, rehearing denied, certiorari granted, affirmed as modified 418 S.C. 500, 795 S.E.2d 26. Criminal Law 1036.6

Juvenile defendant subject to electronic monitoring following guilty plea to criminal sexual conduct with a minor in the first degree (CSC‑First) was entitled to petition for judicial review to determine the necessity of continued electronic monitoring ten years after the commencement of electronic monitoring. In re Justin B. (S.C. 2013) 405 S.C. 391, 747 S.E.2d 774, certiorari denied 134 S.Ct. 1496, 188 L.Ed.2d 380. Mental Health 469(5)

15. Harmless error

Trial court’s error of giving jury instruction that stated that testimony of criminal sexual conduct victim need not be corroborated and that violated state constitution’s section prohibiting courts from commenting to the jury on the facts of a case was harmless in prosecution for first‑degree criminal sexual conduct with a minor, where there was corroborating evidence. State v. McBride (S.C.App. 2016) 416 S.C. 379, 786 S.E.2d 435, certiorari denied. Criminal Law 1172.3

In a prosecution for first degree sexual conduct with a minor, the testimony of a social worker testimony as to the wretched condition of the home in which the defendant, the children, and their mother lived was erroneously admitted since such testimony was wholly irrelevant to the question of whether the defendant was guilty of the crime charged; moreover, it could not be said that the erroneous admission was harmless since the state’s case against the defendant was not overwhelming. State v. Smith (S.C.App. 1992) 309 S.C. 48, 419 S.E.2d 816.

16. Reversible error

Qualifying forensic interviewer as an expert in child abuse assessment and in forensic interviewing, in prosecution of defendant on charge of first degree criminal sexual conduct with a minor, constituted reversible error; the case turned solely on the credibility of the minor and the defendant, the minor testified to abuse by defendant over a course of three to four years, while defendant denied any improper conduct, and there was no physical evidence of sexual abuse. State v. Anderson (S.C. 2015) 413 S.C. 212, 776 S.E.2d 76, rehearing denied. Criminal Law 1169.9

Trial court’s refusal to determine witness’s qualification as a “child abuse assessment” expert before allowing her to testify during defendant’s prosecution for first degree criminal sexual conduct with a minor constituted patent error; the witness vouched for the minor when she testified only to those characteristics which she observed in the minor, impermissibly bolstering the minor’s testimony. State v. Anderson (S.C. 2015) 413 S.C. 212, 776 S.E.2d 76, rehearing denied. Criminal Law 481; Criminal Law 1036.6

Erroneous admission of child victim’s hearsay statements to her stepmother concerning alleged sexual abuse by defendant was reversible error in prosecution for committing lewd act upon child under age of 14, even though stepmother’s testimony was cumulative; because state introduced no physical evidence of molestation, case was essentially swearing contest, pitting defendant’s word against victim’s as to whether incident occurred, and stepmother’s testimony mirrored victim’s testimony, improperly bolstering victim’s story in minds of jury. State v. Whisonant (S.C.App. 1999) 335 S.C. 148, 515 S.E.2d 768. Criminal Law 1169.1(9); Infants 1740(5)

Erroneous admission into evidence of search warrant affidavit and testimony concerning various items seized pursuant to execution of search warrant, all of which was irrelevant, was reversible error in prosecution for first degree criminal sexual conduct (CSC) with minor; evidence against defendant was not overwhelming, but rather, case was basically swearing contest between minor victims and defendant. State v. Johnson (S.C. 1999) 334 S.C. 78, 512 S.E.2d 795. Criminal Law 1169.1(9); Criminal Law 1169.11

**SECTION 16‑3‑656.** Criminal sexual conduct; assaults with intent to commit.

Assault with intent to commit criminal sexual conduct described in the above sections shall be punishable as if the criminal sexual conduct was committed.

HISTORY: 1977 Act No. 157 Section 6; 1978 Act No. 639 Section 2.

CROSS REFERENCES

Commission of this crime within specified radius of child day care center as separate offense, see Section 63‑13‑200.

Denial of registration as an operator of a child day care or group day care home where the applicant, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑820.

Denial of renewal for child day care or group day care home where the person applying for approval, the operator of the facility, or an employee or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑630.

Electronic monitoring, reporting damage to or removing monitoring device, penalty, see Section 23‑3‑540.

Fingerprint review of any person applying to operate or seek employment at a child day care or group day care home to determine prior conviction of the crime referred to in this section, see Section 63‑13‑620.

Foster care placement with certain persons prohibited, see Section 63‑7‑2350.

No license or registration will be issued to any religious establishment to operate a child day care or group day care home where the operator, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑1010.

No person may be employed by the Department of Social Services in its day care licensing or child protective services divisions who has been convicted of the crime referred to in this section, see Section 63‑13‑190.

Offender registry information available to public, see Section 23‑3‑490.

Past conviction check prior to initial employment of teachers, see Section 59‑26‑40.

Persons convicted of Title 16, Chapter 3 crimes prohibited from appointment as guardian ad litem for child in abuse or neglect proceeding, see Section 63‑11‑520.

Persons convicted under this section must provide a sample from which DNA may be obtained for inclusion in the State DNA Database, see Section 23‑3‑620.

Persons convicted under this section must register for sex offender registry, see Section 23‑3‑430.

Placement of minor sex offenders, see Section 63‑7‑2360.

Sentencing, see Section 17‑25‑20 et seq.

Sexually Violent Predator Act, definitions, see Section 44‑48‑30.

Library References

Assault and Battery 31.

Infants 1581.

Rape 16.

Sodomy 2.

Westlaw Topic Nos. 37, 211, 321, 357.

C.J.S. Assault Section 50.

C.J.S. Evidence Section 380.

C.J.S. Infants Sections 200 to 202.

C.J.S. Rape Sections 37 to 38, 43 to 50.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Burglary Section 9, Punishment.

S.C. Jur. Criminal Sexual Conduct Section 4, Assault With Intent to Commit Criminal Sexual Conduct.

S.C. Jur. Probation, Parole, and Pardon Section 14, Summary of Parole Eligibility Calculations.

Attorney General’s Opinions

Offenses categorized by the Attorney General as tier 3 offenders as defined by the Federal Sex Offender Registration and Notification Act. SC Op.Atty.Gen. (May 30, 2008) 2008 WL 2324820.

NOTES OF DECISIONS

In general 1

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1. In general

The elements of first‑degree assault with intent to commit criminal sexual conduct on a minor are: (1) an assault, (2) with the intent to commit a sexual battery, (3) against a minor under the age of eleven. State v. Brock (S.C.App. 1999) 335 S.C. 267, 516 S.E.2d 212. Infants 1594; Sex Offenses 16

Elementally, the offense of assault with intent to commit first‑degree criminal sexual conduct is analyzed as: (1) an assault, and (2) criminal intent to commit criminal sexual conduct in the first degree. State v. Ervin (S.C.App. 1998) 333 S.C. 351, 510 S.E.2d 220. Sex Offenses 98; Sex Offenses 99

1.5. Construction with other laws

Under South Carolina law, common law crime of assault with intent to ravish was not same as statutory offenses of first or second degree assault with intent to commit criminal sexual conduct, for purpose of determining whether common law offense qualified as most serious offense, under two‑strike mandatory sentencing law; the common law crime was broader than the statutory offenses, as both statutory offenses required intent to commit a sexual battery or the use of aggravated force. Bowers v. McFadden, 2015, 153 F.Supp.3d 875. Sentencing and Punishment 1273

2. Lesser included offense

Assault and battery of a high and aggravated nature (ABHAN) is a lesser included offense of assault with intent to commit criminal sexual conduct (ACSC), despite fact that the elements of ABHAN and ACSC do not meet the elements test; since battery is not a necessary element of ACSC, it follows that ABHAN, which requires battery as an element, does not satisfy the elements test, but this situation presents an anomaly in the law. State v. Elliott (S.C. 2001) 346 S.C. 603, 552 S.E.2d 727. Indictment And Information 191(.5)

Assault and battery of high and aggravated nature (ABHAN) is not lesser included offense of assault with intent to commit criminal sexual conduct (CSC) in third degree; battery is element of ABHAN, but not of assault with intent to commit CSC third. State v. Elliott (S.C.App. 1999) 335 S.C. 512, 517 S.E.2d 713, rehearing denied, certiorari granted, reversed 346 S.C. 603, 552 S.E.2d 727. Indictment And Information 191(.5)

Committing a lewd act upon a minor was not a lesser included offense of first‑degree assault with intent to commit criminal sexual conduct on a minor. State v. Brock (S.C.App. 1999) 335 S.C. 267, 516 S.E.2d 212. Indictment And Information 191(.5)

Although assault and battery of a high and aggravated nature (ABHAN) is a lesser included offense of criminal sexual conduct in the first degree, the 2 offenses constituted 2 separate acts where the assault with intent to commit criminal sexual conduct occurred when the defendant grabbed the victim, forced her into the woods and ripped her clothes in an effort to commit a sexual battery, and ABHAN occurred when the defendant subsequently put his knee on the victim’s chest, put one hand around her neck and told her that he was going to kill her. Under the facts of the case, it could be inferred that the defendant abandoned his attempt to rape the victim, and then assaulted her in an attempt to silence her because she could identify him, so that the threat to kill the victim and the ensuing assault were not in furtherance of the attempted criminal sexual conduct. Thus, the defendant’s convictions for assault with intent to commit criminal sexual conduct and ABHAN were for different acts constituting separate offenses and did not violate the constitutional prohibition against double jeopardy. State v. Frazier (S.C. 1990) 302 S.C. 500, 397 S.E.2d 93.

3. Presumptions and burden of proof

In order to prove assault with intent to commit first‑degree criminal sexual conduct, the state is not required to prove conduct showing criminal sexual conduct in the first degree; however, the state must prove the intent to commit criminal sexual conduct in the first degree. State v. Ervin (S.C.App. 1998) 333 S.C. 351, 510 S.E.2d 220. Sex Offenses 98; Sex Offenses 99

4. Admissibility of evidence

In a prosecution for assault with intent to commit criminal sexual conduct in the first degree, tape recorded evidence that the victim offered to drop the charges for $1,000 and wanted $20 that night was relevant on the issues of whether the prosecuting witness tried to obstruct justice or whether she was attempting to extort money, and thus was admissible. State v. Finley (S.C. 1989) 300 S.C. 196, 387 S.E.2d 88.

In a prosecution for assault with intent to commit criminal sexual conduct in the first degree, evidence of the victim’s alleged sexual intercourse with her neighbor in the defendant’s presence and of the defendant’s belief as to her motive for allegedly fabricating the charges against him did not come within the purview of the Rape Shield Statute. The evidence was essential to a full and fair determination of the defendant’s guilt and was offered for purposes other than to attack the victim’s character by revelation of her sexual activity with a third party. Although the State’s interest in protecting criminal sexual conduct victims is stronger than the right of a defendant to attack such a victim’s character in a manner that has limited or no relevance to the question of guilt, the State’s interests in protecting criminal sexual conduct victims from disclosure of sexual acts with third parties yielded to the defendant’s right to present evidence that he was being falsely accused because of his knowledge of the victim’s sexual conduct with a third party. State v. Finley (S.C. 1989) 300 S.C. 196, 387 S.E.2d 88.

Although evidence of prior consistent statements is ordinarily inadmissible when a witness has not been impeached, an exception to this rule exists in criminal sexual conduct cases. When the victim testifies, evidence from other witnesses that the victim complained of the sexual assault is admissible as corroboration of the incident. However, the evidence must be limited to the time and place of the assault, and may not include particulars or details. State v. Barrett (S.C. 1989) 299 S.C. 485, 386 S.E.2d 242.

Prejudice resulting from improper evidence of defendant’s prior bookmaking conviction was substantial and denied defendant a fair trial on charge of assault with intent to commit criminal sexual conduct, where the evidence presented to the jury was essentially limited to the testimony of the two alleged female victims and the defendant, and their testimony was sharply in conflict. State v. Morris (S.C. 1986) 289 S.C. 294, 345 S.E.2d 477.

5. Instructions

Pursuant to Section 16‑3‑657, the testimony of the victim need not be corroborated in prosecutions under Sections 16‑3‑652 through 16‑3‑658; consequently, the trial judge, in the prosecution of an action for criminal sexual conduct with a minor, properly charged the jury that it could believe any single witness over several, it was the sole judge of the facts, he had no opinion about those facts, and the state had the burden of proving the offense charged beyond a reasonable doubt. State v. Schumpert (S.C. 1993) 312 S.C. 502, 435 S.E.2d 859, rehearing denied. Infants 1666(5); Sex Offenses 421

6. Sufficiency of evidence

The evidence supported a verdict of second degree assault with intent to commit criminal sexual conduct, even though the defendant did not verbally threaten the victim, where, after pulling her from the balcony railing over which she was trying to escape, the defendant grabbed her breasts with both hands and began fumbling with the clothing that covered her stomach; thus, the defendant’s actions supported an inference that he threatened to use high and aggravated force on the victim to commit a sexual battery. State v. Fulp (S.C.App. 1992) 310 S.C. 278, 423 S.E.2d 149.

**SECTION 16‑3‑657.** Criminal sexual conduct; testimony of victim need not be corroborated.

The testimony of the victim need not be corroborated in prosecutions under Sections 16‑3‑652 through 16‑3‑658.

HISTORY: 1977 Act No. 157 Section 7.

CROSS REFERENCES

Commission of this crime within specified radius of child day care center as separate offense, see Section 63‑13‑200.

Denial of registration as an operator of a child day care or group day care home where the applicant, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑820.

Denial of renewal for child day care or group day care home where the person applying for approval, the operator of the facility, or an employee or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑630.

Fingerprint review of any person applying to operate or seek employment at a child day care or group day care home to determine prior conviction of the crime referred to in this section, see Section 63‑13‑620.

Foster care placement with certain persons prohibited, see Section 63‑7‑2350.

No license or registration will be issued to any religious establishment to operate a child day care or group day care home where the operator, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑1010.

No person may be employed by the Department of Social Services in its day care licensing or child protective services divisions who has been convicted of the crime referred to in this section, see Section 63‑13‑190.

Past conviction check prior to initial employment of teachers, see Section 59‑26‑40.

Persons convicted of Title 16, Chapter 3 crimes prohibited from appointment as guardian ad litem for child in abuse or neglect proceeding, see Section 63‑11‑520.

Library References

Assault and Battery 91.9.

Infants 1753.

Rape 54(1).

Sodomy 6.

Westlaw Topic Nos. 37, 211, 321, 357.

C.J.S. Infants Section 214.

C.J.S. Rape Sections 107 to 108.

C.J.S. Sodomy Sections 8 to 12.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Criminal Sexual Conduct Section 37, Outcry Evidence.

LAW REVIEW AND JOURNAL COMMENTARIES

Annual Survey of South Carolina Law: Criminal Law: Rape Reform in South Carolina: The Non‑Corroboration Rule. 30 S.C. L. Rev. 55.

NOTES OF DECISIONS

In general 1

Constitutional issues 1.5

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1. In general

Although testimony of victim in prosecutions under criminal sexual conduct statutes need not be corroborated, corroboration is not barred. State v. Cox (S.C. 1980) 274 S.C. 624, 266 S.E.2d 784.

1.5. Constitutional issues

Supreme Court’s holding, that trial court’s instructing the jury on statute, providing that testimony of the victim need not be corroborated in prosecutions for criminal sexual conduct, was unconstitutional, was effective in this case and those which were pending on direct review or were not yet final, but not in post‑conviction relief. State v. Stukes (S.C. 2016) 416 S.C. 493, 787 S.E.2d 480, rehearing denied. Courts 100(1)

Instructing the jury on statute, providing that testimony of the victim need not be corroborated in prosecutions for criminal sexual conduct, was an impermissible charge on the facts and, therefore, unconstitutional; charge was confusing and violative of the constitutional provision prohibiting courts from commenting to the jury on the facts of a case, and addressing the veracity of a victim’s testimony in its instructions, the trial court emphasized the weight of that evidence in the eyes of the jury, and charge invited the jury to believe the victim, explaining that to confirm the authenticity of her statement, the jury need only hear her speak; abrogating State v. Rayfield, 369 S.C. 106, 631 S.E.2d 244. State v. Stukes (S.C. 2016) 416 S.C. 493, 787 S.E.2d 480, rehearing denied. Criminal Law 763(18)

2. Questions for jury

Jury question was presented in prosecution for criminal sexual conduct (CSC) with minor as to whether “intrusion” occurred; victim testified that defendant touched her and that it hurt, and physical examination of victim showed she had suffered injury inside her vagina which was consistent with sexual abuse. State v. Johnson (S.C. 1999) 334 S.C. 78, 512 S.E.2d 795. Infants 1665(5); Sex Offenses 339

3. Instructions

Trial court’s error in instructing the jury on statute, providing that testimony of the victim need not be corroborated in prosecutions for criminal sexual conduct, which was an impermissible charge on the facts, was not harmless; case hinged on credibility, victim said it was rape, and defendant said it was consensual, and jury was confused as to whether it was required to accept victim’s testimony as truth. State v. Stukes (S.C. 2016) 416 S.C. 493, 787 S.E.2d 480, rehearing denied. Criminal Law 1172.2

Trial court’s “no corroboration” instruction in prosecution for criminal sexual conduct (CSC) with a minor did not amount to reversible error; the instruction was not unduly emphasized, and the charge as a whole comported with the law. State v. Hill (S.C.App. 2011) 394 S.C. 280, 715 S.E.2d 368. Criminal Law 822(13); Criminal Law 1172.2

Giving of instruction that in South Carolina the testimony of a victim need not be corroborated for prosecution in a criminal sexual conduct case was not reversible error in prosecution for first‑degree criminal sexual conduct (CSC) with a minor, where trial court also instructed jury that state had the burden of proving the defendant guilty beyond a reasonable doubt, that the jury had the duty to find the facts and determine the credibility of the witnesses, and that the jury should disregard any indication from the trial judge that he might believe a fact to be true or not. State v. Orozco (S.C.App. 2011) 392 S.C. 212, 708 S.E.2d 227, rehearing denied, certiorari granted. Criminal Law 1172.2

Jury instruction that the testimony of the victims “need not be corroborated” was not reversible error, where court also instructed jury that they were the sole finders of fact with the discretion to determine the credibility of the witnesses, instructed that the law did not permit court to have an opinion about the case, and correctly charged the State’s burden of proof. State v. Rayfield (S.C.App. 2004) 357 S.C. 497, 593 S.E.2d 486, rehearing denied, certiorari granted, affirmed 369 S.C. 106, 631 S.E.2d 244. Criminal Law 1172.2

Pursuant to Section 16‑3‑657, the testimony of the victim need not be corroborated in prosecutions under Sections 16‑3‑652 through 16‑3‑658; consequently, the trial judge, in the prosecution of an action for criminal sexual conduct with a minor, properly charged the jury that it could believe any single witness over several, it was the sole judge of the facts, he had no opinion about those facts, and the state had the burden of proving the offense charged beyond a reasonable doubt. State v. Schumpert (S.C. 1993) 312 S.C. 502, 435 S.E.2d 859, rehearing denied. Infants 1666(5); Sex Offenses 421

4. Sufficiency of evidence

Victim’s testimony was sufficient to withstand motion for directed verdict in prosecution for committing lewd act upon child under age of 14; victim testified that she fell asleep on defendant’s couch, that she thereafter woke up to find defendant seated next to her, that defendant started touching her breast area, both on top of and underneath her clothing, that he unbuttoned her shorts and attempted to touch her below waist, that she defied defendant’s instruction to “open up,” and that defendant threatened to kill her if she told anyone. State v. Whisonant (S.C.App. 1999) 335 S.C. 148, 515 S.E.2d 768. Infants 1665(5); Sex Offenses 339

Evidence in prosecution for criminal sexual conduct (CSC) with minor was insufficient to create jury issue on “penetration,” despite victim’s testimony that defendant fondled her while she sat on his lap in recliner chair in the living room, that defendant touched her “lu‑lu,” and such touching made victim “feel bad”; such testimony did not show “intrusion,” victim’s physical examination revealed no signs of sexual battery, and other victims testified that, although defendant fondled them in living room, he attempted penetration only in bedroom. State v. Johnson (S.C. 1999) 334 S.C. 78, 512 S.E.2d 795. Infants 1665(6); Sex Offenses 339

**SECTION 16‑3‑658.** Criminal sexual conduct; when victim is spouse.

A person cannot be guilty of criminal sexual conduct under Sections 16‑3‑651 through 16‑3‑659.1 if the victim is the legal spouse unless the couple is living apart and the offending spouse’s conduct constitutes criminal sexual conduct in the first degree or second degree as defined by Sections 16‑3‑652 and 16‑3‑653.

The offending spouse’s conduct must be reported to appropriate law enforcement authorities within thirty days in order for a person to be prosecuted for these offenses.

This section is not applicable to a purported marriage entered into by a male under the age of sixteen or a female under the age of fourteen.

HISTORY: 1977 Act No. 157 Section 8; 1991 Act No. 139, Section 2; 1997 Act No. 95, Section 3.

CROSS REFERENCES

Commission of this crime within specified radius of child day care center as separate offense, see Section 63‑13‑200.

Denial of registration as an operator of a child day care or group day care home where the applicant, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑820.

Denial of renewal for child day care or group day care home where the person applying for approval, the operator of the facility, or an employee or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑630.

Fingerprint review of any person applying to operate or seek employment at a child day care or group day care home to determine prior conviction of the crime referred to in this section, see Section 63‑13‑620.

Foster care placement with certain persons prohibited, see Section 63‑7‑2350.

No license or registration will be issued to any religious establishment to operate a child day care or group day care home where the operator, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑1010.

No person may be employed by the Department of Social Services in its day care licensing or child protective services divisions who has been convicted of the crime referred to in this section, see Section 63‑13‑190.

Past conviction check prior to initial employment of teachers, see Section 59‑26‑40.

Persons convicted of Title 16, Chapter 3 crimes prohibited from appointment as guardian ad litem for child in abuse or neglect proceeding, see Section 63‑11‑520.

Persons convicted under this section must register for sex offender registry, see Section 23‑3‑430.

Prohibited acts A, narcotics, penalties, see Section 44‑53‑370.

Library References

Assault and Battery 59.

Rape 4, 17.

Sodomy 1.

Westlaw Topic Nos. 37, 321, 357.

C.J.S. Rape Sections 3, 12, 14, 31 to 35, 42, 49.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Adoption Section 12, Notice and Service on Necessary Parties.

S.C. Jur. Adoption Section 16, When Consent Required.

S.C. Jur. Criminal Domestic Violence Section 6, Sexual.

S.C. Jur. Criminal Domestic Violence Section 9, State‑Wide Statistics.

S.C. Jur. Criminal Sexual Conduct Section 3, Involving Married Persons.

Attorney General’s Opinions

The following would be classified as Tier III sexual offenses pursuant to the Sex Offender Registration and Notification Act requirements: spousal sexual battery; criminal sexual conduct, where the victim is a spouse; incest, where the victim is under 16 years of age; and sexual misconduct with an inmate, patient, or offender, depending on the sexual misconduct involved and the age of the victim. S.C. Op.Atty.Gen. (July 7, 2011) 2011 WL 3346429.

The crime of assault and battery of a high and aggravated nature is a crime of moral turpitude. 1994 Op.Atty.Gen., No 94‑26, p. 64 (1994 WL 199758).

NOTES OF DECISIONS

In general 1

1. In general

Pursuant to Section 16‑3‑657, the testimony of the victim need not be corroborated in prosecutions under Sections 16‑3‑652 through 16‑3‑658; consequently, the trial judge, in the prosecution of an action for criminal sexual conduct with a minor, properly charged the jury that it could believe any single witness over several, it was the sole judge of the facts, he had no opinion about those facts, and the state had the burden of proving the offense charged beyond a reasonable doubt. State v. Schumpert (S.C. 1993) 312 S.C. 502, 435 S.E.2d 859, rehearing denied. Infants 1666(5); Sex Offenses 421

The exception contained in Section 16‑3‑658,which provides that a person cannot be guilty of criminal sexual conduct if the victim is his legal spouse unless the couple is living apart by reason of a court order, is not a part of the description of the offense of criminal sexual conduct, but is a matter of defense, and therefore it need not be negatived in the indictment. State v. Bermudez (S.C. 1989) 297 S.C. 230, 376 S.E.2d 258.

**SECTION 16‑3‑659.** Criminal sexual conduct; males under fourteen not presumed incapable of committing crime of rape.

The common law rule that a boy under fourteen years is conclusively presumed to be incapable of committing the crime of rape shall not be enforced in this State. Provided, that any person under the age of 14 shall be tried as a juvenile for any violations of Sections 16‑3‑651 to 16‑3‑659.1.

HISTORY: 1977 Act No. 157 Section 9.

CROSS REFERENCES

Foster care placement with certain persons prohibited, see Section 63‑7‑2340.

Persons convicted of Title 16, Chapter 3 crimes prohibited from appointment as guardian ad litem for child in abuse or neglect proceeding, see Section 63‑11‑520.

Library References

Infants 1594 to 1599, 2479.

Rape 18.

Westlaw Topic Nos. 211, 321.

C.J.S. Assault Sections 75 to 76, 102 to 103.

C.J.S. Evidence Section 380.

C.J.S. Infants Sections 193, 378 to 379.

C.J.S. Rape Sections 3, 6, 13, 20 to 21, 24, 38.

C.J.S. Sodomy Sections 1 to 5, 13 to 14.

NOTES OF DECISIONS

In general 1

1. In general

Sexual offense committed by petitioner when he was under 14 years of age could not be transferred to general sessions court; intervening statute providing that any person under age of 14 should be tried as juvenile for sexual offenses was unaffected by later repeal and simultaneous reenactment of provision limiting transfer of sexual offenses to those committed by juveniles fourteen years of age and over. Slocumb v. State (S.C. 1999) 337 S.C. 46, 522 S.E.2d 809. Infants 2971

**SECTION 16‑3‑659.**1. Criminal sexual conduct; admissibility of evidence concerning victim’s sexual conduct.

(1) Evidence of specific instances of the victim’s sexual conduct, opinion evidence of the victim’s sexual conduct, and reputation evidence of the victim’s sexual conduct is not admissible in prosecutions under Sections 16‑3‑615 and 16‑3‑652 to 16‑3‑656; however, evidence of the victim’s sexual conduct with the defendant or evidence of specific instances of sexual activity with persons other than the defendant introduced to show source or origin of semen, pregnancy, or disease about which evidence has been introduced previously at trial is admissible if the judge finds that such evidence is relevant to a material fact and issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value. Evidence of specific instances of sexual activity which would constitute adultery and would be admissible under rules of evidence to impeach the credibility of the witness may not be excluded.

(2) If the defendant proposes to offer evidence described in subsection (1), the defendant, prior to presenting his defense shall file a written motion and offer of proof. The court shall order an in‑camera hearing to determine whether the proposed evidence is admissible under subsection (1). If new evidence is discovered during the presentation of the defense that may make the evidence described in subsection (1) admissible, the judge may order an in‑camera hearing to determine whether the proposed evidence is admissible under subsection (1).

HISTORY: 1977 Act No. 157, Section 10; 1994 Act No. 295, Section 2.

CROSS REFERENCES

Applicability of provisions of this section to any trial brought under Section 16‑3‑615 regarding spousal sexual battery, see Section 16‑3‑615.

Library References

Criminal Law 670, 671.

Rape 40.

Westlaw Topic Nos. 110, 321.

C.J.S. Criminal Law Sections 1285, 1645, 1650 to 1652.

C.J.S. Rape Sections 96 to 100.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Criminal Sexual Conduct Section 3, Involving Married Persons.

S.C. Jur. Criminal Sexual Conduct Section 44, Rape Shield Statute.

LAW REVIEW AND JOURNAL COMMENTARIES

Annual Survey of South Carolina Law: Constitutional Law: the Sixth Amendment—the Rape Shield Statute. 32 S.C. L. Rev. 43.

Annual survey of South Carolina law, criminal law. 42 S.C. L. Rev. 68 (Autumn 1990).

Annual Survey of South Carolina Law: Criminal Law: Rape Reform in South Carolina: Evidence of the Victim’s Prior Sexual Conduct. 30 S.C. L. Rev. 61.

Victim Testimony in Sex Crime Prosecutions: An Analysis of the Rape Shield Provision and the Use of Deposition Testimony Under the Criminal Sexual Conduct Statute. 34 S.C. L. Rev. 583 (December 1982).

Attorney General’s Opinions

Act No. 157 of 1977 permitting evidence of a victim’s sexual activity when it constitutes adultery only would be in violation of the equal protection clause, unless the Legislature found that alleged victims who are adulterers, whether married or not, are more likely to have consented to sexual intercourse with the defendant. 1976‑77 Op.Atty.Gen., No 77‑328, p 262 (1977 WL 24667).

NOTES OF DECISIONS

In general 1

Constitutional issues 2

1. In general

Exceptional circumstances did not exist that would warrant reversal of the trial court’s finding that the prejudicial value of evidence that stepbrother had previously sexually abused child victim substantially outweighed its probative value, during prosecution for criminal sexual conduct involving child’s sibling; the evidence did not provide an alternate explanation as to how sibling was familiar with the sexual conduct she alleged defendant committed. State v. Williams (S.C.App. 2014) 409 S.C. 455, 761 S.E.2d 770. Criminal Law 1134.49(1)

The Rape Shield Statute does not bar evidence of a victim’s sexual conduct if the evidence is offered for a purpose other than to attack the victim’s morality. State v. Williams (S.C.App. 2014) 409 S.C. 455, 761 S.E.2d 770. Sex Offenses 224

Proffered evidence of victim’s sexual history, that victim allegedly wanted defendant “to hurt her” in order to achieve sexual satisfaction, was irrelevant, and thus, inadmissible pursuant to “rape shield” statute, in prosecution for criminal sexual conduct in the first degree, kidnapping, and assault and battery of a high and aggravated nature, where evidence that victim might have enjoyed “rough sex” with defendant during their marriage did not tend to show that victim consented to sexual encounter on night in question. State v. Tennant (S.C. 2011) 394 S.C. 5, 714 S.E.2d 297. Sex Offenses 231

Proffered evidence of victim’s sexual history, purporting to show that victim had a preference for “rough sex” was inadmissible at rape trial pursuant to Rape Shield Law, since whether defendant and victim engaged in “rough sex” at time of alleged assault was not an issue at trial. State v. Tennant (S.C.App. 2009) 383 S.C. 245, 678 S.E.2d 812, rehearing denied, certiorari granted, affirmed as modified 394 S.C. 5, 714 S.E.2d 297. Sex Offenses 228

Evidence that alleged child sexual abuse victims had, prior to charged offenses, sexually assaulted young girl was relevant to show that defendant was not only possible source of victims’ ability to testify about alleged sexual conduct, and probative value of evidence outweighed prejudice; though cross‑examination of victims concerning allegations could impugn their character, trial court could eliminate this effect with instruction limiting admissibility for sole purpose of establishing an alternate explanation for victims’ sexual knowledge. State v. Grovenstein (S.C.App. 2000) 340 S.C. 210, 530 S.E.2d 406, rehearing denied, certiorari granted. Criminal Law 338(8)

A defendant charged with first‑degree criminal sexual conduct was prejudiced by the denial of permission, based on the Rape Shield Statute, to offer evidence of the complainant’s homosexuality for purposes of impeaching the complainant’s credibility, where the complainant testified that he was not homosexual and the state brought this matter up both on direct examination and in its closing argument; the Rape Shield Statute was not designed to shield a complainant from his own inconsistent statements. State v. Lang (S.C.App. 1991) 304 S.C. 300, 403 S.E.2d 677.

In a prosecution for assault with intent to commit criminal sexual conduct in the first degree, evidence of the victim’s alleged sexual intercourse with her neighbor in the defendant’s presence and of the defendant’s belief as to her motive for allegedly fabricating the charges against him did not come within the purview of the Rape Shield Statute. The evidence was essential to a full and fair determination of the defendant’s guilt and was offered for purposes other than to attack the victim’s character by revelation of her sexual activity with a third party. Although the State’s interest in protecting criminal sexual conduct victims is stronger than the right of a defendant to attack such a victim’s character in a manner that has limited or no relevance to the question of guilt, the State’s interests in protecting criminal sexual conduct victims from disclosure of sexual acts with third parties yielded to the defendant’s right to present evidence that he was being falsely accused because of his knowledge of the victim’s sexual conduct with a third party. State v. Finley (S.C. 1989) 300 S.C. 196, 387 S.E.2d 88.

In prosecution for criminal sexual conduct trial court did not err in ruling that before defendant could question prosecutrix about whether she had venereal disease, he had to make in camera offer of proof to assure that proposed questions were admissible; trial court did not err in refusing defendant’s motion for judgment notwithstanding verdict on ground that prosecutrix’s credibility was impeached due to inconsistencies in her testimony regarding venereal disease since, in ruling on motions to set aside verdict, court is concerned with existence of evidence, not with its weight. State v. Gunter (S.C. 1979) 273 S.C. 347, 256 S.E.2d 317.

2. Constitutional issues

State rape‑shield statute, insofar as it authorized preclusion of evidence of past sexual conduct between victim and accused, did not per se violate Sixth Amendment where statute permits defendant to introduce evidence of own past sexual conduct with alleged victim upon timely filing written motion and offer of proof; it was error for state Court of Appeals of state to adopt “per se rule” that notice requirement violates Sixth Amendment in all cases where requirement was used to preclude introduction of such evidence; it would be left to state courts on remand to address whether statute authorized preclusion of such evidence and whether preclusion violated Sixth Amendment on facts of case. Michigan v. Lucas, U.S.Mich.1991, 111 S.Ct. 1743, 500 U.S. 145, 114 L.Ed.2d 205.

Defendant did not receive ineffective assistance of counsel, in prosecution for criminal sexual conduct with a minor, based on counsel’s failure to question victim about prior sexual activities he may have had engaged in, as such testimony would have been barred by rape shield statute, and evidence supported postconviction relief court’s determination that counsel conducted reasonably effective cross‑examination. Skeen v. State (S.C. 1997) 325 S.C. 210, 481 S.E.2d 129. Criminal Law 1925

Rights of confrontation and cross‑examination are not unduly restricted and the shield statute, which limits evidence of a victim’s past sexual conduct, is not unconstitutional. State v. McCoy (S.C. 1979) 274 S.C. 70, 261 S.E.2d 159.

**SECTION 16‑3‑660.** Deposition testimony of rape victim or victim of assault with intent to ravish.

Before or during the trial of a person charged with rape or assault with intent to ravish, when the female who is alleged to have been assaulted is a witness, the judge of the court in which the case is to be tried may, in his discretion, by an order direct that the deposition of such witness be taken at a time and place designated in such order within the county in which the trial is to be had upon such notice to the accused as the judge may direct.

HISTORY: 1962 Code Section 16‑73; 1952 Code Section 16‑73; 1942 Code Section 1016; 1932 Code Section 1016; Cr. P. ‘22 Section 107; Cr. C. ‘12 Section 92; 1909 (26) 206.

CROSS REFERENCES

Court rules regarding depositions, see Rules of Civil Procedure, Rule 27.

Library References

Criminal Law 627.2.

Westlaw Topic No. 110.

C.J.S. Criminal Law Sections 637 to 643.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Criminal Sexual Conduct Section 27, Depositions.

NOTES OF DECISIONS

In general 1

Constitutional issues 2

1. In general

In a prosecution for committing a lewd act upon a female child under 14 years of age, there was no abuse of discretion in excluding the public from the trial during the testimony of the 9‑year old victim, although the preferred practice was the taking of the victim’s deposition pursuant to Sections 16‑3‑660 et seq. State v. Sinclair (S.C. 1981) 275 S.C. 608, 274 S.E.2d 411. Criminal Law 635.9(7)

The purpose of Code 1962 Sections 16‑73 and 16‑74 [Code 1976 Sections 16‑3‑660 and 16‑3‑670] was to provide a procedure by which a victim of a sexual assault could be spared the trauma of relating the details of the crime in open court. State v. Harris (S.C. 1977) 268 S.C. 117, 232 S.E.2d 231.

Code 1962 Sections 16‑73 and 16‑74 [Code 1976 Sections 16‑3‑660 and 16‑3‑670] are not intended to grant a defendant the right to cross‑examine a victim prior to trial by a deposition proceeding and are not intended to be used as a discovery device. State v. Harris (S.C. 1977) 268 S.C. 117, 232 S.E.2d 231.

2. Constitutional issues

This section [Code 1962 Section 16‑73] is constitutional. State v. Butler (S.C. 1910) 85 S.C. 45, 66 S.E. 1041.

**SECTION 16‑3‑670.** Procedure for taking deposition.

Such deposition shall be taken by the clerk of the court of general sessions for the county in which the case is to be tried or by such other officer as the presiding judge may name in his order, at the taking of which the accused shall be present and shall have the same rights in regard to the examination of the witness as if she were testifying in open court. No persons other than the attorneys for the State and accused shall be present unless expressly admitted by the judge, and the accused shall have the right to object to the admissibility of the testimony of such witness, either at the time of the taking of the deposition or when the same is offered in evidence on the trial in open court.

HISTORY: 1962 Code Section 16‑74; 1952 Code Section 16‑74; 1942 Code Section 1016; 1932 Code Section 1016; Cr. P. ‘22 Section 107; Cr. C. ‘12 Section 92; 1909 (26) 206.

CROSS REFERENCES

Court rules regarding depositions, see Rules of Civil Procedure, Rule 27.

Library References

Criminal Law 627.2.

Westlaw Topic No. 110.

C.J.S. Criminal Law Sections 637 to 643.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Criminal Sexual Conduct Section 27, Depositions.

NOTES OF DECISIONS

In general 1

1. In general

The purpose of Code 1962 Sections 16‑73 and 16‑74 [Code 1976 Sections 16‑3‑660 and 16‑3‑670] was to provide a procedure by which a victim of a sexual assault could be spared the trauma of relating the details of the crime in open court. State v. Harris (S.C. 1977) 268 S.C. 117, 232 S.E.2d 231.

Code 1962 Sections 16‑73 and 16‑74 [Code 1976 Sections 16‑3‑660 and 16‑3‑670] are not intended to grant a defendant the right to cross‑examine a victim prior to trial by a deposition proceeding and are not intended to be used as a discovery device. State v. Harris (S.C. 1977) 268 S.C. 117, 232 S.E.2d 231.

**SECTION 16‑3‑680.** Sheriff shall secure attendance of accused; absence of counsel.

The sheriff of the county shall secure the personal attendance of the accused at the time and place of taking such depositions, and the absence of either the attorney for the State or for the accused, after notice prescribed in the order, shall not prevent or delay the taking of such depositions.

HISTORY: 1962 Code Section 16‑79; 1952 Code Section 16‑79; 1942 Code Section 1016; 1932 Code Section 1016; Cr. P. ‘22 Section 107; Cr. C. ‘12 Section 92; 1909 (26) 206.

CROSS REFERENCES

Court rules regarding depositions, see Rules of Civil Procedure, Rule 27.

Library References

Criminal Law 627.2.

Westlaw Topic No. 110.

C.J.S. Criminal Law Sections 637 to 643.

**SECTION 16‑3‑690.** Custody of deposition.

Such depositions, when taken, shall be signed by the witness in the presence of the clerk or other officer taking the same, placed in a sealed envelope, the title of the case endorsed thereon, and be retained by the clerk of court until the same is opened in court; and if taken by another officer he shall deliver the same to the clerk, to be retained by him as herein provided.

HISTORY: 1962 Code Section 16‑77; 1952 Code Section 16‑77; 1942 Code Section 1016; 1932 Code Section 1016; Cr. P. ‘22 Section 107; Cr. C. ‘12 Section 92; 1909 (26) 206.

CROSS REFERENCES

Court rules regarding depositions, see Rules of Civil Procedure, Rule 27.

Library References

Clerks of Courts 69.

Criminal Law 627.2.

Westlaw Topic Nos. 79, 110.

C.J.S. Courts Section 341.

C.J.S. Criminal Law Sections 637 to 643.

**SECTION 16‑3‑700.** Reading deposition to jury.

Such deposition shall be read to the jury upon the trial and shall be considered by them as though such testimony had been given orally in court.

HISTORY: 1962 Code Section 16‑75; 1952 Code Section 16‑75; 1942 Code Section 1016; 1932 Code Section 1016; Cr. P. ‘22 Section 107; Cr. C. ‘12 Section 92; 1909 (26) 206.

CROSS REFERENCES

Court rules regarding depositions, see Rules of Civil Procedure, Rule 27.

Library References

Criminal Law 627.2, 664.

Westlaw Topic No. 110.

C.J.S. Criminal Law Sections 637 to 643.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Criminal Sexual Conduct Section 27, Depositions.

**SECTION 16‑3‑710.** Depositions in rebuttal.

The judge may, in like manner, direct other depositions of such witness, in rebuttal or otherwise, which shall be taken and read in the manner and under the conditions herein prescribed as to the first deposition.

HISTORY: 1962 Code Section 16‑76; 1952 Code Section 16‑76; 1942 Code Section 1016; 1932 Code Section 1016; Cr. P. ‘22 Section 107; Cr. C. ‘12 Section 92; 1909 (26) 206.

CROSS REFERENCES

Court rules regarding depositions, see Rules of Civil Procedure, Rule 27.

Library References

Criminal Law 627.2, 664, 683(1).

Westlaw Topic No. 110.

C.J.S. Criminal Law Sections 637 to 643, 1662, 1664.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Criminal Sexual Conduct Section 27, Depositions.

**SECTION 16‑3‑720.** Destruction of deposition.

The clerk of the court in which such case is tried, in the event no appeal is taken, shall, as soon as the time for appealing has elapsed, withdraw the deposition from the record of the case and destroy it. And in case there is an appeal, as soon as the case is finally disposed of, the clerk shall destroy the depositions herein provided for.

HISTORY: 1962 Code Section 16‑78; 1952 Code Section 16‑78; 1942 Code Section 1016; 1932 Code Section 1016; Cr. P. ‘22 Section 107; Cr. C. ‘12 Section 92; 1909 (26) 206.

Library References

Clerks of Courts 69.

Criminal Law 1088.20.

Westlaw Topic Nos. 79, 110.

C.J.S. Courts Section 341.

**SECTION 16‑3‑730.** Publishing name of victim of criminal sexual conduct unlawful.

Whoever publishes or causes to be published the name of any person upon whom the crime of criminal sexual conduct has been committed or alleged to have been committed in this State in any newspaper, magazine or other publication shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than one thousand dollars or imprisonment of not more than three years. The provisions of this section shall not apply to publications made by order of court.

HISTORY: 1962 Code Section 16‑81; 1952 Code Section 16‑81; 1942 Code Section 1275; 1932 Code Section 1275; Cr. C. ‘22 Section 170; Cr. C. ‘12 Section 317; 1909 (26) 208; 1979 Act No. 23.

CROSS REFERENCES

Commission of this crime within specified radius of child day care center as separate offense, see Section 63‑13‑200.

Denial of registration as an operator of a child day care or group day care home where the applicant, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑820.

Denial of renewal for child day care or group day care home where the person applying for approval, the operator of the facility, or an employee or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑630.

Fingerprint review of any person applying to operate or seek employment at a child day care or group day care home to determine prior conviction of the crime referred to in this section, see Section 63‑13‑620.

Foster care placement with certain persons prohibited, see Section 63‑7‑2350.

No license or registration will be issued to any religious establishment to operate a child day care or group day care home where the operator, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑1010.

No person may be employed by the Department of Social Services in its day care licensing or child protective services divisions who has been convicted of the crime referred to in this section, see Section 63‑13‑190.

Persons convicted of Title 16, Chapter 3 crimes prohibited from appointment as guardian ad litem for child in abuse or neglect proceeding, see Section 63‑11‑520.

Library References

Constitutional Law 2112.

Newspapers 6.5.

Obstructing Justice 129.

Westlaw Topic Nos. 92, 274, 282.

C.J.S. Constitutional Law Sections 836 to 840.

C.J.S. Newspapers Sections 32 to 34.

C.J.S. Obstructing Justice or Governmental Administration Sections 63 to 66, 75 to 77, 79 to 81.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Action Section 14, Determination of Private Rights.

S.C. Jur. Criminal Sexual Conduct Section 10, Publishing Name of Victim of Criminal Sexual Conduct.

LAW REVIEW AND JOURNAL COMMENTARIES

Identity Protection for Sexual Assault Victims: Exploring Alternatives to the Publication of Private Facts Tort. 55 SC Law Rev 619 (Spring 2004).

South Carolina: Last Haven for Rape Victim Privacy? 50 S.C. L. Rev. 873, Summer 1999.

NOTES OF DECISIONS

In general 1

Constitutional issues 2

Private actions 3

1. In general

The object of this section [Code 1962 Section 16‑81] is to encourage a free report of the crime by the victim. Nappier v. Jefferson Standard Life Ins. Co. (C.A.4 (S.C.) 1963) 322 F.2d 502. Torts 388

“Name” is to be read in this section [Code 1972 Section 16‑81] as the equivalent of “identity.” Thus, where the victims were sufficiently identified other than by name, this section [Code 1962 Section 16‑81] was transgressed. Nappier v. Jefferson Standard Life Ins. Co. (C.A.4 (S.C.) 1963) 322 F.2d 502.

2. Constitutional issues

Imposition of civil damages on newspaper for publishing rape victim’s name which was lawfully obtained from police records violated First Amendment, since news article contained lawfully obtained, truthful information about matter of public significance, and imposing liability under circumstances was not narrowly tailored means of furthering state interests in maintaining privacy and safety of sexual assault victim or encouraging such victims to report offenses. The Florida Star v. B.J.F., U.S.Fla.1989, 109 S.Ct. 2603, 491 U.S. 524, 105 L.Ed.2d 443.

Section 16‑3‑730, which prohibits publication of a sexual assault victim’s name, does not violate the equal protection clauses of the federal and state constitutions on the ground that it applies only to the print media and not to, for example, television and radio broadcasts, since the language of the statute is broad enough to cover publication by means other than print. Dorman v. Aiken Communications, Inc. (S.C. 1990) 303 S.C. 63, 398 S.E.2d 687.

Section 16‑3‑730, which prohibits publication of a sexual assault victim’s name, is not unconstitutional on its face as violative of the First Amendment to the United States Constitution made applicable to the states by the Fourteen Amendment. Dorman v. Aiken Communications, Inc. (S.C. 1990) 303 S.C. 63, 398 S.E.2d 687. Constitutional Law 2112; Newspapers 6.5

3. Private actions

An action for invasion of privacy arising from a publication’s reporting of a prison rape which included the victim’s name, the controlling law in determining whether the information had been obtained lawfully was not the rape shield law, Section 16‑3‑730, but the South Carolina Freedom of Information Act, Sections 30‑40‑10. Doe v. Berkeley Publishers (S.C.App. 1996) 322 S.C. 307, 471 S.E.2d 731, rehearing denied, certiorari granted, reversed 329 S.C. 412, 496 S.E.2d 636, certiorari denied 119 S.Ct. 406, 525 U.S. 963, 142 L.Ed.2d 330.

No private cause of action is created under Section 16‑3‑730. Section 16‑3‑730 is a criminal statute which provides only for criminal sanctions; the language and form of the statute do not purport to establish civil liability for violations. Dorman v. Aiken Communications, Inc. (S.C. 1990) 303 S.C. 63, 398 S.E.2d 687.

**SECTION 16‑3‑740.** Testing of certain convicted offenders for Hepatitis B and HIV.

(A) For purposes of this section:

(1) “Body fluid” means blood, amniotic fluid, pericardial fluid, pleural fluid, synovial fluid, cerebrospinal fluid, semen or vaginal secretions, or any body fluid visibly contaminated with blood.

(2) “HIV” means the Human Immunodeficiency Virus.

(3) “Offender” includes adults and juveniles.

(B) Upon the request of a person who is the victim of a criminal offense which involves the sexual penetration of the victim’s body or who has been exposed to body fluids during the commission of a criminal offense, or upon the request of the legal guardian of a person who is the victim of a criminal offense which involves the sexual penetration of the victim’s body or who has been exposed to body fluids during the commission of a criminal offense, the solicitor, after the offender is charged, must petition the court for an order to have the offender tested for Hepatitis B and HIV. An offender must be tested pursuant to this section for Hepatitis B and HIV as soon as practicable after the court order is issued but not later than forty‑eight hours after the date the person is indicted for the offense or waives indictment for the offense. If the offender is subject to the jurisdiction of the family court, he must be tested not later than forty‑eight hours after the petition is filed with the family court alleging he is delinquent for committing the offense. If the offender cannot be located before the end of the forty‑eight hour period as provided in this subsection, the forty‑eight hour period is tolled until the offender is located by law enforcement. To obtain a court order, the solicitor must demonstrate the following, that the:

(1) victim or the victim’s legal guardian requested the tests;

(2) offender has been charged with, indicted for, or waived indictment for an offense which involved the sexual penetration of the victim’s body or that there is probable cause that during the commission of the criminal offense there was a risk that body fluids were transmitted from one person to another; and

(3) offender has received notice of the petition and notice of his right to have counsel represent him at a hearing.

The results of the tests must be kept confidential but disclosed to the solicitor who obtained the court order. As soon as practicable, the solicitor shall notify only those persons designated in subsection (C) of the results of the initial Hepatitis B and HIV tests and the results of any follow‑up HIV tests.

(C) The tests must be administered by the Department of Health and Environmental Control through the local county health department or the medical professional at the state or local detention facility where the offender is imprisoned or detained. The solicitor shall notify the following persons of the tests results:

(1) the victim or the legal guardian of a victim who is a minor or is a person with intellectual disability or mentally incapacitated;

(2) the victim’s attorney;

(3) the offender and a juvenile offender’s parent or guardian; and

(4) the offender’s attorney.

The results of the tests shall be provided to the designated recipients with the following disclaimer: “The tests were conducted in a medically approved manner, but tests cannot determine infection by Hepatitis B or HIV with absolute accuracy. Additionally, the testing does not determine exposure to, or infection by, other sexually transmitted diseases. Persons receiving the test results should continue to monitor their own health, seek retesting in approximately six months, and should consult a physician as appropriate”.

The solicitor also shall provide to the state or local correctional facility where the offender is imprisoned or detained and the Department of Health and Environmental Control the test results for HIV and Hepatitis B which indicate that the offender is infected with the disease. The state or local correctional facility where the offender is imprisoned or detained shall use this information solely for the purpose of providing medical treatment to the offender while the offender is imprisoned or detained. The State shall pay for the tests. If the offender is subsequently convicted or adjudicated delinquent, the offender or the parents of an adjudicated offender must reimburse the State for the costs of the tests unless the offender or the parents of the adjudicated offender are determined to be indigent.

If the tests given pursuant to this section indicate infection by Hepatitis B or HIV, the Department of Health and Environmental Control shall be provided with all test results and must provide counseling to the offender regarding the disease, syndrome, or virus. The Department of Health and Environmental Control must provide counseling for the victim, advise the victim of available medical treatment options, refer the victim to appropriate health care and support services, and, at the request of the victim or the legal guardian of a victim, test the victim for HIV and Hepatitis B and provide post‑testing counseling to the victim.

(D) If deemed medically appropriate, the offender must undergo follow‑up testing for HIV. The follow‑up testing, and any counseling which may be ordered, shall be performed on dates that occur six weeks, three months, and six months following the initial test. Any follow‑up testing shall be terminated if the offender obtains an acquittal on, dismissal of, or is not adjudicated delinquent for all charges for which testing was ordered.

(E) If, for any reason, the testing requested under subsection (B) has not been undertaken, upon request of the victim or the victim’s legal guardian, the court shall order the offender to undergo testing for Hepatitis B and HIV following conviction or delinquency adjudication. The testing shall be administered by the Department of Health and Environmental Control through the local county health department or the medical professional at the state or local detention facility where the offender is imprisoned or detained. The results shall be disclosed in accordance with the provisions of subsection (C).

(F) Upon a showing of probable cause that the offender committed a crime, the collection of additional samples, including blood, saliva, head or pubic hair may be contemporaneously ordered by the court so that the State may conduct scientific testing, including DNA analysis. The results of the scientific testing, including DNA analysis, may be used for evidentiary purposes in any court proceeding.

(G) Any person or entity who administers tests ordered pursuant to this section and who does so in accordance with this section and accepted medical standards for the administration of these tests shall be immune from civil and criminal liability arising from his conduct.

(H) Any person who discloses information in accordance with the provisions of this section or who participates in any judicial proceeding resulting from the disclosure and who does so in good faith and without malice shall have immunity from civil or criminal liability that might otherwise be incurred or imposed in an action resulting from the disclosure.

(I) Results of tests performed pursuant to this section shall not be used as evidence in any criminal trial of the offender except as provided for in subsection (F).

HISTORY: 1988 Act No. 490, Section 17; 1994 Act No. 430, Section 1; 2000 Act No. 218, Section 1; 2009 Act No. 59, Sections 2, 3, eff June 2, 2009; 2010 Act No. 292, Section 2, eff August 27, 2010; 2011 Act No. 36, Section 1, eff June 7, 2011.

CROSS REFERENCES

Commission of this crime within specified radius of child day care center as separate offense, see Section 63‑13‑200.

Library References

Criminal Law 627.5(1).

Searches and Seizures 78.

Westlaw Topic Nos. 110, 349.

C.J.S. Criminal Law Sections 434, 663 to 668.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Criminal Sexual Conduct Section 1, Scope Note.

S.C. Jur. Criminal Sexual Conduct Section 54, Aids Testing of Convicted Sex Offenders.

NOTES OF DECISIONS

Constitutional issues 1

1. Constitutional issues

That statute under which defendant was ordered to undergo testing for sexually transmitted diseases pending prosecution for criminal sexual conduct with a minor (CSCM) allowed such testing without regard to the timing of an alleged crime did not render it unconstitutionally vague; defendant’s evidentiary concerns addressing the timing of testing in the context of the criminal proceeding were outweighed by State’s interest in preventing the spread of HIV and Hepatitis B and protecting the health of alleged victims. State v. Houey (S.C. 2007) 375 S.C. 106, 651 S.E.2d 314. Constitutional Law 4461; Searches And Seizures 12

State was not required to show probable cause or individualized suspicion that defendant was actually infected with a sexually transmitted disease before testing of defendant’s blood for sexually transmitted diseases could be performed pending prosecution for criminal sexual conduct with a minor (CSCM), and such procedure did not violate defendant’s right of protection against unreasonable searches and seizures; special needs exception allowed search, as State had valid interest in protecting the health and safety of victim, and the testing furthered State’s interest in stemming the spread of HIV and Hepatitis B through education and counseling of victim, had she been found to have contracted a disease. State v. Houey (S.C. 2007) 375 S.C. 106, 651 S.E.2d 314. Searches And Seizures 78

**SECTION 16‑3‑750.** Request that victim submit to polygraph examination.

A law enforcement officer, prosecuting officer, or other governmental official may request that the victim of an alleged criminal sexual conduct offense as defined under federal or South Carolina law submit to a polygraph examination or other truth telling device as part of the investigation, charging, or prosecution of the offense if the credibility of the victim is at issue; however, the officer or official must not require the victim to submit to a polygraph examination or other truth telling device as a condition for proceeding with the investigation, charging, or prosecution of the offense.

HISTORY: 2009 Act No. 59, Section 4, eff June 2, 2009.

Notes of Decisions

In general 1

1. In general

Statute allowing law enforcement to request victim of alleged criminal sexual conduct offense to submit to polygraph examination did not apply, where there was no evidence challenging credibility of victim. State v. McBride (S.C.App. 2016) 416 S.C. 379, 786 S.E.2d 435, certiorari denied. Criminal Law 388.5(1)

**SECTION 16‑3‑755.** Sexual battery with a student.

(A) For purposes of this section:

(1) “Aggravated coercion” means that the person affiliated with a public or private secondary school in an official capacity threatens to use force or violence of a high and aggravated nature to overcome the student, if the student reasonably believes that the person has the present ability to carry out the threat, or threatens to retaliate in the future by the infliction of physical harm, kidnapping, or extortion, under circumstances of aggravation, against the student.

(2) “Aggravated force” means that the person affiliated with a public or private secondary school in an official capacity uses physical force or physical violence of a high and aggravated nature to overcome the student or includes the threat of the use of a deadly weapon.

(3) “Person affiliated with a public or private secondary school in an official capacity” means an administrator, teacher, substitute teacher, teacher’s assistant, student teacher, law enforcement officer, school bus driver, guidance counselor, or coach who is affiliated with a public or private secondary school but is not a student enrolled in the school.

(4) “Secondary school” means either a junior high school or a high school.

(5) “Sexual battery” means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person’s body or of any object into the genital or anal openings of another person’s body, except when such intrusion is accomplished for medically recognized treatment or diagnostic purposes.

(6) “Student” means a person who is enrolled in a school.

(B) If a person affiliated with a public or private secondary school in an official capacity engages in sexual battery with a student enrolled in the school who is sixteen or seventeen years of age, and aggravated coercion or aggravated force is not used to accomplish the sexual battery, the person affiliated with the public or private secondary school in an official capacity is guilty of a felony and, upon conviction, must be imprisoned for not more than five years.

(C) If a person affiliated with a public or private secondary school in an official capacity engages in sexual battery with a student enrolled in the school who is eighteen years of age or older, and aggravated coercion or aggravated force is not used to accomplish the sexual battery, the person affiliated with the public or private secondary school in an official capacity is guilty of a misdemeanor and, upon conviction, must be fined not more than five hundred dollars or imprisoned for thirty days, or both.

(D) If a person affiliated with a public or private secondary school in an official capacity has direct supervisory authority over a student enrolled in the school who is eighteen years of age or older, and the person affiliated with the public or private secondary school in an official capacity engages in sexual battery with the student, and aggravated coercion or aggravated force is not used to accomplish the sexual battery, the person affiliated with the public or private secondary school in an official capacity is guilty of a felony and, upon conviction, must be imprisoned for not more than five years.

(E) This section does not apply if the person affiliated with a public or private secondary school in an official capacity is lawfully married to the student at the time of the act.

HISTORY: 2010 Act No. 265, Section 1, eff June 24, 2010.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Criminal Sexual Conduct Section 2, All Degrees.

S.C. Jur. Criminal Sexual Conduct Section 13, Aggravated Coercion.

S.C. Jur. Criminal Sexual Conduct Section 14, Aggravated Force.

S.C. Jur. Criminal Sexual Conduct Section 19, Sexual Battery.

ARTICLE 8

Sexual Performance by Children

**SECTION 16‑3‑800.** Definitions.

As used in this article:

(1) “Sexual performance” means any performance or part thereof that includes sexual conduct by a child younger than eighteen years of age.

(2) “Sexual conduct” means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado‑masochistic abuse, or lewd exhibition of the genitals.

(3) “Performance” means any play, motion picture, photograph, dance, or other visual representation that is exhibited before an audience.

(4) “Promote” means to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmit, publish, distribute, circulate, disseminate, present, exhibit, or advertise or to offer or agree to do any of the above.

HISTORY: 1984 Act No. 267.

CROSS REFERENCES

Requirement that persons convicted of crimes involving sexual conduct as defined in this section, and their victims, be tested for Human Immunodeficiency Virus, see Section 16‑3‑740.

Trafficking in persons, definitions, see Section 16‑3‑2010.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Criminal Sexual Conduct Section 54, Aids Testing of Convicted Sex Offenders.

Treatises and Practice Aids

Guide to Employment Law and Regulation 2d Section 61:9, Child Labor Law.

**SECTION 16‑3‑810.** Engaging child for sexual performance; penalty.

(a) It is unlawful for any person to employ, authorize, or induce a child younger than eighteen years of age to engage in a sexual performance. It is unlawful for a parent or legal guardian or custodian of a child younger than eighteen years of age to consent to the participation by the child in a sexual performance.

(b) Any person violating the provisions of subsection (a) of this section is guilty of criminal sexual conduct of the second degree and upon conviction shall be punished as provided in Section 16‑3‑653.

HISTORY: 1984 Act No. 267.

CROSS REFERENCES

Commission of this crime within specified radius of child day care center as separate offense, see Section 63‑13‑200.

Denial of registration as an operator of a child day care or group day care home where the applicant, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑820.

Denial of renewal for child day care or group day care home where the person applying for approval, the operator of the facility, or an employee or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑630.

Electronic monitoring, reporting damage to or removing monitoring device, penalty, see Section 23‑3‑540.

Fingerprint review of any person applying to operate or seek employment at a child day care or group day care home to determine prior conviction of the crime referred to in this section, see Section 63‑13‑620.

Foster care placement with certain persons prohibited, see Section 63‑7‑2350.

No license or registration will be issued to any religious establishment to operate a child day care or group day care home where the operator, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑1010.

No person may be employed by the Department of Social Services in its day care licensing or child protective services divisions who has been convicted of the crime referred to in this section, see Section 63‑13‑190.

Offender registry information available to public, see Section 23‑3‑490.

Past conviction check prior to initial employment of teachers, see Section 59‑26‑40.

Persons convicted of Title 16, Chapter 3 crimes prohibited from appointment as guardian ad litem for child in abuse or neglect proceeding, see Section 63‑11‑520.

Persons convicted under this section must register for sex offender registry, see Section 23‑3‑430.

Placement of minor sex offenders, see Section 63‑7‑2360.

Sentencing, see Section 17‑25‑20 et seq.

Sexually Violent Predator Act, definitions, see Section 44‑48‑30.

Trafficking in persons, definitions, see Section 16‑3‑2010.

Library References

Infants 1587.

Westlaw Topic No. 211.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Burglary Section 9, Punishment.

S.C. Jur. Probation, Parole, and Pardon Section 14, Summary of Parole Eligibility Calculations.

Attorney General’s Opinions

Offenses categorized by the Attorney General as tier 3 offenders as defined by the Federal Sex Offender Registration and Notification Act. SC Op.Atty.Gen. (May 30, 2008) 2008 WL 2324820.

**SECTION 16‑3‑820.** Producing, directing or promoting sexual performance by child; penalty.

(a) It is unlawful for any person to produce, direct, or promote a performance that includes sexual conduct by a child younger than eighteen years of age.

(b) Any person violating the provisions of subsection (a) of this section is guilty of criminal sexual conduct of the third degree and upon conviction shall be punished as provided in Section 16‑3‑654.

HISTORY: 1984 Act No. 267.

CROSS REFERENCES

Commission of this crime within specified radius of child day care center as separate offense, see Section 63‑13‑200.

Denial of registration as an operator of a child day care or group day care home where the applicant, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑820.

Denial of renewal for child day care or group day care home where the person applying for approval, the operator of the facility, or an employee or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑630.

Electronic monitoring, reporting damage to or removing monitoring device, penalty, see Section 23‑3‑540.

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No person may be employed by the Department of Social Services in its day care licensing or child protective services divisions who has been convicted of the crime referred to in this section, see Section 63‑13‑190.

Offender registry information available to public, see Section 23‑3‑490.

Past conviction check prior to initial employment of teachers, see Section 59‑26‑40.

Persons convicted of Title 16, Chapter 3 crimes prohibited from appointment as guardian ad litem for child in abuse or neglect proceeding, see Section 63‑11‑520.

Persons convicted under this section must register for sex offender registry, see Section 23‑3‑430.

Placement of minor sex offenders, see Section 63‑7‑2360.

Sexually Violent Predator Act, definitions, see Section 44‑48‑30.

Trafficking in persons, definitions, see Section 16‑3‑2010.

Violent crimes defined, see Section 16‑1‑60.

Library References

Infants 1587.

Westlaw Topic No. 211.

Attorney General’s Opinions

Offenses categorized by the Attorney General as tier 3 offenders as defined by the Federal Sex Offender Registration and Notification Act. SC Op.Atty.Gen. (May 30, 2008) 2008 WL 2324820.

**SECTION 16‑3‑830.** Reasonable belief as to majority of child as affirmative defense.

It is an affirmative defense to a prosecution under this article that the defendant, in good faith, reasonably believed that the person who engaged in the sexual conduct was eighteen years of age or older.

HISTORY: 1984 Act No. 267.

Library References

Criminal Law 33.

Infants 1587.

Westlaw Topic Nos. 110, 211.

C.J.S. Criminal Law Section 127.

**SECTION 16‑3‑840.** Methods of judicial determination of age of child.

When it becomes necessary for the purposes of this article to determine whether a child who participated in sexual conduct was younger than eighteen years of age, the court or jury may make this determination by any of the following methods:

(1) personal inspection of the child;

(2) inspection of the photograph or motion picture that shows the child engaging in the sexual performance;

(3) oral testimony by a witness to the sexual performance as to the age of the child based on the child’s appearance at the time;

(4) expert medical testimony based on the appearance of the child engaging in the sexual performance; or

(5) any other method authorized by law or by rules of evidence.

HISTORY: 1984 Act No. 267.

Library References

Criminal Law 627.5(1).

Infants 1721.

Westlaw Topic Nos. 110, 211.

C.J.S. Criminal Law Sections 434, 663 to 668.

C.J.S. Infants Section 210.

RESEARCH REFERENCES

Treatises and Practice Aids

Guide to Employment Law and Regulation 2d Section 61:9, Child Labor Law.

**SECTION 16‑3‑850.** Film processor or computer technician to report film or computer images containing sexually explicit pictures of minors.

Any retail or wholesale film processor or photo finisher who is requested to develop film, and any computer technician working with a computer who views an image of a child younger than eighteen years of age or appearing to be younger than eighteen years of age who is engaging in sexual conduct, sexual performance, or a sexually explicit posture must report the name and address of the individual requesting the development of the film, or of the owner or person in possession of the computer to law enforcement officials in the state and county or municipality from which the film was originally forwarded. Compliance with this section does not give rise to any civil liability on the part of anyone making the report.

HISTORY: 1987 Act No. 168 Section 4; 2001 Act No. 81, Section 3.

Library References

Protection of Endangered Persons 9.

Westlaw Topic No. 315P.

United States Supreme Court Annotations

Supreme Court’s development, since Roth v United States, of standards and principles determining concept of obscenity in context of right of free speech and press, 41 L Ed 2d 1257.

NOTES OF DECISIONS

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1. Constitutional issues

Computer repairman was not acting as a government agent when he searched defendant’s computer and found images of child pornography, and therefore repairman’s search was a search by a private individual and did not violate Fourth Amendment, despite fact that a South Carolina statute required repairman to report such finding to authorities; government did not know of and acquiesce in repairman’s search. U.S. v. Peterson, 2003, 294 F.Supp.2d 797, affirmed 145 Fed.Appx. 820, 2005 WL 2640971. Searches And Seizures 33

2. Search warrant

Evidence that defendant, after speaking with computer repairman in store, left the store to go home and get his computer to be repaired, together with inference that computer was likely kept in a private residence inasmuch as it was a desktop computer not capable of easy mobility, and contained images of a private nature, provided a sufficient nexus, for purposes of issuance of a search warrant, between defendant’s residence and the evidence of child pornography observed on his computer. U.S. v. Peterson, 2003, 294 F.Supp.2d 797, affirmed 145 Fed.Appx. 820, 2005 WL 2640971. Obscenity 282(2)

Defendant, who gave her laptop to a computer technician for repair, did not have a reasonable expectation of privacy in a video file on the laptop, which displayed two minor children dancing naked with defendant’s naked boyfriend and contained the sound of defendant’s voice directing the children, and thus a warrant was not required for police officer to view the video, where officer happened to observe on the laptop’s screen, as the laptop progressed through a data transfer, a still image of one of the children, who was naked and wearing a bra, and the computer technician had a statutory duty to report images depicting minors “engaging in sexual conduct, sexual performance, or a sexually explicit posture.” State v. Cardwell (S.C.App. 2015) 414 S.C. 416, 778 S.E.2d 483, rehearing denied. Obscenity 274(2); Searches and Seizures 26

ARTICLE 9

Kidnapping

**SECTION 16‑3‑910.** Kidnapping.

Whoever shall unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away any other person by any means whatsoever without authority of law, except when a minor is seized or taken by his parent, is guilty of a felony and, upon conviction, must be imprisoned for a period not to exceed thirty years unless sentenced for murder as provided in Section 16‑3‑20.

HISTORY: 1962 Code Section 16‑91; 1952 Code Section 16‑91; 1942 Code Section 1122; 1937 (40) 137; 1966 (54) 2151; 1974 (58) 2361; 1976 Act No. 684; 1991 Act No. 117, Section 1.

CROSS REFERENCES

Additional punishment for possession of firearm or knife during commission of, or attempt to commit, violent crime, see Section 16‑23‑490.

Commission of this crime within specified radius of child day care center as separate offense, see Section 63‑13‑200.

Custody of convicted persons, designation of place of confinement, participation in work release and training program, see Section 24‑3‑20.

Denial of registration as an operator of a child day care or group day care home where the applicant, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑820.

Denial of renewal for child day care or group day care home where the person applying for approval, the operator of the facility, or an employee or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑630.

Electronic monitoring, reporting damage to or removing monitoring device, penalty, see Section 23‑3‑540.

Eligibility for work release, see Section 24‑13‑125.

Fingerprint review of any person applying to operate or seek employment at a child day care or group day care home to determine prior conviction of the crime referred to in this section, see Section 63‑13‑620.

Foster care placement with certain persons prohibited, see Section 63‑7‑2350.

No license or registration will be issued to any religious establishment to operate a child day care or group day care home where the operator, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑1010.

No person may be employed by the Department of Social Services in its day care licensing or child protective services divisions who has been convicted of the crime referred to in this section, see Section 63‑13‑190.

Offender registry information available to public, see Section 23‑3‑490.

Past conviction check prior to initial employment of teachers, see Section 59‑26‑40.

Persons convicted of Title 16, Chapter 3 crimes prohibited from appointment as guardian ad litem for child in abuse or neglect proceeding, see Section 63‑11‑520.

Persons convicted under this section must register for sex offender registry, see Section 23‑3‑430.

Prohibited acts A, narcotics, penalties, see Section 44‑53‑370.

Prohibition against release of offender into community in which he committed violent crime, see Section 24‑13‑650.

Sentencing, see Section 17‑25‑20 et seq.

Library References

Kidnapping 14, 41.

Westlaw Topic No. 231E.

C.J.S. Kidnapping Sections 10 to 27, 48 to 50.

RESEARCH REFERENCES

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S.C. Jur. Burglary Section 9, Punishment.

LAW REVIEW AND JOURNAL COMMENTARIES

Annual Survey of South Carolina: The Death Penalty. 31 S.C. L. Rev. 49.

Attorney General’s Opinions

Offenses categorized by the Attorney General as tier 3 offenders as defined by the Federal Sex Offender Registration and Notification Act. SC Op.Atty.Gen. (May 30, 2008) 2008 WL 2324820.

The taking of an illegitimate child by the putative father from the child’s natural mother without the mother’s permission could be considered to constitute kidnapping under Section 16‑3‑910. However, each situation would have to be considered on a case‑by‑case basis. 1987 Op.Atty.Gen., No 87‑28, p 85 (1987 WL 245437).

A magistrate would not have jurisdiction to entertain any bail proceedings concerning a defendant charged with kidnapping where there was no murder, punishment for which is life imprisonment. 1978 Op.Atty.Gen., No 78‑202, p 228 (1978 WL 22670).

NOTES OF DECISIONS

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1. In general

Confining customers, who were not being robbed, could support kidnapping conviction independently of confinement required to commit armed robbery. State v. Porter (S.C.App. 2010) 389 S.C. 27, 698 S.E.2d 237, certiorari denied, appeal from dismissal of habeas corpus dismissed 657 Fed.Appx. 181, 2016 WL 4916871. Kidnapping 22

Single act of confining bank employees and customers while robbery was taking place could support finding of kidnapping regardless of whether it was merely incidental to commission of armed robbery. State v. Porter (S.C.App. 2010) 389 S.C. 27, 698 S.E.2d 237, certiorari denied, appeal from dismissal of habeas corpus dismissed 657 Fed.Appx. 181, 2016 WL 4916871. Kidnapping 22

The corpus delicti of kidnapping was established circumstantially by evidence of a struggle in the kidnapped victim’s home and the fact that the victim remained missing at the time of the trial. State v. Owens (S.C. 1987) 291 S.C. 116, 352 S.E.2d 474. Kidnapping 36

Where defendant threatened the prosecutrix with a knife, walked her from the front of the clubhouse of her apartment complex to the pool area, forced her to assume various positions around the pool while he engaged in sexual acts with her, and finally released her approximately 45 minutes after he had initially accosted her, such restraint constituted kidnapping within the meaning of Section 16‑3‑910, regardless of the fact that the purpose of the seizure was to facilitate the commission of a sexual battery. State v. Hall (S.C. 1983) 280 S.C. 74, 310 S.E.2d 429.

Abducting and carrying away the victim in order to avoid arrest fits within the meaning of the terms “ransom or reward” as they are used in 1962 Code Section 16‑91 [1976 Code Section 16‑3‑910]. State v. Allen (S.C. 1976) 266 S.C. 468, 224 S.E.2d 881. Kidnapping 19

2. Constitutional issues

Statutory definition of kidnapping is not unconstitutionally vague on its face. Adams v. Aiken (C.A.4 (S.C.) 1992) 965 F.2d 1306, certiorari denied 113 S.Ct. 2966, 508 U.S. 974, 125 L.Ed.2d 666, vacated on rehearing 114 S.Ct. 1365, 511 U.S. 1001, 128 L.Ed.2d 42, on remand 41 F.3d 175.

Counsel rendered deficient performance, as element of ineffective assistance claim, when counsel failed to obtain an independent competency evaluation of defendant prior to allowing defendant to plead guilty but mentally ill to charges that included assault and battery with intent to kill, kidnapping, and first‑degree sexual assault, although one evaluation of defendant stated he was competent to stand trial; plea counsel was aware that a more thorough evaluation and school board assessment stated defendant was cognitively limited, his IQ placed him in the category of severe mental retardation, and his intellectual functioning was similar to that of a four to seven‑year‑old child, and plea counsel’s strategy of pursuing the plea instead of obtaining competency evaluation was not objectively reasonable because if defendant was found incompetent at time of pleas, he could not have been convicted of the crimes. Ramirez v. State (S.C.App. 2015) 413 S.C. 351, 776 S.E.2d 101, rehearing denied, affirmed in part, reversed in part 419 S.C. 14, 795 S.E.2d 841. Criminal Law 1900; Criminal Law 1920

Evidence of probative value supported postconviction relief court’s finding that applicant did not prove, as element of ineffective assistance claim, that he was prejudiced by plea counsel’s failure to request mental examination prior to entry of applicant’s plea of guilty but mentally ill to assault and battery with intent to kill, kidnapping, and first‑degree sexual assault, although one doctor’s evaluation, based on five meetings with applicant lasting three to four hours each, found applicant incompetent; another doctor, who met with applicant for a total of approximately 90 minutes, filed a report stating applicant was competent to stand trial, and postconviction relief counsel failed to introduce an independent competency evaluation at the postconviction relief hearing. Ramirez v. State (S.C.App. 2015) 413 S.C. 351, 776 S.E.2d 101, rehearing denied, affirmed in part, reversed in part 419 S.C. 14, 795 S.E.2d 841. Criminal Law 1618(10)

Defense counsel’s failure to interview kidnapping defendant’s former girlfriend as potential alibi witness prejudiced defendant, as element of ineffective assistance of counsel, since girlfriend offered alibi testimony that reasonably could have resulted in different outcome at trial; girlfriend testified at post‑conviction relief hearing that she and defendant spent every weekend together prior to his arrest, which, if true, made it physically impossible for defendant to have committed charged offense. Walker v. State (S.C. 2014) 407 S.C. 400, 756 S.E.2d 144. Criminal Law 1923

Defense counsel was required to interview kidnapping defendant’s former girlfriend as potential alibi witness as part of duty to make reasonable investigation; counsel was aware of defendant’s claim that he spent night of alleged incidents at girlfriend’s home, but counsel never followed up with investigator’s attempt to speak with girlfriend. Walker v. State (S.C. 2014) 407 S.C. 400, 756 S.E.2d 144. Criminal Law 1923

Defendant’s 30‑year sentence for kidnapping would be vacated in case in which he was also convicted of murdering same victim, despite fact that defendant failed to object to the sentence when it was imposed. State v. Vick (S.C.App. 2009) 384 S.C. 189, 682 S.E.2d 275, rehearing denied, habeas corpus denied 2015 WL 4459011, appeal dismissed 633 Fed.Appx. 183, 2016 WL 757932. Criminal Law 29(14); Criminal Law 1030(3)

Defendant’s sentence of life imprisonment without the possibility of parole under “Two‑Strikes” law did not violate the separation of powers doctrine on basis that law deprives the judiciary of “all judicial discretion” in the exercise of its sentencing function; judicial discretion in sentencing was subject to statutory restriction without any violation of the separation of powers doctrine. State v. Johnson (S.C.App. 2002) 350 S.C. 543, 567 S.E.2d 486, rehearing denied, certiorari denied. Constitutional Law 2371; Sentencing And Punishment 1210

Application to defendant of “Two‑Strikes” law, resulting in sentence of life imprisonment without possibility of parole for his convictions for first‑degree burglary, armed robbery, and kidnapping, did not amount to cruel and unusual punishment; burglary, armed robbery, and kidnapping were grave offenses of the most serious nature, and when considered along with defendant’s prior offenses, two of which were for attempted armed robbery and one of which was for assault and battery with intent to kill, penalty of life without parole for each of offenses for which defendant was convicted was not extreme. State v. Johnson (S.C.App. 2002) 350 S.C. 543, 567 S.E.2d 486, rehearing denied, certiorari denied. Sentencing And Punishment 1513

Assistant solicitor’s comment, during closing argument, on defendant’s failure to call his uncle as an alibi witness in the prosecution for kidnapping and assault violated defendant’s constitutional presumption of innocence, because the defendant did not testify and did not present a defense, though defendant cross‑examined the detective about defendant’s statement to detective that defendant was visiting his uncle’s house at the time of the crimes; the alibi defense was introduced by assistant solicitor through direct examination of detective, and neither defense counsel’s closing argument nor trial judge’s charge on alibi constituted evidence of alibi. State v. Primus (S.C. 2002) 349 S.C. 576, 564 S.E.2d 103, habeas corpus denied 555 F.Supp.2d 596, appeal dismissed 298 Fed.Appx. 236, 2008 WL 4790104, certiorari denied 129 S.Ct. 1621, 173 L.Ed.2d 1004. Criminal Law 2136

The prosecution of a defendant for murder, after his conviction for kidnapping the murder victim, would not be barred on double jeopardy grounds, even though a body was never found and thus the state relied primarily on evidence of the kidnapping offense, since kidnapping is not an essential element of murder; the mere overlapping of proof does not establish a double jeopardy violation. State v. Owens (S.C. 1992) 309 S.C. 402, 424 S.E.2d 473, certiorari denied 113 S.Ct. 1861, 507 U.S. 1036, 123 L.Ed.2d 482, denial of post‑conviction relief reversed 331 S.C. 582, 503 S.E.2d 462.

The prosecution of a defendant for murder, after his conviction for kidnapping the murder victim, would not be barred by double jeopardy, even though the majority of physical evidence linking the defendant to the victim’s disappearance could have been discovered at the time of the kidnapping trial, where (1) the lapse of 15 months between the time the kidnapping occurred and the defendant was indicted for murder made the fact of the victim’s death more probable since a body was never found, and (2) the defendant made statements to several fellow inmates regarding his murder of the victim, which could not have been discovered prior to the kidnapping conviction. State v. Owens (S.C. 1992) 309 S.C. 402, 424 S.E.2d 473, certiorari denied 113 S.Ct. 1861, 507 U.S. 1036, 123 L.Ed.2d 482, denial of post‑conviction relief reversed 331 S.C. 582, 503 S.E.2d 462. Double Jeopardy 150(3)

A defendant convicted of kidnapping and sentenced to life imprisonment was not entitled to resentencing pursuant to a legislative amendment reducing the maximum penalty for kidnapping to 30 years imprisonment where the amendment did not become effective until after his sentence had been pronounced, and there was no language in the act which would require its retroactive application. State v. Varner (S.C. 1992) 310 S.C. 264, 423 S.E.2d 133, rehearing denied.

A defendant on trial for kidnapping, sexual assault and battery, and attempted criminal assault was not deprived of a fair trial by the remarks of the trial judge, who sustained the solicitor’s objection to defense counsel’s assertion that “you’re going to have to think about whether you’re going to brand my client as a kidnapper and rapist for the rest of his life. He will always have that stigma if you attach it to him,” where the judge neither struck the statement nor gave the jury a curative instruction, but rather stated “that is a matter for the jury. It’s in your province. I’ll say no more.” State v. Dildine (S.C.App. 1991) 306 S.C. 198, 410 S.E.2d 597, certiorari denied.

The kidnapping statute is not unconstitutionally vague or overbroad. An indictment, which charged kidnapping “against the peace and dignity of the State,” the common‑law designation for kidnapping, was not invalid for using the common‑law name instead of the statutory name. State v. Plath (S.C. 1981) 277 S.C. 126, 284 S.E.2d 221.

3. Construction and application

Generally, when a defendant is convicted for murder, any sentence for the kidnapping of the victim would be vacated. State v. Vazsquez (S.C. 2005) 364 S.C. 293, 613 S.E.2d 359, rehearing denied, denial of post‑conviction relief reversed 388 S.C. 447, 698 S.E.2d 561. Sentencing And Punishment 531

The deletion of the “holding for ransom” element of kidnapping in 1976 clearly indicates that the legislature intended to lower the standard of culpability required to hold one liable for the crime of kidnapping; however, such a change does not indicate that the crime of kidnapping is one of strict liability. State v. Jefferies (S.C. 1994) 316 S.C. 13, 446 S.E.2d 427, rehearing denied, certiorari denied 115 S.Ct. 911, 513 U.S. 1115, 130 L.Ed.2d 793.

4. Elements

Kidnapping is a continuous offense that commences when one is wrongfully deprived of freedom and continues until freedom is restored. State v. Porter (S.C.App. 2010) 389 S.C. 27, 698 S.E.2d 237, certiorari denied; State v. Porter (S.C.App. 2010) 389 S.C. 27, 698 S.E.2d 237, certiorari denied; Hinton v. South Carolina Dept. of Probation, Parole and Pardon Services (S.C.App. 2004) 357 S.C. 327, 592 S.E.2d 335, rehearing denied, certiorari granted, certiorari dismissed as improvidently granted 364 S.C. 608, 614 S.E.2d 635; State v. Stuckey (S.C.App. 2001) 347 S.C. 484, 556 S.E.2d 403, rehearing denied, certiorari denied; State v. Tucker (S.C. 1999) 334 S.C. 1, 512 S.E.2d 99, certiorari denied 119 S.Ct. 2407, 527 U.S. 1042, 144 L.Ed.2d 805.

The mens rearequired for the crime of kidnapping is knowledge. Hinton v. South Carolina Dept. of Probation, Parole and Pardon Services (S.C.App. 2004) 357 S.C. 327, 592 S.E.2d 335, rehearing denied, certiorari granted, certiorari dismissed as improvidently granted 364 S.C. 608, 614 S.E.2d 635. Kidnapping 16

South Carolina’s kidnapping statute requires proof of an unlawful act taking one of several alternative forms, including seizure, confinement, inveiglement, decoy, kidnapping, abduction, or carrying away. State v. East (S.C.App. 2003) 353 S.C. 634, 578 S.E.2d 748. Kidnapping 15

Mens rea required for the crime of kidnapping is “knowledge.” State v. Tucker (S.C. 1999) 334 S.C. 1, 512 S.E.2d 99, certiorari denied 119 S.Ct. 2407, 527 U.S. 1042, 144 L.Ed.2d 805. Kidnapping 16

The mens rea of “knowledge” is required under Section 16‑3‑910 for kidnapping. State v. Jefferies (S.C. 1994) 316 S.C. 13, 446 S.E.2d 427, rehearing denied, certiorari denied 115 S.Ct. 911, 513 U.S. 1115, 130 L.Ed.2d 793. Kidnapping 16

“Purpose” is the highest level of mens rea known in criminal law and it is not required under the South Carolina kidnapping statute. State v. Jefferies (S.C. 1994) 316 S.C. 13, 446 S.E.2d 427, rehearing denied, certiorari denied 115 S.Ct. 911, 513 U.S. 1115, 130 L.Ed.2d 793.

The kidnapping statute, Section 16‑3‑910, is broad enough to include,yet not require, proof of the elements constituting the common law crime of false imprisonment. One element of false imprisonment, force or reasonably apprehended force, would be present under some, but not other, alternatives listed in Section 16‑3‑910. Thus, the crime of false imprisonment has been incorporated into Section 16‑3‑910 as one method of proving kidnapping. State v. Berntsen (S.C. 1988) 295 S.C. 52, 367 S.E.2d 152.

Kidnapping occurs when one unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts or carries away any other person by any means whatsoever without authority of law; a kidnapping commences when one is lawfully deprived of his freedom and continues until freedom is restored. State v. Kornahrens (S.C. 1986) 290 S.C. 281, 350 S.E.2d 180, certiorari denied 107 S.Ct. 1592, 480 U.S. 940, 94 L.Ed.2d 781, denial of habeas corpus affirmed 66 F.3d 1350, certiorari denied 116 S.Ct. 1575, 517 U.S. 1171, 134 L.Ed.2d 673, rehearing denied 116 S.Ct. 2541, 518 U.S. 1013, 135 L.Ed.2d 1063.

5. Joinder

Trial judge based his decision to deny joinder of kidnapping defendant’s trial with trial of other alleged kidnapper upon just and proper consideration of issues at hand, and thus did not abuse his discretion in denying joinder, where trial judge determined that while authority of a solicitor to facilitate efficient administration of the office’s duties was subject to trial court’s supervision, defendant did not present sufficient legal cause to grant joinder and to affect facility and strategy of solicitor. State v. Page (S.C.App. 2013) 406 S.C. 272, 750 S.E.2d 623. Criminal Law 622.7(1); Criminal Law 622.7(12)

Trial court relied on manner, not order, in which solicitor proceeded with kidnapping defendant’s prosecution, when trial court denied other alleged kidnapper’s motion for joint trial, and thus did not violate Langford, which held that while a solicitor could not determine order in which cases were called, solicitor’s authority to determine manner in which to proceed with any particular case was permissible, where trial court explicitly referenced solicitor’s right to “call cases in such a manner” as to “facilitate the efficient administration of h[er] official duties.” State v. Page (S.C.App. 2013) 406 S.C. 272, 750 S.E.2d 623. Criminal Law 622.7(12)

6. Questions for jury

Circumstantial evidence that defendant’s fingerprint was found on stolen vehicle, which was located two miles from victim’s home within 30 minutes of crime, that defendant denied he had contact with victim’s vehicle, knew victim, or knew where he lived, that one assailant had exited vehicle and assaulted victim before leaving scene, that defendant and alleged accomplice were in same vocational rehabilitation program, and that DNA evidence on duct tape removed from victim’s head was matched to alleged accomplice, was sufficient to raise question for jury as to defendant’s guilt in prosecution for first‑degree burglary, armed robbery, kidnapping, and other crimes. State v. Pearson (S.C. 2016) 415 S.C. 463, 783 S.E.2d 802. Burglary 45; Criminal Law 741(2); Robbery 26

State proved mens rea necessary for kidnapping, thus permitting its submission as aggravating circumstance in murder prosecution; victim was deprived of her freedom once defendant bound her with duct tape, and purpose of such restraint was to facilitate commission of burglary and robbery. State v. Tucker (S.C. 1999) 334 S.C. 1, 512 S.E.2d 99, certiorari denied 119 S.Ct. 2407, 527 U.S. 1042, 144 L.Ed.2d 805. Kidnapping 36; Sentencing And Punishment 368.5

Circumstantial evidence created jury question on corpus delicti for kidnaping independent of defendant’s statement that he knocked victim unconscious and drove him to ball field; evidence consisted of victim’s defensive wounds, remote grave in wooded location, victim’s opposition to other persons driving his car, discovery of car in parking lot for employer of defendant’s mother, and testimony that blow may have knocked victim unconscious, and jury could infer that defendant forcibly took victim to woods or forcibly confined him. State v. Bennett (S.C. 1997) 328 S.C. 251, 493 S.E.2d 845, appeal after new sentencing hearing 369 S.C. 219, 632 S.E.2d 281, certiorari denied, certiorari denied 127 S.Ct. 681, 166 L.Ed.2d 530. Criminal Law 413.62

7. Admissibility of evidence

Victim’s statements to her mother that defendant, whom victim had been dating off‑and‑on over period of years, beat her, raped her, and sodomized her, which statements mother repeated to 911 operator, came within excited utterance exception to rule against hearsay, in trial for criminal sexual conduct and kidnapping, where mother testified that victim was shaking, crying, and distraught when victim called mother to tell her what happened, and that victim “lost it” when she arrived at mother’s house. State v. Hendricks (S.C.App. 2014) 408 S.C. 525, 759 S.E.2d 434, rehearing denied. Criminal Law 366(6)

Statements by victim’s mother to 911 operator that victim’s “boyfriend just broke into [victim’s] house, and beat her up and raped her,” and that “[h]e sodomized her,” were hearsay, in trial for criminal sexual conduct and kidnapping, even if statement was offered to explain why police went to hospital to meet with victim, where reason for police arriving at hospital was not significant issue at trial, and probative value of mother’s statement was truth of statements, i.e., that defendant had broken into victim’s home and raped and sodomized her. State v. Hendricks (S.C.App. 2014) 408 S.C. 525, 759 S.E.2d 434, rehearing denied. Criminal Law 419(3)

Statements by victim’s mother to 911 operator that victim’s “boyfriend just broke into [victim’s] house, and beat her up and raped her,” and that “[h]e sodomized her,” did not come within present sense impression exception to rule against hearsay, in trial for criminal sexual conduct and kidnapping, where mother was not perceiving rape and sodomy while making statements. State v. Hendricks (S.C.App. 2014) 408 S.C. 525, 759 S.E.2d 434, rehearing denied. Criminal Law 419(2.15)

Statements by victim’s mother to 911 operator that victim’s “boyfriend just broke into [victim’s] house, and beat her up and raped her,” that “[h]e sodomized her,” identifying defendant by name, and requesting that operator have police meet them at hospital did not come within excited utterance exception to rule against hearsay, in trial for criminal sexual conduct and kidnapping; although mother may have been stressed when victim initially called her to tell her what happened, there was no evidence that mother was still under significant stress of excitement when she later made statement to operator while driving victim to hospital, after victim arrived at mother’s home with her children and after mother put victim’s children to bed, and mother was not speaking spontaneously when making statements to operator, but instead, statements indicated reflection and purpose to initiate criminal investigation against defendant. State v. Hendricks (S.C.App. 2014) 408 S.C. 525, 759 S.E.2d 434, rehearing denied. Criminal Law 368(3)

Victim’s in court identification testimony was admissible, even though victim chose not to make selection from the one photographic lineup she was shown, where she described the scene as well‑lit, victim testified that she had heightened degree of attention during incident, which she described in great detail, and victim was with perpetrator for some fifteen minutes. State v. McCord (S.C.App. 2002) 349 S.C. 477, 562 S.E.2d 689. Criminal Law 339.9(3)

8. Instructions

Defendant could not escape conviction for kidnapping by asserting that kidnapping was merely incidental to offense of armed robbery; trial judge charged jury that in order for it to convict defendant of both offenses, it must find that he had the requisite intent to commit two separate offenses. State v. East (S.C.App. 2003) 353 S.C. 634, 578 S.E.2d 748. Criminal Law 29(13)

The trial court did not err in refusing to charge attempted kidnapping as a lesser included offense of kidnapping and refusing to allow the defense to argue that the defendant only attempted to kidnap the victim, where the defendant had grabbed the victim, pulled her towards the woods, and had her in a headlock, and although she struggled, she could not get away from him; thus, the only reasonable inference was that the defendant completed the act of kidnapping. State v. Dildine (S.C.App. 1991) 306 S.C. 198, 410 S.E.2d 597, certiorari denied.

9. Sufficiency of evidence

In prosecution for armed robbery and seven counts of kidnapping, defendant was not entitled to directed verdict on one count of kidnapping because victim of that count did not testify at trial, where there was testimony from other witnesses that victim was present when the offenses were committed. State v. East (S.C.App. 2003) 353 S.C. 634, 578 S.E.2d 748. Criminal Law 753.2(3.1)

Evidence that defendant took assaulted victim with a gun, took his vehicle, and placed defendant in the trunk was sufficient to support conviction for carjacking, kidnapping, and assault; testimony of victim, testimony of witness, and statement of codefendant, along with evidence from victim’s car gathered by police at defendant’s apartment, all identified defendant as one of the people committing the offenses, and evidence found at defendant’s apartment was consistent with testimony of witnesses. State v. Garrett (S.C.App. 2002) 350 S.C. 613, 567 S.E.2d 523, rehearing denied, certiorari denied. Assault And Battery 91.6(3); Kidnapping 36; Robbery 24.10

Evidence was sufficient to show that defendant and the individual previously convicted were one and the same, and thus, State satisfied its burden of proof that defendant had been convicted of the prior offenses that triggered the “Two‑Strikes” law; State proffered certified copies of court records showing that defendant had previously pled guilty to two counts of attempted armed robbery and one count of assault and battery with intent to kill, and defendant offered no evidence to suggest that he was not that individual. State v. Johnson (S.C.App. 2002) 350 S.C. 543, 567 S.E.2d 486, rehearing denied, certiorari denied. Sentencing And Punishment 1381(6)

Evidence supported finding that defendant participated in victim’s kidnapping, even though evidence did not establish whether defendant was involved in the initial confinement of victim; inmate testified that defendant admitted to watching co‑defendant have sex with victim while she was kidnapped, defendant invited a cookout guest into his trailer to view victim while she was bound and gagged, defendant helped move victim from his trailer to an abandoned house, and defendant and co‑defendant retrieved victim from house, placed her in car, and then drove to creek where her body was dumped. State v. Stuckey (S.C.App. 2001) 347 S.C. 484, 556 S.E.2d 403, rehearing denied, certiorari denied. Kidnapping 36

Evidence at sentencing phase of capital murder prosecution supported finding of aggravating circumstance that murder was committed in course of kidnapping; victim was inveigled into getting in truck under pretense she was being taken to hospital, and defendant’s intent not to take her to hospital was evidenced by fact that when they departed in truck he took rope with which he subsequently strangled her. Ray v. State (S.C. 1998) 330 S.C. 184, 498 S.E.2d 640, rehearing denied, certiorari denied 119 S.Ct. 240, 525 U.S. 905, 142 L.Ed.2d 197. Sentencing And Punishment 1681

In a prosecution for murder, the evidence supported a determination that the defendant committed the murder during the commission of a kidnapping where (1) the victim, who had been shot, was conscious when she left the site of the shooting to go with the defendant to the hospital, (2) she resisted the ensuing abduction, and (3) she was strangled and stabbed while in the process of being deprived of her freedom. State v. Ray (S.C. 1993) 310 S.C. 431, 427 S.E.2d 171. Sentencing And Punishment 1681

The evidence supported a determination that the murder with which the defendant was charged was committed during the commission of a kidnapping where (1) the defendant indicated that the victim “hollered” when he touched her, and that as a result he hit her several times, and (2) the clothing that the victim was carrying was found scattered inside the front door of the dormitory outside of which she was killed, indicating that she had been forcibly removed from the premises. State v. Davis (S.C. 1992) 309 S.C. 326, 422 S.E.2d 133, rehearing denied, certiorari denied 113 S.Ct. 2355, 508 U.S. 915, 124 L.Ed.2d 263. Sentencing And Punishment 1681

Kidnapping conviction was supported by the evidence, even though the state offered no evidence directly connecting defendant to the light struggle in the victim’s home, in view of evidence connecting defendant to the preparation of the ransom note, the statement in the ransom note that the victim was in the authors’ custody, delivery of the victim’s drivers license with the ransom note, and other proof of the corpus delicti. State v. Owens (S.C. 1987) 291 S.C. 116, 352 S.E.2d 474. Kidnapping 36

There was sufficient evidence during the sentencing phase of a capital murder prosecution from which the jury could conclude that the victim had been kidnapped, where State’s witnesses testified that the victim had been invited into defendants’ car after they had formed and expressed the intention to carry away and murder her, on the basis that Section 16‑3‑910 includes among the operative definitions of kidnapping the words “inveigle” and “decoy” along with such terms as “seized,” “confined,” and “abduct.” State v. Plath (S.C. 1984) 281 S.C. 1, 313 S.E.2d 619, certiorari denied 104 S.Ct. 3560, 467 U.S. 1265, 82 L.Ed.2d 862, rehearing denied 105 S.Ct. 27, 468 U.S. 1226, 82 L.Ed.2d 920, rehearing denied 105 S.Ct. 28, 468 U.S. 1226, 82 L.Ed.2d 920, denial of habeas corpus affirmed 113 F.3d 1352, certiorari denied 118 S.Ct. 715, 139 L.Ed.2d 655, denial of habeas corpus affirmed 130 F.3d 595, certiorari denied 118 S.Ct. 1854, 140 L.Ed.2d 1102. Sentencing And Punishment 1681

10. Sentence and punishment

Petitioner’s conviction in Pennsylvania for unlawful restraint was sufficiently similar to conviction in South Carolina for kidnapping as to require petitioner to register as a sex offender in South Carolina; South Carolina sex offender registration statute required registration for kidnapping conviction, and Pennsylvania unlawful restraint statute and South Carolina kidnapping statute had similar public policy goals proscribed the same conduct. Lozada v. South Carolina Law Enforcement Div. (S.C. 2011) 395 S.C. 509, 719 S.E.2d 258, rehearing denied. Mental Health 469(2)

Defendant’s previous conviction in Ohio for abduction was not a prior violent offense for purposes of prohibition on grant of parole under subsequent violent offender statute; statute codifying which crimes are “violent offenses” provided that, “Only those offenses specifically enumerated in this section are considered violent offenses,” offense of “abduction” was not included among enumerated violent offenses, Ohio offense of abduction could be committed without violating South Carolina kidnapping statute, and Ohio conviction was not accompanied by explication of what facts supported jury’s determination of guilt. Hinton v. South Carolina Dept. of Probation, Parole and Pardon Services (S.C.App. 2004) 357 S.C. 327, 592 S.E.2d 335, rehearing denied, certiorari granted, certiorari dismissed as improvidently granted 364 S.C. 608, 614 S.E.2d 635. Pardon And Parole 49

Life sentence for kidnapping should have been vacated when, five years later, defendant was convicted of and sentenced for murder based on same facts; statute prohibiting concurrent sentences for murder and kidnapping was not limited to situations in which life sentence for kidnapping was received in conjunction with or subsequent to life sentence for murder. Owens v. State (S.C. 1998) 331 S.C. 582, 503 S.E.2d 462. Criminal Law 1557(1); Sentencing And Punishment 531

The imposition of a life sentence for a kidnapping conviction was properly vacated where the defendant forced a 72‑year‑old man into the trunk of his car, drove to an isolated place, removed the man from the trunk and took his money, then forced the man back into the trunk and left him there, where he was found dead of a heart attack several days later, and the defendant received a life sentence on these same facts under the murder statute. State v. McCall (S.C.App. 1991) 304 S.C. 465, 405 S.E.2d 414, certiorari denied.

In a prosecution for armed robbery, kidnapping, and murder, defendants’ sentences of life imprisonment for kidnapping would be vacated where defendants were already sentenced to death for murder. State v. Copeland (S.C. 1982) 278 S.C. 572, 300 S.E.2d 63, certiorari denied 103 S.Ct. 1802, 460 U.S. 1103, 76 L.Ed.2d 367, rehearing denied 103 S.Ct. 3099, 462 U.S. 1124, 77 L.Ed.2d 1357, certiorari denied 103 S.Ct. 3553, 463 U.S. 1214, 77 L.Ed.2d 1399, rehearing denied 104 S.Ct. 39, 463 U.S. 1249, 77 L.Ed.2d 1457, appeal from denial of post‑conviction relief dismissed 134 F.3d 364. Criminal Law 1181.5(1)

Under Section 16‑3‑910, which provides that a defendant suffer the punishment of life imprisonment for kidnapping unless sentenced for murder as provided in Section 16‑3‑20, defendants sentenced for murder were entitled to have their sentence of life imprisonment for kidnapping vacated. State v. Copeland (S.C. 1982) 278 S.C. 572, 300 S.E.2d 63, certiorari denied 103 S.Ct. 1802, 460 U.S. 1103, 76 L.Ed.2d 367, rehearing denied 103 S.Ct. 3099, 462 U.S. 1124, 77 L.Ed.2d 1357, certiorari denied 103 S.Ct. 3553, 463 U.S. 1214, 77 L.Ed.2d 1399, rehearing denied 104 S.Ct. 39, 463 U.S. 1249, 77 L.Ed.2d 1457, appeal from denial of post‑conviction relief dismissed 134 F.3d 364.

In a prosecution for murder, assault and battery with intent to kill, criminal sexual conduct in the first degree, and two counts of kidnapping, the court improperly sentenced defendant to life in prison for kidnapping where defendant had already been sentenced to life imprisonment for murder. State v. Perry (S.C. 1983) 278 S.C. 490, 299 S.E.2d 324, certiorari denied 103 S.Ct. 1881, 461 U.S. 908, 76 L.Ed.2d 811.

A defendant who had entered a plea of guilty to kidnapping was entitled to withdraw her plea where she had been misled by her attorney and the presiding judge into believing that the judge had some discretion in passing sentence, whereas a life sentence for kidnapping is mandatory under Section 16‑3‑910 and suspension of such sentence is prohibited by Section 24‑21‑410. State v. Hazel (S.C. 1980) 275 S.C. 392, 271 S.E.2d 602.

Despite defendant’s argument that central feature of his crime was sexual assault and therefore life sentence for associated kidnapping constituted cruel and unusual punishment, such penalty on kidnapping charge is not “so greatly disproportionate to offense committed as to be completely arbitrary and shocking to sense of justice.” State v. Smith (S.C. 1980) 275 S.C. 164, 268 S.E.2d 276.

11. Review

Defendant’s challenge to admission of 911 call made by victim’s mother as hearsay was adequately preserved for appellate review, even if defendant did not state his objection with specificity, in trial for criminal sexual conduct and kidnapping, where objection based on hearsay was apparent from record, in that State immediately responded to objection by citing to case dealing with “excited utterance” and “present sense impression” exceptions to hearsay rule. State v. Hendricks (S.C.App. 2014) 408 S.C. 525, 759 S.E.2d 434, rehearing denied. Criminal Law 1036.5

Kidnapping defendant sufficiently raised issue that trial court abused its discretion in denying joinder of defendant’s trial with trial of other alleged kidnapper, and thus preserved issue for appellate review, although the motion for joinder was filed by other kidnapper’s counsel, where motion was filed with defendant’s consent, trial judge noted that motion was a joint motion, and defendant’s counsel stated to trial judge that it was to defendant’s advantage to have joint trial. State v. Page (S.C.App. 2013) 406 S.C. 272, 750 S.E.2d 623. Criminal Law 1044.2(1)

Upon remand, following reversal, on an appeal by a defendant who had been sentenced to life for murder and to life for kidnapping, the trial court’s attention was called to Section 16‑3‑910. State v. Joyner (S.C. 1986) 289 S.C. 436, 346 S.E.2d 711.

In a prosecution for house‑breaking, kidnapping and murder, the trial court erred in sentencing the defendant to life imprisonment for his kidnapping conviction where he had already been sentenced to death on the murder conviction inasmuch as no statutory provision was made for concurrent punishment under this circumstance. State v. Adams (S.C. 1981) 277 S.C. 115, 283 S.E.2d 582.

12. Harmless error

Error in admission of hearsay evidence in form of statements by victim’s mother to 911 operator that defendant had raped and sodomized victim, identifying defendant by name, and requesting that police officer be sent to hospital to meet with victim, was harmless, in trial for criminal sexual conduct and kidnapping, where it was merely cumulative of mother’s testimony regarding victim’s statements to her in initial telephone call, which came within excited utterance exception to hearsay rule, and 911 recording. State v. Hendricks (S.C.App. 2014) 408 S.C. 525, 759 S.E.2d 434, rehearing denied. Criminal Law 1169.2(6)

In prosecution for first degree criminal sexual conduct, kidnapping, and carjacking, any possible error that resulted from the introduction of police officers’ alleged hearsay testimony regarding statements made by bystander and in the introduction of officer’s single reference to warrants that existed against defendant was harmless, considering the overwhelming evidence of defendant’s guilt; defendant confessed to raping and abducting victim, as well as taking her car, victim’s car was found near defendant’s home after offenses were committed, and defendant’s DNA matched the DNA obtained from vaginal swabs taken from victim and victim’s clothing. State v. Thompson (S.C.App. 2003) 352 S.C. 552, 575 S.E.2d 77. Criminal Law 1169.1(9); Criminal Law 1169.11

Assistant solicitor’s improper comment, during closing argument, on defendant’s failure to call his uncle as an alibi witness, in a prosecution for kidnapping and assault in which defendant did not testify and did not offer a defense, was harmless error, where evidence of guilt was overwhelming; defendant’s fingerprint was found on doorknob of abandoned home at which the assault occurred, defendant had scratches on his face and chest two days after the assault which were consistent with victim’s assertion she had scratched the attacker on the face and chest with a stick, victim’s blood was positively identified as being on the wooden stick she used to fend off her attacker, and DNA tests determined that defendant could have left the blood on the other end of the same wooden stick and that only one of 174 people would match the DNA profile of the blood located on the stick. State v. Primus (S.C. 2002) 349 S.C. 576, 564 S.E.2d 103, habeas corpus denied 555 F.Supp.2d 596, appeal dismissed 298 Fed.Appx. 236, 2008 WL 4790104, certiorari denied 129 S.Ct. 1621, 173 L.Ed.2d 1004. Criminal Law 1171.1(5)

In a trial for kidnapping, the trial judge’s failure to define the term “positive act” was harmless error where the jury heard no evidence which would tend to show that the defendant did not possess at least the mens rea of knowledge. State v. Jefferies (S.C. 1994) 316 S.C. 13, 446 S.E.2d 427, rehearing denied, certiorari denied 115 S.Ct. 911, 513 U.S. 1115, 130 L.Ed.2d 793.

13. Reversible error

Jury instruction that committing crime under instructions of another was no defense to crime was not implicated by facts of armed robbery case, and thus giving such “orders of another” instruction constituted reversible error; defendant did not argue that another person had instructed him to commit crime, but rather that because defendant thought entire event was staged Central Intelligence Agency (CIA) operation, it was not criminal act. State v. Blurton (S.C. 2002) 352 S.C. 203, 573 S.E.2d 802. Criminal Law 814(8); Criminal Law 1172.6

**SECTION 16‑3‑920.** Conspiracy to kidnap.

If two or more persons enter into an agreement, confederation, or conspiracy to violate the provisions of Section 16‑3‑910 and any of such persons do any overt act towards carrying out such unlawful agreement, confederation, or conspiracy, each such person shall be guilty of a felony and, upon conviction, shall be punished in like manner as provided for the violation of Section 16‑3‑910.

HISTORY: 1962 Code Section 16‑92; 1952 Code Section 16‑92; 1942 Code Section 1122; 1937 (40) 137; 1991 Act No. 117, Section 1.

CROSS REFERENCES

Commission of this crime within specified radius of child day care center as separate offense, see Section 63‑13‑200.

Crime of conspiracy, generally, see Section 16‑17‑410.

Denial of registration as an operator of a child day care or group day care home where the applicant, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑820.

Denial of renewal for child day care or group day care home where the person applying for approval, the operator of the facility, or an employee or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑630.

Fingerprint review of any person applying to operate or seek employment at a child day care or group day care home to determine prior conviction of the crime referred to in this section, see Section 63‑13‑620.

Foster care placement with certain persons prohibited, see Section 63‑7‑2350.

No license or registration will be issued to any religious establishment to operate a child day care or group day care home where the operator, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑1010.

No person may be employed by the Department of Social Services in its day care licensing or child protective services divisions who has been convicted of the crime referred to in this section, see Section 63‑13‑190.

Past conviction check prior to initial employment of teachers, see Section 59‑26‑40.

Persons convicted of Title 16, Chapter 3 crimes prohibited from appointment as guardian ad litem for child in abuse or neglect proceeding, see Section 63‑11‑520.

Persons convicted under this section must register for sex offender registry, see Section 23‑3‑430.

Sentencing, see Section 17‑25‑20 et seq.

Library References

Conspiracy 28(3), 51.

Westlaw Topic No. 91.

C.J.S. Conspiracy Sections 228 to 235, 243 to 256, 273 to 278, 286 to 289, 291.

NOTES OF DECISIONS

In general 1

Sufficiency of evidence 2

1. In general

Where trial judge charged this section [Code 1962 Section 16‑92] in full and explained its meaning to the jury and charged conspiracy in the language of Code 1962 Section 16‑550, there was no error, because Code 1962 Section 16‑550 defines conspiracy and must be taken in connection with this section. [Code 1962 Section 16‑92]. State v. Jacobs (S.C. 1961) 238 S.C. 234, 119 S.E.2d 735.

2. Sufficiency of evidence

There was sufficient evidence of defendant’s guilt on charges of murder and kidnapping to present jury question; defendant’s fingerprints were found at victim’s residence, there was testimony that electrical cords which bound victim’s hands and ankles had been cut by pair of scissors found in defendant’s home, and there was evidence that same severed electrical cords had at one time been attached to electric blanket found in defendant’s home. State v. Asbury (S.C. 1997) 328 S.C. 187, 493 S.E.2d 349. Homicide 1321; Kidnapping 40

ARTICLE 11

Miscellaneous Offenses

**SECTION 16‑3‑1010.** Failing to remove doors from abandoned airtight containers.

Any person who abandons or discards any icebox, refrigerator, ice chest or other type of airtight container of a capacity sufficient to contain any child and who neglects prior to such abandonment to remove the door, lid or other device for the closing thereof and any owner, lessee or other person in charge of property who knowingly permits any abandoned icebox, refrigerator, ice chest or other type of airtight container to remain thereon accessible to children without removing the door, lid or other closing device therefrom shall be guilty of a misdemeanor and upon conviction shall be fined not more than one hundred dollars or imprisoned not more than thirty days.

HISTORY: 1962 Code Section 16‑94; 1954 (48) 1479.

CROSS REFERENCES

Applicability of provisions pertaining to use of uniform traffic ticket, see Section 56‑7‑10.

Commission of this crime within specified radius of child day care center as separate offense, see Section 63‑13‑200.

Denial of registration as an operator of a child day care or group day care home where the applicant, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑820.

Denial of renewal for child day care or group day care home where the person applying for approval, the operator of the facility, or an employee or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑630.

Fingerprint review of any person applying to operate or seek employment at a child day care or group day care home to determine prior conviction of the crime referred to in this section, see Section 63‑13‑620.

Foster care placement with certain persons prohibited, see Section 63‑7‑2350.

No license or registration will be issued to any religious establishment to operate a child day care or group day care home where the operator, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑1010.

No person may be employed by the Department of Social Services in its day care licensing or child protective services divisions who has been convicted of the crime referred to in this section, see Section 63‑13‑190.

Past conviction check prior to initial employment of teachers, see Section 59‑26‑40.

Persons convicted of Title 16, Chapter 3 crimes prohibited from appointment as guardian ad litem for child in abuse or neglect proceeding, see Section 63‑11‑520.

Library References

Negligence 1802, 1809.

Westlaw Topic No. 272.

C.J.S. Negligence Section 1031.

Attorney General’s Opinions

The State Department of Health has authority to make an investigation into the illegal maintenance of abandoned iceboxes, etc., and if it is determined that there is a violation of any of the State laws, the Department is empowered to and should proceed against the responsible parties. If there is no violation of the State health laws, the question should be referred to city and county officials for procedure under this section [Code Section 1962 Section 16‑94]. 1965‑66 Op.Atty.Gen., No 2155, p 286 (1966 WL 8605).

**SECTION 16‑3‑1020.** Maintaining open and unprotected abandoned wells.

It shall be unlawful for any owner or tenant to permit or allow any abandoned well to remain open and unprotected, curbed or fenced in on any place or premises owned or occupied in this State. Any person convicted of allowing any such abandoned well to remain open and unprotected, curbed or fenced in shall be fined in the sum of ten dollars or imprisoned not more than thirty days.

HISTORY: 1962 Code Section 16‑95; 1952 Code Section 16‑95; 1942 Code Section 1189; 1932 Code Section 1189; Cr. C. ‘22 Section 80; Cr. C. ‘12 Section 240; 1904 (24) 383.

CROSS REFERENCES

Commission of this crime within specified radius of child day care center as separate offense, see Section 63‑13‑200.

Denial of registration as an operator of a child day care or group day care home where the applicant, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑820.

Denial of renewal for child day care or group day care home where the person applying for approval, the operator of the facility, or an employee or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑630.

Fingerprint review of any person applying to operate or seek employment at a child day care or group day care home to determine prior conviction of the crime referred to in this section, see Section 63‑13‑620.

Foster care placement with certain persons prohibited, see Section 63‑7‑2350.

No license or registration will be issued to any religious establishment to operate a child day care or group day care home where the operator, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑1010.

No person may be employed by the Department of Social Services in its day care licensing or child protective services divisions who has been convicted of the crime referred to in this section, see Section 63‑13‑190.

Past conviction check prior to initial employment of teachers, see Section 59‑26‑40.

Persons convicted of Title 16, Chapter 3 crimes prohibited from appointment as guardian ad litem for child in abuse or neglect proceeding, see Section 63‑11‑520.

Library References

Negligence 1802, 1809.

Westlaw Topic No. 272.

C.J.S. Negligence Section 1031.

**SECTION 16‑3‑1040.** Threatening life, person or family of public official or public employee; punishment.

(A) It is unlawful for a person knowingly and wilfully to deliver or convey to a public official or to a teacher or principal of an elementary or secondary school any letter or paper, writing, print, missive, document, or electronic communication or verbal or electronic communication which contains a threat to take the life of or to inflict bodily harm upon the public official, teacher, or principal, or members of his immediate family if the threat is directly related to the public official’s, teacher’s, or principal’s professional responsibilities.

(B) It is unlawful for a person knowingly and wilfully to deliver or convey to a public employee a letter or paper, writing, print, missive, document, or electronic communication or verbal or electronic communication which contains a threat to take the life of or to inflict bodily harm upon the public employee or members of his immediate family if the threat is directly related to the public employee’s official responsibilities.

(C) A person who violates the provisions of subsection (A), upon conviction, must be fined not more than five thousand dollars or imprisoned not more than five years, or both.

(D) A person who violates the provisions of subsection (B), upon conviction, must be fined not more than five hundred dollars or imprisoned not more than thirty days, or both.

(E) For purposes of this section:

(1) “Public official” means an elected or appointed official of the United States or of this State or of a county, municipality, or other political subdivision of this State.

(2) “Public employee” means a person employed by the State, a county, a municipality, a school district, or a political subdivision of this State, except that for purposes of this section, a “public employee” does not include a teacher or principal of an elementary or secondary school.

(3) “Immediate family” means the spouse, child, grandchild, mother, father, sister, or brother of the public official, teacher, principal, or public employee.

HISTORY: 1982 Act No. 299; 1990 Act No. 579, Section 8; 1998 Act No. 435, Section 1.

Editor’s Note

1990 Act No. 579, Section 7 eff June 12, 1990, provides as follows:

“This act may be cited as the ‘Safe Schools Act of 1990’.”

CROSS REFERENCES

Commission of this crime within specified radius of child day care center as separate offense, see Section 63‑13‑200.

Denial of registration as an operator of a child day care or group day care home where the applicant, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑820.

Denial of renewal for child day care or group day care home where the person applying for approval, the operator of the facility, or an employee or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑630.

Fingerprint review of any person applying to operate or seek employment at a child day care or group day care home to determine prior conviction of the crime referred to in this section, see Section 63‑13‑620.

Foster care placement with certain persons prohibited, see Section 63‑7‑2350.

No license or registration will be issued to any religious establishment to operate a child day care or group day care home where the operator, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑1010.

No person may be employed by the Department of Social Services in its day care licensing or child protective services divisions who has been convicted of the crime referred to in this section, see Section 63‑13‑190.

Past conviction check prior to initial employment of teachers, see Section 59‑26‑40.

Persons convicted of Title 16, Chapter 3 crimes prohibited from appointment as guardian ad litem for child in abuse or neglect proceeding, see Section 63‑11‑520.

Library References

Homicide 736, 1565.

Threats, Stalking, and Harassment 7, 53.

Westlaw Topic Nos. 203, 377E.

C.J.S. Homicide Sections 148 to 149, 539 to 541.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Extortion, Blackmail, and Threats Section 19, Definition.

S.C. Jur. Extortion, Blackmail, and Threats Section 22, Threats to Frighten.

Attorney General’s Opinions

Discussion of the interpretation of this section where a person threatened to shoot holes in any police car that came on or near his property. SC Op.Atty.Gen. (April 30, 1998) 1998 WL 261529.

A court would likely construe the term “teacher” broadly for purposes of this section to cover a guidance counselor. SC Op.Atty.Gen. (August 7, 1997) 1997 WL 569062.

A Deputy Sheriff would constitute a “public official” for purposes of this section. SC Op.Atty.Gen. (Dec. 5, 1996) 1996 WL 766531.

Failure by a student or other person to leave a school campus or school bus, when requested to do so by a principal, could, under particular circumstances, constitute a criminal offense. 1994 Op.Atty.Gen., No 94‑25, p 62 (1994 WL 199757).

South Carolina Code Section 16‑17‑420 makes it unlawful to interfere with or to disturb in any way the students or teachers of any school. Fighting would be included within the prohibition of Section 16‑17‑420. 1994 Op.Atty.Gen., No 94‑25, p 62 (1994 WL 199757).

Use of foul or offensive language toward a principal, teacher, or police officer can constitute a crime. 1994 Op.Atty.Gen., No 94‑25, p 62 (1994 WL 199757).

Police officer is considered “public official” for purposes of Section 16‑3‑1040, which prohibits persons from making threats to take life of or to inflict bodily harm upon public official or their immediate families. 1984 Op.Atty.Gen., No 84‑103, p 241 (1984 WL 159910).

NOTES OF DECISIONS

In general 1

Severance 2

1. In general

Fact that jail’s designated mental health examiner, who was threatened by defendant, was “appointed” to her position did not—by itself—qualify her as a public official within meaning of statute prohibiting threatening the life of a public official; court also had to look to the common law to determine whether designated examiner was a public official. State v. Bailey (S.C.App. 2016) 416 S.C. 344, 785 S.E.2d 622, rehearing denied, certiorari denied. Threats, Stalking, And Harassment 15

In distinguishing between public officers and public employees, for purposes of offense of threatening the life of a public official, a court must look at whether (1) the position was created by the General Assembly; (2) the qualifications for appointment of the position are established by law; (3) the duties, tenure, salary, bond, and oath are prescribed or required by law; and (4) the person occupying the position is a representative of the sovereign. State v. Bailey (S.C.App. 2016) 416 S.C. 344, 785 S.E.2d 622, rehearing denied, certiorari denied. Threats, Stalking, And Harassment 15

Jail’s designated mental health examiner, who was threatened by defendant, was not a “public official” within meaning of statute prohibiting threatening the life of a public official, and instead, examiner was a “public employee;” State failed to prove that a designated examiner’s tenure, salary, bond, and oath were prescribed or required by law, examiner’s position did not require the exercise of sovereign power, and examiner’s duties were intermittent. State v. Bailey (S.C.App. 2016) 416 S.C. 344, 785 S.E.2d 622, rehearing denied, certiorari denied. Threats, Stalking, And Harassment 15

Juvenile’s threat of police officer, during ride in police car following juvenile’s unlawful arrest for breach of peace, constituted a new and distinct crime that provided independent grounds for juvenile’s arrest; juvenile threatened to take the life of officer, and juvenile did not challenge the officer’s authority to arrest him. In re Jeremiah W. (S.C. 2004) 361 S.C. 620, 606 S.E.2d 766. Infants 2505

Police officer is “public official” within meaning of statute criminalizing threatening public official; officers are elected or appointed to their positions. State v. Carter (S.C.App. 1996) 324 S.C. 383, 478 S.E.2d 86, rehearing denied, certiorari denied. Threats, Stalking, And Harassment 15

State highway patrol officer against whose life threat had been made by motorist who was arrested after he had left scene of accident was not “public official” for purposes of offense of threatening to injure or kill public official; highway patrol officers, since they are not elected or appointed, cannot be considered public officials within meaning of statute. State v. Bridgers (S.C.App. 1996) 323 S.C. 185, 473 S.E.2d 829, rehearing denied, certiorari granted, reversed 329 S.C. 11, 495 S.E.2d 196. Threats, Stalking, And Harassment 15

A student violated the Safe Schools Act, Section 16‑3‑1040, when he stated that he would kill a teacher; although the student made his comment to another student, the comment was conveyed to a teacher in that the comment was made within the presence of a teacher. In Interest of Steven S. (S.C.App. 1993) 315 S.C. 472, 434 S.E.2d 312, rehearing denied, certiorari denied.

2. Severance

Defendant was not entitled to severance of charge of threatening public official, for threatening to shoot police officer, from charges of attempted armed robbery, assault with intent to kill, and use of deadly weapon during violent crime, since all offenses arose from same transaction; evidence used to establish presence of officers who observed defendant’s behavior toward threatened officer was also used to prove other three charges. State v. Carter (S.C.App. 1996) 324 S.C. 383, 478 S.E.2d 86, rehearing denied, certiorari denied. Criminal Law 620(6)

**SECTION 16‑3‑1045.** Use or employment of person under eighteen to commit certain crimes.

(A) It is unlawful for any person at least eighteen years of age to knowingly and intentionally:

(1) use, solicit, direct, hire, persuade, induce, entice, coerce, or employ a person under eighteen years of age to commit a violent crime as defined in Section 16‑1‑60, the crime of lynching as a result of mob violence prohibited by Article 3, Chapter 3 of this title, or the unlawful distribution of cocaine, crack cocaine, heroin, marijuana, or LSD;

(2) conspire to use, solicit, direct, hire, persuade, induce, entice, coerce, or employ a person under eighteen years of age to commit a violent crime as defined in Section 16‑1‑60, the crime of lynching as a result of mob violence prohibited by Article 3, Chapter 3 of this title, or the unlawful distribution of cocaine, crack cocaine, heroin, marijuana, or LSD.

(B) Any person who violates subsections (A)(1) or (A)(2) is guilty of a felony and, upon conviction, must be punished by a term of imprisonment of not less than five years nor more than fifteen years. Each violation of this section constitutes a separate offense.

(C) The felonies established in this section are supplemental to and do not supersede any other provisions of law which make the conduct referred to in subsection (A) unlawful.

HISTORY: 1996 Act No. 290, Section 1.

CROSS REFERENCES

Commission of this crime within specified radius of child day care center as separate offense, see Section 63‑13‑200.

Denial of registration as an operator of a child day care or group day care home where the applicant, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑820.

Denial of renewal for child day care or group day care home where the person applying for approval, the operator of the facility, or an employee or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑630.

Fingerprint review of any person applying to operate or seek employment at a child day care or group day care home to determine prior conviction of the crime referred to in this section, see Section 63‑13‑620.

Foster care placement with certain persons prohibited, see Section 63‑7‑2350.

No license or registration will be issued to any religious establishment to operate a child day care or group day care home where the operator, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑1010.

No person may be employed by the Department of Social Services in its day care licensing or child protective services divisions who has been convicted of the crime referred to in this section, see Section 63‑13‑190.

Past conviction check prior to initial employment of teachers, see Section 59‑26‑40.

Persons convicted of Title 16, Chapter 3 crimes prohibited from appointment as guardian ad litem for child in abuse or neglect proceeding, see Section 63‑11‑520.

Library References

Infants 1566.

Westlaw Topic No. 211.

C.J.S. Evidence Section 380.

C.J.S. Infants Sections 198 to 199.

**SECTION 16‑3‑1050.** Failure to report, perpetrating or interfering with an investigation of abuse, neglect or exploitation of a vulnerable adult; penalties.

(A) A person required to report abuse, neglect, or exploitation of a vulnerable adult under Chapter 35 of Title 43 who has actual knowledge that abuse, neglect, or exploitation has occurred and who knowingly and wilfully fails to report the abuse, neglect, or exploitation is guilty of a misdemeanor and, upon conviction, must be fined not more than twenty‑five hundred dollars or imprisoned not more than one year. A person required to report abuse, neglect, or exploitation of a vulnerable adult under Chapter 35 of Title 43 who has reason to believe that abuse, neglect, or exploitation has occurred or is likely to occur and who knowingly and wilfully fails to report the abuse, neglect, or exploitation is subject to disciplinary action as may be determined necessary by the appropriate licensing board.

(B) Except as otherwise provided in subsections (E) and (F), a person who knowingly and wilfully abuses a vulnerable adult is guilty of a felony and, upon conviction, must be imprisoned not more than five years.

(C) Except as otherwise provided in subsections (E) and (F), a person who knowingly and wilfully neglects a vulnerable adult is guilty of a felony and, upon conviction, must be imprisoned not more than five years.

(D) A person who knowingly and wilfully exploits a vulnerable adult is guilty of a felony and, upon conviction, must be fined not more than five thousand dollars or imprisoned not more than five years, or both, and may be required by the court to make restitution.

(E) A person who knowingly and wilfully abuses or neglects a vulnerable adult resulting in great bodily injury is guilty of a felony and, upon conviction, must be imprisoned not more than fifteen years.

(F) A person who knowingly and wilfully abuses or neglects a vulnerable adult resulting in death is guilty of a felony and, upon conviction, must be imprisoned not more than thirty years.

(G) A person who threatens, intimidates, or attempts to intimidate a vulnerable adult subject of a report, a witness, or any other person cooperating with an investigation conducted pursuant to this chapter is guilty of a misdemeanor and, upon conviction, must be fined not more than five thousand dollars or imprisoned not more than three years.

(H) A person who wilfully and knowingly obstructs or in any way impedes an investigation conducted pursuant to Chapter 35 of Title 43, upon conviction, is guilty of a misdemeanor and must be fined not more than five thousand dollars or imprisoned not more than three years.

As used in this section, “great bodily injury” means bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

HISTORY: 1999 Act No. 56, Section 5.

CROSS REFERENCES

Commission of this crime within specified radius of child day care center as separate offense, see Section 63‑13‑200.

Denial of registration as an operator of a child day care or group day care home where the applicant, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑820.

Denial of renewal for child day care or group day care home where the person applying for approval, the operator of the facility, or an employee or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑630.

Fingerprint review of any person applying to operate or seek employment at a child day care or group day care home to determine prior conviction of the crime referred to in this section, see Section 63‑13‑620.

Foster care placement with certain persons prohibited, see Section 63‑7‑2350.

No license or registration will be issued to any religious establishment to operate a child day care or group day care home where the operator, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑1010.

No person may be employed by the Department of Social Services in its day care licensing or child protective services divisions who has been convicted of the crime referred to in this section, see Section 63‑13‑190.

Past conviction check prior to initial employment of teachers, see Section 59‑26‑40.

Persons convicted of Title 16, Chapter 3 crimes prohibited from appointment as guardian ad litem for child in abuse or neglect proceeding, see Section 63‑11‑520.

Library References

Infants 1565.

Protection of Endangered Persons 9.

Westlaw Topic Nos. 211, 315P.

C.J.S. Evidence Section 380.

C.J.S. Infants Sections 196 to 197.

**SECTION 16‑3‑1060.** Receipt of compensation for relinquishing custody of child for adoption; penalty.

No person may sell or buy a minor child, or request, or accept, receive, or pay any fee, compensation, or any other thing of value as consideration for relinquishing the custody of a child for adoption. Provided, however, release or termination of prior support obligations shall not be construed as compensation or any other thing of value within the meaning of this section. However, reasonable costs may be assessed if they are reimbursements for expenses incurred or fees for services rendered, as provided for in Section 63‑9‑310(F). This section does not prohibit the assumption by a prospective adoptive parent of child support obligations previously established by the order of any court.

Any person violating the provisions of this section or the provisions of Section 63‑9‑310(F) is guilty of a felony and, upon conviction or plea of guilty, must be fined not more than ten thousand dollars or imprisoned for not more than ten years, or both, in the discretion of the court.

HISTORY: 1984 Act No. 474, Section 1; 1988 Act No. 653, Section 18A.

CROSS REFERENCES

Commission of this crime within specified radius of child day care center as separate offense, see Section 63‑13‑200.

Denial of registration as an operator of a child day care or group day care home where the applicant, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑820.

Denial of renewal for child day care or group day care home where the person applying for approval, the operator of the facility, or an employee or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑630.

Fingerprint review of any person applying to operate or seek employment at a child day care or group day care home to determine prior conviction of the crime referred to in this section, see Section 63‑13‑620.

Foster care placement with certain persons prohibited, see Section 63‑7‑2350.

No license or registration will be issued to any religious establishment to operate a child day care or group day care home where the operator, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑1010.

No person may be employed by the Department of Social Services in its day care licensing or child protective services divisions who has been convicted of the crime referred to in this section, see Section 63‑13‑190.

Past conviction check prior to initial employment of teachers, see Section 59‑26‑40.

Persons convicted of Title 16, Chapter 3 crimes prohibited from appointment as guardian ad litem for child in abuse or neglect proceeding, see Section 63‑11‑520.

Library References

Adoption 6.

Westlaw Topic No. 17.

C.J.S. Adoption of Persons Sections 27 to 44, 137.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Adoption Section 8, Who May Adopt.

NOTES OF DECISIONS

In general 1

1. In general

The statutes allow the family court to consider competing interests when an out‑of‑state resident attempts to adopt a South Carolina child: (1) the finding of unusual or exceptional circumstances such as would allow an out‑of state couple to adopt a child born in South Carolina, and (2) the express and implied state policy against baby selling. Adoptive Parents v. Biological Parents (S.C. 1994) 315 S.C. 535, 446 S.E.2d 404. Adoption 13

In an action for adoption by an out‑of‑state couple, it is within the discretion of the family court to require the testimony of all relevant parties to determine whether unusual or exceptional circumstances exist, and to examine, if necessary, the issue of whether the parties have engaged in baby selling. Adoptive Parents v. Biological Parents (S.C. 1994) 315 S.C. 535, 446 S.E.2d 404. Adoption 13

**SECTION 16‑3‑1072.** Reporting medical treatment for gunshot wound; immunity; physician‑patient privilege abrogated; penalties.

(A) Any physician, nurse, or any other medical or emergency medical services personnel of a hospital, clinic, or other health care facility or provider who knowingly treats any person suffering from a gunshot wound or who receives a request for such treatment shall report within a reasonable time the existence of the gunshot wound to the sheriff’s department of the county in which the treatment is administered or a request is received. However, no report is necessary if a law enforcement officer is present with the victim while treatment is being administered.

(B) The reports provided for in subsection (A) may be made orally, or otherwise. A hospital, clinic, or other health care facility or provider may designate an individual to make the reports provided for in this section. However, a report must be made as soon as possible, but no later than the time of the victim’s release from that facility.

(C) A person required to make a report pursuant to this section or who participates in judicial proceedings resulting from the report, acting in good faith, is immune from civil and criminal liability which might otherwise result by reason of these actions. In all such civil and criminal proceedings, good faith is rebuttably presumed.

(D) For purposes of this section, the confidential or privileged nature of communication between physician and patient and any other professional person and his patient or client is abrogated and does not constitute grounds for failure to report or the exclusion of evidence resulting from a report made pursuant to this section.

(E) A person required to report the existence of a gunshot wound who knowingly fails to do so is guilty of a misdemeanor and, upon conviction, must be fined not more than five hundred dollars.

HISTORY: 1999 Act No. 69, Section 1.

CROSS REFERENCES

Commission of this crime within specified radius of child day care center as separate offense, see Section 63‑13‑200.

Denial of registration as an operator of a child day care or group day care home where the applicant, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑820.

Denial of renewal for child day care or group day care home where the person applying for approval, the operator of the facility, or an employee or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑630.

Fingerprint review of any person applying to operate or seek employment at a child day care or group day care home to determine prior conviction of the crime referred to in this section, see Section 63‑13‑620.

Foster care placement with certain persons prohibited, see Section 63‑7‑2350.

No license or registration will be issued to any religious establishment to operate a child day care or group day care home where the operator, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑1010.

No person may be employed by the Department of Social Services in its day care licensing or child protective services divisions who has been convicted of the crime referred to in this section, see Section 63‑13‑190.

Persons convicted of Title 16, Chapter 3 crimes prohibited from appointment as guardian ad litem for child in abuse or neglect proceeding, see Section 63‑11‑520.

Library References

Health 257.

Privileged Communications and Confidentiality 252.

Westlaw Topic Nos. 198H, 311H.

C.J.S. Hospitals Section 20.

C.J.S. Witnesses Section 407.

**SECTION 16‑3‑1075.** Felony of carjacking; penalties.

(A) For purposes of this section, “great bodily injury” means bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

(B) A person is guilty of the felony of carjacking who takes, or attempts to take, a motor vehicle from another person by force and violence or by intimidation while the person is operating the vehicle or while the person is in the vehicle. Upon conviction for this offense, a person must:

(1) be imprisoned not more than twenty years; or

(2) if great bodily injury results, be imprisoned not more than thirty years.

HISTORY: 1993 Act No. 163, Section 1; 1998 Act No. 402, Section 1.

CROSS REFERENCES

Additional punishment for possession of firearm or knife during commission of, or attempt to commit, violent crime, see Section 16‑23‑490.

Commission of this crime within specified radius of child day care center as separate offense, see Section 63‑13‑200.

Custody of convicted persons, designation of place of confinement, participation in work release and training program, see Section 24‑3‑20.

Denial of registration as an operator of a child day care or group day care home where the applicant, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑820.

Denial of renewal for child day care or group day care home where the person applying for approval, the operator of the facility, or an employee or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑630.

Eligibility for work release, see Section 24‑13‑125.

Fingerprint review of any person applying to operate or seek employment at a child day care or group day care home to determine prior conviction of the crime referred to in this section, see Section 63‑13‑620.

Foster care placement with certain persons prohibited, see Section 63‑7‑2350.

No license or registration will be issued to any religious establishment to operate a child day care or group day care home where the operator, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑1010.

No person may be employed by the Department of Social Services in its day care licensing or child protective services divisions who has been convicted of the crime referred to in this section, see Section 63‑13‑190.

Persons convicted of Title 16, Chapter 3 crimes prohibited from appointment as guardian ad litem for child in abuse or neglect proceeding, see Section 63‑11‑520.

Prohibition against release of offender into community in which he committed violent crime, see Section 24‑13‑650.

Sentencing, see Section 17‑25‑20 et seq.

Library References

Robbery 1, 30.

Westlaw Topic No. 342.

C.J.S. Robbery Sections 1 to 3, 17 to 18, 101 to 107, 109, 125 to 127, 133, 140.

NOTES OF DECISIONS

Harmless error 2

Sufficiency of evidence 1

1. Sufficiency of evidence

Evidence that defendant took assaulted victim with a gun, took his vehicle, and placed defendant in the trunk was sufficient to support conviction for carjacking, kidnapping, and assault; testimony of victim, testimony of witness, and statement of codefendant, along with evidence from victim’s car gathered by police at defendant’s apartment, all identified defendant as one of the people committing the offenses, and evidence found at defendant’s apartment was consistent with testimony of witnesses. State v. Garrett (S.C.App. 2002) 350 S.C. 613, 567 S.E.2d 523, rehearing denied, certiorari denied. Assault And Battery 91.6(3); Kidnapping 36; Robbery 24.10

2. Harmless error

In prosecution for first degree criminal sexual conduct, kidnapping, and carjacking, any possible error that resulted from the introduction of police officers’ alleged hearsay testimony regarding statements made by bystander and in the introduction of officer’s single reference to warrants that existed against defendant was harmless, considering the overwhelming evidence of defendant’s guilt; defendant confessed to raping and abducting victim, as well as taking her car, victim’s car was found near defendant’s home after offenses were committed, and defendant’s DNA matched the DNA obtained from vaginal swabs taken from victim and victim’s clothing. State v. Thompson (S.C.App. 2003) 352 S.C. 552, 575 S.E.2d 77. Criminal Law 1169.1(9); Criminal Law 1169.11

**SECTION 16‑3‑1080.** Committing or attempting to commit a violent crime while wearing body armor a felony.

(A) Except as provided in subsection (B), a person who commits or attempts to commit a violent crime, as defined in Section 16‑1‑60, or threatens to commit a violent crime, as defined in Section 16‑1‑60, while wearing body armor is guilty of a felony and, upon conviction, must be imprisoned not more than five years or fined not more than two thousand dollars, or both. A term of imprisonment imposed for violating this section may be served consecutively to any term of imprisonment imposed for the crime committed or attempted.

(B) Subsection (A) does not apply to:

(1) a peace officer of this State or another state, or of a local unit of government of this State or another state, or of the United States, while in the performance of his official duties; or

(2) a security officer while in the performance of his official duties.

(C) As used in this section:

(1) “Body armor” means clothing or a device designed or intended to protect a person’s body or a portion of a person’s body from injury caused by a firearm;

(2) “Security officer” means a person lawfully employed to protect another person or to protect the property of another person.

HISTORY: 2001 Act No. 100, Section 1.

CROSS REFERENCES

Commission of this crime within specified radius of child day care center as separate offense, see Section 63‑13‑200.

Denial of registration as an operator of a child day care or group day care home where the applicant, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑820.

Denial of renewal for child day care or group day care home where the person applying for approval, the operator of the facility, or an employee or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑630.

Fingerprint review of any person applying to operate or seek employment at a child day care or group day care home to determine prior conviction of the crime referred to in this section, see Section 63‑13‑620.

Foster care placement with certain persons prohibited, see Section 63‑7‑2350.

No license or registration will be issued to any religious establishment to operate a child day care or group day care home where the operator, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑1010.

No person may be employed by the Department of Social Services in its day care licensing or child protective services divisions who has been convicted of the crime referred to in this section, see Section 63‑13‑190.

Persons convicted of Title 16, Chapter 3 crimes prohibited from appointment as guardian ad litem for child in abuse or neglect proceeding, see Section 63‑11‑520.

Library References

Disorderly Conduct 120, 151.

Westlaw Topic No. 129.

C.J.S. Disorderly Conduct Sections 1 to 4, 12 to 13.

**SECTION 16‑3‑1083.** Death or injury of child in utero due to commission of violent crime.

(A)(1) A person who commits a violent crime, as defined in Section 16‑1‑60, that causes the death of, or bodily injury to, a child who is in utero at the time that the violent crime was committed, is guilty of a separate offense under this section.

(2)(a) Except as otherwise provided in this subsection, the punishment for a separate offense, as provided for in subsection (A)(1), is the same as the punishment provided for that criminal offense had the death or bodily injury occurred to the unborn child’s mother.

(b) Prosecution of an offense under this section does not require proof that:

(i) the person committing the violent offense had knowledge or should have had knowledge that the victim of the underlying offense was pregnant; or

(ii) the defendant intended to cause the death of, or bodily injury to, the unborn child.

(c) If the person engaging in the violent offense intentionally killed or attempted to kill the unborn child, that person must, instead of being punished under subsection (A)(2)(a), be punished for murder or attempted murder.

(d) Notwithstanding any provision of this section or any other provision of law, the death penalty must not be imposed for an offense prosecuted under this section.

(B) Nothing in this section may be construed to permit the prosecution under this section:

(1) of a person for conduct relating to an abortion for which the consent of the pregnant woman, or a person authorized by law to act on her behalf, has been obtained or for which such consent is implied by law;

(2) of a person for any medical treatment of the pregnant woman or her unborn child; or

(3) of a woman with respect to her unborn child.

(C) As used in this section, the term “unborn child” means a child in utero, and the term “child in utero” or “ child who is in utero” means a member of the species homo sapiens, at any state of development, who is carried in the womb.

(D) Nothing in this section shall be construed to broaden or restrict any other rights currently existing for the child who is in utero.

HISTORY: 2006 Act No. 325, Section 2, eff June 2, 2006.

Editor’s Note

2006 Act No. 325, Section 1, provides as follows:

“This act may be cited as the ‘Unborn Victims of Violence Act of 2006’.”

Library References

Homicide 503.

Westlaw Topic No. 203.

C.J.S. Homicide Section 6.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Children and Families Section 5.1, Victims of Violence Act of 2006.

**SECTION 16‑3‑1085.** Violent offender prohibited from purchasing, owning, or using body armor; exceptions.

(A) Except as otherwise provided in this section, it is unlawful for a person who has been convicted of a violent crime, as defined in Section 16‑1‑60, to purchase, own, possess, or use body armor.

(B)(1) A person who has been convicted of a violent crime whose employment, livelihood, or safety is dependent on his ability to purchase, own, possess, or use body armor may petition the chief of police of the local unit of government in which he resides or, if he does not reside in a local unit of government that has a police department, he may petition the county sheriff for written permission to purchase, own, possess, or use body armor.

(2) The chief of police of a local unit of government or the county sheriff may grant a person who properly petitions the chief of police or county sheriff under subsection (B)(1) written permission to purchase, own, possess, or use body armor as provided in this section if the chief of police or county sheriff determines that the petitioner:

(a) is likely to use body armor in a safe and lawful manner; and

(b) has reasonable need for the protection provided by body armor.

(3) In making the determination required under subsection (B)(1), the chief of police or county sheriff must consider:

(a) the petitioner’s continued employment;

(b) the interests of justice; and

(c) other circumstances justifying issuance of written permission to purchase, own, possess, or use body armor.

(4) The chief of police or county sheriff may restrict written permission issued to a petitioner under this section in any manner determined appropriate by that chief of police or county sheriff. If permission is restricted, the chief of police or county sheriff must state the restrictions in the permission document.

(5) Chiefs of police and county sheriffs must exercise broad discretion in determining whether to issue written permission to purchase, own, possess, or use body armor under this section. However, nothing in this section requires a chief of police or county sheriff to issue written permission to any particular petitioner. The issuance of written permission to purchase, own, possess, or use body armor under this section does not relieve any person or entity from criminal liability that might otherwise be imposed.

(6) A person who receives written permission from a chief of police or county sheriff to purchase, own, possess, or use body armor must have the written permission in his possession when he is purchasing, owning, possessing, or using body armor.

(C) A law enforcement agency may issue body armor to a person who is in the custody of a law enforcement agency or a local or state correctional facility or who is a witness to a crime for his protection without a petition being filed under subsection (B). If the law enforcement agency issues body armor to a person under this subsection, the law enforcement agency must document the reasons for issuing the body armor and retain a copy of that document as an official record. The law enforcement agency must issue written permission to the person to possess and use body armor under this section.

(D) A person who violates this section is guilty of:

(1) a felony for a violation of subsection (A) and, upon conviction, must be imprisoned not more than five years or fined not more than two thousand dollars, or both;

(2) a misdemeanor for a violation of subsection (B)(6) and, upon conviction, must be imprisoned not more than ninety days or fined not more than one hundred dollars, or both.

(E) As used in this section “body armor” means clothing or a device designed or intended to protect a person’s body or a portion of a person’s body from injury caused by a firearm.

HISTORY: 2001 Act No. 100, Section 2.

CROSS REFERENCES

Commission of this crime within specified radius of child day care center as separate offense, see Section 63‑13‑200.

Denial of registration as an operator of a child day care or group day care home where the applicant, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑820.

Denial of renewal for child day care or group day care home where the person applying for approval, the operator of the facility, or an employee or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑630.

Fingerprint review of any person applying to operate or seek employment at a child day care or group day care home to determine prior conviction of the crime referred to in this section, see Section 63‑13‑620.

Foster care placement with certain persons prohibited, see Section 63‑7‑2350.

No license or registration will be issued to any religious establishment to operate a child day care or group day care home where the operator, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑1010.

No person may be employed by the Department of Social Services in its day care licensing or child protective services divisions who has been convicted of the crime referred to in this section, see Section 63‑13‑190.

Persons convicted of Title 16, Chapter 3 crimes prohibited from appointment as guardian ad litem for child in abuse or neglect proceeding, see Section 63‑11‑520.

Library References

Convicts 20.

Disorderly Conduct 120, 151.

Westlaw Topic Nos. 98, 129.

C.J.S. Convicts Sections 1 to 6, 8 to 24.

C.J.S. Disorderly Conduct Sections 1 to 4, 12 to 13.

**SECTION 16‑3‑1090.** Assisted suicide; penalties; injunctive relief.

(A) As used in this section:

(1) “Licensed health care professional” means a duly licensed physician, surgeon, podiatrist, osteopath, osteopathic physician, osteopathic surgeon, physician assistant, nurse, dentist, or pharmacist.

(2) “Suicide” means the act or instance of taking one’s life voluntarily and intentionally.

(B) It is unlawful for a person to assist another person in committing suicide. A person assists another person in committing suicide if the person:

(1) by force or duress intentionally causes the other person to commit or attempt to commit suicide; or

(2) has knowledge that the other person intends to commit or attempt to commit suicide and intentionally:

(a) provides the physical means by which the other person commits or attempts to commit suicide; or

(b) participates in a physical act by which the other person commits or attempts to commit suicide.

(C) None of the following may be construed to violate subsection (B):

(1) the withholding or withdrawing of a life sustaining procedure or compliance with any other state or federal law authorizing withdrawal or refusal of medical treatments or procedures;

(2) the administering, prescribing, or dispensing of medications or procedures, by or at the direction of a licensed health care professional, for the purpose of alleviating another person’s pain or discomfort, even if the medication or procedure may increase the risk of death, as long as the medication or procedure is not also intentionally administered, prescribed, or dispensed for the purpose of causing death, or the purpose of assisting in causing death, for any reason; or

(3) the administering, prescribing, or dispensing of medications or procedures to a patient diagnosed with a medical condition that includes an element of suicidal ideation, even if the medication or procedure may increase the risk of death, as long as the medication or procedure is not also intentionally administered, prescribed, or dispensed for the purpose of causing death, or the purpose of assisting in causing death, for any reason.

(D) Subsection (C) must not be construed to affect the duty of care or legal requirements other than those in this section concerning acts or omissions under subsection (C).

(E) A person who violates subsection (B) is guilty of a felony and, upon conviction, must be imprisoned not more than fifteen years or fined not more than one hundred thousand dollars, or both.

(F) Injunctive relief may be sought against a person who it is reasonably believed is about to violate or who is in the course of violating subsection (B) by a person who is:

(1) the spouse, parent, child, or sibling of the person who would commit suicide;

(2) entitled to inherit from the person who would commit suicide;

(3) a current or former health care provider of the person who would commit suicide;

(4) a legally appointed guardian or conservator of the person; or

(5) a public official with the appropriate jurisdiction to prosecute or enforce the laws of this State.

An injunction shall legally prevent the person from assisting any suicide in this State regardless of who is being assisted.

(G) The licensing agency which issued a license or certification to a licensed health care professional who assists in a suicide in violation of subsection (B) shall revoke or suspend the license or certification of that person upon receipt of a copy of the record of:

(1) a criminal conviction, plea of guilty, or plea of nolo contendere for the violation of subsection (B); or

(2) a judgment of contempt of court for violating an injunction issued under subsection (F).

HISTORY: 1998 Act No. 398, Section 1.

CROSS REFERENCES

Commission of this crime within specified radius of child day care center as separate offense, see Section 63‑13‑200.

Denial of registration as an operator of a child day care or group day care home where the applicant, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑820.

Denial of renewal for child day care or group day care home where the person applying for approval, the operator of the facility, or an employee or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑630.

Fingerprint review of any person applying to operate or seek employment at a child day care or group day care home to determine prior conviction of the crime referred to in this section, see Section 63‑13‑620.

Foster care placement with certain persons prohibited, see Section 63‑7‑2350.

No license or registration will be issued to any religious establishment to operate a child day care or group day care home where the operator, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑1010.

No person may be employed by the Department of Social Services in its day care licensing or child protective services divisions who has been convicted of the crime referred to in this section, see Section 63‑13‑190.

Persons convicted of Title 16, Chapter 3 crimes prohibited from appointment as guardian ad litem for child in abuse or neglect proceeding, see Section 63‑11‑520.

Library References

Constitutional Law 1801, 1807.

Suicide 3, 4.

Westlaw Topic Nos. 92, 368.

C.J.S. Constitutional Law Sections 667, 738 to 741, 799, 802 to 811, 820 to 839, 853, 860, 871 to 873, 936 to 940, 951 to 952, 961 to 965, 968 to 972.

C.J.S. Suicide Sections 5, 7 to 14.

ARTICLE 12

Crime Victim Assistance Grants

**SECTION 16‑3‑1095.** Creation of Department of Crime Victim Assistance Grants; solicitation and administration of grants and awards.

(A) The Department of Crime Victim Assistance Grants is created within the Office of the Attorney General, South Carolina Crime Victim Services Division to administer the Victims of Crime Act grants, the Violence Against Women Act grants, and the State Victim’s Assistance Program grants. The Director of the Crime Victim Services Division shall appoint a deputy director of the department.

(B) The deputy director shall establish a process to solicit and administer the disbursement of funds for Victims of Crime Act grants, the Violence Against Women Act grants, and the State Victim’s Assistance Program grants available under Public Law 98‑473 establishing the Victims of Crime Act of 1984, and the Violence Against Women Act (VAWA‑I) established under Title IV of the Violent Crime Control and Law Enforcement Act of 1944, Public Law No. 103‑322, 108 Stat. 1796 (September 13, 1994), and administer all other crime victim service funding as provided by law, including, but not limited to, the authority to solicit for federal formula or discretionary grant awards and foundation funding.

HISTORY: 2017 Act No. 96 (S.289), Section 8.A, eff July 1, 2017.

ARTICLE 13

Compensation of Victims of Crime

CROSS REFERENCES

Creation of Office of the Attorney General, South Carolina Crime Victim Services Division, transfer of existing crime victim services entities, see Section 1‑7‑1100.

Department of Administration established, transfer of offices, divisions, other agencies, see Section 1‑11‑10.

**SECTION 16‑3‑1110.** Definitions.

(A) For the purpose of this article and Articles 14 and 15 of this chapter:

(1) “Board” means the South Carolina Crime Victim Advisory Board.

(2) “Claimant” means any person filing a claim pursuant to this article.

(3) “Fund” means the South Carolina Victim Compensation Fund, which is administered by the Office of the Attorney General, South Carolina Crime Victim Services Division.

(4) “Director” means the Director of the Office of the Attorney General, South Carolina Crime Victim Services Division who is appointed by the Attorney General.

(5) “Field representative” means a field representative of the Office of the Attorney General, South Carolina Crime Victim Services Division, Department of Crime Victim Compensation assigned to handle a claim.

(6) “Crime” means an act which is defined as a crime by state, federal, or common law, including terrorism as defined in Section 2331 of Title 18, United States Code. Unless injury or death was recklessly or intentionally inflicted, “crime” does not include an act involving the operation of a motor vehicle, boat, or aircraft.

(7) “Recklessly or intentionally” inflicted injury or death includes, but is not limited to, injury or death resulting from an act which violates Sections 56‑5‑1210, 56‑5‑2910, 56‑5‑2920, or 56‑5‑2930 or from the use of a motor vehicle, boat, or aircraft to flee the scene of a crime in which the driver of the motor vehicle, boat, or aircraft knowingly participated.

(8) “Victim” means a person who suffers direct or threatened physical, emotional, or financial harm as the result of an act by someone else, which is a crime. The term includes immediate family members of a homicide victim or of any other victim who is either incompetent or a minor and includes an intervenor. The term also includes a minor who is a witness to a domestic violence offense pursuant to Section 16‑25‑20 or Section 16‑25‑65.

(9) “Intervenor” means a person other than a law enforcement officer performing normal duties, who goes to the aid of another, acting not recklessly, to prevent the commission of a crime or lawfully apprehend a person reasonably suspected of having committed a crime.

(10) “Panel” means a three‑member panel of the board designated by the board chairman to hear appeals.

(11) “Restitution” means payment for all injuries, specific losses, and expenses sustained by a crime victim resulting from an offender’s criminal conduct. It includes, but is not limited to:

(a) medical and psychological counseling expenses;

(b) specific damages and economic losses;

(c) funeral expenses and related costs;

(d) vehicle impoundment fees;

(e) child care costs; and

(f) transportation related to a victim’s participation in the criminal justice process.

(B) Restitution does not include awards for pain and suffering, wrongful death, emotional distress, or loss of consortium.

Restitution orders do not limit any civil claims a crime victim may file.

(C) Notwithstanding any other provision of law, the applicable statute of limitations for a crime victim, who has a cause of action against an incarcerated offender based upon the incident which made the person a victim, is tolled and does not expire until three years after the offender’s release from the sentence including probation and parole time or three years after release from commitment pursuant to Chapter 48 of Title 44, whichever is later. However, this provision shall not shorten any other tolling period of the statute of limitations which may exist for the crime victim.

HISTORY: 1982 Act No. 455, Section 2; 1984 Act No. 489, Section 1; 1988 Act No. 405, Section 1; 1993 Act No. 181, Section 271; 1996 Act No. 437, Section 6; 1997 Act No. 45, Section 1; 1998 Act No. 321, Section 2; 2015 Act No. 58 (S.3), Pt IV, Section 17, eff June 4, 2015; 2017 Act No. 96 (S.289), Section 5.A, eff July 1, 2017.

Editor’s Note

1996 Act No. 437, Section 8, eff January 1, 1997, provides as follows:

“Implementation of the changes in law effectuated by this act to Sections 16‑3‑1110, 16‑3‑1535, 17‑25‑322, 17‑25‑324, and 24‑21‑490 of the 1976 Code and the requirements thereunder or in any new provisions of law contained herein which would necessitate funding are contingent upon appropriations of sufficient funding by the General Assembly. Nothing herein shall relieve the various agencies and authorities within the offices of the respective clerks of court or judicial, correctional, and parole systems of this State from continuing to meet, enforce, and address those provisions of law related to restitution in effect prior to the enactment hereof.”

Effect of Amendment

2015 Act No. 58, Section 17, in (8), added the last sentence, relating to Sections 16‑25‑20 and 16‑25‑65.

2017 Act No. 96, Pt. II, Section 5.A, inserted the (A), (B), and (C) identifiers; in (A)(1), substituted “Victim” for “Victim’s”; in (A)(3), substituted “Victim Compensation Fund, which is administered by the Office of the Attorney General, South Carolina Crime Victim Services Division” for “Victim’s Compensation Fund, which is a division of the Office of the Governor”; in (A)(4), substituted “Office of the Attorney General, South Carolina Crime Victim Services Division who is appointed by the Attorney General” for “Victim’s Compensation Fund who is appointed by the Governor. The director shall be in charge of the State Office of Victim’s Assistance which is part of this division under the supervision of the Governor”; in (A)(5), substituted “Office of the Attorney General, South Carolina Crime Victim Services Division, Department of Crime Victim Compensation” for “State Victim’s Compensation Fund”; deleted (A)(10), which had related to the definition of “deputy director”, and redesignated accordingly; and made nonsubstantive changes.

CROSS REFERENCES

Civil action for victim of trafficking, statute of limitations, see Section 16‑3‑2060.

Interagency task force established to develop and implement State Plan for Prevention of Trafficking in Persons, members, responsibilities, see Section 16‑3‑2050.

Restitution for victims of trafficking, see Section 16‑3‑2040.

Trafficking in persons, definitions, see Section 16‑3‑2010.

Trafficking in persons, penalties, defenses, see Section 16‑3‑2020.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Criminal Sexual Conduct Section 9.50, Trafficking in Persons.

Treatises and Practice Aids

29 Causes of Action 2d 229, Cause of Action Under State Statute Granting Compensation to Crime Victims.

Attorney General’s Opinions

Victims involved in accidents with drunk drivers are eligible for Victims Compensation provided that all other eligibility requirements are met. 1984 Op.Atty.Gen., No 84‑50, p 122 (1984 WL 159857).

Notes of Decisions

Restitution 1

1. Restitution

The execution of a civil settlement and covenant not to execute between the assault victim and defendant prior to sentencing did not preclude an award of restitution; civil settlements and criminal restitution were distinct remedies with differing considerations, and the plain language of the covenant did not preclude further litigation between the parties, let alone restitution in the criminal court. State v. Morgan (S.C.App. 2016) 417 S.C. 338, 790 S.E.2d 27. Sentencing and Punishment 2138

**SECTION 16‑3‑1120.** Director of Crime Victim Services Division; powers and duties.

(A) A director of the South Carolina Crime Victim Services Division must be appointed by the Attorney General and shall serve at his pleasure. The director is responsible for administering the provisions of this article. Included among the duties of the director is the responsibility, with approval of the South Carolina Crime Victim Advisory Board as established in this article, for developing and administering a plan for informing the public of the availability of the benefits provided under this article and procedures for filing claims for the benefits.

(B) The director, upon approval by the South Carolina Crime Victim Advisory Board, has the following additional powers and duties:

(1) to appoint a deputy director of the Department of Crime Victim Compensation, and staff necessary for the operation of the department, and to contract for services. The director shall recommend the salary for the deputy director and other staff members, as allowed by statute or applicable law;

(2) to request from the Attorney General, South Carolina Law Enforcement Division, solicitors, magistrates, judges, county and municipal police departments, and any other agency or department such assistance and data as will enable the director to determine whether, and the extent to which, a claimant qualifies for awards. Any person, agency, or department listed above is authorized to provide the director with the information requested upon receipt of a request from the director. Any provision of law providing for confidentiality of juvenile records does not apply to a request of the deputy director, the director, the board, or a panel of the board pursuant to this section;

(3) to reopen previously decided award cases as the director or deputy director considers necessary;

(4) to require the submission of medical records as are needed by the board, a panel of the board, or deputy director or his staff and, when necessary, to direct medical examination of the victim;

(5) to take or cause to be taken affidavits or depositions within or without the State. This power may be delegated to the deputy director or the board or its panel;

(6) to render each year to the Governor and to the General Assembly a written report of the activities of the Department of Crime Victim Compensation and the Victim Compensation Fund pursuant to this article;

(7) to delegate the authority to the deputy director to reject incomplete claims for awards or assistance;

(8) to render awards to victims of crime or to those other persons entitled to receive awards in the manner authorized by this article. The power may be delegated to the deputy director;

(9) to apply for funds from, and to submit all necessary forms to, any federal agency participating in a cooperative program to compensate victims of crime;

(10) to delegate to the board or a panel of the board on appeal matters any power of the director or deputy director.

HISTORY: 1982 Act No. 455, Section 2; 1984 Act No. 489, Section 1; 1988 Act No. 658, Part II, Section 16; 1993 Act No.181, Section 272; 2017 Act No. 96 (S.289), Section 5.B, eff July 1, 2017.

Effect of Amendment

2017 Act No. 96, Pt. II, Section 5.B, inserted the (A) and (B) identifiers; in (A), substituted “South Carolina Crime Victim Services Division” for “Victim’s Compensation Fund”, “Attorney General” for “Governor”, and “Victim” for “Victim’s”; in (B), substituted “Victim” for “Victim’s”; in (B)(1), substituted “Department of Crime Victim Compensation” for “Victim’s Compensation Fund” and “of the department” for “thereof”; deleted (B)(2), relating to regulations and redesignated accordingly; in (B)(3), deleted “investigate or” prior to “reopen” and inserted “director or”; and, in (B)(6), substituted “Department of Crime Victim Compensation and the Victim Compensation Fund” for “Victim’s Compensation Fund”.

CROSS REFERENCES

South Carolina Crime Victim’s Advisory Board regulations, see S.C. Code of Regulations R. 132‑1 et seq.

Victim/Witness Assistance Program, see Section 16‑3‑1400 et seq.

Library References

Criminal Law 1220.

States 46, 68, 73.

Westlaw Topic Nos. 110, 360.

C.J.S. Criminal Law Sections 2462 to 2510.

C.J.S. States Sections 88, 158 to 161, 163 to 165, 195, 224 to 225, 229, 240 to 249, 252 to 253.

**SECTION 16‑3‑1130.** Claims; assignment to field representative; investigation and reports.

(1) A claim, once accepted for filing and completed, must be assigned to a field representative. The field representative shall examine the papers filed in support of the claim and cause an investigation to be conducted into the validity of the claim. The investigation shall include but not be limited to an examination of police, court, and official records and reports concerning the crime and an examination of medical and hospital reports relating to the injury upon which the claim is based. All claims arising from the death of an individual as a direct result of a crime must be considered together by a single field representative.

(2) Claims must be investigated and determined, regardless of whether the alleged criminal has been apprehended, prosecuted, or convicted of any crime based upon the same incident or whether the alleged criminal has been acquitted or found not guilty of the crime in question.

(3) The field representative conducting the investigation shall file with the deputy director a written report setting forth a recommendation and his reason for the recommendation. The deputy director shall render a written decision and furnish the claimant with a copy of the decision.

HISTORY: 1982 Act No. 455, Section 2; 1984 Act No. 489, Section 1; 1989 Act No. 181, Section 1.

Library References

Criminal Law 1220.

States 74.

Westlaw Topic Nos. 110, 360.

C.J.S. Criminal Law Sections 2462 to 2510.

C.J.S. States Sections 229, 250, 252.

Attorney General’s Opinions

Victims involved in accidents with drunk drivers are eligible for Victims Compensation provided that all other eligibility requirements are met. 1984 Op.Atty.Gen., No 84‑50, p 122 (1984 WL 159857).

**SECTION 16‑3‑1140.** Application for review of decision; appeals; subpoenas; report on review.

(A) The claimant may, within thirty days after receipt of the report of the decision of the deputy director, make an application in writing to the deputy director for review of the decision.

(B) Upon receipt of an application for review pursuant to subsection (A), the deputy director shall forward all relevant documents and information to the Chairman of the Crime Victim Advisory Board. The chairman shall appoint a three‑member panel of the board which shall review the records and affirm or modify the decision of the deputy director; provided, that the chairman may order, in his discretion, that any particular case must be heard by the full board. If considered necessary by the board or its panel or if requested by the claimant, the board or its panel shall order a hearing prior to rendering a decision. At the hearing any relevant evidence, not legally privileged, is admissible. The board or its panel shall render a decision within ninety days after completion of the investigation. The action of the board or its panel is final and nonappealable. If the deputy director receives no application for review pursuant to subsection (A), his decision becomes the final decision of the Department of Crime Victim Compensation.

(C) The board or its panel, for purposes of this article, may subpoena witnesses, administer or cause to be administered oaths, and examine such parts of the books and records of the parties to proceedings as relate to questions in dispute.

(D) The deputy director shall within ten days after receipt of the board’s or panel’s final decision make a report to the claimant including a copy of the final decision and the reasons why the decision was made.

HISTORY: 1982 Act No. 455, Section 2; 1984 Act No. 489, Section 1; 2017 Act No. 96 (S.289), Section 5.C, eff July 1, 2017.

Effect of Amendment

2017 Act No. 96, Pt. II, Section 5.C, made nonsubstantive changes throughout the section.

Library References

Criminal Law 1220.

Westlaw Topic No. 110.

C.J.S. Criminal Law Sections 2462 to 2510.

**SECTION 16‑3‑1150.** Emergency awards.

Notwithstanding the provisions of Section 16‑3‑1130, if it appears to the deputy director that the claim is one with respect to which an award probably will be made and undue hardship will result to the claimant, if immediate payment is not made, the deputy director may make one or more emergency awards to the claimant pending a final decision in the case, provided that:

(1) the amount of each emergency award shall not exceed five hundred dollars;

(2) the total amount of such emergency awards shall not exceed one thousand dollars;

(3) the amount of such emergency awards must be deducted from any final award made to the claimant; and

(4) the excess of the amount of any emergency award over the amount of the final award, or the full amount of any emergency award if no final award is made, must be repaid by the claimant to the Victim Compensation Fund as created by this article.

HISTORY: 1982 Act No. 455, Section 2; 1984 Act No. 489, Section 1; 1986 Act No. 540, Part II, Section 27A; 2017 Act No. 96 (S.289), Section 5.D, eff July 1, 2017.

Effect of Amendment

2017 Act No. 96, Pt. II, Section 5.D, made nonsubstantive changes throughout the section.

Library References

Criminal Law 1220.

Westlaw Topic No. 110.

C.J.S. Criminal Law Sections 2462 to 2510.

**SECTION 16‑3‑1160.** South Carolina Crime Victim Advisory Board; appointments; terms of office; vacancies in office; meetings; subsistence, mileage, and per diem.

(A) There is created a board to be known as the South Carolina Crime Victim Advisory Board to consist of eleven members to be appointed by the Attorney General. Of the original seven members, at least two of the members shall have been admitted to practice law in this State for not less than five years next preceding their appointment, one member shall be a physician licensed to practice medicine under the laws of this State, and one member shall have at least four years’ administrative experience in a court‑related Victim’s Assistance Fund, provided that such a qualified person is available. Of the four additional members, one must be a law enforcement officer with at least five years’ administrative experience, one shall have at least five years’ experience in directing sexual assault prevention or treatment services, one shall have at least five years’ experience in providing services for domestic violence victims, and one shall have been a victim of crime.

(B) The term of office of each appointed member is five years and until his successor is appointed and qualified. Of those seven members first appointed, two shall serve for a term of one year, two for a term of two years, one for a term of three years, one for a term of four years, and one for a term of five years, with the initial terms to be designated by the Attorney General when making the initial appointments. The initial terms of four additional members to be appointed as provided in this section are for two, three, four, and five years, respectively, the initial term of each member to be designated by the Attorney General when making the appointment. The Attorney General shall select a chairman. The board may elect a secretary and other officers as deemed necessary.

(C) Any vacancy must be filled for the remainder of the unexpired term by appointment in the same manner of the initial appointments. On June 30, 2017, the terms of the members of the board currently serving shall terminate, and members serving on that date, or subsequently appointed by the Attorney General, are eligible for reappointment at the discretion of the Attorney General.

The board shall meet at least twice each year and must be subject to the call of the chairperson, to consider improvements in and monitor the effectiveness of the Victim Compensation Fund, and to review and comment on the budget and approve the regulations pertaining to the Victim Compensation Fund and the Victim/Witness Assistance Program of Article 14. The members of the board shall receive the same subsistence, mileage, and per diem as is provided by law for members of state boards, committees, and commissions, to be paid from the Victim Compensation Fund as created by this article.

HISTORY: 1982 Act No. 455, Section 2; 1984 Act No. 489, Section 1; 2008 Act No. 273, Section 4, eff June 4, 2008; 2017 Act No. 96 (S.289), Section 5.E, eff July 1, 2017.

Effect of Amendment

2017 Act No. 96, Pt. II, Section 5.E, inserted the paragraph identifiers; substituted “Attorney General” for “Governor” throughout the section; in (C), added the second sentence, relating to the termination of board members currently serving; and made nonsubstantive changes.

Library References

Criminal Law 1220.

States 45, 46, 51, 52, 62, 72.

Westlaw Topic Nos. 110, 360.

C.J.S. Criminal Law Sections 2462 to 2510.

C.J.S. States Sections 88 to 89, 101 to 102, 145 to 146, 151, 153 to 154, 157 to 161, 163 to 165, 169 to 170, 175, 178 to 182, 184 to 198, 202 to 204, 229, 249.

**SECTION 16‑3‑1170.** Basis for award.

(A) No award may be made unless:

(1) a crime was committed;

(2) the crime directly resulted in physical or psychic trauma to the victim;

(3) the crime was promptly reported to the proper authority and recorded in police records; and

(4) the claimant or other award recipient has fully cooperated with all law enforcement agencies and with the Office of the Attorney General, South Carolina Crime Victim Services Division, Department of Crime Victim Compensation.

(B) For the purposes of subsection (A)(3), a crime reported more than forty‑eight hours after its occurrence is not “promptly reported”, absent a showing of special circumstances or causes which justify the delay.

HISTORY: 1982 Act No. 455, Section 2; 1984 Act No. 489, Section 1; 1988 Act No. 405, Section 2; 2017 Act No. 96 (S.289), Section 5.F, eff July 1, 2017.

Effect of Amendment

2017 Act No. 96, Pt. II, Section 5.F, in (A)(4), substituted “Office of the Attorney General, South Carolina Crime Victim Services Division, Department of Crime Victim Compensation” for “South Carolina Victim’s Compensation Fund”; and in (B), substituted “subsection (A)(3)” for “item (3) of subsection (A)”.

CROSS REFERENCES

Rights of victims and witnesses, generally, see Section 16‑3‑1520 et seq.

Library References

Criminal Law 1220.

Westlaw Topic No. 110.

C.J.S. Criminal Law Sections 2462 to 2510.

Attorney General’s Opinions

A court will likely conclude the State Office of Victim Assistance has the right to recover the assistance it provided to the Victim of a crime to the full amount over and above the Victim’s recovery of 100% of actual losses and expenses as a direct result of the crime. S.C. Op.Atty.Gen. (Sept. 23, 2013) 2013 WL 5494614.

Discussion of whether a minor victim of criminal sexual conduct is barred from receiving compensation because the non‑offending parent or guardian refuses to fully cooperate with law enforcement. SC Op.Atty.Gen. (Oct. 25, 1999) 1999 WL 1390357.

The State Office of Victim Assistance possesses ample discretion to award compensation to a crime victim even though the applicant may have refused to prosecute. SC Op.Atty.Gen. (Oct. 25, 1999) 1999 WL 1390357.

Victims involved in accidents with drunk drivers are eligible for Victims Compensation provided that all other eligibility requirements are met. 1984 Op.Atty.Gen., No 84‑50, p 122 (1984 WL 159857).

**SECTION 16‑3‑1180.** Amount of award; apportionment among multiple claimants; rejection of application for award.

(A) An award may be made for:

(1) reasonable and customary charges as periodically determined by the board for medical services, including mental health counseling, required and rendered as a direct result of the injury on which the claim is based, as long as these services are rendered by a licensed professional. Payment for mental health counseling is limited to the number of sessions during a one hundred eighty‑day period beginning on the date of the first counseling session or twenty sessions, whichever is greater. Upon recommendation of the director, the board may allow victims who max out the current benefit of twenty mental health counseling sessions to request up to an additional twenty sessions for a total of forty sessions;

(2) reasonable and customary charges as periodically determined by the board for other services required and rendered as a direct result of the injury upon which the claim is based, as long as the service is rendered by a professional or paraprofessional who holds a license, certificate, or other documentary evidence of specific training and qualification in a field of service which, by regulation, the board recognizes as a service required by and beneficial to crime victims;

(3) loss of earning or support, provided that:

(a) claimant is deprived of that income for at least two consecutive weeks;

(b) the loss is not reimbursable;

(c) the amount may not exceed the maximum rate provided in Section 42‑1‑50;

(d) conditions (a), (b), and (c) may be waived in severe hardship cases;

(4) reasonable and customary charges for employment‑oriented retraining or rehabilitative services incurred as a direct result of the injury; and

(5) burial expenses not to exceed four thousand dollars.

(B) If there are two or more family members as specified in Section 16‑3‑1210(c) who are entitled to an award as a result of the death of a person, the award must be apportioned among the claimants; however, the amount awarded for burial expenses must be paid to or on behalf of the person who has paid or is responsible for that expense.

(C) The aggregate of award to and on behalf of victims may not exceed fifteen thousand dollars unless the Crime Victim Advisory Board, by two‑thirds vote, and the director concur that extraordinary circumstances exist. In this case, the award may not exceed twenty‑five thousand dollars.

(D) An award may be made only if and to the extent that the amount of compensable loss exceeds one hundred dollars; however, this limitation may be waived in the interest of justice and must be waived upon a showing that the claimant is at least sixty‑five years old.

(E) A previously decided award may be reopened for the purpose of increasing the compensation previously awarded, subject to the maximum provided in this article. In this case the Office of the Attorney General, South Carolina Crime Victim Services Division, Department of Crime Victim Compensation shall send immediately to the claimant a copy of the notice changing the award. This review may not affect the award as regards any monies paid, and the review may not be made after eighteen months from the date of the last payment of compensation pursuant to an award under this article unless the director or deputy director determines there is a need to reopen the case as specified in Section 16‑3‑1120(B)(3).

HISTORY: 1982 Act No. 455, Section 2; 1984 Act No. 489, Section 1; 1986 Act No. 540, Part II, Sections 27B, 2C; 1988 Act No. 406; 1990 Act No. 480, Section 1; 1991 Act No. 144, Section 1; 1995 Act No. 83, Section 12; 1996 Act No. 458, Part II, Section 51A; 2008 Act No. 271, Section 1, eff January 1, 2009; 2017 Act No. 96 (S.289), Section 5.G, eff July 1, 2017.

Effect of Amendment

2017 Act No. 96, Pt. II, Section 5.G, in (C), substituted “Victim” for “Victim’s”; in (E), substituted “Office of the Attorney General, South Carolina Crime Victim Services Division, Department of Crime Victim Compensation” for “State Office of Victim Assistance”, inserted “deputy director”, and substituted “16‑3‑1120(B)(3)” for “16‑3‑1120(4)”.

Library References

Criminal Law 1220.

Westlaw Topic No. 110.

C.J.S. Criminal Law Sections 2462 to 2510.

**SECTION 16‑3‑1190.** Reduction of award.

Any award made pursuant to this article may be reduced by or set off by the amount of any payments received or to be received as a result of the injury (a) from or on behalf of the person who committed the crime, (b) from any other private or public source, including an award of workers’ compensation pursuant to the laws of this State or (c) as an emergency award pursuant to Section 16‑3‑1150; provided, that private sources shall not include contributions received from family members, or persons or private organizations making charitable donations to a victim.

HISTORY: 1982 Act No. 455, Section 2; 1984 Act No. 489, Section 1.

Library References

Criminal Law 1220.

Westlaw Topic No. 110.

C.J.S. Criminal Law Sections 2462 to 2510.

RESEARCH REFERENCES

Treatises and Practice Aids

Modern Workers’ Compensation Section 207:6, Statutes Governing Workers’ Compensation Offsets.

**SECTION 16‑3‑1200.** Conduct of victim or intervenor contributing to infliction of injury; reduction of award; rejection of claim.

In determining the amount of an award, the Deputy Director, the Board, or its panel shall determine whether because of his conduct the victim or intervenor of such crime contributed to the infliction of his injury, and the Deputy Director, the Board, or its panel may reduce the amount of the award or reject the claim altogether in accordance with such determination; provided, however, the Deputy Director, the Board, or its panel may disregard for this purpose the contribution of an intervenor for his own injury or death where the record shows that the contribution was attributable to efforts by the intervenor as set forth in subsection (8) of Section 16‑3‑1110.

HISTORY: 1982 Act No. 455, Section 2; 1984 Act No. 489, Section 1.

Library References

Criminal Law 1220.

Westlaw Topic No. 110.

C.J.S. Criminal Law Sections 2462 to 2510.

**SECTION 16‑3‑1210.** Persons eligible for award.

Except as provided in Section 16‑3‑1220, a victim, surviving spouse, or a parent or legally dependent child of a victim is entitled to file for benefits under this article if either:

(a) the offense was committed in this State; or

(b) the victim was a resident of this State when the crime was committed in either another state or outside the United States if the crime is terrorism. In either case the award payable under this article must be reduced by the amount paid or payable under the laws of another state as a result of the criminal act giving rise to the claim; or

(c) the victim was a resident of this State when the offense was committed in another state. In any case, the award payable under this article must be reduced by the amount paid or payable under the laws of another state as a result of the criminal act giving rise to the claim.

A surviving spouse, parent, or legally dependent child is not entitled to file for benefits under this section if that person is the subject of an investigation, has been charged with, convicted of, or pled guilty or nolo contendere to the offense in question, or acted on behalf of the suspect, juvenile offender, or defendant.

HISTORY: 1982 Act No. 455 Section 2. 1984 Act No. 489, Section 1; 1989 Act No. 181, Section 2; 1997 Act No. 45, Section 2; 1997 Act No. 141, Section 2.

CROSS REFERENCES

Rights of victims and witnesses, generally, see Section 16‑3‑1520 et seq.

Library References

Criminal Law 1220.

Westlaw Topic No. 110.

C.J.S. Criminal Law Sections 2462 to 2510.

LAW REVIEW AND JOURNAL COMMENTARIES

Note, At least treat us like criminals!: South Carolina responds to victims’ pleas for equal rights, 49 S.C. L. Rev. 575, Spring 1998.

**SECTION 16‑3‑1220.** Persons ineligible for award.

A person listed in Section 16‑3‑1210 is not eligible to recover under this article if the person:

(1) committed or aided in the commission of the crime upon which the claim is based or engaged in other unlawful activity which contributed to or aggravated the resulting injury;

(2) is the surviving parent, spouse, or dependent of a deceased victim who would have been barred by subsection (1) had he survived;

(3) is a dependent of the offender who committed the crime upon which the claim is based, and the offender would be a principal beneficiary of the award.

HISTORY: 1982 Act No. 455, Section 2. 1984 Act No. 489, Section 1; 1989 Act No. 181, Section 3; 1991 Act No. 144, Section 2; 2017 Act No. 96 (S.289), Section 5.H, eff July 1, 2017.

Effect of Amendment

2017 Act No. 96, Pt. II, Section 5.H, substituted “Section 16‑3‑1210” for “Section 16‑3‑1210(1)”.

Library References

Criminal Law 1220.

Westlaw Topic No. 110.

C.J.S. Criminal Law Sections 2462 to 2510.

Attorney General’s Opinions

Discussion of whether a victim of criminal domestic violence is eligible for compensation if the victim still resides with the offender, and the offender might be a principal beneficiary of the award. SC Op.Atty.Gen. (Oct. 25, 1999) 1999 WL 1390357.

**SECTION 16‑3‑1230.** Claim filed on behalf of minor or incompetent; time limitations.

(A) A claim may be filed by a person eligible to receive an award, as provided in Section 16‑3‑1210 , or, if the person is an incompetent or a minor, by his parent or legal guardian or other individual authorized to administer his affairs.

(B) A claim must be filed by the claimant not later than one hundred eighty days after the latest of the following events:

(1) the occurrence of the crime upon which the claim is based;

(2) the death of the victim;

(3) the discovery by the law enforcement agency that the occurrence was the result of crime; or

(4) the manifestation of a mental or physical injury is diagnosed as a result of a crime committed against a minor.

(C) Upon good cause shown, the time for filing may be extended for a period not to exceed four years after the occurrence, diagnosed manifestation, or death. “Good cause” for the above purposes includes reliance upon advice of an official victim assistance specialist who either misinformed or neglected to inform a victim of rights and benefits of the Victim Compensation Fund but does not mean simply ignorance of the law.

(D) Claims must be filed in the Department of Crime Victim Compensation with input from the board by conventional mail, facsimile, in person, or through another electronic submission mechanism approved by the director. The director shall accept for filing all claims submitted by persons eligible pursuant to subsection (A) and meeting the requirements as to the form of the claim contained in the form developed by the Office of the Attorney General, South Carolina Crime Victim Services Division, Department of Crime Victim Compensation.

HISTORY: 1982 Act No. 455, Section 2; 1984 Act No. 489, Section 1; 1989 Act No. 181, Section 4; 2006 Act No. 380, Section 5, eff upon approval (became law without the Governor’s signature on June 14, 2006); 2008 Act No. 271, Section 2, eff January 1, 2009; 2017 Act No. 96 (S.289), Section 5.I, eff July 1, 2017.

Effect of Amendment

2017 Act No. 96, Pt. II, Section 5.I, renumbered the section; in (C), substituted “Victim Compensation Fund” for “Victim’s Compensation Fund”; and, in (D), substituted “Department of Crime Victim Compensation with input from the board” for “office of the director”, “subsection (A)” for “subsection (1)”, and “form developed by the Office of the Attorney General, South Carolina Crime Victim Services Division, Department of Crime Victim Compensation” for “regulations of the board”.

Library References

Criminal Law 1220.

Westlaw Topic No. 110.

C.J.S. Criminal Law Sections 2462 to 2510.

RESEARCH REFERENCES

Treatises and Practice Aids

29 Causes of Action 2d 229, Cause of Action Under State Statute Granting Compensation to Crime Victims.

**SECTION 16‑3‑1240.** Disclosure of records as to claims; confidentiality; applicability of Freedom of Information Act.

It is unlawful, except for purposes directly connected with the administration of the fund, for any person to solicit, disclose, receive, or make use of or authorize, knowingly permit, participate in or acquiesce in the use of any list, or names of, or information concerning persons applying for or receiving awards pursuant to the provisions of this article without the written consent of the applicant or recipient. The records, papers, files, and communications of the board, its panel, and the director and his staff must be regarded as confidential information and privileged and not subject to disclosure under the Freedom of Information Act as contained in Chapter 4, Title 30.

HISTORY: 1982 Act No. 455, Section 2; 1984 Act No. 489, Section 1; 2017 Act No. 96 (S.289), Section 5.J, eff July 1, 2017.

Effect of Amendment

2017 Act No. 96, Pt. II, Section 5.J, substituted “fund” for “victim’s compensation program”, “pursuant to the provisions of this article” for “hereunder”, “Chapter 4, Title 30” for “Chapter 3 of Title 30”, and made nonsubstantive changes.

CROSS REFERENCES

Compensation for victims of trafficking, identity of victim and victim’s family confidential, see Section 16‑3‑2070.

Rights of victims and witnesses, generally, see Section 16‑3‑1520 et seq.

Library References

Criminal Law 1220.

Records 31, 54.

Westlaw Topic Nos. 110, 326.

C.J.S. Colleges and Universities Section 30.

C.J.S. Criminal Law Sections 2462 to 2510.

C.J.S. Records Sections 116, 118, 120, 130 to 132.

**SECTION 16‑3‑1250.** Subrogation of State to right of action accruing to claimant, victim, or intervenor.

Payment of an award pursuant to this article subrogates the State to the extent of the payment to any right of action accruing to the claimant or to the victim or intervenor to recover losses resulting from the crime with respect to which the award is made, except that subrogation shall not reduce the financial recovery by the victim, claimant, or intervenor to less than one hundred percent of actual losses or expenses. The subrogation amount must be reduced if there is a jury award or judicial award in a bench trial, which results in a loss to the victim, claimant, or intervenor. Subrogation shall not be reduced if the action is terminated other than by a jury award or judicial award in a bench trial.

HISTORY: 1982 Act No. 455, Section 2; 1984 Act No. 489, Section 1; 1996 Act No. 458, Part II, Section 51B.

Library References

Criminal Law 1220.

Westlaw Topic No. 110.

C.J.S. Criminal Law Sections 2462 to 2510.

Attorney General’s Opinions

A court will likely conclude the State Office of Victim Assistance has the right to recover the assistance it provided to the Victim of a crime to the full amount over and above the Victim’s recovery of 100% of actual losses and expenses as a direct result of the crime. S.C. Op.Atty.Gen. (Sept. 23, 2013) 2013 WL 5494614.

**SECTION 16‑3‑1260.** Reimbursement of State by convicted person for payment by Office of the Attorney General, South Carolina Crime Victim Services Division.

(A) A payment of benefits to, or on behalf of, a victim or intervenor, or eligible family member under this article creates a debt due and owing to the State by a person as determined by a court of competent jurisdiction of this State, who has committed the criminal act.

(B) The circuit court, when placing on probation a person who owes a debt to the State as a consequence of a criminal act, may set as a condition of probation the payment of the debt or a portion of the debt to the State. The court also may set the schedule or amounts of payments subject to modification based on change of circumstances.

(C) The Department of Probation, Parole and Pardon Services shall also have the right to make payment of the debt or a portion of the debt to the State a condition of parole or community supervision.

(D) When a juvenile is adjudicated delinquent in a Family Court proceeding involving a crime upon which a claim under this article can be made, the family court, in its discretion, may order that the juvenile pay the debt to the Office of the Attorney General, South Carolina Crime Victim Services Division, Department of Crime Victim Compensation, as created by this article, as an adult would have to pay had an adult committed the crime. Any assessments ordered may be made a condition of probation as provided in Section 63‑19‑1410.

(E) Payments authorized or required under this section must be paid to the Office of the Attorney General, South Carolina Crime Victim Services Division. The Director of the Office of the Attorney General, South Carolina Crime Victim Services Division, together with the Deputy Director of the Department of Crime Victim Compensation, shall coordinate the development of policies and procedures for the South Carolina Department of Corrections, the Department of Juvenile Justice, the South Carolina Office of Court Administration, the Department of Probation, Parole and Pardon Services, and the South Carolina Board of Probation, Parole and Pardon Services to assure that victim restitution programs are administered in an effective manner to increase payments into the fund.

(F) Restitution payments to the Office of the Attorney General, South Carolina Crime Victim Services Division, Department of Crime Victim Compensation, Victim Compensation Fund may be made by the Department of Corrections from wages accumulated by offenders in its custody who are subject to this article, except that offenders’ wages must not be used for this purpose if monthly wages are at or below minimums required to purchase basic necessities.

HISTORY: 1982 Act No. 455, Section 2; 1984 Act No. 489, Section 1; 1995 Act No. 83, Section 13; 2017 Act No. 96 (S.289), Section 5.K, eff July 1, 2017.

Effect of Amendment

2017 Act No. 96, Pt. II, Section 5.K, redesignated the paragraph identifiers; in (D), substituted “Office of the Attorney General, South Carolina Crime Victim Services Division, Department of Crime Victim Compensation” for “State Office of Victim Assistance”; in (E), substituted “Office of the Attorney General, South Carolina Crime Victim Services Division” for “State Office of Victim Assistance”, “Office of the Attorney General, South Carolina Crime Victim Services Division, together with the Deputy Director of the Department of Crime Victim Compensation,” for “State Office of Victim Assistance”, and “fund” for “State Office of Victim Assistance”; in (F), substituted “Office of the Attorney General, South Carolina Crime Victim Services Division, Department of Crime Victim Compensation, Victim Compensation Fund” for “State Office of Victim Assistance”; and made nonsubstantive changes throughout.

CROSS REFERENCES

Funds generated by courts from fines and assessments to be allocated to State Office of Victim Assistance, see Sections 14‑1‑205 to 14‑1‑208.

Library References

Criminal Law 1220.

Infants 2687.

Pardon and Parole 64.

Sentencing and Punishment 1973.

Westlaw Topic Nos. 110, 211, 284, 350H.

C.J.S. Criminal Law Sections 2152, 2462 to 2510.

C.J.S. Pardon and Parole Sections 65 to 67.

**SECTION 16‑3‑1270.** Restitution by offender; lien against offender; filing of lien.

If a person is unable at the time of sentencing or at any other time the court may set to pay a restitution charge imposed by the court pursuant to Sections 24‑23‑210 through 24‑23‑230, such restitution charge shall constitute a lien against the offender and against any real or personal property of the offender. A restitution charge shall not constitute a lien if it is waived by the Director pursuant to Section 24‑23‑210. Such lien may be filed by the Attorney General in the respective offices of the clerks of court and registers of deeds of this State in the same manner state tax liens are filed and may be enforced and collected by the Attorney General in the same manner state tax liens are enforced and collected.

HISTORY: 1982 Act No. 455, Section 2; 1984 Act No. 489, Section 1; 1997 Act No. 34, Section 1.

Editor’s Note

Section 24‑23‑210 was repealed by 1994 Act No. 497, Part II Section 36.U, and section 24‑23‑220 was repealed by 1996 Act No. 292, Section 6.

CROSS REFERENCES

Interagency task force established to develop and implement State Plan for Prevention of Trafficking in Persons, members, responsibilities, see Section 16‑3‑2050.

Restitution for victims of trafficking, see Section 16‑3‑2040.

Library References

Criminal Law 1220.

Sentencing and Punishment 2212.

Westlaw Topic Nos. 110, 350H.

C.J.S. Criminal Law Sections 2462 to 2510.

**SECTION 16‑3‑1280.** False claim; penalties.

Any person who knowingly makes a false claim or a false statement in connection with any claim hereunder is guilty of a misdemeanor and upon conviction must be punishable by a fine of not less than five hundred dollars or by a term of imprisonment for not less than one year, or both, and shall further forfeit all money received hereunder, if any.

HISTORY: 1982 Act No. 455, Section 2; 1984 Act No. 489, Section 1.

Library References

Criminal Law 1220.

Fraud 68.10.

Westlaw Topic Nos. 110, 184.

C.J.S. Criminal Law Sections 2462 to 2510.

C.J.S. Fraud Sections 125 to 132.

**SECTION 16‑3‑1290.** Victim Compensation Fund; payment of claims, expenses and administrative costs.

(A) There is hereby created a special fund to be known as the Victim Compensation Fund for the purpose of providing for the payment of all necessary and proper expenses incurred by the operation of the fund and the payment of claims. The State Treasurer is the custodian of the fund and all monies in the fund are held by the State Treasurer.

(B) The funds placed in the Victim Compensation Fund shall consist of all money appropriated by the General Assembly, if any, for the purpose of compensating claimants under this article and money recovered on behalf of the State pursuant to this article by subrogation or other action, recovered by court order, received from the federal government, received from additional court costs, received from assessments or fines, or received from any other public or private source, pursuant to this article.

(C) All administrative costs of this article, except the director’s salary, must be paid out of money collected pursuant to this article which has been deposited in the fund.

(D) Interest earned on all monies held in the fund shall be remitted to the general fund of the State.

HISTORY: 1982 Act No. 455, Section 2; 1984 Act No. 489, Section 1; 1984 Act No. 512, Part II, Section 73; 2017 Act No. 96 (S.289), Section 5.L, eff July 1, 2017.

Effect of Amendment

2017 Act No. 96, Pt. II, Section 5.L, redesignated the paragraph identifiers; in (A), substituted “Victim Compensation Fund” for “Victim’s Compensation Fund” and “fund” for “Victim’s Compensation Fund”; in (B), substituted “Victim Compensation Fund” for “Victim’s Compensation Fund”; in (C), substituted “fund” for “Victim’s Compensation Fund”; in (D), substituted “fund” for “Victim’s Compensation Fund”; and made nonsubstantive changes.

CROSS REFERENCES

Allocation of a portion of the funds generated by the sale of property seized and forfeited by reason of its use in the commission of a violation of Sections 16‑15‑305, 16‑15‑395, or 16‑15‑405, pertaining to obscenity, material harmful to minors, child exploitation, and child prostitution, see Section 16‑15‑445.

Effect of insufficiency of funds in the Victim’s Compensation Fund to pay claims, see Section 16‑3‑1330.

Funds generated by courts from fines and assessments to be allocated to State Office of Victim Assistance, see Sections 14‑1‑205 to 14‑1‑208.

Responsibilities of the Victim Compensation Fund concerning the Victim/Witness Assistance Program, see Section 16‑3‑1410.

Library References

Criminal Law 1220.

States 127.

Westlaw Topic Nos. 110, 360.

C.J.S. Criminal Law Sections 2462 to 2510.

C.J.S. States Sections 386 to 387.

**SECTION 16‑3‑1300.** Payment of award; exemption from garnishment, execution, or attachment.

Any award made under this article must be paid in accordance with the discretion and decision of the Deputy Director as to the manner of payment, subject to the regulations of the board and not inconsistent with the Board’s or panel’s award. No award made pursuant to this article is subject to garnishment, execution, or attachment other than for expenses resulting from the injury which is the basis for the claim. In every case providing for an award to a claimant under this article, the Deputy Director, the Board or its panel may, if in its opinion the facts and circumstances of the case warrant it, convert the award to be paid into a partial or total lump sum, without discount.

HISTORY: 1982 Act No. 455, Section 2; 1984 Act No. 489, Section 1.

Library References

Attachment 49.

Criminal Law 1220.

Execution 46.

Garnishment 25.

Westlaw Topic Nos. 44, 110, 161, 189.

C.J.S. Attachment Sections 64 to 69, 71 to 72, 76.

C.J.S. Criminal Law Sections 2462 to 2510.

C.J.S. Executions Section 31.

C.J.S. Federal Civil Procedure Section 263.

C.J.S. Garnishment Sections 60, 110, 112 to 113, 134.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Attachment Section 5, Types of Property Subject to Attachment.

**SECTION 16‑3‑1310.** Payment of award to victim or intervenor confined in correctional facility.

No award of any kind must be made under this article to a victim or intervenor injured while confined in any federal, state, county, or municipal jail, prison, or other correctional facility.

HISTORY: 1982 Act No. 455, Section 2; 1984 Act No. 489, Section 1.

Library References

Criminal Law 1220.

Westlaw Topic No. 110.

C.J.S. Criminal Law Sections 2462 to 2510.

**SECTION 16‑3‑1320.** Payment of award as not constituting ordinary income for tax purposes.

An award made pursuant to this article shall not constitute a payment which is treated as ordinary income under either the provisions of Chapter 7 of Title 12 of the 1976 Code, or to the extent lawful, under the United States Internal Revenue Code.

HISTORY: 1982 Act No. 455, Section 2; 1984 Act No. 489, Section 1.

Library References

Criminal Law 1220.

Internal Revenue 3119.

Taxation 3451.

Westlaw Topic Nos. 110, 220, 371.

C.J.S. Criminal Law Sections 2462 to 2510.

C.J.S. Internal Revenue Sections 44 to 45, 51.

C.J.S. Taxation Sections 1858, 1862 to 1863, 1869 to 1870.

**SECTION 16‑3‑1330.** Insufficient funds for payment of claims.

(A) When the director determines that projected revenue in any fiscal year will be insufficient to pay projected claims or awards in the amounts provided pursuant to the provisions of this article, he shall reduce the amount of all claims or awards by an amount equal to the ratio of projected revenue to the total projected claims or awards cost. When these reductions are required, the director shall inform the public through the media of the reductions as promptly as possible. The reductions apply to all claims or awards not paid as of the effective date of the reductions order.

(B) Any award is specifically not a claim against the State if it cannot be paid due to a lack of funds in the Victim Compensation Fund.

HISTORY: 1982 Act No. 455, Section 2; 1984 Act No. 489, Section 1; 1988 Act No. 367, Section 1; 2017 Act No. 96 (S.289), Section 5.M, eff July 1, 2017.

Effect of Amendment

2017 Act No. 96, Pt. II, Section 5.M, inserted the paragraph identifiers; in (A), substituted “pursuant to the provisions of this article” for “herein”; and, in (B), deleted “hereunder” following “Any award”, and substituted “Victim Compensation Fund” for “Victim’s Compensation Fund”.

CROSS REFERENCES

Funds generated by courts from fines and assessments to be allocated to State Office of Victim Assistance, see Sections 14‑1‑205 to 14‑1‑208.

Library References

Criminal Law 1220.

States 127.

Westlaw Topic Nos. 110, 360.

C.J.S. Criminal Law Sections 2462 to 2510.

C.J.S. States Sections 386 to 387.

**SECTION 16‑3‑1340.** Attorney for claimant; fees; attorney for Department of Crime Victim Compensation; soliciting employment to pursue claim or award; penalties.

(A) A claimant may be represented by an attorney in proceedings under this article. Attorneys’ fees must be paid from the Victim Compensation Fund, subject to the approval of the director, except that in the event of an appeal pursuant to Section 16‑3‑1140, attorneys’ fees are subject to the approval of the board or its panel hearing the appeal. Attorneys within the Office of the Attorney General shall represent the Department of Crime Victim Compensation in proceedings under this article.

(B) Any person who receives any fee or other consideration or any gratuity on account of services so rendered, unless the consideration or gratuity is approved by the deputy director, or who makes it a business to solicit employment for a lawyer or for himself in respect to any claim or award for compensation is guilty of a misdemeanor and, upon conviction must for each offense, be punished by a fine of not more than five hundred dollars or by imprisonment not more than one year, or both.

HISTORY: 1982 Act No. 455, Section 2; 1984 Act No. 489, Section 1; 1993 Act No. 181, Section 996; 2017 Act No. 96 (S.289), Section 5.N, eff July 1, 2017.

Effect of Amendment

2017 Act No. 96, Pt. II, Section 5.N, rewrote the section, making conforming changes reflecting the restructuring of victim services generally relating to the Victim Compensation Fund and certain responsibilities of the newly created Office of the Attorney General, South Carolina Crime Services Division, Department of Crime Victim Compensation.

Library References

Attorney and Client 33.

Criminal Law 1220.

Westlaw Topic Nos. 45, 110.

C.J.S. Attorney and Client Section 153.

C.J.S. Criminal Law Sections 2462 to 2510.

**SECTION 16‑3‑1350.** Medicolegal examinations for victims of criminal sexual conduct or child sexual abuse.

(A) The State must ensure that a victim of criminal sexual conduct in any degree, criminal sexual conduct with a minor in any degree, or child sexual abuse must not bear the cost of his or her routine medicolegal exam following the assault.

(B) These exams must be standardized relevant to medical treatment and to gathering evidence from the body of the victim and must be based on and meet minimum standards for rape exam protocol as developed by the South Carolina Law Enforcement Division, the South Carolina Hospital Association, and the Office of the Attorney General, South Carolina Crime Victim Services Division with production costs to be paid from funds appropriated for the Victim Compensation Fund. These exams must include treatment for sexually transmitted diseases, and must include medication for pregnancy prevention if indicated and if desired. The South Carolina Law Enforcement Division must distribute these exam kits to any licensed health care facility providing sexual assault exams. When dealing with a victim of criminal sexual assault, the law enforcement agency immediately must transport the victim to the nearest licensed health care facility which performs sexual assault exams. A health care facility providing sexual assault exams must use the standardized protocol described in this subsection.

(C) A licensed health care facility, upon completion of a routine sexual assault exam as described in subsection (B) performed on a victim of criminal sexual conduct in any degree, criminal sexual conduct with a minor in any degree, or child sexual abuse, may file a claim for reimbursement directly to the Office of the Attorney General, South Carolina Crime Victim Services Division, Department of Crime Victim Compensation if the offense occurred in South Carolina. The department must develop procedures for health care facilities to follow when filing a claim with respect to the privacy of the victim. Health care facility personnel must obtain information necessary for the claim at the time of the exam, if possible. The department must reimburse eligible health care facilities directly from the fund.

(D) The Office of the Attorney General, South Carolina Crime Victim Services Division, Department of Crime Victim Compensation must utilize existing funds appropriated from the general fund for the purpose of compensating licensed health care facilities for the cost of routine medical exams for sexual assault victims as described above. When the director determines that projected reimbursements in a fiscal year provided in this section exceed funds appropriated for payment of these reimbursements, he must direct the payment of the additional services from the fund. For the purpose of this particular exam, the one hundred dollar deductible is waived for award eligibility under the fund. The department must develop appropriate guidelines and procedures and distribute them to law enforcement agencies and appropriate health care facilities.

HISTORY: 1997 Act No. 141, Section 1; 2009 Act No. 59, Section 5, eff June 2, 2009; 2017 Act No. 96 (S.289), Section 5.O, eff July 1, 2017.

Effect of Amendment

2017 Act No. 96, Pt. II, Section 5.O, rewrote the section, making conforming changes reflecting the restructuring of victim services generally relating to the Victim Compensation Fund and certain responsibilities of the newly created Office of the Attorney General, South Carolina Crime Services Division, Department of Crime Victim Compensation.

Library References

Criminal Law 1224(1), 1225.

Westlaw Topic No. 110.

C.J.S. Criminal Law Sections 2402 to 2403, 2410.

LAW REVIEW AND JOURNAL COMMENTARIES

Note, At least treat us like criminals!: South Carolina responds to victims’ pleas for equal rights, 49 S.C. L. Rev. 575, Spring 1998.

**SECTION 16‑3‑1360.** Debt collection activities prohibited until award is made or denied; suspension of statute of limitations; definition.

(A) When a person files a claim pursuant to this article, a health care provider that has received written notice of a pending claim is prohibited from all debt collection activities relating to medical and psychological treatment received by the person in connection with the claim until an award is made on the claim or the claim is determined to be noncompensable and is denied, or ninety days have passed after the health care provider first received notice of a pending claim. The statute of limitations for collection of the debt is suspended during the period in which the applicable health care provider is required to refrain from debt collection activities.

(B) For purposes of this section, “debt collection activities” means repeatedly calling or writing to the claimant and threatening to turn the matter over to a debt collection agency or to an attorney for collection, enforcement, or filing of other process. The term does not include routine billing or inquiries about the status of the claim.

HISTORY: 2010 Act No. 241, Section 1, eff June 11, 2010.

Library References

Antitrust and Trade Regulation 214.

Criminal Law 1220.

Westlaw Topic Nos. 29T, 110.

C.J.S. Credit Reporting Agencies; Consumer Protection Sections 82, 86, 92.

C.J.S. Criminal Law Sections 2462 to 2510.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Attachment Section 35, Nature and Grounds for Liability: Persons Liable and Persons Entitled to Damages.

ARTICLE 14

Crime Victim Services Training, Provider Certification, and Statistical Analysis

CROSS REFERENCES

Creation of Office of the Attorney General, South Carolina Crime Victim Services Division, transfer of existing crime victim services entities, see Section 1‑7‑1100.

**SECTION 16‑3‑1400.** Omitted.

HISTORY: Former Section, titled Definitions, had the following history: 1984 Act No. 489, Section 2; 1988 Act No. 405, Section 3; 2008 Act No. 271, Section 3, eff January 1, 2009; 2010 Act No. 293, Section 1, eff August 27, 2010. Omitted by 2017 Act No. 96, Section 6, eff July 1, 2017. See now, Section 16‑3‑1420.

**SECTION 16‑3‑1410.** Department of Crime Victim Services Training, Provider Certification, and Statistical Analysis; public crime victim assistance programs.

(A) The Department of Crime Victim Services Training, Provider Certification, and Statistical Analysis is created within the Office of the Attorney General, South Carolina Crime Victim Services Division. The Director of the Crime Victim Services Division shall appoint a deputy director of the department.

(B) The Department of Crime Victim Services Training, Provider Certification, and Statistical Analysis shall:

(1) provide oversight of training, education, and certification of victim assistance programs;

(2) in cooperation with the Victim Services Coordinating Council, promulgate training standards and requirements;

(3) approve training curricula for credit hours toward certification;

(4) provide victim service provider certification;

(5) maintain records of certified victim service providers; and

(6) collect and analyze statistical data gathered from providers; grant providers; grant recipients; all victim services funding streams; and local, state, and federal crime data and publish analysis, needs assessments, and reports.

(C) Public crime victim assistance programs shall ensure that all victim service providers employed in their respective offices are certified through the department.

(1) Private, nonprofit programs shall ensure that all crime victim service providers in these nonprofit programs are certified by a Victim Services Coordinating Council‑approved certification program. Victim Services Coordinating Council approval must include review of the program to ensure that requirements are commensurate with the certification requirements for public victim assistance service providers.

(2) Crime victim service providers, serving in public or private nonprofit programs and employed on the effective date of this article, are exempt from basic certification requirements but must meet annual continuing education requirements to maintain certification. Crime victim service providers, serving in public or private nonprofit programs and employed after the effective date of this article, are required to complete the basic certification requirements within one year from the date of employment and to meet annual continuing education requirements to maintain certification throughout their employment.

(3) The mandatory minimum certification requirements, as promulgated by the deputy director, may not exceed fifteen hours, and the mandatory minimum requirements for continuing advocacy education, as promulgated by the deputy director, may not exceed twelve hours.

(4) Nothing in this section shall prevent an entity from requiring, or an individual from seeking, additional certification credits beyond the basic required hours.

HISTORY: 2017 Act No. 96 (S.289), Section 6, eff July 1, 2017.

Editor’s Note

Prior Laws: Former Section 16‑3‑1410 was titled Victim assistance services; membership of Victim Services Coordinating Council, and had the following history: 1984 Act No. 489, Section 2; 2008 Act No. 271, Section 3, eff January 1, 2009. See now, Code 1976 Section 16‑3‑1430.

**SECTION 16‑3‑1420.** Definitions.

For purposes of this article:

(1) “Victim service provider” means a person:

(a) who is employed by a local government or state agency and whose job duties involve providing victim assistance as mandated by South Carolina law; or

(b) whose job duties involve providing direct services to victims and who is employed by an organization that is incorporated in South Carolina, holds a certificate of authority in South Carolina, or is registered as a charitable organization in South Carolina, and the organization’s mission is victim assistance or advocacy and the organization is privately funded or receives funds from federal, state, or local governments to provide services to victims.

“Victim service provider” does not include a municipal court judge, magistrates court judge, circuit court judge, special circuit court judge, or family court judge.

(2) “Witness” means a person who has been or is expected to be summoned to testify for the prosecution or who by reason of having relevant information is subject to call or likely to be called as a witness for the prosecution, whether or not an action or proceeding is commenced.

HISTORY: 1984 Act No. 489, Section 2; 1988 Act No. 405, Section 3; 2008 Act No. 271, Section 3, eff January 1, 2009; 2010 Act No. 293, Section 1, eff August 27, 2010. Formerly Section 16‑3‑1400, renumbered by 2017 Act No. 96 (S.289), Section 6, eff July 1, 2017.

Editor’s Note

Prior Laws: Former Section 16‑3‑1420 was titled Director, and had the following history: 1984 Act No. 489, Section 2; 2008 Act No. 271, Section 3, eff January 1, 2009.

Effect of Amendment

2017 Act No. 96, Pt. II, Section 6, reenacted former Section 16‑3‑1400 as Section 16‑3‑1420.

Attorney General’s Opinions

Magistrates and municipal court judges and their staff are victim service providers. SC Op.Atty.Gen. (Oct. 9, 2009) 2009 WL 3658271.

**SECTION 16‑3‑1430.** Victim assistance services; membership of Victim Services Coordinating Council.

(A) The Department of Crime Victim Services Training, Provider Certification, and Statistical Analysis, in collaboration with the Department of Crime Victim Compensation, is authorized to provide the following victim assistance services, contingent upon the availability of funds in the Victim Compensation Fund:

(1) provide information, training, and technical assistance to state and local agencies and groups involved in victim and domestic violence assistance, such as the Attorney General’s Office, the solicitors’ offices, law enforcement agencies, judges, hospital staff, rape crisis centers, and spouse abuse shelters;

(2) provide recommendations to the Governor and General Assembly on needed legislation and services for victims;

(3) serve as a clearinghouse of victim information;

(4) develop ongoing public awareness and programs to assist victims, such as newsletters, brochures, television and radio spots and programs, and news articles;

(5) provide staff support for a Victim Services Coordinating Council representative of all agencies and groups involved in victim and domestic violence services to improve coordination efforts, suggest policy and procedural improvements to those agencies and groups as needed, and recommend needed statutory changes to the General Assembly; and

(6) coordinate the development and implementation of policy and guidelines for the treatment of victims with appropriate agencies.

(B) The Victim Services Coordinating Council shall consist of the following twenty‑two members:

(1) the Director of the Office of the Attorney General, South Carolina Crime Victim Services Division, or his designee, who shall serve as chairperson;

(2) the Director of the South Carolina Department of Probation, Parole and Pardon Services, or his designee;

(3) the Director of the South Carolina Department of Corrections, or his designee;

(4) the Director of the South Carolina Department of Juvenile Justice, or his designee;

(5) the Director of the South Carolina Commission on Prosecution Coordination, or his designee;

(6) the deputy directors of the three departments and the ombudsman under the Office of the Attorney General, South Carolina Crime Victim Services Division;

(7) the Director of the South Carolina Sheriffs’ Association, or his designee;

(8) the President of the South Carolina Police Chiefs Association, or his designee;

(9) the President of the South Carolina Jail Administrators’ Association, or his designee;

(10) the President of the Solicitors’ Advocate Forum, or his designee;

(11) the President of the Law Enforcement Victim Advocate Association, or his designee;

(12) the Director of the South Carolina Coalition Against Domestic Violence and Sexual Assault, or his designee;

(13) the Attorney General, or his designee;

(14) three representatives appointed by the State Office of Victim Assistance for a term of two years and until their successors are appointed and qualified for each of the following categories:

(a) one representative of university or campus services;

(b) one representative of a statewide child advocacy organization; and

(c) one crime victim; and

(15) three at‑large seats elected upon two‑thirds vote of the other eighteen members of the Victim Services Coordinating Council for a term of two years and until their successors are appointed and qualified, at least one of whom must be a crime victim and two of which must be representatives of community‑based nongovernmental organizations.

The Victim Services Coordinating Council shall solicit input on issues affecting relevant stakeholders when those stakeholders are not explicitly represented. The Victim Services Coordinating Council shall meet at least four times per year.

HISTORY: 1984 Act No. 489, Section 2; 2008 Act No. 271, Section 3, eff January 1, 2009. Formerly Section 16‑3‑1410, renumbered and amended by 2017 Act No. 96 (S.289), Section 6, eff July 1, 2017.

Effect of Amendment

2017 Act No. 96, Pt. II, Section 6, in (A), substituted “Department of Crime Victim Services Training, Provider Certification, and Statistical Analysis, in collaboration with the Department of Crime Victim Compensation,” for “Victim Compensation Fund”, and added “in the Victim Compensation Fund”; in (B)(1), substituted “Office of the Attorney General, South Carolina Crime Victim Services Division” for “State Office of Victim Assistance”, and added “, who shall serve as chairperson”; in (B)(6), substituted “deputy directors of the three departments and the Ombudsman under the Office of the Attorney General, South Carolina Crime Victim Services Division” for “Governor’s Crime Victims’ Ombudsman, or his designee”; deleted (B)(14), which related to the administrator of the Office of Justice Programs and redesignated accordingly; in (B)(14), substituted “three” for “four”; deleted (B)(14)(b), which related to one representative of a statewide crime victim organization and redesignated accordingly; in (B)(15), substituted “three” for “four”; and made nonsubstantive changes.

CROSS REFERENCES

Authority of South Carolina Advisory Board for Victim Assistance to promulgate regulations for the Victim/Witness Assistance Program, see Section 16‑3‑1120.

Duties of Commission on Prosecution Coordination not to displace functions of Victim/Witness Assistance Program, see Section 1‑7‑940.

Requirement that all monetary penalties imposed for violation of the prohibition against using firearms and archery tackle in a criminally negligent manner be remitted to the Victim’s Compensation Fund, see Section 50‑1‑85.

Victim’s Compensation Fund, generally, see Section 16‑3‑1290.

Library References

Criminal Law 1220.

Westlaw Topic No. 110.

C.J.S. Criminal Law Sections 2462 to 2510.

Attorney General’s Opinions

The phrase “technical assistance” and the authority of the State Office of Victims Assistance or the South Carolina Crime Victims Advisory Board to grant funds from the Victims Compensation Fund to the South Carolina Commission on Prosecution Coordination. SC Op.Atty.Gen. (Dec. 15, 2009) 2009 WL 5205406.

ARTICLE 15

Victim and Witness Services

CROSS REFERENCES

Crime victim funds, programmatic review and financial audit, cooperation with audit, see Section 14‑1‑211.6.

**SECTION 16‑3‑1505.** Legislative intent.

In recognition of the civic and moral duty of victims of and witnesses to a crime to cooperate fully and voluntarily with law enforcement and prosecution agencies, and in further recognition of the continuing importance of this citizen cooperation to state and local law enforcement efforts and to the general effectiveness and the well‑being of the criminal and juvenile justice systems of this State, and to implement the rights guaranteed to victims in the Constitution of this State, the General Assembly declares its intent, in this article, to ensure that all victims of and witnesses to a crime are treated with dignity, respect, courtesy, and sensitivity; that the rights and services extended in this article to victims of and witnesses to a crime are honored and protected by law enforcement agencies, prosecutors, and judges in a manner no less vigorous than the protections afforded criminal defendants; and that the State has a responsibility to provide support to a network of services for victims of a crime, including victims of domestic violence and criminal sexual assault.

HISTORY: 1997 Act No. 141, Section 3.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Criminal Sexual Conduct Section 9.50, Trafficking in Persons.

Treatises and Practice Aids

Criminal Procedure, Second Edition Section 21.3(F), Responsibilities to the Victim.

LAW REVIEW AND JOURNAL COMMENTARIES

Note, At least treat us like criminals!: South Carolina responds to victims’ pleas for equal rights, 49 S.C. L. Rev. 575, Spring 1998.

Attorney General’s Opinions

Discussion of whether notice should be provided to attorneys representing crime victims of judicial proceedings involving their clients. SC Op.Atty.Gen. (March 12, 2007) 2007 WL 1031444.

The City of Pickens may not contract its victim services with the Pickens County Behavioral Health Services. SC Op.Atty.Gen. (August 26, 2003) 2003 WL 22050880.

Notes of Decisions

In general 1

1. In general

No statutory basis existed for public policy exception to at‑will employment doctrine for reporting suspected crime, and thus, at‑will employee did not have cause of action in tort for wrongful termination when employee reasonably suspected that criminal activity had occurred on employer’s premises and reported suspected criminal activity to law enforcement and employee was terminated in retaliation for reporting suspected criminal activity; statute providing that it is unlawful for person to intimidate witness was not applicable, as employee was discharged for incorrectly reporting crime, and no broad public policy protecting those who report suspected crimes could be read from statute, and while legislative intent section of Victim and Witness Service Act recognized importance of people’s civic duty to cooperate with law enforcement, there was no indication this concept extended outside context of ongoing criminal proceeding. Taghivand v. Rite Aid Corp. (S.C. 2015) 411 S.C. 240, 768 S.E.2d 385. Labor and Employment 778

**SECTION 16‑3‑1510.** Definitions.

For the purpose of this article:

(1) “Victim” means any individual who suffers direct or threatened physical, psychological, or financial harm as the result of the commission or attempted commission of a criminal offense, as defined in this section. “Victim” also includes any individual’s spouse, parent, child, or the lawful representative of a victim who is:

(a) deceased;

(b) a minor;

(c) incompetent; or

(d) physically or psychologically incapacitated.

“Victim” does not include any individual who is the subject of an investigation for, who is charged with, or who has been convicted of or pled guilty or nolo contendere to the offense in question. “Victim” also does not include any individual, including a spouse, parent, child, or lawful representative, who is acting on behalf of the suspect, juvenile offender, or defendant unless his actions are required by law. “Victim” also does not include any individual who was imprisoned or engaged in an illegal act at the time of the offense.

(2) “Individual” means a human being.

(3) “Criminal offense” means an offense against the person of an individual when physical or psychological harm occurs, or the property of an individual when the value of the property stolen or destroyed, or the cost of the damage to the property is in excess of one thousand dollars. This includes both common law and statutory offenses, the offenses contained in Sections 16‑25‑20, 16‑25‑30, 16‑25‑50, 56‑5‑1210, 56‑5‑2910, 56‑5‑2920, 56‑5‑2930, 56‑5‑2945, and the common law offense of attempt, punishable pursuant to Section 16‑1‑80. However, “criminal offense” specifically excludes the drawing or uttering of a fraudulent check or an offense contained in Title 56 that does not involve personal injury or death.

For purposes of this article, a victim of any misdemeanor or felony under state law must be notified of or provided with the information required by this section. The terms “crime”, “criminal conduct”, “charge”, or any variation of these terms as used in this article mean all misdemeanors and felonies under state law except the crimes the General Assembly specifically excludes from the notification provisions contained in this article.

(4) “Witness” means a person who has been or is expected to be summoned to testify for either the prosecution or the defense or who by reason of having relevant information is subject to be called or likely to be called as a witness for the prosecution or defense for criminal offenses defined in this section, whether or not any action or proceeding has been commenced.

(5) “Prosecuting agency” means the solicitor, Attorney General, special prosecutor, or any person or entity charged with the prosecution of a criminal case in general sessions or family court.

(6) “Summary court” means magistrate or municipal court.

(7) “Initial offense incident report” means a uniform traffic accident report or a standardized incident report form completed at the time of the initial law enforcement response. “Initial offense incident report” does not include supplementary reports, investigative notes or reports, statements, letters, memos, other communications, measurements, sketches, or diagrams not included in the initial offense incident report, or any material that may be considered the work product of a law enforcement officer or witness.

(8) “In writing” means any written communication, including electronically transmitted data.

HISTORY: 1984 Act No. 418, Section 1; 1997 Act No. 141, Section 3; 1998 Act No. 343, Section 1A.

CROSS REFERENCES

Restitution to crime victim by person convicted of crime, see Section 17‑25‑322 et seq.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Criminal Sexual Conduct Section 28, Taped and Closed Sessions‑Generally.

NOTES OF DECISIONS

In general 1

1. In general

A victim of a crime possesses no rights in the appellate process. Reed v. Becka (S.C.App. 1999) 333 S.C. 676, 511 S.E.2d 396. Criminal Law 1023.5

**SECTION 16‑3‑1515.** Victim or witness to supply certain information; requirements for restitution; victims wishing to be present in court to notify prosecuting agency or summary court judge; victim impact statement.

(A) A victim or prosecution witness who wishes to exercise his rights under this article or receive services under this article, or both, must provide a law enforcement agency, a prosecuting agency, a summary court judge, the Department of Corrections, the Department of Probation, Parole, and Pardon Services, the Board of Juvenile Parole, or the Department of Juvenile Justice, as appropriate, his legal name, current mailing address, and current telephone number upon which the agency must rely in the discharge of its duties under this article.

(B) A victim who wishes to receive restitution must, within appropriate time limits set by the prosecuting agency or summary court judge, provide the prosecuting agency or summary court judge with an itemized list which includes the values of property stolen, damaged, or destroyed; property recovered; medical expenses or counseling expenses, or both; income lost as a result of the offense; out‑of‑pocket expenses incurred as a result of the offense; any other financial losses that may have been incurred; an itemization of financial recovery from insurance, the offense victim compensation fund, or other sources. The prosecuting agency, court, or both, may require documentation of all claims. This information may be included in a written victim impact statement.

(C) A victim who wishes to be present for any plea, trial, or sentencing must notify the prosecuting agency or summary court judge of his desire to be present. This notification may be included in a written victim impact statement.

(D) A victim who wishes to submit a written victim impact statement must provide it to the prosecuting agency or summary court judge within appropriate time limits set by the prosecuting agency or summary court judge.

(E) A victim who wishes to make an oral victim impact statement to the court at sentencing must notify the prosecuting agency or summary court judge of this desire in advance of the sentencing.

HISTORY: 1997 Act No. 141, Section 3.

Code Commissioner’s Note

Pursuant to 2017 Act No. 96, Section 14, the reference to “victim’s compensation fund” in (B) was changed to “victim compensation fund”.

Library References

Criminal Law 633.1, 659.

Sentencing and Punishment 361, 2180.

Westlaw Topic Nos. 110, 350H.

C.J.S. Criminal Law Sections 1542 to 1555, 1604 to 1605, 1607 to 1609, 2056, 2488, 2504 to 2506.

NOTES OF DECISIONS

Restitution 1

Victim impact statements 2

1. Restitution

Defendant who claimed he was less culpable in robbery than codefendant could be held jointly and severally liable for restitution in order to assure victim was fully compensated. State v. Cox (S.C.App. 1997) 326 S.C. 440, 484 S.E.2d 108. Sentencing And Punishment 2178

2. Victim impact statements

Victim impact evidence is relevant for jury to meaningfully assess during sentencing phase the defendant’s moral culpability and blameworthiness. Stone v. State (S.C. 2017) 419 S.C. 370, 798 S.E.2d 561. Sentencing and Punishment 1763

State may present victim impact evidence during sentencing phase for the purpose of demonstrating the uniqueness of victim and the specific harm committed by defendant. Stone v. State (S.C. 2017) 419 S.C. 370, 798 S.E.2d 561. Sentencing and Punishment 1763

Statute that sets forth the procedure for victim impact statements in noncapital cases does not preclude introduction of victim impact evidence in a death penalty case. State v. Hill (S.C. 1998) 331 S.C. 94, 501 S.E.2d 122, rehearing denied, certiorari denied 119 S.Ct. 597, 525 U.S. 1043, 142 L.Ed.2d 539, denial of habeas corpus affirmed 339 F.3d 187. Sentencing And Punishment 1763

**SECTION 16‑3‑1520.** Victim entitled to copy of initial incident report; assistance in applying for victim’s compensation benefits; information on progress of case.

(A) A law enforcement agency must provide a victim, free of charge, a copy of the initial incident report of his case, and a document which:

(1) describes the constitutional rights the State grants victims in criminal cases;

(2) describes the responsibilities of victims in exercising these rights;

(3) lists local victim assistance and social service providers;

(4) provides information on eligibility and application for victim’s compensation benefits; and

(5) provides information about the rights of victims and witnesses who are harassed or threatened.

(B) A law enforcement agency, within a reasonable time of initial contact, must assist each eligible victim in applying for victim’s compensation benefits and other available financial, social service, and counseling assistance.

(C) Law enforcement victim advocates, upon request, may intervene with, and seek special consideration from, creditors of a victim who is temporarily unable to continue payments as a result of an offense and with the victim’s employer, landlord, school, and other parties as considered appropriate through the investigative process.

(D) A law enforcement agency, upon request, must make a reasonable attempt to inform a victim of the status and progress of his case from initial incident through:

(1) disposition in summary court;

(2) the referral of a juvenile offender to the Department of Juvenile Justice; or

(3) transmittal of a general sessions warrant to the prosecuting agency.

HISTORY: 1984 Act No. 418, Section 2; 1988 Act No. 405, Section 4; 1997 Act No. 141, Section 3.

CROSS REFERENCES

Restitution to crime victim by person convicted of crime, see Section 17‑25‑322 et seq.

Library References

Criminal Law 1220.

District and Prosecuting Attorneys 8.

Municipal Corporations 189(1).

Westlaw Topic Nos. 110, 131, 268.

C.J.S. Criminal Law Sections 2462 to 2510.

C.J.S. District and Prosecuting Attorneys Sections 26 to 31, 47 to 55, 62 to 63.

C.J.S. Municipal Corporations Sections 620 to 622, 640 to 644, 646, 657, 660.

NOTES OF DECISIONS

In general 1

1. In general

Victim of crime does not have right to veto plea agreement. Reed v. Becka (S.C.App. 1999) 333 S.C. 676, 511 S.E.2d 396. Criminal Law 273.1(2)

Solicitors’ prosecutorial discretion is not contracted or limited by victims’ rights laws. Reed v. Becka (S.C.App. 1999) 333 S.C. 676, 511 S.E.2d 396. District And Prosecuting Attorneys 8(5); District And Prosecuting Attorneys 8(10)

**SECTION 16‑3‑1525.** Arrest or detention of person accused of committing offense; notification to victims; protection of witnesses; notification of bond proceedings; juvenile detention hearings.

(A) A law enforcement agency, upon effecting the arrest or detention of a person accused of committing an offense involving one or more victims, must make a reasonable attempt to notify each victim of the arrest or detention and of the appropriate bond or other pretrial release hearing or procedure.

(B) A law enforcement agency, before releasing to his parent or guardian a juvenile offender accused of committing an offense involving one or more victims, must make a reasonable effort to inform each victim of the release.

(C) A law enforcement agency, upon effecting the arrest or detention of a person accused of committing an offense involving one or more victims, must provide to the jail, prison, or detention or holding facility, including a mental health facility, having physical custody of the defendant, the name, mailing address, and telephone number of each victim. If the person is transferred to another facility, this information immediately must be transmitted to the receiving facility. The names, addresses, and telephone numbers of victims and witnesses contained in the files of a jail, prison, or detention or holding facility, including a mental health facility, are confidential and must not be disclosed directly or indirectly, except as necessary to provide notification.

(D) A law enforcement agency, after detaining a juvenile accused of committing an offense involving one or more victims, must provide to the Department of Juvenile Justice the name, address, and telephone number of each victim. The law enforcement officer detaining the juvenile, regardless of where the juvenile is physically detained, retains the responsibility of notifying the victims of the pretrial, bond, and detention hearings, or pretrial releases that are not delegated pursuant to this article.

(E) Upon detention of a person, other than a juvenile, accused of committing an offense not under the jurisdiction of a summary court, and involving one or more victims, the arresting law enforcement agency must provide, in writing, to the prosecuting agency before a bond or release hearing before a circuit or family court judge the name, address, and telephone number of each victim.

(F) Upon detention of a person, other than a juvenile, accused of committing an offense involving one or more victims and which is triable in summary court or an offense involving one or more victims for which a preliminary hearing may be held, the arresting law enforcement agency must provide, in writing, to the summary court the name, mailing address, and telephone number of each victim.

(G) A law enforcement agency must provide any measures necessary to protect the victims and witnesses, including transportation to and from court and physical protection in the courthouse.

(H) In cases in which a defendant has bond set by a summary court judge:

(1) the arresting agency of the defendant reasonably must attempt to notify each victim of each case for which bond is being determined of his right to attend the bond hearing and make recommendations to the presiding judge. This notification must be made sufficiently in advance to allow the victim to exercise his rights contained in this article;

(2) the summary court judge, before proceeding with a bond hearing in a case involving a victim, must ask the representative of the facility having custody of the defendant to verify that a reasonable attempt was made to notify the victim sufficiently in advance to attend the proceeding. If notice was not given in a timely manner, the hearing must be delayed for a reasonable time to allow notice; and

(3) the summary court judge must impose bond conditions which are sufficient to protect a victim from harassment or intimidation by the defendant or persons acting on the defendant’s behalf.

(I) In cases in which a defendant has a bond proceeding before a circuit court judge:

(1) the prosecuting agency reasonably must attempt to notify each victim of each case for which bond is being determined of his right to attend the bond hearing and make recommendations to the presiding judge. This notification must be made sufficiently in advance to allow the victim to exercise his rights contained in this article;

(2) the circuit court judge, before proceeding with a bond hearing in a case involving a victim, must ask the representative of the prosecuting agency to verify that a reasonable attempt was made to notify the victim sufficiently in advance to attend. If notice was not given in a timely manner, the hearing must be delayed for a reasonable time to allow notice; and

(3) the circuit court judge must impose bond conditions which are sufficient to protect a victim from harassment or intimidation by the defendant or persons acting on the defendant’s behalf.

(J) In cases in which a juvenile has a detention hearing before a family court judge:

(1) the prosecuting agency reasonably must attempt to notify each victim of each case for which the juvenile is appearing before the court of his right to attend the detention hearing and make recommendations to the presiding judge. This notification must be made sufficiently in advance to allow the victim to exercise his rights pertaining to the detention hearing;

(2) the family court judge, before proceeding with a detention hearing in a case involving a victim, must ask the prosecuting agency to verify that a reasonable attempt was made to notify the victim sufficiently in advance to attend. If notice was not given in a timely manner, the hearing must be delayed for a reasonable time to allow notice; and

(3) the family court judge, if he does not rule that a juvenile must be detained, must impose conditions of release which are sufficient to protect a victim from harassment or intimidation by the juvenile or a person acting on the juvenile’s behalf.

(K) Upon scheduling a preliminary hearing in a case involving a victim, the summary court judge reasonably must attempt to notify each victim of each case for which the defendant has a hearing of his right to attend.

(L) A diversion program, except a diversion program administered by the South Carolina Prosecution Coordination Commission or by a circuit solicitor, reasonably must attempt to notify the victim of a crime prior to the defendant’s release from the program unless the defendant is released to a law enforcement agency.

(M) In every case when there is a court‑ordered or mandatory mental evaluation, which takes place in an inpatient facility, the organization or facility responsible for the evaluation reasonably must attempt to notify the victim of the crime prior to the defendant’s release from the facility unless the defendant is released to a law enforcement agency.

(N)(1) Notification of a victim pursuant to the provisions of this section may be by electronic or other automated communication or recording. However, after three unsuccessful attempts to reach the victim in cases involving criminal domestic violence, criminal sexual conduct, and stalking and harassment, and those cases when physical injury has occurred as a result of a physical or sexual assault and in cases where a pattern of conduct exists by the offender or suspected offender that would cause a reasonable person to believe he may be at risk of physical assault the appropriate agency or diversion program shall attempt to make personal contact with the victim, or the victim’s guardian, upon the judicial or administrative release or the escape of the offender.

(2) For purposes of this section, “pattern” means two or more acts occurring over a period of time, however short, evidencing a continuity of purpose.

HISTORY: 1997 Act No. 141, Section 3; 1998 Act No. 343, Section 1B; 2005 Act No. 106, Sections 3, 4, eff January 1, 2006; 2006 Act No. 380, Section 4, eff upon approval (became law without the Governor’s signature on June 14, 2006).

Library References

Arrest 70(1).

Bail 49(1), 59.

District and Prosecuting Attorneys 8.

Infants 2502.

Westlaw Topic Nos. 35, 49, 131, 211.

C.J.S. Arrest Sections 58, 61.

C.J.S. Bail; Release and Detention Pending Proceedings Sections 73 to 77, 81, 99 to 102, 156 to 159.

C.J.S. District and Prosecuting Attorneys Sections 26 to 31, 47 to 55, 62 to 63.

C.J.S. Infants Sections 32, 378 to 389, 391, 393.

Attorney General’s Opinions

The City of Pickens may not contract its victim services with the Pickens County Behavioral Health Services. SC Op.Atty.Gen. (August 26, 2003) 2003 WL 22050880.

Discussion of a municipality within Hampton County that fails to provide the information required by this section during the booking process at the Hampton County Detention Center. SC Op.Atty.Gen. (March 1, 1999) 1999 WL 387029.

NOTES OF DECISIONS

In general 1

Protection of victims and witnesses 2

1. In general

Victim of crime does not have right to veto plea agreement. Reed v. Becka (S.C.App. 1999) 333 S.C. 676, 511 S.E.2d 396. Criminal Law 273.1(2)

Solicitors’ prosecutorial discretion is not contracted or limited by victims’ rights laws. Reed v. Becka (S.C.App. 1999) 333 S.C. 676, 511 S.E.2d 396. District And Prosecuting Attorneys 8(5); District And Prosecuting Attorneys 8(10)

2. Protection of victims and witnesses

Criminal Domestic Violence Act and statute requiring law enforcement agency to protect victims and witnesses at courthouse did not impose special duty on county and sheriff’s department to protect domestic violence victim from ex‑boyfriend at bond revocation hearing; a statute provided that no provision of article on victim and witness protection created cause of action against a public employee or agency. Edwards v. Lexington County Sheriff’s Dept. (S.C. 2010) 386 S.C. 285, 688 S.E.2d 125, on remand 2011 WL 9521618. Counties 148; Public Employment 916; Sheriffs And Constables 99

**SECTION 16‑3‑1530.** Notification of victim of release, escape or transfer of accused.

(A) Notwithstanding another provision of law, except the provisions contained in Section 16‑3‑1525(D) relating to juvenile detention:

(1) notwithstanding the provisions of Section 22‑5‑510, a department or agency having custody or custodial supervision of a person accused, convicted, or adjudicated guilty of committing an offense involving one or more victims reasonably must attempt to notify each victim, upon request, before the release of the person;

(2) a department or agency having custody or custodial supervision of a person accused of committing an offense involving one or more victims reasonably must attempt to notify each victim, upon request, of an escape by the person;

(3) a department or agency having custody of a person accused, convicted, or adjudicated guilty of committing an offense involving one or more victims must inform each victim, upon request, before any nonintradepartmental transfer of the person to a less secure facility or to a diversionary program including, but not limited to, a drug court program or a mental health court. The provisions of this item do not apply to transfers to other law enforcement agencies and transfers to other nonlaw enforcement locations if the person remains under security supervision. All victims, upon request, must be notified of intradepartmental transfers after the transfer occurs; and

(4) a department or agency having custody or custodial supervision of a person convicted or adjudicated guilty of committing an offense involving one or more victims must reasonably attempt to notify each victim and prosecution witness, upon request, of an escape by the person.

(B) Notification of a victim pursuant to the provisions of this section may not be only by electronic or other automated communication or recording except in the case of an intradepartmental transfer.

HISTORY: 1984 Act No. 418, Section 3; 1991 Act No. 68, Section 1; 1995 Act No. 83, Sections 14, 15; 1997 Act No. 141, Section 3; 1998 Act No. 343, Section 1C; 2005 Act No. 106, Section 5, eff January 1, 2006.

CROSS REFERENCES

Inmate privileges, attending funeral service, visiting family member in the hospital, transportation, notification, see Section 24‑3‑220.

Restitution to crime victim by person convicted of crime, see Section 17‑25‑322 et seq.

Victim or witness pursuant to this section may request notice of offender’s eligibility and may make statement for or against offender’s release under Offender Management System, see Section 24‑22‑90.

Victim’s Compensation Fund, see Section 16‑3‑1290.

Library References

Prisons 250.

Westlaw Topic No. 310.

C.J.S. Convicts Section 23.

C.J.S. Prisons and Rights of Prisoners Sections 149 to 150.

RESEARCH REFERENCES

ALR Library

91 ALR 5th 343 , Validity, Construction, and Application of State Constitutional or Statutory Victims’ Bill of Rights.

Encyclopedias

S.C. Jur. Criminal Sexual Conduct Section 29, Taped Sessions‑ Prerequisites to Use.

S.C. Jur. Criminal Sexual Conduct Section 30, Closed Sessions‑Requirements for Ordering.

S.C. Jur. Probation, Parole, and Pardon Section 9, Conditions of Probation.

Treatises and Practice Aids

Employment Coordinator Benefits Section 14:43, South Carolina.

Guide to Employment Law and Regulation 2d Section 61:6, Antidiscrimination Law.

LAW REVIEW AND JOURNAL COMMENTARIES

Annual survey of South Carolina law: Evidence. 46 S.C. L. Rev. 191 (Autumn 1994).

“Lights, camera, action”: videotaping and closed‑circuit television procedures coyly confront the Sixth Amendment. 40 S.C. L. Rev. 693 (Spring 1989).

Attorney General’s Opinions

Magistrate may impose fine, jail time and order restitution in fraudulent check violation. 1993 Op.Atty.Gen. No 93‑54 (1993 WL 379444).

**SECTION 16‑3‑1535.** Summary court’s duty to notify victim of victim’s rights; form for victim impact statement.

(A) The summary court, upon retaining jurisdiction of an offense involving one or more victims, reasonably must attempt to notify each victim of his right to:

(1) be present and participate in all hearings;

(2) be represented by counsel;

(3) pursue civil remedies; and

(4) submit an oral or written victim impact statement, or both, for consideration by the summary court judge at the disposition proceeding.

(B) The summary court must provide to each victim who wishes to make a written victim impact statement a form that solicits pertinent information regarding the offense, including:

(1) the victim’s personal information and supplementary contact information;

(2) an itemized list of the victim’s economic loss and recovery from any insurance policy or any other source;

(3) details of physical or psychological injuries, or both, including their seriousness and permanence;

(4) identification of psychological services requested or obtained by the victim;

(5) a description of any changes in the victim’s personal welfare or family relationships; and

(6) any other information the victim believes to be important and pertinent.

(C) The summary court judge must inform a victim of the applicable procedures and practices of the court.

(D) The summary court judge reasonably must attempt to notify each victim related to the case of each hearing, trial, or other proceeding.

(E) A law enforcement agency and the summary court must return to a victim personal property recovered or taken as evidence as expeditiously as possible, substituting photographs of the property and itemized lists of the property including serial numbers and unique identifying characteristics for use as evidence when possible.

(F) The summary court judge must recognize and protect the rights of victims and witnesses as diligently as those of the defendant.

(G) In cases in which the sentence is more than ninety days, the summary court judge must forward, as appropriate and within fifteen days, a copy of each victim’s impact statement or the name, mailing address, and telephone number of each victim, or both, to the Department of Corrections, the Department of Probation, Parole and Pardon Services, or the Board of Juvenile Parole, the Department of Juvenile Justice, and a diversion program. The names, addresses, and telephone numbers of victims and prosecution witnesses contained in the records of the Department of Corrections, the Department of Probation, Parole and Pardon Services, the Board of Juvenile Parole, and the Department of Juvenile Justice are confidential and must not be disclosed directly or indirectly, except by order of a court of competent jurisdiction or as necessary to provide notifications, or services, or both, between these agencies, these agencies and the prosecuting agency, or these agencies and the Attorney General.

HISTORY: 1996 Act No. 437, Section 1; 1997 Act No. 141, Section 3; 2005 Act No. 106, Section 6, eff January 1, 2006.

Editor’s Note

1996 Act No. 437, Section 8, eff January 1, 1997, provides as follows:

“Implementation of the changes in law effectuated by this act to Sections 16‑3‑1110, 16‑3‑1535, 17‑25‑322, 17‑25‑324, and 24‑21‑490 of the 1976 Code and the requirements thereunder or in any new provisions of law contained herein which would necessitate funding are contingent upon appropriations of sufficient funding by the General Assembly. Nothing herein shall relieve the various agencies and authorities within the offices of the respective clerks of court or judicial, correctional, and parole systems of this State from continuing to meet, enforce, and address those provisions of law related to restitution in effect prior to the enactment hereof.”

Library References

Courts 86.

Sentencing and Punishment 361.

Westlaw Topic Nos. 106, 350H.

C.J.S. Criminal Law Section 2056.

Attorney General’s Opinions

A coroner’s office would not be responsible for compensating the next of kin of a deceased individual if the personal belongings cannot be returned more expeditiously than authorized by the Preservation of Evidence Act. S.C. Op.Atty.Gen. (Oct. 12, 2010) 2010 WL 4391643.

**SECTION 16‑3‑1540.** Department of Juvenile Justice to confer with victims before taking certain actions.

(A) The Department of Juvenile Justice, upon referral of a juvenile accused of committing an offense involving one or more victims, must make a reasonable effort to confer with each victim before:

(1) placing the juvenile in a diversion program;

(2) issuing a recommendation for diversion;

(3) referring the juvenile to the prosecuting agency for prosecution;

(4) issuing a recommendation for evaluation at the agency’s reception and evaluation center; or

(5) taking other action.

(B) The Department of Juvenile Justice must make a reasonable effort to keep each victim reasonably informed of the status and progress of a case from the time it is referred by law enforcement until it is referred to the prosecuting agency.

HISTORY: 1984 Act No. 418, Section 4; 1997 Act No. 141, Section 3.

CROSS REFERENCES

Restitution to crime victim by person convicted of crime, see Section 17‑25‑322 et seq.

Library References

Infants 2661.

Westlaw Topic No. 211.

C.J.S. Infants Sections 158 to 159, 396.

**SECTION 16‑3‑1545.** Juvenile cases; notification to victims of right to submit victim impact statement for disposition proceeding; form of statement; other required information for victims.

(A) The prosecuting agency, when a juvenile case is referred or a general sessions charge is received involving one or more victims, reasonably must attempt to notify each victim of his right to submit an oral or written victim impact statement, or both, for consideration by the circuit or family court judge at the disposition proceeding. The victim also must be informed that a written victim impact statement may be submitted at any postadjudication proceeding by the Department of Corrections, the Department of Probation, Parole, and Pardon Services, the Board of Juvenile Parole, or the Department of Juvenile Justice. The prosecuting agency must provide to each victim who wishes to make a written victim impact statement a form that solicits pertinent information regarding the offense that may include:

(1) the victim’s personal information and supplementary contact information;

(2) an itemization of the victim’s economic loss and recovery from any insurance policy or another source;

(3) details of physical or psychological injuries, or both, including their seriousness and permanence;

(4) identification of psychological services requested or obtained by the victim;

(5) a description of any changes in the victim’s personal welfare or family relationships; and

(6) any other information the victim believes to be important and pertinent.

(B) The prosecuting agency must offer the victim assistance in preparing a comprehensive victim impact statement and assistance in reviewing and updating the statement, as appropriate, before the case is disposed.

(C) The prosecuting agency must inform victims and witnesses of the applicable procedures and practices of the criminal or juvenile justice system, or both.

(D) The prosecuting agency must inform each victim of his right to legal counsel and of any available civil remedies.

(E) A law enforcement agency, the prosecuting agency, and the circuit and family courts must return to a victim personal property recovered or taken as evidence as expeditiously as possible, substituting photographs of the property and itemized lists of the property including serial numbers and unique identifying characteristics to use as evidence when possible.

(F) The prosecuting agency must inform victims and prosecution witnesses of financial assistance, compensation, and fees to which they may be entitled and must offer to the victims and witnesses assistance with applications for these items.

(G) The prosecuting agency, upon request, must make a reasonable attempt to keep each victim informed of the status and progress of a case, with the exception of preliminary hearings, from the time a juvenile case is referred to, or a general sessions charge is received by, the prosecuting agency for disposition of the case in general sessions or family court.

(H) The prosecuting agency must discuss a case with the victim. The agency must confer with each victim about the disposition of the case including, but not limited to, diversions and plea negotiations.

(I) The prosecuting agency reasonably must attempt to notify each victim of each hearing, trial, or other proceeding. This notification must be made sufficiently in advance to allow the victim to exercise his rights contained in this article. When proceedings are canceled or rescheduled, the prosecuting agency must reasonably attempt to inform victims and witnesses in a timely manner.

(J) The prosecuting agency victim advocate, upon request, may intercede with, and seek special consideration from, employers of victims and witnesses to prevent loss of pay or benefits, or both, resulting from their participation in the criminal or juvenile justice system and with the victim’s creditors, landlord, school, and other parties, as appropriate, throughout the prosecution process.

(K) If a victim or witness is threatened, the prosecuting agency immediately must refer the incident to the appropriate law enforcement agency for prompt investigation and make a reasonable attempt to prosecute the case.

(L) The prosecuting agency must take reasonable and appropriate steps to minimize inconvenience to victims and witnesses throughout court preparation and court proceedings and must familiarize victims and witnesses with courtroom procedure and protocol.

(M) The prosecuting agency must refer victims to counselors, social service agencies, and victim assistance providers, as appropriate.

HISTORY: 1997 Act No. 141, Section 3.

Library References

Infants 2661.

Westlaw Topic No. 211.

C.J.S. Infants Sections 158 to 159, 396.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Constitutional Law Section 124, Victim’s Bill of Rights.

NOTES OF DECISIONS

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1. In general

Because their cases were not contained within the guilty plea resolution, individuals against whom alleged perpetrator committed white collar crimes were not “victims” under the Victims’ Bill of Rights with the rights to notice and attendance at the plea bargain, where alleged perpetrator was arrested, but not indicted, on offenses against those individuals. Ex parte Littlefield (S.C. 2000) 343 S.C. 212, 540 S.E.2d 81. Criminal Law 1220

The rights granted to a victim by the state constitution and statutes are enforceable by a writ of mandamus, rather than through direct participation at the trial level. Ex parte Littlefield (S.C. 2000) 343 S.C. 212, 540 S.E.2d 81. Mandamus 61

A writ of mandamus voiding prior plea bargain was not proper remedy for individuals against whom alleged perpetrator committed white collar crimes, as they did not retain their legal rights as “victims” under the Victims’ Bill of Rights when the solicitor’s office decided not to prosecute their claims, where alleged perpetrator entered plea with respect to offenses committed against others. Ex parte Littlefield (S.C. 2000) 343 S.C. 212, 540 S.E.2d 81. Mandamus 61

Victim of crime does not have right to veto plea agreement. Reed v. Becka (S.C.App. 1999) 333 S.C. 676, 511 S.E.2d 396. Criminal Law 273.1(2)

Solicitors’ prosecutorial discretion is not contracted or limited by victims’ rights laws. Reed v. Becka (S.C.App. 1999) 333 S.C. 676, 511 S.E.2d 396. District And Prosecuting Attorneys 8(5); District And Prosecuting Attorneys 8(10)

**SECTION 16‑3‑1550.** Restriction on employers of victims and witnesses; protection of rights of victims and witnesses.

(A) Employers of victims and witnesses must not retaliate against or suspend or reduce the wages and benefits of a victim or witness who lawfully responds to a subpoena. A wilful violation of this provision constitutes contempt of court.

(B) A person must not be sequestered from a proceeding adjudicating an offense of which he was a victim.

(C) For proceedings in the circuit or family court, the law enforcement and prosecuting agency must make reasonable efforts to provide victims and prosecution witnesses waiting areas separate from those used by the defendant and defense witnesses.

(D) The circuit or family court judge must recognize and protect the rights of victims and witnesses as diligently as those of the defendant. A circuit or family court judge, before proceeding with a trial, plea, sentencing, or other dispositive hearing in a case involving a victim, must ask the prosecuting agency to verify that a reasonable attempt was made to notify the victim sufficiently in advance to attend. If notice was not given in a timely manner, the hearing must be delayed for a reasonable time to allow notice.

(E) The circuit or family court must treat sensitively witnesses who are very young, elderly, handicapped, or who have special needs by using closed or taped sessions when appropriate. The prosecuting agency or defense attorney must notify the court when a victim or witness deserves special consideration.

(F) The circuit or family court must hear or review any victim impact statement, whether written or oral, before sentencing. Within a reasonable period of time before sentencing, the prosecuting agency must make available to the defense any written victim impact statement and the court must allow the defense an opportunity to respond to the statement. However, the victim impact statement must not be provided to the defense until the defendant has been found guilty by a judge or jury. The victim impact statement and its contents are not admissible as evidence in any trial.

(G) The circuit and family court must address the issue of restitution as provided by statute.

HISTORY: 1984 Act No. 418, Section 5; 1987 Act No. 9, Section 1; 1988 Act No. 579; 1995 Act No. 83, Section 16; 1997 Act No. 141, Section 3.

CROSS REFERENCES

Restitution to crime victim by person convicted of crime, see Section 17‑25‑322 et seq.

Library References

Contempt 12.

Criminal Law 665(2).

Sentencing and Punishment 236, 361, 2100.

Westlaw Topic Nos. 93, 110, 350H.

C.J.S. Contempt Section 52.

C.J.S. Criminal Law Sections 1631 to 1632, 2056, 2473, 2494.

RESEARCH REFERENCES

Encyclopedias

24 Am. Jur. Proof of Facts 2d 515, Defense to Charges of Sex Offense.

14 Am. Jur. Trials 619, Juvenile Court Proceedings.

34 Am. Jur. Trials 1, Representing Sex Offenders and the “Chemical Castration Defense”.

S.C. Jur. Appeal and Error Section 129, Trial Matters.

S.C. Jur. Children and Families Section 90, General Considerations.

S.C. Jur. Criminal Sexual Conduct Section 28, Taped and Closed Sessions‑Generally.

S.C. Jur. Criminal Sexual Conduct Section 29, Taped Sessions‑ Prerequisites to Use.

S.C. Jur. Probation, Parole, and Pardon Section 9, Conditions of Probation.

S.C. Jur. Witnesses Section 32, Generally; Mode of Testifying.

Treatises and Practice Aids

69 Causes of Action 2d 763, Cause of Action Against Employer for Violation of Employment Rights of Victim of Domestic Violence.

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1. In general

Victim of crime does not have right to veto plea agreement. Reed v. Becka (S.C.App. 1999) 333 S.C. 676, 511 S.E.2d 396. Criminal Law 273.1(2)

Solicitors’ prosecutorial discretion is not contracted or limited by victims’ rights laws. Reed v. Becka (S.C.App. 1999) 333 S.C. 676, 511 S.E.2d 396. District And Prosecuting Attorneys 8(5); District And Prosecuting Attorneys 8(10)

2. Constitutional issues

While there is no requirement that trial court’s finding of necessity for videotaped testimony of child witnesses contain magic words in order to satisfy Confrontation Clause, at minimum trial court should at least convey that alternative procedure is necessary to protect particular child from being traumatized by testifying in defendant’s presence. State v. Lewis (S.C.App. 1996) 324 S.C. 539, 478 S.E.2d 861, rehearing denied, certiorari denied. Criminal Law 662.65

Finding that it was necessary to have child testify outside molestation defendant’s presence in violation of defendant’s Confrontation Clause rights was not harmless error; child’s testimony was not merely cumulative but was heart of state’s case on two charges for which defendant was convicted, only other testimony on charges provided neither direct nor circumstantial evidence that defendant abused child, and defendant offered direct and circumstantial evidence refuting child’s account. State v. Lewis (S.C.App. 1996) 324 S.C. 539, 478 S.E.2d 861, rehearing denied, certiorari denied. Criminal Law 1168(2)

A defendant’s right to confrontation was not violated by the use at her trial for first‑degree criminal sexual conduct of a videotape of the child‑victim’s testimony in place of the child where at the videotaping (1) her trial attorney was present, (2) she was able to view the proceeding by way of a closed circuit monitor, and (3) she was in constant contact with her attorney through the use of headphones; protecting a child‑victim from further trauma is an important state interest warranting the use of videotape testimony. Starnes v. State (S.C. 1991) 307 S.C. 247, 414 S.E.2d 582, rehearing denied.

3. Videotaped testimony

A trial court’s decision to allow testimony outside the presence of the defendant pursuant to statute permitting videotaped testimony of very young victims and witnesses in certain circumstances may be reversed only upon a showing that the trial court abused its discretion in making the decision or in implementing the appropriate procedure once the decision has been made. South Carolina Dept. of Social Services v. Wilson (S.C.App. 2000) 342 S.C. 242, 536 S.E.2d 392, rehearing denied, certiorari granted, affirmed as modified 352 S.C. 445, 574 S.E.2d 730. Appeal And Error 971(1)

When permitting a child witness to testify via closed circuit television (CCTV), the trial judge must first make a case‑specific determination of the need for videotaped testimony; in making this determination, the trial court should consider the testimony of an expert witness, parents or other relatives, other concerned and relevant parties, and the child. State v. Bray (S.C. 2000) 342 S.C. 23, 535 S.E.2d 636, rehearing denied. Witnesses 228

A trial court’s decision to allow videotaped or closed‑circuit testimony is reversible only if it is shown that the trial judge abused his discretion in making such a decision. State v. Bray (S.C. 2000) 342 S.C. 23, 535 S.E.2d 636, rehearing denied. Criminal Law 1170.5(1)

Trial court erred by failing to set forth case‑specific reasons in support of its decision to permit alleged victim of child sexual abuse, who was seven years old at time of trial, to testify via closed circuit television (CCTV); although trial court’s colloquy with solicitor prior to court’s ruling could give rise to reasonable inference that victim would be harmed by testifying in defendant’s presence, such language was equally susceptible of inference that trial court determined to utilize CCTV procedure based upon victim’s young age and fear of other family members who did not believe her. State v. Bray (S.C. 2000) 342 S.C. 23, 535 S.E.2d 636, rehearing denied. Witnesses 228

When permitting a child witness to testify via closed circuit television (CCTV), the trial judge must find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant; denial of face‑to‑face confrontation is not needed to further the state interest in protecting the child witness from trauma unless it is the presence of the defendant that causes the trauma. State v. Bray (S.C. 2000) 342 S.C. 23, 535 S.E.2d 636, rehearing denied. Criminal Law 662.65; Witnesses 228

The better practice, when possible, is for the trial judge to personally interview a child witness prior to determining whether use of closed circuit television (CCTV) is necessary; however, there is no categorical prerequisite of such a personal interview. State v. Bray (S.C. 2000) 342 S.C. 23, 535 S.E.2d 636, rehearing denied. Witnesses 228

Allowing victim to testify via closed circuit television (CCTV) did not violate juvenile’s confrontation clause rights in delinquency proceedings based on charge of assault with intent to commit criminal sexual conduct; in addition to having mental functioning of seven or eight year old, victim also suffered from hereditary immune system disorder placing her at risk of severe swelling of any body part during periods of illness or stress, and there was substantial evidence that victim would suffer emotional distress if forced to testify in juvenile’s presence. In re Robert D. (S.C.App. 2000) 340 S.C. 12, 530 S.E.2d 137. Infants 2579; Witnesses 228

In determining need for closed circuit television (CCTV) or videotaped testimony of child witness, only when the considered testimony is strong, specific, and persuasive about the child’s fear of the defendant and the harm the child will suffer if forced to testify in front of the accused may the trial judge forego interviewing the child directly. State v. Bray (S.C.App. 1999) 335 S.C. 514, 517 S.E.2d 714, rehearing denied, certiorari granted, affirmed but criticized 342 S.C. 23, 535 S.E.2d 636. Witnesses 228

The evidence supporting a finding of the need for closed circuit television (CCTV) or videotaped testimony of child witness must be more than de minimis. State v. Bray (S.C.App. 1999) 335 S.C. 514, 517 S.E.2d 714, rehearing denied, certiorari granted, affirmed but criticized 342 S.C. 23, 535 S.E.2d 636. Witnesses 228

A trial court’s decision to allow child witness testimony via closed circuit television (CCTV) may be reversed only upon a showing that the trial court abused its discretion in making the decision or in implementing the appropriate procedure once the decision has been made. State v. Bray (S.C.App. 1999) 335 S.C. 514, 517 S.E.2d 714, rehearing denied, certiorari granted, affirmed but criticized 342 S.C. 23, 535 S.E.2d 636. Criminal Law 1153.16(2); Criminal Law 1153.18(1)

Family court judge permissibly relied solely on the testimony of victim’s treating physician in allowing the State to present the victim’s testimony via closed‑circuit television in proceeding against juvenile charged with first degree criminal sexual conduct with a minor; physician had conducted 18 treatment sessions with the victim, and stated the victim would be unlikely to talk at all in the juvenile’s presence. In Interest of Cisco K. (S.C.App. 1998) 332 S.C. 649, 506 S.E.2d 536. Infants 2579; Witnesses 228

Trial court made required case‑specific finding of necessity for videotaped testimony of child witnesses in child molestation prosecution; trial court found that group of six children would be traumatized by testifying in defendant’s presence in open court. State v. Lewis (S.C.App. 1996) 324 S.C. 539, 478 S.E.2d 861, rehearing denied, certiorari denied. Witnesses 228

In determining whether a videotape procedure pursuant to Section 16‑3‑1530 is necessary to protect a minor witness, the following procedure must be followed by the trial judge. First, the trial judge must make a case‑specific determination of the need for videotaped testimony. In making this determination, the trial court should consider the testimony of an expert witness, parents or other relatives, other concerned or relevant parties, and the child. Second, the court should place the child in as close to a courtroom setting as possible. Third, the defendant should be able to see and hear the child, should have counsel present both in the courtroom and with him or her, and communication should be available between counsel and the defendant. A decision as to whether to utilize a videotape procedure is subject to reversal only if it is shown that the trial judge abused his or her discretion in making such a decision or failed to follow the appropriate procedure upon deciding that a witness was entitled to special protection. State v. Murrell (S.C. 1990) 302 S.C. 77, 393 S.E.2d 919.

The use of videotaped testimony of a 5‑year‑old criminal sexual misconduct victim was proper where the trial judge heard testimony from the relevant witnesses, including an expert witness, the State presented ample evidence of the case‑specific need for the videotape procedure to be used which enabled the judge to conclude that testimony by the victim in the defendant’s presence would have a traumatic effect on the child, the trial judge made specific findings in this regard, the child was placed in a courtroom setting, the defendant was allowed to view and hear the child, the defendant’s counsel was permitted to cross‑examine the child, and the defendant had counsel present with him and in the courtroom and a communication procedure between all 3 was made available. State v. Murrell (S.C. 1990) 302 S.C. 77, 393 S.E.2d 919.

The procedure established by Section 16‑3‑1530(G) regarding the use of videotaped testimony, in conjunction with State v Cooper 291 SC 351, 393 SE2d 451 (1987) and State v Rogers 293 SC 505, 362 SE2d 7 (1987) which construed this statute, sufficiently protects the defendant’s constitutional right to confrontation while simultaneously protecting the rights of the victim. State v. Murrell (S.C. 1990) 302 S.C. 77, 393 S.E.2d 919. Criminal Law 662.40; Witnesses 228

Trial judge abused his discretion by failing to view videotaped deposition before admitting it into evidence, and by making competency determination based upon Assistant Solicitor’s representations rather than upon his own personal observations while witness was being questioned. State v. Camele (S.C. 1987) 293 S.C. 302, 360 S.E.2d 307.

Trial judge should have presided during competency examination of witness who was 3 years old, rather than determine her competence merely upon viewing of videotape; judge’s presence lends court‑like atmosphere to better evaluate witness’ ability to appreciate consequences of his or her testimony. State v. Hudnall (S.C. 1987) 293 S.C. 97, 359 S.E.2d 59. Witnesses 77

Videotaping of a 3‑year‑old criminal sexual assault victim’s testimony outside the defendant’s presence, and the playing of the videotape before the jury at trial, did not violate the defendant’s right of confrontation by denying him eye‑to‑eye contact with the witness, where: the trial judge, court reporter, solicitor, defense counsel, victim and her mother were present at the taping session; defendant, who was in a nearby room with a second attorney provided for him, was able to view the proceedings live over a closed circuit television monitor, and was afforded constant contact with defense counsel through headphones; defense counsel was permitted to cross‑examine without limitation; and the jury, through the videotape, was able to observe the victim’s appearance and demeanor throughout her testimony. State v. Cooper (S.C. 1987) 291 S.C. 351, 353 S.E.2d 451.

The need to protect young victims of crimes, such as sexual abuse, from the trauma of in‑court testimony is reflected in the General Assembly’s enactment of Section 16‑3‑1530(G). State v. Cooper (S.C. 1987) 291 S.C. 351, 353 S.E.2d 451.

The discretion afforded the trial judge pursuant to Section 16‑3‑1530(G) allows the utilization of modern technology so as to enhance the truth‑determining quality which marks a fair trial and, while live testimony is always preferred, other techniques may be used when, in the exercise of sound discretion, the trial judge deems them appropriate and adequate. State v. Cooper (S.C. 1987) 291 S.C. 351, 353 S.E.2d 451.

4. Private cause of action

The Victim’s and Witness’ Bill of Rights Act does not create a private cause of action against an employer that retaliates against or reduces the wages of an employee who responds as a victim or a witness to a subpoena. Patterson v. I.H. Services, Inc. (S.C.App. 1988) 295 S.C. 300, 368 S.E.2d 215. Labor And Employment 851; Labor And Employment 2193

5. Sufficiency of evidence

There was sufficient evidence to support finding that it was necessary for alleged victim of child sexual abuse, who was seven years old at time of trial, to testify via closed circuit television (CCTV); expert in field of counseling services for victims of child sexual abuse testified that victim might not testify at all in open court in front of defendant and that doing so would do further negative emotional harm, and victim’s mother testified that she did not feel victim could testify in court, that victim would not say anything if required to testify in front of defendant, that she believed victim may have been intimidated by defendant, and that victim was glad when mother told her defendant would not be there when she testified. State v. Bray (S.C. 2000) 342 S.C. 23, 535 S.E.2d 636, rehearing denied. Witnesses 228

Finding that it was necessary for child victim of alleged sexual abuse to testify via closed circuit television (CCTV) was not supported by sufficient evidence, where trial judge failed to interview child directly, social worker who saw child only eight times testified generally about child’s intimidation by courtroom setting, but pointed to nothing specific about her fear of defendant, social worker was not an expert in child sexual abuse, and child’s mother conceded that child loved defendant and considered him to be her best friend. State v. Bray (S.C.App. 1999) 335 S.C. 514, 517 S.E.2d 714, rehearing denied, certiorari granted, affirmed but criticized 342 S.C. 23, 535 S.E.2d 636. Witnesses 228

When determining need for closed circuit television (CCTV) or videotaped testimony of child witness, a trial judge’s first‑hand observations and impressions of a child, whether through testimony, interviewing, or otherwise, are not only required when possible, but carry great weight in the evidentiary sufficiency question. State v. Bray (S.C.App. 1999) 335 S.C. 514, 517 S.E.2d 714, rehearing denied, certiorari granted, affirmed but criticized 342 S.C. 23, 535 S.E.2d 636. Witnesses 228

Violation of defendant’s Sixth Amendment right to confrontation by permitting child victim of alleged sexual abuse to testify via closed circuit television (CCTV) based on insufficient evidence of necessity was prejudicial, where child’s testimony provided only direct evidence of defendant’s alleged abuse, medical examination of child did not validate sexual abuse claim, child did not mention defendant or sexual acts until after several events had already transpired in investigation into alleged abuse, and defendant testified in his own defense and directly denied the allegations. State v. Bray (S.C.App. 1999) 335 S.C. 514, 517 S.E.2d 714, rehearing denied, certiorari granted, affirmed but criticized 342 S.C. 23, 535 S.E.2d 636. Criminal Law 1170.5(1)

Trial court’s finding that it was necessary to have child testify outside molestation defendant’s presence was without evidentiary support and, therefore, defendant’s Confrontation Clause rights were violated; child stated she could testify in defendant’s presence, child’s testimony was sole basis in support of finding of necessity for testimony outside defendant’s presence and trial judge, who saw and heard child, explicitly stated she was competent and could testify in court. State v. Lewis (S.C.App. 1996) 324 S.C. 539, 478 S.E.2d 861, rehearing denied, certiorari denied. Criminal Law 662.65

Evidence that a 4‑year‑old sexual abuse victim suffered from attention deficit disorder with hyperactivity, and would have difficulty focusing if she were required to testify in front of a jury (particularly about abuse), satisfied the “special needs” requirement of Section 16‑3‑1530(G) so as to allow videotaped testimony, although there was no evidence that the victim was afraid of the defendant or would be traumatized by his presence. State v. West (S.C.App. 1993) 313 S.C. 426, 438 S.E.2d 256. Witnesses 228

**SECTION 16‑3‑1555.** Expert witness fees; distribution, maintenance and use of victim’s impact statements.

(A) The circuit or family court must order, in a timely manner, reasonable expert witness fees and reimbursement to victims of reasonable out‑of‑pocket expenses associated with lawfully serving a subpoena.

(B) In cases in which the sentence is more than ninety days, the prosecuting agency must forward, as appropriate and within fifteen days, a copy of each victim’s impact statement or the name, mailing address, and telephone number of each victim, or both, to the Department of Corrections, the Department of Probation, Parole and Pardon Services, or the Board of Juvenile Parole, the Department of Juvenile Justice, and a diversion program. The names, addresses, and telephone numbers of victims and prosecution witnesses contained in the records of the Department of Corrections, the Department of Probation, Parole and Pardon Services, the Board of Juvenile Parole, and the Department of Juvenile Justice are confidential and must not be disclosed directly or indirectly, except by order of a court of competent jurisdiction or as necessary to provide notifications, or services, or both, between these agencies, these agencies and the prosecuting agency, or these agencies and the Attorney General.

(C) The prosecuting agency must maintain the victim’s original impact statement. The victim’s impact statement must not be provided to the defendant until the defendant has been adjudicated, found guilty, or has pled guilty. The victim’s impact statement and its contents are not admissible as evidence in any trial.

(D) The prosecuting agency must inform the victim and the prosecution witnesses of their responsibility to provide the prosecuting agency, the Department of Corrections, the Department of Probation, Parole and Pardon Services, the Board of Juvenile Parole, the Department of Juvenile Justice, or the Attorney General, as appropriate, their legal names, current addresses, and telephone numbers.

(E) The prosecuting agency must inform the victim about the collection of restitution, fees, and expenses, the recovery of property used as evidence, and how to contact the Department of Corrections, the Board of Juvenile Parole, the Department of Probation, Parole and Pardon Services, the Department of Juvenile Justice, or the Attorney General, as appropriate.

HISTORY: 1997 Act No. 141, Section 3; 1998 Act No. 343, Section 1D; 2005 Act No. 106, Section 10, eff January 1, 2006.

Library References

Costs 310, 312.

District and Prosecuting Attorneys 8.

Indictment and Information 17.

Westlaw Topic Nos. 102, 131, 210.

C.J.S. District and Prosecuting Attorneys Sections 26 to 31, 47 to 55, 62 to 63.

C.J.S. Indictments and Informations Section 50.

**SECTION 16‑3‑1560.** Notification to victim of post‑conviction proceedings affecting probation, parole, or release, and of victim’s right to attend.

(A) The Department of Corrections, the Department of Probation, Parole, and Pardon Services, the Board of Juvenile Parole, or the Department of Juvenile Justice, as appropriate, reasonably must attempt to notify each victim, who has indicated a desire to be notified, of post‑conviction proceedings affecting the probation, parole, or release of the offender, including proceedings brought under Chapter 48 of Title 44, and of the victim’s right to attend and comment at these proceedings. This notification must be made sufficiently in advance to allow the victim to exercise his rights as they pertain to post‑conviction proceedings.

(B) The Attorney General, upon receiving notice of appeal or other post‑conviction action by an offender convicted of or adjudicated guilty for committing an offense involving one or more victims, must request from the Department of Corrections, the Department of Probation, Parole, and Pardon Services, the Board of Juvenile Parole, or the Department of Juvenile Justice, as appropriate, the victim’s personal information.

(C) The Department of Corrections, the Department of Probation, Parole, and Pardon Services, the Board of Juvenile Parole, or the Department of Juvenile Justice, upon receipt of request for the victim’s personal information from the Attorney General in an appeal or post‑conviction proceeding, must supply the requested information within a reasonable period of time.

(D) The Attorney General must confer with victims regarding the defendant’s appeal and other post‑conviction proceedings, including proceedings brought under Chapter 48 of Title 44.

(E) The Attorney General must keep each victim reasonably informed of the status and progress of the appeal or other post‑conviction proceedings, including proceedings brought under Chapter 48 of Title 44, until their resolution.

(F) The Attorney General reasonably must attempt to notify a victim of all post‑conviction proceedings, including proceedings brought under Chapter 48 of Title 44, and of the victim’s right to attend. This notification must be made sufficiently in advance to allow the victim to exercise his rights pertaining to post‑conviction proceedings.

HISTORY: 1984 Act No. 418, Section 6; 1988 Act No. 367, Section 2; 1996 Act No. 458, Part II, Section 51C; 1997 Act No. 141, Section 3; 1998 Act No. 321, Section 3; 1998 Act No. 343, Section 1E.

CROSS REFERENCES

Restitution to crime victim by person convicted of crime, see Section 17‑25‑322 et seq.

Library References

Criminal Law 1585.

Pardon and Parole 57.1, 85.

Sentencing and Punishment 1890, 2013.

Westlaw Topic Nos. 110, 284, 350H.

C.J.S. Criminal Law Sections 2149, 2163.

C.J.S. Pardon and Parole Sections 57 to 58, 81, 86, 91 to 93.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Criminal Sexual Conduct Section 28, Taped and Closed Sessions‑Generally.

S.C. Jur. Probation, Parole, and Pardon Section 18, Statutory Requirements.

NOTES OF DECISIONS

In general 1

1. In general

Trial court’s failure to conduct a hearing on state’s motion to reconsider trial court’s finding that defendant had not willfully violated a condition of his community supervision program did not violate the Victim’s Rights Act; Act did not require judge to hold a hearing, but rather only required state to notify victim that an offender has filed a motion to reconsider a decision to revoke community supervision. State v. Garrard (S.C.App. 2010) 390 S.C. 146, 700 S.E.2d 269. Sentencing and Punishment 2031

Trial court did not err in permitting victim’s advocate to address trial court about facts of defendant’s underlying crime during probation revocation proceeding, as victim was granted by statute the right to attend and comment at post‑conviction proceedings affecting probation. State v. Barlow (S.C. 2007) 372 S.C. 534, 643 S.E.2d 682. Criminal Law 1220; Sentencing And Punishment 2019

**SECTION 16‑3‑1565.** No cause of action against public employees or agencies.

(A) Nothing in this article creates a cause of action on behalf of a person against a public employee, public agency, the State, or an agency responsible for the enforcement of rights and provision of services set forth in this article.

(B) A sentence must not be invalidated because of failure to comply with the provisions of this article.

(C) This article must not be construed to create a cause of action for monetary damages.

HISTORY: 1997 Act No. 141, Section 3.

Library References

District and Prosecuting Attorneys 10.

Municipal Corporations 189(1).

Officers and Public Employees 114.

States 193.

Westlaw Topic Nos. 131, 268, 283, 360.

C.J.S. District and Prosecuting Attorneys Sections 56 to 61.

C.J.S. Municipal Corporations Sections 620 to 622, 640 to 644, 646, 657, 660.

C.J.S. Officers and Public Employees Sections 350 to 352, 355 to 362.

C.J.S. States Sections 559 to 560.

NOTES OF DECISIONS

In general 1

1. In general

Criminal Domestic Violence Act and statute requiring law enforcement agency to protect victims and witnesses at courthouse did not impose special duty on county and sheriff’s department to protect domestic violence victim from ex‑boyfriend at bond revocation hearing; a statute provided that no provision of article on victim and witness protection created cause of action against a public employee or agency. Edwards v. Lexington County Sheriff’s Dept. (S.C. 2010) 386 S.C. 285, 688 S.E.2d 125, on remand 2011 WL 9521618. Counties 148; Public Employment 916; Sheriffs And Constables 99

ARTICLE 16

Crime Victim Ombudsman

Editor’s Note

1994 Act No. 433, Section 2, provides:

“SECTION 2. Upon the effective date of this act, there is transferred from the Division of Victim’s Assistance of the Office of the Governor $125,000 and three full‑time equivalent positions to the Crime Victims’ Ombudsman of the Office of the Governor. The transfer shall apply for the current and succeeding fiscal years.”

CROSS REFERENCES

Creation of Office of the Attorney General, South Carolina Crime Victim Services Division, transfer of existing crime victim services entities, see Section 1‑7‑1100.

Department of Administration established, transfer of offices, divisions, other agencies, see Section 1‑11‑10.

**SECTION 16‑3‑1610.** Definitions.

As used in this article:

(1) “Criminal and juvenile justice system” means circuit solicitors and members of their staffs; the Attorney General and his staff; law enforcement agencies and officers; adult and juvenile probation, parole, and correctional agencies and officers; officials responsible for victims’ compensation and other services which benefit victims of crime, and state, county, and municipal victim advocacy and victim assistance personnel.

(2) “Victim assistance program” means an entity, whether governmental, corporate, nonprofit, partnership, or individual, which provides, is required by law to provide, or claims to provide services or assistance, or both to victims on an ongoing basis.

(3) “Victim” means a person who suffers direct or threatened physical, emotional, or financial harm as the result of an act by someone else, which is a crime. The term includes immediate family members of a homicide victim or of any other victim who is either incompetent or a minor and includes an intervenor.

HISTORY: 1994 Act No. 433, Section 1; 2017 Act No. 96 (S.289), Section 7, eff July 1, 2017.

Effect of Amendment

2017 Act No. 96, Pt. II, Section 7, reenacted the section with no apparent change.

**SECTION 16‑3‑1620.** Department of Crime Victim Ombudsman.

(A) The Department of Crime Victim Ombudsman is created in the Office of the Attorney General, South Carolina Crime Victim Services Division. The Crime Victim Ombudsman is appointed by the Director of the Crime Victim Services Division.

(B) The Crime Victim Ombudsman shall:

(1) refer crime victims to the appropriate element of the criminal and juvenile justice systems or victim assistance programs, or both, when services are requested by crime victims or are necessary as determined by the ombudsman;

(2) act as a liaison between elements of the criminal and juvenile justice systems, victim assistance programs, and crime victims when the need for liaison services is recognized by the ombudsman; and

(3) review and attempt to resolve complaints against elements of the criminal and juvenile justice systems or victim assistance programs, or both, made to the ombudsman by victims of criminal activity within the state’s jurisdiction.

HISTORY: 1994 Act No. 433, Section 1; 2008 Act No. 271, Section 4, eff January 1, 2009; 2014 Act No. 121 (S.22), Pt V, Section 7.Z, eff July 1, 2015; 2017 Act No. 96 (S.289), Section 7, eff July 1, 2017.

Effect of Amendment

2017 Act No. 96, Pt. II, Section 7, rewrote the section, making conforming changes reflecting the restructuring of victim services all generally relating to the newly created Office of the Attorney General, South Carolina Crime Victim Services Division, Department of Crime Victim Ombudsman and its responsibilities.

Library References

States 44, 73.

Westlaw Topic No. 360.

C.J.S. States Sections 145 to 146, 156, 158 to 161, 229, 240 to 249, 253.

Attorney General’s Opinions

To the extent a magistrate or municipal court judge and his or her staff carry out duties associated with victims, they must undergo the training and certification required by this section. SC Op.Atty.Gen. (Oct. 9, 2009) 2009 WL 3658271.

**SECTION 16‑3‑1630.** Ombudsman; responsibilities; authority; annual report.

Upon receipt of a written complaint that contains specific allegations and is signed by a victim of criminal activity within the state’s jurisdiction, the ombudsman shall forward copies of the complaint to the person, program, and agency against whom it makes allegations, and conduct an inquiry into the allegations stated in the complaint.

In carrying out the inquiry, the ombudsman is authorized to request and receive information and documents from the complainant, elements of the criminal and juvenile justice systems, and victim assistance programs that are pertinent to the inquiry. Following each inquiry, the ombudsman shall issue a report verbally or in writing to the complainant and the persons or agencies that are the object of the complaint and recommendations that in the ombudsman’s opinion will assist all parties. The persons or agencies that are the subject of the complaint shall respond, within a reasonable time, to the ombudsman regarding actions taken, if any, as a result of the ombudsman’s report and recommendations.

The ombudsman shall prepare a public annual report, not identifying individual agencies or individuals, summarizing his activity. The annual report must be submitted directly to the Governor, General Assembly, elements of the criminal and juvenile justice systems, and victim assistance programs.

HISTORY: 1994 Act No. 433, Section 1; 2017 Act No. 96 (S.289), Section 7, eff July 1, 2017.

Effect of Amendment

2017 Act No. 96, Pt. II, Section 7, reenacted the section with no apparent change.

Library References

States 68, 73.

Westlaw Topic No. 360.

C.J.S. States Sections 224 to 225, 229, 240 to 249, 252 to 253.

**SECTION 16‑3‑1640.** Confidentiality of information and files.

Information and files requested and received by the ombudsman are confidential and retain their confidential status at all times. Juvenile records obtained under this section may be released only in accordance with provisions of the Children’s Code.

HISTORY: 1994 Act No. 433, Section 1; 2017 Act No. 96 (S.289), Section 7, eff July 1, 2017.

Effect of Amendment

2017 Act No. 96, Pt. II, Section 7, reenacted the section with no apparent change.

Library References

Infants 3163.

Records 30.

Westlaw Topic Nos. 211, 326.

C.J.S. Infants Section 171.

C.J.S. Records Sections 74, 76, 78, 80, 112.

**SECTION 16‑3‑1650.** Cooperation with the criminal and juvenile justice systems and victim assistance programs.

All elements of the criminal and juvenile justice systems and victim assistance programs shall cooperate with the ombudsman in carrying out the duties described in Sections 16‑3‑1620 and 16‑3‑1630.

HISTORY: 1994 Act No. 433, Section 1; 2017 Act No. 96 (S.289), Section 7, eff July 1, 2017.

Effect of Amendment

2017 Act No. 96, Pt. II, Section 7, reenacted the section with no apparent change.

Library References

States 73.

Westlaw Topic No. 360.

C.J.S. States Sections 229, 240 to 249, 253.

**SECTION 16‑3‑1660.** Grounds for dismissal.

A victim’s exercise of rights granted by this article is not grounds for dismissing a criminal proceeding or setting aside a conviction or sentence.

HISTORY: 1994 Act No. 433, Section 1; 2017 Act No. 96 (S.289), Section 7, eff July 1, 2017.

Effect of Amendment

2017 Act No. 96, Pt. II, Section 7, reenacted the section with no apparent change.

Library References

Criminal Law 303.30(1), 1450.

Westlaw Topic No. 110.

C.J.S. Criminal Law Sections 546, 2227, 2229, 2231, 2233, 2235 to 2237, 2261 to 2263.

**SECTION 16‑3‑1670.** Purpose.

This article does not create a cause of action on behalf of a person against an element of the criminal and juvenile justice systems, victim assistance programs, the State, or any agency or person responsible for the enforcement of rights and provision of services set forth in this chapter.

HISTORY: 1994 Act No. 433, Section 1; 2017 Act No. 96 (S.289), Section 7, eff July 1, 2017.

Effect of Amendment

2017 Act No. 96, Pt. II Section 7, reenacted the section with no apparent change.

Library References

District and Prosecuting Attorneys 10.

Municipal Corporations 189(1).

Officers and Public Employees 114.

States 193.

Westlaw Topic Nos. 131, 268, 283, 360.

C.J.S. District and Prosecuting Attorneys Sections 56 to 61.

C.J.S. Municipal Corporations Sections 620 to 622, 640 to 644, 646, 657, 660.

C.J.S. Officers and Public Employees Sections 350 to 352, 355 to 362.

C.J.S. States Sections 559 to 560.

**SECTION 16‑3‑1680.** Recommendation of regulations.

The Department of Crime Victim Ombudsman through the Crime Victim Services Division may recommend to the Attorney General those regulations necessary to assist it in performing its required duties as provided by this chapter.

HISTORY: 2008 Act No. 271, Section 5, eff January 1, 2009; 2014 Act No. 121 (S.22), Pt V, Section 7.AA, eff July 1, 2015; 2017 Act No. 96 (S.289), Section 7, eff July 1, 2017.

Effect of Amendment

2017 Act No. 96, Pt. II, Section 7, substituted “Department of Crime Victim Ombudsman through the Crime Victim Services Division may recommend to the Attorney General” for “Crime Victims’ Ombudsman Office through the Department of Administration may promulgate”.

**SECTION 16‑3‑1690.** Submission of complaints; appeals.

Complaints regarding any allegations against the Office of the Attorney General, Crime Victim Services Division or any of its affiliated departments concerning crime victim services should be submitted in writing to the Crime Victim Ombudsman, who shall cause a rotating three‑person panel of the Crime Victim Services Coordinating Council chosen by him to record, review, and respond to the allegations. Appeal of the three‑person panel’s response or any decision made by the panel regarding the allegations will be heard by the State Inspector General under the authority provided by the provisions of Chapter 6, Title 1. The State Inspector General shall provide the procedures for this appeal process, including, but not limited to, a written finding at the end of the appeal process, which must be provided to the complainant and to the Attorney General and the Director of the Crime Victim Services Division.

HISTORY: 2017 Act No. 96 (S.289), Section 7, eff July 1, 2017.

ARTICLE 17

Harassment and Stalking

**SECTION 16‑3‑1700.** Definitions.

As used in this article:

(A) “Harassment in the first degree” means a pattern of intentional, substantial, and unreasonable intrusion into the private life of a targeted person that serves no legitimate purpose and causes the person and would cause a reasonable person in his position to suffer mental or emotional distress. Harassment in the first degree may include, but is not limited to:

(1) following the targeted person as he moves from location to location;

(2) visual or physical contact that is initiated, maintained, or repeated after a person has been provided oral or written notice that the contact is unwanted or after the victim has filed an incident report with a law enforcement agency;

(3) surveillance of or the maintenance of a presence near the targeted person’s:

(a) residence;

(b) place of work;

(c) school; or

(d) another place regularly occupied or visited by the targeted person; and

(4) vandalism and property damage.

(B) “Harassment in the second degree” means a pattern of intentional, substantial, and unreasonable intrusion into the private life of a targeted person that serves no legitimate purpose and causes the person and would cause a reasonable person in his position to suffer mental or emotional distress. Harassment in the second degree may include, but is not limited to, verbal, written, or electronic contact that is initiated, maintained, or repeated.

(C) “Stalking” means a pattern of words, whether verbal, written, or electronic, or a pattern of conduct that serves no legitimate purpose and is intended to cause and does cause a targeted person and would cause a reasonable person in the targeted person’s position to fear:

(1) death of the person or a member of his family;

(2) assault upon the person or a member of his family;

(3) bodily injury to the person or a member of his family;

(4) criminal sexual contact on the person or a member of his family;

(5) kidnapping of the person or a member of his family; or

(6) damage to the property of the person or a member of his family.

(D) “Pattern” means two or more acts occurring over a period of time, however short, evidencing a continuity of purpose.

(E) “Family” means a spouse, child, parent, sibling, or a person who regularly resides in the same household as the targeted person.

(F) “Electronic contact” means any transfer of signs, signals, writings, images, sounds, data, intelligence, or information of any nature transmitted in whole or in part by any device, system, or mechanism including, but not limited to, a wire, radio, computer, electromagnetic, photoelectric, or photo‑optical system.

(G) This section does not apply to words or conduct protected by the Constitution of this State or the United States, a law enforcement officer or a process server performing official duties, or a licensed private investigator performing services or an investigation as described in detail in a contract signed by the client and the private investigator pursuant to Section 40‑18‑70.

(H) A person who commits the offense of harassment in any degree or stalking, as defined in this section, while subject to the terms of a restraining order issued by the family court may be charged with a violation of this article and, upon conviction, may be sentenced pursuant to the provisions of Section 16‑3‑1710, 16‑3‑1720, or 16‑3‑1730.

HISTORY: 1995 Act No. 94, Section 1; 2001 Act No. 81, Section 4; 2005 Act No. 106, Section 7, eff January 1, 2006; 2013 Act No. 99, Section 1, eff June 20, 2013.

Editor’s Note

2005 Act No. 106, Section 1, provides as follows:

“This act may be cited as ‘Mary Lynn’s Law”‘.

CROSS REFERENCES

Permanent restraining orders, criminal offence defined, see Section 16‑3‑1900.

RESEARCH REFERENCES

Encyclopedias

158 Am. Jur. Proof of Facts 3d 1, Proof of Facts Under State Criminal Stalking Statutes.

Attorney General’s Opinions

Discussion of whether a private investigator, hired by a third party, may be prosecuted under the “harassment” portion of this section. SC Op.Atty.Gen. (Feb. 29, 2000) 2000 WL 356789.

The anti‑stalking law as it pertains to licensed private investigators. SC Op.Atty.Gen. (Sept. 22, 1995) 1995 WL 805759.

NOTES OF DECISIONS

In general 1

1. In general

First‑degree harassment is a lesser included offense of stalking. State v. Brandenburg (S.C.App. 2017) 419 S.C. 346, 797 S.E.2d 416. Indictment and Information 191(.5)

“Act of violence” sufficient to support a charge of aggravated stalking can be an act of violence against property; since stalking can be either a pattern of conduct causing fear of damage to one’s person, or a pattern of conduct causing fear of damage to one’s property, and since simple stalking can consist of fear of property damage, it logically follows that aggravated stalking can consist of actual property damage, which is consistent with state’s purpose of providing help and intervention to stalking victims before a pattern of harassing conduct results in bodily injury or death. State v. Prince (S.C.App. 1999) 335 S.C. 466, 517 S.E.2d 229. Threats, Stalking, And Harassment 33

**SECTION 16‑3‑1705.** Electronic mail service provider; immunity; definition.

(A) An electronic mail service provider must not be charged with or have a penalty assessed based upon a violation of this article or have a cause of action filed against it based on the electronic mail service provider’s:

(1) being an intermediary between the sender and recipient in the transmission of an electronic contact that violates this article; or

(2) providing transmission of an electronic contact over the provider’s computer network or facilities that violates this article.

(B) For purposes of this article, “electronic mail service provider” means a person or entity which:

(1) is an intermediary in sending or receiving electronic mail; and

(2) provides to users of electronic mail services the ability to send or receive electronic mail.

HISTORY: 2005 Act No. 106, Section 7, eff January 1, 2006.

Library References

Threats, Stalking, and Harassment 36.

Westlaw Topic No. 377E.

C.J.S. Threats and Unlawful Communications Section 41.

**SECTION 16‑3‑1710.** Penalties for conviction of harassment in the second degree.

(A) Except as provided in subsection (B), a person who engages in harassment in the second degree is guilty of a misdemeanor and, upon conviction, must be fined not more than two hundred dollars, imprisoned not more than thirty days, or both.

(B) A person convicted of harassment in the second degree is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars, imprisoned not more than one year, or both if:

(1) the person has a prior conviction of harassment or stalking within the preceding ten years; or

(2) at the time of the harassment an injunction or restraining order, including a restraining order issued by the family court, was in effect prohibiting the harassment.

(C) In addition to the penalties provided in this section, a person convicted of harassment in the second degree who received licensing or registration information pursuant to Article 4 of Chapter 3 of Title 56 and used the information in furtherance of the commission of the offense under this section must be fined two hundred dollars or imprisoned thirty days, or both.

HISTORY: 1995 Act No. 94, Section 1; 1996 Act No. 458, Part II, Section 31B; 2005 Act No. 106, Section 7, eff January 1, 2006; 2013 Act No. 99, Section 2, eff June 20, 2013.

CROSS REFERENCES

Commission of this crime within specified radius of child day care center as separate offense, see Section 63‑13‑200.

Denial of registration as an operator of a child day care or group day care home where the applicant, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑820.

Denial of renewal for child day care or group day care home where the person applying for approval, the operator of the facility, or an employee or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑630.

Fingerprint review of any person applying to operate or seek employment at a child day care or group day care home to determine prior conviction of the crime referred to in this section, see Section 63‑13‑620.

Foster care placement with certain persons prohibited, see Section 63‑7‑2350.

Harassment, penalties, inclusion of family court restraining orders, see Section 16‑3‑1700.

No license or registration will be issued to any religious establishment to operate a child day care or group day care home where the operator, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑1010.

No person may be employed by the Department of Social Services in its day care licensing or child protective services divisions who has been convicted of the crime referred to in this section, see Section 63‑13‑190.

Permanent restraining orders, criminal offence defined, see Section 16‑3‑1900.

Persons convicted of Title 16, Chapter 3 crimes prohibited from appointment as guardian ad litem for child in abuse or neglect proceeding, see Section 63‑11‑520.

Library References

Threats, Stalking, and Harassment 56.

Westlaw Topic No. 377E.

**SECTION 16‑3‑1720.** Penalties for conviction of harassment in the first degree.

(A) Except as provided in subsections (B) and (C), a person who engages in harassment in the first degree is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars, imprisoned not more than three years, or both.

(B) A person who engages in harassment in the first degree when an injunction or restraining order, including a restraining order issued by the family court, is in effect prohibiting this conduct is guilty of a misdemeanor and, upon conviction, must be fined not more than two thousand dollars, imprisoned not more than three years, or both.

(C) A person who engages in harassment in the first degree and who has a prior conviction of harassment or stalking within the preceding ten years is guilty of a felony and, upon conviction, must be fined not more than five thousand dollars, imprisoned not more than five years, or both.

(D) In addition to the penalties provided in this section, a person convicted of harassment in the first degree who received licensing or registration information pursuant to Article 4 of Chapter 3 of Title 56 and used the information in furtherance of the commission of the offense under this section must be fined one thousand dollars or imprisoned one year, or both.

HISTORY: 1995 Act No. 94, Section 1; 1996 Act No. 458, Part II, Section 31C; 2005 Act No. 106, Section 7, eff January 1, 2006; 2013 Act No. 99, Section 3, eff June 20, 2013.

CROSS REFERENCES

Harassment, penalties, inclusion of family court restraining orders, see Section 16‑3‑1700.

Permanent restraining orders, criminal offence defined, see Section 16‑3‑1900.

Library References

Threats, Stalking, and Harassment 57.

Westlaw Topic No. 377E.

**SECTION 16‑3‑1730.** Penalties for conviction of stalking.

(A) A person who engages in stalking is guilty of a felony and, upon conviction, must be fined not more than five thousand dollars, imprisoned not more than five years, or both.

(B) A person who engages in stalking when an injunction or restraining order, including a restraining order issued by the family court, is in effect prohibiting this conduct is guilty of a felony and, upon conviction, must be fined not more than seven thousand dollars, imprisoned not more than ten years, or both.

(C) A person who engages in stalking and who has a prior conviction of harassment or stalking within the preceding ten years is guilty of a felony and, upon conviction, must be fined not more than ten thousand dollars, imprisoned not more than fifteen years, or both.

(D) In addition to the penalties provided in this section, a person convicted of stalking who received licensing or registration information pursuant to Article 4, Chapter 3 of Title 56 and used the information in furtherance of the commission of the offense pursuant to this section must be fined one thousand dollars or imprisoned one year, or both.

HISTORY: 1995 Act No. 94, Section 1; 2005 Act No. 106, Section 7, eff January 1, 2006; 2013 Act No. 99, Section 4, eff June 20, 2013.

CROSS REFERENCES

Commission of this crime within specified radius of child day care center as separate offense, see Section 63‑13‑200.

Denial of registration as an operator of a child day care or group day care home where the applicant, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑820.

Denial of renewal for child day care or group day care home where the person applying for approval, the operator of the facility, or an employee or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑630.

Fingerprint review of any person applying to operate or seek employment at a child day care or group day care home to determine prior conviction of the crime referred to in this section, see Section 63‑13‑620.

Foster care placement with certain persons prohibited, see Section 63‑7‑2350.

Harassment, penalties, inclusion of family court restraining orders, see Section 16‑3‑1700.

No license or registration will be issued to any religious establishment to operate a child day care or group day care home where the operator, an employee, or caregiver has been convicted of the crime referred to in this section, see Section 63‑13‑1010.

No person may be employed by the Department of Social Services in its day care licensing or child protective services divisions who has been convicted of the crime referred to in this section, see Section 63‑13‑190.

Permanent restraining orders, criminal offence defined, see Section 16‑3‑1900.

Persons convicted of Title 16, Chapter 3 crimes prohibited from appointment as guardian ad litem for child in abuse or neglect proceeding, see Section 63‑11‑520.

Library References

Threats, Stalking, and Harassment 57.

Westlaw Topic No. 377E.

**SECTION 16‑3‑1735.** Law enforcement officer empowered to sign warrant in place of victim.

A law enforcement officer or another person with knowledge of the circumstances may sign a warrant in place of the victim for a person alleged to have committed a harassment or stalking offense as provided in Section 16‑3‑1710, 16‑3‑1720, or 16‑3‑1730.

HISTORY: 2005 Act No. 106, Section 7, eff January 1, 2006.

Library References

Criminal Law 210.

Westlaw Topic No. 110.

C.J.S. Criminal Law Section 439.

**SECTION 16‑3‑1740.** Mental health evaluations of persons convicted of stalking or harassment; notice to victim in person of unsupervised release.

(A) Before sentencing a person convicted of stalking or harassment in the first or second degree, the court may require the person to undergo a mental health evaluation. If the court determines from the results of the evaluation that the person needs mental health treatment or counseling, the court shall require him to undergo mental health treatment or counseling by a court‑approved mental health professional, mental health facility, or facility operated by the State Department of Mental Health as a part of his sentence.

(B) When the court orders a mental health evaluation, the evaluation may not take place until the facility conducting the evaluation has received all of the documentation including, but not limited to, warrants, incident reports, and NCIC reports associated with the charges.

(C) If the evaluation results in the unsupervised release of the person, the victim must be notified prior to the person’s release. All reasonable efforts must be made to notify the victim personally to assure the notice is received.

HISTORY: 1995 Act No. 94, Section 1; 2005 Act No. 106, Section 7, eff January 1, 2006.

Library References

Mental Health 436.

Sentencing and Punishment 258.

Westlaw Topic Nos. 257A, 350H.

C.J.S. Criminal Law Section 2059.

C.J.S. Mental Health Sections 272 to 277, 283.

**SECTION 16‑3‑1750.** Action seeking a restraining order against a person engaged in harassment or stalking; jurisdiction and venue; forms; enforceability.

(A) Pursuant to this article, the magistrates court has jurisdiction over an action seeking a restraining order against a person engaged in harassment in the first or second degree or stalking.

(B) An action for a restraining order must be filed in the county in which:

(1) the defendant resides when the action commences;

(2) the harassment in the first or second degree or stalking occurred; or

(3) the plaintiff resides if the defendant is a nonresident of the State or cannot be found.

(C) A complaint and motion for a restraining order may be filed by any person. The complaint must:

(1) allege that the defendant is engaged in harassment in the first or second degree or stalking and must state the time, place, and manner of the acts complained of, and other facts and circumstances upon which relief is sought;

(2) be verified; and

(3) inform the defendant of his right to retain counsel to represent him at the hearing on the complaint.

(D) The magistrates court must provide forms to facilitate the preparation and filing of a complaint and motion for a restraining order by a plaintiff not represented by counsel. The court must not charge a fee for filing a complaint and motion for a restraining order against a person engaged in harassment or stalking. However, the court shall assess a filing fee against the nonprevailing party in an action for a restraining order. The court may hold a person in contempt of court for failure to pay this filing fee.

(E) A restraining order remains in effect for a fixed period of time of not less than one year, as determined by the court on a case‑by‑case basis.

(F) Notwithstanding another provision of law, a restraining order or a temporary restraining order issued pursuant to this article is enforceable throughout this State.

HISTORY: 1995 Act No. 94, Section 1; 2002 Act No. 175, Section 1, eff March 5, 2002; 2005 Act No. 106, Section 7, eff January 1, 2006.

Library References

Protection of Endangered Persons 43.

Westlaw Topic No. 315P.

C.J.S. Breach of the Peace Sections 18, 20, 32 to 35.

C.J.S. Domestic Abuse and Violence Sections 1, 5, 7 to 10, 15 to 16, 18.

Attorney General’s Opinions

A defendant involved in a restraining order hearing pursuant to the provisions of Sections 16‑3‑1750 et seq. has no right to a jury trial. SC Op.Atty.Gen. (March 19, 2008) 2008 WL 903967.

The assessment of filing fees pursuant to this section. SC Op.Atty.Gen. (May 5, 2006) 2006 WL 1376905.

The authority to prohibit persons subject to a restraining order from purchasing or possessing a handgun. SC Op.Atty.Gen. (Dec. 18, 2001) 2001 WL 1736765.

Venue under this section. SC Op.Atty.Gen. (Dec. 18, 2001) 2001 WL 1736765.

The applicable standard for the issuance of a restraining order. SC Op.Atty.Gen. (Nov. 4, 1997) 1997 WL 811891.

NOTES OF DECISIONS

Discretion of court 1

1. Discretion of court

Circuit court did not abuse its discretion in issuing restraining order against former client, who brought legal malpractice action, to prevent client from harassing attorney and other parties involved in action, where client testified that he would spend ten years and a million dollars to get justice against parties and used threatening conduct towards the parties, such as telling one dismissed party that he “wasn’t out of the woods yet.” Brandt v. Gooding (S.C. 2006) 368 S.C. 618, 630 S.E.2d 259, rehearing denied, habeas corpus granted 664 F.Supp.2d 626, affirmed 636 F.3d 124. Protection Of Endangered Persons 43

The decision of whether to issue a restraining order is within the trial judge’s discretion. Brandt v. Gooding (S.C. 2006) 368 S.C. 618, 630 S.E.2d 259, rehearing denied, habeas corpus granted 664 F.Supp.2d 626, affirmed 636 F.3d 124. Injunction 1126

**SECTION 16‑3‑1760.** When temporary restraining orders may be granted without notice; notice and hearing on motion seeking restraining order.

(A) Within twenty‑four hours after the filing of a complaint and motion seeking a restraining order pursuant to Section 16‑3‑1750, the court, for good cause shown, may hold an emergency hearing and, if the plaintiff proves his allegation by a preponderance of the evidence, may issue a temporary restraining order without giving the defendant notice of the motion for the order. A prima facie showing of present danger of bodily injury, verified by supporting affidavits, constitutes good cause.

(B) A temporary restraining order granted without notice must be served upon the defendant together with a copy of the complaint and a Rule to Show Cause why the order should not be extended for the full one‑year period. The Rule to Show Cause must provide the date and time of the hearing for the Rule to Show Cause. The defendant must be served within five days before the hearing in the same manner required for service as provided in the South Carolina Rules of Civil Procedure.

(C) In cases not provided in subsection (A), the court shall cause a copy of the complaint and motion to be served upon the defendant at least five days before the hearing in the same manner required for service as provided in the South Carolina Rules of Civil Procedure.

(D) The court shall hold a hearing on a motion for a restraining order within fifteen days of the filing of a complaint and motion, but not sooner than five days after service has been perfected upon the defendant.

(E) Upon motion of a party, the court may determine that a temporary restraining order was improperly issued due to unknown facts. The court may order the temporary restraining order vacated and all records of the improperly issued restraining order destroyed.

HISTORY: 1995 Act No. 94, Section 1; 2005 Act No. 106, Section 7, eff January 1, 2006; 2013 Act No. 99, Section 6, eff June 20, 2013.

Library References

Protection of Endangered Persons 51.

Westlaw Topic No. 315P.

C.J.S. Breach of the Peace Sections 18, 24 to 28, 32 to 38.

C.J.S. Domestic Abuse and Violence Sections 2, 4, 11 to 14, 16 to 17, 19 to 34, 36 to 45.

**SECTION 16‑3‑1770.** Form and content of temporary restraining order.

(A) A temporary restraining order granted without notice must be endorsed with the date and hour of issuance and entered of record with the magistrates court.

(B) The terms of the restraining order must protect the plaintiff and may include temporarily enjoining the defendant from:

(1) abusing, threatening to abuse, or molesting the plaintiff or members of the plaintiff’s family;

(2) entering or attempting to enter the plaintiff’s place of residence, employment, education, or other location; and

(3) communicating or attempting to communicate with the plaintiff in a way that would violate the provisions of this article.

(C) A restraining order issued pursuant to this article conspicuously must bear the following language:

(1) “Violation of this order is a criminal offense punishable by thirty days in jail, a fine of five hundred dollars, or both.”; and

(2) “Pursuant to Section 16‑25‑125, it is unlawful for a person who has been charged with or convicted of criminal domestic violence or criminal domestic violence of a high and aggravated nature, who is subject to an order of protection, or who is subject to a restraining order, to enter or remain upon the grounds or structure of a domestic violence shelter in which the person’s household member resides or the domestic violence shelter’s administrative offices. A person who violates this provision is guilty of a misdemeanor and, upon conviction, must be fined not more than three thousand dollars or imprisoned for not more than three years, or both. If the person is in possession of a dangerous weapon at the time of the violation, the person is guilty of a felony and, upon conviction, must be fined not more than five thousand dollars or imprisoned for not more than five years, or both.”.

(D) A restraining order issued by a court may not contain the social security number of a party to the order and must contain as little identifying information as is necessary of the party it seeks to protect.

HISTORY: 1995 Act No. 94, Section 1; 2005 Act No. 106, Section 7, eff January 1, 2006; 2008 Act No. 319, Section 2, eff June 11, 2008.

Library References

Protection of Endangered Persons 72.

Westlaw Topic No. 315P.

C.J.S. Breach of the Peace Section 18.

C.J.S. Domestic Abuse and Violence Sections 3 to 4, 7 to 11, 15 to 19, 21 to 22, 37 to 38.

Attorney General’s Opinions

The authority to prohibit persons subject to a restraining order from purchasing or possessing a handgun. SC Op.Atty.Gen. (Dec. 18, 2001) 2001 WL 1736765.

**SECTION 16‑3‑1780.** Expiration of temporary restraining orders and restraining orders; extensions and modifications.

(A) A temporary restraining order remains in effect until the hearing on the Rule to Show Cause why the order should not be extended for the full one‑year period. The temporary restraining order must be for a fixed period in accordance with subsection (B) if the court finds the defendant in default at the hearing.

(B) In cases not provided for in subsection (A), a restraining order must be for a fixed period not to exceed one year but may be extended by court order on a motion by the plaintiff, showing good cause, with notice to the defendant. The defendant is entitled to a hearing on the extension of an order issued pursuant to this subsection within thirty days of the date upon which the order will expire.

(C) Notwithstanding subsection (B), the provisions included in a restraining order granting relief pursuant to Section 16‑3‑1770 dissolve one year following the issuance of the order unless, prior to the expiration of this period, the court has charged the defendant with the crime of harassment in the first or second degree or stalking and has scheduled a date for trial on the charge. If the trial has been scheduled, relief granted pursuant to Section 16‑3‑1770 remains in effect beyond the one‑year period only until the conclusion of the trial.

(D) The court may modify the terms of an order issued pursuant to this section.

HISTORY: 1995 Act No. 94, Section 1; 2005 Act No. 106, Section 7, eff January 1, 2006.

Library References

Protection of Endangered Persons 79, 82.

Westlaw Topic No. 315P.

C.J.S. Breach of the Peace Sections 18, 24 to 28, 32 to 38.

C.J.S. Domestic Abuse and Violence Sections 2 to 4, 7 to 34, 36 to 45.

**SECTION 16‑3‑1790.** Service of certified copies of restraining orders.

A magistrates court shall serve the defendant with a certified copy of an order issued pursuant to this article and provide a copy to the plaintiff and to the local law enforcement agencies having jurisdiction over the area where the plaintiff resides. Service must be made without charge to the plaintiff.

HISTORY: 1995 Act No. 94, Section 1; 2005 Act No. 106, Section 7, eff January 1, 2006.

Library References

Protection of Endangered Persons 56.

Westlaw Topic No. 315P.

C.J.S. Breach of the Peace Sections 18, 24 to 28, 32 to 38.

C.J.S. Domestic Abuse and Violence Sections 2, 4, 11 to 14, 16 to 17, 19 to 34, 36 to 45.

Attorney General’s Opinions

The County Sheriff would be required to serve a restraining order against stalking or harassment where issued by the magistrate’s court and placed in the Sheriff’s hands for service. SC Op.Atty.Gen. (Jan. 30, 1996) 1996 WL 82901.

**SECTION 16‑3‑1800.** Arrest upon violation of restraining order.

Law enforcement officers shall arrest a defendant who is acting in violation of a restraining order after service and notice of the order is provided. An arrest warrant is not required.

HISTORY: 1995 Act No. 94, Section 1; 2005 Act No. 106, Section 7, eff January 1, 2006.

Library References

Arrest 63.

Westlaw Topic No. 35.

C.J.S. Arrest Sections 9, 14 to 39, 42 to 44.

**SECTION 16‑3‑1810.** Law enforcement officer’s responsibilities when responding to a harassment or stalking incident.

(A) The primary responsibility of a law enforcement officer when responding to a harassment in the first or second degree or stalking incident is to enforce the law and protect the complainant.

(B) The law enforcement officer shall notify the complainant of the right to initiate criminal proceedings and to seek a restraining order.

HISTORY: 1995 Act No. 94, Section 1; 2005 Act No. 106, Section 7, eff January 1, 2006.

Library References

Municipal Corporations 189(1).

Westlaw Topic No. 268.

C.J.S. Municipal Corporations Sections 620 to 622, 640 to 644, 646, 657, 660.

**SECTION 16‑3‑1820.** Immunity from liability for filing a report or complaint or participating in a judicial proceeding concerning alleged harassment or stalking; rebuttable presumption of good faith.

A person who reports an alleged harassment in the first or second degree or stalking, files a criminal complaint, files a complaint for a restraining order, or who participates in a judicial proceeding pursuant to this article and who is acting in good faith is immune from criminal and civil liability that might otherwise result from these actions. A rebuttable presumption exists that the person was acting in good faith.

HISTORY: 1995 Act No. 94, Section 1; 2005 Act No. 106, Section 7, eff January 1, 2006.

Library References

Criminal Law 42.

Westlaw Topic No. 110.

C.J.S. Criminal Law Sections 65, 97 to 112.

**SECTION 16‑3‑1830.** Availability of other civil and criminal remedies.

A proceeding commenced pursuant to this article is in addition to other civil and criminal remedies.

HISTORY: 1995 Act No. 94, Section 1; 2005 Act No. 106, Section 7, eff January 1, 2006.

Library References

Protection of Endangered Persons 32.

Westlaw Topic No. 315P.

C.J.S. Breach of the Peace Sections 18 to 19, 23, 28 to 38.

C.J.S. Domestic Abuse and Violence Sections 1, 3 to 4, 6 to 11, 15 to 19, 21 to 22, 37 to 38, 41, 43 to 44.

**SECTION 16‑3‑1840.** Mental health evaluation prior to setting bail; purpose; report.

Prior to setting bail, a magistrate or a municipal judge may order a defendant charged with harassment in the first or second degree or stalking pursuant to this article to undergo a mental health evaluation performed by the local mental health department. The purpose of this evaluation is to determine if the defendant needs mental health treatment or counseling as a condition of bond. The evaluation must be scheduled within ten days of the order’s issuance. Once the evaluation is completed, the examiner must, within forty‑eight hours, issue a report to the local solicitor’s office, summary court judge, or other law enforcement agency. Upon receipt of the report, the solicitor, summary court judge, or other law enforcement agency must arrange for a bond hearing before a circuit court judge or summary court judge.

HISTORY: 1995 Act No. 94, Section 1; 2005 Act No. 106, Section 7, eff January 1, 2006.

Library References

Bail 59.

Westlaw Topic No. 49.

C.J.S. Bail; Release and Detention Pending Proceedings Sections 156 to 159.

ARTICLE 18

Permanent Restraining Orders

**SECTION 16‑3‑1900.** Definitions.

For purposes of this article:

(1) “Complainant” means a victim of a criminal offense that occurred in this State, a competent adult who resides in this State on behalf of a minor child who is a victim of a criminal offense that occurred in this State, or a witness who assisted the prosecuting entity in the prosecution of a criminal offense that occurred in this State.

(2) “Conviction” means a conviction, adjudication of delinquency, guilty plea, nolo contendere plea, or forfeiture of bail.

(3) “Criminal offense” means an offense against the person of an individual when physical or psychological harm occurs, including both common law and statutory offenses contained in Sections 16‑3‑1700, 16‑3‑1710, 16‑3‑1720, 16‑3‑1730, 16‑25‑20, 16‑25‑30, 16‑25‑65 and 23‑3‑430; criminal sexual conduct offenses pled down to assault and battery of a high and aggravated nature; domestic violence offenses pled down to assault and battery or assault and battery of a high and aggravated nature; and the common law offense of attempt, punishable pursuant to Section 16‑1‑80.

(4) “Family” means a spouse, child, parent, sibling, or a person who regularly resides in the same household.

(5) “Respondent” means a person who was convicted of a criminal offense for which the victim was the subject of the crime or the witness who assisted the prosecuting entity in prosecuting the criminal offense.

(6) “Victim” means:

(a) a person who suffers direct or threatened physical, psychological, or financial harm as a result of the commission or attempted commission of a criminal offense; or

(b) the spouse, parent, child, or lawful representative of a victim who is deceased, a minor, incompetent, or physically or psychologically incapacitated.

“Victim” does not include a person who is the subject of an investigation for, charged with, or has been convicted of the offense in question; a person, including a spouse, parent, child, or lawful representative, who is acting on behalf of a suspect, juvenile offender, or defendant, unless such actions are required by law; or a person who was imprisoned or engaged in an illegal act at the time of the offense.

(7) “Witness” means a person who has been or is expected to be summoned to testify for the prosecution, or who by reason of having relevant information is subject to being called or likely to be called as a witness for the prosecution, whether or not any action or proceeding has been commenced.

HISTORY: 2015 Act No. 58 (S.3), Pt V, Section 24, eff June 4, 2015.

**SECTION 16‑3‑1910.** Permanent restraining orders; procedure.

(A) The circuit court and family court have jurisdiction over an action seeking a permanent restraining order.

(B) To seek a permanent restraining order, a person must:

(1) request the order in general sessions court or family court, as applicable, at the time the respondent is convicted for the criminal offense committed against the complainant; or

(2) file a summons and complaint in common pleas court in the county in which:

(a) the respondent resides when the action commences;

(b) the criminal offense occurred; or

(c) the complainant resides, if the respondent is a nonresident of the State or cannot be found.

(C) The following persons may seek a permanent restraining order:

(1) a victim of a criminal offense that occurred in this State;

(2) a competent adult who resides in this State on behalf of a minor child who is a victim of a criminal offense that occurred in this State; or

(3) a witness who assisted the prosecuting entity in the prosecution of a criminal offense that occurred in this State.

(D) A complaint must:

(1) state that the respondent was a person convicted of a criminal offense for which the victim was the subject of the crime or for which the witness assisted the prosecuting entity;

(2) state when and where the conviction took place, and the name of the prosecuting entity and court;

(3) be verified; and

(4) inform the respondent of his right to retain counsel to represent the respondent at the hearing on the complaint.

(E) A complainant shall provide his address to the court and to any appropriate law enforcement agencies. The complainant’s address must be kept under seal, omitted from all documents filed with the court, and is not subject to Freedom of Information Act requests pursuant to Section 30‑4‑10, et seq. The complainant may designate an alternative address to receive notice of motions or pleadings from the respondent.

(F) The circuit court must provide forms to facilitate the preparation and filing of a summons and complaint for a permanent restraining order by a complainant not represented by counsel. The court must not charge a fee for filing a summons and complaint for a permanent restraining order.

(G) A complainant shall serve his summons and complaint for a permanent restraining order along with a notice of the date, time, and location of the hearing on the complaint pursuant to Rule 4 of the South Carolina Rules of Civil Procedure. The summons must require the respondent to answer or otherwise plead within thirty days of the date of service.

(H) The court may enter a permanent restraining order by default if the respondent was served in accordance with the provisions of this section and fails to answer as directed, or fails to appear on a subsequent appearance or hearing date agreed to by the parties or set by the court.

(I) The hearing on a permanent restraining order may be done electronically via closed circuit television or through other electronic means when possible. If the respondent is confined in a Department of Corrections facility, the complainant may come to the Department of Probation, Parole and Pardon Services in Richland County to have the hearing held electronically via closed circuit television or through other electronic means.

(J) Upon a finding that the respondent was convicted of a criminal offense for which the victim was the subject of the crime or for which the witness assisted the prosecuting entity, as applicable, the court may issue a permanent restraining order. In determining whether to issue a permanent restraining order, physical injury to the victim or witness is not required.

(K) The terms of a permanent restraining order must protect the victim or witness and may include enjoining the respondent from:

(1) abusing, threatening to abuse, or molesting the victim, witness, or members of the victim’s or witness’ family;

(2) entering or attempting to enter the victim’s or witness’ place of residence, employment, education, or other location; and

(3) communicating or attempting to communicate with the victim, witness, or members of the victim’s or witness’ family in a way that would violate the provisions of this section.

(L) A permanent restraining order must conspicuously bear the following language: “Violation of this order is a felony criminal offense punishable by up to five years in prison.”

(M)(1) A permanent restraining order remains in effect for a period of time to be determined by the judge. If a victim or witness is a minor at the time a permanent restraining order is issued on the minor’s behalf, the victim or witness, upon reaching the age of eighteen, may file a motion with the circuit court to have the permanent restraining order removed.

(2) The court may modify the terms of a permanent restraining order upon request of the complainant, including extending the duration of the order or lifting the order.

(N) Notwithstanding another provision of law, a permanent restraining order is enforceable throughout this State.

(O) Law enforcement officers shall arrest a respondent who is acting in violation of a permanent restraining order after service and notice of the order is provided. A respondent who is in violation of a permanent restraining order is guilty of a felony, if the underlying conviction that was the basis for the permanent restraining order was a felony and, upon conviction, must be imprisoned not more than five years. If the underlying conviction that was the basis for the permanent restraining order was a misdemeanor, a respondent who is in violation of a permanent restraining order is guilty of a misdemeanor and, upon conviction, must be fined not more than two thousand dollars or imprisoned not more than three years, or both.

(P) Permanent restraining orders are protection orders for purposes of Section 20‑4‑320, the Uniform Interstate Enforcement of Domestic Violence Protection Orders Act, as long as all other criteria of Article 3, Chapter 4, Title 20 are met. However, permanent restraining orders are not orders of protection for purposes of Section 16‑25‑30.

(Q) The remedies provided by this section are not exclusive, but are additional to other remedies provided by law.

HISTORY: 2015 Act No. 58 (S.3), Pt V, Section 24, eff June 4, 2015.

**SECTION 16‑3‑1920.** Emergency restraining orders; procedure.

(A) The magistrates court has jurisdiction over an action seeking an emergency restraining order.

(B) An action for an emergency restraining order must be filed in the county in which:

(1) the respondent resides when the action commences;

(2) the criminal offense occurred; or

(3) the complainant resides, if the respondent is a nonresident of the State or cannot be found.

(C) A summons and complaint for an emergency restraining order may be filed by:

(1) a victim of a criminal offense that occurred in this State;

(2) a competent adult who resides in this State on behalf of a minor child who is a victim of a criminal offense that occurred in this State; or

(3) a witness who assisted the prosecuting entity in the prosecution of a criminal offense that occurred in this State.

(D) The complaint must:

(1) state that the respondent was convicted of a criminal offense for which the victim was the subject of the crime or for which the witness assisted the prosecuting entity;

(2) state when and where the conviction took place, and the name of the prosecuting entity and court;

(3) be verified; and

(4) inform the respondent of his right to retain counsel to represent the respondent at the hearing on the complaint.

(E) A complainant shall provide his address to the court and to any appropriate law enforcement agencies. The complainant’s address must be kept under seal, omitted from all documents filed with the court, and is not subject to Freedom of Information Act requests pursuant to Section 30‑4‑10, et seq. The complainant may designate an alternative address to receive notice of motions or pleadings from the respondent.

(F) The court must provide forms to facilitate the preparation and filing of a summons and complaint for an emergency restraining order by a complainant not represented by counsel. The court must not charge a fee for filing a summons and complaint for an emergency restraining order.

(G)(1) Except as provided in subsection (H), the court shall hold a hearing on an emergency restraining order within fifteen days of the filing of a summons and complaint, but not sooner than five days after service has been perfected upon the respondent.

(2) The court shall serve a copy of the summons and complaint upon the respondent at least five days before the hearing in the same manner required for service as provided in the South Carolina Rules of Civil Procedure.

(3) The hearing may be done electronically via closed circuit television or through other electronic means when possible. If the respondent is confined in a Department of Corrections facility, the complainant may come to the Department of Probation, Parole and Pardon Services in Richland County to have the hearing held electronically via closed circuit television or through other electronic means.

(4) The court may issue an emergency restraining order upon a finding that:

(a) the respondent was convicted of a criminal offense for which the victim was the subject of the crime or for which the witness assisted the prosecuting entity, as applicable; and

(b) a restraining order has expired, is set to expire, or is not available and the common pleas court is not in session for the complainant to obtain a permanent restraining order.

In determining whether to issue an emergency restraining order, physical injury to the victim or witness is not required.

(H)(1) Within twenty‑four hours after the filing of a summons and complaint seeking an emergency restraining order, the court may hold an emergency hearing and issue an emergency restraining order without giving the respondent notice of the motion for the order if:

(a) the respondent was convicted of a criminal offense for which the victim was the subject of the crime or for which the witness assisted the prosecuting entity, as applicable;

(b) a restraining order has expired, is set to expire, or is not available and the common pleas court is not in session for the complainant to obtain a permanent restraining order;

(c) it clearly appears from specific facts shown by a verified complaint or affidavit that immediate injury, loss, or damage will result to the victim or witness before the respondent can be heard; and

(d) the complainant certifies to the court that one of the following has occurred:

(i) efforts have been made to serve the notice; or

(ii) there is good cause to grant the remedy because the harm that the remedy is intended to prevent would likely occur if the respondent were given prior notice of the complainant’s efforts to obtain judicial relief.

In determining whether to issue an emergency restraining order, physical injury to the victim or witness is not required.

(2) An emergency restraining order granted without notice must be endorsed with the date and hour of issuance and entered on the record with the magistrates court. The order must be served upon the respondent together with a copy of the summons, complaint, and a Rule to Show Cause why the order should not be extended until the hearing for a permanent restraining order.

(I) The terms of an emergency restraining order must protect the victim or witness and may include temporarily enjoining the respondent from:

(1) abusing, threatening to abuse, or molesting the victim, witness, or members of the victim’s or witness’ family;

(2) entering or attempting to enter the victim’s or witness’ place of residence, employment, education, or other location; and

(3) communicating or attempting to communicate with the victim, witness, or members of the victim’s or witness’ family in a way that would violate the provisions of this section.

(J) An emergency restraining order conspicuously must bear the following language: “Violation of this order is a felony criminal offense punishable by up to five years in prison.”

(K) The court shall serve the respondent with a certified copy of the emergency restraining order and provide a copy to the complainant and to the local law enforcement agencies having jurisdiction over the area where the victim or witness resides. Service must be made without charge to the complainant.

(L)(1) An emergency restraining order remains in effect until a hearing on a restraining order. However, if a complainant does not seek a permanent restraining order pursuant to Section 16‑3‑1910 within forty‑five days of the issuance of an emergency restraining order, the emergency restraining order no longer remains in effect.

(2) The court may modify the terms of an emergency restraining order.

(M) Notwithstanding another provision of law, an emergency restraining order is enforceable throughout this State.

(N) Law enforcement officers shall arrest a respondent who is acting in violation of an emergency restraining order after service and notice of the order is provided. An arrest warrant is not required. A respondent who is in violation of an emergency restraining order is guilty of a felony, if the underlying conviction that was the basis for the emergency restraining order was a felony and, upon conviction, must be imprisoned not more than five years. If the underlying conviction that was the basis for the emergency restraining order was a misdemeanor, a respondent who is in violation of an emergency restraining order is guilty of a misdemeanor and, upon conviction, must be fined not more than two thousand dollars or imprisoned not more than three years, or both.

(O) Emergency restraining orders are protection orders for purposes of Section 20‑4‑320, the Uniform Interstate Enforcement of Domestic Violence Protection Orders Act, as long as all other criteria of Article 3, Chapter 4, Title 20 are met. However, permanent restraining orders are not orders of protection for purposes of Section 16‑25‑30.

(P) The remedies provided by this section are not exclusive but are additional to other remedies provided by law.

HISTORY: 2015 Act No. 58 (S.3), Pt V, Section 24, eff June 4, 2015.

ARTICLE 19

Trafficking in Persons

LAW REVIEW AND JOURNAL COMMENTARIES

Land of the free, home of the slave: Human trafficking legislation in South Carolina. Caroline A. Ross, 68 S.C. L. Rev. 1015 (Spring 2017).

**SECTION 16‑3‑2010.** Definitions.

As used in this article:

(1) “Business” means a corporation, partnership, proprietorship, firm, enterprise, franchise, organization, or self‑employed individual.

(2) “Charitable organization” means a charitable organization pursuant to Section 33‑56‑20.

(3) “Debt bondage” means the status or condition of a debtor arising from a pledge by the debtor of his personal services or those of a person under his control as a security for debt, if the value of those services as reasonably assessed is not applied toward the liquidation of the debt or the length and nature of those services are not respectively limited and defined or if the principal amount of the debt does not reasonably reflect the value of the items or services for which the debt was incurred.

(4) “Forced labor” means any type of labor or services performed or provided by a person rendered through another person’s coercion of the person providing the labor or services.

This definition does not include labor or services performed or provided by a person in the custody of the Department of Corrections or a local jail, detention center, or correctional facility.

(5) “Involuntary servitude” means a condition of servitude induced through coercion.

(6) “Person” means an individual, corporation, partnership, charitable organization, or another legal entity.

(7) “Sex trafficking” means the recruitment, harboring, transportation, provision, or obtaining of a person for one of the following when it is induced by force, fraud, or coercion or the person performing the act is under the age of eighteen years and anything of value is given, promised to, or received, directly or indirectly, by another person:

(a) criminal sexual conduct pursuant to Section 16‑3‑651;

(b) criminal sexual conduct in the first degree pursuant to Section 16‑3‑652;

(c) criminal sexual conduct in the second degree pursuant to Section 16‑3‑653;

(d) criminal sexual conduct in the third degree pursuant to Section 16‑3‑654;

(e) criminal sexual conduct with a minor pursuant to Section 16‑3‑655;

(f) engaging a child for sexual performance pursuant to Section 16‑3‑810;

(g) producing, directing, or promoting sexual performance by a child pursuant to Section 16‑3‑820;

(h) sexual battery pursuant to Section 16‑3‑651;

(i) sexual conduct pursuant to Section 16‑3‑800; or

(j) sexual performance pursuant to Section 16‑3‑800.

(8) “Services” means an act committed at the behest of, under the supervision of, or for the benefit of another person.

(9) “Trafficking in persons” means when a victim is subjected to or a person attempts to subject a victim to sex trafficking, forced labor or services, involuntary servitude, or debt bondage by employing one of the following:

(a) physically restraining or threatening to physically restrain another person;

(b) knowingly destroying, concealing, removing, confiscating, or possessing an actual or purported passport or other immigration document, or another actual or purported government identification document, of the victim;

(c) extortion or blackmail;

(d) causing or threatening to cause financial harm to the victim;

(e) facilitating or controlling a victim’s access to a controlled substance; or

(f) coercion.

(10) “Victim of trafficking in persons” or “victim” means a person who has been subjected to the crime of trafficking in persons.

HISTORY: 2012 Act No. 258, Section 1, eff December 15, 2012; 2015 Act No. 7 (S.196), Section 3, eff April 2, 2015.

Effect of Amendment

2015 Act No. 7, Section 3, in (7), substituted “person performing the act” for “person forced to perform the act”; deleted former (7)(g), relating to Section 16‑3‑800; and redesignated the remaining paragraphs accordingly.

CROSS REFERENCES

Interagency task force established to develop and implement State Plan for Prevention of Trafficking in Persons, members, responsibilities, see Section 16‑3‑2050.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Criminal Sexual Conduct Section 9.50, Trafficking in Persons.

**SECTION 16‑3‑2020.** Trafficking in persons; penalties; defenses.

(A) A person who recruits, entices, solicits, isolates, harbors, transports, provides, or obtains, or so attempts, a victim, knowing that the victim will be subjected to sex trafficking, forced labor or services, involuntary servitude or debt bondage through any means or who benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in this subsection, is guilty of trafficking in persons.

(B) A person who recruits, entices, solicits, isolates, harbors, transports, provides, or obtains, or so attempts, a victim, for the purposes of sex trafficking, forced labor or services, involuntary servitude or debt bondage through any means or who benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in subsection (A), is guilty of trafficking in persons.

(C) For a first offense, the person is guilty of a felony and, upon conviction, must be imprisoned not more than fifteen years.

(D) For a second offense, the person is guilty of a felony and, upon conviction, must be imprisoned not more than thirty years.

(E) For a third or subsequent offense, the person is guilty of a felony, and, upon conviction, must be imprisoned not more than forty‑five years.

(F) If the victim of an offense contained in this section is under the age of eighteen, an additional term of fifteen years may be imposed in addition and must be consecutive to the penalty prescribed for a violation of this section.

(G) A person who aids, abets, or conspires with another person to violate the criminal provisions of this section must be punished in the same manner as provided for the principal offender and is considered a trafficker. A person is considered a trafficker if he knowingly gives, agrees to give, or offers to give anything of value so that any person may engage in commercial sexual activity with another person when he knows that the other person is a victim of trafficking in persons.

(H) A business owner who uses his business in a way that participates in a violation of this article, upon conviction, must be imprisoned for not more than ten years in addition to the penalties provided in this section for each violation.

(I) A plea of guilty or the legal equivalent entered pursuant to a provision of this article by an offender entitles the victim of trafficking in persons to all benefits, rights, and compensation granted pursuant to Section 16‑3‑1110.

(J) In a prosecution of a person who is a victim of trafficking in persons, it is an affirmative defense that he was under duress or coerced into committing the offenses for which he is subject to prosecution, if the offenses were committed as a direct result of, or incidental or related to, trafficking. A victim of trafficking in persons convicted of a violation of this article or prostitution may motion the court to vacate the conviction and expunge the record of the conviction. The court may grant the motion on a finding that the person’s participation in the offense was a direct result of being a victim. A victim of trafficking in persons is not subject to prosecution pursuant to this article or prostitution, if the victim was a minor at the time of the offense and committed the offense as a direct result of, or incidental or related to, trafficking.

(K) Evidence of the following facts or conditions do not constitute a defense in a prosecution for a violation of this article, nor does the evidence preclude a finding of a violation:

(1) the victim’s sexual history or history of commercial sexual activity, the specific instances of the victim’s sexual conduct, opinion evidence of the victim’s sexual conduct, and reputation evidence of the victim’s sexual conduct;

(2) the victim’s connection by blood or marriage to a defendant in the case or to anyone involved in the victim’s trafficking;

(3) the implied or express consent of a victim to acts which violate the provisions of this section do not constitute a defense to violations of this section;

(4) age of consent to sex, legal age of marriage, or other discretionary age; and

(5) mistake as to the victim’s age, even if the mistake is reasonable.

(L) A person who violates the provisions of this section may be prosecuted by the State Grand Jury, pursuant to Section 14‑7‑1600, when a victim is trafficked in more than one county or a trafficker commits the offense of trafficking in persons in more than one county.

HISTORY: 2012 Act No. 258, Section 1, eff December 15, 2012; 2015 Act No. 74 (S.183), Section 1, eff June 8, 2015.

Effect of Amendment

2015 Act No. 74, Section 1, in (E), added a comma following “and”; in (G), added the second sentence; and in (J), added the last three sentences.

CROSS REFERENCES

Electronic monitoring, reporting damage to or removing monitoring device, penalty, see Section 23‑3‑540.

Forfeiture, see Section 16‑3‑2090.

Life sentence for person convicted for certain crimes, see Section 17‑25‑45.

Narcotics and controlled substances, prohibited acts A, penalties, see Section 44‑53‑370.

Public inspection of offender registry, see Section 23‑3‑490.

Recording and reporting allegations of federal immigration law violations, centralized tracking database, see Section 8‑30‑10.

Sex offender registry, convictions and not guilty by reason of insanity findings requiring registration, see Section 23‑3‑430.

Unlawful entrance or presence on grounds of domestic violence or trafficking shelter, see Section 16‑3‑2080.

Violent crimes defined, see Section 16‑1‑60.

Library References

Slaves 24.

Westlaw Topic No. 356.

C.J.S. Peonage Sections 2 to 5.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Criminal Sexual Conduct Section 9.50, Trafficking in Persons.

S.C. Jur. Forfeitures Section 10, Due Process Considerations.

**SECTION 16‑3‑2030.** Criminal liability of principal owners of business; loss of profits and government contracts; penalties.

(A) The principal owners of a business, a business entity, including a corporation, partnership, charitable organization, or another legal entity, that knowingly aids or participates in an offense provided in this article is criminally liable for the offense and will be subject to a fine or loss of business license in the State, or both. In addition, the court may consider disgorgement of profit from activity in violation of this article and disbarment from state and local government contracts.

(B) If the principal owners of a business entity are convicted of violating a section of this article, the court or Secretary of State, when appropriate, may:

(1) order its dissolution or reorganization;

(2) order the suspension or revocation of any license, permit, or prior approval granted to it by a state or local government agency; or

(3) order the surrender of its charter if it is organized under state law or the revocation of its certificate to conduct business in the State if it is not organized under state law.

HISTORY: 2012 Act No. 258, Section 1, eff December 15, 2012; 2015 Act No. 74 (S.183), Section 2, eff June 8, 2015.

Effect of Amendment

2015 Act No. 74, Section 2, in (A), added the last sentence.

Library References

Slaves 24.

Westlaw Topic No. 356.

C.J.S. Peonage Sections 2 to 5.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Criminal Sexual Conduct Section 9.50, Trafficking in Persons.

**SECTION 16‑3‑2040.** Restitution for victims of trafficking.

(A) An offender convicted of a violation of this article must be ordered to pay mandatory restitution to the victim as provided in this section.

(B) If the victim of trafficking dies as a result of being trafficked, a surviving spouse of the victim is eligible for restitution. If no surviving spouse exists, restitution must be paid to the victim’s issue or their descendants per stirpes. If no surviving spouse or issue or descendants exist, restitution must be paid to the victim’s estate. A person named in this subsection may not receive funds from restitution if he benefited or engaged in conduct described in this article.

(C) If a person is unable to pay restitution at the time of sentencing, or at any other time, the court may set restitution pursuant to Section 16‑3‑1270.

(D) Restitution for this section, pursuant to Section 16‑3‑1270, means payment for all injuries, specific losses, and expenses, including, but not limited to, attorney’s fees, sustained by a crime victim resulting from an offender’s criminal conduct pursuant to Section 16‑3‑1110(12)(a). In addition, the court may order an amount representing the value of the victim’s labor or services.

(E) Notwithstanding another provision of law, the applicable statute of limitations for a victim of trafficking in persons is pursuant to Section 16‑3‑1110(12)(a).

(F) Restitution must be paid to the victim promptly upon the conviction of the defendant. The return of the victim to his home country or other absence of the victim from the jurisdiction does not prevent the victim from receiving restitution.

HISTORY: 2012 Act No. 258, Section 1, eff December 15, 2012; 2015 Act No. 74 (S.183), Section 3, eff June 8, 2015.

Effect of Amendment

2015 Act No. 74, Section 3, in (D), inserted “, including, but not limited to, attorney’s fees,”, and added the last sentence.

Library References

Criminal Law 1220.

Sentencing and Punishment 2121.

Westlaw Topic Nos. 110, 350H.

C.J.S. Criminal Law Sections 2462 to 2510.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Criminal Sexual Conduct Section 9.50, Trafficking in Persons.

**SECTION 16‑3‑2050.** Interagency task force established to develop and implement State Plan for Prevention of Trafficking in Persons; members; responsibilities; grants.

(A) The Attorney General shall establish an interagency task force to develop and implement a State Plan for the Prevention of Trafficking in Persons. The task force shall meet at least quarterly and should include all aspects of trafficking in persons, including sex trafficking and labor trafficking of both United States citizens and foreign nationals, as defined in Section 16‑3‑2010. The Attorney General also shall collect and publish relevant data to this section on their website.

(B) The task force shall consist of, at a minimum, representatives from:

(1) the Office of the Attorney General, who must be chair;

(2) the South Carolina Department of Labor, Licensing and Regulation;

(3) the South Carolina Police Chiefs Association;

(4) the South Carolina Sheriffs’ Association;

(5) the State Law Enforcement Division;

(6) the Department of Health and Environmental Control Board;

(7) the Office of the Attorney General, South Carolina Crime Victim Services Division;

(8) the South Carolina Commission on Prosecution Coordination;

(9) the Department of Social Services;

(10) a representative from the Office of the Governor;

(11) a representative from the Department of Employment and Workforce; and

(12) two persons appointed by the Attorney General from nongovernmental organizations, especially those specializing in trafficking in persons, those representing diverse communities disproportionately affected by trafficking, agencies devoted to child services and runaway services, and academic researchers dedicated to the subject of trafficking in persons.

(C) The Attorney General shall invite representatives of the United States Department of Labor, the United States Attorneys’ offices, and federal law enforcement agencies’ offices within the State, including the Federal Bureau of Investigations and the United States Immigration and Customs Enforcement office, to be members of the task force.

(D) The task force shall carry out the following activities either directly or through one or more of its constituent agencies:

(1) develop the state plan within eighteen months of the effective date of this act;

(2) coordinate the implementation of the state plan; and

(3) starting one year after the formation of the task force, submit an annual report of its findings and recommendations to the Governor, the Speaker of the House of Representatives, and the President of the Senate on or before December thirty‑first of each calendar year.

(E) The task force shall consider carrying out the following activities either directly or through one or more of its constituent agencies:

(1) coordinate the collection and sharing of trafficking data among government agencies, which data collection must respect the privacy of victims of trafficking in persons;

(2) coordinate the sharing of information between agencies for the purposes of detecting criminal groups engaged in trafficking in persons;

(3) explore the establishment of state policies for time limits for the issuance of Law Enforcement Agency (LEA) endorsements as described in C.F.R. Chapter 8, Section 214.11(f)(1);

(4) establish policies to enable state government to work with nongovernmental organizations and other elements of civil society to prevent trafficking in persons and provide assistance to United States citizens and foreign national victims;

(5) review the existing services and facilities to meet trafficking victims’ needs and recommend a system to coordinate services including, but not limited to, health services, including mental health, housing, education and job training, English as a second language classes, interpreting services, legal and immigration services, and victim compensation;

(6) evaluate various approaches used by state and local governments to increase public awareness of the trafficking in persons, including United States citizens and foreign national victims of trafficking in persons;

(7) mandatory training for law enforcement agencies, prosecutors, and other relevant officials in addressing trafficking in persons;

(8) collect and periodically publish statistical data on trafficking, that must be posted on the Attorney General’s website;

(9) prepare public awareness programs designed to educate potential victims of trafficking in persons and their families on the risks of victimization. These public awareness programs must include, but are not limited to:

(a) information about the risks of becoming a victim, including information about common recruitment techniques, use of debt bondage, and other coercive tactics, risk of maltreatment, rape, exposure to HIV or AIDS and other sexually transmitted diseases, and psychological harm related to victimization in trafficking cases;

(b) information about the risks of engaging in commercial sex and possible punishment;

(c) information about victims’ rights in the State;

(d) methods for reporting suspected recruitment activities; and

(e) information on hotlines and available victims’ services;

(10) preparation and dissemination of awareness materials to the general public to educate the public on the extent of trafficking in persons, both United States citizens and foreign nationals, within the United States and to discourage the demand that fosters the exploitation of persons that leads to trafficking in persons.

(a) The general public awareness materials may include information on the impact of trafficking on individual victims, whether United States citizens or foreign nationals, aggregate information on trafficking in persons worldwide and domestically, and warnings of the criminal consequences of engaging in trafficking in persons. These materials may include pamphlets, brochures, posters, advertisements in mass media, and other appropriate media. All materials must be designed to communicate to the target population.

(b) Materials described in this section may include information on the impact of trafficking in persons on individual victims. However, information on the experiences of individual victims must preserve the privacy of the victim and the victim’s family.

(c) All public awareness programs must be evaluated periodically by the task force to ensure their effectiveness.

(F) To the extent that funds are appropriated, the task force may make grants to or contract with a state agency, local government, or private victim’s service organization to develop or expand service programs for victims. A recipient of a grant or contract shall report annually to the task force the number and demographic information of all victims receiving services pursuant to the grant or contract.

HISTORY: 2012 Act No. 258, Section 1, eff December 15, 2012; 2015 Act No. 7 (S.196), Section 5, eff April 2, 2015; 2015 Act No. 74 (S.183), Section 4, eff June 8, 2015.

Code Commissioner’s Note

Pursuant to 2017 Act No. 96, Section 14, the reference to “State Office of Victim Assistance” in (B)(7) was changed to “Office of the Attorney General, South Carolina Crime Victim Services Division”.

Effect of Amendment

2015 Act No. 7, Section 5, in (B)(2), inserted “Department of”; deleted former (B)(7), relating to the U.S. Dept. of Labor; and redesignated the remaining paragraphs accordingly; and in (C), inserted “Department of Labor, the United States” and inserted a comma following “Attorneys’ offices”.

2015 Act No. 74, Section 4, added (F).

Library References

Criminal Law 1222.1.

Westlaw Topic No. 110.

C.J.S. Criminal Law Sections 2401, 2406 to 2409.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Criminal Sexual Conduct Section 9.50, Trafficking in Persons.

**SECTION 16‑3‑2060.** Civil action for victim of trafficking; statute of limitations.

(A) A person who is a victim of trafficking in persons may bring a civil action in the court of common pleas. The court may award actual damages, compensatory damages, punitive damages, injunctive relief, and other appropriate relief. A prevailing plaintiff also must be awarded attorney’s fees and costs. Treble damages must be awarded on proof of actual damages when the defendant’s acts were wilful and malicious.

(B) Pursuant to Section 16‑3‑1110, the applicable statute of limitations for a crime victim who has a cause of action against an incarcerated offender is tolled and does not expire until three years after the offender’s sentence is completed, including probation and parole, or three years after release from commitment pursuant to Chapter 48, Title 44, whichever is later. However, this provision does not shorten any other tolling period of the statute of limitations which may exist for the victim.

(C) The statute of limitations for the filing of a civil suit does not begin to run until a minor victim has reached the age of majority.

(D) If a victim entitled to sue is under a disability at the time the cause of action accrues, so that it is impossible or impractical for him to bring an action, then the time of the disability is not part of the time limited for the commencement of the action. Disability includes, but is not limited to, insanity, imprisonment, or other incapacity or incompetence.

(E) The running of the statute of limitations may be suspended when a victim could not have reasonably discovered the cause of action due to circumstances resulting from the trafficking situation, such as psychological trauma, cultural and linguistic isolation, and the inability to access services.

(F) A defendant is estopped to assert a defense of the statute of limitations when the expiration of the statute is due to conduct by the defendant inducing the victim to delay the filing of the action or placing the victim under duress.

HISTORY: 2012 Act No. 258, Section 1, eff December 15, 2012.

Library References

Action 5.

Limitation of Actions 31.

Westlaw Topic Nos. 13, 241.

C.J.S. Actions Sections 66 to 67.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Criminal Sexual Conduct Section 9.50, Trafficking in Persons.

**SECTION 16‑3‑2070.** Compensation for victims of trafficking; identity of victim and victim’s family confidential.

(A) Victims of trafficking in persons pursuant to this article are considered victims for purposes of the Victims’ Bill of Rights and are entitled to all appropriate forms of compensation available pursuant to the South Carolina Victim Compensation Fund in accordance with the provisions of Article 13, Chapter 3, Title 16. Victims of trafficking in persons pursuant to this article also are entitled to the rights provided in Article 15, Chapter 3, Title 16.

(B) In addition to the provisions of subsection (A), in a prosecution for violations of the criminal provisions of this article, the identity of the victim and the victim’s family must be kept confidential by ensuring that names and identifying information of the victim and victim’s family are not released to the public, including by the defendant.

(C) Pursuant to Section 16‑3‑1240, it is unlawful, except for purposes directly connected with the administration of the victim compensation fund, for any person to solicit, disclose, receive, or make use of or authorize, knowingly permit, participate in or acquiesce in the use of any list, or names of, or information concerning persons applying for or receiving awards without the written consent of the applicant or recipient. The records, papers, files, and communications of the board, its panel and the director and his staff must be regarded as confidential information and privileged and not subject to disclosure under the Freedom of Information Act as contained in Chapter 4, Title 30.

HISTORY: 2012 Act No. 258, Section 1, eff December 15, 2012.

Code Commissioner’s Note

Pursuant to 2017 Act No. 96, Section 14, the reference to “State Crime Victim’s Compensation Fund” in (A) was changed to “South Carolina Victim Compensation Fund”, and the reference to “victim’s compensation fund” in (C) was changed to “victim compensation fund”.

Library References

Criminal Law 1220.

Westlaw Topic No. 110.

C.J.S. Criminal Law Sections 2462 to 2510.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Criminal Sexual Conduct Section 9.50, Trafficking in Persons.

**SECTION 16‑3‑2080.** Unlawful disclosure; trespassing notice; unlawful entrance or presence on grounds of domestic violence or trafficking shelter; exceptions; penalties.

(A) For purposes of this section:

(1) “Domestic violence shelter” means a facility whose purpose is to serve as a shelter to receive and house persons who are victims of criminal domestic violence and that provides services as a shelter.

(2) “Trafficking shelter” means a confidential location which provides emergency housing for victims of trafficking in persons.

(3) “Grounds” means the real property of the parcel of land upon which a domestic violence or trafficking shelter or a domestic violence or trafficking shelter’s administrative offices are located, whether fenced or unfenced.

(B) A person who maliciously or with criminal negligence publishes, disseminates, or otherwise discloses the location of a trafficking victim, a trafficking shelter, a domestic violence shelter, or another place designated as a trafficking shelter or domestic violence shelter, without the authorization of that trafficking victim, trafficking shelter, or domestic violence shelter, is guilty of a misdemeanor and, upon conviction, must be imprisoned not more than three years.

(C) It is unlawful for a person who has been charged with or convicted of a violation of Section 16‑3‑2020 to enter or remain upon the grounds or structure of a domestic violence or trafficking shelter in which the victim resides or the domestic violence shelter’s administrative offices or the trafficking shelter’s administrative offices.

(D) The domestic violence shelter and trafficking shelter must post signs at conspicuous places on the grounds of the domestic violence shelter, trafficking shelter, the domestic violence shelter’s administrative offices, and the trafficking shelter’s administrative offices which, at a minimum, must read substantially as follows: “NO TRESPASSING—VIOLATORS WILL BE SUBJECT TO CRIMINAL PENALTIES”.

(E) This section does not apply if the person has legitimate business or any authorization, license, or invitation to enter or remain upon the grounds or structure of the domestic violence or trafficking shelter or the domestic violence or trafficking shelter’s administrative offices.

(F) A person who violates this section is guilty of a misdemeanor and, upon conviction, must be fined not more than three thousand dollars or imprisoned for not more than three years, or both. If the person is in possession of a dangerous weapon at the time of the violation, the person is guilty of a felony and, upon conviction, must be fined not more than five thousand dollars or imprisoned for not more than five years, or both.

HISTORY: 2012 Act No. 258, Section 1, eff December 15, 2012.

Library References

Forfeitures 48(1).

Westlaw Topic No. 180.

C.J.S. Customs Duties Sections 286, 291 to 294.

C.J.S. Forfeitures Sections 1, 15 to 21, 30 to 33, 55.

C.J.S. RICO (Racketeer Influenced and Corrupt Organizations) Section 47.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Criminal Sexual Conduct Section 9.50, Trafficking in Persons.

**SECTION 16‑3‑2090.** Forfeiture.

(A)(1) The following are subject to forfeiture:

(a) all monies used, or intended for use, in violation of Section 16‑3‑2020;

(b) all property constituting the proceeds obtained directly or indirectly, for a violation of Section 16‑3‑2020;

(c) all property derived from the proceeds obtained, directly or indirectly, from any sale or exchange for pecuniary gain from a violation of Section 16‑3‑2020;

(d) all property used or intended for use, in any manner or part, to commit or facilitate the commission of a violation for pecuniary gain of Section 16‑3‑2020;

(e) all books, records, and research products and materials, including formulas, microfilm, tapes, and data which are used, or which have been positioned for use, in violation of Section 16‑3‑2020;

(f) all conveyances including, but not limited to, trailers, aircraft, motor vehicles, and watergoing vessels, which are used or intended for use unlawfully to conceal or transport or facilitate a violation of Section 16‑3‑2020. No motor vehicle may be forfeited to the State under this item unless it is used, intended for use, or in any manner facilitates a violation of Section 16‑3‑2020;

(g) all property including, but not limited to, monies, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for any kind of services under Section 16‑3‑2020, and all proceeds including, but not limited to, monies, and real and personal property traceable to any exchange under Section 16‑3‑2020; and

(h) overseas assets of persons convicted of trafficking in persons also are subject to forfeiture to the extent they can be retrieved by the government.

(2) Any property subject to forfeiture may be seized by the investigating agency having authority upon warrant issued by any court having jurisdiction over the property. Seizure without process may be made if the:

(a) seizure is incident to an arrest or a search under a search warrant or an inspection under an administrative inspection warrant;

(b) property subject to seizure has been the subject of a prior judgment in favor of the State in a criminal injunction or forfeiture proceeding based upon Section 16‑3‑2020;

(c) the investigating agency has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or

(d) the investigating agency has probable cause to believe that the property was used or is intended to be used in violation of Section 16‑3‑2020.

(3) In the event of seizure, proceedings under this section regarding forfeiture and disposition must be instituted within a reasonable time.

(4) Any property taken or detained under this section is not subject to replevin but is considered to be in the custody of the investigating agency making the seizure subject only to the orders of the court having jurisdiction over the forfeiture proceedings. Property is forfeited and transferred to the government at the moment of illegal use. Seizure and forfeiture proceedings confirm the transfer.

(5) For the purposes of this section, whenever the seizure of property subject to seizure is accomplished as a result of a joint effort by more than one law enforcement agency, the law enforcement agency initiating the investigation is considered to be the agency making the seizure.

(6) Law enforcement agencies seizing property pursuant to this section shall take reasonable steps to maintain the property. Equipment and conveyances seized must be removed to an appropriate place for storage. Monies seized must be deposited in an interest bearing account pending final disposition by the court unless the seizing agency determines the monies to be of an evidential nature and provides for security in another manner.

(7) When property and monies of any value as defined in this article or anything else of any value is seized, the law enforcement agency making the seizure, within ten days or a reasonable period of time after the seizure, shall submit a report to the appropriate prosecution agency.

(a) The report must provide the following information with respect to the property seized:

(i) description;

(ii) circumstances of seizure;

(iii) present custodian and where the property is being stored or its location;

(iv) name of owner;

(v) name of lienholder; and

(vi) seizing agency.

(b) If the property is a conveyance, the report shall include the:

(i) make, model, serial number, and year of the conveyance;

(ii) person in whose name the conveyance is registered; and

(iii) name of any lienholders.

(c) In addition to the report, the law enforcement agency shall prepare for dissemination to the public upon request a report providing the following information:

(i) a description of the quantity and nature of the property and money seized;

(ii) the seizing agency;

(iii) the make, model, and year of a conveyance; and

(iv) the law enforcement agency responsible for the property or conveyance seized.

(d) Property or conveyances seized by a law enforcement agency or department may not be used by officers for personal purposes.

(B)(1) Forfeiture of property must be accomplished by petition of the Attorney General or his designee or the circuit solicitor or his designee to the court of common pleas for the jurisdiction where the items were seized. The petition must be submitted to the court within a reasonable time period following seizure and shall provide the facts upon which the seizure was made. The petition shall describe the property and include the names of all owners of record and lienholders of record. The petition shall identify any other persons known to the petitioner to have interests in the property. Petitions for the forfeiture of conveyances also shall include the make, model, and year of the conveyance, the person in whose name the conveyance is registered, and the person who holds the title to the conveyance. A copy of the petition must be sent to each law enforcement agency which has notified the petitioner of its involvement in effecting the seizure. Notice of hearing or rule to show cause must be directed to all persons with interests in the property listed in the petition, including law enforcement agencies which have notified the petitioner of their involvement in effecting the seizure. Owners of record and lienholders of record may be served by certified mail, to the last known address as appears in the records of the governmental agency which records the title or lien.

(2) The judge shall determine whether the property is subject to forfeiture and order the forfeiture confirmed. The Attorney General or his designee or the circuit solicitor or his designee has the burden of proof to establish by a preponderance of the evidence that the property is subject to forfeiture. If the judge finds a forfeiture, he shall then determine the lienholder’s interest as provided in this article. The judge shall determine whether any property must be returned to a law enforcement agency pursuant to this section.

(3) If there is a dispute as to the division of the proceeds of forfeited property among participating law enforcement agencies, this issue must be determined by the judge. The proceeds from a sale of property, conveyances, and equipment must be disposed of pursuant to this section.

(4) All property, conveyances, and equipment which will not be reduced to proceeds may be transferred to the law enforcement agency or agencies or to the prosecution agency. Upon agreement of the law enforcement agency or agencies and the prosecution agency, conveyances and equipment may be transferred to any other appropriate agency. Property transferred may not be used to supplant operating funds within the current or future budgets. If the property seized and forfeited is an aircraft or watercraft and is transferred to a state law enforcement agency or other state agency pursuant to the provisions of this subsection, its use and retainage by that agency is at the discretion and approval of the Department of Administration.

(5) If a defendant or his attorney sends written notice to the petitioner or the seizing agency of his interest in the subject property, service may be made by mailing a copy of the petition to the address provided, and service may not be made by publication. In addition, service by publication may not be used for a person incarcerated in a Department of Corrections facility, a county detention facility, or other facility where inmates are housed for the county where the seizing agency is located. The seizing agency shall check the appropriate institutions after receiving an affidavit of nonservice before attempting service by publication.

(6) Any forfeiture may be effected by consent order approved by the court without filing or serving pleadings or notices provided that all owners and other persons with interests in the property, including participating law enforcement agencies, entitled to notice under this section, except lienholders and agencies, consent to the forfeiture. Disposition of the property may be accomplished by consent of the petitioner and those agencies involved. Persons entitled to notice under this section may consent to some issues and have the judge determine the remaining issues.

(7) Disposition of forfeited property under this section must be accomplished as follows:

(a) Property forfeited under this subsection shall first be applied to payment to the victim. The return of the victim to his home country or other absence of the victim from the jurisdiction shall not prevent the victim from receiving compensation.

(b) The victim and the South Carolina Victim Compensation Fund shall each receive one‑fourth, and law enforcement shall receive one‑half of the value of the forfeited property.

(c) If no victim is named, or reasonable attempts to locate a named victim for forfeiture and forfeiture fails, then all funds shall revert to the South Carolina Victim Compensation Fund and law enforcement to be divided equally.

(d) If federal law enforcement becomes involved in the investigation, they shall equitably split the share local law enforcement receives under this section, if they request or pursue any of the forfeiture. The equitable split must be pursuant to 21 U.S.C. Section 881(e)(1)(A) and (e)(3), 18 U.S.C. Section 981(e)(2), and 19 U.S.C. Section 1616a.

(C)(1) An innocent owner, manager, or owner of a licensed rental agency or any common carrier or carrier of goods for hire may apply to the court of common pleas for the return of any item seized. Notice of hearing or rule to show cause accompanied by copy of the application must be directed to all persons and agencies entitled to notice. If the judge denies the application, the hearing may proceed as a forfeiture hearing.

(2) The court may return any seized item to the owner if the owner demonstrates to the court by a preponderance of the evidence:

(a) in the case of an innocent owner, that the person or entity was not a consenting party to, or privy to, or did not have knowledge of, the use of the property which made it subject to seizure and forfeiture; or

(b) in the case of a manager or an owner of a licensed rental agency, a common carrier, or a carrier of goods for hire, that any agent, servant, or employee of the rental agency or of the common carrier or carrier of goods for hire was not a party to, or privy to, or did not have knowledge of, the use of the property which made it subject to seizure and forfeiture.

If the licensed rental agency demonstrates to the court that it has rented the seized property in the ordinary course of its business and that the tenant or tenants were not related within the third degree of kinship to the manager or owner, or any agents, servants, or employees of the rental agency, then it is presumed that the licensed rental agency was not a party to, or privy to, or did not have knowledge of, the use of the property which made it subject to seizure and forfeiture.

(3) The lien of an innocent person or other legal entity, recorded in public records, shall continue in force upon transfer of title of any forfeited item, and any transfer of title is subject to the lien, if the lienholder demonstrates to the court by a preponderance of the evidence that he was not a consenting party to, or privy to, or did not have knowledge of, the involvement of the property which made it subject to seizure and forfeiture.

(D) A person who uses property or a conveyance in a manner which would make the property or conveyance subject to forfeiture except for innocent owners, rental agencies, lienholders, and the like as provided for in this section, is guilty of a misdemeanor and, upon conviction, must be imprisoned for not less than thirty days nor more than one year, fined not more than five thousand dollars, or both. The penalties prescribed in this section are cumulative and must be construed to be in addition to any other penalty prescribed by another provision of this article.

HISTORY: 2012 Act No. 258, Section 1, eff December 15, 2012.

Code Commissioner’s Note

At the direction of the Code Commissioner, references in this section to the offices of the former State Budget and Control Board, Office of the Governor, or other agencies, were changed to reflect the transfer of them to the Department of Administration or other entities, pursuant to the directive of the South Carolina Restructuring Act, 2014 Act No. 121, Section 5(D)(1), effective July 1, 2015.

Pursuant to 2017 Act No. 96, Section 14, the references to “Victim’s Compensation Fund” in (B)(7)(b) and (B)(7)(c) were changed to “Victim Compensation Fund”.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Forfeitures Section 4, Character of Forfeiture Prosecutions.

S.C. Jur. Forfeitures Section 5, Statutory Basis.

S.C. Jur. Forfeitures Section 9, Statutes of Limitation.

S.C. Jur. Forfeitures Section 10, Due Process Considerations.

S.C. Jur. Forfeitures Section 11, Notice and Opportunity to be Heard.

S.C. Jur. Forfeitures Section 13, Burden and Standard of Proof.

S.C. Jur. Forfeitures Section 19, Judicial Approach.

**SECTION 16‑3‑2100.** Posting of information regarding National Human Trafficking Resource Center Hotline in certain establishments; fines.

(A) The following establishments are required to post the information contained in subsection (B) regarding the National Human Trafficking Resource Center Hotline:

(1) an establishment which has been declared a nuisance for prostitution pursuant to Chapter 43, Title 15;

(2) an adult business, including a nightclub, bar, restaurant, or another similar establishment in which a person appears in a state of sexually explicit nudity, as defined in Section 16‑15‑375, or seminudity, as defined in Section 57‑25‑120;

(3) businesses and establishments that offer massage or bodywork services by any person who is not licensed under Chapter 30, Title 40;

(4) emergency rooms within any hospital;

(5) urgent care centers;

(6) any hotel, motel, room, or accommodation furnished to transients for which fees are charged in this State;

(7) all agricultural labor contractors and agricultural labor transporters as defined pursuant to Section 41‑27‑120; and

(8) all airports, train stations, bus stations, rest areas, and truck stops.

(B) The information must be posted in each public restroom for the business or establishment and a prominent location conspicuous to the public at the entrance of the establishment where posters and notices are customarily posted on a poster no smaller than eight and one‑half by eleven inches in size and must state in both English and Spanish on the same poster information relevant to the hotline, including the following or language substantially similar:

“If you or someone you know is being forced to engage in any activity and cannot leave, whether it is commercial sex, housework, farm work, or any other activity, call the National Human Trafficking Resource Center Hotline at 1‑888‑373‑7888 to access help and services. Victims of human trafficking are protected under federal law and the laws of South Carolina. The hotline is:

(1) available twenty‑four hours a day, seven days a week;

(2) operated by a nonprofit, nongovernmental organization;

(3) anonymous and confidential;

(4) accessible in one hundred seventy languages;

(5) able to provide help, referral to services, training, and general information.”

(C) The Department of Revenue, the State Law Enforcement Division, and the Department of Transportation, as appropriate depending on the regulatory control or authority the respective department exercises over the establishment, are directed to provide each establishment with the notice required to be posted by this section. The departments shall post on the departments’ websites a sample of the notice required to be posted which must be accessible for download. The business must download and post the notice in not less than sixteen point font.

(D) The Department of Revenue, the State Law Enforcement Division, or the Department of Transportation, as appropriate, is authorized to issue a written warning to an establishment which fails to post the required notice provided in this section and may assess a fine of not more than fifty dollars for each subsequent violation. Each day that the establishment remains in violation of this section is considered a separate and distinct violation and the establishment may be fined accordingly.

(E) The South Carolina Human Trafficking Task Force, Department of Revenue, and Department of Transportation are directed to collaborate on the design of the required notice to be posted and may partner to develop materials, and shall have the design finalized no later than one hundred twenty days after the effective date of this section. Establishments required to post the notice must be in compliance no later than six months after the effective date of this action.

(F) This section does not apply to establishments providing entertainment in theatres, concert halls, art centers, museums, or similar establishments that are devoted primarily to the arts or theatrical performances when the performances presented are expressing matters of serious literary, artistic, scientific, or political value.

HISTORY: 2015 Act No. 7 (S.196), Section 4, eff April 2, 2015.