South Carolina Law Review

Volume 55
Issue 3 *ANNUAL SURVEY OF SOUTH CAROLINA LAW*

Article 11

Spring 2004

State v. Dudley: Defining the Theory of Extraterritorial Criminal Jurisdiction

Emily Nanette Swalm

STATE V. DUDLEY: DEFINING THE THEORY OF EXTRATERRITORIAL CRIMINAL JURISDICTION

I. INTRODUCTION

In a recent South Carolina Court of Appeals decision, *State v. Dudley,*[1] the State of South Carolina convicted defendant Dana Dudley, a resident of Georgia, of trafficking in cocaine and conspiracy to traffic in cocaine.[2] Dudley appealed her convictions based on two theories.[3] Dudley first argued that South Carolina did not have jurisdiction to prosecute her because she never entered South Carolina and none of the alleged criminal conduct took place within the borders of South Carolina.[4] Second, Dudley argued that the trial judge erred in failing to grant her motion for a directed verdict on the conspiracy charge because there was no evidence of agreement or intent to violate South Carolina law.[5]

In deciding the case, the court of appeals faced an issue of first impression in South Carolina: "*whether extraterritorial jurisdiction*[6] *is actually a component of subject matter jurisdiction or whether it is more properly considered part of personal jurisdiction.*"[7] A three-judge panel of the court of appeals first heard the case and, in a divided opinion, upheld the conviction for trafficking in cocaine, but reversed the circuit court's denial of Dudley's motion for a directed verdict on the charge of conspiracy to traffic in cocaine.[8] The full court of appeals voted to rehear en banc, and on rehearing, "six judges[9] voted to vacate both of Dudley's convictions," effectively withdrawing the panel opinion.[10] The court found that

---

1. 354 S.C. 514, 581 S.E.2d 171 (Ct. App. 2003), *petition for cert. filed*, Adv. Sh. No. 31 (Aug. 18, 2003) (No. 3641).

2. *Id.*

3. *Id.* at 520, 581 S.E.2d at 174.

4. *Id.*; *see infra* text accompanying notes 22–25, 35–39.

5. *Dudley*, 354 S.C. at 520, 581 S.E.2d at 174; *see infra* text accompanying note 43.

6. Courts sometimes refer to the concept of "extraterritorial jurisdiction" as "territorial jurisdiction." For purposes of this Note, the terms are synonymous.

7. *Dudley*, 354 S.C. at 521, 581 S.E.2d at 175 (emphasis added). The classification of extraterritorial jurisdiction as a component of subject matter jurisdiction allows the court to address the issue despite Dudley's failure to argue it at trial or on appeal, whereas the classification of extraterritorial jurisdiction as a component of personal jurisdiction precludes review of the issue because Dudley waived her right to challenge personal jurisdiction by failing to preserve the issue. *Id.*

8. State v. Dudley, No. 3579, 2002 S.C. App. LEXIS 202, at *23 (Ct. App. Dec. 9, 2002) (withdrawn and superseded on rehearing en banc by *State v. Dudley*, 354 S.C. 514, 581 S.E.2d 171 (Ct. App. 2003)). Judge Anderson wrote the majority opinion, in which Judge Stilwell concurred, and Judge Connor dissented in a separate opinion filed on December 9, 2002. *Id.* at *23.

9. The South Carolina Code requires six votes on rehearing to reverse the judgment below. S.C. CODE ANN. § 14-8-90(b) (West 2002).

10. *Dudley*, 354 S.C. at 518, 581 S.E.2d at 173.

South Carolina did not have extraterritorial jurisdiction to prosecute Dudley, and it ultimately held that "[b]ecause extraterritorial jurisdiction is a component of subject matter jurisdiction, it may be raised for the first time on appeal or *sua sponte* by an appellate court."[11] *Dudley* is currently pending certiorari in the Supreme Court of South Carolina.[12]

Part II of this Note outlines the facts of *Dudley* and describes the opinions from the case, including both the original three-judge panel's decision and the full court's resolution. Part III presents an overview of the theory of criminal jurisdiction, including subject matter, personal, and extraterritorial jurisdiction, and discusses South Carolina's and other states' treatment of extraterritorial jurisdiction. Part IV revisits *Dudley,* questioning whether the court of appeals correctly decided that extraterritorial jurisdiction is a component of subject matter jurisdiction capable of being raised by a party for the first time on appeal or *sua sponte* by the court.[13] Finally, Part V argues that the court of appeals erred in treating extraterritorial jurisdiction as a component of subject matter jurisdiction. By posing the question as whether extraterritorial jurisdiction is a component of *either* subject matter jurisdiction *or* personal jurisdiction,[14] the court overlooked the real possibility of extraterritorial jurisdiction as an entirely separate concept. Ultimately, South Carolina should treat extraterritorial jurisdiction as distinct from both subject matter jurisdiction and personal jurisdiction—not subsumed into either category.

The question then becomes whether South Carolina should consider a defect in extraterritorial jurisdiction as similar to a defect in subject matter jurisdiction and capable of being raised by a party for the first time on appeal or *sua sponte* by an appellate court, or to be more like a defect in personal jurisdiction and, thus, capable of being waived.[15] Arguably, the court should have treated any defects in jurisdictional elements other than subject matter jurisdiction as effectively waived unless raised in the trial court and properly preserved for appeal.[16] However, a strong argument exists that territorial jurisdiction, although not necessarily a *component* of subject matter jurisdiction, is akin to subject matter jurisdiction in that

---

11. *Id.* at 537, 581 S.E.2d at 183. Note that by holding that extraterritorial jurisdiction is a component of subject matter jurisdiction, the court avoided an examination of the actual nature of extraterritorial jurisdiction and simply concluded that it can be raised by a party for the first time on appeal or *sua sponte* by an appellate court.

12. 354 S.C. 514, 581 S.E.2d 171 (Ct. App. 2003), *petition for cert. filed,* Adv. Sh. No. 31 (Aug. 18, 2003) (No. 3641).

13. *Id.* at 537, 581 S.E.2d at 183. This Note does not consider the law of conspiracy generally or Dudley's second theory that the trial judge erred in failing to grant her motion for a directed verdict on the conspiracy charge because there was no evidence of agreement or intent to violate South Carolina law. *See id.* at 518, 581 S.E.2d at 173.

14. *See supra* note 7 and accompanying text.

15. It is even unsettled whether this issue is one of constitutional law or common law. *See infra* note 116.

16. *See* Gordon v. Commonwealth, 568 S.E.2d 452, 454 (Va. Ct. App. 2002) (observing that "a defendant's claim that the trial court lacked territorial jurisdiction is generally waivable" except "where the defendant claims that the evidence fail[s] to prove the crime occurred in the commonwealth").

it is such a fundamental limitation on the court's authority that it is capable of being raised by a party for the first time on appeal or *sua sponte* by an appellate court.

Ultimately, the Supreme Court of South Carolina should hold that extraterritorial jurisdiction is separate from both subject matter jurisdiction and personal jurisdiction and that a challenge to extraterritorial jurisdiction is capable of being raised by a party for the first time on appeal or *sua sponte* by an appellate court. Accordingly, a criminal case brought in South Carolina should satisfy all three of these "jurisdictional" elements.

II. STATE V. DUDLEY

A. Facts

On September 9, 1997, admitted drug dealers Earl Hale and Donald Stokes drove from Roanoke, Virginia to Atlanta, Georgia.[17] Hale and Stokes, both residents of Roanoke, decided to go to Atlanta for a "dope run" after having some "dry spells" in Roanoke.[18] Earlier in September, Stokes had spoken with his friend Dana Dudley, a resident of Atlanta, to tell her he was planning to come to Atlanta.[19] When the two men arrived in Atlanta, they visited a nightclub and later returned to their hotel.[20] The next morning, Stokes called Dudley and asked her if she could get them cocaine; Dudley took $5,000[21] from the men and returned with cocaine within thirty to forty-five minutes.[22] Hale and Stokes planned to sell the cocaine in Roanoke but were arrested in Anderson County, South Carolina as they returned to Virginia.[23]

Deputy Matthew Durham from the Anderson County Sheriff's Department stopped Hale and Stokes' vehicle on Interstate 85 after noticing the vehicle "weaving and making an improper lane change."[24] Hale, the driver, told the deputy "he was returning from a *party* in Atlanta," while Stokes, the passenger, told the deputy they were "returning from a *funeral* in Atlanta."[25] After giving the driver a warning, Deputy Durham asked Hale if he could search the vehicle.[26] Hale consented, and Durham's partner, Deputy James Littleton, spoke with Hale and Stokes while Durham searched the vehicle.[27] Durham found a Ziploc bag containing

17. *Dudley*, 354 S.C. at 519, 581 S.E.2d at 173–74.
18. *Id.* at 519, 581 S.E2d at 173.
19. *Id.*
20. *Id.* at 519, 581 S.E.2d at 174.
21. State v. Dudley, No. 3579, 2002 S.C. App. LEXIS 202, at *3 (Ct. App. Dec. 9, 2002) *vacated by Dudley*, 354 S.C. 574.
22. *Dudley*, 354 S.C. at 519, 581 S.E.2d at 174.
23. *Id.*
24. *Id.*
25. *Dudley*, 2002 S.C. App. LEXIS 202, at *2 (emphasis added).
26. *Id.*
27. *Id.*

cocaine in the trunk of the car.[28] Stokes attempted to flee while Littleton tried to arrest Hale.[29] Hale broke free in an effort to seize the cocaine and dispose of it while Durham pursued Stokes.[30] The deputies ultimately apprehended both men.[31]

Hale and Stokes identified Dudley as the supplier of the cocaine found in the vehicle.[32] The two men agreed to help the Drug Enforcement Agency prosecute narcotics cases in South Carolina and Virginia as a part of a plea bargain.[33] As a result, agents monitored and recorded telephone conversations between Stokes and Dudley in which Stokes attempted to set up a drug exchange with Dudley in South Carolina.[34] "Dudley refused to meet Stokes in South Carolina, but agreed to meet him in Atlanta" on September 15, 1997.[35] The set-up transaction was not successful; however, officers arrested Dudley for the previous transaction for which Deputies Durham and Littleton had arrested Hale and Stokes in Anderson County, South Carolina.[36]

An Anderson County grand jury indicted Dudley for trafficking in cocaine and for conspiracy to traffic in cocaine.[37] "A jury convicted Dudley of both charges," and the circuit court judge sentenced her to concurrent terms of twenty-five years imprisonment and fined her $6,000 for each charge.[38] Dudley appealed to the South Carolina Court of Appeals, alleging "that South Carolina lacked jurisdiction to prosecute her . . . and [that] the Circuit Court erred in failing to grant her motion for a directed verdict on the conspiracy charge."[39]

B. *Opinions from* State v. Dudley

1. *Original Panel*

The original court of appeals panel considered several jurisdictional concepts

---

28. *Id.*
29. *Dudley*, 354 S.C. at 519, 581 S.E.2d at 174.
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.* at 519, 581 S.E.2d at 174.
35. State v. Dudley, 354 S.C. 514, 519–20, 581 S.E.2d 171, 174 (Ct. App. 2003), *petition for cert. filed*, Adv. Sh. No. 31 (Aug. 18, 2003) (No. 3641).
36. *Id.* at 520, 581 S.E.2d at 174.
37. *Id.* "The indictment for trafficking in cocaine provided the following: 'That Dana Dudley, AKA Dana Wilson did in Anderson County, South Carolina on or about September 10, 1997 traffic in cocaine by aiding and abetting the bringing into this State of South Carolina 200 or more grams of cocaine.'" *Id.* "The indictment charging Dudley with conspiracy to traffic in cocaine read as follows: 'That Dana Dudley, AKA Dana Wilson did in Anderson County, South Carolina on or about September 10, 1997 to September 15, 1997 conspire with another to knowingly traffic in excess of 200 grams of cocaine.'" *Id.* at 520 n.1, 581 S.E.2d at 174 n.1.
38. *Id.* at 520, 581 S.E.2d at 174.
39. State v. Dudley, No. 3579, 2002 S.C. App. LEXIS 202, at *1 (Ct. App. Dec. 9, 2002).

including subject matter jurisdiction, personal jurisdiction, and extraterritorial jurisdiction.[40] Both the majority opinion and the dissenting opinion found that a valid indictment vested the circuit court with subject matter jurisdiction, and "Dudley consented to the circuit court's exercise of personal jurisdiction because she appeared at trial, defended her case, and failed to raise any objection."[41]

a. Majority Opinion

The majority disagreed with Dudley's contention that the circuit court lacked jurisdiction to prosecute.[42] Writing for the majority, Judge Anderson outlined three concepts of jurisdiction: (1) subject matter jurisdiction; (2) personal jurisdiction; and (3) the exercise of extraterritorial jurisdiction by South Carolina.[43] Judge Anderson also cited the relevant section of the South Carolina Code under which the State convicted Dudley for conspiracy to traffic and for trafficking in cocaine.[44] Since "both indictments apprized Dudley of the charges against her" and "contained the necessary elements of the offenses charged," the indictments conferred subject matter jurisdiction on the circuit court.[45] Additionally, the court held that Dudley waived any objection to personal jurisdiction because she appeared at trial.[46] Lastly,

---

40. *Id.* at *4–16.

41. *Dudley*, 354 S.C. at 520, 581 S.E.2d at 174.

42. *Dudley*, 2002 S.C. App. LEXIS 202, at *4.

43. *See id.* Note that Judge Anderson's opinion reappears, with some expansion, as the en banc court's dissenting opinion, in which Judge Goolsby concurred. *Dudley*, 354 S.C. at 538, 581 S.E.2d at 184 (Anderson, J., dissenting).

44. *Dudley*, 2002 S.C. App. LEXIS 202, at *8, *9. The South Carolina Code provides in relevant part as follows:

> Any person who knowingly sells, manufactures, cultivates, delivers, purchases, or brings into this State, or who provides financial assistance or *otherwise aids, abets, attempts, or conspires to sell, manufacture, cultivate, deliver, purchase, or bring into this State*, or who is knowingly in actual or constructive possession or who knowingly attempts to become in actual or constructive possession of:
>
> . . . .
>
> ten grams or more of cocaine or any mixtures containing cocaine, as provided in Section 44-53-210(b)(4), is guilty of a felony which is known as "trafficking in cocaine" and, upon conviction, must be punished as follows if the quantity involved is:
>
> . . . .
>
> two hundred grams or more, but less than four hundred grams, a mandatory term of imprisonment of twenty-five years, no part of which may be suspended nor probation granted, and a fine of one hundred thousand dollars . . . .

S.C. CODE ANN. § 44-53-370(e) (West 2002) (emphasis added), *quoted in Dudley*, 2002 S.C. App. LEXIS 202, at *8–9. Dudley also faced charges of conspiracy to traffic in cocaine under this section. *Dudley*, 2002 S.C. App. LEXIS 202, at *9.

45. *Dudley*, 2002 S.C. App. LEXIS 202, at *9–10; *see infra* notes 58–59 and accompanying text.

46. *Dudley*, 2002 S.C. App. LEXIS 202, at *11. (Connor, J., dissenting); *see infra* notes 59–60 and accompanying text.

the majority found that South Carolina *could* exercise extraterritorial jurisdiction in this case because "Dudley demonstrated specific intent to act and the intent that the harm occur in South Carolina."[47]

b. Dissenting Opinion

In her dissenting opinion, Judge Connor agreed with the majority that the circuit court "was vested with subject matter jurisdiction based on a valid indictment" and "that the circuit court had personal jurisdiction over Dudley."[48] However, Judge Connor "disagree[d] with the majority's holding that South Carolina could exercise extraterritorial jurisdiction over acts committed by Dudley outside of this State."[49] Since Judge Connor did not find "evidence that Dudley *intended* either crime to take *effect* in South Carolina," she concluded South Carolina could not exercise jurisdiction.[50]

2. Rehearing En Banc

The full court of appeals voted to rehear the case en banc,[51] and on rehearing, the court concluded that extraterritorial jurisdiction is a component of subject matter jurisdiction that *can* "be raised [by a party] for the first time on appeal or *sua sponte* by an appellate court."[52] The court vacated both of Dudley's convictions, holding that South Carolina could not exercise extraterritorial jurisdiction.[53]

a. Majority Opinion

Judge Connor, writing for the majority,[54] noted that "[a]lthough neither Dudley nor the State specifically raised or argued extraterritorial jurisdiction, the original panel implicitly recognized that extraterritorial jurisdiction is a theory under the

---

47. *Dudley*, 2002 S.C. App. LEXIS 202, at *16. *Contra* note 65 and accompanying text (discussing that the court of appeals in its rehearing held that South Carolina could not exercise extraterritorial jurisdiction over Dudley).

48. *Dudley*, 2002 S.C. App. LEXIS 202, at *23 (Connor, J., dissenting).

49. *Id.* at *23–24.

50. State v. Dudley, No. 3579, 2002 S.C. App. LEXIS 202, at *24 (Ct. App. Dec. 9, 2002) (Connor, J., dissenting) (emphasis added).

51. *See supra* notes 9–10 and accompanying text.

52. State v. Dudley, 354 S.C. 514, 537, 581 S.E.2d 171, 183 (Ct. App. 2003), *petition for cert. filed*, Adv. Sh. No. 31 (Aug. 18, 2003) (No. 3641).

53. *Id.*

54. After rehearing on March 19, 2003, Chief Judge Hearn and Judges Cureton, Huff, Howard, and Shuler concurred with Judge Connor's majority opinion. *Id.* at 538, 581 S.E.2d at 183. Judges Anderson and Goolsby dissented, and Judge Stilwell concurred in part and dissented in part in a separate opinion. *Id.* at 538, 581 S.E.2d at 184.

general concept of subject matter jurisdiction."[55] To analyze the nature of extraterritorial jurisdiction, the majority focused on the general concept of jurisdiction and attempted to "distinguish between the component parts of subject matter jurisdiction and personal jurisdiction."[56]

The majority stated:

> Jurisdiction is of two distinct kinds: (1) Jurisdiction of the subject or subject matter, and (2) jurisdiction of the person. In determining questions relating to each, different rules apply. Jurisdiction of the subject matter cannot be waived by any act or admission of the parties; but a party may confer jurisdiction over his person by consent, or may waive the right to raise the question.[57]

The majority noted that South Carolina has defined subject matter jurisdiction as "the power of a court to hear and determine cases of the general class to which the proceedings in question belong."[58] The majority also noted that for criminal offenses, a court has subject matter jurisdiction if "(1) there has been an indictment that sufficiently states the offense; (2) there has been a waiver of indictment; or (3) the charge is a lesser-included offense of the crime charged in the indictment."[59] The majority's conclusion was as follows:

---

55. *Id.* at 521, 581 S.E.2d at 175. Footnote 2 contained the following:

> Other than a reference in her closing argument, Dudley never raised any jurisdictional challenge to the circuit court. On appeal, Dudley only challenged the lack of subject matter jurisdiction with respect to the charge of trafficking in cocaine. In contrast, the State argued there was no jurisdictional issue before this Court. The State characterized Dudley's appeal as a question of personal jurisdiction, which Dudley waived by failing to raise this issue at trial.

Id. n.2.

56. State v. Dudley, 354 S.C. 514, 537, 581 S.E.2d 171, 183 (S.C. Ct. App. 2003), *petition for cert. filed*, Adv. Sh. No. 31 (Aug. 18, 2003) (No. 3641).

57. *Id.* at 522, 581 S.E.2d at 174 (quoting State v. Douglas, 245 S.C. 83, 87, 138 S.E.2d 845, 847 (1964)).

58. State v. Dudley, 354 S.C. 514, 522, 581 S.E.2d 171, 175 (Ct. App. 2003), (quoting Pierce v. State, 338 S.C. 139, 150, 526 S.E.2d 222, 227 (2000), *petition for cert. filed*, Adv. Sh. No. 31 (Aug. 18, 2003) (No. 3641)).

59. *Id.* (citing Carter v. State, 329 S.C. 355, 362, 495 S.E.2d 773, 777 (1998); *see also* S.C. CODE ANN. § 17-19-20 (West 2003):

> Every indictment shall be deemed and judged sufficient and good in law which, in addition to allegations as to time and place, as required by law, charges the crime substantially in the language of the common law or of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood and, if the offense be a statutory offense, that the offense be alleged to be contrary to the statute in such case made and provided.

Id.

> South Carolina was vested with personal jurisdiction because Dudley appeared at trial and defended her case on the merits. With respect to subject matter jurisdiction, Dudley never challenged the validity of her indictments. The indictments are valid in that they sufficiently state the elements of the charged offenses. *Thus, South Carolina was vested with subject matter jurisdiction to the extent provided by a valid indictment.*[60]

Although the majority found personal jurisdiction and subject matter jurisdiction satisfied, the court determined that the facts of this case required "an *additional level* of jurisdictional analysis."[61] Accordingly, the majority addressed the concept of extraterritorial jurisdiction as viewed both by South Carolina and by other states.[62] Ultimately, the court referred to decisions from other jurisdictions and secondary authorities in determining an issue of first impression in South Carolina; namely, whether extraterritorial jurisdiction is a component of subject matter jurisdiction that the court can raise *sua sponte*.[63] Based on this review, the majority concluded that "Dudley's jurisdictional challenge is properly viewed as one of subject matter jurisdiction and more specifically, as one of extraterritorial jurisdiction."[64] Ultimately, the majority found no evidence to support the exercise of extraterritorial jurisdiction over Dudley,[65] and therefore, the court vacated both of Dudley's convictions.[66]

b. Dissenting Opinion

Judge Anderson wrote a dissenting opinion in which Judge Goolsby joined.[67] The dissenters voted to affirm the conviction for trafficking in cocaine and found

---

60. *Dudley*, 354 S.C. at 523, 581 S.E.2d at 176 (emphasis added); *see also Douglas*, 245 S.C. at 87, 138 S.E.2d at 847 ("Generally, jurisdiction of the subject matter is satisfied when appropriate charges are filed in a competent court, while jurisdiction of the person is acquired when the party charged is arrested or voluntarily appears in court and submits himself to its jurisdiction.") (citing State v. Landford, 223 S.C. 20, 27, 23 S.E.2d 854, 857 (1953)).

61. *See Dudley*, 354 S.C. at 524, 581 S.E.2d at 176 (emphasis added) (noting that Article I, Section 11 of the South Carolina Constitution grants South Carolina jurisdiction over crimes that occur within its borders, but questions whether South Carolina may exercise jurisdiction in the present case, where the "alleged criminal conduct occurred . . . entirely in Georgia").

62. *Id.* at 524–29, 581 S.E.2d at 176–79; *see infra* Part III.C.

63. *Dudley*, 354 S.C. at 529, 581 S.E.2d at 179; *see also supra* notes 7, 15 and accompanying text (discussing that whether extraterritorial jurisdiction is part of subject matter jurisdiction was an issue of first impression in South Carolina).

64. *Dudley*, 354 S.C. at 531, 581 S.E.2d at 180.

65. *Id.*

66. *Id.* at 537, 581 S.E.2d at 183. Because the majority found no evidence that Dudley intended her acts to create a detrimental effect in South Carolina, the court concluded that South Carolina could not exercise jurisdiction over her for conspiracy to traffic in cocaine or for trafficking in cocaine. *Id.* at 531, 581 S.E.2d at 181.

67. *Dudley*, 354 S.C. at 538, 581 S.E.2d at 184 (Anderson and Goolsby, JJ., dissenting).

that the majority's holding "misconstrue[d] and misapplie[d] the law extant in regard to: (1) personal jurisdiction; (2) subject matter jurisdiction; and (3) extraterritorial jurisdiction."[68]

In analyzing the concept of extraterritorial jurisdiction, the dissenting opinion noted the general rule that "a state may not prosecute an individual for a crime committed outside its boundaries."[69] While noting this general rule, the dissent also noted that a state is not prevented from exercising jurisdiction over every case in which the criminal defendant was not present within the state at the time the crime occurred.[70] "The exception to the rule against extraterritorial jurisdiction requires a finding that the defendant *intended a detrimental effect* to occur in this state."[71] The dissent found that "Dudley demonstrated specific intent to act and the intent that the harm occur in South Carolina;" therefore, the dissent supported South Carolina's exercise of extraterritorial criminal jurisdiction.[72]

c. *Concurring and Dissenting Opinion*

Judge Stilwell wrote a separate opinion concurring in part and dissenting in part.[73] He found that "[t]he fundamental issue is whether the defense that the State exceeded its territorial jurisdiction should have been raised to and ruled on by the trial court."[74] Judge Stilwell further noted that because the issue was not raised to or ruled on by the trial court, the court of appeals could address the issue only if it equated extraterritorial jurisdiction to subject matter jurisdiction.[75]

This was an issue of first impression in South Carolina; however, a "review of the sparse case law from [South Carolina] and the leading cases from other states" convinced Judge Stilwell that the issue was not a question of subject matter jurisdiction.[76] He noted that no error preservation issues existed in the two leading South Carolina cases (namely *State v. Morrow*[77] and *State v. Farne*[78]) or in the cases from other jurisdictions cited by the majority opinion, including both *In re*

---

68. *Id.*

69. *Id.* at 543, 581 S.E.2d at 186 (citing *In re* Vasquez, 705 N.E.2d 606 (Mass. 1999); *see infra* notes 104–15, 122–25 and accompanying text.

70. *Dudley*, 354 S.C. at 543, 581 S.E.2d at 186–87 (citing *Vasquez*, 705 N.E.2d at 610).

71. *Id.* at 545, 581 S.E.2d at 188 (citing *Blume*, 505 N.W.2d at 846) (emphasis added).

72. *Id.* at 547, 581 S.E.2d at 188. *Contra* text accompanying note 66 (discussing the majority opinion).

73. *Dudley*, 354 S.C. at 547, 581 S.E.2d at 188 (Stilwell, J., concurring in part and dissenting in part). Judge Stilwell's analysis is of particular significance to this Note because he overtly stated that he was "not convinced that extraterritorial jurisdiction is equivalent to subject matter jurisdiction." *Id.* at 547, 581 S.E.2d at 189.

74. *Id.* at 547, 581 S.E.2d at 189.

75. *Id.*

76. *Id.*

77. 40 S.C. 221, 18 S.E. 853 (1893).

78. 190 S.C. 75, 1 S.E.2d 912 (1939).

Vasquez[79] and *People v. Blume*,[80] "because objections to the court's jurisdiction were appropriately made in the trial court, fully argued, and ruled on."[81] Judge Stilwell concluded with the following:

> Subject matter jurisdiction is generally determined as a matter of law, requiring little if any evidence, particularly evidence of the intent of the accused. I frankly do not know whether extraterritorial jurisdiction is a part of personal jurisdiction, or is a third kind of jurisdiction not yet clearly articulated as such by the courts of South Carolina. I am nevertheless convinced it is an issue that must be raised to and ruled on by the trial court, as well as properly briefed to this court to warrant our addressing it. Because Dudley did neither, I would affirm her conviction.[82]

III. CRIMINAL JURISDICTION[83] GENERALLY AND BOTH SOUTH CAROLINA'S AND OTHER STATES' TREATMENT OF EXTRATERRITORIAL JURISDICTION

"O[ne] of the most difficult words in the legal lexicon to delineate is the term 'jurisdiction.'"[84] Derived from the Latin word "jurisdictio," meaning the "administration of the law," jurisdiction refers to "administration of justice; authority or legal power to hear and decide cases."[85] *Black's Law Dictionary* defines jurisdiction as:

---

79. 705 N.E.2d 606 (Mass. 1999).

80. 505 N.W.2d 843 (Mich. 1993).

81. State v. Dudley, 354 S.C. 514, 548, 581 S.E.2d 171, 189 (Stilwell, J. concurring in part and dissenting in part), *petition for cert.*, Adv. Sh. No. 31 (Aug. 18, 2003) (No. 3641).

82. *Id.* at 549, 581 S.E.2d at 189–90. *But see infra* Part IV (arguing that although South Carolina should not treat territorial jurisdiction as a component of subject matter jurisdiction, a defect in territorial jurisdiction resembles a defect in subject matter jurisdiction in that both jurisdictional elements are fundamental limitations on the court's authority. Therefore, a defect in territorial jurisdiction should be able to be raised by a party for the first time on appeal or *sua sponte* by an appellate court).

83. "T[here] are four different theories of criminal jurisdiction, namely: (1) territorial, (2) Roman, (3) injured forum, and (4) cosmopolitan." Rollin M. Perkins, *The Territorial Principle in Criminal Law*, 22 HASTINGS L.J. 1155, 1155 (1970–71) (footnote omitted). "Some courts have listed five . . . [theories], designated 'territorial,' 'nationality,' 'protective,' 'universality,' and 'passive personality.'" *Id.* at n.1. "[T]he common law recognized only the territorial theory of criminal jurisdiction." *Id.* at 1156. Even today, "[t]he authority of legislatures and courts in criminal matters is supposed to be circumscribed by the territorial boundaries of the state." Wendell Berge, *Criminal Jurisdiction and the Territorial Principle*, 30 MICH. L. REV. 238, 238 (1931–32). Berge discusses the reality of modern crime conditions and postulates that a solution to the criminal jurisdiction problem "can be effectuated only by a frank acceptance of elastic jurisdictional principles which are adaptable to the realities of modern crime situations." *Id.* at 239, 244.

84. B. J. George, Jr., *Extraterritorial Application of Penal Legislation*, 64 MICH. L. REV. 609, 609 (1966).

85. WEBSTER'S NEW WORLD COLLEGE DICTIONARY 734 (3d ed. 1997).

> 1. A government's general power to exercise authority over all persons and things within its territory. 2. A court's power to decide a case or issue a decree. 3. A geographic area within which political or judicial authority may be exercised. 4. A political or judicial subdivision within such an area.[86]

Courts generally consider two types of jurisdiction: subject matter jurisdiction and personal jurisdiction.[87] However, at least one state, Virginia, has found the following:

> The term jurisdiction embraces *several* concepts including *subject matter jurisdiction*, which is the authority granted through constitution or statute to adjudicate a class of cases or controversies; *territorial jurisdiction*, that is, authority over persons, things, or occurrences located in a defined geographic area; notice jurisdiction, or effective notice to a party or if the proceeding is *in rem* seizure of a *res* . . . ."[88]

In addition, the Supreme Court of Tennessee has noted "that before a court may exercise judicial power to hear and determine a criminal prosecution, that court must possess *three* types of jurisdiction: jurisdiction over the defendant, jurisdiction over the alleged crime, and territorial jurisdiction."[89] Both Virginia and Tennessee define the elements of "jurisdiction" to include subject matter jurisdiction, personal jurisdiction, *and* extraterritorial jurisdiction.

Courts long have misused and mishandled the term "jurisdiction" by finding

---

86. BLACK'S LAW DICTIONARY 383 (2d pocket ed. 2001).

87. E.g., *Dudley*, 354 S.C. at 522, 581 S.E.2d at 175 ("Jurisdiction is of two distinct kinds . . . ." (quoting *State v. Douglas*, 245 S.C. 83, 87, 138 S.E.2d 845, 847 (1964))); *see supra* note 57 and accompanying text. The Supreme Court of Wyoming also has treated jurisdiction as of two distinct kinds, subject matter and personal, thus ultimately subjugating the concept of territorial jurisdiction into the former kind. *See* Rios v. State, 733 P.2d 242, 245 (Wyo. 1987) ("Subject matter jurisdiction is limited by the territorial reach of the courts.").

88. Morrison v. Bestler, 387 S.E.2d 753, 755 (Va. 1990) (emphasis added) (citing Farant Inv. Corp. v. Francis, 122 S.E. 141, 144 (Va. 1924)); *see also* Gordon v. Commonwealth, 568 S.E.2d 452, 453–54, n.3 (Va. Ct. App. 2002) (quoting *Morrison* and recognizing that "there is a significant difference between subject matter jurisdiction and the other 'jurisdictional' elements"). In *Commonwealth v. Fafone*, 621 N.E.2d 1178, (Mass. 1993), the Supreme Judicial Court of Massachusetts held that Massachusetts could not convict the defendant of three counts of being an accessory before the fact to trafficking in cocaine because *the court lacked territorial jurisdiction over the crime*. *Id.* at 1178–79. The court made no reference to subject matter jurisdiction or personal jurisdiction, but stated, "[w]e do not reach the other issues because of the failure of proof of territorial jurisdiction." *Id.* at 1179. Therefore, the court in Massachusetts implicitly recognized a difference between territorial jurisdiction and subject matter jurisdiction.

89. State v. Legg, 9 S.W.3d 111, 114 (Tenn. 1999) (emphasis added).

"subject matter jurisdiction" synonymous with "competency"[90] and equating questions of venue to issues of subject matter jurisdiction.[91] Because a court must maintain "jurisdiction" over a controversy before it can adjudicate the controversy, logic requires that "jurisdiction" be broken into *all* of its constituent parts, including subject matter jurisdiction, personal jurisdiction, *and* territorial jurisdiction.

A. Subject Matter Jurisdiction

Subject matter jurisdiction is "jurisdiction over the nature of the case and the type of relief sought; the extent to which a court can rule on the conduct of persons or the status of things."[92] South Carolina has defined subject matter jurisdiction as the power of a court to adjudicate cases belonging to a general class.[93] Subject matter jurisdiction cannot be waived, even by consent of the party.[94] In light of this fundamental difference between subject matter jurisdiction and other "jurisdictional" elements, the Restatement (Second) of Judgments notes:

> There is a strong tendency in procedural law to treat various kinds of serious procedural errors as defects in subject matter jurisdiction. This is because characterizing a court's departure in exercising authority as "jurisdictional" permits an objection to the departure to be taken belatedly. This, in turn, permits a serious blunder to be remedied despite tardy objection. Thus, if the defect in the proceeding is treated as a matter of the court's subject

---

90. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 11 cmt. a, b (1982) (noting that usage of the term "subject matter jurisdiction" can result in confusion with territorial jurisdiction, "owing to the fact that the term 'subject matter jurisdiction' is also commonly used as the synonym of the term 'competence,'" and suggesting that "[t]he confusion can be partly dispelled by recognizing the differences in the source and functions of the rules governing a state's territorial jurisdiction over a res and the rules of subject matter jurisdiction").

91. *See Gordon*, 568 S.E.2d at 453. In *Gordon*, the defendant filed a motion to set aside his conviction for transporting marijuana into Virginia for a lack of jurisdiction. The trial court found that Gordon's argument related to *venue* rather than to subject matter jurisdiction, and that Gordon had waived the argument by his failure to raise it before trial. The court of appeals affirmed the trial court's judgment; however, the court of appeals found that Gordon's claim related to territorial jurisdiction, not to venue. The court upheld the conviction because Gordon's objection to territorial jurisdiction was untimely. *Id. Gordon* is thus an example of a court treating territorial jurisdiction as waivable; thus, the court noted, "a defendant's claim that the trial court lacked territorial jurisdiction is generally waivable. However, where the defendant claims that the evidence failed to prove that the offense occurred in the Commonwealth, we have found the claim is not subject to waiver." *Id.* at 454 (citing *Morrison*, 387 S.E.2d at 756).

92. BLACK'S LAW DICTIONARY 385 (2d pocket ed. 2001).

93. Pierce v. State, 338 S.C. 139, 150, 526 S.E.2d 222, 227 (2000) (citing Dove v. Gold Kist, Inc., 314 S.C. 235, 442 S.E.2d 598 (1994)); *see also supra* note 58 and accompanying text (discussing the definition of subject matter jurisdiction in South Carolina).

94. State v. Douglas, 245 S.C. 83, 87, 138 S.E.2d 845, 847 (1964); *see also supra* note 57 and accompanying text (noting that subject matter jurisdiction is nonwaivable).

> matter jurisdiction, then under various circumstances it can be a basis for arresting the proceedings . . . for complaint on appeal even though the matter was not raised in the trial court . . . .[95]

In a criminal case, an indictment is sufficient to confer jurisdiction "if 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."[96]

B. Personal Jurisdiction

Personal (or *in personam*) jurisdiction is "[a] court's power to bring a person into its adjudicative process."[97] In contrast to subject matter jurisdiction, "a party may confer jurisdiction over his person by consent, or may waive the right to raise the question."[98] A party often waives the right to challenge personal jurisdiction by appearing before the court and defending one's case, as Dudley did.[99]

In deciding *In re Vasquez*,[100] the Supreme Court of Massachusetts considered the nature of personal jurisdiction in a criminal setting.[101] Vasquez, a Massachusetts resident, divorced in 1985 and was ordered to make child support payments for his two children.[102] In 1987, Vasquez's ex-wife moved to Oregon with the children and without Vasquez's knowledge.[103] Vasquez never went to Oregon, and because he failed to make support payments, his ex-wife "brought a reciprocal support petition in Oregon in 1988 under the Uniform Reciprocal Enforcement Support Act."[104] Officials in Oregon obtained an indictment against Vasquez because authorities in

---

95. RESTATEMENT (SECOND) OF JUDGMENTS § 11 cmt. e (1982) (internal reference omitted). Note that although the Restatement covers the concepts of subject matter jurisdiction and the other "jurisdictional" elements in the civil context only, a strong analogy exists between the civil context and the criminal context, as is discussed below. *See infra* notes 193–94 and accompanying text.

96. State v. Dudley, 354 S.C. 514, 522–23, 581 S.E.2d 171, 175–76 (Ct. App. 2003), *petition for cert. filed*, Adv. Sh. No. 31 (Aug. 18, 2003) (No. 3641) (citations omitted); *see also supra* notes 60–61 and accompanying text (discussing when a South Carolina court is vested with subject matter jurisdiction in criminal cases).

97. BLACK'S LAW DICTIONARY 384 (2d Pocket ed. 2001).

98. *Douglas*, 245 S.C. at 87, 138 S.E.2d at 847 (citing City of Florence v. Berry, 61 S.C. 237, 240, 39 S.E. 389, 390 (1901)).

99. *See, e.g., Dudley*, 354 S.C. at 523, 581 S.E.2d at 176 ("South Carolina was vested with personal jurisdiction because Dudley appeared at trial and defended her case on the merits.").

100. 705 N.E.2d 606 (Mass. 1999).

101. *Id.* at 610–12; *Dudley*, 354 S.C. at 548, 581 S.E.2d at 189 (Stilwell, J., concurring in part and dissenting in part). Judge Stilwell noted that the majority relied on *Vasquez* for the proposition that the issue was not a question of personal jurisdiction. He wrote, "I do not agree, however, with the inference drawn therefrom that because it is not personal jurisdiction, it must be subject matter jurisdiction." *Id.*

102. *Vasquez*, 705 N.E.2d at 607.

103. *Id.*

104. *Id.*

Massachusetts could not locate him.[105] Vasquez was arrested pursuant to a warrant that Oregon requested from the Governor of Massachusetts.[106] "Vasquez filed a petition for a writ of habeus corpus," claiming "the courts of Oregon [did] not have *personal jurisdiction* over him.[107]

The court stated that "[t]he jurisprudence of personal jurisdiction has no bearing on the question whether a person may be brought to a State and tried there for crimes under that State's laws."[108] Furthermore, the court noted that "[t]he petitioner's claim is more properly viewed as an argument that Oregon has no legislative jurisdiction to criminalize acts that occur outside the boundaries of the State."[109] The extent of Oregon's extraterritorial jurisdiction thus determined the question of "[w]hether Oregon may prosecute [Vasquez] for criminal non-support."[110] The court concluded that the lower court properly denied Vasquez's petition because Oregon provided for jurisdiction on the theory that "a crime involving a failure to act is committed at the place where the act is required to be performed."[111]

C. Extraterritorial Jurisdiction[112]

Extraterritorial jurisdiction, also referred to as "territorial jurisdiction," is "[a] court's ability to exercise power beyond its territorial limits."[113] The common law recognized the territorial theory of criminal jurisdiction,[114] and the general rule "is that a State may not prosecute an individual for a crime committed outside its boundaries."[115]

---

105. *Id.*

106. *Id.*

107. *Id.* (emphasis added).

108. *In re* Vasquez, 705 N.E.2d 606, 609 (Mass. 1999).

109. *Id.*

110. *Id.* at 610.

111. *Id.* at 611–12 (quoting State v. Gantt, 548 N.W.2d 134, 136 (Wis. Ct. App. 1996)).

112. For a thorough discussion of the history of the territorial principle in criminal law, see Perkins, *supra* note 83. *See also* 22 C.J.S. *Criminal Law* § 155 (2003):

> No state or sovereignty can enforce the penal laws of another, or punish offenses committed entirely in and against another; but a state may punish an offense only part of which has been committed within its limits, or which, although committed without the state, affects persons or property within it.

See also George, *supra* note 84 (discussing the ways in which states exercise jurisdiction to penalize criminal conduct occurring outside the state); Daniel L. Rotenberg, *Extraterritorial Legislative Jurisdiction and the State Criminal Law*, 38 TEX. L. REV. 763 (1960) (same).

113. BLACK'S LAW DICTIONARY 384 (2d Pocket ed. 2001).

114. Perkins, *supra* note 83, at 1156.

115. *Vasquez*, 705 N.E.2d at 610; *see also* People v. Blume, 505 N.W.2d 843, 845 (Mich. 1993) (noting the "general rule is that jurisdiction is proper only over 'offenses as may be committed within its [state's physical borders]'" (quoting People v. Devine, 151 N.W. 646 (1915))); State v. Legg, 9 S.W.3d 111, 114 (Tenn. 1999) (noting that territorial jurisdiction is a concept recognizing a state's power "to punish criminal conduct occurring within its borders"); Moreno v. Baskerville, 452 S.E.2d

The ability of a state "to exercise jurisdiction over acts that occur outside the state's physical borders developed as an exception to the [general] rule against extraterritorial jurisdiction."[116] This exception is limited to acts "intended to have, and that actually do have, a detrimental effect within the state."[117]

For example, in *People v. Blume*,[118] the Supreme Court of Michigan held that "Michigan may exercise extraterritorial jurisdiction over acts committed outside Michigan when the acts are *intended to and do have a detrimental effect within the state*."[119] The court dismissed certain drug-related charges against the defendant, a resident of Florida, because "knowledge alone is not enough to exercise extraterritorial jurisdiction."[120] "The entire transaction took place in Florida," and although the defendant *knew* that the person to whom he sold cocaine was from Michigan,[121] the court dismissed the charges because there was not sufficient evidence of intent to cause a detrimental effect in Michigan to warrant exercising extraterritorial jurisdiction.[122]

In addition, some states have penalized conduct that took place beyond the state's boundaries by implying the defendant's "constructive presence" within the state.[123] In *Simpson v. State*,[124] for example, the Supreme Court of Georgia affirmed the conviction of a man who had been standing in South Carolina when he shot a man in Georgia.[125] The court stated:

> Of course, the presence of the accused within this state is essential to make his act one which is done in this state, but the presence need not be actual. It may be constructive . . . . So, if a man in the

---

653, 655 (Va. 1995) (recognizing the exception to the general rule against extraterritorial jurisdiction "where an accused sets in motion a force that operates in another state, such as, for example, the case of a shot being fired at a person across a state line"); Rios v. State 733 P.2d 242, 245 (Wyo. 1987) (referring to the common law principle that a state's criminal law has no effect beyond the state's territorial boundaries). Further, "[t]he source of this rule [against extraterritorial jurisdiction] is unsettled and has not been ascribed to any particular constitutional provision." *Vasquez*, 705 N.E.2d at 610 (citing State *ex rel.* Juvenile Dep't. v. W., 578 P.2d 824, 827 n.5 (Or. Ct. App. 1978)).

116. *Blume*, 505 N.W.2d at 845 (citation omitted); *see also* Rotenberg, *supra* note 112, at 764–65 (noting that the reality of contemporary American society, including "boundary straddling" by areas of large population, increased mobility, and the existence of intelligent and well-organized criminals, determines the practical importance of the "legal problem of the extraterritoriality of state criminal law").

117. *Blume*, 505 N.W.2d at 845 (citing Strassheim v. Daily, 221 U.S. 280, 285 (1911)).

118. *Id.* at 843.

119. *Id.* at 844 (emphasis added).

120. *Id.*

121. *Id.* at 845.

122. *Id.* at 844–45.

123. Berge, *supra* note 83, at 243 (noting that some cases "imply that such presence [of the offender] is necessary by holding that the offender was constructively present at the place where the offense was consummated and by proceeding to base jurisdiction on such constructive presence").

124. 17 S.E. 984 (Ga. 1893).

125. *Id.*

> state of South Carolina criminally fires a ball into the state of Georgia, the law regards him as accompanying the ball, and as being represented by it, up to the point where it strikes . . . . [T]he act of the accused did take effect in this state. He started across the river with his leaden messenger, and was operating it up to the moment when it ceased to move, and was, therefore, in a legal sense, after the ball crossed the state line, up to the moment that it stopped, in Georgia.[126]

Dissenting in *Hyde v. United States*,[127] Justice Holmes referred to "constructive presence" as the "language of fiction."[128] Specifically, Justice Holmes stated, "[w]hen a man is said to be constructively present where the consequences of an act done elsewhere are felt, it is meant that for some special purpose he will be treated as he would have been treated if he had been present, although he was not."[129]

In 1893, South Carolina initially addressed the issue of extraterritorial jurisdiction in *State v. Morrow*,[130] where the Supreme Court of South Carolina implicitly recognized and applied the "effects doctrine."[131] Eighteen years after *Morrow*, the United States Supreme Court addressed the issue in *Strassheim v. Daily*,"[132] and in 1939 (post-*Strassheim*) South Carolina again addressed the issue of extraterritorial jurisdiction in *State v. Farne*,[133] applying the Strassheim Doctrine.[134]

1. State v. Morrow

South Carolina addressed the concept of extraterritorial jurisdiction in 1893 in *State v. Morrow*.[135] In *Morrow*, South Carolina indicted defendant Morrow for abortion and for intent to procure abortion.[136] The indictment charged Morrow with "having procured and advised the taking of a certain drug with the intent to produce abortion, and that in consequence of such abortion the death of the woman was produced."[137] Morrow apparently acquired medication in Washington, D.C. and

---

126. *Id.* at 985–86, *quoted in Blume*, 505 N.W.2d at 855 n.12 (Boyle, J., dissenting); Berge, *supra* note 83, at 243–44.

127. 225 U.S. 347 (1912).

128. *Id.* at 386 (Holmes, J., dissenting).

129. *Id.* (Holmes, J., dissenting) *quoted in Blume*, 505 N.W.2d at 855 n.12 (Boyle, J., dissenting); Berge, *supra* note 83, at 244).

130. 40 S.C. 221, 18 S.E. 853 (1893).

131. *Id.* at 242, 18 S.E. at 861; *see also infra* Part III.C.1 (discussing *Morrow*).

132. 221 U.S. 280 (1911); *see also infra* Part III.C.2 (discussing *Strassheim*).

133. 190 S.C. 75, 1 S.E.2d 912 (1939).

134. *Id.* at 83; *see also infra* Part III.C.3 (discussing *Farne*).

135. *Morrow*, 40 S.C. at 221, 18 S.E. at 853.

136. *Id.* at 229–30, 18 S.E. at 856.

137. *Id.* at 222, 18 S.E. at 853.

mailed it to a woman in South Carolina, who took the medication, had an abortion, and died as a result.[138]

The court, in deciding whether South Carolina had jurisdiction, implicitly recognized the 'effects doctrine,'[139] which instructs "that a person may commit an offence within this State by putting in motion a force which takes effect here . . . although the party charged may never have been personally present in this State."[140] The court concluded that although Morrow was in Washington when he used "an innocent agent, the United States mail,"[141] to send drugs to the woman in South Carolina, he had the intent to cause an abortion and the woman actually ingested the drugs in South Carolina; thus, "the offense was, in the eye of the law, committed within the limits of this state."[142]

2. *Strassheim Doctrine*

The United States Supreme Court first addressed the concept of strict territorial jurisdiction in 1911 in *Strassheim v. Daily*.[143] In *Strassheim*, the State of Michigan sought to extradite Daily, a man from Illinois, to answer charges of bribery and "obtaining money from the State by false pretenses." The charges related to machinery that Daily had sold to the State of Michigan.[144] The Governor of Illinois granted Michigan's request for a warrant extraditing Daily to Michigan.[145] Daily then filed a petition for habeus corpus,[146] and at the hearing, presented evidence that he was in Chicago when the alleged bribery and false pretenses were made.[147] The district court granted the habeus corpus petition, finding that the events alleged "did not constitute a crime against the laws of Michigan."[148] The United States Supreme

---

138. *Id.* at 237, 18 S.E. at 860. There was some evidence that the defendant had sexual intercourse with the girl resulting in pregnancy and that when she told the defendant about her condition, "he then formed the intention of using means to cause an abortion." *Id.* at 235–36, 18 S.E. at 858.

139. State v. Dudley, 354 S.C. 514, 527, 581 S.E.2d 171, 178 (Ct. App. 2003), *petition for cert. filed*, Adv. Sh. No. 31 (Aug. 18, 2003) (No. 3641) (citing *Morrow*, 40 S.C. at 236–38, 18 S.E. at 858–59). See *supra* notes 117–19 and accompanying text for a discussion of the "effects doctrine."

140. *Morrow*, 40 S.C. at 242, 18 S.E. at 861.

141. *Id.* at 237, 18 S.E. at 860.

142. *Id.* at 240, 18 S.E. at 860.

143. 221 U.S. 280 (1911); *see* United States v. Baker, 609 F.2d 134, 138 (5th Cir. 1980) (connecting the development of the objective territorial theory to Justice Holmes in *Strassheim*); In re Vasquez, 705 N.E.2d 606, 610–11 (Mass. 1999) (tracing the "effects doctrine" to *Strassheim*); People v. Blume, 505 N.W.2d 843, 845 (Mich. 1993) (citing *Strassheim* "as an exception to the rule against extraterritorial jurisdiction"); *Dudley*, 354 S.C. at 525, 581 S.E.2d at 177 (citing *Strassheim* as the United States Supreme Court's expansion of the strict territorial theory); Rios v. State, 733 P.2d 242, 245–46 (Wyo. 1987) (discussing *Strassheim* as "extending the reach of the territorial jurisdiction concept"); Rotenberg, *supra* note 112, at 780–81 (quoting Justice Holmes from *Strassheim*).

144. *Strassheim*, 221 U.S. at 281–82.

145. *Id.* at 281.

146. *Id.*

147. *Id.* at 283.

148. *Id.* at 281.

Court reversed the district court's order granting the writ and held that Michigan could prosecute Daily.[149] In an opinion by Justice Holmes, the Court stated:

> If a jury should believe the evidence and find that Daily did the acts that led Armstrong to betray his trust, deceived the Board of Control, and induced by fraud the payment by the State, the usage of the civilized world would warrant Michigan in punishing him, although he never had set foot in the State until after the fraud was complete. *Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect, if the State should succeed in getting him within its power.*[150]

The Court assumed, for purposes of habeus corpus, that Daily was a criminal under the laws of Michigan, and although it did not necessarily follow that he was a "fugitive from justice" within the provisions of the United States Constitution,[151] Justice Holmes noted that a criminal does not have to do "every act necessary to complete the crime" within the state.[152] Rather, "[i]f he does there an overt act which is and is intended to be a material step toward accomplishing the crime" and then leaves the state completing the crime elsewhere, "he becomes a *fugitive from justice*, when the crime is complete, if not before."[153]

3. *State v. Farne*

In 1939, South Carolina addressed the *Strassheim* doctrine in *State v. Farne*.[154] In this case, Farne faced charges of circulating an alleged forged bank check, and the co-defendant, Kennedy, faced charges of being an accessory before the fact.[155] Kennedy moved to quash the indictment, alleging that as to him, it was contrary to law because the offense was committed both inside and outside the state.[156] The indictment alleged that Kennedy's felonious acts occurred both inside South Carolina and in places outside the state, including Asheville, North Carolina and

149. *Id.* at 285.

150. *Strassheim*, 221 U.S. at 284–85. (emphasis added).

151. *Id.* at 285 (citing Hyatt v. Cockran, 188 U.S. 691, 712 (1903)) (emphasis added).

152. *Id.*

153. *Id.* (emphasis added). Note that other states have recognized the *Strassheim* Doctrine as providing an exception to the general rule against extraterritorial jurisdiction—an exception limited to those acts intending to produce, and actually producing, a detrimental effect within the state. Some states refer to this as the "effects doctrine." *See, e.g.*, In re Vasquez, 705 N.E.2d 606, 610–11 (Mass. 1999) (discussing the "effect doctrine"); *supra* notes 117–20 and accompanying text.

154. 190 S.C. 75, 1 S.E.2d 912 (1939).

155. *Id.* at 76, 1 S.E.2d at 912.

156. *Id.* at 82, 1 S.E.2d at 915.

Nashville, Tennessee.[157] Kennedy argued that if a person is an accessory before the fact, he "should be tried in the State where he instigates the crime," not in the state where the principal commits the crime.[158] However, the court upheld Kennedy's conviction, under the follow rationale:

> Although the general rule is that a State or sovereignty cannot punish for offenses committed beyond its territorial limits, it may pass laws in regard to its own citizens which will be binding and obligatory on them when they are beyond such limits, and for the violation of which they may be punished in its Courts, whenever it can find them within its jurisdictions. Aside from this, where a person, being beyond the limits of a State or Country, puts in operation a force which produces a result and constitutes a crime within those limits, he is as liable to indictment and punishment, if jurisdiction can be obtained of his person, as if he had been within the limits of the State or Country when the crime was committed.[159]

4. Jurisdictional Statutes

Some states have adopted the *Strassheim* doctrine by enacting specific legislation clearly defining the state's jurisdictional reach over criminal activity occurring outside the state.[160] For example, in *People v. Blume*[161] the Supreme Court of Michigan acknowledged that the state of Michigan "has not defined the boundaries of the exception [to the rule against extraterritorial jurisdiction], but [the state] consistently has required a finding that the actor intended a detrimental effect to occur *in this state*."[162] The dissent "agree[d] with the majority that the Legislature

---

157. *Id.*

158. *Id.* at 83, 1 S.E.2d at 915. In making this argument, Farne and Kennedy relied on Section 17, Article 1 of the South Carolina Constitution of 1895, which provided the following: "No person shall be held to answer for any crime . . . unless on a presentment or indictment of a grand jury of the county where the crime shall have been committed." *Id.* at 82–83, 1 S.E.2d at 915.

159. *Farne*, 190 S.C. at 83, 1 S.E.2d at 915 (quoting 16 C.J.S. § 198).

160. State v. Dudley, 354 S.C. 514, 526, 581 S.E.2d 171, 177 (Ct.App. 2003), *petition for cert. filed*, Adv. Sh. No. 31, (Aug. 18, 2003) (No. 3641) (listing various state statutes that implement the *Strassheim* doctrine); *see also In re* Vasquez, 705 N.E.2d 606, 611 (Mass. 1999) ("Many States have enacted jurisdictional statutes specifically permitting prosecution under the rule of *Strassheim*, and some courts, in upholding prosecutions of persons who committed criminal acts outside the State, are careful to cite these statutes as justification."). In *Vasquez*, Oregon had no such statute, but the court observed, "it does not necessarily follow that the Oregon courts are disabled from relying on the rule of Strassheim." *Id*; *see also infra* notes 169–71 and accompanying text (discussing that states should still be able to rely on the *Strassheim* doctrine without explicit legislation, and therefore, reach criminal behavior occurring outside a state).

161. 505 N.W.2d 843 (Mich. 1993).

162. *Id.* at 846 (citing Deur v. Newaygo Sheriff, 362 N.W.2d 698 (Mich. 1984)).

may proscribe conduct that occurs outside our physical borders that is intended to produce, and actually produces, a detrimental effect in Michigan."[163] Furthermore, the dissent noted that:

> The statute may only be enforced against conduct that occurs out of state if the Legislature's intent to give the statute extraterritorial effect is clear. The statutes in question are silent with regard to their extraterritorial application. We therefore look to their purpose and subject matter to determine the relevant legislative intent.[164]

Likewise, in *State v. Legg*[165] the Supreme Court of Tennessee addressed "whether the State of Tennessee has territorial jurisdiction pursuant to Tennessee Code Annotated section 39-11-103(b)(1) to prosecute a charge of aggravated kidnapping that was commenced in Alabama."[166] In 1858, Tennessee modified the common law rule against extraterritoriality by enacting a statute that conferred jurisdiction on the courts over certain crimes commenced outside of the state but consummated within the state.[167] The court held that the statute allows the state to "exercise territorial jurisdiction over continuing offenses when at least one element of the crime is continued and therefore committed in Tennessee."[168]

In *State v. Dudley*,[169] the South Carolina Court of Appeals observed that "[a]lthough states with a specific legislative enactment certainly more clearly define a state's jurisdictional power over criminal conduct outside of its territorial borders, the absence of a state jurisdictional statute is not dispositive."[170] Thus, the court concluded that the absence of a statute does not preclude South Carolina from

---

163. *Id.* at 856 (Boyle, J., dissenting).

164. *Id.* at 857 (Boyle, J., dissenting).

165. 9 S.W.3d 111 (Tenn. 1999).

166. *Id.* at 112.

167. *Id.* at 114 (interpreting TENN. CODE § 4973 (1858)). In 1989, "the legislature reworded the statute to read, 'When an offense is commenced outside this state and consummated in this state, the person committing the offense is liable for punishment in this state in the county in which the offense was consummated, unless otherwise provided by statute." *Id.* at 115 (quoting TENN. CODE ANN. § 39-11-103(b)(1) (1997)).

168. *Id.* at 118. The court held "that when an offense is continuing in nature and has continued into Tennessee from another state, the offense is deemed to have both commenced and consummated anew in Tennessee so long as any essential element to the offense continues to be present in Tennessee." *Id.* at 116. The court also held that the legislature "intended for the crime of aggravated kidnaping to punish a continuing course of conduct," and because there was sufficient evidence for the jury to determine that at least one element of the crime occurred in Tennessee, the court reversed the lower court's judgment that the state lacked territorial jurisdiction. *Legg*, 9 S.W.3d at 118–19.

169. 354 S.C. 514, 581 S.E.2d 171 (Ct. App. 2003), *petition for cert. filed*, Adv. Sh. No. 31 (Aug. 18, 2003) (No. 3641).

170. *Id.* at 526, 581 S.E.2d at 177 (citing Rios v. State, 733 P.2d 242, 249 (Wyo. 1987)) (recognizing that a state is not precluded from relying on the *Strassheim* doctrine in the absence of a jurisdictional statute); *In re* Vasquez, 705 N.E.2d 606, 611 (Mass. 1999) (same).

exercising jurisdiction over "out-of-state criminal conduct."[171] As one commentator has written,

> [a]n examination of selected current criminal statutes reveals that though there are many directed at extraterritoriality, the states differ considerably in regard to the total amount of legislation, the crimes covered, and the methods of drafting and organizing provisions. . . . Few of the states checked have a thorough and orderly method for dealing with criminal jurisdiction. Why this is so is not known. . . . Whatever the reasons, the present status of state legislation on the extraterritorial crime is not adequate.[172]

5. Extraterritorial Jurisdiction in Contrast to Venue

"Venue has been defined as the locality where the offense is triable . . . ."[173] The rules of territorial jurisdiction differ from the rules of venue: "[t]he former are rules determining whether a state may adjudicate a matter at all, while the latter are rules determining which court within the state is the proper forum."[174] "[T]here is a conflict of authority as to whether the rules as to venue relate to jurisdiction of the

---

171. *Dudley*, 354 S.C. at 526, 581 S.E.2d at 178 at 526, 581 S.E.2d at 178. In a footnote, the court noted that the General Assembly has "extend[ed] the reach of South Carolina's criminal statutes" in at least two situations. *Id.* at n.3 (quoting both statutory sections). The first of these situations is found in section 17-21-30, entitled "[v]enue where perpetrator of homicide and victim are in different states:"

> When any person within the limits of this State shall inflict an injury on any person who at the time the injury is inflicted is beyond the limits of this State or when any person beyond the limits of this State shall inflict an injury on any person at the time within the limits of this State and such injury shall cause the death of the person injured, in either case the person causing such death shall be subject to be indicted, tried and punished in the first case in the county of this State where the person inflicting the injury was at the time when the injury was inflicted and, in the second case, in the county in which it was received.

S.C. CODE ANN. § 17-21-30 (West 2003). The second situation involving this extension is section 17-21-50, entitled: "[v]enue for accessories before the fact." This section provides:

> A person charged as an accessory before the fact may be indicted, tried and punished in the same court and county in which the principal felon might be indicted and tried, although the offense of counseling, hiring or procuring the commission of such felony is committed on the high seas or on land outside of the county either within or without the limits of this State.

S.C. Code Ann. § 17-21-50 (West 2003).

172. Rotenberg, *supra* note 112, at 771.

173. 22 C.J.S. *Criminal Law* § 177 (2003). This section also defines venue as "the county, or jurisdiction, or geographical subdivision, or territorial area within the state or district, in which the prosecution is, or must be, brought or tried." *Id.*

174. RESTATEMENT (SECOND) OF JUDGMENTS § 4 cmt. h (1982).

subject matter or merely confer a personal right which the accused may waive."[175] The two are often distinguished:

> While it has been held that venue involves jurisdiction of the subject matter, so that it is not subject to waiver by accused, it has also been held that in this context "jurisdiction" refers to jurisdiction of the particular case rather than jurisdiction of the subject matter or the person, that venue relates to practice and procedure and not to jurisdiction, that the right to have the case tried in a particular county is a right personal to [the] accused which may be waived by him, and that improper venue will not deprive a court of jurisdiction over a criminal action.[176]

Some state constitutions and statutes reflect the common law principle that proper venue exists in the county where the offense occurred, "but in the absence of a constitutional inhibition, the legislature may fix venue otherwise."[177] However, "[q]uestions of venue in criminal cases raise deep issues of public policy and are not merely matters of formal legal procedure."[178] Public policy thus determines how courts should construe legislation concerning venue.[179] Generally, "[t]he rules of territorial jurisdiction are to be distinguished from rules of venue."[180]

IV. REVISITING *STATE V. DUDLEY* AND THE TREATMENT OF EXTRATERRITORIAL JURISDICTION AS A COMPONENT OF SUBJECT MATTER JURISDICTION

The complexity of modern crime and social policy considerations require a flexible approach to criminal jurisdiction, including certain exceptions to the general rule against extraterritorial jurisdiction.[181] South Carolina courts concede this point. But while the nature of crime requires a certain degree of doctrinal flexibility, the integrity of the legal system requires a degree of doctrinal clarity.[182]

---

175. 22 C.J.S. *Criminal Law* § 177 (2003); *see, e.g., supra* note 91 (discussing venue and territorial jurisdiction issues in *Gordon v. Virginia*, 568 S.E2d 452 (Va. Ct. App. 2002)).

176. 22 C.J.S. *Criminal Law* § 177 (2003) (citations omitted).

177. *Id.* at § 178.

178. *Id.* at § 177.

179. *Id.*

180. RESTATEMENT (SECOND) OF JUDGMENTS § 4 cmt. h (1982).

181. *See* Berge, *supra* note 83, at 244 ("Reality in modern crime conditions must be faced; the important question must be not so much one of respecting the theoretical sovereignty of neighboring states as one of evolving workable principles upon which to base effective administration of criminal law."); *see also* People v. Blume, 505 N.W.2d 843, 856 (Mich. 1993) (Boyle, J., dissenting) (noting that Michigan has "recognized exceptions to the general rule against extraterritorial" jurisdiction as populations have grown, technology has progressed, and mobility between jurisdictions has increased).

182. As should be apparent from this Note, there is a conflict of authority as to the proper treatment of the various jurisdictional elements, including subject matter jurisdiction, personal jurisdiction, territorial jurisdiction, and to some extent, venue. Therefore, the law regarding these

The question remains: what exactly does the term "jurisdiction" encompass?[183] Admittedly, it includes the long-recognized concepts of subject matter jurisdiction and personal jurisdiction. But does the concept of extraterritorial jurisdiction have any additional significance regarding the scope of jurisdiction?

This Note proposes a solution, albeit a solution contrary to the majority's holding in *State v. Dudley*.[184] Rather than asking whether extraterritorial jurisdiction is *either* a component of subject matter jurisdiction *or* personal jurisdiction, the courts should consider a third alternative; namely, the one tacitly proposed by Judge Stilwell in his concurrence and dissent: "whether extraterritorial jurisdiction . . . is a third kind of jurisdiction not yet clearly articulated as such by the courts of South Carolina."[185]

Whatever the correct approach, a review of other states' case law and secondary sources leads to the conclusion that for purposes of balancing the competing goals of flexibility and clarity, courts should treat extraterritorial jurisdiction as an entirely separate jurisdictional element and not necessarily a component of *either* subject matter jurisdiction *or* personal jurisdiction.[186]

In viewing extraterritorial jurisdiction as a separate requirement, courts must consider whether a defect in extraterritorial jurisdiction is as fundamental as a defect in subject matter jurisdiction and thus capable of being raised by a party for the first time on appeal or *sua sponte* by an appellate court, or whether a defect in extraterritorial jurisdiction is more like a defect in other jurisdictional elements that a party can waive. "With respect to objections to the jurisdiction of the court in criminal prosecutions, a distinction is to be made between those which involve jurisdiction *or fundamental rights* of accused and those which involve mere personal privileges of accused; the former cannot be waived, but the latter can."[187]

The Restatement (Second) of Judgments contrasts the concepts of subject matter jurisdiction and territorial jurisdiction in the civil context and somewhat cryptically states that issues of subject matter jurisdiction are "matters of the organic law of the government involved, state or federal," while the rules of territorial jurisdiction stem from "the rules that define the political authority of the state itself."[188] The Restatement thus draws a distinction between the source of subject matter jurisdiction and the source of territorial jurisdiction: the rules of subject matter jurisdiction stem from "the political authority that has created the court"—Congress and the state legislatures—and the rules of territorial jurisdiction

---

elements often provides blurry distinctions rife with conceptual difficulty. Courts struggle to balance the competing goals of doctrinal flexibility and doctrinal clarity, and this Note proposes only one possible solution in an effort to find a proper balance for South Carolina.

183. This question refers only to criminal jurisdiction for purposes of this Note.

184. 354 S.C. 514, 581 S.E.2d 171 (Ct. App. 2003); *petition for cert. filed*, Adv. Sh. No. 31 (Aug. 18, 2003).

185. *Id.* at 549, 581 S.E.2d at 189 (Stilwell, J., concurring in part and dissenting in part).

186. *See supra* Part III.

187. 22 C.J.S. *Criminal Law* § 175 (2003) (emphasis added).

188. RESTATEMENT (SECOND) OF JUDGMENTS § 11 cmt. b (1982).

are "embodied in the Constitution."[189]

Furthermore, although "a state may refrain from exercising the full range of territorial jurisdiction that the Constitution permits," regardless of how a state chooses to define its territorial jurisdiction, it must stay within the prescribed constitutional limit.[190] Thus, "[t]he definition of proper territorial jurisdiction of the states . . . derives from Constitutional limitations upon the authority of the states and from limitations established by the law of the states themselves."[191]

In the civil context, the decision in *International Shoe Co. v. Washington*[192] established the concept of "minimum contacts,"[193] referring to the *constitutional* requirement that a defending party must have a certain relationship with the forum state to make the exercise of territorial jurisdiction reasonable.[194] Interestingly, because the Due Process Clause of the United States Constitution's Fourteenth Amendment governs territorial jurisdiction in the state court system and the Due Process Clause of the United States Constitution's Fifth Amendment governs territorial jurisdiction in the federal court system *in both the civil context and the criminal context*, one can draw a clear analogy between the "minimum contacts" test and the "effects doctrine." The due process analogy does provide some insight into the nature of territorial jurisdiction; perhaps due process, viewed from the defendant's perspective, and territorial jurisdiction, viewed from the states' perspective, are analogous in that they both measure a state's power to reach beyond its borders. However, due process in the civil context is a broader concept that includes certain personal privileges that a party *can* waive, while territorial jurisdiction (viewed from the states' perspective) is more fundamental and concerns the *state's* actual authority to subject persons to its political will. Because a distinction exists between jurisdictional objections relating to fundamental rights, which a party cannot waive, and those relating to personal privileges, which a party can waive, a strong argument exists that territorial jurisdiction is a fundamental right that a party should not be able to waive.[195]

Essentially, although subject matter jurisdiction and territorial jurisdiction have different sources and deserve recognition as separate jurisdictional elements, they both impose fundamental limitations on a court's authority to adjudicate. Policy

---

189. *Id.*

190. *Id.; see also* 22 C.J.S. *Criminal Law* § 156 (2003) ("Criminal jurisdiction conferred on a court by the constitution is subject to legislative change only where, and to the extent, permitted by the constitution."); *Id.* § 154 ("Subject to constitutional limitations, the legislature may enlarge or curtail the criminal jurisdiction of courts . . . .").

191. RESTATEMENT (SECOND) OF JUDGMENTS § 4 cmt. a (1982); *see also id.* § 4 cmt. c (noting that in addition to constitutional limitations, "[t]he scope of a state's territorial jurisdiction may be limited by provisions of the state's own decisional law, statutes and rules of court.").

192. 326 U.S. 310 (1945).

193. *Id.* at 317.

194. *See also* RESTATEMENT (SECOND) OF THE LAW OF JUDGMENTS § 4 cmt. a (1982) (discussing *International Shoe*, 326 U.S. at 317).

195. *See supra* note 187 and accompanying text.

considerations, including basic notions of fairness and the legal system's overarching interest in providing valid judgments, support the argument that territorial jurisdiction is so basic a requirement that South Carolina should treat a defect as nonwaivable—similar to a defect in subject matter jurisdiction. Therefore, although the court in *State v. Dudley*[196] erred by treating extraterritorial jurisdiction as a *component* of subject matter jurisdiction,[197] the court correctly recognized the fundamental nature of extraterritorial jurisdiction by raising the issue *sua sponte*.[198] Jurisdiction is a comprehensive concept comprised of various elements, including subject matter jurisdiction, personal jurisdiction, *and* territorial jurisdiction. While all three elements are commonly "jurisdictional," it does not follow that one element must fit snugly *within*, or ultimately *beneath*, another element. At most, such a forced configuration not only confounds the issue but also defeats principles of logic and common sense.

V. CONCLUSION

This Note suggests that the South Carolina Court of Appeals erred in treating extraterritorial jurisdiction as a component of subject matter jurisdiction and recommends that the Supreme Court of South Carolina treat extraterritorial jurisdiction as distinct from both subject matter jurisdiction and personal jurisdiction. Separating the three types of jurisdiction would provide greater doctrinal clarity. Ultimately, South Carolina should recognize "that before a court may exercise judicial power to hear and determine a criminal prosecution, that court must possess [all] three types of jurisdiction: jurisdiction over the defendant, jurisdiction over the alleged crime, and territorial jurisdiction."[199]

In *Dudley*,[200] the court correctly dismissed the convictions, determining that South Carolina could not exercise extraterritorial jurisdiction.[201] While the court rightfully raised the issue of extraterritorial jurisdiction and dismissed the charges, the court inaccurately included extraterritorial jurisdiction in the category of subject matter jurisdiction. Because the court should have treated extraterritorial jurisdiction as separate from subject matter jurisdiction, the court also should have considered the nature of extraterritorial jurisdiction to determine whether it more closely resembles subject matter jurisdiction or personal jurisdiction for purposes of determining the waivability of the defect.

---

196. 354 S.C. 514, 581 S.E.2d 171 (Ct. App. 2003), *petition for cert. filed*, Adv. Sh. No. 31 (Aug. 18, 2003) (No. 3641).

197. *Id.* at 531, 581 S.E.2d at 183.

198. *Id.*

199. State v. Legg, 9 S.W.3d 111, 114 (Tenn. 1999); *see also* Morrison v. Bestler, 387 S.E.2d 753, 755 (Va. 1990) (recognizing that the term "jurisdiction" encompasses several elements and describing subject matter jurisdiction separately from other jurisdictional elements, including territorial jurisdiction); Gordon v. Virginia, 568 S.E.2d 452, 453–54 n.3 (Va. Ct. App. 2003) (citing *Morrison*).

200. 354 S.C. 514, 581 S.E.2d 171 (Ct. App. 2003).

201. *Id.* at 531, 581 S.E.2d at 183.

Although stemming from different sources, both subject matter jurisdiction and extraterritorial jurisdiction impose fundamental limitations on the court's authority to adjudicate. Due to the constitutional origin of extraterritorial jurisdiction, a strong argument exists that extraterritorial jurisdiction involves a fundamental right of a party. Although South Carolina should view extraterritorial jurisdiction and subject matter jurisdiction as separate jurisdictional elements, it should treat a defect in extraterritorial jurisdiction like a defect in subject matter jurisdiction, thus capable of being raised by a party for the first time on appeal or *sua sponte* by the appellate court.

Emily Nanette Swalm