

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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JUN 24 2015

THE STATE,

S.C. Supreme Court  
RESPONDENT,

V.

CURTIS J. SIMMS,

APPELLANT

APPELLATE CASE NO. 2013-001219

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Appeal from Richland County

Diane Schafer Goodstein, Circuit Court Judge

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Opinion No. 27528

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PETITION FOR REHEARING

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Pursuant to Rule 221(a), SCACR, appellant requests rehearing because the majority of this Court may have overlooked the fact that the dissent is correct that neither this Court nor the courts of England prior to 1712 ever created a common law crime of breach of peace of a high and aggravated nature (“BPHAN”). The majority wrongly claims an agreement with the dissent that BPHAN already exists. This reading of the dissent is incorrect. The dissent only agrees that the common law crime of simple breach of peace exists. It does not follow that because simple breach of peace exists, that BPHAN exists or was ever created. If this were so, then a solicitor could simply add “high and aggravated” to any existing offense and create a new crime, even if it

had never been defined by the Legislature or this Court. A creative solicitor could charge someone who dumps a large amount of trash with Littering of a High and Aggravated Nature. See Arlo Guthrie, *Alice's Restaurant Massacree* (Warn. Bros. 1967). As the dissent points out, due to the destruction of the records of State v. Mason, 108 S.C. 410, 94 S.E. 870 (1918), the name of the creative solicitor (not judge or legislator) who invented BPHAN is lost to history.

The dissent's analysis is not just "semantics" as characterized by the majority in footnote 3. The dissent's position is that the mere mention of a practice at the circuit court level or in a statute—without more—does not demonstrate intent to create or sanction a new legal animal. It takes more than the wheeling and dealing of circuit judges and lawyers to create a new crime or a new cause of action. It takes more than a passing reference in a statute. This principle is conclusively demonstrated by this Court's opinion in Nocher v. Nocher, 268 S.C. 503, 234 S.E.2d 884 (1977).

Nocher dealt with something called a divorce a mensa et thoro. Nocher at 506, 234 S.E.2d at 885. This meant a "divorce from table and bed." Id. at 508, 234 S.E.2d at 886 (citing Black's Law Dictionary (4<sup>th</sup> ed)). It was a limited divorce which sanctioned the wife's refusal to cohabit with her husband. Id. citing 24 Am.Jur.2d, Divorce and Separation, § 3. Trial courts of the time were granting these limited divorces. Id. at 510, 234 S.E.2d at 887. This Court said in Nocher, "We are not unaware of the fact that limited divorces have been granted at the trial level (unappealed) in this State on the theory that there was a cause of action for a divorce a mensa et thoro." Id. Indeed, a search on Westlaw reveals at least twenty-nine appellate decisions going back to 1801 mentioning divorces a mensa et thoro prior to Nocher. See Morris v. Morris, 268 S.C. 104, 232 S.E.2d 326 (1977); Heckle v. Heckle, 266 S.C. 355, 223 S.E.2d 590 (1976); Smith v. Smith, 264 S.C. 624, 216 S.E.2d 541 (1975); Underwood v. Underwood, 257 S.C. 235, 185

S.E.2d 370 (1971); Lowe v. Lowe, 256 S.C. 243, 182 S.E.2d 75 (1971); Gardner v. Gardner 253 S.C. 296, 170 S.E.2d 372 (1969); Mann v. Mann, 252 S.C. 160, 165 S.E.2d 632 (1969); Brown v. Brown, 250 S.C. 114, 156 S.E.2d 641 (1967); Cheatham v. Cheatham, 245 S.C. 579, 141 S.E.2d 813 (1965); Foster v. Nordman, 244 S.C. 485, 137 S.E.2d 600 (1964); Rooney v. Rooney, 242 S.C. 503, 131 S.E.2d 618 (1963); Brewer v. Brewer, 242 S.C. 9, 129 S.E.2d 736 (1963); Brown v. Brown, 239 S.C. 444, 123 S.E.2d 772 (1962); Hyder v. Hyder, 231 S.C. 134, 97 S.E.2d 505 (1957); Miller v. Miller, 225 S.C. 274, 82 S.E.2d 119 (1954); Machado v. Machado, 220 S.C. 90, 66 S.E.2d 629 (1951); Kahn v. Kahn, 213 S.C. 369, 49 S.E.2d 570 (1948); Jeter v. Jeter, 193 S.C. 278, 8 S.E.2d 490 (1940); Alexander v. Alexander, 164 S.C. 466, 162 S.E. 437 (1932); Scheper v. Scheper, 125 S.C. 89, 118 S.E.2d 178 (1923); McCreery v. Davis, 44 S.C. 195, 22 S.E. 178 (1895); Mattison v. Mattison, 20 S.C. Eq. 387 (1847); State v. Barefoot, 31 S.C.L. 209 (1845); Shields v. Jolly, 18 S.C. Eq. 99 (1844); Young v. Naylor, 10 S.C. Eq. 383 (1833); Taylor v. Taylor, 4 S.C. Eq. 167 (1811); Prather v. Prather, 4 S.C. Eq. 33 (1809); In re Anonymous, 2 S.C. Eq. 198 (1803); Jelineau v. Jelineau, 2 S.C. Eq. 45 (1801).

Nocher also noted that divorces a mensa et thoro were mentioned in a statute. Nocher at 509, 234 S.E.2d at 886. Section 20-113.1 of the South Carolina Code as it existed in 1977 stated, “In all actions for divorce a mensa et thoro, allowances of alimony and suit money and allowances of alimony and suit money pendente lite shall be made according to the principles controlling such allowance in actions for divorce a vinculo matrimonii.” Nocher at 509, 234 S.E.2d at 886.

Therefore the Court in Nocher was confronted with a type of divorce used in common practice in the trial courts, that had been mentioned at least twenty-nine times in appellate decisions, and was called an “action” in a statute. Despite all of these common law and statutory

references to divorces a mensa et thoro, the Nocher Court concluded they did not exist. Nocher at 509-10, 234 S.E.2d at 887. The Court stated, “The cited cases contain no issue requiring a determination of whether Section 20-113.1 authorized a cause of action for a limited divorce.” Id. Examining the divorce statute, the court found that the grounds for a divorce a mensa et thoro had never been stated, “**without which the cause of action could not be created.**” Id. at 510, 234 S.E.2d at 887 (emphasis added). The Court concluded that a “cause of action for a limited divorce a mensa et thoro does not exist in South Carolina, either by virtue of the common law or statute.” Id.

The Court’s reasoning in Nocher applies with equal force to BPHAN. Since neither the Legislature nor the appellate courts ever made a decision to create a cause of action for a divorce a mensa et thoro, the Nocher Court concluded it did not exist. The mention of divorce a mensa et thoro in twenty-nine prior cases dating back to 1801 did not mean it existed. The mention of the “action” of divorce a mensa et thoro in a statute did not mean it existed. The principle of Nocher is that a cause of action (or a crime) must be intentionally created and its grounds (or elements) stated with specificity.

Applying Nocher, nothing in the common law or in any statute purports to create the crime of BPHAN. Nothing in the common law or in any statute defines the elements. Nowhere are its aggravators—including in the majority decision in this case—defined. Compare the string cite above mentioning “divorce a mensa et thoro” with the singular cite in the majority opinion mentioning “BPHAN” prior to Simms: State v. Mason, 108 S.C. 410, 94 S.E.2d 870 (1918). Just as in Nocher, a statute mentions BPHAN, but does not state its elements or its aggravators. See S.C. Code Ann. § 22-5-150. The majority correctly states that section 22-5-150 only allows BPHAN to be tried in circuit court. Nothing in section 22-5-150 purports to create a new crime

or define BPHAN. This statute does not demonstrate the Legislature's intent to create the crime of BPHAN. See Adkins v. South Carolina Dep't Corrs., 360 S.C. 413, 418, 602 S.E.2d 51, 54 (2004) (holding that wage statute did not create a private right of action for inmates and stating, "The primary consideration in deciding whether a private cause of action should be implied under a criminal statute is legislative intent."). Therefore, this code section cannot be relied upon as the source of BPHAN.

The dissent painstakingly traced the origins of breach of the peace. The dissent found no traces of BPHAN in the common law of England. Nothing in the majority opinion disputes the dissent's research. As shown by the dissent and the principle embodied in Nocher, nothing cited by the majority can show that BPHAN was ever intentionally created by this Court or the Legislature.

And perhaps the question that resolves **whether** BPHAN exists is the question of whether BPHAN **should** exist. This Court has the power to eliminate BPHAN even if it does exist. See Russo v. Sutton, 310 S.C. 200, 422 S.E.2d 750 (1992) (abolishing criminal conversation and alienation of affections and stating, "The common law changes when necessary to serve the needs of the people."). If the majority's opinion stands, solicitors will have at their disposal a crime defined "in broad terms" with aggravators vaguely defined as a "wide variety of factual circumstances." Simms, at 5-6. South Carolina's citizens are now in jeopardy of serving ten years in prison based on this amorphous crime. Aggressive solicitors can now overcharge garden variety breaches of the peace as BPHAN in hope of forcing a guilty plea.

BPHAN is too powerful a weapon for the State to be granted by accident and without democratic debate. Solicitors can now cite Simms any time they want to punish an individual for unpopular views. It does not take much thought to imagine such a vague charge being used for

mischief or to stifle political dissent. Would Judge Perry have needed to defend against a possible ten-year sentence when he represented Gloria Rackley after she was arrested for sitting in the whites-only emergency room in Orangeburg? See Rackley v. Board of Trustees of Orangeburg Reg. Hosp., 310 F.2d 141, 142 (4<sup>th</sup> Cir. 1962) (Rackley was arrested for “disturbing the business of a hospital”). See also Bouie v. City of Columbia, 378 U.S. 347 (1964) (Judge Perry represented two college students convicted of trespass for a sit-in). Would Chief Justice Finney have represented the Friendship Nine on a BPHAN charge when they staged a sit-in at McCrory’s Five and Dime in Rock Hill in 1961? See 54 Years Later, South Carolina Court Clears ‘Friendship Nine’, New York Times, January 28, 2015. Would they have served ten years in prison for protesting segregation?

A drunken fight after a Gamecock football game does not compare to the civil rights movement, but the adage of “bad facts make bad law” certainly applies here. The facts of appellant’s case should not be used to mask the surreptitious entry of BPHAN into our State’s jurisprudence. This Court should be mindful of the effect of this decision and be wary of giving solicitors a tool they can use for repression. Appellant suspects that if the majority’s decision stands, it will not be ninety-seven years before the next appellate case involving BPHAN.

This case illustrates the absurdity of BPHAN. Appellant was absolved of criminal responsibility by the trial jury for the decedent’s death when it acquitted him of the charge of involuntary manslaughter. The decedent’s drunken friend tragically ran over him. Despite being acquitted of involuntary manslaughter, which carried a maximum of five years in prison, the tag along BPHAN charge stole the day with a possible sentence of ten years imprisonment for appellant seemingly making post Carolina big game traffic on Bluff road worse than its normal, which is horrible anyway.

Because BPHAN should not exist, it is not surprising that it has never been defined or intentionally and purposefully created by this Court or the Legislature. The majority respectfully should not forfeit the Supreme Court of South Carolina’s authority over the common law to the Richland County Solicitor’s Office. All five justices of this Court agree that if BPHAN exists, it is a creature of the common law. Instead of fighting over whether it does exist, the Court should simply exercise its power over the common law and declare that BPHAN does not exist. Such a ruling would serve the needs of the people and promote justice—not only in this case—but by eliminating cases that could spawn from this decision. Solicitors have no shortage of crimes with which to charge our citizens. If they are to be given another one—especially one as serious as BPHAN—it should only be enacted by the Legislature.

**Significant reasons rehearing also should be granted**

No one questions that “[a] breach of the peace is a common law offense.” State v. Simms, Op. No. 27528 (S.C. Sup. Ct. filed June 10, 2015)(Shearhouse Adv. Sh. No. 22 at 30). The dispute lies in the majority’s leap from reiterating that breach of peace is a common law offense to finding the existence of the criminal offense of a breach of peace of a high and aggravated nature (BPHAN). According to the majority, BPHAN exists because section 22-3-560 of the South Carolina Code provides that a person arrested as an affrayer, rioter, or disturber or breaker of the peace may be “waived up” to the Court of General Sessions “when the offense is of a high and aggravated nature.” State v. Simms, Op. No. 27528 (S.C. Sup. Ct. filed June 10, 2015)(Shearhouse Adv. Sh. No. 22 at 31-32). However, the statute cited by the majority provides no elements or definitions for the offense, offers no sentencing range, delineates no classification in terms of misdemeanor or felony, violent or non-violent, serious or most serious. It is simply devoid of all guidance and assistance in determining what is BPHAN.

**A. Undefined aggravating circumstances**

South Carolinians can find neither statute nor case law to define what circumstances are considered aggravating to elevate a misdemeanor breach of peace to BPHAN. The majority in the instant case refuses to define what the aggravating circumstances comprising BPHAN are. According to the majority, “[i]t makes no difference that the aggravators are not expressly defined by statute” because “the law only requires that a breach of the peace be ‘of a high and aggravated nature.’” State v. Simms, Op. No. 27528 (S.C. Sup. Ct. filed June 10, 2015)(Shearhouse Adv. Sh. No. 22 at 32). The majority envisions “a wide variety of factual circumstances [that] could render a simple breach of the peace triable in circuit court because of its ‘high and aggravated nature.’” State v. Simms, Op. No. 27528 (S.C. Sup. Ct. filed June 10, 2015)(Shearhouse Adv. Sh. No. 22 at 32).

The lack of clearly defined aggravating circumstances surrounding BPHAN contrasts greatly with all other aggravated offenses in South Carolina. For example, the circumstances of aggravation for the common law offense assault and battery of a high and aggravated nature (ABHAN) are well-settled.

Circumstances of aggravation include the use of a deadly weapon, the 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 or familiarities with a female and resistance to lawful authority.

State v. White, 353 S.C. 566, 578 S.E.2d 728 (Ct. App. 2003)(quoting State v. Primus, 349 S.C. 576, 580-581, 564 S.E.2d 103, 105-106 (2002)); see also State v. Murphy, 322 S.C. 321, 471 S.E.2d 739 (Ct. App. 1996)(noting the circumstances of aggravation which apply to ABHAN also apply to common law assault of a high and aggravated nature). Statutory ABHAN requires proof of great bodily injury or the accomplishment of the act by means likely to produce death or

great bodily injury. S.C. Code Ann. § 16-3-600(B)(1). Likewise, the aggravating circumstances of criminal domestic violence of a high and aggravated nature and aggravated voyeurism are statutorily defined with specificity. See S.C. Code Ann. § 16-25-65; S.C. Code Ann. § 16-17-470(C).

The lack of clearly delineated aggravating circumstances renders BPHAN susceptible to challenges of overbreadth and vagueness. Criminal offenses, whether statutory in nature or creatures of the common law, are overbroad when the acts criminalized are constitutionally protected speech, in violation of the Due Process Clause of the United States Constitution. State v. Bouye, 325 S.C. 260, 264, 484 S.E.2d 461, 463 (1997). “[T]he overbreadth doctrine applies only to First Amendment cases where the challenged law would have a ‘chilling effect’ on constitutionally protected forms of speech.” Id. at 265, 484 S.E.2d at 464 (internal quotations omitted). By its very nature, breach of peace may infringe upon First Amendment rights. Breach of the peace is “not susceptible of exact definition.” State v. Randolph, 239 S.C. 79, 83, 121 S.E.2d 349, 350 (1961). “The term ‘breach of the peace’ is a generic one embracing a great variety of conduct destroying or menacing public order and tranquility.” State v. Peer, 320 S.C. 546, 552, 466 S.E.2d 375, 379 (Ct. App. 1996)(citing State v. Poinsett, 250 S.C. 293, 157 S.E.2d 570 (1967)). Speaking generally, “it is a violation of public order, a disturbance of the public tranquility, by any act or conduct inciting to violence.” Id. “The word ‘peace’ as used in the phrase ‘breach of peace’ means the tranquility enjoyed by members of a community where good order reigns.” Id.

Obviously, breach of peace is a criminal offense without clearly defined parameters that criminalizes disturbances of public tranquility, which may include speech. The danger of a common law breach of peace violating the First Amendment is real. However, the danger of

BPHAN violating the First Amendment is greater due to the lack of any definition at all for the offense. Its bounds are limitless.

In addition to the potential challenge to the overbreadth of the criminal offense of BPHAN in light of the lack of clearly identified aggravating circumstances, the offense is susceptible to a challenge for vagueness.

The concept of vagueness or indefiniteness rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication. The primary issues involved are whether the provisions of a penal statute are sufficiently definite to give reasonable notice of the prohibited conduct to those who wish to avoid its penalties and to apprise judge and jury of standards for the determination of guilt. If the statute is so obscure that men of common intelligence must necessarily guess at its meaning and differ as to its applicability, it is unconstitutional.

Guinyard v. State, 260 S.C. 220, 226, 195 S.E.2d 392, 394 (1973); see also Peterson Outdoor Advert. v. City of Myrtle Beach, 327 S.C. 230, 236, 489 S.E.2d 630, 633 (1997). Due process is offended when a criminal statute fails to give fair notice of the conduct it proscribes. State v. Patterson, 261 S.C. 362, 200 S.E.2d 68 (1973). No definition of BPHAN can be found in the Code or the case law, including the majority's opinion. No one in South Carolina, including appellant, has fair notice of the conduct it prohibits.

It is worth noting that the trial judge charged the jury regarding the aggravating circumstances as follows:

The state must also prove beyond a reasonable doubt [a] circumstance of aggravation. Circumstances of aggravation are things such as use of a deadly weapon, infliction of serious bodily injury, great disparity between the ages or physical conditions of parties, a difference in the genders of the parties, purpose full [*sic*] imbleaching [*sic*] of shame and disgrace, resistance of lawful authorities. These are merely examples of circumstances of aggravation.

R. 1140, ll. 1-8. Obviously, the judge instructed the jury to use the aggravating circumstances for common law ABHAN. This is hardly surprising given the lack of any law or guidance concerning

the relevant aggravating circumstances for BPHAN.<sup>1</sup> What is surprising though is the trial judge's failure to charge the jury using the aggravating circumstances contained within the indictment.<sup>2</sup>

It is also worth noting that none of the aggravating circumstances charged to the jury appear in the indictment and none appear in the majority's opinion for affirming the denial of directed verdict. The use of the circumstances of aggravation for ABHAN has no place when examining a breach of peace. Common law ABHAN permits a simple assault and battery to be aggravated if the parties have different genders or different physical conditions. This would permit a simple breach of peace to be aggravated if the peace were broken of a person of a different gender of a different physical condition or age. Certainly, the law does not contemplate treating individuals differently based upon the victim in a breach of peace.

The lack of clarity in the law concerning the applicable aggravating circumstances for BPHAN renders the offense unconstitutional on grounds of overbreadth and vagueness. The lack of guidance to judges allowed the trial judge in the instant case to charge the jury concerning aggravating circumstances for common law ABHAN, which have no place in analyzing a BPHAN. Not only did the judge's instruction permitted the jury to consider circumstances for which appellant lacked notice, but the instruction permitted the jury to convict appellant based simply on the fact that appellant was much larger than the deceased, which was undisputed. The sizes of the

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<sup>1</sup> Appellant notes the judge's benchbook contains no instruction for BPHAN. However, the instruction used by the judge concerning the circumstances of aggravation is verbatim instruction from the benchbook regarding the circumstances of aggravation for the common law offense of ABHAN. <http://www.sccourts.org/juryCharges/GS%20InstructionsJune2013.pdf> (last viewed June 19, 2015).

<sup>2</sup> Appellant notes the trial judge read the breach of peace of a high and aggravating nature to the jury at the beginning of her charge. R. 1123, ll. 13-24. Yet, when the judge instructed the jury on the elements of breach of peace – high and aggravated, the instruction for circumstances of aggravation was devoid of the two circumstances found in the indictment. Further, the instruction was devoid of any of the circumstances evaluated by the majority.

parties should play no role in a breach of the peace, just as gender would play no role. The majority's sanctioning of BPHAN in these circumstances cannot stand. Not only has the confusion permitted appellant to be convicted following an inaccurate jury charge, but the majority permits and encourages the confusion to persist by offering no guidance of how to define the aggravating circumstances.

**B. Lack of notice to appellant**

The majority erred in considering aggravating circumstances for which appellant was not placed on notice through the indictment. The majority found "the trial court did not err in refusing to direct a verdict of acquittal regarding the aggravated breach of the peace charge, because the state presented evidence of aggravation." State v. Simms, Op. No. 27528 (S.C. Sup. Ct. filed June 10, 2015)(Shearhouse Adv. Sh. No. 22 at 33). On this point, the majority held:

The fight and the victim's subsequent death occurred in a public roadway immediately adjacent to Williams-Brice Stadium after a football game attended by a capacity crowd. At the time, thousands of fans were attempting to exit all corners of the stadium on foot and in vehicles. Moreover, the resultant melee caused previously slow-moving traffic to come to a standstill for over two hours, as the fight occurred on a particularly busy thoroughfare. Further, many members of the public witnessed the victim's death. Several witnesses testified to the extremely disturbing nature of the crime. Ultimately, Appellant's direct involvement in the incident, which led to the victim's unfortunate demise, contributed to the distress of many members of the community, and the general public upheaval that followed. Thus, Appellant's actions exemplify the type of behavior constituting an aggravated breach of the peace.

State v. Simms, Op. No. 27528 (S.C. Sup. Ct. filed June 10, 2015)(Shearhouse Adv. Sh. No. 22 at 33). Although unclear, it appears the majority found the aggravating circumstances to include: (1) previously slow-moving traffic coming to a stand still for over two hours; (2) many members of the public witnessing the deceased's death; (3) the extremely disturbing nature of the crime scene; (4) contributing to the distress of many members of the community; and (5) the general public upheaval following the deceased's death. In doing so, the majority simply ignores that the

aggravating circumstances in the indictment were “fighting in the roadway and/or disrupting traffic.” R. 1464-1465. Of the aggravating circumstances listed by the majority, only the change in slow-moving traffic to stopped traffic was provided in the indictment and for which appellant was on notice.

“A defendant has a constitutional and statutory right to demand that a properly constituted grand jury consider his case and decide whether to issue a sufficient indictment.” State v. Means, 367 S.C. 374, 383, 626 S.E.2d 348, 352 (2006), overruled on other grounds by Talley v. State, 371 S.C. 535, 640 S.E.2d 878 (2007). “The indictment is a notice document.” State v. Gentry, 363 S.C. 93, 102, 610 S.E.2d 494, 500 (2005). The sufficiency of the indictment is determined by “whether (1) the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer and whether he may plead an acquittal or conviction thereon; and (2) whether it apprises the defendant of the elements of the offense that is intended to be charged.” Id. at 102-103, 610 S.E.2d at 500. Appellant simply had no notice of the other aggravating circumstances utilized by the majority in affirming the trial judge’s denial of a directed verdict.

Over a hundred years ago, this Court declared that an indictment must set out the facts which make a crime of a high and aggravated nature. State v. Beadon, 17 S.C. 55 (1882). Consistently, this Court has reversed convictions where indictments were amended to change the aggravating circumstances, which changed the nature of the offense. See e.g., State v. Lynch, 344 S.C. 635, 641, 545 S.E.2d 511, 514 (2001)(reversing a conviction for first-degree burglary where the trial judge allowed the prosecution to amend the aggravating circumstance from entering during the darkness to causing physical injury because the amendment changed the nature of the offense charged by requiring proof of a materially different aggravating circumstance); Weinhauer v. State,

334 S.C. 327, 513 S.E.2d 840 (1999)(granting post-conviction relief where the state amended an indictment for second-degree burglary to state the burglary occurred at night because the amendment changed the nature of the offense).

Despite this case law, the majority affirmed appellant's conviction finding the state had presented evidence of circumstances of aggravation for which appellant never received notice. The indictment never warned appellant that he would be required to answer for the additional circumstances of aggravation addressed by the majority. Further, the judge's instruction to the jury never contemplated consideration of the circumstances of aggravation addressed by the majority. It is undisputed that appellant never received notice of the additional circumstances of aggravation discussed by the majority as reasons to affirm his conviction. It is also undisputed that no grand jury ever passed upon the additional circumstances of aggravation discussed by the majority. Appellant could not rebut the circumstances if he never received notice of how the circumstances would be used against him for the first time on appeal and what the implications of finding such circumstances would mean. The majority's findings on this point violate appellant's federal and state constitutional rights to due process of law, which requires notice.

**C. Circumstances not proximately caused by appellant**

Turning to the only aggravating circumstance considered by the majority for which appellant was placed on notice – disrupting traffic, the majority erred in considering circumstances for which appellant's conduct was not the proximate cause. Appellant's conduct of punching the decedent did not disrupt traffic. Traffic after football games on Shop Road is always bumper-to-bumper, as the evidence clearly demonstrated, and the majority candidly admits. Every witness testified that prior to appellant punching the decedent, the traffic was at a standstill. Although the roadway was blocked to enable police to investigate the homicide, traffic continued to move.

Appellant's conduct of punching the decedent was not the cause of the disruption of traffic, if such a disruption occurred. Any disruption of traffic was the direct result of Paxton running over and killing his friend. Appellant *was not the proximate cause of the decedent's death as confirmed by the jury's verdict on the involuntary manslaughter charge*; therefore, he could not be the proximate cause of the disruption of traffic resulting from the death.<sup>3</sup>

Proximate cause is the direct cause, the immediate cause, the efficient cause. It is the cause that without which the result would not have occurred. Goode v. St. Stephens United Methodist Church, 329 S.C. 433, 447, 494 S.E.2d 827, 834 (Ct. App. 1998). “The touchstone of proximate cause in South Carolina is foreseeability. Foreseeability is determined by looking to the natural and probable consequences of the act complained of.” Id. (quoting Vinson v. Hartley, 324 S.C. 389, 400, 477 S.E.2d 715, 721 (Ct. App. 1996)). The “wrongful or illegal act of an independent third person” is not foreseeable because it is “an unnatural and abnormal intervention in the ordinary train of events and consequences not reasonably to be anticipated.” Id. at 447-448, 494 S.E.2d at 834 (quoting Crowley v. Spivey, 285 S.C. 397, 407, 329 S.E.2d 774, 780-781 (Ct. App. 1985)).

Appellant could not foresee that Paxton would run over his friend. Although this was undoubtedly a tragic mistake on Paxton's part, appellant would be remiss if he did not point out that Paxton was never charged officially by police for violating the law, any law. In his testimony, he admitted to violating several laws of South Carolina when he ran over the decedent, including driving under the influence and reckless vehicular homicide.

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<sup>3</sup> Judge Goodstein found the jury acquitted appellant of involuntary manslaughter, having determined that his conduct was not the proximate cause of the decedent's death. “We now know the jury found the Defendant's conduct was not the proximate cause of [] Mr. Gasque's death.” R. 1452; R. 1454.

Confining the analysis to the only aggravating circumstance for which appellant had notice and was reviewed by the majority, disrupting traffic, and to the circumstances proximately caused by appellant's conduct, it is clear the trial judge erred in refusing to direct a verdict of acquittal. Appellant's punching of the deceased was not the reason the traffic changed from slow-moving to a standstill. It was the act of Paxton running over his friend that caused the traffic to change. Reviewing the only aggravating circumstance for which appellant had notice and considering only the conduct for which appellant was the proximate cause reveal appellant's conviction for BPHAN cannot stand.

**The relevant testimony of Allen in response to corroborate the defense was admissible**

There was certainly conflicting evidence in this case, at a minimum, whether appellant hit the decedent as the decedent approached him in a menacing fashion, or whether appellant hit the decedent while he was seated in the truck driven by Paxton. The majority chose to believe that appellant hit the decedent while the decedent was inside the truck. Regardless, the majority wrote that:

[T]he resultant melee caused previously slow-moving traffic to come to a standstill for over two hours, as the fight occurred on a particularly busy thoroughfare. Further, many members of the public witnessed the victim's death. Several witnesses testified to the extremely disturbing nature of the crime scene. Ultimately, Appellant's direct involvement in the incident, which led to the victim's unfortunate demise, contributed to the distress of many members of the community, and the general public upheaval that followed.

State v. Curtis Simms, Op. No. 27528, Shearouse's Adv. Sh. # 22, at p. 33.

Respectfully, to blame all of the above on appellant where the decedent's intoxicated friend tragically ran over the decedent is disturbing enough. However, given the above, it was only fair to point out that there was contrary evidence that the decedent got out of the truck, and approached appellant ready to fight before appellant hit him.

The Attorney General in its brief engaged in a creative writing exercise regarding what occurred in the bumper-to-bumper post-game traffic along Shop Road. Appellant attempted to set the record straight in his reply brief that remains before this Court.

The decedent's drunken friend, Paxton: "Martin [the decedent] was celebrating for the Gamecocks, you know, telling people, congratulations to the Gamecocks. **And that was it.** He was talking on the phone and he was just sitting in traffic." R. 13. (emphasis added). Paxton also claimed that the decedent was **only** talking to Carolina fans as they were walking by the truck. Paxton maintained the decedent was just saying "Go Gamecocks, congratulations, woohoo." R. 514, Respondent's brief at 10.

The opinion in this case illustrates why evidence from eyewitness Allen James in response to Paxton's claims that the decedent was only a happy celebrating Gamecock fan was admissible on the BPHAN charge, assuming such a crime exists. Allen James was an independent witness. He had not been tailgating or drinking that day. James testified in camera that the intoxicated decedent got out of the pickup truck, and approached the much larger Curtis Simms expecting a confrontation. The decedent was not the happy-go-lucky fellow celebrating a big Carolina win. If there is such a crime as BPHAN then evidence of the decedent breaching the peace and causing the confrontation on Bluff Road, or on the side of Bluff Road, was certainly relevant. The proffered evidence that the decedent was a belligerent, highly intoxicated man who was cursing, relieving himself in public and conducting himself in a grossly disorderly manner was admissible as impeachment, and was relevant to the res gestae of the BPHAN charge.

Appellant had the right to impeach Paxton with this contradictory James evidence of what occurred. See *State v. Todd*, 290 S.C. 212, 349 S.E.2d 339 (1986). In *State v. Green*, 213 S.C. 170, 175, 48 S.E.2d 641, 643 (1948), this Court noted, (while the rule at that time was one could not

impeach his own witness), “that while a party cannot impeach his own witness, he may prove by other witnesses that the facts or otherwise than as such witness testified them to be.” (Emphasis added) See, also, Collins, South Carolina Evidence, Section 5.14 at 161 (2000 ed.).

The exclusion of this eyewitness testimony was not only erroneous it was fundamentally unfair.

In Smith v. Henry, 2 Bail. 118, 18 S.C.L. 118 (Ct. App. of Law and Equity of South Carolina 1831), the Court reversed based on trial court’s improper exclusion of witness testimony contradicting earlier testimony. The trial court had rejected the testimony, as being merely a contradiction of the witness in matter irrelevant to the issue.

The Court noted: “[I]f the question is, in any wise, material to the issue, his answer can be contradicted . . . A new trial must be granted.” Smith v. Henry, 2 Bail. 118 at 127.

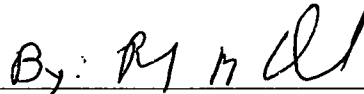
Further, as defense counsel argued, “this was part of the fabric of the case. He’s [James] just another witness to provide relevant evidence as to what his observations were. Because they asked questions as to observations of Mr. Paxton and observations of the Echenroths. And we’re going to ask Mr. James under the same theory.” R. 769, l. 15 – 770, l. 16.

As this Court will recall, the state stressed the importance of “independent witnesses,” and James was that for the defense. While the state would attempt to discount the eyewitness testimony of the former Carolina football players -- the Lindsey twins, Mike Davis, and Marque Hall because they were appellant’s friends – James had left working at this own business and he was a sober independent witness with a unique vantage point. He watched the decedent cursing and “flipping off” Alabama fans in the bumper to bumper Shop Road traffic, the decedent being disorderly, and him urinating in front of the police station. His eyewitness testimony was powerful response impeachment on the BPHAN charge, should the majority of this Court continue to hold that such a crime exists, it should determine this testimony should not have been excluded. Consequently, this

Court should grant appellant a new trial if it does not hold there is no recognized crime known as BPHAN.

While the solicitor can choose the charges brought against the defendant, and choose the time and place of the trial, the solicitor should not control whether relevant evidence in response to the state's evidence should be heard by the jury. Evidence that the decedent was at fault for the tragic accident in this case due to his own grossly disorderly conduct was respectfully admissible given the definition of relevant evidence, evidence in response, and any definition of fundamental fairness. This Court should respectfully grant rehearing on this issue also.

Respectfully submitted,

By: 

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This 24th day of June, 2015.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

Appeal from Richland County  
Diane Schafer Goodstein, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

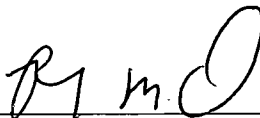
CURTIS J. SIMMS,

APPELLANT

APPELLATE CASE NO. 2013-001219

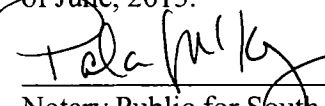
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 24th day of June, 2015.

  
\_\_\_\_\_  
Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 24th day  
of June, 2015.

  
\_\_\_\_\_  
(L.S.)  
Notary Public for South Carolina  
My Commission Expires: July 24, 2022.