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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Pickens County

Honorable Daniel McLeod Coble, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MELANIE CROMER MCCLAIN,

APPELLANT

APPELLATE CASE NO. 2024-000472

INITIAL REPLY BRIEF OF APPELLANT

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ARGUMENTS IN REPLY

1. The trial judge erred in refusing to allow cross-examination of a co-defendant about his pending charges in another county.

Questioning co-defendant, Albert Dustin Pace, about a pending distribution of methamphetamine from March 5, 2023, in Anderson County should have been allowed pursuant to Rule 608(c), SCRE and the Confrontation Clause of the Sixth Amendment. Rule 608(c) allows a defendant to cross-examine a witness for "[b]ias, prejudice or any motive to misrepresent." Rule 608(c), SCRE. In State v. Gillian, 360 S.C. 433, 450–51, 602 S.E.2d 62, 71 (Ct. App. 2004), aff'd as modified, 373 S.C. 601, 646 S.E.2d 872 (2007), the South Carolina Court of Appeals wrote:

> The primary interest secured by the Confrontation Clause of the Sixth Amendment is the right to cross-examination. State v. Shuler, 344 S.C. 604, 545 S.E.2d 805 (2001); Starnes v. State, 307 S.C. 247, 414 S.E.2d 582 (1991); see also Graham, 314 S.C. at 385, 444 S.E.2d at 527 (specifically included in defendant's Sixth Amendment right to confront witness is right to meaningful cross-examination of adverse witnesses). The Confrontation Clause guarantees a defendant the opportunity to cross-examine a witness concerning bias. Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); State v. Brown, 303 S.C. 169, 399 S.E.2d 593 (1991); see also Mizzell, 349 S.C. at 331, 563 S.E.2d at 317 (defendant has right to cross-examine witness concerning bias under Confrontation Clause). Considerable latitude is allowed in the cross-examination of a witness for potential bias. State v. Clark, 315 S.C. 478, 445 S.E.2d 633 (1994); Brown, 303 S.C. at 171, 399 S.E.2d at 594; State v. McFarlane, 279 S.C. 327, 306 S.E.2d 611 (1983). On cross-examination, any fact may be elicited which tends to show interest, bias, or partiality of the witness. Mizzell, 349 S.C. at 331, 563 S.E.2d at 317; State v. Starnes, 340 S.C. 312, 531 S.E.2d 907 (2000); State v. Brewington, 267 S.C. 97, 226 S.E.2d 249 (1976). The appropriate question under a Confrontation Clause analysis is whether there has been any interference with the defendant's opportunity for effective cross-examination at trial. Kentucky v. Stincer, 482 U.S. 730, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987); Shuler, 344 S.C. at 624, 545 S.E.2d at 815; Starnes, 307 S.C. at 250, 414 S.E.2d at 583.

The trial judge erred in refusing to allow the cross-examination of Pace to show bias. Co-defendant Pace faced the same trafficking methamphetamine charge as Appellant as well as an

additional subsequent distribution of methamphetamine charge from another county that could result in enhanced penalties as a second offense. There was a substantial possibility that Pace would give biased testimony in the hopes of mitigating his exposure on both charges.

In Smalls v. State, 422 S.C. 174, 182–83, 810 S.E.2d 836, 840 (2018), the South Carolina Supreme Court wrote:

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

Pace's pending distribution of methamphetamine charge had a legitimate tendency to question Pace's credibility. The pending charge was compelling impeachment evidence to show bias. The trial judge erred in refusing to allow cross-examination of Pace about his other pending charge.

The fact that the requested cross-examination was about a pending charge does not outweigh Appellant's constitutional right to confront the witness. In State v. Mizzell, 349 S.C. 326, 334, 563 S.E.2d 315, 319 (2002), the South Carolina Supreme Court addressed the ability to cross-examine a co-conspirator witness about a potential sentence the witness faced and wrote, "We believe the defendant's Sixth Amendment right to effective cross-examination in this case outweighs the right of the State to shield the jury from knowledge of the possible sentence for a

defendant who faces the same charges as a witness against him." The present case does not involve a limitation on questioning about sentencing, as in Mizzell. In the same way, however, that shielding the jury from knowledge of the possible sentence the defendant faced did not outweigh the defendant's Sixth Amendment right to effectively cross-examination in Mizzell, the fact that the requested cross-examination in the present case was about a pending charge does not outweigh Appellant's constitutional right to confront the witness. Rule 404(b) does not exclude the proper cross-examination of Pace about the pending distribution of methamphetamine charge.

Evidence of Pace's bias would have been compelling impeachment evidence. The error in refusing to allow the proper cross-examination is not harmless. The State's evidence in the present case was based on constructive possession. Appellant, Pace, and Shawna Johnston were all charged with trafficking based on constructive possession of the methamphetamine found in the brown camo bag. The jury had to determine if Appellant exercised dominion and control over the bag. As Pace denied knowledge of the contents of the bag (Tr. p. 262, lines 1-15), his testimony was critical and Appellant should have been able to explore potential bias by questioning him about the pending distribution of methamphetamine charge. The limitation on the cross-examination about the additional distribution of methamphetamine was not made harmless by Appellant's cross-examination of Pace about the charges he faced as a result of the traffic stop with Appellant.

In arguing that the limitation on cross-examination was harmless the State writes, "Also, the question about other meth charges was asked in front of the jury and while the trial judge struck the question from the record, the jury still heard the question." (BOR p. 11). Defense counsel asked Pace, "You've – you know, you were saying it's just marijuana. You don't – you

haven't been charged with any other kind of methamphetamine charge?" (Tr. p. 279, lines 23-25). The State objected and the judge sustained the objection. (Tr. p. 280, line 1-2). The judge sent the jury out, heard arguments, and allowed a proffer of questioning Pace about the pending distribution of methamphetamine charge. (Tr. pp. 280-288). When the jury returned the judge instructed them, "All right. Ladies and gentlemen, the last question has been stricken from the record. And y'all are to disregard that during your deliberations." (Tr. p. 288, lines 16-18). Jurors are presumed to follow the law as instructed to them. See State v. Washington, 431 S.C. 394, 411, 848 S.E.2d 779, 788 (2020) citing State v. Grovenstein, 335 S.C. 347, 353, 517 S.E.2d 216, 219 (1999). The jury was instructed to disregard the question and the jury is presumed to have followed this instruction. The fact the question was asked in front of the jury but then stricken and the jury instructed to disregard does not make the limitation harmless.

Additionally, defense counsel argued, "Judge, he just opened the door when he said, I used to do meth in my younger days." (Tr. p. 280, lines 23-24). The cross-examination about the pending distribution of methamphetamine was proper and needed no door opened for admission. The door, however, was opened and the cross-examination should have been allowed. The error in refusing to allow the proper cross-examination was not harmless.

2. **The trial judge's error in refusing to allow cross-examination of a co-defendant about counterfeit bills he had at the time of arrest and then prohibiting counsel from referencing the counterfeit bills in closing argument was not harmless.**

The trial judge erred in refusing to allow cross-examination of Pace about the counterfeit bills he had on the night he was arrested and then prohibiting reference to the counterfeit bills in closing argument. As discussed in the main brief, the counterfeit bill evidence is not the type of third-party guilt evidence limited by State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941). The evidence was discovered during the arrests of the co-defendants and was part of the investigation of the case. The counterfeit bill evidence did not simply cast a bare suspicion or raise a conjectural inference in this constructive possession case. The counterfeit bills were connected to the crime because they were found in the possession of the co-defendants when they were arrested for constructively possessing trafficking weight methamphetamine. Pace, Appellant, and Shawna Johnston were all charged with trafficking methamphetamine based on constructive possession. Only Johnston and Pace, however, had counterfeit bills. While all three could have constructively possessed the bag containing methamphetamine, Appellant had a right to present a defense that the counterfeit bills made it more likely that that Pace and Johnston exercised dominion and control over the methamphetamine rather than Appellant.

The error prevented Appellant from presenting a complete defense. As the Court wrote in Holmes v. South Carolina, 547 U.S. 319, 324–25, 126 S. Ct. 1727, 1731, 164 L. Ed. 2d 503 (2006):

> "[S]tate and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials." United States v. Scheffer, 523 U.S. 303, 308, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998); see also Crane v. Kentucky, 476 U.S. 683, 689–690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986); Marshall v. Lonberger, 459 U.S. 422, 438, n. 6, 103 S.Ct. 843, 74 L.Ed.2d 646 (1983); Chambers v. Mississippi, 410 U.S. 284, 302–303, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); Spencer v. Texas, 385 U.S. 554, 564, 87 S.Ct. 648, 17 L.Ed.2d 606 (1967). This latitude, however, has limits. "Whether rooted directly

> in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' " Crane, supra, at 690, 106 S.Ct. 2142 (quoting California v. Trombetta, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984); citations omitted). This right is abridged by evidence rules that "infring[e] upon a weighty interest of the accused" and are " 'arbitrary' or 'disproportionate to the purposes they are designed to serve.' " Scheffer, supra, at 308, 118 S.Ct. 1261 (quoting Rock v. Arkansas, 483 U.S. 44, 58, 56, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987)).

Respondent misunderstands Holmes writing, "Holmes v. South Carolina expanded Gregory by holding that "where there is evidence of defendant's guilty [sic], especially under strong forensic evidence, proffered evidence about a third party's alleged guilt may (or perhaps must) be excluded." (BOR p. 12). The above quote appears in the syllabus of the United States Supreme Court case and is criticizing the findings, in State v. Gay, 343 S.C. 543, 541 S.E.2d 541 (2001), and State v. Holmes, 361 S.C. 333, 605 S.E.2d 19 (2004), radically changing and extending the rule in State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941). The full portion of the syllabus reads:

> In Gregory, the South Carolina Supreme Court adopted and applied a rule intended to be of this type. In Gay and this case, however, that court radically changed and extended the Gregory rule by holding that, where there is strong evidence of a defendant's guilt, especially strong forensic evidence, proffered evidence about a third party's alleged guilt may (or perhaps must) be excluded. Under this rule, the trial judge does not focus on the probative value or the potential adverse effects of admitting the defense evidence of third-party guilt. Instead, the critical inquiry concerns the strength of the prosecution's case: If the prosecution's case is strong enough, the evidence of third-party guilt is excluded even if that evidence, if viewed independently, would have great probative value and even if it would not pose an undue risk of harassment, prejudice, or confusion of the issues. Furthermore, as applied below, the rule seems to call for little, if any, examination of the credibility of the prosecution's witnesses or the reliability of its evidence.
>
> By evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt. Because the rule applied below did not heed this point, the rule is "arbitrary" in the sense that it does not rationally serve the end that the Gregory rule and other similar third-party guilt rules were designed to further.

> Nor has the State identified any other legitimate end served by the rule. Thus, the rule violates a criminal defendant's right to have " 'a meaningful opportunity to present a complete defense.' " Crane, supra, at 690, 106 S.Ct. 2142. Pp. 1731–1735.

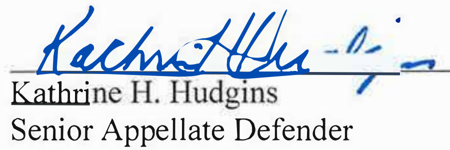
Holmes v. South Carolina, 547 U.S. 319, 320, 126 S. Ct. 1727, 1729, 164 L. Ed. 2d 503 (2006). As the Court noted at the beginning of the opinion, "This case presents the question whether a criminal defendant's federal constitutional rights are violated by an evidence rule under which the defendant may not introduce proof of third-party guilt if the prosecution has introduced forensic evidence that, if believed, strongly supports a guilty verdict." Holmes, 547 U.S. at 321, 126 S. Ct. at 1729. The Court in Holmes vacated the judgment of the South Carolina Supreme Court and remanded. In the present case, the exclusion of the counterfeit bill evidence as inadmissible third-party guilt evidence prevented Appellant from presenting a complete defense. This Court should reverse.

The fact Agent Daw testified, without objection, that an employee of the detention center found six hundred and sixty ($660.00) dollars of counterfeit twenty ($20.00) dollar bills in co-defendant Shawna Johnston's purse and sixty ($60.00) dollars in counterfeit bills in co-defendant Pace's wallet. (Tr. p. 129, lines 14-20; p. 138, lines 11-17) does not render the error harmless. When defense counsel asked Pace on cross-examination about the counterfeit bills, the State objected, the judge sustained the objection and advised the jury to disregard. (Tr. p. 268, line 25 – p. 269, lines 1-7). When defense counsel brought up the counterfeit bills in closing argument, the State objected, a bench conference held, and no further mention of the counterfeit bills was made during closing argument. (Tr. p. 340, line 23 – p. 341, lines 1-6). The jury was specifically instructed to disregard evidence that tended to prove that the co-defendants rather than Appellant exercised dominion and control over the bag where the drugs were found. The

exclusion of the counterfeit bill evidence was error. The error was not harmless because it prevented Appellant from presenting a complete defense. The error requires reversal.

CONCLUSION

Based on the above arguments, this Court should reverse the conviction and remand for a new trial.



Kathrine H. Hudgins
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ATTORNEY FOR APPELLANT

This 29th day of July, 2025.

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SC Court of Appeals

STATE OF SOUTH CAROLINA

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Appeal from Pickens County

Honorable Daniel McLeod Coble, Circuit Court Judge

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MELANIE CROMER MCCLAIN,

APPELLANT

APPELLATE CASE NO. 2024-000472

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies true copies of the Initial Reply Brief of Appellant and Designation of Matter in the above-referenced case have been served upon Ambree M. Muller, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 29th day of July, 2025.

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From: Warren, Kaylynn
Sent: Tuesday, July 29, 2025 10:36 AM
To: Ambree Muller
Cc: Hudgins, Kathrine; Grace Sommer
Subject: 2024-000472 The State v. Melanie Cromer McClain
Attachments: 2024-000472 The State v. Melanie Cromer McClain Initial Reply Brief of Appellant.pdf; AG Cover Letter-IRBOA.pdf

Good Morning,

Attached for service in the above-referenced case is the Initial Reply Brief of Appellant which will be filed today, July 29, 2025, with the Court of Appeals via email filing.

Respectfully,
Kaylynn

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