



# Indictment Sufficiency in Delayed-Disclosure Child Abuse

by Sam Tooker, Esq.



ften in criminal sexual conduct cases involving minor victims, particularly those in which the disclosure of abuse is delayed, alleged victims may not be capable of remembering the specific days or dates that abuse occurred.

Generally, child victims are capable of recalling broad timeframes of victimization. Children can sometimes articulate that abuse occurred during a particular school year, when they lived in a particular home, or during some other significant event. It is, however, difficult to get young children to articulate a date and time during which alleged abuse is said to have occurred. As a result, in many child abuse trials, the state's indictment will allege that the accused abused the victim during an expansive period of time.

From a defense attorney's perspective, indictments that are broad in temporal scope are problematic inasmuch as it is difficult to assert alibi defenses or find witnesses who make less likely alleged instances of abuse when the period of time any defendant is asked to account for is as broad as months or years. Therefore, defense attorneys should prepare to challenge the sufficiency of any indictment that brackets criminal conduct within the confines of months and years rather than days or

weeks. Unfortunately, there is no per se threshold of unconstitutionality when it comes to the period of time included in an indictment, so trial courts are tasked with examining each motion to quash an indictment for temporal overbreadth on a case-by-case basis.

## **Indictments Generally**

An indictment is an accusation in writing that charges the person named therein with an act or an omission that constitutes a violation of the laws of our state. For an accused person to be indicted, the grand jury must convene and twelve or more of the eighteen grand jury members must find that probable cause exists substantiating the allegations contained in the indictment submitted to the grand jury and vote in favor of it. <sup>1</sup> The indictment must contain allegations regarding time and place and charge the crime in the language of the law or statute prohibiting the act or omission or "so plainly that the nature of the offense charged may be easily understood." <sup>2</sup> If an indictment alleges a violation of statute, then that indictment must include the statute alleged to have been violated. <sup>3</sup> Article I of the South Carolina Constitution holds that "[n]o person may be held to answer for any

crime the jurisdiction over which is not within the magistrate's court, unless on a presentment or indictment of a grand jury of the county where the crime has been committed." <sup>4</sup> In other words, South Carolina's Constitution requires that an individual be indicted by the grand jury before standing trial for an offense. <sup>5</sup> Prior to *State v. Gentry*, <sup>6</sup> no circuit court possessed subject matter jurisdiction to try a criminal defendant in South Carolina unless: 1) there existed an indictment sufficiently stating the offense for which the defendant was to have been tried; 2) the defendant waived presentment of the indictment to the grand jury; or 3) the offense was a lesser-included offense of the crime charged in the indictment. <sup>7</sup> However, in *Gentry*, our Supreme Court "abandoned the view that, in criminal matters, the circuit court acquires subject matter jurisdiction to hear a particular case by way of a valid [grand jury] indictment" and determined that the indictment served as a notice document designed to apprise a defendant of the allegations pending against him and the facts for which he was called to account. <sup>8</sup>

Pursuant to "[s]trict common law practice," indictments were to "allege the day of the month and year when the offense was committed." <sup>9</sup> This rule remains in effect when the date of the offense is a material element of the same. <sup>10</sup> However, if the date of the offense is not a material element related to its commission, then South Carolina Code Section 17-19-20<sup>11</sup> provides that an indictment is sufficient as long as it "apprises the defendant of what he must be prepared to meet at trial and describes a time before the date of the indictment" and "within the period prescribed by any applicable statute of limitations" that the offense was to have been committed. <sup>12</sup> Therefore, in the instance of criminal sexual conduct cases involving minor victims, the specific date and time of an offense is not an element of that offense so long as the indictment ensures the offense occurred within a timeframe certifying that the alleged victim would have been statutorily incapable of consenting to any sexual battery or lewd or lascivious touching by virtue of age.

### ***The Indictment as a Notice Document and the Sufficiency Thereof***

In *State v. Munn*, <sup>13</sup> the South Carolina Supreme Court concluded that a trial court "lacks subject matter jurisdiction to convict a defendant for an offense when there is no indictment charging him with that offense when the jury was sworn." <sup>14</sup> However, in *State v. Gentry*, the South Carolina

supreme court reversed its prior ruling and held that "[t]he indictment is a notice document," a challenge to which, when based on the grounds of the sufficiency of the indictment, "must be made before the jury is sworn as provided by § 17-19-90." <sup>15</sup> If a defendant objects to an indictment before the jury is sworn, then, the objection is timely and preserved. If a defendant objects to the sufficiency of an indictment, the circuit court is called to determine 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" for which he is charged. <sup>16</sup> In determining the sufficiency of an indictment, the trial court "must look at the indictment with a practical eye in view of all the surrounding circumstances." <sup>17</sup>

### ***The Temporal Scope of an Indictment and the Case-by-Case Approach***

In *State v. Wade*, the South Carolina supreme court was called to determine whether an indictment for criminal sexual conduct with a minor in the first degree was insufficient inasmuch as the alleged criminal conduct included in the indictment spanned a two-year length of time. <sup>18</sup> As it would have been impossible for the defendant in *Wade* to account for his whereabouts for the entirety of the two-year duration alleged in the indictment, he requested that the court rule that the indictment was insufficient on its face. <sup>19</sup> In finding that it was inappropriate to create a per se rule of insufficiency based on specific temporal limits, the court adopted a case-by-case approach to indictment sufficiency, ruling that "the true test of the sufficiency of an indictment is not whether it could have been more definite and certain, but whether it contains the necessary elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet." <sup>20</sup>

Acknowledging that a defendant would be prejudiced were the state allowed to prove that an offense occurred during a temporal bracket different than that alleged in the indictment, the court concluded that "prejudice" constitutes a surprise precluding the preparation and presentation of a defense to a given set of charges. <sup>21</sup> The defendant in *Wade*, then, was not prejudiced inasmuch as the two-year scope of the indictment in his case did not prevent him from

appreciating the nature of the offense for which he was standing trial and the elements the state was required to prove to meet its burden of proof. <sup>22</sup>

Similarly, in *State v. Tumbleston*, the Court of Appeals concluded that an indictment that included a three-year window for the commission of the crime of criminal sexual conduct with a minor and lewd act upon a minor was not insufficient as “indictments for a sex crime that allege offenses occurring[ing] during a specified time period are sufficient when the circumstances of the case warrant considering an extended time frame.” <sup>23</sup> As the victim in *Tumbleston* was “a young child, whom one cannot reasonably expect to recall the exact dates of the sexual abuse,” time was not a material element of the offense, and the defendant was not precluded from adequately preparing for his defense, the court concluded that the indictment was constitutionally sufficient and upheld the trial court’s ruling denying the defendant’s motion to quash the indictments. <sup>24</sup>

However, in *State v. Baker*, the Supreme Court ruled that offenses alleged in an indictment to have occurred at unspecified times over a six-year period were so broad as to preclude the defendant’s ability to combat the charges against him or plead acquittal. <sup>25</sup> Specifically, the court noted that the court was to “look at the surrounding circumstances that existed pre-trial, in order to determine whether a given defendant has been ... taken by surprise and hence unable to combat the charges against him.” <sup>26</sup> The court in *Baker* appeared to take particular umbrage to the fact that the temporal scope of the indictments were expanded shortly before trial, taking the defendant by surprise and limiting his ability to prepare a defense. <sup>27</sup> Accordingly, the court concluded that the trial court erred in failing to quash the indictments as unconstitutionally overbroad. <sup>28</sup>

### ***How to Prepare for a Case-by-Case Analysis?***

Boiled down to its essence, the question in each of the aforementioned cases in the post-Gentry era was whether the temporal scope of the indictment prejudiced the defendant’s ability to prepare his defense. As was made plain in *Baker*, this analysis is greatly influenced by the circumstances in existence before a case is called for trial. Therefore, to adequately prepare a motion to quash an indictment based on the

period of time during which the alleged criminal conduct was said to have transpired, a zealous advocate should look to any alleged victim’s statements, any incident reports or supplemental reports, any warrants, and any other information that would inform when an event or a series of events was said to have occurred. If the information contained in an indictment diverges dramatically from the information contained in the discoverable materials provided by the state, then there may exist a strong argument that the expanded indictment constitutes an unfair and prejudicial surprise if it reasonably precludes the defendant from combating the substance of the allegations against him. The diligent defense attorney, then, should move to quash not because a particular period of time seems lengthy but because the period of time contained in the indictment unfairly prejudices the defendant’s ability to prepare his defense.

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**1** South Carolina Code of Laws § 14-7-1750.

**2** South Carolina Code of Laws § 17-19-20.

**3** Id.

**4** S.C. Const. Art. I § 11.

**5** State v. Joseph, 346 S.C. 637, 552 S.E.2d 745 (2001).

**6** State v. Gentry, 363 S.C. 93, 610 S.E.2d 494, (2005).

**7** Joseph v. State, 351 S.C. 551, 571 S.E.2d 580 (2002).

**8** State v. Tumbleston, 376 S.C. 90, 94-95, 654 S.E.2d 849, 851 (Ct. App. 2007).

**9** State v. Thompson, 305 S. C. 496, 500, 409 S.E.2d 420, 423 (1991).

**10** Id.

**11** The supreme court concluded that “[t]he specific date and time is not an element of the offense of first degree criminal sexual conduct” as the indictment apprised the defendant of what he was required to meet at trial and described an event occurring before the date of the indictment. State v. Thompson, 305 S.C. 496, 409 S.E.2d 420 (1991).

**12** Id.

**13** State v. Munn, 292 S.C. 497, 357 S.E.2d 461 (1987).

**14** State v. Gentry, 363 S.C. 93, 101, 610 S.E.2d 494, 499 (2005).

**15** Id.

**16** Id. at 103, 610 S.E.2d at 499.

**17** Id.

**18** State v. Wade, 306 S.C. 79, 409 S.E.2d 780 (1991).

**19** Id.

**20** Id. at 82-83, 306 S.E.2d at 782.

**21** Id. at 86, 306 S.E.2d at 784.

**22** Id.

**23** Tumbleston, 376 S.C. at 101-102, 654 S.E.2d at 855.

**24** Id.

**25** State v. Baker, 411 S.C. 583, 769 S.E.2d 860 (2015). It is important to note that in Baker, the prosecution presented the defendant’s counsel with new indictments two weeks before trial that expanded the scope of alleged criminality to the six-year period deemed unconstitutionally overbroad. Citing the factual circumstances specific to the defendant’s case, the court acknowledged that the defendant’s counsel was prejudiced by the state’s late-in-the-game amendment to the indictment as the defendant was no longer capable of amassing records and witnesses that might have provided an alibi for the defendant at trial.

Id. at 589, 769 S.E.2d at 864.

**26** Id.

**27** Id.

**28** Id.